

ABA Antitrust Section – Committee on Legislation
July Report
As of July 31, 2008

Communications

On May 15th, the Senate passed a joint resolution (**S.J. Res. 28**) disapproving the FCC's new ownership rule that would allow in some cases, media ownership of newspapers and broadcasters in the same markets. The resolution was sponsored by Sen. Byron Dorgan and was reported out of the Senate Commerce, Science and Transportation Committee unanimously in April. The FCC rule was created in December of 2007 and limited the ban on media cross-ownership in the 20 largest national markets. The House has yet to consider the resolution and the Bush Administration threatened to veto it in a statement made on the same day as its passage in the Senate.

On July, 15th the Senate Judiciary Committee's Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing regarding Yahoo's proposed advertising deal with Google. The panel included David Drummond, Senior vice president for Corporate Development and Chief Legal Officer for Google, Michael Callahan, General Counsel for Yahoo! as well as Brad Smith, Senior Vice President and General Counsel of Microsoft. The proposed deal would have Yahoo replacing some of its text ads which appear on sites for search results with more valuable ads from Google. The deal could improve Yahoo's cash flow by \$250 million to \$450 million in the first year alone. Microsoft executives have complained that this deal would be anticompetitive and Smith claimed in the hearing that Yahoo has admitted this fact during meetings conducted with Microsoft. Yahoo has asserted that the deal would allow them to continue to be a player in the search market and would be more competitive than the previously explored Microsoft purchase of Yahoo. The current Yahoo-Google deal is being reviewed by the Department of Justice and by attorneys general in several states.

Credit Card Interchange Fees

On July 17th, the House Judiciary committee approved the **Credit Card Fair Fee Act of 2008 (H.R. 5546)**. The bill would create an antitrust exemption for retailers and other merchants allowing them to collectively negotiate for lower interchange fees with banks. A major provision of the bill requiring a three-judge panel to preside over fee rate disputes was removed during the committee's mark-up session. Introduced by House Judiciary Committee Chairman John Conyers on March 6th, the bill received bipartisan support in a close vote, 19-16. The bill is not expected to be voted on by the full House of Representatives until after the November elections.

As similar measure was introduced by Rep. Peter Welch on June 11th. Entitled the **Credit Card Interchange Fees Act (H.R. 6248)**, this bill would require credit card companies to disclose all interchange rates as well as give the Federal Trade Commission and the Federal Reserve Board the ability to review and possibly reform the

rates and terms. The FTC and Fed would be authorized to create any regulations necessary to prevent interchange rates from becoming anticompetitive. It would also prohibit any additional fees on merchants for rewards cards and allow merchants to give cash discounts to customers. The bill has been referred to the House Financial Services Committee.

Credit

On May 20th the House Financial Services Committee held a hearing regarding the proposed **Credit Monitoring Clarification Act (H.R. 2885)**. The act provides relief for legitimated credit monitoring services by giving them a CROA (Credit Repair Organizations Act of 1996) activity-based exemption. The purpose of CROA is to prevent unscrupulous credit repair organizations from deceiving consumers by false advertising and misleading claims. The broad language of CROA has led some legitimate credit repair groups and credit monitoring services developed after CROA's passage to face lawsuits for violations of the law. Witnesses and representatives in the hearing agreed that CROA needs to have some significant changes and that further discussion on the bill is necessary.

Energy

On May 20th the House passed the so-called "NOPEC" bill or **No Oil Producing and Exporting Cartels Act of 2008 (H.R. 6074)** by the margin of 324-84, despite a presidential veto threat. The bill was introduced on May 15th under the title the **Gas Price Relief for Consumers Act of 2008**. The bill would amend the Sherman Act to make oil-producing and exporting cartels illegal and hopes to prevent the accumulation and exercise of market power by oil companies. It would also create a new Justice Department task force assigned to examine anticompetitive market practices in the petroleum industry. The bill is a follow-up to the failed NOPEC Act of 2007 which was nearly passed as part of the House's omnibus energy bill (the Renewable Fuels, Consumer Protection, and Energy Efficiency Act of 2007, H.R. 6) signed into law in December. The bill has been placed on the Senate calendar awaiting further consideration.

Senate Judiciary Committee hearing on May 21 regarding status of oil sector – Sen. Kohl discussed his NOPEC bill – S. 879

House Judiciary Committee's Task Force on Competition Policy and Antitrust Laws – question oil execs. on May 22nd.

