



The Civil Practice & Procedure Committee's Young Lawyers Advisory Panel: Perspectives in Antitrust

JULY 18, 2013

VOLUME 1, NUMBER 7

In this Issue:

Spotlight on Molly Boast

Erica S. Weisgerber

Declining to State Its Enforcement Intentions: Insights from the DOJ's Business Review Letter to IPXI, Inc.

Tracy L. Januzzi

Ninth Circuit Opens Additional Window For Removal to Federal Court

Cindy Reichline

Supreme Court to Shape Future of Popular Antitrust Enforcement Tool

Nate Asher

Perspectives in Antitrust
Editors:

Tiffany Rider
Vice Chair, CP&P
trider@skadden.com

Frank Qi
Young Lawyer
Representative, CP&P
frank.qi@ropesgray.com

Spotlight on Molly Boast



Molly S. Boast is a partner in WilmerHale's Litigation/Controversy and Regulatory and Government Affairs Departments, and is a member of the Antitrust and Competition and Government and Regulatory Litigation Practice Groups. She joined WilmerHale in 2011, after serving as the Deputy Assistant Attorney General for the Antitrust Division of the US Department of Justice. Ms. Boast has more than 30 years of experience in both senior federal government positions and private practice.

Erica S. Weisgerber conducted this interview for Perspectives in Antitrust.*

Q: How did you get your start practicing antitrust law? Did you know you wanted to practice antitrust law since law school?

A: In law school, I actually did not have a particular area of interest; it seemed the big decision coming out of law school was whether to practice litigation or something else. During my third year of law school, I participated in the Big Apple Clinic at Columbia, in which law students worked on slip and fall cases for the New York City Law Department. Working on those cases, I realized that I had tapped into a skill set that I hadn't previously realized I had. This helped me decide I wanted to be a litigator.

At my first law firm, I worked on several antitrust cases, including several class actions involving the paper industry. In particular, I worked for Hon. Kimba Wood, who was an excellent mentor and fostered my interest in antitrust law. So for me, specializing in antitrust was both a matter of finding the right people to work with and developing an expertise over many years of practice.

Q: How did you end up making the transition from private practice to Deputy Director, and then Director of the Bureau of Competition at the Federal Trade Commission? Did you always know you wanted to spend time working in the government?

* Erica S. Weisgerber is an associate at Debevoise & Plimpton LLP whose practice focuses on a wide range of civil litigation, with an emphasis on bankruptcy litigation and antitrust matters.

A: I made many contacts in the antitrust community through my work with the American Bar Association and large defense groups, and I came to know several people who ended up going into government and working for antitrust agencies during the first part of the Clinton Administration. So, my work on antitrust cases and my bar association participation certainly helped me to develop antitrust contacts; those contacts came to fruition when I was invited to join the FTC. Although I had not been seeking a government position, the moment the idea was raised, I knew I wanted to do it.

My time in the government kick-started my antitrust learning because it was the first time in my career that I was practicing antitrust law exclusively. I started at the FTC during the merger wave, and around that time, there were roughly 5,000 HSR filings a year. So I was forced to hit the ground running. There was also quite a bit of litigation for me to jump into. Additionally, working in government affords you exposure to a multitude of unique antitrust issues that you do not typically come across in private practice. The position was a combination of an antitrust job, a litigation job, and a management position, which made it the perfect fit for me.

Q: Can you compare your experience working at the Federal Trade Commission to the Department of Justice?

A: In my experience, the day-to-day work at the two agencies was almost identical. My experience with the Bureau of Competition at the FTC helped me ease into the DOJ. One major difference, of course, is that the FTC does not have criminal jurisdiction. In addition, the Antitrust Division is part of the larger Department of Justice, which results in officials at the DOJ perhaps taking greater measure of the government-wide consequences of the actions they take. The FTC, by comparison, is an independent agency, and as a whole has its own culture that comes out of being a small agency that does a lot of important work.

Q: You were one of the three Division authors of the 2010 Horizontal Merger Guidelines. What were the working group's goals when drafting the Guidelines, and now, several years later, do you think these goals have been achieved?

A: We set out to update the Merger Guidelines because some believed that the Guidelines did not reflect the most recent economic thinking on mergers. When our project got underway, we had three primary goals. First, we wanted to make sure that we did not end up confining enforcement options as a result of creating these Guidelines. Second, we wanted to make the Guidelines lucid enough that courts could embrace them. Third, we wanted to figure out specific areas of the merger law that needed to be updated. This included clarifying the coordinated effects analysis, to include "parallel coordinated conduct." This was a deliberate effort on our part to set forth guidance on this issue and flag the dangers of firms coordinating without colluding. We particularly wanted to update the coordinated effects analysis to provide better guidance for the courts, so court could understand how economists think about the analysis, but at the same time not feel confined to a "check the box" type of analysis.

We also thought it was important to discuss at the beginning of the Guidelines the

types of evidence that will be examined in any pre-merger review—evidence of adverse competitive effects. These provide a framework for looking at any merger. The staff typically believes that you don't know the proper market definition until you are done with the investigation, once you've looked at all the evidence.

Finally, I would note that the concerns about over-enforcement as a result of the 2010 Horizontal Guidelines have not materialized. I think overall the Guidelines have been beneficial, both to the government and private parties.

Q: Speaking of merger review – if you could give one piece of advice to parties going through the pre-merger review process, what would it be?

A: The best piece of advice that I can give any parties before the FTC or DOJ is to maintain your credibility. It is far better to say "I haven't reviewed these documents yet, but here is my/my client's analysis of this market," than to go in and say "you'll never have a case here." Do not overstate the facts. Acknowledge ambiguity. This will be far better for your client in the long run than overreaching and losing your credibility in the middle of the investigation.

Q: Let's talk about Keyspan. You helped obtain the Antitrust Division's first judicial decision recognizing its authority to seek disgorgement as a remedy in a civil Sherman Act case brought by the Department of Justice. Why do you think there had been a prior reluctance to seek disgorgement, and what led to the decision to seek disgorgement in Keyspan?

A: Keyspan was sitting on my desk when I arrived at the Antitrust Division. I would not say that there had been a prior reluctance to seek disgorgement, but rather just that there was a concern that the statute did not contemplate anything but injunctive relief. The decision to seek disgorgement in Keyspan was really a result of the fact that there was nothing to enjoin. So the question was, how do you create a deterrent in this situation? Ultimately, the amount disgorged was considerably less than the amount involved, which resulted in significant criticism, but Judge Pauley's decision was a significant step forward for the Division.

Q: Do you think we will see disgorgement used as a remedy more often going forward?

A: I think it is relatively unlikely that we will see disgorgement used frequently going forward. The DOJ has not articulated the circumstances where disgorgement is appropriate. The concern is not to create maximum deterrence, but rather to create effective deterrence. Disgorgement is simply another available tool toward that end.

Q: Because this is a publication primarily prepared by young antitrust lawyers, I have to ask – what advice do you have for young antitrust lawyers looking to grow their profile and develop their skills and expertise?

