The Antitrust Review of the Americas 2017

Published by Global Competition Review in association with

Analysis Group
Axinn, Veltrop & Harkrider LLP
Baker & Hostetler LLP
Baker & McKenzie LLP
Bennett Jones LLP
Borden Ladner Gervais LLP
Cooley LLP
Coronel & Pérez
Demarest Advogados
Freshfields Bruckhaus Deringer US LLP
Goodmans LLP
Goodwin Procter LLP
King and Spalding LLP
Mattos Engelberg Advogados
Norton Rose Fulbright
Orrick, Herrington & Sutcliffe LLP
Shearman & Sterling LLP
Thompson Hine LLP
Vinson & Elkins
Von Wobeser y Sierra, SC
Weil, Gotshal & Manges LLP
White & Case LLP
Zürcher, Odio & Raven

GCR GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

United States: Private Antitrust Litigation

Robert G Abrams, Gregory J Commins and Danyll W Foix
Baker & Hostetler LLP

Whether commencing a lawsuit or planning for the defence of one, the potential for counterclaims is an important strategic consideration. US civil procedure rules permit, and sometimes require, that parties pursue counterclaims in response to being sued. Antitrust counterclaims can be pursued in a variety of types of cases, but are most prevalent in intellectual property litigation. The assertion of antitrust counterclaims can increase the cost of litigation, add risk for the party bringing the lawsuit, and alter the relative positions of the parties to the case. Given the possible impact on litigation, potential counterclaims should be given careful consideration.

What are counterclaims?

Counterclaims are simply demands for relief made by defendants in civil cases against plaintiffs that brought the lawsuits. Counterclaims are based on the rationale that dealing with all the issues that may come in the same case saves time, money, and effort for the parties involved, including the courts.[1] Due to this perceived efficiency, courts tend to be flexible in permitting counterclaims whenever possible.

In practice, there are two forms of counterclaims: Compulsory and permissive. As a general rule, counterclaims that are related to the same event or transaction as the original claim in the lawsuit are considered 'compulsory,'[2] while all counterclaims that are not related to the original lawsuit's claims are considered 'permissive.'[3] The distinction between the two is more than academic, as claims that are deemed compulsory but were not timely brought as counterclaims may be barred from being asserted in future lawsuits.[4]

Courts have not uniformly determined whether antitrust counterclaims are compulsory or permissive. For example, the Fifth and Ninth Circuits hold that antitrust claims are not compulsory in patent infringement cases.[5] But most other circuit courts hold the opposite.[6] Absent uniform standards across the courts, each potential antitrust counterclaim should be scrutinised to determine whether it is compulsory under the civil rules, based on whether it 'arises out of the transaction or occurrence that is the subject matter of the opposing party's claim' and 'does not require adding another party over whom the court cannot acquire jurisdiction.'[7]

Why consider counterclaims?

There are a number of significant reasons for parties to consider potential antitrust counterclaims.

For parties bringing lawsuits, antitrust counterclaims should be considered as early as the formulation of the types of claims to be brought. Some claims by their nature invite antitrust counterclaims. Lawsuits to enforce patents or non-compete provisions, for instance, often draw antitrust counterclaims since such suits typically involve exclusion of competitors. It may be advantageous for parties not to bring claims conducive to antitrust counterclaims, particularly if the claims add little to the overall relief being sought. Parties bringing litigation also should be mindful of the burden and inconvenience that potential antitrust counterclaims, if asserted, can impose. Antitrust claims are notoriously expensive to defend.[8] Beyond costs, parties defending counterclaims may be compelled to produce voluminous information on pricing, strategies, business plans, and other sensitive information. Finally, parties should not disregard the risk of a potential antitrust counterclaim succeeding. With awarded antitrust damages trebled by law,[9] antitrust counterclaims can add sizeable damages exposure. The importance of these considerations is illustrated in *Avaya, Inc v Telecom Labs, Inc*.[10] There, Avaya initiated the lawsuit, making trade secret and similar claims. Defendants countered with antitrust claims. After Avaya's claims eventually were dismissed, the antitrust counterclaims still proceeded to trial, and a jury awarded US$60 million, after trebling, based on the antitrust counterclaims.

