

## ADMINISTRATIVE LITIGATION AT THE FTC: PAST, PRESENT, AND FUTURE

D. BRUCE HOFFMAN  
M. SEAN ROYALL\*

### I. INTRODUCTION

President Woodrow Wilson and the Congress established the Federal Trade Commission eighty-nine years ago with the goal of breathing new life into antitrust enforcement. Central to their vision of the FTC was its ability to function not simply as an antitrust prosecutor or analytical “think tank,” but also as an adjudicator trying its own cases and rendering its own decisions.<sup>1</sup> Wilson and Congress anticipated that the FTC, acting as an adjudicator, would facilitate the development of antitrust policy while simultaneously enhancing certainty and accuracy in the decision of specific antitrust cases.<sup>2</sup> And so, under Section 5(b) of the FTC Act, 15 U.S.C. § 45(b), the FTC was granted an adjudicative function, which ultimately became embodied in Part III of the FTC’s rules of practice.<sup>3</sup>

The FTC today is aggressively continuing to use the administrative litigation process in the manner envisioned by the agency’s creators: as

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\* M. Sean Royall is the Deputy Director of the FTC’s Bureau of Competition, and D. Bruce Hoffman is Associate Director for Regional Litigation. The views expressed in this article are the authors’ own, and not necessarily those of the Commission or of the Bureau of Competition.

<sup>1</sup> The FTC’s formation and early history is comprehensively explored in Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1 (2003). See also Martin Morrison, *The Legislative History of the FTC Act*, Memorandum to the Chief Counsel, Federal Trade Commission, Jan. 5, 1926, at 1 (available in the FTC library); Rush Butler & Cornelius Lynde, *The Federal Trade Commission 1-7* (1915).

<sup>2</sup> See *Report of the ABA Commission to Study the Federal Trade Commission*, Sept. 1969, 427 Antitrust & Trade Reg. Rep., Spec. Supp., at 5, 36 [hereinafter *1969 ABA Report*]; see also Winerman, *supra* note 1; Morrison, *supra* note 1; *Interview with William J. Baer, Director, Bureau of Competition, Federal Trade Commission*, ANTITRUST, Summer 1996, at 15, 16; *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, April 7, 1989, at 2, 16-17, 113, 120-21, 58 ANTITRUST L.J. 43 (1989) [hereinafter *1989 ABA Report*]; Calkins, *The Legal Foundation of the Commission’s Use of Section 5 to Challenge Invitations to Collude Is Secure*, ANTITRUST, Spring 2000, at 69, 78-79.

<sup>3</sup> 16 C.F.R. § 3.1 *et seq.* (2003).

a uniquely effective vehicle for advancing the development of antitrust law in complex settings in which the agency's expertise can make a measurable difference. From standard-setting cases like *Rambus* and *Unocal*, to pharmaceutical cases like *Schering-Plough*, to consummated merger cases like *MSC.Software* and *Chicago Bridge*, to horizontal restraints cases like *Polygram* (the "Three Tenors" case), the FTC's administrative litigation process has become the forum in which many of our day's most complex and interesting antitrust issues are being litigated. Yet, even today, with FTC administrative litigation on the rise, many antitrust practitioners know relatively little about the Part III process. In this article we hope to shed light on some of the unique procedural features and the substantive role of Part III litigation today.

## II. THE EVOLVING STRUCTURE AND PROCEDURE OF PART III LITIGATION

As envisioned in 1914, in the context of administrative litigation, the FTC today functions as both prosecutor and judge. After receiving Commission authorization, the Commission staff files and litigates cases before agency administrative judges. In the event of an appeal, the five Commissioners themselves are responsible for rendering final decisions on the merits. Within this framework, however, FTC administrative litigation has undergone substantial evolution, largely in the direction of increased formality and convergence with federal court procedure.

