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Abbreviated Rule of Reason Inquiry: A Place Between Per Se Rule and the Full-Blown Rule?

By Maria Del Monaco

For many years, practitioners have analyzed antitrust agreements by categorizing them in terms of either the rule of reason or the per se rule. Beginning in the mid-1980s, however, courts began applying more of an intermediate standard, which came to be known as an "abbreviated," "truncated," or "quick look" rule-of-reason inquiry.[1] This standard was further validated in 1999 in *California Dental Ass'n v. FTC*, when the U.S. Supreme Court explicitly granted certiorari to "resolve conflicts among the Circuits . . . over . . . the occasions for abbreviated rule-of-reason analysis."[2] Accordingly, practitioners must consider the possibility of a court or an administrative tribunal evaluating an antitrust dispute using this third mode of analysis. This article discusses when and how courts and other adjudicative bodies have used an abbreviated or "quick look" rule-of-reason analysis.

A Third Mode of Analysis or Not?

Some courts have eschewed calling the truncated rule-of-reason inquiry a third mode of analysis; indeed, some have insisted that there are no categories of analysis at all. Thus, in 1989, the Federal Trade Commission (FTC) observed that the per se rule and the rule of reason appear to be "converging."[3] It based its reasoning on

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NUTS & Bolts

By Bradley S. Lui, Eugene Illovsky, and Jacqueline Bos

Increased DOJ Intervention to Stay Discovery in Civil Antitrust Litigation

Grand jury investigations by the Antitrust Division of the Department of Justice (DOJ) are inevitably followed by multiple civil class action lawsuits. The parallel civil lawsuits can interfere with the government's investigation when discovery prematurely reveals its witnesses or documents. The complications of parallel civil and criminal litigation also pose significant challenges to the defense bar. As a result, in the last five years, the division's San Francisco Field Office[1] has sought to stay discovery in many major private civil antitrust actions pending the conclusion of its own criminal investigations. After intervening to stay discovery in the *DRAM* civil litigation in 2002,[2] the division has since successfully sought discovery stays in the *Rambus*, the *SRAM*, and the *TFT-LCD* litigation.[3] It has intervened in numerous others in the last year, including *Flash Memory* and the *Graphics Processing Units* antitrust litigation,[4] and even in at least two cases outside the Northern District of California.[5]

While this approach may herald a greater emphasis by the division on protecting its grand jury proceedings, its repeated success in convincing courts to put the brakes on civil discovery has benefited antitrust defendants.

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A Change in Practices

Until the recent string of Northern District of California cases, the Antitrust Division was seen as much less aggressive in seeking discovery stays than, say, the Securities Exchange Commission (SEC) or the DOJ's Criminal Division in securities actions, which actively seek (and are regularly granted) discovery stays to protect grand jury materials[6] and criminal investigations in litigation.[7] The San Francisco Field Office's pattern of intervention in private lawsuits appears to be a new approach by the Antitrust Division, which, in the past, only intermittently sought stays in parallel civil suits.[8] An example of its earlier indifference is the 1980 *Golden Quality Ice Cream* litigation, in which the Eastern District of Pennsylvania denied defendants' request to stay all civil proceedings (including discovery) pending the conclusion of the DOJ's parallel criminal investigation. In that case, the Antitrust Division stated that it took no position on the motion, satisfied with preserving the confidentiality of its grand jury documents through the protective order.[9] This early position contrasts with the statement the division made in the same court 20 years later in the *Graphite Electrodes* litigation, in which it agreed "with the position set forth by [the defendant] that the Government should not obtain by civil discovery that to which it is not entitled to through the Rules of Criminal Procedure. . . ."[10] The division's intent in civil proceedings was often to make sure it was not dragged into those proceedings. For example, in the *In re Flat Glass Antitrust Litigation* in 1998, the division opposed plaintiffs' third-party subpoena issued to the DOJ to produce grand jury documents in the parallel civil matter.[11]

