# The Supreme Court's 21st Century Section 2 Jurisprudence: Penelope or Thermopylae?

John DeQ. Briggs & Daniel J. Matheson

Reprinted with Permission
from The Sedona Conference Journal Volume 11, 2010

Copyright 2010, The Sedona Conference.
All Rights Reserved.

The Sedona Conference®
Antitrust Law, Complex Litigation and Intellectual Property Rights

*The Sedona Conference Journal*® (ISSN 1530-4981) is published on an annual basis, containing selections from the preceding year's Conferences and Working Groups. The *Journal* is available on a complementary basis to courthouses and public law libraries and by subscription to others ($95; $45 for Conference participants and Working Group members). Send us an email (rgb@sedonaconference.org) or call (1-866-860-6600) to order or for further information. Complete Conference Notebooks for each of our Conferences are separately available. Check our website for further information about our Conferences, Working Groups, and publications: www.thesedonaconference.org.

Comments (strongly encouraged) and requests to reproduce all or portions of this issue should be directed to:
Executive Director, The Sedona Conference®,
180 Broken Arrow Way South, Sedona, AZ 86351-8998
(toll free) 1-866-860-6600 or (tel.) 928-284-2698;
fax 928-284-4240; email rgb@sedonaconference.org.

*The Sedona Conference Journal*® designed by
Margo Braman of Studio D: mbraman@sedona.net.

Cite items in this volume to "11 Sedona Conf. J. ____ (2010)."

Copyright © 2010, The Sedona Conference®.
All Rights Reserved.

# THE SUPREME COURT'S 21ST CENTURY SECTION 2 JURISPRUDENCE:[1] PENELOPE[2] OR THERMOPYLAE?[3]

*John DeQ. Briggs & Daniel J. Matheson*[4]
*Axinn Veltrop Harkrider LLP*
*Washington, DC*

In recent decades, the Supreme Court has been in an affectionate embrace with unilateral conduct by a dominant firm. The Court has lauded the stimulating effect of efforts to achieve monopoly and generally has been reluctant to declare unlawful conduct except where particular practices are overwhelmingly likely not to represent competition on the merits. But at the same time these themes have been played differently by a number of lower courts in significant cases. And the announced enforcement intentions of the new administration's competition agencies - the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ") - also point in a different direction, exhibiting skepticism about, if not hostility to, the Supreme Court's serenade to monopoly and its virtues.

There is thus something of a struggle shaping up for the heart and soul of antitrust. It remains to be seen whether the Supreme Court will continue to be dominated by the Chicago-informed antitrust economics and resulting law; whether the lower courts, being tugged in the other direction by the executive branch and the plaintiffs bar, will follow the lead of the Supreme Court, or have to be pulled along somewhat by the heels; or whether the pendulum will swing back past center at all. Much depends on the politics of the Supreme Court in the next few years, but there is also at least some sense in the Congress that U.S. antitrust is out of step with competition law and policy in the rest of the world.[5]

---

1 We leave it to each reader to decide his or her own answer posed in the title. We suspect that where readers stand on the questions depends in some measure on where they sit.

2 In Homer's ODYSSEY, Penelope waits 20 years for the final return of her husband, during which she has a hard time snubbing marriage proposals from 108 suitors, many odious. She is a symbol of fidelity in the face of temptation.

3 The Battle of Thermopylae took place over three days during the second Persian invasion of Greece in September 480 B.C. It was fought between an alliance of Greek city-states, led by Sparta, and the Persian Empire of Xerxes. Vastly outnumbered, the Greeks held up the Persians for seven days in total (including three of battle) at the pass of Thermopylae, before the rear-guard was annihilated in one of history's most famous last stands. The battle has become a symbol for courage against overwhelming odds.

4 Mr. Briggs is Co-Chairman of Axinn Veltrop & Harkrider LLP's Antitrust Group and Managing Partner of the firm's Washington, D.C., office. He is a former Chair of the American Bar Association's Section of Antitrust Law (1995-96). Prior to joining AV&H, he served for more than a decade as Chair or Co-Chair of Howrey LLP's Antitrust Practice Group and then as Managing Partner, Strategy & Planning. Mr. Matheson is an associate in the Washington, D.C., office of Axinn Veltrop & Harkrider LLP. Both Mr. Briggs and Mr. Matheson have been counsel to the prevailing parties in several of the cases discussed herein.

5 *See* Letter of from 22 Congressmen to Christine Varney and Jon Leibowitz (Sept. 18, 2009) (on file with author). They express their " ... increasing concern ... about developments in international competition policy, how the EC is shaping the global competitive environment, and the impact these developments are having on American companies." The signers of the letter pointed specifically to recent or ongoing proceedings involving Google, IBM, Intel, Microsoft and QUALCOMM, and then went on to say:

> "…with so many of the world's successful technology companies based in the United States and very few located in the European Union or elsewhere, the Administration should be an advocate of the "American Way" both at home and in foreign jurisdictions. Otherwise, DG Comp will become the de facto super regulator in competition markets, and its approach in managing competition will shape commerce worldwide. Indeed, DG Comp already is spending millions of Euros exporting its competition policy to emerging markets like China."

*See* John DeQ. Briggs, *The U.S. Competition Law Regime is Losing the Competition in the World Market for Competition Regimes,* EUROPEAN AFFAIRS (Fall 2009).

## I.

A brief overview of historical enforcement may help put the current state of affairs into perspective. For much of the 20th century both the judiciary and the executive branch wielded the Sherman Act to combat practices by which dominant firms disadvantaged smaller rivals. Section 2, which governs the unilateral conduct of dominant firms,[6] was directed against trusts in the first three decades of the century.[7] Then, after the decade and a half of the Great Depression and World War II, during which antitrust went into the closet in favor of the sort of centralized planning marked by the Industrial Recovery Act, antitrust emerged invigorated and refreshed. For some time after the war, the government brought § 2 cases against firms whose strength for dominance was perceived to present structural barriers to competition.[8] During this post-World War II period of aggressive enforcement, the Supreme Court and lower courts suggested that the Sherman Act condemned the use of monopoly power "to gain a competitive advantage;"[9] even where the firm's power was primarily attributable to "superior skill, industry, and foresight,"[10] and the dominant firm neither sacrificed profits to gain its advantage nor intended to use the advantage to maintain or further increase its monopoly power.[11] During this phase of American antitrust, a monopolist defending a challenged practice (for instance, leasing to customers capital equipment rather than selling it) was required to demonstrate that the practice made no contribution to its market power, and that the monopolist's strength was attributable "solely to [its] ability, economies of scale, research, natural advantages, and adaptation to inevitable economic laws."[12]

Not only was this period a time of aggressive enforcement, it was a time during which antirust law was held in the highest esteem and enjoyed a place in the American constellation of laws near to the Constitution itself. This is what the Supreme Court said about the importance of antitrust in 1972:"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[13]

And in 1978, the importance of antitrust meant that

> ...[E]ven when Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant. The presumption against repeal by implication reflects the understanding that the antitrust laws establish overarching and fundamental policies, a principle which argues with equal force against implied exclusions.[14]

6 Exclusive dealing and tying practices are often challenged under other statutes requiring concerted action or agreement, but inasmuch as those practices are fundamentally unilateral, we treat them so for purposes of this discussion.

7 *United States v. United States Steel Corp.*, 251 U.S. 417 (1920); *United States v. American Can Co.*, 230 F. 859 (D. Md. 1916), appeal dismissed by 256 U.S. 706 (1921). The oil and tobacco trusts were found guilty of violating both § 1 of the Act, which prohibits unreasonable restraints of trade, and § 2. *See Standard Oil Co. v. United States*, 221 U.S. 1, 55, 61-62, 75 (1911) (finding the Standard Oil trust guilty of monopolization); *United States v. American Tobacco Co.*, 221 U.S. 106, 182-83 (1911) (finding monopolization). Other combinations, however, were found to violate only § 1. *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904) (injunction under § 1 of the Sherman Act prohibiting the Harriman-Hill-Morgan railroad holding company from exercising control over competing railroads); *Swift & Co. v. United States*, 196 U.S. 375 (1905) (injunction under § 1 of the Sherman Act prohibiting the beef trust from collusive price fixing).

8 *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Hand, J.); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) (endorsing *Aluminum Co. of America*); *United States v. Griffith*, 334 U.S. 100 (1948); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. Feb. 18, 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

9 *Griffith*, 334 U.S. at 107.

10 *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

11 *Griffith*, 334 U.S. 100 (1948).

12 *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 343 (1953), *aff'd per curiam*, 347 U.S. 521 (1954).

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

14 *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398-99 (1978).

The Court's loss of esteem for antitrust over the next several decades is perhaps nowhere better captured than in the juxtaposition of these ringing endorsements of antitrust law's fundamental importance to economic regulation with the language from *Credit Suisse* reflecting a deep mistrust of antitrust and antitrust courts. See quoted *infra*, at § III.

## II.

This period of heartfelt and aggressive § 2 jurisprudence came to an end in the early 1980s. Important cases in the late 1970s, while not involving § 2, represented a harbinger of change with respect to the entire canvass of antitrust, including § 2. *General Dynamics* in 1976 marked an important turning point in merger analysis – introducing a certain rigor into the analysis of market share.[15] Three years later in *GTE Sylvania,* the Supreme Court overruled the *per se* rule against vertical territorial restraints and established a return to a rule of reason analysis for evaluating non-price vertical restraints.[16] While these cases suggested the direction in which the Court was moving, the greatest changes in doctrine began with the appointment of William Baxter as the head of DOJ. He introduced to the broader antitrust community, and the bench: the Chicago School; efficiencies; empiricism; economics-based guidelines; amicus briefs to lower courts in an effort to shape the law at the bottom of the judicial pyramid, and more.

In the 1980s antitrust policy makers attempted to impose strict, relatively objective, principles designed not only to restrict the growth of antitrust as it was then known, but to attack many of its accepted features root and branch. For the most part the Supreme Court enthusiastically joined in, not only adopting limited antitrust doctrines but altering procedural approaches in ways that limited private enforcement.

