

Roundtable Conference with Enforcement Officials

American Bar Association Section of Antitrust Law Spring Meeting ■ Washington, D.C. ■ April 20, 2007

MODERATOR



Joseph Angland
Chair, ABA Section of Antitrust Law, and Heller Ehrman LLP, New York, NY

ENFORCEMENT OFFICIALS



Thomas O. Barnett
Assistant Attorney General, Antitrust Division, U.S. Department of Justice



Robert L. Hubbard
Chair, Multistate Antitrust Task Force of the National Association of Attorneys General



Neelie Kroes
European Commissioner for Competition



Deborah Platt Majoras
Chairman, Federal Trade Commission

QUESTIONERS



Ilene Knable Gotts
Wachtell Lipton Rosen & Katz, New York, NY



Jonathan M. Jacobson
Wilson Sonsini Goodrich & Rosati PC, New York, NY



Jeffrey A. LeVee
Jones Day, Los Angeles, CA

JOSEPH ANGLAND: I'd like to welcome you all to the highlight of the Spring Meeting each year, the Enforcers' Roundtable.

We're delighted to have today four members of the enforcement community who are here to share their thoughts and perspectives with us. On the stage with us at the moment we have Chairman Debbie Majoras of the Federal Trade Commission—thank you, Debbie, for being here once again—and Assistant Attorney General Tom Barnett, head of the Antitrust Division—Tom, a pleasure to have you back.

During the first roughly half of this session we'll be directing our questions exclusively to Debbie and to Tom, and then we will be joined for the second half of the session by Bob Hubbard, the Chair of the Multistate Antitrust Task Force, and by Commissioner Neelie Kroes, European Commissioner for Competition.

Directing questions to this august group will be, starting on my left, Ilene Gotts, a partner at Wachtell Lipton in New York; to Ilene's left we have Jon Jacobson at Wilson Sonsini—and, Jon, I will take this opportunity to again thank you for your work in getting out the Sixth edition of *Antitrust Law Developments*, which hit the bookstores, if you will, this week. The Section is indebted to you

for that. To Jon's left we have Jeff LeVee, a partner at Jones Day, and Jeff is also somebody to whom we are greatly indebted because of his role as Co-Chair of the Spring Meeting.

With that, let's turn to some questioning. I'll exercise the Chair's prerogative and start off.

The Supreme Court has apparently developed a very pleasant fetish with antitrust these days. It is occupying an unusually large share of its docket. Now, given that antitrust is on a roll at the Supreme Court, where should it go next?

What do you, Tom, think the Supreme Court should address to clarify the law in the antitrust area?

THOMAS BARNETT: Well, I would phrase it slightly differently, in terms of what I hope gets up to the Supreme Court. They don't necessarily get to choose.

I would say the issues that are least settled in U.S. antitrust law right now—and a couple spring to mind—include this whole issue of bundling and loyalty discounts. The Solicitor General filed a brief, as you all know, in the *LePage's*¹ case a few years ago, saying that we didn't necessarily agree with what the Third Circuit had done there, but that this is an important issue, it's a hard issue. Both agencies have been looking hard at that question in the context of our Section 2 hearings. It's an area of law that is important for day-to-day economic activity but in which the standards are not clearly articulated. So I'd like to see that.

I know it has been said before, but I'll say it again. It would be nice to see a merger case up there. Practicalities make that unlikely, but it's just one specific example.

If you look at the jurisprudence on efficiencies, the Court wasn't overly receptive to efficiencies the last time it looked at it. My guess is they would have a different view today. Now, in practice, I think the agencies take a hard look at efficiencies and they play an important role, but it would be nice to have that affirmed.

ANGLAND: Debbie?

DEBORAH PLATT MAJORAS: I'm going to pick up where Tom just left off. I would love to see the Court take a merger case. I think, by my calculation, the Supreme Court hasn't decided a substantive merger issue since the 1970s. We've been working under the 1992 Merger Guidelines,² including a unilateral effects regime, for a number of years. While a lot of us talk about how we think it's fairly settled the way we review mergers, some people, I think, disagree. I think it would be terrific if the Court decided a substantive merger issue.

I may be a little more optimistic about the possibility of the Court taking on a merger case because, perhaps, if we had an FTC merger case in Part III, especially if the AMC [Antitrust Modernization Commission] doesn't have its way and Part III³ is still a meaningful part of our enforcement regime,⁴ then I think it is possible that we could get one up, and I think that would be a good thing.

¹ *LePage's v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc).

² U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, revised 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

³ The FTC may enforce Section 5 of the FTC Act through internal administrative litigation known as Part III proceedings. See 15 U.S.C. § 45(b)–(c); 16 C.F.R. § 3 (2006).

⁴ See ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS (2007) [AMC REPORT], available at http://www.amc.gov/report_recommendation/toc.htm.

Another area would be, obviously, the area of pharmaceutical patent settlements under the Hatch-Waxman regime. This is an issue that we think is extremely important to the U.S. economy, certainly to our consumers, and that is an issue that we hope the Court will have the opportunity to take up.

And finally, I would say the *Noerr-Pennington* area. The FTC has identified topics that are interesting in the *Noerr-Pennington* area, like the pattern of lawsuits, for example, perhaps for strategic competitive advantage. I think there are some interesting issues there, and it would be another useful area for us.

In my view, a lot of what the Supreme Court has been doing is looking at some old, sometimes very old, doctrines and jurisprudence in antitrust, applying modern thinking in terms of antitrust principles and consumer welfare standards.

—TOM BARNETT

ANGLAND: Sticking with the Supreme Court, at Wednesday's luncheon Steve Calkins in his inimitable style remarked that the last, I think, thirteen times the Department of Justice had filed an amicus brief in the Supreme Court it had sided with the defendant rather than with the plaintiff. He took pains to say he wasn't saying that any one of those filings was wrong or on the wrong side of the issue, but, again in his unique style, suggested that maybe the Department of Justice should concede that sometimes a plaintiff might be right. I note that he seemed to have spared the Federal Trade Commission, although by my count the numbers wouldn't be much different in that same set of cases.

Any reaction to Steve's observation?

BARNETT: Well, I think we thought the plaintiff was right in the *Dentsply*⁵ case and the *Visa/MasterCard* case,⁶ and we're not shy about saying so in that respect.

But, more generally, we again don't choose the cases that get petitioned to the Court for certiorari, and we look at each case on its individual merits.

Now, I will go so far as to say I don't think this is entirely random. In my view, a lot of what the Supreme Court has been doing is looking at some old, sometimes very old, doctrines and jurisprudence in antitrust, applying modern thinking in terms of antitrust principles and consumer welfare standards. A lot of the insights that we have developed over the last thirty, forty, fifty years indicate that some of those old doctrines were too interventionist. The Court has been cleaning up those things.

If you look at the *Independent Ink* case⁷ regarding the presumption that intellectual property rights or patents confer market power, to some extent clarifying the per se rule or the role of the per se rule in joint ventures in *Dagher*,⁸ applying objective standards to Section 2 conduct in the *Weyerhaeuser* case,⁹ those tend to lead you to a less interventionist approach.

Although Steve did take pains to point out that he wasn't commenting on the merits, I would like to point out—I haven't gone back and calculated it, but I think our win:loss ratio in terms of when the Court agreed with us and when they didn't is extraordinarily high. I think in major league baseball we would certainly be an MVP.

ANGLAND: Debbie?

⁵ *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

⁶ *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

⁷ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

⁸ *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006).

⁹ *Weyerhaeuser v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

MAJORAS: I agree with what Tom said. I think the Supreme Court has been cleaning up antitrust law, if you will. Antitrust law is sort of a unique area of the law, in that it is perfectly suited for a common law system. There is a lot of back and forth between courts, agencies, private plaintiffs, certainly the academic and economic communities, and we have pushed the law in a particular direction over the past thirty years.

I don't think most of these cases were particularly close. If you look at the way the Court voted on the cases, I think there is an indication there that the Court hasn't viewed these as particularly close calls. I know that the ABA weighed in on most, if not all, of these, and I think weighed in very similarly to the way that the agencies have.

I think two of the more interesting cases, frankly, are two that haven't been decided. I think *Twombly*¹⁰ addresses an extremely important issue overall for, in particular, private lawsuits. So I'm anxious to see where that one comes out. And I think *Leegin*¹¹ is also a very interesting case for the Court. Maybe some of us don't think that one is a particularly close call, but reasonable minds can differ, and there are a lot of people I respect a great deal who have a different viewpoint. So those, I think, are the two to watch.

ANGLAND: Well, sticking with *Leegin*, that is a case in which the Solicitor General urged that the per se rule against resale price maintenance be repealed.¹² Assuming for a moment that that is the way the Court comes out, the question becomes: Under a rule-of-reason regime, how much risk is there going to be associated with resale price maintenance? For example, after *Khan*¹³ came down and the rule of reason applied to maximum resale price maintenance, it has virtually become per se legal; I don't think you will find any case where it has been illegal under the rule of reason since then.

It may be premature because we do not have any Supreme Court guidance on the issue, but any thoughts on how a rule of reason would be applied in the case of minimum resale price maintenance? Would it be sort of de facto legal, or do you see situations where it is really problematic?

MAJORAS: I think de facto legal goes too far. Look, dealing with maximum resale price maintenance under *Khan* I think was an easier case for the Court. If you look at the *Leegin* argument, I think you see that certain Justices are grappling with the tougher issues for minimum resale price maintenance. I think that certainly tells you something.

First of all, the FTC had a case not so very long ago, the *MAP* case back in 2000,¹⁴ in which you had really an entire industry trying to get all retailers of—can you say “record stores” anymore? I mean does anybody know what those are? They were worried about, I think, the mass retailers coming in and selling music, and so there was an effort by the recording industry to get all retailers to succumb to MAP policies. So obviously, in a case like that we would want to take a very, very close look.

¹⁰ *Ed. Note:* The *Twombly* decision was subsequently decided on May 21, 2007. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

¹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 1511 (2007).

¹² Brief of United States as Amici Curiae for Petitioner, *Leegin Creative Leather Products, Inc.*, 127 S. Ct. 1511 (2007) (06-480), available at <http://www.usdoj.gov/osg/briefs/2006/3mer/1ami/2006-0480.mer.ami.pdf>.

¹³ *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

¹⁴ Statement of Chairman Robert Pitofsky & Comm'rs Sheila Anthony, Mozelle W. Thompson, Orson Swindle & Thomas B. Leary, *Sony Music Ent., Inc., BMG Music, Universal Music & Video Corp., Capitol Records, Inc.*, FTC Docket Nos. C-3971, C-3972, C-3973, C-3974, C-3975, 2000 WL 1257799 (F.T.C.) (announcing consent decrees in MAP cases).

Beyond that, I think you apply the rule of reason. You look at issues like market power, obviously, and then apply it. But no, I wouldn't say per se legal. I will be interested to see what sort of complaints we get, because sometimes I'm asked this question about "why don't you guys bring more of these cases?" Well, my sense is these complaints are not rolling in the door for us, and perhaps that is because the states have been more active, so there has been a good division of labor there.

I think we'll have to see what happens. But I think how we apply the rule of reason will not be anything particularly new.

BARNETT: I would agree. First, that issue is obviously not really before the Court. We'll see, but based on recent practice, I'd be a little surprised if they get into that too much. But I don't see any reason why you wouldn't apply normal principles.

I have heard people make the argument that says, "Look, if somebody adopts resale price maintenance and it looks like prices went up, that's presumptively anticompetitive and unlawful." I don't think it is quite that simple. I look at two things to think about. One is if the company that did that in the relevant market has a 3 percent share, I am a little hard put to find out how that had a market-wide impact on competition or competitive prices. I'm not clear why you would presume that is anticompetitive. You also have to be careful about the post-policy good, if you will. That may be fundamentally or qualitatively different from the pre-policy good, in that there are certain ancillary services—sales services, marketing services, et cetera—that consumers may value that are being paid for by that.

I think you work through those in the traditional rule-of-reason fashion. Bottom line, I agree with Debbie, I don't see them as per se lawful. The brief that we filed with the Court made clear that we view it as potentially anticompetitive in certain circumstances. I also agree it is more likely to be anticompetitive than maximum resale price maintenance.

ANGLAND: The traditional argument is that even if price goes up somewhat because of resale price maintenance, there may be overall net efficiencies because of greater services being offered—the free-rider argument.

One question that arises is whether that argument works in the abstract, or whether the agencies in looking at resale price maintenance would demand the same level of proof regarding efficiencies that they do in certain other contexts, like mergers, where simply saying, "Oh, it's going to be efficient" doesn't seem to carry the day. In those other contexts, theoretical efficiencies don't always win.

If you are looking at resale price maintenance, would you be insisting upon the same level of proof that you would require in, say, the merger context?

MAJORAS: Well, remember in conduct cases you often have the benefit of a track record of what has actually occurred. When we look at mergers, we have to make a prediction about what is going to happen. So I think that is actually one of the differences.

In mergers when parties come in and give us under the Guidelines a solid efficiencies story that is supported and not wholly hypothetical, I think we take it quite seriously, just as we would when we are in a rule-of-reason fashion weighing. It's a little bit of a different context, so you are looking at different types of documents and different types of evidence. But it makes a big difference if you can look at what has actually happened in a marketplace versus trying to predict what a merger will bring.

ANGLAND: Speaking of mergers, Ilene?

ILENE KNABLE GOTTS: Steve Calkins, quite amusingly, at lunch the other day featured a member of Congress accusing the agencies of being slack in merger enforcement. Yet we've heard various Commissioners, including Commissioner Kovacic, emphasizing how the pendulum may be swinging the other way, with enforcement activity occurring in even four-to-three mergers.¹⁵

I was wondering—maybe, Debbie, you could begin first—what is the truth? Is the FTC's merger policy slack or tough these days?

MAJORAS: Well, we are enforcing. Look, Senator Dorgan said that Republican administrations, Democratic administrations—all of us should have our pictures on milk cartons because we've been missing.¹⁶ We obviously take very, very seriously what our members of Congress think about what we are doing, particularly on our oversight committees, and we certainly take seriously any very specific criticisms.

But I'll tell you why I don't think that is correct in the least. Let's just take the current fiscal year, which started about six months ago. Already in this fiscal year we have issued about twenty second requests;¹⁷ we've already had twelve merger enforcement actions, including two in which we are litigating in court;¹⁸ we just had another abandoned merger last week after expressing some concerns. I don't just like to spout statistics, but for those of you who follow these things I think it is very difficult under any current measure to say that somehow merger enforcement isn't fairly aggressive.

The real question, of course, is: Are mergers going unchallenged that could be harming consumers? I have been asking this question as this issue floats around. It is not just floating in Congress. As we get closer to 2008, a lot of people are floating it, some in this room, and no one has come up with even a potential example of a place where we may have fallen down.

I mentioned the two in which we are litigating. But one of the criticisms that I was hearing previously is: "What's going on? Why haven't you all litigated more cases?" I've actually been a little bit disappointed to see well-educated members of our bar using that as a benchmark.

Look, consent decrees are enforcement actions. The fact of the matter is that parties come in. I think they are more eager than ever to give us relief and move on with a deal. So when parties are willing to solve the competitive problem, naturally we are going to take it. It would be highly irresponsible not to.

Last year, when we identified sixteen mergers that we thought were anticompetitive, seven of them were abandoned or completely restructured, coming in as a new deal. So there again would someone argue that, "Oh my goodness, no, don't let them abandon the merger, sue them anyway"? Of course no one would say that.

Already in this fiscal year we have issued about twenty second requests; we've already had twelve merger enforcement actions, including two in which we are litigating in court; we just had another abandoned merger last week after expressing some concerns . . . I think it is very difficult under any current measure to say that somehow merger enforcement isn't fairly aggressive.

—DEBORAH MAJORAS

¹⁵ See, e.g., Press Release, Fed. Trade Comm'n, FTC General Counsel Speaks on the Modern Evolution of U.S. Competition Policy Enforcement Norms (May 2, 2003), available at <http://www.ftc.gov/opa/2003/05/kovacic.shtm>. The text of Commissioner Kovacic's "pendulum" speech is also available at the FTC's Web site, at <http://www.ftc.gov/speeches/other/0304modernevolution.shtm>.

¹⁶ See, e.g., *Media Concentration: Hearing before the Senate Commerce, Science & Transportation Comm.* (July 17, 2001) (remarks by Senator Dorgan), available at http://lobby.la.psu.edu/_107th/096_Newspaper_Crossownership/Congressional_Hearings/Testimony/S_ComSc_Trans_Hollings_071701.htm.

¹⁷ See FED. TRADE COMM'N, THE FTC IN 2007: A CHAMPION FOR CONSUMERS AND COMPETITION 5 (2007) [FTC 2007 REPORT], available at <http://www.ftc.gov/os/2007/04/ChairmansReport2007.pdf>.

¹⁸ *Id.* at 5–10 (discussing merger enforcement actions in 2007).

The fundamental question is: Are there any mergers that are being unchallenged, that have gone through, that are harmful to the competitive process? Again, I am hard put to identify one myself and have yet to have anyone identify one to me.

—TOM BARNETT

So I think when you start to parse this—and one of the things that I have actually tried to explore a little bit is whether parties are less willing to litigate with us because, I think, the cost of a failed merger has become quite high on many fronts. The fact is it takes two to tango, and we are not going to bring cases irresponsibly.

So we feel really quite secure that we are being sufficiently aggressive in our merger enforcement, that we are bringing the cases that need to be brought. So I will gladly have that discussion in greater detail with any of our members of Congress and anybody else who wants to have it.

GOTTS: Tom?

BARNETT: I certainly agree with what Debbie said. Just to expand on a couple of points on that front. The fundamental question is: Are there any mergers that are being unchallenged, that have gone through, that are harmful to the competitive process? Again, I am hard put to identify one myself and have yet to have anyone identify one to me.

I also have to question seriously the methodology, if you will, of the way some people are looking at this. They say, “Well, you’re not litigating in court.” Over and above Debbie’s point, which I completely agree with, is we decide whether or not we think a deal is problematic and we decide what relief is necessary. If I think a deal is problematic, my goal is not to go into court and block the deal. Most deals actually have some efficiencies associated with them. I would rather find the most narrow remedy that is going to be sufficient, get that remedy, and move on. If we have to litigate in contested litigation to get that, so be it. That’s an inefficient way to get to a result. If we can get it through a consent decree, that is a better result.

But, in terms of these numbers, that can reflect a lot of things. It can reflect the mix of the deals.

Also, step back for a second and look at one of the efforts that both agencies have been making for a number of years now, and I think with some success. We are trying to be more transparent in what we do—how we analyze mergers, where we are going to have a problem, where we are not. It’s not just the 1992 Guidelines; it’s closing statements, the commentary that both agencies put out last year.¹⁹ To the extent that we are being successful in transparency, you would expect parties to be less likely to bring deals that just have no fix associated with them and less likely to bring deals that are going to be challenged.

So even assuming that the overall percentage of deals that are being challenged in some way has gone down, is that a good thing or is that a bad thing? Are we being more efficient, more transparent in our process, and are we letting through deals that are appropriately procompetitive?

