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# CONSUMER NEWS

## LINKLINE DECISION PUTS THE SQUEEZE ON THE PRICE SQUEEZE THEORY OF LIABILITY

*Dawn Goulet\**

On February 25, 2009, the Supreme Court issued its opinion in *Pacific Bell Telephone Co. v. linkLINE Communications, Inc.* (“linkLINE”), resolving a circuit split over the viability of price squeeze claims under Section 2 of the Sherman Act.<sup>1</sup> As predicted, the Court used the *LinkLINE* case as an opportunity to reinforce the message in *Trinko* further limiting the reach of Section 2 by, if not abolishing outright, then certainly squeezing the life out of the price squeeze theory of liability.<sup>2</sup>

### I. THE FACTS

The plaintiffs in *linkLINE* are independent Internet Service Providers (“ISPs”) who sold DSL internet access, using existing telephone lines, to retail customers in California.<sup>3</sup> Because of the high cost of building the required infrastructure, regional telecommunications monopolies have developed, known as incumbent local exchange carriers (“ILECs”).<sup>4</sup> These ILECs control the delivery of telecommunications services within their regions, especially the

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<sup>1</sup> *Pacific Bell Telephone Co. v. linkLINE Commc'ns, Inc.*, No. 07-512, 2009 U.S. LEXIS 1635 (Feb. 25, 2009) [hereinafter *linkLINE*]. Chief Justice Roberts was joined in his opinion by Justices Scalia, Kennedy, Thomas and Alito, with Justices Breyer, Stevens, Souter and Ginsburg joining in a concurring opinion.

<sup>2</sup> Manfred Gabriel, *Thoughts on LinkLine*, ANTITRUST REV., at <http://www.antitrustreview.com/archives/1471> (Nov. 19, 2008, 8:45 p.m. EST).

<sup>3</sup> *LinkLine Commc'ns., Inc. v. California, Inc.*, *f/k/a Pacific Bell Telephone Co.*, 503 F.3d 876, 877 (9th Cir. 2007).

<sup>4</sup> *Id.*

telephone lines known as the “last mile” which connect individual consumers to the network.<sup>5</sup> Independent ISPs that want to connect to consumers must deal with their regional ILECs.<sup>6</sup>

For the *linkLINE* ISPs, the ILEC was SBC California, a subsidiary of SBC Communications, now AT&T.<sup>7</sup> SBC, through its various subsidiaries and affiliates sold both wholesale DSL access to the ISPs and retail DSL access to individual consumers, making the company both a supplier to the ISPs at the wholesale level and their competitor at the retail level.<sup>8</sup> On July 24, 2003, the ISPs filed suit against SBC in the Northern District of California, alleging violation of § 2 of the Sherman Act.<sup>9</sup> The complaint’s primary allegation: that SBC “created a price squeeze by charging ISPs a high wholesale price in relation to the price at which [it] w[as] providing retail services.”<sup>10</sup>

## II. A CIRCUIT SPLIT IN THE SHADOW OF *TRINKO*

On July 6, 2004, SBC moved for a judgment on the pleadings.<sup>11</sup> The trial court, which interpreted the plaintiffs’ complaint to allege a refusal and deal and denial of access to an essential facility, as well as price squeezing, dismissed the first two theories of liability, finding they were barred by the Supreme Court’s recent decision in *Verizon Commc’ns v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).<sup>12</sup> The court allowed the plaintiffs, however, to file an amended complaint to allege specific facts supporting their price squeeze claim.<sup>13</sup> It ultimately denied SBC’s motion to dismiss for failure to state a claim, but granted its request to certify the order for interlocutory appeal.<sup>14</sup> On review, the Ninth Circuit considered the following question:

whether the Supreme Court’s decision in [*Trinko*] bars a plaintiff from claiming a violation of § 2 of the Sherman Antitrust Act by virtue of an alleged price squeeze perpetrated by a competitor who also serves as the plaintiff’s supplier at the wholesale level, but who has no duty to deal with the plaintiff absent statutory compulsion.<sup>15</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 878.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *LinkLine Commc’ns., Inc. v. California, Inc., f/k/a Pacific Bell Telephone Co.*, 503 F.3d 876, 878.

