The Price Point

Newsletter of the ABA Section of Antitrust Law Pricing Conduct Committee

Volume 11, Issue 3 **FALL 2012**

We are pleased to bring you this issue of Pricing Conduct Committee's newsletter, which includes a letter from PCC Chair Bob Hubbard highlighting some of the projects Pricing Conduct is working on this year, an article reviewing a recent RPA case, an overview of the recent joint FTC/DOJ workshop on MFNs, and summaries of the final two programs in our 2011-2012 pricing fundamentals series. Special thanks to Leslie E. John of Ballard Spahr LLP for summarizing a recent 3rd Circuit case interpreting *LePage's* for our New & Noteworthy Section and to Chris O'Connell of the Law Office of Christopher O'Connell for co-editing this Issue.

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New & Noteworthy

ZF Meritor, LLC v. Eaton Corporation, Nos. 11-3301 et al. (3d Cir. Sep. 28, 2012). The U.S. Court of Appeals for the Third Circuit affirmed a jury's verdict in favor of ZF Meritor LLC and Meritor Transmission Corporation, finding that Eaton Corporation, a leading supplier of heavy-duty truck transmissions in North America, entered into unlawful exclusive dealing agreements with the primary direct purchasers of transmissions. According to the court, the "most significant issue in this case" was whether plaintiffs' claims were subject to the "price-cost test" or the rule of reason applicable to exclusive dealing claims. Choosing the rule of reason analysis, the court held that the price-cost test only applies "when price is the clearly predominant mechanism of exclusion." Here, the court found that the exclusionary tool was not Eaton's prices, but the entirety of Eaton's long-term agreements. Notably, the Third Circuit used this issue as a platform to circumscribe its 2003 decision in *LePage's Inc. v. 3M*, in which the court declined to apply the price-cost test to a bundled rebate scheme. *ZF Meritor* limited *LePage's* to bundling and tying cases in which "a single-product producer is excluded through a bundled rebate program offered by a producer of multiple products, which conditions the rebates on purchases across multiple different product lines." Nonetheless, the court made clear that it still considered the price-cost test inapplicable to exclusionary behavior involving tying, enforcement of a legal monopoly provided by a patent procured through fraud (so-called "Walker Process" claims), some exclusive dealing claims, and other unfair tortious conduct targeting competitors.

Call for Articles. The Price Point is seeking submissions for our next issue. Consistent with the Pricing Conduct Committee's focus, articles on resale price maintenance, predatory pricing, bundled pricing, price squeezes, or other pricing-related topics are welcome, as of course are articles on price discrimination and Robinson-Patman Act issues. Articles should be approximately 2,000 words in length, excluding notes. Submissions are due by January 15, 2013.

The Price Point is published three times a year by the American Bar Association Section of Antitrust Law Pricing Conduct Committee. Members of the Section of Antitrust Law may access past issues through the Pricing Conduct Committee's website. The views expressed in this publication are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Pricing Conduct Committee. If you wish to comment on the contents of **The Price Point**, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654-7598 or to the Editor, Mary Marks (marksm@gtlaw.com).

Chair's Letter

Welcome to another edition of the newsletter of the Pricing Conduct Committee. I write to encourage you to join the Committee's activities, including this newsletter. As chair of the Committee I work with Vice-Chairs Mary Marks, Deena Jo Schneider, Claire Debney, Jeffrey Schmidt, and Trey Nicoud, the Young Lawyer Representative, Adam Goodman, and Responsible Council Member is Anthony Chavez. The Committee also has an Advisory Board consisting of Tasneem Chipty, Evan Schouten, and Greg Sergi.

Committee Vice Chair Deena Schneider will be the session chair for a spring meeting program: **Little Joy or Guidance for Bundling Discounters.** Courts and regulators disagree on the proper legal standard for bundled pricing. *LePage's*, *Cascade Health*, the Antitrust Modernization Commission, and the DOJ represent four different views. Foreign law is no clearer. What are the appropriate competitive and economic considerations, and what's a global seller to do in today's patchwork environment?

The Committee is working on publications. In addition to this newsletter, we are working on our share of ALD led by Greg Sergi. A price discrimination book will be published soon, led by a former chair of the Committee, Scott Perlman. We are thinking about proposing another book, and welcome thoughts you might have.

We are also building on the pricing fundamentals series we presented last year.[1] With the International Committee we are planning Committee programs focusing on pricing fundamentals around the globe. Each of the programs will focus on a country or region's pricing laws and policies. We will cover the basic aspects of pricing in each jurisdiction, including, as applicable, the following: (1) pricing tied to other offerings; (2) pricing restrained by the supplier, including resale price fixing and minimum advertised price; (3) variations on pricing to customers, including price discrimination; (4) pricing tied to competitors, such as most favored nations clauses and loyalty discounts; and (5) price measured against costs (predatory and excessive).

Our first non-U.S. pricing fundamentals program is set for October 24, 2012 and covers fundamental pricing law and enforcement policies in Canada. The program focuses on price discrimination, price maintenance, and predatory pricing. We are considering future programs on pricing fundamentals and developments in Asia (Japan, S. Korea, China, India), the European Union, Eastern Europe, Western Europe, the Middle East (Israel, Egypt, Turkey), Africa (S. Africa, Zimbabwe, Botswana), and Latin America (Mexico, Brazil, Chile).

I encourage your participation in the Committee's work and your comments on how you think the Committee might do better.

Bob Hubbard

[1] The program audio and handouts for the 2011-12 pricing fundamentals programs are available on our Committee webpage at http://apps.americanbar.org/dch/comadd.cfm?com=ATT320000&pg=1.

Sixth Circuit Uses Some Old Supreme Court Cases To Give Robinson-Patman Act New Life

By: Harvey Saferstein

The Robinson-Patman Act is now 76 years old. It was enacted in 1939, during the Great Depression, to attack price discrimination by sellers of commodities—in order to protect small retailers from large chain stores. However, it has now become something of an albatross in the antitrust world. Calls for its repeal have been numerous and varied. The history of criticism and calls for legislative solutions are well summarized in the 2003 report and recommendations of the Antitrust Modernization Commission. *See* Saferstein and Shamonki, "Whither the Robinson-Patman Act? The Antitrust Modernization Commission Tackles a Wily Veteran," 15 Competition 1 (Journal of the State Bar of California Antitrust and Unfair Competition Law Section) (Fall 2006).

