



February 2009

At the beginning of January, we celebrated the one-year anniversary of the creation of Compass Lexecon, which was formed by the merger of COMPASS and Lexecon. We are thrilled about our success over the past year; we have been fortunate to have been retained on many of the most prominent, challenging, and complex cases. In our June 2008 newsletter, we described many of these cases. Here, we highlight cases from the second half of 2008, which was just as eventful as the first half of the year.

For example, we worked on the historic *American Express v. Visa/MasterCard* settlement, the largest antitrust settlement in US history; the Delta-Northwest merger, the largest airline merger in US history; and the Chicago Mercantile Exchange acquisition of the New York Mercantile Exchange. We are also immersed in subprime, securities fraud, valuation, and options backdating litigation. And, we have recently been retained in litigation growing out of the Madoff scandal, and by major financial clients such as Bank of America, Barclays, Bear Stearns, Citigroup, Credit Suisse Group, Goldman Sachs, JPMorgan Chase, Merrill Lynch, Morgan Stanley and many others. Our energy, intellectual property, discrimination, and general litigation practices have been similarly active.

The major highlights of our economic consulting practice since our last newsletter in June 2008 are described below:

### **Hydrogen Peroxide Antitrust Litigation**

On December 30, 2008, The United States Court of Appeals for the Third Circuit ruled unanimously in favor of our clients, several producers of hydrogen peroxide, with regard to class certification in the Hydrogen Peroxide Antitrust Litigation. In what has been described as one of the most important class certification decisions in recent years, the Court, relying heavily on the testimony of Compass Lexecon expert Janusz Ordover, ruled that district courts must find that

each Rule 23 requirement is met by a preponderance of the evidence, resolve all factual and legal disputes relevant to class certification even if they overlap with the merits of the case, and consider all expert testimony, opposing as well as supporting class certification, when deciding to certify a class. We worked with several legal teams including Adam Paris at Sullivan & Cromwell LLP, Christine Levin at Dechert LLP, Steven Bizar at Buchanan, Ingersoll & Rooney PC, Jeffrey Cashdan at King & Spalding LLP, and Joanna Cline at Pepper Hamilton LLP.

### **American Express v. Visa/MasterCard**

Compass Lexecon was retained by David Boies, Don Flexner, Bob Silver, Damien Marshall, and others at Boies, Schiller & Flexner LLP on behalf of their client American Express, to conduct analyses and provide testimony regarding liability and damages in American Express' suit against Visa, MasterCard, and their member banks. The complaint alleged that the defendants agreed to operate under anticompetitive rules that effectively prohibited member banks from issuing credit cards over the American Express network. Bobby Willig and Northwestern University Professor Mort Kamien, a Compass Lexecon affiliate, testified in the case. We also provided support for other experts retained by American Express. Hal Sider, Lisa Landes, Mark Israel, Allan Shampine, Tom Stemwedel and Lynette Neumann from our Chicago office, and Susan Manning and Jay Ezrielev of our Washington, DC office and many others worked actively on the case. American Express settled with the defendants before trial for more than \$4 billion – the largest antitrust settlement in US history.

### **World Trade Center Litigation**

In April 2001, corporations formed by Larry Silverstein and the Port Authority of New York and New Jersey entered 99-year leases for Towers One, Two, Four and Five of the World Trade Center. The consideration paid by Silverstein to the Port Authority in a competitive auction was valued at \$2.805 billion. Pursuant to the destruction of these buildings on September 11, 2001, Silverstein's company, World Trade Center Properties LLC, and several holding companies filed suit against American Airlines Inc., United Air Lines Inc., Boeing and other defendants seeking over \$16 billion in damages. Counsel for the aviation defendants filed a motion for summary judgment, arguing that Silverstein's damage claim was implausible and the correct benchmark for damages was the market value of the four towers as of September 11, 2001. Judge Alvin K. Hellerstein concurred and held that the "market value as of September 11, 2001 is the limit of permissible recovery." Rajiv Gokhale, supported by a team in our Chicago office, filed an affidavit in support of the motion. Judge Hellerstein found Mr. Gokhale "qualified to be an expert, and that his opinion provides useful information within his expertise." We worked with Brian Fraser and Neil Binder of Richards Kibbe & Orbe LLP, Roger Podesta and Maura Monaghan of Debevoise & Plimpton LLP, and Robert Atkins of Paul, Weiss, Rifkind, Wharton & Garrison LLP, among others.

