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A NEW U.S. ADMINISTRATION AND U.S. ANTITRUST ENFORCEMENT

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I. INTRODUCTION

Come January of 2009, one thing is certain: the Bush Administration will be gone and there will be a new Administration in Washington. The question to be considered by this paper is what difference, if any, will a new Administration make in United States antitrust enforcement. The answer of course depends somewhat, if not a great deal, on whether Barack Obama or John McCain is the next President. Predicting the outcome of the coming election, however, is beyond the scope of this paper.[1]

Indeed, one can argue that the outcome of the impending election as an influence on future antitrust enforcement pales as a causative factor in comparison with the state in which the outgoing Administration leaves both substantive and procedural antitrust law. Before one can predict what future antitrust enforcement will look like, one had better take a good long look at the present state of antitrust jurisprudence to see whether there is anything still left alive, and, if so, whether the patient can be revived and to what degree of health and vigor.

Accordingly, this paper will look first at the condition in which the Bush Administration is leaving antitrust, and then hazard a few predictions about the nature and extent of its possible resuscitation.

II. THE BUSH LEGACY IN ANTITRUST

A. What the Supreme Court Hath Wrought

Beginning in 2004, the Supreme Court decided a series of eight antitrust cases, each of which significantly narrowed and placed limitations on private antitrust enforcement and, one would argue, also on Government enforcement, in that the Supreme Court in each case either found conduct not to be subject to *per se* treatment, or not to be reachable at all under the antitrust laws.[2] The cumulative effect of these decisions has been greatly to restrict antitrust enforcement, whether public or private.

The cases, each of which will be briefly discussed, include *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.*, 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.*, 549 U.S. ____, 127 S. Ct. 1069 (2007); *Bell Atlantic Corp. v. Twombly*, ___ U.S. ____, 127 S. Ct. 1955 (2007); *PSKS, Inc. v. Leegin Creative Leather Prods.*, ___ U.S. ____, 127 S. Ct. 2705 (2007); *Billing v. Credit Suisse First Boston, Ltd.*, ___ U.S. ____, 127 S. Ct. 2383 (2007); and *Pacific Bell Telephone Co. v. linkline Communications, Inc.*, ___U.S.___, 555 U.S. ___ , No. 07-512 (U.S. 2/25/2009) (2009).

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1 Of course, we now know the outcome of the election. I have taken this into account, where appropriate, in this paper, which was originally written in July of 2008.

2 Since the writing of this paper, there has now been a ninth Supreme Court antitrust decision, *Pacific Bell Telephone Co. v. linkline Communications, Inc.*, No. 07-512 (U.S. 2/25/2009) (2009). This decision fits exactly with its predecessors in the pattern discussed in this article. The Court has also granted certiorari in another antitrust case, *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir., 2008), *certiorari granted*, No. 08-661 (U.S. 6/29/2009), which does not fit the pattern, but does portend a further shrinking of antitrust, as will be discussed, *infra*.

In *Verizon v. Trinko*, the Supreme Court significantly narrowed the duty of an alleged monopolist to deal with customers or rivals. The plaintiff claimed that the defendant's refusal to interconnect with other carriers violated the Telecom Act and was therefore unlawful predatory conduct under Section 2 of the Sherman Act. The Court held not only that there was no Section 2 violation that could be premised on a violation of the Telecom Act, but also that there was no otherwise unlawful refusal to deal. In so holding, the Court stated that generally a monopolist has no duty to deal with or assist rivals or customers, and that the "outer limits" of the refusal to deal doctrine are those enunciated in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, 472 U.S. 585 (1985). The Supreme Court also cast doubt on the so-called essential facilities doctrine from *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912). The effect of *Trinko* is unquestionably to limit, if not eliminate, a monopolist's duty to deal, except in limited circumstances akin to those of *Aspen Skiing*, where the alleged monopolist terminates a prior long-standing relationship without a valid business justification.

In *Volvo v. Reeder-Simco*, the Court reversed a decision for the plaintiff in a secondary line Robinson-Patman case involving bidding by Volvo dealers for truck sales. The Court reversed the decision on the very narrow ground that the plaintiff had failed to show that it competed against favored Volvo dealers for sales to the same buyers. The Court failed to reach the issue of whether the Robinson-Patman Act can ever apply to competitive bidding situations, which might appear, by definition, not to involve two sales. It is difficult to know what precedential value the *Volvo* decision has, or even to understand why the Supreme Court took the case, except perhaps that the Court disapproved of the result in the lower court. One cannot conclude that the decision bespeaks any hostility by the Court towards secondary line Robinson-Patman cases, although one can expect that if this Court takes any such cases in the future, it will be to narrow their scope.