Consideration of antitrust counterclaims can be equally important for parties planning defences against lawsuits. Claims that may be deemed compulsory should be identified and considered when responding to litigation because they could be waived if not asserted as counterclaims. Potential permissive counterclaims also should be considered since asserting them could be strategically advantageous for defendants. Antitrust counterclaims can impact the course of litigation by, for example, increasing the expense and burden for the parties that brought the litigation, as well as adding risk of exposure to litigation with treble damages. Pursuing counterclaims, however, can be as expensive and burdensome for the party asserting them. Further, there is a risk that the expense and burden will be for naught, as shown in *Kolon Industries v E.I. Du Pont de Nemours & Company*.[11] This litigation was initiated by DuPont making trade secret claims, and Kolon responded with antitrust counterclaims. After years of litigation, the counterclaims were dismissed but the trade secret claims continued through trial, with a jury ultimately awarding more than US$900 million in damages for DuPont.

Types of potential antitrust counterclaims

The US antitrust laws are flexible by design,[12] and an array of antitrust counterclaims may be possible in response to any given claim. Notwithstanding, a few types of counterclaims in response to certain categories of claims have developed in the courts. These counterclaims can be the starting point for parties considering commencement of a lawsuit or planning a response to litigation.

Any antitrust counterclaim must satisfy the usual elements for the underlying antitrust cause of action. This means counterclaims based on Sherman Act section 2 monopolisation generally must show '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'[13] Similarly, counterclaims based on Sherman Act section 1 restraint of trade generally must show '(1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstates or foreign commerce.'[14] In addition to showing the usual elements, a counterclaim must show antitrust injury, which is 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'[15]

Intellectual property claims

Intellectual property litigation, by its nature, invites antitrust counterclaims – and over 100 have been pursued through the courts in recent years.[16] Intellectual property laws, and particularly US patent laws, give owners a limited ability to exclude others from making, using, or selling the protected property.[17] This exclusion invariably leads to competitive issues that can be raised through antitrust counterclaims. While these counterclaims can take numerous forms, there are two general contexts in which they arise that parties should consider in connection with intellectual property litigation.

First, potential antitrust counterclaims often involve how intellectual property rights were obtained. Obtaining patents or copyrights through fraud or deceit can result in forfeiture of the right to enforce the intellectual property rights.[18] And, in *Walker Process Equipment, Inc v Food Machinery & Chemical Corp*, the Supreme Court held that enforcement of fraudulently obtained intellectual property can provide the basis for a section 2 counterclaim of monopolisation or attempted monopolisation.[19] Courts have explained that such counterclaims must show (1) the intellectual property was procured by intentional fraud and (2) all the usual elements necessary to establish a section 2 claim.[20] Aspects of both prongs, however, can hinder the successful assertion of counterclaims. For example, for the fraud prong, some courts require clear and convincing evidence of an intentional misrepresentation of a material fact,[21] which is a standard that can be difficult for counterclaimants to meet. Similarly, it can be difficult for counterclaims to satisfy the section 2 prong, as proof of relevant markets can be complicated by the presence of patented or copyrighted property in the marketplace,[22] and a patent does not necessarily confer market power on its holder.[23]

The second type of potential antitrust counterclaim concerns the means by which intellectual property rights are enforced. Although holders of intellectual property generally can enforce their rights without violating the antitrust laws, courts have identified certain conduct that can provide the basis for section 2 counterclaims. One such counterclaim, recognised in *Handgards, Inc v Ethicon, Inc*,[24] is asserting a section 2 violation against a patent holder that files a lawsuit to enforce a patent while knowing it was not infringed or not valid (even if the patent had been lawfully obtained).[25] This counterclaim, however, can be difficult because, similar to the *Walker Process* claim, the counterclaimant has to establish the plaintiff's state of mind as well as the usual section 2 elements.[26] With its narrow factual predicate and challenging proofs, this appears to be a relatively rare counterclaim.