### **BP v. Northern Trust**

On December 16, 2008, Judge William J. Hibbler ruled in favor of our client, the Northern Trust Corporation, by denying a preliminary injunction sought by BP p.l.c. Northern

Trust serves as investment manager for various BP pension plans and engaged in securities lending pursuant to its management agreements. After the securities lending program suffered losses, BP sought to withdraw its investments, and it objected to Northern Trust's requirement that BP accept as part of its withdrawal a pro-rated slice of the assets in the securities lending collateral pool. BP sought a preliminary injunction requiring Northern Trust to distribute the BP plans' assets in cash or liquid securities only. Vince Warther, supported by a team in our Chicago office, testified that, among other things, BP's alleged damages could be measured in monetary terms. In its decision, the Court agreed and denied the request for a preliminary injunction, concluding that "the BP plans' injuries are purely monetary and easily measured." We worked with Caryn Jacobs, John Tharp, and Zachary Ziliak of Mayer Brown LLP on the case.

### **Stand Energy Corp., et al. v. Columbia Gas Transmission Corp., et al.**

Joe Kalt, supported by Eric Henson and a team in Cambridge, MA, was retained by attorneys for defendants Columbia Gas Transmission Corp., Dynegy Inc., Virginia Electric and Power Company, and El Paso Merchant Energy LP. Plaintiffs alleged that they and other proposed class members were harmed because Columbia Gas Transmission provided its own marketing affiliate and other defendants with preferential access to pipeline services. Dr. Kalt testified that plaintiffs' claims were not susceptible to class-wide treatment and that injury to proposed class members could not be established without individualized inquiry. Judge Robert C. Chambers agreed, concluding that "To decide liability, individual inquiries would dominate the case," and denied class certification. Compass Lexecon worked with several members of the defendants' legal teams including Hamilton Loeb of Paul, Hastings, Janofsky & Walker LLP, Richard "Ky" Owen of Goodwin & Goodwin, LLP, Roxane Polidora of Pillsbury Winthrop Shaw Pittman LLP, Howard Feller of McGuireWoods LLP, and Murray Fogler of Beck Redden & Secrest, LLP.

### **In Re Loral Space & Communications Consolidated Litigation**

In this case, plaintiffs alleged that Loral's October 2006 issuance of convertible preferred stock for \$300 million to its largest shareholder, MHR Fund Management LLC, was unfair. David Ross, supported by a team in our Chicago office, testified at trial on behalf of the class action plaintiffs. Vice Chancellor Leo Strine issued a memorandum opinion in favor of plaintiffs, cited Ross's testimony favorably in his opinion, and ordered as a remedy that MHR exchange the convertible preferred shares (which would have been convertible into at least 14.8 million shares) for 9.5 million shares of Loral non-voting common stock. Our client was successfully represented by Travis Laster of Abrams & Laster LLP.

### **Consortium Information Services v. Equifax Inc.**

Duncan Cameron, supported by a Compass Lexecon team in Los Angeles (Lisa Marovich, Marc Huntley and Chris Fasel), testified on behalf of Equifax in a case involving allegations of conspiracy to create and maintain a monopoly of credit report resellers. The plaintiff, Consortium, alleged that it had been terminated as a reseller of Equifax credit reports as

a result of a conspiracy among Equifax and certain other resellers, for the purpose of maintaining prices for credit reports. After a two week trial, the jury deliberated for less than an hour and unanimously found in favor of Equifax on all counts. Equifax was represented by Bill Molinski and Frank Rorie of Orrick, Herrington & Sutcliffe LLP.

