Volume 6, Issue 4 Fall 2010

American Bar Association
Section of Antitrust Law
Business Torts & Civil RICO Committee

BUSINESS TORTS & RICO NEWS

Inside this issue:

Recent Developments In California's Antitrust and Unfair Competition Law

By James Speyer and Zachary B. Allen[1]

James Speyer

Zachary B. Allen

Two recent decisions—one from California's Court of Appeal and one from its Supreme Court—signal that lively times are ahead for the development of antitrust and unfair competition law in California.

1. The Court of Appeal in San Francisco recently issued an opinion that plaintiffs' lawyers are sure to argue establishes near-strict liability under California law for selling a product below cost. That is bad news for businesses competing aggressively on price, as well as bargain-hunting consumers.

2. The California Supreme Court recently held that manufacturers cannot assert a "pass-on" defense under the Cartwright Act, California's antitrust statute.[2] But they also recognized an exception to this new rule that may ultimately end up swallowing the rule. In the same decision the court suggested that a plaintiff must

(Continued on page 3)

Horizontal Collusion is Necessary for Antitrust Preemption: The Seventh Circuit's Decision in *Flying J, Inc. v. Van Hollen*

By Christopher J. Heck[1]

In a decision reversing a district court's invalidation of a Wisconsin fair trade provision, the United States Court of Appeals for the Seventh Circuit took a major step in aligning the level of antitrust scrutiny applied to state fair trade laws more with current Supreme Court precedent concerning alleged price-fixing or collusion among private parties. Among other things, the decision in *Flying J, Inc. v. Van Hollen*, __ F.3d__ , No. 09-1883, 2010 WL 3447731 (7th Cir., Sept. 3, 2010), is one of the first to more rigorously apply the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*[2] to an antitrust challenge to a state

(Continued on page 6)

FROM THE CHAIRS ....

Greetings from the Business Torts & Civil RICO Committee. We've been busy this fall lining up a great slate of activities for the 2010-2011 year.

We are excited to announce that we've established a LinkedIn page. This provides an excellent opportunity to network with other Committee members. Please join us via this link: http://www.linkedin.com/groups?mostPopular=&gid=3569221. Get to know your fellow Committee members!

If you have not already done so, you will want to mark your calendars for the Antitrust Section's 59th Annual Spring Meeting in Washington, D.C. (March 30th – April 1st). We'll be co-sponsoring three programs this year: (1) "*A Penumbra Conundrum: Section 5 of the FTC Act*"—which will feature a stimulating debate about the scope of Section 5, including the availability of follow-on class actions under federal and state law; (2) "*Unintended Consequences—Are Indirect Purchaser Settlements Over?*"—which will explore the current debate over class certification, remedies, and settlements for indirect purchaser suits; and (3) "*California's Unfair Competition Law and the 'No-Injury Class Action'*"—which will address the current issues and most recent opinions interpreting California's Unfair Competition Law.

This newsletter features three articles relating to our Committee's joint state business torts and Civil RICO jurisdiction.

- We lead with an article by **James Speyer** & **Zachary Allen** of Arnold & Porter, which discusses two recent state court decisions under California antitrust law—(1) the Court of Appeals' decision in *Bay Guardian Co. v. New Times Media LLC*, which establishes a near-strict liability under California law for selling a product below cost, and (2) the California Supreme Court's decision in *Clayworth v. Pfizer*, which held, among other things, that manufacturers cannot assert a "pass-on" defense under the Cartwright Act.

- Next, we feature an article by **Christopher Heck** of Wolf, Rifkin, Shapiro, Schulman & Rabkin, which provides a scholarly analysis of the Seventh Circuit's September decision in *Flying J, Inc. v. Van Hollen*, holding that the provisions of Wisconsin's Unfair Sales Act regulating gasoline pricing do not violate the Sherman Act. This is a terrific article for those looking for a primer on sales below cost issues.

- **Allen Grunes** of Brownstein Hyatt Farber Schreck provides an article discussing the possibility that the federal government should be more aggressive and creative when it pursues remedies for antitrust violations.

- Finally, we bring you the latest RICO developments grid summarizing the cases during the last quarter. Thanks to **David Brenneman** of Morgan, Lewis, & Bockius for his hard work in getting the grid completed.

We're on the lookout for articles for our next edition which will be distributed in March and featured at the Spring Meeting. Please contact our terrific newsletter editors **Holden Brooks** (hbrooks@foley.com) and **Eric Enson** (epenson@jonesday.com), if you have any ideas or are interested in writing.

Finally, if you have any ideas about programs or other things we can do to make the Committee more useful to your practice, please contact us as we're always looking for ways to improve.

Best, Tom, Svetlana, Mandy, and Mel

Thomas J. Lang
Committee Chair
Morgan, Lewis & Bockius LLP
Washington, DC
tlang@morganlewis.com

Svetlana S. Gans
Committee Vice-Chair
Federal Trade Commission
Washington, DC
sgans@ftc.gov

Amanda P. Reeves
Committee Vice-Chair
Federal Trade Commission
Washington, DC
areeves@ftc.gov

Mel Schwarz
Committee Vice-Chair
Marsh & McLennan Companies
New York, New York
mel.schwarz@guycarp.com

(Continued from page 1)

have paid an "overcharge" for goods or services to show standing under the "lost money or property" language of California's Unfair Competition Law (UCL).[3] Whether the "overcharge" requirement will last for long remains to be seen. The California Supreme Court heard argument this month in another case that could redefine the UCL standing requirements.

I. Strict Liability for Below Cost Pricing?

In *Bay Guardian Co. v. New Times Media LLC*, the California Court of Appeal in San Francisco recently affirmed the San Francisco *Bay Guardian* newspaper's $15.9 million jury verdict against the owners of its competitor, the *San Francisco Weekly*.[4] The decision punished the *SF Weekly* for luring away some of the *Bay Guardian*'s display advertisers through below-cost discounts, even though there was no proof that the *SF Weekly* could recoup its losses later through higher monopoly pricing.

In the court's opinion, California law—unlike federal antitrust law and the law of many sister states—does not require such proof. In fact, harm to competition may not even be necessary. Instead, the court held that Business & Professions Code section 17043 requires only proof that the "purpose" of a below-cost sales scheme was to harm another competitor. In California, according to the Court of Appeal for the First District, it doesn't matter that consumers benefit from lower prices, even in the long run: so long as one competitor sets out to harm another by below-cost prices, treble damages may be available.

Section 17043 is only one sentence long: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

The court of appeal viewed this language as setting a standard for businesses competing in California that is at odds with the federal standard, and inimical to the purpose of the antitrust laws. The court recognized that federal law looks to "the ultimate monopolistic impact and threatened harm produced by the pricing scheme—that is, the probability of recoupment through future supracompetitive pricing upon elimination of competitors." Yet in the court's opinion, "the very gravamen of [a section 17043] offense is the *purpose* underlying the anticompetitive act, rather than the actual or threatened harm to competition." In the court's view, the fact that low prices without the probability of subsequent monopoly prices are an unmitigated boon to consumers is not part of the equation.

To make matters worse for discounters, the court also ruled that evidence of harm to a competitor triggers a presumption that a defendant's purpose was to injure competitors or destroy competition. The presumption affects the burden of proof, not the burden of persuasion. That means that to escape liability, a defendant must affirmatively demonstrate that it had no such purpose. Given that one company's success generally comes at the expense of its competitors, such proof may be difficult to adduce.

The court's views are in tension with those of other California courts, and even its own prior decisions. The court's finding that "section 17043 does not require an anticompetitive impact" (meaning that a violation can be established not only without a showing of harm to competition, but possibly without even showing harm to any competitor) is at odds with the court's earlier decision holding that a plaintiff in a predatory pricing case is required to link "below-cost pricing to a competitive injury."[5] The shift is justified, in the court's view, by a policy of protecting smaller business from their larger, more aggressive competitors, even though consumers would benefit from vigorous competition by paying lower prices.

