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# Hot Topics in Antitrust Enforcement: The Questions You Want Answered

Presented by

**Jon Leibowitz and Christopher B. Hockett**

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**Davis Polk**

Davis Polk & Wardwell LLP

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# Presenters



## **Jon Leibowitz – Davis Polk Partner**

Mr. Leibowitz is a partner in Davis Polk's Washington DC office. His practice focuses on the complex antitrust aspects of mergers and acquisitions, as well as government and private antitrust investigations and litigation. He also provides counsel in the developing area of privacy law.

Mr. Leibowitz was Chairman of the Federal Trade Commission from 2009 through 2013, and was noted for his bipartisan effectiveness. He served as a Commissioner from 2004 to 2009. While at the FTC, his priorities included health care and high-tech competition.



## **Christopher B. Hockett – Davis Polk Partner**

Mr. Hockett is a member of Davis Polk's Litigation Department, practicing in the Menlo Park office. He represents clients in a broad range of complex commercial litigation matters, including antitrust and unfair competition disputes, IP litigation, securities litigation, professional malpractice matters, contract cases and consumer class actions. He has also counseled and represented clients in connection with government investigations and the antitrust aspects of mergers and acquisitions. His clients have included many well-known technology and telecommunications companies, as well as a variety of leading firms in other industries, including financial and legal services, sports, e-commerce, media, manufacturing and health care.

Mr. Hockett is the global head of Davis Polk's antitrust practice. He is currently Chair of the 8,000-member ABA Section of Antitrust Law.

# Agenda

- **Antitrust and Competition Agencies**
- **Recent merger challenges**
- **Antitrust enforcement and technology industries**
- **Standard-essential patents**
- **“Patent assertion entities”**
- **Antitrust enforcement in China**
- **FTC’s likely priorities for privacy and data protection**

# Antitrust and Competition Agencies

- 2 U.S. antitrust enforcement agencies:

- **Federal Trade Commission**

- Jurisdiction: competition and consumer protection, including privacy
- Bipartisan commission of 5 commissioners

- **Antitrust Division, U.S. Department of Justice**

- Jurisdiction: civil and criminal antitrust
- AAG appointed by administration

**SUPREME COURT OF THE UNITED STATES**

Syllabus

FEDERAL TRADE COMMISSION v. ACTAVIS, INC.,

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA et al.,

*Plaintiffs,*

v.

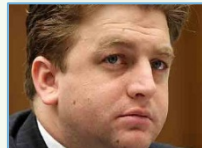
AT&T INC. et al.,

*Defendants.*

Civil Action No. 11-01560 (ESH)



Chairwoman Edith Ramirez, FTC



Clockwise from top left: Brill (D.),  
Ohlhausen (R.), McSweeney (D.,  
nom'd), Wright (R.)



AAG William J. Baer, DOJ

# Recent Merger Challenges

## ■ Department of Justice

- *AT&T/T-Mobile* (2011) (abandoned)
- *AB-InBev/Grupo Modelo* (2013) (divestitures)
- *Bazaarvoice/PowerReviews* (2013) (post-merger challenge awaiting a decision)
- *American Airlines/U.S. Airways* (2013) (being challenged in court)

## ■ FTC

- *Nielsen/Arbitron* (2013) (divestitures)
- *Ardagh-St. Gobain* (2013) (being challenged in court)
- *St. Luke's Health System/Saltzer Medical Group* (2013) (being challenged in court)

# Recent Merger Challenges (CONT.)

- **How to interpret recent government successes? How to account for heightened antitrust risk?**
  - Deal protections
  
- **Challenges to transactions beyond HSR filings:**
  - Consummated mergers
  - Unreported mergers
  
- **What factors make a merger challenge more or less likely?**
  - Power buyers
  - Customer input
  - Efficiencies
  - Timing of remedy negotiations

# Antitrust Enforcement in Technology Industries

- **In fast-changing technology markets, firms and platforms that seem dominant today may get upended tomorrow.**
  - How does this change the antitrust assessment?
  - Should the antitrust authorities exercise restraint in such markets? Do they?