### **Allied Orthopedic Appliances, Inc., et al. v. Tyco Healthcare Group L.P.**

In this class action, Janusz Ordoover, supported by Jith Jayaratne and a Compass Lexecon team in San Francisco, provided economic analyses for Tyco Healthcare and concluded that the impact on members of a proposed class of direct purchasers of pulse oximetry products in the United States could not be assessed using evidence common to the class. In our last newsletter, we reported that Judge Mariana Pfaelzer agreed and denied the motion to certify the putative class. Since our last writing, Tyco Healthcare filed a motion for summary judgment on plaintiffs' Sherman Act Section 1 and 2 claims. In support of this motion, two Compass Lexecon teams provided economic analyses. Janusz Ordoover, supported by Jith Jayaratne and a Compass Lexecon team in San Francisco, concluded that plaintiffs had failed to establish that they were injured by the challenged conduct. Joe Kalt, supported by Steve Peterson and a team in Cambridge, also provided economic analyses for Tyco Healthcare to conclude that Tyco Healthcare does not possess monopoly power in the relevant market. In July 2008, Judge Pfaelzer citing changes in competitive conditions in the marketplace, granted Tyco's motion for summary judgment and rejected plaintiffs' antitrust claims. Compass Lexecon was retained by Christopher Dusseault of Gibson, Dunn & Crutcher LLP, who successfully represented Tyco Healthcare.

### **California DRAM Indirect Purchasers Litigation**

In this motion for class certification, Meg Guerin-Calvert, supported by Paul Godek, Loren Poulsen, and a Compass Lexecon team in Washington, DC, provided economic analysis on behalf of manufacturers of DRAM modules. Ms. Guerin-Calvert concluded that impact and damages allegedly suffered by members of a proposed class of state governments and agencies could not be assessed on a class-wide basis. In its opinion, the Court cited Ms. Guerin-Calvert's expert report in its critical holdings and ultimately agreed with her conclusion that class certification was not appropriate. Defendants were represented by G. Charles Nierlich of Gibson, Dunn & Crutcher LLP, Ken O'Rourke and Steve Bergman of O'Melveny & Myers LLP, David Brownstein of Heller Ehrman LLP, Jonathan Swartz of Thelen LLP, Joshua Stambaugh of Kaye Scholer LLP, and Harrison Frahn of Simpson, Thacher & Bartlett LLP.

### **Boston Scientific ERISA Litigation**

In this class action case, plaintiffs alleged Boston Scientific breached its fiduciary duty to its 401(k) Retirement Savings Plan by selecting company stock as an investment despite knowledge the price was artificially inflated. David Ross, supported by a team in Chicago, submitted an affidavit on behalf of the defendants who opposed class certification. Judge Joseph Tauro ruled in favor of the defendants, denied class certification, and dismissed the Boston Scientific ERISA litigation because the plaintiffs sold substantially more shares than they

purchased during the class period and benefited from the alleged artificial inflation of the Company's stock price. Our client was successfully represented by Stuart Baskin, John Gueli, and Kirsten Cunha of Shearman & Sterling LLP.

### **Siegel v. Shell Oil Company, et al.**

On September 23, 2008, The United States District Court for the Northern District of Illinois Eastern Division ruled in favor of our client, Exxon Mobil, and other petroleum refiners in denying certification of a proposed class of retail gasoline purchasers in the United States. The allegations involved market dominance and deceptive practices on the part of major integrated oil refiners. Janusz Ordover and a Compass Lexecon team in Washington, DC worked with David Yohai of Weil, Gotshal & Manges LLP.

### **Prusky v. ReliaStar Life Insurance Company**

On July 10, 2008, the United States Court of Appeal for the Third Circuit issued an opinion affirming judgments favorable to our client, ReliaStar Life Insurance Company, in its lengthy litigation with the Pruskys, well-know mutual fund market timers. The Third Circuit favorably cited Compass Lexecon expert Vince Warther's trial testimony at length regarding how the Pruskys' could have mitigated their claimed damages from ReliaStar's refusal to allow them to continue their market timing activities. We worked with Joe Moodhe and Lorna Schofield of Debevoise & Plimpton LLP on the case.

### **Fleischman, et al. v. Albany Medical Center, et al.**

In this price-fixing class action, a plaintiff class of registered nurses in the Albany, NY area alleged that defendant hospitals in Albany conspired to fix nursing wages. Bobby Willig, supported by Meg Guerin-Calvert, Susan Manning, and a Compass Lexecon team in Washington, DC, testified on behalf of the defendants on common impact and injury. Judge Thomas J. McAvoy ruled that plaintiffs had met their burden with respect to a violation of antitrust law but not with respect to issues of injury and damage calculations. The Court placed significant weight on Dr. Willig's testimony particularly with regard to "injury-in-fact" and on his critique of plaintiffs' damages methodology. Therefore, the court refused to certify a class on the issues of injury, causation and damages. Defendants were represented by **Tom Demitrack**, Phillip Proger, Toby Singer, and Michael Shumaker of Jones Day; David Marx, Jr. of McDermott Will & Emery; Nicholas D'Ambrosio, Jr., William Reynolds, and Matthew Boyd of Bond, Schoeneck & King, PLLC; Gordon Lang of Nixon Peabody LLP; and Brian Culnan of Iseman, Cunningham, Riester & Hyde, LLP.

