

February 15, 2007

N.G.A. Fights for All Retailers Right to Use EDLPs

N.G.A., along with 11 leading retailers have filed opposition before the Trademark Trial and Appeal Board (TTAB) to Wal-Mart's effort to trademark EDLP for its exclusive use. N.G.A. was joined by Associated Wholesale Grocers, Inc.; Wakefern Food Corporation; SUPERVALU, Inc.; Safeway, Inc.; HEB Grocery Company, LLP; Basha's, Inc.; Meijer, Inc.; Publix Supermarkets, Inc.; Lowe's Home Centers, Inc.; Food Lion, LLC; and Schnucks Markets, Inc. N.G.A. is pleased by the industry-wide support that has been received in the effort to preserve the right for all retailers to use the term EDLP, not just one company. N.G.A. and others believe strongly that EDLP is a critical marketing tool that has long been used by retailers throughout the country, and the acronym is commonly used to indicate the use of the tool in reference to "Everyday Low Price," "Every Day Low Price," "Every Day Low Prices," "Every Day Low Pricing" and similar phrases. Wal-Mart's attempt to register this mark in connection with retail store services would unfairly injure and unduly restrict other retailers' ability to market and advertise their goods and services in a manner which has been long-standing, on-going and successful. Wal-Mart, in its response, has denied N.G.A.'s allegations and filed a motion to consolidate the complaints of all opposers before the Trademark Trial and Appeal Board. It is expected that the TTAB will likely rule on Wal-Mart's motion to consolidate sometime at the end of February or in March.

N.G.A. will continue to coordinate its efforts with other opposers in order to preserve the right of all retailers to use EDLP in marketing and advertising. As the case before the TTAB proceeds, N.G.A. will keep members advised and N.G.A.'s trademark counsel, Andrew Katz may well seek retailers' input on the use of EDLP.

N.G.A. Opposes CMS Proposal to Limit Medicaid Generic Drug Reimbursement

The Centers for Medicare and Medicaid Services (CMS) has proposed regulations that would provide an arbitrary and unfair definition and application of the average manufacturer's price (AMP) for generic drugs. In comments that N.G.A. will file with CMS on February 20, N.G.A. will oppose the proposed regulatory definition of AMP because it would result in reimbursement values that do not reflect the prices at which retail pharmacists purchase medications. The AMP definition should be revised to reflect retail purchasing costs. Only manufacturers' sales to wholesalers for drugs distributed to traditional community retail pharmacists should be included in the AMP definition. Under the proposal, the new Medicaid Federal Upper Limit (FUL) for generic drugs would reduce Medicaid generic payments to pharmacies by \$8 billion over the next five years. A recent report from the Government Accountability Office found that pharmacies would be reimbursed, on average, 36 percent less for generics than their acquisition costs. N.G.A. in its comments will recommend the delay release of AMP data and that CMS should suspend the new Generic Medicaid Federal Upper Limit.

European Commission Issues Report Involving Credit Card Interchange Fees.

On January 31, 2006, the European Commission issued its report on retail banking practices in European countries. The report stated that interchange fees raised competition concerns. Neelie Kroes, European

Commissioner for Competition Policy, stated upon release of the report that “The Commission continues to have serious concerns about the levels of multilateral interchange fees in some card schemes. Our inquiry gathered the best evidence base yet available. And I’m afraid to say that the evidence we found rebuts several of the industry’s arguments for the economic benefits of high interchange fees. Card payment networks claim that substantial interchange fees are vital. And they argue that without these high fees, consumers would be worse off. We have a different opinion.

“Firstly, the evidence shows that several card networks operate efficiently with low fees. And secondly, customers already pay the cost of interchange fees, since retailers pass them on in higher retail prices, paid not only by card users but also by customers paying cash. So reducing these fees would, on balance, benefit consumers. Let me make clear our view of these interchange fees. We are not arguing for their abolition. But it is clear that the present level of interchange fees in many of the schemes we have examined does not seem justified.” The Commissioner concluded, “Where the Commission looks at a specific scheme, outside the framework of the sector inquiry, and concludes that the level of interchange fees is unjustified, then we will not hesitate to take appropriate enforcement action on the basis of the EC Treaty’s antitrust rules.”

FDIC Board Extends ILC Moratorium; H.R. 698 Introduced

The Federal Deposit Insurance Corporation (FDIC) Board of Directors extended the moratorium against applications for Industrial Banks (Industrial Loan Corporation) owned by commercial firms for one year until January 31, 2008. This extension of the moratorium is intended to give Congress the opportunity to act on legislation (H.R. 698) that was introduced by the Chairman of the House Financial Services, Barney Frank (D-MA) and Representative Paul Gillmor (R-OH) to prohibit commercial firms from owning industrial banks to engage in retail banking. Chairman Frank and 107 members of Congress wrote to the FDIC in December, 2006 requesting an extension of the moratorium. The FDICs moratorium applies to commercial companies like Wal-Mart and Home Depot that have applications pending to establish an industrial bank. H.R. 698 would prohibit any industrial bank from being controlled directly or indirectly by a commercial firm, defined as having no more than 15 percent of gross annual revenues coming from activities that are not financial in nature.

N.G.A., along with other members of the Sound Banking Coalition, supports legislation to address a lack of regulation of ILCs and the need for holding company regulation of these industrial banks by the Federal Reserve. N.G.A. strongly supports H.R. 698 that would close the ILC loophole in the Bank Holding Company Act by prohibiting commercial companies who operate ILCs to operate industrial banks.

N.G.A. members are encouraged to request their Representatives to sponsor H.R. 698. Call and ask for your Representative’s office at 202-225-3121.

FDA Warns Consumers Not to Eat Certain Jars of Peter Pan Peanut Butter And Great Value Peanut Butter

The Food and Drug Administration (FDA) has warned consumers not to eat certain jars of Peter Pan peanut butter or Great Value peanut butter due to the risk of contamination with *Salmonella* Tennessee (a bacterium that causes foodborne illness). The affected jars of Peter Pan and Great Value peanut butter have a product code located on the lid of the jar that begins with the number "2111." Both the Peter Pan and Great Value brands are manufactured in a single facility in Georgia by ConAgra.

If consumers have any of this Peter Pan or Great Value brand peanut butter in their home that has been purchased since May 2006, they should discard it.

ConAgra is recalling all Peter Pan and Great Value peanut butter beginning with product code 2111 that already was distributed. ConAgra will advise consumers to destroy any Peter Pan and Great Value brand peanut butter beginning with product code 2111 in their possession.

OSHA Provides Employer Guidance for Influenza Pandemic

The Occupational Safety and Health Administration (OSHA) has issued “Guidance on Preparing Workplaces for Influenza Pandemic” so that employers can prepare for disruptions that may be caused by a pandemic influenza outbreak. According to the OSHA Guidance, “it is important for all businesses and organizations to begin continuity planning for a pandemic. Employers and employees should use this guidance to help identify risk levels and implement appropriate control measures in the workplace.” OSHA anticipates businesses that people rely on for necessities, such as grocery stores, would be at medium risk for potential pandemic exposure because of the possibility of contact among consumers and co-workers. The OSHA Guidance provides recommendations for developing sick leave policy, minimizing exposure, cross-training employees and having sufficient items of sanitation products and personal protective equipment on hand. The OSHA Guidance is available to download at the N.G.A. website at www.nationalgrocers.org.

If you have any questions or need additional information, please contact Tom Wenning or Greg Ferrara at 703-516-0700.