While the Supreme Court's early decisions, such as *FTC v. Morton Salt Co*., 334 U.S. 37 (1948), gave the Act a solid backing, the Court's recent decisions have criticized and narrowed the law. *See, e.g*., *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc*., 546 U.S. 164 (2006) ("By declining to extend Robinson-Patman's governance . . . we continue to construe the Act 'consistently with broader policies of the antitrust laws.'"). The negative attitude toward the Act has also pervaded most lower federal court decisions in recent years. *See, e.g., Feesers, Inc. v. Michael Foods, Inc*., 591 F.3d 191 (3d Cir. 2010) ("[B]ecause the [Act] often has 'anticompetitive effects that 'promote rather than prevent monopolistic pricing practices, the Supreme Court in seeking to construe the statute consistently with the broader policies of the antitrust laws, has repeatedly limited its reach. . . . This court has dutifully followed the Supreme Court's lead by narrowly construct the [Act].") The Federal Trade Commission, which once brought scores of Robinson-Patman cases, now brings no cases. Private antitrust treble damage actions have slowed considerably in the face of a hostile judiciary and a severely narrowed Robinson-Patman Act. *See* Luchs, R., T. Geylani, A. Dukes, and K. Srinivasan, "The End of the Robinson-Patman Act? Evidence from Legal Case Data," 56 Management Science, 2123-2133 (2010).

Thus it is somewhat surprising to find a Circuit Court decision, such as *Williams v. Duke Energy International, Inc*., 681 F.3d. 788 (6th Cir. June 4, 2012), which upholds much of the Act and supports a plaintiff's treble damage claim. It harkens back to the days when private treble damage claims under the Robinson-Patman were more frequent and successful. In *Williams v. Duke Energy International, Inc*., the Sixth Circuit upheld a Robinson-Patman claim against Duke Energy for discriminatory pricing of retail electricity. The Robinson-Patman claim was based upon substantial side rebates Duke Energy gave to certain large customers, including GM, which were not given to Ohio retail customers such as plaintiffs. The Sixth Circuit rejected Duke Energy's various substantive attacks on the Robinson-Patman claim raised in its motion to dismiss.

The Sixth Circuit's 12(b)(6) holding is also in contrast to a recent trend of federal court rulings finding that plaintiffs had not adequately pled a viable Robinson-Patman claim under the Supreme Court's *Twombly-Iqbal* line of cases regarding federal court 12(b)(6) pleading standards. Thus, for example, in *New Albany Tractor v. Louisville Tractor, Inc*., 650 F.3d 1046 (6th Cir. 2011), the Sixth Circuit upheld the dismissal of a Robinson-Patman claim based upon the *Twombly-Iqbal* lines of cases on pleading requirements in federal cases. "Before *Twombly* and *Iqbal*, courts would probably have allowed this case to proceed so that plaintiff could conduct discovery . . . . By foreclosing discovery to obtain pricing information, the combined effect of *Twombly* and *Iqbal* require plaintiff to have greater knowledge now of factual details in order to draft a 'plausible complaint.'"

The Sixth Circuit decision is also notable for addressing some controversial areas of Robinson-Patman interpretation. Despite the fact that the Robinson-Patman Act is the most detailed of major antitrust laws, the interpretation of that Act has led to an enormous body of decisional law about the nuances of the Act. *See* Saferstein, "An Overview and Update of the Federal and State Law of Price Discrimination," 2012 PLI Antitrust

Institute (2012). The Court resolved a number of these important Robinson-Patman issues.

First, the Court rejected a challenge to the jurisdiction of the Robinson-Patman claim over utility price discrimination because of the filed rate doctrine. The filed rate doctrine bars private antitrust damage claims in situations where the discriminatory pricing is part of an approved rate under state utility regulation. Relying upon the Sixth Circuit's 2004 decision in *MCI Telecomms. Corp. v. Ohio Bell Tel. Co*., 376 F.3d 539 (6th Cir. 2004), and the First Circuit decision in *Town of Norwood, Mass. v. New England Power Co*., 202 F.3d 408 (1st Cir. 2000), the Court held that the plaintiffs were not challenging the filed rates—but rather Duke Energy's side agreements for rebates that were not approved or filed with the Public Utilities Commission of Ohio. This filed rate holding, especially when a consumer, not a competitor is involved, is arguably in conflict with other Circuit Court decisions such as in *Lockyer v. Dynegry, Inc*., 375 F.3d 831 (9th Cir. 2004) and *Evans v. AT&T Corp*., 229 F.3d 837 (9th Cir. 2000).

Second, the Court held that electricity is a "commodity" under the Robinson-Patman Act. Such a finding was crucial because the Act is only applicable to commodities, not services. The Court pointed out that in a 1993 decision, *Metro Commc'ns Co. v. Ameritech Mobile Commc'ns. Inc.*, 984 F.2d 739 (6th Cir. 1993), the Sixth Circuit seemed to indicate support for this conclusion that electricity is a commodity by its discussion of *City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), in which the Eight Circuit held that that electricity is a commodity. In the *Metro Commc'ns Co*. case, the Court found cellular telephone service was not a commodity, because it is "very different from electricity. It cannot be produced, felt or stored, even in small quantities." *Metro Commc'ns Co*., 98 F.2d at 745. The Court also pointed to the decision by the District Court of Massachusetts that electricity is a commodity. *Town of Concord v. Bos. Edison Co.*, 676 F. Supp. 396 (D. Mass. 1988). The Court rejected the precedent of a 1979 Delaware District Court decision, *City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763 (D. Del. 1979), that held that electricity was not a commodity. The Court agreed that electricity is a commodity because it is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities. *City of Kirkwood v. Union Elec. Co*., 671 F.2d at 1182.

Third, the Court rejected the argument that the Act does not apply because the plaintiffs, such as Munafo and BGR, Inc., and the favored purchasers, such as GM, did not specifically compete for resale of electricity. Relying upon the seminal 1948 Supreme Court decision in *FTC v. Morton Salt Co*., 334 U.S. 37 (1948), the Court held that plaintiffs adequately alleged competitive injury despite the fact that Plaintiffs and the favored purchasers were not competing for the resale of electricity. It was enough that "Plaintiffs allege that they were injured when they had to pay substantially more for electricity than their competitors due to the rebates provided to some of Defendants' large customers."

