2002–2003 Antitrust Year in Review

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

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

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

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

"I'll Be Back!"

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

Supreme Court. The Supreme Court has been missing in action on the antitrust front for a long time now. The Court has not had a robust antitrust term since the October 1992 term.[1] Now the

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

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

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

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

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

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

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

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

[3] Dkt. No. 02-1865 (views invited Oct. 6, 2003).

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

[5] *See* Brenda Sandburg, *Billion-Dollar Settlement in* Microsoft *Class Action*, 127 The Recorder 8 (Jan. 13, 2003).

[6] Antitrust Source, July 2003, http://www.abanet.org/antitrust/source/july03/brownbag.pdf.

[7] 246 F. Supp. 2d 469 (S.D. W. Va. 2003).

[8] Maddaloni Jewelers Inc. v. Rolex Watch USA, 2003-2 Trade Cas. (CCH) ¶ 74,086 (S.D.N.Y. 2003).

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

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

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

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

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

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

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

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

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

[12] 338 F.3d 189 (3d. Cir. 2003).

[13] 310 F.3d 183 (4th Cir. 2002).

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

[15] *See* Indiana Household Movers and Warehousemen, Inc., 68 Fed. Reg. 14,234 (Mar. 24, 2003).

[16] 317 U.S. 341 (1943).

[17] Electrical Inspectors, Inc. v. Village of East Hills, 320 F.3d 110 (2d Cir. 2002).

[18] 71 P.3d 5 (Okla. 2003).

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

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

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

"Big Mistake!"

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

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

[19] 110 F.T.C. 549 (1988).

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

[21] 344 F.3d 1294 (11th Cir. 2003).

[22] 322 F.3d 1133 (9th Cir. 2003).

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

[24] *See* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, DUKE L.J. (forthcoming).

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

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

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

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

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

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

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[25] Coca-Cola Co. v. Harmar Bottling Co., 111 S.W. 3d 287 (Tex. App. 6th Dist. 2003).

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

[27] 334 F.3d 204 (2d Cir. 2003).

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

[29] 305 F.3d 1124 (10th Cir. 2002).

[30] Remember *Todd v. Exxon*, 275 F.3d 191 (2d Cir. 2001).

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

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

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

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

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[31] United Mine Workers of America v. Pennington, 381 U.S. 657, 670 n.3 (1965).

[32] *Telcor*, 305 F.3d at 1138.

[33] 2003-1 Trade Cas. (CCH) ¶ 74,013 (C.D. Cal. 2003).

[34] 235 F. Supp. 2d 708 (E.D. Ky. 2002).

[35] 467 U.S. 752 (1984).

[36] 431 U.S. 720 (1977).

[37] 322 F.3d 1133 (9th Cir. 2003).

[38] "Section 1, like the tango, requires multiplicity." *Id.* at 1147.

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

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

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

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

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

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[39] *Id.* at 1148–49.

[40] 307 F.3d 277 (4th Cir. 2002)

[41] *Id.* at 281.

[42] *Id.* at 281–82.

[43] 309 F.3d 193 (4th Cir. 2002) (2–1).

[44] 306 F.2d 469, 483 (7th Cir. 2002).

[45] *Id.* at 484.

[46] 322 F.3d at 1145–46.

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

Kindergarten Cop (Teachers)

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

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

- How plausible is predatory pricing? The district court followed the now-traditional line. It emphasized the "'general implausibility of predatory pricing'" and quoted the *Matsushita* assertion that "'there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.'"[48] Not so the court of appeals. Judge Lucero's opinion notes that economists writing more recently "have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets."[49] "Although this court approaches the matter with caution, we do not do so with the incredulity that once prevailed."[50]

- Must the government show pricing below average variable cost? The district court ruled that the government, and implicitly every plaintiff, must prove pricing below average variable costs. "Average variable cost, as a measure of predatory pricing, enjoys not only the weight of authority, it is also most congruent with the goal of the Sherman Act . . . ."[51] Again, the court of appeals was more receptive to concerns about predatory pricing:

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

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

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

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

50 335 F.3d at 1115.

51 140 F. Supp. 2d at 1199.

52 335 F.3d at 1116.

- **Does Section 2 have a meeting competition defense?** The district court, more impressed with the Robinson-Patman Act than many commentators, borrowed that Act's meeting competition defense and found that it should be applicable in some or all Sherman Act predatory pricing cases.[53] The court of appeals was less impressed. Noting that the Robinson-Patman Act sets out that defense (and the Sherman Act does not) and that the Supreme Court "has never mentioned the possibility of such a defense under the Sherman Act," the court "decline[d] to rule that the 'meeting competition' defense applies in the § 2 context."[54]

- **Recoupment by reputation?** The district court rejected out of hand the suggestion that a monopolist could achieve the required dangerous probability of "recoupment" through establishing a reputation for predation that could benefit it outside the market in issue. The court found this approach "fundamentally misguided, contrary to law, and unsupported by the uncontroverted facts."[55] The court of appeals ruled for AMR on the issue of pricing below cost, and wrote that this rendered an examination of recoupment "unnecessary."[56]

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

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

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

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[53] 140 F. Supp. 2d at 1204–08.

[54] 335 F.3d at 1120 n.15.

[55] 140 F. Supp. 2d at 1213.

[56] 335 F.3d at 1121.

[57] *Id.* at 1117.

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

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

[60] *Id.* at 1200 n.14.

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

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

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

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

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

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

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

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

[62] Brief for the United States and the Federal Trade Commission as Amici Curiae, at 10.

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

[64] Brief of Amici Curiae Economics Professors in Support of Respondent, at 5 (LEXIS).

[65] *Id.* at 12.

[66] *Id.* at 7.

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

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

- According to petitioner 3M: "Whether a dominant firm's discounted but above-cost prices for volume purchases, or either individual products or multiple products, may be condemned as unlawful under Section 2 of the Sherman Act based on the incentive such low prices offer to shift purchases away from smaller rivals."[68]

- According to respondents: "Whether the court of appeals correctly rejected petitioner "3M's legal theory that after *Brooke Group*, no conduct by a monopolist who sells its product above cost—no matter how exclusionary the conduct—can constitute monopolization in violation of § 2 of the Sherman Act."[69]

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

> In its analysis of the en banc decision in this case, the leading treatise on antitrust law observes: "[t]he gravamen of LePage's complaint was not pricing, but foreclosure. . . ."
>
> . . . .
>
> . . . The en banc Third Circuit properly rejected 3M's argument that *Brooke Group* 'overturned decades of Supreme Court precedent' (Pet. App. 16a) and immunized all above-cost practices of monopolists from antitrust scrutiny. The leading antitrust treatise agrees that "the court seems quite correct" in having done so.[70]

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

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[67] Dkt. No. 02-1865 (petition for certiorari filed).

[68] Petition for a Writ of Certiorari at (i).

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

[70] Brief in Opposition at 1-2 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749, at 133 (Supp. 2003)).

[71] *See* Brief for the Boeing Co. et al. as Amici Curiae in Support of Petitioner at 9–11 & n.2, 13–20.

[72] Reply Brief of Petitioner at 8 n.8.

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

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

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

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

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

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

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

75 324 F.3d at 152 (quoting Carribean Broadcasting Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998)).

76 324 F.3d at 157 n.11.

77 *Id.* at 163 (citing *Aspen Skiing* and *Lorain Journal*).

78 *Id.* at 152.

79 *Id.* at 163–64.

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

81 110 F.T.C. 549 (1988).

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

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

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

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

Three Tenors: Is the conduct "*inherently suspect* owing to its likely tendency to suppress competition. Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation."[86]

Comment: *Three Tenors* resurrects the "inherently suspect" label. Critics who complained of the earlier lack of detailed definition,[87] are unlikely to be mollified by the nod to courts and economics.

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

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

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

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[84] *Three Tenors*, supra note 80, at 96 n.66.

[85] 110 F.T.C. at 604 (emphasis added).

[86] *Three Tenors*, *supra* note 80, at 61 (emphasis added).

[87] *See, e.g.,* Joseph Kattan, *The Role of Efficiency Considerations in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613 (1996).

[88] 110 F.T.C. at 604 (emphasis added).

[89] *Three Tenors*, *supra* note 80, at 61.

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

[91] *Id.* at 62.

[92] *Id.*

[93] *Id.*

[94] *Id.* at 65.

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

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

Three Tenors:

> When the defendant advances such cognizable and plausible justifications, the plaintiff must make a *more detailed showing* that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing *still need not prove actual anticompetitive effects* or entail 'the fullest market analysis.' . . . [S]uch a showing may or may not require evidence about the particular market as issue, but at a minimum must entail the *identification of the theoretical basis* for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive. *Such a showing may, for example, be based on a more detailed analysis of economic learning* about the likely competitive effects of a particular restraint, in markets with characteristics comparable to the one at issue. The plaintiff may also show that the proffered procompetitive effects could be achieved through means *less restrictive of competition*. . . .
>
> The plaintiff has the burden of persuasion overall, but not necessarily the burden with respect to each step of this analysis. If the plaintiff satisfies its initial burden of showing that the practices in question are inherently suspect, then the defendant must come forward with a substantial reason why there are offsetting procompetitive benefits. If the defendant articulates a legitimate . . . justification, then the plaintiff must address the justification, and provide the tribunal with sufficient evidence to show that the anticompetitive effects are in fact likely, before *the evidentiary burden shifts to the defendant*.[97]

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

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

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

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[95] *See* Antitrust Guidelines for Collaborations Among Competitors § 3.36 ("'Cognizable efficiencies' are efficiencies that have been verified by the Agencies, that do not arise from anticompetitive reductions in output or service, and that cannot be achieved through practical, significantly less restrictive means.").

[96] 110 F.T.C. at 604 (emphasis added).

[97] *Three Tenors*, *supra* note 80, at 66 (footnotes omitted; emphasis added).

- Where does this leave the Competitor Collaboration Guidelines? *Three Tenors* cites the Guidelines frequently but obviously advances a different analytical structure. Have the Guidelines implicitly been revised—and, if so, for both agencies, or only for the FTC? As a matter of good government if not legal obligation, should the agencies explicitly update the Guidelines?

- Will *Three Tenors* have any application outside the FTC? *Three Tenors* is a thoughtful, potentially important contribution to antitrust, as was *Mass. Board*. But no court ever cited *Mass. Board*! Courts wrote per se, rule of reason, and "quick look" opinions without once referencing the Commission's contribution. *Mass. Board* neither used the language with which courts were familiar nor enjoyed the endorsement of any appellate court. It is not clear whether *Three Tenors* will enjoy a different fate. The respondents have appealed the Commission's decision, which means that this time an appellate court will weigh in (perhaps reversing, of course). Even assuming the court affirms, it could do so by showing deference to the Commission's application of Section 5 without endorsing the Commission's structure for use in private Sherman Act litigation. Thus, antitrust may once again be developing two different tracks, one for administrative proceedings, one for federal district court. Some observers have recommended such an approach.[98] On the other hand, it would be unfortunate were a professor as talented as Chairman Muris not to help the courts wrestle with issues as fundamental to antitrust as the interplay between the per se rule and the rule of reason.

Conclusion

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

Christopher Hockett: *IP and Antitrust 2002–03*

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

DOJ/FTC IP Hearings

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

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

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

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

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

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

Standard Setting

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

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

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

[101] Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495 (2001).

[102] *See* Pate Speech, *supra* note 100.

[103] *See* http://www.abanet.org/antitrust/source/may03/simonsinterview.pdf.

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

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

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

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

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

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

[106] Dell Computer Corp., 121 F.T.C. 616 (1996).

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

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

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

MathWorks Settlement

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

3G Patent Platform Partnership Business Review

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

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

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

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

111 http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/1651|0|AGED&lg=EN&display=.

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

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

Pharmaceutical Industry Patent Cases

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

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

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

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

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

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

Misuse

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

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

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113 *See supra* note 112.

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

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

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

117 Brulotte v. Thys Co., 379 U.S. 29 (1964).

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

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

Procedure

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

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

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[118] Monsanto Co. v. McFarling, 302 F.3d 1291 (Fed. Cir. 2002).

[119] Baxter Int'l, Inc. v. Abbott Labs., 315 F.3d 829 (7th Cir. 2003).

[120] *Id.* at 833.

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

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

Ilene Gotts: *Mergers 2002–03*

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

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

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

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[121] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 2003 WL 21537832 (C.D. Cal. July 2, 2003).

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

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

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

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

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

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

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

[125] Andrew R. Dick, New Approaches at the Agencies to Coordinated Effects Merger Analysis (copy on file with author).

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

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

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

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

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

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

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

[127] United States v. SunGard Data Sys., Inc., 172 F. Supp. 2d 172 (D.D.C. 2001) (order denying preliminary injunction);

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

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

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

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

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

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

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

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[131] FTC v. H.J. Heinz, Co., 246 F.3d 708 (D.C. Cir. 2001).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Tad Lipsky: *International Antitrust 2002–03*

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

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

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

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

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

[143] Den Norske Stats Oljeselskap AS v. HeereMac v.o.f., 241 F.3d 420 (5th Cir. 2001).

[144] Kruman v. Christie's Int'l Plc, 284 F.3d 384 (2d Cir. 2003)

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

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

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

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

[145] Case T-342/99, Airtours plc v. Commission (Ct. First Instance 2002).

[146] Case T-05/02, Tetra Laval BV v. Commission (Ct. First Instance 2002).

[147] Case T-310/01, Schneider Electric SA v. Commission (Ct. First Instance 2002).

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

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

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

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[148] Case No. COMP/M.2220, GE/Honeywell, Commission Decision of July 3, 2001.

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

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

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

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

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

Interview with William E. Kovacic, General Counsel, Federal Trade Commission

Editor's Note: *In this interview with* The Antitrust Source*, William Kovacic candidly discusses the role and functions of the FTC's Office of General Counsel (OGC), setting out with great specificity his goals for the OGC and the challenges it faces as it fulfills its mission. During the interview, Professor Kovacic addresses, among other topics, the FTC's enforcement priorities through administrative and federal court litigation, including its commitment to appellate advocacy through amicus work. He also highlights the FTC's special non-litigation capabilities to advance antitrust and consumer protection policy making, notably the important contribution of the FTC's recent report on intellectual property and antitrust. Of course, the views Kovacic presents in this interview are his own and not necessarily those of the FTC or any of its individual members.*

This is Bill Kovacic's second tour of service at the FTC. He left academia to rejoin the Commission, this time as its General Counsel, in June 2001. From 1979 to 1983 he worked with the Bureau of Competition's Planning Office and later as an attorney-advisor to Commissioner George W. Douglas. He is on leave from the George Washington University Law School, where he has served as a professor since 1999.

Professor Kovacic is a prolific writer and speaker on antitrust topics. He is the co-author of the 4th Edition of Ernest Gellhron's Antitrust Law and Economics in a Nutshell *(1994), and is a co-author, with Andrew Gavil and Jonathan Baker, of* Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy *(2002). Kovacic's most recent article,* The Modern Evolution of U.S. Competition Policy Enforcement Norms*, has just been published in 71* Antitrust Law Journal *377 (2003). He also has special expertise as a global ambassador for antitrust. Since 1992, Professor Kovacic has served as an advisor on antitrust and consumer protection issues to numerous foreign governments, including Benin, Egypt, El Salvador, Georgia, Guyana, Indonesia, Mongolia, Nepal, Panama, Russia, Ukraine, Vietnam, and Zimbabwe.*


William E. Kovacic

ANTITRUST SOURCE: Let's start with a general question: Would you please explain your role and responsibilities as General Counsel of the Federal Trade Commission?

