NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

ANTITRUST NEWS

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The Chair's Comments

A Word from Clinton R. Pinyan

Clinton Pinyan

Among my many professional activities, there is one that is particularly meaningful to me because – more than any other – it has provided me with immense pride in our profession and opportunities to develop my relationships with other attorneys. That activity is my participation in the North Carolina Bar Association in general, and the Antitrust & Trade Regulation Section in particular. I am honored to serve as chair of the section, and I am thrilled about all that we have planned for the section this year. The section is undertaking so many exciting projects that it is difficult to list them all.

I will start with the publication you are

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Inside This Issue:

Mergers on the Examining Table:

The FTC Ratchets Up Antitrust Enforcement in the Healthcare Sector

by Brian A. Hayles

If you have picked up a newspaper or turned on the television recently, you probably noticed that the healthcare industry is garnering special attention. "Reform" is the watchword of the day, with President Obama's plan to overhaul the healthcare system representing one of the most controversial and ambitious agenda items of his young presidency. While it is difficult to predict precisely when reform will occur or what shape it will ultimately take, it is reasonably clear that the relentless debate over "ObamaCare" will not subside anytime soon.

Against this political backdrop, it is perhaps not surprising that the antitrust enforcement agencies – the Federal Trade Commission ("FTC") in particular – have been very active in the healthcare sector. In the past six months, there have been at least three significant healthcare-related mergers and acquisitions in which the parties – faced with the prospects of a protracted battle with the FTC – opted to walk away from their respective transactions.

In some respects, these enforcement actions are consistent with the heightened scrutiny the agencies applied to healthcare transactions in the waning days of the Bush administration. *See, e.g.*, **In the Matter of Inova Health System and Prince William Health System, Inc.**, FTC Docket No. 9339. Nevertheless, the emphasis that President Obama has placed on healthcare reform suggests that the federal antitrust agencies will continue to be enforcement-heavy in this arena. In that vein, the following is a brief synopsis of three recent FTC enforcement actions in the healthcare sector: Carilion Clinic, Thoratec Corporation, and CSL Limited.

I. Carilion Clinic

Carilion Clinic ("Carilion") is the largest hospital system in southwest Virginia, holding an ownership interest in eight acute care hospitals and various other healthcare facilities. Through its holdings, Carilion controls approximately 80% of the hospital beds in Roanoke, Virginia. Carilion provides outpatient imaging services at three of its locations and provides outpatient surgery services at four of its locations. On Aug. 22, 2008, Carilion acquired the Center for Advanced Imaging ("CAI") and the Center for Surgical Excellence ("CSE"), the only independent providers of advanced outpatient imaging and surgical services, respectively, in the Roanoke area. The acquisition carried a reported purchase price of $20 million. As a result of the acquisition, the number of imaging and surgical services providers in the area decreased from three to two, with HCA Lewis-Gale placing the only competitive constraint on Carilion.

On July 23, 2009 – nearly one year after the acquisition was consummated –

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ANTITRUST NEWS

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reading. The *Antitrust News* consistently contains informative articles on important developments in the practice in our State and around the country. This issue is no exception. Brian Hayles surveys recent Federal Trade Commission enforcement efforts in the healthcare field. George Sanderson addresses the implications of the Supreme Court's decision in **Pacific Bell Telephone Co. v. Linkline Communications, Inc.**, 129 S.Ct. 1109 (2009). And Gonzalo Frias brings us the latest in the *Antitrust News*'s series of articles on Chapter 75 decisions.

This year, the *Antitrust News* will become 50 percent more helpful by increasing its publication run from two issues to three. The section thanks its newsletter editors, Jason Evans and Brian Hayles, for undertaking the additional work to expand this benefit for section members.

