

## 2002–2003 Antitrust Year in Review

**Editor's Note:** At the annual meeting of the ABA Section of Antitrust Law, held August 11, 2003, in San Francisco, Professor Stephen Calkins led a panel of experts in a presentation of antitrust developments and trends during the previous twelve months. Professor Calkins began with a review of activity in the courts. He was followed by Chris Hockett, who covered the world of intellectual property, Ilene Gotts, who spoke about the year's deals, and Tad Lipsky, who reviewed highlights in international antitrust. The panelists have edited and slightly updated their presentations for publication in *The Antitrust Source*. Their comments have been supplemented with citations.

### PANELISTS



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### Stephen Calkins: *Arnold Schwarzenegger's Antitrust 2002–03\**

The organizing theme for any presentation in California this year has to be Arnold Schwarzenegger (whose election these remarks sagely anticipated). In particular, this presentation will address three categories of points:

- "I'll be back!" (*Terminator*, 1984): Things that returned to antitrust this year;
- "Big Mistake!" (*Last Action Hero*, 1993): Entities and issues the ignoring of which could be a serious error; and
- *Kindergarten Cop* (1990): Professors have played unusually prominent roles.

#### "I'll Be Back!"

Look what's back in antitrust this year: the Supreme Court, class actions, Robinson-Patman, FTC administrative adjudication, professions cases, exemptions cases, *Mass. Board*, and the per se rule.

**Supreme Court.** The Supreme Court has been missing in action on the antitrust front for a long time now. The Court has not had a robust antitrust term since the October 1992 term.<sup>1</sup> Now the

\* Thanks go to Amanda Barkey for research and assistance.

<sup>1</sup> That year saw the issuance of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), and *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The term is discussed in Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever*, 62 ANTITRUST L.J. 327 (1994).

Court has granted certiorari in four antitrust cases and may not be done.<sup>2</sup> Moreover, the Solicitor General's views have been invited in *3M Co. v. LePage's Inc.*<sup>3</sup>

**Class Actions.** Class actions are back, as a lot of lawyers' bank accounts could testify. Exhibit A is the \$3 billion *Visa* settlement.<sup>4</sup> That case, and the on-going vitamins saga, also illustrate that it is now socially acceptable for major corporations to sit at a plaintiffs' table. Nor are class actions limited to federal causes of action, as is made clear by the \$1.1 billion California *Microsoft* class action.<sup>5</sup>

**Robinson-Patman.** Robinson-Patman never really leaves, but it always seems to be "back" because we forget about it. Two cases deserve mention. The first is one of a series of 2(c) cases highlighted by an excellent Section Brown Bag Program, *A New Wave of Robinson-Patman Act Section 2(c) Litigation: Anti-Brokerage Claims in the Franchise Supply Context*.<sup>6</sup> The case, *In Town Hotels Ltd. Partnership v. Marriott International, Inc.*,<sup>7</sup> is factually simple. The plaintiffs owned a hotel that Marriott had managed for them for twenty years. Marriott allegedly solicited and received "sponsorship funds"—payments to Marriott by vendors seeking to sell goods to the plaintiffs' hotel. The plaintiffs apparently believed that any such payments ought to be going to it, rather than to Marriott. The court refused to dismiss the complaint, finding that commercial bribery can be reached by Section 2(c) and that a cause of action had been stated. As the Section's Brown Bag program suggests, this is not an isolated example of the successful (so far) use of Section 2(c) to reach allegedly questionable behavior, and we can expect to see continued litigation unless and until the law takes a pro-defendant turn.

Our second commercial bribery case illustrates the joyous complexity of Robinson-Patman.<sup>8</sup> Maddaloni Jewelers was unhappy that Rolex was allegedly receiving bribes from other rival retailers and, in exchange, giving those retailers preferential service, support, and access to products. The court thoughtfully discussed two possible theories of price discrimination. One possibility is that the plaintiff is making the same questionable payments as rival retailers—in which event, there is no price discrimination and hence no violation. The other possibility is that the plaintiff is not making such payments whereas its competitors are—in which event, the plaintiff is enjoying a lower net price as the *beneficiary* of any price discrimination! The court dismissed the Section 2(a) claim but kept alive the 2(d) and (e) counts.

**FTC Administrative Adjudication.** FTC administrative adjudication is back with a vengeance. There are, if you count *Three Tenors*, ten pending Part 3 antitrust matters at the Federal Trade Commission. One can debate what "counts" as a pending matter, and how to account for similar

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<sup>2</sup> See *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, Dkt. No. 02-682 (argued Oct. 14, 2003); *United States Postal Service v. Flamingo Indus. (U.S.A.) Ltd.*, Dkt. No. 02-1290 (argued Dec. 1, 2003); *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, *cert. granted*, Dkt. No. 03-724 (Dec. 15, 2003); *Intel Corp. v. Advanced Micro Devices, Inc.*, *cert. granted*, Dkt. No. 02-572 (Nov. 10, 2003).

<sup>3</sup> Dkt. No. 02-1865 (views invited Oct. 6, 2003).

<sup>4</sup> *In re Visa Check/Master Money Antitrust Litigation*, 2003 U.S. Dist. LEXIS 22898 (E.D.N.Y. 2003).

<sup>5</sup> See Brenda Sandburg, *Billion-Dollar Settlement in Microsoft Class Action*, 127 THE RECORDER 8 (Jan. 13, 2003).

<sup>6</sup> ANTITRUST SOURCE, July 2003, <http://www.abanet.org/antitrust/source/july03/brownbag.pdf>.

<sup>7</sup> 246 F. Supp. 2d 469 (S.D. W. Va. 2003).

<sup>8</sup> *Maddaloni Jewelers Inc. v. Rolex Watch USA*, 2003-2 Trade Cas. (CCH) ¶ 74,086 (S.D.N.Y. 2003).

or related proceedings, but the basic point is irrefutable: Antitrust lawyers are spending a lot more time practicing before administrative law judges than has been the norm.<sup>9</sup>

**Professions Cases.** Professions cases also are back. The past is prologue, and anybody who thought about it should have known that when Tim Muris went back to the Federal Trade Commission, the Commission would be back doing the kinds of things it did when he was last with the FTC. When he was last there, the Commission was doing professions cases and, sure enough, professions cases are back. The FTC (and even the Justice Department) have a whole series of doctor consent orders.<sup>10</sup>

**Exemptions Cases.** Exemptions cases also are back. Again, Chairman Muris focused Commission attention on the periphery of exemptions when he was last at the Commission, so it should not have been surprising that this would resume when he returned. Sure enough, the FTC has *Noerr-Pennington* and state action task forces; a series of administrative complaints have challenged joint rate submissions; and the Commission took on the *Noerr-Pennington* defense, which has been at the center of spirited administrative litigation.<sup>11</sup>

In addition to the *Union Oil* decision—and that was a case with quality briefing on important issues—two *Noerr* cases deserve mention. The first, *Mariana v. Fisher*,<sup>12</sup> asks an intriguing question: Can a governmental agency enjoy *Noerr* petitioning immunity. The Third Circuit answered in the affirmative. The second case, *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*,<sup>13</sup> focuses on *Noerr* in bidding situations. Are attempts to influence the bidding process *Noerr*-protected? Here the Fourth Circuit answered in the affirmative.

The important *Noerr* cases this year have been joined by state action cases. The Commission has put a series of regulated industry cases into Part 3, some of which have been removed for entry of consent orders.<sup>14</sup> Through these cases and a proposed consent order issued in March,<sup>15</sup> the Commission is attempting to use settlements and administrative adjudication to make law on what is required to earn state action immunity under *Parker v. Brown*.<sup>16</sup>

Two state action court cases are worthy of note. The first one is a thoughtful opinion on a whole series of issues including the question of whether a village has to be supervised in order to enjoy immunity.<sup>17</sup> The second case, *Fine Airport Parking, Inc. v. City of Tulsa*,<sup>18</sup> involved a challenge

<sup>9</sup> The same cannot be said of consumer protection lawyers, who find themselves increasingly appearing only in federal court. The FTC's most recently issued "Quarterly Report" on adjudicative proceedings pending before administrative law judges (July 1, 2003) lists no consumer protection case. See <http://www.ftc.gov/os/2003/08/status0307.htm>. Since then, only one consumer protection case has been sent to Part 3, *Telebrands Corp.*, FTC Dkt. No. 9313 (complaint filed Oct. 1, 2003).

<sup>10</sup> Defendants can win at least private physician cases. Joint negotiating, challenged as per se illegal, withstood challenge in *International Healthcare Management v. Hawaii Coalition for Health*, 332 F.3d 600 (9th Cir. 2003).

<sup>11</sup> See John T. Delacourt, *The FTC's Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, ANTITRUST, Summer 2003, at 36; FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>; *Union Oil Co. of California*, FTC Dkt. No. 9305 (initial decision issued Nov. 25, 2003) (dismissing complaint).

<sup>12</sup> 338 F.3d 189 (3d. Cir. 2003).

<sup>13</sup> 310 F.3d 183 (4th Cir. 2002).

<sup>14</sup> See, e.g., *Kentucky Household Goods Carriers Ass'n*, FTC Dkt. No. 9309 (complaint filed July 8, 2003); *Alabama Trucking Ass'n*, FTC Dkt. No. 9309 (complaint filed July 8, 2003; proposed consent order issued Oct. 30, 2003).

<sup>15</sup> See *Indiana Household Movers and Warehousemen, Inc.*, 68 Fed. Reg. 14,234 (Mar. 24, 2003).

<sup>16</sup> 317 U.S. 341 (1943).

<sup>17</sup> *Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110 (2d Cir. 2002).

<sup>18</sup> 71 P.3d 5 (Okla. 2003).

under state antitrust law. The trial court ruled that *Parker* immunized the City of Tulsa's alleged attempts to exclude a private airport parking operator. Wrong, held the state Supreme Court: *Parker* is all about deference to state law, not immunity from state law. Although the states do not all take similar views, *Fine Airport Parking* is an important reminder that state antitrust law may do more than merely echo federal law.

**Massachusetts Board and the Per Se Rule.** Finally, this year saw the return of cases featuring two quite different approaches to analyzing agreements: that of *Massachusetts Board of Registration in Optometry*,<sup>19</sup> which is discussed below, and that of the per se rule. Although the per se rule's application was rejected in *International Healthcare* (see note 10 above), it thrived in two other cases. The first was the important affirming of Judge Nancy Edmonds's opinion, *In re Cardizem CD Antitrust Litigation*.<sup>20</sup> Judge Edmonds had boldly assigned per se liability (on summary judgment) in one of those many generic payment cases, and the Sixth Circuit, in an opinion by Judge Oberdorfer, moonlighting from the District of Columbia, affirmed her unanimously. After these remarks were delivered, the Eleventh Circuit addressed a similar issue and decided that the Sixth Circuit was just wrong, in *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*<sup>21</sup>

That split may make *In re Cardizem* either more (if the Supreme Court eventually gets involved and agrees) or less important. Certiorari has been denied from the other per se rule case of note, *Freeman v. San Diego Realtors*.<sup>22</sup> Judge Kozinski, writing for a unanimous court, proceeded unusually deliberately, and was very tough on what restraints are "ancillary," what justifications are acceptable, and which restraints are reasonably tailored to their justifications. The opinion makes clear that, at least in Judge Kozinski's eyes, the per se rule is back.

### "Big Mistake!"

The point here is simple: it would be a big mistake to ignore or forget about state law plaintiffs, foreign plaintiffs, monopsony, *Pennington's* footnote 3, the fact that high market shares are not sufficient to establish violations, *Copperweld*, or *Illinois Brick*.

**State Law Plaintiffs.** We've already noted—in the *Microsoft* settlement and in *Fine Airport Parking*—the importance of state antitrust law. Frankly, state antitrust law owes Microsoft a vote of thanks for causing state courts across the country to turn to and develop substantive state antitrust law (particularly with respect to indirect purchasers). This past year, state attorneys general continued to monopolize resale price maintenance enforcement, achieving settlement in *George Foreman* and *Compact Disks*.<sup>23</sup> The states are becoming specialists at delivering money to consumers.<sup>24</sup> *Compact Discs* employed a particularly innovative distribution method, relying on an Internet honor system whereby consumers could visit a Web site, assert eligibility, and claim an award. Although self-identification inevitably means that some class members will go without (and some non-class members may file fraudulent claims), it was apparently a highly

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<sup>19</sup> 110 F.T.C. 549 (1988).

