

## Firm Report

Volume 1, Issue 1

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## BS&F EXPOSES CHINESE CARTEL

BS&F has filed two class actions based on evidence uncovered by the firm demonstrating cartel activity in China in the sale of vitamin C and magnesite, a mineral used in steel making and refractories. Last year, at the invitation of the United States Department of Justice, Bill Isaacson and Tanya Chutkan of the Washington D.C. office briefed members of the Antitrust Division on the evidence relating to vitamin C and cartel activity in China.

In February 2006, the firm filed a third class action charging members of a Chinese trade association (including U.S. and European companies) with cartel activity relating to high grade bauxite which is also used in steel making and refractories. From 2002 to 2004, Chinese imports of refractory grade bauxite grew from 25% of the U.S. market

to 75% of the U.S. market and during the same period prices doubled. The trade association in question, like other trade associations in China, requires its members to honor a self restraint agreement to limit competition.

On February 10, the *Wall Street Journal* put the firm's investigation on the front page and quoted many of the materials uncovered by the firm. This month, we gave a second briefing to the Antitrust Division on magnesite and bauxite and an update on China-related antitrust issues. In response to the *Wall Street Journal* article, the office of minority leader Senator Harry Reid and the office of Senator Hillary Clinton also requested and received briefings on the issues raised by the firm's investigation.

## Jonathan Schiller Awarded Columbia University's John Jay Award for Professional Achievement



On March 1, Jonathan Schiller, co-founder and managing partner of BS&F, was one of five graduates of Columbia College to receive the John Jay Award for Professional Achievement. Jonathan was a member of the 1967–68 Ivy League championship basketball team and was inducted into the Columbia Athletics Hall of Fame. A 1973 graduate of Columbia Law School, he was elected a Fellow of the American Bar Foundation “in recognition of professional attainment and distinguished service” and a member of the Milan Chamber of Commerce International Arbitration Club of Arbitrators.

Jonathan has represented the Columbia Law School faculty, on a *pro bono* basis, submitting an amicus curiae brief to the United States Supreme Court this term in the F.A.I.R. litigation. He also serves on the Law School Dean's Council. Jonathan has served for many years as a director of the Washington Tennis and Education Foundation, which provides tennis instruction and academic tutoring to at-risk children, and on the Leadership Advisory Board for the Junior Tennis Champions Center in Washington, D.C.

## Litigation Highlights

### BS&F Wins \$34.5 Million for Scrap Metal Sellers

On January 22, 2006, a team from BS&F tried an antitrust conspiracy class action on behalf of a plaintiff class of scrap metal sellers in Cleveland federal court. The jury ruled in plaintiffs' favor and returned a verdict of \$11.5 million – subsequently trebled to \$34.5 million – in favor of the class. (Plaintiffs had previously entered into settlement agreements totaling over \$10 million with other class members.) The BS&F team was led by Bill Isaacson, Tanya Chutkan, John Clifford and Jennifer Milici.

A high point in the trial occurred when the CEO of the defendant, in attempting to explain during cross examination why he had changed his testimony multiple times during trial, referred to an outline on which he based his new testimony and pointed to a copy of the outline at his

counsel's table; the defendant was then compelled during the cross examination to turn over a 14 page "script" (so described by the Judge) prepared for the CEO's testimony. The outline was folded down the middle; the CEO explained that he'd been carrying it around in his coat pocket all day for easy reference.

The trial involved allegations of bid rigging and customer allocation among scrap metal dealers in Northeastern Ohio from 1992 to 2000. Since filing in 2002, BS&F, led by Bill Isaacson and Richard Drubel, expended many thousands of hours investigating, developing, and litigating the case.

### BS&F Wins Dismissal of \$50 Million Breach of Contract Case

On behalf of our clients Fidelity National Financial, Inc., and two of its subsidiaries, BS&F recently obtained a dismissal on grounds of forum non-conveniens of a breach-of-contract action brought in California state court by its former Chinese sales agent. The lawsuit, which sought damages in excess of \$50 million from Fidelity, alleged

that Fidelity breached its teaming agreement with the agent related to the sale of sophisticated banking software to a large Chinese bank by failing to pay commissions and by allegedly bribing the president of the China.

