California Law Review

Volume 75 | Issue 3 Article 2

May 1987

The Durability, Relevance, and Future of American Antitrust Policy

Donald F. Turner

Link to publisher version (DOI)
http://dx.doi.org/doi:10.15779/Z387J1X

The Durability, Relevance, and Future of American Antitrust Policy

Donald F. Turner†

It is clear that American antitrust law, at least in some respects, has made a significant contribution to the performance of the United States' economy. So persuaded, other countries have enacted and expanded competition laws in recent decades. It is also clear that retention of antitrust law limitations on anticompetitive business conduct will continue to be a critically important feature of public economic policy. While increasing foreign competition and other changing economic conditions may oblige us to revise the antitrust bases for prohibiting such agreements as mergers and joint ventures in some markets, such changes do not eliminate the need for antitrust limitations. Moreover, the trend away from direct regulation of prices and entry in such industries as transportation increases the importance of antitrust law as a check on anticompetitive free market conduct.

Judicially formulated antitrust approaches and rules have varied over time. While there are extensive disputes as to what their defects have been and are, it is generally recognized that antitrust law still has some unsatisfactory features that courts and Congress should endeavor to correct. The issues that have been raised involve not only substantive rules governing various forms of conduct, but also remedial and procedural issues such as the appropriateness of eliminating mandatory treble damages and jury trials from, and broadening the bases for summary judgment in, private antitrust suits.

In Part I, I discuss the proper goals of antitrust law and the problems raised in formulating appropriate substantive rules to effect those goals. In Part II, I set forth my tentative views concerning substantive rule changes that should be made in particular areas, including horizontal and vertical resale restraints, tying arrangements, mergers, and leveraging behavior. Finally, in Part III, I consider several potentially beneficial remedial and procedural changes in the adjudication of private antitrust suits, including restricting the availability of treble damages, eliminating jury trials, and expanding the bases for summary judgment.

† Professor of Law, Georgetown University Law Center. B.A. 1941, Northwestern University; Ph.D. 1947, Harvard University; LL.B. 1950, Yale Law School. Former United States Assistant Attorney General in charge of the Antitrust Division, 1965-1968.

I
GOALS AND PROBLEMS IN FORMULATING ANTITRUST RULES

The basic questions concerning the proper approach to the evaluation and revision of existing antitrust rules ask: (1) What are the proper goals of antitrust law? and (2) How should the problems encountered in formulating suitable rules be resolved?

A. The Goals of Antitrust

Antitrust law is a pro-competition policy. The economic goal of such a policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use. Consonant with this goal, the primary function of antitrust law is to protect and promote such procompetitive conduct, not to protect individual competitors as such.

The legislative history of the Sherman Act and other antitrust laws also suggests "populist" goals—social and political reasons for limiting business size and preserving large numbers of small businesses and business opportunities. However, economics-based antitrust law serves those goals to a substantial extent by preventing agreements, mergers, and monopolizing conduct that tend to eliminate or reduce competition without yielding economic benefits. With the possible exception of the secondary-line feature of the Robinson-Patman Act, there is no reasonable basis for presuming that courts must give priority or even weight to populist goals where the pursuit of such goals might injure consumer welfare by interfering with competitive pricing, efficiency, or innovation. Indeed, even where there is no such apparent conflict, it is questionable whether populist goals are appropriate factors to consider when formulating antitrust rules. The pursuit of these goals would broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.[1]

B. Formulating Appropriate Rules

With populist goals set aside, the function of courts is to formulate antitrust rules that promote the economic goals of competition. Ideal

1. For an extended discussion of the issues concerning antitrust goals, see 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103-112 (1978) and 4 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 903-904 (1980).

rules are clearly predictable in their application and economically rational in that they outlaw anticompetitive conduct but not conduct that is economically beneficial. Economic analysis strongly supports a clear, simple rule in some areas. For example, it is generally agreed that naked horizontal price-fixing or market-sharing agreements—agreements that are unrelated to such legitimate forms of cooperation as joint ventures—should be held unlawful per se.

It is often difficult, however, to formulate rules that are both clear and economically rational. This problem arises for several reasons. First, there are gaps in economic theory, such as the lack of economic analysis of novel practices. Second, there are disagreements among economists as to the competitive effects of particular practices. Disputes over vertical non-price and price resale restraints are a well-known example. Among other things, there is a dispute as to whether resale price maintenance should be treated more severely than non-price resale restraints. Indeed, one economist has advanced the view that minimum resale price maintenance is less likely to have anticompetitive effects on distribution markets than such non-price restrictions as exclusive distributorships or other limits on the number of distributors.[2] Third, economic analysis often indicates that assessment of the net effects of particular conduct requires consideration of several market factors, including short-run and long-run effects. This requirement seems to recommend complex rather than simple rules, but it may be difficult and costly to obtain adequate facts for deciding individual cases where the outcome depends on assessing various market factors as well as on balancing anticompetitive and procompetitive effects.

