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Antitrust and patent law high on the docket at Cleveland judicial hearing

CLEVELAND–Normally, when the seven judges serving on the Judicial Panel on Multi-District Litigation gather at one of their six-times-a-year sessions, they confront a docket jam-packed with antitrust and consumer protection lawsuits, with lawyers on both sides angling for the most advantageous court locations and most sympathetic judges to hear their cases.

When the migratory court appeared last week at the Carl B. Stokes Courthouse on West Superior Avenue, there were more than a half-dozen such cases waiting for assignment, many of which have their roots in prior actions taken by the FTC or Justice Department. A Justice Department investigation into price-fixing in 2007 spawned the Chocolate Confectionary Antitrust Litigation, MDL 1935, for example, and a guilty plea in 2008, also from a DOJ inquiry, by a cargo carrier transporting goods from the mainland United States to Puerto Rico led to the filing of the Puerto Rican Cabotage Antitrust Litigation, MDL 1960. A 2009 action taken by the FTC to prevent a merger in the plasma-derivative industry was the impetus for the Plasma-Derivative Protein Therapies Antitrust Litigation, MDL 2109.

But at last week's hearing, antitrust and consumer protection were not the main events. The courtroom was swollen with spectators, standing room only, with every seat taken, because of the surge in patent litigation being brought to the courts by so-called "non-practicing entities" against businesses that actually make or sell products and who have been using internet technology software packages they bought in good faith. Some firms, derisively called patent trolls, are being perceived as gaming the patent system for personal gain in ways that financially injure other firms. In March, the publication Internet Retailer reported that in the previous six months, there had been 54 new infringement cases of all kinds filed across the country naming 804 defendants, citing statistics from the PriorSmart litigation tracking service.

Body Science LLC, for example, drew some controversy at the Cleveland hearing. It is suing a number of companies that manufacture a wide variety of products, alleging that the companies are impinging

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on their ownership of the rights to devices that attach a sensor to the human body and transit data via wireless communication. Body Science's lawyers want to move the case to the Northern District of Illinois, while some of the big firms who have been named as defendants suggested other venues.

One lawyer represented a small firm that makes three products in question—a blood-pressure monitor, an activity monitor and a scale—and plaintively asked to be removed from the case altogether. The attorney, Kimberly Donovan, speaking on behalf of California-based A & D Engineering, said the Silicon Valley firm has only 53 employees and that the expense of fighting this lawsuit could put the firm out of business. "We don't want to be part of this case," Donovan told the judges. "Patent litigation is very difficult for a small company."

The judges appeared to be sympathetic but indicated they were unable to do anything to remove smaller defendants from these cases, despite the financial harm it could be causing them. They urged her to try to collaborate with the larger firms as much as possible to reduce litigation costs.

After the hearing, Donovan told *FTC:WATCH* in an interview that A & D's executives were very worried about the litigation. "Obviously it's very difficult and costly for them, as it is for any small player," she said.

Unified Messaging Solutions is suing 58 defendants, including Careerbuilder, LLC, Groupon Inc., Southwest Airlines Co., Sprint Nextel Corp. and American Airlines–37 cases in all, in seven jurisdictions, saying they have infringed on its patents for sending electronic messages. Defendant Time-Warner Cable, Inc., was seeking to have the case transferred to the Northern District of Illinois; lawyers for Unified Messaging Solutions want the case to remain in the Eastern District of Texas, which has a history of being friendly to patent holders, despite the fact that jurisdiction is so understaffed that it has been declared the site of a "judicial emergency." The judges suggested the case might be moved to a "less crowded docket," either in Illinois or Missouri.

Select Retrieval, LLC, is suing more than 100 defendants, most of them retailers, after looking at their websites and alleging that they are impinging on their patents for electronic search functions. The defendants are vying for relocation to a number of different locations, each based on what would be more convenient or make sense for that particular business. Many asked them to be relocated to Delaware, where many of the firms are incorporated.

But attorney Diane K. Lettelleir, senior managing counsel for retailer JCPenney, warned that the rush of patent litigation is causing case loads to bloat in Delaware, and could result in delays. "There's an avalanche of litigation in Delaware," she told the judges.

The judges listened benignly to the parties to the litigations, and, where a case involved claims of patent infringement by multiple defendants, they tried to urge them to cooperate with one another and to minimize their costs and exposure. The panel also tried to assign the biggest multidistrict cases to judges they thought could handle them competently and expeditiously.

Chairman John G. Heyburn II, who is chief judge of the panel, even has a term for this. He asks his colleagues whether a particular trial judge "has MDL spirit." This is a term of art, but it seems to encompass a positive attitude, an organized mind, and a willingness to embrace the duties of complex litigation with enthusiasm, intellectual curiosity and good grace.

But even the best efforts of the judicial panel couldn't allay the concerns of the businesses being sued, many of whom had little connection with the patented technologies at issue. Some of them said they felt they had been left twisting in the wind by tech suppliers that seemed more interested in waging their own patent wars than in facilitating the flow of e-commerce among the ordinary retailers who are their clients.

In an interview after the hearing, Diane Lettelleir of JCPenney, (JCP) told *FTC:WATCH* that the retail giant is facing fourteen such lawsuits, most of which allege that the retailer infringed on patents because of its use of software it bought from computer vendors. She said she had been a lawyer in private practice at Winstead PC in Dallas but joined JCPenney full-time two years ago when it became apparent the retailer needed a specialist inhouse because of the crush of patent-related work.

She said these cases are causing retailers a great deal of stress and expense, forcing firms to try to decide whether it makes more sense to settle a lawsuit, even if the claims seem unmerited, or fight to an uncertain outcome. She said the patent lawsuits are one of the reasons many firms are reluctant to hire new workers in today's economy. She said these lawsuits create "unbudgeted costs…that arrive out of nowhere."

Lettelleir said the firms bringing the lawsuits seem indifferent to the havoc they are causing. One patent lawyer she knows laughingly calls himself a pirate—priding himself on his ability to pick a ship, catch its crew unaware, clamber aboard and take their money, she said.

"Billions of dollars are being wasted, billions of dollars," she told *FTC:WATCH*.

–Kirstin Downey

REFERENCE:
http://www.jpml.uscourts.gov/

Former FTC official wins Republican Senate nomination in Texas

Ted Cruz, former head of the FTC's Office of Policy Planning, may be coming back to Washington in a return engagement, but in a markedly different role.

He was the long-shot victor in an acrimonious Republican nomination fight in Texas, as one of two contenders to replace Sen. Kay Bailey Hutchison, who is retiring. His opponent was Lt. Gov. David Dewhurst, whose well-funded candidacy was supplemented by his own large fortune.

Cruz, who has become a tea-party favorite, will now run for the Senate seat against a Democratic contender. He will face former Texas lawmaker Paul Sadler.

Cruz is well-known in antitrust circles in Washington, having served under FTC Chairman Tim Muris during the early years of the administration of President George W. Bush. He left the agency in January 2003 when he became solicitor general of Texas.

Cruz was recalled as affable and well-liked at the FTC. Among other things, he helped organize an all-day workshop in 2002 that examined anticompetitive efforts to restrict competition on the internet, an idea that was just coming into wide currency at the time. It examined ways the internet could provide consumers with goods more cheaply than traditional bricks-and-mortar retailers but also enabled speakers to discuss ways that opening up internet retail channels could create new harms for consumers as well.

