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# The Roberts Court Turn to the Left?

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UNTIL *AMERICAN NEEDLE*, ANTITRUST plaintiffs had not won a case in the Supreme Court since 1993.[1] Under Chief Justice Roberts, plaintiffs had lost eight straight cases, half unanimously.[2] The last loss, *linkLine*, was a low point for plaintiffs as Justice Roberts's majority opinion effectively overruled Judge Hand's venerated *Alcoa* decision recognizing a price squeeze as an independent Section 2 violation, while the four more liberal concurring justices would have dismissed the complaint under an expansive regulatory immunity theory.[3]

Since then, however, with the government as plaintiff or favoring the plaintiff,[4] plaintiffs have racked up three straight victories (*American Needle*, *Phoebe Putney*, and *Actavis*), including two unanimous wins (*American Needle* and *Phoebe Putney*).[5] So is it time to break out the champagne at 600 and 950 Pennsylvania Avenue and at plaintiffs' law firms from coast to coast? Has the Obama administration been able to use its influence to push a business-friendly Court in a progressive direction? Not so fast. *American Needle* and *Phoebe Putney*, although not foregone conclusions when certiorari was granted, would have been fairly radical departures from consensus antitrust views had they come out the other way. *Actavis* is a significant win for plaintiffs, but it may be a precarious one reflecting the Court's attitude towards patents more than antitrust.

## American Needle

*American Needle*[6] raised the question of when a joint venture could be considered a "single entity" not subject to Section 1 under *Copperweld*.[7] The National Football League—which had won in the Seventh Circuit—supported certiorari in an effort to make an idiosyncratic decision by Judge Easterbrook[8] the law of the land and thereby short-circuit the "cascade" of antitrust suits the League faced rather than having to muddle through burdensome rule of reason litigation.[9] Rejecting the NFL's overreach, as well as the Obama administration's proposal to contain it,[10] Justice Stevens's final antitrust opinion sensibly held that *Copperweld* does not apply to a joint venture when its decisions are made by firms that have independent economic interests that might conflict with those of the venture itself.[11] Justice Stevens reminded the antitrust world that the competitive effects of legitimate joint venture activity are properly analyzed under the rule of reason, not under the logically anterior question of whether there is a plurality of actors. If *American Needle* has any appreciable impact, it may be in its use of Areeda's "twinkling of an eye" metaphor to encourage courts summarily to exculpate certain joint venture restraints under the rule of reason.[12]

## Phoebe Putney

*Phoebe Putney*[13] reversed an Eleventh Circuit ruling that immunized a hospital merger under the state action doctrine. It is more significant than *American Needle* but still modest and well within the antitrust consensus. Indeed, nowhere is there greater bipartisan consensus in antitrust than in the state action area, where liberals' distrust of private power and conservatives' skepticism of government cronyism meet. And it would have been surprising if the Court had ruled against the FTC when the states themselves argued that the Eleventh Circuit's expansive view of the state action doctrine *undermined* federalism concerns.[14]

The Eleventh Circuit decision was something of an outlier insofar as it held that granting of general corporate powers to a local hospital authority—pursuant to which the authority acquired a competing hospital—was sufficient to "clearly articulate" a state policy to displace competition. On the other hand, several lower courts had applied the Supreme Court's "foreseeability" test liberally to find a clear articulation to displace competition in various contexts when an anticompetitive result was merely a possible result of state legislation. The Muris-led FTC had sharply criticized this expansion of state action immunity in a 2003 Report,[15] as had Professor Hovenkamp and other commentators.[16]

The upshot was that in reversing the Eleventh Circuit, *Phoebe Putney* explicitly tightened up the foreseeability test to require that, unless expressly stated by the state legislature, the "displacement of competition [must be] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."[17] The Court also reiterated helpful dicta that, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'"[18]

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### *Actavis*

*Actavis*[19] is plaintiffs' real victory among the three cases. Monetarily, the case promises to save drug purchasers billions of dollars. Doctrinally, the extent of the victory is evidenced by the Court's sharp split,[20] as well as by the fact that the Court rejected the dominant view of the appeals courts that reverse-payment settlements were immunized from antitrust challenge unless the underlying patent litigation amounted to a sham. But the victory rested on the slender reed of Justice Kennedy's vote.[21] And rather than a positive endorsement of antitrust enforcement,[22] his vote may reflect his relatively more skeptical view of patent rights (shared by the majority) than that of Chief Justice Roberts, who dissented because the majority's approach "weakens the protections afforded to innovators by patents."[23]

