

American Antitrust Institute
10th Anniversary



**10 YEARS OF EDUCATION, RESEARCH
AND ADVOCACY**

contents

Section 1

About AAI

Overview	4
Officers, Fellows and Advisory Board	4-6

Section 2

10 Years in Antitrust

Timeline.....	8-9
Years in Review	10-21
Publications	22-27
Amicus Briefs.....	28-30

Section 3

Sherman Society

About the Society.....	32
------------------------	----

LETTER FROM THE PRESIDENT

I incorporated the AAI as a non-profit education, research, and advocacy organization in 1998, after conversations and consultation with a number of experts and advocates who emphasize consumer-oriented antitrust enforcement. The plan, based on my prior experience as a Federal Trade Commission official and business executive, was to build an organization around a multidisciplinary expert corps within the antitrust community. The group would occupy the center and the center-left of the antitrust spectrum, neither libertarian nor populist, but believing strongly in an affirmative role for antitrust necessary to maintain competition and to protect consumers. We would be a counterweight to the conservative think tanks and monopolists that routinely oppose antitrust.

Now, 10 years later, the American Antitrust Institute has become the focal point for those who believe that a vigorous role for antitrust is essential for the public interest.

This year we celebrate the AAI's achievements and look forward to fulfilling our role as "a bastion of the antitrust community," as the press recently described us. The AAI's involvement in competition issues has always been made possible by contributions from supporters and revenue generated at our annual conference. This support has enabled the AAI to:

- Answer the call of consumers, industry, and government to testify and participate in major antitrust and regulatory policy events
- Support regular publication in the trade press, economic journals, and law reviews
- Advise the media on antitrust developments
- Examine newly-emerging competitive issues
- Develop interventions and white papers on major mergers and other investigations, and
- Educate the public on the value of antitrust.

Thank you for supporting the AAI during these past 10 years. We look forward to your continuing support in the future.

Sincerely,

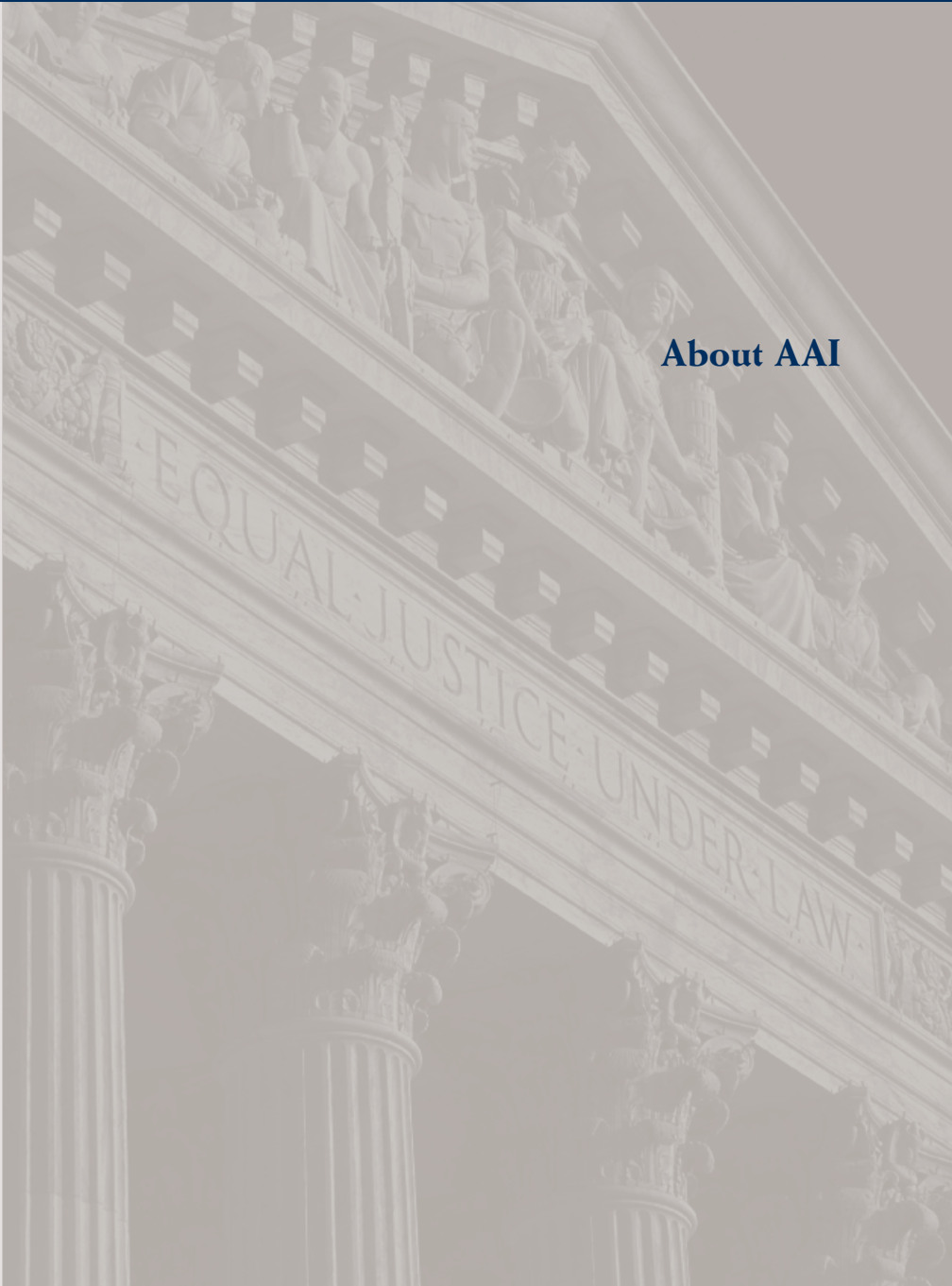
A handwritten signature in dark blue ink, reading "Albert A. Foer". The signature is fluid and cursive, with the first name "Albert" being more prominent and the last name "Foer" written in a simpler, more direct style.

Albert A. Foer
President, American Antitrust Institute

section **ONE**

AAI 10TH ANNIVERSARY

About AAI



ABOUT THE AMERICAN ANTITRUST INSTITUTE

The AAI is an entrepreneurial proponent of the position that competition serves the most vital interests of the American public by (1) assuring competitive prices, (2) fostering innovation and efficiency so that consumers get the choices that a free market should provide to them, and (3) protecting opportunities for small and medium-size businesses to compete on the merits in ways that do not undermine efficiently operating markets. To achieve its mission, AAI:

- Educates the public about the benefits of competition and the ways in which fair and effective competition can be enhanced in the interest of consumers.
- Generates and facilitates research and multidisciplinary approaches to a national and international competition agenda.
- Advocates competition-oriented policies in Congress, in the Administration, in the states, and internationally, as an essential element of civil society.

Founded in 1998, the AAI's work includes research and commentary, public testimony, briefings and conferences, and filmmaking — examples of which can be found on our website at www.antitrustinstitute.org.

