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ANTITRUST UPDATE

Predictions are that with two new pro-business Justices on the Supreme Court, John Roberts and Samuel Alito, the Court will hear an increased number of antitrust cases in the coming years. Even before the new Justices took the bench, however, the Court took an unusual number of antitrust cases this term - and ruled for the defendant in all of them.

In this issue of the Drinker Biddle & Reath *Antitrust Update*, we address the Court's recent decisions in *Texaco v. Dagher* and *Illinois Tool Works v. Independent Ink*. As Bob Skitol explains, the Court in *Dagher* rescued a joint venture between Texaco and Shell from a holding of *per se* illegal price-fixing. In the process, the Court has removed some of the fog over the antitrust treatment of restraints within or upon horizontal joint ventures of many varieties. And as Ken Vorrasi and Paul Saint-Antoine explain in *Independent Ink*, the Court clarified the rules applicable to tying patents with products, holding that there should be no presumption of market power from intellectual property. Their article also addresses an important recent decision of the U.S. Court of Appeals for the Federal Circuit, *Philips v. International Trade Commission*, which distinguishes patent-to-patent ties from patent-to-product ties, or package licensing. The two decisions show that the courts will be more receptive to tying arrangements that are procompetitive, but also make clear that tying by firms with market power causing significant foreclosure of competition may still be condemned.

This issue also reviews the state of class action litigation in antitrust cases one year after adoption of the Class Action Fairness Act or "CAFA". The article by DB&R litigators Michael Daly, Alicia Hickok and Mark Sosnowsky summarizes key provisions in CAFA and their importance to antitrust class actions.

In an article by Joanne Lewers, we highlight important reforms to the Hart-Scott-Rodino review process recently announced by Federal Trade Commission Chairman Deborah Majoras. Mergers that are subject to a thorough review by the government face what are known as "Second Requests" or "Requests for Additional Information and Documentary Material" - which substantially delay consummation of transactions and impose huge costs on merging parties. As Joanne explains, the announced reforms are aimed at reducing the time and expense of compliance and reflect a serious agency effort to streamline the Second Request process. Most of the reforms require merging parties to cooperate with the government to reduce Second Request burdens, and so businesses will still need to work closely with counsel to navigate their way through the review process.

Finally, Bryan Sgrignoli highlights four new faces at the antitrust enforcement agencies: two new Commissioners and a new Bureau Director at the FTC, and a new Assistant Attorney General at the DOJ's Antitrust Division.

As always, we welcome your questions regarding any of the issues addressed in these articles.

M. Howard Morse
Paul H. Saint-Antoine
Co Chairs, DB&R Antitrust Practice Group

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Tying Arrangements After Independent Ink and Philips

By Kenneth M. Vorrasi and Paul H. Saint-Antoine

Two recent appellate decisions, one by the U.S. Supreme Court and the other by the Federal Circuit, underscore the interplay between the antitrust law on tying arrangements and law on patent misuse. Earlier this month, in *Illinois Tool Works Inc. v. Independent Ink., Inc.*, No. 04-1329, the Supreme Court decided that the manufacturer of patented printing components should not be presumed to have market power when it conditioned the sale of those "tying" products on the purchase and use with them of a specially designed but unpatented ink product. In September, the Federal Circuit in *U.S. Philips Corp. v. Int'l Trade Comm'n*, 424 F.3d 1179 (Fed. Cir. 2005), reversed a decision by the International Trade Commission, holding that U.S. Philips Corporation's package license for recordable compact discs and rewritable compact discs ("CD-R/RWs") did not constitute *per se* patent misuse. In reaching their respective decisions, the Supreme Court and the Federal Circuit looked to developments in both antitrust and patent misuse law. The opinions in *Independent Ink* and *Philips* also signaled that, whichever body of law is applied to tying arrangements, courts should be more open to viewing such arrangements as potentially procompetitive.

I. Illinois Tool Works Inc. v. Independent Ink, Inc.

On March 1, 2006, the Supreme Court unanimously reversed longstanding precedent under tying doctrine that a seller of a tying product that is patented is presumed to have market power.

Sixty years ago, as the Supreme Court observed in *Independent Ink*, patent law was influential to the development of antitrust law, but in the opposite direction in terms of the Court's tolerance of tying arrangements. In particular, the Court's decision in *International Salt Co. v. United States*, 332 U.S. 392 (1947), to find *per se* unlawful the tying of patented machines to unpatented salt products was influenced by the finding of patent misuse in *Morton Salt Co. v. G.S. Suppieger Co.*, 314 U.S. 488 (1942). In *Independent Ink*, the Court expressly made this connection between the two decisions: "The assumption that tying contracts 'ten[d] … to accomplishment of monopoly' can be traced to the Government's brief in *International Salt*, which relied heavily on our earlier patent misuse decision in *Morton Salt*."

In *Independent Ink*, the Supreme Court made clear that there should no longer be any such presumption: "[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." The plaintiff bears this burden of proof even when the defendant has patent rights with respect to the tying product.

Two factors led to the ultimate demise of the market power presumption in tying cases involving patented products. First, and more generally, since *International Salt*, "[the] Court's strong disapproval of tying arrangements has substantially diminished." By the 1970s, the Court was no longer presuming that tying arrangements only served to suppress competition. *See, e.g., United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977). Second, in 1988, Congress amended the Patent Code to eliminate the presumption of market power in the patent misuse context. *See* 35 U.S.C. § 271(d)(5) (no relief for patent misuse "unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned"). Thus, the foundation for the presumption of market power in antitrust cases, which had been based on *Morton Salt* and other patent law cases, was gone.

Perhaps seeing the writing on the wall, the respondent in *Independent Ink* advocated several alternatives to an outright rejection of the market power presumption. It suggested, for example, a rebuttable presumption or, alternatively, a rule that would not presume market power when the two products were arguably two components of a single product. (This latter alternative would have been comparable to the distinction made by the Federal Circuit in *Philips* between package licenses with all "essential" patents and those with both essential and non-essential patents.) Nevertheless, the Supreme Court declined to adopt any such middle ground, holding that in all cases the plaintiff must prove market power in the tying product.