The split between Kennedy and Roberts on patent rights is most clearly evident in *eBay*, in which the Court unanimously held that a victorious plaintiff in a patent infringement action was not necessarily entitled to an injunction, as "the creation of a right is distinct from the provision of remedies for violation of that right."[24] Roberts and Kennedy issued dueling concurring opinions. Roberts emphasized "the long tradition of equity practice," which was that courts granted injunctions "in the vast majority of patent cases" given "the difficulty of protecting a right to *exclude* through monetary remedies that allow an infringer to use an invention against the patentee's wishes."[25] In contrast, Kennedy emphasized that modern cases often involved "considerations quite unlike earlier cases," including enforcement by patent trolls, the use of injunctions to engage in patent holdup, and the potential vagueness and suspect validity of business-method patents.[26]

In *Actavis*, Roberts saw nothing wrong from a patent law perspective with a patent holder paying a potential competitor not to challenge its patent,[27] whereas the majority recognized that "[i]t would be difficult to reconcile the proposed right [to pay off a challenger] with the patent-related policy of eliminating unwarranted patent grants so the public will not 'continually be required to pay tribute to would-be monopolists without need or justification.'"[28] Moreover, while the majority endorsed the government's key contention that a payment to prevent the *risk* of competition was "the relevant anticompetitive harm," making the patent merits logically irrelevant to the antitrust analysis,[29] it seems plausible that the majority's nominal rejection of the government's "quick look" approach and its lack of definitiveness regarding patent merits ("it is *normally* not necessary to litigate patent validity") may have been necessary to get Justice Kennedy's vote.[30] The defense bar no doubt will seek to exploit the ambiguity as lower courts take up the task of "structuring" the rule of reason in reverse payment cases.[31]

*Actavis* is also a significant victory for the Obama administration. The Bush Justice Department, while rejecting the "scope of the patent" test, famously opposed the FTC's certiorari petition in *Schering* and the FTC's position that an unexplained reverse payment is presumptively anticompetitive.[32] Rather, Solicitor General Clement told the Supreme Court that "an appropriate legal standard should take into account the relative likelihood of success of the parties' claims, viewed *ex ante*."[33] The Obama DOJ changed course in amicus briefs it submitted in the private *Cipro* and *K-Dur* cases, in which it supported the FTC's position that reverse payment settlements should be presumptively unlawful and that the patent merits are essentially irrelevant.[34] The Solicitor General's office was instrumental in persuading the Third Circuit in *K-Dur* to adopt the FTC's approach,[35] which led to a clear circuit split and the granting of certiorari in *Actavis*. And the result it obtained in *Actavis* is closer to the FTC's position than Solicitor General Clement's prior approach.

### Next on Tap

**Dental Examiners.** What are the implications of plaintiffs' string of victories for cases that are now before the Court or may come to the Court in the near future? *Phoebe Putney* is unlikely to have much impact on *North Carolina State Board of Dental Examiners v. FTC*, the state action case that will be heard by the Court in the fall of 2014.[36] *Dental Examiners* presents the question of whether dentists who are elected to a state dental board by other dentists are "private actors" for purposes of the state action immunity—and thus potentially liable for board actions excluding would-be competitors from the market—in the absence of active state supervision.

*Dental Examiners* is a tougher case for the FTC than *Phoebe Putney* for several reasons. It involves the potential liability of a state board, rather than purely private actors or a local government authority, so states themselves may be less supportive. And the FTC assumed that the board was acting pursuant to a clearly articulated state policy to displace competition, which means the federalism concerns are theoretically heightened. Also, the Fourth Circuit's ruling upholding the FTC arguably is the minority view. On the other hand, the only "active supervision" the FTC required was that the board follow the prescribed state procedure (i.e., going to court to obtain an injunction) when it seeks to prevent nondentists from purportedly engaging in the unlicensed practice of dentistry, so the actual intrusion on state sovereignty is minimal.[37]

***Preemption.*** A pending certiorari petition in an antitrust preemption case, *Oneok v. Learjet*,[38] involves an approach towards regulatory immunity that is arguably outside the antitrust mainstream. In *Oneok*, the Ninth Circuit held that the Natural Gas Act did not preempt class actions under state antitrust law seeking damages for commercial and industrial purchasers of natural gas harmed by a price-fixing conspiracy in deregulated natural gas markets that was partly responsible for the California energy crisis of 2000–2001.

