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DOJ Settles First Data Matter

On December 15, the Antitrust Division announced that it reached a compromise with First Data Corporation ("First Data") that would allow First Data to complete its acquisition of Concord EFS ("Concord"). As part of the settlement agreement, First Data will have to sell its majority stake (64% ownership interest) in electronic-funds transfer network NYCE. Combined with Concord's similar STAR network, NYCE would have allegedly given the newly combined company a 50% plus market share in certain point of service ("POS") personal identification number ("PIN") debit-based electronic transactions (*i.e.*, transactions that require a consumer with a debit card to enter a PIN at the point of sale). The announced settlement was very timely as it averted the need for trial on whether the proposed merger violated the antitrust laws.

Absent the last minute settlement, which occurred only minutes before the government's scheduled trial to challenge the merger was to take place, lawyers for the Antitrust Division and the parties were prepared to face off in a one-week trial. The Antitrust Division was prepared to offer strong testimony from large retailers and financial institutions in its attempt to convince a federal judge that the combination would harm competition in the growing market for PIN debit card transactions. According to a witness list submitted by the Antitrust Division to the United States District Court for the District of Columbia, managers and executives from Citigroup's Citibank, American Express Co., PULSE, Target, Safeway Inc., Kmart Holding Corp., and Fifth Third Bank were prepared to testify for the government. First Data's third party witness list was much weaker, with only two retail customers willing to offer their opinions on the merger.

As with all merger reviews, the Antitrust Division and the merging parties debated over the appropriate relevant product market and whether the combination would harm competition in that particular market. The Antitrust Division and the merging parties agreed that POS PIN debit - based networks such as STAR and NYCE provide the telecommunications and payment infrastructure that connects merchants to consumers' demand deposit accounts at banks and that

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these networks enable consumers to purchase goods and services from merchants through PIN debit transactions rather than signature debit (where a signature instead of PIN authenticates the transaction), credit, check, or cash transactions. Both sides also agreed that PIN debit networks provide an increasingly important method of payment for consumers and retailers. However, the Antitrust Division alleged that PIN debit is different from signature debit or credit transactions because PIN debit is the least expensive, most efficient and most secure form of card payment. Therefore, the Division focused its investigation on POS PIN debit networks as the merger would have combined the largest and third largest POS PIN debit networks in the United States, while Visa's Interlink, which has the second largest network, would have been the only other significant competitor.

The merging parties, on the other hand, contended that the government's view of the relevant product market was much too narrow. First and foremost, First Data countered that the merger, even without a divestiture, was procompetitive because it would allow the combined company to compete against Visa in the broader payments market that includes credit cards and checks. Second, PIN and signature debit cards serve exactly the same function, as they both allow consumers to access their bank accounts and to make purchases from retailers. Third, the prices of PIN and signature debit will converge in the future. Fourth, the merging parties contended that formidable competition in the narrowly defined PIN debit market already existed with increasing competition from MasterCard's Maestro, PULSE, and FiServ. While it is true that these three businesses are emerging as competitors, none of them could really be viewed as significant competitors today.

Apparently, First Data and the Antitrust Division could not resolve their differences during the government's preliminary merger investigation. First Data and Concord complied with their second requests for additional information in September and dictated the timing of events. This forced the Antitrust Division to make a decision to either allow the deal to go through or to file a complaint to block the merger. Instead of allowing the waiting period to expire, the Antitrust Division filed a lawsuit to challenge the merger. The complaint led to a number of aggressive public statements by both First Data and the DOJ. Both sides maintained that their merger theory was correct and that they would vigorously pursue litigation on the merits.

Since the suit was filed, antitrust experts understood that the natural solution was for First Data to divest its smaller NYCE network, as that would allow First Data to trade up to Concord's larger STAR network. Indeed, First Data's market share in PIN-based debit card transactions should increase from 10% to about 45%. PIN-based debit transactions processed through the STAR network are growing at 20% a year vs. 10% for signature-based debit cards and 3% for credit cards, because PIN-based transactions are less expensive for merchants. In fact, the world's largest retailer, Wal-Mart, is pushing them and has indicated that it will stop accepting certain MasterCard debit cards that require signatures instead of a PIN number. Consequently, the deal is still a good one for First Data even though they are required to divest NYCE.

In summary, the First Data/Concord investigation was fascinating because the companies baffled many antitrust experts by consistently refusing to offer a divestiture of NYCE to resolve the Antitrust Division's concerns. As most antitrust experts

know, companies have historically been reluctant to face off against the government in court, particularly when a simple fix involving a small part of the business is available. Indeed, merger challenges usually only occur when the divestiture/solution would make the deal almost worthless as all divestitures make a deal less valuable. Therefore, companies typically offer early divestitures to appease government regulators when a horizontal merger results in a combined company having more than a 50% market share in a defensible antitrust market. First Data's decision to force the government to file a complaint should not have been such a major surprise because it forced the government to show its hand or fold. First Data's aggressive stance resulted in a price cut for the overall deal and while the substance of the settlement would have been similar earlier on in the process, the overall settlement is probably better than First Data could have received earlier. That being said, it comes as no surprise that First Data eventually backed down and offered the divestiture that should have been offered in October, or even earlier, and it was no surprise that the Division didn't fold under pressure and got the divestiture it required to maintain competition in PIN debit networks.

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Fear Not: Court Holds That California Antitrust Law Does Not Apply To Nonresident Claims

California state law largely parallels federal law with respect to both horizontal price fixing claims and class action requirements and procedures. Under the Cartwright Act, horizontal price fixing is *per se* illegal. Under the Code of Civil Procedure, a plaintiff must satisfy the typicality, adequacy of representation, and predominance of common questions requirements to have an action certified as a class action. California law varies from federal law, however, in that it (along with several other states) allows indirect purchasers to bring price fixing claims. When a plaintiff seeks to certify a class composed in part of purchasers from other states, this raises the further issue of whether, and under what circumstances, California law should apply to such claims.