Fourth, in analyzing the 12(b)(6) motion to dismiss, the Court rejected the argument that plaintiffs failed to adequately allege competitive injury—citing the Supreme Court's 1945 decision in *Corn Prods. Refining Co. v. FTC*, 324 U.S. 726 (1945)—stating that the Act does not require that the discrimination must, in fact, have harmed competition, but only that there is a reasonable possibility that competition has been harmed. The court relied on its prior decision in *Schwartz v. Sun Co.*, 276 F.3d 900 (6th Cir. 2002), which pointed out that damage issues in a Robinson-Patman case are rarely susceptible of precise determination and that a fact finder may infer competitive injury from proof of defendants wrongful acts and their tendency to injure plaintiffs' business. The Court also rejected the argument that plaintiffs failed to allege competitive injury because they did not allege the identity of the favored purchaser or the effect of the cost of electricity on sales or profit margins. Because the favoritism occurred through side agreements and no discovery had taken place, plaintiffs had pled enough to proceed with the Robinson-Patman claim.

This decision, from the Sixth Circuit is well worth watching to see how it fares in other courts or in the Supreme Court. It is not likely to start a wave of pro-Robinson-Patman decisions, but it does show that plaintiffs can survive a motion to dismiss a Robinson-Patman private treble action.

Harvey Saferstein is the managing partner of the Los Angeles office of Mintz Levin. He has been practicing antirust and intellectual property law for over 30 years. He is currently Vice Chair of the Janet D. Steiger Fellowship Project of the ABA Antitrust Section. He has written extensively about the Robinson-Patman Act, particularly for the Practising Law Institute Antitrust series.

Joint DOJ/FTC Workshop On Most Favored Nation Clauses: September 10, 2012 Washington, D.C.

By: Evan Hoffman Schouten

Antitrust policy and the enforcement of most favored nation ("MFN") provisions[1] were the focus of a September 10, 2012, workshop co-sponsored by the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in Washington, D.C. As Fiona Scott Morton, Deputy Assistant Attorney General for Economic Analysis for the DOJ's Antitrust Division, explained, the intent of the workshop was to provide a forum where interested parties – including lawyers, economists, academics, and business people – might engage in a dialog in which they could explore the potential uses and misuses of MFN provisions. The goal of the workshop was to provide regulators with additional insight as to when to undertake investigations and to assist corporate and private practitioners in better understanding when MFNs are likely to attract regulatory scrutiny.

Following opening remarks by Dr. Scott Morton, Professors Jonathan Baker (American University) and Judy Chevalier (Yale University) explained the economic theories underlying MFNs, with an emphasis on potential harms and efficiencies. This session, which laid the groundwork for all the morning discussions, was moderated by Robert Majure, the Economics Director of Enforcement for the DOJ's Antitrust Division, and Leemore Dafny, Deputy Director for Healthcare and Antitrust, Bureau of Economics, FTC.

According to economic theory, there are several key ways in which an MFN provision may be harmful to competition.[2] First, the effect of an MFN may be to facilitate coordination among competitors. Because MFNs make it more expensive for a firm to reduce its price,[3] "cheating" on a collusive agreement is less likely to occur. In addition, such "cheating" is more easily detected. Second, an MFN may be an effective way to raise a rival's or would-be entrant's costs. When an MFN is in place, a rival or would-be entrant may be unable to undercut the incumbent's price. In such a case, competition is likely to be dampened.[4] Third, the existence of MFNs may soften price competition. The fact that a discount to one customer may trigger another customer's existing MFN means that the discount to the first customer ends up being more costly to the seller than it would be absent the MFN. Fourth, an MFN may increase a seller's bargaining power. In certain industries (for example, durable goods), customers may expect prices to decrease over time and may choose to delay their purchases, which, in turn, will lead to lower prices from the start. However, with an MFN provision in place, customers will recognize that prices are less likely to decline and will thus be more likely to purchase the good at the initial, higher price.

The panel noted that there are a variety of ways in which MFN provisions may be efficiency-enhancing, but focused on their ability to alleviate opportunism, particularly in the presence of high transactions costs and price uncertainty.[5] Consider the example of a new Internet music service that is trying to launch. Uncertain of the value of their content to the new technology, content owners may be unwilling to make the necessary investments to develop their content for the new format. Moreover, content owners will understand that if the music service is successful, the amount that that service will agree to pay for content in the future will likely increase. In such a situation, the best strategy for a content owner may

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[1] An MFN provision is when a seller (buyer) agrees to treat a buyer (seller) as well as the seller/buyer treats its best (most-favored) customer (vendor).

[2] Jonathan Baker, "Competitive Harm from MFNs: Economic Theories," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286766.pdf .

[3] This is the case because the firm may have to offer the lower price to other customers.

[4] For example, in *Delta Dental of Rhode Island*, the Department of Justice alleged that the MFN meant that dentists were unable to accept lower rates from Delta Dental's competitors because in doing so they would have to agree to accept that lower rate from Delta Dental (U.S. v. Delta Dental of Rhode Island, 943 F. Supp.172 (D.R.I. 1996)).

[5] Judith Chevalier, "Efficiencies from MFNs: Economic Theories," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286767.pdf.

be to wait. Of course, if all content owners wait, the technology will never be launched. An MFN is likely to offer an efficient solution to this problem. Indeed, when the transaction costs associated with price discovery are high, when renegotiation is expensive, or when one party may behave opportunistically after the other has made a large investment, MFNs may allow the buyer and seller to agree on a useful "placeholder" price that allows the endeavor to move forward without either the buyer or the seller risking being disadvantaged in the long run.[6]

Given that MFNs can in theory be either procompetitive or anticompetitive, it is useful to turn to the empirical literature to provide further support with regards to whether these clauses are likely to harm or benefit consumers. But as Dr. Ramsey Shehadeh (NERA Economic Consulting) explained, relatively few studies exist that examine MFNs empirically. Despite this, Dr. Shehadeh described how one might undertake such an analysis and summarized key empirical works.[7] In one study, Dr. Scott Morton and Dr. Mark Duggan examined the impact of the passage of Omnibus Budget Reconciliation Act of 1990 (OBRA 90) on prescription drug prices. OBRA 90 requires pharmaceutical manufacturers to provide their "best prices" to Medicaid (i.e., to give the government an MFN). The authors found that the impact of the law was to increase certain prescription drug prices.[8]

Moving from economics to the law, Peter Levitas, Deputy Director of the FTC's Bureau of Competition, moderated a panel on the legal treatment of MFNs. FTC's Director of Policy Planning, Andrew Gavil, reminded the audience that antitrust claims directed at MFNs have arisen in a number of industries in addition to health care. With the recent enforcement actions in the e-Books and BCBS of Michigan matters, MFNs are receiving broader attention.[9] Given the renewed interest, Mr. Gavil described how MFNs could be assessed under a rule of reason approach:

> (1) Does the MFN arise in a context that indicates it has the potential for significant anticompetitive effects?
> (2) What is the nature of the anticompetitive effect (collusive or exclusionary)?
> (3) What is the mechanism for the effect?
> (4) Are there cognizable procompetitive justifications?

