

Leegin Creative Leather Products: What Does the New Rule of Reason Standard Mean for Resale Price Maintenance Claims?

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In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,¹ a divided Supreme Court overruled the nearly century-old rule set forth in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*² that made vertical agreements to fix minimum prices per se illegal under Section 1 of the Sherman Act.³ Under the new rule announced in *Leegin*, resale price maintenance (RPM) now will be analyzed under the rule of reason.

Writing for the majority, Justice Kennedy focused on whether RPM meets the test the Court applies generally to per se prohibitions. Per se treatment is reserved for restraints that “always or almost always tend to restrict competition and decrease output.”⁴ After concluding that the rationales on which *Dr. Miles* itself was based (principally, the rule against restraints upon alienation) do not continue to support the per se rule, the Court considered whether the economic effects of vertical agreements to fix minimum prices nonetheless make a per se rule appropriate.

The Court observed that the economic literature is replete with procompetitive justifications for RPM, including principally that: (1) by eliminating free riding, it can help ensure that retail services and promotions that enhance interbrand competition will not be underprovided; and (2) it may facilitate market entry for new companies and brands. As the Court noted, similar justifications were offered in support of rule of reason analysis for nonprice vertical restraints⁵ and, in fact, non-price restraints can be used to achieve similar objectives, while being less efficient and more costly to consumers than RPM.⁶ The Court also rejected the argument that RPM is inherently suspect because it frequently leads to higher prices.⁷ This critique of RPM “overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins,”⁸ and that many other concerted actions—such as contracts for superior inputs, for example—may lead to higher prices while enhancing consumer welfare.⁹

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¹ 127 S. Ct. 2705 (2007).

² 220 U.S. 373 (1911).

³ For further discussion of *Dr. Miles* and the Supreme Court’s treatment of vertical restraints, see, for example, Donald M. Barnes & David T. Fischer, *Dr. Miles: Will the Supreme Court Find a Cure?*, ANTITRUST SOURCE, Feb. 2007, <http://www.abanet.org/antitrust/at-source/07/02/Feb07-Fischer2=23f.pdf>, at 1–3.

⁴ *Leegin*, 127 S. Ct. at 2713 (quoting *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (internal quotations omitted)).

⁵ *Id.* at 2715–16. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54–57 (1977).

⁶ *Leegin*, 127 S. Ct. at 2722–23.

⁷ *Id.* at 2718 (“Respondent is mistaken in relying on price effects absent a further showing of anticompetitive conduct.”).

⁸ *Id.*

⁹ *Id.* at 2719.

At the same time, the Court was careful not to overlook the potential harmful effects of RPM. It noted, in particular, that RPM can be used to facilitate cartels either at the manufacturer or retailer level.¹⁰ Nonetheless, in the majority's view, RPM simply does not meet the *Business Electronics*¹¹ test for per se rules. While recognizing that empirical evidence regarding the competitive effects of RPM is limited, the Court found it significant that "[e]ven those more skeptical of resale price maintenance acknowledge it can have procompetitive effects."¹²

Nor did the majority think that stare decisis dictated the result in this case. To the contrary, the Court explained that the doctrinal underpinnings of *Dr. Miles* are impossible to reconcile with many of the Court's more recent opinions (including, for example, *Colgate*,¹³ *Sylvania*,¹⁴ and *Business Electronics*) and the entire body of law that has grown up concerning other forms of vertical restraints.¹⁵ The Court therefore held that "[v]ertical price restraints are to be judged according to the rule of reason."¹⁶

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, dissented. Justice Breyer agreed with much of the majority's economic analysis of RPM, acknowledging that "sometimes resale price maintenance can prove harmful; sometimes it can bring benefits,"¹⁷ but disagreed that this necessarily means that the per se rule is inappropriate. The dissent questioned whether the procompetitive justifications for RPM were compelling in light of the general agreement that RPM results in higher prices to consumers.¹⁸ The dissent also concluded that the majority undervalued the administrative difficulties of separating "good" RPM from "bad" in the context of a rule of reason case (a topic to which we return below).¹⁹ And most important from Justice Breyer's perspective, the majority erred by analyzing the question as if the Court were "starting from scratch."²⁰ In the dissent's view, the long history of per se prohibition of RPM—without any significant changes in economic theory or market dynamics that might support altering the rule—tipped the scale in favor of affirming the holding of *Dr. Miles*.²¹

Although the Court's decision overruling *Dr. Miles* was not unexpected, the practical impact that the decision will have on the U.S. economy is not yet clear. First, although state antitrust laws often closely follow the decisions of federal courts, some states may continue to apply a per se rule against RPM. In fact, thirty-seven states filed an amicus curiae brief in *Leegin* urging the Court to maintain the per se rule of *Dr. Miles*. It is possible that sharp differences may arise between state and federal law in this area such as occurred with respect to indirect purchaser actions in the

¹⁰ *Id.* at 2716–17.

