

LePage's v. 3M:

Will the Third Circuit Make *Brooke Group* Stick in Assessing the Legality of a Monopolist's Bundled Discount Programs?

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The last year has been a very busy one for important monopolization cases. Prominent decisions such as the D.C. Circuit's *en banc* *Microsoft* opinion, and the lengthy district court *MasterCard/Visa* opinion, have explored the often challenging task of distinguishing the “willful acquisition or maintenance” of monopoly power, which is unlawful, from “competition on the merits,” which the antitrust laws encourage even when engaged in by a monopolist. The *en banc* Third Circuit will soon contribute its views in another important monopolization case that bears watching.

In its *en banc* review of *LePage's Inc. v. 3M*,¹ (*LePage's*), the Third Circuit will address when a monopolist is liable for the willful maintenance of monopoly power by offering retailers low prices on multiple product lines. The case grapples with how the antitrust laws should treat so-called “bundled discounts”—discount programs that link the level of discounts available on one product to purchases of separate but related products.

In *LePage's*, a panel of the Third Circuit considered several 3M discount programs that linked the level of rebates available to retailers for 3M's “Scotch-brand” transparent tape—products as to which 3M was alleged to have monopoly power—to their purchases of other 3M office products, including private-label tape products with which *LePage's* competed. Following a published opinion, which included an insistent call for *en banc* review by a dissenting judge, the Third Circuit decided to reconsider the viability of *LePage's*' claims *en banc*.

Because the crux of *LePage's*' antitrust claims challenged 3M's bundled discounts, the case would involve an inherently “sticky” issue even if it did not concern the market for transparent tape: will complex discount programs be treated the same as straightforward price reductions under the antitrust laws? On the one hand, discounts are unquestionably good for consumers, at least in the short run. The Supreme Court has instructed that a monopolist's low prices, even if aimed at maintaining a firm's monopoly share of the market, cannot be a predicate for Section 2 liability unless (1) “prices are below an appropriate measure of . . . cost,” and (2) the monopolist could raise prices in the future without fear of competitive challenge so as to recoup the losses incurred in its predatory pricing campaign. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

On the other hand, low prices can make life difficult for a monopolist's would-be competitors, and those difficulties can be magnified if the monopolist provides incentives to purchase a bundle of products. The monetary value of the monopolist's slate of discounts may be difficult or impossible for a competitor to match if it produces only one part of the bundle. For this reason, some

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¹ The now-vacated panel decision was reported at 277 F.3d 365 (3d Cir. 2002).

courts have refused to extend the traditional rule applicable in single-product predatory pricing cases to discount programs involving bundles of multiple products, even if each of the products is sold at a price above its cost. The leading case has been another Third Circuit decision decided long before Brooke Group—*SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1065 (3d Cir. 1978). *SmithKline* affirmed a finding of Section 2 liability where the defendant maintained its monopoly power through an above-cost bundled rebate program. A handful of lower courts, including the district court in *LePage's*, have similarly concluded that above-cost bundled discounts can violate Section 2. See *Ortho Diagnostic Systems, Inc. v. Abbott Labs., Inc.*, 920 F. Supp. 455, 467–69 (S.D.N.Y. 1996); *LePage's Inc. v. 3M*, 1999-1 Trade Cas. (CCH) ¶ 72,538 (E.D. Pa. 1999) (denying summary judgment).²

Against this backdrop, the Third Circuit in *LePage's* was asked to review a jury's conclusion that 3M's bundled discount programs and related efforts to persuade retailers to purchase 3M's private-label tape unlawfully maintained 3M's monopoly power in the market for transparent tape. The case has become a battle between two warring visions of how the antitrust laws should treat bundled discount programs. The degree of tolerance the law affords to discounting by firms with significant market power—and indeed the way the law approaches Section 2 issues generally—may be greatly affected by the vision the Third Circuit adopts.

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The *LePage's* Case

By the 1990s, 3M had achieved spectacular success in the market for transparent tape. Its “Scotch” brand of tape products was familiar to all American consumers and accounted for over 90 percent of all transparent tape sales in the United States. Consumers did have options, however. Many large retailers—like Wal-Mart, Kmart, Staples, CVS, and others—sold “private-label” tape in addition to 3M's Scotch-brand products. This private-label niche attracted *LePage's*, an established office products company founded in 1876. *LePage's* also was quite successful. By 1992, it accounted for 88 percent of private-label tape sales in the United States, and those sales were eating into 3M's sales of branded tape.

3M responded. In the early 1990s it too entered the private-label business. And in 1993 it launched various marketing programs aimed at encouraging retailers to acquire all of their transparent tape—both branded and private-label—from 3M.

Bundled Rebates. 3M offered retailers a variety of rebate programs that provided strong incentives to acquire private label tape from 3M instead of *LePage's*. Although the details varied, the essence of those programs was to link the level of rebates on 3M branded tape—which “customers had to buy from 3M” (277 F.3d at 376)—to the retailer's purchases of 3M private-label tape and other 3M office products. Under one of 3M's programs, retailers became eligible for rebates only if they increased their *total* purchases of six separate 3M product lines by a target percentage. The magnitude of their rebate (ranging between 0.5 percent and 2 percent) would depend on the number of product lines for which the customer increased its purchases and the magnitude of the overall increase. *LePage's* contended that retailers were highly motivated to reduce their acquisition costs for the Scotch-brand tape they had to buy from 3M, and doing so under 3M's programs required that they purchase private-label tape from 3M instead of *LePage's*.

² See also Willard K. Tom, David A. Balto & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 637–38 (2000).

Other Conduct. LePage's also argued that 3M entered the private-label segment "only to 'kill it'" (277 F.3d at 405 (dissent)), and that 3M's exclusive relationships with retailers foreclosed competition for private-label sales. For the most part, however, these arguments were merely a re-packaged version of LePage's' bundled rebate claims, since the alleged "exclusion" stemmed from decisions by certain retailers to drop LePage's' private-label tape products to maximize their 3M rebates. Two sets of alleged conduct went somewhat further: 3M entered one-year contracts with two retailers that conditioned discounts on 3M's being the exclusive supplier of private-label tape, and 3M offered a discount to the Office Buying Group in exchange for exclusive promotion of 3M products in their catalog.

Procedural Posture. LePage's challenged 3M's course of conduct by asserting three separate antitrust claims:

- (1) 3M's bundled rebates and other conduct illegally maintained 3M's monopoly power in the U.S. transparent tape market, in violation of Section 2 of the Sherman Act;
- (2) The same conduct constituted an illegal "attempted maintenance of monopoly power," also in violation of Section 2; and
- (3) 3M's arrangements with retailers constituted unlawful exclusive dealing, in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act.

The district court permitted all of these claims to go to the jury, which found for LePage's on the Section 2 claims but rejected LePage's' remaining claims. LePage's was awarded over \$68 million in treble damages.

3M's post-trial motions challenged the legal sufficiency of the Section 2 verdict. The district court granted judgment as a matter of law as to LePage's' "attempted monopoly maintenance claim" but let the verdict stand as to the monopoly maintenance claim. The court concluded that LePage's' evidence satisfied the requirements laid down in *SmithKline* for an "intra-market monopoly leveraging claim." It specifically rejected 3M's contentions that: (1) LePage's failed to establish that 3M's customers were effectively forced to forgo purchases of LePage's' private label tape to obtain rebates on Scotch-brand tape; (2) the court should have required LePage's to prove that it was as efficient as 3M; and (3) the court should have required LePage's to prove that 3M could recoup the revenues it sacrificed through its rebate program by charging higher prices. 2000-1 Trade Cas. (CCH) ¶ 72,846, 84,287-88 (E.D. Pa. 2000). The district court did not even cite *Brooke Group*, having previously distinguished the case (in rejecting 3M's summary judgment motion) on the curious grounds that it involved a "predatory pricing" claim and did not address the pricing behavior of a monopolist. 1999-1 Trade Cas. at 84,849 & n.9.

On appeal, the case focused almost exclusively on whether 3M's conduct constituted the "willful maintenance" of monopoly power. Neither the market definition—which included both branded and private-label tape in a single market—nor 3M's monopoly power within that market were at issue.³ The parties again presented diametrically opposed views of 3M's conduct. LePage's sought to invoke *SmithKline*, arguing that 3M's bundled rebates prevented it from competing on the merits for private-label sales. 3M defended its programs by invoking *Brooke Group*, arguing

³ LePage's' success in establishing a market consisting of all transparent tape and limited to the United States fundamentally shaped the course of the case. Had 3M successfully proven a broader geographic market, its "monopoly power" would have vanished. Had 3M established that branded and private label tape were in separate markets, LePage's' monopoly maintenance claim based on *SmithKline* would have been transformed into a "monopoly leveraging" claim. LePage's' inability to prove that 3M had a dangerous probability of monopolizing a private label market—not least because LePage's still commanded a two-thirds share of such a market at the time of trial, 277 F.3d at 376 n.5—would probably have doomed such a claim. The law of the Third Circuit and most other federal courts does not permit a monopoly leveraging claim unless the plaintiff can prove a dangerous probability of successful monopolization in the "competitive" market. The Second Circuit is the

that its rebate programs were mere price competition insulated from antitrust scrutiny so long as prices remained above cost.

The Majority Opinion. The Third Circuit panel (Judges Greenberg, Alito, and Sloviter) was as deeply divided as the parties. Judges Greenberg and Alito found in 3M's favor and directed the district court to enter judgment for 3M. The majority decision rested on five principal conclusions:

- (1) First, the majority repeatedly alluded to the standard for testing predatory pricing claims established in *Brooke Group*. It noted that “LePage’s did not demonstrate that 3M’s pricing was below cost and, in the absence of such proof, the record does not supply a basis on which we can uphold the judgment.” 277 F.3d at 376; *see also id.* at 382, 384. The majority was careful to say, however, that it was not deciding “the effect of *Brooke Group* on *SmithKline*.” *Id.* at 380 n.10.
- (2) Second, the majority distinguished *SmithKline* based on LePage’s’ failure to prove the anti-competitive effects of 3M’s bundling. *SmithKline* upheld a finding that Lilly illegally maintained its monopoly in the market for cephalosporin antibiotic drugs by establishing a bundled rebate program that linked rebates on two patented Lilly products that faced no direct competition—Keflex and Keflin—to purchases of a third product—Kefzol—that faced competition from SmithKline. Companies might have read *SmithKline* to suggest a virtual per se rule against bundled discounts by monopolists.⁴ But the majority in *LePage’s* focused on the court’s reference to the district court’s finding that “the effect” of Lilly’s rebate program was to “force SmithKline to pay rebates on one product, Ancef, equal to rebates paid by Lilly based on volume sales of three products,” and the related finding, “[o]n the basis of expert testimony, . . . that SmithKline’s prospects for continuing in the cephalosporin market under these conditions [were] poor.” 575 F.2d at 1065.⁵ The *LePage’s* majority held that, unlike the plaintiff in *SmithKline*, LePage’s “did not even attempt to show that it could not compete by calculating the discount that it would have had to provide in order to match the discounts offered by 3M through its bundled rebates.” 277 F.3d at 378.⁶

The *LePage’s* majority thus concluded that *SmithKline* could not be read to establish a per se rule against a monopolist’s use of bundled rebates because consumers would be harmed if “bundled rebates are illegal regardless of how competition is affected.” 277 F.3d at 381. Instead, echoing a predominant theme of recent antitrust jurisprudence, the plain-

one possible exception, where *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275–76 (2d Cir. 1979), suggests the potential of a leveraging claim where a monopolist merely uses its power in one market to “gain a competitive advantage in another.” But the vitality of this aspect of *Berkey* is in grave doubt in light of the Supreme Court’s ruling in *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993), that an indispensable element of any attempted monopolization case is proof of “a dangerous probability that [defendant] would monopolize a particular market.” *See Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 272 (2d Cir. 2001).

⁴ For example, the *SmithKline* court regarded Lilly as having abused its “awesome power of a monopolist” when it instituted its discount program, which “blatantly revised” the “economic laws of a competitive market.” 575 F.2d at 1065.

⁵ Lilly offered a bundled rebate of 3% on a group of three products. SmithKline would have had to offer discounts of 16 to 35% on its competitive product to match the monetary value of the Lilly’s rebate program. *SmithKline*, 575 F.2d at 1062. The district court in *SmithKline* performed a detailed analysis of SmithKline’s cost structure and specifically concluded that, so long as Lilly’s discount program remained in place, SmithKline “could not remain in the market, even for the smaller accounts.” 427 F. Supp. at 1123.

⁶ The Second Circuit recently distinguished *SmithKline* on the same basis, holding that it involved “expert testimony demonstrating the anti-competitive effects of a bundling arrangement.” *Virgin Atlantic*, 257 F.3d at 270. Ironically, the same case distinguished the district court’s decision in *LePage’s* on the same basis, noting (in sharp contrast with the *LePage’s* majority’s views) that LePage’s had “introduced exhibits showing that specific customers felt compelled to purchase products under the defendants’ bundling program because the plaintiff could not match the discounts.” *Id.*

tiff must show how competition—as distinct from the plaintiff’s own profit margins—would be harmed by the discount program. To make such a showing, the majority suggested that LePage’s burden was to prove that—taking into account its “relative efficiency or cost structure”—it would actually be “driven out of business” (*id.* at 380), and not merely suffer a reduction in its sales and profits.⁷ The majority concluded that LePage’s had not satisfied that standard, since LePage’s was “able to retain some customers through negotiation” (*id.* at 382), and at the time of trial accounted for 67 percent of all private-label sales. *Id.* at 376 n.5.⁸

- (3) Third, the majority also reviewed the lawfulness of 3M’s bundled rebates under the assertedly “more stringent” standard established in the *Ortho* case, which required plaintiffs challenging bundled discounts to prove either that the discounts resulted in products being sold “below cost” or that the plaintiff was “at least as efficient a producer” as the defendant but could not compete profitably as a result of the defendants’ pricing. *Id.* at 380. LePage’s could not satisfy that standard either, because its economist had conceded that LePage’s was less efficient than 3M. *Id.*
- (4) Fourth, the majority gave weight to the fact that 3M’s bundled rebate programs served the business objective of increasing 3M’s sales and profits:

3M’s pricing structure and bundled rebates were not necessarily contrary to its economic interests, as they likely increased its sales. Furthermore, other than the obvious reasons such as increasing bulk sales, market share, and customer loyalty, there are several other potential ‘procompetitive’ or valid business reason for 3M’s pricing structure and bundled rebates: efficiency in having single invoices, single shipments and uniform pricing programs for various products.

Id. at 382. The majority specifically concluded that, even if 3M had intended to eliminate the “private label aspect of the transparent tape market,” its actions would be lawful because, “‘examined without reference to its effects on competitors,’ it is evident that in view of 3M’s dominance in brand tape, . . . it was rational for 3M to want the sale of tape concentrated in that category of the market.” *Id.* at 385.

- (5) Finally, the majority brushed aside LePage’s’ reliance on alleged exclusive arrangements with retailers, noting that 3M’s two exclusive agreements locked up at most a tiny fraction of the market, and did so for only one year at a time. *Id.* at 383–84.

