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The Judicial Contraction of Section 2 Doctrine

Diana De Leon

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A critical safeguard of the competitive process, Section 2 of the Sherman Antitrust Act prohibits unilateral conduct that results in the acquisition or maintenance of monopoly power. The Supreme Court in recent years has seemingly continued to defend monopoly power as "an important element of the free-market system," but it has failed to provide clear instructions to guide lower courts in their analyses of Section 2 claims. This Article examines the state of Section 2 jurisprudence with an emphasis on lower federal courts, focusing on their interpretations of Supreme Court decisions dealing with unilateral refusals to deal and price squeezes. In 2003, the Court narrowed the scope of Section 2 liability in Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, suggesting that monopolists generally have no duty to continue dealing with rivals. In the years following the decision, lower federal courts have struggled to uniformly interpret and apply* Trinko *in their determinations of what conduct is unlawfully predatory or exclusionary under Section 2. Additionally, it has become clear that lower federal courts have adopted the Court's desire to avoid overdeterrence, as their constructions have ultimately made it more difficult for private plaintiffs to win monopolization cases against dominant firms. This Article urges antitrust courts to adapt to a changing global economic climate and, in doing so, proposes four avenues for reform that range from theoretical to practical. In light of shrinking enforcement efforts and the increasing obstacles faced by private plaintiffs in federal courts, fundamental change is necessary to protect competition and consumers.*

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I. INTRODUCTION

In 1974, San Francisco State University Professor Ralph Anspach sold two hundred thousand copies of his newly invented board game, "Anti-Monopoly."[1] Disgruntled by his fruitless search for a board game that plainly depicted the concept of monopoly in a harsher light, Professor Anspach crafted the "prankish antithesis to the Monopoly game,"[2] in which players could compete as trustbusters to break up monopolies existing at the start of the game.[3] In that same year, President Gerald Ford signed into law the Antitrust Procedures and Penalties Act,[4] which marked a significant toughening of the nation's antitrust laws. The act punished violators of the Sherman Act[5] much more stringently: it upgraded an antitrust offense from a misdemeanor to a felony, raised the maximum prison sentence from one year to three years, and increased monetary fines from $50,000 to $1 million for corporations and from $50,000 to $100,000 for individuals.[6] Upon signing the bill, President Ford

1. Mary Pilon, *How a Fight over a Board Game Monopolized an Economist's Life*, WALL ST. J., Oct. 20, 2009, at A1, *available at* http://online.wsj.com/article/SB125599860004295449.html.

2. Burton H. Wolfe, *Anti-Monopoly*, WASH. FREE PRESS, Nov./Dec. 1998, at 1, *available at* http://wafreepress.org/36/monopoly.html.

3. Pilon, *supra* note 1; *see* Doug Collins, *Go to Court, Go Directly to Court*, WASH. FREE PRESS, Nov./Dec. 1998, at 1, *available at* http://wafreepress.org/36/court.html; *How to Play*, ANTI-MONOPOLY (1999), http://antimonopoly.com/how-anti-monopoly-plays (last visited Nov. 20, 2012). Interestingly, in 1997, Anspach's Anti-Monopoly, Inc. ("AMI") filed an antitrust action against Hasbro, the game-manufacturing giant and parent company of Monopoly creator Parker Brothers. Anti-Monopoly, Inc. v. Hasbro, Inc., 958 F. Supp. 895 (S.D.N.Y. 1997), *aff'd*, 130 F.3d 1101 (2d Cir. 1997). AMI alleged that Parker Brothers engaged in monopolization in the form of discriminatory pricing by giving discounts and promotions to mass retailers, which discouraged those retailers from selling non-Hasbro games, thereby injuring competition. *Id*. at 900. Ultimately, the district court granted Hasbro's motion for summary judgment, finding that AMI failed to prove that Hasbro's market share accurately reflected its market power and failed to present sufficient evidence to support its discriminatory pricing claims. *Id*. at 904, 906–07.

4. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706 (1974), *available at* http://transition.fcc.gov/Bureaus/OSEC/library/legislative_histories/1625.pdf.

5. Sherman Act, 15 U.S.C. §§ 1–7 (2006).

6. Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1706, 1708 (1974). Since 1974, Congress has augmented the maximum prison sentence to ten years and the maximum monetary penalties to $100 million for a corporation and $1 million for an individual. Sherman Act § 2. While this Article focuses primarily on Section 2 enforcement in private civil cases, the increased penalties and fines illustrate the government's broader willingness to take a tough stance on monopoly violations. Notably, however, there has been an absence of criminal enforcement under Section 2. William F. Adkinson, Jr. et al., Enforcement of Section 2 of the Sherman Act: Theory and Practice 6 n.30 (Nov. 3, 2008) (unpublished working paper), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/section2overview.pdf.

highlighted the necessity of strengthening antitrust laws, stating, "The time is long overdue for making violations of the Sherman Act a serious crime, because of the extremely adverse effect which they have on the country and its economy . . . . In times like these, we cannot afford to do less."[7]

While Professor Anspach's impassioned quest to market a game depicting the darker consequences of monopoly differs markedly from President Ford's advancement of antitrust reform as but a piece of broader efforts to spur the economy,[8] both men understood the fundamental purpose of antitrust law and recognized that monopolizing companies ought to be reined in.[9] Nearly a quarter century later, in the midst of a grave economic downturn, then-Senator Barack Obama similarly pledged to "take seriously [the] responsibility to enforce the antitrust laws so that all Americans benefit from a growing and healthy competitive free-market economy."[10] However, in light of recent Supreme Court decisions that have severely narrowed the scope of liability for violations of Section 2 of the Sherman Antitrust Act, it appears that the Obama Administration's promised enforcement efforts in the realm of

7. Presidential Statement on Signing the Antitrust Procedures and Penalties Act, 317 PUB. PAPERS 772 (Dec. 23, 1974). During this period, President Ford faced a recession and heightened anxiety over soaring inflation and unemployment rates, not unlike current concerns about the economic climate. *Compare Inflation: Ford's Plan: (Mostly) Modest Proposals*, TIME, Oct. 14, 1974, at 39, *available at* http://www.time.com/time/magazine/article/0,9171,908847,00.html (discussing the recession and soaring inflation and unemployment in 1974), *with* Alister Bull, *U.S. Job Losses Worst Since 1974 as Downturn Deepens*, REUTERS (Dec. 5, 2008, 5:22 PM), http://www.reuters.com/article/2008/12/06/us-usa-economy-jobs-idUSTRE4B437520081205 (discussing the recession and soaring unemployment in 2008).

8. Presidential Statement on Signing the Antitrust Procedures and Penalties Act, *supra* note 7 (noting that the increased antitrust penalties in the senate bill would help to lower inflation).

9. It should be noted that the central focus of this Article is on the federal judiciary, which, unlike President Ford or Professor Anspach, has strongly cautioned in recent years against taking affirmative steps to curb monopolization. *See infra* Parts III, IV, V. This Article goes a step further to suggest that recent Supreme Court decisions have further muddied the already-clouded waters of Section 2 jurisprudence to the detriment of competition and consumers.

10. Senator Barack Obama, Statement of Senator Barack Obama for the American Antitrust Institute (Sept. 27, 2007), *available at* http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf. Then-Senator Obama additionally criticized the Bush Administration for possessing "what may be the weakest record of antitrust enforcement of any administration in the last half century," highlighting the administration's failure to bring a single monopolization case in seven years. *Id*. at 1.

Section 2 monopoly cases have amounted more to rhetoric than to realization.[11]

From its inception in 1890, through the 1970s, and still today, Section 2 of the Sherman Act has served to promote a market-based economy that increases growth, maximizes societal wealth, and protects the public from market failures stemming from stagnated competition.[12] As a critical safeguard of the competitive process, Section 2 specifically prohibits unilateral conduct that results in the acquisition or maintenance of monopoly power: "Every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[13] Over time, and particularly in the last decade, the Supreme Court has severely narrowed the range of conduct targeted by the act, leaving a great deal of uncertainty and inconsistency in the lower federal courts.[14] Not long after President Ford's address, a period of "heartfelt and aggressive [Section] 2 jurisprudence came to an end" as both policy makers and courts altered procedural rules in ways that limited private enforcement.[15] This trend continued into the new millennium as the Supreme Court reversed nine straight antitrust cases in which lower federal courts had found that defendant-monopolists had violated the Sherman Act.[16]

11. *See* discussion *infra* Part VI.

12. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 12 (2008); *see* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1985) (asserting that the purpose of the Sherman Act is "to protect the public from the failure of the market"); United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (declaring that the purpose of the Sherman Act is "to preserve the right of freedom to trade").

13. Sherman Act, 15 U.S.C. § 2 (2006). Section 2 additionally reaches concerted action, *see* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.13 (1984), but this Article focuses solely on unilateral Section 2 conduct.

14. John DeQ. Briggs & Daniel J. Matheson, *The Supreme Court's 21st Century Section 2 Jurisprudence: Penelope or Thermopylae?*, 11 SEDONA CONF. J. 137, 139 (2010).

15. *Id*.

16. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009) (finding no Section 2 violation, as plaintiff's price-squeeze claim was not cognizable under the Sherman Act); Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (finding no Section 1 violation); Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S 264 (2007) (holding that there can be no antitrust liability where application of antitrust laws is clearly incompatible with securities law); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (holding that the Section 1 complaint should be dismissed if it merely alleges parallel conduct and conspiracy without more explicative facts); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007) (rejecting Section 2 predatory bidding claim); Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006)

Boundless technological advances, fast-paced globalization, and new agglomerations of wealth have irrevocably changed the way the world does business.[17] Arguably, the perspectives on antitrust liability in federal courts have changed just as dramatically.[18] While the recent economic crisis might signal that "market-based economies are neither as efficient nor self-correcting" as policymakers once touted,[19] the Supreme Court in recent years has continued to defend monopoly power as a critical part of the free-market system[20] but has failed to provide clear instructions to guide lower federal courts in their analyses. In the wake of the Supreme Court's prodefendant decisions, district and circuit courts have been left with fragmented guidelines on the definition of predatory or exclusionary behavior prohibited by Section 2.[21] In this uncertain framework, how has the Supreme Court's approach to Section 2 taken root in lower federal courts?

This Article examines the state of Section 2 jurisprudence with an emphasis on lower federal courts, focusing on their interpretations of Supreme Court decisions and how those constructions may illuminate or obstruct future paths of decision-making or reform. Part II begins with a general overview of Section 2's scope and sets forth

(finding that a tying arrangement did not violate Section 1); Texaco Inc. v. Dagher, 547 U.S. 1 (2006) (finding that a horizontal price-fixing agreement was not a per se violation of Section 1); Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006) (finding no antitrust violation under Robinson-Patman Act); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (holding that a unilateral refusal to deal did not violate Section 2); *see* Daniel R. Shulman, *Refusals to Deal: Is Anything Left; Should There Be?*, 11 SEDONA CONF. J. 95, 110 (2010).

17. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 33–34 (1992) (describing formidable changes in the structure of the economy and rise of huge firms).

18. *Compare* United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (declaring that the Sherman Act is "the Magna Carta of free enterprise" and is as important to economic freedoms "as the Bill of Rights is to the protection of our fundamental personal freedoms"), *with Credit Suisse Sec.*, 551 U.S. at 282 (asserting that courts will likely make grave mistakes in evaluating antitrust claims, resulting in inconsistent outcomes).

19. *See* Briggs & Matheson, *supra* note 14, at 160; Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 281 (2010) ("[A]ntitrust has so narrowed the focus of its discipline that it has chosen to ignore larger issues, contributing to larger scale consumer harm.").

20. *Trinko*, 540 U.S. at 407.

21. *See* Carl Hittinger & Jarod Bona, *Supreme Court Decisions Weaken Antitrust Laws*, EXECUTIVE COUNS., Mar./Apr. 2008, *available at* http://www.dlapiper.com/files/upload/Executive_Counsel_Reprint_MarApr08.pdf.

the accepted two-part test for actual monopolization. Part II.A discusses the first requirement of monopoly power, while Part II.B describes the second requirement of exclusionary or predatory conduct and explores the difficulties that courts face in determining what kinds of unilateral conduct violate Section 2.

Next, Parts III and IV examine the impact of recent Supreme Court decisions on lower courts, arguing that the Supreme Court has succeeded in making it more difficult for plaintiffs to win monopolization cases against dominant firms. Specifically, Part III.A centers on refusals to deal, illustrating how the Supreme Court's seminal decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*[22] has significantly narrowed the scope of Section 2 liability, and Part III.B examines the differing lessons lower federal courts have extrapolated from the *Trinko* Court's famously nebulous decision. Part IV.A explores the Supreme Court's recent decision in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*,[23] and Part IV.B describes how various Section 2 claims of predatory pricing have fared in lower federal courts after *Linkline*, highlighting the ways in which plaintiffs have restructured their Section 2 claims to survive dismissal.

Part V examines the state of attempted monopolization claims, noting that, after the Court's holding in *Bell Atlantic Corp. v. Twombly*,[24] it is now increasingly difficult for plaintiffs to survive motions to dismiss.[25] Part VI assesses enforcement efforts under the Obama Administration, noting that its rejuvenated enforcement efforts have amounted to more rhetoric than action in the realm of Section 2. Part VII then urges federal courts deciding antitrust cases to adapt to a changing economic climate. In doing so, it considers radically eliminating the market-definition process, advances a novel judicial approach to Section 2 claims that aims to reduce the risk of false positives, explores the viability of pursuing monopolization

22. 540 U.S. 398 (2004).

23. 555 U.S. 438 (2009).

24. 550 U.S. 544 (2007).

25. While this Article focuses exclusively on *Twombly*'s effect on attempted monopolization claims, *Twombly*'s impact reaches all antitrust claims, including actual monopolization. *See* Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1, 4 (2010).

claims under Section 5 of the Federal Trade Commission Act,[26] and proposes that courts broaden the scope of Section 2 liability. The Article concludes in Part VIII by suggesting that fundamental change is both necessary and possible.

II. THE SUPREME COURT: ESTABLISHING THE RULES OF SECTION 2

In *Standard Oil Co. of New Jersey v. United States*,[27] the Supreme Court analyzed the legislative history influencing the passage of the Sherman Act in 1890.[28] It determined that the new antitrust laws were "required by the economic condition of the times," referring to the rise of powerful and profitable corporations and the steady proliferation of trusts.[29] Compounded with the widespread impression that corporate power would continue to "oppress individuals and injure the public,"[30] these conditions motivated the United States Congress to pass the Sherman Act to encourage vigorous competition as a way to diffuse concentrations of economic power, open access to markets and consumers, and generate efficiencies.[31] Section 2 of the Sherman Act attempts to achieve these goals by stating, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[32]

26. 15 U.S.C. § 41 (2006).

27. 221 U.S. 1 (1911).

28. *Id*. at 50.

29. *Id*.

30. *Id*.

31. Hon. Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 68–69 (2010).

32. Sherman Act, 15 U.S.C. § 2 (2006). For a discussion of actual monopolization, see *infra* Parts II.B–C, III.A–B. For a discussion of attempted monopolization, see *infra* Parts II.D, III.C. Conspiracy to monopolize will not be a point of discussion in this Article. As the First Circuit commented in *Fraser v. Major League Soccer, L.L.C.*, "[c]onspiracy to monopolize claims are not often the subject of much attention, since almost any such claim could be proved more easily under section 1's ban on conspiracies in restraint of trade." 284 F.3d 47, 67 (1st Cir. 2002) (citing PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 809 (3d ed. 1996)); *see* Sherman Act § 1 ("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.").

Courts have continually emphasized that the Sherman Act exists to prevent harm to the *competitive process*, not to protect individual competitors from harm.[33] While Section 1 of the Sherman Act is directed at concerted action and agreements between parties that unreasonably restrain trade, Section 2 reaches the independent, unilateral actions of single firms that have the effect of creating or maintaining a monopoly.[34] The broad judicial consensus indicates that the Section 2 offense of actual monopolization is twofold: first, a single firm must possess monopoly power or be likely to achieve it,[35] and second, it must engage in predatory or exclusionary conduct.[36]

A. Measuring Monopoly Power

Since the 1940s, courts hearing antitrust issues have largely remained loyal to the test articulated by the Supreme Court in *United States v. Grinnell Corp*.[37] to determine actual monopolization.[38] First, plaintiffs must identify the relevant market,[39] which refers to both the relevant geographic and product markets.[40] Defining the relevant geographic market requires identifying "the area or areas to

33. *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993); Appleton v. Intergraph Corp., 627 F. Supp. 2d 1342, 1357 (M.D. Ga. 2008) (dismissing a Section 2 claim because defendant's conduct only harmed plaintiff and not competition in general).

34. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984).

35. *See id*. at 767–68 ("In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization."); U.S. DEP'T OF JUSTICE, *supra* note 12, at 5.

36. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (citing United States v. Grinnell Corp., 384 U.S. 563 (1966)). Although this formulation is frequently a fixture in contemporary antitrust cases, it is often criticized as too vague. *See, e.g*., Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003) (describing the test as "not just vague but vacuous").

37. 384 U.S. 563 (1966).

38. *E.g*., Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 447–48 (2009); *Trinko*, 540 U.S. at 407; *see* SECTION OF ANTITRUST LAW, AM. BAR ASS'N, MONOPOLIZATION AND DOMINANCE HANDBOOK 101 [hereinafter MONOPOLIZATION HANDBOOK] (characterizing the *Grinnell* rule as "[w]idely cited").

39. This inquiry is fact-intensive and focuses on commercial realities and the existence of product or service alternatives. *See* MONOPOLIZATION HANDBOOK, *supra* note 38, at 66.

40. *See id*. at 67; *see also* U.S. DEP'T OF JUSTICE, *supra* note 12, at 27 (finding that "market definition remains an important aspect of section 2 enforcement and that continued consideration and study is warranted regarding how to appropriately determine relevant markets in this context"). *But cf*. Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 438 (2010) (advancing the claim that "the market definition process is incoherent as a matter of basic economic principles and hence should be abandoned entirely").

which a potential buyer may rationally look for the goods or services that he seeks."[41] The relevant product market includes "products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered."[42]

Once the relevant market is established, plaintiffs must demonstrate that the defendant-monopolist possesses monopoly power in the relevant market.[43] Courts have often used the terms "market power" and "monopoly power" interchangeably,[44] as both refer to "the power to control prices or exclude competition."[45] On the rare occasion that legitimate direct evidence of monopoly power exists that clearly evinces the ability to exclude competitors, courts will find that a plaintiff has established the existence of monopoly power.[46] However, in most instances, courts will need to find circumstantial evidence of monopoly power.[47] Indirect indicia of monopoly power include the defendant's share of the market,[48] entry barriers to the market,[49] the existence of excess capacity, and

41. *Grinnell*, 384 U.S. at 588 (Fortas, J., dissenting).