A: My advice to young antitrust lawyers is that there are many benefits to getting involved in professional associations outside of your law firm. Involvement with

**Spotlight on
Molly Boast**

*Erica S. Weisgerber
(continued)*

**Declining to State
Its Enforcement
Intentions:
Insights from the
DOJ's Business
Review Letter to
IPXI, Inc.**

Tracy L. Januzzi

bar associations forces you to stay on top of legal developments in your practice area and provides rich opportunities for networking.

It is particularly important to stay on top of developments in the law because it allows you to understand where the courts are heading in enforcement. I advise young lawyers to figure out what part of antitrust law they love and spend time reading up on that area to better understand it. For example, if you are interested in mergers, understanding the economics behind mergers and pre-merger analysis is very important, and young lawyers should become very familiar with that; if you are interested in criminal antitrust actions, the law is less complicated, but factual development is very important to criminal cases. Young antitrust lawyers should find the area of practice that they love and jump into it.

Declining to State Its Enforcement Intentions: Insights from the DOJ's Business Review Letter to IPXI, Inc.

By Tracy L. Januzzi[†]

In 2012, Intellectual Property Exchange International, Inc. ("IPXI") proposed to provide a financial exchange designed to facilitate the licensing and trading of intellectual property ("IP") rights. Patent holders would provide exclusive field-of-use licenses to the exchange, which would sublicense the patents in pooled and à la carte offerings through unit license rights ("ULRs"). The offered ULRs are standardized licenses for patents or defined sets of patents whose terms and conditions are set by the exchange and the patent holder(s). IPXI's goal was to simplify and streamline patent licensing in accordance with "market-based principles."¹

In November 2012, IPXI requested a business review of its proposed exchange pursuant to the Department of Justice's ("DOJ") business review procedure. Such a review enables individuals concerned about the legality of proposed business conduct under the antitrust laws to receive guidance from the DOJ regarding application of the antitrust laws to the proposed conduct and to ascertain the DOJ's enforcement intentions. On March 26, 2013, the DOJ issued a negative business review letter ("BRL"), declining to state its enforcement intentions with respect to IPXI's proposed exchange.

Negative BRLs are highly unusual because the parties requesting a business review may withdraw the request at any time and often do so if they anticipate that the DOJ is not prepared to issue a favorable ruling. Although the DOJ declined to take a firm position on the legality of IPXI's proposed exchange, the IPXI BRL offers critical insight into the DOJ's present views on the competitive

[†] Tracy L. Januzzi is an associate in the Washington, DC office of Hogan Lovells US LLP where she is a member of the Antitrust, Competition, and Economic Regulation practice group. Her practice focuses on antitrust litigation, government investigations, and antitrust clearance of mergers and acquisitions. She also provides counseling on a variety of antitrust compliance issues.

impact of patent pools and joint-licensing arrangements. This article will examine the DOJ’s analysis in the IPXI BRL in order to distill the DOJ’s evolving position on similar business conduct.

I. IPXI’s Proposed Licensing Exchange

IPXI’s proposed exchange is the brainchild of corporate, university, and laboratory IP owners who sought to create a platform to facilitate patent licensing. Interested patent holders from various industries would offer exclusive licenses to their patents to IPXI, which would license the patents through the newly created exchange. Upon receipt of an offer for an exclusive license, IPXI would engage in due diligence to evaluate the patent’s validity and current infringement and would determine market interest among potential licensees. The exchange would offer sublicenses in the form of ULRs, which are

non-exclusive sublicenses to make, have made, use, sell, or offer for sale a single “unit” of a product in accordance with the ULR’s field of use. In other words, each unit of a product that practices patents in a ULR requires the acquisition of one ULR in order for it to be a licensed product under IPXI’s system.²

These ULRs would be available for direct purchase on IPXI’s primary market. Additionally, IPXI would offer a secondary market through which primary-market purchasers of ULRs could sell unconsumed ULRs to third parties. An offering memorandum—with terms agreed to by IPXI and the patent holder—would be circulated to potential licensees in advance of the listing. Revenues would be allocated 20% to IPXI and 80% to the patent holder.

Listed ULRs would be comprised of single, à la carte offerings from individual patent owners or multiple patents relevant to a specified field of use. If a ULR bundled patents from two or more non-affiliated patent holders, those patent holders also would be required to offer their patents in à la carte ULR offerings unless the bundled ULRs field of use was coextensive with a published technical standard. Patent holders would be required to provide an expert opinion confirming essentiality, which would be reviewed by IPXI staff. Additionally, IPXI staff and attorneys would review ULRs to ensure that competing ULR offerings were not listed on the exchange.

IPXI planned to offer ULRs in three tranches. The first two tranches would provide discounted offerings relative to the third. ULRs in the second and third tranches would become available only after offerings in the preceding tranches sold out. Although the prices and quantities of ULRs in the three tranches would be determined in accordance with anticipated demand, IPXI promised to make follow-on offerings available as needed. IPXI also established strict policies barring patent holders from sharing price, quantity, and other non-public information.

II. The DOJ’s Business Review Procedure

The DOJ’s business review procedure provides an opportunity for businesses to determine how the DOJ will react to proposed business conduct before undertaking the effort and expense necessary for the transaction.³ To obtain a review, the business submits a written request to the Antitrust Division, which may refuse the request. If the DOJ agrees to consider the request, the business must submit specified information and documents for review. Staff attorneys also may conduct an independent investigation. Although the length of the review depends on the complexity of the transaction, a business can expect a responsive review letter thirty days after the DOJ receives all relevant information, which can be several months from the time the business requested the review.

A business review letter alerts the business to the DOJ’s enforcement intentions with one of three responses: (1) the DOJ does not presently intend to bring an enforcement action against the proposed conduct; (2) the DOJ declines to state its enforcement intentions—i.e., the DOJ may or may not challenge the proposed conduct when it occurs; (3) the DOJ will sue if the proposed conduct happens. Upon issuance of a business review letter, the DOJ also issues a press release regarding the proposed conduct and the DOJ’s response. Typically, the information provided to aid the business review is made available to the public within thirty days after issuance of the letter response, although confidentiality concerns may warrant withholding the information from public disclosure.

Negative responses—those espoused in (2) and (3) above—are rare because a business may withdraw its request at any time, and most requesters do so if it appears the DOJ has any concerns relating to the proposed transaction. Notwithstanding, IPXI chose not to withdraw its request. Instead, it welcomed the DOJ’s refusal to state its enforcement intentions, commenting that it was “gratified that those few practices that the Department identified as potential ‘risks’ are largely practices in which IPXI will not engage.”⁴ IPXI expressed confidence that its exchange will “meet the most stringent of any test under the competition laws.”⁵

III. Previous DOJ Guidance Regarding Patent Pools and Joint-Licensing Arrangements

The DOJ and other competition authorities recognize that patent pools, such as that proposed by IPXI, often have many procompetitive benefits. They can be efficiency-enhancing by reducing transaction costs, clearing blocking positions, and accelerating the introduction and adoption of new technologies.⁶ Nonetheless, they also may raise competitive concerns and antitrust issues to the extent they enable horizontal coordination among competitors or discourage product development and innovation on account of grantbacks.⁷ In evaluating pooling and licensing arrangements, the DOJ uses the methodology applied to joint ventures, balancing procompetitive benefits, such as efficiencies, against the risk of harm to competition.⁸ Having examined these issues time and time again, the DOJ has developed a body of guidance identifying its concerns and ways

businesses establishing pooling and licensing arrangements can avoid running afoul of the antitrust laws.