The Justice Department and the CFTC had brought civil and criminal fraud claims against some of the individuals and energy firms engaged in the market manipulation; FERC also investigated and obtained some forward-looking relief.[39] The Ninth Circuit held the state antitrust claims were not

preempted by FERC's "exclusive jurisdiction" over practices affecting *wholesale* natural gas rates insofar as some of the conduct at issue (as well as plaintiffs' injuries) involved *retail* sales over which states have long had jurisdiction and other "non-jurisdictional sales." The certiorari petition claims there is a conflict based on decisions of the Tennessee and Nevada Supreme Courts that dismissed on field preemption grounds somewhat similar claims arising out of the same misconduct. Ironically, the state courts adopted a relatively expansive interpretation of the preemptive scope of the Natural Gas Act while concluding that state antitrust enforcement undermined "national uniformity and freedom from burdensome government intervention."[40] At the Court's invitation, the Solicitor General filed an amicus brief supporting preemption but arguing that certiorari should be denied because there is no conflict and the regulatory environment has changed.[41]

The Solicitor General (and the Ninth Circuit for that matter) did not consider that the plaintiffs' antitrust claims were not necessarily preempted even if FERC had jurisdiction over all the practices at issue because state antitrust laws are laws of general applicability, like those against fraud and theft, as to which field preemption under the Natural Gas Act does not apply.[42] To be sure, the Roberts Court's expansion of regulatory immunity (*Credit Suisse*, *linkLine*'s gloss on *Trinko*)[43] might suggest that the Court would not be sympathetic to antitrust class action claims—federal or state—that challenge conduct subject to regulation and potential relief by FERC and other agencies. On the other hand, even as it has expanded the notion of what constitutes an "actual conflict" between regulation and antitrust, the Court has not eliminated the analysis altogether when it comes to implied regulatory immunity under the federal antitrust laws.[44] And there is little logic in applying a different standard to the preemption of parallel state antitrust laws.[45] So it would not be surprising for the Court, if it reaches the issue, to reject petitioners' sweeping field preemption theory under which FERC's mere jurisdiction to regulate would completely oust state antitrust claims. Relatedly, it seems plausible that when and if a circuit conflict arises in connection with the lower courts' expansion of the filed rate doctrine to bar treble-damages claims in connection with FERC "market-based" (i.e., deregulated) rates, the Court will rein in the doctrine.[46]

***Standard Essential Patents.*** An antitrust-related patent issue that may be headed to the Supreme Court in the near future is the question of whether (or when) owners of standard essential patents (SEPs) who have promised to license the patents on (fair,) reasonable, and nondiscriminatory (RAND or FRAND) terms may obtain an injunction under *eBay*. Both the FTC and the Justice Department have engaged in advocacy to limit injunctions and exclusion orders as SEP infringement remedies because of the severe holdup problem that an injunction (or threat of injunction) entails.[47] And the FTC (in consents) has found that *seeking* an injunction or exclusion order in breach of a RAND commitment may violate Section 5 of the FTC Act.[48]

A Federal Circuit panel recently upheld a decision by Judge Posner (sitting by designation) finding that a RAND commitment by Motorola precluded it from obtaining an injunction against Apple.[49] But the court issued a fractured ruling, the controlling opinion of which is unclear in the degree to which it provides any presumption against SEP injunctions. While stating that a RAND commitment and widespread licensing "strongly suggest" a lack of irreparable harm and the adequacy of money damages, the "majority" opinion by Judge Reyna also said that "an injunction may be justified where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect," but Reyna found "no evidence that Apple has been . . . unilaterally refusing to agree to a deal."[50]

In dissent, Judge Rader argued that (1) "'hold out'" was just as much a problem as "'hold up,'" (2) an infringer would be an "unwilling licensee, which would strongly support [an] injunction," if it refused to accept an offer that was "actually FRAND," and (3) there were sufficient facts to allow Motorola to prove that Apple was an unwilling licensee.[51] In a concurring opinion, Judge Prost disagreed "with the majority's suggestion that an alleged infringer's refusal to negotiate a license justifies the issuance of an injunction," and would have limited the availability of injunctive relief to situations in which infringement damages could not otherwise be collected.[52] The standard suggested by the dissent, which would put the implementer of a standard at serious risk of an injunction if it refused an offer that a court subsequently determined to be "FRAND," would sharply tilt the negotiating balance in favor of SEP holders. And the majority opinion could be read to support such an approach, at least absent the gloss provided by the concurrence.