A California state Court of Appeals recently dealt with these issues in two companion cases asserting price fixing claims arising from defendants' alleged manipulation of the price of copper on the London Metals Exchange ("LME") and the American Copper Futures Exchange ("COMEX"), *J. P. Morgan & Co. v. Superior Court*, 113 Cal. App. 4th 195 (2003); *Global Minerals & Metals Corp. v. Superior Court*, 2003 Cal. App. LEXIS 1770. In both cases, the plaintiffs sought to represent a class that included copper purchasers in 18 other states with indirect purchaser statutes, as well as California purchasers. In *J. P. Morgan*, the purchaser class consisted of those purchasers of copper products that are not scrap or recycled, while the *Global Minerals* class consisted of purchasers of scrap or recycled copper product. The trial court granted motions to certify both classes. The defendants filed petitions for a writ of mandate with the Court of Appeals. On November 12, 2003, the Court of Appeals issued two nearly identical opinions holding that the trial court erred and directing it to vacate its order of class certification.

The Court of Appeals based its decision both on the plaintiffs' inability to satisfy the traditional requirements of typicality, adequacy and predominance, and that plaintiffs had failed to show

that the claims of out-of-state class members had significant contacts with California such that California law should apply to their claims. The two opinions both contain an extensive and thorough analysis of the issues arising from the application of class action requirements to indirect purchaser claims and the standards to be used in evaluating the propriety of the extraterritorial application of California law to nonresidents.

The plaintiffs relied primarily, if not exclusively, on expert evidence that the impact of the alleged conspiracy on class members could be shown by common evidence that they paid higher prices for copper as a result of defendants' manipulation of the LME and COMEX markets. The Court of Appeals, however, found that the trial court's reliance on such evidence was an abuse of discretion in light of the realities of the market and the claims at issue. It emphasized that the copper distribution chain is such that entities regularly buy and sell from each other in individually negotiated transactions based on factors other than the current LME and COMEX prices. As such, there were conflicts among the class members depending on whether they were a buyer or seller in a particular transaction, and whether any alleged overcharge was passed on to the next purchaser. The Court noted there was also evidence that, to the extent that the proposed class members did use COMEX prices in particular transactions, the class members used different types of COMEX prices. Given these market realities, the Court held that proof of causation and injury in fact would require individual, not common, proof and hence the class vehicle was inappropriate.

As to the non-California purchasers, the Court held that the trial court failed to follow the three step analysis mandated by the California Supreme Court in *Washington Mutual Bank v. Superior Court*, 24 Cal. 4th 906 (2001), for determining whether the choice of law issues raised by the inclusion of nonresidents operated to defeat the predominance, typicality, and other class action requirements. While all the nonresident class members were from states that had indirect purchaser statutes like California, the Court noted that there were "key differences" in the various statutes, such as the limitations period, the availability of the pass-on defense, the extraterritorial application of such statutes, and different damages rules, such as whether treble damages were allowed at all. The trial court managed to skirt these differences by holding that California law would apply to all the claims, a conclusion the Court of Appeals found inconsistent with the *Washington Mutual* decision.

The Court of Appeals emphasized that a court should not ordinarily construe a statute as regulating occurrences outside the state unless a contrary intention can be inferred from the language or purpose of the statute. The fact a defendant may have sufficient contacts with California such that personal jurisdiction is appropriate does not mean that the trial court should apply California law to its out-of-state transactions. Rather, said the Court, California must still have significant contact or a significant aggregation of contacts to the claims asserted by each class member to ensure that the application of California law to each plaintiff's claim is not arbitrary or unfair. The showing by plaintiffs fell far short of this standard. Plaintiffs failed to establish that the nonresident class members, who conducted their business in other states, brought themselves within the protection of the Cartwright Act. Further, the defendants were not headquartered in California and there was no showing that defendants made any misrepresentations emanating from that state. The Court emphasized that these factors must be

considered when a court is asked to certify a nationwide class, as otherwise California has no "special obligation" to undertake a nationwide class action.

While the Court of Appeals analysis of the class action requirements in the context of the copper industry itself is in the mainstream and unremarkable, its application of *Washington Mutual* to prevent the application of California antitrust and indirect purchaser law to nonresidents whose claims have little or no connection with California is significant. Some prior decisions had reached a similar conclusion with respect to the unfair competition law (the ubiquitous "Section 17200") and to tort claims generally, *Norwest Mortgage, Inc. v. Superior Court*, 22 Cal. App. 4th 214 (1999); *Osborne v. Subaru of America*, 198 Cal. App. 3d. 646 (1988). These decisions, combined with *Washington Mutual*, clearly establish that California law now requires a business to have significant contacts with California before its law may apply to extraterritorial transactions and claims.

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FTC Overturns ALJ's Dismissal Of Claims In *Schering-Plough* Litigation

On December 18, the FTC overturned Administrative Law Judge ("ALJ") Michael Chappell's 2002 dismissal of FTC claims against Schering-Plough, Upsher-Smith Laboratories, Inc. ("Upsher-Smith") and ESI Lederle ("ESI") stemming from the settlement of patent infringement allegations brought by Schering-Plough against ESI and Upsher-Smith. The FTC's claims related to K-Dur, a potassium chloride supplement that is used to help treat high blood pressure. *See In the Matter* of Schering-Plough Corporation, Upsher-Smith Laboratories, and American Home Products Corporation, FTC Docket No. 9297.

According to the original FTC staff complaint, Schering-Plough agreed approximately seven years ago to pay Upsher-Smith and ESI millions of dollars to induce these companies to delay launching their generic versions of the drug. The agreement was a settlement of patent infringement claims brought by Schering-Plough against these would-be manufacturers of generic equivalents to K-Dur, who had previously petitioned the FDA to enter the relevant product market. Under most patent settlement agreements, the alleged infringers - in this case, Upsher and ESI - usually pay the patent owner an agreed amount. However, FTC staff found it unusual that Schering-Plough (the patent owner) paid Upsher-Smith and ESI (the alleged infringers) pursuant to the settlement terms. This "reverse payment" fact pattern led to a subsequent delay of the manufacture, regulatory approval, and distribution of the generic products to consumers, according to the FTC. This delay was estimated to have cost consumers more than $100 million.

ESI and its parent company, American Home Products, settled FTC charges in April 2002. However, the administrative litigation proceeded against Schering-Plough and Upsher-Smith until July 2, 2002, when ALJ Chappell dismissed FTC staff charges against the defendants.

