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THE FUTURE OF US FEDERAL ANTITRUST ENFORCEMENT: LEARNING FROM PAST AND CURRENT INFLUENCES

James Langenfeld[1] *and Daniel R. Shulman*[2]

I. INTRODUCTION[3]

There are a number of major influences that shape federal antitrust enforcement now, and in the future.[4] One of these influences is obviously who is running the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ), and their particular enforcement agendas. Much has been made of the continuity and general consensus about the role of antitrust, and in many ways this is true.[5] However, if there is a new administration or simply a change in the heads of the agencies, then past experience indicates that at least some change in emphasis will take place. Another direct influence on antitrust enforcement is what businesses decide to do. For example, if the number of mergers decline substantially, then presumably fewer mergers are likely to be challenged.

There are other influences that may be more indirect, but can have a longer run impact. The progress of economic thought has had a major influence on the agencies and courts over time, and that presumably will continue.[6] In addition, antitrust policy groups and associations can influence enforcement. For example, the Antitrust Modernization Commission (AMC) has recently made a number of recommendations.[7] These recommendations may guide the actions of the agencies, and could even lead Congress to enact changes to the law. Finally, the antitrust agencies success in winning cases is ultimately governed by the federal courts. Supreme Court and appeals court rulings set the bounds within the agencies and private plaintiffs can operate, as well as any legislative changes. Accordingly, the future of federal antitrust enforcement requires predicting the future of a variety of influences and how they will interact.

To project likely future enforcement, we perform five analyses. First, economists often look to past and current trends to predict the future; so we try to determine what those trends have been and what factors have influenced them. Second, we analyze some of the external market influences that could affect the level of antitrust enforcement. Third, we look at statements of those in charge of the agencies, taking into account that a new administration will occur in two years and will likely chose different senior officials at the agencies. Fourth, we look at the general state of economic thinking and research to see how this might influence future enforcement. Finally, we look at some key court decisions that are likely to limit and shape the success of federal enforcement efforts.

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3 An earlier version of this article was presented at the Sedona Conference Antitrust Law and Litigation of October 26-27, 2006. The opinions expressed here are only those of the authors. However, we would like to thank Thomas Rosch, William Kovacic, and the participants in the Sedona Conference Antitrust Law and Litigation for their very helpful comments on the earlier version of this article, recognizing that this article does not necessarily reflect their opinions or the opinions of their colleagues. We also would like to thank Jamie Ziesch for her excellent research help.
4 The funding levels of the agencies can limit their level of activity, although with the advent of filing fees for mergers meeting the minimum size threshold there does not appear to be substantial budget pressure on either agency now.
5 *See*, for example, William E. Kovacic, "The Modern Evolution of U.S. Competition Policy Enforcement Norms", 71 *Antitrust L. J.* 377 (2004) and Thomas B. Leary, "The Essential Stability of Merger Policy in the United States", 70 *Antitrust L. J.* 105 (2002) (Hereafter Leary (2002)).
6 *See*, for example, William Kovacic, "The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix," 1 *Columbia Law Review* 1-80 (2007). (Hereafter Kovacic (2007a)).
7 Antitrust Monopolization Commission, Report and Recommendations, April 2, 2007, *available at* www.amc.gov/index.html. (Hereafter AMC (2007)).

We do not analyze other potentially important influences in this article, but mention some of them here. In particular, we do not try to predict the influence of the various interested antitrust groups on future federal antitrust enforcement, except to discuss some of the AMC's recommendations. Other potentially important groups include the Antitrust Section of the American Bar Association (ABA), the International Bar Association, the National Association of Attorneys General, and the American Antitrust Institute. The ABA tends to argue caution in enforcing antitrust laws, while the latter two organizations have tended to argue for more active enforcement.

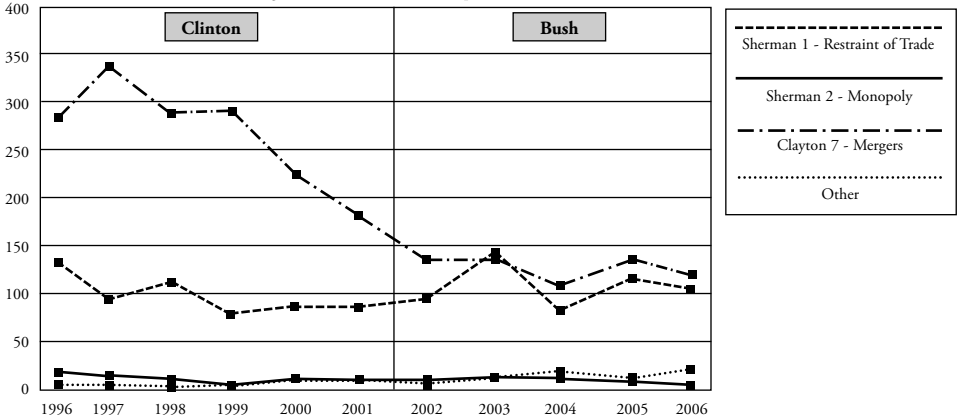
The remainder of the article begins with a discussion of the future of merger enforcement. We then discuss price fixing, cartels, and agreements among competitors; unilateral behavior and vertical non merger cases (monopolization, tying, bundling, predatory behavior, resale price maintenance, etc.); and finally a few other areas where there has been relatively little recent enforcement (Robinson-Patman, invitations to collude, facilitating practices, etc.).

II. MERGER ENFORCEMENT

The agencies have traditionally devoted about half of their antitrust resources to merger enforcement since the implementation of the Hart-Scott-Rodino Act in 1976 premerger review process. Both agencies have been active in investigating and challenging mergers, and the vast majority of these have been mergers between direct competitors. Looking at the recent trend in the aggregate number of merger challenges and investigations can provide some insights into the level of enforcement activity that is likely to take place in the future.[8]

The DOJ publishes fairly detailed statistics on the number of its investigations and challenges by type of case, and the FTC makes less detailed information available in some of its reports.[9] Figure 1 shows the number of DOJ investigations of Sherman 1 restraint of trade, Sherman 2 monopolization, and Clayton 7 mergers from 1996 to 2006. Focusing on the merger investigations, it is clear that the number of investigations have fallen from its high during this period of 338 in 1997 to between less than 140 per year from 2002 to 2006.

Figure 1
Department of Justice* Antitrust Division
Total Investigations Initiated by Primary Type of Conduct

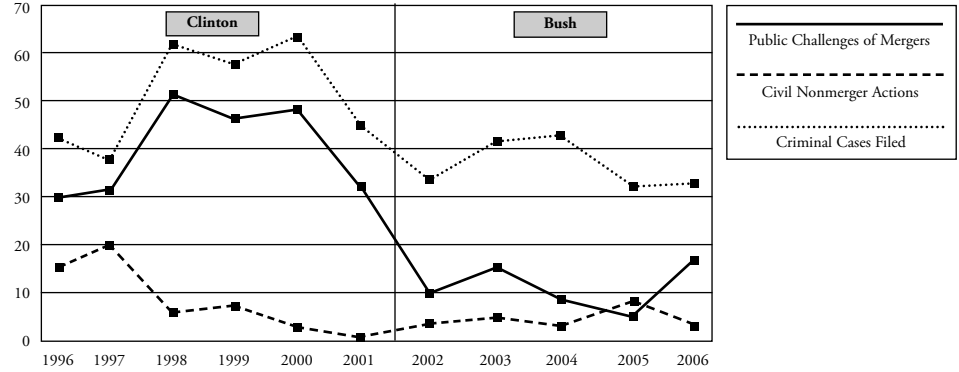


8 Clearly all mergers are not equal in terms of size, complexity, or the potential impact on consumers, so simple counts of the number of enforcement actions and investigations can be misleading. Moreover, as then FTC General Counsel, now Commissioner, William Kovacic has written "Beyond cases, the successful competition agency invests in research, holds hearings and workshops, performs empirical work, publishes studies, and submits advocacy comments to other public authorities." William E. Kovacic, "*The Future of U.S. Competition Policy*," September 2004, The Antitrust Source, www.antitrustsource.com. However, when the agencies report their enforcement activity they usually begin with the aggregate number of enforcement actions taken, suggesting the agencies put some weight on "the numbers". In addition, other researchers have analyzed the number of actions brought be the agencies to evaluate the level of federal antitrust enforcement activity. For example, Jonathan Baker and Carl Shapiro have recently studied merger challenges as a percentage of HSR filings since 1982 in their analysis of trends in merger enforcement at the FTC and DOJ. *See* Baker and Shapiro, "*Reinvigorating Horizontal Merger Enforcement*", April 10, 2007, *available at* http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf. (Referred to as Baker and Shapiro (2007) hereafter.) We caution putting too much weight on the number of challenges and investigations in any given year, since the mix of mergers presented to the agencies in any year may be substantially different from the norm.

