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Editor's Note

Eric Sacks, Chicago, IL

I am pleased to present this spring's Sherman Act Section 1 Committee newsletter. I believe that the contributing authors have supplied material that will be very helpful to the Section 1 practitioner.

We have multiple articles on post-*Twombly* cases, tying, and class certification matters. **Twombly.** Since the Supreme Court's decision in *Bell Atlantic v. Twombly*, many have wondered how that decision will bear on future cases. Several have now been decided. Contributing authors Stacey Slaughter, Chad Doellinger, and Vadim Brusser each have written an article discussing the effect of *Twombly* on certain cases. Together, those three articles should provide helpful guidance on the "new" Rule 8 pleading requirements. **Tying.** Year 2007 saw several tying cases be decided. Paul Hoffman, John Schulze, Jr., and Shankar Iyer each have written an article addressing one or more tying decisions. And, Ryan Hurley discusses *Belton v. Comcast Cable Holdings*, in which the California Court of Appeal addressed tying law under California law. Those articles are a terrific means of staying current on that area of the law. **Class Actions.** 2007 also saw several class action certification decisions. Each of Helen Cho Eckert, Allyson Maltas, W. Joseph Bruckner and Elizabeth Odette, and Marguerite Sullivan have written a piece addressing certain of those developments.

In addition to the several subjects discussed above, the contributing authors have summarized several interesting decisions from the federal and state courts. **The U.S. Courts of Appeal.** John Eklund has written on the Fifth Circuit's decision in *Tunica Web Advertising v. Tunica Casino Operators Association*, in which the Court of Appeals upheld a per se theory in a boycott case. Together, Caterina Nelson and Ian Conner have addressed the Eighth Circuit's decision in *Craftsmen Limousine v. Ford Motor Company*, in which the Court of Appeals rejected a plaintiff's conspiracy claim. Kristen McAhren has written on the Fourth Circuit's recent decision addressing the arbitration of antitrust claims, *In re Cotton Yarn Antitrust Litigation*, an article that summarizes the law in that developing area. (continued on page 2)

In This Issue:

Recent Developments

I. <i>Twombly</i>	Page 3
II. Tying.....	Page 10
III. Class Certification.....	Page 15
IV. Federal Courts of Appeals	Page 21
V. Federal District Courts.....	Page 28
VI. State Courts.....	Page 30
VII. Analysis	Page 31
VIII. Canadian Developments	Page 38

The Sherman Act Section 1 Committee maintains a listserv to keep members informed of breaking developments in Sherman Act Section 1 law. You may join by going to the ABA's website, or go directly to www.abanet.org/scripts/listcommands.;sp?parm=subscribe/at-S1 and follow the instructions there.

Chair's Report

Lynda Marshall, Washington, DC

Welcome to the Spring 2008 edition of the Sherman Act Section 1 Committee newsletter. I hope that you find it as useful and enjoyable as I did. A big thanks to the editorial staff and talented authors who worked so hard on pulling this issue together – you did a great job!

Sherman Act Section 1 continues to be in the forefront of jurisprudence this year as courts, regulators and practitioners grapple with the application of the Supreme Court's decisions in *Bell Atlantic vs. Twombly* and *Leegin Creative Leather Products v. PSKS, Inc.* This issue contains excellent articles examining the effects of both decisions, and the Committee is devoting its Spring Meeting program to the practical aspects of the latter decision. The program, entitled, "Counseling Clients after *Leegin* – Proceed with Caution" – will be extremely interesting and I encourage you to attend. In addition, the regulatory agencies continue to focus on cartel enforcement (aspects of which are discussed in several articles) and class action price-fixing claims remain prevalent. Finally, the rule of reason continues to evolve in a number of settings, including but not limited to tying claims. Altogether a busy year for those who follow Section One jurisprudence.

