U.S. ANTITRUST DEVELOPMENTS

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Antitrust activity in the U.S. remains robust notwithstanding a sluggish economy and a somewhat more cautious enforcement outlook within the current Republican Administration. Individually, and in the aggregate among the Antitrust Division of the Department of Justice, the Federal Trade Commission and the various States, government enforcement in both the merger and non-merger areas and on both the civil and criminal fronts remains steady. Just as importantly, private litigation in federal and state courts remains intense and provides the primary vehicle through which many key issues of antitrust policy continue to be developed.

Enforcement Activity Remains Robust Despite Declining Pre-Merger Filings

The number of transactions reported pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1975 ("HSR Act") dropped in 2002, on the heels of a 55% fall in notifications in 2001. Only 1,122 notifications were filed through mid-September 2002, compared with 2,245 and 4,537 notifications for the same period in 2001 and 2000, respectively. The decline reflects both an increase in the HSR Act notification thresholds implemented in 2001 and the worldwide merger slowdown, primarily in the telecommunications, media, and information technology sectors that were active in the boom of the late 1990s.

Enforcement activity, however, remains robust. While it had spiked in 1998-2000, it is now at 1996 and 1997 levels. Thus, enforcement activity, while experiencing an overall decline, is now commensurate with pre-boom statistics.

DOJ Merger Enforcement Remains Steady

Following the departure of Charles James in December 2002, R. Hewitt Pate has been named as the Acting Assistant Attorney General for the DOJ. He brings broad antitrust experience, most recently as senior official within the DOJ and previously in private practice.

***Echostar/DirectTV:* "3 into 2" mergers face almost insurmountable hurdles**

In October 2002, the DOJ, joined by 23 states, filed a lawsuit to block the proposed acquisition of Hughes Electronics Communication by Echostar Communications

Corporation. The transaction proposed a combination of the nation's two largest direct broadcast satellite services. The crux of the DOJ's complaint was that the proposed merger would substantially reduce competition in the multichannel video programming distribution ("MVPD") market.

While the merger would lead to only one nationwide DBS service, the parties argued that the merger was essential to the ability of DBS providers to compete effectively against local cable monopolists. Rejecting that argument, the DOJ affirmed what has emerged as a bright line rule of U.S. antitrust policy, most recently applied in the *Baby Foods* case[1]: mergers reducing the number of competitors from three to two will not be permitted absent extraordinary circumstances. Here, the proposed transaction would have reduced the number of competitive choices available to consumers in the MVPD market from three (DirectTV, DISH, cable) to two where cable is available; in non-cable areas, it was a merger to monopoly, resulting in one company controlling all three continental U.S. satellite positions, making it the exclusive gatekeeper for nationwide satellite services.

Much like the parties in *Baby Foods*, Echostar and Hughes produced compelling evidence of merger-specific technological and distribution efficiencies. These efficiency claims were rejected by the DOJ as insufficient. Neither Echostar nor Hughes was in danger of failing; to the contrary, both firms had experienced significant subscriber growth in recent years, and were projected to continue growing in the future at rates faster than the cable industry. Further, competition was intense between the merging firms, resulting in reduced programming prices, more attractive programming packages, reduced equipment costs and free installation. In the absence of such competition, the DOJ concluded that these consumer benefits would be lost.

***United/US Airways:* Grim financial conditions will not salvage mergers**

At the time of their proposed merger, United Airlines and US Airways were the second and sixth largest U.S. airlines, respectively. Following its prior practice, the DOJ examined the transaction by routes connecting city pairs, concluding that the merger would result in a monopoly or duopoly on more than 30 routes on which consumers spend more than $1.6 billion annually, as well as significantly reduce competition on routes representing more than $4 billion in revenues. Based on this evidence, the DOJ concluded that US Airways was the most significant competitor of United.

Following the DOJ's announcement of its intent to challenge the transaction, the airlines abandoned their plans and later each was forced to seek the protection of the bankruptcy courts. There is no assurance that either airline will emerge intact.

