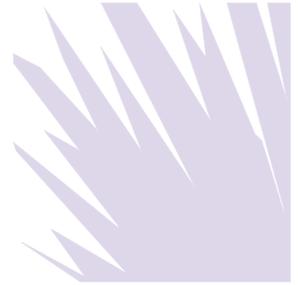


## Changing the Way We Try Merger Cases

J. Thomas Rosch



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# CHANGING THE WAY WE TRY MERGER CASES

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I was sworn in as a FTC Commissioner at the beginning of 2006. Just before that time the Antitrust Division had lost a number of merger cases that it felt it should have won.<sup>1</sup> Similarly, the Commission had lost a number of merger cases it thought it should have won.<sup>2</sup> Moreover, the Agencies had not won a single hospital merger case in nearly a decade.<sup>3</sup> Not surprisingly, then, the staffs of both Agencies were somewhat dazed and gun shy about trying merger cases.

As a career trial lawyer, I had faced some of the best plaintiffs' lawyers in the country. For example, they include Mike Khourie in *England v. Chrysler Corp.*,<sup>4</sup> *Jenkins v. Gray Line*, and *Polaris Enterprises, Inc. v. United States Golf Association*,<sup>5</sup> a non-merger case; Joe Alioto, Jr. in *Ringsby v. Trucking Employers, Inc.*,<sup>6</sup> who was joined by Dan Shulman in *Reilly v. Hearst Corp.*, a merger case involving the *San Francisco Chronicle* and the *San Francisco Examiner*,<sup>7</sup> and Fred Furth in numerous cartel cases against Continental Can in the 1980s. I figured we at the Commission could learn a lot from them. On the other hand, I had faced a number of plaintiffs' lawyers who weren't so skilled. I think, for example, of the plaintiffs' lawyers in the *Brand Name Prescription Drugs* case, which we tried to a Chicago jury for eight weeks in the late 1990s;<sup>8</sup> and of most (not all) of the Justice Department team in the *Oracle* case, which we tried to Judge Walker in 2004.<sup>9</sup> I figured I could learn from their mistakes how *not* to try an antitrust case.<sup>10</sup>

\* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Henry Su, for his invaluable assistance in preparing this paper. (I served as FTC Commissioner from 2006 - 2013.)

- 1 See *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172 (D.D.C. 2001); *United States v. Engelhard Corp.*, 970 F. Supp. 1463 (M.D. Ga.), *aff'd*, 126 F.3d 1302 (11th Cir. 1997).
- 2 See *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. H.J. Heinz Co.*, 116 F. Supp. 2d 190 (D.D.C. 2000), *rev'd*, 246 F.3d 708 (D.C. Cir. 2001).
- 3 See *FTC v. Tenet Healthcare Corp.*, 186 F.3d 1045 (8th Cir. 1999), *rev'd* 17 F. Supp. 2d 937 (E.D. Mo. 1998); *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121 (E.D.N.Y. 1997); *FTC v. Butterworth Health Corp.*, 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (unpublished per curiam decision at No. 96-2440, 1997 U.S. App. LEXIS 17422); *United States v. Mercy Health Servs.*, 902 F. Supp. 968 (N.D. Iowa 1995), *vacated as moot*, 107 F.3d 632 (8th Cir. 1997); *FTC v. Freeman Hosp.*, 911 F. Supp. 1213 (W.D. Mo.), *aff'd*, 69 F.3d 260 (8th Cir. 1995); *FTC v. Univ. Health, Inc.*, No. CV-191-052, 1991 U.S. Dist. LEXIS 19299 (S.D. Ga. Apr. 11, 1991).
- 4 493 F.2d 269 (9th Cir. 1974).
- 5 No. C-78-1320-RHS, 1984 U.S. Dist. LEXIS 21475 (N.D. Cal. Dec. 5, 1984).
- 6 760 F.2d 276 (9th Cir. 1985).
- 7 107 F. Supp. 2d 1192 (N.D. Cal. 2000).
- 8 *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94-C-897, 1999 U.S. Dist. LEXIS 550 (N.D. Ill.), *aff'd in part & rev'd in part*, 186 F.3d 781 (7th Cir. 1999).
- 9 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).
- 10 See generally J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Lessons Learned from *United States v. Oracle Corp.*, Remarks Before the Antitrust in the High Tech Sector: Mergers, Enforcement and Standardization Conference (Jan. 31, 2012), <http://www.ftc.gov/speeches/rosch/120131oraclelessons.pdf>; J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Can Antitrust Trial Skills Really Be "Mastered"? Tales out of School About How to Try (or Not to Try) an Antitrust Case, Remarks Before the ABA Section of Antitrust Law Antitrust Masters Course (Sept. 30, 2010), <http://www.ftc.gov/speeches/rosch/100930roschmasterscourseremarks.pdf>.