Similarly, courts have often denied requests by the government[12] and defendants[13] alike to stay civil antitrust discovery made on the basis of parallel criminal proceedings and often granted plaintiffs access to grand jury materials. Courts have noted that they will not necessarily protect a defendant, asserting that "materials unearthed during civil discovery may eventually inure to the benefit of the Government in the prosecution of the criminal action" because "this concern is of doubtful relevance to the civil proceedings."[14] When courts refused to grant stays, they did so to protect the interests of parties—usually plaintiffs,[15] but sometimes defendants[16]—in having their civil cases litigated efficiently and expediently.

The change in attitude by the courts has been demonstrated by the San Francisco Field Office's success in obtaining stays since the 2002 *DRAM* stay as well as decisions of courts nationwide. The division was granted stays by the Southern District of New York in 2000,[17] the Central District of California in 2000,[18] the Eastern District of Pennsylvania in 2000[19] and 2003,[20] the Eastern District of New York in 2002,[21] the District of Columbia in 2003,[22] and twice by the District of New Jersey in 2004.[23] As a possible spillover effect, it is also becoming commonplace to see courts grant requests for stays by defendants for other reasons, such as a pending motion to dismiss,[24] *Twombly* grounds,[25] or pending the filing of a consolidated complaint.[26]

Defendants' and plaintiffs' positions on government-requested discovery stays in private antitrust actions also appear to have evolved. It was typical to see plaintiffs or defendants object to stay requests by the government. However, in the recent series of Northern District of California antitrust complex class actions, all parties supported the government's stay motions and agreed to joint stipulations. The *SRAM*, *DRAM*, and *TFT-LCD* matters are examples. In the *TFT-LCD* matter, all parties and the government had agreed to a discovery stay, leaving Judge Illston to decide only one peripheral dispute about whether access to grand jury materials should be allowed.[27]

The evolution to a position of consistent support by the government, parties, and judges alike for requests to stay civil discovery pending the conclusion of parallel criminal antitrust proceedings has made discovery stays an appropriate procedural step and a critical case management tool.

A Stay as an Appropriate and Beneficial Procedural Step

The government has established authority to intervene in a civil action for the purpose of limiting discovery when there is a parallel criminal proceeding involving a common question of law or fact.[28] The courts, however, recognize that they must "hesitate before granting a blanket stay of discovery in a civil proceeding, based on conclusory allegations of prejudice and on the mere possibility that a non-party witness may be called to testify before the Grand Jury."[29] Although not an automatic right[30] and sometimes described as "an extraordinary remedy,"[31] a civil stay of discovery is often the most appropriate result. In deciding whether to stay civil litigation, courts examine the interests of all interested parties and consider the "particular circumstances and competing interests involved in the case."[32]

When the same individual faces simultaneous civil and criminal proceedings, a civil stay serves a valuable purpose for all interested parties. It is efficient for the court: The prior resolution of particular issues as part of the criminal matter may eliminate duplication in the civil process.[33] Judges appear inclined to grant government motions to stay discovery, likely because the government, charged with justice, is the more appropriate party to lead the investigation than plaintiffs whose goal is to conduct a shakedown. Plaintiffs

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benefit because the government will have laid out the road map of the case, reducing their work.

A discovery stay also typically benefits defendants. The civil matter may be resolved through alternative means while a stay is in place or may be dismissed before defendants ever need to embark on the expensive process of locating, collecting, sorting, and producing documents and electronic data. A stay protects defendants from plaintiffs attempting to use the discovery process to add substance to otherwise superficial complaints, as noted in *Twombly*. It also protects innocent players that are not the subject of the government investigation but have been dragged into the case because they are industry players. Letting the government investigation take its course avoids unfairly involving parties that do not belong in the case.

