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ANTITRUST SYMPOSIUM—INTRODUCTION: SO WHAT ELSE IS NEW?

*Daniel E. Lazaroff**

This issue of the *Loyola of Los Angeles Law Review* is dedicated to discussion and analysis of recent developments in federal antitrust law. Five student authors present their views regarding: (1) trends in merger enforcement under Section 7 of the Clayton Act;¹ (2) the current state of monopolization law under Section 2 of the Sherman Act;² (3) the law of horizontal restraints pursuant to Section 1 of the Sherman Act;³ (4) evolving Section 1 principles for vertical price and nonprice restraints;⁴ and (5) the modern view of the *Noerr-Pennington* and state action doctrines limiting application of substantive antitrust doctrine.⁵ My role in this symposium project consists of assisting the authors in the selection of their topics, guiding them in their research, and making suggestions on early drafts of their articles. They have been encouraged to provide their own original criticisms, insights, and suggestions for improving American antitrust policy. I will simply provide some brief introductory background and historical context as a prelude to the more elaborate analyses that follow.

The Supreme Court has characterized federal antitrust law as “the Magna Carta of free enterprise,”⁶ and “as important to the

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1. See Marleina Paz, *Almost But Not Quite Perfect: The Past, Present and Potential Future of Horizontal Merger Enforcement*, 45 LOY. L.A. L. REV. 1045 (2012).

2. See Diana De Leon, *The Judicial Contraction of Section 2 Doctrine*, 45 LOY. L.A. L. REV. 1105 (2012).

3. See Allen G. Haroutounian, *Shedding Light on the Federal Courts’ Treatment of Horizontal Restraints Under Section 1 of the Sherman Antitrust Act*, 45 LOY. L.A. L. REV. 1173 (2012).

4. See Nicole McGuire, *An Antitrust Narcotic: How the Rule of Reason Is Lulling Vertical Enforcement to Sleep*, 45 LOY. L.A. L. REV. 1225 (2012).

5. See Karen Roche, *Deference or Destruction? Reining in the Noerr-Pennington and State Action Doctrines*, 45 LOY. L.A. L. REV. 1295 (2012).

6. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

preservation of economic freedom . . . as the Bill of Rights is to the protection of our fundamental personal freedoms.”⁷ Yet, much like our experience with judicial constitutional interpretation of unclear and undefined terminology, the skeletal language of the Sherman and Clayton Acts has resulted in considerable fluctuation in statutory construction.⁸ There have been periods of expansive interpretation as well as more laissez-faire eras of judicial reluctance to interfere with private business practices. Antitrust enforcement policy in the Antitrust Division of the Department of Justice and the Federal Trade Commission is significantly affected by presidential elections because the incumbent chief executive will make the crucial appointments of our top antitrust officials. However, the ultimate decisions regarding proper application of the antitrust laws rests with the members of the federal judiciary. Most importantly, the Supreme Court may rein in aggressive antitrust enforcement efforts by reading the Sherman Act and Clayton Act language narrowly.⁹ In essence, this means that federal judges, appointed for life, may effectively frustrate both government and private efforts to enforce the antitrust statutes by clinging to precedent deemed undesirable and too narrow by the prospective plaintiffs. This may well reflect the posture of contemporary antitrust policy and doctrine.¹⁰

7. *Id.*

8. Phrases in the U.S. Constitution like “due process,” U.S. CONST. amend. XIV § 1, “equal protection,” *id.*, “regulate Commerce with foreign Nations and among the several States,” *id.* art. 1, § 8, cl. 3, “establishment of religion,” *id.* amend. I, “abridging the freedom of speech,” *id.*, “unreasonable searches and seizures,” *id.* amend. IV, and “cruel and unusual punishment” *id.* amend. VIII, have provoked a seemingly endless array of lawsuits requiring courts to decide the content and scope of these terms. Similarly, because Section 1 of the Sherman Act proscribes “every contract, combination . . . or conspiracy in restraint of trade,” Section 2 makes it illegal to “monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize,” Sherman Act §§ 1–2, 15 U.S.C. §§ 1–2 (2006), and Section 7 of the Clayton Act can be utilized to attack mergers that “may . . . substantially lessen competition, or tend to create a monopoly,” Clayton Act § 7, 15 U.S.C. § 14 (2006), courts must necessarily flesh out the contours of this vague and uncertain statutory language.

9. Of course, Congress could respond to Supreme Court decisions with which it disagrees by enacting amendments to the antitrust statutes.

10. The current Supreme Court has been relatively conservative on antitrust issues. Of equal importance is the fact that the lower federal courts are now dominated by Republican appointees and are generally disinclined to view antitrust doctrine broadly in a pro-plaintiff manner. *See, e.g.*, Kimberly Atkins, *Bush Touts Legacy of Appointing Conservative Judges*, DC DICTA, LAWYERS USA (Oct. 6, 2008, 3:41 PM), <http://lawyersusadicta.wordpress.com/2008/10/06/bush-touts-legacy-of-appointing-conservative-judges/> (commenting on Senate confirmation of 61 circuit court and 261 district court Bush nominees); Charlie Savage, *Appeals Court Pushed to Right by*

I. THE OBAMA ADMINISTRATION'S ANTITRUST AGENDA

When Barack Obama campaigned for the presidency, he said relatively little about how antitrust policy would be affected if he were elected. Obviously, the American people were more receptive to a candidate's commentary on jobs and the economy and U.S. involvement in Iraq and Afghanistan. Still, the future president did signal that he would reverse the previous administration's deferential, probusiness approach to antitrust enforcement. In May 2008, he announced that he would pursue a "vigorous antitrust policy," and singled out the media industry as one that needed monitoring because of increasing consolidation.¹¹ After winning the November 2008 election, the new Obama Administration quickly demonstrated that there was a "new sheriff" in town.

On May 11, 2009, Christine A. Varney, the new Assistant Attorney General in charge of the Antitrust Division, delivered a speech to the Center for American Progress.¹² She addressed three issues: (1) antitrust enforcement in a distressed economy; (2) Section 2 and single-firm conduct; and (3) perceived challenges "going forward."¹³ After reviewing the decline of federal antitrust enforcement after World War I and the Great Depression,¹⁴ Varney concluded that "there is no adequate substitute for a competitive market, particularly during times of economic distress."¹⁵ Maintenance of competitive markets requires "vigorous antitrust enforcement" even in times of economic crisis.¹⁶ With respect to

Bush Choices, N.Y. TIMES (Oct. 28, 2008), <http://www.nytimes.com/2008/10/29/us/29judges.html?pagewanted=all> (noting conservative judicial appointments); Michael Waldman, *A Brewing Court Battle*, THE DAILY BEAST (Mar. 13, 2009, 8:00 PM), <http://www.thedailybeast.com/newsweek/2009/03/13> (explaining that fourteen consecutive antitrust cases were won by business defendants in the Supreme Court).