rejected the argument that the AGC factors determine standing under Minnesota antitrust law. The Court held that AGC factors (2) (whether the injury alleged is direct or indirect) and (3) (whether there are more directly injured plaintiffs with motivation to sue) cannot apply in Minnesota because indirect purchasers are explicitly vested with a cause of action under Minn. Stat. Section 325D.57. Addressing AGC factor (5) (complexity of apportionment and risk of duplicative recoveries), the Court held that Minnesota courts must address complex apportionment issues and attempt to prevent duplicative recoveries but that neither problem presents a valid reason for denying standing. Likewise, the Court rejected the use of AGC factor (1) (whether the plaintiff is a consumer or competitor in the allegedly restrained market) as a reason for denying standing under Minnesota law. A plaintiff's relation to the alleged violation must satisfy ordinary principles of antitrust injury (and thus must be an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful), but antitrust injury is not limited to participants in the market in which trade was restrained. Minnesota courts must, however, apply the fourth AGC factor (whether the damages claims are speculative) and must address whether the alleged injuries are "so remotely related to antitrust violations that courts simply cannot provide relief." 736 N.W. 2d at 631. The Court concluded, "Standing under Minnesota antitrust law must be defined by some prudential limits informed by foreseeability, proximate cause, remoteness, and relation of the injury to the purposes of the antitrust law. . . ." *Id.* Applying these principles, the Court held that plaintiff had standing because she was an end user of a consumer good whose price was inflated by anticompetitive conduct earlier in the chain of manufacture, and the alleged injury – an overcharge – is

exactly the sort of injury that would be expected to flow from a price-fixing violation.

In discussing the recent trend of cases that have applied the AGC factors to defeat indirect purchaser standing by consumers who allege that the merchants they bought from were subjected to an illegal arrangement tying the acceptance of credit and debit cards (including the decision of a Minnesota District Court in *Gutzwiller v. Visa U.S.A., Inc.*, No. C4-04-68, 2004 WL 2114991 (Minn. Dist. Ct. Sept. 15, 2004)), the Court stated that Minnesota standing law would likely reach the same result in those cases as did application of the AGC factors, since the injury alleged in those cases "is most likely too remote and speculative to afford standing." 736 N.W. 2d at 632. The Court noted the "unique damages issues" in tying cases, where an increase in the price of the tied product may be offset in whole or in part by a decrease in the price of the tying product. The Court also pointed out that the overcharge alleged in the credit card/debit card tying litigation was an overcharge incurred by merchants that accepted credit and debit cards and was then "passed on to consumers in the form of higher prices on essentially every good sold in the state of Minnesota, even those purchased with cash. . . . Thus, the market affected by the anticompetitive conduct was in essence the market for all goods bought and sold in Minnesota." In contrast, Lorix's claim was "relatively focused, and was "limited to purchasers of tires manufactured with price-fixed chemicals." *Id.* And the Court could not say on a motion to dismiss whether Lorix's damages "are so speculative as to render proof impossible." *Id.* at 633.

VII. ANALYSIS

The Evidentiary Role of Antitrust Compliance Policies in Section One Civil Litigation

By Jeffrey A. Leon,
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Antitrust compliance policies have become a standard part of the corporate compliance milieu, joining policies on harassment, IT abuse, document retention, and many others. Antitrust compliance policies serve numerous salutary corporate objectives, including educating the workforce to avoid exposing the company to antitrust litigation and potentially protecting the company from criminal exposure if low-level employees violate the law.

Thus, a robust antitrust compliance program can act as a shield against antitrust litigation and exposure. See e.g., *U.S. v. Stolt-Nielsen S.A.*, 524 F.Supp.2d 586, 608 (E.D. Pa. 2007) (Compliance with leniency agreement found because "[b]y promptly instituting the antitrust compliance policy . . . Stolt-Nielsen 'took prompt and effective action to terminate its part in the anticompetitive activity being reported.'"). However, lawyers involved in civil price-fixing litigation know all too well that plaintiffs' lawyers regularly try to use non-compliance with antitrust policies as an evidentiary sword, seeking admissions from witnesses on whether particular actions were permitted or prohibited by the employee's compliance policy. The following actual exchange is typical of plaintiff deposition questioning:

- Q. Do you understand the [] antitrust compliance program to tell [] employees that they are not to share with competitors, either directly or through a third party, information concerning future price moves planned by [your company]?
- A. Our policy would certainly say that we would not provide to our competitors,

directly or intentionally through a third party, future pricing moves.

- Q. Because that would be a violation of the antitrust laws, as you understand them?
- A. I believe so.

