IN THIS ISSUE

Editor’s Note
The articles in the Judge Posner Retrospective Symposium in this issue of The Antitrust Source are revised and expanded versions of papers prepared for the ABA Antitrust Law Section April 2018 Spring Meeting Chair’s Show- case. This issue of The Source also features a freestanding article by Farrell Malone and Ian Thresher, Leaving Time to Litigate: Lessons from Recent Merger Challenges.

SYMPOSIUM: JUDGE POSNER RETROSPECTIVE

Posner on the Federal Trade Commission: Why the Change of Heart?
Rebecca Haw Allensworth asks and answers the question of why Richard Posner’s attitude towards the FTC changed from harsh criticism in 1969 to a rosier assessment of the agency in 2005.

Motorola Mobility: How Far Should a Nation’s Law Reach?
Eleanor M. Fox explores Judge Posner’s relation to antitrust and the world and the proper reach of national law, using his opinions in Motorola Mobility as the basis for her discussion.

Posner on Antitrust Remedies: The Good, the Bad, and the Very Ugly
Douglas H. Ginsburg dissects five of Richard Posner’s policy prescriptions for how antitrust violations should be remedied.

Oligopoly Pricing and Richard Posner
Keith N. Hylton examines the change in Posner’s views on oligopoly pricing, from his 1969 article to the recent Text Messaging litigation, and where we—and the courts—go now.

Understanding Richard Posner on Exclusionary Conduct
Steven C. Salop puts Posner’s writings on exclusionary conduct under a microscope.

ARTICLE

Leaving Time to Litigate: Lessons from Recent Merger Challenges
Farrell J. Malone and Ian C. Thresher provide practical guidance for companies facing regulatory review of high-profile strategic transactions that raise difficult antitrust problems.
Posner on the Federal Trade Commission: Why the Change of Heart?

Rebecca Haw Allensworth

In 1969, less than a year into his academic career, Richard Posner published a scathing takedown of the Federal Trade Commission. In what would become classic Posner style, he pulled no punches, despite himself being an alum of the agency. Having just served on the ABA’s Blue Ribbon Commission, created at the request of President Nixon to study the performance of the FTC, he built on what he described as a long tradition of disparaging the agency. But he parted ways with previous critics by avoiding a “dubious, and largely unexamined assumption[]” that the very idea of having an agency to address consumer fraud and competition concerns was sound in the first place. He examined this proposition and found it lacking, concluding: “On the evidence we have, the costs of having a federal trade commission appear to exceed the benefits.”

More than three decades later he was invited to again appraise the FTC’s performance at a celebration of the agency’s 90th anniversary. His assessment here was a good deal rosier, although not without its barbs. He described the agency’s improvements since his last assessment to be “considerable,” but expressed a hope that “it will not become complacent and cease striving to contribute to the nation’s prosperity.”

What accounts for this change of attitude? Posner identifies one important factor and implies another. A third—inferred from the arc of his career and the evolution of his scholarship between 1969 and 2005—is argued here. In particular, I speculate that his later experience as a judge led him to a more realistic view of various legal institutions, and to a judicial philosophy that accepted less-than-perfect regulatory solutions. In other words, although at least some of Professor Posner’s objections to the FTC remained in 2005, to Judge Posner, it was close enough for government work.

Posner on the FTC
Posner was the only dissenting member of the Blue Ribbon Commission, which was tasked with studying the FTC’s performance. In his dissent, he asserted that while he largely agreed with the majority, he would go further. His position, which he elaborated in a later law review article, was

2 Id. at 48.
3 Id. at 89.
5 Id. at 771.
6 David A. Hyman & William E. Kovacic, Can’t Anyone Here Play This Game—Judging the FTC’s Critics, 83 GEO. WASH. L. REV. 1498 (2015).
that where the majority identified internal dysfunction and poor management as the principal flaws of the agency, Posner saw the problem as more fundamental. The very enterprise of combining lawmaking, enforcement, and adjudication in an agency made sense only if the result was something better than the sum of its parts. As a traditional law enforcement agency, the Department of Justice was superior to the FTC in its ability to identify, investigate, and prosecute cases. Additionally, the theoretical advantages of “continuity, expertise, focus, and initiative” ascribed to agency decision-making were more apparent at the DOJ than at the FTC. As a court, the generalist federal courts were superior in deciding cases and controversies, in part because Article III courts were able to attract more talented and diligent judges by virtue of being more prestigious. Combining these functions in one agency did not add anything; in fact, it was worse. Combining adjudication and enforcement meant that the same entity prosecuted and judged the same case. As Posner explained, “It is too much to expect men of ordinary character and competence to be able to judge impartially in cases that they are responsible for having instituted in the first place.”

Other supposed advantages of the FTC over the DOJ and private enforcement included its ability to bring cases under the FTC and Clayton Acts. Both statutes were thought to go further than the Sherman Act—the FTC Act because it more broadly prohibits “unfair competition,” and the Clayton Act because it prohibited specific anticompetitive practices. Posner argued that any significant anticompetitive conduct is within the ambit of the Sherman Act and that “novel extensions of antitrust doctrine such as we owe to section 5 [of the FTC Act] seem in general highly questionable.” And the specific prohibitions of the Clayton Act “were never significant sources of monopoly.” Thus, in his view the FTC offered no special tools to antitrust enforcement.

Posner also identified the agency’s “independence” as a flaw. Without significant oversight from the President, the FTC was largely under the thumb of Congress, a supervisor that Posner thought inferior. Congress, he explained, was largely designed to vindicate parochial interests, while the President, through the DOJ, could more reliably pursue policies that served unorganized interests, such as that of the consumer. Posner saw the protectionist tendencies of Congress repeated at the FTC. At a more granular level, Posner criticized the incentive structure of the bureaucrats at the agency who were rewarded more for doing less than for making waves with creative or far-reaching enforcement policies. Posner was unflinching in his criticism: “To many, its comparative inefficiency will seem scandalous, but one could regard it as the agency’s saving grace.”

These structural problems translated to a very poor record in the antitrust arena, as cataloged by Posner. Posner used as a sample the approximately 250 restraint-of-trade cases brought by

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8 Posner, supra note 1, at 53.
9 Id. at 51.
10 Id. at 52.
11 Id. at 53.
14 Posner, supra note 1, at 52.
15 Id. at 49.
16 Id. at 82–84.
17 Id. at 87.
18 Id. at 54–61.
the agency in 1963. The vast majority of these were brought under the Robinson-Patman Act, which forbids manufacturers from price discriminating when selling to distributors. In none of these cases did the agency identify market power at the manufacturer or distributor level—a pre-requisite, according to Posner—for any anticompetitive effect. He observed that the remainder of the cases are divided between cases brought under the “brokerage clause” of the Robinson-Patman Act, the Clayton Act, and the FTC Act, most also lacking the allegation of market power that would suggest anticompetitive conduct was afoot. The record, according to Posner, was dismal. He concluded that his sample “contains none that seems justified on economic or any other grounds save (a) one merger case . . . and (b) the conspiracy cases that should have been brought, if at all, by the Department of Justice.”

Posner’s critical stance on the FTC was likely influenced by his own experience at the agency, where he served as assistant to Commissioner Philip Elman. In fact, his boss and mentor was himself a staunch critic of the agency. The former Commissioner wrote an article in 1971 that faulted the agency for its aimlessness, reactivity, secrecy, lack of accountability, and, above all else, poor quality personnel. One can only imagine that these criticisms were frequently discussed between Posner and Elman during their time at the agency.

More than three decades later, in 2005, Posner considered the agency’s progress since his 1969 observation that the FTC’s costs outweighed its benefits. Looking back with over 20 years of experience as a federal judge, Posner had a different perspective than as a 30-something law-and-economics theorist. One positive change that he identified was acceptance of the 1969 ABA Report’s suggestion that the President appoint more qualified commissioners, fulfilling the hope that “the quality of the staff would improve” from the top down. The change had been so dramatic, said Posner, that he believed “Philip Elman, were he alive today, would be pleased with the improvement in the agency’s quality.”

The most important change at the FTC, according to Posner, was that it “underwent an ideological makeover, becoming a champion of free markets rather than a throwback to Progressive Era collectivism.” This change meant fewer actions brought under Robinson-Patman’s price-discrimination provisions and more actions targeted at conduct where actual market power was in play. He particularly praised the “imaginative use of statistics in the Office Depot merger case” and also singled out “the Intel consent decree, the Commission’s actions against online scams, and the Commission’s investigation of pharmaceutical patent abuses.” He identified the FTC’s role as a “gadfly, spurring legislative action; a catalyst.”

But Posner was not all positive, even if his stance against the FTC had softened. The role of catalyst, as he observed, is limited. The agency, in his view, could go further in driving antitrust policy through its litigation role. He also suggested that the quality of the agency could be improved

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19 Id. at 60.
21 Posner, supra note 4, at 764.
22 Id.
23 Id.
24 Id. at 765.
25 Id. at 767.
26 Id.
even more, by finding more expert Commissioners and staff. Finally, he observed that many of the
ostensible improvements to the Commission had been to remake it in the form of a traditional law
enforcement agency, which raised the question of what it added to the DOJ.

Posner’s Change of Heart

Posner explicitly identifies changes at the FTC as the reason why he was “duly chastened”27 in
2005. It is no wonder that the agency reacted strongly to the 1969 Report—the Report implicitly
gave the agency a “shape up or ship out” mandate. Its personnel, from Commissioners down to
line-level staff, were far more expert in 2005 than they were in 1969. Today, the agency employs
about 70 Ph.D.-level economists,28 and has had several Commissioners with an Economics Ph.D.
The agency also changed by being more aggressive in its enforcement, chastened by criticisms
of being defanged. As Professor David Hyman and Former Commissioner William Kovacic have
put it, “Admonished to attain stratospheric results, the FTC embarked on a program in the 1970s
that sought to hit 800-foot home runs.”29 These efforts may have resulted, according to the
authors, in “too many outs,”30 but they also resulted in the kinds of actions—like the Office Depot
merger and Intel decree—that Posner praised in 2005. Finally, the FTC did attempt to use the
broad language of Section 5 of the FTC Act to challenge conduct that was thought beyond reach
of the Sherman Act.31

Posner implies a second reason for his change of heart: the substantive changes to antitrust
law between 1969 and 2005. During this time, courts largely adopted the position of law-and-econo-

27 Id. at 765.
29 Hyman & Kovacic, supra note 6, at 1966.
30 Id.
31 Unfortunately, these attempts were often “quashed” by courts. See Crane, supra note 28, at 136.
left Posner feeling less troubled by the possibility of political influence from Congress or the President. Indeed, Posner himself identified this feature in his 2005 article when he observed that “antitrust and consumer protection have so far lost their traditional ideological coloration that the FTC has become effectively bipartisan, in the sense that changes from administration to administration in the policies of the Commission are incremental rather than radical.”37

But more changed between 1969 and 2005 than the FTC itself and substantive antitrust law. In 1969, Posner was in the first year of his academic career. By 2005, he had been a federal appeals court judge for 24 years. He spent his early academic career—between his 1969 critique and his appointment to the bench in 1981—urging courts and agencies to apply economic analysis to the law. His vision was for a more rigorous accounting of how rules influence individual, social, and firm behavior, with an eye towards optimizing efficiency. During this time, he applied economic analysis to countless areas of law, including antitrust, property, health care, torts, securities, privacy, anthropology, criminal law, and, perhaps most controversially, child adoption.

Most relevant to this comment is Posner’s economic analysis of the antitrust agencies. Writing just one year after his scathing account of the FTC, Posner analyzed the performance of the FTC and the DOJ.38 He reported the number of cases each agency brought over time, the length of time each case took to be resolved, the win/loss record, the kinds of cases brought, the identities of the parties involved, among many other variables. His conclusions were not particularly flattering, as one might expect, but his conclusions are less interesting than his methodology, about which he wrote extensively.

He explains that statistical analysis of enforcement is necessary to understand what is broken with the antitrust system because agencies should evaluate their achievements systematically. He lamented the fact that

[the people who manage the antitrust agencies—who, not incidentally, are lawyers—do not view antitrust enforcement as a means, but as an end. They do not view it as a “business” whose “output” is reductions in monopoly power and whose “inputs” are the legal and related activities (private as well as public) employed in bringing about such reductions.39]

In other words, not only can economic analysis be fruitfully applied to substantive law, but also it can be used to improve the process of law.

The articles from this decade—on the economic analysis of the substance as well as the process of law—were variations on a theme: law should be purposive, and should effect that purpose with as much information about human and market behavior as possible. During this period, Professor Posner’s principal source of information about behavior was supplied by theoretical models epitomizing the thinking of 1960s “Chicago School” economists. These articles were hyper-rational, unflinching (especially the infamous “baby-selling” article), and simple in their view of the world. That is not to say that Professor Posner did not acknowledge that the real world was more complicated. But the simplicity of the models is what made them useful because they could be applied across different contexts by generalist judges.

By 2005, he had a richer set of information about markets and human behavior: his experience as a federal appeals court judge. By that time he had penned about 2000 opinions40 and sat on

37 Posner, supra note 4, at 764.
39 Id. at 418.
the panels of around three times that many cases. Each controversy gave him a window into the workings of how businesses and individuals conducted their affairs, and resolved (or failed to resolve) conflicts as they arose. It also gave him insight into the limitations of a judge. Reflections on Judging, published in 2013, contains a thoughtful discussion of how complexity—both internal and external to the legal system—presents a challenge to judges. He does not despair about a generalist judge’s ability to resolve cases in the face of such complexity, but he does suggest that complexity (and other judicial challenges) makes nonsense of judicial philosophies such as originalism or textualism.

Reflections on Judging is an example of how his academic writing shifted in focus from law and economics to legal pragmatism. While his early scholarship focused on rigorous abstractions, his later work called for approximations and good guesses. The two philosophies are certainly not mutually exclusive; in fact, pragmatism can be seen as a practical method for the judicial implementation of law and economic analysis. Both legal pragmatism and law and economics emphasize the purposive nature of law and use rationality to achieve it. Pragmatism parts ways, however, with the theoretically pure law-and-economics conception of law by acknowledging the uncertainty, complexity, and indeterminacy inherent in judging.

Judge Posner’s legal pragmatism seems to admit more of a role for expert agencies, perhaps because of its realistic view of the limitations of judging. Writing in 2011, Posner compared agency and judicial decision making in a book chapter entitled Regulation (Agencies) vs. Litigation (Courts): An Analytical Framework.41 He explained that agencies are more expert, are able to make law ex ante, and lack the pressure to be “minimalist”42 that judges feel because they lack political legitimacy.43 He also identifies the weaknesses of judicial decision-making, which are mostly the flip sides of an agency’s strengths: “The judges’ lack of specialized knowledge, their limited staffs, limited investigatory resources, cumbersome and to a degree antiquated procedures, commitment to incremental rulemaking, and delay in responding to serious social problems . . . are impediments to effective regulation, especially of technical subjects.”44

Judge Posner by no means suggests that agencies are superior decision makers to courts as a general matter. However, his taxonomy does suggest there are some kinds of law best made by an agency. At least in 2005, antitrust law to Posner qualified as a technical subject, and one that afforded a role for the FTC.

These pragmatic views about the relative strengths and weaknesses of agencies and courts—formed by his own time on the bench—probably contributed to his shifting perspective on the agency. By 2005, he was prepared to say that eliminating the FTC would be “unpragmatic.”45 And the theoretical flaws that so disturbed Professor Posner in 1969 seemed less urgent to Judge Posner in 2005, who argued that “[o]ne doesn’t urge abolition of an agency because it does not fit into some ideal table of organization.”46

42 Judicial minimalism, often associated with originalism or textualism, is the theory that judges should merely apply the law mechanically and avoid policy judgments. Posner is critical of “judicial minimalism” and often contrasts it with his pragmatic theory of judging. See, e.g., Reflections on Judging 105–31 (2013).
43 Id. at 19.
44 Id. at 20.
45 Posner, supra note 4, at 770.
46 Id.
Conclusion
Posner’s accounts of the FTC in 1969 and 2005 are not opposites—he was still quite critical in 2005. But there is no doubt that by 2005 some of his hard feelings towards the agency had softened. He identified concrete improvements to personnel and priorities at the agency as the reason for his change of heart. In addition, substantive changes in antitrust law that emphasized consumer welfare and economic analysis probably also further contributed to his optimism in 2005. These changes gave the agency focus and allowed it to make better use of its investigatory and analytical resources. Finally, another reason for the change of attitude had nothing to do with the FTC per se, and everything to do with Posner’s own perspective. In 1969 he was Professor Posner, with a rigorous, yet theoretical, model of human behavior and perhaps an unrealistic view of how courts operate. In 2005 he was Judge Posner, with over two decades on the federal bench. Exposure to judging and the courts led Judge Posner to his pragmatic philosophy of judging, and its acceptance of the good where the perfect is elusive.●
Motorola Mobility: How Far Should a Nation’s Law Reach?

Eleanor M. Fox

As we honor the Renaissance man Judge Richard Posner, who has contributed so much to law, philosophy, law and economics, law and literature, and law and life, I explore an important corner: Judge Posner, antitrust law, and the world. This is a bottom-up essay with, hazardously, only one inflection point: Motorola Mobility LLC v. AU Optronics Corp., 1 including what we can infer from it about the appropriate reach of the U.S. antitrust laws in a marketplace that extends far beyond U.S. shores.

Motorola Mobility is the case of an offshore cartel in Taiwan, Korea, and elsewhere in Asia to fix the price of liquid crystal display (LCD) panels that were sold from the manufacturers’ home countries to Motorola-China (wholly-owned subsidiaries of Motorola Mobility, sometimes called Motorola US or Motorola) to be assembled as part of cell phones. These, in turn, were to be sold to Motorola US and other buyers around the world for resale. Motorola US, unaware of the conspiracy, negotiated the price of the LCD panels to be bought by its Chinese subsidiaries, and subsequently bought 42 percent of the cell phones assembled by these subsidiaries that included the price-fixed panels. The Chinese subsidiaries sold 57 percent of the devices to buyers abroad. The remaining 1 percent of the panels were sold directly from the Asian price fixers to Motorola US for Motorola’s resale in the United States. The price fixing of the 1 percent of the panels was clearly subject to the Sherman Act, and the 57 percent were not claimed to be covered by the Sherman Act, so the panels in point are the 42 percent.

Should Motorola US be entitled to recover under the Sherman Act for losses it suffered from the price fix? That was the question in the case before Judge Posner and his fellow panel members of the Seventh Circuit Court of Appeals. The case arose against the backdrop of a sister criminal case brought by the United States against Taiwanese manufacturer AU Optronics (AUO) for price fixing LCD panels sold to Motorola’s Chinese subsidiaries. In that case, certain AUO executives were convicted and sentenced in the United States. 2 The other price fixers settled with the Department of Justice. 3

What is the proper reach of national law? Can the United States hold offshore price fixers to account? Can it require them to pay damages to a step-removed buyer? Can a U.S. court sentence them to jail even if their nation’s competition law does not have or apply jail terms? Is the U.S. answer the right answer for the world? These are basic questions on the cutting edge of international/comparative competition law, and likewise on the cutting edge of other disciplines of economic law where conduct in one nation affects the world but there is no international law.

1 775 F.3d 816 (7th Cir. 2015) (Motorola Mobility II).
2 United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015).
I approach these questions in four parts. First, I give a brief background of the evolution of national antitrust law applied to offshore transactions and identify a growing global consensus. Second, I explain the relevant U.S. statute, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). Third, I tell the saga of the Motorola Mobility case as decided by Judge Posner. Fourth, I ask both local and global questions, including: Is there merit to an alternative big-picture narrative for reach and restraint of national law applicable to the global commons of competition?

Application of National Law to Offshore Transactions that Hurt the Nation: The Evolution

The United States was the pioneer in devising legal principles to protect its citizens from offshore acts that harmed them. In United States v. Alcoa, the Second Circuit, sitting as the court of last resort, decreed that the Sherman Act applies to acts done with the intent and effect (which could be implied from intent) to affect U.S. commerce. The court qualified the effect requirement; it held that the effect must be more than mere repercussions. This effects doctrine was—and remains—solidly U.S. law, but it was controversial for many years. Our trading partners—particularly the UK, which then allowed most cartels—argued that international principles precluded the reach of U.S. law to acts done on British shores that were legal in the UK. The tables were turned when European buyers were harmed by an alleged offshore wood pulp cartel (and the UK had joined the EU). If Europe could not protect itself, who would? Even the UK, a recalcitrant Member State, was obliged to accept a version of the effects doctrine when the European Court of Justice decided the Wood Pulp case. That case held that EU law reached offshore agreements "implemented" in the EU. A cartel involving offshore sales directly to purchasers established in the EU was "implemented" in the EU. With the much-later Intel case—which involved agreements on computer chips between the U.S. and China and sales of the integrated product from China to the world—the Court of Justice of the European Union expanded the Wood Pulp test. Specifically, it declared that EU jurisdiction extends also to foreseeable immediate and substantial impacts in the European Economic Area, and it gave enormous flexibility to each of those three words.

The effects doctrine is no longer controversial in the world. Almost all nations embrace it. It is a fixture of global policy understood as necessary to protect people from global harms in the absence of a global competition law. The controversy today surrounds national legal interpretations at the margins. In the United States, two legal questions have come into play: (1) When is an effect of challenged conduct sufficiently direct? and, (2) In view of the U.S. FTAIA, when does the effect of conduct that has a direct, substantial, and reasonably foreseeable effect on U.S. commerce “give rise to a claim” under the Sherman Act or FTC Act? Both questions arose in the Motorola Mobility case, on which Judge Posner has, influentially, ruled.

These questions arise against a soft global consensus that cartels are wrong and are, at least if without state sponsorship or explicit exemption, illegal. Nonetheless, and despite multiple sources of anti-cartel enforcement around the world, world cartels are rampant. Further, the glob-

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4 148 F.2d 416 (2d Cir. 1945).
5 Id. at 443.
6 Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö v. Comm’n (Wood pulp), 1988 E.C.R. 05193, ¶¶ 12, 16 (holding that the decisive factor is the place of implementation).
al economy does not stand still. The drive for cheapest execution has produced the global value
chain. Whereas outsourcing once meant one stop abroad, global value chains commonly entail
production in country A, assembly in country B, and sales to country C.