The 1980s began with a bang. Four of the largest antitrust cases in history were concluded – three of them just abandoned: the *IBM* case challenging IBM's dominance in mainframe computers and peripherals; the FTC's so-called *cereal* case; and the FTC's *Exxon* case seeking to dismember the oil industry. The settlement of the fourth case, *AT&T*, resulted in the breakup of AT&T's monopoly on local telephone service, but hardly brought an end to antitrust issues in telecommunications. The end of these cases could be regarded as the end of the era of antitrust challenges to structural dominance. Henceforth, § 2 enforcement and doctrine would primarily focus on delineating the boundaries of specific competitive (or anticompetitive) practices, in particular below-cost pricing, bundled pricing, exclusive dealing, and the use of intellectual property. And the approach to these specific practices has been consistent with the Supreme Court's post-1980 distrust of antitrust law's role in governing aggressive competition by single firms.

In 1984, for example, the Supreme Court said that unilateral conduct, regardless of its effect on rivals, runs afoul of the antitrust laws ***only*** if it "threatens actual monopolization. It is not enough that a single firm appears to 'restrain trade' unreasonably, for even a vigorous competitor may leave that impression."[17] By 1993 the Court had largely repudiated the *Alcoa* line of cases (while not explicitly overruling any case) that had suggested a monopolist could violate § 2 by seizing business opportunities from its rivals, holding instead that § 2 of the Sherman Act

15 415 U.S. 486, 501-504 (1976) ( In *General Dynamics* the Court held that coal company's huge past and present market share was unrevealing about the firm's future ability to compete where the company had few reserves in the ground, and thus could not effectively compete for future long term supply contracts).

16 *GTE Sylvania Inc. v. Continental T.V.,* 433 U.S. 36, 59 (1977).

17 *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767 (1984) (citations omitted).

> directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. Thus, this Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it.[18]

In a separate case that same year the Court made clear that

> [e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce."[19]

## III.

Now, fifteen years later and in the early 21st century, the Court has gone further. Antitrust is no longer seen by the Supreme Court as the Magna Carta of free enterprise; rather, it seems to be seen as something of a beast on the verge of out of control. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, the Court indicated not only comfort with the existence of monopoly power, but fawning approval of the stimulating effects of monopoly profits:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.[20]

Even more dramatic was the Court's decision and language in *Credit Suisse*, which expressed a deep suspicion that the vagaries of antitrust litigation could not be trusted to produce consistent results. What the Court said about antitrust, while in context limited to the regulated securities markets, doubtless resonates with all critics of antitrust, class actions, treble damages, the lack of contribution and the American antirust regime in general:

> [A]ntitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate different fact patterns consistently. The result is an unusually high risk that different courts will evaluate similar fact patterns differently.

---

18 *Spectrum Sports Inc v. McQuillan,* 506 U.S. 447, 458 (1993) (citations omitted). To prevail on a claim of attempted monopolization, plaintiff must prove that the defendant has (1) "engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Id.* at 456.

19 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (citation omitted).

20 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407-408 (2004).

> …[T]hese factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, i.e., results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids … but also a wide range of joint conduct that the securities law permits or encourages ….[21]

This remarkable distaste for antitrust is a very far cry from antitrust as the Magna Carta of free enterprise.

The Supreme Court's solicitude for defendants, including monopolists, is captured in a single statistic. Since its 1992 decision in *Eastman Kodak Co. v. Image Technical Services Inc.,*[22] the Court has issued 17 antitrust decisions. Many were and are important; some less so. But not a single one ruled in favor of the party that was the antitrust plaintiff.[23] All involved holdings that favored the defendant. But the Supreme Court's doctrine must be applied by the lower courts, thus it may not be the end of the story.

In contrast to the endorsement of aggressive competition by dominant firms in *Spectrum Sports, Brooke Group*, *Trinko*, and *linkLine,*[24] stand the applications of § 2 by the Supreme Court in *Kodak*[25] and by lower courts in *LePage's, Inc. v. 3M,*[26] *Conwood Co. v. United States Tobacco Co.*,[27] and to a lesser extent *United States v. Microsoft Corp.,*[28] *United States v. Dentsply Int'l, Inc.,*[29] and *Broadcom Corp. v. Qualcomm Inc.*[30] These cases have all articulated a somewhat more expansive role for antitrust and demonstrate that dominant firms engaging in exclusionary conduct sometimes do so at their peril. Perhaps most importantly, DOJ's recent § 2 guidance, and also the FTC's enforcement actions in *In the Matter of Rambus, Inc.*,[31] and *In the Matter of Negotiated Data Solutions*[32]seem also, and more recently, to exhibit resistance to the Supreme Court's broad exculpatory mood.

Below, we seek to categorize the areas where litigation seems to be being shut off, as well as those where it may not be.

### A. *The Supreme Court's Safe Harbors for Aggressive Competition*

#### 1. *Pricing*

Plainly persuaded by the procompetitive benefits of aggressive competition, the Court in *Brooke Group* and *Trinko* created safe, or at least snug, harbors for certain types of

21 *Credit Suisse Securities LLC v. Billing*, 551 U.S. 264, 282 (2007).
22 504 U.S. 451 (1992).
23 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993); *Spectrum Sports Inc v. McQuillan*, 506 U.S. 447, 458 (1993); *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *California Dental Ass'n v. F.T.C.*, 526 U.S. 756 (1999); *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004); *United States Postal Service v. Flamingo Indus. (U.S.A.) Ltd.*, 540 U.S. 736 (2004); *F. Hoffman-la Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 (2004); *Volvo Trucks North America, Inc. v. Reeder Simco GMC, Inc.*, 546 U.S. 164 (2006); *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006); *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006); *Leegin Creative Leather Products v. PSKS, Inc.*, 126 S. Ct. 2705 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, 127 S. Ct. 1069 (2007*); Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007); *Credit Suisse Securities v. Billing*, 127 S. Ct. 2383 (2007); *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009).
24 *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 129 S. Ct. 1109 (2009).
25 504 U.S. 451 (1992).
26 324 F.3d 141 (3d Cir. 2003), *cert. denied,* 542 U.S. 953 (2004).
27 290 F.3d 768 (6th Cir. 2002), *cert. denied,* 537 U.S. 1148 (2003).
28 253 F.3d 34 (D.C. Cir.), *cert. denied,* 534 U.S. 952 (2001).
29 399 F.3d 181 (3d Cir. 2005), *cert. denied,* 126 S. Ct. 1023 (2006).
30 501 F.3d 297 (3d Cir. 2007).
31 Docket No. 9302 (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/index.shtm.
32 *In the Matter of Negotiated Data Solutions LLC,* File No. 0510094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

conduct. Specifically, after *Brooke Group,* dominant firms may aggressively discount individual products against small rivals without fear of antitrust liability, provided those prices remain above some measure of cost. In *Brooke Group,* plaintiff-Liggett claimed that Brown & Williamson "cut prices on generic cigarettes below cost and offered discriminatory volume rebates to wholesalers to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy [cigarette] segment."[33] Characterizing Liggett's claim as one of predatory pricing, the Court said that, to prevail, plaintiff must prove that defendant's prices were below an "appropriate level" of cost, and that defendant "had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."[34] Key to that holding was the principle that:

> "[L]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . ." As a general rule, the 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.[35]

The Court subsequently expanded this analysis to predatory bidding situations in *Weyerhauser*,[36] rejecting a competitor's complaint that a dominant firm's unreasonably high bids for alder logs excluded competitors from the market.

2. *Refusals to Deal*

*Trinko* and *linkLine*, the Supreme Court's most recent decisions focused directly on single firm conduct, follow in the steps of *Brooke Group* and increase the confidence with which a dominant firm may refuse to aid a rival.[37] *Trinko* narrowly defined the circumstances under which a refusal to deal may be characterized as anticompetitive conduct and expressly limited the Court's earlier decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[38] to its facts. *Aspen* appeared to raise the stakes for dominant firms that refused to deal with a rival, where the refusal represented an "important change in a pattern of distribution that had originated in a competitive market," and facts suggested that the decision to cut off the rival amounted to a sacrifice of short-run profits in order to reduce competition in the long run.[39] However, the impact of *Aspen* extended beyond its facts. It renewed, at least for a time, the importance of intent in discerning whether conduct was "fairly characterized as 'exclusionary' or 'anticompetitive'" defined "exclusionary"

33 *Brooke Group, Ltd.,* 509 U.S. at 212.

34 *Id.* at 222, 224. Liggett's predatory pricing claim arose under § 2(a) of the Robinson-Patman Act. The Court held, however, that the same standard applied whether the claim arose under the Robinson-Patman Act or the Sherman Act: "the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." *Id.* at 222.

35 *Id.* at 223 (citations omitted).

36 *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber*, 127 S. Ct. 1069 (2007).

37 While not focused tightly on the standards for liability in a single firm conduct setting, the Court's three decisions from the 2005 Term also give defendants a degree of aid and comfort. First, in *Volvo Trucks N. Am. Inc. v. Reeder-Simco GMC Inc.,* 126 S. Ct. 860 (2006), the Court reversed an Eighth Circuit decision that had allowed a manufacturer offering its dealers different wholesale prices to be held liable for price discrimination proscribed by the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. Second, in *Texaco Inc. v. Dagher,* 126 S. Ct. 1276 (2006), the Court reversed a Ninth Circuit decision applying the per se rule to claims of price fixing among parties to a joint venture who effectively operated as a single entity competing with other sellers in the market. Third, in *Independent Ink Inc. v. Illinois Tool Works Inc.,* 126 S. Ct. 1281 (2006), the Court vacated a judgment against a patent holder for tying and monopolization that had been affirmed by the Federal Circuit, holding that ownership of a patent does not presumptively confer market power in tying cases.

38 472 U.S. 585 (1985).

39 *Id.* at 603.

conduct as any conduct that "attempt[s] to exclude rivals on some basis other than efficiency," and suggested that a court should consider the impact of the challenged conduct on consumers and "whether it has impaired competition in an unnecessarily restrictive way."[40] The latter tinged with antitrust risk competitive strategies by a dominant firm (whether a refusal to deal or other type of conduct) that were not "efficient" in the sense of lowering cost or improving quality and not the least restrictive alternative to achieve the firm's objectives.

