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Recent Legal and Regulatory Developments in Slotting Allowances and Category Management

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Slotting allowances and category management are increasingly the subject of antitrust litigation and antitrust enforcement actions. In the past two years, slotting allowances received greater attention before the Federal Trade Commission (FTC) and Canadian Competition Bureau (CCB), in terms of both distribution practices and mergers. Several cases are in litigation, and in Spring 2002, two important decisions were handed down that begin to illuminate the legal rules addressing slotting allowances. The controversy over slotting allowances appears as vibrant as it has for the past few years, with increasing attention likely in the future. What were the major recent developments involving slotting allowances and category management?

Litigation over Slotting and Category Management

Augusta News Co. v. Hudson News Co.

There has been relatively little precedent on the legal treatment of slotting allowances. A recent First Circuit decision, *Augusta News Co. v. Hudson News Co.* (2001), provides a modest contribution to the legal landscape in dismissing a challenge to the use of slotting fees in the wholesale distribution of magazines. Wholesale magazine distributors offered large up-front payments to chain store retailers—as much as $15,000 per store. The plaintiffs, who refused to pay these up-front fees because they thought they were illegal and unprofitable, rapidly lost chain store customers. They sued, arguing that these payments were slotting allowances and violated Section 1 of the Sherman Act (15 U.S.C.) and Section 2(c) of the Robinson–Patman Act (15 U.S.C. § 13[c]), prohibiting sham brokerage payments. Judge Boudin's opinion observed that slotting fees were not illegal brokerage payments, but "simply price reduction offers to buyers for the exclusive rights to supply a set of stores under multi-year contracts" (269 F.3d 41, 45 [1st Cir. 2001]). The court rejected the use of Section 2(c) on the ground that this provision should be narrowly applied to "sham brokerage arrangements" disguising unlawful discrimination. In doing so, the First Circuit followed the Sixth Circuit decision in *Zeller Corp. v. Federal Mogul Corp.* (1999). The court also rejected the Section 1 claim because these payments were quite typical and represented "competition at work." Claims of horizontal price fixing and horizontal market division were dismissed as devoid of evidentiary support.

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Unlawfully Inducing Slotting Allowances: The Power Buyer Claim

Some commentators have suggested that slotting allowances arise because certain power buyers are able to induce discriminatory allowances or payments from manufacturers, which ultimately harms smaller retailers. This is the most common complaint against slotting allowances. A group of more than 100 smaller automobile part retailers has taken the claim, alleging that eight major "category killer" merchants, including Wal-Mart, Sam's Club, AutoZone, and Pep Boys, induced illegal discounts, including slotting allowances, volume discounts, sham advertising, promotional payments, and other payments. The plaintiffs allege that these payments allowed the defendants to purchase auto parts at prices approximately 40% less than the plaintiffs and that these payments violated Sections 2(a), 2(c), and 2(f) of the Robinson–Patman Act. Section 2(f) prohibits illegal inducement of discriminatory prices. The plaintiffs' claims survived a motion to dismiss in *Coalition for a Level Playing Field, LLC v. AutoZone, Inc. Coalition* (2001).

R.J. Reynolds Tobacco Co. v. Philip Morris

In *R.J. Reynolds Tobacco Co. v. Philip Morris* (2002), the plaintiffs attacked Philip Morris's "Retail Leaders" program. Philip Morris has more than a 50% share of the cigarette market, and its Marlboro brand alone has more than 38% of the market. Under the Retail Leaders program, retailers received progressively larger retail display allowances in exchange for progressively greater commitments of display, advertising, and promotion space. In general, the program required retailers to give Philip Morris shelf space equal to its market share (but if Philip Morris's share exceeded 55%, its display space was capped at 90% of its market share). These agreements were terminable on 30 days notice. For most products, restrictions on shelf space may have a modest impact on competition because shelf space placement is only one means of communicating to the market. However, tobacco products are different because advertising is severely restricted. For tobacco products, there are severe legal restrictions on the ability of cigarette manufacturers to advertise and promote products through television, radio, billboards, and sports venues. As the district court in *R.J. Reynolds* observed, "Cigarette manufacturers are only left with three basic channels to communicate with adult smokers: print media, direct mail, and point of purchase" (p. 4) (see also *Conwood Co. v. United States Tobacco Co.* [2002] discussed subsequently).