<sup>20</sup> 105 F. Supp. 2d 682 (E.D. Mich. 2000), *aff'd*, 332 F.3d 896 (6th Cir. 2003).

<sup>21</sup> 344 F.3d 1294 (11th Cir. 2003).

<sup>22</sup> 322 F.3d 1133 (9th Cir. 2003).

<sup>23</sup> *New York v. Salton, Inc.*, 265 F. Supp. 2d 310 (S.D.N.Y. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003).

<sup>24</sup> See Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, Duke L.J. (forthcoming).

cost-effective way to distribute small sums to masses of people—and certainly better than some of the notorious coupon settlements. The *George Foreman* settlement included an innovative requirement that top company officials, among others, attend a compliance presentation by an outside expert. This was an interesting way to force officials to think about antitrust issues. (Full disclosure: I ended up serving as the expert, so I'm biased.)

Finally, an intriguing case found Coca-Cola, which usually wins its federal law cases, losing a state court case, which upheld a \$14.6 million verdict.<sup>25</sup> At issue was Coke's allegedly abusive calendar marketing program and its effect in several counties where Coke was particularly strong. At this point, one cannot say that the case has great doctrinal significance. Rather, it serves as an important reminder that when planning promotional activities, it would be a big mistake to forget about potential state law plaintiffs.

**Foreign Plaintiffs.** By now, everyone knows that foreign plaintiffs are, rightly or wrongly, important enforcers of U.S. antitrust law. We are all familiar with the initials FTAIA.<sup>26</sup>

One case deserving of special mention is *In re Magnetic Audiotape Antitrust Litigation*.<sup>27</sup> The case serves as a reminder that a court, and especially the Second Circuit, may examine competitive effects while addressing the issue of personal jurisdiction. In *Magnetic Audiotape*, the court ruled that it was premature to dismiss the case on jurisdictional grounds without additional discovery. The conundrum for defendants, of course, is that complete discovery of issues related to competitive effects may not be that different from complete discovery on the merits. If you think that personal jurisdiction offers an easy route to prompt ending of litigation, you may be making a big mistake.

**Monopsony.** Monopsony as an antitrust issue has been making a big comeback recently, aided in part by the accessible and informative discussion in Herbert Hovenkamp, *Federal Antitrust Policy* § 1.2b (2d ed. 1999). Assistant Attorney General Pate's recent testimony on agriculture and antitrust was devoted principally to monopsony issues. As a matter of rhetoric or reality (or both), the Antitrust Division positioned itself as dedicated to preventing creation of monopsonistic power.<sup>28</sup>

In the courts, the noteworthy case is *Telcor Communications, Inc. v. Southwestern Bell Telephone Co.*<sup>29</sup> This was a wonderfully interesting opinion that upheld the finding of a pay telephone market that excluded cell phones. That might seem bizarre to all of you who have forgotten what a pay phone looks like. This was a monopsony case, however, and the court looked through the lens of a provider of locations for pay telephones. From that upside-down vantage point, the world looks different.<sup>30</sup> The court was persuaded that it looked sufficiently different that one could exclude cell phones. The larger lesson is that if you have a monopsony case and fail to think long, hard, and creatively about the possible ramifications thereof, you're making a big mistake.

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<sup>25</sup> *Coca-Cola Co. v. Harmar Bottling Co.*, 111 S.W. 3d 287 (Tex. App. 6th Dist. 2003).

<sup>26</sup> *See, e.g., Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2002), *cert. granted*, Dkt. No. 03-724 (Dec. 15, 2003).

<sup>27</sup> 334 F.3d 204 (2d Cir. 2003).

<sup>28</sup> Statement of AAG R. Hewitt Pate Before the Senate Committee on the Judiciary Concerning Antitrust Enforcement in the Agricultural Marketplace (Oct. 30, 2003).

<sup>29</sup> 305 F.3d 1124 (10th Cir. 2002).

<sup>30</sup> Remember *Todd v. Exxon*, 275 F.3d 191 (2d Cir. 2001).

**Pennington Footnote 3.** The *Telcor* case also focused new attention on *Pennington's* long-forgotten footnote 3. Assume a defendant has engaged in clearly *Noerr-Pennington*-protected petitioning. Is it home free with respect to that conduct, or can that conduct nonetheless put it at risk? The answer is the latter, according to *Telcor*. *Pennington's* footnote 3 notes that a trial judge can admit protected evidence, if “probative and not unduly prejudicial ‘if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.’”<sup>31</sup> The *Telcor* court relied on this to uphold the presentation to the jury of evidence of some allegedly ethically questionable lobbying. The jury was cautioned that lobbying is protected and here did not violate antitrust law—but was told that “you may consider this evidence if you find it tends to show the purpose and character of the transactions under scrutiny.”<sup>32</sup> If you think that presentation of such evidence cannot influence a jury, you’re probably making a big mistake.

**High Market Shares May Not Be Enough.** It has been a long time since a plaintiff could walk into court with evidence of a high market share and expect an automatic win even on the issue of market power. Were any reminder needed, this year offered two, through cases in which even alleged market shares of 90 percent or more were not sufficient to stave off defeat. In *Ticketmaster Corp. v. Tickets.com, Inc.*,<sup>33</sup> Ticketmaster won summary judgment against a challenge to its exclusive licenses on the grounds that even if it had a market share of 75 percent or 90 percent, market power was impossible where that share is the result of long-term contracts awarded through a bidding competition. In *FieldTurf, Inc. v. Southwest Recreational Industries, Inc.*,<sup>34</sup> the defendant won summary judgment when the court ruled that even if it had a 90 percent market share the plaintiff had failed to demonstrate an ability to control prices or exclude competition. To add insult to injury, in *FieldTurf* the defendant also prevailed on grounds of lack of antitrust injury where prices, although high, had been declining and new competitors had been entering the market. Neither case is doctrinally important (these are just district courts, after all). Both serve as reminders to plaintiffs that it would be a big mistake to think that antitrust litigation is easy simply because defendants have large market shares.

**Copperweld and Illinois Brick.** It is all too easy for lawyers and (especially) law professors to focus on substantive antitrust law and ignore the apparently less core issues of *Copperweld v. Independence Tube Corp.*<sup>35</sup> and *Illinois Brick v. Illinois*.<sup>36</sup> Big mistake. These issues arise regularly; the law is sufficiently unsettled that they deserve attention; and the issues cannot be cabined into narrow areas.

The first of two *Copperweld* cases that deserve mention is Judge Kozinski’s typically colorful worded opinion in *Freeman v. San Diego Association of Realtors*.<sup>37</sup> The Ninth Circuit held that a single corporation owned by a group of realtor associations was *not* a single entity and was capable of conspiring in violation of Section 1.<sup>38</sup> In an unusually thorough discussion of the issue,

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<sup>31</sup> *United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 n.3 (1965).

<sup>32</sup> *Telcor*, 305 F.3d at 1138.

<sup>33</sup> 2003-1 Trade Cas. (CCH) ¶ 74,013 (C.D. Cal. 2003).

<sup>34</sup> 235 F. Supp. 2d 708 (E.D. Ky. 2002).

<sup>35</sup> 467 U.S. 752 (1984).

<sup>36</sup> 431 U.S. 720 (1977).

<sup>37</sup> 322 F.3d 1133 (9th Cir. 2003).

<sup>38</sup> “Section 1, like the tango, requires multiplicity.” *Id.* at 1147.

the court set forth three factors to be considered in deciding when, “in the absence of economic unity,” there is nonetheless a single entity: (1) pursuit of “common interests” is “generally not enough, by itself” to establish a single entity; (2) the fact that firms are “not actual competitors” also is not enough; and (3) “where firms are not an economic unit and are at least potential competitors, they are usually not a single entity for antitrust purposes.”<sup>39</sup>

Even more interesting was the thought-provoking opinion by the Fourth Circuit in *Virginia Vermiculite v. Historic Green Springs*.<sup>40</sup> The court confronted the question whether a donation with anticompetitive strings attached can violate Section 1. As a matter of plain English, acceptance of such a donation surely constitutes an “agreement.” But the court reasoned that we are not in the world of ordinary English; rather, *Copperweld* has made the word “agreement” (or, more precisely, “concerted action”) into a “term of art.”<sup>41</sup> “[I]t cannot be understood as it might be in ordinary parlance.”<sup>42</sup> Rather, the logic of *Copperweld* means that in the world of antitrust, “concerted action” is limited to “activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests.” Accordingly, a gift, even with conditions, cannot be a Sherman Act agreement.

As for *Illinois Brick*, the issue of indirect purchasers has been fought out in almost every state in the Union, thanks to Microsoft. Even at the federal level, it is astonishing how frequently litigation struggles to resolve disputed questions. Three cases merit attention, one providing comfort to defendants, two providing discomfort. Microsoft was the big winner here, in *Dickson v. Microsoft Corp.*<sup>43</sup> The court firmly rejected the existence of any co-conspirator exception to *Illinois Brick*, except possibly where, for instance, a manufacturer and retailer agree on the retail price to be charged to the plaintiff. It makes no difference, said the court, that the direct purchasers have not and, allegedly, will not sue. A strikingly different approach was taken in *Loeb Industries v. Sumitomo*:

*Hanover Shoe, Illinois Brick, and McCready* make plain that the antitrust laws create a system that, to the extent possible, permits recovery in rough proportion to the actual harm a defendant’s unlawful conduct causes in the market without complex damage apportionment. This scheme at times favors plaintiffs (*Hanover Shoe*) and at times defendants (*Illinois Brick*), but it never operates entirely to preclude market recovery for an injury.<sup>44</sup>

Judge Diane Wood, writing for the court, noted that when a court turns to the question of who may recover for a wrong, “[t]he defendants’ answer (nobody) is not supported by *Illinois Brick*—or economics or fairness for that matter.”<sup>45</sup> Judge Kozinski, writing for the court in *Freeman*, was even more explicit. He ruled that the *Illinois Brick* rule has several exceptions, including where “there is no realistic possibility that the direct purchaser will sue its supplier over the antitrust violation.”<sup>46</sup>

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<sup>39</sup> *Id.* at 1148–49.

<sup>40</sup> 307 F.3d 277 (4th Cir. 2002)

<sup>41</sup> *Id.* at 281.

<sup>42</sup> *Id.* at 281–82.

<sup>43</sup> 309 F.3d 193 (4th Cir. 2002) (2–1).

<sup>44</sup> 306 F.2d 469, 483 (7th Cir. 2002).

<sup>45</sup> *Id.* at 484.

<sup>46</sup> 322 F.3d at 1145–46.

How the tension between the Fourth Circuit and the Seventh and Ninth Circuits will be resolved remains to be seen. In the meantime, any lawyer who gives short shrift to *Copperweld* and *Illinois Brick* issues is making a big mistake.

### **Kindergarten Cop (Teachers)**

Perhaps the most remarkable feature of the past year was the leading role played by teachers—in this case, of antitrust law and economics. The three noteworthy cases are *American Airlines*, *Trinko*, and *LePage's*.

**American Airlines (*Hovenkamp*).** *American Airlines* surely counts as a DOJ defeat, but the government can be somewhat comforted by how much better it fared at the hands of the court of appeals than at those of the district judge.<sup>47</sup> Consider some of the issues on which the two courts differed:

- **How plausible is predatory pricing?** The district court followed the now-traditional line. It emphasized the “general implausibility of predatory pricing” and quoted the *Matsushita* assertion that “there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.”<sup>48</sup> Not so the court of appeals. Judge Lucero’s opinion notes that economists writing more recently “have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets.”<sup>49</sup> “Although this court approaches the matter with caution, we do not do so with the incredulity that once prevailed.”<sup>50</sup>
- **Must the government show pricing below average variable cost?** The district court ruled that the government, and implicitly every plaintiff, must prove pricing below average variable costs. “Average variable cost, as a measure of predatory pricing, enjoys not only the weight of authority, it is also most congruent with the goal of the Sherman Act . . . .”<sup>51</sup> Again, the court of appeals was more receptive to concerns about predatory pricing:

[T]here may be times when courts need the flexibility to examine both AVC as well as other proxies for marginal cost in order to evaluate an alleged predatory pricing scheme . . . . Sole reliance on AVC as the appropriate measure of cost may obscure the nature of a particular predatory scheme and, thus, contrary to what is suggested by the district court, we do not favor AVC to the exclusion of other proxies for marginal cost.<sup>52</sup>

<sup>47</sup> Compare *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2002) with *United States v. AMR Corp.*, 140 F. Supp. 2d 1141 (D. Kan. 2002). Indeed, AAG Pate made this point in his Luncheon Address, delivered shortly after these remarks were presented. R. Hewitt Pate, *Vigorous and Principled Antitrust Enforcement: Priorities and Goals*, Remarks Before the Antitrust Section of the American Bar Association Annual Meeting (Aug. 12, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201241.pdf>.

