Summer 2018

Message from the Editor

Dear Friends of the Trial Practice Committee,

We are pleased to bring you the Summer 2018 edition of the Trial Practice Committee's newsletter, *Trying Antitrust*. This edition contains three articles that we hope are useful to your practice. In our first article, Jodie M. Williams, discusses a challenge to a years-old consummated merger on Section 7 grounds. The case was tried to a federal jury in Virginia in February of this year, and the plaintiff prevailed. In our second article, Dan Graulich and Nick Brod discuss the Seventh Circuit reversal of a preliminary injunction on the grounds that the injunction remedy did not match the violation. The article also shows how the decision may apply to platform operators and application developers. In our third article, Jessica N. Leal discusses the second edition of the recently published Antitrust Class Actions Handbook. The new book is highly recommended as a fantastic resource for our members whose practices include class cases.

Kristen M. Anderson
Scott+Scott Attorneys at Law LLP
kanderson@scott-scott.com

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

BETTER LATE THAN NEVER: LESSONS FROM *STEVES & SONS, INC. V. JELD-WEN, INC.*

By: Jodie M. Williams[1]

On February 15, 2018, a federal jury in Virginia ruled that JELD-WEN's near six-year old acquisition of competitor CraftMaster Manufacturing, Inc. ("CMI") was anticompetitive in violation of Section 7 of the Clayton Act[2] ("Section 7"). This case marks a rare occurrence in which a private post-merger challenge on antitrust grounds (1) meets a jury and (2) is successful. It also serves as a warning to merging parties that, even if a deal gets through the federal antitrust agencies – whether by early termination or after a Second Request – that deal is not inoculated from antitrust liability, even several years down the road. This article examines the dispute between Steves & Sons and JELD-WEN, how the litigation played out, and offers some key takeaways from the case.

The Dispute

The facts of the lawsuit describe a familiar antitrust tale. Two companies do business together but are also competitors; one partner-company acquires a third competitor which also happens to be a supplier. Post-merger, the newly-formed company allegedly charges higher prices and produces lower quality products. Such was the position of Steves & Sons when its primary supplier and competitor, JELD-WEN, purchased one of its two remaining suppliers.

Steves & Sons and JELD-WEN manufacture doors. *Steves and Sons, Inc. v. JELD-WEN, Inc.*, Case No. 3:16-cv-00545-REP (E.D.Va. June 29, 2016), Complaint at 1 ("Complaint"). JELD-WEN also manufactured and sold molded doorskins, a component part for some interior doors. *Id*. at 3. Molded doorskins are made of synthetic materials and typically glued over a wooden frame to create interior doors that are less expensive than solid wood doors. *Id.* at 3. Only three companies manufactured and sold molded doorskins in the United States: JELD-WEN, Masonite and CMI. Steves & Sons used molded doorskins for interior doors that it sold to consumers. While Steves & Sons relied on all three companies for its supply, it had a long-term supply agreement with JELD-WEN. *Id.* at 4. Steves & Sons also competed against JELD-WEN and Masonite when selling doors to consumers.

All was well and good in the molded doorskins and doors markets until October 2012, when JELD-WEN acquired the rival doorskins manufacturer CMI. The transaction was reviewed and approved by the U.S. Department of Justice ("DOJ") Antitrust Division; Steves & Sons even supported the deal. *Id*. at 7. According to the complaint, however, shortly after the merger closed, JELD-WEN embarked on a series of price increases for its doorskins notwithstanding its prior supply agreement with Steves & Sons, and the quality of its doorskins allegedly deteriorated. Matters grew worse when Masonite, Steves & Sons' only other doorskins' supplier post-merger, exited that market in 2014. *Id* at 7.

What happened next provides the twist in our tale. Faced with ever increasing costs for its component parts and intensified competition for its end products, Steves & Sons, not surprisingly, turned to litigation in 2016. But, rather than merely seeking damages based on the supply agreement, Steves & Sons also filed suit under Section 7 to challenge the now four-year-old JELD-WEN/CMI merger as anticompetitive. A risky legal move given the length of time that had passed since the merger was announced, but one that paid off in the end.

