



DEPARTMENT OF JUSTICE

ANTITRUST LAW IN THE U.S. SUPREME COURT

Address by

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In considering my topic for a forum on comparative law, it occurred to me that it might be useful to focus on the special role of the United States Supreme Court in making American antitrust law. The topic is especially timely because our Supreme Court granted review in four antitrust cases this term, each of which is the object of intense study by U.S. antitrust practitioners. The Supreme Court, unlike the intermediate appellate courts of the federal system, has discretion to choose the cases it will hear, and its choices have a profound effect on the development of antitrust law.

Little has changed over the last century in terms of the wording of our antitrust statutes. The Sherman Act was enacted in 1890, and the Clayton Act in 1914, and the legislative amendments since that time have been minimal. Yet U.S. antitrust law has come a long way indeed in those years through judicial interpretations of the law. Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations. As former Assistant Attorney General William Baxter has observed, this “common law” approach may lack the certainty provided by a more detailed statute, but it “permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law.”¹ Our Supreme Court has described the antitrust laws as having “a generality and adaptability comparable to that found to be desirable in constitutional provisions.”²

¹William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 Tex. L. Rev. 661, 666 (1982).

²*Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark *Standard Oil* case, in which the United States sought to break up the famed oil conglomerate.³ Observing that the standards of the antitrust law must be developed by the courts deciding each case “by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute,”⁴ the Court announced the Rule of Reason, under which the Sherman Act is deemed to prohibit only “unreasonable” restraints of trade. In another decision that year, *United States v. American Tobacco Co.*,⁵ involving a conglomerate in the tobacco industry, the Supreme Court emphasized the Rule of Reason’s fundamental grounding in competition concerns. This standard proscribed “contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade”⁶

In 1918, *Chicago Board of Trade v. United States*⁷ made clear that the Rule of Reason encompasses all the relevant circumstances. To determine whether a restraint is illegal, a court must “ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect,

³*Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁴*Id.* at 64.

⁵221 U.S. 106 (1911).

⁶*Id.* at 179.

⁷246 U.S. 231 (1918).

actual or probable” and the “history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained.”⁸

Around the same time, the Court was also developing the doctrine of *per se* illegality, which provides bright-line guidance as to certain clearly anticompetitive practices. In *United States v. Trenton Potteries Co.*,⁹ the Court held that a price fixing agreement among competitors is an unreasonable restraint “without the necessity of minute inquiry whether a particular price is reasonable or unreasonable.”¹⁰ In 1940, in another landmark case brought by the United States in the oil industry, *United States v. Socony-Vacuum Oil Co.*,¹¹ the Supreme Court repeated that price-fixing agreements are illegal *per se* and that “no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.”¹² The *per se* rule underpins the Antitrust Division’s criminal prosecution of collusion among competitors.

The Supreme Court’s pre-1950 decisions set the stage for the late twentieth-century developments in antitrust law. They established the fundamental principle – consistent with the modern approach worldwide – that antitrust laws prohibit only conduct that unreasonably restricts competition, to the detriment of consumers. And the Court established that the type of inquiry required depended on the nature of the particular conduct at issue.

⁸*Id.* at 238.

⁹273 U.S. 392 (1927).

¹⁰*Id.* at 397.

¹¹310 U.S. 150 (1940).

¹²*Id.* at 218.

That auspicious beginning did not mean that the course of American antitrust analysis always ran smoothly through the last half of the century. A consequence of the common law approach is that when antitrust thinking veers from the path of promoting consumer welfare, the Supreme Court may follow. We experienced that effect in the 1960s and 1970s as our Supreme Court issued decisions emphasizing artificial presumptions not soundly grounded in economic reasoning. In *Brown Shoe*, *Pabst*, and *Von's Grocery*, the Court ruled that mergers could be found unlawful based on extremely small increases in market concentration.¹³ In *Schwinn*,¹⁴ it abandoned its formerly cautious approach to vertical practices,¹⁵ holding exclusive dealer territories unlawful *per se*. Similarly, in *Albrecht*,¹⁶ it held vertical maximum price fixing illegal *per se*.