42. Brown Shoe Co. v. United States, 370 U.S. 294, 324 (1962) ("[T]he 'area of effective competition' must be determined by reference to a product market (the 'line of commerce') and a geographic market (the 'section of the country')."); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956); MONOPOLIZATION HANDBOOK, *supra* note 38, at 67–75. Although it is well established that the starting point for defining the relevant market includes inquiries into both geographic and product markets, courts have neither settled on a single method to determine the relevant geographic market nor determined the degree of substitutability of a product necessary to qualify that product as part of the relevant market. MONOPOLIZATION HANDBOOK, *supra* note 38, at 67, 69, 74–75.

43. *Grinnell*, 384 U.S. at 570–71.

44. MONOPOLIZATION HANDBOOK, *supra* note 38, at 63.

45. *E. I. du Pont de Nemours & Co*., 351 U.S. at 391; MONOPOLIZATION HANDBOOK, *supra* note 38, at 62–63. *But see* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (stating without further clarification that "monopoly power under § 2 requires, of course, something greater than market power under § 1"); *In re* Payment Card Litigation, 562 F. Supp. 2d 392, 400 (E.D.N.Y. 2008) (asserting that "market share and monopoly power are not the same thing; the former is merely evidence of the latter").

46. MONOPOLIZATION HANDBOOK, *supra* note 38, at 64–65.

47. *Id*. at 64–65.

48. United States v. Dentsply Int'l, Inc., 399 F.3d 181, 187 (3d Cir. 2005); Harold R. Weinberg, *Is the Monopoly Theory of Trademarks Robust or a Bust?*, 13 J. INTELL. PROP. L. 137, 146 (2005) ("A rough proxy for a firm's monopoly power is its market share: the greater the market share, the greater the power, and vice versa.").

49. Entry barriers exist where existing or potential rivals are discouraged from competing with a single firm's supracompetitive pricing. United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001) (per curiam). Other examples include "regulatory requirements, large capital costs, control of natural supplies, intellectual-property ownership, and network effects." Bonny E.

monopsony power.[50] Market share over 70 percent typically supports an inference of monopoly power, while "a gray area between approximately 50 and 70 percent market share . . . [requires] additional evidence [to] substantiate monopoly power."[51] Entry barriers to the relevant market are particularly critical in this analysis. For example, courts may find that a single firm dominating 100 percent of a market with very low entry barriers lacks monopoly power.[52] Equally, a single firm with a lower market share may be found to possess monopoly power where entry barriers to the market are high.[53] Thus, while a single firm's market share may be an indicator of its monopoly power, courts must consider barriers to entry in determining whether a single firm in fact possesses monopoly power.[54]

B. Detecting Monopolizing Conduct

Once monopoly power is established, the second prong of the test for actual monopolization requires the plaintiff to demonstrate that the defendant willfully acquired or maintained that power through monopolizing conduct—namely, predatory or exclusionary actions that unlawfully allow a firm to gain or extend monopoly

Sweeney, *An Overview of Section 2 Enforcement and Developments*, 2008 WIS. L. REV. 231, 236 (2008).

50. MONOPOLIZATION HANDBOOK, *supra* note 38, at 65. "Monopsony power is market power on the buy side of the market," where a powerful buyer purchases an excess of a particular input, thereby driving up the price of that input for competitors. Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 320 (2007); MONOPOLIZATION HANDBOOK, *supra* note 38, at 200.

51. MONOPOLIZATION HANDBOOK, *supra* note 38, at 76–77; *e.g.*, United States v. E. I. du Pont de Nemours & Co., 351 U.S. 379, 379, 391 (1956) (finding 75 percent to be sufficient); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (holding 90 percent to be "enough to constitute a monopoly" but 33 percent to be insufficient).

52. *See* Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 99 (2d Cir. 1998) (finding possession of 70 percent market insufficient to establish a monopoly because the rival successfully entered the market); Image Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1208 (9th Cir. 1997) ("Even a 100% monopolist may not exploit its monopoly power in a market without entry barriers."); Daniel E. Lazaroff, *Entry Barriers and Contemporary Antitrust Litigation*, 7 U.C. DAVIS BUS. L.J. 1, 21 (2006) ("Theoretically, if barriers to entry do not exist, no antitrust violations for which market power is a critical component would be established.").

53. *See* Image Tech. Servs., Inc., 125 F.3d at 1207 (noting that lower market share demonstrates market power "if entry barriers are high and competitors are unable to expand their output in response to supracompetitive pricing" (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1438 (9th Cir. 1995))).

54. *See* Lazaroff, *supra* note 52.

power, "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[55] In other words, Section 2 does not condemn the mere possession of a monopoly: it in fact permits a single firm to acquire or maintain monopoly power by, for example, lawfully crafting a preferable good or service, implementing innovative business strategies, or seizing open opportunities in a new market.[56] As the Supreme Court emphasized in its 2004 landmark decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, "[t]o safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*."[57]

Herein lies the rub: at what point does this encouraged competitive behavior become unlawfully exclusionary? By virtue of the statute's brevity, the critical task of defining the offense of "monopolization," and essentially molding the contours of Section 2, has fallen to federal courts.[58] The problem is that courts have traditionally been unable, or unwilling, to define what constitutes

55. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

56. *See* MONOPOLIZATION HANDBOOK, *supra* note 38, at 87–88. Under Section 2, a lawful monopolist may exploit the benefits of monopoly power "as a consequence of a superior product, business acumen, or historic accident" under the belief that consumer interests are best protected by preserving the dynamic competition that occurs as firms struggle for monopoly profits. *Id.* at 2, 87–89; *see Grinnell*, 384 U.S. at 570–71; *Aluminum Co. of America*, 148 F.2d at 430 ("The successful competitor, having been urged to compete, must not be turned upon when he wins."). This competitive process generates desirable increased efficiencies, such as product development, lower retail prices, higher output, and higher quality products. MONOPOLIZATION HANDBOOK, *supra* note 38, at 102.

57. 540 U.S. 398, 407 (2004). Indeed, in upholding a monopolist's refusal to deal with a rival as lawful, the *Trinko* Court recognized that "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth." *Id. But see* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the LECG Newport Summit on Antitrust Law & Economics, Wading into Pandora's Box: Thoughts on Unanswered Questions Concerning the Scope and Application of Section 2 and Some Further Observations on Section 5, at 5 (Oct. 3, 2009) (transcript available at http://www.ftc.gov/speeches/rosch/091003roschleegspeech.pdf) ("[W]hile it is true that anticipated financial rewards certainly drive innovation and competition, the observation that monopolies incentivize the monopolist to engage in innovation is meaningless in the Section 2 context so long as it is divorced from the effects that monopolies have on rivals.").

58. *See* United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (per curiam) (asserting that antitrust courts are entrusted with the task of divining "a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it").

predatory or exclusionary behavior that violates Section 2.[59] Unfortunately, unlike chemical toxicity or pollution emissions, which can be measured using accurate and widely accepted scientific devices and mathematic formulae,[60] anticompetitive effects resulting from particular acts are not directly measurable.[61] As one commentator noted, judges and juries find it nearly impossible to concretely define monopolization, but they "know it when they see it."[62]

Bright-line rules of conduct have had little place in Section 2 jurisprudence because, quite simply, it is extremely difficult to distinguish procompetitive behavior from exclusionary behavior in many instances.[63] Oftentimes a firm's routine conduct—whether it be pricing or nonpricing behavior—can appear to both harm the competitive process and generate efficiencies at the same time. For example, exclusive supply contracts may enhance consumer welfare by assuring supply, affording protection against rises in price, and eliminating costs associated with short-term planning; on the other hand, exclusive dealings can cause material harm to excluded competitors whose products are not sold or promoted by retailers or distributors bound by such contracts.[64] In the context of refusals to deal, a monopolist can both benefit from its general freedom to conduct business with whom it pleases and suffer legal sanctions by

59. *See* U.S. DEP'T OF JUSTICE, *supra* note 12, at 13 ("[D]istinguishing between vigorous competition by a firm with substantial market power and illegitimate forms of conduct is one of the most challenging puzzles for courts, enforcers, and antitrust practitioners.").

60. For example, the Environmental Protection Agency has a national vehicle and fuel emissions laboratory whose emissions tests are replicated by many other corporations. *Testing and Measuring Emissions*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/nvfel/testing/index.htm (last updated Apr. 29, 2010).

61. *See* Cudahy & Devlin, *supra* note 31, at 77 (noting that courts must examine "'anticompetitive' conduct remains disturbingly ill-defined" and questioning the extent to which "increased prices, diminished supply, or lower quality" to illustrate an anticompetitive impact on the competitive process).

62. Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1624 (2005) (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (describing one method to detect obscenity)).

63. *See Microsoft Corp*., 253 F.3d at 58 ("[T]he means of illicit exclusion, like the means of legitimate competition, are myriad."); Alan Devlin & Michael Jacobs, *Antitrust Error*, 52 WM. & MARY L. REV. 75, 88 (2010) (observing that "the line between [beneficial] novel conduct . . . and its harmful counterpart is so thin as to be invisible").

64. MONOPOLIZATION HANDBOOK, *supra* note 38, at 166–67.

unlawfully denying a competitor access to a particular resource.[65] In the context of single-product pricing, strategically cutting prices undoubtedly benefits consumers in the short run, but in the long run, a monopolist's predatory pricing strategy may spur a mass exodus from a competitive market by wrongfully misleading rivals and new entrants about the future viability of participating in that market.[66] Thus, courts must carefully handle the sensitive balance inherent in any analysis of single firm behavior and recognize the danger posed by concrete rules that might chill future procompetitive conduct.[67]

In declining to impose Section 2 liability, the Supreme Court in *Trinko* firmly articulated the constraints that echo throughout recent decisions, and it revealed its reluctance to make more sweeping pronouncements about the scope of permissible single-firm behavior.[68] First, the danger of false positives "counsels against an undue expansion of § 2 liability."[69] False positives refer to the wrongful condemnation of conduct that actually benefits competition and consumers, as well as the loss of procompetitive acts by firms that are deterred from undertaking such conduct by fear of litigation.[70] The risk of inadvertently penalizing beneficial

65. *E.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); *see infra* Parts II.B, III.A. In a famous early example of what the Court deemed an unlawful refusal to deal, a newspaper publisher that enjoyed a monopoly on the dissemination of local news refused to deal with advertisers who also placed ads with a radio station that the newspaper publisher perceived to be a rival. *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951). The Court was willing to find a Section 2 violation because the newspaper publisher used its monopoly power to essentially foreclose competition in the advertising market. *Id*. at 155.

66. Typically, a plaintiff can demonstrate predatory pricing by proving a monopolist's (1) below-cost pricing and (2) a dangerous probability of recouping losses after having driven rivals from the market. *E.g.*, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 444 (2009); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993); *see infra* Parts II.C, III.B. The Supreme Court has yet to announce what measure of cost should be used to determine whether prices are "below cost," although commentators have suggested average total cost and average variable cost. MICHAEL L. DENGER ET AL., *Predatory Pricing and Practices*, *in* ADVANCED ANTITRUST SEMINAR 2009: DISTRIBUTION & MARKETING, at 276–79 (PLI Corporate Law & Practice, Course Handbook Ser. No. 18749, 2009).

67. *See Trinko*, 450 U.S. at 414 ("Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986))); MONOPOLIZATION HANDBOOK, *supra* note 38, at 112.

68. *See Linkline*, 555 U.S. at 452–53; Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007); *Trinko*, 450 U.S. at 414.

69. *Trinko*, 450 U.S. at 414.

70. *See* U.S. DEP'T OF JUSTICE, *supra* note 12, at 16.

competitive conduct is magnified when one considers stare decisis: if a court errs by condemning a beneficial practice, any other firm that uses the condemned practice faces the possibility of sanctions as well.[71] In the context of antitrust cases, courts have adhered to precedents established by earlier decisions in acknowledging that the Sherman Act is a common-law statute, which "adapts to modern understanding and greater experience . . . ."[72] In 2007, the Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[73] a Section 1 case, observed that "the Sherman Act's prohibition on 'restraint[s] of trade' evolve[s] to meet the dynamics of present economic conditions."[74] In light of stare decisis, false positives can chill the very conduct that the antitrust laws are designed to protect.[75]

Second, the *Trinko* Court evinced a deep distaste for placing antitrust courts in the role of "central planners," who must "identify proper prices, quantity, and other terms of dealing . . . ."[76] Not only would this role impose a greater strain on judicial resources, but, according to the Court three years later in *Credit Suisse Securities LLC v. Billing*,[77] it would also increase the likelihood that courts would make unusually serious mistakes in evaluating the evidentiary nuances intrinsic to antitrust challenges.[78] The *Trinko* Court further

71. *See id.* at 17 (asserting that "*stare decisis* inhibits courts from routinely correcting errors or updating the law to reflect the latest advances in economic thinking" (emphasis added)).

72. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 887, 899 (2007); *see* Ill. Brick Co. v. Illinois, 431 U.S. 720, 736 (1977) ("[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation.").

73. 551 U.S. 877 (2007).

74. *Id.* at 899.

75. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986). *But see* Peter C. Carstensen, *False Positives in Identifying Liability for Exclusionary Conduct: Conceptual Error, Business Reality, and* Aspen, 2008 WIS. L. REV. 295, 296 (2008) (arguing that fear of false positives is ultimately incompatible with the needs of a market economy).

76. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004). The Court emphasized that even if the problem of false positives did not exist, "no court should impose a duty to deal that it cannot explain or adequately and reasonably supervise." *Id.* at 415 (citing Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1989)).

77. 551 U.S. 264, 282 (2007). While *Credit Suisse* involved regulated securities markets, the Court's comment "resonates with all critics of antitrust, class actions, treble damages, the lack of contribution and the American antirust [sic] regime in general." Briggs & Matheson, *supra* note 14, at 140.

78. *But see* Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 917–18 (2000)

emphasized that judges do not have *carte blanche* to insist that dominant single firms change their ways of doing business whenever another approach might generate greater competition.[79] To many commentators, *Trinko* represented a probusiness decision that dramatically narrowed the scope of Section 2 liability with drastic consequences.[80] However the decision is characterized, the Court made clear its acute awareness of the dangers of overdeterrence.[81] Combined with the possibility of treble damages and class action suits,[82] false positives appear to present a potent threat to the competitive process, which has effectively impeded any judicial expansion of Section 2 liability.

With these concerns in mind, how can courts best determine what behavior is predatory or exclusionary? Because many types of conduct straddle the line between procompetitive and predatory, courts have yet to endorse an all-purpose legal test.[83] Within this second prong, courts have historically struggled to arrive at a consensus as to which legal tests appropriately and adequately detect different forms of monopolistic behavior.[84] For example, in the early twentieth century, the Supreme Court in *Standard Oil Co. of New Jersey v. United States*[85] appeared to rely on the defendant oil refinery's growth to show illegal intent to monopolize.[86] Noting that Standard Oil's massive expansion "necessarily involved the intent to

(observing that courts have become more sophisticated with antitrust analysis and have become more receptive to economic arguments).

79. *See Trinko*, 540 U.S. at 415–16 (additionally noting that there is no duty to aid competitors).

80. *See* James A. Keyte, *The Ripple Effects of* Trinko*: How It Is Affecting Section 2 Analysis*, ANTITRUST, Fall 2005, at 44, 46; Shulman, *supra* note 16. *But see* Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 B.C. L. REV. 871, 873–74 (2011).

81. *See Trinko*, 540 U.S. at 414.

82. *See* U.S. DEP'T OF JUSTICE, *supra* note 12, at 15.

83. *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 93–94 (2007) (finding in Recommendation 12 that no consensus exists that any one test can suffice to assess all types of conduct that may be challenged under Section 2); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435, 437 (2006) ("[T]he few clear guideposts in Section 2 case law demonstrate that courts properly apply different Section 2 legal tests to different conduct.").

84. *See* MONOPOLIZATION HANDBOOK, *supra* note 38, at 110 (observing that the consensus that consumer welfare is the touchstone of Section 2 enforcement has not led to a consensus on how the courts should identify and detect monopolizing behavior).

85. 221 U.S. 1 (1911).

86. *See id*. at 75–79.

drive others from the field and to exclude them from their right to trade," the Court affirmed that Standard Oil unlawfully attempted to perpetuate an "unreasonable" monopoly.[87] Toward the middle of the century, courts increasingly began to find Section 2 liability based on evidence of market structure as a vehicle for improper conduct, combined with unusually high levels of return—that is, where a monopolist clearly possessed significant market power, courts more readily found violations of Section 2 where there was minimal questionable conduct.[88] Another formulation by the Court in *United States v. Griffith*,[89] decided in 1948, established that the second element of a Section 2 claim is the use of monopoly power, however lawfully acquired, "to foreclose competition, to gain a competitive advantage, or to destroy a competitor."[90] Although *Griffith* remains good law, modern courts would not likely find a monopolist's simple pursuit of a competitive advantage to be unlawful.

In contrast, today's current emphasis on consumer welfare, the danger of false positives, and courts' susceptibility to that danger have spurred myriad solutions addressing different types of Section 2 claims.[91] Proposed standards for evaluating unilateral conduct under Section 2 include, but are not limited to, the "no economic sense" test,[92] the profit-sacrifice test,[93] and the "equally efficient rival"

87. *See id*. at 76, 79.

88. *See* Cudahy & Devlin, *supra* note 31, at 71; *see, e.g*., American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

89. 334 U.S. 100 (1948).

90. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 482–83 (1992) (citing United States v. Griffith, 334 U.S. 100, 107 (1948)).

91. *See* ANTITRUST MODERNIZATION COMM'N, *supra* note 83, at 88 (noting in Recommendation 12 that "the Supreme Court has now adopted and is applying legal standards and rules for Section 2 that are more sensitive to the possible efficiencies of business conduct and more attuned to the potential for consumer harm from overly stringent application of Section 2 standards . . . .").

92. The "no economic sense" test examines whether the challenged conduct would have been economically rational even if it did not reduce or eliminate competition. *See* Gregory J. Werden, *The "No Economic Sense" Test for Exclusionary Conduct*, 31 J. CORP. L. 293 (2006).

