

Equilibrating Tendencies in Competition Law: Implications for European Reforms

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Europe is where it's at

- Elevator and Escalator Cartel: € 992 million
- Gas Insulated Switchgear € 750 million
- Rubber cartel: € 519 million
- Private enforcement
- non-horizontal guidelines
- revised leniency policy
- UK criminal enforcement
- Draft remedies guidelines

Agenda

- Introduction: Supreme Court Oral Arguments
- Equilibrating Tendencies
- Lessons for Europe and Multi-Jurisdiction Antitrust Enforcement

This Term's U.S. S. Ct. Competition Cases

- KSR Int'l Co. v. Teleflex Inc. (Apr. 3, 2007)
- Leegin Creative Leather Products, Inc. v. PSKS, Inc. (pending)[skip for now]
- Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. (Feb. 20, 2007)
- Bell Atlantic Corp. v. Twombly (May 21, 2007)
- Credit Suisse First Boston v. Billing (pending)

US Law is Different Because of Private Litigation

- Summary judgment/motions to dismiss
- RPM
- Proof of Agreement
- Predatory Pricing
- Standing
- Jurisdiction
- Exemptions
- expert witnesses

The *Monsanto* Story: I

- Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)
- Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988)
- State Oil Co. v. Khan, 522 U.S. 3 (1997)
- Leegin Creative Leather Products, Inc. v. PSKS, Inc. (pending)

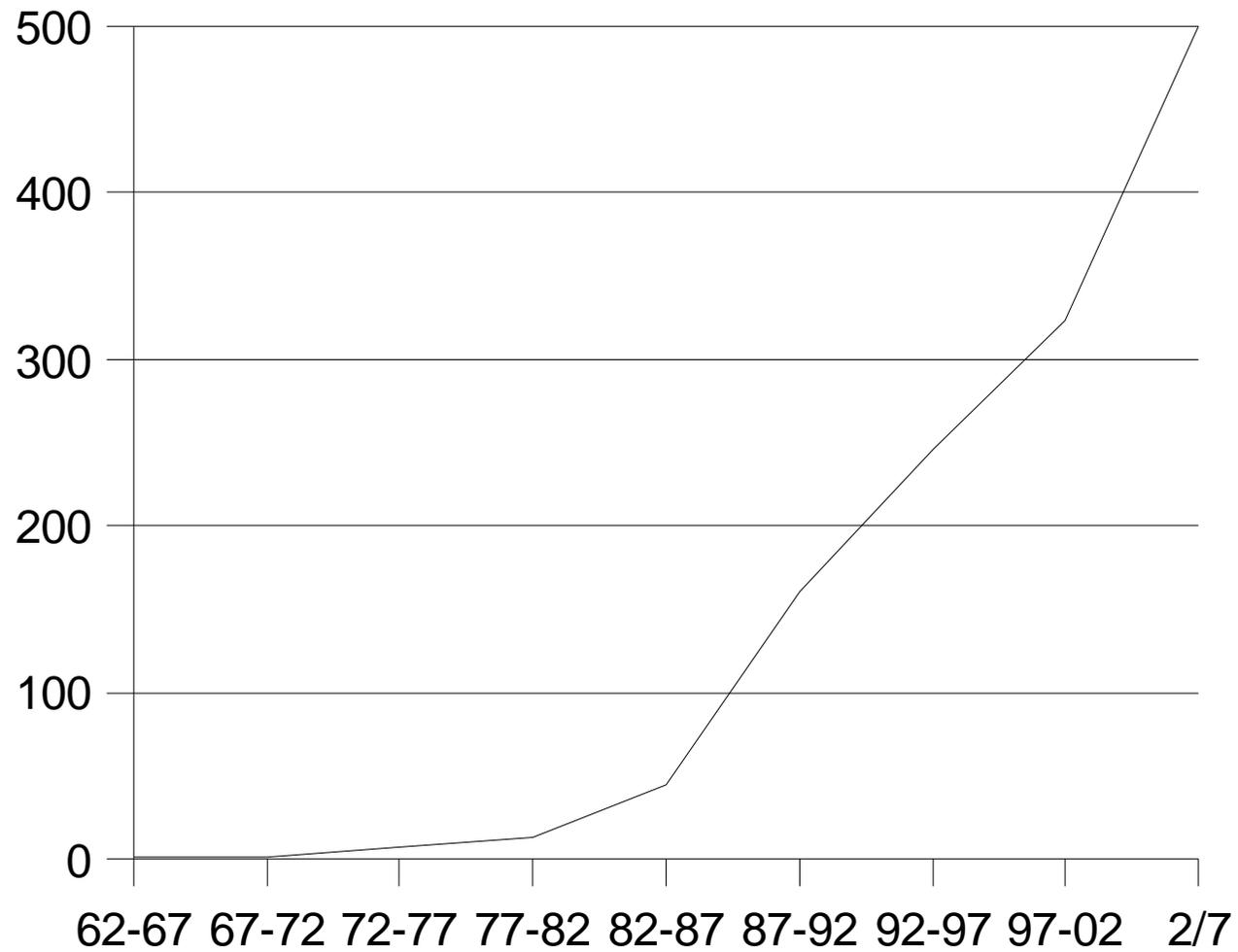
The *Monsanto* Story: II

- *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)
- *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)
- *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)
- *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004)
- *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.* (Feb. 20, 2007)
- Antitrust Modernization Commission

The *Monsanto* Story: III

- Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)
- Bell Atlantic Corp. v. Twombly (May 21, 2007)

“False Positives” in Court Opinions



Multi-jurisdictional Antitrust Enforcement

- Deterrence
- Equilibrating tendencies like it or not
- Principal enforcer liberated
 - DOJ and RP
 - Self-help
- Principal enforcer constrained (the rule of law)
- Principal enforcer's loss of control
 - compare *GTE Sylvania* and FTC Act 13(b)

