

**Antitrust and Category Captains
Roundtable Discussion
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¹ Research Analyst, American Antitrust Institute. The ground rules for discussion were that individuals, other than participants with prepared remarks, would not be identified in this report. The summary of remarks and discussion is necessarily filtered through the rapporteur. Ms. Herderschee-Hunter gained her experience as an antitrust reporter during four years with FTC:WATCH.

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Introduction

Over 65 antitrust policymakers, business and legal advisors and academics debated the antitrust implications of recent but increasingly widespread retail business practice known as category captains (CC) at a roundtable forum on June 23.

The *American Antitrust Institute (AAI)*, the *Journal of Public Policy & Marketing*, *Cornerstone Research*, and the *Coggin School of Business* at the University of North Florida jointly hosted the forum at the National Press Club in Washington, D.C.

Objectives: The workshop's objective was to bring together knowledgeable stakeholders from antitrust, marketing, retailing and category management to:

- Examine antitrust questions around category captains;

- Enhance understanding of the antitrust implications of category captain arrangements;
- Develop an informed approach for assessing these implications; and
- Chart a course for further understanding.

Topics:

- Overview of category captains
- Practitioner, consultant and trade association perspectives
- Antitrust case developments
- Enforcement agency and legislative activities
- Academic and applied research
- Antitrust concepts and theories

*SEE APPENDIX ONE FOR DETAILED FORUM AGENDA
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EXECUTIVE SUMMARY

(The Forum's Rapporteur Gabrielle Herderschee-Hunter created the following executive summary with the intent of providing a relatively succinct but comprehensive forum overview for a broad audience. It does not purport to represent the policy views of the AAI or any other sponsor of the Roundtable.)

Definition and Outline of Concerns Raised about CCs

Category Management (CM) refers to a distributor/supplier process of managing individual product categories as strategic business units. CM is designed to enhance business results by focusing on delivering consumer value, according to the Food Marketing Institute. To date, most examples of CM are in the food and drug distribution sector, although CM and CC's do appear in other retailing fields, such as bookselling.

Retailers often assign to various leading manufacturers in individual product categories the (often-exclusive) privilege of advising them on, and sometimes even physically managing, the shelf space for the respective market categories where the supplier is well established and often dominant.

Thus the term Category Captain (CC) (or Lead Resource) refers to the leading supplier who advises a retailer on how to manage individual categories as strategic business units. Manufacturers who act as CCs often pay for the privilege both in terms of allocating human resources to the task of managing the shelf space and also by paying retailers for the right to be the CC. Captains can play pivotal roles in terms of helping retailers to (a) determine prices for all category brands, (b) decide which products are shelved where and for how long in their respective product categories, and (c) market individual categories to consumers.

Retailers' growing reliance on leading suppliers as CCs grew out of category management by retailers in the mid 1990s and business trends are now reportedly moving towards whole aisle captains (leading suppliers who advise retailers on how to manage shelf space for entire aisles) and segment captains (leading suppliers who advise retailers on managing shelf space for product segments). The exclusivity and extent of the category captain's role varies, depending on the relationship and/or agreement between the captain and retailer.

According to the FTC Slotting Allowances Report [February 2001], there are two major competitive concerns in retail CM. First, a dominant manufacturer could use its role as CC to exclude rival suppliers or significantly increase their costs of competing. Second, a category captain could use its role to facilitate collusion among the competing category manufacturers or retailers. (For FTC Report see <http://www.ftc.gov/opa/2001/02/slotting.htm>)

Consumers greatly benefit from expert market leaders in narrow product areas advising widely generalized retailers about trends in respective products categories, according to CM advocates. CM generates efficiencies for retailers -- such as the timely ordering and stocking of appropriate and desirable seasonal products, -- which are

passed on to consumers, CM supporters argue.

Many leading manufacturers believe that they need to adopt a CM regime in order to stay competitive, according to a recent survey (see summary of session one). Likewise, many larger but not behemoth retailers reportedly believe that CM is necessary in order for them to be able to compete effectively against mega-store rivals such as Wal-Mart.

However some industry observers expressed concerns that market leaders are being given considerable free rein to manage downstream distribution outlets for their rivals' products.

For example, some forum participants endorsed the CM practice as beneficial to consumers because retailers benefit from the lead suppliers' expertise and knowledge of product category trends and stock their shelves more in line with consumer demands, but nonetheless they cautioned that retailers should not give CCs their rivals' confidential pricing data and other competitively sensitive information such as rivals' product development plans. One participant questioned the benefits to consumers by having the makers of long established and low-tech products such as ketchup and peanut butter advising retailers about product developments in those categories, and questioned whether the transfer of such information justifies retailers giving dominant category manufacturers access to rivals' pricing data or product development plans.

One of the empirical issues (i.e., arguments requiring fact based research to validate positions taken) that was left open for further analysis is whether the efficiencies for retailers by having manufacturers use their own staff and resources to manage retail shelves are passed on to consumers. Some limited data to date suggests that prices may actually rise and consumer choices decrease among categories where CM is practiced [see summary session one].

Some CM supporters argued that any antitrust concerns raised by CM business practices should be classified as raising strictly vertical issues (i.e. argument that CM does not raise antitrust concerns between direct or horizontal competitors but involves vertical

business relationships between suppliers and retailers). However, others argued that leading suppliers who advise retailers on what to do with their rivals' products would appear to generate horizontal antitrust concerns. Also, various experts such as the Economist Robert Steiner, pointed out that many retailers are also producers by making and selling their own proprietary home brands for many essential product categories.

CC research

Most experts agreed that the research data to date is inconclusive and that further empirical studies need to be done (*see summary of session one below*).

Consumer prices slightly increased in a narrow product area where CM was widely practiced. In addition, category sales volume and revenues decreased, and profits increased in a product category where CM was practiced and its effects on prices and sales measured [See Suman Basuroy, Murali Mantrala, and Rockney Walters study]. However it is not clear what role CCs played in those surveys.

Another study based on retailers' perspectives found that the most influential or focal suppliers do not exert pressure upon retailers to give preferential treatment to their lines and that retailers benefit both directly and indirectly via improved supplier category management [see Neil Morgan, Richard Gooner and William Perreault study].

More than eight out of every ten manufacturers stated that they take part in CM in order to influence category decisions by retailers and stay competitive. [See Debra Desrochers study].

According to a trend identified in the study of 120 retailers and manufacturers surveyed between 1999 and 2002, the most effective in-class manufacturers also manage either: (1) day-parts (e.g., breakfast, lunch, dinner); (2) occasions (e.g., picnic, party, Christmas); and/or (3) aisles (e.g., beverage aisle, cooler section) rather than just categories.

Hence, CM is reportedly moving towards aisles management. CCs manage specific product categories while “aisle captains” handle the set up of entire aisles such as those for beverages, cleaning agents, condiments/seasonings, and/or magazines & office supplies. “Day-part captains” deal with arranging shelf space for catering to different parts of the day such as morning, midday and evening meal needs. “Occasion captains” advise retailers on managing shelves for specific occasions such as summer picnics, birthday parties, Halloween, Christmas and Easter.

The leading practitioners of CM are dominant manufacturers (P&G, Kraft, General Mills, and Pepsi) and dominant retailers (Wal-Mart, Safeway, HEB and Kroger).

There is little evidence of negative consumer outcomes such as fewer choices and higher prices in increasingly concentrated markets that use CM as a managerial method/tool, according to Ravi Achrol’s study. Since 1996 when the use of CCs in CM began to take hold, concentration among top retailer firms continued to increase as it has since the late 1960s. Theoretically, this would increase the chances for exclusion of competitors and anticompetitive price setting but the study found that CCs were not engaged in profiteering. The study did show a significant decrease in new grocery products between 1995 and 2,000 but overall items per store have significantly increased since 1990. Further, the study suggested that the major retailers with the most innovative consumer marketing and merchandising also have the best category management/ buying teams.

Relevant legal case developments

The Supreme Court recently refused to review a \$1.05 billion antitrust award against the United States Tobacco Co. Conwood Co. filed the suit, alleging that United States Tobacco unfairly dominated the smokeless tobacco industry through its category captain arrangements. The damage award is possibly the largest verdict ever upheld under antitrust law, and it marked the first time an appeals court condemned as an antitrust violation a system that gives a company some control over merchandise displays of its own and competitors' products. (For the Sixth Circuit opinion, go to

http://www.nacds.org/user-assets/Html_files/USCA6_Opinion.htm)

R.J. Reynolds, Brown and Williamson and Lorillard filed a case against Philip Morris that also challenged category captain conduct. The case was recently dismissed. Other category captain cases in the tortilla, carbonated beverage and cranberry product sectors are pending.

Suggestions for Best Practices Guidelines

A number of experts either advocated for, or agreed with, the notion that there is a need for CC Best Practices guidelines for both industry members and antitrust practitioners.

Business consultant Paul Christman strongly supports the CM and CC practices but argued that abuse is more likely in the absence of unambiguous and well-written best practices guidelines for industry members (*see summary of session one below*). He suggested that such guidelines could include:

- (a) Implementation of strictly-enforced firewalls between CCs and Retailers to prevent leaking of competitively sensitive information such as price data of rivals;
- (b) Prohibitions on monetary payments for the right to be CC;
- (c) Competition for the right to be CC or the retailer's 'lead resource' should include other major manufacturers who may only rank 2nd, 3rd, 4th or lower in terms of market share but that may have more dynamic, and innovative approaches to moving their product category forward (however they would need to be sufficiently established and large so as to have developed expertise in their product category);
- (d) Use of lead resources or CCs should not preclude all major and minor suppliers from having an opportunity to offer their advice to retailers at any time; and
- (e) The Retailer, rather than the CC, must own the CM process and be the true decision maker.