At his departure, Chairman Muris said that Cruz had been "instrumental in implementing (an) agenda" that promoted growth of the free-market economy.

Cruz, who is Cuban-American, is a graduate of Princeton University and Harvard Law School.

As mobile payments surge, regulators pondering new consumer protections

Federal regulators and consumer advocates are trying to get ahead of the mobile payments gold rush by implementing new rules they hope will prevent an explosion of hidden charges being imposed on customers who will soon begin paying for more goods and services by phone.

This is a problem that is called "cramming," and some fear that the advent of apps that allow mobile payments in restaurants and retail stores will provide scam artists with more opportunity to seek new prey.

The Federal Communications Commission has adopted some new rules and proposed others that would require landline telephone companies to revise their bills to make it clear to consumers that they have the right to block third-party charges from their phone bills and change disclosures on billing statements so consumers can more easily detect hidden charges lurking there. It extended the comment period so that more people could comment, and asked whether more should be done to remedy the problem.

The Federal Trade Commission last week weighed in on the matter, labeling these hidden charges a "significant consumer problem," and said that wireless providers should be required to give consumers the option to block them altogether. On July 20, the FTC commissioners voted unanimously that "specific consumer protections are needed now" before the problem migrates to smartphones.

Illinois, meanwhile, last month passed legislation banning third-party vendors from placing unwanted charges on telephone bills, following in the steps of Vermont, which did so last year.

But while regulators and activists shout "Charge!," telephone carriers are yelling, "Whoa!"

Telephone carriers are warning against hasty action, saying that there are not enough consumer complaints to justify regulation in this rapidly evolving industry, and that rule-makers have not gathered enough empirical evidence to make such rules. They also are urging regulators to allow more time for voluntary measures undertaken by carriers to prove their effectiveness.

In comment letters to the FCC, which is pondering the new rules, the carriers urged regulators not to take actions that could have costly and negative consequences.

"Such drastic action would harm the substantial number of customers who prefer the ease and convenience of reviewing and paying a single bill each month and who have not experienced any unauthorized charges," wrote Edward Shakin and Mark J. Montano, attorneys for Verizon and Verizon Wireless.

Attorneys for AT&T acknowledged that "some unscrupulous persons have abused" third-party billing, but said that efforts made by individual carriers, including AT&T, will go far toward solving the problems. AT&T, Verizon and CenturyLink recently announced they would cease third-party billing for most non-carrier charges.

AT&T said that the opt-in plan proposed by the FTC would be very costly, estimating that it would cost about $90 million to send a written notice to all its customers, $10 million more to make changes to its customer service system, and that it would cost up to $100 million more simply to respond to customer questions as they try to decide whether to opt-in or opt-out. “Such high costs are justifiable only if the harm to consumers far outweighs the cost of the remedy,” AT&T’s attorneys wrote, adding that there is no evidence that large numbers of consumers are being harmed.

U.S. Sen. John D. Rockefeller IV, (D-W. Va.), who has monitored the situation for more than a decade, disagrees. In June, he introduced a measure, SB 3291, or The Fair Telephone Billing Act of 2012, which would prohibit telephone carriers from placing unauthorized third-party charges on consumer phone bills.

In a report released last summer, Rockefeller’s staff said that the industry’s efforts to limit cramming through voluntary actions have proven inadequate, and said that accounts of what he called “egregious” conduct continue to come to light:

Third-party vendors have billed family members for services that they said were requested by other family members, including people who were deceased; they have charged telephone lines dedicated to fire alarms and security systems; and they have enrolled senior citizens in webhosting services, even when the customers did not have access to the internet. A children’s hospital was charged for a “celebrity tracker” service, giving updates on the lives and loves of entertainers, and in another case, a bank was charged for a credit protection plan.

The Rockefeller report stated that businesses and other large organizations are particularly likely to fall prey to third-party billing scams because they operate telephone lines based in far-flung offices. An auditor for the U.S. Postal Service detected $550,000 in unauthorized telephone charges, according to the report, and the U.S. Naval Station in San Diego was charged $11,000 during a three-month period in 2009.

The FCC, meanwhile, reports that some 15 million to 20 million households are estimated to have received crammed charges on their telephone bills each year, with monthly surcharges ranging from $1.99 per month to $19.99, sometimes lasting for years. The agency found that only a small percentage of the people being charged for the fees actually requested the services.

In its comments to the FCC about its proposed rule changes, the FTC said it has received and reviewed thousands of such complaints. The agency said it has brought more than two dozen enforcement actions against firms to halt cramming practices.

The FTC said it “is focused” on the growth of these problems in wireless telephones, giving the expansion of the mobile payments field. In April, the FTC conducted a workshop on mobile payments that discussed the cramming phenomenon, and it is urging federal action to prevent what it fears may be bigger problems in the future.

But Illinois has decided to forge ahead on its own. In mid-July, Illinois Governor Pat Quinn signed into law a measure, endorsed by Illinois Attorney General Lisa Madigan, that makes it illegal to place false phone charges on bills.

Illinois House Bill 5211, sponsored by Rep. Kelly Burke (D-Evergreen Park) and Sen. Dave Koehler (D-Peoria), bans third-party vendors from charging customers for unwanted services, starting Jan. 1, 2013.

The bill was backed by Madigan’s office, which had received numerous reports of vendors using deceptive sales pitches and placing unauthorized charges on consumers’ phone bills for things they never intended to buy, including calling cards, voice mail service, credit repair services, extended warranties and toll-free numbers for free long distance service. The charges ranged from $10 to $45 dollars and often went undetected, Madigan said in a press release.

“Far too many consumers have opened their monthly phone bills to find bogus charges they never authorized,” Madigan said in a statement. “I applaud the governor for his support of this law to stop our phone numbers being used as credit cards by scammers.”

–Kirstin Downey

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Baer’s hearing for Justice post goes smoothly but Senate vote may not be on horizon

Bill Baer finally got a hearing.

After being nominated to lead the Justice Department’s antitrust division in February, Baer, who heads the antitrust group at Arnold & Porter and has had two tours of duty at the Federal Trade Commission, got a friendly reception on Capitol Hill on July 26 as he fielded questions on a range of issues from the two lawmakers who showed up—Sen. Herb Kohl, D-Wis., chairman of the Judiciary Committee's antitrust, competition policy and consumer rights subcommittee, and Sen. Bill Lee, R-Utah, the subcommittee's ranking member. Still, it seems a long shot that a confirmation vote on Baer will occur before Election Day.

The affable Wisconsin native alternately deftly dodged questions or responded in ways that seemed to please both the low-key, veteran lawmaker Kohl, who is not seeking re-election this year, and the tenacious, conservative freshman Lee, who at 41 is the Senate's youngest member.

Kohl immediately pressed Baer for his view of the Justice Department's decision to close four regional offices—in Atlanta, Cleveland, Philadelphia and Dallas—a move that Kohl and some other Democratic lawmakers strongly oppose. "Many antitrust experts including most of the senior leadership of these field offices and also myself have serious concerns about what this closure will mean for detection and antitrust enforcement directed against local conspiracies," he said. "These local conspiracies involve such things as gas price fixing, construction bid-rigging and rigged school milk bids…that affect local consumers most directly."

