Antitrust 2001–02: The Year of the Baseball Bat

Stephen Calkins

The past year should go down in antitrust lore as the year of the baseball bat, as commentators continue to reference the *Microsoft* court's memorable analogy, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (per curiam). To be sure, 2001 may not rank with the year that we learned that the "sole consistency" in merger litigation is that "the Government always wins," *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting), or that "'the rule of reason can sometimes be applied in the twinkling of an eye,'" *NCAA v. Board of Regents*, 468 U.S. 85, 109 n.39 (1984) (quoting Phillip Areeda), let alone the year that we learned that antitrust truly is to protect "'competition, not competitors,'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). The D.C. Circuit's vivid analogy promises to be an enduring image, nonetheless. Indeed, in reviewing the cases of the year, one can consider cases in which courts have been (1) protecting the plate by fouling off pitches, preventing core merits issues from being addressed; and (2) being forced, finally, to take a cut at core merits issues, putting the ball in play. One can also (3) take a brief look at what the future is likely to hold, as even Yankees fans are forced occasionally to do.

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Ed. Note: *Professor Calkins presented a review of the past year's antitrust law developments at the ABA Section of Antitrust Law Annual Meeting (Aug. 8, 2001). We asked Professor Calkins to turn his speech into an article for* The Antitrust Source. *This article also contains references to several important developments that occurred after the presentation.*

Courts Fouling Off Pitches

Most antitrust litigation is about issues that might seem to be on the substantive periphery, on the edges of the antitrust plate, if you will. The statutes suggest that the principal questions are whether an agreement restrains trade, or whether a firm is a monopoly, or whether some method of competition is unfair. In fact, however, the courts vigorously resist addressing (or letting juries address) these issues. This year was no exception, as courts took tough positions on standing, on letting a jury consider whether or not an agreement existed at all, and in determining whether conduct was exempt from the antitrust laws altogether.

Standing. Any defendant failing to claim the absence of antitrust injury risks committing malpractice. The applicable case law is in disarray, with the only consistency being that defendants almost always win. All too often one gets the impression that a court, confident that a defendant deserves to win but unsure of why, simply concludes that antitrust injury is missing.

Noteworthy recent cases include:

RSA Media, Inc. v. AK Media Group, Inc., 260 F.3d 10 (1st Cir. 2001). Defendant AK Media Group prevailed in this billboard war, winning summary judgment even though it enjoyed a 92 per cent share of a market into which restrictive zoning made entry virtually impossible. Apparently seeking to discourage entry, AK Media told landlords that if they switched to another billboard firm, AK Media would (1) tear down the existing billboard, and (2) retain the permit for a billboard at that site, such that neither the landlord nor any billboard company would be able to erect a replacement billboard. The court of appeals ruled that even if this were exclusionary, RSA Media lacked antitrust standing. "RSA was not excluded from the market for outdoor billboards because of AK's threats; it

was excluded because of the Massachusetts regulatory scheme that prevents new billboards from being built." *Id.* at 15. The court thus viewed the dispute as turning on the state-controlled inability to erect a billboard, rather than AK Media's refusal to allow a license to be transferred.

Indeck Energy Services, Inc. v. Consumers Energy Co., 250 F.3d 972 (6th Cir. 2000) (per curiam), *cert. denied*, 121 S. Ct. 2623 (2001).[1] Consumers Energy won dismissal of an antitrust challenge by a frustrated new entrant into the Michigan energy market, with the district court ruling that Consumers' actions were highly regulated and thus protected by the state action exemption. *Id.* at 975. The district court also ruled almost in passing that dismissal was justified under the Sixth Circuit's aggressive application of the antitrust injury doctrine, and this was the sole ground on which the Sixth Circuit affirmed. *Id.* at 975–77. Although the opinion is not entirely clear, it could be read to suggest that when a dominant firm offers a major customer a favorable price in exchange for an exclusive contract, that customer is the only firm with standing to allege an antitrust violation.

Watkins & Son Pet Supplies v. The Iams Co., 254 F.3d 607 (6th Cir. 2001). Watkins, a distributor, complained without success when it was terminated by a manufacturer that wanted to grant a rival an exclusive territory and a 2 percent price discount (in exchange for a promise that the favored distributor would carry no rival brand). The court rather cryptically wrote that antitrust standing is lacking "because the injury to Watkins flows from the termination; the antitrust violation was not a necessary predicate of the injury." *Id.* at 616.

Pool Water Products v. Olin Corp., 258 F.3d 1024 (9th Cir. 2001). The Ninth Circuit affirmed dismissal of a claim that mergers and predatory practices harmed a competitor of defendant Olin Corp. "It is not enough . . . to show that defendants violated the law and that the plaintiffs suffered a causally related injury." *Id.* at 1036. Losses caused by a defendant's non-predatory prices are irrelevant, and the court was unimpressed with evidence that the plaintiff's market share fell from 60 to 35 percent. *Id.* at 1035–36. "A decrease in one competitor's market share . . . affects competitors, not competition. Shifting [plaintiff's] sales to [defendant] and other competitors in the market does not directly affect consumers and therefore does not result in antitrust injury." *Id.* at 1036. The court declared that "reduced profits from lower prices and *de*creased market share is not the type of harm Section 4 was meant to protect against." *Id.*

There were exceptions, of which the most noteworthy was ***Andrx Pharmaceuticals, Inc. v. Biovail Corp. International***, 256 F.3d 799 (D.C. Cir. 2001), which allowed an excluded competitor to challenge a patent-related agreement that allegedly "neither enhanced competition nor benefitted consumers." *Id.* at 813. (The court also ruled that even if consumers could assert an antitrust claim, an illegally-excluded competitor can seek redress for its own, distinct injury.) *Id.* at 816–17. The D.C. Circuit thus reversed the district court's conclusion that antitrust injury had been absent—which serves as a reminder that the outcomes of these cases are not easy to predict.