Experienced antitrust counselors know that a well written compliance policy is not intended as a statement of antitrust law. Indeed, it is recognized that "sometimes, the drafter of the materials will opt to set the written standards higher than what the law requires" so as to avoid behavior which, while not illegal, could expose the company to expensive and distracting litigation or investigations. Hannay, W., *Corporate Compliance Series: Designing An Effective Antitrust Compliance Program*, Chapter 3:8 (2005). It is thus questionable whether an admission of violating a company's antitrust compliance policy has any evidentiary significance. Given the recurrent use of antitrust compliance policies in civil antitrust litigation, it is perhaps surprising that there is little settled law on the admissibility of such evidence. This prudential dearth is most likely due to the infrequency of civil price-fixing actions reaching trial.

This article shares my recent experience with, and views about, these evidentiary issues in *In re High Pressure Laminates Antitrust Litigation* (S.D.N.Y.) No. 00-MD-1368. The HPL Litigation was tried to a verdict before Judge Charles Brieant in the White Plains Division of the Southern District of New York during April and May, 2006. The HPL plaintiffs were seeking a post-trebling damages award of \$1.3 billion from the sole non-settling defendant, Wilsonart International. Plaintiffs' primary evidence was certain conversations among HPL competitors, and the plaintiffs sought and were allowed to introduce some testimony relating to whether the conversations were a violation of applicable company policies, subject to a limiting instruction. The jury ultimately

returned a complete defense verdict in favor of Wilsonart, ending more than six years of litigation.

This article discusses the arguments advanced for and against admission of antitrust compliance policies and reproduces the curative instruction delivered by Judge Brieant. It is hoped that this article can serve as a practical resource for those briefing this issue in the future.

It is the author's view that such evidence ought not be admissible because of a lack of relevance and the very real prospect of jury confusion. This is a view most likely shared by Judge Brieant, who stated at summary judgment that "any violation of defendants' antitrust compliance policies by one of its employees is not evidence of a violation of the antitrust laws." (Slip Op., Sept, 7, 2004 at 20.) The prudential significance of Judge Brieant's admissibility ruling in the HPL case is limited by the unique factual context of the HPL case, where a key document discussing a competitor conversation made reference to, and was prepared pursuant to, an antitrust compliance policy. As Judge Brieant explained during his oral ruling, he believed the compliance evidence had "to be received to give coherence to the [] memorandum at issue." (April 10 Tr. at 5.) Absent such a need to "give coherence," it is questionable whether the deposition testimony at issue would have been admissible.¹⁴⁶

I. IS EVIDENCE OF THE CONTENT OF OR COMPLIANCE WITH DEFENDANTS' ANTITRUST COMPLIANCE POLICIES RELEVANT PURSUANT TO

¹⁴⁶ Judge Brieant did not allow all testimony related to antitrust compliance into evidence. The record is replete with instances where particular questions and answers concerning antitrust compliance were not admitted because they did not provide "context."

FEDERAL RULE OF EVIDENCE 402?

The threshold question in evaluating the admissibility of antitrust compliance policies is whether it is relevant evidence. To be relevant under Fed. R. Evid. 402, evidence must have "a tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence." *Conway v. Icahn & Co., Inc.*, 16 F.3d 504, 511 (2d Cir. 1994). "Evidence which is not relevant is not admissible." *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 587, 593 (2d Cir. 1998) (citing Fed. R. Evid. 402).

Wilsonart argued that defendants' antitrust compliance policies and their application had no probative value and were thus irrelevant under Fed. R. Evid. 402 because the existence of such policies or alleged violations of such policies do not establish an element of a *per se* section one claim. Plaintiffs argued that relevance was established by the fact that indisputably relevant evidence "contains references to antitrust compliance policies." Plaintiffs did not identify an element made more likely by the evidence, relying instead on the need to provide context to other evidence which had already been determined to be relevant.

A. Can Antitrust Compliance Policies Be Used As Evidence Of Intent To Violate The Antitrust Law, And Is Willfulness An Element Of A *Per Se* Claim?

Most price-fixing class actions allege an agreement to fix prices that are illegal *per se*. Willfulness and intent have limited significance in a *per se* civil price-fixing case because "*per se* analysis does not allow inquiry into the intent behind the restraint" *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 773 (8th Cir. 2004). See also *Spectators' Comm. Network, Inc. v. Colonial Country*

Club, 253 F.3d 215, 220 (5th Cir. 2001) (under *per se* analysis, "even reluctant participants have been held liable for conspiracy.") Accordingly, when the claim is one governed by the *per se* rule, "the trial court must reject as immaterial and irrelevant defendants' proffered evidence of their intent, motive and good faith in entering into the agreement" *United States v. Columbia Pictures Corp.*, 189 F. Supp. 153, 159 (S.D.N.Y.1960).¹⁴⁷ The basis for admission of antitrust compliance policies must thus be based on something other than the need to establish intent.