So I tried to rectify things once I joined the Commission as a Commissioner. At first, I ran into some resistance from the staff. I was told, for example, that they'd "outlast" me. Maybe so, but that did not mean they were trying merger cases the right way. And they weren't. They were relying for the most part on customer and competitor testimony to make their cases. That was understandable. That is what they had been taught to do, and old habits die hard.<sup>11</sup>

But that wasn't what I had learned from the A-plus plaintiffs' trial lawyers. In fact, when the lead lawyer for the Antitrust Division in the *Oracle* case told Judge Walker that his best witnesses were the customer witnesses,<sup>12</sup> I was pretty sure we had that case won because that wasn't how the A-plus lawyers tried their cases. Judge Walker has subsequently confirmed my litigation instincts in his post-mortem discussions of the customer testimony.<sup>13</sup>

## I.

The best plaintiffs' lawyers try their cases by describing succinctly but distinctly how the transaction or practice they were challenging was anticompetitive. I call that "describing the story line" of the case.<sup>14</sup> There are numerous advantages to doing that. Most importantly, it focuses the court or jury on something they could understand,<sup>15</sup> instead of on esoteric, econometric formulae that lay judges and juries (including me) are not so likely to comprehend,<sup>16</sup> or on the speculation by third-party witnesses about whether the transaction would lead to a small but significant, non-transitory increase in price (SSNIP).<sup>17</sup> Beyond that, if the merger had already been consummated, it means that

11 See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.2.2 (2010) (continuing to describe customers as a potential source of "highly relevant" and "valuable" information), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf> [hereinafter MERGER GUIDELINES].

12 See *Oracle Corp.*, 331 F. Supp. 2d at 1125–33.

13 See Vaughn R. Walker, *Merger Trials: Looking for the Third Dimension*, COMPETITION POL'Y INT'L, Spring 2009, at 35, 45 ("Apart from the rehearsed character and monotony of these witnesses' testimony, the most striking feature or image the testimony conveyed was that it was at odds with the basic premise of the government's case.") [hereinafter *Merger Trials*]; Vaughn R. Walker, *Search for a Competition Metric: The Role of Testimony from Customers, Competitors and Economists*, 2 COMPETITION L. INT'L 3, 3–5 (2006) (describing several shortcomings of customer testimony, including litigation-inspired perspective, selection bias, and competency issues) [hereinafter *Competition Metric*]. See also *Oracle Corp.*, 331 F. Supp. 2d at 1131, 1158–59.

14 Mike Tigar refers to this as the "primacy of story." MICHAEL E. TIGAR, PERSUASION: THE LITIGATOR'S ART 6–8 (1999).

15 See John D. Bates, *Customer Testimony of Anticompetitive Effects in Merger Litigation*, 2005 COLUM. BUS. L. REV. 279, 289 (2005) ("[T]he challenge of the advocate is to take the complicated issues and explain or present them in a clear fashion to someone who, in all probability, is not an expert in the field."); *Interview: Judge William W. Schwarzer, Northern District of California*, 2 ANTITRUST, Fall 1987, at 32, 32 ("The burden is on the lawyers to teach the trier of fact and to present the case so that it can be understood.")

16 See Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. ECON. PERSPECTIVES 91, 96 (1999) ("Econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all the criticisms of an econometric study, no matter how skillful the econometrician is in explaining a study to a lay audience." (citing Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048 (1985))).