The FTAIA
The FTAIA was enacted in 1982. It was intended to help American businesses bolster their com-
petitiveness abroad by clarifying that U.S. law did not follow U.S. firms into foreign markets. Thus,
U.S. law would neither reach export cartels nor any other restraint whose effects were felt only
abroad and that hurt only foreigners. As co-sponsor Chairman Peter Rodino said, “[The FTAIA] wou-
ded remove . . . any unnecessary barriers to export trading by U.S. firms. At the same time, it
would continue to provide antitrust protection for American consumers and competitors.”8

The FTAIA does not apply to import commerce; the statute treats import commerce as not rais-
ing territorial issues. As for non-import commerce, the legislature took the following approach: For
the Sherman or FTC Acts to reach conduct in foreign commerce, the commerce must have “a
direct, substantial and reasonably foreseeable effect” on U.S. commerce, and [paragraph 2]
“such effect gives rise to a claim” under the provisions of [the Sherman Act or FTC Act] other than
this section.”9 The legislative history explains paragraph 2 as necessary to clarify that not any U.S.
effect—such as profitability or employment in the United States—would evoke Sherman Act cov-
erage.10 It must be an antitrust effect—i.e., credibly raising an antitrust issue.

For the next two decades, courts and parties did not treat paragraph 2 as a stumbling block
to jurisdiction for it seemed merely reinforcing of the general understanding that the relevant
effect on U.S. commerce had to be an antitrust-relevant effect. The important questions sur-
rrounded the phrase “direct, substantial, and reasonably foreseeable” when the major antitrust
harms were abroad. For example, was American harm from a restrictive distribution system
abroad too indirect? (It was.11) Then, in the new millennium, the defendants in Empagran (foreign
cartelist who injured foreign plaintiffs on foreign soil and whose cartel would have been beyond
Sherman Act reach without the FTAIA) argued successfully that the FTAIA shrank the Sherman Act
by importing standing concepts into a reach-of-the-law statute. They argued that the phrase “a
claim [must arise from the U.S. effect]” meant “the claim” of the particular plaintiff must arise from
the U.S. effect, and thus that the Sherman Act’s prohibitions are inapplicable unless the plaintiff’s
antitrust case stems from the conduct’s domestic effect. The Supreme Court’s interpretation of
paragraph 2 in Empagran was to become a critical factor in Judge Posner’s disposition of
Motorola Mobility.

Motorola Mobility
AUX, Samsung, Sanyo, and several other Japanese, Korean, and Taiwanese firms manufactured
and price fixed LCD panels. These panels were sold, as noted, to Motorola-China (Motorola’s
Chinese wholly-owned subsidiaries), which incorporated them into cell phones. Motorola-China

8 Foreign Trade Antitrust Improvements Act, Hearing on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H.
10 See John F. Bruce & John C. Peirce, Understanding the Export Trading Company Act and Using (or Avoiding) Its Antitrust Exemptions, 38
Value Lane—The Collision Course with Empagran and How to Avert It, CPI ANITRUST CHRON. (Jan. 2015).
sold 42 percent of these phones to Motorola for resale in the United States and sold 57 percent into world commerce. The question at issue in Motorola Mobility was whether Motorola could maintain its U.S. lawsuit for damages on the overcharge for the 42 percent. The district court dismissed this part of the complaint. The court of appeals (Judge Posner presiding) agreed to hear an interlocutory appeal and, without any briefing or argument on the merits, affirmed dismissal. The court, in an opinion by Judge Posner, held (in a soon-to-be vacated opinion):

[What is missing from Motorola’s case is a “direct” effect. The effect is indirect—or “remote”. . . . The alleged price fixers are not selling the panels in the United States. They are selling them to foreign companies (Motorola’s subsidiaries) . . . . The effect of component pricing on the price of the product of which it is a component is indirect compared to the situation in Minn-Chem, where the “foreign sellers allegedly created a cartel, took steps outside of the United States to drive up the price that is wanted in the United States, and then (after succeeding in doing so) sold that product to U.S. customers.” . . . It is closer to the situation in which . . . action in a foreign country filters through many layers and finally causes a few ripples in the United States.]

Thus, indirectness was the first ground of the decision; the Asian price fix of the component was too remote from the (high) price Motorola had to pay for the assembled phone. Second, Judge Posner found that the effect of the cartel on U.S. commerce did not “give rise to” an antitrust claim. Any U.S. effect on competition would depend on what Motorola decided to charge its U.S. customers. Motorola’s claim was not based on any illegality in Motorola’s prices, “in which event Motorola would be suing itself.” (Here, Judge Posner is playing around with the solipsistic absurdities to which the Empagran interpretation of paragraph 2 leads.) Rather than a U.S. effect on competition that hurt Motorola, said Judge Posner, the effect of the price fixing was on Motorola’s Chinese subsidiaries. The subsidiaries have remedies in their own country. If the remedies are not adequate, this was a risk that the subsidiaries assumed.

Finally, Judge Posner turned to policy. There would be big negative practical stakes in allowing this lawsuit to proceed, he said. Global supply chains are common. Manufacturers may be located in countries that do not have or do not enforce antitrust laws, or whose laws or their remedies are far more lenient than ours. “The Supreme Court has warned that rampant extraterritorial application of U.S. law ‘creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.’” A finding of the Sherman Act’s applicability under these circumstances would enormously increase the global reach of the Sherman Act, creating friction and resentment at the U.S. role of police officer for the world. “It is a concern to which Motorola is oblivious.”

12 746 F.3d 842, 844 (7th Cir. 2014), reh’g granted and opinion vacated, Order No. 14-8003 (7th Cir. July 1, 2014) (Motorola Mobility I).
13 Judge Posner cites WILLIAM GADDIS, A FROIC OF HIS OWN (1994). This may be the key to the whole decision. A Frolic of His Own is a novel about an undistinguished college instructor, Oscar Crease, who has written a long philosophical Civil War play that never got published. Many years later he sees a Hollywood blockbuster film that, in his mind but probably not in reality, duplicates the ideas in his play. He sues for plagiarism “and is promptly sucked down into wholesale legal disaster: depositions, bills, opinions, more bills, appeals, more bills, bills and bills.” KIRKUS REVIEW (Nov. 1. 1993), https://www.kirkusreviews.com/book-reviews/william-gaddis/a-frolic-of-his-own/. The novel (a very long one, which I confess not having read), appears to Kafkaesque except the hero is not eaten by the system but the system is eaten by the hero. Perhaps Judge Posner is asking, is Motorola an unworthy litigant, paranoid or opportunistic, trying to bring someone else’s claim and doing so in the wrong forum? Will the Motorolas of the nation pull the system down?
14 Motorola Mobility I, 746 F.2d at 846 (quoting F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004)).
15 Id.
Motorola petitioned the court of appeals to vacate the decision and hear arguments on the merits. The Justice Department, alarmed that the circuit court decision might put offshore component price fixers beyond its reach, even for products destined for the U.S. market, filed an amicus brief in support of the petition.16

The same panel reheard the case and it affirmed the result, but with this difference in the reasoning: Judge Posner, perhaps not wanting to take on the Justice Department or to undermine its foreign enforcement program, said he would assume that the U.S. effect was sufficiently direct (although the language of the case suggests he never believed that this assumption was true). On this second round, Judge Posner articulated a quite different view (from his first and now vacated decision) of “directness.” He now said, referring to the chain from price fix of the component in Taiwan, to assembly in China, to sale to Motorola for resale in the United States: “This doesn’t seem like ‘many layers,’ resulting in just a few ripples” in the United States cellphone market. . . .”17

The case was decided instead on the basis of FTAIA paragraph 2: the U.S. effect did not give rise to Motorola’s claim. Judge Posner said: “What trips up Motorola’s suit is the statutory requirement that the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action.”18 The effect did not give rise to a U.S. cause of action by Motorola because:

(1) The price fixing that engendered the price increase “occurred entirely in foreign commerce.” The immediate victims were Motorola’s foreign subsidiaries, which were separate from Motorola; corporate formalities matter. Motorola itself was only derivatively injured and was forum shopping.

(2) Motorola’s case collided with the indirect-purchaser doctrine of Illinois Brick.19 Under this doctrine, even if the cartel premium was passed on to Motorola, Motorola has no antitrust cause of action. Illinois Brick is based on the difficulties of apportioning damages and preventing windfall damages, both of which would be a danger here. We do not know (said the court) if and how much Motorola was harmed; whether it increased prices to cover a pass-on charge and by how much; whether it lost sales; or even whether competitors likewise increased prices and they all profited through tacit collusion. Besides, since Motorola had argued that its subsidiaries’ harm was its harm, the court held that Motorola waived the claim that its damages arose from the inflated cost of the cellphones to it.

(3) The court then repeated the policy arguments that it made in the first (now vacated) opinion: with the forming of global value chains and the multitudinous products that incorporate components from foreign manufacturers—some of whom are located in countries that do not enforce their antitrust laws or have weaker remedies than the United States—recognizing this claim would be “rampant extraterritoriality” and “unreasonable interference with the sovereign authority of other nations.”20

Finally, the court turned to the amicus brief of the Justice Department. The Justice Department had worried about the effect of the Motorola I decision on its successful criminal prosecution of

17 Motorola Mobility II, 775 F.3d at 819.
18 Id.
20 Motorola Mobility II, 775 F.3d at 824.
Taiwanese company AU Optronics and its employees (who were sentenced to jail). It wanted comfort that the court’s ruling would not interfere with the criminal and injunctive remedies it sought against foreign firms in general. Specifically, the Justice Department wanted a reversal of the prior holding that the components conspiracy filtered through Chinese assembly had no direct effect on U.S. commerce.

Judge Posner obliged, while expressing “surprise” with the amicus brief’s “absence of any but glancing references to the concerns that our foreign allies have expressed with rampant extra-territorial enforcement of our antitrust laws.”21 (The DOJ brief did not undercut the plaintiff’s position.) Judge Posner accepted the DOJ statement that “the Justice Department has worked out a modus vivendi with foreign countries regarding the Department’s antitrust proceedings against foreign companies.” He stated (but incorrectly)22 that “foreign antitrust laws rarely authorize private damages actions.”23 He noted that the U.S. government has reason to weigh sovereignty concerns in bringing foreign commerce cartel cases while private plaintiffs do not. And he repeated the “mind-boggling” thought of the number of private damage claims that could be brought if private purchasers of assembled products containing price-fixed components can sue. Thus, the court held, the FTAIA precludes a U.S. purchaser of an assembled product containing foreign-price-fixed components from suing the price fixers for damages but does not preclude the United States from criminally prosecuting those price fixers, including putting individual offenders in jail.

Judge Posner the Pragmatist, and Another View of the Cathedral

Judge Posner is a pragmatist, self-styled. His disposition of Motorola Mobility is a fine example.

If I may be allowed to speculate: He believed from the start that component price fixing abroad with assembly abroad and importation of the assembled product at an elevated price was just too remote. The pragmatic course was to dismiss the case at the outset. It was natural for him to play the hand that Empagran handed him: Call the conduct “not direct.” Perhaps he was amused to observe, playing with paragraph 2 of the FTAIA, that the effect of the price fixing on U.S. commerce (a supra-competitive price) could not give rise to Motorola’s claim because the effect was Motorola’s claim.

But then the Justice Department brief alerted Posner to the effect of his opinion on a significant part of U.S. enforcement, an unintended consequence that he felt he did not need to produce. So he assumed that the effect on U.S. commerce was sufficiently direct and based his opinion on the next clause of the FTAIA: the effect on U.S. commerce did not give rise to Motorola’s claim. This, we saw, had three prongs: Motorola and its Chinese subsidiaries were not one, and Motorola could not recover for their harm under the Sherman Act; Motorola waived its claim that it was suing for its own (indirect buyer) harm; and Motorola had no indirect claim by reason of Illinois Brick. Neat and pragmatic, but is there another view of the Cathedral?

I ask four questions and present an alternative picture.

First, does Judge Posner succeed in painting DOJ criminal enforcement against component price fixers as legitimate and not “rampant extraterritorial enforcement,” while painting Motorola’s private damage action as illegitimate and “rampant extraterritorial enforcement”? Criminal enforcement with incarceration, because of its severity, moral ramifications, and often cultural uniqueness, is usually more territorial than civil enforcement. True, the DOJ considers comity concerns before

21 Id. at 825.
22 See, e.g., DAVID ASHTON & DAVID HENRY, COMPETITION DAMAGES ACTIONS IN THE EU, LAW AND PRACTICE (2014).
23 Motorola Mobility II, 775 F.3d at 826.
prosecuting, but the effect of civil suitors’ lack of concern with international consequences is overstated. Normally, a victim of price fixing has a cause of action that the courts must enforce. Comity dismissals are rare, but where they are appropriate, the court will dismiss the case. Moreover, the Justice Department appeared in this very case and (to Judge Posner’s expressed surprise) did not express a worry that our foreign allies would regard the case as impermissibly extraterritorial.

Second, did Judge Posner give too short shrift to the single-enterprise argument offered by Motorola (and also suggested by the DOJ in its brief)? Uniquely, in this case, the subsidiaries were wholly owned by Motorola, Motorola itself negotiated the price they paid for the screens, the price fixers knew that the screens were for Motorola devices, neither China nor the homes of the price fixers were likely to be receptive to private damage actions against them in their courts, and one can hardly imagine that the Chinese subsidiaries and not Motorola US were the ultimate and foreseeable victims (as between the two). Does the single-enterprise argument, in light of these facts, make sense here?

Third, does Judge Posner convince us that the harm to Motorola from the component price-fixing conspiracy in Motorola Mobility is less direct than the harm to the U.S. potash buyers from the potash cartel in Minn-Chem? In Minn-Chem, the potash cartelists studiously did not sell directly into the United States. The Canadian and Russian firms had nearly monopolized the supply of potash. Campotex, the sales agent for the big producers in all markets except Canada and the United States, was bargaining to sell potash to China, and during this period of difficult negotiations with China, the producers agreed to restrict and did restrict supply. The supply restriction “compelled Chinese buyers to accept a price increase.” The price of the deal set the world benchmark. The potash producers then applied the high benchmark prices to sales to the United States, which is a big market for potash and was known to be.

In Motorola Mobility, on the other hand, the component makers knew they were making the LCD screens for Motorola devices. They knew the line of the supply and assembly chain, and would have known that a very large portion of the assembled products were earmarked for the United States. The Chinese firms, wholly-owned subsidiaries of Motorola, were manufacturers/assemblers in the Motorola supply chain. In the criminal case, the jury found that the LCD price fixers “targeted” the United States. The price fixers intended to, and did, harm U.S. commerce. Motorola’s harm was part of that commerce, and a specifically foreseeable part.

24 Minn-Chem, Inc. v. Agrium, Inc., 683 F.3d 845 (7th Cir. 2012) (en banc) (holding that the Sherman Act applies and the requirement of directness should be construed flexibly where the overcharges to U.S. customers were substantial and plainly foreseeable by the off-shore cartelists, especially where the home of the price fixers has no incentive to sue).

25 In its Sentencing Memorandum for sentencing AUO and its top executives, the Justice Department called the LCD price-fixing cartel “the most serious cartel ever prosecuted by the United States.” “[T]he conspirators sold $23.5 billion . . . in price-fixed panels destined for the United States.” “The conspiracy affected every family, school, business, charity and government agency that paid more to purchase notebook computers, computer monitors, and LCD televisions during the conspiracy” and all those who did not purchase because of the increased prices. United States’ Sentencing Memorandum at 1, United States v. AU Optronics Corp., No. CR-09-0110 SI (N.D. Cal.).

26 Was the connection between the foreign conduct and domestic effect more direct under the circumstances of Minn-Chem or Motorola Mobility? Minn-Chem did not involve a chain of production and a transformed product, and Motorola Mobility did. In that respect, the connection was more direct in Minn-Chem. But Motorola involved a product made specifically for Americans, and Minn-Chem did not. In that respect, the connection was more direct (more closely connected) in Motorola Mobility.

But recall that in his second opinion in Motorola Mobility II, Judge Posner accepted arguendo (he assumed) that the connection was sufficiently direct. In the second opinion, he rested the case for dismissal on the FTAIA’s phrase: “gives rise to.” He held that the Taiwan price fix of components did not “give rise to” Motorola Mobility’s claim; not that it was too indirect.

Judge Posner sat on the en banc panel that reversed the grant of dismissal in Minn-Chem.
Fourth, is *Illinois Brick* a hazardous ground for declaring limits to the reach of the Sherman Act? Reach-of-the-law is an “umbrella” issue, not a personal (to plaintiff) issue.\(^{27}\) *Illinois Brick*, which held that indirect purchasers cannot sue, absent exceptions, is a procedural doctrine of U.S. federal antitrust law, and an exceptional one. It has been questioned even in the last few months by the U.S. Department of Justice, which may consider seeking its repeal.\(^{28}\) It is not the law in many states of the United States. EU law has rejected it and so have its Member States and the many jurisdictions that follow EU law. There is a case to be made that the reach of the Sherman Act should be a stable concept of general applicability, understandable (as generally applicable) to foreign manufacturers that consider fixing the price of components of products known to be en route to the United States.\(^{29}\)

### The Other View of the Cathedral

We are living in a world of global value chains with tightly calibrated (if geographically distant) steps from input to assembly to sale. There is world consensus on the law against price fixing. Nonetheless, price fixers are rampant and are gaming the system. If they fix prices of components in Asia, sell them to assemblers in countries with weak antitrust enforcement who assemble the finished product for shipment to the West, can they thus insulate themselves from at least one big element of liability? If countries like the United States draw in their reins for fear of interfering with other nations’ decisions about how to regulate their own economies,\(^{30}\) we are creating a price fixers’ paradise.

If this is the main narrative, the technicalities should follow. To begin, interpreters of paragraph 2 of the FTAIA can find their way around its improvident and sometimes silly constraints. And procedural doctrines such as *Illinois Brick* should not encumber a reach-of-the-Sherman Act inquiry, but should be left to another day.

### Conclusion

Judge Posner gave us two provocative opinions in *Motorola Mobility*. They were, as usual, pragmatic. *Motorola Mobility* will not be the last word on the issue of input cartels with offshore assembly, or indeed the broader issue of proper spheres of geographic reach of nations’ laws.\(^{31}\)

We would normally have looked forward to Judge Posner’s writing yet another chapter in the book on component cartels and geographic reach of the law. Or yet another book. Maybe he will grant this wish, but sadly, for the admirers of his jurisprudence, not from the bench. ●

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27 At least this should be so, but *Empagran* has complicated the issue.


29 *Illinois Brick* is a federal procedural doctrine and regards who can sue and recover damages. It can be repealed and it can be weakened. It is undermined by state laws. It is not the international standard. If global value chains flourish, if Americans are the foreseeable targets of component cartels at the top end of the chain, and if the first Americans hurt are indirect buyers, Congress or the courts may see fit to relax the doctrine. The reach of national antitrust laws is a grander concept than indirect purchaser treatment and should not be driven by an otherwise pragmatic barrier to private-firm damages.

30 Freedom from compensating victims abroad for price fixing of products destined for abroad is not a legitimate aspect of nations’ regulating their own economies. They all prohibit price fixing at home. If the problem is double counting for overcharges, this can be cured by a rule of law requiring offsets. If the problem is that the United States has real deterrent remedies and the home country does not, then exposure to U.S. antitrust law is a cost of making products for sale in the United States.

31 See Case C-413/14P, Intel v. Comm’n, ECLI:EU:C:2017:632 (transactions from US to China to the world market included in abuse of dominance violation); Iiyama v. Samsung, Philips & LG, [2018] EWCA Civ 220 (UK Court of Appeal) (reversing dismissal of damage claims for price fixing of LCD panels and cathode ray tubes first sold in Asia and assembled into monitors in Asia).
Posner on Antitrust Remedies:
The Good, the Bad, and the Very Ugly

Douglas H. Ginsburg

In the course of his career as a law professor and judge, Richard Posner thought a great deal about antitrust remedies. Ultimately he collected and synthesized these proposals in his treatise, Antitrust Law. The first edition, characterized as a polemic by Herbert Hovenkamp, was well-received in 1976, and several of its remedial prescriptions were later implemented. For example, Posner successfully argued merger policy should dispense with strict structuralist presumptions in favor of a more flexible economic assessment of the merger’s likely effects. In 2001, Posner issued a substantially revised and updated edition.

This article focuses upon five policy prescriptions that appear in both editions. These prescriptions are interesting both because Posner retained them in the second edition, effectively re-adopting them and in some cases expanding upon them, and because none of them has been implemented. Yet, like a fine wine they have grown more interesting and complex with age. They propose to:

1. Decriminalize antitrust;
2. Replace treble damages with a damage multiplier calculated in each case to reflect the probability of detection;
3. Allow the Department of Justice a right of first refusal to bring consumer antitrust claims for damages;
4. Extend the antitrust laws to reach, and to remedy, oligopolistic conduct without the need to find an agreement—a position Posner recently abandoned; and
5. Limit the use of divestiture as an antitrust remedy.

The propriety of a remedy depends, of course, upon the violation it is meant to fix. Because the underlying facts vary from case to case, so too do our judgments. In that sense a remedy that is inadvisable today may become desirable tomorrow, and vice-versa. Therefore, with the caveat that the underlying facts—and the resulting policy proposals—may shift again, I hazard a few broad conclusions.

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2 RICHARD A. POSNER, ANTITRUST LAW (1st ed. 1976) [hereinafter POSNER, 1ST ED.].
3 RICHARD A. POSNER, ANTITRUST LAW 132–33 (2d ed. 2001) [hereinafter POSNER, 2ND ED.] (arguing “[f]or the time being, the history of merger doctrine is at an end,” which is “a modest vindication of the approach taken in the first edition of this book” that “there was little basis in economic theory for automatic intervention in markets in which the four largest firms have a combined market share of less than 60 percent”); see also Hovenkamp, supra note 1, at 927–28 (recognizing “[t]he case law and actual [merger] enforcement practice probably come closer to Posner’s proposals” than the more structuralist view adopted by Areeda and Turner).
4 POSNER, 2ND ED., supra note 3.
Some of Posner’s proposals, such as allowing for more nuanced damage remedies, were—and remain—attractive. I am in complete agreement with his proposal to eliminate treble damages in cases, such as those brought under Section 2 of the Sherman Act, where the conduct is not furtive and more than actual damages are unnecessary either to deter violations or to encourage investigation by private attorneys general.

Other proposals may well have made sense when Posner made them but have not aged well. For example, his proposal to abolish criminal penalties made more sense when enforcers lacked powerful tools to combat cartels, such as leniency programs and heavy sanctions. Some of Posner’s other proposals are provocative but likely as unworkable today as when they were first advanced; this is particularly true of his since forsaken proposal to attack conscious parallelism.

Stepping back, however, it is impossible to disagree with Posner’s motivating principle: We should examine and re-examine antitrust principles we take as received wisdom in order to ensure they remain appropriate as the world changes. To be clear, neither Posner nor I suggest we go so far as to reassess our adherence to the fundamental model of antitrust analysis that focuses upon economic efficiency as the goal and economic analysis as the means. Rather, he has suggested, and I agree, we should periodically consider whether the inputs to this model, the output of the model, or the conclusions to be drawn from the model have changed.