<sup>48</sup> 140 F. Supp. 2d at 1195 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986)).

<sup>49</sup> 335 F.3d at 1114–15. The court cited, with an “e.g.,” Jonathan B. Baker, *Predatory Pricing after Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 590 (1994), and Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000).

<sup>50</sup> 335 F.3d at 1115.

<sup>51</sup> 140 F. Supp. 2d at 1199.

<sup>52</sup> 335 F.3d at 1116.

- **Does Section 2 have a meeting competition defense?** The district court, more impressed with the Robinson-Patman Act than many commentators, borrowed that Act's meeting competition defense and found that it should be applicable in some or all Sherman Act predatory pricing cases.<sup>53</sup> The court of appeals was less impressed. Noting that the Robinson-Patman Act sets out that defense (and the Sherman Act does not) and that the Supreme Court "has never mentioned the possibility of such a defense under the Sherman Act," the court "decline[d] to rule that the 'meeting competition' defense applies in the § 2 context."<sup>54</sup>
- **Recoupment by reputation?** The district court rejected out of hand the suggestion that a monopolist could achieve the required dangerous probability of "recoupment" through establishing a reputation for predation that could benefit it outside the market in issue. The court found this approach "fundamentally misguided, contrary to law, and unsupported by the uncontroverted facts."<sup>55</sup> The court of appeals ruled for AMR on the issue of pricing below cost, and wrote that this rendered an examination of recoupment "unnecessary."<sup>56</sup>

In a series of ways, thus, the Government fared much better in the court of appeals than in the district court. Why, then, did it lose? We can only speculate, of course. Although one never knows what might have made a difference, my guess is that the Government made a strategic mistake when it offered up four different tests for measuring below-cost pricing. The mere fact of offering four tests carries with it the implication that the Government is confident in none. The court of appeals addressed two of the tests in a footnote, explaining that the Government had virtually abandoned them on appeal.<sup>57</sup> Another test was flawed because it included some fixed costs. The court viewed the fourth test as flawed because it faulted American for failing to engage in profit-maximization, and the law does not require this (again relying on academics<sup>58</sup>). One can only wonder what would have happened had the Government focused on a single test.

Unhappily ironically for the Government, the best comment on all this may have been made by antitrust guru Herbert Hovenkamp, who explained why the *AMR* court was more likely to accept a single test based on average variable cost. He explained that other tests "are problematic in that (1) they represent severe departures from existing case law; and (2) will be hazardous to administer in court."<sup>59</sup>

What must be acutely painful to the Government is that Professor Hovenkamp wrote those words *before* the district court ruled, in the role of a consultant to the Government expressing his views in a letter which the Government "inadvertently delivered" to AMR, waiving the privilege.<sup>60</sup>

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<sup>53</sup> 140 F. Supp. 2d at 1204–08.

<sup>54</sup> 335 F.3d at 1120 n.15.

<sup>55</sup> 140 F. Supp. 2d at 1213.

<sup>56</sup> 335 F.3d at 1121.

<sup>57</sup> *Id.* at 1117.

<sup>58</sup> The court cited 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 736c2 (2d ed. 2002) and Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power*, 112 *YALE L.J.* 681, 694 (2003).

<sup>59</sup> "The biggest advantage that the AVC test has going for it is a high degree of general acceptance . . . [It would] be far easier to get a court to agree to adhere to the AVC test but take some care as to how costs are classified, rather than abandon it in favor of any test that uses 'failure to maximize in the short run' or average total cost as a standard. Such an AVC standard would also give the court a more manageable set of numbers to work with and limit the amount of speculation." 140 F. Supp. 2d at 1175, 1200 n.14.

<sup>60</sup> *Id.* at 1200 n.14.

AMR gleefully included the letter as an exhibit and the district court quoted it extensively. Presumably the Government wishes that it had either followed that law teacher's advice, or at least not allowed it to be shared with the court!

**Trinko (Ordovery/Willig/Baumol/Warren-Boulton).** Professors also played an unusual role in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*.<sup>61</sup> At issue was the "sacrifice test" championed in two different versions by the Government.

That test was advocated most forcefully in the SG's brief on the petition. "Conduct is 'exclusionary' or 'predatory' in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition."<sup>62</sup> In their merits brief, the agencies were more cautious: "Where, as here, the plaintiff asserts that the defendant was under a duty to *assist a rival*," then inquiry into its conduct "requires a sharper focus. In that context, conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."<sup>63</sup>

The Government's advocacy was criticized forcefully, however, by an extraordinary amicus brief filed by four economists: William J. Baumol, Janusz A. Ordover, Frederick R. Warren-Boulton, and Robert D. Willig. The brief is the antitrust equivalent of the scene from the film, *Annie Hall*, where two men argue about what Marshall McLuhan ("The medium is the message.") really meant, until McLuhan, playing himself, emerges on screen and informs one of them, "You know nothing of my work!" Similarly, the economists declare that the "sacrifice test" is their test:

Professors Ordover and Willig are widely credited with developing the "sacrifice" test that was also independently formulated and applied about the same time by Professor Baumol . . . . This is the criterion the Department of Justice and Federal Trade Commission . . . urge the Court to adopt as an absolute prerequisite for a finding that a refusal to deal, whatever the particular market or regulatory conditions, amounts to "willful acquisition or maintenance" of monopoly power.<sup>64</sup>

And the economists are no happier than McLuhan: "Amici strongly disagree with the Government's request that the Court adopt the sacrifice test as the sole basis for determining willfulness in all Section 2 refusal-to-deal cases."<sup>65</sup> The Government would "give the sacrifice test a broader role than it can legitimately bear," which "would be a serious misapplication of the sacrifice test and, if adopted, could have far-ranging and detrimental consequences for consumers in particular and for competition more generally."<sup>66</sup>

The ultimate irony is that in *Trinko* Professors Baumol and Ordover criticized the Government for what they saw as a too pro-defendant use of the sacrifice test—but in *AMR*, the Government

<sup>61</sup> 2004 U.S. LEXIS 657 (Jan. 13, 2004). The points made in these remarks are unchanged by the Supreme Court's opinion, issued long after these remarks were delivered.

<sup>62</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae, at 10.

<sup>63</sup> Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, at 15. The brief on the petition was also much more aggressively critical of the *Microsoft* balancing test. Compare Brief on Petition at 11 n.2 ("In *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59, *cert. denied*, 534 U.S. 952 (2001), the en banc District of Columbia Circuit suggested, as one step of its analysis under Section 2, a 'balancing approach' analogous to the 'rule of reason' standard applied under Section 1 of the Sherman Act. The United States did not suggest or endorse such a 'balancing approach' in the *Microsoft* case.") with Brief on Merits at 15 n.4 (no mention of *Microsoft* balancing, and a new sentence notes that "the private standard-setting process may afford opportunities for opportunistic behavior that may harm competition").

<sup>64</sup> Brief of Amici Curiae Economics Professors in Support of Respondent, at 5 (LEXIS).

<sup>65</sup> *Id.* at 12.

<sup>66</sup> *Id.* at 7.

was criticized for what the court saw as a too pro-plaintiff use of that test. The defense economists included, of course, Professors Baumol and Ordover!

**LePage's (*Hovenkamp*).** The final fascinating featuring of a professor occurred in *3M Company v. LePage's Incorporated*.<sup>67</sup> What wonderfully different questions are allegedly presented by the Third Circuit's opinion!

- According to petitioner 3M: "Whether a dominant firm's discounted but above-cost prices for volume purchases, or either individual products or multiple products, may be condemned as unlawful under Section 2 of the Sherman Act based on the incentive such low prices offer to shift purchases away from smaller rivals."<sup>68</sup>
- According to respondents: "Whether the court of appeals correctly rejected petitioner "3M's legal theory that after *Brooke Group*, no conduct by a monopolist who sells its product above cost—no matter how exclusionary the conduct—can constitute monopolization in violation of § 2 of the Sherman Act."<sup>69</sup>

Respondent LePage's wrapped itself tightly in Herbert Hovenkamp's cloak, featuring him in the first and the last sentence of its opening comment:

In its analysis of the en banc decision in this case, the leading treatise on antitrust law observes: "[t]he gravamen of LePage's complaint was not pricing, but foreclosure. . . ."

. . . .

. . . The en banc Third Circuit properly rejected 3M's argument that *Brooke Group* 'overturned decades of Supreme Court precedent' (Pet. App. 16a) and immunized all above-cost practices of monopolists from antitrust scrutiny. The leading antitrust treatise agrees that "the court seems quite correct" in having done so.<sup>70</sup>

Nor were respondents the only ones to focus on the views of Professor Hovenkamp. A series of amicus briefs have been filed, inevitably focusing in part on his views. Indeed, one brief is devoted principally to refuting his writings.<sup>71</sup> Petitioner positioned itself as disagreeing not with his doctrinal views but with his application of those views to this case.<sup>72</sup> One cannot accuse the antitrust bar of ignoring academics.<sup>73</sup>

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<sup>67</sup> Dkt. No. 02-1865 (petition for certiorari filed).

<sup>68</sup> Petition for a Writ of Certiorari at (i).

<sup>69</sup> Brief for the Respondents in Opposition at (i) (quoting *LePage's Inc. v. 3M Co.*, 324 F.3d 141, 147 (3d Cir. 2003)). Respondent also identified a second question: "Whether certiorari review is foreclosed by 3M's failure, in its question presented, to address the court of appeals' holding that 3M's exclusive dealing practices independently supported the jury verdict in this case." Brief in Opposition at (i).

<sup>70</sup> Brief in Opposition at 1-2 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 749, at 133 (Supp. 2003)).

<sup>71</sup> See Brief for the Boeing Co. et al. as Amici Curiae in Support of Petitioner at 9-11 & n.2, 13-20.

<sup>72</sup> Reply Brief of Petitioner at 8 n.8.

<sup>73</sup> One unfortunate side effect of the attention that academic writings may receive is that scholars can be accused of shading writings to conform to litigation positions. Cf. Declaration of Herbert Hovenkamp in Support of Plaintiff's Motion for Reconsideration of the Court's September 28, 2000, Order Granting Defendants' Motion to Review, *United States v. AMR Corp.*, Civ. No. 99-1180-JTM (Oct. 20, 2000) (addressing AMR's allegation that after consulting with the government Hovenkamp added a footnote to his 1999 *Supplement* that was consistent with the Government's position). One can only hope that full disclosure and academic standards can prevent such charges from ever being merited.

In fact, the Third Circuit's en banc opinion in *LePage's* is terribly important—as will be the Government's decision about what views to share with the Court on whether to grant cert.<sup>74</sup> *LePage's* addresses many of the most critical issues in Section 2 and exclusive dealing law. Bundling issues are central, of course, but there are a half-dozen other important pronouncements:

- One cannot even enumerate all the varieties of anticompetitive conduct.<sup>75</sup>
- Pricing above cost is not always legal.
- Exclusive dealing arrangements of a year or less are not automatically legal.<sup>76</sup>
- “The Supreme Court has made clear that intent is relevant to proving monopolization and attempt to monopolize.”<sup>77</sup>
- The Supreme Court's “consistent holdings” are “that a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.”<sup>78</sup>
- “[A] defendant's assertion that it acted in furtherance of its economic interests does not constitute the type of business justification that is an acceptable defense to § 2 monopolization. . . . The fact that 3M acted to benefit its own economic interests is hardly a reason to overturn the jury's finding that it violated § 2 of the Sherman Act.”<sup>79</sup>

Whether or not certiorari is granted—and my guess is that it will be denied at least if that is what the SG recommends—*LePage's*, the debate over which has been enriched by law teachers, will offer a rich bounty of material suitable for challenging students and legal advisors alike.

