The AIPLA Antitrust News

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Chair's Corner

Thank you to everyone who attended the Mid-Winter 2018 Meeting! The Antitrust Law, Copyright Law, and Standards and Open Source Committees hosted a rousing discussion of the impact of Open Source licenses on Copyright and Patent Rights.

We look forward to seeing those who can attend the Spring Meeting. In the coming weeks, we will also schedule a call to discuss the important work of each of the Subcommittees.

The Committee is plead to announce that Stephen Larson has taken on the responsibilities of Editor of the AIPLA Antitrust News. The Committee is grateful for the excellent work of Steve's longtime predecessor, Professor David Swanson of the Baylor University School of Law, who masterfully edited the Antitrust News for eight years!

Our current newsletter includes an interview of Former ITC Commissioner F. Scott Kieff. Professor Kieff recently left the ITC to return to George Washington University Law School. Professor Kieff discusses the dynamics and division between the FTC, DOJ, and the ITC. He also shares practice tips, discusses litigation trends, and explains the connection between economics, tariffs and the smash Broadway hit *Hamilton*.

Our newsletter also includes an article by Forrest McClellen and Stephen Larson regarding the Tenth Circuit's decision in *In re Cox Enterprises, Inc.* McClellen and Larson explain how *In re Cox* further erodes the per se tying doctrine and is the latest decision in a three-decade old split stemming from *Jefferson Parish*.

The Antitrust Committee publishes this newsletter three times a year. We welcome articles from regular as well as first-time contributors on any relevant topic. If you would like to contribute, we encourage you to contact Stephen Larson at Stephen.Larson@knobbe.com.

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AN INTERVIEW WITH FORMER ITC COMMISSIONER F. SCOTT KIEFF

F. Scott Keiff served as Commissioner of the U.S. International Trade Commission ("ITC") from 2013 to June 2017. He left the ITC to return to his academic posts at George Washington University Law School and as a senior fellow at Stanford University's Hoover Institution. The Committee thanks Vice Chair Dina Kallay for facilitating this interview.

AN: **Tell us a little bit about your career leading to your appointment at an ITC Commissioner?**

Kieff: After practicing law for several years for large firms in New York and Chicago and clerking for Judge Rich at the Federal Circuit, for the next fifteen years I was an academic who maintained a broad private sector docket working with wonderfully creative business people across all segments of our economy from biomedicine and high technology to aluminum, steel, manufacturing, finance, cyber, agriculture, arts, entertainment, and the environment. The substance of my work has been focused at the interface among antitrust, intellectual property, and trade. My private docket during the 15 years before I joined the ITC was split between serving as a neutral doing mediation, arbitration, and compliance monitoring, and as a strategic consultant on one side of a dispute by helping particular law firms and companies.

AN: **What struck you about the Commission that wasn't visible from the outside?**

Kieff: Many government officials seem to outsiders as very reserved and sometimes even unengaged in particular facets of a docket. That's very understandable given the important rules everyone follows to preserve and protect impartiality and fairness. Once I became a colleague on the inside I had so much fun learning from the many great professional colleagues I had at the ITC as they opened up about their diverse set of important insights and experiences.

AN: **What are the some of the hot topics the ITC is dealing with?**

Kieff: With Hamilton so popular on Broadway these days it's now easy to remind people that the political economy issues raised by tariffs at our borders have been a bundle of hot topics since the start of our country. For the first 100 years we financed the Federal Government on those – this was before the income tax – but it's basic economics that the more you charge for something the less you get of it. One of the first problems Hamilton had to tackle as Treasury Secretary was to figure out this dynamic interaction between quality and price and that's why he compiled his famous Report on Manufactures. That first 100 years brought immense political turmoil to the dynamics of tariffs including the Civil War. The Chairman of the Economics Department at Harvard at the time, Frank Taussig, proposed a model for an agency designed to de-politicize these issues as much as possible and it was first known as the Tariff Commission and later as the US ITC. Almost all of those issues remain hot topics at the ITC today, as they have long been and likely will be for years to come.