In *R.J. Reynolds*, the district court began by observing that the Retail Leaders programs were not technically exclusive dealing arrangements, because they did not technically "preclude the display of competing products, [did] not control the prices at which those products are offered, and [did]

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not provide [Philip Morris] with more than its market share of product space" (p. 22). The program had several different levels of commitment (i.e., shelf space dedication), but even under the most restrictive level (which permitted only Philip Morris equity signage), the other manufacturers had other permanent or temporary in-store advertising or promotion opportunities. Moreover, there was evidence that the other manufacturers could effectively compete for shelf space through their own promotion programs. After the Retail Leaders program was implemented in 1999, R.J. Reynolds and Brown & Williamson responded with their own programs. These programs succeeded in achieving greater shelf space for these smaller rivals.

Much of the argument then focused on the terminability of the Retail Leaders program because, under the law, contracts terminable within a year typically are not considered to substantially foreclose competition. Here, the plaintiffs argued that the attractive Philip Morris "buy-down" program, which provided rebates to retailers for the sale of Marlboro, effectively coerced retailers into participating in the Retail Leaders program. However, the trial record showed that many retailers had ceased participating in the Retail Leaders program or had changed participation. The district court was unwilling to penalize Philip Morris because of the success of Marlboro.

This decision does not mean that any practice in this environment would be permissible. In 1999, the same district court enjoined a stricter version of Philip Morris's Retail Leaders program that prevented retailers from using the signage of rival tobacco products and restricted where rival products could be displayed. This version of the program effectively relegated rival brands to "out of sight" shelves, and the court decided that this control of rival shelf space could be anticompetitive (*R.J. Reynolds Tobacco Co. v. Philip Morris, Inc.* 1999).

Conwood Co. v. United States Tobacco Co.

The *Conwood* (2002) case involved the $1.7 billion U.S. moist snuff market, in which the United States Tobacco Company (USTC) had approximately a 77% market share and Conwood had a 13% market share. The USTC manufactures Skoal and Copenhagen, and Conwood manufactures Kodiak and Cougar. The USTC was a monopolist in this market for most of the twentieth century, but there was increasing entry in the 1970s and 1980s. In some respects, the market appeared to be competitively healthy because during the 1990s, there was an increase in both output and brands. However, there had been no new entry since 1990, and though the USTC's market share had decreased, the company had been able to increase its prices approximately 8% to 10% per year between 1979 and 1998. The USTC was the most profitable publicly traded company in the United States in 1999.

This case focused on the use of category management. Conwood sued claiming that USTC's use of category management and other practices excluded competition and were unlawful monopolization. After a lengthy trial, a jury in Paducah, Ky., deliberated for four hours and returned a verdict in favor of Conwood of $1.05 billion. The USTC was able to secure the role of category captain at the vast majority of retailers. Retailers had little time to focus on a small category such as moist snuff. Similar to *Reynolds*, because of restrictions on advertising, point-of-sale in-store advertising was critical to the moist snuff industry, and thus the role of the category captain in recommending shelf space allocation was important.