In addition, the section has launched a new initiative to reach out to law students. In September, the section held its quarterly meeting at Wake Forest. Lawrence Moore organized and moderated a panel featuring Jon Heyl, Bill Mayberry and Robin Vinson, which addressed antitrust and trade regulation practice in North Carolina. Thirty students attended. On Feb. 23, 2010, the section will hold a similar meeting at UNC. We encourage any interested section members to join us there. The section council believes that these meetings will encourage law students to view the Bar Association and its sections as allies and resources during these trying economic times, and will allow talented students to see the sophisticated practice that is available to them at our State's fine law firms.

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The section is also in the process of planning its annual continuing legal education program which, this year, will focus on various issues raised by alternative dispute resolution in the context of antitrust and complex business litigation. Jennifer Van Zant is assembling panels and presentations to include topics such as avoiding antitrust problems when settling disputes against your client's competitors, dealers or customers; the enforcement of arbitration clauses in antitrust disputes; and practical tips on mediating antitrust and other complex business cases. Mark your calendars to join us for this program on April 30, 2010, at the Grandover Resort in Greensboro. We look forward to seeing as many of you as we can at this event.

The section will soon unveil a new pro bono program in which we hope that all section members will participate. Rich Fennell is working hard to bring that project to fruition. More on that will appear in future issues of the *Antitrust News*.

The Bar Association will soon "go live" with a new Web site. Jeff Oleynik is leading a group working to improve our section's little corner of the new Web site over the course of the year.

And, finally, I hope that this year will bring one last exciting development: the increased presence of a number of you in section activities. This section thrives on the fresh ideas and energy that come from those who become more active in our section. So we encourage you to come to a section council meeting, write a newsletter article, or ask to pitch in on pro bono efforts. Nominate yourself to join the section council. Nominate a friend, or even two. If you want to get more involved, please contact me at *cpinyan@brookspierce.com*. You will find your involvement to be rewarding.

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the FTC issued an Administrative Complaint challenging the transaction. Complaint, **In the Matter of Carilion Clinic**, Docket No. 9338, at *http://www.ftc.gov/os/adjpro/d9338/090724carilioncmpt.pdf*. According to the FTC, Carilion's acquisition "significantly reduced competition in the two affected markets, and will result in higher prices and reduced non-price competition for these services." Compl. at 2. The relevant product markets were defined as (1) "advanced outpatient imaging services sold to private payors, including commercial health plans"; and (2) "outpatient surgical services." Compl. at 4. The relevant geographic market was defined as "the Roanoke area, which includes the Counties and Cities of Roanoke and Salem, Virginia." Compl. at 4. The FTC alleged that the transaction would lead to numerous anticompetitive effects, including an increase in patients' out-of-pocket expenses by 900% for some services and would create a disincentive for Carilion and HCA to compete aggressively on a going-forward basis. Compl. at 7. The primary relief sought by the FTC was Carilion's divesture of the facilities in question. Compl. at 9.

In light of this challenge, Carilion agreed to unwind the transaction by selling CAI and CSE within three months to a buyer approved by the FTC. Carilion also agreed to several measures aimed at restoring competition, such as a six-month prohibition on soliciting for employment any physician who had referred patients to the CAI since Jan. 1, 2008. This measure, according to the FTC, will allow CAI's new owner to develop and reestablish its referral base. *See* Federal Trade Commission Press Release, Commission Order Restores Competition Eliminated by Carilion Clinic's Acquisition of Two Outpatient Clinics (Oct. 7, 2009), available at *http://ftc.gov/opa/2009/10/carilion.shtm*.

It is certainly not unheard of for the FTC to mount a challenge to a health system's acquisition of a competitor after the transaction was consummated. For instance, in the highly-publicized Evanston Northwestern case, the FTC filed an Administrative Complaint four years after Evanston Northwestern Healthcare Corporation acquired Highland Park Hospital. *See generally,* **In the Matter of Evanston Northwestern Healthcare Corporation**, Docket No. 9315. However, one key distinction between Carilion and Evanston Northwestern lies in the FTC's general competitive theory: Unlike the retrospective competitive assessment conducted in Evanston Northwestern, in Carilion, the FTC seemed focused primarily on *prospective* anticompetitive effects. In other words, notwithstanding the fact that the FTC had nearly an entire year of operations on which it could evaluate the acquisition's actual competitive impact, it focused instead on how Carilion's acquisition of CAI and CSE could lead to increased prices *in the future*.

