The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel:

Perspectives in Antitrust

OCTOBER 16, 2013 VOLUME 2, NUMBER 1

In this Issue:

Spotlight on Peter Levitas

Pete Levitas is a partner in Arnold & Porter's antitrust practice group. Mr. Levitas has more than 20 years of experience as an antitrust lawyer addressing and resolving complex merger and conduct issues, particularly those affecting the healthcare, pharmaceutical and technology sectors. Mr. Levitas has served in a wide range of U.S. government positions; most recently, he served for over four years in the role of Deputy Director in the Bureau of Competition at the Federal Trade Commission (FTC) (2009-2013), where he was responsible for the Mergers 1, Health Care and Anticompetitive Practices divisions, as well as the FTC's Northeast Regional Office in New York.

Frank Y. Qi[*] conducted this interview for Perspectives in Antitrust.

Q. You worked at the Antitrust Division towards the beginning of your career. How did that experience affect how you approached your second stint in an antitrust enforcement agency when you joined the FTC? Maybe compare and contrast your experiences? Has the relationship between the two agencies evolved since you first worked at the DOJ?

A. My time as a trial attorney at the Antitrust Division was a formative experience for me, and it gave me a practical grounding in how staff approaches the day-to-day details of an investigation. Having a litigation and investigative background made it much easier for me to take on a management role at the FTC, because I had a solid understanding of what the staff was trying to accomplish and how they were trying to accomplish it. Of course, the specific jobs themselves were very different, but Antitrust Division staff and FTC staff are cut from the same cloth -- so in many ways my experience at both agencies was very much the same. I was surrounded by smart, hard-working people who are very dedicated to the mission of antitrust enforcement. In both jobs we all spent our time trying to get the right answer to some very complex issues. As far as the

[*] Frank Y. Qi is an associate at Ropes & Gray LLP in Washington, D.C., where his practice concentrates on antitrust and competition issues. He has represented private equity, technology, pharmaceutical, and biotechnology clients before government enforcement agencies. He has also advised telecommunications and other high-technology clients on numerous transactions and joint ventures.

relationship between the agencies, I can't honestly say that I had a clear sense of the high-level relationship when I started at the Antitrust Division as a junior lawyer back in 1991, but in the last few years when I was a Deputy the relationship was very good. I anticipate that it will continue on that track going forward -- both FTC Chairwoman Edith Ramirez and AAG Bill Baer have emphasized their interest in maintaining the strong working relationship, and of course Bill worked closely for many years with Debbie Feinstein, who is the new Director of the Bureau of Competition at the FTC.

How did you manage your transitions both to and from the Senate?

Going from being a trial attorney at the Antitrust Division to the Senate Judiciary Committee Antitrust Subcommittee was a big change. At the Division I was usually working on one or two investigations at a time, and if we were in litigation that is the only thing I would be focused on for an extended period. Working on the Judiciary Committee meant that I wasn't focused on the details of specific litigations, but it did allow me to have a much wider lens on a larger number of mergers, conduct cases and policy issues -- from telecom and aviation mergers to the Microsoft case and HSR reform and everything in-between. We were able to work on every major antitrust issue that arose and help put some issues on the table as well, which made it an extremely enjoyable and interesting job. It was really a great opportunity. In fact, that is where I first met former FTC Chairman Jon Leibowitz. He was the staff director for then-Senator Herb Kohl (D-WI) and I was working for then-Senator Mike DeWine (R-OH) on the Antitrust Subcommittee -- Senator DeWine and Senator Kohl were the Chair and Ranking Member of the Subcommittee, and switched back and forth in those roles, depending on which party was in control of the Senate. But they always wanted us to run the Subcommittee in a bi-partisan, non-partisan fashion, no matter which party was in charge. So Jon and I worked very closely together and years later, when he became the FTC Chairman he asked me to be a Deputy in the Bureau of Competition.

