Antitrust Developments in the Petrochemical Industry: International Regulatory Highlights 2009-2013

By Grayson McDaniel

This article provides a brief overview of worldwide antitrust regulatory highlights over the last four years in the petrochemical industry. In recent years, chemical distributors have continuously restructured and reorganized as they seek to gain market share and maintain a competitive edge. Regulatory activity has been particularly active in North America and Europe, where distributor markets are both consolidated and mature. Authorities in those regions have, in a number of recent instances, ordered divestiture when a petrochemical deal causes a market to shrink to three or fewer competitors. The faster-growing and still fragmented markets of Asia and Latin America have seen fewer regulatory actions — with Asia seemingly particularly sparse.

This article summarizes key transactions in North America, the European Union, and South America, as well as notable fines and penalties. Sometimes even the largest deals close smoothly: in 2012, BASF acquired Becker Underwood in a $1.02 billion deal that required no reported regulatory concessions. Other times, regulatory demands cause the deal to dissolve, as when, in 2010, the European Commission referred Univar’s proposed acquisition of Quaron France to French regulatory authorities, which froze the deal until Quaron France’s eventual purchase by Kern AG.

Highlights in Regulatory Approval, by Region

North America
- In 2008, Australian chemical company Nufarm Limited (Nufarm) acquired a significant share in the United States market for two herbicides, MPCA and MCPP-P, when it purchased chemical company A.H. Marks. The purchase also gave Nufarm a large share of market power over a third herbicide, 2,4-DB, which, after Nufarm acquired A.H. Marks, was supplied by only two companies. In July 2010, after an investigation by the Federal Trade Commission (FTC), Nufarm was ordered to sell A.H. Marks’s MPCA rights to Albaugh Inc., a new competitor, and A.H. Marks’s MCPP-P rights to PBI Gordon Co.,


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another new competitor. Nufarm was also ordered to modify its agreements with Dow Chemical (Dow) and Aceto Corporation to allow both companies to compete in the U.S. markets for the MPCA and 2,4-DB herbicides.

- In March 2009, the FTC intervened in Dow’s plan to acquire Rohm and Haas (R&H), a rival chemical manufacturer. The FTC required Dow to divest itself of its acrylic acid and esters business in Texas, and Dow’s UCAR Emulsions Systems specialty latex business in North America. Dow announced that Arkema would purchase the relevant interests. However, one plant’s sale fell through. After the FTC approved Dow’s request for a one-year extension of the deadline and later appointed a monitor to keep it apprised of Dow’s progress, Dow petitioned the FTC in 2011 to modify its order, asking the FTC to either release Dow from its obligation to sell the plant or grant it a three-year extension. The FTC denied the petition, and subsequently, Dow submitted an application to sell the California plant to Hager Pacific Acquisitions. The FTC approved the sale in 2012.

- In 2011, the FTC required Houghton International (Houghton), a leading supplier of hot rolling oil, commonly used in aluminum processing, to divest itself of assets acquired when it purchased D.A. Stuart GmbH in 2008. The FTC found that the acquisition merged the two largest suppliers of hot rolling oil in North America, giving the resulting firm control of 75 percent of the market. To settle the FTC’s charges, Houghton agreed to sell the former D.A. Stuart GmbH business. Quaker Chemical Corporation announced that it had purchased D.A. Stuart’s aluminum hot rolling business on July 23, 2010.

- On August 16, 2010, Air Products and Chemicals, Inc. (Air Products), a supplier of industrial gas, announced its agreement with the FTC on the terms of a consent decree that would allow Air Products to proceed with its acquisition of Airgas, a competitor in the same market. The decree provided that Air Products would divest itself of certain Airgas production assets within four months after the deal. On August 25, 2010, Air Products filed notification with the FTC regarding the proposed hostile acquisition of Airgas. On October 29, 2010, the FTC issued its final order, and noted that Air Products might be required to seek prior approval of a buyer before it could close if the acquisition failed to go through by February 15, 2011. Meanwhile, the Airgas board of directors contemplated using its Rights Agreement, which contained a poison pill — the effect of which would be to dilute the bidder’s stock holdings while also driving up the purchase price of the company. Air Products sued to have the Rights Agreement set aside. On February 15, 2011, the Delaware Court of Chancery refused to set aside the Rights Agreement, denied all claims, and