1 *FTC v. H. J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

***SunGard/Comdisco:* Fast judicial review**

Since June 2001, the DOJ has successfully challenged 20 of the 21 transactions it considered to be anticompetitive; the lone exception was the *SunGard/Comdisco* merger. On July 16, 2001, Comdisco filed for bankruptcy protection and, at a subsequent auction, two competing bids were submitted by Hewlett-Packard and SunGard. SunGard's bid was higher by $125 million, but presented some antitrust risk because the two firms were horizontal competitors. On October 22, 2001, one day before the bankruptcy court was to approve the sale of Comdisco to SunGard, the DOJ filed suit and sought to enjoin the sale. The court, under significant pressure to adjudicate the matter within a time frame that did not jeopardize either the rival bid by HP or the parties' timetable to close, ordered the parties to adhere to a truly extraordinary schedule: the entire case was litigated (including significant fact discovery, briefing, and trial) and decided in less than three weeks from the filing of the DOJ's complaint.

While the exigencies of bankruptcy propelled *SunGard* to a remarkably swift conclusion, the rationale that justified the fast-track procedure will undoubtedly be used by parties facing timing issues of a different nature. While it is unclear today how far the *SunGard* procedure will extend outside of the bankruptcy arena, *SunGard* conclusively has demonstrated just how fast U.S. courts can decide complicated merger cases.

***Computer Associates/Platinum Technology:* "Gun-Jumping"**

In 2002, the DOJ announced the settlement of its gun-jumping complaint against Computer Associates and Platinum Technology, which alleged that serious antitrust violations occurred during the pre-closing activities undertaken by the merging parties. *Computer Associates* did not expand the range of impermissible pre-closing activities, but serves as a textbook example of gun-jumping, and provides guidance to companies as they work towards integrating businesses in anticipation of closing.

At the core of the DOJ's complaint were certain operating covenants in the merger agreement that effectively ceded control, pre-HSR Act clearance, of Platinum Technology (the seller) to Computer Associates (the buyer). Specifically, the merger agreement:

- ceded pricing control of the seller's products to the buyer by requiring that all contracts providing for discounts in excess of 20% (when such discounts were common for both the seller and the industry as a whole) must be approved in advance by the buyer;

- ceded day-to-day control of the seller's business to the buyer by providing that a vice-president of the buyer would work at the seller's headquarters pre-closing to review and approve all customer contracts and participate in other business decisions; and

- prohibited the seller from entering into contracts for a term of more than 30 days if the contract specified a fixed or capped price for its services.

The DOJ alleged that the seller pre-closing had altered substantially its ordinary discounting and contracting practices. Moreover, the buyer, by virtue of its unfettered pre-closing access to the seller, systematically collected competitively sensitive information relating to the seller's competitive bids, including the identity of the customer, products and services offered, pricing, and proposed discounts. The DOJ further alleged that the buyer passed much of this information on to its own staff to enhance its competitive position in negotiations. The DOJ sought $1.3 million in fines for the exchange of competitively sensitive information and the exercise of premature control by the buyer over the seller during the 58-day period between the date the parties signed the merger agreement and the date the waiting period expired under the HSR Act.

Among the cooperative conduct *not* challenged by the DOJ in *Computer Associates* were:

- restrictions on the seller's ability to assume new debt or financing;
- restrictions on the seller's ability to issue new voting securities; and
- restrictions on the seller's ability to sell assets.

These restrictions do not inhibit the seller's ability to conduct its business in the ordinary course prior to closing. Thus, while parties may plan for the integration of their assets and businesses, implementation of those plans must await, at least, the expiration of the waiting period.[2]

The Impact of the DOJ's Merger Review Initiative Remains Unclear

In early 2002, the DOJ announced an initiative designed to make more efficient use of the first 30-day waiting period of the HSR Act by getting to the core antitrust issues quickly, so that the staff and the parties may reach closure on most or all issues before the end of this initial waiting period. The initiative did not create new formal procedures, but signals a commitment to find practical ways to identify, address, and resolve issues within the initial

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[2] One open question is whether parties may combine assets and operations after the expiration of the waiting period, but prior to closing of the transaction. It is clear that such activities would not be violations of the HSR Act, but still could be violations of the Sherman Act if the parties were competitors. While in practice, the government has declined to enforce the Sherman Act if closing is imminent, it has not ruled out future enforcement actions where the parties' pre-closing activities could jeopardize the target's ability to compete effectively should the parties not consummate the merger.

30-day waiting period or, if closure is not reached, to narrow the scope of any Second Request which may follow.