New Times Media filed a petition for review on September 20, 2010. If the court of appeal's opinion stands, it has the potential to chill aggressive price competition and promotion throughout California. By so blatantly ignoring the guiding principle of the antitrust laws—that antitrust is intended to protect competition, not competitors—the opinion threatens to reduce consumer welfare and punish firms seeking to compete aggressively. That is an unfortunate and ironic result, given that cutting prices in order to increase business is conduct the antitrust and consumer laws are supposed to promote and protect, rather than inhibit.

II. The Viability of the Pass-On Defense Under the Cartwright Act and the Meaning of "Lost Money or Property" Under the UCL

On July 12, 2010, the California Supreme Court issued its opinion in *Clayworth v. Pfizer*[6] addressing two of California's competition statutes: the Cartwright Act (California's antitrust statute), and the Unfair Competition Law (UCL). The decision provides more confusion than clarity for companies facing indirect purchaser claims under the Cartwright Act. But it also provides a hopeful sign that rational standing rules may be on the way for businesses facing unfair competition claims in consumer class actions.

In *Clayworth*, retail pharmacies alleged that pharmaceutical manufacturers violated both statutes by agreeing to fix the prices of their brand-name drugs in the United States at levels significantly higher than the same drugs were sold for abroad, resulting in overcharges to the pharmacies. The trial court granted summary judgment in favor

(Continued on page 4)

(Continued from page 3)

of the manufacturers. It held that, because the pharmacies had passed on to consumers the entirety of any overcharges they had paid, the pharmacies could not show "damages sustained," as required under Cartwright Act, and could not show "lost money or property," as required under the UCL. The court of appeal affirmed, but the supreme court reversed.

A. The Cartwright Act

The California Supreme Court held that the manufacturers could not assert a "pass-on defense." That is, the manufacturers could not argue that the pharmacies were not entitled to recover damages because they had passed on all of the overcharges to consumers. In holding that "a pass-on defense generally may not be asserted" under the Cartwright Act, the supreme court essentially adopted the federal rule from *Hanover Shoe* for California antitrust actions.[7]

Although the *Clayworth* decision creates the *general* rule that a pass-on defense is unavailable, the court recognized two exceptions, the second of which may ultimately swallow the rule. First, it held that a pass-on defense is available in cases involving "cost-plus" contracts that pre-determine both a fixed markup and a fixed quantity to be delivered. Second, concerned over the specter of double-recovery for plaintiffs, the court held that "where multiple levels of purchasers have sued, or where a risk remains that they may sue . . . [and] if damages must be allocated among the various levels of injured purchasers, the bar on consideration of pass-on evidence must necessarily be lifted."[8] The language of this second exception is seemingly open-ended, and could render the general rule irrelevant in many antitrust cases.

In the usual situation "where multiple levels of purchasers have sued, or where a risk remains that they may sue," the *Clayworth* decision may not preclude the pass-on defense.[9] The applicability of this broad exception will turn upon the meaning of the court's language. The exception could be limited to instances in which "damages *must* be allocated among the various levels of injured purchasers" and where defendants need a pass-on defense "to avoid duplication in the recovery of damages."[10]

The court's language raises several obvious questions about the scope of the exception:

First, would the filing of a direct purchaser class action in federal court trigger this exception in the indirect purchaser's California case? In that scenario, certainly "multiple levels of purchasers have sued" and defendants need the pass-on defense "to avoid duplication in the recovery of damages." But the federal case does not contemplate that "damages must be allocated among the various levels of injured purchasers" because the direct purchasers are entitled under federal law to recover the entire overcharge they paid, without any allocation to downstream purchasers. So both the plaintiff and the defendants in the indirect purchaser case could point to *Clayworth* language to support their conflicting position on whether a pass-on defense would be available.

Second, what degree of "risk" of litigation involving multiple levels of purchasers is required to trigger the exception? That "risk" was not present in *Clayworth*, because no other lawsuits had been filed and the statute of limitations had expired.[11] But what about situations where others are unlikely to sue because of commercial dependence on the alleged antitrust violator? Will courts find that there is no "risk" of suit from multiple levels in those cases?

Third, would a settlement with purchasers at a different level (direct purchasers or end-use consumers) affect a Cartwright Act claim brought by middlemen indirect purchasers? Those middlemen plaintiffs will contend that the exception does not apply because the settlement eliminates the risk of more lawsuits, and the need for allocation of damages. But the defendants will contend that the settlement (and the lawsuit that was settled) are sufficient to allow them to assert a pass-on defense against the middleman plaintiff.

Clayworth thus does not definitively decide the viability of the pass-on defense in the usual California antitrust case. Whether *Clayworth* results in a new group of middlemen antitrust litigants will depend on how California courts interpret this exception to *Clayworth's* general rule.

B. Unfair Competition Law

While the *Clayworth* opinion focused mostly on the pass-on defense under the Cartwright Act, the court's UCL discussion is also significant. The court apparently decided three open UCL questions that will probably have a substantial impact on the arguments both plaintiffs and defendants will make in future UCL litigation.

First, citing *Shersher v. Superior Court*, the court stated that the pharmacies had standing to sue under the UCL even though they made only indirect purchases from the manufacturers.[12] *Shersher*, in fact, did not involve standing, but rather the issue of whether a plaintiff who did not have money taken directly from it by the defendant could recover restitution. In that regard, *Shersher* seemed inconsistent with the seminal UCL restitution opinion, *Korea Supply*, where the court stated that the UCL is "limited to restoring money or property to direct victims of an unfair practice."[13] In endorsing *Shersher*, *Clayworth* casts doubt on defendants' ability to continue to rely on the "direct victim" language of *Korea Supply* as a bar to indirect purchasers' ability to

(Continued on page 5)

(Continued from page 4)

recover restitution.

Second, the supreme court held that the pharmacies satisfied the UCL's "lost money or property" requirement for standing whether or not they were entitled to restitution.[14] The court recognized that the voter-approved Proposition 64 had "substantially revised the UCL" in 2004 and predicated standing upon proof that the plaintiff actually "lost money or property" as a result of the unfair practice.[15] Several lower courts had held that the "lost money or property" condition for standing required a plaintiff to show an entitlement to restitution. The *Clayworth* opinion concluded that such reasoning wrongfully "conflates the issue of standing with the issue of… remedies."[16] "That a party may ultimately be unable to prove a right to damages (or, here, restitution) does not demonstrate that it lacks standing to argue for its entitlement to them."[17] In other words, a plaintiff may satisfy the UCL "lost money" requirement simply by showing a monetary loss caused by the unfair practice, as the pharmacies suffered here when they overpaid for the manufacturers' drugs.

This piece of the court's holding could signal how it will rule in another UCL case, *Kwikset Corp. v. Superior Court*, which was argued this month and is awaiting decision.[18] *Kwikset* directly raises the issue of what is required to satisfy the "lost money" requirement for standing. The recent statements in *Clayworth* suggest that it will rule in *Kwikset* that a plaintiff not entitled to restitution can satisfy the standing requirement. Such a ruling would disapprove the rationale of the court of appeal in *Kwikset*, and the other lower court opinions requiring entitlement to restitution as a condition of UCL standing.

However, the *Clayworth* court made a third statement on UCL standing that may mean that the *Kwikset* plaintiff does not have standing. The court repeatedly emphasized that the money the pharmacies "lost" and that therefore gave them standing was not the total amount they paid for the drugs, but rather only the *overcharge* they paid.[19] If the court adheres to its "overcharge" requirement, it also should find that the *Kwikset* plaintiff lacks standing. That is because the *Kwikset* plaintiff also received a product worth what he paid for it, and accordingly paid no overcharge.

Of course, the court's ruling in one case does not necessarily presage its ruling in another case. It would not be a surprise if the *Kwikset* court were to accept the plaintiff's contention that he "lost money or property," and thereby established standing, as soon as he paid money to the defendant as a result of a UCL violation—regardless of whether he paid an overcharge. Such a ruling would make it substantially easier for plaintiffs who have in fact suffered no monetary loss (because they received full value for their money) to assert UCL claims.

1 Mr. Speyer is a partner in the Los Angeles office of Arnold & Porter LLP. His practice focuses on antitrust and other complex civil litigation, including product liability, unfair competition, and franchise law. Mr. Allen is an associate in Arnold & Porter's San Francisco office. His practice emphasizes complex and international disputes, including class actions, as well as consumer products, antitrust, and environmental cases. The opinions are those of the authors and do not necessarily reflect the views of the American Bar Association.