AN: **Isn't it odd that the ITC is dealing with competition while we also have two U.S. antitrust agencies?**

Kieff: I guess it depends on what you want a court or agency to do. It always struck me that orange juice and apple juice are both good and good for you. But I never recommend trying to squeeze an apple to get orange juice or an orange to get apple juice. Apples and oranges are different things and their juices are different, too. In courts and in the 337 docket at the ITC, the decision-makers are put into place with significant structural characteristics of the posts that foster political independence (at the ITC there's an even number of Commissioners and a Chair required by statute to rotate person and party every two years); and the interested commercial parties have the opportunity to fight directly against each other, testing facts and arguments with the ordinary trial lawyer set of tools including cross examination, rules of evidence, and procedure. In the more political branches of the government that do antitrust, including the Antitrust Division and the FTC (where there's an odd number of Commissioners usually with a majority backing up a Chair who often sits for most of a Presidential Administration), the practice is designed to be significantly more open to policy preferences of the Executive Branch.

AN: **Speaking of antitrust agencies – can you explain the dynamics and work division between the FTC, DOJ Antitrust Division and the ITC when it comes to unfair competition?**

Kieff: Both the FTC and ITC organic statutes speak in the same phraseology about unfair competition. And like the DOJ, both the FTC and ITC look to the common set of substantive antitrust laws. A key difference is that the ITC focuses on imports while the DOJ and FTC focus on conduct that's within the country.

AN: **Speaking of intellectual property and trade, last year administration announced a special 301 investigation of China for theft of U.S. IPR. How is the ITC involved in this, if at all? Do the ITC and USTR work together?**

Kieff: One large area of the ITC's statutory mission is for it to provide assistance – to conduct studies for and to in effect give consulting services to – three overseeing bodies: the USTR in its role as part of the White House, the Ways & Means Committee in the House of Representatives, and the Committee on Finance in the Senate. Throughout all of this work in those supporting roles, the ITC typically gathers detailed factual data, conducts extensive analysis including using dynamic computer-based models of the US economy, and describes actual and probable economic effects of particular aspects of real and contemplated actions and events. But the ITC does not take policy positions, including avoiding ultimate conclusions about how "good" or "bad" something is for our economy or society.

AN: **What advice do you have for private practitioners doing work in front of the ITC?**

Kieff: Practitioners and the companies they represent should bear in mind that different parts of our government operate differently. In the case of the ITC, different portions of the ITC's docket operate differently. Some parts are very much like or very dependent upon the parts of the government that respond to political influence and set policy-based agendas. At the ITC, this includes

most of the Title VII portion of the docket where the antidumping and countervailing duty investigations are handled, and where Congress and the White House have set in the statute a famously low threshold for injury determinations. In contrast, other parts of the ITC docket, including most famously its 337 docket, operate very much like commercial litigation in court where the legal standards are more in the middle and the factual records are developed and challenged through a full throated adversarial proceeding including cross examination of witnesses and the like. The more policy-based portions of the government require practitioner skills in government relations and can get powerful outcomes that are tied to particular political movements and moments in time. The more litigation-based portions of the government require practitioners skilled as trial lawyers, who can get powerful outcomes that transcend political movements and moments in time. Apples for apple juice. Oranges for orange juice.

AN: **What impact have you seen from implementation of the ITC's pilot program? Has it been successful in resolving investigations at the early stages?**

Kieff: The biggest takeaway from the ITC's 100-Day Pilot Program is that it demonstrates as only action can – and that words alone cannot – that the ITC is actually willing and able to take in information from stakeholders about how it can make improvements, to consider the good ideas and good motives associated with that information, and to then act on that input by rolling out pilot programs that attempt new procedures.

AN: **District court litigation has declined since the advent of post-grant challenges under the AIA. How has the ITC been impacted, if at all, by AIA proceedings?**

A: The flow of 337 cases does not seem to have been significantly impacted by the AIA proceedings themselves. At the same time, the observations some folks have made about how strong patents are after the AIA combined with the observations some folks have made about the substantive breadth of the ITC's 337 statute suggest that practitioners who do work with clients that might find themselves on one side or the other of a dispute arising under the patent laws, may see those disputes increasingly take on aspects of other sources of substantive law, such as trade secret, false advertising, or antitrust.