II. U.S. Philips Corp. v. Int'l Trade Comm'n

U.S. Philips Corporation ("Philips") owns patents to technology for manufacturing in accordance with a technical standard developed by Philips and Sony Corp. and published as the Recordable CD Standard (the "Orange Book"). Philips licensed its patents in a package which charged licensees a fee for each disc manufactured regardless of how many patents in the package were used by the licensee. In the late 1990s, Philips entered into such package licensing agreements with three Taiwanese companies and their subsidiaries (collectively, the "Licensees"). After those companies failed to pay licensing fees due under the agreements, Philips complained to the International Trade Commission ("ITC"), alleging that the Licensees violated Section 337 of the Tariff Act of 1930 by importing CD-R/RWs that infringed Philips' patents.

In proceedings before an administrative law judge, the Licensees asserted a defense of patent misuse to Philips' infringement claims, arguing that Philips impermissibly tied the patents necessary to manufacture CD-R/RWs to other Philips patents that were not "essential" to the Orange Book standards. They argued that "a number of the patents that Philips had included in the category of 'essential' patents were actually not essential for manufacturing compact discs compliant with the Orange Book standards, because there were commercially viable alternative methods of manufacturing CD-Rs and CD-RWs that did not require the use of the technology covered by those patents." Although the administrative law judge found that the Licensees infringed Philips' patents, he ruled that the patents were unenforceable because Philips engaged in patent misuse, concluding that Philips' package licensing arrangements constituted unlawful tying under analogous antitrust law principles.

The ITC affirmed the administrative law judge's ruling, holding that Philips' licensing arrangement "constitutes patent misuse *per se* as a tying arrangement between (1) licenses to patents that are essential to manufacture CD-Rs or CD-RWs according to Orange Book standards and (2) licenses to other patents that are not essential to that activity." After finding that some of the patents in the package were not essential to the CD-R/RW standards, the ITC held the arrangements to be unlawful tying because "Philips did not give prospective licensees the option of licensing individual patents (presumably for a lower fee) rather than licensing one or more of the patent packages as a whole." The ITC also held, in the alternative, that Philips' licensing arrangement constituted impermissible tying under the rule of reason.

The Federal Circuit reversed on two principal grounds. First, the court held that the ITC erred in concluding that Philips' package licensing arrangements constituted *per se* patent misuse. Second, the court held that the ITC erred in ruling that some of Philips' patents were not "essential" to the Orange Book standards.

The Federal Circuit began by distinguishing Supreme Court precedent holding it *per se* unlawful to tie intellectual property licenses. Those cases involved either (1) patent-to-product ties, requiring licensees to buy an unpatented product as a condition of a patent license, or (2) "block-booking" that tied licenses to desirable and less desirable movies together for exhibition in movie theaters. The Federal Circuit explained that, in all of these cases, the licensor used market power to compel a licensee to purchase a product that might otherwise be bought from a competitor. The non-essential patents in Philips' licensing arrangement, the court reasoned, were not analogous to a separate product because the licensees were not compelled to use any of the patents in the package. The court stated:

> [A] package licensing agreement that includes both essential and nonessential patents does not impose any requirement on the licensee. It does not bar the licensee from using any alternative technology that may be offered by a competitor of the licensor. Nor does it foreclose the competitor from licensing his alternative technology; it merely puts the competitor in the same position he would be in if he were competing with unpatented technology.

Thus, the court rejected the ITC's finding that licensees were "forced" to license non-essential patents in order to obtain the patents essential to the Orange Book standards. Rather, the court stated that the package license was a way of assuring the Licensees that Philips "would not sue any licensee for engaging in any conduct covered by the entire group of patents in the package."

In addition, the court reasoned that package licensing arrangements can be pro-competitive. Specifically, they can achieve efficiencies, including reducing transaction costs, resolving blocking patent situations, avoiding infringement litigation, and combining complementary technologies. The court also found that there was insufficient evidence of commercially viable alternatives to any of the Philips patents, thus precluding a finding that any of them was non-essential. "If there are no commercially practicable alternatives to the allegedly nonessential patents, packaging those patents together with so-called essential patents can have no anticompetitive effect . . . because no competition for a viable alternative product is foreclosed."

The *Philips* decision is significant to the law on tying arrangements in all of the following respects:

> First, *Philips* distinguishes patent-to-patent tying from patent-to-product tying. The decision holds that it is not *per se* unlawful to tie essential patents to non-essential patents, even when there is market power in the tying patents, because it does not necessarily foreclose any competition in alternative technologies or otherwise lead to higher prices.
>
> Second, the opinion is also potentially significant for its reading of "non-essential." In Philips, the court refused to treat patents as "non-essential" under the following factual scenario: the licensee would not absent the package choose alternatives to the patent even though they exist, the licensee did not request that the patent be removed from the package, and commercially viable alternatives were in development but not available at the time of licensing. This suggests a more narrow interpretation of "non-essential" than was assumed in the late 1990's in the DOJ Business Review letters on patent pools.
>
> Third, *Philips* involved unilateral conduct by a single firm; it did not concern patent pool Licensing by multiple parties. In *Philips*, the licensees did not challenge Philips' joint package licensing with other companies owning technology relating to the Orange Book standards because Philips offered a Philips-only license alternative. Rather, the Licensees challenged Philips' tying of its own essential patents and non-essential patents. The outcome in *Philip*s would not necessarily have been the same had the case involved a pool encompassing multiple parties offering similar packaged licenses to Licensees.
>
> Fourth, the court in *Philips* made clear that package licenses would not constitute misuse under a tying theory if they were limited to patents essential to manufacture to an industry standard. Such licenses might be analogized to tying arrangements for components of what is judged to be a single product, where there is no significant demand for the components separately. It is notable also that the Federal Circuit rejected Philips' argument that it lacked market power.
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> Fifth, the *Philips* decision provides support for more flexibility and discretion in structuring multi-party patent pools than often assumed under common interpretations of the DOJ Business Review Letters. More specifically, *Philips* provides support for the proposition that combining essential and non-essential patents within the same pool (even if it is a multi-party affair in connection with an industry standard) is not necessarily anticompetitive and can be desirable in some circumstances.
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> Finally, it is important to recognize that the *Philips* decision leaves open the possibility that package licenses may be challenged under the rule of reason if they consist of essential and non-essential patents where there is evidence of actual foreclosure of commercially viable alternative technologies. Although certainly a favorable decision from a package licensor's point of view, it would be a mistake to view the *Philips* decision as a green light for all licensing arrangements involving both essential and non-essential patents.