¹¹ *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988).

¹² *Leegin*, 127 S. Ct. at 2715, 2717.

¹³ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

¹⁴ *Continental T.V., Inc. v. GTE Sylvania Inc.* 433 U.S. 36 (1977).

¹⁵ *Leegin*, 127 S. Ct. at 2721–22.

¹⁶ *Id.* at 2725. Not surprisingly, the Court did not reach the issue of whether *Leegin*'s ownership interest in stores selling Brighton goods affected this analysis. PSKS raised this issue for the first time in the Supreme Court. *Id.*

¹⁷ *Id.* at 2729 (Breyer, J., dissenting).

¹⁸ *Id.* at 2727–28 (Breyer, J., dissenting).

¹⁹ *Id.* at 2730–31 (Breyer, J., dissenting).

²⁰ *Id.* at 2731 (Breyer, J., dissenting).

²¹ *Id.* at 2731–37 (Breyer, J., dissenting).

wake of the Supreme Court's decision in *Illinois Brick*.²² Second, it is conceivable that Congress may legislatively reintroduce the per se rule.²³ Third, the lower courts still need to decide how best to apply the rule of reason to RPM. We will spend the remainder of the article discussing the latter topic.

The Court's Guidance Regarding the Rule of Reason

In holding that RPM, like most other vertical restraints, now will be analyzed under the rule of reason, the Court appeared to anticipate two of the most common criticisms leveled against the rule of reason: that it is effectively a rule of per se legality²⁴ and it lacks any real content.²⁵ Thus, the Court urged lower courts to be vigilant in using the rule of reason to weed out anticompetitive transactions and also provided specific guidance for applying the rule in the RPM context.

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The majority opinion makes clear that the Court's overruling of *Dr. Miles* should not be interpreted as giving all RPM an automatic stamp of approval. The majority emphasized that "the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated,"²⁶ and cautioned courts "to be diligent in eliminating [the] anticompetitive uses" of RPM from the market.²⁷

The Court then enumerated some of the more important factors relevant to the rule of reason analysis. First, it suggested that market power could be a threshold requirement for an RPM claim.²⁸ Second, the Court explained that RPM is unlikely to harm competition if it is not widespread in the relevant market (either at the manufacturer or retailer level).²⁹ Conversely, RPM should receive more scrutiny if competing manufacturers adopt the practice.³⁰ Third, vertical restraints driven by retailers are much more likely to be harmful to competition than restraints for

²² Furthermore, RPM is unlawful in some jurisdictions outside the United States, including, for example, the European Union. See Guidelines on Vertical Restraints, 2000 O.J. (C 291) 1, 11, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/c_291/c_29120001013en00010044.pdf (noting that the European Commission's 1999 Block Exemption Rule does not exempt RPM from liability under Article 81).

²³ Congress has been active in this field in the past. See *Leegin*, 127 S. Ct. at 2723–24. In fact, on July 31, 2007, the Senate Committee on the Judiciary's Subcommittee on Antitrust, Competition Policy and Consumer Rights held a hearing on the topic, "The *Leegin* Decision: The End of Consumer Discounts or Good Antitrust Policy?"

²⁴ See, e.g., Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knives"?: The Coming Challenge to the Dr. Miles Rule*, ANTITRUST, Spring 2007, at 61, 64 ("It is plausible that abandonment of a per se approach to minimum resale price maintenance would lead to a very generous and difficult to enforce full rule of reason and eventually to de facto per se legality."); cf. 8 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1633b, at 329 (2d ed. 2004) [hereinafter, AREEDA] ("The typical rule of reason is a form of presumptive legality in the sense that the defendant prevails unless the plaintiff offers some proof of harmful effects or tendencies.")

²⁵ See, e.g., Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153–57 (1984).

²⁶ *Leegin*, 127 S. Ct. at 2717.

²⁷ *Id.* at 2719.

²⁸ *Id.* at 2720 ("[T]hat a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.") (internal citation omitted).

²⁹ *Id.* at 2719 ("When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand.") (citations omitted).

³⁰ *Id.*

which the manufacturer was the impetus.³¹ These comments highlight many of the procedural and substantive issues that will play out in future cases.

The Court stopped far short, however, of detailing how a rule of reason RPM case should proceed. Instead, the Court encouraged lower courts to “establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses.”³² To that end, the Court explained that lower courts could “devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.”³³

Applying the Rule of Reason

Even though *Dr. Miles* has been the rule of law for nearly a century, many commentators have written about how to apply the rule of reason to RPM. In the remainder of the article we discuss some of those proposals in the context of the Court’s opinion in *Leegin*.