93. Like the "no economic sense" test, the "profit-sacrifice test" examines whether the profitability of a strategy that sacrifices immediate profits depends on recoupment of losses by excluding competitors. *See* Elhauge, *supra* note 36, at 255. However, as one commentator pointed out, the profit-sacrifice test falls short because undesirable conduct that normally excludes rivals requires no sacrifice of short-run profits. *Id*.

test.[94] This "dizzying array of tests," designed to distinguish between procompetitive and anticompetitive conduct, may actually "serve to entrench rather than to expose the deficient legal foundation of contemporary section 2 doctrine."[95] In recent years, the use of the "rule of reason" test, seemingly borrowed from analyses of Section 1 claims, has gathered momentum in Section 2 cases, where courts essentially balance the effects of the alleged anticompetitive behavior against a monopolist's procompetitive justifications.[96] More specifically, under the "rule of reason" test as presented in *United States v. Microsoft Corp.*,[97] the plaintiff bears the burden of proof to first demonstrate that the alleged monopolist's act has an "anticompetitive effect."[98] Next, if the "plaintiff successfully establishes a prima facie case under [Section] 2 by demonstrating an anticompetitive effect," the burden shifts to the defendant-monopolist to "proffer a procompetitive justification for its conduct" to illustrate that the conduct constitutes competition on the merits.[99] Finally, the plaintiff will prevail on the claim if the plaintiff can then rebut the defendant's claim by showing that the anticompetitive harm outweighs the procompetitive benefit.[100]

The Antitrust Modernization Commission has emphasized that legal tests to determine the existence of violations must be straightforward, administrable, and crafted to reduce the possibility

94. Under the "equally efficient rival" test, a plaintiff must prove that the defendant's challenged conduct is likely to exclude an equally or more efficient competitor from the market. The defendant must rebut this assertion by demonstrating that the challenged practice is, on balance, efficient. MONOPOLIZATION HANDBOOK, *supra* note 38, at 123–25 (citing Richard A. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 116 (2d ed. 2001)).

95. Alan Devlin, *Analyzing Monopoly Power Ex Ante*, 5 N.Y.U. J.L. & BUS. 153, 155, 156 (2009).

96. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam).

97. 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

98. *Id.* at 58–59.

99. *Id.* In contrast to illegal "exclusionary conduct," "competition on the merits" is often characterized by a single firm's internal activities that are per se lawful, such as nonexploitative pricing, higher output, improved product quality, energetic market penetration, successful research and development, and cost-reducing innovations. *See* 3 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 626(b) at 77–78 (1978). *But see* Elhauge, *supra* note 36, at 255 (asserting that Section 2 doctrine uses "a barrage of conclusory labels," such as "exclusionary" and "competition on the merits," that fail to provide a coherent standard for judges to separate desirable from undesirable conduct).

100. *Microsoft*, 253 F.3d at 59.

of false positives.[101] The accepted standard must also "be reasonably susceptible to judicial control, which means that the court must be able to identify the conduct as anticompetitive and either fashion a penalty producing the correct amount of deterrence or an equitable remedy likely to improve competition."[102] The following sections examine how, over the last decade, the Supreme Court has analyzed discrete forms of monopolizing conduct after plaintiffs have established the first prong of monopoly power.

III. WHEN UNILATERAL REFUSALS TO DEAL VIOLATE SECTION 2

As early as 1897, the Supreme Court recognized the right of a private trader or manufacturer to

> sell to whom he pleases; . . . charge different prices for the same article to different individuals; . . . charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable . . . and . . . cease to do any business whenever his choice lies in that direction.[103]

Later Supreme Court decisions have clarified that these rights are not unqualified.[104] Part A of this Section focuses on leading Supreme Court decisions, particularly emphasizing the manner in which the Court's decision in *Trinko* altered the landscape of unilateral refusals to deal as previously defined by *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[105] Part B analyzes the different ways in which lower federal courts are interpreting the *Trinko* decision.

101. ANTITRUST MODERNIZATION COMM'N, *supra* note 83, at 89–90.

102. Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 148–49 (2005).

103. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 320–21 (1897) (involving horizontal price-fixing and holding that the Sherman Act applied to the railroad industry). In spite of this expansive recognition, early court decisions still condemned unilateral refusals to deal when coupled with a patently anticompetitive purpose. *Compare* United States v. Colgate, 250 U.S. 300 (1918) (finding no violation of Section 2 through contracts that aimed to prevent dealers from freely exercising the right to sell), *with* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (finding a violation of Section 2 based on a monopoly newspaper's refusal to deal with advertisers who also placed ads with a radio station viewed as a competitor by the newspaper).

104. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601 (1985); *Lorain*, 342 U.S. at 155 (suggesting that the right to select customers or refuse advertisements can only be exercised in the absence of any purpose to create or maintain a monopoly); *see Colgate*, 250 U.S. at 307 (finding that the right to refuse to deal exists "[i]n the absence of any purpose to create or maintain a monopoly").

105. 472 U.S. 585 (1985).

A. The Supreme Court and Unilateral Refusals to Deal

For almost two decades, the leading Section 2 case on refusals to deal was *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, in which the Court found unlawful a monopolist ski resort's refusal to deal with a smaller rival.[106] The two ski resorts had operated competitively for several years, even collaborating in a joint, all-area ski pass that generated profits for both resorts.[107] When the plaintiff refused to accept lower revenue percentages of the joint ticket, the defendant-monopolist ended the business relationship and even refused to sell its lift tickets to the plaintiff at retail value.[108] Defining predatory behavior as "attempting to exclude rivals on some basis other than efficiency,"[109] the *Aspen* Court affirmed the lower court's judgment against the monopolist, noting that it was "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[110] The Court found that the defendant's refusal to deal was completely motivated by a desire to deprive its rival of any benefit, even though cooperation "would have entailed no cost . . . , would have provided immediate benefits, and would have satisfied potential consumers."[111] Adding to this efficiency-based definition of predatory conduct, the Court in *Eastman Kodak Co. v. Image Technical Services*[112] emphasized that no violation of the law exists if there are legitimate business reasons for the refusal to deal, as stated in *Aspen*'s jury instructions.[113] Thus, until 2004, *Aspen* effectively led courts deciding antitrust cases to hold that refusals to continue dealing with rivals might violate

106. *Id.* at 610–11.
107. *See id.* at 589–92.
108. *See id.* at 592–93.
109. *Id.* at 605 (quoting ROBERT H. BORK, THE ANTITRUST PARADOX 138 (1978)).
110. *See id.* at 610–11.
111. *See id.* at 610.
112. 504 U.S. 451 (1992).
113. *Id.* at 483 n.32 (citing *Aspen Skiing Co.*, 472 U.S. at 602–605); *accord* Lorain Journal Co. v. United States, 342 U.S. 143 (1951) (finding liability under Section 2 where a monopolist's refusal to deal lacked any substantial business justification and stemmed from the rival party's unwillingness to enter into an anticompetitive agreement intended to injure competition).

Section 2 in the absence of valid business justifications evidencing internal efficiencies or benefits to consumers.[114]

The Supreme Court's 2004 decision in *Trinko* cannot confidently be deemed a watershed decision,[115] but the Court certainly changed the landscape of Section 2 liability by limiting the *Aspen* exception and endorsing probusiness—if not promonopoly[116]—interests.[117] The plaintiffs in *Trinko* were AT&T customers who claimed that Verizon failed to comply with its obligations under federal law[118] to provide AT&T and other rivals with access to its network.[119] This violation, they asserted, contravened Section 2 because Verizon intended to discourage AT&T customers from remaining with the service and ultimately impaired AT&T's ability to compete in the local telephone service market.[120]

Instead of entering into an *Aspen*-style inquiry about whether Verizon possessed valid business reasons for refusing interconnection services to its rivals, the Court emphasized that it could not derive anticompetitive intent from Verizon's failure to comply with federal law[121] and that the existence of regulatory mechanisms to deter anticompetitive harm lessened the need for increased judicial involvement.[122] Most significantly, the Court effectively eliminated potential avenues to claiming Section 2 liability by proclaiming that the refusal to deal exhibited in *Trinko*

114. *See* J. Thomas Rosch, *The Common Law of Section 2: Is It Still Alive and Well?*, 15 GEO. MASON L. REV. 1163, 1170 (2008).

115. *See id*. at 1169 ("The Supreme Court's decision in *Trinko* generated more questions than answers."). In fact, the *Trinko* decision did not expressly overrule any prior Section 2 cases. *Id*. at 1170.

116. Bonny E. Sweeney, *An Overview of Section 2 Enforcement and Developments*, 2008 WIS. L. REV. 231, 243 (2008).

117. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

118. Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56.

119. *See Trinko*, 540 U.S. at 402–03.

120. *Id*. at 404–05.

121. *Id*. at 409 (noting that Verizon's reluctance to comply with federal law "tells us nothing about dreams of monopoly").

122. *Id*. at 411–13 (holding that the Telecommunication Act's "extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access" and finding that the system of regulation and penalties imposed by the New York Public Service Commission and the Federal Communications Commission "was an effective steward of the antitrust function").

did not "fit within the limited exception recognized in *Aspen*."[123] The Court found that the *Aspen* exception did not apply because Verizon's course of dealing was mandated by law, while the monopolist in *Aspen*, Aspen Skiing, voluntarily engaged in joint ticketing with its rival; because Verizon did not market to the public or make the services at issue available to them, while Aspen Skiing directly sold tickets at retail; and because Verizon was subject to a regulatory framework dictating restrictions and remedies, while Aspen Skiing's business decisions were governed by no such structure.[124] Therefore, *Trinko* suggests that monopolists have no duty to continue to deal with rivals unless the monopolist unilaterally severs a voluntary and profitable course of dealing that suggests a "distinctly anticompetitive bent."[125] Notably, post-*Trinko* courts and commentators have not reached a consensus on how to read and apply the case.[126] One commentator summarized the ambiguity of the Court's decision quite succinctly: "We are left with the clear rule that monopolists do not have a duty to assist their competitors, except when they do."[127]

B. Discord in Deciphering Refusals to Deal

In 2006, one commentator wondered whether later courts would ultimately apply the Supreme Court's "thinly veiled swipes at antitrust" far beyond the facts of the case.[128] Although J. Thomas Rosch, Commissioner of the Federal Trade Commission, answered the inquiry in the negative in 2008,[129] the impact of the *Trinko* decision continues to generate divergent speculation among courts

123. *Id*. at 409.

124. *See id*. at 409, 411–12.

125. *Id*. at 409.

126. *See* MONOPOLIZATION HANDBOOK, *supra* note 38, at 149; Hovenkamp, *supra* note 102, at 147–48 ("No generalized formulation of unilateral or multilateral exclusionary conduct enjoys anything approaching universal acceptance."); discussion *infra* Part III.A.

127. John E. Lopatka & William H. Page, *Bargaining and Monopolization: In Search of the "Boundary of Section 2 Liability" Between* Aspen *and* Trinko, 73 ANTITRUST L.J. 115, 152 (2005); *see* MONOPOLIZATION HANDBOOK, *supra* note 38, at 149.

128. Michael A. Carrier, *Of* Trinko, *Tea Leaves, and Intellectual Property*, 31 J. CORP. L. 357, 373 (2006); *accord* James A. Keyte, *supra* note 80, at 50 ("There is no reason why similar reasoning will not be extended to any number of antitrust areas . . . .").

129. Rosch, *supra* note 114, at 1170 (observing that lower federal appellate courts have construed *Trinko* fairly narrowly).

and scholars about the future of refusal-to-deal claims.[130] While it has become clear that lower courts now limit *Aspen* to its facts, their interpretations of the *Trinko* decision have proven inconsistent at best.[131] Lower federal court decisions have emphasized a wide spectrum of *Trinko* take-away requisites for Section 2 liability. For example, some courts have found that Section 2 liability for a refusal to deal under *Trinko* requires a unilateral severance of a voluntary and profitable course of dealing.[132] Other courts have underscored the existence of persuasive evidence of anticompetitive intent or the presence of an active regulatory scheme.[133] A large number of lower courts interpreting *Trinko* continue to echo *Aspen*, placing the heaviest emphasis on whether there is an absence of a valid business justification that exhibits a "willing[ness] to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on [a] smaller rival."[134] Moreover, consideration of the essential facilities doctrine—which requires equal access for all competitors to an indispensable facility that cannot be equally duplicated[135]—continues to percolate through the lower courts

130. *Compare* Robert A. Skitol, *Three Years After* Verizon v. Trinko*: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law*, ANTITRUST SOURCE, Apr. 2007, at 1, 5 ("*Trinko*'s analysis of *Aspen* has become an instructive roadmap for plaintiffs asserting refusal-to-deal claims . . . ."), *with* Lopatka & Page, *supra* note 127, at 152 ("We are left with the clear rule that monopolists do not have a duty to assist their competitors, except when they do.").

131. *See* Edward D. Cavanagh, Trinko*: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 ME. L. REV. 111, 132 (2007) ("Lower courts have not been uniform in their application of *Trinko* principles."); Keyte, *supra* note 80, at 47 ("*Aspen* has now effectively been limited to its facts.").

132. *E.g.*, LiveUniverse, Inc. v. MySpace, Inc., 304 F. App'x 554, 556 (9th Cir. 2008); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049 (11th Cir. 2004); *In re* Apple iPod iTunes Antitrust Litig., 796 F. Supp. 2d 1137, 1145 (N.D. Cal. 2011); RxUSA Wholesale, Inc. v. Alcon Labs., Inc., 661 F. Supp. 2d 218, 228 (E.D.N.Y. 2009), *aff'd sub nom*. RxUSA Wholesale, Inc. v. Alcon Labs., 391 F. App'x 59 (2d Cir. 2010).

133. *E.g.*, Sunbeam Television Corp. v. Nielsen Media Research, Inc., 763 F. Supp. 2d 1341 (S.D. Fla. 2011); N.Y. Jets LLC v. Cablevision Sys. Corp., No. 05 Civ. 2875(HB), 2005 WL 2649330 (S.D.N.Y. Oct. 17, 2005).

134. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–11 (1985); *e.g.*, Four Corners Nephrology Assocs., P.C. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216, 1223 (10th Cir. 2009); MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1134 (9th Cir. 2004); Precision CPAP, Inc. v. Jackson Hosp., No. 2:05cv1096-MHT, 2010 WL 797170, at *11 (M.D. Ala. Mar. 8, 2010); Int'l Bus. Machs. Corp. v. Platform Solutions, Inc., 658 F. Supp. 2d 603, 613 (S.D.N.Y. 2009); Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1197 (D. Utah 2009).

135. Byars v. Bluff City News Co., 609 F.2d 843, 858 (6th Cir. 1979).

despite the fact that the Supreme Court in *Trinko* left the viability of the doctrine in serious doubt.[136]

1. Cessation of Voluntary and Profitable Business Dealings

The Supreme Court in *Aspen* never held that a defendant must cease prior voluntary business dealings in order to be held liable under Section 2 for refusing to deal.[137] However, several circuit courts following the *Trinko* decision have imposed such a requirement, thereby narrowing even further the scope of behavior constituting an unlawful refusal to deal.[138] For example, in 2008, the Ninth Circuit in *LiveUniverse, Inc. v. MySpace, Inc.*[139] interpreted *Trinko* to require that an unlawful refusal to deal evinces a "unilateral termination of a voluntary and profitable course of dealing."[140] In affirming the district court's holding that MySpace, Inc. did not violate Section 2 by deactivating links leading users from its website to plaintiff's networking website,[141] the Ninth Circuit recognized "the narrow scope of the refusal to deal exception."[142] A California district court echoed this position in 2011 in *In re Apple iPod iTunes Antitrust Litigation*[143] when it granted defendant Apple Computer, Inc.'s motion for summary judgment, emphasizing that "Plaintiffs present[ed] no evidence that Defendant had a prior course

136. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004) (finding no need either to recognize or repudiate the essential facilities doctrine).

137. *See Aspen Skiing Co*., 472 U.S. at 610–11; Helicopter Transp. Servs., Inc. v. Erickson Air-Crane, Inc., No. CV 06-3077-PA, 2008 WL 151833, at *9 (D. Or. Jan. 14, 2008) ("The Supreme Court has never held that termination of a preexisting course of dealing is a necessary element of an antitrust claim.").

138. *See* Keyte, *supra* note 80, at 49 (noting that lower courts have "focused on the limitation of *Aspen* to 'voluntary' prior courses of dealing."). *But cf*. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 376 (7th Cir. 1986) (dismissing a suit by competitors alleging Section 2 violation because judicial condemnation would likely have the perverse effect of discouraging cooperation in the first instance).

139. LiveUniverse, Inc. v. Myspace, Inc., 304 F. App'x 554, 556 (9th Cir. 2008).

140. *Id*. at 556 (quoting MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132 (9th Cir. 2004)).

141. *Id*. at 555–56.

142. *Id*. at 556.

143. 796 F. Supp. 2d 1137 (N.D. Cal. 2011).

of dealing" to support their claim that Apple unlawfully refused to license its audio digital-file-sharing software to the plaintiffs.[144]

The Second Circuit has held similarly, observing that the "sole exception to the right of refusal to deal" arises where the defendant terminates a prior relationship, marking a change in position characteristic of monopolistic motives.[145] In *RxUSA Wholesale, Inc. v. Alcon Laboratories, Inc.*,[146] a case brought by a secondary pharmaceutical-product wholesaler against pharmaceutical manufacturers, the court echoed this point by emphasizing that the complaint failed to allege that the defendants voluntarily engaged in a course of dealing.[147] Likewise, the Eleventh Circuit in 2004 in *Covad Communications Co. v. BellSouth Corp.*[148] deemed "the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim . . . ."[149] Citing *Trinko*, the circuit court rejected the plaintiff's claim that the defendant telephone company violated Section 2 by failing to provide DSL service as mandated under federal law.[150] Noting the *Trinko* Court's emphasis on "the coercive effect of the [FTC Act]," which requires an interconnection agreement, the *Covad* court found no voluntary course of dealing between the parties.[151]

These decisions touting the necessity of showing a prior course of dealing have narrowed the *Aspen* exception considerably. Before *Trinko*, plaintiffs could arguably allege Section 2 violations (for exclusionary or predatory conduct) under *Aspen* where competition had been impaired "in an unnecessarily restrictive way," where firms attempted to exclude rivals on some basis other than efficiency,

144. *See id*. at 1145–46 ("[T]he Ninth Circuit has since clarified that a refusal-to-deal claim, under *Trinko*, requires the 'unilateral termination of a voluntary and profitable course of dealing' between competitors." (quoting *MetroNet*, 383 F.3d at 1132)).

145. *In re* Elevator Antitrust Litig., 502 F.3d 47, 53–54 (2d Cir. 2007); *see* Williams v. Citigroup, Inc., 433 F. App'x 36 (2d Cir. 2011) (dismissing a Section 2 claim where plaintiff-attorney failed to demonstrate that the defendant-underwriter "terminated a prior, voluntary course of dealing").

146. RxUSA Wholesale, Inc. v. Alcon Labs., Inc., 661 F. Supp. 2d 218 (E.D.N.Y. 2009), *aff'd sub nom*. RxUSA Wholesale Inc. v. Alcon Labs., 391 F. App'x 59 (2d Cir. 2010).

147. *Id*. at 228. However, the court's ultimate dismissal of the plaintiff's Section 2 claims hinged on the plaintiff's failure to prove that the parties were in direct competition. *Id*. at 227–28.

148. 374 F.3d 1044 (11th Cir. 2004).

149. *Id*. at 1049 (referencing *Aspen* and *Trinko*).