**Three Tenors (*Muris*).** Our final professor is Timothy Muris, currently serving as Chairman of the FTC, and the author of the opinion in *Three Tenors*.<sup>80</sup> Fifteen years ago the FTC offered its own unique solution to the tension between the per se rule and the rule of reason, in *Massachusetts Board of Registration in Optometry*.<sup>81</sup> That approach was set aside by the Commission in Chairman Pitofsky's opinion in *California Dental Association*.<sup>82</sup> Writing about what he characterized as the Commission's *Cal Dental* “categorization” approach, Muris defended the abandoned *Mass. Board*. He presciently observed that “whether emphasis on categorization will continue or not depends on the Commission leadership, particularly the Chairman and the Bureau Director.”<sup>83</sup> And, sure enough, Professor Muris succeeded Professor Pitofsky, and *Mass. Board* was back.

But *Three Tenors* is not exactly *Mass. Board*. This is best illustrated by comparing *Mass. Board's* three questions with *Three Tenors'* equivalent questions, using highlighting to emphasize similarities and differences.

<sup>74</sup> See 124 S. Ct. 365 (Oct. 6, 2003) (inviting the SG to file a brief).

<sup>75</sup> 324 F.3d at 152 (quoting *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1087 (D.C. Cir. 1998)).

<sup>76</sup> 324 F.3d at 157 n.11.

<sup>77</sup> *Id.* at 163 (citing *Aspen Skiing* and *Lorain Journal*).

<sup>78</sup> *Id.* at 152.

<sup>79</sup> *Id.* at 163–64.

<sup>80</sup> *Polygram Holding, Inc.*, 2003 FTC LEXIS 120 (July 24, 2003) (*Three Tenors*).

<sup>81</sup> 110 F.T.C. 549 (1988).

<sup>82</sup> 121 F.T.C. 190 (1996), *aff'd*, 128 F.3d 720, *rev'd*, 526 U.S. 756 (1999).

<sup>83</sup> Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of Massachusetts Board*, 66 ANTITRUST L.J. 773 (1998).

Preliminary question: *Three Tenors* only. Unlike *Mass. Board*, *Three Tenors* expressly recognizes a role for the per se rule. “[I]n cases with no possible arguments that restraints are needed to achieve beneficial results” and in other cases where “the proffered justifications can likewise be dismissed summarily,” then “a more traditional per se approach remains appropriate.”<sup>84</sup>

Question One. *Mass. Board*: “First, we ask whether the restraint is ‘*inherently suspect*.’ In other words, is the practice the kind that appears likely, absent an efficiency justification, to ‘restrict competition and decrease output’?”<sup>85</sup> (If not, “then the traditional rule of reason, with attendant issues of market definition and power, must be employed.”)

*Three Tenors*: Is the conduct “*inherently suspect* owing to its likely tendency to suppress competition. Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation.”<sup>86</sup>

*Comment*: *Three Tenors* resurrects the “inherently suspect” label. Critics who complained of the earlier lack of detailed definition,<sup>87</sup> are unlikely to be mollified by the nod to courts and economics.

Question Two. *Mass. Board*: “Is there a *plausible efficiency justification* for the practice? That is, does the practice seem capable of creating or enhancing competition . . . Such an efficiency defense is plausible if it *cannot be rejected without extensive factual inquiry*.”<sup>88</sup>

*Three Tenors*: If challenged restrictions are “inherently suspect, then the defendant can avoid summary condemnation only by advancing a *legitimate justification* for those practices.”<sup>89</sup> “To be legitimate, a justification must plausibly create or improve competition.”<sup>90</sup> “At this early stage of the analysis, the defendant need only articulate a legitimate justification.”<sup>91</sup> But “the proffered justifications must be both *cognizable* under the antitrust laws and at least *facially plausible*.”<sup>92</sup> A “cognizable” justification is “[c]ompatible with the goal of antitrust law to further competition.”<sup>93</sup> “A justification is plausible if it *cannot be rejected without extensive factual inquiry*. . . . Although the defendant need not produce detailed evidence at this stage, it must articulate the specific link between the challenged restraint and the purported justification . . . .”<sup>94</sup>

*Comment*: A simple second question has been replaced with much more elaborate scrutiny. Before, a justification needed only to be “plausible.” Now, it must be “legitimate,” meaning both “plausible” and “cognizable.” “Cognizable” is a concept apparently borrowed from the Competitor

<sup>84</sup> *Three Tenors*, supra note 80, at 96 n.66.

<sup>85</sup> 110 F.T.C. at 604 (emphasis added).

<sup>86</sup> *Three Tenors*, supra note 80, at 61 (emphasis added).

<sup>87</sup> See, e.g., Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission’s Antitrust Analysis*, 64 ANTITRUST L.J. 613 (1996).

<sup>88</sup> 110 F.T.C. at 604 (emphasis added).

<sup>89</sup> *Three Tenors*, supra note 80, at 61.

<sup>90</sup> *Id.* at 65. An alternative phrasing of this requirement is harder to parse but perhaps easier to satisfy: Legitimate justifications “may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question; or they may consist of reasons why the practices are likely to have beneficial effects for consumers.” *Id.* at 61.

<sup>91</sup> *Id.* at 62.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 65.

Collaboration Guidelines but defined more narrowly.<sup>95</sup> More generally, by requiring articulation of a “legitimate” justification, rather than just a “plausible” one, the Commission has replaced a term with a permissive connotation with one with a demanding one. *Webster’s New World Dictionary* (2d College Ed. 1982), defines “plausible” as “seemingly true, acceptable, etc.: often implying disbelief,” and explains that it “applies to that which at first glance appears to be true, reasonable, valid, etc. but which may or may not be so, although there is no connotation of deliberate deception.” In contrast, it defines “legitimate” variously as “sanctioned by law or custom; lawful;” “conforming to or abiding by the law;” “reasonable; logically correct;” “justifiable or justified;” and “conforming to or in accordance with established rules, standards, or principles.”

**Question Three: *Mass. Board*:** If the efficiency justification is “plausible,” a “third inquiry . . . is needed to determine whether the justification is really valid. If it is, it must be assessed under the full balancing test of the rule of reason.”<sup>96</sup> If not, illegal.

*Three Tenors:*

When the defendant advances such cognizable and plausible justifications, the plaintiff must make a *more detailed showing* that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing *still need not prove actual anticompetitive effects* or entail ‘the fullest market analysis.’ . . . [S]uch a showing may or may not require evidence about the particular market as issue, but at a minimum must entail the *identification of the theoretical basis* for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. *Such a showing may, for example, be based on a more detailed analysis of economic learning* about the likely competitive effects of a particular restraint, in markets with characteristics comparable to the one at issue. The plaintiff may also show that the proffered procompetitive effects could be achieved through means *less restrictive of competition*. . . .

The plaintiff has the burden of persuasion overall, but not necessarily the burden with respect to each step of this analysis. If the plaintiff satisfies its initial burden of showing that the practices in question are inherently suspect, then the defendant must come forward with a substantial reason why there are offsetting procompetitive benefits. If the defendant articulates a legitimate . . . justification, then the plaintiff must address the justification, and provide the tribunal with sufficient evidence to show that the anticompetitive effects are in fact likely, before *the evidentiary burden shifts to the defendant*.<sup>97</sup>

**Comment:** The *Mass. Board* third step was at least seemingly simple—was this plausible justification valid—with a positive answer leading to the full rule of reason. *Three Tenors* is very different. Even where the defendant can point to “legitimate” justifications, the plaintiff can prevail through resort to theory, economics scholarship, and the existence of less restrictive alternatives. Indeed, the plaintiff can sometimes shift the evidentiary burden back onto the defendant.

The Commission’s new three questions raise three questions for us:

- Under *Three Tenors*, once a restraint is labeled “inherently suspect,” is it ever evaluated by the full-blown rule of reason? *Mass. Board* clearly identified analytical paths back to the rule of reason. *Three Tenors* does not. Identification of “inherently suspect” restraints may be even more critical than it used to be.

<sup>95</sup> See Antitrust Guidelines for Collaborations Among Competitors § 3.36 (“‘Cognizable efficiencies’ are efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means.”).

<sup>96</sup> 110 F.T.C. at 604 (emphasis added).

<sup>97</sup> *Three Tenors*, *supra* note 80, at 66 (footnotes omitted; emphasis added).

- Where does this leave the Competitor Collaboration Guidelines? *Three Tenors* cites the Guidelines frequently but obviously advances a different analytical structure. Have the Guidelines implicitly been revised—and, if so, for both agencies, or only for the FTC? As a matter of good government if not legal obligation, should the agencies explicitly update the Guidelines?
- Will *Three Tenors* have any application outside the FTC? *Three Tenors* is a thoughtful, potentially important contribution to antitrust, as was *Mass. Board*. But no court ever cited *Mass. Board*! Courts wrote per se, rule of reason, and “quick look” opinions without once referencing the Commission’s contribution. *Mass. Board* neither used the language with which courts were familiar nor enjoyed the endorsement of any appellate court. It is not clear whether *Three Tenors* will enjoy a different fate. The respondents have appealed the Commission’s decision, which means that this time an appellate court will weigh in (perhaps reversing, of course). Even assuming the court affirms, it could do so by showing deference to the Commission’s application of Section 5 without endorsing the Commission’s structure for use in private Sherman Act litigation. Thus, antitrust may once again be developing two different tracks, one for administrative proceedings, one for federal district court. Some observers have recommended such an approach.<sup>98</sup> On the other hand, it would be unfortunate were a professor as talented as Chairman Muris not to help the courts wrestle with issues as fundamental to antitrust as the interplay between the per se rule and the rule of reason.

## Conclusion

That completes our survey. Given the importance of the issues addressed last year, it is almost inevitable that in the future they will “be back”—and that if you don’t pay close attention you’ll be making a “big mistake.” And for those who think that they can forget about antitrust and economics professors once they are done with school—all I can say is “Hasta la vista, baby!”

## Christopher Hockett: *IP and Antitrust 2002–03*

I will first address Government activities, then selected private litigation.

### DOJ/FTC IP Hearings

Let me begin by diving straight in to the DOJ/FTC IP hearings. There were twenty-one days of hearings and three days of workshops. Testimony was taken from dozens of academics, practitioners, and business people, and the topics included the full range of issues relevant to antitrust and intellectual property. The agencies are currently working on reports summarizing findings and policy recommendations from the hearings.<sup>99</sup> In January 2003, AAG Hew Pate pointed out certain issues of disagreement that had emerged in the commentator’s testimony and certain issues where there appeared to be a general consensus.<sup>100</sup> So let’s take a look at those.

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<sup>98</sup> See Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337 (2000).

<sup>99</sup> In October 2003, the FTC issued its report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

<sup>100</sup> R. Hewitt Pate, *Antitrust and Intellectual Property* (Jan. 24, 2003), available at <http://www.usdoj.gov/atr/public/speeches/200701.htm>.

Several areas of difference emerged, according to Hew Pate. The first is whether economics can ever justify imposition of unilateral duties to license or more intense scrutiny of conditional licenses. Related to this is the age-old issue of whether you can extract more than one monopoly rent. The second area of difference, another chestnut, is whether intellectual property is different from other property for antitrust purposes. The third is whether or not antitrust enforcers should attack patents they think are invalid or leave that sort of thing to the PTO. (That is a question I think that is deeply implicated by the Government and private antitrust attacks on settlements of patent infringement lawsuits because it's usually inescapable that one has to delve into the strength of the patent that's being asserted to evaluate the compromise struck by the parties.) And the final area of disagreement is whether or not there are too many "bad" patents, meaning patents that the Patent Office shouldn't have issued. On that there is a fair debate about whether it's a good investment to spend the time up front to control the issuance of the patents as opposed to letting the process sort itself out in litigation and bargaining afterwards. It turns out that, in spite of the 160,000 or so patents that are issued every year, only about 1,600 patent cases get filed, and only about 100 patent trials happen every year. So, to spend a lot of money improving the quality of patents is not necessarily a rational thing to do.<sup>101</sup>

Then there are points of consensus and agreement. It was agreed, according to Hew Pate, that the significance of patents varies by industry. The semiconductor industry has lots of patents and there's a lot of cross-licensing. The pharmaceutical industry, for example, has relatively few but bigger patents and not very much cross-licensing. It was also agreed that unilateral duties to deal should be very limited, even outside of the intellectual property context. There was a consensus that legitimate standard-setting activities are good, and that the PTO needs better funding, which is hard to refute. Interestingly, Hew also points out in his speech that he thought that there was general agreement that the Ninth Circuit "pretext" analysis of refusals to deal was unsound.<sup>102</sup> This grows out of the *Kodak* case on remand to the Ninth Circuit, which went to the issue of what the intellectual property holder's intent was when it decided to exercise its rights. I point you to an interesting comment made by Joe Simons when he was head of the FTC's Competition Bureau in an interview in *Antitrust Source*, where he said that subjective intent on this issue would helpfully inform the inquiry as to legality.<sup>103</sup> So I'm not sure how universal the agreement actually is on this.