The splintering of the panel portends yet another split of the full Federal Circuit and review by the Supreme Court.[53] Based on *Actavis* and the concurring opinions in *eBay*, one might expect Justice Kennedy's patent views—which are more in line with Judge Prost's than Judge Rader's—to prevail over the views of Chief Justice Roberts.[54] This suggests that, even if the Court were to hold that an implementer of a standard may be subject to an injunction if it preemptively refuses to negotiate or participate in a fair process for determining what constitutes a reasonable and nondiscriminatory royalty,[55] the Court is unlikely to agree that the "willingness" of a licensee may depend on a post hoc determination of whether the SEP holder offered FRAND terms.

***Profit Sacrifice.*** Another issue that may come before the Court is whether a refusal-to-deal claim requires a plaintiff to show that the monopolist sacrificed short-term profits. The issue was raised in a certiorari petition, recently denied, that sought review of *Novell v. Microsoft*,[56] a decision that waxes poetic about the evils of refusal-to-deal claims. The Tenth Circuit in *Novell* went well beyond *Trinko* and *linkLine* (as well as the district court and the defendant) to suggest that a refusal to deal that sacrifices short-term profits in the monopoly market is not actionable if the unjustified exclu-

sion enables the monopolist to increase profits in a related market.[57]

In *Trinko*, not even the Bush administration's Justice Department endorsed a strict profit-sacrifice test for refusals to deal, opting instead for the "no economic sense" variant,[58] under which profit sacrifice might be "conceptual" or profits could be recouped simultaneously.[59] The Supreme Court has not yet adopted any kind of profit-sacrifice requirement for refusals to deal.[60] Doing so would be quite controversial because, among other reasons, it would imply that a refusal to deal with mixed motives and slight efficiency benefit is not actionable,[61] whereas the ordinary liability standard under Section 2 requires some balancing of costs and benefits.[62] Indeed, the Obama Antitrust Division's very first significant action was to withdraw the Bush administration's Section 2 Report because the Report's "overly lenient approach to enforcement . . . allow[s] all but the most bold and predatory conduct to go unpunished and undeterred."[63] So the denial of certiorari in *Novell* could be taken as a plaintiffs' victory of sorts, given the prospect that the Court would adopt some form of profit-sacrifice test if it reached the merits. On the other hand, it would have been surprising to see the Court affirming the Tenth Circuit's extreme version of the test.

## Conclusion

The recent plaintiffs' victories in the Supreme Court do not suggest that the Roberts Court has veered left on antitrust doctrine. Rather, they show that the Court will rein in lower courts that stray too far out of the antitrust mainstream, which they commonly do, perhaps encouraged by Supreme Court dicta. The Roberts Court seems likely to continue to resolve highly contested issues within the antitrust community in defendants' favor, but take a more progressive approach on contemporary patent-related antitrust matters. ■

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1 *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993), was the previous (partial) plaintiff's victory. Excluding *Hartford Fire*, antitrust plaintiffs had lost 16 straight Supreme Court cases.

2 *See* Joanne C. Lewers & Robert A. Skitol, *The Developing Legacy of the Roberts Court*, ANTITRUST, Summer 2014, at 7 (citing *Volvo*, *Dagher*, *Illinois Tool Works*, *Weyerhauser*, *Twombly*, *Credit Suisse*, *Leegin*, and *linkLine*).

3 *See generally* Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 292–97 (2012) (discussing *linkLine* and noting that majority did not entirely rule out a price squeeze claim when there is an "antitrust duty to deal").

4 In each of the cases decided during the Bush administration, the government filed an amicus brief supporting defendants, although in some cases (e.g., *Credit Suisse*) the Court restricted the antitrust laws more than the government had sought. *California Dental Association v. FTC*, 526 U.S. 756 (1999), was the last case in which the government was a party.

5 I do not count the class action and arbitration decisions (e.g., *Comcast* and *Italian Colors*) or the CAFA decision (*AU Optronics*) as antitrust decisions because they apply well beyond antitrust claims and do not implicate antitrust doctrine. Of course, as Paul Clement suggests, these (and related class action) decisions may have more impact on antitrust litigation than the cases that appear in antitrust textbooks. *Roundtable Discussion: The Developing Antitrust Legacy of the Roberts Court*, ANTITRUST, Summer 2014, at 15, 24 (comments of Paul Clement). Notably, none of the three plaintiffs' victories involved a class action.

6 Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010).