<sup>10</sup> *Id.* (citing *linkLINE Communications, Inc. v. SBC California, Inc.*, No. CV 03-5265, 2004 U.S. Dist. LEXIS 30761, at \*7 (N.D. Cal. 2004)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 879.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 880.

<sup>15</sup> *LinkLine Commc’ns., Inc. v. California, Inc., f/k/a Pacific Bell Telephone Co.*, 503 F.3d 876, 877.

The Ninth Circuit affirmed the trial court's denial of SBC's motion for judgment on the pleadings, finding that "*Trinko* did not involve a price squeezing theory," because the theory "formed part of the fabric of traditional antitrust law prior to *Trinko*," and holding that the ISP's complaint stated a potentially valid claim under § 2.<sup>16</sup> The Supreme Court granted certiorari to resolve a circuit split over the issue presented in *linkLINE*, as the D.C. Circuit had previously held that such claims were barred by *Trinko* in *Covad Comims Co. v. Bell Atl. Corp.*, 398 F.3d 666 (D.C. Cir. 2005).<sup>17</sup>

### III. DID *LINKLINE* POSE A MOOT QUESTION?

The Court seems to have rushed to grant certiorari in this case, an interlocutory appeal from a Rule 12(b)(6) motion for judgment on the pleadings, where the facts had not been fully developed.<sup>18</sup> As a preliminary matter, the Court admitted that the case had "assumed an unusual posture," because the plaintiff ISPs took up the position of the dissent in the Ninth Circuit decision, by Judge Gould.<sup>19</sup> Now consenting that their price squeeze claims would be required to meet the *Brooke Group* requirements for predatory pricing, the ISPs asked the Court to vacate the decision below and grant them leave to amend in accordance with *Brooke Group*.<sup>20</sup> The Court concluded, however that the parties were still seeking different relief, were therefore still adverse, and seemed unconvinced that the ISPs had really abandoned their price squeeze claim.<sup>21</sup> Stating that "prudential concerns favor our answering the question presented," the Court went ahead to resolve the circuit split that prompted it to grant certiorari.<sup>22</sup>

### IV. THE SUPREME COURT'S DECISION

In its opinion, the Court, led by Chief Justice John Roberts, held that the ISPs' claim was "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level," for "[i]f there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required

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<sup>16</sup> *Id.* at 833.

<sup>17</sup> *linkLINE*, *supra* note 1, at \*14.

<sup>18</sup> Gabriel, *supra* note 2.

<sup>19</sup> *linkLINE*, *supra* note 1, at \*15.

<sup>20</sup> *Id.* This is the relief that the concurring justices, led by Justice Breyer, would have granted them. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993), the Court established two requirements for predatory pricing: below-cost retail pricing and a "dangerous probability" that the defendant would recoup its lost profits.

<sup>21</sup> *linkLINE*, *supra* note 1, at \*15-16.

<sup>22</sup> *Id.* at \*17.

to price *both* of these services in a manner that preserves its rivals' profit margins."<sup>23</sup> The Court was concerned that "recognizing a price squeeze claim where the defendant's prices remain above cost would invite the prices harm the Court sought to avoid in *Brooke Group*: Firms might raise retail prices or refrain from aggressive price competition to avoid potential antitrust liability."<sup>24</sup>

The Court went on to explain that, pursuant to its repeated emphasis on the importance of clear rules in antitrust law, "[i]nstitutional concerns also counsel[ed] against recognition of such claims."<sup>25</sup> Quoting *Trinko*, it reiterated that "[c]ourts are ill suited to act as central planners, identifying the proper price, quantity, and other terms of dealing," and that "[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise."<sup>26</sup> Such problems "should be deemed irremediable by antitrust law" when they require the court "to assume the day-to-day controls characteristic of a regulatory agency."<sup>27</sup>