4 Cal. Bus. & Prof. Code § 16720 *et seq.* (West 2008).

5 Cal. Bus. & Prof. Code § 17200 (West 2008).

6 *Bay Guardian Co. v. New Times Media LLC*, No. A122448, 2010 WL 3156631 (Cal. App. 1st Dist. Aug. 11, 2010).

7 *See Fisherman's Wharf Bay Cruise Corp. v. Super. Ct.,* 114 Cal. App. 4th 309 (Cal Ct. App. 1st Dist. 2003).

8 *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 759 (July 12, 2010).

9 *Clayworth*, 49 Cal. 4th at 763; *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968) (holding that antitrust violators ordinarily cannot assert as a defense that any illegal overcharges had been passed on by a plaintiff direct purchaser to indirect purchasers).

10 *Clayworth*, 49 Cal. 4th at 787.

11 *Id.*

12 *Id.* (emphasis added).

13 *Id.*

14 *Clayworth*, 49 Cal. 4th at 788, citing, *Shersher v. Super. Ct.*, 154 Cal. App. 4th 1491 (2007).

15 *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1151 (2003).

16 *Clayworth*, 49 Cal. 4th at 788. Cal. Bus. & Prof. Code § 17204 (West 2008).

17 *Clayworth*, 49 Cal. 4th at 789. *Id.*

18 *Kwikset v. Superior Court*, No. S171845. The briefing is available at http://www.courtinfo.ca.gov/courts/supreme/oralarg-1110.htm.

19 *Clayworth*, 49 Cal. 4th at 788 ("They lost money: the overcharges they paid" and "Pharmacies paid more than they otherwise would have because of [the alleged UCL violation].")).

We welcome your input!

If you have ideas for future articles for the BTCR Committee Newsletter or would like to author one, please contact the co-editors:

Holden Brooks / hbrooks@foley.com

Eric Enson / epenson@jonesday.com

The next deadline for submissions is early February 2011.

(Continued from page 1)

fair trade law. In holding that the statute in question, the motor vehicle fuel provisions of the Wisconsin Unfair Sales Act,[3] was not preempted, the Seventh Circuit also reaffirmed a fundamental principle of preemption law; namely, that for a state statutory scheme to be preempted by federal antitrust law, that scheme must irreconcilably conflict with federal law. In particular, the statute must mandate or authorize collusive conduct between competitors. The court also observed that for an "as applied" challenge, there must be actual evidence of a conspiracy or concerted action among competitors acting pursuant to the state scheme. The mere fact that a state scheme might lead to collusion or might have an anticompetitive effect is not sufficient.

I. Background

The doctrine of antitrust preemption, and its corollary, the doctrine of state action immunity, concern whether state laws that attempt to regulate the terms of resale in a particular state should be preempted by the Sherman Antitrust Act.[4] This issue most commonly arises in the context of state laws or regulations that attempt to protect competition (or, some would say, protect competitors) at the resale or wholesale level by imposing restrictions on resale practices. These restrictions can include minimum markup provisions, bans on discount sales, bans on credit sales, price-posting regulations, price "hold" regulations, licensing of distributors or wholesalers, bans on central warehousing by retailers, locality restrictions, required marketing plans and even governing boards. Generally, these laws can be characterized as "fair trade statutes" or "fair trade provisions."

Courts considering whether such fair trade statutes are preempted go through a two-step analysis: first, they consider whether a given statute or regulation creates a restraint of trade that is an unlawful *per se*, i.e. "naked" concerted action or conspiracy among competitors. If and only if it does do they ask the second question: does the statute qualify for state action immunity under *Parker v. Brown*[5] and its progeny; that is, is the restraint created by the particular statute "clearly articulated and affirmatively expressed as state policy," and is it "actively supervised by the state itself?"[6]

As explained in far greater detail in my article on this topic, *Concerted Action and the Preemption of State Fair Trade Provisions After Leegin*, in the past when analyzing state fair trade statutes, courts often gave short-shrift to the to the threshold question of whether a given statute or restraint creates an unlawful restraint of trade in the first place.[7] Indeed, often with little or no evidence, many simply presumed the requisite concerted action giving rise to an unlawful restraint of trade,[8] or held that it need not be shown,[9] and focused on whether the state or the litigant supporting the statute could meet the two-part test to establish state action immunity. This may have been appropriate before the Supreme Court overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*;[10] after all, many state fair trade provisions attempt to impose vertical minimum resale prices, and, for nearly a century, vertical resale price maintenance was a *per se* unlawful restraint. After the Court decided *Leegin Creative Leather Products v. PSKS, Inc.*, however, vertical price restraints were subject to the rule of reason.[11] Thus, courts could no longer presume unlawful conspiracy or concerted action from vertical restraints without any evidence or horizontal conspiracy between competitors. Nevertheless, some courts persisted in the practice of presuming a *per se* unlawful restraint of trade, even in the absence of statutory language mandating or authorizing collusive conduct or of evidence showing actual horizontal conspiracy.[12] The district courts in *Flying J* were two such examples.[13]

II. The Wisconsin Unfair Sales Act

The Wisconsin Unfair Sales Act was enacted in 1939 and has changed little since that time. Indeed, in the 70 years of its existence, the minimum markup formula for the Motor Vehicle Provisions (originally 6%) was amended only once.[14] The purpose of the Act is to prohibit retailers of motor fuel from selling fuel below their cost. The statute explained what was meant by the retailers' cost as follows:

> In the case of the retail sale of motor vehicle fuel by a person other than a refiner or a wholesaler of motor vehicle fuel at a retail station, the invoice cost of the motor vehicle fuel to the retailer within ten days prior to the date of sale, or the replacement cost of the motor vehicle fuel, whichever is lower, less all trade discounts except customary discounts for cash, plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale and any cost incurred for transportation and any other charges not otherwise included in the invoice cost or the replacement cost of the motor vehicle fuel, plus a markup of 6% of that amount to cover a proportionate part of the cost of doing business; or the average posted terminal price at the terminal located closest to the retailer plus a markup of 9.18% of the average posted terminal price to cover a proportionate part of the cost of doing business; whichever is greater.[15]

The statute defined the term "average posted terminal price" as

> [t]he average posted rack

(Continued on page 7)

(Continued from page 6)

> price, as published by a petroleum price reporting service, at which motor vehicle fuel is offered for sale at the close of business on the determination date by all refiners and wholesalers of motor vehicle fuel at a terminal plus any excise, sales or use taxes imposed on the motor vehicle fuel or on its sale, any cost incurred for transportation and any other charges that are not otherwise included in the average posted rack price. In this paragraph, "average" means the arithmetic mean.[16]

The statute authorizes the Wisconsin Department of Agriculture, Trade and Consumer Protection or a district attorney to sue violators on behalf of the state to recover specified fines. It also allows for a private cause of action for any person injured or threatened with injury as a result of sale or purchase of fuel to sue for an injunction and treble damages.

III. The District Court Decisions

Flying J, Inc. is a Utah corporation and a vertically-integrated supplier of motor vehicle fuel. It maintained that it could sell fuel in Wisconsin for substantially less than the statutory minimum and still make a profit. Initially, Flying J was sued by Lotus Business Group in Wisconsin state court for unfair competition under the Unfair Sales Act. It removed the case to federal court and asserted preemption as an affirmative defense.[17] The *Lotus Business Group* court agreed, holding that the relevant provisions of the Unfair Sales Act fixed resale prices industry-wide in violation of Section 1 and that they were not immune under *Parker v. Brown*. In particular, the court held that the statute, while forthrightly stated and clear in its purpose, was not actively supervised by the state, because the state did not properly supervise either the "cost to retailers" or the minimum markup percentage. Accordingly, it failed the second prong of the *Midcal* test and did not qualify for state action immunity.[18] On a motion for reconsideration, the *Lotus Business Group* court held that even applying the Supreme Court's decision in *Leegin* did not change the result, because the statute "facilitates the creation of horizontal price fixing," and because the plaintiff submitted insufficient procompetitive justification.[19] Notably, no evidence was presented that horizontal price fixing was actually occurring.