Private practitioners Janet McDavid (Hogan Lovells) and Elai Katz (Cahill Gordon & Reindell LLP) emphasized that in the real world, MFNs are extremely common. In counseling their clients, they explore the client's own explanation of the purpose of the MFN, the alternatives considered, whether the request came from the supplier or the customer, the size of any specific up-front investment, as well as the client's relative size in the market. Often, the client wants to know that it will not be in a position of subsidizing its competitor. A best-price guarantee ensures that this will not happen and avoids the costs of constant renegotiating. MFNs are also particularly useful when the buyer and seller are unsure of the right price -- for example, when the product or service is new.

It was emphasized throughout the workshop that special attention may need to be paid to MFNs in health care. At present, nineteen states bar or significantly restrict MFNs in health care contracts. Doug Anderson (Bailey Cavalieri LLC), who participated in Ohio's investigation of MFNs in health care contracts, described the process under which the state decided to impose a ban on MFNs. Although the investigation did not uncover any explicit effort by firms to use MFNs for anticompetitive purposes, the committee did conclude that MFNs could, at times, create a price floor and/or discourage innovation. The recommendation was to continue Ohio's moratorium on MFN provisions in health care contracts.

Nelson Jung, Director, Markets and Projects, of the U.K. Office of Fair Trading (OFT), addressed the audience during lunch. His talk focused on the OFT's recently published report concerning the competition implications that arise from price relationship agreements, such as lowest price guarantees. The report suggests that while some of these agreements may be attractive to

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[6] Of course, not all buyers and sellers in the market can agree to a placeholder price. Ultimately, at least one party must expend the effort to determine the equilibrium price.

[7] Ramsey Shehadeh, "Empirical Evidence on the Effects of MFNs," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286851.pdf.

[8] Mark Duggan & Fiona Scott Morton, *The Effect of Medicare Part D on Pharmaceutical Prices and Utilization*, 100 AMERICAN ECONOMIC REVIEW 590-607 (March 2010).

[9] Andrew Gavil, "Legal Framework for Evaluating MFNs under the Antitrust Laws," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286852.pdf.

buyers, they also may soften competition. For example, a shopper may be less diligent in searching for a lower price when provided with a price guarantee. The effect may be to reduce downward pressure on prices. Moreover, knowing that price reductions will be met, both rivals and potential entrants may have less incentive to compete on prices. This, in turn, may further limit price competition. It may also inhibit entry.

An afternoon session moved the discussion "From Theory to the Real World." Martha Samuelson (Analysis Group, Inc.), the session's moderator, highlighted the overlap between the themes developed in the prior sessions with those developed by the "Real World" panelists, noting that economists, regulators, and real-world practitioners all appear to be grappling with the same issues. Echoing an earlier theme, panel members described an omnipresence of MFNs in the real world, observing that MFNs are found in health care contracts as well as in other industries' contracts and in monopoly as well as in competitive environments. Melissa Scanlan (T-Mobile USA) observed that MFNs facilitate negotiations and help to "get things done."[10]

Several panelists remarked that MFNs are often used when prices are in flux, when the transaction is novel, when parties must make interdependent decisions, and/or when the costs of renegotiating are high. In such circumstances, MFNs can reduce risk and alleviate uncertainty. Panel members generally agreed that while a full rule of reason analysis may be appropriate at times, there is no basis to view MFNs more suspiciously than other vertical restraints.[11]

The use of MFNs in health care, however, was viewed by some with caution. For example, Dr. Murray Ross (Kaiser Permanente's Institute of Health Policy) suggested that one possible solution to the Medicaid best-price rule would be to sever the link to privately negotiated prices and instead to give flat rebates to Medicaid.[12] Tom McGough (University of Pittsburgh Medical Center) noted that in certain circumstances, an MFN could assist both a dominant health insurer and a dominant hospital at the expense of payers and consumers.[13]

The final session of the day was "Moving Forward – How Has Thinking about MFNs Evolved and Where Might It Go?" Renata Hesse (Deputy Assistant Attorney General for Civil Enforcement, DOJ's Antitrust Division) moderated a discussion of the evolution in how we think about MFNs and the uncertainty regarding how to define a standard. Whereas MFNs were once viewed as presumptively procompetitive, this no longer appears to be the case. Still, as David Gelfand (Cleary Gottlieb Steen & Hamilton LLP) explained, given the prevalence of MFNs across businesses, he did not expect the courts to make wholesale changes.

Professor Steven Salop (Georgetown University's Law Center) offered an MFN characteristics checklist. The checklist provides guidance regarding which characteristics are likely to be worrisome and which are not. It includes such relevant characteristics as market structure, buyer, seller, investment requirements, and rationale for inclusion of a MFN provision.[14]

Ms. Hesse probed the panelists on how the agencies should view situations in which no single MFN is bad, but in which, collectively, MFNs lead to higher prices. The consensus was that one must have a well-articulated theory of why an MFN led to higher prices before one can determine whether it is harmful. Absent a horizontal agreement, it is incorrect to attack atomistic agreements in an atomistic industry.

Jonathan Jacobson (Wilson Sonsini Goodrich & Rosati) and Mr. Gelfand both cautioned against a standard that looks only at prices, noting that like other vertical restraints,

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[10] Melissa Scanlan, "Most-Favored-Nation Clauses 'Real World' Benefits and Challenges," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286772.pdf.

[11] Mark Whitener, "MFN Provisions and Antitrust Policy," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286769.pdf; John Thorne, "'Real World' Panel on MFNs," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286771.pdf.