## V. WHAT THE COURT DID NOT DO

What is more surprising about this decision than the fact that the Court overruled the Ninth Circuit, further collapsing Section 2 liability, is what the Court did not do. Notably, it "sidestepped the explicit invitation from the Solicitor General and AT&T to overrule the price squeeze analysis" in the classic 1945 price squeeze case, *Alcoa*.<sup>28</sup> Instead the Court simply explained that "[g]iven developments in economic theory and antitrust jurisprudence since *Alcoa*, [it] f[ou]nd [its] recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before [it]."<sup>29</sup> As one commentator has put it, with this decision the Court has "respectfully placed [the *Alcoa* case] in the attic, and not

<sup>23</sup> *Id.* at \*25 (emphasis in original).

<sup>24</sup> *Id.* at \*6.

<sup>25</sup> *Id.* at \*26.

<sup>26</sup> *Id.* (quoting *Trinko*, 540 U.S. 398, at 408) (internal quotations omitted).

<sup>27</sup> *Id.* (quoting *Trinko*, 540 U.S. 398, at 408) (internal quotations omitted).

<sup>28</sup> *Monopolization: Where Defendant Has No Duty to Deal, Price Squeeze Claim Isn't Viable Under § 2, BNA ANTITRUST & TRADE REGULATION REPORT* (Feb. 27, 2009), available at 96 ATRR 177 [hereinafter *Monopolization*] (quoting Abbott B. Lipsky, Jr., of the Washington, D.C., office of Latham & Watkins LLP). As the Court noted in *linkLINE*:

in [*United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416 (1945)], the Government alleged that Alcoa was using its monopoly power in the upstream aluminum ingot market to squeezed the profits of downstream aluminum sheet fabricators. The [*Alcoa*] court concluded: 'That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must be regarded as higher than the 'fair price.' *linkLine*, No. 07-512, 2009 U.S. LEXIS 1635, at \*25-26 n. 3. (internal citations omitted).

<sup>29</sup> *linkLINE*, *supra* note 1, at 26 n. 3.

put [it] out with the trash."<sup>30</sup>

Additionally, near the very end of the opinion, the Court seems to foreshadow even greater future obstacles for plaintiffs alleging §2 claims:

Even if the amended complaint is further amended to add a *Brooke Group* claim, it may not survive a motion to dismiss. For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of business by pricing them out of the market. Nevertheless, such questions are for the District Court to decide in the first instance . . . We are a court of review, not of first review.<sup>31</sup>

With this closing comment, the Roberts Court seems poised and eager to further squash Section 2 liability in the future.

## VI. CONCLUSION

Reactions to the Court's decision in *linkLINE* have included several criticisms. Initially, by eliminating the price squeeze theory of liability for entities regulated at the wholesale level, the Court leaves it to the regulator, here the FCC, to lower the wholesale rate and prevent the price squeeze, but does so in a time where faith in the ability of federal regulation to protect consumers is at an all-time low.<sup>32</sup> The decision also underscores the ever-widening gap between U.S. and European Union antitrust approaches with respect to vertically integrated monopolists.<sup>33</sup>

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<sup>30</sup> *Monopolization*, *supra* note 28.

<sup>31</sup> *linkLINE*, *supra* note 1, at \*33 (internal quotation and citation omitted).

<sup>32</sup> *Id.* (citing statements by Professor Eleanor M. Fox, New York University School of Law, former Department of Justice International Competition Policy Advisory Committee member).

<sup>33</sup> *Id.* (citing statements by Donald I. Baker, of the Washington, D.C. firm Baker & Miller, PLLC, former Chief of the Department of Justice's Antitrust Division in the Ford and Carter administrations).