A more frequently asserted counterclaim based on conduct to enforce intellectual property is 'sham litigation.' This counterclaim typically involves alleged infringers responding with allegations that the litigation to enforce intellectual property rights constitutes a sham, ie, it is baseless and serves no purpose other than to interfere with a competitor. Such conduct, if established, can form the basis for a section 2 violation. These counterclaims, however, can face several hurdles in the courts. The allegedly sham litigation must be 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'[27] In addition, the challenged litigation must be shown to be motivated by a subjective intent to abuse the litigation process to interfere with the business of a competitor, rather than to obtain judicial relief.[28] Any difficulty in making these showings has been increased by courts, including the Federal Circuit, also holding that claims of sham litigation are precluded as long as there is 'probable cause' for the challenged litigation, which is met when 'the law is unsettled, the action is arguably warranted by existing law, or there is an objectively good faith argument for extending existing law.'[29]

In litigation that may involve sham litigation counterclaims, the *Noerr-Pennington* doctrine should be considered since it can provide a counter-defence. *Noerr-Pennington* generally immunises a party from antitrust liability based on its filing of a lawsuit, unless the lawsuit is 'sham litigation.'[30] Proving that litigation is a 'sham' in the context of *Noerr-Pennington* results only in stripping a litigant of antitrust immunity. This means that 'even a plaintiff who defeats the defendant's claim to *Noerr* immunity by demonstrating both the objective and subjective components of a sham must still prove a substantive antitrust violation.'[31]

Hatch-Waxman claims

In the wake of the Supreme Court's recent ruling that certain 'reverse' payments to settle pharmaceutical litigation can be anticompetitive,[32] Hatch-Waxman-related claims and counterclaims may receive increased interest. The Hatch-Waxman Act provides special procedures for patent disputes involving pharmaceuticals approved by the US Food and Drug Administration, including authorising pharmaceutical patent-holders to sue manufacturers for infringement when they propose to sell generic versions of the patented pharmaceuticals.[33] As in other patent contexts, the manufacturers can respond with counterclaims that the infringement lawsuits constitute sham litigation that subjects the plaintiffs to liability for monopolisation under section 2. The Hatch-Waxman context, however, does not excuse the counterclaimant from showing alleged sham litigation falls outside the *Noerr-Pennington* immunity.[34]

Distribution claims

Distribution agreements between manufacturers or suppliers and their distributors often include provisions that restrict or otherwise govern how goods or services are to be marketed. These agreements sometimes include exclusivity provisions that prohibit distributors from marketing products of competing manufacturers, territory provisions that preclude distributors from marketing outside assigned geographic areas, or customer provisions that limit distributors from marketing to certain categories of customers. Courts have recognised the pro-competitive benefits for such provisions, mainly based their ability to promote intra-brand competition, reduce marketing costs, and allow manufacturers or suppliers to better control product quality and service in the distribution chain.[35] This does not eliminate the need to consider potential antitrust counterclaims in this context.

Antitrust counterclaims may arise in response to lawsuits claiming restrictive provisions in distribution agreements have been breached, or seeking to enforce compliance with these provisions. Counterclaims by distributors often are premised on the theory that enforcement of these restrictive provisions constitutes a form of monopolisation in violation of Sherman Act section 2,[36] or an unreasonable restraint of trade in violation of section 1 if multiple parties allegedly agreed concerning the restrictive provisions.[37] Such claims can be strengthened if the restrictive provisions are excessively broad in scope. These claims, however, may face obstacles in the courts.[38] Applying the rule of reason analysis, which weighs the pro-competitive benefits against the anticompetitive consequences of a restraint to determine whether it unreasonably impacts the competitive conditions,[39] courts often find restrictive provisions in distribution agreements to be pro-competitive on balance because of their potential to stimulate intra-brand competition and preclude other distributors from 'free-riding' on the effort and investment of others.[40] Further, it can be difficult to show these provisions are detrimental to market-wide competition, rather than only the counter-claimant, as is required to show antitrust injury.[41]

The termination of distribution agreements also may result in antitrust claims that, like counterclaims, impact how the parties resolve their business relationships. Downstream distributors sometimes are terminated by manufacturers and replaced by other distributors. Typically, terminated parties that respond with antitrust claims allege that the manufacturers conspired with the replacement distributors, or other market participants, and effectuated the termination as part of an effort to monopolise or unreasonably restrain trade.[42] These claims can be daunting. Courts may view these cases with the presumption that firms have considerable freedom to choose with whom they will do business.[43] Proof of anticompetitive effect and antitrust injury also can be problematic, since changing distributors may have no adverse consequences in a market, and termination arguably may increase competition to the extent the replacement distributors provide better services or otherwise enable the realisation of efficiencies.[44] The existence of legitimate business justifications, in a rule of reason analysis, makes an anticompetitive showing difficult in termination claims.

