Message From The Editor

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Dear Friends of the Trial Practice Committee,

We are pleased to bring you the latest edition of our Committee Newsletter, Trying Antitrust. A special thank you to Pallavi Guniganti who won our first-ever contest on an original name for the Newsletter. This Winter's edition features four articles we believe you will find relevant and useful to your practice. In our first article, Mark Krotoski discusses establishing withdrawal from an antitrust conspiracy, including recent Supreme Court precedent addressing the issue. Jason S. Angell, Robert E. Freitas, and Jessica N. Leal next examine guilty pleas in civil antitrust trials, including potential strategies parties may consider. Steven N. Williams and Elizabeth Tran analyze trial structure in antitrust cases involving both direct and indirect purchasers. And last but certainly not least, Adam Acosta reviews recent hospital merger litigation and enforcement takeaways that clients should consider before embarking on such transactions.

The Trial Practice Committee has many exciting projects going on right now! We are planning brown bag discussions (including one regarding the Amex trial), working on updates to ABA publications, and preparing our Mock Trial and other panels for the upcoming Spring Meeting. We welcome all volunteers – please contact any of the Committee officers listed below to find out how to get involved.

Enjoy the Newsletter!

Trying Antitrust, the newsletter of the Trial Practice Committee, is published twice a year by the American Bar Association Section of Antitrust Law. The views expressed in the newsletter are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law, the Unilateral Conduct Committee or the editors of this newsletter. If you wish to comment on the contents of Trial Ruminations, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654.

Establishing Withdrawal From An Antitrust Conspiracy

Based On Recent Supreme Court Guidance

By: Mark Krotoski[1]

In criminal antitrust cases, a recurring issue concerns whether an individual or company has withdrawn from a conspiracy before the statute of limitations period. Effective withdrawal may extinguish or limit criminal liability. This article reviews the *Smith v. United States* Supreme Court case which clarified the burden of proof and reinforced the evidence necessary to establish withdrawal from a conspiracy.

I. Withdrawal Determines Liability

The Sherman Act prohibits conspiracies to fix prices, rig bids, or allocate markets.[2] Conspiracy law broadly imposes liability on each member for the acts of other co-conspirators made in furtherance of the conspiracy. In the landmark *Pinkerton v. United States* case, the Supreme Court noted that "so long as the partnership in crime continues, the partners act for each other in carrying it forward."[3] As a continuing offense, a conspiracy persists until the conspiracy goals are accomplished or the conspiracy is terminated.

Withdrawal from the conspiracy provides one key means to limit conspiracy liability.[4] Depending on the facts, evidence of withdrawal can make the difference between a conviction, the scope of any liability, a dismissal, or an acquittal.

In antitrust cases, individual or corporate liability can turn on sufficient proof of withdrawal. A five year statute of limitations applies to Sherman Act violations along with most criminal offenses.[5] Because an antitrust investigation can take several years to complete before charges are filed, a statute of limitations defense is frequently raised.

II. Circuit Split: Who Bears The Burden To Establish Withdrawal?

Since proof of withdrawal determines liability, who should bear the burden of establishing withdrawal? A few years ago, the circuits were evenly divided on whether the government or defendant held the burden. The D.C. Circuit summarized the state of the case law in *United States v. Moore*:

> Our sister circuits have differed on this issue. While some have said that the burden of proving withdrawal always rests on the defendant, [citing the Second, Fifth, Sixth, Tenth and Eleventh Circuits], others have held that, once the defendant meets his burden of production that he has withdrawn prior to the relevant limitations period, the burden of persuasion shifts to the government [citing the First, Third, Fourth, Seventh and Ninth Circuits].[6]

The Supreme Court was asked to resolve the division among the courts in the *Moore* case (under the case name of co-defendant Smith).

III. Supreme Court Resolves and Clarifies Issue

A. Lower Court Proceedings

In *Smith v. United States*,[7] the defendant was charged with others in a 158-count indictment which included separate drug and Racketeer Influenced and Corrupt Organization Act (RICO) conspiracy counts among other charges. Defendant Smith argued that the conspiracy counts were barred under the five-year statute of limitations because he had spent the prior six years in prison. At trial, he offered "a stipulation of his dates spent incarcerated" and "testimonial evidence showing that he was no longer a member of the charged conspiracies during his incarceration."[8]

During deliberations, the jury asked for clarification about what constitutes withdrawal from a conspiracy. The trial judge instructed: "Once the government has proven that a defendant was a member of a conspiracy, the burden is on the defendant to prove withdrawal from a conspiracy by a preponderance of the evidence."[9] The jury convicted the defendant on the conspiracy charges and he appealed.

The U.S. Court Of Appeals for the District Of Columbia Circuit affirmed the conspiracy convictions after concluding that the trial court gave correct instructions on the burden to establish withdrawal.[10] The defendant had failed to meet his burden to show that his time in prison constituted withdrawal. The defendant then sought *certiorari* review in the Supreme Court.

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[2] 15 U.S.C. § 1.

[3] 328 U.S. 640, 646 (1946).

[4] The Supreme Court stated a century ago: "As he has started evil forces he must withdraw his support from them or incur the guilt of their continuance." *Hyde v. United States*, 225 U.S. 347, 369-70 (1912).

[5] 18 U.S.C. § 3282.

[6] *United States v. Moore*, 651 F.3d 30, 90 (D.C. Cir. 2011) (per curiam) (holding "that the defendant bore the burden of persuasion to show that he withdrew from the conspiracy outside of the statute of limitations period"), *aff'd*, 133 S.Ct. 714 (2013).

[7] 568 U.S. _, 133 S.Ct. 714, 184 L.Ed.2d 570 (Jan. 9, 2013) (No. 11-8976), http://www.supremecourt.gov/opinions/12pdf/11-8976_k5fl.pdf. The conspiracies in *Smith* were based on charges under 21 U.S.C. §846 (drug conspiracy) and 18 U.S.C. §1962(d) (RICO conspiracy).

[8] 133 S.Ct. at 720 n.5 (quoting Brief for Petitioner, at 3, http://federalevidence.com/pdf/Smith.v.US/Smith.v.US.PetitionerBrief.pdf).

[9] 133 S.Ct. at 718.

[10] 651 F.3d at 90.

