

# Antitrust Enforcement and Compliance: A Global Perspective

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# Agenda

- Overview
- EC Cartel Enforcement
- Case Study - In re Vitamins Antitrust Litigation
- Managing Private Antitrust Litigation
- The New Administration and the Economic Downturn
- Overview of Merger Review Process
- Recent Merger Activity at the US Enforcement Agencies
- Questions?

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# EC's Current Overall Enforcement Results

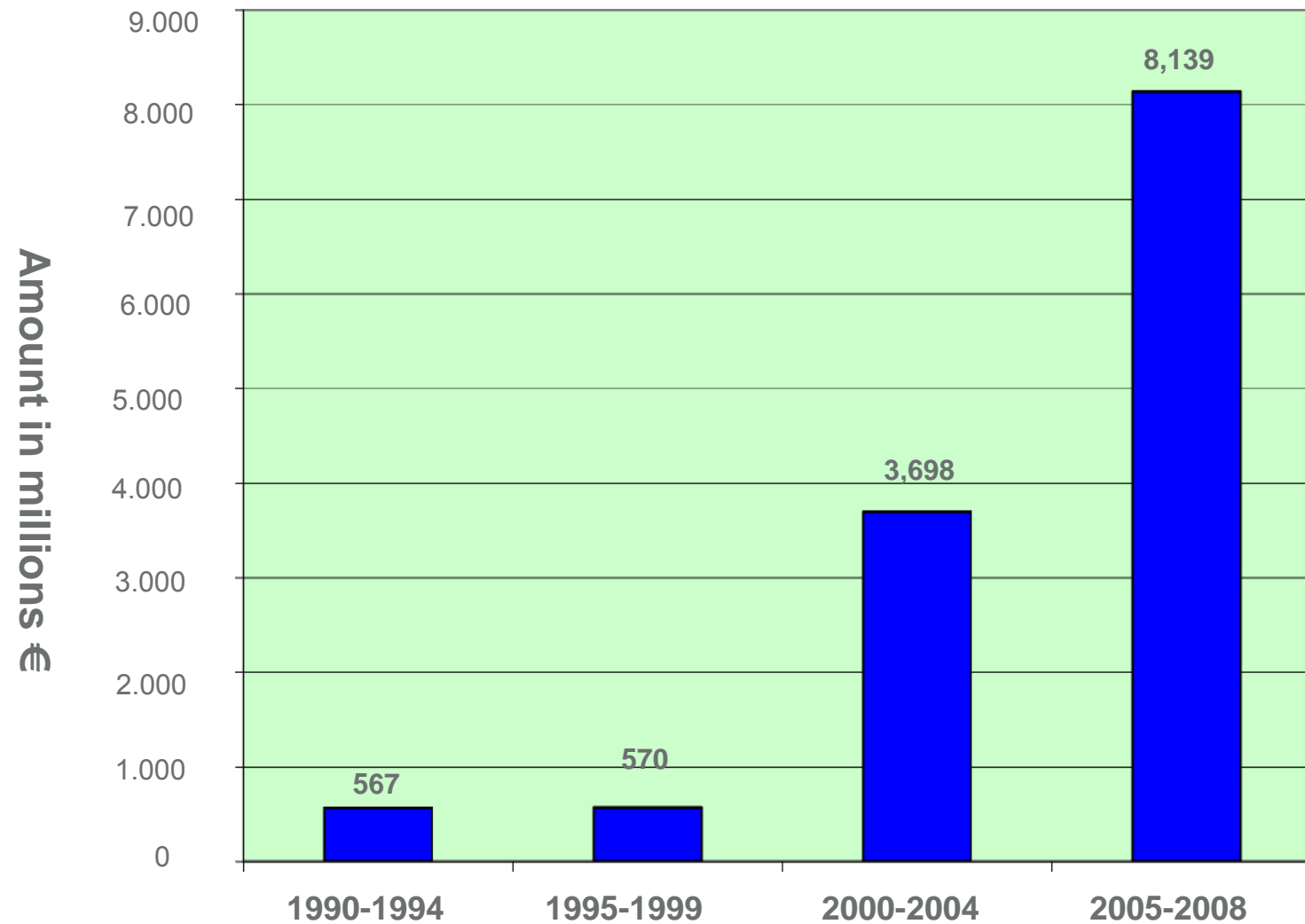
- Powerful Investigatory Tools
  - Dawn raids
  - Compulsory requests of information
  - Leniency applications
  - Ex-officio economic research (oligopolies)
- Successful EC Leniency Program for Corporations
  - For amnesty or reductions, the EC is demanding upfront evidence which brings significant added value to the proceedings
  - Better quality decisions, normally upheld by the EC Courts, result in higher fines and more deterrence – *vicious circle* (see next slides for examples).
- Coordination between DG COMP and 27 Member States
  - Has led to multiplication of efforts
  - Harmonized leniency policy throughout EU (role of the ECN)

## Cartel Fines 1990-2008

Year	Amount in €*
1990-1994	€566,691,550
1995-1999	€569,886,000
2000-2004	3,697,516,100
2005-2008	8,139,075,100
<b>Total</b>	<b>12,973,168,750</b>

\* Not corrected per Court Judgments

# Cartel Fines 1990-2008



## Ten Highest Cartel Fines Per Case (since 1969)

<b>Year</b>	<b>Case Name</b>	<b>Amount in €* </b>
2008	Car Glass	1,383,896,000
2007	Elevators and escalators	992,312,200
2001	Vitamins	790,515,000
2007	Gas insulated switchgear	750,712,500
2008	Candle waxes	676,011,400
2006	Synthetic rubber (BR/ESBR)	519,050,000
2007	Flat glass	486,900,000
2002	Plasterboard	458,520,000
2006	Hydrogen peroxide and perborate	388,128,000
2006	Methacrylates	344,562,500

\*Amounts corrected for changes following judgments of the CFI and ECJ.

