Federal Trade Commission

A New Direction for Antitrust at the Supreme Court?

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The Supreme Court may issue as many as five antitrust decisions this term – an unprecedented number in recent years. To give one a sense a perspective, in the fifteen years prior to the 2003-2004 term the Court averaged less than a single antitrust decision a year. At the conclusion of the current term the Court may have ten antitrust decisions to its credit since the 2003-2004 term.[2]

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[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I would like to express my gratitude to Kyle Andeer, my Attorney Advisor, for his invaluable contributions to this paper.

[2] The Court decided *Trinko* and *Empagran* during the 2003-2004. *See* Verizon Communications v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004). The Court did not decide any antitrust cases in its 2004-2005 term but it issued three opinions on antitrust during the 2005-2006 term. *See* Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006); Texaco v. Fouad N. Dagher, 126 S. Ct. 1276 (2006); Illinois Took Works Inc. v. Independent Ink, Inc., 126 S. Ct. 1281 (2006). The current term is shaping up to be one of the most active in the last three decades. Thus far in the 2006-2007 term the Supreme Court has issued one opinion, heard argument in one other antitrust matter, granted cert on two others (oral argument is scheduled for later this month), and has yet to decide whether to grant cert on one other case. *See* Weyerhaeuser v. Ross Simmons, 549 U.S. ___ (2007); Bell Atlantic v. Twombly, 425 F.3d 99 (2d Cir. 2005), *cert granted* 126 S.Ct. 2965 (2006); PSKS v. Leegin Creative Leather Services, 171 Fed. Appx 464 (5th Cir. 2006), *cert granted* 127 S.Ct. 763 (2006); Billing v. Credit Suisse First Boston, Ltd., 426 F.3d 130 (2d Cir. 2005), *cert granted* 126 S.Ct. 2916 (2006); In re Tamoxifen Antitrust Litigation, 466 F.3d 187 (2d Cir. 2006).

I thought I would spend my time here today discussing these recent cases, share some of my observations, and then make some predictions for the future.

I.

Let me begin by briefly recapping the recent cases, starting with two cases decided in 2004 – *Trinko* and *Empagran*. *Trinko* focused on Verizon's alleged failures to comply with its regulatory obligations under the Telecommunications Act of 1996 and claimed that its conduct had stifled competition in the local telephone service market. Justice Scalia's majority opinion, joined by five of his fellow justices, characterized the conduct as a "refusal to deal" and held that given the context of the conduct – that is the regulatory overlay in the telecommunications market and the fact that the conduct at issue was addressed by the FCC – the plaintiffs' allegations did not state a claim under Section 2 of the Sherman Act.[3]

Empagran, decided later that same term, dealt with the ability of foreign plaintiffs to bring antitrust claims in United States courts. Relying on principles of international comity and statutory interpretation, Justice Breyer's majority opinion concluded that the plaintiffs' Sherman Act claims were barred by the FTAIA because the adverse foreign effect of the alleged conspiracy was wholly independent of any adverse domestic effect.[4] In other words, there was no allegation that the harm suffered by the foreign plaintiffs was tied to the harm suffered by domestic plaintiffs.

The 2005 - 2006 term saw two new Justices take their place on the Court and three

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[3] Justice Stevens, joined by Justices Souter and Thomas, concurred in the outcome but did so because they believed that the plaintiffs lacked standing. *See Trinko*, 540 U.S. at 416.

[4] Justices Scalia and Thomas concurred in the judgment but wrote separately to state that their decision was grounded solely on the language of the statute. *See Empagran*, 542 U.S. at 176.

antitrust decisions. In *Dagher*, the plaintiffs challenged the pricing practice of an otherwise legitimate joint venture as a *per se* violation of the Sherman Act. Texaco and Shell had formed a joint venture that combined their retailing and refining assets on the West Coast. The joint venture had a unitary pricing scheme, but it sold its products under both the Shell and Texaco brand names. Justice Thomas, writing for a unanimous Court, held that the pricing practices of an otherwise legitimate joint venture should be analyzed under the rule of reason.