In his decision, Chappell stated that substantial competition in the relevant product market existed because there were several potassium chloride products that were said to compete with K-Dur, and that the patent settlement agreements between the defendants did not amount to monopolization under

Sherman Act Section 2, or an agreement in restraint of trade under Sherman Act Section 1. FTC staff then appealed ALJ's decision to the five Commissioners.

In an opinion written by Commissioner Tom Leary, the Commissioners overturned Chappell's decision, stating that there were at least two fundamental errors of law on which the decision was founded. In the first place, Chappell incorrectly concluded (according to the Commissioners) that because FTC staff could not prove that the patent was invalid or was not going to be infringed upon, they could therefore not prove that Schering-Plough could not validly assert the rights that stem from the patent. According to the Commissioners, no federal court has ever required the government to prove the underlying merits of the patent dispute in order to successfully assert that the agreement settling such a dispute is anticompetitive.

In the second place, Chappell asserted that FTC staff needed to prove the anticompetitive effects of the settlement under a full "rule of reason" analysis. The Commissioners, however, employed guidance from the jointly-issued Antitrust Guidelines for Collaborations Between Competitors in determining what method of analysis under Sherman Act Section 1 should be employed. Recognizing that patent settlement agreements can often lead to certain efficiencies (such as avoiding further costs associated with risky litigation), the Commissioners stated that some attention to the effects of the agreement on the market was necessary, but that FTC staff was not required to prove all of the elements required by Chappell in his initial decision. The Commission then concluded that Schering-Plough did, in fact, pay to delay market entry, and was therefore anticompetitive, given the particular facts of the case.

The defendants have 60 days to appeal the decision, and Schering-Plough has already stated its intent to do so. Regardless of the final outcome of the case, its resolution at the FTC not only provides pharmaceutical companies - as well as firms in other markets where intellectual property ownership is critical - with guidance on how the agency analyzes patent settlement agreements that appear to have detrimental effects on the market. The intersection of intellectual property law with antitrust law has continued to remain an important public policy priority for the current administration, but it has become clear by way of the Schering-Plough decision that at all levels of FTC review, someone is not afraid to delve into the details of fairly complicated intellectual property disputes.

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Court Grounds Airline's Bid To Acquire Regional Airline That Aspires To Become Low-Fare Carrier; Conspiracy Allegations To Be Probed

Mesa Air Group's hostile takeover attempt for Atlantic Coast Airlines Holdings, Inc. was preliminarily enjoined on December 18 by a federal trial judge in Washington, D.C. who found a substantial likelihood that Atlantic would succeed on the merits of its claim that Mesa and United Airlines had conspired to injure competition in violation of Sherman Act Section 1. Atlantic Coast, a long-time regional carrier for United, alleges that Mesa is trying to wrest control over Atlantic pursuant to a United-Mesa conspiracy to prevent Atlantic Coast becoming a full-fledged, national low-fare airline which would compete head-to-head with United at its Dulles Airport hub near Washington. The court concluded that regardless

of whether the hostile takeover ultimately was consummated, the efforts by Mesa and United were likely to keep Atlantic Coast from launching the new low-fare carrier to compete against United, which was precisely the type of injury the antitrust laws were designed to prevent.

Background

Atlantic Coast operates as a regional air carrier under the United Express and Delta Connection brands in the Eastern and Midwestern United States, as well as Canada. Last summer, it announced it would become an independent, low-fair airline based at Dulles, to be called "Independence Air". Last Fall, Mesa, a shareholder in Atlantic that is also a fellow regional air carrier with most of its operations in the Western and Midwestern United States, submitted an unsolicited proposal to acquire Atlantic to keep it in its traditional role as a United carrier, and to create the leading regional carrier in the U.S. After the Atlantic board rejected the proposal, Mesa commenced to solicit Atlantic shareholders to replace the Atlantic board with Mesa nominees. In addition, Mesa and United entered into a non-binding memorandum of understanding, agreeing in principal to have Atlantic Coast and Mesa both operate as United Express carriers.

Atlantic filed suit and sought to preliminarily enjoin the shareholder solicitation on the grounds that it violated (1) the Securities Exchange Act through materially false and misleading statements and omissions, and (2) Sherman Act Section 1 and Clayton Act Section 7, because it represents an agreement between Mesa and United that will have the effect of eliminating competition by blocking the entry of the planned low-fare Independence Air into the marketplace. Atlantic claimed that the attempted acquisition reflected the following conspiracy: "United needed a partner to help it extinguish emerging competition from Atlantic Coast, and Mesa stepped forward to help United eliminate this competition. In return, United has agreed to compensate Mesa through increased margins across all of Mesa's United Express routes. If the [shareholder] Solicitation is successful, new competition will be foreclosed, consumers and Atlantic Coast will be harmed, and the conspirators will share the spoils." (Sherman Act Section 1 declares illegal "[e]very contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States", whereas Clayton Act Section 7 prohibits any acquisition of the stock or assets of another company where "the effect of such acquisition may be substantially to lessen competition".)

The Ruling

The court granted the preliminary injunction based solely on the Sherman Act Section 1 claim, "enjoining Mesa from proceeding with the consent solicitation or exchange offer" until a trial on the merits.

In concluding that Atlantic possessed "antitrust standing" under Section 1, the court rejected Mesa's argument that the target of an acquisition can never have standing to complain about potential antitrust violations that might arise from a merger or acquisition. Such standing exists, the court observed, where the target alleges "true antitrust injury". Moreover, Section 1 does "not require a hostile takeover to achieve its anticompetitive effect"; rather, if United and Mesa act to keep Atlantic Coast from launching Independence Air to compete in the marketplace against United, this is the type of injury the antitrust laws were designed to prevent. By contrast, the court found Atlantic lacked antitrust standing under

Clayton Act Section 7 because Atlantic would not be injured if the acquisition was consummated; rather, "Atlantic Coast [would] become part of Mesa and enjoy the exact same benefits from the anticompetitive conduct as the alleged conspirators * * *."

The court also found the requisite "concerted action" between United and Mesa. This was critical because Sherman Act Section 1 claims require collusion between two or more independent entities. In other words, it would not be sufficient if United alone acted to prevent the existence of Independence Air. The court found ample evidence of United's clear motivation to block Independence Air: although it wanted to retain Atlantic as a feeder operation, it also feared price competition from the new Independence Air. Internal United documents recognized that competing with a new low-fare carrier would "result in lower revenue to United, both from a customer mix perspective and a yield perspective", that would "negatively affect United's system-wide profits more severely than competition from JetBlue". In addition, United had threatened Atlantic that if a new agreement could not be struck, United was capable of being irrational and it was in both parties' interest to avoid a bloodbath.