Courts have taken various approaches to such problems. On occasion, the Supreme Court has suggested that difficulties in economic analysis or in obtaining relevant facts warrant a simple rule of illegality.[3] However, recognizing that this approach may well have undesirable economic consequences, the Court has tended in recent years to take into account factors obviously relevant to a rational assessment of the conduct in question. Even so-called per se rules have qualifications. In

2. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143 (1985).

3. United States v. Topco Assocs., 405 U.S. 596, 609-10 (1972) ("courts are of limited utility in examining difficult economic problems"); Standard Oil Co. v. United States, 337 U.S. 293, 307-11 & n.13 (1949) ("judges [are] unequipped for [appraisal of economic data] either by experience or by the availability of skilled assistance"); *cf.* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963) ("[a] merger . . . is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already . . . ."); *Standard Oil*, 337 U.S. at 311-14 (in interpreting whether the effect may be to lessen competition, it is inappropriate for courts to "determin[e] in each case the ultimate demands of the 'public interest' ").

Broadcast Music, Inc. v. Columbia Broadcasting System[4] and *NCAA v. Board of Regents*,[5] the Court recognized that the per se approach to horizontal price-fixing or similar competition-reducing agreements is not appropriate where the practice has a cooperative and economically justified context.[6] The so-called per se rule as to the illegality of tying arrangements rests on a finding of market power over the tying product.[7] Furthermore, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*,[8] the Court recognized that not all collective refusals to deal are subject to the rule of the so-called per se illegality.[9]

The extreme alternative to the per se approach—pure or modified—is the rule of reason, which requires an examination of all facts bearing on whether the conduct is on balance anticompetitive or procompetitive. Such an approach suffers from several problems—vagueness, unpredictability, high costs of litigation, and difficulties in obtaining facts. These have in some instances led the Court to adopt modified versions of the rule of reason, creating presumptions of illegality on the basis of certain findings, such as that the legitimate objectives of defendants were achievable by less restrictive alternatives. Thus, as the Supreme Court noted in the *NCAA* case, "there is often no bright line separating *per se* from Rule of Reason analysis."[10] In short, use of "per se" and "rule of reason" labels has become confusing.[11]

The question, therefore, is what approach courts should take in endeavoring to clarify and improve substantive antitrust rules. In a strong article, Judge Easterbrook argues that the aims should be to formulate rules that "minimize the total costs of (1) anticompetitive practices that escape condemnation; (2) competitive practices that are condemned or deterred; and (3) the system itself."[12] These aims are proper; the question is how they can best be achieved. Concerned over the ability of courts to assess the economic effects of restrictive conduct, Easterbrook suggests a series of presumptive rules designed to "filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury."[13]

Easterbrook's proposed filters are all potentially relevant, but they

4. 441 U.S. 1 (1979).
5. 468 U.S. 85 (1984).
6. *NCAA*, 468 U.S. at 98-104; *Broadcast Music*, 441 U.S. at 19-23.
7. *See, e.g.*, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18-25 (1984).
8. 105 S. Ct. 2613 (1985).
9. *Id.* at 2621.
10. *NCAA*, 468 U.S. at 104 n.26.
11. *See* 7 P. AREEDA, ANTITRUST LAW ¶¶ 1508-1511 (1986).
12. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 16 (1984).
13. *Id.* at 17.

should not be universally applied in the sequence and with the degree of decisiveness that he proposes for them. For example, the first filter, which he would apply to all cases, is a requirement that plaintiffs demonstrate that defendants possess market power. Easterbrook reasons that if defendants lack market power, their conduct could not have substantial anticompetitive effects. As he points out, many lower courts have held that proof of market power is a required first step in any rule of reason case, and the Supreme Court has required proof of market power as a predicate to finding tying arrangements illegal. However, while the presence or absence of market power may occasionally be easily determinable, it usually rests on market definition, which is often a complex issue. There is no need to examine market power where the conduct can properly be treated as per se unlawful (as is true of naked horizontal price-fixing or other competition-reducing agreements[14]) or per se lawful (as in the case of a patentee's refusal to license its product or process patent to competitors).

The decisiveness of the third and fourth of Easterbrook's filters—indicating dismissal where all or most firms in the defendant's market do not use the same practice, or where the practice did not lead to a reduction in defendant's output or market share—is also questionable. For example, a dominant firm's imposition of long-term exclusive requirements contracts on buyers should not be excused solely because its competitors do not follow that practice, or because its output or market share does not decline. While requirements contracts often may well have economic justifications, a dominant firm's retention or increase of its market share via such contracts should be viewed as an anticompetitive result absent such justification.

In short, while the key to clarifying and rationalizing antitrust rules is the imposition of presumptions and proof requirements on plaintiffs and defendants, the selection and sequence of such "filters" depends upon the nature of the conduct concerned. Moreover, economic analysis problems do not warrant a severe retrenchment in the scope of antitrust law. Unregulated markets do not adequately deal with anticompetitive conduct, and despite disputes among economists and the complications of some economic issues, judges have become better at assessing them. Moreover, the Supreme Court has demonstrated a growing tendency to modify or overrule past precedents that are economically irrational.[15]

---

14. The Supreme Court recently reiterated this position in FTC v. Indiana Fed'n of Dentists, 106 S. Ct. 2009, 2018 (1986).

15. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771-77 (1984); Broadcast Music, Inc. v. Columbia Broadcasting Sys., 441 U.S. 1, 16-24 (1979); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 47-59 (1977); United States v. General Dynamics Corp., 415 U.S. 486, 494-504 (1974).

So there is reason to approach antitrust reform with caution and restraint. At the same time, however, I think antitrust's goals could be better served if some of its rules were revised. In Part II, I explore five areas in which substantive antitrust rules are ripest for such change.

II
ANTITRUST RULES AND THEIR REFORM

A. *Horizontal Restraints*

As I have previously stated, it is appropriate to retain the rule that naked horizontal price-fixing, market-sharing, and other competition-eliminating agreements are illegal per se. However, as the Supreme Court indicated in *Broadcast Music* and *NCAA* (impliedly reversing its reasoning in *Topco*[16]), the per se rule plainly should not apply to agreements that may be reasonably ancillary to legitimate horizontal forms of economic cooperation such as lawful joint ventures. And in determining whether the agreement is reasonably ancillary, the existence of a less restrictive alternative should not alone warrant a finding of illegality unless that alternative was fairly obvious at the time of the agreement and would have achieved the legitimate objective as effectively and economically.[17]

Similarly, while the per se illegality rule seems appropriate for naked horizontal boycotts such as those involved in *Klor's, Inc. v. Broadway-Hale Stores*,[18] there are often problems in determining whether a collective refusal to deal is "naked." The status of refusals to deal associated with lawful joint ventures or similar cooperative enterprises will also need further clarification. For example, suppose a joint research and development venture among competitors that account for only a small part of a market develops and patents an improved product or production process. The refusal of the venture to license its competitors should not be deemed an unlawful collective boycott, even if the patent confers a decisive competitive advantage.

B. *Vertical Resale Restraints*

The present law concerning vertical resale restraints is characterized

16. *See supra* text accompanying notes 3-6. In United States v. Topco Assocs., 405 U.S. 596 (1972), the Court stated that since the defendants' territory-division agreement incidental to their joint venture was "horizontal," it was a per se violation of section 1. *Id.* at 606-08. *Cf. GTE Sylvania*, 433 U.S. at 42-47 (Court willing to balance intrabrand against interbrand competitive effects).

17. Also, as the Court has recognized, the mere fact that such horizontal agreements to collect and disseminate nonpersonalized price and other market information affect prices is insufficient to prove illegality. *See e.g.*, United States v. Citizens & Southern Nat'l Bank, 422 U.S. 86, 113 (1975); Maple Flooring Mfrs. Ass'n. v. United States, 268 U.S. 563, 582 (1925).

18. 359 U.S. 207 (1959).

by two key differences in rules. First, non-price resale restraints—territorial and customer restrictions—are subject to the rule of reason, while minimum and maximum resale price agreements are illegal per se. Second, the Supreme Court has held that resale price maintenance effected solely by an announced policy of refusing to deal with distributors who fail to abide by the manufacturer's suggested resale prices, followed by the acquiescence of distributors seeking to avoid termination, does not involve an "agreement."[19] As the Court recognized in *Monsanto Co. v. Spray-Rite Service Corp.,* these rules lead to different legal results even where the price effects are substantially the same.[20]

These rules should be reassessed. The Court's *GTE Sylvania* decision was clearly correct in reversing the rule that territorial and customer restrictions are illegal per se.[21] However, the Court's only suggested test under the rule of reason characterizes the issue erroneously because it merely weighs the adverse effects on intrabrand competition against the beneficial effects on interbrand competition. Territorial and customer restrictions always reduce or eliminate intrabrand competition, but no rational producing firm would voluntarily adopt them if they diminished its competitive success against other brands. Moreover, whether a firm has market power has nothing to do with the likelihood of efficiency or other justifications for territorial restrictions or most customer restrictions. Even a monopolist would not employ these restrictions if their sole effect were to give to distributors monopoly profits from higher resale prices. The proper response to the concern that such restrictions may lead to higher prices for consumers is to reverse *Albrecht v. Herald Co.*[22] and allow producers to couple beneficial territorial and customer restrictions with maximum resale price restraints.

Although it may raise some proof assessment problems, there is much to be said for presuming territorial resale restraints lawful unless the plaintiff proves that they were solely attributable to dealer coercion.[23] The same is true of customer restrictions ancillary to a lawful limited distribution system. Where a manufacturer may lawfully limit the number of wholesalers and retailers handling its product (as it plainly may absent dealer coercion), its right would be undermined if it could not require its wholesalers to sell only to franchised retailers, and require its retailers to sell only to consumers. Finally, vertical restraints that

---

19. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984) (reaffirming United States v. Colgate & Co., 250 U.S. 300 (1919)).

20. *Id.* at 761-62.

21. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58 (1977).

22. 390 U.S. 145 (1968).

