



# Federal Trade Commission

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## **The Supreme Court's Antitrust Jurisprudence: Will The Past Be Prologue?**

**Remarks of J. Thomas Rosch<sup>1</sup>  
Commissioner, Federal Trade Commission**

**before**

**The Antitrust Section of the Connecticut Bar Association  
Hartford, Connecticut**

**April 23, 2009**

Two years ago I shared some thoughts about the Supreme Court with members of the Minnesota State Bar Antitrust Section. I'd like to do the same thing with you this evening. But before I do so let me say that the airport in Minneapolis-St. Paul is more efficient in moving snow than any airport I've ever visited. The morning of my remarks, a blizzard blanketed the Midwest, and by lunch time I didn't think there was a chance I'd make it back to Washington that night. I told my host how I felt, and he replied "Don't worry. We have the most efficient snow removal equipment in the world, and you'll be fine." Sure enough, after the remarks, a taxi with chains bulldozed its way through the drifts to the airport, my plane (from San Diego) landed only 15 minutes late, they de-iced it, we skidded down a snowy runway, and I made it back to

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<sup>1</sup> The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Amanda Reeves, for her invaluable assistance preparing this paper.

Washington almost on time. But I don't want to do it again. So let's hope that Spring has sprung in Connecticut!

My remarks, like my remarks in Minneapolis, can be broken down into three parts. First, I will address where the Supreme Court, in light of its most recent orders in antitrust cases, stands today in terms of antitrust jurisprudence. Second, I will address how and why I believe the Court got where it is. Third, I will close by offering some thoughts on the open antitrust issues that I expect the Court will address in the near future.

## **I.**

To begin with, the Court has issued important orders in three antitrust cases during the past year – all during the last week of February. The first order was its February 25, 2009 decision in

A unanimous Supreme Court held that the Ninth Circuit erred in allowing the claim to proceed, though the justices split 5-4 in their rationale. Led by Chief Justice Roberts, five justices followed the defendants' lead by viewing the plaintiffs' Section 2 price squeeze claim as raising two separate doctrinal questions: First, did AT&T have a duty under the antitrust laws to deal with its competitors? Second, did AT&T violate Section 2 by engaging in downstream pricing practices that forced out a competitor? Separating the price squeeze claim into two separate questions provided Chief Justice Roberts with a straightforward path for resolving the Section 2 question because, under dicta in



deal after *Trinko*. The Court, however, took none of these steps and, as a result, price squeeze claims are no longer cognizable in the United States under Section 2.<sup>7</sup>

The second important order that the Court has issued in 2009 was its order denying the Commission's Petition for Certiorari in *Rambus*.<sup>8</sup> *Rambus* was a standard-setting case. The Commission found that, in violation of Section 2, Rambus engaged in a deceptive course of conduct respecting patent applications covering its technology and that, but for that conduct, (1) Rambus' technology would not have been incorporated into the standard (allegedly locking licensees into that technology), or (2) the standard setting organization (the JEDEC) would have required Rambus to license its technology for a reasonable and nondiscriminatory royalty (called

Solicitor General,<sup>11</sup> we went it alone. Our Petition raised two questions: First, whether the D.C. Circuit erred in its causation requirement by rejecting as a basis for liability the Commission's finding that *but for* Rambus' deception, the standard setting organization would have obtained a RAND commitment from Rambus *or*

necessarily an endorsement of the D.C. Circuit's decision as much as a reflection of the Court's view that the issues presented were not worthy of certiorari. As I will discuss in a moment, these factors may be important in understanding the forces at work in the Court's antitrust jurisprudence.

