

Can Water Run Uphill?

Predictions About Future Antitrust Appeals

J. Robert Robertson

It is nearly impossible to predict the types of antitrust cases that might be heard by the Supreme Court or by any court of appeals. A few years ago, as an editor, I worked with a few authors who thought they had a hot antitrust topic: buyer power. The *Weyerhaeuser* case,¹ which raised this issue, was in its infancy but soon headed into an appeal in the Ninth Circuit and then to the Supreme Court. The authors' articles were right on target and became the leading support in the opinions of both the Ninth Circuit and the Supreme Court.² These authors' prescience was admirable. But when I look back on that process, the one driving force was not the interesting idea; it was the fact that this interesting idea was appealed. Thus, to make predictions about what kinds of antitrust cases the U.S. Supreme Court or courts of appeals may decide, I believe it is important to consider which kinds of cases are more likely to find their way up the appellate ladder.

Cases that Are Not Appealed Do Not Count

First, a reality check: Many interesting topics in the antitrust field are unresolved, but few will ever be heard on appeal. For example, as much as we antitrust lawyers love to discuss the merits (or lack thereof) of the Robinson-Patman Act, it is unlikely that the courts will ever provide clear rules in that area. Few cases are ever brought under the Act, and fewer still are appealed. And when the Supreme Court had a chance to clear up the law in the area, it created more ambiguity than answers.³

Another example of an interesting issue that took years to get to the Court can be found in the recent *Leegin* case, in which the Court decided to change the law of resale price maintenance that had been in effect for nearly one hundred years.⁴ Commentators had been complaining about the unreasonableness of a per se rule against resale price maintenance for at least twenty years.⁵ So why did it take so long? The law prior to *Leegin* was more than interesting: it was central to the

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¹ *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir. 2005), *vacated*, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

² John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 ANTITRUST L.J. 625, 652 (2005) (cited by both courts); Roger G. Noll, "Buyer Power" and Economic Policy, 72 ANTITRUST L.J. 589, 591 (2005) (cited by the Supreme Court); Richard O. Zerbe, Jr., *Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood*, 72 ANTITRUST L.J. 717, 724 (2005) (cited by the Ninth Circuit); Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005) (cited by both courts).

³ See *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2725 (2007).

⁵ See Frank Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 158 (1984) ("What the Court decides from 1911 to 1926, and reconsiders in the 1960s, it can review yet again in the 1980s. And everyone should expect it to do so."); see also Frank Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 887–90 (1981); Herbert Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 IOWA L. REV. 451, 452–56 (1984); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 803–04 (1987).

advice that most antitrust practitioners gave their clients. The likely reason that the issue had not been decided sooner is that the issue had rarely made it to the appellate level.⁶

Other interesting cases are simply not heard by the Supreme Court or are not appealed—even by the losing government agency. *Schering-Plough* is a good example of an important case that the Supreme Court declined to take,⁷ and many recent cases that the Federal Trade Commission or the Department of Justice lost were never appealed. New law will never be developed if the agencies refuse to appeal their losses. But recent developments may show a change in direction for the agencies. For example, the FTC recently appealed its district court losses in *Whole Foods* and in *Equitable Resources*.⁸ Whether the agency loses or wins, in my view, is not as important as having the case heard on appeal with a result that adds clarity to the law.

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What Kinds of Antitrust Cases Are Appealed?

In antitrust litigation, almost all cases settle, but three types of cases seem to be more likely to go to trial and then on to an appeal: intellectual property cases, cases involving remedies, and merger cases. These categories often overlap, but recent trends seem to indicate that more litigation, and hence increased chances for appeals, may occur in these general areas.

Aside from a few tying cases, for years there was a disconnect between intellectual property law and antitrust law. However, over the past few years, what one sees in the practice and in the agencies is a growing convergence of the two areas. For example, the agencies have taken on Rambus and Microsoft, and high-tech companies are suing each other over patent rights and antitrust counterclaims at an ever-increasing rate. In the past, these kinds of cases were rarely litigated and appealed. The consent decree in the *Dell* case is a great example. *Dell* is often cited as an example of a standard-setting case involving fraud, yet the FTC apparently never had any evidence of actual fraud.⁹ One can only wonder what the result and the law would have been if the case had been fully litigated and appealed.

The recent increase in patent-related antitrust cases may change this trend. First, the high-stakes nature of patent cases means that losses are likely to be appealed. Second, many district courts (such as the Eastern District of Texas and the Western District of Wisconsin) have found ways to streamline patent litigation, resulting in more trials. As more of these cases also involve antitrust counterclaims, the chances for an appeal of antitrust issues through intellectual property cases appear to be increasing. It is also important to note that many of these cases focus on technology issues in critical industries related to telecommunications or computers. Perhaps because of the high stakes involved in these cases, companies involved in these industries tend to litigate fiercely, without the usual caution that one sees in other kinds of commercial litigation. For example, Broadcom and Qualcomm litigate against each other in nearly every forum possible, and as

⁶ The Court could have taken on the issue in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), but the case was decided on the issue of standing. It appears that the next previous, closest case on point was *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207 (9th Cir. 1983), but the issue of whether resale price maintenance was a per se offense was barely addressed by the court.

⁷ *Schering Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005) (rejecting the Commission's theory that settlements of patent claims were anticompetitive shams), *cert. denied*, 126 S. Ct. 2929 (2006).