But the more complex issue was whether Mesa was acting in concert with United by trying to seize control over Atlantic. Ultimately, the court found that Mesa failed to offer a credible reason for its efforts other than to help United realize its objective. In other words, it was sufficient that Mesa was trying to aid its business partner (one that had recently agreed to give Mesa more profit margins from Mesa operated flights for United). The court emphasized that even if "conspirators have different underlying motives for restraining potential competitors" - *i.e.*, United wants to prevent Independence Air and Mesa wants to help United - this "does not vitiate the existence of a Section 1 conspiracy". Similarly, even though United and Mesa were vertically aligned and not direct competitors, Mesa was eager to help United solve its problem with Atlantic in a manner whose "outcome would be the death of Independence Air".

For all the legal complexities addressed in the decision, the result was quite simple: having been presented with credible evidence that United was involved to some degree in the Mesa effort to control Atlantic, the court was not about to allow those two carriers destroy competition from a new low-fare entrant. The court was sufficiently concerned that, absent the injunction, Independence Air would not exist, with the concomitant loss of the lower prices that would result from its creation. It was certainly also important that Independence Air was no "pipe dream". Rather, its (1) control of 22 gates at Dulles, (2) operation of more than 80 of its own regional jets, (3) commitment to purchase 25 new Airbus jets with capacity suitable for coast-to-coast flights, (4) operating experience, (5) over $200 million in cash, and (6) the steps it has taken to enter the market, such as negotiating new pay and work rules with its pilots, contracting for a reservation system and developing a marketing campaign, all showed that the new airline was a reality, but for the Mesa solicitation and the credible evidence of the United-Mesa conspiracy.

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Another Mountain for Monti?

Since 2001, Europe's second-highest court has annulled three decisions by European antitrust regulators to block mergers and overturned one of the biggest cartel penalties ever imposed by European regulators. In early December, the same court, the Court of First Instance in Luxembourg (the "Court"), overturned yet another decision by the European Commission ("EC"), which is led by Mario Monti -- a decision by the EC to fine Volkswagen ("VW") for price fixing, handing Monti another setback. But what the Court perceived as only the latest of a string of molehills is being viewed as a mountain by the EC, who expects the ruling to complicate future antitrust cases in Europe.

The EC investigated VW as the result of a complaint from a customer who was refused a discount on a Passat. Volkswagen was subsequently fined 31 million euros in 2001 for its practice of forbidding dealers of its vehicles from offering their customers discounts on its new Passat cars. The EC concluded that this prohibition was an anticompetitive restriction on price, because the purpose was to eliminate price competition among the dealers.

Unhappy with the decision, Volkswagen drove its case to Court and argued that there was no general agreement with all German dealers to fix prices. Instead, the company maintained separate agreements with individual dealers, which did not breach European competition laws. In its ruling, the Court sided with VW, finding that the EC had failed to prove that VW forced its dealers to agree to pricing terms for the Passat.

The EC had argued that such proof was not necessary since the dealers, by signing a dealership agreement, had tacitly agreed to abide by VW's pricing conditions. The Court hit the brakes on this line of reasoning, ruling that the signature of the dealership agreement by VW's dealers could not be regarded as implied acceptance of VW's allegedly anticompetitive behavior, since the signatures were given in advance. Hence, the Court forced Monti to make another u-turn, ruling that the EC had failed to show adequate proof that VW had engaged in anticompetitive behavior.

The EC has two months to consider whether it wants to motor its case on to Europe's highest court, the European Court of Justice. Not surprisingly, the EC views the Court's latest decision as a setback for consumers and as an impediment to price competition. In particular, it feels that the decision could hamper antitrust regulators if the EC has to prove an order was issued not to give rebates or discounts, making it very difficult to challenge this kind of behavior and harder to protect consumers and price competition.

As we all know, Monti blocked General Electric's proposed acquisition of Honeywell International in 2001. Since his office successfully derailed that merger, the Court annulled three major decision by Mr. Monti's office to block other mergers. In addition, in September of last year, the same Court overturned a fine of 273 million euros that had been imposed by the EC in 1998 against a group of ocean freight carriers for price fixing.

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White Collar Crime Crackdown Continues

Recent investigations by the Antitrust Division into the parcel tanker shipping industry and computer memory chip industry have yielded guilty pleas by several white collar criminal defendants.

International Parcel Tanker Shipping Investigation

On December 8, 2003, Hendrikus van Westenbrugge, former co-managing director of JO Tankers B.V., based in Spikenisse, the Netherlands, was charged with participating in an international cartel to allocate customers, rig bids and fix prices on parcel taker affreightment contracts for shipments of specialty liquids to and from the United States and elsewhere.

Parcel tanker shipping is the transportation of bulk chemicals, edible oils, acids and other specialty liquids by compartmentalized deep sea vessels. The temperature and other specifications of the compartments in the vessels can be regulated according to the specific requirements of the type of liquid being transported. A contract of affreightment provides for the transportation of bulk liquids from one port to another and typically covers multiple shipments during a certain period.

According to the charges, van Westenbrugge joined the ongoing parcel tanker shipping conspiracy as early as January 2001, and participated until at least as late as November 2002. The charges state that van Westenbrugge and his co-conspirators: 1) engaged in discussions concerning customers and prices of parcel tanker shipping of products to and from the United States and elsewhere; 2) agreed not to compete for one another's customers either by not submitting prices or bids to certain customers, or by submitting intentionally high prices or bids to certain customers; and 3) discussed and exchanged prices submitted to certain customers so as not to undercut one another's prices. As a result, the Antitrust Division alleged that consumers in the market for international parcel tanker shipping services paid non-competitive and higher prices for parcel tanker shipping.

Van Westenbrugge has agreed to plead guilty and cooperate with the ongoing investigation. In addition, van Westenbrugge, a Dutch citizen, has agreed to serve three months incarceration and pay a fine of $75,000. Van Westenbrugge's plea is the latest in the Antitrust Division's ongoing investigation into the parcel tanker shipping industry being conducted out of its Philadelphia Field Office.