The Court next turned its attention to the Robinson-Patman Act – the perpetual whipping boy of antitrust.[5] The Court's decision in *Volvo Trucks* toughened the competitive injury requirement in secondary line cases. Justice Ginsburg, joined by six of her fellow justices, held that the plaintiff must show that it actually competed with a favored dealer. The Court refused to draw an inference of competitive injury from evidence that other dealers had received greater discounts when pursuing sales.

In the last of the three cases – *Illinois Tool Works v. Independent Ink* – the Court revisited the presumption that a patent confers market power in tying cases. Justice Stevens, writing for a unanimous Court, held that a patent does not necessarily confer market power upon a patentee –

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[5] The Antitrust Modernization Committee may recommend that Congress repeal the Robinson-Patman Act. *See* Antitrust Modernization Commission, Tentative Recommendations, at p.19 (Jan. 11, 2007), *available at* http://www.amc.gov/pdf/meetings/list_of_recommendations_jan_11v3.pdf; *see also* Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Statement before the Antitrust Modernization Commission (Mar. 21, 2006) ("The Commission should seriously consider recommending the repeal of the Robinson-Patman Act, the overall purpose of which stands in contrast to the recognized goals of modern antitrust law - the protection and enhancement of consumer welfare"); Thomas Barnett, Assistant Attorney General, Testimony before the Antitrust Modernization Commission, Tr. at 56 (Mar. 21, 2006) ("I don't believe the administration has formed a formal position on that, but I'm not in a position to argue with or disagree with the analysis set forth by my illustrious colleague [Chairman Majoras]") http://www.amc.gov/commission_hearings/pdf/060321_FTC_DoJ_Transcript_reform.pdf

that the plaintiff must prove that the defendant has market power in the tying product.

Last week, the Court issued its decision in *Weyerhaeuser* – the first case of the current term touching on antitrust.[6] That case addressed the appropriate standard for evaluating "predatory buying"claims under Section 2 of the Sherman Act.[7] The plaintiff in that case – a saw mill in the Pacific Northwest – alleged that Weyerhaeuser had purposely overpaid for inputs (alder sawlogs) and bought more than it needed in an effort to increase its rivals' costs and drive them out of business. The Court unanimously rejected the standard adopted by the lower courts and held that the plaintiffs' predatory bidding claims were subject to a test modeled on *Brooke Group*.[8] First, the plaintiff must prove that the predator's bidding on the buy side (in this case, alder hardwoods) caused the cost of the relevant output (all hardwood lumber) to rise above the revenues generated in the sale of those outputs. Only higher bidding that leads to below-cost pricing in the ***relevant output market*** will suffice as a basis for liability for predatory bidding. This raises an interesting question that was not explicitly addressed by the Court; what is the output benchmark. Here the relevant input market was alder hardwood; what was the relevant

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[6] *See Weyerhaeuse*r, 549 U.S. ___ (2007).

[7] I have previously discussed my thoughts on the appropriate standard for evaluating buy-side conduct. *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Monopsony and the Meaning of "Consumer Welfare" A Closer Look at Weyerhaeuser," Address Before the 2006 Milton Handler Annual Antitrust Review (Dec. 7, 2006), *available at* http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf.

[8] In *Brooke Group*, the Court addressed the appropriate standard for evaluating allegations of predatory pricing under § 2 of the Sherman Act. "First a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below and appropriate measure of its rival's costs." Second, a plaintiff must demonstrate that "the competitor had . . . a dangerous probabilit[y] of recouping its investment in below-cost prices." Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-224 (1993).

output market? Was it the market defined by the jury – all hardwood lumber? Or was it alder lumber? The Court seemed to suggest that it was the hardwood lumber market. Second, the plaintiff must also prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power.