[12] Murray Ross, "'Most Favored Nation' Clauses in Health Care," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286770.pdf.

[13] Tom McGough, "Most-Favored-Nation Arrangements in Health Care," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286768.pdf.

[14] Steven C. Salop, "Developing Administrable MFN Enforcement Policy," *available at* http://www.justice.gov/atr/public/workshops/mfn/presentations/286834.pdf.

MFNs could lead to both higher prices and higher quality.

Joseph Kattan (Gibson, Dunn & Crutcher) seemed to voice the concerns of many in the room when he suggested that telling clients that they enter into MFNs at their own risk is likely to do more harm than good. The consensus was that further clarification as to when MFNs are legal and when they are not would be useful.

In his closing remarks, Howard Shelanski (Director of the FTC's Bureau of Economics) suggested that the agencies likely will continue to examine MFNs as a matter of law enforcement and to assess how MFNs fit in with their thinking about other types of contracts.

Evan Hoffman Schouten is a vice president at Analysis Group, Inc. She has provided economic analyses and expertise in a variety of high-profile antitrust and intellectual property litigation matters. Her work focuses on both liability and damages issues.

Summary Of Pricing Fundamentals Series, Program 3: Price Discrimination

By: Angela J. Yu

On June 12, 2012, the American Bar Association, Section of Antitrust Law's Pricing Conduct Committee presented the third program in its Pricing Fundamentals Series. This program provided an overview of price discrimination, focusing on: price discrimination under Section 2(a) of the Robinson-Patman Act (the "Act" or the "RPA"); discrimination in promotional allowances or services under Sections 2(d) and 2(e) of the Act; defenses available under the Act; and most favored nation clauses. Steele Clayton of Bass, Berry & Sims PLC and Steve Cipolla of Cipolla Associates, LLC discussed the applicable law and offered suggestions for counseling clients in these areas. Deena Schneider, a Vice-Chair of the Pricing Conduct Committee, both moderated and contributed to these discussions.

History of the Robinson-Patman Act

Mr. Clayton commenced the program with a brief history of the Robinson-Patman Act of 1936. He explained that an attorney for the U.S. Wholesale Grocers Association drafted the Act, which was enacted in response to the perceived power of chain stores, relative to mom-and-pop stores. (Huey Long, for example, famously declared that he would "rather have thieves and gangsters than chain stores.") The statute is thus somewhat counter-intuitive and seems to protect competitors, rather than competition. In fact, William Baxter once commented that the purpose of the Act is "to put lead weights in the saddlebags of the fastest riders." Prior to 1969, the Federal Trade Commission (the "FTC") made efforts to enforce the Act. Since 1969, however, enforcement agencies have brought few cases under the Act.

General Elements of Price Discrimination Under Section 2(a) of the Act

Messrs. Clayton and Cipolla then discussed the general elements of price discrimination under the Act. Mr. Clayton introduced the first element, a difference in price. This first element requires a difference in the net price; the gross price and the list price are irrelevant. Mr. Cipolla commented that in counseling a client, one must also consider non-price terms. That is, one must consider things of financial value as part of the price – for example, prompt-payment discount terms; guarantees against price increases in the future; and rebate programs that reward customers on some basis. These non-price terms must be implemented in a manner that is fair and equivalent across the board, though the terms need not be the same. In counseling a client, the client should identify every aspect of the financial deal and articulate reasons for each.

The second element of price discrimination requires two completed sales reasonably contemporaneous in time. Mr. Clayton explained that consignments, internal transfers, and offers to sell do not constitute actual sales. For example, an offer to sell at price X and an actual sale at price Y would not present two completed sales and would not violate the Act. Mr. Cipolla noted that the requirement for two completed sales also considers comparability of sales. Under case law, purchase pursuant to a long-term contract is treated as outside the ambit of the Act when compared to purchase at spot market prices. For example, the sale of a ton of coal pursuant to a long-term contract and the sale of a ton of coal at the spot market price do not constitute illegal discrimination because the terms of the two deals differ.

According to Mr. Clayton, practitioners often struggle with the "contemporaneous in time" aspect of this requirement. Whether two completed sales are contemporaneous in time depends on the product and market at issue. Two completed sales several months apart might be contemporaneous. Mr. Cipolla noted that for more dynamic markets that experience more frequent changes in pricing and volatility in pricing, the period for contemporaneousness is shorter.

Mr. Clayton explained that the third element of price discrimination requires that the favored purchaser and the disfavored purchaser actually compete against each other. The Act therefore does not apply to sales to purchasers for personal use. Another factor to consider is whether the favored purchaser and the disfavored purchaser compete in the same geographic market. According to Mr. Cipolla, this geographic distinction among purchasers was important years ago, but is not as much so today. Rather, the key inquiry now is whether the favored purchaser and the disfavored purchaser compete for the same customers when they resell products.

The fourth element, that the sales involve goods, reflects the concept that the Act applies only to goods, not to services. Where a transaction involves both goods and services – for example, the purchase of an installed satellite dish – the analysis is similar to that under the Uniform Commercial Code (the "UCC"); the predominant nature of the transaction is determinative.

The fifth element of price discrimination requires sales of products of like grade and quality. Physical differences in products must be substantial. A difference in consumer preferences does not necessarily suggest a difference in goods. Mr. Cipolla commented that in counseling a client, the key is to tailor the analysis to the perspective of the client's customers. Do those customers consider the products at issue to be interchangeable? Do changes in price influence the purchasing decisions of customers? Is a discount the only means of discouraging the client's competitor's brand? If a discount would not influence customers in the selection of products, it is difficult to show that products are of like grade and quality.

Mr. Clayton stated that the self-explanatory sixth element of price discrimination is use, consumption, or resale in the U.S.

The final element of price discrimination is competitive injury – that is, a reasonable probability of harm to competition. Primary line price discrimination occurs where the plaintiff is a competitor of the defendant, the seller granting the discriminatory price. The plaintiff must show that the defendant's discriminatory price is below an appropriate measure of the defendant's cost and that market conditions are such that the defendant can recoup its losses down the road. A primary line price discrimination case is thus similar to a predatory pricing case under Section 2 of the Sherman Act. *Brooke Group* is the seminal primary line price discrimination case.