As the sophistication of economic analysis increased, our Supreme Court began to reexamine some of these precedents and return to fundamental principles of competition and consumer welfare. In *GTE Sylvania*,¹⁷ the Court overruled *Schwinn*, and in *State Oil v. Khan*,¹⁸ it overruled *Albrecht*. The Court adopted a significantly different approach to mergers in *General*

¹³See *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

¹⁴*United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

¹⁵See *White Motor Co. v. United States*, 372 U.S. 253 (1963).

¹⁶*Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

¹⁷*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

¹⁸522 U.S. 3 (1997).

Dynamics,¹⁹ refusing to find a violation, despite current high market shares, in a case where those market shares did not reflect a realistic threat to future competition. And in *Matsushita*,²⁰ the Court poured cold water on theories of liability that make little economic sense, and it expressed scepticism of liability theories based on price cutting, which is often “the very essence of competition.”²¹

Of particular note is the Court’s decision in *Brunswick*,²² in which it rejected the theory that a private plaintiff could obtain treble damages as compensation for continued competition resulting from a merger that prevented a firm from leaving the market. This may be one of the Supreme Court’s lesser-known decisions outside the United States, but it is of fundamental significance. Private treble damage litigation is an important tool in the U.S. antitrust enforcement scheme, and the *Brunswick* decision mandated that it, like government enforcement, be firmly anchored to pro-competition, pro-consumer principles. The Court emphasized that private damages must be based on conduct causing injury of the type that the antitrust laws were intended to prevent. Plaintiffs may not prevail unless they are harmed by anticompetitive consequences of a defendant’s conduct, for the antitrust laws were enacted to protect competition, not competitors.

¹⁹*United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

²⁰*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

²¹*Id.* at 594.

²²*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

In the last quarter of the twentieth century, the Supreme Court began hearing fewer antitrust cases. In part this reflects a general trend in the Court's practices. In its 2002 term, it issued only 81 written opinions, having issued only 71 the year before.²³ In contrast, thirty years earlier, the Court issued 164 written opinions in its 1972 term and 151 in 1971, including full opinions in ten antitrust cases during those two terms.²⁴ A litigant's chance of obtaining review today is quite low. In the last complete term, 2002, the Supreme Court considered 8,340 petitions for review by writ of *certiorari*, but granted full review to only 91 cases, or 1.1%.²⁵ Even if the unpaid, *in forma pauperis*, petitions are left out of the calculation, the odds improve only to 4.5%.²⁶

A change in the statute governing appeals in civil antitrust cases brought by the government has also had the effect of limiting the number of Supreme Court opinions in antitrust cases in recent years. Until 1974, appeals in these cases went directly to the Supreme Court under the Expediting Act. That statute was amended in 1974 to provide that these appeals go to the intermediate appellate courts unless the district court certifies that immediate Supreme Court review is of "general public importance in the administration of justice."²⁷ Even then, the Court

²³Table I: Actions of Individual Justices, 116 Harv. L. Rev. 453, 453 (Nov. 2002); Table I: Actions of Individual Justices Granted Review, 117 Harv. L. Rev. 480, 487 (Nov. 2003).

²⁴Table I: Actions of Individual Justices, Table III: Subject Matter of Dispositions with Full Opinions, 86 Harv. L. Rev. 300, 304-05 (Nov. 1972); Table I: Actions of Individual Justices, Table III: Subject Matter of Dispositions with Full Opinions, 87 Harv. L. Rev. 303, 307-08 (Nov. 1973).

²⁵ Table II: Cases Granted Review, 117 Harv. L. Rev. 480, 487 (Nov. 2003).

²⁶*Id.*

²⁷15 U.S.C. § 29(b).

retains discretion to remand the case to the court of appeals. District courts have certified only three such cases for direct appeal.²⁸ One of these was *Microsoft*, but the Supreme Court declined to hear the case and remanded it to the court of appeals.

Because there are so few Supreme Court antitrust decisions each year – and because each one sets precedent that will govern the application of the antitrust laws in the lower courts for decades to come – each decision is an event of major significance for antitrust enforcers and the antitrust bar. Every phrase is studied with care, and every future case is evaluated in terms of the Court’s reasoning process.