B. Supreme Court Review

The Supreme Court decided to resolve the circuit split. The issue presented to the Supreme Court was:

> Whether withdrawing from a conspiracy prior to the statute of limitations period negates an element of a conspiracy charge such that, once a defendant meets his burden of production that he did so withdraw, the burden of persuasion rests with the government to prove beyond a reasonable doubt that he was a member of the conspiracy during the relevant period -- a fundamental due process question that is the subject of a well-developed circuit split.[11]

In stark contrast to the nearly even circuit split, the Supreme Court unanimously held that the defendant holds the burden to establish the affirmative defense of withdrawal.[12] In an opinion authored by Justice Antonin Scalia, the Court concluded that neither the Constitution, nor the applicable statutes, nor the common law required the government to establish withdrawal. Under the Due Process Clause, the government was obligated to prove each element of the conspiracy offense beyond a reasonable doubt. However, the Due Process Clause did not require that the government "must prove beyond a reasonable doubt that he did not withdraw outside the statute-of-limitations period."[13] Because the conspiracy statutes did not impose this burden on the government, the Court "presume[d] that Congress intended to preserve the common-law rule" that the defendant was obligated to prove affirmative defenses.[14]

In rejecting the argument that the government should bear the burden of proof, the Court noted that the defendant was in the best position to present facts about the circumstances of withdrawal. As the Court explained, "It would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened."[15]

The Supreme Court also clarified the proof necessary to establish withdrawal. "Passive nonparticipation" is insufficient. Instead, "'to avert a continuing criminality' there must be 'affirmative action ... to disavow or defeat the purpose' of the conspiracy."[16] Unless the defendant can show withdrawal, his "membership in the conspiracy, and his responsibility for its acts, endures even if he is entirely *inactive* after joining it."[17]

Finally, when a claim is made that withdrawal occurred before the statute of limitations period, "the analysis does not change." Once a statute of limitations defense is asserted, the Court explained that the government must only show "that the conspiracy continued past the statute-of-limitations period."[18] The government made this showing in the case.

Ultimately, the jury concluded that defendant Smith "did not establish by a preponderance of the evidence an affirmative act of withdrawal."[19] His inactive participation during his incarceration for six years was insufficient.

IV. Proving Withdrawal After Smith

A. Jury Instructions Modified

Following *Smith*, a number of model jury instructions were revised or updated. Jury instruction committees for three courts of appeals, including the Third,[20] Seventh,[21] and Ninth Circuits,[22] redrafted instructions based on the abrogation of prior circuit case law by *Smith*. The commentaries to the Fifth and Sixth Circuit model jury instructions were also updated.[23]

The model jury instructions take different approaches in providing guidance to the jury. Most model instructions state the general rule that the defendant must take affirmative steps to withdraw, leaving to the jury to consider the particular facts of the case. The Seventh Circuit instruction lists some examples to guide the jury in deciding whether the individual "took some affirmative act in an attempt to defeat or disavow the goal[s] of the conspiracy." Some of the examples include: (a) "completely undermining his earlier acts"; (b) notifying "the proper law enforcement authorities"; (c) "making a genuine effort to prevent the commission of the crime"; or

[11] Case Docket for *Smith v. United States* (No. 11-8976), http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-8976.htm; Question presented, http://www.supremecourt.gov/qp/11-08976qp.pdf.

[12] 133 S.Ct. at 720.

[13] *Id*. at 717; *see also id*. at 719 ("Allocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause.").

[14] *Id*. at 720.

[15] *Id*. at 720-21.

[16] *Id*. (quoting *Hyde*, 225 U.S. at 369).

[17] 133 S.Ct. at 721(emphasis in original).

[18] 133 S.Ct. at 721 (citing *Grunewald v. United States*, 353 U.S. 391, 396 (1957) (the government was required "to prove that the conspiracy … was still in existence" with the statute of limitations period)).

[19] *Id*. at 720 n.5.

[20] Third Circuit Model Criminal Jury Instruction § 6.18.371J-2 (2012 ed.) (modified May 2013) (noting revision following *Smith*), http://www.ca3.uscourts.gov/sites/ca3/files/Chap%206%20Conspiracy%20Instructions%20May%202013Rev.pdf

[21] Pattern Criminal Jury Instructions of the Seventh Circuit §§ 5.13, 5.14(A), and 5.14(B) (2012 ed.) (as modified Feb. 4, 2013) (noting abrogation of prior cases), http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf.

[22] Ninth Circuit Manual of Model Criminal Jury Instruction § 8.24 (modified April 2013), http://www3.ce9.uscourts.gov/jury-instructions/node/479

[23] Fifth Circuit Pattern Jury Instructions (Criminal Cases) § 2.23 (2012 Edition) (updated commentary citing to *Smith*), http://www.lb5.uscourts.gov/juryinstructions/fifth/crim2012.pdf; Sixth Circuit Pattern Criminal Jury Instruction § 3.11A (Updated March 15, 2014), http://www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/crmpattjur_full.pdf. For other model circuit withdrawal instructions, *see* Eighth Circuit Manual of Model Criminal Jury Instructions § 5.06C (2014 Edition), http://www.juryinstructions.ca8.uscourts.gov/Manual_of_Model_Criminal_Jury_Instructions.pdf; Tenth Circuit Criminal Pattern Jury Instructions § 2.22 (2011 Edition), http://www.ca10.uscourts.gov/sites/default/files/clerk/pji10-cir-crim.pdf; Eleventh Circuit Pattern Jury Instructions (Criminal Cases) §§13.4, 101.2 (2010); http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/FormCriminalPatternJuryInstruction.pdf. Other circuits, including the First, Second, Fourth and D.C. Circuits, do not have model jury instructions.

(d) "communicating to each of his co-conspirators that he has abandoned the conspiracy and its goals."

B. Proof Scenarios

The *Smith* case also highlighted the evidence necessary to establish withdrawal. The Court relied upon and reinforced the withdrawal standard used a century ago in *Hyde v. United States*.[24]

Consider a couple of scenarios. Assume one member of a long-term antitrust conspiracy withdraws *before* the five year statute of limitations period, yet other members continue the conspiracy into the statute of limitations period. The withdrawing conspirator will have a *full defense* under the statute of limitations as long as there is sufficient proof of his or her withdrawal.[25]

In contrast, consider a member who participated in a ten-year price fixing conspiracy but withdrew four years before the charges were filed while others continued in the conspiracy. Since some of the individual's conduct occurred within the five-year statute of limitations period, liability will be capped at the time of the withdrawal. The individual will not be responsible for the conduct of others after his effective withdrawal.[26]

In establishing withdrawal, *Smith* also provides some guidance on what proof is required and what proof is insufficient. Withdrawal requires "'affirmative action ... to disavow or defeat the purpose' of the conspiracy."[27] Mere inactivity (including incarceration as in *Smith*) fails to show withdrawal. In *Smith*, the mere testimony that the individual "was no longer a member of the" conspiracy was insufficient.[28]

V. Conclusion

The *Smith* case resolved an important circuit split. Given the importance of this issue, the *Smith* case provides useful guidance on how best to address withdrawal issues. Ultimately, each case will turn on consideration of the facts under the preponderance of the evidence standard with a focus on the concrete steps taken by the individual or company to withdraw.

[24] 225 U.S. 347 (1912).