Secondary line price discrimination occurs where the plaintiff is a competitor of the defendant's favored customer. The plaintiff may establish injury with direct evidence of lost sales or profits or with indirect evidence of a substantial price difference over a period of time. *Morton Salt* is the seminal secondary line price discrimination case. Proof of injury to the plaintiff gives rise to a rebuttable presumption of competitive market injury.

General Elements of Discrimination in Promotional Allowances and Services Under Sections 2(d) and 2(e) of the Act

Ms. Schneider and Mr. Cipolla then discussed the basic requirements of discrimination in promotional allowances and services under Sections 2(d) and 2(e) of the Act. According to Ms. Schneider, these Sections of the Act were designed to protect against indirect price discrimination, through benefits that are not related to price, but confer advantages on larger competitors.

Ms. Schneider explained that the first requirement of discrimination in promotional programs is a promotion provided in connection with the resale of goods. A promotional allowance or service is designed to increase the resale of goods. It is not a benefit that is monetary, but instead a benefit intended to promote the resale of products. Examples of promotional allowances include advertising payments from the manufacturer to the reseller to advertise products to consumers; and payments from the manufacturer to the reseller to place products in a more prominent place, such as at eye level or on a front table. An example of a promotional service is the offering of a display to highlight the goods in the store and thus drive downstream sales. Ms. Schneider cautioned that a promotion not connected to the resale of goods might not implicate discrimination in promotional allowances under Sections 2(d) and 2(e), but might constitute price discrimination under Section 2(a).

Mr. Cipolla echoed this sentiment. Many manufacturers, for example, enter into inventory management agreements designed to reward the reseller's efficient purchasing practices that result in less inventory for the manufacturer and a more efficient manufacturing schedule. Inventory management agreements operate as means of enhancing efficiency in the relationship between the seller and the purchaser and are more related to pricing than to enhancing the resale of products to consumers. That is, these agreements analytically belong more to Section 2(a). In contrast, providing support in the form of a display on a counter or placing products in a more prominent position than a competitor's display is subject to Sections 2(d) and 2(e).

According to Ms. Schneider, another core requirement of discrimination in promotional allowances is availability, which has two aspects. The first aspect of availability is information: resellers must know of the existence of a promotion. Written notice is not required, but can be useful in overcoming a claim that the reseller did not know of the promotion. Ms. Schneider and Mr. Cipolla both observed that some sellers use distributors and wholesalers to provide information and notice of a promotion to downstream resellers. Mr. Cipolla further observed that the seller can achieve notice through publication of the existence of a promotion in trade publications or on the Internet.

Ms. Schneider explained that the second aspect of availability is that resellers have a practicable opportunity to participate in the promotional program. For example, where the program consists of the manufacturer paying for advertisement, and a smaller reseller does not advertise and thus cannot take advantage of the program, the manufacturer must offer that reseller something comparable of which it can take advantage. Mr. Cipolla commented that alternatively, the manufacturer can make a promotional program functionally available to a reseller. For example, if a program is based on collection of information in a browser-based format, and a reseller does not have the means to provide information in that format, it may collect information in an alternative format, such as an Excel spreadsheet, to take advantage of the program. The manufacturer must provide the reseller with an alternative program of similar value.

Ms. Schneider suggested that in counseling a client with a promotional program, under which the client provides money or a service to resellers, one should advise the client to ensure that resellers are in fact doing what the client has agreed to underwrite. Otherwise, the client's provision of money or services can be construed as a "freebie."

A further requirement of discrimination in promotional allowances or services is availability on proportionally equal terms. Methods of measuring this are dollar volume or quantity of goods purchased, or cost to the reseller of obtaining the promotional allowance or performing the promotional service. Ms. Schneider and Mr. Cipolla agree that dollar volume is the best and preferred method.

Ms. Schneider stated that like price discrimination under Section 2(a), discrimination in promotional programs also requires competing resellers; two reasonably contemporaneous sales; and goods of like grade and quality.

Defenses to Liability Under the Robinson-Patman Act—Meeting Competition

Mr. Clayton explained that meeting competition is an absolute defense to a Robinson-Patman Act claim for discrimination in either price or a promotional program. Meeting competition involves the situation where a customer approaches a manufacturer, states that the customer has received an offer to purchase products at, for example, two dollars less, and asks the manufacturer to provide the customer the same terms. The manufacturer can meet the price differential, as long as the manufacturer has a good faith belief that it is meeting – and not beating – a competitor's offer. This is true even where the customer misrepresents the price at issue, such that the manufacturer in fact beats its competitor's offer. Additionally, a manufacturer can selectively meet competition – that is, meet competition for one or some customers, but not all customers. The lower price should be effective only for the duration of the competing offer and only as to an equal or lesser volume of products subject to the competing offer. The key is maintaining contemporaneous documentation of all relevant terms of the competing offer.

Mr. Cipolla agreed and suggested that a client should contemplate creating documentation of the basis for its good faith belief that a price is necessary to meet its competitor's price. A client should commit to writing and create a record of the information that it received; where it received that information; and why it believes that the information is reliable – for example, the customer has a long history of providing reliable pricing information to the client.

Defenses to Liability Under the Robinson-Patman Act—Cost Justification

Mr. Clayton explained that the cost justification defense arises where the seller gives a discount equal to cost savings from the manufacture, sale, or delivery of goods resulting from different methods of sale and delivery. The defendant seller's burden to establish that the discount is equal to the cost savings is very difficult to meet because the discount cannot be more than the cost savings. Courts permit defendants to use average cost comparisons between customer classes, but the classes must be properly drawn and this is often a subject of great debate.

Defenses to Liability Under the Robinson-Patman Act—Changing Conditions

The changing conditions defense applies to price differentials where the seller responds to changes in the marketability of goods, generally perishable or seasonable goods, such as technology products. Where, for example, the seller accumulates an unexpected supply of inventory and has nowhere to store that inventory, distress sales may be permissible.

Defenses to Liability Under the Robinson-Patman Act—Functional Availability

According to Ms. Schneider, the functional availability defense derives from Section 2(d) of the Act and is the best way to defend against a Robinson-Patman claim. Under this defense, a promotional allowance is permissible where it is available to everyone in a practicable manner. Case law has expanded the functional availability defense to apply to promotional services and even price terms. The defense has two basic elements: 1) the availability of the promotion or price must be known to all purchasers / resellers; and 2) the promotion or price must be practicably useable to all purchasers / resellers. A volume discount, for example, would not meet these elements, as it would not be available to all. But a 2-percent discount given to purchasers / resellers for increasing orders by 5 percent would satisfy the requirements of the functional availability defense because all resellers should be able to increase their orders by 5 percent.