a. The 1995 Intellectual Property Guidelines

In April 1995, the DOJ and Federal Trade Commission (“FTC”) issued *Antitrust Guidelines for the Licensing of Intellectual Property*. These guidelines were intended “to assist those who need to predict whether the Agencies will challenge a practice as anticompetitive.”⁹ Three general principles underlie the guidelines. First, the guidelines recognize that IP licensing arrangements generally are procompetitive because they enable companies to combine complementary elements of production. Second, they reject the presumption that IP necessarily creates market power in the antitrust context. And third, they regard IP as comparable to other forms of property and thus subject to the same antitrust principles and analyses.¹⁰ Although the DOJ’s BRLs and the FTC’s advisory opinions offer more specific guidance as to application of the guidelines to particular business conduct, the guidelines represent a logical starting point for firms considering licensing arrangements.

b. Past BRLs

Two previous BRLs provide the most insight into the DOJ’s main concerns with respect to pooling arrangements like that proposed by IPXI. Both involved patent pools relating to DVD-Video and DVD-ROM standards. The first pool—the 3C DVD pool—was created by three competitors licensing 210 patents.¹¹ The three pool members proposed to grant nonexclusive licenses to essential patents to the pool, which would be administered by one of the three licensors who could appoint an independent accountant to audit royalties owed and paid. The pool also hired an independent patent expert to examine the patents to ensure essentiality. Non-essential patents would be excluded from the pool.

In its BRL, the DOJ stated that it was not presently inclined to bring an enforcement action against the proposed pool. The DOJ focused on the fact that the pool would contain only complementary—not substitute—patents since only patents deemed essential to the specified standard for the technology at issue would be included in the pool. According to the DOJ, inclusion of two or more substitute patents risked turning the pool into a price-fixing device to raise the prices of products that utilize the patents. It further applauded the concept of essentiality as the criterion for inclusion, noting that it eliminated the risk that competing patents would be foreclosed from use. For example, patents A and B are substitutes. If patent A is included in the pool and conveyed to licensees along with the standard-essential patents, licensees may opt not to license patent B even if they consider it a superior patent. The potential for such foreclosure is vitiated where only essential patents are included in a pool. Although the DOJ recognized that the “independent” patent expert who would evaluate essentiality was hired by the licensors, it was assuaged by written assurances from the licensors that the expert’s compensation and future retention would not be based on his essentiality determinations. Accordingly, the DOJ responded favorably to the licensors’ request for a statement of its enforcement intentions.

A similar result was obtained with respect to the 6C DVD pool formed by six licensors.¹² Like the 3C DVD pool, the 6C DVD pool would license only essential patents and would be administered by one of the six licensors. Essentiality would be determined by an expert retained by the pool members. This pool contained the additional requirements that pool members also offer their licenses independently of the pool.

Concluding that it was not presently inclined to initiate an antitrust enforcement action against the proposed 6C DVD pool, the DOJ relied on the fact that the pool would combine complementary patent rights, which would lower costs for manufacturers who needed licenses to produce various products in accordance with specified formats and standards. The DOJ expressed the same concern regarding the “independence” of the patent expert as it did in the 3C DVD BRL. Likely having learned from the guidance set forth in the 3C DVD BRL, the 6C DVD licensors put several safeguards in place to allay the DOJ’s concerns. First, the licensors specified that the expert’s opinions on essentiality were “conclusive and non-appealable.”¹³ Second, the rules governing the expert’s retention provided that the licensors could dismiss the expert only on account of malfeasance and nonfeasance. And third, the expert’s compensation was tied solely to the time spent evaluating the patents regardless of whether they were subsequently deemed essential. With these safeguards in place, the DOJ was convinced that the expert would operate independently and, consequently, the pool would be comprised of complementary patents.

In deciding that it was not presently inclined to bring an enforcement action against the 3C DVD and 6C DVD patent pools, the DOJ also focused on the fact that the licensors granted *nonexclusive*, sublicensable licenses to the pool, meaning the licensors retained the right to license their essential patents outside of the pool and for fields of use other than those designated by the standard. Nonexclusive licensing to the pool reduces potential antitrust risk. First, independent licensing by the individual patent owners helps to “ensure that the proposed program [the pool] facilitates, rather than forecloses, access.”¹⁴ Additionally, independent licensing minimizes the likelihood that a potential licensee will accuse the pool of imposing a tying arrangement. Finally, licensing outside the pool “permits innovators that invent around one or more pool patents to compete with the pool.”¹⁵ Despite these risk-reducing aspects, the DOJ has recognized that “[e]xclusive licenses may be desirable, and thus potentially procompetitive if they are necessary to provide a significant incentive for the licensees to invest in complementary assets (e.g., when complementary assets would be subject to free-riding absent the exclusive license).”¹⁶ Moreover, the DOJ has viewed the exclusive versus nonexclusive licensing issue as less troubling when the pool offers à la carte licenses, such as those available on the IPXI exchange.

IV. DOJ’s Evolved Position and Guidance Distilled from the IPXI BRL

The DOJ’s IPXI BRL identified four ways in which the proposed exchange created the potential for competitive harm: (1) the possibility that the pool will offer substitute patents, (2) the inability of licensors to offer their patents outside the

**Declining to State
Its Enforcement
Intentions:
Insights from the
DOJ's Business
Review Letter to
IPXI, Inc.**
*Tracy L. Januzzi
(continued)*

pool, (3) the potential for competing patent holders to collaborate to fix prices and establish licensing terms, (4) the opportunity for competitors to share competitively sensitive information. Unlike the 3C DVD and 6C DVD patent pools, the IPXI exchange was not limited to essential patents, which raised the possibility that the exchange would offer substitute, not merely complementary, patents. As the DOJ noted, because the “combin[ing] [of] complementary factors of production . . . is generally procompetitive,” it may have the effect of reducing the royalty rate to licensees and, therefore, lowering the final cost of a product to consumers.¹⁷ A pool offering substitute patents, on the other hand, may be able to raise royalty rates, limit competition among competing patents, and enable coordination and price-fixing among rivals. An essentiality requirement protects against these anticompetitive harms because, by definition, an essential patent has no viable substitutes.¹⁸ The IPXI rules provide that ULRs are limited to patents that are “reasonably relevant or beneficial” to the ULR’s field of use. The breadth of this limitation, as well as the fact that it would not exclude substitutes, did not sit well with the DOJ. In the IPXI BRL, the DOJ lamented that because “IPXI cannot predict in advance the patents or markets that might be subject to a pooled ULR . . . the Department is unable to . . . assess the likely competitive effects of IPXI’s pooled ULRs, which may include substitute patents.”¹⁹

The IPXI exchange also differed from the 3C DVD and 6C DVD pools in that it required licensors to grant exclusive licenses to their patents to IPXI. This meant that licensors would not retain the right to license their patents independently outside of the IPXI exchange. Historically, the DOJ has looked favorably upon arrangements that permit independent licensing, finding that it “can encourage competition and create incentives for innovators to invent around some of the patents in a pool.”²⁰ The IPXI exchange does provide for certain à la carte patent licenses. If a patent is licensed as part of a pooled ULR, the IPXI rules require that the contributed patents comprising the pool also be licensed individually in separate ULRs on the exchange. This, however, would not necessarily have the same potential procompetitive benefits as independent licensing by the patent holders. As discussed below, IPXI’s status as a common agent for all patent holders creates the possibility that the terms of the à la carte offerings would not make them competitive with the pooled ULRs, which may lead purchasers to acquire the pooled ULRs regardless of their needs. Accordingly, the DOJ remained troubled by the exclusive-licensing requirement.