[25] *Smith*, 133 S.Ct. at 719 ("Withdrawal also starts the clock running on the time within which the defendant may be prosecuted, and provides a complete defense when the withdrawal occurs beyond the applicable statute-of-limitations period.") (footnote omitted).

[26] *Id*. ("Withdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators, but he remains guilty of conspiracy" for prewithdrawal acts if the statute of limitations has not run.).

[27] *Id*. at 720 (quoting *Hyde*, 225 U.S. at 369 ("Having joined in an unlawful scheme, having constituted agents for its performance, scheme and agency to be continuous until full fruition be secured, until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law.")).

[28] *See* note 8(*), *supra*.

Guilty Pleas in Civil Antitrust Trials

By: Jason S. Angell, Robert E. Freitas, and Jessica N. Leal of Freitas Angell & Weinberg LLP, Redwood Shores, California

For parties accused of participating in an unlawful conspiracy in an antitrust case, an investigation by the United States Department of Justice ("DOJ") that culminates in a guilty plea is, in many ways, just the beginning. A defendant's guilty plea and guilty pleas of alleged co-conspirators are likely to feature prominently in the inevitable class action and opt-out treble damages litigation that follows a DOJ investigation.

The conventional wisdom holds that guilty pleas are a goldmine for plaintiffs, and devastating for defendants. However, the reality is much more nuanced. Admission of evidence of guilty pleas certainly offers benefits to plaintiffs in the form of efficient means of proving the existence of an alleged conspiracy, and can tar non-pleading defendants with admissions of guilt by alleged co-conspirators.

On the other hand, guilty pleas can also provide opportunities to both pleading and non-pleading civil defendants that carefully manage the guilty plea issue from an early stage in the litigation. Skillful cross examination and limitations posed by the rules of evidence can help illuminate problems presented by plaintiffs that rely too heavily on guilty pleas.

Legal Basis for Admissibility of Guilty Pleas

Antitrust plaintiffs typically argue that guilty pleas are relevant to proving the existence of an alleged conspiracy, participants to a conspiracy, and, often, the temporal, geographic, and subject matter scope of an alleged conspiracy.

The admissibility analysis for a guilty plea is driven by the identity of the party against whom it is offered. A guilty plea of a defendant is not hearsay and will be admissible in a trial as a party admission. Fed. R. Evid. 801(d)(2). A guilty plea of a co-conspirator will almost always be offered against a defendant to prove the truth of the matters asserted in the guilty plea and, therefore, is hearsay. Fed. R. Evid. 801(c).

Where a guilty plea of another is offered against a defendant, nothing in Rule 801 is likely to exclude the plea from the definition of hearsay. It is unlikely that, for example, a guilty plea of a co-conspirator would be offered as a prior consistent or inconsistent statement of the co-conspirator. Fed. R. Evid. 801(d)(1)(A) and (B). It is similarly unlikely that the guilty plea would be made by a representative of the defendant against whom it is offered, or that the defendant would have adopted the statement as true. Fed. R. Evid. 801(d)(2)(A) and (B). Guilty pleas also are not statements made in the course of a conspiracy. Fed. R. Evid. 801(d)(2)(E). To be admissible, a guilty plea offered against another party therefore must fit within an exception to the hearsay rule.

The most commonly invoked hearsay exception justifying the admission of guilty pleas is the exception for prior "judgments." Evidence of a "final judgment" may be admissible under an exception to the rule against hearsay under Rule 803(22). Rule 803(22) applies to evidence of a "final judgment" if the "judgment" was entered after a trial or a guilty plea, the conviction was for a crime punishable by death or imprisonment for more than one year, and the evidence of "final judgment" is admitted to prove "any fact essential to the judgment."

By its terms, Rule 803(22) does not provide an exception for a guilty plea. Nevertheless, some courts have admitted guilty pleas and other non-judgment evidence under Rule 803(22). The decisions evaluating admissibility of guilty pleas under Rule 803(22) do not address the discrepancy between the language of the rule (which is addressed to "judgments") and the evidence being offered (e.g., a guilty plea). *See, e.g., U.S. ex rel. Miller v. Bill Harbert Intern. Const., Inc*., 608 F.3d 871, 891-893 (D.C. Cir. 2010) (rejecting challenge to admission of guilty plea and Rule 11 memorandum); *Scholes v. Lehmann*, 56 F.3d 750, 762 (7th Cir. 1995) (asserting without analysis that plea agreements are admissible under Rule 803(22)).

If it is assumed that a guilty plea qualifies for admission under Rule 803(22), the rule also includes further requirements. Rule 803(22) allows admission of a prior judgment if the judgment "is admitted to prove any fact essential to the judgment." The reported cases of which the authors are aware do not include focused analysis of what "facts" underlying a plea agreement are "essential" to a subsequent "judgment." Rather, the analysis generally stops at the point at which a court determines that the guilty plea is admissible, without limiting the admissibility to facts essential to the judgment.

In the end, nevertheless, guilty pleas of alleged co-conspirators are likely to be admitted into evidence in a trial against parties alleged to have participated in the same or a similar conspiracy. Both plaintiffs and defendants should prepare for a trial that includes the guilty pleas of non-parties, and should organize their trial presentations with the admission of guilty pleas as part of trial planning.

Strategic Benefits to Plaintiffs

For plaintiffs, the benefits to be obtained from the introduction of guilty pleas against alleged co-conspirators are relatively straight-forward. Defendants accused of participating in a price fixing or other conspiracy in violation of the antitrust laws will either be non-pleaders contesting liability or, more rarely, defendants that themselves pleaded guilty but are disputing other aspects of the plaintiff's case.

As to defendants contesting liability, the admission of guilty pleas of one or more co-conspirators can help the plaintiff to establish the existence of an alleged conspiracy, as well as participants in the alleged conspiracy. A given guilty plea may identify other parties with which the pleading party conspired, thus providing an efficient vehicle to populating the conspiracy.

The guilty plea is also likely to contain statements about the temporal scope of the conspiracy, the products or services subject to the conspiracy, and may specify victims or the volume of affected commerce. The plea document in many cases will say where conspiratorial activity took place, and where harm arising from the conspiracy occurred. Presumably, a plaintiff filing suit after a DOJ investigation has used the plea

agreements and other documents from the investigation in preparing its complaint, and admitted plea agreements generally will be consistent with the scope of the liability and damages theories the plaintiff presents at trial.

In cases alleging broad, complex conspiracies, a plaintiff may seek to introduce guilty pleas of numerous companies and individuals. Unless the court is inclined to instruct the jury as to the existence and content of the plea agreements, presenting plea agreement evidence can threaten to consume valuable trial time. In a recent price fixing trial in which the authors represented a defendant that had pleaded guilty during a DOJ investigation, the plaintiffs sought to streamline the presentation of co-conspirator guilty plea evidence by presenting it through a "summary witness" who testified about the content of the guilty pleas and other materials the court had ruled admissible. *See Best Buy Co., Inc. v. Toshiba Corp., et al.* Case No. 12-CV-4114 and *Best Buy Co., Inc. v. AU Optronics Corp., et al.,* Case No. 10-CV-4572 (N.D. Cal.).