9 "Antitrust Division Workload Statistics FY 1996-2005," www.usdoj.gov/atr/public/workstats.htm.

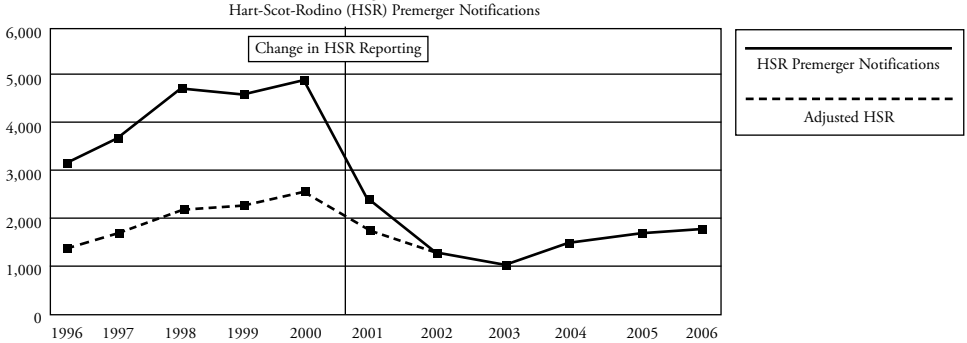
Figure 2 shows the number of DOJ public challenges to mergers for the same time period, as well as the number of criminal and civil nonmerger cases. During this time period, merger challenges by the DOJ were at their highest level from 1998 to 2000, ranging from 51 to 46 per year. The number of challenges fell sharply in the period 2002 to 2006, and ranging from a low of 4 challenges in 2005 to a high of 16 in 2006.

Figure 2
Department of Justice* Antitrust Division
Challenges



One reason for the fall in the number of investigations appears to be the drop off in the number of mergers after 2000, although measuring the fall off in the numbers is complicated by February of 2001 change in the Hart-Scott-Rodino (HSR) reporting requirements that raised the minimum cut off for reporting from $15 million to $50 million.[10] This change explains to a large degree the number of filings dropping from 4,926 to 2,376 from 2000 to 2001, as shown by the sold line in Figure 3. There is limited publicly available information that adjusts for this change over time in a way to use the HSR reporting as a measure of aggregate merger activity. However, in 2005 the FTC printed a chart in one of its annual reports that shows (without reporting the exact data) the number of transactions that would have been filed subject to the thresholds established in 2001.[11] We have roughly estimated these numbers from 1996 to 2001 based on that chart, and they are represented by the dashed line in Figure 3. These adjusted data also show a substantial (although less dramatic) drop in the number of mergers under the new HSR reporting requirements from a high of about 2,500 in 2000 to a low of about 1000 in 2003.

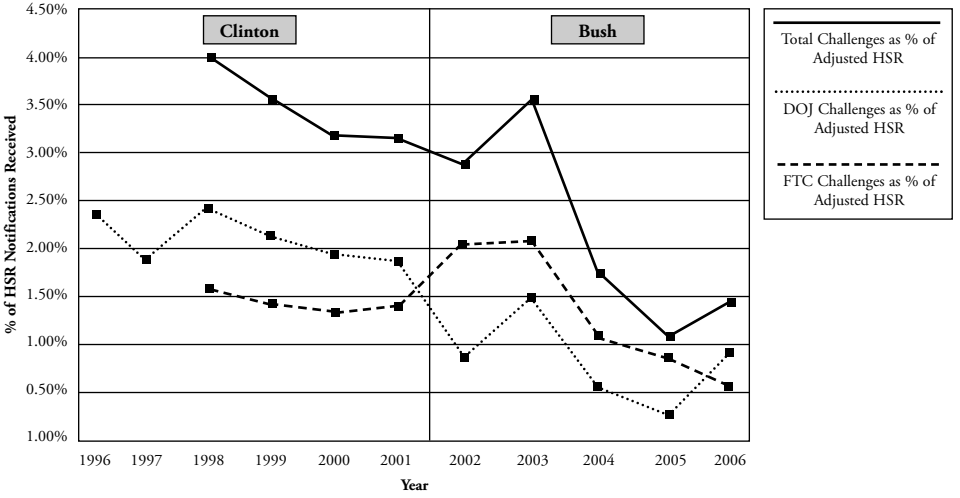
Figure 3
Hart-Scot-Rodino (HSR) Premerger Notifications



10 Premerger Notification, 66 Fed, Reg. 8680 (Feb, 1, 2001).
11 Federal Trade Commission, "The FTC in 2005: Standing up for Consumers and Competition," April 2005, p. 5, *available at* http://www.ftc.gov/os/2005/04/0504abareportfinal.pdf.

To control for this drop in merger activity, we calculate the percentage of the adjusted HSR filings received that were subject to DOJ public challenges, as illustrated in Figure 4. Although there are variations from year to year, the challenges as a percent of the adjusted HSR filings averaged about 2.2% per year from 1996 to 2001. During the years of 2002 to 2006, this average fell to about 1%.

Figure 4
Merger Challenges as a Percent of Adjusted HSR Fillings



The unadjusted data since 2002 is indicative of changes in the level of merger activity over that period. As shown in Figure 3, the number of filings after the reporting change fell to a low of 1,014 in 2003, and then rose to 1,768 in 2006, reflecting a reduction and then rise in merger activity over the last 6 years.[12] DOJ challenges as the percentage the number of HSR filings fell as the number of mergers increases. As illustration in Figure 4, in 2003 this percentage was1.5%, when there were the fewest HSR filings. In 2004 this percentage fell to 0.62% and to 0.24% in 2005, before increasing to 0.9% in 2006.

Based on the adjusted and unadjusted data, the reduction in merger activity in 2001 through 2003 does not appear to explain all of the reduction in DOJ merger challenges since 2002. DOJ public challenges of mergers as a percentage of DOJ investigations should not be affected by the change in HSR reporting, and could reflect changes in DOJ management decision criteria for challenge mergers. Figure 5 shows the percentage of DOJ merger investigations that resulted in merger challenges. This percentage fell from an average of 19 percent per year for 1998 to 2000 to about 8 percent per year in the 2002 to 2005 period, before increasing to 14% in 2006. It appears that not only are there substantially fewer DOJ investigations in recent years, but the rate of challenges coming out of those investigations fell compared to the earlier period by more than half until 2006.

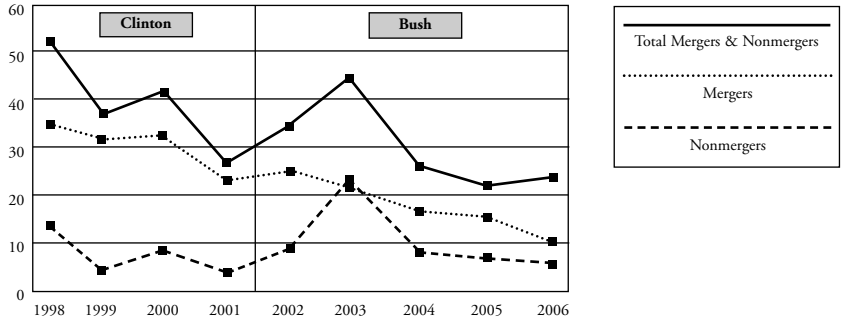
Figure 5
Department of Justice* Antitrust Division
Percentage of Merger Investigations Leading to Challenges

12 Obviously using HRS filings for 2001 number will overstate the level of merger activity in that year, since two months of filings reflect the lower threshold prior to the change.