The DOJ also expressed concern regarding the manner in which IPXI and the patent holders would set terms for the ULRs. For an à la carte ULR, IPXI and the contributing patent holder would agree on the licensing terms. For a pooled ULR, IPXI and all contributing patent holders jointly would set the licensing terms. As the DOJ noted, it was unclear whether this system would foster incentives for the patent holders to list the à la carte ULRs on terms competitive with those set for the pooled offering. It was also possible that IPXI could “ensure that accommodating terms are maintained across competing patent holders because it [would set] the licensing terms and schedule of each offering jointly with each patent holder.”²¹ Because IPXI and the patent holders would share revenues from each ULR sold, the DOJ worried that they had incentives to reduce competition between ULRs in order to jointly profit. This concern was not mitigated by IPXI’s assurance that its staff would eliminate competing ULRs from

the exchange. As the DOJ noted, such a system would only work if IPXI staff were entirely consistent in how they identified and eliminated competing patents from the exchange.

Finally, the DOJ acknowledged the possibility that the exchange would enable competitors to fix prices and share competitively sensitive information. IPXI rules, however, were sufficient to convince the DOJ that there was little to no risk that such anticompetitive practices would occur. IPXI personnel would be barred from disclosing material nonpublic information obtained in connection with their employment, and patent holders would be prohibited from discussing the price or quantity of ULR contracts. The exchange would only publish historical, aggregated data that did not enable the identification of specific purchases or companies. Nonetheless, coordination could still occur by virtue of IPXI's term-setting procedures discussed above.

So what does this mean for future patent pools and other joint-licensing arrangements? Although patent pools and joint-licensing arrangements are becoming more common, the DOJ has maintained its vigorous scrutiny. As evidenced by this most recent BRL, the DOJ's core concerns remain unchanged from those expressed fifteen years ago in its 3C DVD BRL. The DOJ made clear that it still views such arrangements with skepticism because they provide fertile ground for the type of competitor collaboration that may result in anticompetitive effects. The IPXI BRL serves as a useful reminder to parties proposing such platforms that the DOJ is wary of the inclusion of substitute patents and the requirement that patent holders forego the ability to license their patents independent of the pool.

The DOJ also expressed doubt as to the effectiveness of eliminating competing patents by subjecting all offerings to a thorough staff review. Notwithstanding, it did not insist that businesspeople only take their cues from the 3C DVD and 6C DVD arrangements, which ensured the nonexistence of competing patents by offering solely standard-essential patents; rather, the DOJ recognized the efficiencies that may result from the IPXI exchange and cautioned that such constructs may require evaluation on a case-by-case basis to accurately assess their potential anticompetitive risk. Accordingly, such pools, until operational, may not fit well into the DOJ's BRL process. That makes some of them risky undertakings, especially given the antitrust agencies' increased focus on the competitive effects of patent pools and other joint-licensing arrangements. In structuring such platforms, it is important to pay particular attention to the DOJ's reinforced concerns and published guidance to ensure the arrangement does not run afoul of the antitrust laws.

V. Conclusion

On March 27, 2013, following the DOJ's issuance of the IPXI BRL, IPXI stated that it "anticipate[d] announcing very soon the official launch of the marketing period for [its] first offerings that will pave the way for trading on the Exchange."²² It will be interesting to see how IPXI fashions its exchange in light of the guidance and concerns articulated in the DOJ's BRL. More interesting, however, will be the DOJ's response to the operation of the IPXI exchange. As the DOJ repeatedly

**Ninth Circuit
Opens Additional
Window For
Removal to
Federal Court**
Cindy Reichline

noted in the IPXI BRL, although certain aspects of the exchange—such as the exclusive-licensing requirement—were troubling, they may, in practice, prove procompetitive.²³ The DOJ also has noted that certain conduct is more accurately evaluated on a case-by-case basis. Accordingly, businesses would be wise to monitor any subsequent action by the DOJ, particularly if the exchange is launched unmodified from that initially proposed. Such action (or inaction) will provide critical insight into the DOJ's future treatment of patent pools and similar arrangements.

Ninth Circuit Opens Additional Window For Removal to Federal Court

By Cindy Reichline[‡]

A defendant may generally remove a civil action from state court to federal district court if the district court would have had jurisdiction had the action been originally filed in that court. 28 U.S.C. § 1441(a). For years it seemed that a defendant had only two windows of time in which to remove an action to federal court. Sections 1446(b)(1) and (b)(3) of the United States Code specify that a defendant must remove a case within thirty days of service of the complaint, or within thirty days of receiving from plaintiff some “other document” from which the defendant could ascertain that the case was removable to federal court. 28 U.S.C. §§ 1446(b)(1), (b)(3).

In *Roth v. CHA Hollywood Medical Center, L.P.*, 2013 WL 3214941 (9th Cir. June 27, 2013), however, the Ninth Circuit addressed for the first time whether the two thirty-day periods described in sections 1446(b)(1) and (b)(3) are the only periods during which a defendant may remove, or if they are merely periods during which a defendant must remove if one of the thirty-day time limits is triggered.

In *Roth*, plaintiffs filed a state-law wage and hour class action in California state court. The plaintiffs thereafter filed an amended complaint naming an additional defendant, CHA Hollywood Medical Center (“CHA”). After conducting its own investigation, CHA discovered that at least one of the putative class members was a citizen of Nevada, thereby creating diversity for removal under the Class Action Fairness Act (“CAFA”). CHA also determined that it could establish that the amount in controversy exceeded CAFA’s jurisdictional minimum of \$5 million. Based on these discoveries, which occurred more than 100 days after the filing of the amended complaint, CHA, joined by the other defendants, filed a notice of removal in federal district court.

Plaintiffs, asserting that the removal was untimely, moved to remand the case back to state court, and the district court granted plaintiffs’ motion to remand. The district court held that removal was improper – even if the jurisdictional

[‡] Cindy Reichline is an associate in Jones Day's Los Angeles office. Ms. Reichline's practice focuses on a broad range of complex commercial litigation and dispute resolution, with an emphasis on consumer class action and antitrust and unfair competition litigation. The views expressed herein do not necessarily reflect the views of Jones Day, its attorneys or its clients.

**Ninth Circuit
Opens Additional
Window For
Removal to
Federal Court**
*Cindy Reichline
(continued)*

requirements had been satisfied – because neither of the thirty-day periods specified in sections 1446(b)(1) and (b)(3) had been triggered by documents received from plaintiffs. Thus, the district court held that the defendants could not remove based on information discovered by CHA outside of the thirty-day periods.