Retailer Best Buy Company and its affiliates were opt-out plaintiffs in the *In re TFT-LCD (Flat Panel) Antitrust Litigation*. Defendant HannStar Display Corporation had pleaded guilty to price fixing. Certain Toshiba entities, also defendants at trial, denied participation in the alleged conspiracy to fix prices of LCD panels, and were never indicted in the underlying DOJ investigation of the TFT-LCD industry.

The defendants objected to the use of the summary witness on the basis that Rule 1006 provides only for admissibility of an exhibit summarizing voluminous records, not a witness to summarize voluminous records. The court overruled the objections, and the plaintiffs' "summary witness" presented a synopsis of the guilty pleas in the form of a chart that purported to set out certain details found in corporate and individual guilty pleas of non-parties (and other documents from the respective criminal proceedings). The Rule 1006 summary exhibit included information about the pleading party, the conspiracy period to which the party pleaded, and fine and incarceration information, among other things. The court admitted the summary exhibit, as well as the underlying documents from which the summary was prepared, thus accelerating the admission of the guilty plea evidence.

Managing Risks and Creating Opportunities for Defendants

The value to a plaintiff of admission of guilty pleas, while potentially significant, can be limited by careful planning and strategy by the defense. Feedback from formal and informal exercises suggests that the public is not as inflamed by a guilty plea as one might think. Attentive management of the defense response to guilty plea evidence can balance the undeniably negative effect of the guilty pleas.

A defendant that has pleaded guilty to the alleged conspiracy can seek to blunt the dramatic and evidentiary impact of the guilty pleas by seizing the liability mantle early in the case. In the *Best Buy* trial, Defendant HannStar's lead lawyer told the jury in opening statement that HannStar and one of its executives had pleaded guilty to fixing prices of the LCD panels that Best Buy claimed caused its damages. By accepting responsibility for its illegal conduct early in the case, HannStar was able to go on the offensive from the beginning. The concession of much of the liability case provided HannStar with a credible platform on which it could focus its trial effort on the damages case. The trial time spent attacking the plaintiffs' damages case was rewarded when the jury awarded less than 1% of the damages the Best Buy plaintiffs claimed.

Clarity and early issue definition is essential for the defense in a case in which guilty pleas will be admitted. Among other things, a defendant that acknowledges liability is better able to metaphorically shrug its shoulders, to some extent, in response to a plaintiff's guilty plea evidentiary flourish.

For a defendant that contests liability, the challenges presented by guilty plea evidence are different, as are the opportunities. An unindicted defendant will seek to distinguish itself from its alleged co-conspirators by highlighting the fact that it was never charged. A defendant that was investigated or charged, but did not plead and was not convicted, may have a still more appealing response to guilty plea evidence.

Beyond the broad thematic points, defendants can attack guilty plea evidence in a variety of ways through *in limine* and trial motions, as well as cross examination. Motions directed to jury instructions aimed at limiting the jury's consideration of guilty plea evidence will be critical.

Defendants should seek instructions that the jury's consideration of an alleged co-conspirator's guilty plea should be limited to facts "essential to the judgment," Fed. R. Civ. P. 803(22), and that plea agreements should be narrowly construed. At least one author has suggested that plea agreements in the civil context should be construed according to the doctrine of *contra proferentem* (that ambiguous terms in written agreement should be interpreted against the drafter of the agreement), as they are in the criminal context. *The Use And Effect Of An Antitrust Guilty Plea In Subsequent Civil Litigation*, Freccero, Stephen P., Competition – The Journal of the Antitrust and Unfair Competition Law Section of the State Bar of California, Vol. 22, No. 1 (Spring 2013); *United States v. Transfiguracion*, 442 F.3d 1222 (9th Cir. 2006).

As another limiting principle, the proof required to establish a Sherman Act violation in a criminal case is different from what civil plaintiffs must prove. Criminal liability under the Sherman Act may arise from the mere agreement to fix prices. Unless the plea agreement specifies otherwise, an appropriate instruction would explain to the jury that the plea agreement establishes only that the pleading party met with at least one other party at some point during the plea period and reached an agreement to fix prices. In a given case, it may be appropriate to seek an instruction that makes clear to the jury that that the guilty plea of one party does not establish that the defendant participated in the conspiracy to which the non-party pleaded. These principles, and Rule 403, should strongly favor providing the jury with a meaningful limiting instruction.

In the context in which multiple guilty pleas may be admitted, skillful cross examination can highlight differences in the pleas that may be helpful to draw contrasts between the facts to which a party pleaded as recorded in the agreements and the conspiracy alleged by a given plaintiff in a civil trial. In a civil

proceeding, it seems likely that a plaintiff's conspiracy allegations will be broad, in an effort to encompass disparate activity recorded in numerous pleas of individuals and corporations.

In the *Best Buy* trial, for example, the cross examination of the Best Buy summary witness focused in large part on eliciting testimony about the differences between the pleaded conduct of the non-parties, and the alleged conduct of HannStar and Toshiba, the defendants in the courtroom. The defense highlighted on cross examination, for example, that some of the plea agreements involved a small number of companies participating in a bid-rigging conspiracy as to products being sold to a computer manufacturer that was not a supplier to Best Buy. Bringing out distinctions of this kind can be critical to deflecting some of the evidentiary power of plea agreements.

In sum, plaintiffs can reap substantial benefits from the admission of guilty pleas of parties or their alleged co-conspirators. Key to defending in the face of admitted guilty pleas is early evaluation of a proper strategy, and a disciplined approach to addressing the pleas.

Idealizing Trial Structure in an Intricate Antitrust Reality

By: Steven N. Williams and Elizabeth Tran[1]

One of the most challenging questions facing federal courts and litigants in antitrust cases is the management of trials involving claims by direct and indirect class plaintiffs, state attorneys general, and opt-out plaintiffs. Before the Class Action Fairness Act of 2005 ("CAFA")[2], indirect purchasers generally brought claims in state courts, often while parallel direct purchaser claims were litigated in federal courts. CAFA greatly expanded federal jurisdiction over state law class actions and, as a result, most class actions involving indirect purchaser claims are either filed in, or removed to, federal court where they proceed in a coordinated manner with federal class claims. Frequently, state attorneys general claims and claims by opt-outs or "direct action plaintiffs" are also coordinated with the class claims.

