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Faculty Editor: Marc S. Spindelman, Assistant Professor of Law, The Ohio State University Michael E. Moritz College of Law

The papers in this symposium were presented at the Michael E. Moritz College of Law at The Ohio State University on November 7, 2003. Equality, Privacy and Lesbian and Gay Rights After Lawrence v. Texas was sponsored by the Ohio State Law Journal with the Moritz College of Law and the Center for Law, Policy, and Social Science at the Moritz College of Law.
ARTICLES

THE ASBESTOS LITIGATION SYSTEM IN THE SAN FRANCISCO BAY AREA: A PARADIGM OF THE NATIONAL ASBESTOS LITIGATION CRISIS

Asbestos litigation has placed an almost unbearable burden on the resources of civil courts nationwide. Courts across the country have implemented various procedural mechanisms and strategies in order to deal with the sheer number of asbestos personal injury cases filed each year. The San Francisco Bay Area has one of the most active asbestos dockets in the country. This article provides a general overview of several of the major challenges and issues facing defendants involved in asbestos litigation in Northern California, and suggests a variety of proposed solutions that could help remedy those problems.

This article explores the following issues and suggested solutions: 1) docket management problems and the inactive docket solution; 2) realistic timelines for taking asbestos cases to trial, in light of the elimination of California’s “Fast Track” rules; 3) issues with the designated defense counsel system created by the San Francisco and Alameda County General Orders; and, 4) the effect of Proposition 51’s modification of the rules of joint and several liability with respect to bankrupt asbestos defendants.

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CLOSED BUT NOT FORGOTTEN: GOVERNMENT REVIEW OF CONSUMMATED Mergers UNDER SECTION 7 OF THE CLAYTON ACT

The antitrust review of consummated mergers has become an increasingly significant component of the Federal Trade Commission’s (“FTC”) and Department of Justice’s (“DOJ”) merger enforcement program. Over the last several years, the FTC, in particular, has aggressively brought suit challenging consummated mergers, requiring parties to unwind transactions that had closed years before the government initiated proceedings. Although the FTC has the authority under Section 7 of the Clayton Act to initiate such review, this aggressive posture toward previously closed transactions has rattled the business community and raised the specter that the antitrust agencies will continue to seek to unwind transactions even years after they have closed, potentially disrupting benefits that these mergers have conferred both upon the market and consumer welfare.

Such review also raises significant legal questions that have for decades gone largely unaddressed. The passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) in large part has eliminated the need to conduct such post-close review because the Act requires parties to most mergers to notify the antitrust agencies of transactions before they are consummated, and provides that the
government may review and challenge these deals before they close. This pre-close notification and review regime has resulted in the vast majority of merger challenges occurring prior to close. Consequently, such challenges generally are settled pursuant to a consent decree, whereby the parties agree to divest assets or license intellectual property to cure the competitive concerns raised by the merger. The government thus allows the merger to close without ever litigating important issues in court, and without the need to issue a formal legal opinion that would have provided guidance for analyzing future merger challenges. As a result, post-close merger litigation followed by formal, published opinion is no longer the norm; instead, today it is the rare exception. Thus, in the 28 years since the enactment of the HSR Act, little case law has developed that explores the contours of post-consummation review, challenge, and relief. There is therefore little guidance to help litigants answer important questions concerning these challenges. Do the antitrust agencies have the authority to conduct such post-close review? What are the appropriate standards of review for analyzing such transactions? What evidence is relevant in conducting such an analysis? What type of relief is permissible in such circumstances? Can the agencies order significant divestitures, even after the assets of the two parties have been co-mingled, or where the assets from one of the two parties have deteriorated or disappeared?

Post-close review also raises significant practical issues for antitrust agencies and markets alike. Are extended post-close investigations ultimately beneficial to the market? Or do they create instability for businesses? Post-close remedies are notoriously difficult to fashion, because it is problematic to unwind technology once it is combined to develop new best-of-breed products, and it is even more difficult to provide a viable package of assets and intellectual property to a third party to restore pre-merger competition. This is especially true in high-tech industries, where assets of merging companies must be co-mingled immediately upon close to realize merger efficiencies and drive innovation in fast-paced markets.

