

# AntitrustConnect Blog

## Enforcers Update Spring Meeting Attendees on Latest Antitrust Developments

Jeffrey May (Wolters Kluwer) · Thursday, April 3rd, 2014

In case you missed some of those morning sessions at the American Bar Association Section of Antitrust Law Spring Meeting last week, here are some of the highlights from the updates with federal and state enforcers.

### Agency Update with the Deputy Assistant Attorneys General

There were some new faces on the panel this year at the Section's annual update from the Department of Justice Antitrust Division. In addition to changes in leadership, over the last year the Antitrust Division has seen an increase in hiring that will support its continued enforcement activities, the enforcers reported during the March 26 session.

David Gelfand and Brent Snyder are the newest deputy assistant attorneys general (DAAGs) at the Antitrust Division. Gelfand is the DAAG in charge of litigation, and Snyder is in charge of criminal enforcement. They were joined on the panel by returning DAAG panelists Renata B. Hesse, who oversees criminal and civil operations; Leslie Overton, who is in charge of civil enforcement; and Aviv Nevo, who is responsible for economic analysis.

Hesse shared some other recent organizational changes at the Antitrust Division with attendees. In the Field Offices, Marc Siegel is the new chief in San Francisco, Jeffrey Martino has taken the helm of the New York office, and Frank Vondrak is the chief of the Chicago office. Vondrak is replacing Marvin Price, who is now criminal enforcement director at the Antitrust Division. In Washington, Kristen Limarzi has been named the chief of the Appellate Section. Mary Strimel also has been named a section chief.

In addition, the Antitrust Division has hired a number of new attorneys and economists. Hesse noted that the rebuilding is occurring on civil and criminal sides. Both Overton and Snyder mentioned budgetary relief that has enabled them to hire the new lawyers.

Overton said that she has finished a first round of hiring and has extended offers to about a dozen lawyers. She also noted that there were plans to hire more junior lawyers to assist with civil enforcement. Staffing levels are still not back to where they were before the closure of a number of Field Offices, however.

As for economists, Nevo said that it was an incredible recruiting year. Five PhD economists were recently hired by at the Antitrust Division, according to Nevo.

Despite the organizational changes, the DAAGS suggested that there would be continuity at the Antitrust Division. The newest DAAGs said that they had no plans to make significant changes.

**Litigation efforts.** Gelfand, a former Cleary Gottlieb Steen & Hamilton LLP partner, said that when he joined the Antitrust Division last year, he was impressed by agency's tremendous capacity to investigate and litigate cases. He noted that five cases were going on at the same time as the Antitrust Division's challenge to Bazaarvoice's consummated acquisition of PowerReviews.

On the topic of the US Airways/American Airlines merger, Gelfand described the pending consent decree resolving the government's antitrust concerns as a "fantastic settlement" that was "earned through difficult litigation." He pointed out that the settlement calls for a very significant divestiture of assets that was the largest ever in the airline industry.

**Criminal enforcement.** "The Antitrust Division has been trying more criminal cases and we're winning most of them," said Snyder, who took over criminal enforcement at the Antitrust Division in November. He discussed key criminal trials over the past year. The government obtained convictions in two out of the three.

In a case against a former project manager for a contractor at designated Superfund sites in New Jersey, Gordon McDonald was convicted in September 2013 on 10 counts of a 12-count indictment and was sentenced recently to 14 years in prison. In a second case, two real estate investors—Andrew B. Katakis and Donald M. Parker—were found guilty of conspiring to rig bids at public real estate foreclosure auctions, but an auctioneer—W. Theodore Longley—who was charged with participating in the conspiracy was acquitted by the same jury in Sacramento. The jury deadlocked on a count of mail fraud against the investors, as well. Lastly, an AU Optronics Corporation executive, Richard Bai, was acquitted by a jury of helping to implement a conspiracy to fix the prices of thin-film transistor-liquid crystal display (TFT-LCD) panels last October.

Snyder pointed out that two of the cases involved purely domestic cartel activity. He reminded attendees that the Antitrust Division continues to actively pursue domestic cartel conduct and that there is a variety of other domestic investigations currently ongoing, such as the muni bonds investigation.

**Comcast-TWC merger.** Looking ahead, Hesse said that the Antitrust Division was closely coordinating with Federal Communications Commission on the review of the combination of Comcast and Time Warner Cable. She said to expect the same high level of coordination that has taken place in past deals involving the communications industry.

Details of these and other developments are included in the Antitrust Division's just-released annual [newsletter](#).

### **Briefing with State Enforcers**

On March 27, a panel of state enforcers discussed the latest state antitrust enforcement developments. They highlighted multi-state actions taken with the federal agencies, as well as some actions brought by individual states. Victor J. Domen, Jr., Senior Antitrust Counsel at the Tennessee Attorney General's Office, moderated the panel.