### **Flagship Theaters of Palm Desert v. Century Theaters, Inc.**

The plaintiff in this case, Flagship Theaters, alleged collusion between Century Theaters and film distributors, Sony Pictures Releasing Corporation and Universal Film Exchanges LLP, in the distribution of first-run feature films in Palm Desert, CA. Dan Rubinfeld, supported by Duncan Cameron and a Compass Lexecon team in Los Angeles, testified on behalf of Century

that the practice of film “clearances” is consistent with the unilateral self-interests of exhibitors and distributors, that Century did not have market power in a properly defined relevant market, that there was no basis for plaintiff’s allegations of “circuit power” exercised by Century to coerce Sony and Universal to distribute their films adverse to their unilateral self-interest, and that there was no antitrust injury in any properly defined antitrust market. Judge Linda Lefkowitz granted summary judgment for Century on all causes of action. Century was represented by Max Blecher and David Kesselman of Blecher & Collins.

### **Mechanical and Digital Phonorecord Delivery Rate Adjustment Proceeding**

Compass Lexecon affiliate William Landes testified on behalf of the National Music Publishers’ Association, the Songwriters Guild of America, and the Nashville Songwriters Association International (jointly, “Copyright Owners”) before the Copyright Royalty Board (CRB) in a hearing to set royalty rates for mechanical licenses, which are required to make copies of records using copyrighted songs, including for example, CDs and other physical records, digital downloads, and ringtones. With regard to ringtones, the CRB cited Landes’ testimony and the “Landes mastertone benchmark” in deciding on reasonable rates for this use of copyrighted songs. Landes was supported by a team in our Chicago office including Lisa Landes, Erica Benton, and Wendy Petropoulos. We were retained by Jay Cohen at Paul, Weiss, Rifkind, Wharton & Garrison LLP who represented the Copyright Owners.

Meg Guerin-Calvert also submitted testimony in this CRB proceeding on behalf of members of the Digital Media Association (DiMA), including Apple iTunes, RealNetworks, Inc., MediaNet Digital, and Yahoo! Inc. Her testimony examined the dynamics of the digital music marketplace and focused on the appropriate rate structure for the range of digital music use in permanent and limited downloads and interactive streaming, such as subscription services. The percentage of revenue method she advanced was the rate structure adopted in the settlement by the parties with regard to limited downloads and interactive streaming. She was supported in the Washington, DC office by Susan Manning and Susan Burkhauser in a retention by Fernando Laguarda and Thomas Connolly of Harris, Wiltshire, & Grannis LLP and Lee Knife of DiMA.

### **Shell Petroleum Inc., v. United States**

On July 3, 2008, Judge Ewing Werlein ruled in favor of our client, Shell Petroleum, Inc., on its tax refund claim against the United States in connection with a dispute concerning the economic substance of a corporate reorganization under Section 351 of the Tax Code. The Court’s detailed ruling relied in part on expert testimony provided by David Ross of our Chicago office concerning the value of exploratory offshore oil leases transferred in the reorganization. We worked with Steve Gardner and Scott Pashman at Cooley Godward Kronish LLP; Charles Hall and Tom Godbold at Fulbright & Jaworski LLP; and Ken Gobetz at Wichler & Gobetz, PC.

### **TriCor Cases**

Direct purchasers, indirect purchasers, and generic manufacturers sued Abbott Laboratories and Fournier in these cases alleging that the introduction of new formulations (and

subsequent delisting of the old formulations) of the cholesterol drug TriCor harmed competition by hindering generic manufacturers' ability to sell old versions of the products. Rich Gilbert and Meg Guerin-Calvert, supported by Jim Ratliff, Bret Dickey, and a Compass Lexecon team spanning the Oakland, San Francisco, Los Angeles, and Washington, DC offices, were retained to analyze the relevant economic issues. Dr. Gilbert and Ms. Guerin-Calvert testified at the liability trial of the direct purchaser and generic manufacturer cases; the cases settled during trial for a fraction of the total damages sought by plaintiffs. Abbott was represented by Bill Cavanaugh, Tom Pippert and others at Patterson Belknap Webb & Tyler LLP; Fournier was represented by Bill Baer, James L. Cooper, and others at Arnold & Porter LLP.