Multi-jurisdictional Antitrust Enforcement (cont)

- Divergent views and approaches (good or bad?)
 - Merger litigation strategy
 - States and RPM
 - RP: FTC and private; now just private

Recent “Real” S Ct Antitrust Cases

- Credit Suisse First Boston v. Billing (pending)
- Leegin Creative Leather Products, Inc. v. PSKS, Inc. (pending)
- Bell Atlantic Corp. v. Twombly (May 21, 2007)
- Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. (Feb. 20, 2007)
- Illinois Tool Works, Inc. v. Independent Ink, Inc. (2006)
- Texaco, Inc. v. Dagher (2006)

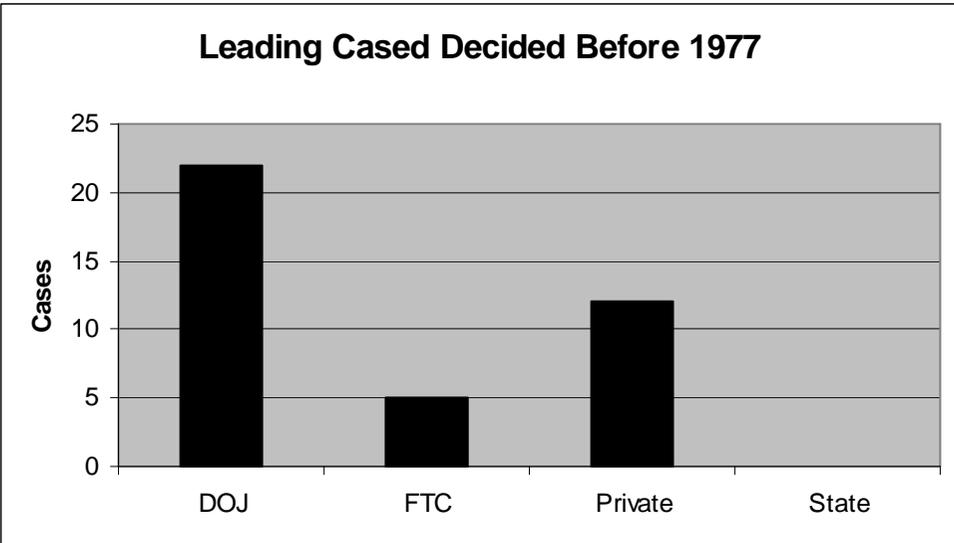
Recent “Real” S Ct Antitrust Cases (cont)

- Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. (2006)
- F. Hoffman-La Roche Ltd. v. Empagran S.A. (2004)
- Verizon Communications Inc. v. Law Offices of Curtis V. Trinko (2004)
- California Dental Ass’n v. FTC (1999)
- NYNEX Corp. v. Discon, Inc. (1998)

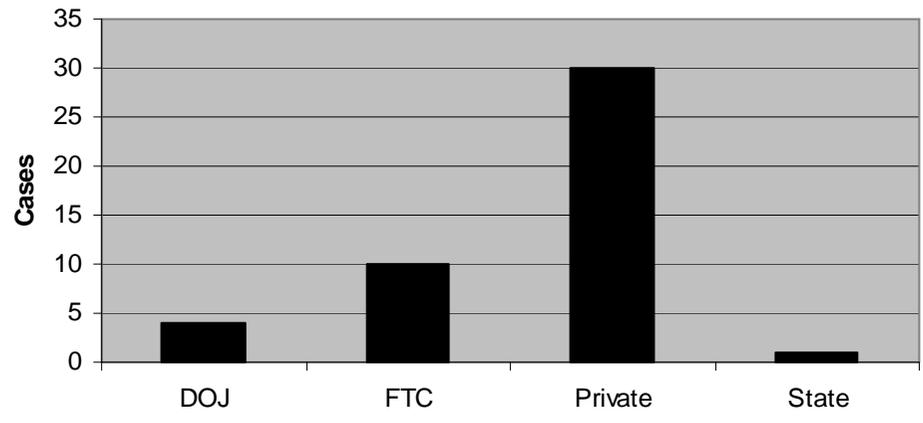
Yet More Recent “Real” S Ct Antitrust Cases

- State Oil v. Khan (1997)
- Brown v. Pro Football, Inc. (1996)
- Hartford Fire Insurance Co. v. California (1993)
- Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. (1993)
- Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. (1993)
- Spectrum Sports, Inc. v. McQuillan (1993)

Leading Cases Decided Before 1977



Leading Cases Decided 1977 and After



Not Counting

- Credit Suisse First Boston v. Billing (pending)
- Leegin Creative Leather Products, Inc. v. PSKS, Inc. (pending)
- Bell Atlantic Corp. v. Twombly (May 21, 2007)
- Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. (Feb. 20, 2007)
- Illinois Tool Works, Inc. v. Independent Ink, Inc. (2006)
- Texaco, Inc. v. Dagher (2006)

And also not counting

- Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. (2006)
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- Verizon Communications Inc. v. Law Offices of Curtis V. Trinko (2004)

Lessons for Multi-jurisdictional Antitrust Enforcement

- Remember equilibrating tendencies: a “win” today may be a loss tomorrow
- Work on process
- Beware of excess
- Collect data: courts should base decisions on facts, not folklore
- Think about diversity as a vice or a virtue
- Benefit from diverse bars

Diverse Bars

- ABA
 - Comments; resource
 - Spring Meeting; cf. Valassis Communications, Inc. (March 14, 2006); Antitrust Modernization Commission
- AAI
- State bars/National bars

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