

## Antitrust Matters in June 2012



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## The June Headliner: Barclays

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- Investigation by US, UK, EU and other authorities into whether banks colluded to manipulate the London InterBank Offered Rate (Libor).
- The US DOJ entered into a non-prosecution agreement with Barclays because of its “extraordinary cooperation.”
- Barclays will pay \$160 million penalty, \$290 MM in other damages.
- The DOJ’s Criminal Division investigated with assistance from the Antitrust Division. CFTC investigated as well.
- Other banks reportedly under investigation are Citigroup, JP Morgan Chase, Royal Bank of Scotland, UBS, ICAP Plc., Lloyds Banking Group, and Deutsche Bank.
- More civil actions by municipalities (Baltimore has sued already), other banks, state AGs, class actions, indirect purchaser actions.

## In the Supreme Court (while you were paying attention to Health Care)

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- *FTC v. Phoebe Putney Health System, Inc.*, No. 11-160
  - *cert. granted*
  - Otherwise anticompetitive conduct of agencies of state and local governments are immune from federal antitrust law if a clearly articulated state policy displaces competition. This can apply to private entities if the state policy clearly extends to the entities and if the state actively regulates the conduct.
  - This case arose from a challenge by the FTC to a hospital merger in Georgia.
  - FTC lost at the District Court and the 11<sup>th</sup> Circuit.
  - The case will clarify the State Action Doctrine.

# In the Supreme Court

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- *Phoebe*: Questions presented
- *(1) Whether the Georgia legislature, by vesting a local government entity with general corporate powers to acquire and lease out hospitals and other property, has “clearly articulated and affirmatively expressed” a “state policy to displace competition” in the market for hospital services, thus rendering federal antitrust laws inapplicable under the “state action doctrine”; and*
- *(2) whether such a state policy, even if clearly articulated, would be sufficient to validate the anticompetitive conduct in this case, given that the local government entity -- which acquired the only competitor of a private actor at the private actor’s behest -- neither actively participated in negotiating the terms of the hospital sale nor has any practical means of overseeing the hospital’s operation.*

## In the Supreme Court (while you were paying attention to Health Care)

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- *Southern Union Co. v. United States*, No. 11-94, decided June 21, 2012
  - The rule in *Apprendi* that every element necessary to determine the maximum sentence in a criminal case must be decided beyond a reasonable doubt by a jury applies to criminal fines imposed on corporations.
  - Where the maximum fine is based on the number of days a violation continued, a jury's finding of "on or about" does not establish the starting or ending date of a violation beyond a reasonable doubt.
  - This calls into questions fines imposed under the alternative fine provision of 18 USC § 3571(d) (twice the gain or loss).

## In the Supreme Court (while you were paying attention to Health Care)

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- *Comcast Corp. v. Behrend*, No. 11-864, *cert. granted*
  - Antitrust class action
  - May a court decline to consider issues relating to the merits when deciding whether common issues of facts dominate over individual ones?
  - Question presented: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

## Actions by the Department of Justice

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- Apple E-Books Litigation Update
  - DOJ settled with certain publishers who had instituted so-called “agency” agreement to set the retail price of their e-books.
  - The DOJ had alleged a conspiracy among large publishers and Apple in response to Amazon’s below-cost pricing of e-books.
  - Strong opposition to the settlement by traditional, bricks-and-mortar stores and by authors
  - Concern about Amazon’s alleged dominance and predatory pricing.
  - More than 800 comments have been received to date.

## Actions by the Department of Justice

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- Size does not matter
  - Kyoungwon Pyo, a senior vice president of Hyosung Corp., who had agreed to plead guilty to obstructing justice in May, was formally sentenced.
    - Pyo will serve five months in prison for submitting false HSR documents in a merger investigation conducted by the DOJ.
    - The parent company, Nautilus Hyosung Holdings Inc. had earlier agreed to pay a \$200,000 fine in connection with the same conduct.
    - These are the first criminal prosecutions for submitting false information in connection with a premerger filing.

## Actions by the Department of Justice

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- Size does not matter (continued)
  - *United States v. William W. Lord*, 12 CR 326 (N.D. Cal.)
    - The owner of a distributor of mesquite charcoal pleaded guilty to rigging bids and allocating customers.
    - Lord's company, Chef's Choice, distributes mesquite charcoal throughout the US.
    - Lord pleaded guilty agreeing with two of its competitors to refrain from competing by not bidding on contracts, by communicating before bidding, and by agreeing on what prices to bid.
    - Lord has not yet been sentenced.