11. See Katrina vanden Heuvel, *Obama Would Pursue Antitrust Policies*, CBS NEWS (May 19, 2008, 10:51 AM), http://www.cbsnews.com/2100-215_162-4107071.html.

12. See Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Vigorous Antitrust Enforcement in this Challenging Era* (May 11, 2009), available at <http://www.justice.gov/atr/public/speeches/245777.pdf>.

13. *Id.* at 1-2.

14. *Id.* at 2-4.

15. *Id.* at 4; see generally Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557 (2010) (discussing antitrust during a recession).

16. Varney, *supra* note 12, at 4.

Section 2 enforcement, the antitrust chief formally withdrew a Section 2 report issued during the Bush Administration in September 2008 because it did not sufficiently protect consumer welfare and gave too much deference to business decisions by dominant firms.¹⁷ With respect to Section 1 of the Sherman Act, Varney promised continued aggressive criminal prosecutions for classic cartel conduct.¹⁸ Interestingly, the speech also indicated that the Antitrust Division would also “push forward with merger and non-merger investigations,”¹⁹ including “vertical theories and other new areas of civil enforcement.”²⁰ Finally, the assistant attorney general urged that antitrust authorities “remain at the forefront of the dialogue, economic learning, and the development of legal doctrine.”²¹ This requires consideration of the overall state of competition in specific industries, as well as market trends and dynamics, so that the ultimate focus of economic discourse reverts “back to the basic and practical principle: when markets are competitive, the consumer ‘wins.’”²² In sum, the Varney speech promised a revitalization of strong oversight and enforcement by federal authorities covering the entire antitrust landscape.²³

Prior to stepping down from her post on August 5, 2011, Varney delivered another address to the Center for American Progress chronicling antitrust enforcement efforts during her tenure.²⁴ In the area of merger enforcement, she explained that some mergers were

17. *Id.* at 7–9. The DOJ report was titled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*. Varney noted that the Bush Administration’s stance “went too far in evaluating the importance of preserving possible efficiencies and understates the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry. The ultimate result is that consumers are harmed through higher prices, reduced product variety, and slower innovation.” *Id.* at 7; see generally Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90 B.U. L. REV. 1611 (2010) (discussing expansion of Section 2 enforcement in innovation-intensive markets but also urging caution against overly aggressive enforcement efforts).

18. Varney, *supra* note 12, at 14–15.

19. *Id.* at 16.

20. *Id.*

21. *Id.* at 17.

22. *Id.*

23. See *id.* at 19; *infra* notes 60–67, 85–92 and accompanying text for discussion of antitrust enforcement by the current administration.

24. See Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep’t of Justice, Vigorously Enforcing the Antitrust Law in the Obama Administration (July 12, 2011), available at <http://www.justice.gov/atr/public/speeches/273753.pdf>.

deterred or significantly altered to ameliorate potential anticompetitive effects.²⁵ With respect to civil nonmerger enforcement, Varney noted that the Antitrust Division brought “its first case since 1999 that challenges a monopolist with engaging in traditional anticompetitive unilateral conduct.”²⁶ Section 1 challenges were asserted against Blue Cross Blue Shield of Michigan’s use of anticompetitive most-favored-nation clauses and American Express’s business practices.²⁷ The antitrust chief also recited statistics reflecting serious criminal enforcement under Section 1 for price-fixing, bid rigging, and market-allocation cartels that raised prices, reduced output, and stifled innovation.²⁸ Varney

25. *Id.* at 2–5. Varney specifically identified the Live Nation/Ticketmaster, NBCU/Comcast and Google/ITA deals as examples of transactions where consent decrees modified merger terms to address concerns about vertical and horizontal effects. *Id.* at 5. She noted that the government is not limited to a “binary choice” of either allowing a merger to proceed or blocking it entirely. *Id.* Recently, the Department of Justice allowed a \$345 million acquisition in the parking-garage market to go forward after requiring significant divestiture of the competitors’ facilities. *Combination of Parking Garages Conditionally Approved*, Trade Reg. Rep. (CCH) No. 1276, at 2 (Oct. 3, 2012).

26. *Id.* at 6. The case was filed against a dominant health care provider who allegedly maintained a monopoly in hospital services by utilizing de facto exclusive-dealing contracts. *See* Complaint at 1–2, *United States v. United Reg’l Health Care Sys.*, No. 7:11CV00030 (N. D. Tex. Sept. 29, 2011). Whether the use of contractual arrangements with third parties to preclude competition is properly characterized as “unilateral” is something one could debate. This case was settled when the defendant consented to refrain from the objectionable conduct. *See* Press Release, Dep’t of Justice, Office of Pub. Affairs, Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers (Feb. 25, 2011).

27. Varney, *supra* note 24, at 6–7; *see also* Complaint at 1–2, *United States v. Blue Cross Blue Shield of Mich.*, 809 F. Supp. 2d 665 (E.D. Mich. 2011) (No. 10-14155); Complaint, *United States v. Am. Express Co.*, No. 1:10-cv-04496-NGG-CLP (E.D.N.Y. Oct. 4, 2010). More recently, the government sued Apple, Inc. and five e-book publishers for alleged price-fixing. Complaint, *United States v. Apple, Inc.*, No. 1:12-cv-02826-UA (S.D.N.Y. Apr. 11, 2012). A settlement with three of the publisher defendants was approved by a federal judge in early September 2012. Chad Bray & Jeffrey A. Trachtenberg, *E-Books Pricing Settlement Approved*, WALL ST. J., Sep. 12, 2012, at B3. The Department of Justice also recently settled a Section 1 case challenging Verizon Wireless’s acquisition of wireless spectrum licenses from a consortium of four cable companies and the subsequent transfer of a large amount of that spectrum to T-Mobile USA. *Verizon, Cable Companies Agree to Revise Marketing Agreements*, Trade Reg. Rep. (CCH) No. 1270, at 1–3 (Aug. 22, 2012).