Franchise claims

Similar to distribution agreements, franchise agreements often include provisions that generally restrict how goods or services are to be marketed, but also often include permission for the franchisee to use the franchisor's intellectual property and trademarks in exchange for allowing the franchisor some control and oversight of the franchisee operations. Given the similarity, the antitrust considerations for distribution claims also apply to franchise claims. An additional consideration for franchise claims involves 'tying' – 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'[45] The competitive harm of tying includes sellers building power in the market for the tied product based on their power or leverage in another market rather than the tied product's prices or product quality.[46]

Tying counterclaims can arise in response to franchisors suing to enforce agreements that require franchisees to purchase parts, supplies, or products from the franchisor or their affiliated entities. In this circumstance, counterclaims can allege that the franchisors have tied the purchase of parts, supplies, or products with the purchase and operation of the franchise itself in violation of section 1.[47] While tying may be *per se* unlawful,[48] courts have required that tying claimants establish a number of elements – including that the tying and tied products are two separate markets, sufficient economic power in the market for the tying product to restrain trade in the tied market, and anticompetitive effect in the market for the tied product.[49] These elements can be onerous to establish. The parts, supplies, or products that franchisees may be required to purchase do not necessarily constitute a market separate from the franchise itself;[50] franchisors often lack economic power, especially since courts generally do not recognise a single brand as a relevant market;[51] and courts can be receptive to business justifications for the challenged arrangements, such as they benefit consumers, which can outweigh allegations of anticompetitive effects.[52]

Non-compete/restrictive covenant claims

Covenants not to compete often appear in employment contracts, employee termination agreements, and agreements for the sale of businesses. Responses to lawsuits to enforce these provisions can include counterclaims based on Sherman Act sections 1 and 2. Specifically, counterclaims can assert that such provisions violate section 2, and are unenforceable, because they are unreasonably broad in terms of duration, territory, or product.[53] Also, when covenants or agreements involve two or more competitors, such as industry non-compete arrangements, counterclaims could assert a violation of section 1 due to an unreasonable restraint of trade.[54] As in the distribution context, these counterclaims can face obstacles because they generally are analysed under the rule of reason[55] and the pro-competitive potential for non-compete or restrictive covenants, such as facilitating the transfer of property and businesses and preserving the goodwill value of firms, may outweigh the harm to competition.[56]

Frivolous litigation claims

While sham litigation usually appears in the context of intellectual property cases, antitrust counterclaims based on allegedly frivolous litigation conceivably can arise in a variety of factual and legal claims. Frivolous lawsuits generally have the potential to be anticompetitive because, for instance, defending litigation can be costly, litigation can deter firms targeted by litigation from competing with those pursing the litigation, and litigation may persuade other market participants not to do business with the target firm so as to avoid provoking litigation.[57] These concerns have prompted congressional hearings focused on 'the strategic abuse of litigation system as an anticompetitive tactic.'[58] Despite the anticompetitive potential, antitrust counterclaims based on frivolous litigation outside of the intellectual property context are infrequent. This may be due to courts tending to allow competitor litigation based on constitutional principles supporting the right to petition the government under *Noerr-Pennington*.[59] This immunity has limits, however, and it could be advantageous for parties in circumstances with possible frivolous litigation to consider the potential for antitrust counterclaims.

Conclusion

The potential for use and abuse of antitrust counterclaims in the categories of litigation discussed in this article demonstrates the importance of considering counterclaims. Plaintiffs should consider the possibility of counterclaims in crafting their lawsuits, defendants should consider whether a counterclaim is required (or otherwise waived), and both parties should be mindful of any strategic advantages that may be gained with counterclaims, and at what cost.

Notes

1 See, e.g., *Southern Constr. Co. v Pickard*, 371 U.S. 57, 60 (1962) (explaining FED. R. CIV. PRO. 13(a) counterclaims were 'designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters').