B. Is Evidence Of Defendants' Antitrust Compliance Policies Relevant To Show Awareness Of The Antitrust Laws Under Fed. R. Evid. 402?

There is no law holding that awareness of the antitrust laws is an element of a *per se* price-fixing claim. Further, the fact that a defendant's employee has read his/her company's antitrust manual does not mean he/she is aware of what conduct is proscribed or allowed by the antitrust laws because compliance manuals are *not* the antitrust laws. Judge Brieant stated in his oral ruling that "practically every major manufacturer in the country has an antitrust compliance guide, [and] that almost always the guide imposes greater restrictions on the sales force than the statute and caselaw does." (Tr. 4/10/06 at 3.)

Such policies are intended to serve as a guide to employees on what types of conduct may give rise to scrutiny by government agencies and civil plaintiffs, not as a restatement of the contours of

¹⁴⁷ Criminal antitrust cases are different because "a defendant's subjective intent is a required element of a criminal antitrust violation. . . ." *U.S. v. Andreas*, 216 F.3d 645, 669 (7th Cir. 2000). Accordingly, the evidentiary use of antitrust compliance policies in a criminal context ought have little bearing on the admissibility of such evidence in a civil case.

the Sherman Act. A comparison of the language of Wilsonart's antitrust compliance policy with governing antitrust law demonstrates the point:

<u>Wilsonart Policy</u>	<u>Governing Law</u>
<p>"Under no circumstances should you contact a competitor to verify a price." (emphasis in original)."</p>	<p>"The exchange of price data and other information among competitors does not invariably have anti-competitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." <i>United States v. united States Gypsum Co.</i>, 438 U.S. 422, 441 n.16 (1978); <i>Blomkest Fertilizer, Inc., v. Potash Corp. of Sask., Inc.</i>, 203 F.3d 1028, 1033-34 (8th Cir. 2000)</p>

C. Is Evidence Of A Defendant's Antitrust Compliance Policy Irrelevant Under Fed. R. Evid. 402 As An Improper Attempt To Influence The Jury About The Applicable Legal Standards In This Case?

By introducing testimony about defendants' antitrust compliance policies, there is a risk that juries could substitute governing antitrust precedent with the summaries of such precedent contained in defendants' policies. Such witness testimony is not relevant because "[i]t is not for witnesses to instruct the jury as to applicable principles of law, but for the judge." *Marx &*

Co., Inc. v. Diner's Club, Inc., 550 F.2d 505, 509-10 (2d Cir. 1977).

II. IS ANTITRUST COMPLIANCE EVIDENCE INADMISSIBLE UNDER FED. R. EVID. 702 AND 703 BECAUSE THE LEGAL NATURE OF THE TESTIMONY IS AN IMPROPER SUBJECT FOR EXPERT TESTIMONY AND BECAUSE THE LAY WITNESSES LACK FOUNDATION?

Expert witnesses are not allowed to testify about the applicable legal standards because "[i]t is a well-established rule . . . that experts are not permitted to present testimony in the form of legal conclusions." See *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994). This "prohibition extends to testimony regarding the legal significance of documents." *Bank Brussels Lambert v. Credit Lyonnais S.A.*, No. 93 CIV 6876, CIV 6876, 2000 WL 1694321 at *1 (S.D.N.Y. Nov. 13, 2000). If such expert testimony is inadmissible, it is difficult to see how a party could be allowed to elicit the same testimony from lay witnesses who lack the foundation that an expert possesses. As Judge Learned Hand once warned trial courts: "Argument is argument whether in the [witness] box or at the bar, and its proper place is the last." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 123 (2d Cir. 1930).

III. SHOULD EVIDENCE OF THE CONTENT OF OR COMPLIANCE WITH ANTITRUST COMPLIANCE POLICIES BE EXCLUDED PURSUANT TO FEDERAL RULE OF EVIDENCE 403?