The third significant order that the Court issued this year – on the same day that it denied the Commission's Petition in *Rambus* – was its request for the Solicitor General's views about whether the Court should hear an appeal from the Seventh Circuit's decision affirming summary judgment in the *American Needle* case.<sup>12</sup> The issue in







Chief Justice Roberts likewise handled a number of antitrust cases while in private practice<sup>17</sup> and – in contrast to Chief Justice Rehnquist who, in his 19 years as Chief Justice wrote just one antitrust decision which was a dissent largely on federalism grounds<sup>18</sup> – Chief Justice Roberts recently authored his first antitrust opinion when he wrote for the majority in *linkLine* after just three years at the Court. These three justices are not alone: the other six justices have likewise written important antitrust decisions as members of appellate courts and while on the Supreme Court.<sup>19</sup>

Apart from this pronounced interest in antitrust, I also suspect that the Roberts Court has had a heightened interest in antitrust because the Court has had some housekeeping to do. Antitrust cases raise complex, difficult questions that are generally at the intersection of law, economics, and business strategy – an intersection where the law is frequently evolving. The century-old antitrust laws are decidedly vague and unlike many other areas of law where there are detailed statutes and regulations, Congress has left the lawmaking in the antitrust realm to the

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*New England*, 858 F.2d 792 (1st. Cir. 1988); *Kartell v. Blue Shield of Massachusetts*, 749 F.2d 922 (1st Cir. 1984).

<sup>17</sup> 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); *Atl. 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).

<sup>18</sup> *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

<sup>19</sup> See *Leeginra1Kt00 TD.0002 Tct00 TD22requently5titrusiTj12 TD.ewjus/Tueys*

courts. In the 1990s, however, the Supreme Court issued fewer antitrust decisions than in any single decade since Congress first enacted the antitrust laws in the 1890s.<sup>20</sup> The turn of the millennium therefore brought with it many open questions that were ripe to resolve.

My second observation is that, in selecting which antitrust cases to review and how to resolve those cases on the merits, this Court has relied heavily on the Solicitor General's views. The Solicitor General is often nicknamed the "tenth

particularly in the Section 2 single firm conduct arena, can have far-reaching effects on how businesses operate – even in the absence of a circuit split, which is typically the main reason why the Court accepts cases for review. However, it is likely hard for the Court to decide on its own which decisions have such far-ranging effects and may chill pro-competitive conduct. The Court’s single firm conduct decisions in *Brooke Group*, *Trinko*, *Weyerhaeuser*, and *linkLine* are illustrative – in *Brooke Group* and *Weyerhaeuser*, the petitioners did not identify a circuit split and in *Trinko* and *linkLine*, the petitioners argued that the Second and Ninth Circuit decisions respectively each conflicted with a decision from just one other appellate court. Nonetheless, in all four cases the Solicitor General recommended that the Court grant the petition for certiorari; in all four cases the Court agreed.

Along the same lines, the Court relies on the Solicitor General’s guidance on when a particular case that raises an issue that is ripe for review is nevertheless not an appropriate vehicle to decide that issue. The Third Circuit’s decision in *3M v. LePage’s*, for example, seemed like a good candidate for Supreme Court review because it raised important questions concerning the legality of bundled discounts that grew out of the Supreme Court’s decision in *Brooke Group*. The Solicitor General, however, cautioned the Court against taking the case because of concerns about the factual record and because an insufficient number of courts had yet to weigh in. Following the Solicitor General’s lead, the Court refused to hear the case. Likewise, the Solicitor General has weighed in against the public and private plaintiffs in conjunction with three petitions for certiorari in so called “reverse payment” cases – cases in which a brand name pharmaceutical company with a patent has made a payment to the generic company challenging the validity of the patent and whether it was being infringed. In all three

instances, consistent with the Solicitor General's recommendation, the Court denied the Petition.<sup>22</sup>

Further, I suspect, as has historically been the case, I suspect that the Court is, in part, deferential to the Solicitor General because both of former President George W. Bush's appointees to the Court served in the Solicitor General's office – Chief Justice Roberts served as Principal Deputy Solicitor General from 1989 to 1993, and Justice Alito served as Assistant Solicitor General from 1981 to 1985.