In your view, what are a couple of the most pressing antitrust doctrinal issues / enforcement priorities facing the DOJ and FTC today? Where would you like to see the agencies push a bit on the boundaries of current case law? Are there areas where you think the agencies have overreached?

One of the areas of the law that I think could most benefit from some additional clarity occurs at the intersection of Antitrust and Intellectual Property -- specifically, the use of patents in high-tech industries. The agencies have been emphasizing these issues and will almost certainly continue to do so. There are a lot of companies, large and small, that have made significant investments in patents and need to understand clearly the boundaries of their use; similarly, there are a lot of potential licensees that need more guidance as to the rules of the road so that they can make their business decisions. The areas where these issues are arising most frequently right now are in the context of industry standard-setting, and also in disputes between licensees and PAE's (Patent Assertion Entities). In fact, with regard to many of the PAE issues there isn't even a consensus on whether or not there is a role for antitrust to play, or whether any problems that exist instead are matters best deal with as a matter of consumer

protection or IP law. If the agencies can continue to work with all the various parties to help sort this out it would be a productive use of resources.

Another critical area, as always, is healthcare. Hospital mergers and physician-practice group deals will take up a lot of agency time, as will issues surrounding the relationship between health insurers and providers. Probably the single biggest issue on the table for the FTC is how to move forward in light of the Supreme Court decision in Actavis, which held that reverse-payment patent settlement agreements are to be judged by a rule-of-reason standard. The Commission will need to assess which deals it believes are worthy of a challenge under this standard, and the Commission, the industry, and the courts collectively are going to eventually need to sort out exactly what Actavis means in practice.

Aside from the billable hour, what do you think will be your biggest challenge in returning to private practice?

I'll definitely miss having compulsory process -- that makes life a lot easier. Without that, it is sometimes difficult to have enough information about the market and all its players to give clients the full, detailed guidance regarding antitrust risk that we would like. Most clients have a good working knowledge of their competitors, suppliers and customers, and that is often sufficient, but it is routinely the case that the agencies have a broader and more-detailed overall view of the market because of their access to customers and competitors. That creates a challenge when attempting to counsel clients with regard to antitrust risk -- the client only knows what it knows, but it is very difficult to know exactly what the investigating agency is hearing from others in the market-place.

The antitrust field, especially government agency practice, is almost a niche or boutique practice. At the FTC, you likely dealt frequently with "repeat players." What are some of the most common "unforced errors" you have seen counsel commit?

In my experience most of the counsel who appear regularly before the agencies do an excellent job; they know the facts, they are well-prepared, and they understand the strengths and weaknesses of their position. So I haven't seen a lot of unforced errors, but I do think that sometimes counsel may not fully utilize the opportunities they have when they are engaging Bureau management and when they meet with the individual Commissioners. Too often much of that time is spent in walking through a power-point presentation, much of which covers topics already known and understood by the audience. Sometimes such a presentation is necessary to make sure that everyone is focused on the same issue, but more often I think that time would be best spend engaging on the two or three key issues that are in dispute.

One other thing that sometimes happens is that counsel for a party may be reluctant to seriously negotiate the contested issues until they have take at shot at convincing Bureau management and sometimes even the individual Commissioners. Thus, they continue to maintain the position that the contested issues must be resolved entirely in their favor or they will litigate, even though it's fairly obvious that the most likely outcome, and the outcome that makes

antitrust sense, is a negotiated solution. It's generally the case that the staff has already discussed these issues in great detail with the Bureau and has its support, and that the Commissioners are aware as well -- so it isn't very likely that the parties are going to convince the Commission to completely abandon the staff position. If an objective observer would agree with the staff that their position has legal merit and there is a fix that is workable for the parties, it's often worthwhile to focus on negotiating the issues with the staff to find a palatable solution rather than going down the road of more white papers and Commissioner meetings.

Conversely, what are some improvements you would like to see from government agency attorneys in how they engage the private bar?

