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In 1997, Jesse Williams, the plaintiff's husband, died of lung cancer after smoking three packs a day for decades. After winning her tort case against Philip Morris, the jury awarded Williams compensatory damages totaling $821,485.50 and punitive damages of $79.5 million. The trial court capped the noneconomic portion of the compensatory damages at $500,000 and reduced the punitive damages to $32 million, citing federal standards. The Oregon Court of Appeals reversed the trial court's decision with regard to the punitive damages and reinstated them. The Oregon Supreme Court refused Philip Morris' appeal, but the United States Supreme Court granted cert and vacated the Court of Appeals decision, remanding the case to the Court of Appeals for reconsideration of the punitive damages in light of State Farm v. Campbell. On remand, the Court of Appeals again decided in the plaintiff's favor. This time, the Oregon Supreme Court granted Philip Morris' appeal and proceeded to affirm the Court of Appeals' decision.

Question Presented: 1. Whether, in reviewing a jury's award of punitive damages, an appellate court's conclusion that a defendant's conduct was highly reprehensible and analogous to a crime can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

2. Whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties.

Mayola WILLIAMS

v.

PHILIP MORRIS Incorporated

Supreme Court of Oregon

Decided February 2, 2006

[Excerpt: some footnotes and citations omitted]

GILLETTE, J:

This tort case arose out of the death of Jesse Williams, a smoker, who died of lung cancer. Plaintiff Mayola Williams is the widow of Jesse Williams and personal representative of his estate. Plaintiff sued defendant Philip Morris Inc. for, inter alia, negligence and fraud, asserting a causal connection between Jesse Williams's smoking habit and his death. A jury found for plaintiff on both causes of action. The jury awarded both economic and noneconomic damages; it also awarded plaintiff punitive damages of $79.5 million. The issue before us is whether that punitive damage award violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Court of
Appeals concluded that it did not. . . For the reasons that follow, we agree.

I. FACTS

Because the jury ruled in favor of plaintiff, we state all facts in the light most favorable to plaintiff. . . . Because the parties do not dispute the way that the Court of Appeals framed the facts, we quote extensively from that court's opinions.

Jesse Williams was a lifelong smoker who eventually died of lung cancer. The cancer was caused by Williams's smoking.

"From the early 1950s until his death from a smoking-related lung cancer in 1997, Williams smoked [Philip Morris]'s cigarettes, primarily its Marlboro brand, eventually developing a habit of three packs a day. At that point, he spent half his waking hours smoking and was highly addicted to tobacco, both physiologically and psychologically. Although, at the urging of his wife and children, he made several attempts to stop smoking, each time he failed, in part because of his addiction. Despite the increasing amount of information that linked smoking to health problems during that 40-year period, Williams resisted accepting or attempting to act on it. When his family told him that cigarettes were dangerous to his health, he replied that the cigarette companies would not sell them if they were as dangerous as his family claimed. When one of his sons tried to get him to read articles about the dangers of smoking, he responded by finding published assertions that cigarette smoking was not dangerous. However, when Williams learned that he had inoperable lung cancer he felt betrayed, stating 'those darn cigarette people finally did it. They were lying all the time.' He died about six months after his diagnosis."

. . . Plaintiff based her fraud claim against Philip Morris on a 40-year publicity campaign by Philip Morris and the tobacco industry to undercut published concerns about the dangers of smoking. . . . Philip Morris and the tobacco industry had known for most of those 40 years, if not all of them, that smoking was dangerous. . . . Nevertheless, they tried to create in the public mind the impression that there were legitimate reasons to doubt the danger of smoking. . . . Philip Morris and the tobacco industry did so to give smokers a reason to keep smoking (or, perhaps more accurately, to undermine one of the main incentives for smokers to stop smoking). . . .

* * *

II. PROCEDURAL POSTURE

At trial, the jury found in favor of plaintiff on both the negligence and fraud claims, and it awarded compensatory damages of $821,485.50—$21,485.80 in economic damages and $800,000 in noneconomic damages.

As to the negligence claim, the jury found Williams 50% responsible for the damages. The jury declined to award any punitive damages respecting that claim. As to the fraud claim, however, the jury awarded punitive damages of $79.5 million.
The trial court significantly reduced the amounts awarded to the plaintiff. The court “capped” the noneconomic damages at $500,000 pursuant to former ORS 18.560 (1999), renumbered as ORS 31.710 (2003), thereby producing a total compensatory damage award of $521,485.80. The court also reduced the punitive damage award. The court did conclude that $79.5 million “was within the range a rational juror could assess based on the record as a whole and applying the Oregon common law and statutory factors.” Nevertheless, the court concluded, the $79.5 million punitive damage award “was excessive under federal standards.” The trial court therefore reduced the punitive damage award to $32 million.

Both plaintiff and Philip Morris appealed to the Court of Appeals. In Williams I, the Court of Appeals reversed the trial court on plaintiff’s appeal and reinstated the $79.5 million punitive damage award. . . . It affirmed on Philip Morris’s cross-appeal. . . . The court later adhered to its opinion on reconsideration. . . . This court denied review.

The United States Supreme Court then granted certiorari, vacated the Court of Appeals’ judgment, and remanded the case to the Court of Appeals for that court to reconsider the amount of the punitive damages award in light of State Farm Mut. Automobile Ins. Co. v. Campbell, . . . The Court of Appeals did so in Williams II, again reversing on plaintiff’s appeal and affirming on Philip Morris’s cross-appeal. We allowed review.

III. ISSUES ON REVIEW

The appeal remained alive only because of, and to the extent that, the United States Supreme Court later directed the Court of Appeals to reconsider its decision respecting the amount of punitive damages in light of Campbell. The Court of Appeals performed that limited function in Williams II, and we allowed review of that decision.

** **

IV. DISCUSSION

A. Overview of State Farm v. Campbell

We begin by reviewing the United States Supreme Court’s opinion in Campbell.

The punitive damage award at issue in Campbell arose from an insured’s action against an insurer for bad faith, fraud, and intentional infliction of emotional distress . . . . Campbell, the insured, had caused an automobile accident that killed one person and permanently disabled another. . . . When Campbell was sued, Campbell’s insurer, State Farm, chose to contest liability. . . . It refused settlement offers that were within policy limits and took the case to trial despite the advice of one of its own investigators, in the process assuring Campbell and his wife that they would face no personal liability. . . . When the jury returned a verdict substantially above the policy limits, State Farm initially refused to cover the excess, telling the Campbells to put “for sale” signs on their property. . . . State Farm also refused to post a supersedeas bond to appeal the verdict. . . .

In their action against State Farm, the Campbells introduced evidence that State Farm’s decision to try the case was part of a nationwide effort to limit payouts on insurance claims. . . . The evidence “concerned State Farm’s business practices
for over 20 years in numerous States. Most of these practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells’ complaint against the company.” . . . The jury awarded the Campbells $2.6 million in compensatory damages and $145 million in punitive damages. . . . The trial court reduced the compensatory damages to $1 million and the punitive damages to $25 million. . . . On appeal, the Utah Supreme Court reinstated the $145 million punitive damage award. . . . The United States Supreme Court granted certiorari. . . .

The Court first noted that compensatory damages are intended to compensate for a loss, while punitive damages “are aimed at deterrence and retribution.” . . . However, the Court noted, the Fourteenth Amendment’s Due Process Clause prohibits imposing “grossly excessive or arbitrary punishments” on a tortfeasor. . . . A person must have fair notice, not just that the state will punish certain conduct, but also how severely it will do so. . . .

The Court identified two risks peculiar to punitive damages. First, although punitive damage awards are similar to criminal sanctions, defendants do not receive the procedural protections required of criminal trials. . . . Second, vague jury instructions can leave the jury with too much discretion in choosing the amount of punitive damages, allowing it to express preexisting biases or to rely too much on tangential or inflammatory evidence. . . . For those reasons, the Court had directed “exacting appellate review” of a jury’s punitive damage award, considering three “guideposts” identified in BMW of North America, Inc. v. Gore, . . . :

“(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”

. . . The Court then applied those guideposts. The first guidepost, the reprehensibility of defendant’s conduct, represents “‘the most important indicium of the reasonableness of a punitive damages award.’ . . . In analyzing reprehensibility, courts should consider whether

“the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.”

. . . In analyzing that guidepost in Campbell, however, the Court did not itself focus on those five considerations. Instead, it concentrated on how evidence of out-of-state conduct and dissimilar conduct had skewed the reprehensibility analysis against State Farm. The state wrongly relied on such conduct, the Court ruled, because a state cannot punish a defendant for its lawful conduct in another state, or for conduct that “occurred outside [the state] to other persons.” . . . In Campbell, most of the out-of-state conduct was lawful where it took place,
and it was not connected to the harm to the Campbells. . . . Furthermore, the Court held, a state cannot punish a defendant for “dissimilar acts”: “A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.” . . . In sum, the Court held that, because the Campbells showed “no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.” . . .

The second Gore guidepost examines the ratio between the punitive damage award and the actual or potential harm to the plaintiff. . . . The ratio, however, is no mechanical formula. . . .

That said, the Court proceeded to give some guidance regarding the second guidepost. Twice in the past, the Court noted, it had suggested that a punitive damage award more than four times compensatory damages “might be close to the line of constitutional impropriety.” . . . The Court also had noted previously that, for 700 years, legislatures had authorized double, treble, or quadruple damages as a sanction. . . . The Court concluded that, “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” . . .

. . . . The Court did acknowledge, however, that even those tentative ratios might be adjusted up or down. A greater ratio might comport with due process if “a particularly egregious act has resulted in only a small amount of economic damages,” if “the injury is hard to detect,” or if “the monetary value of noneconomic harm might have been difficult to determine.” . . . With a “substantial” compensatory damage award, however, due process might require “a lesser ratio, perhaps only equal to compensatory damages.” . . . But “the precise award must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” . . .

In applying the second Gore guidepost, the Court stated that there is “a presumption against an award that has a 145-to-1 ratio.” . . . The Campbells had received a substantial compensatory damage award; they were injured economically, not physically; and State Farm paid the excess verdict before the Campbells sued them, so their economic injuries were minor. . . . Additionally, the outrage and humiliation that State Farm caused the Campbells may have been considered twice—once in the compensatory damage award and again in the punitive damage award. . . .

The Court also rejected several other factors that the Utah Supreme Court had identified in support of the punitive damage award. For example, the Utah Supreme Court had pointed to State Farm’s wealth. The Court concluded that wealth should not have been considered . . .

. . . . The comparable civil sanctions in Campbell fell well below the punitive damage award. The Court identified only one, a $10,000 fine for fraud. . . . The Utah Supreme Court had
pointed to other, more substantive penalties, but they were all based on evidence of out-of-state and dissimilar conduct. . . .

In all, the Court in *Campbell* found the case "neither close nor difficult," . . . and concluded that $145 million in punitive damages violated due process, . . . The Court suggested that the guideposts,

"especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award at or near the amount of compensatory damages."

. . . However, the Court concluded, Utah state courts should calculate punitive damages in the first instance. . . .

With the foregoing principles in mind, we turn to the questions presented on review.

B. The Trial Court’s Refusal to Give Philip Morris’s Proposed Jury Instruction No. 34

Philip Morris first argues that the trial court erred in refusing to give its proposed jury instruction number 34. That instruction stated, in part:

"The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant’s punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit."

In *Williams I*, the Court of Appeals concluded that instruction was incorrect under state law. . . . We agree. . . . That is, the jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.

Philip Morris, however, contends that *Campbell* overrules state rules like the one set out in *Parrott*. Specifically, Philip Morris asserts that *Campbell* prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harm to nonparties. In support of that argument, Philip Morris quotes the following from *Campbell*:

"Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis * * *. * * * Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains. *Gore*, *supra*, [517 US at 593] (Breyer, J., concurring) (‘Larger damages might also “double count” by including in the punitive damages award some of the compensatory, or punitive,
damages that subsequent plaintiffs would also recover)."

... [W]e conclude that evidence of similar conduct against other parties may be relevant to a punitive damage award. The Court criticized the Utah courts only for allowing in evidence of dissimilar conduct...

* * *

Philip Morris's proposed jury instruction would have prohibited the jury from "punishing the defendant for the impact of its alleged misconduct on other persons," even if those other persons were Oregonians who were harmed by the same conduct that had harmed Williams, and in the same way. As we noted, that is not correct as an independent matter of Oregon law respecting the conduct of jury trials and instructions that are given to juries. Neither, as we read in Campbell, does it correctly state federal due process law. Because the proposed jury instruction did not accurately reflect the law, the trial court did not commit reversible error when it refused to give it...

Philip Morris also claims that the trial court committed reversible error because the jury instructions that were given did not accurately reflect some aspects of Campbell's holding. But Philip Morris did not preserve that argument before the Court of Appeals. Fairly read, Philip Morris's assignment of error in the Court of Appeals claimed only that the trial court erred in refusing to give requested instruction number 34. That narrow assignment of error did not give the Court of Appeals notice that it needed to consider any challenge to the instructions actually given.

Based on the foregoing discussion, we affirm the Court of Appeals on the first issue.

C. The Punitive Damage Award and Federal Due Process

On review of a punitive damage award under the Due Process Clause of the Fourteenth Amendment, a court must determine whether the punitive damage award is "grossly excessive"... Whether the verdict exceeds the gross excessiveness standard is a question of law....

In Parrott, this court identified five factors to be considered to determine whether a punitive damage award is grossly excessive:

"The range that a rational juror would be entitled to award depends on the following: (1) the statutory and common-law factors that allow an award of punitive damages for the specific kind of claim at issue; (2) the state interests that a punitive damages award is designed to serve; (3) the degree of reprehensibility of the defendant's conduct; (4) the disparity between the punitive damages award and the actual or potential harm inflicted; and (5) the civil and criminal sanctions provided for comparable misconduct."

... Parrott has been superseded somewhat by Campbell, but the last three Parrott factors are, of course, the Gore guideposts as they have been further elucidated by Campbell. We consider only those guideposts in the following analysis.

The first guidepost directs us to consider, based on the facts contained in the record, how reprehensible Philip Morris's conduct was. As noted, we consider whether:
“the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.”

... And, as we have explained, the jury, in assessing the reprehensibility of Philip Morris's actions, could consider evidence of similar harm to other Oregonians caused (or threatened) by the same conduct.

Again, we construe all facts in favor of plaintiff, the party in whose favor the jury ruled. Doing so, there can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.

Philip Morris's fraudulent scheme would have kept many Oregonians smoking past the point when they would otherwise have quit. Some of those smokers would eventually become ill; some would die. Philip Morris's deceit thus would, naturally and inevitably, lead to significant injury or death.

Although it weighs less in our analysis, we also note that Philip Morris harmed a much broader class of Oregonians. Every smoker tricked by its scheme, even those who never got ill, kept buying cigarettes—taking money out of their pockets and putting it into the hands of Philip Morris and other tobacco companies. And every one of those smokers risked serious illness or death for as long as they remained deceived.

Of the five reprehensibility factors listed in Gore and recited—if not precisely used—in Campbell, four certainly are met here. The harm to Williams was physical—lung cancer cost Williams his life. Philip Morris showed indifference to and reckless disregard for the safety not just of Williams, but of countless other Oregonians, when it knowingly spread false or misleading information to keep smokers smoking. Philip Morris's actions were no isolated incident, but a carefully calculated program spanning decades. And Philip Morris's wrongdoing certainly involved trickery and deceit. We conclude, then, that the first Gore guidepost favors a very significant punitive damage award.

We also conclude that the third Gore guidepost—comparable civil or criminal sanctions—favors plaintiff. In examining that guidepost, however, we believe that it is important to correct two errors that the Court of Appeals committed in applying it.

In Williams I, the Court of Appeals suggested that, because the comparable sanctions guidepost was about notice to a prospective defendant, “the established Oregon law of punitive damages, including ORS 30.925(2),” gave Philip Morris adequate notice here... That was not correct.

Courts consider comparable sanctions for two reasons. First, comparable sanctions suggest a legislative determination about what constitutes an appropriate sanction for the
conduct, a determination that is entitled to “substantial deference.” . . . Second, comparable sanctions may give a defendant fair notice of the penalties that the conduct may carry. . . .

Those reasons explain why we conclude that the Court of Appeals misunderstood the guidepost. Neither Oregon law generally, nor ORS 30.925(2) specifically, suggest how severely the state may choose to punish Philip Morris’s conduct. Thus, they do not independently provide a legislative standard entitled to substantial deference. If the Court of Appeals’ analysis were correct, then the third Gore guidepost would always support any punitive damage award, i.e., the mere existence of the award would justify itself automatically, regardless of the amount awarded. That reasoning is circular, and we reject it.

In Williams I, the Court of Appeals also suggested that the comparable sanctions guidepost does not “play[] a major role one way or the other,” because it concluded that there were no comparable civil penalties and that criminal penalties were not truly comparable. . . . Although it is not clear to us that the foregoing statement correctly interprets and applies the law as Campbell now explicates that law, we need not pursue that issue definitively here. That is true, because applying the comparable sanctions guidepost involves more than just asking whether the dollar amount of the sanction equals or exceeds the punitive damage award. Campbell proves that. There, the most relevant civil sanction was $10,000; the Court found that civil sanction was “dwarfed” by the $145 million punitive damage award. . . . Yet the Court approved a punitive damage award “at or near the amount of compensatory damages,” . . . i.e., an award somewhere around $1 million. And a $1 million punitive damage award was still 100 times the comparable sanction.

So far as we can discern from Campbell, then, the “comparable sanctions” guidepost requires three steps. First, courts must identify comparable civil or criminal sanctions. Second, courts must consider how serious the comparable sanctions are, relative to the universe of sanctions that the legislature authorizes to punish inappropriate conduct. Third, courts must then evaluate the punitive damage award in light of the relative severity of the comparable sanctions. The guidepost may militate against a significant punitive damage award if the state’s comparable sanctions are mild, trivial, or nonexistent. However, the guidepost will support a more significant punitive damage award when the state’s comparable sanctions are severe.

We turn, then, to consider the facts of this case, in light of the guideposts and the Fourteenth Amendment. If there are comparable civil sanctions, the parties did not cite them to us and we have not found them by independent investigation.

There are what we consider to be comparable criminal sanctions, but we must exercise care when relying on them. As the Court took pains to caution in Campbell:

“The existence of a criminal penalty does have [a] bearing on the seriousness with which a State views the wrongful action. When used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened
protections of a criminal trial have been observed, including, of course, its higher standards of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."

That admonition is important, of course. But the basis for holding that Philip Morris’s actions in this case compare to a familiar crime is not speculative or remote. Viewing the facts in the light most favorable to plaintiff, Philip Morris’s actions, under the criminal statutes in place at the beginning of its scheme in 1954, would have constituted manslaughter. Today, its actions would constitute at least second-degree manslaughter, a Class B felony. . . . Individuals who commit Class B felonies may face up to 10 years in prison and a fine of up to $250,000. . . . Corporations that commit a felony of any class may be fined up to $50,000, or required to pay up to twice the amount that the corporation gained by committing the offense. . . . Thus, the possibility of severe criminal sanctions, both for any individual who participated and for the corporation generally, put Philip Morris on notice that Oregon would take such conduct very seriously. We conclude that the third guidepost, like the first, supports a very significant punitive damage award.

The same cannot be said of the second Gore guidepost. As noted, that guidepost considers the ratio between the punitive damage award and the compensatory damage award. The numerator of the ratio is fixed by the punitive damage award: $79.5 million.

To determine the denominator of the ratio, we consider not only the harm actually suffered by plaintiff, but also the potential harm to plaintiff. . . . Plaintiff suffered relatively small economic damages for Williams’s wrongful death—less than $25,000. However, that low figure occurred only because Williams died shortly after being diagnosed with cancer. If Williams had lived long enough to incur substantial medical bills, for example, economic damages could easily have been 10 or more times the amount awarded here. Only chance saved Philip Morris from a much higher compensatory damage award.

In analyzing the ratio of punitive to compensatory damages, the Court of Appeals also added to the compensatory damages calculus the estimated harm to others. . . .

Using harm to others as part of the ratio may have been correct under the plurality opinion in TXO Production Corp. v. Alliance Resources Corp., . . . However, it no longer appears to be permissible (if it ever was) to factor in that consideration. Although Campbell held that similar acts could bear on reprehensibility, it now appears that harm to others should not be considered as part of the ratio guidepost. . . . From the foregoing, we conclude that the ratio guidepost considers only harm to the plaintiff. . . .

There also is some imprecision regarding what amount we should use for noneconomic damages—is it the $800,000 awarded by the jury, or the $500,000 awarded by the trial court after applying the statutory cap? We need not decide between the “capped” or “uncapped” figure, however, because it makes no difference here. Either way, the second Gore guidepost is not met. All arguable versions of the ratios substantially exceed the single-digit ratio (9:1) that the Court has said ordinarily will apply in the usual case. . . .
In Williams II, the Court of Appeals also relied on Philip Morris's wealth to conclude that the jury's punitive damage award did not violate due process. . . . Philip Morris objects that Campbell prohibits using wealth in that way. We agree. Wealth "cannot justify an otherwise unconstitutional punitive damages award." . . . If a punitive damage award is grossly excessive under Gore and Campbell, then the defendant's wealth will not make it constitutional. In short, wealth is not a fourth Gore guidepost.

However, Campbell did not otherwise remove wealth from the punitive damage equation, as Philip Morris asserts. A jury still may levy a higher punitive damage award against a wealthy defendant, as long as the final punitive damage award does not exceed the constitutional limits established by the three Gore guideposts. . . . Consistently with the foregoing, Oregon law specifically permits a jury to consider a defendant's financial condition when it imposes a punitive damage award. . . .

Of the three Gore guideposts, then, two support a very significant punitive damage award. One guidepost—the ratio—cuts the other way. In the end, we are left to use those competitive tools to assess whether the jury's punitive damage award was not "grossly excessive" and therefore should be reinstated.

The Gore guideposts are not bright-line tests. . . . In other words, the guideposts are only that—guideposts. Gore also referred to them as indicia. . . . Campbell specifically contemplated that some awards exceeding single-digit ratios would satisfy due process. . . . Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

And this is by no means an ordinary case. Philip Morris's conduct here was extraordinarily reprehensible, by any measure of which we are aware. It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme.

In summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group. Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process, as we understand that standard to relate to punitive damage awards. It follows that the Court of Appeals correctly held that the trial court should have entered judgment against Philip Morris for the full amount of the jury's punitive damage award.

The decision of the Court of Appeals is affirmed. The judgment of the circuit court is reversed, and the case is remanded to the circuit court for further proceedings.
The Supreme Court, opening a new chapter in its effort to establish constitutional boundaries for punitive damages, agreed on Tuesday to hear a cigarette maker’s appeal of a $79.5 million punitive damage award.

The amount was 97 times greater than the compensatory damages that an Oregon jury awarded in the case to the widow of a smoker who died of lung cancer.

As in earlier punitive damages cases, the question for the justices is whether the award was so disproportionate to the injury as to violate the constitutional guarantee of due process. The Supreme Court has been closely divided in these cases, and with two new justices, the court may have decided that the time was right for a fresh look.

When the justices take up the case in their next term, they will hardly be writing on a clean slate. In an important victory for corporate defendants, the court three years ago overturned an award of $145 million in punitive damages against the State Farm insurance company and set out some guidelines.

In the State Farm case, a Utah jury had assessed compensatory damages of $1 million, meaning that there was a 145:1 ratio of punitive damages to compensatory. Finding the punitive award “neither reasonable nor proportionate to the wrong committed,” Justice Anthony M. Kennedy wrote for the majority that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”

The vote in that case was 6 to 3; two members of the majority, Chief Justice William H. Rehnquist and Justice Sandra Day O’Connor, are no longer on the court. Not only for that reason, the outcome in the new case, Philip Morris USA v. Williams, No. 05-1296, is far from certain.

Punitive damages decisions have not followed the court’s typical liberal-conservative ideological alignments. Justices Antonin Scalia, Clarence Thomas and Ruth Bader Ginsburg were the dissenters last time, with Justice Ginsburg complaining that the majority was “boldly out of order” to invade the province of state legislatures and state courts in placing limits on punitive damages.

Further, the court’s major punitive damages rulings have come in cases in which the injury that led to the lawsuit was economic rather than physical. The State Farm case began as a suit over the insurance company’s initial refusal to settle a claim for a policyholder. Another important precedent, a 1996 decision that overturned a $2 million punitive damage award against the BMW automobile company, began as a complaint that cars were being sold as new without informing buyers that the paint had been touched up.

In his opinion in the State Farm case, Justice Kennedy noted that the case involved “no physical injuries.” While he did not elaborate, the suggestion was that other
considerations might apply had the harm to the plaintiffs consisted of more than “only minor economic injuries.”

The plaintiff in the new case, Mayola Williams, was married to a man who began smoking while serving in the United States Army in Korea in 1950 and who went on to smoke three packs of Marlboro cigarettes a day for decades. In 1996, lung cancer was diagnosed in the man, Jesse Williams, and he died the next year.

Mrs. Williams’s lawsuit asserted that the maker of Marlboro, Philip Morris, which with its various brands accounts for about half the cigarette sales in the United States, had perpetrated a 50-year fraud to conceal the health effects of smoking. Her lawyer asked the jury to consider “how many other Jesse Williamses in the last 40 years in the state of Oregon there have been.”

The company’s Supreme Court appeal argues that it violates due process to punish a defendant “for the effects of its conduct on nonparties,” that is, on other smokers whose cases were not before the jury.

Rejecting that argument in its opinion in February of this year, the Oregon Supreme Court said that Philip Morris “engaged in a massive, continuous, near half-century scheme to defraud the plain-tiff and many others” by concealing the truth and inducing its customers to keep smoking. The state court called the company’s conduct “extraordinarily reprehensible, by any measure of which we are aware.”

The Supreme Court’s precedents have referred to “reprehensibility” as a factor to consider in evaluating a punitive damages award. In this case, Philip Morris argues in its appeal, the Oregon court improperly permitted its conclusion on reprehensibility to “override the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.”

The company’s appeal was supported by briefs filed by the United States Chamber of Commerce and the Product Liability Advisory Council, a coalition of 133 manufacturers. The case will be argued in November or December.
The Oregon Supreme Court on Thursday upheld a $79.5 million punitive damage award against cigarette maker Philip Morris.

The U.S. Supreme Court in 2003 ordered a review of the award for excessiveness, but nearly three years later Oregon's top court said Philip Morris' bad behavior justified a large verdict.

"Philip Morris’s conduct here was extraordinarily reprehensible, by any measure of which we are aware," wrote Justice Michael Gillette for a unanimous court. "It put a significant number of victims at profound risk for an extended period of time. The State of Oregon treats such conduct as grounds for a severe criminal sanction, but even that did not dissuade Philip Morris from pursuing its scheme."

Mayola Williams, who filed the suit on behalf of her deceased husband, Jesse, praised the ruling.

"I put Jesse in the place of David against the great giant, and he came out pretty good so far," she said. "The justice system has done us fairly."

Philip Morris officials said the decision violated U.S. Supreme Court rulings.

"Philip Morris USA will once again seek review of this case by the U.S. Supreme Court," said William S. Ohlemeyer, Philip Morris USA vice president and associate general counsel.

Oregon and the U.S. Supreme Court have tussled over the size of punitive damage awards for more than a decade. Since 1994, the nation's highest court has sent at least five punitive damage awards back to the state for review.

Oregon has complied with the orders to reconsider, but the Philip Morris case marks at least the second time the state Supreme Court has concluded that a large punitive damage award was appropriate.

"The Oregon supremes' response to this has always been somewhat grudging," said Thomas W. Sondag, a Portland attorney who has argued against large punitive damage awards in several Oregon cases.

David F. Sugerman, a Portland attorney on the other side of the debate, said Oregon was one of several states that have had punitive awards sent back by the U.S. Supreme Court. "It's not defiance. It's that we have a system here, and when the two collide, there's going to be some tension," Sugerman said.

Jesse D. Williams, 67, a former Portland janitor and longtime smoker, died of lung cancer in 1997. During the 1999 trial in Multnomah County, lawyers for his family argued that a large punitive damages award was justified because Philip Morris officials had known for more than half a century that smoking was deadly, had consistently downplayed the health risks and had manipulated the levels of nicotine to keep smokers addicted.

In addition to the $79.5 million punitive
damages award, the jury awarded $821,485 in compensatory damages. At the time, it was the largest individual smoking-death verdict in the country.

Philip Morris attorneys asked the judge to reduce the punitive damage award, arguing that the U.S. Supreme Court had ruled that such verdicts generally should be less than 10 times compensatory damages.

The judge reduced the punitive damages to $32 million.

Both sides appealed. The Oregon Court of Appeals reinstated the $79.5 million punitive damages award. The Oregon Supreme Court declined to review the case, but the U.S. Supreme Court took it on appeal.

In 2003, the U.S. Supreme Court overturned a $145 million punitive damages award out of Utah. The court said the amount was excessive in violation of the 14th Amendment due process clause. The court spelled out a series of rules for evaluating punitive damages.

The court then told Oregon to reconsider three punitive damages awards, including the Williams verdict, in light of the Utah case.

A decade earlier, the U.S. Supreme Court overturned a $5 million punitive damages award in an all-terrain vehicle rollover case because the Oregon Supreme Court had declined to review the size of the verdict.

In 1995, the Oregon Supreme Court acquiesced and reviewed the verdict, but decided it was not excessive.

The U.S. Supreme Court let that decision stand.

When the Williams case went back to Oregon, the Court of Appeals got the first look. And in 2004, the court said the award was justified.

Next stop was the Oregon Supreme Court, which said the ratio of compensatory damages to punitive damages in the case—the two sides do the math differently—was by any calculation higher than is generally allowed. But the ratio was just one part of the analysis, and in this case the company’s egregious conduct outweighed it, the court said.

“\nIn summary, Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect—and for two or more decades absolutely knew—that the scheme was damaging the health of a very large group of Oregonians—the smoking public—and was killing a number of that group,” Gillette wrote. “Under such extreme and outrageous circumstances, we conclude that the jury’s $79.5 million punitive damage award against Philip Morris comported with due process."

Under Oregon law, 60 percent of punitive damages awards go to the state crime victims’ compensation fund.
On remand from the U.S. Supreme Court, the Oregon Court of Appeals reinstated a jury's award of $79.5 million against a tobacco company.

The appeals court had previously reversed a trial court's reduction of the jury's $79.5 million award on Mayola Williams' fraud claim against Philip Morris Inc., and remanded the case with instructions to enter judgment on the verdict. The appeals court affirmed on Philip Morris' cross-appeal (see 11 HLawWk 542, Aug. 30, 2002).

Thereafter, the Supreme Court granted Philip Morris' petition for a writ of certiorari, vacated the appeals court's decision, and remanded the case for reconsideration in light of the Court's decision in State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).

On remand, the appeals court reached the same result that it reached in its previous decision. First, it found the holding in State Farm did not affect its previous conclusion that "the potential injury to past, present, and future consumers as the result of a routine business practice is an appropriate consideration in determining the amount of punitive damages."

The appeals court then turned to the primary issue before it, whether the jury's award was consistent with the guidelines as the Supreme Court refined them in State Farm. As an initial matter, the court noted the state of Oregon had a legitimate interest in punishing Philip Morris and deterring it from further misconduct.

After analyzing the guidelines, the appeals court concluded that an award of punitive damages in the amount of $79.5 million did not violate the Due Process Clause under the guidelines provided by State Farm. According to the court, the amount of the award was reasonable and proportionate to the wrong inflicted on decedent and the public of the state of Oregon. Thus, after reconsidering its previous opinion in light of State Farm, the appeals court believed its original decision was correct.
The Supreme Court tossed out a large punitive damage verdict against cigarette maker Philip Morris on Monday, telling lower court judges to reevaluate the size of the award.

The court set aside a $79.5-million award that was designed to punish the tobacco firm for the lung cancer death of an Oregon janitor. In another personal injury case, it set aside a $3-million verdict in which jurors sought to punish DaimlerChrysler for the death of a Kentucky man who was ejected from his Dodge Ram pickup in a crash.

The court’s one-line orders Monday followed a major ruling in April that sharply limited the power of juries to punish companies with huge punitive damage awards. The justices stressed that civil lawsuits are intended to compensate plaintiffs for their losses if they were injured and wronged by another. It is not a system for punishing unpopular industries and “unsavory businesses,” the court said.

Since the 1970s, an increasing number of lawsuits filed by injured individuals have resulted in multimillion-dollar verdicts against corporations. Typically, the jurors are asked to award actual damages to cover the victim's losses and then award a second, larger amount to punish the company for its wrongdoing.

In its April decision in State Farm vs. Campbell, the high court warned judges that they must rein in punitive damage verdicts that greatly exceed the actual losses of the victims who brought the lawsuit.

In that case, a Utah jury had ruled against the auto insurer with $145 million in punitive damages for having refused to pay the full verdict against a man who caused an accident that killed another driver.

Ordinarily, after handing down such a ruling, the justices act on a series of pending appeals in related cases and send them back to lower courts to be reevaluated.

They did just that in May when they reversed two large verdicts against Ford Motor Co., including a $290-million punitive verdict in California. In that case, a Stanislaus County jury had awarded more than $6 million to a family that suffered injuries and a death when its Bronco rolled over, plus $290 million to punish Ford for what it said was gross wrongdoing in manufacturing a defective vehicle.

In Monday’s action involving Philip Morris and DaimlerChrysler, the high court did not rule out the possibility of punitive damages. Its order told lower courts that the amount of these damages should be in line with the actual losses of the victim.

Only in the rarest circumstance can the punitive verdict “exceed a single-digit ratio” compared with the actual damages, said Justice Anthony M. Kennedy. For example, if a jury awards $1 million to a plaintiff for actual losses, the punitive damages should...
not exceed $9 million, he said.

In the Oregon case, lawyers for Philip Morris had appealed, saying "the 97-1 ratio of punitive-to-compensatory damages in this case cannot stand constitutional scrutiny."

