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TABLE OF CONTENTS

Breaking News: Merger Workshops and Agency Staff Changes	Page 2
The Google Book Search Settlement – the United States Submits its Views	Page 4
Antitrust Legislation to Watch: Reverse Payments, Insurance, and RPM	Page 5
The FTC’s Evolving Approach Toward Reverse Payment Settlements.....	Page 7
The United States files Cert and <i>Amicus</i> Briefs in <i>American Needle</i>	Page 11
Competition Roundup	Page 14
Consumer Protection Roundup	Page 15

EDITOR’S NOTE

Dear Committee Member:

Change is afoot in the antitrust world, whether in merger policy, agency staff, proposed legislation, or the FTC’s pay-for-delay settlement strategy. In this issue, we cover all these items and the agencies’ filings in the Google Books settlement and the Supreme Court’s *American Needle* case, and also include our competition and consumer protection “roundups.”

Mark your calendars now for the ABA Antitrust Section’s [Spring Meeting](#), April 21 to 23, 2010, where the Federal Civil Enforcement Committee will have three must-see panels: Breakfast with the DOJ Deputies, Breakfast with the FTC Directors, and Administrative Litigation at the FTC.

Please [sign up](#) for our committee and click [here](#) to join our listserve – both are free to members of the Antitrust Section. Pass this newsletter to your colleagues and encourage them to sign up!

Hill Wellford, Editor

Kelly Horne, Co-Editor

LEADERSHIP

Chairs:

Sarah Mathias
Federal Trade Commission
smathias@ftc.gov

Howard Morse
Drinker Biddle & Reath LLP
howard.morse@dbr.com

Vice Chairs:

Kyle Andeer
Federal Trade Commission
kandeer@ftc.gov

Lisl Dunlop
Shearman & Sterling LLP
Lisl.Dunlop@Shearman.com

Hill Wellford
Bingham McCutchen LLP
hill.wellford@bingham.com

Kevin Yingling
Google Inc.
kyingling@google.com

Council Liaison:

Patrick Thompson
Goodwin Procter LLP
pthompson@goodwinprocter.com

CO-EDITOR BOARD

Bree Hann
Bingham McCutchen LLP
bree.hann@bingham.com

Kelly Horne
Federal Trade Comm’n
kahorne@gmail.com

Joseph Matelis
Department of Justice
joseph.matelis@usdoj.gov

Patrick Kuhlmann
Department of Justice
patrick.kuhlmann@usdoj.gov

Breaking News: Merger Workshops Begin, Staff Changes at FTC and DOJ

As this newsletter went to press, the FTC and DOJ announced personnel changes and held the first of their planned workshops to consider revisions to the [1992 Horizontal Merger Guidelines](#).

Merger Workshops Begin

The agencies announced in September that they would hold a series of workshops to consider whether and how to revise the Horizontal Merger Guidelines. The agencies have since established a [workshops web site](#) and have scheduled five hearings, for December 3, 8, and 10 and January 14 and 26, held in DC, New York, Chicago, Stanford/Palo Alto, and again in DC, respectively.

The first workshop, December 3, featured an introduction by DOJ Assistant Attorney General Christine Varney. Varney kept her in-person remarks brief and informal but also published an eight-page [speech](#). In her published remarks, Varney stuck to general themes, and she took care to emphasize that the agencies had not yet formed specific ideas as to how – or even whether – to revise the Guidelines. However, she did seem to emphasize the issue of market definition:

[T]he comments we have received reflect the reality that the role of market definition in the process of assessing competitive effects has diminished over time. Within the Agencies, for instance, we often back into a market definition after assessing likely competitive effects through other means.

Varney's comment is one of many indications that a de-emphasis of market definition appears to be at the top of the minds of agency leadership.

The December 3 session's agenda included panels on a historical overview of the

guidelines, market definition, "direct evidence" of anticompetitive effects, and unilateral effects. The December 8 session's [agenda](#) included panels on working with international and state authorities, market concentration and structural presumption, minority interests and the failing firm defense, and merger remedies. Agendas for the remaining workshops are not yet final.

This newsletter will cover the workshops in more detail in a future issue.

Changes at the FTC

On December 15, the Senate Commerce Committee held hearings on the nominations of **Julie Brill** and **Edith Ramirez** to become FTC Commissioners. The nominees' witness statements and other information can be found on the Senate's web site [here](#). Both nominees' statements were short (each was less than two pages). Neither the statements nor the nominees' answers to Senators' questions – which were brief and generally friendly – provided clues as to the nominees enforcement philosophy, beyond making clear that the nominees generally support the FTC's current efforts.

On November 30, the FTC [announced](#) four senior staff appointments.

Cecelia Prewett has become Director of the Office of Public Affairs. She joins the agency from the [American Association for Justice](#), where she was Vice President for Strategic Communications, and her 15 years of communications experience includes stints with the American Association of Retired Persons and as senior communications manager for the State of Illinois. Prewett worked on Capitol Hill for seven years, serving as communications director to Members of Congress including former Representative Rahm Emanuel (now President Obama's White House Chief of Staff) and Representatives Carolyn McCarthy and Bob Filner.

Jessica Rich has become a Deputy Director in the Bureau of Consumer Protection. She has served as Acting Associate Director of the Division of Privacy and Identity Protection in the Bureau of Consumer Protection since June, and before that was an Assistant Director in that division and the Division of Financial Practices since 1998. She previously was a legal advisor to the Director of the Bureau of Consumer Protection and a staff attorney in one of the agency's consumer fraud divisions. Before joining the FTC, Rich worked in private practice in New York City.