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

8 In ruling in favor of the NFL, the Seventh Circuit relied heavily on Judge Easterbrook's decision in *Chicago Professional Sports Ltd. v. National Basketball Association* (*Bulls II*), 95 F.3d 593 (7th Cir. 1996).

9 *See* Brief for the NFL Respondents at 11, *American Needle*, 560 U.S. 183 (No. 08-661) [hereinafter NFL Brief].

10 *See American Needle*, 560 U.S. at 202 n.9. Both the NFL and the government seemed to think that it was important that *Texaco Inc. v. Dagher*, 547 U.S. 1, 6, 7 (2006), had referred to the joint venture in that case as a "single entity." *See* NFL Brief, *supra* note 9, at 14; Brief for the United States as Amicus Curiae Supporting Petitioner at 10, 17, *American Needle*, 560 U.S. 183 (No. 08-661). However, *American Needle* barely made reference to *Dagher*.

11 *See American Needle*, 560 U.S. at 200–01; *see also* Richard M. Brunell, *Some Thoughts on Professor Brodley's Contributions to Antitrust Through the Eye of* American Needle, 90 B.U. L. REV. 1385, 1390 (2010).

12 *See* Lewers & Skitol, *supra* note 2, at 9.

13 FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013), *rev'g* 663 F.3d 1369 (11th Cir. 2011).

14 *Id.* at 1016 (noting 20 states had filed an amicus brief in support of the FTC arguing that "loose application of the clear-articulation test would . . . effectively requir[e] States to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct").

15 *See* FED. TRADE COMM'N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 25–36 (Sept. 2003) [hereinafter STATE ACTION REPORT]. The State Action Task Force was headed up by George Mason University's Todd Zywicki (who had replaced Ted Cruz on the panel) and included General Counsel Bill Kovacic and now-Commissioner Maureen Ohlhausen.

16 *See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 225a, at 133 (3d ed. 2006); ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 372 (2007); ABA Section of Antitrust Law, Comments on FTC Report re State Action Doctrine 9, 10 (May 2005).

17 133 S. Ct. at 1013. This test was somewhat less strict than the test proposed by the Solicitor General, which was: "displacement of competition must be the 'inherent' or 'necessary' result of the State's alternative regulatory structure." Brief for Petitioner at 17, *Phoebe Putney*, 133 S. Ct. 1003 (No. 11-1160); *see also id.* at 21, 27. In continuing to apply the foreseeability test loosely, a recent decision by a Ninth Circuit panel latched on to the Court's use of the phrase "ordinary result," without making reference to the accompanying "inherent" or "logical" language. *See* United Nat'l Maint. v. San Diego Convention Ctr., No. 12-56809, 2014 WL 1910598, at *6 (9th Cir. May 14, 2014), (finding clear articulation where "it is foreseeable that an operator of the convention center *may* exclusively provide cleaning staff") (emphasis added).

18 133 S. Ct. at 1010 (quoting FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636 (1992)).

19 FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013). The author worked on the FTC's brief in *Actavis*.

20 While Paul Clement measures success by how many votes one side gets, *Roundtable Discussion*, *supra* note 5, at 21, victory in a sharply divided Court usually is far more significant than a 9-0 win, for the obvious reason that a split vote suggests the issue is more controversial.

21 It seems doubtful that Justice Alito, who was recused, would have voted with the majority.

22 To be sure, Justice Kennedy is not entirely conservative on antitrust matters. Although he authored the majority decision in the sharply contested *Leegin* decision overturning the per se rule against resale price maintenance agreements, he did suggest the rule of reason ought not to be toothless. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 892–94, 898–99 (2007). Moreover, Justice Kennedy joined the 6-3 major-

ity opinion in *Kodak*, which Chief Justice Roberts, as a practitioner, said was dubious. *See* Lewers & Skitol, *supra* note 2, at 12.

[23] *Actavis*, 133 S. Ct. at 2247. At the same time, Chief Justice Roberts noted the "irony . . . that the majority's decision may very well discourage generics from challenging pharmaceutical patents in the first place," *id.*, while ironically not recognizing that such a result would strengthen, rather than lessen, the protection afforded to branded manufacturers' patent rights.

[24] eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 392 (2006).

[25] *Id.* at 395 (Roberts, C.J., concurring, joined by Justices Scalia and Ginsburg).

[26] *Id.* at 396–97 (Kennedy, J., concurring, joined by Justices Stevens, Souter, and Breyer); *see also* Global-Tech Appliances, Inc. v. SEB SA, 131 S. Ct. 2060, 2072 (2011) (Kennedy, J., dissenting from otherwise unanimous holding that willful blindness is sufficient for active inducement liability under § 271(b) of Patent Act).