Proof of Agreement. Although the great antitrust issues revolve around the reasonableness of various restraints, the appraisal of questionable practices, and the measurement of market power, in recent years defendants have had singular success winning summary judgment decisions that kept the issue of agreement from a jury. *See, e.g.*, *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir.), *cert. denied*, 531 U.S. 815 (2000); *7-Up Bottling Co. v. Archer Daniels Midland Co.* (*In re Citric Acid Litigation*), 191 F.3d 1090 (9th Cir. 1999), *cert. denied*, 529 U.S. 1037 (2000); *Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 201 F.3d (4th Cir. 1999) (table decision), *text available at* 1999 WL 691840. (not for publica-

tion); *In re Baby Food Antitrust Litigation*, 166 F.3d 112 (3d Cir. 1999). This year saw more of the same, albeit with an exception or two.

The most significant decision was ***Aguilar v. Atlantic Richfield Co.***, 24 P.3d 493 (Cal. 2001) (Mosk, J.). The seven justices unanimously and decisively acted to position California state law within the pro-defendant federal stream originating with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). "Ambiguous evidence . . . do[es] not allow . . . a trier of fact [to find an unlawful conspiracy]." 24 P.3d at at 514. According to the court, collection and dissemination of capacity, production, and pricing information is not troubling because, as suggested by the old case, *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925), information is a good thing. 24 P.3d at 518–19. The use of common consultants can be explained by the need to draw on scarce expertise. *Id.* at 519. Barter-type exchange agreements have long been common and have been recognized as likely beneficial. *Id.* Interdependence? In an oligopoly such as exists here, it is inevitable. "In such a market . . . prices may move generally upward across all of the firms more or less together, rising quickly and falling slowly, and may do so interdependently but nevertheless independently." *Id.* at 520. In short, proof of "motive, opportunity, and means to enter into an unlawful conspiracy . . . is not enough." *Id.* No matter how much evidence a plaintiff has, if it is entirely "ambiguous"—that is, perhaps, "open to more than one interpretation," The American Heritage Dictionary of the English Language (4th ed. 2000)[2]—the California courts may prevent juries from finding the facts.

Another strong defense win was ***In re High Fructose Corn Syrup Antitrust Litigation***, 156 F. Supp. 2d 1017 (C.D. Ill. 2001). To no avail, the class of high fructose corn syrup purchasers pointed to evidence, such as announcement of a pricing formula followed by adoption by industry members; trade association meetings at seemingly-suspicious times; similar or identical prices lists, circulated in advance; intra-firm contacts; inter-defendant sales; and examples of firms refusing to cut prices to win attractive orders. The court concluded that "no single piece of evidence tends to exclude the possibility of independent action," *id.* at 1055, and that was the end of the matter. "It is undisputed that the HFCS market is a highly concentrated market dominated by very few players, and it is well established that where a market is dominated by a few major players, parallel pricing is not uncommon and is generally insufficient to prove an antitrust conspiracy." *Id.* at 1038. (The court ruled that the case turned on inferences because direct evidence was not found in statements such as, "'We have an understanding within the industry not to undercut each others' prices.'" *Id.* at 1029.)

To be sure, there were exceptions to the pattern. Most notable was ***In re Disposable Contact Lens Litigation***, No. MDL 1030, 2001 WL493244 (M.D. Fla. Feb. 8, 2001), which denied summary judgment in a case alleging a horizontal agreement to eliminate discounters. The court pointed to a series of letters suggesting pressure and compliance, and, quoting some typically colorful Posnerian language, noted that "when a conspirator warns a non-complying dealer to restrain trade and the dealer 'merely grunts but complies' there is agreement." Id. at *7 (quoting *Isaksen v. Vermont Castings*, Inc., 825 F.2d 1158, 1164 (7th Cir. 1987)).

The pattern nonetheless remains.

Antitrust Exemptions. Although there are exceptions,[3] the most noteworthy exemption cases this past year addressed the *Noerr-Pennington* doctrine. Two treated that doctrine expansively. ***A.D. Bedell Wholesale Co. v. Philip Morris Inc.***, 263 F.3d 239 (3d Cir. 2001), *petition for cert. filed*, 170 U.S.L.W. 3317 (U.S. Oct. 19, 2001) (No. 01-656), held that a settlement between state governments and tobacco companies, and apparently the resulting consequences, was immune: "[I]f its conduct constitutes valid

petitioning, the petitioner is immune from antitrust liability whether or not the injuries are caused by the act of petitioning or are caused by government action which results from the petitioning." *Id.* at 251. Even if tobacco companies had craftily negotiated a consent order whose various penalty clauses discouraged vigorous competition, and even if the plaintiff states had been motivated by an interest in sharing in the anticipated profits, settlement agreements were awarded as much protection as traditional petitioning.