It has thus become commonplace for all of these plaintiffs to litigate claims concerning the same conduct in one federal court. Indirect purchasers must, however, bring their damage claims—typically based on state antitrust, consumer protection, and unjust enrichment laws—under state law because *Illinois Brick Co. v. Illinois*[3] prohibits them from recovering antitrust damages under the Sherman Act. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[4] prohibits defendants from asserting pass-through of overcharges as a defense to claims made under the Sherman Act, except in very limited circumstances. And *California v. ARC America Corp.*[5] upholds the right of the states to provide for remedies for indirect purchasers that are separate from, and in addition to, the liability that antitrust violators may face under federal law.

If direct and indirect purchasers file actions alleging the same claims in different federal courts, the Judicial Panel on Multidistrict Litigation will consolidate all actions in one district and assign them to a single judge for centralized pretrial proceedings. Both direct and indirect purchasers must prove liability, though indirect purchasers must also prove pass-on of overcharges. Coordinated pretrial proceedings can support the efficient conduct of discovery to prove liability.

Direct class plaintiffs and indirect class plaintiffs typically would prefer to try their cases separately from each other. Concerns of efficiency and avoiding duplicative work by overburdened courts often lead to proposals to try some or all claims together to minimize costs to the court and the parties. On the issue of liability, direct purchasers' Sherman Act claims and indirect purchasers' state law claims can be consolidated per Federal Rule of Civil Procedure ("Rule") 42(a) and tried together before a single jury. The liability standard under federal antitrust law and the state counterparts are virtually identical, and courts can instruct a jury on state consumer protection statutes that predicate liability on "deceptive," "unfair," and "unconscionable" conduct. The court's objective is to approve or create a trial structure that maximizes the likelihood of a fair and impartial trial while minimizing inefficiencies, such as time, costs, and judicial resources.

It is sometimes argued that the most efficient trial structure would be one trial of all direct and indirect purchaser issues, including liability and damages. Fact and expert witnesses would only have to testify once on liability and damages, and the jury would only have to make one determination as to whether an antitrust violation has been proven and its impact on all plaintiffs in the distribution chain. This approach is problematic due to the conflict between the requirement that indirect purchasers show pass-on of damages to them and the bar on evidence of pass through of damages as a defense in a Sherman Act claim.

Experiences Thus Far

The following cases demonstrate how courts have structured trials in antitrust class actions with direct and indirect purchasers to balance the need for a fair trial with the desire for efficiency:

In re Static Random Access Memory (SRAM) Antitrust Litigation

In *SRAM*, a class action alleging price-fixing by certain manufacturers of SRAM, the plaintiffs made two trial proposals. The plaintiffs first proposed that the court initially jointly try the issue of whether there was a conspiracy. If the jury returned a finding that such a conspiracy existed, the direct and indirect purchasers would then have proceeded separately on impact and damages issues. Alternatively, the plaintiffs proposed that after a joint trial on conspiracy issues, the direct purchasers would continue by trying their impact and damages issues to the same jury and the indirect purchasers to a separate jury that had sat through the conspiracy trial. If the direct purchasers received a favorable verdict, defendants would not have to re-litigate liability with indirect purchasers and indirect purchasers would only have to then try damages. The reverse would not have been true, however, rendering it less appealing to defendants.[6]

One of two remaining defendants, Samsung, requested a joint trial on liability and damages.[7] The Northern District of California chose plaintiffs' alternative proposal partly due to *Hanover Shoe* concerns[8]; that is, in a joint trial on liability and damages, indirect purchasers would effectively be making the same pass-on argument that defendants are forbidden to raise—that direct purchasers did not absorb the overcharge but other

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[2] 28 U.S.C. § 1711.

[3] 431 U.S. 720 (1977).

[4] 392 U.S. 481 (1968).

[5] 490 U.S. 93 (1989).

[6] Joint Pretrial Conference Statement, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, MDL No. 1819, ECF No. 1170 (Nov. 30, 2010), at 16-18.

[7] *Id.* at 23-28.

[8] Tr. Of Motions Hearing, *In re Static Random Access Memory (SRAM) Antitrust Litig.*, MDL No. 1819, Dec. 14., 2010, at 5-6.

purchasers further down the distribution chain did so.[9] The court never tested the effectiveness of this trial structure because a direct purchaser settlement broke the overlap in the line-up of defendants shortly after the announcement of the trial structure.

In re TFT-LCD (Flat Panel) Antitrust Litigation

In *Flat Panel*, a class action alleging price-fixing by certain manufacturers of Flat Panels, the Northern District of California ordered a single trial with two phases. In the first phase, direct and indirect purchasers would try their common liability issues and direct purchasers would try their impact and damage issues. In the second phase, the indirect purchasers would try their impact and damages issues. As in *SRAM*, the court never tested the feasibility of the trial structure due to settlements reached shortly thereafter that concluded the indirect purchaser action.[10]

In re Polyurethane Foam Antitrust Litigation

In *Polyurethane Foam*, a class action alleging price-fixing by certain manufacturers of flexible polyurethane foam or flexible polyurethane foam products, the Northern District of Ohio decided on a trial structure as follows: In the first trial, direct purchasers would try their liability and impact issues before a single jury and then try their damages before the same jury. The court would then hold a second trial for the Sealy Corporation plaintiffs (a large bedding manufacturer/licenser and opt-out plaintiff). This would be followed by a third trial for indirect purchasers. The court ruled that this trial structure would prevent the potentially unfair advantage to plaintiffs of using "separate juries in a consolidated, bifurcated setting," while noting that the plaintiffs would not be prejudiced by the phased trial approach because a direct purchasers-only will avoid the complications created by pass-on issues. The case is ongoing.[11]

A Trial Structure Proposal

The aforementioned cases show that antitrust litigation presents complex issues and choices for the parties. Post-CAFA, no trial has yet gone forward involving the simultaneous prosecution of both direct and indirect purchaser claims. Bringing antitrust class actions to conclusion requires the court and parties to find efficient means of litigating the issues while avoiding duplicative efforts and minimizing unnecessary costs but also requires that no party is prejudiced and that the different rights and remedies provided by federal and state law be preserved and protected. The financial exposure of these cases is substantial for both plaintiffs and defendants. We propose a four-phase trial for complex antitrust cases with both direct and indirect purchasers. Certain issues and allegations are common to direct and indirect purchasers, such as whether the defendants violated the antitrust laws, and courts should endeavor to try these issues jointly.

Courts are empowered to adopt "special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems" per Rule 16(c)(2)(L). Courts are also authorized to order separate trials on issues or claims for "convenience, to avoid prejudice, or to expedite and economize" pursuant to Rule 42(b).