## Actions by the Department of Justice

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- Size does not matter (continued)
  - Real Estate investors continue to rig bids at foreclosure auctions.
  - In June, as the result of separate investigations, the DOJ indicted two real estate investors in Alabama, and two investors in California agreed to plead guilty
  - The DOJ will continue to pursue low hanging fruit, such as these small cases as well as big, headline-grabbing international cartels.

## Actions by the Department of Justice

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- Autoliv Inc. of Sweden and an executive of Yakazi Inc. of Japan agreed to plead guilty to fixing the price of automobile parts in the U.S.
  - This is part of an ongoing investigation of price fixing in the auto parts industry which the DOJ says goes back to at least 2006.
  - Autoliv will pay a fine of \$14.5 million.
  - Kazuhiko Kashimoto agreed to serve 14 months in prison and pay a fine.

# Actions by the Federal Trade Commission

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- Merger Enforcement
  - Premerger Notifications increased by 24% from fiscal year 2010 to fiscal year 2011 (ending September 30)
  - June Merger Enforcement:
    - Johnson & Johnson was required to sell its system for surgically treating serious wrist fractures before it could acquire Synthes, Inc.
    - Koninklijke Ahold NV (parent of Giant Food Stores) had to sell a supermarket before it could acquire the Genuardi's chain from Safeway.

# Actions by the Federal Trade Commission

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- Active Areas of Interest of the FTC:
  - Pay for Delay: where a patent-owner, especially one in the pharmaceutical industry, pays a prospective competitor to delay generic entry into the market.
  - Abuse of standard essential patents.
    - FTC filings at ITC opposing injunctions.
    - Concern about patent “hold-ups.”
  - Increasing the enforcement authority of Section 5 of the FTC Act to expand the jurisdiction of the FTC beyond the antitrust laws.

# Private Litigation

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- *Williams v. Duke Energy Int'l*, No. 10-3604 (6<sup>th</sup> Cir. June 12, 2012)
  - Customers of Duke, an electrical utility, sued claiming that payments that Duke made to certain large customers in exchange for those large customers' dropping objections to a rate stabilization plan, violated the Robinson-Patman Act and other statutes.
  - The District Court held that the filed rate doctrine deprived it of subject-matter jurisdiction.
  - The Sixth Circuit held that the complaint was about the payments, which the plaintiffs sufficiently alleged amounted price discrimination, and not about the rate setting; the filed-rate doctrine therefore did not shield the alleged conduct.
  - Electricity is a commodity covered by the R-P Act.

# Private Litigation

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- *In re New Jersey Title Insurance Litigation*, No. 10-3343 (3d Cir. , June 14, 2012)
- *McCray v. Fidelity Nat'l Title Ins. Co.*, No. 10 56765 (3d Cir., June 14, 2012) (cases with very similar facts)
  - Plaintiffs here challenged title insurance companies claiming that that had collusively set rates.
  - Rates in New Jersey must be filed with the Department of Banking & Insurance; in Delaware, with the Dept' of Insurance.
  - The Third Circuit held in each case that the filed rate doctrine applies. Among other things, determining damages would require the court undertake a rate-making process, which the court would not do.

# Private Litigation

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- *Hexcel Corp. v. Ineos Polymers, Inc.*, No. 10-56765 (9th Cir. June 1, 2012).
  - In 2008 Hexcel sued Ineos for civil damages from an alleged price fixing conspiracy that dated back to before 1999.
  - Ineos claimed the action was time-barred.
  - Hexcel claimed it lacked knowledge of the conspiracy but the court held it received constructive notice when it received a grand jury subpoena and learned that it was one of the targets of the investigation.
  - Hexcel cannot claim it lacked knowledge of the conspiracy because the subpoena and other “red flags” should have put it on notice of its claims against Ineos.

# Private Litigation

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- *In re Hypodermic Products Antitrust Litigation*, No. 11-3122 (3d Cir., June 5, 2012)
  - In two consolidated class actions, distributors of hypodermic needles and their health-care provider customers sued Becton Dickinson, the manufacturer of the syringes, under Sections 1 and 2 of the Sherman Act.
  - B-D entered into a conditional settlement pursuant to which it would pay \$45 million to the distributors if the court held that the distributors and not the providers (e.g. hospitals) had standing to sue.
  - The Third Circuit reviewed the question on an interlocutory appeal and held that the providers were indirect purchasers and therefore lacked standing to sue under the Sherman Act.