III. Conclusion

Philips was a patent misuse case and not an antitrust case. That distinction might mean less in terms of limiting the application of the Federal Circuit's decision, however, in

light of the Supreme Court's decision in *Independent Ink*. In reaching its result, the Supreme Court relied heavily on developments in patent misuse law. This reliance on patent misuse law in considering the antitrust treatment of tying arrangements involving patented products may persuade lower federal courts to look to patent misuse doctrine, as analyzed in *Philips*, in deciding similar claims under the antitrust laws.

The influence of *Philips* on lower courts presented with antitrust claims was seen earlier this month in *GlobespanVirata, Inc. v. Texas Instruments, Inc.*, 2006 U.S. Dist. LEXIS 8860 (D.N.J. Mar. 3, 2006). There the plaintiff sued Texas Instruments, alleging, *inter alia*, that Texas Instruments' tying of essential patents to technology relating to the Asymmetric Digital Subscriber Line ("ADSL") to its other patents not essential to implement the ADSL standard was a *per se* violation of § 1 of the Sherman Act. The district court dismissed the plaintiff's claim, holding that Texas Instruments' tying arrangement did not constitute a *per se* violation of the Sherman Act. In doing so, the court said that it was "persuaded by the reasoning in *Philips* that the *per se* rule against certain tying arrangements should not extend to patent-to-patent tying cases in light of the procompetitive aspects of such arrangements." The court acknowledged that, "[a]lthough *Philips* concerned a patent misuse case, its reasoning applies to antitrust cases also."

What remains to be seen with the decisions in *Philips* and *Independent Ink* is how influential they will be in curtailing tying claims more generally, where the issues go beyond those unique to patent cases. There is certainly language in each of the opinions that suggests a broader recognition of the possible procompetitive benefits of tying arrangements. In *Philips*, the Federal Circuit identified a number of potential efficiencies associated with package licenses, such as having "the procompetitive effect of reducing the degree of uncertainty associated with investment decisions." Similarly, in *Independent Ink*, the Supreme Court observed that "[m]any tying arrangements . . . are fully consistent with a free, competitive market."

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Supreme Court Clarifies Joint Venture Law

By Robert A. Skitol

The Supreme Court's February 28, 2006, decision in *Texaco v. Dagher* rescues a major joint venture between Texaco and Shell from a Ninth Circuit holding of *per se* illegal price-fixing. The Court thereby also removed some of the fog over the antitrust treatment of restraints within or upon horizontal joint ventures of many varieties.

The joint venture at issue, called Equilon Enterprises, combined previously competing gasoline refining and marketing businesses in the western United States. The FTC had approved Equilon's formation prior to commencement of a class action against the joint venture partners on behalf of Texaco and Shell service station owners. Their suit asserted the *per se* illegality of Texaco's and Shell's agreement, as Equilon co-owners, that Equilon would sell both Texaco-branded and Shell-branded gasoline at the same price. The district court dismissed but the Ninth Circuit reversed and thus reinstated the claim, rejecting what it characterized as the joint venture owners' "request for an exception to the *per se* prohibition on price fixing." In reversing that reversal, the Supreme Court characterized the issue at hand in a far less sinister manner: "whether it is *per se* illegal" under Section 1 of the Sherman Act "for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products."

While, on the surface, the Court's opinion addresses only the issue of *per se* illegality because plaintiffs asserted no alternative rule of reason claim, the Court's analysis of the challenged restraint amounts to a holding of virtual *per se* legality: the Equilon pricing policy "amounts to little more than price setting by a single entity -- albeit within the context of a joint venture -- and not a pricing agreement between competing entities with respect to their competing products." In short, as a result of joint venture formation (which plaintiffs did not challenge), Texaco and Shell morphed from being competitors into being co-owners collaborating upon venture pricing strategy. "As such, though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense."

The Ninth Circuit reached the opposite conclusion through its invocation of the "ancillary restraints doctrine," a mischievously confusing part of joint venture law for the past 100 years. Under this doctrine, competition-suppressing agreements between parties to an otherwise lawful joint venture are generally treated as "naked"-- thus *per se* illegal -- restraints unless the parties demonstrate that they are "reasonably necessary" to achieving the legitimate purposes of the joint venture. In this case, the Court held, the doctrine was inapplicable because the challenged practice involved a "core activity of the joint venture itself -- namely, the pricing of the very goods produced and sold by Equilon."

Indeed, the Court importantly clarified the scope of the ancillary restraints doctrine by describing it as governing only restrictions upon "nonventure activities." A prime example of the latter type of restriction would be an agreement between joint venture parties to cease or suspend competition between them in products outside the scope of their venture. Just last year, the D.C. Circuit applied a rule of "presumptive" illegality to an agreement of that very type in *Polygram Holding, Inc. v. FTC*. But, prior to *Texaco v. Dagher*, that hostility toward joint venture restraints was applied in many contexts without distinction between conduct inside versus conduct outside the joint venture itself.

The Court has now sharply drawn that line, removing many intra-venture types of agreements from any serious antitrust cloud. In the case before it, the restraint at issue involved nothing more than an agreement between joint venture partners on joint venture pricing of joint venture products. One can, however, easily extend the Court's overall analysis and conclusion to an agreement between joint venture partners on territories or customers to which each of them will market and sell joint venture products.

How did the Ninth Circuit, in its now-repudiated decision below, get it so wrong? It did so in part by its reliance upon the 2000 FTC/DOJ "Antitrust Guidelines for Collaborations Among Competitors," which do appear to say that any "price-fixing" agreement between joint venture partners should be considered *per se* illegal absent proof of their "reasonable necessity" to achieve joint venture efficiencies. The agencies were quick to deny this intent in their amicus brief to the Supreme Court in which they promoted the inside versus outside distinction that the Court adopted in its opinion. So one can now fairly say that the Court has clarified not only the ancillary restraints doctrine but the agencies' collaboration guidelines as well.

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CAFA and Antitrust - A Mismatch?

By Michael P. Daly, D. Alicia Hickok, and Mark H.M. Sosnowsky

Last year began with bold predictions that the Class Action Fairness Act ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005), would be felt most strongly in antitrust cases. *See, e.g.*, A.S. Blumstein, *The Class Action Fairness Act of 2005 Makes Two Big Adjustments to Class Action Practice*, 41 TENN. B.J. 16, 17 (April 2005). Yet, twelve months after CAFA's enactment, only a few of the over 100 published CAFA decisions involve antitrust cases. Indeed, during the entire past year, removal was upheld in an antitrust case on only one occasion - and that in an opinion where CAFA was not even mentioned. *See Aikens v. Microsoft Corp.*, 2005 U.S. App. LEXIS 27756 (4th Cir. Dec. 15, 2005). Given that CAFA could be such a significant tool for antitrust litigants, the fact that it has been so infrequently used thus far is surprising. This article describes CAFA and its potential future use in antitrust cases.

