

# Whither Antitrust under Obama

Aaron Edlin

Richard Jennings Professor of Law and Professor of  
Economics, UC Berkeley

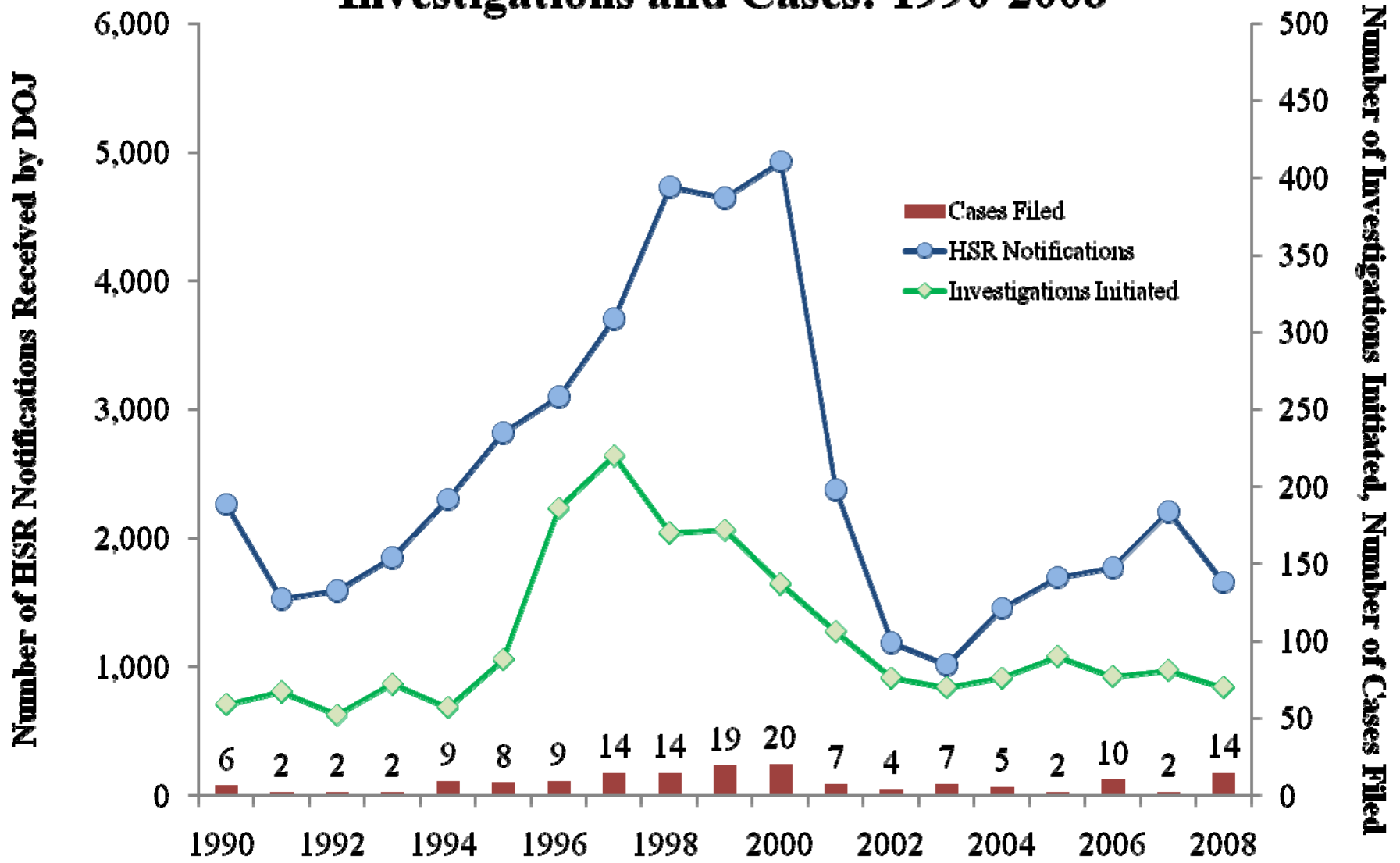
National Bureau of Economic Research

Chairman, Berkeley Electronic Press

# Mergers

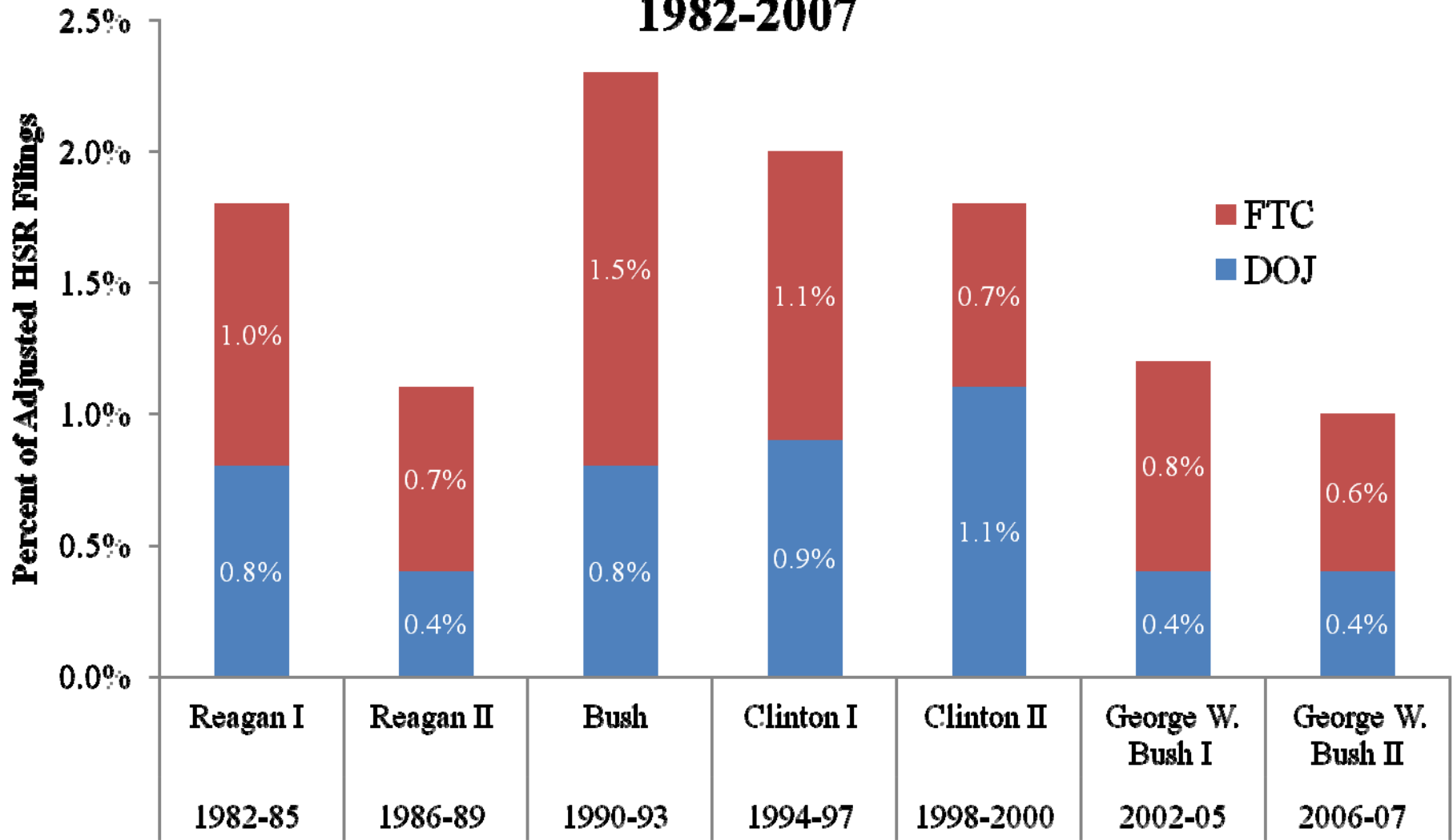
- Obama campaign observed:
  - 70 cases 1996-2000
  - 33 cases 2001-2006
- Berkeley School takeover
  - Shapiro, Farrell, Shelanski
- New Merger Guidelines on the way
  - Stronger presumption of anticompetitive effects
  - Skeptical about entry, expansion, and efficiencies

# Hart-Scott-Rodino Premerger Notifications, Investigations and Cases: 1990-2008



Source: Antitrust Division Workload Statistics FY 1990-2008.