Price Fixing Investigation of Computer Memory Chips

On December 17, 2003, Alfred P. Censullo agreed to plead guilty to obstructing the grand jury investigation of a suspected conspiracy to fix the price of dynamic random access memory ("DRAM") products sold in the United States.

Micron, based in Boise, Idaho, is the largest DRAM manufacturer in North America. DRAM is most commonly used in semiconductor memory products in the computer industry with billions of dollars in sales annually. DRAM provides high-speed storage and retrieval of electronic information in personal computers, servers and other devices. As Micron's regional sales manager for upstate New York, Censullo was responsible for Micron's DRAM sales to customers in his region, including the server division of International Business Machines Inc. ("IBM").

According to the charge, a federal grand jury in the Northern District of California issued a subpoena to Micron requesting documents relating to the Antitrust Division's criminal antitrust investigation in the DRAM industry. The subpoena called for the production of documents relating to any contacts and communications between DRAM competitors regarding the pricing and sale of DRAM. The charge alleges that Censullo altered his handwritten notes pertaining to telephone conferences among Micron sale managers discussing price recommendations for DRAM sales to the major computer equipment manufacturer ("OEM") customers and prices at which competing DRAM suppliers would sell their products to major OEMs in upcoming price negotiations. In addition, the charge alleged that Censullo removed and initially concealed 14 pages from his notebooks that contained competitor pricing information and obvious alterations that could be detected by the naked eye, which, if produced, would have alerted the Antitrust Division that these documents had been altered. The Antitrust Division alleges that the alterations by Censullo were an attempt to disguise the nature, source and accuracy of information responsive to the grand jury subpoena concerning contacts and communications between DRAM suppliers relating to the pricing and sale of DRAM. This evidence was central to the criminal antitrust investigations.

Censullo was charged with obstruction of justice and could face up to ten years in prison and a $250,000 fine. The Antitrust Division's ongoing investigation into suspected price fixing in the DRAM industry is being conducted by its San Francisco field office.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On December 23, the Antitrust Division announced that it would close its investigation into two joint ventures formed by the major record labels to distribute music over the Internet because the investigation failed to reveal any evidence that the deals harmed competition or consumers of digital music. The investigation involved the ventures of major record labels PressPlay and MusicNet. PressPlay began as a joint venture of major labels Sony Music Entertainment and Universal Music Group, but recently was sold to software supplier Roxio. MusicNet is a joint venture of major labels Warner Music Group, EMI Group and BMG Music, as well as RealNetworks, an Internet media company. The Division concluded that the joint ventures did not restrain competition among the major record labels concerning the terms on which they would license their music to digital music services not owned by the record labels themselves and that the joint ventures did not allow the major record labels to impede the growth of the Internet as a channel for the authorized promotion and distribution of music. Moreover, the Division's investigation did not uncover any impermissible coordination among the record labels concerning the terms on which they would individually license their music to third-party services. Therefore, the Division closed its investigation.

- On December 19, the Antitrust Division announced that it would not challenge News Corp.'s proposed acquisition of Hughes Electronics Corp., including its DirecTV subsidiary. The Antitrust Division analyzed the impact of combining News Corp.'s programming assets with the video distribution assets of DirecTV, the nation's largest Direct Broadcast Satellite ("DBS")

RECENT ACTIVITIES

DOJ Antitrust Highlights (*Continued*)

provider. Its extensive investigation included interviews of industry participants and reviews of documents provided by the parties and firms in the multichannel video programming distribution business. During the course of its investigation, the Antitrust Division consulted with and provided assistance to the FCC, which conducted its own investigation. The Antitrust Division claims that the restrictions imposed by the FCC as a condition for granting its approval of the transaction will reduce News Corp.'s ability to withhold, or to threaten to withhold, its programming content from cable television and DBS providers that currently compete with DirecTV. In light of the FCC's decision, the Antitrust Division closed its investigation. (For additional information on this matter, *see January Antitrust Review* at page 18.)

- According to a proposed consent decree filed in the U.S. District Court of the District of Columbia on December 2, the Antitrust Division is allowing Dyno Nobel Inc.'s acquisition of ammonium nitrate production assets from El Paso Corp., provided that Dyno divests its 50 percent interest in an industrial grade ammonium nitrate production facility in Utah. As originally proposed, the transaction would have allegedly resulted in higher prices for industrial grade ammonium nitrate ("IGAN") purchasers in the western United States. IGAN is an essential ingredient in the production of nearly all blasting agent explosives used commercially in industries such as mining and construction. The Antitrust Division opposed the transaction as originally proposed because the two firms would have controlled about 90 percent of IGAN sales in Western North America. The divestiture in the proposed settlement would resolve DOJ's anticompetitive concerns.

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FTC ANTITRUST HIGHLIGHTS

- On December 29, the FTC closed its investigation of Sunoco, Inc.'s proposed acquisition of the El Paso Corporation's Coastal Eagle Point Oil Company. Sunoco owns three refineries in the Philadelphia area and, through its Coastal acquisition, would acquire a fourth petroleum refinery. Though the Commission received complaints and other expressions of concern that proposed acquisitions would adversely affect the price of reformulated gasoline ("RFG") and conventional gasoline in the Philadelphia area, the investigation revealed that Philadelphia has access to several sources of supply of RFG. In addition, the Commission concluded that shipments of conventional gasoline from outside the Philadelphia area via pipeline would prevent area refiners from increasing prices of conventional gasoline. The Commission voted 5-0 to close the investigation and issued a brief statement to explain its decision-making process.

- On December 24, the FTC issued an administrative complaint against Piedmont Health Alliance, Inc. ("PHA"), a North Carolina physician-hospital organization, and ten individual physicians for allegedly fixing prices for the services of its physician members. (*See In re Piedmont Health Alliances, Inc.*, FTC File No. 021-0119.) PHA is a for profit physician hospital organization with about 450 physician members. The FTC alleged that PHA collectively set the prices it demanded for physician services from payors, thereby eliminating competition among these physicians in four counties in Western North Carolina. All PHA's physician members purportedly signed agreements that required them to participate in all contracts PHA entered and to accept PHA negotiated prices. The FTC alleges that PHA's Contract Committee negotiated contracts, including physician fees, with payors on behalf of PHA and its members, and that all contracts were approved by

RECENT ACTIVITIES

FTC Antitrust Highlights (*Continued*)

PHA's Board of Directors. Since 1994, PHA negotiated and entered into over 50 payor contracts. In 2001, the Commission's complaint alleges, PHA began using a "modified messenger model" to enter into contracts with payors. Legitimate messenger arrangements can reduce contracting costs between payors and physicians without involving or facilitating coordinated responses by physicians. Such arrangements may not constitute unlawful agreements to fix prices. However, the FTC challenged PHA's messenger model because the Commission did not consider PHA's approach legitimate and instead indicated that the procedure represents coordinated behavior by PHA and its physician members.