BILL KOVACIC: The Office of the General Counsel (OGC) basically performs four functions. The first is litigation. Under the supervision of John Daly, our Deputy General Counsel for Litigation, our litigation group represents the FTC in most matters before the federal courts. For example, we have represented the Commission in the various cases involving the implementation of the Do Not Call Rule. We consult with the Commission and the FTC's operating bureaus on proposed enforcement actions and provide advice to commissioners on matters in administrative adjudication. The litigation group also acts for the FTC on employment law issues.

The second principal area of responsibility is legal counsel, a function supervised by Chris White, who is our Deputy General Counsel for Legal Counsel. This area concerns the large body of statutes and regulations that form the Commission's administrative practice and procedure infrastructure. Among other activities, we oversee FTC's Freedom of Information Act program, carry out the agency's Paperwork Reduction Act duties, advise the Commission on governance questions, including voting procedures, counsel current and former FTC employees on ethics questions, and consult on proposed legislation such as reforms to improve the agency's ability to address cross-border fraud.

The third area is policy studies, which is managed by Susan DeSanti, the Deputy General Counsel for Policy Studies. The policy studies group is one of the FTC's internal think tanks and a focal point for the Commission's investment in what Chairman Tim Muris has called "competition policy R&D." Among other projects, the policy studies group was the principal drafter of the Commission's report, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (October 2003) and has represented the Commission in the joint FTC/Department of Justice hearings on Health Care and Competition Law and Policy.

The fourth function is to coordinate the Commission's international technical assistance programs involving competition and consumer protection policy. This area is managed by Jim Hamill, who is Senior Counsel for International Affairs. In the current fiscal year, the Commission will receive roughly $1.5 million in funds provided by the U.S. Agency for International Development—the largest sum the agency ever has received in a single year for technical assistance. With these funds the FTC will present short-term seminars in Africa, Asia, Eurasia, and Latin America and will support the FTC's participation in long-term, resident advisor programs with the competition agencies of Indonesia and South Africa.

My own role is mainly to focus on policy-related issues in each of these four areas. I am blessed to work with a management team that is second to none and is headed by John Graubert, the Principal Deputy General Counsel. John and the other senior managers do a masterful job of supervising the operations of OGC's four main practice areas. This gives me considerable freedom to work on policy-related features of projects within the General Counsel's office and on other matters of interest to the Commission.

A second priority is to contribute to a more complete understanding of the full array of institutions that affect competition policy.

ANTITRUST SOURCE: You started in this position thirty months ago. What have been your top priorities, have you accomplished them, and what are your priorities going forward?

BILL KOVACIC: One major priority is to continue to develop the FTC's distinctive capabilities as both a competition authority and a consumer protection agency. One of the most impressive developments in my professional lifetime is the progress the Commission has made towards realizing the potential inherent in the unique institutional design contained in the mandate that Congress gave the FTC upon its creation nearly ninety years ago. A key area in which the Commission can and must justify its distinctive institutional existence is the administrative adjudication of competition and consumer protection matters. Administrative adjudication today commands a prominent place on the FTC's policy agenda. In the past twelve months the FTC has issued decisions in two cases, *PolyGram* and *Schering*, and a number of other matters—including *Unocal*, *Rambus*, *Chicago Bridge & Iron*, *Brown & Toland*, and *South Carolina Board of Dentistry*—are in various stages of the administrative process. As a group, these matters are an important measure of the Commission's capacity to use administrative elaboration to improve the quality of antitrust jurisprudence. OGC has advised the Commission extensively on administrative adjucation matters and expects to work closely with the Commission on other matters that have been or will be presented for decision by the Commission.

A second priority is to contribute to a more complete understanding of the full array of institutions that affect competition policy. There is a tendency sometimes to equate "competition" or "antitrust" with the prosecution of cases. More properly considered, the enforcement of antitrust laws is a subset of a much larger category of activity that could be called "competition policy." For a competition agency like the FTC, making competition policy involves not only the prosecution of cases, but also demands substantial investments in non-litigation activities, such as issuing reports, performing empirical studies, urging other government bodies to undertake pro-competition reforms, and cooperating with other competition agencies at home and abroad to improve the institutional framework of competition policy. To an ever greater extent, the success of the FTC and other competition authorities will require devoting significant resources to non-litigation initiatives. One dimension of the necessary investment in developing non-litigation policy tools includes attaining greater appreciation for how other government bodies that we do not ordinarily mention in discussions of competition policy affect the competitive process. These would include, for example, the Patent and Trademark Office and the Food and Drug Administration. A major objective for the General Counsel's Office is to assist the Commission in promoting greater awareness of the role that these and other government institutions play in shaping the competitive environment and in drawing attention to possible reforms that would improve competition policy by promoting adjustments in how such institutions operate. OGC played a central part in preparing recent FTC contributions on this front, including the Commission's recently published study on the relationship between competition and patent policy, *To Promote Innovation*, and the Commission's empirical study of the introduction of generic equivalents to branded drugs, *Generic Drug Entry Prior to Patent Expiration*. Through its legal counsel, litigation, policy studies, and international affairs activities, OGC spends a substantial amount of time working with other government agencies and observing how their decisions influence competition policy. This gives us a unique vantage point within the Commission and a special ability to assist in developing a fuller, more accurate understanding of how competition policy is formed and might be improved by the prosecution of cases and the application of non-litigation tools, alike.

A third priority, another aspect of developing the FTC's unique institutional capabilities, is to promote the realization of the benefits of the Commission's distinctive combination of functions—to further integrate the application of the agency's competition and consumer protection authority and pursue projects that exploit synergies between the two missions. One dimension of realizing the Commission's destiny as an institution consists of realizing that its competition and consumer protection mandates are not linked simply as a matter of historical accident, but instead provide opportunities to realize policy benefits that would be unattainable if the Commission had a single mandate, but not both. The understanding of links between competition and consumer protection policy has an increasingly major international component, and OGC has been active in the Commission's recent efforts to explore these links with foreign governments that have institutional configurations and a mix of competition and consumer protection responsibilities similar to the FTC's. By my count, approximately thirty foreign competition authorities also have a major consumer protection portfolio. OGC is participating in the Commission's initiatives to explore ways to work with these agencies to explore how better understanding of the complementarities of or synergies between competition and consumer protection policy can help agencies assigned this combination of functions to improve policy making. I think that is part of the larger theme of identifying unique institutional strengths of the Agency.

A fourth priority is for OGC to assist the Commission in further developing our relationships and cooperation at home and abroad with other government institutions having competition or consumer protection duties, or both. A significant change in the world since 1983, when I ended my first tour at the FTC, is the growing multiplicity of institutions that make competition or consumer protection policy in the United States and abroad. This multiplicity often is seen as a difficulty to be managed, yet it also is an opportunity to be grasped. The multiplicity has created an unprecedented opportunity for comparative study to identify how the FTC and, more generally, the U.S. system of competition and consumer protection policy, may have lagged behind some jurisdictions in adopting best practices. A second, related possibility is to look for ways in which cooperative relationships among the FTC and other government institutions—with domestic government agencies, such as state competition and consumer protection authorities, and with foreign government agencies—can improve the quality of competition and consumer protection policy. From the work that OGC does together with the FTC's other bureaus in dealing with other government bodies in the United States and overseas, it is apparent that building more effective cooperation with these institutions is essential to the performance of the FTC's responsibilities. For example, the FTC today faces the same challenges in consumer protection law enforcement against serious cross-border fraud that the Department of Justice faced years ago in dealing with international cartels. Tim Muris has emphasized the need to develop international mechanisms and networks that will permit the Commission to deal with wrongdoers who increasingly operate globally, are highly adaptable, and are adroit in devising countermeasures to deflect enforcement measures pursued strictly on a national scale. Assisting the Commission in building new domestic and foreign intergovernmental relationships to combat serious fraud is a major OGC goal.

The final OGC priority I will mention is to help the FTC improve its human and administrative infrastructure. OGC has a number of projects underway to improve the quality of life for FTC employees and, among other aims, to deal with the fact that a significant number of our most valued employees are entering the zone in which they could retire if they choose. We are seeking ways to sustain and enhance our human capital and preserve the technical knowledge and institutional know-how that our senior employees have developed—in some cases, in the course of three decades of service to the FTC. The Commission's administrative infrastructure demands similar attention. Let me give one example. The development of e-mail and expanded reliance on electronic records present difficult recordkeeping challenges that did not exist twenty years ago for the agency. In the era of paper transactions and paper correspondence, one could not generate records at the rate that electronic media and networks permit. This confronts OGC and the Commission with the need to change dramatically how the agency maintains records and to impose greater discipline on how the agency collects and transmits information. These infrastructure issues may not be as glamorous as other policy matters I have mentioned, but their successful resolution is absolutely indispensable to putting the Agency on a footing to operate successfully in the future. An institution ignores or slights them at its peril.

You can liken the Commission to a ship whose engine room has a number of different boilers.

ANTITRUST SOURCE: In a speech in December 2003, you said there was historically too little willingness in government to embrace sound programs initiated by prior administrations. Are there any such programs from the prior administration that the Commission is currently pursuing?

BILL KOVACIC: In my view, the most crucial respect in which Bob Pitofsky took the FTC to a higher level during his chairmanship in the 1990s was his recognition of the importance of having the Commission make substantial investments in attaining intellectual leadership—by undertaking research and policy analysis projects to support its competition and consumer protection missions. Bob Pitofsky's first major initiative after becoming FTC Chairman in April 1995 was to launch the Commission's hearings on innovation and the global market place. That was a brilliant and highly influential measure, both for its immediate contributions to policy making and for its enhancement of the institution. In choosing this path, Bob recognized that the capability—indeed, responsibility—to use non-litigation policy instruments to advance the state of the art of understanding about difficult competition and consumer protection issues is uniquely within the charter that Congress has given the FTC. You can liken the Commission to a ship whose engine room has a number of different boilers. One of the FTC's boilers is administrative adjudication, another boiler is the gathering of data and issuance of reports, another boiler is the capacity to conduct hearings and workshops, still another boiler is the synergy of consumer protection and competition functions, and others consist of the litigation of cases in the federal courts. To make the vessel perform at its peak, you need to light all of the boilers and accurately chart a course toward superior policy destinations. Bob understood that expanding the research and analysis component of the FTC's work was essential to increase speed and improve navigation. Tim Muris has built upon this foundation, and future generations of FTC leadership will inherit well-tested approaches for exploiting the Commission's special non-litigation capabilities. The centrality of hearings, workshops, reports, studies, and advocacy initiatives on the Commission's current agenda builds upon Bob Pitofsky's legacy and embraces his realization that the Commission can make extraordinary contributions by using a unique portfolio of policy instruments that includes considerably more than the prosecution of cases.

A second, closely related element of Bob Pitofsky's legacy, and an exemplar for how the Commission has continued to operate since Tim Muris's arrival, is the realization that it is not enough simply to use all of the agency's policy instruments. It is important in approaching any single project or undertaking to develop an integrated approach to policy making—to encourage the Commission and its professional staff to treat individual competition or consumer protection problems with an awareness of the full range of policy instruments at the Commission's disposal. For example, to solve perceived competitive problems in the pharmaceutical sector, you might pursue a strategy that addresses the problems from several directions. The Commission can, and did, bring cases that challenge certain patent settlements. The Commission can do empirical research, and it did conduct a 6(B) study, initiated in 2000 and published in 2002 as *Generic Drug Study Prior to Patent Expiration*, that examined the introduction of generic equivalents. The Commission can, and did, hold hearings that gather information about the role of intellectual property and competition policy. The point is that you have to have a strategy that from the beginning not only identifies the problem in a general way, but also recognizes there are a variety of policy tools that can be brought to bear on diagnosing and solving the problem. The Commission made enormous progress during Bob Pitofsky's tenure in realizing that good policy making requires the FTC to make sustained, conscious efforts to devise strategies that take advantage of the unique ensemble of tools within its control.

This is not an exhaustive list, but I want to mention one other of Bob Pitofsky's contributions as Chairman that continues to influence the Commission's work under Tim Muris. In examining initiatives during my time as General Counsel, it is extremely impressive to see how much one's predecessors shape the FTC's current agenda, and determine its future success, by their willingness to make investments—commitments to new litigation and non-litigation projects—that promise to increase the agency's effectiveness and are likely to bear fruit after incumbent managers have left the agency. Bob Pitofsky demonstrated how, in order for the FTC to prosper in the long term, incumbent leadership must be willing to invest in projects that will yield results well after one's own tenure ends. As Tim Muris underscored in his remarks at the Antitrust Section's Fall Forum last November, the forward-looking ethic has been extremely important to the Commission as I have seen it in the past two and one-half years.

ANTITRUST SOURCE: In the same speech that I alluded to earlier, you said it was very important for federal agencies to promote policy improvements by doing *ex post* assessments of outcomes, and you pointed to both internal and external audits as vehicles for conducting those kinds of assessments. Do you envision commissioning internal or external audits of FTC activities, and if so, in what areas?

BILL KOVACIC: One initiative consists of an extensive study the Commission is conducting of the consequences of mergers in the petroleum industry. Scheduled to be published later in 2004, the oil merger study will provide the FTC's assessment of the competitive consequences of mergers in recent years involving petroleum companies. Another step in this direction is the recent publication by the FTC and the Department of Justice of data concerning merger challenges in fiscal years 1999–2003. The information includes HHI data and some qualitative information that, taken together, illuminate considerations that affected the decision to prosecute. The oil merger study and the release of the merger data set are two examples of measures that involve the development of a process of *ex post* assessment. I believe it is important for the Commission to commit itself to undertaking the routine practice of performing an internal examination of the competitive outcomes of specific enforcement matters and to engage external audiences in the examination of the effects of what the Commission has done. Both of the specific matters I mentioned, the oil merger study and the merger enforcement data set, will stimulate a larger discussion in the competition policy community about merger policy.

ANTITRUST SOURCE: Is there any particular plan to call for an external audit of any of the Commission's activities?

BILL KOVACIC: None that I can point to at the moment. I would like to see the FTC move toward adopting a systematic process of not only having the agency's professional staff routinely do internal assessments of enforcement effects, but also to engage outsiders in the examination and discussion of the Commission's work. Two models for this type of evaluation by outsiders go back to my first time at the Commission from 1979 to 1983. The first is a collection of studies of vertical restraints cases published under the title of Federal Trade Commission, *Impact Evaluations of Federal Trade Commission Vertical Restraints Cases* (Ronald N. Lafferty, Robert H. Lande & John B. Kirkwood eds., 1984). The second was a study of the effects of the consent decree that the FTC accepted in 1975 to resolve its claims of illegal monopolization by Xerox in the market for plain paper photocopiers. This study was published as Timothy Bresnahan, *Post-Entry Competition in the Plain Paper Copier Market*, 75 AM. ECON. REV. 15 (1985). The studies of the vertical restraints cases and the *Xerox* consent decree all were done by academic economists who were given a very modest fee to study the individual cases and write reports on their findings. The inquiries were very limited in their scope, as they did not involve the collection of substantial amounts of data. Nonetheless, they did provide very useful insights on the outcomes of the FTC's cases. In addition to the internal assessments that the Commission has done, I would like to see the Commission find a way to revive some variant of analysis by outsiders and the publication of their studies.

ANTITRUST SOURCE: Let's change topics and follow up on something you said earlier with regard to administrative litigation. Certainly administrative litigation is an avenue that is uniquely available to the Federal Trade Commission to pursue competition enforcement, but why is there such an emphasis on it now as opposed to litigation in the federal courts? Can't the Federal Trade Commission pursue its policy objectives equally well in the federal courts, and why are there no cases being prosecuted in the competition area in federal courts?