Another fact that distinguishes the Carilion case from other recent FTC challenges is that the acquisition – with a relatively low purchase price of $20 million – did not require premerger notification under the Hart-Scott-Rodino Act ("HSR"). This underscores the notion that the FTC is focusing not only on large mergers and acquisitions, but also on those smaller transactions that otherwise fly below the HSR radar.

II. Thoratec Corporation

Thoratec Corporation ("Thoratec"), headquartered in Pleasanton, California, is a producer of medical devices used to sustain end-stage heart failure patients, known as left ventricular assist devices ("LVAD"). LVADs are surgically-implanted and assist such patients by mechanically pumping blood into the patient's native heart. LVADs are commonly used in two clinical settings: (1) to assist patients on a short-term basis while they are awaiting a heart transplant, *i.e.*, "bridge to transplant therapy"; and (2) as a long-term alternative for patients who – because of advanced age or other medical conditions – are not suitable transplantation candidates, *i.e.*, "destination therapy." Thoratec's HeartMate II and HeartMate XVE are the only LVADs currently approved by the U.S. Food and

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Drug Administration ("FDA") for commercial sale.

Massachusetts-based HeartWare International, Inc. ("HeartWare") is one of a handful of companies that is currently developing LVADs. HeartWare is permitted to sell limited quantities of its LVAD – known as HVAD – in connection with its participation in ongoing FDA clinical trials. If these trials are successful, HeartWare could receive FDA approval and eventually compete directly with Thoratec in the LVAD market.

On Feb. 12, 2009, Thoratec and HeartWare entered into an Agreement and Plan of Merger, pursuant to which Thoratec proposed to acquire 100% of HeartWare's voting securities. The cash and stock transaction was valued at approximately $282 million, thus triggering premerger notification requirements under HSR.

On July 28, 2009, the FTC filed an Administrative Complaint challenging the transaction. Complaint, **In the Matter of Thoratec Corporation and HeartWare International, Inc.**, Docket No. 9339, at *http://www.ftc.gov/os/adjpro/d9339/090730thorateadminccmpt.pdf*. The complaint characterized Thoratec as a monopolist in three relevant product markets: (1) LVADs; (2) LVADs as a bridge to transplant therapy; and (3) LVADs as a destination therapy. Compl. at 3. The relevant geographic market was defined as the United States. *Id.* The FTC alleged that a variety of anticompetitive effects would flow from the merger, including the elimination of current and future competition between the firms and the increased likelihood that Thoratec would collude with other LVAD manufacturers. *Id.* at 4. On July 31, 2009, the parties announced that they were abandoning the transaction.

The FTC's predominant competitive theory in the Thoratec case was the elimination of *potential* competition. This is due to the fact that HeartWare – with its LVAD currently the subject of clinical trials – has not fully entered the relevant product markets. The "potential competition" theory has been utilized by the FTC in prior enforcement actions, *see, e.g.*, **Cephalon, Inc.**, 138 F.T.C. 583, 635-36 (2004), but it creates a complex proof structure that makes the prosecution of such claims particularly thorny. It is therefore difficult to determine whether the facts of the Thoratec case were especially well-suited for this competitive theory, or whether one should expect an increase in enforcement actions based on the alleged loss of "potential competition."

III. CSL Limited

Plasma-derivative protein products are essential for treating a host of rare and life-threatening medical conditions, such as autoimmune and coagulation diseases. Patients dependent on such therapy can spend in excess of $90,000 per year on these products.

CSL Limited ("CSL") is the second-largest supplier of plasma-derivative protein therapies in the world. Talecris Biotherapeutics Holdings Corporation ("Talecris") is a wholly-owned subsidiary of Cerberus-Plasma Holdings, LLC ("Cerberus"). Headquartered in Research Triangle Park, Talecris is the third-largest producer of plasma-derivative protein therapies in the world. CSL and Talecris are both vertically integrated, owning and operating plasma collection and manufacturing facilities across the United States.