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dismissed the action with prejudice, which forced Air Products to deal with the Airgas board of directors in order to purchase the company.\textsuperscript{11} In the wake of the ruling, Air Products withdrew its bid to purchase Airgas. In a final — for now — development, Airgas sued its legal counsel in the Delaware suit. Air Gas alleged that the law firm breached its fiduciary duty to former client Airgas when it represented Air Products in the Delaware suit. The lawsuit has since settled.\textsuperscript{12}

- On September 30, 2012, BASF announced that it planned to acquire seed- and crop-protectant company Becker Underwood for $1.02 billion, pending regulatory approval.\textsuperscript{13} BASF announced on November 28, 2012, that the acquisition had been completed, with no mention of regulatory requirements.\textsuperscript{14}

- On October 30, 2012, 3M received regulatory approval from German antitrust authorities for its $860 million acquisition of Ceradyne. U.S. regulators approved the deal on October 15, 2012, and 3M announced that the deal was complete on November 28, 2012.\textsuperscript{15}

- In October 2012, Ecolab Inc., a leading global provider of chemicals for water and wastewater treatment, entered a purchase agreement to buy Champion Technologies, Inc. (Champion).\textsuperscript{16} The deal, valued at $2.2 billion, would make Ecolab the largest oil-field chemical supplier in North America. On November 9, 2012, Ecolab filed a Form 8-K with the Securities & Exchange Commission (SEC), stating that it had received a “Second Request” from DOJ’s Antitrust Division.\textsuperscript{17} Ecolab stated that it was cooperating with DOJ and expected the deal to close by the end of 2012.

In December 2012, Ecolab announced that it amended its acquisition agreement with the parent company of Champion, Permian Mud Service, such that Champion’s downstream process and water solutions business would be spun off to Permian’s shareholders prior to the acquisition by Ecolab.\textsuperscript{18} On April 8, 2013, however, after extending the closing twice more, DOJ filed a complaint to enjoin the acquisition and, simultaneously, a proposed final order in the United States District Court for the District of Columbia.\textsuperscript{19} DOJ stated that the acquisition would combine two of the three leading providers of production chemical management services for deepwater wells in the U.S. Gulf of Mexico, leading to higher prices, decreased innovation, and reduced innovation.

DOJ and Ecolab announced that they had reached an agreement that Ecolab would divest Champion patented technology used in the Deepwater Gulf of Mexico, license certain other Champion deepwater chemistry to a third party for use in the Deepwater Gulf of Mexico, provide an option to purchase a Champion chemical blending facility, manufacture relevant products for the third party for a limited period, and enable the third party to recruit certain Champion employees needed to support the business.\textsuperscript{20} On April 10, 2013, Ecolab closed on the Champion acquisition.

- In January 2013, the FTC filed a proposed consent order requiring bleach producer Oltin Solutions, LLC (Oltin) to release JCI Jones Chemicals, Inc. (JCI) from

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\textsuperscript{11} Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).
\textsuperscript{13} Press Release, BASF, BASF to strengthen global crop protection business with acquisition of Becker Underwood (Sept. 20, 2012), http://www.basf.com/group/pressrelease/P-12-419.
\textsuperscript{14} Press Release, BASF, BASF Completes Acquisition of Becker Underwood (Nov. 28, 2012), http://www.basf.com/group/pressrelease/P-12-526.
\textsuperscript{20} Press Release, Department of Justice, Justice Department Requires Divestiture in Merger of Ecolab Inc. and Permian Mud Service Inc. (Apr. 8, 2013), http://www.justice.gov/opa/pr/2013/April/13-419.html.
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a non-compete agreement not to sell bleach in North Carolina and South Carolina.\(^2\) The non-compete agreement was part of a March 2010 transaction in which Oltrin paid JCI $5.5 million to agree not to sell bulk bleach in North Carolina or South Carolina for six years. The order required Oltrin not only to release JCI from the non-compete agreement, but to transfer bulk bleach contracts back to JCI and assist JCI to reenter the market. In addition, Oltrin and JCI must notify the FTC prior to entering into any agreements in the bulk bleach market. In March 2013, the FTC approved the final order.