Similarly, Irving Scher Of Weil Gotshal & Manges LLP recommended that Guidelines for Antitrust Practitioners could clarify that:

- Category management is a legitimate sales management function so long as CCs present objective accurate factual data to retailer;
- Retailers should make all final decisions;
- CCs should not provide data that favor CC's brands or SKUs;
- CCs may suggest retail price points so long as retailer independently makes the actual pricing decisions;
- Co-CC arrangements should be avoided because of the likelihood of co-ordination;
- CCs should not see rival's product development plans;
- CCs should not share competitive information among competing retailers whether or not the CC acts in that capacity for both retailers; and
- CCs should respect the confidentiality of any information considered by the Retailer customer to be proprietary.

Future Directions

The forum's moderators invited the expert participants to proffer their insights into many practical questions around category management such as:

- The implications for Retailers, Suppliers, Legal Counselors, Law enforcers, and Legislators;
- Appropriate information sharing between category captains and retailers in areas such as retailers' prices and promotions and retailer's proprietary brands;
- Safeguards against collusion between CCs and rivals, and/or retailers;
- Appropriate formal written contracts between CC and retailers;
- Propriety of suppliers paying for the right to be a CC;
- Analyzing efficiencies; and
- Appropriate antitrust remedies.

Many practitioners agreed that CM represents a two-edged sword with many potential consumer benefits and business efficiencies coexisting side by side with considerable antitrust risks for collusion and subtle and perhaps even blatant disruptions to competition. Many legal counsel appeared to favor advising clients against inappropriate business relationships and communications containing competitively sensitive information while some economists and business consultants generally expressed more concerns about prematurely

prohibiting or regulating innovative business arrangements before clear evidence of consumer harm is established.

Academics identified specific areas requiring further empirical and/or analytical studies into CM. These include determining whether:

- A range of CM activities such as coordinated buying, pricing, promotions and merchandising of category brands affect retailer and manufacturer performance;
- There are different CM effects for retailers who seek to maximize category profits as compared to retailers who prioritize building store traffic;
- Trends towards whole aisle management and segment management have an impact on competition, consumer choices and prices; and
- Manufacturers are influenced by retailer adoption of CM (i.e. suppliers' sales and profit performances pre and post CM adoption).

Other questions raised by antitrust thinkers include:

- Why opportunistic focal supplier behaviors are (allegedly) uncommon (from retailers' perspectives)?
- Are counter-productive behaviors by focal suppliers overstated?
- Are antitrust concerns in CM primarily vertical or horizontal, and what standard of proof is required to establish competitive harm?

Conclusion

The forum stimulated informed debate about antitrust issues surrounding Category Captains and identified several critical areas where further thought and research is needed. According to experts, the use of Category Captains in the Category Management retail management method will continue to evolve into broader management approaches that also require close cooperation and communications between Retailers and leading Manufacturers such as whole Aisle Management and Special Occasion Product Management. Hence, further empirical evidence and fact based research is needed to help public policy makers, industry members, antitrust practitioners and thinkers understand whether and how CCs are changing downstream market dynamics.

Opening remarks by FTC Commissioner Thomas B. Leary

Although he is not a man of the cloth, FTC Commissioner Thomas B. Leary opened the forum by fulfilling AAI President Bert Foer's request that he "Bless the Ships." The ships sailing into the un-chartered antitrust waters of category management (CM) scrutiny may consider themselves to have been officially blessed.

Commissioner Leary sounded notes of caution regarding the relatively new but popular retail managerial method. Manufacturers have to be careful when they discuss retail pricing of their own products with supermarkets, let alone the pricing and timing of special offers for competitors' products, he warned.

There are many justifications commonly offered for the Category Captains (CC) business method, noted Leary. These include the arguments that:

- (a) Retailers may sell thousands of products and don't know how to optimize the sale of specialized items, and thus benefit from free advice from expert producers themselves; and
- (b) CM may actually increase sales of categories of products.

Nonetheless, Leary explained why CM continues to trouble him.

1. There is some tension between the arguments that: (a) CCs merely advise while retailers are free to accept or reject CM advice; and (b) Inexpert supermarket managers don't know what they are doing in individual categories. How can one expect informed, knowledgeable assessment of any CM advice if retailers don't know as much about the subject as the CCs do, especially since the CC's advice is likely to be biased in its own favor?

2. There are likely to be subtle influences at work, he said. Leary added that he doubts most CCs would risk credibility by obvious

tactics such as those exhibited in the recent *Conwood v. U.S. Tobacco* case. Any anticompetitive CM conduct is more likely to involve CC recommendations that would protect their position as leading suppliers by discouraging disruptive competition rather than through blatant foreclosure of competition in the traditional sense.

3. Leary questions whether all aspects of CM raise strictly vertical antitrust issues. To the extent CMs recommend retail strategies for their own brands, the issues are vertical, but he suggests that advice to retailers on the suppliers' rivals' products may raise traditional horizontal concerns. He mentioned that in cases involving so-called "dual distribution," where a manufacturer directly competes on the retail level, a court will still consider its communications as vertical if they serve traditional vertical interests recognized in *Sylvania*. The manufacturer's status is not decisive. He suggests, by analogy, that communications can be analyzed as horizontal if they serve the manufacturer's horizontal interest, regardless of its formal status.

Leary concluded by suggesting that antitrust practitioners should ponder whether any problems raised by CM are horizontal or vertical, and then determine what is an appropriate standard of proof. One obvious consequence is that the distinction between mere "advice" and "agreement" is not as well recognized in the horizontal context.

Session One, Part A: Overview & Emerging Developments By Paul Christman, Winston Weber and Associates

Paul Christman advises major retailers on business strategies, and emphasized that he dislikes the term "category captains" and vastly prefers the term "category advisor or consultant." "The CC concept is prudent but the term is not," said Christman.

"The term 'category captains' gives the impression of advising about rivals' products placements. It conveys the image of rivals controlling the helm of the retailer's ship – and deciding what direction

and speed the retailer will go. ... We strongly urge all our clients to get that word (captain) out of their language.”

Category management will continue to evolve and become part of an integral part of total business planning, said Christman. Retailer and supplier collaboration is essential to the ability to drive category growth and enhance consumer value.

Definition of Category Management

CM is a “process of managing a product category or service and its related items as a strategic business unit, making all merchandising decisions based on stated category goals, which have been developed considering the needs of consumers, the competitive environment and the retailers own stated business objectives.”

CM is essential for helping retailers:

- Reduce costs
- Drive growth of category sales and profitability
- Improve category marketing
- Plan for category specialization
- Achieve an acceptable return on the investment in technology
- Analyze rival retailers strategically at category level, and
- Enhance customer value.

CM helps suppliers by:

- Aligning suppliers with retailer strategies for satisfying consumer needs and influencing consumer behavior;
- Helping achieve brand and category objectives through increased retailer support;
- Providing opportunities to achieve higher rate of return on brand expenditures; and
- Allowing better understanding of retailers’ business process and category dynamics.

Favorable results to date:

- Framework for disciplined planning across functions and top down to the store;
- CM moved the industry from “relationship” selling to “fact-based” decision-making;
- Retailers’ and suppliers’ “go-to-market” strategies are better aligned;

- Retailers have improved performance in:
 - a) Category sales
 - b) Lower cost of goods
 - c) Sales per square foot, and
 - d) Aligning variety, shelf merchandising and promotional programs with consumer needs.

Category Captains concept

- Analytical and planning resources
- Consumer research resources
- Co-marketing resources
- Multifunctional team resources
- Consulting resources
- Execution resources
- Training resources

CC selection criteria

- Primary position in category (not always the leader)
- Ability to influence overall category performance
- Value added resources
- Technology/ information resources
- Sales/ management professionalism
- Ability/ willingness to collaborate
- Category focus, rather than brand focus.

Typical abuse of captain concept

1. The Retailer selects one supplier to provide resources and develop the category plan.
 - Category Captain controls outcomes.
 - Captain receives preferred treatment.
 - Other suppliers are not used as resources – limited influence on outcome.
 - Leverages combined resource for mutual gain;
 - Supplier may own the plan.
2. The Retailer charges suppliers to be a category captain
3. The selection of captain is based on who pays the most money and not who is best able to move the category forward;
Payment eliminates objectivity and dilutes quality of decision-making process.

4. The decision regarding who should be captain is not consumer based.

Best Practice Approach

1. Retailer selects “Lead Supplier Resource” based on defined selection criteria, to provide resources and input relative to the development of the category plan. Retailer considers choosing leading manufacturers who are ranked second, third, fourth or lower in the category’s current market share, but who exhibit more innovative enthusiasm for moving the category forward than established dominant players.
2. The Retailer and Lead Resource work together to develop the category plan.
3. Competitively-sensitive and confidential information such as rivals’ pricing data and product development plans are not shared.
4. Retailers use input from all major suppliers to validate input of the lead resource and to make appropriate modifications to the plan required to achieve the Retailers’ objectives.
5. Any supplier, large or small can provide input at any time.
6. Retailer owns the process and is the decision maker.

The Road Ahead

1. Organizational structures and CM processes will continue to evolve and become an integral part of total integrated business planning.
2. Utilization of consumer information will increase significantly to gain strategic value and guide tactical application.
3. Category planning processes will be designed to better support seamless and collaborative planning and execution across functions.
4. Category planning processes will integrate closely with financial and logistics planning to enable fully integrated business planning and management.
5. The level and type of collaboration will largely depend on who most directly influences consumer behavior – the retailer or supplier.
6. Category roles will dictate the allocation of all retailer-merchandising resources.
7. Suppliers will be required to supply more resources to support the process but they will have less influence on the final plan.
8. The store execution dilemma will necessitate a major reallocation of retail resources.