Specifically, the staff is encouraged to tailor its investigative plans and strategies to the specific issues posed by each transaction, rather than relying on standardized procedures or boilerplate models. Parties may expect the DOJ to be more proactive during the initial 30-day waiting period, and may find it to their advantage to reciprocate by proffering key documents beyond those required by a HSR Act filing, anticipating requests for information, and availing themselves of opportunities to meet with staff to discuss issues raised by their transaction. While the practical effectiveness of the initiative remains to be seen, it is clear that its success is dependent on the willingness of both the DOJ and the parties to engage in candid discussions during the initial 30-day period.

Federal Trade Commission Introduces New Procedures

Decisions in Cases Involving Second Requests

In one of the more significant changes to its merger review procedure in some time, the FTC announced in 2002 that it would issue written decisions in all cases in which a Second Request was issued, but no enforcement action was taken. The FTC hopes that these decisions will provide additional transparency into its merger analysis. Indeed, the FTC's statement justifying its decision to close two investigations of mergers in the cruise industry helped to correct the misperception that these cases represented a shift in enforcement policy. While many commentators suggested that the FTC in these cases had abandoned the policy of opposing mergers in highly concentrated industries (here, from four to two competitors), the FTC's statement argued that its decision resulted from a straightforward application of the Horizontal Merger Guidelines.

FTC "Best Practices" Guidelines for Second Requests

In December 2002, the FTC issued a set of procedural guidelines aimed at improving the efficiency and quality of the merger review process. In particular, the FTC has proposed to eliminate several requirements that place heavy and expensive burdens on parties responding to Second Requests.

Among other things, the FTC has proposed significant changes in its requests for the production of electronic documents. First, the FTC proposes various methods by which parties can actually produce documents electronically, such as in searchable .pdf format. Second, the FTC proposes guidelines for the use of "term" searches of electronic databases to find responsive documents. Third, the FTC proposes to limit the need to produce archived electronic documents in many cases, and vastly restrict the scope of production if eventually required in a case. Finally, the FTC suggests limiting the scope of email production via the use of term searches and date limits.

Libbey/Anchor Hocking: **Beware of "Self-Help" Remedies**

The FTC's successful action to block Libbey's proposed acquisition of Anchor Hocking Corporation, a wholly owned subsidiary of Newell Rubbermaid, was the FTC's most significant enforcement action in 2002. While this case could, at first glance, be dismissed as the FTC's disapproval of a "3 to 2" merger between the first (65%) and third (7%) largest players in the FTC-defined "food service glassware market," this case is an example of the repercussions of structuring a substantively deficient "fix-it-first" remedy.

At the core of the FTC's objection to the *Libbey* merger was its belief that the merger would substantially lessen competition in the highly concentrated food service glassware market where the only other major players (with 10% and 3% of the market) were deemed insignificant due to their inability to produce replacement Libbey glassware. Indeed, the FTC determined that nearly 80% of food service glassware purchases were replacements of Libbey glassware and, further, that Anchor was the only competitor with the ability to manufacture and sell Libbey look-alikes at prices up to 20% lower than Libbey.

The parties attempted to salvage their transaction by adopting a dubious fix-it-first approach which provided that the seller would carve out and transfer, pre-closing, nearly all of its food service glassware assets to a division not being sold. This amended agreement did not alleviate the FTC's concerns, primarily because Libbey would still acquire the seller's food service glass manufacturing facilities leaving the carved-out business with no independent supply source for its newly segregated glassware assets. While the parties subsequently proposed an alternative offshore supply source, the FTC determined that the cost of goods would still increase a minimum of 4.3% by virtue of the foreign supply source. Thus, the FTC concluded that the proposed merger would still result in an unacceptable price increase. By unilaterally adopting an insufficient remedy, Newell was forced to agree to notify the FTC of any proposed sale of its food service glassware business during the next five years in settlement of the FTC's administrative action.

Criminal Enforcement is Active

The Bush Administration has continued the trend toward more certain and longer prison terms for antitrust offenders. Since the beginning of the new administration, the DOJ has secured more than $125 million in criminal fines, convicted 24 corporations and 25 individuals, and obtained prison sentences for 25 individuals averaging more than 17 months. In recent years, the DOJ has brought criminal prosecutions against a wide variety of industries, including various industrial chemical, various food additives, scrap metal, automotive tooling, and the collectible stamp auctions markets. In its most recent high profile criminal case, the DOJ successfully convicted A. Alfred Taubman, the former chairman of the board of Sotheby's Holdings Inc., of fixing the prices of sellers' commissions at fine art auctions. Taubman was sentenced to serve one year and one day in prison and to pay a $7.5 million fine.