Charles Harwood has become a Deputy Director in the Bureau of Consumer Protection. He is departing his post as Director of the FTC's Northwest Regional Office in Seattle, a position he occupied for 20 years. Harwood joined the FTC in 1989 after six years as counsel to the U.S. Senate's Committee on Commerce, Science, and Transportation. He is also a member of the U.S. Department of Interior's Indian Arts and Crafts Board, a position to which he was appointed in 2008.

Norm Armstrong, Jr. has become a Deputy Director in the Bureau of Competition, having served in an Acting capacity in that position since August 2008. He oversees the Bureau's Mergers II (chemicals), Mergers III (energy) and Mergers IV (hospital and retail) Divisions. His experience includes serving as Deputy Assistant Director of the Mergers IV Division from 2007-08, Counsel to the Director in 2007, and Liaison to the Department of Defense from 2001 through 2006. Armstrong joined the agency in 1995 as a staff attorney.

The FTC also announced the appointments of **Joel Winston** as Associate Director of the Division of Financial Practices, **Maneesha Mithal** as Associate Director of the Division of Privacy and Identity Protection, and **Mark Eichorn** as Assistant Director of the Division of Privacy and Identity Protection, all within the Bureau of Consumer Protection.

Changes at DOJ

On November 30, DOJ announced that **Rachel Brandenberger**, currently a partner at Freshfields Bruckhaus Deringer in Brussels (law firm bio [here](#)), would join the Antitrust Division front office in January 2010 as a special adviser for international matters. She has extensive international competition law experience and has served on the UK Department of Trade and Industry's Panel of Experts on the Modernisation of EU law, as Chair of the UK Law Society's European Group, and as a member of the IBA's Extraterritorial Jurisdiction Task Force.

The timing of Brandenberger's appointment is interesting in light of the DOJ's and European Commission's difference of opinion regarding the pending acquisition by Oracle Corporation of Sun Microsystems, Inc. DOJ closed its investigation of the deal in August 2009, effectively clearing it to proceed. The EC issued a statement of objections in November 2009, sparking speculation of a new transatlantic rift in merger enforcement. The deal remains under review before the EC.

Roberta Katz has joined DOJ as Special Advisor to the Assistant Attorney General for Technology Issues. She is a former Chief Executive Officer of the Technology Network, a roundtable of technology executives, and was a Senior Vice President and General Counsel of Netscape Communications Corporation.

Katz has assumed a significant role in competition advocacy and representing the Antitrust Division, delivering a keynote address to the Business Software Alliance's [General Counsel Forum](#) and serving as a panelist at the Future of Music Coalition's [Policy Summit](#), among other projects.

By Patrick M. Kuhlmann *

The Google Book Search Settlement – The United States Submits its Views

On September 18, 2009, the United States (the “Government”) submitted its [views](#) concerning the proposed settlement of the “Google Book Search” case, *The Author’s Guild, Inc. et al. v. Google, Inc.*, No. 05 Civ. 8136-DC (S.D.N.Y.), in a filing by the Antitrust Division and the United States Attorney for the Southern District of New York. In July 2009, the Government had notified the court that it had opened an antitrust investigation into the proposed settlement, and the court invited it to submit its views.

The case, filed in 2005, arises out of Google’s efforts to create digital copies of millions of books and permit its users to search those digital copies on its website. Plaintiffs, who seek class certification, are authors, publishers, and affiliated associations. They allege that Google violated the copyrights of authors, publishers, and other owners of U.S. copyrights in books and other writings by scanning them, including them in an electronic database of books, and displaying short excerpts without the copyright owners’ authorization.

In October 2008, the parties filed a proposed settlement that, among other provisions, would require Google to (a) pay \$45 million to compensate class members whose materials have been scanned without their permission and (b) establish and maintain a Book Rights Registry (which, according to the Government, would effectively be controlled by large commercial publishers) that will locate and distribute revenues to class members for the future use of copyrighted material pursuant to the settlement. Google would continue to scan books published before January 5, 2009, and

* Patrick M. Kuhlmann is an attorney in the Legal Policy Section of the Antitrust Division. The views expressed herein are not purported to reflect those of the United States Department of Justice.

would monetize its searchable database of digital books by, among other strategies, selling library subscriptions to its database, selling online access to individual books, selling advertising around snippets of books displayed on its web pages, and pursuing future revenue models approved by the Registry. Google would pay to copyright owners 63 percent of revenues earned from these future uses of members’ works. Copyright owners would retain the right to license their works to other parties, either on their own or through the Registry, for any use.

In its filing, the Government argued that the court should not approve the settlement without modifications, voicing concerns about whether the settlement satisfies Rule 23 of the Federal Rules of Civil Procedure and whether the settlement would violate copyright law or antitrust laws. The Government acknowledged that “one goal of the settlement—making large numbers of copyrighted works available to the public in electronic form while providing compensation to authors and publishers—is a public benefit that, to date, has not come to pass due to certain realities of the copyright system.” However, it observed that the settlement, which would dispose of the rights to millions of copyrighted works, “is typically the kind of policy change implemented through legislation, not through a private judicial settlement,” mandating that the court “undertake a particularly searching analysis” of the settlement.