*Trinko* ended lingering ambiguity about the duty to deal with rivals, declaring *Aspen* "at or near the outer boundary of § 2 liability,"[41] and drove the result in *linkLine*. In *linkLine*, independent Internet service providers that competed with AT&T in the retail DSL market, and also leased DSL transport service from AT&T at the wholesale level, argued that AT&T subjected them to a price squeeze in violation of § 2.[42] The Supreme Court rejected the possibility of a price squeeze as a cognizable antitrust offense, at least in the absence of an "antitrust duty to deal." "*Trinko* ... makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."

It is rarely the case, as in *Trinko* and *linkLine,* that an alleged monopolist can claim that its products or services have never been willingly sold to third parties, and rarer still that a monopolist is required by regulation to sell at cost to its downstream rivals. Nevertheless, and doubtless going farther than the facts before it required, the Court in both cases left no doubt that the duty to deal is no broader than that arising on the facts of *Aspen* where "[t]he unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end."[43] After *Trinko* and *linkLine,* unless facts surrounding a unilateral refusal to deal can be squeezed into *Aspen,* the antitrust analysis may well end.[44]

3. *Regulated Industries*

Another situation in which the Supreme Court has limited the application of the antitrust laws involves immunizing certain conduct in regulated industries from antitrust scrutiny. In 2007, the Supreme Court held in *Credit Suisse*, mentioned above, that the antitrust laws could not be applied to a conspiracy among securities underwriters to inflate the commissions on initial public offerings, due to a "plain repugnancy" between the antitrust claims and the federal securities laws.[45] The Court held that although the Securities and Exchange Commission ("SEC") condemned the practices in question, application of the antitrust laws to the unlawful practices would "threaten[] serious securities-related harm" due to the likelihood that "dozens of different courts with different nonexpert judges and different nonexpert juries" would have difficulty reaching consistent results.[46]

---

40 *Id.* at 602, 605.
41 124 S. Ct. at 879 (citation omitted).
42 The plaintiff ultimately argued that it should be given the opportunity to prove a predatory pricing claim in the retail market, but the Court rejected this effort as well.
43 *Id.* at 879.
44 A patentee or copyright owner generally has an absolute right to refuse unilaterally to license patents or copyrights (or refuse to sell patented or copyrighted products) for any reason. *See, e.g., In re Indep. Serv. Orgs. Antitrust Litig.,* 203 F.3d 1322, 1329 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1143 (2001). In the First and Ninth Circuits, however, the refusal to license (or sell) only gives rise to a rebuttable presumption that the refusal is supported by a legitimate business reason and, in the Ninth Circuit, that presumption can be rebutted by *subjective intent* evidence. *See Image Tech. Servs., Inc. V. Eastman Kodak Co.,* 125 F. 3d 1195, 1218 (9th Cir. 1997); *Data Gen. Corp. v. Grumman Sys. Support Corp.,* 36 F.3d 1147, 1187 (1st Cir. 1994); *see also Microsoft,* 253 F.3d at 63 ("frivolous" to argue "absolute and unfettered right" to use one's own intellectual property as one wishes). It remains to be seen whether the use of subjective intent evidence, without satisfying the factual predicate of *Aspen,* can stand after *Trinko.*
45 *Credit Suisse Securities LLC v. Billing*, 551 U.S. 264 (2007).
46 *Id.* at 280.

In the Court's view, while the risk of inconsistent results is present in all antitrust lawsuits, the difficulty in "separating the permissible from the impermissible" in the securities context meant that "there is no practical way to confine antitrust suits so that they challenge only activity ... unlawful under the securities law."[47] Thus significant risk existed that underwriters would be forced to "act in ways that will avoid not simply conduct that the securities law forbids ... but also a wide range of [efficiency-enhancing] joint conduct that the securities law permits or encourages."[48] Further, because the SEC "actively enforces the rules and regulations that forbid the conduct in question," the "enforcement-related need for ... antitrust ... " was held to be "unusually small."[49]

*Credit Suisse* went significantly further than any previous case in holding that the antitrust laws could not be applied to a conduct deemed illegal by a regulator due to the potential that hypothetical "nonexpert judges" and "nonexpert juries" would reach erroneous conclusions in future cases. It remains to be seen whether dominant firms will be able to avail themselves of this principle in other regulated industries (power generation and airlines spring immediately to mind), but given the tenor of the Court's decision, one might well wonder whether the *Credit Suisse* holding will remain limited to the particularly intricate securities industry and the SEC.

4. *Pleading Rules*

Perhaps even more important than immunizing from antitrust scrutiny specific practices or conduct in certain regulated industries, the Supreme Court has also, in the last three terms, erected more onerous pleading requirements for plaintiffs that may render it difficult for many § 2 plaintiffs to survive motions to dismiss. In *Bell Atlantic Corp. v. Twombly*,[50] the Supreme Court abandoned its 50-year-old precedent governing when a complaint states a claim under the Federal Rules of Civil Procedure. *Conley v. Gibson*[51] had for five decades instructed courts that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[52] *Twombly* held that this standard had "earned its retirement," and that henceforth in antitrust cases alleging conspiracy, in order to survive a motion to dismiss a claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made."[53]

Some lower courts resisted expanding *Twombly* beyond the antitrust conspiracy context, leading the Supreme Court, in *Ashcroft v. Iqbal*, to expand *Twombly* and make clear that a complaint "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions," and that all civil complaints "must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.'"[54] In identifying the "factual matter," *Iqbal* instructs courts considering motions to dismiss "to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."[55] In *Twombly*, the "legal conclusions" not entitled to the assumption of truth included the allegation that the defendants formed a conspiracy, while in *Iqbal*, they included the allegation that the defendants "knew of, condoned, and willfully and

47 *Id.* at 282.
48 *Id.*
49 *Id.*
50 550 U.S. 544 (2007).
51 355 U.S. 41 (1957).
52 *Id.* at 45.
53 550 U.S. at 557.
54 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).
55 *Id.* at 1950.

maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[56]

Under the *Twombly/Iqbal* approach, § 2 plaintiffs will face particular difficulty alleging the specific intent required to support a claim of attempt to monopolize, as well alleging that a practice such as a monopolist's refusal to deal are not justified or undertaken for the purpose of excluding a competitor. The assertion that a firm possesses a particular intent, and other fundamentally factual assertions may come to be treated as a "legal conclusion"[57] – indeed, it is difficult to picture circumstances in which a dominant firm would be so careless as to allow a potential plaintiff to acquire facts that would allow specific intent to be pled "plausibly."

### B. *Lower Courts Accept Broader Theories of Liability*

The Supreme Court's last opinion opening the door to more, not less, risk for dominant firms was its 1992 decision in *Kodak,* which created antitrust risks for aggressive aftermarket competitors even if they lacked market power in the foremarket. *Kodak* precipitated a rush of claims challenging the aftermarket practices of manufacturers and franchisors,[58] but for years *Kodak's* seemingly expansive theory failed to take root, as lower courts' strict application of the conditions under which a small rival could become an aftermarket monopolist led to the rejection of the vast majority of post-*Kodak* claims.[59] Yet the Ninth Circuit relatively recently clarified the circumstances in which such a claim may lie, consistent with the willingness of plaintiffs to pursue and lower courts to allow claims not entirely foreclosed by the Supreme Court. Recent district courts have been more receptive to such aftermarket § 2 claims than was initially the case.[60]

In *Newcal Industries, Inc. v. IKON Office Solutions*,[61] the Ninth Circuit held that lack of market power in a primary market does not preclude an antitrust claim in an aftermarket where consumers make separate decisions to purchase in the primary market and the aftermarket, as long as customers do not explicitly contract away their ability to take advantage of competition in the aftermarket.[62] *Newcal* represents an interesting elaboration of *Kodak* for several reasons. First, *Newcal* suggests that a § 2 claim can be based on conduct that does not violate the reasonable expectations of customers at the time the primary good was purchased, as long as the conduct denied the customers the benefits of

---

56 *Id.* at 1951.

57 *Ginsburg et al. v. InBev NV/SA et al.*, No. 08-cv-1375 (E.D. Mo. Aug. 3, 2009) at 5 (granting defendants' motion for judgment on the pleadings and dismissing complaint with prejudice because allegations that beer makers were influenced by the possibility that defendant might enter the United States market were "legal conclusions."); *see also In Re Travel Agent Commission Antitrust Litigation*, No. 07-4464 (6th Cir. Oct. 2, 2009).

58 *See generally* John DeQ. Briggs and James G. Kress, *Trends in Private Antitrust Litigation: The Monopolist Next Door,* The Antitrust Review of the Americas 2003, Global Competition Review.

59 *See, e.g., Queen City Pizza, Inc. v. Domino's Pizza,* 124 F.3d 430 (3d Cir. 1997), *cert. denied,* 523 US. 1059 (1998); *PSI Repair Services Inc. v. Honeywell, Inc.,* 104 F.3d 811 (6th Cir.) *cert. denied,* 520 U.S. 1265 (1997); *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.,* 73 F.3d 756 (7th Cir. 1996); *10 Security Systems Canada, Inc. v. Checkpoint Systems, Inc.,* 249 F. Supp. 2d 622 (E.D. Pa. 2003); *Universal Avionics Sys. Corp. v. Rockwell Int'l Corp.,* 184 F. Supp. 2d 947 (D. Ariz. 2001).

60 *E.g., Alternative Electrodes LLC v. Empi, Inc.,* 597 F. Supp. 2d 322 (E.D.N.Y. 2009) (denying motion to dismiss antitrust claim alleging monopolization of market for replacement electrodes for use with medical device sold by defendants); *Helicopter Transport Services, Inc. v. Erickson Air-Crane Inc.*, 2008 U.S. Dist. LEXIS 3466 (D. Or. Jan. 14, 2008) (denying defendant's motion for summary judgment on antitrust claim alleging defendant monopolized the market for helicopter spare parts and leveraged its parts monopoly into the heavy helicopter services market); *Xerox Corp. v. Media Sciences Int'l,* 511 F. Supp. 2d 372 (S.D.N.Y. 2007) (denying motion to dismiss antitrust counterclaim alleging monopolization or attempt to monopolize the market for replacement solid ink sticks for use in Xerox's phase change color printers); *Fin. & Sec. Prods. Ass'n v. Diebold,* 2005 U.S. Dist. LEXIS 45409 (N.D. Cal. July 8, 2005) (denying preliminary injunction to plaintiff alleging monopolization by Diebold of a parts and service aftermarket relating to ATMs).