Jesse Williams started smoking during the 1950s and continued a three-pack-a-day habit for four decades. He died of lung cancer in 1997. His family sued Philip Morris and won $521,000 in compensatory damages. The jury tacked on $79.5 million in punitive damages. The verdict was upheld last year by the Oregon Supreme Court.

On Monday, the court granted an appeal by Philip Morris, vacated the lower court ruling and sent the case back to Oregon "for further consideration in light of State Farm vs. Campbell."

The tobacco industry has several other large punitive damage awards on appeal, including four in California.

Last month, a state appeals court in San Francisco reduced the punitive damages awarded to a former smoker with lung cancer to $9 million from $25 million. But the court refused Philip Morris' request to toss out the award entirely, saying $9 million was "permissible and appropriate" because Philip Morris had "touted to children what it knew to be a cumulatively toxic substance."

Two other cases in California that resulted in punitive damages of $28 billion and $3 billion were later reduced to $28 million and $100 million, respectively.

Shares of Philip Morris parent Altria Group Inc. rose 34 cents Monday to $45.03. Daimler-Chrysler gained 36 cents to $35.94. Both trade on the New York Stock Exchange.
A state jury in Portland, Ore., yesterday ordered the largest award in a smoking-related lawsuit, deciding that the Philip Morris Companies must pay $81 million to the family of a man who smoked Marlboro cigarettes for four decades before he died.

The verdict, coming just a month after a San Francisco jury awarded $51 million in another case brought by an individual smoker against Philip Morris, could indicate that the tobacco industry's legal fortunes may have shifted, analysts said. In recent years, the public has witnessed a constant drumbeat of documents damaging to cigarette makers, which industry analysts say may be a factor in the jury decisions.

For example, in both cases involving Philip Morris, the juries called for large punitive damages, which are meant to punish a company for its behavior. In yesterday's decision, the jury awarded $79.5 million in punitive damages and $1.6 million in compensatory damages to the family of Jesse Williams, who died in 1997, five months after lung cancer was diagnosed. In the San Francisco case, the jury awarded $50 million in punitive damages.

Yesterday Mr. Williams's wife, Mayola, said he had had a dying wish. "He wanted to make cigarette companies stop lying about the health problems of smokers," she told The Associated Press. "This jury agreed with his goals."

Philip Morris, which is appealing the California verdict, said yesterday that it would also appeal the Oregon verdict. Higher courts have thrown out the few previous victories by smokers in cigarette-related lawsuits, often on procedural grounds.

"No verdict has ever withstood an appeal, and we don't believe this will be a first one," said Gregory Little, the associate general counsel for Philip Morris, which is the country's biggest cigarette maker.

But tobacco industry analysts said yesterday's decision was a particular setback for cigarette makers because state product liability laws in Oregon are far tougher than those in California or Florida, the other states in which producers have suffered legal losses.

In Oregon, a smoker is barred from receiving an award if a jury determines that he or she bore more than 50 percent liability for the problem over which a suit was brought.

Cigarette company lawyers argued that Mr. Williams was aware of the health risk when he decided to continue smoking. The jury determined that Mr. Williams and Philip Morris equally shared liability.

William A. Gaylord, a lawyer for the Williams family, said they had acknowledged that Mr. Williams was partly responsible for his death.

"The problem has been that Philip Morris and other cigarette companies have never accepted an ounce of responsibility," Mr. Gaylord said. "They deny everything. They
essentially say to their very best customers that you get what’s coming to you for believing us.”

Gary Black, a tobacco industry analyst with Sanford C. Bernstein & Company in New York, said that added to the California decision, yesterday’s verdict suggested that the industry’s $206 billion settlement last year with 46 states had failed to put its legal troubles to rest.

Under that agreement, which resolved lawsuits brought by the states to recover health care expenses related to smoking, individual smokers and groups of them can still sue. Four states had earlier settled their claims in deals with the industry.

“I think the industry has got to get its head out of the sand and stop believing that the settlement got them closure,” Mr. Black said. “With all the documents and whistle-blowers out there, juries are increasingly going to award damages.”

In trading after the verdict, Philip Morris stock fell $3.4375 a share to close at $37.75 a share.

In the California case last month, the jury ordered Philip Morris to pay $51.5 million to Patricia Henley, who said her lung cancer had been caused by more than 35 years of smoking. That verdict was the largest award of its kind until yesterday.

Cigarette industry officials have portrayed that case as an aberration, pointing to a number of recent legal victories. Earlier this month, a Federal jury in Akron, Ohio, ruled that tobacco companies did not have to repay the costs of treating smoking-related illnesses to dozens of union health and benefit plans in Ohio.

But analysts said the back-to-back losses by Philip Morris in individual cases suggested that cigarette makers were likely to see more defeats and escalating awards.

“It does seem to appear in the last two cases that the juries wanted to punish Philip Morris and the industry,” said Bonnie Zoller, an analyst with Credit Suisse First Boston Corporation in New York.

The Oregon lawsuit was brought by the wife and children of Mr. Williams, a former janitor in the Portland school system who was 67 when he died. It charged that Philip Morris knew cigarettes caused cancer and misrepresented that information.

In making its finding, the Oregon jury also had to conclude that the misrepresentations took place over the past decade because state law limits the time in which plaintiffs can seek damages.

There are more than 500 smoking-related lawsuits pending against Philip Morris. President Clinton also announced this year that he had directed the Justice Department to begin preparing a lawsuit against cigarette makers to recover Medicare and other Federal money spent treating illnesses related to smoking.

Mr. Black said a Federal lawsuit could be in the industry’s interest because it might provide a way to resolve individual cases as well.

“The industry has got to make a decision,” he said. “They have to recognize that the tide has turned and decide they have to get some type of settlement. Either that or they have to build in the anticipated price of litigation in the cost of cigarettes.”
Addiction Overturned; Until Recently, the Odds of Recovering a Legal Settlement Against Big Tobacco Were Less Than Those of Winning the Illinois Lottery

Chicago Tribune
April 5, 1999
Douglas W. Kmiec

Last week a jury ordered the giant tobacco firm Philip Morris to pay a record $81 million to the Jesse Williams family of Portland, Ore. Jesse Williams smoked three packs of Marlboros a day for more than 40 years before succumbing to lung cancer in 1997. Two months earlier in San Francisco, another Marlboro smoker with inoperable lung cancer got an award of $51.5 million.

Death and legal appeals aside, it looks like it is beginning to pay to be (or at least to have been) a Marlboro man. This was seldom true in the past. Until recently, the odds of recovering a legal settlement against Big Tobacco were less than those of winning the Illinois lottery. Only in three other cases had a tobacco-maker been found liable to an individual, and each was overturned on appeal.

Yes, yes, 46 states did indeed squeeze $206 billion out of the tobacco firms last year to recoup the cost of medical care. Four states settled separately for another $40 billion, but these cases were decidedly different. Reimbursing states for tobacco-related health-care costs indemnifies innocent taxpayers, but can the same be said of individuals who consumed a product known, in the words of the ubiquitous federal label, “to be hazardous to your health”?

Jesse Williams’ family claims he picked up his unhealthy habit a decade before the imposition of the 1966 federal warning label. But as early as 1952, Reader’s Digest ran a nationally circulated, easily understandable series titled “Cancer by the Carton.” A couple of years later legendary journalist Edward R. Murrow devoted his popular program “See It Now” to detailing the health risks of smoking.

The industry, of course, hotly contested back then that a causal linkage exists between smoking and lung cancer. But you’d have to have been living in a cave to be caught by surprise that the risk existed. In 1954, there already were 25,000 lung cancer deaths with more than 60 percent of those deaths among males attributable to smoking.

This is not to say that cigarette smoking wasn’t fashionable when Williams lit up in the ’50s. Celebrities were all over radio, television and the silver screen doing the same. But as far as anyone could tell it was all voluntary stupidity. You might as well sue Lauren Bacall for her corrupting influence in asking Humphrey Bogart for a match in “To Have and Have Not,” as to sue R.J. Reynolds.

And for a good long while the tobacco folks kept the courthouse doors closed with just this argument. Surely a remarkable feat given that much of what lawyers call tort law today is little more than a hunt for a deep pocket, and there are few deeper than tobacco. Yet jury after jury would find no liability because frankly, the injured parties had enough knowledge to know and assume the risks.

What changed? In a ground-breaking article
in 1980, Don Garner, now a visiting law professor at Pepperdine University, made a modest proposal in academic writing—namely that the addictive character of tobacco be relied upon to deny the voluntariness of intense smoking habits like those of the late Jesse Williams.

Garner’s able work, however, yielded less in immediate courtroom triumph than it otherwise might. In part, this was because addiction experts were seldom in a position to talk knowledgeably and specifically about the often deceased smoker as opposed to abstract or generalized data.

And of course, the tobacco industry made much of the fact that close to one-half of long-term smokers have managed to quit—albeit often with considerable difficulty.

But that was then. Litigation since 1994 has unearthed a wealth of previously undisclosed internal memoranda demonstrating that cigarette manufacturers have been covertly manipulating the nicotine levels of their products to “hook” Jesse Williams and millions of others, no matter how many admonishing stories Reader’s Digest or anyone else released. Twenty-five years before the U.S. surgeon general would even officially list nicotine as possibly addictive, a confidential manufacturer memo observed: “. . . (N)icotine is addictive. We are, then, in the business of selling nicotine, an addictive drug . . .”

True, Jesse Williams and smokers like him made that fatally unwise choice to smoke, and this misstep may properly reduce his family’s compensation. Yet, as the medieval philosopher Thomas Aquinas resolved, a continued action is only worthy of praise or blame if it remains within the power or dominion of one’s reason. In context, a knowledge of a cancer risk is hardly equivalent to an understanding that one is becoming physically dependent on a drug.

The manufacturers of nicotine-laced tobacco made a choice to deny Jesse Williams’ his ability to freely choose. In so doing it is hard to think of them as any different than common purveyors of other addictive drugs, like say, heroin. Except heroin is illegal and doesn’t kill 400,000 Americans a year—more than the combined number of people who die of illegal drug use, AIDS, car accidents, alcohol abuse, murders, suicides, plane crashes and fires.

Eighty-one million dollars suddenly seems far too little.
"Jurors Vent Outrage at Industry; Verdicts Against Tobacco, Gun Firms Stake Out New Legal Territory"

The Washington Post
August 30, 1999
Joan Biskupic

Tony Vaccaro thought it was time for “the little people” to send a message—the “average citizens,” as he put it, “who usually don’t have a voice.”

The message was this: Tobacco companies have spent decades deceiving the public about the effects of their cigarettes, and they should be made to pay for it.

But the message wasn’t just from Vaccaro, a 28-year-old financial services worker in San Francisco. It was the verdict of a 12-person jury on which he served in February. Its $51 million judgment against Philip Morris—one of four verdicts against tobacco since last summer—was part of a populist trend of jurors around the country exacting punishment on disfavored industries.

Tobacco hasn’t been the only business newly buffeted by this wave of juror outrage. In February, for the first time, a jury decided to hold gun manufacturers responsible for the criminal use of their products. Again, some jurors said the industry had it coming.

Lawsuits condemning cigarettes and guns are nothing new. Advocacy groups have campaigned for years against the tobacco and firearms industries, using the courts as a weapon. What is new is that juries are listening.

These verdicts coincide with a national trend of juries assessing harsher and harsher damages against corporate defendants, such as the $4.9 billion verdict returned last month against General Motors Corp, for six people whose car exploded—and reduced on appeal last week to about $1 billion. But they add a new element.

Jurors in these cases were staking out new territory in American law, asserting their interest in issues broader than the behavior of a single corporate defendant. Unlike past product liability verdicts, such as those against the Ford Pinto or the Dalkon shield, where a single company was targeted, juries are focusing on broad social problems—smoking-related disease, gun violence—that traditionally have been addressed through legislation.

“Jurors are ready to believe that they are the public avengers. Because the governor won’t do it, the state legislature won’t do it, the jurors are the only ones who will do it,” said Victor Schwartz, a liability law expert who opposes the trend.

The recent verdicts are part of a pattern of juror activism across the country that also includes so-called juror nullification, in which juries have let criminal defendants go free, despite the weight of the evidence against them, in protest of particular laws. In the current product liability disputes, jurors say their verdicts are based on the evidence in the case. But, as with nullification, they also appear to be giving freer rein to their own sense of justice.

“There is a lot of anger out there,” said Stanford University law professor Robert Rabin, “and it’s getting translated into jury
verdicts.”

This increased willingness to find against the tobacco and gun industries has released a torrent of new litigation and could have wide repercussions for other businesses and people who claim they have been hurt by their products. Smokers and their families have filed hundreds of individual law-suits across the country; numerous class action efforts are also pending. And since the groundbreaking Brooklyn gun verdict in February, the firearms industry has faced an onslaught of lawsuits. A total of 27 cities and the NAACP are now suing firearms companies.

“All these cases have a snowball effect,” Rabin added, “as potential jurors read . . . about an industry that appears to have been involved in some coverup and then gets nailed. They feel empowered to act likewise.”

Some lawyers argue that these verdicts poach on the government’s role in regulating tobacco and guns, determining, for example, what constitutes deceptive cigarette advertising or the negligent marketing of firearms.

This trend of jury verdicts—in essence, steering national policy on tobacco and guns—raises important questions. Can a single corporate defendant in a court case receive a fair trial if the jury seeks to punish an entire industry? Can a scattered set of verdicts add up to a coherent national policy? And if this tendency continues, what other unpopular industries might feel themselves targeted by jurors: Health maintenance organizations? The entertainment industry? The media?

Expanding Public Scorn

It may have been inevitable that public scorn for cigarette and gun manufacturers ultimately would find its way into the jury box. A new Washington Post survey found that 59 percent of Americans think the tobacco industry has not behaved responsibly in selling its products and about half feel that way about gun manufacturers. But at the same time, the public has watched state legislatures and Congress struggle with how to regulate these controversial but legal industries.

Last year a proposed settlement that would have further regulated the sale of cigarettes collapsed in Congress after the tobacco companies withdrew their support and lobbied hard against it. (A subsequent settlement between the states and companies involved smaller sums and little regulation.)

And despite a series of high-profile shootings that have strengthened public support for gun control, Congress remains at an impasse. Competing Senate and House versions of a juvenile justice bill—one with modest gun control measures, one with none—are expected to be debated in conference when Congress returns from its recess.

The legislative vacuum on tobacco and guns is increasingly being filled by litigation brought by individuals, organizations, states and the federal government. And that litigation is increasingly finding sympathetic juries.

“In the jury room generally, it is now seen as very acceptable to take a stand against an industry,” said David S. Davis, senior vice president of the national jury research firm DecisionQuest. “It used to be that jurors who spoke about individual responsibility would get the applause.”
The Post poll shows that a majority of those questioned—55 percent—are suspicious of jurors’ taking on a more important role in punishing companies for their legal but dangerous products.

But a substantial minority—35 percent—believe it’s a good thing if juries take the lead against harmful products when legislatures have failed to act. Experts found this percentage significant, given that juries traditionally have confined themselves to deciding the facts of a single case. They also noted the potential importance of this minority, because one or two forceful opinions on a jury can affect the outcome of a case.

“The growing body of evidence suggests some jurors are turning mass tort litigation into a vehicle for the moral condemnation of corporate behavior thought to be irresponsible or malevolent,” said University of Georgia law professor Richard Nagareda.

Jurors’ New Confidence

To be sure, some of the recent cigarette and gun liability lawsuits have ended in the industries’ favor, including a verdict against the family of a longtime smoker in Baton Rouge, La., last month. But even in cases where the industry ultimately wins, juries are conscious of appearing pro-tobacco. “People said we weren’t sending the right message,” said Rodney Marchand, foreman of a Memphis jury that returned verdicts for three cigarette companies in May. “They said we are ‘letting the tobacco companies off.’”

This attitude on the part of jurors is a recent development. In four decades of litigation by smokers and their survivors against cigarette companies, there were only two verdicts ordering companies to pay damages to smokers before last summer. The earliest victory for a smoker came in 1988, when a divided jury said Liggett Group was responsible for the death of Rose Cipollone, a New Jersey woman who smoked Chesterfields and died of lung cancer in 1984.

But the second thoughts of the Cipollone jurors were revealing. Many of them told reporters at the time that they were worried that they had done the wrong thing. Some cried about having given in to more dominant jurors. Not until 1996 did a jury again decide in favor of a smoker, and this verdict, like the Cipollone case, was overturned.

Today, after years of allegations of the industry manipulating nicotine levels and concealing the health risks associated with smoking, jurors express no such tentativeness. In recent interviews, juror after juror spoke confidently about the desire to punish the industry, citing its alleged history of misbehaviors and its perceived ability to use large profits to beat the system.

“It was the whole lay of the land,” said April Dewees, a 30-year-old schoolteacher on the Portland, Ore., jury that awarded a record $80 million to the family of a man who used to smoke three packs of Marlboros a day. “All the ways they played down the dangers of it. Someone said to me afterward, ‘Well, all businesses lie.’ Well, they shouldn’t lie. There are repercussions. They profited from their misrepresentations. They did need to be punished.”

John Bowman, a 53-year-old businessman who was on a 1998 Jacksonville, Fla., jury that ordered Brown & Williamson to pay $1 million for the death of a Lucky Strike smoker, including the first punitive damages ever in such a case, said that verdict was an
indictment of the whole industry: "We felt that all tobacco products are dangerous."
Fellow juror Nicole Boyer, 36, a homemaker, said she believed "all the companies were in on it together, trying to get people hooked on nicotine."

Tony Vaccaro, of the San Francisco jury, added, "We thought it was important to send a message because of the stonewalling they had done for all those decades."

Gary Doski, a 49-year-old electronics technician and the foreman on the 1998 Jacksonville jury, summed up the contrast between his jury and the 1988 Cipollone panel: "Afterward, the lawyers were all surprised at how happy all of us seemed."

Discord on Gun Verdict

In contrast, the watershed verdict in February against gun makers was marked by the kind of discord and angst that the Cipollone jurors felt a decade ago. At one point, the Brooklyn jurors sent the judge a note asking for help: "We are all very upset. We are starting to fight. We cannot reach a decision. . . . Please, please, give us more direction!"

One juror expressed some reservations, saying a verdict against the gun manufacturers would "open the floodgate of lawsuits across the country." Other jurors wept. At one point, a note pleaded, "One of the jurors doesn't feel well. Is there any way we can get some Pepto Bismol?"

The Brooklyn jury's discomfort reflected a broader public ambivalence. The Post poll found that 70 percent of those questioned said they disapproved of holding gun manufacturers responsible for shooting deaths and other illegal uses of their weapons. But the respondents were evenly divided—46 percent to 45 percent—on the question of whether gun manufacturers have behaved irresponsibly or responsibly in advertising and selling their products.

Even this ambivalence represents a change in the social and legal context of firearms violence. Shooting victims have been suing gun manufacturers for putting the weapons on the streets for years. But no such lawsuit had ever reached trial until last year when a jury decided, also in a Brooklyn case, in favor of a gun company after about six hours of deliberation.

This year's Brooklyn jury deliberated for six days before ultimately deciding to hold 15 manufacturers responsible for the negligent marketing of handguns in three of the seven shootings covered by the lawsuits. But they awarded damages in only one of the cases, to 19-year-old Steven Fox of Queens, who survived a bullet to the brain.

"The Rubicon has been crossed," said Elisa Barnes, a lawyer for the victims.

A Corrective or Bad Policy?

Some legal experts argue that juries' increased willingness to take on controversial industries is a necessary, democratic corrective to unchecked corporate power.

"What is happening now is that jurors are more angry and aware," said John Banzhaf, a George Washington University law professor active in anti-tobacco litigation. "For years, tobacco companies could say addiction and deaths weren't their responsibility. But the social climate has changed. And this is why we have juries."

"Jurors feel empowered within the system and against an industry that has flagrantly
not done the right thing," added Stephanie Hartley, a Florida lawyer who represents smokers.

But defense lawyers argue that juries are unsuited to the broader role they are beginning to embrace. They say jurors who are eager to use their position to send a message to an industry may find it hard to render a fair verdict on whether a specific defendant caused a single victim’s cancer or other injury.

Critics also point out the uneven policy likely to result from a patchwork of verdicts that inevitably depend on the predilections of the jurors and the quality of the case mounted by each side’s attorneys. Unlike legislators, who typically hold hearings on a subject and seek out information from a multitude of competing interests, jurors are told only what the two sides of a case want them to know.

"Juries aren’t equipped to decide social policy," said Anne Kimball, a Chicago lawyer who represented gun makers in the recent Brooklyn case. "To the extent that we give a jury the power to effectively legislate . . . we are doing damage to the underlying principles of our government."

Meanwhile, industry analysts worry that the negative revelations from the recent cases will only produce more lawsuits, and say unpopular industries must change the way they handle litigation. Corporate defense lawyers say they are now warier about letting cases get to trial, more careful in choosing jurors and, if a trial is inevitable, intent on communicating their own message about the limits of a company’s responsibility.

And those on both sides of the debate wonder what industries might be next. Some believe they already have seen signs of incipient jury backlash against media excesses in a verdict against the "Jenny Jones Show" in May.

The talk show was on trial over a killing that arose from a 1995 episode called "Secret Same-Sex Crashes." On the program, Scott Amedure told his friend Jonathan Schmitz that he had a crush on him; three days later, Schmitz gunned down Amedure. The victim’s family lodged a wrongful death suit against the show for "ambushing" Schmitz with news of the crush. The jury deliberated about six hours before finding against the "Jenny Jones Show" and awarding the Amedure family $25 million in damages.

Geoffrey Fieger, the lawyer for the victim’s family, said the jury was sending a message to the talk show industry: "That type of human exploitation needs to be corralled."

"In the future, defendants that make products that create perceived social costs could all be at risk," said lawyer Schwartz, suggesting as possibilities chemical manufacturers, pharmaceutical companies and liquor producers. "I have never bought the idea that tobacco is unique. I say: No way. This is the beginning."

_Claudia Deane, assistant director of polling, and Madonna Lebling, staff researcher, contributed to this report._

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On and on they go, mammoth lawsuits against the nation’s biggest tobacco companies.

Just two weeks ago, Philip Morris USA and five other cigarette makers were sued in a federal court in Boston by a group seeking to recover $60 billion for the government in Medicare benefits for smoking-related diseases. Lawyers for the group, the United Seniors Association, said the law also allowed the court to award an additional $60 billion to the plaintiff.

The lawsuit is just the latest in more than 50 years of legal challenges to the tobacco industry. Hundreds of other cases are still pending in this country and abroad, including some that have been grinding on for years, like the federal government’s effort to claim $280 billion in a racketeering case.

As the nation’s largest cigarette maker with half the domestic market, Philip Morris, alone, is currently a defendant in 454 cases; it spent $933 million in legal costs from 2002 to 2004, with lawyers billing $850 an hour and, in rare cases, up to $1,000.

Are company officials concerned about the Boston case? Are they concerned about any case? To some extent, yes, they say. But this is an industry that long ago accepted litigation as a routine cost of business.

"Obviously, we take the litigation very seriously," said Steven C. Parrish, a senior vice president of the Altria Group, the parent company of Philip Morris. Mr. Parrish added, "We believe we have the appropriate strategies and resources to successfully manage the litigation."

Like other tobacco companies, Philip Morris has a modest staff that oversees the company’s litigation and retains leading law firms and specific lawyers on a case-by-case basis.

For the trial in the government lawsuit, which ended in June after nine months, much of the courtroom work was handled by two lawyers representing Philip Morris—Dan K. Webb of Winston & Strawn in Chicago and Theodore V. Wells Jr. of Paul, Weiss, Rifkind, Wharton & Garrison in New York—along with David M. Bernick of Kirkland & Ellis in Chicago, who represented the Brown & Williamson tobacco company.

Mr. Webb is a former United States attorney in Illinois who has represented Microsoft, General Electric and the New York Stock Exchange. Mr. Wells has defended civil and white-collar criminal defendants, including former Agriculture Secretary Mike Espy, former Senator Robert G. Torricelli of New Jersey and the financier Michael Milken. Mr. Bernick, who has defended chemical and asbestos companies, specializes in complex corporate cases and has been retained by Philip Morris for a class-action tobacco case in New York.

With such legal power, the tobacco companies have enjoyed a reasonable measure of success in court.
Since 1998, when the major tobacco companies settled lawsuits with the states for $246 billion over health care costs related to smoking, domestic cases involving Philip Morris as a defendant, alone or with other companies, have ended with 27 verdicts in favor of the defendants and 16 in favor of the plaintiffs, with potential combined awards of $948 million.

But the company has appealed 13 of those cases. Of the remaining three, Philip Morris paid plaintiffs in two, for a total of $20.3 million. The other case was dismissed.

Over the same period, Philip Morris's leading competitor, Reynolds American, which merged last year with Brown & Williamson and now has 30 percent of the domestic market, has been a defendant in 50 cases and has paid once, for $5 million.

In the same years, the stock prices of Philip Morris and Reynolds American have more than doubled.

“Tobacco companies have an excellent, excellent track record in litigation,” said Christine Farkas, an equities analyst for Merrill Lynch who follows the industry. “Is it disruptive to business? Yes. But if they lose at trial, they typically win on appeal.”

The biggest lawsuit facing the industry is the government’s racketeering case, which now hinges on a federal judge’s ruling on liability and the Supreme Court’s decision on whether to consider an appeal to sustain a request for $280 billion in damages that a lower court denied.

If the Supreme Court decides not to hear the government’s appeal, the companies are facing a potential $14 billion judgment, an amount the government is seeking from the companies to finance a national stop-smoking campaign.

The government case is one of nine pending actions against Philip Morris as sole defendant or co-defendant in class-action lawsuits over health-related claims or a case involving multiple claims. The other Philip Morris cases involve plaintiffs seeking the recovery of health care costs, as well as tobacco prices and cigarette contraband.

In addition, Philip Morris is a defendant in 151 cases in other countries.

Among the unresolved cases, stock analysts and lawyers who monitor tobacco litigation identify three cases as most threatening to the industry and especially to Altria, which is waiting for litigation to diminish before splitting off its food company, Kraft.

They are the federal government’s case and two class-action suits—one in Florida that could cost Philip Morris $74 million and other companies $69 million, and the other in Illinois, where Philip Morris is the lone defendant, facing a lower court verdict of $10.1 billion.

“Whatever spin the companies give you, they are still under a serious threat from all three of these cases,” said Richard A. Daynard, associate dean at Northeastern University School of Law in Boston and chairman of its Tobacco Products Liability Project. “There’s a reasonable likelihood they could get a bad result in any or all of them.”

The government case involves the largest amount of money and the most sweeping charges. The companies are accused of misleading the public about addiction, nicotine content, secondhand smoke, scientific evidence and marketing practices.
The Florida suit poses a considerable threat as well. It started 11 years ago, when lawyers sued Philip Morris, Reynolds and six other tobacco companies on behalf of all “addicted” smokers in the United States who contended that their illnesses derived from cigarettes. After the class was narrowed to smokers in Florida, a two-year jury trial ended in 2000 with the largest judgment ever against the tobacco industry, $145 billion. Three years later, an appeals court reversed the decision. After the full appeals court refused to reconsider, the plaintiffs appealed to the Florida Supreme Court, which agreed to hear the case. Oral arguments were heard last November. If the State Supreme Court rules against them, the companies say they intend to take the case to the United States Supreme Court. Stanley M. Rosenblatt, the Miami lawyer who represents the plaintiffs, declined to discuss the case, saying it was “too sensitive” with the decision expected at any time. The Illinois case is one of several in which plaintiffs are accusing the companies of fraud over the use of terms like “light,” “lites” and “low-tar” to describe their products. The case is directed only at Philip Morris, with accusations that the company defrauded smokers by using words that suggest Marlboro Lights and Cambridge Lights cigarettes may be less hazardous than the so-called full flavor brands. In 2003, a state judge ruled for the plaintiffs, awarding $7.1 billion in compensatory damages and $3 billion in punitive damages. The Illinois State Supreme Court agreed to hear an appeal, and oral arguments were made in November.

Matthew L. Myers, the president of the Campaign for Tobacco-Free Kids, who has been fighting the cigarette companies for years, said any substantial financial judgment against the industry had the potential to shake investor confidence despite a history that shows tobacco companies to be resilient in the face of their legal problems. As an example, Mr. Myers said, a victory for the plaintiffs in the Illinois case may influence court decisions in some of the other “lights” cases. “I think they understate the risk,” he said of corporate officials. “Since Wall Street operates on psychological impact, tobacco companies have done a brilliant job since they settled the lawsuits with the states, telling people there’s nothing out there that could rattle their economic stability in a fundamental way. I just don’t believe that’s true.” But Ms. Farkas, the analyst, said two developments convince her that the companies can probably withstand current and future legal attacks. Courts have shown a growing reluctance to certify large groups as a “class” plaintiff, and a Supreme Court ruling in a 2003 case involving State Farm Insurance limited the amount of punitive damages a plaintiff could seek. “If tobacco companies lose in one court, they simply move to the next,” Ms. Farkas said. “In general, the litigation environment has gotten better for them, and their stock prices reflect it.”
Massachusetts v. E.P.A.

(05-1120)


In 1999, several states and environmental groups petitioned the E.P.A. to regulate carbon dioxide and other greenhouse gasses in new motor vehicles. Four years later, under President Bush, the E.P.A. rejected the petitions stating that it did not have the statutory authority to act. The groups that had petitioned the E.P.A. brought this suit, seeking to force the E.P.A. to promulgate CO\textsubscript{2} regulations for cars under the Clean Air Act. A divided 3-judge panel of the D.C. Circuit held that the E.P.A.'s rejection of the petitions was within the agency's discretion. One judge concurred in the result, but would have held that the petitioners lacked standing in the suit. The dissenting judge would have held that the E.P.A. was compelled by the Clean Air Act to promulgate regulations upon finding that greenhouse gasses threatened public health, a conclusion he said was unavoidable given the available evidence.

Questions Presented: 1. Whether the EPA Administrator may decline to issue emission standards for motor vehicles based on policy considerations not enumerated in section 202(a)(1). 2. Whether the EPA Administrator has authority to regulate carbon dioxide and other air pollutants associated with climate change under section 202(a)(1).

Commonwealth Of MASSACHUSETTS, Et Al., Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, Respondent, Alliance Of Automobile Manufacturers, Et Al., Intervenors.

United States Court of Appeals
for the District of Columbia Circuit

Decided July 15, 2005

RANDOLPH, Circuit Judge:

Petitioners are twelve states, three cities, an American territory, and numerous environmental organizations. They are opposed by the Environmental Protection Agency as respondent, and ten states and several trade associations as intervenors. The controversy is about EPA's denial of a petition asking it to regulate carbon dioxide (CO\textsuperscript{2}) and other greenhouse gas emissions from new motor vehicles under § 202(a)(1) of the Clean Air Act, 42 U.S.C. § 7521(a)(1). EPA concluded that it did not have statutory authority to regulate greenhouse gas emissions from motor vehicles and that, even if it did, it would not exercise the authority at this time. . . .

I.
[The Court reviews statutory and jurisdictional issues under the Clean Air Act]
presented by this suit and concludes that, because the E.P.A.'s denial of the petitions for rulemaking constitutes a "final action," the Court has exclusive jurisdiction. With regard to the plaintiffs' Article III standing, the Court decided to proceed to consider the merits of the case without making a specific standing determination, recognizing that the merits inquiry and standing inquiry often overlap in ways that are difficult to distinguish.]

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...We will therefore assume arguendo that EPA has statutory authority to regulate greenhouse gases from new motor vehicles. The question we address is whether EPA properly declined to exercise that authority.

II.
Greenhouse gases trap energy, much like the glass panels of a greenhouse. The earth's surface is warmed by absorbing solar energy (visible light). The earth, in turn, radiates infrared energy (heat) back into space. A portion of the infrared radiation is trapped by greenhouse gas molecules, resulting in additional warming of the lower atmosphere and the earth's surface. This "greenhouse effect" is a natural phenomenon, without which the planet would be significantly colder and life as we know it would not be possible...

Petitioners sought to have EPA regulate, under § 202(a)(1) of the Clean Air Act, carbon dioxide (CO₂), and three other greenhouse gases: methane (CH₄), nitrous oxide (N₂O), and hydrofluorocarbons (HFCs). In response to EPA's request for public comments on the 1999 petition for rulemaking, the agency received nearly 50,000 submissions... Most were short expressions of support for the petition; many were nearly identical... The comment period closed in May 2001. In the same month, the White House requested the National Academy of Sciences to assist the Administration in its review of climate change policy. The Academy "is a private, nonprofit, self-perpetuating society of distinguished scholars engaged in scientific and engineering research..."... Under its congressional charter, issued in 1863, the Academy has a mandate to advise the federal government on scientific and technical matters when requested. The Academy's principal operating agency for providing such advice is its National Research Council...

In denying the rulemaking petition, EPA found that the scientific comments petitioners and others submitted rested on information already in the public domain and did not add significantly to the body of knowledge available to the National Research Council when it prepared the report cited above. Since none of the comments caused EPA to question the Council's report, EPA decided to rely on the Council's "objective and independent assessment of the relevant science."

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[The Court discusses uncertainty in the debate over global warming. In particular, the Court emphasizes that the National Research Council could not unequivocally establish a causal connection between greenhouse gas emissions and global warming. The Court also highlights a statistic that global temperatures decreased from 1946 to 1975 despite increasing carbon dioxide levels.]

Relying on Ethyl Corp. v. EPA... petitioners challenge EPA's decision to
forego rulemaking “until more is understood about the causes, extent and significance of climate change and the potential options for addressing it.” . . . In our view Ethyl supports EPA, not petitioners. Section 202(a)(1) directs the Administrator to regulate emissions that “in his judgment” “may reasonably be anticipated to endanger public health or welfare.” Section 202(a)(1) was not at issue in Ethyl; . . . but what the court had to say about § 202(a)(1) is instructive. In requiring the EPA Administrator to make a threshold “judgment” about whether to regulate, § 202(a)(1) gives the Administrator considerable discretion. . . . Congress does not require the Administrator to exercise his discretion solely on the basis of his assessment of scientific evidence. . . . What the Ethyl court called “policy judgments” also may be taken into account. By this the court meant the sort of policy judgments Congress makes when it decides whether to enact legislation regulating a particular area. . . .

