Antitrust Liability for Category Management and Other New Merchandising Techniques: Have You Updated Your Counseling?

Ted Banks

The Supreme Court's refusal to disturb the billion dollar judgment that Conwood Company obtained at the expense of United States Tobacco Co.[1] drew a great deal of breathless attention. Of course, the size of the verdict (more than $1 billion after trebling) would result in a case of "sticker shock" for most people, even antitrust lawyers. But some of the press reports characterized the case as a condemnation of all category management efforts, and there was extensive discussion (among those antitrust lawyers) of the fact that the huge damage award was recovered by a profitable and growing plaintiff. Plus, there was speculation about whether the Federal Trade Commission, which had been investigating category management and related practices, such as slotting payments, might now take a more active role in regulating the area.

As we think about what to tell our clients about all of this, we're temped to ask if there has been a fundamental shift in antitrust focus requiring us to change our antitrust compliance programs. Previously, the main focus was on collusion: "Don't talk to that competitor!" Yes, we also tried to train our clients about not engaging in predatory or discriminatory practices, but the big issue was price fixing. When we talked about things like exclusive dealing, we thought we could calibrate the risk based on market share. And, we had the idea that just having a bad intent didn't mean much in antitrust law if the purported victim really wasn't hurt.

Does *Conwood* mean that any time you can show a smattering of "bad" conduct by a market leader that is trying to displace competitors, and you have a theory on how you were damaged by that market leader, you have a winning case? Is a nonmonopolist now at risk any time it tries to raise prices, since, in *Conwood*'s definition, the ability of a firm to raise prices (even at the cost of sales volumes) was offered as proof of monopoly power? Is there anything particularly risky about paying or requesting slotting allowances or using category management tools?

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The short answer is no. While it is too soon to be certain, *Conwood* does not appear to represent any seismic shift in antitrust law. *Conwood* does not set out new legal standards to enable one to determine when there has been unreasonable exclusion, since the defendant admitted that it had market power. It probably belongs in the *Utah Pie*[2] line of cases where a jury becomes incensed when hearing about acts they consider unfair, and renders a verdict designed to

[1] Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 123 S. Ct. 876 (2003).

[2] Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).

punish a wrongdoer, which the reviewing court does not overturn, due to the sufficiency of the evidence to sustain the verdict. But the case does suggest that a prudent antitrust counselor will guide clients that have market power, or that may find themselves characterized as having market power due to a lock-in theory,[3] away from practices that seem to generate the most risk under this developing area of law. A few suggestions along these lines follow.

Counseling Point #1: Don't Lie . . .

As the market power of the buyer or seller increases, the risks of antitrust violation for utilizing false information or deceptive tactics increases.

It is really not a radical suggestion to advise clients not to lie, but this usually didn't appear in "top 10" lists of antitrust "do's and don'ts." While prior cases did not automatically turn every business tort into an antitrust violation,[4] it is hard to overestimate the impact of an untruth on a jury (or judge) that is already predisposed not to like the "big guy."[5] As the market power of the buyer or seller increases, the risks of antitrust violation for utilizing false information or deceptive tactics increases. Thus, for your clients that are sellers with actual or potential market power, it is important that you review the sales plans they plan to use. If the plans contain a category management component (where the customer will be given suggestions by a supplier as to what products it should carry), then the plans should clearly rely on demonstrably accurate information, should not disparage competitors, and should not contain financial incentives or clever "hints" that would push employees to bend the rules in order to make that extra sale.

You should also review the training program (and make sure there *is* a training program) for the sales staff responsible for implementing the sales plan. The importance of following the company sales plan (after it has received its legal review, of course), and an understanding of what might happen (to the employee and to the company) if they don't, should be made clear. If challenged about a sales program that succeeded (i.e., one that resulted in an increase of sales at the expense of competitors), a company should be able to demonstrate that its program was legal and that it thoroughly trained its sales staff on how to properly implement the program. The displacement of any competing products, rearrangement of shelves, or removal of display racks (things that got U.S. Tobacco into trouble in the *Conwood* case), must be the decision of the retailer, based on demonstrably accurate factual information provided to the retailer. Other parts of the sales program, such as display allowances, should be implemented according to a nondiscriminatory promotion program, as outlined below.