Originally, the Commission itself served in most respects as a trial court. There were very limited formal pleadings, consisting of the Commission's complaint and an answer; no other pleadings or motions were permitted.<sup>4</sup> Following submission of the pleadings, a fact-finding hearing that combined discovery with the introduction of evidence and that was presided over by a hearing examiner would commence. Once the evidentiary record was complete, the pleadings, evidence, and a set of proposed findings of fact and a proposed order would be forwarded to the Commission, which would then accept briefs from the parties, hear oral argument, and make findings of fact and issue its final order (either to cease and desist, or dismissing the case).<sup>5</sup> The Commission had no authority to enforce its orders. If a respondent failed to obey, the FTC was limited to seeking prospective enforcement (with no retrospective sanctions)

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<sup>4</sup> GERARD C. HENDERSON, *THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 56-61 (1924). Henderson notes that an exception was occasionally made for motions by the Commission's counsel to strike portions of respondents' answers on the grounds that they did not state a legal defense.

<sup>5</sup> *Id.* at 61-71.

from the federal appeals court.<sup>6</sup> This limitation was corrected in the 1938 Wheeler-Lea Amendments to the FTC Act, which allowed the FTC to seek civil penalties in federal district court for violations of FTC Act cease and desist orders.<sup>7</sup>

In 1946 the Administrative Procedure Act spurred the evolution of the FTC's hearing examiners into a much closer approximation of today's Administrative Law Judges (ALJs),<sup>8</sup> and also led the Commission to amend its rules to restrict ex parte contact. Along with these substantive changes came an increase in the formality of the hearings, which previously were often quite unceremonious (at times apparently even including "fisticuffs.")<sup>9</sup>

In the 1960s, the Commission abandoned its practice of consolidating discovery with the actual hearing—a practice that resulted in hearings being broken into numerous installments conducted at locations scattered across the country (typically, wherever witnesses resided)<sup>10</sup>—in favor of procedures more closely mirroring federal litigation, with pre-trial discovery followed by a separate trial.<sup>11</sup> Subsequently, Part III has continued its convergence with federal procedure, with additional conforming procedural amendments in 1979, the mid-1980s,<sup>12</sup> and, most recently, in the mid-1990s, when the recommendations of a task force formed by Chairman Robert Pitofsky, and chaired by FTC General Counsel Stephen Calkins, resulted in rule changes designed to expedite the administrative trial and decision-making process and enhance the ALJs' ability to manage their cases.<sup>13</sup>

<sup>6</sup> Respondents also had the ability to seek review of a Commission order in the courts of appeal. *Id.* at 77–78.

<sup>7</sup> Act of March 21, 1938, ch. 49, 52 Stat. 111.

<sup>8</sup> Abelardo G. Samonte, *Development of Administrative Adjudication in the Federal Trade Commission Since 1946* at 2–5 (Ph.D. dissertation presented to the Princeton University Political Science Department) (University Microfilms International, 1959) (available from the FTC library).

<sup>9</sup> Samonte, *supra* note 9, at 199 (quoting John W. Norwood, *Reflections of a Trial Examiner*, 10 FED. B. J. No. 1, Oct. 1948, at 56).

<sup>10</sup> Samonte, *supra* note 9, at 179–80; James P. Timony, *Administrative Adjudication of Consumer Protection Cases as an Alternative to Litigation in Federal Court*, CONSUMER PROTECTION UPDATE (ABA Section of Antitrust Law Consumer Protection Committee Newsletter), Fall 2002, at 2–3, available at <http://www.abanet.org/antitrust/committees/consumer/cpfall02.pdf>. Judge Timony provides a firsthand view of the Commission's "traveling" hearings and procedures during the late 1950s and early 1960s.

<sup>11</sup> Timony, *supra* note 10, at 3. Judge Timony argues that this change actually slowed the FTC litigation process.

<sup>12</sup> STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION, § 8.01, 8-3 (1979); KANWIT, FEDERAL TRADE COMMISSION 2001 CUMULATIVE SUPPLEMENT § 8.07, at 58.

<sup>13</sup> *Id.* at 30; FTC Press Release (Sept. 18, 1996), available at <http://www.ftc.gov/opa/1996/09/adminlit.htm>; William J. Baer & David A. Balto, *New Myths and Old Realities: Recent*

Administrative litigation at the Commission today employs a structure that combines certain aspects of trial and appellate litigation. Initially, litigation similar in most respects to federal court proceedings is conducted before an ALJ, culminating in a “hearing” (in essence, a bench trial). The FTC is represented by “complaint counsel” from the FTC’s Bureau of Competition (BC) in antitrust actions and from the Bureau of Consumer Protection in consumer protection cases. Complaint counsel may include lawyers from the litigating divisions (or “shops”), the BC Director’s office, and the regions, depending on the case.