Even if a court were to find some probative basis under Fed. R. Evid. 402 to admit evidence regarding antitrust compliance, it

still must weigh that probative value against any prejudice to the party opposing admission under Fed. R. Evid. 403. "[Rule 403] provides in pertinent part that even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *United States v. Cruz*, 363 F.3d 187, 194 (2d Cir. 2004) (citation omitted).

A. Is Evidence Of Non-Compliance With Antitrust Policies An Attempt To Create Unfair Prejudice By Portraying Defendants As "Bad Guys" Who Were Willing To Violate Company Policy, Thereby Creating An Improper Inference Of Wrongdoing Under The Antitrust Laws?

The introduction of evidence regarding violations of antitrust compliance policies can prejudice a defendant by giving the jury the impression that if defendants would violate their own company antitrust policies they would also violate the antitrust laws. This type of argument is governed by Fed. R. Evid. 404(b).

In the HPL case, plaintiffs argued that a witness "knowingly violated his company's antitrust compliance policy in [a] conversation, and that he admits that the conversation was inappropriate, has a tendency to show that his conversations with competitors were not innocuous locker room talk, but instead, the conspiratorial meetings of co-conspirators." (Pltf Mem. at 3-4.) This "character evidence" is typically inadmissible pursuant to Fed. R. Evid. 404(b) as "[c]haracter evidence is not admissible to prove conduct." *Eng. v. Scully*, 146 F.R. D. 74, 77 (S.D.N.Y. 1993). Evidence of alleged violations of company policy will unavoidably paint these employees with the broad brush of rule-breakers and thus is normally excluded pursuant to Fed. R. Evid. 404(b). See *Giles v. Rhodes*, No.

94 Civ. 6385, 2000 WL 1425046, at *14 (S.D.N.Y. Sept. 27, 2000) (excluding evidence pursuant to Fed. R. Evid. 404(b) because "[a]dmitting [such evidence] would serve only to paint [defendant] as a rule violator, an impermissible purpose under 404(b).") (emphasis added).

Character evidence that an employee previously had violated an internal policy, and thus would violate the antitrust laws, is the sort of "bad man" evidence excluded by the Federal Rules of Evidence. The rationale behind Fed. R. Evid. 404(b) is that:

[C]haracter evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.

Lombardo v. Stone, 99 Civ. 4603, 2002 WL 113913 at *3 (S.D.N.Y. Jan. 29, 2002) (citations omitted).

B. Could Evidence Of Antitrust Compliance Policies Mislead The Jury As To The Applicable Legal Standards And Confuse The Issues Regarding What Standards Of Conduct Apply?

Another consideration is whether admitting evidence of antitrust policies will mislead and confuse the jury as to whether anything improper occurred under section one of the Sherman Act. The antitrust laws are complex and difficult to understand even for those who practice antitrust on a full-time basis, and it is potentially unreasonable to expect a jury to make such distinctions; especially where the lay "opinions" are inconsistent with this Court's jury instructions.

1. Could The Inconsistency Between Company Policies And The Antitrust Laws Confuse The Issues And Mislead The Jury?

Expecting a jury to sort out the difference between the antitrust compliance policies and the jury instructions may be unrealistic, especially when measured against the limited probative value. In good faith, companies across the nation have implemented compliance policies in an effort to avoid even close encounters with antitrust enforcement. These policies thus often prohibit actions that antitrust law does not. These blanket prohibitions are a prophylactic effort to avoid litigation, and allowing plaintiffs to turn these policies from a "shield into a sword" could have a chilling effect on companies' efforts to educate their workforce about the antitrust laws.

For example, companies that are afraid of any hint of wrongdoing or potential litigation from plaintiffs' attorneys may strictly prohibit their employees from any contact with the employees of competitors. But simply having contact with a competitor's employees, and even having close relationships and frequent contacts with a competitor's employees, does not run afoul of the antitrust laws. See *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 952-53 (2d Cir. 1982); *H.L. Moore Drug Exchange v. Eli Lilly*, 662 F.2d 935, 941 (2d Cir. 1981). The fact that one employee has a close relationship with a competitor's employee and has frequent contact with him, while admittedly a violation of a company antitrust policy, does not result in a violation of the antitrust laws. Likewise, to avoid any potential inference of misconduct a company may strictly prohibit meetings or contacts with competitors at trade shows or association meetings. But this prohibition has no relation to the standards of conduct allowed or proscribed by the antitrust laws. See *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d

41, 44-45 (2d Cir. 1982); *Alpha Lyracom Space Communs. v. COMSAT Corp.*, 968 F. Supp. 876, 894 (S.D.N.Y. 1996)

2. Could Inconsistencies Between Different Defendants' Antitrust Compliance Policies Confuse And Mislead The Jury?

Not only are antitrust compliance policies frequently more stringent than the antitrust laws, but the compliance policies of individual companies can significantly differ from one another. That was certainly the case in the *HPL* litigation:

Wilsonart Compliance Policy

"1. Do not discuss prices, production or terms and conditions of sales with competitors. 2. Do not divide, or discuss division of, customers markets, or territories with competitors."