Mr. Cipolla advised to exercise caution where a program continues in cycles or renews. The seller should ensure that it makes some effort to remind purchasers / resellers that previously declined to join the program of its existence and to publicize renewal of the program in trade journals or through distributors.

Defenses to Liability Under the Robinson-Patman Act—Functional Discounts

Ms. Schneider explained that the functional discount defense has its basis in the purchaser performing the distribution function and the seller providing a discount to the purchaser for performing that function. For example, the seller might provide a price discount for advertising products, warehousing products, or providing sales services to downstream resellers. The difference between a wholesale price and a retail price is a form of functional discount. The seller, however, must be careful where the purchaser performs multiple distribution functions. The purchaser, for example, might resell products both to other resellers and directly to consumers. In those circumstances, the defense of functional discounts applies only to products sold to other resellers.

Observing that the defense of functional discounts is a "very useful discount defense," Mr. Cipolla characterized the defense as a way of softening the effects of the cost justification defense. His key counseling advice for this defense is to conduct a documented and reasonable evaluation of the value of the function or service to the client. What would the client pay to purchase those services? What would others pay? Is there some efficiency in having the client's customer perform these services? An exact mathematical calculation of the value of the function or service to the client is not required. But it is critical that the client not overpay for the service. Otherwise, the situation might appear to be price discrimination dressed up as a functional discount.

Ms. Schneider explained that not all of these defenses apply to all provisions of the Act. The only defenses available for promotional allowances and services are meeting competition and functional availability.

Buyer Liability Under Section 2(f) of the Act

Buyer liability arises where the buyer knowingly solicits or receives an unlawful price. The plaintiff has the burden of establishing that the buyer knew that it was receiving an unlawful price.

Buyer liability applies only to prices and not to promotional allowances and services. It is considered derivative of seller liability, with most practitioners agreeing that it is absolutely derivative of seller liability.

Brokerage Commissions Under Section 2(c) of the Act

Under Section 2(c) of the Act, no payment or allowance may be given to a buyer, agent, broker, or any third party, except for services actually rendered. Violating the Act with respect to broker commissions is thus analogous to commercial bribery. And the Act provides for treble damages.

Exemptions to the Robinson-Patman Act

Ms. Schneider briefly mentioned two exemptions to the Act: 1) sales to non-profits of goods for their own use; and 2) direct sales to the federal government. With respect to the former exemption, it is important that the non-profit organization purchases goods ***for its own use***. If, for example, a non-profit hospital purchases drugs and dispenses those drugs to patients, the exemption applies. If instead, the hospital resells those drugs in its on-site pharmacy, the exemption does not apply, as the hospital would not have purchased drugs for its own use. As to the latter exemption, direct sales to local or state governments do not come within the exemption.

Most Favored Nation Clauses

Mr. Clayton explained that typically, a most favored nation ("MFN") clause in an agreement provides that the seller will not charge the purchaser more than the purchaser's competitors for goods or services. MFN clauses can be relevant to claims under both Section 1 and Section 2 of the Sherman Act. MFN clauses are not *per se* illegal and are analyzed under the rule of reason. From an enforcement standpoint, the most interesting MFN clauses tend to be aimed at two-sided markets with a central platform – for example, the healthcare market, with insurance as a central platform. The more participants on the platform, the more scrutiny the MFN clause receives. MFN clauses are also of interest to enforcers where a buyer has a large market share or market power.

Mr. Cipolla noted that ultimately, an MFN clause is a clause in an agreement, such that if the MFN clause is breached, the seller can be liable for breach of the agreement. In counseling a client where the client's customer demands an MFN clause, an MFN clause might not appear high-risk on paper. "But as with everything, it is all in the implementation." One should consider how the client intends to monitor prices offered to the favored customer and to competitors of the favored customer. One must impress upon the client that to avoid breaching an MFN clause, it must make a commitment to ensure that pricing is being policed inside the client's organization and that doing so is at a cost. Thus, the client must decide whether it is worth policing every price that might trigger an obligation to provide the favored customer with an additional price concession.

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Summary Of Pricing Fundamentals Series, Program 4: Price Measured Against Costs

By: Ryan Wong

On July 20, 2012, the ABA Pricing Conduct and Corporate Counseling Committees held a joint program titled "Price Measured Against Costs." This program, the fourth in the Pricing Conduct Committee's Pricing Fundamentals Series, addressed how cost benchmarks may be used in unilateral conduct cases. Martin Mandorff, Acting Deputy Chief Economist, Swedish Competition Authority, Matthew Bennett, Charles River Associates, and Joe Angland, partner at White & Case, sat on the panel, which was moderated by Seth Sacher of the Federal Trade Commission's Bureau of Economics.

Cost benchmarks are used in a variety of unilateral conduct cases, including those addressed in this program: predatory pricing, loyalty rebates, bundled discounts, and margin squeezes. While competition law is concerned about conduct that creates high prices, the concern in these cases is, generally, low prices. But in order to determine that prices are "low," they must be compared with some benchmark. Typically, the alleged violator's cost is used as this benchmark.

Background

Mr. Sacher discussed several theories that may be used to measure the alleged violator's cost. One is marginal cost, which is the cost to produce one additional unit of the product or service that is the subject of the alleged violation. According to this theory, pricing below marginal costs is not economically rational and consequently may be indicative of anticompetitive conduct. In practice, marginal cost is difficult to measure, and therefore is not often used.

An alternative is average variable cost ("AVC"). Variable costs are costs that vary with output, such as the cost of inputs. As AVC may approximate marginal costs, it can be used as a measure of the cost that the alleged violator incurs to increase production. But because AVC is an average, the relevant time period must determined. In addition, it must be determined which costs are fixed and which are variable. These all may be points of contention. Pricing below AVC is typically not economically rational and may evidence anticompetitive conduct.

Another theory is average avoidable cost ("AAC"). Avoidable cost consists of the costs that could have been avoided if a certain amount of units had not been produced. Unlike AVC, AAC includes both variable and fixed costs. Under this theory, it is not economically rational to produce the units related to the alleged violation if the price is below the AAC to produce those units.