At the conclusion of the hearing, the ALJ issues an “Initial Decision,” including findings of fact and conclusions of law. That decision can then be appealed to the Commission itself, which conducts a *de novo* review of the facts and law, receives briefs, hears oral argument, and then renders a final decision. In other words, the Commission functions like a mix of trial and appellate court. The Commission’s decisions can be appealed to the relevant federal circuit court of appeals,<sup>14</sup> and from there by writ of certiorari to the U.S. Supreme Court.

#### A. SOME PROCEDURAL NUANCES OF PART III LITIGATION

While FTC administrative litigation as we know it today is in most respects procedurally similar to federal court litigation, there are some significant actual or potential differences (aside from the obvious fact that FTC trials are non-jury). These break down into four main areas: timing; evidence and discovery; appeals; and the preclusive effects of FTC judgments.

##### a. Timing

In 1996 the FTC took aggressive steps to transform Part III litigation into a procedure faster by far than virtually any federal antitrust case; so fast that in at least one recent case, counsel for the respondent argued (unsuccessfully) that the proceeding’s speed had effectively denied it due process.<sup>15</sup> The rules state that the Commission’s policy is to conduct expeditious proceedings.<sup>16</sup> This general statement is given concrete form

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*Developments in Antitrust Enforcement*, 1999 COLUM. BUS. L. REV. 207, 268–70; 61 Fed. Reg. 50,639 (Sept. 26, 1996).

<sup>14</sup> Appeals may be filed in “any circuit where the method of competition or act or practice in question was used or where such person . . . resides or carries on business.” 15 U.S.C. § 45(c).

<sup>15</sup> See Respondent MSC.Software Corporation’s Motion to Extend Trial Date, February 11, 2002, and Order on Respondent MSC.Software Corporation’s Motion to Extend Trial Date, Mar. 5, 2002, both available at <http://www.ftc.gov/os/adjpro/d9299/index.htm>.

<sup>16</sup> FTC Rules of Practice, 16 C.F.R. § 3.1 [hereinafter FTC Rules].

under Rule 3.51, which requires the ALJ to issue the initial decision within one year after the issuance of the complaint.<sup>17</sup> The Commission itself, however, is not under any specific obligation to issue its Final Decision on appeal from an ALJ's initial decision in any particular time, except in "fast track" cases.<sup>18</sup>

In Part III proceedings, the trial typically begins within about eight months or less of the filing of the complaint, with correspondingly rigidly short time periods for discovery and other pretrial proceedings. For example, in *MSC.Software*,<sup>19</sup> the complaint was filed on October 10, 2001. The original scheduling order set March 29, 2002, as the date on which most fact discovery would close, allowing only six months for fact discovery, and the trial was set to commence on May 21, 2002.<sup>20</sup> In *Rambus*,<sup>21</sup> the complaint was filed on June 18, 2002, and trial began on April 30, 2003, a mere ten months after the case commenced.<sup>22</sup> This is extraordinarily fast for complex antitrust litigation.

#### b. Evidence and Discovery

This is an area in which ostensible differences between federal court litigation and Part III may be more theoretical than actual. Nevertheless, certain potential variations are worth noting.

First, the FTC is not bound by the formal rules of evidence.<sup>23</sup> The test for admissibility is whether evidence is "relevant, material, and reliable," not whether it conforms to the various requirements of the Federal Rules of Evidence.<sup>24</sup> Thus, while ALJs have generally tended to follow the rules of evidence, or at least have used them as guideposts, administrative trials before the FTC often include evidence that would not be admissible in jury trials—for example, hearsay.<sup>25</sup>

<sup>17</sup> *Id.* § 3.51(a). The ALJ can extend the deadline by 60-day increments, but only on a finding of extraordinary circumstances. An even faster resolution is available in so-called "Fast Track" cases, when a federal court has entered a preliminary injunction halting a merger. *Id.* § 3.11A.