In general, these data suggest that merger enforcement activity at the DOJ has been reduced – rightly or wrongly. The upswing in merger challenges during 2006 has not raised the level of challenges or investigations to even half of their lowest levels from 1996 to 2001, and the fall in the number of mergers in 2002 and 2003 does not explain all of this drop. Presumably something substantial would need to change to reverse the trend in the foreseeable future.

The FTC does not publish similarly detailed systematic data on the number of investigations as far as our research has been able to determine, but one can track the number of merger related FTC preliminary injunctions, consents, Part III administrative complaints, and mergers abandoned due to FTC actions.[13] Figure 6 shows the sum of these actions from 1998 to 2005. The FTC's merger challenges have steadily fallen during this time period, from 34 in 1998 to 10 in 2006. Until 2006, the fall in the number of FTC enforcement actions had not been as substantial as the DOJ's, but there is a downward trend in merger challenges.

Figure 6
FTC Enforcement: Number of Part II & Part III Complaints & Consents



As illustrated in Figure 4 above, the FTC merger challenges as a percentage of the total adjusted HSR filings per year averaged about 1.4 percent both before and after 2002. This percentage was about 2 percent in the two years where there were the fewest filings, 2002 and 2003. It fell in 2004 to 2006 to less than half of the level in 2002 and 2003, also suggesting fewer FTC challenges in the last three years after taking into consideration the increase in aggregate merger activity during those three years.

Figure 4 also shows the combined percentage of DOJ and FTC challenges as a percent of adjusted HSR filings. There does not appear to be any significant drop in the total percentage of challenges through 2003. However, there has been a noticeable drop in this percentage in 2004 to 2006 as the number of mergers has increased.

In attempting to predict the level of future merger enforcement based on what we have observed in the recent past, the relevant question is why does there appear to have been so many investigations and challenges in late 1990s and relatively few recently? Examining Figures 1 to 6, one thing is apparent from the data. There are fewer investigations and challenges of mergers by both agencies since President Bush took office and installed new senior administrators at both agencies, and the reductions at least since 2003 do not appear to be due to fewer mergers. To illustrate the change in the administrations, we included vertical lines in Figures 1, 2, 5, and 6 to show the transition from the Clinton to the Bush administration enforcement between 2001 and 2002. This demarcation reflects what has become the standard analysis of treating the first year after a new administration as being more reflective of the prior than the new administration.[14]

13 "Summary of Bureau of Competition Activity Fiscal Year 1998 through March 31, 2002," ABA Antitrust Spring Meeting, http://www.ftc.gov/reports/aba/abaspring2002.pdf; "Summary of Bureau of Competition Activity Fiscal Year 2002 through March 15, 2006," ABA Antitrust Spring Meeting, www.ftc.gov/reports/aba/abaspring2006.pdf. Note that the FTC's 2004 and 2005 data as published do not reflect mergers abandoned due to FTC actions, and I have adjusted these figures based on discussions with FTC staff and "Annual Report to Congress Fiscal Year 2005," FTC and DOJ, www.ftc.gov/reports/hsr05/P989316trwentyeighthannualhsrreport.pdf, p. 13; "Annual Report to Congress Fiscal Year 2004," FTC and DOJ, http://www.ftc.gov/reports/hsr0 5/050810hsrrpt.pdf, p. 11; "Annual Report to Congress Fiscal Year 2003," FTC and DOJ, http://www.ftc.gov/os/2004/09/040903hsrrpt03.pdf, p. 13.

14 *See*, for example, Leary (2002); James Langenfeld and Louis Silvia "Federal Trade Commission Horizontal Restraint Cases: An Update," *The Antitrust Bulletin* 49, no.3, (Winter 2004) (hereafter Langenfeld and Silvia (2004)), pp. 521-591; and Baker and Shapiro (2007).

Although (as we discuss below) there are other reasons that at least in part likely explain the substantial decline, the data are consistent with the Bush administration reducing the level of enforcement actions. It is possible that more or less mergers will be challenged in the next two years based on the specific agendas of the current senior officials[15] and other factors external to the agencies. Clearly the DOJ substantially increased the number of mergers it challenged from 4 in 2005 to 16 in 2006. However, to the extent the lower number of challenges and investigations reflect Bush administration policy, there will presumably not be an increase to the levels seen in the Clinton administration – again rightly or wrongly.

Forecasting the level of enforcement beyond two years will obviously depend on who becomes President and who they will choose to run the agencies. It may be tempting to assume that if a Democrat is elected, then there will be more aggressive merger enforcement. In fact, the non Republicans FTC commissioners have been more aggressive about pursuing some mergers. Commissioners Jon Liebowitz and Pamela Harbour Jones dissented over closing the FTC's investigation of the Time Warner/Comcast acquisition and "swap" of certain Adelphia cable systems because "this transaction may raise the cost of sports programming to rival content distributors, and thus substantially lessen competition and harm consumers."[16] Moreover, Commissioner Harbour would have continued to litigate the FTC's district court loss in *Arch Coal* in an FTC Part III administrative proceeding.[17] On the DOJ side, the Antitrust Division recently approved the merger of AT&T and BellSouth without any divestitures or conditions, but Democratic members of the Federal Communications Commission raised substantial questions about whether the merger will harm competition.[18] Nevertheless, Republican administrations in the past have supported active antitrust enforcement. If there is a Republican president after the next election, the impact on the level of merger investigations and challenges will presumably depend on whether they share the same views of enforcement as President Bush and his administrators.

As discussed above, there are other factors that can affect the level of enforcement and the types of mergers challenged, so it would be too simplistic to attribute the fall off in the number of merger challenges merely to the change in administrations.[19] For example, both the FTC and DOJ have recently lost high profile merger challenges. The DOJ's unsuccessful challenge of the *Oracle/Peoplesoft*[20] merger is one, and the FTC's defeat in *Arch Coal*[21] is another. The FTC just received another defeat in district court in its attempt to challenge a merger in the petroleum industry.[22] At least some courts appear to be changing the old presumptions of *Philadelphia National Bank*[23] that a substantial increase in market share is the key for the agencies to successfully challenge a merger. The Supreme Court appears content with the situation, since it has not taken a Section 7 case in decades. Beyond what the agencies' policy priorities may be, the agencies are pragmatic. It is not surprising that such losses would make them cautious about bringing new cases that could establish even higher burdens of proof for future challenges. Interestingly, FTC Commissioner Pamela Harbour Jones' dissent on the Commission's decision not to challenge the Arch Coal merger in Part III highlights the potential problems of challenging mergers and losing. She states "[i]f the Commission does not continue its enforcement action, we run the risk that the district court opinion will impose an unnecessarily high burden of proof for future merger challenges predicated on coordinated effects."[24] These court imposed limitations on merger enforcement suggest that an increase in the aggregate level of merger challenges will be difficult, even if the agencies want to expand their activity.

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15 There is evidence that shows that administrators can have a substantial impact on policy. *See*, for example, Thomas F. Walton and James Langenfeld, "Regulatory Reform Under Reagan - The Right Way and the Wrong Way," in *Regulation and the Reagan Era: Politics, Bureaucracy and the Public Interest*, ed. Roger Meiners and Bruce Yandle (San Francisco: Independent Institute, 1989).

16 Statement of Commissioners Jon Liebowitz and Pamela Harbour Jones (Concurring in Part, Dissenting in Part), Time Warner/Comcast/Adelphia, Filed No. 051-0151 available at FTC web site.

17 Dissenting Statement of Commissioner Pamela Harbour Jones In The Matter of Arch Coal Inc., et. al., Docket No. 9316/File No. 031- 0191, *available at* FTC website.