⁸ *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC v. Equitable Res., Inc.*, 2007-1 Trade Cas. (CCH) ¶ 75,716, 2007 WL 1500046 (W.D. Pa. May 21, 2007).

⁹ *Dell Computer Corp.*, 121 F.T.C. 616, 628-31 (1996) (Azcuena, Comm'r, dissenting).

a result antitrust issues are being raised on appeal.¹⁰ In short, over the past few years many antitrust appeals have arisen from the intellectual property field, and that trend should continue.

A second area in which the appellate courts and perhaps the Supreme Court may be more active is antitrust remedies. *Chicago Bridge*¹¹ in the merger area and *Rambus*¹² in the intellectual property area are good examples. What the proper remedy is in antitrust cases is an issue that the Supreme Court addressed decades ago in such cases as the *Ford* case,¹³ but there is still plenty of uncertainty in the law. For example, in a merger case brought by the FTC, does Section 11(b) of the Clayton Act mean what it says—that the FTC must order a divestiture upon finding a violation of Section 7?¹⁴ Or does the FTC or a court have discretion to determine whatever remedy is appropriate to resolve the competitive harm, as the FTC attempted to do in the *ENH* case?¹⁵ The nature of the remedies in antitrust cases involving patents is also an area that needs clarification and is an issue likely to find its way into the appellate courts, if not the Supreme Court. The *Rambus* case, which is currently on appeal, is a good example.

Finally, the Supreme Court and the courts of appeals have added little to merger law in the last few years. Little has changed in Supreme Court merger law since *General Dynamics*—or even since *Brown Shoe* and *Philadelphia National Bank*.¹⁶ And yet there is little resemblance between those cases and current merger practice at the agencies and in the district courts, even though all three cases are probably still good law.

But merger law will remain unchanged if cases are not appealed. As we all know, many merger cases have been brought and lost by the antitrust agencies over the past five years. Many of those were never appealed.¹⁷ Clearly, there are differences in how courts, even in the same district, handle these cases. But we will not see any more clarity in the law until the government agencies show their willingness to fight on appeal.¹⁸ The problem with the agencies' reluctance to appeal is that the standards for litigation and negotiation with the government (often resulting in consent decrees or informal resolutions of merger investigations) bear little relationship to the law

¹⁰ See, e.g., *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007) (reversing dismissal of an antitrust claim involving standard setting).

¹¹ *Chicago Bridge & Iron*, FTC Docket No. 9300 (Jan. 6, 2005) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9300/050106opinionpublicrecordversion9300.pdf>, amended by Order Granting in Part and Denying in Part Respondents' Petition for Reconsideration of the Final Order (Aug. 30, 2005), available at <http://www.ftc.gov/os/adjpro/d9300/050830ordergranting.pdf>. The case is now on appeal in the Fifth Circuit (case no. 05-60192), and the Commission's brief is available at <http://www.ftc.gov/os/adjpro/d9300/index.shtm>.

¹² *Rambus Inc.*, FTC Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/index.shtm>, on appeal, Nos. 07-1086 and 07-1124 (D.C. Cir.).

¹³ *Ford Motor Co. v. United States*, 405 U.S. 562 (1972).

¹⁴ 15 U.S.C. § 21(c) states that:

[If] the Commission . . . shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the . . . assets, held . . . in the manner and within the time fixed by said order.

¹⁵ *Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Oct. 20, 1995) (Initial Decision), available at <http://www.ftc.gov/os/adjpro/d9315/051020initialdecision.pdf>. The Commission opinion is available at <http://www.ftc.gov/opa/2007/08/evanston.shtm>.

¹⁶ *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁷ For example, the FTC did not appeal its losses in *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004), and *FTC v. Foster*, 2007-1 Trade Cas. (CCH) ¶ 75,725, 2007 WL 1793441 (D.N.M. May 29, 2007). The Antitrust Division did not appeal its loss in *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

¹⁸ The agencies' reluctance to appeal has a preclusive effect in the merger area because few cases are ever brought under Section 7 by private parties.

that might have resulted if the issues had been decided through litigation and appeal. If the agencies appeal more of their losses, the courts, and perhaps even the Supreme Court, may address the lingering issues that exist in the merger area and make the outcomes in these cases more predictable. I should add, however, that there are three merger cases currently wending their way through the courts. The FTC has appealed its loss in *Whole Foods* to the D.C. Circuit and its loss in *Equitable Resources* to the Third Circuit, while the respondent in *Chicago Bridge* has appealed to the Fifth Circuit. With these and other merger cases on the horizon, the courts of appeals or the Supreme Court could readdress this area of the law—perhaps clarifying the power of the FTC to stop mergers pending administrative review or to address the ability of the FTC or the courts to create broad remedies to resolve violations of Section 7.

Conclusion

No one can know what the Supreme Court or the courts of appeals will do when it comes to antitrust. Many of us have been surprised by the number of Supreme Court antitrust cases in the past few years. These cases may be enough for the Court at this point. But intellectual property cases, cases involving remedies, and even merger cases are beginning to find their way into the appellate courts. These types of cases involve legal issues that have yet to be resolved in any meaningful way by the Supreme Court. Thus, if any new antitrust cases are heard by the Court, there is a reasonable chance that these kinds of cases will be among them. ●