150. *Id*.

151. *Id*.

where the alleged conduct impaired the opportunities of rivals, or where conduct failed to further competition on the merits.[152] However, it now appears that the lower courts imposing the narrow requirement of prior, voluntary business dealings have severely constricted such channels. *Aspen* no longer provides plaintiffs with a number of strategies with which to pursue a Section 2 claim. Consigned to rest "at or near the outer boundary of Section 2 liability,"[153] *Aspen* has been reduced to a narrow exception to *Trinko*'s proclamation that there is generally no duty to deal, and it demands that plaintiffs not only prove that a monopolist unilaterally severed a profitable course of dealing, but that there was an ongoing, voluntary relationship prior to the alleged refusal to deal.

2. Persuasive Evidence of Anticompetitive Intent

Some courts, post-*Trinko*, have looked to the existence of anticompetitive intent to determine whether a refusal to deal violates Section 2 in spite of the fact that the *Trinko* decision makes no mention of the word intent.[154] It is clear that "specific intent to monopolize" is not an element of actual monopolization;[155] however, lower courts, citing *Aspen*, have treated intent as probative evidence of anticompetitive effects and of whether the refusal to deal is unlawfully exclusionary.[156] For example, in 2005, the district court in *New York Jets LLC v. Cablevision Systems Corp.*,[157] in determining whether Cablevision's refusal to air the Jets' advertisements constituted an unlawful refusal to deal, emphasized that a refusal to deal is impermissible "when the purpose of such refusal is to maintain a monopoly."[158] In denying Cablevision's motion to

152. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985); *see* Keyte, *supra* note 80, at 47.

153. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

154. *See* N.Y. Jets LLC v. Cablevision Sys. Corp., No. 05 Civ. 2875(HB), 2005 WL 2649330 (S.D.N.Y. Oct. 17, 2005).

155. *See* United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

156. *See Aspen Skiing Co.*, 472 U.S. at 602 ("[T]he question of intent is relevant to the offense of monopolization in determining whether the challenged conduct is fairly characterized as 'exclusionary,' or 'anticompetitive,'. . . or 'predatory.'").

157. No. 05 Civ. 2875(HB), 2005 WL 2649330 (S.D.N.Y. Oct. 17, 2005).

158. *Id.* at *8.

dismiss, the court noted that the cable provider's sale of airtime to other consumers, but not to the plaintiff, might indicate its desire to prevent the plaintiff from encroaching on Cablevision's monopoly and thus would constitute conduct "predicated on an impermissible purpose."[159]

Similarly, in 2011, the district court in *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*[160] asserted that refusal-to-deal claims might fall within the *Aspen* exception if "specific compelling factors suggest anticompetitive purpose and effect in a manner which alleviates concern over ambiguous evidence and tenuous inferences . . . ."[161] Sunbeam alleged that Nielsen's subscription policy essentially forced it to incur costly expenses.[162] Contrary to the court's holding in *New York Jets*, the *Sunbeam* court ultimately granted Nielsen's motion for summary judgment, finding that the evidence of both anticompetitive purpose and effect was insufficient to meet the *Aspen* exception. Although Nielsen's policy might have swayed some competitors from entering the market, its implementation fell beyond the outer boundary of Section 2 liability.[163] In this way, courts use evidence of a monopolist's intent as a primary indicator of an illegal refusal to deal.

The district court in *Safeway Inc. v. Abbott Laboratories*[164] similarly emphasized that a plaintiff must demonstrate anticompetitive intent, as well as a voluntary and profitable course of dealing, in order to prevail on a refusal-to-deal claim under the *Aspen* exception.[165] The plaintiffs in *Safeway* were direct purchasers of

159. *Id*.

160. 763 F. Supp. 2d 1341 (S.D. Fla. 2011).

161. *Id*. at 1350. The district court admitted that this was "the most sensible reconciliation of *Trinko* and *Aspen Skiing*" given that "the current state of refusal to deal/essential facility jurisprudence is somewhat uncertain." *Id*. at 1349–50.

162. *See id*. at 1348. Specifically, Nielsen's policies required Sunbeam to return all of its historical ratings data upon termination of its subscription to Nielsen's ratings. *Id*. at 1347–48. This costly policy allegedly coerced Sunbeam and other Nielsen customers to purchase ratings simultaneously from both Nielsen and its potential rival. *Id*. at 1348.

163. *Id*. at 1350, 1359. However, a bigger source of uncertainty for the court was whether the rationale of *Trinko* ought to be applied to each form of anticompetitive conduct or to the defendant's behavior in the aggregate. *Id*. at 1350 ("This tension underlies antitrust jurisprudence, and one can only hope that appellate courts have an opportunity to resolve it in the near future."). *But see* discussion *infra* Part IV.B.2 (emphasizing that an assessment of monopolistic conduct for potential liability must be viewed in the aggregate in the context of predatory pricing).

164. 761 F. Supp. 2d 874 (N.D. Cal. 2011).

165. *Id*. at 893–94.

pharmaceutical products who claimed that the defendant pharmaceutical manufacturer engaged in a sudden 400 percent increase of a protease inhibitor, which impaired the plaintiffs' ability to compete.[166] The court had previously ruled in the plaintiffs' favor on the defendant's motion to dismiss, holding that "liability under Section 2 could arise if a defendant unilaterally alters a voluntary course of dealing and 'anticompetitive malice' motivates the defendant's conduct."[167] Denying the defendant's motion, the court found that the plaintiffs' evidence suggested that the defendant engaged in massive and sudden price hikes to impair competition "with anticompetitive malice."[168] Notably, while the *Trinko* Court declined to speculate about the defendant's intent to monopolize, proclaiming that "Verizon's reluctance to interconnect . . . tells us nothing about dreams of monopoly,"[169] it appears that some lower courts continue to consider a monopolist's intent as probative evidence of an unlawful refusal to deal.

3. Refusal to Deal Without a Legitimate Business Justification

The *Aspen* Court criticized a monopolist's willingness "to sacrifice short-run benefits . . . for a perceived long-run impact on its smaller rival" without a valid business reason, which could have been inferred from evidence of conduct that promoted specific efficiencies, such as cost savings passed on to consumers or higher-quality services.[170] After the *Trinko* decision, however, it appears that lower courts exercise broad discretion in determining what constitutes a valid business justification. It has become more difficult for plaintiffs to prove that a monopolist has sacrificed short-term profits where the defendant can tie its refusal to deal to any

166. *Id*. at 881–82.

167. *Id*. at 894. The court reiterated "three factors of significance" for an unlawful refusal to deal. *Id*. (citing MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132–34 (9th Cir. 2004)). The circuit court in *MetroNet* distilled from *Trinko* that a claim falling within the *Aspen* exception would entail, first, a voluntary and profitable course of dealing; second, an offer to deal on unreasonable terms and conditions, which could amount to a "practical refusal to deal"; and third, a refusal to provide competitors with products already sold at retail. *MetroNet*, 383 F.3d at 1132–33.

168. *Safeway*, 761 F. Supp. 2d at 895.

169. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 409 (2004).

170. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–611 (1985).

investment or innovation efforts aimed at protecting its short-term profits and improving its long-term gains.

For example, in 2009, the district court in *International Business Machines Corp. v. Platform Solutions, Inc.*[171] granted a motion to dismiss where the defendant, IBM, decided to discontinue licensing its operating system to the plaintiff.[172] Emphasizing the presence of valid business justifications for terminating the relationship, the court found that the plaintiff failed to demonstrate that IBM had forgone short-term profits by refusing to license its patents.[173] The court pointed out that where IBM had invested billions of dollars to make its operating systems more functional and competitive, it was "not required to support and maintain its thirty-one bit technology" at issue.[174]

Some courts have even defined "valid business justification" to include acts that would likely allow a firm to acquire monopoly power. In affirming the dismissal of the plaintiff's Section 2 claim in *Christy Sports, LLC v. Deer Valley Resort Co.*,[175] the Tenth Circuit emphasized that "[t]he critical fact in *Aspen Skiing* was that there were no valid business reasons for the refusal."[176] In *Christy Sports*, the circuit court found that the defendant was free to begin exercising a restrictive covenant following years of nonenforcement and stop dealing with a rival in order to promote its own ski-rental facility.[177] Although this would likely lead to the defendant's acquisition of monopoly power in the ski rental market,[178] the court emphasized that the plaintiff was on notice that the business relationship was temporary and that "antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path."[179]

171. 658 F. Supp. 2d 603 (S.D.N.Y. 2009).
172. *Id.* at 615.
173. *Id.* at 613–14.
174. *Id.*
175. 555 F.3d 1188 (10th Cir. 2009).
176. *Id.* at 1197.
177. *Id.* at 1190–91.
178. *See* Paul Jones, *Analyzing Refusal-to-Deal Cases Under* Brooke Group's *Predatory Pricing Test: The Tenth Circuit Misses the Mark in* Christy Sports, LLC v. Deer Valley Resort Co., 2010 BYU L. REV. 135, 135 (2010).
179. *Christy Sports, LLC*, 555 F.3d at 1197–98.

It appears that nearly any refusal that a monopolist justifies as an investment in its own services will suffice for a court to grant dismissal or summary judgment in favor of the defendant. Drawing on *Christy Sports*, the Tenth Circuit in *Four Corners Nephrology Associates, P.C. v. Mercy Medical Center of Durango*[180] granted the defendant hospital's motion for summary judgment, finding that the *Aspen* exception does not require more economic justification than a defendant's pursuance of a course of action "to protect and maximize its chances of profitability in the short-term."[181] The defendant hospital had shared its facilities with the plaintiff nephrologist, who declined to become an active hospital staff member but remained a consultant.[182] The hospital later decided to grant nephrology services exclusively through its own practice and terminated the plaintiff's consulting privileges.[183] Although the circuit court found that the defendant willfully incurred short-term losses of up to $500,000 to create its own practice, it determined that the defendant had refused to deal with the plaintiff "to avoid an *unprofitable* relationship" and that it did so to protect its investment in its own practice.[184]

Following suit in an analogous case, an Alabama district court in *Precision CPAP, Inc. v. Jackson Hospital*[185] granted the defendant's motion to dismiss where the plaintiffs could not demonstrate that the defendants' "unilateral termination of a voluntary . . . course of dealing suggested a willingness to forsake short-term profits."[186] The plaintiffs, providers of durable medical equipment (DME), alleged that the defendant hospitals' decision to stop referring patients to plaintiffs' services in order to promote their own joint ventures with DME providers violated Section 2.[187] The court, in recognizing *Trinko*'s modification of the refusal-to-deal standard,[188] emphasized that there was no evidence that the defendant's cessation of dealings

180. 582 F.3d 1216 (10th Cir. 2009).
181. *Id*. at 1225.
182. *Id*. at 1217–18.
183. *Id*. at 1218–19.
184. *See id*. at 1217–18, 1225 (emphasis in original).
185. No. 2:05cv1096-MHT, 2010 WL 797170 (M.D. Ala. Mar. 8, 2010).
186. *Id*. at *11.
187. *Id*. at *1–2.
188. *Id*. at *10.

with the plaintiffs "was for any purpose other than increasing both the short-term and long-term profits of their DME providers."[189]

Not all courts have granted monopolists leeway in what constitutes a valid business justification. In sharp contrast to the Tenth Circuit, in the 2005 case, *Covad Communications Co. v. Bell Atlantic Corp.*,[190] the District of Columbia Circuit affirmed a district court's denial of a defendant's motion to dismiss although the plaintiff, like the plaintiff in *Precision*, failed to specify that the defendant's refusal to deal resulted in a short-term economic loss.[191] Rather, the court found it sufficient that the plaintiff alleged that the defendant's refusal to deal was "predatory" since, according to the court, "a 'predatory' practice is one in which a firm sacrifices short-term profits in order to drive out of the market or otherwise discipline a competitor."[192] Similarly, the *Safeway* court upheld the plaintiffs' claim and found significant the fact that the defendant's allegedly exclusionary price hike came "at some cost" and without evidence of a short-term benefit.[193] Citing again to *Metronet*, the court in *Safeway* noted that the Ninth Circuit found dispositive the defendant's "willingness to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition."[194]

These decisions emphasizing a profit-sacrifice standard[195] suggest that courts exercise broad discretion in deciding whether a defendant's short-term losses are part of a valid business strategy or

189. *Id*. at *11.

190. 398 F.3d 666 (D.C. Cir. 2005).

191. *Id*. at 675–76.

192. *Id*.

193. Safeway Inc. v. Abbott Labs., 761 F. Supp. 2d 874, 894–95 (N.D. Cal. 2011).

194. MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1132 (9th Cir. 2004). At issue in *MetroNet* was an incumbent local exchange carrier's switch to a new pricing policy after it estimated that it was losing $300,000 in revenue to the plaintiffs, who purchased services at a volume discount from the defendant and resold them to small businesses. *See id*. at 1128. However, unlike the outcome in *Safeway*, the *MetroNet* court found that the defendant's switch to a different pricing system was not an abandonment of short-term profits but rather an attempt to increase them after realizing that its policy negatively impacted its own profitability. *Id*. at 1134.

195. *See* Morris Commc'ns Corp. v. PGA Tour, Inc., 364 F.3d 1288, 1290, 1295–96 (11th Cir. 2004) (granting summary judgment in favor of defendant, and finding "valid business justifications for its actions"); Dealer Computer Servs., Inc. v. Ford Motor Co., No. Civ.A. H-06-175, 2006 WL 801033, at *5 (S.D. Tex. Mar. 28, 2006) (rejecting plaintiff's antitrust claim because defendant was "not sacrificing short term profits for long term anticompetitive gains"), *aff'd sub nom*. Dealer Computer Servs. Inc. v. Ford Motor Co., 190 F. App'x 396 (5th Cir. 2006).

are indicative of an overarching anticompetitive intent to impair competition in the long run. Moreover, lower court readings of *Trinko* suggest that the protection and pursuit of monopoly profits are legitimate business justifications. Tenth Circuit decisions seem to go even further, accepting virtually any profit-motivated act as a valid business justification. Considering that any business decision can be rooted in a profit motive, some lower court decisions seem to suggest that courts can completely eradicate the need for any business justification at all.

4. Refusal in the Absence of an Active Regulatory Scheme

As the *Trinko* Court observed, active regulatory oversight "diminishes the likelihood of major antitrust harm."[196] Since 2004, a vast number of lower courts have applied *Trinko*'s rationale and dismissed Section 2 claims where the allegedly exclusionary or predatory conduct at issue was monitored and remediable by an active regulatory scheme. For example, in *Stein v. Pacific Bell*,[197] a case brought by a subscriber to defendant Pacific Bell's DSL service, the Ninth Circuit found that the course of dealing between the parties "occurred within a congressionally-imposed regulatory scheme"—namely, the Telecommunications Act of 1996 ("TCA")—"and therefore '[did] not fit comfortably in the *Aspen Skiing* mold' of voluntariness."[198] Similarly, in *Covad Communications Co. v. BellSouth Corp.*,[199] the Eleventh Circuit dismissed the plaintiff's refusal-to-deal claim, holding that the defendant telephone company did not violate Section 2 by refusing to provide interconnection services pursuant to the TCA.[200] Like the Supreme Court in *Trinko*, the circuit court decided that the distinctive federal regulatory regime "created a broad and detailed regulatory environment that effectively abrogated the need for

196. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 412 (2004) (citing Concord v. Boston Edison Co., 915 F.2d 17, 25 (1st Cir. 1990)).

197. 172 F. App'x 192 (2006).

198. *Id*. at 193 (quoting MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d at 1132).

199. 374 F.3d 1044 (11th Cir. 2004).

200. *Id*. at 1049.

antitrust scrutiny."[201] Moreover, beyond finding that the TCA's savings clause barred a finding of implied immunity from antitrust laws, the court found that the TCA was an "effective and even more ambitious mechanism for regulating the telecom industry [than the Sherman Act]."[202]

Conversely, where a regulatory scheme lacks the power or clear authority to address or remedy the alleged anticompetitive conduct at issue, courts have declined to apply *Trinko*, finding that the defendant's anticompetitive breach of regulatory enforcement violates Section 2.[203] An early example, cited in *Trinko*, is the Supreme Court's decision in *Otter Tail Power Co. v. United States*,[204] in which municipal entities brought suit against an electrical power company that had refused to transmit power from other suppliers to the plaintiffs.[205] Finding that the Federal Power Commission, which employed some regulatory oversight over the transmission lines, lacked the authority to order the defendant to cooperate, the Court sustained the plaintiffs' Section 2 refusal-to-deal claim.[206]

In 2004, the Second Circuit in *In re Remeron Antitrust Litigation*,[207] a case involving not a refusal to deal but allegedly anticompetitive delays in patent listings to extend a monopoly, held that neither the Food and Drug Administration (FDA) regulations nor the Hatch-Waxman Act gave regulators the power to enforce rules and penalties against the defendant drug manufacturer, and,

201. *Id*. Although the text of the TCA states that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws," Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, cases like *Covad* suggest that lower courts are doing the opposite.

202. *Covad Commc'ns Co*., 374 F.3d at 1049.

203. Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc., 311 F. Supp. 2d 1048 (D. Colo. 2004). Courts have also upheld refusal-to-deal claims despite an active regulatory scheme where plaintiffs can demonstrate that the alleged conduct at issue falls outside the scope of such regulation. *E.g*., Covad Commc'ns Co. v. Bell Atl. Corp. 398 F.3d 666, 669–70 (D.C. Cir. 2005) (upholding the plaintiff's claim that the defendant failed to sell DSL service to potential customers because the defendant's conduct was "unrelated to duties" imposed by the controlling Telecommunications Act of 1996).

204. 410 U.S. 366 (1973).

205. *See id*. at 368.

206. *See id*. at 373–74.

207. 335 F. Supp. 2d 522 (D.N.J. 2004).

therefore, antitrust laws applied.[208] The court contrasted the fragmented power of FDA regulators with the completeness of the regulatory scheme of the Telecommunication Act of 1996 and found no indication that antitrust laws had been superseded by the Hatch-Waxman Act or FDA regulations.[209] Similarly, in 2005, a district court sustained a refusal-to-deal claim in *Stand Energy Corp. v. Columbia Gas Transmission Corp*.[210] because the controlling Federal Energy Regulatory Commission (FERC) statutes had not granted the authority to remedy the defendant's refusal to provide access to transportation and shipping services.[211] The court additionally noted that "FERC's authority to remedy anti-competitive behavior is decidedly less than the regulatory authority in *Trinko*."[212] These cases make clear that plaintiffs asserting refusal-to-deal claims within the regulatory context are more likely to encounter success where the regulatory scheme lacks the power or capacity to detect or remedy monopolizing behavior. Without this condition, *Trinko* leaves little opportunity for plaintiffs to assert viable claims in regulated industries.