17 See *Oracle Corp.*, 331 F. Supp. 2d at 1131 ("Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. There was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle."); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 145–46 (D.D.C. 2004) ("Furthermore, while the court does not doubt the sincerity of the anxiety expressed by SPRB customers, the substance of the concern articulated by the customers is little more than a truism of economics: a decrease in the number of suppliers may lead to a decrease in the level of competition in the market. Customers do not, of course, have the expertise to state what will happen in the SPRB market, and none have attempted to do so."). See also Bates, *supra* note 15, at 286 (pointing out that the fundamental problem with customer testimony is not that the testimony is subjective, or being used to prove anticompetitive effects, but that customers are not competent to testify about something of which they have no personal knowledge—namely, a prediction or projection of the likely effects of a merger that they have never had an occasion (outside of litigation) to make); Walker, *Competition Metric*, *supra* note 13, at 3–4 (explaining that customer testimony about their likely reactions to a post-merger price increase amounts to "unsubstantiated conjecture" because customers are really testifying about their "preferences established in the premerger landscape" rather than what they could do in response to anticompetitive price increase).

the trier of fact doesn't have to speculate about what would have happened because it has already happened.<sup>18</sup>

Additionally, the story line approach means that we can more flexibly consider a broad range of effects to be anticompetitive effects. For example, we are used to being told by economists that if pricing is opaque, then we cannot consider higher prices to be a coordinated effect of the transaction or practice.<sup>19</sup> For one thing, this isn't even accurate because there are many practices short of price-fixing (as, for example, the allocation of customers or territories) that have the same effect as monitoring and coordinating prices.<sup>20</sup> In any event, economists tend to focus on elevated prices both because neoclassical economics focuses largely on prices,<sup>21</sup> and because prices are more easily measurable than non-price dimensions of competition like quality, variety, and consumer choice.<sup>22</sup> If we analyze the transaction or practice by reference to the transaction's or practice's anticompetitive effects, whatever they may be, we are not so apt to be imprisoned by price theory.

Finally, we can consider both coordinated effects and unilateral effects to be anticompetitive effects of the transaction or practice. Traditionally, merger analysis has tended to treat the two as entirely separate theories of liability.<sup>23</sup> A unilateral effects theory more often than not involves proof that the products (or services) of the acquired and acquiring firms are each other's closest substitutes such that a diversion of sales from the B side to the A side is likely to make a post-merger price increase profitable.<sup>24</sup> A coordinated effects theory more often than not involves proof that the transaction is likely to further concentrate an already concentrated market that is vulnerable to coordinated conduct.<sup>25</sup> But, as we have learned from bitter experience, there are cases in which our proof of unilateral effects may be found wanting so that we must rely, in the alternative, on proof of coordinated effects.<sup>26</sup> So I have suggested that almost every merger case be pleaded as both a unilateral effects and a coordinated effects case (since most unilateral effects cases involve highly concentrated markets too).