The Litigation

Unlike most merger challenges, Steves & Sons did not attempt to preliminarily enjoin the merger pending trial. Instead, it chose to follow a more traditional trial schedule, albeit truncated when compared to a typical antitrust case, and filed its complaint on June 29, 2016 on the heels of a failed pre-litigation arbitration attempt. The complaint contained the Section 7 claim as well as five other counts based on the supply agreement and alleged breach thereof, Complaint at 40-45. JELD-WEN moved to dismiss the antitrust claim early on, but that was denied and the case speeded to trial, initially set for early June 2017. *See Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 3:16-cv-00545-REP, 2018 U.S. Dist. LEXIS 21983, *13-14 (E.D. Va. Feb. 9, 2018). The six claims for relief in the Complaint were: violation of Section 7, breach of contract, breach of warranty, declaratory judgment pertaining to certain rights under the supply agreement, specific performance and trespass to chattels.

After pre-trial proceedings, including cross-motions for summary judgment, the two-week jury trial began on January 29, 2018. *See Steves & Sons*, 2018 U.S. Dist. LEXIS 21983, at *13-14.

Over the course of the next 12 days, the jury heard a total of 15 live witnesses, along with another 13 by video and written deposition, concerning Steves & Sons antitrust and contract-based claims. *See generally Steves & Sons* Docket.

The case went to the jury on February 14, 2018 and, in less than 24 hours, the parties had their verdict. JELD-WEN's six-year old acquisition of CMI was found anticompetitive. The jury awarded Steves & Sons over $12 million in damages from the anticompetitive behavior, and another over $46 million in future lost profits. If upheld after the conclusion of trial on JELD-WEN's counterclaims, post-trial motions and appeals, Steves & Sons will be entitled to treble those damages and recover attorneys' fees and certain litigation costs. Not to mention JELD-WEN's costs associated with unwinding its now anticompetitive acquisition, if ordered.

[1] Jodie M. Williams is Counsel at MoginRubin, LLP, a boutique antitrust law firm with offices in San Diego, California and Washington, D.C. Ms. Williams began her career as a staff attorney in the Federal Trade Commission's ("FTC") Bureau of Competition.

[2] The jury also found for Steves & Sons on a breach of contract claim.

The Takeaways

Steves & Sons took a gamble challenging a years-old, consummated merger on Section 7 grounds. Section 7 claims are frequently invoked to challenge mergers that have not yet closed, although private parties do not have the pre-merger information available to government agencies and frequently prefer to hold their fire until the governments' position is known. This case, however, underscores the lengths that companies are willing to take to save their operations. With increasing consolidation and technological advances in various markets, Steves & Sons may have just paved the way for more post-consummation Section 7 actions. For merged firms, which may feel emboldened by a pass from the DOJ or FTC, would be wise to keep this case in mind. A free ticket from the federal antitrust agencies is not a license to engage in post-merger anticompetitive behavior.

For practitioners, this case is a reminder to go back to basics. Many of us, especially those of us who have been through merger challenges with a federal antitrust agency, hold tight to the DOJ and FTC Horizontal Merger Guidelines ("Merger Guidelines") as gospel for private antitrust actions. But the Merger Guidelines were relegated to a more supporting role in this case. Given the timing of the lawsuit, and a review already completed by the DOJ, the Merger Guidelines did not make for the best ally for Steves & Sons. But the elements for violating Section 7 and for issuing an injunction did. At the end of the day, Steves & Sons demonstrated that that the required elements had been met – without strict reliance on the Merger Guidelines – and the jury agreed.

Time will tell whether private merger challenges increase, and whether any increase is attributable to the success of Steves & Sons under Section 7. But for now, it's safe to say that the door is wide open.

ACCESS (AND INJUNCTION) DENIED: THE SEVENTH CIRCUIT'S *AUTHENTICOM* DECISION AND THE ANTITRUST IMPLICATIONS FOR MANAGING DATA NETWORKS

By: Dan Graulich & Nick Brod [1]

I. Introduction

The form and scope of injunctive relief has generated challenging legal questions in high-profile constitutional litigation. *See, e.g.*, Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017). But injunctions matter under the antitrust laws, too, and the Seventh Circuit's recent decision in *Authenticom, Inc. v. CDK Global, LLC*, 874 F.3d 1019 (7th Cir. 2017), reminds district courts that — at least in Sherman Act cases — injunctive relief must be tailored to eliminate the alleged anticompetitive conduct. The antitrust laws do not give courts license to use injunctions to create new, more "competitive" outcomes. Instead, the injunction must follow the violation to restore the status quo: no more, no less.

