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I. INTRODUCTION

United States antitrust law has seen a number of significant developments in recent years—from *American Needle* to shifts in regulatory priorities—and 2013 promises to continue that trend. We cannot know exactly how U.S. antitrust law will or will not change in the coming year, but we can highlight some key events and cases to watch. The goal of this article is thus not to predict changes in antitrust law. Instead, we aim to identify critical questions that are on the horizon.

In the first section of this article, we identify some of the pending cases that have the greatest potential to change antitrust law in 2013. In the second, we discuss possible changes in regulatory enforcement.

II. CASES TO WATCH IN 2013

A. Class Certification: *AmGen Inc. v. Conn. Ret. Plans & Trust Funds, No. 11-1085 (U.S.); Comcast Corp. v. Behrend, No. 11-864 (U.S.).*

Both of these highly watched cases have the potential to significantly impact class certification in private antitrust cases. Oral argument for both cases took place on November 5 before the Supreme Court. *AmGen Inc.* v. *Connecticut Retirement Plans & Trust Funds*, a Rule 10b-5 case, is poised to make waves regardless of how the Court decides it. This case concerns allegations that AmGen Inc., a biotechnology company, made misstatements and omissions about two of its treatments for anemia. After the district court certified the class, the Ninth Circuit affirmed, holding that at the class certification stage, securities fraud plaintiffs "must plausibly allege—but need not prove" materiality.[2]

If the Court reverses the Ninth Circuit and holds that plaintiffs are required to prove materiality in order to invoke the fraud-on-the-market presumption at the class certification stage, defendants will likely treat class certification as an even more important and meaningful step. A decision affirming the Ninth Circuit would signal a trend in favor of declining to impose any further requirements on putative classes.[3] The Court's options, moreover, are not black and white: theoretically, the Court could take an intermediate position, holding that there is no

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[2] *Conn. Ret. Plans & Trust Funds* v. *AmGen Inc.*, 660 F.3d 1170, 1172 (9th Cir. 2011).

[3] In *Erica P. John Fund, Inc.* v. *Halliburton Co.*, 131 S. Ct. 2179 (2011), the Court unanimously refused to impose a requirement that plaintiffs prove loss causation at the class certification stage.

requirement that plaintiffs prove materiality in order to invoke the presumption, but once plaintiffs have invoked it, defendants are allowed to rebut it by a showing of immateriality.[4]

Comcast Corp v. *Behrend* is a class action brought by Comcast customers asserting violations of Sections 1 and 2 of the Sherman Act. The cable company allegedly colluded with competitors to swap customers and obtained a monopoly over the regional cable market. The issue before the Supreme Court is whether the Comcast customers must provide admissible evidence of measurable and quantifiable class-wide damages at the class certification stage. Although *Comcast* has the potential to impact class certification standards significantly, the parties came to a settlement two weeks before the Court granted the petition for certiorari, and thus, the Court could hold that the issue is moot. The Justices seemed split at oral argument, leaving commentators (including ourselves) reluctant to predict the outcome of this case.

B. Reverse Settlements in Patent Cases*: FTC v. Watson Pharmaceuticals, Inc. No. 12-416 (U.S.).*

On December 7, 2012, the Supreme Court granted certiorari in this case, presumably to resolve a circuit split on the issue of whether "reverse settlements" are susceptible to antitrust attack. The FTC has brought several cases over the last decade with the objective of eliminating these settlements, under which a pharmaceutical plaintiff patent-holder pays a defendant generic manufacturer to delay introduction of the generic drug. The Third and Sixth Circuits, as well as the DC Circuit, all have provided support for the FTC's position.