The final theory addressed by Mr. Sacher is long-run average incremental cost ("LRAIC"). LRAIC is an average of all variable and fixed costs the alleged violator incurs to produce the product at issue. Thus, LRAIC includes development costs, even if they occurred before the challenged conduct. Because this test includes development costs, it may be more appropriate in situations where the challenged product has high development costs, but low marginal costs.

Mr. Sacher concluded by observing that, in practice, all of these cost benchmark tests may be difficult to use, given that practitioners will need to rely on company accounting data, which may not record what is necessary for economists to measure costs.

Predatory Pricing

This difficulty, as noted by Mr. Angland, is reflected in the Tenth Circuit's ruling in *United States v. AMR Corp.*[1] In 2001, the Department of Justice challenged alleged predatory pricing by American Airlines ("AA") on certain routes from its Dallas hub. While AA had about a 70% market share on these routes, low-cost carriers entered the market and took some market share with lower prices. AA responded by adding capacity – more flights and larger planes – on certain routes at prices matching the new low-cost carriers. However, noting that AA had many empty seats on

[1] 335 F.3d 1109 (10th Cir. 2003).

these routes, internal AA documents stated that this approach only made sense if it led to the demise of or withdrawal by the low-cost carriers. The Department's theory was that the incremental revenues AA derived by adding capacity did not cover the costs resulting from this expansion. The district court granted summary judgment for AA, holding that the Department needed to show that incremental costs exceeded incremental revenues for *all routes at issue,* not just for the incremental capacity on a particular route. Mr. Angland observed that the Tenth Circuit did not reject the Department's theory – that even if revenues for a particular route exceeded costs, there could still be predation if the revenues attributable to the *incremental capacity* on that route did not cover the incremental cost of that capacity. Nevertheless, the Tenth Circuit affirmed summary judgment in favor of AA because it found that the data used in AA's accounting systems could not show that incremental costs exceeded incremental revenue. Thus, *AMR Corp.* illustrates that even if a court can be persuaded to accept a particular price-cost theory, litigants may have difficulties applying that theory to company accounting data.

Margin Squeezes

Next, focusing on the European Union, Dr. Bennett addressed margin squeezes. Margin squeezes involve situations where a vertically-integrated firm competes with a downstream competitor in a certain product market, but also sells an input for that product to the downstream competitor. A margin squeeze arises when the vertically- integrated firm reduces its downstream competitor's profit margin by either: (1) increasing the price of the input sold to the downstream competitor, while keeping its own downstream product price constant; or (2) decreasing its downstream product price, while keeping the price of the input sold to the downstream competitor constant. In either scenario, the vertically-integrated firm degrades its downstream competitor's margin such that the competitor cannot survive or effectively compete. This may harm competition by ultimately raising downstream consumer prices or reducing the quality of downstream consumer products.

Under the European Commission's Article 82 guidelines,[2] a margin squeeze is generally *not* sufficient to show abuse of dominant position. Rather, like a refusal to supply, three circumstances must be present: (1) the act relates to an input that is necessary to compete downstream; (2) the act is likely to eliminate effective competition in the downstream market; and (3) the act is likely to lead to consumer harm.[3] But there are certain exceptions. A margin squeeze test is sufficient if the alleged violator either: (1) is a regulated monopoly; or (2) received its dominant position through special or exclusive rights or has been financed by state resources.[4]

In the *TeliaSonera* case,[5] the European Court of Justice ("ECJ") confirmed that a margin squeeze in itself may constitute an abuse of dominance, even where there is no duty to supply.[6] Thus, litigants need not establish that downstream product prices are predatory, or that input prices are excessive. The ECJ also went on to find that margin squeezes are a separate type of violation, not just a species of refusal to supply. Accordingly, unlike refusal-to-supply cases, there is no requirement to prove that the vertically-integrated firm's input is indispensable. This treatment contradicts the Article 82 guidelines, which appear to characterize margin squeezes as a type of refusal to supply. In any event, Dr. Bennett believes that in margin squeeze cases, indispensability will still need to be considered when analyzing the anticompetitive effect, as alleged margin squeezes may not have any effect if the particular input is not indispensable.

Loyalty Rebates

The panel concluded by discussing loyalty rebates. Loyalty rebates include practices such as

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[2] After the December 1, 2009, Treaty of Lisbon, the former Article 82 of the Treaty Establishing the European Community was renumbered as Article 102 of the Treaty on the Functioning of the European Union. *See* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF.

[3] Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, 18-19 at ¶ 81.

[4] *Id.* at ¶ 82.

[5] Case C-52/09, Konkurrensverket v. TeliaSonera Sverige AB (ECJ Feb. 17, 2011), http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009CJ0052:EN:HTML.

[6] Conversely, the U.S. Supreme Court has held that margin squeeze claims may not be brought when the defendant has no duty to deal. *See* Pacific Bell Telephone Co. v. linkLine Communications, Inc., 129 S.Ct. 1109, 1115 (2009). According to the Court, wholesale duty-to-deal and retail predatory pricing theories of liability are sufficient to address the competitive harm caused by margin squeezes. *See id.* at 1122.

bundled discounts (discounts when two or more products are purchased), all-units discounts (where the buyer's price is reduced on each unit purchased beyond a certain quantity), and market-share discounts (where discounts are awarded in return for purchasing a certain amount of the buyer's total requirements from a supplier).

Mr. Mandorff addressed the second type of loyalty rebates with the Swedish *Posten* case.[7] Posten is the former national incumbent for postal services in Sweden. Bring CityMail ("CityMail") is a competitor for postal services in three metropolitan areas in Sweden – *i.e.,* the contestable areas. In 2008, Posten introduced a retroactive rebate of 0.2 SEK per item (a 10% discount) on a sender's entire shipment of pre-sorted bulk mail if it exceeded 300,000 pieces. CityMail complained that for shipments slightly above the threshold but with small contestable shares, CityMail would need to pay an effective rebate well in excess of 0.2 SEK per piece (possibly even greater than a 100% discount) to compete with Posten. If CityMail did not pay these rebates, customers would lose their discounts by selecting CityMail. Using a price-cost test, which compared the effective (incremental) price to the relevant measure of cost (Posten's own costs), the Swedish Competition Authority ("SCA") found that the rebate did not exclude an equally efficient competitor. The SCA case closed in December 2009.

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[7] Swedish Market Court, June 8, 2011