Weyerhaeuser was only the first of four antitrust decisions expected this term. The Court is expected to issue a decision in *Twomby* soon. The plaintiffs in *Twombly* alleged that the Baby Bells – such as Verizon, Bell South, and SBC – conspired not to compete in one another's geographic territories for local telephone and high-speed internet service. The conspiracy claim is supported by allegations that the firms have not entered each other's markets and that there were incentives under the Telecommunications Act for them to enter new geographic markets. The question before the Court is whether these allegations are sufficient to state a claim under the Sherman Act because they are also consistent with competitively benign conduct.

The Court will hear oral argument in two more cases – *Leegin* and *Credit Suisse* – later this month.[9] In *Leegin,* the *per se* treatment of vertical minimum resale price maintenance – first established in *Dr. Miles* – is under attack. The Supreme Court has moved away from *per se* treatment of vertical restraints and I expect them to add *Dr. Miles* to this list.[10] The last case

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[9] Oral argument in PSKS v. Leegin Creative Leather Services is scheduled for March 26, 2007 and Credit Suisse v. Billing will be heard on March 27, 2007. *See* http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMarch2007.pdf

[10] *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977) (applying the rule of reason to vertical nonprice restraints; overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967)); State Oil Co. v. Khan & Assocs., Inc., 522 U.S. 3 (applying the rule of reason to vertical maximum price fixing, overruling Albrecht v. Herald Co., 390 U.S. 145 (1968)); NYNEX Corp v. Discon, Inc., 525 U.S. 128 (1998) (applying the rule of reason to purely vertical boycotts).

currently pending before the Court is *Credit Suisse*. It involves two private class actions, in which respondents allege antitrust violations in the course of initial public offerings (IPOs) of securities, including allegations of illegal tie-ins and "laddering." The Second Circuit ruled that, on a motion to dismiss, the district court had erred in ruling that all of the alleged violations were impliedly immune from the antitrust laws because of IPO regulation by the Securities and Exchange Commission (SEC).

There is a chance that the Court will add a fifth antitrust matter to its docket this year. A petition for a writ of certiorari is pending in *In re Tamoxifen Antitrust Litigation.* This is the third case brought to the Court's doorstep that challenges the legality of patent litigation settlements in the pharmaceutical industry involving so-called "reverse payments."

II.

If cert is granted in *In re Tamoxifen*, the Court will have heard argument in ten antitrust matters in the last three years – a remarkable record of activity. In those cases, the Court addressed a broad range of issues – from vertical restraints, such as minimum resale price maintenance and tying claims, to horizontal restraints, such as joint venture activity, to single firm conduct. The breadth of issues addressed by these opinions has provided antitrust scholars plenty of grist to mull over.

I have a few observations to share. First, it is obvious that the current Justices are comfortable with antitrust. All the current justices have some antitrust experience, and a few, like Justices Stevens and Breyer, have a documented interest in the subject. Justice Stevens has played a significant role in the Court's antitrust jurisprudence with over two dozen antitrust

opinions to his credit.[11] Justice Breyer shares Stevens' interest in antitrust, if not his body of work. Justice Breyer worked as a Special Assistant in the Antitrust Division and he has authored a number of significant opinions on antitrust issues – first as a appellate judge and later as a Supreme Court Justice.[12]

Other justices have also written significant substantive antitrust opinions as members of both appellate courts and the Supreme Court.[13] And although Chief Justice John Roberts has yet to author an antitrust opinion – either as an circuit court judge or a Supreme Court justice – he worked on several significant antitrust matters prior to joining the judiciary.[14]

Second, and perhaps this is a personal bias, I believe that antitrust is an attractive subject

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[11] *See, e.g., Volvo Trucks*, 546 U.S. 164 (2006) (dissent);Brown v. Pro Football, 518 U.S. 231 (1996) (dissent); California v. American Stores 495 U.S. 271 (1990); Cargill v. Monfort of Colorado, 479 U.S. 104 (1986) (dissent); Aspen Skiing v. Aspen Highlands Skiing, 472 U.S. 585 (1985); Jefferson Parish v. Hyde, 466 U.S. 2 (1984); Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982); BMI v. Columbia Broadcasting, 441 U.S. 1 (1979) (dissent). Prior to joining the judiciary, Justice Stevens was a practicing antitrust attorney in Chicago, taught antitrust law at both University of Chicago and Northwestern, and served on government panels studying antitrust law.