Most recently, in *In re K-Dur Antitrust Litigation*, 686 F.3d 197 (3d Cir. 2012), the Third Circuit adopted a "quick look rule of reason analysis," under which reverse settlements are treated as presumptively unlawful.[5] The Eleventh Circuit, however, had previously rejected the FTC's challenge *to the very same settlement agreement* as the one at issue in the Third Circuit's decision—applying a "scope of the patent" test, which holds that reverse settlement payments are lawful so long as they do not result in a term of exclusion beyond the one provided by the patent itself.[6] The Second and Federal Circuits also have rejected challenges to reverse settlements and declined to adopt the "presumptively unlawful" standard favored by the FTC and DOJ.[7]

In *FTC* v. *Watson*, the Eleventh Circuit remained true to its earlier position and rejected the FTC's challenge to a reverse settlement agreement between Solvay Pharmaceuticals and two generic drug manufacturers—Watson Pharmaceuticals and Paddock Laboratories. The court

[4] The Ninth Circuit rejected this position in its opinion. 660 F.3d at 1172.

[5] The Supreme Court is holding the defendants' petition for certiorari in this case pending its decision in *FTC* v. *Watson Pharmaceuticals*.

[6] *Schering-Plough Corp.* v. *FTC*, 402 F.3d 1056, 1076 (11th Cir. 2005).

[7] *See generally* Aidan Synnott & William B. Michael, *Federal Trade Commission Suffers Another Setback in Its Campaign to End Pharmaceutical "Reverse Settlement" Agreements*, 6(2) CPI ANTITRUST CHRON. (2012), *available at* https://www.competitionpolicyinternational.com/file/view/6712; Paul, Weiss, Rifkind, Wharton & Garrison LLP, Client Memorandum, *Third Circuit Holds that "Reverse Settlement" Payments are* Prima Facie *Evidence of an Antitrust Violation, Widening Circuit Split* (July 19, 2012), *available at* http://www.paulweiss.com/media/1081418/19-jul-12.pdf.

again applied the "scope of the patent" test, holding that the settlement was not unlawful because its "anticompetitive effects [fell] within the scope of the exclusionary potential of the patent."[8]

The FTC has warned that if the practice of reverse settlement payments is allowed to continue, consumers will lose billions of dollars each year.[9] Those in favor of these settlements have argued that without them, generic drug manufacturers will face the more onerous hurdle of litigation before entering the market and, as a result, the market will be less competitive. So long as the Court announces a clear rule of law to apply to reverse settlements, it will at least eliminate the incentive for forum shopping created by the prevailing circuit split and will hopefully provide more certainty to pharmaceutical companies impacted by this issue. Oral argument is set for March 25, 2013.

C. Class Arbitration: *Am. Express Co. v. Italian Colors Restaurant, No. 12-133 (U.S.).*

On November 9, 2012, the Supreme Court granted certiorari in this case, which presents the issue of whether courts can invoke federal substantive law on arbitrability to invalidate arbitration agreements that contain a waiver of class arbitration of federal law claims. The plaintiffs are a class of retail businesses who brought suit against American Express for antitrust violations stemming from their "Honor All Cards" policy, which they alleged constituted an unlawful tying arrangement that creates "an upward spiral in interchange fees without the downward price competition that normally exists in competitive markets."[10] The plaintiffs each signed agreements with American Express agreeing to bilateral arbitration but waiving class arbitration. When American Express moved to compel arbitration of plaintiffs' claims, however, plaintiffs objected on the grounds that the class arbitration waiver precluded them from being able to effectively vindicate their federal statutory rights.

The Second Circuit agreed with the plaintiffs, holding the waivers unenforceable so long as they could show that "'the cost of . . . individually arbitrating their dispute . . . would be prohibitive.'"[11] Because the agreements at issue "preclude[d] the spreading of costs among claimants even in separate arbitrations" and prohibited sharing information about the arbitration proceedings, the Second Circuit held that the agreements essentially would "grant [American Express] 'de facto immunity' from federal antitrust law."[12]

This case seems to pit policy objectives against one another. On the one hand, the Court would theoretically be inclined to rely on the traditional presumption in favor of arbitration. On the other hand, there is a well-established rule that courts cannot force parties to arbitrate claims they did not agree to arbitrate, and the Court has emphasized that a main policy goal of the FAA

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[8] *See FTC* v. *Watson Pharmaceuticals, Inc.*, 677 F.3d 1298, 1312 (11th Cir. 2012).