# EC's Current Overall Enforcement Results

- EC Settlement Program
  - Separate, although ancillary to Leniency Program
  - Potential additional 10% discount if company's cooperation facilitates administrative process
  - Not a Classical Negotiation Scenario
    - EC will have enough evidence (and/or readily provable evidence)
    - EC initial position: "Take it or leave it"
    - Ability to establish trust and good working relationships will be essential
  - But discussion on e.g., duration, parental liability & range of fines



# Differences between EC & US Enforcement

## US

- Criminal
- Prosecutor (DoJ)
- Corporations + individuals
- Fostering quick race and outcome (plea bargaining)
- Strong discovery culture
- Plea bargaining

## EC

- Administrative
- Decision-maker (EC)
- Corporations
- Full and lengthy investigation (principle of equal treatment)
- Aversion to discovery
- No plea bargaining, but settlement, and no requirement to waive right of appeal

- EC Cartel enforcement inspired by the US, but with significant legal and enforcement differences which need to be understood in order to successfully coordinate.
- Lawyers and corporations must understand the differences and coordinate US/EC to minimise risks and benefit from existing opportunities.

# International Cartels: Need for Coordination

- It is essential to manage time and scope of provision of evidence against company before DoJ and DG COMP
- EC procedure/policy aims to prevent foreign courts discovering information submitted under EC leniency/settlement programs
- As a result, in parallel cartel cases (EC/US) lawyers must be aware of how and when EC/US enforcement processes can influence each other
- Therefore, it is important to:
  - Manage information: when/how it is disclosed for civil and criminal proceedings (US)
  - Be aware of the need for sophisticated coordination if investigation results from coordinated raids and information is limited
  - Consider Other Issues: differences across the EU; e.g. Germany - has no leniency program for allegations of bid rigging

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# Snapshot of the Proceedings

- Allegation: Bulk vitamin cartel from 1990-98
  - Vitamin use in animal feed and human consumption
  - Nature of cartel
- DOJ launched investigation in 1997
- Plaintiffs filed direct and indirect actions in federal and state courts around the country
- Certain defendants cooperated, others agreed to plead guilty in 1999
- Government levied fines of over \$875 MM in US, €855 in Europe
- Civil settlements exceeded the fines

## How Initiated?

- Customer complaints, particularly in oligopolies
- Started with grand jury investigation of other food additive products, like lysine, citric acid and high fructose corn syrup
  - Government interviews: March 1997 citric acid interview of Roche's Dr. Kuno Sommer

# Trash Talking

IN THE UNITED STATES DISTRICT COURT		<div style="border: 1px solid black; padding: 5px; text-align: center;"><b>FILED</b> <b>MAY 20 1999</b> RANCY DOWNEY, CLERK BY <u>T. Shuten</u> Deputy</div>
FOR THE NORTHERN DISTRICT OF TEXAS		
UNITED STATES OF AMERICA	)	
v.	)	
DR. KUNO SOMMER	)	Criminal No. <u>3:99-CR-201-R</u>
	)	Filed:
Defendant.	)	Violation: 15 U.S.C. § 1
	)	18 U.S.C. § 1001
	)	Judge:

## PLEA AGREEMENT

The United States of America and Dr. Kuno Sommer, the defendant, hereby enter into the following Plea Agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

## RIGHTS OF DEFENDANT

1. The defendant understands his right:
  - (a) to be represented by an attorney;
  - (b) to be charged by Indictment;
  - (c) to be charged, as to each offense, in the District where the offense occurred;
  - (d) to plead not guilty to any criminal charges brought against him;
  - (e) to have a trial by jury, at which he would be presumed not guilty of the charges against him and the United States would have to prove him guilty beyond a reasonable doubt;
  - (f) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

# Trash Talking - 2

(d) Substantial quantities of vitamins affected by this conspiracy were sold by Roche and other conspirators to customers in the Northern District of Texas.

## **COUNT TWO** **18 U.S.C. § 1001**

5. Had this case gone to trial, the United States would have presented evidence to prove the following facts:

(a) on or about March 12, 1997, the defendant appeared for an interview by law enforcement officials of the United States Department of Justice, Antitrust Division, who were investigating a matter within the jurisdiction of the United States Department of Justice, a department of the United States;

(b) on or about March 12, 1997, the defendant did knowingly and willfully make and cause to be made false, fictitious and fraudulent statements and representations as to material facts to law enforcement officials in a matter within the jurisdiction of the United States Department of Justice, a department of the United States;

(c) on or about March 12, 1997, the defendant stated and represented to law enforcement officials of the United States Department of Justice, Antitrust Division, that: there was no conspiracy among the world's leading vitamins manufacturers, including his own corporate employer, Roche; that the defendant had never participated in meetings, conversations, or agreements to fix, increase, and maintain prices, or allocate sales volumes of, or customers for, certain vitamins with any representative of any other manufacturer of vitamins. The defendant stated and represented that he was not aware of any meetings or

conversations among other representatives of Roche and any other vitamin manufacturer relating to any agreements or conspiracy to fix, increase, or maintain prices, or allocate sales volumes and customers in the vitamin industry;

(d) in truth and in fact, the defendant then and there knew that he, and other employees of Roche, had regularly communicated and met on at least a quarterly basis with competitors, and discussed and agreed to fix, increase, and maintain prices, allocate volumes of, and customers for, certain vitamins manufactured by the defendant's employer, Roche, and its corporate co-conspirators, which products were sold in the United States and elsewhere.

## **POSSIBLE MAXIMUM SENTENCE**

6. The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of:

- (a) the Sherman Antitrust Act (15 U.S.C. § 1) charged in Count One is:
  - (i) a term of imprisonment for three (3) years (15 U.S.C. § 1);
  - (ii) a fine in an amount equal to the greatest of (1) \$350,000 (15 U.S.C. § 1), (2) twice the gross pecuniary gain derived from the crime, or (3) twice the pecuniary loss caused to the victims of the crime (18 U.S.C. § 3571(d)); and
  - (iii) a mandatory term of supervised release of not more than one (1) year following any term of imprisonment. If the defendant violates the conditions of supervised release, the defendant could be imprisoned for the entire term of supervised release (18 U.S.C. § 3583(b)).
- (b) the False Statements Statute (18 U.S.C. § 1001) charged in Count