2 See, e.g., 3-13 Moore's Federal Practice – Civil at section 13.10 (Matthew Bender 3d ed.).

3 See, e.g., id. at section 13.30.

4 See *Baker v Gold Seal Liquors, Inc.*, 417 U.S. 467, 469 n.1 (1974) ('A counterclaim which is compulsory but is not brought is thereafter barred.'); see also 3-13 Moore's Federal Practice, note 3, supra, at section 13.14.

5 See, e.g., *Destiny Tool v SGS Tools Co.*, 344 F. App'x 320, 323 (9th Cir. 2009).

6 See, e.g., *Nobelpharma AB v Implant Innovations, Inc.*, 141 F. 3d 1059, 1067, n.4 (Fed. Cir. 1998) (en banc) (citing cases).
7 FED. R. CIV. PRO. 13(a).
8 See, e.g., *Bell Atl. Corp. v Twombly*, 127 S. Ct. 1955, 1975 (2007) ('Private antitrust litigation can be enormously expensive').
9 See 15 U.S.C. section 15.
10 2014 U.S. Dist. LEXIS 88815 (D.N.J. June 30, 2014); see also *Avaya, Inc. v Telecom Labs, Inc.,* 2014 U.S. Dist. LEXIS 135669 (D.N.J. Aug. 19, 2014).
11 748 F. 3d 160, 164 (4th Cir. 2014).
12 See, e.g., *Leegin Creative Leather Prods. v PSKS, Inc.*, 127 S. Ct. 2705, 2724 (2007) (explaining that antitrust laws inherently are flexible so they can 'evolv[e] with new circumstances and new wisdom').
13 *United States v Grinnell Corp.*, 384 U.S. 570-71 (1966).
14 ABA section of Antitrust Law, Antitrust Law Devs. at 2 (7th ed. 2012).
15 *Brunswick Corp. v Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).
16 See, e.g., Herbert Hovenkamp, et al., 1 IP and Antitrust at section 13.1, 11-2 (2006) (observing that there were over 100 reported decisions involving antitrust counterclaims during a seven-year period).
17 See 35 U.S.C. section 102, et seq.
18 See, e.g., *Therasense, Inc. v Becton, Dickinson and Co.,* 649 F. 3d 1276, 1285 (Fed. Cir. 2011) ('Inequitable conduct is an equitable defense to patent infringement that, if proved, bars enforcement of a patent.').
19 382 U.S. 172 (1965) (considering fraudulently obtained patents); see also *Knickerbocker Toy Co., Inc. v Winterbrook Corp.*, 554 F. Supp. 1309 (D.N.H. 1982) (considering fraudulently obtained copyrights).
20 See *Ritz Camera & Image, LLC v SanDisk Corp.*, 700 F. 3d 503, 506 (Fed. Cir. 2012).
21 See *Dippin' Dots, Inc. v Mosey*, 476 F. 3d 1337 (Fed. Cir. 2007).
22 See, e.g., *IGT v Alliance Gaming Corp.*, 702 F. 3d 1338 (Fed. Cir. 2012).
23 See *Ill. Tool Works, Inc. v Indep. Ink, Inc.*, 547 U.S. 28, 45-46 (2006).
24 601 F. 2d 986 (9th Cir. 1979).
25 See, e.g., *C.R. Bard, Inc. v M3 Sys., Inc.*, 157 F. 3d 1340 (Fed. Cir. 1998).
26 This burden may be increased by the court applying a rebuttable presumption that the 'patentee's infringement suit is presumptively in good faith.' *Handgards, Inc. v Ethicon, Inc.*, 601 F. 2d 986, 996 (9th Cir. 1979).
27 *Prof'l Real Estate Investors, Inc. v Columbia Pictures, Inc*, 508 U.S. 49, 60 (1993).
28 Id. at 60-61.
29 *ERBE Elektromedizin GmbH v Canady Tech. LLC*, 629 F. 3d 1278, 1292 (Fed. Cir. 2010).
30 *Prof'l Real Estate Investors,* 508 U.S. at 56.
31 Id. at 61.
32 See *FTC v Actavis, Inc*., 133 S. Ct. 2223 (2013) (holding that 'reverse payment' settlements where a brand name drug manufacturer had provided a potential generic competitor with economic benefits in return for the generic applicant's agreement to withhold competitive products for some time period prior to expiration of the patent may be anticompetitive).