I. Overview Of CAFA

A. Expanded Jurisdiction

Before CAFA, class actions based on state law claims were rarely removable - because they did not satisfy the "complete diversity" requirement and the plaintiffs' individual claims did not exceed $75,000. CAFA changes both requirements. First, it grants jurisdiction over class actions so long as there is "minimal diversity":

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy

> exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant . . . .

28 U.S.C. § 1332(d)(2)(A). Second, it requires courts to aggregate class members' claims:

> [T]he claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

28 U.S.C. § 1332(d)(6). Thus, diversity jurisdiction now exists over any qualifying class action so long as there is minimal diversity, the aggregate amount in controversy exceeds $5,000,000, and there are 100 or more class members. See 28 U.S.C. §§ 1332(d)(2)(A), (d)(5)(B), (d)(6). However, even if an action is within a court's jurisdiction, CAFA contains two provisions pursuant to which remand may be appropriate.

1. The Home State Provision

If all of the "primary defendants" are citizens of the state where the action is filed, i.e., the home state, remand may be appropriate under the Home State provisions, one of which is mandatory and one discretionary. Under the mandatory remand provision, courts must decline their jurisdiction over a class action if "two-thirds or more of the members of all proposed plaintiff classes" are citizens of the state in which the action was filed. 28 U.S.C. § 1332 (d)(4)(B). Under the discretionary remand provision, courts may decline their jurisdiction if "greater than one-third but less that two-thirds of all proposed plaintiff classes" are citizens of the state in which the action was filed. Whether to do so depends on the following factors:

> (A) whether the claims asserted involve matters of national or interstate interest;
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> (B) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states;
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> (C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;
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> (D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;
>
> (E) whether the number of citizens of the state in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other state, and the citizenship of the other members of the proposed class is dispersed among a substantial number of states; and
>
> (F) whether, during the 3-year period preceding the filing of that class action, one or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

28 U.S.C. § 1332(d)(3)(A)-(F).

2. The Local Controversy Provision

Even if the primary defendants are not all citizens of the state in which the action is filed, remand may still be appropriate under the Local Controversy provision. Under this provision, courts must decline their jurisdiction over a class action if:

> 1. More than two-thirds of the proposed class are citizens of the state where the action was originally filed; **and**
>
> 2. At least one defendant is a citizen of the state in which the class action was originally filed; **and**
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> 3. That defendant's conduct forms a "significant basis" for the claims asserted by the class; **and**
>
> 4. That defendant is a defendant from whom "significant relief is sought" by members of the class; **and**
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> 5. The "principal injuries from the alleged conduct" were incurred in the state where the class action was originally filed; **and**

> 6. No class action has been filed in the 3-year period preceding the filing that asserts "the same or similar factual allegations against any of the defendants on behalf of the same or other persons."

28 U.S.C. § 1332(d)(4)(A)(i)-(ii).

B. Simplified Removal

CAFA also simplifies the procedure for removing class actions. It permits removal "by any defendant without the consent of all defendants" and "without regard to whether any defendant is a citizen of the state in which the action is brought." 28 U.S.C. § 1453(b). It also provides that "the 1-year limitation under section 1446(b) shall not apply" to class actions. *Id.*

CAFA also streamlines the factual inquiries that have plagued suits against unincorporated entities, caused by the fact that partnerships are citizens of every state in which a partner is a citizen, and unincorporated associations are treated similarly. Under CAFA, the citizenship of unincorporated associations is determined in the same manner as the citizenship of corporations. *See* 28 U.S.C. § 1332(d)(10).

C. Appellate Rights

Traditionally, remand orders could not be appealed. CAFA changes this, but requires a petition for permission to appeal to be filed within seven days, 28 U.S.C. §1453(c)(1), and affords appellate courts only 60 days in which to rule. 28 U.S.C. § 1453(c)(2). If the court fails to do so, the appeal is considered denied. *See* 28 U.S.C. § 1453(c)(4). Courts may extend the latter time period if the parties agree or "such extension is for good cause shown and in the interests of justice." 28 U.S.C. § 1453(c)(3)(B).

D. "Bill of Rights"

In addition to expanding diversity jurisdiction and amending the removal statute, CAFA adopts a "consumer class action bill of rights" that calls for increased scrutiny of settlements in which coupons are provided to class members and has several important parts. *See* 28 U.S.C. §§ 1711-1715.

First, it protects class members from proposed settlements that would obligate them to pay more in attorneys' fees than they would recover from the defendant. *See* 28 U.S.C. § 1713. Second, it protects class members from geographic discrimination in proposed settlements. *See* 28 U.S.C. § 1714. Third, it requires defendants to provide the appropriate federal official (normally the Attorney General) and state official (the official with primary regulatory or supervisory responsibility with respect to the defendant or, failing that, the State Attorney General) with notice of a proposed settlement within 10 days of its being filed with the court, and prevents courts from approving a proposed settlement until 90 days after that notice. *See* 28 U.S.C. § 1715.

Finally, CAFA requires heightened scrutiny of fee awards in coupon settlement cases. If the coupon distribution is used as the basis of the attorneys' fees award, "the portion of any attorney's fees award to class counsel that is attributable to the award of coupons shall be based on the value to class members of the coupons that are *redeemed*," not the value of coupons *distributed*. 28 U.S.C. § 1712(a) (emphasis added). Courts may receive expert testimony to assist in determining the value of the coupons provided to class members. 28 U.S.C. § 1712(d). If the proposed settlement does not use the value of the coupons redeemed by the class as the basis of the attorneys' fees award, then those fees "shall be based upon the amount of time class counsel reasonably expended working on the action." 28 U.S.C. § 1712(b)(1). An award based on attorneys' hours may, however, be increased by a lodestar multiplier, subject to the court's approval. 28 U.S.C. § 1712(b)(2). Courts must conduct a hearing before approving any proposed settlement that involves coupon distribution. 28 U.S.C. § 1712(e). Courts may require that such a settlement agreement provide for the distribution of a portion of the value of unclaimed coupons to one or more charitable or governmental organizations, as agreed to by the parties. The distribution of proceeds cannot be used to calculate attorneys' fees. *Id.*

E. Effective Date

CAFA applies to "any civil action commenced on or after the date of enactment," *i.e.*, February 18, 2005. When an action was "commenced" turns on state law and is ordinarily the date of the filing of the complaint. Courts have had to confront the question whether amending a complaint in an action pending before CAFA can trigger removal rights. Many courts - and most notably the Seventh Circuit Court of Appeals - have found that, if the amendment does not

relate back to the original complaint, a new civil action has been commenced and removal is permitted. *E.g., Knudsen v. Liberty Mutual Ins. Co.*, 411 F.3d 805, 807 (7th Cir. 2005).