More disconcerting was ***Baltimore Scrap Corp. v. David J. Joseph Co.***, 237 F.3d 394 (4th Cir.), *cert. denied*, 121 S. Ct. 2521 (2001). Here, the only metal shredder in Baltimore attempted to block a threatened new entrant, Baltimore Scrap, by secretly financing "consumer" litigation. The district court lambasted the defendant's conduct as "'deceitful,'" "'underhanded,'" and "'morally wrong,'" *id.* at 398—but protected by *Noerr*. The court of appeals affirmed. In an explanation reminiscent of (and no more uplifting than) campaign-financing debates, the court declared: "Funding of litigation by a non-party can be petitioning to the same extent that filing a lawsuit itself is petitioning." *Id.* at 401. The Fourth Circuit rejected the Fifth Circuit's contrary view, espoused in *In re Burlington Northern, Inc.*, 822 F.2d 518, 531 (5th Cir. 1987), as fatally undermined by *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries*, 508 U.S. 49 (1993). *Baltimore Scrap*, 237 F.3d at 400–01.

The exception, and a case that serves to cabin *Bedell*, is ***Andrx Pharmaceuticals, Inc. v. Biovail Corp. International***, 256 F.3d 799 (D.C. Cir. 2001). This rich opinion is well worth reading on several grounds, including its prospective importance in the on-going wars over the Hatch-Waxman Act and its ramifications. Relying largely on the reasoning of Judge Nancy Edmunds in a related case, *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618 (E.D. Mich. 2000), the court held that an agreement between litigants, ancillary to their litigation, is not protected by *Noerr*. Agreeing with Judge Edmunds, the D.C. Circuit explained that "[t]he harm . . . was not the result of a court decision. 'Rather, it is the result of purely private conduct and thus constitutes a private restraint of trade subject to liability under the antitrust laws.'" *Biovail*, 256 F.3d at 818 (quoting 105 F. Supp. 2d at 635).

When the Ball Is Over the Plate: Courts Dealing with Core Issues

When issues are squarely presented and easy outs are not available, courts may seriously address core antitrust doctrine. The three examples of this in the past year are (a) the relationship between the per se rule and the rule of reason, (b) mergers, and (c) *Microsoft*.

Per Se—Rule of Reason. Anyone who thought that the Supreme Court's disappointing opinion in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999),[4] had resolved the tension between the per se rule and the rule of reason will be discouraged. This remains an area in which much work is still to be done. This past year, six different institutions offered opinions that sought with limited success to clarify the law:

A.D. Bedell Wholesale Co. v. Philip Morris Incorporated, 263 F.3d 239 (3d Cir. 2001), *petition for cert. filed* (Oct. 19, 2001). Although it dismissed the complaint on *Noerr-Pennington* grounds, the Third Circuit found the *Bedell* complaint otherwise meritorious. It ruled that an output cartel that, without explicitly raising prices, creates a significant disincentive to increasing market share, is sufficiently likely to be illegal that a challenge to it states a cause of action. *Id.* 247–48. Noting that none of the analytical categories are separated by bright lines, the court wrote, "We need not address whether the output cartel alleged here would be illegal per se or would be illegal under a 'rule of reason' analysis." *Id.* at 248 n.23. (The otherwise meritorious complaint was dismissed on *Noerr-Pennington* grounds.)

Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000) (2–1). Cheese-makers

accused of price fixing under state law with respect to their principal input, milk, defended in part by arguing that their combined purchases were obviously much too insignificant to permit them to exercise any market power or affect competition. *Id.* at 986. The argument won below and helped attract Judge Paez's vote. *See id.* at 1002–03 (Paez, J., dissenting). The majority, in an opinion by Judge Dwyer, was unpersuaded. The per se status of price fixing deflects any claimed lack of competitive effect.

Toys "R" Us v. FTC, 221 F.3d 928 (7th Cir. 2000) (Wood, J.). It was no defense to a charge of horizontal group boycott for ringleader Toys "R" Us to point to its 20 per cent market share. *Id.* at 937. Market power, to the extent needed, can be proven either by market share or directly from anticompetitive effects.

Carpet Group International v. Oriental Rug Importers Association, 227 F.3d 62 (3d Cir. 2000). A boycott by the defendant wholesalers' association of oriental rug manufacturers who sold directly was per se illegal. Proof of market power is often necessary, but not here: "'[W]hen the defendants are not engaged in any significant integration of production or distribution, and the only rationale for the restraint is the elimination of additional, lower-cost, higher quality, or more innovative output from the market,' this rationale 'implies the existence of market power.'" *Id.* at 74 (quoting 13 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2203a (1999)). The district court relied on the absence of proof of market definition or market impact. *Id.* at 75. The court of appeals reasoned, in contrast, that plaintiffs' showing "that the defendants' conduct had its intended effect of undermining the trade shows, and that its only purpose was to eliminate competition in the United States" raised "a strong inference that ORIA [the association] and its member rug importer/wholesalers possessed some degree of market power." *Id.*

Continental Airlines, Inc. v. United Air Lines, Inc., 126 F. Supp. 2d 962 (E.D. Va. 2001). This fascinating case, made somewhat dated by the events of September 11, saw plaintiff Continental Airlines win summary judgment in its challenge to defendant Dulles Airport Airline Management Council's decision to adopt defendant United Airlines's suggestion and use baggage-screening "templates" with x-ray machines. (Continental had retrofitted planes with extra luggage space and promoted itself as the carrier for serious "road warriors.") The court applied what it described as the "abbreviated rule of reason." "This third mode of analysis skips the inquiry into anticompetitive effects because those effects are manifest from the nature of the restraint; instead, the focus of the abbreviated Rule of Reason analysis is the procompetitive justifications offered in support of the restraint . . . ." *Id.* at 972–73.