# Merger Enforcement Challenges by DOJ and FTC as a Percentage of Adjusted Hart-Scott-Rodino Filings: 1982-2007



Source: Jonathan Baker and Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, October 2007, pp. 14-17.

# Monopolization

- Withdrawal of Unilateral Conduct Report
  - Balancing not disproportionality
- Google Books objection
- Will there be another Microsoft?
- Advice to monopolies:
  - Exclude competitors by
    - Making great products
    - Satisfying consumer needs
  - Price as high as you like (in America)
    - Marketing and sales strategies should emphasize communication of value not extraction of value

# Exclusion beyond the Basics Problematic

- Loyalty discounts
  - Low prices to some on some units
- Predatory pricing
  - Pricing very low, below cost, after entry
- Exclusive dealing
- Tying/bundling
  - Requiring purchase of A to buy B
  - Selling A and B only together
  - Discount for A and B
- Ask
  - Do I need to?
  - Could marketing genius be refocused?

# Price-Fixing, Market Division, Other Agreements Not to Compete

- Price-fixing
  - A constant across administrations
  - Don't do it
- Don't do market division in patent settlements
  - *Carpenters Health and Welfare Fund v. Bayer*
- Do high tech firms agree with each other not to solicit employees?
- No interlocking directorships
  - Apple, Google

# Gradual Change – No Revolution

- Appointees not radicals
- Bureaucracies have inertia
- Courts
  - Schooled in 3 E's: efficiency, entry, and expansion

# Merger Enforcement in the Current Economic Crisis:



## Directors Roundtable

New York City  
The Harvard Club  
September 30, 2009

Ted Henneberry  
Orrick, Herrington & Sutcliffe

# Changing Landscape in U.S.?

- ❖ Emphasis on ‘Renewed’ Enforcement at DOJ
- ❖ Asst AG C. Varney Speech to U.S. Chamber of Commerce:
  - Look to Lessons of 1930’s
  - National champions protected at expense of consumers for sake of “stability”
  - “No adequate substitute for a competitive market, particularly during times of economic distress”

# Merger Policy During Recession

- ❖ **Commissioner Rosch**: *“...I think antitrust laxity during an economic recession can result in a deepening of economic contraction”, and “...will result in increased prices, lower output and more unemployment”*
- ❖ **Query**: **Will FTC itself go beyond antitrust factors?**  
*“Mergers should arguably be examined with an eye toward whether they are creating a merged entity that is ‘too big to fail.’ ”*
- ❖ **FTC**: Acted to block anti-competitive sale of assets in bankruptcy court, but felt it had no independent authority to stop
- ❖ **DOJ**: Successfully obtained injunctive relief against buyer chosen by bankruptcy court in case involving only two mfrs of aluminum tubing for HF cables

# New Economic Approach?

- ❖ Appointment of Shapiro/Farrell: Possible revision to Guidelines?
- ❖ Skeptical of market definition, market shares and concentration as basis of presumptions in Guidelines, especially in differentiated product cases
- ❖ Inconsistent with modern economics, and “has created a tangle of problems”, such as Whole Foods and Oracle
- ❖ Have proposed new test- “Upward Pricing Pressure” (UPP)- based on gross margins and diversion ratios
- ❖ Also skeptical of efficiencies arguments and reliance on entry

# Current U.S. Merger Enforcement

- ❖ **FTC**: Heavy emphasis on Health Care and Pharmaceutical Industries
- ❖ **Ovation Pharmaceuticals**: Far-reaching  
Non-reportable, consummated acquisition of only two drugs for infants with heart defect. FTC sought disgorgement of profits due to post-acquisition price increase of 1300%. Raised issue of “reputational” constraint on seller being removed
- ❖ Currently taking action against two other consummated deals in health care sector

