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Is LIBOR the biggest antitrust case in history?

By Kirstin Downey

The first shoe dropped last week in what may become the largest antitrust case in history.

On Wednesday, Barclays PLS, announced a $450 million settlement, including $160 million with the U.S. Justice Department, after admitting it was part of a conspiracy to rig interest rates affecting millions of consumers, home borrowers, pension funds and government agencies.

Barclays has admitted wrong-doing and accepted responsibility for its misconduct, the Justice Department said in a statement. About a dozen other financial institutions, including HSBC Holdings, UBS AG, and a number of other banks appear likely to be implicated.

According to the Barclay admission statements, some number of banks conspired to artificially set the benchmark rate used to calculate interest rates on loans. That system, known as the London Interbank Offered Rate, LIBOR, or Euro Interbank Offered Rate, or EURIBOR, was used by banks all over the world to set their own interest rates.

The Justice Department said its criminal investigation is ongoing and is being conducted jointly by the Department's Antitrust Division and the FBI's Washington DC field office. The Commodity Futures Trading Commission is also playing an important role.

Class-action and individual lawsuits, meanwhile, have been flying since reports of multi-agency investigations came to light in March 2011 as a result of regulatory filings. The city of Baltimore, Charles Schwab, and the New Britain firefighters' pension fund are among the plaintiffs making claims against banks they said injured them by manipulating interest rates to favor themselves.

There are now more than two dozen lawsuits, consolidated in New York's Southern District under Judge Naomi Reice Buchwald, with claims being made against Bank of America, Citibank NA, Credit Suisse Group AG, Deutsche Bank AG, JP Morgan Chase & Co., Lloyds Banking Group plc, Royal Bank of Scotland Group plc, the Norinchukin Bank, the Bank of Tokyo-Mitsubishi UFJ Ltd., and Societe Generale.

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The extent of the impact of the antitrust violations is unknowable at this time.

"Because mortgages, student loans, financial derivatives and other financial products rely on LIBOR and EURIBOR as reference rates, the manipulation of submissions used to calculate those rates can have significant negative effects on consumers and financial markets worldwide," said Assistant Attorney General Lanny A. Breuer in a statement.

Barclays has acknowledged that it participated in misrepresentations of interest rates to benefit deals they were conducting and during the midst of the 2008 financial crisis, to help banks appear more solvent than they actually were.

Documents released by the CFTC, also on Wednesday, reveal that traders working on derivatives desks in capital cities including New York, London and Tokyo, openly asked their colleagues who submitted rates to the central authorities to reduce or increase interest rates to make their own transactions more profitable. The CFTC provided many verbatim examples of these conversations, which took place by email and instant message, such as:

"Hi, Guys, We got a big position in 3m libor for the next 3 days," wrote a senior trader in New York to an employee whose job was to submit LIBOR rates to a central exchange. "Can we please keep the libor fixing at 5.39 for the next few days. It would really help. We do not want to fix any higher than that. Tks a lot."

And another: "Pls go for 5.36 Libor again tomorrow, very long and would be hurt by a higher setting…thanks," wrote another trader in New York, on Dec. 14, 2006.

The "submitters," according to the CFTC, frequently responded in the affirmative and agreed to make false representations about the interest rates being charged in the market. "These conversations were an open, common and pervasive practice" on the trading desks, the CFTC said, noting that traders would often shout across the trading desk to fellow traders to confirm that there were no conflicting requests before the false numbers were reported to the authorities who established the benchmark rates.

Barclays admitted that its traders coordinated with traders at other banks to set rates at certain levels regardless of market realities.

In the United Kingdom, the news of Barclay's activities has been met with fierce criticism. Under intense pressure, Barclay's Chairman Marcus Agius apologized for what had happened, calling it a "devastating blow" to the bank's reputation. He has stepped down from his post.

Who's next?

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Google pondering First Amendment defense

By Kirstin Downey

Google, Inc., is opening its kimono to reveal a likely defense against the possibility the FTC will accuse the internet giant of improperly using its search engine function to steer consumers to online advertisers that have financial ties to the Silicon Valley firm.

Neal Katyal, fomer acting solicitor general of the Justice Department and who now appears to be representing Google, said the internet company may use a First Amendment defense in the case, asserting that its manipulation of its search engine reflects editorial discretion, and is therefore protected corporate speech. Katyal, who was speaking at an American Antitrust Institute conference, is now a partner at Hogan Lovells.

The FTC does not discuss cases under investigation, but many published reports have indicated that a probe is underway.

Katyal's opinion carries particular weight because he argued for the US government in a June 2011 case where the Supreme Court voted 6-3 to overturn a Vermont law that had banned pharmacies and data-mining companies from obtaining doctors' prescription records to market drugs to them, saying that it impinged on the First Amendment rights of drug companies to engage in commercial speech unimpeded. Justice Anthony M. Kennedy wrote the opinion, joined by Justice John Roberts, Antonin Scalia, Clarence Thomas, Samuel Alito and Sonia Sotomayor. Justices Stephen Breyer, Ruth Bader Ginsberg and Elena Kagan dissented.

That case followed the 2010 opinion in the Citizens United case, where the Supreme Court ruled that the First Amendment prohibits the government from restricting independent political expenditures by corporations as violations of their First Amendment rights.

Other companies are taking a similar tack. A Georgia credit-reporting company is alleging the Fair Credit Reporting Act's impositions of time limits on revealing harmful information about the subjects of its credit searches outside the statutory period impinge on its First Amendment right to report truthful information.

Katyal, who argued the Vermont pharmaceuticals case, *Sorrel vs IMS Health*, said that corporations have the upper hand on this issue now. “The government has lost most of these speech cases,” he said.

Google appears to be paving the way for its own use of this approach. In April, Google released a study it had commissioned, authored by Eugene Volokh, a Russian-born professor of law at the University of California at Los Angeles, which discussed and defended Google’s First Amendment rights to protected speech, including the ways that search engines search and select information. In his article, Volokh compared Google’s decisions on how to place search results to a newspaper editor’s role in deciding which news stories are most worthy of a reader’s attention, placing them higher on the page or in a more prominent location.

