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Arnold Leads The Way: California Amends Its Unfair Competition Law To Stop Shakedown Lawsuits

California voters, in the November 2 election, made significant changes to the state's "Little FTC" Act, called the Unfair Competition Law ("UCL"). The UCL is found at section 17200 *et seq.* of the California Business & Professions Code. Section 17200 defines unfair competition as any "unlawful, unfair or fraudulent" act or practice. Section 17500 also makes false and misleading advertising unlawful. Like most states, California permits private actions under its Little FTC Act. Unlike any other state, however, until recently California allowed such actions to be brought by any person regardless of whether that person had been injured by the defendant's alleged acts or practices. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* 17 Cal. 4th 553, 561 (1990). Additionally, until recently, such "representative" actions on behalf of the general public were assertedly permissible without observing the notice and due process requirements normally attendant to class actions. When coupled with the broad liability of sections 17200 and 17500, this led to many frivolous suits by private parties on behalf of "consumer" groups having nothing to do with real consumers.

Proposition 64, passed by California voters on November 2 by a substantial margin, reduces or eliminates the possibility of such perceived abuses. It imposes both an injury requirement and requires that representative actions comply with normal class action procedures. Governor Arnold Schwarzenegger, who batted a 1.000 on statewide propositions, supported Proposition 64. Its campaign was headed by business groups under the banner of "Stop Shakedown Lawsuits."

More specifically, Proposition 64 amended Bus. & Prof. Code section 17204. As amended, section 17204 now provides that UCL actions "shall be prosecuted exclusively" by designated public officials or by a private party "who has suffered injury in fact and has lost money or property as a result of" the alleged UCL violations. Proposition 64 imposed the same standing requirement for false advertising cases under Bus. & Prof. Code section 17535.

Proposition 64 also *deleted* language in Bus. & Prof. Code section 17204 that had previously granted standing to any person "acting for

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the interests of itself, its members *or the general public*." (Prop. 64, Section 3.) The intent behind this change was "to prohibit private attorneys from filing lawsuits for unfair competition where they have no client who has been injured in fact under the standing requirements of the United States Constitution." (Prop. 64, Section 1, subd. (e).)

With respect to the procedures for pursuing a UCL claim, Proposition 64 amended Bus. & Prof. Code section 17203 to provide that a private party bringing a UCL action as a representative of others must not only have personally suffered injury, but must also comply with the procedures governing class actions: "any person may pursue representative claims or relief on behalf of others *only if the claimant meets the standing requirements of Section 17204 [requiring injury in fact] and complies with Section 382 of the Code of Civil Procedure*, but these limitations do not apply to claims brought under this chapter by [designated public officials]." (Prop. 64, Section 2.) These amendments were designed to combat the practice of private attorneys who "[f]ile lawsuits on behalf of the general public without any accountability to the public and without adequate court supervision." (Prop. 64, Section 1, subd. (b)(4).) By this amendment, the voters intended "that only the California Attorney General and local public officials be authorized to file and prosecute actions on behalf of the general public." (Prop. 64, Section 1, subd. (f).)

As is clear from the foregoing, Proposition 64 in no way inhibits the ability of public officials, such as the Attorney General, to bring UCL claims on behalf of the general public for civil penalties. It does not apply to such actions, except to require that all civil penalties collected by public prosecutors can be used only to enforce consumer protection laws.

Proposition 64 itself was silent as to its effective date. The California Constitution provides, however, that an initiative or referendum approved by "a majority of the voters takes effect the day after the election unless the measure provides otherwise." Art. II, Section 10a. Thus, Proposition 64 took effect on November 3, 2004. One yet to be resolved issue is whether Proposition 64 applies to pending actions, incorrectly characterized by some as "retroactive" application.

It is clear that Proposition 64 should apply to pending actions. In addition to the language from the California Constitution, there are two reasons for this conclusion. First, it is an amendment to a statutory cause of action. Under California law, ". . . an action wholly dependent on a statute abates if the statute is repealed without a savings clause before the judgment is final." *Younger v. Superior Court*, 21 Cal. 3d. 102, 109 (1978). Second, statutes amending the procedures a plaintiff must follow to pursue a particular action or remedy apply with full force to pending actions, even those filed before the statute's effective date. *Pelsworth v. Workers' Comp. Appeals Bd.*, 116 Cal. App. 4th 913, 917918. While this issue will be hotly debated in the coming months, either ground should be sufficient for Proposition 64 to apply to pending actions, including those on appeal.

Prior to Proposition 64, California courts had taken some steps to rein in the scope of the UCL, particularly in antitrust cases. In *Chavez v. Whirlpool Corporation*, 93 Cal. App. 4th 363 (2001), for example, the court ruled that a resale price maintenance policy permissible under the *Colgate* doctrine could be neither unlawful nor unfair under the UCL. Likewise, in *Korea Supply Co. v. Lockheed Martin*, 29 Cal. 4th 1134 (2003), the court reaffirmed the principle that damages were not available in UCL actions, and the only monetary relief available was restitution. This

trend in the case law, coupled with passage of Proposition 64, now provides defendants with strong weapons to combat UCL claims in California.

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Out With The Old And In With The New -- Achievements Of EC Competition Policy Over The Past 5 Years And Challenges For The Future

After a five year mandate as chief enforcer of the EU's antitrust rules, Mr. Mario Monti was replaced by a new European Competition Commissioner, Ms. Neelie Kroes, who started in her new post on November 22, 2004. What were Mr. Monti's main achievements over the past five years, and what challenges lie ahead for his successor, Ms. Kroes, and the European Commission's Competition Directorate ("the Commission")?

New Framework

Mr. Monti's primary achievement has been to oversee the implementation of a new antitrust enforcement framework in the EU. Major changes such as the modernization of procedures, the introduction of an economic approach, and a careful priority setting have allowed the Commission to move from being an authority mainly processing merger and distribution agreement notifications to an authority focused on prosecuting major international cartels and other antitrust infringements of significant economic impact.

Level Playing Field

Mr. Monti ensured a level playing field across the EU for cross-border agreements. Regulation 1/2003 ensures for the first time that a single set of antitrust rules will apply to agreements that have an impact on cross-border trade. Since all national competition authorities and national judges are bound by this provision, companies operating across the EU will only need to respect the EU antitrust standard when concluding their agreements, rather than adding to it 25 national rules, as was the case before May 1, 2004.

Consumer Interest As The Main Goal of Competition Policy

The past five years have consolidated consumer interest as the central goal of European competition policy, and cases that directly affect consumer interests have been given particular preference. The Commission ensured that the views of consumer organizations were heard during investigations by appointing a consumer liaison officer. Mr. Monti recognized that he needed to remove the (mainly US) perception that the main goal of the EU's antitrust rules is to protect European competitor companies and not European consumers.