At trial, however, the testimony on whether traditional category management was exclusionary seemed relatively mixed. Although USTC attempted to secure exclusive racks at major retailers, it was able to achieve such agreements at less than 10% of the stores. Moreover, there was also testimony by major retailers, such as Wal-Mart and Kroger, that they carefully reviewed all plan-o-gram information and made their own independent analysis and decisions on which brands to carry. Furthermore, there was additional testimony that the USTC did not obtain all the product shelf facings it sought. Accordingly, Conwood was not challenging the USTC's role as category captain per se. Rather, it claimed that the USTC strayed far afield from that role by (1) removing competitors' racks from stores without the permission of store management and destroying these racks, (2) training its salespeople to take advantage of inattentive store clerks in an effort to destroy Conwood racks, (3) misusing its position of category manager by providing misleading information to retailers in an attempt to dupe them into believing that the USTC products were better sellers (and securing greater shelf space), and (4) entering into exclusive agreements with retailers in an effort to exclude rival products. Overall, this conduct appeared to be an effort to control and limit the number of price value products introduced into the stores and to control the merchandising and point-of-sale advertising by rivals in stores. Perhaps the most problematic activity was the unauthorized removal of Conwood racks by USTC salespeople. There was evidence that identified several cases in which the USTC had removed Conwood racks and that Conwood had to spend a significant amount of time and money to restore the racks. The USTC claimed that these incidents were merely anecdotal, and there was evidence of only a small handful of incidents. In addition, the USTC claimed that it only removed the racks when it received permission from the retailers.

The USTC argued that its category management program was ordinary "demand-enhancing" conduct and that the evidence provided at trial was merely anecdotal or no more than the acts of ordinary marketing services. It asserted that its category management practices enhanced demand for USTC products, helped ensure that retailers used shelf space efficiently, built consumer loyalty, and improved the presentation of the products. The USTC further argued that Conwood failed to demonstrate that it was foreclosed from the market and unable to compete for shelf space or that competition was injured, because during the relevant period, market output increased as competitors' market shares doubled and Conwood's sales and profits grew. In addition, 40 new brands were introduced (24 of which came from USTC competitors), and Conwood's market share increased. Under the antitrust laws, however, the court evaluates not simply whether the market appears to be behaving competitively, but whether the market could be behaving more competitively but for the restrictions placed on competition.

Each of these arguments was rejected by the District Court and the Court of Appeals. As to competitive impact, the appellate court credited expert testimony that, as a result

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of the exclusionary conduct, consumers paid higher prices and there was less variety in the market. Although Conwood's market share had grown, it grew at a much slower pace than it did before the category management practices were adopted. Moreover, there was no new entry into the moist snuff market, which was notable, according to the expert, because of the high amount of potential profit at stake in the market. Although USTC's market share dropped, there was testimony that it would have dropped must faster but for these practices.

Were these anecdotes of anticompetitive conduct sufficient? The Sixth Circuit observed that isolated tortuous activity alone does not constitute exclusionary anticompetitive conduct, absent a significant and more than temporary effect on competition and not merely the exclusion of a competitor. The court was faced with a somewhat daunting establishment of proof, because there are more than 300,000 separate retail establishments that sell moist snuff and the USTC made approximately eight to nine million sales calls during the 1990s. The district court held, and the Sixth Circuit affirmed, that there was sufficient evidence of anticompetitive effect. Conwood employees spent a substantial amount of their time replacing racks that had been improperly removed by the USTC. In addition, there was some evidence that the USTC paid bonuses to its employees based on how many Conwood racks they could remove from the store. But the most persuasive evidence was that the USTC acted in this fashion to dampen price competition by "suggesting that retailers carry fewer products, particularly competitors' products; by attempting to control the number of price value brands introduced in stores; [and] by suggesting that stores carry its slower-moving products instead of better-selling competitor products" (p. 14). Ultimately, these actions affected retail prices: The court credited expert testimony that for every 10% increase in USTC facings, retail pricings for moist snuff increased by seven cents (p. 14). In a monopolization case, when a plaintiff shows evidence of anticompetitive effects, it is the defendant's burden to show some legitimate business justification. Here, the USTC failed to offer any valid business justification for its practices, particularly the pervasive destruction of Conwood's racks. Rather, it claimed that this conduct could never be at the basis of an antitrust violation.