5. Viability of the Essential Facilities Doctrine

The *Trinko* decision left many commentators speculating about the state of the essential facilities doctrine.[213] Several decades prior to *Trinko*, federal district and circuit courts developed the essential facilities doctrine, which states that the "owner of a properly defined 'essential facility' has a duty to share it with others, and that a refusal

208. *See id*. at 531. The court emphasized that "[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue" and that "[c]areful account must be taken of the pervasive federal and state regulation characteristic of the industry." *Id*. at 530 n.10 (citing Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004)).

209. *Id*. at 530–31.

210. 373 F. Supp. 2d 631 (S.D. W. Va. 2005).

211. *See id*. at 641.

212. *Id*.

213. *Compare* Eleanor M. Fox, *Is There Life in* Aspen *After* Trinko*? The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153, 154 (2005) (commenting on "a nearly obliterated essential facilities doctrine"), *with* Rosch, *supra* note 114, at 1170 (observing that "the essential facility doctrine has survived largely intact").

to do so violates § 2 of the Sherman Act."[214] As a Maryland district court recently explained, to establish a Section 2 violation under the essential facilities doctrine, a plaintiff must prove four elements: "(1) control by the monopolist of the essential facility; (2) the inability of the competitor seeking access to practically or reasonably duplicate the facility; (3) the denial of the facility to the competitor; and (4) the feasibility of the monopolist to provide the facility."[215] In deciding *Trinko*, the Supreme Court found "no need either to recognize . . . or to repudiate" the doctrine, but it briefly asserted that essential facility claims should be denied where a regulatory scheme exists and is equipped to compel and regulate sharing.[216] Thus, the Supreme Court seemed to foreclose the viability of the essential facilities doctrine in the regulatory context.

Taking cues from the highest court, many lower federal courts have dispensed with the essential facilities doctrine where a regulatory framework mandates access to services among competitors.[217] For example, in *New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.*,[218] a district court rejected the plaintiff's essential facilities claim that the defendant's denial of access to its posted settlement prices, which the plaintiff required to conduct certain business transactions, constituted a Section 2 violation.[219] The court denied the claim, "leaving it to regulatory agencies, rather than antitrust courts, to regulate the terms of any forced access."[220] In a similar vein, the district court in *Z-Tel Communications, Inc. v. SBC Communications, Inc.*[221] rejected the plaintiff's argument that the controlling regulatory agency lacked

214. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 7.7, at 306 (2d ed. 1999).

215. Loren Data Corp. v. GXS, Inc., No. DKC 10-3474, 2011 WL 3511003, at *10 (D. Md. Aug. 9, 2011) (citing Laurel Sand & Gravel Inc. v. CSX Transp., Inc., 924 F.2d 539, 544 (4th Cir. 1991)).

216. Verizon Commn'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

217. *E.g.*, N.Y. Mercantile Exch., Inc. v. Intercontinental Exch., Inc., 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

218. 323 F. Supp. 2d 559 (S.D.N.Y. 2004).

219. *Id.* at 569.

220. *Id.* (citing *Trinko*, 540 U.S. at 407–08). The *Mercantile Exchange* court went on to reiterate the Supreme Court's concern in *Trinko* about the "supreme evil of antitrust: collusion." *Id.* (quoting *Trinko*, 540 U.S. at 408).

221. 331 F. Supp. 2d 513 (E.D. Tex. 2004).

power to compel the defendant to provide access to shared transport.[222] Consistent with *Trinko*, the court reiterated that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms."[223]

However, post-*Trinko*, some lower courts continue to recognize and employ the doctrine outside of regulated industries. For example, in *Wood v. Archibald Medical Center, Inc.*,[224] decided in 2006, a Georgia district court upheld a plaintiff medical director's essential facilities claim that the defendant denied the plaintiff medical privileges at the defendant's hospital without valid business reasons.[225] In upholding the viability of the essential facilities doctrine, the district court emphasized the inverse of the Court's comment in *Trinko* that the doctrine serves no purpose where access exists,[226] asserting that "a plaintiff has the burden of proving that a defendant controls an essential facility, has refused access to said facility, and that a facility cannot be practically or economically duplicated."[227] In a similar vein, the district court in *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*[228] upheld a Section 2 claim, finding that both the essential facilities doctrine and the *Aspen* exception applied.[229] In that case, the plaintiffs—concert promoting businesses—alleged that the defendant radio station's termination of advertising and promotional dealings

222. *Id.* at 541.

223. *Id.* (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 773(e), at 150 (2003 Supp.)); *accord* MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1129 (9th Cir. 2004) (noting that the essential facilities doctrine is still viable after *Trinko* but declining to apply it in the case); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1049–50 (11th Cir. 2004) (finding that the ability of the Federal Telecommunications Act of 1996 to compel access foreclosed essential facilities claim); Am. Channel, LLC v. Time Warner Cable, Inc., No. 06-2175(DWF/SRN), 2007 WL 142173, at *11 (D. Minn. Jan. 17, 2007) (denying essential facilities claim where Federal Communications Commission regulated access to cable systems); Applera Corp. v. MJ Research, Inc., 349 F. Supp. 2d 338, 348 (D. Conn. 2004) (acknowledging the essential facilities doctrine but finding it inapplicable to the case).

224. No. 6:05CV53(HL), 2006 WL 1805729 (M.D. Ga. June 29, 2006).

225. *Id.* at *5–6.

226. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410–11 (2004).

227. *Wood*, 2006 WL 1805729, at *5–6.

228. 311 F. Supp. 2d 1048 (D. Colo. 2004).

229. *Id.* at 1106–08, 1114.

with all competing concert promoters constituted a refusal to deal.[230] The plaintiffs claimed that by tying their radio airplay to their concert promotions, the defendant violated Section 2.[231] The court ultimately denied the defendant's motion for summary judgment because access to rock radio advertising and promotional support could be considered an essential facility and because it found the Sherman Act to be "the only mechanism by which Clear Channel's behavior may be policed."[232] These cases make clear that the essential facilities doctrine lives on in lower courts as a viable, though limited, exception to the general rule that refusals to deal are not unlawful.[233]

IV. THE END OF THE GAME FOR PRICE SQUEEZES

Distinct from pricing strategies like volume discounts[234] or bundling,[235] a price squeeze aims to drive rivals from the market and occurs where a monopolist sells a product to its rival at a price that makes it impossible for rivals to compete at the retail level.[236] In the process, the monopolist incurs deliberate losses that are recouped by charging higher prices after competitors have been driven from the market or effectively prevented from offering a competitive price to consumers.[237] Part A of this section examines how the Supreme Court has addressed certain predatory pricing claims, focusing on the Court's decision in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*[238] and its elimination of price-squeeze claims.

230. *Id.* at 1106–07.

231. *Id.* at 1107.

232. *Id.* at 1114.

233. *See* Sunbeam Television Corp. v. Nielsen Media Research, Inc., 763 F. Supp. 2d 1341, 1348–50 (S.D. Fla. 2011) (recognizing the essential facilities doctrine but finding that availability of continued subscription access to ratings information precluded its application).

234. A volume discount refers to low pricing conditioned on large volume purchases of a product. Volume discounts generally have been found to be legal and reflective of cost savings. *E.g.*, LePage's Inc. v. 3M Co., 324 F.3d 141, 154 (3d Cir. 2003) (en banc).

235. Bundling refers to the popular marketing practice of offering two or more different products in one discounted bundle. Section 2 scrutiny of bundling is triggered where a monopolist intends to leverage its power in one product market to monopolize or attempt to monopolize a second market. *See* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 894, 903 (9th Cir. 2008).

236. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 584 (1986).

237. *Id.*

238. 555 U.S. 438 (2009).

Part B illustrates how lower courts have addressed claims of predatory pricing and product disparagement in response to the Court's decision in *Linkline*.

A. Pacific Bell Telephone Co. v. Linkline Communications, Inc.

Rather than endorse a case-by-case approach to determinations of predatory pricing, the Court in *Brooke Group Ltd*. *v*. *Brown & Williamson Tobacco Corp*.[239] established a two-prong test to detect predatory pricing that violates Section 2.[240] First, a plaintiff must demonstrate that the defendant-monopolist's prices are "below an appropriate measure of . . . costs,"[241] which allows consumers to benefit from the monopolist's low pricing strategy while competitors struggle to compete and eventually exit the market.[242] Second, a plaintiff must show—not imply—a "dangerous probability" that the defendant-monopolist will recoup its investment in below-cost prices.[243] The Court in *Brooke Group* clarified that the plaintiff must demonstrate that the alleged pricing scheme will likely result in a recoupment phase, characterized by sustained supracompetitive pricing—that is, pricing above competitive levels—or high entry barriers to new entry.[244] Thus, single firms that engage in single-product, above-cost pricing, the success of which is not dependent on recoupment, are effectively exempted from Section 2 liability.[245] For

239. 509 U.S. 209 (1993).

240. *Id*. at 222–24. Although *Brooke Group* centered on a Robinson-Patman Act claim, the Court made clear that the same test applies to Section 2 claims. *Id*. at 222.

241. *Id*. The Court declined to define "appropriate," leaving the conflict unresolved in the lower federal courts. While some circuits find it presumptively predatory when a monopolist's prices are below the average variable cost—that is, the firm's total variable costs divided by units of output—a plurality of appellate circuits has not "definitively articulated an appropriate measure of costs for determining predatory pricing." DENGER ET AL., *supra* note 66, at 276–79.

242. *Brooke Grp*. *Ltd*., 509 U.S. at 225.

243. *Id*. at 224–25. The court noted that the element is satisfied if, "given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb," and if the monopolist would be sufficiently compensated by the scheme. *Id*. at 225.

244. *Id*. at 226 (noting that summary disposition of the plaintiff's claim is warranted in certain situations where new entry is easy or where the defendant monopolist lacks adequate excess capacity to absorb the market shares of its rivals).

245. *See* MONOPOLIZATION HANDBOOK, *supra* note 38, at 139. While the Court recognized that this rule might realistically permit some strategies detrimental to consumers, such as low- but above-cost pricing, it observed that "predatory pricing schemes are rarely tried, and even more rarely successful," alluding to a low risk of serious anticompetitive consequences. *Brooke Grp*. *Ltd*., 509 U.S. at 226 (quoting Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 589

example, the Court in *Brooke Group* affirmed a verdict of summary judgment in favor of the defendant-monopolists because they had "no reasonable prospect of recouping [their] . . . losses."[246] The Court's emphasis on the recoupment requirement additionally signals that a strong showing of the probability of recouping profits is necessary to survive summary judgment in light of the oft-cited observation that "predatory pricing schemes are rarely tried, and even more rarely successful."[247]

In 2009, the Court's *Trinko* decision regarding refusals to deal found its way into another area of Section 2 conduct: single-product predatory pricing.[248] Combining the *Brooke Group* standard for predatory pricing with the refusal-to-deal reasoning in the *Trinko* decision, the Court in *Linkline* effectively "eliminated from antitrust purview" all price-squeeze claims.[249] A price squeeze occurs when a firm—enjoying a monopoly of some input needed by other competitors—charges its competitors a higher price while lowering retail prices to the point that no competitor could profitably sell the same product at retail for less than the monopolist.[250] In *Linkline*, the defendant, AT&T, offered DSL services at retail but was also mandated by the Federal Communications Commission (FCC) to sell wholesale transmission services to the plaintiff and other competing DSL companies.[251] The plaintiffs alleged that AT&T "squeezed" the plaintiffs' profit margins by charging a high wholesale price to competitors for DSL transport and a low retail price to consumers for DSL services.[252]

(1986)). Moreover, the Court noted that such practices are "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Id*. at 223.

246. *Id*. at 243.

247. *Matsushita*, 475 U.S. at 589; *see* DENGER ET AL., *supra* note 66, at 295–97; *see also* Virgin Atl. Airways Ltd. v. British Airways PLC, 257 F.3d 256, 272 (2d Cir. 2001) (affirming summary judgment based on failure to prove probability of recoupment); United States v. AMR Corp., 140 F. Supp. 2d 1141, 1209 (D. Kan. 2001) (granting summary judgment in favor of defendant based on absence of probable recoupment), *aff'd*, 335 F.3d 1109 (10th Cir. 2003).

248. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 450 (2009) ("[T]he reasoning of *Trinko* applies with equal force to price-squeeze claims.").

249. Ellen Meriwether, *Putting the "Squeeze" on Refusal to Deal Cases: Lessons from* Trinko *and* Linkline, ANTITRUST, Spring 2010, at 65, 65.

250. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 436–37 (2d Cir. 1945).

251. *Linkline*, 555 U.S. at 442–43.

252. *Id*. at 443.

The Court in *Linkline* declined to recognize the plaintiffs' claims, holding that an actionable Section 2 claim requires either proof of the monopolist's unlawful refusal to deal or evidence of predatory pricing under the *Brooke Group* standard.[253] In reaching its conclusion, the Court reasoned that the plaintiffs could not challenge AT&T's retail prices, as it found no evidence of retail sales below any measure of cost.[254] The Court feared that recognizing a price-squeeze claim such as this, where the monopolist's "retail price [remained] above cost," would invite false positives and chill competition.[255] Most significantly, the Court found that AT&T had no duty to deal with the plaintiffs[256] and certainly possessed no obligation "to deal under terms and conditions that the rivals find commercially advantageous."[257] Although AT&T's wholesale activities were federally mandated, the Court seemed to interpret the *Aspen* exception so narrowly that any duty to deal "arose from FCC regulations, not from the Sherman Act."[258] Troublingly, the Court reduced to a footnote another reason why AT&T might have lacked a duty to deal.[259] The Court observed that an antitrust duty to deal would require a "showing of monopoly power, but . . . the market for high-speed Internet service is now quite competitive; DSL providers face stiff competition from cable companies and wireless and satellite providers."[260] This puzzling observation also seems to suggest that AT&T might not have possessed monopoly power in the relevant market, which would then have eliminated the possibility of a Section 2 violation.[261] However, the Court moved on to focus more

253. *Id*. at 451–52.

254. *Id*. Critics of the decision argue that the Court overlooked the fact that suppliers with control over wholesale prices can accomplish anticompetitive results without even resorting to below-cost pricing that violates the *Brooke Group* standard. Meriwether, *supra* note 249, at 67.

255. *See Linkline*, 555 U.S. at 452 (citing Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993)) ("[T]he exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents 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.").

256. *Id*. at 457 (stating that plaintiffs may not bring a price-squeeze claim under Section 2 when the defendant monopolist has no antitrust duty to deal with the plaintiffs at wholesale).

257. *Id*. at 450.

258. *Id*.

259. *Id*. at 448 n.2.

260. *Id*. at 448.

261. Without a showing of monopoly power, the Court could have dismissed the claim without even inquiring into the viability of the plaintiff's price-squeeze claim.

heavily on the issue of whether a plaintiff could bring a price-squeeze claim "when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place."[262]

Ultimately, the Court found that when an absolute refusal to deal would have been lawful, a firm should never face Section 2 liability for selling to a competitor at an unreasonable price.[263] Furthermore, if a monopolist has no duty to deal with a competitor in the wholesale market, its price squeeze is not unlawful unless prices in the retail market are predatory or below an appropriate measure of cost, as defined by the *Brooke Group* test.[264] The Court's decision in *Linkline* effectively overruled a line of lower court decisions that interpreted *Trinko* to hold that plaintiffs could bring predatory-price-squeeze claims even where a monopolist had no duty to deal.[265]

262. *Id*. at 442.

263. *Id*. at 449–52.

264. *Id*. at 452; *see* White v. R.M. Packer Co., 635 F.3d 571, 584 (1st Cir. 2011) (asserting that actions in the wholesale and retail markets cannot be conflated to produce an antitrust violation when there is no violation in either market alone).

265. *E.g*., Linkline Commc'ns, Inc. v. SBC Cal., Inc., 503 F.3d 876, 877 (9th Cir. 2007), *rev'd sub nom.*, Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 554 U.S. 916 (2008), *vacated* 563 F.3d 853 (9th Cir. 2009); Covad Commc'ns Co. v. BellSouth Corp., 374 F.3d 1044, 1050 (11th Cir. 2004). *Contra* Covad Commc'ns Co. v. Bell Atl. Corp. 398 F.3d 666, 673 (D.C. Cir. 2005); Cavalier Tel., LLC v. Verizon Va., Inc. 330 F.3d 176, 190 (4th Cir. 2003). Two years later, in a unanimous vote, the Supreme Court in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co*. extended the *Brooke Group* predatory-pricing standard to predatory bidding claims. 549 U.S. 312, 315 (2007). Predatory bidding "involves the exercise of market power on the [market's] buy [], or input, side." *Id*. at 320. A purchaser engaging in predatory bidding raises the market price of an input product so high that rival buyers cannot compete and must exit the market. *Id*. The purchaser, now in possession of "monopsony power," then drives down input prices to reap supracompetitive profits that offset its losses from bidding up high input prices. *Id*. at 320–21. The Court reasoned that predatory bidding claims are "analytically similar" to predatory pricing claims and that "predatory bidding presents less of a direct threat of consumer harm than predatory pricing." *Id*. at 324; *see* Thomas A. Lambert, Weyerhaeuser *and the Search for Antitrust's Holy Grail*, 2007 CATO SUP. CT. REV. 277, 289–91 (2007) (noting the similarities between predatory bidding and predatory pricing). *But see* John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?*, 72 ANTITRUST L.J. 625, 654–55 (2005) (noting the differences between predatory bidding and predatory pricing and arguing that the *Brooke Group* requirement of below-cost pricing should not apply to predatory bidding). While *Weyerhaeuser* represents a "significant victory for antitrust defendants" in the realm of predatory bidding claims, plaintiffs challenging pricing disparities at retail and wholesale levels face an uphill battle to demonstrate either an unlawful refusal to deal under the *Aspen* exception or below-cost pricing. Nickolai G. Levin, Weyerhaeuser's *Implications for Future Antitrust Disputes*, 4 N.Y.U. J.L. & BUS. 343, 353 (2007); *see Linkline*, 555 U.S. at 452 (finding plaintiffs' claims to be "nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level" and noting that "[i]f there is no duty to deal at the wholesale level and no

B. Predatory Pricing and Product Disparagement in the Lower Courts

The Court's analysis in *Linkline* demonstrates that a monopolist can price as it chooses so long as it prices above some level of cost[266] or has no duty to deal. This analysis of single-product predatory pricing claims has also been adopted in several recent district and circuit court decisions.[267] Beyond this application, the rationale in *Linkline* has been expanded in some lower courts to preclude all pricing claims alleged under Section 2, as detailed in Part 1 of this Section. Part 2 explores how some courts have distinguished *Linkline* in order to keep Section 2 claims viable.