President

Albert A. Foer, *Attorney*

Vice President

Diana L. Moss, *Economist*

Secretary

Robert H. Lande, *Law Professor*

Directors

Jonathan Cuneo, *Attorney*

Albert A. Foer, *Attorney*

Robert H. Lande, *Law Professor*

Diana L. Moss, *Economist*

Robert Skitol, *Attorney*

Senior Fellows

Richard Brunell, *AAI Director of Legal Advocacy*

Stephen Calkins, *Professor of Law, Wayne State*

Kenneth Davidson, *Attorney*

Warren Grimes, *Professor of Law, Southwestern*

Gregory Gundlach, *Professor of Business,*

University of North Florida

Norman Hawker, *Professor of Business,*

Western Michigan University

John Kwoka, Jr., *Professor of Economics,*

Northeastern

James Langenfeld, *Economist, LECG, LLC*

Diana L. Moss, *Economist*

Philip Nelson, *Economist, Economists Incorporated*

Roger Noll, *Professor of Economics, Stanford*

Rudolph Peritz, *Professor, New York Law School*

Stephen Ross, *Professor of Law, Penn State*

F.M. Scherer, *Economist, Harvard*

Robert L. Steiner, *Economist*

The Advisory Board

Kenneth Adams, Partner, *Dickstein Shapiro LLP*

Art Amolsch, Editor, *FTC:WATCH*

Jonathan B. Baker, Professor, *Washington College of Law, American University*

David Balto, Attorney

Joseph P. Bauer, Professor of Law, *Notre Dame Law School*

Maxwell M. Blecher, Partner, *Blecher & Collins*

James Brock, Professor of Economics, *Department of Economics, Miami University*

Joseph F. Brodley, Professor and Honorable Frank R. Kenison Scholar of Law, *Boston University Law School*

W. Joseph Bruckner, Partner, *Lockridge Grindal Nauen PLLP*

Richard Brunell, AAI Director of Legal Advocacy and Adjunct Professor of Law, *Boston College Law School*

Phillipe Brusick, Development Economist and International Antitrust Expert

Darren Bush, Associate Professor of Law, *University of Houston Law Center*

Stephen Calkins, Associate Vice President for Academic Personnel and Professor of Law, *Wayne State University Law School*

Michael Carrier, Professor of Law, *Rutgers School of Law-Camden*

Peter C. Carstensen, Young-Bascom Professor of Law, *University of Wisconsin Law School*

Andrew Chin, Professor of Law, *University of North Carolina Law School*

William S. Comanor, Professor of Economics, *University of California, Santa Barbara & Los Angeles*

Patricia A. Connors, Associate Deputy Attorney General, *Florida Attorney General's Office*

John M. Connor, Professor of Economics, *Purdue University*

Ellen S. Cooper, Assistant Attorney General, Chief, Antitrust Division, *Office of the Attorney General of Maryland*

Craig Corbitt, Partner, *Zelle, Hofmann, Voelbel, Mason & Gette LLP*

Eric L. Cramer, Shareholder, *Berger & Montague, P.C.*

Eugene Crew, Partner, *Townsend and Townsend and Crew*

Jonathan Cuneo, Partner, *Cuneo Gilbert & LaDuca*

Joshua P. Davis, Professor and Director, *Center for Law and Ethics, University of San Francisco School of Law*

Paul Dobson, Professor of Competition Economics, *Loughborough University Business School, UK*

Robert W. Doyle, Jr., Partner, *Doyle, Barlow & Mazard PLLC*

Beth Farmer, Professor of Law, *Penn State Dickinson School of Law*

Harry First, Professor of Law, *New York University School of Law*

Kathleen E. Foote, Senior Assistant Attorney General, Antitrust Section, *California Department of Justice*

Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation, *New York University School of Law*

Michael J. Freed, Principal, *Freed Kanner London & Millen LLC*

Gary L. French, Senior Vice President, *Nathan Associates Inc.*

Michal Gal, Professor of Law, *University of Haifa Law School*

Andrew I. Gavil, Professor of Law, *Howard University School of Law, Of Counsel, Sonnenschein Nath & Rosenthal LLP*

Richard J. Gilbert, Professor of Economics, *University of California at Berkeley*

Joseph Goldberg, Partner, *Freedman Boyd Hollander Goldberg & Ives*

Thomas Greaney, Professor of Law and Director, *Center for Health Law Studies at Saint Louis University School of Law*

Hillary Greene, Associate Professor of Law & Director, *Intellectual Property and Entrepreneurship Law Clinic, University of Connecticut School of Law*

Warren Grimes, Professor of Law, *Southwestern Law School*

Mauro Grinberg, Attorney, *Barcellos Tucunduva*

Allen Grunes, Shareholder, *Brownstein Hyatt Farber Schreck, LLP*

Gregory T. Gundlach, Professor, *University of North Florida*

Daniel E. Gustafson, Partner, *Gustafson Gluck PLLC*

Norman Hawker, Professor, *Western Michigan University Haworth College of Business*

George A. Hay, Edward Cornell Professor of Law and Professor of Economics, *Cornell University Law School*