The Use of Screens or Filters to Reduce Litigation. The Court in *Leegin* encouraged lower courts to devise rules to enhance administrative efficiency and predictability for businesses. One of the most effective means of reducing the burden of litigation, and providing more guidance to businesses, is to create safe harbors or non-rebuttable presumptions of legality. One commonly discussed safe harbor is a market power screen.³⁴ That is, to state a claim for a violation of the Sherman Act based on RPM, the plaintiff would be required to plead (and later prove) that the defendant—either the manufacturer or the retailer—possesses market power in the relevant market. The rationale for a market power screen is that, unless the manufacturer has market power, competing manufacturers will be able to find distributors for their goods and discounters will be able to buy products from other manufacturers, thus affording consumers choices between higher- and lower-priced goods. For example, in the case of *Leegin* itself—given Brighton’s tiny share of the relevant market—it is hard to see how consumers could be harmed by *Leegin*’s RPM policy. Similarly, in the case of a retailer defendant, unless the retailer has market power, it will be unable to foist the RPM policy on an unwilling manufacturer or freeze discounters out of the market. Consumers will be able to purchase from other retailers. Although the Court in *Leegin* did not expressly sanction the adoption of a market power screen at the pleading stage, there is some support in the opinion for such an approach.³⁵

But a simple market power screen might leave too much potentially harmful RPM unaddressed. If a small number of manufacturers together make up a very large share of the market, it is more likely that they will be able to use RPM to facilitate horizontal coordination. Retailer concentration

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³¹ *Id.* (“If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer.”) (citation omitted).

³² *Id.* at 2720.

³³ *Id.*

³⁴ See, e.g., Warren S. Grimes, *Brand Marketing, Intra-brand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 120 (1995).

³⁵ See *Leegin*, 127 S. Ct. at 2720 (RPM “may not be a serious concern unless the relevant entity has market power”). Justice Breyer, in the dissent, expressed concern that applying a market power screen would be “easier said than done” and would invite “lengthy time-consuming argument among competing experts.” *Id.* at 2730 (Breyer, J., dissenting). To be sure, market power is frequently disputed and even hotly contested. But that does not mean that in many circumstances a prospective plaintiff simply would be unable to plead that the defendant has market power and litigation would be avoided altogether (or it would be readily apparent from a quick look at the facts in an early summary judgment motion that there was no market power). *Leegin*, itself, would appear to be just such a case.

also increases the likelihood that RPM will be used for anticompetitive purposes. Consequently, some commentators suggest that the focus of analysis should be market concentration—irrespective of whether any single manufacturer or retailer enjoys market power.³⁶ Although allowing suits against defendants without market power in cases where the market is concentrated suggests that RPM might be subjected to more rigorous rule of reason scrutiny than other forms of vertical restraints, there is arguably some support in Justice Kennedy’s opinion for this approach, particularly in circumstances where more than one manufacturer has adopted RPM.³⁷

Thus, under a possible modified screen approach, the plaintiff would be required to allege and prove either that (1) the defendant has market power or (2) the market is concentrated and the defendant is one of the leading manufacturers or retailers in the market.³⁸ Requiring, at a minimum, that the defendant be one of the leading firms in the industry seems appropriate to eliminate the possibility that a small manufacturer or retailer could be subjected to expensive rule of reason litigation merely because the market was concentrated and other manufacturers in the same market had previously adopted RPM. In such a case, the small firm’s adoption of RPM could not have any significant incremental harmful effect on competition. In fact, the manufacturer quite likely may have followed its larger competitors in adopting RPM merely to survive.³⁹

Others have suggested that a modified market power screen also should include the requirement that RPM have been adopted in a significant portion of the market.⁴⁰ There appears to be general agreement that RPM is unlikely to be harmful if it operates only in a small portion of the market.⁴¹ A potential problem, however, with adding this element to a pleading screen is that the plaintiff may not be in a position at the time the suit is filed to know how many competing manufacturers or retailers use or require RPM. The Areeda and Hovenkamp treatise argues that “market coverage is the most difficult [factor] to prove or disprove.”⁴² This observation, if correct, suggests that market coverage should not be used as a screen to keep plaintiffs from bringing a case at all.

Another possible screen or filter is to require the plaintiff to plead that a retailer or group of retailers was the driving force behind the RPM. There appears to be widespread consensus that RPM is much less likely to be harmful if it is instituted by the manufacturer. Because “the interests of

³⁶ See, e.g., AREEDA, *supra* note 24, ¶ 1632d2, at 322.

³⁷ See *Leegin*, 127 S. Ct. at 2719.

³⁸ For instance, a modified market power screen could require the plaintiff to allege and prove that the market is concentrated and the defendant has at least a 10 percent share of the relevant market. See Brief Amici Curiae of William S. Comanor and Frederic M. Scherer in Support of Neither Party at 10, *Leegin* (No. 06-480) [hereinafter Comanor and Scherer Brief] (proposing a market power screen that is triggered when the “relevant line of commerce is oligopolistic, e.g., with a Herfindahl-Hirschman index exceeding 1800” and when the “RPM is implemented by a seller with a relevant market share of 10 percent or more, i.e., a Herfindahl-Hirschman change of 100 or more”).