He asked Baer if the fallout from these closings "worry" him since they might adversely affect law enforcement involving local antitrust conspiracies. Baer sidestepped the specifics of the closures and answered more generally about the importance of maintaining vigorous antitrust enforcement at the local level.

"I appreciate the importance of having a plan in place to ensure effective local and regional enforcement," Baer said. "The press tends to focus on international and national antitrust issues, but there are serious local and regional problems that need to be addressed. A top priority for me, if confirmed by the Senate, is to make sure that those plans are in place."

"When I was at the FTC we went through a similar experience of reducing the number of regional offices," he added. "It was my job as the director of Bureau of Competition to make sure we continued to have effective local and regional enforcement, and I think we were able to do that."

Kohl also raised questions about Google, noting that over the past five years the antitrust subcommittee had held three hearings on the company, including one that focused on charges that it was steering Internet searches in favor of its own products and services. While recognizing that the FTC is investigating the Internet company, Kohl pointed out that it has grown to become a dominant player in Internet searches, "a sector of vital importance" to the economy. He asked Baer how he would approach allegations of anti-competitive behavior and whether he believed that Google could gain a "stranglehold" over this market.

With FTC chairman Jon Leibowitz sitting behind him at the hearing, Baer pointed to the "division of responsibility for certain Internet-related subject matters between the FTC and the antitrust division. I don't understand exactly how that is allocated." And then in a comment that provoked some laughter, he added, "I am sure chairman Leibowitz will educate me at the first opportunity."

Aside from jurisdictional issues, Baer noted that when a dominant firm is at a tipping point and abuses its position, then antitrust issues ought to be explored. "We don't want to penalize success but to make sure that success isn't improperly translated into an unfair advantage," he added.

The answer showed Baer skillfully nodding to the FTC, indicating that he would not seek to have Justice muscle its way into such matters without consulting with the agency, while also taking a measured view of an increasingly hot topic on Capitol Hill and elsewhere—whether Google is unfairly squeezing competitors.

Baer also deflected a question about marketing agreements—an issue that the Justice Department and the Federal Communications Commission are looking into as part of a $3.9 billion deal being pursued by Verizon Wireless to buy spectrum from Comcast, Time Warner Cable and other cable firms while also signing joint marketing agreements with the firms—a move that critics see as stifling competition in the cable market.

Asked about such marketing agreements, Baer noted that such deals have pros and cons. "There are two sides to the coin: one is what are the pro-competitive efficiency-oriented justifications, and do those rules stand up to scrutiny," he said. "On the other hand, what is the risk to competition?"

"When I was at the FTC in the 90s, very often we had to make those sorts of assessments, evaluating company justifications for transactions and to make sure…they held up and the risks to consumers were properly taken into account. It is a detailed, fact-specific inquiry but it is one that needs to be done."

Perhaps surprisingly, the one issue to which Baer gave an unequivocal answer came when he strongly disagreed with a Supreme Court decision, Leegin Creative Leather Products Inc. v. PSKS Inc., that allows manufacturers to establish retail prices for their products. It was a 5-4 ruling in 2007, and Kohl noted that he had introduced legislation to overturn it.

"For nearly a century it was basic rule of antitrust law that a manufacturer could not set a minimum price for a retailer to sell its product," Kohl said. "This rule allowed discounts to flourish and greatly enhanced competition in dozens of consumer products—everything from electronics to clothes."

But the Leegan decision overturned that, Kohl noted, and held that vertical price fixing was no longer banned in every case. "This decision is very dangerous to consumers' ability to purchase products at discount prices and harmful to retail competition," he said, adding that his legislative proposal would restore the ban on vertical price fixing.

Baer said he would support legislative repeal of Leegan decision, for several reasons, including that the law had been "well-settled," and there was "widespread industry understanding of where the lines were."

The decision, he added, "created a major dichotomy between federal law, which now is vertical price fixing is subject to a rule of reason and state law, which in most cases still considers it per se unlawful. That creates enormous confusion and misunderstanding in the business community and for antitrust" compliance officers. To create such a dichotomy, Baer concluded, "was unfortunate."

Even as Kohl asked Baer about such specific issues, Lee focused more on Baer's general philosophical approach to antitrust issues, including the vibrancy of the Chicago School, which posits that antitrust is solely about consumer welfare and the protection of competition and not competitors. Lee noted that the last confirmed assistant attorney general, Christine Varney, had seemed to disparage it when she said it ought to be "retired."

Baer responded carefully with a nod to the Chicago School but also the notion that some distinctions in antitrust enforcement are not as great as they might seem. "Sound economic analysis is fundamental to good antitrust enforcement—[that] means being able to articulate a theory of harm that has occurred from past behavior or is likely to occur from future behavior," he said. "That has been the core discipline or learning from the Chicago School."

Antitrust enforcers, "whether Republican or Democrat, Chicago School or post-Chicago…do tend to see the target level of enforcement in very similar terms," he added. "At the end of day it is all about consumers—it's not about competitors."

And Lee also persisted in asking Baer about whether "overzealous enforcement" could cause harm in markets. Baer agreed, and elaborated that, "While I think there is a risk from being too cautious about taking action where you see a problem—there's [also] a risk from being overly aggressive."

Such responses clearly won points with Lee, who said, "I am pleased to hear that—there are some limits—there are some risks associated with overzealous enforcement."

Despite his smooth performance at the hearing, prospects for moving Baer's nomination any time before Election Day remain dim as partisanship in the Senate has choked off action on nominees, whether to the bench or to high-level posts. Senate aides would not speculate about Baer's chances for a vote, but the handwriting is on the wall in the near term. First, his nomination must be voted out of committee and then he must get on the Senate calendar for a vote. None of that is likely to happen any time soon.

Judiciary Committee members have a week to submit additional questions, and Baer will need some time to answer them. By then, the August recess will be in full swing. So the committee won't vote on his nomination until after Labor Day, at the earliest. After that, politics will intrude even more into everything on Capitol Hill. Baer might well have to wait until after the election to get a vote—and hope that President Obama wins re-election for that to happen.

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Justice Department finalizes office closings despite outcry

CLEVELAND–Antitrust prosecutors normally have a spring in their step around the time they announce an indictment of a key figure in a case where real and lasting damage has been done to taxpayers.

So one might have expected this kind of buoyant attitude at the Antitrust Division's Cleveland regional office, in the week after the Justice Department announced that it was bringing a case against Phillip D. Murphy, former head of Bank of America's municipal derivatives desk, who has been accused of participating in a "far-reaching conspiracy" to defraud state and local governments. The storied Cleveland office – whose intellectual forebears had helped to break up the mighty and Machiavellian

Standard Oil Co. 100 years ago – has been identified as playing a role in bringing about the indictment.

But although the office, located in a downtown courthouse building, was drenched in sunlight on a recent Wednesday afternoon, the faces of the prosecutors and support staff passing in and out of the doors were anguished.

Last week they received formal notice that the political appointees at the Department had decided to shutter this office, along with the other criminal antitrust offices in Philadelphia, Atlanta, and Dallas. They were told the offices would be closed within 12 months.

A battle over the continued existence of these offices has been underway for a year, ever since political appointees Attorney General Eric Holder and Christine Varney, assistant attorney general for the antitrust division, decided that the regional criminal offices were no longer needed and that their work could be better overseen and coordinated from headquarters and from the remaining offices in San Francisco, Chicago and New York.