After being informed of the *Lotus* decision, the State of Wisconsin continued to require Flying J and other retailers to issue pricing reports to the State pursuant to the Unfair Sales Act. Flying J, therefore, brought a second action to enjoin enforcement of the Act. Its challenge appears to have been a facial constitutional challenge.

In *Flying J, Inc. v. Van Hollen,* Judge Rudolph Randa, also of the Eastern District of Wisconsin, granted summary judgment for Flying J and struck down the Motor Vehicle Fuel Provisions, holding that they were preempted by the Supremacy Clause of the United States Constitution and that they violated Section 1 of the Sherman Antitrust Act.[20] Judge Randa held that the provisions "authorize [ ] and enforce [ ] resale price maintenance among competitors, a *per se* violation of Section 1 of the Sherman Antitrust Act since the early years of national antitrust enforcement."[21] He based this holding on his findings that "the Act allows motor fuel retailers to match (but not undercut) their competitors' prices," and that the mandatory minimum markup percentage "creates a range in which competitors may engage in collusive parallel pricing, which is exacerbated as the wholesale price of gasoline fluctuates."[22] Thus, even though there was no evidence of actual parallel pricing presented, the court concluded that the Provisions "authorized and enforced" a parallel pricing policy. It likened the case to *324 Liquor Corp. v. Duffy*, which it quoted as follows: "[m]andatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring resale price competition."[23]

For this same reason, the court rejected the state's argument that the provisions should be judged under the rule of reason pursuant to *Leegin*. It held that the restraint was "also horizontal because it effects [sic] competing gasoline retailers in Wisconsin."[24] And, it held that the provisions also violated the rule of reason, relying on two studies, one from the Federal Trade Commission and the other from the Wisconsin Policy Research Institute, both of which concluded that the provisions restricted competition and harmed consumers in the form of higher gas prices.

The State of Wisconsin had argued that the provisions did not violate the Sherman Act because there was no concerted action. It relied on *Fisher v. City of Berkeley*, which upheld the City of Berkeley, California's rent control ordinance, because the rent ceilings in the ordinance were imposed unilaterally by the government, and, as the Court held, "[a] restraint imposed unilaterally by government does not become concerted-action within the meaning of [Section1] simply because it has a coercive effect upon parties who must obey the law."[25] Judge Randa rejected this argument, holding that the price restraints in this case should be characterized as "hybrid" in that they allowed private parties to set the prices which government then enforces. He seems to have reached this result based on his holding in the second part of his

(Continued on page 8)

(Continued from page 7)

decision, where he rejected Wisconsin's claim of antitrust immunity under *Parker.* In particular, he held that Wisconsin did not adequately supervise the minimum markup provisions, because it had no program in place to determine whether the average posted terminal price bears a close relationship to the actual price paid by retailers and likewise did not adequately supervise the markup percentages.[26] Thus, retailers had too much discretion to decide their own pricing.[27]

IV. The Seventh Circuit's Holding and Analysis

In the court of appeals, Judge Kanne, writing for a unanimous panel that included Judges Posner and Ripple, reversed, holding that Flying J's challenge to the Wisconsin Unfair Sales Act did not even move past the threshold, that is, the challenged minimum markup of provisions were not preempted.[28] The Court noted, first of all, that "to be preempted, the state regulatory scheme must irreconcilably conflict with the federal scheme."[29] A hypothetical or theoretical conflict, the court noted, is insufficient to warrant preemption of the state's statute.[30] And, right off the bat, the court rejected any argument that, because the minimum market provisions might lead to anti-competitive outcomes, the statute should be preempted. Instead, the court quoted *Fisher* in stating that a statute is preempted "only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."[31]

The court then turned to Flying J's argument that the motor vehicle fuel provisions of the Act facilitated a "classic horizontal price fixing scheme." As it had argued in the district court, Flying J asserted that, by establishing a minimum price for gasoline among retailers, and by providing a mechanism for enforcement, Wisconsin created a "scheme that allows retail sellers of gasoline to collude on prices to the detriment of consumers." [32] The court stated, however, that a state law could only be preempted by federal antitrust law if the state law "mandates or authorizes collusive conduct,"[33] and this statute did not.

The court reached this conclusion by analogizing the case before it to *Fisher,* rather than to *324 Liquor*. The City of Berkeley's rent control ordinance at issue in *Fisher* imposed rent ceilings, established a rent stabilization board to control future increases in rental rates, and allowed tenants to sue if their landlord charged more than what was allowed in the ordinance.[34] While the *Fisher* Court found that the landlords could not legally enter into a private agreement to stabilize rent prices, it also held that the Berkeley Rent Control Ordinance was not preempted, because the rent ceilings were unilaterally imposed by government upon landlords "to the exclusion of any private control."[35]

The *Flying J* panel found that it could "discern no meaningful difference" between the rent ceilings imposed in *Fisher* and the mandatory markup provisions in the case before it. The court went on to explain how the Act operates:

> On its face, the Act requires retail sellers of motor vehicle fuel to calculate the minimum price at which they can sell motor vehicle fuel using relatively simple mathematical formulas. The seller calculates its actual costs, subtracts certain items, and adds 6%. The seller then goes to the nearest terminal, averages the price being offered at the terminal, and adds 9.18%. The seller then compares the actual cost plus the markup – generally, the Act requires the seller to charge no less than the higher of those two numbers.[36]

The only exception permitted to this minimum pricing structure is that a seller is allowed to charge less in order to match a competitor's advertised price.[37] Once the price was posted, it had to be maintained for least twenty-four hours.

As the court pointed out, the Wisconsin statute did not require or authorize gasoline dealers to get together and agree on what price they would charge for gasoline, nor did it allow wholesalers to get together and decide what prices they would charge at the terminal. Therefore, on its face, nothing in the statute compelled collusive private conduct that would violate the Sherman Antitrust Act.[38] Rather, those retailers and wholesalers complying with the statute were merely acting at the unilateral direction of the state.

The court rejected the district court's conclusion that the Unfair Sales Act was a *per se* restraint on trade, because "the minimum markup percentage creates a range in which competitors may engage in collusive parallel pricing, which is exacerbated as the wholesale price of gasoline fluctuates."[39] The statute neither authorized nor required collusive conduct, and, the court held, the mere fact that the parties or the court "can envision scenarios under the regulatory scheme in which private parties could more easily collude is insufficient to invalidate the statute."[40] Second, the court pointed out that there was simply no evidence on the record that gasoline dealers, be they wholesalers, retailers, or otherwise, were colluding to fix or raise the price of gasoline in Wisconsin.[41] It specifically held that the evidence Flying J cited in support of its argument that private parties were, in fact, colluding to fix or raise prices, the 2003 Federal Trade Commission Study and the 1999 Wisconsin Policy Re-

(Continued on page 9)

(Continued from page 8)

search Institute Study, were insufficient to support a facial challenge (and, implicitly, insufficient to support an as applied challenge).[42]

The court then went on to reject Flying J's argument that the Unfair Sales Act is a "hybrid" statute and, therefore, was preempted for that reason. The distinction between "unilateral" statutes—direct commands of the sovereign that allow no private control over pricing—and "hybrid" statutes—which allow parties to exercise discretion to set prices that the government then enforces— originated in *Schwegmann Bros. v. Calvert Distillers Corp.,*[43] but the terms "unilateral" and "hybrid" come from *Fisher*.[44] As the *Flying J* court explained, hybrid statutes are preempted (unless, of course, they meet the two-part test for state action immunity).[45]

In holding that the Unfair Sales Act imposed a "unilateral" restraint, the court had little trouble distinguishing *Midcal* and *324 Liquor Corp. v. Duffy*.[46] In *Midcal*, the Supreme Court invalidated California's wine pricing system, which required all producers and wholesalers to submit either fair trade contracts or price schedules to the state. Wine dealers were not allowed to sell wine at any price other than that set by the fair trade contracts or price schedules, and the state, thus, played no role in determining the prices of wine. Accordingly, the pricing scheme in *Midcal* was, when examined by the *Fisher* court five years later, deemed to amount to a "hybrid" restraint.[47] The *Flying J* panel held that the Wisconsin provisions, unlike the California system at issue in *Midcal*, did not allow wholesalers to collude or manipulate the prices to which the markup was to be applied.[48]