II. Purposes of CAFA

CAFA's enactment reflected a disaffection with state courts that apply governing rules inconsistently and lawyers that "game the system" in order to keep their actions in front of those courts and out of the federal system. S. Rep. No. 109-14 at 4, 10 (1st Sess. 2005). Congress was sensitive to the extent to which defendants could be held hostage by plaintiffs' lawyers who filed complaints in state courts known for being less than diligent in applying even basic procedural rules related to class certification. *Id.* at 14. These courts improperly granted certification even when the claims of class members did not share common facts or when defenses differed from class member to class member. *Id.* at 22-23. Courts often certified classes without affording defendants an opportunity to respond (and sometimes before the defendant had even received the complaint) in order to pressure the defendant to settle quickly and thereby remove the case from the docket. Id. at 20-22. They would also approve settlements with little regard for the actual benefit to the class members. *Id.* at 15-21.

These problems were exacerbated by the fact that many of these courts did not have the judicial resources to monitor and supervise settlements. *Id.* at 14. Class members are often dispersed over a large geographic area with no unified voice and little incentive to monitor their counsels' actions. *Id.* at 33. The lack of active involvement compounded by a lack of judicial oversight provides no check on plaintiffs' lawyers, and less scrupulous attorneys were able to seek excessive fees at the expense of class members who recovered little or nothing for themselves. *Id.* at 14.

Some state tribunals also demonstrated a "provincialism against out-of-state defendants or a failure to recognize the interests of other states in the litigation." *Id.* at 6. In some cases, state courts adjudicated large, multi-state actions that involved inconsistent and often conflicting legal and regulatory regimes in various states. *Id.* at 23-27. In the end, some overly-ambitious state courts imposed nationwide rulings that actually *contradicted* the laws of other states. *Id.* at 24, 26.

In enacting CAFA, Congress sought to curb these abuses of the class action system by discarding some of the obstacles to removal to federal court where judges are (at least perceived to be) more willing to adhere to rules governing class certification, more likely to scrutinize settlements before granting approval, and more likely to have adequate resources to supervise settlements to ensure that they benefit the class members. *Id.* at 14. Furthermore, through the various checks on attorneys' fees and settlements, CAFA reinforces judicial oversight over these cases to prevent disproportionate plaintiffs' attorneys' fees.

III. If CAFA Can Solve State Court Headaches Why Has There Not Been An Exodus Of Antitrust Actions From State Court?

Given the vast amount of parallel litigation that existed and continues to be filed since CAFA took effect, and given CAFA's goal to address oppressive state class action litigation, it would seem natural that all or most of the parallel state antitrust class actions would have disappeared to the extent they were removable. Instead, what has been remarkable is how miniscule the amount of CAFA litigation related to antitrust claims has been. Indeed, although there has been an interesting discussion of CAFA in one antitrust *non*-removal case, the only real test of CAFA's antitrust removal powers appears to have been a few unsuccessful attempts to use CAFA to remove litigation filed prior to CAFA's effective date. *See Lott v. Pfizer*, 2005 U.S. Dist. LEXIS 16291 (S.D. Ill. Apr. 7, 2005), aff'd. 417 F.3d 725 (7th Cir.); *Joe Comes & Riley Paint, Inc. v. Microsoft Corp.*, 403 F. Supp. 2d 897 (S.D. Iowa 2005); *Carpanelli, Inc. v. American Std., Inc.*, 2006 WL 568307 (N.D. Cal. Mar. 6, 2006). In fact, removal appeared to withstand a challenge only once in the past year, in one of the Microsoft cases, *Aikens v. Microsoft Corp.*, 2005 U.S. App. LEXIS 27756 (4th Cir. Dec. 15, 2005). There, removal was held to be appro-

priate because of the amount of attorney's fees sought; CAFA was not even discussed.

A. The Antitrust Laws Are Idiosyncratic

Part of the explanation for CAFA's minimal impact on antitrust litigation thus far relates to the nature of the antitrust regime. The federal antitrust laws were originally crafted to "supplement" already existing state laws, but most of the current state laws are in substance virtually identical to the federal statutes, although states vary as to the interpretive force they accord to federal law. *Compare Baker v. Jewel Food Stores, Inc.*, 823 N.E.2d 93, 101 (Ill. App. 2005) *with Vacco v. Microsoft Corp.*, 793 A.2d 1048, 1056 (Conn. 2002). Thus, a plaintiff can draft claims that "look" federal but cite only to state law statutes and file those claims in whatever state court he chooses. That, combined with the relatively high per-member recovery available to antitrust plaintiffs, may mean that a multi-forum antitrust plaintiff's counsel is better situated than, say, a consumer class action plaintiff's counsel, to bring suits in individual state courts that have fewer than 100 plaintiffs (and are thus subject to remand under CAFA).

Further, unlike many concurrent jurisdictional federal statutes, the Clayton Act requires that any remedy for a federal antitrust violation be sought in federal court. Thus, plaintiffs that want to assert federal antitrust with state antitrust or other claims may do so *only* in federal court. There is also the most obvious feature of the antitrust laws: because the statutes are both criminal and civil, the federal government or states' attorneys general may bring enforcement actions that signal to potential plaintiffs a prospectively vulnerable industry.

Given this combination of factors, class plaintiffs have a possibly unparalleled opportunity either to (a) watch for federal enforcement actions, backed by government funding and discovery powers, and then bring claims predicated upon the federal court's findings (as in the *Microsoft* litigations); (b) follow a state court enforcement action with private class actions (*In re Insurance* litigation is one example); (c) bring a state court action in which claims and strategy are refined, then opt out and bring a federal action (as in the copper industry litigation); or (d) bring simultaneous federal and state actions and force defendants to face extensive discovery and litigation on multiple fronts (as happened in the *Liberty Mutual* funeral cases). Thus, because any given class action is likely to be part of a strategy rather than an end in itself, a class plaintiff may have both the opportunity and the motivation to do what it can to work around CAFA for any action it wants to litigate in state court. At the same time, the defendant's calculus as to whether to remove a state action may turn in part on which class strategy is pursued and where.