# DOJ Enforcement

- ❖ **DOJ**: Will focus on high tech and Internet based industries
- ❖ **Oracle/Sun transaction**: Cleared after Second Request - EU pending
- ❖ **Microsemi**: Also acted to overturn consummated transaction involving only two approved suppliers of small semi-conductor devices to space and military programs-seller had sales of only \$15MM
- ❖ **Continental/Star Alliance**: DOJ objections rejected by regulatory agency which granted antitrust immunity to expansion of alliance and refused to add 'carve outs' since it would lessen efficiencies and benefits to consumers

# New Competition Rules Under the Obama Administration:



*What Your Business Needs to Know*

New York City  
September 30, 2009

# Key Principles of Antitrust Law

- ❖ Protect the *competitive process*, not *competitors*
- ❖ Focus more on *inter-brand* competition, as compared to *intra-brand* competition
- ❖ Ultimate objective is to benefit *consumers*:  
lower prices, higher quality, more services, more choices, greater innovation

# Key Antitrust Laws

## ❖ Sherman Act

- Section 1 (conspiracies and cartels)
- Section 2 (dominant firm conduct)

## ❖ Clayton Act

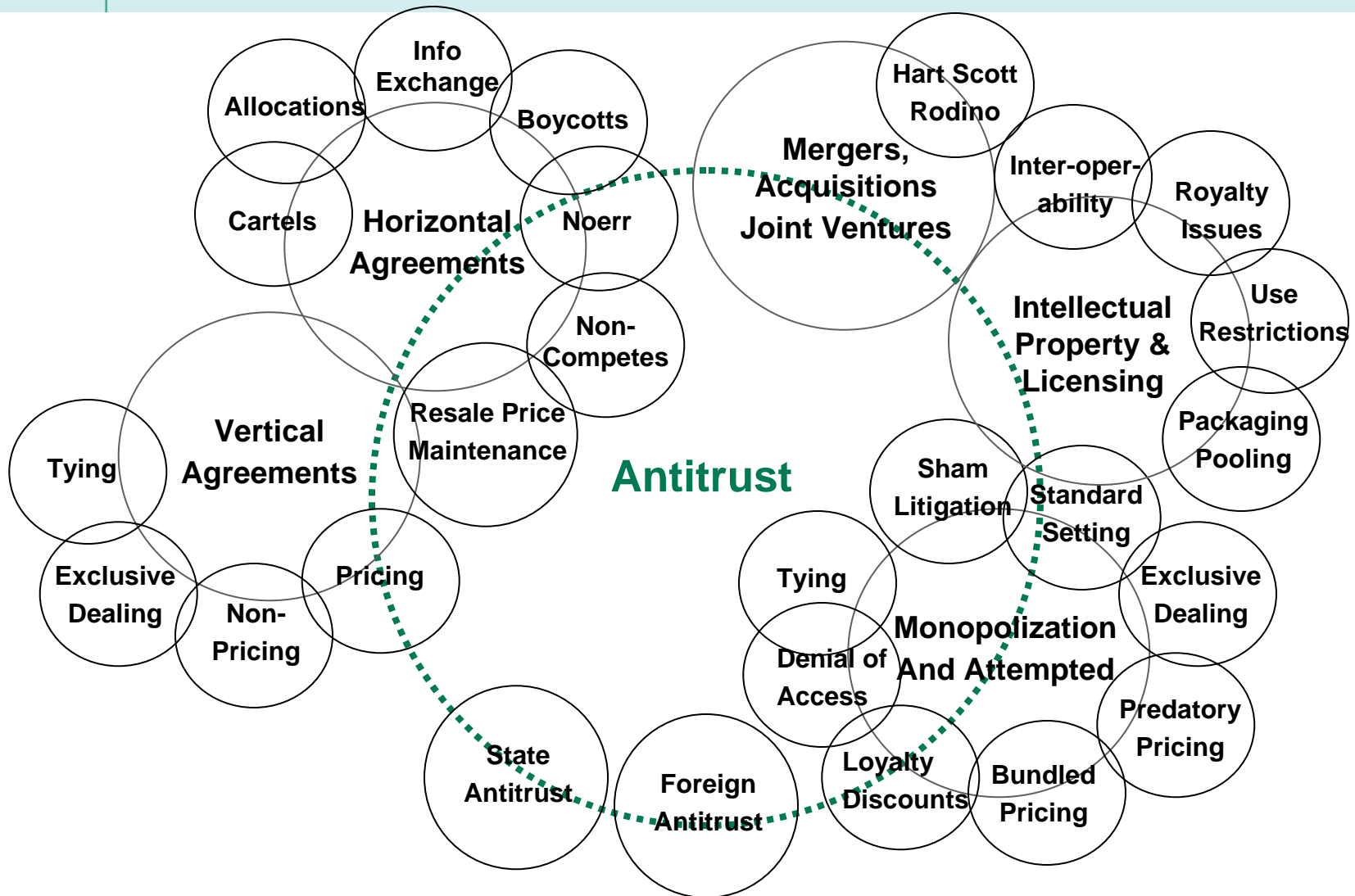
- Section 7 (mergers)
- Section 3 (tying, exclusive dealing – see also Sherman Act § 1)
- Robinson Patman