Agency officials said shuttering the offices was a cost-cutting move, and that it would save the department $8 million a year. They said that staff would be offered the opportunity to relocate to other offices. (See comment by Sharis Pozen, page 14)

But career prosecutors in almost all the offices nationwide quickly criticized the move as counterproductive, furnishing legislators and journalists with information about the legal victories these offices had won on behalf of consumers. The Cleveland office, for example, which costs about $3 million a year to operate, has generated $140 million in fines against wrong-doers in the past year alone. The money is used to provide support services for victims of crimes.

Prosecutors, attorneys, legislators, and judges around the country pleaded with top Justice Department officials not to do it. The lowest point for Eric Holder was surely the moment when respected civil rights legend John Lewis, now a congressman, said he believed that people and communities would suffer from the Justice Department decision.

Indeed, the plight of Cleveland is particularly stark. The robber barons who once ruled the city have died off and the industrial base has withered. Ten years ago the city suffered a further damaging blow. Cleveland became a magnet for predatory lending, which soon caused it to have the highest foreclosure rate in the nation. The real estate market has never recovered, and the houses left abandoned have now become dangerous eyesores.

Republican state Attorney General Mike DeWine is giving local housing officials $75 million – out of a total available pot of about $100 million from the recent AG settlement with banks – to expand the work of demolishing an estimated 100,000 vacant and abandoned houses in Ohio, homes that are too far gone to attempt to refurbish.

Even in suburban areas, real estate values have never really recovered. The Cuyahoga County assessor just reported that home values in Cleveland had dropped 9 percent in the past three years, and had fallen as much as 30 percent in parts of the city.

That means that many of the prosecutors and support staff in the Cleveland office have mortgage loans that are now under water, ensuring that they cannot easily sell their houses and move, even if they were to be offered one of the jobs that the Justice Department has promised to make available in other parts of the country. Few of the staff attorneys are reported to have found jobs with local law firms, because the firms' volume of business will also be affected by the closing of the office.

The local Democratic establishment has been plaintive in its pleas to the Justice Department that it reconsider the decision, but the political appointees at the Justice Department were unswayed.

"The proposal just got too far along for anyone to stop it, even after Christine Varney left," said attorney Mark Rosman of Wilson Sonsini Goodrich & Rosati, former assistant chief of the national criminal enforcement section of the antitrust division. "They didn't want to back down. Once they came out with that opinion, they felt they needed to stand by it."

Rosman blamed the problem on the "dysfunctional bureaucracy" at the Justice Department.

But the insistence on closing the offices, particularly the one in Cleveland, is surprising for another reason as well, given Ohio's increasing importance as a swing state in the upcoming election. President Obama has visited the state nine times in the past year, emphasizing to its residents his concern for their well-being.

–*Kirstin Downey*

Saving lives and lining pockets at New York City hospital

Two new victories in a string of convictions and guilty pleas nearly wrap up a five-year prosecution of bid rigging and kickbacks that bled New York Presbyterian Hospital from 2000 to 2008. On July 31, the Department of Justice secured guilty pleas from Santo Saglimbeni and

Emilio "Tony" Figueroa for awarding service contracts in exchange for cash, goods and services. Both also pleaded guilty to mail fraud.

Coming as the hospital takes a star turn on a reality television series called New York Med, victories by the Department of Justice Antitrust Division expose a darker side of the number one hospital in New York City and one of the country's top seven hospitals, according to U.S. News and World Report. The convictions also fired an early salvo in a concerted prosecution of wider allegations that target fraud in the New York City construction business, where billions of dollars are spent each year.

The eight-part series on ABC-TV shadows physicians, surgeons, nurses and other medical workers at New York Presbyterian for one year. "It's exciting stuff," says an emergency room nurse whose wry understatement expresses the dire consequences of a patient's aortic rupture that, for an ER nurse, is an everyday challenge. She and hundreds of her colleagues exemplify commitment to preserving patients' lives at a health facility known for groundbreaking advances in medicine from non-invasive surgical procedures to pediatric heart transplants. On Sept. 11, 2011, 28 hospital employees rushed to the World Trade Center to rescue people who were injured, arriving among the first on the scene. Four of them lost their lives.

But even as heroic emergency medical technicians were racing toward burning towers, several NY Presbyterian purchasing managers and a circle of contractors busily pursued a less savory motive: lining their own pockets by manipulating bids. Details began to surface in 2007, and soon resulted in a string of victories for the Justice Department, which has jurisdiction in cases of fraud against municipalities and not for profit institutions.

After construction company executive Michael Theodorobeakos, a resident of swank Upper Saddle River, N.J., entered a guilty plea in 2007 and agreed to cooperate, fraud schemes started to unravel. He and his co-conspirators admitted they rigged bids for maintenance and insulation services provided to NYPH. And with noteworthy audacity, some kept at it after the first convictions came down and even sought business tax deductions for kickbacks they distributed.

Successful prosecutions followed. "This investigation has secured both bid-rigging and fraud convictions against 21 individuals and companies that harmed New York health care institutions," Acting Assistant Attorney General Joseph Wayland, who steers the Justice Department's antitrust division, told *FTC:WATCH*.

In addition, conspirators pled guilty to bogus business tax deductions for money distributed in kickbacks. Cumulative penalties thus far add up to 115 months in prison, 60 months of probation, $2.03 million in fines and $140,000 in restitution.

In the course of its investigation, DOJ essentially performed an autopsy on the operation, exposing an epidemic of brazen fraud.

A key figure was Santo Saglimbeni, director of the hospital's facilities operations department and director of engineering from Facilities Operations and the Director of Engineering, whose job allowed him to select vendors of construction, asbestos abatement and asbestos monitoring services to provide work for the hospital. Evidence suggested he received money and gifts for his efforts steering contracts to his favored vendors.

Another insider who allegedly participated was Salvatore Scotto-DiVetta, a hospital purchasing supervisor who prepared false documents that made it appear that the firms that were given contracts had met the hospital's competitive bidding policy. In fact, service providers submitted high bids and co-conspirators submitted inflated non-competitive bids so the favored contractors won the work. For his illegal services, Scotto-DiVetta earned approximately $25,000 in kickbacks in cash and gift cards from his co conspirators, prosecutors said, but his sentence fetched a $1 million fine and jail time.

In January 2010, Freddy Deoliveira, another purchasing supervisor, pleaded guilty to similar charges. According to his plea agreement, he decided which bids were high and which were low to ensure that designated companies would win contracts. Co-conspirators used each other's letterhead stationery to submit non-competitive bids. Deoliveira collected unspecified kickbacks.

Then in November 2010, two heating and ventilation companies and their owner, Michael Vignola, confessed to allegedly rigging bids on HVAC services to New York Presbyterian. The owner of the company also pleaded guilty to a conspiracy to defraud NYPH. Stephen E. McAnulty, of Brooklyn, N.Y., pleaded guilty for lying about his knowledge of a kickback and fraud conspiracy that took place at NYPH.

The rogues' gallery steadily expanded. Aaron S. Weiner, of Meadowbrook, Pa., pleaded guilty in U.S. District Court in Manhattan, for allegedly acting as a conduit in the kickback scheme from at least June 2004 to March 2005. To conceal kickbacks, Weiner's company wrote checks worth about $1 million to the shell company formed by a senior hospital-purchasing administrator in his mother's name.