In *Illinois Tool v. Independent Ink*, the issue was whether, in a tying case, a patented tying product requires a presumption of market power, as the Court had previously held in *International Salt v. United States*, 332 U.S. 392 (1947), and *United States v. Loew's*, 371 U.S. 38 (1962). Overruling *International Salt* and *Loew's*, the Court held that there would be henceforth no presumption of market power in the tying product based solely on the tying product's intellectual property protection. Instead, the plaintiff in a tying case will have to prove a relevant market and market power in the relevant market, with no assistance from a presumption arising from the product's intellectual property. Obviously, the effect of this will be to make tying cases much harder for plaintiffs. The opinion is also illuminating in the light it throws on the present Court's regard, or disregard, for precedent.

In *Texaco v. Dagher*, the Court reversed a Ninth Circuit decision that permitted a finding of *per se* price-fixing liability against Shell and Texaco, after they formed a joint venture and ordered the venture to charge identical prices for the Shell and Texaco brands of gasoline. The Court said there could be no *per se* price-fixing when a fully-integrated joint venture sets prices for its own products. The Court also said that the ancillary restraints doctrine articulated in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899), was inapplicable to intraventure decisions, and applied only to decisions that affected activities of the venture partners outside the joint venture. What the case appears to stand for is the proposition that the *per se* rule cannot be applied to decisions by joint venture participants regarding the operations of their venture, although such a holding appears inconsistent with the Court's decisions in *Citizen Publishing Co. v. United States*, 394 U.S. 191 (1969) and *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), as well as at least one lower court decision, *Freeman v. San Diego Board of Realtors*, 322 F.3d 1133 (9th Cir. 2003).

In *Weyerhaeuser v. Ross-Simmons*, the plaintiff made a claim of predatory bidding against the defendant, which allegedly violated Section 2 by paying excessive prices to corner the market for timber, an input in the defendant's lumber business. The Supreme Court held that in order to establish predatory bidding for an input product in violation of Section 2, the plaintiff had to show, with respect to the defendant's output product, finished lumber, that the defendant sold the product below cost and was likely to be able to recoup its losses after driving competitors from the market. In other words, the Supreme Court extended the rule of *Brooke Group v. Brown & Williamson*, 509 U.S. 209 (1993), a predatory selling case, to predatory buying cases. What *Weyerhaeuser* appears to hold and portend is that in any Section 1 or 2 case challenging the defendant's pricing (other than a horizontal price-fixing case), the plaintiff must show that the defendant sold the product below an appropriate measure of cost (which the Supreme Court has not yet specified) and had a reasonable likelihood of being able to recoup any losses by future supracompetitive pricing.

In *Bell Atlantic v. Twombly*, the issue for the Supreme Court was the sufficiency of a complaint under Section 1 alleging parallel conduct. The Supreme Court held that a complaint alleging only parallel conduct with a conclusory allegation of agreement fails to state a claim of unlawful concerted action. The Court said that a complaint must now allege facts beyond parallel conduct tending to exclude the possibility of independent conduct, and establishing a plausible claim of conspiracy. The impact of *Twombly* has been that complaints are now routinely being challenged, and often dismissed, for being insufficiently specific not only with regard to the particulars of unlawful agreement, but also with regard to every other element of the claim asserted and the insufficient plausibility of the claim alleged. Although the Supreme Court disavowed any intention of doing so, *Twombly* has without question created a heightened pleading standard in antitrust cases, and has caused Rule 12 motion practice to burgeon and proliferate. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), encouraged the use of summary judgment to dispose of antitrust claims; *Twombly* has now done the same with regard to Rule 12(b)(6) motions.

In *PSKS v. Leegin*, the issue for the Court was whether the *per se* rule against minimum resale price maintenance, first announced in *Dr. Miles Med. v. Park & Sons*, 220 U.S. 73 (1911), should be overruled. Overruling *Dr. Miles*, the Court held that minimum vertical price-fixing would now be subject to analysis under the rule of reason, just as maximum resale price-fixing is treated. The ease with which the Supreme Court overruled *Dr. Miles* after roughly a century is hard to reconcile with the Court's decision in *Flood v. Kuhn*, 407 U.S. 258 (1972), in which the Court refused to overrule its prior decisions that baseball was exempt from the antitrust laws as not being commerce, because the Court construed Congressional inaction to be satisfaction with the status quo. After *Leegin*, all vertical restraints, whether price or non-price, are now subject to the rule of reason.