On appeal, the Ninth Circuit reversed. The Ninth Circuit held that “a defendant who has not lost the right to remove because of a failure to timely file a notice of removal under § 1446(b)(1) or (b)(3) may remove to federal court when it discovers, based on its own investigation, that a case is removable.” Because, here, plaintiffs’ amended complaint was “at best ‘indeterminate’” with respect to removability, CHA, which conducted its own investigation and discovered that the case was removable, was not barred from removing the action outside the two thirty-day periods.

The Ninth Circuit acknowledged that, under sections 1446(b)(1) and (b)(3), there are valid reasons for imposing strict time limits on a defendant when a defendant is put on notice of removability by a plaintiff, but the court concluded that a plaintiff should not be able to prevent or delay removal by failing to reveal information showing removability and then objecting to removal when the defendant discovers grounds for removal through its own investigation. The Ninth Circuit noted: “[i]t would be odd, even perverse, to prevent removal in this case, and we see nothing in the text of §§ 1441 and 1446 to require such a result.”

The Ninth Circuit further dismissed any concerns that a defendant may delay removing an action based on information it discovered until it is strategically advantageous for the defendant to do so. The Ninth Circuit noted that, in general diversity actions, any such advantages are severely limited because an action must be removed within one year of the commencement of the action. Although no similar limitation exists in CAFA cases, the Ninth Circuit reasoned that a plaintiff can prevent potential gamesmanship by providing the defendant with a document from which removability may be ascertained, thus triggering the 30-day removal period under section 1446(b)(3).

This groundbreaking ruling has significant implications for defendants that prefer to be in federal court. Defendants now have more flexibility and should not be deterred from removing general diversity or CAFA actions to federal court, provided that they have otherwise complied with sections 1446(b)(1) and (b)(3). Although it remains to be seen how lower courts will apply the Ninth Circuit’s ruling in *Roth* – whether courts will attempt to distinguish *Roth* on its facts or otherwise attempt to narrow this additional window for removal – the ruling (if followed by other circuit courts) would remove the time constraints that previously existed to determine removability, giving defendants additional time to investigate and obtain evidence to support removal.

Supreme Court to Shape Future of Popular Antitrust Enforcement Tool

By Nate Asher[§]

I. Introduction

The Supreme Court is poised next term to settle a circuit split affecting state enforcement of antitrust and competition laws. On May 28, 2013, the Court granted the state of Mississippi's petition for a writ of certiorari in *Mississippi ex rel. Hood v. AU Optronics Corp.*²⁴ That case stems from a Fifth Circuit opinion holding that *parens patriae* actions, in which a state brings a suit to protect its citizens, are removable under CAFA as mass actions.²⁵ The *Hood* allegations centered on purported violations of Mississippi antitrust law in the liquid-crystal display ("LCD") market. Like Mississippi, several other states filed actions in their respective courts seeking to enforce antitrust and competition laws relating to the LCD panel market. But those states succeeded in defeating removal attempts, leaving the matters in state court, while Mississippi lost its bid to remand *Hood* case to state court.

Depending on how the Supreme Court rules, *parens patriae* filings may diminish if they are deemed removable in most instances as mass actions. Or states may file more *parens patriae* actions if they know that they can safely avoid federal court in the future. Aside from these implications, the *Hood* case raises questions of how best to analyze *parens patriae* actions and how those actions affect antitrust enforcement and individual consumers.

II. *Parens Patriae* Actions: Historical Actions with Modern Endorsements

Parens patriae actions involve complaints brought by states on behalf of their citizens. The actions are "rooted in the English common-law concept of the 'royal prerogative,' which allowed the king to act on behalf of people unable to act for themselves."²⁶ *Parens patriae* suits allow states to protect quasi-sovereign interests in the health and economic well-being of their citizens.²⁷ Typically, states are the only parties to *parens patriae* actions, and private persons may only intervene or join the action if they have a compelling interest separate from that of the class of state citizens.

Standing for states to bring *parens patriae* actions originally springs from common law,²⁸ although several states explicitly authorize the actions by statute. *Parens patriae* suits may be particularly appealing where state citizens are unable to litigate for themselves, either for practical reasons, such as the likelihood of a nominal damages award, or because individuals are legally barred

[§] Nate Asher is an associate in O'Melveny's New York office and a member of the White Collar Defense and Corporate Investigations Practice. Nate's diverse practice includes white collar criminal defense, antitrust, complex civil litigation, mass tort, securities, regulatory investigations, and corporate counseling. Nate also represents *pro bono* clients in a variety of legal matters. The opinions expressed in this article do not necessarily reflect the views of O'Melveny or its clients, and should not be relied upon as legal advice.

from seeking relief.²⁹

a. Parens Patriae Suits and Antitrust Enforcement

Even though courts recognize the common-law validity of parens patriae actions, most states have explicitly authorized the mechanism as a means of enforcing state antitrust or competition law. For instance, several state antitrust and competition laws expressly provide for parens patriae suits.³⁰ Others allow such suits through analogous legal actions.³¹ Finally, some state courts have allowed parens patriae actions even absent statutory authorization.³² Thus, attorneys general in most states can bring antitrust enforcement actions on behalf of their citizens for violations of state law.

Three of the four parens patriae actions discussed below implicate only state antitrust and competition law. But states can also bring parens patriae actions in federal court to remedy alleged violations of federal antitrust law. This was not always the case, though. Before Congress passed the Hart-Scott-Rodino Act (“HSRA”), the Supreme Court rejected Hawaii’s attempt in a parens patriae action to recover damages for alleged injury to its economy due to purported antitrust violations.³³ Rather than allow the state to recover for injury to its general economy, the Court explained that injured citizens could pursue their own remedies through class actions.³⁴ The Court stated that between parens patriae actions and class actions, “the latter are definitely preferable in the antitrust area.”³⁵

One year later, the Ninth Circuit declined to recognize California’s authority to seek treble damages pursuant to the Clayton Act in a parens patriae suit alleging a price-fixing conspiracy.³⁶ The court explained that it would not allow the damages because “authority [to bring the suit] must come not through judicial improvisation but by legislation and rule making.”³⁷

Three years after *Frito-Lay*, Congress expressly responded to the Ninth Circuit, taking up the “judicial invitation extended by *Frito-Lay*.”³⁸ Congress described the HSRA as an effort “to overturn *Frito-Lay* by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have” encountered in federal class actions.³⁹ Following the HSRA, states could “protect their citizens by suing for damages when they are injured by antitrust violations.”⁴⁰ HSRA authorizes parens patriae claims unless a “state provides by law for its nonapplicability in such state.”⁴¹

III. Hood: The Fifth Circuit Considers Parens Patriae Suits To Be Mass Actions Because Individual Citizens Are Real Parties in Interest