BILL KOVACIC: One explanation simply deals with the reduced flow of work concerning mergers. There has been a significant reduction in the number of merger filings with the federal agencies owing to the general reduction in deal making in the past two years. There have been fewer occasions for the Commission to use its 13(b) authority to go to court and challenge mergers. The Commission has authorized the staff to seek injunctions in federal court to block a number of matters, but only one of these—the challenge to the glassware merger in *Libbey*—has resulted in a litigated decision in a 13(b) case since I became General Counsel in June 2001. The amount of federal court litigation in the competition mission depends heavily on the intensity and nature of deal making at any one time. As a general matter, the more robust the transactional market, the larger the number of events that provide the points of friction that tend to generate federal court litigation for the FTC. Recent news accounts about acquisition trends and comments by practitioners with active merger practices have suggested that we might see a general rise in deal making in the coming months and an increase in ambitious transactions. If such a trend emerges, the FTC might be in federal court more frequently. Notwithstanding the decline in federal court litigation, the FTC has pursued three administrative cases in the past thirty months involving consummated mergers: *MSC.Software*, *Chicago Bridge & Iron*, and *Aspen Technology*.

ANTITRUST SOURCE: Does the Commission currently have any competition cases pending in the federal courts?

BILL KOVACIC: The only competition case in federal court at the moment is the appeal to the D.C. Circuit from the Commission's decision in *PolyGram*.

ANTITRUST SOURCE: In light of that, is there any situation that you can envision in which the Commission would pursue a non-merger case in the federal courts in the first instance?

BILL KOVACIC: It is possible, though such matters have been exceptionally rare. Going back over the past decade or so, the only cases that come to mind in which the FTC used its 13(b) authority to go directly to federal court in non-merger matters are *Mylan Laboratories* and *Abbott Laboratories*. Another I might add to the list is *Hearst Trust*, which sought disgorgement arising from a merger and was resolved by settlement within a few months after I returned to the FTC in 2001. The best indication of the Commission's intentions is the policy statement issued in 2003 dealing with disgorgement and monetary recoveries in competition cases. Consistent with that statement, if the Commission saw a matter that involved a clear violation of antitrust law, a reasonable means of calculating the remedial payment, and a strong possibility that other means of recovery and other means of recourse would not protect injured parties, I easily could imagine the Commission would bring a case. I have no specific examples in mind, but, given the historical rate since 1990 of what is basically one matter every four years, I would not expect there would be a lot of them.

ANTITRUST SOURCE: Let me ask you one follow-up there. Will the Commission urge Congress or the courts to allow a private right of action under the FTC Act?

BILL KOVACIC: I am aware of no discussions along those lines. A factor that would weigh against such a measure is the elastic property that Congress built into Section 5 and the power Congress gave the FTC to use Section 5 to establish competition or consumer protection principles of liability that are not embodied in existing judicial interpretations of other statutes. The deliberately evolutionary process embodied in Section 5 is best suited to an administrative process, by which the Commission can draw upon the complete mix of analytical tools discussed earlier to denominate specific practices as contrary to Section 5. The list of competition cases in which the Commission has relied on distinct Section 5 authority to establish principles outside the boundaries of Clayton Act or Sherman Act jurisprudence is fairly short. This is principally because the courts have interpreted the Clayton Act and the Sherman Act in a more expansive and adaptive manner than Congress expected in 1914 when it passed the Federal Trade Commission Act. To the extent that Congress conceived Section 5 as a flexible instrument for extending the zone of competition policy liability to address practices beyond the reach of the other antitrust statutes, Congress also perceived—correctly, I believe—that the process of jurisprudential elaboration and extension was best entrusted exclusively to the Commission's administrative process and not through routine litigation before federal or state courts.

ANTITRUST SOURCE: What is the General Counsel's Office's role in administrative litigation? Earlier you said it was advisory, but what exactly do you do?

BILL KOVACIC: In the pre-complaint period leading up to the Commission's decision to prosecute, OGC gives the Commission our views about the strengths and weaknesses of specific proposed enforcement actions. We provide the same guidance to the Bureau of Competition and the Bureau of Consumer Protection in the pre-complaint period. In this capacity, for both the Commission and the operating bureaus, we offer an independent opinion concerning proposed enforcement actions. Once the FTC issues an administrative complaint, we stand on the adjudication side of the administrative litigation fence. In the post-complaint period, our most important contributions consist of advising the Commission on the drafting of opinions and in defending the agency in appeals from Commission decisions.

Chairman Muris has a special concern about the modern expansion of judicially developed antitrust immunity doctrines.

ANTITRUST SOURCE: Let's talk for a moment about amicus briefs. What causes the Commission to want to file an amicus brief in a particular case, and how does it come up with the position that it wants to take?

BILL KOVACIC: One major consideration is the preferences of the Commissioners about the kinds of matters in which FTC amicus participation might best contribute to the improvement of doctrine and policy. As articulated in a number of his speeches, Chairman Muris has a special concern about the modern expansion of judicially developed antitrust immunity doctrines. In recent years, several FTC competition policy amicus filings have dealt with the bounds of immunity established in the state action and *Noerr* doctrines. In a closely related area of activity, the FTC has filed briefs to discourage state government instrumentalities from adopting measures that unnecessarily restrict opportunities for competition. One example is the amicus brief that the FTC and Justice Department jointly filed, without success, to persuade the Georgia Supreme Court to reject an interpretation of the definition of the unauthorized practice of law that would require the presence of an attorney at real estate closings.

A second important factor is the flow of proposals that come to our attention. We rely mainly on two sources of information to identify promising amicus candidates. First, we have a number of internal "case watchers" who examine advance sheets and news accounts to spot matters making their way through the district courts and through the courts of appeals. The second source of information consists of recommendations by outsiders, including those who are in engaged in pending litigation matters. External observers are particularly important sources of information for less noticed cases or matters developing in the trial courts.

ANTITRUST SOURCE: How does the Commission figure out what position it wants to take in an amicus brief? Is a vote or a straw poll taken? And who reviews the briefs before they are filed?

BILL KOVACIC: In competition matters, OGC usually makes an initial identification of potential amicus candidates, in cooperation with the Bureau of Competition and the Office of Policy Planning (OPP). We typically consult the Commissioners concerning amicus possibilities and, working with the Bureau of Competition and OPP, we often will take the lead role in drafting a memo that discusses the issues and the Commission's possible contribution as amicus. Based on the response to that memo, OGC usually drafts the text of the brief. We obtain Commission approval before we file an amicus brief. Most of our amicus matters also involve close cooperation with the Department of Justice. Matters involving amicus appearances before the court of appeals typically involve a joint appearance by the FTC and the Department.

The U.S. competition policy system faces two fundamental challenges: one from private behavior, and the other from publicly imposed restrictions on competition.

ANTITRUST SOURCE: Then do the briefs as filed represent the official position of the Federal Trade Commission?

BILL KOVACIC: That's right.

ANTITRUST SOURCE: Have you seen any evidence that courts are influenced positively by amicus briefs filed by the Commission?

BILL KOVACIC: There have been instances in which it is apparent that the court has embraced a specific proposed analytical approach. Perhaps the clearest example in my experience in OGC is the decision issued in the Southern District of New York in 2001 in the *Buspirone* case. In *Buspirone*, the district court directly drew upon the framework that the FTC had recommended in its amicus brief. There also have been instances in which the court indicates that our views were unpersuasive. In the unauthorized practice of law (UPL) matter I mentioned earlier, the Supreme Court of Georgia thanked the FTC and the Justice Department for their views and proceeded to dismiss the agencies' recommendations. The Georgia UPL matter and *Buspirone* are instances in which the court provided an unambiguous signal about its assessment of our views. Probably more often than not, the reaction is not so transparent, and we are left to speculate about how our suggestions influenced the result.

ANTITRUST SOURCE: Let's turn to the state action doctrine which you mentioned earlier. How would you describe the Commission's agenda in the area of *Parker v. Brown* state action issues?

BILL KOVACIC: The U.S. competition policy system faces two fundamental challenges: one from private behavior, and the other from publicly imposed restrictions on competition. The paradox is that the more effectively competition agencies attack private behavior, the more they create an inducement for private parties to solicit public regulations or statutes that authorize measures—such as concerted action by competitors to set prices, to establish conditions of entry, or to specify other elements of trade—that antitrust doctrine otherwise would forbid if undertaken purely by private action. A competition policy system that takes publicly imposed restrictions less seriously than it addresses private restrictions is akin to an army that devotes the mass of its arms to a single front to wage a war that has two equally significant fronts. Upon observing a decidedly asymmetrical deployment of resources by a competition system, private parties seeking to restrict competition can prevail simply by overrunning the weakly defended second front. To put it another way, focusing all of a competition policy system's attention upon attacking purely private behavior can become the equivalent of building and reinforcing the Maginot Line. A significant number of private parties will learn not to challenge the Maginot Line and instead will devote more effort to circumventing the fixed fortifications—in this case, by seeking publicly imposed shelter from antitrust commands.

The state action doctrine, as first recognized in *Parker v. Brown* and elaborated in subsequent judicial decisions, is uniquely American in the breadth of the dispensation it creates from antitrust rules. Many other jurisdictions, including the European Union, do not so readily or expansively allow the decisions of subordinate political units—such as states and municipalities—to curb the operation of competition law as does the United States. Chairman Muris has stressed the concern that expanded notions of *Parker* immunity will dilute the success that U.S. competition agencies have achieved over the past century in dealing with purely private behavior and will invite ever greater efforts by private actors to employ public instrumentalities to achieve the anticompetitive ends that government cases attacking private action routinely oppose. I would say the basic, minimum objective is simply containment—to make sure that courts do not expand *Parker* immunity beyond its existing boundaries. This minimum aim is not the FTC's only goal. There is a desire to retrench various frontiers where *Parker* already has become inappropriately tolerant of public intervention to restrict competition. So the minimal agenda is containment; the more ambitious objective is to push back.

ANTITRUST SOURCE: Would you say that you think courts are mostly getting it wrong as they apply the "clear articulation" and "active supervision" requirements of *Parker v. Brown*?

BILL KOVACIC: As the FTC's State Action Task Force observed in a report that was issued in September 2003, there are a disturbing number of instances in which both of *Midcal*'s requirements—that the legislature clearly articulate its aim to curb competition, and that the state actively supervise the operation of the regime to suppress rivalry—are not applied with adequate rigor. On the whole, we are not satisfied with the existing equilibrium of jurisprudence with respect to the application of either of the *Midcal* conditions.

ANTITRUST SOURCE: Does the Commission's amicus brief in the *Brentwood Academy* case represent an extension of its findings in the State Action Task Force report of September?

BILL KOVACIC: That is a fair characterization. The concern addressed in the Commission's *Brentwood* brief is that the government intervention taken and pointed to as the basis for Sherman Act immunity lacked the clear statement of intent that the state must make to displace competition. The goal on the clear articulation issue is to promote acceptance of the principle that allows the state to suppress rivalry pursuant only to a declaration that unmistakably articulates its intent to displace competition. Requiring the relevant decision maker to provide such an unambiguous declaration at least has the potential to alert adversely affected parties to the consequences of the proposed government intervention and to inspire debate about the wisdom of anticompetitive measures.

ANTITRUST SOURCE: I have the same question about the *Noerr-Pennington* doctrine that I asked you about state action. How would you describe the Commission's agenda as it relates to *Noerr-Pennington* immunity?

BILL KOVACIC: It is very similar to what the FTC seeks to accomplish concerning state action immunity. The first element of the agenda is to ensure that the bounds of what courts deem to be immune petitioning do not expand. The second, more ambitious goal is to try to push back on what some decisions seem to contemplate as being acceptable petitioning. As with state action, the FTC's concern with *Noerr* immunity is that the easier it is for public action to displace antitrust rules, the more effort private parties will devote to soliciting public bodies to do so. Again, the hard-won benefits gained from an active and successful campaign against private misconduct will be dissipated because the public avenue to achieve the same objectives is too easily traveled.

ANTITRUST SOURCE: Would you describe the *Unocal* decision as a set back to the Commission's actions to curb expansion of *Noerr-Pennington* immunity?

BILL KOVACIC: Because the General Counsel's Office is on the adjudicative side of the FTC's administrative process, I have to refrain from saying anything that might be interpreted as discussing the merits of the *Unocal* case or characterizing the substantive significance of developments in the ongoing litigation.

ANTITRUST SOURCE: Let's talk about the Commission's IP Report that recently came out. How has that report been received both by the intellectual property community and the antitrust bar?

BILL KOVACIC: Even though some observers have expressed reservations of different intensity about specific policy recommendations, the general reaction in both the domestic IP bar and the antitrust bar is that the FTC's report was exceptionally well done in both the care with which it examined both the competition policy and the intellectual property institutions at issue and in the evenhandedness with which it presented the arguments for and against its recommendations. Even those within the intellectual property community who most ardently have disputed the report's recommendations generally recognize that this was a thoroughly professional, thoughtful, and pathbreaking contribution.

A second reaction I distill from comments so far is that the FTC's report is having the desired effect, within the U.S. IP and competition policy communities, of stimulating a debate and a discussion about the appropriate design of the rights-granting process.

A third consequence is that the FTC's report and the proceedings on which it is based have elicited considerable interest within the IP and competition policy communities overseas. Three weeks before the issuance of report, I attended a program that featured presentations by a large number of government officials from patent offices in Europe. Speaker after speaker referred to the proceedings that led up to the report and identified those proceedings as focusing needed attention upon the relationship between the intellectual property system and competition policy. The participants repeatedly praised the proceedings for pointing out how rights-granting organizations should pay closer attention to the competition policy consequences of what they do. And this was before the FTC's report appeared. Judging from reaction in the past two months to the report itself, I am convinced that FTC's contribution will change the way that many foreign officials and practitioners in the IP and competition policy communities think about the intersection of their fields. The FTC's report is a powerful illustration of how investments in first-rate research and analysis can exert a major impact on policy at home and abroad.

ANTITRUST SOURCE: What have been the most significant criticisms of the report that you have heard?

BILL KOVACIC: Two stand out. One line of criticism takes issue with the FTC's recommendation that Congress change the standard of review used by courts in considering the decisions of rights-granting authorities. A second criticism disputes the FTC's view that competition policy considerations ought in some instances to affect how the Patent and Trademark Office (PTO) reviews applications. Both FTC recommendations have stimulated, to put it politely, intense debate. It does not surprise us that these recommendations are the subject of criticism, as we learned in the hearings that the issues in question are particularly sensitive. Yet we think that these subjects are, at a minimum, vital subjects for discussion. Despite disagreements with some of the FTC's recommendations, there appears to be general agreement within the IP community that improvements in the rights-granting process would have great benefits for innovation and the U.S. intellectual property system. This view is evident in the PTO's own well considered strategic plan. So even if there is disagreement with specific recommendations the FTC has made, we see considerable agreement with our larger theme that policy makers must upgrade the rights-granting process and must recognize interdependencies between what competition authorities and antitrust courts do and their perception of the quality of the rights-granting process.

ANTITRUST SOURCE: You noted that some criticisms have been voiced about the recommendations on the standard of review for granted patents. The report calls for lowering the legal standard for patent validity challenges from "clear and convincing evidence" to a "preponderance of the evidence." As you know, already nearly 50 percent of litigated patents are found invalid; do you think that it would be a good thing or a bad thing for that number to increase further and why?