The Dissent. Judge Sloviter vigorously disagreed with the majority’s reasoning. In a lengthy opinion, she made the following key points:

- (1) First, the dissent contended that the majority erred by analyzing 3M’s bundled rebates in isolation from the alleged exclusive contracts. The dissent asserted that courts must assess the legality of an alleged monopolist’s behavior by examining the entire “monopoly broth”⁹ of its alleged conduct. Judge Sloviter also stated, however, that she believed 3M’s bundled rebates violated Section 2 even if considered independently.
- (2) Second, the dissent brushed aside the majority’s heavy reliance on *Brooke Group*. The dis-

⁷ The majority observed that without such a rule “competitors unwilling to accept lower profits could use the [antitrust] law to insulate themselves from competition.” *Id.* at 380.

⁸ The majority also noted that LePage’s lost sales for reasons unrelated to 3M’s conduct, such as LePage’s’ inferior service. *Id.* at 382.

⁹ See *City of Mishawaka v. American Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980). (“The [defendant] would have us consider each separate aspect of its conduct separately and in a vacuum. If we did, we might agree with the [defendant] that no one aspect standing alone is illegal. It is the mix of the various ingredients of [defendant] behavior in a monopoly broth that produces the unsavory flavor.”).

sent reasoned that *Brooke Group* did not apply for two reasons. First, it did not purport to address “bundled” rebates. Second, *Brooke Group* did not address the behavior of a monopolist. The defendant in that case—Brown & Williamson—was one of six manufacturers of cigarettes in the United States. Invoking the antitrust tenet that a monopolist is not permitted to engage in action that would be legal if undertaken by a firm with lesser power, the dissent therefore concluded that “[e]ven if *Brooke Group* could be read that all pricing action is legal if the company’s prices are not below costs, nothing in the Supreme Court’s decision suggests that its discussion of the issue is applicable to a monopolist with its unconstrained market power.” 227 F.3d at 400 (dissent).¹⁰

- (3) Third, the dissent believed that *SmithKline* was controlling. The dissent disagreed strongly with the majority’s efforts to distinguish *SmithKline* on the ground that LePage’s had not proven any anticompetitive effect. The dissent argued that there was abundant evidence in the record to support a jury finding that 3M’s bundled rebates prevented LePage’s from competing on the merits. The dissent pointed to the negative profits of LePage’s following the institution of 3M’s rebate program and evidence that the program caused retailers to displace LePage’s altogether or purchase significantly less from LePage’s. The dissent also noted that there was ample evidence that 3M desired to force LePage’s from the market.

Where Does the Third Circuit’s *En Banc* Review Leave Private Parties?

The majority opinion was directionally pro-defendant and in that sense the Third Circuit’s decision to review the case *en banc* might be viewed as creating new uncertainties for firms employing or considering bundled discounting programs. On the other hand, the majority decision left open a number of questions, perhaps the most significant being how a court would deal with claims asserted by plaintiffs that did a better job of meeting the *SmithKline* test (as interpreted by the majority) by establishing that they could not compete in the face of the plaintiff’s bundled discount program. On the one hand, would the ultimate legality of the program be tested solely by reference to the defendant’s costs? On the other hand, might liability rest on some other, murkier standard, such as the plaintiff’s inability to compete successfully, the plaintiff’s relative costs, or the defendant’s intent as gleaned after the fact from company documents.

What Might the *En Banc* Third Circuit Do in *LePage’s*?

The Third Circuit now has the opportunity to answer some of these questions. How many of them it addresses will depend on how it approaches the issues in the case.

We consider below the two principal sets of possibilities. The court may view bundled rebates

¹⁰ In fact, however, courts have routinely applied the *Brooke Group* standard in cases where the defendant is alleged to be a monopolist. Indeed, as the Seventh Circuit has observed, “firms found guilty of attempting to monopolize are typically, and in predatory pricing cases must always be, monopolists.” *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 992 F.2d 1317, 1320 (7th Cir. 1991). Examples of such cases include *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 528 (5th Cir. 1999) (discussing predatory pricing brought against an alleged monopolist, noting that “such a claim must demonstrate both that (1) the prices complained of are below an appropriate measure of the *alleged monopolist’s* costs, and (2) that the *alleged monopolist* has a reasonable chance of recouping the losses through below-cost pricing”) (emphasis added) (citing *Brooke Group*); *Morley-Murphy Co. v. Zenith Elecs. Corp.*, 142 F.3d 373 (7th Cir. 1998) (noting that problems of allocating fixed costs between products arises “in predatory pricing cases in the antitrust area, when courts try to figure out whether an *alleged monopolist* is selling a product below cost”) (emphasis added) (citing *Brooke Group*); and *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1202 (3d Cir. 1995) (rejecting a “strategic entry deterrence” theory, under which “a *monopolist* who pursues predatory pricing with sufficient zeal and frequency will earn a reputation formidable enough to scare off all potential entrants indefinitely” as at odds with *Brooke Group*) (emphasis added);

of the sort engaged in by 3M as indistinguishable from the pricing behavior provided by *Brooke Group* and thereby explicitly demand that the plaintiff prove that prices were below cost. In the process, the Third Circuit may or may not see fit to overrule *SmithKline*. Alternatively, the court may see 3M's conduct through LePage's' lenses, and decline to apply *Brooke Group*. The court must then decide what standard ought to be applied to bundled rebates—the rule applied in *SmithKline* (whatever it was) or another standard.

Will the Third Circuit Overrule Smithkline in Light of Brooke Group? If the Third Circuit views 3M's bundled rebate programs as price reductions—which in substance they were—the stark legal question presented in *LePage's* is whether the Third Circuit should continue to treat single-product pricing differently than multiple-product pricing. A plaintiff bringing a monopolization claim based on allegedly anticompetitive single product rebates must, under the *Brooke Group* standard, present evidence of below cost pricing and the reasonable prospect that the monopolist could raise prices in the future to recoup the losses incurred. In contrast, under at least one reading of *SmithKline*, a plaintiff bringing a claim based on bundled rebates could prevail merely by showing that it could not compete against the defendant's pricing strategy. The *en banc* court must decide if a plaintiff states a Section 2 claim by showing that it could not compete profitably in the face of a bundled discount program, even if the monopolist's pricing was above cost and therefore contributed to its profits in the short term without regard to any adverse effect on the plaintiff.

Getting past the principal laid down in *Brooke Group* would require a considerably more robust effort than LePage's or the judges who agreed with it could muster below.¹¹ If the law intends to encourage—or at least not avoid chilling—price reductions by monopolists, why should it matter that a monopolist's discounts are structured in relatively complex ways? Single-product and multi-product discounts both have considerable potential to harm would-be competitors (especially inefficient ones) and deter entry, but also bring real value to consumers. If the law does not penalize a monopolist for cutting its prices to the bone on a single product in ways a competitor cannot match—which may be the case if a core group of the monopolist's customers have deeply-engrained brand loyalty, thereby giving the monopolist a built-in advantage in achieving scale economies—why should multi-product discounts be treated any differently?¹²

The *LePage's* majority adopted this basic view of the proper application of *Brooke Group* to 3M's conduct, but was constrained to attempt to distinguish *SmithKline* rather than to overrule it.¹³ The *en banc* court should not feel similarly constrained because it has the power to overturn *SmithKline*.¹⁴

As it sorts out the reach of *Brooke Group*, one course the Third Circuit might take is to draw a distinction between “take-it-or-leave-it” price offerings (including discounts and rebates) and pro-

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¹¹ Both the dissent and district court in *LePage's* noted differences in the factual details of the cases—the fact that *Brooke Group* involved pricing of a single product by firms that were not monopolists—without any serious effort to analyze why those differences should be regarded as substantively meaningful. See 1999-1 Trade Cas. at 84,849 & n.9; 277 F.3d at 399–400 (dissent). The latter basis is particularly insubstantial. See *supra* note 10.

¹² See, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749 (criticizing rule that would condemn above-cost bundled discounts).

¹³ The majority implied (but did not decide) that *Brooke Group* might well have overruled *SmithKline*. It emphasized that it had not decided whether “if LePage's had supplied pricing information similar to that *SmithKline* presented our result would be different.” 277 F.3d at 380 n.10.

¹⁴ In this scenario, whether the court overrules *SmithKline* would seem to depend on whether, like the panel majority, it sees a rational basis for distinguishing the effect of 3M's discount programs from that of Lilly's. If *Brooke Group* applies and *SmithKline* cannot be distinguished, *SmithKline* would have to be overruled. As suggested by the dissent, and the Second Circuit's observations in *Virgin Atlantic*, there is some reason to doubt the robustness of the majority's rationale for distinguishing the case.

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grams that involve restrictive agreements between an alleged monopolist and its customers. The former might be deemed to fall within the ambit of *Brooke Group*, while the latter might be viewed as traditional vertical restraints. For example, if a defendant persuades retailers to enter a binding commitment to purchase a high percentage of its needs from the defendant by offering the customer a significant monetary payment, the amount of the payment might not be viewed as the equivalent of a price reduction (even if denominated a “rebate”), but instead as consideration for a restrictive agreement. In contrast, if the defendant offered a rebate program under which the customer could earn the same sum by choosing to buy from the defendant, but had no obligation to make that choice, such a program might be viewed as a price reduction.

This line of reasoning would be consistent with the Eighth Circuit’s analysis in *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1043, 1063 (8th Cir.), cert. denied, 531 U.S. 979 (2000). *Concord Boat* overturned a jury verdict for plaintiffs on a Section 2 claim against an alleged monopolist’s voluntary market share discount programs. Under the defendant’s programs, retailers could earn increasingly large rebates by increasing the share of boat engines that they purchased from the defendant. Because retailers entered into no contractual commitment to purchase a particular percentage of engines from the defendant, the defendant’s programs were analyzed under the *Brooke Group* predatory pricing standard rather than under the rule of reason standard sought by plaintiffs.

Applying this reasoning in *LePage’s* should result in the application of *Brooke Group* to 3M’s rebated programs. The reported decisions contain no indication that 3M’s programs involved any agreement with retailers committing them to purchase any particular volume (or share) of 3M private-label tape.

If the court does apply the *Brooke Group* standard, the *LePage’s* case apparently would be over, because on appeal *LePage’s* dropped any contention that 3M’s prices were below cost. 277 F.3d at 380. Such a ruling, however, would leave open the very interesting question of how future plaintiffs might attempt to demonstrate that bundled rebates are below cost. Under the average variable cost standard accepted by most courts, bundled rebates should avoid condemnation if the price charged for each of the elements of the bundle is above the average variable cost of that product.¹⁵ Yet the court must still decide how much of the total rebate should be attributed to the various components of the bundle.

For example, if a program is structured in such a way that a customer earns an incremental rebate on the “monopoly” product by purchasing some readily identifiable quantity of a “competitive” product, a plaintiff might attempt to demonstrate that the full monetary value of the incremental rebate is directly attributable to the incremental purchases that trigger the discount. Whether that value is characterized as a “cost” of the competitive product or as a reduction in the product’s price, it is conceivable that a plaintiff might succeed in establishing that the price received for those incremental quantities was less than the costs associated with selling those units.

Although such an argument would likely face considerable difficulties,¹⁶ it would not be entirely unprecedented. For example, in its lawsuit challenging American Airlines’ alleged monopolization of the Dallas-Fort Worth Hub, the Department of Justice tried to prove that American

¹⁵ As a proxy for marginal costs, average variable cost has emerged as the leading standard for determining whether a monopolist has engaged in predatory pricing. *E.g.*, *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1198 (3d Cir. 1995); see generally *United States v. AMR Corp.*, 140 F. Supp 2d 1141, 1198 (D. Kan. 2001) (collecting cases).

¹⁶ The *LePage’s* majority expressed doubts about the “validity of attributing all other rebates to the one competitive product.” 277 F.3d at 379.

engaged in predatory conduct when it added incremental capacity (additional aircraft in city pair markets) at prices that generated less incremental revenue than the cost of the additional capacity. The district court rejected this incremental cost measure, adopting instead average variable costs as the “only appropriate, credible measure of costs in the present action.” See *United States v. AMR Corp.*, 140 F. Supp 2d at 1196. But the Department has advanced a credible argument for its proposed standard in the pending appeal. See *United States v. AMR Corp.*, No. 01-3202, Brief for Appellant United States at 36–46 (10th Cir. filed Jan. 11, 2002).¹⁷

Could the Third Circuit Fall Back on SmithKline? If the Third Circuit is unwilling to apply the *Brooke Group* standard to bundled discount programs, it may seek to distinguish *Brooke Group* by characterizing 3M’s conduct as involving an undifferentiated mass—or “broth”—of behavior that was more akin to efforts to induce exclusive relationships with 3M than straightforward discounts. Such a distinction would seemingly ignore the substance of 3M’s rebate programs, which were very much the economic equivalent of price reductions on products sold by 3M. But it is conceivable that the court (like Judge Sloviter) would be sympathetic to the plight of firms like LePage’s that assert that they cannot economically match bundled rebate programs offered by multi-product firms like 3M.¹⁸

If the court does manage to get past *Brooke Group*, however, it must still address what standard to apply to test the legality of 3M’s programs. None of the available options offers the kind of certainty that antitrust law has recently sought in the predatory pricing context.

The most obvious potential source for such a standard is the Third Circuit’s own *SmithKline* decision. Any standard derived from *SmithKline* likely would focus on the impact of the bundled discount program on competitors. It would, however, place potential discounters in a difficult position. Companies might pull their punches to avoid offering discount programs that potential plaintiffs were ill equipped to match.

The court might look elsewhere for a standard. Two places the court might turn are the standards articulated in *Ortho*, which addressed bundled discounting, and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), which did not.

Under the *Ortho* test, a bundled rebate program would potentially establish Section 2 liability if the monopolist was either (1) charging a price for the competitive product below average variable cost, or (2) the competitor was as efficient as the monopolist but still could not afford to match the monopolist’s discount. This standard may provide a refuge for the *en banc* court if it wants to find in favor of 3M, since LePage’s conceded that 3M was the more efficient tape manufacturer.

¹⁷ Virgin Atlantic made a similar effort to prove that British Airways’ discounts to travel agents and corporate customers, which bundled alleged monopoly routes with competitive routes, caused its prices on competitive routes to fall below cost. The Second Circuit rejected this contention without considering whether prices exceeded costs, because Virgin Atlantic failed to establish that the bundled rebates prevented it from competing effectively or that British Airways raised its prices on monopoly routes so as to recoup the alleged losses. *Virgin Atlantic*, 257 F.3d at 269–70.

¹⁸ Basing liability on the allegedly “unsavory flavor” of the “monopoly broth” would entail significant pitfalls. At times, it is undoubtedly appropriate to consider the totality of an alleged monopolist’s conduct, as when aggregating the impact of numerous exclusive contracts with distributors. In cases like *LePage’s*, however, where the conduct at issue includes the kind of price-cutting encouraged by the law, attempting to discern the flavor of the alleged “broth” is more dangerous. First, it is difficult if not impossible to offer a clear standard for deciding such cases. What blend of ingredients suffices to establish antitrust liability? Second, but more fundamentally, such a standard may discourage price-cutting by a monopolist in response to competition. Most large companies employ a wide variety of marketing strategies. If such firms must be concerned that competitors might establish antitrust liability (and treble damages) for discounting practices by pointing to some number of other marketing practices that are likewise targeted at gaining sales from competitors, they may think twice before putting the screws to competitors by lowering prices. Such a result would seem inconsistent with the strong aim of the law to avoid chilling aggressive above-cost discounting.