**E-books case.** Connecticut Assistant Attorney General Joseph Nielsen provided an update on one of the most significant victories for state enforcers over the last year—the multi-state e-books case

against Apple Inc. The Department of Justice and 33 plaintiff states jointly sued Apple for engaging in a conspiracy with the major publishers to fix retail prices for e-books. Last year, after a 12-day bench trial over the course of three weeks, the federal district court in New York City concluded that Apple violated federal and state antitrust laws. A [final judgment and permanent injunction](#) was imposed on Apple.

The states are pursuing damages against the company. Nielsen, who served as a trial attorney in that matter, said that a damages trial (which does not involve the Justice Department) will not be held in May, as previously anticipated. It is more likely that the damages trial will take place in the summer, although no new trial date has been set. After the damages trial, the court may consider the states' requests for civil penalties.

Apple has appealed the final judgment and injunction. A response from the states and Justice Department is due at the end of May. Apple has raised a number of interesting arguments, in the case, including a challenge to the constitutionality of Section 4C of the Clayton Act, Nielsen noted. Section 4C authorizes states to sue as *parens patriae* on behalf of their citizens for federal antitrust violations.

**US Airways/American Airlines merger.** Pennsylvania Senior Deputy Attorney General Jennifer Thomson discussed the federal/state challenge to the combination of US Airways and American Airlines. Thomson was one of the lead counsel for the states in matter.

Last November, the Department of Justice and the attorneys general of six states and the District of Columbia reached a [proposed settlement](#) that would resolve their challenge to the merger that would create the world's largest airline. Thomson explained that the settlement's divestiture obligations will facilitate entry low cost carriers and create more network opportunities.

As part of the settlement with the states, the new American will maintain historic hubs for three years. Additionally, there was an agreement to serve small airports for five years. Because hubs have been abandoned after other airline mergers, Thomson noted that Pennsylvania made these state-specific remedies enforceable by court order.

**Health care acquisitions.** Thomson also discussed the efforts of the State of Idaho, along with the FTC and private plaintiffs, to successfully challenge St. Luke's Health System, Ltd.'s acquisition of Saltzer Medical Group. Earlier this year, the federal district court in Boise [ordered](#) St. Luke's—the largest health care system in Idaho—to divest Saltzer—the state's largest independent, multi-specialty physician practice—after concluding that the 2012 acquisition violated Section 7 of the Clayton Act and the Idaho Competition Act.

Thomson also touched on a recent health care acquisition challenge in her own state. Last year, healthcare provider Geisinger Health System Foundation agreed to settle the state's challenge to its acquisition of Lewistown Health Care Foundation and its affiliates. The state had alleged that the transaction was “likely to substantially lessen or eliminate competition in the provision of primary care physician services and primary and secondary inpatient acute care hospital services in Mifflin and Juniata Counties.”

**AU Optronics decision.** Also highlighted during the panel was the state enforcement victory in the U.S. Supreme Court's decision in *Mississippi v. AU Optronics Corp.* Natalie Manzo, Supervising Deputy Attorney General in the Office of the California Attorney General, explained that the case is significant because it reaffirms states' *parens patriae* authority, which is an important means for

obtaining consumer relief. In that price fixing action filed by the State of Mississippi, the High Court ruled that the suit was not a “mass action” under the Class Action Fairness Act, even though the state sought restitution for injuries suffered by its citizens, as the defending manufacturer argued. The Court concluded that the case had to be remanded to state court.

**Other state cases.** Manzo discussed some recent California-specific developments. First, California has sued eBay for entering into no-solicitation and no-hire agreements with Intuit between 2006 and 2010. Manzo explained that the case against eBay is important to California because the state has strong interest in employee mobility and in the technology sector.

Also discussed were actions against two apparel manufacturers for gaining an unfair competitive advantage over American companies by using pirated software in the production of clothing imported and sold in California. The cases, one against an [Indian company](#) and the other against a [Chinese company](#), were filed under California’s unfair competition law as they involved unilateral conduct. The state is seeking an injunction to prevent the foreign companies from bringing goods into California until the companies are in compliance with the software licensing requirements.

Nielsen also weighed in with a discussion of Connecticut’s challenge to a group boycott and bid rigging conspiracy in the snow plowing industry. The challenged conduct took place after the Town of Southbury decided to put its snow removal work out to bid and seek competitive rates. Earlier this year, three snow removal companies agreed to settle the state’s allegations over their conduct with respect contracts for snow removal. Nielsen noted that the settlement involved unique affirmative relief because the services agreed to work at pre-bid prices. He also lauded the state’s efforts to acquire evidence of the conspiracy contained in electronic communications between the providers.

### **Agency Update with the FTC Bureau Directors**

On the final day of the meeting, the directors of the FTC’s Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics provided an update on the agency’s latest antitrust and consumer protection enforcement and policy initiatives. All three were speaking at the annual FTC bureau director update session for the first time. Each was appointed to his or her post within the last year.

Bureau of Competition Director Deborah Feinstein discussed some major merger cases. She noted the FTC’s challenge to Ardagh Group S.A.’s proposed \$1.7 billion acquisition of Saint-Gobain Containers, Inc. over its impact on markets for glass containers supplied to distillers and brewers. Also highlighted was the agency’s challenge to St. Luke’s Health System, Ltd.’s acquisition of Saltzer Medical Group in Idaho. In January, the federal district court in Boise ordered St. Luke’s—the largest health care system in Idaho—to divest Saltzer—the state’s largest independent, multi-specialty physician practice.