[12] *See Empagran*, 542 U.S. 155 (2004); *Brown*, 518 U.S. 231 (1996); Town of Concord v. Boston Edison Co., 915 F.2d 17 (1st Cir. 1990); Grappone, Inc. v. Subaru of New England, 858 F.2d 792 (1st. Cir. 1988); Kartell v. Blue Shield of Massachusetts, 749 F.2d 922 (1st Cir. 1984).

[13] *See Weyerhaeuser*, 549 U.S. ___ (2007) (Thomas, J.); *Volvo Trucks*, 546 U.S. 164 (2006) (Ginsburg, J.); Dagher, 126 S. Ct. 1276 (2006) (Thomas, J.); California Dental Ass'n v. FTC, 526 U.S. 756 (1999) (Souter, J.); *Brooke Group Ltd.*, 509 U.S. 209 (Kennedy, J.); LePage's Inc. v. 3M Corp., 324 F.3d 141 (3d Cir. 2003) (Judge Alito in dissent); United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990) (Judge Thomas).

[14] *See* Commonwealth of Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004)(represented the states in the remedy proceedings); In re Independent Service Organizations Antitrust Litigation, CSU, L.L.C. v. Xerox, 203 F.3d 1322 (Fed. Cir. 2000) (represented CSU); Intergraph Corp. v. Intel, 195 F.3d 1346 (Fed. Cir. 1999) (was on the brief for appellee Intergraph); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) (as the Principal Deputy Solicitor General, he argued for the United States as amicus curiae).

to the members of the Court – and their clerks. It raises difficult questions that have a profound impact on the nation's economy. Few areas of the law attract academics from so many disciplines – law, economics, business strategy – all have something to add to the debate.

Third, the common law nature of antitrust lends itself to reevaluation and reconsideration over time.[15] The drafters of the major antitrust statutes – the Sherman and Clayton Acts – left them vague, allowing the courts to give them substantive meaning. The Court's relative silence on antitrust in the 1990s led to a backlog. There were a number of issues that were ripe for reconsideration – among them the presumption that patents confer market power and the legality of minimum resale price maintenance practices.

Fourth, the explosion of private antitrust litigation – particularly class action litigation – in recent years has attracted a sophisticated and well funded plaintiffs bar. The combination of deep pocketed defendants and the prospect of treble damages have led some plaintiff attorneys to test the outer boundaries of the law. One could read the Court's decisions in *Trinko*, *Empagran*, *Dagher*, and *Twombly* as an effort to define those boundaries more clearly.

One last observation I would make is on the role of the Solicitor General's office in the development of the Court's antitrust jurisprudence. The Court, to an even greater degree than in the past, values the current Administration's input on antitrust. If one wants to predict where a majority of the Court will come out on an issue, the Solicitor General's briefs are a good place to start. By my count, the Solicitor General has submitted amicus briefs in at least fourteen antitrust matters since 2002. In five cases it urged the Court to deny cert – and in all five instances the

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[15] *See State Oil*, 522 U.S. at 21 ("The general assumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common law tradition.").

Supreme Court followed that advice.[16] In the five antitrust matters decided since 2004, a majority of the Court agreed with the Solicitor General's ultimate conclusion on the outcome – if not always on the reasoning behind those conclusions. I am not going to speculate as to the reasons but it does put a twist on Justice Potter Stewart's observation forty years ago "that the sole consistency that I can find ... is that the government always wins" when it comes to antitrust.[17]

III.

Finally I would like to close by sharing my thoughts on the future.

