The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel:

Perspectives in Antitrust

JUNE 17, 2013 VOLUME 1, NUMBER 6

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***Perspectives in Antitrust* Editors:**

Tiffany Rider
Vice Chair, CP&P
trider@skadden.com

Frank Qi
Young Lawyer Representative, CP&P
frank.qi@ropesgray.com

The Art of Successful Competitor Complaints

*By Bernard A. Nigro Jr. and Damon J. Kalt**

Well-crafted competitor complaints can help companies achieve strategic business objectives by using the antitrust laws to their advantage. However, not all competitor complaints are successful; not all are effective; and, not all are prudent. Indeed, some competitor complaints are complete failures, or worse, some can backfire.

Most U.S. antitrust lawyers are familiar with the Supreme Court's 1922 decision in *Federal Baseball Club of Baltimore v. The National League of Professional Baseball Clubs*.[1] It is likely, however, that many are not familiar with the events leading up to the case, and why it is a good example of a competitor complaint with disastrous consequences.

The story starts one hundred years ago with Ty Cobb. Cobb played for Detroit. As a star center fielder, he hit .409 in 1912 to win his sixth consecutive batting title.[2] Cobb hoped to capitalize on his success by seeking a salary increase from ten to fifteen thousand dollars.[3] Detroit, however, refused to pay Cobb a penny more. Because the leagues imposed a so-called "reserve clause" on players, Cobb's choice was to accept the salary offered by Detroit or not play.[4] Cobb quit baseball.

That's when complaints caused Congress to join the fray.[5] Senator Hoke Smith pronounced that the leagues were in violation of the Sherman Act. Congress initiated an investigation and within days, Detroit resolved its differences with Cobb.[6] That was an effective successful complaint, albeit not by a competitor.

What happened next, however, did involve a competitor and ultimately backfired, giving Major League Baseball the gift that keeps on giving. Organized baseball's main antagonist at the time was the Federal League.[7] With its entry in 1913, the Federal League confronted numerous obstacles placed in its path by two incumbent and well-established competitors – the American and National

* Mr. Nigro is Chair of the Antitrust Group, and Mr. Kalt an associate, at Fried Frank Harris Shriver & Jacobson. This article is adapted from Mr. Nigro's introductory remarks at a panel presented by the Civil Practice & Procedure, Federal Civil Enforcement, and International Committees at the 2013 ABA Antitrust Law Spring Meeting on April 10, 2013.

Baseball Leagues. For example, Western Union, under pressure from the incumbent leagues, refused to carry Federal League scores on its ticker.[8] When the Federal League tried to introduce a resolution in the House of Representatives to investigate the "audacious and autocratic" baseball trust,[9] hundreds of minor league teams, scattered in Congressional districts throughout the country, moved to block the resolution from coming to a vote. The competitor complaint failed.

The Federal League then decided it needed better players to attract more fans. However, the players – and the fans – had to be diverted from the entrenched and more popular American and National League teams. Remember Ty Cobb? When he settled his dispute with Detroit, nothing was done to prohibit the use of the restrictive reserve clause. As a result, the Federal League was unable to recruit players and forced to pursue a litigation strategy.

An antitrust suit was initiated by the Baltimore Terrapins, one of the most successful teams in the Federal League.[10] The case was filed in Chicago because the senior judge, Kenesaw Mountain Landis, was viewed as a trust-buster, having recently fined Standard Oil today's equivalent of seven hundred million dollars.[11] Judge Landis, however, was an avid baseball fan, and sat on the case while the Federal League struggled to compete.[12] Eventually, the cost of the delay became too great. At the urging of Judge Landis (who later became baseball's first Commissioner), the Federal League settled,[13] and many of the new entrant's teams joined forces with the "branded competitor."[14]

The settlement, however, failed to satisfy all of the teams, and the Baltimore Terrapins brought, and won, a second antitrust suit.[15] Had the story ended there, it would have been a success. But, it did not. It was on appeal that Baltimore's competitor complaint boomeranged.[16] The appeal ultimately produced a unanimous opinion from the Supreme Court exempting baseball from the antitrust laws because baseball is a "purely state affair" and does not constitute interstate commerce.[17] Imagine your client's excitement when it learns that its "competitor complaint" resulted in antitrust immunity for its principal competitor. Any umpire would call that pitch career-shortening.