In distinguishing *324 Liquor*, which invalidated a New York State scheme that mandated a minimum markup price be applied to a bottle price, the court rejected both Flying J's argument and the holding of the court below concerning the application of markups to actual costs. Judge Randa, in ruling in favor of Flying J, had expressed concern that the "average posted terminal price" did not necessarily "bear a close (or any) relationship to the actual price paid by retailers."[49] The Seventh Circuit held, instead, that the problem with the New York statute in *324 Liquor* was not that the markup was applied to a price that did not represent actual costs, but that wholesalers could sell to the retailers at one price and force the retailers to apply the minimum markup to another price.[50] By contrast, the Wisconsin minimum markup provisions do not authorize wholesalers to manipulate wholesale prices to guaranty a bigger return to retailers.[51] And the court returned once again to the lack of evidence, noting that the allegations of price fixing by wholesalers of liquor in *324 Liquor* were more than hypothetical or theoretical, and that there was actual evidence in the record of wholesalers advertising that their lowered case prices could guarantee retailers a higher profit than the statutory 12%.[52] Thus, the lack of evidence supporting allegations of collusive conduct was, once again, fatal to any claim that the motor vehicle fuel provisions were preempted by the Sherman Antitrust Act.

Finally, the panel held that the mere fact that Wisconsin had created a private cause of action to enforce the minimum markup provision did not make the statute "hybrid." Because the state itself mandates the minimum price, "the mere fact that interested private parties may enforce [it] does not make the Act a hybrid statute."[53] Consequently, the Seventh Circuit held that the Act was not preempted, and thus, it was not necessary to consider whether the provision would qualify for state action immunity under *Parker v. Brown*.[54] The court closed by noting that it may well be that "gasoline retailers are getting together with each other and agreeing on how to estimate their costs or what final price to charge, or that retailers and wholesalers are colluding to manipulate the average posted terminal price." However, the court noted that there was no evidence that this was occurring. It accordingly rejected the facial challenge to the constitutionality of the Unfair Sales Act, but indicated that it did not "preclude a future plaintiff, properly armed with evidence of actual collusion among Wisconsin gasoline dealers, in bringing an as-applied challenge to the Act or an enforcement action against those dealers under antitrust laws at a later time."[55]

V. Significance

As simple as the idea seems, the court's requiring either a showing that the challenged statute mandates or authorizes conduct that violates the Sherman Act in all cases or proof of actual horizontal collusion is highly significant. As the court pointed out, Flying J's challenge to the Unfair Sales Act was a facial challenge, premised on the argument that the statute is preempted because it requires private parties to horizontally fix prices. The court rejected that argument, but also rejected the only evidence Flying J cited in support of its argument that private parties were, in fact, colluding to fix or raise prices. The two studies, which concluded that the minimum markup provisions were unnecessary and may be raising prices, were not enough to support a facial challenge. Although not stated, the court implicitly rejected both the district court's conclusions and the line of authority suggesting that proof of collusion or concerted action was unnecessary to invalidate a statute that has an anti-competitive effect.[56] Although it was not cited, this panel of the Seventh Circuit reached a similar outcome to the Second Circuit in *Battipaglia v. New York State Liquor Authority*

(Continued on page 10)

(Continued from page 9)

almost thirty years ago. The *Battipaglia* court rejected a challenge to a New York state fair trade law after closely examining the evidence in the case before it of actual collusion or concerted action, and, rather than presuming collusion from consciously parallel pricing in response to a statute, concluded that such evidence was insufficient without additional evidence of "plus" factors.[57] Other cases in other circuits had held that actual proof of collusion was not a requirement, and that view was implicit in Judge Randa's decision as well.

In requiring actual proof of horizontal conspiracy, the court may have brought the law of antitrust preemption a little closer to the more rigorous standards applied to challenges to private price-fixing arrangements. Unlike a number of other courts who looked to evidence of parallel behavior to infer collusive conduct,[58] the Seventh Circuit pointed out that while "[t]he Act authorizes parallel behavior," it "does not authorize retailers to get together and agree on a posted price."[59] Without more, the court observed, "parallel conduct does not suggest conspiracy."[60]

Also not cited, but looming large in the background of this case, is the *Leegin* decision. Before *Leegin*, resale price maintenance was a *per se* offense, so a litigant challenging a fair trade regulation could simply show that it fixed minimum resale prices, and the initial burden of proof would be met. The regulation would be preempted unless the state could establish *Parker* state action immunity.[61] Because resale price maintenance is no longer a *per se* offense, litigants like Flying J who want to pursue facial challenges to state fair trade acts such as this now must provide proof that the statute mandates or authorizes horizontal collusion. If they want to pursue "as applied" challenges, they must provide actual proof of horizontal collusion.[62]

If the other circuits follow this decision, it will be much more difficult to invalidate state laws designed to protect competitors at the wholesale and retail levels.

1 Mr. Heck is a partner at the Los Angeles office of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, who specializes in antitrust, unfair competition, commercial litigation and insurance. The opinions are those of the author and do not necessarily reflect the views of the American Bar Association or of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP.

2 550 U.S. 544 (2007)

3 Wis. Stat. § 100.30, *et seq.* (2009)

4 15 U.S.C. §§ 1-7 (2006).

5 317 U.S. 341 (1943).

6 This is the so-called *Midcal* test, first articulated in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

7 Christopher J. Heck, *Concerted Action and the Preemption of State Fair Trade Provisions After Leegin,* 2009 Colum. Bus. Law Rev. 853, 864-65 & *passim.*

8 *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 897n.19 (9th Cir. 2008).

9 *See, e.g., Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987); *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223-24 (2d Cir. 2004). Some courts read the Supreme Court's decision in *324 Liquor Corp. v. Duffy*, 479 U.S. 325 (1987) as holding that no contract, combination or conspiracy need be shown for a state statute to be preempted. *E.g.*, *Costco*, 522 F.3d at 894 n.16.

10 220 U.S. 373, 404-09 (1911).

11 *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

12 *E.g., Costco*, 522 F.3d at 894 n.16.

13 *Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848 (E.D. Wis. 2009).

14 In 1997, the Wisconsin legislature amended the markup formula to require a 6% markup above certain actual costs *or* a 9.18% markup above the "average terminal price," whichever is greater. WIS. STAT. § 100.30(2)(am)(1m)(c). This amendment took effect in Wisconsin on August 1, 1998. *Id.* at 852.

15 *Id.* § 100.30(2)(am)(1m.c.) (emphasis added).

16 *Id.* § 100.30.(2)(a).

17 *Lotus Business Group, LLC v. Flying J, Inc.*, 532 F. Supp. 2d 1011 (E.D. Wis. 2007).

18 *Id.* at 1019, 1021-25.

19 *Id.* at 1027-29.

20 *Flying J, Inc. v. Van Hollen*, 597 F. Supp. 2d 848 (E.D. Wis. 2009).

21 *Id.* at 856 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 325, 341 (1987)).

22 *Id.*

23 *Id.* at 856-57 (quoting *324 Liquor*, 479 U.S. at 342).

24 *Id.* at 857.

25 475 U.S. 260, 267 (1986).

26 *Flying J*, 597 F. Supp. 2d at 859.

27 For a discussion of the overlap between the issue of "active supervision" and the question of whether a state fair trade act imposes a "hybrid" restraint, *see Costco*, 522 F.3d at 887. For a more thorough treatment of the confusion these competing analyses create, *see Heck*, 2009 Colum. Bus. Law Rev. at 872-74, 894-95.

28 *Flying J*, 2010 WL 3447731 at *8 (7th Cir., Sept. 3, 2010).

29 *Id. a*t *4 (*citing Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

30 *Id.*

31 *Id.* (quoting *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986) (quoting *Rice*, 458 U.S. at 661)).

32 *Id.*

33 *Id.* (*citing Fisher*, 475 U.S. 265).

34 *Fisher*, 475 U.S. at 261-263.

35 *Flying J*, 2010 WL 3447731 at *4 (*quoting Fisher*, 475 U.S. 266)

36 *Id.* at *5.

