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INTRODUCTORY REMARKS

Welcome to the 2004 Milton Handler Annual Antitrust Review. Our subject for discussion today is how one proves or disproves the actual or threatened anticompetitive effects that predicate a non-per se violation of the antitrust laws. It is more than a little ironic that the rule of reason, which is the fundamental precept of antitrust law since the *Standard Oil* decision in 1911,<sup>1</sup> is still only weakly understood by practitioners, the enforcement agencies, and the courts, largely because of the ambiguity surrounding what constitutes an anticompetitive effect and the means of proving or disproving that one exists.

This issue is particularly salient today given the recent lack of success by our federal enforcement agencies in the courts. In the last several years, the Antitrust Division of the Department of Justice has lost its predatory pricing claim in *American Airlines*,<sup>2</sup> its merger claims in *SunGard/Comdisco*<sup>3</sup> and *Oracle/PeopleSoft*,<sup>4</sup> and its duality claim in the *Visa/MasterCard* case,<sup>5</sup> while the Federal Trade Commission has lost its merger claim in *Arch Coal*.<sup>6</sup> I should say before continuing that both of the federal enforcement

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<sup>1</sup> *Standard Oil Co. of N.J. v. United States*, 221 U. S. 1 (1911).

<sup>2</sup> *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

<sup>3</sup> *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001).

<sup>4</sup> *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

<sup>5</sup> *United States v. VISA U.S.A., Inc.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003).

<sup>6</sup> *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004).

agencies also have prevailed recently in court in a number of cases requiring the proof of anticompetitive effect, including the Antitrust Division's successful prosecution of the boycott claim in *Visa/MasterCard*<sup>7</sup> and the Commission's successes in the *Heinz/Beechnut*<sup>8</sup> and *Libbey/Anchor*<sup>9</sup> merger cases. But, still, the recent losses do suggest that there is something important here to explore.

The agencies do not bring their prosecutions lightly. Those of us who have been in the agencies in senior decision-making positions know that a great deal of thought and effort goes into making the decision to bring a case, and once the decision is made the enforcement agencies put every resource possible into winning the case. So the fact that there have been some significant losses suggests that there is a disconnect somewhere, and the question in part for us today is where lies that disconnect? The simple answers, which I do not think are the correct ones, are bad prosecutorial decision-making in the agencies, bad litigation in courts, or bad judging. Rather, I think the answer lies in a more fundamental misunderstanding, or at least a lack of a shared understanding, on what exactly an anticompetitive effect is, what evidence is materially probative of the presence or absence of an existing or likely future anticompetitive effect, and the decision rules for balancing conflicting evidence.

To help us explore these issues, we have a very distinguished panel of speakers. First, Judge John D. Bates. Judge Bates was appointed a judge in the United States District Court for the District of Columbia in 2001. He has presided over a full range of criminal and civil cases. Most significantly for our purposes, Judge Bates presided over the FTC's Section 13(b) proceeding for a preliminary injunction to block the Arch Coal/Triton merger.<sup>10</sup>

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<sup>7</sup> *Visa*, 344 F.3d at 243.

<sup>8</sup> *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000).

<sup>9</sup> *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34 (D.D.C. 2002).

<sup>10</sup> *Arch Coal*, 329 F. Supp. 2d 109.

Next is Thomas O. Barnett. Tom is the Deputy Assistant Attorney General responsible for civil enforcement in the Antitrust Division of the Department of Justice. In that capacity, he is the senior enforcement official at the Division, behind the Assistant Attorney General, for the selection and prosecution of cases where anticompetitive effect must be proved.

Our third speaker, John D. Harkrider, is a founding member of Axinn, Veltrop, and Harkrider, LLP. John is also a member of the Antitrust and Trade Regulation Committee. His practice focuses primarily on merger antitrust law, and he was one of the lead attorneys representing SunGard in its successful defense against the Antitrust Division's challenge in *SunGard/Comdisco*.<sup>11</sup> He also plays on the other side of the aisle: he was retained by the Antitrust Division to head the economics team during the Division's investigation and ultimate challenge to WorldCom's proposed merger with Sprint.

Finally, we have Margaret Guerin-Calvert. Meg is a principal with Competition Policy Associates in Washington. This is one of the most sought-after consulting firms for those who respect high-quality antitrust economic analysis. Meg is a former assistant chief of the Economic Regulatory Section of the Antitrust Division. She is very experienced both as an analyst and as a testifying expert in antitrust cases, and recently she testified for the defense in the FTC's challenge to the Arch Coal/Triton transaction.

Let me end with a few words of thanks. First of all, I would like to thank the Association for hosting this event and this magnificent room. Second I would like to thank the editors and the staff of the *Columbia Business Law Review*, who will be publishing the proceedings here. Third, I would like to thank Bill Rooney and David Park. Bill and David were respectively the Chair and Secretary of the Committee for the past three years, and their footsteps are very hard to follow. And finally, I would like to thank Lisl Dunlop, the

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<sup>11</sup> *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001).

current secretary of the Committee, without whom this review—and indeed all Committee functions—would not happen.

Wayne Dale Collins

*Chair*

Committee on Antitrust & Trade Regulation

The Association of the Bar of the City of New York