AN: **What steps can patent owners take to help the ITC and CBP (Customs and Border Protection) enforce exclusion orders?**

Kieff: Often it is best for practitioners to think ahead about how to enforce an ITC order – whether it's an exclusion order for Customs or a cease and desist order for a party – while still during the earlier phases of the dispute, when litigating how the actual harm is being caused and how the details of the orders are going to be ultimately written by the ITC.

AN: **Do you think the ITC should treat antitrust issues any differently than the federal courts, given the ITC's separate statutory mandate? Should the ITC require a strict showing of antitrust injury to the plaintiff, as in federal courts?**

Kieff: This is of course an open question pending before the ITC and one on which I sat as a Commissioner, participating in the full day of oral arguments we heard on 20 April 2017. As a result, I'll limit my remarks to just mentioning two thoughts. The first is that although oral arguments are not often conducted at the Commission level in the 337 docket, that particular event showcased the best of a good government approach to the exchange of ideas among the Commissioners in keeping with the Government in the Sunshine Act, and between the Commissioners and the parties, in keeping with the finest traditions of appellate review in ordinary commercial litigation and the Administrative Procedures Act. The second is that with respect to the merits of the ideas discussed, each party, counsel, including the OUII staff, and each Commissioner, struck me as speaking and listening in the finest traditions of a deliberative process that integrated the full spectrum of diverse perspectives. I look forward to seeing how those issues unfold over time.

AN: Tell us a little about what you will be doing now that you have left the ITC? What issues are of interest to you now?

Kieff: I'm delighted to return from government to again work on the practical problems and opportunities that companies face each day at the interface among antitrust, IP, and trade. I've returned to my academic posts at GW Law School and Stanford University's Hoover Institution as well as to my private sector work as a neutral doing mediation, arbitration, and compliance monitoring and as a lawyer for particular parties. For this private sector work, I was drawn to partner with the McKool Smith firm's fantastic team of trial lawyers adept at handling virtually any type of dispute in any forum, from district courts to the ITC and beyond, while offering entrepreneurial client solutions including innovative fee arrangements. At McKool Smith, my practice focuses on helping our business clients facing serious competitive or regulatory threats and opportunities to achieve sustainable real-world solutions through high-stakes litigations and investigations across a range of courts and agencies including the ITC.

IN RE COX ENTERPRISES: THE TENTH CIRCUIT CONTENDS WITH A THREE-DECADE OLD CIRCUIT SPLIT AND CHANGES ITS PER SE TYING DOCTRINE[1]

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Antitrust law applies per se rules to behavior that causes obvious anticompetitive harm.[2] For instance, a naked price restraint is a per se violation.[3] But the per se tying doctrine is different: "tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis."[4] Therefore, a plaintiff who pleads a per se tie must prove that a defendant has market power—in addition to all the other elements of the per se claim.[5]

In *In re Cox Enterprises, Inc.*,[6] the Tenth Circuit recently further eroded the per se tying doctrine and required a plaintiff to show "proof of actual or potential anticompetitive effects in the tied-product market."[7] The Tenth Circuit injected that requirement into the fourth element of its per se tying rule, that the tie affect a "not insubstantial" amount of commerce.[8] *In re Cox* is the latest decision in a circuit split that stems from the Supreme Court's *Jefferson Parish* decision.[9]

I. The Trial Court Proceedings

Richard Healy ("Healy") filed a class action alleging that Cox Communications ("Cox") committed a per se antitrust violation by tying its set-top boxes to its premium cable services.[10] Healy argued that Cox Communications ("Cox") forced subscribers to rent set-top boxes before they could access Cox's premium content services.[11] Cox bought the set-top boxes from third-party manufacturers and had few or no competitors in the market for leasing or selling set-top boxes to its cable subscribers.[12]

The Tenth Circuit's per se tying doctrine has four elements: "(1) two separate products are involved; (2) the sale or agreement to sell one product is conditioned on the purchase of the other; (3) the seller has sufficient economic power in the tying product market to enable it to restrain trade in the tied product market; and (4) a 'not insubstantial' amount of interstate

[1] By Forrest McClellen and Stephen Larson. Mr. McClellen is an associate in the San Francisco office and Mr. Larson is a partner in the Orange County office of Knobbe Martens LLP.