28. Varney, *supra* note 24, at 7. Criminal enforcement in fiscal year 2010 consisted of the filing of sixty criminal cases with fines exceeding \$550 million. Twenty-nine individual violators received a total of more than twenty-six thousand days in prison. This represented an increase to 76 percent of sentenced defendants punished with jail time over only 37 percent in the 1990s. *Id.* More recently, under the leadership of Sharis A. Pozen (who replaced Varney), substantial fines were assessed in connection with guilty pleas regarding price-fixing and bid rigging in the automobile parts industry. *See Auto Parts Industry Probe Yields Additional \$548 Million in Fines*, Trade Reg. Rep. Online (CCH) No. 1241, at 2 (Feb. 1, 2012). In April 2012, Ms. Pozen

spoke extensively about the Antitrust Division's dedication to "competition advocacy," including the filing of amicus briefs when important cases arise without the government as a party plaintiff.²⁹ Importantly, the outgoing division head recognized that several recent Supreme Court precedents could conceivably create major roadblocks for ongoing vigorous antitrust enforcement, although she argued for narrow construction of these decisions.³⁰

II. OBSTACLES TO RENEWED ANTITRUST ENFORCEMENT

Despite the announced intentions of the Obama Administration to reinvigorate federal antitrust enforcement, the Department of Justice and Federal Trade Commission appointees faced significant challenges in their attempts to become more aggressive monitors of allegedly anticompetitive business practices. For several decades, an increasingly conservative Supreme Court (and lower federal courts) had made it more difficult for the government and private plaintiffs

stepped down and was replaced by Acting Assistant Attorney General Joseph Wayland. Since his appointment, several antitrust suits have been filed against major companies, including Goodrich and Verizon. See *Antitrust Division Case Filings Index*, U.S. DEP'T OF JUST., <http://www.justice.gov/atr/cases/index.html#page=page-1> (last visited Oct. 20, 2012). On September 20, 2012 a federal district court in San Francisco imposed a \$500 million fine on AU Optronics Corporation in connection with a price-fixing conspiracy regarding thin-film transistor LCD panels. Two high level executives received three-year prison terms and \$200,000 fines. *AU Optronics Fined \$500 Million for Fixing Prices of TFT-LCD Panels*, Trade Reg. Rep., (CCH) No. 1275, at 1–2 (Sept. 26, 2012). Recently, Mr. Wayland stepped down and President Obama's nomination of William J. Baer as antitrust chief has been stalled. See *Acting Antitrust Chief Stepping Down*, Trade Reg. Rep., (CCH) No. 1282, at 1 (Nov. 14, 2012). In the interim, Renata B. Hesse will serve as an acting assistant attorney general. See *Hesse Appointed Acting Chief of Antitrust Division*, Trade Reg. Rep., (CCH) No. 1283, at 1 (Nov. 20, 2012).

29. Varney, *supra* note 24, at 9–15.

30. *Id.* at 15–21. See *infra* notes 81–84 and accompanying text for a discussion of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), and *Pacific Bell Telephone, Co. v. Linkline Communications, Inc.*, 555 U.S. 438 (2009), and the impediments these cases create for prospective plaintiffs. See also De Leon, *supra* note 2 (discussing cases); Jon Leibowitz, Comm'r Fed. Trade Comm'n, Statement of Jon Leibowitz, Nomination for a Second Term as Commissioner, Federal Trade Commission (Nov. 15, 2011), available at <http://www.ftc.gov/speeches/leibowitz/111115leibowitzstatement.pdf> (noting the FTC's rigorous scrutiny of mergers in the health care industry and challenges to "anticompetitive restrictions on health care goods and services").

to succeed in antitrust litigation under the Sherman and Clayton Acts.³¹

A. *Section 1 of the Sherman Act*

Both horizontal and vertical restraint jurisprudence over the last thirty-five years have transformed the precedents from a strong per se approach into a fact-intensive, case-by-case, rule of reason methodology. In the context of horizontal restraints, Supreme Court decisions in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,³² *NCAA v. Board of Regents*,³³ and *California Dental Ass'n v. FTC*³⁴ have muddied the distinction between the per se rule and the rule of reason doctrine, leaving uncertain when the per se rule can be utilized except in the most “plain vanilla” cases of naked horizontal price-fixing or territorial/customer division. Equally uncertain are the appropriate situations for application of the “quick

31. See Daniel A. Crane, *Obama's Antitrust Agenda*, REG., Fall 2009, at 16 (discussing obstacles to antitrust enforcement in Congress and the courts). Although it is undeniable that the current DOJ and FTC have stepped up antitrust scrutiny in the post-Bush era, criticisms continue that even more aggressive measures are necessary. See DAVID A. BALTO, CENTER FOR AMERICAN PROGRESS, REINVIGORATING ANTITRUST ENFORCEMENT: THE OBAMA ADMINISTRATION'S PROGRESSIVE DIRECTION ON COMPETITION LAW AND POLICY IN CHALLENGING ECONOMIC TIMES 30 (July 2011), available at http://www.americanprogress.org/issues/2011/07/pdf/antitrust_enforcement.pdf (approving of enforcement efforts but arguing that “there is definitely more to be done” and offering suggestions for improvement); Ben Protess & Michael J. De La Merced, *U.S. Rolls Dice with AT&T Antitrust Move*, INT'L HERALD TRIB., Sept. 2, 2011, at 18 (noting that the DOJ has “taken flak” for not stopping more mergers and agreeing to only minor compromises by companies proposing takeovers); Jia Lynn Yang, *Obama's Weak Antitrust Enforcement Similar to Bush*, WASH. POST, Sept. 8, 2010, at A1 (asserting that Obama has used “tough rhetoric” but “has shown a certain reluctance to radically reshape industries”); Michael Bobelian, *Uptick in Antitrust Enforcement Falls Short of Obama's Promises*, FORBES (Feb. 14, 2012, 2:43 PM), <http://www.forbes.com/sites/michaelbobelian/2012/02/14/uptick-in-antitrust-enforcement-falls-short-of-obamas-promises/> (arguing that antitrust enforcement “has increased modestly in volume and vigor” but has “fallen way short of the rhetoric of the president's campaign”); Martha Hamilton, *Antitrust Enforcement Has Picked Up*, TAMPA BAY TIMES POLITIFACT.COM, (Jan. 17, 2012), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/395/strengthen-antitrust-enforcement/> (noting some academic criticism of the modesty of governmental antitrust efforts). More recently, one academic commentator noted again that Obama Administration antitrust enforcement “looks much like enforcement under the Bush Administration.” Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 13 (2012), available at <http://www.stanfordlawreview.org/sites/default/files/online/articles/Crane-65-SLRO-41.pdf>.

32. 441 U.S. 1 (1979).

33. 468 U.S. 85 (1984).

34. 526 U.S. 756 (1999).

look” rule of reason when neither the per se rule nor full-blown rule of reason is deemed the correct judicial approach.³⁵ The Court’s decision in *American Needle, Inc. v. National Football League*,³⁶ noted primarily for concluding that the NFL is not a single entity for Section 1 purposes, also complicated matters by approving a “flexible [r]ule of [r]eason” analysis.³⁷

The role of the ancillary restraints doctrine in rule of reason analysis is also muddled. In *Texaco Inc. v. Dagher*,³⁸ the Court concluded that a joint venture’s decision to set a single price for gasoline produced by the two participants was appropriate for full-blown rule of reason treatment rather than either per se or quick-look analysis.³⁹ Justice Thomas opined that this was not an ancillary restraint case because the price agreement involved the “core activity” of the venture, but he nevertheless called the challenged restraint “clearly ancillary to the sale of its own products.”⁴⁰ This further confused questions about the definition of “ancillary” and the proper context for invoking the rule of reason in ancillary restraint