Courts have not been oblivious to plaintiffs' tactics and have, entirely independently of CAFA, developed responses that might reduce the pressure upon a defendant to rely upon CAFA. These responses include an aggressive use of the Multi-District Litigation statute to retain cases that have been moved, and, in extreme cases, an injunction against state litigation (as the Fifth Circuit affirmed in *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1332 (5th Cir. 1981)) as well as a generous reading of the removal provisions to allow removal even when only state law claims are pleaded. *E.g., In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79 (E.D.N.Y. 1980).

State courts have also tried to curtail the proliferation of litigation that plagues an industry once one violation has been established in one jurisdiction. *See, e.g., Belliston v. Texaco, Inc.*, 521 P.2d 379 (Utah 1974) (barring state price discrimination claims that could have been raised in prior federal litigation). And preclusion has been applied in a seemingly opposite manner to the same effect. *See, e.g., Comes v. Microsoft Corp.*, 2006 Iowa Sup. LEXIS 10 (Iowa Jan. 27, 2006) (refusing to accord preclusive effect to the factual findings of the federal court). In a footnote, the *Comes* court demonstrated that it understood full well what it was being asked to do but would not:

> This court is cognizant of the difficulty in presenting this case at trial and an underlying motivation of Comes to start this case with a panoply of facts that are deemed established - facts that do not need further proof. These findings would provide a broad landscape of facts upon which to park this case. Given the size of this litigation, it is enticing to start this case with a foundation of basic facts. However, as explained herein, such is not the purpose of collateral estoppel.

Id. at *14 n.2.

Not all state courts are as concerned. In *Olstad v. Microsoft Corp.*, 700 N.W.2d 139 (Wisc. 2005), a Wisconsin-based antitrust class action, the Wisconsin Supreme Court was just as explicit as the Iowa Supreme Court in interpreting its statute to extend to interstate commerce: "We recognize that our holding implies that in some circumstances, a monopolist's conduct is actionable under either federal law, Wisconsin law, or both…. As a general rule, a person is not unconstitutionally subject to double jeopardy when he is tried by successively different sovereigns for the same crime." *Id.* at 157.[1]

These characteristics of the antitrust regime may help to explain why 2005 saw so many CAFA arguments, but so few in the antitrust context. As well, antitrust cases may have also been affected by non-CAFA developments affecting class actions.

B. Non-CAFA Developments

In its decision in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 125 S.Ct. 2611(2005), the United States Supreme Court stressed that it was not rendering a CAFA decision; the decision concerned construction of the supplemental jurisdiction statute, 28 U.S.C. § 1367. At the same time, the effect of the Court's decision was pro-removal: the Court held that the amount in controversy requirement could be satisfied by any one defendant rather than by each, resolving a split among the circuits.

Professor Myriam Gilles has suggested that, as defendants learn the lessons of the Visa and MasterCard record settlement, they will employ collective action waivers in their agreements. And, because direct purchaser antitrust cases are predicated upon contracts, she posits that court enforcement of those waivers will render antitrust class actions extinct. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 353, 417-18 (December 2005). Given the potential for duplicative litigation, defendants should explore every possibility for limiting prospective antitrust class actions.

C. The Direction of Federal Enforcement May Affect the Number and Type of Antitrust Class Actions Brought

As noted above, antitrust class action plaintiffs have a myriad of strategies to pursue, but they clearly recognize that it is to a plaintiff's advantage to ride on other parties' discovery and establishment of liability. The proliferation of Microsoft cases shows as much. Historically, the direction of federal enforcement has been a predictor of the number and type of class actions to follow. Thus, Stephen Calkins has observed that during the 1983-1987 period, although the Justice Department initiated 397 actions, the vast majority were bid-rigging; only 26 alleged horizontal price-fixing. During the same period, antitrust class action filings decreased significantly. Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413 (Summer 1997). In that light, it could be that the minimal CAFA antitrust activity this year is related not so much to CAFA as to its timing in the cycle; the current enforcement actions have not proceeded far enough to spawn class actions, and the enforcement actions that have progressed far enough already instigated class actions before CAFA's effective date. However, if the explanation were cyclical, one would expect the number of cases filed in the district court during the past year to have *decreased*; but the Federal Judicial Center's newly-released statistics indicate that civil antitrust actions *increased* 8.8 % from 2004 to 2005, from 752 to 818 actions.

D. It is Not Clear that State Enforcement Actions Are Subject to CAFA

Because the attorneys general bring most of their suits in their capacity as *parens patriae*, the ensuing litigations may not be class actions and thus may not be subject to CAFA. *See Harvey v. Blockbuster, Inc.*, 384 F. Supp. 2d 749 (D.N.J. 2005). Thus, while antitrust defendants may find themselves defending multiple suits, the suits are not necessarily one federal enforcement action and several *private* class actions; they could just as well be one federal and several state enforcement actions, in which case CAFA might not provide relief. In fact, one study found 103 *parens patriae*

1 Given this substantive ruling by the Wisconsin Supreme Court as to the reach of its own statutes, one still has to wonder whether a defendant is better off having the Wisconsin courts determine whether its state act extends relief in a given instance or having a federal court apply the above decision to removed and/or pendent claims.

antitrust actions during the decade from 1993-2002. Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (Winter 2005). Thus, if a defendant is facing multiple parens *patriae actions*, and if there is no pending federal action, it may prefer to litigate the private class actions in separate state forums rather than remove the private actions and litigate in both federal and state courts.

IV. Will CAFA Continue To Play A Small Role In Antitrust Litigation?

The unique characteristics of antitrust litigation may limit an antitrust defendant's ability to benefit from CAFA and, conversely, the remand provisions of CAFA may better allow class plaintiffs to avoid CAFA. Nonetheless, at least two factors argue that antitrust class litigants should examine closely prospects for more use of CAFA in these cases in the months and years ahead.