# Smile, You're On ....

- *Lysine*: Secret Tapes





# Direct Evidence Of Agreement: Scorecards Per Se Offense – No Excuses

## Lysine Scoresheet

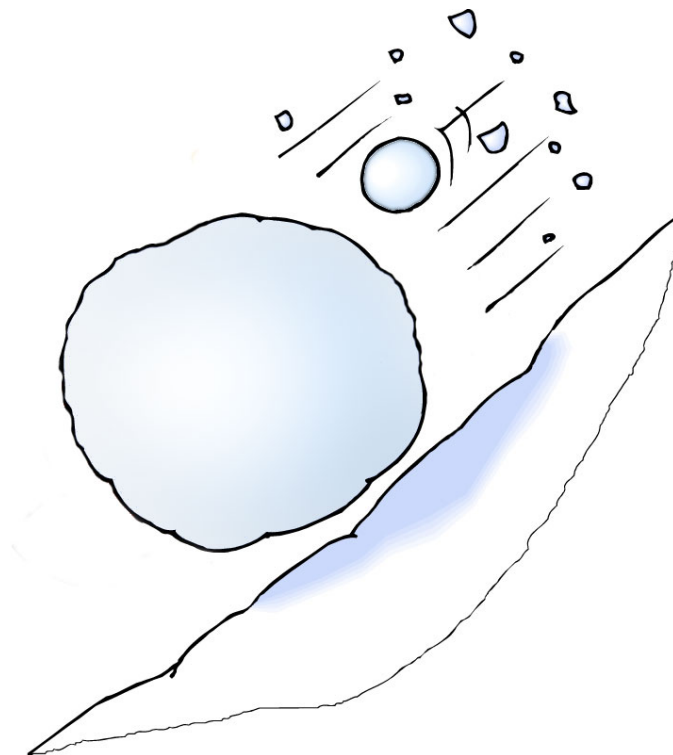
		1994/1-12																Share (%)	Progress (%)
		Budget		Sales Results															
		Qty	Share	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.	Total	Share (%)	Progress (%)	
N.America	AJWOR	17,900	26.1%	1,503	1,095	1,518	1,488	1,751								7,353	25.0%	41%	
	ADM	28,800	42.0%	2,568	2,177	2,566	2,438	2,872								11,851	40.3%	41%	
	K	15,000	21.9%	1,350	1,072	1,432	1,395	1,586								8,755	23.0%	45%	
	M	6,800	9.9%	840	587	497	830	826								3,380	11.5%	80%	
	CSA	0		0	34	0	34	0								68	0.2%	SDR/01	
	Others	0														0			
L.America	AJWOR	3,300	14.3%	89	245	405	298	509								1,544	17.2%	47%	
	ADM	6,500	26.3%	558	409	413	412	516								2,307	25.7%	35%	
	K	11,500	50.0%	829	777	1,125	852	1,116								4,699	52.3%	41%	
	M	1,700	7.4%	170	51	17	123	68								429	4.8%	25%	
	CSA	0		0	0	0	0	0								0		SDR/01	
	Others	0														0			
Europe	AJWOR	43,800	47.7%	2,835	2,404	3,183	2,882	3,821								14,105	42.7%	32%	
	ADM	18,000	19.7%	1,107	1,290	1,042	1,078	1,398								5,913	17.9%	33%	
	K	10,800	11.8%	1,158	812	1,014	887	850								4,801	14.5%	45%	
	M	10,200	11.2%	711	1,031	818	773	868								4,301	13.0%	42%	
	CSA	9,000	9.8%	897	797	745	748	753								3,940	11.9%	44%	
	Others	0														0			
Asia, Oceania, etc.	AJWOR	20,400	31.4%	2,037	2,573	1,889	1,879	1,878								10,154	34.8%	80%	
	ADM	13,200	20.3%	1,124	1,372	1,242	887	855								6,280	18.1%	40%	
	K	8,300	12.8%	377	1,108	527	852	477								3,141	10.8%	38%	
	M	15,100	23.2%	1,528	1,198	1,742	1,280	1,813								7,341	25.2%	48%	
	CSA	8,000	12.3%	818	595	705	703	840								3,282	11.2%	41%	
	Others	0														0			

		1994/1-12																Share (%)	Progress (%)
		Budget (Yearly)		Sales Results															
		Qty	Share	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.	Total	Share (%)	Progress (%)	
Total	AJWOR	84,000	33.9%	6,484	6,317	6,995	6,423	6,957								33,156	33.0%	38%	
	ADM	87,000	27.0%	5,357	5,247	5,313	4,585	4,839								25,351	25.2%	36%	
	K	48,000	18.5%	3,714	3,789	4,098	3,888	3,948								18,398	18.3%	42%	
	M	34,000	13.7%	3,249	2,867	3,174	3,086	3,075								15,451	15.4%	45%	
	CSA	17,000	6.9%	1,518	1,426	1,450	1,485	1,383								7,270	7.2%	43%	
	Others	0		0	0	0	0	0								0		41%	
Total		248,000	100.0%	20,298	19,829	21,800	19,455	20,213								100,824	100.0%		

		Budget (Monthly)																Share (%)	Progress (%)
		Qty		Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep.	Oct.	Nov.	Dec.	Total	Share (%)		
Total	AJWOR	7,000		92.3%	90.2%	98.9%	91.8%	99.4%								38.5%			
	ADM	5,583		85.9%	84.0%	85.2%	82.3%	86.7%								37.8%			
	K	3,833		86.9%	88.3%	108.9%	100.9%	103.0%								42.2%			
	M	2,833		114.7%	101.2%	112.0%	108.9%	108.5%								48.4%			
	CSA	1,417		107.0%	100.7%	102.4%	104.8%	98.3%								42.8%			
	Others	0																	
Total		20,867		96.2%	95.0%	101.8%	94.1%	97.8%								48.6%			

# Picking Up Speed

- More tools under the Patriot Act
- Increasing amnesty/leniency applications



# What's Left?

- Guilty pleas became *prima facie* evidence of liability
- What was left?
  - Affected plaintiffs
  - Affected defendants
  - Scope of conspiracy
  - Fact and amount of damages
- These were the remaining subjects for the civil litigation

# Additional Complications: Defending the Action

- Traditional civil litigation, but typically brought by your customers
  - Costs to company
  - Customer relations issues

# Global Impact

- Proliferation of actions
  - Cooperation among enforcement agencies
  - Filing of civil actions in Canada and Europe
  - Filing of civil actions here based upon European law

## *Empagran*: The Internationalization of Civil Actions

- District Court dismissed due to lack of subject matter jurisdiction (2001)
- Court of Appeals reversed and refused to rehear en banc (2003)
  - Jurisdiction conferred for claim if damage occurred to *someone* in the US
- Supreme Court granted certiorari and vacated Court of Appeals's decision – Steve Shapiro argued for all defendants (2004)
  - Government Amici: develop national law

# Mission Creep

- Development of national law has encouraged plaintiffs' lawyers to establish offices in Europe
- Our colleagues in Europe have developed substantial expertise in the area

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# Civil Litigation in the U.S.: Ground Rules

- Private Right of Action has existed since 1890
  - Automatic Treble Damages
  - Plaintiff's Right to Attorneys Fees
- Amnesty can limit private damages to single damages
  - Antitrust Criminal Penalty Enhancement and Reform Act of 2004, H.R. 1086
- Class Actions are permitted
- Suits may be commenced in both federal and state courts
  - Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332

# Civil Litigation in the U.S.: Ground Rules

- Indirect purchasers may not sue under federal law but may sue under the laws of about half the states
  - *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 (1977)
- Non-US claimants may not sue under US law unless injured by something injuring US competition
  - Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), 15 U.S.C. § 6a
  - *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)
- May non-US claimants sue in the US under non-US law?