Defendants also may require a discovery stay to protect their constitutional rights; it avoids potential exposure to double jeopardy from simultaneous proceedings.[34] And a stay helps defendants avoid the dilemma of invoking Fifth Amendment rights during civil depositions proceedings, which may diminish their chances of success at trial.[35] The criminal rules also offer defendants procedural protections that could be undermined through the more lenient civil discovery rules, and courts have criticized the government when it has, in a securities context, engaged in an "abuse of process"[36] and attempted to expand the scope of its discovery by filing parallel civil suits.[37]

The government often seeks a stay to prevent the defendant or the plaintiff from obtaining testimony or evidence in the civil proceeding to show their innocence or learn more about how much the government actually knows.[38] The San Francisco Field Office intervened in civil proceedings in the Eastern District of Pennsylvania in 2005, arguing that it sought "to intervene . . . to prevent [the] defendant from using civil discovery to circumvent the much narrower rules of criminal discovery," noting that it was "an unprecedented effort to use the more liberal civil discovery rules to pierce the secrecy of an active antitrust criminal grand jury investigation."[39]

In the Northern District of California cases mentioned earlier, the government's primary argument in support of its motions for a stay was that it did not want to reveal its theories prematurely. In the *TFT-LCD* litigation, the court acknowledged that a stay helps the government preserve the secrecy and confidentiality of its grand jury proceedings and not "reveal the nature, scope and direction of the ongoing criminal investigation, as well as the identities of others who may be providing evidence to the grand jury or the government, and the identities of potential witnesses and targets."[40] The government is not the only party concerned about protecting the government's theories. Defendants have objected to the stays on these grounds. For example in the *Rambus* civil litigation, the defendant objected because the target of the *DRAM* criminal investigation was a plaintiff in separate civil litigation.[41]

Comparison of Recent Stays

Not all stays obtained by the San Francisco Field Office have been in the same format, perhaps demonstrating the division's growing experience in crafting its stays and negotiating them with parties. The first Northern District of California stay order in an antitrust class action was the *DRAM Antitrust Litigation* order granted by Judge Hamilton in 2003 in the format agreed and stipulated by the plaintiffs and defendants in that matter and by the division.[42] The *DRAM* stay was open-ended, with a status conference scheduled nine months from the order. It stayed deposition, interrogatory, and documentary discovery but allowed for the production of documents submitted to the grand jury and non-substantive documents, such as sales data and other data that plaintiffs could use to identify damages. It also allowed for third-party depositions (other than of former employees of defendants). In *DRAM*, the government filed a joint stipulation with the plaintiffs and defendants, which the court ordered without modification.

The *SRAM* stay did not cover documentary discovery. Judge Wilken agreed to stay all deposition and interrogatory discovery ordered in the *SRAM* litigation for nearly a full year.[43] The *TFT-LCD* stay granted by Judge Illston was broader than both the *DRAM* and *SRAM* stays as it did not allow discovery of the documents produced to the grand jury. It covered deposition, interrogatory, and documentary discovery. The government continues to take an active interest in discovery in the *TFT-LCD* matter and recently requested an extension of a partial version of the existing stay until January 9, 2009.[44] The government proposed that discovery be allowed to move forward except for communications with the government regarding its grand jury investigation.

The Northern District's evolution in accepting that stays are appropriate in the complex antitrust litigation matters has developed to the point that in January 2008, Judge Armstrong granted a stay[45] requested by defendants in *Flash Memory*, rather than by the division. The division intervened in *Flash Memory*, stating that it was "for the purpose of limiting certain discovery during an ongoing criminal grand jury investigation."[46] The division filed a statement that had no position on the application of *Twombly* to the litigation.[47]

Impact of the Recent Pattern of Intervention

The new apparent pattern of intervening to stay discovery in complex private civil litigation by the San Francisco Field Office has garnered consistent support from the courts and from plaintiffs and defendants alike. The courts and parties have recognized the benefits of avoiding the duplication and contraventions of due process that parallel criminal and civil proceedings will bring. Other field offices of the Antitrust Division have started, and are likely, to adopt a similar strategy and policy. ■