37 *Id.*

38 *Id.*

39 *Id.* (*citing Flying J v. Van Hollen*, 597 F.Supp.2d 848, 856).

40 *Id. (citing Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 131 (1978)).

41 *Id.*

(Continued from page 10)

42 *Id.*
43 341 U.S. 384, 389 (1951).
44 475 U.S. at 267-68.
45 *Flying J,* 2010 WL 3447731 at *6. For a critique of the "unilateral"/"hybrid" mode of analysis, *see* Heck, 2009 Colum. Bus. Law Rev. at 871-73, 893-97.
46 479 U.S. 335, 342 (1987).
47 *Midcal*, 445 U.S. 97, 99-100, 103; *Fisher*, 475 U.S. at 267-268. Notably, the terms "unilateral" and "hybrid" were not used by the *Midcal* Court nor by any court prior to *Fisher*. They appear to represent the *Fisher* Court's effort to explain the opinions in *Midcal* and *Schwegmann* and distinguish them from the result in *Fisher*.
48 *Flying J*, 2010 WL 3447731 at *6.
49 *Flying J*, 597 F.Supp.2d at 859.
50 *Flying J*, 2010 WL 3447731 at * 6.
51 *Id.* at *7.
52 *Id.* (*citing 324 Liquor*, 479 U.S. at 340).
53 *Id.*
54 317 U.S. 341 (1943).
55 *Flying J*, 2010 WL 3447731 at * 8.
56 *See Costco*, 522 F.3d at 894 n.16; *Miller*, 813 F.2d at 1349; *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223-24 n.17 (2d Cir. 2004) (rejecting *Battipaglia* and relying on *324 Liquor* (479 U.S. at 345-46 n.8) to assert that "an actual contract, combination or conspiracy need not be shown for a state statute to be preempted by the Sherman Act).
57 *Battipaglia*, 745 F.2d 166, 173-174 (2d Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). *See* Heck 2009 Col. Bus. Law Rev. at 883-84 (discussing *Battipaglia* and contrasting with *Miller* and *Costco* decisions).
58 *See, e.g.*, *Costco*, 522 F.3d at 893-95.
59 *Flying J*, 2010 WL 3447731 at *7.
60 *Id.* (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007)).
61 *See Heck,* 2009 Colum. Bus. Law Rev. at 864-67 & *passim.*
62 *Id.* at 886-90 (predicting this kind of outcome).

Why is the Government Leaving Taxpayer Money on the Table? Some Thoughts About Remedies When the Government is the Target of Antitrust Violations

Allen P. Grunes[1]

Every year the federal government purchases billions of dollars of goods and services. At times the government or its agencies are direct targets of serious antitrust violations such as bid-rigging, price-fixing or monopolization. At other times, the federal government may be one of many purchasers paying inflated prices due to an antitrust violation. In either case, the government, and ultimately taxpayers, are paying more for goods or services than they would have paid under competitive market conditions.

Price-fixing and bid-rigging are of course crimes, and the government expends significant resources to prosecute these crimes. But how often does the government actually seek to recover antitrust damages when it is a victim? What are the available remedies, and how often are they used?

There are several statutory damage remedies available when the government is a victim of a serious antitrust violation. These include civil actions under the False Claims Act (including its *qui tam* provisions), 31 U.S.C. §§ 3729-3733, civil actions for damages under Section 4A of the Clayton Act, 15 U.S.C. § 15a, and orders of restitution in criminal cases under 18 U.S.C. § 3563(b)(2) or 18 U.S.C. § 3663(a)(3). The evidence suggests, however, that these remedies are underutilized, and as a result the government is not being compensated for its losses. As Professor Harry First concludes, "it is quite likely that current enforcement practice is leaving taxpayer money on the table . . . ."[2]

This Article discusses the compensatory remedies available to the government (and potentially to private parties in *qui tam* cases) and advocates that these remedies be more widely used. I first briefly discuss why criminal fines are not a substitute for compensatory remedies. Next I discuss the compensatory remedies that are available and show that they are not often used. Finally, I make a few recommendations.

I. Criminal Fines

The Department of Justice (DOJ) criminally prosecutes hard-core antitrust violations. Indeed, it has been said more than once that this is the most important mission of DOJ's Antitrust Division.

> Criminal enforcement against the most serious antitrust offenses is our core mission. People who rig bids, allocate markets or fix prices are taking money out of the pockets of American consumers and out of the registers of American businesses just as surely as if they broke in under cover of darkness.[3]

The DOJ devotes substantial resources to criminal prosecution, and regularly calls attention to the size of the criminal fines and amount of jail time it has been able to obtain.[4] But it is important to keep in mind that criminal fines (as well as jail sentences) are intended to deter the formation of cartels and to punish companies and individuals involved in cartels, and do not provide compensation to the victims of cartels. By statute, criminal fines paid in antitrust cases go into a general "Crime Victims Fund."[5] This fund supports many federal and state crime victim assistance programs, particularly the victims of violent crime. Criminal fines in antitrust cases thus offer no real compensation to those injured by antitrust offenses, including the government or taxpayers when the offense results in the federal government paying significant overcharges for goods and services.

And so, despite the frequent showcasing of "record-breaking" fines and jail time, we must ask the following question: What does the government do to obtain compensation for antitrust wrongs? The answer, surprisingly, is that although Congress has supplied the DOJ with ample tools, it seldom makes use of them.

II. The False Claims Act

The False Claims Act, 31 U.S.C. §§ 3729-3733, represents an avenue for the government to obtain compensation in antitrust cases where the offense is directed against the government or a government agency. In relevant part, the Act generally prohibits presenting or causing the presentation of false claims to the United States government for payment, knowingly submitting false records or statements in order to get a false claim paid, and conspiracies to defraud the government by getting a false claim paid. Antitrust offenses including bid-rigging and price-fixing are clearly covered by the False Claims Act.[6] The "false claim" in such cases is that the government is being charged an artificially inflated price for goods or services; the price has been "tainted" by the bid-rigging or price-fixing. There is no reason to believe that other antitrust offenses, such as monopolization, are not also subject to that False Claims Act if the requirements of the Act are otherwise

(Continued on page 13)

(Continued from page 12)

met. The Act permits treble damages as well as civil penalties for each false claim.

In general, recoveries for the federal government in False Claims Act cases have grown dramatically since Congress amended the Act in 1986 to encourage greater use of its *qui tam* provisions. However, only a small percentage of these cases involved the use of the False Claims Act to recover in antitrust conspiracies in which the United States was the principal victim. And settlements in those cases have not been dramatic.

In 2008, DOJ's Civil Division settled with seven freight forwarding firms in a *qui tam* action involving allegations of bid-rigging of Defense Department contracts. According to the press release, the conspiracy was brought to the government's attention by relators in two *qui tam* cases in which the government elected to intervene. Prior to the civil settlements, the Antitrust Division had criminally prosecuted the underlying conduct under the Sherman Act.[7] In 2009, the Civil Division settled with two additional companies involved in the conspiracy, bringing the total amount of the civil settlements to approximately $14 million.[8]

In 2010, the Civil Division settled with fourteen corporations and individuals to resolve a *qui tam* action—in which the government elected to intervene—alleging that the defendants rigged bids, fixed prices, and allocated markets on marine hose, marine fenders and plastic sea pilings in contracts with the Navy and other federal agencies. The government collected $15.4 million from the fourteen defendants as settlements of the False Claims Act cases.[9] The original *qui tam* complaint, filed in 2005, had formed the basis for a number of criminal antitrust prosecutions pursued by the Antitrust Division under the Sherman Act and several guilty pleas.[10]

Currently pending is a *qui tam* case involving an alleged price-fixing conspiracy by the manufacturers of automotive aftermarket filters. In June 2010, the Civil Division reportedly gave notice that it was declining to intervene.[11] Apparently, the Antitrust Division had decided to close its criminal investigation several months earlier without taking any action against the alleged conspirators.[12]

The use of the False Claims Act seems to be slowly increasing in antitrust cases, but it has a long way to go before one can say that it is a primary compensatory tool. A number of factors could account for this. Plaintiffs (relators) in *qui tam* cases must file cases under seal and wait while the Department of Justice investigates the merits of the case and decides whether to criminally prosecute or intervene. Even if the DOJ decides to take over the civil case—which is by no means a foregone conclusion—the plaintiff may be barred from participating if he or she does not meet the False Claims Act's requirements (for example, that the relator have direct and independent knowledge of the allegations) or does not meet pleading requirements such as the requirement of Rule 9(b) that fraud be pled with specificity.