Regulatory and Legislative

Issuance of the FTC Slotting Allowance Report

In February 2001, the FTC issued a staff report on slotting allowances and other related practices in the supermarket industry (FTC 2001). This report grew out of the FTC's June 2000 hearings on slotting allowances and category management, which brought together representatives of all segments of the grocery market to discuss these practices. Although the report does not recommend any earthshaking actions, such as slotting allowance guidelines, it provides a foundation for the continuing public policy debate and some guidance on those situations that may raise competitive concerns. The report contained five parts. The first part identified the wide variety of grocery marketing practices at issue including slotting allowances, pay-to-stay fees, payments that limit rival shelf space, and discriminatory payment of access fees. The second part evaluated the marketing practices that are most likely to create competitive harm and set out a structure for analyzing these practices. The analysis focused on the potential for these practices to exclude a rival manufacturer's goods from the market. The analytical framework followed the well-recognized "raising rivals cost" theory by asking whether the practice in question disadvantages rivals, whether such disadvantage is likely to have an effect on competition in the markets in which the rivals compete, whether there are any efficiencies from the practices and whether those efficiencies outweigh any competitive effects, and whether there are less restrictive means of achieving such benefits.

The report provided no black and white rules as to any of these shelf space practices, but did suggest that slotting allowances are somewhat less likely to raise competitive concerns when they are used in connection with bringing new products into the market, as opposed to other exclusionary fees. In this situation, slotting allowances serve to better allocate the risks of new product failure between the retailer and the manufacturer. The third part of the report examined the practice of category management and the use of category captains to supply information to retailers on a specific product line. Both of these practices involve retailers seeking information and guidance from manufacturers on the proper allocation of shelf space and other marketing practices. Category captains are typically representatives of large manufacturers that provide a wide variety of information to retailers. Retailers appoint a single manufacturer to play this role in each product category. Category management may result in significant efficiencies because manufacturers usually have greater resources and access to information on consumer demand practices. However, these category management practices may raise concerns over collusion or exclusion. Exclusion can arise when the category captain secures sensitive or proprietary information about rivals that enables it to design category management practices that disadvantage rivals. A category captain can also facilitate either tacit or explicit collusion among either manufacturers or retailers.

To avoid potential anticompetitive concerns, the report recommended that retailers (1) make their own category management decisions, rather than rely solely on advice from captains; (2) use firewalls; and (3) limit as much as possible the amount of competitor-specific information they provide to captains (see Steiner 2001). The fourth part of the report identified the additional concerns that slotting allowances might be attributable to retailer market power (known as monopsony or oligopsony power). The report discussed types of potential buyer power and provided a balanced description of the analysis. It observed the need to scrutinize potential buyer power issues in the review of supermarket mergers. The final part of the report summarized the FTC staff policy recommendations. The FTC eschewed the issuance of slotting allowance guidelines, even though some advocates of small manufacturers proposed them. Instead, the FTC staff suggested additional empirical research and further analysis of specific areas of potential concerns such as price discrimination, exclusive dealing contracts, pay-to-stay fees, category management, and merger enforcement.

The FTC staff report was a first step, limited by the lack of empirical information about the types and scopes of prac-

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tices. Its greatest contribution was bringing some level of transparency to these practices and a greater understanding of potential competitive concerns. Moreover, the report articulated a framework for the analysis of competitive harm, which should aid parties in structuring marketing practices to avoid competitive concerns.

FTC Slotting Allowance Study

In December 2000, Congress passed the FTC's appropriation with a requirement that the agency conduct an investigation of slotting allowances and prepare a report to Congress using its powers under Section 6 of the FTC Act (15 U.S.C. § 45). Section 6 authorizes the FTC to use compulsory process in conducting studies. To date, the FTC's study has focused on securing information from major retailers about slotting allowance practices in various categories and geographic markets. No deadline has been given to publicly release the results of the FTC study.