. . . In addition to the scientific uncertainty about the causal effects of greenhouse gases on the future climate of the earth, the Administrator relied upon many “policy” considerations that, in his judgment, warranted regulatory forbearance at this time. . . . New motor vehicles are but one of many sources of greenhouse gas emissions; promulgating regulations under § 202 would “result in an inefficient, piecemeal approach to the climate change issue.” . . . The Administrator expressed concern that unilateral regulation of U.S. motor vehicle emissions could weaken efforts to persuade developing countries to reduce the intensity of greenhouse gases thrown off by their economies. . . . Ongoing research into scientific uncertainties and the Administration’s programs to address climate change including voluntary emission reduction programs and initiatives with private entities to develop new technology also played a role in the Administrator’s decision not to regulate. . . . The Administrator pointed to efforts to promote “fuel cell and hybrid vehicles” and ongoing efforts to develop “hydrogen as a primary fuel for cars and trucks.” . . . The Administrator also addressed the matter of remedies. Petitioners offered two ways to reduce CO₂ from new motor vehicles: reduce gasoline consumption and improve tire performance. As to the first, the Department of Transportation the agency in charge of fuel efficiency standards—recently issued new standards requiring greater fuel economy, as a result of which millions of metric tons of CO₂ will never reach the stratosphere. . . . As to tire efficiency, EPA doubted its authority to regulate this subject as an “emission” of an air pollutant. . . . “With respect to the other [greenhouse gases]—CH₄, N₂O, and HFCs—petitioners make no suggestion as to how those emissions might be reduced from motor vehicles.” . . .

It is therefore not accurate to say, as petitioners do, that the EPA Administrator’s refusal to regulate rested entirely on scientific uncertainty, or that EPA’s decision represented an “open-ended invocation of scientific uncertainty to justify refusing to regulate.” . . . A “determination of endangerment to public health,” the court said in Ethyl, “is necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact.” . . . And as we have held, a reviewing court “will uphold agency conclusions based on policy judgments” “when an agency must resolve issues ‘on the frontiers of scientific
knowledge." . . .

We thus hold that the EPA Administrator properly exercised his discretion under § 202(a)(1) in denying the petition for rulemaking. The petitions for review in Nos. 03-1365, 03-1366, 03-1367, and 03-1368 are dismissed, and the petitions for review in Nos. 03-1361, 03-1362, 03-1363, and 03-1364 are denied.

So ordered.

CONCURBY: SENTELLE (In Part)

DISSENTBY: SENTELLE (In Part); TATEL

DISSENT:
SENTELLE, Circuit Judge, dissenting in part and concurring in the judgment:

As the majority’s opinion observes, courts of the United States must resolve jurisdictional questions, including “Article III standing questions, before proceeding to the merits of a case.” . . . As the majority further observes, “standing exists only if the complainant has suffered an injury in fact, fairly traceable to the challenged action, and likely to be redressed by a favorable decision.” . . . While I respect the majority’s thorough and accurate history of the precedents on the standing question, after consulting the same authorities I have come to a different conclusion. I conclude that EPA is correct in its assertion that the petitioners have not demonstrated the element of injury necessary to establish standing under Article III . . .

* * *

[The concurrence argues that the petitioners failed to establish a particularized injury sufficient to establish Article III standing. At most, the petitioners established that global warming may affect all of humanity and therefore may affect the petitioners. This harm is precisely the type of general harm that has historically been held insufficient for adjudication by the Supreme Court and lower courts. After reaching this conclusion, the concurrence goes on to accept the majority decision as dictating the law of the case because the result most nearly matches the result favored by the concurrence.]

TATEL, Circuit Judge, dissenting in Nos. 03-1361, 03-1362, 03-1363, and 03-1364:

Petitioners claim that motor vehicle emissions of greenhouse gases contribute to global warming and that global warming in turn is causing a host of serious problems, likely including increased flash flood potential in the Appalachians, degraded water quality and reduced water supply in the Great Lakes, sea-ice melting and permafrost thawing in Alaska, reduced summer snow-pack runoff in the Rockies, extreme water resource fluctuations in Hawaii, and rising sea levels combined with higher storm surges along the coasts of Puerto Rico, the Virgin Islands, and some eastern states. . . . Concerned about such problems, petitioners asked EPA to regulate these emissions under Clean Air Act section 202(a)(1), which provides: “The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” . . . EPA denied the petition on two grounds—that it lacked statutory authority to regulate such emissions and that even given such authority
it would not exercise it—and petitioners sought review in this court.

My colleagues agree that the petitions for review should not be granted, but they do so for quite different reasons. Judge Sentelle thinks that petitioners lack standing and would dismiss the petitions for that reason. Judge Randolph does not resolve whether petitioners have standing and would deny the petitions based on one of EPA’s two given reasons.

I have yet a different view. Unlike Judge Sentelle, I think at least one petitioner has standing, as I explain in Part II. Unlike Judge Randolph, I think EPA’s order cannot be sustained on the merits. EPA’s first given reason—that it lacks statutory authority to regulate emissions based on their contribution to welfare-endangering climate change . . .—fails, as I explain in Part III, because the statute clearly gives EPA authority to regulate “any air pollutant” that may endanger welfare, . . . with “air pollutant” defined elsewhere in the statute as “including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air,” . . . . EPA’s second given reason—the one accepted by Judge Randolph—is that even if it has statutory authority, it nonetheless “believes” that “it is inappropriate to regulate [greenhouse gas] emissions from motor vehicles” due to various policy reasons. As I explain in Part IV, however, none of these policy reasons relates to the statutory standard—“cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” . . .—and the Clean Air Act gives the Administrator no discretion to withhold regulation for such reasons.

In short, EPA has failed to offer a lawful explanation for its decision. I would accordingly grant the petitions for review and send the matter back to EPA either to make an endangerment finding or to come up with a reasoned basis for refusing to do so in light of the statutory standard.

I.

[The dissent reviews the evidence in support of global warming. Relying largely on the same National Research Council report used by the majority, the dissent comes to different conclusions—namely that there is likely a causal linkage between greenhouse gas emissions and global warming and that the uncertainties surrounding global warming are generally about its scope, not its existence.]

II.

[The dissent argues that the petitioners have sufficient statutory and Article III standing. Noting that the court needs only determine that one petitioner has standing to reach the merits of the case, the dissent reviews the potential injuries claimed by Massachusetts, such as permanent loss of coastal land. When combined with evidence that global warming is responsible for rising sea levels, the dissent concludes that the injuries asserted by Massachusetts are sufficiently individualized to establish standing.]

III.

As to the merits, the threshold question is this: does the Clean Air Act authorize EPA to regulate emissions based on their effects on global climate? Taking a constricted view, EPA insists it has no authority to regulate GHG emissions even if they contribute to substantial and harmful global
warming. By contrast, petitioners claim that Congress has plainly given EPA the authority it says it lacks.

... CAA section 202(a)(1), added by Congress in 1965 and amended in 1970 and 1977, provides,

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

... This language plainly authorizes regulation of (1) any air pollutants emitted from motor vehicles that (2) in the Administrator's judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare. EPA's claimed lack of authority relates to the first of these two elements. According to EPA, GHGs like CO₂, CH₄, N₂O, and hydrofluorocarbons (HFCs) "are not air pollutants."... Congress, however, left EPA little discretion in determining what are "air pollutants." Added in 1970 and amended in 1977, CAA section 302(g) defines the term as follows:

The term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.

... This exceedingly broad language plainly covers GHGs emitted from motor vehicles: they are "physical [and] chemical . . . substances or matter . . . emitted into . . . the ambient air."...

Unswayed by what it calls "narrow semantic analyses," ... but what courts typically call Chevron step one—EPA claims that a "more holistic analysis . . . [of] the text, structure, and history of the CAA as a whole, as well as the context provided by other legislation that is specific to climate change," justifies its conclusion that it cannot regulate GHGs like CO₂ for their effects on climate change, ... To disregard the Act's plain text in this way, EPA needs an "extraordinarily convincing justification." ...

EPA offers four reasons for abandoning the Act's text. First, it suggests that since the 1965, 1970, and 1977 Congresses were not specifically concerned with global warming, the Act cannot apply to GHGs. Second, it claims that for both practical and policy reasons, global pollution should be tackled through specific statutory provisions rather than general ones. Third, relying on FDA v. Brown & Williamson Tobacco Corp., ..., it argues that Congress's passage of legislation calling for study of climate change, along with Congress's failure to pass any provisions tailored solely to regulating GHGs, demonstrates that the CAA cannot apply to GHGs. Finally, EPA suggests that Congress couldn't have intended the definition of "air pollutant" to cover CO₂, since EPA regulation of CO₂ emissions from automobiles would overlap with Department of Transportation (DOT) authority over fuel economy standards under a different act. None of these reasons provides a convincing justification—let alone an "extraordinarily convincing" one—for EPA's counter-textual position...
EPA first suggests that because the 1965, 1970, and 1977 Congresses showed little concern about the specific problem of global warming, reading the CAA's language to cover such problems would be like finding "an elephant in a mousehole." . . . Hardly a mousehole, the definition of "air pollutants"—"including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air"—enables the Act to apply to new air pollution problems as well as existing ones....

EPA's second reason for its interpretation—that for practical and policy reasons global warming should be dealt with through specifically tailored statutes—likewise fails to trump Congress's plain language. It may well be that a statute aimed solely at global warming would deal with the problem more effectively than one aimed generally at air pollution. But an agency may not "avoid the Congressional intent clearly expressed in the [statutory] text simply by asserting that its preferred approach would be better policy.” . . .

EPA also attempts an unworkability argument. Its argument goes like this: another part of the CAA provides that the Administrator shall maintain a list of air pollutants that, among other things, "in [the Administrator's] judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” . . . Once pollutants go on this list, the Administrator must set national ambient air quality standards (NAAQS) for them, i.e., ambient air concentration levels that, in the Administrator's judgment, “are requisite to protect the public health” and in some areas are "requisite to protect the public welfare.” . . . States must submit plans explaining how they will achieve these NAAQS.... According to EPA, these provisions would be unworkable if applied to CO₂: because CO₂ disperses relatively evenly throughout the lower atmosphere, states would have only minimal control over their atmospheric CO₂ concentrations and thus over whether they meet the CO₂ NAAQS. EPA then concludes that because CO₂ regulation would be unworkable in the NAAQS context, no general CAA provisions, including section 202(a)(1), authorize it to regulate any GHGs.

This unwieldy argument fails. Even assuming that states' limited ability to meet CO₂ NAAQS renders these provisions unworkable as to CO₂, ... the absurd-results canon would justify at most an exception limited to the particular unworkable provision, i.e., the NAAQS provision.... As EPA acknowledges, regulating CO₂ emissions from automobiles is perfectly feasible....

In support of its third justification for abandoning the plain text of sections 202(a)(1) and 302(g), EPA relies on later congressional action (and inaction). . . . But relying almost exclusively on Brown & Williamson, ... EPA claims that together these facts indicate that the CAA's general provisions do not cover GHGs. EPA also asserts that, as in Brown & Williamson, the "extraordinary" political and economic significance of the regulation requested casts doubt on the agency's authority to undertake it....

* * *

EPA's reliance on Brown & Williamson is misplaced. To begin with, I am unconvinced by EPA's contention that its jurisdiction over GHG emissions would be as significant
as FDA jurisdiction over tobacco. ... But even assuming the implications are equally significant, this is not an “extraordinary” case where “common sense,” ... calls into question whether Congress has delegated EPA authority to regulate GHGs. Congress gave EPA broad authority to regulate all harmful pollutants, as section 202(a)(1)’s text makes clear. Congress did so intentionally, deeming it “not appropriate to exempt certain pollutants” from the Act’s “comprehensive protections.” ... And, as I explain below, no subsequent statutory indicia comparable to those relied on by the Court in Brown & Williamson justify a different conclusion.

Perhaps most significantly, no conflict exists between EPA’s section 202(a)(1) authority to regulate GHGs and subsequent global warming legislation. Whereas an FDA ban on tobacco would have directly conflicted with congressional intent that tobacco remain on the market, EPA regulation of GHGs would be fully compatible with statutes proposing additional research and other nonregulatory approaches to climate change....

Furthermore, and unlike subsequent tobacco legislation that “effectively ratified the FDA’s previous position,” ... this subsequent global-warming-related legislation passed without any assurance from EPA that the agency lacked authority to regulate GHGs. Quite to the contrary, at the time of the two appropriations riders relied on by EPA, ... EPA was taking the position that it possessed general authority to regulate GHG emissions under section 202(a)(1). ... Finally, the fact that later Congresses failed to pass bills specifically tailored to regulating global warming hardly provides a basis for inferring that earlier Congresses meant to exclude climate-endangering pollutants from the coverage of the CAA’s general provisions. ...

EPA has one last argument, applicable to CO₂ emissions alone, for claiming it lacks the authority the language of sections 202(a)(1) and 302(g) expressly bestow upon it. According to EPA, the only practical way to regulate CO₂ emissions from motor vehicles is to require increased fuel economy, since CO₂ is a byproduct of fuel combustion and “no technology currently exists or is under development that can capture and destroy or reduce” CO₂ “emissions from motor vehicle tailpipes.” ... Such regulation, EPA reasons, would overlap substantially with DOT’s authority under the 1975 Energy Policy and Conservation Act (EPCA) to set average fuel economy standards for certain classes of motor vehicles....

EPA may well be correct that setting standards for fuel economy (rather than for capturing tailpipe emissions) represents its only currently practical option for regulating CO₂ emissions. ... But given that the two regulatory regimes—one targeted at fuel conservation and the other at pollution prevention—are overlapping, not incompatible, there is no reason to assume that Congress exempted CO₂ from the meaning of “air pollutant” within the CAA, particularly since section 103(g) explicitly calls CO₂ an “air pollutant.” ... Moreover, Congress acknowledged, indeed accepted, the possibility of regulatory overlap. Not only does the current EPCA recognize the relevance of “the effect of other motor vehicle standards of the Government on fuel economy,” ... but in passing the 1977 CAA amendments Congress emphasized that EPA regulation under the CAA should go forward even where it overlaps with responsibilities given to other agencies under other acts, ...
In sum, GHGs plainly fall within the meaning of “air pollutant” in section 302(g) and therefore in section 202(a)(1). If “in [the Administrator’s] judgment” they “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” . . . then EPA has authority—indeed, the obligation—to regulate their emissions from motor vehicles.

IV.

EPA’s second reason for refusing to act—what EPA’s counsel termed “the fallback argument,” . . .—is that even if GHGs are air pollutants, the agency gave appropriate reasons and acted within its discretion in denying the petition for rulemaking. EPA stresses that our “arbitrary and capricious” standard of review is particularly deferential in reviewing an agency refusal to institute rulemaking. . . . This is certainly true, but this court must nonetheless “consider whether the agency’s decisionmaking was reasoned,” and we will not permit the agency to make “plain errors of law.” . . . Indeed, “the agency has the heaviest of obligations to explain and expose every step of its reasoning,” so that we can “exercise our responsibility to determine whether [its] decision is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” . . .

In my view, EPA has failed to satisfy this standard. Indeed, reading the relevant sections of EPA’s petition denial—one titled “No Mandatory Duty,” another “Different Policy Approach,” and a third “Administration Global Climate Change Policy,” . . .—I find it difficult even to grasp the basis for EPA’s action. . . .

EPA’s Discretion to Make an Endangerment Finding

In the petition denial, EPA states:

The CAA provision authorizing regulation of motor vehicle emissions does not impose a mandatory duty on the Administrator to exercise her judgment. Instead, section 202(a)(1) provides the Administrator with discretionary authority to address emissions . . . . While section 202(a)(1) uses the word ‘shall,’ it does not require the Administrator to act by a specified deadline and it conditions authority to act on a discretionary exercise of the Administrator’s judgment regarding whether motor vehicle emissions cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.

. . . Expounding on this passage, EPA argues in its brief that “the ICTA Petition Denial reflects EPA’s decision not to make any endangerment finding—either affirmative or negative—under section 202(a)(1).” . . . In EPA’s view, “the Agency’s authority to make the threshold finding is discretionary” and petitioners err in suggesting that “if the statutory test for making the finding is met, EPA has no choice but to set standards.” . . .

EPA’s brief also turns several policy concerns raised in other portions of its petition denial into rationales for holding off examining endangerment. . . .

EPA’s reasoning is simply wrong. In effect, EPA has transformed the limited discretion given to the Administrator under section 202—the discretion to determine whether or not an air pollutant causes or contributes to pollution which may reasonably be
anticipated to endanger public health or welfare—into the discretion to withhold regulation because it thinks such regulation bad policy. But Congress did not give EPA this broader authority, and the agency may not usurp it.

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But section 202(a)(1) plainly limits the Administrator’s discretion—his judgment—to determining whether the statutory standard for endangerment has been met. The Administrator has no discretion either to base that judgment on reasons unrelated to this standard or to withhold judgment for such reasons. In claiming otherwise, EPA not only ignores the statute’s language, but also fails to reckon with this circuit’s related precedent.

Our en banc decision in Natural Resources Defense Council, Inc. v. EPA, . . . makes clear that the Administrator may only exercise “judgment” in evaluating whether the statutory standard has been met. There, considering a CAA provision authorizing the Administrator to set emission standards “at the level which in his judgment provides an ample margin of safety to protect the public health,” . . . we held that the Administrator had to base his determination on what level would “provide an ‘ample margin of safety.’” . . . We struck down his proposed standards because he failed to ground them in the statute. . . .

Similarly, in Ethyl Corp. v. EPA, . . . we considered whether EPA appropriately linked its policy analysis to the statutory standard. . . . Siding with EPA, we held that the agency had discretion in determining what level of harm—or risk of harm—constitutes endangerment. . . . We indicated that such determinations involve policy issues, but—as Judge Randolph neglects to mention, . . .—these policy issues all related to whether the statutory standard had been met, i.e., to whether lead in gasoline endangered public health. . . . Indeed, Ethyl makes quite clear that the Administrator’s policy-based discretion is limited to the terms of the statute. . . .

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In short, EPA may withhold an endangerment finding only if it needs more information to determine whether the statutory standard has been met. Similarly, for EPA to find no endangerment (as Judge Randolph, going beyond the agency’s own arguments, appears to claim happened here . . .), it must ground that conclusion in the statutory standard and may not rely on unrelated policy considerations.

The statutory standard, moreover, is precautionary. At the time we decided Ethyl, section 202(a)(1) and similar CAA provisions either authorized or required the Administrator to act on finding that emissions led to “air pollution which endangers the public health or welfare.” . . . After Ethyl found that “the statutes and common sense demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable,” . . . the 1977 Congress not only approved of this conclusion, . . . but also wrote it into the CAA. Section 202(a)(1) (along with other provisions, see H.R. Rep. No. 95-294, at 50) now requires regulation to precede certainty. It requires regulation where, in the Administrator’s judgment, emissions “contribute to air pollution which may reasonably be anticipated to endanger public health or welfare.” . . .

Given this framework, it is obvious that
none of EPA's proffered policy reasons justifies its refusal to find that GHG emissions "contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." . . . Instead, as in Natural Resources Defense Council (where we found EPA to have acted arbitrarily and capriciously), EPA has "ventured into a zone of impermissible action" by "simply substituting" freestanding policy concerns for the sort of evaluation required by the statute. . . . A look at these policy concerns proves the point.

First, EPA claims that global warming still has many scientific uncertainties associated with it. . . . But the CAA nowhere calls for proof. It nowhere calls for "unequivocal" evidence. Instead, it calls for the Administrator to determine whether GHGs "contribute to air pollution which may reasonably be anticipated to endanger" welfare. EPA never suggests that the uncertainties identified by the NRC Report prevent it from determining that GHGs "may reasonably be anticipated to endanger" welfare. . . .

EPA's silence on this point is telling. Indeed, looking at the NRC Report as a whole, I doubt EPA could credibly conclude that it needs more research to determine whether GHG-caused global warming "may reasonably be anticipated to endanger" welfare. Though not offering certainty, the report demonstrates that matters are well within the "frontiers of scientific knowledge," . . . The report also indicates that the projected consequences of global warming are serious.

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[The dissent quotes from the National Research Council report on the potential effects of global warming.]

. . . I have grave difficulty seeing how EPA, while treating the NRC Report as an "objective and independent assessment of the relevant science," . . . could possibly fail to conclude that global warming "may reasonably be anticipated to endanger public health or welfare," . . . with effects on welfare including "effects on soil, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being," . . . It thus comes as no surprise that EPA's petition denial not only undertakes none of the risk assessments described in Ethyl, . . . but also utterly ignores the statutory standard.

EPA similarly fails to link its second policy justification—that setting fuel economy standards represents the only currently available way to regulate CO₂ emissions and petitioners "make no suggestions" for how to reduce CH₄, N₂O, and HFC emissions, . . .—with the statutory standard. As discussed earlier, . . . the fact that DOT sets fuel economy standards pursuant to the EPCA in no way prevents EPA from setting standards pursuant to the CAA. . . .

As to EPA's point about other GHGs, it may well be that no current technologies exist for reducing their emissions. But once again, this has nothing at all to do with the statutory endangerment standard. Indeed, in section 202(a)(2), Congress has made it crystal clear that endangerment findings must not wait on technology.

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As the Senate Report explained, EPA "is expected to press for the development and application of improved technology rather than be limited by that which exists." In refusing to make an endangerment finding because it lacks currently available technology for controlling these emissions, EPA goes well beyond the bounds of its statutory discretion.

EPA's final policy reasons likewise fail. Because other domestic and foreign sources contribute to atmospheric GHG concentrations, GHG regulation might well "result in an inefficient, piecemeal approach to addressing the climate change issue," But again, Congress has expressly demanded such an approach. Section 202(a)(1) requires EPA to regulate if it judges that U.S. motor vehicle emissions "cause, or contribute to, air pollution." Similarly, EPA's concern that regulation could weaken U.S. negotiating power with other nations has nothing at all to do with whether GHGs contribute to welfare-endangering air pollution. Finally, while EPA obviously prefers nonregulatory approaches to regulatory ones Congress gave the Administrator discretion only in assessing whether global warming "may reasonably be anticipated to endanger" welfare, not "freedom to set policy on his own terms." In short, EPA has utterly failed to relate its policy reasons to section 202(a)(1)'s standard. EPA apparently dislikes the fact that section 202(a)(1) says the Administrator "shall" regulate—rather than "may" regulate—on making an endangerment finding. But EPA cannot duck Congress's express directive by declining to evaluate endangerment on the basis of policy reasons unrelated to the statutory standard. Although EPA is free to take its policy concerns to Congress and seek a change in the Clean Air Act, it must obey the law in the meantime.

EPA's Discretion After Making an Endangerment Finding
Alternatively, EPA may have believed that even if it made an endangerment finding, it had no obligation to regulate GHG emissions. The petition denial states,

EPA also disagrees with the premise of the petitioners' claim—that if the Administrator were to find that GHGs, in general, may reasonably be anticipated to endanger public health or welfare, she must necessarily regulate GHG emissions from motor vehicles. Depending on the particular problem, motor vehicles may contribute more or less or not at all. An important issue before the Administrator is whether, given motor vehicles' relative contribution to a problem, it makes sense to regulate them. The discretionary nature of the Administrator's section 202(a)(1) authority allows her to consider these important policy issues and decide to regulate motor vehicle emissions as appropriate to the air pollution problem being addressed. Accordingly, even were the Administrator to make a formal finding regarding the potential health and welfare effects of GHGs in general, section 202(a)(1) would not require her to regulate GHG emission from motor vehicles.

This passage is puzzling. Motor vehicles emit GHGs in significant quantities—a point EPA nowhere contests. The statute clearly states that the Administrator "shall
by regulation prescribe . . . standards” governing the emissions of air pollutants from motor vehicles if the Administrator makes an endangerment finding regarding these pollutants . . . . Refusing to regulate following an endangerment finding would violate the law. Indeed, EPA appears to have abandoned this argument . . . .

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Although this case comes to us in the context of a highly controversial question—global warming—it actually presents a quite traditional legal issue: has the Environmental Protection Agency complied with the Clean Air Act? For the reasons given above, I believe that EPA has both misinterpreted the scope of its statutory authority and failed to provide a statutorily based justification for refusing to make an endangerment finding. I would thus grant the petitions for review.
The Supreme Court entered the debate over global warming Monday, agreeing at the urging of environmentalists to rule on whether emissions from new cars, trucks and power plants must be further regulated to slow climate change.

The court’s action gave a surprising, if tentative, boost to 12 states, including California, and a coalition of environmentalists who say the federal government must restrict the exhaust fumes that contribute to global warming. Their appeal accused the Environmental Protection Agency of having “squandered nearly a decade” by failing to act.

The high court voted to take up the issue over the objection of the Bush administration. Its lawyers questioned whether the government could and should “embark on the extraordinarily complex and scientifically uncertain task of addressing the global issue of greenhouse gas emissions” by regulating motor vehicles sold in the United States.

The case, to be heard in the fall, could be one of the most important environmental disputes to come before the court. Environmental advocates said automakers could be forced to produce a fleet of vehicles that pollute less.

The outcome also could determine the fate of California’s effort to adopt its own rules designed to limit greenhouse gases from cars and trucks. Those rules, set to go into effect in 2009, require EPA approval.

“Everything now hinges on what the Supreme Court does,” said David Bookbinder, a lawyer for the Sierra Club, one of the environmental groups that pressed the issue.

Until now, the threat of global warming has prompted little government action.

The legal dispute turns on standards set during the 1970s when Congress passed the Clean Air Act. One provision requires the government to regulate “any air pollutant” from motor vehicles or power plants that may well “endanger public health or welfare”—including by affecting the “weather” or “climate.”

In 1999, a group of environmental scientists pointed to this legal standard and petitioned the EPA to set new regulations to confront the problem of global warming. They said the evidence showed that pollutants from cars, trucks and power plants were endangering the public welfare by changing the climate.

They called upon the EPA to restrict emissions of carbon dioxide, methane, nitrous oxide and hydrofluorocarbons.

Four years later, the EPA under the Bush administration rejected the petition. It questioned the link between auto emissions
and global warming and concluded that new regulations were not required.

Last year, that conclusion was upheld in a 2-1 ruling by the U.S. Court of Appeals for the District of Columbia Circuit.

Usually, federal agencies are given broad leeway to interpret the laws they are supposed to administer. In this case, however, California and the other states joined with environmentalists and went to court to challenge the EPA’s decision. In their appeal to the Supreme Court, they argued that the Clean Air Act required regulation of greenhouse gases and that the EPA was defying this requirement.

The other states are Connecticut, Illinois, Massachusetts, New Jersey, Maine, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington. Three cities—New York, Baltimore and Washington—also joined the appeal.

At least four of the nine justices must vote to grant an appeal, and on Monday, the high court issued a one-line order saying it had agreed to hear the case of Massachusetts vs. EPA.

The Supreme Court has been closely divided along ideological lines on issues of environmental regulations. Last week, the justices were split on whether the government still had broad authority to regulate wetlands.

Justice Anthony M. Kennedy wrote a pivotal opinion that fell in between the views of the high court’s four conservatives and four liberals, preserving most of the government’s authority to protect wetlands.

His vote will probably be crucial as well on the issue of greenhouse gases.

Environmentalists hailed the court’s decision to hear the case.

“The Bush administration has continually tried to say that it’s not their job to fight global warming,” Bookbinder said. “In fact, they have both the legal and moral responsibility to tackle global warming pollution.”

California Atty. Gen. Bill Lockyer said he was confident the Supreme Court “will make history by striking down the Bush administration’s stance” against regulating greenhouse gases.

“Science overwhelmingly documents the certainty of global warming, and we must act now,” Lockyer said.

But a spokeswoman for the EPA said the agency had made the right decision by relying on voluntary moves by manufacturers.

“The Bush administration has an unparalleled financial, international and domestic commitment to reducing greenhouse gases,” said Jennifer Wood, an agency spokeswoman.
The Supreme Court agreed yesterday to hear arguments on whether the federal government must regulate carbon dioxide as a pollutant, a case that could have broad implications for utilities, auto manufacturers and other industries across the country.

The decision to take up Massachusetts v. Environmental Protection Agency—a lawsuit that pits 12 states, 13 environmental groups, two cities and American Samoa against the federal government—could break the political impasse that has stymied regulation by the United States on global warming for more than a decade.

Environmentalists and state and local officials argue that President Bush has the legal authority to regulate carbon dioxide under the 36-year-old Clean Air Act because it is linked to climate change and poses a threat to the environment. While the Clinton administration endorsed this reasoning, it did not issue rules on carbon dioxide emissions. The Bush administration, which rejects this theory, must convince the Supreme Court that it has no legal obligation to restrict greenhouse gases.

"The court's decision to hear the case is momentous," said New Mexico Gov. Bill Richardson (D), whose state is suing the administration along with 11 others. "I am confident the court will rule in the states' favor. This issue is not a matter of if, but when."

The EPA, which successfully defended its position before the U.S. Court of Appeals for the D.C. Circuit last year, issued a statement yesterday saying that it is "confident in its decision" not to regulate carbon dioxide. The administration's voluntary efforts to cut emissions, it added, "are helping achieve reductions now while saving millions of dollars, as well as providing clean, affordable energy."

Bush told reporters during his regular question-and-answer session yesterday that he has devised a plan focused on technological solutions "to be able to deal with greenhouse gases." He added that he considers global warming "a serious problem. There's a debate over whether it's man-made or naturally caused; we ought to get beyond that debate" and use technology such as nuclear power to meet the nation's energy needs.

The Supreme Court ruling is likely to come next year. Should it rule in favor of the plaintiffs, the opinion would be significant because, beyond forcing the administration's hand, it could have a profound effect on global warming-related lawsuits nationwide. In California, for example, a coalition of automakers is challenging California's decision and that of 10 other states to regulate carbon dioxide emissions from cars and trucks.

"This is highly significant because there are a whole set of global warming cases that are working their way through the courts," said David Doniger, climate center policy director at the advocacy group Natural Resources Defense Council. "We may need
new legislation” to regulate carbon dioxide, “but it really matters what the existing law says.”

Environmental advocates have been pressing this point on a number of fronts. The U.S. Court of Appeals for the 2nd Circuit heard oral arguments this month in a case in which eight states, New York City, three state land trusts and several environmental groups are suing five major utilities on grounds that their greenhouse gas pollution amounts to a public nuisance that crosses state lines.

“Now that we have so much damage locked into the system, groups of individuals and communities across the country and elsewhere are seeking compensation because of the injuries they’re experiencing,” said Matthew F. Pawa, one of the lead attorneys in the public nuisance case.

Many opponents of greenhouse gas curbs also welcomed the Supreme Court’s announcement, saying it will settle the question of regulation once and for all.

William O’Keefe, who lobbies for Exxon Mobil and heads the George C. Marshall Institute, a Washington think tank, said he hopes the court will apply the rigorous scientific standards it has required in cases since the early 1990s.

“If they apply that to this filing, they will reject it,” he said. “They’ll say the agency is well within its rights” to not regulate carbon dioxide.

But a coalition of indigenous Alaskan tribes that filed a friend-of-the-court brief urging the court to consider the suit said evidence is mounting that more needs to be done to curb global warming. Faith Gemmill of the Fairbanks-based Resisting Environmental Destruction on Indigenous Lands (REDOIL) said tribes across Alaska must deal with a shortened hunting season, widespread forest fires and other effects of climate change.

“Our entire ecosystem is changing due to global warming,” Gemmill said. “Our very existence is at threat.”
A federal appeals court rejected on Friday an effort by a dozen states and cities, along with environmental groups, to have the Bush administration regulate greenhouse gases that spill out of the tailpipes of new cars and trucks.

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit found that the federal Environmental Protection Agency had the administrative discretion to decide, in 2003, not to order reductions in carbon dioxide and other greenhouse gases from new motor vehicles, as the states sought.

The decision—the most authoritative court ruling on the issue so far—lessens the likelihood that there will be any national programs to control greenhouse gas emissions anytime soon. However, Judge A. Raymond Randolph, writing for the panel, and Judge David B. Sentelle, who disagreed with Judge Randolph on some of the issues in the case, did not directly address the agency's contention that it had not been given authority under the federal Clean Air Act to regulate greenhouse gases.

That omission led environmental groups to claim that the decision leaves the door open for the agency to regulate greenhouse gases in the future, if it chooses to do so.

The ruling appears to leave unchecked the authority of some states, such as California and New York, to continue their programs to regulate greenhouse gas emissions from motor vehicles or power plants.

But it was clearly a setback for the states that had sought federal involvement in controlling greenhouse gases.

James R. Milkey, chief of the environmental protection division in the Massachusetts attorney general's office, called the ruling "a deeply fractured set of opinions" that was both disappointing and heartening.

"The two judges in the majority just assumed that E.P.A. had the authority to regulate emissions without dealing directly with the question," Mr. Milkey said.

Only Judge David S. Tatel, who wrote a pointed dissenting opinion, touched the central issue, Mr. Milkey said, and he "firmly rejected each and every argument that E.P.A. made trying to hide behind the claim that it lacked authority."

Mr. Milkey said the strong dissent could strengthen the case for a rehearing before the full 11-member Court of Appeals. The case could also be taken to the Supreme Court.

Eryn Witcher, the press secretary for the Environmental Protection Agency, called the court decision a welcome win.

"We are pleased with this ruling and glad the court supported our decision," Ms. Witcher said. She said voluntary programs were better ways to reduce carbon and greenhouse gases than "mandatory regulations and litigation that don't promote economic growth."
The agency was joined in the case by the attorneys general of 11 states that oppose carbon dioxide regulation and a coalition of trade groups, including the Alliance of Automobile Manufacturers.