The *Hood* case originated in Mississippi state court as a parens patriae action. The state argued that the defendants—LCD panel manufacturers and distributors—violated the Mississippi Consumer Protection Act and the Mississippi Antitrust Act by engaging in a price-fixing conspiracy.⁴² The defendants removed the action to federal court, arguing that the case qualified under CAFA as a mass action,⁴³ which is a civil suit seeking more than \$5 million in monetary damages,

involving 100 or more persons, raising common questions of law or fact, and requiring only minimal diversity.⁴⁴ CAFA excludes certain types of cases from qualifying as mass actions, including: (1) actions brought pursuant to a state statute asserting a claim on behalf of the state's general public; or (2) actions arising entirely from an event that occurred in the state where the suit was filed.⁴⁵

Despite an earlier Fifth Circuit case upholding removal of a *parens patriae* action as a mass action under CAFA,⁴⁶ the *Hood* district court remanded the case back to state court because it met CAFA's "general public exception."⁴⁷ The defendants appealed to the Fifth Circuit, which held that the case properly belonged in federal court because the state was not bringing the suit solely on behalf of the public in general. Instead, certain state consumers were real parties in interest to the suit.⁴⁸ In its ruling, the Fifth Circuit endorsed claim-by-claims analyses of *parens patriae* actions, which involved separately examining the party in interest for each particular claim.⁴⁹ Taking that approach, the Fifth Circuit determined that certain Mississippi citizens were real parties in interest to the state's damages claims given that the claims hinged on the rights of those citizens.⁵⁰ To support this position, the Court noted that the Mississippi statutes at issue did not authorize "public collection of private damages."⁵¹

The *Hood* court also noted that Mississippi was not acting on behalf of citizens who lacked legal recourse.⁵² Rather, Mississippi state law allows individual citizens to bring the type of indirect purchaser claims at issue in *Hood*, so the consumers ostensibly being protected could have pursued their own remedies in private suits.⁵³ But the court did not discuss the fact that Mississippi prohibits all class actions,⁵⁴ leaving state consumers with the lone option of filing individual actions.

IV. Circuit Split: Other Circuits Reject the Mass Action View

The *Hood* complaint alleged claims similar to *parens patriae* actions in several other states as well, including Arkansas, California, Florida, Illinois, Michigan, Missouri, New York, Oregon, South Carolina, Washington, West Virginia, and Wisconsin.⁵⁵ These actions center on the alleged conduct of LCD panel manufacturers and/or distributors first identified by a government investigation into the industry in 2006.⁵⁶

Illinois's attorney general initiated a *parens patriae* action against eight LCD panel manufacturers in August 2010, alleging price fixing in violation of the Illinois Antitrust Act.⁵⁷ Similar to the *Hood* defendants, the *Madigan* defendants tried to remove the action to federal court under CAFA. But unlike the Fifth Circuit in *Hood*, the Seventh Circuit held that the case properly belonged in Illinois state court.⁵⁸

Like the *Hood* defendants, the *Madigan* defendants asked the court to view the case on a claim-by-claim basis to find that particular purchasers were the real parties in interest.⁵⁹ To support the approach they advocated, the defendants argued that separately determining which party would benefit from each individual claim would reveal that the state was not the real party in interest for

all the claims.⁶⁰ The defendants conceded that the state was the real party in interest for the enforcement claims, but not for the damages claims.⁶¹ And given that individual Illinois citizens were the intended beneficiaries of damages claims, according to the defendants, the case constituted a mass action under CAFA.⁶²

But both the district court and circuit court rejected this approach.⁶³ The district court viewed the action holistically, applying a whole-claim approach.⁶⁴ This approach required examining the “essential nature and effect of the proceeding” and found that Illinois was the real party in interest, which the Seventh Circuit affirmed.⁶⁵ The circuit court also raised concerns about removing an action that a state filed in its own court to federal court absent a clear directive to do so.⁶⁶

In another opinion on the topic, the Ninth Circuit held that *parens patriae* actions are not mass actions under CAFA. In *Nevada v. Bank of Am. Corp.*, the Nevada attorney general brought an action against Bank of America and related entities, alleging violations of the Nevada Deceptive Trade Practices Act.⁶⁷

The district court denied a motion to remand, finding that the suit qualified under CAFA as a class action and also that the case implicated federal question jurisdiction.⁶⁸ After the district court’s ruling, the Ninth Circuit held in a separate matter that *parens patriae* actions do not constitute class actions under CAFA.⁶⁹ On appeal, then, the Ninth Circuit focused not on the class action argument, but on whether the case could constitute a mass action under CAFA.⁷⁰

Siding with the Seventh Circuit in *Madigan*, the Ninth Circuit reversed and adopted the whole-case approach to assess the nature and effect of the case from the entire record.⁷¹ From this perspective, the court found that Nevada was the only real party in interest in the action.⁷² And the Court was unfazed by Nevada’s claim for restitution that would benefit particular state citizens.⁷³ That restitution claim did not “negate Nevada’s substantial interest in this case.”⁷⁴ Although the *Nevada* case did not involve antitrust or competition laws, the case (1) relied in part on a previous California district court opinion in the consolidated LCD litigation,⁷⁵ and (2) informed a later Fourth Circuit opinion in yet another LCD-related lawsuit.

That Fourth Circuit opinion stemmed from two South Carolina *parens patriae* actions initiated in state court, alleging that LCD panel manufacturers violated South Carolina Antitrust Act and South Carolina Unfair Trade Practices Act.⁷⁶ The defendants attempted to remove the cases to federal court as mass actions under CAFA, but the district court rejected each of these removal attempts, and the Fourth Circuit upheld that determination.⁷⁷ Continuing the trend from *Madigan* and *Nevada*, the *South Carolina* defendants requested a claim-by-claim analysis of the case, which would indicate whether the state was the “beneficiary of each basis of relief.”⁷⁸ The district court rejected this request, finding instead that under a whole-claim view, South Carolina was more than a nominal party to the action because it was enforcing its quasi-sovereign interest in protecting its citizens.⁷⁹

After examining approaches adopted in other circuits as well as the South Carolina statutes at issue, the Fourth Circuit affirmed the district court's whole-claim analysis and agreed that the state was the only real party in interest.⁸⁰ Of importance to the Fourth Circuit, South Carolina citizens could not bring individual enforcement actions under the state Antitrust Act or the Unfair Trade Practices Act.⁸¹ The court also found that the statutory authorization of restitution to injured citizens was "incidental to the State's overriding interests and to the substance of these proceedings."⁸²

V. The Indirect Purchaser Rule Twist

Parens patriae actions may particularly appeal to states whose citizens cannot enforce their own rights under antitrust jurisprudence, such as indirect purchasers, who are often precluded from bringing antitrust claims. An indirect purchaser is a party that bought a product from an antitrust conspirator's customers, but not from the conspirator itself. For example, a person who bought a flat-screen LCD television from a retail store would be considered an indirect purchaser because the customer did not transact directly with the LCD panel manufacturer. And *Hood*, *Madigan*, and *South Carolina* all implicated harm to indirect LCD panel purchasers.