**European Union**

- On February 10, 2010, Univar, a global chemical distributor, announced that it had signed an agreement to acquire the Quaron Group (Quaron), a Dutch industrial chemical distributor (also known as Eurochem). On May 28, 2010, Univar notified the European Commission (the Commission) that it had agreed to acquire Quaron. On July 19, 2010, the Commission approved Univar’s acquisition of Quaron in Belgium and the Netherlands after Quaron promised to limit its supply relationships with two companies — both controlled by Univar’s parent, CVC Capital Partners. The effect on the French market was more problematic. The acquisition would limit the number of similar chemical distributors from three to two, and the Commission believed the acquisition posed a substantial threat to competition in the market. Though Univar and Quaron offered remedies in an effort to win approval, the Commission referred that part of the acquisition to French regulatory authorities.\(^2\) The referral killed the aspect of the deal relating to Quaron’s French activities; in 2011, Kem AG agreed to purchase Quaron France from its parent company.\(^3\)

- In November 2010, BASF and Ineos Industries Holdings Limited (Ineos), a global chemical company centered in the United Kingdom, announced that they planned to found a joint venture, called Styrolution that would combine the companies’ business activities in styrene monomers, polystyrene, and other styrene-based copolymers.\(^2\) However, buyers of styrene products complained to the Commission that the joint venture would combine the two largest producers of the four existing, giving Styrolution control of 60 percent of the market. On May 18, 2011, the Commission extended its deadline to approve the venture after BASF and Ineos offered to sell a plant in order to gain regulatory approval. On June 1, 2011, the joint venture received approval from the Commission, on the condition that BASF divest itself of an acrylonitrile butadiene styrene (ABS) plant in Spain.\(^2\)

**South America/Brazil**

- On February 1, 2010, Braskem S.A. (Braskem), the eighth largest thermoplastic resin producer in the world, and the largest in North America, announced that it planned to acquire Sunoco Chemicals’ polypropylene business in the United States, in a transaction valued at $350 million.\(^2\) The deal would give Braskem control of 13 percent of the United States polypropylene market. On April 1, 2010, Braskem announced that the deal was final, after receiving approval from the FTC and the Antitrust Division of DOJ.

- On July 27, 2011, Braskem announced its acquisition of Dow’s polypropylene business, which included two plants in the U.S. and two in Germany.\(^2\) The acquisition was valued at $323 million, and made Braskem the largest polypropylene resin supplier in the United States, pending regulatory approval. On

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October 1, 2011, Braskem announced it had completed the acquisition, after receiving approval from the FTC, the Antitrust Division of DOJ, and the Commission.

**Notable Fines and Penalties**

- On April 13, 2011, the Commission fined Proctor & Gamble and Unilever for fixing prices of household laundry detergent in multiple countries across Europe between January 7, 2002, and March 8, 2005. Proctor & Gamble was fined $306.5 million, and Unilever was fined $150.9 million. The fines imposed on Proctor & Gamble and Unilever were discounted 10 percent, according to the Commission, because the companies cooperated with the investigation. A third company, Henkel, avoided fines by revealing the collusive activity to the Commission in 2008.
- On February 2, 2012, the European Union General Court upheld fines imposed on Dow and E.I. du Pont de Nemours (DuPont) in 2007, after a joint venture between the companies was determined to be a rubber cartel. The General Court rejected Dow's argument that it should not be held jointly and severally liable with DuPont for the activities of their joint venture. DuPont has appealed the decision, and the appeal is listed as "in progress" in the General Court's database.

The Supreme Court Holds, Again, That Parties Are Bound by Their Agreement Not to Bring Class Arbitrations

By Alden Atkins and Vincent van Panhuys

On June 20, 2013, the U.S. Supreme Court released the last of several decisions concerning class actions and arbitrations. The Court held that a party's agreement that all disputes would be arbitrated, and that those arbitrations could not be brought as class actions, would be enforceable. In doing so, the Court firmly rejected the Court of Appeals’ rationale that it would be too expensive for a plaintiff to assert its complex antitrust claims except as a class action. The Court’s decision is the latest in a consistent line of cases that enforce the parties’ agreements to arbitrate (including agreements about the scope of the arbitration) and arbitrators’ decisions. The Supreme Court is sending a strong message to the lower courts that parties may decide for themselves how to resolve their disputes and must live with the consequences.