## SUPREME COURT FINDS FDA APPROVAL OF PHARMACEUTICAL WARNING LABELS DOES NOT PREEMPT STATE TORT CLAIMS

Dawn Goulet

On March 4, 2009, the Supreme Court issued its opinion in *Wyeth v. Levine*, the most recent in a trilogy of FDA preemption cases to wend their way to the Supreme Court.<sup>34</sup> The case involved a migraine sufferer who contracted gangrene and lost part of her arm after receiving an administration of Wyeth's nausea drug Phenergan via "IV push," a disfavored method of administration that can cause the drug to inadvertently be injected into an artery.<sup>35</sup> Called "the mother of all preemption cases," by the Wall Street Journal's Health Blog,<sup>36</sup> a finding of preemption in *Levine* had the potential to eliminate many hundreds of state tort and consumer protection actions by private plaintiffs and state attorneys general.<sup>37</sup> Consumer protection advocates around the country breathed a sigh of relief, and perhaps a little surprise, as the Court announced that the longstanding coexistence of state and federal law in the area of pharmaceutical warning labels would remain intact.

In the opinion, Justice Stevens identified two issues of fact decided by the trial court and two legal principles that guided the Court's decision.<sup>38</sup> The trial court's proceedings initially "established that Levine's injury would not have occurred if Phenergan's label had included an adequate warning about the risks of the IV-push method of administering the drug," and "further established that the critical defect in Phenergan's label" was the lack of such a warning.<sup>39</sup> The Court was also primarily guided by what Stevens referred to as the "two cornerstones of [its] pre-emption jurisprudence":

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<sup>34</sup> *Wyeth v. Levine*, No. 06-1249, 2009 U.S. LEXIS 1774 (Mar. 4, 2009).

<sup>35</sup> *Id.* at \*6.

<sup>36</sup> Jacob Goldstein, *Wyeth v. Levine: The Mother of All Preemption Cases*, WSJ HEALTH BLOG, <http://blogs.wsj.com/health/2008/09/19/wyeth-v-levine-the-mother-of-all-preemption-cases/>.

<sup>37</sup> See this author's previous discussion of this case in *Consumer News: Supporters and Opponents of Federal Preemption Take Sides, Anticipate High Court's Ruling on Third FDA Preemption Case This Year*, 21 LOY. CONSUMER L. REV. 96 (2008).

<sup>38</sup> *Levine*, *supra* note 34, at \*14. Justice Stevens delivered the opinion of the Court, joined by Justices Kennedy, Souter, Ginsburg and Breyer. Breyer and Thomas filed separate concurring opinions, and Justice Alito filed a dissenting opinion, in which he was joined by Justices Roberts and Scalia.

<sup>39</sup> *Id.*

First, the purpose of Congress is the ultimate touchstone in every pre-emption case. Second, [i]n all pre-emption cases, and particularly in those in which Congress has legislated . . . in a field in which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.<sup>40</sup>

The Court first rejected Wyeth's argument that state law claims should be preempted because they made it impossible to comply with federal labeling duties.<sup>41</sup> It pointed out that "[i]mpossibility pre-emption is a demanding defense,"<sup>42</sup> and that, although a manufacturer may only change a drug label after the FDA approves a supplemental application, the Agency's "changes being effected" ("CBE") regulation allows the manufacturer to "add or strengthen a contraindication, warning, precaution, or adverse reaction," or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product," *without* waiting for FDA approval.<sup>43</sup>

The Court disagreed with Wyeth's claim that the CBE regulation only applies where the manufacturer has acquired completely new data concerning the drug, finding instead that "newly acquired information . . . is not limited to new data, but also encompasses new analyses of previously submitted data," thus acknowledging that "risk information accumulates over time and the [ ] the same data may take on a different meaning in light of subsequent developments."<sup>44</sup> The Court found "Wyeth's cramped reading of the CBE regulation" to be "premised on a more fundamental misunderstanding . . . that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling," including ensuring that the labeling remains adequate for as long as the drug is marketed, a presumption the Court firmly rejected.<sup>45</sup>

Wyeth's next argument, "that requiring it to comply with a state-law duty to provide a stronger warning . . . would obstruct the purposes and objectives of the federal drug labeling regulation," was also rejected.<sup>46</sup> Wyeth argued that the FDCA establishes both a ceiling and a floor for drug regulation, but the Court disagreed, finding that "all evidence of Congress' purpose is to the contrary," based in part on the fact that Congress has had 70 years during which to amend the

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<sup>40</sup> *Id.* at \*16-17 (internal citations and quotations omitted).