However, this standard would do little to protect defendants from the sort of uncertainty that *Brooke Group* disfavors. It would be extraordinarily difficult for firms considering complex discount programs to make assessments about the relative efficiency of their rivals, even if it were crystal clear how the “efficiency” of two firms would be compared.

Alternatively, the Third Circuit may consider adopting the likely influential Section 2 standard articulated by the D.C. Circuit in *Microsoft*, which ultimately focuses on whether “the anticompetitive harm outweighs the procompetitive benefit.” *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).¹⁹ This is essentially the rule of reason standard. Such a standard seemingly would send the question of liability to the jury whenever there was evidence that a bundled rebate program impeded competition on the merits in some way. This would provide little guidance to businesses. Perhaps more importantly, however, it would beg the most important question: is an above-cost discount that provides economic value to customers “anticompetitive,” as LePage’s argues, or “procompetitive,” as 3M contends and *Brooke Group* (and the well-developed law of predatory pricing) seems to suggest.²⁰

Conclusion

LePage’s offers the Third Circuit a genuine and important opportunity to clarify the antitrust law that governs bundled rebates. In the panel decision, neither the majority nor dissent offered clear guidance to firms employing or considering complex bundled discount programs. Whatever standard the Third Circuit adopts, we expect the *en banc* court will offer a clearer standard to guide corporations in this controversial area. ●

¹⁹ Applying such a standard to bundled discount programs would of course require a predicate conclusion that such programs are distinguishable from single-product discounting. The D.C. Circuit’s decision in *Microsoft* explicitly applied the full panoply of predatory pricing law (including the requirement that sales be below cost) in the context of Microsoft’s licensing of Internet Explorer to Internet Access Providers at no charge. *Microsoft*, 253 F.3d at 67. The D.C. Circuit disagreed with the district court’s condemnation of this conduct, writing that “[t]he rare case of price predation aside, the antitrust laws do not condemn even a monopolist for offering its product at an attractive price, and we therefore have no warrant to condemn Microsoft for offering . . . [Internet Explorer] free of charge or even at a negative price.” *Id.*

²⁰ If the Third Circuit chooses not to follow *Brooke Group* and adopts some middle ground or applies *SmithKline*, it might feel compelled to address an important subsidiary question debated by the majority and dissent in the panel decision: what is the role of the kind of “business justification” described by the *LePage’s* majority? A central element of any reasonableness inquiry is the business justification for the conduct in question. Does the desire to increase sales exonerate the defendant or merely avoid an inference that the defendants’ conduct was necessarily intended to achieve anticompetitive effects? We think that the court chose the latter course, and in fact a careful reading of the majority opinion suggests that it did not intend to go farther than that in holding that a desire to increase sales eliminates any potential for a successful monopolization claim. *See* 277 F.3d at 381 (“some cases suggest that when a company acts against its economic interests and there is no valid business justification, then it is a good sign that its acts were intended to eliminate competition”). Such a reading is consistent with other case law. The D.C. Circuit, for example, would have afforded 3M’s business justifications little weight under the standard articulated in *Microsoft* because it does not regard a monopolist’s desire to “preserve its power” as a “procompetitive justification” for conduct that tends to exclude competition. 253 F.3d at 71 (addressing exclusive dealing contracts with internet access providers).

Interview with Patricia Conners, Chair, NAAG Multistate Antitrust Task Force

April 11, 2002



Patricia Conners

Ed. Note: *It's a rare day that does not include a report of the states' involvement in major antitrust litigation and enforcement activity. Microsoft, Vitamins, Mylan, Cardizem—the states are front and center in a large number of high-profile antitrust matters.*

To give us the insider's view of these cases and other enforcement initiatives, we interview here Patricia Conners, who is particularly well-positioned to discuss these issues in her dual role as Chair of the NAAG Multistate Antitrust Task Force and as Chief of the Antitrust Section for the Florida Attorney General's Office. As Florida's chief antitrust attorney since 1995, Ms. Conners is responsible for implementing and overseeing the Attorney General's state and federal antitrust enforcement efforts. Prior to this, she was an Assistant Attorney General in the Antitrust Section, working on such notable cases as

Florida v. Borden, Inc., the 1989 school milk bid-rigging case that resulted in a \$36 million recovery for Florida school boards and Florida v. Abbott Laboratories, Inc., the first of the so-called Infant Formula cases.

Last fall, Ms. Conners was appointed Chair of the NAAG Multistate Antitrust Task Force, in which capacity she coordinates multistate antitrust enforcement efforts and ensures the implementation of NAAG Task Force initiatives and policy. Prior to becoming Chair of the Antitrust Task Force, Ms. Conners served the Task Force as Vice Chair from 1999 to 2001 and as the Southeast Regional Vice Chair from 1996 to 1999.

Ms. Conners is a member of the advisory board of the American Antitrust Institute and Vice Chair of the Florida Bar's recently established Antitrust Certification Committee. She received both her undergraduate and J.D. degrees from the University of Florida.

ANTITRUST SOURCE: What does the Chair of the NAAG Multistate Antitrust Task Force do?

CONNERS: Well, that's an interesting question because we've actually been revisiting that a little bit with the new head of the Antitrust Committee, Hardy Myers, the Attorney General for the State of Oregon. The NAAG Antitrust Task Force has been in existence for about twenty years and we forget sometimes that we have newcomers who come in—new Attorneys General and new Assistant Attorneys General—who do not have the institutional knowledge of those of us who have been there from the very beginning. And so we've tried to more specifically define the role of the Chair and the Vice-Chair and tweak the organizational structure a bit. The Chair's principal duties are threefold: to coordinate multistate task force litigation and investigation working groups by providing a forum within the Task Force for the exchange of ideas regarding enforcement policy and investigative priorities; to convene regular multistate task force meetings to facilitate coordination of multistate antitrust enforcement, including policy and litigation; and to be a liaison, as necessary, with the federal enforcement agencies to ensure effective state-federal cooperation and coordination wherever possible. Now, it's important for me to emphasize with respect to the first primary duty I've listed that my role as chair is only to assist in the facilitation of coordination between working groups, not to coordinate the tasks for the working groups themselves. Neither the Task

My current emphasis is on streamlining and improving upon case coordination among the states in antitrust matters, especially with respect to the various indirect purchaser cases that have cropped up recently as a new dynamic in multistate antitrust enforcement.

What is the relationship between the Chair of the Antitrust Committee that you mentioned and the Chair of the Task Force?

The Chair of the Task Force is selected by the Chair or Co-convenor of the Antitrust Committee. Every year or two the National Association of Attorneys General Antitrust Committee selects a Chair, just as they do with the other NAAG committees. Last summer, Oregon Attorney General Hardy Myers was selected as Chair, along with two co-convenors, Eliot Spitzer of New York and Joseph Curran of Maryland. Together, they oversee generally various antitrust initiatives and effectuate antitrust policies significant to multistate antitrust enforcement. The policies and initiatives established by the Antitrust Committee are effected by the Chair of the Multistate Task Force, and the Chair of the Task Force keeps the Antitrust Committee leadership apprised of multistate matters generally and, of course, consults with the Antitrust Committee leadership on policy issues and cases of significance to the multistate Task Force.

You mentioned that one of the objectives was to streamline and coordinate among the states in their enforcement activities, specifically with respect to indirect purchaser actions. How are you planning to do that?

Force nor the Task Force Chair actually engages in the coordination of multistate investigations or litigation. These are conducted by individual states or by working groups formed by states interested in pursuing a particular matter. Each state retains its sovereignty in these matters, with the Task Force simply providing a forum for the discussion of ideas and investigative priorities.

My current emphasis is on streamlining and improving upon case coordination among the states in antitrust matters, especially with respect to the various indirect purchaser cases that have cropped up recently as a new dynamic in multistate antitrust enforcement. A second priority is to serve as a liaison more with federal agencies with whom we already have an excellent relationship. Finally, we're going to make an effort to coordinate better with the private plaintiffs bar as they're in just about every case in which we get involved, whether by way of overlapping representation of consumers or by way of representation of different sets of plaintiffs.

ANTITRUST SOURCE: What is the relationship between the Chair of the Antitrust Committee that you mentioned and the Chair of the Task Force?

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ANTITRUST SOURCE: You mentioned that one of the objectives was to streamline and coordinate among the states in their enforcement activities, specifically with respect to indirect purchaser actions. How are you planning to do that?

CONNERS: Well, with respect to indirect purchaser cases, we already have two templates that are outstanding examples of what we can do to improve case coordination. One is the *Vitamins* case and the other is the *Mylan* case. In the *Vitamins* case, we were forced into state court because that is where the class action cases were already pending. We had to quickly learn to adapt to the idea of coordinating multiple state court proceedings in parallel fashion. Ultimately, one court, the District of Columbia Superior Court, became the forum that provided the foundation from which all the other state court proceedings were coordinated. Once the master settlement agreement was finalized and submitted to the D.C. Court and various procedures were agreed upon, the settlement and all related papers were submitted for approval in all the other state courts where *Vitamins* cases were pending. Coordination on preliminary approval and final approval of the individual state court proceedings using the D.C. Court proceedings as the prototype has worked out extremely well thus far. A lot of credit, I think, goes to David Boies III, the private plaintiff lawyer who helped coordinate between the private plaintiffs, the states, and the defendants.

The *Mylan* case provides an excellent example of a case where the states filed jointly in a

single federal court, alleging both direct claims and indirect purchaser claims. In *Mylan*, the different states had varying state law remedial postures that made for a very difficult litigation and settlement process, but we got through it. I'm proud to say I participated in the settlement negotiations, along with Meredyth Andrus of Maryland and Mitch Gentile of Ohio, and I believe we were able to obtain an excellent settlement for consumers. *Mylan* is a nice template for streamlining multistate actions not only for litigation but also for settlement negotiations, claims administration, and claims distribution.

ANTITRUST SOURCE: How will you coordinate more closely with the private plaintiffs bar? Will that include drafting private plaintiffs to actually represent the states' interests?

CONNERS: There are some private plaintiff firms that are representing state attorneys general in particular actions, but that's not the norm. It's more likely that we will conduct our own investigation into a matter to determine whether we want to file a lawsuit. In some cases, it may be that the private plaintiffs have already filed their own class actions before we file ours. In other instances, we are the first to file and the class plaintiffs must rely on what they learn about the case from what the government is doing. So, depending on where we are in the posture of things, coordination with the private plaintiffs is extremely important. If it's at the beginning of the case, it's more likely that the states will move forward and there might be more limited, at least initially, coordination with the private plaintiffs bar. But, typically, if the class action bar is already out there in some way, before we complete our investigation, as was the case, for example, in many of the generic drug cases, then, we will join the litigation and move to coordinate immediately in an effort to avoid any unnecessary delay. The desire—ours and the private plaintiffs' counsel—is to coordinate and effectuate the best possible litigation strategy—and settlement strategy, if needed. My priority is to build upon that mutual interest and continue to improve upon our working relationship with the private plaintiffs bar so that those that we represent receive the most effective and efficient representation—and result—possible.

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ANTITRUST SOURCE: Let me ask you some questions about *Microsoft*. One of the things you mentioned earlier was that you were attempting to coordinate more closely your enforcement activities with the federal agencies. In the *Microsoft* settlement, of course, the DOJ's settlement was adopted by some states and rejected by others, leaving the states that rejected it to pursue their own remedies. How do you think the *Microsoft* settlement will affect the way states and federal agencies work together in the future?

CONNERS: I don't believe it will have any negative effect at all. It may have a very positive one. We saw that case go through two administrations, and in both instances, both in the trial phase under the previous administration, and in the mediation phase leading to the settlement under the current administration, we had unprecedented cooperation and coordination. It had never been that close and the access had never been so open. So, I don't really perceive the split between DOJ and some of the states at the remedies phase as having had any kind of negative effect. Currently, the dialogue remains open and there continues to be interaction between state and federal agencies—and it's extremely good at this point. I think the antitrust bar benefits from the give and take that goes on between state and federal agencies, and I think the federal agencies appreciate that and I know the states do. So, I think state-federal coordination is a very important thing to develop. I think it's a very important priority for both Tim Muris and Charles James,

and I know they intend to move forward with it, as do we, to continue to build on what has been an excellent working relationship.

ANTITRUST SOURCE: From the *Microsoft* experience, are there any lessons learned, or anything that you would say you might do differently in approaching that case?

I don't think that what happened in Microsoft is going to cause a great stir down the road, nor really should it have at the time.

CONNERS: Well, I was not privy to a lot of the discussions that went on, but obviously to the extent that we could have foreseen some of the things that unfolded quickly and how we had to deal with them, it would have been nice to have had another experience prior to *Microsoft* that might have taught us better ways to interact and deal with each other on certain issues. But, I think what ultimately happened and the way it happened was perfectly appropriate for the situation. As some at DOJ have said, when certain state attorneys general decided to continue with the litigation, that was their prerogative as plaintiffs. As with any private litigation, there are separate sets of plaintiffs, and some may settle before others. That's all that happened here. I don't think that what happened in *Microsoft* is going to cause a great stir down the road, nor really should it have at the time. Rather, I think, the fact that we experienced differences and our positive relationship and cooperative effort survived unscathed means that our relationship is solid and that we have a firm foundation in place for continued cooperation and coordination.

ANTITRUST SOURCE: To what extent do you think it matters, or should matter, to the states whether a federal antitrust agency has made a clear decision on what national policy should be in a particular enforcement scenario?

CONNERS: Setting national antitrust policy is not within the exclusive realm of the federal enforcement agencies. That is not how our system of concurrent enforcement works. Under our system, any plaintiff in any antitrust matter may affect national antitrust policy through the development of case law, whether the plaintiff is a federal enforcement agency, a private plaintiff or a state attorney general. It's well settled that state attorneys general have the ability to bring multi-state matters or even single-state matters that, in effect, have an impact on national policy. And to the extent that private plaintiffs can do it, and have done it, the states likewise should be able to do it without causing a lot of pause out there. In the Reagan years, of course, the state attorneys general were the ones bringing antitrust cases of national impact because the federal agencies were taking a passive approach to antitrust enforcement. So, to the extent that a national policy exists, even if the policy is one of non-enforcement, I think it's obviously important for a state to take that into account in approaching its own views on antitrust issues. To the extent that there is no policy out there, then a state or set of states should have no compunction nor be disinclined to pursue cases that establish national policies. That's in essence what happened in *Microsoft*, and there was absolutely nothing inappropriate about it.

ANTITRUST SOURCE: Can you think of examples where either the states or private litigants have made national policy through litigation?