[2] *See Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344 (1982).

[3] *See National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109 (1984).

[4] *See id.* at 104 n.26.

[5] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984); *see also Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 31 (2006).

[6] 871 F.3d 1093, 1103 (10th Cir. 2017).

[7] *Id.* at 1104.

[8] *Id.*

[9] *See generally Jefferson Parish*, 466 U.S. at 2.

[10] *Id.* at 1093.

[11] *Id.*

[12] *Id.* at 1107–08.

commerce in the tied product is affected."[13] Healy proved these elements to a jury and won a $6.3 million verdict.[14]

The District Court overturned that verdict, holding that no reasonable jury could have found that Cox had foreclosed a substantial volume of commerce.[15] It reasoned that Healy could not have proven foreclosure because it did not show that Cox had actively interfered with another party's entry into the set-top box market.[16]

II. The Tenth Circuit Requires Anticompetitive Effects

On appeal, Healy argued that the requirement that a tie affect a "not insubstantial" amount of commerce simply refers to "the volume of sales affected by the tie."[17] Healy argued that he had met that element by showing that Cox had collected a non-de minimis amount of revenue—here, $200 million—from the set-top boxes during the class period.[18] The Tenth Circuit rejected this argument and held that the fourth element of the Tenth Circuit's test requires the plaintiff to show that the defendant's conduct had anticompetitive effects.[19]

The majority first examined two Supreme Court cases, *Fortner Enterprises* and *Jefferson Parish*.[20] The majority initially examined the foreclosure requirement in *Fortner Enterprises*: "the controlling consideration is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely de minimis, is foreclosed to competitors by the tie . . ."[21] The majority reasoned that *Jefferson Parish* had "[d]iscretely amend[ed] its approach from previous cases such as *Fortner* . . . [by] requir[ing] as a threshold matter a "substantial potential for impact on competition" before it would apply its per se rule to a tying arrangement."[22] Therefore, according to the majority, *Jefferson Parish* meant that a plaintiff had to show a likelihood of anti-competitive harm to make out a per se tying claim.[23]

The majority then examined how other circuit courts had treated the foreclosure requirement.[24] It observed that the "circuit courts generally recognize that a tie should not be condemned under the per se rule unless it has the potential to harm competition."[25] The majority identified a "growing trend" in which the circuit courts require a plaintiff to show a likelihood of anticompetitive harm.[26] The majority also cited its own prior decision in *Fox Motors*, where the Tenth Circuit had implicitly required a plaintiff to show anticompetitive

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[13] *Suture Express, Inc. v. Owens & Minor Distribution, Inc.*, 851 F.3d 1029, 1037 (10th Cir. 2017).

[14] Brief for Appellant at 3, *In re: Cox Enterprises, Inc.*, 871 F.3d 1093 (10th Cir. 2017) (Nos. 15-6218, 15-6222).

[15] *Id.* at 2.

[16] *Id.*

[17] Brief for Appellant at 5, *In re: Cox Enterprises, Inc.*, 871 F.3d 1093 (10th Cir. 2017) (Nos. 15-6218, 15-6222).

[18] *Id.* at 29.

[19] *In re: Cox Enterprises, Inc.*, 871 F.3d. at 1096.

[20] *Id.* at 1098.

[21] *Id.* (*citing Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 501 (1969)).

[22] *Id.* (*quoting Jefferson Parish*, 466 U.S. at 16).