What does injunctive relief look like for a Section 1 violation? According to the Seventh Circuit, the injunction may "break up the allegedly troublesome agreement," but it cannot set the terms of a new agreement that the parties never before reached. *Id*. at 1026. The district court's preliminary injunction in *Autheticom* did just that.

In vacating that order, however, the appellate court left a number of important questions unresolved. What should happen on remand? What if the claim had been brought under Section 2? And what, if any, sharing obligations do the antitrust laws impose on the kind of "big data" firms at issue in the case?

II. Factual Background

All car dealerships use a dealer-management system (DMS) to store and organize their business data. These systems cover the gamut of dealership operations from accounting and payroll, to inventory, sales, and parts. CDK Global, LLC ("CDK") and Reynolds & Reynolds Company ("Reynolds") provide and maintain a DMS for more than 70 percent of automobile dealers in the United States. *Id.* at 1022. In addition to providing DMS software and hardware and running the servers holding dealers' data, CDK and Reynolds also offer their users specific applications (or "apps") for managing the data or for performing other services. Dealers also use apps from third-party vendors that provide features and services not already included in the DMS.

A DMS can be either "open" or "closed." Under a "closed" system, third parties are only allowed to access a DMS if they receive direct approval from the DMS operator. By contrast, an open system allows third parties to access a DMS so long as they have the *dealer's* authorization. No prior approval from the DMS operator is required. Until 2015, CDK kept an open system, while Reynolds maintained a closed system. CDK decided to switch to a closed system, triggering an antitrust challenge from Authenticom, Inc. ("Authenticom"), a third-party data integrator that specializes in collecting data from DMSs and organizing that data for use by third-party vendors.

Because it is time-consuming for dealers to retrieve and transmit their own data to third-party vendors, they typically allow the third-party vendors to access the data from the DMS directly or through a third-party integrator, such as Authenticom. To enable a third-party integrator to access their business data, dealers authorize the integrator to access their data on the DMS, retrieve it, reformat it, and then provide it to a service provider, who then either returns the data to the dealer or uses it in an app to provide some service to the dealer. In other words, a third-party integrator is "no different from an intermediary in any industry, whether sheet steel, uncut fabrics, or anything else." *Id.* at 1021.

To provide these services, Authenticom relied on accessing dealership data in an open environment since the process for directly obtaining dealers' data through a DMS operator's third-party access program is significantly more expensive. Authenticom also presented evidence that the price CDK charged to use its third-party interface, as well as prices CDK charged vendors for using its data-integration services, substantially increased after CDK switched to a closed system.

CDK's decision to switch to a closed system also coincided with its decision to contract with Reynolds — its primary competitor — to help manage the open-to-closed transition and to obtain reciprocal access to Reynolds' apps. To minimize the disruptiveness of this change, CDK and Reynolds entered into three written agreements, which together formed the basis for Authenticom's antitrust challenge:

- ***Data Exchange Agreement***: CDK agreed to a five-year wind-down of its two data-integration subsidiaries (which compete with other third-party integrators like Authenticom), while Reynolds agreed not to block the subsidiaries' access to its system during the wind-down period. In addition, CDK promised that it would help transition users of its services on Reynolds' systems to Reynolds' third-party access program. Finally, CDK and Reynolds stipulated that they would not assist any third party who tried to "hostilely" integrate with one of their systems. *Id.* at 1022-23.

- ***Third Party Access ("3PA") and Reynolds Certified Interface ("RCI") Agreements***: Under these agreements, the parties provided each other with reciprocal access to their data-integration platforms, including the add-on software apps that they make available to dealers. CDK and Reynolds also agreed to use each other's third-party access programs (known as 3PA and RCI, respectively) exclusively to access each others' systems. *Id.* at 1023.