This approach to the case is already stirring some controversy.

Former FTC official Timothy Wu, an internet privacy expert who recently returned to his job at Columbia University, wrote an opinion piece in the New York Times on June 19 suggesting that such an approach would give computers the same rights as human speakers.

“Consider that Google has attracted attention from both antitrust and consumer protection officials after accusations that it has used its dominance in search to hinder competitors and in some instances has not made clear the line between advertisement and results,” Wu wrote. “Consider that the “decisions” made by Facebook’s computers may involve widely sharing your private information; or that the recommendations made by online markets like Amazon could one day serve as a means for disadvantaging competing publishers. Ordinarily, such practices could violate laws meant to protect consumers. But if we call computerized decisions “speech,” the judiciary must consider these laws as potential censorship, making the First Amendment, for these companies, a formidable anti-regulatory tool.”

Several other attorneys at the AAI conference responded to Katyal’s comments about Google’s possible strategy with some disdain.

Kurt Wimmer, a partner at Covington & Burling who was formerly general counsel for the news media company Gannett Co., Inc, said First Amendment rights are not what he called a “trump card” on legal issues.

“The First Amendment has never been held to immunize against antitrust laws,” he said.

Silicon Valley attorney Gary L. Reback, who has represented some clients who have complained that Google’s search engine function puts them at a competitive disadvantage, said that many people would be offended by Google using a First Amendment defense in this case.

He showed the crowd, via powerpoint, a recent Dilbert cartoon that he said captured the feelings about the issue on the West Coast. It depicted a business executive discussing how a new regulation is going to cut into the company’s profits, and deciding to put out a press release saying the law will infringe on the company’s First Amendment rights to free speech. In the final panel, employees acknowledge the effort will make them look like, according to Dilbert, “selfish liars.”

“This is not just the way I feel,” Reback told participants. “There is a pervasive sense that this argument is not about the First Amendment but about market position.”

But other participants said the issue may reflect a fundamental and changing attitude within the courts. Katyal said he has witnessed that shift in attitude himself. He emphasized that opinions are being given enhanced First Amendment protections.

“This court is specifically worried about the government picking winners and losers in the speech market,” he said.

REFERENCE:

http://www.nytimes.com/2012/06/20/opinion/free-speech-for-computers.html

Behavioral economics gets top-level consideration

Groups on both sides of the Atlantic took another look this month at new research on behavioral economics and its implications for antitrust enforcement and consumer protection.

On June 13 and 14, the Competition Committee of Organisation for Economic Cooperation and Development held a hearing in Paris to hear discussion by Professors Xavier Gabaix of New York University, Steffen Huck of University College London, and Maurice Stucke of the University of Tennessee. They led the discussion and fielded questions from EU antitrust and consumer protection officials.

OECD officials said that 48 countries were represented at the hearing. Among the participants were Frederic Jenny, chairman of the OECD Competition Commission, and Jon Leibowitz, FTC chairman. They spoke in a roundtable discussion, without making prepared speeches, and agency spokesmen said no transcripts were available.

Behavioral economics questions the key premise of neoclassical economic theory, which assumes that firms are profit maximizers and that consumers make informed and rational choices when they buy goods and services. Neoclassical theory posits that interventions into the market are likely to do more harm than good by creating unintended consequences.

Stucke's research, however, suggests that consumers will simply accept a second-rate product if it is the default setting and the path of least resistance, and will trustingly believe that the company from whom they have made the purchase is acting in their best interest. Xavier Gabaix's research indicates that some successful businesses prosper because they can rely on the naivete of ill-informed customers and frequently hide information that would allow buyers to make informed decisions. Huck's work suggests that business executives behave irrationally as well, sometimes in ways that injure their own companies. Group dynamics can encourage faulty decision-making and poorly conceived compensation plans can skew behavior, he has written.

This research, by these academics and many others, suggests that more active intervention into markets and consumer protection may be needed to prevent outcomes that can cause real and long-lasting injury to consumers and communities.

Stucke told *FTC:WATCH* that it was a lively discussion with many good questions posed by the government officials.

"This was the first time the implications of behavioral economics and competition policy were brought to so many competition authorities in one setting," Stucke said. He called it a "great opportunity" to discuss the issues with the heads of so many agencies.

But the topic remains highly controversial. Stucke also made a presentation on behavioral economics at a gathering of the American Antitrust Institute's annual conference last week in Washington. Facing some tough questions from the crowd, Stucke said that behavioral economics complements conventional economic theory but does not displace it.

Some markets are more economically rational than others. "Behavioral economics is not going to apply to every antitrust (case)," Stucke said. But he noted that some of the research has big implications for jurisprudence. A study of judges in Germany, for example, found that in a laboratory setting they would impose longer sentences on criminals if they had been exposed to higher numbers on a roulette wheel rather than lower ones. In other words, judges, too, are highly suggestible.

Stephen Ross, a law professor at Pennsylvania State University who formerly served as an attorney for the FTC and Justice Department, said these new redevelopments were unsettling and problematic for antitrust theory. "I am getting seasick here in a sea of doubt," Ross told the AAI group. "If we're moving away from the efficiency (model), what's my Dramamine here?"

An OECD announcement about the hearing in Paris called the discussion "avante garde." An OECD spokesman said he would have no further comment about the discussion but that a report would be prepared on it in the future.

Supreme Court to hear Georgia hospital case

The Supreme Court has granted cert in an FTC case that sought to stop a Georgia hospital from buying its only major competitor and that questioned the limits of the "state action immunity" in blocking antitrust enforcement.

"We are pleased that the Supreme Court will consider the Phoebe Putney matter in the coming term," said FTC Chairman Jon Leibowitz in a statement. "This case is important to consumers, who benefit from a competitive health care marketplace. It also may provide crucial guidance on the boundaries of the state action doctrine."