I don’t have any evidence to the contrary, so I, like Debbie, am quite comfortable that we are aggressive and will pursue challenges where it is appropriate and we will back off and go away where it is not.

GOTTS: In countries or jurisdictions, such as the European Union, there is one agency that decides the merger outcome. In the United States, of course, we have two agencies with concurrent jurisdiction, and even the AMC says that’s okay.

I would like to explore, though, for a second whether there are differences as a result. At the U.S. Department of Justice you have the Tunney Act procedures²⁰ applicable to proposed merg-

¹⁹ Fed. Trade Comm’n & U. S. Dep’t of Justice, Commentary on the Horizontal Merger Guidelines (2006), available at <http://www.ftc.gov/opa/2006/03/mergercom.html>.

²⁰ The Antitrust Procedures & Penalties Act, Pub. L. 93-528, §§ 1-3 (1974) (codified at 15 U.S.C. §§ 16(b)-(h)).

er consents, such that a U.S. District Court judge must “approve” the settlement. In contrast, the FTC issues its own consents, but you have five decision makers; also, when the FTC challenges a merger in court, the FTC is just seeking a preliminary injunction and brings its own Part III matter. I would like to explore whether those procedural differences could ultimately have an effect on outcome. And also, looking at remedies, there are differences between the two agencies, for instance in the acceptance of “fix-it-first.”

Maybe on this one, Tom, you could go first.

BARNETT: Are there differences in terms of process between the two agencies? Obviously there are. But even on that front there are pluses and minuses.

We do have to go through a Tunney Act proceeding. I will digress for a moment and just say that there was some attention paid over the last year or so as to whether or not those were going to fundamentally change in terms of their scope and depth and burden, which in many ways could be a bad thing because it would make it more expensive for parties to enter into consent decrees with us and less certain of the outcome when they do.

I am referring, of course, to the Tunney Act review of the *Verizon/MCI* and *AT&T/SBC* transactions. The district judge recently ruled on that and came out, after looking at various arguments—quite persuasively, to me at least—and decided that the review is really pretty much where it had been in terms of process.²¹

So there are differences there. But at the end of the day I think the real question is: Does it make a substantive difference? I actually do not think that there is a substantive difference. I can't point to an example of a merger where I think we would have come out differently than the FTC, or vice versa, based on what I know.

MAJORAS: I think that's largely right. The fact is there are two different decision-making trees at the two agencies. I have done both.

Because merger enforcement is so based on individual market facts, so incredibly fact-specific, the staff plays the most enormous role in the decision making on mergers. Not always—there could be disagreements on the close calls, but there aren't very many, and I haven't seen very many at either agency. I think the reason is that the staff really works up the case.

Now, sometimes people might tell you that if they get this staff in one agency versus another staff in that agency, they have more of a chance of getting a different reception or a different result, frankly, than between the two agencies. That is unfortunate if that is occurring. That is where we should come in and make sure we even that all out. But the fact of the matter is there is a human element to this, depending on how people are taking up an issue.

But I largely think that it is a non-issue. It potentially could be an issue on the length of the deal because of the possibility that a merger challenge could continue in Part III in the FTC process. But, again, that has really largely been nonexistent.

I think, starting even at the preliminary injunction stage, while there are slightly different standards on the books, depending on whether the district court is looking at an FTC case or a DOJ case, my view is that it really hasn't made any difference, that courts have used largely the same standard.

While there are slightly different standards on the books, depending on whether the district court is looking at an FTC case or a DOJ case, my view is that it really hasn't made any difference, that courts have used largely the same standard.

—DEBORAH MAJORAS

²¹ See *United States v. SBC Commc'ns, Inc.*, No. 05-2102, 2007 U.S. Dist. LEXIS 22947 (D.D.C. Mar. 29, 2007).

Then, from there, if we have lost in the district court, we have only very rarely continued in the Part III process, although that is absolutely an option for us that we preserve. But we have standards for doing it. That is one area where you could see a difference because of the time it takes. But, of course, if the parties have won in the district court, then they will have closed. They are litigating with us, but it hasn't held up their deal at that point.

I think it is exactly the same as what I told the AMC. If you were going to design a system from scratch, you may not establish two agencies. I understand that. But we have the two agencies, and each agency has tremendous strengths. I think the FTC gets tremendous strength from the synergy between consumer protection and competition, for example. I think the DOJ draws tremendous strength from having the criminal and the civil component.

So we are where we are. I think that concern is largely overblown.

ANGLAND: Earlier this week the agencies released Part 2 of the Intellectual Property Report.²² Jeff, do you want to pursue that topic?

JEFFREY LEVEE: What Joe didn't mention is that the report was issued five years after the hearings. So the question to you is: What took so long? A related question obviously would be: What do you view as being the most important enforcement issues associated with the new guidelines—that is, what's new?

MAJORAS: What took so long was these are thorny issues, certainly at the margin. There are a lot of issues that are somewhat nuanced in the way you say them. It made a lot of difference to a lot of people in the process how exactly we phrased things. And the fact of the matter is that the more time passed, the tougher it became to get it done, because we had, if you take DOJ, an entirely new front office from the time the process got started. My sense is as people came in, it was going to be their report, so they wanted to weigh in.

I switched agencies. I am at the FTC. I had one Commission when we started this process. We have another Commission today to get it out. And there were a lot of people who contributed along the way who cared deeply for these issues.

So we got stuck on some things. These were not easy issues. So while I regret that it took so long—I kept telling you all that it was coming, and I would go back and beat my head against the wall back at the office. But I can't overlook the fact that by taking this time and having this input and really working this through, the process became very important to the result.

BARNETT: I guess my observation is basically we'd rather get it right than get it out quickly. In an ideal world, it would have gotten out several years ago.

But I'm just glad that people do care about these issues, and we did spend a lot of time working through them. I am very pleased with the report and I commend it to you. I think there is a tremendous amount of information in there that will give you insight into at least how we are looking at these issues.

I will just flag a couple of them with respect to enforcement matters.

²² U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [ANTITRUST IP REPORT], available at <http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf>.

We do make the statement in there that from our perspective a mere unilateral, unconditional refusal to license intellectual property rights is unlikely to play a meaningful role in terms of the antitrust/IP interface on the enforcement front.²³ I think the gist of that is that's not where the enforcement focus should be. If you are looking in terms of where is there most likely to be harm and where are you most likely to avoid doing more harm than good, you shouldn't be looking in that direction.

The other is that there is a fairly extensive discussion about the role of standard-setting bodies and the discussions of patent disclosure policies, and even ex ante discussions and negotiations of licensing terms. I know Debbie and I have both spoken on this topic before, but it is good to have it out there. I think there has been some concern from our perspective that there is a legitimate issue here in terms of standard-setting bodies not wanting to walk into hold up-type problems. I think there may have been less flexibility, or a perception of less flexibility, in terms of the options available to standard-setting bodies, about whether they could engage in some discussions and try to better educate the working group members in respective cases.

We think that there are enough reasons there that this is an issue that it should be evaluated under the rule of reason. We are not endorsing or promoting any particular approach, but saying that it is one that we will look at under a rule of reason analysis and that there are circumstances where it is probably justified.

LEVEE: Let me follow up on that in one particular area for Debbie on the pharmaceutical reverse settlement cases. If the Supreme Court continues to refuse to take certiorari in these cases, and if Congress doesn't pass new legislation, which of course is pending each year it seems, do you see the FTC changing its view in any respect on bringing enforcement actions relating to these reverse settlements?

MAJORAS: I suppose at some point down the line you might be forced to say, "Okay, this was wrong" or "everybody thinks we're wrong" or "we'll take a different approach." But I don't think we're anywhere near there. I think there is a tremendous amount of support for the types of cases we have brought. I think people try to put the cases into absolute boxes.

Indeed, I think the Eleventh Circuit went too far in trying to do that. But, in fact, the *Schering* case,²⁴ while it tried to lay out some basic principles, actually was fairly fact-specific. That is what you find in these investigations with these patent settlement cases. We obviously are very cognizant of the Eleventh Circuit decision, and others, and we take it very seriously.

But nonetheless, not surprisingly, when we lost the *Schering* case, the number of patent settlements in which brand pharmaceutical companies made payments to generics and generics agreed to stay out of the market for a period of time definitely went up. We are required statutorily to look at all those. So we have a lot of them to look at. We are investigating them very, very carefully because we are required to do it. If Congress should tell us to stop, that's one thing, but that hasn't happened.

The billions of dollars that are at stake here make this an issue we think we need to continue to push. But, again, we are taking it investigation by investigation. It's interesting. These settlements

²³ See Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice Issue Report on Antitrust and Intellectual Property (Apr. 17, 2007) (summarizing main points of joint report), available at <http://www.ftc.gov/opa/2007/04/ipreport.shtm>.

²⁴ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), cert. denied, 126 S. Ct. 2929 (2006).

are fairly unique to the Hatch-Waxman context. We haven't seen these agreements in patent settlements outside this industry. That tells you something about the incentives that Hatch-Waxman has put in place.

So stay tuned. You haven't heard the last of this one yet.

ANGLAND: Jon, you are a member of the Antitrust Modernization Commission. Any questions on that topic?

JONATHAN JACOBSON: First, in self defense, I will note that Don Kempf, Deb Garza, and I dissented from the Part III recommendation that I know you are not crazy about. But the AMC did make a number of recommendations, legislative and prescriptive, and a number of recommendations specifically that the agencies should do or should consider doing certain things.

Is there an organized plan of response from the agencies to the AMC Report? Will there be any sort of interagency task force? Debbie, do you want to take that one first?

MAJORAS: What we have done at the FTC is I have appointed a group of people to examine closely the AMC's recommendations. I guess we're calling it a task force. They are still in the stage where we are parsing it, trying to figure out what we need to do in order to make decisions about any of the issues.

We are also simultaneously looking at issues where we would want to be in consultation with DOJ, and Tom and I have already talked about it. So while at the moment we haven't had a need for some formal task force, we are certainly going to make sure we have liaisons.

BARNETT: I would hope under any circumstance we would be organized in our response. We are doing the same thing. We are looking through the many and weighty pages of recommendations that you have made.

I agree with Debbie. We have been following this closely, as you know. We were active participants in the process and are working through the various recommendations. I think some of them—for example, the ones relating to criminal enforcement—don't really require a lot of discussion with the FTC. Others do, and Debbie and I have talked about that. Our staffs are talking about that. We will do a coordinated or otherwise organized response, as appropriate.

JACOBSON: I have no doubt it will be organized.

One of the areas that the AMC focused on was the Hart-Scott-Rodino process and, in particular, clearance. The Commissioners were strongly supportive in concept of a clearance agreement along the lines of the Charles James-Tim Muris agreement, and have made recommendations both to the agencies that they consider not necessarily the same agreement but the same concept of agreement, and a parallel recommendation to the Congress that they embrace this effort.²⁵ Can we expect to see anything along those lines? Tom, do you want to start?

BARNETT: On the clearance front, it is important to put things in perspective, and the clearance process we have in place in the vast majority of cases works reasonably well.

²⁵ AMC REPORT, *supra* note 4, at 134–37.

Having said that, there are a small number of instances where it takes time or we have some disagreement about which agency ought to handle a matter. It's a credit to both agencies that they are passionate enough about their enforcement that they want to handle these matters. Sometimes it frankly takes too long, and so there is room for improvement there. I would certainly like to see a system in place that does two things: clears all matters within a very short period of time, and, second, guarantees that it never gets to Debbie and me.

But clearance is an issue that we have been looking at and that we have had discussions about. I view the AMC recommendation as an opportunity for us to take an even more focused look at it. If we can make some improvements, that would be terrific.

MAJORAS: Clearance is the price you pay for having this job. I heard Bill Baer said yesterday that when there is a disagreement it's embarrassing, and "Gee, why can't they just work it out?" I agree it's embarrassing, and I have always said that. Although I would note that my very good friend Bill Baer used to be at the FTC, and he knows how hard this can be in the few matters a year where it really becomes an issue.

Prior to the AMC's recommendation, though, we had already been working on new tie-breaking mechanisms between us, which I think is really the important thing.

I think when you look at clearance—and this is what I always try to tell my folks and tell Tom when we're having our friendly discussions about these things if it ever does get to us—the thing you just have to always remember is that both agencies are equally capable of reviewing these mergers. What matters the most is that the system does not completely break down. We try to keep those principles in mind.

As for whether we can have a new clearance agreement like the one we tried in 2002, it is hard for me to imagine. We are looking at this, and we'll talk about it, and we will be completely open-minded because it is an important recommendation. But having lived through it in 2002, I think without congressional support—you know, Tim Muris and Charles James and Joe Simons and Bill Kovacic and myself and Hew Pate put countless hours into this, and our staffs. We spent a lot of time on that agreement. Every hour you spend on something like that you can't spend doing something else.

So without some assurance of that—and we have different oversight committees, so they may if they are brought in have something to say about where particular industries should go—I am not going to over-promise on this one.

JACOBSON: Following up on the same set of issues, I think no one doubts that the agencies deeply want to get mergers cleared within a few days. There is a reality that you and I have talked about occasionally, that sometimes deals go to the thirtieth day and you get a second request just because the agency has no choice. That still does happen, and everyone agrees that it shouldn't.

In recognition of this, the AMC has recommended that Congress actually pass a statute, in large part to help you out, that would require the agencies to clear a deal within nine days, and a suggestion that the agencies develop a firm tiebreaker for that ninth day, an arbitrator or a coin toss, or some other method.²⁶

It was suggested yesterday by Bill Baer that maybe if the agencies want to do it now and can't, that a statute isn't going to make a difference. Do you agree with that? Would the statute help or just be another piece of legislative paper?

²⁶ *Id.* at 137.

BARNETT: Let me say that the goal of clearing all mergers within nine days is certainly an admirable goal and anything that would help us get to that would be a good thing. As to whether a particular statute would help or not, I think I need to say that I'm not aware that the Administration has taken a position on any particular proposed legislation.

But the general concept of trying to clear something—I won't bore you with the details of it, because Debbie and I have talked about even trying to get there—there are some complications that can arise in terms of not even realizing there is an issue until later, for example because a third-party comes in later or something like that. But at the end of the day anything that moves us in that direction I think is a positive thing.

MAJORAS: If a statute is passed, we will follow it, of course.

What I would say about the tiebreaker idea is there does need to be one. But I am dead set against any kind of mediation. I think that's a complete embarrassment. I've been through it twice where I was told to do it, and I did it. But give me a break. Talk about time not well spent. No. There should be a quick, easy tiebreaker that is unlikely to be gamed.

JACOBSON: A large coin with two separate sides?

MAJORAS: A Super Bowl coin.

JACOBSON: Following up on HSR, the agencies came out last year with separate but similar custodian limitation proposals that I think are very well received by the bar.²⁷ They largely set a presumptive limit of thirty-five custodians for a particular deal. Although these are well received, I think there is a perception, certainly in some quarters of the bar, that they are illusory, that the ability of the staff to get more than thirty-five custodians is really not particularly cabined, and that in any large deal it is going to be fifty, seventy, a hundred, just back the way it was.

In recognition of that, or at least in recognition of that concern, the AMC proposed an additional limitation that would require a filer if they wanted to get the benefit of this to come clean, to check a box on the form and say, "If we get a second request, we would opt in to this."²⁸ That would require them to provide the data to allow the agencies to limit the custodians to fifteen-to-thirty-five, depending on the size of the deal, with an exception for ones where to go in excess of that would be approved by Chairman Majoras or Tom Barnett, depending on which agency it went to.

I know at least Chairman Majoras has some views on that one. Do you want to have at it?

MAJORAS: Well, I do. Look, I have been talking about merger process my whole career. When I came into the FTC, I said I'll take it on at my level, we'll try to make some changes, we'll try to put in place in the Bureau an opportunity to appeal if someone thinks that staff is not being reasonable in balancing the burden against the benefits.

We have done that. The process we came up with has been in place for a year. I really welcome input from people as to how they think that is working. I said from day one this is a beginning, not an end, and it can be changed and tweaked.

*The goal of clearing
all mergers within
nine days is certainly
an admirable goal and
anything that would
help us get to that
would be a good thing.*

—TOM BARNETT

²⁷ Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Reforms to the Merger Review Process (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewpocess.pdf>.

²⁸ AMC REPORT, *supra* note 4, at 169–70.

We are going to look more closely at that proposal, Jon, which I know you personally really spent a lot of time on because I know you took it seriously. But I have to tell you that my initial reaction is negative.

You know, we looked at whether one could tie this issue of how many custodians should be searched to the size of the deal, and the correlation is not nearly as strong as you might guess.

I would also say that thirty-five custodians, if we encountered a deal like an Exxon/Mobil, would be nothing. You have all of these geographic markets, and the FTC has a lot of industries we review that have lots of geographic markets. Conversely, though, we have huge pharmaceutical deals where Mike Moiseyev ends up needing only to search ten custodians. So I think the correlation isn't there as much as you might think, although it is a good thought and one that we have considered.

Overall let me just express a concern. If you look at the *AMC Report* overall, you look at what we have been talking about in the Supreme Court cases, and where we all have been in the last thirty years. We need more fact-based analysis, not less—although this week there was a conference in which some people were suggesting that maybe we should go back to more structural-based analysis. But in any event, that is one of the messages I took from the AMC.

But if you want us to do that, we have to be able to get at the facts. I was thinking about this a little bit this morning and for any Monty Python fans, like suddenly I'm the Black Knight—you know, I'm going to cut off this arm, and you're still moving, you're still dancing; we'll cut off this arm; then we'll cut off both of your legs. At some point, "Wait, come back, come back and fight." I mean no, your legs are off.

What we tried to do—and I really tried to listen to both the bar and staff in devising something—was balance the need for information for us to be able to determine whether a deal should go through or whether we need to challenge it for the benefit of consumers. You've got to balance that clearly against the burdens, not only on the parties but on us, and that is legitimate and fair, and, again, I have been very outspoken on that.

But on the other hand, in a fact-based analysis you need a fair amount of information. And I understand, Jon—you and I have talked about this—that when HSR was first passed it was contemplated it would be a lot less information. But we are in the information age now and companies have a lot more information. So I think that without sufficient flexibility, and I'm not sure—you know, people find it is hard to go to the Bureau Director and object. The fact that they are all going to be streaming into my office—I'm just not sure how well that will work.

So I think this is important, and we ought to really have some further discussions on this going forward.

JACOBSON: A similar machete to wield?

BARNETT: Well, I certainly agree with Debbie's overall assessment.

We'll start with the fact that the movement away from just rigid market share presumptions to a more specific competitive effects analysis in my view is a good thing or a good circumstance in merger enforcement. It enables us, for example, to realize, even though you may have a substantial market share in a particular case, there are other factors that suggest the deal is actually likely to benefit consumers. I wouldn't want to lose that.

As Debbie is suggesting, there is some tension there, and so when you get a second request and you are likely to be in court, it is inherently very document/fact/data-intensive, and it is hard to get around that.

To some extent, I think that there is an excessive focus on the second-request burden itself in terms of trying to step back and think about “How can I reduce the overall burdens or costs of the system most dramatically?” It’s not that those things aren’t important, but it is things like using that first thirty days aggressively, trying to get up to speed, so that you avoid the need to issue a second request at all. Then it doesn’t matter how many custodians you might have searched.