### **Facebook Founders Litigation**

Compass Lexecon was retained by Boris Feldman, Gideon Schor, and Jennifer Lee of Wilson Sonsini Goodrich & Rosati on behalf of their client, The Facebook, Inc. Plaintiff and Facebook co-founder Eduardo Saverin moved in California court for a declaratory judgment that he was fraudulently induced to sign an agreement specifying his share interest in Facebook and that the agreement was therefore void. He also moved for a declaration that he was entitled to a 30% interest in the company that was protected from future dilution. Daniel Fischel, Rajiv Gokhale and Rahul Sekhar of our Chicago office supported Facebook at mediation, including analyzing the capital structure and valuation of the company and developing a model for estimating share and monetary damages under varying scenarios. They also conducted a study of share grants to founders of comparable technology firms to determine the frequency with which Saverin's claim that he was entitled to a dilution-protected interest had occurred in the past for comparable companies. Mediation resulted in a successful settlement of the matter for a small fraction of the amount claimed.

### **In Re K-Dur Antitrust Litigation**

Indirect purchasers of Schering-Plough's potassium chloride drug, K-Dur, sued Schering-Plough Corporation, Upsher-Smith Laboratories, Inc., and Wyeth, alleging that patent settlement agreements between Schering-Plough and the generic manufacturers harmed consumers by delaying entry of generic versions of K-Dur. Dan Rubinfeld, supported by Bret Dickey, Mark Rodini, and Compass Lexecon teams in the Oakland, Los Angeles, and Washington, DC offices, was retained by Schering-Plough to analyze economic issues relevant to certification of the putative class of insurers and consumers. Dr. Rubinfeld demonstrated that, because K-Dur is much less expensive than the typical branded drug, the conventional wisdom that insurers save money with generic drugs was not correct in this situation and therefore class certification should be denied. The court, citing Dr. Rubinfeld's analysis, agreed, concluding that plaintiffs failed to demonstrate that injury could be established using common proof and denied plaintiffs' motion to certify the putative class. Schering-Plough is represented by John Niels, Alan Wiseman, Tom Isaacson, and others at Howrey LLP.

## **GE Funding Holdings, Inc.**

Federal Guaranty Insurance Co. (FGIC) entered into a master agreement with MBIA Insurance Corp. (MBIA) in which MBIA acquired approximately \$184 billion of FGIC's municipal bond insurance obligations. GE Funding Holdings, Inc. (GE), the owner of FGIC's senior preferred shares, challenged the transaction alleging that it would constitute the sale of assets that were vital to FGIC. Compass Lexecon was retained by counsel for GE, Greg Danilow of Weil, Gotshal & Manges LLP and Kevin Abrams of Abrams & Laster LLP to assist in analyzing the relative risks and value of the portfolio being transferred versus the portion being retained, and the effect of such transfer on FGIC's capitalization. Dr. Christopher Culp, supported by a team in our Chicago office, filed expert reports on GE's behalf. The matter settled favorably before the conclusion of the hearing in Delaware.

## **SEC Rule Change for NYSE Arca Data**

On December 2, 2008, the Securities and Exchange Commission approved a proposed rule change relating to the sale of "non-core" data by NYSE Arca. Janusz Ordovery and Gustavo Bamberger filed an economic assessment of a prior draft order on behalf of the NASDAQ Stock Market. The Commission cited the Ordovery/Bamberger analysis throughout its order to support its conclusions. We worked with Eugene Scalia at Gibson Dunn & Crutcher LLP and Jeff Davis and Frank Hatheway at NASDAQ.

## **Securities Settlement Distribution Funds**

Professor Francis McGovern of Duke University School of Law, in his role as an administrator of numerous securities settlement distribution funds, retained Jon Orszag, Arti Bhargava, and Yair Eilat to provide a wide range of analyses in determining equitable distribution methodologies of various large and complex settlements, including on behalf of AIG, Bear Stearns, HealthSouth, Smith Barney, and the Global Research Analyst Settlement involving Goldman Sachs, Citigroup, Morgan Stanley, JP Morgan, and others.