Criminal Penalties
Posner argued the United States should eliminate criminal penalties for antitrust violations altogether. He noted that the U.S. criminal antitrust law was imported wholesale—and without adaptation—from general criminal conspiracy law: “The weapons that the criminal law had developed to deal with conspiracies in other areas were simply trained on price fixing.”

Posner argued the imposition of criminal antitrust penalties is inappropriate for two reasons. First, “[I]t is difficult to translate a monetary sum (the costs of a particular price-fixing conspiracy, say) into a nonpecuniary cost”—a specific prison sentence. “The effort to do so,” he says, “is almost certain to lead to excessive leniency,” but, curiously, he does not explain why the result is more likely too little instead of too much punishment. Second, Posner argued imprisonment imposes social costs that exceed the likely benefits. “[I]mprisonment is a much costlier sanction for society to administer than the collection of a fine” because society loses the output of an otherwise productive individual during his imprisonment. The implication of this observation is that prison sentences are, if anything, too long when their full social cost is considered.

In the second edition, Posner, reviewing the number of cases between 1970 and 2000 in which a jail sentence was imposed, noted a significant decline from the 1980s to the 1990s. From those data he concluded that “imprisonment is imposed so rarely in antitrust cases that its deterrent effect

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5 POSNER, 1ST ED., supra note 2, at 226 (arguing “[m]erely to abolish imprisonment in antitrust cases would not constitute a sufficient reform of the antitrust penalty structure” and proposing an increase in fines and damage awards); POSNER, 2ND ED., supra note 3, at 271 (same).
6 POSNER, 1ST ED., supra note 2, at 40; POSNER, 2ND ED., supra note 3, at 53.
7 POSNER, 1ST ED., supra note 2, at 225; POSNER, 2ND ED., supra note 3, at 270.
8 POSNER, 1ST ED., supra note 2, at 225; see POSNER, 2ND ED., supra note 3, at 270 (repeating the same phrase but using “likely” instead of “almost certain”).
9 POSNER, 1ST ED., supra note 2, at 225; see POSNER, 2ND ED., supra note 3, at 270 (repeating the same phrase but omitting the word “much”).
10 POSNER, 2ND ED., supra note 3, at 45 tbl. 3.
may be slight.”

This statement seems odd to the contemporary ear: Whereas, on average, courts imposed imprisonment 37 percent of the time in the 1990s, that proportion rose to 62 percent in the 2000s and 70 percent between 2010 and 2016. The average antitrust sentence also rose, from 8 months in the 1990s to 20 months in the 2000s and 22 months between 2010 and 2016. Outside the United States, at least 30 jurisdictions have now criminalized collusion, but most have done so quite recently, and aggressive criminal enforcement is still rare outside the U.S.

The tools enforcers use have also changed. Given Posner’s focus upon detection, which is discussed in greater detail below, perhaps the most relevant change is the development of corporate leniency programs. The United States introduced its program in 1978, but it did not take off until after its reform in 1993. Since then it has become a key tool in the U.S. enforcers’ toolkit. In 2010 the Department of Justice estimated half of its ongoing cartel investigations were assisted by leniency applicants, and cases in which leniency was granted accounted for 90 percent of the dollars collected in criminal fines over the preceding 15 years. By that time, too, more than 50 jurisdictions had adopted leniency programs.

Given the more robust criminal enforcement we see now, and particularly the significant increase in both individual jail sentences and antitrust fines, Posner might well take a more favorable view of criminal enforcement today.

### Treble Damages

Posner argued the routine trebling of antitrust damages should be abandoned in favor of a case-specific approach. Consistent with his focus upon economic efficiency, he proposed that damage multipliers be used to set the penalty for an antitrust violation equal to its social cost. As he pointed out, the function of a damage multiplier is to account for the uncertainty of detection:

Because the probability of a violation being detected varies both by the type of conduct and from case to case, the damage multiplier should as well.

Posner proposed two reforms. First, he would allow only single damages in Section 2 cases (and in mergers, to the extent mergers give rise to any damage claims). Because the probabil-

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11 Id. at 270.
16 Id. at 3.
17 Id. at 1.
18 POSNER, 2ND ED., supra note 3, at 267 (“[A]s I have argued throughout this book, the purpose of the antitrust laws is to promote efficiency . . .”).
19 See id. at 272–73.
20 Plaintiffs have long sought treble damages in merger matters, largely without success. See, e.g., Earl W. Kintner & Merle F. Wilberding, Enforcement of the Merger Laws by Private Party Litigation, 47 IND. L.J. 293, 299–304 (1972) (stating “it seems unmistakably clear that a violation of § 7 of the Clayton Act would support a treble damage recovery”; acknowledging that “the litigation involving this question has
ity of detection is greater than one-third, trebling damages in Section 2 cases (as we routinely do today) over-compensates plaintiffs and leads to more litigation than is efficient. Posner recommended that “[o]nly single damages should be available in such cases, but they should of course be realistically computed, with interest at market rates from the date of the violation.” I agree on both counts but also note the lack of pre-judgment interest in antitrust cases makes no sense, economic or equitable.

Second, Posner believed much greater nuance is appropriate when calculating damages in cartel cases. In contrast to mergers and exclusionary conduct, Posner believed the risk of detection for cartels may well be less than one-third. Accordingly, he recommended abolishing the rule of treble damages and in its place “authoriz[ing] the award of punitive damages in an amount to be determined by the jury,” which would be instructed that “the only thing to consider in setting the amount of punitive damages is whether the defendant’s misconduct was concealed and, if so, what amount of damages would be necessary to raise the punishment cost to what it would have been had the misconduct not been concealable.” He explained his concept of concealment accounts for “the probability ex ante that the defendant would be caught.” In other words, Posner would allow a variable damage multiplier, whether more or less than three, so that the ex post cost to the defendant in the form of monetary penalties equals the benefit anticipated by the defendant ex ante when deciding to join a cartel.

This approach would expand greatly the role of the jury. Whereas today the jury is charged with finding liability and damages, which are then automatically trebled by the court, Posner would in effect add a third component, the ex ante probability of successful concealment. For example, a cartel with a 10 percent ex ante chance of detection (as set by the jury ex post, that is, after it was detected) would face a damage multiplier of 10.

Like any shift from a rule to a standard, Posner’s proposal raises several practical complications. The first is one of measurement: Estimating the ex ante risk of detection is a highly speculative venture, particularly because that risk is itself a quotient, the result of dividing a known value (the number of cartels detected) by an unknown one (the total number of cartels). That the latter

been long and strewn with obstacles”; but arguing 1960s-era decisions by the Second, Fifth, and Ninth Circuits have definitively recognized the possibility); Note, Treble Damage Actions for Violations of Section 7 of the Clayton Act, 38 U. Chi. L. Rev. 404 (1971) (explaining that “[t]he persistent reluctance of the judiciary to allow private plaintiffs to maintain treble damage actions under section 4 of the Clayton Act to enforce the section 7 prohibition on potentially anticompetitive mergers has dissolved dramatically in recent years” and collecting cases from the late 1960s). But see, e.g., In re AMR Corp., No. 11-15463, mem. op. at 11–15 (Bankr. S.D.N.Y. Mar. 14, 2014) (construing Section 4 of the Clayton Act to authorize treble damages in mergers only when the merger has been consummated and the claimed damages actually sustained).

21 See POSNER, 2ND ED., supra note 3, at 272.
22 Id.
24 POSNER, 2ND ED., supra note 3, at 272.
25 Id.
26 Id.
number is a known unknown does not make it any easier to estimate. Moreover, the economic literature suggests—and Posner expressly allowed for the possibility—that the risk of detection varies from one cartel to the next depending upon a variety of factors, such as the number of members, the nature of the product, and the nature of the market. Therefore, the jury would be charged with the more difficult task of determining which cartels are sufficiently similar to the charged agreement to be included in the calculation of the risk of detection; the jury would then adjust the numerator and denominator accordingly.

Presumably the creativity of counsel and the accumulation of precedents would in time make the jury’s task somewhat more tractable, but Posner’s proposal would still make it more difficult ex ante to estimate the likely damage figure, with practical implications both for corporate disclosures and for settlement discussions. By expanding the range of possible damages, Posner’s proposal would make it more difficult for a defendant with a corporate reporting obligation to advise its shareholders on the potential cost of a given case. Surprises, such as when damages turn out to be greater than estimated, might then become the subject of separate securities litigation. The enhanced difficulty in valuing a case would also vex settlement negotiations, as the plaintiff and defendant may have wildly divergent views about the probability of detection and, hence, the resulting damages. The greater the gulf in valuations, the fewer settlements and the more trials. Further, because the risk of detection may change over time as investigative techniques evolve, these effects are likely to be dynamic.

All in all, Posner’s proposal seems worse than the problem it is meant to solve. It is no wonder that it has been ignored; even Homer nods.

DOJ Right of First Refusal to Take Consumer Damage Cases

Posner also recommended changing the way in which private cases are litigated. In essence, he argued the market is producing more than the optimal number of private antitrust suits because...
“the plaintiffs’ bar cannot be relied upon to exercise reasonable self-restraint,” a possibility to which we shall return later. His prescription evolved over time. In the first edition he argued “it is possible to imagine alternatives [to private class action suits] ranging from middlemen’s suits to state parens patriae actions . . . [but] it is not at all clear that any of them is superior to—or even markedly different from—the class action.” Evidently his estimation of the merits of private suits subsequently fell; in the second edition he suggested “giving the enforcement agencies (or one of them, probably the Justice Department, which has the deeper bench) a right of first refusal to bring damages suits” on behalf of consumers, although he was “not prepared to go so far as to suggest . . . a monopoly.”

In both editions he argued the government was bringing too few cases because a “tight budget constraint has forced the agencies to be selective in their choice of cases.” Here he posited that the Horizontal Merger Guidelines “are a good example” of how budget constraints “force[] the [DOJ] to bring far fewer cases than it could win under current interpretations of the antitrust statutes.” Of course, the judicial interpretation of the antitrust laws “current” in 1976 was a great deal more expansive than is the prevailing view today, particularly in the merger arena. I think it much more likely that the HMGs reflect not a budget constraint but a contemporary understanding of what types of cases are welfare enhancing. After all, who yearns for another Von’s Grocery case?

A striking aspect of Posner’s proposal is its lack of confidence in the efficiency of the market for private antitrust litigation. Indeed, his faith fell further over time, as shown by his 2001 proposal to grant the DOJ a right of first refusal. Perhaps his doubt about the functioning of the market simply reflects his concern that damage multipliers are set too high for some violations (e.g., Section 2 violations) and too low for others (Section 1 violations). If so, then the market may indeed produce too many non-cartel cases and too few cartel cases—particularly those that are not follow-ons to a government prosecution. If Posner’s separate proposal to adjust those multipliers to reflect social costs were adopted and proved workable, however, then the resulting equilibrium would produce the optimal number of each kind of case. That is, this reform would be superfluous if the problem it addresses had already been solved by the more direct method of adjusting damage multipliers.

It also would require the Antitrust Division to choose among competing considerations when deciding when to exercise the Division’s newfound right of first refusal. The Division might reason-

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32 POSNER, 2ND ED., supra note 3, at 275; POSNER, 1ST ED., supra note 2, at 228.
33 See infra at 7 & n.41.
34 POSNER, 1ST ED., supra note 2, at 227–28.
35 POSNER, 2ND ED., supra note 3, at 276; see also id. at 273–74.
36 Id. at 275; POSNER, 1ST ED., supra note 2, at 228.
37 POSNER, 2ND ED., supra note 3, at 276; POSNER, 1ST ED., supra note 2, at 228.
39 Cf. Merritt v. Faulkner, 823 F.3d 1150, 1158 (7th Cir. 1987) (Posner, J., concurring) (arguing against appointment by the court of counsel for a prisoner because “we should let the market direct the allocation of those services in cases where there is an effective market in them” and asking rhetorically whether “anyone doubt[s] that there is vigorous competition among lawyers to represent a contingent-fee basis tort plaintiffs with meritorious claims for substantial damages?”).
ably consult the factors it uses when deciding whether to seek dismissal of a *qui tam* action, all but one of which would be relevant: (1) “curbing meritless [cases]”; (2) “preventing parasitic or opportunistic” cases; (3) “preventing interference with agency policies and programs”; (4) “controlling litigation brought on behalf of the United States,” i.e., avoiding adverse precedent; (5) “safeguarding classified information and national security interests” (likely irrelevant here); (6) “preserving government resources . . . when the government’s expected costs are likely to exceed any expected gain”; and (7) “addressing egregious procedural errors” by which the would-be plaintiff interferes with the Division’s investigation.\(^4\)

The Division could weigh these criteria in myriad ways, each resulting in a different equilibrium. For example, it might prioritize “curbing meritless [cases]” or “preserving government resources.” The associated equilibria are themselves dynamic because private plaintiffs and defendants will react to any chosen policy by adjusting their own strategies. As the *qui tam* cases show, however, the Department can effectively balance these competing considerations.\(^4\) At the same time, applying the *qui tam* factors to Posner’s proposed right of first refusal would vest the Assistant Attorney General for Antitrust with broad discretion, making Division policy vulnerable to abrupt changes when Division leadership turns over.\(^4\)

**Conscious Parallelism**

Posner long argued Section 1 of the Sherman Act is broad enough to prohibit any conscious parallelism—which he called “tacit collusion”—that results in supracompetitive prices.\(^4\) He believed there was adequate support for this proposal in the precedents of the Supreme Court, particularly *American Tobacco Co. v. United States*,\(^4\) in which the court said, in an extended dictum, that “[n]o formal agreement is necessary to constitute an unlawful conspiracy.”\(^4\) Posner first made this pro-

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\(^4\) Michael D. Granston, Director, U.S. Dep’t of Justice, Civil Division, Commercial Litigation Branch, Fraud Section, Memorandum to U.S. Dep’t of Justice Attorneys Regarding Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018). Although this document was intended to remain privileged and confidential, it soon leaked and has been extensively distributed and summarized. See, e.g., Antonio M. Pozos & Jesse A. Witten, Drinker Biddle & Reath LLP, Justice Department Issues Policy Suggesting New Emphasis on Dismissal of Unwarranted False Claims Act *Qui Tam* Cases (Jan. 29, 2018), https://www.drinkerbiddle.com/insights/publications/2018/01/new-policy-on-dismissal-of-unwarranted-fca.


\(^4\) *Posner, 2nd Ed.*, supra note 3, at 95 (“[T]he law should not always equate tacit and explicit pricing agreements. Some degree of tacit coordination of pricing in reaction to external shocks . . . is inevitable and unobjectionable. What is not inevitable and is objectionable is a tacit agreement to limit output and charge a higher than competitive price.”); see also *Posner, 1st Ed.*, supra note 2, at 72 (same); Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969).

\(^4\) 328 U.S. 781 (1946).

\(^4\) Id. at 809; see id. at 809–10 (focusing upon the co-conspirators’ course of dealing and concluding that “[n]o formal agreement is necessary . . . . Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified”); *Posner, 2nd Ed.*, supra note 3, at 95.
propos a l before the Supreme Court rejected it in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, but he reiterated it in his 2001 edition. Although Posner has since abandoned the argument, noting that he heretofore had not "sufficiently appreciate[d] the force of Turner's doubts about the feasibility of an antitrust remedy for tacit collusion," his initial proposal still has purchase in some quarters and therefore still merits examination today.

Posner limited his proposal to prohibit conscious parallelism in two ways. First, he would not have prohibited apparently supracompetitive prices caused by legitimate common factors, such as an external supply shock. He believed detailed economic analysis should be able to distinguish this type of parallel conduct from collusion. He acknowledged that the analysis may sometimes be difficult and may produce some false positives, but preferred it nonetheless. Second, he retreated somewhat by conceding that "[i]t will . . . be difficult to prove tacit collusion in a case of pure price leadership . . . for example where X raises its price, and Y . . . follows suit." This concession, however, would refocus the inquiry upon proving an agreement, albeit with circumstantial evidence.

Posner would have made tacit coordination subject to both legal and equitable remedies. Consistent with his 2001 proposal to grant the DOJ a right of first refusal, he wrote "the ideal remedy in cases of purely tacit collusion" would be to authorize the DOJ "to bring damages suits . . . on behalf of the victims of antitrust violations." Relatedly, he would have allowed courts to enjoin facilitating practices. He gives as examples basing-point pricing schemes, inter-firm price communications falling short of an agreement, and "far-in-advance announcement of price changes." There are a couple of weaknesses in Judge Posner's legal argument. First, he relies heavily upon a passage in *American Tobacco* that may not provide as much support as he suggests. Although the court did state in a dictum that "[n]o formal agreement is necessary to constitute an unlawful conspiracy," it then proceeded to infer the existence of an agreement "from the evidence of the action taken in concert by the parties to it" and the resulting "proof of an intent to exercise the power of exclusion acquired through that conspiracy." *American Tobacco* therefore seems

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46 509 U.S. 209, 227 (1993) ("T tacit collusion . . . describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions.").


49 *Posner*, 2nd Ed., supra note 3, at 98 ("Remedy is a problem . . . , but not, as Turner thought, because it would require telling oligopolists to behave irrationally."); *id*. at 98–99 (discussing the risk of punishing firms that were "not colluding").

50 *id*. at 97. Posner revisited this complication in his 2013 retraction. See Posner, *Book Review*, supra note 48, at 763–64 (summarizing a similar scenario in which oligopolist Y raises its price and noting that, if the law prohibited conscious parallelism, then any response competitor X might make could trigger antitrust liability).


52 *id*. ("Coupled with an injunction against any facilitating practices . . . a damages judgment in a tacit-collusion case would promote competition at a tolerable cost in legal uncertainty and judicial supervision."). But see Posner, *Book Review*, supra note 48, at 764–65 (considering alternative remedies, such as forbidding most-favored-nations clauses, advance announcement of price changes, and public inter-firm communications, and rejecting all but the first as "either very difficult for a court to administer . . . or infeasible").

53 *American Tobacco Co.*, 328 U.S. at 809.
to require at least an “informal” agreement in the sense that it can be inferred from circumstantial evidence. That is quite different from Posner’s proposal to dispense entirely with the requirement that there be an agreement, which would have made the presence of plus factors in *American Tobacco* irrelevant.

Second, whatever the conceptual merits of the proposal, the Supreme Court has since rejected it, albeit again in a dictum, in *Brooke Group*. Although the Supreme Court has been known to reverse course, as it did with respect to the per se condemnation of vertical restraints,54 *Brooke Group* further reduced the odds that the Court will accept Posner’s proposal. The proposal may also be impractical; although economic modeling has improved a good deal since 1976, it remains difficult even today to distinguish accurately among the various reasons for nearly simultaneous price changes by rivals.

### Structural Remedies and the AT&T Modified Final Judgment

Posner consistently suggested that “divestiture [has] . . . a poor overall record as a Sherman Act section 2 remedy,”55 a proposition more widely accepted in recent years.56 In the 2001 edition, however, he also noted an exception for the AT&T Modified Final Judgment (MFJ), which he called “the most successful antitrust structural remedy in history.”57 He cited a 1999 study concluding the divestiture had a positive effect on competition even after accounting for subsequent deregulation and innovation.58 Other studies reach the same conclusion.59

Still, Posner may be right that divestitures have a poor record, at least if he means in comparison with transactions that are blocked outright. But he is likely wrong if the relevant alternative is a behavioral remedy. As explained in the FTC Statement on Negotiating Merger Remedies,60 in the

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55 *Posner, 2nd Ed.*, supra note 3, at 111; *see also Posner, 1st Ed.*, supra note 2, at 87–88 (“Why has divestiture such a poor record as either a Clayton Act section 7 or a Sherman Act section 2 remedy?”).

56 *Posner, 1st Ed.*, supra note 2, at 87 (“Why has divestiture such a poor record as either a Clayton Act section 7 or a Sherman Act section 2 remedy?”).


58 *Posner, 2nd Ed.*, supra note 3, at 111. Note that the first edition was published several years before the MFJ.

59 *Id.* at 110 (citing Clement G. Krouse et al., *The Bell System Divestiture/Deregulation and the Efficiency of the Operating Companies*, 42 J.L. & Econ. 61 (1999) (“[T]o 1993 the divestiture yielded savings of $115.4 billion and state-level regulatory reform yielded a slightly smaller $96.7 billion in savings (both measured in 1993 dollars).”)


61 *See Fed. Trade Comm’n, Bureau of Competition, Negotiating Merger Remedies 5 (Jan. 2012) (“Most merger cases involve horizontal mergers, and the Commission prefers structural relief in the form of a divestiture to remedy the anticompetitive effects of an unlawful horizontal merger.”).
DOJ Guide to Merger Remedies, and by enforcement officials in recent statements, the agencies have good reasons to favor structural remedies over behavioral ones, which are less likely to succeed, and which too often have the untoward consequence of turning the antitrust agency into a regulator.

**Conclusion**

Posner advocated several radical changes in the way antitrust violations are remedied. Sometimes his proposed cure is worse than the disease, such as abolishing criminal antitrust enforcement and bringing conscious parallelism within the ambit of Section 1 of the Sherman Act. Others merit serious consideration, including in particular his proposal to eliminate treble damages in cases where the conduct is not furtive. When the Congress next considers amending the antitrust statutes, it should consider both this proposal and the possibility of giving the Antitrust Division a right of first refusal either to pursue or to squelch private consumer cases.

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62 Makan Delrahim, Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Keynote Address at the Am. Bar Ass’n’s Antitrust Fall Forum (Nov. 16, 2017) (“I expect to cut back on the number of long-term consent decrees we have in place and to return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer.”); see also Written Responses of Joseph J. Simons to the Senate Committee on Commerce, Science, and Transportation, Jan. 31, 2018, at 16 (noting the failure of some structural divestitures and arguing the failure rate “is too high and needs to be lowered substantially or, ideally, zeroed out altogether”).
Oligopoly Pricing and Richard Posner

Keith N. Hylton

Over a span of nearly 50 years Richard Posner’s ideas have loomed large over the subject of oligopoly pricing and antitrust. The span begins in 1969 with Posner’s publication of Oligopoly and the Antitrust Laws: A Suggested Approach,1 which argues for more aggressive enforcement of Section 1 in cases involving circumstantial evidence of conspiracy. The span ends with Posner’s opinion in In re Text Messaging Antitrust Litigation2 in 2015.

The two writings, the first an academic article published early in Posner’s career and the second a judicial opinion published near the end, suggest very different approaches to the enforcement of Section 1 in oligopoly pricing cases. The article counsels aggression while the opinion counsels timidity, with a closing paragraph that begins with the sentence, “We hope this opinion will help lawyers understand the risks of invoking ‘collusion’ without being precise about what they mean.”3

I will refer to the oligopoly pricing cases sometimes as “circumstantial-evidence conspiracy” cases because they typically involve a charge of conspiracy and an absence of direct evidence of agreement, such as a transcript or recording of messages proving the existence of an agreement to restrain trade in violation of Section 1. Almost always these are cases involving oligopoly pricing—though some circumstantial evidence cases have involved groups consisting of too many members to be considered an oligopoly.4 What makes these cases special, however, is the type of circumstantial evidence brought to court and the difficulty of determining whether the evidence justifies a finding of conspiracy.