### BS&F Wins \$8 Million for FLOORgraphics

Last Fall, BS&F partners Bill Isaacson and William Jackson, and DC Associate Dan Low, tried an arbitration on behalf of FLOORgraphics, Inc. against Safeway. FLOORgraphics had contracts to be the exclusive provider of floor advertising and shelf advertising and coupons in Safeway stores. FLOORgraphics used those rights to sell and place floor and shelf ads in Safeway stores on behalf of consumer packaged goods companies such as Proctor & Gamble and General Mills.

Safeway failed to comply with its obligations to exclude other advertisers from placing ads and coupons in Safeway stores. FLOORgraphics hired the firm to arbitrate its claims against Safeway, which was represented by Latham & Watkins, Morgan, Lewis, as well as a small California firm. Following a three week arbitration in October and November, the arbitrators ruled in favor of FLOORgraphics on its exclusivity claim and several other claims, and awarded approximately \$8 million in damages.

## **BS&F Wins Appeal In Auction Houses Antitrust Case**

In January 2006, the firm won an appeal before the United States Court of Appeals for the Second Circuit regarding the treatment of claimants in the Auction Houses Antitrust Litigation who had failed to file timely claim forms, an issue that had been extensively litigated below. In 2000, Sotheby's and Christie's auction houses agreed to pay \$512 million to settle claims they conspired to manipulate prices they were paid by sellers and buyers. That case was led by David Boies, Richard Drubel, and Phil Korologos. The resolution of this appeal is expected to clear the way for the final distribution of all settlement funds to class members. Eric Brenner argued the appeal.

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## **BS&F Wins Dismissal of Claims Against Waterford**

In early January 2006, the firm succeeded in dismissing 5 out of 6 claims brought against our client Waterford Development. The claims had been asserted by the former construction manager of the Adriaen's Landing development project (convention center, hotels, urban/waterfront development) in Hartford, CT. In an earlier suit not handled by BS&F, other plaintiffs had obtained a multi-million dollar jury verdict against our clients. The only remaining claim after the dismissals we obtained was for vexatious litigation. The parties have reached an agreement to settle that claim for \$75,000. Phil Korologos and Eric Brenner handled the matter.

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## **BS&F Obtains Favorable Settlement for Hillenbrand**

In January 2006, the firm obtained preliminary approval of a class action settlement for our client, Hillenbrand Industries, the defendant in an antitrust "bundling" case in Spartanburg, SC, on very favorable terms. The final approval hearing will be in June. A number of people worked on this case from different BS&F offices, including Hanover, New Hampshire, New York City, Albany, Washington DC, Las Vegas, and Miami. The settlement was mentioned in the *Big Suits* section of the February 2006 edition of *The American Lawyer*.

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## **BS&F Leads Class Action Against Purdue Pharmaceuticals**

BS&F is serving as co-lead counsel for the alleged direct purchaser class in the OxyContin antitrust multi-district litigation before Judge Stein in the Southern District of New York. This is a Walker Process and sham litigation monopolization case against Purdue Pharmaceuticals alleging that Purdue obtained critical patents for Oxycontin as a result of fraud on the Patent Office, which prevented other manufacturers from coming to market with competing generics. OxyContin, a controlled release pain reliever, is a widely prescribed medication with 2002 sales of \$1.5 billion.