23. Resting illegality on conclusive proof of dealer coercion may present some evidence assessment problems, but to adopt a rule that vertical nonprice resale restraints are lawful per se would encourage collusive dealer coercion and diminish the ability of a producer to resist.

reserve certain customers or classes to the producer for direct distribution should be deemed legal per se, as they would never be the result of dealer coercion.

The next question is whether the per se illegality rules of vertical maximum and minimum resale price maintenance should be revised. As I have suggested, the *Albrecht* case, holding that maximum resale price maintenance is unlawful per se, should be reversed. Apart from vertical integration, which often may be economically unavailable or a more costly alternative, such a restraint is the only way that a producer with market power can insure that the efficiency or other benefits from exclusive distributorships are passed on to consumers.

Minimum resale price maintenance is a more difficult issue, subject to more dispute. Some commentators believe that such agreements should be treated the same as non-price resale restrictions, on the grounds that they are similar in effect and would not be voluntarily adopted by a manufacturer unless they had a beneficial effect on his sales.[24] However, minimum resale price restrictions do not have all of the efficiency possibilities, such as scale economies, attributable to limited distribution and non-price restrictions; and they may be adopted by a producer solely to encourage distributors to promote its product over those of competitors.

Notwithstanding this possibility, I believe that courts should create one or perhaps more exceptions to the per se rule regarding minimum resale price restrictions. As some cases have held, the per se rule should not be applied where a producer has not entered into specific minimum resale price agreements, but has merely elected not to sell to high-discounting distributors.[25] Moreover, even specific resale price agreements may have competitive justification in some circumstances. For example, suppose the consumer product involved is a complex product requiring costly presale services, and sales maximization requires that the producer have a plurality of dealer outlets in the same consumer markets. In these circumstances, minimum resale price maintenance may be the only effective device for eliminating the "free rider" problem of dealers setting lower resale prices to avoid the cost of presale services and to take sales away from dealers who provide them. Absent proof of such a justification or others that may come to light, however, courts should continue to presume illegal minimum resale price maintenance agreements.

Finally, *Monsanto*'s preservation of the *Colgate* doctrine seems inappropriate. Wherever vertical restraints have undesirable economic effects suggesting illegality, there is no substantial reason for permitting a manu-

24. R. BORK, THE ANTITRUST PARADOX 288 (1978); R. POSNER, ANTITRUST LAW 165 (1976).

25. *E.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

facturer to achieve the same results by threatening to terminate distributors who fail to comply with its announced restraint policy. Acquiescence in response to such threats can fairly be described as a vertical agreement.[26]

C. Tying Arrangements

Under present law, tying the sale of separate products or services is classified as unlawful per se where the seller has market power over the tying product and the tying covers a substantial dollar volume of the tied product's sales. A few lower court decisions have qualified the rule with a "good will" defense—that is, with proof that requiring purchase of the tied product or service was critical to high performance of the tying product.[27] But Supreme Court opinions have stated that such a purpose is normally served by the less restrictive alternative of defining the specifications of the product to be used with the tying product.[28]

The law's coverage is too broad for three reasons. First, the Supreme Court was wrong in stating that tying agreements "serve hardly any purpose beyond the suppression of competition."[29] Such agreements can serve a number of purposes that are either procompetitive or devoid of anticompetitive intent.[30] Second, courts mistakenly assume the "market power" predicate to be met where the tying product is patented or copyrighted or is distinctive from products offered by competitors.[31] Third, a substantial dollar amount of the tied product sales does not show foreclosure of a substantial share of the tied product market; a fortiori, it does not indicate a tendency to monopoly. In short, present anti-

26. *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARV. L. REV. 655, 684-95 (1962).

27. Baker v. Simmons Co., 307 F.2d 458, 469 (1st Cir. 1962) (requirement that motels advertising rooms with Simmons mattresses equip all rooms with Simmons mattresses justified by manufacturer's concern for reputation and goodwill); Dehydrating Process Co. v. A.O. Smith Corp., 292 F.2d 653, 656-57 (1st Cir.) (tying of silo unloading devices to sale of silos justified where one-half of customers who used company's silo unloading devices with other silos were dissatisfied with unloaders), *cert. denied,* 368 U.S. 931 (1961); United States v. Jerrold Elec. Corp., 187 F. Supp. 545, 557 (E.D. Pa. 1960) (tying of servicing to product justified by complex maintenance required and risk of irreparable harm to reputation if products failed), *aff'd,* 365 U.S. 567 (per curiam) (1961).

28. *E.g.,* International Salt Co. v. United States, 332 U.S. 392, 397-98 (1947) (tying machines that utilized salt to the purchase of salt improper where lessor could have specified salt quality to be used with machines); IBM Corp. v. United States, 298 U.S. 131 (1936) (tying leased machines to purchase of calculating cards unjustified because defendant could have issued specifications for card quality).

29. Standard Oil Co. v. United States, 337 U.S. 293, 305-06 (1949).

30. Such purposes include: tying a complementary product to insure high performance of the tying product; tying servicing to generate information leading to product improvement; cost savings from joint production or distribution; and use of tying as a vehicle for indirect price competition in an oligopoly market.