In discussing its antitrust concerns, the Government cautioned that, because its investigation was not complete, it could not state with certainty whether the settlement violated the antitrust laws. But it articulated its current views in order to aid the court in its consideration of the settlement and the parties in their continuing negotiations.

The Government identified “serious [antitrust] issues” raised by the settlement. First, the settlement appeared to give book publishers the ability to restrict price competition. It would restrain price competition at the

wholesale level (where publishers currently compete in selling digital books to Google and other distributors) because it fixes the royalty rate at 63 percent of all revenues Google earns under the settlement, a rate that would operate as a price floor. It also would restrain price competition at the retail level because it requires Google to develop a pricing algorithm to set default prices for individual books governed by the settlement and prohibits Google from discounting off a rights-holder's list price without authorization of the Registry and notification of the rights-holder, either of which may veto the discount. Finally, it allows the publishers effectively controlling the Registry to set the prices of orphan works (works whose rights-holders are unlikely to be located after a diligent search), which will compete with those publishers' works. These features, the Government concluded, "bear an uncomfortably close resemblance" to *per se* horizontal offenses and, even if subject to the rule of reason, would require "a strong countervailing procompetitive justification" to avoid antitrust condemnation. Thus, "there is a significant possibility that the Department will conclude that those terms violate the federal antitrust laws."

Second, the settlement "appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital book subscription." According to the parties, the Registry will not have the ability to license orphan works to parties other than Google. Hence, "the Registry will lack the ability to provide competitors with licenses that will allow them to offer to the public anything like the full set of books Google can offer." And competitors are unlikely to be able to obtain comparable rights through other means because, among other reasons, they are not likely to identify the owners of most orphan works. Moreover, it is not reasonable to think that a competitor could precipitate a lawsuit and settlement akin to Google's by an act of intentional infringement (nor would it be sound policy to encourage that strategy). This means that the settlement effectively vests

Google with exclusive rights to orphan works, and rivals will not be able to compete effectively against Google's more comprehensive database.

In addition to the Government, numerous class members and others submitted comments on and objections to the proposed settlement. On November 13, 2009, the parties filed an amended settlement agreement. The court will hold a hearing on February 18, 2009, to determine, among other issues, whether to approve the amended settlement agreement. Future filings by the Government, if any, will likely be posted at the Antitrust Division [web site](#).

By Samuel N. Weinstein*

Antitrust Legislation to Watch

With the flurry of legislative activity taking place in Congress this fall, a number of bills with potentially important implications for antitrust enforcement are under consideration. These include proposals to limit "reverse-payment" patent settlements, partially eliminate the McCarran-Ferguson Act's antitrust exemption for certain types of insurance, and make minimum resale price maintenance *per se* illegal. This article describes these three legislative initiatives and where they stand in Congress.

Reverse-Payment Legislation

A number of U.S. courts of appeals recently have analyzed the competitive impact of Hatch-Waxman patent-infringement settlements involving reverse cash payments, which occur when a pioneer drug maker pays a potential generic entrant to stay out of the

* Samuel N. Weinstein is an attorney in the Legal Policy Section of the Department of Justice, Antitrust Division. The views expressed in this article are those of the author alone, and are not purported to reflect those of the United States Department of Justice.

pioneer's market. The majority of these courts have found that these settlements are not *per se* illegal and do not violate the antitrust laws unless one of three circumstances is present: (1) the relevant patent was procured by fraud; (2) the suit for its enforcement is shown to be objectively baseless; or (3) the exclusionary effects of the settlement exceed the scope of the relevant patent. Under this standard, it appears likely that most reverse-payment settlements will not result in antitrust liability.

In light of this judicial trend, some opponents of reverse-payment settlements are seeking a legislative solution. On October 15, 2009, the Senate Judiciary Committee voted to report out of committee [S. 369](#), the "Preserve Access to Affordable Generics Act." This bill would make it presumptively illegal to settle a patent infringement claim in connection with the sale of certain drug products if the generic manufacturer receives anything of value from the patent holder and, in exchange, agrees to limit or forego research, development, manufacturing, marketing, or sales of its generic product. Defendants may rebut this presumption if they can show by clear and convincing evidence that the procompetitive benefits of the agreement outweigh its anticompetitive effects. The bill lists a number of factors for courts to consider when determining whether defendants have rebutted the presumption. The Federal Trade Commission is authorized to enforce these provisions.

In the House, [H.R. 1706](#) takes a different approach. It would make Hatch-Waxman reverse-payment settlements *per se* illegal. The bill would prohibit, under Section 5 of the FTC Act, anyone from entering into an agreement in which a potential generic manufacturer receives anything of value and agrees not to research, develop, manufacture, market, or sell its generic product. However, the bill has an exception for settlements in which the value the generic receives is the right to make the drug in question prior to expiration of the relevant patent or waiver of a patent infringement claim for damages based

on prior marketing of the relevant drug. The bill also authorizes the FTC to exempt, by rulemaking, certain agreements that would otherwise violate the Act if the FTC finds the agreements to be in furtherance of market competition and for the benefit of consumers. The House Judiciary Committee's Antitrust Subcommittee has passed this bill to the full Committee but the full Committee has not yet taken it up.

While it is uncertain at this point whether either of these bills will become law, it is clear that if either of them (or a similar bill) is enacted, the legal landscape for evaluating reverse-payment settlement agreements will change radically.