<sup>41</sup> *Id.* at \*30.

<sup>42</sup> *Id.*

<sup>43</sup> *Levine, supra* note 34, at \*22.

<sup>44</sup> *Id.* at \*23 (internal quotation omitted).

<sup>45</sup> *Id.* at \*26.

<sup>46</sup> *Id.* at \*45.

FDCA, and has in fact added an express preemption provision for medical devices, but has notably not done so for prescription drugs.<sup>47</sup> To support its “ceiling and floor” argument, Wyeth referenced a much-debated preamble to a 2006 FDA regulation in which the FDA itself announced its recent view under the Bush administration that the FDCA was to have preemptive effect.<sup>48</sup> The Court found this pronouncement was “entitled to no weight,”<sup>49</sup> and was “inherently suspect” in light of the way the Agency slipped it into the regulation without providing interested parties notice or an opportunity to comment on it,<sup>50</sup> and based on the fact that it “plainly d[id] not reflect the agency’s own view at all times relevant to th[e] litigation.”<sup>51</sup>

In conclusion, the Court extolled the benefits of a dual system of state and federal regulation, especially appropriate where, as here, the FDA has limited resources to monitor the many drugs on the market and where pharmaceutical manufacturers have far superior access to information about the safety of their drugs.<sup>52</sup> Because state tort suits “serve a distinct compensatory function that may motivate injured persons to come forward with information,” state law claims provide “an additional, and important, layer of consumer protection that complements FDA regulation.”<sup>53</sup>

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<sup>47</sup> *Id.* at \*20, \*32-33.

<sup>48</sup> *Id.* at \*34-35.

<sup>49</sup> *Levine, supra* note 34, at \*45.

<sup>50</sup> *Id.* at \*38.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at \*39.

<sup>53</sup> *Id.* at \*39-40.

## PRESIDENT OBAMA SELECTS NEW FTC CHAIRMAN

*Dawn Goulet*

On March 2, 2009, President Barack Obama designated Commissioner Jon Leibowitz to succeed Republican William Kovacic as Chairman of the Federal Trade Commission (“FTC”).<sup>54</sup> At present, Leibowitz is the only Democrat on the Commission. In addition to Kovacic, the FTC has two additional commissioners, J. Thomas Rosch, a Republican, and Pamela Jones Harbour, an independent. One seat is currently vacant.<sup>55</sup>

Leibowitz, who was the Democratic chief counsel and staff director for the U.S. Senate Antitrust Subcommittee from 1997 to 2000, became an FTC Commissioner in 2004.<sup>56</sup> In addition to serving as chief counsel to several other Senate subcommittees and individual senators over the years, Leibowitz also served as Vice President for Congressional Affairs for the Motion Picture Association of America from 2000 to 2004.<sup>57</sup>

One area of focus some anticipate the Chairman to push for in the coming months is increased online privacy safeguards, especially in light of the emerging use of so-called “behavioral advertising,” in which online advertisers track a consumer’s online activities in order to deliver targeted advertisements.<sup>58</sup> This is confirmed by Leibowitz’ recent concurring statement to the FTC’s staff report “Self-Regulatory Principles for Online Behavioral Advertising,” in which the Commissioner expressed concern that “online tracking and data collection, coupled with inadequate notice to consumers about what information is collected and how it is used, raise critical privacy concerns.”<sup>59</sup> The Commissioner chose to write separately “to ensure that the Report’s endorsement of self-regulation [wa]s viewed neither as a regulatory retreat by the Agency nor an imprimatur for current

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<sup>54</sup> Press Release, John Leibowitz Named Chairman of the Federal Trade Commission (Mar. 3, 2009), <http://www2.ftc.gov/opa/2009/03/chairman.shtm> [hereinafter FTC Press Release].

<sup>55</sup> See FTC organizational chart at <http://ftc.gov/ftc-org-chart.pdf>.