Given the difficult problems of inference in oligopolistic pricing cases, it is easy to exaggerate the change in Posner’s outlook from 1969 to 2015. To fairly assess the change, one should keep in mind that inference is generally entwined with the specific set of facts at issue—alter the facts, alter the inference. Still, on a superficial level Posner’s reversal appears to be dramatic. He is skeptical in 2015 of the types of evidence he suggested would support a finding of conspiracy in 1969, and by 2015 he tells us that he no longer believes, as he did in 1969, that Sherman Act Section 1 prohibits tacit collusion. These changes alone would be of interest given Posner’s influence in antitrust law, but they are even more interesting in light of his impressive critique, in 1969, of the conservative enforcement approach advocated by former Antitrust Division chief Donald Turner and others. The journey changes the journeyer: the conservative approach that Posner criticizes in 1969 he embraces in 2015.

In this article, I first describe the text messaging litigation and the reasoning behind Posner’s virtual volte-face on oligopoly pricing. Then I discuss the beginning of Posner’s journey and the

2 782 F.3d 867 (7th Cir. 2015) [hereinafter Text Messaging 2015].
3 Id. at 879.
4 See, e.g., Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (data dissemination plan involving roughly 400 firms).
basis for his comparatively idealistic vision of the scope of Section 1. I conclude by considering the path forward—what courts are likely to do on the question of the scope of Section 1, and what courts should do.

The End of the Journey, 2015
Let's start with the final stage of this odyssey, Posner’s 2015 *In re Text Messaging* opinion.\(^5\) We will have to consider both that opinion and his 2010 opinion affirming the denial of a motion to dismiss in the same case.\(^6\) The case arose from the consolidation in a multidistrict litigation of several class actions accusing major wireless network providers (T-Mobile USA Inc., Sprint Corp., AT&T Mobility LLC, and Verizon Wireless LLC) of fixing prices in the “pay per use” text messaging market (paying per message rather than a fixed fee for an unlimited number). The 2010 opinion examines the defendants’ interlocutory appeal of the trial court’s refusal of their motion to dismiss. The 2015 opinion examines the trial court’s decision to grant summary judgment in favor of the defendants. For simplicity, I will refer to the first opinion as *Text Messaging 2010* and the second as *Text Messaging 2015*.

*Text Messaging 2010* is mostly an application and explication of the standard of review for dismissal motions under *Bell Atlantic Corp. v. Twombly*.\(^7\) Quite helpfully, Posner describes *Twombly* as changing the standard for dismissal from a *possibility* standard to a *plausibility* standard.\(^8\) Under a possibility standard, a court should not dismiss a complaint if there is a potential scenario under which the allegations of the complaint would be valid.\(^9\) In other words, a court could not properly dismiss a complaint as long as it is possible that facts exist that would enable the plaintiff to prove the allegations in court. Thus, even a small or miniscule probability of being capable of proof would enable a complaint to survive a motion for dismissal under the possibility standard. By contrast, a plausibility standard requires the allegation of facts in a complaint that suggest a significant probability that the plaintiff will prove the allegations to the degree required by the prevailing proof standard.\(^10\) The plausibility standard does not require the allegation of facts that would enable a reasonable jury to conclude that the plaintiff is telling the truth with a probability greater than 50 percent. Such a standard would be equivalent to the preponderance standard for a verdict, and would clearly be too demanding at the complaint stage. But a plausibility standard, Posner explains, points to a probability that is greater than miniscule though less than 51 percent as the requirement for avoiding dismissal.\(^11\)

The defendants in *Text Messaging 2010* argued that the plaintiff’s complaint did not satisfy the plausibility standard because it presented facts that established nothing more than parallel conduct equally consistent with unilateral action as with collusion. Posner concluded, however, that the complaint did meet the plausibility standard for a conspiracy claim. In addition to the observed parallel price increases, his analysis points to two important “plus factors” that are addressed by

\(^5\) *Text Messaging 2015*, 782 F.3d at 867.
\(^6\) *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010) [hereinafter *Text Messaging 2010*].
\(^7\) 550 U.S. 544 (2007).
\(^8\) *Text Messaging 2010*, 630 F.3d at 629.
\(^9\) *Twombly*, 550 U.S. at 561.
\(^10\) *Text Messaging 2010*, 630 F.3d at 625.
\(^11\) Id. at 629 (“The fact that the allegations undergirding a claim could be true is no longer enough to save a complaint from being dismissed; the complaint must establish a nonnegligible probability that the claim is valid; but the probability need not be as great as such terms as ‘preponderance of the evidence’ connote.”).
the facts asserted in the complaint. One plus factor is that of shared information. Posner noted that
the defendants had met in trade associations and within other special groups with sufficient fre-
quency to enable them to form and monitor an agreement on prices.\footnote{Id. at 628 (“Of note is the allege-
ation in the complaint that the defendants belonged to a trade association and exchanged price informa-
tion directly at association meetings.”).} Second, Posner argued that prices for “pay per use” text messaging service increased as costs were falling, which he treated as an anomalous feature suggesting the existence of a conspiracy.\footnote{Id. (“The complaint also alleges that in the face of steeply falling costs, the defendants increased their prices.”).} Third, he noted that the complex and nearly simultaneous changes in the pricing structure bolstered the plaintiff’s theory of conspiracy.\footnote{Id. (“The change in the industry’s pricing structure was so rapid, the complaint suggests, that it could not have been accomplished with-
out agreement on the details of the new structure, the timing of its adoption, and the specific uniform price increase that would ensue on
its adoption.”).} Based on these plus factors, Posner held that the plaintiff’s complaint met the plausibility test of \textit{Twombly}.\footnote{Id. at 629.}

The defendants’ appeal having been denied by Posner, the case proceeded to discovery in the
trial court, ending with a summary judgment in favor of the defendants.\footnote{\textit{Text Messaging 2015}, 782 F.3d at 869.} The plaintiffs appealed
the summary judgment, leading to \textit{Text Messaging 2015}, in which Posner upheld the judgment
and took the further step of announcing that tacit collusion does not violate Section 1 of the
Sherman Act.\footnote{Id. at 872–73.}

\begin{itemize}
\item Posner provides a careful and exhaustive assessment of the circumstantial evidence in \textit{Text Messaging 2015}. His conclusion, however, boils down to the statement that the evidence pro-
duced by the plaintiffs was entirely consistent with individually rational conduct on the part of the
defendants. The only new piece of evidence generated through discovery was an e-mail by an
employee of T-Mobile criticizing the price increase for messaging services on the ground that it
was not justified by an increase in costs and that it was just an attempt to gouge consumers.\footnote{Id. at 872. The manager also characterized the price increase as “colusive” (sic), which Posner suggested did not necessarily mean express collusion. \textit{Id.}} Posner dismisses the probative weight of the e-mail because it contained no language suggest-
ing that there was an agreement among the firms to fix prices—if anything, the e-mail appears to
adopt the premise that there was no agreement among the firms.\footnote{Id. at 872–73.} In addition, the employee’s
later attempt to delete all traces of the e-mail was consistent with an effort to avoid letting his own
criticism of senior management get out, which would have risked retaliation from those managers,
rather than with an effort to conceal the existence of a conspiracy.\footnote{Id. at 873 (“But that is consistent with his not wanting to be detected by his superiors criticizing their management of the company.”).}

\item Posner then turns to the subject of the scope of Section 1, holding that tacit collusion is not within
its reach. As far as I am aware, this is the first appellate court opinion to state such a position
so clearly.\footnote{In an earlier opinion Posner equated “tacit collusion” with “oligopolistic interdependence,” and appeared to suggest that the practice does
not violate the Sherman Act, JTC Petroleum Co. v. Plasna Motor Fuels, Inc., 190 F.3d 775, 780 (7th Cir. 1999). However, Posner noted that
a “number of cases treat the question as open.” \textit{Id.} Moreover, Posner’s discussion focuses on the narrower question whether tacit collu-
in itself unlawful.”23 While the Court’s statement in *Brooke Group* is surely of value to antitrust defense lawyers, it was not necessary for the holding in that case, and the Court later backed away from the statement in *Twombly*.24 The earlier Supreme Court case law on circumstantial-evidence conspiracies, including such decisions as *Interstate Circuit*25 and *Theatre Enterprises*,26 is also ambiguous on the question of whether Section 1 prohibits tacit collusion. Posner’s opinion appears to be the first, setting aside the *Brooke Group* dictum, to say unambiguously that Section 1 does not include tacit collusion within its prohibition.

Posner’s reasons for articulating a clear limit on the scope of Section 1 would be familiar to anyone who has followed the literature on this matter.27 First, there is the problem of notice:28 If a firm simply follows the price decisions of another firm, perhaps because it believes the other firm has superior information on market conditions, how is the firm to understand that such an act is a violation of Section 1? Or consider any other decision that appears to be based on considerations of interdependence, such as to increase spending on advertising in response to the same actions by a rival. Again, how is the firm to know when it has crossed the line into a violation of Section 1?

Second, there is the problem of remedy:29 If the Sherman Act prohibits tacit collusion, how can an order prevent the conduct from occurring again? Are firms to be instructed that they should not take the actions of rivals into account? How would they comply with such an injunction?

Posner notes also the problem of discouraging entry:30 If the Sherman Act prohibits tacit collusion, and courts infer tacit collusion from evidence that a firm acted in response to a move by a rival, then the threat of liability for such unspecified conduct would tend to deter new entrants from entering a market. Firms would fear that by entering a market, and adopting the same price level as incumbent firms, their actions might be taken as evidence of a Section 1 violation. Of course, as firms become aware of this danger, fewer will choose to enter new markets, leaving consumers even more vulnerable to anticompetitive pricing in oligopolistic markets.

Posner does not mention this, but there is also the problem of discouraging competition: If the Sherman Act prohibits tacit collusion, then if firms compete too vigorously, leading to losses, and then retreat by raising prices, enforcers and plaintiffs will bring Section 1 claims. Knowing that this

23 For a discussion and critique of the literature, see KEITH N. HYNTAX, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION 75–89 (2003).

24 *Id. at 227.


27 Id. (“It is one thing to prohibit competitors from agreeing not to compete; it is another to order them to compete.”).

28 Id. (“And might not entry into concentrated markets be deterred because an entrant who, having successfully entered such a market, charged the prevailing market price would be a tacit colluder and could be prosecuted as such, if tacit collusion were deemed to violate the Sherman Act?”).
is the likely result of “overshooting” competition, firms will compete less aggressively. Again, the effect of such a perception among firms is to leave consumers more vulnerable to oligopolistic surcharges, a result that contradicts the goals of the Sherman Act.

Posner notes in passing a recent book by Louis Kaplow that urges more aggressive enforcement of Section 1 in circumstantial-evidence conspiracy cases, suggesting that Kaplow’s proposals would be mostly unworkable and potentially harmful if implemented. The unusual feature of Posner’s harsh critique is that Kaplow’s book largely pursues a thesis that Posner himself initiated. I will turn to that next.

The Beginning of the Journey, 1969

Posner’s arguments justifying a narrow scope for Section 1 in Text Messaging 2015 appear to contradict a position that he had taken in his 1969 article. In Oligopoly and the Antitrust Laws, Posner called for more aggressive enforcement of Section 1 in circumstantial-evidence conspiracy cases. He criticized the tacit collusion model that had been described in an article by Donald Turner and at the same time rejected Turner’s relatively conservative approach to Section 1 enforcement. The Posner-Turner “conscious parallelism” debate includes several interesting arguments that I will not attempt to survey in detail here.

The conscious parallelism debate did not begin with Turner and Posner. Of course, discussion of tacit collusion, and its implications for antitrust, had been in the economics literature for a considerable time before law professors began exploring the issue. In the law literature, James Rahl, a Northwestern University law professor, had initiated the debate about Section 1 enforcement and tacit collusion in his article Conspiracy and the Anti-Trust Laws. The interesting feature of Rahl’s article is that he saw the close connection between the doctrine of intra-enterprise conspiracy and the application of Section 1 to tacit collusion. In both cases, according to Rahl, enforcers were seeking to apply Section 1 to conduct that did not involve a conspiracy. In the intra-enterprise context, the necessary *duality* of conspiracy doctrine is missing, because a single enterprise always agrees with itself. In the conscious parallelism case, the agreement component of conspiracy doctrine is missing.

Rahl’s article anticipates some of the arguments that would later appear in Donald Turner’s article on tacit collusion and antitrust. Still, for the sake of conciseness I will not review Rahl’s article in detail. Rahl’s arguments for restraint in enforcing Section 1 overlap substantially with Turner’s. Interestingly, the first footnote in Turner’s article cites the Rahl article, but only as a source of “historical background” on Section 1 of the Sherman Act. Turner’s article includes no other citations to Rahl even though it is apparent that Turner was influenced by Rahl.

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32 Text Messaging 2015, 782 F.3d at 874–76.
33 See generally Posner, supra note 1.
37 Id. at 754–62.
38 Id. at 762–68.
39 Id. at 755–62.
40 Turner, supra note 34, at 655.
Turner makes two core arguments. First, he contends that tacit collusion could in theory be viewed as a type of agreement (or an “agreement to agree”), even though it involves unilateral conduct. In other words, Turner refuses to say that Section 1 does not reach instances of tacit collusion.41 Second, Turner argues that the practical difficulties of using Section 1 in cases of tacit collusion make it largely an ineffective and ill-advised enforcement weapon in these scenarios.42 However, Turner does not claim that the practical difficulties imply that Section 1 can under no circumstances be applied to cases of tacit collusion, and indeed closes his article with examples of conscious parallelism where he thinks the application of Section 1 is appropriate.43

Turner grounds his reasons for rejecting Section 1 as an enforcement tool against tacit collusion on the structure of the statute. First, there is a doctrinal problem. He argues that consciously parallel conduct is unilateral—that is, not based on a concrete agreement—then Section 1 does not provide a direct route to enforcement.44 However, even if we assume that the conduct is unilateral, Section 2 provides a basis for enforcement, in Turner’s view, if the oligopoly power wielded by firms was acquired through unlawful means. Thus, the mere fact that the firms’ conduct is unilateral does not exempt it from the Sherman Act. As long as a factual basis could be generated that would demonstrate that the oligopoly power had been acquired by unlawful means, the Sherman Act can be used as an enforcement tool against tacit collusion in oligopolistic markets. Still, Turner’s concession that the statute was inapplicable in settings where oligopoly power had been lawfully acquired amounts to a significant reduction in the potential for Section 1 enforcement in the tacit collusion setting.

The second problem Turner finds is in the statute’s remedial structure. Turner says that he could not envision an injunction that would implement the statute’s goals in the tacit collusion setting.45 If a firm is instructed not to follow the actions of its rivals, then what is the firm supposed to do? How can a firm in an oligopolistic market ignore the actions of its rivals? If such an order were issued by a court, the next question that would arise is precisely how to enforce the order. Turner says that in order to enforce such a capacious order, the court would have to transform itself into a regulatory agency.46 He regards such a transformation as inconsistent with both the structure and the history of the Sherman Act.

I noted earlier that Turner appears to have been influenced by Rahl because of the similarities in their arguments. Rahl’s article argues (like Turner) that the statute itself—broadly including its associated common law and enforcement structure—is the most important obstacle to using Section 1 as an enforcement tool against tacit collusion.47 The statute can be applied to oligopolistic pricing, according to Rahl, only if the evidence threshold necessary to prove conspiracy is lowered to the point where antitrust courts adopt a doctrine similar to res ipsa loquitur in tort law, where industry structure would provide the basis for inferring conspiracy.48 Rahl also argues that

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41 See id. at 663–73 (“And of course if there is agreement in the legal sense, the agreement seems inescapably an unlawful conspiracy in restraint of trade because a price-fixing agreement is unlawful per se.”).
42 Id. at 682.
43 Id. at 703–05.
44 Id. at 668.
45 Id. at 669–70.
46 Id. at 669.
48 Id. at 758.
the significant notice problems of using Section 1 would render the statutory enforcement scheme unworkable.49 The notice and remedial problems are so closely related that Rahl’s concern over notice mostly anticipates Turner’s later expressed doubt as to the existence of a viable remedy.

Posner enters the conscious parallelism debate as a critic of Turner. Posner begins by expressing skepticism of the theory that tacit collusion, in the absence of any system of monitoring and enforcement, could generate stable cartel prices.50 Posner specifically directs his criticism to the price leadership model described by Turner and implicitly warranted by the Court as a species of unlawful collusion in American Tobacco, where the major cigarette manufacturers were found guilty of violating Section 1 for participating in a scheme in which they followed the lead of R.J. Reynolds.51 Posner argues that price leadership, with nothing more assumed, provides an unpersuasive theory of collusion. If the follower firms simply mimic the price changes of the leading firm, then the leading firm could choose to undercut the cartel price whenever the opportunity arrives (in short time windows or in narrow markets) and quickly return to the cartel price to prevent a breakdown. Because of this vulnerability, Posner argues that successful collusion requires some system of monitoring and enforcement, even if or especially if there is no concrete agreement.52 A pattern of price leadership without any accompanying evidence of monitoring and enforcement should be insufficient to support a Section 1 conspiracy finding, according to Posner.53 However, when evidence of enforcement and monitoring are added to the particular observations of parallel conduct, Section 1 enforcement is entirely appropriate.54

In contrast to Turner (and Rahl), Posner does not suggest that Section 1 is a mostly ineffective or inappropriate enforcement tool with respect to tacit collusion. Posner argues that enforcement agencies should use Section 1 more aggressively in cases of circumstantial evidence, which necessarily implies cases of tacit collusion.55 In the absence of evidence of an agreement, Posner would have enforcers substitute evidence of monitoring and enforcement.

This is a reasonable position when viewed on an abstract plane. The Supreme Court’s case law has long supported the view that courts can infer conspiracy from circumstantial evidence.56 Radically, the Posner of 1969 suggests that the question of whether an agreement actually exists is a red herring. The essential question in his view is whether a conspiracy should be inferred because the evidence indicates that the observed arrangement has sufficient infrastructure, backed up by practice, to operate as a reasonably stable cartel. The infrastructure consists of shared information, monitoring, and enforcement. The practice consists of efforts to monitor and enforce the terms of a cartel, whether the parties have formally agreed to it or not.

On the question whether a court can find, in a manner consistent with the common law, that the parties have agreed, Posner argues that courts can infer the existence of a “unilateral contract.”57

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49 Id. at 762.
50 Posner, supra note 1, at 1569–75.
51 Id. at 1568, 1585–87.
52 Id. at 1570.
53 Id. at 1578–79.
54 Id. at 1567–87.
55 Id. at 1583–84.
56 Interstate Circuit, 306 U.S. at 221; Theatre Enterprises, 346 U.S. at 540; cf. Twombly, 550 U.S. at 556 n.4 (“The parties in this case agree that ‘complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason,’ would support a plausible inference of conspiracy.”) (citation omitted).
57 Posner, supra note 1, at 1576.
Such a contract exists, in the ordinary common law setting, when one party announces that he will offer something in exchange to anyone who carries out some specific actions. For example, a dog owner may post a sign saying that he will pay a reward to anyone who returns a dog bearing certain features; and under such conditions the person who complies with the terms of the offer thereby accepts and is entitled under the law to the reward. The promise followed by conduct meeting its conditions constitutes a unilateral contract. In the same sense, argues Posner, a firm that takes an action that is likely to be construed by other firms as an invitation to set the price at a high level effectively communicates the terms of a unilateral contract to those other firms. If they accept the contract by setting their prices at a high level, then under the law an agreement exists.58

The difficult questions generated by Posner’s approach in 1969 appear in the details of application. What sort of suspicious phenomena justify an inference that collusion might be the explanation? Once a court observes such phenomena, what sort of evidence justifies an inference of collusion? Posner’s article discusses some of the phenomena, as do his opinions in the text messaging case. However, some of the oft-cited examples of suspicious phenomena have turned out to have low probative weight, as Posner concedes in Text Messaging 2015.59

One classic example, noted by Posner in Text Messaging 2010, is the observation of price going up as costs fall.60 This was an important observation in the Court’s finding of conspiracy in American Tobacco.61 Posner refers to the phenomenon in his 1969 article as a potential piece of circumstantial evidence in Section 1 cases.62 In American Tobacco, the Supreme Court noted that cigarette prices had increased as costs fell during the Depression.63 The cigarette sellers had offered no justification sufficient to allay the suspicion of collusion. However, historical evidence indicates that demand for cigarettes increased markedly during the Depression.64 The observation that cigarette prices increased as costs fell during the Depression could suggest that the cigarette sellers were colluding. On the other hand, the observation could also suggest that prices increased with demand, as in any market. If demand increases and prices increase too, then clearly it would be inappropriate to infer conspiracy on the part of the sellers in the particular market under observation. Hence, the Supreme Court’s use of the evidence of a price increase at the same time as costs fell as a fact supporting a charge of conspiracy in American Tobacco is an example of improper inference. If, on the other hand, a case arises in which demand remains stable or falls, costs also fall, and price increases, then an inference of conspiracy among the sellers would be minimally plausible.

The same pattern with respect to prices and costs appears in the text messaging litigation. In Text Messaging 2010, Posner notes that prices for messaging services, in the “pay per use” market in which the plaintiffs allege the conspiracy occurred, had increased at a time when costs were

58 Id.
59 Text Messaging 2015, 782 F.3d at 871.
60 Text Messaging 2010, 630 F.3d at 628.
62 See Posner, supra note 1, at 1585. However, Posner expresses some skepticism toward the price increase (with falling costs) observation, and especially criticizes Turner’s readiness to embrace the observation as evidence of conspiracy. Id.
63 American Tobacco, 328 U.S. at 805.
falling. However, in *Text Messaging 2015*, Posner finds that the price increases could be attributed to a policy on the part of the defendants to shift consumers out of the more expensive “pay per use” text messaging service to cheaper bulk plans that permit the consumer to send a large (or unlimited) number of messages per month for a fixed price. Moreover, the customers who chose to remain in the pay-per-use market were those who used the messaging service quite infrequently and were relatively price inelastic. If, as the result of some market disruption or change, a multi-service firm finds that it has a group of consumers who are price inelastic in some particular market that it serves, then it will rationally raise price under the Ramsey-pricing model. There would be no need for a collusive agreement among the wireless network firms to see prices going up in the price-per-use messaging market. Although the text messaging case appears at first glance to be one where price increases as costs fall, raising the suspicion Posner notes in *Text Messaging 2010*, a closer look at the market, as Posner undertakes in *Text Messaging 2015*, indicates that a change in demand conditions (and to some degree cost conditions) could fully account for the price increase.