The case involves the attempt by Phoebe Putney Health System, Inc., which operates a 443-bed hospital in Albany, Georgia, to buy nearby Palmyra Medical Center, a 248-bed hospital also located in Albany, for $198 million.

According to the FTC complaint seeking to block the acquisition, filed by the agency in April 2011, the merger would allow Phoebe Putney to control 100 percent of the hospital beds in Dougherty County, Georgia, with the next closest hospitals located about 40 miles away. Over the years, according to the FTC, competition between the two hospitals allowed health insurers and consumer to obtain better prices and more choices for health-care services in the area.

Phoebe Putney executives have acknowledged they sought to reduce competition between Phoebe Putney and Palmyra by buying Palmyra, according to the FTC complaint.

The FTC complaint alleged that Phoebe Putney sought to avoid antitrust scrutiny by federal regulators by sheltering the transaction behind the "state-action" immunity granted to local government officials on antitrust issues. They alleged that the stratagem used by the hospital was arranging that a local government entity, the Hospital Authority of Albany-Dougherty County, would be the putative entity purchasing Palmyra, using Phoebe Putney's money, and then transferring control of it to Phoebe Putney.

Both the District Court that heard the case and the 11th Circuit Court of Appeals ruled that the merger could proceed because the Hospital Authority, and by extension, Phoebe Putney Health System, were shielded under state-action immunity, because acquisitions like this one must have been intended by the Georgia legislature when it established the hospital authority system in 1941.

This case represents a rare appearance for the FTC before the High Court. In the last 25 years, the Supreme Court has granted cert in only a handful of FTC cases, including Indiana Federation of Dentists in 1986, Ticor Title in 1992 and a case against the California Dental Association in 1999.

At a conference in May on antitrust issues in the health care field, FTC Chairman Leibowitz was especially adamant that the 11th Circuit Court of Appeals had been dead wrong in ruling against his agency's challenge to the merger of two Georgia hospitals. So now that the Supreme Court has agreed to hear the case, it is a fair guess that top honchos at the agency are hopeful that the appellate court's decision that caused them great consternation might be reversed.

Liebowitz was as blunt as a public official gets in decrying the 11th Circuit's decision. "I guess I would say reasonable people can disagree about whether a 4-3 hospital [merger] may substantially lessen competition. Some can even contend that a 3-2 merger may not be problematic under some circumstances….but there is rarely disagreement about any merger to monopoly—precisely what we confront in Albany, Ga."

Phoebe Putney decision, he continued, "as it stands today is just disturbingly, jarringly wrong. It is wrong on the law; it is wrong for patients, it is wrong for consumers, it is wrong for those of us in the business of trying to drive down health care costs and increase choice. Hopefully the Supreme Court will take cert and hopefully reverse this decision."

"The 11th Circuit acknowledged that on the facts alleged a merger would substantially lessen competition. We don't ask for certiorari everyday; if [the Supreme Court] takes it—it would be the first merger case in more than 30 years since General Dynamics. Here we agreed and the Solicitor General apparently agreed that the questions were so important that they warranted Supreme Court review."

The key legal issue before the High Court is not whether the merger would create a monopoly; everyone agrees that it does. The question instead revolves on whether the state can decide to accept and legitimize that degree of market power, and whether Georgia, in fact, did so in this case.

Executives at Phoebe Putney, of course, disagree and say the actions they are taking will promote good health care in the region in the future.

Sharp debate emerges over Universal, EMI merger

By Kirk Victor

There were few voices singing in harmony at a recent Senate hearing over a major proposed music industry merger.

Critics of Universal Music Group's proposed acquisition of EMI's recorded music division argued at a recent Senate Judiciary subcommittee hearing that the deal would create a goliath that would stifle competition, harm consumers and thwart innovation in new digital distribution platforms.

Proponents countered that the merger would provide needed investments to reinvigorate EMI, which was acquired by Citigroup following a default by its previous owner. They also contended that the merger would give artists more choices and add vibrancy to an already dynamic market.

But an underlying theme for much of the hearing centered on the contention advanced by supporters of the merger that the music industry has changed so dramatically as a result of the digital revolution that major record companies are no longer the gatekeepers that can use their power to limit consumer choice or make or break artists. Their contention essentially means that traditional antitrust analysis doesn't really make sense in this market—a point that was met with fierce put-downs by opponents of the merger, who dismissed the notion that record labels are no longer powerful.

Even as the debate heated up at the hearing, just a few blocks away, the Federal Trade Commission is examining the competitive fallout from the merger and whether it should challenge the deal. One source suggested that the real purpose of the hearing was to make the Judiciary Committee's Antitrust, Competition Policy and Consumer Rights Subcommittee appear relevant before the FTC makes its decision.

Meanwhile, amid speculation that the FTC is nearing a decision, opponents of the merger hope that the Justice Department's stepped-up aggressiveness in antitrust enforcement might influence the agency to follow suit. Gigi Sohn, president and chief executive officer of Public Knowledge, a public interest group, and a fierce critic of the merger, said in an interview with *FTC:WATCH*, that there is "a lot of competition between these agencies."

Sohn, who testified at the hearing, contended that Universal's move to acquire EMI was similar to the proposed deal between AT&T and T-Mobile, which was withdrawn after the Justice Department challenged it. She noted that had that merger been consummated, just as in the case of Universal-EMI, it would have reduced the number of major competitors from four to three and strengthened the power of an already-dominant firm.

The Justice Department also recently blocked H&R Block's effort to acquire TaxAct tax preparation software. As DOJ takes a more vigorous approach, Sohn speculated, "maybe the FTC wants to show its chops [too]."

But Lucien Grainge, chairman and CEO of Universal, dismissed the repeated analogy to the AT&T deal, saying that unlike those telecommunications companies, "we have no direct billing relationship with the consumer—the analogy just doesn't work….Everything we do is to create business. I keep using this word 'duty'—we have a duty to the people that we sign—whether they sign in 1970 or whether they sign tomorrow afternoon. They come to us to market, to sell, to create, to work with [them] on a global basis and that is what we do."