In light of the Solicitor General's decisive role, it is not surprising that the Court followed the Solicitor General's views in *linkLine*; nor is it surprising that the Court asked for the Solicitor General's views in *American Needle*. Similarly, it would not be surprising if the Solicitor General's refusal to join the Commission's petition in *Rambus* weighed against the Petition.

My third observation is that this Court, at least until recently, seemed to prize unanimity. As you may recall, the Rehnquist Court not only frequently issued 5-4, but also issued splintered decisions where there were only majorities as to certain parts of certain opinions. The Roberts Court, at least in its infancy, has moved away from that practice in the antitrust realm by fashioning narrow decisions to achieve a consensus. Take, for example, Justice Stevens' opinion in *Illinois Tool Works*.<sup>23</sup> In that case the Court could have reached out and held that tying was no longer to be treated as a per se or even a quasi-per se offense. But it did not. Instead, in that 8-0 decision, the Court simply held that “the mere fact that a tying product is patented does not

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<sup>22</sup> *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003), *cert. denied*, 543 U.S. 939 (2004); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert. denied*, 548 U.S. 919 (2006); *In re Tamoxifen Citrate Antitrust Litig.*, 429 F.3d 370 (2d Cir. 2005) (Pooler, J., dissenting), *amended*, 466 F.3d 187 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 3001 (2007).

<sup>23</sup> *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

support [a presumption of market power].”<sup>24</sup> Or, consider Justice Thomas’ opinion in *Weyerhaeuser*.<sup>25</sup> The Court could have fashioned a brand new rule for assessing the legality of alleged predatory bidding. It did not do that. Instead that 9-0 decision simply held that the standards for predatory pricing articulated in *Brooke Group* also applied to predatory bidding claims.<sup>26</sup> Or, examine what happened in *Dagher*.<sup>27</sup> The Court could have issued a cosmic decision about the antitrust principles applicable to joint ventures. Again, it did not. Instead that 8-0 decision just held that in the particular circumstances of that case the joint venture at issue was not per se illegal.<sup>28</sup>

However, in its *Leegin* decision, issued in 2007, the Court divided 5-4, to overturn more than a century of precedent holding that resale price maintenance (where a producer sets its resellers’ prices) is *per se* illegal. Justice Breyer wrote a stinging dissent, and (as in *linkLine*) he was joined by Justices Stevens, Souter and Ginsburg.<sup>29</sup>

### III.

Finally, I would like to close by offering my thoughts on what lies on the horizon.

To start, there are some obvious open questions that the Court has not yet ruled on, but that I do expect the Court to take up in the next few years assuming the right case presents itself. First, the Court has been chipping away at the *per se* rule for tying, most recently with its 2006 decision in *Illinois Tool Works*.<sup>30</sup> As the Court noted in *Illinois Tool Works*, “[m]any tying arrangements, even those involving patents and requirement ties, are fully consistent with a free, competitive market.”<sup>31</sup> 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 (sometimes called “technological tying”) should be analyzed under the rule of reason.<sup>32</sup> I would not be surprised to see the Court formally reject *per se* treatment for tying in the very near future.

Second, there is continued debate about the appropriate measure of a defendant’s costs under the Court’s 1992 decision in *Brooke Group*.<sup>33</sup> *Brooke Group* articulated a two-part test for predatory pricing claims under which the plaintiff must show, first, that the defendant priced its products below an appropriate measure of its costs, and, second, that there was a dangerous probability that the defendant would recoup its investment in below-cost prices.<sup>34</sup> Although *Brooke Group* is now 17 years old, lower courts continue to debate the appropriate measure of

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<sup>30</sup> *Illinois Tool Works*, 547 U.S. 28.

<sup>31</sup> *Id.* at 45.

<sup>32</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (applying the rule of reason to the bundling of operating systems and applications software).

<sup>33</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The *Brooke Group* Court itself had no need to address this issue because the parties agreed that the relevant measure of cost was average variable cost.