These observations undermine the probative weight of the simple observation that “price increases while costs fall” in a circumstantial-evidence conspiracy case. As a general matter, courts should not accord such an observation any inferential weight unless the plaintiff can also produce evidence indicating that demand conditions could not justify the price increase. Although *Text Messaging 2010* cites the observation as one of several factors supporting the trial judge’s refusal to dismiss the complaint, one lesson suggested by *Text Messaging 2015* is that courts should not cite the observation, standing alone with no evidence on demand conditions, without an accompanying admonition that it has zero probative value.

Recall that Posner’s 1969 article argues that courts should use evidence showing the existence of monitoring and enforcement mechanisms to support the inference of conspiracy. As with the case of “suspicious price increases,” the probative weight of evidence of such activities depends greatly on how one defines the activities and the specifics of every instance of application. The problem of definition is illustrated by one of the Court’s famous circumstantial-evidence Section 1 cases, *American Column*. In *American Column*, the Court found the enforcement mechanism in the reluctance of any member of the information-sharing plan to depart the plan and thereby forgo the benefits of being a member of the plan. This is perhaps the most troubling example of the use of circumstantial evidence in all of the Section 1 case law. Of course, every cartel member for-

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65 *Text Messaging 2010*, 630 F.3d at 628.
66 *Text Messaging 2015*, 782 F.3d at 877.
67 *Id.* at 876–77.
69 The district court in *Text Messaging* dismissed the first complaint (2009) using similar reasoning to Posner’s *Text Messaging 2015*. *In re Text Messaging Antitrust Litig.*, No. 08 C 7082, 2009 WL 5066652, at *11 (N.D. Ill. Dec. 10, 2009) (“In the wireless communications industry, price competition is fierce for voice calling, data services, and bundled plans. Most consumers purchase text messaging services on a bundled or unlimited basis. Defendants charge consumers steep penalties for early termination of service contracts. Given these factors, parallel pricing in this single, relatively narrow part of the field in which they compete does not support a reasonable inference of an agreement not to compete.”).
71 *Id.* at 401–12.
goes the benefits of being in a cartel if he chooses to cheat on the cartel. But basic cartel theory holds that the incentive to cheat is strong—often a dominant strategy—precisely because the benefits from cheating exceed the benefits from remaining in the cartel in any single period of consideration. As a general rule, evidence of an enforcement mechanism should refer to evidence of a punishment mechanism independent of the loss of the benefits of cartel membership. Such a definition should be part of the inference case law under Section 1.

One can raise similar questions about monitoring evidence. If the definition of monitoring includes self-reporting, as in American Column, then it is arguably too broad. A firm can report list prices without also reporting the actual transaction prices. An information-sharing plan that does not require the reporting of actual transaction prices leaves quite a lot of room for firms to discount list prices and thereby undercut a collusive pricing structure. This was one of the lessons of Du Pont (Ethyl), where the court found that the evidence of discounting below delivered prices weakened the FTC’s theory of tacit collusion.

These questions of application and detail bedevil any serious effort to take the more aggressive approach to Section 1 enforcement urged by Posner in his 1969 article. Posner’s Text Messaging 2015, while not entirely rejecting the thesis of his 1969 article, is a sobering exploration of the problems of application. Probably because of these difficulties, Posner concluded that a clear statement that Section 1 does not prohibit tacit collusion would help guide courts toward a more rigorous treatment of the circumstantial evidence in conspiracy cases.

The Journey that Remains: Where Do We Go from Here?

While Posner’s limitation of the scope of Section 1 provides guidance to other courts, the question remains whether other circuits will adopt his statement and whether the Supreme Court will endorse it at some point in the future. The limitation contradicts the Court’s most recent statements on the scope of Section 1 in Twombly. Even if the Supreme Court eventually endorses Posner’s limitation on the scope of Section 1, the larger question is whether it will have much of an impact on circumstantial-evidence conspiracy litigation. The circumstantial evidence cases have consisted of two types: one where the prosecution’s theory is that an actual agreement exists but that it is difficult to find evidence of the formal agreement, and the other where the prosecution’s theory is that only a tacit understanding or agreement exists. Posner’s limitation eliminates the second type of case—provided that it is brought under Section 1 and not by the FTC under Section 5. However, the two types of circumstantial evidence case are often factually indistinguishable, and many cases are, like Schrodinger’s cat, of both types at the same time. Longstanding doctrine enables plaintiffs to bring circumstantial evidence cases to court and to survive summary judgment on the basis of plus factors established in Interstate Circuit. Courts have not required evidence of the formal agreement, either in text or transcript form, among the conspirators. Posner’s limitation, if eventually accepted by the

72 Note that I am not considering a case where the whole cartel disintegrates in a punishment scheme (trigger strategy) against any particular deviator. I have in mind the case where one firm deviates while the remaining firms stay within the cartel.

73 E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

74 Id. at 132.

75 Text Messaging 2015, 782 F.3d at 879.

76 See Twombly, 550 U.S. at 564–70.

77 On plus factors and the Interstate Circuit doctrine, see Hulten, supra note 27, at 134–43.
courts, will change the theories asserted by plaintiffs, but may not substantially change the sorts of circumstantial-evidence conspiracy cases that enter the courts.

There are also questions having to do with the present state of Twombly and the definition of agreement. Consider the Twombly question first. Posner’s Text Messaging opinions, viewed together, take a relatively plaintiff-friendly approach to the dismissal question and a seemingly defendant-friendly approach to the summary judgment question. The reason for describing Posner’s approach as plaintiff-friendly at the dismissal stage is that he suggests that an undefinable list of facts can serve as plus factors that enable a plaintiff to get beyond the dismissal stage.\(^\text{78}\) Such an approach encourages plaintiffs to come into court with a long list of facts that can satisfy this burden. And, as I noted earlier, some of the facts often used for this purpose, such as the observation that “price increases while costs fall,” should be accorded zero probative weight standing alone. On the other hand, in the summary judgment phase, Posner imposes a degree of rigor on the inference process that goes beyond what is suggested in the Supreme Court’s foundational circumstantial-evidence conspiracy cases.\(^\text{79}\) In this sense, Posner appears to favor defendants at the summary judgment stage.

This is a troubling pattern under the theory of Twombly. One important reason for imposing a plausibility standard, the Court argued in Twombly, is to save trial courts and defendants the expense of going through discovery, which can be costly and time-consuming, when it is unlikely that the plaintiffs will procure sufficient evidence to pass the summary judgment threshold.\(^\text{80}\) A light touch at review of the dismissal stage followed by a heavy hand at summary judgment contradicts this rationale for Twombly, and opens the gates to the sort of cases the Twombly doctrine attempts to bar. In lending credibility to such cases, the light-touch review enables plaintiffs to threaten to impose significant discovery costs on defendants. As discovery costs increase, such threats become as powerful as threats to impose trial costs. Imposing such costs on defendants then leads directly to the perverse incentive effects of tacit collusion prosecution that Posner worries about in Text Messaging 2015.

A counterargument is that it is not entirely clear what sort of antitrust case Twombly attempts to bar. The general term “plausibility” does little to resolve this question. This problem of definition is properly attributed to the Twombly opinion rather than Posner’s application of Twombly. However, the solution to this problem is suggested in Text Messaging 2015 (and also by the trial court’s opinion in Twombly). Posner’s decision rests largely on his assessment that the plaintiffs had failed to produce objective evidence contradicting the conclusion that the defendants’ conduct was individually rational.\(^\text{81}\) If Posner had subjected the evidence brought into court at the dismissal stage to the same test, he probably would have fashioned a more demanding standard for trial courts to apply than the multiple plus-factors approach that he adopts in Text Messaging 2010. It follows from this that Twombly itself, when applied to circumstantial-evidence conspiracy cases, should be interpreted to require evidence inconsistent with individually rational conduct at the dismissal stage. Under the individual rationality test, Posner could have conducted the same rigorous analysis of the “price increase after costs fall” observation at the dismissal stage that he

\(^{78}\) Text Messaging 2015, 782 F.3d at 871–76; Text Messaging 2010, 630 F.3d at 627–29.

\(^{79}\) See Text Messaging 2015, 782 F.3d 867.

\(^{80}\) Twombly, 550 U.S. at 558–59.

\(^{81}\) Text Messaging 2015, 782 F.3d at 871–78.
applies at the summary judgment stage, and the result may have been a reversal of the trial court or a remand requiring the court to apply the individual rationality test.

The other question remaining after Posner’s Text Messaging 2015 has been at the heart of circumstantial-evidence conspiracy cases from the start, and that is the definition of tacit collusion. There is not enough space in this contribution to discuss this question in reasonable depth, but I will sketch some of obvious concerns here.

The Supreme Court, in its effort to retract the dictum of Brooke Group that tacit collusion is “not in itself unlawful,” 82 states in Twombly that “conscious parallelism . . . is not in itself unlawful,” 83 after quoting from an earlier opinion indicating that tacit collusion falls within the prohibition of Section 1. 84 The question raised by this is what courts should regard as tacit collusion. The distinction between conscious parallelism and tacit collusion can be explained by reference to the two-firm Cournot oligopoly game. 85 In the Cournot-Nash equilibrium, each firm chooses an output level taking the anticipated output choice of its rival as given and maximizing profit with respect to the residual market. In the collusion outcome, each firm adopts an output level that maximizes the joint profits of the two firms. The Cournot-Nash equilibrium, because it involves each firm considering the anticipated output of the other firm, could easily generate consciously parallel behavior. However, collusion requires more than conscious parallelism; it requires accommodation and adjustment so that each firm takes a complementary position along the set of output combinations that optimize joint profits. The question is whether the taking of such positions can occur in the absence of a formal agreement among the firms. Since conflict is likely, especially if the firms are not equally efficient, the firms would have to acquire a shared understanding of signals, and a method of enforcing the joint profit-maximizing allocation.

This suggests Posner was correct in 1969 to hold that tacit collusion of this sort should fall within the reach of the Sherman Act. However, it also points to a narrower definition of tacit collusion than what currently exists in the case law. Case law recognizes two types of tacit collusion: price leadership and focal point coordination. The price leadership model is exemplified by American Tobacco. 86 The focal point model of tacit collusion has been suggested in cases like Maricopa, 87 where the Court expressed the concern that physicians would use the maximum price-setting mechanism under the challenged insurance arrangement to collude in the fee-for-service market. Posner’s theory would imply that the basis for inferring conspiracy is weak in both types of case, unless plaintiffs can identify and prove the existence of an enforcement mechanism. 88 The Supreme Court’s case law has not incorporated this important proviso from Posner. Moreover, the definition of an enforcement scheme is difficult to state, and American Column stands as a lasting reminder that such a definition can easily be botched. If the costs of erroneous convictions are substantial, Posner’s flat exclusion of tacit collusion from the reach of Section 1 could be prefer-

82 Brooke Group, 509 U.S. at 227.
83 Twombly, 550 U.S. at 553 (quoting Brooke Group, 509 U.S. at 227).
84 Id. (“[T]he crucial question is whether the challenged anticompetitive conduct ‘stem[s] from independent decision or from an agreement, tacit or express[.]’”) (second alteration in original) (quoting Theatre Enterprises, 346 U.S. at 540).
85 See, e.g., Hylton, supra note 27, at 83–85.
86 American Tobacco, 328 U.S. 781.
88 For a recent 12(b)(6) decision that considers enforcement and monitoring mechanisms, see In re Domestic Airline Travel Antitrust Litig., 221 F. Supp. 3d 46, 60 (D.D.C. 2016).
able to the more theoretically appropriate rule. However, if, as is likely, the Supreme Court rejects Posner’s limitation of Section 1, a preferable path forward would entail the Court adopting a narrower definition of tacit collusion consistent with Posner’s argument.

**Conclusion**

Posner’s views on oligopoly pricing have enriched antitrust for nearly 50 years, and they have not been static. The general arc, however, has been from optimism for aggressive enforcement to a more conservative enforcement stance that worries about the costs of over-deterrence. More important than his suggested approach to enforcement are the clarity and richness of his arguments, which have guided courts not only in applying antitrust law but also in how to think about antitrust.

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Understanding Richard Posner on Exclusionary Conduct

Steven C. Salop

Over his antitrust career of now about 55 years, Judge (and Professor) Richard Posner has provided highly creative and incisive contributions to antitrust jurisprudence. These contributions have spanned the entire range of antitrust categories: procedure, mergers, vertical restraints, collusion, and exclusion. There is no topic on which he has not made important contributions. A single article cannot touch on, let alone do justice to, all of his ideas or conclusions.

This article focuses on exclusionary conduct, the area where I have a comparative advantage. Posner has written about exclusion generally as well as specific types of potentially exclusionary conduct. Reviewing his writings in this area is like drinking from a fire hose. As such, this article will focus on the areas of exclusionary conduct where I have the greatest interest. Aside from several judicial opinions, I will discuss his 1974 article on exclusionary conduct, the 1976 first edition of his antitrust law treatise, and mainly his 2001 second edition.

Posner’s analysis of exclusionary conduct in his 1974 article and the First Edition were highly influential. The two works presented the economic analysis of exclusion in a clear way that lawyers and judges could understand and use. They set out relatively simple analyses (and criticisms) of classic cases. His analysis of predatory pricing used cutting-edge game-theoretic analysis, although for the most part, his analysis of non-price exclusionary conduct did not. For economists like myself who entered antitrust in the mid-1970s at the beginning of modern industrial organization economics (which is associated with models of strategic behavior in oligopoly markets), his analysis of non-price exclusionary conduct was not a security blanket but rather an overly simple framework to rebut.

Posner’s overall assessment of alleged exclusionary conduct is skeptical: “The category of exclusionary practices is too broad, embracing practices that may actually reduce the social costs of monopoly, and the courts are uncertain about the effects of possibly exclusionary practices in particular cases.” While he also makes the point that skepticism is not denial, the thrust of his analysis emphasizes the impediments to a firm succeeding at anticompetitive exclusion. Except for predatory pricing, he is less likely to delve deeply into the reasons why exclusion would succeed. This emphasis on one side of an argument is typical for mere humans. However, for a giant like Posner who has a well-deserved reputation of relentlessly following ideas, rather than ideology or fashion, it is humanizing as well as surprising.
It also is noteworthy that Posner believes that there is little need for Section 2. This is because most exclusionary conduct (e.g., exclusive dealing, tying, and vertical mergers) involves agreements that could be attacked under Section 1, while vertical mergers also could be attacked under Section 7. The possible exceptions are predatory pricing, unilateral refusals to deal, threats, and so on. He suggests that Section 1 could apply to predatory pricing because there is normally a contract.  

General Definition of Anticompetitive Exclusionary Conduct

Posner's proposed legal standard for anticompetitive exclusion has three prongs. The plaintiff must prove that (1) "the defendant has monopoly power" and (2) "the challenged practice is likely in the circumstances to exclude an equally or more efficient firm from the defendant's market." The defendant can rebut this showing by proving that (3) "the practice is, on balance, efficient."

The Monopoly Power Requirement. Most importantly, Posner limits his concern to monopoly maintenance. Liability is limited solely to firms with monopoly power, not simply market power. Thus, it would not be sufficient to prove that exclusionary vertical agreements such as exclusive dealing would reinforce the market power of the defendant or allow it to achieve monopoly power. Posner is very skeptical that exclusionary conduct can be used to achieve monopoly power and reduce efficiency when the excluding firm lacks monopoly power. Thus, his monopoly power prong refers to pre-existing monopoly power, not monopoly power achieved through the conduct in question.

Monopoly power can only be durable if there are entry barriers. This raises a contentious issue. George Stigler defined a barrier to entry as a cost that an entrant must bear that the incumbent did not need to bear, a definition which Posner uses. However, economists have since made clear that this definition is not appropriate when evaluating the role of potential entry in preventing supracompetitive pricing by monopolists when there are sunk costs. In monopoly and oligopoly markets, post-entry price competition normally would cause prices to fall. The anticipation of this post-entry competition can deter entry. An entrant may anticipate that while pre-entry prices are high, post-entry competition might be so intense that prices will fall below the entrant's average total cost. If this were the case, then entry would be unprofitable and therefore deterred.

This risk of entry failure becomes a deterrent when the entrant has any sunk costs, that is, costs that would not be recovered if it exits. This deterrent effect can occur even if the entrant has the same cost structure as the incumbent monopolist. Aside from sunk costs, risk occurs when the entrant has economies of scale and anticipates that its post-entry market share will be limited by product differentiation or various (even short-run) incumbency advantages, as well as by the

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7 Posner, 2d ed., supra note 3, at 260. I think that Colgate might provide some protection to the predator if Section 2 were repealed. See United States v. Colgate & Co., 250 U.S. 300 (1919).


9 Posner makes the point that every firm selling a differentiated product has some market power. He does not explain in detail how much market power would qualify as monopoly power, except to mention in passing the traditional requirement of a sufficient market share.


11 For a review, see Steven C. Salop, Strategic Entry Deterrence, 69 AM. ECON. REV. (PAPERS & PROCEEDINGS) 335 (1979). By contrast, Posner suggests that the optimal response of a monopolist facing entry normally would be to cede half the market to the entrant. Posner, 2d ed., supra note 3, at 74. That might be the case if they could collude or perfectly coordinate. However, the monopolist would have an incentive to prevent the entrant from anticipating this coordination. The incumbent could better deter entry by committing to a policy that would lead to deeper post-entry price competition. That might be done by adopting a technology with lower marginal costs.
Posner inexplicably does not explicitly confront this issue. In his discussion of predatory pricing, he refers to exit costs (i.e., sunk costs) and contestability theory. Posner, 2d ed., supra note 3, at 210. He cites William J. Baumol & Robert D. Willig, Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly, 96 Q.J. ECON. 405, 420 (1981). Posner, 2d ed., supra note 3, at 210 n.32. He argues that entrants generally would have exit costs. In discussing deconcentration policy elsewhere, however, the tenor of his discussion seems to reject the role of sunk costs in permitting monopoly pricing. Id. at 114–16. In this discussion, he is skeptical that non-recurring costs (which I believe means sunk capital costs) are significant.

Robert Bork applied the criterion that it would be sufficient to show that the entrant was cut off from the most efficient distribution network. In his 1974 article, Posner refers to possibly higher costs of two-level entry as potentially deterring entry. He also refers to two-level entry as taking longer, so that there would be delayed entry. Nevertheless, he does not discuss explicitly the idea that forcing higher costs on a fringe competitor or new entrant might allow the entrant to survive, albeit with higher costs, which would allow the monopolist to charge higher prices.

Posner mentions a hypothetical based on Oliver Williamson's famous example of an industry-wide union contract that raises the cost of the more labor-intensive firms by more than that of the capital-intensive firms, thereby allowing the capital-intensive firms to raise prices by more than their costs have risen. However, in this example, Posner focuses on the scenario where the labor-intensive firm would exit, not simply shrink.

The Meaning of “Exclude.” One interpretative issue involves the definition of the term “exclude” in the second prong. One possibility could be total exclusion. For example, in the case of exclusive dealing with distributors, must the plaintiff show that it has no alternative distributors? Alternatively, is it enough for the plaintiff to show that it has been cut off from the most efficient distributors? Or can the plaintiff satisfy this prong simply by showing that its costs have been materially raised because it lacks fewer than the optimal number of distributors? That is, can it suffice to show that it becomes a less efficient entrant rather than having to show that it will be unable to enter at all or that its entry would be materially delayed or restricted?

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The Equally Efficient Competitor Standard. Posner’s focus is placed solely on exclusion of equally or more efficient competitors and not less efficient competitors. One interpretative issue involves the meaning of the phrase “equally or more efficient competitor.” A straightforward reading of this second prong of his standard might suggest that the defendant can rebut the plaintiff’s case by showing that the excluded competitor is less efficient in fact. An alternative interpretation is that the conduct would be capable of excluding an equally or more efficient competitor, whether or not the specific excluded competitor is more or less efficient. The latter definition is stated elsewhere. It also seems implied by Posner’s analysis of the price/cost test for predatory pricing.

12 Posner inexplicably does not explicitly confront this issue. In his discussion of predatory pricing, he refers to exit costs (i.e., sunk costs) and contestability theory. Posner, 2d ed., supra note 3, at 210. He cites William J. Baumol & Robert D. Willig, Fixed Costs, Sunk Costs, Entry Barriers, and Sustainability of Monopoly, 96 Q.J. ECON. 405, 420 (1981). Posner, 2d ed., supra note 3, at 210 n.32. He argues that entrants generally would have exit costs. In discussing deconcentration policy elsewhere, however, the tenor of his discussion seems to reject the role of sunk costs in permitting monopoly pricing. Id. at 114–16. In this discussion, he is skeptical that non-recurring costs (which I believe means sunk capital costs) are significant.


14 Posner, Exclusionary Practices, supra note 1, at 524.

15 Oliver E. Williamson, Wage Rates as a Barrier to Entry: The Pennington Case in Perspective, 82 Q.J. ECON. 85 (1968). Posner does not cite Williamson’s Pennington article, citing instead W. Kip Viscusi, John M. Vernon & Joseph E. Harrington Jr., Economics of Regulation and Antitrust 183–84 (2d ed. 1995). His hypothetical also does not involve an industry-wide bargaining agreement, but rather separate bargains with the various firms. In explaining why this strategy likely would fail, he explains that the union would fear that the remaining monopolist would become a monopsonist, a point discussed elsewhere in this article.

16 POSNER, 2d ed., supra note 3, at 251.
However, this interpretation raises two other issues. First, it seems clear that if an entrant has the same technology as the incumbent monopolist but has higher costs because the exclusionary conduct itself limits its scale, that firm would be considered equally efficient. However, suppose an entrant has higher costs when it enters, but it would achieve the same costs as the monopolist in the future if it were not excluded. Is that entrant considered equally efficient? Posner does not address this issue. However, some commentators have suggested that he would not consider such firms equally efficient. 17

Second, there is a question of how he would define an “equally efficient entrant” when products are differentiated. For example, suppose that the monopolist and entrant have identical fixed and marginal costs. Suppose that their products are differentiated, so that some consumers would prefer each of them if their prices were identical. If their market shares would each be 50 percent at identical prices, then the entrant clearly would be equally efficient. However, suppose instead that the monopolist would obtain 80 percent of the customers at identical prices. This could be said to suggest that the monopolist’s product is “better” for most consumers, so that the entrant could be characterized as less efficient. But, even if a high fraction of consumers do prefer the monopolist’s product, a significant number prefer the entrant’s product. Thus, if the entrant were forced to exit as a result of exclusionary conduct, some consumers would clearly be harmed and that harm would need to figure in the welfare balance.