On Aug. 12, 2008, CSL entered into an Agreement and Plan of Merger to acquire Talecris from Cerberus. The transaction was valued at approximately $3.1 billion, easily triggering HSR premerger reporting requirements. Pursuant to applicable HSR provisions and a timing agreement entered into between the parties and the FTC staff, the acquisition could have been consummated on or after May 29, 2009. On May 27, 2009, the FTC challenged the transaction by filing an Administrative Complaint. Complaint, **In the Matter of CSL Limited and Cerberus-Plasma Holdings, LLC**, Docket No. 9337, at *http://www.ftc.gov/os/adjpro/d9337/090527cslcmpt.pdf.*

The Complaint alleged four separate relevant product markets: (1) immune globulin, commonly known as "Ig"; (2) albumin; (3) alpha-1; and (4) Rho-D. Compl. at 8. The relevant geographic market was defined as the United States. Compl. at 10. According to the FTC, the transaction would constitute a three-to-two or a five-to-four merger, depending on the product market in question. Compl. at 2. Additionally, CSL's post-merger market share would range from 42% to 82% in these various product markets. Compl. at 10.

While the FTC alleged that the merger would result in the aggrandizement of market share in the relevant product markets, its chief competitive concern rested on the notion that, post-merger, CSL could impermissibly coordinate with its remaining competitors. This is due largely to the fact that the industry has traditionally operated as a "tight oligopoly." Compl. at 2. According to the FTC, there is a history of competing firms "closely monitor[ing] each other, collecting and cataloging an extraordinary wealth of timely competitive information, to ensure that all are engaged in desired 'rational' and 'disciplined' behavior." *Id.* Furthermore, a spate of industry consolidation in recent years has resulted in greater market concentration, tighter supply, and higher prices for many plasma-derivative protein products. Compl. at 6-7. In the FTC's view, "Talecris is the one firm in the industry that can thwart the prevailing restrained, oligopolistic approach." Compl. at 8. Although the parties initially signaled that they would fight the FTC's challenge, CSL announced on June 8, 2009 that it would not proceed with the acquisition. *http://www.ftc.gov/opa/2009/06/csl.shtm*.

While the FTC's competitive theories focused on the peculiarities of the plasma-derivative protein products industry, there is nonetheless at least one take-away that applies to virtually all enforcement actions: In evaluating the competitive impact of a transaction, the antitrust enforcement agencies frequently gather industry information from a variety of extraneous sources. Here, for instance, the FTC's view of the oligopolistic nature of the industry was reinforced by comments made by a competitor's Chief Financial Officer during a conference call with investors.

Compl. at 7. This underscores the importance of carefully evaluating not only a firm's internal "deal-related" documents, but other information available in the public record, when developing an antitrust rationale in support of a transaction.

IV. Conclusion

In light of these enforcement actions, one might assume that those in the healthcare industry – hospital systems in particular – are losing an appetite for mergers and acquisitions. To the contrary, in the past few months, there has been a marked uptick in announced transactions. This proliferation is likely due to several factors, including (1) the tightening of the credit markets over the past two years, which has left smaller, stand-alone hospitals cash-strapped; and (2) the general sense among industry experts that national health reform will result in lower reimbursement. *See* Vince Gallaro, *Urge to Merge*, MODERN HEALTHCARE, Aug. 17, 2009 at 6-7, 16.