[27] *Actavis*, 133 S. Ct. at 2239 ("Solvay paid a competitor to respect its patent—conduct which did not exceed the scope of its patent.").

[28] *Id.* at 2233 (quoting Lear, Inc. v. Adkins, 395 U.S. 653, 670 (1969)). *Lear* held that an agreement by a patent licensee not to challenge the validity of the patent was not enforceable because of "the important public interest in permitting full and free competition in the use of ideas which are in reality a part of the public domain." *Lear*, 395 U.S. at 670; *see also* MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118 (2007) (extending *Lear* to allow licensee to challenge validity of patent under Declaratory Judgment Act even while continuing to pay royalties).

[29] *Actavis*, 133 S. Ct. at 2236; *cf.* Brief for Petitioner at 55, 133 S. Ct. 2223 (No. 12-416) (key question is "whether, in avoiding the risks that accompany patent infringement litigation, the parties have by contract obtained more exclusion than warranted in light of those risks").

[30] *See* Transcript of Oral Argument at 9, 133 S. Ct. 2223 (No. 12-416) ("[M]y concern . . . is your test is the same for a very weak patent as a very strong patent.") (Kennedy, J.).

[31] *See, e.g.*, Kevin D. McDonald, *Because I Said So: On the Competitive Rationale of* FTC v. Actavis, ANTITRUST, Fall 2013, at 36.

[32] The FTC in *Schering* said it was applying the "direct effects" version of the rule of reason, and explained, "If there has been a payment from the patent holder to the generic challenger, there must have been some offsetting consideration. Absent proof of other offsetting consideration, it is logical to conclude that the *quid pro quo* for the payment was an agreement by the generic to defer entry beyond the date that represents an otherwise reasonable litigation compromise." Schering-Plough Corp., 136 F.T.C. 956, 976–77, 988 (2003).

[33] Brief for the United States as Amicus Curiae at 11, FTC v. Schering-Plough Corp., 548 U.S. 919 (2006) (No. 05-273). The Justice Department distanced itself from the FTC's position that an unexplained payment made consumers worse off because "'a settlement with an earlier date might be compromised, *or* because continuation of the litigation without settlement would yield a greater prospect of competition.'" *Id.* at 12 (quoting Brief for Petitioner at 19 & n.12).

[34] *See* United States Amicus Brief at 21–27, Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98 (2d Cir. 2010) (No. 05-2851) (filed July 7, 2009); United States Amicus Brief at 22–28, *In re* K-Dur Antitrust Litig., 686 F.3d 197 (3d Cir. 2012) (No. 10-2077) (filed May 18, 2011). The two agencies were not in complete accord, however, as reflected in the fact that the FTC filed a separate amicus brief in *K-Dur*.

[35] *In re* K-Dur Antitrust Litig., 686 F.3d 197 (3d Cir. 2012), *vacated and remanded*, 133 S. Ct. 2849 (2013). The Deputy Solicitor General participated in the Third Circuit oral argument for the Department as amicus curiae.

[36] N.C. State Bd. of Dental Examiners v. FTC, 717 F.3d 359 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 1491 (Mar. 3, 2014).

[37] *See* N.C. Bd. of Dental Examiners, FTC Docket No. 9343 (Dec. 7, 2011) (merits opinion), 2011 WL 6229615, at *42.

[38] *In re* W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716 (9th Cir. 2013), *cert. filed*, Oneok, Inc. v. Learjet, Inc., No. 13-271 (Aug. 26, 2013).

[39] *See* FED. ENERGY REG. COMM'N, FINAL REPORT ON PRICE MANIPULATION IN WESTERN MARKETS: FACT-FINDING INVESTIGATION OF POTENTIAL MANIPULATION OF ELECTRIC AND GAS PRICES, ch. III, Docket No. PA02-2-000 (Mar. 2003).

[40] Leggett v. Duke Energy Corp., 308 S.W. 3d 843, 869 (Tenn. 2010); Nevada *ex rel.* Johnson v. Reliant Energy, Inc., 289 P.3d 1186, 1193 (Nev. 2012).

[41] Brief for the United States as Amicus Curiae, Oneok, Inc. v. Learjet, Inc., No. 13-271 (filed May 27, 2014) [hereinafter U.S. Brief]. Notably, FERC was on the brief but the antitrust agencies were not.