[9] *See generally* FTC Staff Study, "Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions" (Jan. 2010), *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

[10] Respondents' Brief in Opposition 4, *Am. Express Co.* v. *Italian Colors Restaurant*, No. 12-133 (U.S.), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/10/12-133-Amex-Opp-FINAL1.pdf.

[11] Petition for a Writ of Certiorari 12, *Am. Express Co.* (quoting *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 217 (2d Cir. 2012)), *available at* http://sblog.s3.amazonaws.com/wp-content/uploads/2012/09/12-133-American-Express-cert-petition.pdf.

[12] Respondents' Brief in Opposition, *supra* note 10, at 1, 5.

is to enforce the terms of arbitration agreements. Given the Court's recent decision in *AT&T Mobility LLC* v. *Concepcion*, 131 S. Ct. 1740 (2011), in which a divided Court held that the FAA preempts state laws that invalidate waivers of class arbitration, a reasonable prediction is that the Court will be divided yet again. As of this writing, the parties have not yet completed merits briefing, and argument is set for February 27, 2013.

D. Market-Share Discounts: *ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012).*

The central issue presented by *ZF Meritor* v. *Eaton Corp.* is whether, and in what circumstances, a single-product market-share discount agreement can violate the antitrust laws even when the seller's discounted prices do not fall below cost.

ZF Meritor involved a competitor's challenge to long-term contracts between Eaton, the leading supplier of heavy duty truck transmissions, and the original equipment manufacturers who purchase those transmissions. Following a jury trial, at which Eaton's conduct was found to violate the antitrust laws, the district court held that Eaton's contracts were properly analyzed under the rule of reason and denied Eaton's renewed motion for judgment as a matter of law.

The Third Circuit affirmed that denial and rejected Eaton's argument that the price-cost test should have applied. The Third Circuit agreed that "above-cost discounting or rebate programs, which condition the discounts or rebates on the customer's purchasing of a specified volume or a specified percentage of its requirements from the seller," generally are not anticompetitive.[13] The court also agreed that if plaintiffs' challenge were based solely on Eaton's pricing practices, the fact that Eaton's prices never fell below its costs would be dispositive. Nevertheless, the Third Circuit held that, based on the facts presented at trial, a jury properly could find that Eaton's contracts—which included other, non-price related provisions that plaintiffs challenged at trial—"improperly foreclosed a substantial share of the market, and thereby harmed competition."[14]

In its petition for rehearing *en banc*, Eaton argued that the Third Circuit's decision conflicted with the Eighth Circuit's decision in *Concord Boat Corp.* v. *Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000),[15] where the Eighth Circuit found that Brunswick's market-share discounts did not violate the antitrust laws. The Third Circuit did not disagree with the holding of *Concord Boat*, but distinguished that case on its facts—noting that there, "price [was] the clearly predominant mechanism of exclusion," whereas Eaton's contracts involved other potentially exclusionary mechanisms.[16]

En banc rehearing was denied, and barring any extensions, Eaton's time to petition for certiorari expires January 24, 2013.

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[13] *ZF Meritor*, 696 F.3d at 275.

[14] *Id.* at 265, 269.

[15] *See also Southeast Mo. Hosp.* v. *C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011). The Ninth Circuit has once approved of market-share discounts and once disapproved of them, holding that the key fact was whether the defendant had effectively "foreclose[d] competition in a substantial share of the line of commerce affected." *Allied Orthopedic Appliances Inc.* v. *Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010).

[16] *ZF Meritor*, 696 F.3d at 275.

E. Agency Pricing*: United States v. Apple Inc., No. 1:12-cv-02826 (DLC) (S.D.N.Y.), No. 12-4017 (2d Cir.).*

On September 6, 2012, Judge Cote approved a controversial settlement in the DOJ's Apple e-books case, though it applied to only three of the six publisher defendants and did not apply to Apple itself. The settlement disposes of claims against Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. that they entered into a conspiracy with Apple to raise the price of e-books and to limit competition among e-book retailers such as Amazon and Apple's iTunes.[17] The scheme allegedly was effected by "Agency Agreements," under which Apple provided the publishers with the power to set retail prices in exchange for a most favored nations clause providing that the publishers would raise prices for all other retailers at least as much. The settlement requires the three settling publishers to allow e-book retailers to set prices for two years without any interference and to void their Agency Agreements with Apple and other e-book retailers.