31. United States v. Loew's Inc., 371 U.S. 38 (1962).

trust prohibition extends to tying arrangements having no significant anticompetitive effects.

Tying can have anticompetitive effects where (1) the seller has a high degree of market power in the tying product market, and (2) the tying leads to monopoly or near-monopoly of the tied product. Anticompetitive effects would be greater if the resulting monopoly eliminates the leading potential entrants into the tying product market or raises barriers to such entry. Therefore, while the law should not abandon altogether the prohibition of tying, it should be revised so as to limit illegality to cases meeting these two criteria.

At least, it would make sense to limit presumptive illegality to cases where (1) the seller has substantial market power—say, a market share of at least fifty percent—in the tying product market, and (2) a substantial share—say, fifteen to twenty percent—of the tied product market is foreclosed. Furthermore, even in such cases, illegality should be rebuttable by establishing one of the following: (1) that tying is the least costly and most effective way of insuring efficient functioning of the tying product; (2) that tying of servicing to the sale or lease of a complex product facilitates product improvement; or (3) that substantial cost savings result from joint production of the tied products (though perhaps that gain could be achieved by the superficially less restrictive alternative of lowering the aggregate price if the buyer purchases both products).

D. Mergers

Supreme Court and lower court merger decisions of the 1960's plainly went too far. For example, in *United States v. Von's Grocery Co.*[32] and *United States v. Pabst Brewing Co.*,[33] the Court found horizontal mergers illegal on the basis of aggregate market shares totalling only 7.5% and 4.5% respectively. In these and similar cases, there was no probability that the prohibited mergers would have substantially lessened competition. That same decade saw similarly extreme decisions concerning vertical and conglomerate mergers.[34]

Another serious problem in the old cases, and one that still to some extent remains is that the Court provided no precise standards for defining markets; consequently, market definitions have been absolutely ridiculous in several cases.[35] Finally, some decisions not only suggested that

32. 384 U.S. 270 (1966).

33. 384 U.S. 546 (1966).

34. *E.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 327 (1962) (vertical merger illegality based on tiny market shares).

35. *Brown Shoe* contained an undifferentiated listing of criteria, and did not precisely define the "market/submarket" distinction. Two examples of unreasonably narrow market definition are Associated Radio Serv. Co. v. Page Airways Co., 624 F.2d 1342, 1349 & nn. 11-12 (5th Cir. 1980) (market defined as installation of avionics equipment in Grumman Goldstream II aircraft, rather

efficiency gains were not a defense to a presumably illegal merger, but even suggested that efficiency gains would be a basis for finding illegality because they indicated a competitive advantage.[36]

The 1968 Department of Justice Guidelines retreated somewhat from this case law, but were still too severe. The aggregate market shares for presumptive illegality of horizontal mergers were too low, particularly where there was a so-called concentration trend, and particularly in light of the virtual rejection of an efficiencies defense. Furthermore,

> The vertical merger guidelines, such as that presumptively challenging any acquisition by a 10 percent seller of a 6 percent buyer except where entry was clearly easy, were far too inclusive. There is simply no defensible economic theory that would support such broad general prohibitions. Finally, the conglomerate merger guidelines, while more or less sound with respect to potential competition, were on much shakier ground, to say the least, in their concern with reciprocity and so-called entrenchment.[37]

Recognizing the undue severity of the case law and the 1968 Guidelines, the government began to relax enforcement standards in the 1970's, giving more attention to efficiency claims and other factors, such as easy market entry and indications that market share figures overstated the competitive potential of one or both of the merging firms. A similar tendency was reflected in two Supreme Court decisions.[38] Government enforcement policy has apparently become even more lenient under the Reagan Administration, although it is hard to tell how much, since the 1982 and 1984 Guidelines did not describe how the expanded list of factors to be considered would be balanced.[39] While courts have not explicitly adopted the new Guidelines, many have been taking into account factors other than market shares and concentration levels.

Formulation of appropriate antimerger rules is a classic example of the difficulties in resolving the competing goals of clarity and predictability, on the one hand, and economically rational results, on the other. Market definition, an often complex problem, is an essential element. Moreover, from an economic standpoint, determining whether a merger

---

than installation in private business aircraft generally); and Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269, 286 (8th Cir.) (market defined as soft grit abrasive made only from black walnut and apricot pit shells, excluding soft grit abrasives made from other materials), *cert. denied*, 414 U.S. 1022 (1973).

36. FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967); *Brown Shoe*, 370 U.S. at 344; *In re* Foremost Dairies Inc., 60 F.T.C. 944, 1084 (1962).

37. Turner, *Observations on the New Merger Guidelines and the 1968 Merger Guidelines*, 51 ANTITRUST L.J. 307, 307 (1982).