Because of the central role of Supreme Court jurisprudence in the development of the law, antitrust enforcers devote significant effort to advising the Court as it chooses the few antitrust cases that it will hear. The government has filed briefs in all four of the antitrust cases the Court selected for review this term, even though only one actually involved the government as a party. The Court sometimes issues a formal invitation to the Solicitor General to express the views of the United States before it decides whether to hear a case. In the 2002 term, for example, the Court requested the views of the United States in 24 cases. Over the last twenty or so years, it has been typical for perhaps one of these invitations each year to involve an antitrust case. The Court has issued two such invitations in the current term – in *LePage’s*²⁹ and *Andrx*.³⁰

²⁸ See *Maryland v. United States*, 460 U.S. 1001 (1983); *California v. United States*, 464 U.S. 1013 (1983); *United States v. Microsoft*, 530 U.S. 1301 (2000).

²⁹ *3M Co. v. LePage’s, Inc. et al* (Sup. Ct. No. 02-1865).

³⁰ *Andrx Pharmaceuticals, Inc. v. Kroger Co., et al.* (Sup. Ct. No. 03-779).

On very rare occasions, the Solicitor General will file a brief urging the Court to hear a private antitrust case without such an invitation, as it did last term in *Trinko*, a fact that presumably figured in the Court's decision to hear that case on the merits.³¹

The government takes into account a variety of factors in deciding whether to recommend that the Court allocate one of the limited places on its docket to a particular case. In addition to discussing the legal merits and any split in authority, we try to give the Court our perspective on factors that may not be apparent on the face of the petition. We discuss the practical importance of the legal issues presented, in terms of their impact on enforcement, on judicial administration, on consumers, and on the business community. We consider whether the case before the Court presents a good vehicle to resolve the questions or whether the facts or the procedural posture might interfere with the Court's ability to give useful guidance of wide applicability. Finally, we consider whether it would be wise to allow the case law to develop further in the lower courts so that the Supreme Court may have the benefit of that additional experience before enunciating a general rule.

The government is by no means the only party interested in the Supreme Court's choice of cases, of course. Academics, public interest groups, and private entities affected by the issues file briefs urging the Court to hear particular cases. Indeed, even foreign governments do so occasionally, as they did in two of the cases currently pending before the Supreme Court.

³¹In general, the success rate of the Solicitor General's recommendations at the petition stage is quite high. For example, recommendations to grant certiorari have been followed by a grant in 5 of 6 cases in 2000, 5 of 6 cases in 2001, and 11 of 11 cases in 2002.

This brings me to the current Supreme Court term and the four antitrust cases before it. The Court has already decided two of these, *Verizon Communications Inc. v. Trinko*³² and *United States Postal Service v. Flamingo Industries Ltd.*,³³ while the two others, *Intel Corp. v. Advanced Micro Devices, Inc.*³⁴ and *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,³⁵ have been argued but remain undecided.

Trinko deals with fundamental questions about the nature of monopolization. The Telecommunications Act of 1996 requires incumbent telephone companies to assist would-be competitors by providing access to the incumbent's facilities. Congress intended our 1996 Act to bring competition to the telecommunications industry, including the market for local telephone service. The plaintiff alleged that the incumbent telephone company sought to discourage customers from using a competitor's telephone service by filling its competitors' orders on a discriminatory basis. The court of appeals upheld the plaintiff's antitrust claim on so-called "essential facilities" and "monopoly leveraging" theories.³⁶ The United States urged the Supreme Court to hear the case and reverse the appeals court. We argued that the 1996 Act neither restricts the antitrust laws nor expands antitrust liability by creating new antitrust duties that did not exist before its passage. And, we argued that a failure to share monopoly power – without more – is not exclusionary. Rather, a refusal to assist rivals cannot be exclusionary

³²124 S.Ct. 872 (2004).

³³124 S.Ct. 1321 (2004).

³⁴Sup. Ct. No. 02-572.

³⁵Sup. Ct. No. 03-724.