It is highly likely that, with an increase in healthcare-related transactions, there will be a commensurate increase in enforcement activity. Tighter enforcement would seemingly be consistent with the current administration's focus on healthcare reform. The Carilion, Thoratec, and CSL Limited cases demonstrate that the FTC is prone to employ a variety of competitive theories as the basis for an antitrust challenge, may take enforcement actions long after a transaction has been consummated, and may challenge those transactions falling below HSR reporting thresholds. In the face of such challenges, some firms may conclude that abandoning a transaction is more appealing than waging a time consuming and costly war with an antitrust enforcement agency. ■

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Putting the Squeeze on Section 2:

The Supreme Court's Decision in **Linkline**

by George F. Sanderson, III

In **Pacific Bell Telephone Co. v. Linkline Communications, Inc.**, 129 S.Ct. 1109 (2009), the Supreme Court rejected a "price squeeze" claim brought under Section 2 of the Sherman Act. Although not previously addressed by the high court, lower courts previously had recognized antitrust liability for price squeezes for over 60 years.

Linkline is the latest in a recent string of Supreme Court opinions siding with the defendant in an antitrust matter. Perhaps the greatest significance of this opinion is that it may signal potential obstacles to stepped up antitrust enforcement broadly hinted at by the Obama Administration. Specifically, although the administration's recently installed antitrust officials have suggested that they will step up scrutiny of unilateral conduct, the **Linkline** opinion suggests that such attempts at enhanced enforcement under Section 2 of the Sherman Act may be met with resistance by the courts.

Commencing with Judge Learned Hand's decision in **United States v. Aluminum Company of America**, 148 F.2d 416 (C.A. 2 1945), price squeeze claims have previously been recognized where a vertically integrated antitrust defendant is in a market at both the retail and wholesale levels. Presuming that the defendant has market power in the wholesale market, the defendant can theoretically raise prices in the wholesale market while simultaneously lowering prices in the retail market, thereby squeezing the profit margins of retail competitors.

Linkline involved the market for DSL high-speed Internet service in California. Petitioner/Defendant AT&T owned much of the infrastructure for providing DSL service in the market and also was a DSL service provider. AT&T had previously been subject to an FCC forced-sharing requirement to lease DSL transport service to other retail providers. Although the FCC had largely abandoned the forced-sharing requirement by the time **Linkline** was filed, AT&T was still bound by the requirements as a condition of a recent merger.

Plaintiffs were four DSL service providers that competed with AT&T as a retail Internet service provider and also leased DSL transport service from the company. AT&T consequently was a participant in the DSL market both at the wholesale level, by providing transport service to the plaintiffs, and at the retail level, by selling DSL service directly to consumers.

The plaintiffs sued AT&T and alleged that AT&T had monopolized the California DSL market in violation of Section 2 of the Sherman Act. Among the monopolization claims, the plaintiffs alleged that AT&T had engaged in a price squeeze by setting high wholesale prices for the transport of DSL service while simultaneously setting low retail prices for DSL Internet service.

AT&T moved for judgment on the pleadings in light of the Supreme Court's decision in **Verizon Communications Inc. v. Law Offices of Curtis V. Trinko**, LLP, 540 U.S. 398, 410 (2004). In **Trinko**, the Supreme Court held that a firm had no obligation to afford competitors with a "sufficient" level of service where the firm, as is true in most instances, has no antitrust duty to deal with the competitor.

The district court denied AT&T's motion to dismiss the price squeeze claims. The district court held that Trinko "simply did not involve price squeeze claims" and noted that such claims were otherwise legally cognizable under existing law. In its decision, the district court requested that plaintiffs amend their complaint to provide greater factual detail concerning their price squeeze claim.

AT&T moved to dismiss the amended complaint that plaintiffs filed in response to the court's request on the grounds that a price-squeeze claim was cognizable only if the claim satisfied the requirements for establishing a predatory pricing claim set forth in the Supreme Court's opinion in **Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.**, 509 U.S. 209 (1993).

The district court subsequently determined that the amended complaint satisfied the **Brooke Group** requirements and certified an interlocutory appeal of the order that denied dismissal of the price squeeze claim in the *original* complaint. The district court certified the question of whether **Trinko** barred such price squeeze claims in an instance where the parties are compelled to deal under federal communication laws.