## ❖ Federal Trade Commission Act

- “Unfair methods of competition” and “unfair or deceptive acts or practices”

## ❖ States and Non-U.S. Jurisdictions

# The Scope of Competition Topics



# Today's Topics

- ❖ **Antitrust Priorities in a Recession Recovery**
- ❖ **Mergers/Joint Ventures:** What Was and What Will Be
- ❖ **Tying/Bundling/Loyalty Discounts:** A Good Deal for Consumers, or Danger?"

## **Molly S. Boast**

Deputy Assistant Attorney General for Civil Enforcement  
U.S. Department of Justice, Antitrust Division

Molly Boast serves as Deputy Assistant Attorney General for Civil Matters in the Antitrust Division of the United States Department of Justice. She rejoined the government after seven years as a litigation partner in the New York law firm of Debevoise and Plimpton LLP, having previously served as Director of the Federal Trade Commission's Bureau of Competition during the Clinton Administration.

Ms. Boast oversaw the preparation of several prominent FTC cases during her tenure there, including the first "reverse payment" cases challenging agreements between branded and generic pharmaceutical companies, the mergers of oil industry giants Exxon-Mobil and BP-Arco, and *FTC v. Heinz*. In 1993 she argued the issue of antitrust extraterritoriality before the United States Supreme Court in *Hartford Fire Insurance Co. v. State of California*.

Ms. Boast received her J.D. from Columbia University in 1979, a M.S. from the Columbia School of Journalism in 1971, and a B.A. from the College of William and Mary in 1970.

## Aaron Edlin

Richard Jennings Endowed Chair & Professor of Economics and of Law,  
University of California, Berkeley

Aaron Edlin is a leading expert in economics and law, specializing in antitrust economics and antitrust law, and is the co-founder of the Berkeley Electronic Press. He has taught at Berkeley since 1993 and received tenure in 1997. He now holds the Richard Jennings Chair and professorships in both the economics department and law school. He served as Senior Economist at the Council of Economic Advisers in the Clinton White House, covering industrial organization, regulation and antitrust. He is co-author with P. Areeda & L. Kaplow of one of the leading casebooks on antitrust; he has also published many articles on industrial organization, competition policy, antitrust law, and a variety of other issues in economics, law and public policy. He received his Ph.D. and J.D. from Stanford, 1993; AB *summa cum laude* from Princeton, 1988.



## Deborah Platt Majoras

Vice President & General Counsel  
The Procter & Gamble Company

Deborah Platt Majoras joined The Procter & Gamble Company in June, 2008, as a Vice President & General Counsel, focusing on Global Compliance, Litigation and Antitrust.