Canadian Slotting Allowance Report

Slotting allowances have been every bit as controversial north of the border with legislative calls to regulate and restrict the use of slotting allowances. On December 17, 2001, the CCB released its effort at guidance: *Enforcement Guidelines: The Abuse of Dominance Provisions as Applied to the Retail Grocery Industry* (CCB 2001). The CCB did not issue specific guidelines, but rather explained how the Abuse of Dominance provisions of the Canadian Competition Act (R.S.C. 1985, Ch. C-34 [Can.]) apply to the retail grocery industry. The Abuse of Dominance provisions are an analogue to Section 2 of the Sherman Act and prohibit anticompetitive conduct by dominant firms. The report describes how the provisions of the Act will be analyzed, focusing on whether the activities in question (1) facilitate raising rivals' costs or reducing rivals' revenues, (2) involve predatory conduct aimed at eliminating or disciplining competitors, and/or (3) encourage interdependence or tacit collusion among firms. Fundamentally, the CCB applies a "raising rivals' cost" analysis similar to that described in the FTC report on slotting allowances. Unlike its U.S. counterpart, the CCB report provides more insight about the degree of some of these concerns. That may be because the CCB has actually brought a slotting allowance enforcement action, challenging the use of slotting allowances by Heinz Canada, which restricted entry into the Canadian baby food market. On August 1, 2000, Heinz voluntarily entered into a consent agreement with the CCB, agreeing to change its marketing conduct. The CCB report notes that it has conducted several other investigations in this area and sets forth a laundry list of contractual practices that raise red flags, including provisions that (1) tie up a specific percentage share of shelf space devoted to a specific product category, (2) limit competitors to a specific number of stockkeeping units (SKUs), (3) exclude specific competitors' SKUs, (4) require some form of price parity with competitors, (5) specify when and how competitors can advertise, and (6) obtain information on the terms of competitors' contract offers.

The CCB report also provides greater information about the results of past enforcement actions. It observes that in terms of potential predatory conduct, in a supermarket stocking between 17,000 and 23,000 SKUs, the sale of some products accounting for approximately 50 SKUs as a loss leader is unlikely to have the type of substantial anticompetitive effect required under the Act. Nor has the CCB found much evidence of interdependent or tacit collusion among firms, though the report observes that various types of contractual practices, such as "most favored nation" or "meet or release" clauses, could facilitate tacit collusion. One aspect of the CCB report is notable: the absence of any discussion of retailer market power. As noted previously, this is a significant aspect of the FTC slotting allowance report and some private U.S. antitrust cases in which large merchants are defendants. The Canadian grocery market is far more concentrated on the buyer side than the U.S. grocery market is, with only three or four major retail chains. The report does not suggest why this issue is not addressed.

More Studies from the U.S. Department of Agriculture (USDA)

As slotting allowances have extended to the fruit and vegetable section of the supermarket, controversy has followed. A common justification for slotting allowances is to share the risk in introducing new products, but some critics ask whether there is much chance of market failure for a bag of carrots. To address these new practices, the Economic Research Service of the USDA conducted an extensive study of the practices. In January 2001, the USDA issued a report on slotting and related practices (Calvin 2001). The report observed that though "[t]he emergence of slotting fees in fresh-cut produce has led to shipper concern that they will soon become standard for commodities as well" (p. 28), the USDA found that "despite the current high-profile of slotting fees in the produce trade press, they are not prevalent beyond the fresh-cut category (e.g., bagged salads), where they may be supplier as well as retailer induced" (p. 32). The report also suggested that slotting allowances were becoming more prevalent over time. It also reported (p. vii) that "[i]n contrast to fresh-cut shippers, none of the commodity shippers reported paying slotting fees," though some had been asked to pay such fees and some had lost accounts when they refused to pay. This was the second of three reports, and the final report is expected in 2002.

Silence from Capitol Hill

The Senate Small Business Committee held two highly publicized hearings on slotting allowances on September 15, 1999, and September 15, 2000. During 2001, little was heard from Congress on the issue, perhaps because the congressional staff is awaiting the results of the FTC study.