The Ninth Circuit affirmed the district court's ruling, largely on the basis that **Trinko** did not involve a price squeeze theory. In a dissenting opinion, Judge Gould opined that, in conjunction with **Brooke Group**, **Trinko** should bar the price squeeze claim. Judge Gould reasoned that, because a price-squeeze claim involved allegations of an improperly high wholesale price and an improperly low retail price, each component of the price analysis needed to be analyzed separately. In that analysis, Judge Gould indicated that **Trinko** should insulate the defendant from liability for setting of the wholesale price absent an antitrust duty to deal while **Brooke Group** insulated the defendant from liability for setting the retail price if a plaintiff could not make out the elements of a predatory pricing claim under **Brooke Group**.

The Supreme Court granted AT&T's Petition for a Writ of Certiorari of the appellate court's decision on the question of whether a plaintiff can bring a price-squeeze claim under Section 2 of the Sherman Act when the defendant has no antitrust duty to deal with the plaintiff.

One interesting twist in the case was its procedural posture while on appeal to the Supreme Court. While on appeal, plaintiffs in essence conceded that Judge Gould was correct that their price squeeze claim had to meet the **Brooke Group** predatory pricing requirement. On that basis, the plaintiffs asked the court to vacate the appellate decision below and remand with instructions that the plaintiffs be granted leave to amend further their complaint to include more specific allegations relating to the predatory pricing elements of their claim.

Chief Justice Roberts, who authored the opinion of the court, declined the suggestion that the case was now moot and characterized plaintiffs' request as seeking a "mulligan." Chief Justice Roberts proceeded to reach the merits of plaintiffs' price squeeze claim and found that a "straightforward" application of **Trinko** foreclosed the claim because of the absence of an antitrust duty to deal. "**Trinko** . . . makes clear that if a firm has no antitrust duty to deal at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous." **Linkline**, 129 S.Ct. at 1119.

The court's opinion goes on to reason that, because a price squeeze claim involves an allegation that the competitor's retail prices are too low, the plaintiffs must demonstrate the elements of a predatory pricing claim as set forth in **Brooke Group**. Specifically, the plaintiffs must demonstrate that: "(1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices." **Linkline**, 129 S.Ct. at 1120 (internal quotation marks omitted). The court then noted that, in the complaint under review, the plaintiffs had failed to allege that the competitor's conduct met either **Brooke Group** requirement.

Dismissing plaintiffs' complaint as nothing more than an "amalgamation of a meritless claim at the retail level with a meritless claim at the wholesale level," *Id.*, the court rejected the plaintiffs price squeeze claim and remanded the case for further proceedings. The court suggested that, on remand, the district court would have to examine whether the amended complaint, in setting out its **Brooke Group** claim, met the heightened pleadings standards of **Bell Atlantic Corp. v. Twombly**, 550 U.S. 544 (2007), which had been decided while the district court's decision had been on appeal, and whether the courts should grant plaintiffs further leave to amend the allegations related to predatory pricing. The court expressed doubt, however, that an amended **Brooke Group** claim could survive a motion to dismiss, reasoning that "if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market." **Linkline**, 129 S.Ct. at 1122.

In a concurring opinion, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, opined that the court's holding should have been more limited in scope and confined to the finding that plaintiffs failed to state a claim under **Trinko** and the care should otherwise have been remanded to analyze whether the plaintiffs would be able to state a predatory pricing claim in accordance with **Brooke Group**.

Despite advocating for a more limited holding, Justice Breyer's opinion did not necessarily hold out more hope for the ultimate success of plaintiffs' predatory pricing claim. Justice Breyer hypothesized that, because AT&T was a regulated firm, the plaintiffs could have gone to the regulators to ask that wholesale prices be lowered in light of the alleged price squeeze. Justice Breyer further noted that, in general, "the costs of antitrust enforcement [were] likely to be greater than the benefits" in such a regulated field. **Linkline**, 129 S.Ct. at 1124.