18 *See*, for example, Paul Davidson, "BellSouth Deal Faces FCC Fight", USA TODAY, October 12, 2006, 3B.

19 Another possible explanation of the drop in the number of mergers challenged and investigated is the changing nature of the types of mergers over time. Clearly there have been many more private equity acquisitions in recent years. Such acquisitions are less likely to reduce competition than traditional strategic mergers, where there is a greater likelihood of competitors merging. To our knowledge, there are no reliable estimates of percentage of transaction that are private equity, so it is difficult to test the likely effect of these acquisitions on the number of potentially anticompetitive mergers. While there are estimates that total value of private equity investments has grown four fold from 2002 to 2005, the actual number of these transactions has fallen from 128 to 67 in this period. Apax Partners, Unlocking Global Value, Future Trends in Private Equity Investment World Wide, at 8. available at http://www.apax.com.

20 *United States v. Oracle Corp.*, 331 F.Suppl.2d 1098, 1123 (N.D. Calif. 2004).

21 *Federal Trade Commission v. Arch Coal, Inc.*, 329 F.Supp. 2d 109 (D.D.C. 2004)

22 *Federal Trade Commission v. Paul L. Foster, Western Refining, Inc.*, and Giant Industries, Inc. (United States District Court of New Mexico), No. CIV 070-352 JB/ACT (Slip. Op,), May 29, 2007.

23 *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963).

24 Dissenting Statement of Commissioner Pamela Harbour Jones In The Matter of Arch Coal Inc., et. al., Docket No. 9316/File No. 031- 0191, at 1-2, *available at* FTC website.

The FTC has clearly tried to re-establish its role in merger enforcement in the face of adverse court decisions in at least one area, hospital mergers. The FTC and DOJ have lost all of the preliminary injunctions brought in hospital mergers since 1992, a total of six losses in a row.[25] Failing consistently in district courts since 1992, the FTC chose to challenge a consummated hospital merger of the Evanston-Northwestern and Highland Park hospitals in the northern Chicago suburbs with a Part III administrative complaint. The FTC sought to show that prices had increased as a result of the merger, and that the patient flow data that most of the recent hospital decisions have relied upon for geographic market definition was unreliable and misleading. The administrative law judge found that the merger was anticompetitive,[26] and the Commission is sitting in judicial review of the ALJ's decision at this writing. The final outcome of the case may determine whether the FTC and DOJ will be able to successfully challenge any hospital mergers in the future.

In recent years there have been very few merger challenges that do not involve direct competitors. Since 2000 the FTC has had at least two (publicly announced) investigations in which vertical issues were prominent – the proposed *Cytyc/Digene*[27] and *Avant!/Synopsys*[28] vertical mergers. The FTC challenged the first and the merger was abandoned, and it did not challenge the second. This is an area where the economics and case law is more complex, and there is much less consensus on when (and if) such mergers should be challenged. The agencies' policies on vertical mergers – other than they are much less likely to present competitive problems than horizontal mergers – are very unclear. This can be seen in the *Merger Guidelines*. In 1984, the *Merger Guidelines* covered vertical as well as horizontal mergers, but in 1992 the agencies only issued the Horizontal Merger Guidelines. A quick review of the 1984 *Guidelines* on vertical mergers show them sadly not up to date with current economic thinking or with the alternative theories of those vertical mergers that have been challenged or investigated. The AMC apparently realized this, since one of its recommendations was to update the *Merger Guidelines* to include how the agencies evaluate non-horizontal mergers.[29] The lack of any revision of the out-of-date 1984 *Guidelines* on vertical mergers suggest this has been an area of low priority, so the agencies seem quite unlikely to challenge many vertical mergers in the foreseeable future. Moreover, given the strong stance that the DOJ took on the European Commission's challenge of the GE/Honeywell merger based on a leveraging theory, it seems quite unlikely that many conglomerate mergers will be challenged absent a sea change in enforcement policy.[30]

The other longer run influences on merger enforce include advances in economic thinking and policy/legislative recommendations from antitrust experts and organizations. Clearly the "Chicago School" of economics has had a major influence on merger enforcement, which can be traced back to the revision of the *Merger Guidelines* in 1982. "Post Chicago School" thought, and in particular the introduction of game theory considerations, affected the 1992 revision of the *Horizontal Merger Guidelines* by shifting the focus of merger inquiries more to unilateral competitive effects from mergers, and to some degree de-emphasized concerns about coordinated effects. With the new administrators put in place by President Bush, the potential for coordinated effects from mergers regained more focus of the agencies' inquiries.

The net effect of recent economic thinking has led to a de-emphasis of reliance on simple market share calculations and an increased focus on an economic analysis of the likely competitive

25 *See* H.E. Frech III, James Langenfeld, and R. Forrest McCluer, "Elzinga-Hogarty Tests and Alternative Approaches for Market Share Calculations in Hospital Markets," *Antitrust Law Journal*, 71, no.3 (2004), pp. 921-947.

26 *Available at* http://www.ftc.gov/os/adjpro/d9315/index.htm

27 FTC Press Release, *Federal Trade Commission Seeks to Block Cytyc' Corporation's acquisition of Digene Corporation*, File No. 021-0098 (June 24, 2002), *available at* http://www.ftc.gov/opa/2002/06/cytyc_digene.htm.

28 *See* FTC Press Release, *Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc.*, File No. 021-0049 (July 26, 2002), *available at* http://www.ftc.gov/opa/2002/07/avant.htm. As three Commissioners noted in their separate statements, the Commission intended to watch this market closely in the future, and did not rule out the possibility of seeking relief in the future if market effects prove to be more harmful than was apparent in advance of the merger. *Statement of Commissioner Thomas B. Leary, Synopsys Inc./Avant! Corp.*, File No. 021-0049 (July 26, 2002), *available at* http://www.ftc.gov/os/2002/07/avantlearystmnt.htm; *Statement of Commissioner Mozelle W. Thompson, Synopsys Inc./Avant! Corp.*, File No. 021-0049 (July 26, 2002), *available at* http://www.ftc.gov/os/2002/07/avantthompsonstmnt.htm; *Statement of Commissioner Sheila F. Anthony, Synopsys Inc./Avant! Corp.*, File No. 021-0049 (July 26, 2002), *available at* http://www.ftc.gov/os/2002/07/avantanthonystmnt.htm. No subsequent public action has been taken by the FTC.

29 AMC 2007, p. 11.

30 *See*, for example, Deborah Platt Majoras, then Deputy Assistant Attorney General of the Antitrust Division, "GE-Honeywell: The U.S. Decision," Remarks before the Antitrust Section of the State Bar of Georgia, November 29, 2001, *available at* http://www.usdoj.gov/atr/public/speeches/9893.htm.

effects of the merger.[31] This can be seen in the agencies recent publications relating their merger enforcement. Clearly, the FTC's retrospective on factors influencing its challenges of mergers indicates that it only uses market concentration statistics (*i.e.*, HHIs) to decide which mergers to investigate, and will only challenge mergers well above the Horizontal Merger Guidelines' thresholds for "highly concentrated" markets.[32] Now there is more focus on the number of competitors (mergers of 3 to 2 or to monopoly typically challenged, relatively little chance of challenging 4 to 3 or higher) and potential entry. After the extensive use of econometric modeling of demand and game theory models to predict price increases from a merger in the late 1990s,[33] economic analysis now focuses more on "natural experiences" that try to predict the impact of a merger based on similar events in the industry or other geographic areas.[34] These shifts from a more structural to a more detailed economic approach to predicting the effects of mergers have occurred under both Democratic and Republican administrations. However, economists Jonathan Baker and Carl Shapiro have recently suggested that this trend may have gone too far, stating "that large increases in market concentration should be given real weight in merger analysis, and that any contrary presumption that 'two is enough' is unsupported."[35]

In general, the influence of economic thought on economic policy seems to occur with a lag, so looking at current economic thinking may be a good way to predict how the agencies will analyze mergers in the future. As illustrated by the court decisions mentioned above, it seems that courts may have not yet accepted some of the current economic thought on mergers, instead relying more on the ability of firms to reposition, requiring a great deal of evidence on precisely defined markets, and following a more traditional Chicago School skepticism of government intervention.[36]

III. AGREEMENTS AMONG COMPETITORS

An area of substantial agreement by both legal scholars and economists is that agreements among competitors that restrict competition are the most dangerous area of potentially anticompetitive practices. Certain types of agreements, such as price fixing and bid rigging, have been investigated and challenged regularly by the DOJ. As can be seen in Figure 1, the DOJ has consistently investigated about 100 of these cases a year over the last decade. Although the number of investigations has remained relatively stable, the number of criminal cases filed has dropped from about 60 per year between 1998 and 2000 to an average of less than 40 per year from 2002 to 2006, as shown in Figure 2.[37]

These data suggest that the DOJ has consistently devoted substantial investigative resources to price fixing and bid rigging criminal cases. However, the data suggest that the DOJ has tightened its criteria for bringing these cases since 2002 compared to the last three full years of the Clinton administration.