CONNERS: Obviously with respect to injunctive relief provisions and the ability for a plaintiff to sue for divestiture after a merger has been consummated, *California v. American Stores* is an important case. As far as laying a foundation for what has become the functional repeal of *Illinois Brick*, there's the *California v. ARC America* case. Finally, there is *California v. Hartford Fire*

Insurance, which not only re-defined “boycott” but became the seminal case the Department of Justice relies on to sue members of international cartels in federal district court. There’s also been a number of cases brought by private plaintiffs, where no federal agency was involved, that ended up reversing prior case holdings; *GTE Sylvania*, which overruled the holding in *Schwinn*, comes to mind, as does *State Oil v. Khan*. There’s a small example out of Florida—the *Lee Memorial* case, where the FTC chose to challenge the acquisition by a public hospital of another hospital in the area, and we actually came out against the FTC and submitted an *amicus* in the 11th Circuit which resulted in some clarification of when state action is applicable and when it isn’t in the 11th Circuit. The point is that state attorneys general, private plaintiffs, and the federal agencies all have had a hand in setting national antitrust policy through litigation. It is not the domain of one enforcer, nor should it be.

ANTITRUST SOURCE: What is the role of the NAAG Task Force Chair in attempting to build a consensus for a particular enforcement outcome or strategy, either in the terms of settling or prosecuting a case?

CONNERS: The role of the Chair is to effectuate generally the best coordination and cooperation possible among the states overall. But, when it comes to specific cases, it becomes the responsibility of the lead states handling the daily oversight of the investigation or litigation in any particular working group to make a recommendation to the larger group as to how to proceed. Our structural approach is to have a working group of states who have signed onto an investigation or joined in a particular litigation who, then, in turn, are led by a core group of states that handle the daily case management. Each state takes on various tasks, not unlike how the class action bar organizes itself in multidistrict litigation. For example, there’s a discovery committee, an experts committee, and a settlement committee. So, depending upon where we are in a given matter, those individuals who are intimately involved in the matter are the individuals the other working group members look to for recommendations regarding enforcement, litigation, or settlement strategies.

ANTITRUST SOURCE: Do you see it as part of your function to try to get agreement from the various states that are involved if the consensus seems to be to settle? Or is it up to the individual states and you don’t feel like you need to play a role in persuading them to join a settlement?

CONNERS: Certainly, the Chair can be of assistance, depending on the circumstances. Typically, though, the states that are taking the lead are the ones that will send out the information regarding the settlement to the states that are in the litigation and offer the opportunity to states who may not be in the litigation to join the settlement. We encourage global settlements and we’ve been very, very effective in obtaining global peace in cases where some people thought it was not possible. *Mylan* was one of them, and it was a very difficult set of circumstances. We ultimately succeeded in getting all fifty states involved in the settlement. It’s a wonderful settlement for consumers as a result.

ANTITRUST SOURCE: Do you think there are too many antitrust enforcers in this country?

CONNERS: The short answer is “no, I don’t think so.” While there’s occasional overlap in the remedies that are sought, the bottom line is that most of the time each antitrust enforcer is seeking a

different kind of relief and usually all of them can be reconciled. The FTC, for example, typically brings administrative proceedings which result only in injunctive relief, and the Department of Justice often deals only in criminal enforcement outside of the merger context. State attorneys general typically represent their consumers and public entities for damages. And, of course, the private class action bar may overlap with us a little as they often represent consumers, but other times, they represent only the direct purchaser commercial entities. So, the focus of each antitrust enforcer is different and all of these perspectives are important to ensure that all who are harmed by the illegal conduct are properly redressed. Additionally, I think cases generated by this kind of concurrent enforcement, when it is concurrent, are a good thing. It makes the law more predictable because there is more law out there upon which to base decisions involving matters with antitrust implications. Moreover, there is no one enforcement agency that has a monopoly on antitrust enforcement that might otherwise preclude the initiation by others of cases that should be brought. This makes for a broader-based approach to antitrust law that's not dependent upon the policies of any one agency. And I think that's a good thing. And, finally, all enforcement is conducted pursuant to general common legal principles within a very integrated court system, so even if a state attorney general goes off and sues on a particular hospital matter which might be considered very local, if he gets his head handed to him in court, that ruling has general application in other contexts of enforcement. It's not lost on the other enforcement agencies.

ANTITRUST SOURCE: How do the states decide on which cases to bring? What are your case selection criteria?

CONNERS: It doesn't differ too much on a multistate basis from what it would be on a state-by-state basis, other than the fact that, obviously, multistate cases are of broader reach. First, for those states with criminal enforcement authority, it goes without saying that criminal antitrust cases are always a priority. Bid-rigging cases, for example, are ones that when brought to state attention, we act on very rapidly. These cases, of course, tend to be handled by individual states and would not likely be multistate matters because they generally deal with the rigging of bids on local public entity contracts within states.

Regarding civil antitrust matters, the case selection criteria for a multistate matter are pretty much the same as they are for an individual state matter. The first question is, who's been harmed by the illegal conduct. If the potential class of victims is consumers or public agencies then, of course, it's more likely that state attorneys general will be interested in bringing a case. Another factor is whether an antitrust violation has local or regional impact or is only national in effect. State attorneys general are often more interested in pursuing cases that have a unique impact in their local area or region rather than those with a uniform national impact. If the case also has a national impact, that is often tangential to whether there is a particular adverse impact locally or regionally. The third factor is whether the case is one that is in the public interest, and if it is, is the ground already being plowed adequately or sufficiently by the private class action bar or otherwise. The presence of the private plaintiffs bar sometimes, but not always, plays a role in how aggressive state attorneys general are going to be in a particular matter. Another very important consideration is whether the primary purpose of bringing a case is to attain some sort of complex, injunctive relief as opposed to perhaps seeking monetary damages. If strong injunctive relief is the primary goal, then the case is less likely to be pursued by the private bar and, therefore, it is the kind of case that state or federal enforcers are more likely to take on. Finally, taking all of these other factors into account—I know this is true in my state and I think it's true across the board—the ques-

tion is, is it the right thing to do? Is this the kind of case that needs to be brought, after weighing everything, the difficulties and risks of litigation, resource expectations, and all the other things that you might normally be concerned about in making a decision to litigate. And, if the answer is “yes,” invariably, that’s the case we’re going to bring.

ANTITRUST SOURCE: How important is the factor that you mentioned—that other people are prosecuting the same case? Either the private plaintiffs bar or the federal antitrust agencies, or both?

CONNERS: I think it depends on the remedies being sought, who’s being represented, and how far along the litigation is. Also important is whether the litigation is being pursued in a manner that will likely attain a result similar to what we would anticipate obtaining if we were bringing the case. So, the presence of existing private plaintiffs’ litigation or federal agency enforcement initiatives is important but may not necessarily foreclose state attorneys general from acting. The generic drug cases are a perfect example. While the FTC, in some of the cases, has obtained injunctive relief, and the class plaintiffs bar has filed numerous lawsuits on behalf of direct and indirect purchasers in various courts, the state attorneys general have joined in the existing multidistrict matters, representing state public agencies and consumers, seeking damages and civil penalties, among other things. There are some thirty states in the *Cardizem* case pending in federal district court in Michigan. We have around thirty-four in the *Buspar* case. We’re in these cases because they are important policy cases for the state attorneys general to bring on behalf of their constituents and their various state and local agencies, and we would be in them whether or not the class action lawyers were involved in the process.

Another example is the coordinated *Vitamins* multiple state court cases, where indirect purchaser cases were already filed all over the country on behalf of consumers by the private plaintiffs bar and the federal government had obtained record criminal fines by the time the state attorneys general became involved on behalf of consumers and state agencies. The coordination with the private bar in that case was remarkable and the result fantastic, and neither was dramatically affected by the subsequent arrival of the state attorneys general to the litigation and settlement negotiations. In fact, the result ultimately achieved was more attainable once the attorneys general were in the litigation because our presence enhanced the defendants’ prospects of obtaining global peace, which is clearly what they wanted.

ANTITRUST SOURCE: Can you tell me what your priorities are for the multistate antitrust task force for the next few years under your leadership?

CONNERS: Primarily there are three priorities. One is to improve upon case coordination among the states in antitrust matters whether they be in state or federal court. We work quite well together, but there is always room for improvement and there’s always room for better coordination. The second priority is to improve upon our already excellent relationship with the federal agencies, including streamlining the merger review process, and continuing the dialogue, which has been very frank and open, with the federal agencies. This latter priority includes rekindling an interagency working group we had in place a few years ago called the Executive Working Group for Antitrust. Members included representatives from the Federal Trade Commission and the Department of Justice Antitrust Division at the executive level, as well as the state attorneys general who lead the NAAG Antitrust Committee and the Chair and Vice Chair

of the Multistate Task Force. Currently, then, the working group would include FTC Chairman Muris, DOJ Antitrust Division Assistant Attorney General Charles James, Oregon Attorney General and NAAG Antitrust Co-convener Hardy Myers, Co-convener Attorney General Eliot Spitzer of New York, Co-convener Joseph Curran of Maryland, my national Vice Chair for the Task Force Jim Donahue of Pennsylvania and myself. Even though we are all fairly new in our federal, NAAG, or Task Force positions, we've already met to discuss increased federal cooperation and coordination. Finally, my third priority is to improve coordination with the private plaintiffs, especially in the settlement context. We have a wonderful working relationship with the private plaintiffs bar and I'd like to see that continue in the myriad of matters that we're handling now, as well as in the future.

ANTITRUST SOURCE: You mentioned streamlining merger review by the states. Can you tell us what that would involve?

CONNERS: There are essentially two different levels of coordination when the states do merger reviews. One is among the states and the other is between the states and the federal agency conducting the review at the federal level. At both levels, we already have in place an excellent working relationship, but the coordination and cooperation can always be improved upon and better streamlined. With respect to state coordination, we have the NAAG Voluntary Compact, which, whether or not formally invoked by the merging parties, has served as a template for ensuring effective coordination and the avoidance of duplication by the states in a joint merger review. Each merger brings a new and different set of circumstances which may require re-tooling the states' approach to merger reviews from time to time. As a result, states are constantly improving on the ways in which they share, review, and code documents; conduct interviews and depositions; coordinate experts and coordinate interaction with the merging parties and their counsel. We are actively discussing within the Task Force ways of streamlining our approach to merger reviews, including acquiring uniform litigation support software capable of handling voluminous documents and data and establishing teams of assistant attorneys general experienced in merger reviews within a particular industry who will put together model pleadings and other pertinent information for use by their colleagues in other states when confronted with a merger in an industry with which they may not be familiar.

On the federal level, we have the 1998 Merger Protocol, an agreed upon set of procedures to effectuate coordination between the federal agencies and the states when conducting merger reviews. [Antitrust Trade Reg. Rep. (CCH) ¶ 13,420 (1998)]. The Protocol has been an effective tool and both the states and the federal agencies feel very strongly about continuing to implement it in our parallel reviews. The antitrust bar can only benefit from this kind of coordinated effort. The Protocol is a great prototype to work from to improve upon the coordination of our merger review process with the federal agencies so that the antitrust bar and the merging parties can benefit from the efficiencies of such a coordinated relationship.

ANTITRUST SOURCE: Are the states generally supportive of the FTC and DOJ when they are asserting equitable remedies like disgorgement and restitution in cases where the states could obtain direct and indirect damages under state or federal law?

CONNERS: My read of the Task Force on this issue is that the states are very supportive of equitable remedies such as disgorgement and restitution. After all, as was demonstrated in the *Mylan*

My read of the Task Force on this issue is that the states are very supportive of equitable remedies such as disgorgement and restitution. After all, as was demonstrated in the Mylan case, many states have these very same remedies available to them under state law.

case, many states have these very same remedies available to them under state law. Disgorgement and restitution are strong deterrents, in my view—especially in conjunction with other remedies. Clearly, though, while remedies like disgorgement are available to state and federal agencies in some instances, that doesn't foreclose states or private plaintiffs from bringing cases seeking damages. Disgorgement and damages are two separate and distinct remedies. So, regardless of what the federal agencies may seek to obtain as an equitable remedy, the states are still going to be out there seeking damages for our public entities and consumers who were harmed by the same unlawful conduct.

ANTITRUST SOURCE: What role do you think the states have to play in the area of high technology matters, including the evolving relationship between antitrust and intellectual property law, the latter of which is, in large part, the province of federal law?

CONNERS: I think the states have the same role that they would have in any other matter involving antitrust. High technology matters, while they involve a new lingo and a new set of circumstances, raise the same antitrust issues as any other industry. The fact that intellectual property is sometimes involved does not mean that the antitrust analysis is typically going to be any different than if it wasn't. All the states need to do is to move up the learning curve needed to understand the particulars of the industry, and we're doing that.

ANTITRUST SOURCE: Are states, do you think, in a good position to balance the sometimes competing interests of patent law, which is obviously not a subject of state law, and antitrust?

CONNERS: Oh, sure, I think you've seen that in spades in the generic drug cases. We have several folks in those cases who have become immersed in patent issues and understand the interface between patent law and antitrust better than some patent attorneys, I would venture to guess, and certainly better than some antitrust lawyers. I believe that we have a firm, firm grasp on that particular component. It's a fascinating area and an important one to pursue, especially now in the context of the generic drug cases we've brought on behalf of our consumers and public entities.

ANTITRUST SOURCE: Let me ask you about another specific enforcement area. What is your perception of the view of the federal agencies toward hospital mergers and multispecialty physician mergers? How does that perception affect the states' view of these transactions?

CONNERS: I think there is no doubt that federal agencies have had a tough time with hospital and health-care related mergers. Of course, I point out that where they've had some successes, state attorneys general have been involved—in the *Poplar Bluff* trial phase, for example, and in Florida, in the Morton Plant/Mease Hospital matter. In the latter case, Florida is a co-plaintiff with the Department of Justice on a consent decree involving a joint venture, which is still in effect today. It was negotiated back when Anne Bingaman was the Assistant Attorney General in charge of the Antitrust Division, so it goes back a bit. In those situations, where state attorneys general have partnered with the federal agencies, there have been more successes than failures. A state attorney general can bring a local perspective to a merger challenge and perhaps lend more credibility to the federal agency's litigation. Having said that, I don't think that the federal agency's recent track record with hospital mergers and health-care related mergers means that

The states remain involved and active in merger reviews and have challenged proposed mergers or joint ventures where they've felt it necessary to do so, whether or not the federal government has acted.

they've abandoned the field by any stretch—I'm sure they're just more careful to pursue the cases that they think are important to pursue. That has not changed, by the way, the perception of states that pursue these deals. The states remain involved and active in merger reviews and have challenged proposed mergers or joint ventures where they've felt it necessary to do so, whether or not the federal government has acted. One example is the *Poughkeepsie* case in New York, where the federal agencies took a pass on a proposed joint venture and the New York Attorney General challenged and prevailed. Another was the *Summit Hospital* case in California, where the FTC passed on the proposed merger and the California Attorney General challenged the merger and lost. So, there is hardly any feeling from the states' point of view that these deals, which involve local markets with which states are often intimately familiar, should not be challenged when they appear to be anticompetitive, regardless of what the federal agencies may determine.

ANTITRUST SOURCE: On the subject of coordination, I'm interested in the effect that the multiplicity of enforcers with potentially different agendas has on parties' attitudes in negotiating with the government about a dispute. The states often announce at the beginning of settlement negotiations that the negotiating states will only recommend settlements to their individual attorneys general, and that each state makes a sovereign decision whether to join or not. What assurance can a multistate litigating group give to a defendant that it can receive global peace as a result of negotiation?