For purchasers, buying decisions that result in the elimination of a supplier should be based on sound business reasons. If a special price or payment was the basis of the decision, it should not have been an induced discriminatory price. In other words, the buyer can tell a seller that its originally quoted price "is not in the ball park,"[6] but it can't fib about the competitive offers.

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[3] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); ID Security Sys. Canada Inc. v. Checkpoint Sys., Inc., No. 99-577, 2002 U.S. Dist. LEXIS 14400 (E.D. Pa. May 28, 2002) (entry of $80 million judgment for sale of anti-theft tags and equipment that rivals could not supply).

[4] "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993).

[5] Caribbean Broad. Sys., Ltd. v. Cable & Wireless Plc, 148 F.3d 1080 (D.C. Cir. 1998) (false information about radio coverage and sham objections to a government licensing agency as basis for Sherman Act § 2 jurisdiction); Digital Equip. Corp. v. Sys. Indus., Inc., 1990-1 Trade Cas. (CCH) ¶ 68,901 (D. Mass. 1990) (false information about products).

[6] Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979).

Counseling Point #1(a): . . . and Don't Abdicate Responsibility

It also seems to be a management mistake to abdicate responsibility for a category in a store.[7] Lack of management attention provides an opportunity for suppliers—or aggressive sales representatives acting with or without corporate encouragement—to engage in mischief. The goal is to be able to demonstrate that isolated instances of unauthorized conduct are just that, and that the company policy and strategy was clearly contrary.

Counseling Point #2: Don't Overpromise

Sometimes, new "cool" merchandising tools, such as category management, can be misunderstood and oversold. Category management frequently involves a retailer using a manufacturer (usually the category leader) to make proposals for managing a product category in a store.[8] The manufacturer is expected to be able to tell the retailer which products to carry for most profit and how to shelve them, using a schematic of the shelf known as a "plan-o-gram" (which has been around for a long time). Historically, a manufacturer would suggest to a retailer a shelf layout designed to get more of its products into a store. In many stores, the leading supplier in a category would be designated the "category captain" and be given the responsibility for presenting a plan-o-gram, but other manufacturers in the category would be providing their input to the retailer as well. The retailer would make the final decision on the shelf-set, based on both what the manufacturers told it and the retailer's knowledge of local purchasing preferences.[9]

Retailers attempt to extract the most value from every inch of shelf space, both by carrying the most profitable products, but also (in many cases) by charging manufacturers or wholesalers for the privilege of being on the shelf (a "slotting allowance"). The result is that obtaining space on the shelf or in the plan-o-gram is an important accomplishment—it may be very difficult (and expensive) to get back into a store after being removed from the shelf or losing your display rack.[10]

The new wrinkle in this process is the use of sophisticated tools to analyze information derived from checkout scanners to give a better picture of consumer demand.[11] Because of the apparent complexity in using all of the category data to prepare a plan-o-gram, a certain mystique seems to have become attached to the process. Category management tools may be touted as a highly valuable asset of a company,[12] and may lead people to believe that they are the key to bulletproof

[7] Even if a department in a store has been "rented" to a supplier, such as a cosmetics counter in a department store, the retailer still has an obligation to oversee the activities to make sure that the lessee of the space is not engaging in improper activities with regard to competitors or customers.

[8] A customer can certainly perform its own category management activities, or hire an independent consultant to assist it. A survey by McKinsey of retailers in the consumer packaged goods industry revealed that the most successful retailers (large and small) were those that used all available data, not just what was supplied by manufacturers, to actively understand and manage every category in the store. See GMA Forum at 18 (First Quarter 2003).