38. United States v. Marine Bancorp., 418 U.S. 602 (1974); United States v. General Dynamics Corp., 415 U.S. 486 (1974).

39. For example, the 1984 Guidelines broaden the consideration of efficiencies, but are unclear as to when efficiencies would constitute a complete defense.

is likely to substantially lessen competition requires consideration not only of market concentration and the market shares of the merging firms, but also of factors such as ease of entry, the degree of product heterogeneity, indications that the present or future competitive significance of the merging firms may be overstated or understated by their present market shares, and the efficiency consequences of the merger. These economic issues are complex and, in some respects, are the subject of dispute among academic economists. Moreover, entertaining a variety of factors introduces the additional problem of how they should be weighed and balanced.

In short, basing antimerger rules solely on market shares, with only a failing company defense, would not make economic sense. However, given the complexities and unpredictability generated by incorporating all relevant economic factors, we should ask whether it is possible to formulate simpler rules—eliminating or limiting the relevance of some factors—that would be unlikely to have significant adverse economic effects.

A possible compromise in the area of horizontal mergers would be to rule that such mergers are prima facie illegal where the aggregate market share of the merging companies exceeds, say, twenty percent, and the merger has increased the HHI by, say, 200 points or more. The factors sufficient to overcome this presumption of illegality would be limited to: (1) facts showing that the market shares overstate the present or future competitive significance of one of the merging firms; (2) proof of significant efficiency gains not likely to be achieved as economically by other means; and (3) the failing company defense.

Such an approach would both discourage substantial horizontal mergers not involving efficiencies and encourage firms to look for mergers that will produce substantial efficiency gains. It may well outlaw some mergers that would not have significantly anticompetitive effects—for example, mergers that are unlikely to increase tacit or explicit collusion because of low market concentration. But it is arguably reasonable to retain the incipiency theory, which prevents any merger of a magnitude that would yield undue concentration if duplicated by future mergers. Moreover, the only likely economic disadvantage of such an approach—given the efficiencies defense—would be a narrowing effect on the market for sale of assets. That effect would not be serious if, as I suspect, sellers typically have a number of alternative purchasers. To be sure, assessment of the efficiency consequences of a merger may well be difficult, but it would be a serious mistake to eliminate that factor from merger evaluation unless the market share threshold for presumptive illegality were raised to thirty percent, and such a rule would permit a large number of anticompetitive mergers.

This suggested compromise could be modified by adding a defense based on proof that new entry has occurred in the past whenever there were significant price increases. But I see no persuasive reason for extending this defense to any merger that produces a monopoly or near monopoly. Moreover, extreme ease of entry may well be reflected in market definition.

As for non-horizontal mergers, while I might make some minor modifications to the 1984 Guidelines, I agree with the general principle that vertical mergers should be deemed unlawful only in narrowly defined circumstances, and that the basis for outlawing conglomerate mergers under antitrust law should be confined to a significant loss of potential competition.

E. Monopolizing Conduct: "Leveraging"

It is vitally important to the promotion of efficiency, innovation, and other procompetitive benefits that the Supreme Court eliminate the overly broad implications of decisions concerning the alleged abuse of monopoly power. For example, in *United States v. Griffith*,[40] the Court stated that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."[41] Taken literally, this ruling appears to question the right of the holder of a patented improved product or production process to use its advantage to drive out competitors. It also appears to preclude any consideration of efficiency or other economic benefits that may result from a firm with monopoly power engaging in vertical integration, integration into complementary products or services, or tying arrangements.

In *Berkey Photo, Inc. v. Eastman Kodak Co.*,[42] the Second Circuit interpreted *Griffith* as meaning that the use of "monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market."[43] The *Berkey Photo* court also stated that "it is improper, in the absence of a valid business policy, for a firm with monopoly power in one market to gain a competitive advantage in another by refusing to sell a rival the monopolized goods or services he needs to compete effectively in the second market."[44] However, the court added the following important qualification to these questionable rules:

> But, as we have indicated, a large firm does not violate § 2 simply by reaping the competitive rewards attributable to its efficient size, nor does

40. 334 U.S. 100 (1948).
41. *Id.* at 107.
42. 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).
43. *Id.* at 276.
44. *Id.* at 284.

> an integrated business offend the Sherman Act whenever one of its departments benefits from association with a division possessing a monopoly in its own market. So long as we allow a firm to compete in several fields, we must expect it to seek the competitive advantages of its broad-based activity—more efficient production, greater ability to develop complementary products, reduced transaction costs, and so forth. These are gains that accrue to any integrated firm, regardless of its market share, and they cannot by themselves be considered uses of monopoly power.[45]

As in *Griffith,* the Supreme Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[46] also contains some dangerously broad language, although reaching an arguably correct result in light of the unusual facts. The district court had instructed the jury to consider whether the defendant had used its power "by anticompetitive *or* exclusionary means or for anticompetitive *or* exclusionary purposes,"[47] and that Aspen Skiing's refusal to deal with its competitor was unlawful if there were no "valid business reasons" for that refusal.[48] As a predicate to its review analysis, the Supreme Court stated that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."[49] This proposition implies that a firm with monopoly power has a duty to assist competitors—by, say, supplying them with superior components, or even licensing a superior production process—where competitors need such assistance in order to compete effectively. The Seventh Circuit recently commented that if *Aspen Skiing* represents any principle that applies beyond its facts, the principle is that "a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition."[50]