CONNERS: Well, I think our record speaks for itself. The states have been extremely successful in getting global peace, or near-global peace, in several of our cases—the *Mylan* case is one such case; the *Nine West* resale price maintenance case is another one. And, of course, the *Vitamins* indirect proceedings are a remarkable example. Obviously, we can't guarantee global peace in every instance so we have to make the representation at the beginning of settlement negotiations that while we can't guarantee a global settlement, we can always recommend to individual attorneys general that they accept the result of our settlement negotiation. There is always a possibility that a particular state may decide that it doesn't wish to be part of the results of a settlement negotiation, but that's unlikely for a number of reasons. First of all, states join multistate litigation to, among other things, benefit from the resource and cost-sharing that wouldn't otherwise be available if the individual state was forced to bring a case on its own. And so, it's unlikely that a state that has joined the matter for this reason would not then turn around and participate in a result. Secondly, there routinely is terrific coordination between the litigating states at all the levels of litigation, but in particular at the settlement level. Every aspect of a settlement is vetted with the larger group, so the states have every opportunity to talk about issues that concern them, including how to work around potential problems or sticking points for various states. Finally, I think that the reality is that everyone eventually wants to see these cases settle, and to the extent that the defendants are willing to sit down and work through all the various issues that might come up with respect to statutory nuances, for example, or other unique components with respect a particular state, it always works out. Having been involved in my share of multistate settlement negotiations, especially recently, I am always very confident that if a matter is meant to settle, it will always work out.

ANTITRUST SOURCE: I want to ask you a question about vertical cases generally. Do you have any plans to update NAAG's vertical restraints guidelines to take account of things like the *Khan*

decision on maximum resale price maintenance?

CONNERS: The Task Force doesn't have any plans to update the guidelines. Obviously, the law has changed, in particular with the *Khan* decision, and so the guidelines could be tweaked to acknowledge the change. But, to my knowledge, no state has ever brought a maximum price fixing case, so the *Khan* decision doesn't really, in my view, provide us with enough of a basis for updating the guidelines. *Khan* is recognized law and will be dealt with by states accordingly. Of course, as Chair, I'm always open to comments or suggestions from anyone interested in providing them regarding updating these guidelines or any other guidelines.

ANTITRUST SOURCE: Do you think that states consider themselves bound by *Khan* in terms of their state law?

CONNERS: I don't know the answer to that with respect to every state. I think that's an individual case-by-case determination, and I'm not versed in all of the various state laws. Some of them may, in fact, somewhat contradict *Khan*. It's an interesting question that I doubt will ever really be answered because, again, I don't think states typically bring those kinds of cases. Our focus has been in the minimum price-fixing area and we've had great success there, and that's probably where our focus will stay.

ANTITRUST SOURCE: Going back to the topic of coordination of states' enforcement activities and the federal government's enforcement activities, now that the leadership has changed at both agencies, do you expect the level of cooperation with the states to increase or decrease or stay the same?

CONNERS: My experience so far with the new administration tells me that the level of cooperation will increase. Currently, cooperation is excellent, and I think that the federal agencies are committed to ensuring that federal-state cooperation continues to be a priority. We have, as I mentioned, already revamped the small group that we call the Executive Working Group for Antitrust and we've already had one meeting with representatives from both agencies. It was a very productive meeting that I believe will be an excellent launching point for expanding upon the dialogue regarding state-federal cooperation and coordination. We've had discussions about the 1998 Merger Protocol and how to proceed there and how to work together on non-merger civil cases in a more effective manner. The federal agencies each have federal-state liaison positions that are extremely active. The FTC's liaison position is currently held by a veteran staff member, Karen Berg. She's been in the liaison position for the last year or so. Gail Kursh, formerly of the DOJ health care task force at the Department of Justice, is now the liaison for state-federal cooperation for the Division. I've known her for years and I have tremendous respect for her. I think she will bring a very positive and open-minded attitude to our dialogue. So, the message has already been sent by the new administration that this is an important issue to them, they know it's an important issue to us, and it should be a very important issue to the antitrust bar to ensure that we effectively work together, speak often, and cooperate as much as possible so that matters can be coordinated effectively and efficiently for the good of everyone involved in an antitrust review.

ANTITRUST SOURCE: At the federal level, the two enforcement agencies have recently entered into an agreement to allocate the review of merger matters according to the industry that the merg-

er is occurring in. Have the states ever given any consideration to dividing responsibility for certain kinds of matters along industry or subject-matter lines to increase efficiency?

CONNERS: Actually, yes, and it's interesting you ask that question, because one of the things we've been tweaking with Attorney General Myers and others is the idea of garnering all the expertise that we have with respect to various industries and organizing this wealth of knowledge and experience by industry to be tapped as needed by states or groups of states that find themselves faced with an antitrust matter involving industries they've perhaps never dealt with before. Throughout the country, there are a number of state assistant attorneys general who have years of experience with respect to particular industry matters. For example, they may have dealt with merger after merger involving the same industry, like oil and gas or banking, or they may have been very, very involved in health care antitrust matters for their state over the years. So, we've taken what was already in place—this knowledge and understanding of a particular industry—and created industry working groups, which an individual state attorney general or groups of state attorneys general can go to, if they don't have the expertise, to enhance their knowledge and deal appropriately and effectively with the matter at hand. Our industry working groups include banking, telecommunications, petroleum products, energy, pharmaceuticals, airlines, and health care, and they're headed up by assistant attorneys general experienced in each industry. These individuals can provide not only a wealth of experience with respect to the industry, but also model documents and pleadings to help any state at anytime get started on industry matters involving similar issues.

ANTITRUST SOURCE: Would that span more than just merger review but also non-merger investigations or enforcement?

CONNERS: Both. It just happens to fit better into the merger context because of the learning curve that is involved in, say, understanding banking and understanding oil and gas or whatever the industry involved in the merger might be. But certainly, it would extend to the civil non-merger context as well. Take health care as an example. There are a lot of cases involving health care antitrust matters that are non-merger related that the states have dealt with over the years and, we have compiled a compendium of health care cases and information for other states to access if they need it, information the states may not otherwise have known about that they can use to their benefit in their own states.

ANTITRUST SOURCE: Aren't the AGs just way too political to be making antitrust enforcement decisions?

CONNERS: No. I think that's a major misperception of state attorneys general, if it's out there. First of all, antitrust enforcement typically is handled at the staff level at such detail that state attorneys general don't get involved in it. Of course, the state attorneys general each make the ultimate decision as to whether to bring a case or whether to settle the case or not, but the politics of the situation, if there are any, don't enter into it. The ultimate decision in bringing a case is whether it is the right thing to do. A prime example of that truly is the *Microsoft* case. *Microsoft* was a case that a lot of states were reluctant to get into, but they got into it in the beginning because, at the time, it did not appear as though the Department of Justice was going to be bringing a broader action. When the DOJ did ultimately file, some states chose to file with the Department of Justice and some

chose not to, but those that chose to join believed it was in the best interest of their constituents as well as the preservation of competition to do so—they thought it was the right thing to do. It goes back to the way we weigh cases and examine them, and politics is not one of the elements. ●

International Cartels: Who's Liable? Who's Not?

Tracking a Moving Target

Ronald W. Davis

For about half a century antitrust did not concern itself with international cartels—either they were not there, or the enforcers could not find them. Then, beginning in the latter part of the 1990s, a series of criminal actions under the Sherman Act against international cartels led ineluctably—as civil actions followed the criminal prosecutions—to the exposure of significant gaps and ambiguities in the legal treatment of international cartels.

Where anticompetitive behavior in foreign countries has no adverse effect on competition in the United States, foreign purchasers and other victims have no U.S. antitrust claim. That much is clear under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (FTAIA).¹ But what about foreign victims of a true international cartel—one that reduces competition both in the United States *and* abroad? Are their Sherman Act claims barred by the FTAIA and/or principles of standing? Or do deterrence and other policy considerations require that foreign victims should be able to sue in the United States?

Two recent cases are of particular moment. In *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002), the Second Circuit may have created a conflict among the circuits as to whether foreign purchasers from an international cartel have a right of action under U.S. law—and brought to a screeching halt the hitherto strong trend against such claims. And in *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629 (7th Cir. 2002), decided February 6, the Seventh Circuit indicated that foreign participants in international cartels may be liable to U.S. purchasers to whom they did not sell, whether or not they are also liable to foreign purchasers, to whom they *did* sell.

It makes a difference who is liable in an international cartel context; it makes a difference who has a claim and who does not; and it makes a difference who gets left holding the bag. First, enormous sums of money may turn on the answers to still controversial questions—which makes these questions important to the parties involved, and to their counsel. Second, precisely *because* enormous sums of money are involved, the answers can make a big difference in deterring (or providing an incentive for) anticompetitive conduct. And third, getting the application of the Sherman Act to international cartels right is an important building block in the foundation of a multi-national antitrust enforcement system.

Thus . . .

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¹ *E.g.*, *Liamuiga Tours v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 922 (E.D.N.Y. 1985) (lack of anticompetitive effect in the United States doomed antitrust action against defendant, a consumer of services of destination tour operators in St. Kitts, who allegedly excluded plaintiff from that market by refusing to do further business).

Assume a Cartel

Assume an international cartel. Assume the members of the cartel include, among others, DM (a U.S. domestic manufacturer) and FM (a foreign manufacturer selling solely to foreign buyers, i.e., with no sales directly in or into the United States). Assume that without FM's participation in the cartel, the U.S. side of the conspiracy would have been ineffective (because U.S. buyers would have responded to an artificial price increase by purchasing in competitive foreign markets).

Assume a suit for damages under the Clayton Act, seeking damages for violation of the Sherman Act, as amended by the FTAIA, brought against all the members of the cartel including DM and FM. The plaintiffs include (1) FP (a foreign entity that does not do business in the United States, is not affiliated with any U.S. entity, and buys directly from FM, solely outside the United States) and (2) DP (a U.S. entity whose only direct purchases from members of the cartel were from DM, such sales having occurred solely in the United States).

This not-so-hypothetical hypothetical raises several interesting questions:

Question 1. Has FM—which does not sell in or into the United States—violated the Sherman Act, or, on the contrary, is its participation in the cartel exempt by reason of the provisions of the FTAIA? (Some courts imprecisely formulate this question by asking whether the FTAIA affords “subject matter jurisdiction” over FM.)

Question 2. If the answer to Question 1 is that FM did not violate the Sherman Act, the logical implication is not only that FM owes no Clayton Act damages to FP, the foreign direct purchaser, but *also* that

- *domestic* purchasers from the cartel, like DP, have no claim against FM under a theory of joint and several liability, and that
- no one may seek to enjoin FM, under Section 16 of the Clayton Act, from further cartel activity, and that
- FM has *no criminal liability* for violation of the Sherman Act.

Is each of these seemingly logical implications correct? (Note that a number of Sherman Act criminal cases have actually been brought against alleged foreign cartel participants; indeed, most of the civil cases discussed in this article have parallel criminal prosecutions.²)

Question 3. Now assume that FM's participation in the international cartel *is* a violation of the Sherman Act, as amended by the FTAIA. On that assumption, do entities such as FP, which purchased only outside the United States, have a claim for damages against FM under Clayton Act Section 4,³ 15 U.S.C. § 15, or, on the contrary, are such claims barred by principles of standing?

Question 4. Finally, continuing to assume that the foreign cartel participant, FM, *did* violate the Sherman Act, is FM jointly and severally liable (along with domestic defendants such as DM) for injuries caused by the cartel to *U.S.* direct purchasers from the cartel—regardless of whether the Clayton Act claims of foreign purchasers might be barred for want of standing?

² United States v. Nippon Paper Indus., 109 F.3d 1, 2 (1st Cir. 1997) (upholding government's right to prosecute international members of alleged thermal fax paper cartel); United States v. J. Alfred Taubman, Crim. No. 01 CR 429 (GBD) (S.D.N.Y. filed May 2, 2001) (auction house cartel); United States v. Lonza AG, Crim. No. 3-98-CR-338-R (N.D. Tex. filed Mar. 1, 1999) (vitamins); United States v. UCAR Int'l, Inc., Crim. No. 98-177 (E.D. Pa. filed Apr. 7, 1998) (graphite electrodes); United States v. HeereMac, v.o.f., Crim. No. 97 CR 0869 (N.D. Ill. filed Dec. 22, 1997) (heavy-lift barge services).

³ Assuming, of course, there is personal jurisdiction over FM, venue is proper, and the action is not barred by the doctrine of *forum non conveniens*. These same assumptions apply to Question 4 as well.

It makes a difference who is liable in an international cartel context; it makes a difference who has a claim and who does not; and it makes a difference who gets left holding the bag.

One Year Ago

As of the summer of 2001, four recent cases had addressed Question 1⁴—whether a foreign participant in an international cartel, who sells only outside the United States, has engaged in conduct violative of the Sherman Act, as amended by FTAIA—and all had answered in the negative. In *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 1059 (2002), over a vigorous dissent by Judge Patrick Higginbotham, the court held that heavy-lift barge service providers, alleged cartel participants, were not liable to a foreign purchaser. In *In re Microsoft Corp. Antitrust Litigation*, 127 F. Supp. 2d 702 (D. Md. 2001), the Sherman Act claims of foreign direct purchasers from an alleged worldwide monopolist were held to be barred by the FTAIA; the question was certified to the Fourth Circuit, which continues to ponder it. In *Kruman v. Christie's International*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001), *aff'd*, 284 F.3d 384 (2d Cir. 2002), the court held that buyers and sellers from London branches of Sotheby's and Christie's could not recover under the Sherman Act for alleged conspiratorial overcharges. (As noted above, the Second Circuit has recently reversed the district court. A petition for rehearing or hearing *en banc* is pending in the Second Circuit as of this writing.) Finally, the court in *In re Copper Antitrust Litigation*, 117 F. Supp. 2d 875 (W.D. Wis. 2000), held that buyers on the London Metals Exchange, who allegedly were illegally “squeezed” as part of an international scheme affecting prices in the United States, had no action against cartel participants.

As of the summer of 2001, four recent cases had addressed Question 1—whether a foreign participant in an international cartel, who sells only outside the United States, has engaged in conduct violative of the Sherman Act, as amended by FTAIA—and all had answered in the negative.

Each of these courts faced the challenge of construing the language of the FTAIA, which provides that the Sherman Act,

shall not apply to *conduct* involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such *conduct* has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) *such effect gives rise to a claim* under the provisions of [the Sherman Act], other than this section.

If [the Sherman Act] applies to such conduct only because of the operation of paragraph (1)(B), then [the Sherman Act] shall apply to such conduct only for injury to export business in the United States. (emphasis added)

The Supreme Court has called this language “unclear” in important respects, *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 796 n.23 (1993), and many would agree, yet these courts generally agreed, in the words of the Fifth Circuit, that “the *plain language* of the FTAIA precludes subject matter jurisdiction over claims by foreign plaintiffs against defendants where the situs of the injury is overseas and that injury arises from effects in a non-domestic market.” *Den Norske*, 241 F.3d at 428 (emphasis added).

In general, these courts reasoned that

- the word “conduct,” as used in the FTAIA, should not be read to mean the act of joining in a cartel but rather the act of selling to a foreign purchaser at a price that includes an anti-competitive overcharge, and that

⁴ See Ronald W. Davis, *Developments: International Cartel and Monopolization Cases Expose a Gap in Foreign Trade Antitrust Improvements Act*, 15 ANTITRUST, Summer 2001, at 53 (outlining the issues in greater detail and discussing the four cases cited in this paragraph). See also Note, *A Most Private Remedy: Foreign Party Suits and the U.S. Antitrust Laws*, 114 HARV. L. REV. 2122 (2001).