[9] A plan-o-gram supplied to a retailer by a manufacturer is just a suggestion. It does not create a binding agreement to carry certain products. Added Extras, Inc. v. Party City Corp., 193 Misc. 2d 403, 749 N.Y.S.2d 647 (Sup. Ct. N.Y. Co. 2002).

[10] "Mass market retailers periodically determine how much retail shelf space will be devoted to particular products. This periodic re-allotment of shelf space is referred to as the 'plan-o-gram reset.' . . . . [The plaintiff] contends that loss of plan-o-gram space compromises sales, and that once lost, plan-o-gram space is difficult to regain." Western Pub. Co. v. Publ'ns Int'l, Ltd., No. 94 C 6803, 1995 U.S. Dist. LEXIS 5917 at *12–13 (N.D. Ill. May 2, 1995).

[11] The data from the scanners can show how well the products sold at differing prices, how the products responded to advertising, displays, or price reductions, and which other products experienced a sales decline when a product was promoted.

[12] Crossmark, Inc. v. DeGeorge, 655 N.W.2d 647 (Wis. Ct. App. 2002) (unpub.) (action for indemnification for theft of trade secrets, including category management templates).

financial management.[13]

Category management is just a way to respond better to what consumers want; rather than guessing, actual sales data inform the choices. But the press reports on *Conwood* were confusing. Some focused on the use of false category management data; others just talked about how category management was now the basis for lawsuits.[14] Reading the text of the *Conwood* opinion, one observes that while the court did not actually say that category management was illegal, it criticized certain common practices (such suggesting that retailers carry fewer brands and promotion of the category captain's brands).

The FTC looked at various category management practices, but declined to issue regulations on how, for example, slotting allowances should be paid.

Realistically, as a result of all of this, should manufacturers stop making suggestions to retailers? No, of course not, but what a manufacturer says about its products and those of its competitors, and the results a retailer is expected to achieve if the suggestions are followed, should be made in good faith. Although category management is, at its foundation, just one more aspect of salesmanship, like all other sales tools, it should not be abused. A customer, as well as a competitor, can bring an action against a supplier based on abuse of a category management system. Theories, such as promissory estoppel, unfair competition, negligent misrepresentation, and breach of fiduciary duty might surface. Even though a manufacturer would not normally have a fiduciary relationship with its customer—even an exclusive dealer or distributor,[15]—it is possible that a fiduciary relationship could be alleged based on a contractual relationship with elaborate representations.[16] So, the message remains the same: use care in how the program is designed, and care in how it is executed.

Counseling Point #3: **Have a Good Reason for What You Do . . .**

Aggressive competition is to be encouraged, but you should always be able to explain, in terms that will sound reasonable to an average consumer, why a certain practice is being implemented.

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[13] In *Bennett Restructuring Fund, L.P. v. Hamburg*, No. (X02)CV010167682S, 2003 Conn. Super LEXIS 61 (Waterbury Dist., Jan. 2, 2003) (unpub.), the plaintiff alleged that the 10-K was misleading since it contained glowing description of a category management system, which allegedly gave a material advantage over the competition by allowing the company to work with retailers and know which products were doing well or poorly and quickly adjust marketing strategies. The plaintiffs claimed that they reasonably relied on these misrepresentations regarding the effectiveness of the category management system when they invested in the company's notes. The existence and effective functioning of those systems made them believe in the accuracy of the financial data in the 10-K, for the data were impliedly based on the category management data. A motion to strike the fraud and negligent misrepresentation counts in the complaint was denied.

[14] "Retail category management programs look vulnerable to antitrust suits now that the U.S. Supreme Court has declined to review a record $1.05 billion antitrust verdict . . . ." Ira Teinowitz, *Antitrust: UST Decision Could Bring More Lawsuits*, ADVER. AGE, Jan. 20, 2003, at 3.

[15] *See, e.g.*, Crim Truck & Tractor v. Navistar Int'l, 823 S.W.2d 591, 594 (Tex. 1992); Adolph Coors Co. v. Rodriguez, 780 S.W.2d 477, 481 (Tex. App. 1989) (writ denied).