Endnotes

1. The San Francisco Field Office covers Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.
2. *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., No. 02-1486 (N.D. Cal.).
3. Hyundai Elec. v. Rambus, Inc., No. 00-20905 (N.D. Cal. Apr. 11, 2005) (*Rambus*) (order granting the United States' motion for protective order under Fed. R. Civ. P. 26(c)); *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-1819 (N.D. Cal.); *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-1827 (N.D. Cal. Sept. 25, 2007) (order granting the United States' motion to stay discovery).
4. *In re* Flash Memory Antitrust Litig., No. 07-86 (N.D. Cal. Oct. 23, 2007) (order permitting intervention); *In re* Graphics Processing Units Antitrust Litig., No. 07-1826 (N.D. Cal. July 30, 2007) (notice of appearance by Alexandra Jill Shepard of U.S. DOJ, Antitrust Division).
5. *In re* Plastics Additives Antitrust Litig., No. 03-2038 (E.D. Pa. June 6, 2005) (memorandum in support of motion for protective order under Fed. R. Civ. P. 26(e) by the U.S.); Ivax Corp. v. Aztec Peroxides, LLC, No. 02-593 (D.D.C. May 12, 2003) (motion by the United States to intervene and limit discovery pending completion of the grand jury investigation and May 19, 2003, order staying depositions, but allowing interviews and interrogatories).

6. Federal Rule of Criminal Procedure 6(e) governs disclosure of grand jury materials by the government (as opposed to disclosure by defendants).

7. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (The government has distinct and "discernible interest in [preventing civil discovery] from being used to circumvent the more limited scope of [criminal discovery]").

8. Many of the stays that were sought in the past were initiated by the Philadelphia Field Office of the Antitrust Division. *See, e.g.*, Randle Trout Distribs. v. Country Skillet Catfish, Co., No. 92-360 (W.D. Wash. Mar. 27, 1992); Am. Seafood v. Magnolia Processing, No. 92-1030 (E.D. Pa. Mar. 11, 1992); *In re* Elec. Carbon Prods. Antitrust Litig., No. 03-2182 (D.N.J. Aug. 18, 2004); *In re* Graphite Electrodes Antitrust Litig., No. 97-4182 (E.D. Pa. Mar. 15, 2000) (motion of the United States to rescind the Mar. 8, 2000, court order).

9. Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53 (E.D. Pa. 1980).

10. *See In re* Graphite Electrodes Antitrust Litig., No. 97-4182 (E.D. Pa. Mar. 15, 2000) (motion of the United States to rescind the Mar. 8, 2000, court order).

11. *See In re* Nelson v. Pilkington, No. 98-3498 (3d Cir. Dec. 7, 1998) (brief for the United States).

12. Denials of the division's motions to stay include White v. Mapco Gas Products, 116 F.R.D. 498 (E.D. Ark. 1987); Alvin Independent School v. Sysco Food Services, No. 90-3774, (S.D. Tex. Aug. 28, 1991) (order denying motion to Stay); American Seafood v. Magnolia Processing, No. 92-1030 (E.D. Pa. May 7, 1992) (memorandum and order denying United States' motion for stay); *In re* Nasdaq Money Makers Antitrust Litigation, 169 F.R.D. 493 (S.D.N.Y. 1996); *In re* Auction Houses Antitrust Litig., No. 00-648 (S.D.N.Y. July 31, 2000) (order); and *In re* Scrap Metal Litig., No. 02-844 (N.D. Ohio Nov. 7, 2002) (memorandum and order). Examples of stays pending disposition of criminal or regulatory proceedings granted on the division's motion include Randle Trout Distributors v. Country Skillet Catfish, Co., 92-360 (W.D. Wash. May 5, 1992); Leasing Ventures v. General Instrument, No. 95-6325 (S.D. Fla. July 19, 1995); and Philip Morris, Inc. v. Heinrich, 1996 U.S. Dist. LEXIS 9156 (S.D.N.Y. June 28, 1996).