9. When done right, CM is an important component of the collaborative planning process.
10. Unfortunately there will continue to be those retailers and suppliers who will abuse the integrity of the CM concept.

Session One, Part B: Academic & Practitioner Research **Suman Basuroy, University of Buffalo**

Suman Basuroy presented findings from the research paper titled *“Impact of Category Management on Retail Prices and Performance: Theory and Evidence,”* which was co-authored by Suman Basuroy (University of Buffalo), Murali Mantrala (University of Missouri, Columbia) and Rockney Walters (Indiana University), [Journal of Marketing, Vol. 65, October 2001].

The study found that one retailer’s adoption of CM increased its average unit price of the category and reduced its sales and revenues. However the retailer still enjoyed an increase in its gross margin profits when competing manufacturers’ wholesale prices fell during the CM process. The retailer that adopted CM in a laundry detergent category had greater profits than those of a rival retailer that followed traditional brand centered management of a product category when the inter-brand competition was high but inter-store competition was low.

Industry motivation

- Since 1995, CM has produced fundamental changes in retail grocery and drug store industries.
- Brand centered management (BCM) vs. category management (CM).

Traditional brand (vendor)- orientated buyers have been replaced by category managers who integrate procurement, pricing and merchandising of all brands in a category and jointly develop and

implement category based plans with manufacturers to enhance outcomes of both parties.

- Strong retailer and manufacturer Interest in CM with the vast majority of grocery retailers have cited CM as the most important management issue facing them.

Research Questions

- Investigate the impact of retailer's shift from BCM to CM on equilibrium retail and wholesale prices, sales and profits in a competitive decentralized setting.
- Focus on pricing decision and their outcomes.

Definitions

- CM is a setting where a category manager jointly sets the prices of all brands in the category so as to maximize total category profits.
- BCM is a setting where each brand's price is set independently so as to maximize its own profit contribution taking the prices of competing brands in the category as given.

Previous Literature

Although adoption of CM has rapidly increased since the mid 1990s, little research on the effects of CM adoption on retailer price and performance has been done.

There is now more trade press coverage of the issue, and more surveys expressing interest

Shelf space management – little available data

- Choi, S. Chan
(1991) "Price Competition in a Channel Structure with a Common Retailer," *Marketing Science*, Fall, pp. 271-96

(1996) "Price Competition in a Duopoly Common Retailer Channel," Journal of Retailing, Vol. 72, pp. 117-134

- Raju, Jagmohan, Raj Sethuraman and Sanjay Dhar (1995) "The Introduction and Performance of Private Labels," Management Science, 41 (6), pp. 957-78
- Steiner, Robert (2001) "Category Management – A pervasive, New Vertical/Horizontal Format," Antitrust, Vol. 15, No. 2, Spring 2001, pp. 77-81
- Trivedi, Minakshi (1998) "Distribution Channels: An Extension of Exclusive Relationship," Management Science, 44 (July), pp. 896-909
- Zenor, Michael (1994) "The Profits Benefits of Category Management," Journal of Marketing Research, 31 (May), pp. 202-213.

Data

- IRI data aggregate store level scanner data for 156 weeks (January 1993 – December 1995) – just in detergent category
- 21 stores of national supermarket chain (Retailer A) that moved its laundry detergent category to CM.
- Aggregated information for rest of market (Retailer C)
- Weekly average unit prices, weekly unit sales
- Retailer A moved the category to CM in February 1994
- For Retailer A, 56 weeks of pre-CM and 100 weeks of CM
- For Retailer C, 156 weeks of BCM.

Propositions: Prices

Proposition 1: All else equal, the average retail price of competing brands in a product category will increase when a retailer moves the category from BCM to CM.

Proposition 2: All else equal, the average retail price of competing brands in a product category moved to CM by a retailer will be higher

than the average retail price of that category at the competing retailer who continues with BCM.

Propositions: Sales

Proposition 3: All else equal, the total unit sales volume of a product category will decrease when a retailer moves the category from BCM to CM.

Proposition 4: All else equal, the total unit sales of a product category moved to CM by a retailer will be lower than the total unit sales of that category at a symmetric competing retailer who continues with BCM.

Propositions: Revenues

Proposition 5: All else equal, the sales revenues (average price times total unit sales) of a product category will decrease when a retailer moves the category from BCM to CM.

Proposition 6: All else equal, the profits (average gross margin times sales in units) of a product category will increase when a retailer moves the category from BCM to CM.

Summary of findings

1. For Retailer A, the move to CM produced a gradual but permanent increase in the category's average unit price by 7%.
2. Retailer A's average unit price was significantly higher than that of the rest of the market who did not move to CM.
3. Retailer A's weekly unit sales abruptly and permanently declined after the move to CM.
4. Retailer A's category revenues declined after the adoption of CM.

Research implications

1. CM is likely to lead to higher retail prices

2. Despite a decline in unit sales, retailer adoption of CM can still result in higher category profits.
3. Adoption of CM can improve a retailer's profit vis a vis a competitor only under certain conditions.

Session One: Part B Academic & Practitioner Research Richard Gooner (University of Alabama)

Richard Gooner discussed retailers' perspectives on CM in a study titled "*Supplier Influence on Retail Category Management*," which was coauthored by himself, Neil Morgan (University of North Carolina) and William Perreault (University of North Carolina).

Study objectives

1. To measure influential supplier or focal supplier influence on supermarket CM, including:
 - Impact on retail category performance;
 - Impact on supplier category performance;
 - Impact on focal supplier opportunism/ self serving behavior;
 - Impact on other suppliers' behaviors; and
 - Opportunism's impact on performance and behavior.
2. Measure category and retailer characteristics that drive or limit focal supplier influence on category management.

Execution of Study

- 80 qualitative interviews refine key relationships
- 35 homogenous categories based in CAN/ IRI sales/ categories reviewed by industry managers.

- Multi-item scales/ measures developed and pre-tested for all measures – combined into four page/ 116 item “buyer/ category expert” survey.
- 5 surveys (categories) mailed to each of 590 US supermarket-buying offices in 2001 and 2002.
- Response—108 retailers/ 347 category buyers for year one; 85 retailers and 261 category buyers for year two.
- Measure to demonstrate excellent reliability/ validity

Key Findings

1. Both retailers and focal or most influenced suppliers benefit from greater focal supplier influence on category management
2. Retailers benefit directly and indirectly via improved supplier category performance.
3. More focal supplier influence has no effect on focal supplier opportunism.
4. Coincidental opportunism depresses everyone’s results.
5. More focal supplier influence actually reduces other suppliers’ counter-predictive behaviors.
6. Category importance drives focal supplier influence.
7. Category importance drives focal supplier influence; however, retailer’s category expertise limits influence.

Discussion/ Next steps

1. Both retailers and focal suppliers are underutilizing more collaborative category management approaches.
2. Opportunistic focal supplier actually a non-issue – why?
3. Counter productive behaviors by other/non-focal suppliers are overstated – why?

4. This study is largely limited to retailers' perspectives but equally important to suppliers.

Session One, Part B, Academic & Practitioner Research Ravi Achrol (West Virginia University)

Ravi Achrol presented his own study "*Category Captains: A Managerial View of the New Shelf Management Protocols in Consumer Retailing.*"

Achrol expressed concern that new CM business practices may be very susceptible to anticompetitive abuse even though his data did not show that CM is causing consumer harm in consolidating retail markets.

After 20 years of slotting and other trade promotions, there are a number of theoretical explanations and studies based on:

1. Risk sharing
2. Signaling
3. Information economics
4. Retailer power

But there are no explicitly managerial theories of trade-pulled promotions.

Key questions from a public policy viewpoint

What has been the effect of CCs on:

1. Concentration
2. Prices
3. Innovation, and
4. Choice/ selection

1. Effect on concentration

Top 20 retail firms comprised 52% of retail market in 2000, up from 34% in 1967, and 40.1% in 1996

Top 8 firms comprise 40.5% of retail market in 2000, up from 25.7% in 1967, and 27.2% in 1996

Top 4 firms - 27.4 % in 2000, up from 19% IN 1967, and 16.6% in 1996

[Query: are these all national figures? Is it for all of retailing or all food retailing or just supermarkets, or what?]

2. Effect on margins, profits prices

1. Gross profit margins: 23.5 in 2001 and 1995, up from 17.4 in 1970
2. Operating expenses: 22.1 in 2001, 22.4 in 1995 and 19.9 in 1976 (n/a for 1970).
3. Net profit before tax: 1.4 in 2001, 1.1 in 1995 and 1.5 in 1970.
4. Overall consumer price index: 177.1 in 2001, 152.4 in 1995 and 38.8 in 1970.

3. Effect on new products/ choices

1. 16,287 new grocery products per store in 2000, down from 22, 572 in 1995 but up from 1,365 in 1970.
2. 49,225 items per store in 2000, up from 7,800 in 1970 (no data for 1995)
3. New grocery product to items per store ratio was 33.1% in 2,000, down from 44.1% in 1990 but up from 17.5% in 1970

Current views on category captains

1. Utilizing suppliers to act as category captains evolved from category management by retailers.
2. According to trade press, category captains have been good for retailers by reducing costs, increasing category sales and improving retailer orientation to consumer life style in marketing products.
3. However some trend indicators are contrary:

- a) CC moving to whole aisle
- b) CM becoming too broad – moving to segment captains
- c) Some retailers feel that the second brand does a better job of being CC than the supplier, which has greatest market share for the category.