Alfred Kahn, Professor of Economics, *Cornell University*

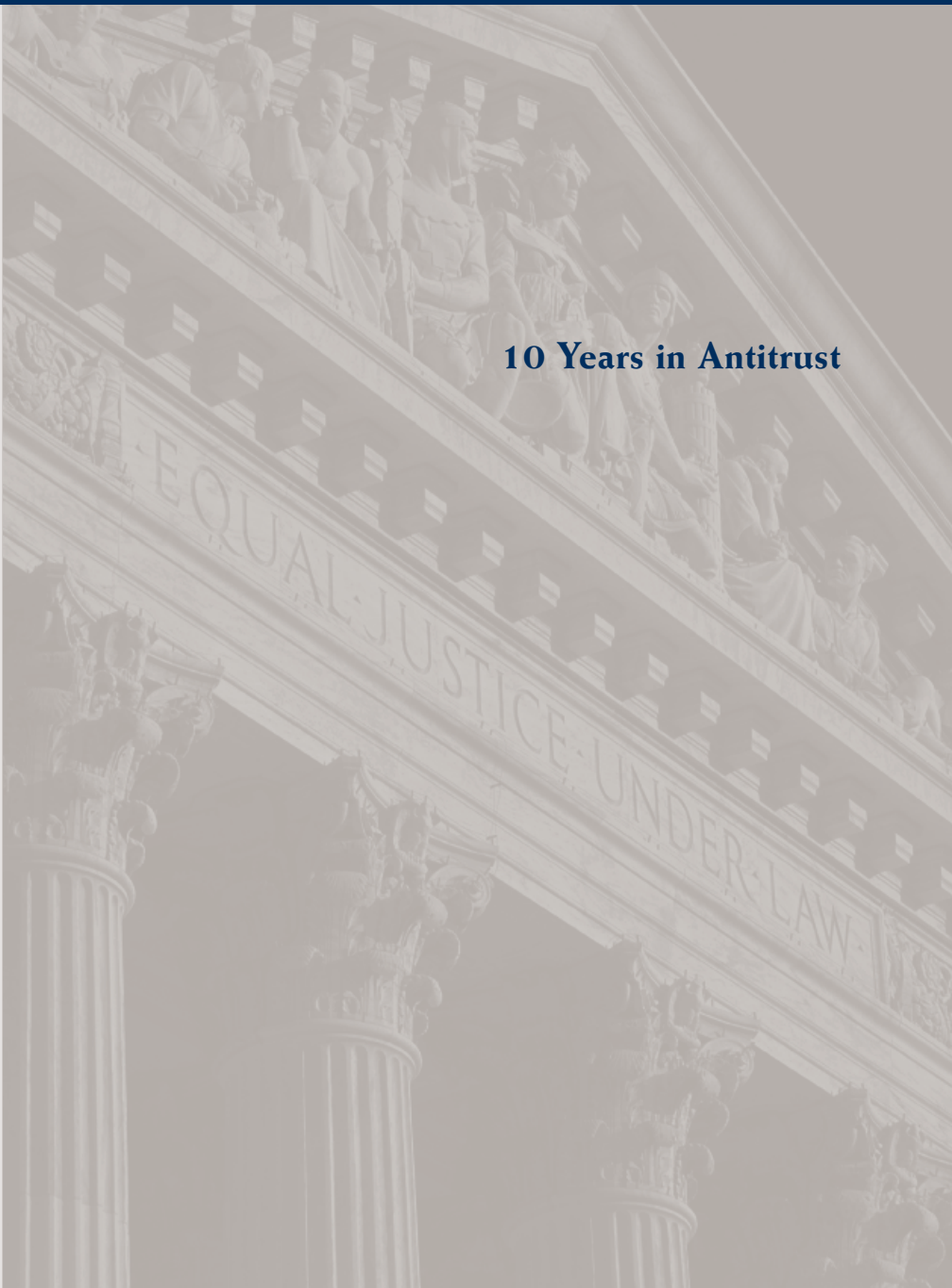
Veronica Kayne, Partner, *Haynes Boone*

Susan Kelly, *Vice President of Policy Analysis and General Counsel, American Public Power Association*
 John B. Kirkwood, *Associate Professor of Law, Seattle University School of Law*
 Joseph Kohn, *Partner, Kohn, Kohn, Swift & Graf*
 John Kwoka, Jr., *Finnegan Professor of Economics, Northeastern University*
 Robert H. Lande, *Venable Professor of Law, University of Baltimore School of Law*
 James Langenfeld, *Director, LECG, LLC; Adjunct Professor, Loyola University Chicago Law School*
 Robert Litan, *Vice President for Research and Policy, The Kauffman Foundation*
 Milton Marquis, *Partner, Dickstein Shapiro LLP*
 Philip Marsden, *Director, Competition Law Forum; Senior Research Fellow, British Institute of International and Comparative Law*
 Stephen Martin, *Professor, Purdue University*
 Monroe Milstein, *Burlington Coat Factory Warehouse Corp. (ret.)*
 Daniel Mogin, *Managing Attorney, The Mogin Law Firm, P.C.*
 David Mohr, *Executive Director, Energy & Power Division, National Rural Electric Cooperative Association*
 Diana L. Moss, *Vice President, American Antitrust Institute*
 Philip Nelson, *Economist, Economists Incorporated*
 Roger Noll, *Professor Emeritus of Economics, Stanford University*
 Kevin O'Connor, *Attorney, Godfrey & Kahn*
 Rudolph J.R. Peritz, *Professor and Director, IProgress Project, New York Law School*
 Bernard Persky, *Partner, Labaton Sucharow LLP*
 Bernard Rapoport, *Chairman Emeritus, American Income Life Insurance Company*
 J. Douglas Richards, *Partner, The Pomerantz Firm*
 Douglas E. Rosenthal, *Partner, Washington Office of Constantine Cannon*
 Stephen Ross, *Professor of Law, Penn State Dickinson School of Law*
 Jonathan Rubin, *Partner, Patton Boggs*
 Jonathan Sallet, *Partner, Glover Park Group*
 Steven Salop, *Professor of Economics and Law, Georgetown University Law Center*
 F.M. Scherer, *Professor of Economics, Harvard University, Kennedy School of Government*
 Marc Seltzer, *Partner, Susman Godfrey*
 John Shenefield, *Partner, Morgan, Lewis & Bockius LLP*
 Robert Skirnicks, *Partner, Meredith, Cohen, Greenfogel & Skirnicks*
 Robert Skitol, *Partner, Drinker Biddle & Reath*
 Daniel A. Small, *Partner, Cohen, Milstein, Hausfeld & Toll PLLC*
 Robert L. Steiner, *Economist*
 Irwin M. Stelzer, *Director of Economic Policy Studies, Hudson Institute*
 Mary Lou Steptoe, *Of Counsel, Skadden, Arps, Slate, Meagher & Flom LLP*
 Maurice E. Stucke, *Associate Professor, University of Tennessee College of Law*
 Bonny Sweeney, *Partner, Coughlin Stoia Geller Rudman & Robbins LLP*
 Spencer Weber Waller, *Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law*
 Phil Weiser, *Professor of Law, University of Colorado School of Law*
 Lawrence J. White, *Professor of Economics, New York University Stern School of Business*
 K. Craig Wildfang, *Partner, Robins Kaplan Miller & Ciresi LLP*
 Charles Wright, *Partner, Siskinds, LLP*
 Richard O. Zerbe, *The Daniel J. Evans Distinguished Professor of Public Affairs and Adjunct Professor of Law, University of Washington*

section **TWO**

AAI 10TH ANNIVERSARY

10 Years in Antitrust



timeline

April 15 –

Articles of incorporation of the American Antitrust Institute filed

December 14 –

Supreme Court ruling: NYNEX Corp. v. Discon, Inc.

June 15 – AAI's first annual national conference.

September 7 –

AAI's first annual roundtable on electricity restructuring.

January 24 –

AAI sues DOJ and Microsoft for multiple failures to comply fully with antitrust settlement disclosure requirements



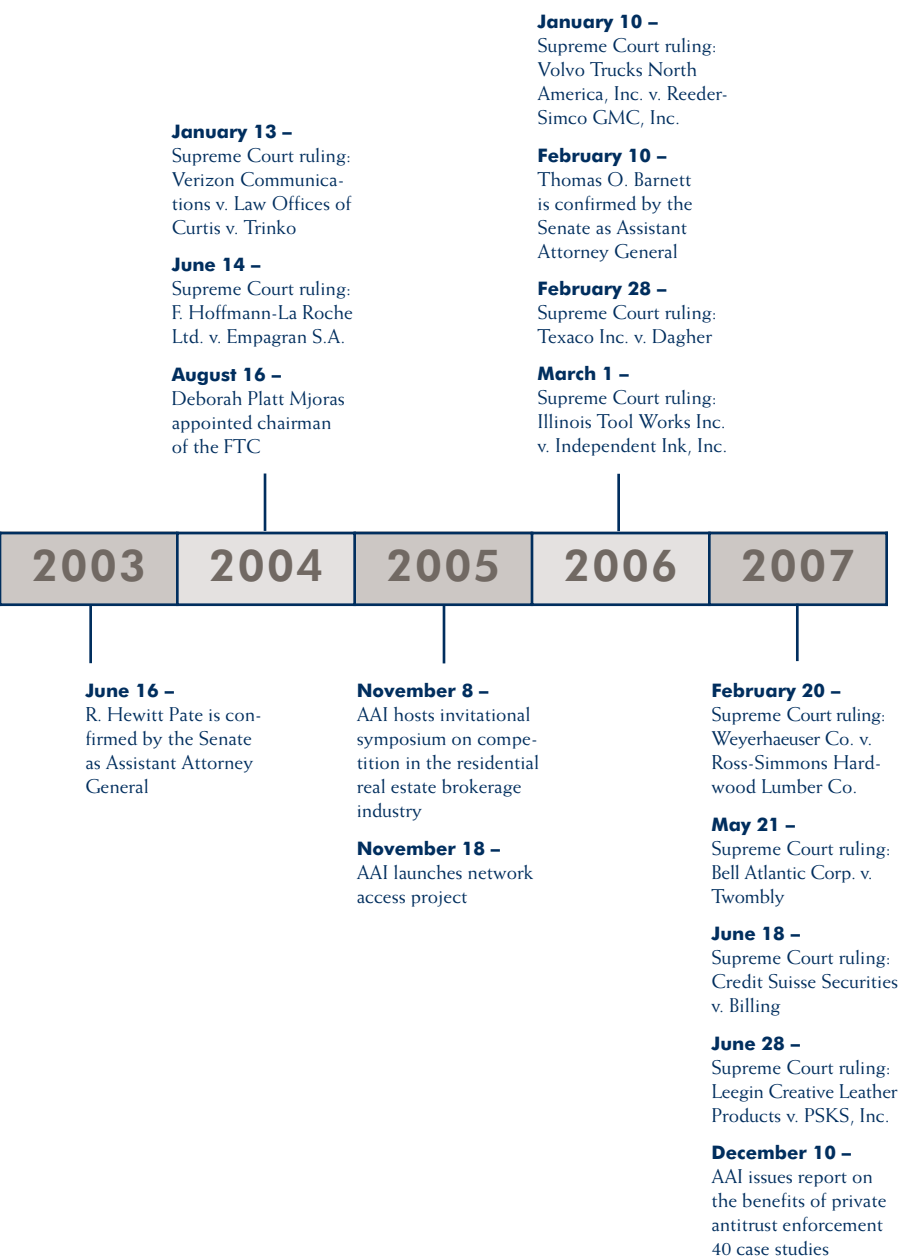
May 24 – Supreme Court ruling: California Dental Association v. F.T.C.