Speeches by DOJ officials do not suggest any substantial change in criminal enforcement efforts,[38] nor does it seem likely that a change in administrations or new economic analyses will reduce Federal policy with regard to this core area of antitrust enforcement. There has been a trend in sharing information about international cartels between the competition agencies in different countries, which is likely to continue. Accordingly, it is more likely that international cartels will be detected and the DOJ should be more likely to challenge agreements involving larger markets. There is also some chance that economic analysis may play a larger role in cartel cases, but this has yet to be firmly established.[39]

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31 *See*, for example, James A. Keyte and Neal R. Stoll, "Markets? We Don't Need No Stinking Markets!" *Antitrust Bulletin* 49, no. 3 (Fall 2004), p. 593; and Malcolm Coate, "Empirical Analysis of Merger Enforcement Under the 1992 Merger Guidlelines," *Review of Industrial Organization*, 27, (Spring 2005), p. 279.
32 Staff Report of the Federal Trade Commission, "Horizontal Merger Investigation Data, 1996-2003," Revised August 31, 2004, *available at* FTC website.
33 Robert Lande and James Langenfeld, "From Surrogates to Stories: The Evolution of Federal Merger Policy," *Antitrust*, Spring 1997, 5-9.
34 *See* Mary Coleman and James Langenfeld, "Natural Experiments," in *Issues in Competition Law and Policy* (American Bar Association, forthcoming 2007).
35 Baker and Shapiro (2007), p. 22.
36 For discussion of other court decisions on mergers, see Baker and Shapiro (2007). In addition, these authors also performed an interesting survey of antitrust practitioners' opinions on merger enforcement.
37 The number of civil non-merger actions (which includes both Section 1 non-criminal competitor agreements and Section 2 monopolization cases) has been less than ten for every year since 1998.
38 *See*, for example, Gerald Masoudi, Deputy Assistant Attorney General Antitrust Division, "Cartel Enforcement in the United States (and Beyond)," Presented at the Cartel Conference, Budapest, Hungary, February 16, 2007, *available at* http://www.usdoj.gov/atr/public/speeches/221868.htm.
39 *See In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2000) (Posner, J.) (use of economic evidence to prove collusion). For a brief discussion of the state of economic analysis' relevancy for inferring conspiracies, see James Langenfeld and James Morsch, "Refining the *Matsushita* Standard and The Role Economics Can Play", *Loyola University Chicago Law Journal*, Vol. 38, No. 3, Spring 2007, 507-512.

The FTC has generally taken the lead in challenging non-criminal agreements among competitors.[40] The vast majority of the FTC's non-merger enforcement efforts in the last 25 years have been challenging non-criminal agreements among competitors. For example, Figure 6 shows the number of FTC non-merger challenges by year from 1998 to 2006. Of the 23 non-merger enforcement actions in 2003, 19 were distinct horizontal restraints cases.[41] Almost half of the cases between 1993 and 2003 involved ambulatory health care or professional, scientific, or technical services. More recently, the FTC has pursued agreements between pharmaceutical firms, such as the so-call "reverse payments" cases where pioneer drug firms have paid money to generic drug firms to set or influence the generic entry date in the context of patent litigation settlements.[42]

With the exception of the 2003, which was an all time high in the FTC bringing agreements among competitors cases, there has been a fairly constant level of FTC enforcement actions in the past 10 years. Research shows that the more recent cases have tended to involve cases brought under traditional economic theories, such as attempts by sellers to fix prices, rather than "raising rivals costs" or "raising own cost" theories.[43]

To a large degree the FTC under the Clinton administration moved away from its approach to analyzing agreements among competitors under a "quick look" approach outlined in its 1980s *Mass. Board*[44] to more traditional per se treatment of agreements. In particular, the FTC took a per se approach in *California Dental Association,*[45] which was overturned by the appeals court for lack of sufficient market analysis of the impact of the challenged advertising restrictions. Under the Bush administration, the FTC has attempted to revitalize the *Mass. Board* approach in its decisions on the *Polygram*[46] ("Three Tenors") and *Schering Plough*[47] cases.[48]

Court decisions may be a major factor in limiting successful future challenges to agreements among competitors. For example, *Schering Plough* was a "reverse payments" case, where the FTC found there was a need for a full "rule of reason" case. However, the appeals court reversed the Commission decision of liability for lack of substantial evidence that the agreement delayed entry in the context of a patent settlement, which the FTC appealed to the Supreme Court. The Supreme Court denied *certiorari*, which raises questions about whether and how the FTC should be investigating and challenging such agreements. Moreover, the FTC appealed without the support of the DOJ, and the Supreme Court requested the opinion of the DOJ on the matter. The DOJ opposed granting *certiorari* in its submission, clearly showing a split between the agencies on these cases.

In addition to this set back to the FTC's challenges to non-criminal agreements not to compete, recent Supreme Court decisions are likely to make it more difficult for the agencies to challenge agreements not to compete. For example, *Texaco, Inc. v. Dagher*, 547 U.S.___, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006) raises the question of whether joint ventures will become something of a safe harbor for concerted activity of competitors. If a combination must be challenged under the equivalent of rule of reason requirements of Section 7 of the Clayton Act because it claims to be a joint venture, then venture participants' conduct becomes difficult to challenge under Sections 1 or 2 of the Sherman Act, and perhaps under Section 5 of the FTC Act. *Dagher* appears to be a rather narrow decision, largely because the Court did not address the broader areas raised by the briefing. It appears to have left untouched the ancillary restraint doctrine of *Addyston Pipe*,[49] although one might legitimately question whether the doctrine has become inapplicable to a "fully integrated" joint venture. One can also question whether *Copperweld*[50] has been extended *sub silentio* to joint ventures.

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40 James Langenfeld and Louis Silvia, "The Federal Trade Commission's Horizontal Restraint Cases: An Economic Perspective," *Antitrust Law Journal*, (Spring 1993), pp. 653-697; James Langenfeld and Louis Silvia "Federal Trade Commission Horizontal Restraint Cases: An Update," *The Antitrust Bulletin* 49, no.3, (Winter 2004) (hereafter Langenfeld and Silvia 2004), pp. 521-591. (Hereafter *Langenfeld and Silvia (2004).*)

41 Langenfeld and Silvia (2004), p. 522.

42 *See*, for example, James Langenfeld and Wenqing Li, "Intellectual Property and Agreements to Settle Patent Disputes: The Case of Partial Settlement Agreement with Payments from Branded to Generic Drug Manufacturers," *Antitrust Law Journal* 70, Issue 3 (Spring 2003), pp. 777-818.

43 Langenfeld and Silvia (2004), p. 536.

44 Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988).

45 California Dental Association, 121 F.T.C. 190 (1996), *aff'd*, 128 F.3d 720 (9th Cir. 1997), *vacated, remanded* 526 U.S. 756 (1999), rev'd, remanded 224 F.3d 942 (9th Cir. 2000).