# Private Litigation

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- *Robert F. Booth Trust v. Crowley*, No. 10-3285 (7<sup>th</sup> Cir. June 13, 2012)
  - This shareholders' derivative suit arose from the merger of Sears, Roebuck with Kmart Corp.; the merged company included directors from both predecessors, two of whom also served on the boards of competitors of the new company.
  - Judge Easterbrook: A shareholders' derivative suit alleging interlocking directors makes no sense: the fear of litigation by others cannot justify this suit.
  - This suit is "an abuse of the legal system" and "serves no goal other than to move money from the corporate treasury to the attorneys' coffers."

# Private Litigation

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- *Agnew v. Nat'l Collegiate Athletic Ass'n*, No. 11-3066 (7<sup>th</sup> Cir. June 18, 2012)
  - Two students who had received one-year, renewable athletic scholarships to play football found their scholarships not renewed after injuries prevented them from playing. They sued under the Sherman Act.
  - The case was properly dismissed because the plaintiffs had not alleged a cognizable market: “The entire point of the Sherman Act is to protect competition in the commercial arena . . . without a commercial market, the goals of the Sherman Act have no place.”

## Private Litigation

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- *Aetna Inc. v. Blue Cross Blue Shield of Michigan*, No. 2:11-cv-15346-DPH-MKM (E.D. Mich. June 14, 2012).
- *Eatoni Ergonomics Inc. v. Research in Motion Corp.*, No. 11-5328 (2d Cir. June 21, 2012)."

# Foreign Trade Antitrust Improvements Act

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- Minn-Chem Inc. v. Agrium Inc., No. 10-1712 (7<sup>th</sup> Cir. June 27, 2012).
  - This en banc decision of the Seventh Circuit addressed the question of whether the FTAIA sets out a jurisdictional limitations on what the courts can hear or an element of a violation of the Sherman Act.
  - The decision, by Judge Wood and joined by, among others, Judges Posner and Easterbrook, overruled earlier Seventh Circuit precedent and adopted the Third Circuit's approach:
    - "the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts."

# International

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- Universal/EMI:
  - The EU has demanded concessions before permitting the deal
  - Note that the US Senate held hearings on the deal on June 21.
- Mitsubishi & Toshiba
  - These companies had successfully challenged their fines in European General Court arguing that they had been based on revenues during the wrong year.
  - The EC recalculated the fines and reimposed them.
- Microsoft
  - The European General Court refused Microsoft's request to overturn a penalty imposed by the EU, but cut the penalty from \$1.3 billion to \$1.1 billion.

## Speaker Biography – John G. Calender

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John G. Calender, managing shareholder of the Washington, D.C., office, is a member of the Firm's Board of Directors and chair of the Corporate Compliance, Ethics and Crisis Management Industry Service Team, and concentrates his practice in antitrust, commercial litigation, government investigations, and in compliance training and counseling, both domestic and international. He has extensive experience with administrative trials, investigations, compliance issues and consent orders before the Federal Trade Commission and the Department of Justice. Mr. Calender regularly counsels clients on antitrust issues including antitrust/intellectual property issues, international antitrust issues, health care and distribution issues and on a variety of other matters, including advertising substantiation, unfair trade practices and contract disputes. He also counsels clients on a variety of other federal compliance issues, including anti-bribery laws, import/export laws, and lobbying and ethics laws and rules. He has made presentations to Congressional staff, responded to Congressional inquiries and conducted internal investigations on behalf of major financial institutions and manufacturers.

Mr. Calender's litigation experience includes the management of large teams of attorneys, experts, economists, paralegals and support staff in complex litigation and class action suits in federal and state courts, as well as in agency investigations. He has successfully defended major Federal Trade Commission and Department of Justice antitrust trials and investigations involving merger cases (both horizontal and vertical), price fixing, market allocation, benchmarking, monopolization and price discrimination. He has also responded to inquiries from various State Attorneys General.

Mr. Calender's substantial commercial litigation experience includes insurance coverage cases on behalf of insureds (*Aetna Casualty Surety Co. v. Abbott Laboratories, et al.*, 636 F.Supp. 546 (D. Conn. 1986)), defense of numerous product liability cases brought by state and local governments, representing a large utility company in a product liability case against the manufacturer of nuclear steam generators (*South Carolina Electric & Gas Co. v. Westinghouse Electric Corp.*, 826 F.Supp. 1549 (D.S.C. 1993)), prosecuting a lawsuit on behalf of a major corporation involving breach of contract, fraud and issues regarding piercing the corporate veil and mortgage lending litigation.