Litigating a complex antitrust case in four phases offers several advantages and little harm to the court and parties. *First*, a joint trial is consistent with Rule 1, which directs the Rules to be "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding." *Second*, a joint trial of direct and indirect purchaser claims on common liability issues promotes efficiency by simplifying the litigation for the court and the jury. *Third*, all parties benefit because they would not be subject to litigating liability issues multiple times, and defendants benefit because they would not be subject to potentially duplicative damages. *Fourth*, deferring the allocation of the total overcharge among the different levels of purchasers in the chain of distribution is consistent with pre-*Illinois Brick* case law where cases were brought under the Sherman Act by plaintiffs occupying multiple levels in the chain of distribution. *See*, *e.g., In re Western Liquid Asphalt Cases*, 487 F.2d 191, 200 (9th Cir. 1973); *Wall Prods. Co. v. Nat'l Gypsum Co.*, 326 F. Supp. 295, 296 (N.D. Cal. 1971). *Fifth*, deferring allocation issues to a later phase also eliminates the need to involve defendants in any dispute between different level indirect purchaser groups as to the allocation of amount passed on from first-level indirect purchasers to their customers.

Phase One

Before the first phase of trial, all plaintiff groups would seek issue certification of issues-only classes per Rule 23(c)(4) as to liability.[12] The Sixth Circuit's decision in *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.* supports such issue certification of a liability class, leaving damage calculations to subsequent proceedings.[13] During phase one of trial, all plaintiff groups could try the nature and scope of defendants' liability or violation of antitrust laws. Issues in phase one would include, for example, the conspiracy that occurred; the identity of the conspirators; the duration of the conspiracy; the effects of the conspiracy; and the identity of the affected entities and individuals.

Phase Two

The second phase of trial would involve a determination of impact and amount of overcharge to all direct purchasers. The jury would determine whether the direct purchasers – both class and opt-out – suffered impact, and the total amount of that impact.

[9] *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

[10] Order re Trial Structure, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, MDL No. 1827 (N.D. Cal. Apr. 20, 2012).

[11] Order Selecting Initial Trial, Requiring Party Mediation, and Revising Remaining Deadlines, *In re Polyurethane Foam Antitrust Litig.*, MDL No. 2196, ECF No. 1272 (July 3, 2014), at 2-3.

[12] Rule 23(c)(4) provides, "When appropriate, an action may be brought or maintained as a class action with respect to particular issues."

[13] *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 860-61 (6th Cir. 2013), *quoting Comcast Corp. v. Behrend*, 133 S.Ct. 1426, 1437 n. * (2013).

Phase Three

Before the third phase of trial, the first-level of indirect purchasers in the distribution chain would seek class certification per Rule 23(b)(3) for all purposes. At this time, customers of first-level indirect purchasers (*i.e.*, subsequent-level indirect purchasers) would also seek issue certification of issues-only classes per Rule 23(c)(4) as to the amount of overcharge paid by direct purchasers and passed on to first-level indirect purchasers. This eliminates any due process concerns regarding the possibility of one-way intervention.[14] All indirect purchaser groups would agree that they can collectively only recover one overcharge as held in *In re TFT-LCD (Flat Panel) Antitrust Litig.*[15] If the court grants the first-level indirect purchasers' motion for class certification and their customers' motion for issue certification, the court could commence phase three of trial and enter a judgment that would bind all first-level indirect purchasers who did not opt-out of the class that established antitrust impact and amount of overcharge.

During phase three of trial, the first-level indirect purchasers in the distribution chain will try the amount of overcharge passed on from the direct purchasers to the first-level indirect purchasers. In this phase, the jury will determine the amount of the previously determined overcharge to the direct purchasers that was passed-on to the indirect purchasers (*i.e.*, the total amount of harm sustained by first-level indirect purchasers and their customers, or all indirect purchasers). Defendants may exit the litigation after this phase.

The indirect purchasers will not try the issue of allocation of damages during the third phase of trial. Instead, if the court enters a judgment awarding damages to indirect purchasers, the court would order the liable defendants to pay the award. The indirect purchaser groups would then proceed to the fourth phase of trial to determine how the jury should apportion the damages award between the various indirect purchaser groups. Deferring the issue of apportioning damages among different levels in the chain of distribution is consistent with the Ninth Circuit's decision in *In re Western Liquid Asphalt Cases*.[16]

Phase Four

In the fourth phase of trial, the indirect purchaser groups would allocate the total amount of overcharge passed on from direct purchasers to indirect purchasers, including end consumers of a good or service, amongst themselves by agreement or by trial for the third phase. If by agreement, the court can avoid adjudication of subsequent-level indirect purchasers' motions for certification of a damages class per Rule 23(b)(c) *and* a phase trial on allocation of damages, therefore concluding the multidistrict litigation subject to the court's approval of final settlement agreements. If by trial, the indirect purchaser groups would litigate the allocation issue, though with no participation by defendants.

Conclusion

The proposal described in this article complies with Rules 16(c)(2)(L), 19, 22(1), 23(c)(4), and 42(b) of the Federal Rules of Civil Procedure, and 28 U.S.C. §§ 1335 and 1407 and provides significant benefits to courts and litigants. The four phases ensure a fair and impartial trial for all parties while a joint trial on common issues enhances savings of time, cost, and judicial resources.

[14] One-way intervention occurs if class members are aware of the outcome of a trial before having to decide whether to opt-out. If the representative plaintiffs won the trial, a class member may choose to stay in the class; if the representatives lost, however, class members would certainly opt-out to avoid being bound by the result.

[15] *In re TFT-LCD (Flat Panel) Antitrust Litig.,* MDL No. 1827, 2012 U.S. Dist. LEXIS 182373 (N.D. Cal. Dec. 26, 2012)

[16] *In re Western Liquid Asphalt Cases*, 487 F.2d 191 (9th Cir. 1973).

Hospital-Merger Litigation in 2014 Leads to Divestitures

By: Adam M. Acosta[1]

Hospital mergers and acquisitions across the country are commonplace as hospitals react to a variety of variables such as the recession, uncertainties in Medicaid and Medicare coverage, and healthcare reform under the Affordable Care Act.[2] According to one prominent healthcare executive, "the most dangerous place to be these days is a stand-alone hospital."[3] In 2013 alone, there were 83 hospital mergers and acquisitions in deals totaling about $14 billion.[4] With the surge in hospital mergers, "most markets in the country are already highly concentrated and they are becoming more so," according to Martin Gaynor, Director of the Bureau of Economics at the Federal Trade Commission.[5] His message to merging hospitals: "We are paying attention."[6]

There have been two significant challenges to hospital mergers resulting in trials and subsequent appeals in 2014: *St. Alphonsus Medical Center v. St. Luke's Health System* and *ProMedica Health System v. FTC*. This article discusses these challenges, both of which resulted in full divestiture orders.