McCarran-Ferguson Repeal Legislation

Enacted in 1945, the [McCarran-Ferguson Act](#) states that the antitrust laws apply to "the business of insurance to the extent that such business is not regulated by state law." Court decisions in the 1950s held that all 50 state regulatory systems met the "state regulation" requirement, with the result that the Act serves as an antitrust exemption for the insurance industry. Later court decisions held that the "business of insurance" covers only activities closely connected to the risk-spreading function that insurers provide to their policyholders, and does not cover dealings between insurers and third-party service providers. The exemption also does not cover "boycott, coercion, or intimidation."

Legislation to partially repeal the McCarran-Ferguson Act has been proposed in both Houses, as part of the larger health care reform movement in Congress. The bills, both entitled the "Health Insurance Industry Antitrust Enforcement Act of 2009," would repeal the insurance industry antitrust exemption, but only for the health insurance and medical malpractice insurance industries, and only for hardcore antitrust offenses such as price-fixing, bid-rigging, and market allocation.

The House Judiciary Committee reported out its version of the bill ([H.R. 3596](#)) on November 2. The Senate Judiciary Committee has held hearings on its version of the bill ([S. 1681](#)) but has yet to vote it out of committee.

There has been a lively debate, both within Congress and among health care experts, about what impact this limited repeal of McCarran-Ferguson likely would have on health insurance premiums. The outcome of that debate and whether or not a McCarran-Ferguson repealer will be enacted in the near future remains uncertain.

Resale Price Maintenance Legislation

In its 2007 *Leegin* decision, the Supreme Court, in a 5 to 4 vote, overturned its nearly century-old precedent in the *Dr. Miles* case, which had made minimum resale price maintenance *per se* illegal under the antitrust laws. Under the rule announced in *Leegin*, minimum resale price agreements are to be evaluated under the rule of reason.

Unhappy with the *Leegin* decision, some lawmakers in both houses have proposed legislation overturning *Leegin*. The bills, both titled the "Discount Pricing Consumer Protection Act" ([S. 148](#), [H.R. 3190](#)), would make agreements setting a price "below which a product or service cannot be sold by a retailer, wholesaler, or distributor" a violation of Section 1 of the Sherman Act. The Senate bill would amend Section 1 specifically to bar these types of agreements, while the House bill would not amend the Act itself, but rather simply would declare these agreements to be violations of Section 1.

On July 30, the Subcommittee on Courts and Competition Policy forwarded the House bill to the House Judiciary Committee for a vote. The Senate bill was referred to the Judiciary Committee in January, but no further action has been taken.

These bills do not appear to be moving quickly in either House, and considering Congress'

heavy workload this fall and winter, passage of a *Leegin* repealer may be unlikely in the near future.

By Carla Hine*

The FTC's Evolving Approach Toward Reverse Payment Settlements

For the past 10 years, the Federal Trade Commission has made reverse payment settlements, or "pay-for-delay," one of its highest enforcement priorities. FTC Chairman Jon Leibowitz has been especially vocal in his opposition toward reverse payments and has actively supported proposed legislation to ban such settlements. While the FTC's prior judicial efforts to outlaw reverse payments have suffered setbacks, the Commission has refined its strategy to address the allegedly anticompetitive aspects of such settlements, approaching the issue judicially and legislatively.

What is a reverse payment settlement?

So-called "reverse payment" settlements arise when branded drug manufacturers suing generic drug companies for patent infringement settle their litigation and pay the generic drug manufacturers (the "reverse" of the normal settlement payment direction from defendant to plaintiff), allegedly to delay entry into the market. Outright cash payments for delay are now rare but the FTC continues to target side deals, supply agreements, and other business arrangements associated with brand-to-generic settlements where the FTC concludes that such agreements are mere camouflage for pay-for-delay.

Such payments arise as unintended consequences of the Hatch-Waxman Act ("Hatch-Waxman"). That act seeks to encourage new drug innovation and to bring

* Carla Hine is an associate in the Antitrust and Competition Practice Group of McDermott, Will & Emery in Washington, DC.

generic drugs to market more quickly. In furtherance of these goals, Hatch-Waxman permits generic drug manufacturers to submit an Abbreviated New Drug Application (“ANDA”) for approval to manufacture and market prescription drugs, which relies on clinical data submitted with the branded drug manufacturer’s original New Drug Application. When filing the ANDA, the generic drug manufacturer must certify that any unexpired patents covering the drug are invalid, unenforceable, or will not be infringed by the generic drug. In response, and following submission of an ANDA, the patent holder of any intellectual property addressed by the application may, within 45 days, initiate a patent infringement lawsuit against the applicant.

The FDA cannot approve a disputed ANDA for 30 months during the pendency of a patent infringement claim. The first generic drug manufacturer to file an ANDA that the FDA subsequently approves is granted a 180-day exclusivity period to sell the drug. The combination of this unusual patent litigation posture – the ANDA filer does not actually infringe the patent, and therefore has no damages liability at stake – and the ability to use (or misuse) the resulting exclusivity period creates the conditions under which reverse payments arise.

Branded and generic drug manufacturers, pursuant to Section 1112 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, must notify the FTC and Department of Justice (“DOJ”) within 10 days of entering any settlement of Hatch-Waxman brand-versus-generic litigation (the FTC has detailed [instructions](#) on its web site). This mechanism furnishes the antitrust authorities with information regarding agreements they may want to investigate and potentially pursue. Such notice additionally provides empirical data that may shape policy and guide enforcement priorities.