Considerations for Successful Competitor Complaints

Although most complaints are unlikely to result in antitrust immunity for your competitor, as it did for the Baltimore Terrapins, there are a number of factors that companies should consider before pursuing a complaint against a competitor. While the facts and circumstances will dictate the precise tactics likely to yield a positive result, companies should always consider the following:

Identify the Strategic Objective and Most Effective Method of Engagement

At the outset, it is important to identify the realistic strategic objective of the complaint in order to craft the best approach. For example, in the merger context, is the goal to stop the transaction or to acquire a divested product line or business from the merging parties? Companies should also consider the nature of the matter when shaping an effective strategy. An effective strategy in a

merger context will not necessarily be the most effective strategy in a conduct investigation. Companies should consider differences related to timing, method of engagement, and scope of the complaint when formulating a strategy.

Depending on the strategic goal of the complaint and nature of the matter, companies should consider the most effective method for engaging with antitrust authorities, such as: (i) passive participation (in response to outreach by the competition authorities); (ii) direct engagement with the antitrust authorities (e.g., in the merger context, through an affirmative complaint during the merger review or Tunney Act review process); and/or (iii) indirect notification through a third-party participant that could make the complaint more persuasive (e.g., customers, suppliers).

Present a Cognizable Antitrust Story

Once the overall strategic objective and approach have been determined, companies should present the competition authorities with mainstream theories of competitive harm, supported by credible evidence grounded in marketplace realities, and be prepared to show why the merger or particular conduct harms consumers, not just competitors.

Competitor complaints are often viewed with a certain degree of skepticism by the antitrust agencies. In the merger context, for example, the agencies may presume that a competitor complaint about a merger between its rivals is motivated by a fear of increased competition.[18] Because of this inherent skepticism, it is important that complainants present factual and anecdotal evidence demonstrating a plausible theory of why the merger or conduct is likely to harm consumers and competition. For example, a competitor could present evidence that, as a result of a merger, it will be foreclosed from access to a necessary input, thereby preventing it from competing effectively against the merged entity.

When gathering evidence and formulating theories of competitive harm, companies should also consider whether to hire an economist. A reputable economist can assist in identifying credible evidence and developing persuasive antitrust arguments in support of a competitor complaint.

Consider Including Other Influential Participants

Companies should consider expanding their approach to include other parties that can influence the process (e.g., customer, legislators, the press, industry trade groups). Well-timed engagement of influential participants can add helpful support to a competitor complaint.

Customers can often be the most credible allies in support of a complaint as they are well-positioned to put forth evidence demonstrating consumer harm. Legislators and other affiliates can also provide influential letters and other support to a complaint, particularly those with antitrust oversight or control over antitrust agency budgets.

Companies should also consider engaging the press and utilizing advertising outlets, which can increase attention to and awareness of the undesired transaction or conduct. Industry organizations (e.g., unions, SSOs), industry allies (e.g., other competitors), and other trade groups also can provide support to a legitimate complaint. For example, several companies opposing Google's acquisition of ITA Software formed the group FairSearch in order to challenge collectively the merger. Although the transaction was cleared, Google agreed to a consent decree with the Department of Justice ("DOJ") that included government oversight related to the acquisition as well as other conditions.[19]

Consider Taking Matters into Your Own Hands

Companies contemplating a competitor complaint should also consider taking more proactive unilateral options, including private litigation or intervention in a government lawsuit. These unilateral options carry their own set of potential benefits and risks, which should be evaluated based on the particular facts and circumstances of the complaint.

Private litigation can give companies more control of the process and encourage or support government enforcement. For example, Sprint filed its own private action in opposition to AT&T's acquisition of T-Mobile, after the DOJ had filed suit to block the transaction.[20] AT&T ultimately dropped its bid to acquire T-Mobile. Private action, however, can also present its own risks and challenges (e.g. lack of standing, difficulty showing causation and harm to competition) causing the competition authority to slow or halt its investigation.