13. Denials of stays despite arguments by defendants of parallel criminal proceedings include *In re* Mid-Atlantic Toyota Antitrust Litig., 92 F.R.D. 358 (D. Md. 1981); *In re* Electric Weld Steel Tubing Antitrust Litig., No. 79-4628 (E.D. Pa. Feb. 28, 1980); *In re* Independent Gasoline Antitrust Litig., M.D.L. 267 (D. Md. July 19, 1977); *In re* Folding Cartons Antitrust Litig., M.D.L. 250 (N.D. Ill. July 2, 1976); *In re* Small Bags Antitrust Litig., C.A. No. 76-3407 (E.D. Pa. Dec. 21, 1979); *In re* Gas Meters Antitrust Litig., M.D.L. 360 (E.D. Pa. 1980); Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp., 269 F. Supp. 540 (E.D. Pa. 1967). Stays pending disposition of criminal or regulatory proceedings granted on defendant's motion include *In re* Residential Doors Antitrust Litig., 900 F. Supp. 749 (E.D. Pa. 1995); Amity Plumbing & Heating v. Rheem Manufacturing Co., No. 79-1519 (E.D. Pa. June 4, 1979); Air-Wize Inc. v. Rheem Manufacturing Co., No. 79-470 (E.D. Pa. Feb. 12, 1979); Texaco v. Borda, 383 F.2d 607 (3d Cir. 1967); and Chronicle Publishing Co. v. NBC, 294 F.2d 744 (9th Cir. 1961).

14. *Golden Quality Ice Cream Co.*, 87 F.R.D. at 57.

15. Connecticut *ex rel.* Blumenthal v. BPS Petroleum Distribs., Inc., No. 91-173 (D. Conn. July 16, 1991) ("stays in proceedings may result in prejudice . . . because 'witnesses relocate, memories fade, and persons . . . are unable to seek vindication or redress for indefinite periods of time on end'") (citation omitted); Citibank, N.A. v. Hakim, No. 92 6233 (S.D.N.Y. Nov. 18, 1993).

16. United States v. Hugo Key & Son, Inc., 672 F. Supp. 656, 658 (D.R.I. 1987) ("Certainly, it cannot be controverted that every defendant has a strong interest in the expeditious determination of his civil liberties").

17. *In re* Auction Houses Antitrust Litig., No. 00-648 (S.D.N.Y. May 17, 2000) (order granting stay until July 17, 2000). This court subsequently denied the government's motion to stay on July 31, 2000.

18. Thomas & Thomas v. Newport Adhesives, No. 99-7796 (C.D. Cal. Apr. 3, 2000) (minutes).

19. *In re* Graphite Electrodes Antitrust Litig., No. 97-4182 (E.D. Pa. Mar. 8 and 24, 2000).

20. *In re* Plastics Additives Antitrust Litig., No. 03-2038 (E.D. Pa. July 6, 2005) (memorandum in support of protective order under Fed. R. Civ. P. 26(e) by the United States).

21. *In re* Visa/Check/Mastermoney Antitrust Litig., No. 96-5238 (E.D.N.Y. Jan. 1, 2000).

22. Ivax Corp. v. Aztec Peroxides, LLC, No. 02-593 (D.D.C. May 12, 2003) (notice of motion and motion by the United States to intervene and limit discovery pending completion of grand jury investigation and order of May 19, 2003).

23. *In re* Elec. Carbon Prods. Antitrust Litig., No. 03-2182 (D.N.J. Oct. 19, 2004) (order granting government's motion for a limited stay of discovery in part); *In re* Ins. Brokerage Antitrust Litig., No. 04-5184 (D.N.J. July 11, 2006) (order).

24. Dismissal at the outset may now be more prevalent in light of the Supreme Court's decision in *Twombly*, 127 S. Ct. 1955 (2007).