BILL KOVACIC: The correct policy choice depends heavily upon the quality and efficacy of the rights-granting process. Depending on the quality of that process, we can go down one of two paths concerning the standard of review. First, if the rights-granting process were made more robust, if it were more demanding in the way it examined patent applications, then the existing, comparatively deferential standard of review would be appropriate. The status quo standard would be defensible if the rights-granting process operated in practice with the same rigor that it is assumed to operate in theory. Alternatively, if the rights-granting process is not made more robust, so that a higher percentage of patents issued by the PTO would be "good patents" in the sense that they truly would satisfy the standards Congress and the courts have established for patentability, then it makes sense to adopt a less deferential standard of review.

ANTITRUST SOURCE: Let's talk briefly about the Slotting Allowances Report that came out in November 2003. The report has been praised for its intellectual honesty, but comes to no conclusive positions about whether slotting allowances are legal or illegal. What further steps will the Commission take in this area, and what's the role of the General Counsel's office?

BILL KOVACIC: OGC's policy studies group prepared the survey and wrote the study, which was issued as a staff report, under Susan DeSanti's supervision. The Commission's next steps depend a great deal on two things. One is the guidance we receive from Congress, particularly because this was a study Congress requested. The second is how the FTC study's findings about the nature and use of slotting allowances stimulate further thinking about slotting and promotional activities and inspire the refinement of hypotheses about the competitive effects of specific tactics. One noteworthy respect in which I believe the report improves the state of the art is its finding that the role of slotting is more ambiguous than the previous commentary on slotting suggested. The FTC's study was based on the survey of a relatively small sample of food manufacturers and retailers, but the survey results were comprehensive enough to make clear that there is tremendous variation in how extensively different manufacturers and retailers choose to rely upon slotting as a promotional method. The variety is striking both across product categories and across individual retailers. The FTC study underscores that slotting is simply one tool that a retailer or a manufacturer can agree to use to elicit a given level of promotional effort from a retailer, with other means being a direct payment of promotional allowances or an increase in advertising (either with displays inside a store or with advertising directed to consumers before they enter the store) that alerts consumers to the availability of a product. Some readers of the study may feel a sense of frustration that the study did not yield clear-cut policy implications that point to the prosecution of specific cases. Yet one of the FTC study's most important contributions is its caution that the phenomenon of slotting is a good deal more complex, and competitively ambiguous, than some observers had envisioned before the study.

ANTITRUST SOURCE: Let's turn to merger enforcement. The FTC and DOJ recently released data on merger challenges from 1999 to 2001. What are antitrust practitioners to take away from that data and what are the highlights from your perspective?

BILL KOVACIC: The data will provide antitrust practitioners with a more accurate picture than they have obtained previously of the quantitative thresholds at which FTC and DOJ decisions to prosecute have taken place in the past. The data also will supply a more informative glimpse of how different qualitative variables affect merger enforcement decision. Perhaps more important from an institutional perspective, the release of the data is a further important step toward making the decision-making process more transparent. It is a first, systematic effort to make publicly available a body of information that identifies the HHI data associated with relatively recent merger challenges. From this information and further data that the FTC expects to release in the near future, practitioners are likely to gain a more illuminating glimpse of how the decision to prosecute actually is made. This should facilitate the larger aim of encouraging discussion about how the federal agencies review mergers and what additional types of information the agencies routinely should reveal to the competition policy community about how they exercise their law enforcement authority.

ANTITRUST SOURCE: The FTC's guidelines for merger investigations issued a year ago offer up the General Counsel's office as an arbitrator if second request negotiations with the staff have failed. Has that happened?

BILL KOVACIC: Twice in the past thirty months.

ANTITRUST SOURCE: How has that process worked?

BILL KOVACIC: I suppose it depends on your point of view. In both instances I denied the appeals. Without regard to the content of individual disputes, I can readily imagine that the merger parties generally will regard any internal review procedure with at least some skepticism. They are likely to wonder whether the appeals process will vindicate their claims or, over the long run, discipline the second request process. The apprehension is that whoever the internal reviewer for the FTC happens to be, whether it's the General Counsel or some other unit in the Commission, there will be an inevitable tendency to endorse the positions advanced by the agency's staff.

One might look at experience with appeals at the FTC and find verification for that skeptical intuition: two appeals, two denials. This underestimates, I think, the potential and actual value of the appeals mechanism. Due to the confidentiality safeguards of the HSR process, I have to be cryptic in describing the two appeals considered at the FTC to date. Even so, without discussing the issues presented, I can identify an important positive consequence from the two appeals for the management of the second request process. Each appeal focused attention on potential difficulties with a practice common in the design of second requests, and each stimulated significant reflection and discussion within the FTC about second requests. As such, the two appeals supplied valuable feedback to the agency and, in a modest way, served to improve the second request process, even though the appeals were denied.

The renewed emphasis on coordinated effects has not caused the Commission . . . to walk away from unilateral effects theories or ignore them . . .

I think a step that my office has to take, with the consent of the parties in question, is to put more information about second request appeals in the public domain. Beyond describing the subject matter of the appeals themselves, fuller disclosure would help indicate how the appeals process can provide useful feedback to the FTC and improve its second request process.

ANTITRUST SOURCE: The Agency has stated a number of times a renewed emphasis on coordinated effects theories in the merger context. After two years, is that emphasis as strong as ever, and in your opinion, does the emphasis on coordinated effects come at the expense of a focus on unilateral effects?

BILL KOVACIC: Unilateral effects and coordinated effects are both important elements in merger analysis. The aim in merger analysis or any other substantive field of antitrust inquiry is to use analytical techniques that best illuminate the competitive phenomena at issue. The concern associated with the increased reliance in recent years on unilateral effects theory is that it could be used in cases better suited to evaluation with a coordinated effects approach. Over time, there might be a tendency to view unilateral effects theories as, in some sense, "easier" vehicles for establishing liability. This perception, in turn, might tempt enforcement officials to push facts artificially into a unilateral effects model or otherwise to apply unilateral effects theories in ways that undermine their analytical integrity. For this reason, it is important to make sure that the other principal tool in the merger analysis tool kit—coordinated effects—remained a viable instrument for diagnosing the competitive effects of mergers. Having effective and workable coordinated effects tools helps discourage strained applications of unilateral effects theories. The FTC's commitment to use coordinated effects analysis in appropriate circumstances remains strong, although the decline in the number of transactions presented for the agency's review means that there are fewer specific applications to point to. The renewed emphasis on coordinated effects has not caused the Commission or the professional staff to walk away from unilateral effects theories or ignore them, but instead to use the most suitable analytical tool and theory for a given set of facts.

ANTITRUST SOURCE: What is the role of General Counsel's office relating to international outreach, and what are its international objectives?

BILL KOVACIC: The most important OGC activity is the management, under Jim Hamill's supervision, of the FTC's participation in international technical assistance for competition policy and consumer protection. In the coming twelve months, the FTC will conduct an average of one significant overseas short-term mission per month. These missions usually consist of seminars of three to five days. Many of the seminars use a mix of lecture and role-playing exercises based on problems developed by the FTC or jointly between the FTC and the Justice Department. The FTC also is supporting two long-term resident advisor programs, one in cooperation with the DOJ in South Africa with the South African Competition Commission and the other carried out by the Commission with Indonesia's competition authority, the KPPU.

In the long-term and short-term missions, we seek to provide advice that builds the capability of emerging market competition authorities. Since the agencies undertook their first projects in the early 1990s with strong encouragement from Janet Steiger and Jim Rill, the technical assistance program of the FTC and the DOJ has been a relatively quiet but remarkably successful story. I have seen this firsthand. In the decade before returning to the FTC in June 2001, I spent a considerable amount of time working on technical assistance projects as an academic. I had many occasions to talk to the recipients of assistance that the U.S. antitrust agencies had provided. I often would pose the simple, direct question: "Have these projects been worthwhile for your competition agencies?" I knew them well enough and had developed enough trust that they did not feel an obligation to say "yes." In the course of many conversations, I never heard an adverse comment about the FTC or DOJ programs or the individual attorneys and economists who performed them. To the contrary, the uniform message from the recipients was that the U.S. agency programs consistently were among the best technical assistance initiatives undertaken by any donor or competition agency. This extraordinary contribution of the two agencies continues to this day, in a still more robust form.

The other role that OGC plays in international matters involves supporting the Bureau of Competition and the Bureau of Consumer Protection in individual enforcement matters and in the Commission's participation in bilateral arrangements with foreign governments and in various multilateral networks. We work extensively with Randy Tritell and Hugh Stevenson, who lead the international activities of the Bureau of Competition and Bureau of Consumer Protection, respectively. The focal point of our work with Randy and Hugh is supporting the Commission's participation in bilateral agreements with foreign competition and consumer protection authorities and the agency's participation in international bodies such as the Organization for Economic Cooperation and Development and the International Competition Network (ICN). Within ICN, attorneys in the General Counsel's Office have contributed extensively to working groups dealing with mergers and capacity building, as well as administrative groups dealing with funding ICN operations and developing the network's operational framework.

Finally, OGC attorneys have played an active part in the design of and advocacy for the FTC's cross-border fraud legislative recommendations to Congress.

ANTITRUST SOURCE: Commentators in the United States have criticized the proliferation of merger review programs adopted by many countries as imposing an excessive tax on international merger transactions, and as being out of step with antitrust norms established by U.S. agencies. What is your reaction to the PricewaterhouseCoopers study that was issued in June 2003 that showed that typical merger review costs for multijurisdictional mergers are relatively small, approximately a tenth of a percent of the transaction value, and that the U.S. merger review regime is by far the most costly?

BILL KOVACIC: In general, the PWC survey made a useful contribution to our understanding of the costs associated with multijurisdictional review of mergers. The PWC survey, like any survey that is so ambitious and difficult to execute, faces severe methodological challenges. There has an active debate about whether the PWC survey was comprehensive enough or whether the survey instrument posed the right questions to provide a confident basis for learning how large the international merger regulatory "tax" actually is. Some commentators, for example, have said that a more comprehensive, properly focused survey would have discovered the regulatory tax to be greater than PWC found it to be. Whatever its specific methodological limitations might be, the PWC study is laudable in a key respect: it demonstrates a proper appreciation for the importance of empirical work in advancing the state of the debate about multiplicity in merger review. So much discussion of the actual effects of multiplicity involving the review of cross-border mergers takes place on the basis of impressionism or highly idiosyncratic, anecdotal accounts of specific transactions. There is a need for a far more systematic examination of what these costs are. I applaud the International Bar Association, the American Bar Association, and PWC for undertaking this kind of effort. I hope that other institutions and individual researchers follow their lead and emphasize empirical study of multijurisdictional review.

What about the significance of the PWC findings for merger review in the United States? The PWC study makes a point that has resonated in other commentary at home and abroad about the U.S. process—that there is a lot of room for improvement. The multiplicity of competition policy systems today affords the U.S. agencies an unequaled opportunity for comparative study. The U.S. competition agencies ought to be involved in, and should be prodded by outsiders such as professional associations, academics, and other competition authorities to be involved in the kind of side-by-side comparative assessment that would help the FTC and the DOJ identify how to improve the process of merger review by, for example, reducing costs or increasing transparency. To the extent that the PWC study helps put a spotlight on the U.S. merger review process and motivates a continuing discussion inside and outside the U.S. antitrust agencies about how to improve the process, that is unambiguously a good thing.

ANTITRUST SOURCE: Has the PWC study done that in the FTC's case?

BILL KOVACIC: The U.S. inaugurated the modern version of premerger notification, and it has the most extensive experience with merger review. The fact of being the first of the modern premerger regimes and the most experienced imparts considerable momentum to the U.S. system. A long succession of federal antitrust officials has found that making adjustments to the U.S. system is no easy task, perhaps like trying to change the course of a large ship.

It is hard for me to isolate specific effects of the PWC study upon the FTC. Along with merger best practice recommendations developed by the ICN, the PWC study helps build awareness within the FTC about the need to improve its merger review process and to consider how enhanced cooperation with foreign competition authorities overseas might reduce merger review costs. ICN has been the main catalyst for this type of self-assessment, which at least has the effect of making agency leadership think more frequently about ways to improve the process.

I would identify another reason for the U.S. agencies to focus on, and eventually pursue, improvements. I do not think the U.S. agencies will have credibility in the international arena when they urge foreign authorities to improve their systems, for merger or non-merger matters, if the United States does not demonstrate observable progress towards reducing the cost of the HSR process. I do not have in mind a specific deadline by which such progress must become evident, say, 6 months, 12 months, or 18 months. If progress does not become observable in what I evasively will call the medium term, the U.S. competition authorities will lose credibility when speaking on these issues internationally. I hope that one consequence of the ICN's work will be to exert continuing pressure by other competition agencies, by academics, the business community, and by the antitrust bar to adopt reforms. If these issues are not kept directly in the field of vision of the U.S. competition agencies, the perceived need to make adjustments will falter. It is simply too easy to put this matter on the back of, or off of, the stove.

ANTITRUST SOURCE: Finally, is there something that we should have asked you but we forgot to, something that would really put you on the spot and would be hard for you to answer?

BILL KOVACIC: You could ask whether anything I have been talking about is actually working, or is likely to work. You could look to the future and ask that we repeat this conversation five or ten years from now in order that you could ask me whether the developments that I have said to be worthwhile had staying power.

In reponse, I would try to think about these questions by comparing the FTC of today with the agency I joined as a staff attorney in the Bureau of Competition twenty-five years ago. I find the comparison to be encouraging and a source of hope for the future. In many respects, the FTC today is a far more capable institution than it was in 1979. In the intervening quarter-century, the FTC has paid increasing attention to questions of institutional design, both internal to the Commission and in the policy-making environment outside its walls. Visible signs of this progression include conscious, systematic efforts to develop and use the Commission's distinctive capabilities; a better understanding of the full constellation of institutions at home and abroad that play important roles in affecting competition and consumer protection policy; and an increasing awareness that the multiplicity of relevant institutions is not simply a source of problems to be managed, but also an opportunity for identifying and emulating superior practices from other institutions and for exploring cooperative relationships that allow the institutions collectively to accomplish beneficial ends that no single institution could attain on its own. I am reminded of a speech that the Director of the FTC's Bureau of Competition, Susan Creighton, gave last Fall to the National Association of Attorneys General during the group's meeting in Washington, D.C. A major theme of Susan's speech was that the FTC's relationship with the states necessarily is a partnership, and the focus of attention in that relationship ought to be in looking at areas where collectively we can achieve superior outcomes. In every structural upheaval that changes the order of established institutions, be it in government policy or in markets, there are difficulties and opportunities. Dwell on the difficulties, and the opportunities pass by.

Adapting to the new environment of multiple decision makers and institutional challenges does not come automatically or cheaply.

Similarly, in working with foreign jurisdictions, I have seen the FTC look for ways to improve its own operations by learning from the experiences of its foreign counterparts and to pursue stronger cooperation to confront misconduct, such as serious fraud, whose global character defies effective control by the activities of any single nation's enforcement authorities. This demonstrates a most encouraging awareness of how institutional design is a key determinant of substantive outcomes.

Adapting to the new environment of multiple decision makers and institutional challenges does not come automatically or cheaply. The necessary adaptation has two major implications for how the FTC allocates resources. First, the fact of the multiplicity means that the FTC over time has devoted, and will continue to expend, a growing amount of resources to intergovernmental coordination and cooperation with foreign and domestic agencies that have a major impact on competition or consumer protection policy.

Second, influence in the policy arena in an age of institutional multiplicity will come to agencies that make substantial investments in what Tim Muris has called policy research and development for competition and consumer protection. The necessary means for building consensus at home or abroad is persuasion, not compulsion. I do not expect to induce officials of foreign governments, state governments, or federal regulatory bodies, such as the PTO or FDA, to accept my views by berating them. They need not listen, and they are not obliged to follow. The means of influence today and in the future is the persuasion achieved by providing the higher quality idea, the more compelling analysis, or the stronger body of empirical data to test the validity of theoretical insights. The successful competition or consumer protection agency of the future is the agency that establishes intellectual leadership—a leadership that can be attained only through a significant, longstanding investment in policy analysis and research.