This is an important point because it is common for entrants to sell differentiated products. In doing so, their entry is more likely to be accommodated by the incumbent monopolist. However, the entrant’s demand disadvantage also would make it cheaper for the monopolist to compensate distributors for an exclusive that closes off access to the entrant, even if the monopolist would not have the incentive to pay to exclude an entrant that would obtain half the market at equal prices. In this hypothetical, whether or not to characterize the entrant that would obtain only 20 percent of the business as less efficient becomes key to the use of the equally efficient entrant standard.

Harm to Efficiency. This same efficiency issue also arises somewhat differently in determining whether the exclusion is “on balance, efficient.” Posner’s overarching standard is efficiency, i.e., total welfare, not consumer welfare. If the monopolist is more efficient than the excluded firm, then the shifting of production from the victim to the monopolist will increase production efficiency. Thus, it would appear to be a permissible defense available to the monopolist.

This also raises the question of whether the efficiency gains from the exclusion could offset the deadweight allocative efficiency loss from the reduction in total market output. It is easy to show that this outcome can occur. To illustrate, suppose that the monopolist’s constant marginal cost is

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$20 and the monopoly price is $60. Suppose that the market output at the monopoly price is 40 units, which yields the monopolist profits of $1600. Suppose that the less efficient entrant has a constant marginal cost of $50 but has limited capacity, say ten units. This formulation captures in a simple way the idea of the entrant with limited ability to grow. In this situation, the monopolist in principle might set a limit price of just under $50 to undercut the entrant and maintain a 100 percent market share and profits of $1500. However, it is easy to show that the monopolist increases profits by accommodating the entry and ceding the ten units to the entrant. Maximum profits occur when the monopolist sets a price of $55 and sells 35 units, for total profits of $1575. The entrant would sell ten units for total market output of 45 units.

Starting from this but-for world of accommodation (i.e., no exclusion), suppose that the monopolist is able to pay the most efficient input suppliers to refuse to sell to the entrant, which would raise the entrant’s costs to a level above $60 so that it is unable to enter. As long as the monopolist can exclude the entrant with a payment of less than the increase in monopoly profits of $25, it will be profitable. Now consider the impact on efficiency of the exclusion. The exclusion raises the price by $5 (from $55 to $60) and reduces the output by five units (from 45 to 40), leading to a consumer deadweight loss of $10 (i.e., $5 x 4 units). The five unit reduction also creates a producer deadweight loss of $75 (i.e., 5 units at a margin of $15 over marginal cost). Thus, the total deadweight loss in allocative efficiency is $200 (i.e., $10 + $75). However, production efficiency rises because the ten units that the entrant would have produced at a cost of $50 are now produced by the monopolist at a cost of $20, resulting in an increase in production efficiency equal to $300. The increase in production efficiency swamps the decrease in allocative efficiency, despite the reduction in market output.

Posner’s analysis of potential harm to efficiency is more complicated than Bork’s because Posner recognizes that part of the “social cost of monopoly” includes the potential inefficient use of scarce resources to maintain its monopoly power. While such investment could include welfare-increasing R&D, it also can include investment in the creation and maintenance of barriers to entry. However, if they are merely expenditures that lack efficiency benefits, then they contribute to the deadweight loss of monopoly.

In principle, the monopolist might use up the entire monopoly profits maintaining the monopoly. In this situation, even though Posner’s welfare standard is aggregate welfare (i.e., efficiency), not consumer welfare, the loss in aggregate welfare actually would equal the loss in consumer welfare. However, this is just a limiting case. If the monopolist need not spend the entire monopoly profits, then the loss in consumer welfare would exceed his definition of efficiency losses. In fact, if the expenditures made to raise or create entry barriers were pure transfers (e.g., campaign

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19 For this example, I am assuming the demand curve is linear with a choke price of $100.

20 With this linear demand, at a price of $60, market demand would be 40 units and the monopolist’s profits would be $1600 (i.e., a price-cost margin of $40 times the 40 units).

21 With this linear demand, at a price just below $50, market demand would be 50 units and the monopolist’s profits would be $1500 (i.e., a price-cost margin of $30 times the 50 units).

22 With this linear demand, at a price of $55, market demand would be 45 units, of which the monopolist would sell 35 units, generating profits of $1575 (i.e., a price-cost margin of $35 times the 45 units).

23 Bork relied on Williamson’s famous diagram of total static welfare effects and then confusingly called it “consumer welfare.” Oliver E. Williamson, Economies as an Antitrust Defense: The Welfare Trade-Offs, 58 AM. ECON. REV. 34 (1968).

contributions to legislators that supported their erecting entry barriers), the transfers would not count as deadweight efficiency losses.

**Predatory Pricing**

Posner’s analysis of predatory pricing had an economic sophistication that was lacking elsewhere. In his 1974 article, he rejected the standard “war of attrition” model of predatory pricing, whereby the monopolist will win only if it has deeper pockets. Instead, he applied a more sophisticated game-theoretic model by which predatory pricing threats would be credible.25 In this model, predatory pricing could be used to create a reputation as a predator. That reputation would raise barriers to entry into other markets where the firm would potentially face competition by raising the entrant’s anticipated cost of entry.

This predatory reputation model was forward-looking economic theory.26 It also is complicated by what economists call the “last period” problem, which was first formalized in Reinhard Selten’s seminal “chain store paradox” article published in 1978.27 Suppose the predator operates in 100 separate markets. The reputation model suggests the firm would have the incentive to engage in predatory behavior when it faces entry competition in the first market because such conduct, while costly, would create a reputation that would deter entry in the other 99 markets. Selten showed that this formulation actually would “unravel” if players were fully rational. Consider what would happen in the 100th market. In that market, the monopolist would have no incentive to predate because it would not lead to further reputational effects. But consider now the 99th market. There are no reputational benefits from predating here because it is known that there will not be predation in the 100th market. And so on back to the first market, which means that the purported reputational effects cannot occur in equilibrium.

In the Second Edition, Posner refers to this unraveling issue.28 He concludes that it is unlikely to deter predatory pricing.29 I think that most economists would agree that the unraveling result is interesting but unlikely to be an issue in practice for a number of reasons.30 What I find more noteworthy is that as far back as his 1974 article, before any of this game-theoretic literature was developed in industrial organization economics, Posner recognized a variant of the unraveling issue. He also made the point that the reputation model would not apply if the entrant were to enter all markets simultaneously since that would eliminate future reputational benefits.31

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29 Id.

30 See Milgrom & Roberts, supra note 26. This same unraveling issue arises in the repeated prisoner’s dilemma game with a finite number of rounds. But as far back as the very first experimental play of the game in 1950 at RAND, the two players (UCLA professor Arman Alchian and game theorist John Williams) ended up reaching the cooperation outcome in about half of the 50 rounds. For a transcript of that game, see William Poundstone, *Prisoner’s Dilemma: John Von Neumann, Game Theory and the Puzzle of the Bomb* (1992). The transcript is reproduced on Brad DeLong’s website, https://web.archive.org/web/20000903010012/http://www.j-bradford-de long.net/economists/prisoners_dilemma.html.

Posner’s economic analysis leads him to conclude that predatory pricing should be illegal under two alternative standards.32 (Posner’s proposal is more aggressive than the Areeda-Turner rule proposed during the same period.) First, pricing should be illegal if it involves pricing below short-run marginal cost. Second, it should be illegal if it involves pricing below long-run marginal cost and there is evidence of anticompetitive intent. Posner recognizes difficulties in measuring costs and determining intent.

Corresponding to the first prong of Posner’s general test of anticompetitive conduct, only predatory pricing used to maintain monopoly would be actionable, not pricing by a firm with market power attempting to achieve monopoly power. However, he relaxes this limitation for new economy product markets, where he argues that predatory pricing to achieve a monopoly also would be actionable.

Applied to predatory pricing, the equally efficient competitor standard in Posner’s second general prong could mean nothing more than setting a price standard that the alleged predator can only be liable if it prices below its own costs, as opposed to the costs of the alleged victim (whether higher or lower). This rule makes sense because the alleged predator generally would have no way of knowing the costs of the entrant. Pricing below one’s own marginal cost would be economically irrational in the paradigmatic circumstances, so it might suggest an intent to monopolize. The first prong of Posner’s standard reflects this interpretation. The second alternative standard also fits this interpretation. If price exceeds marginal cost, then anticompetitive intent cannot be inferred automatically. Thus, Posner adds an explicit intent provision. The recoupment prong in Brooke Group33 also can be given an intent interpretation in that no profit-maximizing firm would knowingly engage in predation if it could not recoup.

Under the third prong of Posner’s general standard, the defendant might argue that the below-cost pricing was efficient because incremental sales will generate complementary product sales, such as aftermarket service. Alternatively, the defendant might argue that this is the introduction of a new product such that it must invest in obtaining consumer trial of the product. I see no reason to think that he intended the defendant to be able to defend below-cost pricing conduct by saying that it is efficient to destroy the rival firm because it is a less efficient firm. However, I see no statement that such a defense would be impermissible.

Aside from limiting his standard just to monopoly maintenance, it seems that Posner’s position is very close to the predatory pricing proposal of Bolton, Brodley, and Riordan.34 Moreover, Posner appears to expand the scope of this standard to include attempts to monopolize in his treatment of new economy markets.35

In discussing predatory pricing, Posner is somewhat dismissive of the impact of game theory models in antitrust. He explains that these models have made “limited inroads” because their required conditions are so exacting.36 While the “chain store paradox” may not be a good reason to reject the reputational value of predatory pricing, his general criticism of game theory is sur-

32 Id. at 518–20.
35 POSNER, 2d ed., supra note 3, at 255–56. He refers to the increased risk of predatory pricing, but he does not explicitly change the standard to include attempts to monopolize.
36 Id. at 212. Posner’s discussion includes game-theoretic oligopoly models, which he criticizes as not providing insights beyond those of non-game theory models such as Stigler’s. Id. at 60. He also cites a skeptical 1986 article by Frank Fisher at the time that strategic models were still new. Id. at 60 n.11.
prising. Posner’s own analysis of predatory pricing clearly embraces a game-theoretic analysis that predatory pricing can be a rational way to deter entry because the predator can gain a dynamic reputation that will deter entry in other markets, even if he did not provide equations setting out exact conditions.37 Similarly, while he characterizes Stigler’s famous oligopoly collusion model as price theory,38 that model really is game theoretic. Moreover, the conditions under which collusion is stable or unstable depend on a complex array of factors that he discusses in detail.39

Non-Price Exclusionary Conduct
Posner also applies his analysis to a variety of non-price exclusionary conduct: exclusive dealing, tying and bundling, vertical mergers (or more generally, vertical integration), exclusionary group boycotts, and unilateral refusals to deal. As a general matter, Posner is very reluctant to find non-price exclusionary conduct to be anticompetitive. It appears that he is more often swayed by the efficiency benefits explanation for the conduct than by the anticompetitive effects explanation. In addition, despite his concern with possible efficiency losses from rent-seeking conduct designed to raise entry barriers, that concern may be offset by the idea that the prospect of greater monopoly profits might drive investment.40

Exclusive Dealing. Posner is skeptical that exclusive dealing can succeed in helping a firm achieve or maintain market or monopoly power. However, he accepts that it can occur. His treatment of exclusive dealing is expanded in the Second Edition. Whereas in the First Edition, Standard Fashion41 is mentioned in a single footnote42 as a potentially valid case of entry deterrence, Posner devotes several pages to the case in the “new economy” chapter of the Second Edition, concluding that it remains good law.43 He also suggests that when exclusive dealing or other conduct does succeed, it generally will only delay entry because of the need for two-level entry, not deter entry permanently. In his manufacturer/distribution example, he suggests that the need to enter distribution as well as manufacturing will cause delays because it will take time for independent distributors to enter.44 This can occur in his paradigmatic example of a manufacturer acquiring (or obtaining exclusive contracts with) all the distributors operating in a highly competitive distribution market without any natural impediments to entry.

Posner also explains that this simultaneous entry will increase the required scale of entry. This can increase the costs of the new entrant relative to those of the existing firm, and can create a risk premium.45 The monopolist would not have faced this risk premium when it entered. Thus, this would create a barrier to entry under Stigler’s narrow definition.

37 The standard Chicago-school argument that predatory pricing is irrational also rests on the game theoretic observation that the strategy would fail if an entrant undertakes the counterstrategy of simply lining up financing.
39 POSNER, 2d ed., supra note 3, at 69–79.
40 Posner’s discussion of the various categories of exclusionary conduct involves considerable cross-referencing. While this creates conceptual unity, it sometimes makes the presentation denser. This density is magnified by Posner’s inclination to include interesting tangents.
42 POSNER, 1st ed., supra note 2, at 202 n.48.
44 Id. at 225.
45 Id.
This type of risk premium can essentially lead to entry being permanently deterred (or delayed for a very long time until exogenous market conditions significantly change). If potential entrants have higher costs, that may be sufficient to deter entry. This is particularly likely when there are significant economies of scale and sunk costs.\textsuperscript{46} The fear that the entrant may fail or the fear that this distribution will increase the risk premium for both the manufacturing and the distribution entrants. Finally, there also may only be a relatively short window of opportunity for entry, which also could make delay essentially long term or permanent.

While Posner does not acknowledge permanent deterrence in his discussion, he does so in his tying discussion.

[T]ying can in principle exclude an equally or even more efficient new entrant by forcing the entrant to enter with a more complex product than otherwise. Provided that such entry is riskier and hence more costly (rather than simply requiring more capital at the same average cost), entry will be slowed or deterred.\textsuperscript{47}

Posner suggests that input suppliers might be reluctant to go along with foreclosure, fearing that once the excluding firm vanquishes its rivals, it might turn against the input suppliers and exercise monopsony power.\textsuperscript{48} This conceivably might be the case for a single input supplier with foresight. However, when there are multiple input suppliers, resistance would be less likely because it would require coordination.\textsuperscript{49} Each input supplier would have the incentive to free ride by cooperating with the monopolist. In addition, the fear of monopsony may be unfounded if the input suppliers also have sufficient customers in other markets. Even with a limited number of input suppliers, they may go along because the monopolist can share the monopoly profits with them.

Posner acknowledges this free-rider problem in the context of his discussion of both predatory pricing and \textit{United Shoe Machinery}.\textsuperscript{50} He makes the point that this view of the free-rider problem would imply that no cartel would ever succeed. He also suggests that totally overlooking this type of free riding would have been less likely in \textit{United Shoe Machinery}\textsuperscript{43} because there were only a small number of shoe manufacturer customers.\textsuperscript{52} Thus, each might be large enough to recognize that free riding would not succeed because the competitors to United Shoe would end up not being viable.

He also discusses a similar possible constraint on achieving or maintaining a monopoly through exclusive dealing: the smaller competitor or entrant might counterbid to get non-exclusive distribution services (or another input). Indeed, for the same reason, Posner opines in \textit{Roland Machinery} that exclusive dealing contracts terminable in less than one year are treated as presumptively lawful.\textsuperscript{53}

\textsuperscript{46} Or, if the entrant requires multiple distributors in order to reach the entire market, or, if distribution involves economies of scale or scope, potential entrants may be unable to gain sufficient scale to be viable, serving only the entrant. This also may deter distributor entrants.

\textsuperscript{47} \textit{Id.} at 236 (emphasis added).

\textsuperscript{48} Posner uses the example of a union that makes a contract more favorable to the larger capital-intensive coal producer. \textit{Id.} at 197. This was Williamson's original formulation. See Williamson, \textit{supra} note 15.


\textsuperscript{50} \textit{POsner, 2d ed.}, \textit{supra} note 3, at 232.


\textsuperscript{52} \textit{Id. I} was surprised by this latter factual claim. The low concentration found in \textit{Brown Shoe}, \textit{Brown Shoe Co. v. United States}, 370 U.S. 294 (1962), suggests that there likely were many shoe manufacturers.

\textsuperscript{53} \textit{Roland Mach. Co. v. Dresser Indus.}, 749 F.2d 380, 395 (7th Cir. 1984).
However, counterbidding likely would be unsuccessful much of the time, even if exclusives have short duration. In the case of entrants, the monopolist might strike the exclusives before the entrant comes on the scene, thereby delaying entry. The monopolist also has a systematic bidding advantage because it is working to protect its monopoly profits, whereas the entrant is only bidding to achieve more competitive duopoly profits. For example, suppose that monopoly profits are $250 per year. If the equally efficient entrant achieves non-exclusive distribution and survives, suppose that the duopoly profits are $70 each for the entrant and now-former monopolist. Given these profits, the entrant would be willing to bid up to $70 for the non-exclusive distribution. By contrast, the monopolist would be willing to bid up to $180 (i.e., $180 = $250 – $70) to deter the entry. Thus, the monopolist normally would prevail with a bid of at least $71. This amounts to the monopolist being willing to share some of the monopoly profits with the input suppliers (here distributors). While Posner observes this point in *JTC Petroleum*, he does not do so in his general treatment of exclusive dealing in the *Second Edition*. With short-term exclusives, this same scenario would be replicated every period, resulting in deterrence, not just delay.

One possible reason why Posner might have ignored this analysis is a belief that there generally are a large number of input suppliers, and the entrant only needs one or two distributors to be viable. For example, suppose in my example that there are three potential distributors and the entrant only needs one to compete equally with the incumbent. The monopolist would need to pay $71 to each one of them to deter entry, for a total of $213, which is more than its gain from deterring entry. However, this door swings both ways. If the entrant needs to obtain two non-exclusive distributors to be viable, and if the entrant won the bidding for the first one of them, the monopolist would have the incentive to pay more than the entrant’s duopoly profits of $70 to the remaining two in order to deter the entry. Anticipating this outcome, the entrant would have no incentive to try to outbid the monopolist even for the first distributor. Thus, an entrant’s failure to counterbid might be rational behavior, not laziness.

Posner also may have had in mind that the equally efficient entrant would not be bidding for a non-exclusive, but rather would have been bidding head-to-head for its own exclusives. If this were an exclusive for the entire market, the monopolist would not have a bidding advantage. However, in most monopoly maintenance situations, the entrant is attempting to gain a non-exclusive foothold in the market against a somewhat entrenched monopolist. It is not attempting to become exclusive. For example, this would describe the situation facing WEOL in *Lorain Journal*, or Netscape in competing with Microsoft’s Internet Explorer.

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54 The more intense the post-entry competition, the larger the disparity in maximum bids will be. If the post-entry competition would drive duopoly profits down to $10, then the monopolist would be willing to bid up to $190 and the entrant would be willing to bid only $10.

55 *JTC Petroleum Co. v. Piasa Motor Fuels*, 190 F.3d 775 (7th Cir. 1999).


Exclusionary Group Boycotts. While Posner is skeptical of the outcome of some of the cases, including *Terminal Railroad*,59 he recognized the competitive concerns from exclusionary group boycotts, such as those in *Eastern States*60 and *Fashion Originators Guild*.61

In his *JTC Petroleum* opinion, Posner presented a very interesting analysis of the role and mechanism of an exclusionary group boycott in a cartel matter.62 In his description of the case, a road contractor cartel paid premium prices to several producers of emulsified asphalt to refuse to sell their critical input to JTC, a disruptive competitor. By neutralizing JTC, the cartel was able to maintain cartel prices. This was a Section 1 cartel case, and Posner characterizes the conduct as a group boycott. He also explains that the case would not be different if there were a single downstream firm instead of a cartel. He discusses the Granitz and Klein analysis of Standard Oil’s agreements with railroads as conduct that both raised the costs of Standard Oil’s refining competitors and stabilized the railroad cartel.63

It was somewhat surprising that Posner does not generalize *JTC Petroleum* to draw out its broader implications for the analysis of exclusive dealing and similar exclusionary conduct. For example, the economic analysis of *JTC Petroleum* clearly goes beyond the case of a group of upstream firms supporting a downstream cartel. Suppose there were a single downstream monopolist firm (like Standard Oil) and multiple competing upstream input suppliers. Suppose that the monopolist enters into exclusive dealing agreements with each of the input suppliers, which obligate each of them to raise their price or refuse to sell to new entrants. Alternatively, suppose that a dominant downstream firm strikes exclusive dealing agreements with some of the differentiated upstream suppliers and the remaining suppliers have the incentive to raise their prices to the smaller competitors, either unilaterally or from legal tacit coordination, not pursuant to a horizontal agreement. Again, the outcome would be the same. In both cases, those exclusive dealing agreements would allow the monopolist to achieve or maintain its monopoly prices by raising rivals’ costs. The monopolist could defeat counterbidding by the excluded rival by sharing the monopoly profits with the input suppliers. However, this broader approach does not show up in his basic analysis of exclusive dealing.

Similarly, Posner makes the point in his analysis of exclusive dealing that input suppliers would not want to take actions that would create a downstream monopolist that might gain monopsony power over them. That is true. However, there is a readily available answer. In *JTC Petroleum*, the cartel compensated the suppliers. The same point would apply to a monopolist or dominant firm. It can compensate the suppliers for refusing to deal with the small rivals. Even if they anticipated the monopsony, the suppliers would face free-rider problems in coordinating their resistance to the downstream firm’s payoffs. Posner recognizes the same type of free-riding concern in his analysis of predatory pricing in explaining why buyers do not resist the predatory price.64 However, he does not do so in the analysis of exclusive dealing.65

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60 E. States Retail Lumber Dealers’ Ass’n v. United States, 234 U.S. 600 (1914).
61 Fashion Originators’ Guild v. FTC, 312 U.S. 457 (1941).
62 JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775 (7th Cir. 1999).
64 POSNER, 2d ed., supra note 3, at 208.
65 Id. at 197.
In his analysis of exclusive dealing, Posner emphasizes that exclusives might force an entrant to enter at two levels (e.g., manufacturing and distribution), which would simply delay entry as the entrant or other firms enter the second level. But, the JTC Petroleum example can suggest why entry would be deterred, not just delayed: there may only be a limited number of asphalt pits in the local area and transportation costs may limit long distance deliveries.

**Tying, Leverage, and the Single Monopoly Profit Theorem.** Posner is skeptical of the leverage theory for tying. One reason is the single monopoly profit theory. As he puts it, “a second—and fatal—weakness of the leverage theory is its failure to explain why a firm with a monopoly in one product would want to monopolize a second product as well.”  He recognizes the fact that when the monopoly in the tying product is not protected by prohibitive barriers to entry, tying might delay entry into the tying product by requiring two-level entry. He also notes that this can deter entry if it is more costly to produce a more complex product. However, his treatment of tying does not recognize that the fixed proportions assumption of the single monopoly profit theory ignores the fact that tying might permit the monopolist to achieve a monopoly over consumers who purchase the tied product but do not purchase the tying product.