Because of the fractured decision, the case did not turn out to be quite the showdown over global warming that was expected. Neither did it settle the question about how much authority the federal agency has to take action on emissions that some believe contribute to the heating of the earth, but that others do not think has any direct relation to climate change on such a large scale.

The emissions case dates to 1999, when several states and environmental groups formally petitioned the Environmental Protection Agency to regulate carbon dioxide, methane, nitrous oxide and hydrofluorocarbons in new motor vehicles to control greenhouse gas emissions.

In 2003, the federal agency rejected the petition, arguing that it lacked the statutory authority to act.

Several states, led by Massachusetts, argued in federal court that the agency’s decision had been based on the conclusion that the connection between greenhouses gas emissions and global warming “cannot be unequivocally established,” which was the finding of a report by the National Research Council of the National Academy of Sciences.

Massachusetts was joined by California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington, along with the cities of Baltimore, New York and Washington, D.C. and American Samoa.

The appeals court ruled that the agency’s decision did not rest “entirely on scientific uncertainty,” but was a justifiable “policy judgment.”

James T.B. Tripp, general counsel for the group Environmental Defense, which participated in the case on the side of the plaintiff states, said that the majority opinion does not deal expressly with the question of the agency’s statutory authority to regulate greenhouse gas emissions. “But it implicitly says the agency may have the discretionary authority to do so,” Mr. Tripp said.

The question of the government’s authority was handled forthrightly in the 38-page dissent of Judge Tatel, who rejected most of the arguments the agency made to defend its decision not to regulate the gases.

Judge Tatel said he had “grave difficulty” seeing how the agency had not concluded that global warming was a serious threat to public health. And in his most strongly worded conclusion, Judge Tatel said the Environmental Protection Agency “has authority—indeed the obligation” to regulate greenhouse gas emissions from motor vehicles.
A federal appeals court heard arguments on Friday in a five-year battle over whether the Environmental Protection Agency has the authority to regulate carbon dioxide emissions from motor vehicles.

In arguments on a suit that consolidates a number of legal actions, opposing lawyers cited the same words of the Clean Air Act and drew entirely different conclusions.

The plaintiffs are 12 states, a territory, 3 cities and 13 nongovernment organizations, most of them environmental groups.

They have been seeking to have the E.P.A. explain why the Clean Air Act does not empower the agency to regulate carbon dioxide emissions for global climate considerations. That position of the Bush administration is a reversal of Clinton administration policy.

Joining the government’s side in the case are 11 states that oppose carbon dioxide regulation and 19 industry groups, including those representing car makers, refiners and chemical companies.

The arguments Friday, before a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, reflected a major fault line in current environmental battles: the extent to which carbon dioxide can be linked to global warming.

The Bush administration has taken a skeptical view of global warming and its effect. It has resisted international treaties, like Kyoto, that govern some polluting countries and not others, and has worked to protect industries that would be adversely affected if carbon dioxide were regulated.

Exchanges between the judges and the lawyers focused on whether Congress intended for the agency to regulate carbon dioxide even if its link to global warming is uncertain and adverse effects on humans cannot be accurately predicted.

In effect, the arguments came down to Congress’s meaning when it wrote into Section 202 of the act that the E.P.A. administrator “shall” regulate any air pollutant from any new vehicles that “may reasonably be anticipated to endanger public health or welfare.”

“You don’t have to look far to find the authority that the E.P.A. says is missing,” said the plaintiffs’ lead lawyer, James R. Milkey, an assistant attorney general of Massachusetts. Ignoring a broad reading of the act, Mr. Milkey said, “is like saying a stop sign is not specific enough.”

But the section makes no specific mention of carbon dioxide as a pollutant. Jeffrey Clark of the Justice Department argued that if Congress had intended for the agency to regulate tailpipe emissions—a quantum shift in policy that would have an enormous economic effect—the lawmakers would have used language more comprehensive.

Judge A. Raymond Randolph, whose questions suggested that he did not believe a clear link had been established between
carbon dioxide and global warming, cited another section of the Clean Air Act that says the language referring to effects on public health includes “climate.” Judge Randolph told Mr. Clark, “I can’t imagine anything turns” on a single word.

“We agree,” Mr. Clark responded.

Mr. Clark compared the current case to an effort by the Food and Drug Administration under President Bill Clinton to regulate tobacco as a drug. That effort was resolved when in 1997 the Supreme Court upheld the tobacco industry’s opposition, ruling that Congress had never intended for tobacco to be considered a drug.

But Mr. Milkey called the comparison erroneous, declaring that if tobacco came under F.D.A. jurisdiction, “it would be banned, and here nobody is banning anything.”

All three judges engaged in aggressive questioning of the lawyers, although it was difficult to determine how the panel might ultimately vote. While Judge Randolph seemed rough on Mr. Milkey, Judge David S. Tatel was equally hard on Mr. Clark. The third judge, David B. Sentelle, was skeptical of assertions from both sides, leading lawyers for the environmental groups to wonder after the arguments if he could be the swing vote.

Regulation of carbon dioxide emissions has been a major national environmental issue since President Bush first won election. Despite a campaign promise in 2000 to include carbon dioxide as an air pollutant that should be regulated, the administration has resisted regulations on such emissions from mobile as well as stationary sources. Conflict over carbon dioxide is one major reason Congress has not passed new antipollution legislation for power plants.

Motor vehicles account for about a quarter of the nation’s carbon dioxide emissions. Yet automakers have fought efforts to force them to build more efficient engines, pointing to the extraordinary costs of altering their factories to meet any new standards. The courtroom audience Friday included lobbyists from leading car manufacturers.

The judges are expected to take as long as six months to issue an opinion, after which an appeal is almost certain.
The Environmental Protection Agency said Thursday it would not force automakers, oil companies or others to reduce “greenhouse gas” emissions from automobiles, a decision that may complicate efforts by California and other states to limit the release of carbon dioxide.

The EPA denied a 1999 petition from environmental groups, which had asked the agency to use its powers under the Clean Air Act to regulate carbon dioxide and other emissions from new vehicles.

Burning oil and other fossil fuels produces gases that can rapidly concentrate in the atmosphere and cause temperatures to rise, a condition known as the greenhouse effect. This global warming, the environmental groups contend, will cause increases in infectious disease, skin cancer, water quality problems and other threats to public health.

But the EPA said that Congress had not sorted out federal policy on climate change, and that lawmakers had not authorized the agency to use the Clean Air Act to stop global warming.

“This is an issue that needs to be addressed first by Congress.... It was quite clear Congress had no intention of giving us the authority to regulate global climate change,” said Jeffrey Holmstead, the EPA’s assistant administrator for air programs.

“This is a sound decision that puts the issue directly where it belongs—back in Congress,” said William Kovacs, vice president of environmental policy at the U.S. Chamber of Commerce.

The announcement came as little surprise.

Early in his term, President Bush reversed a campaign promise to regulate carbon dioxide emissions from power plants, and the administration has favored voluntary efforts rather than mandates to industry to control greenhouse gases.

David Doniger of the Natural Resources Defense Council, a New York-based environmental group, called the decision “another big favor for big-polluter campaign contributors” to the Bush administration.

The International Center for Technology Assessment, a Washington-based technology policy organization that filed the 1999 petition along with Greenpeace and the Sierra Club, said it would challenge the EPA’s decision in court.

In California, an air-quality official also promised to sue the EPA, saying the federal agency’s decision threatened state efforts to control greenhouse gases.

Under a law signed last year by Gov. Gray Davis, California became the first state to regulate greenhouse gas emissions from vehicle tailpipes. The law requires automakers to reduce emissions as much as
possible according to rules the California Air Resources Board is scheduled to release in 2005. The rules would take effect in 2009.

Catherine Witherspoon, the board’s executive officer, said her agency would sue the EPA to force it to identify carbon dioxide as an air pollutant.

“The EPA not only rejected the petition but made a decision that could limit individual states trying to regulate greenhouse gas pollutants,” Witherspoon said. “We fundamentally disagree. We have to stand up and litigate for ourselves over whether greenhouse gases are pollutants.”

Illinois, Massachusetts, New Hampshire and North Carolina are also considering laws or regulations to require industries—mainly power plants—to reduce carbon dioxide emissions.

“The states have demonstrated very successfully over the years that when the federal government does not act, the states will step in and fill that void,” said S. William Becker, executive director of the Assn. of Local Air Pollution Control Officials.

The EPA’s action came one day after another controversial agency announcement. On Wednesday, environmental groups protested as the EPA unveiled revisions to the Clean Air Act that allow power plants and factories to upgrade without installing antipollution devices.

The Thursday decision on vehicle emissions also drew complaints from environmental groups. They noted that during the Clinton administration, two successive EPA general counsels had concluded that the agency did in fact have authority under the Clean Air Act to regulate carbon dioxide and other greenhouse gases.

The EPA on Thursday formally withdrew a legal memorandum laying out that opinion.

EPA critics ridiculed the agency’s reasoning, under which it concluded that carbon dioxide, hydrofluorocarbons and other emissions did not meet the legal definition of “air pollutants” under the Clean Air Act.

“Refusing to call these gases ‘pollutants’ is like refusing to say that smoking causes lung cancer,” said Melissa Carey of Environmental Defense, a New York-based policy group. “There are things we have to come to terms with: The Earth is round, Elvis is dead and climate change is really happening.”

With the EPA limiting its role in global warming, new attention will fall on regulatory efforts in Congress.

In the Senate, Republican leaders have promised a vote this fall on legislation from Sens. John McCain (R-Ariz.) and Joe Lieberman (D-Conn.) that would attempt to reduce gases believed to contribute to global warming. Lieberman is a candidate for his party’s presidential nomination.

Carbon dioxide and other emissions from vehicles account for at least 18% of U.S. greenhouse gas production, environmental groups said.
Defending his reversal of a campaign pledge, President Bush said today that "an energy crisis" that threatened the nation's economic health caused him to decide not to try to regulate power plants' emissions of carbon dioxide.

"I was responding to realities, and the reality is our nation has a real problem when it comes to energy," Mr. Bush told reporters in New Jersey today.

White House officials said any plan to limit emissions of the gas, widely seen as a contributor to global warming, would have pushed electricity prices up, and could have compounded energy shortages like those being felt in California. They said Mr. Bush decided on Monday, hours before the White House announced the move, after concluding a week ago that the promise he had made in the campaign was "an error."

But many of Mr. Bush's supporters outside the White House said they had little doubt that the president's move also reflected the power of a last-minute pressure campaign from Congressional Republicans and industry leaders. Among the top corporate officials said by Washington lobbyists to have been in direct contact with either the president or Vice President Dick Cheney to win the turnabout was Tom Kuhn, a close friend of Mr. Bush's who is president of the Edison Electric Institute, the power plants' main lobbying organization.

"We had been convinced that we were done for," a top industry lobbyist said today of what he said was widespread resignation that Mr. Bush would honor his campaign promise, which called for mandatory reductions in power plants' emissions of the gas. Characterizing the lobbying of the last several weeks, this industry official said, "The very top people on our side were talking to the very highest levels of the administration."

Among people critical of Mr. Bush's move, several suggested in particular today that his diagnosis of "energy crisis" was overstated and was being offered at least in part as a cover for a decision driven by a desire to satisfy the oil and coal industries, the biggest beneficiaries of his decision, as well as to preserve good ties with their supporters on Capitol Hill.

"In every energy decision, politics plays a big role," said Bill Richardson, who was the Clinton administration's last energy secretary. "But the emissions decision is a particularly unfortunate one because it basically says we're for coal and not for any alternative, including natural gas, which should be our future source of energy in this country."

A decision to regulate power plants' emissions of carbon dioxide would have been felt most heavily by coal- and oil-burning plants, which are the largest emitters of the gas among the electric utilities. The adoption of the standards would have almost certainly resulted in a shift toward more widespread use of natural gas, a cleaner fuel, in power generation.
White House officials said today that such a shift would have taken place too quickly for the natural gas industry to come up with the supplies necessary to meet the new demand, and that higher prices would have resulted. But Skip Horvath, president of the Natural Gas Supply Association, said his industry regarded Mr. Bush's decision as a mistake.

"The policy seems to view a shift toward natural gas use as some kind of problem, and it seems to us that natural gas is the solution," Mr. Horvath said.

The energy problems now facing California have little to do with oil and coal because most of the state's electricity is generated from hydropower, nuclear power and natural-gas fired plants. But White House officials said Mr. Bush's comments about "an energy crisis" reflected a broader concern about the need to expand the domestic energy supply, by increasing production and use of all possible sources.

Mr. Bush's decision was warmly welcomed today by spokesmen for the oil and gas industries, as well as by a top official of the United States Chamber of Commerce, which had warned that any regulation of carbon dioxide emissions could have hurt the economy.

"It's very positive in that they've balanced environmental needs against our needs for energy security, and the decision is going to mean that we can both protect and begin increasing our domestic energy supplies," said the official, William L. Kovacs, the industry group's vice president for environment, technology and regulatory affairs.

The pressure on the White House to reverse Mr. Bush's decision began early this month, after Christie Whitman, the new administrator of the Environmental Protection Agency, began publicly to describe the president's campaign pledge as if it were already policy.

Four Republican senators strongly opposed to regulation of carbon dioxide emissions, led by Chuck Hagel, Republican of Nebraska, then sent Mr. Bush a letter asking that he clarify his position. That set in motion an internal White House review and the furious lobbying effort that culminated in the policy shift on Tuesday, White House and industry officials said.

"It was very good that they made a swift decision here, rather than let this issue fester and fester," said John Grasser, a spokesman for the National Mining Association, the coal industry's main representative.

Environmentalists have been sharply critical of Mr. Bush's move, and some elaborated on their criticisms today, saying that the president had passed up an important chance to address the most dire problem facing the environment.

"The energy crisis we have is a short-term phenomenon, but the global warming phenomenon is a long-term issue, and what's important is to begin to put in place a solution that will reduce our consumption of fossil fuels and cut our emissions of carbon dioxide," said Michael Oppenheimer, chief scientist for Environmental Defense, a New York-based environmental group.

A former Clinton administration official who was one of the chief State Department negotiators in recent talks aimed at completing a global warming treaty, the Kyoto Protocol, said today that Mr. Bush's
decision would undercut efforts to find a solution to the problem.

"The only silver lining I can see here is that it makes things so stark and clear," said the official, David B. Sandalow. "There's not ambiguity, no attempt to greenwash this. He's just going back on his promise."

(05-848)


During the mid-1990’s, the Environmental Protection Agency began efforts to crack down on power plants grandfathered by the Clean Air Act that sought to expand their operations and increase their output without installing modern anti-pollution equipment. Such plants do not need to meet modern pollution standards unless they seek to modernize or expand their operations to produce “new sources” of pollution. Duke Energy undertook to extend the life of eight plants by replacing components that would allow the plant to operate longer hours. The Clinton Administration sued as part of its anti-pollution crackdown and the Bush Administration continued the suit while simultaneously seeking to change regulations to make similar suits more difficult to bring in the future. The Fourth Circuit sided with Duke Energy, finding that it was not required to meet modern pollution standards under the Clean Air Act because of its improvements. Several lower courts have sided with the government.

Questions Presented: 1) Whether the Fourth Circuit’s decision violated Section 307(b) of the Act, which provides that national Clean Air Act regulations are subject to challenge “only” in the D.C. Circuit by petition for review filed within 60 days of their promulgation, and “shall not be subject to judicial review” in enforcement proceedings, 42 U.S.C. 7607(b); and 2) whether the Act’s definition of “modification,” which turns on whether there is an “increase” in emissions and which applies to both the NSPS and PSD programs, rendered unlawful EPA’s longstanding regulatory test defining PSD “increases” by reference to actual, annual emissions.

ENVIRONMENTAL DEFENSE, et al. Intervenors/Plaintiffs-Appellants,
v.
DUKE ENERGY CORPORATION, Defendant-Appellee.

United States Court of Appeals
for the Fourth Circuit

Decided June 15, 2005

[Excerpt: some footnotes and citations omitted]
DIANA GRIBBON MOTZ, Circuit Judge:

The United States brought this enforcement action against Duke Energy Corporation, which provides North Carolina and South Carolina with electricity generated from eight plants located throughout the two states. The United States maintains that Duke Energy on numerous occasions modified these plants without first obtaining appropriate permits in violation of the Clean Air Act. . . . The district court granted summary judgment to Duke Energy. . . . We affirm, albeit for somewhat different reasons

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I. The Clean Air Act is a complex statute supported by an elaborate regulatory scheme; both have a complicated history. This case involves two different, but complementary provisions of the Act: the New Source Performance Standards ("NSPS") provisions, 42 U.S.C. § 7411, and the Prevention of Significant Deterioration ("PSD") provisions, 42 U.S.C. § 7470-92.

In order to "protect and enhance the quality of the Nation's air resources" and "promote the public health and welfare," 42 U.S.C. § 7401(b)(1), the Clean Air Amendments of 1970 directed the Environmental Protection Agency ("EPA") to devise National Ambient Air Quality Standards establishing the maximum concentrations of certain air pollutants allowable in each region of the United States. . . . The Act then directed each State to design a State Implementation Plan to effect compliance with its air quality standards. . . .

To help attain and thereafter maintain these air quality standards, the 1970 amendments enacted the NSPS provisions, which required the EPA to promulgate standards regulating emissions from both newly constructed and modified sources of pollution at power plants. . . . Congress defined "modification" in the NSPS provisions as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." . . .

Since 1971, the EPA has promulgated NSPS regulations that define "modification" in virtually the same words as the statute. . . . In 1975, the EPA added a regulation elaborating on this definition and further defining "modification" by reference to an increase in the hourly emission rate: a modification includes "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any [regulated] pollutant," measured not in tons per year, but in kilograms per hour. . . . Modified equipment becomes subject to the NSPS's "technology-based" standards . . . which mandate the installation of the "best demonstrated pollution control technology." . . .

The NSPS program was not entirely successful. . . . In 1972, the United States District Court for the District of Columbia issued a preliminary injunction directing the EPA to promulgate regulations to supplement the NSPS program and protect air quality from deterioration in areas that had met or exceeded the relevant ambient standards. . . . The EPA duly disseminated the first PSD regulations in 1974. . . . Congress thereafter enacted a PSD program in the Clean Air Act Amendments of 1977. . . .

As originally enacted, the PSD permit provisions in the Clean Air Act applied only to the "construction" of major emitting facilities. . . . However, in November 1977, a few months after the original enactment became effective, Congress passed the "Clean Air Act Technical and Conforming Amendments." . . . These amendments added to the "Definitions" section of the PSD provisions in 42 U.S.C. § 7479 a subparagraph that provides: "The term 'construction' when used in connection with any source or facility, includes the modification (as defined in [section 7411(a)]) of any source or facility." . . . This
amendment thus incorporated the NSPS statutory definition of “modification,” § 7411(a)(4), into § 7479 of the PSD statute.

The PSD program imposes, inter alia, pre-construction review and permit requirements on new or modified sources in areas that have attained or exceeded their air quality standards. . . . Unlike the NSPS program, the PSD program does not focus primarily on technology-based controls, but on the “net emissions from an entire plant resulting from construction or modification of one or more emitting sources within the plant.” . . . And so, while NSPS centers on technological controls at an individual pollution-emitting apparatus, PSD fixes on the actual emissions from a site. . . .

The EPA promulgated regulations under the PSD provisions of the statute in 1978 . . . and amended them in 1980 . . . . Under the 1980 PSD regulations, a plant cannot engage in a “major modification” of equipment without first undergoing the EPA’s permit process and acquiring a permit. . . . The EPA’s PSD regulations define a “major modification” as “any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.” . . . A “net emissions increase” is “any increase in actual emissions from a particular physical change or change in the method of operation” of a unit. The PSD regulations measure emissions increases relative to a baseline calculation of “actual emissions,” i.e., “the average rate, in tons per year, at which the unit actually emitted” the regulated pollutant for, usually, the two years prior to date of measurement, “using the unit’s actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.” . . .

II.

A.

Duke Energy’s eight plants in the Carolinas include thirty coal-fired generating units that were placed in service between 1940 and 1975. Each unit contains, as one of its three major components, a boiler, which is a large structure from six-to twenty-stories tall containing thousands of steel tubes. The tubes are arranged into sets of tube assemblies, including economizer tubes, in which water is initially heated; furnace waterwall tubes, in which water evaporates to steam; superheater tubes, in which the temperature of the steam is raised before being released into a turbine; and reheater tubes, in which steam released from the turbine is reheated and returned to the turbine.

Between 1988 and 2000, as part of a plant modernization program, Duke Energy engaged in twenty-nine projects on the coal-fired generating units, most of which consisted of replacing and/or redesigning one or more of the boiler tube assemblies. These projects would both extend the life of the generating units and allow the units to increase their daily hours of operation. Duke Energy did not apply for or acquire new permits from the EPA for these projects, some of which, according to the Government, cost “more than seven times the original cost of the unit.” . . .

In December 2000, at the direction of the Administrator of the EPA, the Attorney General brought this enforcement action against Duke Energy, alleging that the life-extension projects violated, inter alia, the Clean Air Act’s PSD provisions. In September 2001, the district court granted Environmental Defense, the North Carolina
Sierra Club, and the North Carolina Public Interest Research Group Citizen Lobby/Education Fund leave to intervene as plaintiffs, and these groups filed a complaint against Duke Energy alleging similar violations.

The EPA and the Intervenors maintain that these life-extension projects constitute "major modifications" of Duke Energy's furnaces as defined in the PSD statutory and regulatory provisions—that is, physical changes leading to a significant net emissions increase—and thus Duke Energy was required to obtain permits for them. The EPA does not contend that the post-project hourly rate of emissions increased. Rather, it argues that the PSD requires measurement of the net emissions increase by using an "actual-to-projected-actual" test, comparing the actual pre-project emissions from a unit to the projected post-project emissions, which takes into account a unit's ability to operate for more hours. Because the Duke Energy projects enable the units to operate for more hours each day, they will lead to an increase in actual yearly emissions.

Duke Energy counters that its projects do not constitute modifications subject to PSD because they did not increase the units' levels of emissions. The company maintains that, under the PSD program, a net emissions increase will result only if there is an increase in the hourly rate of emissions. Because none of its projects increased a unit's hourly capacity to emit pollution (but increased only the number of hours the unit could operate), the projects did not increase emissions from pre-project levels, and so, according to Duke Energy, it did not have to obtain permits.

B. The district court agreed with Duke Energy.

It held that a modification subject to PSD exists only if there is a post-project increase in the hourly rate of emissions from a unit. Duke Energy Corp. . . . In reaching this conclusion, the district court relied on the language of the PSD regulations, "contemporaneous interpretations" of the regulations by the EPA, and "the statutory language incorporating the NSPS concept of modification into PSD." . . .

One regulation promulgated by the EPA pursuant to the PSD statute, 40 C.F.R. § 51.166(b)(2)(i), characterizes a "major modification" as "any physical change in or change in the method of operation . . . that would result in a significant net emissions increase"; another, 40 C.F.R. § 51.166(b)(2)(iii)(f), excludes "an increase in the hours of operation or in the production rate" from the definition of "physical change or change in the method of operation." Reading these two provisions in conjunction, the district court determined that an emissions increase traceable to increased hours of operation cannot trigger the PSD provisions because an increase in hours is not a physical change. Put another way, because increased hours are not a physical change under the PSD regulations, calculation of post-project net emissions cannot take into account increased hours of operation, but rather must be based on pre-project hours of operation and rates of production. Therefore, the court concluded, only if the hourly rate of emissions increases can there be a net emissions increase under the PSD regulations. . . .

The district court recognized that the EPA interpreted its PSD regulations differently, excluding a much smaller group of projects from the definition of "major modification." The EPA would exclude only those projects that increase hours of operation and involve
no construction. . . According to the interpretation pressed by the EPA, whenever there is an increase "in utilization coupled with a physical change, any increase in hours of operation . . . may be considered in the emissions calculus." . . . The district court concluded that it could not defer to the EPA's interpretation because in addition to being, in the court's view, belied by the plain language of the PSD regulations, the present EPA interpretation was "clearly contrary to earlier [EPA] interpretations" of the regulations. . . . Specifically, the court noted that "immediately after the promulgation of the PSD regulations in 1980, the EPA's Director of the Division of Stationary Source Enforcement . . ., Edward E. Reich, confirmed in two separate applicability determinations that the requirements of PSD would be implicated only by an increase in the hourly rate of emissions." . . .

Finally, the court determined that its interpretation of the PSD regulation was "also consistent with the NSPS [statutory] definition of 'modification'" found in 42 U.S.C. § 7411(a), "which was incorporated by explicit reference into PSD" in 42 U.S.C. § 7479(2)(C) (defining "construction" to include "the modification (as defined in section 7411(a) . . .) of any source or facility"). . . . The interpretation of PSD regulations urged by the EPA in this suit would, the district court concluded, be "inconsistent with the congressional design of defining PSD construction in terms of NSPS modification and should therefore be accorded little deference." . . .

After resolution of this legal issue, the parties stipulated that the Duke Energy projects would not result in an increase in the hourly rate of emissions. The court then entered summary judgment for Duke Energy.

III.

In cases in which an agency's interpretation of its regulations are at issue, a court engages in a modified Chevron analysis. . . . First, as in the usual Chevron analysis, a court must determine "whether Congress has directly spoken to the precise question at issue." . . . "The judiciary is the final authority on issues of statutory construction" and "if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." . . . Only if the statute is silent or ambiguous on the point is Congress deemed to have delegated authority to the agency to clarify the point in its regulations. . . . Thus, only in such cases does a court examine the regulation itself, determining its legitimate meaning, asking whether the regulation is based on a permissible construction of the statute, and, if so, deferring to it . . .

The EPA and the Intervenors expressly acknowledge that these principles govern our review in the case at hand. . . . They fail to understand, however, that straightforward application of these principles can lead to only one conclusion: affirmance of the judgment of the district court.

This is so because Congress has indeed "directly spoken to the precise question at issue." . . . As the EPA itself concedes, the critical first "question at issue" here is whether the EPA "can interpret the statutory term 'modification' under PSD differently from how EPA interpreted that term" in the NSPS. . . . Congress expressly defined "modification" in the NSPS provisions of the Clean Air Act . . . and then expressly directed that the PSD provisions of the Act
employ this same definition. . . . When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently. Thus, because Congress mandated that the PSD definition of "modification" be identical to the NSPS definition of "modification," the EPA cannot interpret "modification" under the PSD inconsistently with the way it interprets that term under the NSPS.

Common sense would seem to dictate this result. Supreme Court precedent certainly does. . . . In Rowan, the Court faced a situation strikingly similar to the one at hand, and held that when Congress itself provided "substantially identical" statutory definitions of a term in different statutes, the agency charged with enforcing the statutes could not interpret the statutory definitions "differently." . . .

The question presented in Rowan was whether the Commissioner of the Internal Revenue Service could interpret the statutory term "wages" differently for, on the one hand, the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment Tax Act ("FUTA"), and, on the other, the statute governing income-tax withholding. . . . Congress had defined the term "wages" in these statutes in substantially the same language: for both FICA and FUTA, "wages" were defined as "all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash"; for income tax withholding, "wages" were defined as "all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash." . . . The Commissioner, however, issued regulations interpreting "wages" under FICA and FUTA to include the value of meals and lodging provided to employees for the convenience of the employer, and "wages" under the income-tax withholding statute to exclude this value. . . .

In holding the Commissioner's interpretation impermissible, the Court relied on the plain language of the statutes and their legislative history. First, the Court noted that when Congress enacted the precursors to FICA and FUTA as part of the Social Security Act of 1935, it chose "wages" as the basis for employer taxation and then statutorily defined the term. . . . Similarly, seven years later, when Congress enacted the original income-tax withholding statute, it chose "wages" as the basis for taxation and statutorily defined the term "in substantially the same language that it used in FICA and FUTA." . . . The Rowan Court held that, "in view of this sequence of consistency, the plain language of the statute is strong evidence that Congress intended 'wages' to mean the same thing under FICA, FUTA, and income-tax withholding." . . . The Court then examined the statutes' history, finding indications that Congress intended to "coordinate the income-tax withholding system with FICA and FUTA . . . to promote simplicity and ease of administration," and concluding that "contradictory interpretations of substantially identical definitions do not serve that interest." . . .

The plain language of the Clean Air Act provides even stronger evidence that Congress intended the statutory definitions of "modification" in the PSD and NSPS provisions to be interpreted identically. While Congress used only "substantially the
same language" in the statutory definitions at issue in Rowan . . . here Congress mandated that the definition of "modification" in the PSD provisions precisely mirror the definition of "modification" in the NSPS provision. Congress did this by directly incorporating the NSPS definition, which it had enacted in 1970, into the PSD provisions, which it enacted seven years later . . .

Moreover, as in Rowan, the legislative history of the statutes at issue here does not in any way suggest that Congress intended these identical statutory definitions to receive different interpretations. Notwithstanding the EPA’s contentions to the contrary, the fact that the PSD definition of modification became part of the statute through “Technical and Conforming Amendments” does not change the fact that the definition is a statutory enactment, entitled to be treated as such. . . . Indeed, the expressed intent in the congressional summary of the legislative amendments to “conform” the definition of modification in the PSD provisions “to usage in other parts of the Act,” . . . indicates congressional concern with the same sort of simplicity and consistency that the Rowan Court discerned from the legislative history examined there. As the Court explained in Rowan, “it would be extraordinary for a Congress pursuing this interest to intend, without ever saying so, for identical definitions to be interpreted differently.” . . .

The EPA points to Senator Muskie’s statement that it was “not the purpose of these amendments to re-open substantive issues” in the Act . . . as evidence that Congress was merely using an expedient method to correct the inadvertent omission of the word “modification” from the PSD provisions. To the extent that Senator Muskie’s remarks demonstrate Congress’ intent, . . . they do not support the EPA’s position. The assertion that the Technical and Conforming Amendments were not “designed to resolve issues that were not resolved” in the debate and passage of the Act . . . says nothing about whether Congress had previously resolved the issue of whether the interpretation of “modification” was to be congruent under the PSD and NSPS statutory provisions.

The EPA and Intervenors also emphasize the “vital differences” between PSD and NSPS. . . . We do not ignore or minimize those differences. Although both statutes are part of the Clean Air Act and designed to serve its purpose “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population,” . . . they address somewhat different problems. PSD exists primarily to prevent significant deterioration of ambient air quality in areas meeting clean air standards . . . while NSPS requires new sources to implement particular technologies to limit their own emissions. . . . These differences have led us and other courts to approve different regulatory definitions for an identical statutory term in the two statutes. In PEPCo, for example, we held that “significant differences between the PSD and NSPS programs” justified a different interpretation of the statutory term “stationary source.” . . . But in PEPCo, although Congress had defined the term “stationary source” in the NSPS provisions . . . it had not defined that term in the PSD provisions. Thus, while in PEPCo both statutes contained the same term, the statutes did not define that term in the same manner; nor was the use of the term in the PSD provisions linked to the statutory definition of the term in the NSPS provisions. Similarly, in Northern Plains Resource
Council, the Ninth Circuit allowed the EPA to interpret the statutory term “commenced” differently in the NSPS and PSD regulations. . . . But again, although one statute—there the PSD provisions—defined the term . . . the other—the NSPS provisions—did not. And, Congress had not linked the PSD definition of the term to its use in the NSPS provisions of the statute.

PEPCo and Northern Plains Resource Council illustrate the principle that the same word or phrase will generally be presumed to have the same meaning when used in different parts of the statute, but this “presumption of the uniform usage . . . relents” when there is “a variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.” . . . Thus, in PEPCo and Northern Plains Resource Council, the difference in purpose between the NSPS and PSD programs justified the conclusion that the same words had different meanings in the two sections of the statute. . . .

In the case before us, however, the presumption of uniform usage has become effectively irrebuttable because Congress’ decision to create identical statutory definitions of the term “modification” has affirmatively mandated that this term be interpreted identically in the two programs. The different purposes of the NSPS and PSD programs cannot override that mandate. Neither the United States nor the Intervenors have cited a single case in which any court has held that identical statutory definitions can be interpreted differently by the agency charged with enforcement of the statute.

Moreover, in Rowan the Supreme Court expressly rejected the argument, which was successful in the Fifth Circuit, that the different purposes of FICA/FUTA and income-tax withholding justified the different regulatory interpretations of the same statutory definition. . . . The Rowan Court concluded that to permit the Commissioner to interpret the same statutory terms differently would “fail to implement the congressional mandate in a consistent and reasonable manner.” . . .

So it is here. Congress mandated that the PSD statute incorporate the NSPS statutory definition of “modification.” No one disputes that prior to enactment of the PSD statute, the EPA promulgated NSPS regulations that define the term “modification” so that only a project that increases a plant’s hourly rate of emissions constitutes a “modification.” The EPA must, therefore, interpret its PSD regulations defining “modification” congruently. Of course, this does not mean that this regulatory interpretation must be retained indefinitely. The EPA retains its authority to amend and revise this and other regulations “through exercise of appropriate rulemaking powers.” . . . Indeed, the parties point out that the EPA has already amended some of the regulations at issue here. . . . As long as Congress mandates that “modification” be defined identically in the NSPS and PSD statutes, however, EPA must interpret that term in a consistent manner in the NSPS and PSD regulations.

IV.
For the foregoing reasons, the judgment of the district court is AFFIRMED.
The Supreme Court announced yesterday that it will review a controversial federal court ruling that environmentalists had said would weaken pollution-control requirements for aging power stations across the country.

In a one-line order, the justices said they will hear Environmental Defense's appeal of a June 2005 ruling by the U.S. Court of Appeals for the 4th Circuit, based in Richmond, which said that Duke Energy Corp., a North Carolina utility, could operate refurbished power plants even though their total annual emissions would go up.

The court's decision injects the justices into a half-decade-old battle between environmentalists and the Bush administration, which has sought to ease what it says is an excessive regulatory burden on the nation's utilities.

Lightening the industry's environmental load was a key component of the administration policy adopted by Vice President Cheney's energy task force in 2001.