4. Key questions remain about the effects of CM on category sales, prices, innovation and variety/selection.

- a) One academic study indicated that CM leads to greater category profits but higher retail prices and lower sales.
- b) CM based on past data but what are its effects on new products?
- c) Retailers delegating back but are not focusing on marketing to consumers.
- d) Benefits may be category specific – High cross-price sensitivity/ switching among brands but not stores.

Retailers Focus on Marketing

Retailers with the most innovative consumer marketing/ merchandising are also judged to have the best CM/ buying teams (i.e. Wal-mart, Safeway, H-E-B, Kroger, Wegmans and Target)

Session One, Part C: Practitioner Surveys Debra Desrochers, University of Notre Dame

Debra Desrochers presented a paper titled “*Antitrust and category captains: Insights from the field.*”

Objective & Method

1. Insights for competition concerns
 - a) Antitrust’s analytic process
 - b) Secondary data sources

2. Annual surveys

- a) AC Nielsen: Senior sales & marketing executives
≈ 120 Retailers & Manufacturers
Survey conducted November – December
Most recent 4 years: 1999 – 2002
- b) Cannondale: All levels of management
> 250 Retailers & Manufacturers
Leading firms in industry
Written survey distributed previous summer
Most recent 4 years: 2000 – 2003
- c) Conducted for highlighting industry trends: Data were not collected for purposes of studying the antitrust issues that may be associated with category captain arrangements or category management. Instead, the data were collected to help the industry understand recent trends and opportunities.

Competition Concerns

1. Market Definition: There is a trend in the industry such that best-in-class manufacturers will manage dayparts/occasions/aisles, rather than just categories.
2. Market Power
 - a. Leading practitioners of CM are also the leaders in their industry
Manufacturers: P&G, Kraft, General Mills & Pepsi-Cola
Retailers: Wal-Mart, Safeway, HEB, Kroger
 - b. Dayparts / occasions / aisles trend may lead to power over more products
3. Conduct - Conflict of Interest:
 - a. There seems to be some recognition that the CC is serving two masters, its own firm and the retailer: 26% of retailers trust analytical objectivity of manufacturers
 - b. In addition, 73% of manufacturers report that they receive at least good investment value for role as CC

4. Conduct - Exclusion
 - a. 84% of manufacturers report that one reason for practicing CM is to influence decisions on their categories
 - b. Single most important reason manufacturers practice CM:
 - i. Ensure category leadership: 27%
 - ii. Influence decisions on category: 27%

5. Conduct – Collusion: There may be an increased risk of collusion because there is a shift by CCs toward serving more, from fewer, retailers
 - a. *Increasing* % of manufacturers with *many* retailers (now 56%)
 - b. *Decreasing* % of manufacturers with *few* retailers (now 34%)

6. Efficiencies: Over the last 4 years
 - a. The average of the annual dollar sales growth due to CM reported by manufacturers is 11%The average of the annual dollar sales growth due to CM reported by retailers is 15%.

Session One: Questions to panelists

Question: Paul Christman expressed concern about charging manufacturers to become a CC – How common is that and how much does it cost?

What is wrong with selling the right to be a category captain?

Paul Christman: I am not sure about the prevalence overall among retailers but several large retailers are charging for right to be their category management lead source.

The problem with the concept for charging is best seen from an economic perspective. The charge will be buried into consumers' costs. That fee will inflate cost of goods and prices and will be passed onto consumers. I strongly urge clients to avoid the temptation to charge for category captaincy. Anything that adds to costs for

consumers will add inefficiencies into the CM process and not efficiency.

Question: Are there third party actors who could perform the CC job such as consultants who collect information?

Paul Christman: No, there aren't. Manufacturers are on top of leading trends for their products more so than anyone else

Question: What about Food brokers?

Paul Christman: Food brokers and its industry are changing drastically. Most local food brokers have gone out of business and have merged into national food brokers. Food brokers were attractive to retailers because they generally represent manufacturers in broader categories and provide local understanding of local markets.

Question: Do you advise your clients to be cautious when manufacturers offer discounts in return for being designated as CC?

Paul Christman: I advise clients that the main purpose of CCs is to provide creativity and objectivity to help grow category consumption. I express concern when discussion is too much around the cost of a product rather than around creative sales of item.

Question: I am happy that Suman Basuroy is doing empirical research into CM. Is research being done into average unit sales and CM?

Suman Basuroy: There could be many things happening that we have no information on. Brand deletion could be a significant issue. For example, I can't get Celestial Seasons Early Grey tea anymore at my supermarket.

Question: Even if suppliers do not pay for privilege of being CC, aren't there significant out of pocket expense for being the CC?

Paul Christman: It is expensive. The payment of fees on top of resources invested is not good. Some of that is defensive spending

because they would prefer themselves rather than their rivals to be the retailer's lead resource .

Question: Where are the academics going from here?

Ravi Achrol: I am developing a model for studying different CM techniques. There are a number of different techniques that serve different objectives so it would help if we can understand those mechanisms and what they do and cannot do.

Richard Gooner:

I would like to research:

- a) How dominant suppliers rationalize the CM process;
- b) Concentration on both supplier and retailer side, and the implications for consumers;
- c) Impact of CM on consumer choice.

Session Two: Antitrust Developments

Part A. Antitrust Dimensions by Robert Steiner, American Antitrust Institute

See "*Category management: A Pervasive, New Vertical/ Horizontal Format,*" Antitrust, Spring 2003, pp.77-81

"Category management bothers Commissioner Leary and it bothers me. Never before in retail history have manufacturers advised retailers on what to do with their rivals' products."

Category management simultaneously provides the opportunity for major cost savings in the distribution of consumer goods and a considerable potential for various sorts of antitrust mischief.

Basis for antitrust concerns

1. Reduction of costs in distribution does not require vertical integration or franchising, which are often not viable options, but can be achieved by cooperation and sharing of previously confidential information among independent manufacturers, wholesalers and retailers.

CM relationships

- Aim to slash costs in supply channels
- Vertical cooperation through channel partnerships
- Abundant testimony that improved vertical relationships has cut much inefficiency.

2. CM structures contain many new and unique horizontal and vertical relationships. New CM relationships, both horizontal and vertical, also invite the possibility of anticompetitive conduct.

Possible Antitrust Misconduct arising from CM

a) A manufacturer may increase its vertical market power at the retailer's expense by obtaining an overly strong say in the retailer's selection of items, their pricing, their display and promotions.

Reduced store brand competition -- concern that CM may lead CCs to bias against store brands. A CC may try to get a retailer to increase its store-brand prices to match the increase in the CC's name-brand prices by accusing the retailer of being opportunistic for not following suit.

Background - Leading national brands and private labels (i.e. retailer's home brands) discipline each other. (When leading national brands dominate a category, manufacturers' margins will be high and retailers' margins will be thin, but in categories that are characterized by many lesser known brands and private labels, retail margins are high and manufacturers' margins are thin). Private labels are disciplined by the need to sell at a considerable discount from retail

prices of leading national brands while factory prices of national brands are constrained by the low retail prices of private labels whose market power derives from the reputation enjoyed by large market share retailers.

b) Exclusion of smaller rivals who are not CCs or advisors. Smaller manufacturers are frequently unable to compete for CC positions because they cannot spare the resources required (staff, software programs and marketing data).

c) Danger of horizontal collusion – no evidence that this occurs but it is a possibility when CCs have price data and other formerly confidential information of rivals.

d) Danger that dominant manufacturers in a class of goods are typically the CCs and can use that position to further increase their market share and market power.

3. Efficiencies from category management are definitely there when suppliers work with retailers to develop practical CM implementation and create promotional plans. But efficiencies and anticompetitive concerns come bundled together.

Some new forms of cooperation between manufacturers and retailers in channel partnerships and CM can produce significant efficiencies but not all cooperation is helpful. “When manufacturer-retailer cooperation weakens or eliminates vertical competition, even when the cooperation does not quite rise to the level of collusion in a legal sense, there can be serious welfare consequences.”

Two situations that came to Steiner’s attention: The category captains tried to persuade retailers to raise prices of store brand by indicating that research showed price elasticities are very low. In another case, a consultant apparently ran around advising everyone except for Wal-Mart to raise its prices in the relevant category.

If vertical competition becomes too flabby through too close vertical cooperation, even though the manufacturer may be gaining power relative to the retailer, it is possible that the margins at both stages

may be raised by CM so that few if any of the gains in efficiencies get passed on to consumers.

Efficiencies can be realized but there is a vested interest on part of category captain to feather the nest of his firm – That is not opportunistic behavior but that is what CCs are supposed to do since the firm pays them.

5. Information asymmetry. Proctor & Gamble, Nestle and other big manufacturers tend to have senior and middle level management officials who were far more educated than retailers who often came up through the ranks. Previously, some suppliers felt they had to educate retailers on how to implement CM regime, but now retailers are more savvy and educated on economics and management.

Future research

There are CM efficiencies but whether they outweigh anticompetitive affects needs to be further analyzed.

What are effects of CM for consumer prices?

Is it possible to retain the efficiencies derived from utilizing CCs to develop categories as strategic business units while simultaneously reining in CM's anticompetitive tendencies?

Session Two Question to Steiner

Question: I can understand the rationale for CM efficiencies in technical markets but what are the likely consumer benefits of category captains advising retailers about long established, popular but non-technical product areas such as ketchup?