St. Alphonsus Medical Center v. St. Luke's Health System

In December 2012, St. Luke's, a healthcare system operating in the Nampa, Idaho area, acquired Saltzer Medical Group, Idaho's largest independent multi-specialty physician practice. While the transaction did not require a Hart-Scott-Rodino filing, the FTC and Idaho Attorney General asked that St. Luke's delay closing until both government entities investigated. Undeterred, St. Luke's proceeded with closing. The FTC, the Idaho Attorney General, and a group of private plaintiffs responded by filing a lawsuit alleging that the acquisition violated § 7 of the Clayton Act as well as the Idaho Competition Act ("ICA"). After a 19-day bench trial, the U.S. District Court for Idaho ruled in January 2014 that the transaction violated the Clayton Act and ICA, necessitating a full divestiture.

The court's decision began by complimenting the merging entities for having the "foresight and vision" to react to a changing healthcare system.[7] The court also recognized the acquisition as a genuine attempt to improve the quality of medical care.[8] Nevertheless, with the parties agreeing that the relevant product market is adult primary care services, the court found that St. Luke's post-merger share of nearly 80% and a Herfindahl-Hirschman Index[9] of 6,219 established prima facie evidence of an illegal merger.[10] These calculations were based on the court's determination that the relevant geographic market is Nampa, despite the largest city in Idaho, Boise, being located nearly 22 miles away.[11] As the court explained, the evidence at trial demonstrated that patients like to get their medical care close to home and that only 15% of Nampa residents obtain medical care in Boise.[12] Thus, Nampa adult primary care services "could band together and successfully demand a 5 to 10% price increase (or reimbursement increase) from health plans."[13]

In evaluating the anticompetitive effects of the transaction, the court also considered a variety of other factors, such as St. Luke's 77 other acquisitions of physician clinics and practices between 2007 and 2012, enhanced post-acquisition bargaining leverage over health plans and hospital billing rates, and increased influence over doctor referrals. The court also emphasized that raising consumer costs "has been the result in the past when St. Luke's has achieved bargaining leverage over health insurers."[14]

The court's analysis relied on pre-merger documents and customer testimony. It cited documents demonstrating St. Luke's plans to fund a pay raise for physicians by obtaining "higher hospital reimbursement" following the transaction.[15] Similarly, the court relied on an email discussing how St. Luke's could improve Saltzer's negotiating position with insurance plans because "there would be the clout of the entire network."[16]

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[2] *See, e.g.*, George L. Paul, *Obamacare Drives HMA & Cmty. Health Merger*, White & Case LLP (July 7, 2013), http://www.whitecase.com/news-07072013/.

[3] Josh Dawsey, *Hospital Mergers in the New York Area Bring Cost Fears*, Wall Street J. (Aug. 4, 2014, 9:11 PM), http://online.wsj.com/articles/hospital-mergers-in-the-new-york-area-bring-cost-fears-1407201110.

[4] Jacob Gershman, *Appeals Court Strikes Down Ohio Hospital Merger in Win for FTC*, Wall Street J. (Apr. 22, 2014, 6:54 PM), http://blogs.wsj.com/law/2014/04/22/appeals-court-strikes-down-ohio-hospital-merger-in-ftc-win/.

[5] Eduardo Porter, *Health Law Goals Face Antitrust Hurdles*, N.Y. Times (Feb. 4. 2014), http://www.nytimes.com/2014/02/05/business/economy/health-law-goals-face-antitrust-hurdles.html.

[6] *Id.*

[7] *St. Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, No. 1:12-CV-00560-BLW, 2014 WL 407446, at *1 (D. Idaho Jan. 24, 2014).

[8] *Id.*

[9] HHI is calculated by "summing the squares of the individual firms' market shares, and thus gives proportionately greater weight to the larger market shares." Agencies generally classify markets into three types: Unconcentrated Markets where HHI is below 1500; Moderately Concentrated Markets where HHI is between 1500 and 2500; and Highly Concentrated Markets where HHI is above 2500. *See Horizontal Merger Guidelines* at 18-19 (2010).

[10] 2014 WL 407446, at *8, *13.

[11] *Id.* at *7.

[12] *Id.*

[13] *Id.* at *8.

[14] *Id.* at *25.

[15] *Id.* at *12.

[16] *Id.* at *11 ("If our negotiations w/luke's go to fruition, this will be something we could try to get back, i.e. consult codes, as there would be *the clout of the entire network*.").

The court also relied on Blue Cross of Idaho, the largest insurer in Idaho, expressing concerns about the transaction and cited testimony that the Saltzer Group is a "must have" provider.[17]

St. Luke's raised efficiency and market entry defenses. It argued that the efficiencies "will far outweigh any anticompetitive effects."[18] Some of those purported efficiencies included elimination of a fee-for-service reimbursement system, moving to a risk-based reimbursement system on a per-patient basis rather than a per-service basis, the prospect of "team-based medicine," and a more comprehensive shared electronic records system.[19] The court rejected those reasons, finding that they are not merger specific and there are other ways to obtain the desired efficiencies that "do not run such a risk of increased costs."[20] The court also opined that entry by competitors is not likely to be "timely, likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects."[21]

The court concluded by observing that absent the Clayton Act, "the best result might be to approve the Acquisition and monitor its outcome to see if the predicted price increases actually occurred."[22] But as the court recognized, it does not have the discretion to "conduct a health care experiment."[23] Accordingly, the court enjoined the acquisition and ordered a full divestiture of the Saltzer physicians and assets.[24] However, it rejected the plaintiffs' request to order St. Luke's to notify the government in advance of any future acquisitions of physician groups.[25]

St. Luke's later sought a stay of the district court's order and asked to continue operating as a combined entity pending appeal. Considering the likelihood of success on the merits, the district court explained that while antitrust laws may not be in tune with the rapidly changing healthcare environment, the law and facts were clear and divestiture is the "remedy best suited to redress the ills of an anticompetitive merger."[26] The court also reasoned that a 30% reduction in Saltzer physician's compensation due to a divesture was insufficient to show irreparable harm, especially where there was no evidence that Saltzer would become unprofitable or uncompetitive.[27] Finally, the court explained that a stay would lock into place an anticompetitive bargaining advantage and the public interest is best served by keeping healthcare prices low.[28]

About a month later, in a one-sentence summary statement, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's decision denying the stay. With respect to the merits of the appeal, St. Luke's argues that the transaction is procompetitive and "the affiliation advances the policy of our society, as reflected in the Affordable Care Act and in healthcare trends generally, to promote clinically integrated care, a transition to value-based delivery of care, and expansion of access for the poor and uninsured."[29] St. Luke's also attacks the district court's determination that Nampa is the relevant geographic market and further argues that the presumption of divestiture has been rebutted because it "would not be effective to reduce the posited anticompetitive effects, and divestiture would reduce or eliminate procompetitive benefits that could be preserved through a remedy short of divestiture."[30] The appeal is still pending.