- subsection (2) of the statute should be construed as if it read “such [direct, substantial, and reasonably foreseeable anticompetitive] effect gives rise to *the* claim” by the particular plaintiff in the lawsuit—instead of “a claim,” in other words, a claim by anyone entitled to sue for antitrust relief.⁵

Although these four cases focused on the FTAIA, two of them, *Copper* and *Microsoft*, particularly the latter, gave some attention to standing as well.⁶ To the extent they addressed the subject, not surprisingly, they found a lack of standing.

The Weight of Authority Grows Heavier

Several other cases continued the trend against allowing claims by foreign purchasers. In *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, No. Civ. 001686TFH, 2001 WL 761360 (D.D.C. June 7, 2001), Judge Hogan ruled that a purported class of purchasers of price-fixed vitamins, who took delivery outside the United States, were barred by FTAIA subsection (2) from pursuing Sherman Act claims because no anticompetitive effect in the United States resulted from their having paid an overcharge on foreign purchases. In the alternative, the court ruled that such claims were also barred for want of standing.⁷ An appeal is pending in the D.C. Circuit.

In *Ferromin International Trade Corp. v. UCAR International, Inc.*, 153 F. Supp. 2d 700 (E.D. Pa. 2001), foreign purchasers from the alleged international graphite electrode cartel were permitted to pursue Sherman Act claims for sales invoiced from the United States, but not for purchases made outside the United States, even though the members of the cartel were U.S.-based companies. The Third Circuit is considering an appeal.

Finally, in *Sniado v. Bank Austria AG*, 174 F. Supp. 2d 159 (S.D.N.Y. 2001), the court addressed a U.S. antitrust claim arising from an alleged agreement among European banks to inflate fees for exchanging European currencies. Some of the allegedly inflated fees may have been charged on transactions occurring in the United States, but the salient point was that the plaintiff had suffered injury only on transactions in Europe. Judge Schwartz discussed the case law in some detail and dismissed the complaint based on the “majority view” that, to survive FTAIA scrutiny, the injury of which plaintiff complains must be one and the same as the injury that creates the requisite “direct, substantial, and reasonably foreseeable [anticompetitive] effect” in the United States. *Id.* at 163.

In sum, by early 2002, as the cases piled up, they showed a very strong trend away from permitting U.S. antitrust damages claims by foreigners purchasing abroad from participants in international cartels. In a brief opposing certiorari in *Den Norske*, the Antitrust Division and the Federal

⁵ In his *Den Norske* dissent, Judge Higginbotham was scathing in his criticism of what he saw as his colleagues’ disregard of the difference between the definite and the indefinite article. 241 F.3d at 432.

⁶ In *Microsoft* Judge Motz rejected the claims for lack of standing after citing with approval an earlier unreported case, *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259FMS, 1997 WL 732498, at *1–*2 (N.D. Cal. Nov. 19 1997), which had found FTAIA “subject matter jurisdiction” over a claim by foreign citric acid purchasers buying abroad from foreign manufacturing facilities owned by U.S.-based alleged cartel participants.

⁷ In a companion ruling, however, the court distinguished *Empagran* and permitted Sherman Act claims by “American companies or subsidiaries of American companies that have purchased substantial volumes of vitamins for delivery both in the United States and abroad as part of a global procurement strategy formulated and directed by United States parent corporations whereby these plaintiffs suffered ultimate financial injury in the United States.” *In re Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 755852, at *2 (D.D.C. June 7, 2001). The reasoning underlying this distinction is thin and difficult to follow, especially in view of abundant authority holding that derivative injury to shareholders does not afford antitrust standing. *See, e.g.*, *Information Resources, Inc. v. Dun & Bradstreet Corp.*, 127 F. Supp. 2d 411, 417 (S.D.N.Y. 2000) (U.S. parent company had no antitrust derivative claim for injuries suffered by foreign subsidiaries, allegedly due to anticompetitive conduct by the defendant).

Trade Commission likewise opposed recovery by foreign purchasers suing in the United States.⁸ At the same time, the courts were backing away from the proposition that participation by foreigners in international cartels is not “conduct” forbidden by U.S. antitrust law and were instead hanging their hats on the alternative, and more limited, rationale that an antitrust plaintiff’s claim may not be heard unless that plaintiff has suffered antitrust injury in the United States.

By adopting that more limited justification—bypassing the question of whether a foreign cartel participant violates U.S. law in the abstract—the courts were able to avoid issues such as whether a foreign cartel participant could be criminally indicted in the United States, or whether it could be enjoined to cease its cartel activity. The no-U.S.-anticompetitive-injury rationale suffers, however, from certain embarrassments, which the case law noted above arguably has not explained away. These include

- the need to ignore that pesky indefinite article in FTAIA subsection (2), pretending that the statutes says “*the* claim” when it actually says “*a* claim,”
- the fact that Congress simply did not have international cartels in mind when it drafted the FTAIA in 1982, but was instead thinking about other issues altogether, and
- the consequent need to read the legislative history in a rather selective manner.⁹

Second Circuit Rejects the Weight of Authority; Seventh Circuit Just Ignores It

Unintimidated by the weight of authority prohibiting foreign claims against international cartel participants, on March 13 of this year, the Second Circuit reversed the district court’s decision in the auction house cartel litigation. *Kruman v. Christie’s International PLC*, 284 F.3d 384 (2d Cir. 2002). In doing so, the court harkened back to its pre-FTAIA decision in *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), and reaffirmed that the Sherman Act applies to foreign conduct that “injures domestic commerce by either (1) reducing the competitiveness of a domestic market; or (2) making possible anticompetitive conduct directed at domestic commerce.” *Kruman*, 284 F.3d at 394. The Second Circuit said that the alleged agreement “could be an agreement to fix prices in both foreign and domestic auction markets,” *id.* at 401, in which case the first leg of the test would apply, that is, the defendants’ conduct had reduced the competitiveness of a U.S. domestic market. Alternatively, said the court, the complaint might be read as alleging “an agreement to fix prices in a foreign auction market that made possible an agreement to fix prices in the domestic auction market.” *Id.* In other words, even if there were “separate” foreign and domestic conspiracies, the complaint alleged that the foreign conspiracy was essential to make the domestic conspiracy work. Thus the second prong of *National Bank* would be satisfied.

Essentially embracing Judge Higginbotham’s dissent in *Den Norske*, the Second Circuit firmly rejected the two theories on which prior courts had held foreign plaintiffs’ claims barred by the FTAIA. First, the court held that “the word ‘conduct’ [in FTAIA] refers to any conduct that would violate . . . the Sherman Act absent the FTAIA. Such conduct necessarily focuses on the acts of the defendant, not the injury to the plaintiff needed to bring a Clayton Act case.” *Id.* at 398.

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⁸ The government argued that the Fifth Circuit’s decision does not prejudice U.S. criminal enforcement against international cartels, that taking *cert* would be premature in view of the fact that several circuits are considering the FTAIA’s impact on suits by foreign purchasers, and that, in any event, the Fifth Circuit’s decision was correct. Brief for the United States and the Federal Trade Commission as Amici Curiae, *Statoil ASA v. HeereMac V.O.F.*, No. 00-1842 (U.S. Sup. Ct. filed Jan. 3 2002), available at <http://www.usdoj.gov/atr/cases/f9800/9844.htm>.

⁹ For a somewhat more detailed treatment of these matters, see Davis, *supra* note 4.

Second, the court disagreed with the assertion that “subsection 2 of the FTAIA changed the *National Bank of Canada* test to require that the ‘effect’ on domestic commerce be the basis for the alleged injury suffered by the plaintiff.” *Id.* at 399. That way of looking at things, said the court, (1) confuses the Sherman Act (which specifies the acts that violate the law) with the Clayton Act (which specifies who has a claim for damages), (2) ignores the favorable citation to *National Bank of Canada* found in the FTAIA’s legislative history, and (3), perhaps most egregiously, rewrites the statute to replace the indefinite with the definite article—most definitely a no-no. *See id.* at 399–400.

One hopes, however, that before breaking out the champagne the plaintiffs in *Kruman* continued reading to the end of the opinion. Rather than simply permitting the foreign purchasers to proceed with their damages claim, the appellate court remanded for consideration of the defendants’ argument on venue as well as their contention that, even if the defendants’ alleged London activities violated U.S. law in the abstract, the plaintiffs nevertheless lacked standing to seek damages for that violation.

Addressing standing, the court briefly, but cogently, identified the relevant issues for consideration in the standing inquiry: balancing the additional deterrence effect of permitting U.S. suits by foreign plaintiffs against the burden on the U.S. judicial system of permitting foreign antitrust plaintiffs to litigate in the United States. *Id.* at 403.

The court harkened back to a significant pre-FTAIA precedent, *Pfizer, Inc. v. India*, 434 U.S. 308 (1978), which held that a foreign government purchaser from U.S. based producers that had cartelized a world market was a “person” within the meaning of the Clayton Act and could pursue an antitrust claim. Although the *Pfizer* Court did not analyze the issue in terms of “standing,” it did discuss at some length the need to decide the case in such a way as to deter future antitrust violations, a concern we recognize today as vital to the “standing” inquiry.¹⁰

Pfizer involved a U.S.-based cartel operating in many countries, not a true international cartel involving foreign participants, and hence the Supreme Court had no occasion to focus on the question of how U.S. antitrust would apply to true international cartels. Similarly, there is no real evidence that Congress had international cartels in mind when it enacted the FTAIA in 1982.

The decision of the *Kruman* panel may be reversed as a result of the petition for rehearing or hearing *en banc*. If, however, the decision stands, on remand the district court will be forced to grapple with a hitherto unresolved mystery; it must decide whether, even if a foreign cartel participant “violates the Sherman Act” in the abstract, a foreign purchaser nevertheless lacks standing to seek damages. The factors that the court will presumably consider in making this decision are not precisely the standing factors laid out in *Associated General Contractors*¹¹ (AGC), for a conventional domestic context, but there is a certain similarity.

(a) For example, one AGC factor is the nature of the injury and the relation between the injury and the purposes of the antitrust laws. In addressing whether foreign purchasers have standing, courts will no doubt emphasize that it is not a purpose of U.S. antitrust to preserve competitive conditions in foreign countries for the sake of foreign consumers and competitors (a point made in many of the cases discussed above).

¹⁰ For example, in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court ruled that direct purchasers may sue to recover their entire overcharge, even if they have passed it on to others, because awarding a windfall to direct purchasers makes antitrust private enforcement more efficient and thus serves to deter violations.

¹¹ *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519, 534–45 (1983).

[T]he Seventh Circuit,
per Judge Easterbrook,
issued its opinion in
*Paper Systems Inc. v.
Nippon Paper Industries
Co. and, in so doing,
passed up a golden
opportunity to address
the issue of how to
read the FTAIA.*

(b) *AGC*, like *Illinois Brick*¹² and other standing authorities, is grounded in large part on concern for efficient antitrust enforcement, in order to deter conduct harmful to U.S. consumers and the U.S. economy. But, in this day and age, is U.S. enforcement the only effective deterrent against international cartels? On the one hand, foreign antitrust enforcement has come a very long way since *Pfizer* was decided in 1978. On the other hand, the U.S. treble damages civil action remains a more fearsome and potent enforcement tool than private antitrust remedies in non-U.S. jurisdictions. It follows that depriving foreign purchasers of a U.S. damages claim will, to some non-trivial extent, reduce the risk of participating in an international cartel, and thereby make joining a cartel a more profitable proposition than it otherwise might be.

(c) Another fundamental policy underlying classic cases like *Illinois Brick* and *AGC* is to keep U.S. private antitrust enforcement efficient by avoiding undue burdens on the courts. (That concern, for example, led the *Illinois Brick* Court to instruct the lower courts to eschew any damages pass-on determination.) Similarly, it is legitimate for a court addressing foreign purchaser standing to be concerned that allowing such claims might place a heavy burden on the U.S. judicial system, not only to the detriment of domestic antitrust plaintiffs but also to the prejudice of all involved in the administration of justice.

All this awaits resolution. And that is where the matter of foreign purchaser/international cartel damages now stands—in a word, unresolved.

Meanwhile, in Chicago, in February of this year, one month before the *Kruman* reversal, the Seventh Circuit, per Judge Easterbrook, issued its opinion in *Paper Systems Inc. v. Nippon Paper Industries Co.*, 281 F.3d 629 (7th Cir. 2002), and, in so doing, passed up a golden opportunity to address the issue of how to read the FTAIA. In that case, following Sherman Act criminal indictments, paper distributors sued thermal fax manufacturers, alleged participants in an international cartel, seeking damages. One of the manufacturers, Nippon Paper,

sold its output *in Japan* to Japan Pulp & Paper Co. and Mitsui & Co., which resold through subsidiaries around the world. Neither [of the two direct purchasers] is alleged to have participated in the conspiracy. . . . Neither of these firms joined the suit or expressed any interest in suing.

Id. at 632 (emphasis added). (The court gave no hint that the foreign purchasers' failure to pursue private antitrust actions might have been due to any legal inability to do so.)

The legal consequence of these facts, as the court explained, is that, under the rule of *Illinois Brick*, “no damages may be awarded to the three plaintiffs (or any class member) on account of Nippon Paper’s sales.” *Id.* at 632.

But, said Judge Easterbrook, the lower court missed the boat when it leapt from the correct premise that Nippon Paper’s sales are out of the case to the erroneous conclusion that “Nippon Paper cannot be liable” at all. *Id.* To the contrary, there is nothing in *Illinois Brick* that trumps the rule of joint and several liability for all who participate in a conspiracy that violates U.S. antitrust law. Hence, as long as Nippon Paper’s status as a member of the cartel remains to be determined, it is possible that that defendant might be found jointly and severally liable for all the sales that *are* in the case, even though that figure does not include any sales by Nippon Paper itself! Thus, ruled the Seventh Circuit, the district court erred in dismissing Nippon Paper from the lawsuit.

Judge Easterbrook failed to address the legal significance of the fact that all of Nippon’s sales were made “in Japan” (to quote the court) to non-U.S. direct purchasers. If the Fifth Circuit’s major-

¹⁰ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

ity holding in *Den Norske* were applied to those facts, then it should follow that Nippon Paper did not engage in “conduct” within the scope of the Sherman Act, as amended by the FTAIA. That, in turn, would mean that the district court’s decision to dismiss Nippon Paper from the case was actually correct, albeit for the wrong reason.

Did Judge Easterbrook just overlook the latent FTAIA issue? Did he think the Fifth Circuit’s view was so wrongheaded that it deserved the back of his hand (i.e., the silent treatment)? Or did he consciously, perhaps, decide to avoid creating a conflict among the circuits as to FTAIA?

Enquiring minds want to know.

And suppose—just for the sake of an interesting discussion—that foreign purchaser claims are held barred on standing grounds while *Nippon Paper* continues to be good law. In that case,

- most sales by foreign cartel participants would be excluded from the calculation of damages in a U.S. antitrust proceeding—which would make participation in a cartel vastly more enticing than it otherwise might be—
- *but*, if there ever is a lawsuit, the U.S. conspirators will have the foreign conspirators in the case with them, to help them pay damages to U.S. purchasers—which would *further* reduce the expected downside of joining a cartel, making conspiracy yet more attractive.