Competition Policy Grounded In Micro-Economics

The Commission has been very conscious of the fact that competition policy influences investment decisions, business acquisitions, pricing policies and economic performance. Mr. Monti ensured that European competition policy was fully compatible with economic learning. This approach inspired new legislation, for example, the new EU merger regulation and the new block exemption regulations. Finally, the appointment of a Chief

Economist assisted by a team of industrial economists shows the Commission's determination to ensure the quality and the influence of economic advice in enforcement and policy making.

Competition Policy As A Tool For Structural Reform

Another important evolution has been the increased use and presentation of competition policy as a tool to foster structural reform in the EU. Competition policy favors the liberalization of Europe's monopolized markets in sectors such as telecommunications, energy, postal services and transport. This has had a positive impact on consumers and encouraged investments and innovation. In all enforcement areas, competition policy has been a tool for structural reform. Some examples are the Deutsche Post case, several cases on airline alliances or the removal of territorial sales restrictions for gas supplies, while in the field of mergers there are cases such as the Telia/Telenor, the EDF/ENBW or the BSCH/Champalimaud.

Enhanced International Cooperation

Mr. Monti also played a leading role amongst competition authorities worldwide to foster international cooperation. The Commission is a founding member of the International Competition Network, a multilateral network with 86 members that has cooperated on procedural and jurisdictional standards in the merger field. Mr. Monti also discussed antitrust standards and the importance of competition policy with the OECD and the WTO. In addition, he engaged in international bilateral co-operation to a level unknown before, in particular with the U.S. antitrust agencies.

Challenges

However, Ms. Kroes and the Commission faces significant challenges in the years to come.

After the abolishment of the notification system, the Commission must be increasingly aware of market dynamics and performance, sector particularities and obstacles to competition. The recent Commission Communication "A pro-active competition policy for a competitive Europe" already portrays what the future may bring with respect to sectoral studies, sectoral inquiries, and market investigations.

The Commission must also review the conditions under which private parties can bring actions before the national courts of the Member States for breach of the Community competition rules. As ruled by the European Court of Justice in *Courage v. Crehan*, the full effectiveness of Article 81 would be at risk if it were not open for individuals to claim damages for losses caused by infringements of EC competition law. A study recently published by the Commission found that private action is "totally underdeveloped" in the EU. Such low levels of private enforcement means there is less incentive for companies to comply with the EC competition rules. To facilitate the consultation of all stakeholders and stimulate debate, the Commission will shortly start work on the drafting of a Green Paper on the private enforcement of EC competition law.

Finally, the Commission must also place more emphasis on government-imposed restrictions on competition. Government measures that impose or induce anticompetitive behavior by companies reinforce the effects of such behavior, or delegate regulatory powers to private operators violate Articles 10 and 81/82 of the EC Treaty. Likewise, Article 86 forbids Member States from adopting measures regarding public undertakings or

undertakings enjoying special or exclusive rights that would be contrary to the competition rules of the Treaty. The Commission is responsible for the enforcement of these provisions, and this is an area where it must be more active in the future.

Mr. Monti was laudably guided by the conviction that a strong and independent Competition Commissioner is crucial wherever the common interest must be protected against national and vested interests. In each of her interventions, Ms. Kroes must similarly devote her efforts to making independent and neutral assessments having in mind the common European interest, and that of European consumers.

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New FTC Chairman Unveils Agenda

Like every newly appointed FTC Chairman since the passage of the HSR Act in 1976, Chairman Deborah Platt Majoras seeks to make the merger review process more efficient. In public remarks before the American Bar Association's Antitrust Section Fall Forum on November 18, Chairman Majoras disclosed an initiative that should help merging companies by streamlining the merger review process in an effort to making it less expensive and time consuming. Chairman Majoras said that the "second request" process by which merging companies respond to the government's requests for more information on a transaction must be improved because she believes that too much time is spent collecting and evaluating documents that offer little insight into whether a merger harms competition.

Chairman Majoras noted that four projects are already under way regarding ways to streamline merger reviews. For instance, she noted that the FTC is currently working with the Department of Justice's Antitrust Division to determine the most effective methods for identifying responsive materials stored in various types of electronic formats; improving the ability to receive and review electronic document productions; modifying the standard second request instructions to permit, and provide specifications for, electronic production; and updating the model second request.

On the merger review reform effort, Chairman Majoras said the FTC will develop a new model second request letter in an effort to further limit the number and type of documents it requests from companies involved in controversial mergers. The FTC will attempt to better define how companies can electronically search their databases for relevant documents rather than rely on legal staff to personally review every potentially relevant document. Electronic receipt of documents by the FTC also will be enhanced to make this a more viable option. The Chairman noted that she is encouraging the staff to be flexible. While these measures should cut down on the amount of documents that are provided to the FTC early on in its investigation, Chairman Majoras cautioned the defense bar and their corporate clients that this does not mean that the FTC is giving up its right to obtain more information regarding a particular merger from the parties if a merger challenge is necessary.

Besides streamlining the merger review process, Chairman Majoras emphasized the importance of cooperation with other foreign agencies in bilateral and multilateral merger reviews. Indeed, she stated that cooperating with foreign competition agencies and promoting convergence toward best practices, both on a bilateral and multilateral basis, will continue to be key components of the FTC's enforcement program.

Although Chairman Majoras spent most of her remarks discussing her goal of reforming the merger review process, she noted that like her predecessor, former Chairman Timothy Muris, she will continue to focus more resources in other important areas such as non-merger investigations, advocacy, and policy research and development. Therefore, the FTC will continue to use hearings, workshops, research projects, reports, studies, advocacy filings, and amicus briefs. Finally, Ms. Majoras noted that the FTC will also increase its efforts on the consumer protection front to protect consumers from domestic and international fraud.

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French Proposal To Amend Supplier/Dealer Relationships

On October 18, 2004, the President of the Cour de cassation (the French Supreme Court) presented a report on prices in the superstore sector. The report proposes to amend the 1996 law, the so-called Loi Galland, regulating commercial relations between suppliers and dealers.

The French Government had asked the President of the Cour de cassation, Mr. Canivet, how to facilitate relations between suppliers and dealers, in order to promote competition and to reduce prices in the super store sector. Mr. Canivet's report suggests amendments to, or cancellation of, some of the provisions of French law dealing with competitive restrictive practices and the modification of the provisions prohibiting resale at a loss.