In addition, the 1986 amendments to the False Claims Act enhanced the awards available to successful relators, which may be as high as 30%.[13] Thus, any recovery to the government in a False Claims Act case will generally be less than the full amount obtained, because the government must share a percentage of the recovery with the *qui tam* relator who filed the original case.

Because bid-rigging and price-fixing conspiracies are always secret, it will be rare when someone with knowledge of the conspiracy is a true "outsider" and not a participant. And a participant in a conspiracy is more likely to seek immunity from prosecution rather than try to obtain a share of the government's recovery as a *qui tam* relator. The False Claims Act allows a court to reduce the relator's share of the proceeds if he or she participated in the wrongdoing, and disallows any recovery if the relator is convicted of the underlying criminal conduct.[14]

Finally, although the government itself may bring a False Claims Act case for an antitrust violation when no *qui tam* action has been filed, there are institutional obstacles (and possible turf battles) standing in the way. The Antitrust Division has been given responsibility for bringing civil actions to recover damages under the antitrust laws.[15] The Civil Division has been given responsibility for bringing False Claims Act cases arising from fraud on the United States, but its authority does not extend to antitrust.[16] Neither division has the clear responsibility to initiate antitrust-based False Claims Act cases, and neither division can claim to have the combined antitrust and false claims expertise. There is only the paradigm of limited cooperation and coordination between the divisions discussed earlier, and that paradigm only appears to cover *qui tam* cases.

III. Clayton Section 4A

In the early days of World War II, the United States brought a civil action under Section 7 of the Sherman Act (the predecessor to Section 4 of the Clayton Act) against eighteen defendants to recover treble damages because of injuries resulting from an alleged unlawful agreement to fix prices charged to the government for automobile tires it purchased. The defendants successfully moved to dismiss the action and the Second Circuit affirmed. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Supreme Court affirmed the dismissal, holding, as a matter of statutory

(Continued on page 14)

(Continued from page 13)

construction, that the United States was not a "person" entitled to sue under Section 7 of the Sherman Act.

Congress responded to *Cooper* in 1955 by adding Section 4A to the Clayton Act.[17] It believed that a federal civil damages remedy was necessary so that "injury to the coffers of the Treasury resulting from violations of the law" would not "remain uncompensated."[18] As originally enacted, Section 4A only authorized the United States to sue for single damages, and not treble damages, because Congress believed that the government needed no extra incentive to bring suit as the United States was already charged by law to enforce the antitrust laws. By contrast, Congress believed that private litigants needed treble damages "so that private persons will be encouraged to bring actions which, though brought to enforce a private claim, will nonetheless serve the public interest in the enforcement of the antitrust laws."[19] *Id.*

In 1990, Congress amended the statute to increase the amount of damages available to the United States from single to treble, even as it was substantially raising criminal penalties. *See* Antitrust Amendments Act of 1990, Pub. L. 101-588, 104 Stat. 2879. In amending the statute, Congress noted that the rationale for distinguishing between civil recoveries by the United States and other persons was suspect because it "ignore[d] the tremendous deterrent value of treble damage actions, regardless of the status of the plaintiff." S. Rep. No. 101-288 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 4119, 4119. As a consequence, the amended Section 4A effectively put the United States on the same footing as private and state governmental plaintiffs: all may recover treble damages.[20]

How and whether the Department has sought compensation for antitrust injuries to the United States has changed over time. In the 1960's and 1970's, the United States actively pursued damages claims under Section 4A, bringing cases in industries as diverse as electrical equipment, dairy products, and broad spectrum antibiotics. The use of Section 4A then slowed to a trickle in the 1980's and dried up completely in the 1990's. Professor Harry First notes that the Justice Department brought sixty-six cases under Section 4A between 1970 and 1979, but between 1980 and 2009—a period of nearly thirty years—it brought only five cases, the most recent being in 1994.[21] One competitive impact statement after 1994 stated that the government had "considered" bringing a Section 4A case, but had determined that injunctive relief was sufficient.[22]

The Division's record thus shows a clear retreat from its statutory authority to file civil damages actions. This has continued to be true even after Congress amended the statute to allow the United States to sue for treble damages. The government has not brought 4A civil damages actions as a follow on to criminal cases, nor sought damages in civil injunctive cases in which it was the main victim, nor brought civil damages claims when it was one of many victims. One explanation for the drop in suits in the 1980's is the Supreme Court's *Illinois Brick* decision in 1978 barring indirect purchaser suits for damages under the Clayton Act, as many of the cases brought in the 1960's and 1970's apparently involved claims by the United States as an indirect purchaser. But *Illinois Brick* cannot fully explain the decline in the number of cases because the United States has unquestionable standing to sue for treble damages when it is a direct purchaser.

IV. Restitution in Criminal Antitrust Cases

In criminal antitrust cases, restitution may be ordered as a condition of probation under 18 U.S.C. § 3563 (b)(2) or to the extent agreed to by the parties in a plea agreement under 18 U.S.C. § 3663(a)(3). While restitution is mandatory in certain types of criminal cases, it is not mandatory in antitrust cases. Nevertheless, restitution is a possible compensatory remedy, although it amounts to something less than the treble damages available under the False Claims Act and Clayton Section 4A.

The evidence suggests that restitution is not often sought in criminal cases even when the United States is a victim.[23] According to DOJ statistics, in 2009 the Antitrust Division imposed approximately $1 billion in criminal fines but recovered only about $17 million as restitution.[24] And this amount was significantly higher than in most of the previous nine years. This is difficult to explain in light of the Antitrust Division's policy on restitution. In cases involving guilty pleas where private parties are victims, the Division favors restitution in theory, but rarely seeks it in practice because private treble damages cases are typically filed on behalf of victims.[25] The Division's Model Plea Agreement makes clear that the justification for not seeking restitution in the general run-of-the-mill criminal case is that, "In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages."[26] However, in cases where the government is a victim, civil damages actions are generally not filed, so there appears to be little justification for not seeking restitution.

V. Conclusion and Recommendations

It is striking that the government does not make greater use of the tools in its toolkit, especially in the current economic climate. The infrequency of False Claims Act cases, the lack of aggressively seeking restitution in criminal cases, and the apparent abandonment of Section 4A can only mean that the United

(Continued on page 15)

(Continued from page 14)

States government is going uncompensated for antitrust harms.

It would seem that the government could easily promote the use of the False Claims Act in antitrust cases. This could be done through Antitrust Division speeches or other public documents, and by revising the Corporate Leniency Policy to further incentivize the bringing of these cases. Likewise, a greater use of the government's power under Clayton Section 4A would seem to require nothing more than a change in DOJ internal policy. The statute exists; the government has unquestioned authority to use it. At a bare minimum, there seems to be good reason to question why the government should not always require restitution in criminal cases where the government is the main victim, and no private civil cases or *qui tam* actions can or will be filed.

There may be some legitimate policy reasons for not utilizing compensatory remedies more often. For example, there may be a concern that a concurrent civil investigation or case could jeopardize the successful prosecution of a criminal investigation or case. But such concerns have not been articulated by DOJ, and in any event could be addressed—for example, by staying a civil case until the conclusion of the criminal matter.

The government could also consider other measures that would allow private claimants to pursue damages on behalf of the United States. Currently, private class actions at times include (or do not exclude) the federal government in the class definition. In the past, the Civil Division has notified private attorneys that they are precluded from representing the United States in such actions. By statute, the Attorney General has exclusive authority to conduct and supervise litigation in which the United States is a party.[27] If the DOJ is unwilling to pursue compensation for the United States, it could explore other options that would allow private counsel to bring cases on its behalf even when the *qui tam* provisions of the False Claims Act do not apply. (Such would be the case, for example, when a violation is first alleged in a publicly filed case or is uncovered through the Corporate Leniency Policy.) Options include "deputizing" counsel in treble damages actions to recover damages on behalf of the government as well as private parties. The government could also consider supporting new legislation that would expand *qui tam* actions in antitrust cases or create private monitoring programs (with appropriate incentives and safeguards) specifically aimed at cartel activity.[28]

1 Shareholder, Brownstein Hyatt Farber Schreck, Washington D.C. The author wishes to thank Professors Richard Brunell, Harry First and Maurice Stucke for their valuable insights and contributions. This Article is an elaboration of a number of the points made in a letter sent by the American Antitrust Institute to Assistant Attorney General Christine Varney. *See* http://www.antitrustinstitute.org/sites/default/files/Clayton%204A%203-29-10%20Lettter_033120101343.pdf. The opinions are those of the author and do not necessarily reflect the views of the American Bar Association.