First, the Court has been chipping away at the *per se* rule for tying, most recently with its decision in *Illinois Tool Works* last year. As the Court noted last year in *Illinois Tool Works*, "Many tying arrangements, even those involving patents and requirement ties, are fully consistent with a free, competitive market." Lower courts have taken these cues and carved out more exceptions. For example, the D.C. Circuit in *Microsoft* held that the integration of additional software functionality should be analyzed under the rule of reason. I would not be surprised to see the Court formally reject *per se* treatment for tying in the very near future.

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[16] *See* Den Norske Stats Oljeselskap As v. HeereMAC v.o.f., 241 F.3d 420 (5th Cir. 2001), *cert denied* Statoil ASA v. HeereMAC v.o.f. 534 U.S. 1127 (2002) (Precursor to Empagran), In re Cardizem Antitrust Litigation, 332 F.3d 886 (6 th Cir. 2003), *cert denied* Andrx Pharmaceuticals, Inc. v. Kroger, 543 U.S. 939 (2004) (patent settlement), *LePage's*, 324 F.3d 141, *cert. denied* 542 U.S. 95 (2004) (legality of bundled discounts under Section 2); Monsanto Co. v. McFarling, 363 F.3d 1336 (Fed. Cir. 2004), *cert denied* McFarling v. Monsanto 125 (2005) (tying/patent misuse); Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11 th Cir. 2005), *cert. denied* Federal Trade Commission v. Schering-Plough Corp. 126 S.Ct. 2929 (2006).

[17] *See* United States v. Von's Grocery Store, 384 U.S. 270, 301 (1966) (In his dissent, Justice Stewart criticized the majority's assertion that its work was consistent with the Court's precedent. He noted that "[t]he sole consistency that I can find is that in litigation under § 7, the Government always wins.").

Second, there is continued debate about the scope and application of *Brooke Group*.[18] One question that continues to be debated in the lower courts is the appropriate measure of cost that should be used in these cases.[19] The Court had an opportunity to address this issue in *Spirit Airlines v. Northwest Airlines.* However, the cert petition was denied on a technicality. I expect that the Court will have to address this issue sooner rather than later.

At the same time there is debate over the applicability of the *Brooke Group* standard in other cases. Defendants have argued that the *Brooke Group* test should be used in any case challenging pricing decisions – loyalty rebates, bundled rebates, and other rebate and discount programs. The law of the land today – with respect to bundled rebates or multi-product rebate strategies – is the Third Circuit's decision in *LePage*.[20] On the other hand, loyalty rebate schemes – that is discounts tied to purchases of a single product – have been evaluated under the *Brooke Group* standard.[21] I would expect that the Court will eventually take a case raising these issues.

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[18] In that case, the Court articulated a two part test for evaluating a predatory pricing claim under Section 2. First, the plaintiff must show that the defendant priced its products below an appropriate measure of its costs. Second, the plaintiff must also show that there was a dangerous probability that the defendant would recoup its investment in below-cost prices. *Brooke Group*, 509 U.S. at 222-224.

[19] All of the circuit courts adopt a variation of the Areeda-Turner test, that is that prices below average variable cost are deemed predatory and prices above average variable cost are deemed non-predatory. However, there is debate whether Areeda-Turner is a bright-line test or whether there is some wiggle room.

[20] The Court, at the urging of the Solicitor General, refused to hear an appeal of *LePage's. LePage's*, 324 F.3d 141, *cert. denied* 542 U.S. 95 (2004); *see also* Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc., 920 F. Supp. 455 (S.D.N.Y.); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978).

[21] Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir.), cert. denied, 531 U.S. 749 (2000).