Bob Steiner: CM provides many opportunities for close cooperation between retailers and suppliers that provides many efficiencies, such as:

- a) Suppliers are familiar with seasonal trends such as common diseases that dominate at different times of the year or changing garden supply needs and how to stock for those needs accordingly.
- b) CM can reduce costs in supply systems by helping retailers learn what is redundant, and by cutting that.
- c) Lead suppliers are familiar with the ongoing changing tastes of their consumers and how demographic changes, cultural shifts or other factors are affecting consumer demand and sales;
- d) Retailers have more information on what is sold and how much is sold – They have more rapid and accurate information on what isn't selling.
- e) Supplier may know how product categories are best aligned (i.e. what other categories of products that people who buy in one category are more likely to also seriously consider purchasing), and know how to cut down on shopping time by recommending placing them in convenient nearby positions.

But, we need further research into whether such efficiencies generated by CM outweigh the anticompetitive tendencies of CM, reiterated Steiner.

Session Two: Antitrust Developments

Part B. Case & Enforcement Update

David Balto, White and Case LLP

Formerly FTC Competition Bureau, Policy & Evaluation Division Chief and currently counsel to Royal Ahold (large Dutch supermarket chain)

David Balto opined that CM is about vertical relationships — because it involves information sharing between suppliers and retailers. CM is largely efficient and should always be analyzed as a vertical relationship, said Balto. Vertical relationships don't force people to integrate information between manufacturers and retailers, according to Balto who also contended that CM efficiencies are generally passed onto consumers. It is good for manufacturers to be

able to make suggestions to retailers regarding how best they can place their products, said Balto.

The Federal Trade Commission's Slotting Allowance Report is a good starting point for analyzing vertical CM relations, advised Balto. In the Report, the FTC addressed the principal issues of foreclosure and collusion.

It is ever incumbent upon goods manufacturers to be vigilant about collusion concerns, admonished Balto.

1. If a category captain (CC) learns of the promotion plans of its rival(s), they might promote less aggressively.
2. Captains can facilitate collusion when retailers inappropriately delegate management duties that they should retain control over.

Balto was critical of recent court decisions such as *LePage v. 3M* where he opined that the courts failed to follow the structured analysis suggested in the FTC Slotting Report.

LePage's challenge to 3M's rebate and allegedly exclusive dealing arrangements resulted in a trebled damages award against 3M that amounted to more than \$68 million. On March 25, the Third Circuit reheard the case, reversed the panel and affirmed the judgment. Critics argue that discounts that reward customer loyalty are commonplace, and that this decision will increase the legal risks to leading firms that implement price programs that are perceived to discourage the purchase of competitive products.

3M makes Scotch brand tape for home and office use, and in the early 1990s had a share of about 90% of the transparent tape market. *LePage's* competed against 3M with second brand and U.S. private label transparent tape and by 1992, *LePage* enjoyed 88% of private label tape sales although this market accounted for a small percentage of overall transparent tape sales. 3M created a bundled discount program that provided a larger discount to Retailers who also bought their private label transparent tape. *LePage* argued that 3M maintained its monopoly by offering higher rebates to customers who bought different 3M products and by offering large customers

lump sum cash payments, promotional allowances and other cash incentives to encourage them to buy exclusively from 3M.

The Third Circuit Court of Appeals concluded that bundled rebates by a monopolist, even if above cost, could be considered exclusionary and may foreclose sections of a market to a competitor that does not make equally diverse products and cannot make comparable offers. Critics argue that the decision will increase uncertainty as to the rules governing above cost strategic pricing of popular branded products.

Foreclosure issues will become murkier following the 3M decision, warned Balto, who critiqued its alleged dearth of analysis into the impact of the challenged behavior (bundled discount rebates by a monopolist manufacturer) on its rivals and the market.

Session Two: Antitrust Developments

Part C. Industry Perspective

**Christopher MacAvoy, Howrey Simon Arnold & White, LLP
Food Marketing Institute Counsel**

Industry perspective

Are category management practices so new? Kellogg advised supermarkets with “Planograms” for how to stock shelves with their products. There was some argument about whether the use of such planograms is anticompetitive – Smaller rivals had contended that they were excluded from shelf space. The court disagreed and ruled that Kellogg was entitled to serve its own profit interests. **[Query: when was this?]**

If people are against slotting allowances, then they ought to be for category management when it is done properly and legitimately, argued MacAvoy. CM is about fact-based decisions – getting the right product on the right shelf in the right amounts. Despite early concerns, FTC staff did good job with slotting fee report, which has provided useful analytical guidance, he opined.

CM is now popular because Retailers have a lot of data but not the time or specific expertise in individual categories to analyze it. CM is a joint project between many stakeholders.

Practical issues.

1. Retailers and NOT category captains should make the final management decisions regarding shelf slotting.

A CC should not make recommendations that marginalize its rivals. CCs should only make recommendations regarding how to properly shelf products or how to promote the category. I.e. CC can transmit information that suggests how to shelve but should not advise on prices, costs, or about the pricing or the discontinuation of a rival's product.

2. Many retailers find that CM recommendations are time-consuming and costly. Implementing CM requires the CC to take into consideration practical limitations of the retailers, such as labor. 85% of product handling is at the store level.

3. Risk of bias: Vendors will give biased information. Of course Retailers need to review information given by CCs with some degree of skepticism.

4. Firewall issue –FTC staff report recommends firewalls – i.e. safeguards to prevent either the deliberate or inadvertent communication of competitively sensitive information. Bob Steiner previously expressed skepticism about whether such firewalls are even possible, let alone whether they are being implemented effectively.

5. Standard for collusion – murky.

6. Private label issue – concern about horizontal constraint. If you are both supplier and retailer, should rivals be given information? Retailers could consider employing a private label broker for example.

7. United States Tobacco Co. Conwood Co. decision may chill manufacturers with high market shares from producing store level services – Retailers do look to manufacturers to help them with displays etc. Conwood alleged that United States Tobacco unfairly dominated the smokeless tobacco industry through its category captain arrangements. (http://www.nacds.org/user-assets/Html_files/USCA6_Opinion.htm)

Session Two Questions

Question: How do you reconcile suggestion of co-captains with collusion?

Chris McAvoy: Retailers need to get information from more than one source.

Question: Apart from food industry, what is the likelihood of category captains leaking into other industries such as books?

Greg Gundlach: It has already happened. CCs have moved into aftermarket auto parts and services industry. Home improvement stores such as Home Depot now use category management also.

Question: Panelists are talking about efficiencies and cost as if the goals of business is to lower its cost and be an altruist to consumers – when the goal of business is generally profit maximizing. Isn't CM inherently very suspect?

David Balto: There are a whole variety of reasons for why Retailers promote some goods over other. Need to assume that different retailers have different, generally legitimate strategies.

Bob Steiner: The basic structure of CC (leading Manufacturers moonlighting as Retail managers advising distribution outlets on

where and when to place their rivals' products and at what price) represents an antitrust concern.

Question: Please elaborate on the concern of a single supplier giving the same advice to competing suppliers. Why should we be concerned about CCs making the same suggestions to rival retailers?

David Balto – How do you overcome the natural tendencies to a cartel?

Chris MacAvoy – Sounds like Suggested retail price

Luncheon Address

Perspectives on Conwood v. United States Tobacco

Michael Guzman, Kellogg, Huber, Hansen, Todd & Evans LLP
Dennis Cross, a partner at Stinson Morrison, Hecker LLP in
Kansas City

Case Background

Conwood Company v. U.S. Tobacco Company

No. 00-6267

Argued November 27, 2001

Decided and Filed May 15, 2002

Reheard and suggestion for rehearing En Banc Denied
July 19, 2002.

A manufacturer of moist snuff, Conwood Co. brought suit alleging that another moist snuff maker, United States Tobacco Co., had used its monopoly position to exclude competitors from the moist snuff market. Among other charges, the 1998, eight-count complaint alleged that United States Tobacco unfairly dominated the smokeless

tobacco industry through its category captain arrangements. USTC filed counter claims for conversion and violation of the Sherman Act.

According to Conwood, when USTC sales representatives restocked or rearranged their own displays, they would routinely discard hundreds of thousands of Conwood racks and their accompanying Point Of Sale (POS) advertising so that after 1990, Conwood spent \$100,000 a month on replacement racks. Conwood's chairman testified that Conwood sales representatives spent half their time repairing racks that had been destroyed by USTC representatives. Several USTC staff testified that they had been instructed by supervisors to remove competitors' racks and fresh moist snuff products.

USTC countered that retailers rely on leading manufacturers to perform certain shelf management tasks for them, such as cleaning and rearranging shelf space in order to create more space, and that they only removed competitors' racks or POS at the retailers' direction. However a retail manager testified that USTC staff removed Conwood's racks secretly after being directed not to disturb their racks. Conwood contended that it did not encounter problems with its displays of smokeless tobacco products in markets in which USTC did not compete.

Conwood argued that had it not been subject to USTC's tactics that it would have had a national market share of approximately 22-23%. After tracking Conwood's market share over 20 years, their expert economic witness testified that lack of growth in the second decade starting from 1990 resulted from USTC's tactics. In locations where USTC did not have rack exclusivity, Conwood's moist snuff market share was well above its national average. In locations where USTC had rack exclusivity, Conwood's market share was below its national average.

In 1999, USTC moved for summary judgment as to Conwood's federal claims (unlawful monopolization in violation of Sherman Act Section 2 and Lanham Act Section 43(a)); and moved for dismissal without prejudice as to the state law claims (violations of Kentucky Revised Statute). In February 2000, the case proceeded to trial.

Conwood dropped the state law claims and both parties dismissed their Lanham Act claims.