Thus, *Aspen Skiing* invites a plethora of section 2 refusal-to-deal cases by competitors against rivals whose alleged monopoly power is based on narrowly defined markets. That case may lead to a retreat from the basic principle that no violation of section 2 occurs where a firm acquires or maintains monopoly power through self-developed productive efficiency or through superior product components that it does not make available to competitors. It may also discourage beneficial vertical integration and integration into complementary products. Moreover, imposing an obligation on a firm with monopoly power to sell components to competitors could involve the courts in price-and supply-alloca-

45. *Id.* at 276.
46. 105 S. Ct. 2847 (1985).
47. *Id.* at 2854 (emphasis added).
48. *Id.*
49. *Id.* at 2859 (quoting R. BORK, THE ANTITRUST PARADOX 138 (1978)).
50. Olympia Equip. Leasing Co. v. Western Union Tel. Co., 797 F.2d 370, 379 (7th Cir. 1986).

tion regulation, because the allegedly necessary benefits to competitors from compulsory selling would be eliminated or reduced if the seller charged them high prices or favored itself during periods of supply shortage.

For the reasons set forth in the Areeda-Turner treatise[51], it is my view that vertical integration or integration into complementary products by a firm with monopoly power merits condemnation only in extremely limited circumstances, and that where the integration is lawful, refusal to supply a monopolized product to competitors, or a "price squeeze" on competitors, rarely merits condemnation.

III
PRIVATE ANTITRUST SUIT REFORMS

The potential adverse economic effects of antitrust law need to be reduced not only by efforts to clarify and revise substantive rules, but also by a reassessment and revision of remedial and procedural rules applicable to private antitrust suits.

It is appropriate to retain private rights of action as a supplement to governmental enforcement. It is extremely unlikely that governmental agencies will ever be given sufficient resources to investigate, detect, and bring suits against all antitrust violators. Moreover, the elimination of private actions would deprive courts of the power to prevent undue cutbacks in the scope of antitrust law enforcement by government agencies. Still, there are problems with private actions that need to be resolved. A substantial number of private antitrust cases are ill-founded, brought in hopes of obtaining substantial cash settlements from defendants seeking to avoid the costs of litigation and the risk that bits of evidence—such as damaging but unauthorized employee statements—will lead to adverse jury verdicts.

Thus, in my opinion, antitrust law would be improved and its costs reduced by: (1) eliminating the mandatory treble damage rule; (2) eliminating jury trials of private suits; and (3) continuing the trend toward expanding the scope of summary judgment.

A. Treble Damages

Treble damages provide a powerful incentive for parties to detect and sue for antitrust violations, and they discourage illegal conduct by increasing the probability of suits and the cost to the violator.

On the other hand, the mandatory treble damages rule has adverse effects, not only encouraging baseless or trivial suits brought in hopes of coercing settlements, but also discouraging legitimate competitive behav-

51. 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 723-729 (1978).

ior in the gray areas covered by the rule of reason. Moreover, mandating treble damages over the whole range of antitrust law is inconsistent with the customary standards for punitive damages, which are similar to those applied to criminal sanctions. Treble damages seem plainly unfair where antitrust rules are vague or where illegality is a close question, resting either on complex facts unknown to the defendant at the time of its action or a close balancing of anticompetitive and procompetitive effects. Thus, the mandatory treble damage rule should be eliminated.

The more difficult issue is how the scope of trebling should be statutorily restricted. The appropriate general approach is to limit treble damages to "clear" violations, namely, cases in which (1) the law was clear at the time the conduct occurred, and (2) the factual predicates for liability are clear, including, inter alia, the anticompetitive nature of the conduct and the plain absence of any procompetitive justification. But such a statutory provision should probably be more specific, both to lower the decisionmaking burden on courts and to diminish the adverse consequences of vagueness.[52]

Such an approach may tend to discourage private actions in complicated rule of reason areas, but that would be a good result. Lowering incentives to bring suit in close rule of reason cases—where there are significant procompetitive probabilities—would not lead to significant consumer harm. Indeed, by lowering firms' disincentives to engage in economically beneficial behavior, the consequence may well be a net consumer gain.

B. Jury Trials

There would be significant gains from eliminating jury trials in private antitrust actions. First, substituting court trials for jury trials would reduce the private and public costs of antitrust litigation. Jury trials involve procedures—such as jury selection, oral presentation of documentary evidence, and formulation of jury instructions—not required in court trials. Trial to judges would also facilitate both the narrowing of the issues to be put to full trial and the granting of summary judgment.