As the two sides anxiously await the FTC's decision, they duked it out at the hearing over the reach of antitrust enforcement to the music world. "Record companies can't control consumer pricing, don't control access to consumers, can't exert control over promotional platforms or the myriad of music discovery tools that fans use today, and they're having to compete with the vastly increased number of alternative paths to market for budding or even established stars," said Roger Faxon, chief executive of EMI Group in his prepared testimony. "If there ever were antitrust issues implicated by label consolidation, it seems to me that on this basis, they are not present today."

Opponents of the deal, including Edgar Bronfman Jr., director of Warner Music Group, who had for years pursued a merger with EMI with his company, vigorously took on the notion that the record labels are no longer powerful. "The truth is," he said, "virtually no artists have achieved long-term, meaningful commercial success without being signed to a record label. The role of record labels is still vital."

That both sides see the stakes as high was evident even before the hearing started, as a long line of what appeared to be industry representatives and lobbyists snaked outside the door, eager to snag a seat. Right out of the gate, concerns about industry consolidation were voiced by subcommittee chairman Herb Kohl, D-Wis., who looked to traditional antitrust analysis to raise questions about the merits of the merger.

"We need to closely examine whether reducing the number of major record companies to three—and giving Universal as much as 40 percent of the music business by some measures—will adversely affect competition," said the low-key lawmaker, who is in his last year in the Senate after deciding not to seek re-election.

"In almost all industries, reducing the number of competitors from four to three expands the market power of the remaining companies and increases the risk of higher prices," Kohl noted. "Why shouldn't these same principles apply to the music business?"

Faxon supplied one answer. The digital revolution has "empowered consumers," he said. "They are in control. If consumers cannot access what they when they want it, the way they want it through existing legal channels, then many consumers will do so through illegitimate channels."

Noting that independent artists can emerge without a major label backing them, Faxon insisted that "major record companies, if they ever were, are no longer the gatekeeper."

Some supporters of the merger also downplayed the significance of EMI as a strong competitor. Kohl asked Grainge why, if EMI was not a strong player, is Universal paying $1.9 billion to acquire it?

"Senator this is an incredibly changing landscape… competition within the industry is really quite extreme and vibrant and we are absolutely committed to giving the artists as many opportunities to get their music to as many consumers and fans as we can," Grainge responded. "We would be insane not to…make our music available through as many platforms, through as many retailers as possible."

Bronfman had a more succinct answer. "Three words from the movie All the President's Men [are] useful: 'Follow the money.' Universal is not only spending $1.9 billion to buy, but it has essentially agreed to pay that whether or not it receives regulatory approval...Clearly Universal wants this very, very badly—and the real reason is that it buys them a market-dominant position."

But when Bronfman was reminded that he had tried to buy EMI and was questioned about whether his real concern about this deal is that it could hurt Warner, he responded, "I certainly don't sit here and portray myself as a saint senator….This puts [Universal] in a market dominant position, a market dominant position that could not have been achieved by Warner. [The deal]…grants

Universal the sole right to determine what digital services live and what digital services die."

When Kohl asked Sohn about whether the merger creates the same risks as any merger that reduces competitors from 4-3 as the AT&T-T-Mobile deal would have, she insisted that "the parallels with the ATT-T-Mobile merger are really spot on. If this merger were to go through, the top three labels would have 90 percent of the market, the top two would have 70 percent of the market and you would have one super label [that would have the ability to dominate] digital distributional services."

When Sen. Richard Blumenthal, D-Ct., cut to the chase and asked directly whether ordinary antitrust analysis should apply to this deal, Grainge responded that "market share in this industry is far less relevant than maybe in any other industry….The artist makes the market—you are as good as your market depending on what choices you have made and what artists you have signed and how well you deliver them to the market and how well you created a demand for them."

But Sohn argued that "antitrust law addresses market power. It doesn't address market shares so much as the amount of power you can impose on a market. Because this new entity would control 42% of the market, it could impose its will on any digital music service. That's what's really, really important."

Amidst the clash of views of supporters and critics of the deal, Sen. Mike Lee, R-Utah, the ranking Republican on the subcommittee, sounded a cautionary note for those supporting government action to stop the deal. "Government regulators should be wary of intervening in rapidly changing and innovative markets. The music industry has experienced much turmoil as it has struggled to adjust to changes in technology, pricing models, and consumer expectations," Scott said. "As the music industry grapples with these and other challenges, government regulators ought to be careful not to prohibit reasonable business judgments and decisions that may lead to efficiencies and productive solutions."

REFERENCE:
http://www.judiciary.senate.gov/hearings/hearing.cfm?id=8731563568b2b734e43c5dc5028fe0d9

Critics charge movie tie-in hazardous for kids

By S. L. Mintz

What do movies with lines like "Poor animals, now you have to deal with me" and "Zebras can't drive, only people and penguins can drive" have to do with the pharmaceutical industry?

Far too much, say critics of a promotional tie in between Madagascar 3 and Claritin for children, an antihistamine with serious side effects if abused.

Charging an egregious breach of precedent that barred Hudson Pharmaceuticals from using Spider Man images in 1977 to sell vitamins to children, the Public Health Advocacy Institute at Northeastern University School of Law, is pressing the FTC to put a stop to Merck's marketing campaign. It filed the complaint in combination with 10 other health organizations.

"Marketing medicine directly to children at all, much less through entertainment tie-ins, is well beyond the pale and is not only inherently unfair, it is downright dangerous," said Mark Gottlieb, executive director of PHAI, in a press release.

Product promotions tied to the movie display customized Madagascar 3 packaging for their Grape Chewables and Grape Syrup products. A "Free Movie Ticket Offer" encourages Walgreens customers to buy Claritin and Claritin's Facebook page offers a free, downloadable Madagascar Inspired Circus Activity Guide and a Madagascar themed "Circus Stackers" game, accompanied by other traditional advertising means and social media programs.