In *Billing v. Credit Suisse*, the issue was whether the securities laws preempted application of the antitrust laws to an alleged conspiracy of underwriters to fix prices in connection with initial public offerings of stock. The Court held that there was preemption. The Court's decision casts doubt on numerous prior Supreme Court decisions holding that implied antitrust immunity is disfavored and to be strictly limited. *E.g.*, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231 (1979); *Abbott Labs v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 11-12 (1976). The decision in *Credit Suisse* is also noteworthy because it contradicts extensive scholarship by economists, which led to significant deregulation in the 1970s, showing that the regulatory agencies, like the Securities and Exchange Commission, cannot be relied upon to regulate the industries they watch because of "regulatory capture," *i.e.*, viewing the regulated industries more as clients than as businesses needing close and skeptical oversight. The opinion also contains language expressing the Court's concern with the high costs of antitrust litigation and the likelihood that lower courts might make mistakes in analyzing complex economic issues. The decision shows a surprising and distressing lack of confidence in a judicial system that most litigating attorneys, both plaintiff and defense counsel, believe has worked extraordinarily well for a very long period of time.

In *Pacific Bell Telephone Co. v. linkline Communications, Inc.*, the issue was the continued viability under Section 2 of a price squeeze claim where a monopolist sells a product or service to its wholesale customers at a price sufficiently high so that they cannot profitably resell against the monopolist's pricing to retail customers. Before *linkline*, the leading price squeeze case was *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). In *linkline*, the Supreme Court held that there could be no price squeeze claim because the monopolist had no "antitrust duty" to deal with the plaintiff at the wholesale level, and because the plaintiff had not shown that the monopolist's retail prices were below any appropriate level of the monopolist's costs. The decision effectively eliminates cost squeeze claims from Section 2 jurisprudence by requiring such claims to become predatory pricing claims subject to the rules of *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.,* 509 U. S. 209, 222-224 (1993). The decision also disturbingly adopts the new concept of an "antitrust duty to deal," which is nothing more than circular reasoning finding no basis in prior antitrust jurisprudence. That a monopolist has no "antitrust duty to deal" is the Court's extrapolation of dictum in *Verizon v. Trinko, LLP* to create a new antitrust principle where none previously existed, without a reasoned consideration of what a monopolist's duty to deal ought to be in a situation where the monopolist sells at both wholesale and retail. In such a situation, the rule might plausibly be that a monopolist electing to sell at retail and wholesale ought not set wholesale prices at a level the monopolist knows and intends will drive out retail competitors. In other words, the monopolist has no duty at all to sell at wholesale to its retail competitors, but if it chooses to do so, it cannot set prices at a level that it knows and intends will prevent them from competing at retail. Whether this rule or some other rule makes sense is not really the point. The point is that the Supreme Court never even considered the issue of what the rule ought to be, and instead swept everything under the rug of its new "antitrust duty to deal" label, which is simply another way of saying that the courts should find that monopolists have a duty to deal only in cases virtually indistinguishable from *Aspen Skiing Co. v. Aspen Highland Skiing Corp. linkline* continues a trend of making a dead letter of the Court's definition of predatory conduct as "attempting to exclude rivals on some basis other than efficiency," *Aspen Skiing*, 472 U.S. at 605, a standard intelligible to litigants, courts, and particularly juries, and therefore threatening to antitrust defendants and apparently anathema to the present Supreme Court.

When one looks back at these cases, one sees that *per se* rules now have a much narrower scope, applying only to horizontal price-fixing and divisions of markets and customers; the rule of reason covers everything else under Section 1, with its requirement of proving market power in a relevant market; the only pricing practices of antitrust concern, other than horizontal price-fixing, require proof of prices below cost and likely recoupment; pleading and procedure have become much more difficult for antitrust plaintiffs; and the overall reach of the antitrust laws is shrinking.