[1] Dan Graulich and Nick Broad are associates in the Washington, D.C. office of Hogans Lovells US LLP. The views expressed in this article are the authors' and not those of the firm or its clients

III. The Preliminary Injunction Standard

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 1024 (citing *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). Irreparable harm is generally considered the most important of the four factors. *See* 11 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* §2948.1 (3d ed. 2011). In the Seventh Circuit, district courts use a two-step analysis to evaluate a motion for preliminary injunctive relief. First, the party seeking the injunction must make a "threshold showing" that "(1) absent preliminary injunctive relief, he will suffer irreparable harm in the interim prior to a final resolution; (2) there is no adequate remedy at law; and (3) he has a reasonable likelihood of success on the merits." *See e.g.*, *Turnell v. CentiMark Corp.*, 796 F.3d 656, 662 (7th Cir. 2015). Second, if this threshold showing is met, the court must weigh "the irreparable harm the moving party will endure if the preliminary injunction is wrongfully denied versus the irreparable harm to the nonmoving party if it is wrongfully granted" along with the effect the injunction would have on nonparties. *Id.*

The Supreme Court has made clear that "[a] preliminary injunction is an extraordinary remedy never awarded as of right." *Winter*, 555 U.S. at 24. But district courts are ordinarily afforded great leeway to fashion injunctive relief, and a court of appeals review the grant of a preliminary injunction for an abuse of discretion. *Turnell*, 796 F.3d at 662.

IV. The District Court's Decision

A. Likelihood of Success on the Merits

The district court first found that Authenticom established "a likelihood of success on the merits" by showing "evidence that could establish the existence of a per se illegal horizontal conspiracy" and that CDK and Reynolds' contracts were "exclusive dealing agreements" in violation of Section 1 of the Sherman Act. *Authenticom, Inc. v. CDK Global, LLC,* No. 17-cv-318, 2017 WL 3017048, at *5-7 (W.D. Wisc. July 14, 2017).

Regarding Authenticom's horizontal conspiracy claims, the district court found that the agreements CDK entered into with Reynolds suggested more than merely parallel conduct. For example, the court credited testimony from Authenticom's CEO that the defendants' representatives told him that the defendants had agreed to "drive Authenticom from the market." *Id.* The district court also credited Authenticom's expert-witness testimony that CDK acted against its economic interests by entering into wind-down and reciprocal-access agreements with Reynolds. *Id.* The court found that the record supported the expert analysis because, among other things, it showed that: (1) data-integration revenue per dealer was nearly equal to the base cost of a DMS itself; (2) internal CDK documents confirmed that its decision to grant Reynolds reciprocal access had been motivated, in part, "by a desire to realize more revenue from third-party access"; and (3) testimony from software vendors suggested that data-integration prices rose significantly after the agreements, particularly, when compared to those that third-party integrators had and continued to charge. *Id.*

Regarding Authenticom's exclusive dealing claims, the district court again noted that the defendants charged significantly more for data integration compared to third-party integrators, and threatened to cut off Authenticom's access to the vast majority of dealers. The district court was not persuaded by the defendants' arguments that these additional costs were justified because they: (1) had not presented evidence about the cost of data integration; and (2) had not shown that properly managed third-party access posed security risks. *Id.*, at *7.

B. Adequacy of Legal Remedies and Irreparable Harm

Next, the district court found that Authenticom had shown "compelling evidence that it is on the brink of collapse." *Id.*, at *8. The district court concluded that Authenticom could not afford continued litigation in the absence of a preliminary injunction, and that damages would come too late to provide a meaningful remedy. Authenticom presented evidence that CDK's decision to block access to its systems would prevent Authenticom from reaching three-quarters of all dealers, and that the most third-party software vendors would be disinclined to engage a third-party data integrator with such limited access. *Id.* Based on this evidence, the court found that Authenticom's inability to serve customers "burns more of its goodwill and solidifies its customers' doubts about its viability . . . [r]egardless of whether the evidence conclusively establishes that defendants are able to effectively and completely block Authenticom" from accessing dealers. *Id.*

C. Balance of Harms and Public Interest

To balance the equities, the district court continued to focus on Authenticom's "very substantial risk of failure without the injunction." *Id.*, at *10. The defendants argued "that a preliminary injunction would harm them in two ways: by imposing increased security risks and overburdening their DMSs." *Id.*, at *8. The district court was not persuaded. In evaluating security risks, the district court focused on the potential consequences of allowing Authenticom to access Reynolds' system. *Id.*, at *9. The court determined that mandated access would not pose significant security risks because the record did not show that Authenticom had ever experienced a security breach or that Authenticom's access was less secure than access by dealer employees. The court also emphasized that Reynolds already "allows many exceptions to its 'no hostile integration' policy" and determined that mandating access would be no more burdensome or risky than Reynolds' existing efforts to make policy exceptions for third parties' short-term transitional needs. *Id.*

The district court also determined that mandating access would not overburden the defendants' systems. While CDK had presented evidence that Authenticom made a significant number of queries to CDK's DMS in a given day, CDK did not present evidence that showed the proportion of overall system resources spent on such queries or how many resources such queries consumed. *Id.*

Finally, in considering whether the injunction was in the public interest, the court concluded that allowing Authenticom to access dealer data on defendants' DMS platforms "would not pose a substantial security risk" and that "third-party software vendors and dealers would be served by the continued availability of Authenticom's DealerVault software and its data integrations services." *Id.*, at *10.