### Standard Setting

I want to talk about standard setting and the *Unocal* case.<sup>104</sup> Steve Calkins is very good about organizing his thoughts into themes. For my talk, the best pattern that I could discern was to determine whether cases were weird, or not weird. So, I hope that will be helpful to you.

The FTC has been working on a couple of cases involving, allegedly illegal attempts to secretly acquire patent rights on technology that's being adopted by a standard-setting organization as an industry standard. These cases are not weird, and I'll explain why.

The *Unocal* case, according to the FTC's complaint filed in March of 2003, involved this fact

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<sup>101</sup> Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495 (2001).

<sup>102</sup> See Pate Speech, *supra* note 100.

<sup>103</sup> See <http://www.abanet.org/antitrust/source/may03/simonsinterview.pdf>.

<sup>104</sup> Union Oil Company of California, FTC Dkt. No. 9305 (complaint Mar. 4, 2003), available at <http://www.ftc.gov/os/2003/03/unocalcmp.htm>. On November 25, 2003, Administrative Law Judge Michael Chappell filed an Initial Decision dismissing the FTC's complaint in its entirety, <http://www.ftc.gov/os/2003/11/031126unionoil.pdf>. On December 2, 2003, FTC Complaint Counsel filed a notice of appeal from the Initial Decision, <http://www.ftc.gov/os/adjpro/d9305/031202ccnoticeofappeal.pdf>.

pattern. Unocal participated in California's regulatory standard-setting process on low emissions gasoline called Summertime Reformulated Gas, or RFG. The standard setting was being done by a government entity, the California Air Resources Board. That's why there are *Noerr* issues in this case, as well as regular standard-setting issues. Unocal had intellectual property rights that it was trying to get, and the standards would have covered those rights. And so, Unocal urged adoption of the standards that it knew would be included within its intellectual property rights. The FTC claims that in this process the Unocal people hid their pending patent claims and their intention to assert the IP interests and, because of that nondisclosure, the California Air Resources Board adopted the standards that it did. After the standards were adopted, Unocal allegedly engaged in a patent ambush, asserting the patents and actually prosecuting to jury verdict its patent claims against some of the refiners. The jury in that patent infringement case found that Unocal was entitled to a royalty of almost six cents per gallon on the RFG, which amounts to about a half a billion dollars a year. So the FTC's complaint sought to prevent assertion of the patents at issue.

The second case is *Rambus*.<sup>105</sup> It's very similar to *Unocal*, except the standard-setting organization was private. Rambus allegedly participated for more than four years in the SDRAM standard-setting process (SDRAM is a kind of advanced random access memory chip technology), and it actually withdrew from participation when the FTC filed its case in *Dell*, which you may remember from 1996.<sup>106</sup> According to the FTC, the press around the *Dell* case led Rambus to realize that what it was doing wasn't right. What the Rambus representatives allegedly had done was to attend the standard-setting meetings and communicate (sometimes via e-mails sent right from the meetings) with their colleagues working on getting the patents to ensure that they included various patent claims that would cover the standards being discussed. And, like Unocal, at the end of the process, the standard urged was adopted and Rambus got lots of royalties as a result, and, like Unocal, the FTC seeks to stop Rambus from asserting those patents.

The reason that these cases are not weird is because if the allegations are true, the strategy of manipulating the standard-setting process so that firms end up owning the industry standard is a relatively cheap and effective means of potentially acquiring market power. So it makes sense for the Government to be focusing on this area. The problem of course is there has to be some kind of a duty to disclose the intellectual property that the Government says the firm is hiding. In *Unocal* there is a real question where the duty to disclose arises, because its representatives were just participating in a government standard-setting process, an activity that is privileged under *Noerr-Pennington*. Unocal was simply urging the adoption of a particular standard. I think a big question in that case is going to be whether there is anything that obliges it to not participate without disclosing its intellectual property interests.

In *Rambus*, the outcome all depends on the rules of the private standard-setting organization and whether the rules were followed. The rules are not a model of clarity, and it depends on how they are interpreted to find out whether Rambus is guilty of hiding its patents. There was an interesting development in private litigation that I think bears directly on that question, and that is the *Rambus v. Infineon* case in the Federal Circuit in 2003.<sup>107</sup> Rambus originally brought this case against Infineon (a competing memory device maker) to enforce the patents at issue. Infineon coun-

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<sup>105</sup> Rambus Inc., FTC Dkt. No. 9302 (complaint June 18, 2002), available at <http://www.ftc.gov/os/2002/06/rambuscmp.htm>.

<sup>106</sup> Dell Computer Corp., 121 F.T.C. 616 (1996).

<sup>107</sup> *Rambus, Inc. v. Infineon Technologies AG*, 318 F.3d 1081 (Fed. Cir. 2003) (reversing fraud verdict on Rambus's alleged failure to disclose relevant IP to standard-setting organization).

terclaimed under Virginia law and said that Rambus had committed fraud by failing to disclose its patents to JDEC, the standard-setting organization. The district court entered judgment as a matter of law that Infinion did not infringe the patents, and the jury found Rambus liable for fraud. On appeal, the Federal Circuit, as is customary, rejected a lot of things that the district court did, reversing in part, affirming in part, vacating in part, and remanding (which is one reason why district court judges love the Federal Circuit so much). It reversed the claim construction in the finding of non-infringement. It reversed the fraud verdict arising from the failure to disclose IP, though, because the disclosure obligation as it applied to the patent being prosecuted by Rambus wasn't clear. So, what are the implications for the FTC case that continues? Well, when this decision came out, the FTC issued a press release saying that it didn't have any kind of impact on the FTC's case because the standards for fraud under Virginia law are different than the FTC's standards and the burden of proof is higher. Yet, if there wasn't a clear duty to disclose the patents, that would seem to be a significant problem for the FTC case no matter what, so it will be interesting to see how it turns out.

Last on standard setting, I will just mention there was a business review letter last fall from the DOJ on robotic welding cells.<sup>108</sup> For those of you who are fans of standard setting or robotic welding cells I recommend it to you.

### **MathWorks Settlement**

Let me give you a quick summary of the DOJ's *Mathworks* matter and settlement.<sup>109</sup> Two companies, Mathworks and WindRiver, were allegedly important competitors to each other in making and selling complex system design software tools which are used, among other things, in the defense industry. One bought an exclusive distribution right to the other's competing product, MATRIXx. The one that sold its rights was bound by the sale agreement not to continue developing the product, and the one that bought the rights closed it down, saying that the product was already dying. Then some months after this transaction happened, the DOJ came along. The DOJ alleged that the conduct committed was per se illegal, and it intervened and forced a sale of the MATRIXx product line to a new purchaser, preserving competition. That is not a weird case except that it seems more like a merger case than a conduct case.

### **3G Patent Platform Partnership Business Review**

The 3G patent platform partnership is a pronouncement from the Department of Justice on patent pooling and licensing, essentially, and it's a very interesting matter.<sup>110</sup> I think it provides some very useful guidance for people interested in constructing patent pools, and it is an example of the kind of thing a business review letter really ought to accomplish. It came out at the same time as a comfort letter from the EC essentially saying the same thing.<sup>111</sup> The problem that needed solving was

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<sup>108</sup> Robotic Welding Cells Interoperability Standards, Business Review Letter (Oct. 7, 2002), available at <http://www.usdoj.gov/atr/public/busreview/200310.htm>.

<sup>109</sup> DOJ challenge to licensing agreement as per se illegal market allocation and price fixing settled on August 15, 2002, [http://www.usdoj.gov/atr/public/press\\_releases/2002/200164.htm](http://www.usdoj.gov/atr/public/press_releases/2002/200164.htm). Court approved sale to third party of MATRIXx, Wind River's dynamic control system design software, in March 2003: [http://www.usdoj.gov/atr/public/press\\_releases/2003/200814.htm](http://www.usdoj.gov/atr/public/press_releases/2003/200814.htm).

<sup>110</sup> 3G Patent Platform Partnership, Business Review Letter (Dec. 12, 2002), available at <http://www.usdoj.gov/atr/public/busreview/200455.htm>.

<sup>111</sup> [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/02/1651|0|AGED&lg=EN&display=](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1651|0|AGED&lg=EN&display=)

there are five different third-generation wireless interfaces (third generation, or “3G,” refers to data applications and heavy duty bandwidth in wireless phones). And there are lots of essential patents necessary to practice and implement the various 3G standards. According to the business review letter, there is no easy way to figure out which patents are really necessary, identify the people who own them, and negotiate license agreements. That is because the transaction costs are too high, with as many as 100 companies owning potentially relevant patents.

So the solution was a patent pool and licensing arrangement that allowed the procompetitive benefit of reducing the transaction costs, but also not creating any antitrust problems. There were five separate patent platforms developed, one for each competing 3G technology. Under the rules, each platform determines the essentiality of a particular patent to its technology. Each one sets its own license terms. Their independence from each other preserves competition between the various competing platforms, and they don't share information with each other about royalty rates and don't participate in setting anyone else's royalty rates and so forth. Like many of these arrangements, there is no obligation to join the platform unless a firm submits its patents to it or receives a license from the platform, and anybody can negotiate outside the terms of the standard agreements. It is a well-constructed solution to a complicated problem.

### Pharmaceutical Industry Patent Cases

Let me say a word about the pharmaceutical industry cases, which constitute, as Steve Calkins mentioned earlier, a very important area. Most of the people who need to know about this already know a lot more about it than I do, but here are the basics. When a generic manufacturer wants to introduce a new drug to compete with a branded counterpart, it files what's called an Abbreviated New Drug Application, or ANDA, and the first to file is rewarded with a period of exclusive generic sales for six months. The name brand, though, can stop things by filing a patent infringement lawsuit, which triggers an automatic stay of up to thirty months on the introduction of any generic competitor. Not surprisingly, two-thirds or three-quarters of the time an ANDA is filed, it is met with a patent infringement claim by the brand name drug manufacturer. Most of those cases settle. Some of them settle weirdly, with the patent owner paying the accused infringer instead of the other way around, and the result most of the time in those cases is that the generic's entry into the market is further delayed. This has raised eyebrows, which is not weird. There is a lot of enforcement activity in this area, particularly at the FTC and NAAG. The categories of alleged violations are, as I mentioned, settlements; abusive Orange Book listings (the Orange Book is the place where a firm lists its patent that supposedly covers its drug); perpetrating fraud on the Patent Office to get an invention patented that shouldn't be; and engaging in sham patent litigation.

I am not going to go into individual cases,<sup>112</sup> but just make some general comments. One is there are very powerful incentives for abuse in this area. There is a lot of money at stake, and a

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<sup>112</sup> For an overview of key issues and the current FTC enforcement program, see Timothy Muris, Chairman, FTC, Testimony to Senate Judiciary Committee on Competition in the Pharmaceutical Industry (June 17, 2003), available at <http://www.ftc.gov/os/2003/06/030617pharmtestimony.htm>); see also Schering-Plough Corp., FTC Dkt. No. 9297 (FTC's challenge to patent litigation settlement agreement defeated before ALJ in June 2002, now on appeal to the Commission), available at <http://www.ftc.gov/os/2002/07/scheringinitialdecisionp1.pdf> (part 1) and <http://www.ftc.gov/os/2002/07/scheringinitialdecisionp2.pdf> (part 2); Bristol-Myers Squibb Co., FTC File Nos. 0010221 (Taxol), 0110046 (BuSpar), and 0210181 (Platinol) (FTC challenge to series of allegedly anticompetitive actions designed to obstruct entry of generic competition to one anti-anxiety and two anti-cancer drugs, settled Mar. 7, 2003) (Agreement Containing Consent Order available at <http://www.ftc.gov/os/2003/03/bristolmyersconsent.pdf>).

lot of money that can be gained by the brand name manufacturer in implementing this strategy. And, it is a relatively inexpensive strategy to implement. Even though patent litigation is expensive, the potential gains from excluding or delaying generic drug competition are so high it may be worth it. Second, the patent issues are awfully hard to untangle, particularly for antitrust experts who are not necessarily experts in patent law. Further, one must be careful not to discourage legitimate settlements or petitioning of the Government, so there is a very interesting debate about how to determine whether or not the settlement or petitioning activity was in good faith and whether it helps consumers rather than hurts them. I recommend to you the recent discussions on these points among Carl Shapiro and Jim Langenfeld and others in recent issues of *Antitrust* magazine and the *Antitrust Law Journal*.