46 PolyGram Holding, Inc., Docket No. 9298, July 24, 2003, *available at* http://www.ftc.gov/os/200307polygramopinion.pdf.

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

48 Langenfeld and Silvia (2004).

49 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

50 *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

The *Copperweld* issue was extensively briefed, but not addressed in the opinion. The opinion also contained no discussion of *Citizen Publishing v. United States*,[51] the precedent on which the 9th Circuit and respondents principally relied.

In the future, *Dagher* will need to be distinguished from numerous joint venture precedents, including *BMI v. CBS*,[52] *Cal. Dental v. FTC*,[53] *FTC v. Indiana Fed. of Dentists*,[54] *NCAA v. Board of Regents*,[55] *Freeman v. San Diego Board of Realtors*,[56] and *Polygram Holding v. FTC*.[57] *Dalgher* may also have implications for the application of the FTC's "quick look" analysis. The Third Circuit approved the FTC framework for analyzing joint venture conduct under the quick look in *Polygram*, and the question is whether *Dagher* will be read to affect that.[58]

In the recent Supreme Court term, there has been another potentially significant development in the law regarding concerted action, the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.[59] This decision puts to rest any idea that vague and conclusory allegations of conspiracy premised on parallel conduct are sufficient to survive a motion to dismiss, eliminating the possibility that discovery will provide evidence in support of such allegations. The Court summarized its holding in *Twombly* as follows:

> The question in this putative class action is whether a Section 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.[60]

In *Twombly*, the plaintiff customer class alleged that the defendant Baby Bells or "incumbent local exchange carriers ('ILECs')" engaged in parallel refusals to deal with "competitive local exchange carriers ('CLECs')," with which the plaintiff class did business.[61] The plaintiffs further alleged that such parallel refusals to deal were evidence of a conspiracy among the defendants. To this, the Court responded,

> [A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level, *see* C. Wright & A. Miller, *Federal Practice and Procedure*, Section 1216, pp. 235-36 (3d ed. 2004) (hereinafter Wright & Miller) ('[T]he pleading must contain something more than . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") . . . .[62]

The Court accordingly held "that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[63] As to proceeding to

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51 394 U.S. 131 (1969).
52 441 U.S. 1 (1979).
53 526 U.S. 756 (1999).
54 476 U.S. 447 (1986).
55 468 U.S. 85 (1984).
56 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003).
57 416 F.3d 29 (D. C. Cir. 2005).
58 *See* James A. Keyte, "*Dagher* and 'Inside' Joint Venture Restraints," *Antitrust* 20, no. 3 (Summer 2006), p. 44.
59 ___ U.S. ____, 127 S.Ct. 1955, 2007 WL 1461066 (May 21, 2007).
60 2007 WL 1461066 at *4.
61 *Id.* at *4-5.
62 *Id.* at *8.
63 Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, *cf. Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n.17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *See also Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (C.A.7 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint") . . .
Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a Section 1 claim.[*Id.*]

discovery, the Supreme Court was clear that the complaint must state a cognizable claim before discovery can be permitted.[64]

After *Twombly*, the question for future antitrust enforcement is whether actions seeking to prove conspiracy from circumstantial evidence will find their path much more difficult, particularly at the pleading stage. This may not affect the FTC's enforcement efforts, since the FTC can develop a detailed record if it chooses to pursue a case through an administrative complaint.

The future enforcement of non-criminal agreements among competitors cases appears mixed. For example, virtually all of these enforcement actions relating to the professions have resulted in settlement agreements, so the Commission's recent victory in the litigated *North Texas Specialty Physicians* matter is likely to add further weight to these cases – as long as that decision stands.[65] We can therefore expect the FTC to continue to challenge physician and other professional agreements cases. The FTC loss in *Schering Plough* and the DOJ's opposition to *certiorari* make the agency's future efforts to challenge agreements in pharmaceuticals where there are patent issues less clear. However, the current composition of the FTC, including the non Republican Commissioners, seems committed to future challenges to agreements among pharmaceutical companies.[66] More generally, the recent Supreme Court decisions are likely to discourage the agencies challenging from bringing some agreements among competitors cases.

IV. UNILATERAL ANTICOMPETITIVE BEHAVIOR AND VERTICAL RESTRAINTS

Unlike merger enforcement and challenges to agreements among competitors, the agencies' recent track record in challenging monopolistic practices and vertical restraints suggests that unless there is a substantial change in policy, court decisions, or empirical economic analysis, there will be very few enforcement actions in these areas. As can be seen in Figure 1, the number of DOJ Sherman Section 2 monopolization investigations has declined from 19 in 1996 to about half or less than that since 1998, with 3 such investigations in 2006. Unlike mergers, these investigations typically take so much time that any actions resulting from an investigation will not be reported until subsequent years. Not surprisingly then, the number of DOJ civil non-merger actions (which include Sherman Section 2 cases) has fallen from 20 in 1997 to between zero and 8 in any year since 1998, as shown in Figure 2. The most notable of the DOJ monopolization cases under the Clinton Administration was the *Microsoft*[67] case, which the DOJ won. However, there has been criticism by some that the consent obtained by the DOJ under the Bush Administration did not go far enough to remedy Microsoft's behavior, and the European Commission has taken a much more aggressive stance in limiting Microsoft's actions.[68] There have been no similar major monopolization cases filed by the DOJ since *Microsoft*. Moreover, as discussed below, a review of the DOJ *amicus* briefs to the Supreme Court in the last 10 years indicates the DOJ has consistently sided with the defendants' positions in these cases, rather than the plaintiffs.

The FTC also has not brought many monopolization or vertical restraints cases under either the Clinton or Bush Administrations. However, the FTC has devoted considerable time and effort in analyzing certain types of unilateral actions related to the enforcement intellectual property rights.

In *Rambus*[69] and *Unocal*[70], the FTC separately found each of these companies had engaged in anticompetitive behavior in the context of forming industry standards. The FTC concluded in these

64 The Court continued, "Hence, when allegations of parallel conduct are set out in order to make a Section 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.. . . An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a Section 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at *9.

65 For discussion of this case, *see* Jeff Miles, "Analyzing the Federal Trade Commission's *North Texas Specialty Physicians Decision," The Health Lawyer* 18, no. 4 (April 2006), p. 1.

66 *See*, for example, Commissioner Jon Leibowitz, "Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-ck!" Second Annual In-House Counsel's Forum on Pharmaceutical Antitrust, Philadelphia, PA, April 24, 2006, *available at* FTC website.

67 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

68 Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the E.C. Treaty (Case COMP/C-3/37.792 Microsoft).

69 *In re Rambus, Inc.*, No. 9302 (F.T.C. July 31, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf, remedy ordered, *In re Rambus, Inc.*, No. 9302 (F.T.C), *available at* http://www.ftc.gov/os/adjpro/d9302/070205finalorder.pdf.

70 *In re Union Oil Co. of Cal.*, No. 9305 (F.T.C. Mar. 4, 2003), *available at* http://www.ftc.gov/os/2003/03/unocalcp.htm, resolved by consent order, *available at* http://www.ftc.gov/os/adjpro/d9305/050802do.htm.

71 *Biovail Corp. and Elan Corp.*, File No. 011 0132 (F.T.C. June 27, 2002) (consent order), *available at*

cases that the defendant did not disclose a key patent to standards setting organization during the creation of a standard, and then "held up" the other members of the organization for high royalties.