The DOJ also has been active in prosecuting international cartels. Since the beginning of the administration, 54% of all corporations prosecuted by the DOJ were foreign-based, and 37% of all individuals prosecuted under U.S. antitrust laws were foreign nationals. As of September 2002, the DOJ had 99 pending grand jury investigations, 39 of which had foreign implications. In prosecuting international cartels, the DOJ relies on the cooperation of the competition authorities in other countries, most notably the European Commission and the Canadian Competition Bureau.

Healthcare Remains A Priority

The DOJ and the FTC have scheduled hearings this year focusing on the healthcare industry. These hearings will complement a series of enforcement initiatives in this sector.

First, the FTC has attacked anticompetitive conduct in the pharmaceutical industry in two generations of lawsuits. The first generation litigation focused on agreements between branded and generic pharmaceutical manufacturers, the result of which allegedly delayed the entry of generic drugs to compete with branded drugs. The FTC's second-generation litigation focuses more on unilateral conduct, namely the abuse of the Hatch-Waxman process to obtain unwarranted 30-month stays of FDA approval of generic drugs.

Second, the FTC has successfully sued physicians' groups for allegedly colluding to raise consumers' costs. In contrast to clinical integration that increases the quality of patient care, the physician agreements were attacked as nothing more than elaborate price-fixing schemes.

Third, and in contrast to the FTC's success in other areas involving healthcare issues, the DOJ and FTC are a combined 0 for 7 in recent cases challenging hospital mergers. In response to this recent string of failures, the FTC has established a merger litigation task force to screen targets, select the best cases, and develop new litigation strategies. In addition, the FTC is currently preparing a study of the effects of hospital mergers. The FTC report will focus not only on the cost to consumers, but also on whether the claimed efficiencies have been realized. In the event that the FTC determines that the mergers were anticompetitive, it will consider initiating remedial administrative actions where appropriate.

Finally, the DOJ has expressed concerns over the recent consolidations in the health insurance market. While the McCarran-Ferguson Act largely exempts the insurance industry from federal antitrust scrutiny, the DOJ has conducted several investigations in this area. Specifically, where a transaction has the potential to raise the merging parties' ability to increase prices to consumers, reduce the quality of managed care plans, or gain monopsony power over doctors, the DOJ has expressed its commitment to conducting intense investigations of these mergers. The DOJ has also initiated several litigations over the use of "most favored nations" clauses in insurance contracts, on the grounds that in areas where an insurer has a dominant market position, such clauses effectively set pricing floors for all patients.

International Cooperation Seeks to Minimize Policy Clashes

The FTC, DOJ, and the European Commission jointly have issued certain "best practices" to coordinate future merger investigations. The divisive *GE/Honeywell* case was the catalyst for these guidelines, which are intended to minimize future transatlantic disputes in cases posing difficult policy questions. In brief, the authorities have agreed:

- to coordinate on timing of investigations, including a joint pre-meeting with the parties to discuss coordination of their investigations;
- to coordinate the evaluation of evidence, including theories of market definition, competitive harm, and sharing of econometric data; andto coordinate on the proposal of remedies to ensure that inconsistent obligations are not placed on the parties.

It is unclear whether the proposed coordination will always be beneficial to the parties or even whether parties will want to avail themselves of these procedures.

Both U.S. Agencies have been active participants in the nascent International Competition Network ("ICN"), a virtual network of over 65 regulatory agencies worldwide. While its resolutions are not binding on its members, the goal of the ICN is to promote consensus on a wide range of competition issues, including resolving issues raised by multi-jurisdictional review of mergers. Through the ICN and other bilateral cooperation agreements with regulatory agencies worldwide, the US Agencies have taken a leading role in developing an international consensus on fundamental principles of antitrust law.