A. Multi-District Litigation

Although there are some instances in which a defendant may wish to defend a few isolated actions as separate actions, once a federal Multi-District Litigation panel has begun consolidating cases, defendants are typically better positioned to pursue a global resolution of the cases, either through litigation or settlement. During the past year, MDL courts remanded single cases that logically belonged to the MDL to state courts. CAFA should help to ameliorate situations such as the ones described below.

In June 2003, an Arkansas Microsoft class action was removed and transferred via MDL. The district court refused to remand, but granted a voluntary non-suit, following which the plaintiffs repleaded a complaint that was almost identical to the original, except for a demand for disgorgement of interest. Despite the fact that the complaint was otherwise "virtually identical" to the earlier complaint, the court remanded. *Peek v. Microsoft Corp.*, 2005 U.S. Dist. LEXIS 10935 (D. Md. June 3, 2005). The grant of voluntary non-suit was filed December 16, 2004. Assuming that plaintiffs re-filed immediately, the suit would have been barely pre-CAFA, explaining why there was no discussion of CAFA in the court's decision. Because the court based its determination on the amount in controversy, however, CAFA could have assisted the defendant in consolidating the case with the others.

In *In re Fresh Del Monte Pineapples Antitrust Litigation*, 2005 U.S. Dist. LEXIS 6825 (S.D.N.Y. Apr. 20, 2005), classes pleading Arizona and Nevada state antitrust statutory violations were alleged; the cases were removed and transferred by MDL and joined with six antitrust cases. They were remanded without reference to CAFA. It is unclear if CAFA would have affected this case, which was argued as properly removed solely because of the significance of patent law to the claims' resolution. In each instance, judicial economy and the prospects of settlement would have been enhanced had the MDL court retained the breakaway actions.

That being said, in certain instances, a defendant might prefer piecemeal settlements to a federal court's attempts at "fairness" to all class members. In *In re Lupron® Marketing and Sales Practice Litigation*, 228 F.R.D. 75, 94 (D. Mass 2005), for example, the federal court responded to a defendant's request for a global settlement by approving relief - albeit in a lesser amount - to class members who were indirect purchasers from non-*Illinois Brick* repealer states. In other words, the defendant ended up paying monies to class members who were ineligible to recover under both federal law *and* under their own state's law.

B. Attorneys' Fees

One area where all defendants do stand to benefit under CAFA is in the assessment of attorneys' fees, both because CAFA expressly limits the recovery of attorneys' fees and because - as was noted before CAFA's passage - there is a distinct discrepancy in attorney fee awards in class actions in state and federal courts, with attorneys in state court actions often receiving more money than all class members combined while attorneys in federal court settlements receive far less than the class members. *See* Douglas C. Nelson, *Antitrust Modernization Commission Goes to Work*, 17 LOY. CONSUMER L. REV. 121, 126 (2004). And, although CAFA's tie of attorney's fees to paid-out coupon-based settlements might mean that a defendant would create a larger reserve for class disbursements than it would have absent CAFA, overall settlement figures should be more reasonable as well as more balanced.

V. Conclusion

Although CAFA has been touted as revolutionary, we have yet to see it make significant inroads in antitrust litigation, and we may never see the deep impact once predicted. But it is premature for antitrust defendants to downplay the possibilities CAFA has opened up. Antitrust litigants will need to assess all of the various issues posed by multiple class action filings to make a proper determination whether CAFA removal is worth pursuing.

* * *

FTC Offers Additional Reforms to the Merger Review Process

By Joanne C. Lewers

Federal Trade Commission Chairman Deborah Platt Majoras recently announced a set of "Reforms to the Merger Review Process" under the Hart-Scott-Rodino Antitrust Improvements Act. Chairman Majoras acknowledged the substantial and growing burden of complying with requests for additional information ("Second Requests"). The announced reforms are aimed at reducing the time and expense of compliance and reflect a serious agency effort to streamline the Second Request process.

Highlights of the FTC merger review reforms include:

- The FTC will agree to limit the number of individuals whose files will be searched to not more than 35 employees from each of the parties. The 35-person limit does not apply to documents contained in corporate or central files. In exchange for this limitation, the Second Request recipient must make certain reciprocal accommodations, including (1) providing FTC staff with organizational charts and making an employee available to meet with FTC staff, (2) committing to a minimum 60-day discovery period if the transaction is formally challenged, and (3) producing all responsive documents and data at least 30 days before certifying compliance, or entering into a rolling production or other timing agreement.

- Searches for documents generally will be limited to those generated or obtained by the party from two years prior to the date on which the FTC issues the Second Request until 45 days prior to the certification of substantial compliance. This modified time period does not apply to requests for data.

- In order to limit the amount of empirical data requested during the merger review process, FTC staff will inform the parties about the competitive effects theories under consideration and the types of empirical analyses that may be useful during the investigation. The staff will request the parties to provide information on their respective data systems so that staff and the parties can negotiate the limits to the data request.

- Producing computer backup files, a particularly burdensome requirement in Second Requests, is addressed by permitting a Second Request recipient to elect to preserve backup tapes for only two calendar days identified by FTC staff. In addition, the FTC will require a party to produce documents contained on backup tapes only when responsive documents are not available through other more accessible sources.

- If a Second Request recipient agrees to certain conditions, the FTC will allow that party to produce a partial privilege log for the employees whose files were searched, along with a complete privilege log for a small subset of those employees.

Chairman Majoras's announcement makes clear that these Second Request limitations are conditioned upon certain specified accommodations by the Second Request recipients. Whether or not the parties are cooperating, the FTC reserves the right to expand the scope of its requests if circumstances so warrant. Further, the announced reforms apply only to FTC merger reviews; they do not apply to merger reviews conducted by the Department of Justice. Although the DOJ has also indicated its intent to streamline its merger review process, there is no certainty that DOJ will implement these same reforms.

Essentially, these reforms formalize a number of practices that have been used by FTC staff and some merging parties for years. Recipients of a Second Request from the FTC should keep several points in mind. First, these reforms do not limit a party's ability to negotiate with FTC staff for different modifications that may be better suited to a particular transaction. Second, any modification is likely to require compromise between the party and the FTC. Finally, and most importantly, these reforms offer another reminder that the merger review process need not be adversarial; it works best when both parties and staff work in a spirit of cooperation. As Chairman Majoras emphasized in her announcement, the merger review process "works most effectively and efficiently when staff and outside counsel and their clients communicate effectively and work in a cooperative and professional manner."