[42] *See* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 308 & n.11 (1988).

[43] *See* Brunell, *supra* note 3, at 286–97.

[44] *See* Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007). And in the natural gas field the Justice Department has continued to challenge anticompetitive conduct even when FERC has investigated and found no market manipulation. *See, e.g.*, United States v. KeySpan Corp., 763 F. Supp. 2d 633 (S.D.N.Y. 2011).

[45] *See* Illinois *ex rel.* Burris v. Panhandle Eastern Pipe Line Co., 935 F.2d 1469, 1479 (7th Cir. 1991). The Court's "plain repugnancy" standard for assessing implied immunity under federal antitrust laws is not very different from the presumption against preemption of state antitrust laws, which requires that the intent of Congress to displace state law must be "clear and manifest." Cal. v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (citation omitted). The Solicitor General, presumably at the urging of the antitrust agencies, argues that preemption of state antitrust law does not mean that federal antitrust law would be displaced. U.S. Brief, *supra* note 41, at 17. His argument for less favorable treatment of state price-fixing claims is unconvincing. On the one hand, he cites *Connnell Construction Co. v. Plumbers Local Union No. 100*, 421 U.S. 616, 635–37 (1975), which held state, but not federal, antitrust law barred "because it creates a substantial risk of conflict with policies central to federal labor law," *id.* at 636, whereas federal antitrust law has been carefully tailored to accommodate federal labor policy. On the other hand, he rejects *Burris*, which distinguished *Connell* when state antitrust law "only mirrors" federal antitrust law, because *Burris* apparently did not involve a field preemption argument. *See* U.S. Brief, *supra* note 41, at 18 n.3. But this begs the question of whether, under the Natural Gas Act, field—rather than conflict—preemption analysis should apply to state price-fixing claims. *Cf. Schneidewind*, 485 U.S at 310 (field preemption supported "by the imminent possibilility of collision between [state law] and the NGA").

[46] *See* 1A AREEDA & HOVENKAMP, *supra* note 16, ¶ 247b, at 448 (4th ed. 2013) ("As weak as *Keogh*'s rationales for the filed rate doctrine were when they were first formulated, they are virtually nonexistent when the rate in question is not subject to filing at all and the firm has unrestrained power to set its own rates.").

[47] *See, e.g.*, Brief of Amicus Curiae Federal Trade Commission Supporting Neither Party, Apple Inc. v. Motorola, Inc., No. 2012-1548 (Fed. Cir. filed Dec. 4, 2012); U.S. Dep't of Justice & U.S. P.T.O. Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013). The author was the principal draftsman of the FTC's amicus brief in *Apple v. Motorola*.

[48] *See, e.g.*, Motorola Mobility LLC, FTC File No. 121-0120 (Jan. 3, 2013), 2013 WL 124100.

[49] Apple, Inc v. Motorola, Inc., No. 2012-1548, 2014 WL 1646435 (Fed. Cir. Apr. 25, 2014), *aff'g in part, rev'g in part*, 869 F. Supp. 2d 901 (N.D. Ill. 2012).

[50] *Id.* at *35.

[51] *Id.* at *36–37.

[52] *Id.* at *45–46.

[53] Further developments will have to come from another case, as Apple and Motorola have settled. *See* Joint Motion to Dismiss the Appeal, Apple Inc. v. Motorola, Inc., No. 2012-1548 (Fed. Cir. filed May 16, 2014).

[54] Judge Prost has relied on Justice Kennedy's concurring opinion in *eBay* in support of denying injunctive relief. *See* Apple Inc. v. Samsung Elecs. Co., 735 F.3d 1352, 1373 (Fed. Cir. 2013) ("'When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations . . . an injunction may not serve the public interest.'" (citing *eBay*, 547 U.S.

at 396–97 (Kennedy, J., concurring))). In contrast, Judge Rader has relied on Chief Justice Roberts's concurring opinion in support of granting injunctions. *See* Broadcom Corp. v. Emulex Corp., 732 F.3d 1325, 1338 (Fed. Cir. 2013) ("[T]he analysis by the district court proceeds under the 'long tradition of equity practice' granting 'injunctive relief upon a finding of infringement in the vast majority of patent cases.'" (citing *eBay*, 547 U.S. at 395 (Roberts, C.J., concurring))); Presidio Components, Inc. v. Am. Tech. Ceramics Corp., 702 F.3d 1351, 1362 (Fed. Cir. 2012) (same).