Although there was speculation that Apple might appeal from Judge Cote's approval of the settlement, it now appears that Apple will not file an appeal.[18] The non-settling defendants are moving forward with discovery, with the exception of Penguin Group (USA), Inc. and The Penguin Group, which have agreed to a settlement. The Penguin settlement being substantially similar to the one Judge Cote has already preliminarily approved, it would seem likely that she will approve this one as well. One could reasonably speculate that the remaining publisher defendant—Macmillan—may be soon to follow, but Apple could be in it for the long haul, or at least through discovery. Trial is set to begin June 3, 2013.

F. Private Equity "Club Deals"*: Klein v. Bain Capital Partners, LLC, No. 1:07-cv-12388 (D. Mass.); Dahl v. Bain Capital Partners, LLC, No. 1:08-cv-10254 (D. Mass.) (related case).*

These consolidated cases are putative class actions brought by former shareholders of acquired companies against eleven private equity firms that entered into "club deals," allegedly artificially suppressing prices and "allocat[ing] deal outcomes" for 19 LBOs between 2003 and 2007, "depriving shareholders of billions of dollars."[19] Due to the sheer number of deals and the high-profile defendants involved, these cases have already caught the eye of many observers. Unfortunately for those observers, many of the substantive filings have been filed under seal.

One recent docket entry that is publicly available is an order from Judge Harrington to be prepared at oral argument to address the legal consequences assuming (1) the plaintiffs are able to "establish one combination, but involving only a limited number of Defendants with respect to a limited number of transactions" and (2) the plaintiffs are able to "establish multiple combinations involving only a limited number of Defendants with respect to a limited number of

[17] The same three publishers have also preliminarily settled claims brought by state attorneys general. *See* Order Preliminarily Approving Proposed Settlement (D.E. #221), *State of Tex.* v. *Hachette Book Grp., Inc.*, No. 12-cv-6625 (S.D.N.Y.).

[18] Apple represented to the Second Circuit that it is not seeking to appeal the Final Judgment in its motion to withdraw from Bob Kohn's appeal.

[19] Fifth Amended Complaint (D.E. #745) ¶¶ 1–32, *Klein* v. *Bain Capital Partners, LLC*, No. 1:07-cv-12388 (D. Mass.).

transactions."[20] One can speculate that Judge Harrington may be inclined to grant summary judgment at least in part, with respect to certain defendants and with respect to a limited number of transactions. Oral argument on the motions for summary judgment took place on December 18 and 19, and the parties are presently waiting for the court's decision.

G. State Action Immunity: *FTC v. Phoebe Putney Health Sys., Inc., No. 11-1160 (U.S.).*

This case involves the scope of state action immunity from federal antitrust laws as applied to a private entity that provides a public service. The FTC had alleged that a private hospital in Dougherty County, Georgia effectively acquired—via a sale and leaseback through the state-authorized local hospital authority—the only other hospital operating in the same county, and thus created an impermissible monopoly. The district court dismissed the complaint, and the Eleventh Circuit affirmed, holding that the state action doctrine covered the merger—and thus, the merger could not be enjoined—because anticompetitive effects were a "foreseeable result" of the Georgia legislature's grant of powers to the hospital authority. Oral argument was held on November 26 in the Supreme Court.

Private actors can be protected by the state action doctrine if their conduct is consistent with a "clearly articulated and affirmatively expressed . . . state policy" and if the state "actively supervise[s]" this conduct.[21] With respect to the first prong of this test, the FTC argued that the Eleventh Circuit had improperly interpreted and applied the "clear articulation" requirement because reliance on "foreseeability" as a proxy could lead to the "serious risk that States will unwittingly confer antitrust exemptions." Instead, the FTC argued, the governing test is whether anticompetitive effects were the "inherent" or "necessary" result of legislation.[22] At oral argument, it seemed evident that the Justices agreed with this position, at least to the extent that a clear articulation of a state's intent to displace competition is necessary for the state to confer antitrust immunity.