"It is one thing to have a book or toy associated with a movie to extend the child's imaginative play," Internet "Movie Mom" and prominent shareholder activist Nell Minow told *FTC:WATCH*. "But it's another entirely when the movie's characters are used to sell junk food. It is especially troubling when the characters are used to further blur the line between medication and candy. I hope the FTC reminds Merck that drugs are not toys."

Compared to the relatively benign nature of vitamins, Claritin poses risks of overdose to children swayed by images they ordinarily associate with candy. And indeed Dreamworks has also cut deals with makers of candy and kid friendly foods, among them: Dole bananas, Airheads candy, Blue Bunny ice cream bars, General Mills (Betty Crocker label) fruit snacks, McDonald's Happy Meals, House Foods organic tofu, Lance sandwich crackers, and Sun-Maid raisin mini-packs.

"The use of the same licensed characters on fruit flavored OTC allergy medication, children's candy and children's gummy snacks creates a very real danger of product confusion that may induce children to over-consume Grape-flavored Children's Claritin allergy medicine," wrote Cara Wilking, the Institute's senior staff attorney.

Apprehension about a vitamin overdose pales next to consequences of much stronger drugs even if the number of fatalities is very small. The website Medscape reports that 3.6 percent of all antihistamine exposures in the U.S. in 2007 caused moderate to major toxicity and 69 cases, less than one case in ten thousand, ended in death. From 1990 to 2005, the Civil Aerospace Medical Institute tracked causes of pilot fatalities and blamed 50 deaths on antihistamines. Children gobbling antihistamines like candy could cause those statistics to swell, critics fear.

There's particular reason for concern about children, researchers have said. In 2008 the National Poison Data System reported that antihistamines were the eighth most frequently reported potentially toxic substance to which children younger than 5 years old are exposed, when they are too young to read cautionary labels. But televised ads are being scheduled to run on Nickelodeon and other venues aimed at children.

But Mary K. Engle, associate director for advertising practices at the FTC, told The New York Times that it is hasty to assume that the 1977 order applies to Claritin. The law defining unfair practice has changed, she said, and cartoon characters and action figures now adorn many brands of children's vitamins. She could not recall any recent investigations into marketing such supplements or drugs to children.

For its part, a Merck spokesman told *FTC:WATCH* that the company is not targeting children. "We advertise in appropriate venues to reach those parents of children who may benefit from the use of children's Claritin, not to the children themselves," Merck told *FTC:WATCH*.

New NAAG president to focus on privacy

By S.L. Mintz

Because the FTC often relies on states to prosecute consumer fraud, it works hand in glove with state attorneys general. Historically, incoming presidents of the National Association of Attorneys General single out an initiative for their one-year terms. This year, incoming president and Maryland Attorney General Doug Gansler has made "privacy in the digital age" a keynote for his tenure.

The virtual nature of Internet fraud straddles state and federal jurisdictions more than most crimes. Although gridlock in Washington means most initiatives must start at the state level, says Gansler, he welcomes FTC collaboration. "We've enjoyed a very strong relationship as attorneys general with the FTC," AG Gansler told *FTC:WATCH*, emphasizing the capacity to work side by side in many actions.

The FTC has been keeping a close eye on privacy issues itself, and FTC Commissioner Julie Brill said she welcomes Gansler's appointment.

"I applaud Attorney General Gansler's decision to make privacy one of his top priorities as president of NAAG," Commissioner Brill told *FTC:WATCH*. She said the Maryland Attorney General "has a proven track record demonstrating his commitment to privacy issues, in particular when it comes to protecting children. His office was instrumental in the passage of several laws designed to protect children in the online space, including a law that helps prevent children from becoming victims of identity theft and one that broadens a Maryland state law designed to protect children and adults from harassment" in messaging, social media and other forms of electronic messaging, she said.

State and federal officials are grappling with online invasions of privacy that pose risks not contemplated by pre Internet laws aimed at consumer fraud, much less by a constitution enacted in the 18th Century. Consumers nowadays encounter criminals in all sorts of appealing guises, armed with personal information gathered from other online sources. Perpetrators that invade homes in Cincinnati or Albuquerque may operate from Kalamazoo or Timbuktu.

Many consumers are unaware of their vulnerability to potential threats, such as identity theft. Consumers willingly enter information into their computers, and that information is made available to various third parties. They collect and store that data, sometimes with expressed permission and sometimes without it.

"That data could include every website you visit and every search you've ever made," Gansler told *FTC:WATCH*. "The issue is, should you have the choice and the ability to easily protect that information and keep it to yourself?"

In Gansler's term as NAAG president, the Internet will close in on and might even exceed 5 percent of all U.S. economic activity, more than the federal government.

The heading of digital privacy comprises a welter of issues from online job scams, garden variety consumer fraud and child safety to perils of social networking which, by design, is supposed to invade privacy much of the time. "[F]ew individuals realize the extent to which they are being tracked by companies that create rich profiles of their web-browsing activities," the Privacy Rights Clearinghouse reports. "Tracking tools go beyond the cookies many of us routinely delete. Some companies deploy "Flash cookies" or other "super cookies" that are not only extremely difficult to delete but can also be used to reinstall cookies that a user has removed."

Because NAAG is non-partisan, Gansler sought to highlight an issue that cuts across party lines. "A focus of every attorney general — Republican and Democrat— is the collection of personalized information and its dissemination," Gansler says.

Gansler appears to command respect across many lines. "He seems to be a real leader in consumer protection," says Susan Grant, director of consumer protection at the Consumer Federation of America. Grant is attuned to many issues but expresses great concern when people are profiled and assumptions are made about them. Specific laws governing credit agencies are on the books, she says, but they'll need to catch up with new data sources and new data brokers whose activities may not be covered.

Officials who have worked with Gansler in the past say he is politically ambitious, and a furious multi-tasker who will bring new energy to state efforts to rein in privacy violations. They called him a "very quick study," though somewhat distractable. "He fits right in with the go-getters," one official said, suggesting Gansler will be effective in promoting his agenda among his attorney general colleagues.