In *American Express Co. v. Italian Colors Restaurant*, Slip Op. 12-133 (June 20, 2013), the Supreme Court reversed a decision of the Second Circuit which refused to enforce an agreement between American Express and merchants that expressly waived class arbitration. The plaintiffs alleged that American Express’ agreements with merchants violated the antitrust laws. American Express’ agreement with the plaintiffs, as with other merchants, expressly waived class arbitration. The plaintiffs submitted evidence to the trial court that it would cost up to a million dollars to present the economic evidence necessary to prosecute their claims. They argued that it was too costly to arbitrate these antitrust claims individually, and therefore the class waiver effectively denied them the ability to vindicate their rights. The district court and court of appeals agreed and held that plaintiffs could pursue their claims on behalf of a class in federal court.

In a 5-3 decision, the Supreme Court reversed. It decided that the arbitration provision between American Express and its merchants stating that there was “no right or authority of any claims to be arbitrated on a class action basis,” which precluded those merchants from bringing an antitrust class action suit against American Express, was valid and enforceable. (Slip Op. at 3-4) Justice Scalia wrote for the majority and was joined by Justices Kennedy, Thomas, and Alito. Justice Kagan filed a dissent and was joined by Justices Ginsburg and Breyer. Justice Sotomayor did not take part in this case.

The decision emphasized that under the Federal Arbitration Act (FAA) “courts must rigorously enforce arbitration agreements according to their terms.” (Slip Op. at 3). The Court described that this “FAA mandate” applied to claims alleging a violation of a Federal Statute and could only be overridden "by a contrary congressional command." (Slip Op. at 4). The Court explained that the class action waiver provision at issue here did not take away the right of

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30 Originally published June 21, 2013, as a V&E client e-communication.
the merchants to bring antitrust claims against American Express as merchants could still make those claims individually, and added that “the antitrust laws do not guarantee an affordable path to the vindication of every claim.” Moreover, the Court pointed out that Congressional approval of the class action provisions under the Federal Rules of Civil Procedure (Rule 23) did not “create an entitlement to class proceedings to vindicate these rights.” The Court further reasoned that allowing the antitrust class action to proceed despite the waiver and based on the cost to plaintiffs would be impractical because it would put courts in the “unwieldy” position of “proceeding case by case to tally the costs and burdens to particular plaintiffs in light of their means, the size of their claims, and the relative burden…” (Slip Op. at 5). The Court expressed concern that allowing lower courts to invalidate an arbitration provision based on the relative costs and benefits of bringing a claim would create a “preliminary litigation hurdle” that would “undoubtedly destroy the prospect of speedy resolution that arbitration…was meant to secure.” (Slip Op. at 9).

The dissent focused on language interpreting the FAA that called for the enforcement of arbitration clauses “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum.” (Dissent Slip Op. at 4). The dissent argued that the arbitration agreement prevented the plaintiffs from effectively vindicating their antitrust claims not only because the class action waiver provision, but also because the arbitration agreement: (1) disallows joinders or consolidation of claims or parties under arbitration; (2) prevented merchants from informally coordinating with each other on a common expert report (due to its confidentiality provisions); and (3) does not allow for any cost sharing with American Express on the necessary economic reports. The dissent described that these arbitration provision had put the merchants in an untenable position, “[s]pend way, way more money than your claim is worth, or relinquish your Sherman Act rights.” (Dissent Slip. Op. at 7-8.)

What This Means to You

The American Express decision underscores that arbitration agreements that prevent counterparties from bringing claims as a class action will be enforced. The Court had previously held that the FAA preempted state laws that found such agreement unconscionable. AT&T Mobility LLC v. Concepcion, 563 U.S. ___ (2011). In American Express, the Court rejected arguments that it would be unfair and too costly for plaintiffs to assert their claims if class waivers could be enforced. Companies that contract with large numbers of customers on the same terms, such as retailers, can use such waivers to protect themselves from the potentially enormous risks of class action litigation.

This decision is part of a strong and consistent message by the Supreme Court to lower courts not to interfere with arbitration agreements and arbitrators’ decisions. In Stolt Nielsen S.A. v. AnimalFeeds Int’l Corp., the Court said that parties cannot be required to engage in class arbitration unless they have consented. 559 U. S. 662 (2010). In AT&T Mobility and American Express, the Court held that Courts should enforce the parties’ agreements not to bring class arbitration claims. In Oxford Health Plans LLC v. Sutter, the Court said it would not second guess an arbitrator’s decision that an arbitration clause permits class arbitration (Slip Op. 12-135, June 10, 2013), and the same day the Court granted certiorari in BG Group v. Argentina, where the lower court vacated an arbitration tribunal decision about its jurisdiction. Together, these decisions show that the Court believes that parties control their own destinies for dispute resolution. They can craft by contract the arbitration procedures to resolve their disputes, and they must live with the resulting decisions by the arbitrators.