[23] *Id.* at 1100.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 1101.

harm.[27] In *Fox Motors*, a Mazda distributor had refused to sell a popular car, the RX–7, to dealerships unless those dealerships first sold a certain number of a less popular car, the GLC.[28] The *Fox Motors* court held that this was not a per se tie, in part, because the dealerships did not produce evidence they would have purchased GLC type vehicles from other manufacturers.[29]

The *In re Cox* majority wove these precedents into a new Tenth Circuit rule: that "the fourth element—foreclosure—requires proof of actual or potential anticompetitive effects in the tied-product market."[30] The Tenth Circuit then upheld the District Court's grant of judgment notwithstanding the verdict.[31]

Judge Briscoe dissented.[32] She wrote: "per se claims, by their nature, focus on the *character* of the alleged anticompetitive conduct, not on the actual market effects that conduct may or may not have caused."[33] Asking whether Cox's conduct had an anticompetitive effect was inappropriate because the Tenth Circuit should have *presumed* an anticompetitive effect.[34] Judge Briscoe also challenged the majority's statement that *Jefferson Parish* had incorporated a threshold requirement of actual or potential anticompetitive effects: "[d]espite the majority's assertion that the Court modified its view of tying arrangements in *Jefferson Parish*, the elements of a tying claim have always been, and continue to be, as they are stated in *Jefferson Parish*."[35]

Healy petitioned the Tenth Circuit for *en banc* review, arguing that the Tenth Circuit panel had erroneously grafted a new requirement into the per se rule.[36] The Tenth Circuit denied Healy's petition.[37]

III. The Circuit Courts Continue to Be Split On Whether A Plaintiff Must Show Separate Proof of Anticompetitive Harm

Courts, including the Tenth Circuit, have grafted the requirement for anticompetitive harm onto their per se tying rules in response to competing commands in *Jefferson Parish*. *Jefferson Parish* explained that a tying arrangement is per se illegal if (1) there are separate, tied products and (2) the seller has sufficient market power to affect buyer behavior in the tied market.[38] But *Jefferson Parish* also wrote that courts should only condemn ties if those ties have a "substantial potential for impact on competition."[39] Those two statements

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[27] *See id.* at 1102 (citing *Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953, 955 (10th Cir. 1986)).

[28] *Fox Motors*, 806 F.3d at 956.

[29] *Id.* at 958.

[30] 871 F.3d at 1104.

[31] *Id.* at 1093.

[32] *Id.* at 1112 (Briscoe, J., dissenting).

[33] *Id.* at 1112–13 (Briscoe, J., dissenting) (emphasis in original).

[34] *Id.* (Briscoe, J., dissenting).

[35] *Id.* at 1117 n.2 (Briscoe, J., dissenting) (*citing Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 461–62 (1992) (repeating that a plaintiff who pleads a per se tie must prove that there are two products and that the defendant has market power in the tying market)).

[36] Petition for Rehearing *En Banc* at 1–2, *In re: Cox Enterprises, Inc.*, 871 F.3d 1093 (10th Cir. 2017) (Nos. 15-6218, 15-6222).

[37] *In re: Cox Enterprises, Inc.*, 871 F.3d 1093 (10th Cir. 2017), *rehearing en banc denied* (10th Cir. Nov. 2, 2017) (Nos. 15-6218, 15-6222).

[38] 466 U.S. at 13–14.

[39] *Id.* at 15.

present circuit courts with a choice: either presume there is anticompetitive harm if a plaintiff meets the elements of a per se tie or demand separate proof of anticompetitive harm.

The First, Second, Fifth, Sixth, Eleventh, and Federal Circuits require separate proof of anticompetitive harm.[40] In contrast, the Third, Fourth, Seventh, Eighth, Ninth, and D.C. Circuits appear to take the opposite view.[41] The latter circuits follow the reasoning explained in *Jefferson Parish*: "[w]hen the seller's share of the market is high, or when the seller offers a unique product that competitors are not able to offer, the Court has held that the likelihood that market power exists and is being used to restrain competition . . . [makes] per se condemnation appropriate."[42] In other words, a plaintiff has no burden to prove anticompetitive effects if the seller has market power because a court must then *presume* a likelihood of anticompetitive effects.[43] Complicating this circuit split, some circuit courts, such as the Seventh Circuit, moderate the per se rule by allowing defendants to rebut the presumption of anticompetitive effects by showing that no anticompetitive effects were possible.[44]