ProMedica Health System v. FTC

The second significant hospital-merger challenge arose from the 2010 merger between two of the four hospital systems in Lucas County, Ohio. The merging entities were ProMedica, the county's dominant hospital provider, and St. Luke's, an independent community hospital (unrelated to St. Luke's in Idaho). Five months after closing, the FTC challenged the merger in the U.S. District Court for the Northern District of Ohio under § 7 of the Clayton Act, obtaining a preliminary injunction pending the outcome of a trial.[31] After a trial lasting over 30 days that included more than 8,000 pages of testimony and over 2,600 exhibits, an Administrative Law Judge and later the Commission concluded that the merger would adversely affect competition in violation of § 7 and ordered ProMedica to divest St. Luke's. ProMedica appealed to the U.S. Court of Appeals for the Sixth Circuit.[32] In a 19-page order issued in April 2014, the Sixth Circuit affirmed.[33]

With the parties agreeing that the relevant geographic market is Lucas County, the Sixth Circuit turned to the "more difficult" issue of determining the relevant product markets. Although hundreds if not thousands of services were implicated, the court agreed with the FTC's clustering theory that "the competitive conditions across the markets for primary and secondary [general acute] services are similar enough to justify clustering those markets when analyzing the merger's competitive effects."[34] The court also agreed with the FTC that "the same is not true for [obstetrical] services, whose competitive conditions

[17] *Id.* at *9.

[18] *Id.* at *14.

[19] *Id.* at *14-19.

[20] *Id.* at *2.

[21] *Id.* at *19 (citing *Horizontal Merge Guidelines* § 9 (2010); *FTC v. Proctor & Gamble, Co.*, 386 U.S. 568, 579 (1967)).

[22] *Id.* at *25.

[23] *Id.*

[24] *Id.* at *26.

[25] *Id.*

[26] *Id.* at *1.

[27] *Id.* at *2.

[28] *Id.* at *2-3.

[29] *Saint Alphonsus Med. Ctr.-Nampa, Inc. v. St. Luke's Health Sys., Ltd.*, No. 14-35173, Apps. Reply Br., ECF No. 95-1 at 1 (9th Cir. Sept. 2, 2014).

[30] *Id.* at 6-12, 28-29.

[31] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 561 (6th Cir. 2014).

[32] *Id.* at 561, 564.

[33] *Id.* at 561.

[34] *Id.* at 566.

differ in at least two respects from those for other services" and therefore should be considered as a separate product market.[35] ProMedica's market share pre-merger for obstetrical services was 71.2% (while its market share for primary and secondary services was 46.8% pre-merger) and would increase above 80% post-merger.[36] Moreover, only three hospital systems provided obstetrical services in Lucas County pre-merger (as opposed to four hospital systems providing primary and secondary services), which would decrease to two hospitals post-merger.[37]

Next, the court addressed the presumption of illegality. The court concluded that the post-merger concentration levels in both product markets "blew through" the Horizontal Merger Guideline thresholds in "spectacular fashion."[38] The already dominant ProMedica's market shares would increase to above 58% post-merger (HHI of 4,391) for primary and secondary services and above 80% post-merger (HHI of 6,854) in obstetrics.[39]

ProMedica argued that measuring HHI to apply a presumption of illegality only applies in "coordinated-effects" cases rather than in "unilateral-effects" cases.[40] The court initially recognized that this argument is "one to be taken seriously," primarily because the extent to which products of merging firms can be substituted is usually a more important factor to consider than HHI data alone.[41]

Nonetheless, the court deemed this an "exceptional" case for two reasons. First, "the record makes clear that a network which does not include a hospital provider that services almost half the county's patients in one relevant market, and more than 70% of the county's patients in another relevant market, would be unattractive to a huge swath of potential members."[42] Second, "[e]ven in unilateral-effects cases, at some point the Commission is entitled to take seriously the alarm sounded by a merger's HHI data. And here the numbers are in every respect multiples of the numbers necessary for the presumption of illegality."[43]

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 568-69.

[39] *Id.*

[40] *Id.* at 568. Coordinated effects cases occur "where rivals are few" and firms are able "to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels." *Id.* (quoting *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36, 77 (D.D.C. 2011)). In contrast, "unilateral price elevation post-merger for a product sold by one of the merging firms normally requires that a significant fraction of the customers purchasing that product view products formerly sold by the other merging firm as their next-best choice." *Id.* at 569 (quoting *Horizontal Merger Guidelines* § 6 at 20-21 (2010)).

[41] *Id.* at 569.

[42] *Id.* at 570.

[43] *Id.*

The final question before the court was whether ProMedica rebutted the presumption of illegality. The court found it "remarkable" that ProMedica did not attempt to argue that the merger would create efficiencies that enhance consumer welfare since that is the goal of antitrust laws.[44] The court also discussed a variety of testimony from the merging entities that tended to confirm the presumption rather than rebut it.[45] For example, St. Luke's CEO admitted that the merger might "harm the community by forcing higher rates on them" and that ProMedica was its "most significant competitor."[46] Managed care organization witnesses also testified that they would have little walk-away options post-merger and would have little ability to resist higher rates.[47] Accordingly, the Sixth Circuit affirmed the Commission's decision and found no basis to dispute the "natural remedy" of divestiture.[48]

Conclusion

While hospital consolidations faced fewer antitrust challenges in the 1990s, antitrust regulators are now taking a more aggressive stance amid a growing body of research suggesting that some hospitals in areas with few competitors charge higher prices.[49] Indeed, these cases demonstrate that even where Hart-Scott-Rodino pre-merger clearance is not required, antitrust regulators and competitors are not only willing to sue, but can do so successfully. Moreover, the Affordable Care Act generally encourages "collaborations among competitors as a way to drive skyrocketing costs down and improve the efficiency of the delivery of healthcare to Americans."[50] Thus, are the government's own competition watchdogs inappropriately standing in the way of these efficiencies? These decisions underscore this emerging question regarding the relationship between antitrust laws, enforcement policy, and the ACA, an issue that is squarely before the Ninth Circuit in the *St. Alphonsus v. St. Luke's* appeal. As the district court suggested in *St. Alphonsus v. St. Luke's*, perhaps one solution is to adjust antitrust laws and enforcement practices in the healthcare arena so that prices can be monitored post-merger as opposed to ordering full divestitures. For now, however, courts and regulators will continue to grapple with these tensions.

[44] *Id.* at 571.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.* at 573.

[49] Jacob Gershman, *Appeals Court Strikes Down Ohio Hospital Merger in Win for FTC*, Wall Street J. (Apr. 22, 2014, 6:54 PM), http://blogs.wsj.com/law/2014/04/22/appeals-court-strikes-down-ohio-hospital-merger-in-ftc-win/.

[50] George Paul & Andrew Mann, *Is the Affordable Care Act the Catalyst to Merger Efficiency Reform?*, Competition Policy Int'l (Sept. 30, 2014), *available at* https://www.competitionpolicyinternational.com/is-the-affordable-care-act-the-catalyst-to-merger-efficiency-reform/.