Criminal behavior did not end with kickbacks and bid rigging, prosecutors have charged. Also in 2007, Mariusz Debowksi pleaded guilty in U.S. District Court to tax evasion. According to the charge, Debowski provided false documentation to co-conspirators indicating that he had performed construction services and received more than $2.3 million in checks from the co-conspirators as payment for the construction services they were supposed to provide to New York Presbyterian. Debowski cashed the checks but returned the bulk of the money to co-conspirators in exchange for a fee. The co-conspirators then took false deductions for those payments made to Debowski's businesses.

Contracts worth more than $20 million were at stake in the conspiracies, but it is difficult to estimate the exact extent of the financial losses the hospital system suffered. Hospital spokesmen declined to comment. With that money, of course, the hospital would have been able to buy more equipment for monitoring patient care or hired more registered nurses.

Even the presence of a single additional nurse could mean much to an individual patient scared and alone in a hospital bed. The starting salary for a registered nurse in New York City, including benefits, is roughly $110,000. And adding a few more nurses to critical care floors can make a meaningful difference for thousands of patients. "A lot of research shows that a reasonable number of patients per nurse can avoid infections in hospitals and avoid unnecessary deaths," Desma Holcomb, strategic research coordinator for the New York State Nurses Association, told *FTC:WATCH*.

In a time of growing financial pressures on hospitals, which often translates to salary cuts and layoffs, news of the bid-rigging scandal caused a stir among the 37,000 nurses her union represents in New York State public and private hospitals. "It made our eyes pop," she said.

But other people were injured as well, including an A-list of generous private benefactors whose donations went into the wrong pockets, and taxpayers left to foot the hefty bill for prosecuting employees and conspirators.

New York Presbyterian declined repeated requests for comment, and offered only a brief public statement. The hospital called itself "a victim of criminal acts," and said they were committed to rooting out all forms of fraud and corruption. "This is a government investigation," a hospital source told *FTC:WATCH*. "It would not be appropriate to comment beyond what we've said."

What is believed to be the final cases are coming to light now. A U.S. District Court judge in Manhattan meted out several penalties in July. Michael Yaron, who owned two of the implicated companies, was sentenced to spend five years in prison and to pay a $500,000 criminal fine. Moshe Buchnik, whose asbestos abatement company was similarly implicated, was sentenced to serve 48 months in prison along with a $500,000 criminal fine for his role in the conspiracy. In an earlier phase, sentencing levied a $1 million fine against Artech Corp., the company that Saglambeni owned.

The indictment reported that David Porath participated in the bid-rigging scheme to look like the low bidder. Moreover, it charged that Porath conspired with Andrzej Gosek to file false tax returns. According to the Department of Justice, Gosek collected checks for more than $2 million made out to companies that performed no work. Gosek cashed the checks and handed the cash to Porath minus a 5% service fee that Porath tried to claim as a business expense.

In an effort to collect millions of dollars in fines, the court has ordered Yaron, Buchnik, Saglambeni and entities they formed to forfeit all property linked to proceeds traceable to their offenses. One property named in court papers is a vacant residential lot in Southampton, New York, purchased for $650,000 in May 2004 and now worth somewhere between $800,000 and $1 million, local real estate agent James McGlauchlen told *FTC:WATCH*. It sits in a neighborhood of homes worth an average of $4 million, according to real estate records.

Federal prosecutors expressed satisfaction with the outcome. "The sentences imposed today are consistent with the seriousness of the crimes," said Wayland. The Justice Department also secured a guilty plea in July from Porath, who not only defrauded the hospital but sought income tax deductions as business expenses on checks he cashed for his own personal use.

The latest guilty pleas wrap up outstanding charges, but the case remains open, a DOJ spokesperson told *FTC:WATCH*. Viewers might not see more about it on New York Presbyterian Hospital's star turn on reality TV. But stay tuned.

–*S. L. Mintz*

REFERENCE:

http://www.jameshoyer.com/two-former-hospital-employees-plead-guilty-to-participating-in-kickback-scheme-at-new-york-city-hospital/

http://www.justice.gov/atr/cases/scotto.htm

http://www.justice.gov/atr/cases/deoliveira.htm

FTC gets good news in Third Circuit ruling

Christmas came early this year for the FTC, when on July 16 the Third Circuit became the first court to accept the agency's view that pay-for-delay settlements between patent-holding pharmaceutical companies and generic entrants are presumptively anticompetitive. The case may now be headed for the Supreme Court, as the ruling creates a split among the circuits on a big-bucks issue.

The ruling was a personal triumph for FTC Chairman Jon Leibowitz, who has made the pay-for-delay issue one of his top priorities, and who has pursued it doggedly throughout his entire time in office, even while his position was uniformly rejected by the courts and Congress failed to enact substantial corrective legislation.

The reversal of fortune came in a private action, *In re K-Dur Antitrust Litigation*, which challenged Schering-Plough's use of this tactic to protect its "K-Dur" sustained-release potassium supplement. The case was brought by a group of drug wholesalers and retailers, including CVS Pharmacy and Rite Aid, and was argued by the Philadelphia firm of Berger & Montague. But the FTC was also present through an amicus brief, and its prior work in the area was cited throughout all parts of the court's decision.

The argument that the Third Circuit accepted was this: Issues in patent cases are seldom clear. The patent may or may not be valid; the new entrant may or may not infringe the patent. Given this uncertainty, parties may often negotiate a time at which the generic will enter, at some point in the future but before the patent expires. That date represents an arms-length assessment of the real strength of the patent and the real scope of the patent protection. But if money is also paid to the generic firm, then that is almost surely intended to push the entry date back further than the real scope of the patent would have warranted. And, so, the court reasoned, that is presumptively an agreement in restraint of trade, unjustified by the policies of the patent laws, and therefore an antitrust violation.

Leibowitz hailed the decision, shooting out a gleeful press release saying that the court "seems to have gotten it just right," and highlighting the Bureau of Economics' estimate that such contracts cost consumers $3.5 billion per year.

But in ruling as it did, the Third Circuit went against precedents set in other courts, including the Eleventh Circuit (which rejected the FTC's original 2001 challenge to these same K-Dur contracts), the Second Circuit, and the Federal Circuit. All of those courts took a simple position, saying that as long as the agreement did not restrict generic entry beyond the formal, stated scope of the patent, then it was legitimate. The special master and the district court in this present case ruled to this effect as well.

Judge Delores Sloviter specified what he saw as the key conceptual weakness in those earlier cases: "[We] take issue with the scope of the patent test's almost unrebuttable presumption of patent validity. This presumption assumes away the question being litigated in the underlying patent suit..."

The Third Circuit also discounted another consideration important to the prior courts – the desirability of encouraging settlements of litigation: "[T]he judicial preference for settlement, while generally laudable, should not displace countervailing public policy objectives – [such as here,] that litigated patent challenges are necessary to protect consumers from unjustified monopolies by name brand drug manufacturers."

A Supreme Court review appears likely. The issue is of great economic importance, and its ruling has now created a split among the circuits. The Third Circuit's opinion began to lay the groundwork for review by citing a long list of Supreme Court cases to the effect that, while patents are valuable as incentives to innovation, it is also important on policy grounds to protect consumers from the assertion of unwarranted or overbroad patent claims. "It appears that these aspects of the Supreme Court's general patent jurisprudence had been overlooked by the Special Master and others adopting the scope of the patent test," the ruling said.