D. Form of the Injunction

The district court's injunction required CDK and Reynolds to give Authenticom access to their DMSs during the pendency of the litigation. As the court explained, the "core provision of the injunction is that defendants are to cease blocking Authenticom from using dealer login credentials to provide data integration services to dealers who authorize Authenticom to provide this service." *Id.*, at *11. At the same time, the district court held that the defendants could require Authenticom to use distinct credentials that would allow the defendants to track its use of their systems and could limit the data that Authenticom accessed to those "fields reasonably necessary" for its automated access offering. *Id.*

The district court approved a detailed series of requirements to govern Authenticom's access. The Seventh Circuit described some of the key provisions as follows:

- Allowing Authenticom to use dealer log-in credentials provided by dealers who were using Authenticom as of May 1, 2017;
- Restricting the scope of Authenticom's access to the scope of the dealer's access;
- Limiting Authenticom's access to read-only data exporting;
- Prohibiting the defendants from blocking Authenticom's access to affected dealers and prohibiting defendants from retaliating against dealers for doing business with Authenticom;
- Configuring log-in credentials for Authenticom to track its use of the defendants' systems;
- Permitting Authenticom's access to be suspended in the event of a material security breach of defendants' DMSs; and
- Requiring Authenticom to provide a $1 million security bond.
- *Authenticom*, 874 F.3d at 1024.

V. The Seventh Circuit's Decision

CDK and Reynolds appealed the district court's order. Writing for a unanimous panel, Chief Judge Diane Wood vacated the district court's preliminary injunction and remanded for further proceedings.

The "fundamental problem" with the injunction, the court held, was that although Authenticom challenged the agreements between CDK and Reynolds, the injunction had nothing to do with those agreements. "Instead, it ordered the defendants to enter into an entirely new arrangement with Authenticom . . . essentially forcing them to do business with Authenticom on terms to which they did not agree." *Id.* at 1026. In the court's view, this improperly imposed a duty to deal — a rarely invoked remedy available in Section 2 cases that may require a monopolist to reenter a prior course of dealing with a competitor (*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)) — under Section 1. But Section 1 is about unreasonable agreements in restraint of trade, and as a result, "all that is needed is to break up the allegedly troublesome agreement." *Authenticom*, 874 F.3d at 1026. Because the injunction remedy did not match the violation it purported to redress, the injunction had to be set aside.

The court's opinion is careful and narrowly drawn. It announces a clear holding about the scope of injunctive relief under Section 1, which must be limited to ending the allegedly anticompetitive agreements. But consider some additional complications below:

1. The decision does not appear to rest on the district court's application of the four-part test for preliminary injunctive relief. The appellate court assumed without deciding that Authenticom could show a likelihood of success on the merits, irreparable harm, and an inadequate remedy at law. *Id*. at 1025. It instead purported to focus on balancing the equities: "how does Authenticom's harm from the *denial* of a preliminary injunction compare to CDK's and Reynolds's harm from the *grant* of an injunction?" *Id.* But it never answered that question. The court instead made clear that "the resolution of this appeal does *not* depend on which side of the balance we favor." *Id.* (emphasis added). The decision suggests that the district court made a "fundamental" error — that is, a legal error — about tailoring the injunction's scope. The court locates that error in the substantive antitrust law itself, rather than in the procedural requirements for preliminary injunctive relief. Thus, the opinion essentially *assumes* that Authenticom had a basis for a preliminary injunction, however, the scope of injunction was so overbroad that it was unlawful. This approach may provide defendants, in antitrust cases, with a separate, independent ground for challenging injunctive relief in future cases.