<sup>34</sup> *Id.* at 222-224.

cost that should be used in these cases. The Court has had several opportunities to address this question, including in an appeal from the Sixth Circuit's 2005 decision in *Spirit Airlines*,<sup>35</sup> but that petition was dismissed because Northwest Airlines' attorneys miscalculated the 90-day deadline and filed it late – the sort of error that no doubt keeps many of you up worrying at night. Some amici also asked the Court to address the issue in 2007 when it evaluated *Brooke Group*'s application to claims of predatory buying in *Weyerhaeuser*, but the Court passed. I continue to expect that the Court will address this issue sooner rather than later.

Third, in light of *Weyerhaeuser*, *Trinko*, and *linkLine* – each of which have applied *Brooke Group* to limit Section 2's reach – this Court may confront the extent to which pricing practices like single product loyalty discounts and multi-product bundling are analyzed under *Brooke Group*, on the one hand, or as exclusive dealing practices, on the other. To date, no case involving loyalty discounts or bundling has yet to garner the Supreme Court's attention. Indeed, thus far only one appellate lower court has held that loyalty rebate schemes – where discounts are tied to purchases of a single product – are subject to the *Brooke Group* standard.<sup>36</sup>

In contrast, courts have had a knottier time sorting out whether bundled rebates – where rebates are tied to the purchase of multiple products bundled and discounted together – are likewise governed by *Brooke Group*. In *Brooke Group*'s wake, lower courts initially rejected the view that a plaintiff must show that the defendant engaged in below cost pricing (as *Brooke Group* required in the predatory pricing context) in order to prove that a defendant's practice of

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<sup>35</sup> *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 952 (6th Cir. 2005). As in *Spirit Airlines*, 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.

<sup>36</sup> See, e.g., *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), cert. denied, 531 U.S. 749 (2000).





sold the competitive product or products below its average variable cost of producing them.”<sup>41</sup> It also explicitly refused to require proof of recoupment.

It remains to be seen whether the Supreme Court would agree with the Ninth Circuit’s assessment in *PeaceHealth* or whether there are limits as to how far *Brooke Group* extends when it comes to the legality of bundling or multi-product discounts. It will be interesting to see how this area of law continues to evolve.

Apart from this low-hanging fruit so to speak, there are broader open issues that remain on the Court’s horizon and which I would not be surprised to see the regional federal appellate courts and Supreme Court grapple with in the upcoming years. One of those issues is how the courts should treat retail price maintenance claims in light of *Leegin*’s holding that resale price maintenance was not per se illegal and was instead subject to the rule of reason.<sup>42</sup> The wild card here traces back to Justice Souter’s decision in *California Dental*, where Justice Souter acknowledged that conduct that was not per se illegal did not necessarily have to be judged under a full blown rule of reason to be considered illegal under Section 1.<sup>43</sup> Justice Souter did not, however, address what that lesser standard should be or what kind of analysis would suffice in those circumstances. Justice Kennedy imported these ambiguities into *Leegin* when he hinted that a truncated rule of reason analysis might

creating uncertainty respecting what, if any, truncated rule of reason analysis might be applicable in future resale price maintenance cases.<sup>45</sup>

Judge Ginsburg on the D.C. Circuit arguably introduced some order into this chaos in his opinion in the Three Tenors case where he essentially adopted former Federal Trade Commission Chairman Muris' truncated rule of reason construct.<sup>46</sup> Under that analysis, if the challenged practice is "inherently suspect" under Section 1, the burden shifts to the defendant to demonstrate that there is a legitimate justification for it based on its efficiencies. If such a justification is shown, the burden shifts back to the party challenging the restraint to show that, even so, it is on balance anticompetitive in effect. More recently, the Fifth Circuit also applied this truncated rule of reason in its *North Texas Specialty Physicians* decision.<sup>47</sup> It may be that this approach is what Justice Kennedy ultimately had in mind for testing resale price maintenance claims. And I would not be shocked if the Court were to grant certiorari in some future resale price maintenance case or even in a case not involving resale price maintenance in order to cast more light on whether a truncated rule of reason analysis is appropriate in the circumstances and/or what form that analysis should take.