After four hours of deliberation, the jury returned a \$350 million verdict in favor of Conwood and the District Court entered judgment on March 29, 2000 and then trebled the award to \$1.05 billion. The jury also ruled in favor of Conwood on USTC's conversion and Sherman Act claims.

Conwood moved for a permanent injunction to prevent USTC from removing or eliminating any competitors' advertising material in retail stores [i.e. unauthorized removal of Conwood's in-store racks and point of sale (POS) displays] without the prior consent of the retailer. The District Court granted the motion on August 10, 2000. USTC moved for judgment as a matter of law or for a new trial or reduction in damages, arguing that its conduct was not exclusionary, competition was not harmed and that Conwood had not established causation and damages. The District Court denied the motion on August 10, 2000.

In September 2000, USTC filed a notice of appeal challenging the district court's earlier denial of its motion for summary judgment or reduction in damages.

In July 2002, the Sixth Circuit Court of Appeals affirmed the earlier decision by U.S. District Court for the Western District of Kentucky, Thomas B. Russell and denied USTC's appeal. The Court of Appeals held that:

- 1) There was sufficient evidence for the jury to find willful maintenance of monopoly power;
- 2) There was sufficient evidence showing that plaintiff's injury flowed from defendant's anticompetitive activity;
- 3) District Court did not abuse its discretion in determining that plaintiff's expert's methodology was sufficiently reliable or relevant; and
- 4) There was sufficient evidence to support the jury's award of damages.

(For the Sixth Circuit opinion, go to [http://www.nacds.org/user-assets/Html files/USCA6 Opinion.htm](http://www.nacds.org/user-assets/Html_files/USCA6_Opinion.htm))

The Supreme Court recently refused to review the \$1.05 billion antitrust award against the United States Tobacco Co., which is possibly the largest verdict ever upheld under antitrust law. It marked the first time an appeals court condemned as an antitrust violation a system that gives a company some control over merchandise displays of its own and competitors' products.

Michael Guzman, Kellogg, Huber, Hansen, Todd & Evans LLP

The Conwood case is not path breaking in terms of how rules have changed for dominant firms because it was merely a case where a monopolist overstepped its bounds, Guzman opined. The challenged conduct (A dominant supplier's willful destruction of rivals' racks and products in the guise of performing routine category management activities for retailers) was extreme, and unsurprisingly it was found to be illegal, he said.

Guzman's Lessons from Conwood case

1. Know the industry – Moist snuff is heavily regulated regarding advertising, hence point of sales (POS) advertising and display racks are more important than in other industries. Freshness is a problem in soft tobacco, so be careful what you do with rivals' products if you are managing shelves and removing rival's products.
2. Don't focus on excluding competition. For example, USTC was unwise to hold contests among its staff for who could eliminate the most rivals' products and to track elimination of rivals products and POS advertising.
3. Explain legitimate category management objectives from the outset and be careful with language.

Dennis Cross, a partner at Stinson Morrison, Hecker LLP in Kansas City

See article “*Monopolization or Competition? Report from the Snuff Wars*” by Dennis Cross in *Antitrust*, Fall 2002, pp 61-66

Cross’ Concerns about Conwood decision

1. Category management should be considered presumptively a pro-competitive thing.
2. Any restraint on competition was minimal. Conwood did not lose existing market share but merely did not grow in projected market share. The challenged conduct did not result in foreclosure of competition. USTC did not have exclusive supply agreements but it had exclusive rack arrangements with a number of major retailers that amounted to less than 10% of the total.
3. The \$1billion antitrust judgment is likely to create a large disincentive for leading manufacturers and monopolists to be prepared to act as category captains given the legal risks, and therefore consumers will forgo many efficiencies generated by CM.
4. Need to distinguish aggressive competitors from illegal conduct. Vigorous competition by a monopolist must not be confused with monopolization in violation of Section 2 of the Sherman Act. However the Seventh Circuit has held that showing “intent to harm rivals” is not a useful standard in antitrust. It is up to the trial court or the court of appeals to distinguish between the intent to monopolize unfairly and the intent to win.

Cross’ Lessons from Conwood

1. Defendants in such cases must win their summary judgment motions. If the case goes to jury, it is very likely that evidence of the defendant’s intent to defeat the competition will play a central role.
2. The problem of separating lawful competitive conduct from unlawful monopolization is not adequately resolved by jury instruction. Even when juries are instructed to distinguish monopolistic from competitive behavior, it is unlikely to be effective when the argument is placing too much emphasis on evidence of a

monopolist's intent to destroy the competition. It is hard enough for lawyers and economists to make that distinction, let alone juries.

3. The antitrust risks of aggressive competitive behavior by monopolists and near monopolists are greater than previously thought. Firms with dominant market shares should advise their sales staff to be careful in their written and spoken communications in order to avoid the appearance of an intent that may be later construed as monopolistic or exclusionary.

Discussion

Bob Steiner: The presumptions that aggressive competitors always want to hurt rivals is different in the context of category captains. Undertaking such a role does impose a greater responsibility on manufacturers to be even handed.

Guzman: CCs have a responsibility to both retailers and consumers to not produce skewed data that favors their own products but to provide data that moves the category as a whole forward.

Participant: How big is moist snuff market and who uses it?

Participant: \$800 million year net profits. Moist tobacco is not, as popular misconceptions suggest, the preferred vice for old country hicks. Users tend to be male and young (18-30). It is popular in many areas where smoking is not allowed and among professionals and educated people, such as on college campuses, in offices where smoking is forbidden, and is increasingly used in urban areas.

Participant: The concept of category management developed because smaller retailers did not have the clout to compete effectively with Wal-Mart. Category captains should be selected because they know how to grow the product category, and are willing to collaborate. Payments for right to be CC should be restricted because they have no benefit and such charges will be passed on to consumers.

Session Four
Guidelines for Antitrust Practitioners
Irving Scher, Weil Gotshal & Manges LLP

Category management antitrust guidelines

Irving Scher proposed category management guidelines that antitrust counsel could use to counsel their clients on how to avoid antitrust problems while practicing CM.

Scher suggested giving legal advice that makes it clear that:

(1) Category management is a legitimate sales management function so long as CC presents objective accurate factual data to retailer. There are many ways that CM, not done right, could undermine or harm competition.

(2) Retailers should make all decisions concerning:

- Optimum brand assortment to carry
- Shelf arrangement for products carried
- Pricing
- Promotions

(3) CCs should not provide data that favors CC's brands or SKUs.

- Focus should be on recommendations to stock brands that meet the customer's stated business objectives.

(4) CCs may suggest retail price points so long as retailer independently makes the actual pricing decisions.

(5) Serious problems arise when CC recommends discontinuance of a rival brand. Retailers and suppliers cannot successfully exclude products especially where there is brand loyalty as with cigarettes.

(6) Clients should not request a co-CC arrangement because of the likelihood of co-ordination.

CCs' recommendations should not be coordinated with a competitor even when requested by the Retailer.

(7) If a retailer demands a co-CC arrangement, the CC's must set up firewalls to prevent copying and sharing each other's competitively sensitive information.

(8) Suppliers should also avoid "observing" rival's product development plans.

(9) CC should only suggest prices if they have new products and/or when pricing is unknown. CC should not suggest to retailers what a rival is promoting or marketing or how rivals are pricing.

(10) CC should never convey to one Retailer customer the pricing brand assortment or other competitive information developed with another Retailer customer.

(11) Care should be taken to avoid a hub and spoke conspiracy claim, i.e. that the CC is orchestrating a conspiracy among the customers for whom it operates as CC.

(12) CC should respect the confidentiality of any information considered by the Retailer customer to be proprietary.

(13) Loyalty discounts. De facto category management by a supplier with market power can violate the Sherman Act – (See REYNOLDS TOBACCO V. Philip Morris 2002- It involves a claim by three competitors that a supplier with a 52% market share, including an essential brand with a 38% market share, abused its market power by paying promotional pass through funds (buy downs) to retailers that were willing to reduce or eliminate the visibility of competitors' products on retail shelves. The case was dismissed on summary judgment and failed on appeal.

Where do we go from here? Predictions?

Session Five:

Category Captains Roundtable Discussion Moderated by AAI President Bert Foer

General questions

What are the implications for Retailers?

What are the implications for Suppliers?

What are the implications for Legal Counselors?

What are the implications for Law enforcers?

What are the implications for Legislators?

Specific Questions

1. What information can CC safely transmit to Retailer?

2. What can CC say about the R's prices and promotions?

3. What can CC say about R's proprietary brands

4. To what extent can the CC cooperate with a rival?

5. How can CC and R's avoid hub and spoke conspiracy?

6. Should there be a formal written contract between CC and R? How much detail?

7. Should a supplier pay a Retailer for the right to be a CC?

8. How should efficiencies be assessed?

9. What antitrust remedies are available?

10. Where do we go from here?

What information can CC safely transmit to Retailer?

Greg Gundlach: Information transmission safeguards need to prevent CC using CM as a mechanism for controlling flow of information and facilitating collusion.

Participant: My fears have been confirmed as a justifiably nervous counsel during this forum. My worry is that my clients are imperfect and will not follow all the CM rules

We are talking about business practices that affect competitors – with the possibility of losing legal challenges since CM provides mechanisms for: vertical and/or horizontal conspiracies, and for exclusion of rivals. I don't think that the argument that retailers can take or leave any advice offered is a defense. If there are documents showing that suppliers and retailers have an agreement, and other papers showing that CC profits went up and so did prices to consumers. Then I lose my clients after they fire me for not warning them against CM related legal backfire.

Bert Foer: It is a safer course to not have CCs but that is just one possibility.