[16] "A fiduciary relationship may arise from a variety of relationships where the parties are 'under a duty to act for or give advice for the benefit of another upon matters within the scope of their relation'." ARA Auto. Group v. Cent. Garage, Inc., 124 F.3d 720, 723 (5th Cir. 1997) (quoting Texas Bank and Trust Co. v. Moore, 595 S.W.2d 502, 507 (Tex. 1980)). One can imagine an overzealous sales representative promising to keep a "special deal" confidential, and working to put the interests of the retailer first (even ahead of the manufacturer's interests, or those of other customers), which are attributes of a fiduciary relationship. Lee v. Wal-Mart Stores, Inc., 943 F.2d 554, 558–59 (5th Cir. 1991). If a retailer completely abandons management of a category, then it may be possible for a court to that the traditional reason for not imposing a higher standard of behavior on the manufacturer (such as is customarily imposed on insurers) no longer exists. "The nature of the supplier-distributor relationship does not require special protection, nor does the supplier have the same exclusive control over the distributor's business that the insurer has over the insured's claim." Adolph Coors Co. v. Rodriguez, 780 S.W. 2d 477, 481 (Tex. App. 1989). Even without a fiduciary relationship, misrepresentations by a supplier may be the basis for an action in breach of contract, although most courts dealing with a commercial action between buyer and seller will not allow a separate tort action for breach of the covenant of good faith and fair dealing. Cambee's Furniture, Inc. v. Doughboy Recreational, Inc., 825 F.2d 167, 174–75 (8th Cir. 1987) (every contract has a covenant of good faith, but it does not form the basis of a separate action, only an aid to contract interpretation).

A good business justification will go a long way toward making the legal reasonableness case, as well.[17] Being able to explain how an excluded plaintiff had alternative methods of getting to the market would also be helpful.[18] But you need to be able to justify your program. Merely asserting that the plaintiff did not prove its case is almost always going to fail when the bad story is not refuted. The good news is that there are good reasons: Manufacturers want to be category captains because it gives them a greater chance to sell their products. Retailers like having the assistance of leading manufacturers because they get the benefit of the expertise of companies that have resources available for sophisticated data analysis, and they are able to get the manufacturers to pick up certain costs involved in analyzing a category that the retailer otherwise would need to undertake. This motivation is reasonable, and it needs to be articulated.

Counseling Point #3(a): . . . and Be Able to Prove It

A company's sales or procurement strategy should be well documented. For a manufacturer, it should be aimed at growing profitable sales—not just eliminating competitors.[19] A retailer's procurement strategy should also have a profit-maximization goal; it should not look like a way to collect kickbacks.[20] This means that a good document-creation training program (i.e., what to say, what to keep) is essential, along with the logistical systems for retaining written and electronic documents (with a disposal suspension switch that can be flipped when litigation is imminent). The provisions of the Sarbanes-Oxley Act should provide enough incentive to make sure the document retention program is in good shape,[21] but think about what might have happened in *Conwood* if the defense had been able to marshal all of their documents to make a compelling case that the "anecdotes" at the heart of the plaintiff's claims were not representative.

Counseling Point #4: Don't Wait for the FTC

Historically, the FTC has shown interest in exclusionary retail practices, but its efforts have not always yielded constructive results. The Commission could not prove the theory of a "shared monopoly" in the cereal aisle,[22] and an investigation of alleged monopolization of the dairy case

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[17] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); Int'l Rys. of Cent. Am. v. United Brands Co., 532 F.2d 231, 239–40 (2d Cir. 1976).

[18] Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1162–63 (9th Cir. 1997) (alternative ways to distribute to be considered in evaluating impact of exclusive dealing).

[19] Attempts to boost your sales cannot always be based on increasing total demand, so the sales will need to come from competitors - and that is not prohibited. Town of Concord v. Boston Edison Co., 915 F.2d 17, 21–22 (1st Cir. 1990).