These considerations guide my own thinking about what the Federal Trade Commission must do to perform its mandate skillfully and to fulfill the promise of its original institutional design in the coming years. I see a number of signs that the requisite efforts will take place, going back to the choices Bob Pitofsky made in the 1990s to revitalize the Commission's research and analysis activities. In the past ten years, the Commission has increased its investment in activities that are a government agency's equivalent of durable capital assets. Investments of this type in any single fiscal year, or even series of fiscal years, do not necessarily generate benefits that the Commissioners who approved the investments can appropriate during their tenures. This was a central message of Tim Muris's presentation at the Fall Forum. The willingness to devote resources to sustain and build capability for the long term reflects a healthy awareness that such investments supply the essential foundation for successful institutions.

I'll finish by saying that the model of institutional improvement I have sketched above requires an understanding of the agency's past and a willingness to measure success by the long term. Along those lines, one area in which the General Counsel's Office has played a role is in assisting the agency in activities that recount the FTC's history and recognize contributions to the agency's development over time. By virtue of work it has done over decades, OGC is in some respects a de facto conservator of the agency's history, a repository of knowledge about how the institution has evolved. The examination of the FTC's past shows that today's good policies are the result of a lot of hard work that the agency and its people have done over the decades, and it promotes acceptance of an internal standard that makes future-oriented investments in institutional development an indispensable ingredient of policy choices today. ●

Congress Examines Antitrust

Larry Fullerton

Congress devoted an unusual amount of attention to antitrust and consumer protection legislation last year, despite concerns about the war in Iraq, the economy, and threats of terrorism.

In the recent past, proposals for new antitrust legislation have tended to focus on creating or eliminating antitrust exemptions.[1] Proposals such as these have presented issues about when and how departures from general antitrust enforcement policies may be justified, and about the respective roles of Congress and the courts in the development of the law. During 2003, proposals to reduce antitrust exposures for standards development organizations have presented the same kinds of issues. But these proposals and others have also raised broader, more fundamental policy issues in an increasingly complex, global enforcement environment.

Three major bills, including two consumer protection measures, were enacted at the close of the first session of the 108th Congress in December 2003. Other major bills received significant committee or floor consideration, and could be enacted in the next session. Some of the bills considered during 2003 have been industry specific (pharmaceuticals, telemarketing), while others have had more widespread application—proposing to alter criminal and civil penalties provisions, for example, and the process for finalizing Justice Department consent settlements. These legislative proposals have presented fundamental questions about deterrence of cartel behavior, federalism, separation of powers, and international antitrust cooperation.

Practitioners should follow legislative developments such as these. In the current Congress the legislature has been become as important to the development of antitrust law and policy as the enforcement agencies and the courts have been historically.

Recently Enacted Legislation

Three major bills of interest to antitrust and consumer protection practitioners were enacted in December 2003, at the close of the last session of Congress:

- **Fair Credit Reporting Act Reauthorization.**[2] This legislation, which passed by overwhelming margins in both the House and Senate, is intended to combat identity theft by making such conduct more difficult, and by making it easier for consumers to identify, document, and remedy cases of identity theft. Significantly for the regulated credit community, the legisla-

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[1] During the 107th Congress, one new antitrust exemption was enacted into law and another temporary exemption was made permanent. The Aviation and Transportation Security Act (Pub. L. No. 107-71) contained a provision allowing intrastate airlines to coordinate their operations, and the Need-Based Educational Aid Act (Pub. L. No. 107-72) extended favorable antitrust treatment for need-based educational aid. Antitrust exemptions were actively considered, but not enacted, in bills intended to reduce airline flight delays (H.R. 1407/S. 633), facilitate the development of biological terrorism countermeasures (S. 1765), and enhance the quality medical care (H.R. 3897). The House Judiciary Committee also considered, but did not act on legislation (H.R. 3288) intended to make clear that the antitrust laws apply to the elimination or relocation of major league baseball franchises.

[2] P.L. No. 108-159.

tion also extends federal preemption of several categories of state credit reporting laws, raising important issues of federalism.

- **CAN-SPAM Act.**[3] The Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act also passed the House and Senate by overwhelming margins. This legislation establishes national standards for sending multiple, unsolicited commercial e-mail messages, subject in some cases to criminal sanctions. The law requires the Federal Trade Commission to develop a plan for a "Do-Not-Spam" registry, but does not mandate its implementation. This legislation is intended to preempt California's anti-spam law and other state laws, as well.
- **Drug Competition Act.**[4] This legislation is designed to facilitate federal antitrust reviews of certain kinds of agreements involving pharmaceutical manufacturers by requiring them to be notified to federal law enforcement agencies. With certain exceptions, what must be filed with the agencies are agreements relating to the "manufacture, marketing or sale" of brand name or generic drugs, and agreements relating to the 180-day generic marketing exclusivity period provided by the Hatch Waxman Act. While this legislation was motivated primarily by concerns about the possible anticompetitive effects of settlements of patent litigation between branded and generic drug firms, as enacted, the legislation also covers agreements between generic manufacturers.

Federalism and the concurrent roles of the federal and state governments in consumer protection enforcement clearly remain subject to discussion and debate.

Earlier in the year, Congress acted (twice) to provide specific legislative authority for the Federal Trade Commission's "do-not-call" registry for telemarketers.[5] Interestingly, in its rulemaking, the FTC decided not to preempt the separate, and potentially conflicting do-not-call registries maintained by twenty-seven states. This approach proved to be controversial. As reflected in the House Commerce Committee Report, some Members of the Committee

> remain concerned that consumers and businesses could continue to face conflicting and confusing regulatory approaches. . . . [W]e encourage the FTC to work diligently to persuade states to adopt the FTC's rule. The Committee cannot [sic] understate the importance of the FTC working aggressively to seek such harmonization, and we will continue to follow the FTC's progress on this issue.[6]

Federalism and the concurrent roles of the federal and state governments in consumer protection enforcement clearly remain subject to discussion and debate.

Senate Judiciary Committee Proposals

Of the legislative proposals still awaiting final Congressional action, the one likely to be of interest to the broadest segment of the antitrust bar is H.R. 1086, a package of provisions approved by the Senate Judiciary Committee last fall, and now awaiting Senate Floor action. This bill proposes important changes in four areas.

First, H.R. 1086 would amend the National Cooperative Research and Production Act[7] to provide that specified standards-setting activities of a "standards development organization" would be subject to rule of reason treatment in any suit under federal or state antitrust law. Proponents of the bill have argued that it is sometimes unclear whether per se or rule of reason standards

[3] Pub. L. No. 108-187.

[4] Sections 1111–18 of the Medicare Prescription Drug Act, Pub. L. No. 108-173.

[5] Pub. L. No. 108-10 and Pub. L. No. 108-82.

[6] H. Rep. No. 108-8, at 4 (2003).

[7] 15 U.S.C. §§ 4301–05.

should apply to such activities. Further, the bill would limit recovery to single damages where the nature and scope of the organization's activities have been disclosed in advance to federal antitrust enforcement agencies.

Second, H.R. 1086 would increase the maximum statutory criminal penalties for violations of Sections 1, 2, and 3 of the Sherman Act.[8] The maximum statutory fine for corporations would be increased tenfold, from $10 million to $100 million; the maximum fine for individuals would be increased from $350,000 to $1 million; and the maximum jail sentence would be increased from three to ten years.

Third, the bill would encourage participation in the Justice Department's criminal corporate leniency program by limiting the civil damages liability of corporations that take part in the program in subsequent private damages actions under Sections 1 or 3 of the Sherman Act or "any similar State law." Under H.R. 1086, participants in the leniency program would be liable only for single damages and only with respect to the sales of their own goods or services. De-trebling would be available only to corporations found by a court to have provided a "full account" of relevant facts and otherwise "provided satisfactory cooperation" to private plaintiffs. The de-trebling provisions wold cease to have effect after five years.

Finally, H.R. 1086 would amend the Tunney Act to mandate a more substantive and searching judicial review of proposed Justice Department consent decrees.[9] Specifically, the bill would require reviewing courts to make an "independent" determination that the proposed settlement is in the public interest, following a judicial finding that there is a "reasonable belief, based on substantial evidence and reasoned analysis, to support the United States' conclusion that the consent judgment is in the public interest."[10]

H.R. 1086 may be close to enactment by Congress. Having been approved by the Senate Judiciary Committee, it now awaits action by the full Senate. If approved by the Senate, it would go directly to a House-Senate Conference Committee. This is because a slimmer version of the bill (containing only the provisions reducing antitrust exposures for standards development organizations) has already passed the House.

The provisions of H.R. 1086 raise a host of significant questions. First, are the provisions reducing antitrust exposures for standards development organizations really necessary? Could they even be counterproductive? Legitimate standards-setting activities are already governed by the rule of reason, and most such conduct is considered pro-competitive and perfectly lawful. Might Congressional consideration of H.R. 1086 therefore create a new source of uncertainty about the proper standards for analysis of standards-setting activities and chill legitimate behavior?[11] In light of questions such as these, the ABA Section of Antitrust Law concluded in a formal Report to Congress that "the legislative record to date does not establish a clear need for the proposed legislation."[12]

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[8] 15 U.S.C. §§ 1–3.

[9] See Antitrust Procedures and Penalties Act of 1974 (Tunney Act), 15 U.S.C. §§ 16(b)–(h).

[10] *See* § 221 of H.R. 1086. Currently, courts look only to determine whether the proposed decree is "within the reaches of the public interest." *See, e.g.*, United States v. Microsoft Corp., 56 F.3d 1448, 1457–58 (D.C. Cir. 1995).

[11] Note that this uncertainty could still remain even if the legislation were enacted because, by its terms, the legislation only protects the activities of "standards development organizations." The liability of *other* organizations and *other* individuals who participate in the standards-setting process would continue to be governed by current (now less certain) law.

[12] *See* American Bar Association, Section of Antitrust Law, Report and Recommendation on H.R. 1086, Standards Development Organization Advancement Act (Nov. 2003), *available at* http://www.abanet.org/antitrust/comments/ncrpa.pdf.

How much added deterrence for cartel conduct is really needed, in light of the current, multi-layered system for civil damages remedies in the United States?

The provisions of H.R. 1086 that would alter the penalties for cartel conduct raise other fundamental issues, including issues about the proper deterrence for cartel conduct. Are increases in criminal penalties fair in light of the uncertain scope of criminal liability under the Sherman Act? Is an increase in the maximum statutory corporate fine needed in light of the Justice Department's success in negotiating plea agreements with even greater fines, based on the "twice-the-gain/loss" provisions of 18 U.S.C. § 3571(d)? Would greater jail sentences for individuals contribute materially to deterrence? Could greater jail sentences discourage foreign participants in international cartels from submitting voluntarily to the jurisdiction of U.S. courts?

More fundamentally, how much added deterrence for cartel conduct is really needed, in light of the current, multi-layered system for civil damages remedies in the United States, consisting of private treble damages class actions and opt-out cases in federal courts; indirect purchaser actions in state courts; and damages and penalties actions by state attorneys general and foreign antitrust enforcement agencies? Could proposed increases in criminal penalties affect, or even threaten continued international cooperation in cartel enforcement? And are greater incentives for cooperation with enforcement officials necessary in light of the success of the current amnesty program?

Finally, the proposed Tunney Act amendments create further controversy by presenting separation of powers issues and calling into question the Justice Department's ability to settle civil antitrust cases. The Department's ability to settle cases with consent decrees is an important part of the enforcement process because it allows the Department to avoid costly trials and frees resources for additional investigations and cases. This is particularly important in merger cases where frequently only a small part of the merger raises antitrust concerns, and the parties go into the process knowing certain assets must be divested under court supervision. Indeed, in enacting the Tunney Act, Congress recognized that the consent process is a "legitimate and integral part of antitrust enforcement" and "of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere." [13]

By requiring a more extensive, substantive judicial review of proposed settlements, the proposed Tunney Act amendments may create additional uncertainty about whether a settlement will be finalized, discouraging the parties from entering into a tentative settlement in the first place. Of particular concern is the requirement that the court's public interest determination must be based on "substantial evidence, " which could be read to impose a new, and potentially burdensome requirement that the Justice Department develop and present an evidentiary record to support the settlement.

Significantly, while Assistant Attorney General R. Hewitt Pate has supported an increase in the maximum jail sentence for antitrust offenses to ten years, and has encouraged consideration of maximum corporate fines and leniency de-trebling, the Bush Administration has not yet taken a formal position on any of the provisions of H.R. 1086. At the same time, the cartel penalty and Tunney Act provisions of H.R. 1086 have not been the subject of hearings or substantial debate in Congress. For these reasons, and because so many fundamental questions remain open concerning these proposals, many observers, including the U.S. Chamber of Commerce, have called for Congressional hearings before the legislation advances further in the process.

[13] S. Rep. No. 93-298, at 3, 5 (1973).

Other Pending Measures

A host of other important bills are pending that may be of interest to the antitrust bar. In some cases, these measures are awaiting final floor action and possible enactment.

The operations of the previously authorized Antitrust Modernization Commission may finally be funded, for example, if Congress acts on omnibus appropriations legislation for fiscal year 2004. That legislation also contains a rider that would partially reverse the Federal Communications Commission's relaxation of media ownership restrictions in 2003.

Legislation approved by the House and Senate Commerce Committees (H.R. 3143 and S. 1234) would enhance the FTC's ability to work with its foreign counterparts to investigate and prosecute cross-border fraud. S. 1234 would also reauthorize the FTC for the next three years. And with a recent bipartisan agreement on a significant over-haul of the rules governing antitrust (and other) class actions, this legislation may be considered by the Senate and enacted in this session (H.R. 1115 and S.1751).

It is difficult to predict whether the pace for Congressional consideration of significant antitrust and consumer protection legislation will continue in 2004, in light of the presidential election and given the many other challenges faced by the United States and its leaders. Nevertheless, the prospects for further legislative activity are clearly sufficient to warrant continued attention by the antitrust bar. Indeed, given the technical nature of many of the issues before Congress in this area, antitrust practitioners and their clients may wish to offer their views about pending proposals. Proactive participation in the process may be well worth the time and effort, given the importance of the issues being considered. ●

Brown Bag Program

On-Line Antitrust Compliance Training: The ABCs and the XYZs

An ABA Section of Antitrust Law "Brown Bag" Conference Call, July 10, 2003, Sponsored by the Corporate Counseling Committee

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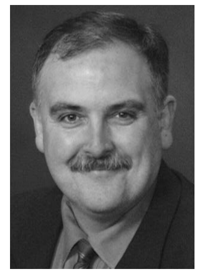

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BRIAN HENRY: Good Afternoon. I am Brian Henry, Senior Competition Counsel at The Coca-Cola Company in Atlanta and Co-Chair of the Corporate Counseling Committee. Along with the co-moderator of this program, Paula Render, who is a member of the Antitrust and Trade Regulation department of Bell, Boyd & Lloyd in Chicago, we welcome you to "On-line Antitrust Compliance Training: the ABCs and the XYZs."

You may be wondering why we selected that title for this program. Those of you who have had experience with on-line compliance programs already know the answer. For those of you who do not, or have not had experience with on-line training, you will know after listening to our program. Implementing an on-line compliance training program requires the consideration and resolution of hundreds of issues and the crossing of a lot of t's and dotting of a lot of i's. Hence, "The ABCs and the XYZs."