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## **BS&F Files Antitrust Claims On Behalf of the State of Alaska**

Last December, BS&F filed a major federal antitrust suit in the U.S. District Court in Fairbanks, Alaska on behalf of the Alaska Gasline Port Authority. The case alleges that ExxonMobil and BP p.l.c., the world's largest oil companies, are conspiring to prevent the sale of natural gas from the North Slope of Alaska. The suit alleges that the two defendants, who together control most of the North Slope's vast gas resources, have colluded to prevented the construction of a natural gas pipeline to deliver gas from the North Slope. Experts estimate that if a pipeline is built it could supply approximately 10% of the total United States demand for natural gas for at least the next thirty years. The purpose and effect of the defendants' conduct has been to artificially restrict the supply of natural gas and inflate natural gas prices in lower Alaska and the lower 48 states. The construction of the natural gas pipeline is a critical issue for the economic well-being of the State and its citizens, as well as for consumers and businesses dependent on natural gas throughout the United States.

## The Firm Wins Two Victories For Goldman, Sachs

The firm recently achieved two victories on behalf of Goldman, Sachs & Co. In November, we successfully defended Goldman against New York Stock Exchange seat holders who sought to enjoin NYSE's multi-billion dollar merger with Archipelago Holdings. In February, the Michigan Court of Appeals affirmed dismissal of \$90 million in securities claims against Goldman brought by several Smith Barney mutual funds. Dismissal was with prejudice as to a negligent misrepresentation claim and on forum non conveniens as to fraud. The BS&F team was led by Jonathan Schiller, David Barrett, and Bob Cooper, along with Brian Baker and Kelly Yuan.

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## Connecticut Supreme Court Affirms Summary Judgment In Favor of BS&F Client

On January 31, 2006, the Supreme Court of Connecticut affirmed a summary judgment in favor of our client, Trading Cove Associates and Waterford Gaming. The case was brought by a former partner in a casino development and management business. The partnership arose from the development of the Mohegan Sun Casino in Connecticut. The case was dismissed because the former partner had failed to rescind a settlement agreement thereby foreclosing the plaintiff's chosen method of measuring damages and because the damages from alleged fraudulent inducement were considered too speculative. *Leisure Resort Technology, Inc., v. Trading Cove Associates*, 277 Conn. 21, 889 A.2d 785 (CT 2006). Phil Korologos argued in September and was assisted by Eric Brenner and Dave Feuerstein.

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## Oakland Office Seeks To Clarify Unsettled California Law

The Oakland office (John Cove, Kieran Ringgenberg, and Kevin Barry) recently submitted a petition for a writ of mandamus in the California Court of Appeals on an important and unsettled issue of California law: whether the alleged indirect purchaser victims of anticompetitive conduct can obtain restitution under California's Unfair Competition Law, Cal. Bus. & Prof. Code 17200. While the court rarely hears writs on the demurrer stage, this issue has divided trial courts in the state.

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## The Firm Continues Its Representation of Tyco International

In 2002, the firm completed two internal investigations for Tyco. During the course of the investigations, the Firm recovered approximately \$40 million in funds that had been looted from the Company.

The findings of the first investigation formed the basis for criminal indictments of Tyco's former executives. Throughout 2003 - 2004, BS&F cooperated with the Manhattan DA, who was successful in obtaining convictions of both Dennis Kozlowski and Mark Swartz, Tyco's former CEO and CFO, in June 2005 (on thirty of thirty-one indictments). Kozlowski and Swartz were both sentenced to between eight and twenty-five years and fined \$70 million and \$35 million, respectively. They were also ordered to pay restitution to Tyco of \$135.6 million.

Numerous ERISA and securities class actions were instituted against Tyco after the findings of the two investigations were published by the Company. Those actions were transferred by the Judicial Panel on Multi-District Litigation to a district court in New Hampshire, where BS&F, along with its co-counsel Cravath, Swaine & Moore, are presently defending the Company. The securities class actions were stayed until the motions to dismiss were resolved in late 2004. After the PSLRA stay on discovery was lifted, BSF produced over 70 million documents to the securities plaintiffs and has embarked on a deposition program which we expect to involve more than 100 depositions.

BS&F also instituted affirmative actions against Kozlowski, Swartz, Frank E. Walsh, a former director, and Mark A.