[20] State commercial bribery statutes or Section 2(c) of the Robinson-Patman Act may be implicated. Envtl. Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066 (3d Cir. 1988), *aff'd*, 493 U.S. 400 (1990); FTC v. Herbert R. Gibson, 95 F.T.C. 553 (1980), *modified*, 96 F.T.C. 126 (1980), *order enforced*, 682 F.2d 554 (5th Cir. 1982) (violation of §2(c) found based on the split of brokerage payments between employee and supplier); Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266 (5th Cir. 1979); Rangen, Inc. v. Sterling Nelson & Sons, Inc., 351 F.2d 851 (9th Cir. 1965) (payments by fish-food supplier to influential government employee to obtain exclusive contract); Edison Elec. Inst. v. Henwood, 832 F. Supp. 413 (D.D.C. 1993).

[21] 18 U.S.C. § 1519 (up to 20 years imprisonment for knowing destruction of documents; no requirement that the defendant acted "corruptly" as in prior obstruction statutes). A document creation/records management program will train employees not to use sloppy, casual comments that can create a risk of miscommunication, and it will also establish a protocol to retain records for the appropriate time. Juries will focus on what they see as evidence of corporate intent, so a confusing document that appears to show improper motive can also do a great deal of damage.

[22] Kellogg Co., 99 F.T.C. 8 (1982) (order dismissing complaint). Although shelf-space allocation was at issue in the *Cereal* case, the Commission sought to establish liability for tacit collusion under Sherman Act § 1.

was resolved after several years with an order requiring an amendment to a distribution contract.[23] In response to Congressional inquiries and a petition for action with regard to slotting allowances,[24] the FTC looked at various category management practices, but declined to issue regulations on how, for example, slotting allowances should be paid.[25] The findings outlined in the FTC Report are instructive as to why this topic is murky—and why it is difficult to counsel clients on the risk profile of various practices.

None of the practices the FTC examined (slotting allowances, pay-to-stay fees, payments to limit the shelf-space available to a rival, discriminatory payment of access fees) were considered anticompetitive by themselves. The FTC Report questioned whether these practices actually could exclude rivals, and whether the efficiencies they stimulated outweighed any anticompetitive effects. The totality of the facts surrounding the suppliers, customers, and markets would determine whether, in a given situation, a specific practice was unreasonable. The staff was not really concerned with slotting allowances when they were used to advance the fundamentally procompetitive goal of introducing new products. In that role they also served to mitigate some of the risks undertaken by the retailer in carrying an untested item. The Commission had some questions about whether the use of category management and category captains raised a greater risk of collusion and exclusion. There was a concern if a category captain obtained proprietary information about its rivals' marketing plans that would enable it to design a promotional program that would blunt the rivals' marketing efforts.

Any lock-up program has a certain element of risk built in, no matter how reasonable or clearly disclosed, so the client should understand the risks before going forward.

The Commission would be concerned if a dominant manufacturer or small group of manufacturers obtained exclusive dealing contracts with a high percentage of the desirable retailers in relevant markets, or if rivals were relegated to fringe retail outlets. This suggests that if your client (buyer or seller) uses an exclusive dealing system that results in foreclosure of an appreciable percentage (as a benchmark, more than 30 percent) of outlets in a market, you should be particularly alert to the risks of public or private enforcement,[26] or if a significant competitor that provided price competition is kept out of a relevant market.[27]

Any practice that encourages communications between competing suppliers could facilitate collusion. For this reason, the FTC proffered that retailers make their own category management decisions, limit competitor communications, and limit the information about competitors given to the category captain. This is another good reason to make sure the client understands the importance of limiting communication among competing suppliers—the FTC may not have wanted to take action in the past, so why give them a reason now? Information about competitive activities are a key to effective competition, but the client must understand that direct contact with com-

[23] The Pillsbury Co., 97 F.T.C. 354 (1981) (consent order eliminating exclusive dealing provisions in distribution contract for refrigerated dough products).