The timing of a private action is also an important consideration, particularly in the merger context where a private suit initiated after the merger has received antitrust clearance may have a reduced likelihood of success. For example, during the Federal Trade Commission's ("FTC") review of the acquisition of Medco Health Solutions by Express Scripts, the National Association of Chain Drug Stores, National Community Pharmacists Association, and nine retail pharmacy companies filed a private suit to block the deal. Although competitor complaints factored into the agency's review, the FTC ultimately closed its investigation and the transaction was consummated. Within months, the court dismissed most of the claims in the private suit.[21]

Likewise, when considering whether to seek to intervene in a government lawsuit against a competitor, companies should be sure to balance the potential benefits and risks of intervening. Such potential benefits include access to information, marshaling evidence and arguments to support the government's case, and the ability to participate in settlement discussions. Intervening also poses potential risks including, the risk of undermining the government's theories of competitive harm (the merging parties will likely argue that a competitor complaint is a sign that deal will reduce prices and benefit consumers) and the risk that standing issues may affect the timeliness of the intervention, thereby reducing its effectiveness.

Supreme Court Denial of Certiorari Leaves Circuit Split on Loyalty Discounts
Justin W. Bernick

Supreme Court Denial of Certiorari Leaves Circuit Split on Loyalty Discounts

By Justin W. Bernick†

On April 29, 2013, the U.S. Supreme Court declined to review the Third Circuit's 2012 decision in *ZF Meritor, LLC v. Eaton Transmission Corp*., 696 F.3d 254 (3d Cir. 2012). In a ruling that conflicts with other Circuits, the Third Circuit upheld the district court's finding that above-cost loyalty discounts can violate the antitrust laws. Rather than apply the "price-cost" test to evaluate the discounts, the Court held that they were *de facto* exclusive agreements and analyzed whether they foreclosed a "substantial share" of the market. The denial of certiorari means that practitioners should exercise caution when advising clients with respect to discounts, rebates, and other pricing incentives. The Third Circuit ruling could very well have the unfortunate effect of deterring discounts that benefit consumers in the future, even in situations where the discounts are above cost.

The Decision

Meritor, a manufacturer of transmissions for heavy-duty trucks, sued Eaton, a competitor, alleging that various long-term agreements between Eaton and heavy-duty truck manufacturers ("OEMs") violated the antitrust laws. Meritor alleged that the agreements contained a provision that gave the OEMs rebates if they purchased a specified percentage (as high as 70 to 90 percent or more) of their transmissions requirements from Eaton. Meritor also alleged that the agreements required that OEMs publish Eaton transmissions as the "standard offering" in the companies' catalogs and to "preferentially price" Eaton transmissions relative to competitor transmissions for customers. The duration of each of the agreements was allegedly at least five years. Meritor never argued that Eaton's discounts resulted in transmission prices below its costs. Meritor's market share allegedly declined until it exited the transmission business in 2007.

After a four-week trial, a jury found that the agreements violated Section 1 and Section 2 of the Sherman Act, and Section 3 of the Clayton Act. Eaton filed a motion for judgment as a matter of law, arguing that the agreements were *per se* lawful because the transmissions were priced above Easton's cost. The District Court disagreed, finding that the agreements were *de facto* exclusive dealing arrangements that foreclosed a substantial share of the market and therefore could harm competition. In a lengthy opinion, the Third Circuit affirmed the District Court, remanding the case for trial on damages.

On appeal, Eaton argued that the agreements offered nothing more than low transmission prices, which Meritor was unable to match. Therefore, under *Brooke Group Ltd. v. Brown & Williamson Tobacco Co*rp., 599 U.S. 209 (1993),

† Justin Bernick is an Associate in Hogan Lovells US LLP's Antitrust, Competition, and Economic Regulation practice. His practice focuses on antitrust litigation, as well as antitrust clearance of mergers and acquisitions and other government investigations. Justin graduated from the University of Virginia School of Law in 2007.