1. The Expansion of *Linkline*

Notably, lower courts have significantly expanded the Court's analysis in *Linkline* beyond its application to single-product predatory pricing. The Ninth Circuit in *John Doe 1 v. Abbott Laboratories*[268] interpreted the *Linkline* decision to preclude Section 2 challenges to *all* product-pricing claims.[269] In that case, the plaintiffs represented "certified classes of HIV patients . . . who purchase[d] Norvir," a drug manufactured by the defendant that scientists discovered "boosted" the effectiveness of HIV-fighting protease inhibitors (PIs) when combined in low doses with other PIs.[270] The defendant held a monopoly on the "boosting" market via Norvir, but it also competed in the "boosted" PI market as a retailer of a boosted PI, Kaletra.[271] After the Food and Drug Administration

predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins").

266. *See supra* note 243 and accompanying text.

267. *E.g.*, Sterling Merch., Inc. v. Nestle, S.A., 724 F. Supp. 2d 245, 271 (D.P.R. 2010) (describing an ice cream distributor's price-squeeze claim against the world's largest ice cream manufacturer as "toothless," and observing that the defendant's prices were not being set above cost and that there was no demonstrated antitrust duty to deal), *aff'd*, 656 F.3d 112 (1st Cir. 2011); Arminak & Assocs., Inc. v. Saint-Gobain Calmar, Inc., 789 F. Supp. 2d 1201, 1207 (C.D. Cal. 2011) (rejecting allegations of monopolization because plaintiff, a manufacturer of trigger sprays, failed to provide evidence that the defendant rival "ever priced its trigger sprays below average variable cost").

268. 571 F.3d 930 (9th Cir. 2009).

269. *Id*. at 934–35.

270. *Id*. at 932.

271. *Id*.

began to permit other competitors to market Norvir as a booster for their PIs, the defendant increased the price of Norvir by 400 percent but maintained the price of Kaletra.[272] According to the plaintiffs, the defendant leveraged its "boosting" monopoly in order to monopolize the "boosted" PI market by inducing consumers to purchase Kaletra over competitors' PIs.[273] The effect was an increased total cost of boosted PIs for competitors and an alleged overall impairment of competition in violation of Section 2.[274]

The Ninth Circuit held that the reasoning in *Linkline* controlled its decision to dismiss the plaintiffs' Section 2 claim of unlawful unilateral conduct.[275] The court found "insubstantial" the difference between Abbott Laboratories' sale to consumers in both the booster and boosted markets and the *Linkline* defendant's transactions with both consumers and competitors in the retail and wholesale markets.[276] The court made no distinction between Section 2 claims brought under theories of monopoly leveraging—that is, the use of monopoly in one market to create or maintain a separate monopoly in another market[277]—and single-product price squeezing.[278] Rather, it found the defendant's price increase functionally equivalent to that of AT&T's in *Linkline* and focused on the fact that the plaintiffs failed to allege that the defendant either refused to sell to them at the booster level or employed below-cost pricing at the boosted level.[279] Reiterating *Linkline*'s rhetoric that "[t]wo wrong claims do not make one that is right,"[280] the court found "no independently cognizable

272. *Id*.
273. *Id*.
274. *Id*.
275. *Id*. at 935.
276. *Id*. ("We understand the difference, but it is insubstantial. However labeled, Abbott's conduct is the functional equivalent of the price squeeze the Court found unobjectionable in *Linkline*.").
277. *See generally* Eun K. Chang, *Expanding Definition of Monopoly Leveraging*, 17 U. MIAMI BUS. L. REV. 325 (2009) (discussing free-standing monopoly leveraging doctrine and exploring judicial division on whether monopoly leveraging violates Section 2).
278. *Abbott Labs*., 571 F.3d at 935. Scholars have criticized the Ninth Circuit's approach in this case for its failure to employ a "bundled discount" analysis, in which Norvir and Kaletra would be deemed separate products—rather than a single finished product—subject to a *Linkline* price-squeeze analysis. Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 466 n.211 (2009).
279. *Abbott Labs*., 571 F.3d at 935.
280. *Id*. at 934 (citing Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 457 (2009)).

harm to competition when the wholesale price and retail price are independently lawful."[281] The Ninth Circuit reiterated its position two years later in a similar case involving the same defendants, *Safeway, Inc. v. Abbott Laboratories*,[282] where different plaintiffs advanced monopoly-leveraging claims identical to those alleged by Doe.[283] Finding that the decisions in *Linkline* and *Doe* precluded liability on a theory of monopoly leveraging, the court granted summary judgment on the issue.[284] Only time will tell if the Ninth Circuit's interpretation of *Linkline*—as virtually eliminating challenges to all pricing of a monopoly product—is merely an outlier, or if other circuits will follow suit.

2. Distinguishing *Linkline*

Not all lower courts have employed the same rationale toward all predatory pricing claims. Courts recognize that predatory pricing can take many forms, from bundling discounts and below-cost pricing to exclusive dealing and rebates, and some courts have used their discretion to restructure Section 2 claims in instances where *Linkline*'s precedent would require dismissal. For example, a California district court in *Church & Dwight Co. v. Mayer Laboratories, Inc.*[285] rejected a "price-based claim" of predatory pricing but allowed the plaintiff's Section 2 claim to survive the defendant's motion to dismiss as a vertical restraint[286] on grounds that "competition was substantially foreclosed."[287] There, the parties involved were manufacturers and distributors in the condom market, where competition depends heavily on point-of-sale advertising and acquisition of display space in retail stores.[288] Mayer Laboratories, Inc. ("Mayer Labs") alleged that monopolist Church & Dwight Co.

281. *Id.* at 934–35.

282. 761 F. Supp. 2d 874 (N.D. Cal. 2011).

283. *Id.* at 883.

284. *Id.* at 895–96.

285. No. C-10-4429 EMC, 2011 WL 1225912, at *10 (N.D. Cal. Apr. 1, 2011) (noting that "[c]ourts have long recognized many forms of exclusionary conduct that do not involve below-cost pricing").

286. Vertical restraints arise when a manufacturer imposes restrictions on another entity, usually a retailer, in the chain of distribution of a project. *See* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1219 (2008). Vertical restraints are governed by Section 1 of the Sherman Act.

287. *Church & Dwight*, 2011 WL 1225912, at *10–11.

288. *Id.* at *1.

("C&D") violated Section 2 by engaging in a rebate program with chain store retailers that required a specified minimum percentage of in-store display space dedicated to their products in exchange for massive rebates.[289] Mayer Labs claimed that this reallocation of display space to C&D was not based on the merits, that Mayer Labs' display space was diminished despite data showing that its condoms were selling better than C&D's, and that C&D's rebates were intended to replace and reduce the visibility of competing brands.[290]

Although one can draw parallels between the coercive conduct exhibited in this case and that of the defendant in *Doe* and *Safeway*, the court found the latter inapplicable.[291] The court distinguished this case from *Doe* and *Linkline* on the grounds that the conduct at issue in those cases involved a pricing scheme that *itself* operated as an exclusionary tool.[292] The central question, according to the court, was whether Mayer Labs' claims alleged a "price-based claim" of predatory pricing.[293] The court answered the inquiry in the negative, noting that the claim focused on the conditions and tactics employed at the exclusion of competitors.[294] The court found that C&D's rebates themselves did not exclude competition; rather, it was the exclusive display space bought through the rebates that increased C&D's sales and aimed to monopolize the market.[295] Drawing on the Sixth Circuit's 2002 decision in *Conwood Co. v. United States Tobacco*,[296] the *Church & Dwight* court asserted that a below-cost pricing analysis need not be employed where the alleged anticompetitive strategy sufficiently "constitute[s] willful anticompetitive conduct."[297] The circuit court in *Conwood*, a case that similarly involved point-of-sale displays as an important means of competition, found a defendant snuff monopolist liable under Section 2 because of its exclusive dealing arrangements and its practice of destroying, removing, and burying a smaller rival's

289. *Id*. at *2.
290. *Id*. at *2–3.
291. *Id*. at *8–10.
292. *Id*. at *9.
293. *Id*. at *10.
294. *Id*.
295. *Id*.
296. 290 F.3d 768 (6th Cir. 2002).
297. *Church & Dwight*, 2011 WL 1225912, at *10–11.

packages from visible display racks to encourage sales of its own snuff tobacco.[298] The *Conwood* court condemned the monopolist's misrepresentations to retailers about the sales strength of its products versus its competitors' after it reduced competition in the monopolized market.[299]

While *Conwood* differs from *Church & Dwight* because it involved "overly tortious means," the district court in *Church & Dwight* found the negative effects on competition to be identical.[300] To support its decision to uphold Mayer Labs's Section 2 claim, the *Church & Dwight* court distinguished Mayer Labs's claim from cases where exclusion from display spaces did not constitute antitrust injuries by emphasizing that the display-space allocation in those cases was based on the merits of competition and the defendant's market share of sales.[301] In addition, no alternative means of marketing were significantly curtailed in those cases.[302] Thus, *Church & Dwight* demonstrates that pricing strategies that significantly impair competitive opportunity and reduce consumer choice, when viewed cumulatively, may result in Section 2 liability. Nevertheless, the boundaries of such liability remain unclear,[303] and there exists little consensus among federal courts about whether to condemn product disparagement under Section 2.[304]

298. 290 F.3d at 774–75, 778–79. However, the court noted that isolated tortious activity without a significant and lasting effect on competition does not constitute an antitrust violation. *Id*. at 783–84.

299. *See id*. at 785–91 ("[T]here was evidence showing that USTC's actions caused higher prices and reduced consumer choice, both of which are harmful to competition.").

300. *Church & Dwight*, 2011 WL 1225912, at *11.

301. *Id*. at *11–13.

302. *Id*. at *13.

303. The Supreme Court has yet to weigh in on the issue, though it did state in *Brooke Group* that malicious conduct among competitors "does not, without more, state a claim under the federal antitrust laws." Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993). *But see* LePage's Inc. v. 3M Co., 324 F.3d 141, 153 (3d Cir. 2003) (characterizing *Conwood* as "a good illustration of the type of exclusionary conduct that will support a § 2 violation").

304. *See* Kevin S. Marshall, *Product Disparagement Under the Sherman Act, Its Nurturing and Injurious Effects to Competition, and the Tension Between Jurisprudential Economics and Microeconomics*, 46 SANTA CLARA L. REV. 231, 251 (2006) (arguing that intentionally false disparagement of a rival's goods or services injures competition, constituting a violation of Section 2); Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 826 (2010) (recognizing that "nearly every court [acknowledges] . . . that a monopolist's deceptive advertising and product disparagement under certain factual circumstances can violate the federal

Notably, the district court in *Church & Dwight* emphasized that an assessment of Mayer's monopolistic conduct for potential liability must view that "conduct in the aggregate" to properly evaluate its "cumulative or synergistic effects."[305] Assertions of "cumulative effects in the aggregate," also known as "overall schemes to monopolize," are not novel.[306] As far back as 1962, the Supreme Court stated that, in Sherman Act cases, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each."[307] Adding to this view, the plaintiffs in *United States v. Microsoft Corp*. urged a finding of liability where a monopolist's unilateral campaign of exclusionary acts in the aggregate had the requisite impact, even if each individual act would be lawful.[308]

The *Church & Dwight* court attempted to reconcile this approach with the *Linkline* Court's rejection of an "amalgamation" of meritless claims by quickly noting that the Court's analysis of "predatory pricing at the retail level took into account the pricing at the wholesale level—the retail pricing was not below the elevated whole price."[309] While this cursory explanation is not wholly persuasive,[310] other lower courts have held similarly in the context of predatory pricing schemes. For example, in *In re Neurontin Antitrust*

antitrust laws" but noting that lower courts employ differing legal standards to evaluate deceit by a monopolist).

305. *Church & Dwight*, 2011 WL 1225912, at *16.

306. *E.g*., United States v. Microsoft Corp., 253 F.3d 34, 78 (D.C. Cir. 2001) (acknowledging that plaintiffs asserted a "cumulative effect" argument but noting no evidence of acts to show course of conduct); Caldera, Inc. v. Microsoft Corp., 72 F. Supp. 2d 1295, 1306–10 (D. Utah 1999) (allowing plaintiff to pursue a Section 2 claim based on the course of conduct theory).

307. Cont'l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

308. *See Microsoft Corp*., 253 F.3d at 78.

309. *Church & Dwight*, 2011 WL 1225912, at *16.

310. The Court in *Linkline* strongly emphasized a divorced analysis of retail and wholesale prices, stating:

> Plaintiffs' price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins.

Pac. Bell Tel. Co. v. Linkline Comm'ns, Inc., 555 U.S. 438, 452 (2009). On the other hand, the *Church & Dwight* court's cursory attempt to liken its analysis to that in *Linkline* fails to make a distinction between analyzing a price-squeeze claim and analyzing a combination of allegedly anticompetitive pricing practices.

Litigation,[311] a New Jersey district court upheld the plaintiffs' claims that the defendant "violated Section 2 . . . by engaging in an overall scheme to monopolize the market" for an anti-epilepsy drug.[312] Rather than alleging independent antitrust violations involving improper patent listings, the plaintiffs, direct purchasers of an epilepsy treatment drug manufactured by the defendant, successfully pursued a Section 2 claim based on an overall scheme that was "designed for the anticompetitive purpose" of obtaining more market exclusivity than permitted by patent laws. This forced plaintiffs and other purchasers to pay supracompetitive prices for the defendant's patents.[313] Moreover, the court asserted that courts may view a group of *factual*, but not *legal*, allegations in their totality.[314] The district court distinguished *Linkline* as a case dealing "only with the viability of a price-squeeze claim in a particular factual situation and in a particular legal context."[315] In addition, the court found that the *Linkline* Court never indicated its intent to overrule preexisting standards that permit claims alleging schemes to monopolize.[316] The district court's willingness to find the plaintiff's Section 2 claim viable demonstrates that some lower courts continue to resist the anti-interventionist rationale underlying *Trinko* and *Linkline*.

V. ATTEMPTED MONOPOLIZATION AND HEIGHTENED PLEADING STANDARDS

Much like actual monopolization, the doctrine of attempted monopolization was crafted in the absence of congressional guidance and remains one of the most "thought-provoking and unsettled" areas in modern antitrust law.[317] Part A of this section sets forth the Supreme Court's test for attempted monopolization and discusses the significance of *Twombly*'s heightened pleading standards in the context of Section 2. Part B examines the impact of these pleading

311. MDL No. 1479, 2009 WL 2751029 (D.N.J. Aug. 28, 2009).
312. *Id*. at *16.
313. *Id*. at *13.
314. *Id*. at *16 (emphasis in original) (citing *In re* Remeron Antitrust Litig., 335 F. Supp. 2d 522, 528 (D.N.J. 2004)).
315. *Id*.
316. *Id*.
317. *See* MONOPOLIZATION HANDBOOK, *supra* note 38, at 213.

standards on attempted monopolization claims[318] in recent lower federal court decisions.

A. Attempted Monopolization Claims in the Supreme Court

The Supreme Court in *Spectrum Sports, Inc. v. McQuillan*[319] held that attempted monopolization requires a plaintiff to show "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[320] The first element refers to the same type of conduct required for actual monopolization and is naturally subject to the same limitations and questions discussed earlier.[321] With respect to the second element, unlike the offense of actual monopolization, the analysis for attempted monopolization inquires into the defendant's intent, asking "not *why*, but *whether*, one intends to acquire unlawful monopoly power."[322] Courts have held that specific intent can be inferred from anticompetitive conduct but also have emphasized that no Section 2 liability is likely to be found where a valid business reason exists for the alleged predatory or anticompetitive conduct.[323]

The *Spectrum* Court imposed the third requirement of a dangerous probability of achieving monopoly power in an effort to "avoid constructions of [Section] 2 which might chill competition,

318. *See supra* note 25. For a discussion of *Twombly* in the context of vertical restraints, 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), which discusses the difficulty plaintiffs face in surviving motions to dismiss as a result of *Twombly*'s heightened pleading standard.

319. 506 U.S. 447 (1993).

320. *Id*. at 456. To clarify, "a company that does not possess significant market power at the time of anticompetitive conduct may . . . [be guilty of actual monopolization] if it obtains monopoly power as a result of that conduct"; however, "[i]f the conduct does not result in a monopoly power, the company may be guilty of attempted monopolization." Katarzyna A. Czapracka, *Where Antitrust Ends and IP Begins—on the Roots of the Transatlantic Clashes*, 9 YALE J.L. & TECH. 44, 50 (2007). Along with pleading the three elements given by *Spectrum*, private plaintiffs must also plead "causal antitrust injury" by demonstrating that the plaintiff's loss "flows from an anticompetitive aspect or effect of the defendant's behavior." Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

321. *See* discussion *supra* Part II.B.

322. Ass'n for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577, 585 (D.C. Cir. 1984) (emphasis in original).

323. *See Spectrum Sports*, 506 U.S. at 459.

rather than foster it."[324] As the Court in *Trinko* highlighted eleven years later,[325] the Court in *Spectrum* observed that "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects."[326] Hinting at the problem of false positives, the Court emphasized that Section 2 only penalizes unilateral firm conduct that monopolizes or *dangerously* threatens to monopolize.[327] Thus, the third requirement of a dangerous probability "reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur."[328]

In the last several years, heightened pleading standards imposed by the Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*[329] have made it more difficult for plaintiffs claiming attempted monopolization to allege the last two prongs. In *Twombly*, the plaintiffs alleged that Bell Atlantic and other incumbent local exchange carriers, which were bound by federal law to share their networks with smaller competitors, engaged in parallel conduct to inhibit their smaller rivals in violation of Section 1.[330] The *Twombly* Court, in a seven–two decision, dismissed plaintiffs' Section 1 conspiracy complaint because it failed to include "plausible grounds to infer an agreement."[331] Countering the permissive pleading standards of Rule 8 of the Federal Rules of Civil Procedure, the Court directed lower courts to require specific facts to support plaintiffs' allegations.[332] Two years later, in *Ashcroft v. Iqbal*,[333] the Court redoubled its stance, announcing that all civil complaints "must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'"[334]

Although Section 2 claims of monopolization were not squarely at issue in these cases, lower federal courts have relied on the pleading standards dictated in *Twombly* and *Iqbal* in deciding cases

324. *Id*. at 455, 458.
325. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004).
326. *Id*. at 458–59.
327. *Id*.
328. *Id*. at 456.
329. 550 U.S. 544 (2007).
330. *Id*. at 550–51.
331. *Id*. at 556.
332. *See* FED. R. CIV. P. 8; *Twombly*, 550 U.S. at 570.
333. 556 U.S. 662 (2009).
334. *Id*. at 1950 (quoting *Twombly*, 550 U.S. at 570).

involving attempted monopolization.[335] After *Twombly*, courts may treat any assertion that a dominant firm possessed a particular intent—or other fundamentally factual assertions—as a legal conclusion.[336] Furthermore, a plaintiff's attempt to demonstrate a defendant's dangerous probability of success is more likely to fail if the plaintiff is unable to amass evidence of market share, barriers to entry, or the strength of existing competitors.[337] In *Twombly*, the Court again manifested its skepticism about intervention by ill-equipped courts and their ability to avoid false positives, noting that behind the decision was a desire to protect antitrust defendants from the heavy burdens of pretrial discovery.[338] In his sharp dissent in *Twombly*, Justice John Paul Stevens wondered whether the decision "will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants . . . ."[339] While it may be too soon to confidently announce that competition has been irreparably hampered, it appears that civil defendants facing allegations of

335. *E.g.*, *In re* Elevator Antitrust Litigation, 502 F.3d 47, 50–51 (2d Cir. 2007) (finding that purchasers of elevators and elevator maintenance services failed to allege plausible inference of antitrust agreement); Shinogi Pharma, Inc. v. Mylan, Inc., No. Civ. A. 10-1077, 2011 WL 2550835, at *1 (D. Del. June 10, 2011) (dismissing attempted monopolization counterclaim for failure to plead with specificity required by *Twombly* and *Iqbal*).