Similarly, in my experience I have found that the staff attorneys routinely do an excellent job in engaging with the private bar. If I had to point to one thing that is worth some more effort I'd say transparency. Of course, nobody expects the government to give away its case, but it is in everyone's interest for staff to be as transparent as possible regarding what they are thinking about an investigation and the possible theories of harm. Staff makes a point of trying to do that, but I think it's fair to say we didn't always convey our thinking as early or as effectively as one might hope. This is something that the agencies should, and do, continue to emphasize.

You played instrumental roles in consent order negotiations with two of the largest technology companies in the world: Intel and Google. How would you compare and contrast those two experiences? Feel free to discuss any personal takeaways, lessons learned for the agencies, or insights for third parties observing from the sidelines.

Of course, every case is different and every company is different, but Intel and Google are both large, sophisticated corporations with a clear understanding of their own business needs, and that is how they approached their negotiations. In both instances there were a number of complex issues to resolve, but in my dealings with the managers and outside counsel for both companies I found them to be smart, focused, and willing to suggest and/or consider creative solutions when we appeared to be at an impasse. Perhaps most important, I was able to trust that as negotiations moved forward they would stick to the agreements we had made previously -- a critical factor when there are so many moving pieces.
Both of these negotiations point out an important distinction between the resolution of a dispute between private parties and the settlement of a complaint or investigation initiated by the government. When two private parties are negotiating, the outcome is driven purely by bargaining power -- which side has the better legal position, which side has the money to litigate, which side has a reputational interest at stake, etc. When negotiating with the agencies, the resolution should be based on a different calculus because the agencies and the opposing party share at least one goal -- they both want the party to remain a strong competitive force in the marketplace. So if the agencies are doing their job, they won't take the most aggressive settlement they can possibly get, they will take only those parts of a settlement that resolve what they believe are the competitive issues, and do it in a way that creates the least competitive

Spotlight on Peter Levitas
Frank Y. Qi

cont'd.

disruption for the settling party. I think that we managed to do that in both the Intel and Google consent orders.

We just recently saw some disagreement among the Commissioners over the FTC's enforcement approach to "futures markets" in the Nielsen/Arbitron consent order. Without commenting on the case specifically, what are your general thoughts on the potential viability of a theory of harm that involves a yet-to-exist relevant product market? How likely will we see the FTC test these theories in court? How would you advise clients who may face these issues in potential transactions?

Like any potential case, the strength of a future competition theory is going to depend a lot on the specific facts at issue -- and for a future markets theory, which is one step beyond the normal future competition case, you are likely going to need to be even more careful about the factual support. For example, one might be somewhat confident that a future market will develop if two merging pharmaceutical companies both have new products in late stage trials for the same condition, but in a lot of other market circumstances a future market theory would be much more speculative. Those types of issues would be front and center for anyone assessing a potential competition/future market case, whether it be the agencies or private counsel.

The Value of Asymmetric Information Under the Robinson-Patman Act: Is Buyer Ignorance Bliss?
Todd N. Hutchison

The Value of Asymmetric Information under the Robinson-Patman Act: Is Buyer Ignorance Bliss?

By Todd N. Hutchison[†]

Claims under the Robinson-Patman Act (the "R-P Act") are not as prevalent today as those under the Sherman Act. The former antitrust statute, which declares certain forms of price discrimination unlawful, certainly does not garner nearly as much attention from government enforcement agencies as the latter. Nevertheless, the R-P Act remains a source of interest for businesses at all supply chain stages, in part because both suppliers and buyers could face private treble damage actions if they engage in unlawful price discrimination.[1]

This article focuses on buyer liability under Section 2(f) of the R-P Act, and the possible value to buyers of having asymmetrical information in their relationships with sellers. Most of the provisions of the R-P Act are directed at sellers.[2] To establish a *prima facie* claim under Section 2(a) of the R-P Act, a claimant must show sales of commodities of like grade and quality, sold to two different purchasers at two different prices, and a reasonable possibility of injury to competition.[3] There are several defenses to a Section 2(a) claim, including that the reduced price is due to different costs incurred in the manufacture, sale, or delivery of goods to the different customers; the reduced price is due to changing