In the case the court agreed to hear yesterday, Environmental Defense v. Duke Energy Corp., No. 05-848, the specific question is how to measure utilities' compliance with the Environmental Protection Agency's "new source review" rules, which govern emissions from plants that have been modernized or expanded.

Environmental Defense says that about 17,000 facilities are covered by the rules, and it cites studies that show 20,000 premature deaths per year traceable to pollution from coal-fired plants.

The EPA's position traditionally has been that the Clean Air Act requires modified plants to reduce their total annual emissions, and Environmental Defense says that interpretation is correct.

But the 4th Circuit disagreed and said that plants should only have to show a reduction in their hourly rate of emissions. This was a victory for utilities because they could run their updated plants for many more hours than previously.

The case against Duke Energy was one of many initiated by the EPA across the country in the waning days of the Clinton administration.

The Clinton crackdown was bitterly opposed by utilities, and the Bush administration promised to change EPA enforcement policy.

But the EPA continued to press cases that were already pending when the administration took office in 2001, so the Bush EPA and Environmental Defense had been on the same side of the Duke Energy case until the 4th Circuit's ruling.

After the 4th Circuit ruled, the administration proposed new clean air regulations that incorporated the 4th
Circuit's decision and would have applied it across the country.

Then the administration asked the Supreme Court not to intervene in the case. The court's decision to take the case over the administration's objection was a surprise; since the adoption of modern environmental legislation in 1970, the court had agreed to hear just two previous cases in which an environmental group was the petitioner.

"The court's decision to grant review despite the administration's request that review be denied constitutes a significant rebuff and places the administration in an awkward position before the court," said Richard Lazarus, professor of environmental law at Georgetown University Law Center.

Environmental Defense, backed by a friend-of-the-court brief from the District, Maryland and 13 other states, argued that the 4th Circuit had acted outside its jurisdiction under the Clean Air Act, and that its ruling clashed with a 2005 decision by the U.S. Court of Appeals for the District of Columbia Circuit, which said that emissions had to be measured on an annual basis.

Though the high court's decision to grant review yesterday was a defeat for Duke Energy, which had urged it to let the 4th Circuit ruling stand, Scott Segal, director of the Electric Reliability Coordinating Council, said in a statement that industry was looking forward to the case.

"Clarity regarding these concepts is essential to improved efficiency, reduced emissions, enhanced workplace safety, and electric reliability," he said. "This Supreme Court has a good track record in support of a reasoned approach to administrative law. We believe the makeup of the court is well positioned to render judgment in a sensible and fair way."

Oral argument will take place in the fall, and a decision is expected by July 2007.
The Supreme Court's divided ruling last week on the scope of the Clean Water Act (CWA) underscores sharp divisions among the justices since President Bush's nominees joined the court, a dynamic legal observers say will almost certainly elevate Justice Anthony Kennedy's role as the key swing vote in future environmental cases.

Several observers believe that the divisions are so sharp that the court may not be able to reach consensus in environmental cases, limiting prospects for regulatory certainty in several future lawsuits involving EPA, including a case the court has already agreed to hear on the agency's new source review (NSR) program and possible suits over EPA's role in climate change and endangered species decisions.

Some sources also said the ruling in Rapanos et ux., et al. v. United States suggests the court could take a more narrow view of EPA and other agencies' authority under environmental statutes.

In the June 19 ruling, Kennedy joined a plurality decision written by Justice Antonin Scalia to remand the case to a lower court, but Kennedy wrote a concurring opinion that took a significantly broader view of when the law allows EPA and the Army Corps of Engineers to regulate wetlands.

Scalia's plurality decision, which was supported by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, allows regulation of waters that are "relatively permanent, standing or continuously flowing." A dissent authored by Justice John Paul Stevens and backed by Justices Stephen Breyer, Ruth Bader Ginsberg and David Souter, backed the government's position of expansive authority.

Kennedy's concurring opinion, which many believe will hold sway with the lower courts, struck a middle ground, saying there should be limits on CWA protections for remote waterbodies, but waterbodies with a "significant nexus" to navigable waters should still be protected. The decision is available on InsideEPA.com.

"It is hard to imagine two conceptions of environmental law that are more at odds than the [Scalia] plurality and the [Stevens] opinion. . . . It is equally true that the dissenting opinion is unpalatable for the new conservatives on the court. . . . and I think at least in the short term, Kennedy gets to be the Supreme Court because he gets to have the swing vote," says one environmental attorney who has argued cases before the high court.

"Neither side was able to figure out a way to write an opinion consistent with their values but that nonetheless attracts Kennedy. That speaks volumes about just how splintered the court is and how unlikely it is you will find a working majority on the court for any environmental issue."

The source adds that neither the Scalia nor Stevens camps were able to lure Kennedy to their side, despite discussions in the opinion that suggest attempts to do so. "The court understands the problems that stem from a
court that can’t produce a majority opinion,” such as continuing uncertainty and weaker legal precedent, the source says.

That is “a concern for people like me who depend on the conservative five [justices] sticking together,” says an industry attorney who practices before the court. The source adds that Kennedy is now clearly in the middle of the court and, “If you are in the middle, and Scalia keeps bashing you, it pushes you the other way.”

An environmentalist agrees that the decision has elevated Kennedy’s role and says that while the justice will moderate the views of both sides, Rapanos is his “most favorable environmental ruling” to date. But the source also says it is a bad sign that Roberts and Alito joined Scalia and Thomas.

Conversely, however, a second legal expert says Kennedy has long been the swing vote on environmental issues and downplays a change in dynamics on the bench. The source adds that because the case was so specific to the water law, it does not provide “much fodder for speculation” about how the court will address other environmental issues.

One law school academic notes that Scalia’s “antagonism toward environmental policies” was the “most striking thing” about the decision. An industry attorney following the case agrees, saying the language in Scalia’s opinion smacks of the same “judicial activism” that Scalia and other conservatives have often decried.

Another law school academic says Rapanos may not be the best test to predict the court’s future action on environmental issues because of its long and complicated history, and says a separate case the court has already agreed to hear, Environmental Defense, et al. v. Duke Energy Corp.—which concerns EPA’s NSR permit program—might serve as a better bellwether.

“The real question about both Roberts and Alito is how much deference they will show to regulatory agencies in an environmental context, and I’m not sure this was a good test,” the source explains. That is because the Corps has long been on notice that it needed to revise its wetlands rule to bring it up to date, particularly following the high court’s earlier ruling on the issue in Solid Waste Agency of Northern Cook County (SWANCC) v. Army Corps of Engineers.

“That makes it easier to say in this case that the Corps’ approach was more expansive than the Clean Water Act and precedent. It might be more difficult if the court is faced with an agency’s interpretation that is a closer call. And NSR might be a better test.”

But an industry source believes there could be parallels between Rapanos and Environmental Defense in terms of how the court treats agency deference.

In the NSR case, EPA has changed its position on how to interpret a key test for triggering NSR—which generally requires facilities to upgrade pollution controls when undertaking major modifications—and the court will decide whether a lower court’s backing of the new test, which was originally sought by industry, passes both jurisdictional and statutory muster.

The industry source says as in Rapanos, the court in the pending NSR case “will look rigorously at whether agency jurisdiction is consistent with statutory authority, and this court is not as inclined to give Chevron deference to agency interpretation as some previous courts.” The Chevron test generally
grants an agency the power to interpret a statute absent explicit congressional direction.

“What you saw in response to Rapanos and what you might see in NSR is . . . this court taking a narrow view of what Congress may do under the Commerce Clause [in granting agencies broad powers] . . . and one might predict a Roberts court would be severe in its judgment about whether an agency stayed within the confines of its authority,” the source says.

But several of the legal experts note that the court may have agreed to hear Environmental Defense not based on the substantive issue presented but because of the novel jurisdictional issue the case presents. The plaintiffs are arguing that the U.S. Court of Appeals for the 4th Circuit’s ruling was tantamount to a regulatory review, in violation of the exclusive jurisdiction granted to the District of Columbia Circuit by the Clean Air Act.

“It is fair to say that neither new justice is likely to be swayed by the unique environmental nature of a given case,” the law school academic says.

The source adds that a better indication of the court’s environmental bent will come through its decisions on whether to accept future environmental cases. The court is slated to respond imminently to a pending petition to hear a high-profile case challenging EPA’s position that the Clean Air Act bars it from regulating greenhouse gas emissions. And EPA and homebuilders are likely to petition the court to resolve circuit court splits on whether the Endangered Species Act requires EPA to ensure its actions protect listed species.

Additionally, the source cautions against reading too much into any single opinion, noting that even perceived pro-environment justices have ruled against environmental groups in recent years, and vice versa. The source cites the unanimous high court rulings in Norton v. Southern Utah Wilderness Alliance et al., and Department of Transportation et al. v Public Citizen et al., both of which overturned environmentalist-supported lower court rulings. Additionally, the source notes that in 2001 Scalia wrote the majority 9-0 opinion in Whitman v. American Trucking Association upholding EPA’s ambient air quality standards.
The Dept. of Justice told a federal court in Ohio that the 4th Circuit Court of Appeals ruling on the Clean Air Act's new source review program was "fundamentally flawed." DOJ said that the court should rely on the "plain language" of the regulation as it considers a similar lawsuit against American Electric Power.

In briefs filed late Tuesday, the DOJ and lawyers representing AEP, at the invitation of U.S. District Judge Edmund Sargus Jr., discussed the implications of the June 15 4th Circuit decision in favor of Duke Energy on the pending NSR case against the energy giant. AEP’s trial before Sargus in Columbus begins July 6.

The 4th Circuit—the highest court to weigh in on an NSR utility lawsuit—affirmed a lower court ruling in favor of Duke Energy. The court said that Congress mandated, in amendments to the Clean Air Act, that the prevention of significant deterioration statute incorporate the new source performance standards definition of "modification" as when a coal-fired unit undergoes a project that increases its hourly rate of emissions.

But DOJ said in its brief to Sargus that the 4th Circuit decision was "fundamentally flawed in its analysis of NSR and NSPS statutes." Instead, the department, representing EPA in its suit against the utility, said that the court “should defer to EPA’s interpretation of the NSR statute and the plain language of its regulations, and hold that emission increases under the NSR regulations will be determined by actual annual tons of emissions.”

Lawyers for AEP asked Sargus to consider the 4th Circuit’s decision and “apply the single definition of ‘modification’ in the Clean Air Act consistently, as Congress intended—and enacted.”

The 1999 suit filed against AEP claims that the company violated NSR when it modified units at 10 coal-fired power stations and boosted their emissions of harmful air pollutants without obtaining necessary permits or installing pollution control equipment. AEP has maintained it acted within the law.

In 2003, Sargus found Ohio Edison liable in a similar NSR lawsuit against Ohio Edison for 11 upgrades at its 2,200-MW Sammis plant. In his decision, the first at the time on the eight pending federal NSR suits against utilities, the judge concluded that by "physically replacing aging or deficient components, Ohio Edison intended and achieved a significant increase in the operation and output of the units. In turn, the amount of emission of sulfur dioxide, nitrogen oxides and particulate matter also increased."
A federal appeals court sided yesterday with industry groups that have been fighting a government crackdown on aging coal-fired power plants, ruling that utility giant Duke Energy did not break the law when it modernized its facilities without obtaining a permit.

The Richmond-based U.S. Court of Appeals for the 4th Circuit said Duke did not violate the Clean Air Act when it upgraded eight plants that provide electricity in North Carolina and South Carolina. The Clinton administration had accused Duke and other utilities of expanding their facilities without adding modern antipollution devices to combat dangerous emissions.

"Common sense would seem to dictate this result. Supreme Court precedent certainly does," a three-judge panel wrote in the ruling, which upheld a lower court decision that said Duke did not need a permit for the upgrades because overall emission levels at individual plants would not increase.

The enforcement policy in dispute was developed by the Environmental Protection Agency in the mid-1990s to crack down on aging power plants and refineries that enlarged their facilities and increased their emissions without installing new antipollution equipment. Under the Clean Air Act, these older plants are exempted from modern pollution standards unless they modernize and expand their facilities and generate "new sources" of emissions.

The ruling is another blow to an effort begun late in the Clinton administration to crack down on coal-fired plants that are the major source of health-threatening pollutants and greenhouse gas emissions blamed for global warming. The Clinton Justice Department and states filed lawsuits against the parent companies of dozens of older power plants and refineries, and Charlotte-based Duke was one of the largest companies sued.

While the Justice Department and EPA have continued to pursue these cases, the Bush administration responded to pressure from the utility industry by attempting to alter rules to make it far more difficult to bring similar cases in the future.

Industry groups hailed yesterday's ruling as a major victory, pointing out that the 4th Circuit is the first appeals court in the nation to pass legal judgment on the crackdown.

"The decision in Duke eviscerates the legal basis for the lawsuits," Scott Segal, director of the Electric Reliability Coordinating Council, said in a statement. He said he hopes the EPA will now "focus its resources in more appropriate and less costly ways to improve air quality."

Duke Energy, which is one of the nation's largest electric utilities, said in a statement that the ruling "further supports the fact that our company has—for decades—understood and lawfully complied with the requirements of the Clean Air Act.

Frank O'Donnell, president of Clean Air Watch, called the decision "a very perverse
reading of the law” and said it is a “setback for clean air in areas covered by the 4th Circuit.” The 4th Circuit covers Virginia, Maryland, West Virginia, North Carolina and South Carolina.

But O’Donnell pointed out that some lower courts in other states have issued rulings against the industry and that some companies that operate coal-fired plants have settled the cases.

“It would be a tragedy for public health if the government stopped enforcing the law just because of this one case,” he said.

An EPA spokesman, who spoke on the condition of anonymity, said the government is reviewing the ruling and will determine “an appropriate course of action.”
On 6/15/05, the U.S. Court of Appeals for the 4th Circuit affirmed a federal district court's 2003 decision to summarily dismiss the Environmental Protection Agency's (EPA's) lawsuit alleging that Duke Energy violated the Clean Air Act's (CAA's) prevention of significant deterioration (PSD) provisions.

While the EPA charged that Duke failed to obtain preconstruction permits required by the PSD program before undertaking certain projects at its power plants, the court found that the EPA improperly classified Duke's projects as "modifications" subject to PSD provisions.

Writing for the three-judge panel, Circuit Judge Diana Motz said that the EPA has attempted to interpret the statutory term "modification" differently under its new source performance standards (NSPS) and its PSD provisions. The EPA has done so, Motz continued, despite the fact that Congress specifically defined the term when it enacted NSPS, and then "expressly directed that the PSD provisions of the Act employ this same definition." Judge Motz explained that "in the case before us, . . . the presumption of uniform usage has become effectively irrebuttable because Congress' decision to create identical statutory definitions of the term 'modification' has affirmatively mandated that this term be interpreted identically in the two programs."

Accordingly, the court found that had the EPA applied its earlier interpretation of the term "modification" when considering whether or not the Duke projects fall within the purview of the PSD program, Duke would not have been required to obtain the preconstruction permits from the EPA.

Serving on the panel with Judge Motz was 4th Circuit Judge Michael Luttig and Samuel Wilson, U.S. District Judge for the Western District of Virginia, sitting by designation. U.S. v. Duke Energy Corp. (No. 04-1763)

In 1970, Congress amended the CAA to enact the NSPS, which required the EPA to promulgate standards regulating emissions from both newly constructed and modified sources of pollution at power plants. Seven years later, Congress enacted the PSD program, which requires a utility to obtain certain preconstruction permits before it makes major modifications to a coal-fired power plant located in areas considered by the EPA to be in attainment with federal clean air standards. Unlike the NSPS program, which focuses primarily on technology-based pollution controls, the PSD program is more concerned about the net emissions from the power plant undergoing modification.

As part of its plant modernization program, Duke Energy between 1988 and 2000 engaged in 29 projects—most of which consisted of replacing and/or redesigning one or more of the plants' boiler tube assemblies—at its eight coal-fired North Carolina and Southern Carolina power plants in an effort to extend the life of the generating units and to allow them to increase their daily hours of operation. Duke did not, however, apply for or acquire PSD
permits from the EPA for any of the projects at issue.

On behalf of the EPA, the Dept. of Justice (DOJ) filed the underlying lawsuit (CA-00-1262-1) in the U.S. District Court for the Middle District of North Carolina in December 2000, alleging that Duke's projects violated the CAA's PSD provisions. In particular, the DOJ/EPA, as well as various environmentalists and other parties who were later added to the suit as intervenors, maintained that Duke's projects constituted "major modifications"—i.e. physical changes leading to a significant net emissions increase—and Duke therefore should have obtained preconstruction permits from the EPA.

The DOJ/EPA reasoned that the "post-project" units are able to operate for more hours, and they therefore emit more pollution on a yearly basis than they did before the projects were undertaken. For its part, Duke argued that the projects did not constitute modifications subject to PSD because they did not increase the units' hourly rate of emissions.

In 2003, Judge Frank Bullock found, for various reasons, that a modification subject to PSD exists only if there is a post-project increase in the hourly rate of emissions from a unit. Since all involved parties agreed—and stipulated to the fact—that Duke's projects did not result in an increase in the units' hourly emissions rates, Judge Bullock summarily ruled on the issue in Duke's favor.

The EPA/DOJ and intervenors subsequently appealed Judge Bullock's finding to the Court of Appeals for the 4th Circuit that, through its instant order, affirmed the lower court's ruling.

The question at issue, according to Judge Motz, is whether or not the EPA can interpret the term "modification" under PSD differently than it interprets the same term under NSPS.

When it enacted the NSPS program, Motz recounted, Congress defined "modification" to mean "any physical change in, or change in the method of operation of, a statutory source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted."

The EPA elaborated on this definition in 1975 by adding a regulation through which it defined "modification," as it pertains to the NSPS, to mean an increase in emissions—measured not in tons per year, but in kilograms per hour. In 1980, however, the agency promulgated regulations under the PSD specifying that a "modification" is any change that increases the amount of pollution a unit emits annually.

Finding that the EPA had acted outside of its authority in changing its interpretation of "modification" in 1980, Judge Motz explained that Congress specifically defined the term when it passed the NSPS provisions of the Clean Air Act, and it also expressly directed that the PSD provisions use this same definition. "When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently," the judge added.

All parties agree that, prior to enactment of the PSD statute, the EPA defined the term "modification" in the CAA as a project that increases a plant's hourly rate of emissions, Motz noted. Accordingly, the court
concluded that “because Congress mandated that the PSD definition of ‘modification’ be identical to the NSPS definition,” it stands to reason that the EPA should be required to interpret the term consistently.

“Common sense would seem to dictate this result,” Motz declared. “Supreme Court precedent certainly does.”

Still, the court acknowledged that the EPA would be within its rights to revise its regulatory interpretation of the term—it just must do so “through exercise of appropriate rulemaking powers.”

Ruth Shaw, Duke Power’s president and chief executive officer, issued a prepared statement on June 15 hailing the court’s ruling.

“Today’s action from the 4th Circuit further supports that fact that our company has—for decades—understood and lawfully complied with the requirements of the Clean Air Act’s new source review program,” Shaw declared. “We have vigorously defended our rights in this case and we have prevailed.”

According to the Electric Reliability Coordinating Council (ERCC), the ruling in the Duke case is significant because it is the first time an appeals court has ruled on the merits of any of the EPA’s various “new source review” (NSR) lawsuits. “When the court’s analysis was complete,” the ERCC declared, “it became inescapably clear that the 1999 NSR enforcement initiative was without legal merit.”

The Edison Electric Institute expressed similar sentiments by stating “there can be little doubt—this is the beginning of the end of an ill-conceived effort to use the NSR program to leverage power sector emissions reductions, potentially at the expense of electric reliability and worker safety.”
Bell Atlantic Corp. v. Twombly
(05-1126)

Ruling Below: (Twombly v. Bell Atlantic Corp., 425 F.3d 99 (2d Cir. 2005), cert granted 126 S. Ct. 2965; 74 U.S.L.W. 3720 [2006]).

The Telecommunications Act of 1996 required the “Baby Bells” created by the breakup of AT&T to open their networks to companies seeking to provide competing phone service. The plaintiffs in this case allege that the Baby Bells resisted this mandate by conspiring with one another to prevent such firms from successfully competing in the Baby Bells’ respective territories. Further, the plaintiffs allege that the Baby Bells conspired to restrain competition by agreeing not to compete for one another’s territory. The plaintiffs’ claims rest on evidence of parallel conduct alone. The district court granted the defendants’ 12(b)(6), ruling that there was insufficient evidence to sustain a conspiracy charge under the Sherman Act. On appeal, the Second Circuit Court of Appeals ruled that the district court improperly applied a “plus one” standard that required the plaintiffs to present at least one independent factor that tends to rule out self-interested behavior as an explanation for the alleged conspiratorial behavior. The Appeals Court held that there was no heightened pleading requirement under the Sherman Act and that the plaintiffs’ complaint was sufficient under the Federal Rules of Civil Procedure.

Question Presented: Whether a complaint states a claim under Section 1 of the Sherman Act, 15 U.S.C. § 1, if it alleges that the defendants engaged in parallel conduct and adds a bald assertion that the defendants were participants in a “conspiracy,” without any allegations that, if later proved true, would establish the existence of a conspiracy under the applicable legal standard.

William TWOMBLY, Plaintiffs-Appellants,
v. BELL ATLANTIC CORPORATION, Defendants-Appellees.

United States Court of Appeals for the Second Circuit

Decided October 3, 2005

[Excerpt: some footnotes and citations omitted]

SACK, Circuit Judge:

In an amended complaint filed in the United States District Court for the Southern District of New York, the plaintiffs allege that the defendant telecommunications providers conspired not to compete against one another in their respective geographic markets for local telephone and high-speed Internet services, and to prevent competitors from entering those markets, in violation of Section 1 of the Sherman Act. At the time the complaint was filed, Section 1 provided:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

... The district court (Gerard E. Lynch, Judge) concluded that the amended complaint fails to allege sufficient facts from which a conspiracy can be inferred and therefore granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted.

Because we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations, we vacate its judgment and remand for further proceedings.

BACKGROUND
This case arises in the wake of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at scattered sections of Titles 15 and 47 of the United States Code) ("Telecommunications Act" or the "Act"), which was designed to promote competition in the market for local telephone service. ... The Act requires that the defendants—so-called "Baby Bells" or "Incumbent Local Exchange Carriers" ("ILECs"), which were created following the 1984 breakup of the American Telephone & Telegraph Co. ("AT&T")—open their government-sanctioned regional monopolies over local telephone service to competition from so-called "Competitive Local Exchange Carriers" ("CLECs"), including by allowing CLECs to connect their own telephone networks to those of the ILECs, by providing the CLECs with access to the ILECs' network elements for "just, reasonable, and nondiscriminatory" rates, and by allowing the CLECs to purchase the ILECs' telecommunications services at wholesale rates for resale to subscribers. ... In exchange, the Act permits the ILECs to enter the market for long-distance service in which they were prohibited from participating since the breakup of AT&T...

The plaintiffs allege that the defendants, motivated by the desire to protect their respective geographic monopolies and otherwise unsustainable profit margins, have resisted the mandate of the 1996 Telecommunications Act by conspiring with one another to keep CLECs from competing successfully in the defendants' respective territories. ... The plaintiffs also allege that the defendants, who among them control more than ninety percent of the market for local telephone service in the United States. ... have agreed not to compete with one another in their respective territories. ... According to the plaintiffs, the result of this alleged conspiracy has been to drive CLECs out of business, to restrain competition in the market for local telephone and high-speed Internet services, and to injure the plaintiffs by forcing them, as consumers of those services, to pay at rates higher than they would otherwise pay in a competitive environment. ...

The amended complaint alleges several factual bases for its far-reaching claims of a
two-pronged antitrust conspiracy.

Agreement Not to Compete
As an initial matter, the plaintiffs allege "parallel conduct" on the part of the ILECs in not competing with each other, which they assert "would be anomalous in the absence of an agreement . . . not to compete." . . . Specifically, they allege that for various historical reasons, the defendants' respective service territories are not entirely contiguous, with some of the defendants serving pockets of territory that are entirely surrounded by the territories of their supposed competitors. . . . While the plaintiffs contend that these geographic anomalies should provide Verizon and Qwest with "substantial competitive advantages" in competing with SBC for business in Connecticut, and California and Nevada, respectively, and SBC with similar advantages in competing with Verizon in the west and midwest, none of those companies has sought to compete with the others "in a meaningful manner. . . . The plaintiffs deem this to be a situation that would be "unlikely" absent an agreement not to compete. . . . They suggest that this result is especially odd in that the defendants have publicly complained that the Telecommunications Act hurts their businesses by forcing them to provide CLECs with access to their networks at rates that are below the cost of maintaining those networks. . . . By this same economic logic, the plaintiffs argue, the ILECs should be scrambling to compete with one another as CLECs, thereby benefitting from inexpensive access to their competitors' networks. . . .

The plaintiffs also point to a statement allegedly made by Richard Notebaert, the current Chief Executive Officer of defendant Qwest and the former Chief Executive Officer of Ameritech Corp., which merged with defendant SBC in 1999. . . . In a newspaper article published in October 2002, Notebaert was quoted as saying that for Qwest, competing in the territory of SBC/Ameritech "might be a good way to turn a quick dollar but that doesn't make it right." . . . According to the plaintiffs, that statement, coming at a time when Qwest's revenues were declining and it was losing money, constituted an admission of collusive conduct among the ILECs. . . .

And the plaintiffs point to a letter from two members of the House of Representatives to then-Attorney General John Ashcroft requesting that the Department of Justice investigate the extent to which the Baby Bells' "very apparent non-competition policy in each others' markets is coordinated." . . .

In addition, the plaintiffs assert that the defendants communicate frequently with one another "through a myriad of organizations," providing an opportunity for a conspiracy to form and be conducted without the likelihood of detection. . . . At the same time, they assert that "the structure of the market for local telephone services is such as to make a market allocation agreement feasible" even in the absence of frequent communications, in part because "if one of the defendants had broken ranks and commenced competition in another's territory the others would quickly have discovered that fact." . . .

Agreement to Prevent CLECs from Competing Successfully
The plaintiffs further allege that from the day of the Telecommunications Act's enactment until the present, the defendants have sought to interfere with the ability of CLECs to compete successfully, including
by negotiating “unfair agreements” with CLECs for access to the ILECs’ telephone networks, by providing CLECs with poor quality connections to those networks, and by interfering with the CLECs’ relationships with the CLECs’ own customers, such as by continuing to bill customers even after they have entered agreements for services with CLECs.

The plaintiffs cite a report by a consumer group, the Consumer Federation of America (“CFA”), which suggested that the defendants “have refused to open their markets by dragging their feet in allowing competitors to interconnect, refusing to negotiate in good faith, litigating every nook and cranny of the law, and avoiding head-to-head competition like the plague.”

The plaintiffs allege that the defendants share a common motivation for their behavior in preventing the CLECs from competing because, were any one of the ILECs to allow meaningful competition in the geographic area it controls, “the resulting greater competitive inroads into that defendant’s territory would [reveal] the degree to which competitive entry by CLECs would [be] successful in the other territories in the absence of such conduct.” Moreover, they contend, “the greater success of any CLEC that made substantial competitive inroads into one defendant’s territory would [enhance] the likelihood that such a CLEC might present a competitive threat in other defendants’ territories as well.”

The District Court’s Decision
In dismissing the plaintiffs’ amended complaint, the district court concluded that the allegations of “conscious parallelism” of the defendants’ actions, taken by themselves, are not sufficiently probative, on a motion to dismiss, of conspiratorial intentions that would support a finding of antitrust-law violations. Instead, applying this Circuit’s case law with respect to Sherman Act claims at the summary judgment stage, the court required the plaintiffs to “establish[] at least one ‘plus factor’ that tends to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.” Such a factor, the court noted, could be, for example, “evidence that the parallel behavior would have been against individual defendants’ economic interests absent an agreement, or that defendants possessed a strong common motive to conspire.” While acknowledging that applying this standard in the context of a motion to dismiss “is somewhat in tension with Fed. R. Civ. P. 8, which requires only a ‘short and plain statement of the claim,’” the court concluded that such a standard is nonetheless appropriate for two reasons. First, it wrote, insofar as parallel behavior by competing companies is not itself illegal absent an agreement to restrain trade, “the doctrine of conscious parallelism [would] allow[] plaintiffs to state a claim by alleging conduct that is, in itself, not prohibited by § 1 of the Sherman Act.” Accordingly, the court concluded, “allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1’s requirement of a conspiracy and Rule 8’s requirement that complaints state claims on which relief can be granted.” Second, the court continued, “allegations of plus factors are necessary to give defendants notice of plaintiff’s theory of the conspiracy.” “There is simply no way to defend against such a claim without having some idea of how and why the defendants are alleged to have conspired.”

Applying that standard, the court concluded
that the plaintiffs fail to allege facts "suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest." . . . First, given the ILECs' stated opposition to the pricing structure imposed by the Telecommunications Act, the court wrote, their "parallel action" to "attempt to discourage CLECs from entering the market and to render it difficult for them to survive once they had entered . . . does not naturally give rise to an inference of an agreement, since the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." . . .

Second, the district court also rejected the plaintiffs' claim that the defendants conspired not to compete against one another in their respective markets even though such behavior might have been financially advantageous to them in the short term. The court suggested that the plaintiffs' theory of the case erroneously assumes that operating a telephone business as an ILEC is substantially similar to operating a telephone business as a CLEC in territory controlled by another company. . . . In fact, the court wrote, the two businesses are "entirely different"; while ILECs are "self-sufficient," CLECs are "completely dependent" on their contractual relationships with the ILECs in whose territories they operate. . . . As a result, "an ILEC's market power in its home territory does not translate into market power as a CLEC in another ILEC's territory," such that "ILECs acting as CLECs are in much the same position as other, smaller, CLECs." . . . Even brand recognition and geographic proximity do not help, the court wrote, because the ILEC competing as a CLEC "is still dependent on its relationship with the [local] ILEC for survival." . . .

Moreover, the court noted, the plaintiffs' own allegations of how difficult it is to operate a successful CLEC cast doubt on their assertion that ILECs should be expected to attempt to compete with one another as CLECs in their respective territories. . . . "Plaintiffs' allegations raise the inference that each ILEC is well aware that becoming a CLEC in another market would be extremely difficult in the face of opposition from the local ILEC, because it is using the same tactics against CLECs in its market." . . . Accordingly, "there is no apparent reason for an ILEC to attempt to push out of its own territory and brave the barriers thrown up by other ILECs." . . .

Finally, the court rejected the plaintiffs' contention that the statement by Qwest CEO Notebaert in any way suggests collusion among the defendants. . . . "Considered in context," the court reasoned, "Notebaert's statement[] suggested only that he did not consider becoming a CLEC to be a sound long-term business plan, because all of the ILECs were challenging [47 U.S.C.] § 251 and its pricing structure through litigation, and the legal landscape in which CLECs operate could have changed at any time." . . .

The district court therefore granted the defendants' motion to dismiss the plaintiffs' complaint in its entirety. . . . The plaintiffs appeal.

DISCUSSION
On appeal, the plaintiffs argue principally that the district court erred by applying, on a motion to dismiss, a heightened, "plus factors" standard of pleading ordinarily applicable as the standard of proof at the summary judgment and trial stages. In addition, the plaintiffs contend that even
were there a "plus factors" pleading requirement, the district court erred in applying that standard by not accepting all of the plaintiffs' allegations as true and by not drawing all inferences in their favor. Because we conclude that the district court applied an incorrect standard for evaluating the defendants' motion to dismiss, we need not, and therefore do not, reach the plaintiffs' second argument.

I. Standard of Review
We review de novo the dismissal of a complaint for failure to state a claim, accepting as true all facts alleged in the complaint and drawing all inferences in favor of the plaintiff.

II. The Notice Pleading Standard
A. General Principles
Fed. R. Civ. P. 11(b) provides:

By presenting to the court a pleading an attorney is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the pleading is presented for a proper purpose, and—

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery . . .

. . . At least in theory, then, when a complaint is filed by counsel, it arrives at the door of the district court with the warrant of counsel that "allegations and other factual contentions" contained in the complaint "have evidentiary support or, if specifically so identified"—presumably by being stated as being "to the best of [his or her] knowledge, information, and belief"—"are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." . . .

As for the contents of the complaint, Rule 8(a) provides only that it "shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." . . . As the Supreme Court recognized nearly half a century ago, the Rules thus set forth a pleading standard under which plaintiffs are required to "give the defendant fair notice of what the claim is and the grounds upon which it rests." . . . "Fair notice" is "that which will enable the adverse party to answer and prepare for trial, allow the application of res judicata, and identify the nature of the case so that it may be assigned the proper form of trial." . . . The complaint thus need not "set out in detail the facts upon which" the claim is based. . . .

B. Heightened Pleading Standards
The Rules do establish more demanding pleading requirements for certain kinds of claims. . . . But as the language of Rule 9 makes clear, and as the Supreme Court has recently confirmed, instances requiring such
particularized pleading are narrowly circumscribed by the Rules. . . . Antitrust actions are not among those exceptions.

In *Swierkiewicz*, the Supreme Court noted that it had previously “declined to extend” heightened pleading requirements to “other contexts” beyond “fraud or mistake.” . . . The *Swierkiewicz* Court unanimously reaffirmed that approach with respect to the allegations of employment discrimination before it. . . .

Our recent opinion in *Wynder v. McMahon*, . . . a race discrimination case, is instructive. The district court had “imposed specific conditions on the form and content of” a complaint beyond those required by Rule 8(a). . . . We held that to have been improper.

. . . We went on to conclude that the plaintiff’s pleading, however imperfect, had satisfied the permissive standard of Rule 8, rightly understood.

. . . We therefore vacated the district court’s dismissal and remanded for further proceedings.