Those sorts of measures, which are things that I think both agencies have been focused on but are certainly an express part of the initiative that we have, are things that can pay very large dividends.

The other thing that is missing here is that you talk about the number of custodians, but increasingly merger analysis doesn’t turn on the documents of particular individuals; it turns on data and centralized files. It is very difficult to address that with the custodian issue. And the percentage of our second-request productions that are attributable to these centralized files or databases is increasingly large. That is an area that we continue to try and think about.

The best answer we have right now is for you all to educate us about what is there so that you can help guide us to the portions that are relevant rather than just dumping everything on us.

So that’s my hack at it.

ANGLAND: Jeff?

LEVEE: Let me turn from the Hart-Scott process to the criminal process. The Department of Justice Antitrust Division is collecting a lot of money in criminal fines these days. You are putting a lot of people in prison. To what do you attribute the continued significant enforcement activity? Are there more criminals? Are there more criminals applying for amnesty and giving you more access to information? It has become such a substantial part, it seems, of what the agency is doing, I’d like you to comment on it.

BARNETT: There is a range of factors.

Let me start off by saying that not only have we obtained large fines last year—we obtained \$470 million or so in fines, the second-largest total in our history for one year—but up until last year (and some of you may have heard this if you have heard Scott Hammond speak), the record for the total number of jail days imposed in sentences for Antitrust Division defendants was something over 13,000. As of today, for this fiscal year, only about halfway through it, our total is over 21,000, on track to more than double that. The average sentence is now twenty-nine months, which is much more than the ten months that it used to be not that long ago.

So what drives all that?

First, I would point to Scott Hammond and the folks in our criminal enforcement sections, who I think are just doing an outstanding job.

But there is a range of things. They are detecting more large international cartels where the volume of commerce is larger, which leads to larger penalties.

They are aggressive about identifying and charging what I will call collateral offenses, mail fraud or wire fraud, in addition to, or even in lieu of, a Section 1 count if we can’t make out that case, or tax evasion, whatever we can do to bring severe penalties to bear on what we view as the supreme evil of antitrust.

I also want to underscore the benefits that we derive—we in the United States, in terms of U.S. cartels—from the increasing activity of cartel enforcement by our friends at the European Commission and our friends at the Japanese Fair Trade Commission and the Korean Fair Trade Commis-

sion, all around the world. Again, it wasn't that long ago where when we were trying to collect evidence or get information about people from abroad, we were facing blocking statutes and affirmative resistance. Now we are linking arm in arm and doing coordinated dawn raids, we are extraditing people with cooperation. That kind of cooperation increases our effectiveness and gives us a greater ability to detect, to build a case against, and to negotiate with cartel participants.

And then, finally, when we actually do end up with a contested proceeding, judges are imposing harsh sentences, harsher than they used to be. All of that increases our negotiating position in plea agreements.

So that is all coming together in a way that I think our criminal folks should be very proud of.

We have brought, in the last few years, fourteen cases against companies for failing to secure data to the detriment of consumers. We will continue to be very active in that area, and also in educating businesses.

ANGLAND: Debbie, we'll switch gears and have you put on your consumer protection hat for a moment. Briefly, in that area what are your highest enforcement priorities?

MAJORAS: Well, we have a lot, because as the marketplace develops and becomes more complicated, we see more consumer issues, some of it new wine in old bottles.

I would say that probably the bundle of issues under the heading of consumer privacy are among the hottest issues that we have to deal with. Many countries actually have a separate privacy agency within the government. Consumer privacy, the issue of privacy in the commercial world, has fallen to the FTC. It is something we have embraced. What that means is a whole range of things.

First of all, of course, the Do Not Call Registry, which now has 142 million telephone numbers on it. One thing I should note here for this group—and I don't want to hear a collective groan—you probably didn't remember, but there was a five-year timetable put on your registration. So, starting next year, for the first set of people who registered, their five years will be up and people will have to re-register. So you heard it here. We have been very active in our enforcement.

Obviously, in data security we have been extremely active. One of the things that has happened in this tremendously dynamic economy, so much of which has gone online, is that we have really had to sort of catch up in thinking about the amount of consumer data this is creating and, unfortunately, the ease with which criminals can get to that data. So we have brought, in the last few years, fourteen cases against companies for failing to secure data to the detriment of consumers.²⁹ We will continue to be very active in that area, and also in educating businesses.

Consumer privacy also now extends into interesting areas. In spyware, we have been very active in challenging companies that have been loading that horrendous spyware on your computer and slowing you down, and in the worst case actually taking information from you and using it.³⁰

In the area of protecting children online, we have been enforcing the Children's Online Privacy Protection Act.³¹ We, for example, brought a case against one of the social networking sites that was knowingly collecting information about our kids who are below the age of thirteen without parental permission.³² That is an area where we will continue.

So there is a whole bundle of issues in this privacy area, and of course ultimately trying to protect kids, and also protect all of us from identity theft.

²⁹ FTC 2007 REPORT, *supra* note 17, at 28.

³⁰ *Id.* at 27–28.

³¹ 13 U.S.C. §§ 1301–1308.

³² FTC 2007 REPORT, *supra* note 17, at 31.

—DEBORAH MAJORAS

Financial fraud is an area where we have a lot of work to do. If you look at things that go on in the economy, you can then start, we hope anyway, to see what is going to develop in terms of consumer problems.

We are looking very closely, for example, at mortgage companies, particularly in the sub-prime area, that have been making offers to consumers perhaps without adequate disclosures. Because of some of the sub-prime issues, that results in debt and credit problems for more of our consumers.

We have unscrupulous, so-called credit repair organizations that do nothing but take precious dollars from our consumers who can ill afford it and then can't pay off their creditors. We also have debt collection practices out there today that, despite the federal Debt Collection Practices Act, are outrageous and harassing. So, the entire area of financial fraud is a priority.

And then, also, I will just finally mention we continue to be very active in health care fraud. Everybody always wants to ask, "Are any of those weight-loss products working? I mean, isn't there just one that we can try?" The answer is: I'm so sorry—another collective groan—no, they don't work. I'm afraid diet and exercise are the only things that do work. So we continue to be active in the weight-loss fraud area. First, we have a terrible obesity problem in this country, particularly with our children, so we think it is an important area.

And then, we are also quite active in going after fraudsters who try to sell people pills and potions that they claim will cure everything from cancer, to Alzheimer's, to emphysema, to skin conditions—an outrageous group of folks. They prey on those who don't have a lot of hope and who are truly in despair. So we need to be there.

That's skimming the surface, but that's a few of our issues.

ANGLAND: Picking up on one in particular, after six years of consideration, Congress recently passed the U.S. Safe Web Act.³³ What powers does it give the agency and how do you envision deploying them?

MAJORAS: We are so thrilled. We have been trying to get these powers.

There is no question that fraud is now completely global. There is a tremendous amount of online fraud out there. Of course, these guys don't have to worry about boundaries or jurisdiction. They can sit in any jurisdiction defrauding consumers in the United States, and vice versa. So we are behind in catching up with this.

While we were forming important alliances and agreements with our counterparts around the world, nonetheless we were hamstrung. We were hamstrung because there are certain types of information and evidence that we were not allowed to share with our counterparts. Our counterparts couldn't share information with us because we couldn't guarantee them that we could keep it confidential, so un-FOIA-able and the like, and other sorts of legal barriers. Congress has broken those legal barriers down for us, which I think is tremendous.

And then, there are a couple of other things in the U.S. Safe Web Act that will be very useful. For example, we now can do staff exchanges with other agencies, not only on the consumer protection side but on the antitrust side, and that is something that we have been wanting to do, trying to do, for a very long time, and we have not been permitted. So that is something that I think is very important.

³³ Undertaking Spam, Spyware, and Fraud Enforcement with Enforcers Beyond Borders Act of 2006, Pub. L. No. 109-455, 120 Stat. 3372 (2006).

We have a team in place now. We are already using the powers under the U.S. Safe Web Act, but we also have a team in place that is going through and being very cautious in how we do this, and also educating our entire agency. It is no longer the case that we can say, “You guys in Randy Tritell’s shop, the new Office of International Affairs”—you know, it’s all Randy’s responsibility, Randy and Hugh Stevenson and others, to do this for U.S. Safe Web. No. I mean that’s the whole point. The international work is throughout the agency now, and everyone needs to know how to use these tools to bring these people to justice in one country or another. So we are very pleased.

ANGLAND: I will ask our remaining panelists to join us now and we will move on to Phase 2 of this morning’s session.

We will start off by turning to Ilene.

GOTTS: Commissioner Kroes, I would like to start out with you, if I could. In the *Sony/BMG* merger the Commission issued a Statement of Objections but ultimately approved the transaction without any conditions. A trade association of competitors challenged the Commission’s decision and prevailed.³⁴ On the other hand, some Court of First Instance decisions found the Commission had blocked mergers that it should have permitted. Like Goldilocks, when you look at these various CFI decisions, how do you get enforcement “just right?”

NEELIE KROES: We are doing our utmost anyhow to get all our enforcement right. Having said that, in this case the judgment illustrates that the Merger Regulation sets out—and this is quite important—a symmetric test. So it is taking into account that getting your arguments and your evidence in place is not only necessary for permitting a merger but also for preventing it.

Having said that, I think that we are learning day by day. But in this case the lesson wasn’t new for us. So I think that it is taken into account.

And talking about the Statement of Objections, we are not going to change our policy. Rightly, you might ask “Why not?” Well, in our policy, the Statement of Objections serves to set out clearly all the Commission’s objections and allows the parties to exercise their rights. The evidence available at that time will include evidence brought forward in that phase as a reaction to the Statement of Objections. So it is serving the interests of all the parties who are involved. It is not only the Statement of Objections. There are also hearings that are possible for the parties to explain what it is all about in their view, and then at the end of the day, we take our final decision.

GOTTS: Continuing our discussion of recent European Union activity, I applaud that you are trying to draft state-of-the-art guidelines in the area of non-horizontal mergers.³⁵ In the United States the non-horizontal merger guidelines are now twenty-two-plus years old. Both the ABA Section of Antitrust Law in our transition report, and the AMC in its recent report, recommended that the U.S. Guidelines in this area be modified to reflect current law.³⁶ I was wondering whether, from the U.S. perspective, any further guidance will be provided in the nonhorizontal area. Do you want to go first, Debbie?

³⁴ For a discussion of the CFI’s July 2006 opinion, see Gail Slater, *E.U. Update: Sony/BMG, THE THRESHOLD* (ABA Section of Antitrust Law, Mergers/Acquisitions Comm. Newsl.), Winter 2006/2007.

³⁵ The 1984 Merger Guidelines include a section on non-horizontal mergers, which, though never formally abandoned, was not included in the 1992 and 1997 revisions to the Merger Guidelines.

³⁶ AMC REPORT, *supra* note 4, at 68.

MAJORAS: I'd be happy to. We have been following very closely the extensive work that the Commission has done on the non-horizontal guidelines and applaud them for the work that has gone into it. We are pleased that we have such an open relationship that we can talk about these things quite freely, and we do.

As far as whether we are moving in a direction of having new Guidelines, the issue comes up from time to time. The AMC has recommended it,³⁷ and, as I've said, we will look at it very closely.

We will look at it seriously if the AMC perceives this—but I can't say up to this point I have perceived a tremendous need for it. Now, I could be completely wrong about that, and I think people should tell us if we are. But I haven't sensed a tremendous amount of uncertainty out there, certainly not on conglomerate mergers. I wonder on vertical issues, which tend to, at least the ones I have dealt with at both agencies, come up in the same industries again and again, like defense.

Now, again, if we are wrong, we want to hear from people if they think some additional guidance would be necessary. But the fact of the matter is that any one of these projects—whether we are taking on Section 2, which we have been, any of the policy issues we are taking on—takes time. What you are always doing is weighing the time and the resources you have against the need for getting greater transparency and guidance. So I will absolutely look at it.

BARNETT: This is an issue we have talked about at various points. I would say up until now our perception has been—I mean you weigh the factors that Debbie was pointing to, in terms of what is it going to take to get this done and what kind of benefit can be derived from it. Our sense has been that one could put out there a set of very general principles that would be accurate and that probably would not provide a whole lot of guidance in a particular case. To get below that, these issues often get fairly detailed, fairly fact-specific. I'm not saying it is impossible, but it is a challenge.

Now, having said that, the AMC has recommended it. We always watch closely what our friends at the European Commission are doing and try to learn from their experience. If all of this makes sense, we will certainly look at it and consider that seriously.

GOTTS: That's wonderful.

Looking at whether there are deviations in applied merger standards in U.S. merger review, I'd like now to focus on the states. Bob, I notice how active the states have been in merger review for mergers that may have local effects—that involve your local gas stations, supermarkets, drug stores, and movie theaters. In these matters, I have also noticed that there have been some instances in which after the FTC or DOJ has finished its investigation, and either cleared the merger or obtained relief, the states have required additional relief. I'm wondering if the states are applying a different substantive standard in their merger review.

ROBERT HUBBARD: The bottom line is that reasonable minds differ about how to apply the same rules. Generally we agree with the federal enforcers about what rules to apply and how to apply them, but sometimes we see a problem that they don't when we look at the same set of facts. We try to keep each other apprised of that and respond as best we can.

Our federal system allows separate sovereigns to make separate decisions, and we try to implement them in as coordinated a way as we can.

Generally we agree with the federal enforcers about what rules to apply and how to apply them, but sometimes we see a problem that they don't when we look at the same set of facts. We try to keep each other apprised of that and respond as best we can.

—ROBERT HUBBARD

³⁷ *Id.*

MAJORAS: It could go the other way, too. There have been times where we thought there was a problem and a particular state hasn't. So I wouldn't say that it is always in one direction.

HUBBARD: Certainly I agree with that, and that's part of the benefits of having a separate set of eyes looking at the facts and being able to get the relief that the people who are focused on the facts can get.

GOTTS: We have right now a system where throughout the world we have seventy-plus jurisdictions with merger review requirements, each with their own forms, and their own requirements of what goes into the form. The Antitrust Modernization Commission encouraged the U.S. agencies to work with the European Commission and other authorities to try to develop a centralized pre-merger notification system.³⁸

First, from the U.S. perspective, do you think this is a good idea and, if so, how would you do it?

BARNETT: It's a good idea if you could do it. It's an issue that we have actually looked at. Indeed, we tried to do it with one other country that was fairly close to us to see if we could do that. I'm making up these numbers, but instead of a fifteen-page filing you had a twenty-eight-page filing, and the first fifteen pages were the U.S. information and the next thirteen or fifteen pages were the other country's information. I mean once you start to break it down, you realize that you are asking for country-specific information. There is some overlap.

What I think is probably more productive, in the shorter term at least, is to talk about what kinds of information you should be asking for and what you should try to avoid asking for to reduce burdens, and to some extent being careful about not misunderstanding the information you are asking for. This bleeds into the substance a little bit. But just because you ask for sales by national boundary, that doesn't necessarily mean that is a relevant market, for example. Those are the sorts of issues where I think achieving some progress in the near future is possible.

MAJORAS: It is always an issue on the table and worth continuing to explore. I wonder whether the effort in the end will be worth it. We have over a hundred agencies around the world now. I don't know that all of them are doing merger review—some probably not.

It sounds like just process, so why can't you just pull it all together and kind of meld it? Well, the interesting thing when you start to talk about process as much as substance is you get into differences in legal structure. Those are far less likely to come together around the world in any short period of time than even the substance of merger review.

So, again, I think it is something that we need to continually be open-minded about. We need to look for such opportunities. But the way we have tried to do this in the ICN through the Merger Working Group has been through procedural best practices,³⁹ to try to get as much directed toward best practices as you can, because it may be impossible to agree on every little form. It's hard enough to do that within one government, let alone all of the others.

So as a goal to think about, sure, but I wouldn't want to get so bogged down in that at the expense of working toward actual best practices, including in the substance of merger review, which is what matters in the end.

³⁸ *Id.* at 217.

³⁹ See INT'L COMPETITION NETWORK, A STATEMENT OF MISSION AND ACHIEVEMENTS UP UNTIL MAY 2006 (May 2006), available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/ICNMission&AchievementsStatement.pdf.

GOTTS: Never an easy answer to a problem, right?

Neelie, what do you think?

*Let's just be pragmatic,
for at the end of the day
we all have the same
target, the same goal
so to say, that we all
want more efficient
competition law
enforcement. If that is
our goal, then we
shouldn't focus too
much on agreeing on
every detail of the
procedures. That takes
time. On a daily basis,
we are already cooper-
ating quite happily.*

KROES: Let's just be pragmatic, for at the end of the day we all have the same target, the same goal so to say, that we all want more efficient competition law enforcement. If that is our goal, then we shouldn't focus too much on agreeing on every detail of the procedures. That takes time. On a daily basis, we are already cooperating quite happily.

We have some experience of cooperation within the European Union. Because we have twenty-seven Member States, we know at the end of the day it is all about a pragmatic attitude. We have to deliver on a daily basis.

GOTTS: In addition, in the last few years we have heard from the agencies about international cooperation in the cartel area, with big headlines on dawn raids throughout the world. We have also seen it in some merger reviews. Has such cooperation also existed in non-cartel conduct investigations? Have there been any examples of comity in merger review or other areas where either the United States or the European Union took the lead and the other jurisdiction watched rather than taking action?

Debbie, could you start with this?

MAJORAS: Absolutely there is cooperation on non-merger conduct matters. I asked the General Counsel's Office whether I was allowed to tell you which ones, and they said no.

I would like to be as transparent as I can, but I think it should be very reassuring to all of you that we don't have to wait for formalities to cooperate with each other. We are on the telephone all the time, talking through issues, explaining our cases to one another, explaining our evidence. So that is quite frequent. That is definitely going on.

As far as comity goes, I think there may have been some cases—none are coming to mind—but I would say this, in smaller bits perhaps. So, for example, in the issue of merger remedies where we have had common mergers that we have reviewed with the European Commission, it won't surprise you to know that we may come out similarly on some of the merger issues but differently on the remedy because we have different sets of consumers in a different geographic region.

The amount of deference to one another, to try to get this right, with the strong understanding that you can't ask a party to enter into two remedies or two remedies that conflict with one another, I think has really been a great success story of our cooperation. It is one that I am very appreciative of and think is really working quite well.

—NEELIE KROES

BARNETT: I agree with that. I do think that the most extensive degree of cooperation that we see on a day-to-day basis, while we do see it on the cartel enforcement front, really is mergers. It can happen on other fronts, but it has become routinized. I mean our staffs talk to each other daily. I don't even hear about it in most instances.

I completely agree with Debbie that we are trying to work with each other, and not only to help each other on the substantive analysis and get to the right result. This issue of remedies is in some ways the most significant potential area of conflict. It has to be viewed as a success story.

I don't think anybody here could point to anything in the last five years where the European Commission and the U.S. agencies have come out with a conflicting merger remedy. I will assure you that is not because there were no opportunities for a conflict there.