The FTC’s Enforcement Efforts Against Reverse Payments

The FTC simultaneously tackles reverse payment settlements through litigation to address individual cases and pursuit of legislation to ban the practice entirely.

The FTC first sought to ban pay-for-delay settlements nearly a decade ago. In 2000 and 2001, the FTC settled two complaints against [Abbott Laboratories and Geneva Pharmaceuticals, Inc.](#) and [Hoechst Marion Roussel and Andrx Corporation](#). In both cases, the Commission alleged that the parties’ reverse payment settlements constituted unfair methods of competition in violation of Section 5 of the FTC Act. Consent orders settling the matters barred the parties from entering into agreements restricting the generic companies from entering the market, and required the parties to provide notice to the FTC when entering into similar agreements in other contexts.

Next, the FTC in 2001 filed an administrative complaint against [Schering Plough Corporation, Upsher-Smith Laboratories, Inc. and American Home Products Corporation](#) alleging that the settlements reached among the parties were *per se* illegal under Sherman Act § 1 and FTC Act § 5. The administrative law judge initially ruled against the FTC, finding that the agreements were not anticompetitive and that the FTC’s theories required a more thorough inquiry into the validity of the patent. The full Commission reversed the ALJ. The defendants appealed to the Eleventh Circuit, [which overturned the Commission’s decision in 2005](#), holding that neither *per se* nor rule of reason analysis was appropriate in this context. The Circuit Court held the FTC should have evaluated the scope of the patent and the extent to which the agreement exceeds that scope. The Court also found that the settlement agreements at issue did not restrain competition beyond the scope of the patent, and therefore did not violate antitrust laws.

While the FTC pursued the *Schering Plough* case, the Sixth Circuit held in 2003 *In re Cardizem CD Antitrust Litigation* that a reverse payment settlement constituted a *per se* illegal horizontal agreement to eliminate competition. In 2004, the FTC took the position, in a government [amicus brief](#) in the *Cardizem* case, that *Cardizem* did not squarely conflict with Eleventh Circuit precedent. After its loss in *Schering*, however, the FTC in 2005 sought *certiorari* to the Supreme Court regarding the Eleventh Circuit's *Schering Plough* decision, and [argued](#) that there was a circuit split. However, the DOJ, at the request of the Justices, filed a [amicus brief](#) continuing to state that no circuit split existed because "the Sixth Circuit's decision involved payments to exclude drugs that did *not* fall within the scope of the patent alleged to be infringed, and thus it is far from clear that the *per se* rule employed by the Sixth Circuit extends beyond the unique circumstances of that case." The Supreme Court declined to take the case.

The Eleventh Circuit's decision may have subsequently emboldened other companies to enter into pay-for-delay agreements. [According to the FTC testimony to Congress](#), none of the agreements notified to the FTC and DOJ under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 during fiscal year 2004 and the early part of fiscal year 2005 included reverse payments. However, following the Eleventh Circuit's reversal of the FTC's decision in *Schering-Plough*, half of all the settlements notified during fiscal year 2006 included some form of pay-for-delay.

With an increase in reverse payments (as defined by the FTC) following *Schering Plough*, the FTC modified its tactical approach to litigating such cases. *Schering Plough* was the last pay-for-delay case the agency pursued through a full administrative litigation; however, the FTC continues to investigate such matters aggressively, has obtained numerous settlements, and has caused other parties to change their behavior.

The Second and Eleventh Circuits also rejected claims that reverse payments violated the antitrust laws in separate private litigations. In 2006, the Second Circuit followed the Eleventh Circuit's lead in *In re Tamoxifen Citrate Antitrust Litigation*, and in 2008, the Federal Circuit also found reverse payments legal in [In re Ciprofloxacin Hydrochloride Antitrust Litigation](#). Both matters focused on the inherently exclusionary power of the patents at issue. The FTC filed an [amicus brief](#) in connection with the plaintiffs' petition for *certiorari* in the *Cipro* case, hoping to resolve disagreement among the circuits; however, the Supreme Court again denied the petition.

Today, three Circuits clearly hold that reverse payment settlements do not violate the antitrust laws and the holding of the Sixth Circuit is the subject of some debate. The FTC seeks to create a split – or, in the FTC's view, a clearer split – among the circuits to compel the Supreme Court to accept a case to finally decide the issue. As foreshadowed in a [2006 speech](#) delivered by then-Commissioner Leibowitz, the FTC recently brought cases in the D.C. Circuit, "[which has significant experience in antitrust and with enforcement agencies](#)" compared to other circuits, and the Ninth Circuit, which Chairman Leibowitz views as "[generally more receptive to antitrust claims](#)." However, the FTC's hopes of creating a wedge among the circuits was dashed when both cases were removed to less sympathetic circuits.

First, in 2008, the [FTC sued Cephalon, Inc.](#) in the District Court for the District of Columbia, alleging that payments to four generic drug manufacturers in exchange for delayed entry into the market until 2012 constituted an illegal exercise of monopoly power under Sherman Act § 2. Notably, this is the first instance where the FTC has pursued a monopolization claim, and not a Sherman Act § 1 claim, as it had in previous cases. Nor did the FTC name the generic companies as defendants in the case, a move with which [Chairman Leibowitz disagreed](#). Cephalon successfully moved to have the case

transferred to the District Court for the Eastern District of Pennsylvania, where this and several other related civil litigations are pending, lessening the FTC's chances for its desired circuit split.