The Supreme Court has rejected multiple opportunities to resolve this

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[40] *See, e.g.*, *Wells Real Estate, Inc. v. Greater Lowell Bd. Of Realtors*, 850 F.2d 803, 815 (1st Cir. 1988); *Coniglio v. Highwood Services, Inc.*, 495 F.2d 1286, 1289 (2d Cir. 1974); *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321, 323 (5th Cir. 1974); *CTUnify, Inc. v. Nortel Networks, Inc.*, 115 F. App'x 831, 836 (6th Cir. 2004); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1503 (11th Cir. 1985); *U.S. Philips Corp. v. International Trade Comm'n*, 424 F.3d 1179, 1193–94 (Fed. Cir. 2005).

[41] *See, e.g.*, *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 80 n.2 (3d Cir. 2011); *Service & Training, Inc. v. Data General Corp.*, 963 F.2d 680, 683 (4th Cir. 1992); *Reifert v. South Cent. Wisconsin MLS Group*, 450 F.3d 312, 317 (7th Cir. 2006); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1498 (8th Cir. 1992); *Hirsh v. Martindale-Hubbel, Inc.*, 674 F.2d 1343, at 1347 n.16 (9th Cir. 1982), *contradicted by In re Webkinz Antitrust Litigation*, 2010 WL 4168845, at *2 (N.D. Cal. Oct. 20, 2010) (requiring a pernicious effect on competition); *United States v. Microsoft Corp.*, 253 F.3d 34, 85 (D.C. Cir. 2001).

[42] 466 U.S. at 17 (citations omitted). There is a caveat to this rule: after *Illinois Tool*, the fact that a defendant has a patent no longer necessarily means that the defendant also has market power. 547 U.S. at 43.

[43] *See Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 476 (3d Cir. 1992) ("the Supreme Court has told us to look at market power to see whether courts should *presume* economic harm and rule "per se" for plaintiffs . . . [d]irect inquiry into forcing or other harm to competition is what the "per se" analysis is supposed to obviate"); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1347 (9th Cir. 1984) ("a detailed analysis of competitive conditions in the tied market is inappropriate in a per se case . . . all that is required. . . is that a "substantial *volume* of commerce be foreclosed . . . "substantial volume" in this context means only an amount greater than *de minimis* . . ."") (emphasis in original); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir. 1978) ("Because the Supreme Court has repeatedly held that tying, if it fits within the Northern Pacific standard, is a per se violation, *we are not free to inquire* whether such tying in any given case injures market competition") (emphasis added).

[44] For example, in *Ohio-Sealy Mattress Mfg. v. Sealy, Inc.*, the Seventh Circuit "agree[d] that if a given tying arrangement has no potential to foreclose access to the tied product market, it does not exemplify the vice that led the Court to declare tying a per se Offense." 585 F.2d 821, 835 (7th Cir. 1978).

confusion. [45] Thus, *In re Cox's* new requirement of anticompetitive effects will likely remain the law in the Tenth Circuit for years to come. Plaintiffs in the Tenth Circuit should take care to plead actual or potential anticompetitive harm. Likewise, defendants should be sure to hold plaintiffs to their new burden.

[45] *See, e.g.*, *Reifert v. South Cent. Wisconsin MLS Corp.*, 549 U.S. 1265 (2007) (denying certiorari); *Princo Corp. v. U.S. Phillips Corp.*, 547 U.S. 1207 (2006) (denying certiorari); *Amerinet, Inc. v. Zerox Corp.*, 506 U.S. 1080 (1993) (denying certiorari); *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 560 U.S. 868 (1992) (denying certiorari); *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 488 U.S. 955 (1988) (denying certiorari); *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 475 U.S. 1107 (1986) (denying certiorari); *Hirsh v. Martindale-Hubbel, Inc.*, 459 U.S. 973 (1982) (denying certiorari).