Supreme Court Denial of Certiorari Leaves Circuit Split on Loyalty Discounts *Justin W. Bernick (continued)*	those transmission prices are *per se* lawful and benefit consumers so long as they are above an appropriate measure of Eaton's cost. However, the Third Circuit found that the price-cost test did not apply because price was not "the clearly predominant mechanism of exclusion." Instead, the Court found that the Eaton agreements imposed *de facto* purchase requirements on the OEMs because the OEMs allegedly had no realistic alternative but to purchase the specified minimum percentage of transmissions from Eaton. Therefore, the Court held that it must analyze the agreements under the law of exclusive dealing, and evaluate whether the agreements foreclosed a "substantial share of the relevant market" to competitors under *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). Applying the *Tampa Electric* test, the court held that a jury could reasonably conclude that the Eaton agreements foreclosed a substantial share of the transmissions market, even though the agreements covered less than 100 percent of the OEMs' requirements. **Critiques** Judge Greenberg dissented from the majority opinion, arguing that the price-cost test was a "cornerstone of antitrust jurisprudence" that should apply whenever a plaintiff challenges pricing practices. Unlike the majority, Greenberg was unwilling to conclude that Eaton's agreements imposed mandatory purchase requirements on the OEMs. Instead, Greenberg found no evidence that Eaton would have refused to supply transmissions to the OEMs had they failed to meet their purchase targets. Therefore, Greenberg reasoned that the agreements could not have excluded an equally-efficient competitor. Greenberg closed by noting that "[w]hat I find most troubling is that firms will play it safe by not formulating discount programs and that the result of this case will be an increase of prices to purchasers and the stifling of competition." Judge Greenberg was not alone. A group of 18 well-known antitrust and economics scholars filed an amicus brief urging the Supreme Court to overrule the Third Circuit's opinion because it "conflicts with a long line of this court's decisions and the decisions of other circuits." The scholars argued that the Third Circuit decision would "chill sellers from offering conditional nonpredatory discounts and rebates, reward less efficient producers, diminish price competition, and harm consumer welfare." On the other hand, FTC Commissioner Joshua Wright recently presented prepared remarks arguing in favor of the Third Circuit's approach to analyzing loyalty discounts. *See* Joshua D. Wright, "Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts" (June 3, 2013) *available at* http://www.ftc.gov/speeches/wright/130603bateswhite.pdf. Wright argued that "the price-cost approach sacrifices economic accuracy in the hope of more efficient administration," and that applying the price-cost test is not as easy as it may seem. According to Wright, predatory pricing and raising rivals' costs are entirely distinct forms of exclusion, and "prices need not be below cost for the exclusion of rivals to occur" under a raising rivals' costs theory, upon which the analysis of exclusive dealing is based. Further, plaintiffs (like Meritor) alleging that loyalty discounts "deprive rivals of access to a critical input, raise their costs,

and ultimately harm competition," are articulating a raising rivals' cost theory rather than predation. Because loyalty discounts raise the same antitrust concerns as exclusive dealing under these circumstances, they should therefore be evaluated under the same legal framework.

The Circuit Split

It is extremely common for companies to increase sales by offering loyalty discounts to customers who purchase more products. Although many loyalty discount programs do not fit neatly into a particular category, they can take several different forms, including discounts based on the volume of products purchased ("volume discounts") or discounts based on the customer buying a specified percentage of its requirements from the company ("market share discounts"). Even in the Third Circuit, mere volume discounts are upheld so long as they satisfy the price-cost test, at least on unbundled products. *Advo, Inc. v. Phila. Newspapers*, 51 F.3d 1191, 1203 (3d Cir. 1995) (volume discounts "offend no antitrust principles"). On the other hand, courts may evaluate discounts conditioned on actual exclusivity as an exclusive-dealing arrangement. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 68-70 (D.C. Cir. 2001); *see also* 15 U.S.C. § 14 (Clayton Act § 3) (prohibiting discounts given "on the condition" that the customer does not purchase a competitor's goods that reduce competition).

However, the circuit courts appear to analyze "market share" loyalty discounts – the alleged discounts at issue in *Meritor* – somewhat differently. As discussed above, the Third Circuit held in *Meritor* that such discounts could be evaluated under the law of exclusive dealing under at least certain circumstances. However, other courts – including the First, Second, Sixth, Eighth, and Ninth Circuits – have evaluated such discounts using the price-cost test, rejecting similar claims of *de facto* exclusive dealing.[22] Although these other circuits have applied the price-cost test to loyalty discounts, the opinions are not without ambiguity. For example, several of the opinions make references to factors other than price and cost, such as allegations of conspiracy, relevant markets, market power, foreclosure, coercion, entry barriers, agreement duration, and business justifications.

Nevertheless, given the Supreme Court's clear guidance that when a plaintiff challenges a defendant's "pricing practices, only predatory [below-cost] pricing has the requisite anticompetitive effect," a clear ruling from the Supreme Court would have resolved the lingering ambiguity in the case law that was exacerbated by the *Meritor* decision. *Atl. Richfield Co. v. USA Petroleum Co*., 495 U.S. 328, 339 (1990).