Second, in early 2009, the FTC and the California Attorney General sued [Solvay Pharmaceuticals](#) and three generic companies, claiming that settlement agreements reached among the parties to delay the generics' entry into the market constituted violations of California's Cartwright Act, Sherman Act § 1, unlawful monopolization under Sherman Act § 2, and an unfair method of competition in violation of FTC Act § 5. Again, the defendants successfully petitioned to have the case removed to the Eleventh Circuit – the same circuit that decided against the FTC in *Schering Plough* – where it is currently pending.

Despite these litigation setbacks, the FTC's aggressive action against reverse payment settlements has affected party behavior. Parties now are unlikely to create explicit pay-for-delay. The FTC's recent challenges, in fact, involve cases where the FTC and the parties vigorously disagree over whether the contracts at issue involve such payments. The agreements typically involve complex business arrangements that involve value flowing both ways – not naked payments – where the FTC alleges that a payment, while not explicit, has been effectively disguised.

Whether by design or not, the FTC's ability to lock parties into a long and expensive investigation and administrative process – since the FTC is not required to go directly to court – is a powerful disincentive to entering reverse payment settlements. Many firms wish to avoid the delay and publicity of such an FTC action (recall that the *Schering* case took four years to conclude), even if they were to believe that a later circuit court decision might vindicate them.

Pending Legislation to Ban Reverse Payments

In advocating before Congress for legislation banning pay-for-delay settlements, Chairman Leibowitz has often warned that the FTC's "[litigation strategy could take years](#)" before a clearer split among the circuits emerges and the Supreme Court agrees to hear a reverse payment case. With almost an air of impatience, Chairman Leibowitz posits that "[\[a\] legislative approach could provide a swifter and cleaner solution.](#)"

In February of 2009, Senators Herb Kohl (D-Wis.) and Chuck Grassley (R-Iowa) introduced the "Preserve Access to Affordable Generics Act" ([S. 369](#)). Representative Bobby Rush (D-III.) introduced one month later a companion bill in the House of Representatives, entitled the "Protecting Consumer Access to Generic Drugs Act of 2009" ([H.R. 1706](#)). As explained in the [previous article](#), the bills would place the burden of defending such arrangements on the settling parties.

As mentioned in the previous article, both pending bills are moving slowly through the respective chambers. Both bills have the support of President Obama. While a senator, then-Senator Obama co-sponsored similar legislation, stating at the time, "it's time to stop these drug company pay-for-delay deals that only serve the profits of the companies involved and deny consumers access to affordable generic drugs." While campaigning, candidate Obama remarked to the American Antitrust Institute that, "An Obama administration will ensure that the law effectively prevents anticompetitive agreements that artificially retard the entry of generic pharmaceuticals onto the market, while preserving the incentives to innovate that drive firms to invent life-saving medications."

Conclusion

Pay-for-delay has been one of the FTC's highest enforcement priorities over the past decade. While the Commission's complaints typically seek injunctive and declaratory relief, Chairman Leibowitz has also [suggested](#) that disgorgement of profits may be an appropriate remedy for the agency to pursue. Despite several judicial decisions to the contrary, the FTC strongly believes that reverse payment settlements are anticompetitive, and should be banned. Unlike in recent years, the FTC now has the support of both its sister agency, the DOJ (expressed in a recent brief to the Second Circuit in [In re Ciprofloxacin Hydrochloride Antitrust Litigation](#)), and the President of the United States. With both agencies and President Obama presenting a unified front on this issue, the comfort that prior judicial decisions provided branded and generic pharmaceutical companies may be short-lived.

By Patrick M. Kuhlmann*

The United States Files Cert and Amicus Briefs in *American Needle*

In September 2009, the United States (the "Government") filed an *amicus* brief, joined by the FTC and the Antitrust Division, in *American Needle, Inc. v. National Football League et al.* (No. 86-661). The case involves the National Football League's (the "NFL's") decision to grant an exclusive headwear license to Reebok International, Inc. For years after its formation in 1963, NFL Properties, the NFL's licensing arm, licensed a number of companies, including plaintiff American Needle, to manufacture baseball caps and stocking hats displaying NFL team marks and logos. But in 2001, the NFL teams authorized NFL

Properties to enter into an exclusive ten-year license with Reebok. American Needle's license was not renewed, and it brought suit in the Northern District of Illinois against the NFL, NFL Properties, the NFL teams, and Reebok, alleging, *inter alia*, that the Reebok licensing agreement violated Section 1 of the Sherman Act.

The district court granted summary judgment to defendants on the Section 1 claim, finding that the NFL and its teams act as a single entity in licensing their intellectual property. The Seventh Circuit affirmed (in an [opinion](#) written by Judge Kanne and joined by Judges Sykes and Tinder), concluding that "the NFL teams are best described as a single source of economic power when promoting NFL football through licensing the teams' intellectual property." The court explained that, because "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny [under Section 1], while in others a league appears to be a joint venture between independently owned teams that is subject to review under § 1," "the question of whether a professional sports league is a single entity should be addressed not only one league at a time, but also one facet of a league at a time." Here, the teams function as a single source of economic power when producing football games, the court reasoned, and it follows that a single source of economic power controls the promotion of NFL football, including the licensing of the teams' intellectual property. The court rejected American Needle's argument that, because teams could compete against each other in licensing their intellectual property, they cannot constitute a single entity.