2. In weighing the equities, the district court and the Seventh Circuit focused on harms to the opposite party. The Seventh Circuit made clear that it was concerned about the burdens the district court's injunction would impose on the defendants. It noted, for example, that Reynolds had always maintained a closed system and that the injunction would "punish it under the antitrust laws for doing exactly the same thing it always has done." *Id*. at 1025. The court observed that CDK made "many of the same points" as Reynolds about security concerns surrounding unauthorized access, and noted that the defendants had "raised serious points" about obligating them to deal with Authenticom on terms that it preferred. As for the harm, Authenticom might suffer in the absence of injunctive relief, the appellate court "appreciate[d]" the district court's fear that the company might go out of business "while the litigation drags on." *Id*. at 1026. But this was not enough: the prospect that Authenticom might go out of business could not "justify a preliminary injunction that goes so far beyond a measure that restores what the market would look like in the absence of the alleged violation." *Id.* In other words, not even irreparable harm — the most important of the preliminary injunction factors — could make up for the injunction's overbreadth.

3. In dicta, the Seventh Circuit cast doubt on the district court's finding that Authenticom would suffer irreparable injury, but it did not resolve the question whether the defendants' agreements raised dealers' switching costs. While the appellate court assumed that Authenticom could show irreparable injury, it stated that it was "not clear" whether insolvency would cause the company to reorganize or dissolve altogether, or whether damages award could save it. *Id*. The court appeared to speculate that Authenticom could survive by contracting with dealers who do not use the defendants' DMSs. The court noted, for example, that business for up to 20 percent of all dealers may be contestable in a given year. This suggestion appears to contradict the district court's finding that dealers face significant costs in attempting to retrieve their data, particularly because the majority of dealers appear to have long- term contracts with DMS operators and often renew such contracts. The court's suggestion also does not fully account for the transition costs dealers might face in switching to a new system, such as the costs associated with retraining personnel or managing gaps that may result in the course of transferring one's business data to a new system.

4. The court appeared to view Authenticom's antitrust theory with skepticism. The court was careful to point out that the record did not show whether the defendants had market power and that it was not considering a monopolization claim under Section 2. *Authenticom*, 874 F.3d at 1026. But even it had confronted a Section 2 claim, the court suggested that the case was "a far cry from *Aspen Skiing*" and that a refusal-to-deal theory "cannot support relief." *Id.* This approach is consistent with recent Supreme Court cases expressing deep concerns about using the antitrust laws to compel access or otherwise impose sharing obligations, especially in the absence of a prior course of dealing. *See Pac. Bell Tel. Co. v. Linkline Commc'ns*, 555 U.S. 438, 450 (2009); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408-09 (2004).

5. The court was silent about the proceedings on remand. Although Authenticom lost the appeal, the Seventh Circuit left room for the district court on remand to fashion a different, narrower injunction targeted at the allegedly anticompetitive behavior. Could Authenticom return to the district court and seek an injunction prohibiting the enforcement of the agreements it alleged were anticompetitive? That would seem consistent with the Seventh Circuit's opinion, but whether such an injunction would remedy Authenticom's alleged injury is far less clear. Perhaps, in the absence of the agreements, CDK would have some incentive return to an open system in an attempt to recoup lost revenue that could have resulted from a narrower injunction. But as the district court observed, this type of long-run relief would be of little solace to Authenticom if it could not survive the length of the litigation.

VI. Lessons for Platform Operators and Solutions Providers

Absent the presence of pre-existing terms mandating sharing, federal courts in antitrust cases are not generally positioned to enforce data sharing between platform operators and solutions providers (*e.g.*, application developers, vendors, integrators and other third parties). Indeed, "compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." *Trinko*, 540 U.S. at 415 (quotation marks omitted). The district court's injunction, however, set out data-sharing terms, imposed new conditions (such as non-retaliation provisions) that restricted the parties' ability to deal with other non-parties, and called for extensive judicial oversight by the court to enforce the order's implementation.

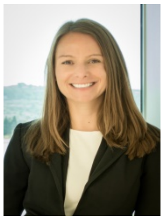
Platform management practices and control over "big data" will continue to raise open questions of antitrust law, and courts likely will continue to struggle — as the district court did here — to tailor meaningful injunctive relief within the bounds of the Sherman Act. Given these challenges, it is important for platform operators and solutions providers who rely on access to user data to consider how to resolve these issues on a going-forward basis.