The court characterized the Management Council's use of templates as an "output restriction" because it was "an agreement to provide a lower quality product . . . . It restricts output because it standardizes, and thereby eliminates open competition on, an element of the bargain between carriers and passengers." *Id.* at 975. The court also complained that "defendants' agreement restricts product and service diversity and constrains innovation competition in the market for air carriage." *Id.*

Although the novelty of the application precluded use of the per se rule, the court focused its inquiry sharply on whether the agreement promoted competition. When the defendants tried to argue that templates would improve the traveling experience, the court was unimpressed: "it cannot be accepted that the elimination of competition through product standardization . . . is procompetitive because it makes more efficient competition on other elements of airline service. . . . Put differently, to sanction an elimination of competition where it has not been shown that unfettered competition in the market has failed is flatly inconsistent with the goals of the Sherman Act . . . ." *Id.* at 980–81. Much of the court's analysis—on what constitutes an output restriction, on use of the abbreviated rule of reason, and on acceptable

justifications—is potentially important, whether or not the case was decided correctly. The defendants appealed.

Warner Communications/Polygram. This fascinating FTC consent decree/administrative complaint (Warner Communications settled; Polygram decided to contest the complaint) challenged Warner and Polygram, which jointly produced and promoted a recording of the Three Tenors' 1998 concert, for agreeing not to advertise or discount the 1990 (Polygram) and 1994 (Warner) recordings. The Analysis to Aid Public Comment rejected any "free riding" justification because the 1998 promotion was shared, not independent. The consent decree stipulated that price and advertising restriction agreements are permissible when "reasonably related" to a lawful joint venture and "reasonably necessary to achieve its procompetitive benefits"; that firms may set prices and restrict advertising for jointly produced products; and that proper ethical codes concerning parental advisories are permitted if "reasonably tailored to such objective." *Warner Communications Inc.*, File No. 001-0231 (July 31, 2001) (proposed consent order Part III). Especially intriguing, as is discussed in the conclusion below, is the Analysis to Aid Public Comment's comfortable reliance on the *Massachusetts Board* method of analysis that had been downplayed in the Commission's *California Dental Ass'n* opinion.

Mergers. Merger law saw the Federal Trade Commission and two courts enjoying what amounted to an old timers' day. New subtleties could be found, of course, but much of the writing would have been familiar to an antitrust veteran.

FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000). The FTC won a preliminary injunction (and more: the parties subsequently abandoned the merger) the old fashioned way: by proving a narrow submarket in which market shares were prohibitively high. The submarket was limited to loose leaf chewing tobacco, which excluded moist snuff and other tobacco products. Oral tobacco products were functionally interchangeable, to be sure, but the court found sufficient *Brown Shoe* factors to support a submarket. Conflicting econometric testimony served largely to cancel each other out, so the court relied heavily on documents, witness testimony, industry recognition, and distinct pricing. It was almost as though, with the FTC having posited a plausible small market, the burden shifted to the defendant to disprove it. With high market shares established, *Philadelphia Bank* permitted a strong presumption of anticompetitive effects. The court was unmoved by defendants' pointing to excess capacity and declining demand because these had long been present yet firms had enjoyed wide margins and rising prices.

FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2000). The FTC's challenge to the merger of Heinz and Beech-Nut baby food, controversial when filed, resulted in a resounding Commission victory. The court ruled that HHI figures, by themselves, establish a prima facie case, and, where substantial direct competition would be eliminated and entry barriers are high, the FTC is entitled to a presumption of illegality. Defendants argued that any loss in wholesale competition between merging Heinz and Beech-Nut would not be felt by consumers; the court responded that cost increases will be passed through (here, from wholesalers to retailers, and, in any event, "Section 7 is, after all, concerned with probabilities, not certainties." *Id.* at 719 (citing, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962)).

The court was very tough on efficiencies, explaining that the high market concentration could be rebutted only by "proof of extraordinary efficiencies," 246 F.3d at 720. In part the appellate court objected to the lower court's math: the relevant reduction is in the percentage of total variable costs, and cost savings must be compared to the combined entity's total output (since presumably all prices are at risk of rising).

In part the court rigorously insisted that only "merger specific" efficiencies, which "cannot be achieved by either company alone," count. *Id.* at 721–22. Thus, Heinz could not point to the benefit of superior Beech-Nut recipes, since the parties did not show that Heinz could not improve its recipes by alternative means. Although Beech-Nut may have an inefficient distribution system, "it can make that system more efficient without merger." *Id.* at 721 n.19. The court found the claim that a firm needed a very substantial shelf presence in order to launch new products to be "highly speculative." *Id.* at 723.

Finally, the court rejected the district court's finding that "'structural market barriers to collusion'" will prevent competitive harm. No such barrier is unique in the baby food industry, ruled the court of appeals, so it would adhere to the usual presumptions: "The combination of a concentrated market and barriers to entry is a recipe for price coordination." *Id.* at 724. Indeed, the court adopted the cautionary language of the leading treatise: "Tacit coordination 'is feared by antitrust policy even more than express collusion, for tacit coordination, even when observed, cannot easily be controlled directly by the antitrust laws. It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which tacit coordination can occur.'" *Id.* at 725 (quoting 4 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 901b2, at 9 (rev. ed. 1998)).

Microsoft. So much about *Microsoft* requires a sophisticated understanding of technology. What are appropriate terms for a settlement? What role should the court play? How should decision making be coordinated among the Justice Department, the many different states, and the European Commission? Even as this is written, developments occur almost too quickly to chronicle.[5] This article will discuss none of these difficult questions, or even the underlying questions of how the district court and court of appeals should have ruled.[6] Instead, it will consider what *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. June 28, 2001) (per curiam), (*Microsoft III*) means for the rest of antitrust law.