French law draws a distinction between two sets of provisions: competition law, which includes antitrust and abuse of a dominant position provisions; and competitive restrictive practices, which deals mainly with transparency, discrimination and resale at a loss.

The proposals contained in the report relate to the provisions on restrictive practices. The report suggests that the competition law provisions should also apply to competitive restrictive practices. The report emphasizes that the removal of the additional prohibition of resale at a loss could help to promote competition among dealers. Resale at a loss involving an abuse of a dominant position could, however, be condemned under the competition law provisions. However, the report does not call for a quick removal of the prohibition of resale at a loss. Rather, it stresses that an immediate elimination could be highly damaging to small operators. Consequently, the report suggests loosening the application of the prohibition for a transitional period before canceling it. The report proposes the amendment of the threshold defining the application of the prohibition against selling at a loss.

The current prohibition forbids a dealer from selling at a lower price than the invoice price of the supplier. At present, the invoice price for these purposes takes into account discounts and rebates, but does not include conditional price reductions. A conditional price reduction is one which is made once the invoice has been issued and so does not appear on the invoice. At present, dealers are able to increase their profits by requiring rebates from their suppliers once the invoice has already been issued. The dealers can currently increase their margins ("marges arrières") without reducing their resale price.

The contemplated amendment suggests allowing dealers to include both actual and conditional price reductions in the threshold for the application of the prohibition. Therefore, it should prohibit the practice of marges arrières.

It is interesting to note that on the same day the report was released, the Competition Council issued an opinion stating that there is no economic justification for the current form of the resale at a loss prohibition, and that the practice of marges arrières restricts competition between dealers.

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Circuit Court Breaks The Temporary "Press" On The NCAA

Last month, a permanent injunction barring enforcement of the National Collegiate Athletic Association's ("NCAA") "Two in Four Rule" limiting play in certified men's basketball events was overturned by the U.S. Court of Appeals for the Sixth Circuit (*Worldwide Basketball and Sport Tours, Inc. v. Nat'l Collegiate Athletic Ass'n,* 6th Cir., No. 03-4024, 11/15/04). In November, Judge Alice M. Batchelder ruled that the district court erred in applying the "quick-look" rule of reason analysis and in its definition of the relevant market as Division 1 men's college basketball games, with a relevant submarket of school-scheduled games. In contrast, the Judge suggested that the record did not contain evidence to support a proper relevant market definition, and, as a result, the district court should have dismissed the claim.

The NCAA, in its capacity as the governing body of college sports programs, implemented rules restricting the type and number of games teams its 1,200 member institutions are permitted to play each year. This case deals with Men's Division 1 basketball, which is organized into conferences of teams that mostly play each other. Each school, however, sets its own schedule and may seek several non-conference games. Some non-conference games involve tournament play, with some events being "certified" and others not. Certified tournaments are multiple-game early season tournaments.

The rule at issue, which raised the number of games each school can play in a year to 28, specifies that a team's participation in a certified event counts as one game, regardless of how many games the team actually plays as part of the event. It also states that each school cannot participate in not more than one certified basketball event in one academic year, and not more than two certified basketball events every four years. Certified events originally were introduced as a means of encouraging scheduled games with schools in Alaska and Hawaii that traditionally had difficulty scheduling games because of their locations.

The NCAA maintained that it adopted the Two in Four Rule because members of the "Big Six" conference were disproportionately taking advantage of the certified events. The plaintiffs are promoters of certified events. They claimed that the real reason for the Two in Four Rule was to deny outside promoters the opportunity to make money from certified events. The complaint, filed on December 21, 2000, alleged that the Two in Four Rule restrained trade in violation of Section 1 of the Sherman Act. The district court initially declined to issue an injunction in July 2002; reasoning that the rule had not been in effect long enough to allow an accurate assessment of its anticompetitive effects. However, in February 2003, the district court granted a permanent injunction. The Sixth Circuit stayed the order pending an expedited appeal.

The NCAA initially argued that Sherman Section 1 was inapplicable because the Two in Four Rule was not commercial in nature, as required by the statute. Rather, the NCAA took the position that the rule is academically directed and motivated, with only a negligible effect on commerce. In her

ruling, Judge Batchelder acknowledged that the Third Circuit supported the NCAA's position. See *Smith v. NCAA*, 139 F.3d 180, 184-85 (3d Cir. 1998), *vacated on other grounds by NCAA v. Smith*, 525 U.S. 459 (1999). Although the Sixth Circuit did not comment on the commercial/non-commercial distinction with respect to NCAA rules in general, the court found that the Two in Four Rule had some commercial impact because it regulates games that constitute sources of revenue for both the member schools and promoters. The court thus found that the NCAA's appeal quarreled with the district court's finding of an unreasonable restraint of trade.

The Sixth Circuit ruled that the case was governed by the rule of reason, rather than the *per se* rule, because horizontal restraints like the Two in Four Rule were necessary to make the kind of league competition at issue available. The question for the court was whether an abbreviated rule of reason analysis was appropriate because the rule had anticompetitive effects on customers and markets, *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), thus alleviating the promoters of their burden under the full blown rule of reason analysis of showing anticompetitive effects. The Sixth Circuit concluded that this was not a case suitable for quick-look analysis. Hence, the court held that the district court erred in applying a quick-look analysis.

The Sixth Circuit went on to find that the record did not support a relevant market of Division 1 Men's basketball, a market that was not disputed by the NCAA, or a submarket limited to school-scheduled games. The court explained that the plaintiffs did not present any evidence about what products or services might substitute for Division 1 Men's basketball. The plaintiffs' expert, Dr. Tollison, admitted that he did not consider the output of the promoters' competitors or test to determine which events were in competition, but derived a Big Six market from "common sense." Moreover, Dr. Tollison did not perform a study to assess the effect of the Two in Four Rule on consumers of Division 1 men's games. With respect to the school-scheduled games submarket found by the district court, a market defined as games that a team is not required to play but are selected by the school's scheduling coach, the court of appeals observed that plaintiffs' expert did not testify to such a market, but rather argued for a relevant submarket consisting of pre-season and post-season tournaments.

On this record, the Sixth Circuit declined to relieve the promoters of their burden to show anticompetitive effects. In addition, the Sixth Circuit concluded that because the promoters failed to define the relevant market within which the significance of the allegedly anticompetitive effects can be gauged, and the record was not sufficient to support the district court's holding with respect to the relevant market, the promoters should not have prevailed on their claim that the Two in Four Rule violated Section 1. The court did not reach the question of whether the promoters suffered an antitrust injury.