[24] The FTC announced on June 21, 2002, that it would not issue guidelines on the payment of slotting allowances, denying a petition, filed on April 14, 2000, by the Independent Bakers Association, the Tortilla Industry Association, and the National Association of Chewing Gum Manufacturers. Acknowledging the complexity of the situation, the FTC said it would research the matter further.

[25] Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry (Feb. 20, 2001), *available at* http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf.

[26] Justice O'Connor's concurring opinion in *Jefferson Parish Hospital Dist. No. 2. v. Hyde*, 466 U.S. 2, 44–47 (1984), is instructive because it analyzed the arrangement in question as exclusive dealing, and determined that the 30 percent share was not exclusionary because there were other options available.

[27] Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 394–95 (7th Cir. 1984) (exclusive dealing agreement may be unreasonable when significant price competitor kept out of market and prices likely to rise above competitive level).

petitors to get that information is prohibited, and documents should not be created that make it look as if such communications took place when they did not.

The Commission did express an interest in how monopsony power and slotting allowances should be considered when evaluating mergers in the retail grocery industry, and, at the same time, they also recognized that slotting allowances are a manifestation of competition. In their challenge to the Heinz-Beech Nut baby food merger,[28] they noted that one way in which the merger would reduce competition would be in the reduction of competition to get on the shelf—which was reflected in the payment of slotting allowances.

Counseling Point #5: **The No Harm-No Foul Rule May Be Gone**

One of the most confusing parts of the *Conwood* case (at least for antitrust lawyers) was the way in which the plaintiff was able to point to a period of time where market output increased 45 percent, new brands were sold, and the market leader's share declined, yet the plaintiff was still able to collect damages for competitive injury. The plaintiff's case was supported by expert economic testimony that its business would have grown faster but for the defendant's violations.[29] The court looked at evidence that for every 10 percent increase in UST facings, retail prices went up by seven cents. It was concerned that there was no recent new market entry, although the substantial profits in the category should have encouraged such entry.

There is probably not much to talk about with the client here, since the goal of a compliance program is to avoid a violation in the first place, not to hope that you get off by showing no damages. However, the defendant's admission that it held monopoly power and criticism of the testimony of company officers by the defendant's CEO may have set the stage for the award of damages.[30] Although judges in some cases have rejected economic testimony that was not reliable,[31] and the normal rule is that consistency of market share should not raise an inference of anticompetitive behavior, the *Conwood* court accepted the plaintiff's theory and the jury ruled accordingly.

Counseling Point #6: **Be Ready for Piling On**

A compelling point to make when you are counseling clients on the consequences of illegal exclusionary acts is that they could get hit multiple times. U.S. Tobacco has been hit with suits filed by Swedish Match (a snuff competitor),[32] as well as by direct customers of U.S. Tobacco,[33] alleging that they, too, were injured by the practices outlined in the *Conwood* decision.

Counseling Point #7: **Be Ready for the Flank Attack**

Even if you are not the initial target of exclusion litigation, someone else may be thinking about

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[28] FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001).

[29] Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768, 791–95 (6th Cir. 2002).

[30] Even if you have a 78 percent share, if there are new entrants, or other persuasive economic evidence (e.g., low barriers to entry and low/no profits), you have the basis for arguing that you do not have the power to restrict competition.

[30] Bailey v. Allgas, Inc., 284 F.3d 1237 (11th Cir. 2002); Blomkest Fertilizer, Inc. v. Potash Corp., 203 F.3d 1028 (8th Cir. 2000); SMS Syst. Maint. Servs., Inc. v. Digital Equip. Corp., 188 F.3d 11 (1st Cir. 1999).

[32] Suit filed July 7, 2002 (W.D. Ky.). "Swedish Match has expanded in the US, but we do not know how much greater this growth would have been without UST's illegal actions, which were designed to impede competition," said Bo Aulin, General Counsel. *Swedish Match Brings Competition Lawsuit Against UST in US*, SWEDISH MATCH INSIDE, No. 4 (2002), *available at* http://www.swedishmatch.com/eng/ir/magazine/2002-mag/mag4-competition.asp.