While the training modules that employees see on their computer screens may be simple to navigate and appear to operate flawlessly, there is a significant amount of groundwork that must be done prior to the first employee's completion of any course. Having been a member of an on-line training task force here at The Coca-Cola Company over the past year, I can report first hand that this is one of those areas where, when you are starting out, "you don't know what you don't know." Thus, the purpose of our program today is to introduce you to on-line compliance training and to raise and discuss some of the more significant issues that you will have to consider if your company proposes going down the on-line path. As you are about to hear, the issues to be considered go far beyond teaching antitrust law.

PAULA RENDER: Our four speakers have very good and somewhat different expertise in on-line antitrust compliance training areas. Our first speaker is Theodore L. Banks, Associate General Counsel at Kraft Foods. Ted's group is responsible for antitrust, merger and acquisitions, and compliance programs, as well as other corporate matters and litigation. To give you an idea of what that means: he successfully defended New York's challenge to the Kraft acquisition of Nabisco in a fully litigated merger case. In the area of compliance, Ted has been on the leading edge of technology utilization by corporate law departments. He will be speaking today about the educational principles that are the basis for a successful on-line compliance training program and about the benefits of in-house programs versus off-the-shelf programs.

Then we are going to turn the floor over to Kirk Jordan. Kirk is a founder and Vice President of Integrity Interactive Corporation. Kirk is a leading legal authority on corporate ethics and compliance. He has written extensively on compliance issues and has been quoted in the *Wall Street Journal*, among a number of other prestigious publications. Kirk is going to speak on the Integrity Interactive on-line training program and get us familiar with what Integrity Interactive does by walking us through one of his on-line training programs.

Next up is Willis Moore, a Principal and Vice President of WeComply. WeComply is a leading on-line compliance training provider. Willis has worked with Fortune 100 companies as well as small high-tech companies. He will talk about the difference between the needs of an enterprise-wide solution versus a single program for a single location. He will familiarize us with the WeComply programs and he will give us some tips on selecting a compliance training partner.

Lastly, Sherry Greer of Olin Corporation will talk to us about implementation issues and critical success factors. Sherry started with Olin as a consultant in 1998 and has worked with Olin's approximately 6,200 employees domestically and abroad to implement their compliance education programs. She supports the Vice President of Business Ethics and Integrity at Olin in developing company-wide ethics programs.

TED BANKS: I would like to talk about the educational principles that apply when doing a compliance program, the computer implementation tools that are available to you, and how to determine whether to develop a custom course or buy one off-the-shelf.

We want to get people's attitudes or values changed, and we want to give them substantive or cognitive information about a subject.

—Ted Banks

To successfully develop an effective compliance program you need to start by understanding how adults learn what they learn. Most attorneys approach an antitrust compliance program by assuming that it will be sufficient merely to stand up and explain (for example) the Sherman Act. Unfortunately, many people don't learn from that. Even if the information delivered in a boring speech is important, the boring aspect of the speech will outweigh the importance, and the audience will tune out. So, you must concentrate not only on the substance of what you are saying, but how you say it.

We can use technology to make the communication of compliance information more effective—if we do it right. There are several different things we want to accomplish in a compliance program: we want to get people's attitudes or values changed, and we want to give them substantive or cognitive information about a subject. They need to know about the policies and procedures of the company, how to respond in certain situations, where we go for information, and how to communicate with others in the company. So, in addition to the substance of a compliance area, the employee needs to know what to do in response to a given fact situation and needs to have the attitude so that he or she will automatically want to do the right thing. Very often, we say, "We don't want to turn you into a lawyer; we just want you to recognize an issue and know where to go with a question."

The compliance training program should generate intuitive responses—getting people to react in a certain way that is in accordance with what we think are proper compliance rules. One of the things that makes this whole area challenging is we know that people learn in different ways. Some people just want to read something: you hand them a book or you give them a computer screen and they read it and they get it. But my experience indicates that most people don't work that way. You can't just give someone information, expect them to assimilate it immediately, and then be able to regurgitate it at the proper time. Most people learn by becoming involved in a situation, by being forced to think about something where they have to engage their mind and make choices. This can be done by a live teacher challenging a class with questions—forcing them to respond. It also can be done by videotape, where a simulation of a situation that is analogous to the person's job is presented. The audience then can connect with the scenario and associate themselves with what they are seeing on a screen. And it can be also done with a computer, where people are presented with a situation that implicates a compliance subject. Once the scenario is assimilated, the user must make a choice: What is the proper course of action?

The most effective computer-based training programs are based on simulation exercises. By putting the employee into a scenario where he or she must make a choice, the training, optimally, will be able to convey both the substantive information about antitrust compliance and the attitudinal or value information about why it is a good thing to do the right thing in a given situation. Participants are forced to make a choice, but they can do so in a safe venue because it is a simulation. The most obvious illustration is to think about how an airline pilot is trained: on a flight simulator. The student pilots can crash many, many times without hurting themselves or any passengers. From each one of those crashes they learn how to avoid a problem or respond in a given situation. And, to a certain extent, any sort of simulation, whether it is in a classroom or on a computer, does the same thing. People learn to make the right choices by first making the wrong choices.

It is also important to remember that a compliance message should be reinforced in multiple venues. Think of it as a holistic approach. The same message should come to the employee from a variety of sources. Don't just rely on computer-based training programs—no matter how state of the art. Consider the other tools you have. You can send e-mail messages periodically with little reminders or updates. A printed newsletter, or articles in a company magazine, can be very helpful. Some companies have set up telephone chats with groups of employees to talk about issues and to enable them to get live answers to their compliance questions. There are computer programs to facilitate having information on a screen while a live discussion takes place via conference call. And of course there is the traditional live appearance at a company meeting where you still can deliver an effective training program. But all of these things are most effective when they are used together and reinforce one another.

Consider doing some awareness testing before you embark on any sort of program. Before buying or building a program, consider what you actually need. Is a computer-based training program something that is common in the company? Do you have the technology available to be able to handle it? Are employees accustomed to this type of training? Both on-line surveys and live focus groups can be used to determine employee preferences and capabilities. You will get a great deal of useful information in these interactive sessions. Plus, people like being asked for their opinion. The exercise can help build the relationship with the law department, as clients know that what they think counts.

Computer-based training can be delivered in a variety of ways. It can be done through a network server to which everyone is connected. Or, it can be recorded on a CD-ROM or DVD that is mailed out to people who may not be on a network but have a computer. It could be done through the Internet, either through the company or through an outside vendor. Note that computer-based training is sometimes referred to as CBT. If it is delivered through the Internet it may be referred to as WBT (Web-based training).

The other abbreviation to keep in mind is LMS, which stands for Learning Management System. You may have heard about these from your human resources department. This is an integration of a computer system that ties training needs and training accomplishments to a human resources or personnel system. These are incredibly powerful tools in the area of compliance because by using LMS you can align your training requirements with individual employees, based on their jobs. For example, you don't really need to give antitrust training to a plant maintenance supervisor, but you probably should give it to a sales person. By knowing what the person's job is, the computer can direct the training appropriately. The system will also track who has completed the training.

These are not simple systems; for companies to adopt them usually represents a major investment. If your company has installed one, or is thinking of installing one, you should work closely with your HR department. Make sure that the system is set up not just to handle training for how to be a better salesman, but also to address the specific compliance requirements tied to each job in the company. In terms of the Sentencing Guidelines, a LMS can be an effective way to demonstrate to a judge that you have delivered the right compliance message to the right people.

The other computer tool that can be an incredibly powerful element of your compliance program is the computer portal. There are a variety of implementations of this tool, but I think of it as control of the screen that users see when they first sign on to the computer. The portal has the ability to direct them to specific information. In the compliance area, you should consider having a section of every employee's first screen devoted to "My Compliance Information," or something similar. The computer knows the identity of each employee who is logged on. Its directory can also have information about the person's job responsibilities. This can hit a database that pulls up on-screen links to information about key compliance areas for that employee.

Should you purchase a preexisting compliance program or build one from scratch? I'd approach this with realistic expectations. One should not expect perfection from an off-the-shelf program, but if you want to design the perfect program for the unique requirements of your company, it will take a fair amount of time and a considerable amount of money. It might be a more prudent course to use a preexisting course that hits 80 percent of your issues, and supplement with other kinds of training. If your company does not have an LMS, you may be able to provide the information to an outside vendor of compliance courses, who will track training on their server.

On the other hand, you may want to do it yourself. If so, there are a lot of consultants out there that can give you a great customized training program. If you have a comprehensive PowerPoint presentation, or an internal compliance manual, you have a head start on telling the consultant what you need to cover. The consultant can work with you to develop illustrative scenarios which will resonate with your employees.

For each company it is an individual decision—there is no one general rule. But there are a lot of resources out there to help you deliver an effective compliance program to your clients.

KIRK JORDAN: I am one of the founders of Integrity Interactive Corporation, and a corporate ethics and compliance lawyer by experience and training. Integrity Interactive provides Web-based corporate ethics and compliance training. Currently, we have about 150 client companies around the world. The Integrity Interactive team includes Joe Murphy and Win Swenson. Joe is widely regarded as the dean of corporate compliance, and Win Swenson headed up the task force that produced the 1991 organizational sentencing guidelines, which many regard as the foundation of the modern corporate ethics and compliance movement.

Integrity Interactive's mission is to help our clients to reduce substantially the risk of compliance and ethics failure by giving employees training based on their risk profiles: that is, their job activities and responsibilities. At Integrity, we analyze each piece of our service against two tests. First, how will the training affect employee behavior? Our goal is to raise employee awareness of compliance risk and to drive employees to do the right thing, namely, ask questions of the internal company experts. The second test is: does the compliance training create a record of due diligence? Does it demonstrate that your company is a good corporate citizen ? Does it create evidence that you could hold up to a prosecutor, regulator, or a plaintiff's attorney to show the overall effectiveness of your compliance program?

We have found that some employees are "riskier" than others.

—Kirk Jordan

We have found that some employees are "riskier" than others. Now, that is not to say that all employees don't need some compliance and ethics training. Many of our clients are rolling out, for example, code of conduct training across virtually their entire employee population. But when we get into the compliance areas of antitrust, insider trading, and harassment we find certain employees who present higher risk than others, by virtue of their job responsibilities and activities. Examples are sales executives, management employees, and R&D employees.

Today, I'm going to put you in the shoes of a sales executive whose risk profile indicates that she should have antitrust training. I'll be showing you screens from one of our courses called "Antitrust—Contact with Competitors," which covers that part of the U.S. antitrust laws dealing with collusive conduct.

But first, how did our hypothetical salesperson arrive at this antitrust course? Well, prior to this point, we would have worked with the client company and determined that this course was appropriate for the employee. Then the salesperson would be invited to the course via an e-mail that appeared to come from a boss or the company's general counsel; that is, someone with clout in the organization. (Actually, Integrity Interactive handles administration of these e-mails). If necessary, further e-mails will remind, even coax the employee to take the course. This enrollment e-mail contains a unique user ID and an active link to the login page, which in turn leads to the company's home page. The home page is both an ethics resource center and a portal to the training itself.

The Integrity system recognizes which employee has logged in, and sends our sales executive to her company home page and the training course she needs: in this case, "Antitrust—Contact with Competitors." We have found that employees learn best when they are told a story which illustrates in a real and practical way what type of behavior we are concerned about. This is a story-based course, involving a sales person named Ryan at the fictional company, Globeteck Industries. Ryan has just closed a very large deal with a customer, and Ryan's boss has called him to his office. Ryan thinks he is going to get a big "Congratulations," but in fact something else has happened that Ryan's boss wants to talk to him about. And now we're going to hear the meeting between Ryan and his boss:

"When Ryan arrived for the meeting with his boss Michael, it was immediately clear that something was very wrong. The Globeteck Corporate Counsel, Dan Levinger, was sitting stone-faced in the corner of the room."

Michael: "You've been one of our best sales managers, Ryan. But I don't have any choice."

Ryan: "Antitrust? Price-fixing? But I'm just a sales guy . . ."

Michael: "You're not just a sales guy, Ryan. You're the guy who may have ruined our company. Because of what you did the Feds came in here and seized all the files about our business with Zyco, your big client Zyco—and they've started a criminal case against us. They're coming after you, too Ryan."

Ryan: "I'll fix it. I can explain."

Michael: "You're not fixing anything, Ryan. We've already canceled your password and your e-mail account. Security is on their way up to escort you out right now. You can stop by your desk to get any of your personal belongings. And by the way, Dan here says that you and the company are going to be on opposite sides of this one. So I'd say you better get yourself a real good lawyer. I've been called before the board tonight . . ."

Ryan: "What am I going to tell Kim? What am I going to tell the kids? A lawyer, how am I going to pay for a lawyer?"

Michael: ". . . and on top of that we'll have the shareholder's suits . . . the story will be all over the papers . . ."

Ryan: "How am I going to get another job after this? They're not going to put me in jail—I know it. They will probably just fine me. But how am I going to pay a fine that large?"

Michael: "Can you imagine what this is going to do to us as a company?"

Ryan: "What was I thinking?"

So, after that powerful introduction, the employee will move to the course menu, where she will go back in time to see what Ryan did wrong to get himself and his company into such a jam. And if you look at the next slide (the Antitrust Course Menu page) you'll see that we've taken this antitrust scenario of "Contact with Competitors" and divided it into six lessons. An employee must complete all six lessons before he or she has access to the final test. An employee must "test to 100%" in order to get credit for the course.

The next slide, "Competitive Issues" is a course lesson screen. Here we have the black letter text that summarizes the important legal principles under this topic. You will see a couple of highlighted words: we call them "side notes." Side notes give more detailed information about the term or the subject area. You will also see a graphic towards the top of the screen that links to a number of controls and access to the library. Each course has its own library, which includes a course handbook, Dos and Don'ts, and so on. Company-specific information can be added to the library.

The entire course takes about 35–40 minutes for an employee to complete, and an employee can proceed through the course at his or her own pace. An employee gets those red checkmarks that you see as she goes through; they act as bookmarks so that the employee can leave the course and come back later to finish it.

When the employee finishes the last test, that is recorded in our databases as a successful course completion, and the employee will receive a congratulatory e-mail. That e-mail can direct the employee to an internal company resource—for example, the antitrust lawyer—in the event the employee has follow-up questions or issues. Integrity Interactive's courses are designed to raise employee awareness of legal and ethical issues in the workplace—and encourage employees to ask questions and report ethical violations or illegal behavior internally.

WILLIS MOORE: WeComply is an on-line compliance training provider based in New York. We've been selected as an Alliance Partner by the Corporate Counsel Association of America (ACC), which is the national bar association for in-house counsel. We are also members of the NASDAQ™ Corporate Services Network, a network of service providers selected by NASDAQ for NASDAQ-listed companies for, among other things, compliance training services. What I would like to do today is to take you through what I call Ten Tips for selecting an on-line training partner. Assuming that you have made the decision to go outside your company rather than creating the training tools yourself, here's what you should consider.

Ten Tips for Selecting an On-line Compliance Training Provider

1. Demand quality content. When I say quality content I not only mean content that has been vetted by topnotch legal professionals, but also by experienced learning developers. Remember that this content must appeal to a very diverse audience. You want to avoid training programs that smack of legalese. At WeComply, we have a team of e-learning developers who are also attorneys. They will take drafts from our attorney writers and editors and turn them into something that is digestible by a broad cross section of a corporation.

2. Avoid one-size-fits-none content. Corporate cultures vary dramatically; an off-the-shelf training program cannot meet every corporation's needs. Most vendors today are claiming to offer customizability, but you really need to press them on that point. At WeComply we provide 100 percent customizability, which means if Ted wanted to include a reference to the "Packers And Stockyards Act" in his training program, our system would allow him to do that. We provide an on-line customization center that allows you to edit our training content as freely as you would a legal form product.