55 For purposes of freeing a SEP holder to seek an injunction without liability under Section 5, the FTC effectively treats an implementer as an "unwilling licensee" if it is not willing to negotiate FRAND terms or abide by their determination by a neutral third party. *See* Motorola Mobility LLC, FTC File No. 121-0120 (Jan. 3, 2013), 2013 WL 124100, at *3, *47. However, the question of whether a court should issue an injunction under *eBay* is somewhat different. There is much to be said for the view of Judges Posner and Prost that a refusal to negotiate never justifies an injunction because it does not alter the fundamental point that money damages are an adequate remedy. And as to the problem of "hold out," Judge Prost points out that implementers who refuse to negotiate face the risk that a court will find willful infringement or otherwise award higher-than FRAND rates. Apple Inc. v. Motorola, Inc., 2014 WL 1646435, at *45 (Fed. Cir. Apr. 25, 2014). Indeed, because a negotiated or arbitrated reasonable royalty will be discounted by the likelihood that SEPs are not valid, infringed, or essential, see Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 Berkeley Tech. L.J. 1135, 1151 (2013), an implementer that "holds out" and loses in court will always face higher FRAND rates. *See In re* Innovatio IP Ventures, LLC Patent Litig., MDL No. 2303, 2013 WL 5593609, at *7 (N.D. Ill. Oct. 3, 2013).

56 Novell, Inc. v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013), *cert. denied*, 2014 WL 833896 (Apr. 28, 2014). Chief Justice Roberts did not participate in the matter.

57 Novell, the then-owner of WordPerfect, claimed that Microsoft, just prior to the launch of Windows 95, withdrew certain APIs Novell needed to compete effectively against Microsoft's office productivity suite. Novell argued that Microsoft did so for the purpose of retarding Novell's (and other rivals') growth relative to Microsoft Office and thereby preserving Microsoft's operating system monopoly. The Tenth Circuit, while questioning whether Novell had in fact proved any short-term sacrifice of profits in the operating systems market, held that even if it did, Novell's claim failed because Microsoft's "exclusion" of Novell increased its immediate profits in the applications market. Novell had also asserted a claim against Microsoft for monopolizing the applications market but such a claim was time-barred.

58 Brief for the United States and Federal Trade Commission as Amici Curiae Supporting Petitioner at 22, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682) ("[C]onduct that would not make sense but for its tendency to reduce or eliminate competition" is required for actionable refusal to deal). *But see* U.S. Dep't of Justice, Competition and Monopoly: Single Firm Conduct Under Section 2 of the Sherman Act 127 (2008) ("The Department . . . concludes that antitrust liability for unilateral, unconditional refusals to deal with competitors should not play a meaningful part of section 2 enforcement.").

59 *See* Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 359 (2006) ("[T]here is a conceptual profit sacrifice even if there is no temporal profit sacrifice."); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 Antitrust L.J. 413, 424 (2006) ("[A]nticompetitive gains from exclusionary conduct sometimes can be reaped immediately.").

60 As Professor Gavil comments, *Trinko*'s "observation that Aspen's sacrifice of profits evidenced its anticompetitive intentions . . . is a far cry from a wholesale endorsement of 'sacrifice' as a *necessary* condition for" liability. Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 58 (2004); *see also* Salop, *supra* note 59, at 355 (noting there are ways to show anticompetitive purpose other than profit sacrifice).

61 *See* Salop, *supra* note 59, at 356; 3 Areeda & Hovenkamp, *supra* note 16, ¶ 651b3, at 104 (3d ed. 2008) (noting that profit-sacrifice test allows "an act [that would] benefit the defendant very slightly while doing considerable harm to the rest of the economy").

62 *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (en banc); *see also* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 597 (1985) (approving instruction that required jury to determine whether policies "were designed *primarily* to further any domination of the relevant market") (emphasis added).

63 Christine A. Varney, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks as Prepared for the Center for American Progress 8–9 (May 11, 2009). In a recent brief, the FTC supported an aggressive refusal to deal theory based on a brand drug manufacturer's refusal to supply product samples to a would be generic competitor, arguing that "the 'essential feature' of viable refusal to deal cases is 'a monopoly supplier's discriminating against a customer because the customer has decided to compete with it.'" Federal Trade Commission's Brief as *Amicus Curiae* at 13, Actelion Pharms. Ltd. v. Apotex Inc., No. 1:12-cv-05743 (D.N.J. filed Mar. 11, 2013) (quoting Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 377 (7th Cir. 1986)).