June 4 – Timothy J. Muris appointed chairman of the Federal Trade Commission

June 21 – Charles James appointed Assistant Attorney General

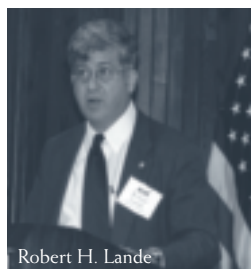
October – Department of Justice forms international competition network

November 2 – U.S. v. Microsoft settled



1998

The American Antitrust Institute was founded on April 15, 1998 as an independent Washington-based non-profit education, research, and advocacy organization. After conversations with consumer advocate Ralph Nader and antitrust law professor Robert H. Lande, antitrust attorney Albert A. Foer incorporated the Institute. The founding Board of Directors included Foer, Lande and Jonathan Cuneo, an antitrust lawyer whose clients include the Committee to Support the Antitrust Laws (COSAL). The three directors developed the mission: to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economy. Based on a centrist legal-economic ideology, they began recruiting an advisory board that could help promote the vigorous use of antitrust as a vital component of national and international competition policy.



Robert H. Lande

AAI's first substantive product was a comment to the Department of Transportation (DOT) endorsing the DOT's efforts to deal through rulemaking with predation at airline hubs. The AAI believed intervention here would be an opportunity to make a statement in favor of the idea that price predation should remain a viable theory of antitrust violation. Also in its first year, the AAI encouraged the reinvention of Federal Energy Regulatory Commission for deregulated electricity, urged the Department of Energy not to cease publishing investor-owned public utility statistics, and asked the DOT to investigate airline caps on travel agent commissions.



Jonathan Cuneo

1999

In 1999, the AAI continued its growth and launched a website intended to provide useful information about antitrust to journalists, academics, lawyers, economists, businesses, the government, and others concerned about anticompetitive practices. Found at www.antitrustinstitute.org, the website was soon considered "probably the best one-stop antitrust site out there" by *Legal Times*.

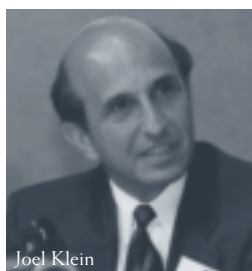
Throughout the year, the AAI urged an aggressive stance by Federal Trade Commission (FTC) on the Exxon/Mobil merger. AAI's Jonathan Cuneo testified in the Senate on the merger. The AAI was also involved in issues regarding Microsoft, Ticketmaster, the proposed acquisition of ARCO by BP Amoco, electricity regulation and market power, and supermarket mergers. The AAI also led a coalition of 32 organizations that banded together to urge Senate and House appropriations conferees to increase antitrust budgets.

The AAI Advisory Board first began to grow in 1999. AAI strove for a balance of professional and political backgrounds, excluding only current federal employees and those whose ideology did not seem generally compatible. Eventually, the Advisory Board grew to more than 90 and included business people and business school professors as well as eminent antitrust experts trained in law and economics.

2000

In 2000, the AAI issued a critique of the FTC's analysis of the proposed tobacco settlement. It also was active in opposing the BP/ARCO merger, attacking Alcoa's proposed acquisition of Reynolds, keeping antitrust reviews active in the Nuclear Regulatory Commission, questioning the AOL/Time Warner merger, commenting on Microsoft, promoting the Minge Antitrust Enforcement Improvement Act of 2000, and outlining the competitive issues in food retailing and food supplying sectors. On the Hill, the AAI gave testimony against the

proposed United/USAirways merger before the Senate Commerce Committee and urged the House Judiciary Committee to overturn *Illinois Brick*.



The AAI's first annual national conference was held on June 15, 2000. The theme of the first conference was "An Agenda for Antitrust in the 21st Century." Participants included FTC Chairman Robert Pitofsky whose keynote address called attention to intellectual property law's increasing sway in the antitrust arena. At the luncheon, U.S. Attorney General Janet

Reno delivered her first and only major antitrust speech, a review of the achievements of Joel Klein's term as Assistant Attorney General for Antitrust. Mr. Klein then became the first recipient of the Antitrust Achievement Award. The various papers that were delivered at the conference were published in a special edition of 62 *Univ. of Pittsburgh Law Review*. This conference set the tone for all annual future conferences which were all held at the National Press Club in Washington, DC and followed by symposium law review issues.



Also in 2000, the AAI began adding Senior Fellows to its team. They quickly became important to the Institute's success. The Senior Fellows are eminent antitrust scholars or practitioners who constitute an inner circle of the Advisory Board and make a significant pro bono commitment of time to the AAI.

2001

In 2001, the AAI staff expanded with the addition of Dr. Diana L. Moss as Vice President. She publishes and speaks widely on energy regulation and antitrust issues and is also adjunct professor at the University of Colorado, Department of Economics. Dr. Moss's addition helped the AAI focus on promoting competition in the U.S. electricity industry through reviews of policy issues and by issuing recommendations.



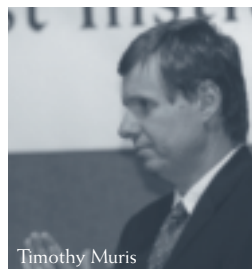
This year, the AAI also focused on the EchoStar/DirecTV merger, the states' Microsoft proposal, the Supreme Court tobacco settlement, Major League Baseball's downsizing, the acquisition of Newport News Shipbuilding Inc. by General Dynamics Corp, government bailout of the airlines, the Hewlett Packard-Compaq merger, collegiate student aid, the Johnson & Johnson contact lens settlement, and per se rules in drug patent cases. The AAI joined other consumer groups in urging the DOJ to modify the Orbitz launch vehicle and also formed a coalition to oppose the Nestle-Ralston merger. At the World Bank Seminar in April, the AAI submitted its proposal for an International Academy for Competition Policy.

The 2001 annual conference followed an election and was appropriately titled, "New Economy, New Regime." The newly appointed Chairman of the FTC Timothy Muris presented the Antitrust Achievement Award to his predecessor Robert Pitofsky. This was



Bert Foer & Robert Pitofsky

Mr. Muris' first speech as the new Chairman of the FTC, which he used as an opportunity to set forth a theme of continuity with his predecessor. The keynote address "Some Principles for Post-Chicago Antitrust Analysis" was presented by F.M. Scherer. The papers for this conference were published in *52 Case Western Reserve Law Review*.

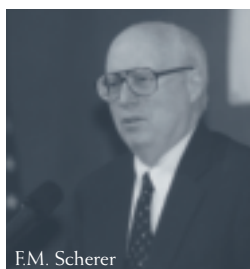


Timothy Muris

2002

During 2002, the AAI concentrated its efforts on the ADM-Minnesota Corn merger, Wal-Mart's growing dominance, the Dee-K Enterprises case, the Carnival/Princess and Royal Caribbean/Princess cruise line mergers, the Voters News Service monopoly, the proposed air alliance of United/US Airways and Delta/Northwest/Continental, the Terazosin generic drug case, the Visa/MasterCard case, and the Microsoft Tunney Act litigation. In the spring, the AAI held the Research Workshop and Conference on Marketing, Competitive Conduct, and Antitrust Policy at Notre Dame's Mendoza School of Business. The AAI also co-sponsored a Forum on Supplier-Owned Joint Ventures with the National Consumers League.

The 2002 annual conference, "Stretching the Envelope," explored (1) what is taught in business schools about the nature of competition, and how it can be used to enhance antitrust analysis and (2) the relationship between trade and antitrust. The keynote speaker was Commissioner Thomas B. Leary of the FTC. The luncheon speaker was Philip Lowe, Director



F.M. Scherer

General of the Commission's Directorate General for Competition of the European Union, who was introduced by FTC Chairman Muris. This was Mr. Lowe's first public appearance after being named head of the Directorate General. John Kwoka presented the Antitrust Achievement Award to F.M. Scherer. The Jerry S. Cohen Award for Antitrust Writing was presented to Joseph Brodley, Patrick Bolton, and Michael Riordan for their article "Predatory Pricing: Strategic Theory and Legal Policy," in 88 *Georgetown Law Journal*. The papers were published in 47 *New York Law School Law Review*.