Feinstein also noted an administrative action against two leading suppliers of propane exchange tanks that was just [announced](#) a day earlier. The FTC filed an [administrative complaint](#) against the companies behind the Blue Rhino brand and the AmeriGas brand, alleging that they illegally coordinated on reducing the amount of propane in their tanks sold to a key customer.

Looking ahead, challenges to pay-for-delay settlements will remain a high priority for the Competition Bureau, Feinstein noted. Bureau of Economics Director Martin Gaynor reinforced Feinstein’s point on the continued focus on pay-for-delay. “This is something that has been

brewing for a very long time,” he said.

Feinstein has issued a [Spring 2014 director’s report](#) detailing the latest developments.

Gaynor also explained the role of the Bureau of Economics in two significant actions. He highlighted the significant contributions made in the St. Luke’s case that is now on appeal to the Ninth Circuit. On the consumer protection side, the Bureau of Economics provided substantial assistance in the case against Apple Inc. for allegedly charging consumers for in-app purchases incurred by children without their parents’ consent.

**Consumer protection.** Bureau of Consumer Protection Director Jessica Rich talked about four themes guiding her bureau. The Consumer Protection Bureau is focusing on protecting consumers as the nation goes mobile. Other priorities include protecting consumers from the harmful uses of big data and targeting gatekeepers and facilitators that enable fraud to occur, such as affiliate marketers, robocallers, and paid endorsers. The Bureau is also working to protect diverse consumer groups, such as the elderly and foreign-language-speaking individuals. These areas will continue to be major themes in the coming year.

Rich advised attendees to watch for more cases enforcing the privacy framework, known as the U.S.-EU Safe Harbor, that enables U.S. companies to transfer consumer data from the European Union to the United States. The agency has already brought about a dozen cases in this area. In closing, Rich also reminded technology businesses and their lawyers that the same consumer protection rules apply across industries and technologies, including mobile platforms.

**Administrative issues.** The bureau directors also announced some administrative and personnel news. The Premerger Notification Office is moving on April 28. The offices will move to the 5th floor of the Constitution Center. A number of changes at the management level in the bureaus over the last year also were noted. Among those personnel changes in the Bureau of Competition was the appointment of Stephen Weissman, who joined the FTC in 2013 as a deputy director. At the Consumer Protection Bureau, Katherine Fallow recently joined as deputy director from Jenner & Block, according to Rich.

## **Enforcers Roundtable**

A number of the cases touched on during these updates were highlighted by Bill Baer, Assistant Attorney General in charge of the Antitrust Division, and FTC Chairwoman Edith Ramirez at the enforcers roundtable that closed the conference.

Baer told attendees that the investments made in antitrust enforcement are paying off. One example of consumer benefit from antitrust enforcement is the drop in prices for e-books following the government’s case against Apple for engaging in a *per se* illegal price fixing conspiracy with book publishers, Baer said. The antitrust chief also pointed to the Antitrust Division’s success at trial in its challenge to Bazaarvoice’s consummated acquisition of PowerReviews. The Justice Department brought the case because the \$190 million transaction looked like a merger to monopoly, Baer noted. The case shows that antitrust concepts are applicable in high tech markets. A decision on the remedy has not yet been rendered.

Baer also reassured attendees that the Antitrust Division remains focused on domestic cartels. Despite the attention paid to international cartels by the media, half of the Antitrust Division’s cartel cases filed over the last five years involved domestic cartels, Baer explained. The antitrust

chief pledged to remain committed to investigating state, local, and regional anticompetitive conduct.

Baer hopes that some recent success in a trial in Sacramento against two real estate investors found guilty of conspiring to rig bids at public real estate foreclosure auctions will serve as a warning to auction participants who contemplate defrauding banks and homeowners.

Ramirez noted the FTC's collusion action against the suppliers of Blue Rhino and AmeriGas propane exchange tanks. On the merger front, Ramirez mentioned the FTC's win in the agency's challenge to St. Luke's Health System, Ltd.'s acquisition of Saltzer Medical Group physician practice.

"We feel strongly that the antitrust laws are compatible with the Affordable Care Act," Ramirez said in response to questions about the potential conflict between the ACA and antitrust laws identified in the St. Luke's case. The parties in the St. Luke's matter had argued that the transaction was in line with the policy objectives of the ACA.

In addition, Ramirez provided an update on the agency's study of patent assertion entities (PAEs), under the agency's FTC Act section 6(b) authority. The agency has received comments from a wide-range of stakeholders, the chairwoman said. The FTC is also getting feedback from the Department of Justice. The study needs to go through another round of comment. Once the study has been approved by the Office of Management and Budget, the FTC can consider issuing compulsory process orders seeking information from the PAEs.

The FTC's accomplishments that were highlighted at the meeting also were made available in an [annual report](#) released by the agency.

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