Participant: Don't we need to ask what information is safe for CC to have in the first place?

Bert Foer: CC is typically being given everything that might be relevant to planning the category – prices, turnover, and experiences with other brands.

Bob Steiner: There are a lot of basic conflicts. Who pays the category captain? – The firm who he works for. There is a lot of emphasis that it all has to work on trust but the problem is that there are efficiencies while one rival makes recommendations over its rivals' products. CM is a revolutionary retail business method but the antitrust consequences have not been thought out fully.

Chris McAvoy: Bad information gets corrected.

Dennis Cross: Information flow doesn't depend on CC system being in place. That type of information would be transferred even if there were no CC system in place. The question is what does CC add to that?

Greg Gundlach: What information can be safely transmitted depends on an analysis of where information could be used against rivals.

E.g. Market power – process of transferring information

Exclusion - Conwood

Foreclosure - Reynolds case

Participant: Marketing schemes have inborn conflicts of interest. Is there another marketing method? There is also a conflict of interest in franchising relationships because franchisers have power over franchisees' money.

Bert Foer: Antitrust law did not deal with Franchise situation adequately, and we ended up needing a special Franchise Rule.

Participant: Truth and trust are overrated. There is a problem with requiring/ assuming perfect trust in business relationships, and in their communication.

No one has ever been convicted for providing accurate information.

Participant: It is possible for two sides with different arguments and corresponding sets of statistics and they can both be presented as accurate.

Paul Christman: One piece of information that shouldn't be shared is costs but sometimes it is. Retailers sometimes provide captains with information of wholesale costs and not just retail prices. It is the Retailer's responsibility to maintain cost information independently and confidentially. For example, keep scorecards by the quarter and analyze those.

Participant: What information can captain provide to retailer? My experience at the FTC on supermarket mergers suggests that CCs know exactly what rivals are going to be doing.

David Balto: Retailers have to be cautious disclosing that information.

Ravi Achrol: How can Retailers open up such information more rather than have CCs control it?

Participant: Requiring disclosure of competitive information is dangerous. There is an Adam Smith quote along the lines that nothing good can come of even just requiring certain information on a sign.

Participant: I am also concerned about disclosing pricing information. But there is a paradox here because if category captains can't know pricing information, then they can't manage shelf turnover properly.

Paul Christman: CCs don't need to know what their rivals are charging. If rivals have better shelf space at eye level than you can know they are providing better cost.

Question: If CC has market power – can antitrust risks be effectively offset by presence of co-captains or advisors?

David Balto: Co-category captains – As a former antitrust enforcer, I find this concept discomfoting.

Greg Gundlach: Concept of co-captains appears to carry present considerable antitrust risks of collusion even though it could counteract the antitrust risks of exclusion of rivals by a single captain who has market power.

What can CC say about the Retailer's prices and promotions?

Bert Foer: Perhaps it useful to examine the example set by the Israeli Antitrust Authority (IAA), which in May 2003 issued ten instructional details to govern Supplier/ Retailer relationships in increasingly consolidated food and non-food retail markets.

This is similar to a trade regulation rule, since the instructions bind the three largest retail chains in Israel and all the food and non-food suppliers. After an extensive investigation lasting more than three years, the IAA discovered various agreements among the major retail chains and dominant food and non-food suppliers that tended to stifle potential supplier competition as well as to hamper competition among retail chains, primarily price competition.

The instructions are aimed at:

- 1) Eliminating the dominant suppliers' ability to increase their power or preserve it by way of agreements with the major retail chains that result directly or indirectly in blocking or limiting the access of competing suppliers to the chain's shelves; and
- 2) Preventing the major retail chains and dominant suppliers from reducing competition at the chain level.

SEE APPENDIX 3 – Israel Antitrust Authority instructions for limits on category management arrangements between major retailers and dominant suppliers.

Irving Scher: There are limits on what a CC can discuss with a retailer about proposed prices and promotions, because plaintiffs' counsel in antitrust class actions may seek to characterize such discussions as improper information sharing among competing suppliers through a retailer used as a conduit.

Participant: Matching brands – It is more efficient to have whoever is making category recommendations to make recommendations for everything and if there is a limit on giving such information then it will likely reduce the efficiencies from the arrangement. We need more evidence of wrong doing before prohibiting exchange of category information between retailers and CCs.

Participant: There is a difference between lawyers and economists because those with their necks directly on the line are more likely to be cautious.

Paul Christman: Pricing should be the Retailers decision not the CC's.

Dennis Cross: Judges can't distinguish between lazy and non-lazy retailers.

Bert Foer: My experience as a retailer was that buyers came up from the sales floor and middle ranks and were generally not college graduates, much less MBA's. They did not generally have the training or skills to match the larger suppliers.

Chris McAvoy: I take exception to the suggestion that retailers are simple-minded passive tools and suppliers as all powerful gatekeepers. Suppliers might fool retailers once but it won't happen too often.

Richard Gooner: Increasingly, Retailers are more sophisticated.

Participant: My concern is not for the large sophisticated retailers but for the few small retailers left who can't afford Paul Christman as consultant.

Greg Gundlach: We need to understand what Retailers care about. Generally speaking, the Retailer doesn't care if the captain obtains more share but only if the share in total category is growing.

What can CC say about R's proprietary brands?

David Balto: Sometimes formalism triumphs over common sense. It is a stretch to suggest that vertical communications could easily be found to be collusive. Many are going too far by characterizing something as horizontal when it is vertical.

Bob Steiner: Dual manufacturer/Retailers are now more commonplace. Private label competition is a complicated matter. The horizontal - vertical divide is an arbitrary one made up by lawyers and economists and it is not a very real test

There are tensions and economic disciplining affects between home brands and other labels.

Richard Gooner: If you want to attack a retailer, there is no faster way than to attack its private label products. There is an Incentive to attack lesser brands in guise of invigorating the category.

Participant: This does not feel like collusion if they are maintaining differentials. It is up to the retailer as to what price they set for it.

Richard Gooner: “I have said the word collusion more in last two hours than over the past twenty years as manager because it is a word that you just don’t say.”

Participant: Going around saying if you raise your price we’ll raise ours is not efficient. It is a felony to discuss ways to raise private label prices and store brands.

Participant: It is not easy to pull off collusion. Customers can go across the street if they raise prices. And if the retailer raises his prices, it doesn’t mean that suppliers get paid more unless the retailer agrees to pay more.

Participant: CC-related collusion would require a more complicated arrangement. Such collusion would require a concentrated market so that there are not sufficient substitutes for products that may be subject to anticompetitive agreements between retailers and dominant suppliers, which result in raised prices.

To what extent can the CC cooperate with a rival?

Question: Firewalls and other protections – Do such measures eliminate efficiencies? –

No one was apparently willing to take a firm position on this question prior to more research being done.

Should a supplier pay a Retailer for the right to be a CC?

Participant: There are so many ways to pay discounts and advertising allowances, with some being more implicit and some more explicit. What is the difference?

David Balto: I could envision a world where CC fees would be so substantial to warrant concern

Bob Steiner: It makes a lot of difference whether fees are enough to cover costs for launching new product or whether they are excessive and require the costs be passed onto consumers.

What antitrust remedies are available?

Bert Foer: Are there alternatives to accomplish the same objectives without raising antitrust concerns such as third party consultants?

Participant: Maybe CCs should be considered per se illegal. There are clear efficiencies in terms of distribution processes and how retailers market and place products – So perhaps a third party could convey useful category information to retailers.

Paul Christman: I haven't seen third parties yet that can demonstrate the capacity to provide the relevant information with a strong vision of where the category is headed. Retailers are not doing the level of research that supplier brand managers are.

Bert Foer: The Israel Antitrust Authority's ten instructional points for CM related business practices between the three major Israeli Retailers and all food and non-food suppliers provides an example of alternative guidance (See Appendix 3).

Participant: Won't the Conwood decision scare off big companies from doing much with CC roles?

Bert Foer: if US Tobacco had followed Irving Scher's guidelines, would that have eliminated the problems around the CC arrangements in that case?

Dennis Cross: I'd still be concerned.

Chris McAvoy: Major Suppliers don't intentionally use CM as a way to fight competition.

Participant: I wonder if the problems in CC are to some degree self-correcting? It is still a newcomer on the block.

Bob Steiner: There are more very skilled people in retailing and sales than was the case ten years ago.

Richard Gooner: It has changed. Most of them have degrees now and did not work their way up through the ranks as before. The problem now is that many of the supermarket managers do not know the ground store level anymore.

Where do we go from here? Predictions?

Richard Gooner: In 5-10 years one of the top five players will go away because competition from Wal-Mart is effective.

Participant: We are all interested in over-estimating returns of increasing variety. It might be hard to show that consumers have been hurt by reduced choice.

Bert Foer: I see CM as a dynamic that ultimately will lead to fewer choices for consumers.

David Balto: CM will be good for driving category sales forward.

Participant: In Conwood, the captains were not looking to increase sales for the smokeless tobacco category as a whole. It depends on the facts of each case.

Greg Gundlach [in closing]: We haven't answered all the questions today. But we have made considerable headway in encouraging informed antitrust thought about the quiet Category Management business method revolution. Further CM related studies, publications and forums are in the pipeline.