35. The opinion of Justice Souter in *California Dental Ass’n v. FTC*, 526 U.S. at 779–81, emphasized that there is often no bright line separating rule of reason and per se analysis and called for “a less quick look” and a more “sedulous” approach to advertising restrictions affecting competing dentists. *Id.* at 781. This suggests even further variations on the traditional rule of reason/per se dichotomy. See *Gen. Leaseways, Inc. v. Nat’l Truck Leasing Ass’n*, 744 F.2d 588, 595 (7th Cir. 1984) (Judge Posner taking a “quick look” to find that a horizontal territorial division was a “per se violation”); Haroutounian, *supra* note 3, at 1206–15 (discussing propriety of recent cases of quick look or full-blow rule of reason). For a recent application of the “quick look,” see *In re K-Dur Antitrust Litigation*, 686 F.3d 197 (3d Cir. 2012) (assessing validity of reverse payment settlements between patent holders and would-be generic competitors). The Supreme Court has now granted certiorari in *FTC v. Watson Pharmaceuticals*, 677 F.3d 1298 (11th Cir.), *cert. granted*, 2012 U.S. LEXIS 9415 (Dec. 7, 2012), to resolve a conflict in the circuits regarding the “pay for delay” issues raised in the *K-Dur* case. This promises to be an important decision in determining the interaction of federal antitrust and patent law.

36. 130 S. Ct. 2201 (2010).

37. *Id.* at 2216. This prompted commentary suggesting that the Court was endorsing a defendant’s “quick look” approach to Section 1. James A. Keyte, *American Needle: A New Quick Look for Joint Ventures*, 25 ANTITRUST 48, 48 (2010). The contours of such a methodology are unclear, and how it might differ from full-blown rule of reason with a heavy burden on plaintiffs to come forward with proof of anticompetitive effects in well-defined markets also appears uncertain. See Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 LOY. CONSUMER L. REV. 15 (2009) (discussing “infirmities” of the rule of reason under rule of law principles); Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375 (2009).

38. 547 U.S. 1 (2006).

39. *Id.* at 7–8.

40. *Id.* at 8.

cases.⁴¹ If “core” restraints can be clearly defined and distinguished from “noncore” restrictions, and if they are subject to rule of reason scrutiny, how will this differ from rule of reason analysis applicable to “ancillary” restrictions? Are courts and commentators conflating the ancillarity issue with the question of reasonableness by deeming some restraints that accompany collaborative activity as too far removed from the purpose of the venture to be characterized as “ancillary”? Should courts not view as ancillary any restraint accompanying legitimate joint-venture activity and use the flexibility of the rule of reason to then determine if a quick look will suffice or whether more fact-intensive analysis is required? Alternatively, should courts determine that some allegedly ancillary restraints are so clearly unnecessary as to preclude application of any form of rule of reason doctrine? Does this uncertainty about what is “core” and what is “ancillary” unnecessarily further complicate antitrust doctrine and provide insufficient guidance to litigants and the courts?⁴²

Similarly, the law of vertical restraints under Section 1 has made a one-hundred-eighty degree turn in a relatively short period of time. In the area of vertical nonprice restraints, the per se rule articulated

41. See Haroutounian, *supra* note 3, at 1206–15.

42. For a good discussion of the ancillary restraints doctrine, see Gregory J. Werden, *Rule of Reason v. Per Se: Where Are the Boundaries Now?*, 54 A.B.A. SEC. ANTITRUST L. 1 (2006) (discussing definitions for ancillary and collateral restraints and making suggestions for doctrinal improvement). See also Haroutounian, *supra* note 3, at 1206–10 (citing numerous authorities). In the Antitrust Guidelines for Collaborations Among Competitors (2000), the FTC and DOJ do not expressly endorse the ancillary restraints approach to horizontal agreements. However, in section 1.2 of the guidelines, the enforcement agencies note that:

Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.

FED. TRADE COMM’N & U.S. DEP’T. OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 4 (2000). Whether the per se rule of *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), should finally be expressly overruled as it applies to ancillary, intrabrand restraints is also a question validly raised by the relevant authorities. Haroutounian, *supra* note 3, at 1206–10. Unlike naked agreements by competitors simply to allocate territories and/or customers, the *Topco* facts involved a cooperative venture by small and medium-sized firms to compete with larger rivals. It is difficult to see how the per se rule should reach that type of arrangement in light of the decisions in cases like *BMI* and *NCAA* and the principles articulated in the guidelines. Yet, *Topco* is cited with approval in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49–50 (1990), years after the decisions in *BMI* and *NCAA*.

in *United States v. Arnold, Schwinn & Co.*⁴³ was overruled in *Continental T. V., Inc. v. GTE Sylvania Inc.*⁴⁴ Consequently, all vertical restraints on territories and customers must now be tested by the rule of reason, requiring proof of the normal indicia of unreasonableness, such as market power and anticompetitive effects, and consideration of offsetting procompetitive virtues. Some would argue that *Sylvania* has essentially changed a per se illegal area of antitrust conduct into a de facto per se lawful category.⁴⁵ Whether interbrand competition will always be sufficient to protect consumers may be questioned,⁴⁶ but intrabrand restraint without significant market power should not ordinarily permit exploitation of consumers.

More dramatically, the Supreme Court has followed a similar path with respect to vertical price restraints. The per se illegality of vertical price-fixing dates back to the 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁴⁷ In 1997, in *State Oil Co. v. Khan*,⁴⁸ the Court eroded *Dr. Miles* by deciding that it should not apply to vertical *maximum* price-fixing. The other shoe dropped in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,⁴⁹ when the Court flatly overruled *Dr. Miles* and concluded in a 5–4 decision that all vertical price restraints should be subject to rule of reason analysis. The doctrine of stare decisis did not dissuade the majority from finishing the task of moving all vertical restraint cases out of the per se category and into the rule of reason regime. Some would argue that these decisions underestimate the value of intrabrand competition in protecting consumers, and others would suggest that the Court is also improperly ignoring stare decisis. More importantly, *Leegin* may profess too much confidence in the ability of litigants

43. 388 U.S. 365 (1967), *overruled by* *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

44. 433 U.S. 36 (1977).

45. See Avishalom Tor & William J. Rinner, *Behavioral Antitrust: A New Approach to the Rule of Reason After Leegin*, 2011 U. ILL. L. REV. 805, 862 (2011); McGuire, *supra* note 4, at 1248.

46. See McGuire, *supra* note 4 at 1234–37.

47. 220 U.S. 373 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

48. 522 U.S. 3 (1997).