And that, some might think, would be a fine how do you do.

In Conclusion: So Much for “Plain Meaning”

Plain as the nose on your face, plainer than the plainest vanilla, is the plain meaning of the FTAIA, is the conclusion of court after court. According to the Second Circuit panel in *Kruman*, the FTAIA clearly and plainly condemns the conduct of foreign participants in anticompetitive activity that has an anticompetitive effect in the United States, even where the sales in question are made to foreign purchasers outside the United States. It was, however, equally clear to the Fifth Circuit majority in *Den Norske* that such conduct is plainly outside the scope of U.S. law, per the FTAIA. And to the Seventh Circuit in *Nippon Paper* the application of U.S. law to the conduct of a foreign cartel participant was evidently so plain that the question was not even worth raising.

In general, the lower court decisions discussed above exhibit an equal level of certainty about the meaning of the FTAIA. Viewed as a whole, these decisions give new meaning to the phrase, “Often in error, but never in doubt.”

One may reasonably conclude that trying to find the answer to this conundrum by staring long and hard at the language of the FTAIA is about as profitable as consulting a ouija board. The relevant question, it seems, is not how to construe the FTAIA, but rather how to apply principles of standing. The relevant policy concerns are foreshadowed in *Pfizer* and readily gleaned from a thoughtful reading of the leading cases on domestic standing.

Missing from these policy concerns are fairness and equity. Domestic standing law affords wind-fall damages to direct purchasing wholesalers and other intermediaries, who passed on the overcharge, while denying the claims of indirect purchasing consumers who wind up holding the bag. Applying the same rule to the claims of foreign direct and indirect purchasers would only add to the inequity.

But letting foreign direct purchasers sue in U.S. courts would add materially to the deterrent effect of American antitrust law. The relevant policy concerns, thus, are essentially twofold, and they point in opposite directions: deterrence of international cartel activity versus burden on the U.S. judicial system. In the final analysis, one may speculate, burden will trump deterrence, and foreign purchasers will ultimately return to their home courts. ●

FTC/DOJ Organization Charts and Photos*

Editor's Note: On January 4, 2002, the United States Department of Justice announced a restructuring of the Antitrust Division designed to more accurately assign the developed expertise and future resource allocations of the agency to "address new industries, network competition, and other emerging trends in the economy." These changes were explained in a press release (http://www.usdoj.gov/atr/public/press_releases/2002/9773.htm) from the agency as well as in a recent interview with Deputy Assistant Attorney General Deborah P. Majoras (<http://www.abanet.org/antitrust/source/march02/majoras.pdf>) in the March issue of The Antitrust Source.

The Spring 2002 issue of Antitrust magazine published selected versions of organization charts of the Antitrust Division and the Federal Trade Commission, including the FTC's Bureau of Competition. The Antitrust Source is reprinting those charts here, accompanied by links to publicly available speeches by certain agency heads that are available on the agencies' respective Web sites. These available links are listed here and are also provided within the photos and corresponding captions for these individuals on the photo pages. We encourage our readers to simply click the appropriate link to obtain access to these speeches.

For the FTC, speeches are available for:

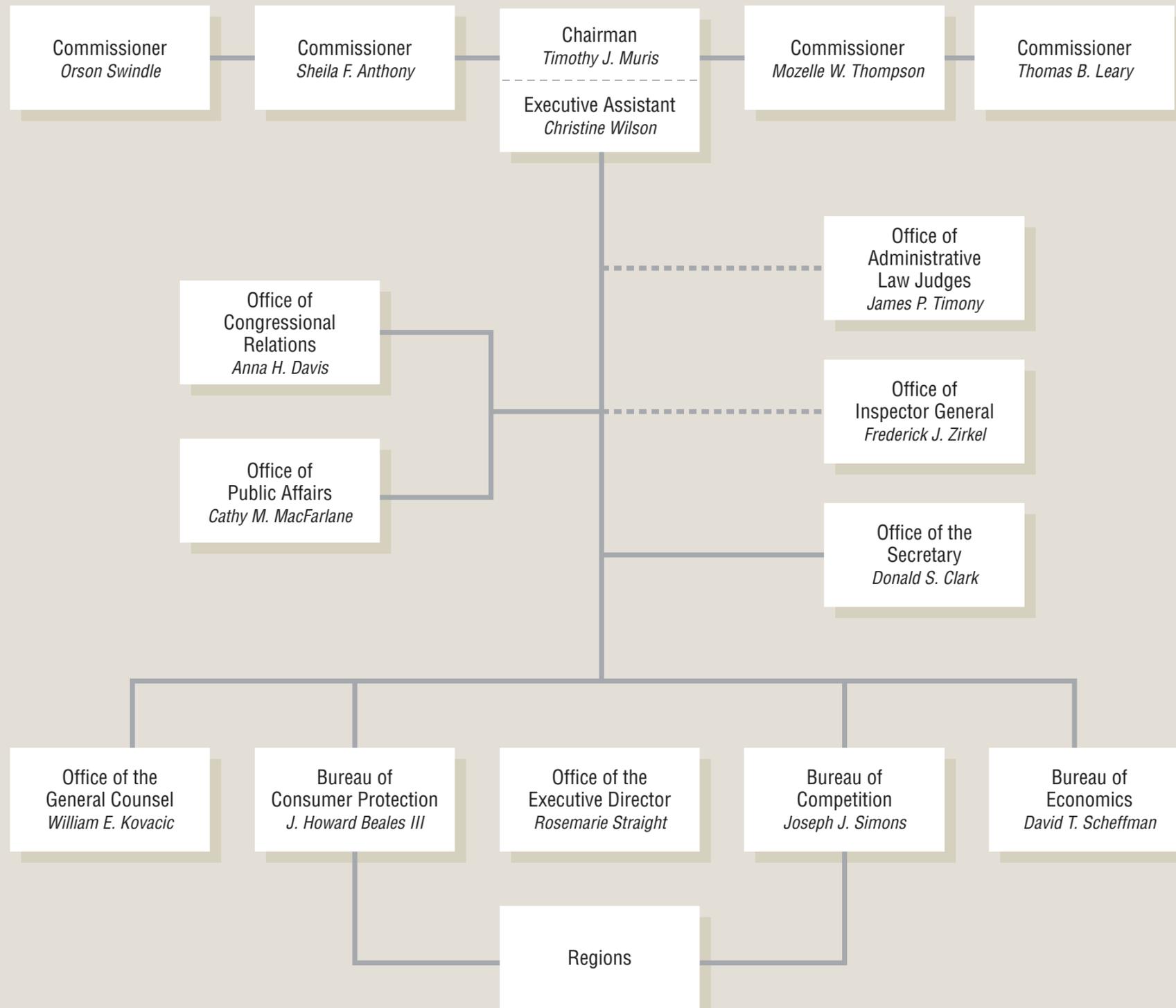
- **Timothy J. Muris**, Chairman: <http://www.ftc.gov/speeches/muris.htm>
- **Sheila F. Anthony**, Commissioner: <http://www.ftc.gov/speeches/anthony.htm>
- **Mozelle W. Thompson**, Commissioner: <http://www.ftc.gov/speeches/thomp1.htm>
- **Orson Swindle**, Commissioner: <http://www.ftc.gov/speeches/swindle.htm>
- **Thomas B. Leary**, Commissioner: <http://www.ftc.gov/speeches/leary.htm>
- **J. Howard Beales, III**, Director, Bureau of Consumer Protection: <http://www.ftc.gov/speeches/beales.htm>

For the Antitrust Division, speeches are available for:

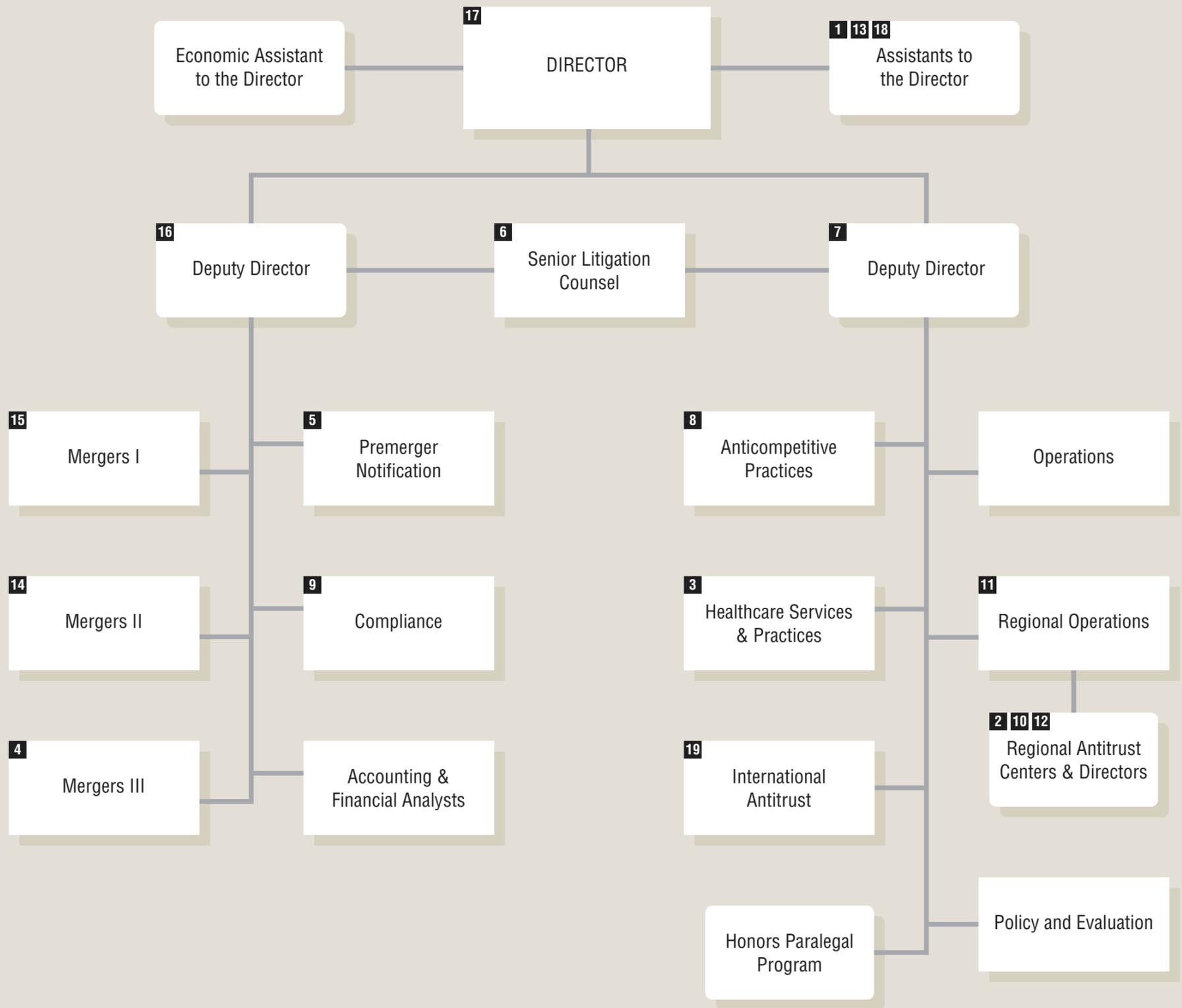
- **Charles A. James**, Assistant Attorney General: http://www.usdoj.gov/atr/public/speeches/speech_james.htm
- **Deborah Platt Majoras**, Deputy Assistant Attorney General:
http://www.usdoj.gov/atr/public/speeches/speech_majoras.htm
- **James M. Griffin**, Deputy Assistant Attorney General:
http://www.usdoj.gov/atr/public/speeches/speech_griff.htm
- **William J. Kolasky**, Deputy Assistant Attorney General:
http://www.usdoj.gov/atr/public/speeches/speech_kolasky.htm
- **Scott D. Hammond**, Director of Criminal Enforcement:
http://www.usdoj.gov/atr/public/speeches/speech_hammond.htm
- **Constance K. Robinson**, Director of Operations:
http://www.usdoj.gov/atr/public/speeches/speech_robinson.htm
- **Douglas Ross**, Special Counsel for Agriculture: http://www.usdoj.gov/atr/public/speeches/speech_ross.htm
- **Mark J. Botti**, Chief, Litigation I Section: http://www.usdoj.gov/atr/public/speeches/speech_botti.htm
- **Roger Fones**, Chief, Transportation, Energy and Agriculture Section:
http://www.usdoj.gov/atr/public/speeches/speech_fones.htm
- **Robert Kramer**, Chief, Litigation II Section: http://www.usdoj.gov/atr/public/speeches/speech_kramer.htm

* These charts and photo pages can be printed out on letter-size, landscape format, at 67%.

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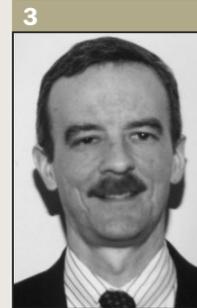
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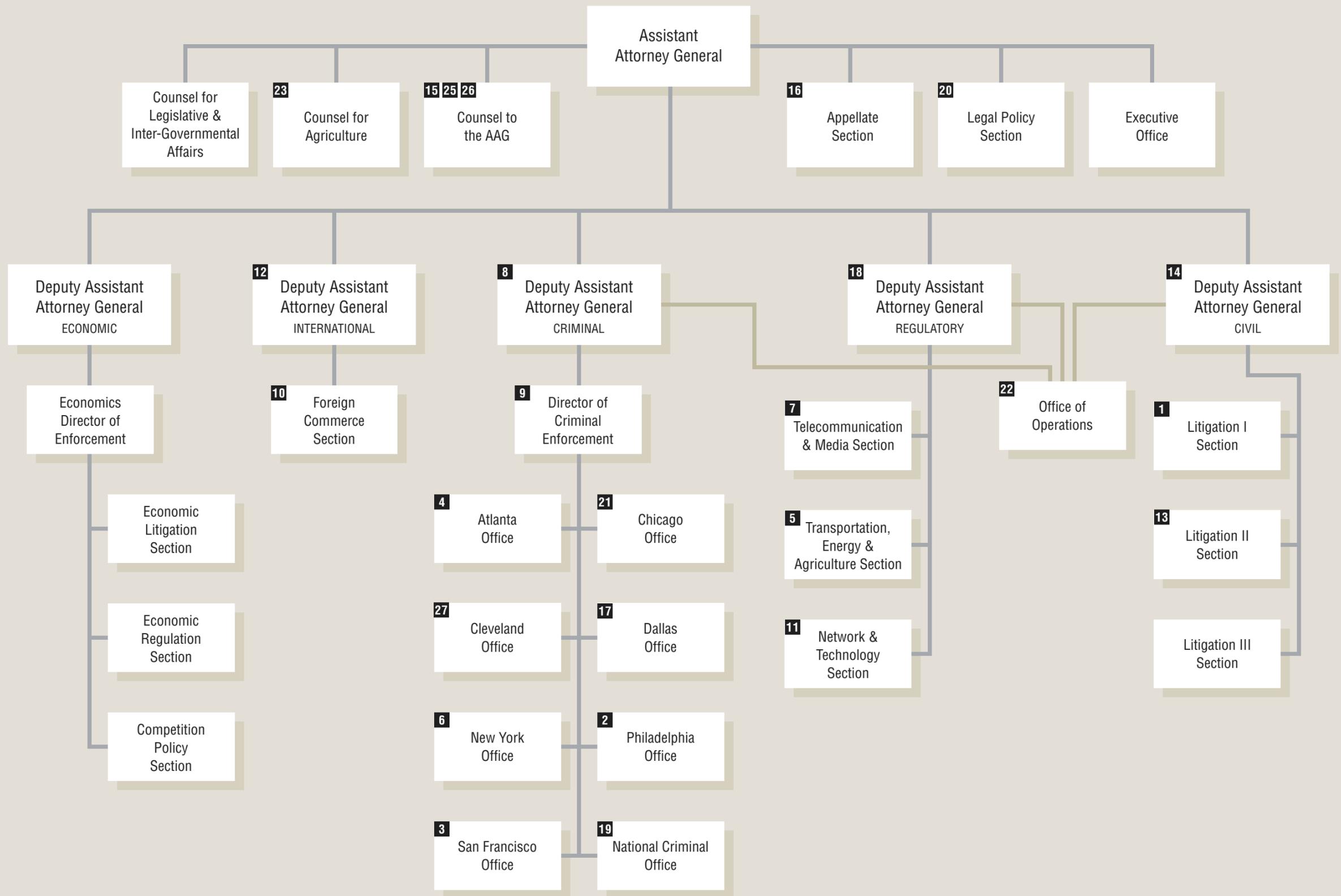


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HOTLinks

Hot Links, an annotated and periodically updated source list for antitrust lawyers and economists.