In *Bioval*[71] and *Bristol-Myers Squibb*[72], the FTC has challenge a pioneer firms listing of patents in the FDA's "Orange Book" in order to block the entry of generic substitutes. Unlike the *Schering* type of FTC agreements cases between pioneer and generic drug manufacturers, the DOJ has not expressed opposition to challenging unilateral anticompetitive acts involving the alleged misuse of patents, as evidenced in a recent joint DOJ and FTC *amicus* brief submitted to the Second Circuit.[73]

It appears that at least the FTC will continue to pursue selective unilateral cases to the extent the courts will permit it. The agencies clearly have been giving a great deal of thought to the area, as illustrated by the resources the FTC and the DOJ have devoted to studying and holding hearings on the areas of patent protection in high tech industries and the pharmaceutical industry.[74] The agencies have also recently concluded a large number of hearings on single firm conduct, although much of the testimony has argued for restraint in pursuing such cases.[75] Senior officials have written articles and given speeches specifically addressing what they believe to the appropriate approach to monopolization cases.[76] Senior officials at the DOJ and members of the Commission have also written articles and given a number of speeches on antitrust and intellectual property, devoting at least part of their analyses to potentially anticompetitive unilateral acts.[77]

Pure vertical restraints cases seem less likely to be pursued by either agency for several reasons. First, there does not appear to be a strong push for these cases by either agency's senior officials. The FTC's Commissioner Harbour gave a speech last year on vertical restraints, and concluded that " . . . I hope to see cutting-edge initiatives that clarify the law and impose appropriate remedies[.]"[78] However, to our knowledge neither the law nor the appropriate remedies have been substantially clarified to date – at least not in a way that would suggest more vertical restraints cases by the agencies.[79]

Second, the theoretical arguments put forward by the Chicago School of economics since the 1970s that vertical restraints are virtually always procompetitive, although questioned by many economists over the last decade, still appear to be heavily influencing both the agencies and the courts. There have been a great number of game theory based economics papers showing the potential for anticompetitive harm from vertical restraints, but there is relatively little empirical research showing whether such restraints damage competition.[80]

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http://www.ftc.gov/os/2002/06/biovailelanagreement.pdf.

72 *Bristol-Myers Squibb Co.*, No. C-4076 (F.T.C. Apr. 18, 2003) (complaint), *available at* http://www.ftc.gov/os/2003/04/bristolmyerssquibbcmp.pdf.

73 *See* Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellants, Civ. Act. No. 06-5525-cv (S.D. N. Y), May 30, 2007, *available at* http://www.ftc.gov/os/2007/05/DDAVPCommission-DoJBrief.pdf. ("The dismissal of the *Walker Process* claim should not be affirmed on the basis that the plaintiffs lack antitrust standing as direct purchasers to bring such a claim.")

74 *See*, for example, U.S. Department of Justice and the Federal Trade Commission, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," April 2007, *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf. This report discusses in detail the procompetitive aspects of intellectual property rights. In general, the report argues for a cautious approach to challenging potentially anticompetitive acts involving intellectual property, and as a matter of prosecutorial discretion the agencies will evaluate these issues using in effect full rule of reason analysis -- including a balancing of anticompetitive effects and efficiencies.

75 *See* http://www.ftc.gov/opa/2007/05/section2507.shtm.

76 *See*, for example, DOJ AAG Thomas O. Barnett, "The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act," Opening Remarks for the Antitrust Division and Federal Trade Commission Hearings Regarding Section 2 of the Sherman Act, Washington DC, June 20 2006, *available at* http://www.usdoj.gov/atr/public/speeches/216738.htm, and Kovacic (2007a).

77 *See*, for example, William Kovacic, FTC Commissioner, "The Importance of History to the Design of Competition Policy: The Federal Trade Commission and Intellectual Property," 30 *Seattle University Law Review* 319 (2007), FTC Chairman Deborah Platt Majoras, "A Government Perspective on IP and Antitrust Law," The IP Grab: The Struggle Between Intellectual Property Rights and Antitrust, the American Antitrust Institute, Washington DC, June 21 2006, *available at* http://www.ftc.gov/speeches/majoras/060621aai-ip.pdf; and Gerald F. Masoudi, Deputy Assistant Attorney General at the Antitrust Division, "Intellectual Property and Competition: Four Principles for Encouraging Innovation," Digital Americas 2006 Meeting, Intellectual Property and Innovation in the Digital World, Sao Paulo, Brazil, April 11, 2006, *available at* http://www.usdoj.gov/atr/public/speeches/215645.htm.

78 Pamela Jones Harbour, "Vertical Restraints: Federal and State Enforcement of Vertical Issues," ALI-ABA Course of Study, Product Distribution and Marketing, March 17-19, 2005, New Orleans, *available at* FTC web site.

79 Senior agency officials are also giving a great deal of thought to vertical cases. For example, *see* Kovacic (2007a) and J. Thomas Rosch, Commissioner of the FTC, "Vertical Restraints and Section 2, Washington D.C., June 13, 2007, *available at* http://www.ftc.gov/speeches/rosch/070613verticalrestraints.pdf.

80 *See,* for example, Michael A. Salinger, Director of the FTC Bureau of Economics, "Looking for Keys under the Lamppost: Insights from Economics into Standards for Unilateral Conduct," AB A Section of Antitrust Law, Economics and Section 2 Committees Brownbag, Washington, D.C, July 24, 2006, *available at* FTC web site: and Michael D. Whinston, *Lectures on Antitrust Economics* (MIT Press, 2006), at 3, pp. 133-197.

81 Michael A. Carrier, "Of *Trinko*, Tea Leaves, and Intellectual Property," *The Journal of Corporation Law* 31, no. 2 (Winter 2006), pp. 357-373; Adam

Third, court decisions have made it more difficult for plaintiffs to win either monopolization or vertical restraints cases. The principal decision dealing with Section 2 at this time is *Verizon Communications v. Trinko*, 540 U.S. 398 (2004), which, largely in *dictum*, appears to close a lot of doors for Section 2 plaintiffs.[81] Refusals to deal that will be deemed anticompetitive now appear to be limited to the fact patterns of prior decisions, as *Trinko* evidenced a judicial reluctance to extend the doctrine. For a refusal to deal to be found predatory under Section 2, there will have to be a showing at least of an anticompetitive purpose and no legitimate business justification-a clear exclusion of rivals on a basis other than efficiency as the Supreme Court put it in *Aspen Skiing*.[82] Many scholars have suggested that the *Trinko* decision indicates a major retrenchment in antitrust law. As one commenter states "[The Court's] thinly veiled swipes at antitrust – with its 'considerable disadvantages,' false positives, negative investment effects, and meddlesome courts – threaten to apply far beyond the facts in Trinko." Another has written "The *Trinko* opinion could potentially immunize from antitrust scrutiny whole swathes of anticompetitive behavior."[84] There are also questions about the continued viability of essential facility claims under Section 2 where there is no concerted action.

In its most recent term, in *Weyerhaeuser v. Ross-Simmons Hardwood*,[85] the Supreme Court extended the rule of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*.[86] to a claim for predatory buying, *i.e.*, allegedly cornering a market by buying up all available supply of a key input. In *Brooke Group*, the Court held low prices that are above cost ordinarily cannot constitute predatory conduct in violation of Sections 1 and 2 of the Sherman Act.[87] In *Weyerhaeuser*, the Court summarized its holding in *Brooke Group*, "Thus, we specifically decline to allow plaintiffs to recover for above-cost price cutting, concluding that 'discouraging a price cut and . . . depriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy.'"[88] The Court held in *Weyerhaeuser*, "Consequently, only higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding."[89] The Supreme Court's decision in *Weyerhauser* could have a major impact on Section 2 jurisprudence, possibly further narrowing the scope of predatory conduct.

In the meantime, there are a number of Court of Appeals decisions that provide some assistance in defining the scope of exclusionary conduct, including *United States v. Microsoft*, (tying and exclusive dealing);[90] *Conwood Co. v. United States Tobacco Co*., (dirty tricks, *i.e*., removing rival's display racks);[91] and *LePage's v. 3M*, (bundled rebates).[92] Given *Trinko* and *Weyerhauser*, it is unclear what force any of these earlier decisions will continue to have. The law seems to have moved a long way from the rather simply expressed and easily workable definition of predatory conduct in *Aspen Skiing*, excluding rivals on a basis other than efficiency. Some lower court decisions, such as Judge Easterbrook's decision on leveraging in *Schor v. Abbott*, ___F.3d___, 2006-2 CCH Trade Cas. Paragraph 75,354 (7th Cir. July 26, 2006), also suggest a clear narrowing of what remains of monopolization in the court's eyes.[93]

As to vertical restraints, in its latest term, the Supreme Court overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[94] and held that minimum resale price maintenance would no longer be *per se* illegal, but would be subject to the rule of reason.[95] This change will place a significantly greater burden of proof on plaintiffs.