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- 18 See *Polypore Int'l, Inc.*, No. 9327, 2010 FTC LEXIS 96, at \*9 (Dec. 13, 2010) (Rosch, Comm'r, concurring) (“Evidence about what actually happened following the transaction may, in other words, reduce the need to employ economic theories in order to predict the relevant market or what is likely to happen—in particular, the SSNIP test described in the Horizontal Merger Guidelines. Put differently, economic theory is not a substitute for, or superior to, the empirical evidence about whether the transaction has actually resulted in anticompetitive effects.”), available at <http://www.ftc.gov/os/adjpro/d9327/101213polyporeconcurringopinion.pdf>; *Evanston Nw. Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at \*255-56 (Aug. 7, 2007) (Rosch, Comm'r, concurring) (“We can look to see if there is any probative post-merger evidence that demonstrates whether or not the merger has been anticompetitive. We do not need to try to predict the future as would be necessary to analyze an unconsumed merger proposal.”), available at <http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf>.
- 19 See, e.g., David T. Scheffman & Mary Coleman, *Quantitative Analyses of Potential Competitive Effects from a Merger*, 12 GEO. MASON L. REV. 319, 337 (2003) (“While negotiated pricing does not mean that coordination of pricing (or customer allocation) is impossible, if prices are not transparent reaching an agreement is more difficult. In addition, if prices are opaque, detection of cheating (at least with respect to price) will not be possible.”).
- 20 MERGER GUIDELINES, *supra* note 11, § 7.2 (“Even if terms of dealing are not transparent, transparency regarding the identities of the firms serving particular customers can give rise to coordination, e.g., through customer or territorial allocation.”); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 64-66 (D.D.C. 2005) (noting that pricing is not the only type of “key information” that can be used to facilitate coordination, and that a mature market with “little room for growth” may supply conditions that “can lead to even greater stabilization of market share and greater segmentation of the market, thus increasing the incentives and lowering the impediments to tacit coordination”).
- 21 See, e.g., Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CALIF. L. REV. 3, 27 (1984); Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293, 330 (1992); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 932 (1979).
- 22 See generally J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *The Next Challenges for Antitrust Economists*, Remarks at the NERA 2010 Antitrust & Trade Regulation Seminar (July 8, 2010), <http://www.ftc.gov/speeches/rosch/100708neraspeech.pdf>. Professor Thomas Sullivan has suggested, however, that nonprice factors can be taken into account through their impact on output, which is measurable. E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U. PITT. L. REV. 771, 800 (1984).
- 23 See, e.g., Thomas O. Barnett, *Substantial Lessening of Competition – The Section 7 Standard*, 2005 COLUM. BUS. L. REV. 293, 298 (2005) (“In the taxonomy of the antitrust kingdom, we divide the genus of anticompetitive effects into two basic species: unilateral effects and coordinated effects.”).
- 24 MERGER GUIDELINES, *supra* note 11, § 6.1.
- 25 *Id.* § 7.1.
- 26 *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60-67, 67-72 (D.D.C. 2009).

The sources of a story line are too numerous to mention, but the staff has looked chiefly to the following possible sources. First, it may be based on the parties' 4(c) submissions. (For the uninitiated, "4(c) documents" are supposed to be provided to the Agencies as part of the materials that the merging parties submit pursuant to the Hart-Scott-Rodino Act,<sup>27</sup> and they are supposed to include all documents authored by, or submitted to, any director or officer of the parties describing any purpose of the transaction or the market in which the parties' goods or services compete.)<sup>28</sup>

Second, the story line may be based on the writings of representatives of the parties, including their email,<sup>29</sup> whether or not the writing is sworn or is a 4(c) document.<sup>30</sup> Third, it may be based on the admissions or statements against interest<sup>31</sup> made by a representative of a party during a deposition (we call it an investigational hearing).<sup>32</sup> Again, for those not familiar with an investigational hearing, it is like a deposition except there may be a second Commission attorney present who keeps the deponent on the "straight and narrow" and who, not surprisingly, generally sides with the Commission attorney who is asking the questions.<sup>33</sup> Fourth, the story line may be based on the conduct of the parties such as the payment of a seemingly exorbitant amount to make the acquisition, or the payment of a high breakup fee, or the implementation of a "fix" before the transaction that evidences a concern about the antitrust merits of the transaction.<sup>34</sup>

Sometimes, of course, the "story line" just falls out of the sky or out of the mouth of a CEO or Chairman of a party during trial. I once had that happen to me. My chairman witness (unnecessarily) confessed to perjury when he was being cross-examined by Joe Alioto Jr. But that doesn't happen very often, which is why football coaches generally "script" their opening plays ahead of time. Or sometimes, a "story line" gets pre-empted. The best at that was Mike Khourie. He once told a jury during opening statements that when I got up I'd say "such and such," and a juror nodded disapprovingly. Sure enough, when I gave my opening statement, I said "such and such" almost word for word.

## II.

The best plaintiffs' antitrust lawyers are adept at telling the anticompetitive story from the get-go out of the mouths of the Chairman, CEO or Chief Marketing Officer of the parties instead of relying solely on customer or competitor witnesses.<sup>35</sup> The advantages to doing it this way are threefold. To begin with, it generally prevents these party officers from giving "canned" testimony to justify the transaction.<sup>36</sup> Instead, the trier of fact will

27 15 U.S.C. § 18a (2011).