**Vertical Mergers.** Posner’s analysis of vertical mergers as a way to maintain monopoly is closely related to his analysis of exclusive dealing. This is not surprising in that he characterizes exclusive dealing as analogous to vertical integration by contract. The main competitive issue he analyzes in this section of the *Second Edition* is foreclosing competitors from access to the monopoly products of the merged firm. Posner concludes that vertical mergers should be forbidden only when undertaken by a monopolist, and then only where the merger is undertaken with anticompetitive intent either to exclude or to shore up a cartel.

Posner notes that integration of two successive monopolists will lead to lower prices. He repeats the point made earlier in the tying section that there is no benefit to integrating in order to leverage into a second monopoly because there is only a single monopoly profit. He then focuses on the possibility that vertical integration by a monopolist might delay entry that otherwise might undo that monopoly. He explains that entry will be delayed because the cost of entry falls by slowing down the process. At the same time, he accepts that the entrant may have higher costs because there is a risk premium from having to coordinate with distributors. However, he does not recognize in this discussion that these coordination problems might deter entry instead of simply delaying it.

Overall, Posner views “predatory” vertical integration as an “iffy” proposition. As partial support, he cites my failure to mention any real-world cases of anticompetitive vertical integration in a short

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66 Id. at 198–99.
67 Id. at 202.
68 Id. at 236.
69 Id. at 224.
70 Id. at 227–28.
71 Id. at 228. This is the “elimination of double marginalization” benefit.
72 Id. at 224–25.
73 Id. at 225–26.
summary article on leverage theory in the New Palgrave Dictionary. However, I would have thought that he was well aware of the exclusionary conduct of integrated firms like AT&T, electricity providers, and long distance railroads. On the chance that he writes a Third Edition, Daniel Culley and I have now catalogued the 52 vertical and complementary merger matters challenged by the FTC or DOJ in the 1994–July 2018 period.

**Unilateral Refusals to Deal.** Posner uses a single-firm version of JTC Petroleum to frame a discussion of unilateral refusals to deal. He also discusses Kodak and Aspen Skiing.

According to Posner, Kodak was wrongly decided. Kodak may have had market power over the installed base of copier owners, but all sellers of durable products that involve such after-market components have this power, and the buyers could have protected themselves by contract. Kodak lacked market power in the original equipment market, such that the loss of reputation would limit the harm. In his view, price discrimination is a better explanation for Kodak’s behavior than exclusion.

Posner does not mention or rebut the counterargument that this was a classic “last period” hold-up problem that was both inefficient and harmed consumers in the installed base. Had Kodak announced a change in policy to be applied only to newly purchased machines, there would not have been harm to the installed base and the plaintiff’s case would have collapsed.

The price discrimination explanation is creative but pretextual. It fails to explain why Kodak suddenly decided that it was profitable to price discriminate, just at the moment that its copier business was in decline. Buyers presumably did not protect themselves by contract because they relied on Kodak’s reputation, failing to anticipate that Kodak’s fortunes might change in the future before their copiers wore out. It is true that the harm was temporary because it only applied to the current installed base, but that is not a bar to finding an antitrust violation and deterring future ones. Moreover, the contract would not have been trivial to negotiate and enforce. Would it require Kodak to sell parts to any or all ISOs at the same price as self-servicers? Or would it set terms under which Kodak could terminate certain ISOs? By the same token, consumers, in principle,

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74 Id. at 226 n.53 (discussing Steven C. Salop, *Vertical Mergers and Monopoly Leverage, in The New Palgrave Dictionary of Economics and the Law* (Peter Newman ed., 1998)). My work does focus more on theory, reflecting my comparative advantage and the fact that there are other economists with more empirical expertise. I note, however, that Posner does not cite an earlier, longer article that does address several matters. See Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 *Antitrust L.J.* 513 (1995). More importantly, he does not engage on the various critiques of the Chicago-school approach set out in numerous articles. For example, he continues to embrace the single monopoly profit theory.

75 MCI Commc’ns v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983); Litton Sys., Inc. v. AT&T Co., 700 F.2d 785, 798–800 (2d Cir. 1983).


82 Id. at 236–37.

83 Posner’s price discrimination analysis follows Benjamin Klein, *Market Power in Antitrust: Economic Analysis After Kodak*, 3 Sup. Ct. Econ. Rev. 43 (1993), which he cites. Id. at 236 n.68.
could have contracted with Microsoft to prevent it from integrating Internet Explorer into Windows or signing exclusive browser contracts with a critical number of ISPs.

Posner also is critical of the *Aspen Skiing* case.\(^8^4\) He makes the valid point that the joint weekly lift ticket was set at the cartel price and the squabble apparently began over the division of the cartel profits. But he ignores the rest of the case. After the breakdown of the joint ticket cartel, the plaintiff, Highlands, attempted to purchase daily tickets from the defendant, Ski Co., at the same retail price as the defendant sold to other purchasers, but Ski Co. refused to do so in an apparent attempt to destroy the plaintiff’s business.\(^8^5\)

One interesting aspect of Posner’s discussion is his concern with over-deterrence. He makes the point that if a monopolist cannot terminate a cooperative relationship with competitors, it may be deterred from even implementing such a relationship to begin with.\(^9^0\) This issue could be applied to the *Kodak* case. One apparent difference in the two cases is that Kodak’s cooperation with ISOs had gone on for many years and apparently was mutually beneficial in that the ISOs offered high quality service that presumably made Kodak copiers more attractive to consumers. In addition, Kodak’s termination of the relationship only came at a time when Kodak’s business model worsened and was heading towards collapse. These facts suggest that it was unlikely that Kodak would have been deterred by the knowledge that it would not be able to withdraw later.

Competitor Complaints About Mergers. One place where Posner’s skepticism approached denial was his treatment of competitor complaints in his opinion reviewing the FTC’s decision in the *Hospital Corporation of America* merger. Towards the end of his discussion of liability, Posner opines:

> Hospital Corporation’s most telling point is that the impetus for the Commission’s complaint came from a competitor. [...] The hospital that complained to the Commission must have thought that the

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\(^8^4\) *Aspen Skiing Co.*, 472 U.S. 585.

\(^8^5\) *Id.* at 607–10.

\(^8^6\) POSNER, 2d ed., supra note 3, at 242–43.

\(^8^7\) Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370 (7th Cir. 1986).

\(^8^8\) *Id.* at 379.

\(^8^9\) *Id.*

\(^9^0\) *Id.* at 379–80.
acquisitions would lead to lower rather than higher prices—which would benefit consumers, and hence, under contemporary principles of antitrust law, would support the view that the acquisitions were lawful. 91

Posner’s analysis ignores the possibility that the complaining competitor may have been concerned with possible exclusionary conduct by Hospital Corporation. For example, the complaining competitor may have been concerned that the merger might increase Hospital Corporation’s incentives to expend resources in the “certificate of need” regulatory process to oppose the complaining hospital from expanding its capacity. His failure to consider this exclusionary incentive as possibly motivating the competitor complaint is hard to understand in that the opinion had already discussed the possibility that colluding hospitals could use the certificate of need law to “enable them to delay any competitive sally by a noncolluding competitor.” 92

**Excess Capacity and Intense Post-Entry Competition as a Barrier to Entry.** A key insight of the strategic (i.e., game-theoretic) approach to antitrust economics involves the fact that when there are sunk costs, the anticipation of post-entry competition can deter entry by an equally or more efficient rival and permit the incumbent firm to maintain the monopoly price without fear of entry. There is a large literature on this issue and the companion concept of “contestable” markets when there are no sunk costs and prices cannot adjust quickly to entry. As a general matter, economists have concluded that most markets are not contestable because they involve sunk costs and incumbent firms can quickly respond to entry with price reductions. 93

Posner alludes to this issue in his analysis of predatory pricing. He makes the point that construction of excess capacity by the monopolist makes a threat of below-cost pricing more credible. 94 He then makes the further point that a firm might adopt a technology with higher fixed costs and lower marginal costs as a way of “warning” potential entrants that it is quite likely to reduce its price drastically in the event of entry. 95

This latter observation that a monopolist might adopt a technology that would induce it to drastically reduce its price in the event of entry in order to deter entry is important for another reason. It suggests that the creation of excess capacity with correspondingly lower marginal costs might be considered as anticompetitive conduct under Section 2. 96 Thus, it could be highly relevant to a discussion of the economics of the excess capacity allegations in Alcoa. 97

**Exclusionary Conduct in New Economy Markets**

Posner analyzes exclusionary conduct in “new economy” markets in a new chapter added to the 2001 Second Edition of his treatise. 98 The Posner of this chapter seems a bit like a New Man. While

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91 Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1391–92 (7th Cir. 1986).
92 Id. at 1387.
95 Posner, 2d ed., supra note 3, at 220. He notes that this observation is very old. Id. at 220 n.45.
96 That analysis would have to take into account the fact that a technology with lower marginal cost would incentivize the monopolist to charge a somewhat lower (albeit still monopoly) price. Thus, the net competitive impact of the conduct would depend on the likelihood of entry and the impact of that entry on prices versus the magnitude of the reduction in marginal costs and prices absent entry.
97 United States v. Aluminum Co. of Am., 148 F.2d 416, 431 (2d Cir. 1945).
he remains skeptical that exclusionary conduct will be anticompetitive, he emphasizes that skepticism is not the same as denial.99 He recognizes that network effects and economies of scale may deter entry, despite the high rates of innovation.100 He recognizes that exclusive dealing, tying, and vertical integration can protect monopolies by raising barriers to entry that significantly delay entry.101 He recognizes that tying may increase the entrant’s costs by more than it raises the monopolist’s costs.102 He sees an increased risk of predatory pricing, suggesting that predatory pricing can be used to achieve a monopoly, not simply to maintain a monopoly, which was the view in the previous chapter.103

His treatment of exclusionary conduct in Chapter 7 of the Second Edition characterizes “raising rivals’ costs” as “not a happy formula” because raising competitors’ costs is neither necessary nor sufficient to maintain monopoly.104 It is correct that conduct that raises a competitor’s costs may not result in higher prices or monopoly power and may be efficient. Thomas Krattenmaker and I thus explain in our article that it is necessary for the plaintiff to also obtain “power over price” (i.e., downstream anticompetitive effects) as well as cost increases.105 And he is correct that exclusionary conduct (whether exclusive dealing, tying or predatory pricing) instead can reduce rivals’ revenues, which can deter entry or cause exit. The revenue-reducing impact of exclusive dealing is the focus of the “naked foreclosure” literature. It also is why Michael Riordan and I discuss “customer foreclosure” as well as “input foreclosure.”106 I agree that a better term is “RRC/Foreclosure conduct” rather than just “RRC conduct.”107 Had we used that term earlier, it might have reduced his apparent confusion.

In any case, in the new economy markets chapter of the Second Edition, the new Posner is happier. Indeed, he says that the idea of raising rivals’ costs was discovered first by Director and Levi.108 He explains why Standard Fashions109 was good law both then and now.110

100 Id. at 250.
101 Id. at 253–55.
102 Id. at 255.
103 Id.
104 Id. at 196–97.
106 Riordan & Salop, supra note 74, at 527–57.
107 I have adopted this terminology to avoid such confusion. See Salop, supra note 57, at 376.
108 Posner focuses on conduct that raises costs and forces two-level or “multi-component” entry. As a “saltwater” economist, I was unaware of this article back in the late 1970s. My own development of the idea flowed from the combination of the following: Williamson’s Pennington article, supra note 15; Bork’s comment that “[b]y disturbing optimal distribution patterns one rival can impose costs upon another, that is, force the other to accept higher costs.” ROBERT BORK, THE ANTITRUST PARADOX 156 (1978); the articles presented at the FTC’s “Strategy, Predation, and Antitrust Analysis” conference that I organized in 1980, particularly the drafts of Janusz A. Ordover & Robert D. Willig, An Economic Definition of Predation: Pricing and Product Innovation, 91 YALE L. J. 8 (1981), and Richard J. Gilbert, Patents, Sleeping Patents, and Entry Deterrence, 17 J. REPRINTS ANTITRUST L. & ECON. 205 (1987–1988); discussions with David Scheffman, Michael Katz, and Carl Shapiro. It is apparent in retrospect that we should have invited Posner to the conference. For those interested in the conference papers, the published volume is FEDERAL TRADE COMMISSION, STRATEGY, PREDA TION AND ANTITRUST ANALYSIS (Steven C. Salop ed., 1981), https://www.ftc.gov/sites/default/files/documents/reports/strategy-predation-and-antitrust-analysis/198109strategy predation.pdf.
110 POSNER, 2d ed., supra note 3, at 255. By contrast, Standard Fashion warrants only a footnote as an exception to the usual analysis in his earlier work. See Posner, Exclusionary Practices, supra note 1, at 528 n.50; POSNER, 1st ed., supra note 2, at 202 n.48. However, in the context of the technology and demand characteristics of the new economy markets, it is given more emphasis.
As mentioned above, Posner recognizes that exclusive dealing, tying, and vertical integration can protect monopolies by raising barriers to entry that delay entry.\(^{111}\) This is because “piecemeal entry” is the norm. As he explains,

A firm may wish to enter the market by producing one component of the network or one value-added service, but if a competitor by virtue of owning or having an exclusive-dealing contract with the network refuses to cooperate with the firm, the firm will have to duplicate the network to get distribution of the product.\(^{112}\)

Stated in different terms, the need to enter more broadly could raise the entrant’s costs. In network markets, the idea that this will merely delay entry is less convincing to me. The potential entrants into the other components will face similar duplication issues and it will be difficult for all these firms to coordinate their entries and their pricing. Therefore, the delay may be very long, that is, essentially permanent for the current generation of the technology. It may have to wait until there is another generational inflection point.

Posner still sees an important efficiency potential for these practices.\(^{113}\) This leads him to propose the following tentative presumption and burden-shifting legal standard:

If the practice is one employed widely in industries that resemble the monopolist’s but are competitive, there should be a presumption that the monopolist is entitled to use it as well [and] the burden should shift to the plaintiff to show that, nevertheless, forbidding the use of the practice will, by increasing the rate or speed of new entry, completely offset the effect of the prohibition on the monopolist’s costs.\(^{114}\)

The idea that the existence of a practice in similar competitive markets implies its efficiency benefits raises two issues.\(^{115}\) First, new economy markets by their nature are not highly competitive in the static sense. Therefore, it may be difficult to find good comparisons. If other firms are using the process while competing to become the monopolist, that may indicate the efficacy of the practice in reducing the efficiency of rivals instead of raising the monopolist’s efficiency. Second, as discussed in Microsoft,\(^{116}\) the test is backward-looking. The novel but innovative use of a practice in this market will not be entitled to the presumption.

What explains the difference between his analysis of traditional exclusion and his analysis of the new economy markets? Posner explains that the technology and demand structures of old economy and new economy markets are very different. In his view, the technologies of old economy markets are inherently competitive. Economies of scale are not the norm. Firms tend to have rising marginal costs and multiple plants with modest minimum efficient scale and minimum viable scale. He also flags stable markets and slow innovation.\(^{117}\)

By contrast, Posner characterizes new economy markets as having significant economies of scale and declining average costs over the relevant range. Intellectual property, for example, has

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\(^{112}\) Id. at 252.

\(^{113}\) Id. at 253.

\(^{114}\) Id. at 253–54.

\(^{115}\) I do not know if Posner was the originator of the idea that the prevalence of a practice in other competitive markets implies that the practice likely is efficient. It also is proposed in Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984). Of course, even if a practice is efficient, those benefits do not necessarily trump the potential anticompetitive effects of the conduct when it is employed by a dominant or powerful oligopoly firm.


\(^{117}\) Posner, 2d ed., supra note 3, at 245.
essentially zero marginal costs of distribution. They often have network effects, which are demand-side economies of scale. He states that these markets are characterized by low-entry costs, rapid innovation, and frequent entry and exit.\footnote{Id. at 245–46.}

If old economy markets are inherently perfectly competitive or close to it, then exclusionary conduct would not raise significant competitive concerns. However, many old economy (“old” in the sense of pre-1980) markets would not fit this characterization. AT&T is an obvious example. There were economies of scale in the local loop, and classic network effects. In fact, the Bell System was the source of the original insights about network externalities. Railroads are another example.\footnote{Dennis W. Carlton & J. Mark Klammer, The Need for Coordination Among Firms, with Special References to Network Industries, 50 U. CHI. L. REV. 446 (1983).}

He discusses in detail Standard Fashion, where there were economies of scale because the patterns business had a major intellectual property component. There also may be economies of scope in designing multiple variants of a basic pattern. As such, it might have been like the new economy markets, but before its time. But the idea that a firm might need wide distribution to be viable is not so limited. In Lorain Journal, the radio station WEOL similarly had large fixed costs and zero marginal cost of distributing its radio signal. There, the cost of attracting advertisers was also a fixed cost, as the cost of a sales call to an advertiser is the same whether the radio station has 10 listeners or 10,000. If there were lack of innovation, that would tend to retard entry, not the opposite.

But some more traditional old economy markets other than telephony and railroads could also be characterized by large economies of scale and declining average costs. While a retail chain like Walmart is old economy, there appear to be large economies of scale in retailing. Larger retailers have reduced costs of warehousing, delivery, shelving plans, and so on. They also have procurement economies of scale from the ability to negotiate lower prices from their vendors. Advertising also involves economies of scale. And what appears to have dislodged Walmart is Amazon, a classic Schumpeterian visionary.

Industrial production may be characterized by large fixed costs and low marginal costs over a significant range of production. They also may have economies of multi-plant production to spread technical know-how and reduce logistical costs. If they often involve large sunk capital costs, that will increase entry risks. However, maybe this was more so in 1930, 1950, or 1970 than now.

**Conclusion**

I hope that this survey makes it clear that Posner has been a major force in antitrust law, economics, and policy for over 55 years. While I do not always agree with his ideas, and it is clear that he generally disagrees with mine, he has been the star around which all of us have orbited.●
Leaving Time to Litigate: Lessons from Recent Merger Challenges

Farrell J. Malone and Ian C. Thresher

It is well-known that high-profile strategic mergers and acquisitions are subject to close scrutiny by the Antitrust Division of the Department of Justice or the Federal Trade Commission and that the regulatory review could take months to a year or more. In recent years, regulatory reviews of over a year have become commonplace, and the agencies’ leadership have taken notice: just recently, the Assistant Attorney General for Antitrust, Makan Delrahim, announced that the Antitrust Division is planning to implement procedural changes intended to expedite the merger review process and avoid unnecessarily lengthy regulatory reviews. Although it will be interesting to see if the proposed changes speed up the average review timeline, AAG Delrahim explicitly noted that “some transactions present knotty problems and it takes a while to untangle them.” In other words, for high-profile, strategic transactions that raise “knotty antitrust problems,” delay in the antitrust regulatory review may seem inevitable.

To reduce possible uncertainty and delay, parties often negotiate precisely what efforts or actions they must take to obtain antitrust clearance, including, for example, whether divestitures must be offered to resolve antitrust concerns and whether the parties must litigate if the transaction is challenged in court. Sometimes the parties agree that a specific “break” fee or termination fee will become due if a deal fails because of an antitrust challenge. These “antitrust risk” provisions in strategic transactions are important for deal certainty and are often heavily negotiated.

There is another agreement provision in strategic deals, however, that can take on even more importance than the antitrust risk provisions: the termination date, or outside date. Although it may vary in name, the outside date is often a defined term in the transaction agreement and is the date by which one party may unilaterally terminate the transaction if antitrust approval has not been obtained, even if the parties are in the midst of ongoing litigation with the DOJ or the FTC. Typically, if the antitrust review (or any challenge to the transaction) is ongoing as of the outside date, either the parties must mutually agree to extend the outside date or a party to the transaction will have a unilateral “walk” right to terminate the agreement, possibly triggering a hefty termination fee payment.

In recent years, there have been several high-profile merger challenges where one or both parties terminated the agreement either in the middle of litigation (Halliburton/Baker Hughes and GE/Electrolux) or while the parties were considering appeals (Anthem/Cigna and Aetna/Humana). A common factor in all four of these cases is that the parties (or party, where there was a unilat-

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2 Id.
eral termination) ran out of time in the middle of the government’s antitrust challenge. This article addresses this phenomenon and provides practical guidance for parties to consider when negotiating the outside date and managing a detailed antitrust regulatory review.

**Problem: Not Enough Time to Litigate**

The DOJ’s recent challenge and subsequent appeal of AT&T’s proposed $85 billion acquisition of Time Warner is the most recent example of the “leaving time to litigate” issue. The transaction was highly publicized as the first court challenge to a purely “vertical” deal in decades—the last time the government successfully blocked a vertical deal on antitrust grounds was almost 46 years ago, during the Nixon administration.

But AT&T/Time Warner is also notable for another reason: it is at least the fifth major transaction since 2015 where the antitrust regulatory review, in each case including a court challenge, extended past the “Termination Date” that the parties originally agreed to in their transaction agreement. (There is now a sixth ongoing—Tronox/Cristal, discussed below.)

In AT&T/Time Warner, the parties initially set April 22, 2018, as the outside date, 18 months from the date of signing. However, District Court Judge Richard Leon scheduled the trial to start on March 19, 2018—just one month before the outside date. Moreover, during a December 2017 hearing, Judge Leon said he expected that the trial would take about three weeks, with a decision to come in late April or May, and in any event after the April 22 outside date.

Following that December hearing, the merging parties agreed to extend the outside date in their transaction agreement by another two months, to June 21, 2018. Following closing arguments in the trial, Judge Leon (quoting composer Leonard Bernstein) facetiously remarked, “To achieve great things, two things are needed: a plan and not quite enough time.” At around the same time, Judge Leon announced that his decision would come on June 12, 2018, a mere 11 days before the termination date in the agreement. As scheduled, Judge Leon issued his decision on the merger challenge on June 12, finding in favor of the parties, clearing the way for the transaction to proceed (subject to an appeal by the DOJ, which is still ongoing as of the writing of this article).

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5 Lengthy antitrust reviews are not merely a recent phenomenon—the trend toward more lengthy and involved (and document-intensive) antitrust reviews has continued off and on since at least 2000. The focus of this article is on the more recent phenomenon of large strategic transactions failing because of the length of the antitrust review.
6 See AT&T Inc., Form 8-K, Exhibit 2.1, Agreement and Plan of Merger Among Time Warner Inc., AT&T Inc., and West Merger Sub. Inc. (Oct. 22, 2016) (§ 8.2 is defined as “Termination by Either Parent or the Company. This Agreement may be terminated and the Mergers may be abandoned . . . by action of the Board of Directors of either Parent or the Company if (a) the Initial Merger shall not have been consummated by October 22, 2017 (as it may be extended below, the “Termination Date”) . . . provided that if on such date any of the Required Governmental Consents shall not have been obtained, the Termination Date may be extended one or more times by the Company or Parent from time to time by written notice to the other party up to a date (or dates) on or before April 22, 2018 . . . ”).
8 AT&T Inc., Form 8-K (Dec. 21, 2017).
AT&T and Time Warner closed the transaction two days later, but needed to work with the DOJ to make that happen. In exchange for a DOJ promise not to seek an emergency court order that would prevent the deal from closing, a move that would effectively push the closing date past the outside date, AT&T promised to operate Time Warner’s Turner Broadcasting as a separate business unit until 2019.\(^{11}\) AT&T and Time Warner had little choice but to agree to this arrangement. On July 12, one month after Judge Leon’s decision, the DOJ filed its notice of appeal.\(^{12}\)

Although AT&T and Time Warner were able to mutually agree to an extension that allowed sufficient time for a decision in the district court, the timing of trial and Judge Leon’s explicit statement that a decision would not come before the parties’ then-current termination date, could have been fatal to the transaction. The same could be said for the DOJ’s subsequent threat to seek an emergency injunction if AT&T did not agree to temporarily operate Turner Broadcasting as a separate entity.