American Needle filed a petition for a writ of certiorari. In what they described as an "unusual step," the NFL defendants filed a response supporting certiorari "in an effort to secure a uniform rule" recognizing "the single-entity nature of highly integrated joint ventures." They argued that "professional sports leagues, which produce a product that no member club could produce on its own, and

* Patrick M. Kuhlmann is an attorney in the Legal Policy Section of the Antitrust Division. The views expressed herein are not purported to reflect those of the United States Department of Justice.

other joint ventures that involve a similarly high degree of economic integration, should be deemed single entities for Section 1 purposes, at least with respect to core venture functions."

At the Court's invitation, the Government filed a [brief](#) opposing a grant of certiorari. The Government characterized the "potential implications of the court of appeals' decision" as "problematic." "The court's reasoning," it explained, "could be understood to extend single-entity treatment to separately owned NFL teams with respect to their decision to collectively license their intellectual property, without regard to the possibility that the teams' agreement would eliminate the potential for meaningful competition among them, simply because potential efficiencies are associated with collective marketing by participants in a lawful venture to produce NFL football." But the Government concluded that review by the Court was not warranted because, among other reasons, the lower court limited its holding to the facts of the case, the lower court's reasoning, though problematic, did not conflict with any decision of the Court or any other circuit, and the case was not an appropriate vehicle for resolving broader questions about the single-entity concept.

The Court granted certiorari, and the Government filed a [brief](#) supporting American Needle. The Government described the NFL as a "hybrid" arrangement, with its teams dependent upon a degree of cooperation for economic survival yet competing with one another in many ways. Accordingly, there is no single "right" characterization for all of the league's conduct, and antitrust courts should focus on the particular conduct under scrutiny.

The Government explained that concerted action occurs when separately owned teams form a league and when, after the formation of the league, the teams centralize additional functions or place additional constraints on the ways they compete with one another. But

single-entity treatment for the league and its teams is appropriate if (1) the teams "have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition among the teams and between the teams and the league in that operational sphere," and (2) the challenged restraint does not "significantly affect actual or potential competition among the teams or between the teams and the league outside their merged operations." Under this framework, the NFL will be treated as a single entity in some situations (for example, in establishing rules of play and hiring referees) but not in others (for example, a rule forbidding teams from poaching one another's coaching talent).

The Government argued that, although the lower court properly limited its review to the conduct at issue, its analysis of that conduct "was misconceived." First, the court failed to identify the particular conduct challenged by American Needle. (Possibilities include the teams' decision to appoint NFL Properties their exclusive licensing agent, the decision to offer only a blanket license, and the decision to select a single headwear licensee.) Second, the court did not acknowledge that, in addition to promoting NFL football, the licensing of team marks and logos generates revenue and promotes individual teams. Third, the court did not understand that "the teams could continue to function as 'independent centers of decisionmaking' [] with respect to the licensing of their individually owned intellectual property, even if they must cooperate to produce games." Fourth, the court "appears to have assumed that collective licensing of intellectual property would qualify as single-entity conduct if it enabled the teams to compete more effectively against other forms of entertainment." For these reasons, and others, the Government argued that the case should be remanded so that the lower courts can clarify the scope of American Needle's Section 1 claim, perhaps allow additional discovery, and then apply the principles from the Court's decision.

The Government rejected both (1) American Needle's contention that, because NFL teams are separately owned and controlled, their conduct is always subject to Section 1 and (2) the NFL's argument that the league is a single entity whenever engaged in a "core venture function." Both approaches, the Government stressed, are inconsistent with the "functional analysis" adopted by the Court in *Copperweld*, *Dagher*, and *NCAA*, which focuses on whether the conduct at issue restricts actual or potential competition and requires case-by-case analysis. American Needle failed to recognize that "[i]f the NFL teams have effectively merged an aspect of their business, and if a further restraint in the merged aspect does not significantly affect competition in

non-integrated operations, then the restraint does not pose the risks that Section 1 is intended to address, notwithstanding the team's separate ownership and control." Conversely, the NFL's approach would afford single-entity treatment "in virtually every Section 1 suit against the league" and "could affect antitrust enforcement far beyond the sports-league context."

The Court has set the case for argument on January 13, 2010.

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American Bar Association
Section of Antitrust Law
321 N. Clark Street
Chicago, IL 60654-7598

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Competition Roundup: other significant FTC and DOJ actions since October 15

December:

- FTC [announces](#) proposed consent order requiring the sale of assets related to drugs used to treat Parkinson's and the side effects of chemotherapy as a condition for Watson Pharmaceuticals, Inc.'s acquisition of Robin Hood Holdings Limited
- DOJ [obtains](#) sentence for Army Officer, his wife, and his relatives for bribery and money laundering scheme related to Department of Defense contracts in support of Iraq war
- FTC [issues](#) 2009 Report on U.S. Ethanol Market Concentration indicating that the market remains un-concentrated

November:

- DOJ will require Stericycle Inc. to [divest certain assets](#) connected to infectious waste collection and treatment services to proceed with its acquisition of MedService Inc.
- FTC [issues](#) proposed consent order requiring Service Corporation International, the nation's largest cemetery operator, to sell a cemetery and funeral home in Las Vegas to complete its proposed acquisition of Palm Mortuary, Inc.
- FTC [issues](#) proposed consent order detailing Panasonic's and Sanyo's agreement to sell assets related to Sanyo's portable nickel metal hydride battery business as part of the conditions for Panasonic's acquisition of Sanyo
- DOJ will require Cameron International Corp. to [divest certain assets](#) used in production and sale of desalters for use in the oil refining industry to proceed with its acquisition of NATCO Group
- DOJ obtains [guilty plea](#) from Australian man for conspiring to solicit kickbacks in connection with government contract in Afghanistan