A copy of the reforms is available at
www.ftc.gov/os/2006/02/mergerreviewprocess.pdf

* * *

Familiar Faces in New Antitrust Enforcement Roles

By Bryan R. Sgrignoli

The new faces at the Federal Trade Commission and the Antitrust Division of the Department of Justice are also familiar faces. All of them are widely known and respected members of the antitrust bar with considerable expertise regarding challenges that the agencies will confront over the months and years ahead.

William E. Kovacic, Commissioner - Federal Trade Commission (*sworn in January 4, 2006*)

William E. Kovacic rejoins the FTC after two previous stints with the Commission. From 1979 to 1983, he worked at the FTC in the Bureau of Competition's Planning Office and as an attorney advisor to former Commissioner George W. Douglas. From 2001 through 2004, he served as the Commission's General Counsel. Between those periods as well as from 2004 through 2005, he was a distinguished antitrust professor, most recently at George Washington University Law School.

J. Thomas Rosch, Commissioner - Federal Trade Commission (*sworn in January 5, 2006*)

J. Thomas Rosch, former antitrust partner in the San Francisco office of Latham & Watkins, joins the FTC with more than 40 years of antitrust and consumer protection experience. He has been the lead counsel in over 100 federal and state antitrust cases, and was named Antitrust Lawyer of the Year for 2003 by the California State Bar's Antitrust and Unfair Competition Law Section. He worked for the FTC earlier in his career as the Director of the Bureau of Consumer Protection from 1973 to 1975.

Jeffrey Schmidt, Director of the Bureau of Competition - Federal Trade Commission (*promoted December 20, 2005*)

Jeffrey Schmidt was promoted to Director of the Bureau of Competition after serving as a deputy director since February of 2005. He is a former managing partner of the D.C. office of Pillsbury Winthrop LLP, where he began his legal career in 1979. He also served as an attorney advisor to FTC Commissioner Terry Calvani from 1985 to 1987.

Thomas O. Barnett, Assistant Attorney General of the Antitrust Division, U.S. Department of Justice (*confirmed on February 10, 2006*)

Prior to being promoted to Assistant Attorney General of the Antitrust Division, Thomas O. Barnett served as the Division's Deputy Assistant Attorney General for civil enforcement. He held that position since April 18, 2004. He was a partner at Covington and Burling before joining the Antitrust Division and was the Vice Chair of that firm's Antitrust and Consumer Protection Practice Group.

It is reasonable to expect the three new FTC officials to support and strengthen a continuation of policy directions that Chairman Majoras has promoted over the course of the past two years. Similarly, Mr. Barnett is likely to continue policy directions promoted by his immediate successor, former Assistant Attorney General Pate. Each of them, however, will also surely bring his own perspectives and priorities to bear on policy evolution.

An important example of that last point emerged in the course of Mr. Kovacic's confirmation testimony before the Senate Commerce Committee. He talked at some length about the increasing importance of defining "relevant markets" in which mergers and other transactions are analyzed "in a global context." Thus, "in evaluating the significance of individual U.S. firms or the significance of transactions involving U.S. firms," he observed, the assessment should increasingly focus on global rather than narrower geographic markets. In short, as he noted, "the question who competes and who's important involves an examination of global players, not simply U.S. firms operating in the U.S." This is a perspective that will, more often than not, support an ultimate green light for transactions between U.S. competitors that might in the past have been tempting targets for agency challenge.

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Antitrust Law Practice Group

Name	Phone	Email
David J. Antczak	215-988-2558	david.antczak@dbr.com
Wilson M. Brown III	215-988-2718	wilson.brown@dbr.com
David P. Bruton	215-988-2711	david.bruton@dbr.com
Richard E. Coe	215-988-3393	richard.coe@dbr.com
Michael P. Daly	215-988-2604	michael.daly@dbr.com
Charles D. Donohue, Jr.	212-248-3152	charles.donohue@dbr.com
James J. Dougherty	215-988-2509	james.j.dougherty@dbr.com
Alexander S. Helderman	215-988-2524	alexander.helderman@dbr.com
D. Alicia Hickok	215-988-3364	alicia.hickok@dbr.com
Mary E. Kohart	215-988-2827	mary.kohart@dbr.com
Jessica Kozlov-Davis	215-988-2624	jessica.kozlov-davis@dbr.com
Charles S. Leeper	202-842-8877	charles.leeper@dbr.com
Joanne C. Lewers	215-988-2712	joanne.lewers@dbr.com
Jeffrey J. Lopez	202-842-8866	jeffrey.lopez@dbr.com
Philip J. Mause	202-842-8819	philip.mause@dbr.com
Elizabeth McCuskey	215-988-2915	elizabeth.mccuskey@dbr.com
Amy B. Miner	215-988-1159	amy.miner@dbr.com
Michael Miner	202-354-1379	michael.miner@dbr.com
M. Howard Morse	202-842-8883	howard.morse@dbr.com
Meredith W. Nissen	215-988-3319	meredith.nissen@dbr.com
Edward M. Posner	215-988-2716	edward.posner@dbr.com
Alfred W. Putnam, Jr.	215-988-2907	alfred.putnam@dbr.com
Meredith Rubin	215-988-3347	meredith.rubin@dbr.com
Paul H. Saint-Antoine	215-988-2990	paul.saint-antoine@dbr.com
Robin Sampson	215-988-2561	robin.sampson@dbr.com
Bryan Sgrignoli	215-988-3358	byran.sgrignoli@dbr.com
Robert A. Skitol	202-842-8824	robert.skitol@dbr.com
Mark Sosnowsky	215-988-2887	mark.sosnowsky@dbr.com
Maresa Torregrossa	215-988-2930	maresa.torregrossa@dbr.com
Kenneth M. Vorrasi	202-354-1361	kenneth.vorrasi@dbr.com
Darcy Walker	215-988-2867	darcy.walker@dbr.com
Vernon I. Zvoleff	415-591-7590	vernon.zvoleff@dbr.com

Drinker Biddle's Antitrust Practice Group represents companies planning mergers, acquisitions and joint ventures. The group also advises companies with respect to the Hart-Scott-Rodino Act, and in making filings under the Act with the Department of Justice Antitrust Division and the Federal Act, Federal Trade Commission Act, and state antitrust statues. Lawyers in the group include a former Assistant Director of the FTC Bureau of Competition, former Assistant to the Chairman of the Commission and a former Assistant to the Director of the Bureau of Competition.

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