Candeub, "*Trinko* and Re-Grounding the Refusal to Deal Doctrine," *University of Pittsburgh Law Review* 66, no. 4 (Summer 2005), pp. 821-870.

82 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585 (1985).

83 Michael A. Carrier, "Of *Trinko*, Tea Leaves, and Intellectual Property," *Journal of Comparative Law* 357, 373 (Winter 2006).

84 Adam Candeub, "*Trinko* and Re-Grounding the Refusal to Deal Doctrine," 66 *University of Pittsburgh Law Review* 821, 823 (2005).

85 ____ U.S. ____, 127 S.Ct. 1069 (2007).

86 509 U.S. 209 (1993).

87 The Court said in *Brooke Group*, "[W]e have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws." 509 U.S. at 223. In *Brooke Group*, the Court also quoted its language in *Atlantic Richfield Co. v. USA Petroleum Co*., (495 U.S. 328, 334-341 (1990)) "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . . We have adhered to this principle regardless of the type of antitrust claim involved." *Id*., quoting *ARCO*, 498 U.S. at 340.

88 127 S.Ct. at 1074-75.

89 *Id*., at 1078.

90 253 F.3d 34 (D.C. Cir. 2001).

91 290 F.3d 768 (6th Cir. 2002).

92 324 F.3d 141 (3d Cir. 2003).

93 *See, also, Smith Wholesale Co., Inc. v. R.J. Reynolds Tobacco Co*., 477 F.3d 854 (6th Cir. 2007); *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039 (8th Cir.), *cert. denied*, 531 U.S. 979 (2000). These decisions also cast doubt on the continued viability of *LePage's*.

94 220 U.S. 373 (1911).

95 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*., __, __S.Ct. __, 2007 WL 1835892 (June 28, 2007).

96 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Volvo Trucks No. Am., Inc. v. Reeder-Simco GMC, Inc*.,

Finally, there is another trend in the case law that cannot be ignored in forecasting the likely future of antitrust enforcement, at least during the remainder of the Bush administration. The present Supreme Court is active in antitrust in a predictable and interesting manner, as has been the participation of Solicitor General. Beginning with *Trinko*, the Court has granted certiorari in eight antitrust cases, most of these involving some form of alleged unilateral anticompetitve behavior.[96] In each case, the plaintiff prevailed in the Court of Appeals. In each case, the Government took the side of the defendant in the Supreme Court, and argued for a ruling that would make antitrust enforcement more restricted and difficult. In each case, the Supreme Court ruled for the defendant, even going beyond the relief sought by the Government in *Credit Suisse v. Billing* to provide blanket immunity for the conduct at issue. In each case, except *Trinko*, which is replete with *dicta* making private enforcement more difficult, the Court's rulings were narrow and limited, providing relatively little guidance beyond the holding of the decision. Thus, the enforcement agencies have succeeded repeatedly before the Supreme Court in limiting to some degree the scope of their own enforcement powers. Based on these filings, the agencies as currently constituted do not appear to envision or desire for themselves a particularly expansionist role in the enforcement of the antitrust laws.

Accordingly, it seems that absent more empirical research showing anticompetitive effects from monopolistic practices and vertical restraint, substantial new agency initiatives, and more plaintiff favorable court rulings, the agencies are likely only pursue these types of cases in limited circumstances. Given resent FTC enforcement actions, such cases are most likely to involve standards setting organizations or pioneer drug manufacturers use of the Orange Book to delay generic entry.

V. OTHER AREAS

Certain types of cases have been abandoned for years by the agencies, and show no sign of returning. For example, up until the 1970s the FTC frequently brought price discrimination cases under the Robinson-Patman Act. The FTC has investigated one or two of these cases in the 1980s and 1990s, and we see no evidence of any renewed enforcement here. Moreover, court decisions have made these types of cases more difficult to win for the plaintiffs.[97]

There have been other types of cases that are not part of the mainstream classifications of mergers, agreements among competitors, and monopolization that were pursued in the 1980s and 1990s, and there is evidence that the agencies might bring some of these types of cases in the future. The FTC brought "facilitating practices" and "invitations to collude" cases in the 1980s and 1990s, but there has been relatively little activity in these areas in a number of years.[98] The FTC brought these cases at least in part under what it considered to be a violation of Section 5 of the FTC Act's unfair method of competition, rather than under the traditional antitrust Sherman and Clayton Acts. However, in March 2006 the FTC challenged and obtained a consent by a unanimous vote in the *Valassis* invitation to collude case based solely on Section 5.[99] One case does not necessarily make a trend for future enforcement, but at least one Commissioner has stated that he believes there are unfair methods of competition cases that can be challenged under the FTC's Section 5 and would not fit into the practices challenged under the traditional antitrust statutes.[100] The unanimous vote in that case suggests there may be renewed enforcement in this area.

VI. CONCLUSION

We have analyzed recent past agencies enforcement in several areas, and what factors appear to have been and will be influencing it. Based on this analysis, we anticipate that federal challenges to

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546 U.S. 164 (2006); *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, ___ U.S. ____, 127 S.Ct. 1069 (2007); *Bell Atlantic Corp. v. Twombly*, ___ U.S. ____, 127 S.Ct. 1955, 2007 WL 1461066 (May 21, 2007); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, ___ U.S. ____, ____S.Ct. ____ (2007) WL 1835892 (June 28, 2007); *Billing v. Credit Suisse First Boston, Ltd.*, ____ U.S. ____, ____ S. Ct. ____, 2007 WL 1730141 (June 18, 2007).

97 *See* Margaret Zwisler, "*Volvo Trucks v. Reeder-Simco*: Judicial Activism at the Supreme Court?" *Antitrust* 20, no. 3 (Summer 2006), p. 40.

98 *See* Veronica Kayne, "Section 5 of the FTC Act: Not All Gaps Need Filling," *Antitrust Bulletin* 49, no. 3 (Fall 2004), p. 783.

99 *In the matter of Valassis Communications, Inc.* FTC File No. 051 0008 (March 16, 2006) *available at* http://www.ftc.gov/os/caselist/0510008/0510008.htm

100 J. Thomas Rosch, "Perspectives on Three Recent Votes: The Closing of the Adelphia Communications Investigation, the Issuance of the Valassis Complaint & the Weyerhaeuser Amicus Brief," before The National Economic Research Associates 2006 Antitrust & Trade Regulation Seminar, Santa Fe, New Mexico, July 6, 2006 *available at* http://www.ftc.gov/speeches/rosch/Rosch-NERA-Speech-July6-2006.pdf.

mergers are likely to continue, but at the current relatively low rate. Merger enforcement actions have been fewer at least since 2004, even taking into a account the reduce level of merger activity. Recent court decisions are likely to discourage or prevent more activism in challenging mergers. even with a change in the administration.

The DOJ will continue to be active in investigating criminal price fixing and market allocation cases, but the number of challenges will likely remain relatively low absent a change in policy. The FTC has continued to challenge non-criminal agreements among competitors' cases, recently using its "quick look" approach. However, that approach has not been completely embraced by the courts, and might be limited by decisions such as *Dagher*.

Section 2 is not a likely area of much federal enforcement in the near future, although the FTC may continue to challenge company actions similar to those its recent standards and Orange Book listings cases. This low level of activity is due to both existing agency policies and the courts. Other areas are not likely to be revived in the foreseeable future, except perhaps in the area of FTC challenges based primarily on its Section 5 powers.

In general, we do not anticipate significantly more aggressive antitrust enforcement from the agencies in near future. Even if there were a major shift in antitrust policy toward more actively challenging potentially anticompetitive acts, the courts have placed and likely would place more limits on what the agencies can do.