³⁶*Law Offices of Curtis v. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002).

unless it makes no economic sense for the defendant but for its tendency to reduce or eliminate competition.³⁷

Earlier this year, the Supreme Court reversed. It concluded that “just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards.”³⁸ Considering the policies of the antitrust laws and the risk of chilling the very competition they are intended to protect, the Supreme Court emphasized the need for caution with respect to government intervention against single firm conduct, especially in imposing antitrust obligations on firms to assist competitors and share resources. The Court’s opinion strictly circumscribed or eliminated expansive theories of antitrust liability under the labels of “essential facilities” or “monopoly leveraging.”

The other case already decided, *Flamingo Industries*, addressed the question of whether the United States Postal Service is subject to liability at all under the federal antitrust laws. The Supreme Court unanimously held that the Postal Service is not subject to suit under the federal antitrust laws. The Court explained that Congress is not presumed to have subjected the federal government itself to liability in the absence of clear evidence of such an intent, which is lacking in this statute.³⁹

The two antitrust cases awaiting decision by the Court, *Intel Corp. v. Advanced Micro Devices, Inc.* and *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, reflect how the growth in

³⁷ Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications, Inc. v. Law Office of Curtis V. Trinko*, (Sup. Ct. No. 02-682) (filed May 2003), at 7, available at <http://www.usdoj.gov/atr/cases/f201000/201048.htm>.

³⁸124 S.Ct. at 878.

³⁹124 S.Ct. at 1327.

antitrust enforcement has made it in many ways an international undertaking. Each case asks, in different ways, what role U.S. courts will play in addressing antitrust violations taking place outside of the United States.

The *Intel* case began when Advanced Micro Devices, or AMD, filed a complaint with the Directorate-General for Competition for the Commission of the European Communities, alleging that Intel was abusing its dominant market position. AMD then asked a U.S. district court to order Intel to produce materials in the United States under a U.S. statute, which authorizes a district court, upon the request of a “foreign or international tribunal or upon the application of any interested person,” to order production of testimony, documents or other things “for use in a proceeding” in the tribunal.⁴⁰ The court of appeals held that production was authorized under the statute.⁴¹ Intel successfully sought Supreme Court review. And in an unusual step, the Commission of the European Communities participated as amicus curiae and asked the Supreme Court to reverse. It argued that the statute should not be interpreted to apply to the proceedings of the European Commission and that such an interpretation “would directly threaten the Commission’s enforcement mission in competition law and possibly interfere with the Commission’s responsibilities in other areas of regulatory concern as well.”⁴² The United States also participated as amicus curiae, arguing that the statute gives the district court discretion to grant or deny AMD’s application. The government urged the Supreme Court to send the case

⁴⁰28 U.S.C. § 1782(a).

⁴¹*Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 668-69 (9th Cir. 2002).

⁴²Brief of Amicus Curiae the Commission of the European Communities Supporting Reversal in *Intel Corporation v. Advanced Micro Devices, Inc.* (Sup. Ct. No. 02-572) (filed Nov. 15, 2002).

back to the district court to consider the points raised by the European Commission and others “that may provide persuasive reasons for the district court to decline to compel production in this case.”⁴³ We expect a decision by the Supreme Court by the end of June.

Finally, just two weeks ago, I had the pleasure of appearing before the Supreme Court to argue the United States’ position in *Empagran*. *Empagran* involves the global price-fixing and market-allocation conspiracies among American and foreign manufacturers and distributors of bulk vitamins. This cartel sold billions of dollars of vitamins in the United States and other countries around the world at fixed prices. The United States’ investigation and prosecution of the cartel resulted in the criminal conviction of twelve corporate defendants and thirteen individual defendants and the imposition of criminal fines exceeding \$900 million. American private parties sued the vitamin companies seeking treble damages under American antitrust law based on the conspiracies’ effects on U.S. commerce; they have obtained a settlement in excess of \$2 billion.