We have worked through some issues there quite successfully, quite amicably, on both fronts—and I see Philip Lowe nodding here as well; he knows—and that is a tremendous success story. I think it is important to underscore the importance of that.

Let me just add that on the comity front, relatedly, it is not really so much a question of “I’m going to delegate this investigation to you or to the others,” but we certainly watch what goes on.

Just as to one public matter, in the *Oracle/PeopleSoft* case⁴⁰ that we litigated, we ended with a resolution. I won’t speak to what exactly was in the minds of the European Commission, but as a practical matter their investigation was suspended while the trial went on, and ultimately it was resolved.

So there is a lot of cooperation going on right now. I think it is great.

KROES: I completely agree.

I also want to say something about cooperation. There is an excellent example of why we should not always both deal with the same issue. That is the Sabre case concerning a computerized airline reservation system set up by a number of European airlines and affecting U.S. airlines.⁴¹ It was a great decision to delegate the case to the EU, as it was better placed to deal with it. I think there are other examples, too.

GOTTS: We live in very interesting times. Reportedly, China is about to come out with its anti-monopoly law. I was wondering if you could discuss what the agencies—both in the United States and in the European Union—have been doing in consultation with the Chinese authorities.

Debbie, do you want to start?

MAJORAS: I will if you want me to.

If Ilene says that the Chinese are about to come out with the anti-monopoly law, then maybe she knows more than I do. But the Chinese have been working very hard on an anti-monopoly law, and suffice it to say I think all three of us could confirm how hard our two respective jurisdictions have been working with the Chinese.

The Chinese have been extremely open to widespread discussion on these issues, both at very high levels and at staff level, which has been terrific. My first year at the FTC I was running out of resources because we were invited to China with DOJ so frequently to really try to work this through. So there has been a great deal of bilateral cooperation.

We have also been in frequent discussions with the European Commission, understanding that, while we may have our differences from time to time, we are far closer to one another, of course, than where the Chinese have been in trying to move closer to a market economy. That, I think, has been fruitful. So, plenty of discussions there.

Then, finally, before I turn it over to Tom, there is something going on in the Administration, high-level meetings with the Chinese, strategic economic dialogue, and we as competition agencies

⁴⁰ United States v. Oracle Corp., 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

⁴¹ See EUROPEAN COMM’N, 30TH REPORT ON COMPETITION POLICY 294–95 (2000) (discussing ultimate settlement of EC investigation); see also Press Release, U.S. Dep’t of Justice, Justice Department Asks European Communities to Investigate Possible Anticompetitive Conduct Affecting U.S. Airlines’ Computer Reservations Systems (Apr. 28, 1977), available at http://www.usdoj.gov/atr/public/press_releases/1997/180at.htm; ABA SECTIONS OF ANTITRUST LAW AND INTERNAT’L LAW, REPORT ON THE INTERNATIONALIZATION OF COMPETITION LAW RULES: COORDINATION AND CONVERGENCE (2000), available at http://www.abanet.org/antitrust/at-comments/2000/reports/01-00/conv_rpt.pdf.

have now been brought into that dialogue. This I think is a recognition on both sides that the competition issues are absolutely critical to this entire enterprise.

BARNETT: We do spend a significant amount of resources specifically on China, in terms of multiple delegations to China and hosting delegations from China. We have, of course, been focused on the draft anti-monopoly law. I hear the second reading should be this summer. The third reading may be in the fall, but that's not entirely clear. So who knows exactly when it will happen? But I agree they are working hard toward it. I sense that they really do want to get this done.

We are also focused very much on finding a way to help them with the implementation phase after they actually pass the law, because that is extraordinarily important.

But one example that I want to give of our work with China, which includes cooperation with all of you, I think illustrates a number of things. When I was in Beijing a couple of years ago, we had a session with representatives from the legislature, the National People's Congress, as well as the agencies that are likely to be involved, as well as the equivalent of the Executive Branch. It was a square table, with Chinese representatives on two sides. We were on one side with our FTC colleagues. On the other side were representatives from the European Commission.

We spent an entire day going through the various areas of the law. Without exaggeration, the way it proceeded was, on a given issue the United States would give our views and the European Commission would say "we agree." The next issue, the European Commission would give their views and we would say "we agree." I actually think that sort of combined message in that very tangible way has much more force and persuasive impact than either of us just talking, particularly if we were giving different messages. But it shows how close we really are in our fundamental approaches and, I think, how cooperation can be helpful.

KROES: More than talking about cooperation, very constructive cooperation, we should also take into account that the situation in China is a challenge. It is unbelievable what is going on in the People's Republic of China. So it is of great importance that their recent developments in competition policy are implemented as soon as possible.

Even if the EC and the US agencies are not always 100 percent of the same view—why not mention that too, for that is reality. If that is the case, then count our blessings where we are together. And the two of us and all the others concerned are indeed very much involved in the whole process of speeding up.

I see three main issues: I am highly interested in when the whole legal procedure is finalized; number two, will there be an independent authority, yes or no?; is it one authority, yes or no?; and, number three, of course highly important, is it implemented in the way that we are used to? So let us do our utmost to fight together for the implementation of the competition law that they are in favor of as soon as possible.

MAJORAS: One last point on the implementation. When the Chinese anti-monopoly law is passed, that will be the beginning of the challenge, not the end.

ANGLAND: We like to think the Antitrust Section is doing its small bit. By the way, in terms of Chinese antitrust law, we have been approached to, and we are agreeable to, having the new edition of *ALD VI* translated into Mandarin. This will be our first venture in a language other than English.

Bob, in the area of resale price maintenance, the states have traditionally been very vigorous enforcers, bringing actions under the Sherman Act, using the per se rule, attacking resale price maintenance. I know you worked on a brief arguing that the per se rule should be retained. Assum-

ing for a moment that you are not successful in that regard and that the per se rule is overruled, do you envision states then treating resale price maintenance as per se illegal under state law?

HUBBARD: Continuing the Monty Python theme, *Dr. Miles*⁴² is not dead yet. It's worthwhile to think about the arguments that are highlighted in *Leegin*⁴³ to show that reasonable minds can differ. I have done most of my analysis assuming that the per se rule will continue. I gave my thoughts on what this might mean at a program yesterday morning.⁴⁴ Vertical restraint law has significantly eroded, but I think that vertical price restraints that efficiently and effectively take money from consumers ought to be per se illegal. We tried to put all those arguments in the *Leegin* amicus.⁴⁵ We were granted oral argument. The New York Solicitor General, who was also an Acting Solicitor General for the United States in her career, presented the argument.

So my first comment is that *Dr. Miles* is not dead yet.

Second, the history of resale price maintenance claims includes a Depression era experiment that allowed states to legalize resale price maintenance. Some states did. Some states didn't. Some states did, but changed their minds. Ultimately, in 1976, Congress removed the authorization for those state statutes.⁴⁶

In connection with that history, a lot of state law says that a manufacturer cannot dictate the price at which a retailer can sell. New York General Business Law section 369-a says that. Other legislative history illustrates that states, like Congress in 1976, endorsed the per se rule.

I hope that we don't get to the kind of problems and disparities we are going through with *Illinois Brick*. I hope that the federal per se rule continues to be applied. But we'll see.

I'm an Ohio State Buckeye fan. You play the games before discussing the result.

ANGLAND: Debbie?

MAJORAS: Remember, Bob, in *Monty Python and the Holy Grail*, the line after "I'm not dead yet" is "Well, you will be soon."

HUBBARD: But we're still alive.

MAJORAS: But I'm a Buckeye fan too, Bob.

ANGLAND: Let's push the hypothetical. I know that Bob will resist strongly even the possibility that the per se rule will be overruled. But let's assume for a second that it is and that states say, "Well, at least under our state antitrust law we are going to apply the per se rule."

⁴² *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

⁴³ *Leegin*, 127 S. Ct. 1511 (2007).

⁴⁴ Robert L. Hubbard, Chair, Multistate Task Force of the Nat'l Ass'n of Attorneys General, Presentation at the Breakfast with State Enforcers, State Antitrust Enforcement Committee Program, 54th Antitrust Law Spring Meeting of ABA Section of Antitrust Law (Mar. 30, 2006), available at http://roberthubbard.net/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=11&MMN_position=18:18.

⁴⁵ See Brief of State of New York as Amici Curiae for Respondent, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 1511 (2007), available at <http://www.oag.state.ny.us/business/antitrust/pdfs/Leegin%20States.pdf> and http://naag.org/assets/files/pdf/amici_leegin.states.pdf.

⁴⁶ For a history of resale price maintenance claims, see Thomas K. McCraw, *Competition and "Fair Trade": History and Theory*, 16 Res. Econ. Hist. 185 (1996).

Now, if you look at the Solicitor General's brief, the position it takes is that some resale price maintenance is not just competitively neutral, but that it is procompetitive. Well, if RPM is procompetitive, then a state law that says it is per se illegal is anticompetitive. Under those circumstances, notwithstanding the general dual system or triple system of enforcement, should Congress, in order to preserve competition that is allowed by resale price maintenance, preempt state laws making resale price maintenance per se illegal?

HUBBARD: As the amicus set forth in some detail, the empirical work supports that consumer prices go up. I have not seen any empirical work that shows that procompetitive effects flow from the restraint.

Assuming hypothetically that we will follow the musings of economists rather than the empirical work on this, I think *ARC America*,⁴⁷ a unanimous Supreme Court decision, would apply four-square. States are allowed to make their own decisions about the appropriate way to structure their economies and their antitrust laws and those decisions are entitled to deference and respect.

ANGLAND: In *ARC America*, of course, the Court was just saying that Congress had not in fact preempted, not that it couldn't preempt.

So the question—Tom, Debbie, do either of you have a view as to whether Congress should preempt if the Supreme Court says, for example, “We think resale price maintenance is often a good idea,” and states come out and say, “Well, we're going to say it's per se illegal anyhow?”

BARNETT: Well, I'm not in a position to say exactly what Congress should do, but I'll make the following observations. The federal antitrust laws prohibit or make illegal anticompetitive activity. They do not necessarily enshrine and grant some sort of protection to all other activity. There are a lot of regulations, laws, statutes, et cetera, that come into play that can be anticompetitive. We do have a federal system of government and the states have a sphere of operation. Both of our agencies have been very active in the real estate industry, for example, where we think the states have stepped in, either legislatively or through regulatory bodies, and done things that are anticompetitive in many instances. They are perfectly entitled to do that. If they feel that that's in the best interests of their citizens, that's fine. But, from my perspective, does it make sense to evaluate resale price maintenance under the rule of reason? Certainly, and I think we would all be better off if that were the case.

MAJORAS: I think it would be odd for Congress to preempt in such a situation. I think if the Supreme Court were to rule in the fashion that the Solicitor General has advised, I can't imagine this Congress, or maybe even the next, doing that. It just doesn't seem possible to me. So I won't add anything to what these two have said.

ANGLAND: Jeff?

LEVEE: It is a reflection of the passage of time that at 11:40 a.m. in the Enforcers Roundtable we have not uttered the word “Microsoft,” which I dare say normally would have been the subject of considerable discussion with the other three enforcement officials.

⁴⁷ *California v. ARC America Corp.*, 490 U.S. 93 (1989).

KROES: That it would be of interest anyway.

LEVEE: Yes, exactly.

Nonetheless, you have issues with respect to *Microsoft*.⁴⁸ I hope you could update our audience on the status of those issues and what the Commission has learned with respect to specifically the issue of remedies.

KROES: Let me first mention that, as you are all aware, 2007 is a very important year for the European Union. We just celebrated our 50th Anniversary.

How is that connected with *Microsoft*? Well, in those fifty years of experience of the European Union, and I'm also talking about fifty years of competition policy, we have never ever had an experience like this one. That, in itself, doesn't give a conclusion, but I am going to come to a conclusion. We have never ever before encountered a company that has refused to comply with a Commission decision. So that is a very important conclusion—is not a lot of fun, to put it that way.

We have indeed learned a couple of things from our past experiences, which are relevant for the future. Firstly, companies may not always find it in their interest to comply with a clear and positive behavioral remedy. I think, therefore, the Commission must be ready and have the resources to monitor. I think if we are able to monitor and enforce such remedies to ensure full compliance, then we are a step forward.

Unlike the situation in your country, the Community law also allows, as you are aware, potential beneficiaries of a clear and unconditional remedy to seek to enforce the decision, imposing that remedy before the competent national courts.

Having said that, the second point we have learned is that we may have to look for alternative and more effective remedies. That is one of the great lessons for me in this case.

We need to consider under which circumstances, for example, structural remedies would be more appropriate, or even a must, to remedy certain competition problems. I can imagine that in a certain situation there could be a dominant company repeatedly abusing its dominant position—and I am not only talking about the company you were touching upon—or where it has consistently failed to comply with a behavioral remedy that we were asking for, despite repeated enforcement actions. From this it could be reasonable to draw the conclusion that behavioral remedies are ineffective and that a structural remedy is warranted.

This type of situation is, by the way, mentioned in the Regulation.⁴⁹ In other situations, it may be efficient and sufficient to impose a simple cease-and-desist order, coupled with a fine, and leave the company to assess how to comply with the decision in question.

Having said that, the situation of today is that we are waiting for the decision from the Court of First Instance as to *Microsoft*. As you can imagine, it is not only we who are waiting for it but there are others who are also looking out for it too.

If you allow me to say so, at the end of the day, how did this case get started? An American company headquartered in the United States was behaving in a way that other U.S. companies were complaining about in Brussels, and then we took up our responsibility. We will continue to take up our responsibility, I can assure you.

*We have never ever
before encountered a
company that has
refused to comply
with a Commission
decision.*

—NEELIE KROES

⁴⁸ See, e.g., European Comm'n, Press Release, European Comm'n Reaction to Microsoft Announcement of Jan. 25, 2006 (Jan. 25, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/49&type=HTML&aged=0&language=EN&guiLanguage=en>.

⁴⁹ Council Regulation (EC) 1/2003, 2003 O.J. (L 1) 1.

LEVEE: Let me question the other three officials on a different topic. A lot of people in this room have spent time prosecuting and defending indirect purchaser cases. The Antitrust Modernization Commission has proposed the repeal of *Illinois Brick* and a modification of *Hanover Shoe*.⁵⁰ It would change the way perhaps a lot of the cases are litigated, particularly some of the follow-on cases of the criminal cases that the Department brings.

Let me start with Bob. Do you sense that the states either support or clearly oppose this kind of a change?

HUBBARD: Forty-six jurisdictions put in comments on civil remedies to the AMC supporting the themes discussed in the Report.⁵¹ A unanimous NAAG resolution talks about *Illinois Brick* being fundamentally unfair and in need of correction, and that state law should not be preempted.⁵² The AMC proposal accomplishes those two things that are in the NAAG resolution.

The state submission to AMC differed in some details. We recommended a lighter treatment of *Hanover Shoe* than AMC appears to be recommending. I'm not quite sure.⁵³ The AMC says different things in different parts of the Report.

Also the AMC takes a "hard" removal position, that as long as the Constitution allows removal, state court litigation should be removed. Our submission took the position that Congress just passed CAFA,⁵⁴ which has provisions on removal; let's see how CAFA works; most problems will probably get fixed; why change something that maybe you don't need to.

Those are details. The fundamentals, as reflected in the NAAG resolution, are met: you get rid of *Illinois Brick*, and you don't preempt state law. I'm confident that states support the AMC proposal. We look forward to some sort of legislative proposal that we could look at and comment on.

LEVEE: Do the agencies agree?

MAJORAS: This obviously is not directly an FTC issue. I will just make a couple of points, probably some based on my past life, maybe a few things based on conversations in my household.

I think fundamentally I agree with Bob. There are some real issues with *Illinois Brick*, probably some of which could not have been anticipated at the time. Our economy, our legal system, a lot of things, have changed over this time period, so I think that there is a very good reason to look at *Illinois Brick* and whether that should be changed.

But I do think it would make no sense not to also look at an overturning of *Hanover Shoe*. The fact of the matter is if you look at our system of litigation today, it works okay but it's fairly inefficient. You have to ask yourself—I mean, look, I am very much, obviously, in favor of strong antitrust enforcement—but you do have to ask yourself at some point: How many times should a

⁵⁰ AMC REPORT, *supra* note 4, at 270–78 (discussion of recommendations for changing indirect purchaser policies derived from *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968)).

⁵¹ The state comments are available at <http://naag.org/assets/files/pdf/antitrust.AMCcommentsCivilRemediesProposals.pdf>.

⁵² The NAAG resolution is available at <http://www.naag.org/assets/files/pdf/2005.Spring.Antitrust.Resolution.Final.pdf>.

⁵³ AMC Recommendation 47 includes: "Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of federal antitrust law." That seems to change *Hanover Shoe* only to the extent necessary to allow direct purchasers to sue for actual damages. Yet the commentary on this recommendation refers to the possibility that "direct purchasers may receive 'windfall' awards exceeding their actual damages," which seems to suggest changing *Hanover Shoe* to prevent "windfall" awards. AMC REPORT, *supra* note 4, at 271.

⁵⁴ Class Action Fairness Act of 2005, Pub. L. No. 109-2, Feb. 18, 2005, 119 Stat. 4 (2005).

company pay? If you had a more unified system for deciding, for example, in a cartel case, where this obviously comes up, what is the damage? What is the harm? And pay that harm trebled, as opposed to paying it trebled here and then maybe paying a little more trebled over here and a little more—it's not only inefficient, but I think it is probably likely that companies are overpaying.

And that's expensive. I mean who do you think is paying that bill? Consumers are paying that bill in the end. A lot of it goes in the pockets of lawyers who benefit from the system. So I think it is definitely worth a look.

We were talking about this once on a panel a few years ago, and someone stood up in the back and said, "How could you, a law enforcer, dare say that you would do anything that would make companies pay less?" Well, what I want is for them to pay fairly. They should have to pay if they have violated the antitrust laws, but that doesn't mean they should have to pay six different times for the same amount of damage.

HUBBARD: And let me clarify. The position that the states took as to *Hanover Shoe* is that whether a plaintiff "passed on" the damages ought to be a question for the allocation of the damages among plaintiffs instead of a potential sword for defendants to prevent everybody from recovering.

The AMC Report discusses deterrence. *Illinois Brick* discusses the importance of deterrence.

In the context of more than one plaintiff, I agree with Debbie and others that the keystone ought to be actual damages. We agree that you have to deal with *Hanover Shoe* in some way, but our proposal was that it ought to be an allocation question among plaintiffs as opposed to something that would prevent the deterrent effect of treble damages.

ANGLAND: Commissioner, we heard awhile ago about how active the Department of Justice has been in collecting fines over the last year. What's the story in the European Union this year? There seems to be a lot of activity there as well.

KROES: On the one hand, it is not only a matter of being more active, it is a matter of just getting the right cases. On the other hand, indeed rightly mentioned by you, we are successful. For the last year the fine total was 2 billion Euros. This year we have already gone further—in the first four months—we are now above 2 billion Euros.

Having said that, some people are asking me, "Aren't you very pleased with that?" I am not, to be quite open with you, for I think it is a shame that we have to do this. But, with all those headlines of the big fines in just the last two days about a beer cartel in The Netherlands, this issue gets a lot of publicity.