- To the extent platform operators manage large and unique data sets, it is important to clearly define terms of use (for both users and solutions providers), make relevant parties aware of such terms, and take steps to provide stakeholders with advanced notice of any transitions that could affect the terms of use.
- Platform operators should be aware of the potential litigation costs associated with denying or terminating access to solutions providers, particularly those with whom the operator has a prior course of dealing. As the Seventh Circuit's opinion shows, the scope of a potential injunction will vary based on the nature of the alleged violation. Operators should also be aware that establishing operations across the platform can affect a court's analysis of competition at the intermediary level, and of the need for rivals to maintain platform access.
- Because courts are often reluctant to impose duties to deal, solutions providers should also develop contingencies for maintaining operations when dealing with users on an open system who could transition to a closed system at any time. This may involve, for example, taking steps to deal with platform operators directly, developing operations in alternative channels, or seeking additional up-front protections from users.

VII. Conclusion

The Seventh Circuit's decision reaffirms that an injunction must remedy only the alleged antitrust violation. The court's decision is a reminder that the antitrust laws do not authorize courts to operate as public utility commissions in the hope of reaching a more "competitive" outcome. So long as markets are free from anticompetitive agreements or predatory conduct, the antitrust laws presume that market forces will lead to the optimal outcome for consumers. If *Authenticom* teaches us anything, it is that — under both Sections 1 and 2 of the Sherman Act — litigants and district courts must proceed with caution when setting the terms of injunctive relief.

A NEW RESOURCE FOR ANTITRUST CLASS ACTION PRACTITIONERS



By: Jessica N. Leal[1]

A lot has happened since 2010, the year the last (and the first) edition of the ABA's Antitrust Class Actions Handbook was published. The Supreme Court decided a number of class action cases, providing a plethora of material for addition to the treatise. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S.Ct. 1036 (2016), *Comcast Corp. v. Behrend*, 569 U.S. 27 (2013), *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), among other jurisprudence, are described in great detail in the recently launched second edition of the Antitrust Class Actions Handbook.

Considering challenges faced by the defense and plaintiff side bars, the newly updated treatise comprehensively addresses issues that arise before, during, and after the filing of an antitrust class action. An even split of antitrust plaintiff and defense practitioners authored and edited the treatise in an effort to achieve a balance of issues that are faced in bringing and defending against a major antitrust class action. Both new and experienced antitrust counsel will find this tool useful in navigating the evolving legal foundations and strategic decisions that guide these complex cases. Below is a summary of what you may find useful from the new edition, as well as comments from a number of authors and editors who participated in the February 23, 2018 launch teleconference.

The first chapter introduces the reader to *the Class Action Fairness Act* and who can bring an antitrust class action. It touches upon current trends and the evolving pleading and class certification standards that are later expanded upon in subsequent chapters of the treatise.

The second chapter, *"Filing a Class Action,"* authored by Danyll W. Foix, covers the many considerations for putting together an antitrust class action case. Issues such as selecting the appropriate class representative, identifying parties that should be defendants (or not be defendants), formulating the relief that best can achieve the objectives of the case, and defining the class are among the topics discussed. Each has an impact on the success, or failure, of a case and bears individual attention. The chapter also includes a number of legal developments on pre-filing consideration since 2010. Issues emerging over the past few years include alleging a class that is plausible under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and formulating claims while keeping in mind the potential enforceability of arbitration and class action waivers.

The third chapter, *"Antitrust Claims Potentially Suitable for Class Treatment,"* considers whether, and under what circumstances, an antitrust complaint can appropriately be considered on a class-wide basis. It explores horizontal restraints of trade, vertical restraints of trade, tying, monopolization and attempted monopolization, and the Robinson-Patman Act.

The fourth chapter, *"Deciding Whether to Opt Out of the Class Action,"* authored by Scott N. Wagner, provides a framework for individuals or companies who have not dealt with an opt out situation before. The chapter highlights a number of legal, strategic and business decisions that one has to go through to determine whether it is advisable or worthwhile to opt out of a class action and pursue an individual claim. Someone considering whether or not to opt out of a class action could read this chapter and get a sense of the right questions to ask. From a practical perspective, the chapter discusses how opt out works. The chapter also discusses how parties who opt out can work together, operating much like their own mini class in pursing their claims.