APPENDIX 1 – FORUM AGENDA

- 1. Coffee and tea (8:30 - 8:45)**
- 2. Welcome and Introductions (8:45 – 8:50)**
by Forum Co-Chairs: Professor Gregory Gundlach, University of Notre Dame and Albert Foer, American Antitrust Institute President.
- 3. Opening Remarks (8:50-9.05)**
The Honorable Thomas B. Leary, Commissioner, Federal Trade Commission
- 3. Category management and captains (9:05 - 10:15)**
 - a. Overview and emerging developments
Paul Christman, Winston Weber and Associates
 - b. Academic and practitioner research
 - i. Academic studies
 - (1) Suman Basuroy, University at Buffalo
 - (2) Richard Gooner, University of Alabama
 - ii. Practitioner surveys
 - (1) Debra Desrochers, University of Notre Dame

- 4. Antitrust developments (10:30 - 12:00)**
 - a. Antitrust dimensions
Robert Steiner, American Antitrust Institute
 - b. Case and enforcement update
David Balto, White and Case LLP
 - c. Industry perspective
Christopher MacAvoy, Howrey Simon Arnold & White, LLP

- 5. Luncheon (12:00 - 1:30)**

Perspectives on Conwood v. United States Tobacco
Michael Guzman, Kellogg, Huber, Hansen, Todd & Evans LLP
Ernest Gellhorn, George Mason University was replaced by Dennis Cross, Stinson Morrison Hecker LLP

- 6. Guidelines for antitrust practitioners (1:45 - 2:15)**
 - a. Irving Scher, Weil Gotshal & Manges LLP

- 7. Roundtable discussion of antitrust issues and guidelines (2:15 - 4:45)**
 - a. Moderator Albert Foer, American Antitrust Institute

- 8. Closing remarks (4:45 - 5:00)**

APPENDIX 2 – List of Participants

Roundtable on Antitrust and Category Captains National Press Club, Washington DC June 23, 2003 (8:30-5:00)

Co-Chairs:

Gregory Gundlach, University of Notre Dame and American Antitrust Institute

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Albert Foer, American Antitrust Institute

- Roundtable Participants -

Ravi Achrol, West Virginia University
Charles Adams, General Accounting Office
David Balto, White and Case, LLP
Suman Basuroy, University at Buffalo
Peter Carstensen, University of Wisconsin
Paul Christman, Winston Weber and Associates
Dennis Cross, Stinson, Morrison, Hecker LLP
Peter de la Cruz, Keller and Heckman, LLP
Mark Denbaly, Economic Research Services, Department of
Agriculture
Debra Desrochers, University of Notre Dame
Albert Foer, American Antitrust Institute
Christopher Garmon, Federal Trade Commission
Andrew Gavil, Howard University
Ernest Gellhorn, George Mason University
Richard Gooner, University of Alabama
Kenneth Grigg, Patton Boggs, LLP
Warren Grimes, Southwestern University
Gregory Gundlach, University of Notre Dame
Michael Guzman, Kellogg, Huber, Hansen, Todd & Evans, LLP
Robert Lande, American Antitrust Institute
Thomas B. Leary, Commissioner, Federal Trade Commission
Christopher MacAvoy, Howrey Simon Arnold & White, LLP
Oded Pincas, Federal Trade Commission
Garret Rasmussen, Patton Boggs, LLP
Irving Scher, Weil Gotshal & Manges LLP
Tom Stanley, Eastham, Watson, Dale & Forney, LLP
Bob Steiner, American Antitrust Institute
Mary Sullivan, Department of Justice

[There were also many members of the audience who were not designated as ‘ roundtable participants’ but who both listened and asked questions.]

APPENDIX 3: The Israel Antitrust Authority’s Ten Instructions for binding Major Retailer/ Dominant Supplier commercial relationships and communications

May 29, 2003 (original Israel Antitrust Authority document is 26 pages in Hebrew. It was translated and summarized into 4 pages for workshop)

1. A chain shall not accept, and a supplier shall not offer, a benefit aimed at changing the identity of the supplier’s rivals on the chain’s shelves, reducing their number or diminishing the size or attractiveness of the display area. A chain and supplier shall not negotiate the identity, number, terms of agreement, or scope of sales of the supplier’s rivals on the shelves.
2. A chain shall not accept, and a supplier shall not offer, a benefit aimed at affecting chains decisions for whether to introduce, discontinue, or decrease sales of private labels or parallel imports.
3. A chain and dominant supplier shall not agree on making available to the supplier:
 - a) Display areas exceeding 50% of display areas for the entire category; or
 - b) Exclusivity in non-shelf display areas for more than 3 months a year, 30 consecutive days, or the entire high holidays. Any agreements for allocation of display areas shall be no more than one year in duration.
4. A chain shall manage all its categories independently and without any supplier involvement, including, but not limited to, in determining the product and supplier variety and the display areas size and place.

5. A chain shall not accept, and a supplier shall not offer, a benefit in return for the dominant supplier's achieving of a preset sales target, unless the target is limited to a specific product and the benefit is given only for units sold after the target has been achieved. Products sold in discount shall not be sold under their production cost.

6. A chain shall not accept, and a supplier shall not offer, a benefit in return for setting the supplier's minimum market share or a rival's maximum market share in the chain's sales.

7. A chain and supplier shall not negotiate an agreement constraining directly or indirectly the inability of a rival supplier to hold a special sale together with the chain or the ability of a rival chain to hold a special sale together with the supplier.

8. A supplier shall not affect directly or indirectly a chain's decision regarding the consumer price of the supplier's or its rival's products. Notwithstanding the foregoing, a supplier may agree with a chain, for promotional purposes, on a maximum resale price, or recommendation to the chain, for a period not exceeding nine months, an introduction price for a new product.

9. A chain shall not contact a supplier with any inquiries in regards to the consumer price of the supplier's products at another chain. Notwithstanding the generality of the foregoing, a chain shall not ask the supplier retroactively or unilaterally, for compensation for any form of discounts that the supplier has offered the chain's rivals.

10. A supplier shall not submit and a chain shall not accept, information relating to the sold quantity or the terms of the sales of the supplier's products at a competing chain. A chain shall not submit and a supplier shall not accept information relating to the sold quantity or the terms of the sales of other suppliers products on the chain's shelves.

APPENDIX 4

AAI links to Category Captains/Management

<http://www.antitrustinstitute.org/links/misc.cfm#captain>

Who's Minding the Store? In this article for Business2.0 (Feb. '03), Andrew Raskin looks at the growing use of "category management" techniques by retailers. "Overwhelmed by the complexities of today's marketplace, retailers are essentially letting vendors run much of their business. Here's the method to their madness." The article includes a set of useful links, and a chart on how to become a Category Captain, in which marketing guru Brian Harris breaks the art of category management into seven steps, showing how a joint Borders-HarperCollins team applied them to cookbooks.

The Category Captain and the Consolidating Food Industry, In his column for the 5/16/01 edition of *FTC:WATCH*, AAI President Bert Foer looks at the competitive issues raised by the use of category captains in the food industry.

Reviewing the significance of the trend for merger analysis, Foer concludes: "The age of innocence is over. In the food industry, there is no longer any escaping the need to examine how mergers at one level can affect competition at another. The linkage of category captaincy and its potential effects on a market must now be confronted."

Retail Merchandiser's Category Captains Program The broad use of category management in retail merchandising can be seen in this e-zine article, *Recognizing Category Management Leaders In the Mass, Drug & Specialty Retail Industry*, which highlights the magazine's choices for its 2002 Winners as the best category captains in dozens of product categories sold in mass marketing, drug and specialty stores, for each of three disciplines: merchandising effectiveness, operational effectiveness, and marketing innovation.

National Brand/Private Label Competition In this Working Paper presented at the 2002 American Economic Association annual meeting, Robert L. Steiner argues that the highly beneficial competition between national brands and private labels may be threatened by the actions of Category Captains. The Paper's full title

is "The Nature and Benefits of National Brand/Private Label Competition." (Jan. 2002, 29 pp., pdf)

Impacts of Supply Chain Management on Competition This Working Paper by economics professors Wm. Hilfred and James Pinto, at the College of Business Administration, Northern Arizona University, examines numerous aspects of supply chain management, including category captaincy, and has an extensive bibliography. (April 2002, 14 pages, pdf)

The Conwood Snuff Case The opinion of the 6th Circuit Court of Appeals in *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), can be found at this web page. Many law firms issued alerts to their clients describing the importance of the *Conwood Case*, including, Morrison & Foerster (July 2002) and White & Case.

Attorney David Balto at W&C explains:

"The Sixth Circuit's recent decision in [*Conwood Co.*] should be a wake-up call to in-house counsel and the defense bar. In *Conwood*, the Sixth Circuit affirmed a verdict of illegal monopolization for a retail category management program awarding over \$1 billion in damages, the second largest verdict in antitrust history.

As articulated in the FTC Slotting Allowances Report, there are basically two competitive concerns in retail category management. First, there are concerns that a dominant manufacturer will use its role as category captain to exclude rival suppliers or significantly increase their costs of competing. Second, there are concerns that a category captain could use its role to facilitate collusion among the competing category manufacturers or retailers."

FTC Report on Slotting Allowances Many of the issues raised by category captaincy and similar practices are discussed in this *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry*. The Slotting Allowances Report is described in an e-alert from Arent Fox, dated Feb. 23, 2001.

Divestiture and the Category Captain In this column from *FTC:Watch* (#577, Nov. 2001), aai's Albert A. Foer argues that "the

role of category captains in an industry may be highly relevant to the qualification of the buyer of assets to be divested under a settlement. This is not hypothetical, in that the current Nestle-Ralston merger directly raises the issue."

Shelf-Determination Subtitled "Kraft Foods is winning the war of the aisles. And causing plenty of casualties," this article for Forbes.com by Brandon Copple (04/15/02) examines the ever-more concentrated markets for food manufacturing and the methods used to gain market share, including category management.