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American Express Sues Visa And MasterCard; Names Eight Member Banks

Piggy-backing on the successful Department of Justice antitrust suit against the Visa and MasterCard associations and their member banks for excluding American Express from competing for the credit card business of banks, American Express filed an antitrust complaint on November 15 seeking treble damages for lost business that

could exceed $1 billion. The lawsuit follows last month's U.S. Supreme Court decision not to hear an appeal from Visa and MasterCard who were seeking to overturn a lower court ruling that found them in violation of the antitrust laws.

The Visa/MasterCard litigation has a long history. The DOJ's Antitrust Division challenged Visa and MasterCard exclusionary rules adopted in the 1990's that precluded the associations' 20,000 member banks from issuing competitive American Express and Discover cards. In October 2001, Southern District of New York held that the rules constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The district court concluded that Visa and MasterCard enjoyed market power in the network services market and the exclusionary rules prevented American Express and Discover from competing for the business of banks that issue Visa and MasterCard cards. On appeal, the Second Circuit affirmed and concluded the challenged rules restrict output, price competition, and retard innovation without any procompetitive justification. *U.S. v. Visa USA*, 163 F. Supp 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F. 3d 229 (2d Cir. 2003), *cert denied*, 125 S. Ct 45 (2004).

In addition to Visa and MasterCard, American Express named eight key banks including J.P. Morgan Chase, Bank of America, Capital One, U.S. Bancorp, Household Bank, Wells Fargo, Providian National Bank and USAA Federal Savings Bank. The eight member banks named as defendants in the Complaint were identified in part based on their being members of one or both of Visa's and MasterCard's board of directors at the time the exclusionary rules were adopted and implemented.

American Express maintains in its press release that the illegality of Visa's and MasterCard's restrictive rules was well established in the DOJ case and liability need not be re-established by this litigation. Thus, American Express now asserts that the primary purpose of the new lawsuit is to determine the damages suffered by American Express as a result of the conduct. Such conduct referred to as an "anticompetitive boycott" foreclosed American Express from a "huge portion of the network services market…" The complaint further alleges that the exclusionary practices extend to the rapidly expanding market in which debit cards are issued and in which debit card network services are provided.

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DOJ White Collar Crime Update

White Collar Crime Continues as a Priority for the Antitrust Division

The Antitrust Division continues to send a strong message to corporations and corporate executives engaged in potential bid rigging and price-fixing schemes. On November 23, Martin Peterson, a former executive of Bayer AG, a German manufacturer of rubber chemicals based in Leverkusen, Germany, agreed to plead guilty to participating in an international conspiracy to fix prices in the rubber chemicals market.

Mr. Petersen was charged with fixing the prices of certain rubber chemicals sold in the United States and elsewhere during 2000 and 2001. Mr. Petersen, a German national, was Head of Marketing and Sales for Bayer's Rubber Business Group during the time he allegedly participated in the conspiracy. Under the plea agreement, Mr. Petersen agreed to assist the government in its ongoing rubber chemicals investigation.

The former Bayer executive was charged with carrying out the conspiracy with his co-conspirators by: participating in meetings and conversations to discuss prices of certain rubber chemicals to be sold in the United States and elsewhere; agreeing, during those conversations and meetings, to raise and maintain prices of certain rubber chemicals to be sold in the United States and elsewhere; participating in conversations and attending meetings concerning implementation of and adherence to the agreements reached; issuing price announcements and price quotations in accordance with the agreements reached; and exchanging information on the sale of certain rubber chemicals in the United States and elsewhere.

The charge and plea agreement stem from an ongoing investigation being conducted by the Antitrust Division's San Francisco Field Office and the Federal Bureau of Investigation in San Francisco.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On November 30, Republic Services Inc. ("Republic") agreed to pay a $1.5 million civil penalty as part of a settlement with the DOJ that resolves Republic's alleged violations of an existing 2000 consent decree in connection with an exchange of certain waste hauling and disposal assets by Republic and Allied Waste Industries Inc. Part of the $1.5 million civil penalty paid to the United States includes reimbursement to the government for the costs of its investigation into alleged violations in the Lakeland, Florida and Louisville, Kentucky areas. The DOJ filed a settlement agreement and enforcement order today in U.S. District Court in Washington, D.C. that ensures Republic's compliance with its obligations under the 2000 consent decree. The settlement demonstrates that the Antitrust Division will continue to monitor and enforce its consent decrees.

- On November 23, The Thomson Corporation ("Thomson") and Information Holdings Inc. ("IHI") announced that they have received confirmation that the DOJ has cleared the proposed acquisition of IHI by Thomson, and the applicable waiting period under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 has been terminated accordingly. No conditions were imposed on the acquisition by the DOJ. Thomson and IHI announced on June 28, 2004 that they entered into a merger agreement pursuant to which Thomson would acquire IHI. On August 12, 2004, Thomson and IHI announced that they received a request for additional information from the DOJ and that the waiting period was extended. On August 31, 2004, IHI received stockholder approval of the merger agreement.

- On November 21, Assistant Attorney General R. Hewitt Pate, Chief of the Justice Department's Antitrust Division, expressed his desire to thwart anticompetitive cartels to the 2004 International Competition Network Cartels Workshop in Sydney, Australia. Mr. Pate asserted that amnesty policies and criminal sanctions will play an increasingly significant role in the detection of cartels and the punishment and deterrence of cartel conduct. He emphasized that the best way to develop a strong competition culture is to place primary emphasis on cartel enforcement. Consumers, businesses, taxpayers and governments will benefit if bid rigging is curtailed. He noted that, unlike other more subtle or controversial areas of competition law, there is no danger in criminal cartel enforcement that government intervention might have anticompetitive effects. The focus of

RECENT ACTIVITIES

DOJ Antitrust Highlights *(Continued)*

his remarks involved a discussion of the development of the U.S. anti-cartel enforcement program, the importance of amnesty programs in the fight against cartels, and criminal sanctions as the most effective deterrent of cartels. He indicated that recent convergence in amnesty policies in multiple jurisdictions has led to many simultaneous amnesty applications, which has enhanced enforcement by providing opportunities for coordinated raids, interviews, and service of subpoenas. He also stated that the DOJ is convinced that criminal sanctions such as jail time for individuals provide the greatest deterrent for cartel activity.

- On November 16, the Antitrust Division announced the closing of its antitrust investigation into Arch Wireless Inc.'s ("Arch") proposed acquisition of Metrocall Holdings Inc. ("Metrocall"). The acquisition combines the two largest sellers of paging services in the United States. The Antitrust Division, however, concluded that there has been a substantial decrease in the number of pager units in service over the past five years, declining from more than 45 million units in 1999 to under 12 million today. Consequently, the Division focused its investigation on a very narrow set of customers that may continue to need to use pagers such as doctors. While an argument was made that certain consumers of pagers would be harmed, the Antitrust Division concluded that this merger will not give a combined Arch/Metrocall market power. Indeed, the Antitrust Division indicated that these purchasers of paging services will likely continue to have a number of other choices after the merger.