The fifth chapter, *"Class Certification Procedure,"* addresses the substantive legal standards for class certification as well as the procedural mechanisms for navigating the class certification process, with a focus on how that process has operated in previous antitrust cases. The chapter walks the reader through the steps from class certification motion requirements, through discovery, Federal Rule of Civil Procedure 23(g) appointment of counsel, and class notice, to appeals.

The sixth chapter, *"Antitrust Class Certification Standards,"* authored by Andrew McGuinness and edited by David Reichenberg, dives into the requirements of Rule 23. Although the requirements are not unique to antitrust, the chapter addresses how in recent years there has been a trend in antitrust class actions toward greater scrutiny of class certification motions. The chapter discusses whether or not one needs to have a way of proving damages using common proofs and the *Comcast* and *Dukes* decisions and their impact on class actions.

The seventh chapter, *"The Role of Experts in Antitrust Class Certification,"* authored by Jessica N. Leal, focuses on the critical role of experts in every antitrust class action. Beginning with the expert's engagement and ending with trial testimony, this chapter outlines what courts have said about the use of experts in antitrust class actions. The chapter identifies how judicial evaluation of expert testimony varies among courts, particularly on how one addresses antitrust expert testimony at class certification. It concludes with a section on the rules governing experts and the *Daubert* challenges that have received recent attention under new case law.

The eighth chapter, *"Antitrust Class Action Settlements,"* explores the practical considerations practitioners must consider in determining whether to settle an antitrust class action. The chapter examines the procedural requirements, particularly the requirements of preliminary and final approval of class settlements, as well as class notice issues. It also considers the impact of an antitrust settlement on non-settling defendants.

The ninth, and last, chapter of the treatise is entitled *"International Mass Actions and Class Actions,"* and is broken into three separate sub-chapters focused on Canada, Australia, and the European Union. This section has greatly expanded

[1] Jessica N. Leal is an associate at Freitas & Weinberg LLP.

since the first edition. For example, the first edition had about three pages on Canada, while the new treatise has over thirty pages.

The first sub-chapter, authored by Davit Akman, explores antitrust claims potentially suitable for class treatment in Canada, including a review of statutory, common law and equitable causes of action. It discusses class certification procedure and addresses antitrust class certification requirements and standards, including a review of the 2013 rejection of the *Illinois Brick* doctrine and discussion on the standard of proof at the certification stage by the Supreme Court of Canada. The sub-chapter emphasizes, wherever possible, the differences between the practices in Canada and the United States, including topics such as MDL, pre-certification discovery, indirect purchasers, arbitration clauses, and summary judgment. It provides a useful analysis for companies in the United States who have Canadian subsidiaries who get pulled into a case.

The second sub-chapter sets out a detailed analysis of the principal features of the Australian class action systems, and the cartel class actions that have occurred in Australia. It highlights the key differences between the competition regime in Australia and the United States.

The third sub-chapter, authored by Nicholas Frey, provides an overview of the main developments at the European Union level, while also providing a snapshot of the class action and class settlement regimes in the United Kingdom, Netherlands, Italy, Belgium, and France. Because there is no harmonized European class action regime, the sub-chapter gives the reader a comparative view not only between the European Union and the United States, but between the different national class action regimes. It discusses the presumption of harm interpreted and implemented by the various member states, and the increased focus on private redress.

The link to the new Antitrust Class Action Handbook for further details is shorturl.at/gsP01. The treatise is the product of the hard work of numerous individuals, with special thanks to project chairs Melissa H. Maxman and Darryl W. Anderson; Eli T. Burriss and Kay Lynn Brumbaugh of the Sections Books and Treatises Committee; authors Davit Akman, Melinda R. Coolidge, Janelle L. Davis, Francis D. Dibble, Jr., Danyll W. Foix, Nicholas Frey, Jon Lawrence, Jessica N. Leal, Michael Legg, Jodi K. Miller, Andrew J. McGuinness, Alexander R. Safyan, Bruce L. Simon, Prudence J. Smith, Nicolas J. Taylor, Laura Van Soelen, Scott N. Wagner, and Nicole L. Williams; and editors Olivia Adendorff, James E. DeLine, Michael A. Finio, Ross A. Fisher, Amanda J. Hamilton, Carolyn Hazard, Donald B. Houston, Thomas Ingalls, Lezlie Madden, Andrew J. McGuinness, Donald J. Polden, and David H. Reichenberg.