Implications

The *Meritor* decision leaves open the question about the proper mode of analysis for loyalty discounts. And the opinion is not the first Third Circuit decision finding that above-cost discounts can violate the antitrust laws. In *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), the Court previously found that bundled discounts could violate the antitrust laws even without evidence of below-cost pricing. As a result of these decisions – and the Supreme Court's denial of

Supreme Court Denial of Certiorari Leaves Circuit Split on Loyalty Discounts
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certiorari – a firm should continue to be cautious and consider whether the pricing practices could be characterized as a *de facto* exclusive agreement by competitors or the courts. This could include evaluating overall market share, the share of the market covered by the agreements, whether any sales targets in the agreement are effectively "mandatory," as well as other factors. Although small firms in unconcentrated markets might still offer discounts with little risk, large firms in concentrated markets face heightened risk (at least in the Third Circuit), which could ultimately deter them from offering discounts. Since many of these large firms are best positioned to pass along lower prices to consumers because of economies of scale or scope, such deterrence could ultimately lead to consumers paying higher prices than they otherwise might have.

Tomato, Tomahto: The Predominance Requirement After *Comcast*
Anna M. Rathbun

Tomato, Tomahto: The Predominance Requirement After *Comcast*

By Anna M. Rathbun‡

The Supreme Court's recent pronouncements on the predominance requirement disagree on whether common questions or common answers are necessary for class certification. But practitioners should continue to focus on the real issue in antitrust cases—have plaintiffs shown by a preponderance of the evidence that impact is susceptible to common proof?

Background

As antitrust practitioners are well aware, class certification in antitrust class actions usually comes down to the question of predominance: Do questions of law or fact common to class members predominate over any questions affecting only individual members?[23] After the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305 (3d Cir. 2008), numerous courts have settled on the standard that proposed class members must show by a preponderance of the evidence that the fact of impact to the class is susceptible to common proof.

In *Wal-Mart Stores, Inc. v. Dukes*, the Supreme Court elucidated that a question of law or fact is not common to the class under F.R.C.P. 23(a)'s commonality requirement unless plaintiffs' claims depend on a common contention "capable of classwide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. 2541, 2551 (2011). In other words, common questions should have common answers.

The Supreme Court recently issued two opinions that discuss common questions and common answers with respect to the predominance requirement. *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*, a securities fraud case, holds

‡ Anna Rathbun is an antitrust associate at Latham & Watkins LLP in Washington, D.C. Her practice focuses on antitrust litigation and assisting corporate clients in large, multi-district actions and government investigations.

that F.R.C.P. 23(b)(3) requires that questions common to the class predominate in order for class certification to be proper.[24] In contrast, *Comcast v. Dukes*, an antitrust case, requires that proposed class members demonstrate that common answers will predominate in the litigation. Ultimately, neither of these approaches improve on the preponderance of the evidence standard.

Amgen and Common Questions

In *Amgen*, plaintiffs filed a securities fraud action against a biotechnology company and its officers, alleging a "fraud-on-the market" theory in support of their claim that they had been injured by Amgen. According to this theory, Amgen's misleading omissions and misreprensentations materially affected Amgen's stock price. Amgen argued that class certification should be denied unless plaintiffs proved materiality at the class certification stage. The Court disagreed, holding that Rule 23(b)(3) "requires a showing that questions common to the class predominate, not that those questions will be answered, on the merits, in favor of the class." The Court reasoned that since the alleged misrepresenations and omissions would be equally material or immaterial for all investors in the class. Therefore, the class's inability to prove materiality after the class certification stage would not result in individual questions predominating. Instead, it would end the case. As the Court explained, "the pivotal inquiry is whether proof of materiality is needed to ensure that the questions of law or fact common to the class will predominate over any questions affecting only individual members."

The Court's decision in *Amgen* makes sense in a securities fraud case, where the fraud-on-the market theory either applies to the whole class or not at all. However, focusing exclusively on the predominance of questions in antitrust actions may be more problematic, especially as to the question of impact. Without some common methodology for assessing impact, the fact of impact to each class member would easily predominate over other common questions in the litigation. But it cannot be the case that a rigorous inquiry into the ability of the plaintiffs' methodology to calculate impact can be left to the merits stage. That would mean that as long as plaintiffs proffer an expert who creates *some* model that demonstrates *some* impact to *some* members of the class, the class may be certified.