From August 2004 – March 2008, Deborah served as Chairman of the Federal Trade Commission. During her tenure as FTC Chairman, she focused on ensuring data security and protecting consumers from emerging frauds, such as identity theft, spyware, and deceptive spam. In May 2006, she was appointed by President George W. Bush to be Co-Chair of his Identity Theft Task Force. Deborah also focused on increasing the efficiency and transparency of the merger review process, implementing sound antitrust policy regarding intellectual property, increasing efforts to prevent anticompetitive government policies, and strengthening cooperation with consumer and competition agencies around the world.

From April 2001 through 2003, Deborah served first as Deputy Assistant Attorney General, then as Principal Deputy, of the U.S. Department of Justice's Antitrust Division. During her tenure, she oversaw matters involving numerous industries, including software, financial networks, defense, health care, media and entertainment, banking, and industrial equipment. She also served as Chair of the International Competition Network's Merger Working Group and oversaw policy initiatives such as the FTC/DOJ Health Care Hearings, DOJ's Merger Review Process Initiative, and the Mergers Best Practices Project. In 2004, President Bush appointed her to serve on the Antitrust Modernization Commission.

Prior to her government service, Deborah was a partner in Jones Day's antitrust section and a member of the firm's technology issues practice.

Deborah is the recipient of the International Association of Privacy Professionals' 2007 Privacy Leadership Award and RSA's 2007 Award for Excellence in the Field of Public Policy. *SC Magazine* named her one of the Top Five Influential IT Security Thinkers in 2006, and *Washington Magazine* listed her among the "100 Most Powerful Women in Washington." Deborah is a frequent speaker on competition and consumer protection policy issues to national and international audiences.

Deborah graduated *summa cum laude* from Westminster College, where she now serves on the Board of Trustees and is Chair of the Institutional Advancement Committee and Vice Chair of the Governance Committee. In 1989, she received her J.D. from the University of Virginia, where she was awarded the Order of the Coif and served as an editor of UVA's Law Review. Deborah is a member of the American Bar Association's Section of Antitrust Law, where she currently serves as Co-Chair of the Competition & Public Policy Task Force. She also serves as Co-Chair of the U.S. Chamber of Commerce International Competition Policy Working Group; on the Board of the Georgetown Law Corporate Counsel Institute; on the Board of the Cincinnati Legal Aid Society; on the Board of the Ohio Chamber of Commerce; as a member of Washington, D.C. Women's Forum; as a member of the Ohio Women's Bar Association; as a member of The Federalist Society; and as a non-governmental advisor to the International Competition Network. She is a member of the Bars of Ohio, Illinois, District of Columbia, and the U.S. Supreme Court.

Deborah resides in Maineville, Ohio, with her husband, John Majoras.

## **Chris Meyers**

Associate General Counsel  
Microsoft Corporation

Chris leads the Antitrust Group for Microsoft, which is responsible for antitrust counseling, investigations, policy, and M&A work across all of Microsoft's business divisions. Chris joined Microsoft as an antitrust attorney in 1999, and spent three years in Microsoft's European headquarters from 2003 to 2006. Prior to joining Microsoft, Chris was a litigation associate at the law firm Sullivan & Cromwell in Washington, D.C.. Chris received his J.D. *magna cum laude* from Cornell Law School and his B.A. from the University of Minnesota.



## Ted P. Henneberry

Partner, Litigation  
Washington, D.C.  
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thenneberry@orrick.com

Edward (Ted) Henneberry is a partner in Orrick's Antitrust and Competition Group and splits his time between the London and Washington, D.C., offices. Mr. Henneberry's practice focuses on antitrust and international competition law, particularly on cross-border merger transactions, multijurisdictional cartel investigations and dominant firm conduct.

### Related Practice Areas

- Antitrust and Global Competition

### Education

- B.A., Boston College, 1967
- J.D., Boston College Law School, 1970

### Honors

- Named "Best Lawyer" for Antitrust Law in "Best Lawyers in America", 2009 and 2010

Mr. Henneberry is one of only a very few U.S. antitrust lawyers who also has held a position as a senior competition enforcement official in the European Union. From 2003-2006, he was appointed as a member of the Irish Competition Authority where he also acted as a director of the Mergers and Cartel Enforcement divisions. As a member of the Authority, he participated directly on the Advisory Committee of the European Commission in major merger policy and competition enforcement matters, including the drafting of the EC's Merger Guidelines. He also served on the Experts' Committee advising the EC in the drafting of its Green Paper on Private Damages Remedies, as well as on the Competition Committee of the Organisation for Economic and Cooperation and Development in Paris.