State Enforcement is Strong

Historically, states have tended to fill any vacuum created in times of reduced federal enforcement of the antitrust laws. Indeed, the states solidified their role as independent enforcers during the Reagan Administration, a role that endures today. Dual enforcement at the federal and state level has invariably led to conflict, and has sparked debate. Recently, divergent views over appropriate remedies led nine states to refuse to sign on to the settlement of the federal *Microsoft* action. See discussion *infra.*

In the merger context, states are increasingly taking the initiative to challenge transactions that either have not been notified to, or even cleared by, the US Agencies. For example, Puerto Rico recently challenged the acquisition of a local supermarket chain by Wal-Mart, despite the fact that the transaction already had been cleared by the FTC. While both the federal trial and appellate courts affirmed the primacy of the FTC's decision to allow the merger to proceed, this case may foreshadow a more activist role for the states in merger control.

State attorneys general will continue to exercise their independent authority in the antitrust arena. The lesson here is simple: parties that fail to account for the independent authority of states to enforce the antitrust laws do so at their peril.

Private Antitrust Litigation Remains Intense

Private antitrust litigation showed no signs of slowing down in 2002. Cases involving claims of monopolization[3] and horizontal[4] and vertical restraints[5] addressed key policy issues affecting these theories. Two doctrines that limit antitrust liability, (i) the implied immunity doctrine and (ii) the *Illinois Brick* direct-indirect purchaser doctrine, have sparked important decisions. The collateral estoppel doctrine has been refined in the aftermath of the government's case against Microsoft. And finally, recent cases portend an expansion of the extraterritorial reach of the U.S. antitrust laws.

In re: Visa Check/MasterMoney Antitrust Litigation

In re: Visa Check/MasterMoney Antitrust Litigation is one of the largest private antitrust actions ever, involving claims of monopolization and vertical and horizontal restraints. A plaintiff class of all merchants who have accepted Visa and/or MasterCard credit cards seeks damages of more than $50 billion.

The merchants' claims center on two main issues. First, the merchants challenge the "honor all cards" rule enforced by both the MasterCard and Visa associations. This rule requires that merchants who agree to accept an association's cards must honor all cards bearing that association's logo. The merchants assert that MasterCard and Visa have "tied" acceptance of debit cards to acceptance of credit cards in order to force merchants to accept debit cards at a significantly higher price than they otherwise would pay. Second, the merchants allege that MasterCard and Visa have conspired to monopolize the "point of sale (POS) debit card market" and suppress the growth of competing regional pin-based ATM payment systems.

3 *See, e.g., Law Office of Curtis V. Trinko LLP v. Bell Atlantic Corp.,* 2002-2 CCH Trade Cases ¶73,719 (2d Cir.); Covad *Communications Co. v. Bell-South Corp.,* 2002-2 CCH Trade Cases ¶73,761 (11th Cir.); *LePage's, Inc. v. 3M,* 2002-1 CCH Trade Cases ¶73,537 (3d Cir.).

4 *See, e.g., High Fructose Corn Syrup Litigation,* 2002-1 CCH Trade Cases ¶73,711 (7th Cir.); *United States v.* Taubman, 2002-2 CCH Trade Cases ¶73,753 (2d Cir.).

5 *See, e.g., Apani Southwest, Inc. v. Coca-Cola Enterprises, Inc.,* 2002-2 CCH Trade Cases ¶73.769 (5th Cir.); *StunFence, Inc. v. Gallagher Security (USA), Inc.,* 2002-2 CCH Trade Cases ¶73,789 (N.D. Ill.); *Lubbock Beverage Co., Inc. v. Miller Brewing Co.,* 2002 CCH Trade Cases ¶73,767 (N.D. Tex.).

Summary judgment motions are *sub judice*. Trial is scheduled to begin on April 28, 2003.

The "Implied Immunity" Doctrine Expands

Two recent decisions[6] examined the interplay between the antitrust laws and the securities laws and expanded the scope of the immunity that the securities law afford against the application of the antitrust laws to challenged conduct. The Supreme Court in earlier cases established a rule that immunity from the antitrust laws should be implied when the application of the antitrust laws to the challenged conduct would be *plainly repugnant* with the securities laws at the time of the alleged conduct. *Friedman* and *Options* broaden the scope of the immunity doctrine by applying it to situations where there is a *potential* for a conflict. Thus, *Friedman* and *Options* underscore the importance of the SEC's regulatory authority at a time in the United States where alleged violations of securities laws are perhaps at an all time high.