REFERENCE:
www.ca3.uscourts.gov/opinarch/102077p.pdf

Huge Visa, MasterCard antitrust deal draws sharp critics

It didn't take long for fissures to begin developing in what had been shaping up as the largest settlement of a private antitrust case in the history of the Sherman Act—a proposed $7.25 billion deal that would end protracted litigation between a class of about eight million U.S. merchants on the one side, and Visa Inc., and MasterCard Inc., and the banks that issue their credit cards on the other.

The case involves allegations that the companies had conspired to set high "swipe fees"—the charges that are assessed for processing credit and debit payments when consumers use MasterCard or Visa cards to make purchases. But critics of the proposal, which was announced July 13, charge that the money and other aspects of the deal are not enough to ensure that the credit card companies won't resume their anti-competitive behavior.

The complex litigation had gone on for about 7 years and while the proposed dollar settlement is significant, these critics say it falls short of the broad remedy needed to deter the card companies and their banks from engaging in future collusive behavior. Walmart issued a statement noting that it, "along with a growing number of consumer groups and merchants," have concluded that the proposed settlement "would not structurally change the broken market or prohibit credit card networks from continually increasing hidden swipe fees, which already cost consumers tens of billions of dollars each year. The proposed settlement would require merchants to broadly waive their rights to take action against the credit card networks for detrimental conduct or acts. We believe the proposed settlement would also constrain emerging payments innovation."

The National Association of Convenience Stores, a class plaintiff in the lawsuit, also rejected its terms. "Not only does the proposed settlement fail to introduce competition and transparency into a clearly broken market, it actually provides Visa and MasterCard with the tools to continue to shield swipe fees from market forces," said NACS Chairman Tom Robinson, president of Santa Clara, Calif.-based Robinson Oil Corp. "This proposed settlement allows the card companies to continue to dictate the prices banks charge and the rules that constrain the market including for emerging payment methods, particularly mobile payments. Consumers and merchants ultimately will pay more as a result of this agreement — without any relief in sight."

Similarly blunt, Mallory Duncan, vice president and general counsel of the National Retail Federation, which is not a party to the litigation, said in a statement that, "The money is significant but money is only temporary—it's here today and spent tomorrow." Instead, he added, any settlement should mandate "changes in the rules that bring about transparency and competition that would be here for years to come."

Duncan elaborated on that point in an interview with *FTC:WATCH*, saying, "As for relief in the future, as our members tell us, it appears to be illusory. There is not much going forward."

"The predominant view is why would I want to be a part of this class and give up all my rights [to sue if this behavior returns] and achieve very little," Duncan added. "Perhaps it is a trial balloon. It doesn't seem to be ready for prime-time."

But Bonny E. Sweeney, a partner in the San Diego office of Robbins Geller Rudman & Dowd, and an attorney for the plaintiffs, told *FTC:WATCH* that the settlement has much to commend it, even beyond the large monetary reward.

"There are three different kind of relief: a very large cash fund to compensate merchants for the inflated interchange fees they have paid in the past—$6.05 billion—that is a very significant sum of money; second, it requires Visa and MasterCard to set aside 10 basis points worth of interchange fees for an eight-month period and sets it aside for merchants—a sum that is estimated by the parties to be approximately $1.2 billion worth of interchange; and third, it requires Visa and MasterCard to change some of the rules that previously have prevented merchants from encouraging their own customers to use less costly forms of payment [than the credit cards]. What this will do in the long run is put pricing pressure on Visa and MasterCard to lower the interchange fees. Merchants will pay less for accepting Visa and MasterCard and consumers will ultimately benefit because it means their prices will go down."

The proposed settlement also requires the card companies to set aside another $525 million to cover claims filed by merchants that brought their own lawsuits and are not part of the class—a group that reportedly includes Kroger, Safeway and Rite Aid.

When asked about the criticisms from some plaintiffs, Sweeney was dismissive. "We are confident that the settlement ultimately will be approved," she said. "After we get preliminary approval from the court, the court will approve a form of notice that will go out to 8 million or so merchants entitled to receive it and they have the opportunity to evaluate the settlement and make their own decision as to whether to stay in or opt out."

"There are always objectors. Here we have a class of probably more than 8 million merchants. The fact that two or three large merchants have decided at this time to object before preliminary approval has even been granted doesn't suggest that other merchants are necessarily going to object or opt out in big numbers."

When asked about timing from this point, Sweeney said that a motion for preliminary approval of settlement will be filed in September or early October and, if the court grants it, then notice will be sent to members of the class—and to all merchants in the United States and former merchants for whom they have addresses. A media campaign also will be launched to get the notice out.

Still, as upbeat as Sweeney is about prospects for the settlement, a veteran source who has served in the retail industry and was involved from the beginning of this case in 2005, was skeptical that the proposal would survive. "There is a very strong belief within the retail community that VISA and MasterCard act as a duopoly. And a settlement of $6 billion means nothing when they can recuperate it just by changing or manipulating the rules or changing the fees within 6 to 12 months," he said. "They entered this suit to force Visa and MasterCard to change the way they set their rates… This proposed settlement does not change that one iota."

–Kirk Victor

REFERENCE:

http://www.nacsonline.com/NACS/News/Press_Releases/2012/Pages/PR0713121.aspx

http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=1402

MERGER UPDATE

CNOOC, Nexen

Crying foul on China appears to resonate these days in the U.S. Lately there's the Olympic swimmer Ye Shiwen whose commanding victory over the U.S. swimmers drew accusations about illegal doping, never mind the fact that she tested clean.

Suspicious U.S. legislators have targeted a $15.1 billion bid by CNOOC Limited, the giant Chinese state-owned oil producer, to acquire Nexen Inc., a Canadian energy company. The deal includes Nexen assets in the Gulf of Mexico near U.S. shores. Senator Charles Schumer of New York, House minority leader Nancy Pelosi and Congressman Ed Markey of Massachusetts contend that extending Nexen's royalty-free licenses intended to stimulate production would subsidize CNOOC at U.S. taxpayers' expense.

"I believe this merger could lead to a massive transfer of wealth from the American people to the Chinese government," Markey warned Treasury Secretary Timothy Geithner, whose department reviews U.S. foreign investment. The Obama administration should opposed the merger if CNOOC will not agree to a more favorable royalty agreement or, alternatively, the sale of Nexen's oil leases in the Gulf of Mexico.

Despite opposition, it's unlikely that the U.S. will sink a deal with ample precedent. Chinese companies including CNOOC already have won approval for minority investments in shale gas and oil fields on U.S. soil and a green light in some cases to operate them.

–S.L. Mintz

REFERENCE:

http://www.theglobeandmail.com/report-on-business/international-business/us-business/cnooc-nexen-deal-faces-more-heat-in-us/article4450643/?cmpid=rss1

FTC BRIEFS

Phony alcoholism cure

Looks were indeed deceiving, a Florida Federal Court ruled in July, upholding joint action by the FTC and the Florida Attorney General against phony alcoholism "cure" programs. Doing business as the Alcoholism Cure Foundation, Enjoy a Few, and Guilt Free Drinking, Robert Douglas Krotzer now faces a fine exceeding $700,000 for bilking 450 consumers.