61 513 F.3d 1038 (9th Cir. 2008).

62 *Id.* at 1050 ("Just as the plaintiffs had in *Eastman Kodak,* Newcal offers factual allegations to rebut the economic presumption that IKON consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter an IKON contract.").

competition. Unlike some *Kodak*-type cases, *Newcal* does not mention any requirement that a policy change violates the expectations of locked-in customers – the allegations in *Newcal* were all about the exclusionary conduct and its impact on competitors in the aftermarket.

Second, *Newcal* recognized that a number of post-*Kodak* cases held that contractual rights did not give rise to market power,[63] but distinguished them because

> [t]his case is not a case in which the alleged market power flows from contractual exclusivity. IKON is not simply enforcing a contractual provision that gives it the exclusive right to provide replacement equipment and lease-end services. Rather, it is leveraging a special relationship with its contracting partners to restrain trade in a wholly derivative aftermarket.[64]

Thus, under *Newcal*, a firm's contractual relationship with its customers can create a "special relationship" that can in turn be leveraged to the detriment of competitors, even absent a policy change violating the expectations of locked-in firms.

Similarly, in contrast to the pro-defendant outcomes in *Brooke Group* and *Trinko*, stand Circuit court decisions in *LePage's, Conwood* and *Microsoft,* affirming adverse verdicts against dominant firms because of aggressive competitive or distribution strategies, as well as *Dentsply,* which reversed the trial court's decision and found § 2 liability in a dominant firm's exclusive dealing policies. Of these, *Microsoft* and *Dentsply* are closest to the Supreme Court's monopolization law, but even those opinions reflect important shifts from center. *Microsoft* could be viewed, in part, as repackaging "mainstream" standards for market definition and suppression of potential competition. But its willingness to find a § 2 violation based on exclusive dealing agreements that did not violate § 1 of the Sherman Act is a dramatic departure from antitrust norms, foreshadowed in *Conwood* and followed in *LePage's.* The Third Circuit in *Dentsply* followed a similar path, finding a violation of § 2 even where there were unappealed findings of no violation of § 3 of the Clayton Act or § 1 of the Sherman Act. Likewise, *Microsoft's* treatment of legitimate business justifications as a balancing exercise consistent with rule of reason analysis under § 1- in which anticompetitive effects are weighed against any offsetting procompetitive benefits - further dilutes the role of such justifications in a § 2 case. In the past, there was at least the argument that the existence of a demonstrable procompetitive business justification served as a shield to § 2 liability.[65] *Microsoft* may have closed that door.

The most serious ambiguity in modern American law bearing upon unilateral conduct may well be the lack of a coherent standard governing "exclusionary" or "anticompetitive" conduct, as reflected in the controversy surrounding the outcomes in *LePage's* and *Conwood.* In particular, dominant firms are faced with uncertainty by the emergence of theories that permit the imposition of § 2 Sherman Act liability for allegedly exclusionary agreements that do not violate § 1. The Supreme Court had three chances in 2004 and 2005 to provide guidance regarding the appropriate standard for exclusionary conduct: first, in response to 3M's petition for *certiorari* in *LePage's;* second, in its decision in *Trinko;* and third, in response to Dentsply's petition for certiorari in *Dentsply.* The Court declined to consider *LePage's* and *Dentsply,* and did not purport to define a standard in *Trinko* that would apply generally to exclusionary conduct. As a consequence, counselors

63 *Id.* at 1048 ("the law prohibits an antitrust claimant from resting on market *power* that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant (as in *Queen City Pizza* and *Forsyth*).").
64 *Id.* at 1050.
65 *See Kodak,* 504 U.S. at 483; *ACT, Inc. v. Sylvan Learning Sys. Inc.,* 296 F.3d 657, 669-70 (8th Cir. 2002).

continue to struggle with a patchwork of different standards in the circuit courts and the vestiges of *Aspen's* "efficiency" based definition of "exclusionary" conduct.[66]

1. *Conwood*

Depending on your point of view, *Conwood* is either a refreshing throwback to the days in which a monopolist was punished for engaging in dirty tricks, or a cautionary tale of unstructured § 2 analysis. No matter your view, the size of the *Conwood* judgment, amounting to trebled damages in excess of USD ***$l billion,*** signals the significant risk to defendants posed by § 2 challenges from rivals losing ground to aggressive merchandising strategies for more popular brands. In *Conwood,* a rival snuff manufacturer complained that United States Tobacco ("UST") "engaged in a concerted effort, directed from the highest levels of a national monopoly, to shut Conwood out from effective competition through the elimination of its racks and [point of sale] advertising, all in the unusual moist snuff market, where [point of sale] is the central marketplace battleground."[67] The jury awarded Conwood $350 million on its § 2 claim, trebled to $1.05 billion. On appeal, the Sixth Circuit affirmed, pointing to UST's misuse of its role as category captain, unauthorized destruction of Conwood racks, burying competitive products on the UST industry rack and misrepresenting its sales performance to increase facings of slower moving UST products.

The decision of the Sixth Circuit is remarkable because of its emphasis on intent, reliance on internal UST documents, dismissal of testimony by retailers that they (not UST) controlled in-store placements, and apparent refusal to assess the extent to which UST's conduct actually foreclosed Conwood and other rivals from reaching consumers. The appellate court was, instead, satisfied that the allegedly exclusionary conduct undertaken by a "conceded monopolist" was widespread, unjustified and driven by anticompetitive intent, and (based largely on testimony by plaintiff's expert) harmed consumers by raising prices, limiting choice, and slowing the growth of rivals.[68] It distinguished, and rejected as irrelevant, established foreclosure analysis of exclusive dealing under § 1.[69] However, the record suggested that less than 10 percent of stores used UST racks exclusively, and evidence of "widespread" destruction of racks was anecdotal.[70] *Conwood* supplies no rules of general applicability beyond the notion that a collection of torts can at times amount to a §2 case and thus tort lead in the hands of a skilled alchemist can be at times converted to antitrust gold.

2. *LePage's*, *Cascade Health Solutions v. PeaceHealth*,[71] and *Doe v. Abbott Labs*[72]

The Third Circuit's *en banc* decision in *LePage's, Inc. v. 3M*[73] illustrates the manner in which lower courts have expanded § 2 liability in a discernible counter-trend to the

66 *See, e.g., Microsoft,* 253 F.3d at 58-59 (setting forth framework to prove anticompetitive conduct that requires proof of anticompetitive effects and permits balancing of procompetitive benefits); *Taylor Publishing Co. v. fastens, Inc.,* 216 F.3d 465, 475 (5th Cir. 2000) ("'exclusionary conduct' is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power.") (citation omitted); *Gen. Indus. Corp. v. Hartz Mountain Corp.,* 810 F.2d 795, 804 (8th Cir. 1987) ("exclusionary" conduct for § 2 purposes is conduct "without legitimate business purpose that makes sense only because it eliminates competition"). *Compare also Concord Boat Corp. v. Brunswick Corp.,* 207 F.3d 1039, 1062-63 (8th Cir. 2000) (ordinary business practices cannot serve as anticompetitive conduct for § 2 purposes), *cert. denied,* 531 U.S. 979 (2000), *with LePage's,* 324 F.3d at 151-52 ("monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take").

67 290 F.3d at 787.

68 *Id.* at 784-90.

69 *Id.* at 787 n.4.

70 *Id.* at 775, 784-85.

71 515 F.3d 883 (9th Cir. 2008).

72 571 F.3d 930 (9th Cir. 2009).

73 324 F.3d 141 (3d Cir. 2003), *cert. denied,* 124 S. Ct. 2932 (2004).

Supreme Court, although admittedly many of the Supreme Court's pronouncements postdate *LePage's*. However, the related decisions of the Ninth Circuit in *PeaceHealth* and *Abbott Laboratories* illustrate that even more limited interpretations of § 2 do not resolve the tension between *LePage's* and the Supreme Court's § 2 jurisprudence, and that lower court efforts to police monopolists' pricing may not survive the Supreme Court's retrenchments.

*LePage's* affirmed an approximately $68 million trebled damage award stemming from 3M's practice of offering certain bundled and incentive discounts. The holding that such arguably ordinary discounting practices amounted to illegal monopolization serves as a further example of juries and lower courts' willingness to sanction dominant firms despite the Supreme Court's more permissive rhetoric. *LePage's,* however, is even more notable because the conduct condemned in *LePage's* is strikingly similar to conduct the prospect of which led the EU Commission in the summer of 2001 to block the proposed merger of General Electric Company and Honeywell International, Inc.[74] - a transaction cleared by its U.S. counterpart subject to minor conditions.[75] That action precipitated an unusual and highly public outcry from U.S. regulators to the effect that the EU action was contrary to fundamental antitrust principles.[76] Then-Assistant Attorney General Charles A. James, in written remarks, described the divergent outcomes:

> We concluded that the merged firm would have offered improved products at more attractive prices than either firm could have offered on its own, and that the merged firm's competitors would then have had a great incentive to improve their own product offerings. This, to us, is the very essence of competition, and no principle is more central to U.S. law than that antitrust protects competition, not competitors.
>
> In stark contrast, the EC focused on how the merger would affect European and U.S. competitors, essentially concluding that the very efficiencies and lower prices the transaction would produce would be anticompetitive because they might ultimately drive some of those competitors from the market or reduce their market shares to a point where they could not [sic] longer compete effectively. In other words, the EC determined that the fact that customers would be "induced" to purchase more attractive and lower-priced GE/Honeywell products, rather than those of its competitors, was a bad thing of a sort that its antitrust law ought to prohibit.[77]

---

74 Commission Decision of July 3, 2001, Case No COMP/M.2220 - *General Electric/Honeywell.* Appeals are currently pending at the Court of First Instance in Luxembourg, Case T-209/01 *Honeywell v. Commission* and Case T-21O/01 *GE v. Commission.*

75 In the view of the European Commission, the proposed transaction would have combined GE's position in engines, described by the Commission as "dominant," and GE's influence as a purchaser and financier of aircraft through GE Capital Aviation Services and GE Credit, with Honeywell's leading position in avionics and other products. The Commission was concerned that the proposed merger would have permitted the merged firm to strengthen its position in engines and achieve dominance in avionics and other products through bundled package deals. In particular, the merged firm would allegedly have had an incentive to bundle engines with avionics (and other products such as auxiliary power units, environmental control systems, electric power, wheels and brakes, landing gear, and aircraft lighting) in sales to aircraft manufacturers and airlines, to gain an advantage over its competitors.