2003

In 2003, the AAI conference, "Antitrust and Access," raised transparency issues to a new height. "The godfather of deregulation," Alfred E. Kahn, accepted the Antitrust Achievement Award from Bert Foer. The Jerry S. Cohen Award



Alfred E. Kahn & Bert Foer

for Antitrust Writing was presented to John Connor for his book *Global Price Fixing: Our Customers Are the Enemy*. Papers of the conference were published in 51 *Buffalo Law Review*.

In 2003, the AAI was active in opposing a Spanish-language tv-radio merger, the First Data/Concord merger, a big trucking merger, Smithfield's acquisition of Farmland Foods, the European Microsoft case, the DOJ's Orbitz investigation, the Supreme Court's *Trinko* case, the *Cardizem* case, and antitrust relief to indirect purchasers. In addition, the State of Utah awarded a research grant to the AAI to study the medical waste industry.

2004

As AAI entered its seventh year, it focused attention on the emergence of market power in the hands of a small number of very large buyers, suggesting the antitrust community needed to re-think its reluctance to question what happens in vertical relationships. The 2004 annual conference was titled "Buyer Power and Antitrust." The keynote speaker was



S. Robson Walton, chairman of Wal-Mart. The Chief Economist of the European Union spoke about the treatment of buyer power in Europe. The various papers were published in a symposium issue of 72 *Antitrust Law Journal*. New York Attorney General Eliot Spitzer and FTC Commissioner Pamela Jones Harbour presented AAI's Antitrust Achievement Award to Lloyd Constantine, managing partner of Constantine and Partners in New York City, for his leadership role in developing the states as an effective antitrust enforcement mechanism.

In 2004, AAI also filed briefs and commentary on price-fixing overcharges, an industrial organization perspective on the influenza vaccine shortage, FERC and electricity mergers, antitrust exemptions for satellite carriers, the FTC Rambus appeal, and the Microsoft case. In addition, the AAI filed its first comments with the Antitrust Modernization Commission.

2005

With the Antitrust Modernization Commission reviewing critical remedial issues, the American Bar Association and the DOJ's Antitrust Division publishing new reports, the adoption of class action legislation (CAFA), and renewed concern over remedies addressed at Microsoft's monopoly trials, the AAI's 6th annual conference on "Thinking Creatively About Antitrust Remedies" couldn't have come at a better time. The keynote was delivered by Judge Thomas P. Jackson (ret.). The conference papers were published in the *Tulane Law Review*. Former FTC General Counsels Stephen Calkins and William Kovacic addressed the luncheon audience as the AAI's Antitrust Achievement Award was presented to outgoing FTC Commissioner Thomas B. Leary. Leary, a Republican, spoke about the bipartisan legacy of antitrust. The Jerry S. Cohen Award for Antitrust Writing was presented to Andrew Gavil for his article, "Exclusionary Distribution Strategies By Dominant Firms: Striking A Better Balance," 72 *Antitrust Law Journal*.



FTC Commissioner Thomas B. Leary & Bert Foer

AAI's Network Access Project, which included three annual workshops at Northeastern University, was published as the book *Network Access, Regulation and Antitrust*, edited by Diana Moss. This year, the AAI also published 13 working papers, including important new analyses of the harm caused by cartels; submitted amicus briefs to the Supreme Court in *Independent Ink* and *Dagher*; provided extensive comments to the Antitrust Modernization Commission prepared by ten different working groups; and presented a briefing paper concluding the Whirlpool-Maytag merger should be blocked.

2006

In 2006, with funding from a cy pres grant, the AAI entered the filmmaking business, producing "Fair Fight in the Marketplace," a documentary film that would be shown on approximately 75 public television stations throughout 2007. The AAI also produced the accompanying educational curriculum for high school classes and the website www.fairfightfilm.org.



Another major project of the year was providing extensive comments to the Antitrust Modernization Commission, including a unique empirical report on private enforcement, new data on the inadequacy of cartel remedies, and critical analyses of several tentative AMC recommendations. The AAI also submitted 10 appellate amicus briefs, including five to the U.S. Supreme Court; prepared white papers on the ATT/Bell South, Exelon/PSEG, and Monsanto/Delta Land and Pine mergers, and participated in Tunney Act proceedings on the Verizon



Senator Herb Kohl, Bert Foer &
Senator Mike DeWine

and ATT mergers; testified in Brussels at the invitation of the European Commission on their Article 82 proceedings; published 10 working papers on a variety of antitrust topics, such as Wal-Mart, multidisciplinary practice, oil refining, indirect purchaser settlements, cartel sanction, and regional sports networks; and hosted a symposium on aftermarkets.

The annual conference, "The I.P. Grab - The Struggle Between Intellectual Property Rights & Antitrust," cast new light on important aspects of the increasingly controversial struggle between intellectual property rights and antitrust. Speakers included FTC Chair Deborah Majoras, Harry First, Michael Carrier, Phil Nelson, Howard Morse, Jonathan Rubin, and Bruce Abramson. Papers were published in 38 *Rutgers Law Journal*. Senators Mike DeWine (R-OH) and Herb Kohl (D-WI), the Chair and Ranking Member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, accepted the Antitrust Achievement Award from FTC Commissioner Jonathan Leibowitz. The Jerry S. Cohen Award for Antitrust Writing was presented to Barry Nalebuff for his article, "Exclusionary Bundling," in 50 *Antitrust Bulletin*.

2007

In 2007, the AAI expanded its staff by hiring Richard Brunell as the director of legal advocacy. A former editor of the *Harvard Law Review*, he has been a visiting law professor at Boston College, Boston University and the Roger Williams School of Law. Brunell began spearheading the AAI Amicus Brief Program. This year, the AAI Board of Directors grew with the addition of Diana Moss and Robert Skitol, and the Advisory board increased to more than 90 members.



Richard Brunell



The AAI re-launched its website with a new design and new features. Interested parties could now sign up for the “e-bulletin” which alerts users as new material is published.

“The Future of Monopoly and Monopolization” was the topic of the eighth annual conference. The Antitrust Achievement Award was presented to Maxwell M. Blecher, renowned antitrust expert who has litigated significant cases resulting in many precedent-setting antitrust decisions. He is a partner in Blecher & Collins in Los Angeles and a member of the AAI Advisory Board. A special award to career civil servants was inaugurated. The Jerry S. Cohen award for antitrust writing was awarded to Lawrence Sullivan and Warren Grimes for *The Law of Antitrust: An Integrated Handbook, second edition*. The conference was repeated later in the year at the University of Wisconsin whose law review will publish the papers.

In addition to the annual conference, AAI held symposia and workshops on electricity restructuring, enhancing coordination of state agencies and the plaintiffs' bar, buyer power, systems competition, and the future of private enforcement.

AAI also filed briefs and commentary on Northwest Airlines' investment in Midwest Airlines, cy pres remedies, the merger of Google and DoubleClick, removal of the antitrust exemption for major U.S. railroads, FERC's electricity merger review process, Intel's monopolistic conduct in microchips, a health insurance merger in Nevada, Whole Foods' acquisition of Wild Oats, the XM-Sirius merger, concentration in the U.S. petroleum industry, the DDAVP class action, indirect purchaser class actions, the Nine West RPM matter before the FTC, and the Leegin case in the Supreme Court.

PUBLICATIONS

An important part of the AAI's educational function has been our generation of working papers, white papers, commentaries, and published articles and other documents. Below is bibliography of our principal publications to date.