28 16 C.F.R. § 803.1(a) & pt. 803, App. (item 4(c)) (2012).

29 See, e.g., *FTC v. ProMedica Health Sys., Inc.*, No. 3:11-cv-00047, 2011 U.S. Dist. LEXIS 33434, at \*45-46 (N.D. Ohio Mar. 29, 2011) (concluding from an internal email that "St. Luke's anticipated that the transaction with ProMedica, and its potential for higher prices, would undergo antitrust scrutiny").

30 See PREMERGER NOTIFICATION OFFICE, FED. TRADE COMM'N, ITEM 4(C) TIP SHEET (Apr. 26, 2012) (describing scope of search for responsive 4(c) documents), available at <http://www.ftc.gov/bc/hst/4cTipSheet.pdf>.

31 See 16 C.F.R. § 3.43(b) (2012) (statements or testimony by a party-opponent are admissible).

32 See 16 C.F.R. § 3.43(e) (2012) (allowing information obtained during investigation to be offered into evidence). See also 16 C.F.R. § 2.8 (2012) (setting forth the basic procedure for investigational hearings).

33 See 16 C.F.R. § 2.9 (2012) (setting forth the rights of witnesses in investigational hearings).

34 MERGER GUIDELINES, *supra* note 11, § 2.2.1 ("The financial terms of the transaction may also be informative regarding competitive effects."); see, e.g., *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 46 (D.D.C. 2002) ("The FTC's argument that defendants have in some manner sought to evade FTC and judicial review by proposing the amended agreement is without merit. Rather, the Court construes defendants' position to be that they have attempted to address the concerns expressed by the FTC by amending the proposed merger agreement.")

35 See Walker, *Merger Trials*, *supra* note 13, at 46 & n.58 (recalling that plaintiff's counsel in *Reilly v. Hearst Corp.* called Timothy White, the publisher of the *Examiner*, as the first witness to talk about he tried to secure San Francisco Mayor Willie Brown's support for Hearst's acquisition of the *Chronicle* with the promise of favorable political coverage; also commenting that "[c]alling a defendant as the first witness is almost always a good idea for plaintiffs").

36 See DAVID BERG, *THE TRIAL LAWYER: WHAT IT TAKES TO WIN* 246 (2006) ("Being called adverse can put defense witnesses at a huge disadvantage. They don't get a chance to get comfortable on the stand or to warm up the jury, by answering friendly questions from a friendly lawyer. Instead, they get cross-examined immediately about the worst facts in the case.")

hear their story for the first time via cross-examination since they are considered hostile witnesses who can be led.<sup>37</sup> Indeed, Dan Wall, who was lead counsel for Oracle, used to welcome efforts by such a witness to disown the documents that he or she authored because it gave him a chance to flash the witnesses' document up on the screen for all the world to see.<sup>38</sup>

Second, because customer or competitor witnesses (like any third party witness) are not generally considered hostile witnesses, one generally cannot interview them, much less prepare them to testify, ahead of time. It takes an amazing amount of talent (or guts) to put a third-party witness on the stand without knowing what he or she will say. Additionally, it is very difficult to "thread the needle" – that is to say, to assure a trier of fact that a third-party witness is "representative" of all other similarly situated witnesses (like customers),<sup>39</sup> and at the same time not to bore the trier of fact to tears because the testimony is repetitive of other third-party witnesses that have testified.<sup>40</sup>

### III.

So as time went on, I and the other Commission members took to asking the staff to describe the "story line" of each antitrust case and to tell us how they would tell the story (that is to say, try the case) before we would vote out a complaint. Then I at least would ask for assurance from the staff that that is indeed how the case would be handled. If it was not, then I might conclude that I lacked the requisite "reason to believe" that Section 5 requires in order to vote out a complaint.<sup>41</sup>

It was critically important that the Commission staff "learn how to lose" as well. As a trial lawyer, I knew full well that if you tried cases you were going to lose some of them. I did and even the best plaintiffs' lawyers did. Of course, I did not want the staff to get used to losing. But at the same time I realized that if the Commission tried as many cases as I hoped we would (and we have), we were going to lose some of them.<sup>42</sup> I wanted the staff to understand that that just goes with the territory.<sup>43</sup>

37 See 16 C.F.R. § 3.41(c) & (d) (2012). For example, Judge Walker found Mr. White's testimony in *Reilly* to be "explosive and entertaining." Walker, *Merger Trials*, *supra* note 13, at 46.