<sup>18</sup> The Commission has adopted non-binding timing guidelines for issuing its decisions.

<sup>19</sup> *MSC.Software Corp.*, FTC Docket No. 9299, available at <http://www.ftc.gov/os/adjpro/d9299/index.htm>.

<sup>20</sup> November 13, 2001 Scheduling Order, *MSC.Software Corp.*, FTC Docket No. 9299.

<sup>21</sup> *Rambus, Inc.*, FTC Docket No. 9302, available at <http://www.ftc.gov/os/adjpro/d9302/index.htm>.

<sup>22</sup> See February 21, 2003 Fourth Revised Scheduling Order, *Rambus, Inc.*, FTC Docket No. 9302.

<sup>23</sup> ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 685 (5th ed 2002); FTC Rules, *supra* note 16, § 3.43(b); *FTC v. Cement Inst.*, 333 U.S. 683, 705-06 (1948).

<sup>24</sup> FTC Rules, *supra* note 16, § 3.43(b).

<sup>25</sup> See, e.g., Order Denying Respondent's Motion to Strike CX 1659, *California Dental Ass'n*, FTC Docket No. D-9259, 1995 WL 17003136 (FTC) (Apr. 7, 1995) ("The documents

Second, while the parties may generally employ the same discovery tools as those used in civil litigation, the ALJ has the discretion to limit the frequency or use of those tools.<sup>26</sup> Thus, in theory, the ALJ could significantly restrict discovery. However, experience suggests that the ALJs have tended to permit fairly wide-ranging discovery in most cases, although, given the tight time limits, the discovery experience is similar to litigating in a federal “rocket docket.”

### c. Appeals

Two unusual aspects of appellate procedure in Part III merit discussion. First, while in some respects the Commission acts as an appellate court reviewing the initial decision of the ALJ, unlike an appellate court the Commission is not required to give any deference to the ALJ’s findings of fact. It may consider evidence the ALJ rejected or excluded, and, in fact, may “exercise all powers which it could have exercised if it had made the initial decision.”<sup>27</sup>

Second, the Commission’s final decisions, when appealed to the circuit courts of appeals, are subject to a standard of review more deferential than that applied to district court judgments. The Commission’s findings of fact are reviewed under the relatively lenient “substantial evidence” standard, which asks whether there is evidence in the record that “a reasonable mind might accept as adequate” to support the Commission’s conclusion.<sup>28</sup> The Commission’s conclusions of law, while generally reviewed de novo, are given deference to the extent that they involve

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underlying CX 1659 are, in many cases, hearsay but they are the kind of evidence which is routinely received in evidence in administrative trials because they are probative and reliable.”). It is also worth noting that the Commission’s rules specifically provide that parties bear the burden to prove that documents originating from their own files are not authentic or were not kept in the ordinary course of business. FTC Rules 3.43(b)(2) (the so-called “Lenox rule,” after *Lenox, Inc.*, 73 F.T.C. 578, 603–04 (1968)).

<sup>26</sup> FTC Rules, *supra* note 16, § 3.31 (a).

<sup>27</sup> *Id.* § 3.54.

<sup>28</sup> 15 U.S.C. § 45; *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986). The Seventh Circuit, in an often-quoted opinion, succinctly described the limited scope of judicial review permissible under this standard: “Our only function is to determine whether the Commission’s analysis of the probably probable effects of these acquisitions . . . is so implausible, so feebly supported by the record, that it flunks even the deferential test of substantial evidence.” *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986). *See also PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 110–11 (2d Cir. 2002) (distinguishing conclusions of lack of sufficient evidence to establish a horizontal agreement on de novo review of district court grant of summary judgment from contrary conclusions by the Seventh Circuit in review of findings in administrative proceeding from the FTC in *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), in part, on basis of different standard of review).

the interpretation and application of the statutes it is charged with enforcing as an expert administrative agency, such as the FTC Act.<sup>29</sup> In contrast, a district court's findings of fact are reviewed under the clearly erroneous standard, which, while quite deferential, allows reversal "when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."<sup>30</sup>