- On November 15, it was reported in various papers that farmers are saying that the DOJ's investigation of anticompetitive practices by the nation's number one dairy cooperative, Dairy Farmers of America, which controls a third of the U-S milk supply, has deepened. The antitrust investigation has been going on since August. The cooperative, commonly referred to as DFA, has been accused by farmers across the country of unlawfully trying to monopolize the nation's production and distribution of milk. Since the probe was made public in August, the investigation has reportedly been expanded to include over a dozen states.

- On November 10, Smithfield Foods Inc. ("Smithfield"), the largest hog producer in the United States, settled a lawsuit with the Antitrust Division for a $2 million civil penalty. The Antitrust Division originally took Smithfield to court in February of 2003, alleging that it failed to comply with pre-merger notification and waiting requirements of the Hart Scott Rodino Act of 1976 ("HSR Act") when it purchased stock in the second largest pork producer in the United States, IBP Inc. ("IBP"). The Antitrust Division further alleged that the purchase was not "solely for the purpose of investment" but was intended as a step towards a Smithfield/IBP merger. According to the complaint, Smithfield twice violated the HSR Act. Once beginning in 1998 and again beginning in 1999, when it acquired more than the statutory threshold amount of the voting securities of IBP Inc. without complying with the premerger notification requirements. Smithfield claimed that all of its IBP stock acquisitions were exempt from the HSR filing requirements because they were "solely for the purpose of investment." The DOJ claimed that the exemption did not apply because Smithfield was actively considering merging with IBP at the time. The lawsuit and settlement indicate that the Antitrust Division is serious about ensuring strict compliance with the HSR Act.

For more information on any of these activities, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com.

RECENT ACTIVITIES

FTC ANTITRUST HIGHLIGHTS

- On or about November 26, the Commission approved a final consent order concerning Enterprise Products partners L.P. and GulfTerra Energy Partners, L.P. related to the merger of the two companies. On the same day, the Commission also approved a final consent order concerning Magellan Midstream Partners, L.P. and Shell Oil Company. The Commission vote to approve the final order was 4-0-1, with Chairman Deborah Platt Majoras recused.

- On November 21, the United States Senate unanimously confirmed the nominations of Deborah Platt Majoras and Jon Leibowitz to serve as Federal Trade Commissioners. Majoras was confirmed to fill the unexpired seven year term which began September 26, 2001. She will continue to serve as Chairman. Leibowitz was confirmed to serve the seven year term which began September 26, 2003.

- On November 16, the Commission released an initial decision filed on November 8 by Administrative Law Judge ("ALJ") D. Michael Chappell which upheld a Federal Trade Commission complaint filed last year against a physicians group practicing in Fort Worth, Texas. In the complaint, the FTC alleged the physicians' group engaged in illegal anticompetitive practices to the detriment of Fort Worth health care consumers. The Commission charged North Texas Specialty Physicians ("NTSP") with restraining trade by conspiring to fix prices in certain contracts its doctors entered into to provide medical services to the patients of health plans. Following an administrative trial, the ALJ ruled in favor of the FTC, writing in his initial decision that, "The government proved its case…," and that, "the appropriate remedy [is] an order to cease and desist."

  NTSP is a nonprofit corporation funded through fees paid by participating physicians. Organized in 1995, it is currently composed of approximately 600 physicians, of whom about 130 are primary-care physicians. Its board of directors consists of participating physicians elected to three-year terms by the members of each of NTSP's sections. A physician may participate in NTSP-payor contracts by granting NTSP the authority to arrange for his or her services to be provided to consumers covered by the payors.

  In his initial decision, Administrative Law Judge Chappell stated that, "In this case, Complaint Counsel has proven that Respondent [NTSP] engaged in horizontal price fixing through its negotiation, on behalf of its member physicians, of economic terms of non-risk contracts with health plan services for the provision of physician services." To remedy this "unfair method of competition," the ALJ issued an order "requiring Respondent to cease and desists from collective price fixing in its negotiation of non-risk contracts." In addition, he stated that "to the extent that there are any existing, current non-risk contracts between NTSP, negotiated on behalf of its member physician, and any health care payor, Respondent must take action . . . to allow termination of any such existing contracts." The ALJ further stated that NTSP "has not met its burden of proof of demonstrating that the challenged conduct has a procompetitive effect on competition," and that NTSP's price-fixing of non-risk contracts "does not have a valid efficiency justification" and "is not reasonably necessary to create any efficiencies." He accordingly ruled that the conduct alleged in the complaint violated Section 5 of the FTC Act. Nothing in the order, however, should be construed as prohibiting any agreement or conduct by NTSP "that is reasonably necessary to form, or participate in, or take any action in furtherance of a qualified risk-sharing joint arrangement or qualified clinically-integrated joint agreement," he wrote. Finally, the ALJ ordered NTSP – for three years – to notify the Secretary of the FTC within 60 days before

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FTC Antitrust Highlights *(Continued)*

entering into any arrangement with any physician under which it would act as a "messenger, or as an agent on behalf of the physician, with payor regarding contracts." He also defined the manner in which NTSP must distribute the order and notify the FTC before changing its structure in any way and stated that the order will terminate in 20 years. Then, on November 29, Commission Counsel filed a Notice of Appeal with the Commission relating to "findings of fact and conclusions of law related to the discussion of market definition in the Initial Decision; certain sections of the Order entered by the Administrative Law Judge and any related findings of fact and conclusions of law."

- On or about November 2, the Commission received a petition for approval of the proposed divestiture from General Electric Company ("GE") related to the FTC decision and order regarding GE's acquisition of InVision Technologies ("InVision"). Under the terms of the order, within six months of the date the consent agreement was executed, GE was required to divest its "X-Ray Nondestructive Technology ("NDT") Business," as that term is defined in the order, to a Commission-approved buyer. In its petition, GE has requested Commission approval to divest the X-Ray NDT Business assets to Prinzipal 26. V V GmbH, a subsidiary of Andlinger & Company, Inc.

- On or about November 2, the Commission approved a proposed divestiture by Sanofi-Synthelabo ("Sanofi") and Aventis. The company's application concerned the final consent order issued to address competition problems raised by Sanofi's acquisition of Aventis. Under the terms of the decision and order in this matter, Sanofi was required to divest certain assets and royalty rights to ensure that competition was maintained following the consummation of the transaction. In its petition, the companies requested Commission approval to divest the "Estorra Royalties," as that term is defined in the order, to Paul Royalty Fund II, L.P., a limited partnership under the control of Paul Capital Partners and PRF Sleep Holdings, LLC, an affiliate of Paul Royalty Fund (collectively referred to as Paul Capital). The FTC has now approved that request.