Defendants were charged with prescribing ineffective concoctions of dietary supplements as a supposed cure for alcoholism, and then threatened to publicly reveal consumers' alcoholism when they tried to cancel their memberships.

"Online ads referred to defendant Krotzer – who is not a doctor – as 'Dr. Doug,' and boasted that the company's "team of doctors" would create customized, low-cost, and permanent alcoholism cures," the FTC reported. Appealing to victims of alcoholism, ads claimed that the program could enable them to drink socially. The court ruled that ads were false and unsupported. It also debunked claims that defendants had a solution "scientifically proven to cure alcoholism."

Defendants have been slapped with a permanent ban on marketing or selling any treatment or cure for alcoholism drug addiction or any other human health related problem. The final order also bars them from using any names that suggest cures for alcoholism, from unauthorized billing and any further collection actions against victims.

"The fact that this company deceived consumers and threatened to reveal their personal information is abhorrent," said Florida Attorney General Pam Bondi. "I am grateful to the FTC for their partnership in stopping this company from exploiting consumers and providing refunds for those harmed by this company's actions."

–S.L. Mintz

REFERENCE:

http://www.ftc.gov/opa/2012/07/alcoholcure.shtm

Facial recognition technology

Before a Senate judiciary subcommittee on July 18th, the FTC previewed its plan to scrutinize current and possible future commercial uses of facial recognition technology.

It embarked on this scrutiny after a 5 – 0 vote in favor of an inquiry and a partial dissent by Commissioner J. Thomas Rosch.

Anticipating wider uses of facial recognition technology, the FTC wants to learn how these technologies operate today and how they will shape consumers' experiences in the future. A workshop in December 2011, "Face Facts," set the stage for an initiative. A report later this year will recommend best practices in facial recognition technology.

Testifying last month to the Subcommittee on Privacy, Technology and the Law, Maneesha Mithal, Associate Director of the Division of Privacy and Identity Protection, summed up the motivation. "While consumers may enjoy the benefits associated with advancements to these technologies," Mithal said, "there are also concerns that the technologies may increase the risks to consumer privacy,"

Moving toward generating policy that balances risks and benefits allied with facial recognition technology, the Commission reported preliminary findings in the March 2012 Privacy Report. The report introduced three core concepts that guide an inquiry.

"Privacy by design" examines the case for building privacy at every stage of product development.
"Simplified Consumer Choice" puts a premium on practices that fit transactions and require clear agreement before collecting sensitive personal data.
"Greater transparency" lobbies for reasonable consumer access to data companies maintain about them.

–*S. L. Mintz*

REFERENCE:
http://www.ftc.gov/opa/2012/07/facial.shtm

Mortgage relief scams

The Federal Trade Commission, as part of its crackdown on scams that exploit folks in financial distress, won a temporary restraining order that shut down a nationwide con that targeted financially-distressed Spanish-speaking homeowners. These consumers were allegedly falsely promised relief on their monthly mortgages so long as they forked over large upfront fees. In fact few homeowners received anything of value, according to the complaint filed in the Northern District of Illinois on July 23.

The defendant, Minnesota resident David F. Preiner owns and directs six companies named as defendants in the scam in which mortgage relief services were advertised, marketed and sold since at least 2009, according to the complaint. The firm identified Spanish-speaking consumers in financial distress, behind on their mortgage payments or in danger of losing their homes. Telemarketers spoke in Spanish to win the trust of consumers, most of whom spoke no English.

After empathizing with these consumers about the sour economy and falsely assuring them that they had expertise in negotiations modifications to mortgages, these telemarketers also said that relief was available through a homeowners' assistance program created by President Obama. To further add to their credibility, the telemarketers either explicitly said or led homeowners to believe that they had the approval of the U.S. government to obtain loan modifications, according to the FTC.

The telemarketers then typically asked the consumers about their income and mortgage and virtually guaranteed them that a loan modification was just around the corner, even for those who previously have been denied such relief. To cinch the deal the telemarketers quote a monthly payment that is "markedly lower"—hundreds or even thousands of dollars lower—than the consumers' current payment. They also throw in a quote on an interest rate that is far lower than the consumer's current rate.

The process, the consumer is told, will take between 30 and 90 days as long as they pay an advance fee that ranges from $995 to $1500 and is called a processing or legal fee. The telemarketer claims it is a one-time payment and makes the pitch for the consumer to pay it immediately before work will commence. Furthermore, consumers are often told to stop paying their current mortgage—a move, they are told, that will help them win approval of their loan modification.

When the homeowner's current lenders send notices or even threaten foreclosure, the telemarketers advise the consumers to ignore the threats and reassure them that is a normal part of the process, the complaint alleges.

After the homeowners complete a package of sensitive financial documents regarding the consumer's current mortgage loan and financial situation—along with the advance fee—the telemarketer assures the consumers that the modification process will begin. When nothing happens for weeks and homeowners reach a live representative, they are reassured that the modification is in progress but that more fees are required, up to several thousand, according to the complaint. Ultimately, few homeowners get anything and whatever they might receive, they could have gotten for free.

The district court order halted the company's operations and froze its assets while the FTC moves forward with the case. The complaint charged Preiner and his companies with violating the FTC Act and the Mortgage Assistance Relief Services Rule by a series of false representations, including that they could get a mortgage modification quickly and for a specified price and that they were affiliated with the U.S. government. They also failed to tell homeowners that they could lose their homes and damage their credit ratings if they stopped paying their mortgage payments.

The commission vote that authorized the filing of the complaint was 5-0. The court granted the temporary restraining order the same day as the case was filed, July 23.

–Kirk Victor

REFERENCE:

http://www.ftc.gov/os/caselist/1223007/120730freedomcompaniescmpt.pdf

PEOPLE

Pozen signs on with Skadden, Arps, Slate, Meagher & Flom

Sharis A. Pozen, the former acting assistant attorney general for the Justice Department's Antitrust Division, has joined Skadden, Arps, Slate, Meagher & Flom and will begin in the firm's global antitrust and competition practice in Washington on September 4. In an interview with *FTC:WATCH*, Pozen said that she was "really excited about the move…Skadden has such a significant global client base and has a really best in class corporate practice and an accompanying antitrust practice, and I was looking for a new challenge at this point in my career."

During her relatively short tenure as the acting division head from August 2011 until April 2012, Pozen led the way to some high-profile victories, including, most significantly, the division's challenge to the proposed $39 billion merger of AT&T and T-Mobile that ended when AT&T capitulated and terminated the deal. Pozen also presided as the division took on Apple and five publishers for alleged conspiracy in setting retail prices for eBooks, and the division prevailed in litigation to block H&R Block's acquisition of TaxACT.

As for the timing of her departure from Justice, Pozen said, "I had seen AT&T through—I had seen [the challenge to] e-books through and some other significant matters. It was time for me to go and also I wanted to have the summer to spend with my family. I have two teenage daughters and time is precious with them."

Pozen had come to the department from a partnership at Hogan Lovells (previously Hogan & Hartson) to serve as chief of staff to Christine Varney, the Antitrust Division's Assistant Attorney General. Pozen had nothing but good things to say about serving as the acting chief of the division.

"It was a wonderful job—some have said, and I would agree, it's one of the best jobs in antitrust that a person can have, acting or confirmed," she said. "I thought I'd spend a couple of years helping Christine Varney as her chief of staff and counsel and then as principal deputy. When she decided to leave [to join the New York law firm Cravath, Swaine & Moore] and the attorney general named me as acting, I agreed to stay on through the point where they had a nominee."