Nor does the Supreme Court appear to be done. In granting certiorari in *American Needle, Inc. v. National Football League*, 538 F.3d 736 (7th Cir., 2008), *certiorari granted*, No. 08-661 (U.S. 6/29/2009), the Court appears poised to extend the single entity defense not only to sports leagues, but to numerous other types of organizations and associations of competitors. In *American Needle*, the Seventh Circuit held that National Football League acted as a single entity in licensing team logos for merchandise, and therefore could not be liable under Section 1 for engaging in an unlawful combination or conspiracy. Both the plaintiff and the NFL asked for certiorari. The Court requested the views of the Solicitor General, which advised *against* granting certiorari. The Court nonetheless granted certiorari, to the mystification of most Supreme Court watchers. Two features of *American Needle* stand out as different from the other nine cases: first, the defendant won in the court of appeals, and the Supreme Court granted certiorari nonetheless; and, second, the Court granted certiorari contrary to the Solicitor General's recommendation. What this seems to presage is that a significant faction on the Court sees an opportunity for a major disquisition on the single entity defense enunciated in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), and on the scope of joint venture liabilty implicated in *Texaco v. Dagher*. Furthermore, the Court's opinion in *American Needle* is likely to give scant, if any, weight to whatever views the Obama Justice Department expresses. One quails at the prospect of what will emerge from the Court in its decision.

In predicting what a new administration will do with antitrust enforcement, one must bear in mind what this Supreme Court has done to antitrust in its last nine decisions, and will likely continue to do. In addition, the judicial appointments of the last eight years have placed on the bench a large number of judges who share the views of the conservative wing of the Supreme Court with regard to antitrust. These judges not only must follow the Supreme Court's decisions in the last nine cases, but also are unlikely to be receptive to expansive and vigorous antitrust enforcement.

Thus, the legacy of the Bush Administration and this Supreme Court has been to restrict antitrust enforcement to such a degree that one must seriously question whether a revival of antitrust enforcement is possible or likely, even if the will is there to accomplish it.

B. The Enforcement (or Non-Enforcement) Agencies

In each of the nine antitrust cases discussed above, the plaintiff prevailed in the Court of Appeals, the Supreme Court granted certiorari, and the Supreme Court ruled for the defendant. Also, in each of these cases, the Solicitor General, expressing the views of the Antitrust Division of the Department of Justice, the FTC, or both, weighed in on the side of the defendant in the Supreme Court. It is difficult to understand the interest of the Government in making antitrust enforcement more difficult and the reach of the antitrust laws narrower and more restrictive. Although each of the nine cases involved private litigants instead of the Government, the rules and limits imposed by the Supreme Court are equally applicable to most Government enforcement actions. Strangely, the Antitrust Division and the FTC appear to want to make their own enforcement actions more difficult. Apparently, this is a tradeoff the Bush Administration was willing to make in order to limit the access of private antitrust plaintiffs to the federal courts.

Besides routinely taking positions in opposition to private plaintiffs before the Supreme Court, the Antitrust Division and FTC also substantially curtailed the number of actions brought against mergers during the Bush years. *See* James Langenfeld & Daniel R. Shulman, "The Future of U.S. Federal Antitrust Enforcement: Learning from Past & Current Influences," *The Sedona Conference Journal* (Vol. 8) (Fall 2007), pp. 2-8. In those instances where the Antitrust Division or FTC challenged mergers, they have met with a singular and distressing lack of success. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); and *FTC v. Arch Coal Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172 (D.D.C. 2001).[3]

The upshot of the foregoing is a perfect storm of merger nonenforcement at the close of the Bush Administration. The Government brings fewer cases; those they bring come before a conservative bench and result in losses; and the effect of losing such apparently strong cases as *Oracle*, *Arch Coal*, and, until its reversal, *Whole Foods* is to demoralize and discourage the Government from bringing more merger cases. The possibility of the Government's challenging a merger from four to three firms in an industry appears nonexistent; the prospect for challenging a three-to-two merger is doubtful or remote.

There are, however, several bright spots. First, the Antitrust Division has consistently prosecuted price-fixing and output reduction cartels, most of which have been international. These have included, *inter alia*, vitamins, air cargo rates, marine hoses, and a succession of electronics components, among them SRAM and DRAM chips, LCD flat panels for computers and televisions, flash memory, and cathode ray tubes, all of which have led to grand jury investigations. *See also* Langenfeld & Shulman, *id.* at pp. 8-11. One reservation that might be expressed, however, is that the Government's enforcement activities do not seem to have had a deterrent effect, as new cartels continue regularly to come to light.