Although some had hoped that the Court would use this case as an opportunity to provide some clarity on the second prong of this test (the supervision requirement), Respondents' counsel seemed unable to move the Court past the first prong at oral argument. The Justices provided Respondents' counsel with a number of opportunities to present evidence of a clear articulation but, ultimately, the Court appeared unsatisfied. Accordingly, it seems possible that the Court's opinion will not provide the hoped-for clarity on the supervision requirement and instead will be limited to the facts of this case.

III. REGULATORY ISSUES TO WATCH IN 2013

A. New Leadership at the DOJ

On December 30, 2012, the Senate confirmed William J. Baer as the new Assistant Attorney General for the Antitrust Division of the Department of Justice. President Obama had

[20] Memorandum Order (D.E. #746) 1, *Klein*.

[21] *See Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

[22] *See* Brief for the Petitioner 4–5, 17–19, *FTC* v. *Phoebe Putney Health Sys., Inc.*, No. 11-1160 (U.S.), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-1160_pet.authcheckdam.pdf.

nominated Baer, who was head of Arnold & Porter's antitrust practice group and a former director and advisor in various capacities at the FTC, in February 2012.

Baer has said that his approach to enforcement would not differ significantly from those of his recent predecessors and that the Antitrust Division should continue to focus on "cartel behavior that raises prices or otherwise adversely affects the welfare of consumers; mergers and other forms of consolidation that risk a substantial lessening of competition; and single firm or collusive conduct that suppresses the free market competition to which consumers are entitled."[23]

On Section 2 monopolization actions, Baer has said that the now-withdrawn 2008 Division report on Section 2 accurately interpreted Supreme Court jurisprudence, but he also agreed with the former Assistant Attorney General Christine A. Varney's stance that the report "espoused a more hesitant approach toward enforcement than is warranted by the case law and did not focus sufficiently on the protection of consumer welfare."[24]

B. Increase in Criminal Enforcement at DOJ?

The Antitrust Division generally considers criminal enforcement its most important function. Despite then-Senator Obama's campaign promise to "curb the growth of international cartels" and "ensure that firms . . . that collude to harm American consumers are brought to justice,"[25] the numbers have been mixed.

The first two full fiscal years of the Obama Administration yielded $1.08 billion in fines, slightly less than the $1.31 billion in fines levied during the last two full fiscal years of the Bush Administration.[26] This difference could be attributed to a number of factors and is not necessarily an indication that the Obama Administration backed off criminal enforcement to any meaningful extent. At least one commentator believes that "[i]t is likely that the Division's overall record in cartel enforcement—judged statistically—will be roughly the same as the prior Administration's."[27]

The Division set an all-time record in the 2012 fiscal year alone, collecting $1.1 billion in criminal fines.[28] But nearly half of that total, $500 million, came from the AU Optronics price-fixing sentence, and the Yazaki Corp. plea bargain accounted for another $470 million. One could argue that the Obama Administration has thus narrowed its focus to strongly prosecute the

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[23] Sen. Charles E. Grassley, Questions for the Record, William J. Baer, Nominee, Assistant Attorney General (Antitrust), U.S. Department of Justice, undated, *available at* http://www.judiciary.senate.gov/resources/transcripts/upload/072612QFRs-Baer.pdf.

[24] Sen. Michael S. Lee, Questions for the Record, William J. Baer, Nominee, Assistant Attorney General (Antitrust), U.S. Department of Justice, undated, *available at* http://www.judiciary.senate.gov/resources/transcripts/upload/072612QFRs-Baer.pdf.

[25] Statement of Senator Barack Obama for the American Antitrust Institute, undated, *available at* http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

[26] *See* Dan Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 14–15 (2012), http://www.stanfordlawreview.org/online/obama-antitrust-enforcement. The federal government's fiscal year runs from October 1 to September 30.

[27] *Id.* at 15.