Competitor's Compliance Policy

"Although certain cooperative activities between competitors are lawful, they may still pose some antitrust risk."

Introducing evidence of the various defendants' antitrust compliance policies would not only require a jury to determine what is appropriate behavior under the antitrust laws and distinguish the prohibitions of the antitrust compliance policies when said policies are in conflict with antitrust laws, but further distinguish between each defendants' individual compliance policy. This distinction upon distinction could easily confuse a jury.

C. Is A Limiting Instruction Regarding Defendant's Antitrust Compliance Policies Sufficient To Prevent Unfair Prejudice?

In the *HPL* case, Judge Brieant found that the unique facts

provided a basis for admissibility, stating that "it is almost essential that [the policies] come in as part of the factual background explaining the reason for and existence of certain exhibits" but that he had made "a Rule 403 ruling . . . conditioned on a limiting instruction being given contemporaneously." (Tr. 4/10/06 at 1-2.)

Judge Brieant delivered the following limiting instruction:

Members of the jury, I'm just reading this to be on the safe side. I did instruct you earlier that it's ordinary and commonplace practice in the industry for corporations to have guidelines and policies for complying with the antitrust laws, and you're instructed that a violation of an antitrust guideline or policy is not necessarily a violation of the federal laws, because the guidelines are ordinarily written to be more stringent than the federal statute in order to avoid any question of a violation of a law.

And you should understand that Wilsonart is not being charged with violating its own antitrust guidelines or the antitrust guidelines or policies of any other company. And the charge here has to do with the federal statute, and I will explain to you at the proper time the Sherman Act provisions that are relevant to this case and what they mean.

(4/12/06 Tr. at 8:24-19:13.)

Limiting instructions have some merit in assisting the jury in evaluating antitrust compliance evidence. However, under a Fed. R. Evid. 404 analysis, "[g]iving [a limiting] instruction may lessen but does not invariably eliminate the risk of prejudice notwithstanding the instruction." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980). Judge Brieant clearly felt that, given the need for context, the limiting instruction

would be sufficient. He delivered this instruction in one form or another several times contemporaneous with the admission of certain evidence, and again with the closing instructions.

CONCLUSION

It is likely that, absent a need to provide context to specific evidence, antitrust compliance policy evidence ought not be admissible. It is this author's view that efforts to use Judge Brieant's ruling beyond this limited context would be inappropriate. It is hoped that this article will assist those dealing with similar evidentiary issues in the future.

New Guidance for Standard Setting Organizations: *Broadcom Corp. v. Qualcomm Inc. and In the Matter of Rambus, Inc.*

*By Dean Harvey,
Boies, Schiller & Flexner LLP¹⁴⁸*

According to Greek mythology, two sea monsters threatened ships from opposite sides of a narrow channel. On one side was Scylla, a multi-headed beast who could reach into nearby vessels and devour their passengers. On the other side was Charybdis, an enormous mouth capable of destroying an entire ship. Sailors attempting to pass between Scylla and Charybdis faced a difficult choice: a ship could not avoid one threat without coming closer to the other.

Standard Setting Organizations ("SSOs") face a similar dilemma. To achieve their purpose without running afoul of the antitrust laws, SSOs must create rules strict enough to prevent one participant from gaining monopoly power over a new standard. But as rules become stricter, SSOs risk

¹⁴⁸ Boies, Schiller & Flexner represents Broadcom Corp. in the litigation this article discusses. The author has had no involvement in that litigation. The views expressed are exclusively those of the author.

accusations of illegal collusion. SSOs must sail between the twin antitrust dangers of monopolization and collusion; the dilemma is how to avoid one without running into the other. Two recent decisions, *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007) ("*Broadcom*"), and *In the Matter of Rambus, Inc.*, 2006 WL 2330117 (FTC Aug. 2, 2006) ("*Rambus*"), help map a path.