Books

Network Access, Regulation and Antitrust

Edited By Diana L. Moss, American Antitrust Institute
Routledge, New York, 2005

Monographs

Converging Professional Services: Lawyers Against the Multidisciplinary Tide Contemporary Issues in Antitrust and Competition Policy

American Antitrust Institute, 2005

Law Reviews and Reports Generated by the AAI

University of Pittsburgh Law Review

Volume 62, Issue 3, Spring 2004

Antitrust and the New Economy – Robert E. Litan

The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing – Joseph P. Bauer

Intellectual Property, Antitrust and the New Economy – Linda R. Cohen and Roger G. Noll

The Politics of Antitrust in the United States: Public Choice and Public Choices – Albert A. Foer

Consumer Choice as the Ultimate Goal of Antitrust – Robert H. Lande

Choice as the Focus of Antitrust: A Marketing Perspective – Gregory T. Gundlach

Antitrust as Consumer Choice: Comments on the New Paradigm – Spencer Weber Waller

Case Western Law Review

Volume 51, Number 4, Fall 2004

Antitrust: New Economy, New Regime

Second Annual Symposium of the American Antitrust Institute

Some Principles for Post-Chicago Antitrust Analysis – F.M. Scherer

Robert Pitofsky: Public Servant and Scholar – Timothy J. Muris

Is Competition Policy Possible in High Tech Markets? An Inquiry into Antitrust, Intellectual Property, and Broadband Regulation as Applied to "The New Economy" – Lawrence A. Sullivan

Intellectual Property and Antitrust: Steps to Striking a Balance – James Langenfeld

Antitrust as a Public-Private Partnership: A Case Study of the Nasdaq Litigation – Arthur M. Kaplan

Antitrust Options to Redress Anticompetitive restraints and Monopolistic Practices by Professional Sports Leagues – Stephen F. Ross

Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors – John E. Kwoka

Toward Guidelines for Merger Remedies – Albert A. Foer

Antitrust and the Systemic Bias Against Small Business: Kodak, Strategic Conduct and Leverage Theory – Warren S. Grimes

The Language of Law and the Language of Business – Spencer Weber Waller

New York Law School Law Review

Volume 47, Number 4, Spring 2003

Antitrust: Stretching the Envelope:

Third Annual Symposium of the American Antitrust Institute

The Dialogue Between Students of Business and Students of Antitrust – Thomas B. Leary

The Third Leg of The Antitrust Stool: What The Business Schools Have to Offer to Antitrust – Albert A. Foer

Contributions and Challenges of Marketing to Antitrust – Gregory T. Gundlach and Joan M. Phillips

Antitrust Insights from Strategic Management – Norman W. Hawker

Microeconomics and Antitrust in MBA Programs: What's Thought, What's Taught – Lawrence J. White

Toward a Dynamic Antitrust Analysis of Strategic Market Behavior – Rudolph J. R. Peritz

The Use of Business Theory in Antitrust Litigation – Spencer Weber Waller

Department Of Justice Experience in Reconciling Antitrust and Trade – Edward T. Hand

Antitrust and Antidumping: Forever Separate Tables? – Gary Hufbauer

Remarks upon Presentation of AAI Antitrust Achievement Award to F. M. Scherer – John Kwoka

Competition Policy and Trade Policy: The Need for Rapprochement – F. M. Scherer

The (Notionally) Bridgeable Chasm Between Antitrust and Trade Policy - Alan Wm. Wolff

Buffalo Law Review

Volume 54, Number 4, Fall 2003

Symposium on Antitrust Law

Transparency in Federal Antitrust Enforcement – Warren S. Grimes

Comments on Warren Grimes: Transparency in Federal Antitrust Enforcement – Robert Pitofsky

Transparency in Antitrust-Do What We Say and Not What We Do: Some Reflections on Professor Grimes's Quest - Peter C. Carstensen

Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes – John M. Nannes

Putting the Antitrust Modernization Commission into Perspective – Albert A. Foer

The Antitrust Bulletin

The Journal of American and Foreign Antitrust and Trade Regulation

Volume 49, Number 4, Winter 2004

Special Issue: The Implications of the Work of Robert L. Steiner

Gregory T. Gundlach and Albert A. Foer, Guest Editors

Combining Horizontal and Vertical Analysis in Antitrust: The American Antitrust Institute's Roundtable on the Implications of the Work of Robert L. Steiner – Gregory T. Gundlach and Albert A. Foer

Vertical Relations in Antitrust: Some Intellectual History – F.M. Scherer

Vertical Relationships in Distribution Channels: A Marketing Perspective – Barton Weitz and Qiong Wang

The Evolution and Applications of Dual-Stage Thinking – Robert L. Steiner

Why Economists Are Wrong to Neglect Retailing and How Steiner's Theory Provides an Explanation of Important Regularities – Michael P. Lynch

Using Steiner's Dual-Stage Model to Develop Better Measures of Retail Distribution – Paul W. Farris
Distribution Matters – Howard P. Marvel

An Enforcement Perspective on the Work of Robert L. Steiner: Why Retailing and Vertical Relationships Matter – Pamela Jones Harbour

Steiner's Two-Stage Vision: Implications for Antitrust Analysis – William S. Comanor

Implications of Robert L. Steiner's Work for Merger Analysis – Philip Nelson, Gloria Hurdle and Tessie Su

Antitrust Law Journal

Section of Antitrust Law, American Bar Association

Volume 72, Issue 2, 2005

Symposium: Buyer Power and Antitrust

Introduction to Symposium on Buyer Power and Antitrust – Albert Foer

Wal-Mart, Supplier-Partners, and the Buyer Power Issue – S. Robson (Rob) Walton

Exploiting Buyer Power: Lessons from the British Grocery Trade – Paul W. Dobson

Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller –
Warren S. Grimes

Buyer Power and Economic Policy – Roger G. Noll

Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding? – John B. Kirkwood

Anticompetitive Overbuying by Power Buyers – Steven C. Salop

Monopsony and the Ross-Simmons Case: A Comment on Salop and Kirkwood – Richard O. Zerbe Jr.

Concerted Buying Power: Its Potential for Addressing the Patent Holdup Problem in Standard Setting –
Robert A. Skitol

Tulane Law Review

Volume 80, Number 2, December 2005

American Antitrust Institute Symposium: Thinking Creatively About Remedies

How High Do Cartels Raise Prices? Implications for Optimal Cartel Fines – John M. Connor and
Robert H. Lande

Remedies and the Courage Of Convictions in a Globalized World: How Globalization
Corrupts Relief – Eleanor M Fox

Building on the Muris and Pitofsky Years: Evolving Remedies from "Time-Outs" to Civil Penalties
(Not the Third Rail of Antitrust) – Jon Leibowitz

The Bipartisan Legacy – Thomas B. Leary

What Makes an Antitrust Class Action Remedy Successful?: A Tale of Two Settlements –
J. Douglas Richards

University Of San Francisco Law Review

Volume 40, Number 3, Spring 2006

Symposium: The Uncertain Future of Antitrust: Responding to the Antitrust Modernization Commission
Some Scholarly Consensus: Modernization of the Antitrust Laws is Generally Best Left to the
Judiciary – Joshua P. Davis

Civil Monetary Remedies Available to Federal Antitrust – Stephen Calkins

Half-Time at the Antitrust Modernization Commission – Albert A. Foer

Federalism and Antitrust Reform – Herbert Hovenkamp

Five Myths About Antitrust Damages – Robert H. Lande

One More Challenge for the AMC: Repairing the Legacy of Illinois Brick – J. Thomas Prud'homme &
Ellen S. Cooper

The Antitrust Bulletin

The Journal of American and Foreign Antitrust and Trade Regulation

Volume 54, Number 1, Spring 2006

Special Issue: Complexity, Networks, And The Modernization Of Antitrust

Gregory T. Gundlach and Albert A. Foer, Guest Editors

Complexity, Networks, and the Modernization of Antitrust: The American Antitrust Institute's
Roundtable on the Science of Complexity and Antitrust – Gregory T. Gundlach and Albert A. Foer

Complexity Science and Antitrust? – Gregory T. Gundlach

Business Ecosystems and the View From the Firm – James F. Moore

The Information Technology Ecosystem: Structure, Health, and Performance – Marco Iansiti and
Gregory L. Richards

The Evolvability of Business and the Role of Antitrust – Ian F. Wilkinson

Business Relationships and Networks: Consequences for Economic Policy – Hakan Hakansson