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FTC CONSUMER PROTECTION HIGHLIGHTS

- On November 30, the Federal Trade Commission charged three related dietary supplement companies located in Norcross, Georgia, their corporate officers, and a physician with deceiving consumers through deceptive advertising for their weight-loss and erectile dysfunction products. The case is part of the agency's on-going effort to combat deceptive claims for dietary supplements that purport to enable obese or overweight consumers to lose substantial amounts of weight safely. The FTC filed charges against National Urological Group, Inc.; National Institute for Clinical Weight Loss, Inc.; Hi-Tech Pharmaceuticals, Inc.; Jared Wheat; Thomasz Holda; Stephen Smith; Michael Howell; and Dr. Terrill Mark Wright. The Commission's complaint alleges that the defendants made deceptive claims about the effectiveness and safety of "Thermalean" and "Lipodrene," purported weight-loss products with ephedra, and "Spontane-ES," a purported erectile

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FTC Consumer Protection Highlights *(Continued)*

dysfunction product with yohimbine. According to the FTC's complaint, the defendants' direct mail and Internet advertisements contained false and unsubstantiated efficacy and safety claims for the weight-loss products Thermalean and Lipodrene. The central theme of the Thermalean advertising campaign was that the product could be used as an effective treatment for obesity, and that it combined the weight-loss benefits of three different prescription drugs. Consumers paid $80 for a two-month supply of Thermalean. The defendants promoted Lipodrene as a dietary supplement that had undergone substantial clinical testing proving that it enabled consumers to lose large amounts of weight safely. Consumers paid about $30 for a one-month supply of Lipodrene. The active ingredient in Thermalean and Lipodrene was ephedra. The FTC alleged that, contrary to the defendants' claims, dietary supplements with ephedra do not cause substantial, long-term weight loss, and create safety risks because they increase blood pressure and stress the circulatory system.

- Following a public comment period, the Federal Trade Commission issued its final rule on November 18 regarding the proper disposal of consumer report information and records under the Fair and Accurate Credit Transactions Act of 2003 ("FACTA") and the Fair Credit Reporting Act ("FCRA"). The final rule, which will be published in the Federal Register shortly, is similar to the proposed rule issued in April 2004 and will become effective on June 1, 2005. The Commission received more than 50 comments from industry trade organizations, businesses, consumer advocacy groups, Members of Congress, and consumers. FACTA, which was enacted on December 4, 2003, amends the FCRA and directs the FTC, the Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, the National Credit Union Administration, and the Securities and Exchange Commission to coordinate with one another to adopt comparable and consistent rules regarding the disposal of sensitive consumer report information. The purpose of these rules is to reduce the risk of identity theft and other consumer harm from improper disposal of a consumer report or any record derived from one. The FTC's Disposal Rule ("Rule") applies to any person over which the FTC has jurisdiction that, for a business purpose, maintains or otherwise possesses such consumer report information. The standard for disposal is flexible to allow entities covered by the Rule to determine what measures are reasonable based on the sensitivity of the information, the costs and benefits of different disposal methods, and relevant changes in technology over time. The Rule's flexibility should also facilitate compliance for smaller entities. Additionally, the Rule includes specific examples of appropriate measures that would satisfy its disposal standard.

- On November 17, Petco Animal Supplies, Inc., a national seller of pet food, supplies, and services, agreed to settle Federal Trade Commission charges that security flaws in its www.PETCO.com website violated privacy promises it made to its customers and violated federal law. The agency alleged that, contrary to Petco's claims, it did not take reasonable or appropriate measures to prevent commonly known attacks by hackers. Instead, the flaws allowed a hacker to access consumer records, including credit card numbers. The settlement requires Petco to implement a comprehensive information security program for its website. According to the FTC, Petco made security claims on the Web site, such as: "At PETCO.com, protecting your information is our number one priority, and your personal information is strictly shielded from unauthorized access. Entering your credit card number via our secure server is completely safe. The server encrypts all of your information; no one except you can access it." This is the fifth FTC case challenging deceptive claims by businesses about the security they provided for consumers' personal information.

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FTC Consumer Protection Highlights *(Continued)*

- As part of a nationwide compliance sweep, the Federal Trade Commission charged two mortgage companies on November 16 with violating the agency's Gramm-Leach-Bliley ("GLB") Safeguards Rule ("Rule") by not having reasonable protections for customers' sensitive personal and financial information. In an administrative action filed against Nationwide Mortgage Group, Inc. and its president John D. Eubank, the FTC alleged that the Fairfax, Virginia-based mortgage broker failed to implement safeguards to protect its customers' names, social security numbers, credit histories, bank account numbers, income tax returns, and other sensitive financial information. Sunbelt Lending Services, Inc. ("Sunbelt"), a subsidiary of Cendant Mortgage Corporation with headquarters in Clearwater, Florida, agreed to settle similar FTC charges. The settlement with Sunbelt will bar future violations of the Safeguards Rule and require biannual audits of Sunbelt's information security program by a qualified, independent professional for 10 years. These are the FTC's first cases enforcing the Safeguards Rule. The Safeguards Rule, which implements the security requirements of the GLB Act, requires financial institutions to have reasonable policies and procedures to ensure the security and confidentiality of customer information. The "financial institutions" covered by the Rule include not only lenders and other traditional financial institutions, but also companies providing many other types of financial products and services to consumers. These institutions include, for example, payday lenders, check-cashing businesses, professional tax preparers, auto dealers engaged in financing or leasing, electronic funds transfer networks, mortgage brokers, credit counselors, real estate settlement companies, and retailers that issue credit cards to consumers. The Rule is intended to be flexible to accommodate the wide range of entities covered by GLB, as well as the wide range of circumstances companies face in securing customer information.