For antitrust, the *Microsoft* decision was profoundly important. In a singularly controversial case in which massed government and private forces squared off, and after the trial judge unfathomably embarrassed himself and the antitrust system, a very tough, sophisticated, en banc panel that included distinguished conservatives and liberals issued a unanimous opinion. Before the opinion was issued, antitrust (or at least monopolization) enforcement as an institution had been in a perilous state. For instance, after the oral argument, a *Business Week* commentary had warned:

> The law can never be crystal clear, but it's supposed at least to be predictable. . . . Most judges should reach the same conclusions most of the time.
>
> After listening to the D.C. Circuit savage the government's lawyers—much as Judge Jackson trashed Microsoft's team—it isn't clear antitrust law meets this standard. And if it doesn't, there may be good reason to begin rethinking its value.

Mike France, *Is Antitrust Law in Need of Remedy?*, BUSINESSWEEK online, Mar. 5, 2001, http://www.businessweek.com/technology/content/mar2001/tc2001035_299.htm. The mere fact of a unanimous decision by a distinguished court that obviously worked hard to draw lines while preserving consensus goes far toward reassuring observers that we live in a nation of laws.

The court's opinion addresses the law of attempted monopolization, tying, exclusive dealing, and monopoly maintenance, with the last being particularly important.

Attempted Monopolization. The court broke no new ground on attempted monopolization. It applied black letter law, and merely concluded that the district court had failed sufficiently to define a relevant market that Microsoft had attempted to monopolize or to identify significant entry barriers. 253 F.3d at 80–84. The court

was singularly unreceptive to relatively undisciplined claims of wrongdoing.

Tying. The court's treatment of tying was particularly elegant. *See* 253 F.3d at 84–97. Its most important action was its brisk dismissal of the permissive standard it had flirted with adopting in *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998) (known as *Microsoft II*). The *Microsoft II* court had interpreted a consent decree to permit any product integration with a "plausible claim" to any consumer benefit, even if the net effect was harmful. *See id.* at 950. Although that court had described its understanding as "consistent with tying law," *id.*, *Microsoft III* squarely limited the *Microsoft II* test to that particular consent decree: the test does not govern antitrust law more generally.

The elegant part of *Microsoft III*'s tying discussion was its explication of the *Jefferson Parish* "separate demand" test for determining the existence of two products. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). In a sense, the court viewed Justice Stevens's majority opinion through the lens of Justice O'Connor's influential concurrence. Justice O'Connor treated surgery and anesthesia as a single product because there was no "coherent economic basis for treating the tying and tied products as distinct." 466 U.S. at 39. "When the economic advantages of joint packaging are substantial the package is not appropriately viewed as two products . . . ." *Id.* at 40. In contrast, the Court held that surgery and anesthesia *were* separate products because "there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services." *Id.* at 21–22. (The Court looked at very practical factors such as billing records and the practice of requesting specific anesthesiologists.) The *Microsoft III* court quoted this *Jefferson Parish* "separate demand" sentence and then, by providing context and then employing the simple expedient of italicizing the word "efficient," interpreted the separate demand test as "a rough proxy for whether a tying arrangement may, on balance, be welfare-enhancing, and unsuited to per se condemnation." 253 F.3d at 87.

The D.C. Circuit cautioned that one is to examine the proxy (separate demand) rather than efficiencies directly. *Id.* at 88. But by moving efficiency and net welfare effects to center stage, the court has virtually guaranteed that defendants will attempt to litigate these issues. If courts succumb to the temptation to resolve such litigation through rulings, Justice O'Connor's concurrence will have won more of the war.

Microsoft III is known more specifically for rejecting the per se rule in the particular case before it. Building on its efficiency-based interpretation of the "separate products" test, the court showed that "the separate-products test is a poor proxy for net efficiency from newly integrated products." *Id.* at 92. The court explained that in a feverishly innovating and integrating industry such as that at issue, the backward-looking test of separate demand does a poor job of distinguishing beneficial from harmful new product integration.

Certainly the decision further undermines the already shaky foundation of the per se rule against tying. Although the court limited its holding to the case before it, the reasoning has much broader applicability. Tying cases often involve new integration, whether being when cars begin to include radios or cemeteries begin to include grave stones. Surely the vast majority of defendants will now insist that the rule of reason should be applied. Logic would predict that courts outside the District of Columbia will reject these pleas. Any court that would rule for a defendant under a rule of reason can rule for it under the unusual per se rule against tying; why not, therefore, take the risk-averse approach and apply Supreme Court, rather than D.C. Circuit, law? Yet simply by focusing so sharply on underlying competitive effects, the court has further weakened the per se rule against tying.

Exclusive Dealing. Exclusive dealing, as a separate antitrust issue, was not technically before the court. Microsoft won below, and the plaintiffs did not appeal. Nonetheless, the court importantly reestablished exclusive dealing as a viable antitrust offense. The district court had adopted a "total exclusion" test, which prevented liability unless rival firms were completely excluded from (not just seriously disadvantaged in reaching) roughly 40 percent of the market. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 52 (D.D.C. 2000), *aff'd in part, rev'd in part,* 253 F.3d 39 (D.C. Cir. 2001). The district court ruled that practices lawful under Section 1 could nonetheless be unlawful under Section 2, and the court of appeals agreed. In doing so, however, it implicitly disagreed with the lower court's Section 1 analysis by using the dismissive phrase, "Even assuming the holding is correct . . . . ," 253 F.3d at 70, and noting that there are "various scenarios under which exclusive dealing, particularly by a dominant firm, may raise legitimate concerns about harm to competition." *Id.* (citing Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659 (2001)).