The effect of these tremendous numbers is that CEOs are more aware than ever that they have to find out what is happening in their own companies. That is what I am pleased about, that it is working out and that management of the companies is aware that cartels will not be tolerated; that it is against the interest of the consumer not only in terms of price but also in terms of research and innovation, and against the interests of other competitors; that is not a fair and level playing field.

So it is still going on, and I am absolutely sure it will be an issue forever. So we have to continue to enforce the rules.

ANGLAND: One of the key aspects of the leniency program in the United States is the marker system, whereby before a company is in a position to make the full compliance, the full showing you need to get leniency, it can reserve a place in the queue, get a marker. That seems to have worked very well here.

The Commission for the first time introduced that concept within the past year. The Antitrust Section applauded the introduction of a marker system in the European Union, but it did express some concern about the Draft Notice, in that it talked about after a lot of information was provided by the party to the Commission, rather than saying “under these circumstances a marker will be granted,” it said “a marker may be granted.”⁵⁵ One concern we had is how uncomfortable corporations would be essentially going in and confessing, but having it be very discretionary—as we read the language and maybe we read it wrongly—as to whether in fact they would get their place in line.

Should firms be worried that, having gone in and laid the facts on the table, the Commission will say, “Well, we could give you leniency but we just won’t?”

We have been very open to the outside world about when you can get the number one treatment out of the leniency program without the danger to our enforcement actions.

KROES: We are quite transparent in this field. We have been very open to the outside world about when you can get the number one treatment out of the leniency program without the danger to our enforcement actions. So there is no misunderstanding so far.

But we don’t want to have our leg pulled and have them ask for the special treatment and not give us the evidence, and we don’t have the same compulsory powers as in the US to ensure cooperation of individuals. So it is clear-cut.

The efficiency of the leniency program was, by the way, again proven by this beer cartel. One of the companies that was highly involved got the zero-fine treatment because they were delivering what we were asking for and was of great help.

leniency program without the danger to our enforcement actions.

ANGLAND: Jon, we have time for a final question or two.

JACOBSON: The single-firm conduct hearings have been widely followed and are going to wind down in closing sessions on the first and eighth of May.⁵⁶ What, and dare I ask when, should we expect from the agencies in this regard?

MAJORAS: Less than five years.

—NEELIE KROES

BARNETT: I’ll start. Obviously, we hope to exhibit, if you will, more efficient, speedy governmental processes in terms of a product.

There have been a large number of hearings over a wide range of issues, from business people, legal people, economists, and academics. It is a lot of information. Frankly, it is addressing some hard issues in some areas.

I do think it has confirmed, at least so far, my impression that there are a lot of areas where there is a fair consensus and a fair amount of agreement, and I think it is important to keep that in perspective as we focus on the hard areas.

We are going to continue to try and digest all of that and work with each other. I would like us to be able to deliver our perspective to the world on how we think about these issues, hopefully advance the ball a bit more than just summarizing what was said, but to convey, hopefully in a

⁵⁵ ABA Section of Antitrust Law and Section of Int’l Law, Comments in Response to The Commission of European Communities’ Request for Public Comment on the Draft Commission Notice on Immunity from Fines and Reduction in Fines in Cartel Cases (2006), available at <http://www.abanet.org/antitrust/at-comments/2006/11-06/comments-ec-leniency.pdf>.

⁵⁶ See Press Release, Fed. Trade Comm’n, Federal Trade Commission/Department of Justice Hearings on Single-Firm Conduct to Continue on May 1 (Apr. 24, 2007), available at <http://www.ftc.gov/opa/2007/04/section2hearings.shtm>.

somewhat normative or prescriptive sense, where we think the law either is or should be going. That's the goal, and we will work hard at it.

MAJORAS: I know for my part, and I think others in our agency, we certainly learned a lot. With every one of these reports we do, we learn a lot. We learned a lot in the IP Report that we just released this week.

Sticking points will arise. The question is how you are going to get past them. I think we have learned something about that. The reason I say sticking points will arise is—I'm just being completely honest—this is the most difficult area of antitrust law around the world.

That doesn't mean that Tom is not right, that in the United States we do have a fair amount of points of broad consensus. That alone, I think, would be a useful thing for us to put out there. But beyond that we have to tackle the tougher issues.

The reason we started the hearings, at least from my perspective, was that I really felt like our discussion was getting stuck, and we were sticking on the same old discussions and the same old issues. I felt like we really needed to step back a little bit and start, not completely over, because we have years of jurisprudence and in fact many recent cases—the FTC has had six single-firm conduct cases in this Administration—so we have some new things with new issues that we can build on.

So we are planning to do a report, and we are planning to do it quickly. If there is one thing that you know when you take one of these jobs it's that your tenure is temporary. Tom and I don't have forever, so we will do our best to get it done as quickly as we can.

JACOBSON: One last follow-up for Neelie. Is the Commission planning to do anything in response? I know you have been following the hearings, and I know one of the purposes of the hearings was to have a dialogue with the European Commission. Any plans in that regard?

KROES: We are highly interested in the results, and we are trying to learn from it. But that doesn't mean that there will be a big change in our policy yet. It is too early to say what the result will be at the end of the day.

Be aware that we are absolutely interested but that we still have a different system on certain points.

JACOBSON: Bob, in two seconds can you tell us what the states are going to say about the Robinson-Patman Act and potential repeal of the same?

HUBBARD: I muse that maybe states should support repeal of the Robinson-Patman Act. I think that is consistent with the argument that we made in *Leegin*.⁵⁷ I think we should consider getting rid of the Depression-era competition statutes, like McCarran-Ferguson, the fair trade laws, and Robinson-Patman. We got rid of the fair trade laws in 1976. There is a proposal to get rid of McCarran.⁵⁸

⁵⁷ One argument in support of the *per se* rule against minimum resale price maintenance is that less restrictive alternatives than resale price restraints are available for a manufacturer seeking to reinforce specific retailer actions. One such alternative would be for the manufacturer to lessen its wholesale price for those retailers that provided specific services. Robinson-Patman creates a risk for manufacturers providing such wholesale price incentives to retailers.

⁵⁸ S. 618, 110th Cong., (2007).

I think Robinson-Patman in many instances is anticompetitive actually. But I don't want to over-react. I think that price and other competition discrimination is an issue that we ought to think through clearly. I think the net neutrality debate illustrates that, sometimes market power and gate-keeper effects are significant.⁵⁹ But Robinson-Patman certainly doesn't mandate net neutrality.

ANGLAND: On behalf of everybody here, I would like to thank our guests for their participation in this Roundtable. We appreciate it greatly. ●

⁵⁹ The Federal Communications Commission recently issued a Notice of Inquiry concerning net neutrality. *In Re Broadband Indus. Practices*, FCC 07-31, WC Doc. No. 07-52 (Apr. 16, 2007), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07-31A1.pdf.

Twombly: A Journey from the Conceivable to the Plausible

Manfred Gabriel

The Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*¹ has shifted the balance between plaintiffs and defendants in antitrust litigation. While it has long been clear that a plaintiff must *prove* more than parallel conduct to win a Section 1 Sherman Act claim,² the Supreme Court has now held that a plaintiff must also *plead* more than parallel conduct to state a claim and survive a defendant's Rule 12(b)(6) motion to dismiss. The Court reversed long-standing notice-pleading precedent, and *Twombly* will have implications beyond Section 1 and antitrust cases.

Twombly

The by-now familiar facts in *Twombly* are as follows: The defendant Baby Bells, Bell Atlantic Corporation, Bell South Corporation, Qwest Communications International, Inc., SBC Communications, Inc. and Verizon Communications, Inc., emerged as regional monopolists from the 1984 breakup of AT&T and operated as Incumbent Local Exchange Carriers or ILECS. The Telecommunications Act of 1996 sought to introduce competition in the telecommunications market and created so-called Competing Local Exchange Carriers or CLECs. In this restructuring of the telecommunications market, the ILECs were obligated to sell local telephone services at wholesale rates, to lease unbundled network services, and to permit other carriers to interconnect to the ILECs' networks. These obligations were meant to give the CLECs and other ILECs access to local-access networks, making competition for local telephone services possible. At the same time, the Baby Bells were permitted to compete in the long-distance market. One of the expected consequences of the 1996 Telecommunications Act was a spate of litigation.³

According to the plaintiffs, another expected consequence has not occurred: meaningful competition in the telecommunications market. The *Twombly* defendants together allegedly control 90 percent of the national market for local telephone services. The heart of the complaint in *Twombly* is that the ILECs conspired to quell competition in that market by on the one hand preventing entry by CLECs and on the other hand agreeing not to enter each other's territories as competitors. Such a conspiracy would violate Section 1 Sherman Act, and the named plaintiffs brought suit on behalf of a putative class of "all subscribers of local telephone and/or high speed internet services." The plaintiffs based this claim of conspiracy on three main allegations:

- The defendant-ILECs territories are non-contiguous and sometimes loop around each other; therefore, the defendants' parallel conduct of not competing as ILECs in each other's territories would be "anomalous in the absence of an agreement among the defendants not to compete with each other."⁴

■
Manfred Gabriel

is an associate with
Latham & Watkins LLP
in New York.

¹ *Bell Atl. Corp. v. Twombly*, No. 05-1126, 2007 WL 1461066 (U.S. May 21, 2007).

² *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (at summary judgment stage, evidence must tend to exclude the possibility that the alleged conspirators acted independently).

³ See, e.g., *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁴ *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 178 (S.D.N.Y. 2003).

- Given that the defendants were already operating as ILECs, competing as CLECs in adjacent territories would be an economically attractive proposition. Plaintiffs alleged that a statement by Qwest's CEO, Richard Notebaert, that competing as a CLEC "might be a good way to turn a quick dollar but that doesn't make it right,"⁵ suggested an agreement not to compete.
- The defendant-ILECs had an incentive to agree to thwart attempts by other telephone carriers to compete as CLECs, since a CLEC, once competing successfully in the territory of one ILEC, would be in a position to enter the territory of another ILEC.⁶

In the district court, Judge Lynch found these arguments were no more than allegations of parallel conduct, and dismissed the case on the defendants' Rule 12(b)(6) motions. Parallel conduct states a claim under Section 1 Sherman Act only, the district court held, if there are additional allegations of "plus factors," which tend to exclude the possibility of independent action (the familiar requirement for summary judgment motions).

[T]here must be

"enough factual matter

(taken as true) to

suggest that an

agreement was made."

The Second Circuit reversed: Rule 8(a) requires nothing but a plain statement of the claim, and plaintiffs do not bear the burden to "plead with special particularity the details of the conspiracies whose existence they allege."⁷ Acknowledging the "sometimes colossal expense" of undergoing discovery, the Second Circuit found that it was up to the legislature or the Supreme Court to recalibrate the balance between notice pleading and the burdens placed on defendants in Section 1 actions based on mere allegations of parallel conduct.⁸

The Supreme Court's Holding

In a 7–2 decision handed down on May 21, 2007, the Supreme Court did re-calibrate this balance, making it harder for plaintiffs to survive Rule 12(b)(6) motions to dismiss in Section 1 cases.⁹ "The need at the pleading stage," writes Justice Souter for the majority, "for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"¹⁰

Twombly's New Pleading Standard. The emphasis has shifted from *Conley v. Gibson* and its holding that a complaint may not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"¹¹ to the requirement of "showing that the pleader is entitled to relief." Taking as a starting point that parallel conduct can be as indicative of independent unilateral decisions as of (illegal) agreement by competitors, the Supreme Court reasons as follows: A showing that the plaintiff is entitled to relief requires more than labels and conclusions. In the context of Section 1, this means that there must be "enough factual matter (taken as true) to suggest that an agreement was made."¹² There must be "plausible grounds to infer an agreement."

⁵ *Id.* at 184.

⁶ *Id.* at 183–84.

⁷ *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 116 (2005).

⁸ *Id.*

⁹ *Bell Atl. Corp. v. Twombly*, 2007 WL 1461066 (U.S. No. 05-1126).

¹⁰ *Id.* at *6 (citation omitted).

¹¹ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

¹² *Twombly*, 2007 WL 1461066, at *6.

An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a Section 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of “entitlement to relief.”¹³

To reach this result, the majority had two obstacles to overcome. Dismissal for failure to state a claim has traditionally been disfavored by the courts given the inherent complexities of antitrust cases.¹⁴ The Court rejected this concern: district courts must retain the power to insist on some specificity in pleading before allowing a “potentially massive” case to proceed, and the burdens of discovery are extraordinary. The Court rejected the suggestion that the burdens of discovery could be lightened by staging discovery, that is, by first conducting discovery into the existence of conspiracy and reserving all other topics until after the plaintiff has had a chance to discover evidence of conspiracy and the defendants have had a chance to move for summary judgment.

The dissent, written by Stevens and joined by Ginsburg, takes issue with the majority’s hostility to staged discovery. While Stevens, had he been the trial judge, would not have permitted massive discovery on the allegations in the case, he would have given the plaintiffs a chance to depose Notebaert and executives of the other defendants.¹⁵

The second obstacle the Court had to overcome is the “no set of facts” formulation in *Conley* that has stood for fifty years, and has been the shield with which plaintiff’s lawyers have blocked myriad motions to dismiss in all types of cases. The Supreme Court in *Twombly* informed us that *Conley* has been misunderstood, and that *Conley* “described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of pleading to govern a complaint’s survival.”¹⁶ The Second Circuit erred, according to the majority, in taking the prospect of unearthing direct evidence of agreement among the defendants as sufficient to preclude dismissal.

The dissenters were dismayed at this abrupt departure from precedent: “[T]oday’s opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation,”¹⁷ wrote Stevens. He insisted that *Conley*’s holding did set out the standard for notice pleading and reflected the policy choice of the Federal Rules of Civil Procedure. Stevens’s argument is strong, as far as it is based on Supreme Court precedent, but it seems insensitive to the struggles of the trial courts, which have long chafed against *Conley*. But the vigor of the dissent here demonstrates how thoroughly the *Twombly* ruling breaks with the past.

Just two weeks after *Twombly* came down, however, the Supreme Court in *Erickson v. Pardus* cited *Twombly* for the proposition that

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Specific facts are not necessary; the statement need only “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”¹⁸

¹³ *Id.*

¹⁴ *Peller v. CBS, Inc.*, 368 U.S. 464, 473 (1962) (“We believe that summary proceedings should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.”)

¹⁵ *Twombly*, 2007 WL 1461066, at *22.

¹⁶ *Id.* at *8.

¹⁷ *Id.* at *21.

¹⁸ *Erickson v. Pardus*, 127 S. Ct. 2197, 2220 (2007) (quoting *Twombly*, 2007 WL 1461066, at *1965 (quoting *Conley*, 355 U.S. at 47)).

The *Erickson* court noted, though, that it involved a *pro se* complaint, which “must be held to less stringent standards than formal pleadings drafted by lawyers.”¹⁹ Yet the quote suggests that *Conley*’s permissive pleading standard is not as dead as the *Twombly* dissenters fear.

The Supreme Court found nothing in the *Twombly* complaint but parallel conduct, and no plausible allegations of agreement. The Court discounted the defendants’ alleged economic incentives to resist the entry of CLECs in their territories as perfectly natural competitive behavior aimed at keeping regional dominance:

Even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a Section 1 violation against almost any group of competing business would be a sure thing.²⁰

Asking about plausibility is an invitation to the parties and the courts to explore economic theories and to speculate about the incentives of competitors to conspire.

Plausibility, Conceivability, and Fact Pleading. We will have to wait and see which of *Twombly*’s phrases will evolve as the horn book formulation of what will plaintiffs have to show to “nudge their claims across the line from the conceivable to the plausible.”²¹ But two points emerge from a close reading of *Twombly*.

Enough factual matter. The Court is clear in requiring the pleading of specific facts suggesting an agreement between the defendants. The facts must “point toward a meeting of the minds;”²² and they must “raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”²³ The real standard seems buried in a footnote. There, responding to Stevens’s dissent, the Court explains what courts should consider to be “enough” factual matter:

Whereas the model form alleges that the defendant struck the plaintiff with his car while the plaintiff was crossing a particular highway at the specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.²⁴

The passage suggests that a Section 1 claim now requires “who, when, where” allegations. The dissent rightfully points out that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators’ . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly”²⁵—a point the majority opinion, surprisingly, does not address.

Plausible, not conceivable. The Court requires that the factual matter must make an agreement “plausible.” This, and similar phrases in *Twombly*, are incompatible with *Conley*’s rule that a claim is well-pleaded if only it is logically consistent with a conceivable set of facts that could lead to liability. Instead, the test has become the plausibility of agreement between conspirators. Asking about plausibility is an invitation to the parties and the courts to explore economic theories and to speculate about the incentives of competitors to conspire.²⁶

¹⁹ *Id.* (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)).

²⁰ *Twombly*, 2007 WL 1461066, at *9 (citation omitted).

²¹ *Id.* at *10.

²² *Id.* at *6.

²³ *Id.* at *6.

²⁴ *Id.* at *13 n.10.

²⁵ *Id.* at *20 (Stevens, J. dissenting) (citing *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976)).

²⁶ *Cf. id.* at *23. (Stevens, J., dissenting) (expressing fear that the new rule will invite “lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence.”)

To the majority in *Twombly*, a conspiracy among the ILECs is implausible because for a long time there was a monopoly in the telecommunications industry:

In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act, and well before that, monopoly was the norm in telecommunications, not the exception. The ILECs were born in that world, doubtless liked the world the way it was and surely knew the adage about him who lives by the sword.²⁷

But why does the adage about living by the sword not equally suggest an incentive to coordinate? “Let’s not fight among ourselves, we’ll all lose by cut-throat competition” is the mantra among Section 1 conspirators, after all, and the exact mindset the Sherman Act seeks to suppress. An actual conspiracy is not rendered legal by being implausible. If the *Twombly* Court is serious about settling for no less than “who, where, when” allegations of conspiracy, a tension might arise with the requirement that allegations must be plausible. The Court suggests that sometimes allegations of no more than parallel conduct will be sufficient to make an agreement plausible.²⁸ An equally plausible alternative to conspiracy as an explanation of the defendants’ behavior is enough for the Supreme Court in *Twombly* to dismiss the complaint and the majority is not troubled by the words of Qwest’s CEO that competing as a CLEC “might be a good way to turn a quick dollar but that doesn’t make it right.” The *Twombly* decision does not fully resolve the potential tension between factual allegations and plausibility.

These are quibbles. Ultimately, the Court has gotten it right in *Twombly* because antitrust liability, and the burdens of discovery, should not turn on the fast and loose words of company executives, or on sketchy economic theories. The Court’s willingness here to search for plausible grounds for unilateral conduct portend how hard future plaintiffs may find it to survive 12(b)(6) motions, just as summary judgment motions became much harder to win for plaintiffs after *Monsanto*²⁹ and *Matsushita*.³⁰

There is also an interesting point here about the telecommunications industry and antitrust: Congress clearly intended private antitrust actions to be a means of implementing the competitive scheme set out in the 1996 Telecommunications Act. Yet, while paying lip service to the legislative command to apply the antitrust laws, the Supreme Court in *Trinko* ultimately refused to apply the “slight benefits” of the Sherman Act.³¹ Now, in *Twombly*, the Court cites the monopolistic history of the industry as grounds for throwing out an antitrust suit.