The Second Circuit in *Friedman* upheld the district court's dismissal of a complaint that challenged the practice by investment banks of permitting institutions to flip their stocks in the aftermarket for IPOs, but restricting individuals from selling their stock for between 30 and 90 days after purchase. The complaint alleged that this practice inflated prices in the aftermarket by restricting the supply of shares and was illegal *per se* price fixing under the antitrust laws. The Second Circuit held that because the SEC could conceivably permit price stabilization in the aftermarket under its regulatory powers, that there was a *potential* for conflict and applied the implied immunity doctrine.

In *Options,* the Second Circuit upheld the district court's dismissal of a class action lawsuit that alleged that five stock exchanges engaged in illegal price fixing by agreeing not to list any options classes that already were listed on another exchange. The SEC had regulated this issue for many years and at the time of the lawsuit prohibited multiple list options. The plaintiffs argued, *inter alia,* that because both the securities and antitrust laws prohibited the alleged conduct there was no conflict. The Second Circuit rejected this analysis and concluded that implied immunity was necessary to preserve the authority of the SEC to regulate the conduct, i.e., the SEC had power to allow the conduct in the future and that authority should not be "rendered nugatory" by application of the antitrust laws. Thus, *Friedman* and *Options* broaden the implied immunity doctrine to apply to *potential* conflicts between the securities and antitrust laws.

[6] *In re Stock Exchanges Options Trading Antitrust Litigation, 317* F.3d 134 (2d Cir. 2003) ("*Options*"), and *Friedman v. Salomon/Smith Barney, Inc.,* 313 F.3d 796 (2d Cir. 2002) ("*Friedman*").

Indirect Purchaser Actions: The *Illinois Brick* Doctrine Continues to Erode

The "*Illinois Brick"* rule, established twenty-five years ago by the U.S. Supreme Court, holds that indirect purchasers generally are barred from recovering damages in federal antitrust actions. *Illinois Brick v. Illinois,* 431 U.S. 720 (1977). The underlying rationale of *Illinois Brick* is that defendants should not be able to defend overcharge claims by showing that purchasers "passed on" the overcharges and therefore were not damaged. Thus, the rule provides that only direct purchasers can sue for overcharges. More than twenty states have passed so-called "*Illinois Brick* repealers" that provide that indirect purchasers (or state attorneys general on behalf of consumers) still may recover damages under state laws. As a result, large single and multi-state consumer class actions have been brought against defendants after they were subject to treble damage claims from direct purchaser claims under federal law. This has caused complex, fragmented and inconsistent results, aggravated by the fact that such laws vary from state to state.[7] For example, during 2002, numerous consumer class actions (as indirect purchasers) were brought in the wake of Judge Jackson's decision in *United States v. Microsoft*, 85 F. Supp. 2d 9 (D.D.C. 1999), *aff'd in part*, 253 F.3d 34 (D.C. Cir. 2001), alleging that consumers were injured by Microsoft overcharges. The determination as to whether consumers are entitled to bring such claims have been inconsistent, depending on whether a state had an *Illinois Brick* repealer, and, if so, its scope.

While reasonable people can debate whether this reflects a healthy tension in the federal system, the negative consequences for businesses are both clear and troublesome. Not only are significant and fundamental issues of antitrust policy being decided in state court under state law, but parties are forced to run the gauntlet of an uneven application of diverse laws being applied to the same conduct, the result of which is divergent, and often duplicative, damage awards.

The Aftershock of *United States v. Microsoft*

The claim by the U.S. Government and a number of states against Microsoft was one of the most publicized antitrust cases in history. Although the government's case has been resolved, many of the underlying issues continue to be the subject of private actions, both in state and federal courts. A key issue concerns the collateral estoppel effect to be given to the findings made against Microsoft in the government's case.

In 1998, the DOJ and a group of state attorneys general initiated simultaneous lawsuits against Microsoft that were consolidated in Washington, D.C. The court entered first its Findings of Fact—a detailed, 412 enumerated paragraphs of facts. Five months later, the court entered its Conclusions of Law holding that Microsoft had violated Sections 1 and 2 of

7 The laws vary in several significant respects including (1) to whom they grant standing (consumer v. Attorney General), (2) procedural devices available (individual v. class action), and (3) the type (damages v. injunction) and amount (single v. treble) of damages recoverable.

the Sherman Act, as well as analogous provisions of the relevant state laws. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000). The court also ordered Microsoft split into two separate companies. The Court of Appeals affirmed those factual findings and a finding of liability on the core claim of the case: the unlawful maintenance of the market for Intel-compatible PC operating systems. It reversed the finding of liability on the browser claim, remanded the tying claim, and vacated the remedy decree ordering the division of the company. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001). The case on remand was reassigned to Judge Kollar-Kotelly. Plaintiffs dropped the tying claim and proceeded directly to the remedies stage.