- On December 24, Frye Regional Medical Center, Inc. ("Frye"), an acute care hospital in Hickory, North Carolina, and its parent company Tenet Healthcare Corporation, a California based for profit corporation, settled FTC charges concerning their role in PHA's allegedly unlawful activities. The FTC alleged that Frye was instrumental in PHA's formation, expansion and operation. According to the Commission, Frye played a central role in acting to implement and facilitate the fixing of prices that PHA physicians charged payors for services. Under the terms of the settlement, Frye and Tenet are prohibited from entering into or facilitating any agreement between or among any physicians practicing in the North Carolina four county market. This settlement with Frye and Tenet marks the first case in which the FTC named a hospital as a participant in an alleged physician price-fixing conspiracy.

- On December 18, the Commission announced it had negotiated a settlement to resolve antitrust concerns arising from General Electric Company's ("GE") proposed $437 million acquisition of Agfa-Gevaert N.V.'s ("Agfa") nondestructive testing business. The proposed transaction combines two of the leading suppliers of ultrasonic NDT equipment in the United States, the Panametrics subsidiary of GE and the Drautdramer subsidiary of Agfa. Ultrasonic NDT equipment includes (1) portable flow detectors, (2) corrosion thickness gages, and (3) precision thickness gages. Such equipment is used for quality control purposes and to inspect the tolerance of materials. The United States markets for portable flaw detectors, corrosion thickness gages and precision thickness gages are all highly concentrated, with GE's and Agfa's combined market share in excess of 70% in each market. The FTC alleged that by eliminating competition between these significant competitors, prices in each market would likely increase and innovation would likely decrease. The proposed order remedies the anticompetitive effects of the proposed transaction and requires GE to divert its worldwide Panametrics ultrasonic NDT business to R/D Tech no later than 20 days after GE consummates its acquisition of Agfa's NDT assets. The Commission voted 3-0 to accept the proposed settlement, with Chairman Muris not participating and Commissioner Pamela Jones Harbour recusing.

- On December 18, the FTC made public its ruling *In the Matter of Schering-Plough Corporation, et al.,* Docket No. 9297. In a unanimous Commission opinion, Commissioner Leary held that Schering-Plough Corporation, Upsher-Smith Laboratories, Inc. and American Home Products entered into illegal agreements in 1997 and 1998 to delay the entry of lower-cost generic competition for Schering's prescription drug K-Dur 20, which is used to treat people with low potassium. Schering-Plough and its potential generic competitors, Upsher-Smith and American Home Products, had settled patent infringement litigation with terms that included unconditional payments by Schering in return for agreements to deter introduction of the generic alternatives. Commissioner Leary held that the provisions governing payments in return for deterred entry of generics constituted unfair methods of competition in violation of Section 5 of the FTC Act. (For additional information on this matter, *see January Antitrust Review* at Page 5.)

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

- In a jointly issued press release on December 18, the FTC and the Antitrust Division of DOJ announced the release of a report summarizing merger challenges data for the two agencies for the years 1999-2003. In addition, the two agencies announced that they will hold a joint workshop on merger enforcement in Washington, DC on February 17-19, 2004.

  The merger data report focuses on the agencies merger enforcement decisions during the past five years and contains tabulated market share and concentration figures associated with the FTC's and DOJ's decisions to challenge mergers in a range of product markets. The data uses the two key market share statistics described in the Horizontal Merger Guidelines, the post merger Herfindahl-Hirschman Index ("HHI"), and the change in the HHI resulting from the proposed merger. The data shows that less than 5% of the challenged mergers between 1999-2003 had concentration levels below 1800, the HHI level identified as indicating antitrust concern. But even when the market concentration HHI level increases to 2500, the percent of challenged deals increases only to 13%. The data also reveals that almost 25% of challenged mergers involved HHIs above 7000, suggesting the merged company would have more than 80% of a defined market. More than 50% of the challenged deals had HHIs in excess of 4000, suggesting a combined market share between 40%-60%.

- "Hearsay", *The Washington Post* Lawyer's Column, named Chairman Muris, along with New York State's Attorney General Eliot L. Spitzer, its 2003 Hearsay Lawyers of the Year. The fourth annual award cited the activist agenda of Chairman Muris and identified him as one of President Bush's "most successful appointees". The Post praised the FTC's aggressive antitrust enforcement program, including the antitrust cases brought by the Commission challenging illegal use of patents to increase market power and raise prices. On the consumer protection side, The Washington Post cited, in particular, Chairman Muris' "rock-star status" as a result of the implementation of the FTC's do-not-call list for telemarketers.

For more information on any of these activities, please contact Robert W. Doyle, Jr. at (202) 218-0030 or rdoyle@sheppardmullin.com.

FTC CONSUMER PROTECTION HIGHLIGHTS

- On December 29, FTC staff announced the results of a sweep of 29 funeral homes in the greater New York City metropolitan area to test compliance with the FTC's Funeral Rule. Twelve of those homes appeared to be in violation of the Rule. The FTC's Northeast Region Office coordinated the sweep as part of an ongoing nationwide law enforcement program. FTC test shoppers visited the funeral homes to determine whether the homes complied with key provisions of the Rule - requirements that consumers be given a copy of an itemized general price list and that they be shown itemized price lists for caskets and outer burial containers in a timely manner. (The Funeral Rule, promulgated by the Commission in 1984 and revised in 1994, is designed to ensure that consumers making funeral arrangements receive price lists and are informed that they can purchase only the goods and services they want or need.) The twelve funeral homes considered to be in violation of the Funeral Rule have been given the opportunity to resolve the possible law violations by participating in the Funeral Rule Offenders Program ("FROP"), in lieu of possible formal legal action that could result in an injunction and civil penalties. The FROP program, announced in January 1996, was developed as a joint effort between the National Funeral Directors Association and the FTC to boost funeral industry compliance with the Funeral Rule.