***Twombly*’s Broader Implications**

There are two broader implications of the *Twombly* decision. The first concerns antitrust and the strengthened requirement to plead “who, when, where” facts to state a claim of an illegal conspiracy. While the Court does allow for circumstances in which parallel conduct itself may be sug-

²⁷ *Id.* at *10.

²⁸ *Id.* at *5.

²⁹ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) (evidence in a Section 1 case must tend to exclude the possibility of independent action).

³⁰ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (conspiracy evidence at the summary judgment stage must tend to rule out the possibility of independent action).

³¹ *Verizon Commc’ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004).

gestive of agreement, those can be expected to be rare in practice. Since such direct evidence of agreement (which of the defendants' vice presidents of sales met in what hotel room during a trade show) will be difficult for private plaintiffs to come by, *Twombly* will tend to restrict private Section 1 actions to piggy-back law suits following government investigations.

The second implication goes far beyond Section 1 cases: There is nothing in *Twombly* that inherently limits the holding to Section 1 claims, and *Twombly* can be expected soon to put in an appearance in Section 2 cases, where economic plausibility is at the forefront of the parties' minds. *Twombly* will, no doubt, resonate in all areas of civil practice and be assured of a prominent spot in the civil procedure case books (including Stevens's eloquent dissent). With *Conley*'s "no set of facts"—the perhaps most widely cited formulation of the notice-pleading standard—gone, it will take some time before formulations like *nudging a claim across the line from conceivable to plausible* take on color inside the antitrust context, let alone outside of that context. ●

The Tunney Act: A House Still Standing

Joseph G. Krauss, David J. Saylor, and Logan M. Breed

*“Well, he huffed, and he puffed, and he huffed and he puffed,
but he could not blow the house down.”¹*

The recent debate over the proper role of the courts in reviewing U.S. Department of Justice Antitrust Division settlements in antitrust cases might remind some of the childhood story about the wolf and the three little pigs. After lots of “huffing and puffing,” the Tunney Act “house” is still standing—although the DOJ may find it worthwhile to reinforce the walls of the house in certain future cases.

Periodically, there has been considerable “huffing and puffing” by the DOJ’s critics and some members of Congress that the courts were not properly fulfilling their responsibilities in reviewing DOJ settlements under the Tunney Act. Much of the criticism followed the approval by the District of Columbia Circuit Court in 1995 and 2002 of the consent orders resolving the DOJ’s cases against Microsoft, which many saw as abrogating the original intent of the Tunney Act. Passed in 1974, the Antitrust Procedures and Penalties Act, commonly referred to as the Tunney Act, requires federal courts to review each consent decree in civil antitrust cases filed by the DOJ to ensure that the remedy proposed in the consent is in the public interest. Courts have long been perceived as simply “rubber stamping” DOJ settlements; but following the *Microsoft* decisions, Congress decided to address these concerns and amended the Tunney Act in 2004. While the modifications were relatively minor, the legislative history indicates Congress (or at least the members that introduced the legislation) intended to strengthen the judicial role in the process and provide more effective oversight of antitrust consent decrees.

The first significant test of the amendments arose recently in Judge Emmet Sullivan’s reviews of the DOJ’s proposed consent decrees in two of the largest telecommunications mergers in American history, the Verizon/MCI and AT&T/SBC transactions. The DOJ’s narrow approach to market definition and its proposed remedy drew intense criticism from consumer groups and some state regulatory agencies, and a number of entities filed briefs arguing that the 2004 amendments required the court to play an extremely active supervisory role. Judge Sullivan initially appeared to take these arguments to heart, holding several hearings and requiring the DOJ to produce significant evidence to support its contentions. But in the end, the 2004 amendments appear not to have made any substantive impact—Judge Sullivan ultimately approved the consent decrees and expressly reconfirmed that the *Microsoft* court’s overarching decisional principles are not inconsistent with the 2004 amendments.

And so, after all the “huffing and puffing,” Judge Sullivan found that the requirements of the Tunney Act had remained largely unchanged—the Tunney Act “house” remained standing and looked a lot like it did before 2004.

■
Joseph G. Krauss
and **David J. Saylor**
are partners, and
Logan M. Breed is
an associate, in the
Washington, D.C. office
of Hogan & Hartson,
L.L.P.

¹ From the *Tale of the Three Little Pigs*, by Joseph Jacobs, first published in 1898.

History of the Tunney Act

Prior to the Tunney Act, there were no formal statutory procedures governing the DOJ's antitrust consent decrees. The Act was inspired largely by the DOJ's settlement of antitrust suits challenging International Telephone & Telegraph Corp.'s mergers with several other corporations during the Nixon Administration.² The settlements prompted allegations of improper influence by ITT because they contained far less relief than was sought in the original complaint and they came on the heels of a \$400,000 donation by ITT to the Republican National Committee.

To avoid future allegations of impropriety in antitrust consent decrees, the Tunney Act imposed specific rules for the notification of consents, the opportunity for third parties to provide comments, and judicial review of the consent. The DOJ must prepare and file a complaint and Competitive Impact Statement (CIS) simultaneously with the proposed consent decree explaining both the alleged antitrust violation and the proposed remedy. These documents are published in the *Federal Register* for public comment.³ The DOJ then files the Comments publicly with the court and appends its own Response to those comments.

Before entering the consent, the court must determine whether entry of the decree is in the public interest. Specifically, the Tunney Act lays out two sets of factors for the court to consider. First, the court assesses the decree's competitive impact, including the duration of relief sought, the anticipated effects of alternative remedies actually considered by the DOJ, and "any other considerations bearing upon the adequacy" of the decree.⁴ Second, the court should examine the impact of the consent decree "upon the public generally and individuals alleging specific injury" from the violations stated in the complaint.⁵ The Act provides the court broad leeway to determine the necessary scope of its review. The court may hold hearings, take testimony of government officials or experts, appoint special masters, consultants or expert witnesses, admit amicus curiae or intervenors, review written comments, responses and objections, and "take other such action in the public interest as the court may deem appropriate."⁶

Courts have generally deferred to the DOJ and approved decrees with little fanfare, but judges in a few instances have used their Tunney Act powers more expansively.⁷ The first widely publicized judicial discussion of the Tunney Act was the 1982 review of the AT&T consent decree. In a lengthy opinion, Judge Greene stated that, although the Act contemplated some deference to the prosecutorial discretion of DOJ,

It does not follow . . . that courts must unquestioningly accept a proffered decree as long as it somehow, and however inadequately, deals with the antitrust and other public policy problems implicated in the lawsuit. To do so would be to revert to the 'rubber stamp' role which was at the crux of the congressional concerns when the Tunney Act became law.⁸

² See 119 CONG. REC. 24,598 (1973) (statement of Sen. Tunney).

³ 15 U.S.C. §§ 16(b), 16(e).

⁴ *Id.* § 16(e)(1).

⁵ *Id.* § 16(e)(2).

⁶ *Id.* § 16(f).

⁷ For example, in a few cases, the parties have withdrawn the decree and resubmitted a modified version in response to opposition by third parties or the court. See, e.g., *United States v. Thomson Corp.*, 949 F. Supp. 907 (D.D.C. 1996); *United States v. NBC*, 449 F. Supp. 1127 (C.D. Cal. 1978).

⁸ *United States v. AT&T*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The AT&T case technically was not a Tunney Act proceeding because the settlement there involved the modification of an existing consent decree,

Courts have generally deferred to the DOJ and approved decrees with little fanfare, but judges in a few instances have used their Tunney Act powers more expansively.

He refused to approve the consent decree as written, insisting that the court's ongoing oversight authority was inadequate. The parties consented to the court's proposed modifications, and the modified decree was entered.

But intense judicial scrutiny of DOJ settlements was the exception, not the norm, and debate over the proper scope of the Tunney Act review remained largely quiet until the 1995 review of the DOJ's consent decree with Microsoft regarding its alleged anticompetitive marketing practices. The D.C. District Court for the first time used its powers under the Tunney Act to prohibit the decree on substantive grounds. The district court denied the DOJ's motion to grant the decree because the DOJ "did not provide the court with the information it needs to make a proper public interest determination,"⁹ the scope of the decree was too narrow, and the parties refused to adequately address certain practices that concerned the court (such as "vaporware," or product preannouncement). The court requested more information regarding the details of the settlement negotiations between the DOJ and Microsoft, and asked the DOJ whether it would continue to investigate certain alleged anticompetitive practices that were not mentioned in the complaint or addressed in the consent.

On appeal, the DC Circuit held that the district court had overstepped its bounds by reformulating the issues and "effectively redraft[ing] the complaint."¹⁰ The court emphasized that the district court's authority to review the decree depends entirely on the DOJ's exercise of its prosecutorial discretion. Using language that would later form the basis of the arguments in favor of the 2004 Tunney Act amendments, the court implied (at least to some readers) that district courts should accept all decrees that do not "appear[] to make a mockery of judicial power."¹¹ The D.C. Circuit reversed and ordered the district court to enter the consent decree.

In 2002, the D.C. Circuit Court was asked once again to approve an antitrust consent decree involving Microsoft when the DOJ agreed to settle its civil suit regarding Microsoft's monopolization of the operating system market. The DOJ had already won on the issue of liability, and the only remaining issue was the proper remedy. This time—despite a prior district court ruling in the case that had ordered the breakup of the company,¹² as well as intense opposition from Microsoft's competitors, customers, and many voices in academia—the court entered the consent decree with only minor modifications.¹³

The 2004 Amendments

Following the approval of the second Microsoft consent decree, Congress considered changes to the Tunney Act. Senator Herbert Kohl (D-WI) proposed some drastic changes, most notably that the district court may not accept any consent decree offered by the Department of Justice "unless it finds that there is *reasonable belief, based on substantial evidence and reasoned analysis, to*

indeed one that was entered in 1956, many years before the Tunney Act. Judge Greene followed Tunney Act procedures without deciding that the Tunney Act applied to the modification of a consent decree in the long-settled case and the dismissal of a different case that he had partially tried.

⁹ *United States v. Microsoft Corp.*, 159 F.R.D. 318, 332 (D.D.C. 1995).

¹⁰ *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995).

¹¹ *Id.* at 1462.

¹² *See United States v. Microsoft Corp.*, 97 F. Supp. 2d 59 (D.D.C. 2000), *rev'd*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

¹³ *See United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (D.D.C. 2002), *aff'd*, *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004).

support the United States' conclusion that the consent judgment is in the public interest."¹⁴ The proposed amendment also potentially expanded the scope of the review by allowing the court to "consider any other factor relevant to the competitive impact of the judgment."¹⁵

Despite these sweeping proposals, Congress ultimately enacted several relatively minor changes to the Tunney Act as part of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004. First, the Act now states that courts "shall" (instead of "may") take the enumerated factors into account in an analysis of the consent decree. Second, there is a new enumerated factor: The judge "shall" consider "the impact of the entry of such judgment upon competition in the relevant market or markets."¹⁶ Third, a provision was added stating that the Act did not require the court to conduct an evidentiary hearing or to permit anyone to intervene. Importantly, the amending legislation also stated in the "Congressional findings and declarations of purposes" preamble: "[I]t would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'"¹⁷

Congressional Record statements by the amendments' supporters indicated they believed the legislation would "make clear" that the D.C. Circuit's 1995 interpretation of the Tunney Act (in particular, the "mockery of the judicial function" language) was too narrow.¹⁸ Senator Kohl stated that the amendments would "insure that the courts can take meaningful and measured scrutiny of antitrust settlements."¹⁹ However, the DOJ apparently did not find these changes very significant—in a press release discussing the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, the DOJ did not even mention that the legislation altered the Tunney Act.²⁰

Verizon/MCI and SBC/AT&T: The 2004 Amendments in Practice

The meaning of the 2004 amendments became the subject of intense debate in 2005 and 2006 when the DOJ sought approval of its consent decrees regarding the Verizon/MCI and SBC/AT&T transactions. The settlements provided narrow relief involving only partial divestitures of fiber into specific buildings. As in the *Microsoft* cases, the proposed decrees received strong criticism from many industry participants and commentators who believed that the remedies were insufficient. Critics argued that the DOJ should have sought additional divestitures and that the amended

¹⁴ See *United States v. SBC Communications, Inc.*, 2007 WL 1020746, *15 n.8 (D.D.C. Mar. 29, 2007) (emphasis added). The ABA Section of Antitrust Law strongly opposed this drastic proposed alteration in the Tunney Act which would have made the process similar to courts' review of administrative agency regulatory decisions under the Administrative Procedure Act and very different from the usual judicial function in law enforcement matters. The Antitrust Section was concerned that such a radical reworking of the Tunney Act would discourage settlements, derail efficiency-enhancing transactions, and prove very time-consuming and burdensome. See Comments of the ABA Section of Antitrust Law on HR 1086: Increased Criminal Penalties, Leniency, Detrebling, and the Tunney Act Amendments (Jan. 2004), available at <http://www.abanet.org/antitrust/at-comments/2004/01-04/increasedcriminalpenalties.pdf>.

¹⁵ See *id.*

¹⁶ 15 U.S.C. §§ 16(e)(1)(A) & (B). Another new factor added in 2004 is "whether its [i.e., the consent decree's] terms are ambiguous." *Id.* § 16(e)(1)(a).

¹⁷ Pub. L. 108-237, Title II, § 221(a)(1)(B), June 22, 2004, 118 Stat. 668.

¹⁸ 150 CONG. REC. S3615-18 (Apr. 2, 2004) (statement of Sen. Kohl).

¹⁹ *Id.* at S3617.

²⁰ See Press Release, U.S. Dep't of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (June 23, 2004), available at http://www.usdoj.gov/atr/public/press_releases/2004/204319.htm.

Tunney Act required more in-depth review. The merging parties and the DOJ argued that the court's inquiry was limited to the competitive issues identified in the complaint, and the DOJ asserted that the 2004 amendments did not alter this principle.

The DOJ's Position—Narrow Harm, Narrow Remedy. The DOJ filed complaints in both cases on October 27, 2005, along with proposed final judgments incorporating remedies that the DOJ argued were tailored to the harm alleged in the complaints. The settlements focused on restoring competition in (1) "local loops," or the "last mile" connections between commercial buildings and the carrier's network, and (2) "local private lines" (LPLs), or dedicated, point-to-point telecommunications circuits that originate and terminate within a single metropolitan area and encompass one or more local loops.²¹ The DOJ alleged that the transactions would reduce competition for LPL service (and the retail voice/data telecommunications services provided via LPLs) for a narrowly defined number of specific commercial buildings where the mergers were "2 to 1"—in other words, they eliminated the only competing alternative to the Regional Bell Operating Company (RBOC)—and entry by another firm was not likely.²² The parties were required to issue an "indefeasible right of use" (i.e., a long-term leasehold interest) to specified strands of their fiber assets serving those buildings.²³

Tunney Act Proceeding—How Far Will the Judge Go? The DOJ filed its motion for entry of the proposed final judgments on April 5, 2006, and the Tunney Act review of the DOJ's proposed consent decrees was assigned to Judge Emmet Sullivan of the D.C. District Court. On July 12, 2006, Judge Sullivan held an unprecedented hearing to determine (1) whether the court should rely on the DOJ's examination of the evidence or if it needed to review the evidence itself, (2) whether the DOJ had produced sufficient evidence, and (3) the proper scope of the court's review. In advance of the hearing, Judge Sullivan issued an order asking the parties to consider a number of questions that created the possibility for a broad debate on the relevance of the 2004 amendments and the proper standard of review in a Tunney Act proceeding, including the following:

- "What authority, if any, does the Court have to question the scope of the government's Complaints in these two cases?"
- "What weight should the Court give to the legislative history of the amended Tunney Act . . . in its determination of what the appropriate standard of review is under the 2004 amended Tunney Act?"
- "What specific evidence is the government relying on for its assertion that its proposed remedies would replace the competition that would be lost as a result of the two mergers?"
- "Has the government provided the Court with sufficient information for it to make an independent determination as to whether entry of the proposed consent decrees is in the public interest? If not, what other information should the government have provided to the Court?"
- "Through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition. In layperson's terms, why isn't that the case?"²⁴

²¹ *SBC*, 2007 WL 1020746 at *3.

²² *Id.* at *3–*4.

²³ *Id.* at *5.

²⁴ *United States v. SBC Communications, Inc.*, Nos. 03-2512, 03-2513 (D.D.C. July 7, 2006) (order regarding July 12, 2006 hearing).

At the hearing, Judge Sullivan expressed concern that the DOJ and the merging parties had not submitted enough evidence to support the remedies. He also granted motions by several critics to participate as amici.

On July 25, 2006, Judge Sullivan held another hearing and refused to sign the consent decrees without more information, complaining that the record “consisted largely or exclusively of unverified legal pleadings.”²⁵ He ordered the DOJ to produce “any material necessary for the Court to satisfy its judicial and statutory function” by August 7, 2006.²⁶ He also indicated that it was “premature” to order a full evidentiary hearing, but he refused to rule out the possibility of such a hearing in the future.

In response, the DOJ filed (1) a detailed memorandum explaining its submission, (2) a declaration by W. Robert Majure, the DOJ economist who directed the economic analysis of the transactions, and (3) extensive technical materials the DOJ had gathered from the parties and their competitors. All of the admitted amici also filed supplemental submissions, including several declarations by economists and other experts. The DOJ submitted a reply to those responses, including a reply by Majure. On November 30, 2006, Sullivan held another hearing to discuss these filings. Finally, the parties submitted supplemental responses regarding specific issues raised at the hearing, particularly amici’s claims that (1) the DOJ’s analysis did not follow the steps outlined in the agencies’ Merger Guidelines, and (2) the DOJ “made up” some of the facts upon which it relied.

The Outcome—The More Things Change, the More They Stay the Same. Following the final hearing on November 30, 2006, the antitrust bar waited with anticipation for Judge Sullivan’s ruling. His statements from the bench during the review process led some to speculate that, in his view, the 2004 amendments changed the Tunney Act procedurally, and maybe substantively as well. This speculation was also fueled by Judge Sullivan’s requests for significant supplemental material to complete the record, which may trace back to the new factor in the 2004 amendments that the judge “shall” consider “the impact of the entry of such judgment upon competition in the relevant market or markets.”²⁷ Sullivan also required the DOJ to persuade him with some factual data that the screen or algorithm used to determine which “2 to 1” situations required divestiture was a reasonable predictor of likely entry and thus within the reaches of the public interest.²⁸

When Judge Sullivan issued his opinion on March 29, 2007, he quickly put to rest any speculation that the 2004 Amendments drastically changed the way the statute worked. In his first paragraph, he stated that “[t]he only question facing this Court, under the procedures crafted by Congress, is whether the divestitures agreed upon by the merging parties and the Department of Justice are ‘in the public interest.’”²⁹ Indeed, throughout his opinion he favorably cited the Justice Department’s favorite incantation that the decree need only be “within the reaches of the public interest.”³⁰ Despite the amici’s heated protestations over the allegedly inadequate scope of the DOJ’s remedy, Judge Sullivan expressly refused to “decid[e] whether these mergers as a whole run afoul of the antitrust laws, nor whether they are altogether in the public interest, nor whether

When Judge Sullivan issued his opinion on March 29, 2007, he quickly put to rest any speculation that the 2004 Amendments drastically changed the way the statute worked.