Complexity, Diversity, and Antitrust – Joseph Farrell

Competing, Countervailing, and Coalescing Forces: The Economics of Intra- and Inter-Business
System Competition – Paul W. Dobson

Competition or Monopoly? The Implications of Complexity Science, Chaos Theory, and Evolutionary
Biology for Antitrust and Competition Policy – Thomas J. Horton

Doctrinal Cross-Dressing in Derivative Aftermarkets: Kodak, Xerox, and the Copycat Game –
Rudolph J.R. Peritz

Real Estate Law Journal

Volume 35, Number 4, Summer 2006

Special Antitrust Issue

The Residential Real Estate Brokerage Industry: What Would More Vigorous Competition Look
Like? – Lawrence J. White

The Incentive and Ability of the Federal Trade Commission to Investigate Real Estate Markets: An
Exercise In Political Economy – Darren Bush

Overview of AAI's Real Estate Competition Project: Highlights from the Existing Literature on
Broker Competition – Norman W. Hawker

Bringing More Competition to Real Estate Brokerage – Robert W. Hahn, Robert E. Litan, and Jesse Gorman

The Price of Residential Real Estate Brokerage Services: A Review of the Evidence, Such as it is – John C. Weicher

The Antitrust Bulletin

The Journal of American and Foreign Antitrust and Trade Regulation

Volume 52, Number 1, Spring 2007

Special Issue: The Future of Aftermarkets in Systems Competition

Gregory T. Gundlach and Albert A. Foer, Guest Editors

The Future of Aftermarkets in Systems Competition: The American Antitrust Institute's Invitational Symposium – Gregory T. Gundlach and Albert A. Foer

Aftermarkets, Systems, and Antitrust: A Primer - Gregory T. Gundlach

Antitrust Implications of Aftermarkets – Joseph P. Bauer

Aftermarket Monopolization: The Emerging Consensus in Economics – Lorenzo Coppi

Evolutionary Theories of Competition and Aftermarket Antitrust Law – Peter R. Dickson

A Marketer's View of Competition and Antitrust – Allan D. Shocker

Rutgers Law Journal

Volume 38, Number 2, Winter 2007

Symposium: The IP Grab: The Struggle Between Intellectual Property Rights and Antitrust

On Whether There Really Is An IP Grab: An Introduction to the Symposium Issue – Albert A. Foer

Controlling the Intellectual Property Grab: Protect Innovation, Not Innovators – Harry First

Intellectual Property and The Alleged Collapsing of Aftermarkets – Bruce Abramson

Pictures at the New Economy Exhibition: Why the Antitrust Modernization Commission Got It (Mostly) Right – Michael A. Carrier

A Government Perspective on IP and Antitrust Law – Deborah Platt Majoras

Patents, Antitrust, and Rivalry in Standard-Setting – Jonathan L. Rubin

Patent Pools: An Economic Assessment of Current Law and Policy – Philip B. Nelson

Other Articles

Comparative Law

Comparative Law Institute, Nihon University, Tokyo

Volume 16, 1999

The Evolution of United States Antitrust Law: The Past, Present and (Possible) Future – Albert A. Foer and Robert H. Lande

Small Business Economics – An International Journal

Volume 16, Number 1, February 2004

Small Business and Antitrust – Albert A. Foer

The New Industrial Organization and Small Business – John E. Kwoka, Jr. and Lawrence J. White

Electricity Journal

Volume 15, Number 19, April 2002

Promoting Competition in the U.S. Electricity Industry: What are the Big Policy Issues? – Diana L. Moss

Energy Law Journal

Volume 23, Number 89, 2003

Electricity in Transition: Lessons Learned for Regulation and Antitrust – Diana L. Moss with Albert Foer

Electricity Journal

Volume 17, Number 11, March 2004

Competition or Reliability in Electricity? What the Coming Policy Shift Means for Restructuring –
Diana L. Moss

Environmental & Energy Law & Policy Journal

University of Houston Law Center

Symposium: Creating Competitive Wholesale Energy Markets

Electricity and Market Power: Current Issues for Restructuring Markets (A Survey) – Diana L. Moss

"Market Power": Why Are We Asking? A Comment on "Electricity and Market Power" – Harry First

The Antitrust Bulletin

Volume 50, Number 4, 2005

The Truth About Trinko – Jonathan L. Rubin

Handbook of Research in Trans-Atlantic Antitrust

Elgar, 2006

The Goals of Antitrust: Thoughts on Consumer Welfare in the U.S. in Philip Marsden (ed.) –
Albert A. Foer

Connecticut Law Review

Volume 39, Number 4, May 2007

Mr. Magoo Visits Wal-Mart: Finding The Right Lens For Antitrust – Albert A. Foer

The Antitrust Bulletin

Volume 52, Numbers 3-4, 2007

Overruling Dr. Miles: The Supreme Trade Commission in Action – Richard M. Brunell

Houston Law Review

Volume 44, 2008 (forthcoming)

Airline Alliances and Systems Competition – Diana L. Moss with James Reitzes

Antitrust Bulletin

Volume 53, 2008 (forthcoming)

The Petroleum Industry, Merger Enforcement, and the Federal Trade Commission – Diana L. Moss

AMICUS BRIEFS TABLE

Amicus Program

The purpose of AAI's amicus program is to positively influence the development of competition law in the courts and to advance the interests of consumers. As a general rule, we focus on legal issues that may have widespread impact and we seek to provide the courts with a unique perspective, focus, or analysis beyond that provided by the parties in a case. We filed our first amicus brief in 2001, and in the last six years have filed more than 30 briefs, including eight on the merits in the U.S. Supreme Court. We have scored some notable victories in the federal appeals courts and state supreme courts, including *Broadcom v. Qualcomm* (abuse of standard setting), *Lorix v. Crompton* (indirect purchaser standing under Minnesota law), *Bunker's Glass v. Pilkington* (indirect purchaser standing under Arizona law), and *In re Cardizem CD Antitrust Litigation* (reverse payments in drug patent settlements). And while we have yet to persuade the Supreme Court, our briefs have provided a road map for important dissents, including Justice Breyer's dissent for four Justices in *Leegin v. PSKS*, which cited our brief at several points. We are appreciative of the many significant voluntary contributions made by members of the Advisory Board and others in producing top-quality legal briefs.

DATE FILED	CASE	COURT	AUTHORS ON BRIEF	ISSUES
1.22.08	FTC v. Whole Foods Market, Inc.	D.C.Cir.	Rick Brunell	Preliminary injunction standard in FTC merger cases
11.13.07	Quanta Computer, Inc. v. LG Electronics, Inc.	Supreme Court	Shubha Ghosh	Patent exhaustion doctrine
7.31.07	FTC v. Whole Foods Market, Inc.	U.S.D.C., D.C.	David Balto	Merger of Whole Foods and Wild Oats

DATE FILED	CASE	COURT	AUTHORS ON BRIEF	ISSUES
6.25.07	Eichenseer v. Tavern League	Wisconsin Supreme Court	Peter Carstensen	Implied immunity under state law
5.25.07	In re DDAVP Direct Purchaser Antitrust Litigation	2nd Cir.	Doug Richards	Purchaser standing to bring Walker Process claim
4.19.07	Cascade Health Solutions v. PeaceHealth	9th Circuit	David Balto, Andrew Kepper, Craig Wildfang, Tom Miller	Standard for section 2 liability for bundled discounts
2.26.07	Leegin Creative Leather Products, Inc. v. PSKS, Inc.	Supreme Court	Rick Brunell	Validity of per se rule against RPM
2.26.07	Credit Suisse Securities v. Billing	Supreme Court	Joe Goldberg, Dan Gustafson, Darren Bush	Implied immunity under securities laws
2.15.07	Joblove v. Barr Labs (In re Tamoxifen)	Supreme Court (cert.) and 2nd Cir.	Paul Slater	Reverse payments in drug patent settlements
12.20.06	Broadcom Corp. v. Qualcomm Inc.	3rd Circuit	Eric Cramer and David Balto	Deceptive conduct in standard setting as violation of §2
11.27.06	Sperry v. Crompton Corp.	NY Ct. App.	Dan Hume and Bob Lande	Availability of treble damages in class actions
10.13.06	Bell Atlantic Corp. v. Twombly	Supreme Court	Parker Folse	12(b)(6) standard for conspiracy
10.12.06	Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.	Supreme Court	Jonathan Rubin, Jon Cuneo, Bob Lande	Standard for predatory overbidding
10.6.06	Lorix v. Crompton Corp.	Minnesota Supreme Court	Richard Lockridge	Indirect purchaser standing
9.29.06	In re Rambus Inc.	FTC	Jonathan Rubin	Remedy
9.20.06	In re American Express Merchants Litigation	2nd Cir.	Dan Gustafson	Enforceability of arbitration clause
11.10.05	Texaco Inc. v. Dagher	Supreme Court	Steve Ross	Ancillary restraints
11.7.05	J.B.D.L. Corp. v. Wyeth-Ayerst Labs, Inc.	6th Cir.	David Balto	Sec. 2, drug market; appeal of summary judgment