C. Heightened Pleading in Antitrust Cases

Antitrust claims are, for pleading purposes, no different. We have consistently rejected the argument—put forward by successive generations of lawyers representing clients defending against civil antitrust claims—that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometimes amorphous nature, or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts. . . . Indeed, it has been argued from time to time that antitrust cases are less suitable candidates for dismissal at the pleading stage than some other kinds of litigation because evidence of the claimed illegality is likely to be in the exclusive control of the defendants. . . .

True, we have said that “although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits dismissal.” . . . “Minimal requirements are not tantamount to nonexistent requirements.” . . .

In *Klebanow*, for example, we rejected as insufficient a complaint that alleged simply that the defendants had engaged “in an illegal contract combination and conspiracy with others, unknown to the plaintiffs, to restrain and monopolize trade in, and to fix the price of, cottonseed oil,” causing damages in excess of $11 million. . . . Judge Friendly, writing for the Court, noted that the complaint “furnished not the slightest clue as to what conduct by the defendants is claimed to constitute ‘an illegal contract combination and conspiracy.’” . . .

But in *United States v. Employing Plasterers Ass’n*, . . . the Supreme Court considered a complaint in a civil action brought by the federal government against a trade association, a labor union, and the union’s president. Between them, the defendants were responsible for some sixty percent of the Chicago-area plastering contracting market. . . . The government alleged that the defendants had violated Section 1 by “acting in concert to suppress competition among local plastering contractors, . . . preventing out-of-state contractors from doing any business in the Chicago area and . . . barring entry of new local contractors without approval by a private examining board set up by the union.” . . . “The effect of all this,”
The Supreme Court disagreed, noting that "the complaint alleged that continuously [for more than a decade] a local group of people were to a large extent able to dictate who could and who could not buy plastering materials that had to reach Illinois through interstate trade if they reached there at all.". . .

The Court continued:

Under such circumstances it goes too far to say that the Government could not possibly produce enough evidence to show that these local restraints caused unreasonable burdens on the free and uninterrupted flow of plastering materials into Illinois. . .

The Government's complaint may be too long and too detailed in view of the modern practice looking to simplicity and reasonable brevity in pleading. It does not charge too little. It includes every essential to show a violation of the Sherman Act. And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.

. . .

Three years later, the Court again emphasized the limited factual proffer required to satisfy the pleading requirement in a Section 1 case. It noted in Radovich v. National Football League . . . that "the test as to sufficiency laid down by Mr. Justice Holmes . . . is whether 'the claim is wholly frivolous,'" . . .

Less than eight months later, we cautioned against extensive antitrust pleading in which unnecessary details "double the bulk without increasing enlightenment." . . . "Such pleading of the evidence is surely not required and is on the whole undesirable." . . . "It is a matter for the discovery process, not for allegations of detail in the complaint." . . .

The factual predicate that is pleaded does need to include conspiracy among the realm of plausible possibilities. . . If a pleaded conspiracy is implausible on the basis of the facts as pleaded—if the allegations amount to no more than "unlikely speculations"—the complaint will be dismissed. . . But short of the extremes of "bare bones" and "implausibility," a complaint in an antitrust case need only contain the "short and plain statement of the claim showing that the pleader is entitled to relief" that Rule 8(a) requires.

We tackled this issue in the Section 1 context in Discon, Inc. v. NYNEX Corp. . . . Our analysis of the complaint under review began,

In this case, we believe that the District Court may have been misled by a poorly drafted complaint into categorizing the arrangement as one that is presumptively legal. Since the complaint may properly be understood to allege arrangements that might be shown to be unlawful,
we are obliged to reverse in part and remand. We believe that the complaint states a cause of action under Section One of the Sherman Act.

We continued:

To state a claim under Section One of the Sherman Act, [the plaintiff] must allege (1) that the NYNEX Defendants entered into a contract, combination, or conspiracy, and (2) that their agreement was in restraint of trade. See 15 U.S.C. § 1.

The Supreme Court reversed, NYNEX Corp. v. Discon, Inc., but on the grounds that the legal theory underlying the asserted cause of action was incorrect, not that the factual allegations contained in the complaint were otherwise insufficient.

While these decisions do not offer a bright-line rule for identifying the factual allegations required to state an antitrust claim, they suggest that the burden is relatively modest. The requirements of Rule 8 "notice pleading" as applied to claims under Section 1 of the Sherman Act remain relatively straightforward. Section 1 proscribes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." Interpreting this prohibition, the Supreme Court "has long recognized that Congress intended to outlaw only unreasonable restraints." As a general matter, then, a Section 1 plaintiff must allege that (1) the defendants were involved in a contract, combination, or conspiracy that (2) operated unreasonably to restrain interstate trade, together with the factual predicate upon which those assertions are made.

III. "Plus Factors" at the Pleading Stage

A. On Summary Judgment

A plaintiff's claim, under the ordinarily applicable standard, will not survive a defendant's motion for summary judgment—a stage that this litigation has, of course, yet to reach—"where the record taken as a whole could not lead a rational trier of fact to find for the [plaintiff on that claim]." In making this determination, all "inferences to be drawn from the underlying facts must be viewed in the light most favorable to the [plaintiff]." In a case brought under Section 1 of the Sherman Act, however, "the range of permissible inferences from ambiguous evidence" is limited, because antitrust laws prohibit only contracts, combinations, or conspiracies—and not independent parallel conduct—that operate unreasonably to restrain trade. Although "parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy," it may also, as the district court in the instant case pointed out, "simply [be] the result of similar decisions by competitors who have the same information and the same basic economic interests." Accordingly, in a Section 1 case where there is no "direct, 'smoking gun' evidence," conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that tends to
exclude the possibility’ that the alleged conspirators acted independently.

... Thus, on a motion for summary judgment in a case involving alleged violations of Section 1, “courts have held that a plaintiff must show the existence of additional circumstances, often referred to as ‘plus’ factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy.” ... These “plus factors” may include: “a common motive to conspire,” ... evidence that “shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators,” ... and evidence of “a high level of interfirm communications,” ...

B. On Motion to Dismiss.

We are reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment, however. To survive a motion to dismiss, as we have explained, an antitrust claimant must allege only the existence of a conspiracy and a sufficient supporting factual predicate on which that allegation is based.

As discussed in part II.C. of this opinion, the pleaded factual predicate must include conspiracy among the realm of “plausible” possibilities in order to survive a motion to dismiss. Nagler suggests that a pleading of facts indicating parallel conduct by the defendants can suffice to state a plausible claim of conspiracy. ... Thus, to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Of course, if a plaintiff can plead facts in addition to parallelism to support an inference of collusion—what we have referred to above as “plus factors” at the summary judgment stage—that only strengthens the plausibility of the conspiracy pleading. But plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal. ...

We cannot know at the pleading stage whether the plaintiffs here will seek to rely on such an inference from parallelism based on “plus factors” or not. But there is no reason we can perceive to require the plaintiffs to include allegations of “plus factors” in their complaint, since they may not be required to establish “plus factors” at trial—if, for example, they can prove conspiracy directly.

We acknowledge that district courts have occasionally elided the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do otherwise would be to condemn defendants to potentially limitless “fishing expeditions”—discovery pursued just “in case anything turns up”—in hopes, perhaps, of a favorable settlement in any event. In several recent cases, including this one, district courts have dismissed Sherman Act complaints because they did not contain substantial allegations of facts beyond “conscious parallelism” sufficient to support an inference that the defendants’ actions were more likely than not conspiratorial. ...

The district court viewed the requirement that Section 1 plaintiffs plead “plus factors” as sensible because anti-trust laws do not prohibit parallel conduct and because “the defendants [need] notice of plaintiff[s’] theory of the conspiracy.” ... To these
considerations, the defendants add a third on appeal: the fear that, unless anti-trust plaintiffs are required to plead “plus factors,” “any claim asserting parallel conduct [will] survive a motion to dismiss.”

We are not unsympathetic to these concerns, but we find the arguments based on them ultimately unconvincing. At the pleading stage, we are concerned only with whether the defendants have “fair notice” of the claim, and the conspiracy that is alleged as part of the claim, against them—that is, enough to “enable [the defendants] to [inter alia] answer and prepare for trial,” . . .—not with whether the conspiracy can be established at trial.

The Nagler Court admonished that while an antitrust defense will often prove “diffuse, prolonged, and costly,” . . . the remedy to that problem is not to be found in abandoning the rules of notice pleading and raising the bar on plaintiffs in the absence of a legislative mandate to do so. . . . Thus, in a regime that contemplates the enforcement of antitrust laws in large measure by private litigants, although litigation to summary judgment and beyond may place substantial financial and other burdens on the defendants, neither the Federal Rules nor the Supreme Court has placed on plaintiffs the requirement that they plead with special particularity the details of the conspiracies whose existence they allege. . . .

We are mindful that a balance is being struck here, that on one side of that balance is the sometimes colossal expense of undergoing discovery, that such costs themselves likely lead defendants to pay plaintiffs to settle what would ultimately be shown to be meritless claims, that the success of such meritless claims encourages others to be brought, and that the overall result may well be a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted. If that balance is to be recalibrated, however, it is Congress or the Supreme Court that must do so. . . .

IV. Applying the Notice Pleading Standard to This Appeal

Accepting as true the facts alleged in the amended complaint, which are described at some length in the Background section of this opinion, above, and drawing all inferences in favor of the plaintiffs, we conclude that the plaintiffs have satisfied their burden at the pleading stage.

As the district court pointed out, to support their single claim of a conspiracy under Section 1 of the Sherman Act, the plaintiffs allege an agreement to employ two anticompetitive tactics to maintain their respective monopoly control over discrete geographic markets. . . . Pursuant to the first tactic, the defendants allegedly conspired “to collectively keep CLECs from successfully entering [the defendants’ respective] markets.” . . . Pursuant to the other, they allegedly agreed “to refrain from attempting to enter each other’s markets as CLECs.” . . .

The amended complaint alleges that the conspiracy began on February 6, 1996, around the time the Telecommunications Act became law, and has continued to the present day. . . . It further alleges that the defendants together control more than ninety percent of the market for local telephone service in the continental United States, . . . and that they, together with other, unnamed “persons, firms, corporations and associations,” engaged in the conspiracy. . . . While the amended complaint does not identify specific instances of conspiratorial
conduct or communications, it does set forth the temporal and geographic parameters of the alleged illegal activity and the identities of the alleged key participants. It further alleges that the conduct was undertaken specifically to preserve historic monopoly conditions, and to thwart the procompetitive purposes of the Telecommunications Act, . . . a claim that, if true, would doubtless constitute an unreasonable restraint of trade. And it specifically alleges an effect on interstate commerce, noting that the defendants provide local telephone and high-speed Internet services “across state lines,” that they “regularly and frequently solicited customers and sent bills and received payments via the mail throughout the United States,” and that the “marketing, sale and provision of local telephone and/or high speed Internet services regularly occurs in and substantially affects interstate trade and commerce.” . . .

With respect to the allegation that the defendants conspired not to invade each other’s territory, the amended complaint asserts that most of the defendants are dominant in particular geographic areas that surround small pieces of territory controlled by other defendants, yet none has attempted to compete meaningfully in the surrounded territories. . . . The amended complaint further alleges that the ILECs have conceded that competing as CLECs would be inherently profitable, because they have complained that the Telecommunications Act requires them to charge CLECs below-cost rates for network access. . . . In addition, the amended complaint points to the alleged admission by defendant Qwest’s CEO that such competition “might be a good way to turn a quick dollar but that doesn’t make it right,” even though Qwest was losing considerable amounts of money at the time the statement was made. . . .

The factual allegations in support of the alleged conspiracy to keep CLECs from entering the ILECs’ respective territories are that the ILECs have engaged in a variety of activities, such as interfering with the CLECs’ customer relationships by continuing to bill customers who switched to the CLECs’ services, denying the CLECs access to essential network equipment and facilities, and providing erroneous and confusing bills to the CLECs for their services, all designed to drive the CLECs out of business. . . . According to the amended complaint, the defendants have frequent opportunities to organize and conduct their conspiracy through industry organizations, . . . and a common incentive to do so, because were even one ILEC to decline to participate, a successful CLEC in its territory would be better positioned to compete against other ILECs and would demonstrate that CLECs could succeed in the absence of anti-competitive conduct, . . .

We conclude that these allegations are sufficient to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” . . . and to “enable [the defendants] to answer and prepare for trial,” . . . Under the principles we have described and our decision in *Discon, Inc. v. NYNEX Corp.*, supra, these allegations are enough successfully to withstand a motion to dismiss.

Whether the plaintiffs will be able to prevail in response to a motion for summary judgment after discovery or at trial is, of course, an entirely different matter. We have and express no view as to the merits of the plaintiffs’ underlying claims and mean to imply none. Indeed, our analysis of the arguments made on appeal, which we have stated at some length, convinces us that it is premature to arrive at any such view. But
even if "it . . . [were to] appear [to us] on the face of the pleadings that a recovery is very remote and unlikely . . . that is not the test" on a motion to dismiss, . . . and would not warrant an affirmance here.

CONCLUSION
For the foregoing reasons, we vacate the judgment of the district court and remand the case to the court for further proceedings.
The Supreme Court announced Monday that it would consider a lawsuit that accuses the nation’s largest telephone companies of violating federal antitrust law by conspiring to carve up local markets to preserve their monopolies.

AT&T, Verizon and Qwest asked the court to rule after they failed to persuade an appeals court that the large consumer action should be dismissed for lack of evidence. The complaint by the consumers did not offer direct evidence of a conspiracy. Instead, it relied on the fact that the companies had engaged in “parallel conduct” of not moving into each other’s service areas.

The phone companies said the standard set by the appeals court was so low that it would inevitably encourage baseless lawsuits.

The case has gained attention because it could set the standard for motions to dismiss antitrust claims filed under Section I of the Sherman Act. A collection of influential business interests, some of whom have been defendants in antitrust cases, has filed briefs supporting the phone companies. They include the United States Chamber of Commerce, the Alliance of Automobile Manufacturers, the National Association of Manufacturers and companies in the airline, commodities, credit card and chemical industries.

The appeals court told the telephone companies that there would be ample opportunity for them to make the case at trial that there was not enough evidence to prove a conspiracy.

The telephone appeal, Bell Atlantic v. Twombly, No. 05-1126, will be heard in the Supreme Court’s next term, which begins in October, along with a second antitrust appeal that the court decided Monday that it would hear. That case, which also poses issues of importance to both businesses and consumers, raises the question of whether Weyerhaeuser, the large forest products company, unlawfully injured a tiny rival by paying too much for saw logs.

In the late 1990’s and early 2000’s, the price of some types of saw logs used to make lumber increased while the price of hardwood lumber decreased, narrowing margins and forcing more than two dozen unprofitable saw mills to close.

A federal jury found that Weyerhaeuser monopolized the market through its large purchases of red alder logs in the Pacific Northwest at high prices, in violation of Section 2 of the Sherman Act.

The jury awarded Ross-Simmons Hardwood Lumber Company, a small rival saw mill, damages of $26.3 million, which a judge then tripled to $78.8 million.

The Bush administration has filed a brief asking the Supreme Court to reverse the decision. It argues that the decision of the lower court “threatens to chill pro-competitive conduct by companies that bid
aggressively in order to ensure access to inputs or to increase their output.” The case is *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*, No. 05-381.

The justices, as they near the end of their current term, rejected a third antitrust appeal, filed by the Federal Trade Commission, which sought to punish a major drug maker for reaching a settlement with a generic maker. The effect of the settlement was that it kept the generic drug off the market.

In that case, the commission found itself in the unusual position of being at odds with the Bush administration.

Representing the administration, the solicitor general sided with the pharmaceutical industry in support of a decision by a federal appeals court that approved a settlement between Schering-Plough and a generic drug company, Upsher-Smith Laboratories. The administration asked the Supreme Court to reject the commission’s appeal.

The trade commission had challenged the settlement between the drug makers because it delayed the generic company from bringing a rival drug to the market. As such, the commission said it violated Section 1 of the Sherman Act and the Hatch-Waxman Act, which Congress passed in 1984 to accelerate the development of lower-cost generic drugs.

But the United States Court of Appeals for the 11th Circuit, in Atlanta, disagreed. It found that the settlement did not violate antitrust law but simply resolved costly and vexatious litigation. A recent study by the trade commission has found a sharp increase in deals between brand and generic drug makers, which some officials say are having the effect of reducing competition for high-cost drugs.

In response to the Supreme Court’s decision, Senator Charles E. Schumer, Democrat of New York, and Senator Charles E. Grassley, Republican of Iowa, said Monday that they would introduce a bill to restrict agreements that block generic drugs from coming to market. The legislation, which is also sponsored by two other Democrats, Senator Patrick J. Leahy of Vermont and Senator Herb Kohl of Wisconsin, faces an uphill battle.

***
The U.S. Supreme Court may be in recess until the fall, but Corporate America is already keeping a close eye on a number of influential business cases on the high court's docket for next term.

Corporate appeals were long neglected by the Supreme Court, leaving the business world to rely on the sometimes vague rulings of the lower appeals courts.

But under Chief Justice John Roberts—once a corporate attorney himself—the high court has again shined a spotlight on corporate concerns, granting review to over a dozen business-related appeals since last term.

And while legal observers are hesitant to call the Supreme Court's decision to take on such a caseload "pro-business," there is a feeling that the court's sudden interest in business litigation will help shape the direction for corporations going forward.

***

Antitrust Cases on the Docket

Antitrust cases figure prominently on the agenda, with legal observers keeping a close watch on a lawsuit that claims some of the nation's major telephone carriers conspired to carve up the market amongst themselves in order to create mini-monopolies that worked against consumers.

Bell Atlantic Corp. v. Twombly will test whether the high court sides with lower courts in determining that a case can go forward into the discovery stage of litigation even when there's no direct evidence against the defendants.

The consumers bringing the case against the carriers cited "parallel conduct," or similar practices, in the way the phone companies, which include AT&T, Verizon and Qwest, conducted business and set prices. They asked the courts to allow them discovery in order to build a case.

The tussle between the telephone companies and consumers has the potential to be huge for companies because it could determine what criteria a plaintiff needs in order to sue, said Jeff Lamken of law firm Baker Botts.

"There is a fair amount of concern that if you allow someone to say "I think there's a conspiracy" without a sufficient reason to derive an inference, you could end up with massive amounts of litigation over cases that are frivolous," he said. "When you're talking about millions of documents during the discovery procedure, going through litigation can be ruinously expensive."

Another antitrust case has raised concern from the business community, as well as the Bush administration, which asked the Supreme Court to weigh in on whether Weyerhaeuser violated antitrust laws by engaging in "predatory buying."

In Weyerhaeuser v. Ross-Simmons Hardwood Lumber, Ross-Simmons Hardwood—a now defunct saw mill—claimed that Weyerhaeuser paid more to hoard alder saw logs in order to create a
monopoly on the timber and drive competitors out of business.

Lower courts awarded Ross-Simmons $78.7 million in damages but legal experts expect the Supreme Court to overturn that verdict.

Washington Legal Foundation’s Samp said a previous case called *Brooke Group v. Brown & Williamson Tobacco Corp.*, created a two-part criteria for predatory pricing which shows that the company accused of having a monopoly lost money in the short-term from lowering its prices and would have to raise the price of a product significantly down the road to make up for the loss—a practice which would damage consumers.

But in Weyerhaeuser’s case, the company paid a higher price to buy the raw materials but continued to make a profit. Without direct proof that the company paid more specifically to drive out competition, Samp said he believed the high court will likely overturn the lower court’s verdict.

And that has broad implications for what constitutes a violation of antitrust law.

The Supreme Court traditionally returns to session on the first Monday in October.
A federal appeals court has breathed new life into an antitrust action alleging that local phone companies conspired to keep out competition and stay away from each other’s turf.

The U.S. Court of Appeals for the Second Circuit, in an opinion written by Judge Robert Sack, found that a lower court judge applied the wrong standard in dismissing an action brought against the so-called “baby Bells,” and it ruled that there is no heightened pleading standard for antitrust actions in the United States.

The ruling came in *Twombly v. Bell Atlantic Corporation*, 03-9213, a case that charged that local carriers attempted to frustrate the purpose of the Telecommunications Act of 1996.

One of the most prominent features of the act was that the baby Bells, the remnants from the 1984 break-up of the American Telephone & Telegraph Co., agreed to open their lines to allow competitors to connect their own lines and compete locally for subscribers. In return, the baby Bells were allowed to enter the market for long-distance phone service.

The complaint charged that the baby Bells agreed not to compete against one another in their respective markets for local telephone and high-speed Internet service, and conspired to prevent competitors from entering those markets, thus violating Section 1 of the Sherman Act.

Southern District Court Judge Gerard Lynch dismissed the case, finding that the complaint failed to allege sufficient facts from which a conspiracy could be inferred.

Dealing with a motion to dismiss, Judge Lynch applied the Second Circuit’s case law with respect to Sherman Act claims where the defendants are accused of “parallel conduct” as part of a conspiracy to restrain trade.

He reasoned that allegations of parallel behavior by competing companies is not enough to violate the Sherman Act unless the allegations include actions that indicate an actual agreement to restrain trade.

“...[A]llowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both §1’s requirement of a conspiracy and Rule 8’s (of the Federal Rules of Civil Procedure) requirement that complaints state claims on which relief can be granted,” he said.

Such a complaint must fail, Judge Lynch said, if plaintiffs fail to allege at least one “plus factor”: a factor that “tends to exclude independent self-interested conduct as an explanation for defendant’s parallel behavior.”

An example of such a plus factor, he said, might be “evidence that the parallel behavior would have been against individual defendants’ economic interests absent an
agreement, or that defendants possessed a strong common motive to conspire.”

But Judge Sack, joined by Judges Reena Raggi and Peter Hall, disagreed.

“We have consistently rejected the argument—put forward by successive generations of lawyers representing clients defending against civil antitrust claims—that antitrust complaints merit a more rigorous pleading standard, whether because of their typical complexity and sometimes amorphous nature, or because of the related extraordinary burdens that litigation beyond the pleading stage may place on defendants and the courts,” Judge Sack said.

While the case law does not present a “bright-line rule for identifying the factual allegations required to state an antitrust claim,” he said, it suggests “that the burden is relatively modest.”

Under Rule 8 of the Federal Rules of Civil Procedure, plaintiffs are merely required to satisfy the “notice pleading,” standard: make a short and plain statement of the claims sufficient to give the defendant fair notice.

The application of Rule 8 to the Sherman Act, he said, is “relatively straightforward.”

Under §1 of the Sherman Act, he said, a plaintiff must generally “allege 1) the defendants were involved in a contract, combination or conspiracy that 2) operated unreasonably to restrain interstate trade, together with the factual predicate upon which those assertions are made.”

Courts have held that, on a motion for summary judgment, that a plaintiff must show “plus factors” where the defendants’ so-called parallel conduct might be explained by competitors acting on the same information and in the same economic interests.

But Judge Sack said, “We are reviewing the grant of a motion to dismiss, not the grant of a motion for summary judgment.”

Plus factors, he said, are not required for an “antitrust claim based on parallel conduct to survive dismissal.”

Judge Sack said the circuit was well aware that district courts occasionally have “elided” the distinction between the standard applicable for summary judgment and the standard for motions to dismiss based “on the well-founded concern that to do otherwise would be to condemn defendants to potentially limitless ‘fishing expeditions’” in discovery.

Judge Lynch was not alone among Southern District judges who have required plaintiffs to allege plus factors in the context of a motion to dismiss. And, in his opinion, Judge Lynch said requiring plus factors made sense because the antitrust laws do not prohibit parallel conduct in and of itself and because defendants need notice of the plaintiffs’ “theory of the conspiracy.”

On their appeal, the baby Bells chimed in with another concern—that unless plaintiffs are required to plead plus factors “any claim asserting parallel conduct [will] survive a motion to dismiss,” and antitrust cases will “clog the courts for years, cost defendants millions of dollars to defend, and...threaten to reward plaintiffs’ attorneys for bringing meritless claims.”

Judge Sack did not agree.
"We are not unsympathetic to these concerns, but we find the arguments based on them ultimately unconvincing," he said. "At the pleading stage, we are concerned only with whether the defendants have 'fair notice' of the claim, and the conspiracy that is alleged as part of the claim, against them,"—enough to enable the defendants to answer and prepare for trial—and "not with whether the conspiracy can be established at trial."

J. Douglas Richards and Michael M. Buchman of Milberg Weiss Bershad & Shulman represented the plaintiffs along with attorneys from Schiffren & Barroway in Bala Cynwyd, Pa.

The defendants were represented by Marc C. Hansen of Kellogg, Huber, Hansen, Todd & Evans and attorneys with Kirkland & Ellis; Mayer, Brown, Rowe & Maw; and Wilmer Cutler Pickering Hale and Dorr.
Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.

(05-381)

Ruling Below: (Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co., 411 F.3d 1030 (9th Cir. 2005), cert granted 126 S. Ct. 2965; 74 U.S.L.W. 3720 [2006]).

A number of small sawmill companies sued Weyerhaeuser, alleging that it engaged in anticompetitive predatory-bidding by paying higher-than-market prices for sawlogs and then hoarding them in an attempt to deprive competitors. In 2003, a jury awarded one of these companies, the now-defunct Ross-Simmons Hardwood Lumber Co., a $26.25 million verdict which was automatically tripled to $78.75 million under federal antitrust law. The Ninth Circuit unanimously upheld the verdict, declining to import an established test for predatory-pricing cases into the predatory-bidding setting. That test—the Brooke Group test—requires plaintiffs to show that the monopolist lost money in the short term by reducing prices and that it was likely to recoup that loss in the long run by increasing prices. Weyerhaeuser, supported by a number of major corporations and the Bush Administration, argues that the Brooke Group test should apply to predatory-bidding cases as well as predatory-pricing cases.

Question Presented: Whether a plaintiff alleging predatory buying may, as the Ninth Circuit held, establish liability by persuading a jury that the defendant purchased more inputs “than it needed” or paid a higher price for those inputs “than necessary,” so as “to prevent the Plaintiffs from obtaining the [inputs] they needed at a fair price”; or whether the plaintiff instead must satisfy what the Ninth Circuit termed the “higher” Brooke Group standard by showing that the defendant (1) paid so much for raw materials that the price at which it sold its products did not cover its costs and (2) had a dangerous probability of recouping its losses.

CONFEDERATED TRIBES of Siletz Indians of Oregon

v.

WEYERHAEUSER Company

United States Court of Appeals
for the Ninth Circuit

Decided May 31, 2005

T.G. NELSON, Circuit Judge:

Ross-Simmons Hardwood Lumber Company brought this action against Weyerhaeuser Company for antitrust violations under Section 2 of the Sherman Act. Ross-Simmons alleged that Weyerhaeuser monopolized and attempted to monopolize the Pacific Northwest input market for alder sawlogs through its purchases of sawlogs. Ross-Simmons prevailed in a jury trial on both its monopolization and attempted monopolization claims. After trebling the jury’s damages award, the court entered judgment for Ross-Simmons and denied

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Weyerhaeuser’s motion for judgment as a matter of law or for a new trial. The court also awarded attorneys’ fees and costs to Ross-Simmons. Weyerhaeuser appeals the court’s denial of its motion for judgment as a matter of law or for a new trial, and seeks reversal of the judgment. Weyerhaeuser also separately appeals the district court’s award of attorneys’ fees and costs to ensure that any reversal of the judgment or remand for a new trial would also result in reversal of the award of attorneys’ fees and costs. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I. BACKGROUND
The forests west of the Cascade Mountains in Oregon and Washington contain sufficient hardwood to support the only concentration of hardwood sawmills in the western United States. These mills are part of what is often called the “alder industry” after the area’s predominant hardwood species, which accounts for 95% of the annual Pacific Northwest hardwood lumber production. The three principal players in the alder portion of the hardwood industry are: (1) timberland owners and loggers who supply alder sawlogs; (2) production facilities, including sawmills, that buy sawlogs and process them into finished alder lumber; and (3) purchasers who buy hardwood lumber from production facilities. Both parties in this case fall under the second category: they operate sawmills.


The defendant-appellant, Weyerhaeuser Company, was established in 1900. In 1980, it acquired Northwest Hardwoods, Inc. (also “Weyerhaeuser”), and now owns six hardwood sawmills in the Pacific Northwest. Weyerhaeuser is one of the largest manufacturers of hardwood lumber in the world. From 1998 to 2001, the period in which Ross-Simmons’s profits dropped, Weyerhaeuser’s share of the Pacific Northwest market for alder sawlogs was approximately 65%.

Ross-Simmons alleged that Weyerhaeuser artificially increased sawlog prices to drive Ross-Simmons and other competitors out of business. At trial, Ross-Simmons offered testimony and other evidence to prove that Weyerhaeuser attempted to eliminate competitors by driving up sawlog prices and restricting access to sawlogs through: (1) predatory overbidding (i.e., paying a higher price for sawlogs than necessary); (2) overbuying (i.e., buying more sawlogs than it needed); (3) entering restrictive or exclusive agreements with sawlog suppliers; and (4) making misrepresentations to state officials in order to obtain sawlogs from state forests. Weyerhaeuser attributed Ross-Simmons’s failure to substandard equipment, inefficient operations, poor management, and inadequate capital investment.

The court instructed the jury on the
applicable law, including the elements of both monopoly and attempted monopoly, the law regarding anticompetitive conduct in the form of predatory overbidding, and the issue of damages. With respect to overbidding, the court instructed the jury that, if it found that Weyerhaeuser paid higher prices than necessary for sawlogs, the jury could regard that as an anticompetitive act. The jury found for Ross-Simmons on both the monopolization and attempted monopolization claims, and awarded damages of $26,256,406. After trebling the damages award, the court entered judgment in the amount of $78,769,218 against Weyerhaeuser. The court then denied Weyerhaeuser’s motion for judgment as a matter of law or for a new trial, and awarded attorneys’ fees and costs to Ross-Simmons.

Weyerhaeuser appeals the judgment, arguing that: (1) it is entitled to judgment as a matter of law because it had no market power in the alder sawlog market and the alleged anticompetitive acts were not actionable under § 2 of the Sherman Act, (2) it is entitled, in the alternative, to a new trial because the jury instructions misstated the law of predatory overbidding, and (3) it is entitled to reversal of the judgment because Ross-Simmons’s damages theory was speculative. Weyerhaeuser also appeals the court’s grant of attorneys’ fees and costs to Ross-Simmons so that any reversal of the judgment or remand for a new trial would also result in reversal of the award of attorneys’ fees and costs.

II. ANALYSIS
Weyerhaeuser’s challenges to the court’s denial of its motion for judgment as a matter of law or for a new trial present us with a legal question of first impression: whether the prerequisites set forth in Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs. We address this legal issue at the outset, applying a de novo standard of review. For the reasons discussed below, we conclude that Brooke Group does not control in the buy-side predatory bidding context at issue here.

Our conclusion that Brooke Group does not apply here disposes of Weyerhaeuser’s challenge regarding a new trial due to erroneous jury instructions in its entirety. The court properly instructed the jury regarding predatory overbidding. Our holding that Brooke Group is inapplicable also partially resolves Weyerhaeuser’s challenge regarding judgment as a matter of law. Because Weyerhaeuser further contends that the evidence was insufficient to support the jury’s verdict, we must examine that contention, however. After doing so, we conclude that substantial evidence did support the jury’s finding of attempted monopolization. Thus, we affirm the court’s denial of Weyerhaeuser’s motion for judgment as a matter of law or for a new trial.

Two issues remain unresolved after we address the issue related to Brooke Group. They are: (1) damages, and (2) attorneys’ fees and costs. We resolve them as follows. First, we uphold the jury’s award of damages because it was based upon an appropriate estimate of damages. Second, we conclude that the court properly granted attorneys’ fees and costs in favor of Ross-Simmons. Accordingly, we affirm.

A. ISSUES RELATED TO BROOKE GROUP
1. Inapplicability of Brooke Group
Monopoly power exercised on the buy-side of the market is called “monopsony” power, and can violate § 2 of the Sherman Act. Both sides of the market affect allocative efficiency, and hence consumer welfare. Antitrust laws are thus concerned with competition on the buy-side of the market as much as on the sell-side of the market.

Weyerhaeuser argues that, regardless of whether a case involves sell-side predatory pricing or buy-side predatory bidding, the same standard of liability should apply. Weyerhaeuser invites the court to borrow the standard of liability set forth in *Brooke Group*, a sell-side predatory pricing case. In *Brooke Group*, the Court created a high standard of liability, holding that a plaintiff bringing a claim under § 2 of the Sherman Act based on predatory sell-side pricing must show that: (1) “the prices complained of are below an appropriate measure of its rival’s costs,” and (2) “a dangerous probability” existed that the rival would later “recoup[] its investment in below-cost prices” once it stopped such pricing. Thus, to establish liability under *Brooke Group*, a plaintiff had to show that its competitor operated at a loss and was likely to recoup its losses. Weyerhaeuser contends that the same standard should apply in buy-side predatory bidding cases. Specifically, Weyerhaeuser argues that the jury instructions were erroneous because the court did not instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of its recoupment of losses existed. Similarly, Weyerhaeuser argues that, as a matter of law, the alleged predatory overbidding was not actionable anticompetitive conduct under the Sherman Act because Ross-Simmons did not satisfy the two *Brooke Group* requirements. We reject Weyerhaeuser’s arguments regarding the applicability of *Brooke Group*.

The *Brooke Group* Court established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition. The Court stated that “low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.” The Court further recognized that above-cost pricing is either “competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.” As a result, the Court did not want to make the standard of liability “so low that antitrust suits themselves became a tool for keeping prices high.”

We recognize that in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon. However, an important factor distinguishes predatory bidding cases from predatory pricing cases: benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing. We turn now to the short-term and long-term effects of predatory bidding.

In a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases. No consumer benefit results during this predation period if the firm raises or maintains the same price level for its finished products. Although consumers
might temporarily benefit if a firm lowered prices during the predation period, a reduction in prices would place even greater pressure on competitors, thereby increasing the threat to competition arising from the predatory bidding. Thus, even though a short-term benefit to consumers might occur in some predatory bidding situations, serious concerns about the threat to competition would concurrently arise in those situations. Moreover, predatory bidding claims do not directly challenge a firm’s decision to cut prices; instead, they focus on a firm’s decision to raise the cost of inputs. Therefore, the concerns the Brooke Group Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory bidding is at issue.