336. Briggs & Matheson, *supra* note 14, at 145.

337. Courts are to consider a combination of factors, such as the defendant's market share as a proxy for monopoly power, elasticity of consumer demand, entry barriers, and the nature of the defendant's anticompetitive conduct. Carpenter Tech. Corp. v. Allegheny Techs., Inc., 646 F. Supp. 2d 726, 735 (E.D. Penn. 2009). With respect to market share as an index for a dangerous probability of success, the higher a defendant's market share, the more likely the court is to find a dangerous probability of success. MONOPOLIZATION HANDBOOK, *supra* note 38, at 222. An inelasticity of consumer demand, indicating that consumers will continue to purchase despite price increases, also increases the likelihood of a dangerous probability of achieving monopoly. *Id*. at 224. A finding of high or multiple barriers to entry, such as government regulations or high start-up costs, additionally indicates a higher probability of success. *Id*. at 225. Lastly, an assessment of the size and financial strength of competitors helps courts to evaluate whether a defendant has a dangerous probability of success. *Id*. at 225–26. Courts have held that deciding whether a defendant possesses a dangerous probability of monopolization is a fact-intensive inquiry. *E.g.*, United States v. Microsoft Corp., 253 F.3d 34, 80 (D.C. Cir. 2011) ("[T]he court must examine the facts of each case, mindful that the determination of what constitutes an attempt . . . is a question of proximity and degree." (citations omitted) (internal quotation marks omitted)); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 319 (3d Cir. 2007).

338. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007); Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Error*, 20 CORNELL J.L. & PUB. POL'Y 1, 1 (2010).

339. *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

attempted monopolization will continue to benefit from *Twombly*'s stricter pleading standards.

B. Attempted Monopolization Meets Twombly *in Lower Federal Courts*

The Supreme Court's decision in *Twombly* seemed to raise the bar for plaintiffs to plead adequate supporting facts for every element of their antitrust claims.[340] Following the Court's decisions in *Twombly* and *Iqbal*, it appears that plaintiffs must overcome more hurdles to state a claim for attempted monopolization, because plaintiffs must now provide enough factual detail "to raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiffs' claims.[341]

As Judge Learned Hand expressed in *United States v. Aluminum Co. of America*,[342] plaintiffs "must prove . . . an intent which goes beyond the mere intent to do the act"; there must be a specific aim to monopolize.[343] Some commentators have speculated that fusing the specific intent requirement with *Twombly*'s requirement of factual allegations that "raise a right to relief above the speculative level"[344] results in particular difficulty for plaintiffs alleging specific intent because courts may treat factual assertions as legal conclusions.[345] However, a few courts have permitted plaintiffs' claims to survive motions to dismiss and motions for summary judgment in spite *Twombly*'s pleading standard.[346] In allowing a plaintiff's Section 2

340. *See id*. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level.").

341. *Id*. at 556.

342. 148 F.2d 416 (2d Cir. 1945).

343. *Id*. at 431–32.

344. *Twombly*, 550 U.S. at 555.

345. Briggs & Matheson, *supra* note 14, at 145.

346. *See e.g*., E. I. du Pont de Nemours & Co. v. Kolon Indus., 637 F.3d 435, 453 (4th Cir. 2011) (inferring specific intent from the plaintiff's adequately pled anticompetitive practices); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 318 (3d Cir. 2007) (noting that "evidence that business conduct is 'not related to any apparent efficiency' may constitute proof of specific intent to monopolize" (quoting Aspen Skiing, Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608 n. 39 (1985))); Scooter Store, Inc. v. SpinLife.com, LLC, 777 F. Supp. 2d 1102, 1116–17 (S.D. Ohio 2011) (finding that the defendant's conduct, as alleged by the plaintiff, was employed "to harass and eliminate competition is sufficient to establish a specific intent to monopolize at the motion to dismiss stage"); Cloverleaf Enters., Inc. v. Md. Thoroughbred, Horsemen's Ass'n, 730 F. Supp. 2d 451, 464–65 (D. Md. 2010) (stating that the plaintiffs' factual allegations must be accepted as true and could consequently support a finding that defendants had a specific intent to

claims to proceed, these courts have echoed the *Spectrum Sports* Court's observation that a fact finder could infer the necessary specific intent to monopolize from anticompetitive conduct.[347] Some courts have additionally found that a defendant's assertion of a valid business justification for the alleged anticompetitive conduct[348] does not defeat a plaintiff's attempted monopolization claim.[349]

Plaintiffs appear to encounter the most difficulty in motions to dismiss, where the requirement of a dangerous probability of successful monopolization intersects with *Twombly*'s pleading standard. Attempted monopolization by nature requires a "lesser degree of market power" to establish a monopolization claim.[350] Some lower courts have sustained plaintiffs' attempted monopolization claims, holding that the fact-specific nature of the relevant market inquiry makes courts reluctant to dismiss Section 2 claims for failure to properly plead a relevant market.[351] However, several other district and circuit courts have interpreted the *Twombly* and *Iqbal* decisions to require, or at least to strongly urge, plaintiffs to allege that the defendants controlled a certain percentage of the market and to describe the market structure.[352]

monopolize the relevant wagering market); White Mule Co. v. ATC Leasing Co., 540 F. Supp. 2d 869, 893 (N.D. Ohio 2008) (noting that "a factfinder could also reasonably infer a specific intent to destroy competition from the . . . defendants' conduct" (quoting Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 101 (2d Cir. 1998) (internal quotation marks omitted)); Babyage.com, Inc. v. Toys "R" Us, Inc., 558 F. Supp. 2d 575, 585–586 (E.D. Pa. 2008) (finding allegations of defendant's procurement of contractual agreements from manufacturers sufficient to constitute specific intent to monopolize); Xerox Corp. v. Media Scis. Int'l, Inc., 511 F. Supp. 2d 372, 390 n.11 (S.D.N.Y. 2007) (finding allegations sufficient to state a claim for attempted monopolization).

347. *See* cases cited *supra* note 337.

348. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

349. *See, e.g.*, All Star Carts & Vehicles, Inc. v. BFI Canada Income Fund, 596 F. Supp. 2d 630, 642 (E.D.N.Y. 2009).

350. *See Tops Mkts*., 142 F.3d at 100.

351. *See In re* Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., 562 F. Supp. 2d 392, 401 (E.D.N.Y. 2008) (upholding attempted monopolization claim).

352. *See* Process Controls Int'l, Inc. v. Emerson Process Mgmt., 753 F. Supp. 2d 912, 927–28 (E.D. Mo. 2010) (holding that the plaintiff failed to support its conclusion about the defendant's control of the market with any factual allegations from which it could be reasonably inferred that defendant "maintain[ed] a dominant share of the relevant market"); Sun Microsystems, Inc. v. Versata Enters., Inc., 630 F. Supp. 2d 395, 403 (D. Del. 2009) (quoting Queen City Pizza, Inc. v. Domino's Pizza, Inc, 124 F.3d 430, 436 (3d Cir. 1997)) (granting the defendant's motion to dismiss where the plaintiff relied on conclusory assertions and failed to allege facts pertaining to the defendant's share of the market, the boundaries of the relevant market, or the "reasonable interchangeability" of the product's use); Hear-Wear Techs., LLC v. Oticon, Inc., 551 F. Supp. 2d

Twombly's stricter requirements, which came into effect in 2007, took a massive toll on antitrust case filings.[353] From 2008 to 2009, the number of antitrust class action lawsuits filed in federal court dropped from 766 to 375.[354] While lower federal courts continue to uphold attempted monopolization claims when alleged with specificity, *Twombly* has undoubtedly impacted the level of specificity with which plaintiffs must now plead Section 2 violations.

VI. ENFORCEMENT EFFORTS: "GET OUT OF JAIL FREE" CARDS FOR ALL

In 2009, newly appointed Assistant Attorney General Christine Varney of the Justice Department's Antitrust Division touted the government's renewed dedication to reinvigorate antitrust enforcement.[355] In her inaugural weeks, Varney cautioned that "too big to fail"—the idea that the collapse of institutions integral to the overall stability of the economy would result in disastrous economic consequences[356]—is a "failure of antitrust."[357] Reflecting on the economic crisis afflicting the United States and countries around the globe, Varney announced, "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected."[358] Stricter antitrust enforcement efforts would require

1272, 1280 (N.D. Okla. 2008) (denying the defendant's motion to dismiss where the plaintiff addressed with factual specificity important factors such as cross-elasticity of demand and interchangeability of products, peculiar characteristics, and unique barriers to entry).

353. Donald W. Hawthorne, *Recent Trends in Federal Antitrust Class Action Cases*, ANTITRUST, Summer 2010, at 58.

354. *Id*.

355. *See* Christine A. Varney, Assistant Att'y Gen., U.S. Dep't of Justice, Remarks as Prepared for U.S. Chamber of Commerce, Vigorous Antitrust Enforcement in This Challenging Era 5 (May 12, 2009).

356. *See* Caren Bohan, *Obama Aide: No Fixed Rules on Too Big to Fail*, REUTERS (Sept. 18, 2008, 9:00 a.m. ET), http://www.reuters.com/article/2008/09/18/us-usa-politics-obama-financial-idUSN1749089920080918; *see also* Sharon E. Foster, *Too Big to Fail—Too Small to Compete: Systemic Risk Should Be Addressed Through Antitrust Law But Such a Solution Will Only Work if It Is Applied on an International Basis*, 22 FLA. J. INT'L L. 31, 34 (2010) (asserting that "years of deregulation coupled with consolidation in the financial services sector due to a lack of antitrust enforcement resulted" in too-big-to-fail firms).

357. *See* David Goldman, *Obama Vows Antitrust Crackdown*, CNN MONEY (May 11, 2009, 3:35 p.m. ET), http://money.cnn.com/2009/05/11/news/economy/antitrust/.

358. *See* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.justice.gov/atr/public/press_releases/2009/245710.pdf.

going "back to the basics" and employing "tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave."[359] Many observers and antitrust commentators who hoped that Varney would spark a wave of stricter antitrust enforcement practices welcomed her appointment.[360] From 2001 to 2010, the United States Department of Justice (DOJ) had not filed a single action charging a monopolist with engaging in anticompetitive conduct in violation of Section 2.[361] Although in 2008, under the Bush Administration, the DOJ issued a 215-page report attempting to lay out clear policy guidelines for determining monopolizing conduct, the Federal Trade Commission (FTC) rejected the report and Varney eventually rescinded it.[362] The FTC characterized the DOJ's report as "a blueprint for radically weakened enforcement,"[363] while Varney found that the report raised too many hurdles to government enforcement.[364]

In retrospect, the government's heightened focus on enforcement spearheaded by Varney ultimately amounted to more rhetoric than action, at least in the realm of Section 2. It took two years for the DOJ under President Obama to file *United States v*.

359. Varney, *supra* note 355, at 9.

360. *See* Stacey Anne Mahoney, *To Day 100 and Beyond: Antitrust Enforcement in the Obama Administration*, ANTITRUST COUNSELOR, Mar. 2009, *available at* http://www.gibsondunn.com/publications/Documents/Mahoney-Day100andBeyondAntitrustEnforcementObamaAdmin.pdf ("In other words, buckle your seatbelts, corporate America; it's going to be a bumpy, enforcement-laden ride."); Robert A. Skitol & Kenneth M. Vorrasi, *Justice Stevens' Antitrust Legacy*, ANTITRUST, Summer 2010, at 32, 36 (observing that the Justice Department's new pledge to aggressive enforcement may "bring *Aspen* in from the 'outer boundary § 2 liability' to which it was consigned by *Trinko*"); Editorial, *Return of the Trustbusters*, N.Y. TIMES, May 13, 2009, at A30 ("So it is heartening to see that the Obama Administration plans to start vigorously enforcing antimonopoly laws again.").

361. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2001–2010, *available at* http://www.justice.gov/atr/public/workload-statistics.pdf [hereinafter ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2001–2010]. It was not until February 25, 2011, that the DOJ filed a complaint against the largest healthcare services provider in Wichita Falls, Texas, alleging that it unlawfully engaged in exclusive contracts to maintain its monopoly, causing consumers to pay higher prices. *See* Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Texas Hospital Prohibiting Anticompetitive Contracts with Health Insurers (Feb. 25, 2011), http://www.justice.gov/atr/public/press_releases/2011/267648.pdf [hereinafter Feb. 25, 2011, DOJ Press Release].

362. U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008); *see* Varney, *supra* note 355, at 8.

363. Statement of Comm'rs Harbour, Leibowitz, and Rosch, Fed. Trade Comm'n (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf.

364. Varney, *supra* note 355, at 8–9.

United Regional Healthcare System,[365] its first Section 2 monopolization claim, in February 2011.[366] In comparison to the Bush Administration's Section 2 enforcement policy (or nonenforcement policy),[367] *United Regional* represented a strong assertion of the U.S. government's disapproval of unfair competition.[368] In the first Section 2 claim brought by the government since 1999, the DOJ alleged that United Regional, the largest hospital in Wichita Falls, Texas, unlawfully used contracts to maintain its monopoly on hospital services.[369] The case settled in September 2011 with United Regional agreeing to stop conditioning its prices on the basis of whether insurers contracted with its rivals.[370] In the same period, Varney stepped down from her position, stating, "I came in with President Obama committed to fulfilling his promise to reinvigorate antitrust law, and I think we've done that."[371] However, the department's failure to reissue a revised report on single-firm conduct guidelines and its single Section 2 filing against United Regional seem to signal otherwise.

VII. CHANGING THE GAME: PROPOSALS FOR REFORM

Against the backdrop of a severe global economic downturn, the lower federal courts' discordant interpretations of *Trinko*'s refusal-to-deal rules and the uncertainty surrounding standards governing other forms of predatory or exclusionary behavior indicate that change is necessary. Judicial coherence on Section 2 issues is needed now more than ever if the Sherman Act is to be the "Magna Carta of

365. Complaint, United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011), *available at* http://www.justice.gov/atr/cases/f267600/267651.pdf.

366. *See* ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2001–2010, *supra* note 361.

367. J. Bruce McDonald, Deputy Assistant Att'y Gen., Dep't of Justice, Presentation to the American Bar Association Antitrust Law Section Annual Spring Meeting, Section 2 in the Second Bush Administration, 2005 WL 5327724 (Mar. 31, 2005) (reiterating its position that it is "preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard" (quoting Brief of United States as Amicus Curiae at 19, 3M Co. v. LePage's Inc., 542 U.S. 953 (2004) (No. 02-1865), *available at* http://www.justice.gov/atr/cases/f203900/203900.pdf).

368. *See* ANTITRUST DIVISION WORKLOAD STATISTICS, FY 2001–2010, *supra* note 361.

369. Feb. 25, 2011, DOJ Press Release, *supra* note 361.

370. *Id*.

371. Thomas Catan & Gina Chon, *Antitrust Chief to Step Down*, WALL ST. J. (Jul. 7, 2011), http://online.wsj.com/article/SB10001424052702303544604576430171298566868.html.

free enterprise."[372] Enforcement efforts, crucial to maintaining the effectiveness of Section 2, remain stunted without a cohesive and receptive judiciary. Thus, this Article proposes fundamental change for a genuinely reinvigorated Section 2 and examines three potential avenues to meaningful reform. Part A of this section considers, but ultimately rejects, more radical reform of the market definition process. Part B attempts to address the need for a single unifying test to evaluate Section 2 claims alleging exclusionary or predatory conduct by presenting a modified rule of reason approach, which would additionally address judicial concerns about false positives and the proper role of the judiciary. Part C advances the viability of using Section 5 of the Federal Trade Commission Act as a "gap-filler" in instances where a certain practice may not constitute a Section 2 violation but nonetheless results in harm to consumers. Lastly, Part D suggests that the changing nature of technology and business requires the Court to return to an *Aspen*-style analysis of allegedly anticompetitive conduct.

A. Reconsidering the Market Definition Process

In 1966, the Supreme Court in *Grinnell* established the basic two-step framework for evaluating Section 2 claims.[373] Since then, the vast majority of courts have required a finding of monopoly power before examining a defendant's alleged exclusionary or predatory conduct.[374] Over the years, many commentators have reflected on the flaws inherent in the process of defining the dominant firm's share of the relevant geographic and product markets in order to make inferences about its market power.[375] In 2010, Professor Louis Kaplow advanced a thesis arguing that "the

372. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415 (2004) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)).

373. United States v. Grinnell Corp., 384 U.S. 563 (1966); *see* discussion *supra* Part II.

374. *See supra* Part II.A.

375. *See* Kaplow, *supra* note 40, at 440 ("No one believes that the market definition process is flawless or that market power inferences drawn from market shares are uniformly reliable, or even nearly so."); *see, e.g.*, Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849 (2000); Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 1 (1984); Thomas E. Kauper, *The Problem of Market Definition Under EC Competition Law*, 20 FORDHAM INT'L L.J. 1682 (1997).

market definition process is incoherent as a matter of basic economic principles and hence should be abandoned entirely."[376] In his intriguing conceptual claim, Kaplow contends that it is impossible to define a relevant market coherently unless the court already has a best estimate in mind, in which case the entire inference is worthless because "one already knows the answer to the market power question that the market definition process is designed to illuminate."[377] While cautioning that his thesis is primarily a conceptual matter advanced to generate new perspectives, Kaplow suggests a "temporizing" solution that would avoid having to resort to the traditional market definition in order to choose the market, thus yielding the best legal conclusion. Kaplow suggests that courts use "whatever evidence and modes of inference" to garner a best estimate of market power.[378] However, it becomes immediately clear that the "best evidence" from which to deduce market power remains unsettled, and Kaplow goes no further in this suggestion. This vague proposal, coupled with Kaplow's acknowledgement that case law contains an "overwhelming endorsement" of the market power definition, further reduces the plausibility that "existing practice could adapt substantially if agencies and adjudicators were receptive."[379]

Furthermore, in light of the Court's decision in *Twombly*, it seems that Kaplow's altered analysis might be inconsistent with redefined pleading standards. *Twombly* arguably entrenched the importance of the market definition process.[380] As illustrated in Part V, *Twombly*'s pleading standards make it easier for courts to deny pretrial discovery and to strike down claims for failure to demonstrate market power.[381] In addition, the weight of stare decisis makes it more difficult to envision the Supreme Court entirely abandoning the market definition process in its evaluation of Section 2 claims.[382] While Kaplow's argument does not persuasively argue

376. Kaplow, *supra* note 40, at 438. The "market definition process" refers to a three-step process in which one first defines the relevant market, typically referring to the product and geographic markets. Next, "one measures the firm's market share" in contrast to others in the market. Lastly, "one infers from this share the firm's degree of market power." *See id*. at 439.