Monopoly Maintenance. The great line in the *Microsoft III* opinion is the court's rejoinder to Microsoft's argument that the exercise of lawfully acquired intellectual property rights cannot violate the antitrust laws. "That is no more correct than the proposition that use of one's personal property, such as a baseball bat, cannot give rise to tort liability." 253 F.3d at 63. The analogy may be a little unfair, but it is so telling and so effective at communicating a fundamental truth that it quickly has become a standard line in debates about the relationship between antitrust and intellectual property.

In fact, the entire monopoly maintenance discussion has the air of a professional ballplayer using a bat to swat away arguments:

- Middleware might eventually replace part of the operating system's function? "The test of reasonable interchangeability, however, required the district court to consider only substitutes that constrain pricing in the reasonably foreseeable future, and only products that can enter the market in a relatively short time can perform this function." 253 F.3d at 53–54.
- Microsoft may have achieved its operating system position "through superior foresight or quality"? *Id.* at 56. "But this case is not about Microsoft's initial acquisition of monopoly power," and "the applications barrier to entry" is "a characteristic of the operating system market, not of Microsoft's popularity, or . . . efficiency." *Id.*
- Microsoft never charged the short-run profit-maximizing price? It might have charged the long-term monopoly price. *Id.* at 57.
- Microsoft did not totally exclude Netscape? But Microsoft may have excluded Netscape from the most efficient channels. *Id.* at 70–71.
- Microsoft's exclusive dealing did not violate Section 1? It may have violated Section 2. *Id.* at 70.

Monopoly maintenance is the heart of the court's opinion, and the court's discussion will yield lessons for years to come. Several particularly important points are worth noting:

(a) The court's Section 1-like burden-shifting series of analytical steps likely will become the basic format for Section 2 analysis:

  (i) The plaintiff "must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect." 253 F.3d at 58–59.[7] If the plaintiff establishes a prima facie case, this shifts a burden (whether of proof or merely of going forward is a little unclear) to the defendant.

  (ii) If the defendant "proffer[s] a 'pro-competitive justification' for its conduct," meaning a "nonpretextual claim that its conduct is indeed a form of competition on the merits . . . then the burden shifts back to the plaintiff to rebut that claim." *Id.* at 59 (quoting *Eastman Kodak Co. v. Image Technical Servs.,*

Inc., 504 U.S. 451, 483 (1992)).

(iii) The plaintiff may meet this burden by successfully rebutting the claimed justification. If the plaintiff fails to do so, then it "must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit." 253 F.3d at 59. The court likened this balancing approach to the "rule of reason" employed to resolve disputes under Sherman Act Section 1.[8] *Id.*

Although subtleties remain to be worked out, the court's structure is likely to appeal to judges seeking a comforting roadmap for decision. An unusually influential court has set out a comprehensible approach to appraising monopoly maintenance claims. No litigant can afford to ignore *Microsoft III*'s template.

(b) The court distinguished sharply between alleged predation through pricing, which it saw as very rarely of concern, and through exclusive dealing, which it saw as more potentially problematic.

(c) The court rigorously scrutinized justifications. When Microsoft sought to justify exclusive dealing by its desire "to keep developers focused upon its APIs," the court translated this as saying the firm "wants to preserve its power in the operating system market. That is not an unlawful end, but neither is it a procompetitive justification . . . ." *Id.* at 71.

(d) Although it was demanding on many points, the court was very forgiving on causation, even referring to the "rather edentulous test for causation." *Id.* at 79. ("Edentulous" is defined as "having no teeth; toothless.")

(e) On the other hand, the court snuck the *Brunswick* antitrust injury concept into a government case: "In a case brought by a private plaintiff, the plaintiff must show that its injury is 'of the type that the statute was intended to forestall'; no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor." 253 F.3d at 59 (citations of *Brunswick* and other cases omitted). As noted above, the *Brunswick* concept, if allowed to flourish, can have a sweeping impact.

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Perhaps the most important lesson from the court's decision was suggested by FTC Chairman Timothy Muris's first speech to the ABA Antitrust Section last August. He noted that "[w]e used to believe that antitrust counseling, at least for major companies, would generally deter anticompetitive conduct." *Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity*, Prepared Remarks of FTC Chairman Timothy J. Muris Before the ABA Antitrust Section Annual Meeting 9 (Aug. 7, 2001), http://www.ftc.gov/speeches/muris/murisaba.htm. This has been proven wrong by two groups of cases, he said. First, the many recent cartel cases, and, second, *Microsoft*. "The strong appellate decision in *Microsoft* reconfirms that improper conduct by firms with monopoly power can give rise to substantial antitrust issues." *Id.* at 10. The unanimous *Microsoft* decision legitimizes the concept of limited monopolization enforcement, and, more important, it reconfirms the rule of law.

A Look to the Future

After September 11, nothing unconnected to terrorism is really front page news. Nonetheless, antitrust's preview of coming attractions includes a series of potential major headlines within the world of antitrust if not the world at large.