76 Charles A. James, Assistant Attorney General, Antitrust Division, USDOJ, International Antitrust in the 21st Century: Cooperation and Convergence, Address Before the OECD Global Forum on Competition, Paris, France (Oct. 17, 2001); *see* Charles A. James, Assistant Attorney General, Antitrust Division, USDOJ, Reconciling Divergent Enforcement Policies: Where Do We Go From Here? Address Before the Fordham Corporate Law Institute, New York, N.Y. (Oct. 25, 2001); William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, USDOJ, Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels, Address Before the George Mason University Symposium, Washington, D.C. (Nov. 9, 2001); *see also* William J. Kolasky & Leon B. Greenfield, *A View to a Kill: The Lost GE/Honeywell Deal Reveals a Trans-Atlantic Clash of Essentials,* LEGAL TIMES, (July 30, 2001) at 28. *See generally* James F. Rill & John DeQ. Briggs, *GE-Honeywell: Chill or Challenge for Global Cooperation?* ANTITRUST REP. 3 (Sept. 2001); John DeQ. Briggs & Howard Rosenblatt, *A Bundle of Trouble: The Aftermath of GE/Honeywell,* ANTITRUST MAGAZINE (Fall 2001); John DeQ. Briggs & Howard Rosenblatt, *Live and Let Die,* 10 GEO. MASON L. REV. 3 (Apr. 2002).

77 Charles A. James, *supra,* International Antitrust in the 21st Century: Cooperation and Convergence.

That characterization of the EU Commission's reasoning, whether or not correct in *GE,* lies at the very heart of the *LePage's* decision.

It is curious that the bundling theories pursued by the EC in *GE/Honeywell,* and so vigorously attacked by senior U.S. government officials, have found fertile soil in the Third Circuit. Even more surprising, in the circumstances, is the decision of the Antitrust Division of the United States Department of Justice not to support 3M's petition for review by the U.S. Supreme Court.[78]

Until *LePage's,* American rules governing discounting and bundling by single firms were believed to be relatively clear, and were fairly reflected in the U.S. reaction to *GE/Honeywell. First,* as a general matter, low prices were hailed as the essence of competition.[79] Whether offered by a dominant firm and "regardless of how ... set," they did not raise the specter of antitrust liability under § 2 unless the price fell below an "appropriate measure of cost," and defendant had a "dangerous probability of recouping its investment in below-cost prices."[80] That standard, set out in *Brooke Group,* ended - so many thought - the debate concerning the circumstances under which discount strategies, without more, could serve as a predicate for § 2 liability. Under that test, the distinction between volume discounts for single products or across product lines attracted little attention.[81] *Second,* rivals generally did not have antitrust standing to complain about increased competition from a competitor's low, above-cost prices.[82] *Next,* package discounts that simply offered two separately priced products at a discount were not suspect,[83] and volume discounts were viewed as procompetitive.[84] Indeed, the Robinson-Patman Act, prohibiting certain price discriminations, was typically the only legal constraint in framing the latter. Bundled discounts could raise issues in some courts if a seller offered two products at a discount, had market power in the market for one of those products and set the stand-alone price of the monopoly product at such a *high* level that, when added to the cost of purchasing the second product from an alternate supplier, the discounted bundle was the customer's only viable option. Such "offers" left the customer virtually no choice, prompting those courts to treat the practice, if proven, as a coercive *de facto* tie.[85] *Finally,* whether price incentives that encourage customers to shift purchases to the discounter might rise to the level of an exclusive dealing arrangement was an open question, but, as noted above, the prospect that a § 2 claim predicated on exclusive dealing could survive if the underlying conduct was lawful under § 1 was considered unlikely.

Not until *Concord Boat Corp. v. Brunswick Corp.*[86] – a case wending its way through the Eighth Circuit in the late 1990s – did counselors raise § 2 concern about non-coercive above-cost price reductions that encouraged customers to increase purchases at the expense of rivals. The district court in that case sustained a trebled damages award of approximately $133 million against an engine manufacturer for certain antitrust violations including, in particular, its use of above-cost volume and market share discounts to increase engine sales. On appeal, the Eighth Circuit rejected out of hand the notion that such

78 Although the brief of the government to the Supreme Court seemed clearly critical of the decision of the Third Circuit, that criticism was not for the reasons of policy more fervently enunciated in *GE/Honeywell.* Indeed, it seems entirely plausible that the decision of the government to oppose *certiorari* may have sprung from a fear, based on the record in *LePage's,* that the Court might well have affirmed the judgment.
79 *Barry Wright Corp. v. ITT Grinnell Corp.,* 724 F.2d 227 (1st Cir. 1983) (Breyer, J.).
80 *Brooke Group Ltd.,* 509 U.S. at 223-24.
81 *But cf Ortho Diagnostics Systems, Inc. v. Abbott Laboratories, Inc.,* 920 F. Supp. 455, 471 (S.D.N.Y. 1996) (§ 2 claims based on package discounts failed).
82 *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 340-41 (1990).
83 *Jefferson Parish Hospital District No.2 v. Hyde,* 466 U.S. 2, 12 (1984).
84 *Fedway Associates, Inc. v. United States Treasury,* 976 F.2d 1416, 1422, 1423 (D.C. Cir. 1992) (Ginsburg, J.).
85 *See, e.g., Marts v. Xerox, Inc.,* 77 F.3d 1109, 1113 (8th Cir. 1996).
86 21 F. Supp. 2d 923 (E.D. Ark 1998), *rev'd,* 207 F.3d 1039 (8th Cir.), *cert. denied,* 531 U.S. 979 (2000).

discounts could violate § 2 of the Sherman Act.[87] The court distinguished, without much analysis, the bundled multi-product discounts then under attack in *LePage's.* However, early signs from other circuits suggested that the successful attack on such strategies, whether single-product or bundled discounts, would be short-lived.[88] That, of course, proved untrue, which brings us most directly to the facts of *LePage's* itself.

The *LePage's* facts are fairly straightforward. 3M manufactures Scotch® brand tape for home and office use and, in the early 1990s, had a share of about 90 percent in a market for transparent tape. LePage's competed against 3M with "second brand" and private label tape and, by 1992, accounted for some 88 percent of private label tape sales in the United States, although private label tape accounted for a relatively small percentage of overall transparent tape sales.

LePage's claimed that 3M improperly maintained its monopoly in transparent tape by offering higher rebates to customers for purchasing products across 3M's different product lines from home care and leisure products to audio/visual and stationery products (the bundled discounts), and by offering certain large customers lump-sum cash payments, promotional allowances and other cash incentives to encourage them to purchase 3M tape (allegedly *de facto* exclusive dealing arrangements). According to the court, the multi-product rebate program

> set customer-specific target growth rates in each product line. The size of the rebate was linked to the number of product lines in which targets were met, and the number of targets met by the buyer determined the rebate it would receive on all of its purchases. If a customer failed to meet the target for any one product, its failure would cause it to lose the rebate across the line. This created a substantial incentive for each customer to meet the targets across all product lines to maximize its rebates. . . . LePage's claim[ed] that customers could not meet these growth targets without eliminating it as a supplier of transparent tape.[89]

The Third Circuit agreed that 3M's bundled and incentive discounts - ordinary business practices in the hands of smaller rivals - were anticompetitive conduct in the hands of an alleged monopolist and, together, caused anticompetitive effects. Notably, however, its analysis was largely limited to the effects on LePage's and *assumed,* in particular, that LePage's would have to absorb the total bundled discount on its smaller volume of tape sales.[90] The court chose to ignore the possibility that LePage's was not as efficient a tape producer as 3M, the availability of other competitive responses such as joint marketing to spread the bundled discount over multiple firms, and the role of power buyers. It undertook scant analysis of the disputed effects of the conduct on tape prices and no analysis of output, which some evidence suggested had increased. It also rejected 3M's evidence of legitimate efficiencies, rejecting the arguments that the challenged discounts

---

87 207 F.3d 1039 (8th Cir.), *cert. denied,* 531 U.S. 979 (2000).

88 *See e.g., Virgin Atlantic Airways Ltd. v. British Airways Plc,* 257 F.3d 256,265-72 (2d Cir. 2001) (§ 2 claim based on bundled sales of tickets tested under *Brooke;* noting in connection with § 1 analysis that "[r]ewarding customer loyalty promotes competition on the merits"); *Microsoft,* 253 F.3d at 68 ("The rare case of price predation aside, the antitrust laws do not condemn even a monopolist for offering its product at an attractive price."); *Western Parcel Express v. UPS of America, Inc.,* 190 F.3d 974, 976 (9th Cir. 1999) (rejecting argument that volume discounts were tantamount to exclusive dealing agreements). *But see Avery Dennison Corp. v. ACCO Brands, Inc.,* 2000-1 Trade Cas. (CCH) 1[ 72,882, at 87,559-60 (CD. Cal. 2000) (permitting § 2 challenge to exclusivity payments, bundled rebates and other promotional payments); *In re Warfarin Sodium Antitrust Litigation,* 1999-1 Trade Cas. (CCH) 'If 72,457, at 84,219 (D. Del. 1998) (permitting § 2 challenge based on defendant's use of, among other things, "rebates and market retention agreements as part of its allegedly multifaceted effort to restrain trade in the oral anticoagulant market").

89 324 F.3d at 154, 170.