3. Test accessibility. The real value to an on-line training program is the ability to cast a wide net across your entire employee population. We have one client, for example, who is training employees in forty-three different countries. If you're considering training programs that use streaming video, streaming audio, animation, or other special effects, talk to your IT professionals to make sure that all your employees can accommodate them. The truth is that many companies, even some of the largest telecommunication and technology manufacturers, do not have the bandwidth to deliver elaborate types of interactive programs to their employees. At WeComply, we take a very simple no-download, no plug-ins approach. Any computer with a Web browser and Internet access will be able to use WeComply training programs.

4. Flexibility. There are hundreds of learning management systems on the market right now. There will be a great deal of consolidation in the e-learning industry over the next couple of years. Companies are really wrestling with which solution to choose. You can play it safe when you're shopping for an on-line training vendor by selecting a vendor that designs materials to AICC and SCORM specifications, the industry standards for e-learning interactivity. Training content built to AICC and SCORM specifications will inter-operate with most learning management systems. Selecting an on-line training vendor that designs to AICC and SCORM specifications will ensure that you're not stuck with a solution that won't work when or if your company ultimately decides to purchase and implement a learning management system.

5. Test drive the tracking tools. In addition to providing a learning environment for your employees, what you're doing is creating an electronic paper trail showing who in your organization has

In addition to providing a learning environment . . . you're creating an electronic paper trail . . . a litigation support tool.

—Willis Moore

been trained. This is what you're paying for: a litigation support tool. Ask your partner to let you use the tracking system and to show you in detail how it works. Make sure that the interfaces are user friendly so that whoever you select as the administrator of the training program will be able to access it and use it without a great deal of training. Make sure it's available 24/7. Most larger companies now are using HRIS systems (Human Resource Information Systems), such as PeopleSoft, SAP, or ADP. Make sure that the tracking system your vendor is providing will generate reports that can be imported or read by your HRIS system. As in the case of learning management systems, even if your company doesn't have an HRIS system now, you still want to purchase your tools from a vendor who is forward-thinking and can provide those tools if your company decides to use an HRIS system.

6. Increase completion rates. Your goal in rolling out any on-line training program, live or otherwise, is 100 percent completion. You want all the targeted folks to line up and participate and to get as much out of the program as possible. Make sure that the partner you're considering has some tools to help you achieve those results. We, like Integrity, use automated e-mail assignment and reminders. They're a very effective way of encouraging your employees to complete assignments and to make sure you have solid training statistics.

7. Ask for references. When you're talking to a vendor, ask about their current customers. Ask to speak to two or three of their customers who are similar in size and business focus (retail, manufacturing, etc.) to your company.

8. Beware of partners that specialize. This is just a dollar and cents issue to me. There are a number of vendors who specialize in only employment law topics or specialize in only the Health Insurance Portability and Accountability Act. I think going with one of those solutions is limiting. You should look for vendors who have a substantial library of training programs so you're not limited in the topics you may select and your employees will not be required to learn multiple platforms from multiple providers or juggle different passwords.

Additionally, you may qualify for deeper discounts or higher volume usage with many vendors. While your concern may be with antitrust, there may be other attorneys in your law department or other departments within the organization who have concerns over privacy, or the HIPAA, for example. You may be able to share the cost or spread it out across the organization, rather than shouldering the full burden yourself.

9. Think about security. You want to make sure that your partner's privacy policy is out there and available. Make sure you review it. Make sure your partner is certified by Verisign™ and Trust-e™, the industry standards in Internet security. If you're training employees based in Europe, you want to make sure that your vendor is a member of the U.S. Commerce Department's Safe Harbor Program for compliance with EU Data Protection Directive.

10. Make it fun. Select a partner that makes the training entertaining. Look for games, pop quizzes, news stories, scenarios and other elements that enhance the learner's experience. If the training is a pleasant experience, word of mouth will enhance your completion rate. At WeComply our programs all end with scenario-based assessments that are wrapped in an on-line game. The games have been a big hit with employees.

In closing, I'd like to invite you all to be our guest. If you'd like to sample the WeComply approach to on-line training or if you didn't receive the materials that accompanied this presentation, please feel free to send me an e-mail message at wmoore@wecomply.com and I will send you login credentials and a copy of the materials. We also publish a quarterly on-line newsletter called *Compliance Training Quarterly*. You may find it at http://www3.wecomply.com/newsletter2.

SHERRY GREER: I work with Olin Corporation, reporting to the Chief Ethics Officer of the company. My challenge at Olin has been to merge the legal compliance components of our company education programs with our ethics program. I am not a lawyer, which may in some cases actually be an advantage. As you go forward, I would encourage you to include some non-attorneys in the selection process to assure that the content you are purchasing or developing is as user friendly as possible.

Olin began the process of selecting a training program in 2001 knowing that we would purchase off-the-shelf courseware and customize it. We do not have a large training and development or IT staff available so we knew that off-the-shelf would be the right choice for our company.

In selecting a vendor we knew we wanted a broad-based, awareness-generating program, rather than an in-depth program. So when you look at your own needs, you should clearly identify your objectives as to the scope of the courseware.

As you begin the selection process, I would also advise you to be honest with yourself. Look at your company's resources. You have individuals in your company who will say they can develop on-line, multi-media training, but you need to see what they've done. We have three divisions in our company. One of them is ahead of the curve in terms of training technology. They have a learning management system and have developed on-line courses, but if you look for quality in those courses, it's not there. The material tends to be boring and the delivery is not terribly engaging. We have two other divisions that are way behind the curve. They don't have a learning management system and would not have the resources to develop in-house multimedia courseware.

In evaluating a vendor's courseware, I'd like to add a couple of things that have were not touched on before. Some vendors will provide huge amounts of information in their courses. They may also take a more "legalistic" look at the topics. Or maybe they'll provide a lot of courses on one topic. You really need to understand upfront whether you want content-heavy courseware that will take multiple sessions to complete. Personally, I think there is a limit to the amount of information that employees can absorb in an on-line training course.

We talked earlier about whether your vendor is going to host your training. Olin knew that would be the case. We did not want to expend IT resources hosting or keeping the courseware on our computers. As I said, we have a learning management system with one division, but not with our other divisions. So we needed the vendor to provide us the hosting services as well as the targeted e-mail support and tracking information.

On the subject of courseware and whether or not it's engaging, I think it's important to remember that we are all consumers of the media. We watch television. We play games on the computer. Training is no different. It needs to keep people interested. If they're not interested, they're not going to pay attention. They're not going to learn and your money is not going to be well spent.

I'm going to move on to a topic that hasn't been discussed, but was important for us at Olin. We had to establish upfront whether courses would be mandatory or optional. We chose the mandatory approach. Every course we offer is required of all our salaried employees. Our required curriculum includes a core group of courses. There are currently eight courses on that list. Everything from code of conduct, financial integrity, insider trading, harassment, records management, intellectual property, etc. These are courses that all salaried employees are required to take, and they are introduced sequentially approximately every sixty days. Certain "high risk" employees also take additional courses, including antitrust, FCPA, export controls, and government procurement. All of these courses are targeted to specific individuals using the targeting capabilities of our vendor's learning management system.

Another requirement we established upfront is that our employees must pass the final quiz with a score of 100 percent. I think most training vendors provide this option. If you miss a couple of questions, you have the opportunity to go back and review, get the right answers before you test out to 100 percent and are given a certificate of completion at the end of the course.

When we introduced our first course, we had an 80 percent completion rate after about two weeks. I think it pretty much astounded our supplier. I will tell you that I honestly believe the reason for our high level of completion is that the courses are mandatory and, most importantly, the welcome e-mail in the very first course came from our CEO. In fact, the welcome e-mails for all of our courses come from the CEO and that is a tremendous incentive for employees to finish their courses on a timely basis. To date, after five course introductions, our completion rates still remain at the 80 percent level after the first two weeks.

Another aspect of implementation is the need to plan for enforcement. I think most suppliers will provide you with an opportunity to send an automatic e-mail to remind employees to complete a course. With our vendor, the capability also exists to copy the supervisor of the individual who may be lagging behind.

Before you launch a training program you will need to do an employee risk assessment to identify which employees get which courses. We decided to target our employees individually. By that, I mean we had each salaried employee reviewed by his supervisor using a questionnaire. The questionnaire helped the supervisor determine the kinds of activities the employee was engaged in and then the supervisor assigned courses based on that information. A simpler way to assess risk would be to look at categories of employees, such as sales employees or R&D employees, for example. We took the more rigorous approach, and while it was initially time consuming, it has worked well for us.

If you purchase off-the-shelf courseware, it's very important to customize it.

—Sherry Greer

As the other speakers mentioned, if you purchase off-the-shelf courseware, it's very important to customize it. We have used actual case histories because we think employees can learn from other employee's mistakes. We also provide company-specific Q&A's in the courses. We hyperlink to relevant policies and procedures. Occasionally, we use audio recordings of our key managers within the course. Audio files are really quite small, and you can deliver them in a timely way over the Internet to employees who have a browser that has a flash plug-in. We have never considered video because the infrastructure just doesn't exist for us to deliver it smoothly. But the use of audio files has been very successful for Olin.

The other important thing we do in our courses is to always provide a link to our compliance hotline. In the latest course we're introducing, which is our code of conduct course, we do a great deal of education about who to contact if you have a problem or question.

The last component of course customization is on-line certification. It has been a remarkable administrative timesaver. At the end of several courses we ask our employees to certify that they have read a certain policy, or in the case of our new course on the code of conduct, that they have read our code of conduct. If they have, they click and go on to the certification page. This page states that you have read and you understand the policy or code and you agree to abide by it. All of that is recorded and archived and it's so much easier and quicker than having written, signed verifications coming in from employees.

One final note . . . be sure to pilot test. I don't mean pilot test before you buy, but once you've selected a supplier, select a sample of employees from different locations who have desktops and laptops and let them actually take a course. This will identify any technical issues with browsers or laptop users and you'll learn about those in time to equip your helpdesk to work with any problems during your rollout.

In closing, I would say the most important success factor is upfront management support. Try to make the compliance requirement mandatory, at least for high-risk employees. Choose a vendor who provides a learning management system that allows you to push these courses out on a predetermined schedule with automatic reminders. You will get really solid completion rates. And make sure management continues to support it. Our CEO takes every course, sometimes faster than many other employees. We believe this commitment from top management is really important.

BRIAN HENRY: Sherry, you've told me about the incredible success rate that Olin had in implementing the program. I think it would be very helpful to share some of the statistics and describe how quickly Olin employees responded to invitations to take the courses.

SHERRY GREER: From the very first course, the "welcome to compliance training" e-mail came from our CEO, who asked that employees complete the course in two weeks. You have to ask people to do what you want them to do. You can't expect them to read your mind. When I look across the five courses we have launched to date and the completion rates, they average about 80 percent for each course. We are now at 98 or 99 percent completion rate for all but the very last course. We will never get to 100 percent because we have new employees coming in, employees on leave, and various reasons why employees haven't taken a course. But we're very happy with 99 and 96 percent.

BRIAN HENRY: How do you keep on-line programs up-to-date? How much of a challenge is that? Do most vendors do that as a service to the companies that have purchased their programs?

WILLIS MOORE: Updating is part of a subscription at WeComply. There's no additional charge for them. We have attorney authors and editors who routinely monitor changes in the law. We notify our subscribers about a change that impacts their training program. One of the things we really try to focus on at WeComply is empowering the attorneys or compliance officers who are charged with making compliance decisions, giving them the opportunity to determine whether or not a change in the law will affect their business and whether or not they want to include it.

SHERRY GREER: This is software, and it's very easy to update. For example, as a result of the recent Sarbanes-Oxley legislation, at least three different training suppliers including our current supplier have developed financial integrity courses and enhanced code of conduct courses. In my experience over the last year and a half I have found that anything that was important in the marketplace has found its way into a course.

WILLIS MOORE: Absolutely, and one of the great things about software is that it allows you to cut and paste learning objects from one program to another. We tend to think in corporate policies rather than in antitrust law or competition law, and we give our customers the option of taking elements from one training program and combining them with elements of another training program to create something that's really useful for them.

PAULA RENDER: Several panelists have talked about conveying the message in a variety of different forms. Have you found that there are key components that your whole compliance training program that you rely on in addition to on-line training? Are there particular kinds of problem situations when you feel that one kind of training is better than another? Can you elaborate a little on that?

TED BANKS: There are combinations of things that depend on the circumstances. One of the dilemmas for any corporation is that if it hasn't had a recent disaster, it's much harder to convince people to pay attention. We've literally had situations where a number of employees have called up the chief compliance officer and said: "I don't see why I should have to take this course since we don't have any problems." This complacency is very frustrating. So what we try to do is send the message in a variety of ways. We have, for example, weekly e-mail messages that look like a newsletter from the Chairman. Just last week, for example, her message was why the company's success was tied to compliance, particularly in the environmental area dealing with sustainable operations. That was triggered by our thinking that we've had no disaster to point to, so we'll just keep hammering on the message that success of the company is tied to doing the right thing. In individual training programs, we also sell the message that career success is tied to developing expertise in compliance areas related to your job and therefore this is one of the things you need to master if you expect to get ahead. In our focus groups, we found that this message resonated particularly strongly. When you appeal to self-interest, the barriers fall away and employees think: "Aha, I will be evaluated on this and if I screw up I know it's a real derailer for my career." This is a good thing!

PAULA RENDER: If there was a compliance problem out there, do you feel that it would come to your attention through on-line training as effectively as it would through other kinds of compliance training?

TED BANKS: We've built a reporting tool into one of our courses. As employees go through the training, we say if you have something to disclose on this subject, click here and we'll get back to you. We also have in our intranet sites a one-button click where you can send a question to a lawyer. Our goal is to make it as easy as possible for people to get information or raise questions. What we have found is just like people differ in terms of learning, they differ in how they want to communicate. Some want to pick up the phone, some want to walk into the office and close the door, and others want to send an e-mail. There are always some people who are reluctant to talk and so of course we provide an anonymous telephone hotline. When you want to make it as easy as possible, you provide as many vehicles as possible to get that information.

Using on-line resources gives you the ability to keep records of the fact that you've made that opportunity available, that you've addressed the questions and so on.

BRIAN HENRY: Would somebody talk a little bit about the cost of these programs and the extent to which they're impractical for smaller companies that may not have the resources of a large public company?

WILLIS MOORE: At WeComply, we've designed our pricing to be scalable so that it will appeal to small and large companies. We don't have any requirements on how large an organization must be to use the WeComply materials. Some other vendors will not work with small companies. Our pricing starts at $7,500 per year. From there, the pricing is based on the volume of usage you anticipate. Typically a training program at WeComply is $15 per use—or completed training. The price per use goes down as the volume goes up. We also offer fixed-rate pricing for companies that want to purchase our entire library of training programs. The fixed-rate pricing is based on the number of employees in the organization. Another thing that you want to consider is contractual lengths. Some vendors require a three-year commitment. WeComply usually asks for a one-year commitment. So there are several different pricing options. If I added a Number Eleven to my Ten Tips, flexibility in pricing would be something to look for when you're looking for a vendor.

BRIAN HENRY: Do you find that most of the other companies that provide on-line training programs charge using this kind of per use format or is there a different method?

WILLIS MOORE: I don't want to speak for the other vendors, but I'm aware of another pricing format that's very popular. That's a per seat license, where you pay an amount based on the number of employees in the organization.

SHERRY GREER: My own experience, from some eighteen months ago, is that some vendors were very flexible and some were not. A lot can change in a year and a half as competition has heated up; everyone may be more flexible now. Olin chose to go on a per seat basis with access to the full library and courseware because we planned to utilize thirteen or fourteen courses. That course number may go up as our supplier develops new courses.