The Antitrust Division and the states can stake a claim to the spotlight based on *Microsoft* alone. Beyond that, the states will be sorting out their role with the new Administration and their role in causing wrongdoers to disgorge ill-gotten gains. The Division boasts an impressive list of cases already in litigation, including the Alfred Taubman criminal trial (sentencing is currently pending for perhaps the most prominent business leader ever formally tried for felony price fixing), *United States v. Visa U.S.A. Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001) (the

split decision that is presumably about to be appealed), *United States v. AMR Corp.*, 140 F. Supp. 2d 1141 (D. Kan. 2001), *appeal docketed*, and *United States v. Dentsply International, Inc.*, 2001-1 Trade Cas. (CCH) ¶ 73,247 (D. Del. 2001) (denying summary judgment).

The Commission of the European Communities has already claimed its share of the antitrust spotlight. Its *GE/Honeywell* decision thrust "portfolio effects" into the current antitrust lexicon. That case, plus the Commission's statement of objections concerning Microsoft, and its *IMS Health* challenge to a refusal to license a copyright (*IMS Health Inc. v. Commission*, Case T-184/01R (C.F.I. Oct. 26, 2001) (suspending Commission-ordered interim measures)), have highlighted the reality that outcomes can be different on the two sides of the Atlantic.

In looking to the future, however, the Federal Trade Commission is worthy of particular note. In part, this is because its new Chairman, Timothy Muris, has an overtly declared interest in shaping antitrust doctrine. Chairman Muris wants to influence the law through hearings, guidance, and litigation.

In part, however, the FTC is interesting because it enjoys unusual remedial power. Section 13(b) of the FTC Act has been interpreted to give the Commission sweeping equitable authority to redress wrongs. Although this authority has been developed and used principally in consumer protection cases, the Commission has now started trying it in competition cases. In *FTC v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25 (D.D.C. 1999), *reconsideration granted in part*, 99 F. Supp. 2d 1 (D.D.C. 1999), the court reaffirmed the appropriateness of this authority, and Mylan Laboratories subsequently agreed to pay $100 million into an escrow account to be administered by the plaintiff FTC and 50 states. *See* FTC Press Release (May 2, 2001) (announcing preliminary approval of settlement), *available at* http://www.ftc.gov/opa/2001/05/fyi0127.htm. Then the Commission, by a 3–2 vote, invoked its 13(b) authority against The Hearst Trust to seek disgorgement of allegedly ill-gotten gains derived from the acquisition of a principal competitor. *See* FTC Press Release (April 4, 2001), *available at* http://www.ftc.gov/opa/2001/04/hearst.htm (former Chairman Pitofsky was part of the majority). The then-two Republican Commissioners dissented from this use of Section 13(b): "We particularly dissent from the Commission's decision to seek disgorgement in this situation. Without expressing a view on whether that extraordinary remedy should ever be available in an antitrust case, we believe that, if a violation is proved, existing private remedies are adequate to ensure that respondents do not benefit from any possible wrongdoing and that their customers can be made whole." *Dissenting Statement of Commissioners Orson Swindle and Thomas B. Leary*, File No. 9910323 *available at* http://www.ftc.gov/os/2001/04/hearstdisswinleary.htm. How the Commission uses its Section 13(b) authority, and how this fits in with the alternative ways the wrongdoers are forced to disgorge gains, is one of the great unsettled issues of antitrust enforcement.[9]

The Commission's other unique antitrust authority is its power to adjudicate. Although many leading antitrust cases began life as an FTC administrative complaint, e.g., *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941), so few cases are actually adjudicated that observers sometimes forget about this weapon in the Commission's arsenal.

That may change. The sharp decrease in mergers reportable under the Hart-Scott-Rodino program guarantees that more mergers will be subject to old-fashioned, post-acquisition challenge, which, at the FTC, will be done through administrative adjudication. This is already occurring, in *Chicago Bridge & Iron Co.*, FTC Docket No. 9300 (administrative complaint announced October 25,

2001), http://www.ftc.gov/os/2001/10/chicagobridgeadmincmp.htm, and MSC Software Corp., Dkt. 9299 (administrative complaint announced Oct. 10, 2001, http://www.ftc.gov/os/2001/10/msccmp.htm. Beyond mergers, the Commission has staked out a position as an aggressive enforcer of perceived abuses of intellectual property rights, where the law is sufficiently unclear and the stakes sufficiently high that administrative litigation is inevitably occurring. (Commission activities are reviewed in *Competition and Intellectual Property Policy: The Way Ahead*, Prepared Remarks of FTC Chairman Timothy J. Muris Before the ABA Antitrust Section Fall Forum (Nov. 15, 2001), *available at* http://www.ftc.gov/speeches/muris/intellectual.htm.) The Muris Commission's interest in self-regulation and other horizontal arrangements, as well as in immunities, also seem likely to lead to the administrative court room.

Administrative adjudication offers the potential to contribute importantly to the development of antitrust doctrine. The *Chicago Bridge & Iron* complaint invokes concepts such as removing a low cost-bidder, reducing "innovation competition," increasing barriers to entry, and allowing the unilateral exercise of market power, Complaint ¶ 40; the MSC Software complaint includes a potential competition charge, Complaint ¶ 29(c). The most intriguing example, however, is provided by *Polygram Holding, Inc.*, FTC Docket No. 9298 (complaint issued July 31, 2001), http://www.ftc.gov/os/2001/07/tenorscmp.htm. This is the *Three Tenors* dispute discussed above, and, if litigated fully, it will give the Commission the opportunity to try again to adjudicate in the interstices between the per se rule and the rule of reason as applied to horizontal restraints. It is ironic that after the Commission issued its *California Dental* opinion walking way from the *Massachusetts Board* approach, it was then-Professor, now FTC Chairman Timothy Muris, who urged the Commission to return to the structured approach of *Massachusetts Board*. Timothy Muris, *FTC and the Rule of Reason: In Defense of* Massachusetts Board, 66 ANTITRUST L.J. 773 (1998). Professor Muris presciently observed that whether the Commission would follow his advice "depends on the Commission leadership, particularly the Chairman and Bureau Director." *Id.* at 799. (The final irony is that now-Chairman Muris (but not his Bureau Director) is recused from participating in *Polygram Holding*.)