# Civil Litigation in the U.S.: Today's Three-Ring Circus

- “Shoot first; ask questions later.” Complaints begin to be filed at the first disclosure.
- “Off to the races”
  - Direct purchaser actions
  - Indirect purchaser actions
  - State court actions
  - States suing as *parens patriae*
  - States suing for injury to the state economy
  - States suing for injury to themselves

# Civil Litigation in the U.S.: Today's Three-Ring Circus

- U.S. plaintiffs suing under U.S. law
- Non-U.S. plaintiffs suing under U.S. law
  - *Empagran*
- Non-U.S. plaintiffs suing under non-U.S. law
  - Jurisdiction
  - Comity
  - Forum Non Conveniens

# Civil Litigation in the U.S.: Juggling Both Civil and Criminal Exposure

- Tension between civil litigation and criminal enforcement
  - Plaintiffs typically demand copies of subpoenas served by government enforcers and copies of everything produced to government enforcers
  - Enforcers commonly object to conducting depositions in private litigation while grand juries are still convened
  - Amnesty enrollees have duty to cooperate

**Meanwhile,**

**What is happening with private  
litigation in Europe?**

**Are “Class Actions” In The EU Fact  
Or Fiction?**

# EU Support for Private Litigation

- Damages actions not yet part of the “culture”
  - Obstacles
  - Lack of incentive
- But the environment is changing
  - EU/UK legislative proposals
  - Global antitrust co-operation/leniency

# EU Support for Private Litigation: Current Position

- Commission comparative study 2004
- Similar lack of actions in other EU jurisdictions
- No EU-wide consistency in approach; variety of obstacles
- *Manfredi* holding: conditions for exercise of right to claim damages for breach of EU competition law to be determined by national rules



# EU Support for Private Litigation: Increased Emphasis On Private Enforcement

- Commission Green Paper 2005
  - *“Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy”*
  - Aims:
    - To stimulate debate
    - To increase effectiveness of right to claim damages for breach of EU competition law

# EU Support for Private Litigation: Increased Emphasis On Private Enforcement

- White Paper – 2008
- “A competition culture, not a litigation culture”

# EU Support for Private Litigation: Increased Emphasis On Private Enforcement

- EU Competition Commissioner Neelie Kroes:
  - The goals of reform will be to 1) compensate victims and 2) deter future anticompetitive activity. (European Report, 9.3.07)
  - At present “many injuries are left uncompensated,” a situation “unjust, incompatible with our Community law, and at odds with our shared competitiveness objectives.” (Id.)
  - Proposals to come will be based on “truly European solutions” and “grounded in our European legal traditions and cultures.” (IHT 19/03/07)
  - She’ll consider *double* damages, “but only if it’s proven that single damages aren’t enough to get the victims to court.” (Id.) *Treble* damages are out of the question.
  - Consumer interest groups will be the preferred claimants: “This kind of representative action empowering groups that truly represent the interests of consumers is closer to the heart of European traditions.” (Id.)

# Influence of U.S.: Efforts to Export “U.S.-Style” Litigation

- THE YANKEES ARE COMING, THE YANKEES ARE COMING!
- U.S. lawyers are scouring Europe for allies and alliances
  - Michael Hausfeld recently opened a London office to pursue, among other things, cartel enforcement. He talks of a “crusade to export America’s legal system around the world.” (Legal Week 5/4/07)
  - Schiffrin & Barroway last year cemented a strategic alliance with Winheller Attorneys at Law, a Frankfurt firm. (Id.)
  - Lawrence G. Scarborough of Bryan Cave says European businesses must be prepared for US plaintiff-side lawyers. (Wary Europe Moves Closer, National Law Journal 12/5/06)

*“a crusade to export America’s legal system  
around the world”*

Michael Hausfeld

# So, How to Manage Private Litigation in the New Global Environment?

- **Class Actions** – How to defeat certification
- **Indirect Purchasers** – How to disqualify remote claimants
- **Damages** – How to exclude experts and defeat damages claims
- **Jurisdiction** – How to exclude foreign claimants
- **Attorney Fees** – How not to pay them

# Class Actions

- How to defeat class certification
  - Ensure that the forum is as favorable to the defendant as possible
    - Removal to federal court
    - File motions to transfer
  - Seek early dismissal of the class petition
  - Limit or bifurcate discovery
    - Postpone expensive merits discovery until after class certification phase
  - Qualify appropriate experts
    - E.g., economists, statisticians, law professors

# Indirect Purchasers

- **How to disqualify remote claimants**

- Move the class action to federal court (e.g., CAFA)

- *Illinois Brick Co. v. Illinois* held that only direct purchasers from a manufacturer are “injured” in their business or property within the meaning of Section 4 of the Clayton Act

- Applies even if direct purchasers passed an illegal overcharge on to consumers (indirect purchasers) of the product

- In most cases, consumer class actions do not overcome the *Illinois Brick* hurdle



# Damages

- **How to exclude experts and defeat damage claims**

- Section 4 of the Clayton Act provides that persons injured “in [their] business or property by reason of” an antitrust violation may recover three times their damages.
- Settle early with potential class members
  - Offer fair compensation to those injured by an adjudicated antitrust violation
- Limit private damages to single damages through the DOJ amnesty program – seek amnesty as soon as a violation is detected

# Jurisdiction

- **How to exclude foreign claimants**
  - Preclude foreign claimants not injured as a result of a violation injuring U.S. competition
    - *Empagran*
    - Foreign Trade Antitrust Improvements Act of 1982 (“FTAIA”), 15 U.S.C. § 6a
    - Defeating claims under non-U.S. laws
      - *Air Cargo*

# Attorneys' Fees

- **How not to pay them**

- Trial by a follow-on plaintiff involves not a matter of whether the defendant is liable, but only whether the class members are injured, and if so, how much should be awarded.
- Settle directly with customers prior to initiation of a Complaint
  - Several jurisdictions preclude defendants from communicating with potential class members once a Complaint is initiated – effectively guaranteeing that any settlement will involve payment of attorneys' fees
  - Most courts hold that a defendant may communicate with and settle claims of potential class members prior to class certification

Victimized?