Comcast and Common Answers

The Court took a different approach in *Comcast v. Behrend*, an antitrust case.[25] In that case, the Court decertified a class of cable subscribers because their expert's damages model did not measure damages attributable only to the theory of harm common to the class. In other words, the model could not provide a common answer as to the reason why plaintiffs suffered damages. The Court complained that under the Third Circuit's approach below, any method of calculating damages would warrant class certification, as long as it could be applied class wide.

The dissent understandably complained that the Court's opinion confused the difference between antitrust impact and damages during the class certification

stage. Focusing exclusively on common answers generated by damages models in antitrust actions ignores clear precedent that individual damage calculations do not preclude certification. The Court's decision in *Comcast* ultimately does not give practitioners any real guidance regarding predominance and fact of injury.

The Evidence Should Support Common Questions and Common Answers

Reconciling the Court's approaches in *Amgen* and *Comcast* requires going back to basics: the preponderance of the evidence test. Put another way, this standard satisfies both sides of the Court. First, the question must be common to the class: Have plaintiffs offered a common methodology to show impact? Plaintiffs must proffer a model or some other methodology, rooted in the particular facts and circumstances of each case. But they must also show that the methodology is capable of providing a common answer to the class by showing that all or virtually all class members were impacted by defendants' conduct.

Rather than focusing on whether plaintiffs' claims raise common questions or common answers, practitioners should focus their class certification arguments on whether the weight of the evidence shows that impact is susceptible to common proof. In both *Amgen* and *Comcast*, the circuit courts below did not consider all of defendants' arguments against plaintiffs' theories because the courts concluded that those arguments were better suited for the fact-finder at the merits stage of the case.[26] Although the Court in *Amgen* did not take issue with the circuit court's exclusion of defendants' evidence, *Comcast* makes clear that, at least in antitrust cases, courts will increasingly be faced with difficult factual determinations at the class certification stage. For that reason, the real effects of *Amgen* and *Comcast* will be felt during discovery, not class certification.

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[1] 259 U.S. 200 (1922).

[2] *Ty Cobb's $15,000 Demand Began Baseball's Antitrust Woes*, Bloomberg, Apr. 2, 2013 *available at* http://www.bloomberg.com/news/2013-04-02/ty-cobb-s-15-000-demand-began-baseball-s-antitrust-woes.html.

[3] *Id.*

[4] *Id*.

[5] Cobb received a telegram from Senator Hoke Smith of Georgia, Cobb's home state. "Send me a copy of your contract with Detroit including reserve clause," Smith wired. "Wish to investigate to see if illegal contract violating federal statutes has been made." Stuart Banner, THE BASEBALL TRUST: A HISTORY OF BASEBALL'S ANTITRUST EXEMPTION, pg. 87 (2013).

[6] Cobb and Detroit settled on a salary of $12,000. Cobb resumed playing, and Congress lost interest in the antitrust implications of his contract. *See*, Bloomberg, *supra* note 2.

[7] The Federal League consisted of teams in Chicago, Cleveland, Pittsburgh, Indianapolis, St. Louis, and Covington, Kentucky. Robert Peyton Wiggins, THE FEDERAL LEAGUE OF BASE BALL CLUBS: THE HISTORY OF AN OUTLAW MAJOR LEAGUE 1914-1915, pg. 7 (2008).

[8] *See* Bloomberg, *supra* note 2.

[9] *Would Investigate 'Baseball Trust': Representative Gallagher of Illinois Urges Action in Resolution to Congress*, N.Y. TIMES, Mar. 12, 1912, at 10, *available at* http://query.nytimes.com/gst/abstract.html?res=9805E7DB143CE633A25751C1A9659C946396D6CF.

[10] Federal League of Professional Baseball Clubs v. National League of Professional Baseball Clubs, Equity Case No. 373 (U.S.D.C. Chi. 1915).

[11] United States v. Standard Oil Co. of Ind., 155 F. 305 (N.D. Ill. 1907). The fine Landis levied on Standard Oil was the largest ever handed out in the United States at that time. *See*, David Pietrusza, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS, pg. 63 (1998).