Enforcement

On April 8, Sen. Daniel K. Inouye, chairman of the Senate Commerce, Science and Transportation Committee and Sen. Byron Dorgan, the chair of the committee's Interstate Commerce, Trade and Tourism Subcommittee, introduced the **Federal Trade Commission Reauthorization Act of 2008 (S. 2831)**. The bill would extend the FTC's

power and streamline its rule making processes. Specifically, the FTC would be given the ability to litigate any civil action involving a violation of the FTC Act, as well as recover civil penalties for any violation of the FTC Act. Further, the bill would allow the FTC to request the appointment of administrative law judges with antitrust, economic, or trade regulation experience. Provisions in the bill would allow the FTC to set aside its current rule-making process in favor of the procedures contained in Section 533 of the Administrative Procedures Act. Rules changes regarding consumer protection against sub-prime lending and nontraditional mortgage loans are specifically mentioned in the bill. The telecommunications common carrier exemption present in the FTC Act would be repealed by the bill, but the FCC's jurisdiction would not be affected. The FTC's exemptions for certain non-profit organizations would also be repealed. Finally, state attorneys general would be allowed to bring cases under the FTC Act in regards to violations of sub-prime mortgage lending or nontraditional mortgage loan rules promulgated by the FTC.

Insurance

On May 21st the House Financial Service's Oversight and Investigations Subcommittee held a hearing focused on two bills regarding the use of credit scores as factors used in determining insurance rates offered to consumers. The first is the **Nondiscriminatory Use of Consumer Reports and Consumer Information Act of 2008 (H.R. 5633)** which amends the Fair Credit Reporting Act to prohibit a consumer reporting agency from furnishing to any insurance provider information which may result lead the provider to discriminate on the basis of racial or ethnic. The bill was originally introduced on March 13th by Rep. Luis V. Gutierrez. The second bill **H.R. 6062** would prohibit insurance providers from using consumer reports or credit scores to determine insurance rates. The measure was introduced on May 15th.

Practice

On July 9th, the Department of Justice released its new proposed policy changes regarding forcing corporations to waive the attorney-client privilege in criminal proceedings. The new policy would instruct federal prosecutors to no longer consider the waiver of confidentiality privileges in deciding whether to provide leniency when charging corporations with criminal conduct. Rather, prosecutors will now measure cooperation "by the extent to which a corporation discloses relevant facts and evidence." These changes were alluded to that same morning by Attorney General Michael Mukasey during the Senate Judiciary committee's oversight hearing on the Department of Justice.

The former policy received much criticism and several legislative measures offered this year and in 2007 sought to change the policy. The **Attorney-Client Privilege Protection Act of 2008 (S.3217)**, introduced by Sen. Arlen Specter on June 26th, was a revision of provisions in **S. 186** which was introduced in January 2007. These bills would bar federal prosecutors from demanding that corporations waive their attorney-client and work product privileges in return for leniency. The house passed a similar measure (**H.R. 3013**) in November.

The new policy was expressed in a letter from Deputy Attorney General Mark Filip to the Senate Judiciary Committee Chairman Patrick Leahy and to ranking minority member Arlen Specter. The letter also proposed other revisions that would be made in the weeks to come.

Privacy

On June 3rd, **Credit and Debit Card Receipt Clarification Act of 2007 (H.R. 4008)** was signed into law. The measure bars unharmed plaintiffs from joining claims action suits under the FACT Act; 15 U.S.C. § 1681c(g). The new law prevents claims made against merchants who properly truncate card numbers but not the card expiration dates on receipts. The bill had passed the Senate and House unanimously. The law applies retroactively to 2004 on claims of merchants failing to exclude credit card expiration dates on receipts.

On June 11, Sen. Mark Pryor introduced legislation to the Senate Commerce, Science and Transportation committee entitled the **Counter Spy Act (S. 1625)**. The bill would prohibit several particular spyware practices such as endless pop-up advertisement, key-stroke tracking and unauthorized file transfers. The legislation is intended to bolster the FTC's existing authority under FTC Act § 5 to go after criminals using spyware. The bill would make spyware programs and operations, which can transmit sensitive personal information to unauthorized computer users, punishable by civil penalties of up to \$3 million per violation, in addition to other remedies.