SSOs are voluntary, nongovernmental groups of firms that work to standardize technologies. The activities of SSOs may have substantial procompetitive effects. For instance, when electric power first entered into widespread commercial use, there were a large variety of incompatible wiring devices. The National Electrical Manufacturers Association ("NEMA") adopted the NEMA 1-15 plug – the plug characterized by two flat parallel pins. The NEMA 1-15 became the standard for domestic plugs in the United States. This standard permitted manufacturers of electrical devices (the "upstream market") to invest in new technologies without fear of excluding consumers who used incompatible outlets. The standard permitted consumers (the "downstream market") to compare and choose from a much wider range of compatible and interchangeable products.

In downstream markets, interoperable products help consumers share information concerning the relative merits of competing manufacturers. Because products are interchangeable, switching costs decline, increasing competition among suppliers. Prices decrease and quality improves. In upstream markets, firms are more willing to invest in technologies that are likely to gain widespread use. In addition, standard-setting is itself a competitive process: firms disclose their relevant intellectual property, and compete to have their innovations become part of the new standard.

SSOs may also increase the likelihood of anticompetitive

conduct. SSOs raise antitrust concerns in two ways. First, SSOs may facilitate collusion among their members. Firms have used SSOs to wield their collective buying power to artificially reduce input prices, exclude rival firms from participating in a market dominant standard, and hide a price-fixing conspiracy.

Product standardization can facilitate collusion by improving the conspiracy's ability to detect and punish defecting participants, and by creating opportunities to collude.

The second worry is that a participating firm may use the SSO to monopolize. One example is a "patent hold-up." The process by which SSOs decide on a new standard is lengthy and costly. Once an SSO has determined the contours of a new standard, it may later discover that a participating firm owns a patent (or patents) over key technology essential to implementing the new standard. That firm would be in a position to "hold-up" other firms from creating products consistent with the standard. Other participants who have spent large sums and invested substantial energy in developing new products may find it prohibitively expensive to design around the patented technology. The patent owner may then extract supracompetitive royalties from other participating firms.

Allegations concerning the latter fear were the subject of both the *Broadcom* and *Rambus* decisions. In the landmark *Rambus* decision, a unanimous FTC held that deceiving an SSO by failing to disclose key intellectual property rights essential to the adoption of a new standard, and by using information gained through the SSO process to amend pending patent applications to cover essential technology of the new standard, is exclusionary conduct under Section 2 of the Sherman Act and unlawful monopolization under Section 5 of the FTC act. 2006 WL 2330117 at 118.

Rambus Inc. was a member of the Joint Electron Device

Engineering Council ("JEDEC"), an SSO that standardized computer memory technology. The FTC found that *Rambus* used information gained from its participation in JEDEC to obtain patents over technology essential to the practice of memory standards. *Rambus*, by hiding its patent position from other participating firms, "was able to distort the standard-setting process and engage in anticompetitive 'hold-up' of the computer memory industry." *Id.* at 1.

In order to prevent the type of conduct described in *Rambus*, SSOs typically require participants not only to disclose intellectual property that is claimed to be essential to implementation of proposed standards, but also to license any such proprietary technology on terms that are fair, reasonable, and non-discriminatory ("FRAND"). FRAND commitments operate as general assurances against hold-up, without embroiling SSOs in detailed discussions of specific licensing terms that could give rise to accusations of unlawful collusion.

The power of a FRAND promise to bind participating firms is the focus of the *Broadcom* litigation. In its recent decision, the Third Circuit examined whether a complaint states actionable antitrust conduct when it alleges that the defendant deceived an SSO into adopting a new standard by committing to license technology on FRAND terms, but later, after firms have locked-in to the new standard, demanding non-FRAND royalties. 501 F.3d at 313.

Broadcom alleged that *Qualcomm* was a member of the European Telecommunications Standards Institute ("ETSI"), an SSO that created the Universal Mobile Telecommunications System ("UMTS") standard for cellular telephones. *Id.* at 303-04. *Broadcom* further alleged that *Qualcomm* committed to license intellectual property that *Qualcomm* claimed was essential to a new standard on FRAND

terms. *Id.* at 304-05. According to Broadcom's complaint, Qualcomm induced ETSI to include Qualcomm's technology within the standard by falsely promising to license the technology on FRAND terms. Once ETSI included the technology in the standard, Broadcom claimed that Qualcomm breached its licensing commitments. Broadcom contended, among other things, that Qualcomm's deception constituted unlawful monopolization under Section 2 of the Sherman Act.