25. In *Twombly*, the Supreme Court specifically noted that "the costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Id.* at 1967. For an example of a stay granted citing *Twombly*, see *In re* Netflix Antitrust Litig., 506 F. Supp. 2d 308, 321 (N.D. Cal. 2007); see also the discussion in *In re* Graphic Processing Units Antitrust Litig., 2007 U.S. Dist. LEXIS 57982, *23 (N.D. Cal. 2007).

26. *See, e.g.*, *In re* Air Cargo Shipping Servs. Antitrust Litig., No. 06-1775 (E.D.N.Y. July 26, 2007) (order staying discovery); *In re* Flash Memory Antitrust Litig., No. 07-86 (N.D. Cal. Jan. 4, 2008) (denying plaintiffs' motion for discovery prior to filing consolidated complaint).

27. *In re* TFT-LCD Antitrust Litig., No. 07-1827 (N.D. Cal.) (order granting the United States' motion to stay discovery, Sept. 25, 2007).

28. SEC v. Downe, 1993 U.S. Dist. LEXIS 753 (S.D.N.Y. Jan. 26, 1993); FED. R. CIV. P. 24(b)(2).

29. Bd. of Governors of Fed. Reserve Sys. v. Pharaon, 140 F.R.D. 634, 640 (S.D.N.Y. 1991). In the *TFT-LCD* matter, although ultimately granting the government's motion for a stay, Judge Illston initially challenged the government's sealed declaration and requested supplemental filings. *In re TFT-LCD* (supplemental declaration of Niall E. Lynch in support of the United States' motion for a limited stay of discovery, Sept. 21, 2007).

30. United States v. Kordel, 397 U.S. 1, 9–10 (1970).

31. *In re* Mid-Atl. Toyota Antitrust Litig., 92 F.R.D. 358, 360 (D. Md. 1981); *In re* Plastics Additives Antitrust Litig., No. 03-2038 (E.D. Pa. Nov. 11, 2004); Weil v. Markowitz, 829 F.2d 166 (D.D.C. 1987).

32. Fed. Sav. and Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902–3 (9th Cir. 1989). The court considers the interests of plaintiffs in proceeding expeditiously and potential prejudice to plaintiffs, the burden on defendants, the convenience of the court and efficient use of judicial resources,the interests of third parties, the and interests of the public.

33. *In re Mid-Atl. Toyota*, 92 F.R.D. at 360.

34. United States v. Halper, 490 U.S. 435 (1989) (government may not proceed civilly against a defendant already criminally convicted for the same offense if it seeks punitive rather than remedial sanction).

35. *See In re* Plastic Additives Antitrust Litig., 2004 U.S. Dist. LEXIS 23989, at *18–19 (E.D. Pa. Nov. 29, 2004). The Fifth Amendment is available only to individual and not corporate defendants. United States v. Kordel, 397 U.S. 1, 9 (1970).

36. SEC v. Dresser Indus., 628 F.2d 1368 (D.C. Cir. 1980). The courts also consider the origin of the conflict between the parallel civil and criminal proceedings.

37. *See, e.g.*, United States v. Parrott, 248 F. Supp. 196, 202 (D.D.C. 1965) ("[T]he Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal proceeding"). Courts are reluctant to grant a government's motion for a stay where the government filed both the civil and criminal actions. United States v. Gieger Transfer Serv., Inc., 174 F.R.D. 382 (S.D. Miss. 1997).

38. SEC v. Chestman, 861 F.2d 49, 50 (2d Cir. 1988) (The government has a distinct and "discernible interest in intervening in order to prevent discovery in the civil case from being used to circumvent the more limited scope of discovery in the criminal matter"); *see also*, Bd. of Governors of Fed. Reserve Sys. v. Pharaon, 140 F.R.D. 634, 639 (S.D.N.Y. 1991) ("A litigant should not be allowed to make use of the liberal [civil] discovery procedures . . . to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled").