[28] Melissa Lipman, *DOJ Hits Record $1.1B Criminal Antitrust Fines in 2012*, LAW360, Dec. 18, 2012, http://www.law360.com/competition/articles/402588.

worst antitrust violations in order to deter others. Others may argue these two cases were flashes in the pan. Now that the Antitrust Division has its first confirmed chief since August 2011, it remains to be seen what criminal enforcement will look like during the President's second term.

C. The FTC's Google Investigations

On January 3, 2013, the FTC announced that it had concluded its investigations of Google, deciding not to file suit against the company in exchange for certain changes in Google's business practices. The FTC had investigated allegations that Google manipulates search results to favor its own sites and products over those of its competitors. In addition, the Commission investigated whether Google's automated advertising program, AdWords, discriminates against Google competitors. Although the FTC found no antitrust violation arising out of search "preferencing," Google did agree to remove restrictions on the use of AdWords.[29] The FTC chose not to file suit, but Google may still face litigation relating to preferencing, possibly brought by state attorneys general or even the DOJ, now under Baer. Additionally, the EU Commission's investigation into Google's search practices is ongoing.

In addition to preferencing, the FTC was also investigating Google's alleged refusal to license standard essential patents to competitors on fair and reasonable terms. The patents in question govern certain technological standards for smartphones, leading to concerns that Google's alleged refusal could create "anticompetitive bottlenecks" in the smartphone industry.[30] Despite rumors that the Commission was inclined to vote in favor of suing over the patents, it announced on January 3, 2013, that it would not bring suit. Instead, Google agreed to refrain from seeking injunctions against technology companies that sought to use its SEPs.

D. Controversy over the FTC's Section 5 Authority

Some lawmakers suggested that the FTC would have exceeded its authority by bringing suit against Google, and the limits of the FTC's powers continue to be controversial. At issue is whether the Commission has the power to pursue a broader range of enforcement actions against perceived anticompetitive conduct under Section 5 of the Federal Trade Commission Act than would satisfy the more demanding antitrust-specific standards of Section 2 of the Sherman Act.

In November, Republican Senator Jim DeMint (South Carolina) and nine other Republican senators sent a letter to FTC Chairman Jon Leibowitz expressing concern over the Commission's "apparent eagerness . . . to expand Section 5 actions without a clear indication of authority or a limiting principle."[31] Of particular concern to the senators was "[t]he potential use of such uncertain authority against businesses in the rapidly evolving technology industry." The letter purported to take "no position regarding the merits of any matter currently under

[29] Press Release, Federal Trade Commission, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns In the Markets for Devices Like Smart Phones, Games and Tables, and in Online Search (January 3, 2013), *available at* http://www.ftc.gov/opa/2013/01/google.shtm.

[30] Steve Lohr, *Widening Scrutiny of Google's Smartphone Patents*, N.Y. TIMES, Oct. 9, 2012, http://www.nytimes.com/2012/10/10/technology/widening-scrutiny-of-googles-smartphone-patents.html.

[31] Letter from Sen. Jim DeMint to Hon. Jon Leibowitz, FTC Chairman (Nov. 15, 2012), *available at* http://www.demint.senate.gov/public/?a=Files.Serve&File_id=c1baf341-468e-4eb5-b6f3-881c383099b4. Senator DeMint subsequently announced his retirement from the Senate effective January 2013.

investigation by the Commission," but it seems clear that Senator DeMint had the Google investigations in mind.

Concerns about the FTC's jurisdiction are not limited to one political party. Democratic Senator Ron Wyden of Oregon sent his own letter to the FTC shortly after Senator DeMint's in which he openly criticized the FTC's investigation of Google.[32] Senator Wyden called the perceived expansion of the Commission's authority under Section 5 "troubling." He also said that government intervention was unnecessary to ensure competition among online search providers, and he rebuked the FTC for apparently leaking confidential details of the investigation to the press. Two Democratic members of the House of Representatives sent a letter to the Commissioners around the same time saying, "massive expansion of FTC jurisdiction [under Section 5] would be unwarranted, unwise, and likely have negative implications for our nation's economy."[33]

The proper scope of the FTC's Section 5 authority is a controversial issue within the Commission as well. Joshua D. Wright, whom the Senate confirmed as the FTC's newest appointee on January 1, 2013, has asserted, "[e]mploying Section 5 of the Federal Trade Commission Act to evade Section 2 monopolization law is not a legitimate use of Section 5."[34] Former Commissioner Thomas Rosch, whom Wright is replacing, held a more expansive view of the Commission's Section 5 authority, advocating for its use as a "gap-filler."[35] In light of this shift in leadership and the bipartisan political opposition to an expansive interpretation of Section 5, it remains uncertain whether or to what extent the FTC will seek to test the limits of its Section 5 power in the future.