38 Indeed, regarding the admissibility of documents generated by the respondents and produced from their own files, there is a Commission rule that puts the burden of proof on the respondents "to introduce evidence to rebut a presumption that such documents are authentic and kept in the regular course of business." 16 C.F.R. § 3.43(d)(3) (2012).

39 *United States v. Engelhard Corp.*, 126 F.3d 1302, 1306 (11th Cir. 1997) ("No matter how many customers in each end-use industry the Government may have interviewed, those results cannot be predictive of the entire market if those customers are not representative of the market."); *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414, 445 (M.D. Pa. 2009) (holding that "testimony presented by Defendants from a few customers who did not find price significant" should not be given "the same weight, particularly where as here, there is other evidence suggesting that price is quite important to other customers in the same industry"); *United States v. SunGard Data Sys., Inc.*, 172 F. Supp. 2d 172, 192 (D.D.C. 2001) ("Without more information, the Court simply cannot determine whether these 50 declarations are representative of the shared hotsite client base."). See also John Harkrider, *Moving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions*, 2005 COLUM. BUS. L. REV. 317, 340–42 (2005) (reviewing a number of problems with reliance on customer testimony, including selection bias); Walker, *Competition Metric*, *supra* note 13, at 3 ("Even when this testimony is given by live witnesses in the courtroom, the choice of customers is almost always a product of selection bias. Seldom does it appear that the customers' views represent the general customer population.").

40 FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: ... undue delay, wasting time, or needlessly presenting cumulative evidence."); FED. R. EVID. 611(a)(2) ("The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: ... avoid wasting time.") *M.T. Bonk Co. v. Milton Bradley Co.*, 945 F.2d 1404, 1408 (7th Cir. 1991) ("Trial courts have discretion to place reasonable limits on the presentation of evidence to prevent undue delay, waste of time, or needless presentation of cumulative evidence.") (citing Rules 403 and 611).

41 See Dissenting Statement of Comm'r J. Thomas Rosch at 2, Lab. Corp. of Am., No. 9345 (Nov. 30, 2010), available at <http://www.ftc.gov/os/adjpro/d9345/101201lapcorpdissentstatement.pdf>.

42 See, e.g., *FTC v. Lundbeck, Inc.*, Nos. 08-cv-6379 & 08-cv-6381, 2010 U.S. Dist. LEXIS 95365 (D. Minn. Aug. 31, 2010), *aff'd*, 650 F.3d 1236 (8th Cir. 2011); *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), *setting aside* No. 9302, 2007 FTC LEXIS 13 (Feb. 2, 2007) & 2007 FTC LEXIS 212 (Apr. 27, 2007); *FTC v. Foster, No. Civ-07-352 JB/ACT*, 2007 U.S. Dist. LEXIS 47606 (D.N.M. May 29, 2007); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *setting aside* No. 9297, 2003 FTC LEXIS 187 (Dec. 8, 2003).

43 See Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 6 (1998) ("One advantage of regularly litigating is that the government can afford to lose.").

Finally, I wanted the staff to understand the importance of publicity during a trial. No trier of fact likes to be taken for granted that either the case is a dead-bang winner or a sure loser. All of the best plaintiffs' antitrust lawyers understood that. That is why they took care to let the media know at all times what was happening.<sup>44</sup> Dan Wall understood that too. He would stroll out of the *Oracle* trial at the end of each day to "brief" the press on what they had just seen. You have no idea how little even experienced media mavens understand our craft. We have an excellent public relations staff at the Commission.<sup>45</sup> The staff should learn to use it.