49. 551 U.S. 877 (2007).

and courts to pursue allegedly vertical restraints when such restraints are also disguising or facilitating horizontal cartelization at the manufacturer or retailer level. Although such restraints remain per se illegal as naked, nonancillary arrangements, the difficulties of pleading and proving an inferable horizontal conspiracy are formidable.⁵⁰ Even if plaintiffs can overcome the heightened pleading demands of *Twombly*, they must also sufficiently plead and prove “plus factors” beyond mere conscious parallelism by competitors to establish a conspiracy through circumstantial evidence.⁵¹ Absent any inferable agreement, no per se violation for price-fixing or territorial/customer division (or any other Section 1 violation) can be established.⁵² Often, evidence required to succeed will require considerable discovery, but *Twombly* may facilitate

50. See McGuire, *supra* note 4, at 8, 1247–83, for a discussion of the lack of success in post-*Leegin* cases and the effects of *Twombly*. See also De Leon, *supra* note 2, at 1153–59 (commenting on *Twombly* in the Section 2 context).

51. See McGuire, *supra* note 4, at 1251–52.

52. See, e.g., *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 227–30 (3d Cir. 2011) (affirming dismissal of complaint for failure to allege conspiracy sufficiently); *White v. R.M. Packer Co.*, 635 F.3d 571, 575, 590 (1st Cir. 2011) (affirming summary judgment for defendants in conscious parallelism case); *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 898, 903–11 (6th Cir. 2009) (affirming dismissal of complaint alleging conspiracy to fix and eliminate travel agent commissions); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1033–38 (8th Cir. 2000) (en banc) (affirming summary judgment for defendants charged with horizontal price-fixing based on interfirm communications and alleged actions against self-interest, and rejecting expert testimony offered to support inference of agreement); *In re Nat'l Ass'n of Music Merchs.*, 2012 U.S. Dist. LEXIS (S.D. Cal. Aug. 20, 2012) (dismissing action for failure to sufficiently allege price-fixing claim); *Evergreen Partnering Grp., Inc. v. Pactiv Corp.*, 2012 U.S. Dist. LEXIS (D. Mass. June 7, 2012) (granting motion to dismiss in refusal to deal case when *Twombly* pleading standard not met); *Superior Offshore Int'l, Inc. v. Bristow Grp. Inc.*, 738 F. Supp. 2d 505, 517 (D. Del. 2010) (granting dismissal in helicopter price increase case). This is not to say that plaintiffs may never prevail based on circumstantial evidence. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 225, 232 (1939) (affirming finding of horizontal agreement by film distributors based on plus factors); *Minn-Chem., Inc. v. Agrium, Inc.*, 683 F.3d 845, 859–60 (7th Cir. 2012) (finding complaint sufficient on issue of concerted action and meeting *Twombly* pleading standard); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 336–48 (3d Cir. 2010) (reversing dismissal of complaint on bid rigging claims); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 666 (7th Cir. 2002) (reversing summary judgment for defendants in price-fixing case based on circumstantial evidence); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000) (affirming FTC finding of horizontal agreement among toy retailers); *Trueposition, Inc. v. LM Ericsson Tel. Co.*, 2012 U.S. Dist. LEXIS 117744 (E.D. Pa. Aug. 21, 2012) (upholding complaint because of “plausible” allegations of conspiracy); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 997–1004 (N.D. Ill. 2011) (finding a conspiracy plausibly alleged under the *Twombly* standard); *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 637, 641–43 (E.D. Pa. 2010) (determining that the Plaintiff sufficiently alleged plus factors).

dismissals at the pleading stage before sufficient pretrial information gathering may occur. Given earlier concerns in the jurisprudence of price restraints about the use of seemingly vertical restrictions to assist horizontal cartelization, legitimate concerns are created by the result in *Leegin*.⁵³

B. Section 2 of the Sherman Act

Although the Supreme Court has not been as direct in discarding existing doctrine regarding monopolization under Section 2, its decisions in this area parallel the modern Section 1 jurisprudence by narrowing considerably the scope of conduct by dominant firms that will be deemed illegal monopolization or an attempt to monopolize. Its decisions in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,⁵⁴ regarding predatory price cutting, and *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,⁵⁵ dealing with predatory bidding, make it extremely difficult to base Section 2 claims on these allegedly exclusionary practices. Similarly, the Court's decisions in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*⁵⁶ and *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,⁵⁷ severely limit an antitrust plaintiff's ability to predicate a Section 2 claim on a unilateral refusal to deal. Even with the Obama Administration's announced policy of vigorous Section 2 enforcement, these recent developments could present significant obstacles for antitrust officials.⁵⁸ Although there is legitimate concern that overzealous Section 2 enforcement could produce "false positives" by deterring innovation and other procompetitive conduct by monopolists, weak or nonexistent enforcement could generate "false negatives" with resulting harm to competition and consumer

53. Efforts in Congress to legislatively overrule *Leegin* are pending. See, e.g., Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011) (introduced by Senator Kohl). Some states continue to make vertical price-fixing illegal under state antitrust laws. See Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, THE ANTITRUST SOURCE, Oct. 2009, at 1, 1–7, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Oct09_FullSource.authcheckdam.pdf.

54. 509 U.S. 209 (1993).

55. 549 U.S. 312 (2007).

56. 540 U.S. 398 (2004).

57. 555 U.S. 438 (2009).

58. See extensive discussion in De Leon, *supra* note 2, at 1159–61.

welfare.⁵⁹ The Obama Administration's withdrawal of the Bush antitrust policy regarding monopolization is a step toward more aggressive enforcement, but the newer doctrine must be confronted.

C. Section 7 of the Clayton Act

There has not been a Supreme Court decision interpreting the substance of Section 7 since *United States v. General Dynamics Corp.*⁶⁰ in 1974. Since that decision, the Department of Justice and the Federal Trade Commission have revised their Joint Horizontal Merger Guidelines in 1982, 1984, 1992, and 2010.⁶¹ The 2010 revisions are designed to expand on the analytical techniques previously utilized by the enforcement agencies to protect consumer welfare threatened by some mergers between competitors.⁶² The new guidelines de-emphasize reliance on market definition to some degree and suggest that other, more direct evidence may accurately predict the competitive effects of a particular merger.⁶³ Especially important is the focus on potential reductions of innovation⁶⁴ and product variety because of a merger.⁶⁵ It is very clear that the Obama Administration has aggressively pursued Section 7 litigation and the

59. See, e.g., *id.* at 1119–23 (commenting on false positives).

60. 415 U.S. 486 (1974).

61. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

62. For an interesting discussion of the revised guidelines, see Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 49 (2010). For a response to Shapiro, see James A. Keyte & Kenneth B. Schwartz, "Tally-Ho!": UPP and the 2010 Horizontal Merger Guidelines, 77 ANTITRUST L.J. 587 (2011). In response to Keyte and Schwartz, see Joseph Farrell, *Fox, or Dangerous Hedgehog? Keyte and Schwartz on the 2010 Horizontal Merger Guidelines*, 77 ANTITRUST L.J. 661 (2011). For a commentary on behavioral economics and merger jurisprudence, see Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513 (2007). See also Paz, *supra* note 1, at 1061–63 (commenting on guidelines).

63. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 61, § 4.0. Upward pricing pressure resulting from a horizontal merger is an example of evidence that might suffice to establish a Section 7 violation without elaborate market definition. *Id.* § 6.1.

64. See Mark A. Lemley, *Industry-Specific Antitrust Policy for Innovation*, 2011 COLUM. BUS. L. REV. 637, 648 (2011) (suggesting that antitrust enforcement decisions be geared to the individual characteristics of each industry); *Symposium: Antitrust and Innovation*, 77 ANTITRUST L.J. 749, 749–1034 (2011) (presenting views of numerous scholars regarding antitrust policy and its impact on innovation).

65. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 61, § 6.4; see Christine A. Varney, *The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution*, 77 ANTITRUST L.J. 651 (2011) (discussing assistant attorney general's views of the new guidelines).

results have been mixed.⁶⁶ Whether new behavioral economic thinking⁶⁷ or varied analytical tools utilized by the government enforcement agencies will generate a warm judicial reception to renewed efforts to challenge horizontal mergers is still uncertain.

D. Noerr-Pennington and State Action Doctrines

Although the *Noerr-Pennington* and state action doctrines do not involve consideration of substantive antitrust principles, judicial interpretation of the scope of these limitations on government and private actions can dramatically alter the impact of the statutes on various kinds of potentially anticompetitive behavior. Predicated on constitutional and statutory construction, application of either or both of these doctrines can immunize behavior that threatens consumer welfare. However, concerns about infringement on the First Amendment right to speak and petition led the Supreme Court to invoke *Noerr* to permit anticompetitive conduct when it is a legitimate attempt to influence legislatures, courts, and

66. See *infra* notes 85–92 and accompanying text.

67. Much recent scholarly commentary has focused on the introduction of behavioral economics into antitrust analysis. Rather than relying on the rational-choice model of behavior in Chicago School neoclassical price theory, behavioral economics examines limits on the assumptions about human economic decision making. Three concepts—bounded rationality, bounded willpower, and bounded selfishness—are examined as factors that may detract from selfish, wealth-maximizing choices by firms and consumers. This school of thought draws heavily on cognitive psychology, neuroscience, and sociology. Behavioral economics can be traced to the work of Nobel Memorial Prize recipient Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. OF ECON. 99, 99–118 (1955), and Daniel Kahneman, Paul Slovic, & Amos Tversky, *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (1982). More contemporary legal scholars have joined this robust discussion. See generally Mark Armstrong & Steffen Huck, *Behavioral Economics as Applied to Firms: A Primer*, 6 COMPETITION POL'Y INT'L 3 (2010) (discussing behavioral economics in the realm of horizontal mergers); Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469 (2011); Amanda P. Reeves, *Behavioral Antitrust: Unanswered Questions on the Horizon*, THE ANTITRUST SOURCE, June 2010, at 1, 3, available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_FullSource6_24.authcheckdam.pdf; Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011); Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. (2007); Maurice E. Stucke, *Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893 (2010). It will be interesting to observe whether the application of behavioral principles to contemporary antitrust doctrine is something with which the federal judiciary is comfortable and willing to undertake. See Paz, *supra* note 1, at 1090–93 (discussing the use of behavioral economics in horizontal merger analysis).

administrative tribunals. Similarly, the state action doctrine has been utilized to protect both government and private actors engaging in what otherwise might be antitrust conduct because of concerns about state sovereignty and states' right to engage in economic regulation of their economies.

The more recent Supreme Court pronouncements regarding these two limits on antitrust coverage have expanded protection for some business conduct that would otherwise raise serious issues under the Sherman Act. In *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*,⁶⁸ the Court erected significant barriers to plaintiffs attempting to predicate an antitrust case on defendants' allegedly "sham" litigation. Justice Thomas articulated a two-step definition of sham litigation, requiring that (1) the defendants' lawsuit must be "objectively baseless," and (2) the baseless suit must be an attempt to directly interfere with the business relationships of a competitor.⁶⁹ This two-tiered standard is difficult to satisfy and may prove to sacrifice consumer welfare by protecting anticompetitive behavior.⁷⁰

The state action (or *Parker*) doctrine also may effectively insulate conduct that damages competition. State regulation of private business actors may be anticompetitive yet survive an antitrust challenge if there is a clearly articulated and affirmatively expressed state policy and active state supervision of the policy.⁷¹ The state need not compel the private anticompetitive conduct to satisfy the requirement of a clearly expressed state policy; permission combined with sufficient state oversight will suffice.⁷² The state action doctrine was further expanded when the Court determined that, even though municipalities enjoy no equivalent to state sovereignty in the federal system, they can engage in anticompetitive regulation pursuant to an articulated state policy without any active supervision.⁷³

68. 508 U.S. 49 (1993).

69. *Id.* at 60–61.

70. See Roche, *supra* note 5, at 1305–09, 1318–28 (discussing breadth of the sham exception and problems with misrepresentations in the *Noerr-Pennington* doctrine).

71. See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978).

72. See S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61–62 (1985).

73. See Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985).

In *City of Columbia v. Omni Outdoor Advertising, Inc.*,⁷⁴ the combined effects of the *Noerr-Pennington* and state action doctrines protected an alleged anticompetitive conspiracy to control the billboard business. Over a dissent by Justices Stevens, White, and Marshall, who decried the decision as a “significant enlargement of the state-action exemption,”⁷⁵ the majority invoked both *Noerr* and *Parker* to immunize what the dissenters viewed as “an agreement between city officials and a private party to restrict competition.”⁷⁶ This expansive reading of both the right to petition and state action necessarily protects a significant amount of anticompetitive conduct from antitrust scrutiny. Local governments may proceed without state supervision once there is a clearly articulated policy by the state. These unsupervised municipal officials may then enter into agreements with favored business contacts that threaten consumer welfare with impunity. Whether corruption statutes and other forms of political financial regulation can compensate for the absence of antitrust oversight is far from certain.⁷⁷ Further, the Supreme Court decisions raise serious concerns about the proper balance between state sovereignty and the right to speak freely and petition, and the countervailing concern about congressional power under the Commerce Clause to protect our economy from actions that disrupt

74. 499 U.S. 365 (1991).

75. *Id.* at 392 (Stevens, J., dissenting).

76. *Id.* at 393.