- DOJ and USDA [set](#) dates and locations of public workshops to explore competition and regulatory issues in the agriculture industry
- FTC [issues](#) compliance guide for its Petroleum Market Manipulation Regulations
- FTC [seeks public comment](#) on Dow Chemical's petition to lease rather than sell its latex polymers facility, as required by the March 2009 consent order
- FTC and DOJ [sign](#) a Memorandum of Understanding with Russia's Federal Antimonopoly Service to promote greater cooperation between the agencies and the Service
- DOJ issues [statement](#) on the European Commission's objections regarding Oracle's proposed acquisition of Sun Microsystems, and explaining why DOJ closed its own investigation
- FTC [issues](#) opinion finding Michigan realtors' group Realcomp II restricted the ability of member agents to offer lower-priced alternatives to traditional real estate services

October:

- FTC [extends](#) through March 2010 the time for Whole Foods to divest Wild Oats stores, as required by the Commission's May 2009 order
- DOJ obtains [indictment](#) against a financial products and services firm and three executives for bid-rigging and fraud conspiracies involving municipal bond proceeds
- FTC [announces](#) consent order resolving its concerns regarding Schering-Plough's acquisition of Merck and detailing the actions the companies must take for the deal to proceed
- DOJ obtains [guilty plea](#) from subcontractor representative for kickback and fraud

conspiracy at an Environmental Protection Agency Superfund site in New Jersey

- FTC [petitions](#) district court to enforce a subpoena issued in an ongoing investigation of patent settlements between Boehringer and Barr Pharmaceuticals, Inc.
- FTC's [right to videotape testimony](#) as part of its Androgel investigation upheld by U.S. Circuit Court for the District of Columbia
- FTC [seeks public comment](#) on BASF SE's petition to divest Ciba Holdings Inc's pigment businesses to Dominion Colour Corporation as part of compliance with May 2009 consent order regarding BASF's acquisition of Ciba

- DOJ obtains [indictment](#) against individual for money laundering as part of a Home Depot kickback scheme
- DOJ obtains [guilty plea](#) from Army Sergeant for bribery and money laundering conspiracy related to Department of Defense contracts in Afghanistan
- DOJ obtains [indictment](#) against individual for involvement in kickback scheme in connection with government contract in Afghanistan

Consumer Protection Roundup: other significant FTC actions since October 15

November:

- FTC [obtains](#) court order requiring the alleged mastermind of an international spam network to pay \$15.5 million in a default judgment
- FTC and state agencies [announce](#) "Operation Stolen Hope," a federal-state crackdown on mortgage foreclosure rescue and loan modification scams
- FTC [enters](#) proposed settlement with company charged with marketing purportedly "free" Internet auction kits but then charging consumers a monthly charge for an "Online Supplier" program
- FTC [files](#) civil contempt action against Internet-based check creation and delivery service for allegedly violating a 2009 order by enabling consumers to create checks via the Internet without any verification of the users' authority to draw funds on the financial accounts they use
- FTC [issues](#) its Performance and Accountability Report for FY 2009
- FTC [sends](#) ten warning letters to Web site operators who the agency believes have made questionable claims regarding their products ability to prevent or treat H1N1
- FTC [asks](#) federal court for contempt order against BlueHippo for allegedly violating its settlement agreement with the FTC and continuing to deceive consumers with phony promises to help them purchase a computer
- FTC [files](#) civil contempt charges against attorney for not turning over money he acquired representing marketers of an "Internet kiosk" business opportunity that turned out to be a Ponzi scheme
- FTC [obtains](#) settlement order against company allegedly selling bogus smoking cessation patches and debiting consumers' bank accounts without their consent
- FTC [files](#) complaint against catalog credit card operation, charging it with deceptively marketing its card and failing to honor its refund policy

- FTC [requests](#) DOJ to file suit against companies for allegedly violating 2006 FTC order barring them from making baseless health or weight-loss claims

October:

- FTC [delays](#) enforcement of Identity Theft Red Flags Rule to June 1, 2010, as requested by Members of Congress
- DC District Court [holds](#) that FTC's Identity Theft Red Flags Rule exceeds agency's authority as applied to lawyers; ABA issues [press release](#)
- FTC [responds](#) to FCC's request for comment and urges adoption of policies that protect consumers when they buy and use communications services
- FTC [seeks comment on](#) proposed rule modifying labeling requirements for light bulbs
- FTC [announces](#) proposed settlement with a company allegedly making deceptive claims that its rayon products are made of 100% bamboo fiber

- FTC [receives](#) \$18 million for consumer redress from MoneyGram to settle charges that the company allowed its system to be used by fraudulent telemarketers to bilk consumers
- FTC [wins](#) civil penalty against Iconix Brand Group, Inc. to settle charges that the company violated the Children's Online Privacy Protection Act (COPPA) in its handling of children's personal information
- FTC [obtains](#) supplemental agreement from ChoicePoint, expanding its data security assessment and reporting duties and requiring the company to pay \$275,000 for its alleged failure to protect consumers' personal data
- FTC [obtains](#) settlements from two credit repair companies for falsely claiming they could clean up consumers' credit reports and for collecting up-front fees for their services