What if Your Company is a Victim?

# What if Your Company is a Victim?

## Key Questions are:

- How to investigate?
- Where to complain?
- Whether to sue?
- Where to sue?
  - Potential recovery
  - Attorneys' fees
  - Exposure to pass-on claims

# What if Your Company is a Victim?

- What if there is already a representative lawsuit?
  - Whether to retain separate counsel?
  - Whether to opt out?
  - Whether to settle?
    - Money
    - Other consideration

# What if Your Company is a Victim?

- Where to recover?
  - Amount
  - Attorneys' fees
  - Exposure to pass-on claims
  - Tax implications

# What if Your Company is a Victim?

- Wisdom of suing a supplier
- Alternative dispute resolution



# Conclusion

**Global Issues + Global Enforcement + Amnesty +  
E-Discovery + Shrinking U.S. Jurisdiction =  
Global Litigation**

**Key: Managing vs. Reacting**

## One more thing...

- In tough economic times, there is a greater temptation to engage in unilateral conduct to foreclose competitors
  - Exclusive dealing, tying, bundling
  - Refusals to deal or license
  - Predatory pricing
- Remember: The antitrust laws are not suspended during recessions

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# At This Moment in History There Are Two Drivers of Antitrust Enforcement

1. New Antitrust Leadership at DOJ & FTC
2. Realities of Economic Downturn

# New Leadership

- Generally Antitrust Is Not Political
  - This Election Is Different
  - DOJ's 2001-09 Enforcement Record Was Weak
    - No Monopolization Cases
    - Very Few Merger Cases
    - Good Cartel Enforcement, But . . .

## New Leadership: What Can We Expect?

- President Obama Campaigned On Antitrust Policy
- AAG – Designate Varney Has An Enforcement Record
- Lack of Enforcement Over Eight Years Means Major Changes

# New Leadership: What Can We Expect?

- Potential Limitations
  - Courts, Including The Supreme Court, Have Moved Illegality Pendulum Dramatically
  - Economic Crises May Temper Aggressive Enforcement on Some Issues

# New Leadership: New Enforcement?

- Monopolization Will Be Investigated
  - DOJ Section 2 Report Will be Withdrawn
  - DOJ-FTC Collaborative Approach
  - Dominant Firm Not Given Benefit of Doubt



# New Leadership: New Enforcement?

- Monopolization: Likely Targets
  - Financial Institutions
  - Pharmaceuticals
  - Standard Setting
  - Tying and Bundling

# New Leadership: New Enforcement?

- Mergers
    - President Obama: “Step Up Review of Merger Activity.”
    - Backlash from Bush Policies
    - More Merger Challenges
- But
- More Failing Company Situations

# New Leadership: New Enforcement?

- Cartels
  - Bright Point of Bush Enforcement
  - Heavy Reliance on Leniency Applications
  - No Major New Investigations Recently
  - Pick Up The Pace Through Investigations Independent of Leniency

# Antitrust in the Economic Downturn

- Economic Downturns Are the Breeding Ground For Antitrust Conspiracies
  - Executives Focus on Short-Term Gains
  - When Gains Are Not Possible, Collusion Becomes A Temptation

# Antitrust in the Economic Downturn

- Collusion Is “The Quick Fix”
- Collusion Can Often Provide Gains and Profitability During The Downturn
- Historically, Major Cartels Arise In Times of Recession
  - Vitamins
  - Air Cargo
  - Citric Acid

# Antitrust in the Economic Downturn

- Unlike During Past Recessions, Detection Has Increased
  - Leniency Makes Self Reporting Very Attractive
  - Multiple Enforcers Are Investigating Today
  - Penalties – Corporate and Individual Are Huge
    - ACPERA – 10 Years in Prison
      - \$100,000,000 in Fines

# Antitrust in the Economic Downturn

- Most Importantly
  - Enforcers Know That Economic Downturns Are Breeding Grounds for Collusion
  - New Administrative Will Be Energized and Creative

# Compliance: How Do You Prepare for New Enforcement In An Economic Crisis?

- Review And Revise Compliance Program
  - Expect More Vigorous Section 2 Enforcement
  - Expect Tougher Merger Review
  - Expect More Vigorous and Stepped-Up Cartel Enforcement
  - Expect Multijurisdictional Coordinated Investigations



## Compliance: This Is The Time To Look For Cartels

- Let Executives Know There Is No Tolerance For Cartel Conduct
- Offer Executives Leniency Within The Company To Root Out Cartels
- Compliance Mini-Audits Drive Home Seriousness of The Effort

# Compliance: The Best Training

- Train Senior Executives Intensively
  - Practical Issues
  - Subtle Meanings
- Review The Language Executives Use
- Teach Executives What To Expect In An Antitrust Investigation
  - Raids
  - Drop by Visits

# Compliance: The Best Training

- Train The Procurement Staff
  - Protect The Company From Being A Victim

# Preparing for the Next Four Years

- Expect More Intensive and Creative Investigations
- Review and Revise Compliance Programs to Anticipate Or Avoid New Investigations
- Focus Executives' Attention on the Seriousness of the Conduct – and Personal Accountability

# Agenda

- Overview
- EC Cartel Enforcement
- Case Study - In re Vitamins Antitrust Litigation
- Managing Private Antitrust Litigation
- The New Administration and the Economic Downturn
- Overview of Merger Review Process
- Recent Merger Activity at the US Enforcement Agencies
- Questions?

# U.S. Merger Review Process

- Purpose of U.S. Federal Merger Review:
  - Proposed Mergers, Acquisitions and Joint Ventures are reviewed by Department of Justice (DOJ) & Federal Trade Commission (FTC).
  - Review focuses on whether proposed transaction will confer “Market Power” upon newly merged company.
  - Agencies look to see:
    - Will newly merged company have ability to raise prices above competitive levels;
    - Decrease quality or output below competitive levels; or
    - Eliminate competition.