Much of the government guidance in this area is expressed in consent orders, but the FTC recently lost one of its few litigated cases (against Schering-Plough) because the ALJ ruled that it didn't prove that the payments made and the settlement of the patent litigation were for an agreement not to compete (which was what alleged) instead for the purchase of IP rights and to resolve the claim.<sup>113</sup> That case is now up on appeal to the FTC.<sup>114</sup>

In short, these are not weird cases, but they may be harder to win than one might think.

## Misuse

Let me talk briefly about intellectual property and misuse, traditionally overlapping areas between antitrust and IP. The first case is *Schreiber v. Dolby Labs*.<sup>115</sup> Steve Calkins spoke in his presentation of the importance of antitrust teachers. Judge Posner's opinion in *Schreiber* is a good example of one of our best and brightest antitrust teachers trying to address an infirmity in the law while still adhering to principles of *stare decisis*. He did so (as he did in his *Khan v. State Oil* decision<sup>116</sup>) by writing an opinion that was essentially a petition for certiorari. Although the petition was granted in *Khan*, it was not granted here.

*Schreiber* is a weird case. There is a rule dating back to 1964 in the *Brulotte* case<sup>117</sup> that a patent owner can't get royalties on his patent after it expires. It was held to be a per se violation of the patent statute. That rule makes no economic sense. Charging royalties beyond the patent term doesn't extend the life of the patent, it just alters the timing of the royalty payments. *Brulotte* has been widely criticized, and *Schreiber* seemed to present a perfect situation for undoing it. The facts are these: Dolby was negotiating with Schreiber, who had sued it for patent infringement, and Dolby allegedly said to Schreiber, "Why don't we do a deal where I pay you royalties after the end of your patent's life because that will help me market my product, and it will be cheaper and better for me," and Schreiber agreed. And then (allegedly) as soon as the patent expired, Dolby said, "I don't have to pay you anymore." And Schreiber sued, of course. But because *Brulotte* is a

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<sup>113</sup> See *supra* note 112.

<sup>114</sup> Since the presentation upon which this transcript is based, the FTC decided the issue on appeal. Schering-Plough Corp., FTC Dkt. No. 9297 (Dec. 18, 2003) (Opinion of the Commission by Commissioner Thomas B. Leary) (parties unreasonably restrained commerce by settling patent litigation through illegal agreements to delay the entry of lower-cost generic competition), available at <http://www.ftc.gov/os/adipro/d9297/031218commissionopinion.pdf>.

<sup>115</sup> 293 F.3d 1014 (7th Cir. 2002), cert. denied, 123 S. Ct. 853 (2003). See also Jeffery Fromm & Robert Skitol, *Harmonization of the IP Misuse Doctrine and Antitrust Law: A Call for Help from the Agencies and Congress*, ANTITRUST SOURCE, Jan. 2003, <http://www.abanet.org/antitrust/source/jan03/frommskitol.pdf>.

<sup>116</sup> *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), vacated and remanded, 522 U.S. 3 (1997).

<sup>117</sup> *Brulotte v. Thys Co.*, 379 U.S. 29 (1964).

Supreme Court decision on point, everybody has to follow it and that is what Judge Posner did. But that didn't stop him from roundly criticizing *Brulotte*, and offering it up to the Supreme Court to overrule. But alas, certiorari was denied, so the result is we are plunged back into a dark world of fear and superstition, and we have to live on with an antiquated and nonsensical rule.

*Monsanto v. McFarling*<sup>118</sup> is an interesting case on tying and misuse out of the Federal Circuit. This is a case in which Monsanto made some soybean seeds that were resistant to herbicide, meaning that farmers could conveniently spray herbicide on everything, but the soybeans did just fine. And Monsanto licensed the seeds to farmers, saying that the farmers could plant them and grow the crops, but if they wanted more seeds they had to buy them, rather than using the traditional method of saving seeds from plants they had grown. Mr. McFarling signed Monsanto's agreement, but he ignored it, saving 1500 bushels of soybean seeds from his crop. That got Monsanto's attention and it sued Mr. McFarling. He countersued, saying that Monsanto's agreement was tying. This was an interesting theory of tying, alleging that the purchase of future Monsanto seeds was being tied to the purchase of the current seeds. That didn't wash, though, because the court said McFarling could buy his future seeds from anyone he wanted to, so Monsanto wasn't forcing him. McFarling also made claims of misuse based on patent exhaustion and the first sale doctrine, claiming that a purchaser like him of a patented article acquires the right to use it and sell it, and the person with the patent doesn't have any control over that or subsequent sales. But the court said those doctrines didn't apply because the seeds McFarling had grown himself were never sold. So, this case is not weird.

### Procedure

Let me address two procedure cases, *Baxter v. Abbott* and *Grokster*, both of which are weird.

*Baxter*<sup>119</sup> is an arbitration case. Baxter had developed and owned some process patents for making a substance called sevoflurane, which is an anesthetic gas. It granted an exclusive license to practice its patents to a third party, which then granted it to Abbott Laboratories, who invested a substantial sum of money and time testing it and getting FDA approval. The product became very successful and Baxter perhaps later wished that it hadn't done what it did. In any event, another company got a new patent on a new process for making sevoflurane, and Baxter bought the rights so that it could begin competing with its licensee, Abbott. Abbott initiated an international arbitration to stop that from happening. Baxter claimed first that its license agreement didn't prohibit it from doing what it had done. Its second point, however, was that if the license agreement did prohibit such a thing, it would be an agreement in violation of the antitrust laws and couldn't be enforced. The arbitrators said no to Baxter on both counts, so Baxter brought suit to vacate the arbitration award. Judge Easterbrook held that the court was powerless to do anything about any issue that had been decided by the arbitrators.<sup>120</sup> He reasoned that since Baxter had raised this issue at the arbitration, the arbitrators obviously had considered whether or not what they were ordering was a violation of the antitrust laws and concluded it wasn't, so that was that. There is a very interesting dissent in the case that basically says that it is wrong to follow a rule that says that arbitrators can preemptively review their own decision and thereby immunize it from

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<sup>118</sup> *Monsanto Co. v. McFarling*, 302 F.3d 1291 (Fed. Cir. 2002).

<sup>119</sup> *Baxter Int'l, Inc. v. Abbott Labs.*, 315 F.3d 829 (7th Cir. 2003).

<sup>120</sup> *Id.* at 833.

judicial review. So the verdict on *Baxter* is that it is kind of weird, but not really so much so when one considers the reluctance of judges to overturn arbitration results even when they are wrong because judges don't want to fill their dockets with challenges to arbitrations.

Steve Calkins observed last year that there are a lot of weird standing cases out there. Standing remains a very flexible doctrine being used to accomplish all kinds of results. *Grokster*<sup>121</sup> is a good example of this. Grokster was in the business of distributing file sharing software. The problem was that most of the files it was facilitating the sharing of were not licensed, so that irritated the owners of the copyrights. The copyright owners sued for copyright infringement. Grokster made a sort of Jean Valjean defense that there wasn't any licensed material to use so it had to use unlicensed material. That wasn't very persuasive, and its antitrust counterclaims for refusal to license the copyrights appeared weak. But the way the court disposed of them was by saying that the way Grokster (actually its parent Sharman) had organized its business was that it was going to get content not directly from content providers but from a third party who was supposed to have licensed it from the content providers. Because the refusals to license the intellectual property were directed at this third party and not Grokster, the court said Grokster was too far away from the alleged antitrust violation to have standing, so the claims were dismissed on that ground. This seems like a weird outcome. Better to have come to grips with the actual antitrust claim.

### **Ilene Gotts: *Mergers 2002–03***

There's always a maxim for everything, and the one applicable to this year, particularly given that we are in the middle of an administration, is "when in doubt predict that the present trend will continue." I truly believe that's the case here. Even with the staffing changes we're seeing at the Federal Trade Commission right now, I do not expect any major policy changes and I expect to see more of the same themes playing out as we move forward.

There's one area where we're seeing an unfortunate trend continue: in terms of the number and size of deals, 2003 looks even worse than 2002. We hope to start seeing a turnaround, but so far, the deals have been small enough that it is unlikely that we're going to see any major changes.

Despite the modest volume and size of deals, the enforcement agencies continue to be very active. While there have not been not quite as many enforcement actions as last year, out of the 1,015 filings for FY 2003, the agencies issued 28 second requests and 17 consent decrees. In addition, parties abandoned their transactions in the face of enforcement actions by the agencies. For example, in the matter involving the Raflatac subsidiary of UPM-Kymmene Corp. and the MACtac unit of Bemis Co.,<sup>122</sup> the parties abandoned the transaction after the district court granted a preliminary injunction. These statistics show that despite the declining number of deals, both agencies remain very active in investigating and taking enforcement actions.<sup>123</sup>

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<sup>121</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 2003 WL 21537832 (C.D. Cal. July 2, 2003).

<sup>122</sup> *United States v. UPM-Kymmene, Civ. No. 03C2528* (N.D. Ill. July 25, 2003) (opinion), available at <http://www.usdoj.gov/atr/cases/f201100/201196.htm>.

<sup>123</sup> For a comprehensive overview of FY 2003 antitrust developments in the M&A area, see Ilene Knable Gotts, *FY 2003—Bush Administration Continues on Straight Course*, ANTITRUST REP. (forthcoming).

There are two theories of harm. Although some would like to skip market definition, arguing Jon Baker's terminology, "res ipsa markets," (i.e., if there is an effect, then there must be a market), we lawyers do worry about how we define markets. But I grew up on Baskin Robbins ice cream, and there always used to be the flavor of the month. Well, by analogy, the theories of harm and market definition are not new theories (or flavors) but old standbys (given our love of dead French economists, we will call one "French vanilla"). This old standby is the one that I knew as a student—coordinated effects. Yes, we are seeing whole manuals created by the Justice Department and the FTC<sup>124</sup> on the only theory that I knew of while in law school. The application of coordinated effects today is best described in a recent paper by Andrew Dick,<sup>125</sup> and when I describe it to you, you are going to say this sounds like what we have always heard, but maybe with a little bit more flavor added. First, you focus on the constraints on coordination that are found in the market, and then you ask, "Will the merger significantly relax one or more of those constraints?" There are three possible effects that you examine. First, you consider whether there is a disappearance of a competitor, a traditional step in coordinated effects analysis. Second, you examine whether there is a narrowing of competitive asymmetries, including the exit of mavericks. Maybe this sounds a little bit different, but in reality, this is merely a way of saying that you consider whether one of the eliminated competitors is a maverick. Have you eliminated things that made it harder for coordination to occur? Third, have you removed other impediments? The latest example of a court applying this test (and I would note that the opinion is painful to read, but it's still worth reading), is *UPM*.

In *UPM*, the court found that while the market was highly competitive, Avery, the 50 percent player, was a little too cozy with UPM, the company with a post-merger share of 20 percent. UPM was basically coming into the market and being very, very aggressive. The matter was further complicated by the fact that Avery would be buying its paper from UPM, perhaps reducing the merged firm's incentive to compete aggressively. Indeed, the court believed that after the merger, the leading firms would not compete aggressively, at least initially, and fringe competition really wouldn't step up and discipline a price increase. So, according to the judge, even though there was an active fringe of competitors, this proposed transaction posited a reduction in competitors from 4 to 3 following the merger, which the judge believed could result in an anticompetitive effect.

The moral of the story in *UPM* is that even in a transaction involving the combination of a 10 percent and a 12 percent player, the combined share—even though modest—could raise concerns. You really do have to stop and analyze the market structure to see if there's something else that could be going on. Supposedly, in this case there may already have been attempts for market coordination. Reportedly, the government was conducting a separate criminal investigation on that issue.