Indirect purchasers are generally barred from bringing individual federal actions under *Illinois Brick v. Illinois*.⁸³ In announcing the *Illinois Brick* standard, the Supreme Court expressed its concerns that separating out the overcharge passed on from the direct purchaser to the indirect purchaser may not be feasible, and enabling indirect purchaser recovery could foster multiple recoveries for the same conduct.⁸⁴ The doctrine is not without exceptions, though. An indirect purchaser may still bring a claim if it bought the overcharged goods pursuant to a "cost-plus" contract with a direct purchaser,⁸⁵ or if the direct purchaser was controlled by the conspiring entity.⁸⁶

Under these standards and exceptions, indirect purchasers have limited avenues to recovery in federal court. But in passing the HSRA, Congress intended to offer an enforcement mechanism to protect indirect purchasers. The Congressional Record shows that one of the Act's sponsors expressly contemplated parens patriae suits on behalf of indirect purchasers: "[A]ssuming the State attorney general proves a violation, and proves that an overcharge was 'passed on' to the consumers . . . recoveries are authorized by the compromise bill whether or not the consumers purchased directly from the price fixer, or indirectly, from intermediaries, retailers, or middlemen."⁸⁷ Not long after the HSRA passed, though, the Supreme Court decided *Illinois Brick*.

So in federal court, indirect purchasers must either meet one of the exceptions of the *Illinois Brick* doctrine or rely on a parens patriae suit to enforce their rights. State courts, on the other hand, offer a greater opportunity for indirect-purchaser recovery. Several states have fully repealed the effects of the *Illinois Brick* doctrine to allow for individual claims by indirect purchasers.⁸⁸ Other states authorize the state attorney general to bring a parens patriae action on behalf of indirect purchasers.⁸⁹

As for the indirect purchasers in *Hood*, *Madigan*, and *South Carolina*, the Illinois and Mississippi statutes at issue authorize indirect purchasers to bring claims for violations of state antitrust law.⁹⁰ But both states prohibit class actions brought by indirect purchasers: Illinois only allows the state attorney general to bring a class action on behalf of indirect purchasers,⁹¹ and Mississippi prohibits all class actions.⁹² And although the South Carolina statute does not authorize any actions on behalf of indirect purchasers, courts have recognized the attorney general's authority to bring *parens patriae* suits to enforce state antitrust law.⁹³ So all three states place either a practical hurdle (e.g., no private class actions) or a legal bar (e.g., no private cause of action) for indirect purchasers to bring claims based on state antitrust laws.

Whether or not indirect purchasers will be significantly impacted by the outcome of the Supreme Court ruling remains to be seen. Even if the Court rules that *parens patriae* actions may constitute mass actions and qualify for removal under CAFA, the *Erie* doctrine would compel federal courts to rely on state law enabling *parens patriae* suits as a means of protecting indirect purchasers. So the impact on indirect purchasers may simply be the difference between a more defense-friendly environment in federal courts and a more plaintiff-friendly environment in state courts.

VI. Conclusion

Given the scope of the *Hood* case, the Supreme Court will likely focus on the history and purpose of CAFA and on *parens patriae* actions in general. The Court may reach its ruling without analyzing any particular antitrust principles or laws. Even so, the ruling will undoubtedly affect antitrust practice throughout the country because *parens patriae* actions are popular tools for enforcing antitrust laws. And the *Hood* case may have a particular impact on claims for indirect purchasers whose interests are frequently at stake in *parens patriae* suits. In the future, will enforcement of antitrust laws on behalf of indirect purchasers be restricted to federal court? Or will states continue to use *parens patriae* actions to protect indirect purchaser interests in state court? The *Hood* case is well worth tracking for an antitrust lawyer interested in these issues.

**ABA ANTITRUST
CIVIL PRACTICE & PROCEDURE COMMITTEE**

Amy Manning
Chair
McGuire Woods LLP

Jeff Jacobovitz
Vice Chair
McCarthy, Sweeney & Harkaway, P.C.

Elizabeth Haas
Vice Chair
Foley & Lardner LLP

D. Martin Low
Vice Chair
McMillan LL

Shannon McClure
Vice Chair
Reed Smith LLP

Joyce Choi
Vice Chair
Linklaters LLP

Tiffany Rider
Vice Chair
Skadden, Arps, Slate, Meagher & Flom LLP

Adam Biegel
Council Representative
Alston & Bird LLP

Frank Qi
Young Lawyer Representative
Ropes & Gray LLP

DISCLAIMER

Perspectives in Antitrust is published eight times a year by the American Bar Association Section of Antitrust Law Civil Practice and Procedure Committee. The views expressed in *Perspectives in Antitrust* are the authors' only and not necessarily those of the American Bar Association, the Section of Antitrust Law or the Civil Practice and Procedure Committee or its subcommittees. If you wish to comment on the contents of *Perspectives in Antitrust*, please write to the American Bar Association, Section of Antitrust Law, 321 North Clark Street, Chicago, IL 60654.

COPYRIGHT NOTICE

© Copyright 2013 American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. To request permission, contact the ABA's Department of Copyrights and Contracts via www.americanbar.org/utility/reprint.

¹ Letter from William J. Baer, Assistant Attorney Gen., U.S. Dep't of Justice, to Garrard R. Beeney, Esq., at 1 (Mar. 26, 2013), available at <http://www.justice.gov/atr/public/busreview/295151.pdf> [hereinafter IPXI BRL] (footnote omitted) (internal quotation marks omitted).

² *Id.* at 2 (citation omitted) (internal quotation marks omitted).

³ See 28 C.F.R. § 50.6; U.S. DEP'T OF JUSTICE, INTRODUCTION TO ANTITRUST DIVISION BUSINESS REVIEWS, available at <http://www.justice.gov/atr/public/busreview/276833.pdf>.

⁴ IPXI Trading Innovation, U.S. Department of Justice Concludes Eight-Month Review of IPXI Licensing Model, available at <http://www.ipxi.com/news-events/90-doj-concludes-review-of-ipxi.html>.