[†] Todd N. Hutchison is an associate at Drinker Biddle & Reath LLP in Philadelphia, Pennsylvania. He is a member of the firm's Commercial Litigation Group and Antitrust Team. The views or opinions expressed herein are the author's alone and do not reflect the views or opinions of the firm or its clients.

conditions affecting markets for the good or marketability; and the reduced price represents a good faith attempt to meet (but not beat) an equally low price of a selling competitor.[4] As noted above, liability under the R-P Act may also extend to buyers. Section 2(f) provides that:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.[5]

Because buyer liability is limited to buyers that "knowingly" receive prohibited discrimination in pricing, the buyer must have knowledge of the unlawful price discrimination.[6] In particular, from the perspective of the buyer under Section 2(f), there is no substantive violation if the buyer did not know of the facts supporting a claim against the seller.[7] "[T]he buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices."[8] Trade experience (such as knowledge about the price another buyer pays, the quantity it purchases, the services the other buyer receives from the seller, or the variety of competing products the other buyer markets) can be a basis for inferring knowledge.[9]

Buyer liability was the focus of a recent Ninth Circuit decision, *Gorlick Distribution Centers, LLC v. Car Sound Exhaust System, Inc.*[10] In *Gorlick*, the Ninth Circuit affirmed a grant of summary judgment in favor of a buyer-competitor (in Robinson-Patman parlance, secondary-line price discrimination). The Ninth Circuit concluded that to state a claim for buyer liability, the plaintiff must show that the buyer (1) knew it was receiving a lower price, and (2) knew the prices it received likely would not qualify for a defense under the R-P Act.[11] The court concluded that plaintiff failed to establish a triable issue of fact that the defendant had actual or trade knowledge that the prices it received were discriminatory, as opposed to a result of the companies' different business practices, and concluded that the defendant did not have a duty to inquire because it had not insisted on an exclusive deal with the seller.[12]

In reaching its decision, the Ninth Circuit noted that the lower prices were justified because the seller was aware that the discount buyer purchased larger quantities, engaged in promotional efforts exclusive to the seller, and made the seller the "flagship brand."[13] In contrast, the plaintiff purchased significantly less volume and marketed the seller's competitors' products as well. A representative from the seller testified about these differences between the two buyers, revealing the seller's awareness, and the court concluded that there was no evidence to suggest that the discount buyer should have known that the prices it received likely did not qualify for an R-P Act defense.[14] In reaching its conclusion, the court highlighted what the buyer did not know: even though it knew it received lower prices, it did not know about the seller's transactions with other buyers or that the price-break was unwarranted by the seller's cost savings, rejecting the plaintiff's argument that knowledge of any discount constitutes notice of discriminatory pricing.[15] Thus, the buyer did not have actual or trade knowledge that the seller could not assert a defense and, therefore, the buyer could not be liable.[16]

The Value of Asymmetric Information Under the Robinson-Patman Act: Is Buyer Ignorance Bliss?
Todd N. Hutchison

cont'd.

Requiring the buyer to have certain knowledge to create liability under Section 2(f) raises an interesting question: Is buyer ignorance bliss? First, it appears that a buyer may possibly avoid liability under Section 2(f) based on a seller's unjustified price difference so long as the buyer does not know too much about the seller's costs of manufacture, sale, or delivery. Indeed, it is recognized that obtaining that information is often difficult and could raise other antitrust concerns: "Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future."[17] *Gorlick*, however, did not consider a buyer that deliberately avoided learning about the seller's costs. Had the court been presented with that fact-pattern, it could have reached a different conclusion and found a triable issue on summary judgment.[18]