Prior to the remedy trial, the DOJ and nine states reached a settlement with Microsoft. Nine other states and the District of Columbia elected not to settle and, instead, sought stronger remedies. On November 1, 2002, Judge Kollar-Kotelly issued a 324-page opinion. She declined to adopt the more forceful remedies proposed by the non-settling states and instead imposed a set of remedies that mirror the settlement among Microsoft, the DOJ, and the nine settling states. The remedy did not undo the harm Microsoft was found to have inflicted on the competing browser and other middleware technologies, such as Netscape's Navigator and Sun Microsystems' Java™ technologies. Nor did it prohibit Microsoft from "commingling" code of future products into the code for the operating system.

Accordingly, four of Microsoft's competitors: Netscape, Sun Microsystems, Be Incorporated and Burst.com, Inc., initiated private actions against Microsoft seeking monetary damages and injunctive relief for conduct that was in whole or in part litigated in the government enforcement action. These lawsuits, as well as a number of consumer class actions, are before Judge J. Frederick Motz in Maryland for resolution of pretrial issues. A significant question in these cases concerns the effect to be given to the findings in the government action. The trial court has ruled that, subject to a contrary showing by Microsoft based on a narrow issue identified by the court, Microsoft would be precluded from relitigating 395 of the 412 enumerated paragraphs of findings of fact by the D.C. District Court. *In re Microsoft Corp. Antitrust Litigation*, 232 F. Supp. 2d 534 (D. Md. 2002).

The court also granted a preliminary injunction decision in favor of Sun Microsystems. *In re Microsoft Corp. Antitrust Litigation*, 2002 WL 31863526 (D. Md. 2002). Sun had moved for a preliminary injunction motion seeking relief that would require Microsoft to ship with every copy of the Windows operating system and the Internet Explorer browser, a copy of the Java Runtime Environment—the software component PC users need to execute programs or view websites utilizing Java technologies. In granting the requested relief, the court focused on the distortion in competition already caused by Microsoft's past violations and the continuing likelihood that competitors will be unable to overcome the advantages that Microsoft enjoys by virtue of its unlawfully maintained monopoly position. Microsoft has appealed this decision to the Fourth Circuit and a hearing has been scheduled for early April 2003.

The resolution of these private competitor and consumer cases against Microsoft promises to develop further the parameters of the collateral estoppel effect of government litigation on subsequent private litigation.

Extraterritorial Reach of U.S. Antitrust Laws May Be Expanding

The Foreign Trade Antitrust Improvements Act ("FTAIA"), enacted in 1982, exempts conduct involving foreign commerce from the Sherman Act unless the conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. commerce. Two recent decisions involving horizontal conspiracies to fix prices threaten to narrow the FTAIA's exemption and expand the reach of the Sherman Act to foreign entities on foreign purchases by focusing on whether any of defendant's alleged conduct has an effect on the U.S. domestic markets. The Second Circuit in *Kruman v. Christie's International,* 284 F.3d 384 (2d Cir. 2002), held that the FTAIA did not exempt claims of sellers and purchasers at auctions conducted outside the U.S. who sued the two largest auction houses in the world even though their particular injuries had no effect on U.S. commerce. The court stated that it had jurisdiction because the defendants' acts (conspiracy to fix commissions at foreign and domestic auctions) included a conspiracy to fix U.S. auction commissions, or alternatively, the agreement to fix foreign auction commissions made possible an agreement to fix domestic auction prices. Similarly, in *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.,* 315 F. 3d 338 (D.C. Cir. 2003), the court held that it had jurisdiction over the Sherman Act claims of foreign purchasers of vitamins on purchases outside the U.S. for their injuries because the manufacturers' worldwide conspiracy to fix prices also had an impact in the U.S. on U.S. entities.

Thus, the danger arising from these cases is that entities engaged in global businesses will be subjected to treble damage actions based on injuries occurring outside the U.S. as long as the alleged conspiratorial conduct also has caused an injury, albeit to distinct plaintiffs, in the U.S. Especially given the broad global nature of businesses, this expansion substantially increases the scope of damages to which companies may be exposed.