[33] *In re* Smokeless Tobacco Antitrust Litig., No. 1:00 CV01454 (PLF) (D.D.C. filed Jan. 8, 2001).

coming after you,[34] particularly if there are similarities to the practices employed in *Conwood*. The case of the future might combine allegations of everything you read about in the newspaper: abuse of category management, discriminatory slotting allowances (or induced slotting allowances), lock-ins via unreasonable contracts, financial fraud (phony orders, phony deductions, phony accounting, and abuse of product returns), and destruction of documents.

So, as you consider what your practices are, think about who might be motivated to challenge your successes in court. Have competitors experienced dramatic business setbacks? Has your (or their) stock price declined precipitously? Relating the litigation horror stories of what another company has gone through might be a helpful technique in counseling a client reluctant to give up a sales (or procurement) practice of borderline legality.

Counseling Point #8: Is the Customer Locked In?

Another factor that may have a significant impact on how a judge or jury looks at the reasonableness of an exclusionary program is whether the customer is locked in to the manufacturer's products—for the main purchase or aftermarket activities.[35] If the lock-in is an important part of the program (as in a franchise), the counseling should emphasize the reasonable reasons for the lock-in, the customer or consumer benefits, and the clarity of the up-front explanation to the customer (including costs) before the purchase commitment is made.[36] And any lock-up program has a certain element of risk built in,[37] no matter how reasonable or clearly disclosed, so the client should understand the risks before going forward.

Counseling point #9: Don't Conspire

In all of the concern about new theories of liability, let's not forget the old basic rule: no horizontal collusion. The client should be told to stay away from agreements with other suppliers in the same category. The role of the category captain should be to present a proposal to the customer, and to implement the customer's decision. If the customer wishes to use another manufacturer as a "validator" of the category captain's recommendations, then all conversations should be with the retailer, and none between the competing manufacturers. If the retailer insists that the category captain communicate with competitors, the client should understand that its role is only to pass on information to the retailer, and not to reach any agreements with the competitor about what will be done with its (or other competitors') products. This does, of course, present a compliance and training challenge, since the sales representatives will normally have numerous encounters with their competitive counterparts at the store. But even if there is no way to avoid the conversations, the training program can emphasize the importance of never having the parties agree on eliminating a competitor or otherwise allocating business. The decision about what products to carry should always go to the retailer. Retailers can assist the process by not delegating the decision

[34] *See, e.g.*, Northland Cranberries, Inc. v. Ocean Spray Cranberries, Inc., No. 1:02cv2214 (D.D.C. filed Nov. 8, 2002) (complaint alleging that Ocean Spray, the market leader, engaged in various exclusionary practices).

[35] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[36] Courts may take different approaches to determine whether an illegal tying agreement is present. *Compare* Queen City Pizza, Inc. v. Domino's Pizza, Inc., 124 F.3d 430 (3d Cir. 1997), *with* Collins v. Int'l Dairy Queen, Inc., 939 F. Supp. 875 (M.D. Ga. 1996).

[37] Aspects of a lock-in arrangement that might be viewed as deceptive will materially increase the risk of illegality. According to Judge Easterbrook, absent deception, the lock-in will be much harder to prove. Digital Equip. Corp. v. Uniq Digital Technologies, Inc., 73 F.3d 756 (7th Cir. 1996).

making to suppliers. An excluded supplier may well bring an action against everyone—manufacturer and retailer.