# U.S. Merger Review Process

- DOJ and FTC use their 1992 *Horizontal Merger Guidelines* to make this assessment.
- Merger Guidelines focus on following factors:
  - Defining relevant market(s) – product (parties' overlapping products and close substitutes) and geographic (local, regional, national or global?);
  - Effect of merger on market concentration – analyze market shares of merging parties and competitors and the resulting level of concentration;
  - Likelihood of anticompetitive effects – higher prices, reduced quality or innovation;
  - New entry or expansion by existing market participants – timely, likely and sufficient to deter anticompetitive effects; and
  - Merger-specific efficiencies.

# Hart-Scott-Rodino Review Process

- DOJ and FTC review most mergers under Hart-Scott-Rodino Act (“HSR Act” or “Act”), 15 U.S.C. § 18a.
  - Passed in 1976 to deal with “midnight mergers” closed by parties before government could investigate.
  - Requires parties to acquisitions of assets, voting securities, controlling interests in noncorporate entities (partnerships, LLCs) meeting certain dollar thresholds to submit premerger notification forms to FTC and DOJ and observe statutory waiting period – usually 30 days – before closing.
  - Allows FTC/DOJ to challenge proposed deals – e.g., agencies may seek to enjoin proposed transactions in court.



# Hart-Scott-Rodino Review Process

- HSR Act jurisdictional dollar thresholds:
  - Size-of-persons threshold: “person” on one side of transaction with \$130.3 million or more in total assets or annual net sales and person on other side with \$13 million or more in total assets or annual net sales (“person” is ultimate parent on each side—assets and sales based on most recent, fully consolidated financials).
  - Size-of-transaction threshold: transaction valued at more than \$65.2 million.
- Transactions valued in excess of \$260.7 million are reportable regardless of size of persons.
- Act has many exemptions – e.g., acquisitions in ordinary course of business, real estate, foreign assets and entities.
- Blunt Instrument – 80+% of reportable transactions – no investigation.

# Hart-Scott-Rodino Review Process

- When HSR filing is required, each party must submit copies of premerger notification form to both DOJ and FTC:
  - Timing – anytime after execution of letter of intent or agreement.
  - Information required – financial statements, SEC filings, revenue by NAICS Code, lists of subsidiaries and minority shareholder interests.
  - Parties' NAICS Codes overlap – identify geographic areas in which overlapping products are sold.
  - Item 4(c) – requires submission of documents prepared by or for officers or directors that evaluate proposed transaction with respect to competition, markets and other similar issues.
  - Acquiring person is required to pay filing fee – can range from \$45,000 to \$280,000, depending on value of transaction.

# Early Termination

- Parties can request early termination (ET) of 30-day waiting period.
  - Generally granted in 2-3 weeks if no substantive issues.
  - Disadvantage to ET – names of parties published on FTC web site, Federal Register – but ET is requested on 80+% of filings.
  - ET not requested – if no substantive issues, period expires without public disclosure.

# Agency Investigations

- Once filing is made – DOJ and FTC determine whether preliminary investigation is warranted.
  - In 2007, approximately 1 in 7 HSR filings resulted in preliminary investigations.
  - Factors going into decision:
    - Agencies' familiarity with industry.
    - Role played in that industry by merging parties – degree of overlap that appears to exist between parties and degree of competition they face based on HSR filings.
    - Information included in Item 4(c) documents, including statements indicating an anticompetitive intent (e.g., "If we do this deal we can raise prices 20%, high entry barriers will prevent new competition," etc.).

# Agency Investigations

- If there is an investigation, only one agency actually will review transaction.
- Determination of which agency will investigate is made through “clearance process.”
- In general, agencies complete this process in first 10-days or so after HSR filing is submitted – is based on past history, expertise (Rx – FTC, airlines – DOJ).
- In some cases – extended clearance battles (AOL/Time Warner – 45 days, Pacific Enterprise/Enova – 5 months).

# Agency Investigations

- Reviewing agency will assign investigation to particular shop or section.
- Staff attorney from investigating shop/section will contact parties' counsel with request for basic information, including:
  - List of Top 10-20 customers – agency will call these customers to determine their reaction to transaction – major factor in whether transaction will be challenged.
  - Recent strategic and marketing plans.
  - Win/loss reports.
  - Information about manufacturing capacity.
  - Other transaction-related documents not provided with filing.
  - Interview company executives.
- Parties may make written submissions, in-person presentations, hire economist to address agency economist concerns.

# Second Request

- End of 30-day period, agency concludes no problem – period terminated or expires.
- End of 30-day period, agency continues to have concerns – will issue “request for additional information” commonly known as “second request” (issued in 2%-4% of HSR filings).
- Second request – subpoena requesting a broad range of documents/data.
- Responding – often very burdensome, time-consuming, expensive. (Parties can avoid by withdrawing filing, re-filing to give agency extra time; no fee if buyer re-files within 48 hours of withdrawal).
- Proliferation of e-mail, other electronic documents/data has increased production costs significantly, may require engaging electronic discovery consultant.
- Compliance can take 1-2 months or 6-8 months or more depending on complexity of parties, transaction – can cost several million dollars.

# Second Request

- Information typically requested in second request:
  - Organizational charts
  - Detailed descriptions of each relevant product
  - Product brochures
  - Business plans
  - All documents relating to competition in relevant product and geographic markets
  - Documents regarding entry and planned expansions
  - Detailed data regarding sales and prices
  - All documents relating to proposed transaction



# Second Request

- Parties usually negotiate to narrow request – limit number of custodians, time period covered.
- Once parties believe they have provided reviewing agency with sufficient information, can certify “substantial compliance” with request.
- Agency decides if parties have complied – may lead to disputes.
- Compliance triggers a second statutory waiting period – usually 30 days.
- During second request process – reviewing agency’s attorneys and economists may request additional information not covered by request, depose company executives.
- Parties may make additional submissions (e.g., white papers), presentations, meet with agency attorneys and economists.

# Second Request

- Because of burdens imposed by second request, parties may choose not to comply.
  - Instead, parties can work with agency to produce narrower set of information.
  - Agency may offer to defer compliance and conduct “quick look” review focused on key issues, such as market definition or entry – if satisfied will close investigation; if not, parties must comply with request.
- Problem with avoiding compliance – eliminates time constraints on government, can lead to prolonged investigations, greater expense if compliance later is necessary.