Becoming president of NAAG "will give him the bully pulpit" on issues of national concern, one colleague told *FTC:WATCH*.

Jeffrey Chester at the Center for Digital Democracy notes a shift in the ways data is being tracked may give states more say over digital commerce.

"Today, much of digital data collection is precisely honed to reach an individual where they live and work–in their neighborhoods, when they shop, bank or go to the doctor or pharmacy," Chester told *FTC:WATCH*. "The rise of mobile and location data targeting make privacy an issue that is hometown in nature."

Gansler's new role may permit a coalition of states to forge ahead on privacy initiatives regardless of the politics in Washington, DC, some observers speculated.

FTC BRIEFS

MARS invades

After countless alien invasion movies, who'd have expected a white knight for strapped homeowners to arrive from MARS? But indeed, the Mortgage Assistance Relief Services Rule has empowered the FTC to clamp down on companies that allegedly prey on consumers.

In June, the FTC persuaded California courts to close down firms that charged thousands of dollars to find errors in mortgage documentation. The court stopped allegedly illegal conduct, froze assets and appointed a receiver to run firms while the FTC continues to investigate.

MARS statutes expressly bar mortgage relief advisors from charging up front fees; concealing total cost and a consumer's right to terminate services any time; and misrepresenting services, among other rules.

Firms in question nevertheless promised that unearthed errors would stop foreclosures and furnish homeowners with leverage to secure better deals. Instead, the FTC called these claims "bogus." In what the agency labels the latest foreclosure scam, "rescue" professionals "use half-truths and outright lies that promise relief to homeowners in distress." The California case charged that Consumer Advocates Group Experts, LLC, in Los Angeles, company owner Ryan Zimmerman and several other companies in his control collected from $1,995 to $2,590 to conduct "forensic audits" that amounted to fraud.

Supposed customer testimonials assured consumers that interventions by Consumer Advocates Group caused lenders to "suddenly get religion" and become "much more cooperative in negotiating." According to court documents, these ads virtually guaranteed favorable resolutions: "They did a wonderful job and saved my home. I received a 3.25% 30 yr fixed ... Wells Fargo kept telling me that my loan mod was denied. CAG put together my package in 30 days and got me APPROVED in under 90 days!"

News of this court action in "War on the Home Front: News, Research & Insights for American Homeowners, Patriots & Constitutional Conservatives" drew dozens of comments from consumers who claimed that mortgage relief agents bilked them. However, none complained about the FTC budget.

REFERENCE:

http://www.ftc.gov/opa/2012/06/consumeradvocate.shtm

Fuel vehicle labeling

To ease tempests over alternative fuel tanks, the FTC has proposed to consolidate labels that inform consumers shopping for new alternative fuel vehicles. Currently, separate labels convey standards governed by the FTC, the Environmental Protection Agency and the National Highway Traffic Safety Administration. An amendment would merge the FTC labels with fuel economy labels required by the EPA and the NHTSA. It also would eliminate FTC labels on used alternative fuel vehicles.

The FTC label currently discloses estimated mileage on a charge or tank of fuel, general factors to consider before buying an alternative fuel vehicle, and toll-free numbers and websites for information from multiple federal agencies. In addition to guidance from the EPA and the NHTSA this may be too much of a good thing. Labels aimed at helping consumer choose vehicles instead cloud measures of fuel economy and sources of definitive information.

In June 2011, the Commission sought comments on the costs and benefits of merging labels on alternative fuel vehicles. Of nine responses, seven favored a merger with EPA fuel economy labels. No comments opposed consolidation but two lent support to existing FTC requirements for labeling non-liquid alternative fuels.

Separately, the Commission invited comments on labeling for vehicles powered by hydrogen fuel cells, advance lean burn and hybrid vehicles. The Alliance of Automobile Manufacturers cited potential consumer confusion stemming from the same or similar information on labels with different formats. General Motors claimed that overlapping labels have led to inconsistencies between fuel efficiency on FTC and EPA labels. The Alliance reiterated industry support for one label to replace all the others. "We are hoping that the final results is one national vehicle labeling program, rather than multiple state and federal labels," says Gloria Bergquist, Vice President, Public Affairs for the Alliance of Automobile Manufacturers. "We are pleased that it appears the FTC supports integrating its alternative fuel labeling with fuel economy labels on vehicles today."

Security breaches at Wyndham

On June 26, the FTC blasted Wyndham Worldwide for failing to protect customers from payment card fraud. It brought charges in the United States District Court for the District of Arizona, alleging repeated breaches in security procedures that exposed millions of dollars to fraud, compromised thousands of customers and led to the export of payment card account information to an Internet domain address registered in Russia.

Charges against Wyndham highlighted alleged unfair and deceptive misrepresentation of security safeguards at Wyndham. By a vote of 5 to 0, Commissioners authorized staff to initiate proceedings under the FTC Act that bars unfair or deceptive acts or practices in or affecting commerce, with Commissioner J. Thomas Rosch dissenting on one of the counts.

A standard disclaimer at the end of the release alerts readers that complaints are not findings or rulings that a defendant has actually violated the law, only the Commission "has reason to believe" that a violation is occurring or has occurred. "We would not make allegations unless we were prepared to prove them in court," an FTC spokesperson told *FTC:WATCH*.

A spokesman for Wyndham says that the company has cooperated fully with FTC investigations of reported data breaches from 2008 to 2010, and blames cyber criminals who "accessed a limited amount of customer information" at some Wyndham properties. The company intends to defend against FTC charges that, in its view, lack merit.

Whatever the outcome for Wyndham, its problems underscore a wider security challenge for companies that do not own properties in their chains. Wyndham and its subsidiaries license the Wyndham name to approximately 90 independently owned hotels, under franchise and management agreements. The FTC may have its eye on parent companies, but not on every business where a lapse can occur. If a parent company cannot guarantee compliance at every location, that may furnish a reason to restrain promises of security that invite FTC scrutiny, but at an indeterminate cost in consumers' eyes.