There were a number of other reforms that the Commission adopted in the merger arena. We had long been criticized (justly I think) by the ABA Section of Antitrust Law and *FTC: Watch* (among other bodies) for how long it took for the Commission to issue a decision on an appeal to the Commission.<sup>46</sup> It was contended that it sometimes took so long that the parties lacked an incentive to consummate the deal. So we changed our so-called Part 3 rules to put a time limit on ourselves.<sup>47</sup> That time limit begins to run when oral argument is held.<sup>48</sup> So far it seems to be working. We have adhered to that time limit in every appeal that we have considered since the *Polyvore* decision was issued.<sup>49</sup> I would like to see our so-called Part 2 rules include a similar governor on the time it takes the staff to complete its investigation in order to eliminate the "one-way" discovery and the "turn over every rock" type of investigation they can conduct whenever the Hart-Scott-Rodino time limits do not apply.<sup>50</sup>

I would also like to see the 2010 Merger Guidelines amended to make clearer the procedures that we follow in analyzing a merger complaint (that is to say, that we focus as a Commission on the story line and how the case is to be tried before we vote out a complaint). The Guidelines purport to describe how a merger is analyzed at the Commission. But they were written mostly by economists for economists. They may describe how economists look at things.<sup>51</sup> But that is not how we, as Commissioners, decide a case.<sup>52</sup> This not to say that the Commission should ignore econometrics (or customer testimony) in trying its cases. But they should be "frosting on the cake" instead of the cake itself.

44 Mike Tigar has suggested prefacing brief informative statements to the media about the issues in the case with the following words of respect to the trier of fact, which serve to show that he or she is not to be taken for granted:

We intend to do our talking in court. We have faith in the jury system. We think that the jurors who will be selected deserve our respect, and we respect them by letting them hear first, in court and from the witness stand, what the evidence will be. We are not going to try our case in the media. Our position, though, is clear. . . . Tigar, *supra* note 14, at 148.

45 See *About the Office of Public Affairs*, FED. TRADE COMM'N, <http://www.ftc.gov/opa/about.shtml>.

46 See *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 116 n.168 (1989) ("Particularly troubling is the length of time between oral argument and issuance of an opinion. . . . There is no excuse for taking more than a year to write an opinion.") (calculating an average time of 15.1 months from oral argument to final decision).

47 See 16 C.F.R. § 3.52 (2012); 16 C.F.R. Parts 3 and 4: Rules of Practice, 74 Fed. Reg. 1804 (Jan. 13, 2009) (announcing interim final rules).

48 16 C.F.R. § 3.52(a)(1) (45 days after oral argument is held, or if there is no oral argument, then 45 days after the deadline for the filing of any reply briefs).

49 *Polyvore Int'l, Inc.*, No. 9327, 2010 FTC LEXIS 97 (Dec. 13, 2010) (oral argument was held on July 28, 2010).

50 See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Reflections on Procedure at the Federal Trade Commission*, Remarks Before the ABA Section of Antitrust Law Antitrust Masters Course 10 (Sept. 25, 2008), <http://www.ftc.gov/speeches/rosch/080925roschreflections.pdf>.

51 See *Schwarzer*, *supra* note 15, at 36 (viewing the then DOJ merger and vertical restraint guidelines as the work of some economists, to be regarded as a form of expert economist opinion).

52 See J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, *Concurring Statement on the Release of the 2010 Horizontal Merger Guidelines 3* (Aug. 19, 2010) ("These Guidelines do not describe the way that the Bureau of Competition and enforcement staff at the Commission proceed today. They also do not reflect the way that the courts proceed."), <http://www.ftc.gov/speeches/rosch/100819horizontalmergerstatement.pdf>. See also Thomas Penfield Jackson, *Merger Analysis in the '90s: The Guidelines and Beyond – Judicial Perspective*, 61 ANTITRUST L.J. 165, 169 (1992) ("And, [a federal judge] will be generally unimpressed with authorities which do not actually control the decision in the case, including anyone's Guidelines on any subject.").