RECENT ACTIVITIES

FTC Consumer Protection Highlights *(Continued)*

- The FTC has requested that a federal district court enjoin Domain Registry of America, Inc. ("DROA"), an Internet domain name re-seller, from making misrepresentations in the marketing of its domain name registration services and has required it to pay redress to consumers. According to the FTC, the company told consumers that their domain registrations were expiring, leading many consumers unwittingly to switch their domain name registrar. The company also allegedly did not disclose that it would charge a processing fee to consumers if their transfer request was not completed - for any reason - and failed to provide consumers refunds in a timely manner. Under the terms of the stipulated final order announced on December 23, DROA, based in Ontario, Canada, may be required to provide redress to up to 50,000 consumers, is prohibited from engaging in similar conduct in the future, and is subject to stringent monitoring by the Commission to ensure its compliance with the court order.

- Reminding consumers about the potential pitfalls associated with pitches for credit card "protection" services and advance-fee credit cards, on December 17 the FTC announced the settlement of a complaint, filed jointly with the State of Illinois, that charged Membership Services, Inc. ("MSI"), a corporation based in San Diego, California, and its principal, James M. Schwindt, with making a variety of misrepresentations in selling such products. Under the terms of the proposed court orders settling the charges, the defendants are barred from engaging or participating in the sale of credit card loss protection or any other credit-related goods or services, from making misrepresentations in connection with charges to consumers' credit card accounts, and from violating the FTC Act or the Telemarketing Sales Rule ("TSR"). Schwindt will pay restitution in the amount of $30,000, and the corporate defendant will pay approximately $50,000. The stipulated final orders, filed in the United States District Court for the Southern District of California in San Diego on December 16, 2003, settle all Commission and state charges against the defendants. The Commission vote to authorize staff to file the stipulated final judgments was 5-0. The original complaint was filed as part of the FTC's "Operation Ditch the Pitch," an interagency law enforcement sweep announced in October 2001 that targeted "cold-call" telemarketers. A preliminary injunction halting the defendants' allegedly illegal practices was entered on October 31, 2001.

- On December 16, the DOJ filed a complaint on behalf of the FTC in the U.S. District Court for the Central District of California against Mantra Films, Inc. and its sole officer and director, Joseph R. Francis (*U.S. v. Mantra Films, Inc.*, C.D. Cal., No. CV-03-9184 RSWL, 12/16/03). The marketers and sellers of "Girls Gone Wild" videos and DVDs are facing civil penalties for violations of previous FTC determinations concerning unfair and deceptive acts or practices, and the FTC is seeking consumer redress. Violations of previous commission determinations that an act or practice is unfair or deceptive carry a civil penalty of up to $11,000 per violation. In addition to seeking civil penalties and consumer redress, the complaint asks the court to bar the defendants from violating FTC Act Section 5, the Electronic Fund Transfer Act, and the Unordered Merchandise Statute. J. Howard Beales, Director of the FTC's Bureau of Consumer Protection referred to the case as "deceptive marketing gone wild". It involved consumers enrolled in a program of monthly deliveries without their knowledge. The Commission vote to ask DOJ to file the complaint was 5-0.

RECENT ACTIVITIES

FTC Consumer Protection Highlights *(Continued)*

- Targeting the sellers of work-at-home schemes who were taking money out of consumers' pockets with their deceptive pitches, the FTC on December 16 announced a joint federal and state law enforcement sweep cracking down on purveyors of fraudulent envelope-stuffing business opportunities. Joining the Commission in announcing its two federal district court complaints in "Operation Pushing the Envelope" were the U.S. Postal Inspection Service, which announced five criminal and 22 civil cases; the Illinois Attorney General's Office, which announced two state complaints; and 23 states and four other government agencies that participated in a nationwide consumer education and outreach initiative about the potential costs of such work-at-home opportunities. "Envelope-stuffing promotions are perennial and pervasive scams. For as long as the BBB system has compiled national statistics, work-at-home schemes have dominated the attention of consumers seeking information from the Better Business Bureau. Educating potential victims is key to curbing the outreach of con artists who perpetrate these 'easy-income, no-experience-necessary' frauds," said Ron Berry, Senior Vice President, Council of Better Business Bureaus. The FTC filed its complaints against particular corporate defendants and individuals that allegedly violated the FTC Act through suspected false statements or other deceptive practices. The complaints also allege that by providing the misleading information, the defendants provided the "means and instrumentalities" for their customers to deceive others.

- In response to a request for public comment by the U.S. Food and Drug Administration (“FDA”), the staff of the FTC filed a comment on December 1 regarding direct-to-consumer (“DTC”) advertising of prescription pharmaceuticals. The staff's response analyzes the overall economic effects of such advertising and provides the FDA with a number of suggestions about how its regulatory scheme for DTC advertising could be modified to communicate information to consumers in an accessible way that is easy to understand. According to the staff's comment, "Empirical evidence suggests that the FDA's current approach to regulating DTC advertising generally benefits consumers." In fact, "DTC ads have provided consumers with useful information about the drug options open to them," and this has "empowered consumers to interact with physicians more effectively." The comment further states that the available evidence does not support concerns that DTC advertising has increased the sale of inappropriate drugs or led to increased drug prices.

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INTERNATIONAL ANTITRUST HIGHLIGHTS

- Guidelines on the appraisal of mergers between competitors were adopted on December 16 by the European Commission ("EC"). The new horizontal guidelines complement the changes already made to the merger control regulation, as well as other improvements to the EC's decision making process. The guidelines clarify that mergers and acquisitions will be challenged only if they enhance the market power of companies in a way likely to affect consumers adversely by resulting in higher prices, poorer quality products, or reduced choice. EC Commissioner Mario Monti commented that the guidelines represent the first time the EC has detailed its analytical approach when assessing the competitive impact of mergers between competing firms.