The Third Circuit held that "(1) in a consensus-oriented standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with and [SSO's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable antitrust conduct." *Id.* at 314. The court added that such deception "harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder." *Id.*

The *Rambus* and *Broadcom* decisions suggest a way for SSOs to decrease the possibility that one participating firm will monopolize a new standard, and also a route SSOs may take to decrease the chances of collusion liability. The *Rambus* decision affords protection to SSOs from a participating firm's attempt to monopolize an emerging standard through deceptive intellectual property disclosure and subsequent patent amendments. Before the Third's Circuit's decision in *Broadcom*, it was unclear whether a FRAND promise was sufficiently specific to prevent one SSO participant from gaining monopoly power over the emerging standard. According to *Broadcom*, a FRAND commitment has teeth: a false promise to abide by a FRAND commitment and subsequent breach by a patent

owner may form the basis of a monopolization action.

SSOs may maintain their distance from accusations that they serve as a front for collusive activities by avoiding up-front discussion of specific license terms, while protecting themselves against hold-up by continuing to insist and rely upon generalized FRAND commitments as a meaningful safeguard.¹⁴⁹ Even in the absence of a FRAND promise, deceptive conduct of the kind described in *Rambus* may subject a firm to antitrust liability. SSOs accordingly have less incentive to push the boundaries of specific royalty terms beyond a FRAND promise.

Use of Evidence from European Antitrust Investigations in U.S. Litigation

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When companies become targets of criminal antitrust investigations in Europe, private suits tend to follow in the United States, where private suits are permitted, discovery is liberal, and the reward of success is especially high. This common cause and effect has created a recognizable pattern of pleading and litigating. Plaintiffs attempt to use the fact of a European investigation to show that the defendants also conspired to violate the U.S. antitrust laws. Two recent cases place limits on this practice.

In *In re Elevator Antitrust Litigation*, 502 F.3d 47 (2d Cir. 2007), as support for the theory that defendants had conspired to restrain trade in the United States, plaintiffs alleged that defendants also had been the target of an investigation by the European Commission and Italy. The

¹⁴⁹ A generalized FRAND commitment is not an SSO's only option. See, e.g., U.S. Department of Justice Business Review Letter re Institute of Electrical and Electronics Engineers Request (April 30, 2007), available at <http://www.usdoj.gov/atr/public/busrevi ew/222978.pdf>.

defendants moved to dismiss on this and other theories of culpability, and the Second Circuit granted dismissal. The court flatly refused plaintiffs' argument that "if it happened there, it could have happened here." *Id.* at *52. The court explained that "absent any evidence of linkage between such foreign conduct and conduct here," plaintiffs' assertions were insufficient to adequately allege a worldwide conspiracy. *Id.*

Though brief, the court's discussion of the European allegations appears to establish that the existence of a European antitrust investigation alone is irrelevant to stating a claim for an antitrust conspiracy in the United States. See *In re Elevator*, 502 F.3d at *52 ("Without an adequate allegation of fact linking transactions in Europe to transactions and effects here, plaintiffs' conclusory allegations do not 'nudge their claims across the line from conceivable to plausible.'") (citing *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007)). This is reminiscent of the Supreme Court's declaration in *Empagran S.A. v. F Hoffman-LaRoche, Ltd.*, 542 U.S. 155 (2005), that allegations of a worldwide conspiracy alone, without allegations of an effect in the United States, are insufficient to trigger jurisdiction under the U.S. antitrust laws. Indeed, the *In re Elevator* court cited to the post-remand circuit court decision in *Empagran* as part of its discussion of the inadequacy of plaintiffs' European allegations. See *In re Elevator*, 502 F.3d at *52.

Read together, these decisions mark a brighter line between adequate and insufficient attempts to use evidence of misconduct abroad to show misconduct here. Allegations are sufficient if they show an interdependent, worldwide conspiracy where conduct abroad is necessarily tied to transactions and effects in the United States. In contrast, where the allegations lack a plausible factual link between the European and U.S. transactions and effects, the fact of