Another observation worth making is that the FTC has consistently appeared more vigorous in its enforcement activities than the Antitrust Division. Although it lost, the FTC brought *Arch Coal.* It also brought *Whole Foods,* where it prevailed on appeal after losing at trial. The FTC has also taken a position against Hatch-Waxman patent settlements as *per se* unlawful market divisions, although with mixed results. The FTC further prosecuted and prevailed in the *Three Tenors* case, and in doing so laid out a logical and principled approach to applying the quick look rule of reason. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).[4]

A third heartening development is the Antitrust's Division's recent repudiation of *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, United States Department of Justice (2008), the last hurrah of the Bush Antitrust Division, which can best be compared to a defeated army's spiking its guns as it retreats vanquished from the field. In this report, the Bush DOJ attempted to establish new guidelines for Section 2 liability, which were ridiculously one-sided in favor of defendants and further demonstrated a disregard, if not disdain, not only for precedent, but also for the views of the FTC, which felt compelled to go on record in opposition to the new guidelines. President Obama's new head of the Antitrust Division, Christine Varney, explicitly disavowed her predecessor's report, in a speech of May 11, 2009, in which she said:

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3 The original draft of this article included in this list *FTC v. Whole Foods Market, Inc.*, 502 F.Supp.2d 1, (D.D.C. 2007), *reversed*, ___F.3d___, 2008 WL 2890688 (D.C. Cir. July 29, 2008). The D.C. Circuit's reversal of *Whole Foods* is a heartening development, which may help to reinvigorate merger enforcement in the next administration.

4 Fairness also requires giving credit to the Antitrust Division for successfully litigating *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).

> For these reasons, I have withdrawn the Section 2 Report by the Department of Justice. Effective May 11, 2009, the Section 2 Report no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act. The Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community.

Finally, the Obama administration has to date signalled an apparent willingness to make a much harder look and much firmer stand against mergers, as is apparent from its review of the proposed Ticketmaster-Live Nation and Pfizer-Wyeth combinations.

C. The Class Action Fairness Act of 2005

Another important antitrust legacy of the Bush Administration is 28 U.S.C. §§ 1332(d), 1453 and 1711-15, which bears the Orwellian title of the Class Action Fairness Act of 2005 ("CAFA"). The effect of CAFA is to put in federal court virtually all state law antitrust actions brought as class actions. The impetus for the legislation was the proclivity of state legislatures to pass statutes allowing for more vigorous private enforcement under state antitrust law than under federal law, such as various *Illinois Brick* repealer statutes permitting indirect purchasers to recover damages from price fixers. With the requirement that such actions be brought instead in federal courts, state law indirect purchaser antitrust cases now end up in MDL proceedings consolidated with direct purchaser cases. This creates for federal district courts a witches brew of procedural and substantive conundrums. For example, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), requires a federal court to decide how various state supreme courts throughout the United States would apply the antitrust law of their respective states. At the same time the federal courts must decide whether and to what extent to follow the procedural law of each state in which a state law antitrust class action is asserted. These issues bubble into a bewildering and noxious effluvium when the federal courts deal with issues of class certification and antitrust injury, as is apparent from recent decisions in the SRAM and graphics processing unit multidistrict proceedings.

Thus, not content with stifling federal antitrust enforcement, the Bush Administration and its cronies in Congress have reached out to cast a dead hand on state antitrust enforcement as well.

III. The Future

Prognostication is risky, but a few predictions can safely be made, while others of a more speculative nature will be advanced.

First, vigorous cartel enforcement can be expected to continue, both by the Government and by private plaintiffs. Where price-fixing is suspected or detected, the Department of Justice will continue to convene grand juries, and private plaintiffs will file cases, particularly consumer class actions. One change that is hoped for is that at least one or more of these proceedings will result in sufficiently serious penalties to deter future cartel activity, such as a trial in a civil class case resulting in a money judgment that actually approximates the damages sustained by the class, trebled, rather than a settlement that the defendants regard merely as a cost of doing business or tax for price-fixing. If cartel activity is effectively to be deterred by Government or private litigation, a doomsday scenario actually needs to eventuate in one of the cases, with top executives going to prison and the company paying the class's real treble damages.

Second, merger enforcement is likely to become more vigorous, especially under a Democratic administration. Even if Senator McCain wins, however, some uptick in merger enforcement is likely, because one cannot imagine enforcement being this moribund forever. Indeed, now that Obama is President, the Department of Justice must deal with a number of drug company mega-mergers and the Ticketmaster-Live Nation merger, all of which involve financially healthy companies, which prophesy cost savings from their combinations as a result of substantial layoffs. This raises the question of whether such cost savings ought to be viewed as pro- or anti-competitive in a time of recession and rising unemployment, and whether this is a proper consideration for antitrust enforcers.