## **MERGERS**

### **Delta Air Lines Acquisition of Northwest Airlines**

Compass Lexecon was retained by both Delta Air Lines and Northwest Airlines in connection with their proposed merger to become the world's largest airline. Robert Willig, Dan Rubinfeld, Jon Orszag, Theresa Sullivan, Steve Peterson, and Bryan Keating, along with others in Chicago, Washington, DC, and Boston, worked with Tim Muris and Christine Wilson of O'Melveny & Myers LLP; Hew Pate and Bruce Hoffman of Hunton & Williams LLP; and Jim Weiss of K&L Gates to assist Delta and Northwest in the merger review process. David Painter and Paul Anderson, working with counsel for both parties, helped evaluate the magnitude and merger specificity of the cost savings likely to result from the deal. The DOJ cleared the merger, concluding that "the merger likely will result in efficiencies such as cost savings in airport



operations, information technology, supply chain economics, and fleet optimization that will benefit consumers.”

Dennis Carlton, supported by Mark Israel, David Fenichel, Eugene Orlov, Kirupa Ramaiah, Dan Stone, and Wendy Petropoulos, was retained by Don Flexner and Jim Denvir of Boies, Schiller & Flexner LLP and Henry Thumann of O’Melveny & Myers LLP to assist in the private litigation seeking to block the Delta-Northwest merger. Dr. Carlton showed that the report of the plaintiffs’ expert had presented a theory of harm wholly inconsistent with the economics literature, as well as the facts of the industry and the proposed merger. Dr. Carlton also showed, using state-of-the-art econometrics, that the Delta-Northwest merger would produce significant benefits for consumers.

### **Chicago Mercantile Exchange Acquisition of New York Mercantile Exchange**

Compass Lexecon was retained by both CME Group Inc. and NYMEX Holdings, Inc. in connection with CME’s \$8 billion acquisition of NYMEX. The deal combined the two largest US-based futures exchanges. In addition to providing antitrust consulting services to the merger, Compass Lexecon was also retained to provide litigation support to NYMEX in the subsequent shareholders’ litigation. Robert Willig, working with Hal Sider, Mark Israel and Tom Stemwedel in our Chicago office, was retained by Ben Crisman and John Lyons of Skadden, Arps, Slate, Meagher & Flom LLP to assist CME in the merger review process. Rick Flyer, supported by Erica Benton and a team in Chicago, was retained by John Scribner and Steve Newborn of Weil, Gotshal & Manges LLP on behalf of NYMEX to conduct pre-merger antitrust evaluations of potential buyers and to assist in the merger review process. Daniel Fischel, working with Vince Warther and a third team in Chicago, was retained by Greg Danilow of Weil, Gotshal & Manges LLP on behalf of NYMEX to analyze shareholder allegations that NYMEX should have negotiated a price “collar” to protect shareholders against a decline in CME’s stock price, and that the fairness opinions were stale. Compass Lexecon analyzed the economics of price collars, management’s incentives to negotiate a collar, and the updating of fairness opinions. The shareholder litigation ended when plaintiffs voluntarily dismissed their claims.

### **McCormick Acquisition of Lawry’s**

Janusz Ordover and Glenn Mitchell, supported by a Compass Lexecon team in Los Angeles and Washington, DC provided economic analysis for McCormick, the nation’s largest provider of spice and seasoning products, in their proposed acquisition of the Lawry’s brand from Unilever. Through written submissions and a presentation to the US Federal Trade Commission staff, Compass Lexecon provided economic analysis related to the determination of relevant product and geographic markets, as well as entry and expansion by competing producers, to show that potential competitive effects from the proposed acquisition would be limited. This helped McCormick reach a suitable agreement with the FTC to allow the deal to go forward. Compass Lexecon also provided substantial assistance to McCormick and Unilever providing the data and other information requested by the FTC in the course of their

investigation. McCormick was represented by Jan McDavid and Phil Larson at Hogan & Hartson LLP and Unilever was represented by Deborah Feinstein at Arnold & Porter LLP.