William Baer, a partner at Arnold & Porter and former director of the Federal Trade Commission's competition bureau, was nominated to the top antitrust post in February, and the Senate Judiciary Committee held his confirmation hearing on July 26. (See related story, p.6)

Pozen's tenure was not without controversy, as she worked on the implementation of the department's decision to close four of its regional antitrust offices. When pressed on this decision, Pozen said that it was driven by a department effort to save costs. "The Antitrust Division was in no way singled out," she said, noting that the many other offices throughout the department also were closed.

"It was a very, very difficult plan to implement because it is people's lives," she added. "On the other hand there is and was tremendous pressure on the Department to cost save—just like there was on every other part of the federal government. So our job as managers of the Department of Justice was to do it responsibly—to cut those costs and to cut them responsibly. The idea was that people didn't lose jobs and that we cut overhead and ensured that the program could be maintained."

"What I really strived to do was to ensure that those attorneys had opportunities and had jobs," Pozen added. "The idea was to save overhead and costs not at the expense of the workers. What seems to get lost sometimes in these articles is that all of the support staff members have guaranteed jobs in U.S. Attorneys offices in their area. They do not have to move. And the attorneys have opportunities in the U.S. Attorneys offices and other task forces, possibly in their localities or they have the opportunity to move to Washington.

They have a job; they have a paid salary; they have a locality adjustment. Washington is more expensive than other places, but there are locality adjustments that are automatically in federal workers' pay."

As she looks ahead to her new job, Pozen said she is excited and very pleased for the department at the prospect of Baer heading the division. "He is going to be a fantastic assistant attorney general….I believe Obama will be re-elected and [Baer] will become the assistant attorney general, and the division will be in great hands. His hands are very capable and experienced."

John Terzaken

John Terzaken, director of criminal enforcement in the Justice Department's antitrust division, has left the department and joined Allen & Overy in their Washington office.

He will lead the office's cartel defense practice in the United States, in collaboration with colleagues in Europe, Asia and Australia. In a statement, the firm said Terzaken's arrival will bolster its ability to represent antitrust defendants in cases that involve numerous parallel investigations here and around the world.

Terzaken joined the national criminal enforcement section of the antitrust division in 2004, became assistant chief of the section in 2008 and was appointed director of criminal enforcement in 2010. He was the agency's chief liaison with state, federal and foreign law enforcement authorities. He is a graduate of American Univeristy and University of Virginia School of Law.

Richard Schwartz

New York Assistant Attorney General Richard Schwartz died in an unusual accident last week.

Schwartz, 61, was walking home from work in Brooklyn, N.Y., when a sudden electrical storm caused a bolt of lightning to hit a church steeple. Schwartz was struck and killed by falling debris.

New York Governor Mario Cuomo, the former state attorney general, and Eric T. Schneiderman, who currently holds the post, both released statements expressing their condolences.

"For over 25 years, Richard served the people of New York with integrity as an expert antitrust lawyer in the Office of the Attorney General's economic justice division," Schneiderman wrote in a statement. "New York is a better place because of Richard's commitment to fairness and legal excellence. Richard's loved ones are in our thoughts and prayers as we mourn the untimely loss of one of our own."

CALENDAR

August 3—FTC Commissioner **Julie Brill** will participate in the American Bar Association's Annual Meeting to discuss "Privacy Law in 2012: Where We Are and Where We Are Going," from 8:30 a.m. to 10 a.m., in Chicago, Ill. For more information, contact Anne Kiefer, Director, ABA Section of Administrative Law & Regulatory Practice. Telephone (202) 662-1690, or via email at *anne.kiefer@americanbar.org.*

August 21—FTC Commissioner **Julie Brill** will make a presentation at the Technology Policy Institute's Aspen Forum on "Multistakeholder Processes for Privacy: Regulation, Self-Regulation, or Markets?"It will be held at the St. Regis Hotel, in Aspen, Colo. For more information, contact Tom Lenard, President, Technology Policy Institute. Telephone (202) 828-4405, or via email at *tlenard@techpolicyinstitute.org.*

Aug. 21–FTC Commissioner **Edith Ramirez** will speak on a panel entitled, "Platform Competition on the Internet Implications for Antitrust," at the Technology Policy Institute's Aspen Forum. It will be held at the St. Regis Aspen Resort. For more information or to register, *http://www.techpolicyinstitute.org/news/show/23365.html.*

September 12–15—FTC Commissioner **J. Thomas Rosch** will speak at the Boston-based Mentor Group's conference on EU and US Legal and Economic Affairs in Paris, France.

Sept. 28—FTC Commissioner **Julie Brill** will attend the American Law Institute Information Privacy Law meeting that will be held in San Francisco. For more information, contact Megan Campbell, meeting assistant for the American Law Institute. Telephone (215) 243-1657, or via email at *mcampbell@ali.org.*

Oct. 3—FTC Commissioner **J. Thomas Rosch** will give the 2012 Lewis Bernstein Memorial Lecture at St. Johns University, Jamaica, NY.

Oct. 3—FTC Commissioner **J. Thomas Rosch** will give the 2012 Lewis Bernstein Memorial Lecture at St. Johns University, Jamaica, N.Y.

October 25–26—FTC Commissioner **J. Thomas Rosch** will speak at the 14th annual Sedona Antitrust Conference in Del Mar, CA.

Nov. 8—The American Bar Association will host its annual antitrust fall forum at the National Press Club, 539 14th St., NW, Washington, DC, 13th floor. It typically includes senior officials from the FTC and Justice Department, but the schedule has not yet been announced. **Ilene Knable Gotts** of Wachtell Lipton

Rosen & Katz is chairing the meeting; vice-chair is **Nikhil Shanbhag**, senior competition counsel at Google Inc. For more information, visit the website, *http://www.americanbar.org/calendar/2012/11/2012_antitrust_fallforum.html*.

Nov. 12-13—FTC Commissioner **J. Thomas Rosch** will speak at the 2012 Global Forum in Stockholm, Sweden.

Nov. 30–Dec. 1—The American Bar Association will host a conference highlighting development in India's Competitive Regime, to be held at the Taj Mahal Hotel in New Delhi, India. Judge **Douglas H. Ginsburg** of the US Court of Appeals for the D.C. Circuit will give the opening address. For more information, visit the website, *http://www.americanbar.org/calendar/2012/11/antitrust_in_asia.html*.

Dec. 5—FTC Commissioner **J. Thomas Rosch** will speak at the Arnall Golden Gregory and International Association of Privacy Professionals' conference on FTC activities, Washington, DC.

FTC:WATCH goes out on summer hiatus

Editor's note: FTC:WATCH goes on vacation for the month of August, when most governments in the Western Hemisphere leave the city to seek refuge from thwe heat. We will return, refreshed, to produce our next issue, on September 16, 2012.

Our advice: Stay cool till then.

EDITORS NOTE:

FTC:WATCH is open to publishing fresh or interesting perspectives on antitrust and consumer protection issues. For consideration of your views in an opinion piece, please contact publisher, Chris Amolsch, at chris@ftcwatch.com, or managing editor, Kirstin Downey, at kirstin@ftcwatch.com.