In the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials. If it succeeded in driving out competition, during this recoupment period the firm would likely pay less for its materials while charging consumers a higher price. The firm would have little incentive to pass on the benefit of lower input prices to consumers when it possessed greater market power and needed to recoup the higher costs it had paid for its materials. Thus, the overall effect of a predatory bidding scheme would result in harm to consumers.

Although in some situations rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements, this is not such a situation. The nature of the input supply at issue here does not readily allow for market expansion. The evidence shows that, during the alleged predation period, the supply of alder sawlogs remained relatively stable or declined. Nothing suggests this situation will change—alder sawlogs are “a natural resource of limited annual supply in a relatively inelastic market.” Thus, at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition. As a result, the concerns that led the Brooke Group Court to establish a high standard of liability in the predatory pricing context do not carry over to this predatory bidding context with the same force. Therefore, the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases. Accordingly, we hold that the high standard of liability in Brooke Group does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing.

Our decision in Reid Bros. Logging Co. v. Ketchikan Pulp Co. provides further support for our holding today that the prerequisites in Brooke Group do not apply here. Although the Supreme Court decided Brooke Group after we decided Reid Bros., Brooke Group involved a different factual situation and did not overrule Reid Bros. In Reid Bros., we affirmed a finding of liability under § 1 of the Sherman Act that was based in part on a predatory buying claim. The plaintiff in Reid Bros. argued that the defendants conspired to bid preclusively on timber sales at higher prices than necessary to block the plaintiff from buying necessary timber. The defendants argued that the district court erred by finding predatory bidding when there was no evidence that the high prices paid for timber would prevent the defendants from covering their marginal costs on the ultimate sale of the processed timber. We rejected the defendants’
argument and held that such a “blind application of a numerical test would only frustrate the intent of the Sherman Act.” This statement that a rigid, numerical test should not apply when a buy-side overbidding scheme was at issue further supports our holding that *Brooke Group* is inapplicable here. Thus, our conclusion that *Brooke Group* does not apply is consistent with our precedent. We now turn to the effect our conclusion has on Weyerhaeuser’s arguments for a new trial and for judgment as a matter of law.

2. New Trial
We generally review a court’s ruling on a motion for a new trial for an abuse of discretion. However, because Weyerhaeuser’s motion for a new trial rested solely on the ground that the jury instructions misstated the law regarding Ross-Simmons’s overbidding claim, we review the court’s denial of the motion for a new trial de novo. Because we hold today that *Brooke Group* does not govern in this case, the court did not need to instruct the jury that overbidding for sawlogs could be anticompetitive conduct only if Weyerhaeuser operated at a loss and a dangerous probability of Weyerhaeuser’s recoupment of its losses existed. The instructions as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive.

Moreover, the instructions were consistent with Supreme Court precedent stating that a defendant violates the Sherman Act by using monopoly power “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.” Thus, the jury instructions “fairly and adequately covered the issues presented, correctly stated the law, and were not misleading.” Accordingly, we affirm the court’s denial of Weyerhaeuser’s motion for a new trial.

3. Judgment as a Matter of Law
“We review [the] district court’s denial of [the] motion for judgment as a matter of law de novo.” Our holding regarding the inapplicability of *Brooke Group* resolves one of the issues related to Weyerhaeuser’s challenge to the denial of judgment as a matter of law: Weyerhaeuser’s contention that, as a matter of law, the alleged predatory overbidding could not be actionable anticompetitive conduct under § 2 of the Sherman Act because Ross-Simmons did not show that Weyerhaeuser operated at a loss and that a dangerous probability of Weyerhaeuser’s recoupment of its losses existed. Because *Brooke Group* does not apply in this case, Ross-Simmons did not have to meet the high standard of liability in *Brooke Group* before relying upon predatory overbidding to satisfy the anticompetitive conduct requirement. Our holding regarding *Brooke Group* does not resolve Weyerhaeuser’s argument that Ross-Simmons’s evidence was insufficient to support the jury’s verdict, however. Accordingly, we now turn to the issue of whether substantial evidence supports the jury’s verdict. We conclude that the record contains substantial evidence.

“Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” When reviewing the record as a whole, we must draw all reasonable inferences in favor of the nonmoving party, keeping in mind that “credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” In reviewing a defendant’s entitlement to judgment as a matter of law in the antitrust context, we presume that “a reasonable jury . . . know[s]
and understand[s] the law, the facts of the case, and the realities of the market."

To establish attempted monopolization under § 2 of the Sherman Act, Ross-Simmons had to demonstrate that Weyerhaeuser: (1) engaged in predatory or anticompetitive conduct, (2) had a specific intent to monopolize, and (3) a dangerous probability of Weyerhaeuser’s achievement of monopoly power in the relevant market existed. Additionally, Ross-Simmons had to show causal antitrust injury. We first examine whether the record contains substantial evidence of anti-competitive conduct.

a. Anticompetitive conduct
Anticompetitive or predatory acts are those that tend to exclude or restrict competition “on some basis other than efficiency.” The record contains substantial evidence of over-bidding for sawlogs to support the jury’s finding of anticompetitive conduct. The evidence shows that during the period of alleged predation: (1) sawlog prices increased while prices for finished lumber decreased, (2) Weyerhaeuser had a dominant share of the market for alder sawlogs and an ability to control alder sawlog prices, (3) Weyerhaeuser suffered declining profits due to the high prices it was paying for raw materials, and (4) Weyerhaeuser employed a strategy of raising sawlog prices. Based on this evidence, the jury could reasonably have concluded that Weyerhaeuser engaged in anticompetitive conduct by overbidding for sawlogs. We need not analyze whether substantial evidence supports the other alleged anticompetitive acts because the evidence of predatory overbidding sufficiently supports the finding that Weyerhaeuser engaged in anticompetitive conduct. We now turn to the issue of whether substantial evidence supports the jury’s finding of specific intent.

b. Specific intent
Attempted monopolization requires proof of intent to monopolize or eliminate competition. The record contains substantial evidence of specific intent to eliminate competition based on: (1) Weyerhaeuser’s anticompetitive conduct itself, (2) the testimony of Weyerhaeuser’s employees, and (3) Weyerhaeuser’s business projections regarding sawlog prices.

Anticompetitive conduct alone can satisfy the specific intent requirement if the conduct “form[s] the basis for a substantial claim of restraint of trade” or is “clearly threatening to competition or clearly exclusionary.” As discussed above, Ross-Simmons offered evidence that Weyerhaeuser overpaid for sawlogs while its profits declined. Weyerhaeuser’s overbidding for sawlogs clearly threatened competition because it restricted competitors’ access to the limited supply of sawlogs. Thus, Weyerhaeuser’s conduct on its own supports a reasonable inference of specific intent to eliminate competition.

The testimony of Weyerhaeuser’s employees further showed that Weyerhaeuser intended to control prices and eliminate competition. One of Weyerhaeuser’s former senior analysts, Eugene Novak, acknowledged on the stand that Weyerhaeuser had the power—and was aware of its power—to influence prices in the alder sawlog market. Novak also authored a memorandum regarding the costs of sawlogs and lumber in which he stated that the increase in sawlog prices despite Weyerhaeuser’s predominant market share made no sense. Novak estimated that, due to the excessive prices Weyerhaeuser paid for sawlogs, it “had given up some $40 to $60
million dollars in the last three years.” He testified that his boss, Vicki McInnally, who was a member of the senior management team, told him that “that was the strategy that [Weyerhaeuser] designed.” A former sales manager for Weyerhaeuser, Cliff Chulos, also testified that “it was taken as a given by everyone that [Weyerhaeuser] could influence price; that [Weyerhaeuser] had to be a major influence.” Thus, the testimony in the record supports the finding that Weyerhaeuser specifically intended to eliminate competition.

Moreover, Weyerhaeuser’s business projections about sawlog prices indicated that it planned to lower the prices it paid for sawlogs after acquiring a greater market share as a result of decreased competition. Weyerhaeuser tracked competitors’ profit margins and estimated the potential effects of targeted increases in sawlog costs on the ability of low-margin competitors to survive. Such evidence also supports an inference that Weyerhaeuser sought to foreclose competition rather than simply to increase its own business. Thus, when viewed in its entirety, the evidence sufficiently supports a finding of specific intent to control prices and eliminate competition. We now turn to the question of whether substantial evidence supports the finding that a dangerous probability of Weyerhaeuser’s achievement of monopoly power existed.

The record contains some direct evidence that could support the jury’s finding that a dangerous probability of Weyerhaeuser’s achievement of monopoly power existed. The testimony from Weyerhaeuser’s employees showed that Weyerhaeuser had the power to influence prices and had used its power to raise the price of sawlogs. This direct evidence of Weyerhaeuser’s injurious exercise of market power is substantial enough by itself to support the jury’s finding of a dangerous probability of achieving monopoly power. We nonetheless examine the circumstantial evidence as well because that evidence provides additional support for the jury’s finding.

(i) Market share

Weyerhaeuser does not dispute Ross-Simmons’s data that, during the relevant time period, Weyerhaeuser’s share of the relevant market was approximately 65%. Weyerhaeuser’s business records showed that its share was 64% in 1998, with projected increases. We have held a 44% market share sufficient as a matter of law to support a finding of market power for attempted monopolization. Thus, we conclude that Weyerhaeuser’s approximately 65% market share supports a finding of market power.
Market share alone, however, does not raise an inference of a dangerous probability of achieving monopoly power if there are “low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors.” We therefore turn to the issue of whether significant barriers to entry and expansion existed.

(ii) Barriers to entry and expansion

“Entry barriers are additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants, or factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.” Such barriers may include legal license requirements, control of an essential resource, entrenched buyer preferences, and higher capital costs for new entrants. Entry barriers that justify a finding of market power must “be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self-correcting.” We conclude that the high capital costs new entrants faced and the limited availability of sawlogs were barriers to entry that justified an inference of monopoly power.

At the outset, we address Weyerhaeuser’s argument that the entry of four new mills during the alleged predation period demonstrated a lack of barriers to entry. We have held that the entry of new competitors does not necessarily demonstrate a lack of barriers to entry. If new entrants are “insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator’s market power.” The evidence did not show that the four new entrants took significant business from Weyerhaeuser or that they had a significant market share. In fact, evidence suggests that Weyerhaeuser’s market share actually increased even though the four new mills entered the market. Moreover, the evidence indicates that, as soon as the new entrants came into the market, they had to pay the sawlog prices Weyerhaeuser set. Thus, the evidence does not show that the four new entrants could take enough business away from Weyerhaeuser to allow the market to correct itself. As a result, the entry of new competitors did not foreclose the possibility that barriers to entry existed. We now turn to the issue of whether higher capital costs and limited sawlog availability were barriers to entry.

Ross-Simmons offered expert testimony to support the proposition that the higher capital costs associated with entering the market constituted a barrier to entry. The record contains evidence that the advent of expensive new machines and product-grading, which did not exist when Weyerhaeuser entered the market, made market entry less feasible because new entrants had difficulty matching the necessary technology. The need for this new technology raised the cost of entering the market to $20-$25 million. While Weyerhaeuser also had to incur costs for machinery and product-grading, it was able to do so over time without bearing the burden of heavy front-end costs to gain entry into the market. Thus, substantial evidence supports the inference that higher capital costs were a barrier to entry.

With respect to the availability of raw materials, Weyerhaeuser argues that there were sufficient sawlogs available for all competitors if they could afford to buy them. However, Weyerhaeuser purchased approximately 65% of the available sawlogs during the period of alleged predation. The evidence further shows that Weyerhaeuser
raised the price of sawlogs and entered into exclusive agreements that restricted competitors’ access to sawlogs. By thus controlling or influencing a number of the available sawlog sources, Weyerhaeuser restricted access to the already limited sawlog supply. Weyerhaeuser’s dominance in the market for sawlogs, its overbidding practices, and its restrictive arrangements together support the inference that the limited supply of sawlogs was a barrier to entry.

The evidence shows that significant barriers to entry existed in the sawlog market in the form of high capital costs and limited raw materials, and that Weyerhaeuser had a dominant share of the market. Moreover, the record contains direct evidence of Weyerhaeuser’s injurious exercise of market power. Therefore, we hold that substantial evidence supports the jury’s finding that a dangerous probability of Weyerhaeuser’s achievement of monopoly power existed.

Because substantial evidence shows that Weyerhaeuser engaged in anticompetitive conduct through predatory overbidding, intended specifically to eliminate competition, and a dangerous probability of Weyerhaeuser’s achievement of monopoly power existed, we uphold the jury’s verdict against Weyerhaeuser on the attempted monopolization claim. Accordingly, we affirm the court’s denial of Weyerhaeuser’s motion for judgment as a matter of law.

B. REMAINING ISSUES

Two issues remain for our consideration: (1) damages, and (2) attorneys’ fees and costs. For the reasons stated below, we uphold both the jury’s damages award and the court’s grant of fees and costs to Ross-Simmons.

1. Damages

We give substantial deference to a jury’s damages award. In antitrust cases, we accept a degree of uncertainty when evaluating damages awards because of the inherent “difficulty of ascertaining business damages” when “the vagaries of the marketplace usually deny us sure knowledge of what [a] plaintiff’s situation would have been in the absence of the defendant’s antitrust violation.” We will affirm the jury’s damages award if it is not based upon “speculation or guesswork.” “It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.” We conclude that the jury based its award upon an appropriate estimate of damages.

Ross-Simmons’s models for estimating damages properly relied upon the fundamental assumption that Weyerhaeuser maintained artificially high costs in the sawlog market during the damages period. Ross-Simmons’s estimates were based either on testimony regarding Weyerhaeuser’s annual loss in profits due to higher sawlog costs or on a decade’s worth of data regarding Weyerhaeuser’s average profit margin prior to the predatory period. The models accounted for changing market conditions by: (1) using data for actual sales and production of finished lumber, which took into account any reduced market demand or decrease in market prices for finished lumber, and (2) assuming that Weyerhaeuser could have controlled sawlog costs to maintain its previous profit margins relative to the price of lumber. The evidence, as discussed above, supports the assumption that Weyerhaeuser had such control. Thus, we conclude that Ross-Simmons’s damages models were not speculative, but provided a reasonable basis...
for computing damages. Accordingly, we uphold the jury’s award of damages.

2. Attorneys’ Fees and Costs
We uphold a court’s award of attorneys’ fees unless it abused its discretion or committed a clear error of law. Because we affirm the jury’s verdict of liability for attempted monopolization, Ross-Simmons remains a prevailing party entitled to attorneys’ fees and costs. Thus, the district court properly granted attorneys’ fees and costs to Ross-Simmons.

III. CONCLUSION
We conclude that *Brooke Group* does not apply in this predatory bidding case because benefit to consumers and stimulation of competition are less likely to result here than in predatory pricing cases. A plaintiff bringing a claim under § 2 of the Sherman Act based on predatory overbidding in a relatively inelastic market need not show that the defendant operated at a loss and that a dangerous probability of the defendant’s recoupment of those losses existed to succeed on its claim. Substantial evidence supports the jury’s finding that Weyerhaeuser was liable for attempted monopolization. Therefore, we affirm the court’s denial of Weyerhaeuser’s motion for judgment as a matter of law or for a new trial. The jury based its damages award upon a reasonable estimate of damages. Therefore, we affirm the jury’s damages award. Finally, because we affirm the jury’s verdict, we also affirm the court’s award of attorneys’ fees and costs to Ross-Simmons.

AFFIRMED.
"High Court Will Revisit Weyerhaeuser Case"

The Oregonian
June 27, 2006
Dylan Rivera

The U.S. Supreme Court will consider overturning a Portland jury's verdict that Weyerhaeuser had established an illegal monopoly in the market for alder saw logs, the court announced Monday.

The Bush administration and some of the biggest names in corporate America have weighed in against the verdict, saying it imposed an unduly vague test for deciding when a company has a monopoly on industrial ingredients.

In 2003, the jury found that Weyerhaeuser had used its market dominance to hoard alder saw logs and drive a small mill out of business. The jury awarded $26.25 million to the defunct Ross-Simmons Hardwood Lumber Co. of Longview, Wash. a sum that was automatically tripled to $78.75 million under federal antitrust law. More than a dozen other small mills followed on the verdict in securing settlements and judgments totaling about $50 million.

Last year, a panel of the 9th U.S. Circuit Court of Appeals, based in San Francisco, unanimously upheld the finding.

The Supreme Court action and a rising tide of corporate opposition to the verdict and the 9th Circuit ruling make it clear that the case raises questions that go far beyond a small sector of the Northwest timber industry.

"Probably every major corporation in the country could be sued somewhere in the 9th Circuit," said Janet McDavid, an attorney for the Business Roundtable, an association of the chief executives of the nation's biggest companies, with combined annual revenue of more than $4.5 trillion. "The implications are really quite extraordinary and much more far-reaching than this would appear."

An attorney representing Ross-Simmons and other plaintiffs said the Bush administration's support for Weyerhaeuser reveals an effort to dismantle the Sherman Antitrust Act of 1890.

"The Bush administration is striving to have an appropriate element in its campaign-finance portfolio to go to big business and say, 'Look at what we're doing,'" said Michael Haglund with Portland law firm Haglund, Kelley, Horngren, Jones & Wilder.

Weyerhaeuser, based in Federal Way, Wash., has argued its innocence throughout the proceedings. Monday, it said it was "gratified" that the court would review the 9th Circuit's opinion.

"We believe that the court's decision to review this case underscores the national importance of the issues we have raised," said Kenneth F. Khoury, Weyerhaeuser senior vice president and general counsel. "It is important to the business community that there be clear standards established before any business can be found to have engaged in so-called predatory buying."

Legal experts agreed Monday that the case raises two questions: How tough should it be to prove monopolization of an industrial
ingredient? How should that standard compare with a more established test for monopolization of a consumer product?

Under antitrust law, companies create illegal monopolies in consumer products when they control a high share of a defined market and price their products low enough to drive competitors out of business. Such “predatory pricing” practices have drawn scrutiny when, for example, large bookstores have used high-volume sales to sell books at lower prices than smaller competitors can offer.

But companies also can create monopolies when they use “predatory bidding” by paying higher than going rates for essential production ingredients.

In a case called Brooke Group Ltd. vs. Brown & Williamson Tobacco Corp., the Supreme Court ruled in 1993 that plaintiffs in predatory-pricing cases must meet a two-part test: They must show the monopolist lost money in the short term by lowering prices and that it was likely to recoup its losses later by raising prices.

Weyerhaeuser contends that it should be held to that standard.

“The fact is that Weyerhaeuser was making money, despite the fact that it was paying higher prices,” said McDavid, the attorney for the Business Roundtable. “There are a lot of reasons that a company might choose to pay more than someone else for a product.”

For example, McDavid said, a company might want to keep a key supplier happy, or to bulk up its inventories in anticipation of rising demand for its products.

Some legal experts said they were surprised that the court took the case, because lower-court decisions on predatory bidding are rare. Ross-Simmons was only the second win by a plaintiff in such a case in 30 years.

Critics have focused on instructions to the jury approved by U.S. District Court Judge Owen Panner in Portland, which said the jury could find Weyerhaeuser had a monopoly if it bought more logs “than it needed” or paid more “than necessary.”

Haglund, the plaintiff’s attorney, said in court filings that Weyerhaeuser did not properly bring up the two-part Brooke Group test at trial. Furthermore, he said Monday, Ross-Simmons had objected to more than Weyerhaeuser’s log purchasing practices.

Ross-Simmons alleged that Weyerhaeuser defrauded the state of Oregon by lying about its market dependence on state-owned logs to obtain special rights to buy alder logs from the state. It also negotiated contracts with large timberland owners requiring them to sell exclusively to Weyerhaeuser or give the company a “last look” at competitors’ bids so that it could outbid them.

The Supreme Court’s decision to take the case indicates that the court was dissatisfied with the 9th Circuit’s logic, said John Kirkwood, an antitrust expert at Seattle University’s law school.

Kirkwood, who has consulted for the plaintiffs, said he thinks the Brooke Group standard is too tough for plaintiffs. But he also believes the 9th Circuit’s ruling gave plaintiffs too much latitude.

“I’d like to see a test in which the plaintiff is
required to prove long-run harm to suppliers," Kirkwood said.

Plaintiffs, he said, should have to show harm not only to themselves but also to broader constituencies, such as consumers—or producers of critical industrial supplies.

By that logic, Kirkwood said, plaintiffs would need to prove Weyerhaeuser bought more logs than it needed at higher prices in the short term and that the long-term effect gave Weyerhaeuser so much control that it could force prices down in the long run. Though timberland owners selling logs to Weyerhaeuser would benefit from short-term price hikes, it could make them lose money over the long run, he said.

Weyerhaeuser shares closed at $60.50, up 20 cents, in trading on the New York Stock Exchange on Monday.
Any firm with an arguably dominant market presence that bids for inputs against competitors, for the meantime, should take note of a recent U.S. Court of Appeals for the Ninth Circuit decision affirming liability for the conduct of predatory bidding. The potential ramifications of the decision are alarming.

In a typical predatory pricing case, a plaintiff complains that a competitor has priced its products too low, in order to force its rivals out of business and subsequently recoup its losses by gaining control over prices in the market. In its seminal decision on predatory pricing, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, the U.S. Supreme Court held that predatory pricing cases must be analyzed according to a two-part test that measures: (1) whether a defendant’s prices “are below an appropriate measure of its rival’s costs” and (2) whether “the competitor had a dangerous probability ... of recouping its investment in below cost prices.” In order to recover, a plaintiff must meet both parts of the test.

While the Court recognized that these prerequisites to recovery would not be easily established, it concluded the high standard was appropriate because “the costs of an erroneous finding of liability are high” and mistaken inferences would “chill the very conduct the antitrust laws are designed to protect.”

Not Predatory Pricing, but Bidding?

But what if the complaint is not for predatory pricing, but rather predatory bidding? Should the analysis be any different? Is the margin of error lower? This was the question that the Ninth Circuit faced recently in *Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.* Its answer was resoundingly, “Yes.” But are there any principled reasons for treating one differently than the other? This is the question facing the Supreme Court as it considers whether to grant certiorari in *Weyerhaeuser*.

On May 26, 2006, the Federal Trade Commission and the antitrust division of the U.S. Department of Justice jointly submitted an amicus brief urging the Court to grant certiorari. The agencies asserted that, contrary to the Ninth Circuit’s holding, there is no principled reason for treating predatory bidding differently from predatory pricing.

In *Weyerhaeuser*, Ross-Simmons Hardwood Lumber Co. and other sawmills sued Weyerhaeuser Co., a major forest products firm. Both Ross-Simmons and Weyerhaeuser operated sawmills in the Pacific Northwest that bought alder sawlogs and processed them into finished alder lumber. From 1998 to 2001, sawlog prices increased while finished lumber prices decreased. During this time period, Weyerhaeuser held approximately 65 percent of the Pacific Northwest market for alder sawlogs. Also during these years, Ross-Simmons experienced a decline in production and, along with a number of other alder sawmills in the region, became unprofitable and shut down.
Ross-Simmons went to court, claiming that Weyerhaeuser increased sawlog prices in order to drive Ross-Simmons and other competitors out of business. It alleged that Weyerhaeuser caused their exit by, among other things, predatory bidding (paying a higher price for sawlogs than necessary) and overbuying (buying more sawlogs than it needed). The jury returned a verdict in favor of Ross-Simmons that, after trebling by the district court, resulted in a judgment of over $78 million in damages.

Ninth Circuit Affirmation

The Ninth Circuit affirmed, explicitly refusing to apply the *Brooke Group* predatory pricing test. As framed by the court, the issue was whether the *Brooke Group* prerequisites “for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs.” The court concluded that “*Brooke Group* [did] not control in the buy-side predatory bidding context at issue” in the case.

The court explained that “[i]n a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases.” It acknowledged that in both predatory pricing and predatory bidding cases, “the price level itself is the anticompetitive weapon.” It then attempted to distinguish predatory bidding from predatory pricing by finding that “the concerns the *Brooke Group* Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory bidding is at issue.”

According to the court, in the short term, predatory bidding does not result in consumer benefit if the bidding firm does not drop its prices for its finished products. In the long term, when the bidding firm is in its “recoupment” period and is making up for the higher costs it paid for its materials, it will have little incentive to drop its prices to consumers. Thus, “the overall effect of a predatory bidding scheme would result in harm to consumers.” Finding alder sawlogs to be “a natural resource of limited annual supply in relatively inelastic market,” the court held that since “predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition...the standard for liability in this predatory bidding case need not be as high as in predatory pricing cases.”

The Ninth Circuit also reviewed the adequacy of the following jury instructions: “One of Plaintiff’s contentions in this case is that the Defendant purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent the Plaintiffs from obtaining the logs they needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.” The court found these instructions to fairly and adequately cover the issues presented and correctly state the law in the case.

So, as the law now stands in the Ninth Circuit, a plaintiff can bring a claim for predatory bidding merely by alleging that it could not buy as much as it wanted at a “fair” price and that its competitor was buying more than it “needed” or paying more than “necessary” for what it bought.

FTC, DOJ Joint Brief

The Federal Trade Commission and the U.S. Department of Justice filed a joint amicus brief urging the Supreme Court to grant certiorari in *Weyerhaeuser*. The agencies
argued that "the decision below threatens to chill procompetitive behavior." Their joint position is that, "the rationales for Brooke Group's stringent standard of proof for predatory-pricing claims are generally applicable in the context of predatory-buying claims as well."

According to the agencies, there are two fundamental flaws in the Ninth Circuit's analysis. First, the court focused on harm to consumers without even analyzing whether increased prices were likely to occur in the output market. The court appeared to assume that Weyerhaeuser's bidding conduct would confer significant market power in the market for finished alder lumber. This demonstrated a misunderstanding of the theory of predatory bidding that predicts recoupment will occur primarily through the ability of the monopsonist bidder to raise prices in output market in the long run once it excludes its competitors from obtaining supra-priced inputs. However, contrary to this theory, the Weyerhaeuser jury effectively found that the output market for finished alder lumber was competitive.

Second, in its zeal to protect "consumers," the court focused exclusively on the potential harm to purchasers in the output market, while ignoring the effects on sellers in the input market. If the price of alder sawlogs goes up, sellers of sawlogs will reap the benefits in the short term. And those sellers will be harmed in the long term only if recoupment is successful. The court also ignored the fact that increased input prices are often a sign of vigorous competition. They can reflect a buyer's efficiency or lower cost structure, or an effort to identify high-quality suppliers.

Agencies' Arguments

The agencies argued that the same reasons that led the Brooke Group Court to require a stringent standard of proof for predatory pricing claims apply equally to predatory bidding claims. In the same way that lowering prices is the mechanism for both predatory pricing and stimulating competition in an output market, raising prices is the mechanism for both predatory bidding and stimulating competition in an input market. In both cases, "[a] rule that attempted to distinguish precisely between competitive and anticompetitive bidding would be 'beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate [conduct].'" As with predatory pricing, the risk of false negatives is low because predatory bidding schemes "are rarely tried, and even more rarely successful." Any broader rule than that imposed by Brooke Group "could lead to false positives and thereby 'chill the very conduct the antitrust laws are designed to protect.'"

Finally, the agencies were highly critical of the jury instructions that the court approved in Weyerhaeuser. The instructions failed to set forth any objective standard for the jury to apply in determining whether the challenged conduct was truly anticompetitive. Nor did they offer any guidance on how the jury should determine whether the price Weyerhaeuser paid for alder sawlogs was higher than "necessary," or what would have constituted a "fair" price to Ross-Simmons. In short, the instructions offered no meaningful guidance but instead laid out a standard that was "entirely unadministrable and wholly subjective, and [failed] to provide meaningful criteria for distinguishing legitimate competition from anticompetitive conduct."
The agencies' amicus opinion in Weyerhaeuser coincides with a series of hearings the agencies are conducting on single-firm conduct and antitrust law, with the goal of exploring how to identify and address anticompetitive exclusionary conduct. Recognizing that the "proper treatment of single-firm conduct under the antitrust laws presents some of the most complex issues facing the [agencies], the courts, the antitrust bar, and the business community," the first full day of sessions is scheduled to address the topic of predatory pricing. Hearings are to be held between June and December 2006, and a number of scholars and practitioners have been invited to participate in panel discussions. At the end of the hearings, the agencies plan to prepare a comprehensive joint report.

Conclusion

While the practical results of these hearings remain to be seen, it is encouraging that the agencies are taking a closer look at single-firm conduct. It is even more encouraging that they filed the amicus brief in Weyerhaeuser in response to the untenable and unworkable decision of the Ninth Circuit. However, until the Supreme Court resolves the question of what standard should be applied in predatory bidding cases, businesses have cause to beware of their bidding practices, especially if they might be subject to Ninth Circuit law. And until then, it would appear that in the Ninth Circuit the standards for predatory bidding liability have been set "so low that antitrust suits themselves [will become] a tool for keeping prices high."

Neal R. Stoll and Shepard Goldfein are partners at Skadden, Arps, Slate, Meagher & Flom. Joanna Warren, an associate of the firm, assisted in the preparation of this article.
A federal appeals court on Tuesday upheld a $78.75 million judgment against Weyerhaeuser, affirming a Portland jury verdict that the company had run an illegal monopoly in the market for alder sawlogs.

A three-judge panel of the U.S. Court of Appeals for the 9th Circuit unanimously supported the 2003 finding, which favored Ross-Simmons Hardwood Lumber Co., based in Longview. The now-defunct producer of alder lumber contended Weyerhaeuser had run it out of business.

Ross-Simmons and 13 other small sawmill companies have sued Weyerhaeuser’s Portland-based Northwest Hardwoods Division, saying it hoarded sawlogs to choke off rivals from a growing niche that turns alder logs into lumber for furniture and musical instruments. They said the timber giant paid higher-than-market prices for logs and sometimes let logs rot to deprive competitors.

“The testimony in the record supports the finding that Weyerhaeuser specifically intended to eliminate competition,” the court’s opinion says.

The antitrust litigation has cost Weyerhaeuser about $145 million in settlements and judgments, a relatively small sum for a company that had $1.3 billion in profits last year. Legal experts said the appeals court ruling could have a wider reach as a precedent for antitrust cases involving raw materials for manufacturing.

“This is a huge victory for small and medium-sized companies in any log market in the West,” said Michael Haglund, the plaintiffs’ attorney. “A company that accumulates a large market share cannot push log prices up with the goal of eliminating its competition . . . That means the vibrancy in the log market will continue.”

Weyerhaeuser said it was “very disappointed” with the opinion.

“It remains our position that our conduct has been lawful and fully consistent with the standards set by the United States Supreme Court,” the company said in a statement. “We believe that this panel of the 9th Circuit failed to follow appropriate Supreme Court precedent, so we will seek further review.”

Company’s Next Step

Weyerhaeuser spokesman Frank Mendizabal said the company wasn’t sure whether it would ask the full 9th Circuit to reconsider the case or appeal directly to the U.S. Supreme Court.

Fourteen companies, including Ross-Simmons, have brought claims against Weyerhaeuser on the alder issue.

The claims of two defunct mills are scheduled for trial later this year: H.R. Jones Veneer Inc., a subsidiary of States Industries Inc. of Eugene, and Pacific Hardwoods-South Bend Co. of South Bend, Wash., owned by TreeSource Industries Inc. of
Tumwater, Wash.

The Confederated Tribes of the Siletz—part of the original Ross-Simmons suit in U.S. District Court in Portland, but not awarded damages—has asked the court to rehear its case.

Ross-Simmons was awarded damages of $26.25 million, which were automatically tripled to $78.75 million under federal antitrust law.

The Ross-Simmons verdict helped prompt Weyerhaeuser to settle the claims of many of the 14 companies for a total of about $50 million.

The 9th Circuit opinion puts enormous pressure on Weyerhaeuser to settle remaining claims, said William Andersen, an antitrust specialist at the University of Washington School of Law in Seattle.

"If you’re a plaintiff in a case like this in the 9th Circuit, I think you’re in good shape," Andersen said. "Defendants in cases that look like this will be very anxious to settle."

The court called its opinion a "first impression," indicating no other circuit courts have ruled on the issue it was facing.

That makes it highly unlikely the Supreme Court would hear an appeal by Weyerhaeuser, because the Supreme Court generally waits for lower courts to issue conflicting verdicts before entering into questions that don’t raise urgent constitutional issues, said Howard A. Shelanski, an antitrust expert with the University of California at Berkeley Law School.

The 9th Circuit rejected an argument by Weyerhaeuser that would have made it harder for plaintiffs to prove monopolization claims, Shelanski said.

Under antitrust law, companies can create illegal monopolies when they have a high market share in a defined market and price their products below cost in an effort to drive competitors out of business, Shelanski said. Such "predatory pricing" practices have drawn scrutiny when, for example, large bookstores such as Barnes & Noble use large volume sales to sell books for lower prices than smaller competitors can offer.

But companies also can create monopolies when they pay too much for essential production ingredients in "predatory bidding," that raises costs for competitors and pushes them out of business, Shelanski said. The Weyerhaeuser appeal turns on how to define predatory bidding.

Two-part Test

The U.S. Supreme Court established in a 1993 case called Brooke Group Ltd. vs. Brown & Williamson Tobacco Corp. that plaintiffs in predatory pricing cases must meet a two-part test: They must show a monopolist lost money by lowering prices and that it was likely to recoup its losses later by raising prices.

That’s a tough standard to meet, said UW’s Andersen, because it’s difficult to show that a company is likely to have enough control over a market to be able to raise prices in the future.

Weyerhaeuser argued that Ross-Simmons should have had to meet the two-part test in proving that Weyerhaeuser had a monopoly on alder sawlogs.
The 9th Circuit rejected that argument, saying predatory bidding claims should not face the two-part test. That’s because such bidding typically has the short-term effect of raising prices for competitors and consumers.