²⁵ *SBC*, 2007 WL 1020746 at *8.

²⁶ *Id.*

²⁷ 15 U.S.C. §§ 16(e)(1).

²⁸ *SBC*, 2007 WL 1020746 at *17.

²⁹ *Id.* at *1.

³⁰ *See, e.g., id.* at *14, *16, *20, *21, *23.

they should be approved by other branches of the federal government.”³¹ In short, while Judge Sullivan required the DOJ to provide more evidence than what was in their Competitive Impact Statement and Response to Public Comments to support the proposed decrees, he applied basically the same substantive test that the courts used under the pre-2004 version of the Tunney Act.

In fact, Judge Sullivan’s opinion mounted a three-step defense of the *Microsoft* decision, which had ostensibly spurred the 2004 amendments. First, Sullivan noted that the amendments were spawned in part by Congressional reaction to the *Microsoft* settlement, particularly the perception that the court misinterpreted the Tunney Act standard when it apparently held that courts may reject settlements only if they “make a mockery of judicial power.”³² However, Sullivan determined that the *Microsoft* court’s holding was actually compatible with the Tunney Act’s traditional purpose—the *Microsoft* court’s controversial statement just meant that “district courts cannot reach beyond the complaint unless the limited nature of the complaint makes a mockery of judicial power.”³³ In other words, Judge Sullivan held that the language of the Tunney Act requires the court to focus on whether the proposed decree adequately remedies the alleged harm in the complaint, not whether the complaint encompasses all of the potential anticompetitive harm arising from the transaction. This position—that the court is not empowered to determine whether the decree is the best possible resolution of the potential anticompetitive harm—is hardly novel; it is the standard that reviewing courts have traditionally applied in Tunney Act reviews for decades.³⁴

According to Judge Sullivan, the Tunney Act interpretation that Congress disapproved came not from *Microsoft*, but from the subsequent *Massachusetts School of Law at Andover, Inc. v. United States* decision.³⁵ In that case, the court transformed the *Microsoft* “mockery” phrase into an element of the substantive standard of review, writing:

The district court must examine the decree in light of the violation charged in the complaint and should withhold approval only if any of the terms appear ambiguous, if the enforcement mechanism is inadequate, if third parties will be positively injured, or if the decree otherwise makes a “mockery of judicial power.”³⁶

Under this formulation of the test, the “mockery” phrase modifies all of the preceding clauses and therefore becomes determinative. Sullivan argued that the 2004 amendments were really Congress’s response to this development, evidenced by (1) the new requirement that the courts evaluate “all of the enumerated factors” and (2) the statement in the Congressional findings that the Tunney Act review process is not limited to a determination of whether the decree would make a mockery of the judicial function.³⁷

³¹ *Id.*

³² *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995).

³³ *SBC*, 2007 WL 1020746 at *12.

³⁴ *See, e.g.*, *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981) (“The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is within the reaches of the public interest.”); *United States v. Alcoa, Inc.*, 2001 WL 1335698, *16 (D.D.C.) (“More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.”); *United States v. Western Elec. Co.*, 592 F. Supp. 846, 856 (D.D.C. 1984); *NBC*, 449 F. Supp. 1127; *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975).

³⁵ 118 F.3d 776 (D.C. Cir. 1997).

³⁶ *Id.* at 783 (quoting *Microsoft*, 56 F.3d at 1462).

³⁷ *SBC*, 2007 WL 1020746 at *12.

Second, Judge Sullivan addressed the issue of whether courts may consider matters other than those specifically mentioned in the DOJ's complaints. He pointed back to *Microsoft* for the proposition that the court cannot go beyond the scope of the complaint, and he found nothing in the Tunney Act or the 2004 amendments to alter that determination. In particular, he reasoned that the language of the statute and the legislative history were both focused on the competitive impact of the judgment rather than the competitive impact of the transaction at issue.³⁸ Under this reading of the Tunney Act, the court's sole responsibility is to ensure that the remedy hits the target set out in the complaint—and “the 2004 amendments have left in place the Circuit's holding [in *Microsoft*] that this Court cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.”³⁹

He pointed back to Microsoft for the proposition that the court cannot go beyond the scope of the complaint, and he found nothing in the Tunney Act or the 2004 amendments to alter that determination.

Third, Judge Sullivan addressed the issue of the proper standard of review, i.e., the proper level of deference accorded to the DOJ's evaluation of the adequacy of the proposed settlements. Judge Sullivan found that neither the original Tunney Act, the 2004 amendments nor the legislative history answered this question. The Act itself lists the factors the court should consider but it is “silent as to whether the court should defer to the government's conclusions regarding those factors.”⁴⁰ Most of the statements in the legislative history provided only vague phrases such as “carefully review,” “undertake meaningful and measured scrutiny,” and “independently review.”⁴¹ The only exceptions Sullivan found were comments by Senator Kohl, including a statement that courts should ensure that decrees are “analytically sound.”⁴² While this statement may indicate an objective standard for the court's independent review, Judge Sullivan ultimately held that it was not persuasive because it was not adopted in the language of the amendments: “The statement of a lone legislator, unaccompanied by a corresponding change in the statutory language, is insufficient to override a well-established judicial construction of the statute.”⁴³

Because Congress had given no precise direction on this point, Judge Sullivan turned to the controlling D.C. Circuit Court precedent: *Microsoft*. He noted that under *Microsoft*, the Tunney Act does not require the DOJ to employ any specific type of analysis in evaluating and settling cases, nor does it require DOJ to prove its underlying allegations in a Tunney Act proceeding.⁴⁴ Moreover, *Microsoft* confirmed that “[t]he government need not prove that the settlements will *perfectly remedy* the alleged antitrust harms; it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.”⁴⁵ Therefore, Judge Sullivan held that the relevant inquiry is whether there is a factual foundation for the DOJ's decisions that make its conclusions reasonable.

Applying these principles to the cases at hand, Judge Sullivan approved the decrees. He noted that it was “quite possible” that buyers of the proposed divestiture assets would not be able to offer overall services of the same quality as the merging parties.⁴⁶ Nevertheless, he found that DOJ

³⁸ See *id.* at *13–*14.

³⁹ *Id.* at *14.

⁴⁰ *Id.*

⁴¹ 150 CONG. REC. S3616–17.

⁴² *Id.* at 3618.

⁴³ *SBC*, 2007 WL 1020746 at *15.

⁴⁴ See *id.* at *14–*15, *20.

⁴⁵ *Id.* at *16 (emphasis added).

⁴⁶ *Id.* at *20.

had “presented a reasonable basis for concluding that the proposed settlements will replace much of the competition lost to the mergers, if perhaps not all of it,” and therefore the remedy was within the public interest.⁴⁷ Similarly, Judge Sullivan noted potential shortcomings of the DOJ’s entry analysis, but found that it was “a reasonable, practical prediction of likely entry” and therefore was “within the reaches of the public interest.”⁴⁸ Finally, he held that the DOJ’s complaints were not so narrow as to make a mockery of judicial power and that all of the other enumerated factors were satisfied.⁴⁹

Conclusion

Judge Sullivan’s lengthy opinion should put to rest—at least for now—the question of what is the proper role for the courts in reviewing DOJ consent decrees.⁵⁰ The answer is substantially the same as it was before 2004—to determine whether the order is in the public interest and not to decide whether the proposed merger runs afoul of the antitrust laws.

Although Judge Sullivan clearly stated that the scope of review under the Tunney Act did not change, the process he invoked to review these consent orders may imply a significant change for future Tunney Act proceedings. He required the parties to generate a detailed record, including papers that provide significant insight into the DOJ’s analysis of the proposed mergers and why the proposed remedies were sufficient to address the competitive concerns described in the complaint. He left unanswered an important question: Are courts required to compile such an extensive record in all Tunney Act proceedings, or was this case unique as a case of first impression following the 2004 amendments? If the former is true, the antitrust bar may have opportunities in the future to gain unprecedented behind-the-curtain insight into how the DOJ’s merger review process actually works in practice. Alternatively, if these decrees were in a small universe of highly controversial settlements in technically complex industries where supplementation of the record was necessary so the court was better informed and did not risk abusing its broad discretion by proceeding in the absence of a fuller record, then these proceedings may be an anomaly.

Third parties that are dissatisfied with future consent decrees may find it worthwhile to try to intervene (or at least submit amici briefs) to force the DOJ to defend the link between the complaint and the proposed remedy with detailed evidence and legal argument. In rare cases, this heightened scrutiny of the DOJ’s decision-making process may expose inexplicable inconsistencies between the harm alleged in the complaint and the proposed remedy—which may then lead to more court-induced modifications of proposed consent decrees.⁵¹

Given this potential increase in future “huffing and puffing,” the DOJ may decide that it needs to reinforce the Tunney Act’s “house” a bit in certain cases. For example, the DOJ may find it

⁴⁷ *Id.*

⁴⁸ *Id.* at *21.

⁴⁹ *Id.* at *22.

⁵⁰ Note, however, that these cases may not be over yet—COMPTEL, one of the amici that protested the consent decrees before Judge Sullivan, has filed a motion for leave to intervene for purposes of appealing Judge Sullivan’s decision. At this writing, the court has not acted on COMPTEL’s request.

⁵¹ On the other hand, there is some evidence that courts may not be likely to engage in the type of detailed evidentiary analysis conducted by Judge Sullivan, even in relatively high-profile cases where amici protest that the proposed remedy does not adequately address the alleged harm. For example, another district court judge recently approved a consent decree regarding Mittal Steel’s acquisition of Arcelor solely on the basis of the complaint, CIS, and proposed Final Judgment, despite vocal opposition from certain third parties. *United States v. Mittal Steel Co. NV*, Case No. 1:06-CV-01360 (D.D.C. May 23, 2007), available at <http://www.usdoj.gov/atr/cases/f223500/223550.htm>.

worthwhile to develop more detailed Competitive Impact Statements and Responses to Public Comments in high-profile, controversial cases in order to provide additional record material upon which the reviewing court may base its decision. Similarly, the DOJ may be more likely to cooperate willingly if future courts want more record material on which to evaluate consent decrees in the face of vocally unhappy amici. If a careful judge wants the DOJ to supply him or her with the kind of additional material the DOJ provided Judge Sullivan, one wonders whether the DOJ could very easily escape the procedural precedent it arguably set in this case. It is likely that future “huffing and puffing” in this area will be centered around these issues, as Judge Sullivan’s decision seems to have left the rest of the Tunney Act “house” standing largely as it did prior to 2004. ●

Ethical Considerations in Settling Antitrust and Consumer Protection Disputes

Kathryn M. Fenton

For those involved in contentious matters, particularly litigation, the prospect of a negotiated settlement generally offers welcome relief after the rigors of the adversary process. In working through the various aspects of the settlement process, however, attorneys do not always focus on ethical issues that may be present. There are various limitations imposed by the obligations of legal ethics and professional responsibility that can arise in the settlement process to trip up the unwary or uninformed.

Several recent ethics opinions have brought renewed attention to the ethical issues that can arise in the settlement process. This article reviews four such issues—communication of settlement offers, truthfulness in negotiations, conflicts of interest in settlements, and restrictions on an attorney's right to bring further claims—and discusses how the specific ethical considerations they raise need to be considered by attorneys seeking to resolve antitrust and consumer protection disputes.¹

Communication of Settlement Offers

Parties wishing to settle commercial disputes frequently become frustrated when they believe that their legitimate settlement proposals are not being communicated promptly (or at all) by opposing counsel to the ultimate client. Because of the ethical restriction on direct attorney contact with a party known to be represented by counsel in a matter, opposing counsel can operate as a roadblock in transmitting offers of settlement.

The starting point for analyzing options to address this problem is ABA Model Rule 4.2, which provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

The reasons for this prohibition are clear: the annotation to the rule explains that “[b]y restricting lawyers from communicating directly with persons who are represented by counsel, Rule 4.2 preserves the lawyer-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that client will disclose confidential or damaging information.”

How can these unquestionably legitimate concerns be balanced with the equally important interests in resolving disputes and promoting settlement? One option available to the frustrated proponent of a settlement offer is to rely on the Comment to ABA Model Rule 1.4, which provides:

¹ This article for the most part relies on the current version of the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). Because these rules have not been uniformly adopted by individual U.S. jurisdictions, however, the specific rules in the applicable jurisdiction should be consulted by any attorney confronting particular settlement issues.

■ **Kathryn M. Fenton**

is a Partner in Jones Day, Washington, D.C.

The views expressed in this article are the personal views of the author and do not represent the views of any other individual or organization.

A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance unless the client has previously indicated that the proposal will be unacceptable or has authorized the lawyer to accept or reject the offer.

To the extent similar ethical rules exist in the applicable jurisdiction, a simple option is to point out to opposing counsel that any refusal to transmit a settlement offer to a client raises not just client relations issues but also potential ethical exposure for the attorneys.²

What about using clients or third parties to make a direct contact and transmit a settlement offer? Understandably frustrated clients often announce their intent to “by-pass” the attorneys and to communicate directly with their counterpart about settlement issues and terms. Relying on the fact that ABA Model Rule 4.2 does not include the phrase “or cause another to communicate,” ABA Formal Opinion 92-362 (1992) determined that the ABA Model Rules do not forbid a lawyer from advising the client about the client’s ability to communicate directly with the opposing party concerning the proposed settlement even though the lawyer could not make such contact. As a prominent ethics scholar has noted:

[T]he ABA Model Rules

do not forbid a lawyer

from advising the

client about the client’s

ability to communicate

directly with the

opposing party

concerning the

proposed settlement

even though the lawyer

could not make such

contact.

Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer. The lawyer . . . [how-ever] must not assist the client inappropriately to seek confidential information, to invite the nonclient to take action without the advice of counsel, or otherwise to overreach the nonclient.³

Thus, in most cases, if a business client decides to communicate a settlement offer directly to his counterpart, such a communication will not create ethical liability for the lawyer, even if the lawyer knows of the client’s plan in advance. An obvious caution, however, is the requirement of ABA Model Rule 8.4, which clearly states that a lawyer shall not attempt to violate the rules of professional conduct through the acts of another or to accomplish indirectly what a lawyer cannot accomplish directly. This raises a number of practical questions: does a lawyer have any ethical obligation to attempt to dissuade his client from making such a direct contact? Should the lawyer notify opposing counsel that such a contact is going to be made? At what point does a description of a client’s legal rights “cross the line” and become a suggestion by the lawyer that the client should in fact reach out and make such an affirmative contact?

Another issue in communications with opposing parties is how to treat in-house counsel for purposes of Rule 4.2. A recent ABA Formal Opinion, 06-443 (2006), held that in-house counsel are not covered by the prohibitions against direct contacts contained in Rule 4.2. This opinion thus permits direct communications of settlement offers to opposing in-house counsel (even when represented by outside counsel) without violating ethics rules.

Opinion 06-443 concluded that the protections established by Rule 4.2 were not needed when the representative of the organization being contacted by opposing counsel is a lawyer employee who is acting as a lawyer for that organization. The opinion first recognized that “when communications are lawyer-to-lawyer, it is not likely that the inside counsel would inadvertently make harmful disclosures.”⁴ Moreover, “[t]o forbid an opposing lawyer from contacting inside counsel

² See Philadelphia Bar Ass’n Op. 94-25 (1994) (subordinate lawyer instructed by supervisory attorney not to inform client of settlement offer had ethical obligation to advise client).

³ THOMAS D. MORGAN, LAWYER LAW: COMPARING THE ABA MODEL RULES OF PROFESSIONAL CONDUCT WITH THE ALI RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS 637 (2005).

⁴ ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-443 (2006).

is inimical to the way the legal system works through communications between counsel regarding matters in dispute. Unlike non-lawyer constituents, inside counsel ordinarily are available for contact by counsel for the opposing party.⁵ Thus, in the view of the ABA, an in-house counsel generally is “fair game” for direct contacts by opposing parties.⁶

Because Rule 4.2 also permits direct contacts “authorized by law,” direct communication of settlement offers would not raise ethical issues where there is legal authority for such contacts by, for example, permitting service of settlement offers on opposing parties.⁷ In such situations, a lawyer may ethically make such direct service, although an older ABA ethics opinion also suggests that in such cases a copy of the proposal should be concurrently served on the attorney for the adverse party.⁸

Obligation of Truthfulness in Settlement Negotiations

The “give and take” required in negotiating settlement agreements also may give rise to ethical issues relating to an attorney’s characterizations of his client’s settlement position or accurately describe his own scope of negotiating authority. Model Rule 4.1(a) prohibits a lawyer in the course of representing a client, from knowingly making “a false statement of material fact or law to a third person.” Some commentators suggest that, in complying with this mandate, lawyers in the settlement context must not make false or deceptive statements or accept unfair outcomes even when they benefit the lawyer’s own client.⁹ Others counter that some element of deception is inherent (and recognized) in the negotiation process, and the obligation of zealous client representation requires an attorney to take advantage of every opportunity within the bounds of the law to advance his client’s interest.¹⁰

The application of Rule 4.1 to the settlement context had been addressed in the Comment to that rule, which describes what constitutes “a statement of material fact” in negotiations:

Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Additional guidance was provided recently by ABA Formal Opinion 06-439 (2006), which concluded that “statements regarding a party’s negotiating goals or its willingness to compromise, as

⁵ *Id.*

⁶ The opinion, however, notes several instances in which direct contacts by opposing counsel to in-house counsel may still raise ethical issues. These include when opposing counsel has been told specifically not to contact in-house counsel (potential violation of Rule 4.4, oppressive and harassing behavior) or when the in-house counsel is a member of the organization’s “constituent” group or involved in the matter in a personal capacity and so should be viewed as a client, not a lawyer. The opinion also notes, “Inside counsel are free to avoid such contact by referring the opposing lawyer to other inside counsel or to outside counsel.” *See id.*

⁷ Statutes or procedural rules in a particular jurisdiction may permit a settlement offer to be served directly on an adverse party. *See* ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1348 (1975).

⁸ *See id.* Another possible option in litigation matters is to file a copy of the settlement offer with the court.

⁹ *See, e.g.,* Reed Elizabeth Loder, *Moral Truthseeking and the Virtuous Negotiator*, 8 GEO. J. LEGAL ETHICS 45, 93-102 (1994).

¹⁰ *See, e.g.,* Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179, 181 (2004) (clients are entitled to expect their lawyers to be zealous advocates; current literature bemoaning lack of honesty and truthfulness in negotiations has gone too far).

well as statements that can fairly be characterized as negotiation ‘puffing,’ are ordinarily not considered ‘false statements of material fact’ within the meaning of the Model Rules.”