Despite the fact that coordinated effects is a hot issue at the agencies and the agencies are bringing cases under this theory, unilateral effects is the theory that continues to be asserted in almost all complaints. In fact, there are only two matters brought by the DOJ this year that were limited to straightforward, coordinated effects cases: the *UPM* case just discussed, and

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<sup>124</sup> Timothy J. Muris, Chairman, FTC, Improving the Economic Foundations of Competition Policy (Jan. 15, 2003) (indicating FTC's renewed interest in coordinated effects theory), available at <http://www.ftc.gov/speeches/muris/improveconfoundatio.htm>; Deborah Platt Majoras, Principal Deputy Assistant Attorney General, U.S. Dept. of Justice, Ensuring Sound Antitrust Analysis: Two Examples (July 3, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201167.htm>.

<sup>125</sup> Andrew R. Dick, New Approaches at the Agencies to Coordinated Effects Merger Analysis (copy on file with author).

the *SGL/CarbideGraphite* case (this was a 4-to-3 merger among large graphite electrodes producers).<sup>126</sup>

I'm going to spend a minute on *SGL/Carbide* because there are a couple of interesting facts about the case that are worth noting. One is that this was a bankruptcy matter, which I believe illustrates that the Justice Department took the lessons of the *SunGard* case seriously,<sup>127</sup> i.e., do not go to bankruptcy court. Rather, the DOJ may be better off notifying the bankruptcy court that it has a problem with the transaction and trying to influence the process that way. A second interesting fact is that Carbide, the company selling the assets to SGL, had ceased operations. This fact raised the interesting question of whether the two parties were really competing. Rather, the matter seemed to resemble a potential competition case.

It is worth noting that *SGL/Carbide* case also involved an industry with a history of coordination. In the 1990s one of the parties in the deal actually had been found to have conspired. So, as specified under the Merger Guidelines, one of the questions is, "Was there a history of collusion?" If so, then as counsel for the merging parties, you should make sure that you can rebut a coordinated effects theory.

One pending case, *Dairy Farmers of American/Southern Belle*,<sup>128</sup> involves a consummated deal. Over the last few years, the FTC and DOJ have not hesitated to challenge transactions that either fall below the Hart-Scott reportability thresholds or were otherwise exempt from the requirements of the HSR Act on competition grounds. *Dairy Farmers* is one such case where the consummated transaction was below Hart-Scott thresholds. As with the other coordinated effects cases, there was a history of collusion in the industry. Indeed, the prior owners of both parties had been found guilty of criminal bid-rigging charges.<sup>129</sup> The case was brought by the Commonwealth of Kentucky and the DOJ.

The DOJ has actually brought consummated merger challenges under two different statutes. While some transactions have been challenged under Section 7 of the Clayton Act, others have been challenged under Section 1 of the Sherman Act. Although it would appear that in most situations it would be easier to bring a case under the Section 7 standard than under Section 1, there may be situations in which bringing a case under Section 1 may be more sensible; for instance, in situations involving licensing agreements.

The FCC and DOJ both sought to block the proposed *EchoStar/DirecTV* transaction.<sup>130</sup> Market definition—specifically whether there was a separate market for satellite TV operations—played a big part in this merger. In most of the country, cable is very strong. If cable and satellite television constitute a single market, then the parties' argument that this transaction would make a more effective "number two" to compete against the dominant cable firm might have some merit. Yet, from what I can see so far, these arguments about creating a more effective number twos don't

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<sup>126</sup> *United States v. SGL Carbon Aktiengesellschaft*, Civ. No. 03-521 (W.D. Pa. filed Apr. 15, 2003), available at <http://www.usdoj.gov/atr/cases/f200900/200935.htm>.

<sup>127</sup> *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001) (order denying preliminary injunction);

<sup>128</sup> *United States v. Dairy Farmers of America, Inc.*, Civ. No. 6:03-206 (E.D. Ky. filed Apr. 24, 2003), available at <http://www.usdoj.gov/atr/cases/f200900/200972.htm>.

<sup>129</sup> See *United States v. Southern Belle Dairy Co.* [1988–1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,092 (E.D. Ky. Nov. 13, 1992); *United States v. Flav-O-Rich, Inc.*, [1988–1996 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,092 (N.D. Ga. Dec. 22, 1992).

<sup>130</sup> U.S. Dep't. of Justice, Press Release, Statement by R. Hewitt Pate on the Abandonment of the Hughes/Echostar Transaction (Dec. 10, 2002), available at [http://www.usdoj.gov/atr/public/press\\_releases/2002/200539.htm](http://www.usdoj.gov/atr/public/press_releases/2002/200539.htm); FCC, Press Release, FCC Declines to Approve Echostar-DirecTV Merger (Oct. 10, 2002), available at <http://www.fcc.gov/transaction/echostar-directv.html>.

seem to be doing too well in court. Take for example *UPM*, where the court rejected a merger in which the parties were trying to combine to create a 20 percent maverick competing against the 50 percent firm. The “strong number two” argument also did not prevent the Heinz<sup>131</sup> merger from being enjoined a couple of years ago. In both *Heinz* and *EchoStar/DirecTV*, the parties argued that efficiencies should justify the merger. The court never heard these arguments in the *EchoStar/DirecTV* matter because the parties abandoned the proposed transaction after the challenge was brought. It is noteworthy that for the first time in decades, the FCC publicly announced its decision to block the merger before the DOJ acted. Usually the DOJ acts first and then the FCC seeks additional relief or keeps the matter pending for a while, as occurred most recently in the *Univision* deal.<sup>132</sup> Also noteworthy in *EchoStar/DirecTV* was the fact that twenty-three states as well as the District of Columbia also filed suit to block the transaction.

*Northrop/TRW*<sup>133</sup> was resolved with a conduct restriction. This transaction is noteworthy for two reasons: (1) the vertical aspect of the transaction; and (2) the role that the Department of Defense played in the transaction’s review. Indeed, the DOJ typically takes into account the Department of Defense’s views in rendering its decision.

A noteworthy case involving no action by the FTC was the Cruise Lines merger.<sup>134</sup> From public accounts, this transaction presented very high concentration levels. When the decision was made, Joe Simons wrote a wonderful statement pointing out the role of economics and how concentration is the starting point that creates a rebuttable presumption. It appears that the FTC analyzed the data and at the end of the day decided that it could not find either a unilateral or coordinating effects story. This transaction resulted in a split Commission decision.

The DOJ challenged two consummated deals on Sherman Section 1 grounds. First, there is the *MathWorks/Wind River* case,<sup>135</sup> involving the software industry. The fix here was interesting in that the court appointed a trustee who sold the business and was very effective at selling it very quickly. The other case to note is the *NT Media/Village Voice* transaction,<sup>136</sup> which involved a market swap resulting from a reciprocal noncompete agreement. Interestingly, because many customers have already switched to another provider, the remedy provides that once an alternative buyer

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<sup>131</sup> *FTC v. H.J. Heinz, Co.*, 246 F.3d 708 (D.C. Cir. 2001).

<sup>132</sup> United States Dep’t of Justice, Press Release, Justice Department Requires Univision to Complete Acquisition of Hispanic Broadcasting Corporation (Mar. 26, 2003), available at [http://www.usdoj.gov/atr/public/press\\_releases/2003/200871.htm](http://www.usdoj.gov/atr/public/press_releases/2003/200871.htm); *United States v. Univision Comm., Inc.*, Civ. No. 1:03CV00758 (D.D.C. Mar. 26, 2003) (final judgment), available at <http://www.usdoj.gov/atr/cases/f200800/200874.htm>; Competitive Impact Statement available at <http://www.usdoj.gov/atr/cases/f201000/201006.htm>.

<sup>133</sup> U.S. Dep’t of Justice, Press Release, Justice Department Requires Northrop Grumman to Adopt Non-Discrimination Terms in Order to Consummate its Acquisition of TRW Inc. (Dec. 11, 2002), available at [http://www.usdoj.gov/atr/public/press\\_releases/2002/200543.htm](http://www.usdoj.gov/atr/public/press_releases/2002/200543.htm).

<sup>134</sup> FTC, Press Release, Statement of the Federal Trade Commission Concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc and Carnival Corporation/P&O Princess Cruises plc (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>.

<sup>135</sup> *United States v. The MathWorks, Inc.*, Civ. No. 02-888-A (E.D. Va. filed June 21, 2002), available at <http://www.usdoj.gov/atr/cases/f11300/11369.htm>; U.S. Dep’t of Justice, Press Release, Justice Department Files Suit Against The MathWorks, Inc. and Wind River Systems Inc. to Challenge Illegal Agreement (June 21, 2002), available at [http://www.usdoj.gov/atr/public/press\\_releases/2002/11349.htm](http://www.usdoj.gov/atr/public/press_releases/2002/11349.htm); see also U.S. Dep’t of Justice, Press Release, Judge Approves the MathWorks/Wind River Settlement (Mar. 3, 2003), available at [http://www.usdoj.gov/atr/public/press\\_releases/2003/200814.htm](http://www.usdoj.gov/atr/public/press_releases/2003/200814.htm).

<sup>136</sup> *United States v. Village Voice Media LLC*, Civ. No. 1:03CV0164 (N.D. Ohio filed Jan. 27, 2003), available at <http://www.usdoj.gov/atr/cases/f200600/200673.htm>; *United States v. Village Voice Media LLC*, Civ. No. 1:03CV0164 (N.D. Ohio Jan. 27, 2003) (proposed final judgment), available at <http://www.usdoj.gov/atr/cases/f200600/200676.htm>. This judgment became final on June 19, 2003. See *United States v. Village Voice Media LLC*, Civ. No. 1:03CV0164 (N.D. Ohio June 19, 2003), available at <http://www.usdoj.gov/atr/cases/f201100/201100.htm>.

emerges, the advertisers/customers that want to switch will have some period of time to do so regardless of what their contracts might say. We'll have to see how effective that consent decree ultimately is.

Potential competition concerns continue to play a particularly important role in pharmaceutical transactions. The remedy in these matters is often to terminate a marketing agreement or grant a license to try to equalize the playing field so there can be more long-term competition.

Multiple governmental entities play a role in merger review and that role cannot be ignored. As we saw in *EchoStar/DirectTV* and as we're seeing in *Univision/HBC*, the FCC plays a role. In fact, *Univision/HBC* is still pending months after the DOJ got the consent. In bank deals, the Federal Reserve Board plays a major role; in defense deals it is really critical to get the Department of Defense on your side. States are also active in merger review. The states were involved in the *NT Media/Village Voice* deal, and more that twenty-three states were involved in *EchoStar/DirectTV*. The State of Kentucky is one of the plaintiffs in the *Dairy Farmers* challenge. In the *Wal-Mart/Supermercados Amigos* case,<sup>137</sup> Puerto Rico was not happy with the FTC's consent and brought its own action, indicating that the Puerto Rican antitrust laws differ from federal law. The Commonwealth was concerned that Puerto Rican suppliers would not be competitive for Wal-Mart business, and raised an interesting monopsony theory. Don't underestimate the states. There was an amicus brief filed by several states in that matter that talked about the rights of states to bring actions.

During the lull in merger activity, the agencies continue to study the merger process. The FTC, DOJ and EU issued a best practice statement for coordinating reviews.<sup>138</sup> The bar has advocated increased transparency in decision making for many years, and in some decisions, such as the Cruise Lines matter, we have seen efforts to explain decisions not to take action. The Bureau of Competition and Economics have issued very useful guides for merger investigations, including what to do with data and with e-mails.<sup>139</sup> The FTC issued another statement on negotiating merger remedies<sup>140</sup> right before the Spring Meeting, and it recently released a statement regarding Section 13(b) of the FTC Act and equitable remedies.<sup>141</sup> The EU is about to issue its final set of horizontal merger guidelines, and intends to issue draft guides with respect to vertical mergers and conglomerate mergers as well.

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<sup>137</sup> Wal-Mart Stores, Inc. and Supermercados Amigos, Inc., No. C-4066 (Feb. 27, 2003) (consent order), available at <http://www.ftc.gov/os/2003/02/walmartdo.htm>.

<sup>138</sup> FTC, Press Release, United States and European Union Antitrust Agencies Issue "Best Practices" for Coordinating Merger Reviews (Oct. 30, 2002), available at <http://www.ftc.gov/opa/2002/10/mergerbestpractices.htm>.