Second, a buyer that refrains from learning other buyers' prices from the seller may undermine a claimant's efforts to show that the buyer had knowledge that it received more favorable pricing.[19] At the same time, the buyer may minimize possible accusations that it was advocating that the seller withhold similar discounts from other buyers or to charge other buyers higher prices, which could lead to claims under Section 2(f) of the R-P Act or Section 1 of the Sherman Act, or under both statutes.[20]

Conversely, the more the seller knows about the buyer's business, the more the seller may be able to justify lower prices. In *Gorlick*, for instance, the court noted that the seller was aware of the buyer's promotional efforts, which were exclusive to the seller's products and may have justified the discounted pricing.[21] For that reason, buyers should keep sellers apprised of buyers' efforts to promote the sellers' products. Sellers should, in turn, ensure that price differences are realistically available to all customers and that similar customers receive similar consideration for their promotional efforts.

More generally, an important lesson from *Gorlick*, with a foundation in *Automatic Canteen* sixty years ago, is that asymmetrical information between sellers and buyers have the potential to reduce the risk of liability under both Sections 2(a) and 2(f) of the R-P Act.

---

[1] *See, e.g.*, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006).
[2] Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 62 (1953); *see id.* at 64 (noting that the R-P Act was enacted to protect "against price discrimination inimical to the public interest").
[3] 15 U.S.C. § 13(a); *see also, e.g.*, Dynegy Mktg. & Trade v. Multiut Corp., 648 F.3d 506, 521-22 (7th Cir. 2011).
[4] *See* 15 U.S.C. §§ 13(a), (b).
[5] 15 U.S.C. § 13(f).

[6] *Automatic Canteen*, 346 U.S. at 71-73.
[7] *Id*. at 74-75; *see also* Great Atl. & P. Tea Co. v. FTC, 440 U.S. 69, 76 (1979) ("[A] buyer cannot be liable if a *prima facie* case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination 'prohibited by this section.'").
[8] *Automatic Canteen*, 346 U.S. at 79.
[9] *See id.* at 79-80.
[10] 723 F.3d 1019 (9th Cir. 2013).
[11] *Gorlick*, 723 F.3d at 1022.
[12] *Id.* at 1022-24 (distinguishing Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968), in which the court concluded Fred Meyer's insistence on discount exclusivity justified imposing inquiry notice).
[13] *Id.* at 1022.
[14] *See id.*
[15] *Id.* at 1022-23.
[16] *See also Great Atl. & P. Tea Co.*, 440 U.S. at 76 (noting buyer cannot be liable if seller would not be liable).
[17] *Automatic Canteen*, 346 U.S. at 69.
[18] *Cf. Fred Meyer*, 359 F.2d at 366 (recognizing duty to inquire under circumstances of case).
[19] *Cf.* Am. Motor Specialties Co. v. FTC, 278 F.2d 225, 228-29 (2d Cir. 1960) (finding buyers knew they received discriminatory pricing when they organized as a group to obtain lower prices than the prices paid by their competitors that did not join).
[20] *See, e.g.*, United States v. U.S. Gypsum Co., 438 U.S. 422, 458-59 (1978) ("[E]xchanges of price information—even when putatively for purposes of Robinson-Patman Act compliance—must remain subject to close scrutiny under the Sherman Act."); Am. News Co. v. FTC, 300 F.2d 104, 110 (2d Cir. 1962) (affirming Commission's findings based on, in part, buyer "insist[ence] on receiving rebates which represented a steep increase over promotional allowances customarily paid"); *see also Gorlick*, 723 F.3d at 1023 (noting defendant had considered, but did not act on, asking seller to increase competitor's prices).
[21] 723 F. 3d at 1022; *see also* W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.), Inc., No. 11-1611, 2013 U.S. Dist. LEXIS 126890, at *26-30 (D. Colo. Sept. 5, 2013) (implying that "meeting competition" affirmative defense under Section 2(b) of the R-P Act may be more justifiable when seller knows more about the offers its customers receive).