### **The Doctors Company Acquisition of SCIPE Holdings, Inc.**

Meg Guerin-Calvert and Jon Orszag were retained by The Doctors Company (TDC) and SCIPE Holdings Inc. (SCIPE) in TDC's proposed acquisition of SCIPE. TDC and SCIPE were two of the largest providers of medical malpractice insurance in California. With numerous references to the white paper submitted by Compass Lexecon on TDC's behalf, the California Attorney General's office concluded that the acquisition would not substantially lessen competition in insurance in California and agreed with Compass Lexecon's assessment that the relevant market must be expanded to include alternative risk vehicles as well as traditional insurance thus decreasing overall market share. SCIPE was represented by Marc Williamson and David Zaheer of Latham & Watkins LLP and The Doctors Company was represented by Philip Peters of Thelen Reid Brown Raysman & Steiner LLP and Hilary Rowen at Sedgwick, Detert, Moran & Arnold LLP.

### **HONORS, PRESENTATIONS AND PUBLICATIONS**

We are proud to announce that Peter Orszag, one of the five original Compass founders, was nominated to serve as Director of the Office of Management and Budget by President Barack Obama and, on January 20, 2008, Peter was confirmed by the US Senate to join the Obama Administration's Cabinet. Peter previously served as Director of the Congressional Budget Office after leaving Compass in January 2007.

For the fifth year in a row, Compass Lexecon was named as one of the best antitrust economics firms in the world by the *Global Competition Review*. Since our merger last year, we now boast 165 competition specialists in the annual *Economics 20* survey produced by *Global Competition Review* and 12 nominees in *The International Who's Who of Competition Lawyers and Economists*.

In September 2008, Compass Lexecon, together with Howrey LLP and Freshfields Bruckhaus Deringer LLP, co-sponsored the 2<sup>nd</sup> Annual Georgetown Law Global Antitrust Enforcement Symposium in Washington, DC. The event featured presentations from the leading competition enforcement officials from the United States, Europe, and Canada including Bill Kovacic, Chairman, Federal Trade Commission; Tom Barnett, Assistant Attorney General, Antitrust Division, Department of Justice; Philip Lowe, Director General, European Commission's Directorate General for Competition; John Fingleton, Chief Executive of the UK's Office of Fair Trade; Sheridan Scott, Commissioner of Competition, Canadian Competition Bureau; and Markus Wagemann, Head of the Enforcement Division, Federal Cartel Office, Germany. In addition, Compass Lexecon's Meg Guerin-Calvert and Dennis Carlton sat on panels discussing "Multinational Merger Developments" and "Innovation and the Regulation of Dominant Firms" respectively.

Dennis Carlton also spoke at two events in Chicago in September. Dr. Carlton delivered remarks on “Measuring the Welfare Effects of the FTC’s Competition and Consumer Protection Efforts” at the “FTC at 100: Into Our Second Century” roundtable, the fourth stop in nine roundtables the FTC held around the world this fall to mark a period of open self-assessment leading up to the agency’s 100<sup>th</sup> anniversary in 2014. Dr. Carlton also gave a presentation on “Appropriate Antitrust Policy Towards Single Firm Conduct” at the Antitrust Economics and Competition Policy Research Symposium co-sponsored by the Searle Center on Law, Regulation, and Economic Growth and the Center for the Study of Industrial Organization at Northwestern University.

In October 2008, Compass Lexecon announced that Ilya Segal of Stanford University and Michael Whinston of Northwestern University were the winners of the 2008 Compass Lexecon Prize for their paper, published in the *American Economic Review*, entitled “Antitrust in Innovative Industries.” The paper provides, for the first time, an analytical framework for studying the static and dynamic impacts of antitrust policy towards innovative industries in an integrated fashion.

Christopher Culp gave a talk in November entitled “The Financial Crisis and Its Aftermath,” before the Professional Risk Managers’ International Association in Chicago. Dr. Culp also gave a talk on “Catastrophic Risk and Risk Capital” to the Chicago Actuarial Association.

In December, Meg Guerin-Calvert traveled to Beijing China as part of a 5-member delegation from the Section of Antitrust Law of the American Bar Association to meet with senior officials of the Anti-Monopoly Bureau of the Ministry of Commerce (“MOFCOM”) of the People’s Republic of China including Director General Shang Ming, Director Yin Yanling, Deputy Director Li Zhiqiang, Deputy Director Ye Jun, and Deputy Director Dong Hongxia, economist. MOFCOM is one of three Chinese government agencies charged with enforcement of the recently enacted Antimonopoly Law (“AML”); and has been drafting guidelines with regard to merger enforcement standards as well as process and procedures. Ms. Guerin-Calvert was assisted in her presentation by Elizabeth Wang and Joanna Tsai who prepared Chinese translations. In January, MOFCOM released for comment initial draft guidelines detailing some of the principles by which merger enforcement will be conducted. Ms. Guerin-Calvert continues actively to participate in the Section of Antitrust Law in review of these drafts.