39. *In re Plastic Additives*, 2004 U.S. Dist. LEXIS 23989, at *18 (memorandum in support for protective order under Fed. R. Civ. P. 26(e) by the United States).

40. *In re TFT-LCD* (order of Sept. 25, 2007 at 2).

41. Hyundai Elec. v. Rambus, Inc. No. 00-20905 (N.D. Cal. Mar. 24, 2005) (Rambus's opposition to the United States' motion for a protective order).

42. *In re* DRAM Antitrust Litig., No. 02-1486 (N.D. Cal.) (order of Apr. 16, 2003).

43. *In re* SRAM Antitrust Litig., No. 07-1819 (N.D. Cal.) (memorandum in support of the government's motion for a stay of all deposition and interrogatory discovery pending resolution of the criminal grand jury investigation and related proceedings, May 31, 2007; and order of June 12, 2007).

44. *In re TFT-LCD* (United States' supplemental status report on continuance of discovery stay, May 14, 2008).

45. *In re* Flash Memory Antitrust Litig., No. 07-86 (N.D. Cal.) (order of Jan. 4, 2008).

46. *Id.* (order of Oct. 23, 2007).

47. *Id.* (government's response to cross-memoranda about discovery before a consolidated complaint, Dec. 12, 2007).

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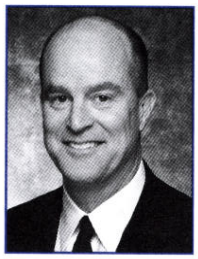
MESSAGE from the Chairs



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We're excited to bring you this issue of *Antitrust Litigator*. It has been a very productive year thus far. First, on the leadership front, Brad Weber of Locke Lord Bissell & Liddell LLP was appointed cochair of the committee. Brad is co-leader of his firm's Antitrust Litigation Practice Group and has more than 20 years of experience in the areas of litigation and antitrust. He has previously served as a coeditor of the newsletter and will remain on the editorial board this year. Our outgoing cochair, Chuck Samel, of Latham & Watkins, LLP, deserves special recognition. Chuck devoted countless hours to improving the committee's organization, initiating programs and features for members, and guiding our activities in constructive ways. We wish him the best.

Our committee website continues to improve in design and content. You will notice a number of enhanced features when you visit www.abanet.org/litigation/committees/antitrust, including recent updates, circuit notes, online resources, and archived issues of *Antitrust Litigator*. We are also pleased to have Bryant Delgadillo of Kaye Scholer LLP and Michael de Leeuw of Fried, Frank, Harris, Shriver & Jacobson LLP back as our web editors. They bring a variety of talents and creative ideas to the web subcommittee and are committed to delivering up-to-the-minute coverage of important antitrust developments.

The committee is also putting the final touches on its monograph examining the judicial treatment of *Illinois Brick* and indirect purchaser claims brought under the antitrust and consumer protection laws of all 50 states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. Later this year, you should also look for another monograph that will analyze various circuit splits involving significant antitrust issues.

As always, your active participation in committee activities is encouraged and appreciated. If you would like to learn more about one of our subcommittees, or offer suggestions as to how we could do a better job or make your committee membership more valuable, feel free to contact us or anyone on our subcommittee leadership roster, available on the web. The Antitrust Litigation Committee needs your input so that we can concentrate our focus on relevant and timely issues of concern. In that regard, if there are particular procedural or substantive antitrust litigation topics you would like to see addressed in telephone CLE programs, the Antitrust Litigator's Corner on the website, newsletter articles, or other committee content, we want to hear from you.

Finally, we hope you had the chance to attend the Section of Litigation Annual Conference in Atlanta. Each year, the Section manages to assemble an extraordinary slate of speakers, events, and programs. The annual conference is a special opportunity to learn more about the art and science of litigation, and to network with other committee members who are practicing in this area of the law.

We hope you enjoy this issue of *Antitrust Litigator*. Let us know if we can do anything to improve your membership experience.

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