#### d. Preclusion

Finally, and (as we discuss below) of particular significance for the FTC's contemplated institutional role in developing antitrust policy, under the Clayton Act findings and conclusions emanating from FTC administrative litigation have no collateral estoppel effect in subsequent litigation.<sup>31</sup> In other words, a party that litigates and loses an issue before the FTC is not precluded from relitigating the same issue if sued in federal court by private parties. This theoretically frees the FTC to pursue novel or difficult theories of violation and to obtain prospective cease-and-desist relief against violators, without concern that its enforcement activities will spawn private suits under the Sherman Act, or state counterparts, where treble damages or other punitive relief might be available. In reality, however, FTC antitrust enforcement actions quite often are followed by private suits, notwithstanding the absence of collateral estoppel.

### III. THE SUBSTANTIVE IMPACT OF PART III TODAY

As Part III procedure has evolved, so too have the purposes for which Part III has been employed by the FTC. From the 1930s until the 1970s, much of the FTC's Part III antitrust enforcement focused on the Robinson-Patman Act.<sup>32</sup> During the 1970s, the FTC employed Part III to launch a newly aggressive antitrust agenda,<sup>33</sup> focusing on two major initiatives:

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<sup>29</sup> *Indiana Federation*, 476 U.S. at 454; *see also* *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>30</sup> *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

<sup>31</sup> 15 U.S.C. § 16(a).

<sup>32</sup> Timothy J. Muris, Chairman, FTC, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Remarks at the Milton Handler Annual Antitrust Review (Dec. 10, 2002), *available at* <http://www.ftc.gov/speeches/muris/handler.htm>; *1989 ABA Report*, *supra* note 2, at 15.

<sup>33</sup> For a comprehensive review of the FTC's activities during the 1970s, including its line-of-business program, the consent decree with Xerox, and other significant initiatives, *see generally* KENNETH W. CLARKSON & TIMOTHY J. MURIS, EDs., *THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR* (1981).

first, a comprehensive effort to apply antitrust principles to the professions,<sup>34</sup> and second, a series of industry-wide actions driven in large part by an attempt to employ administrative litigation as a tool to restructure relatively highly concentrated markets.<sup>35</sup>

In the 1980s the FTC refocused its administrative antitrust litigation efforts to concentrate more on conduct with potential to injure consumers and impair economic efficiency. During that period—which coincided with the institutionalization of rigorous, consumer welfare-oriented economic analysis as a key component of antitrust law,<sup>36</sup> the promulgation of the 1982 Merger Guidelines by William Baxter's Antitrust Division at the Department of Justice, and Chairman Muris's tenure as Director of the FTC's Bureau of Competition—the FTC conducted a number of administrative litigation cases that have become landmarks in antitrust.<sup>37</sup> That trend continued through the 1990s<sup>38</sup> (albeit somewhat attenuated by the need to divert agency resources to the enormous

<sup>34</sup> See, e.g., *AMA v. FTC*, 638 F.2d 443 (2d Cir. 1980). This effort continues today.

<sup>35</sup> Muris, *supra* note 32. These industry structure cases, notably the FTC actions against the major breakfast cereals manufacturers and against the major oil companies, were breathtaking in scope but ultimately failed. For example, the FTC's action against the oil industry named eight major U.S. oil companies as respondents and had lasted five years before document discovery even began. At the time of its dismissal by the Commission, the FTC staff estimated that the case would be in litigation for seventeen years before reaching the court of appeals. See *Exxon Corp.*, 98 F.T.C. 453 (1981); *Standard Oil Co. v. FTC*, 475 F. Supp. 1261, 1264 (N.D. Ind. 1979). The breakfast cereals case was comparable in scale. At the time of its dismissal in 1982, it had been pending for nearly ten years, nine of which were consumed in discovery and the administrative trial. See *Kellogg Co.*, 47 Fed. Reg. 6871 (FTC Feb. 17, 1982) (order vacating initial decision and dismissing the Commission's complaint with prejudice).

<sup>36</sup> James C. Miller, III, *Revamping the Federal Trade Commission (CSAB 1984)*, at 5–6; Muris, *supra* note 32.