# Second Request Reforms

- FTC and DOJ reforms attempt to streamline review process:
  - Parties can elect a “Process and Timing Agreement” option:
    - Limits number of employees whose files are searched to 30-35;
    - Limits time period covered by request to 2 years;
    - Requires the preservation of fewer back-up tapes and maintenance of a reduced privilege log.
  - Reforms may reduce second request compliance burden, but come with tradeoffs:
    - Must make employees available for interviews;
    - Waive objections;
    - If transaction challenged must agree to extended discovery period (generally a 60-day to 6-month discovery period for FTC and 4 to 6 months for DOJ);
  - Parties and counsel need to consider whether reduced production burden is worth it.

## Second Request

- End of second request waiting period:
  - Agency concludes no problem – can grant early termination or allow waiting period to expire, enabling parties to close.
  - After approval agency can come back to challenge transaction – very rare.
  - Agency wants more time – required to go to court but parties usually agree to extension (e.g., agree not to close without prior notice).
  - Agency staff recommends challenging transaction — can appeal up the line (DOJ — front office, Assistant Attorney General; FTC—Bureau of Competition Director, Commissioners) — if appeal fails, agency will go to court to seek preliminary injunction (“PI,” if granted usually ends deal), or parties may abandon transaction.
  - Litigation for permanent relief (may be combined with PI) – DOJ must seek permanent injunction in court, FTC can use administrative process – if litigated can add months to process. Government has lost major cases in recent years (**DOJ** – Oracle/PeopleSoft; **FTC** – Arch Coal, Foster, and Whole Foods [Court of Appeals now has reversed District Court denial of PI, FTC proceeding administratively, Whole Foods seeking to enjoin FTC process]).

# New FTC Adjudication Procedures

- FTC has proposed changes to its Rules that would expedite adjudicative proceedings.
  - Comment period will last until February 12, 2009.
- Past: generally, adjudicative proceedings brought by FTC only after preliminary injunction issued by federal court.
- Changes will include, *inter alia*,
  - Parallel preliminary injunction and adjudicatory proceedings.
  - Tighter timetables (including less time to answer a complaint; 210 hours for a hearing, unless Commission allows otherwise).
  - Commissioners acting as ALJ's.
  - Commission authority over dispositive pretrial motions.

# Possible Objections to New Procedures

- Changes attempt to address concern that FTC Administrative Process takes too long for parties to continue with deal if they prevail, but proposed changes raise new concerns:
  - Bias of Commissioner serving as ALJ.
  - Commission presiding over outcome-determinative proceedings (discovery and dispositive motions) is unfair.
  - Expediting procedures gives FTC staff time advantages over merging parties.
  - Burden of two parallel proceedings puts additional pressure on merging parties to abandon transaction (see, e.g., Inova/Prince William Health System, Inc.).

# Consent Decrees

- Any point in process – parties can negotiate consent decree (in 2007 32% of second requests ended in challenges or requests for consent).
- Negotiated between parties and reviewing agency to resolve agency concerns.
- Usually involves divestiture of subsidiaries or divisions, assets (plants, stores), license of patents or other intellectual property.
- Allows parties to conclude deal without it being challenged in court.
- Upon approval by agency is placed on public record for comment (DOJ decree – 60 days, FTC decree – 30 days) – parties permitted to close during comment period, comments rarely result in changes.

# Merger Review Outside of HSR Process

- If HSR filing is not required:
  - DOJ and FTC may learn of deal through customer or competitor complaints, press reports.
  - Agencies have authority to review any proposed or consummated merger they believe will have anticompetitive effects.
  - If transaction is challenged absent HSR filing – agencies are not constrained by HSR time limitations – investigation may take longer, particularly if agency has to prioritize HSR investigations.
  - Parties can close at any time but may not be in their interests to close over agency objections – creates ill will, government could seek an injunction – parties more likely to work to convince agency no problem.



# State Merger Review

- State Attorneys General may investigate merger even if it is subject to HSR review. Particularly when merger:
  - Raises issues of local concern.
  - Has significant impact on consumers.
  - Involves politically “hot” industry:
    - Hospitals
    - Health insurance
    - Supermarkets
    - Oil refineries, gas stations, etc.
- Generally, federal agencies take lead.
  - If local issues are prevalent, however, state can play pivotal role:
    - *Wal-Mart Stores v. Rodriguez*, 23 F.Supp.2d 395 (D.P.R. 2002).
      - Puerto Rico sought P.I. despite FTC consent order (grocery stores)

# Multi-Jurisdictional Merger Review

- Transactions may be subject to premerger notification requirements in other countries.
- Today, more than 80 countries have merger control statutes.
- Most significant foreign jurisdiction for U.S. companies re merger control – European Union (EU).

# European Union

- Unlike HSR filings, initial filings under EU Form CO require parties to provide detailed descriptions of products and markets.
- Generally, merger review by EU will produce same result as in U.S.
- There have been conflicting results, however:
  - GE/Honeywell (Approved by DOJ but rejected by EU).
  - Sony/BMG (approved by FTC; initially approved by European Commission, later reversed and remanded by Court of First Instance; later approved again by Commission).

## European Union: A filing in the EU is required when:

- Merged companies' worldwide turnover would exceed €5 billion;
- And**
- Combined EEA-wide turnover of at least two companies individually exceeds €250 million.
- OR**
- Post-transaction worldwide turnover would exceed €2.5 billion;
- AND**
- Post-transaction EEA-wide turnover of at least two companies would exceed €100 million;
- AND**
- Post-transaction turnover would exceed €100 million in at least three member states;
- AND**
- In each of these three member states, turnover of at least two of parties to deal exceeds €25 million.

# Individual Countries

- If EU premerger filing is not required, merger laws of individual member countries apply:
  - Germany - probably European country in which U.S. companies are required to file most often.
- Outside of Europe – Canada, Mexico, **Brazil**, Argentina, South Africa, Israel, South Korea – countries in which U.S. companies frequently must file.
- China recently enacted merger reform that requires premerger approval of transactions exceeding certain threshold – where deal involves US target, may require filing at same time as HSR but with substantive market discussion like EU Form CO.

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# Dual U.S. Antitrust Enforcement: Who Has You Covered?