WILLIS MOORE: To add to what Sherry just mentioned, you should consider not only how many training programs you will ultimately want but also how soon you will need them. Is it reasonable to think you will roll out fourteen in one year, or will you roll out fourteen over a three-year period? We encourage our clients to be realistic. If e-learning is very new for the organization, it is reasonable to expect a six-course adoption rate in the first year? Does your culture support that type of aggressive schedule? Perhaps you should limit yourself to one or two e-learning programs for the first year. I know that sounds like bad business sense for the vendors, but it's not in the long term: the goal is to make sure the company has a good experience and good completion rates so that they'll come back again and again.

QUESTIONER: I am a competition lawyer in London and we've been rolling out an on-line compliance system to our clients here in Europe. I want to ask the panel whether they have ever experienced the reluctance we've encountered in clients who are not really used to the on-line training approach. In particular, French, Italian, and German clients who regard the big-brother function of on-line training and on-line compliance product as perhaps being too "Anglo-Saxon" for their liking.

WILLIS MOORE: We haven't encountered that, although we have rolled out training programs to 43 different countries in 19 different languages.

SHERRY GREER: I would have to say that we haven't had that problem at Olin either, although we're not in those countries that you mentioned. The reluctance has not been vocalized. Maybe it's there and we don't know it, but our completion rates would indicate it's not a problem.

TED BANKS: In terms of our worldwide rollout of various programs, which is relatively new, what we're seeing is that there is more reaction to some of the components of the courses, rather than the fact of the courses themselves. There are cultural issues. Sharing business information with competitors may be a hard habit to break. Subjects like diversity and sexual harassment may be difficult for people in other countries to understand. In some countries, the works council must be part of the process for reporting wrongdoing. So the issues that we've experienced in our international implementation are cultural more than technological, at least so far.

WILLIS MOORE: We've tried to address some of these issues by bringing in great translation and localization partners who look specifically for these cultural issues, and then before rolling it out to a large population, we test it on a group of folks in the location to make sure that it resonates and is not offensive.

BRIAN HENRY: From an international operations perspective are there any special technology issues that need to be considered?

TED BANKS: Since our training is Internet based, it really goes back to whether the employee's desktop or laptop computer is equipped with a relatively fast network connection. Dial up connections make getting a course, whether it's text or audio, very cumbersome.

WILLIS MOORE: Even some large telecommunications and technology companies face limitations on bandwidth. So we err on the side of technological caution—designing our content in dynamic HTML so that there's interactivity and animation that engages the employees, but does not require a lot of bandwidth. We avoid downloads or software plug-ins that may challenge firewalls. Our programs can be accessed from a dial-up connection as well as a T-1 connection so everyone will have virtually the same experience. That's what you want to aim for.

TED BANKS: Once again you have to consider your target audience. In the antitrust world, we're probably not worried about educating, for example, assembly-line workers in a manufacturing plant who have no computer. But we may have people who are in remote locations where a lot of people work out of their homes with only a dial-up connection. So then we go to the lowest common denominator for the technology. As an alternative, we sometimes will take a course and burn it onto a CD because our corporate standard computer, whether it's a laptop or desktop, has a CD-ROM player and sometimes you can get a little more robust course on the CD than you do on dial-up. In this situation you have to deal with the certification at the end of the course by sending an e-mail message or memo. In areas where we can't use computer-based training we use what we call the workbook (paper) equivalent. ●

Paper Trail: Working Papers and Recent Scholarship

Editors' Note: *In this edition, we offer notes on three new papers, as well as an author's response to a note from the last issue. The first new paper is by Fred McChesney, who critically surveys developments in antitrust over his career as an antitrust scholar. The second paper is a theoretical analysis of the deadweight welfare losses associated with coupon and discount remedies in overcharge class actions. The third paper adds another view to the debate on the usefulness of critical loss analysis. The response is by Alan Meese, who clarifies his usage of the term "price theory" in his article,* Price Theory, Competition, and the Rule of Reason*, 2003* Illinois L. Rev. *77, which we noted in the November 2003 issue.*

Send suggestions for papers to review, or your comments, to Editors William Page: page@law.ufl.edu or John Woodbury: jwoodbury@crai.com.

—William H. Page

Papers and Summaries

Fred S. McChesney, Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=428641

In this paper, McChesney comments on some of the forces at work in the evolution of antitrust law over the past three decades. He characterizes those forces using the metaphors of competition *for* the field of antitrust and competition *within* the field. In the former category, he discusses the competition between theoretical paradigms for dominance as the standard for antitrust decision making, and the competition between the Supreme Court, which had adopted "nonsensical" liability rules, and rebellious lower federal courts, which adopted various stratagems to limit the rules' perverse effects.

In the category of competition *within* the field, McChesney discusses the competition between property rules and antitrust rules, and the competition among antitrust authorities. He notes that the long-recognized tension between antitrust and intellectual property is part of a larger tension between antitrust strictures and collective efforts to clarify or to enforce property rights. Property seeks to maximize welfare in the long run by creating incentives to create wealth even at the expense of higher prices; antitrust seeks to maximize (static or short-term) welfare by increasing output and reducing prices. No one has yet proposed a practical way of quantifying and comparing the two welfare effects in particular cases. McChesney points out, for example, that Easterbrook's famous "filters" aimed at identifying practices most likely to reduce welfare (market power, profit at consumers' expense, etc.) may operate perversely in cases in which the scope of property rights is unclear.

McChesney also considers the costs of having multiple antitrust enforcers, both within the United States and internationally. Following Posner, McChesney is particularly critical of state antitrust enforcement on public choice grounds. He suggests that, because of their unique political incentives, states will either free ride on federal enforcement, as in the *Microsoft* case, or will bring easily-won cases that would not interest federal enforcers. Typical of the latter, he contends, was the suit by states, including New York and Illinois, against Salton, Inc., alleging resale price maintenance on the George Foreman grill. According to McChesney, the case challenged an economically beneficial practice and produced a settlement fund that was not distributed to consumers. He concludes that “suspicion abides that state antitrust enforcement is mostly about politics.”

McChesney also criticizes EU antitrust enforcement on public choice grounds. As a bureaucracy substantially independent of member states, the EU enforcers have an incentive to stake out positions that are more aggressive than those of U.S. enforcers in cases with major international impact, such as *Microsoft* or the GE/Honeywell merger. Mere deference to the United States does not, he argues, give enforcers the power to “control economic resources.”

A. Mitchell Polinsky & Daniel L. Rubinfeld, Remedies for Price Overcharges: The Deadweight Loss of Coupons and Discounts, http://papers.ssrn.com/paper.taf?abstract_id=471001

Polinsky and Rubinfeld examine the effect on economic welfare of coupon and discount remedies, which are commonly used in settlements of price-fixing class actions. A coupon remedy awards overcharged buyers coupons, redeemable for a fixed period, allowing them to purchase the affected good for less than the competitive price. A discount remedy gives all buyers of the affected good a discount for a fixed period. The authors assume that both remedies seek to compensate consumers for both the total overcharge and the deadweight loss in consumer welfare from reduced output during the damage period. Some have criticized these sorts of remedies for giving attorneys for the class a perverse incentive to settle the case on terms that are unfavorable to the class members. Polinsky and Rubinfeld consider the separate objection that, by setting prices temporarily below competitive levels, these remedies may reduce economic welfare. Consumers may purchase more of the good than they would at a competitive price. Such a consequence reduces welfare because consumers value the marginal units (purchased above the competitive output) less than those units’ cost of production.

Discount remedies inevitably reduce welfare to some extent by reducing prices below the competitive level to all buyers, regardless of whether the buyers ever paid an overcharge. But the amount of the welfare loss depends on the magnitude of the discount (and the length of the remedial period). To compensate consumers for the overcharge plus the deadweight loss, in a period comparable to the damage period, the discount will be smaller than the overcharge because the quantity demanded at the discounted price will be higher than the quantity demanded at the overcharge.

Coupons may also reduce welfare, but only if the coupon-holder’s demand is lower during the remedial period than it was during the damage period. If his demand remains high during the remedial period, the coupon holder will use up his coupons on intra-marginal purchases, and purchase only an optimal amount of the good, paying the competitive price for the marginal units. If, however, his demand is lower, the coupon-holder will use the coupons to purchase more than the optimal amount of the good.

Which remedy creates the greater welfare loss depends on a number of factors. The discount applies to all buyers, and is smaller than the overcharge. The coupon only applies to a subset of buyers, but it must be larger than the actual overcharge to allow a full recovery for the class, because the marginal consumers who were deterred from purchasing the good at all by the overcharge do not receive coupons. The critical point to note, however, is that the coupon remedy only generates a welfare loss if the coupon-holder’s demand is lower in the remedy period than it was in the damage period. When there is a high probability that this key condition is met, the coupon remedy is correspondingly more likely to create a higher welfare loss than the discount remedy.

The authors also consider the effect of extending the time in which coupons or discounts can be used. The analysis becomes considerably more complex, but the authors conclude that increasing the number of remedy periods tends to reduce the welfare loss for both types of remedy (though not to zero), and that essentially the same factors determine which remedy is preferable.

In a concluding section the authors note that a cash remedy is preferable to coupons, because it does not distort prices and is no more costly to administer. The discount remedy, however, is less administratively costly than either cash or coupons because it does not require identification of particular recipients.

Malcolm B. Coate and Mark D. Williams, Generalized Critical Loss for Market Definition (October 2003), available on request from mcoate@ftc.gov

As readers of the *Antitrust Source* are aware, there has been recent debate about the usefulness of critical loss analysis for purposes for market definition, much of it stemming from research by the staff of the FTC's Bureau of Economics (O'Brien and Wickelgren, Scheffman and Simons). The Coate/Williams paper joins that debate by exploring the implications of non-constant marginal costs for critical loss analysis. As the authors note, if the marginal costs are rising, then the standard critical loss analysis, which assumes constant marginal costs, will result in markets that are too broad. Coate and Williams explore a number of possibilities for incorporating increasing marginal costs into the critical loss analysis, culminating in a table in which, for any given ssnip, the magnitude of the critical loss depends on both the contribution margin and the elasticity of marginal cost with respect to output. (The authors also conclude that if the products being evaluated are differentiated, then "firm-level modeling," not standard critical loss analysis, is the appropriate means for assessing competitive effects.)

It's not obvious what the practical import of the Coate/Williams analysis might be. In the standard critical loss analysis, the assumption of constant marginal costs is made because the typical accounting data—which are usually the only cost data available—do not provide enough information to trace out the marginal cost relationship within the vicinity of the price increase. Thus, the usefulness of this paper is not in changing the way practitioners calculate the critical loss but rather in evaluating how sensitive that calculation might be to the assumption of constant marginal costs. While this paper is not nearly as technical as the original O'Brien/Wickelgren papers, more work is needed to make it truly accessible to lawyers.

Author's Response

Editors' Note: In our last Paper Trail, http://www.abanet.org/antitrust/source/nov03/trail.pdf, Bill Page's note on Alan Meese's article, Price Theory, Competition, and the Rule of Reason, 2003 *Illinois L. Rev.* 77, questioned Professor Meese's use of the term "price theory" in a way that excluded transaction costs—a usage different from that of Chicago School analysts. Professor Meese responds:

I'm sorry you found my discussion and/or definition of "price theory" somewhat "confusing[ ]" in your words. As you said, I certainly used "price theory" in a manner different from some in the Chicago School. This was deliberate. In so doing, I tried to use that term, and the framework it describes, in the same manner that Williamson, Langlois, and even Coase have used it. These *economists, I submit, use "price theory" in a manner quite different from the way in which Judges Bork and Posner have used the term, for instance. Moreover, it seems to me that both Bork and Posner use the term in a way that deprives it of any real utility in this context.*

Here is what I mean. As you know better than I do, both Bork and Posner argue that the Chicago School of antitrust analysis is based upon "price theory," and that the Chicago approach is therefore superior to prior approaches such as that associated with the "Harvard School" of Kaysen, Turner, Bain, and Mason. There are two problems with this, in my view. First, if you asked Kaysen, Turner, Bain, and Mason what economic framework they were applying back in the 1940s, 1950s and 1960s, they would certainly say "price theory." Indeed, Joe Bain's text on Industrial Organization begins by asserting that the subject is really just applied price theory. Second, "price theory" as understood in the 1960s and 1970s, when Posner and Bork were first writing about antitrust, referred to just that, the theory of how price can (or cannot) allocate scarce resources between competing uses. Price theory as such had no theory of the firm, but instead treated the firm as a black box, which pursued the unitary interests of its owners. At the same time, price theory ignored information costs and opportunism and implicitly assumed a perfect specification of property rights. (Some of these assumptions were first associated with the perfect competition model, but as Hayek and Langlois have pointed out, price theorists embraced most of these assumptions even when analyzing concentrated markets or markets characterized by product differentiation.) Price theory treated the operation of markets as costless and thus could not explain various non-standard contracts like rpm, tying and exclusive dealing. For these and other reasons Professor Coase criticized both Bain and George Stigler for treating industrial organization as "applied price theory."

*Telser, Bork, and Williamson came along and explained how non-standard contracts could, in fact, further social welfare in many instances by reducing the cost of transacting, i.e., relying upon the market to conduct economic activity. Note that Telser does not, I think, invoke "price theory" in his 1960 article on minimum rpm. Moreover, Williamson's 1971 article on vertical integration and market failure does not invoke "price theory" to help explain such contracts. There is simply nothing about the price theoretic industrial organization paradigm as reflected in the work of Bain, Turner, or Stigler for that matter that can help explain minimum rpm, exclusive territories, or exclusive dealing. In fact, by assuming a high cost of negotiation between manufacturers and dealers, Telser, Williamson, and Bork departed from the price-theoretic assumption that such bargaining was costless, with the result that manufacturers could simply contract with dealers to provide services they desired. (*See *William Comanor,* Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, *81* Harv. L. Rev. *1419 (1967) (assuming that manufacturers can costlessly negotiate with dealers)). All also rejected price theory's tendency to assume away opportunism.*

Against this background, Bork and Posner's invocation of "price theory" seems to me a bit misplaced. There is nothing about the price theory contained in textbooks in the 1940s, 50s, or 60s that helps one properly interpret minimum rpm, exclusive territories, or exclusive dealing agreements. The same is true for tying contracts. (The price discrimination account of these contracts is really a transaction cost account and thus is not grounded in price theory.) Like Telser, Bork, and Posner implicitly reject price theory's assumption of no transaction costs and well-specified property rights. Moreover, Bork's early work actually cites Coase's "Nature of the Firm" and thus implicitly rejects price theory in an important respect, i.e., its theory of the firm. Indeed, when Bork and Posner get done with "price theory," the only thing left seems to be its rationality assumption.

For what it's worth, I made a similar argument in the context of vertical restraints. See *Meese,* Price Theory and Vertical Restraints: A Misunderstood Relation*, 45* UCLA L. Rev. *143 (1997).*

Ironically, many scholars have attacked Chicagoans for their purported reliance on price theory, claiming that Chicagoans equate price theory with perfect competition. I claim that this argument demolishes a straw man, and that Chicago's approach to vertical restraints rests upon all sorts of departures from perfect competition and price theory. I also argue that Bork and Posner claim to be relying on price theory when in fact they are relying on Transaction Cost Economics. Put another way, Bork and Posner's most important contributions involved a rejection of price theory in many respects. I realize that some of this is semantics, but it seems to me that we can improve the antitrust conversation if terms like "price theory" have fixed meanings, so we know what sort of framework we are talking about if we invoke price theory.