2 Harry First, *Lost in Conversation: The Compensatory Function of Antitrust Law*, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1579343, at 60 (forthcoming St. John's Law Rev. 2010).

3 Anne K. Bingaman and Gary R. Spratling, Criminal Antitrust Enforcement, Speech before the Criminal Antitrust Law and Procedure Workshop, American Bar Association Section of Antitrust Law (Feb. 23, 1995) at 3, *available at* http://www.justice.gov/atr/public/speeches/0103.pdf.

4 *E.g.* Scott D. Hammond, Recent Developments, Trends, and Milestones in the Antitrust Division's CriminalEnforcement Program, Speech at the 56th Annual Spring Meeting, American Bar Association Section of Antitrust Law (March 26, 2008), *available at* http://www.justice.gov/atr/public/speeches/232716.htm.

5 42 U.S.C. § 10601.

6 *See, e.g.,* John T. Boese, Civil False Claims and Qui Tam Actions §§ 1.06[B], 3.01[B] (Third ed. 2006 & 2010 Supp.).

7 *See* Press Release, United States Department of Justice, Seven Freight Forwarding Firms to Pay U.S. $666,237 to Resolve Bid Rigging Allegations in Violation of the False Claims Act (July 21, 2008), *available at* http://www.justice.gov/opa/pr/2008/July/08-civ-629.html.

8 *See* Press Release, United States Department of Justice, Office of Public Affairs, United States Settles Claims Alleging Bid Rigging Conspiracy with Two German Moving Companies (June 23, 2009), *available at* http://www.justice.gov/opa/pr/2009/June/09-civ-618.html.

9 *See* Press Release, United States Attorney's Office, Central District of California, 14 Entities Pay $15.4 Million to Resolve Allegations of Bid-Rigging and Price-Fixing on Defense Contracts (Feb. 26, 2010), *available at* http://www.dodig.mil/iginformation/IGInformationReleases/Trelleborg.pdf.

10 *Id.*

11 *See* Notice of the United States' Election to Decline Intervention, *United States* ex rel. *Burch v. Champion Labs., Inc.*, Civ. No. 09-801 (N.D. Okla.) (Docket No. 11, filed June 10, 2010).

12 *See* Donaldson Company, Inc. Form 10K for the Fiscal Year Ending July 31, 2010, at 6 *available at* http://www.sec.gov/Archives/edgar/data/29644/000089710110001864/donaldson104463_10k.htm.

13 31 U.S.C. § 3730(d). For a discussion of the relator's share of the proceeds, see Boese, *supra* note 6, §4.08.

14 31 U.S.C. § 3730(d)(3).

(Continued from page 15)

[15] *See* 28 C.F.R. § 0.40(a) (Assistant Attorney General, Antitrust Division given responsibility for "[g]eneral enforcement of the antitrust laws," including, inter alia, "civil actions to recover . . . damages for injuries sustained by the United States as a result of antitrust law violations").

[16] *See* 28 C.F.R. § 0.45(d) (Assistant Attorney General, Civil Division given responsibility, inter alia, for "civil claims arising from fraud on the Government (other than antitrust, land and tax frauds), including alleged claims under the False Claims Act . . .").

[17] Section 4A of the Clayton Act currently provides in relevant part as follows:

> Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by it sustained and the cost of suit.

[18] See First, *supra* n.2, at 50 (quoting H.R. Rep. 84-422).

[19] S. Rep. 84-619 (1955), *as reprinted in* 1955 U.S.C.C.A.N 2328, 2330.

[20] In *Georgia v. Evans*, 316 U.S. 159 (1942), the Court distinguished *Cooper* and held that a state was a "person" within the meaning of § 7 of the Sherman Act, and therefore entitled to sue for treble damages.

[21] *See* First, *supra* n.2, at 50.

[22] *See United States v. Mercury PCS II, L.L.C.*, No. 98-2751 (D.D.C. filed Nov. 10, 1998) (PCS auction).

[23] *See* First, *supra* n.2, at 59.

[24] See *Antitrust Division, Workload Statistics FY 2000-2009*, *available at* http://www.justice.gov/atr/public/workstats.pdf.

[25] *See Antitrust Division Manual, Fourth Edition*, IV-90-92, *available at* http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf.

[26] *See* Model Annotated Corporate Plea Agreement (July 13, 2009) at 7 n.6, *available at* http://www.justice.gov/atr/public/guidelines/corp_plea_agree.pdf. A similar statement is made in a footnote in the *Antittrust Division, Workload Statistics* cited above.

[27] *See* 28 U.S.C. §§ 516, 519.

[28] *See, e.g.*, William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 Geo. Wash. L. Rev. 766 (2001).

RICO Issue Index and Grid
For Cases Compiled Through October 2010
(Federal Cases/Federal RICO)

by David Brenneman,
Associate, Morgan, Lewis & Bockius LLP in Washington, DC

CIVIL RICO ISSUE INDEX

A	Pleading
B	Venue and Jurisdiction
C	Constitutionality
D	Statue of Limitations
E	Discovery
F	Section 1962(a) Liability
G	Section 1962(b) Liability
H	Section 1962(c) Liability
I	Section 1962(d) Liability
J	Interstate Commerce
K	Enterprise
L	Person
M	Predicate Acts
N	Pattern of Racketeering Activity
O	Aiding and Abetting/Respondeat Superior
P	Standing and Injury
Q	Causation
R	Damages
S	Attorneys' Fees and Costs
T	Arbitration
U	Equitable Relief
V	Class Action
W	Trial
X	Miscellaneous (Other Issues and Defenses)
MD	Motion to Dismiss
SJ	Summary Judgment Motion
Gr	Granted
Den	Denied

CIVIL RICO ISSUE GRID

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
U.S. Supreme Court																												
Federal Circuit																												
D.C. Circuit																												
First Circuit																												
Second Circuit																												
UFCW Local 1776 v. Eli Lilly & Co,.2010 U.S. App. LEXIS 18959 (2d Cir. Sept.													X			X	X	X				X				X		
Third Circuit																												
Morales v. Superior Living Prods., LLC, 2010 LEXIS 22319 (3d Cir. Oct. 28,	X							X	X																X		X	
In re Insur.Brokerage Antitrust Litig., 618 F.3d 300 (3d Cir. 2010)	X							X	X		X			X										X	X		X	X
Andela v. Am. Ass'n for Cancer Research, 2010 U.S. App. LEXIS 17797 (3d Cir. Jul. 26, 2010)	X							X																				
Fourth Circuit																												
US Airline Pilots Ass'n v. Awappa, LLC, 615 F.3d 312 (4th Cir. 2010)	X												X												X		X	
Fifth Circuit																												

	A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T	U	V	W	X	MD	SJ	Gr	Den
<u>Sixth Circuit</u>																												
<u>Seventh Circuit</u>																												
<u>Eighth Circuit</u>																												
Steinhauser v. City of St. Paul, 619 F.3d 823 (8th Cir. 2010)								X	X				X			X										X	X	
<u>Ninth Circuit</u>																												
Sanford v. Member-Works, 2010 LEXIS 22601 (9th Cir. Oct. 25, 2010)								X	X							X										X	X	
Enterprises Inc. v. Roque De Law Fuente, II, 2010 U.S. App. LEXIS 15444 (9th Cir. Jul. 23, 2010)	X												X												X		X	
<u>Tenth Circuit</u>																												
<u>Eleventh Circuit</u>																												
In re Managed Care Litig., 610 F.3d 1296 (11th Cir. 2010)																						X						