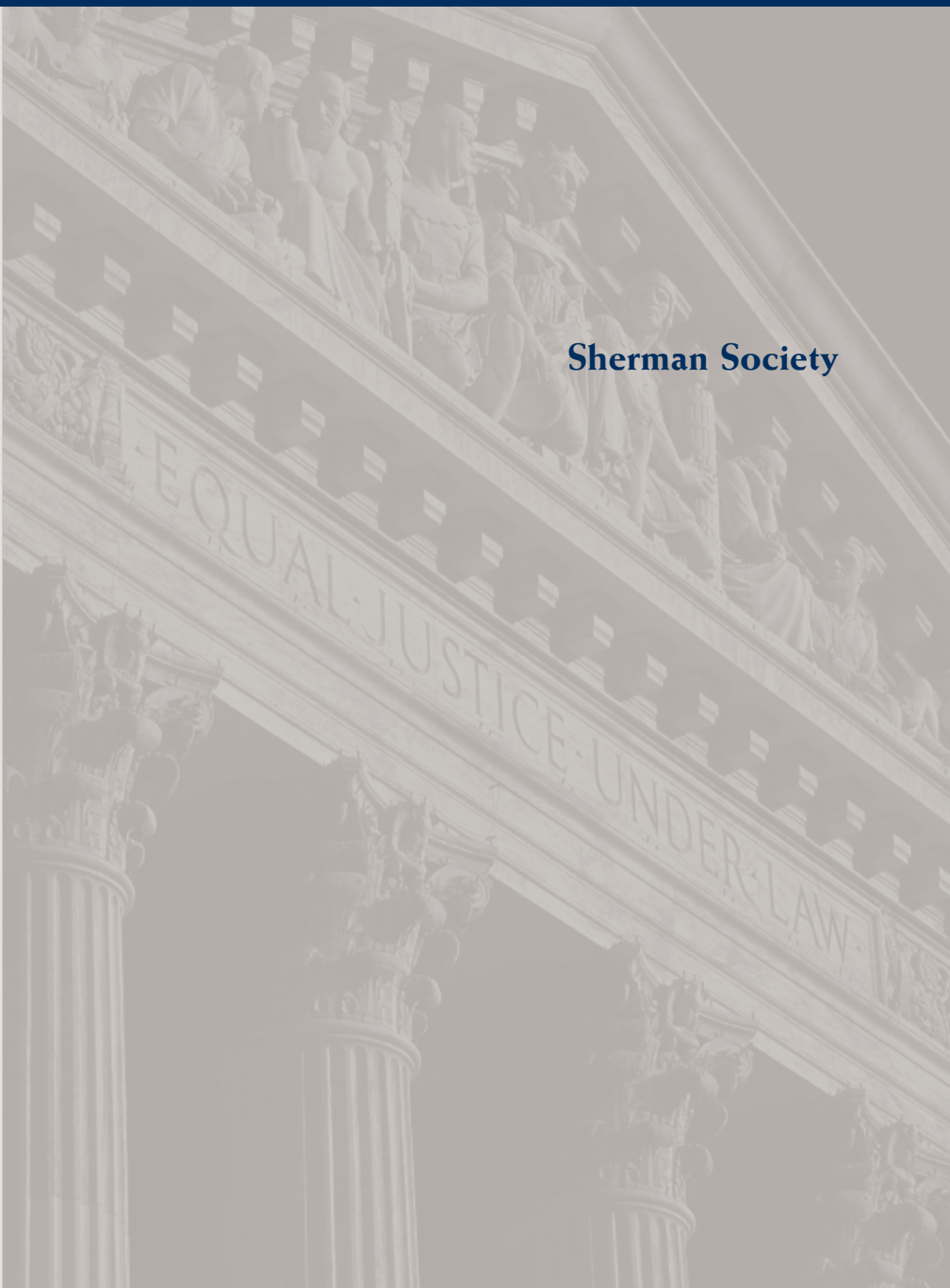
DATE FILED	CASE	COURT	AUTHORS ON BRIEF	ISSUES
9.28.05	Illinois Tool Works Inc. v. Independent Ink, Inc.	Supreme Court	Jonathan Rubin	Presumption of market power in patent tying cases
5.5.05	Monsanto Co. v. Scruggs	Federal Circuit	Mark Patterson	First sale doctrine
7.19.04	Johnson v. Microsoft Corp.	Ohio Supreme Court	Norman Hawker, Mark Tucker	Indirect purchaser standing
5.17.04	In re Rambus Inc.	FTC	Jonathan Rubin	Liability for standard setting
7.23.03	Verizon Comm., Inc. v. Trinko	Supreme Court	Jonathan Rubin	Refusal to deal under §2
2.27.03	Wal-Mart Stores, Inc. v. Rodriguez	1st Cir.	Kevin O'Connor	Injunction against state merger enforcement
1.22.03	Bunker's Glass Co. v. Pilkington plc	Arizona Supreme Court	Warren Grimes	Indirect purchaser standing
12.5.02	Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd	Supreme Court (cert.)	Warren Grimes, Bob Skitol, Doug Rosenthal	Foreign jurisdiction
7.9.02	United States v. Visa U.S.A., Inc.	2nd Cir.	Ian Ayres	Credit card networks' exclusionary rules
7.9.02	Valley Drug Co. v. Geneva Pharms.	11th Cir.	Paul Slater	Reverse payments in drug patent settlements
3.29.02	Major League Baseball v. Crist	11th Cir.	Steve Ross	Baseball exemption
3.11.02	U.S. v. Microsoft	U.S.D.C. D. D.C.	Jon Cuneo	Tunney Act proceeding
11.21.01	A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.	Supreme Court (cert.)	Steve Anderson	Application of Noerr Pennington to tobacco settlement
7.19.01	In re Disposable Contact Lens Antitrust Litigation	U.S.D.C. M.D. Fla.	Bert Foer	Clarification of settlement agreement
5.31.01	In re Cardizem CD Antitrust Litigation	6th Cir.	Paul Slater	Reverse payments in patent settlements
4.16.01	Loeb Industries, Inc. v. Sumitomo Corp	7th Cir	Warren Grimes, Larry Sullivan, Joe Bauer	Application of Illinois Brick to copper conspiracy

section

THREE

AAI 10TH ANNIVERSARY

Sherman Society



THE SHERMAN SOCIETY

The Sherman Society is an honorary recognition group named for John Sherman and the Sherman Antitrust Act of 1890, which is our quintessential protection against anticompetitive activities. The Sherman Society honors the foresight of those who have committed to designate the AAI as a beneficiary of their estate plan or have established a life income gift.

If you would like to discuss the various ways in which you might include the AAI in your will or living trust or name the AAI as a beneficiary of your retirement plan or life insurance policy, please call **Bert Foer at 202-276-6002 or email bfoer@antitrustinstitute.org.**



American Antitrust Institute
2919 Ellicott Street, NW
Washington, DC 20008
www.antitrustinstitute.org