Slotting, Category Management, and Merger Enforcement

Slotting Is Competition Worth Protecting: the D.C. Circuit Decision in *FTC v. H.J. Heinz Co.* (2000)

Although the FTC brought no slotting allowance enforcement actions last year, the agency found itself advocating that slotting allowances are an important element of competition in its challenge to the merger of Heinz and Beech-Nut, the second and third largest U.S. baby food manufacturers, respectively. Slotting allowances make strange bedfellows, and in this case, the FTC successfully argued to the D.C. Circuit that the merger would be anticompetitive because it

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could result in a reduction in slotting allowances, even though there was some evidence that these allowances did not result in lower prices to consumers. The merger was proposed as an attempt by Heinz and Beech-Nut to compete more effectively against the market leader, Gerber, which had approximately 70% share of the market. Almost all supermarkets handle only two brands, which meant that Heinz and Beech-Nut competed to be the second brand by offering supermarkets a variety of promotional allowances, discounts, couponing, and payments. As supermarket chains consolidated, much of those promotional funds switched from variable volume-based promotions (such as couponing) to large, up-front payments (such as fixed payments), the type of pay-to-stay fees critically scrutinized in the FTC's slotting allowance report. The merger would have resulted in a reduction of these fees, but the defendants contended that (1) the up-front fixed fees did not result in lower prices to consumers, but instead were pocketed by the retailers, and (2) loss of these fees would not harm consumers. Indeed, the defendants contended that elimination of these fees would be procompetitive, as promotional funds would move to more variable payments that would benefit consumers more directly.

This placed the FTC staff in an awkward position of appearing to defend pay-to-stay fees, and the FTC's concerns on slotting allowances were paraded before the court. The trial went through extensive testimony of what types of fees are fixed and variable, and at least one major retailer concurred that up-front fees did not result in lower prices. At closing argument, the trial judge asked FTC counsel whether consumers would benefit from slotting fees if the retailer simply relinquished shelf space to manufacturers and used the money however the retailer wanted. Counsel for the FTC implied that the benefits of competition for shelf space are not limited to direct, quantifiable reductions in prices and that the merger should be blocked even if there was no proof that slotting fees were passed on to consumers.

The District Court found that the Heinz/Beech-Nut merger would not result in a significant loss of competition, but the D.C. Circuit reversed (*FTC v. H.J. Heinz Co.* 2000). The D.C. Circuit agreed with the FTC's argument that competition between Heinz and Beech-Nut at the wholesale level ultimately benefited consumers even if that competition took the form of fixed trade spending such as slotting allowances and that these payments did not necessarily result in lower prices to consumers. As the D.C. Circuit held (p. 719), "no court has ever held that a reduction in competition for wholesale purchasers is not relevant unless the plaintiff can prove impact at the consumer level."

The irony of the Heinz litigation is that it placed the FTC in a position of advocating that competition in slotting allowances was procompetitive even though the allowances might not ultimately result in lower prices to consumers. This may have appeared inconsistent to slotting fee critics who argue that slotting allowances harm consumers because they result in wealth transfer from manufacturers to retailers.

Slotting Allowances, Category Management, and Merger Enforcement

Although there may not be many reported slotting allowance enforcement actions, both slotting allowances and category management are increasingly the focus of merger investigations involving retail products. Many advocates of recent food product and consumer goods mergers have found themselves providing details to the enforcement agencies on slotting allowance and category management policies. These concerns have been the subject of several merger investigations including Pepsi/Quaker Oats, Heinz/Beech-Nut, Clairol/Procter & Gamble, Pillsbury/General Mills, and Ralston Purina/Nestlé. Why have these concerns arisen?

The agencies' merger analysis has not changed, but their focus on entry barriers and the potential for anticompetitive effects has begun to factor in the role of these practices. Some have suggested that the acquisition of a rival by a category captain may have more significant anticompetitive effects, because a category captain may be able to use a variety of practices to limit market access to its rivals. A category captain that holds that position at many retailers may use the opportunity to serve as a hub facilitating either collusion or exclusion of rivals among the retailers. Such a category captain can also coordinate oligopolistic price leadership among rivals. Another theory is based on the concern that certain manufacturers may be category captains in more than one category and that these manufacturers possess considerable clout in their relations with retailers. This multicategory clout may be an important consideration in the analysis of market power and entry barriers and the evaluation of potential remedies. In particular, measurement of market power that is narrowly limited to a defined product market (e.g., typically a single category) may underestimate the clout held by the category captain. Similarly, a multicategory captain may be far more capable of overcoming entry barriers than another manufacturer that focuses on one category.