<sup>139</sup> FTC, Best Practices for Data, and Economics and Financial Analyses Investigations, available at <http://www.ftc.gov/be/ftcbebp.pdf>; FTC, Statement of the FTC's Bureau of Competition on Guidelines for Merger Investigations, available at <http://www.ftc.gov/os/2002/12/bcguidelines021211.htm>.

<sup>140</sup> FTC, Bureau of Competition, Guidelines for Negotiating Merger Remedies (Apr. 2, 2003), available at <http://www.ftc.gov/opa/2003/04/mergerremedies.htm>.

<sup>141</sup> FTC, Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

## Tad Lipsky: *International Antitrust 2002–03*

I've only got time to hit some real highlights. Most of you in the audience are familiar with the fact that years ago antitrust was pretty much a U.S. show, and international antitrust meant, when a plaintiff sued under the antitrust laws and you're a foreign defendant, deciding which defense to use: Lack of jurisdiction? Comity? Forum non conveniens, foreign sovereign immunity, or act of state? That was "your father's" international antitrust. But now, with 100 jurisdictions around the world actually having antitrust laws and about 50 of those jurisdictions enforcing them in a serious way, you've got to think about international antitrust as having a number of different dimensions. I only have time to cover just a very few of them.

For example, there have been some key developments in a variety of foreign jurisdictions, particularly the European Union. The EU of course must be paid attention to very carefully. To take another example, the increasing number of international organizations that now participate in international antitrust law and policy matters—the International Competition Network, the OECD, APEC, Mercosur, UNCTAD—the list goes on and on. There are some things you should be aware of that are occurring in that realm. But I'd like to start out on one of the good old-fashioned issues, namely, the circumstances in which a U.S. antitrust case can be brought to challenge cartel behavior. You probably recall not so long ago an important national question was the meaning of the word "is." We now have an important antitrust law debate that depends in a very profound way on the meaning of the word "a."

The narrow question is exemplified by *Empagran*, which is pending on petition for en banc review before the U.S. Court of Appeals for the D.C. Circuit.<sup>142</sup> This question arises under Section 6a of the Sherman Act, the Foreign Trade Antitrust Improvements Act of 1982, which you probably recall had a variety of limiting provisions applicable to foreign commerce cases under the Sherman Act. Section 6a allows jurisdiction with regard to antitrust violations affecting foreign trade and commerce only where there's a direct, substantial, and reasonably foreseeable effect on such commerce. And there is an additional limitation to cases in which such effect gives rise to "a" claim under the other substantive provisions of the Sherman Act.

A number of district and appellate courts have analyzed the meaning of this limitation, allowing the issue to percolate over time. Does it mean the claim in suit? Or does it mean any claim—perhaps one that the plaintiff does not have standing to assert but that some other plaintiff could assert on its own? One of these cases, *Den Norske*,<sup>143</sup> also referred to as *Stat Oil*, arose in the Fifth Circuit. It was the subject of an unsuccessful *cert.* petition on the following question: if you're a foreign plaintiff who purchased from a foreign participant in a conspiracy that had cognizable effects on U.S. commerce, can you recover damages by asserting an antitrust claim in a U.S. court? The circuits are very badly split on that question, with the Fifth Circuit answering "no" in *Den Norske*, and the D.C. and Second Circuits answering "yes"—the former in *Empagran* and the latter in *Kruman*<sup>144</sup> (also known as *Fine-Art Auctions*). (*Kruman* settled while *cert.* was pending, so it won't be heard from again.) The answer depends on how the Court will construe the word "a" in this critical little clause in the statute

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<sup>142</sup> *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, 315 F.3d 338 (D.C. Cir. 2003). This case has now been accepted on *cert.* by the U.S. Supreme Court.

<sup>143</sup> *Den Norske Stats Oljeselskap AS v. HeereMac v.o.f.*, 241 F.3d 420 (5th Cir. 2001).

<sup>144</sup> *Kruman v. Christie's Int'l Plc*, 284 F.3d 384 (2d Cir. 2003)

The U.S. Executive Branch likes the Fifth Circuit's position, to the effect that "a" claim means the claim of the plaintiff bringing the suit—that would leave out the foreign purchaser who had no purchases in United States commerce. Only purchasers in U.S. commerce would have a claim, even though the conspiracy is global. The reasoning is very interesting. There's a lot of back and forth about statutory interpretation and the *Webster's New International Dictionary* definition of "a." But basically, the Executive Branch fears that if every conspiracy that gave rise to a U.S. claim could bring in all of the foreign sellers and foreign purchasers, regardless of their connection (or lack of it) to U.S. commerce, the attendant problems of discovery and the complexity of these foreign-foreign claims would make it harder to enforce the federal antitrust laws. The United States specifically fears that its amnesty program, which is thought to be responsible for bringing a number of huge cartels out into the light and allowing them to be prosecuted, would be less effective if amnesty applicants feared these huge additional litigation consequences. There appears to be a certain tension between this last argument and the current Executive Branch support for Congressional efforts to increase criminal penalties under the Sherman Act. Why wouldn't the increased fear of criminal penalties be equally threatening to the amnesty program?

Because of all these class actions that Steve Calkins was mentioning before, *Empagran* is a case that is bound for glory even if it should settle. Now, you have to pay attention here because this is really profound stuff. The difference between bringing or defending a class action involving a global market conspiracy on the basis of claims limited to those involving U.S. commerce on the one hand, versus litigating such a case based on all the claims of all purchasers and sellers everywhere in the world is a huge difference. A class-action suit covering treble-damage claims for all purchases occurring anywhere in the world for an entire industry would be quite a beast. But if the D.C. Circuit is upheld in *Empagran*, that will be the model for cartel litigation until Congress does something different.

So much for one of the more important developments concerning traditional U.S. antitrust litigation. Let me turn to my second area and describe a few important developments in the EU. You are probably aware of the fact that the EU competition rules and the applicable enforcement procedures are undergoing very substantial reform. There is both a "modernization" effort and an "enlargement" effort. On top of that, there has been a lot of criticism leveled at the way the European Commission's Directorate-General for Competition was conducting merger review through its Merger Task Force. There has been a lot of criticism of the notification and exemption system applied to restrictive agreements in the EU. The EU has been trying to change some of that. They have modified just about all of their major block exemptions and their major rules that govern restrictive agreements, both vertical and horizontal. The Commission has issued a series of guidelines that take more of an economic approach to analysis of business practices under the competition rules.

While the Commission was in the midst of this reform effort it was on the receiving end of a "hat trick" by the Court of First Instance. The CFI is the first-level court of appeal for Competition decisions by the Commission. In very quick succession, the Commission lost three important merger cases: *Air Tours*,<sup>145</sup> *Tetra Pak*,<sup>146</sup> and *Schneider*.<sup>147</sup> The CFI identified what is in essence careless

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<sup>145</sup> Case T-342/99, *Airtours plc v. Commission* (Ct. First Instance 2002).

<sup>146</sup> Case T-05/02, *Tetra Laval BV v. Commission* (Ct. First Instance 2002).

<sup>147</sup> Case T-310/01, *Schneider Electric SA v. Commission* (Ct. First Instance 2002).

reasoning and careless economic analysis. That had the effect of intensifying some reform efforts that had already been placed in motion at the Commission. They've hired a chief economist whose credentials look very credible. The substantive test to be employed for merger analysis is shifting to a framework quite close to our own Clayton Act standard. And there is a long list of procedural reforms coming as well. So I think the key question in the EU is whether they will get religion on economics, and will they do it fast enough and go far enough? The use of economic reasoning has had a profound effect on U.S. antitrust, and it will be very interesting to see how seriously economics will be taken in European antitrust.

Let me suggest that you watch three cases to get some indication of how extensive the competition reforms are likely to be. First is *GE/Honeywell*.<sup>148</sup> The Commission decision prohibiting that merger is on appeal to the Court of First Instance. It's on a slow track, however, so before the decision in that case we'll have two other indications of the general direction in EU competition law and whether it will modify its fundamental approach to economic analysis of competition issues. The European investigation of Microsoft is the second such case. The Commission seems to be taking an extraordinary degree of care to come up with a concise theory of abuse of dominance, and to collect all the evidence that will give it a solid basis to survive any appeal to the Court of First Instance. Another case you might not have heard about is going to be decided on October 23, 2003. (One of the great things about European competition law is the European judicial practice of announcing in advance the day when the decision is expected to be made public.) That case is known simply as *Ice Cream*.<sup>149</sup> The basic question involves the permissibility of restrictions on the use of ice-cream freezers that are given or loaned by producers to retailers. Is a producer that subsidizes the retailer's freezer entitled to limit the retailer's use of the freezer to store and display competing products? It seems like a simple free-riding question in a vertical context, and whether the Court of First Instance regards it as such could say a lot about the use of economic analysis in European competition law.

I have three minutes to cover the WTO, which means of course three minutes to cover the whole world. You probably heard back in 2001, the last time all the WTO ministers got together to launch a new trade round in Doha, Qatar, there was a commitment in the Ministerial Declaration that—subject to an explicit consensus on “negotiating modalities”—there would be a negotiation launched at the next WTO Ministerial Conference, scheduled for September 2003, in Cancun, Mexico, to develop a competition framework agreement within the WTO. According to the Doha Ministerial Declaration, this would mean that WTO members would be required to adopt antitrust rules prohibiting “hard-core cartels.” This antitrust framework agreement would also mean that the antitrust rules adopted by WTO members would have to be transparent, fair and nondiscriminatory. (Who can argue with that?) In addition, a variety of help would be given to the developing countries in the way of technical assistance and capacity building so that those who knew less

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<sup>148</sup> Case No. COMP/M.2220, *GE/Honeywell*, Commission Decision of July 3, 2001.

<sup>149</sup> Case T-65/98, *Van den Bergh Foods v. Commission* (Ct. First Instance 2002). As matters developed, the Commission won the *Ice Cream* appeal, leaving in question whether economic analysis will be the dominant influence on EU competition law involving vertical restraints. Later European judicial decisions in *Bayer* and *Volkswagen*, however, have introduced or reaffirmed another, and to some extent offsetting, development of vertical restraints law. Both decisions give some apparent substance to the right of unilateral decision making by producers in structuring distribution arrangements—somewhat similar to the rights of producers subject to U.S. antitrust law to engage in unilateral action under the doctrine of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

about antitrust—and cared less until a few years ago—can be brought up to the standards now commonplace throughout the developed world.

The European Union has for ten years been the most aggressive advocate of this type of approach. The United States fought that for a long time, but gradually gave in. The United States opposed any multilateral discipline involving antitrust until Joel Klein said, toward the end of his eventful term, “well, maybe multilateral is OK, but not the WTO.” Then finally the U.S. Trade Representative, Robert Zoellick, not too long before the Doha meeting, finally said, in a bilateral statement issued jointly with the EU Commissioner for International Trade, “Okay, we’ll discuss it in the WTO even though the Americans don’t really understand what the EU wants.” So that’s how competition got on the Doha agenda. And as the time approaches for the Fifth WTO Ministerial Conference at Cancun, the competition issue is up for discussion, like many other issues: agricultural, government procurement, trade facilitation, trade-related investment, and everything else. To date, there is no indication that the Cancun Ministerial will be especially productive with regard to a competition framework agreement or anything else. The parties have not met any of the negotiating deadlines that were set at Doha.<sup>150</sup>

So there are just three areas in which the world of international antitrust remains very dynamic. Since I can’t go on for any longer, I’m going to stop with a comment as to why it’s so enjoyable to return to California. This recall election craze has been very useful. We’ve all made a lot of Arnold Schwarzenegger jokes, including me, but I’m anxious to get back to the good old days when we could base our jokes on various scenes and dialogue from *The Godfather*. This is how every good antitrust panel should begin and end, in keeping with the hallowed traditions of this tribe. So let me turn the proceedings back over to Steve by reminding you of some excellent advice given in a famous scene in *The Godfather*: Leave the gun, take the cannolis. ●

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<sup>150</sup> As matters turned out, nothing tangible was accomplished at the Cancun Ministerial in September. Whether and how the Doha Round will be revived is still anybody’s guess, and there is no greater certainty as of this writing as to whether the idea of a framework competition agreement will remain on the trade agenda.