FTC administrative adjudication has important ramifications for the Commission's court appearances. Before administrative adjudication commences, when the Commission is seeking a preliminary injunction, the Commission enjoys a more permissive legal standard than most litigants. The court in *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001), explained this with unusual clarity, and really seemed to mean that the Commission merely had to "'raise[] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance.'" *Id.* at 714–15 (citations omitted). Then, if the Commission adjudicates a case and finds a violation, it is entitled to very deferential review. As described by the Seventh Circuit in two cases: "'Our only function is to determine whether the Commission's analysis of the probable effects of these acquisitions . . . is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.'" *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 935 (7th Cir. 2000) (adopting *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986)). In a conspiracy case, "[t]he test states only that there must be some evidence which, if believed, would support a finding of concerted behavior." *Toys "R" Us*, 221 F.3d at 935. In an implied deception claim case, the "court's 'task' is 'to determine if the Commission's finding is supported by substantial evidence on the record as a whole.'" *Novartis Corp. v. FTC*, 223 F.3d 783, 787 (D.C. Cir. 2000) (quoting *Thompson Medical Co. v.*

FTC, 791 F.2d 189, 196 (D.C. Cir. 1986)). Although legal issues are reviewed de novo, if courts in fact accord the Commission the deference that judicial phrasings suggest it is due, the Commission will enjoy considerable leeway to use litigation for good or ill.

With all that is occurring at the FTC and the Division, and in the states and the European Union (not to mention private litigation), all of us have ample incentive to keep our eyes on the ball. ●

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[1] I was consulted by the defendants in this case.

[2] Read cautiously, *Aguilar v. Atlantic Richfield Co.* actually contemplates a specialized meaning of "ambiguous evidence," namely, "'conduct' that is 'as consistent with permissible competition' by independent actors 'as with illegal conspiracy' by colluding ones" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)). It is unclear whether courts successfully distinguish between this meaning and the ordinary dictionary definition of "ambiguous."

[3] The past year saw some important discussions of U.S. courts' jurisdiction over foreign parties and actions, Den Norske Stats Oljeselskap AS v. Heere Mac VOF, 241 F.3d 420 (5th Cir. 2001) (denying relief to foreign plaintiffs), *petition for cert. filed*, 69 U.S.L.W. 3791 (June 11, 2001) (No. 00-1842), Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62 (3d Cir. 2000) (finding not insubstantial effect on commerce, which is sufficient), but readers interested in this topic are referred to more specialized sources of information. The year also saw some unremarkable discussions of the ever-litigated state action exemption, A.D. Bedell Wholesale Co. v. Philip Morris Inc., 263 F.3d 239, 260–65 (3d Cir. 2001) (insufficient state supervision for exemption on this ground), *petition for cert. filed*, 70 U.S.L.W. 3317 (U.S. Oct. 19, 2001) (No. 01-656); TFWS, Inc. v. Schaeffer, 242 F.3d 198, 208–09 (4th Cir. 2001) (state statute and regulations requiring posting and maintaining prices, and prohibiting volume discounts, violate the Sherman Act and are not immune state action).

[4] *See* Stephen Calkins, California Dental Association*: Not the Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000)

[5] The Revised Proposed Final Judgment and Competitive Impact Statement reflecting the stipulation into which Microsoft, the Justice Department, and nine states entered are available at 66 Fed. Reg. 59,452 (Nov. 28, 2001). Public comment is invited for sixty days.

[6] Were I to evaluate the underlying merits of the case, I would have to note two affiliations. I currently serve of counsel to Covington & Burling, a law firm that has represented Microsoft, including in connection with the Justice Department case. From 1995–97 I served as General Counsel to the FTC, and in that capacity had informal conversations with Justice Department officials who were evaluating Microsoft's conduct. The views expressed herein are entirely my own, based on public information.

[7] The court counts this as its second point, but since the first point is merely that a monopolist's conduct can be condemned only if it has an "anticompetitive effect," *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir.), *cert. denied*, 122 S. Ct. 350 (2001), the first two points listed are really only one.

[8] Although not a separate step, the court added that during the weighing of the net effect of the monopolist's conduct, the focus is on the effect of the conduct, not the underlying intent. *Id.* at 59.

[9] The Commission recently entered into a proposed settlement that calls for $19 million in disgorgement. *See* FTC Press Release (Dec. 14, 2001), http://www.ftc.gov/opa/2001/12/hearst.htm. Commissioner Leary dissented from the requirement of disgorgement; Commissioner Swindle issued a separate statement asserting that the decision to seek disgorgement was incorrect; Commissioners Anthony and Thompson issued a statement reasserting their view that disgorgement was appropriate. Chairman Muris was conspicuously silent—but cast an unqualified vote in favor of the proposed settlement. The Commission has now formally solicited comments on the use of disgorgement as a remedy for competition violations. Press Release (Dec. 20, 2001), *available at* http://www.ftc.gov/opa/2001/12/disgorgefrn.htm.