U.S. Supreme Court Holds That “Reverse Payment” Patent Settlements Are Not Immune From Antitrust Attack

On June 17, 2013, the U.S. Supreme Court decided whether a “reverse payment” patent settlement, where a patentee makes a payment to an alleged infringer, can unreasonably diminish competition in violation of the antitrust laws. Federal Trade Commission v. Actavis, Inc., No. 12-416, slip op. (U.S. June 17, 2013). Previously, the Eleventh Circuit affirmed the dismissal of the FTC’s antitrust complaint and held that such a settlement (which often occurs in the context of patent litigation between branded and generic pharmaceutical manufacturers) is generally “immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent.” FTC v. Watson Pharmaceuticals, Inc., 667 F.3d

1298, 1312 (11th Cir. 2012). The FTC sought certiorari, which was granted, to resolve a split in the circuit courts. Compare, e.g., id. with In Re: K-Dur Antitrust Litigation, 686 F.3d 197, 214-218 (3rd Cir. 2012) (holding that reverse payment settlements are presumptively unlawful).

The Supreme Court reversed the Eleventh Circuit and held that the FTC’s lawsuit should be allowed to proceed because “reverse payment settlements … can sometimes violate the antitrust laws.” Actavis at 2. While the Court recognized the value of settlements, five considerations led the Court to conclude that the FTC should have been given the opportunity to prove the antitrust claim. First, reverse payments have the potential to bring about genuine adverse anticompetitive consequences. Id. at 14-17. Second, such “anticompetitive consequences will at least sometimes prove unjustified.” Id. at 17-18. Third, “where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice.” Id. at 18.

Fourth, by examining the size of the payment, a court should be able to assess its likely anticompetitive objectives, along with its potential justifications, without litigating the validity of the patent. Id. at 18-19. Fifth, the fact that large, unjustified reverse payments may risk antitrust liability does not prevent parties from finding other ways to settle patent disputes without the use of reverse payments. Id. at 19.

The Court pointed out that the anticompetitive effects of reverse payment settlements may be particularly pronounced in the context of litigation between branded and generic pharmaceutical manufacturers under the Hatch-Waxman Act, such as in this case. Id. at 15-17.

The Court declined to adopt the FTC’s argument that reverse payment settlements are presumptively unlawful. Instead, the Court instructed courts to follow the “rule of reason,” where courts evaluate the potential anticompetitive effects on a case-by-case basis. Id. at 20. Importantly, the Court said that lower courts need not resolve disputes about the validity of the patent when applying the rule-of-reason analysis. Id. at 21. As the dissent noted, however, the Court provided relatively little guidance to lower courts tasked with drawing conclusions from the inherently fact-intensive rule-of-reason analysis.

What This Means For You

The Court’s opinion emphasized that the holding applies to the narrow category of patent settlements that involve a reverse payment from the patentee to the alleged infringer. More specifically, the Court stressed that it is the “unexplained large reverse payments” that “suggest the patentee has serious doubts about the patent’s survival” which represent the anticompetitive behavior that may be an antitrust violation. Id. at 18. In contrast, more moderate reverse payments, such as those that reflect avoided litigation costs or fair value for services, may survive the rule-of-reason analysis. Id. at 17. If litigants choose to include a reverse payment in a patent settlement, they should document the reasons for the reverse payment, such as avoided litigation costs or the fair value for other services to be provided, to show that the payment was not intended to reduce competition. As a practical matter, a party considering a reverse payment settlement should anticipate costly and lengthy antitrust litigation to defend claims by government enforcers and customers that the settlement violates the antitrust laws.