<sup>37</sup> These cases included, among others, *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), which established that the “active supervision” prong of state action immunity required actual, affirmative, ongoing involvement by the state, as opposed to mere passive acquiescence in private anticompetitive conduct; *FTC v. Superior Court Trial Lawyers' Ass'n*, 493 U.S. 411 (1990), which held that a “strike” by criminal defense lawyers conducted to obtain higher compensation from the government was a naked price-fixing agreement, not a “political” boycott, and merited summary condemnation regardless of the fact that the participants lacked market power; *Indiana Federation*, which used a “quick look” rule of reason (under which direct evidence of anticompetitive effects obviated the need to conduct a formal analysis of market power) to condemn dentists' collective refusal to provide x-rays to insurers; and *Massachusetts Bd. of Registration of Optometry*, 110 F.T.C. 549 (1988), which eschewed classical per se/rule of reason analysis in favor of a multi-step inquiry taking into account efficiency justifications for allegedly anticompetitive restraints.

<sup>38</sup> Significant Part III cases in the 1990s included *Toys “R” Us*, discussed above, and *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (holding that the Commission had failed sufficiently to establish the anticompetitive effects of certain restraints on advertising by dentists).

merger wave of that period)<sup>39</sup> and, we believe, characterizes the FTC's activities today.<sup>40</sup>

Few commentators would disagree that FTC administrative litigation provides a forum for expert adjudication of antitrust issues. The types of cases that should be subject to that expert analysis may be a greater source of controversy, as various analysts' comments suggest. For example, in its *1989 Report* the ABA identified eight characteristics it believed described cases particularly suited for Part III litigation:

- (1) Conduct arguably subject to the rule of reason or truncated rule of reason;
- (2) The development and application of uncertain legal theories;
- (3) Conduct arguably entitled to an antitrust exemption;
- (4) Industries newly exposed to antitrust laws through deregulation, or in which restraints are arguably justified by the need to further technological innovation or other public purposes;
- (5) Theories with a firm economic foundation;
- (6) Industries with which the FTC has developed familiarity;
- (7) Anticompetitive practices in industries about which there is substantial public concern; and
- (8) Legal theories grounded in the antitrust laws, rather than an extension—or, at least, an aggressive extension—of the scope of Section 5.<sup>41</sup>

More generally, the *1989 ABA Report* urged that the Commission should “identify [non-merger] cases not subject to easy application of the per se rule, and for which criminal penalties or treble damages may be overly severe sanctions because, for instance, the challenged conduct is arguably exempt, the industry is newly exposed to the antitrust laws, or the legal theory is uncertain.”<sup>42</sup>

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<sup>39</sup> See *Interview with Stephen Calkins, General Counsel, Federal Trade Commission*, ANTITRUST, Fall 1995, at 28, 31.

<sup>40</sup> See Timothy Muris, *Antitrust Enforcement at the Federal Trade Commission: In A Word—Continuity*, Prepared Remarks Before the ABA Antitrust Section Annual Meeting (Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.htm>; Muris, *supra* note 32.

<sup>41</sup> *1989 ABA Report*, *supra* note 2, at 17–20.

<sup>42</sup> *Id.* at 2. Professor Calkins echoed this view, arguing that “as a matter of policy if not law, it is the novel cases that should be challenged through administrative adjudication.” *Calkins Interview*, *supra* note 39, at 79. The ABA contended that this role was “a creature

The Commission's current extensive use of administrative litigation may certainly be viewed as consistent with the idea that complex issues are particularly appropriate for Part III adjudication. A brief review of the cases brought since Chairman Muris's return to the Commission illustrates this point. Four of those cases have now resulted in completed (or nearly completed) administrative trials: *Polygram* ("Three Tenors"),<sup>43</sup> *Schering-Plough*<sup>44</sup> (filed in March 2001, but largely litigated and pursued under Bureau of Competition Director Joseph Simons), *Chicago Bridge*,<sup>45</sup> and *Rambus*. These cases are not only resulting in full trials and initial decisions by the ALJs, helpful as those are on their own merits—some are proceeding to appeals to the full Commission, providing extensive opportunities for the Commission itself to weigh in on the state of several important antitrust issues. Oral arguments before the Commission have already been held in *Polygram* and *Schering-Plough*. While it is of course premature to speculate, there would seem to be at least a reasonable chance that either *Chicago Bridge* or *Rambus*, or, eventually, the recently filed *Unocal*<sup>46</sup> action, may ultimately result in fully argued appeals to the Commission as well.