Subsidiaries and franchisees do not always assign the same priority to security as the parent that furnishes security apparatus, a spokesman for the PCI Security Standards Council2 told *FTC:WATCH*. They'll install software without so much as changing passwords — the first thing every business ought to do. "The most frequently used password is 'password1'," he warns. "The bad guys can simply ping for systems with the same configuration and try default passwords. Once they are in they move on down the line to the next location, like a phone book."

REFERENCE: http://www.ftc.gov/opa/2012/06/wyndham.shtm; http://www.ftc.gov/ogc/stat1.shtm; https://www.pcisecuritystandards.org/

Sony music deal OK'd

Sony/ATV whistled a happy tune on June 29th when the Federal Trade Commission closed its non-public investigation of a proposed acquisition of EMI Music publishing from Citigroup — an unlikely home if ever there was one for the likes of recording artists like Bob Dylan, The Rolling Stones, Taylor Swift, Kanye West, Willie Nelson, Joni Mitchell, Lady Gaga and Jay-Z, among other luminaries. Then too there's the late Michael Jackson, whose estate shares with Sony the ownership of Sony/ATV.

The scope of music titles now under one roof sounds almost breathtaking. EMI Music Publishing owns over 1.3 million copyrights, including the greatest hits of Motown, classic film and television scores and timeless standards, and Sony/ATV Music Publishing owns more than 750,000 copyrights, featuring the Beatles, current superstars and the legendary Jerry Leiber and Mike Stoller catalog of songwriting hits like "Jailhouse Rock," "Stand by Me," and "On Broadway."

While allowing the merger to go forward, the FTC left the door ajar in case new evidence of anti competitiveness comes to light. Letters to counsels for Sony/ATV, EMI and Citigroup warned them not to construe an end to the investigation as a determination that a violation may not have occurred, just a pending investigation didn't mean that a violation had occurred. The Commission always reserves the right to take further action if the public interest mandates it.

REFERENCES:

http://www.ftc.gov/opa/2012/06/sonyemi.shtm (FTC press release)

http://www.sony.com/SCA/press/120629.shtml (Sony press release)

Video games

Bright lights and sharp images notwithstanding, the Internet is a dark neighborhood where kids spend inordinate amounts of time on consoles, tablets and mobile devices.

For parents apprehensive about video games, the FTC offers new and comprehensive guidance on means to regain the upper hand.

In addition to consumer-friendly advice about computer security and dating scams, OnguardOnline.gov now furnishes information that can help parents navigate a thicket of games that range from innocuous to emotionally disturbing — even scarring. Worse, some invite children to interact with strangers. The new FTC pages give parents a lowdown on controls that can curtail access to inappropriate games and unauthorized shopping. It posts detailed descriptions of game content and, for online enabled games, risks that game ratings don't include, including how to keep kids safe from cyberbullying.

REFERENCES:

http://onguardonline.gov/topics/protect-kids-online

DVD scams

Sixteen months after collecting more than $3 million in penalties from operators of a DVD vending machine scam, the FTC has mailed 454 refund checks totaling more than $2.9 million — nearly $8,600 per check, on average. The case was part of "Project Biz Opp Flop," an FTC law enforcement sweep aimed at prosecuting business opportunity scams.

Filed in 2005 in the U.S. District Court for the Southern District of Florida, the suit named ten defendants. The FTC alleged that they tricked investors into paying $28,000 to $37,500 for video rental vending machines with the expectation they could earn between $60,000 and $80,000 a year, or recoup their initial investment in six to 14 months. The FTC's case in Florida stood still for three years while the Department of Justice pursued parallel criminal proceedings.

The Court entered a permanent injunction against one defendant, approved settlements with five defendants, and entered default judgments against three other defendants. Litigation continues against the estate of the tenth defendant, who died in 2009.

REFERENCES:

http://www.ftc.gov/opa/2012/06/aedrefund.shtm

JUSTICE BRIEFS

Charcoal bid-rigging

In response to a one-count felony charge filed by the Justice Department, the owner of a southern California-based mesquite charcoal distributor pleaded guilty for participating in a customer allocation and bid-rigging conspiracy. William W. Lord, the owner of Carpinteria, California-based Chef's Choice Mesquite Charcoal, had conspired with competitors to refrain from competing for each other's customers and to submit noncompetitive bids for the sale of mesquite charcoal, according to the charge filed by the Justice Department in federal district court in San Francisco.

Lord, under the terms of the plea agreement, has agreed to cooperate with the department's ongoing investigation.

"Today's charge demonstrates the Antitrust Division's commitment to prosecute bid-rigging conspiracies that involve products used in the everyday lives of consumers and businesses' daily operations," Joseph Wayland, the division's acting assistant attorney general, said in a statement.

Chef's Choice distributes and sells mesquite charcoal throughout the United States. Mesquite charcoal, typically used by restaurants and individuals to grill meat, fish and poultry, comes primarily from Mexico and is sold to U.S. distributors for eventual resale to restaurants and consumers.

The conspiracy began as early as January 2000 and lasted until about September 2010, according to the court documents. Lord and his competitors, a Los Angeles-area mesquite charcoal distributor and a San Francisco-area mesquite charcoal distributor, agreed not to compete for the sale of mesquite charcoal to each other's customers. Their goal was to avoid having to reduce mesquite charcoal prices in response to competition.

The conspiracy was conducted in several ways, including not submitting bids for the sale of mesquite charcoal to each other's customers; submitting bids that were intentionally not competitive to each other's customers; and working together to set the bid price and following through by submitting the bids to each other's customers.

Lord is charged with violating the Sherman Act, which carries a maximum penalty of 10 years in prison and a $1 million fine for individuals. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victim of the crime if either of those amounts is greater than the statutory maximum fine.

The plea stems from an ongoing investigation of the U.S. mesquite charcoal industry and is being conducted by the Justice Department's Chicago field office and the FBI's San Francisco office.