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Belnick, Tyco's former general counsel that were transferred by the Judicial Panel on Multi-District Litigation to a New Hampshire Court as tagalong cases to the securities cases discussed above. The Kozlowski and Swartz actions seek disgorgement of all income and benefits paid to them from the date of their first disloyal acts, under the faithless servant doctrine, which will amount to more than \$500 million. In both of these affirmative cases, we have successfully defended motions to dismiss that sought the enforcement of binding arbitration clauses. We have also prevailed on an interlocutory appeal challenging the district court's non-enforcement of the arbitration clause in Swartz's termination agreement. The action against Walsh seeks consequential damages for the market losses to Tyco's stock suffered after an unauthorized payment of \$20 million was made by Kozlowski to Walsh. That action and the affirmative actions against Kozlowski and Swartz are still pending in the district court. The action against Belnick sought recovery of Belnick's substantial outstanding loans. BSF has recently settled Tyco's affirmative action against Belnick in Tyco's favor, recovering \$17.8 million for the Company.

To date, BS&F's investigative efforts and ongoing representation has recouped more than \$190 million for Tyco.

## Pro Bono Highlights

### BS&F Pro Bono Support of the U.N. War Crimes Tribunals

Last month the firm sponsored the participation of Washington DC Associate Philippa Scarlett in an appellate advocacy training program for prosecutors from the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda. The training took place January 25-30, 2006 at the International Criminal Tribunal for Rwanda (ICTR). The program's faculty included Hon. Ann Claire Williams of the U.S. Court of Appeals for the Seventh Circuit; Hon. Patricia Wald, former Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and former Judge of the International Criminal Tribunal for the Former Yugoslavia (ICTY); Canadian appeals judges; senior prosecutors from Canada's Crown Law Office; and NITA's Director of Education. Philippa assisted in facilitating the training, including providing translation support for francophone prosecutors. The purpose of the appellate advocacy

### BS&F Wins \$10 Million Order of Attachment For Pro Bono Client

In *Lord v. Willig*, a *pro bono* matter pending in New York Supreme Court for Dutchess County, BS&F obtained a \$10 million Order of Attachment on behalf of the guardians of two minor sisters who were the victims of sexual abuse. The Order of Attachment, which secures the assets of one of the defendants who pleaded guilty to the abuse, will remain in place until the conclusion of the lawsuit that BS&F will file against him at the end of March. This preliminary victory was critical to preventing the defendant from dissipating his assets and frustrating any judgment that we obtain for our clients.

On February 9, 2006, we learned that the defendant was preparing to sell a significant portion of the land that represents his largest known asset. The next day, we filed an *ex parte* motion for an Order of Attachment to frustrate that sale. The court granted our *ex parte* motion on February 10, 2006, issuing a temporary Order of Attachment, and ordered the parties to appear for a hearing to confirm the temporary order. At a hearing on March 2, 2006, the court granted our motion to confirm its initial temporary order, keeping it in force indefinitely. The team has shifted its focus to prosecuting the underlying lawsuit, which will include causes of action for assault, battery, outrageous conduct causing emotional distress and fraudulent conveyance. Armonk associate Ian Dumain is responsible for this matter. Supporting Ian are Armonk associate Rick Bettan and Armonk partner Chris Green.

## Items of Interest

**Albany Office:** In January, Kirsten Gillibrand launched her campaign as the Democratic candidate in the election for New York's 20th Congressional District. Kirsten, a partner in BS&P's Albany office, has spent a substantial amount of her career in public service. During the Clinton Administration she served as Special Counsel to the Secretary of Housing and Urban Development (HUD), Andrew Cuomo. She played a key role in furthering HUD's Labor Initiative and its New Markets Initiative, working to strengthen Davis-Bacon Act enforcement and drafting new markets legislation for public and private investment in building infrastructure in lower income areas. To learn more about Kirsten's campaign you can visit her website at [www.gillibrand2006.com](http://www.gillibrand2006.com).

**Oakland Office:** Associate Steve Tidrick was re-elected as president of the Alameda County Democratic Lawyers Club last month. He also moderated the first televised debate among the candidates for mayor of Oakland.