90 *ld.* at 159-63.

were consistent with legitimate economic interests to increase sales and further rejecting proffered benefits in the form of single invoices and consolidated shipments for lack of narrowly tailored cost-justification evidence.[91]

Relying on *Brooke Group,* 3M argued that its conduct was lawful because its tape prices were above cost. Declaring that "the most significant legal issue in this case," the Third Circuit dismissed *Brooke Group* as "[in]applicable to a monopolist with its unconstrained market power."[92] Looking to more general standards for exclusionary conduct reached in refusal to deal (not pricing) cases, the majority concluded that bundled rebates - even if above-cost - could be exclusionary for § 2 purposes.[93] In its view, the "principal anticompetitive effect of bundled rebates as offered by 3M is that when offered by a monopolist they may foreclose portions of the market to a potential competitor who does not manufacture an equally diverse group of products and who therefore cannot make a comparable offer," where the branded product is "indispensable to any retailer in the transparent tape market."[94]

At the urging of the Department of Justice, the Supreme Court denied 3M's petition for *certiorari,* leaving *LePage's* the rule at least in the Third Circuit. Companies are not free to ignore *LePage's*, because most large businesses in the United States are amenable to suit in the Third Circuit, which encompasses an economically significant region in the mid-Atlantic area of the United Sates' East Coast. However, the Ninth Circuit's subsequent decision in *Cascade Health Solutions v. PeaceHealth*[95] provides a rather different analysis of bundled discounts offered by dominant firms, and another recent case suggests, at least obliquely, that the Supreme Court's *linkLine* decision might ultimately eliminate all such challenges.

In *PeaceHealth*, the Ninth Circuit addressed a straightforward challenge to a bundled pricing offer. The defendant hospital operator offered both (1) tertiary care services[96] and (2) primary and secondary care services.[97] A competing hospital operator, offering only primary and secondary care services, charged that PeaceHealth monopolized and attempted to monopolize the relevant market for primary and secondary acute care hospital services by offering more favorable rates on tertiary services to purchasers (insurance companies) that made PeaceHealth their sole preferred provider for *all* services-primary, secondary, and tertiary. The district court, relying on *LePage's*, instructed the jury that "a defendant with monopoly power (or, in the case of an attempted monopolization claim, a dangerous probability of achieving monopoly power) engaged in exclusionary conduct by simply offering a bundled discount that its competitor could not match. The instruction did not require the jury to consider whether the defendant priced below cost."[98]

The Ninth Circuit reversed, based on *Brooke Group* and *Weyerhauser*, holding that a plaintiff must allege pricing below cost to allege exclusionary conduct.[99] To determine the appropriate measure of cost, the Ninth Circuit adopted the "discount attribution" standard:

91 *Id.* at 163-64.
92 *Id.* at 147, 151.
93 *Id.* at 146-52, 154-57.
94 *Id.* at 155, 156.
95 515 F.3d 883 (9th Cir. 2008).
96 Tertiary care includes more complex services such as invasive cardiovascular surgery and intensive neonatal care.
97 Primary and secondary acute care hospital services are common medical services such as setting a broken bone and performing a tonsillectomy.
98 *Id.* at 898-99.
99 *Id.* at 903.

> Under this standard, the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products [primary and secondary care]. If the resulting price of the competitive product or products is below the defendant's incremental cost to produce them, the trier of fact may find that the bundled discount is exclusionary for the purpose of § 2.[100]

But while the discount attribution standard is far more rigorous than the Third Circuit's *LePage's* approach, it is obviously more likely to result in liability than a safe harbor based on *linkLine*. *PeaceHealth* and *linkLine* differ in that *PeaceHealth* did not involve the dominant firm providing an input directly to its competitors, while in *linkLine* AT&T squeezed its retail competitor on a good that AT&T provided at wholesale. But there is not a tremendous amount of analytical space between the Supreme Court's insistence that dominant firms be able to deal with whomever they choose and the *Brooke Group/Weyerhauser* doctrine that firms should generally be able to price however they choose. And as the Ninth Circuit demonstrated in *Abbott Laboratories*, to which we now turn, *linkLine* can be read entirely to insulate monopolists from liability based on the interplay between the doctrine of bundled discounts and the doctrine of refusal to deal.

In *Abbott Laboratories*, the defendant was allegedly a monopolist in a drug known as ritonavir, sold under a brand name as Norvir, that "boosts" the effectiveness of protease inhibitors used to fight HIV. Abbott originally sold Norvir as a standalone protease inhibitor, but later discovered it was more useful as a "booster" taken in low dosages along with other inhibitors. Abbott sold such a "boosted" protease inhibitor, Kaletra. Once Abbott's competitors received FDA approval to advertise that their protease inhibitors could be "boosted" by taking them in conjunction with Norvir, Abbott more than quadrupled the price of Norvir from $1.71 to $8.57 per 100 mg, but did not increase the price of Kaletra. According to the plaintiffs, the effect was to raise the total cost of boosted protease inhibitors provided by Abbott's competitors, and leverage its "Norvir monopoly to attempt to monopolize the boosted market for Kaletra."[101]

The district court denied Abbott's motions to dismiss, holding that *PeaceHealth* did not foreclose the plaintiffs' claims because the characteristics of the prescription drug market were not appropriate for the discount allocation approach. In particular, the insignificant marginal costs of manufacturing drugs compared to the tremendous research expenditures necessary to invent the drugs allows a discounter to offer a price that discourages competitive entry without ever slipping below marginal cost. The Ninth Circuit did not question the district court's reasoning on this point, but reversed in any event. According to the Ninth Circuit, "[t]ime, and the United States Supreme Court, have overtaken this case," and in light of *linkLine*, "allegations of monopoly leveraging through pricing conduct in two markets [do not] state a claim under § 2 of the Sherman Act, absent an antitrust refusal to deal (or some other exclusionary practice) in the monopoly market or below-cost pricing in the second market."[102]

The Ninth Circuit thus read *linkLine* to preclude antitrust challenges to ***all*** pricing – including bundled pricing – of a monopoly product. This holding risks some possibility of being adopted by other Circuits in other contexts. The Ninth Circuit could have distinguished *linkLine* on the facts, because Abbott did not sell directly to its

---

100 *Id.* at 906.
101 *Doe v. Abbott Labs.*, 571 F.3d 930, 932 (9th Cir. 2009).
102 *Id.* at 931.

competitors; it sold Norvir directly to consumers. While the Supreme Court may need a more explicit decision to bring all lower courts into line, *Abbott Laboratories* may foreshadow the proposition that, even where a refusal to deal is not directly at issue, some circuits may read the Court's 21st century jurisprudence as nearly eliminating lower courts' ability to police monopolists' pricing.

3. *Dentsply*

Joining the cluster of lower court cases condemning exclusionary distribution practices by dominant firms is *United States v. Dentsply International, Inc.,*[103] a case brought by the DOJ against Dentsply, the nation's largest manufacturer of dental equipment and supplies. DOJ alleged that Dentsply's policy, prohibiting dealers that carried Dentsply's artificial teeth from carrying competitive products, amounted to unlawful exclusive dealing and unlawful maintenance of a monopoly. After a five-week trial, the district court issued a 165-page opinion finding that, although Dentsply had a high market share, it was not able to exclude competition from a substantial share of the market for artificial teeth. The court also found that Dentsply's exclusive dealing did not violate § 2 of the Sherman Act because the government had failed to prove that Dentsply had monopoly power. Notably, even though distribution through Dentsply's dealers "may be easier" for rivals, the court held that "it is not the function of the antitrust laws to ease the burden of competing with an established and focused rival."[104]

The court also held that the absence of liability under § 3 of the Clayton Act, which prohibits exclusive dealing (as does § 1 of the Sherman Act), prevented the government from prevailing under § 2.

The Third Circuit reversed the District Court, finding liability for monopolization based mainly upon the propositions that: (1) Dentsply had a persistent share of some 75-80 percent of the U.S. tooth market and enjoyed monopoly power; (2) Dentsply's purpose in adopting the exclusive dealing policy was anticompetitive; (3) certain of Dentsply's proffered non-exclusionary business reasons were "pretextual"; and (4) the policy of exclusive dealing (and not the ineffectiveness of rivals and other factors that the District Court had found) in fact foreclosed rivals from (unquantified) access to "key dealers" that represented a "narrow, but heavily traveled channel" of distribution.

Dentsply asked for rehearing and rehearing *en banc,* on the grounds, among others, that the Court of Appeals simply found its own set of facts, and petitioned the Supreme Court for a writ of *certiorari*, but both courts denied review. The case is yet another instance in which the soaring language of the Supreme Court has a rather different sound down on the ground in the courts of appeal.

Probably the most interesting basis for the Third Circuit's *Denstply* opinion is the notion that exclusive dealing arrangements that raise no issue under § 1 of the Sherman Act can nonetheless provide the basis for § 2 liability. In the past, exclusive dealing arrangements that did not violate § 1 were generally not treated as anticompetitive for purposes of § 2. As noted above, that has now changed at least in some courts.[105] But the basis for that fresh § 2 liability is far from clear, although what is clear is that properly

103 399 F.3d 181 (3d Cir. 2005), *cert. denied,* 126 S. Ct. 1023 (2006).
104 277 F. Supp. 2d 387, 450 (D. Del. 2003).
105 *Microsoft,* 253 F.3d at 70 ("[m]onopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

instructed juries have a great deal of latitude in finding liability under their own general notion of "fairness". The courts finding a defendant liable under § 2 have simply characterized the channels, foreclosure from which was held illegal, to be "key" or "efficient".[106] The failure of *Microsoft* and *LePage's* - and, now, *Dentsply* - to provide guidance concerning the degree of foreclosure or quality of channel that may lead a court to declare, on a different set of facts, that § 2 has been violated has left the law of exclusive dealing in shambles.