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<sup>45</sup> See Robert Hubbard, Protecting Consumers Post-Leegin, 22 ANTITRUST 41, 42 (Fall 2007); Marina Lao, Leegin and Resale Price Maintenance: A Model for Emulation or for Caution for the World? p. 8 (November 2007) available at [http://law.shu.edu/faculty/fulltime\\_faculty/laomarin/publications/leegin\\_rpm.pdf](http://law.shu.edu/faculty/fulltime_faculty/laomarin/publications/leegin_rpm.pdf) ("Because the Leegin majority took pains to warn courts to recognize and prohibit the anticompetitive uses of Resale Price Maintenance (RPM) in the absence of a showing of efficiency, the Court's decision in *Leegin* is a warning to courts to recognize and prohibit the anticompetitive uses of RPM in the absence of a showing of efficiency.")

From my perspective, the other large open question looming ahead is the scope of the Commission's powers under Section 5 of the Federal Trade Commission Act, which provides the Commission with broad power to challenge "any unfair method of competition."<sup>48</sup> In its 1972 decision in *Sperry & Hutchinson*, the Supreme Court held that, although Section 5 gives the FTC power to enforce Sections 1 and 2 of the Sherman Act, Section 5 is not merely co-extensive with these other antitrust statutes.<sup>49</sup> But the gaping question *S&H* left open is, if Section 5 extends beyond Sections 1 and 2, how far does it go? A trilogy of appellate court decisions from the early 1980s offered some limiting principles, including the Ninth Circuit's teaching in *Boise Cascade* that Section 5 cannot reach conduct that Section 1 and 2 reach simply because there is a failure of proof<sup>50</sup> and the Second Circuit's teachings in the *Official Airline Guides* and *Dupont* cases that Section 5 does not apply to conduct that cannot, in context, be considered to be oppressive and injurious to consumers at least in the long run.<sup>51</sup> Beyond those limiting principles, however, there are still many tough questions that remain. For example, in the Commission's recent *N-Data* consent decree, a majority of the Commission found a violation of Section 5 because the defendant's conduct in the context of standard setting was uniquely likely to harm consumers, even if it did not rise to the level of exclusionary conduct required under

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<sup>48</sup> 15 U.S.C. § 45(a)(1). For a more extensive summary of my thoughts on Section 5, see J. Thomas Rosch, "The FTC's Section 5 Heari

Section 2.<sup>52</sup> As the panel that I participated on at the Antitrust Section’s Spring Meeting made clear, there is vigorous debate as to whether that use of Section 5 was correct. Similarly, although the Court’s 1984 *Jefferson Parish* decision rejected the view that the Sherman and Clayton Acts permit claims based on a reduction in consumer choice<sup>53</sup> – such as might result from practices or transactions that deprive customers of non-price competition – it is arguable that, subject to certain limiting principles, such practices might create liability under Section 5. Again, the jury is still out on whether that is so. I expect that, in the upcoming future, as the Commission continues to bring more Section 5 cases, the appellate courts and eventually the Supreme Court will weigh in again on these hard questions.

In conclusion, the Court is perhaps blessed with an embarrassment of riches when it comes to hard, open question of antitrust law. It would not surprise me if the Court was to address many of these issues in the years to come. In resolving these questions, it seems clear that the Court will give considerable weight to the Solicitor General’s views, including requesting those views when they are not initially provided. What seems less clear after *linkLine* is whether consensus-building is something that will still carry the day. While I do expect that the Court will make every effort to strive towards unanimity, it may be the case that some of these issues turn on deep-seated philosophical differences about economics and the role that the courts should play in regulating the free markets that prove too difficult to reach broad agreement on. It will be fun to see how this all plays out.

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<sup>52</sup> *In the Matter of Negotiated Data Solutions, LLC*, Docket No. C-4234, (Consent Order accepted September 23, 2008), available at <http://www.ftc.gov/opa/2008/09/nds.shtm>.

<sup>53</sup> *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 30-31 (1984).