77. The Supreme Court’s decision in *Citizens United v. FEC*, 130 S. Ct. 876 (2010), could conceivably contribute to the problem of business interests having undue influence on the decision making of public officials. This landmark decision found that corporations have the same First Amendment right as individuals to make independent campaign expenditures to promote or oppose a candidate. This ruling has the potential to further cloud the judgment of public officials who must decide on questions of business regulation that impact corporations choosing to make political campaign expenditures. Although *Citizens United* arose in the context of federal elections, its impact at the state and local level seems likely. However, in *Western Tradition Partnership, Inc. v. Attorney General*, 363 Mont. 220 (2011), the Supreme Court of Montana limited *Citizens United* to its facts in federal elections and declined to apply it to corporate expenditures for judicial elections in the state. This decision was subsequently reversed in a one paragraph, 5–4 per curiam decision by the U.S. Supreme Court. *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012). The Ninth Circuit also struck down a ban on political advertising on public television. *Minority Television Project, Inc. v. FCC*, 676 F.3d 869, 872 (9th 2012). For a recent book-length commentary on the problems created by the influence of money on the democratic process, see generally LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* (2011) (commenting on the corruption caused by the influence of campaign contributions and money in politics).

market forces, restrict output, and cause supercompetitive prices for American consumers. Certainly, lower federal courts have not been in complete agreement about the extent of these immunizing doctrines.⁷⁸ Whether current doctrine insufficiently protects a competitive economy by construing these exemptions too broadly merits serious discussion.⁷⁹

E. Limits on Private Enforcement

Private parties are authorized by the Clayton Act to seek treble damages and injunctive relief for violations of the federal antitrust laws.⁸⁰ However, the Supreme Court has created obstacles for private plaintiffs pursuing these remedies. Most notably, in *Bell Atlantic Corp. v. Twombly*,⁸¹ the Court ratcheted up the pleading requirements required to survive a motion to dismiss. No longer was general notice pleading sufficient; rather, an antitrust complaint must contain “enough factual matter (taken as true) to suggest that an agreement was made.”⁸² When one considers the fact that Section 1

78. See Roche, *supra* note 5, at 1347–49, for a discussion regarding conspiracy and market-participation exceptions to the state action doctrine. The Supreme Court will soon review the scope of the state action doctrine. See *FTC v. Phoebe Putney Health Sys.*, 663 F.3d 1369 (11th Cir. 2011), *cert. granted*, No. 11-1160, 2012 U.S. LEXIS 4852 (U.S. June 25, 2012).

79. In his Supreme Court memoir, now-retired Justice Stevens comments on five different chief justices, including the three he served under as Associate Justice. In the chapter on Chief Justice Rehnquist, Justice Stevens questions the decisions of that era regarding the scope of state sovereignty and the obligations of the states to obey federal law. JOHN PAUL STEVENS, *FIVE CHIEFS* 191–93 (2011). The venerable former justice continued by writing that “[l]ike the gold stripes on his robes, Chief Justice Rehnquist’s writing about sovereignty was ostentatious and more reflective of the ancient British monarchy than our modern republic. I am hopeful that his writings in this area will not be long remembered.” *Id.* at 197. Although Stevens was specifically focusing on state sovereign immunity, the status of states as sovereign entities in our constitutional system is directly relevant to the proper scope of the state action doctrine. If federal law is to be given greater weight and deference, perhaps exceptions to the doctrine should be broader to enforce federal procompetition policy.

80. Clayton Act, §§ 4, 16, 15 U.S.C. §§ 15, 26 (2006).

81. 550 U.S. 544 (2007).

82. *Id.* at 556. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court extended *Twombly* to all federal civil actions. These cases require pleadings to satisfy an ill-defined “plausibility” standard; in antitrust cases this will require that a claim be “plausible” in light of basic economic principles, judicial experience, and common sense. *Twombly*, 550 U.S. at 556. Courts struggle to reach consensus on what allegations will satisfy this requirement. Gregory G. Wrobel et al., *Judicial Application of the Twombly/Iqbal Plausibility Standard in Antitrust Cases*, 26 ANTITRUST 8, 8–15 (2011) (assessing the effect of *Twombly* on antitrust pleadings regarding standing, causation, injury, relevant markets, market power, conspiracy, anticompetitive conduct,

conspiracies will not often be admitted by defendants and must be based on inferences drawn from circumstantial evidence, the effect of *Twombly* will be to defeat many private actions at the outset, before there is an opportunity for discovery to flesh out the allegations of a complaint.⁸³ Coupled with other case law that imposes rigorous standing, causation, and antitrust injury requirements on the private plaintiff,⁸⁴ many antitrust claims may be dismissed before any adjudication on the merits occurs.

III. RECENT DEVELOPMENTS IN THE LOWER FEDERAL COURTS

Recent decisions in the federal judiciary at the district court and appellate levels underscore the difficulties the Obama Administration and private litigants face in persuading the courts to implement its vision of a more energetic and vigorous antitrust enforcement policy. The application of the important Supreme Court precedent during the three years of the Obama presidency can best be described as a mixed palette, with reason for claims of victory from both sides of the antitrust debate. Equally important is the fact that considerable uncertainty continues.

The current administration places a high priority on challenging mergers under Section 7 of the Clayton Act when these mergers create a reasonable probability of a threat to competition. In addition to the restructuring of proposed transactions in order to diminish anticompetitive impact,⁸⁵ the government won a significant victory in *United States v. H&R Block, Inc.*,⁸⁶ when a federal district court enjoined a merger between two makers of digital do-it-yourself tax preparation products.⁸⁷ Utilizing traditional methods of Section 7 analysis, the court found that the government had properly defined a relevant submarket for do-it-yourself tax preparation products and

and competitive effects in the lower courts, and concluding that courts take “widely divergent approaches”).

83. For a discussion of the impact of *Twombly* on all aspects of antitrust litigation, see Wrobel et al., *supra* note 82, at 8–15.

84. See the extensive discussion of these limits on private actions in HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY §§ 16.1–16.10 (4th ed. 2011).

85. See *supra* notes 24–25 and accompanying text.

86. 833 F. Supp. 2d (D.D.C. 2011).

87. *Id.* at 42.

that this merger to “duopoly” between the second and third largest competitors heightened the danger of illicit coordination.⁸⁸ The premerger administrative review process also prevented a major combination of AT&T and T-Mobile USA, as resistance from the FTC and the FCC caused the parties to abandon their transaction.⁸⁹ Other mergers were restructured to deal with potential threats to competition.⁹⁰ However, antitrust enforcers were rebuffed in other cases, as federal courts were unwilling to reflexively apply Section 7 whenever the government decided to challenge a merger.⁹¹ These developments illustrate that more aggressive challenges to horizontal mergers will not necessarily result in victories for the FTC or DOJ.⁹²

Similarly, the enforcement of Section 2 by the government and private plaintiffs faces obstacles created by *Trinko* and *Linkline*.⁹³ Claims predicated on unilateral refusals to deal or alleged price squeezes will be unlikely to succeed, and predatory pricing or bidding claims will also be problematic because of the recoupment requirement articulated in *Brooke Group* and *Weyerhaeuser*.⁹⁴ The

88. *Id.* at *92. The court relied on the merger guidelines, considered expert testimony carefully, and ultimately rejected defendants’ claims of low entry barriers and merger specific efficiencies that were asserted to offset the fact that the merger resulted in the two largest competitors controlling 90 percent of the market in do-it-yourself tax preparation products. *Id.* See also *Polypore Int’l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012) (affirming an FTC order of divestiture in a horizontal merger case in a narrow market for deep-cycle battery separators).