- First American Payment Processing, Inc., two related corporations, and their principals are banned from processing any payments for outbound telemarketers as part of a settlement with the Federal Trade Commission. The FTC charged the defendants with assisting fraudulent telemarketers by electronically debiting consumers' bank accounts in violation of the Telemarketing Sales Rule ("TSR") and the FTC Act. The settlement announced on November 3 prohibits the defendants from engaging in the types of practices alleged in the complaint and requires them to pay redress in the amount of $1,580,739. In January 2004, the FTC filed a complaint in federal district court against First American Payment Processing, Inc.; CET Corporation; Check Processing Center, LLC; Carl E. Towner; and Matthew Robinson alleging that they knowingly processed electronic payments for telemarketers who deceptively sold advance-fee credit cards or who engaged in other deceptive or abusive telemarketing practices. The FTC alleged that the defendants violated the TSR by providing substantial assistance and support to numerous telemarketing clients whom they knew or should have known were engaging in deceptive or abusive telemarketing practices. The FTC further alleged that the defendants violated the law by processing these consumer payments through the Automated Clearing House Network ("ACH") on behalf of merchants engaged in outbound telemarketing to consumers. According to the FTC, the defendants' payment processing activities breached rules governing the ACH Network – rules to which they were contractually bound.

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INTERNATIONAL ANTITRUST HIGHLIGHTS

- On November 26, the New Zealand Commerce Commission announced new policies on leniency, co-operation and cease and desist orders. The leniency policy is aimed at breaking cartel behavior and is comparable with the policies adopted by most competition agencies worldwide. The purpose of the policy is to offer immunity from Commission initiated proceedings to the first person involved in a cartel who comes forward with information about the cartel and co-operates fully with the Commission. The effect of the Commission's Co-operation Policy is that the Commission, in respect of all of its enforcement responsibilities, will exercise its discretion to take a lower level of enforcement action, or no action at all, against an individual or business in exchange for information and full, continuing and complete co-operation. The Commerce Act 1986 also provides specific powers for the Commission to obtain cease and desist orders against anti-competitive behavior.

- On November 25, it was announced that the technology trade group, Computer & Communications Industry Association ("CCIA") and Microsoft had reached a settlement concerning Microsoft's antitrust violations. The CCIA agreed to end its support for the ongoing antitrust case in the European Union, and pending investigations in other European and Asian countries, in return for $19.75m. Microsoft also settled several legal claims with Novell Inc. for $536m. The deals could prove crucial to the outcome of the European Union case. On November 25, Bo Vesterdorf, the judge who will decide whether to delay the European Commission's remedies, held a special closed session to discuss the impact of the settlements.

- On November 19, Telecom SpA ("Telecom Italia") was fined by Italy's antitrust authority EUR152m, the highest fine ever imposed for abuse of a dominant position in the regulator's history. The authority said that Italy's former telecom monopoly offered prices that smaller competitors could not match in a public tender in 2002. The authority said that Telecom Italia's offer was intentionally lower than the costs it charged rivals to interconnect to its own network. Italian operators, including Wind, the telecommunications arm of Enel and e.Biscom, the broadband provider, had argued that Telecom Italia prevented competition in the market for government and business contracts. Other telecom operators who instigated the antitrust probe were Tiscali Spa, Albacom SpA and Colt Telecom Group Plc. Telecom Italia intends to appeal at the administrative regional court.

- On November 18, reform of South Korea's antitrust laws were passed by the Assembly Committee, while members of the opposition boycotted the vote. The new laws will constrain investments by the family-owned conglomerates, known as Chaebols, through measures designed to limit their voting rights. The bill also reintroduces the right of South Korea's financial watchdog to scrutinize Chaebols' accounts when gathering evidence of illegal inter subsidiary trading and transfers.

- On November 12, sixteen contractors were told by the Japanese Fair Trade Commission to desist from bid rigging in public work contracts. The Commission took the action after it found evidence that bids for a landslide prevention project ordered by Ehime Prefecture had been fixed. As part of that project over 450 contracts were awarded to the companies, with a value of over twelve billion yen. In May 2002, half of the sixteen firms were issued with a similar warning after contracts were awarded in another landslide project.

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International Antitrust Highlights *(Continued)*

- On November 9 and 10, European Commission inspectors, assisted by officials from national competition authorities, launched simultaneous and unannounced inspections at premises of manufacturers and importers of bathroom fittings in Austria and four other EU member states. The dawn-raids were conducted as a preliminary step in the investigation of alleged cartel arrangements in the bathroom fittings sector. It is alleged that over a period of years the suspected members of the cartel shared information on price increases, rebate and discount schemes and individual sales data

- On November 9, the UK Office of Fair Trading ("OFT") has concluded that five companies operating in the double glazing product market have been party to an overall price-fixing arrangement where a number of sub-agreements or concerted practices were held to form part of a common plan. Three of the parties benefited from the OFT's leniency program for having acted as whistle-blowers. The OFT concluded that UOP Ltd, the UK's leading supplier of a chemical used in double glazing called desiccant, and four double glazing manufacturers were involved in an agreement and/or concerted practice from March 1, 2000 until March 12, 2003 to fix and/or maintain minimum resale prices for UOP's desiccant in infringement of the Chapter 1 prohibition of the Competition Act 1998. The OFT identified five sub-agreements and/or concerted practices which formed a pattern of continuous conduct with the common objective of maintaining the resale price.

- On November 2, the Canadian Minister of Industry tabled legislation to amend five components of the Canadian Competition Act. The legislation will provide authority for the Commissioner of Competition to seek restitution for consumer loss resulting from false or misleading representations; introduce administrative money penalties ("AMP"s) for the various abuses of a dominant position; remove airline-specific provisions from the Act, in favor of general application of those sections; increase AMPs for deceptive marketing practices, and decriminalize certain pricing provisions.

- The Chinese Fair Trade Bureau of the State Administration for Industry and Commerce ("SAIC") has issued a report entitled "Behavior and Countermeasures for Acts that limit Competition undertaken by Multinational Companies in China" ("the Report"). SAIC issued the Report in connection with allegations that multinational companies are abusing their market dominance in China. According to the Report, the government is primarily concerned about the abuse of market dominance through tie-in sales and price discrimination, acts that limit competition, and acts related to mergers and acquisitions. The Report recommends that the government should accelerate the amendment of the existing Anti-Unfair Competition Law and the development of a proposed new Anti-Monopoly Law.

- On October 28, the Irish Competition Authority announced that the proposed acquisition by IBM Ireland Limited of Schlumberger Business Continuity Services (Ireland) Limited would substantially lessen competition for business recovery hotsite services in Ireland and could not go ahead. The proposed acquisition was part of a global acquisition by IBM of the international Schlumberger business, the UK element of which was cleared by the Office of Fair Trading on August 6, 2004. The Authority published its determination on November 17, 2004. The Authority concluded that the merging parties were in direct competition with one another, being the two largest providers of the hotsites in the State. Together they would have a combined

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International Antitrust Highlights *(Continued)*

market share, based on revenue, of over 80%. The other two providers of business recovery hotsite services in Ireland, Synstar and Network Recovery, would not provide sufficient competitive pressure to counteract the market power of the merging parties. In-house business recovery provision, general service IT companies, teaming specialists and aggregators would also not be an effective check on the ability of the merged entity to raise prices towards certain identifiable groups of customers.