As for patent settlements that do not involve a reverse payment, the impact of this opinion is less clear. The holding applies only to reverse payment patent settlements, and the Court was plainly influenced by the appearance that a potential competitor was being paid not to compete. Settlements that do not involve reverse payments are more likely to survive antitrust scrutiny. For example, the opinion explained that other types of settlements are permissible, such as settlements in which the patentee allows the alleged infringer to enter the patentee’s market before expiration of the patent, so long as the alleged infringer is not paid to stay off the market. Id. at 19. The dissent warned, however, that this opinion may open the door for a broader range of patent settlements to be scrutinized for antitrust violations under the fact-intensive rule-of-reason analysis. As a result, settlements between patent owners and alleged infringers that affect competition between them are likely to receive greater antitrust scrutiny going forward, even without the presence of a reverse payment.

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## Antitrust Practice Contacts

<table>
<thead>
<tr>
<th>Name</th>
<th>Office</th>
<th>Email</th>
<th>Phone</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alden L. Atkins</td>
<td>Washington</td>
<td><a href="mailto:aatkins@velaw.com">aatkins@velaw.com</a></td>
<td>+1.202.639.6613</td>
</tr>
<tr>
<td>Frank C. Brame</td>
<td>Dallas</td>
<td><a href="mailto:fbrame@velaw.com">fbrame@velaw.com</a></td>
<td>+1.214.220.7818</td>
</tr>
<tr>
<td>David T. Harvin</td>
<td>Houston</td>
<td><a href="mailto:dharvin@velaw.com">dharvin@velaw.com</a></td>
<td>+1.713.758.2368</td>
</tr>
<tr>
<td>Neil W. Imus</td>
<td>Washington</td>
<td><a href="mailto:nimus@velaw.com">nimus@velaw.com</a></td>
<td>+1.202.639.6675</td>
</tr>
<tr>
<td>Matthew J. Jacobs</td>
<td>San Francisco</td>
<td><a href="mailto:mjacobs@velaw.com">mjacobs@velaw.com</a></td>
<td>+1.415.979.6990</td>
</tr>
<tr>
<td>Jeffrey S. Johnston</td>
<td>Houston</td>
<td><a href="mailto:jjohnston@velaw.com">jjohnston@velaw.com</a></td>
<td>+1.713.758.2198</td>
</tr>
<tr>
<td>Katherine C. Kim</td>
<td>New York</td>
<td><a href="mailto:kkim@velaw.com">kkim@velaw.com</a></td>
<td>+1.212.237.0148</td>
</tr>
<tr>
<td>William E. Lawler III</td>
<td>Washington</td>
<td><a href="mailto:wlawler@velaw.com">wlawler@velaw.com</a></td>
<td>+1.202.639.6676</td>
</tr>
<tr>
<td>Cathy A. Lewis</td>
<td>Washington</td>
<td><a href="mailto:clewis@velaw.com">clewis@velaw.com</a></td>
<td>+1.202.639.6537</td>
</tr>
<tr>
<td>Dionne C. Lomax</td>
<td>Washington</td>
<td><a href="mailto:dlomax@velaw.com">dlomax@velaw.com</a></td>
<td>+1.202.639.6610</td>
</tr>
<tr>
<td>Jason M. Powers</td>
<td>Houston</td>
<td><a href="mailto:jpowers@velaw.com">jpowers@velaw.com</a></td>
<td>+1.713.758.2522</td>
</tr>
<tr>
<td>Harry M. Reasoner</td>
<td>Houston</td>
<td><a href="mailto:hreasoner@velaw.com">hreasoner@velaw.com</a></td>
<td>+1.713.758.2358</td>
</tr>
<tr>
<td>James A. Reeder, Jr.</td>
<td>Houston</td>
<td><a href="mailto:jreeder@velaw.com">jreeder@velaw.com</a></td>
<td>+1.713.758.2202</td>
</tr>
<tr>
<td>Craig P. Seebald</td>
<td>Washington</td>
<td><a href="mailto:cseebald@velaw.com">cseebald@velaw.com</a></td>
<td>+1.202.639.6585</td>
</tr>
<tr>
<td>Kathleen B. Spangler</td>
<td>Houston</td>
<td><a href="mailto:kspangler@velaw.com">kspangler@velaw.com</a></td>
<td>+1.713.758.2853</td>
</tr>
<tr>
<td>William R. Vigdor</td>
<td>Washington</td>
<td><a href="mailto:wvigdor@velaw.com">wvigdor@velaw.com</a></td>
<td>+1.202.639.6737</td>
</tr>
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