Linkline joins a string of other recent Supreme Court decisions siding with the antitrust defendant's position and, in certain instances, overturning long-held antitrust precedent in the process. *See, e.g.*, **Leegin Creative Leather Products, Inc. v. PSKS, Inc.**, 551 U.S. 877 (2007) (overturning the 1911 case, **Dr. Miles Medical Co. v. John D. Park & Sons Co.**, 220 U.S. 373 that held vertical retail price maintenance was a per se antitrust violation); **Twombly**, 550 U.S. 544 (abrogating the pleading standard announced originally in **Conley v. Gibson**, 335 U.S. 41 (1957)).

This pattern may set up some interesting challenges to enhanced antitrust enforcement, especially in the unilateral conduct arena, that the Obama Administration has broadly hinted it would undertake. With some public fanfare, the DOJ's Antitrust Division announced in May of this year that it was withdrawing the report on "Single-Firm Conduct under Section 2 of the Sherman Act" that the previous administration had issued in September 2008, less than a year prior. Recently appointed Assistant Attorney General Christine A. Varney announced that the Antitrust Division withdrew the report because it "raised too many hurdles to government antitrust enforcement." *See* Press Release, U.S. Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009) at *http://www.usdoj.gov/atr/public/press_releases/ 2009/245710.htm*. The withdrawal of this report appears to signal the Antitrust Division's intent to scrutinize and investigate unilateral firm conduct more closely. The recent string of Supreme Court rulings paring back cognizable antitrust claims under Section 2, which for now ends with **Linkline,** may be a headwind that it signals to those efforts. ■

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Chapter 75 Update

by Gonzalo E. Frias

The following is a summary of several notable cases that were decided in the last seven months by North Carolina state and federal courts interpreting North Carolina's Unfair and Deceptive Trade Practices Act, N.G.C.S. Section 75-1.1.

White v. Thompson, __ N.C. App. __, 676 S.E.2d 104 (2009).

In this case, the North Carolina Court of Appeals considered whether deceptive actions relating to a partnership dispute may be considered violations of the Unfair and Deceptive Trade Practices Act (UDTPA). In October 2000, the plaintiffs formed a partnership with a third individual in a welding business. The partnership then hired the third partner's father as an accountant to manage the partnership's accounting records. The plaintiffs alleged that the third partner was taking jobs independently instead of funneling the work through the partnership, while the third partner alleged that the plaintiffs were not available to take jobs. The plaintiffs left the partnership after disagreements over the partnership finances and after discovering that the third partner was operating independently under another business entity. In 2002, the plaintiffs sued the defendants for siphoning business from the partnership. Among the claims was an allegation that the defendants' acts constituted unfair and deceptive trade practices.

The jury at trial found that the third partner and the accountant breached a fiduciary duty resulting in damages of $138,195 and $750, respectively. The trial court then trebled the damages against both defendants. On appeal, the court held that the lower court erred by trebling the damage award against the third partner because the partnership dispute did not meet the "in or affecting commerce" requirement of the UDTPA. Breach of partnership duties did not amount to practices impacting the marketplace. The court held that the third partner's usurpation of business harmed the partnership, but had no affect on the broader marketplace. The court did find, however, that the accountant's services to the partnership and his actions were of a general business nature and may be considered unfair practices in or affecting commerce. Thus, the court affirmed the trebled damages award against the accountant.

Feeley v. Total Realty Management, No. 1:08cv1212, 2009 WL 2902505 (E.D.Va. 2009).

The United States District Court for the Eastern District of Virginia dealt with a choice of law issue in the context of the North Carolina UDTPA. The plaintiffs in this case were a large number of individuals, mostly from Virginia, who purchased overvalued land in North Carolina and South Carolina. The multiple defendants included a real estate firm and various banks involved in the land sale transactions.

The plaintiffs asserted that the real estate firm lured individual investors to invest in the unimproved land. They further alleged that the real estate firm colluded with the banks to defraud the investors. While most of the alleged misrepresentations occurred in Virginia, the property closings occurred in North Carolina and South Carolina. Among other claims, the plaintiffs sued under the North Carolina UDTPA. The court reasoned that the place of financial injury is the home state of the victims, where the alleged economic loss was sustained, not where the closings on the properties took place. The court held that since none of the plaintiffs were residents of North Carolina, none can maintain claims under the North Carolina UDTPA and dismissed the claims with prejudice.