Mr. Henneberry has played a significant role in the International Competition Network, where he acted as co-chair of the Mergers Working Group and was responsible for the drafting of the ICN's Merger Remedies Study and the Merger Guidelines Workbook. He continues to serve as a Non-Governmental Advisor to the ICN for the U.S. Department of Justice and the Federal Trade Commission.

He has substantial experience in representing major international companies and counseling senior management in strategic acquisitions and mergers and in dealing with government investigations. He has extensive trial and appellate experience as lead counsel in federal and state courts in the United States, as well as in administrative proceedings and investigations in Europe.

Mr. Henneberry is a frequent writer and speaker on international merger and competition enforcement issues and has lectured as a Visiting Fellow on European and Irish Competition Law at University College Dublin.

### **Admitted in**

- District of Columbia
- Massachusetts
- Registered Foreign Lawyer in England and Wales

### **Memberships**

- International Task Force, Section of Antitrust Law, American Bar Assoc.
- Task Force on Extraterritorial Antitrust Jurisdiction, International Bar Assoc.

### **Publications**

- "Joint Ventures After Publication of the Consolidated Jurisdictional Notice," (with D. Lahnborg), *Global Competition Review*, 2009 *European Antitrust Review*.
- "Private Enforcement in EC Competition Law: The Passing on Defence and Standing for Indirect Purchasers, Representative Organisations and Other Groups," Vol. 1/2006 *ERA-Forum* 15, 2006.

### **Speeches & Programs**

- "Article 82-Current Developments: The U.S. Perspective," 20th Annual IBA Communications and Competition Conference, Florence, May 2009.
- "Merger Analysis Best Practices Workshop: Market Definition and Structure," Ministry of Commerce, Beijing, December 2009.
- "Europe and the Globalization of Antitrust: Unilateral Firm Conduct," Studienvereinigung Kartellrecht/IBA Antitrust Conference, Berlin, 2008.
- Chair, "International Cartels Conference-Current Issues in Multi-National Investigations," British Institute of International and Comparative Law Conference, London, 2008.
- "Recent Antitrust Decisions in the US Supreme Court: Lessons for Europe?" The Law Society's European Group, October 2007.
- "Cross Border Issues in Merger Remedies," CECI Workshop on Merger Remedies, Budapest, 2006.
- "Damages Actions in the US and the EU: A Comparison,"

European Parliament, Legal Affairs Committee, Brussels, October 2006.

- "The Role of Economics and Economic Evidence in Merger Control," Competition Committee O.E.C.D., Paris, 2004.



## Robert A. Rosenfeld

Partner, Litigation  
San Francisco  
(415) 773-4190  
rosenfeld@orrick.com

Robert Rosenfeld, a partner in Orrick's San Francisco office, is the chair of the firm's Antitrust and Competition Group.

### Related Practice Areas

- Antitrust and Global Competition
- Commercial Litigation

### Education

- J.D., *cum laude*, *Managing Editor*, *Harvard Law Review*, Harvard Law School, 1976
- B.A., *First Class Honors*, *Rhodes Scholar*, University of Oxford, 1973
- B.A., *Highest Distinction*, Public Affairs, The George Washington University, 1971

### Clerkship

- Hon. Warren E. Burger, Chief Justice of the U.S. Supreme Court
- Hon. Marvin E. Frankel of the U.S. District Court for the Southern District of New York

### Honors

- Named as one of "America's Leading Lawyers: Antitrust," *Chambers USA*, 2003-2008
- Named one of *The Best Lawyers in America*, Antitrust Law, Bet-the-Company Litigation and Commercial Litigation, 2006-2010
- Included in *Who's Who Legal, Commercial Litigation*, 2007

Mr. Rosenfeld's practice focuses on antitrust, complex commercial litigation and financial institutions. For the last 10 years, Mr. Rosenfeld has represented Microsoft Corporation in numerous antitrust proceedings in California and elsewhere in the United States and abroad. In addition, he provides advice regarding antitrust issues to companies in Silicon Valley. He also has advised major health insurance companies and has litigated a number of cases involving the application of antitrust principles in the health care marketplace.