John has been recognized by AV® Preeminent™ Peer Review Rated by Martindale-Hubbell.

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Robert E. Hauberg Jr. is a shareholder in the Jackson, Mississippi, and Washington, D.C., offices and former leader of the Firm's Government Regulatory Actions Group. He is a member of the Corporate Compliance, Ethics and Crisis Management Practice and the Health Care Investigations and the Government Contracts Industry Service Teams. Mr. Hauberg concentrates his practice in antitrust, securities, False Claims Act and RICO litigation; white collar crime; internal investigations including foreign corrupt practices and price fixing; corporate compliance; and litigation for financial institutions, health care and pharmaceutical providers, government contractors, and public officials. He has represented companies and individuals from Canada, China, Denmark, Egypt, Germany, Japan, Kuwait, The Netherlands, Russia, Switzerland, Turkey and the United Kingdom. He has handled dozens of grand jury investigations and trials. In 1973, he became an Assistant U.S. Attorney for the District of Columbia and served until 1976, at which time he became a Trial Attorney and then Assistant Chief of the Communications and Finance Section of the Antitrust Division of the Department of Justice. In 1986, he was appointed Senior Trial Attorney and then Senior Litigation Counsel of the Fraud Section of the Criminal Division of the U.S. Department of Justice. In 1990, Mr. Hauberg was honored by the Department of Justice with a special commendation for his work on major prosecutions by the Dallas Bank Fraud Task Force.

Robert is listed in *Mid-South Super Lawyers* since 2006, listed in *The Best Lawyers in America*® in Criminal Defense: White Collar Law since 1995; Antitrust Law since 2003; Corporate Governance and Compliance Law and AV® Preeminent™ Peer Review Rated by Martindale-Hubbell.

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Forrest Hinton has more than thirty years' experience as a commercial litigator with an emphasis on antitrust law. As a shareholder in the Birmingham and Washington, D.C., offices, he represents not only national, regional and local businesses, but also individuals in a variety of complex litigation and antitrust matters including trade regulation, intellectual property law, and regulatory issues in conjunction with business transactions. Mr. Hinton represents clients in federal grand jury proceedings related to antitrust enforcement activities, and has established antitrust compliance programs and materials for both businesses and national trade associations. Mr. Hinton has also defended directors and officers of businesses, including non-profits, financial institutions and insurance companies.

Mr. Hinton is actively involved in antitrust, litigation and intellectual property sections of national and state bar associations. He has authored numerous articles for professional publications and conducted seminar presentations on antitrust and trade regulation issues for companies and professional groups.

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Phillip Zane, of counsel in the Washington, D.C., office, concentrates his practice in the regulation of competition and trade. He represents clients from around the world in criminal and civil litigation and investigations relating to antitrust matters, fraud, money laundering, foreign asset control, public corruption and national security issues. He represents plaintiffs and defendants in commercial litigation involving antitrust, breach of contract and business torts. Mr. Zane counsels clients on the full range of antitrust issues, including premerger notification and investigation, pricing and distribution policies, information exchange and joint ventures. He advises clients on issues relating to consumer protection, including compliance with regulations relating to advertising, warranties and other consumer protection issues. Mr. Zane's practice includes conducting compliance programs and analyzing litigation risk for businesses and investors.

Mr. Zane's representations have included matters in which hundreds of millions of dollars rested on the outcome. He has represented individuals suspected of criminal violations such as price fixing, bid rigging, fraud and obstruction of justice. He has conducted confidential internal investigations of alleged price fixing, bid rigging, fraud, public corruption, money laundering and violations of OFAC regulations concerning activity in the United States and elsewhere, including Austria, Belgium, Bermuda, Canada, China, Cuba, Egypt, France, Germany, Iran, Italy, Japan, Lesotho, Liechtenstein, Nigeria, Oman, Saudi Arabia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. His experience includes negotiating with senior officials in the Antitrust Division of the U.S. Department of Justice in criminal and civil cases, and assisting in the preparation of arguments made before the Competition Directorate General of the European Commission.

Mr. Zane is a frequent contributor to professional journals, particularly in the areas of antitrust and criminal procedure, and often lectures on those and other topics.

Mr. Zane is proficient in reading and speaking Swedish and Russian, and reading German, Polish and Spanish. He has reading knowledge of other Slavic, Germanic, and Romance languages.

Phillip is listed in *Washington, D.C. Super Lawyers* in Criminal Defense: White Collar Law in 2012 and AV® Preeminent™ Peer Review Rated by Martindale-Hubbell.