377. *Id*. at 441–42, 515.

378. *Id*. at 508–09, 511.

379. *Id*. at 508, 511.

380. *See supra* Part V.

381. *See supra* Part V.

382. *See* discussion *supra* Part II.B.

that federal courts are anywhere near ready to relinquish their attachment to the market power definition, his proposal to eliminate such an integral part of antitrust analyses serves as a reinvigorating reminder that Section 2 analyses and enforcement strategies might benefit from more-than-incremental reform.

B. A Modified Rule of Reason

Courts strive to apply legal tests that minimize false positives in order to achieve the end goals of economic efficiency and consumer welfare. In order to advance these objectives, FTC Commissioner Rosch advocates the application of a single test with which courts can analyze alleged monopolizing behavior, even if the test is imperfect and would not apply to all cases.[383] A single test would provide more predictability to practitioners and more guidance to lower courts and enforcement agencies, and it would contribute to a more uniform development of antitrust law.[384] Thus, this Article advances a "modified" rule of reason approach that allows courts to compare legal frameworks to find the legal test that most effectively improves consumer welfare in the case at hand.[385] As discussed above, the rule of reason approach involves balancing procompetitive justifications for the alleged monopolizing conduct against its alleged anticompetitive effects.[386]

The District of Columbia Circuit Court laid out the workings of the rule of reason approach in a Section 2 case, *United States v. Microsoft Corp.*,[387] even though the test routinely applied exclusively in Section 1 cases.[388] Instead of balancing a monopoly's alleged anticompetitive effects against its procompetitive justifications,

383. Rosch, *supra* note 57, at 14–15 (proposing a test that would analyze anticompetitive effects by examining whether the intent of firms with monopoly or near-monopoly power is to cripple or eliminate rivals, and whether the conduct has that effect).

384. *Id.* at 15.

385. *See generally* Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265 (2008) (arguing that the use of the rule of reason in Section 2 claims requires adopting different legal tests depending on the circumstances and that courts should engage in a balancing of such tests with certain "safe harbors"—meaning that when certain factors are present, the conduct is lawful under Section 2 without further scrutiny—to better serve competition and consumers).

386. *See* discussion *supra* Part II.B.

387. 253 F.3d 34 (D.C. Cir. 2001) (per curiam).

388. *Id.*; *see* discussion *supra* Part II.B.

courts employing a "modified" rule of reason approach must examine the procompetitive and anticompetitive consequences of each *legal test* proposed by the parties to the claim.[389] Examples of legal tests include the aforementioned no-economic-sense test, profit-sacrifice test, and less-efficient-rival test, all of which aim to determine whether the anticompetitive effects of a monopolist's conduct outweigh the monopolist's procompetitive justifications.[390]

In the course of deciding which proposal to adopt, courts would have to determine a number of factors about each test, separately and comparatively: (1) enforcement costs; (2) the increase or diminution of false positives; (3) the ease of applicability; (4) likely competitive consequences; and (5) whether courts are likely to have all necessary information to apply the proposed test accurately.[391] In weighing these considerations, courts would be able to select a legal test that best diminishes the risk of false positives. Indeed, the ultimate goal of a modified rule of reason approach would be to encourage courts to find the best legal test to minimize error under the circumstances. Where the "means of illicit exclusion, like the means of legitimate competition, are myriad," legal tests should be flexible enough to address the nuances of any Section 2 claim.[392] However, the modified rule of reason approach would not apply where courts have settled on an appropriate Section 2 legal test to address a particular category of conduct—such as *Brooke Group*'s two-prong test for single-product predatory pricing.[393]

Consistent with FTC Commissioner Rosch's suggestion,[394] this modified rule of reason approach possesses the flexibility needed to address the heterogeneous conduct subject to Section 2. Clearly, this approach to identifying the proper test necessarily requires courts to determine a great deal of information and, at first glance, seems to echo a concern prominently manifested in the *Trinko* decision—namely, that courts are "ill-suited" to "act as central planners, identifying the proper price, quantity, and other terms of

389. *See* Popofsky, *supra* note 385, at 1274.
390. *See supra* Part II.B.
391. *See* Popofsky, *supra* note 385, at 1276–77.
392. *See Microsoft*, 253 F.3d at 58.
393. *See* Popofsky, *supra* note 385, at 1277.
394. Rosch, *supra* note 57, at 14–15.

dealing."[395] However, upon closer examination, the task required by the modified rule of reason does not require courts to conduct any novel analyses.[396] While it does require courts to carefully consider two proposed legal tests and their associated errors and consequences, courts balance the same factors, seek to diminish false positives, and make identical calculations regarding anticompetitive effects when evaluating virtually every Section 2 claim. Moreover, just six months after the *Trinko* Court doubted the capacity of lower courts to handle complex antitrust analyses, the Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[397] entrusted lower courts with precisely that role by noting that "[a]s courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."[398] Although *Leegin* involved a Section 1 claim, the Court's observation may apply to courts conducting similar analyses of Section 2 claims.

Ultimately, a modified rule of reason approach would preserve the existing array of tests to evaluate unilateral conduct in Section 2 claims, and it would allow courts to employ the test that best reduces false positives by giving them the power to carefully consider and choose the best, though imperfect, option.

C. Falling Back on Section 5 of the Federal Trade Commission Act

While some commentators argue that there is an urgent need for more vigorous government intervention[399] and others more temperately endorse a more balanced federal enforcement policy,[400]

395. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

396. *See* Popofsky, *supra* note 385, at 1277 ("Fortunately, the common-law process of developing Section 2 does not take place on a clean slate . . . . The existence of background legal tests greatly aids courts' tasks because such tests provide a starting point for the analysis, a baseline against which to assess whether a different legal test is warranted.").

397. 551 U.S. 877 (2007).

398. *Id*. at 898.

399. *See* J. Thomas Rosch, *The Redemption of a Republican*, FTC: WATCH, June 1, 2009, at 5–6, *available at* http://www.ftc.gov/speeches/rosch/090601redemption.pdf.

400. *See* Bonny E. Sweeney, *An Overview of Section 2 Enforcement and Developments*, 2008 WIS. L. REV. 231, 259–60 (2008).

it is apparent that improvements in antitrust law critically depend on dynamic enforcement strategies. On the other hand, the Supreme Court's anti-expansionist perspective on Section 2 has constrained what the DOJ can do about single-firm conduct.[401] However, Section 5 of the FTC Act may provide added support to the prosecution of monopolization claims.

Section 5 of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce."[402] The FTC has no authority to prosecute Section 2 claims but routinely uses Section 5 to challenge the same conduct that would violate the Sherman Act.[403] In fact, Congress passed the FTC Act in 1914 with the belief that the Supreme Court interpreted the Sherman Act much too strictly.[404] However, it granted the FTC only the authority to issue prospective remedies because it intended for "Section 5 to reach novel or incipient conduct."[405] The Supreme Court has also recognized that the FTC, in pursuing claims under Section 5, has broad powers to find trade practices illegal.[406]

Despite this seemingly broad mandate to prosecute anticompetitive behavior under Section 5, the FTC's power to challenge anticompetitive business practices has been curtailed by three circuit level decisions in which lower courts were unwilling to accept the FTC's judgment about whether allegedly anticompetitive practices, which did not rise to the level of Section 2 violations,

401. *See* Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 311 (2010) (noting that enforcement agencies may hesitate to bring suit to minimize the risk of losing and eliciting more undesirable judicial precedent); James Langenfeld & Daniel R. Shulman, *The Future of US Federal Antitrust Enforcement: Learning from Past and Current Influences*, 8 SEDONA CONF. J. 1, 11, 15 (2007) (predicting few Section 2 enforcement actions, absent a "substantial change in policy, court decisions, or empirical . . . analysis").

402. 15 U.S.C. § 45 (2006).

403. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the New York State Bar Association Annual Antitrust Conference, The Great Doctrinal Debate: Under What Circumstances Is Section 5 Superior to Section 2?, at 2 (Jan. 27, 2011) (transcript available at http://www.ftc.gov/speeches/rosch/110127barspeech.pdf).

404. Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 873 (2010).

405. Rosch, *supra* note 403, at 9.

406. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 242, 244 (1972) (noting that the FTC has the authority to "consider [] public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws").

would lead to anticompetitive harm to consumers.[407] The circuit courts feared that the vague language in Section 5 would lead to arbitrary enforcement and a blurred "distinction between guilty and innocent commercial behavior."[408]

While these concerns have effectively tempered the FTC's use of Section 5 in potential Section 2 cases, FTC Commissioner Rosch argues that Section 5 generally acts as a more effective mechanism than Section 2 for resolving unsettled questions of law and alleviates the worry of creating negative precedent in Section 2 jurisprudence.[409] Specifically, Section 5 may prove to be a favorable channel in "hard" cases in which existing Section 2 precedent may lead a court to find that a firm is not liable for allegedly unfair methods of competition. To put it as Rosch described: "[I]f [the FTC] shoehorn[s] the facts of the case into a Sherman Act framework, we run the risk of either making bad law (to bring an unusual case within the ambit of existing precedent), or alternatively, losing the case even though the firm's conduct is causing anticompetitive effects."[410] Such practice would not be "ducking" bad law; rather, it would be "using [the FTC's] authority to reach a particular category that the Sherman Act generally did not and should not reach."[411]

One example in which this approach might have been more useful is the District of Columbia Circuit Court's decision in *Rambus Inc. v. FTC*,[412] which involved a memory chip manufacturer accused of deceptively failing to disclose patent information.[413] Deception and failure to disclose patent information may fall under Section 5 of the FTC Act; however, the FTC pursued the monopolization claim under Section 2.[414] In 2008, the circuit court held that the FTC failed to prove that Rambus engaged in exclusionary conduct and

407. *See* E. I. Du Pont De Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984); Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980); Official Airline Guides, Inc. v. FTC, 630 F.2d 920 (2d Cir. 1980); Amy Marshak, Note, *The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5*, 86 N.Y.U. L. REV. 1121, 1132–33 (2011).

408. Marshak, *supra* note 407, at 1134 (quoting *Boise Cascade*, 637 F.2d at 582).

409. Rosch, *supra* note 403, at 2–3.

410. *Id*.

411. *Id*. at 5.

412. 522 F.3d 456 (D.C. Cir. 2008).

413. *Id*. at 458–59.

414. *See id*. at 467.

unlawfully monopolized the market,[415] thus illustrating how a court of appeals can rein in the FTC without any obligation of deference. While the court expressly conceded that claims involving deception could be pursued under Section 2,[416] according to former FTC Commissioner Leary, the FTC could have benefited by framing the alleged monopolizing conduct as a pure Section 5 claim because a court may have viewed a novel claim with more deference.[417]

Furthermore, some scholars have observed that "[t]he FTC's institutional mission and structure, as well as the broad substantive reach and limited enforcement mechanisms of [S]ection 5, make the FTC uniquely suited to take the lead in shaping the future of antitrust law."[418] Structurally, the FTC possesses advantages over the federal court system. As a specialized agency with its own antitrust experts and magistrates,[419] the FTC has investigatory authority to request documents or compel information sharing through compulsory process.[420] FTC proceedings are also governed by more permissive rules of evidence and procedure and do not use juries.[421] Notably, *Twombly*'s burdensome pleading standards would not apply in FTC proceedings, thereby permitting the FTC's investigation to proceed "on a more general, reasonable-belief standard."[422] Upon a hearing on the merits of the alleged anticompetitive conduct, the FTC has the power to issue injunctions or cease-and-desist orders and may seek civil penalties or injunctions in the event that a party violates the order.[423] Although Section 5 of the FTC Act does not include a private right of action, it stands poised to grow into a powerful mechanism for redressing anticompetitive harm.[424]

415. *Id*. at 464; Marshak, *supra* note 407, at 1146.

416. *See Rambus*, 522 F.3d at 464.

417. *See* Marshak, *supra* note 407, at 1147 (citing Thomas B. Leary, *A Suggestion for the Revival of Section 5*, ANTITRUST SOURCE, Feb. 2009, at 3–4).

418. *Id*. at 1159.

419. Hovenkamp, *supra* note 404, at 876.

420. *See* ABA SECTION OF ANTITRUST LAW, FTC PRACTICE AND PROCEDURE MANUAL 153–56 (2007).

421. Hovenkamp, *supra* note 404, at 877.

422. *Id*.

423. *See* 15 U.S.C. § 45(b), (l) (2006).

424. Rosch, *supra* note 403, at 8.

D. Broadening the Scope of Section 2 Liability

As evidenced by the federal courts' hesitance to impose Section 2 liability, the end goals of economic efficiency and consumer welfare have been shrouded in the mist of false positives and judicial burdens. Rather than engage in a careful balancing of efficiency justifications, the Court has tended to substantially scale back liability, leaving a wide range of conduct in limbo. The *Trinko* decision in particular has left the state of refusals to deal in disarray.[425] Taking cues from *Trinko*, some lower courts have even eliminated the need for a monopolist to assert valid business justifications for its allegedly monopolizing acts.[426] This undermines the purpose of Section 2 altogether and renders antitrust laws meaningless: without need to justify its actions, a monopolist is free to pursue any course that aligns with a rational profit motive, regardless of anticompetitive harm. Ultimately, it appears that the danger of false positives has weighed heavily in the Court's approach.

However, it seems increasingly shortsighted to apply outmoded, disjointed standards of Section 2 scrutiny in a new millennium defined by rapidly evolving technology, novel ways of doing business online and abroad, and new methods of harnessing greater wealth.[427] Both massive corporations and smaller businesses are becoming more sophisticated with the use of new technology and online tools that broaden their reach and grow their resources.[428] As one commentator noted, "[A]ntitrust laws are anachronisms when

425. *See supra* Part III.

426. *See*, *e.g.*, Christy Sports, LLC v. Deer Valley Resort Co., 555 F.3d 1188 (10th Cir. 2009); Four Corners Nephrology Assocs., P.C. v. Mercy Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009).

427. *See* Jonathan B. Baker, *Can Antitrust Keep Up?: Competition Policy in High-Tech Markets*, BROOKINGS REV., Winter 2011, at 16–19, *available at* http://www.brookings.edu/articles/2001/winter_regulation_baker.aspx; Peter T. Barbur et al., *Market Definition in Complex Internet Markets*, 12 SEDONA CONF. J. 285 (2011) (noting that the growth of technology, "rapid innovation, and unstable market shares ha[ve] made the prevailing [antitrust] analytical structure . . . seem anachronistic").

428. *See* L. Gordon Crovitz, *The Antitrust Anachronism*, WALL ST. J. (Aug. 3, 2009 11:00 AM), http://online.wsj.com/article/SB10001424052970204313604574326250751120772.html.

applied to industries of constant innovation."[429] Moreover, increasingly competitive market structures often arise as a result of technological advances or changing consumer demand patterns.[430] With these considerations in mind, the Court and, more importantly, the public would benefit from a return to the principles laid out in *Aspen*, which left open several possibilities through which a court may find liability.[431] Returning to standards set forth in *Aspen* would provide courts with the flexibility essential to more comprehensive analyses of contemporary cases. As referenced above, the Court in *Leegin* entrusted courts with sophisticated calculations, so it remains unclear why courts evaluating Section 2 claims would be unable to conduct the same task.[432] While simplistic in theory, this approach supports the notion that the protection of consumers and the promotion of free-market competition require a more receptive judiciary than *Trinko* permits.

VIII. CONCLUSION

Effectively addressing the incongruence of Section 2 jurisprudence requires patience for fragmented rules and a willingness to consider a variety of legal tests to identify solutions with the lowest risk of overdeterrence. Ironically, even the world's most commercially successful board game, Monopoly, has undergone interesting reform in adapting to the new century.[433] Among many changes, the railroads have been transformed into airports, the electric company has become a cell phone service, the water works turned into an internet service provider, and all property

429. *Id*.; *accord* Salil K. Mehra, *Paradise Is a Walled Garden? Trust, Antitrust, and User Dynamism*, 18 GEO. MASON L. REV. 889, 914 (2011) ("From a practical standpoint, antitrust law, as it is conducted in the United States, is unlikely to work well or faster on the Internet.").

430. Howard A. Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683, 728 (2011) (suggesting that consumers and industry would benefit from a rebalancing of antitrust and regulation).

431. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985); *see* discussion *supra* Part III.A.

432. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

433. A variation from the original board game, "Monopoly Here & Now" was released in 2006. *See* Erik Arneson, *Monopoly Here & Now–United States Edition*, ABOUT.COM GUIDE, http://boardgames.about.com/od/monopoly/a/here_and_now.htm (last visited Nov. 11, 2011); *Monopoly History and Fun Facts*, HASBRO, http://www.hasbro.com/monopoly/en_US/discover/history.cfm (last visited Mar. 2, 2012).

values and rents are 10,000 times more expensive.[434] Passing "Go" gives a player two million dollars instead of two hundred, and a carton of McDonald's french fries serves as a game piece.[435] A reflection of American culture and a gauge of societal trends, this new version of Monopoly provides excellent fodder for reflection on the drastic evolution of the economy and the role of antitrust law within it. It is time that antitrust laws evolve with the changing global economic climate, and as one commentator recently urged, antitrust "should not be . . . silent at a time when economic crisis looms large."[436]

Section 2 is an area of law that will never achieve a level of great clarity because anticompetitive harms cannot be directly measured. However, in the last several years, the Supreme Court has done little to clarify Section 2 or further the goals of consumer welfare and economic efficiency that are fostered by robust competition. In addition, the Court's narrow holdings and intimidating warnings about false positives have contributed to dissonance in the lower federal courts and higher barriers for private plaintiffs. The Supreme Court should take steps to clarify the *Trinko* decision, although the optimal solution would be for the Court to adopt a more cohesive stance on different forms of monopolizing conduct, if not a single unifying test. The future of Section 2 depends not only on the direction of the judiciary but also on dynamic enforcement strategies. In times like these, we cannot afford to do less.

434. Arneson, *supra* note 433.
435. *Id*.
436. Bush, *supra* note 401, at 311.