Thus, according to Opinion 06-439:

[A] lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's “bottom line” position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

In contrast, false statements of material fact by lawyers in negotiation, as well as implicit misrepresentations created by a lawyer's failure to make truthful statements, have led to professional discipline in some circumstances.¹¹

Affirmative misrepresentations by a lawyer in negotiations remain a source of ethical liability and may also be a source of litigation sanctions.¹² In this regard, it also is important to consider the possible applicability of ABA Model Rule 8.4(c), which broadly prohibits attorney conduct “involving dishonesty, fraud, deceit or misrepresentation.” Opinion 06-439 expressly declined “to delineate the precise outer boundaries of Rule 8.4(c) in the context of truthfulness in negotiations.” It noted, however, that whatever the reach of Rule 8.4(c), it does not prohibit conduct that is permitted by Rule 4.1(a).

Settling Related Claims or Cases

ABA Model Rule 1.8(g) prohibits a lawyer from making an aggregate settlement of two or more clients' claims with a single opposing party without fully informing each client and obtaining consent in a writing signed by the client. This obligation poses potential issues for all lawyers involved in settlements of antitrust claims involving multiple parties.

The danger, of course, is that in such “package” settlements, a lawyer might be tempted to sacrifice the interests of one client in order to obtain an advantage for the other.¹³ Alternatively, a lawyer may be motivated to settle a group of claims and reap a substantial fee without incurring the trouble associated with diligent development of the individual clients' claims that might merit greater recovery.¹⁴

The disclosure required by Model Rule 1.8(a) is intended to ensure that each client is fully informed regarding the impact of the settlement on its individual interest. The following information must be provided to the clients for whom or to whom the settlement or agreement proposal is made:

¹¹ See, e.g., *In re Scanio*, 919 A.2d 1137 (D.C. 2007) (suspending lawyer for dishonest statements while representing himself in settlement negotiations with insurance company; lawyer falsely claimed lost income at billing rate when he was paid fixed salary by firm); *In re Warner*, 851 So. 2d 1029, 1037 (La. 2003) (lawyer disciplined for failure to disclose death of client prior to settlement of personal injury action); *In re McGrath*, 468 N.Y.S.2d 349, 351 (N.Y. App. Div. 1983) (attorney disciplined for statement to opposing counsel that client's insurance coverage was limited to \$200,000, when documents established that client had \$1 million in coverage); *Kentucky Bar Ass'n v. Geisler*, 938 S.W.2d 578, 579–80 (Ky. 1997) (lawyer disciplined for failure to disclose death of client: “Standards of ethics require greater honesty, greater candor, and greater disclosure, even if it might not be in the interests of the client or his estate.”).

¹² See, e.g., *New York County Lawyers' Ass'n Comm. on Prof'l Ethics*, Op. 731 (Sept. 1, 2003).

¹³ See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 8.15 (1986).

¹⁴ See *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. Ct. App. 1997), *aff'd in part, rev'd in part on other grounds*, 997 S.W.2d 229 (Tex. 1999) (“Settling a case in mass without consent of the clients is unfair to the clients and may result in a benefit to the attorney (speedy resolutions and payment of fees) to the detriment of the clients (decreased recovery).”).

It is easy to imagine situations in which the class representatives may have settlement objectives that are not shared by the absent class members or in which the class representatives disagree on a particular settlement proposal.

- The total amount of the aggregate settlement or the result of the aggregated agreement.
- The existence and nature of all of the claims, defenses, or pleas involved in the aggregate settlement or aggregated agreement.
- The details of every other client's participation in the aggregate settlement or aggregated agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other contribution or receipt of something of value as a result of the aggregate resolution. For example, if one client is favored over the other(s) by receiving non-monetary remuneration, that fact must be disclosed to the other client(s).
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.
- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among them.

In February 2006, the ABA issued Formal Opinion 06-438, which offers additional guidance on what a lawyer must do to obtain the informed consent of multiple clients evaluating aggregated settlement proposals. Among the specific issues identified and discussed by the opinion are sharing of confidential information provided by one client with other clients and how to deal with the risk that, if the offer or demand requires the consent of all commonly represented parties, the failure of one or more members of the group to consent may result in the withdrawal of the offer.

Settlements in Class Action Litigation

Class action lawsuits, which are common in both price-fixing and consumer protection litigation, by their very nature are prone to potential conflicts of interest, including conflicts in the settlement process. It is easy to imagine situations in which the class representatives may have settlement objectives that are not shared by the absent class members or in which the class representatives disagree on a particular settlement proposal.¹⁵ In some situations, these conflicts may be so significant that they prevent a single lawyer from representing the entire class with respect to settlement issues.¹⁶

Conflicts also may arise if the personal financial interests of the class lawyer become adverse to the interests of the class in the settlement process. This is most obvious with respect to the lawyer's interest in receiving the largest possible fee while the class members' interest is in minimizing that fee so as to maximize their own recovery.¹⁷ In antitrust and consumer protection matters, a variant of this issue sometimes exists when the settling class members are offered some-

¹⁵ See, e.g., Memorandum of Points and Authorities re Lead Plaintiffs Ryan Rodriguez, Loredana Nesci and Lisa Ginta, et al., filed in *Rodriguez v. West Publishing*, 05-cv-3222 (C.D. Cal. May 17, 2007) (three of seven named plaintiffs in antitrust action against bar exam preparation companies objected to settlement as too low); *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982) (named plaintiffs are not entitled to oppose settlement "primarily to gain leverage in settling their individual claims").

¹⁶ *In re Corn Derivatives Antitrust Litig.*, 748 F.2d 157 (3d Cir. 1984) (although attorney withdrew from representing settlers, prejudice to former clients was too great to allow continued representation of other objecting class members); see also *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir. 1986) ("whenever a rift arises in the class, with one branch favoring a settlement or course of action that another branch resists, the attorney who has represented the class should withdraw entirely and take no position"). But see *Lazy Oil Co. v. Witco Corp.*, 166 F.3d 581 (3d Cir. 1999) (class counsel not disqualified where class representatives object to settlement); *Banyai v. Mazur*, No. 00-Civ-9806(SHS), 2004 U.S. Dist. LEXIS 17572 (S.D.N.Y. Sept. 1, 2004) (class counsel did not have a conflict of interest even though class representatives were objecting to the terms class counsel were seeking).

¹⁷ See David Brainerd Parish, Comment, *The Dilemma: Simultaneous Negotiation of Attorneys' Fees and Settlement in Class Actions*, 36 Hous. L. Rev. 531 (1999).

thing of nominal value (such as coupons for use in future purchases) and the lawyers for the class receive significant attorneys' fees.¹⁸ Another conflict may arise when the lawyer receives payments from the settling defendant that are not disclosed to the lawyer's client.¹⁹ Evaluating when these conflicts require retention of separate counsel is a very fact-intensive inquiry that must be undertaken on a case-by-case basis.

Seeking Agreement of Plaintiff's Counsel Not to Bring Similar Claims or File Similar Suits

Ethical rules in most jurisdictions as well as the ABA Model Rules prohibit an attorney from entering into agreements that restrict the attorney's right to practice law. According to ABA Model Rule 5.6(b), a "lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement." These provisions have been interpreted as forbidding attorneys from entering into settlements conditioned on the attorney's agreement not to represent similarly situated clients or to bring similar claims against the defendant in the future.²⁰

In light of this ethical prohibition, various alternatives have been attempted over the years to preclude the likelihood of a settling plaintiff's attorney from bringing new claims against a defendant before the ink is dry on the first settlement.²¹ Some older ethics opinions hold that settlement agreements that restrict the lawyer's right to reveal information about the terms of the settlement or the underlying case or that prohibit use of that information in other cases are permitted under the applicable ethics rules.²² However, in ABA Formal Opinion 00-417 (2000), the ABA concluded that a lawyer may not participate in or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party except in very limited circumstances. The ABA found that it is "generally accepted" that agreeing not to disclose certain information about a settlement such as dollar amounts or other settlement terms is appropriate as a means to protect client confidentiality. Opinion 00-417 also excluded from its application nondisclosure obligations resulting from compliance with protective orders. Similar conclusions have been reached by various state bar ethics opinions.²³

¹⁸ *In re Auction Houses Antitrust Litig.*, 197 F.R.D. 71 (S.D.N.Y. 2000) (discussing how certain fee arrangements could create conflicts of interest between counsel and members of the class).

¹⁹ *See, e.g., In re Hager*, 812 A.2d 904 (D.C. 2002) (lawyer suspended for one year and required to disgorge \$225,000 payment made to lawyer by opposing party and not disclosed to client).

²⁰ *See, e.g., ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-394* (1995) (prohibition on a lawyer's participating in offering or making an agreement in which a restriction on the lawyer's rights to practice is part of the settlement applies not only to controversies between private parties but also where the party is a government entity); *see also State Bar of Tex. Prof. Ethics Comm., Op. 505* (1994) (lawyer may not agree to refrain from soliciting third parties to bring claims against settling defendant; any restriction on ethical solicitation impermissibly restrains the practice of law).

²¹ *See generally* Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291 (2005).

²² *See, e.g., State Bar of N.M. Advisory Opins. Comm., Op. 1985-5* (1985) (proper for lawyer to agree not to reveal amount and terms of non-public settlement and to turn over file to opposing counsel if client consents).

²³ *See, e.g., D.C. Bar Legal Ethics Comm. Op. 335* (2006) (settlement agreement may not compel counsel to keep confidential and not disclose in promotional material or on law firm Web site public information about the case, such as name of opponent, allegations contained in public complaint, or fact that case settled); *NY State Bar Ass'n Op. 730* (2000) (lawyer may not agree to settlement term that prohibits disclosure of information that lawyer has no ethical duty to keep secret; such agreements restrict lawyer's right to practice and violate NY Code of Professional Responsibility DR2-108(B)).

Other ethics opinions have found that lawyers in a settlement agreement cannot ethically agree:

- Not to refer a potential client with a claim against the settling defendant to another lawyer;²⁴
- Not to reveal names of other franchisees that have contacted the lawyer regarding claims against the defendant franchisor;²⁵ or
- Not to subpoena records or fact witnesses or use particular expert witnesses in future litigation.²⁶

Another approach to avoid future claims by a settling attorney has been to employ the attorney as a consultant to advise on the subject matter of the lawsuit or retain the attorney to provide legal representation on unrelated matters, thus creating an attorney-client relationship that would preclude the attorney from any directly adverse representation while the attorney-client relationship exists. In cases in which the claimed attorney-client relationship is a sham (i.e., money is paid without any intent for actual legal services to be provided), such agreements also would likely be a violation of Rule 5.6(b).²⁷

These issues highlight just some of the ethical concerns that can arise in settling antitrust and consumer protection matters. Attorneys need to be sensitive to these concerns in order to avoid introducing unnecessary complications and delays to the settlement process. ●

²⁴ See D.C. Bar Legal Ethics Comm. Op. 35 (1977).

²⁵ See Ariz. Op. No. 90-6 (1990).

²⁶ See Colo. Bar Ethics Comm. Op. No. 92 (1993).

²⁷ See, e.g., Fla. Bar v. St. Louis, No. SC04-49, 2007 Fla. LEXIS 762 (Fla. 2007) (disbarring lawyer who received separate fee to refrain from litigation against settling defendant and to serve as counsel or consultant for company in future matters); Fla. Bar v. Rodriguez, No. SC03-909, 2007 Fla. LEXIS 761 (Fla. 2007) (suspending second lawyer in same case for two years and requiring disgorgement of settlement fees).

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition we note a paper by Daniel Crane that examines the American tradition of opposition to federal incorporation and its consequences for antitrust policy. Send comments and suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Daniel A. Crane, Antitrust Antifederalism, 95 CAL. L. REV. ___ (forthcoming 2007)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976711

In this paper, Daniel Crane attempts to link various “pathologies” of modern antitrust to Congress’s decision in 1890, reaffirmed many times since, to address the monopoly problem by a system of public and private rights of action (a “crime-tort” model) rather than by a centralized system of federal incorporation and administrative regulation. Crane argues that this congressional choice was an expression of the American tradition of “antitrust antifederalism,” a hostility to federal incorporation that long predates the antitrust movement of the late 19th century. The antifederalists of the 18th century associated governmental charters with monopoly and royal privilege. In part because of this antipathy, the framers of the constitution rejected James Madison’s proposal that Article I grant Congress a power to charter corporations. The Supreme Court later discovered the same power in the Necessary and Proper clause of Article I § 8, but political opposition to special federal incorporation remained strong. The most dramatic expression of this opposition was Andrew Jackson’s veto in 1832 of a bill that would have renewed the charter of the second Bank of the United States. Instead, Jackson supported state general incorporation laws, which would (in William Letwin’s words) “reduce the privilege of incorporation, not by taking it from the few, but by opening it to the many.”¹

In the late 19th century, however, firms like Standard Oil exploited liberal state incorporation laws to form the trusts. Some states sought to void the charters of trusts using quo warranto proceedings, but with little success. In framing a federal response to the trusts, Congress, according to Crane, “might well have chosen to require all corporations operating in interstate commerce to be federally chartered by competition law bureaucrats in Washington.” Instead, it chose to “divorce antitrust and corporate law” by adopting the “crime-tort” enforcement model, condemning restraints and monopolistic acts in the language of the common law, but with the crucial addition of public and private rights of action. This choice, according to Crane, is the source of “a number of systemic problems for antitrust enforcement that have persisted, and in some instances become aggravated, over time.”

Crane details efforts over the ensuing decades to enact a regime of federal incorporation that would include direct federal supervision of corporations. Proposals along these lines garnered significant support during the Progressive and New Deal eras, but were always fended off by

¹ WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 65 (1965).

renewals of commitment to the crime-tort model, accompanied by new legislation or by more aggressive enforcement. Congress did choose to intervene in corporate law by enacting the Securities Acts in the early 1930s, but these statutes were focused most directly on the interests of investors rather than consumers. Even during the 1960s and 1970s, when economists widely believed that market structure was more important than conduct in determining the competitiveness of markets, there were no serious proposals for federal incorporation accompanied by direct regulation of market structures.

Crane suggests that a regime of federal incorporation might have emerged had events played out slightly differently over the past two centuries. In such a system

the corporation and its capital-concentrating effects would be the justification for federal antitrust regulation and its focus. The corporation operating in interstate commerce would owe its existence and privileges to the federal government, whether through chartering, licensure, or regulation. Federal regulators would play an active role in specifying *ex ante* corporate structures and behaviors compatible with competition values and would check anticompetitive behavior through rule-making and injunctive intervention. Antitrust decisions would be made primarily by expert lawyers, economists, and administrative tribunals. Federal competition standards would preempt any inconsistent state regulations thus creating competitive channels of interstate commerce.

In a system of federal incorporation, the chartering authority could prescribe rules of conduct without regard to violation of competitive norms and could revoke the charters of firms regardless of their conduct.

The rejection of such a regime in favor of a crime-tort model, according to Crane, has produced a number of pathologies in the American antitrust system. In the crime-tort model, courts must identify a competitive “sin” before they can intervene. They must, for example, find an “agreement” before punishing parallel conduct, even though parallel conduct in the absence of agreement may be just as harmful to consumers. Similarly, they must find inefficient exclusionary conduct before punishing monopolies, even though monopolies that emerge for other reasons may be just as harmful to consumers. The search for clear standards of conduct has been fruitless, and is likely to be vain because “there is no conceptually satisfying, *ex ante* way to define a social norm of industrial competition.”

These problems are aggravated by the crime-tort model’s reliance on generalist judges and lay juries that are ill-equipped to understand the kinds of issues that normally decide antitrust cases. The fear of incompetent juries has led courts to shape substantive antitrust rules and accompanying standards of evidentiary sufficiency in ways that limit the risks of “false positives,” that is, erroneous findings of liability for efficient competition. Because of this characteristic of the crime-tort system, courts have decided more and more cases on summary judgment rather than on a complete record.

The crime-tort model, Crane argues, has elevated private litigation over public, even though private plaintiffs have their own interests, not those of the consumers, at heart. Courts have shaped antitrust rules to prevent perverse private enforcement, but these same rules have burdened public enforcement actions. The Antitrust Division, for example, lost the *American Airlines* predatory pricing case, and the FTC has lost collusive patent settlement cases, under restrictive criteria developed in private litigation.

The reliance on a litigation model has also given states undue regulatory power. The state action doctrine allows clearly articulated and actively supervised state regulatory regimes to displace antitrust rules. If antitrust were regulatory to begin with, there would be less reason to prefer state regulatory choices over federal ones. Furthermore, state attorneys general have brought antitrust actions, like the state *Microsoft* case, that have interfered with a coherent federal antitrust policy.

Against these pathologies of the litigation model, Crane sets the experience of the Hart-Scott-Rodino (HSR) system of premerger notification and review, the primary instance in which antitrust law has adopted a regulatory model. The HSR procedures have

shattered most vestiges of antitrust antifederalism in the merger review area by promoting structure over conduct, delegating authority primarily to expert bureaucrats and virtually never to juries, making merger control an almost exclusively public function, focusing solely on large corporations, and giving the federal government partial preemptive authority in merger cases.

Despite the relative success of the HSR regime, its approach has only rarely been used in other antitrust domains. The National Cooperative Research and Production Act, for example, allows ex ante review of prospective joint ventures. The FTC has also recently received authority to review proposed pharmaceutical patent settlements. Congress, Crane argues, might adopt similar models in other areas of antitrust, without creating a system of federal incorporation. He suggests, for example, that private damage actions might be limited to instances in which federal regulators have found a violation.

Crane concedes that his article does not propose any particular system of corporate regulation as an alternative to our present system of public and private enforcement of antitrust rules in the federal courts. He addresses only two objections that would be raised to any more overtly regulatory system. First, any such proposal would require a greatly increased antitrust budget. He suggests, however, that the program could be funded by fees, in much the same way as premerger review. Second, he recognizes that any “corporate regulatory model may have its own pathologies, such as the possibility of agency capture, a self-aggrandizing tendency, and volatility in enforcement due to centralization and political control.” He does not, however, address these concerns in the article. He also does not compare the American system of public and private antitrust enforcement to the far more regulatory European system.

Crane has provided an interesting history of proposals for federal incorporation that have, at various times in American history, provided lawmakers with a model of competition policy very different from the one chosen by Congress in the Sherman Act and later legislation. One might argue, however, that Congress’s longstanding preference for the crime-tort model of antitrust reflects something more basic than hostility to federal incorporation. The requirement of a competitive “sin” as a prerequisite for federal intervention seems to reflect an ideological belief that free exchange in markets framed by common law rules of property and contract, maximizes social wealth except when a demonstrable competitive sin occurs. Congress may well have authorized only sporadic and temporary intervention in markets because it believed that, once intervention removed the sin that impeded market functions, competition would once again legitimate the outcomes of market transactions more certainly than the choices of experts.

Even if courts cannot identify competitive sin very well, it does not follow that Congress has been wrong to be skeptical that regulatory supervision of the entire economy by competition experts would achieve better outcomes. As Crane recognizes, federal enforcement officials as recently as the 1960s regularly brought cases and made arguments that revealed that they had little more expertise than the courts. Premerger review in the hands of the 1960s-era FTC, for example, might have been more harmful to consumers than the status quo of that time, bad as it was. Even today, it is difficult to conceive of a much more regulatory form of antitrust that would be demonstrably preferable to our present system, for all its pathologies. ●