Category captaincy may also be an important issue in the evaluation of potential merger remedies and potential purchasers of divested assets. Sometimes a manufacturer with multicategory clout is in a superior position to overcome entry barriers for new products and leverage its shelf space strength into other parts of the supermarket aisles. The question arises when assets are divested from a firm that has this type of clout and whether another less prominent manufacturer can continue to grow the divested brand without multicategory clout. This was among the concerns about the divestiture in the General Mills/Pillsbury merger. (See Statement of Commissioner Sheila A. Anthony, *In the Matter of General Mills et al.* 2001. For a more considered articulation of these issues, see Foer 2001.) These theories are fairly untested, but regardless of their merit, this will continue to be an important line of inquiry in merger analysis.

What does the future portend? Slotting allowances and category management will certainly be a mainstay of merger analysis in consumer goods and food product mergers. No date has been given for the release of Act II of the FTC's slotting allowance study, but it should provide some greater information on the use of these marketing practices. Perhaps greater guidance will come from private litigation. The *Conwood* and *Reynolds* decisions are currently on appeal, but the decisions suggest that firms with dominant positions must be extremely careful not to demand shelf space beyond their market share. In *LePage's, Inc. v. Minnesota Mining & Mfg. Co.* (2002), a panel for the Third Circuit set relatively

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broad rules for marketing practices that would permit payments unless they were clearly predatory, but the entire Third Circuit recently accepted rehearing *en banc* in that case. Finally, academic research is afoot, and the next answers on slotting allowances may come from academia. In any case, slotting allowances and category management will continue to attract lively debate and litigation in the future.

References

Augusta News Co. v. Hudson News Co. (2001), 269 F.3d 41 (1st Cir.).

Calvin, Linda (2001), *U.S. Fresh Fruit and Vegetable Marketing: Emerging Trade Practices, Trends, and Issues*, Report No. 795 (January). Washington, DC: Economic Research Service, U.S. Department of Agriculture.

Canadian Competition Bureau (2001), *Enforcement Guidelines: The Abuse of Dominance Provisions as Applied to the Retail Grocery Industry*. Ottawa, ON: Canadian Competition Bureau.

Coalition for a Level Playing Field LLC v. AutoZone, Inc. Coalition (2001), No. 00-CV-0953, WL 1763440 (E.D.N.Y. 2001).

Conwood Co. v. United States Tobacco Co. (2002), No. 00-6267, 2002 WL 987282 *1 (6th Cir. May 15).

Federal Trade Commission (2001), *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*, (February), (accessed October 3, 2002), [available at http://www.ftc.gov/opa/2001/02/slotting.htm].

FTC v. H.J. Heinz Co. (2000), 116 F.Supp. 2d 190 (D.D.C.), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001).

General Mills et al., In the Matter of (2001), Dkt. 001-0213 (October 23).

LePage's, Inc. v. Minnesota Mining & Mfg. Co. (2002), 2002-1 Trade Cas. (CCH) & 73,537 (3d Cir.).

R.J. Reynolds Tobacco Co. v. Philip Morris, Inc. (1999), 60 F.Supp. 2d 502 (M.D. N.C.).

——— (2002), No. Civ. 1:99 CV 185, 2002 WL 826892 * 1 (M.D. N.C. May 1).

Steiner, Robert L. (2001), "A Category Management: A Pervasive, New Vertical/Horizontal Format," *Antitrust*, 77 (Spring).

Zeller Corp. v. Federal Mogul Corp. (1999), 173 F.3d 858 (6th Cir.).

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