# Standard-Essential Patents

- **Standard-setting organizations (“SSOs”) and standard-essential patents (“SEPs”) are vital for any industry requiring interoperability.**
  - **Policy concern:** balance “hold up” with “hold out”
    - **Hold up:** a demand for higher royalties or more costly licensing terms after the standard is implemented than could have been obtained before the standard was chosen
    - **Hold out:** if firms are free to refuse to pay for their use of SEPs without risk of injunction or significant damages, SEPs will be undervalued
- **What is the role of antitrust enforcement when it comes to SSOs and SEPs?**
- **When are injunctions appropriate for FRAND-encumbered standard-essential patents?**
  - **FTC’s complaint against Google/Motorola Mobility for violating FTC Act**



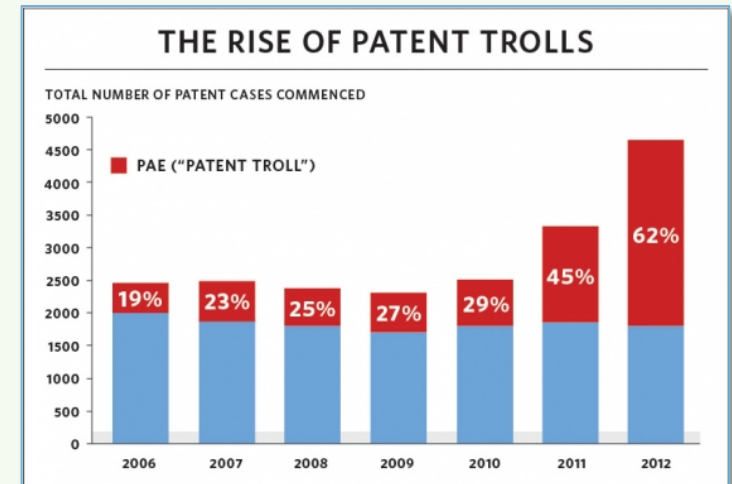
# Standard-Essential Patents (CONT.)

## ■ Recent Developments

- The Obama Administration's August 2013 veto of an International Trade Commission ruling against Apple in a patent infringement case brought by Samsung that would have banned the import of some older models of the iPhone and iPad
- Judge Robart's April 2013 determination of Motorola's FRAND licensing terms for a SEP portfolio license with Microsoft and Judge Holderman's adoption of the *Microsoft* royalty base approach in *In re Innovatio IP Ventures, LLC Patent Litigation* in September 2013

# “Patent Assertion Entities”

- Proliferation of “Patent Assertion Entities,” a.k.a. Patent Trolls
- Growing bipartisan “churn” in Washington over PAEs:
  - In the White House
    - Report on PAEs
  - In Congress – on both sides of the aisle
    - Senate: Leahy bill
    - House: Goodlatte bill
  - At the FTC and DOJ
    - FTC’s Section 6(b) report – *comments due Dec. 2*
  - *But see GAO report*
  - Role for State AGs?



Exec. Office of the President, “Patent Assertion and U.S. Innovation” (June 2013)

# Antitrust Enforcement in China

## ■ China's antitrust regime:

- It is **young** and features three separate Chinese agencies
  - Anti-Monopoly Law implemented in 2008
  - MOFCOM (mergers); NDRC (pricing allegations); SAIC (non-pricing allegations)
- Its timing can be **slower** than other jurisdictions
  - 3-phase review rather than U.S./E.U.'s 2-phase system
- We now have some coordination with China
  - China and U.S. have signed cooperation agreements
  - U.S. and China antitrust agencies to share comments on policy and investigations (but not documents or confidential information)



## ■ A number of important strategic questions:

- State of development of Chinese system?
- What should companies expect?
  - Importance of state-owned enterprises (“SOEs”)?



*FTC Chairman Jon Leibowitz, MOFCOM Vice Minister (now Minister) Gao Hucheng, Acting AAG Sharis Pozen (2011)*

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# FTC's Likely Priorities for Privacy and Data Security

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**As Justice Brandeis once wrote, the right to privacy is “the most comprehensive of rights and the right most valued by civilized men.”**

***Olmstead v. United States (1928)***

# FTC's Likely Priorities for Privacy and Data Security (CONT.)

- **What can we expect from the FTC?**
  - **Privacy and data protection are a significant policy priority for at least three Commissioners**
    - Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen
  - **Section 5 of the FTC Act prohibits “unfair and deceptive acts and practices”**
    - > 100 spam and spyware cases
    - > 100 Do Not Call cases
    - > 40 data security actions under this law
  - **Cases brought under Section 5 often focus on:**
    - Data breaches
    - Meaningful consent
    - Spam and spyware

# FTC's Likely Priorities for Privacy and Data Security (CONT.)

## ■ What can we expect from the FTC? (cont.)

### ■ Do-Not-Track

- The Do-Not-Track Online Act of 2013 (a bill to allow consumers to opt out of third-party tracking online)
- The industry has agreed not to send ads back but is unwilling to restrict collection

### ■ FTC's 6(b) data broker study

- In December 2012, the FTC issued orders requiring nine data brokerage companies to provide the agency with a Special Report providing information about how they collect and use data about consumers
- The FTC will use the information collected to study privacy practices in the data broker industry

# Questions