Implicit in the *Brooke* opinion was the idea that courts should be reluctant to interfere with companies that are offering lowered prices for consumers, Shelanski said. But by interfering in a predatory bidding situation, courts don’t risk scuttling lowered prices, he said.

“Right out of the gate, lower prices are good for consumers,” Shelanski said. “There’s nothing about high prices that right off the bat is good for consumers. The high prices might be good for producers (of logs), but the antitrust laws are consumer-focused.”

The opinion also came as a big win for the Portland law firm Haglund, Kelley, Horngren & Jones, which has only 12 attorneys. San Francisco-based Heller Ehrman White & McAuliffe, one of the top 100 firms in the nation, represented Weyerhaeuser on the appeal.

The opinion came during the trading day on the New York Stock Exchange, where Weyerhaeuser shares closed at $64.15, up 13 cents.
Teleflex sued KSR for infringement of a patent related to the throttle control assembly for an electronic gas pedal, and the district court granted summary judgment for KSR, holding the patent to be invalid because it was obvious. The district court held the invention to be obvious because all the important parts of the invention were previously patented. The Federal Circuit Court reversed, holding that a combination of prior inventions should not be considered to be an obvious patent unless it would be obvious to a person of ordinary skill in the art to combine them in that way.

Question Presented: Whether the Federal Circuit has erred in holding that a claimed invention cannot be held "obvious", and thus unpatentable under 35 U.S.C. § 103(a), in the absence of some proven "teaching, suggestion, or motivation" that would have led a person of ordinary skill in the art to combine the relevant prior art teachings in the manner claimed.


United States Court of Appeals for the Federal Circuit

Decided January 6, 2005

SCHALL, Circuit Judge.

Teleflex Incorporated and Technology Holding Company (collectively, "Teleflex") sued KSR International Co. ("KSR") in the United States District Court for the Eastern District of Michigan for infringement of U.S. Patent No. 6,237,565 B1 ("the '565 patent"). On December 12, 2003, the district court granted summary judgment in favor of KSR, after determining that claim 4 of the '565 patent, the sole claim at issue, was invalid by reason of obviousness. Teleflex Inc. v. KSR Int'l Co., 298 F. Supp. 2d 581 (E. D. Mich. 2003). Teleflex now appeals the district court's decision. For the reasons set forth below, we vacate the grant of summary judgment and remand the case to the district court for further proceedings.

DISCUSSION

I.

Claim 4 of the '565 patent relates to an adjustable pedal assembly for use with automobiles having engines that are controlled electronically with a device
known as an electronic throttle control. As such, the assembly of claim 4 incorporates an electronic pedal position sensor (referred to in claim 4, and throughout this opinion, as an "electronic control"). The electronic control is responsive to the pedal pivot and thereby generates an electrical signal corresponding to the relative position of the gas pedal between the rest and applied positions. Claim 4 specifically provides for an assembly wherein the electronic control is mounted to the support bracket of the assembly. This configuration avoids movement of the electronic control during adjustment of the pedal's position on the assembly. Claim 4 reads:

A vehicle control pedal apparatus (12) comprising:

a support (18) adapted to be mounted to a vehicle structure (20);

an adjustable pedal assembly (22) having a pedal arm (14) moveable in force [sic] and aft directions with respect to said support (18);

a pivot (24) for pivotally supporting said adjustable pedal assembly (22) with respect to said support (18) and defining a pivot axis (26); and

an electronic control (28) attached to said support (18) for controlling a vehicle system;

said apparatus (12) characterized by said electronic control (28) being responsive to said pivot (24) for providing a signal (32) that corresponds to pedal arm position as said pedal arm (14) pivots about said pivot axis (26) between rest and applied positions wherein the position of said pivot (24) remains constant while said pedal arm (14) moves in fore and aft directions with respect to said pivot (24).

The numbers in claim 4 correspond to the numbers in Figure 2 of the '565 patent.

The specification of the '565 patent indicates that prior-art pedal assemblies incorporating an electronic control suffered from being too bulky, complex, and expensive to manufacture. See '565 patent, col. 1, ll. 48-53. It was this problem that the '565 patent set out to address. See id. col. 2, ll. 2-5.

Teleflex sued KSR in the Eastern District of Michigan, alleging that KSR's adjustable pedal assembly infringed claim 4 of the '565 patent. KSR moved for summary judgment of invalidity of claim 4 based on obviousness under 35 U.S.C. § 103. The district court granted KSR's motion after determining that claim 4 was obvious in view of a combination of prior art references. Teleflex timely appealed the district court's decision. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

II.

This court reviews a district court's grant of summary judgment de novo. TorPharm Inc. v. Ranbaxy Pharms., Inc., 336 F.3d 1322, 1326 (Fed. Cir. 2003). "In a patent case, as in any other, summary judgment may be granted when there are no disputed issues of material fact, ... or when the non-movant cannot prevail on the evidence submitted when viewed in a light most favorable to it." Knoll Pharm. Co. v. Teva Pharms. USA, Inc., 367 F.3d 1381, 1383 (Fed. Cir. 2004). The movant carries the initial burden of proving that there are no genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-24, 106 S. Ct. 2548, 91 L. Ed.
If the movant shows a prima facie case for summary judgment, then the burden of production shifts to the nonmovant to present specific evidence indicating there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). "When ruling on a motion for summary judgment, all of the nonmovant's evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant's favor." Caterpillar Inc. v. Deere & Co., 224 F.3d 1374, 1379 (Fed. Cir. 2000). "Where the evidence is conflicting or credibility determinations are required, the judgment should be vacated rather than reversed, and the case should be remanded for further proceedings." Jones v. Hardy, 727 F.2d 1524, 1531 (Fed. Cir. 1984).

"The grant of summary judgment of invalidity for obviousness must be done on a claim by claim basis." Knoll Pharm., 367 F.3d at 1383. Because patents are presumed valid, "the accused infringer must prove by clear and convincing evidence that each claim that is challenged cannot reasonably be held to be non-obvious." Id.; see also Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH, 139 F.3d 877, 881 (Fed. Cir. 1998). Clear and convincing evidence exists when the movant "places in the mind of the ultimate fact finder an abiding conviction that the truth of its factual contentions are 'highly probable.'" Colorado v. New Mexico, 467 U.S. 310, 316, 104 S. Ct. 2433, 81 L. Ed. 2d 247 (1994).

A patent claim is obvious, and thus invalid, when the differences between the claimed invention and the prior art "are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art." 35 U.S.C. § 103; see also Graham v. John Deere Co., 383 U.S. 1, 14, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966); In re Dembiczak, 175 F.3d 994, 998 (Fed. Cir. 1999). While obviousness is ultimately a legal determination, it is based on several underlying issues of fact, namely: (1) the scope and content of the prior art; (2) the level of skill of a person of ordinary skill in the art; (3) the differences between the claimed invention and the teachings of the prior art; and (4) the extent of any objective indicia of non-obviousness. See Graham, 383 U.S. at 17-18. When obviousness is based on the teachings of multiple prior art references, the movant must also establish some "suggestion, teaching, or motivation" that would have led a person of ordinary skill in the art to combine the relevant prior art teachings in the manner claimed. See Tec Air, Inc. v. Denso Mfg. Mich. Inc., 192 F.3d 1353, 1359-60 (Fed. Cir. 1999); Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc., 75 F.3d 1568, 1572 (Fed. Cir. 1996). The nonmovant may rebut a prima facie showing of obviousness with evidence refuting the movant's case or with other objective evidence of nonobviousness. See WMS Gaming, Inc. v. Int'l Game Tech., 184 F.3d 1339, 1359 (Fed. Cir. 1999).

"The reason, suggestion, or motivation to combine [prior art references] may be found explicitly or implicitly: 1) in the prior art references themselves; 2) in the knowledge of those of ordinary skill in the art that certain references, or disclosures in those references, are of special interest or importance in the field; or 3) from the nature of the problem to be solved, 'leading inventors to look to references relating to possible solutions to that problem.'" Ruiz v. A.B. Chance Co., 234 F.3d 654, 665 (Fed. Cir. 2000) (quoting Pro-Mold, 75 F.3d at 1572). "Our case law makes clear that the
best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references. Dembiczak, 175 F.3d at 999; see also Ruiz, 234 F.3d at 665 (explaining that the temptation to engage in impermissible hindsight is especially strong with seemingly simple mechanical inventions). This is because "combining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor's disclosure as a blueprint for piecing together the prior art to defeat patentability—the essence of hindsight." Dembiczak, 175 F.3d at 999. Therefore, we have consistently held that a person of ordinary skill in the art must not only have had some motivation to combine the prior art teachings, but some motivation to combine the prior art teachings in the particular manner claimed. See, e.g., In re Kotzab, 217 F.3d 1365, 1371 (Fed. Cir. 2000) ("Particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed." (emphasis added)); In re Rouffet, 149 F.3d 1350, 1357 (Fed. Cir. 1998) ("In other words, the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed." (emphasis added)).

III.

On appeal, Teleflex argues that we should vacate the district court's grant of summary judgment and remand the case because the district court committed multiple errors in its obviousness determination. First, Teleflex urges that the district court erred as a matter of law by combining prior art references based on an incorrect teaching-suggestion-motivation test. Second, it contends that genuine issues of material fact still remain as to whether a person of ordinary skill in the art would have considered it obvious to combine prior art in the manner stated in claim 4. Finally, Teleflex argues that the district court erred by not properly considering the commercial success of Teleflex's patented assembly and by failing to give adequate deference to the patentability determination of the U.S. Patent and Trademark Office ("PTO").

KSR responds that the district court did apply the correct teaching-suggestion-motivation test, and that, under that test, the court correctly concluded that no genuine issues of material fact existed so as to prevent the grant of summary judgment. KSR contends that the district court properly discounted the declarations of Teleflex's experts because their opinions were based on mere legal conclusions. KSR also contends that the district court properly dismissed Teleflex's evidence of commercial success because Teleflex failed to establish a nexus between commercial success and the claimed invention. Finally, KSR argues that the district court gave proper deference to the PTO.

We agree with Teleflex that the district court did not apply the correct teaching-suggestion-motivation test. We also agree that, under that test, genuine issues of material fact exist, so as to render summary judgment of obviousness improper. For these reasons, we vacate the decision of the district court and remand for further proceedings consistent with this opinion.
After comparing the teachings of the prior art with claim 4 of the '565 patent, the district court concluded that, at the time of the invention, all of the limitations of claim 4 existed in the prior art. The court explained that U.S. Patent No. 5,010,782, issued to Asano et al. ("the Asano patent"), disclosed all of the structural limitations of claim 4 with the exception of the electronic control. Teleflex, 298 F. Supp. 2d at 592 ("Asano teaches an adjustable pedal assembly pivotally mounted on a support bracket with the pedal moving in a fore and aft directions with respect to the support and the pivot remaining in a constant position during movement of the pedal arm."). Electronic controls were well known in the prior art. Id. Consequently, after finding a person of ordinary skill in the art would have been motivated to combine Asano and electronic control references, the district court granted KSR's motion for summary judgment of invalidity by reason of obviousness.

The district court based its finding of a suggestion or motivation to combine largely on the nature of the problem to be solved by claim 4 of the '565 patent. Id. at 593-94. The court determined from the patent's specification that the invention of the '565 patent was intended to "solve the problem of designing a less expensive, less complex and more compact [assembly] design." Id. at 593. The court then explained that U.S. Patent No. 5,819,593, issued to Rixon et al. ("the Rixon '593 patent"), also "suffered from being too complex because the pedal position sensor is located in the pedal housing and its fore and aft movement with the adjustment of the pedal could cause problems with wire failure. Thus, the solution to the problem required an electronic control that does not move with the pedal arm while the pedal arm is being adjusted by the driver." Id. at 594. The court then concluded that "a person with ordinary skill in the art with full knowledge of Asano and the modular pedal position sensors would be motivated to combine the two references to avoid the problems with Rixon '593." Id.

The district court also found an express teaching to attach the electronic control to the support bracket of a pedal assembly based on the disclosure of U.S. Patent No. 5,063,811, issued to Smith et al. ("the Smith patent"). The court explained that Smith teaches the use of a "rotary potentiometer ... attached to a fixed support member and responsive to the pedal's pivot shaft." Id. Moreover, the court stated that Smith provided express teachings as to the desirability of attaching the electronic control to a fixed support member in order to avoid the wire failure problems disclosed in the Rixon '593 patent and solved by the '565 patent: "The wiring to the electrical components must be secure from the possibility of chafing which will eventually result in electrical failure. Thus, the pedal assemblies must not precipitate any motion in the connecting wires themselves ...." Id. (quoting the Smith patent, col. 1, ll. 33-38).

Finally, the district court explained that the prosecution history of the '565 patent bolstered its finding of a suggestion or motivation to combine the Asano and electronic control references. The court explained that the patent examiner initially rejected the '565 patent in view of the teachings of U.S. Patent No. 5,460,061, issued to Redding et al. ("the Redding patent"), and the Smith patent. The examiner stated that the Redding patent disclosed the assembly structure of claim 4 and that Smith
disclosed the electronic control attached to the assembly support structure. The patentee overcame the rejection, the court explained, by adding the limitation requiring the position of the assembly's pedal pivot to remain constant during adjustment of the assembly. (The position of the pedal pivot of the Redding patent does not remain constant during adjustment of the assembly position.) However, the Asano patent discloses an assembly where the position of the pivot remains constant during adjustment of the pedal assembly. Therefore, the district court reasoned, had Asano been cited to the patent examiner, the examiner would have rejected claim 4 as obvious in view of the Asano and Smith patents. Id. at 595.

We agree with Teleflex that the district court's analysis applied an incomplete teaching-suggestion-motivation test in granting KSR summary judgment. This is because the district court invalidated claim 4 of the '565 patent on obviousness grounds without making "findings as to the specific understanding or principle within the knowledge of a skilled artisan that would have motivated one with no knowledge of [the] invention to make the combination in the manner claimed." Kotzab, 217 F.3d at 1371. Under our case law, whether based on the nature of the problem to be solved, the express teachings of the prior art, or the knowledge of one of ordinary skill in the art, the district court was required to make specific findings as to whether there was a suggestion or motivation to combine the teachings of Asano with an electronic control in the particular manner claimed by claim 4 of the '565 patent. See Kotzab, 217 F.3d at 1371; Rouffet, 149 F.3d at 1357. That is, the district court was required to make specific findings as to a suggestion or motivation to attach an electronic control to the support bracket of the Asano assembly.

The district court correctly noted that the nature of the problem to be solved may, under appropriate circumstances, provide a suggestion or motivation to combine prior art references. However, the test requires that the nature of the problem to be solved be such that it would have led a person of ordinary skill in the art to combine the prior art teachings in the particular manner claimed. See Rouffet, 149 F.3d at 1357. We have recognized this situation when two prior art references address the precise problem that the patentee was trying to solve. See Ruiz v. A.B. Chance Co., 357 F.3d 1270 at 1276 ("This record shows that the district court did not use hindsight in its obviousness analysis, but properly found a motivation to combine because the two references address precisely the same problem of underpinning existing structural foundations."). In this case, the Asano patent does not address the same problem as the '565 patent. The objective of the '565 patent was to design a smaller, less complex, and less expensive electronic pedal assembly. The Asano patent, on the other hand, was directed at solving the "constant ratio problem." The district court's reliance on the problems associated with the Rixon '593 patent similarly fails to provide a sufficient motivation to combine. This is because the Rixon '593 patent does not address the problem to be solved by the '565 patent; rather, it suffers from the problem. The court did not explain how suffering from the problem addressed by the '565 patent would have specifically motivated one skilled in the art to attach an electronic control to the support bracket of the Asano assembly.

Neither do we agree with the district court's reliance on the express teachings of the Smith patent. This is because the statement in the Smith patent that "the pedal
assemblies must not precipitate any motion in the connecting wires," does not necessarily go to the issue of motivation to attach the electronic control on the support bracket of the pedal assembly. In other words, solving the problem of wire chafing is a different task than reducing the complexity and size of pedal assemblies. What is more, the Smith patent does not relate to adjustable pedal assemblies; therefore, it does not address the problem of wire chafing in an adjustable pedal assembly.

Our view of the case is not altered by the '565 patent's prosecution history. That is because a court's task is not to speculate as to what an examiner might have done if confronted with a piece of prior art. Rather, a court must make an independent obviousness determination, taking into account the statutory presumption of patent validity. See *TorPharm*, 336 F.3d at 1329-30 ("Where the factual bases of an examiner's decision to allow a claim have been undermined—as in other cases where prior art not before the examiner is brought to light during litigation—a court's responsibility is not to speculate what a particular examiner would or would not have done in light of the new information, but rather to assess independently the validity of the claim against the prior art under section 102 or section 103. Such determination must take into account the statutory presumption of patent validity.").

We also agree with Teleflex that the presence of genuine issues of material fact rendered summary judgment inappropriate. KSR, in the first instance, failed to make out a prima facie case of obviousness. The only declaration offered by KSR—a declaration by its Vice President of Design Engineering, Larry Willemsen—did not go to the ultimate issue of motivation to combine prior art, i.e. whether one of ordinary skill in the art would have been motivated to attach an electronic control to the support bracket of the assembly disclosed by Asano. Mr. Willemsen did state that an electronic control "could have been" mounted on the support bracket of a pedal assembly. (Willemsen Decl. at P33, 36, 39.) Such testimony is not sufficient to support a finding of obviousness, however. See, e.g., *In re Deuel*, 51 F.3d 1552, 1559 (Fed. Cir. 1995) ("Obvious to try' has long been held not to constitute obviousness."). Mr. Willemsen also provided the following as a "specific motivation to combine" an electronic control with an adjustable pedal assembly:

An increasing number of vehicles sold in the United States came equipped with electronic throttle control systems because such systems offered various operational advantages over cable-actuated throttle control systems ... In order to function in a vehicle whose engine incorporated an electronic throttle control, the adjustable pedal assembly ... would have had to be coupled to an electronic pedal position sensor.

(Willemsen Decl. at P34, 37, 39.) This statement may be factually correct. However, the issue is not whether a person of skill in the art had a motivation to combine the electronic control with an adjustable pedal assembly, but whether a person skilled in the art had a motivation to attach the electronic control to the support bracket of the pedal assembly.

In addition, Teleflex offered two declarants—Clark J. Radcliffe, Professor of Mechanical Engineering at Michigan State University; and Timothy L. Andresen, a
former engineer at Ford Motor Company and McDonnel-Douglas Corporation—in rebuttal of the declaration of Mr. Willemsen. Mr. Radcliffe stated, inter alia, that "the location of the electronic control" (Radcliffe Decl. at P15) in claim 4 "was a simple, elegant, and novel combination of features," (Radcliffe Decl. at P16) as opposed to the Rixon '593 patent's attachment of the electronic control to the assembly housing, which was both electrically and mechanically complex (Radcliffe Decl. at P17). Mr. Andresen also stated that the non-obviousness of claim 4 was reflected in Rixon's choice to mount the electronic control to the assembly housing instead of the assembly's support bracket. (Andresen Decl. at P5.) At the summary judgment stage of a proceeding, it is improper for a district court to make credibility determinations. See, e.g., Jones, 727 F.2d 1531. Therefore, by crediting KSR's expert declarant and discrediting the two declarants offered by Teleflex, the district court erred as a matter of law.

V.

In sum,

(1) We hold that, in granting summary judgment in favor of KSR, the district court erred as a matter of law by applying an incomplete teaching-suggestion-motivation test to its obviousness determination. The correct standard requires a court to make specific findings showing a teaching, suggestion, or motivation to combine prior art teachings in the particular manner claimed by the patent at issue.

(2) Under this standard, we hold that genuine issues of material fact exist as to whether a person of ordinary skill in the art would have been motivated, at the time the invention was made, to attach an electronic control to the support structure of the pedal assembly disclosed by the Asano patent.

(3) We consequently vacate the decision of the district court and remand the case for further proceedings on the issue of obviousness, and, if necessary, proceedings on the issues of infringement and damages.

Each party shall bear its own costs.
"Supreme Court Agrees to Hear Patent and Clean Air Act Cases"

*Legal Times*
June 27, 2006
Tony Mauro

The Supreme Court on Monday agreed to answer a crucial question that arises in virtually every patent application: When is an invention so obvious that it does not deserve a patent?

The question is posed in *KSR International v. Teleflex*, which could produce "the most important patent ruling in a decade," said Michael Barclay, a patent specialist at Wilson Sonsini Goodrich & Rosati. "I can hardly think of a patent case I've handled in 25 years where obviousness isn't an issue."

Teleflex sued KSR, a Canadian company, for patent infringement, claiming its patents on a gas-pedal design for trucks infringed on a Teleflex patent. KSR, in turn, said that Teleflex's patented design was so obvious that it should not have been given a patent. A district court judge sided with KSR, but the U.S. Court of Appeals for the Federal Circuit reversed.

On the issue of obviousness the federal circuit, which was created in 1982 to handle patent appeals, uses a test that asks whether "teaching, suggestion, or motivation" drawn from prior inventions would have led a person of ordinary skill to the claimed new invention. Critics say this test has no basis in the law and has made it too hard to prove obviousness, leading to the granting of questionable patents.

The standard poses "substantial obstacles" to proving obviousness and "unnecessarily sustains patents that would otherwise be subject to invalidation," Solicitor General Paul Clement told the Court in a brief urging the justices to take up the case. "It forecloses competitors from using the public storehouse of knowledge that should be freely available to all."

The KSR case is likely to draw interest from all factions in current disputes over patent and intellectual property law. Obviousness is often an issue in litigation over the validity of "business method" patents, for example.

* * *
WASHINGTON—The Supreme Court widened its fall docket yesterday, accepting a bevy of business-related cases that touch on issues varying from antitrust to global warming.

The case list underscores that the court, with two new Bush appointees, is ready to make its mark on economic issues as well as matters such as abortion.

The marquee case accepted involves regulation of so-called greenhouse gases believed by some to contribute to global climate change. Twelve states and several cities and environmental groups say the Bush administration has shirked its duty to regulate auto emissions thought to cause climate change.

Several automotive- and oil-producing states, along with industry groups, argue that the administration wasn't obliged to act on the issue. It should be "for the electorate to decide and not for the judiciary to decide," said Robin Conrad, senior vice president of the U.S. Chamber of Commerce's litigation arm.

In 2003, the Environmental Protection Agency reversed a Clinton administration finding and said the Clean Air Act doesn't grant it authority to regulate greenhouse gases. Even if it did, the agency said, regulation should be postponed until more is known about the health and environmental consequences. The plaintiffs, led by Massachusetts, claimed the agency misread the law and that scientific evidence has made clear that global warming has harmful effects.

The Clean Air Act directs the EPA administrator to set emission standards for pollutants from car engines that "in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Groups siding with the EPA, including the American Petroleum Institute and the Engine Manufacturers Association, have said carbon dioxide emissions aren't pollutants.

The EPA prevailed at the U.S. Court of Appeals for the District of Columbia, although the judges couldn't agree on the reason why. One found the agency could choose not to use authority granted under federal law, while another said Massachusetts and other plaintiffs lacked standing to sue for actions they deemed harmful to humanity at large.

(Massachusetts v. Environmental Protection Agency)

The court agreed to consider two cases concerning the scope of federal antitrust laws. In the first, the justices will determine how much evidence plaintiffs must present in conspiracy allegations to go forward with litigation. In a suit filed on behalf of customers since 1996, the plaintiff, represented by the class-action firm Milberg Weiss Bershad & Schulman LLP, alleged that telecom firms BellSouth Corp., Qwest Communications International Inc., SBC
(now AT&T Inc.) and Verizon Communications Inc. conspired to avoid competing in each other's territory, driving prices higher for their customers.

The Second U.S. Circuit Court of Appeals, in New York, found the plaintiff had shown enough to proceed to discovery—an often costly endeavor in which defendants can be compelled to turn over reams of records. Fearing that future plaintiffs could file frivolous claims to induce settlements, a host of corporate interests—including airline, credit card and wireless communications companies—asked the court to accept the case.

The other case concerns "predatory bidding," or the practice of buying raw goods at inflated prices to drive out smaller competitors. The plaintiff alleged that Weyerhaeuser Co., a leading hardwood manufacturer, paid a higher price and ordered more of a particular type of logs than necessary to run its business, thereby limiting supply and driving prices higher for competitors. The Ninth Circuit Court, in San Francisco, upheld an $80 million jury award for the plaintiff.

(Bell Atlantic v. Twombly; Weyerhaeuser v. Ross-Simmons Hardwood Lumber)

The justices also will review a dispute over gas-pedal designs to consider when an invention is too obvious to win protection in the U.S. patent system. The high court's decision to review the "obviousness" doctrine in patent law came in litigation between KSR International Co., a Canadian maker of gas pedals, and Teleflex Inc., an industrial engineering company that claims KSR violated several patents it owns.

The case is being watched by patent experts who are following a decision by the Washington-based Federal Circuit Court of Appeals, a special patent law court. The Federal Circuit in January 2005 made it harder to challenge patented inventions for being too obvious, ruling the challenger must prove existing "teaching, suggestion or motivation would have led a person of ordinary skill in the art" to come up with the invention. The high court hasn't reviewed patent obviousness since 1966 when it ruled in a case involving the John Deere Co., today known as Deere & Co.

(KSR International v. Teleflex)

Last week, the court ruled that employers could face liability for a host of actions that constitute retaliation against workers who file discrimination claims. Yesterday, it agreed to review how much back pay workers may seek when alleging employment discrimination under the 1964 Civil Rights Act.

Specifically, the justices will decide when the statute of limitations starts running on wage discrimination claims—when the employer made the payment decision or each time the worker receives a substandard paycheck.

(Ledbetter v. Goodyear Tire & Rubber)
A man "has a right to use his knife to cut his meat, a fork to hold it; may a patentee take from him the right to combine their use on the same subject?" -Thomas Jefferson

The order was potentially a big one for KSR International Co. General Motors Corp. (GM) wanted the Canadian auto parts maker to supply gas pedals for its 2003 Chevrolet and GMC light trucks and sport-utility vehicles. But not just any pedals. GM wanted adjustable ones that could move back and forth to accommodate drivers of different heights. And it wanted the pedals to send an electronic signal, rather than using a mechanical cable, to change the engine speed when a driver stepped on or off the accelerator.

Both features had been around the automobile industry for a number of years, so KSR set about designing a combination. Not so fast, warned a March, 2001, letter from Teleflex Inc. (TFX), a Limerick (Pa.) competitor that had gotten wind of KSR's discussions with GM. Teleflex claimed its patents covered all combinations of an adjustable pedal with an electronic sensor and that anyone else making them would be infringing. If KSR wanted to proceed, the letter said, it needed to pay Teleflex a royalty. Rejecting the demand, KSR sealed the deal with GM, which it still supplies.

Teleflex sued KSR, and the companies are now locked in litigation. KSR's defense is simple: U.S. law does not allow patents for inventions that are "obvious." Nothing could be more obvious, KSR says in court filings, than a combination of "preexisting, off-the-shelf components" that each perform "exactly the same function" for which they were originally designed. In essence, KSR's argument is that Teleflex may as well have patented the combination of the refrigerator and the light bulb. Rodger D. Young, Teleflex's attorney, counters: "The fact that Device A and Device B exist does not make it...obvious that they should be put together."

HIGH COURT INTEREST
KSR has asked the U.S. Supreme Court to weigh in. If it does, the gas pedal dispute will join a high court docket unusually rich in patent cases this term, with the collective potential for broadly reshaping current law. The justices have not taken such an interest in the area since 1965.

How to determine when an invention is "obvious" is one of the most critical and contentious issues in patent circles. Over the past two decades, critics say, the hurdle for passing the obviousness test has been steadily lowered, and the U.S. is now awash in a sea of junk patents. Some are just plain silly, such as a patent for "a method [of] exercising and entertaining cats" (basically teasing them with a laser pointer), or another for "an animal toy that a dog may carry in its mouth" (which not only sounds suspiciously like a stick but also looks like one in the patent drawings).

But many perceive a serious threat. A coalition of businesses, including Microsoft
business method covering every conceivable business operation, such as methods of billing clients, hiring employees, marketing products or service...or simply obtaining funding."

All this complicates day-to-day life for a range of businesses. Companies operating in patent-choked environments are at continual risk of tripping over someone else's intellectual property. Microsoft Corp. is now defending itself in 35 to 40 patent infringement suits simultaneously, and Cisco Systems Inc. faces seven. That in itself is a sign something is amiss, says Robert Barr, who was chief patent counsel for Cisco from January, 2000, to July, 2005.

Barr, who now teaches at the University of California at Berkeley School of Law, says it's too easy for engineers to inadvertently infringe patents just by doing their normal work. "That's not what the law is intended to do," he says. "There shouldn't be patents on things that people will just routinely invent." Barr adds that "the idea of the obviousness test is to root these things out."

Old Economy companies face similar trouble. Apparel maker VF Corp., for instance, regularly gets letters complaining it has infringed bra patents. "In the old days you would think of these things as the tinkering of a technician who knew his way around women's apparel...and wouldn't even think about getting a patent on it," says Peter Sullivan, the attorney who filed the brief in the KSR case on behalf of VF and others. "How many bra patents can you possibly have?"

Defeating even a dubious patent can take tremendous resources. After Storage Technology Corp. (MSFT) sued Cisco for patent infringement, it took Cisco six years
and $10 million to get a jury to declare last
June that StorageTek's patent was invalid. (StorageTek was purchased by Sun Microsystems Inc. (SUNW) a week before
the verdict.) Even before the trial, Cisco believed the disputed technology was
obsolete and no longer used by its
customers. But it still had its engineers
remove it from its routers because of the
potential for draconian damages or an
injunction if Cisco had lost.

DEFENSIVE PATENTING
Those kinds of litigation-driven business
decisions can waste resources and money.
So can another strategy known as defensive
patenting. To ward off claims of
infringement from others, companies pump
up their own patent portfolios. Cisco has
gone from obtaining a few hundred patents
annually to around 1,000. "A large part of
that investment is to assure that if someone
wants to assert patents against us, we will
have some countervailing tools," says Cisco
General Counsel Mark Chandler.

It's the patent world's equivalent of mutually
assured destruction. Instead of suing,
companies agree to license each other their
intellectual property. "A network router, a
golf club, a software program...a bra all
become more expensive as more and more
patent holders must be paid royalties," notes
the brief filed in the KSR case by Cisco and
others.

To many observers, one of the primary
culprits in this situation is the evisceration of
the obviousness test by the Federal Circuit
Court of Appeals. That has led to a flood of
low-quality patents being granted, and made
it particularly difficult to challenge a patent
in court on the ground of obviousness. In
2001, Microsoft settled a suit by
Priceline.com (PCLN) for infringing its
"name-your-price" auction patent. Yet to
this day, Andy Culbert, Microsoft's top in-
house patent litigation counsel, says the
Priceline patent is a prime example of an
obvious combination of two things that
already existed: reverse auctions and the
Internet.

KSR initially was able to persuade a court
that Teleflex's invention was obvious. After
Teleflex filed suit in federal court in Detroit,
Judge Lawrence P. Zatkoff considered
evidence from engineering experts on
whether combining an adjustable pedal with
an electronic sensor would have been
obvious to someone having skill in the area.
He concluded that it would and ruled on
summary judgment in December, 2003,
that Teleflex' patent was invalid. (Teleflex sold
its pedal unit to a private-equity group last
August. It now operates in Troy, Mich.,
under the name DriveSol Worldwide Inc.)

But in January, 2005, the Federal Circuit
Court of Appeals vacated Judge Zatkoff's
ruling. The court, which hears nearly all
patent appeals, said the judge had not
followed its rule for inventions based on a
combination of existing elements. That rule
says courts—and patent examiners—can't
reject an invention as obvious unless they
can point to specific references suggesting
the elements could be combined. Those
references are typically previous patents or
technical literature.

Defenders of the rule say it prevents
hindsight bias—the natural tendency of a
person to regard something as obvious once
she sees it—by requiring documented
evidence that an idea was easily within
grasp. KSR and others who oppose the rule
say it is contrary to guidelines set by the
Supreme Court, which last considered the
issue 40 years ago. And they say it doesn't square with how the world works.

Microsoft attorney Culbert notes that new technology emerges all the time that isn't written about in scientific journals or other published materials, particularly in fast-developing areas such as software. Other commentators have noted that, in many fields, what gets written down is precisely what isn't obvious, guaranteeing that what the Federal Circuit Court requires won't be found. The bottom line: Rulings rejecting patents on the basis of obviousness are rare, and massive overpatenting continues to be a thriving business.
A United States Federal Circuit Court has ruled that an automotive pedal system patent owned by Teleflex, Inc., headquartered in Plymouth, Mich., is valid in Teleflex's complaint against KSR International Co., based in Southfield, Mich.

In its ruling, the United States Court of Appeals for the Federal Circuit vacated a previous summary judgment that determined the patent was invalid and remanded the case to the district court for further proceedings.

The patent at issue, U.S. Patent No. 6,237,565 B1, described a product that combined an electronic throttle control (ETC) with an adjustable pedal system (APS). The patent was originally ruled as invalid by U.S. District Court (Eastern District of Michigan, Southern Division) Judge Lawrence P. Zatkoff for the reason that combining these two progressive technologies was deemed "obvious," as claimed by KSR.

However, Teleflex's attorney, Steven Susser, argued that combining the two technologies was not obvious as a matter of law because there was no clear and convincing evidence that there was a motivation to combine the two technologies. The Federal Circuit agreed that KSR had not demonstrated Teleflex's patent to be invalid as a matter of law.

ETC is a revolutionary method of delivering fuel to the car engine electronically as opposed to mechanically, while APS is a relatively new technology that allows a driver to adjust the position of the gas and brake pedals to suit his or her size and comfort.

Susser, shareholder with Southfield, Mich.-based Young & Susser, said, "The Federal Circuit here rejected a hindsight-based analysis and instead found that the combination of two ground-breaking automotive technologies was not necessarily obvious at the time of its conception."