RECENT ACTIVITIES

International Antitrust Highlights *(Continued)*

- General Motors ("GM") joined the already-heated competition on December 4 in the race to take over Ssangyong Motor, Korea's fourth-largest carmaker, by submitting a letter of intent to Ssangyong's creditors, led by Chohung Bank. Other contenders bidding for Ssangyong include France's Renault, China's Shanghai Automotive Industry Corp. and the Nanxing Group. Ssangyong is a struggling carmaker that specializes in sports utility vehicles. In 2002, GM purchased Daewoo Motors, launching GM Daewoo Auto & Technology. However, when GM purchased Daewoo, it excluded Ssangyong, then an affiliate of Daewoo, citing the companies' overlapping products.

- The EC, on December 3, imposed fines totaling 101.44 million Euros against several companies accused of operating a cartel in the market for electrical and mechanical carbon and graphite products. Electrical and mechanical carbon and graphite products are used primarily to transfer electricity to and within electrical motors. Common applications include electric car windows, shavers, vacuum cleaners, and railway applications (carbon traction brushes). One of the six companies allegedly involved in the cartel, British company Morgan Crucible Co. plc, obtained immunity for being the first to disclose the behavior to the EC. The other five companies are Carbone Lorraine S.A. France; SGL Carbon A.G.; German companies Schunk GmbH and Schunk Kohlenstofftechnik GmbH; Austrian company Hoffmann & Co. Elektrokohle AG, now part of the Schunk Group; and C. Conradty Nürnberg GmbH. The six companies operated a secret cartel between October 1988 and December 1999. During this period, these companies, which have 93 percent of the European market, held over 140 meetings to decide price increases for a broad range of products and for large individual customers.

- The Council of Ministers responsible for EU competitiveness gave its unanimous political agreement to amend the text of the Merger Regulation on November 27. The amendment is due to enter into force on May 1, 2004, the date for enlargement of the EU. The changes approved by the Council include:

  - abolition of the requirement of a binding merger agreement as a pre-condition of notification. It will now be sufficient to demonstrate a genuine intention to merge. This change is in accordance with the "Recommended Practices" developed within the International Competition Network;

  - the possibility for firms that are party to a merger for which the Commission does not have automatic jurisdiction to ask to benefit from the "one-stop shop" if, failing an appraisal by the Commission, the transaction would have to be notified in three or more Member States;

  - strengthening of the Commission's investigating powers; and

  - extension of the Phase II investigation period by three weeks where the parties to the merger submit remedies. Phase II may also be extended by four weeks at the request of the parties or at the request of the Commission, but with the consent of the parties, to look more closely into difficult aspects of particularly complex cases.

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International Antitrust Highlights *(Continued)*

- On November 26, the Australian Competition and Consumer Commission ("ACCC") opposed Coca-Cola Amatil Limited's ("CCA") proposed acquisition of Berri Limited, claiming it could result in reduced choice and higher prices for consumers. ACCC Chairman Graeme Samuel observed that CCA could exert its market power to link sales of the Berri fruit juice products to its dominant Coca-Cola® soft drink product. Berri is Australia's largest fruit juice manufacturer, accounting for almost 50 percent of total national sales of fruit juice and fruit drink. Berri also produces a range of packaged water, sparkling mineral water, flavored milk, cordial, and water ice products. CCA is Australia's largest non-alcoholic beverage manufacturer, with a portfolio of carbonated soft drink, packaged water and sports drink products. It also sells cordial, energy drinks and iced tea.

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FCC ANTITRUST HIGHLIGHTS

- On December 19, the FCC conditionally approved News Corporation's ("News Corp.") acquisition of Hughes Electronics and its DirecTV subsidiary from General Motors. The approval, by a vote of 3 to 2, removes the final obstacle to a $6.6 billion media mega-merger that will combine the DirecTV satellite television service with News Corp.'s Fox studios, pay television networks like Fox News and Speed, its Fox broadcast channel and 35 local stations. News Corp., which is controlled by Rupert Murdoch, will become the only media conglomerate with such broad offerings and national reach. However, the Commission said it had concluded that the combined control of DirecTV with the Fox television programming businesses could enable News Corp. to drive up the fees that other cable or satellite companies pay for its programming. As a result, the FCC imposed certain conditions on News Corp.'s licensing of its regional sports networks and granting of retransmission consent for its Fox Broadcasting Network. These are intended to limit the company's ability to use two of its most potent bargaining chips to squeeze higher programming fees from cable systems and other satellite companies. Following both FCC and DOJ approval of the deal, the companies announced on December 22 that they had successfully completed the split-off of DirecTV Inc. parent Hughes from GM and the acquisition by News Corp. of 34% of Hughes' outstanding common stock. (*See also*, *January Antitrust Review* at Page 11.)

- The $14 billion merger of General Electric Co.'s NBC television unit and Vivendi Universal Entertainment cleared its first regulatory hurdle on December 19, winning approval from the European Union. Because the merger has little impact on the European market, the EU used a simplified procedure that clears mergers and acquisitions after one month if no third parties object. The deal - which would combine the NBC broadcast network, CNBC, Bravo, MSNBC and Telemundo Communications Group Inc. with USA Network, Sci Fi Channel, Trio, Universal Studios and Universal's theme parks - is still under regulatory review in the United States. After having received internal NBC documents showing that some at NBC think the merged company could raise fees cable operators pay for its programming, the FTC issued a second request for information from the companies earlier this month. Still, the deal is expected to close sometime in the first half of 2004.

RECENT ACTIVITIES

FCC Antitrust Highlights *(Continued)*

- According to an unofficial announcement by the FCC on January 5, 2004, the Commission has imposed a forfeiture of $5,379,000 against Fax.com, Inc. for faxing unsolicited advertisements on 489 separate occasions to consumers in violation of the Telephone Consumer Protection Act ("TCPA") and the Commission's rules. Fax.com operates as a "fax broadcaster", faxing messages on behalf of others for a fee. This is the largest single fine ever imposed by the Commission for violation of the TCPA. The FCC penalized the company its maximum forfeiture of $11,000 per violation on the basis that "Fax.com's primary business activity itself constitutes a massive on-going violation" of the TCPA.

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The Sheppard Mullin Antitrust Review is intended to apprise readers of noteworthy developments involving antitrust matters. The contents are based upon recent decisions, but should not be viewed as legal advice or legal opinions of any kind whatsoever. Legal advice should be sought before taking action based on the information discussed.

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