33 Id. at 2228.
34 See, e.g., *Tyco Healthcare Group LP v Mut'l Pharm. Co., Inc.*, 762 F. 3d 1338 (Fed. Cir. 2014).
35 See, e.g., *Bus. Elecs. Corp. v Sharp Elecs. Corp*., 485 U.S. 717 (1988) (explaining that vertical, non-price restraints have 'real potential to stimulate interbrand competition, 'the primary concern of antitrust law') (citing *Continental T.V., Inc. v GTE Sylvania Inc.*, 433 U.S. 36, 52, n.19 (1977)).
36 See, e.g., *Anheuser-Busch, Inc. v G.T. Britts Dist., Inc.,* 44 F. Supp. 2d 172 (N.D.N.Y. 1999).
37 See, e.g., *Ezzo's Investments v Royal Beauty Supply*, 243 F. 3d 980 (6th Cir. 2001).
38 See, e.g., *United States v Arnold, Schwinn & Co*. 220 U.S. 373 (1967).
39 See *Nat'l Soc. of Prof'l Engineers v United States*, 435 U.S. 679, 688-91 (1978).
40 See, e.g., Antitrust Law Devs., note 14, supra at 159 (stating that no court has territorial or customer restrictions unreasonable in the last 25 years).
41 See, e.g., *Anheuser-Busch*, 44 F. Supp. 2d at 174-75.
42 See, e.g., *Crane & Shovel Sales Corp. v Bucyrus-Erie Co.*, 854 F. 2d 802 (6th Cir. 1988).
43 See, e.g., *NYNEX Corp. v Discon, Inc.*, 525 U.S. 128, 137 (1988) (explaining that '[t]he freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.').
44 See Antitrust Law Devs., note 14 supra, at 167 (reviewing business rationales accepted by courts for finding termination was not anticompetitive).
45 *N. Pac. Ry. Co. v United States*, 356 U.S. 1, 5-6 (1958).
46 See *Ill. Tool Works,* 547 U.S. at 33.
47 See, e.g., *AAMCO Auto. Trans., Inc. v Tayloe*, 407 F. Supp. 430 (1976).
48 See Jefferson Parish Hosp. Dist. No. 2 v Hyde, 466 U.S. 2, 6 (1984).
49 See, e.g., E & L Consulting v Doman Indus., 472 F. 3d 23, 32 (2d Cir. 2006); Princo Corp. v Int'l Trade Comm'n, 616 F. 3d 1318 (Fed. Cir. 2010).
50 See *Rick-Mik Enters., Inc. v Equilon Enters.*, LLC, 532 F. 3d 963 (9th Cir. 2008).
51 See *Subsolutions, Inc. v Doctor's Assocs., Inc.,* 436 F. Supp. 2d 348 (D. Conn. 2006).
52 See, e.g., *Mozart Co. v Mercedes-Benz of N. Am., Inc.*, 833 F. 2d 1342 (9th Cir. 1987).
53 See, e.g., *Drury Inn-Colo. Springs v Olive Co.*, 878 F. 2d 340 (10th Cir. 1989).
54 See, e.g., *In re High-Tech Employee Antitrust Litig.,* Case No. 11-CV-02509-LHK (N.D. Cal.).
55 See, e.g., *Nat'l Soc. of Prof'l Engineers*, 435 U.S. at 688-89. An exception to the application of the rule of reason when non-compete agreements are between horizontal competitors can be reviewed as per se unlawful. See, e.g., *Palmer v BRG of Ga., Inc.*, 498 U.S. 46 (1990).
56 See, e.g., *Lektro-Vend Corp. v Vendo Co.,* 660 F. 2d 255, 265, n.12 (7th Cir. 1981).
57 See *Prof'l Real Estate Investors,* 508 U.S. at 68 (Stevens, J. concurring).
58 See United States. Cong. House. Subcommittee on Intellectual Property, Competition, and the Internet, Litigation as a Predatory Tactic, Hearings, Feb. 17, 2012, 112th Congress, Second Session.
59 See *Cal. Motor Transp. Co. v Trucking Unlimited,* 404 U.S. 508 (1972).