This article provides an overview of the development of modern merger antitrust law, discusses the origins of pre- and post-close review of potentially anticompetitive mergers, and examines the series of issues that arise when conducting post-close review, including the appropriate time in which to analyze the potential anticompetitive effects of mergers (at time-of-suit or at time-of merger), the relevance of post-acquisition evidence, and the scope of relief allowed under the antitrust laws to remedy a consummated, but anticompetitive, transaction.

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RETHINKING THE WAR POWERS RESOLUTION: A STRENGTHENED CHECK ON UNFETTERED PRESIDENTIAL DECISION MAKING ABROAD

The War Powers Resolution establishes a structure intended to guarantee Congress, in the absence of a declaration of war, an active role in decisions concerning the deployment of United States Armed Forces. The Resolution’s existence has been burdened with controversy and deliberation concerning the statute’s
constitutionality and effectiveness. This comment explores the Resolution's history and its influence on past presidential actions, and it also weighs the opposing arguments surrounding the Resolution's constitutionality. This comment proposes that the Resolution must be modified due to the statute's ineffectiveness and the legislature's overall inability to manage the problems that result from the statute's weaknesses. It further asserts that the Resolution should be strengthened by a congressional amendment, stronger congressional action, or more specific judicial interpretations of the statute as it currently stands. Alterations must take place if Congress wishes to reassert its constitutionally defined role in determining when the United States should become involved in military actions and to ensure internationally responsible decision-making in the future. These proposed changes to the Resolution would help reinforce the United States' position as a world leader, while at the same time respecting the global trend of multilateral foreign policy.

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A PROPOSED AMENDMENT TO THE CALIFORNIA PUBLIC RECORDS ACT: BALANCING PRIVACY AND PUBLIC ACCESS

Are public officials' salaries subject to disclosure pursuant to the California Public Record Act ("CPRA"), which governs access to government records? While the CPRA favors broad disclosure of government records, it also recognizes the right of privacy that is reflected in the CPRA's express limitations on disclosure. This comment poses several questions. Is the disclosure of city officials' salaries by individual name an invasion of privacy that trumps the CPRA? Further, does the publication of individuals' salaries help the public ensure government accountability and shed light on the government's performance of its duties? Finally, do public officials' salaries actually constitute public records that must be disclosed under the CPRA? In conclusion, this comment proposes two amendments to the California Public Records Act that would provide that 1) the individual salary, bonuses, and total compensation of each identifiable public official shall not constitute a public record, and 2) the salary, bonuses, and total compensation corresponding to each governmental position within a state or local agency shall constitute a public record. The amendments would promote public awareness of governmental performance, while also protecting privacy rights.

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AN END RUN AROUND ANTITRUST LAW: THE SECOND CIRCUIT'S BLANKET APPLICATION OF THE NON-STATUTORY LABOR EXEMPTION IN CLARETT v. NFL

In 2003, the National Collegiate Athletic Association ("NCAA") disqualified Maurice Clarett from further participation in collegiate football. Clarett then sought entry to the National Football League ("NFL") via its entry draft, but was denied access because of a league rule that limited eligibility for that draft to players who had been out of high school for a predetermined number of years. Clarett's appeal of that decision was ultimately decided by the Second Circuit, which upheld the NFL's rule based on its application of the non-statutory labor exemption. This comment considers the Second Circuit's approach to the application of that exemption as compared to the case
law of other circuits and the Supreme Court. Based on an analysis of the Second Circuit's approach in light of other courts' decisions in similar cases, this comment ultimately concludes that the Second Circuit's approach fails to give proper respect to the policies underlying the federal antitrust and labor laws at issue in Claret's case. Because the Claret decision is typical of the Second Circuit's approach in similar cases it has decided, unless its analysis is modified, there is a considerable risk that future plaintiffs in the Second Circuit will face a similarly inequitable fate.

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