Third, the interpretation of the competitive injury requirement in Robinson-Patman Act cases continues to divide the circuit courts. Some courts require a showing that there is a showing of injury to competition, others have held that evidence of injury to a competitor may be enough.[22] The Court in *Volvo Trucks* stated that it "would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*" and it went on to note that it would "continue to construe the [Robinson Patman] Act "consistently with broader policies of the antitrust laws."'[23] The Court did not explicitly overrule decisions in *Chroma Lighting* or *Feeser* where the courts focused on the harm to the individual competitor based on a reading of the statute and its legislative history. Yet some of the language in *Volvo Trucks* seems to conflict with those earlier cases.[24]

Robinson-Patman cases raise an interesting dilemma for some of the Court's conservative justices – the statutory language supports the decisions by the Third, Ninth, and Eleventh Circuits. At the same time the Act has been the subject of much criticism – much of it from the business and conservative communities. The dilemma played itself out in *Volvo Trucks* where

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[22] The Third, Ninth, and Eleventh Circuits have all held that a showing of a sustained and substantial price discrimination targeting a particular competitor satisfies the competitive injury requirement. Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653 (9th Cir. 1995); JF Feeser, Inc. v. Serv-a-Portion, Inc., 909 F.2d 1524 (3d Cir. 1990); Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414 (11th Cir. 1990). However, the D.C. Circuit, along with the Eighth and Tenth Circuits, have held that a showing of price discrimination merely creates a presumption of competitive injury that can be rebutted by a showing that the market remains competitive. *See* Bosie Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988); Richard Short Oil Co. v. Texaco, Inc., 799 F.2d 415 (8 th Cir. 1986); Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985).

[23] *Volvo Trucks*, 546 U.S. at __.

[24] A decision endorsing *Boise Cascade* – and rejecting *Chroma Lighting* – might overrule the *Morton Salt* presumption as well.

Justice Thomas – one of the court's "strict constructionists" – dissented from the majority's opinion.

Fourth, a hotly debated issue that the Court should take on at some point is the legal standard for evaluating a firm's refusal to license intellectual property under Section 2. The split between the Ninth Circuit's decision in *Kodak* and the Federal Circuit's decision in the *Xerox* case continues to fester.[25] *Kodak* prohibits a monopolist from refusing to deal in order to create or maintain a monopoly absent a legitimate business justification. The case is criticized because the Ninth Circuit rejected Kodak's proffered business justification on the grounds that it was largely pretextual. The Federal Circuit came to a very different conclusion several years later. It concluded that a firm could refuse to license its intellectual property – that its refusal was immunized from antitrust scrutiny.[26] The Court has remained silent on this issue. Some have argued that after *Trinko* there is no liability for unilateral refusals to license patents.

It remains to be seen whether the Court will tackle some of these controversial issues dividing the antitrust bar. The recent cases were decided on fairly narrow grounds and with one or two exceptions those decisions were not all that controversial. Some have speculated that the addition of Chief Justice Roberts and Justice Alito may lead the Court to take on some of the

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[25] *See*, In re Independent Service Organizations Antitrust Litigation ("Xerox"), 203 F.3d 1322 (Fed. Cir. 2000); Intel v. Intergraph, 195 F.3d 1346 (Fed. Cir. 1999); Image Technical Services, Inc. v. Eastman Kodak Co., 125 F.3d 1195 (9th Cir. 1997). Chief Justice John Roberts represented the plaintiffs on appeal in both the Xerox case and the Intel case when he was in private practice.

[26] The opinion suggested that a patent holder would be subject to antitrust liability under only three circumstances: (1) where it had fraudulently obtained the patent; (2) where it had fraudulently engaged in infringement litigation; and (3) where it had attempted to enlarge the scope of its patent by, for example, tying the sale of the patented good to the sale of an unpatented good. *Xerox,* 203 F.3d at 1327.

more controversial antitrust issues. I think that remains to be seen. The Court's dynamics have not shifted all that greatly – at least in terms of antitrust. The Court may wait until Justice Stevens retires from the Court to take on some of these issues. He has staked out his position on some of the most controversial issues – tying and refusals to deal for example – and his fellow justices may not be willing to take him on directly.