-
- ⁵ *Id.*
- ⁶ See DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 65 (2007) [hereinafter "PROMOTING INNOVATION & COMPETITION"], available at <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>.
- ⁷ See *id.*
- ⁸ See U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.5 (1995), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,132 [hereinafter "ANTITRUST-IP GUIDELINES"], available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf>.
- ⁹ ANTITRUST-IP GUIDELINES § 1.0.
- ¹⁰ *Id.* § 2.0.
- ¹¹ See Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Garrard R. Beeney, Esq., at 1-4 (Dec. 16, 1998) [hereinafter 3C DVD BRL], available at <http://www.justice.gov/atr/public/busreview/2121.pdf>.
- ¹² See Letter from Joel I. Klein, Assistant Attorney Gen., U.S. Dep't of Justice, to Carey R. Ramos, Esq., at 1 (June 10, 1999) [hereinafter 6C DVD BRL], available at <http://www.justice.gov/atr/public/busreview/2485.pdf>.
- ¹³ *Id.* at 13.
- ¹⁴ *Id.* at 14 n.66.
- ¹⁵ PROMOTING INNOVATION & COMPETITION at 80.
- ¹⁶ *Id.* at 79-80.
- ¹⁷ ANTITRUST-IP GUIDELINES § 2.0.
- ¹⁸ 6C DVD BRL at 3.
- ¹⁹ IPXI BRL at 9.
- ²⁰ *Id.*
- ²¹ *Id.* at 11.
- ²² IPXI Trading Innovation, U.S. Department of Justice Concludes Eight-Month Review of IPXI Licensing Model, available at <http://www.ipxi.com/news-events/90-doj-concludes-review-of-ipxi.html>.
- ²³ See *supra* Part III.b.
- ²⁴ 186 L. Ed. 2d 191 (2013).
- ²⁵ 701 F.3d 796 (5th Cir. 2012).
- ²⁶ *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011).
- ²⁷ See *Arias v. Dynacorp*, 738 F. Supp. 2d 46, 54 (D.C. Cir. 2010).
- ²⁸ See generally, Jay L. Himes, *State Parens Patriae Authority: The Evolution of the State Attorney General's Authority*, The Institute for Law and Economic Policy Symposium (2004).
- ²⁹ See, e.g., *State of Calif. v. Levi Strauss & Co.*, 41 Cal. 3d 460, 477 (1986) ("[T]he parens patriae action is designed to provide a means of redress where a private class action is not viable.")
- ³⁰ These states include California, Colorado, Delaware, Hawaii, Idaho, Nevada, Ohio, Oregon, Rhode Island, South Dakota, Utah, and West Virginia, along with Puerto Rico and Washington, D.C. See Cal. Bus. & Prof. Code § 16760; Colo. Rev. Stat. § 6-4-11; Del. Code Ann. tit. 6 § 2108; Haw. Rev. Stat. § 480-14(c); Idaho Code § 48-108(2)-(4); Mass. Gen. Laws Ann. ch. 93 § 9; Nev. Rev. Stat. § 598A.160(1); Ohio Rev. Code Ann. §109.81(A); Or. Rev. Stat. § 646.775; R.I. Gen. Laws § 6-36-12; S.D. Codified Laws §§ 37-1-23 – -32; Utah Code Ann. §§ 76-10-918; W. Va. Code § 47-18-17; D.C. Code § 28-4507(b).
- ³¹ These states include Alaska, Arizona, Florida, Illinois, Kansas, Maryland, Mississippi, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, Wisconsin, and Wyoming. See Robert L. Hubbard, *Authority of State Attorneys General to Represent Consumers*, presentation at ABA Antitrust Spring 2003 Meeting, available at <http://apps.americanbar.org/antitrust/at-committees/at-state/pdf/programs/spring-03/agconsumer.pdf>.
- ³² These states include Alabama, Arkansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, Tennessee, Texas, and Washington. *Id.*
- ³³ See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972).
- ³⁴ *Id.* at 266.
- ³⁵ *Id.*
- ³⁶ See *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973).
- ³⁷ *Id.* at 777.
- ³⁸ 1976 U.S.C.C.A.N. 2572, 2578.
- ³⁹ *Id.*
- ⁴⁰ *Id.* at n.8.
- ⁴¹ *Id.* at 15h.

⁴² 701 F.3d at 799.

⁴³ *Id.* at 798.

⁴⁴ 28 U.S.C. § 1332(d)(11).

⁴⁵ *Id.* at 1332(d)(11)(B)(ii).

⁴⁶ See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008).

⁴⁷ 876 F. Supp. 2d 758, 775 (S.D. Miss. 2012)

⁴⁸ 701 F.3d at 802.

⁴⁹ *Id.* at 799–800 (citing *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418 (5th Cir. 2008)).

⁵⁰ *Id.*

⁵¹ *Id.* at 800–801.

⁵² *Id.* at 801.

⁵³ Miss. Code Ann. § 75-21-9.

⁵⁴ See *Jannsen Pharmaceutica, Inc., v. Armond*, 866 So.2d 1092, 1102 (Miss. 2004) (Graves, J., concurring) (“Mississippi is the only state that permits no class actions of any kind. . . .”) (citation omitted).

⁵⁵ Petition for Writ of Certiorari, *Hood*, No. 12-1036, at 7–8 (Feb. 19, 2013).

⁵⁶ Brief for the Respondents, *Hood*, No. 12-1036, at 43a (Apr. 24, 2013). Although Mississippi brought the action in state court, several attorneys general in other states filed *parens patriae* actions in federal court because they alleged federal-based claims as well as violation of state law. Petition for Writ of Certiorari, *Hood*, No. 12-1036, at 7–8. Those actions filed in federal court were consolidated with other federal actions relating to alleged price-fixing conduct in the LCD panel market. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal.). The *parens patriae* plaintiffs in that consolidated litigation recently settled their claims against the defendants. See *id.*, 2013 WL 1365900 (Apr. 3, 2013, N.D. Cal.).

⁵⁷ *LG Display Co. v. Madigan*, 665 F.3d 768 (7th Cir. 2011).

⁵⁸ *Id.* at 773–74.

⁵⁹ *Id.* at 772–73.

⁶⁰ *Id.* at 772.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 773.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 774.

⁶⁷ 672 F.3d 661 (9th Cir. 2012).

⁶⁸ *Id.* at 664.

⁶⁹ *Wash. State v. Chimei Innolux Corp.*, 659 F.3d 842 (9th Cir. 2011).

⁷⁰ *Nevada*, 672 F.3d at 667–68.

⁷¹ *Id.* at 670.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 671 (citation omitted).

⁷⁵ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 U.S. Dist. LEXIS 17793 (N.D. Cal. Feb. 15, 2011) (remanding *parens patriae* actions brought by Washington and California after finding states to be real parties in interest in enforcing consumer protection and antitrust laws).

⁷⁶ See *AU Optronics Corp. v. South Carolina*, 699 F.3d 385 (4th Cir. 2012).

⁷⁷ *Id.* at 387. Like the Ninth Circuit, the Fourth Circuit had already rejected an argument that *parens patriae* actions constituted class actions under CAFA without addressing the mass action issue. See *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.*, 646 F.3d 169 (4th Cir. 2011).

⁷⁸ *Id.* at 391–92.

⁷⁹ *Id.* at 388–89.

⁸⁰ *Id.* at 391–93.

⁸¹ *Id.* at 393.

⁸² *Id.* at 394.

⁸³ 431 U.S. 720 (1977).

⁸⁴ *Id.* at 731, 737.

⁸⁵ *Id.* at 735–36.

⁸⁶ *Id.* at 736 n.16.

⁸⁷ 122 Cong. Rec. 30878 (daily ed. Sept. 16, 1976).

⁸⁸ See ABA Section of Antitrust Law, *Indirect Purchaser Litigation Handbook*, Appendix A (2007); see, e.g., Haw. Rev. Stat. § 480-13(a)(1).

⁸⁹ See, e.g., Ark. Code Ann. § 4-75-212(b).

⁹⁰ See 740 Ill. Comp. Stat. 10/7(2); Miss. Code Ann. § 75-21-9.

⁹¹ See 740 Ill. Comp. Stat. 10/7(2).

⁹² See *Jannsen* 866 So.2d at 1102 (Graves, J., concurring).

⁹³ See S.C. Code § 39-3-180; *Trident Neuro-Imaging Lab. v. Blue Cross & Blue Shield of S. Car.*, 568 F. Supp. 1474, 1483 (D.S.C. 1983) (“[T]here is no private right of action under the state antitrust statutes.”); see generally *AU Optronics Corp. v. South Carolina*, 699 F.3d 385.