E. Two New Commissioners?

The FTC will see at least one new Commissioner in 2013, and possibly two. As noted above, the Senate has confirmed Joshua D. Wright, a professor at the George Mason University School of Law, as a replacement for departing Commissioner Rosch. In addition to his comments disapproving a broad application of Section 5, Wright has criticized regulatory intervention in mergers on a number of occasions.

In a written opening statement at Wright's confirmation hearing, Chairman of the Senate Committee on Commerce, Science, and Transportation Jay Rockefeller expressed concern that Wright seemed to believe that "market forces can solve almost any consumer protection problem," a notion that Rockefeller criticized as having been formulated in "the academic ivory tower." Senator Rockefeller said that in the "real world," Wright would have to "enforce the law

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[32] Letter from Sen. Ron Wyden to Hon. Jon Leibowitz, FTC Chairman (Nov. 26, 2012), *available at* http://www.wyden.senate.gov/download/wyden-letter-to-ftc-re-google.

[33] *See Reps. Anna Eshoo, Zoe Lofgren Say Google Should Not Be Accused of "Unfair" Acts*, REUTERS, Nov. 19, 2012, *available at* http://www.huffingtonpost.com/2012/11/19/anna-eshoo-zoe-lofgren-google_n_2160994.html.

[34] Joshua Wright, *The Case Against the FTC's Section 5 Case Against Intel*, TECH. ACADS. POL'Y, Jan. 11, 2012, http://www.techpolicy.com/Blog/January-2010/The-Case-Against-the-FTC-s-Section-5-Case-Against-.aspx.

[35] *See generally* J. Thomas Rosch, Commissioner, Federal Trade Commission, The FTC's Section 5 Hearings: New Standards for Unilateral Conduct? (Mar. 25, 2009), *available at* http://www.ftc.gov/speeches/rosch/090325abaspring.pdf (arguing for a "reinvigoration of the use of Section 5 of the FTC Act[]").

as it is written, not as he theorizes it should be."[36] During the hearings, Senator Barbara Boxer (California) also pointed out that some of Wright's writings suggested he "doubt[ed] the FTC's mission."[37] Wright replied that he supported the Commission's goal of protecting consumers.

Notably, Wright has widely reported connections to Google. For example, Wright is Director of Research at the International Center for Law and Economics, which receives funding from Google. He is also the co-author of an article titled *Google and the Limits of Antitrust: The Case Against the Case Against Google*. Due to these connections, Wright promised that he would recuse himself from any matter involving Google for two years.[38] Now that the FTC has concluded its investigations into Google's search application and SEPs, there may be no need for Wright to recuse himself.

President Obama may soon be nominating another new Commissioner. Although he has made no public announcement yet, Chairman Jon Leibowitz is rumored to be leaving the FTC in the near future. Leibowitz is a Democrat, making it virtually certain that the president would nominate another Democrat to fill the vacancy.

[36] Statement of Sen. John D. Rockefeller IV, Nominations Hearing, Dec. 4, 2012, *available at* http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=7b901434-8d5d-43a2-bf82-bcf1f18c758c&Statement_id=81cfb59e-e336-4cfd-aa93-da6e1647a543&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a&MonthDisplay=12&YearDisplay=2012.

[37] Diane Bartz, *FTC Nominee Says to Recuse Himself on Google Issues for Two Years*, REUTERS, Dec. 4, 2012, http://www.reuters.com/article/2012/12/04/us-usa-politics-fcc-ftc-idUSBRE8B30U220121204.

[38] *Id.*