Robert G Abrams
Baker & Hostetler LLP

Bob Abrams leads BakerHostetler's antitrust and competition practice team and guides a team of attorneys with great depth and strength in the litigation and trial of antitrust cases, including class actions. The antitrust group also has significant experience in mergers and acquisitions, and its partners have been point persons in dealing with the Department of Justice (DOJ) and the Federal Trade Commission (FTC) on the antitrust aspects of clearing transactions. Bob has more than 30 years of experience litigating and trying antitrust and complex commercial and government enforcement matters. He is a fellow of the American College of Trial Lawyers and is ranked in *Chambers USA: America's Leading Lawyers for Business* in the area of antitrust.

Bob's experience as a trial and litigation strategist spans practice areas, and he has been lead counsel in lengthy antitrust, intellectual property, trade secret and breach-of-contract jury trials, and has represented both plaintiffs and defendants. He has argued in most of the US courts of appeals, presenting cases involving distribution and other business practices, the Alien Torts Claims Act and constitutional law issues. He has also defended clients in enforcement actions initiated by the DOJ, the FTC, the Environmental Protection Agency and the California Air Resources Board. He was counsel in one of the largest FTC proceedings ever filed and lead counsel in one of the largest Clean Air Act enforcement actions in history. Bob tried a major class action on behalf of the defendant, ExxonMobil, and as lead plaintiffs' counsel settled a major class action for more than US$300 million and effective conduct changes on behalf of dairy farmers in 14 south-eastern states that was recognised as one of the six leading antitrust cases in 2012 by *Global Competition Review*.

Gregory J Commins
Baker & Hostetler LLP

Greg Commins is an established trial lawyer who focuses his practice on matters involving antitrust class action litigation, intellectual property disputes and complex commercial litigation. He has experience representing both plaintiffs and defendants in multi-week trials and on appeal throughout the country, as well as providing counselling on a variety of complicated commercial issues.

Greg is a contributor to BakerHostetler's *Antitrust Advocate* blog, providing informative commentary on the latest developments in the antitrust litigation sector.

Danyll W Foix
Baker & Hostetler LLP

Dan Foix represents clients in commercial disputes, with a particular focus on antitrust litigation, investigations and class actions. Serving a number of clients in the agriculture and food industries, Dan also advises on agricultural issues, such as strategies for commodities procurement and marketing practices. Having represented both plaintiffs and defendants in large matters, Dan brings a comprehensive perspective to litigation that helps him advocate effectively for clients. Dan also is the editor of and a regular contributor to BakerHostetler's *Antitrust Advocate* blog and the antitrust newsletter.

Baker Hostetler

1050 Connecticut Avenue, NW
Washington, DC 20036-5304
United States
Tel: +1 202 861 1500
Fax: +1 202 861 1783

Robert G Abrams
rabrams@bakerlaw.com

Gregory J Commins
gcommins@bakerlaw.com

Danyll W Foix
dfoix@bakerlaw.com

www.bakerlaw.com

One of the nation's largest law firms, Baker & Hostetler LLP (BakerHostetler) helps clients around the world to address their most complex and critical business and regulatory issues. With five core national practice groups – business, employment, intellectual property, litigation and tax – the firm has nearly 900 lawyers located in 14 offices coast to coast. BakerHostetler is widely regarded as having one of the country's top 10 tax practices, a nationally recognised litigation practice, antitrust practice, data-privacy practice and an industry-leading middle-market business practice.

BakerHostetler's antitrust and trade regulation practice is as dynamic as the environment in which we practice. In today's marketplace, it is more important than ever to have a trusted antitrust adviser who knows the significance of understanding a company's business and can provide frank and ongoing guidance aligned with a company's strategic goals. With more than 40 antitrust lawyers spread across the firm's 14 offices, the BakerHostetler antitrust and competition team has the experience and judgement to navigate clients successfully through the most significant business issues, antitrust litigation, investigations and transactions.

At BakerHostetler we distinguish ourselves through our commitment to the highest standard of client care. By emphasising an approach to service delivery as exacting as our legal work, we are determined to surpass our clients' expectations.

ABA Section of International Law
Your Gateway to International Practice

Strategic Research Sponsor of the
ABA Section of International Law

Law
Business
Research

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

 ISSN 1468-7054