In January 2009, Dennis Carlton delivered the keynote address, “Competition Policy: Beware of Using it to Harm Competition,” at the Symposium on Competition Policy sponsored by the Japanese Fair Trade Commission in Tokyo, Japan.

Compass Lexecon professionals contributed seven chapters to *The Antitrust Revolution: Economics, Competition, and Policy*, Fifth Edition edited by John E. Kwoka, Jr. and Lawrence J. White. They are in order of publication: Rich Gilbert and Jim Ratliff, “Sky Wars: The Attempted Merger of EchoStar and DirecTV (2002);” Meg Guerin-Calvert, “Coordinated Effects Analysis: Cruise Lines Mergers (2002);” Bobby Willig (with John Bigelow), “Reverse Payments in Settlements of Patent Litigation: Schering-Plough, K-Dur, and the FTC (2005);” Michael Katz, “Exclusive Dealing and Antitrust Exclusion: *U.S. v. Dentsply* (2005);” Gustavo

Bamberger, “Revisiting Maximum Resale Price Maintenance: *State Oil v. Khan* (1997);” Dennis Carlton and Hal Sider, “Regulation, Antitrust, and *Trinko* (2004);” and Dan Rubinfeld, “Maintenance of Monopoly: *U.S. v. Microsoft* (2001).”

Since June, Dennis Carlton published several articles on antitrust topics including an analysis of bundled discounts titled “Assessing the Anticompetitive Effects of Multiproduct Pricing,” (with Patrick Greenlee and Michael Waldman), *Antitrust Bulletin*, (2008); two analyses of the proper antitrust policy toward unilateral conduct titled, “Appropriate Antitrust Policy Towards Single-Firm Conduct: Extraction vs. Extension,” (with Ken Heyer), *Antitrust Magazine*, (Summer 2008) and “Extraction vs. Extension: the Basis for Formulating Antitrust Policy Towards Single-Firm Conduct,” *Competition Policy International*, (Autumn 2008); and an analysis of how to measure the effectiveness of merger policy titled “The Need to Measure the Effect of Merger Policy and How to Do It,” *Antitrust Magazine*, (Summer 2008). He also published two papers in the ABA volume on economics and antitrust, *Issues in Competition Law and Antitrust* (2008), Wayne Collins editor. One article was on barriers to entry and the other, with Michael Waldman, was on tying.

Jon Orszag was a panelist at the Computer & Communications Industry Association’s Antitrust Summit on Innovation and Competition Policy in High-Tech Markets in Washington, DC.

Bret Dickey, Jon Orszag, and University of California at Berkeley Professor Laura Tyson wrote a paper titled, “An Economic Assessment of Patent Settlements in the Pharmaceutical Industry.” The paper, which was commissioned by the Pharmaceutical Research and Manufacturers of America, presents an analytical framework for evaluating the competitive effects of patent settlements, including those involving reverse payments, and demonstrates that these settlements can benefit consumers. The authors conclude that while continued scrutiny of such settlements is important, broad brush treatments are inappropriate and only a more individualized evaluation can correctly evaluate the competitive effects of a particular settlement agreement.

Yair Eilat, Bryan Keating, Jon Orszag, and Bobby Willig wrote a paper titled, “An Econometric Analysis of the Matching Between Football Student-Athletes and Colleges.” The study, funded in part by the NCAA, seeks to improve the understanding of how college football programs and student-athletes make their recruiting and acceptance decisions. The authors develop and employ an econometric framework that investigates both directions in the process by which student-athletes are matched with schools: (i) the considerations schools take into account when making scholarship offers to student-athlete candidates, and (ii) the factors that affect student-athletes’ choices of which scholarship offers to accept. The methodology, thus, allows the authors to predict the probability that a student-athlete candidate will sign with a school based on the candidate’s and the school’s characteristics, as well as the distance between the candidate’s hometown and the school.

If you would like to find out more details about our work or our experts, please feel free to email or call any of us.

**Compass Lexecon Executive Committee**

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