- On October 26, the Czech Republic's Chairman of the Office for the Protection of Competition confirmed the fine of CZK23 million (approximately EUR730,000) imposed on CESKÝ TELECOM, the largest provider of telecommunications services in the Czech Republic, for abusing its dominant position in the telecoms market. In particular, the Chairman found that CESKÝ TELECOM had prevented competitors from entering the market for internet and data transfers using ADSL technology, between February 2002 and January 2003, by failing to provide key information on network interconnectivity. The Chairman's decision confirmed that CESKÝ TELECOM was able to provide the information necessary for network interconnection and had no legitimate reason for withholding this information. The duration of the infringement lasted for 11 months, during which time other telecommunications network operators were precluded from entering the market, to the detriment of final consumers.

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FCC ANTITRUST HIGHLIGHTS

- On November 26, the FCC warned SBC Communications Inc. ("SBC"), the second-biggest U.S. local telephone company, against using tariffs on internet phone calls to hamper competition. The Commission said it may begin an investigation of fees levied by the San Antonio-based company if it concludes the tariffs for carrying other companies' phone calls are being used to "discriminate" against competitors. FCC chairman Michael Powell said in the statement he's trying to foster competition in internet-based calling, which is becoming more popular as an alternative to the wire-line services that have been in place for a century. Specifically, the tariff "comes at a time when Voice over Internet Protocol ("VoiP") services are continuing to grab consumer attention by offering more choice, lower prices, greater value and enhanced features," Powell said in the statement. He continued that, "Should we [the FCC] conclude that this tariff is being used to justify the imposition of traditional tariffed access charges on VoIP providers or to discriminate against SBC's competitors, the Commission will take appropriate action including, but not limited to, initiating an investigation of SBC's interstate tariff and any other tariff that proposes similar terms."

- On November 23, Comcast Corp. ("Comcast") urged the FCC to roll back rules that the MSO said are inconsistent with a competitive pay TV market just as the Commission is nearing the release of its annual pay-TV-competition report to Congress. Specifically, Comcast wants a rule that would totally deregulate all cable

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FCC Antitrust Highlights *(Continued)*

systems in a state where direct-broadcast satellite penetration exceeds 15%. Current rules require cable operators to prove that an individual franchise area has 15% penetration by pay TV rivals. Comcast's proposal would result in total cable deregulation in 41 states, according to data the National Cable & Telecommunications Association submitted to the FCC July 23. "Congress has been clear: Competition trumps regulation. Regulation for the sake of helping competition to take root or to curtail the exercise of `market power' is no longer needed or justified," Comcast said in its filing with the FCC. Comcast, the largest U.S. cable company, with about 21 million subscribers, also urged the FCC to "initiate a review" of its program-access rules, which require Comcast to sell its satellite-delivered programming to EchoStar Communications Corp. ("EchoStar") and DirecTV Inc. ("DirecTV"). The FCC, Comcast said, should eliminate the rule prior to its October 2007 sunset, or at least allow the company to withhold programming from EchoStar and DirecTV, which are allowed to secure exclusive program rights with affiliated and unaffiliated programmers and not sell those services to cable operators.

- On November 21, the U.S. Court of Appeals for the D.C. Circuit released a one-page order, instructing the FCC to explain why it hasn't acted on requests from TV broadcasters to force cable systems to carry every free digital service transmitted by local digital-TV stations. A three-judge panel gave the agency 30 days to file a response. At issue is a petition filed by Paxson Communications Corp. ("Paxson") on August 27 that was designed to get the appeals court to pressure the FCC into adopting new digital-cable-carriage rules within a few weeks. Paxson has 14 days to respond to the Commission's filing with the court next month. Paxson, owner of 60 local TV stations that largely rely on mandatory cable-carriage rights, has joined the bulk of the TV-broadcast industry in lobbying the FCC to impose digital-multicasting-carriage obligations on cable operators. The FCC ruled in early 2001 that digital-TV stations that elected must-carry on cable after they had surrendered their analog licenses were entitled to carriage of a single programming stream. The agency said a provision in federal law that requires cable carriage of a station's "primary video" meant just one programming service. But Paxson and other broadcasters complained that because digital technology allows them to use their digital spectrum to provide five or six programming services in the same amount of bandwidth occupied by a single analog channel, cable operators should be required to carry all of them so long as they are not subscription services. FCC chairman Michael Powell has said that the argument that the Commission has failed to act on the multicasting issue is incorrect. He added that the agency decided the issue in 2001, and it has not elected to revisit that ruling. However, an FCC staff plan to end broadcasters' digital-TV transition December 31, 2008, would call on the agency to impose digital-multicasting-carriage obligations on cable. Powell, who supported the 2001 interpretation of primary video as meaning carriage of a single service, has not publicly endorsed the staff proposal's carriage recommendation in the digital-TV-transition plan. The D.C. Circuit's order was handed down by Judges Douglas Ginsburg, David Sentelle and Karen Lecraft Henderson. The judges specifically asked the FCC to address six factors that govern whether the court should rule favorably on Paxson's request, formally called a petition for a writ of mandamus.

- On November 19, the FCC's Media Bureau released its report on the efficacy of 'a la carte' pricing in the pay-television service industry. According to a Commission press release, the report found that although an a la

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FCC Antitrust Highlights *(Continued)*

carte option would allow consumers to pay for only the programming they choose, given current viewing practices, few consumers would experience lower bills for multi-channel programming. In addition, the report includes several policy recommendations that the Congress and Commission should consider to enhance consumer choice, foster competition and provide consumers with the tools to prevent objectionable programming from entering their home. The Media Bureau Report found that an a la carte regime would not produce the desired result of lower multi-channel video programming distributor rates for most pay-television households. The report estimates that the impact on retail rates of pure or mandatory a la carte sales indicates that only those consumers who would purchase fewer than nine programming networks may see a reduction in their monthly cable bill. Consumers who purchase at least nine networks will likely face an increase in their monthly bills. The average cable household watches approximately 17 channels, including broadcast stations. If the average household purchased each of these channels under an a la carte regime, it would likely face a monthly rate increase under a la carte sales of between 14% and 30%. According to FCC Chairman Michael Powell, "We remain committed to our long-standing policy goals of making communications and media technologies available to all Americans at affordable rates and fostering diversity in our nation's media. Many Americans are frustrated with year after year increases in their pay-television bills and we will continue to address those concerns through the recommendations provided in this report and other avenues available to the Commission."

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