Second, elimination of juries would increase the probability of accurate results. Juries cannot easily absorb and retain all of the evidence presented in the typical antitrust case. While there are procedural devices that would help in this regard, such devices would not enable jurors to arrive at a rational decision because the nature and complexity of the factual and legal issues raised in most antitrust cases are beyond their competence. Leading examples of such complexity include the *IBM*

52. A more precise formulation would be to limit treble damages to naked horizontal restraints. Such a rule is arguably too narrow, but might well make sense.

cases, predatory pricing, non-price vertical restraints, and close market definition questions. Even in per se cases, determining whether there was a conspiracy (rather than simply parallel behavior that was individually rational) requires, in the absence of direct evidence, an analysis of economic and business factors beyond the competence of most jurors. Consequently, there is a high likelihood that jury decisions will be influenced by emotional and other irrational factors, which invite distorted case presentation and legal argument.

Third, while judges are or typically feel obligated to spell out the reasons behind their findings of fact and conclusions of law, juries, even when required to submit special verdicts, do not have to explain how they reached their decisions. Substituting bench trials for jury trials would thus facilitate corrective appellate review. Detailed district court opinions would allow increased appellate review, with concomitant clarification and rationalization of substantive antitrust rules and results more consistent than those realized in jury trials.

I see no overriding disadvantages to eliminating jury trials of private antitrust suits. Judges may be biased as juries, but judges are constrained both by their obligation to explain their decisions and by their concern with the prospect of appellate reversal. Furthermore, while some judges may be unfamiliar with antitrust law when they hear their first antitrust case, their learning and understanding accumulates as they hear additional cases. Jurors, on the other hand, change with each case and their learning begins anew.

The problem, of course, with this proposal is raised by the seventh amendment to the Constitution, which provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."[53] Although the amendment's language is limited to common law actions, the Supreme Court expanded its coverage to action enforcing statutory rights "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[54] Yet the Court also has limited the right to jury trial by stating that it hinges, among other things, on "the practical abilities and limitations of juries."[55] While the Court offered this test with reference to issues, not entire cases, several lower courts have denied jury trials in antitrust cases of great complexity. In addition, the Third Circuit has held that the due process clause overrides the seventh amendment where the suit is so complex "that a jury would be unable to understand the case and decide it rationally."[56]

53. U.S. CONST. amend. VII.
54. Curtis v. Loether, 415 U.S. 189, 194 (1974).
55. Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).
56. *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1089 (3d Cir. 1980).

Since antitrust law is a vitally important national public policy, and since Congress created private rights of action not merely to permit recovery of damages but also to supplement governmental enforcement, I believe that a congressional statute eliminating jury trial of private antitrust actions would be constitutional—particularly given the importance to antitrust policy of accurate results, clarification of the law, and minimizing deterrence of procompetitive behavior. In *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*,[57] the Supreme Court upheld a statute creating new private rights to protect employees from death or injury due to unsafe working conditions, and providing that they be adjudicated by an administrative agency:

> We cannot conclude that the [seventh] Amendment rendered Congress powerless—when it concluded that remedies available in courts of law were inadequate to cope with a problem within Congress' power to regulate—to create new public rights and remedies by statute and commit their enforcement, if it chose, to a tribunal other than a court of law—such as an administrative agency—in which facts are not found by juries.[58]

Given that holding, I do not believe the Court would insist that there be jury trials of private rights of action under the antitrust laws committed to courts of law, since important public policies are at stake and there is good reason to believe that juries are incapable of functioning satisfactorily in such cases. Indeed, there are good reasons for concluding the seventh amendment does not cover federal statutory actions generally.[59]

C. Summary Judgment

So long as private antitrust actions are triable to juries, it is important that the bases for summary judgment be expanded, as the Supreme Court has done in the *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[60] and two other recent cases[61] that signal a retreat from its earlier rules in *Adickes v. S.H. Kress & Co.*[62] and *Poller v. Columbia Broadcasting System, Inc.*[63]

A critical feature of *Matsushita* is the Court's use of economic analysis as a basis for concluding that plaintiffs' claim of a conspiracy to charge predatory export prices was implausible, and that plaintiffs' evi-

57. 430 U.S. 442 (1977).

58. *Id.* at 460.

59. *See* Note, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459 (1986).

60. 106 S. Ct. 1348 (1986).

61. Anderson v. Liberty Lobby, 106 S. Ct. 2505 (1986); Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986).

62. 398 U.S. 144 (1970).

63. 368 U.S. 464 (1962).

dence, which included no direct proof, was insufficient to warrant a "reasonable" inference of conspiracy. This approach—empowering district judges to grant summary judgment where they find plaintiffs' claim economically implausible and unsupported by more persuasive evidence that would otherwise suffice—could well be extended to other kinds of antitrust claims. Indeed, since plaintiffs have the burden of proof, summary judgment for defendants is appropriate in any antitrust case where the evidence is such that a jury could reach a verdict for plaintiff only by speculation.

Moreover, since plaintiffs can almost invariably find an economist who will testify that in his opinion their claim is correct, summary judgment is still appropriate despite such testimony where the rest of the evidence fails to meet the *Matsushita* test.

CONCLUSION

Antitrust law needs some revisions to improve its economic effects, but extreme restrictions on its scope are not warranted. Rules fashioned with reference to the proper goals of antitrust law will continue to promote American economic and social welfare by checking anticompetitive free market conduct.