### C. *Obama DOJ Breaks With Bush DOJ, and Possibly the Supreme Court*

The administration of the Antitrust Division, Department of Justice, during the years of the second President Bush was remarkably flaccid. The DOJ began its tenure by accepting a consent decree with Microsoft that would almost certainly never have been adequate for the Clinton administration, which began the action and sought a structural remedy. During these Bush years, the DOJ did not initiate a single § 2 case or, so far as the record discloses, commence any meaningful investigations with respect to single firm conduct. It did issue a highly controversial report articulating its enforcement priorities, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, (the "Report"). The Report, issued in September 2008, grew out of a joint project that began in 2006 between DOJ and the FTC, including a year-long series of joint hearings, with 29 separate panels and 119 witnesses covering a wide range of topics and perspectives. Despite the effort that went into it, the Report was not well-received. The FTC declined to endorse the Report, and the majority of the FTC Commissioners issued a strongly-worded critique. Commissioners Harbour, Leibowitz, and Rosch wrote that the Report, "if adopted by the courts, will be a blueprint for radically weakened enforcement of Section 2," and that the enforcement principles DOJ sets forth "would place a thumb on the scales in favor of firms with monopoly or near-monopoly power."[107] At its very first opportunity, the new administration signaled its agreement with the FTC, and perhaps also its disagreement with the approach to antitrust reflected in the most recent Supreme Court decisions.

In her first speech after her confirmation as Assistant Attorney General, Christine Varney expressly withdrew the Report. Announcing that the Report "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act [and that] the Report and its conclusions should not be used as guidance by the courts, antitrust practitioners, and the business community," AAG Varney criticized the Report for "rais[ing] many hurdles to Government antitrust enforcement."[108] Among other concerns, she criticized the report's skepticism about the "ability of antitrust enforcers—as well as antitrust courts—to distinguish between anticompetitive acts and lawful conduct," and argued the Report placed excessive emphasis on "a dominant firm's ability to act efficiently" and "understate[d] the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry."[109]

In any case, AAG Varney did not criticize, at least explicitly, the opinions on which the Report was based, or any Supreme Court holdings, but she cited as lodestars for

---

106 *Id.* (despite no unlawful exclusive dealing under § 1, district court found § 2 violation; "Microsoft had substantially excluded Netscape from 'the most efficient channels for Navigator to achieve browser usage share,' ... and had relegated it to more costly and less effective methods") (citation omitted); *LePage's,* 324 F.3d at 160 (loss of "key retail pipelines necessary to permit it to compete profitably" sufficient under § 2).

107 Statement of Commissioners Harbour, Liebowitz, and Rosch On the Issuance of the Section 2 Report By the Department of Justice (Sept. 8, 2008) at 1, *available at* www.ftc.gov/os/2008/09/080908section2stmt.pdf.

108 Christine A. Varney, Vigorous Antitrust Enforcement In This Challenging Era (May 12, 2009) at 7, 9, *available at* http://www.usdoj.gov/atr/public/speeches/245777.htm.

109 *Id.* at 6, 7.

the new administration's enforcement policy cases far removed from the Court's current jurisprudence: *Lorain Journal v. United States*,[110] *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[111] *Microsoft*, *Dentsply*, and *Conwood*. Relying on these five cases and their undergirding principles, the DOJ has made clear that it will attack exclusionary or predatory conduct where it has an effect on competition, and ultimately consumers. The cases pointed to are well-known and to a helpful degree somewhat straightforward, at least in their articulation of key principles. The three lower court opinions are discussed above, while *Lorain Journal* and *Aspen* pre-date the current Supreme Court's rollback of § 2. But we summarize them all to simplify an elucidation of their guiding principles.

1. *Lorain Journal:* a newspaper publisher was the only business disseminating news and advertising in the Ohio town of Lorain until a small radio station began broadcasting in a neighboring community. The newspaper publisher sought to destroy the competitor by refusing to sell advertising space to anyone who also used the radio station for local advertising. The Supreme Court found the publisher to have violated § 2 of the Sherman Act by virtue of its exclusionary and predatory conduct.

2. *Aspen Skiing:* Ski Co. owned three of the four major downhill skiing facilities in Aspen, Colorado. Highlands owned the fourth. After many years of cooperating with Highlands to offer interchangeable ski passes that could be used at all four facilities, Ski Co. discontinued the practice and refused to sell lift tickets to Highlands even if Highlands was willing to pay full retail rates for them. Thus, Ski Co. was willing to sacrifice short-run benefits and consumer goodwill in exchange for a desired long-run impact on Highlands's business.

    a. The prior cooperation between the two companies was probably pivotal to the outcome. Absent the prior cooperation, the case likely never would have been brought, and if brought almost certainly would not have been decided as it was.

    b. The period of cooperation also began at a time when Aspen did not own all three of the mountains; prior to changing its policies, it obtained its dominant position by acquisition (a point rarely mentioned in writings about the case), making the change in policy more effective in excluding the smaller rival Highlands.

3. *Microsoft:* Microsoft was found to have violated § 2 of the Sherman Act by tying its browser (Internet Explorer) to its Windows operating system, thus effectively excluding Netscape from the market and thereby protecting its monopoly in operating systems.

4. *Dentsply:* Dentsply had a dominant share (74 to 80 percent) of the market for false teeth distributed to dentists in the U.S. The company had a policy of refusing to deal with distributors who handled the product of a rival and there was evidence that (a) Dentsply's purpose in adopting the exclusive dealing policy was anticompetitive and (b) the policy of exclusive dealing in

110 342 U.S. 143 (1951).
111 472 U.S. 585 (1985).

fact foreclosed rivals from access to "key dealers" that represented a "narrow, but heavily traveled channel" of distribution.[112]

5. *Conwood*: U.S. Tobacco ("UST") had a dominant share (more than 80 percent) of the U.S. market for moist snuff. In affirming the enormous judgment against UST, the Sixth Circuit referred to UST's misuse of its role as category Captain, unauthorized destruction of Conwood racks, burying competitive products on the UST industry rack and misrepresenting its sales performance to increase display space given to slower-moving UST snuff products. Based on internal UST documents that demonstrated an anticompetitive intent, the Sixth Circuit was satisfied that the exclusionary conduct was widespread, unjustified, driven by anticompetitive intent, and harmed consumers by raising prices, limiting choice, and slowing the growth of rivals.

The main takeaway from these cases, and from the DOJ's recent statements about its change of policy with respect to single firm conduct, is certain that such conduct will become a target of government investigation and/or litigation if the conduct:

a. Is exclusionary or predatory

b. Has no apparent legitimate business purpose (advancing one's own business interest solely by injuring a rival is not thought of as "legitimate")

c. Is engaged in by a dominant firm (any firm with 50 percent or more of a defined market), and

d. Injures competition (perhaps by slowing down or injuring a rival or raising barriers to entry).

Great change could occur if the courts permit cases to go forward that are based on these four principles. These principles seem to promote back to a position of primacy the importance of evidence going to the "legitimacy" of the business conduct at issue. Indeed, it is interesting and perhaps instructive to revisit what the DOJ said about this in its brief to the *en banc* D.C. circuit in *Microsoft* back on January 12, 2001, about a week before the Bush administration took over the case:

> The Supreme Court has described exclusionary conduct as conduct that "not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way". ... if "valid reasons" do not justify conduct that tends to impair the opportunities of a monopolist's rivals, that conduct is exclusionary.

Brief for Appellees United States and the State plaintiffs in *United States v. Microsoft,* at 47 (Jan. 12, 2001) (internal citations omitted). And further:

> Microsoft is mistaken if it means to suggest that a series of actions, which standing alone would not be unlawful, can never, in combination, resulting in a violation of

112 This is the last successful monopolization case brought by the Antitrust Division. It was brought in Wilmington, and ultimately decided by the Third Circuit in Philadelphia in 2005.

> the Sherman Act. ... an individual practice that serves no legitimate purpose and is intended to exclude a rival might nevertheless have so modest an effect on competition as not to violate the Sherman Act. But a coordinated campaign of such acts that in the aggregate has the requisite impact on the marketplace is unlawful. ... as a matter of both logic and sound antitrust law, the market effects of Microsoft's anticompetitive actions should be considered in their totality. It would be irrational to allow a monopolist to inflict a thousand anticompetitive cuts, many perhaps causing only small injury in isolation, that collectively extinguish or disable competition in the relevant market. The Sherman Act does not require courts to ignore the realities of an anticompetitive course of conduct.

*Id.* at 82. One can, for example, imagine many *Kodak*-type cases and other cases that would come out rather differently under this sort of standard, compared to what would happen under the screens articulated in the now withdrawn DOJ Guidelines.

Perhaps Varney's most significant statement was that, following the D.C. Circuit's opinion in *Microsoft*, the DOJ "will need to look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm's conduct, weigh those factors, and determine whether on balance the net effect of this conduct harms competition and consumers."[113] Her statement suggests that the new administration would not be comfortable with advocacy in favor of bright-line rules creating safe harbors for conduct by dominant firms – an advocacy that finds strong support in the Supreme Court's cases since *Brooke Group* and that of course found strong support in the most recent Bush administration.

It remains to be seen whether or to what extent DOJ will seek to expand the categories of conduct that are deemed "exclusionary" or "predatory" under § 2, but it is entirely possible that DOJ will assert that § 2 covers conduct that the courts have not yet recognized as exclusionary or predatory or that the courts have previously found to be within a safe harbor. If DOJ identifies conduct that "on balance" harms consumers and competition, they can be expected to both target the conduct directly and file *amicus* briefs in existing private litigation seeking to advance a more expansive view of the rights of plaintiffs under § 2 of the Sherman Act.

### D. *The Federal Trade Commission*

The Federal Trade Commission was far out in front of DOJ for most of the Bush administration, and appears likely to remain so even in the new environment, in at least two areas. First, the FTC has claimed a lead role in challenging patent settlements between brand and generic prescription drug manufacturers when the settlements are accompanied by "reverse payments" from the brand manufacturer to the generic, challenging such alleged reverse payments agreements both under § 1 and under § 2 in *FTC v. Cephalon*. Second, the FTC has actively pursued companies perceived to exploit standard setting organizations by concealing technology or breaching apparent obligations to license on "reasonable and non-discriminatory" ("RAND") terms. The FTC has successfully challenged alleged abuses of standard-setting procedures under § 5 of the FTC Act, which allows the FTC to both enforce the antitrust laws to prohibit "unfair methods of competition," and to protect consumers by punishing "unfair or deceptive acts or practices."[114] But the FTC has been less successful when it bases liability theories explicitly on § 2 of the Sherman Act.[115]

---

113 Vigorous Antitrust Enforcement In This Challenging Era, *supra,* at 13.
114 15 U.S.C. § 45(a)(1).
115 After years of litigation, the FTC found a defendant guilty of violating § 2 in a lengthy opinion *In the Matter of Rambus, Inc*, Docket No. 9302 (Aug. 2, 2006), *available at* http://www.ftc.gov/os/adjpro/d9302/index.shtm, but ultimately suffered reversal on appeal. *Rambus, Inc. v. Federal Trade Commission*, 522 F.3d 456 (D.C. Cir. 2008).