Carcano v. JBSS, LLC, No. COA08 -1423, 2009 WL 3320275, (N.C. Ct. App. Oct. 06, 2009).

In this North Carolina Court of Appeals case, the court considered whether raising of capital falls within the scope of the UDTPA. The plaintiff invested in real estate with the defendant. The plaintiff alleged that he made the investments based on misrepresentations by the defendant. The defendant was obligated to set up an LLC for this purpose, but never did so. The appeals court held that raising of capital fails to meet the in or affecting commerce prong of the UDTPA because it does not affect commerce outside the dealings of the parties' limited business relationship and affirmed the dismissal of this claim.

Charlotte-Mecklenburg Hospital Authority v. Wachovia Bank, N.A., No. 08 CVS 27739, N.C. Business Court, Order on Def.'s Mot. Dismiss (Oct. 06, 2009).

The North Carolina Business Court addressed a similar question of whether raising of capital falls within the UDTPA. The plaintiff hospital system sued Wachovia Bank for allegedly mishandling millions of dollars it had entrusted to Wachovia to invest. The hospital system alleged that Wachovia failed to liquidate a certain investment not authorized under the original investing agreement. The hospital system classified the commercial relationship in terms of investment advice because all parties acknowledged that traditional securities transactions are beyond the scope of the UDTPA. In an order to dismiss, the court held that even unconventional securities transactions lie beyond the scope of the UDTPA and ruled in favor of the defendant, dismissing the unfair trade practices claim.

Henson v. Green Tree Servicing LLC, __ N.C. App. __, 676 S.E.2d 615 (2009).

In this case, the North Carolina Court of Appeals addressed the issue of whether a fraudulent act in the course of a business transaction is sufficient for a claim under the UDTPA if, in fact, the act did not produce damages to the plaintiff. The plaintiff purchased a mobile home from the defendant. In the lawsuit, the plaintiff alleged that the mobile home owner forged a signature on the sales agreement and that this constituted an unfair or deceptive act. The court found that the purported forgery of the plaintiff's name on the agreement was immaterial in light of the fact that the defendant provided a clear title and plaintiff took possession of the mobile home. Accordingly, the appeals court reasoned that the plaintiff received clear title and that no damages could be attributed to the act.

Noble v. Hooters of Greenville (NC), LLC, No. COA08-1144, 2009 WL 2601845 (N.C. Ct. App. Aug. 18, 2009).

In this case, the North Carolina Court of Appeals considered whether a restaurant has an inequitable assertion of power over patrons when serving alcoholic beverages and whether such act may be deceptive under the North Carolina UDTPA. The plaintiffs were patrons of the defendant restaurant who alleged negligence and violation of the UDTPA for being served 58 beers during a five-hour period. Plaintiffs further alleged that no employee of the restaurant attempted to prevent plaintiffs from driving home. On their way home, the driver lost control of the vehicle and as a result it flipped four times. Both plaintiffs sustained serious bodily injuries. The trial court dismissed the claims. On appeal, the court held that the defendant's conduct did not amount to an inequitable assertion of defendant's power over the plaintiff. Additionally, the court held that actions by the restaurant failed to have a capacity or tendency to deceive. The appeals court affirmed the trial court's dismissal of the case.

In a similar case, **Eason v. Cleveland Draft House, LLC**, No. COA08-684, 2009 WL 676951 (N.C. App. Mar. 7, 2009), the plaintiff alleged a violation of the UDTPA by defendant restaurant for serving stronger alcoholic beverages than recommended by industry standards. The North Carolina Court of Appeals held that, since the plaintiff had not alleged that the defendant misrepresented the amount of alcohol, the plaintiff's UDTPA claim failed and affirmed the lower court's motion to dismiss. ■

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