Turning to the substance of the Commission's current administrative cases, in general one can conclude that, if not necessarily novel, each raises issues of great importance and each poses interesting antitrust questions.

The merger bar, in particular, may view *MSC.Software* and *Chicago Bridge* as both unusual and important in that they involve efforts to unwind consummated mergers that were discovered to be anticompetitive after the fact. *MSC.Software*, already accounting for 90 percent of the market for a certain type of advanced computer-aided engineering software, acquired its only two rivals in non-reportable transactions in 1999, and so became a monopolist. In October 2001, the FTC sued to unwind the transactions; the case settled when *MSC.Software* agreed, in

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of the FTC's special attributes: an ability to seek injunctions without establishing antitrust liability for purposes of private damages actions, an ability to devote substantial time to litigating complicated economic questions, and an ability to consider a variety of remedies for competitive harms." *1989 ABA Report, supra*, at 17.

<sup>43</sup> *Polygram Holdings, Inc.; Decca Music Group Ltd.; UMG Recordings, Inc.; and Universal Music & Video Distribution Corp.*, FTC Docket No. 9298, available at <http://www.ftc.gov/os/adjpro/d9298/index.htm>.

<sup>44</sup> *Schering-Plough Corp., Upsher-Smith Labs., and American Home Prods. Corp.*, FTC Docket No. 9297, available at <http://www.ftc.gov/os/adjpro/d9297/index.htm>.

<sup>45</sup> *Chicago Bridge & Iron Co. N.V., Chicago Bridge & Iron Co., and Pitt-Des Moines, Inc.*, FTC Docket No. 9300, available at <http://www.ftc.gov/os/adjpro/d9300/index.htm>.

<sup>46</sup> *Union Oil Co. of Cal.*, FTC Docket No. 9305, available at <http://www.ftc.gov/os/adjpro/d9305/index.htm>.

essence, to divest a “clone” of itself to restore competition in the market. Similarly, *Chicago Bridge* involved a merger that allegedly substantially lessened competition in four product markets. The ALJ in *Chicago Bridge* recently issued an Initial Decision ruling in favor of complaint counsel and ordering a divestiture. If appeals are pursued, the case may provide the Commission with its first opportunity to rule on a consummated merger in many years.

*Polygram* (“Three Tenors”), filed in July 2001, involved a challenge to horizontal restraints agreed to by joint venturers—in this case, Warner Communications and PolyGram Music Group—that were facially anti-competitive, but which the respondents contended (unsuccessfully) were necessary to the joint venture. The case revolved around the recording and distribution of the quadrennial joint performances of the world-famous “Three Tenors:” Luciano Pavarotti, Placido Domingo, and Jose Carreras. Beginning in 1990, the Three Tenors celebrated each World Cup with a combined live concert and recording session. PolyGram distributed the first recording in 1990, and Warner handled the second, in 1994. PolyGram and Warner agreed to distribute the 1998 iteration together and, at the same time, to refrain from advertising or discounting the two earlier recordings during the promotional period for the third. While the Commission did not challenge the joint venture itself, it challenged these advertising and discounting restraints, and the ALJ agreed, finding that they unreasonably restrained competition, were not reasonably necessary to the joint venture, and had raised prices and injured consumers. The issues in this matter, of course, are not merely important to impecunious opera fans, but help demonstrate how the FTC may be likely to interpret and apply certain aspects of the April 2000 FTC/DOJ Guidelines on Competitor Collaboration. The full Commission’s decision on the appeal is currently pending.