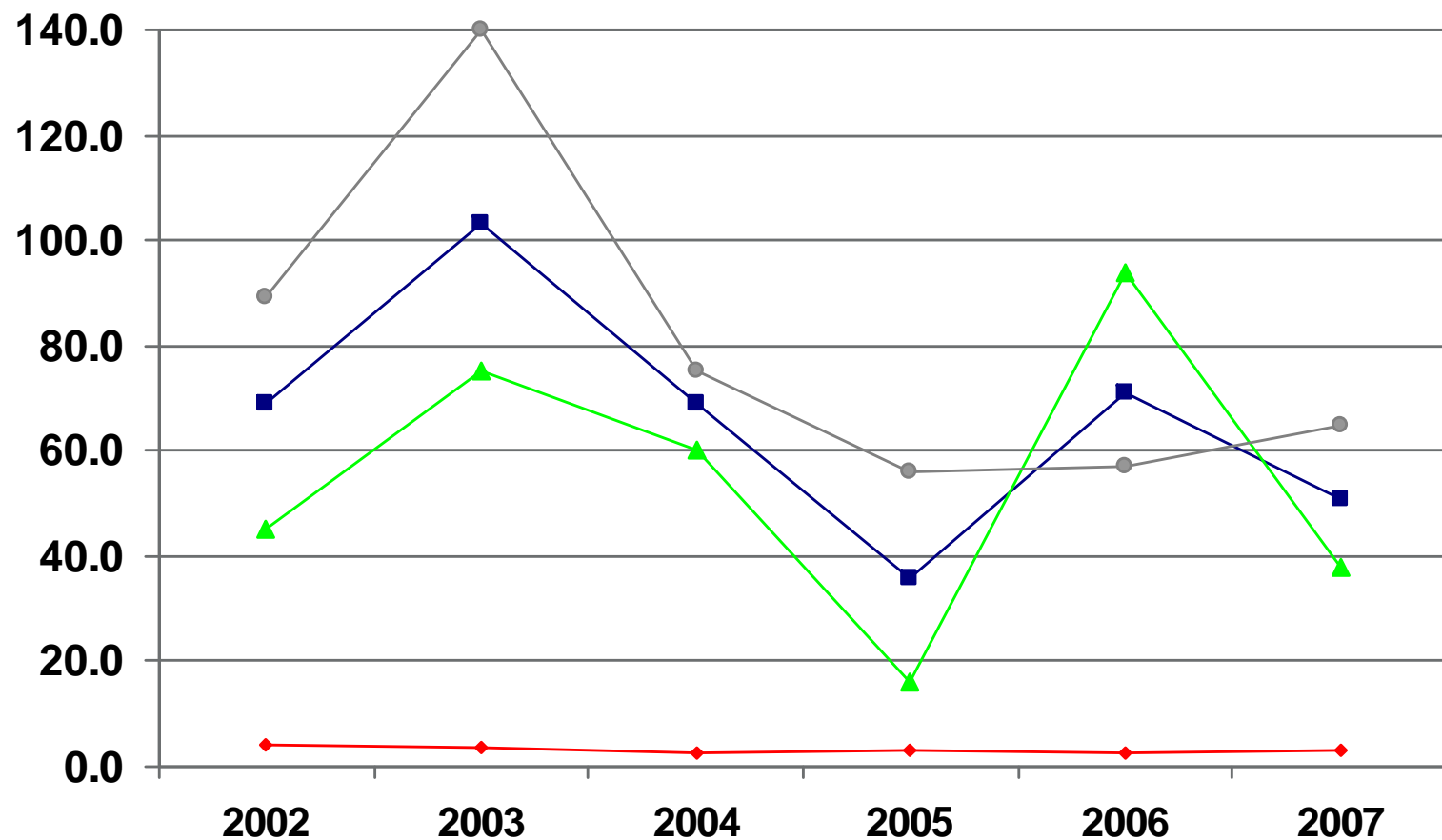
- Computer hardware
- Health care
- Pharmaceuticals & biotech
- Satellite manufacturing and launch
- Retail
- Grocery manufacturing
- Chemicals
- Distilled spirits



- Computer software
- Health insurance
- Agritech
- Satellite & other broadcasting
- Advertising
- Cosmetics & hair care
- Telecommunications
- Beer

# Trends in US Merger Investigations

(Second Requests and Challenges by Fiscal Year, Oct. 1 – Sept. 30)



Note: 2003 results reflect inclusion of non-HSR investigations in DOJ's challenges figure

—♦— 2d Requests as % of Filings  
—■— Challenges as % of 2d Request  
—▲— DOJ Challenges as % of 2d Request  
—●— FTC Challenges as % of 2d Requests



# Few DOJ Litigated Merger Challenges

- Since *U.S. v. Oracle* in 2004, only two:
  - *U.S. v. Microsemi Corp.*, No.1:08 CV 1311 (E.D. Va., filed Dec. 18, 2008)
    - Military and aerospace transistors and diodes
    - Deal consummated in July 2008; not HSR-reportable
    - TRO motion pending
  - *U.S. v. Daily Gazette Co.*, No. 2:07-cv-0329 (S.D. W. Va., filed May 22, 2007)
    - Involved Daily Gazette's consummated acquisition of its only competitor
    - Papers already were operating under a joint operating agreement
    - Depositions underway (each side allowed 25); trial set for Oct. 19

# FTC's Merger Actions: On a Roll in Part III?

- *Chicago Bridge & Iron*, Docket No. 9300
  - FTC decision blocking deal affirmed by 5<sup>th</sup> Cir.
- *Evanston Northwestern Healthcare Corp.*, Docket No. 9315
  - Post-merger challenge; FTC rejected divestiture as remedy – “may reduce or eliminate the resulting benefits for a material period of time.”
  - Remedy: separate negotiating teams to deal with managed-care organizations
- *Equitable Resources, Inc.*, Docket No. 9322
  - Acquisition of Peoples Natural Gas from Dominion Resources abandoned while appeal from dismissal of PI action was pending
- *Foster*, Docket No. 9323
  - Acquisition by Western Refining, Inc. of Giant Industries, Inc., a competing refiner
  - FTC dismissed complaint after 10<sup>th</sup> Cir. affirmed denial of PI
- *Inova Health System Foundation*, Docket No. 9326
  - Transaction abandoned after PI granted

# FTC's Merger Actions: Pending Actions

- *Whole Foods Markets, Inc., Docket No. 9324*
  - PI proceeding currently on remand from DC Circuit; Part III trial set for April 6
  - Stayed on Jan. 28 until Feb. 5 to allow Whole Foods to consider potential consent order.
- *FTC v. Ovation Pharmaceuticals, Civ. No. 08-6379 (D. Minn., filed Dec. 16, 2008)*
  - Consummated acquisition; two Commissioners would have challenged earlier deal that **did not reduce number of competitors**
  - Same commissioners would have sought **disgorgement**
  - FTC seeks trial in July; defendants want May trial date

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