[12] *See* Harold Seymour, BASEBALL: THE GOLDEN AGE, pg. 212-213 (1960) ("Never one to permit judicial impartiality to interfere with his personal biases and leanings, Landis then proceeded to take the case under advisement and stall it a full year").

[13] *See* David Quentin Voigt, American BASEBALL VOL. 2, pg. 119 (1983) ("The Federal settlement cost the major leagues five million dollars as the price for preserving their baseball monopoly").

[14] The majority of the Federal League owners decided to come to terms with the major leagues. Two Federal League owners, Charles Weeghman of the Chicago Whales and Phil Ball of the St. Louis Terriers, were allowed to buy existing major league teams, the Chicago Cubs and St. Louis Browns, respectively. The remaining owners were offered a buyout. Five of the six teams accepted the money, with the ownership group of the Baltimore Terrapins the lone holdout. *See*, Samuel A. Alito, Jr., *The Origins the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Players*, FEDERAL BASEBALL CLUB OF BALTIMORE, INC. V. NATIONAL LEAGUE OF PROFESSIONAL BASEBALL PLAYERS THE BASEBALL RESEARCH JOURNAL, SABR, Volume 38, Number 2 (Fall 2009), pp. 86-93.

[15] The Baltimore owners launched their own antitrust suit in the District of Columbia against the established leagues and their fellow Federal League owners claiming that the settlement agreement was a conspiracy to form a monopoly on baseball by destroying the Federal League in violation of the Sherman Act. The Baltimore owners won in district court and were awarded damages of $80,000, which was then tripled to $240,000 under the Clayton Act. *Id*.

[16] On appeal, the Court of Appeals reversed the verdict, and held that baseball was not subject to the Sherman Act because it did not constitute a form of interstate commerce. The National League of Professional

Baseball Clubs v. Federal Baseball Club of Baltimore 269 F. 681 (D.C. Cir. 1921). The Baltimore owners then appealed to the Supreme Court.

[17] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, *supra* note 1 at 208-09 (reasoning that "the business is giving exhibitions of baseball, which are purely state affairs … the transport [of teams across state lines for games] is a mere incident, not the essential thing").

[18] This skepticism regarding competitor complaints is reflected in the 2010 Horizontal Merger Guidelines, which note that the antitrust agencies typically do not rely on competitor complaints because their interests usually diverge from those of consumers. U.S. Department of Justice and Federal Trade Commission: Horizontal Merger Guidelines §2.2.3 (Aug. 19, 2010).

[19] *See* Competitive Impact Statement, United States v. Google, Inc. and ITA Software, Inc., No. 1:11-cv-00688 (D.D.C. Apr. 8, 2011), *available at http://www.justice.gov/atr/cases/f269600/269620.pdf.*

[20] Sprint Nextel Corp. v. AT&T, 821 F. Supp 2d 308 (D.D.C. 2011) (granting AT&T's motion to dismiss Sprint's claim regarding higher prices for wireless services because while higher prices may harm consumers, those effects benefit competitors by allowing them to increase prices; but denying AT&T's motion to dismiss Sprint's claim that it would be foreclosed access to a necessary input because foreclosure of competitors is the type of injury the antitrust laws were designed to prevent).

[21] National Association of Chain Drug Stores, et al., v. Express Scripts, Inc., No. 12-cv-00395 (W.D. Pa. Aug. 27, 2012) (dismissing claims that arose in the market for provision of drugs to the beneficiaries of large employers, but allowing claims involving the market for clinical specialty drugs to move forward).

[22] *See Southeast Missouri Hospital v. C.R. Bard, Inc.,* 642 F.3d 608 (8th Cir. 2011); *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); *Nicsand Inc. v. 3M Co.*, 507 F.3d 768 (6th Cir. 2002); *Virgin Atlantic Airway, Ltd. v. British Airways, PLC*, 257 F.3d 256 (2d Cir. 2001); *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039 (8th Cir. 2000); *Barry Wright Corp. v. ITT Grinnell Corp*., 724 F.2d 227 (1st Cir. 1983).

[23] F.R.C.P. 23(b)(3).

[24] 568 U.S. ___(2013), No. 11-1085, Feb. 27, 2013.

[25] 133 S.Ct. 24 (2012).