Fujikura price-fixing

Tokyo-based Fujikura Ltd. entered a guilty plea and agreed to pay a $20 million criminal fine for conspiring to fix prices for automotive wire harnesses and related products installed in U.S. cars. The plea, entered in federal court in the Eastern District of Michigan on June 21, covered the period from January 2006 until February 2010, during which the company employed more than 5,000 individuals and sold wire harnesses and related products in the U.S. and elsewhere.

In that four-year period, Fujikura conspired, according to the plea agreement, to rig bids and fix and maintain the prices of the wire harnesses, which are electrical distribution systems that direct and control automobiles' electrical components, wiring and circuit boards.

As set out in the plea agreement, Fujikura conspired with other firms that also manufacture and sell the wire harnesses to automobile manufacturers in the United States. They engaged in discussions and attended meetings to hammer out details, coordinate prices and control the supply of the wire harnesses and related products.

While these conspiratorial conversations occurred in Japan, the harnesses and related products were sold by Fujikura's subsidiary, which is located in the Eastern District of Michigan. Fujikura acknowledged in the plea agreement that it could face fines of $100 million for violating the Sherman Act or twice the pecuniary gains realized by the co-conspirators from the crime or twice the losses suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

Before the court imposes sentence, the Justice Department will advise the judge of the "fact, manner and extent" of defendant's cooperation and their commitment to prospective cooperation in ongoing investigations and prosecutions. If the Court does not accept the recommended sentence, then Fujikura is free to withdraw its guilty plea. Similarly, if Fujikura does not live up to its agreement to cooperate with the Justice Department, then the Justice Department may prosecute the company for the offenses that led to the plea agreement.

In April, after Fujikura agreed to the plea agreement but before it was filed in federal court, top Justice officials made clear that the antitrust division would bring bread-and-butter cases like this one that affect folks in their daily lives.

"The division has focused its enforcement efforts in industries essential to consumers' everyday lives, and we, along with our law enforcement partners, have been successful in bringing to justice companies and executives engaged in illegal price fixing conspiracies," Sharis A. Pozen, the then-acting assistant attorney general for the antitrust division, said in a statement. "The Antitrust Division will remain vigilant in its efforts to detect and prosecute anticompetitive conduct in this important industry, which affects virtually every American consumer."

REFERENCE:

http://www.justice.gov/atr/cases/f284500/284581.pdf

Mortgage fraud summits

The Justice Department recently held summits in California, Florida and Nevada, to help protect homeowners in areas that have been hit hardest by scammers engaged in mortgage fraud. These sessions, part of President Obama's Financial Fraud Enforcement Task Force's Mortgage Fraud Working Group, give homeowners the chance to hear and learn about common mortgage fraud schemes and how to avoid becoming a victim.

In a blog post on the Justice Blog, Ben Wagner, U.S. Attorney for the Eastern District of California, and co-chair of the task force, wrote that the criminal schemes used to perpetuate mortgage fraud have changed as conditions in the housing market have changed. "Five years ago, when mortgage lenders were eager to make loans, loan origination schemes aimed at defrauding lenders were widespread," he wrote. "More recently, with the dramatic increase in foreclosure rates in many parts of the country, there has been an increase [in the number] of schemes targeting desperate homeowners, including foreclosure rescue fraud schemes and loan modification scams."

The department has found that struggling homeowners can become targets of fraudsters who pose as foreclosure rescue or loan modification experts. Typically, the con artists claim they can help save their home from foreclosure for an upfront fee, even though advance fees are generally prohibited by law, and loan counseling and modification services are generally provided free from the lender or from a Housing and Urban Development counseling center.

The scams take many forms, including asking homeowners to transfer title to their property, to make mortgage payments to someone other than the lender, or to stop making mortgage payments altogether. Other scammers use false filings in the U.S. Bankruptcy Courts to temporarily stop the foreclosure process, while still others create websites that contain false government logos and bold promises. The fraudsters take money and the remaining equity in the house and flee, leaving the homeowner penniless and more likely to be foreclosed.

Given the growing incidents of such fraud, members of the task force have stepped up efforts to prevent and prosecute the schemers. The Treasury Department's Financial Crimes Enforcement Network (FinCEN), a member of the task force, recently issued its first quarter 2012 update that details the increase in this fraud. It confirmed that California, Florida and Nevada lead the country in the number of mortgage fraud suspicious activity report subjects per person. Financial institutions report suspected illegal activity to FinCEN, which collects, analyzes and distributes the information to state, federal and local law enforcement investigators.

The Justice Department has stepped up its prosecutions of mortgage fraud cases as shown by a 92 percent increase in such cases since fiscal year 2009. In fiscal years 2010 and 2011, alone, the department indicted more than 2,100 individuals for mortgage-fraud related crimes.

That prompted the outreach efforts to communities to educate homeowners by holding summits that offer advice about how to identify, avoid and report these criminal schemes. Federal and state law enforcement and regulatory officials share information about the latest trends in mortgage fraud scams that target homeowners, discuss effective investigative strategies and seek to learn more about how best to coordinate enforcement efforts across agency and jurisdictional lines for maximum impact.

Michael Bresnick, the task force's executive director, observed: "It's more important than ever that we arm homeowners with the information they need to recognize the predators up front and empower them to avoid falling victim to these devastating scams. That's why the task force is holding these summits in states hit hardest by the foreclosure crisis."

CALENDAR

June 19—Commissioner **Julie Brill** will participate in the Practicing Law Institute Privacy Summit on a panel entitled "Privacy and Security Enforcement Agenda: The Regulator's Perspective," from 2:45 to3:45 pm in New York City. For more information, contact **Lisa Sotto** at Hunton & Williams LLP, telephone 212- 309-1223 or by email at *lsotto@huntion.com*.

June 22—FTC Commissioner **J. Thomas Rosch** will speak at the Annual Chatham house Competition Policy Conference in London, England.

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

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

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

EDITORS NOTE:

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