Counseling Point #10: Don't Discriminate

Economists may debate the merits of the Robinson-Patman Act, and it may be difficult to win a case on price discrimination alone, but when a discrimination scenario is added to an exclusion story, the picture starts to look scary, particularly if the programs completely exclude competing suppliers or dramatically seem to favor larger purchasers.[38] Promotional payments for display of products (including slotting allowances) if nondiscriminatory, should be legal.[39] Promotional payments or services are generally allocated in proportion to a buyer's purchases, although exact mathematical precision is not required, and a seller's costs in connection with providing services can be taken into account.[40] Smaller retailers may allege that they were never told about available allowances (including slotting allowances),[41] so your client's promotional program should include a method to communicate with both direct and indirect customers.[42] Because smaller customers may never be able to utilize certain promotions or services, alternatives should be made available that they can utilize, although they need not be identical.[43]

Training on this issue should emphasize the fundamentals of price discrimination and the importance of documenting a meeting competition defense. Even though the FTC Report expressed concern over getting competitive marketing information from a common customer, if the customer will share the information with you to help you support a meeting competition defense, by all means get it.

Counseling Point #11: Don't Stop Competing

Conwood may have been an aberration, or it may be a harbinger of things to come. But while the client should be counseled on the proper rules and risks, the primary rule of our economy is to compete aggressively. Sometimes that will mean offering a promotional payment to secure access to the store,[44] or advising a retailer that it can increase profits by changing the product assortment. When done properly, tools like category management can promote efficiency and enhance com-

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[38] In *Coalition for a Level Playing Field, LLC v. AutoZone, Inc.*, No. 00-CV-0953 (E.D.N.Y Oct. 18, 2001) (unreported decision denying motion to dismiss on § 2(f) claim but granting it as to § 2(c) claim), the plaintiffs alleged a violation of Robinson-Patman § 2(f) based on a variety of practices, including induced slotting allowances, volume discounts, sham advertising, and improper promotional payments, all of which enabled the defendants to reduce their retail prices as much as 40 percent. In the complaint in the *Smokeless Tobacco Antitrust Litigation*, No. 1:00 CV01454 (PLF) (D.D.C. filed Jan. 8, 2001), the plaintiff alleges that Wal-Mart was offered millions of dollars worth of services and in-kind benefits for exclusivity in the snuff category. When it was discovered that the reduction of brands hurt overall sales, US Tobacco allegedly gave Wal-Mart more money to make up for losses in the form of rebates and promotions not offered to other retailers.

[39] In *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002), the plaintiff challenged a merchandising program that provided payments in proportion to shelf space commitments. The program was allowed, since commitments were terminable in less than a year, and the defendant, notwithstanding a market share in excess of 50 percent, was found not to have foreclosed competition, due to the introduction of several new brands.

[40] *See* Guides For Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.1 et seq.

[41] Hygrade Milk & Cream Co. v. Tropicana Prods., Inc., 1996-1 Trade Cas. (CCH) ¶ 71,438, 1996 U.S. Dist. LEXIS 6598 (S.D.N.Y. 1996).

[42] FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

[43] *See* 16 C.F.R. § 240.10; L.S. Amster & Co. v. McNeil Labs., Inc., 504 F. Supp. 617 (S.D.N.Y. 1980).

[44] Augusta News Co. v. Hudson News Co., 269 F.3d 41 (1st Cir. 2001) (paying up-front fees to chain retailers for exclusive right to supply was not per se violation of the Sherman Act); Zeller Corp. v. Federal-Mogul Corp., No. 97-4134, 1999 U.S. App. LEXIS 6345 (6th Cir. Apr. 2, 1999) (unpublished).

petition by providing information to trading partners that enables them to better serve consumers. Purchasers should be aggressive to get the best economic proposal—but not cross the line of providing false information or facilitating collusive practices. If the information provided is correct (or at least offered in good faith), and any payments are made in a nondiscriminatory fashion,[45] the risk can be managed. Even monopolists have no duty to pull their competitive punches.[46] ●

[45] There are two aspects of the "nondiscriminatory" concept to bear in mind. First, the promotional allowances or services offered to customers must allocated in a nondiscriminatory fashion (in proportion to purchases). *See, e.g.*, L.S. Amster & Co. v. McNeil Labs., 504 F. Supp. 617 (S.D.N.Y. 1980). Second, the program itself must provide the benefits to each customer related to actual performance. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002).

[46] Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986).