Third, there are lacunae and uncertainties in antitrust law that cry out for resolution and will need to be addressed. Chief among these is bundled pricing. The Third Circuit's decision in *3M v. LePage's, Inc.*, 324 F.3d 141 (3d Cir. 2004), cert. denied 542 U.S. 953 (2004), has been widely condemned, and specifically rejected by the report of the Antitrust Modernization Commission, and by the Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), *superseding and amending* 502 F.3d 895 (9th Cir. 2007). This is an area where the Supreme Court could provide welcome guidance.

The Supreme Court has also not reviewed a merger case in almost 40 years. As Judge Posner noted in *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986), with respect to the Supreme Court's merger decisions of the 1960s:

> The other decisions in that decade—in particular *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962); *United States v. Aluminum Co. of America*, 377 U.S. 271, 84 S. Ct. 1283, 12 L. Ed. 2d 314 (1964); *United States v. Von's Grocery Co.*, 284 U.S. 270, 86 S. Ct. 1478, 16 L. Ed. 2d 555 (1966), and *United States v. Pabst Brewing Co.*, 384 U.S. 546, 86 S. Ct. 1665, 16 L. Ed. 2d 765 (1966)—seemed, taken as a group, to establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words "may . . . substantially . . . lessen competition." None of these decisions has been overruled.

One would be hard pressed to find a lower court decision following any of these cases to enjoin or unwind a merger.

Similarly, alleged "efficiencies" in the form of cost savings are today the most frequently cited justifications for proposed mergers. Nonetheless, the Supreme Court has stated that claimed cost savings are not a sufficient justification for an otherwise unlawful combination. *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 580 (1967). When lower courts have considered such an efficiency or cost-saving defense, they have generally required some showing that any claimed cost savings will ultimately be passed on to consumers. *FTC v. H.J. Heinz Co.,* 246 F.3d 708, 720 (D.D.C. 2001); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088-89 (D.D.C. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285, 1300-01 (W.D. Mich. 1996); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 171-72 (D.D.C. 2000); *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1084-85 (D. Del. 1991); *California v. Am. Stores Co.*, 697 F. Supp. 1125, 1132-33 (C.D. Cal. 1988), *aff'd* in part and *rev'd* in part on other grounds, 872 F.2d 837 (9th Cir. 1989), *rev'd*, 495 U.S. 271 (1990); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 148-49 (E.D.N.Y. 1997) ("The second prong of the 'efficiencies' analysis is whether these savings would be passed on to the consumers."). Here, again, guidance from the Supreme Court would be welcome and is long overdue.

The issue of Hatch-Waxman patent settlements also cries out for Supreme Court analysis and guidance. Because the trend of the decisions is strongly in favor of sustaining the validity of these settlements, contrary to the position of the FTC, however, this Supreme Court is unlikely to intervene, unless the FTC is able to prevail in one of its challenges.

Finally, it is anyone's guess what the future holds for enforcement directed at unilateral conduct. The Supreme Court appears, in *Trinko*, to have closed the door to challenges to a monopolist's refusal to deal. Likewise, there do not appear to be any prohibited pricing practices by a monopolist that do not require below-cost pricing and a reasonable likelihood of recoupment. This raises the interesting question of the future of exclusive dealing arrangements by a monopolist, when the inducement to obtain the exclusivity is based on some form of monetary consideration, like a market share discount, rebate, or some other form of payment for not doing business with competitors. One must ask whether, in such cases, the plaintiff must allocate the payment for exclusivity to the price for the monopolist's product or products and show the products are being sold below cost in order to establish predation. If so, this raises the question of whether there is a principled basis for distinguishing these rebate or payment-based exclusive dealing cases from exclusive dealing arrangements procured by non-monetary inducements or threatened refusals to deal if the buyer deals with the monopolist's competitors. Because exclusive dealing arrangements are a staple of Section 2 cases, such as in *Microsoft*, these are interesting issues that courts are almost certain to wrestle with in the next four years.

IV. CONCLUSION

Unfortunately, analysis of the future of antitrust enforcement under the next administration must begin with a post-mortem, to determine whether there is anything of the patient that has survived the last eight years, and, if so, what. Equally unfortunately, the answer is not much. Even more unfortunately, the medical staff charged with ensuring the future health and viability of the patient consists of the present Supreme Court and sitting federal bench, which in many respects exhibits an attitude of "better off dead." That said, cartel enforcement appears to be alive and perhaps well, and should continue so under the next administration. Merger enforcement can only get better. The rest depends on who occupies the White House and Congress and whether there is any interest in beginning to disinter the centenarian now buried at least up to its neck and gasping for air. I refer to the antitrust laws. November 4 will tell us.