The plaintiffs in the *Empagran* are foreign corporations who purchased vitamins abroad for delivery abroad. They brought suit in a U.S. district court under the U.S. antitrust laws. The district court held that it lacked subject matter jurisdiction over their claims under the Foreign Trade Antitrust Improvements Act of 1982. The 1982 Act provides that the Sherman Act shall

⁴³Brief for the United States as Amicus Curiae Supporting Affirmance, *Intel Corp. v. Advanced Micro Devices, Inc.* (Sup. Ct. No. 02-572) (filed Jan. 2004), at 13, available at <http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2002-0572.mer.ami.pdf>.

not apply to non-import foreign conduct unless it has a direct, substantial, and reasonably foreseeable effect on U.S. commerce and that such effect gives rise to a claim under the Sherman Act.⁴⁴ The court of appeals, however, reversed and held that the 1982 Act allows foreign plaintiffs injured by anticompetitive conduct to sue whenever the conduct's harmful effect on U.S. commerce gives rise to a claim by anyone, even if not the foreign plaintiff who is actually before the court.⁴⁵

The United States, joined by Germany, Belgium, Canada, Japan, the United Kingdom, Ireland, and the Netherlands, participated as amici and urged the Supreme Court to reverse.⁴⁶ Our position is that the 1982 Act's requirement that the effect on U.S. commerce gives rise to a claim means that the effect must give rise to a claim by the particular plaintiff before the court. We also argue that the expansive reading by the court of appeals is "highly likely to have the perverse effect of undermining the [United States'] efforts to detect and deter international cartel

⁴⁴15 U.S.C. § 6a.

⁴⁵*Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003).

⁴⁶ Brief of the United States as Amicus Curiae Supporting Petitioners in *F. Hoffman-La Roche Ltd. v. Empagran* (Sup. Ct. No. 03-724) (filed Feb. 3, 2004), available at <http://www.usdoj.gov/osg/briefs/2003/3mer/1ami/2003-0724.mer.ami.pdf>; Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners in *F. Hoffman-La Roche Ltd. v. Empagran* (Sup. Ct. No. 03-724) (filed Feb. 3, 2004); Brief for the Government of Canada as Amicus Curiae Supporting Reversal in *F. Hoffman-La Roche Ltd. v. Empagran* (Sup. Ct. No. 03-724) (filed Feb. 3, 2004); Brief of Japan as Amicus Curiae in Support of Petitioners in *F. Hoffman-La Roche Ltd. v. Empagran* (Sup. Ct. No. 03-724) (filed Feb. 3, 2004); Brief of the United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners in *F. Hoffman-La Roche Ltd. v. Empagran* (Sup. Ct. No. 03-724) (filed Feb. 3, 2004).

activity” and to impair similar efforts by foreign nations.⁴⁷ Again a decision is expected by the end of June.

The Supreme Court’s decision to hear these two cases is a sign of its recognition that the increasingly globalized nature of commerce makes controversies like these more prevalent and more important. The Court’s decision to hear these cases also reflects its concern that the extraterritorial reach of U.S. jurisdiction not be unreasonable. Certainly, the participation of foreign sovereigns as *amici curiae* has only heightened this issue with the Court.

Our Supreme Court is currently considering petitions for *certiorari* in two more antitrust cases: *3M (Minnesota Mining and Manufacturing Co.) v. LePage’s Inc.*,⁴⁸ an *en banc* decision of the Court of Appeals for the Third Circuit,⁴⁹ and *Andrx Pharmaceuticals, Inc. v. Kroger Co.*,⁵⁰ a decision of the Court of Appeals for the Sixth Circuit in an interlocutory appeal.⁵¹ As I mentioned, the Supreme Court often invites the views of the United States on whether a case is worthy of *certiorari* and it has done so in these cases. Because the United States has not yet filed briefs in these cases, it would be inappropriate for me to comment beyond a brief description of the cases. *LePage’s* involves appropriate standard to be applied to “bundled rebates” and “fidelity discounts.” *Andrx* involves the antitrust implications of an agreement among parties to patent infringement litigation.

⁴⁷Brief of the United States, *supra* n.36, at 8.

⁴⁸Sup. Ct. No. 02-1865.

⁴⁹324 F.3d 141 (3d Cir. 2003) (*en banc*).

⁵⁰Sup Ct. No. 03-779.

⁵¹ *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003).

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American antitrust law has come a long way since 1890. At every stage of the journey, the most significant mileposts have been decisions of our Supreme Court. This common law approach has led us on some detours. But this approach also provides the flexibility for the law to develop in light of sound economic principles. My hope is that the Antitrust Division's efforts will assist our Supreme Court in keeping us firmly on the road to sound economic policy and increased consumer welfare.