89. See Jim Puzzanghera, *AT&T Lobbying Didn’t Pay Off*, L.A. TIMES, Dec. 21, 2011, at B1.

90. See Paz, *supra* note 1 for discussion of these negotiated settlements.

91. See, e.g., *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1374, 1378 (11th Cir. 2011) (denying preliminary injunction in hospital merger because of state action immunity); *FTC v. Lab. Corp.*, No. SAVC 10-1873 AG (MLGx), 2011 WL 3100372, at *1 (C.D. Cal. Mar. 11, 2011) (denying preliminary injunctive relief in clinical laboratory merger); *FTC v. Lundbeck, Inc.*, Nos. 08-6379 (JNE/JJG), 08-6381 (JNE/JJG), 2010 WL 3810015, at *1 (D. Minn. Aug. 31, 2010) (finding no Section 7 violation in acquisition of FDA-approved drugs to treat patent ductus arteriosus).

92. See Paz, *supra* note 1, at 1073–74.

93. See, e.g., *Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr.*, 582 F.3d 1216, 1217 (10th Cir. 2009) (rejecting Section 2 claim for refusal to deal with competing nephrologist); *Doe v. Abbott Labs.*, 571 F.3d 930, 931–32 (9th Cir. 2009) (functional equivalent of a price squeeze on protease inhibitor not monopoly conduct); *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1190, 1194–95 (10th Cir. 2009) (enforcement of restrictive covenant not illegal under *Trinko*); *De Leon*, *supra* note 2, at 1125–53.

94. In *In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation*, 767 F. Supp. 2d 880 (N.D. Ill. 2011), a predation claim did survive a motion to dismiss. However, predatory bidding claims have not fared well after *Brooke*. See, e.g., *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 901–11 (9th Cir. 2008) (explaining predatory pricing and citing scholarship); *United*

courts have clearly narrowed the scope of unilateral conduct reachable under Section 2, and it will be interesting to see whether the Obama Administration can make progress in convincing courts to “turn back the clock” to some degree. Questions will remain over the propriety of proposed market definitions,⁹⁵ and private plaintiffs will confront the issues of standing and antitrust injury.⁹⁶

Ultimately, antitrust will change if the federal courts are more receptive to post-Chicago School and behavioral economic thinking.⁹⁷ The standard economic model of human behavior assumes that people act with unbounded rationality, unbounded willpower, and unbounded selfishness. In other words, “every man and woman for himself or herself.” If this rational choice approach is modified because of recognition that these assumptions are often fallacious, there may be less judicial reliance on neoclassical price theory and Chicago School thinking and more focus on market imperfections and case-by-case factual analysis.⁹⁸ In the absence of any willingness on the part of a conservative federal bench or Congress to consider alternatives, the Obama Administration and private plaintiffs will struggle to secure broader application of the Sherman and Clayton Acts. A key element to modification of existing doctrine will be determining how to work the post-Chicago School and behavioral thinking into the confines of an actual antitrust trial that must be conducted in accordance with the Federal

States v. AMR Corp., 335 F.3d 1109, 1111 (10th Cir. 2003) (rejecting predatory pricing claim); see also Michael L. Denger & John A. Herfort, *Predatory Pricing Claims After Brooke Group*, 62 ANTITRUST L.J. 541, 556–57 (1994) (noting the rigor of the recoupment requirement and the chilling message sent to predatory pricing plaintiffs).

95. See Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010) (criticizing the approaches to antitrust market definition); De Leon, *supra* note 2, at 1161–62.

96. See HOVENKAMP, *supra* note 84, §§ 16.1–16.5.

97. There has been an abundance of law review scholarship dedicated to behavioral economics and antitrust. See *supra* note 67 and accompanying text.

98. Commentators often refer to “liberal” judges and justices as “judicial activists.” The term may be traced to an article about the Supreme Court by Arthur M. Schlesinger, Jr. appearing in *Fortune* magazine in January 1947. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, XXXV FORTUNE 73 (Jan. 1947). It is used to refer to jurists who bring their personal views about public policy into their decision-making process. It may fairly be said that judicial activism in the Supreme Court and other federal tribunals has been evident from both sides of the political spectrum. At the moment, a rather conservative antitrust philosophy is prevailing. This may well chill aggressive antitrust enforcement efforts and make it unlikely that some of the proposals articulated by the ensuing student-authored articles will be implemented.

Rules of Civil Procedure and Federal Rules of Evidence. The role of expert witnesses in any antitrust proceeding has been complicated by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁹⁹ which outlines the "gatekeeping" function of a federal trial judge to admit evidence that is relevant and reliable.¹⁰⁰ Exclusion of economic expertise regarding shifts in economic thinking could dramatically affect the adjudicatory process. If history teaches us anything, it is that economic analysis is not static; it evolves and changes with potentially dramatic impact on the application of federal antitrust law. Economics is not a precise science and new thinking about the behavior of consumers and firms seems to greet the reader of legal scholarship on a regular basis. The influence of prevailing political viewpoints affects the composition of the federal judiciary and Congress. Thus, any discussion of recent antitrust developments can tell us where we have been, give us some sense of where we are, and make only an educated guess about where we will be in a decade or beyond. We must continue to focus on the purposes of federal antitrust law, but there continues to be considerable disagreement even about that fundamental question. We also should be mindful of a statement whose author remains unknown: "It is not the strongest of the species that survive, nor the most intelligent, but the most responsive to change."¹⁰¹ Message received.

99. 509 U.S. 579 (1993); see FED. R. EVID. 702 (requiring the judge to determine whether the expert testimony is "based on sufficient facts or data," is the "product of reliable principles and methods," and is reliably applied to the facts of the case).

100. See James Langenfeld & Christopher Alexander, *Daubert and Other Gatekeeping Challenges of Antitrust Experts*, 25 ANTITRUST 21, 23–24 (2011) (discussing challenges presented for expert witnesses in antitrust cases and noting that plaintiffs' experts experience exclusion of testimony and evidence more than defendants' experts).

101. This quotation has been misattributed to Charles Darwin. For a more down-to-earth quote with a similar message, consider Ellen Glasgow's comment that "[t]he only difference between a rut and a grave is their dimensions." If I were to teach my Antitrust course based on the state of the law when I entered the profession, I would be misstating doctrine as frequently as I would be correctly stating it. The law has changed so dramatically in a relatively short period of time. There is every reason to think this will continue. We all need to keep up and keep thinking about improving federal antitrust law to balance our commitment to free enterprise with protection of consumer welfare. Yet, as legendary UCLA basketball coach John R. Wooden wrote in *Wooden: A Lifetime of Observations and Reflections On and Off the Court*: "There cannot be progress without change—even though not all change is progress." COACH JOHN WOODEN WITH STEVE JAMISON, WOODEN: A LIFETIME OF OBSERVATIONS AND REFLECTIONS