Mr. Rosenfeld's practice also includes complex business litigation, principally on behalf of major financial institutions. He has represented and counseled special litigation committees in the conduct of internal investigations and the prosecution and defense of derivative litigation.

His notable cases include:

- **Microsoft Corporation.** Mr. Rosenfeld represents Microsoft Corporation in numerous antitrust actions in California and elsewhere in the United States and abroad.
- **The Kohler Company.** Mr. Rosenfeld represented Kohler in various antitrust matters in the engine and plumbing fixtures markets.
- **Texas Instruments.** Mr. Rosenfeld represented Texas Instruments in antitrust litigation involving standard-setting and portfolio licensing practices.
- **Bank of America.** Mr. Rosenfeld represented Bank of America in litigation concerning personal trustee charges and practices as well as in litigation arising out of alleged irregularities in the bank's corporate trust operations.
- **Bank of America.** Mr. Rosenfeld argued and won a major National Bank Act preemption case in the California Supreme Court.
- **KPMG International.** Mr. Rosenfeld represented KPMG International in several matters arising out of the Orange County

bankruptcy.

- **Bank of America.** Mr. Rosenfeld directed a team of lawyers defending Bank of America in litigation arising out of a loan servicing failure in the secondary market for guaranteed student loans.
- **California Vision Services.** Mr. Rosenfeld was lead counsel in antitrust actions involving state and federal monopolization claims as well as challenges to allegedly exclusionary contractual relationships with suppliers and distributors.
- **Delta Dental.** Mr. Rosenfeld litigated several state and federal antitrust actions involving challenges to Delta's contractual relations with its member dentists and to the inclusion of most-favored-nation clauses in its contracts.
- **Pacific Gas & Electric Co.** Mr. Rosenfeld represented the Special Litigation Committee of Pacific Gas and Electric Company in connection with an investigation into the construction and operation of the Diablo Canyon Nuclear Power Plant as well as in the defense and ultimate settlement of a derivative action relating to that facility.
- **Sun Microsystems, Inc.** Mr. Rosenfeld represented the Special Litigation Committee of Sun Microsystems in derivative litigation arising out of an unprecedented challenge to the settlement of a major securities action.
- **Seattle First National Bank.** Mr. Rosenfeld represented Seattle First National Bank in litigation against its former officers and directors arising out of the failure of Penn Square Bank in Oklahoma. The representation resulted in a stipulated judgment for US\$110 million against the former officers and directors and a trial against the D&O insurance carrier from whom substantial damages were ultimately recovered.

From 1986 until 1992, Mr. Rosenfeld traveled to the Soviet Union on a number of occasions to participate with Soviet lawyers and academics in projects involving commercial matters and human rights issues.

Before joining Orrick, Mr. Rosenfeld practiced at Heller Ehrman LLP.

#### **Admitted in**

- California

### **Court Admissions**

Supreme Court of the United States

United States Court of Appeals

- Third Circuit
- Seventh Circuit
- Ninth Circuit
- Federal Circuit

United States District Court

- Central District of California
- Northern District of California

United States Court of Federal Claims

### **Memberships**

- American Bar Association
- State Bar of California
- American Bar Foundation, Fellow
- Pacific Council on International Policy, Western Partner – Council on Foreign Relations
- California Pacific Medical Center, Board of Directors
- Physicians Foundation, California Pacific Medical Center, Vice Chairman – Board of Directors
- Consensus Building Institute (MIT), Board of Directors
- San Francisco Neighborhood Legal Assistance Foundation, Board of Directors, 1995-2002
- The George Washington University, Board of Trustees, 1987-2003
- World Affairs Council of Northern California, Board of Trustees, 1998-2004
- Bar Association of San Francisco, Board of Directors, 1996-1999