Complaint counsel does not, of course, always win administrative cases at trial, as the Initial Decision in *Schering-Plough* shows. In that case, the complaint alleged that Schering-Plough, maker of a prescription potassium chloride supplement, sued generic competitors for patent infringement and then settled those cases by paying the purported infringers to stay out of the market. Under the Hatch-Waxman Act, this chain of events precluded further generic entry for a considerable period of time. This, the complaint alleged, cemented Schering-Plough’s ability to raise prices to consumers. The ALJ, however, did not agree, finding that complaint counsel had failed to “prove or properly define” the relevant product market, Schering-Plough did not have monopoly power in the market as properly defined, and complaint counsel did not prove that the payments by Schering-Plough to the alleged offenders were

either improper or delayed generic competitor entry. The initial decision was appealed, and the Commission recently heard oral argument in this important case testing the interface between pharmaceutical intellectual property and the antitrust laws.

Finally, at an earlier stage of development, *Rambus* and the even more recent *Unocal* case both challenge alleged anticompetitive abuses of the standard-setting process.<sup>47</sup> In *Rambus* the FTC contends that over the course of the past decade Rambus, through deliberate and intentional means, illegally monopolized, attempted to monopolize, or otherwise engaged in unfair methods of competition in certain markets relating to technological features necessary for the design and manufacture of a common form of digital computer memory, known as dynamic random access memory (DRAM). According to the complaint, Rambus's anticompetitive scheme involved participating in the work of an industry standard-setting organization, known as JEDEC, without making it known to JEDEC or to its members that Rambus was actively working to develop, and did in fact possess, a patent and several pending patent applications that involved specific technologies proposed for and ultimately adopted in the relevant standards. By concealing this information—in violation of JEDEC's own operating rules and procedures—and through other bad-faith, deceptive conduct, Rambus purposefully sought to and did convey to JEDEC the materially false and misleading impression that it possessed no relevant intellectual property rights. The complaint alleges that Rambus's anticompetitive scheme further entailed perfecting its patent rights over these same technologies and then, once the standards had become widely adopted within the DRAM industry, enforcing its patents worldwide against companies manufacturing memory products in compliance with the standards.

*Unocal* is similar to *Rambus* in that it involves allegations of anticompetitive deception in the standard-setting process, but dissimilar in that the standard-setting process at issue was conducted by a governmental agency (the California Air Resources Board, or CARB). According to the FTC's complaint, during the 1990s Unocal participated in regulatory proceedings before CARB regarding the development of reformulated gasoline. During those proceedings, Unocal developed and ultimately patented certain technologies related to the production of a particular form of

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<sup>47</sup> The standard-setting cases build on the Commission's earlier consent decree in *Dell Computer*, 121 F.T.C. 616 (1996), in which Dell manipulated a standard-setting organization by making affirmative misrepresentations to that organization about Dell's ownership—or lack thereof—of intellectual property rights, just as the *Schering-Plough* patent settlement matter discussed above will have built upon the *Summit Technology, Inc. and VISX, Inc.* matter, FTC Docket No. 9286, and other related FTC initiatives.

low-emission gasoline: Phase 2 “summer-time” CARB gasoline, which is mandated for sale and use in California for much of the year. The complaint alleges that Unocal deceived CARB (and participating industry groups) about its intellectual property rights, and as a result, the formulation CARB adopted infringes Unocal’s patents. When Unocal finally revealed its patents, the industry was locked in to the infringing technology, conferring monopoly power on Unocal and enabling it to impose hundreds of millions of dollars in rents likely to be passed on to consumers. The *Unocal* case, in addition to continuing the articulation of antitrust theories predicated on anticompetitive deception in the context of standard-setting processes, also raises complex questions of *Noerr-Pennington* immunity as a consequence of the involvement of the California government in the standard-setting process.

#### IV. CONCLUSION

Thus, in recent Commission actions, the FTC’s adjudicative process has been employed to litigate consummated mergers; to test claims of efficiency justifications for restraints agreed to among joint venturers; to address a variety of provocative issues surrounding pharmaceuticals; and to challenge the alleged subversion of standards-setting activities to achieve anticompetitive ends. Each of these cases would seem to lie at the heart of the role originally envisioned, and frequently reaffirmed, for administrative litigation before the FTC. It seems likely that the Commission’s extensive use of administrative litigation to resolve important and difficult antitrust issues will continue for the foreseeable future.