[Neither The Antitrust Source nor its sponsor, the ABA Section of Antitrust Law, necessarily endorses the sites listed below or any of the content within them.]

General

From the American Bar Association:

■ <http://www.abanet.org/antitrust/>

Contains abstracts and tables of contents for the Antitrust Law Journal and Antitrust magazine; links to antitrust-related Web sites; Membership services; committee activities and publications, including newsletters; meeting information and new publications order forms.

■ <http://www.abanet.org/abapubs/>

From the ABA, its listing of publications on antitrust and other legal disciplines.

■ **From the US DOJ Antitrust Division:** <http://www.usdoj.gov/atr/contact/otheratr.htm>

Not just their home page, but they actually have a comprehensive set of links to a lot of competition agencies around the globe.

■ **From the Federal Trade Commission:** <http://www.ftc.gov/ftc/antitrust.htm>

Links to who's who in the Bureau of Competition, their mission, public schedules, and documents.

■ **From NAAG:** <http://www.naag.org/>

The National Association of State Attorneys General (NAAG) for the latest on what States are doing in the antitrust arena.

■ **From FindLaw:** <http://www.findlaw.com/01topics/01antitrust/index.html>

A great source for finding other AT law firms, consultants, summaries of law, cases, discussion groups, and more.

■ <http://www.antitrustcases.com/>

More antitrust case law that allows one to search chronologically, or by legal issue or even by product.

General continued

■ **From Cornell Law:** <http://www.law.cornell.edu/topics/antitrust.html>

Links to the statutes that bind us and the latest decisions that guide us . . . as well as information on antitrust generally. Includes links to federal and state enforcement and decisions as well.

■ **From Ripon College:** <http://www.ripon.edu/faculty/bowenj/antitrust/INTRO.htm>

Excerpts from the Supreme Court's debates on antitrust cases up to about 1993.

■ **From Georgetown University Law Center:** <http://www.ll.georgetown.edu/intl/antitrustguide.htm>

This guide is intended to assist you with researching foreign and international antitrust issues. Also has a comprehensive vocabulary of antitrust issues, various links and a bibliography if you like books.

■ **From Villanova University School of Law:** <http://vls.law.vill.edu/compass/guide/antitrust.htm>

A short concise listing of antitrust law links.

■ <http://www.virtualchase.com/resources/antitrust.shtml>

An online guide to where to go for researching antitrust issues, including links to various federal agencies involved in antitrust analysis.

Antitrust Policy

■ <http://www.antitrust.org/>

A pretty broad range of editors, including economists and lawyers in government, private practice, and academia. Interesting articles. More economics, and news.

■ **From the American Antitrust Institute:** <http://www.antitrustinstitute.org/>

Information on the latest antitrust issues, links to cases, people in antitrust.

■ <http://www.cato.org/research/con-st2.html#antitrust>

The Cato Institute seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace. Here's its perspective on antitrust policy.

International Antitrust

■ **From the United Nations:** <http://www.unctad.org/en/subsites/cpolicy/index.htm>

Thorough set of links to international competition authorities.

■ <http://www.usdoj.gov/atr/contact/otheratr.htm>

Different from DOJ's homepage, this site provides links to other competition agencies around the globe.

International Antitrust continued

From the EU:

■ <http://europa.eu.int/comm/competition/antitrust/oj/>

■ http://europa.eu.int/comm/competition/index_en.html

A calendar of events of interest to competition lawyers from the EU.

■ **From the OECD:** <http://www.oecd.org/oecd/pages/home/displaygeneral/0,3380,EN-home-71-3-no-no-no,FF.html>

The leaders of the world's major competition authorities provide a source of policy analysis and advice to governments.

■ **From the IBA:** <http://www.ibanet.org/general/CommHome.asp?section=SBL&Committee=SBL-C>

From the International Bar Association: their Antitrust and Competition site, complete with international links

■ <http://www.clubi.ie/competition/comprframesite/WorldsBiggestAntiTrustSitesList.html>

From Competition Online, a site with links to a variety of national competition agencies

The Politics of Antitrust

■ <http://thomas.loc.gov/home/thomas.html>

This is a great site for general information about the legislative process, pending legislation, and links to committees.

■ <http://www.senate.gov/~judiciary/>

The Senate Committee on the Judiciary's Web site. These are the Senators and staffers who are responsible for writing and passing antitrust legislation.

■ <http://www.house.gov/judiciary>

The House Committee on the Judiciary's site. These are the representatives and staff working on antitrust laws on the House side.

News

■ http://fullcoverage.yahoo.com/fc/Business/Antitrust_and_Trade_Regulation/

From Yahoo: a comprehensive list of antitrust/competition articles from around the world. Arranged chronologically, and searchable.

Paper Trail: Working Papers and Recent Scholarship

The lead-off paper in this issue is a recently published article by Jonathan Baker. In previous issues of The Antitrust Source (see “archives,” <http://www.antitrustsource.com>), the chief agency economists (Mike Katz and Dave Scheffman) have told antitrust practitioners that we should expect a greater agency emphasis on coordinated effects analysis in merger reviews. Certainly, some if not many economists may have been dismayed because coordinated effects approach has at least the appearance of being both unstructured and subjective, focusing as it does on the “plus” factors and concentration. Baker’s paper is an important first and very big step in proposing a much more structured framework for coordinated effects analysis. It is well worth the read.

Another paper described here is one authored by a number of FTC economists, including Dave Scheffman, reviewing the problems that arise in the course of using scanner data in estimating substitution patterns among suppliers of scanable products. The paper also discusses the difficulties in using those patterns in the standard models used to simulate the unilateral price effects of mergers. This is the paper that Scheffman promised us at the ABA Antitrust Section’s “brown bag” last September (a transcript of which appeared in our January edition). The authors made a clear effort to make the paper accessible to a non-economist audience, although there are times when the discussion, perhaps unavoidably, does become a bit technical.

Finally, the events of 9/11 will always and appropriately overshadow any event in antitrust. However, on that day, the FTC hosted a roundtable of some of the leading players in the economics of Industrial Organization, a transcript of which recently became available. While the discussion breaks no new ground, it is a useful overview of the state of empirical IO. The discussion does occasionally ramble (as it would with any transcript of spoken remarks) and even more occasionally becomes technical (we’re sure that lawyers will find the global concavity discussion quite interesting). However, it is by and large very readable and accessible.

—JRW

Papers and Summaries

Jonathan Baker, Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws, 77 *N.Y.U. L. Rev.* 135 (2002).

As noted above, this article provides a framework for a more structured analysis of coordinated effects claims by focusing on the role and identification of “mavericks.” The concept of mavericks is not new to antitrust, and it is well known that the identification of a maverick can neutralize the agencies’ concern with what might otherwise be an anticompetitive merger (or raise substantial concerns if the maverick is one of the merging parties). In conventional antitrust wisdom, the maverick label is usually applied to a firm that is a disruptive price cutter or innovator. Baker instead argues that an appropriate redefinition of a maverick would be one that is at or near indifference about participating in the tacitly collusive agreement. In this view, the maverick may not be one that actually cuts prices, but instead is the one that constrains the amount of any tacitly collusive price increase. Consequently, there is always a maverick.

Baker deals with easiest cases conceptually in an appropriately perfunctory way. If the deal does not involve the maverick *and* the behavior of the maverick does not change as a result of the deal, a merger between non-mavericks will not have a price effect. If the merger does involve the maverick *and* there is no other firm that can assume that title, then the merger will raise prices (ignoring entry possibilities and other merger-induced destabilizing events).

But Baker's article goes far beyond these simple cases and provides insights into the process of identifying a maverick, predicting whether the behavior of a maverick not party to the deal will change following the deal, considering how a merger might create a maverick, and how a merger might neutralize a maverick. Baker illustrates these insights using numerous real-world examples drawn from existing case law. And along the way, the article provides a lucid discussion of the rise and fall of the "structural presumption," that concentration is the critical variable of interest in merger analysis.

This article is certainly the most carefully constructed and analytically interesting evaluation of coordinated effects analyses available during the (perhaps now bygone) era of unilateral effects. It certainly doesn't provide all of the answers for (e.g.) identifying mavericks and determining when a merger might affect the behavior of a maverick. Nor will it replace the "plus" factors or Posner's checklist, but it is a very solid start along the road of developing a more structured approach to structural analysis.

Daniel Hosken, Daniel O'Brien, David Scheffman, Michael Vita, Demand System Estimation and its Application to Horizontal Merger Analysis, FTC Bureau of Economics Working Paper (April 2002)

<http://www.ftc.gov/be/workpapers/wp246.pdf>.

This paper describes an array of challenges faced by the economist using scanner data for estimating substitution patterns among the products of the parties to a proposed merger. In addition, the paper highlights the challenges arising when one uses those substitution patterns as an input into model to predict price changes.

The inventory of estimation problems discussed include, among others: the aggregation price and quantity data across stores (stores may charge different prices for the same commodity, but the scanner data provides on the "average" price, and consumers are assumed to respond to this average price by purchasing the quantity indicated) and channels (the elasticities may be different for mass merchandisers than for supermarkets); the choices made about the curvature of the demand curve and implications of that choice for simulated price predictions; and the "endogeneity" issue (when we observe a change in the price and quantity, is that a change driven by changes on costs while moving along the same demand curve or is it a result of a shift in demand?).

In terms of the simulation challenges, the paper notes three issues (although it claims only two), only one of which really has to do with scanner data-based estimation of substitution. First, the scanner data tracks consumer behavior among retailers, but typically the proposed mergers are among the upstream wholesalers and therefore the substitution pattern of interest is at the wholesale, not retail, level. In these models, the wholesale own-demand elasticity for a product (in absolute value terms) will always be less than the elasticity estimated at the retail level. Second, the paper correctly notes that even if one could infer wholesale elasticities from the retail elasticities, ignoring other dimensions of competition (particularly shelf-space competition) in the pricing simulation may generate misleading results. Third, if wholesalers pay slotting fees (e.g.) to retailers for being carried, then again the standard simulation models may not be accurate.

On the one hand, this is a useful read for antitrust practitioners who frequently find that their clients have access to scanner data. We all should be aware of the pitfalls in using these data. On the other hand, the paper rarely indicates the direction of the bias (have we underestimated or overestimated cross-price elasticities) or the size of the bias if the estimation is less than perfect. The paper would have been much more helpful if instead of an uninformative conclusion, it had described when one should attach more or less weight to a particular problem if considering the use of scanner data. Certainly, a set of Estimation Guidelines would be useful for lawyers and economists alike. Perhaps there will be an Episode II of this paper.

(On a somewhat related matter, there is virtually no discussion of how demand analysis might be used in newly-emphasized coordinated effects analyses. The discussion is instead focused on unilateral effects. And in note 3, there is a sizeable list of recent articles that are described as validating the predictions of the simulation models, notwithstanding the concerns by the agencies' chief economists about the inability of the unilateral effects models to predict prices.)

Federal Trade Commission, Empirical Industrial Organization Roundtable (Sept. 11, 2001)

<http://www.ftc.gov/be/empiricalioroundtabletranscript.pdf>.

The roundtable was moderated by Dave Scheffman (Director of the FTC's Bureau of Economics), who asked that the speakers focus on where the agencies need additional research to hone merger enforcement policy. Inevitably the speakers did so against the backdrop of current antitrust wisdom. Some of the highlights.

Dennis Carlton began by noting that we really don't know what methodology we should use to predict the price effects of mergers. Should we be relying on price-market share/concentration studies within industries—the "reduced form" approach—or relying on estimates of own and cross price elasticities which are then plugged into simulation models?

While it's fair to say that there was a mix of views, it was surprising (at least to this editor) that there was a sense if not consensus among the participants that the Bertrands are overused. To paraphrase Janusz Ordover, some participants opined that Bertrands were used as an excuse for ignoring real-world market complexities. Many (but not all) of the participants agreed that appropriately done price-share/concentration studies might provide insight into coordinated effects implications of a merger. While Jerry Hausman explained why his approach to large-scale demand analysis was preferable to the alternative demand approaches, he did concede that perhaps industry-specific "true" reduced forms might be useful for merger evaluation.

Carlton also expressed the view that the economics profession knows so little about innovation that the evaluation of innovation market effects should play no role in antitrust analysis. Dick Schmalensee agreed about the profession's ignorance, but seemed to argue that the role of innovation in some markets is too important to ignore. While he urged more research into predicting when Schumpeterian-like innovation would disrupt the existing market structure, he noted that such requests have been made for the last fifty years with little result.

The participants also seemed to agree that separating the parties' rhetoric from reality in efficiency claims was both important and difficult for merger analysis. FTC General Counsel Bill Kovacic suggested a novel way to acquire the data to perform post-mortems on efficiency claims on mergers cleared by the agencies and all of the participants seemed to agree that some effort at post mortems could be instructive. (But, speaking of separating rhetoric from reality, it's not clear from the discussion that the agencies would actually pay attention to efficiency defenses.)

In other areas, Mike Whinston—a leading force in exclusionary behavior modeling—provided

a nice summary of the intellectual history of the theory of anticompetitive exclusion, but also opined that we are not empirically sophisticated enough to predict when a vertical merger will significantly increase the likelihood of such behavior. UCLA's Ben Klein discussed the role and significance of slotting fees.

And there were occasionally some interesting if seemingly off-point discussions. One such discussion addressed the implications of price discrimination for market definition and how to distinguish systematic from unsystematic discrimination. Another exposed how little we know conceptually and empirically about the entry process. ●