Similar issues have arisen in cases challenged by the FTC. In the Tronox/Cristal merger, after an FTC administrative challenge to that transaction,\(^{13}\) the parties had to agree to an extension of the outside date in their original agreement, making Tronox/Cristal a sixth recent example of merger parties having to extend their merger agreement while an antitrust challenge is pending.

This timing issue has proven fatal to several high-profile transactions in recent years. As summarized in the table below, there have been at least four major transactions where one or both parties abandoned the transaction on or after the outside date.

### Table 1: Transactions Where Litigation Extended Beyond Original Outside Date

<table>
<thead>
<tr>
<th>Transaction</th>
<th>Date Signed &amp; Date of Complaint</th>
<th>Months to Date of Complaint</th>
<th>Date a Party Could Terminate (Date Terminated)</th>
<th>Months to Termination/Completion</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Examples of Transactions with Challenges/Appeals Pending</strong></td>
<td></td>
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</tr>
<tr>
<td>Tronox/Cristal</td>
<td>February 21, 2017 to December 5, 2017</td>
<td>-9.5 months (287 days)</td>
<td>May 21, 2018 1st Extension: June 30, 2018 Automatic three-month extensions until March 31, 2019</td>
<td>Trial completed on September 14. Post-trial Briefs submitted on September 17</td>
</tr>
<tr>
<td>AT&amp;T/Time Warner</td>
<td>October 22, 2016 to November 20, 2017</td>
<td>-13 months (394 days)</td>
<td>Original: October 22, 2017 1st Extension: April 22, 2018 2nd Extension: June 21, 2018</td>
<td>-20 months (598 days)</td>
</tr>
</tbody>
</table>

| **Examples of Transactions that Were Terminated** |                                 |                             |                                               |                                  |
| Anthem/Cigna          | July 23, 2015 to July 21, 2016    | -12 months (364 days)       | Original: January 31, 2017 1st Extension: April 30, 2017 (May 12, 2017) | -22 months (659 days) |
| Aetna/Humana          | July 3, 2015 to July 21, 2016     | -12.5 months (385 days)     | Original: June 30, 2016 1st Extension: December 31, 2016 2nd Extension: February 15, 2017 (February 14, 2017) | -19.5 months (582 days) |


\(^{12}\) Id.

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</tr>
</thead>
<tbody>
<tr>
<td>Halliburton/ Baker Hughes</td>
<td>November 17, 2014 to April 6, 2016</td>
<td>-17 months (506 days)</td>
<td>Original: October 30, 2015 1st Extension: December 15, 2015 2nd Extension: April 30, 2016 (May 1, 2016)</td>
<td>-17.5 months (531 days)</td>
</tr>
<tr>
<td>GE/Electrolux</td>
<td>September 8, 2014 to July 1, 2015</td>
<td>-10 months (297 days)</td>
<td>December 7, 201514 (December 7, 2015)</td>
<td>-15 months (466 days)</td>
</tr>
</tbody>
</table>

The average time from announcement to termination (including any trial period pre-termination) has been over 18 months—and this period has been steadily growing. The path to termination and the posture of the parties at the time of termination was different in each case. Anthem/Cigna, one of the two major health care deals announced in 2015, may be the best example of one party running out of time mid-challenge. The press was reporting tension between the parties from the outset, and it was widely reported that Cigna wanted out of the deal.15

On January 19, 2017, with tensions between the parties apparently escalating, Anthem extended the agreement by three months, to April 30, 2017.17 Per the terms of the merger agreement, any trial period pre-termination has been

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14 For GE/Electrolux, the agreement is not public and thus the precise outside date is unknown, but the agreement permitted GE to terminate at least by December 7, 2015, and maybe earlier if GE waited some time before terminating. Simon Johnson & Diane Bartz, GE Calls Off Electrolux Appliance Deal Amid U.S. Antitrust Fight, REUTERS (Dec. 6, 2015), https://www.reuters.com/article/us-ge-equity-electrolux/ge-calls-off-electrolux-appliance-deal-amid-u-s-antitrust-fight-idUSKBN0TQ0MP20151207.

15 All four of these transactions were terminated on or around the effective termination dates in the parties’ merger agreements. Tronox/Cristal, like AT&T/Time Warner, narrowly avoided this fate when both parties agreed to extend their merger agreement on March 1, 2018. See Tronox Ltd., Tronox Announces Extension to Cristal TiO2 Acquisition Agreement, PR NEWSWIRE (Mar. 1, 2018), https://www.prnewswire.com/news-releases/tronox-announces-extension-to-cristal-tio2-acquisition-agreement-300606364.html.


Anthem (or Cigna) could unilaterally extend the agreement only once, and given the tension between the parties it seemed likely that Cigna would seek to terminate on April 30 if clearance was not obtained. Sure enough, after the district court ruled against the parties on February 8, 2016, Cigna attempted to terminate the agreement. Although Anthem forged ahead with an appeal, it was left with under three months to win the appeal before the April 30 outside date. Despite initially winning a temporary injunction preventing Cigna from terminating, a Delaware court eventually ruled in Cigna’s favor, allowing termination, on May 11. Cigna announced it had terminated the next day.

The Aetna/Humana merger followed a similar timetable. As in Anthem/Cigna, Aetna and Humana reached an agreement to merge in July 2015. After a year-long antitrust review, on July 21, 2016, the DOJ filed a complaint to block the merger. By that time Aetna and Humana had already been forced to extend the outside date until December 31, 2016, something they had to do again during the trial. (The second time they extended the agreement to February 15, 2017.) After a two-month trial, the district court ruled against the parties on January 23, 2017.

Although Aetna Chairman Mark Bertolini said that Aetna was mulling an appeal of the court’s ruling and vowed to review the decision up to the February 15 outside date, neither party appealed. Instead, Aetna and Humana issued a joint press release on February 8 announcing that they had mutually agreed to abandon the merger. Bertolini’s statements, though, raise at least the possibility that Aetna opted not to appeal because the parties could not reach an agreement on another extension of the outside date that would last beyond the appellate court’s review and decision.

The DOJ’s review of the Halliburton/Baker Hughes merger—a $35 billion merger announced in November 2014 that would have created the world’s largest oil and gas field services company—took almost 17 months. When it finally filed its complaint, the DOJ alleged that the transaction would harm competition in 23 different relevant markets in the global well-drilling and oil-construction services industry.

Given the lengthy review period, Halliburton and Baker Hughes needed to extend the outside date in their agreement twice, and, on the second occasion, extended it the maximum amount permitted under the agreement, to April 30, 2016. Even then, the DOJ’s complaint came only on April 6, 2016, just about three weeks before the extended outside date. On May 1, both sides issued a press release indicating the parties were terminating the agreement. The decision may


have been motivated as much by a changed marketplace (affecting deal economics) as it was by the government’s complaint. Moreover, the lengthy review period (almost 17 months) raises questions about what might have happened had Halliburton and Baker Hughes been more proactive in encouraging the DOJ to expedite its review (See the discussion in the Solutions section below).

Nonetheless, the termination was not a complete loss for Baker Hughes. The company received a $3.5 billion breakup fee from Halliburton and was later acquired by GE. Although it is impossible to say for certain that it was Baker Hughes’s decision to terminate the deal, the large breakup fee coupled with the fact that the termination came on the first day that either party could walk away makes it plausible that Baker Hughes acted more unilaterally in ending the deal than the parties’ press releases would suggest.

An impending outside date also provides an “out” for a party concerned about the costs or possible unfavorable outcome of litigation. Take, for instance, the failed GE/Electrolux merger in 2015. In that case, the DOJ filed a complaint after a nearly ten-month review. Trial started four months later, but as the fourth week of trial got underway, on December 7, GE announced it was terminating the transaction. There were, according to GE, several interested buyers in GE’s appliances division, and the prospect of a protracted appeals process (and a $175 million termination fee payment) likely entered into GE’s decision to terminate. When GE later sold its appliances division to Haier, a GE spokesman stated that GE did not foresee any antitrust issues like they did with Electrolux.

Although these examples are the most recent merger cases where one party was able to walk away from the deal, or where circumstances changed such that the parties chose not to proceed with the deal, the same timing considerations apply generally as well—antitrust reviews are simply taking longer. Specifically, since 2011, there have been 190 merger enforcement actions, defined as cases that involved either a remedy or a court challenge (or both). The trend in these

25 A Halliburton Press Release quotes Halliburton Chairman and CEO Dave Lesar as saying, “While both companies expected the proposed merger to result in compelling benefits to shareholders, customers and other stakeholders, challenges in obtaining remaining regulatory approvals and general industry conditions that severely damaged deal economics led to the conclusion that termination is the best course of action.” Press Release, Halliburton and Baker Hughes Announce Termination of Merger Agreement, (May 1, 2016), https://www.halliburton.com/content/dam/halliburton/public/news/pubsdata/press_release/2016/halliburton-baker-hughes-terminate-merger.html.


27 Halliburton/Baker Hughes highlights another critical timing factor in high-profile, global strategic deals: the need for merger approvals outside the United States. Although this article is focused on U.S. reviews, the DOJ was not the only entity investigating the Halliburton/Baker Hughes merger. Like many of these transactions, the parties required additional approvals in the EU and elsewhere. Those reviews are also lengthy: the EU filing in Halliburton/Baker Hughes, for example, was not accepted until July 2015, eight months after signing, and the case entered Phase II, signaling a more in-depth investigation, only in January 2016, which was months after the parties’ original outside date. In short, the timing concerns related to lengthy antitrust reviews are not unique to the United States and are indeed compounded where the parties face multiple foreign antitrust hurdles as well. See, e.g., Tom Fairless, Halliburton-Baker Hughes Merger Under EU Antitrust Review, WALL ST. J. (Jan. 12, 2016), https://www.wsj.com/articles/halliburton-baker-hughes-merger-under-eu-antitrust-review-1452624062.


29 See id.


31 There were 190 total enforcement actions against proposed mergers from 2011–2017. In 37 of those cases, there was not a contemporaneous settlement (and thus, at least initially, it appeared that the parties would contest the challenge). The merging parties abandoned the transaction or later reached a settlement with the government in 24 of those 37 cases. In the other 13 cases, there was a decision on the
cases is clear—investigations, especially in transactions that are litigated to a decision in the district court, are growing significantly longer:

- Across all merger enforcement actions, the average time from a transaction’s announcement to the filing of the complaint (or settlement) has increased by about three months, from seven months in 2011 to more than ten months in 2017.\(^\text{32}\)
- In the 37 challenges that did not involve a contemporaneous settlement (i.e., where the parties were in a litigation posture), the average length of the investigation has increased by three-and-a-half months, from about six months in 2011 to over nine-and-a-half months in 2017.
- In the 13 cases that were litigated to a decision, the increasing length of the investigation was even more significant—an increase of almost six months, from about five-and-a-half months in 2011 to over a year in 2017.\(^\text{33}\)

- Longer investigations do not necessarily translate into faster trial outcomes. As shown in the figure below, among the 13 cases that were litigated to a decision in 2011–2017, the average time from the filing of a complaint until a district court's decision on the merits has increased from 99 days in 2011 to as high as 221 days in 2017.\(^\text{34}\)

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\(^{32}\) In 2007, the Antitrust Modernization Commission reported that the time needed for review of a transaction and receipt of approval could be up to “six months or longer.” See Antitrust Modernization Comm’n, Report and Recommendations 152 (2007), http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.


\(^{34}\) The following two graphs use data from 13 enforcement actions between 2011 and 2017. As noted above, see supra note 31, the Bazaarvoice/PowerReviews and St. Luke’s/Saltzer Medical Group mergers were not included in this data because those were consummated prior to the DOJ and FTC enforcement action.
Taken together, companies hoping to weather both the government’s investigation and any challenge in court could see a total review period that is 11 months longer than in 2011.

Solutions: Creating or Leaving Time to Litigate

The recent strategic transactions that were terminated mid-challenge involved complex antitrust issues that inevitably take time to resolve. The parties surely knew that at the time of signing, so one would expect that the antitrust risk provisions, the requirement that the parties litigate to resolve any antitrust concerns, and the outside date agreed between the parties reflected their interest in, and willingness to fight for, the transaction. Regardless, in each of the terminated transactions described above, the parties (or one of the parties) either ran out of time, lost interest in the transaction, or both. The outcomes in these cases could have been different if the parties had (1) created more time to litigate at the outset of the transaction, by specifically negotiating for it in the transaction agreement and/or (2) left more time to litigate, by explicitly and efficiently controlling the pace of the antitrust review wherever possible.
Creating Time: Be Specific in the Agreement. Because the antitrust review of any large, strategic transaction will take significant time—months, or even years—parties have increasingly tried to account for this by allowing additional time for the antitrust review, setting an outside date that is very far into the future (18 months or more). Take the Disney/Fox transaction announced in December 2017, which will combine Walt Disney Co. and various 21st Century Fox assets, including its film and television studios. There, the parties agreed to an outside date of December 13, 2018, one year from the date of the agreement, but also provided for at least two six-month extensions (which could be triggered by either party) in the event antitrust clearance had not been obtained.35

The Disney/Fox two-year allowance for the antitrust review may be extremely long, but it nevertheless seems warranted based on outcomes summarized above. However, because the parties cannot predict the pace of the antitrust review, litigation, or any appeals, any outside date that is based on a period of days—even if it is two years out as in Disney/Fox—could be insufficient to ensure there is a regulatory outcome before one party can unilaterally terminate the agreement. After all, Aetna/Humana and Anthem/Cigna were approaching a two-year review period at the time those deals were terminated. And in at least some of the abandoned transactions summarized above, there is a reasonable inference that at least one of the parties found the fixed outside date inadequate when their deal partner managed to slip away.36

A more certain way to achieve a regulatory outcome (good or bad) before one party can unilaterally terminate the agreement is to be explicit in the transaction agreement and agree (stipulate) that a party cannot terminate if there is a pending regulatory proceeding, such as a DOJ and FTC investigation or merger challenge. (This assumes of course that the parties are also contractually agreeing to litigate, if it comes to that.) This solution would contractually guarantee that the transaction could not be terminated before the regulatory review has run its course. A major obstacle to this approach is that parties cannot always predict incentives 18 to 24 months into the future. By negotiating a timing provision that leaves the agreement open until a certain future event, a party is also committing itself not to terminate, even in a circumstance where the party may wish to do so, possibly 18 months into the future when a government merger challenge is pending.

The failed transactions summarized above are prime examples of this difficulty. The market forces and valuations that led the parties to enter the agreement may or likely will change over time, and it is important for deal certainty for parties to assess each other’s interests and, where there is alignment, to be as specific as possible in the contract about both parties’ obligations. For any number of reasons, it may not be possible for parties to contractually commit to leave an agreement open for an uncertain period of time until there is a resolution in the antitrust review. In particular for the target or acquired party, it seems unlikely that they would agree to an open-ended transaction agreement given risks to the business (and customer base) from a protracted regulatory review of uncertain duration. Either way, it is important for parties to have an understanding on this timing issue from the outset, so that when a specific outside date is agreed, the


36 There is little data on which party is more likely to walk away from a deal, largely because the parties rarely publicize that information. In the deals described above though, the acquired party walked away in two of them (GE and Cigna), and it is likely that Baker Hughes is a third. None of the acquiring parties opted to terminate the deal. This discrepancy makes sense given the prospect of breakup fees and the enormous resources acquiring companies invest to win approval from antitrust regulators.
parties can still work proactively to manage the timing of the antitrust review to get a regulatory outcome within the contractually agreed outside date (whether it involves litigation or not).

**Leaving Time: Control the Clock.** Although the parties have limited, if any, control over the length of a merger trial, they can to some extent control the timing of the investigation leading up to any challenge—i.e., the period between signing of the transaction and a decision by the reviewing agency to file a complaint. A key element of this control is close coordination with each other and with the DOJ and FTC where necessary to encourage swift resolution of issues. Indeed, in his recent speech on the merger review process, AAG Delrahim encouraged early meetings with Staff and early provision of data and information in response to voluntary DOJ requests as a means of expediting the antitrust review. This is very good advice, particularly in harder cases raising difficult issues—the parties will not hide those issues from the agencies, so it is best to engage on them early.

**Accelerate the second request process.** The DOJ and FTC “second request” investigatory process, where the agencies collect tremendous amounts of data, documents, and information about the transaction, is very burdensome and time-consuming. It is not unusual for the response to a second request to take four to six months, or even longer. However, the data and information required by a second request is fairly standard and predictable. While a lengthy timeframe to respond was perhaps understandable 15 years ago, at the dawn of e-discovery, today parties and their antitrust counsel should be able to respond to second requests much more quickly. Consistent with this, parties can and should agree in the transaction agreement to a specific time period in which they must comply with any second request (e.g., comply with any second request within two months).

As a practical matter the parties may not have real recourse in the event of delay, but having an agreed date will help focus the parties’ legal teams on providing the agencies with the information they need as quickly as possible. The downside to this strategy—as the DOJ and FTC are quick to point out—is that it may “jam” them, because the Hart-Scott-Rodino Act (HSR Act) governing the agencies’ statutory review periods provides that the DOJ and FTC must reach a decision on whether to challenge a transaction within 30 days of substantial compliance with any second request. This concern—assuming it is valid—can be managed, for example, with a “timing agreement” that gives the agency additional time (but not too much time) to review the transaction.

**Limit timing agreements.** The biggest factor in the increasing length of antitrust reviews may be the DOJ’s and FTC’s now pervasive reliance on so-called timing agreements. In a timing agreement, the merging parties agree, possibly in exchange for relief during the second request process, to give the reviewing agency additional time to investigate the transaction after the statutory 30 days (after substantial compliance) provided by the HSR Act. To create leverage, the DOJ and FTC may take a hardline stance on what information or data must be provided in response to the second request or how many custodians’ documents must be searched to com-

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37 While the average time for trial has been around 145 days since 2011, that figure has varied significantly from year to year, and even within the same year. For instance, in 2011, the district court issued its decision on the Phoebe Putney/Palmry Park Hospital merger 71 days after the FTC initially filed its complaint. The DOJ’s challenge of the H&R Block/TaxACT merger that same year, however, took 162 days before there was a decision on the merits. More recently, in 2016, the amount of time to a decision varied between 154 days and 186 days.

38 See supra note 1.

39 A “timing agreement” is an agreement between the merging companies and a government agency that provides an agreed upon framework for the timing of certain steps in the investigation, including, most importantly, when the parties are permitted to close the transaction.
ply with the second request. If they will only have 30 days after substantial compliance to decide whether to clear or challenge a deal, the DOJ and FTC have the incentive to make second request compliance as time-consuming as possible, as that will provide more time to review a transaction.

To resolve this tension, a timing agreement may provide that the parties will not close the transaction for an additional 30-60 days after the statutory 30-day review period following substantial compliance, so the DOJ and FTC would have 60-90 days instead of 30 to complete the investigation. Indeed, this is precisely the approach the FTC outlined in its Model Timing Agreement, and the DOJ has said it will aim to make a decision within 60 days following substantial compliance with a second request.

In exchange for a timing agreement, the DOJ and FTC may provide some relief on the volume of information required or the number of custodians whose documents must be searched. Any number of permutations are possible, but by construction (and indeed, it is their main purpose, from a DOJ and FTC perspective) timing agreements delay the antitrust review. Although there are no publicly available data on the duration of timing agreements in lengthy reviews of strategic transactions, timing agreements are now commonplace, and likely a significant cause of delay.

Notwithstanding the FTC’s and DOJ’s model timing agreement, which may suggest otherwise, timing agreements are not required, and while there may be, in appropriate cases, good reason to give the agencies additional time for review after compliance with a second request, the parties, not the agencies, should control that timing. Parties should proactively manage any extensions of time given to the reviewing agency. As a specific example, instead of offering blanket extensions of time—e.g., agreeing not to close a transaction for an additional 30 days (or even 60 or 90 days, as sometimes happens)—the parties should tether these extensions to specific investigative milestones to avoid being “strung along,” finding themselves five months post-compliance with no meaningful progress on the issues.

Merging parties should also consider relying on “rolling” notice provisions, for example, where the parties commit that they will give at least 30 days’ notice before closing the transaction, as the only limit on timing to close the transaction. The parties can give the notice at any time, putting the agency on a precise deadline. Again, other permutations are possible, with the main goal of tying any lengthening of an investigation to real progress in narrowing the issues.

Conclusion

The question then arises: “How much time do I need? Where does this leave us?” Based on recent outcomes analyzed above, the data suggest that parties to major strategic transactions (those raising “knotty problems”) should leave at least a year for the agency’s review (before any challenge), and up to 18 to 24 months to litigate to a decision. This seems extreme, and it is extreme by historical standards—for example the Whole Foods/Wild Oats merger in 2007 went from

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41 See supra note 1.

42 The FTC Bureau of Competition’s Model Timing Agreement includes rolling notice provisions as part of the broader timing elements that affect when parties can close, but the suggestion here is to only rely on the rolling notice provision, without any other promise not to close for, e.g., 90 days after substantial compliance.
announcement to decision in the district court in about six months, although the subsequent appeal decision from the D.C. Circuit added 11 months.

Complying with a second request in a major strategic transaction will take time, and it may be in the parties’ interest to give the DOJ and FTC additional time on top of that to assess the transaction. In practice, to avoid being left at the altar, parties should be as specific as possible in the transaction agreement, and then actively manage the antitrust review to ensure there is sufficient time to get clearance or, in a worst case, fight through the end of litigation. The strongest protection would be a specific provision that allows unilateral termination only after a specified regulatory outcome (decision to challenge, preliminary injunction in district court, etc.). The parties to a transaction may not be able to agree to that up front, but they will at least know that fact and can plan ahead, working backwards from whatever outside date is agreed upon, to ensure there is sufficient time to resolve the antitrust issues and, if necessary, litigate.

Every transaction is different, but parties that manage the clock, hold themselves and the DOJ and FTC to strict timelines, and leave time to litigate any remaining issues, if necessary, will find themselves in a much better position from a deal certainty and overall timing perspective.