The FTC has vigorously pursued defendants in the area of patent settlements, undeterred either by resistance from the Bush DOJ or consistent failure in court. For instance, in the *Schering Plough* case,[116] involving the controversial settlement of a patent dispute between a branded manufacturer and a generic manufacturer, Schering won the trial before the FTC's ALJ, lost the appeal to the Federal Trade Commission, and won in the Eleventh Circuit. The FTC then filed its own petition for *certiorari,* which was opposed by the Department of Justice and the Solicitor General,[117] and the Supreme Court denied the petition. The new administration's DOJ, by contrast, appears more willing to support the FTC's efforts. In *Arkansas Carpenters v. Bayer, AG* (the ciprofloxacin hydrochloride antitrust litigation), the FTC had already filed a brief in the litigation when the Second Circuit invited "the United States" to express its position on patent settlements accompanied by reverse payments. DOJ took the opportunity to support the FTC, and filed a brief arguing that reverse payments should be treated as "presumptively unlawful" under § 1 of the Sherman Act.[118] This signal from DOJ suggests that it will be similarly willing to support the FTC's position in § 2 litigations such as the *Cephalon* case. (DOJ has not yet had the opportunity to weigh in on the *Cephalon* case - the defendant's motion to dismiss has not yet been decided more than 18 months after the FTC's Complaint was filed.)

The FTC has also taken the lead in challenging "patent holdup" situations, in which one member of a standard setting organization ("SSO") exploits intellectual property rights covering a technology essential to practice the standard. Normally SSOs require all participants to disclose any intellectual property rights essential to practice the standard, and commit to license such essential intellectual property on RAND terms. Holdup situations arise when a member of the SSO either (a) makes a RAND commitment and fails to honor it, or (b) fails to disclose its intellectual property in order to avoid making a RAND commitment. The FTC has challenged both types of patent holdup under § 5 of the FTC Act.

The FTC's first action against holdup came in 1996, when the FTC alleged that Dell Computer Corporation violated § 5 by breaching its commitment to disclose patents to an SSO before the organization developed a standard relying on those patents.[119] The FTC alleged a violation of the antitrust laws and reached a consent decree with Dell, under which Dell agreed not to enforce its patent rights against computer manufacturers complying with the standard. In 2005, the FTC reached a consent decree with Union Oil Company of California ("Unocal") settling charges that Unocal violated § 5 by misrepresenting its intellectual property rights to a board promulgating standards governing low-emissions gasoline, and thus wrongfully obtained monopoly power after refiners became locked-in to regulations that required the use of defendant's proprietary technology.[120] Just as in *Dell*, the FTC alleged a violation of the antitrust laws, and Unocal agreed not to enforce the relevant patents.

Most recently, and more controversially, in 2008 the FTC extracted a consent decree from Negotiated Data Solutions LLC ("N-Data").[121] Unlike *Dell* and *Unocal*, which

116 *Schering-Plough v. FTC,* 402 F.3d 1056 (11th Cir. 2005), *cert. denied,* 126 S. Ct. 2929 (2006).
117 DOJ's brief opposing certiorari criticized some aspects of the 11th Circuit's opinion but argued that there was no circuit split, *available at* http://www.usdoj.gov/atr/cases/f216300/216358.htm.
118 http://www.usdoj.gov/atr/cases/f247700/247708.htm.
119 *In the Matter of Dell Computer Corp.*, 121 F.T.C. 616 (May 20, 1996).
120 In re *Union Oil Co. of California*, Docket No. 9312 (Aug. 2, 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/index.shtm. The FTC was able to extract the consent decree in connection with Chevron's acquisition of Unocal.
121 *In the Matter of Negotiated Data Solutions LLC,* File No. 0510094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

were based on failure to disclose technologies, the FTC alleged a violation in *N-Data* based on the respondent's change in the rates at which it would make available licenses to essential patents covering an industry standard. The controversy arose because of a significant distinction between the Commission's liability theory in *N-Data* and its liability theories in *Dell* and *Unocal*. In N-Data, the FTC alleged a violation of § 5 (just as in *Dell* and *Unocal*), but it did not allege a violation of the antitrust laws. Instead, in *N-Data* the FTC alleged that N-Data's conduct constituted a freestanding violation § 5 without violating § 2. Chairman Majoras and Commissioner Kovacic both dissented from the Commission's decision to lodge a complaint, arguing that the "unfair acts or practices" prong of § 5 should not be applied, and that the "the preconditions for use of stand-alone § 5 authority to find an unfair method of competition [absent an antitrust violation] are not present."[122] The FTC's approach in N-Data indicates that the Commission is willing to resort to other theories of liability when § 2 jurisprudence fails to offer a weapon to combat practices to which the FTC objects.

But the FTC's most significant recent action was probably its *Rambus* opinion, which was ultimately reversed by the D.C. Circuit. The FTC's theory of liability in *Rambus* was that the defendant should have revealed its technology to the SSO, which would have given the members of the organization the opportunity to either (a) seek a commitment that the technology would be licensed on RAND terms, or (b) develop an alternative to the technology. The D.C. Circuit found it a relatively easy case on appeal, holding that the FTC's theory of liability depended on the assertion that the standard-setting organization would have sought a RAND commitment if the technology had been disclosed. This, to the D.C. Circuit, distinguished the Third Circuit's conclusion that § 2 could be violated by deception of an SSO in *Broadcom v. Qualcomm*.[123] In that case, Broadcom alleged that Qualcomm violated § 2 "by falsely promising to license its patents on [RAND] terms, and then reneging on those promises after it succeeded in having its technology included in the standard."[124] *Rambus* and *Broadcom* differ because in *Broadcom* the plaintiff alleged that the SSO relied on the RAND commitment such that absent the deception Qualcomm's technology would not have been selected,[125] while in *Rambus*, "the Commission expressly left open the likelihood that [the SSO] would have standardized Rambus's technologies *even if Rambus had disclosed* its intellectual property."[126] Because all that Rambus accomplished through its alleged deception was to avoid making a RAND commitment, the outcome was controlled by the Supreme Court's decision in *Nynex Corp. v. Discon, Inc.*,[127] which held that a monopolist does not violate § 2 by avoiding a constraint on its pricing because avoiding a pricing constraint does not actually exclude competition.[128] The FTC sought *certiorari,* unsupported by the Bush administration's DOJ, and the Petition was denied.

While the FTC was unsuccessful in *Rambus*, its positions in both *Rambus* and *N-Data* suggest that the FTC is willing to push the envelope of § 2 liability in the standard-setting context. If DOJ joins the FTC in this area as well, the Supreme Court may face assaults on its jurisprudence from both agencies, heard by lower courts similarly willing to seek the cracks in the protection the Supreme Court has erected for dominant firms.

---

122 Dissenting Statement of Chairman Majoras *In the Matter of Negotiated Data Solutions LLC,* File No. 0510094 (2008), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.
123 *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007).
124 *Id.* at 306.
125 *Id.* at 314.
126 522 F.3d at 466 (emphasis in original).
127 525 U.S. 128 (1998).
128 522 F.3d at 464-66.

**E. *Final Thoughts***

The current tension between the Supreme Court's jurisprudence and the more activist inclinations that persist in some of the lower courts and at the agencies is neither a struggle between good and evil, nor an all-or-nothing proposition. Antitrust jurisprudence since the mid-1980s has added analytical rigor and depth to § 2 antitrust analysis, and the current Supreme Court's formidable antitrust thinkers – including both the Chicago-influenced Justice Scalia and the Harvard-school Justice Breyer – have made imprints on antitrust doctrine that may prove indelible. Section 2 enforcement will likely continue to proceed on the ground they have prepared, although perhaps with detours here and there and some road building into new areas. For instance, the divergence between *Rambus* and *Broadcom* was entirely about whether Justice Breyer's 1998 *Nynex v. Discon* opinion was applicable, not over whether it was correct. The fact that outcomes have been pro-defendant since 1993 may reflect as much about the enforcement excesses of previous decades as about the Supreme Court's rigid adherence to dogma, although all of this remains to be seen. Politics and judicial appointments will play a role in the future trajectory of U.S. antitrust. Indeed, for many years there was the notion, almost certainly a convenient fiction, that antitrust had reached a sort of lasting bipartisanship. But politics drives policy and the last several years have demonstrated that politics matters no less in antitrust than elsewhere.

It is worth pointing out, finally, that the substantial influence of the Chicago School in antitrust since the 1980s was a byproduct of a strong and relatively widespread belief in the operation, efficiency, and self-correcting nature of markets in general. The recent credit crisis – encompassing the spectacular collapse of Lehman Brothers and AIG, and the near collapse of the domestic financial system – has led to a broad and deep consensus among policymakers (at least in the Obama administration, and almost certainly much more broadly) that market-based economies are neither as efficient nor self-correcting as previously thought. This collapse in faith and confidence in markets strikes directly at core antitrust principles of the last two and a half decades and represents an independent basis for the current administration to become both more regulatory and more interventionist in a variety of markets, including especially those where there appears to be a "dominant" player.

What is not so clear is what sort of economic or regulatory model will replace the Chicago school's heady optimism that all would be well if we just trusted markets. But now that we know enough to distrust, indeed be fearful of, markets, what can or should we trust to provide a framework within which to construct an antitrust regime and a coherent set of rules? Congress? Sectoral regulators? Courts? These are the larger questions that the new administration needs to address and that conferences such as this can aid.