<sup>56</sup> FTC Press Release, *supra* note 54.

<sup>57</sup> *Id.*

<sup>58</sup> *Appointments: Obama Taps Leibowitz to Chair Commission*, BNA ANTITRUST & TRADE REGULATION REPORT (Mar. 6, 2009), available at 96 ATRR 207 [hereinafter *Appointments*].

<sup>59</sup> CONCURRING STATEMENT OF COMMISSIONER JON LEIBOWITZ, FTC STAFF REPORT: SELF-REGULATORY PRINCIPLES FOR ONLINE BEHAVIORAL ADVERTISING 1 (Feb. 2009), <http://www.ftc.gov/os/2009/02/PO85400behavadleibowitz.pdf>.

business practices.”<sup>60</sup>

Another issue on which Leibowitz has made his position clear is the use of patent litigation and settlements between brand name and generic pharmaceutical manufacturers to keep less costly generics off the market. Leibowitz wrote a piece for the Washington Post in February, 2008 titled “This Pill Not to Be Taken with Competition: How Collusion Is Keeping Generic Drugs Off the Shelves” and gave a statement before the House Subcommittee on Commerce, Trade, and Consumer Protection in May, 2007 in support of H.R. 1902, a proposed bill to eliminate these pay-for-delay settlements.<sup>61</sup> Most recently, in February, 2009, the Commissioner authored a concurring statement in a case against Watson Pharmaceuticals, where he clearly announced his view that “[e]liminating these pay-for-delay settlements is one of the most important objectives for antitrust enforcement in American today,” because “illegally delaying generic entry on even a single drug can cost consumers billions of dollars.”<sup>62</sup>

With Leibowitz’ outspoken views on such issues, it comes as no surprise that consumer advocates have welcomed the President’s decision to appoint him to the position of Chairman. Chris Murray, senior counsel for Consumers Union, said Leibowitz is “the right person for this moment,” when “the need for antitrust scrutiny and consumer protection have never been greater.”<sup>63</sup> Others feel hopeful that the new Chairman will “help transform what has been a largely anemic regulatory watchdog during the Bush years.”<sup>64</sup> Leibowitz himself has said he “look[s] forward to continuing [the FTC’s] rich tradition of vigorous antitrust enforcement and consumer protection.”<sup>65</sup>

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<sup>60</sup> *Id.*

<sup>61</sup> See Jon Leibowitz, *This Pill Not to Be Taken with Competition: How Collusion is Keeping Generic Drugs Off the Shelves*, THE WASHINGTON POST A15 (Feb. 25, 2008); H.R. 1902, *Protecting Consumer Access to Generic Drugs Act of 2007: Hearing before the House Subcommittee on Commerce, Trade and Consumer Protection, Committee on Energy and Commerce*, 110th Cong. (2007) (oral statement of FTC Commissioner Jon Leibowitz) available at <http://www.ftc.gov/speeches/leibowitz/070502reversepayments.pdf>. See also *Paying Off Generics to Prevent Competition with Brand Name Drugs: Hearing Before the Senate Comm. on the Judiciary*, 110th Cong. (2007) (statement of Jon Leibowitz, Commissioner, Federal Trade Commission), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=2472&wit\\_id=5981](http://judiciary.senate.gov/hearings/testimony.cfm?id=2472&wit_id=5981).

<sup>62</sup> CONCURRING STATEMENT OF COMMISSIONER JON LEIBOWITZ, FEDERAL TRADE COMMISSION V. WATSON PHARMACEUTICALS, ET AL. (Feb. 2, 2009) <http://www.ftc.gov/speeches/leibowitz/090202watsonpharm.pdf>; see also <http://www.ftc.gov/os/caselist/810156/081216ovationleibowitzstmt.pdf>.

<sup>63</sup> *Appointments*, *supra* note 5.

<sup>64</sup> *Id.* (quoting Jeff Chester, executive director of the Center for Digital Democracy, a Washington-based advocacy group.)

<sup>65</sup> FTC Press Release, *supra* note 54.