³⁹ While proof of this assertion would serve as a defense, it would be more efficient not to allow the small manufacturer or retailer to be haled into court in the first place.

⁴⁰ See, e.g., Easterbrook, *supra* note 25, at 161–62 (“Unless all or almost all firms in an industry use the same vertical restraints, a case should be dismissed on the pleadings. The rationale for this filter is that every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice. For example, RPM or territorial restraints could facilitate or enforce a cartel only if all firms in the industry use identical practices.”).

⁴¹ AREEDA, *supra* note 24, ¶ 1632d2, at 322 (“we doubt that facilitation of manufacturer coordination is a serious threat” if the percentage of the market engaging in RPM is less than 60 percent); *id.* ¶ 1632e2, at 324 (“We would suggest that coverage [in the retail market] in the range of 50 or 60 percent signifies a risk of competitive harm.”); see also *Leegin*, 127 S. Ct. at 2719 (RPM is more likely to be a problem when “many competing manufacturers adopt the practice”).

⁴² AREEDA, *supra* note 24, ¶ 1633c2, at 332.

manufacturers and consumers are aligned with respect to retailer profit margins,”⁴³ if the manufacturer is the moving force behind RPM, it “must have some special reason for wanting resale price maintenance.”⁴⁴ But the fact that the efficiency justifications for RPM are found most often when the manufacturer originates RPM (see the discussion of justifications below) does not necessarily mean that manufacturer-driven RPM is never harmful to consumers.⁴⁵ While a “retailer screen” might dramatically reduce the number of cases that could be brought, it probably would be overbroad and inconsistent with *Leegin*.

Conversely, it has been suggested that the courts should adopt a rebuttable presumption of *illegality* if the RPM is instituted at the behest of retailers.⁴⁶ According to Professors Comanor and Scherer, “there are no arguments in economic analysis supporting restraints arising from distributor actions or pressures.”⁴⁷ Although, as noted, there is broad agreement that retailer-driven RPM is more likely to be harmful than RPM initiated by the manufacturer, a rebuttable presumption of per se liability seems clearly inconsistent with *Leegin*. And, as Justice Breyer pointed out, it may not be easy to determine which party is the driving force behind the RPM.⁴⁸ In circumstances where the interests of the manufacturer and at least some of its distributors align—such as when there are legitimate free-rider concerns—it may not be clear who is the driving force behind the RPM and it probably does not matter.⁴⁹ For example, assume a retailer of high-end stereo equipment tells a manufacturer that it can no longer afford to provide highly trained sales people to explain the features of the manufacturer’s products because it is losing too many sales to discounters. The retailer says it will either stop allocating trained sales people to the manufacturer’s line or drop it altogether unless the manufacturer adopts an RPM policy. In response, the manufacturer adopts a new policy requiring all of its distributors to agree not to sell below the manufacturer’s suggested retail prices. Assuming no agreement among retailers to pressure the manufacturer, is there any reason why this RPM—which is intended to address a classic free-rider problem—is any more suspect than if the manufacturer had instituted RPM without having been asked to do so? In such cases a rebuttable presumption of illegality for retailer-driven RPM would be both overinclusive and difficult to administer. Nonetheless, in the face of evidence that RPM was adopted as a result of retailer coercion, it might be relatively easy to condemn the restraint through the rule of reason analysis discussed below.

Thus, although there are a number of possible filters or screens that courts could consider to enhance administrative efficiency and predictability for businesses, some type of modified market power screen appears to have widespread support and would be consistent with the Court’s opinion in *Leegin*.

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⁴³ *Leegin*, 127 S. Ct. at 2718.

⁴⁴ *Id.* at 2729 (Breyer, J., dissenting).

⁴⁵ *See id.* at 2716–17.

⁴⁶ *See* Comanor and Scherer Brief, *supra* note 38, at 9.

⁴⁷ *Id.* at 8 (“In such circumstances, RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values, unless one subscribes to the notion that protecting small retailers is desirable in its own right.”); *cf.* AREEDA, *supra* note 24, ¶ 1648, at 442 (“if dealers coerce a manufacturer into restraining intrabrand competition, the restraint is clearly anticompetitive”).

⁴⁸ *Leegin*, 127 S. Ct. at 2730 (Breyer, J., dissenting).

⁴⁹ Of course, this is very different from a situation in which a retailer or group of retailers coerces a manufacturer to introduce RPM contrary to the manufacturer’s own interests. *Cf.* Areeda, *supra* note 24, ¶ 1633d2, at 335 (“Except for each dealer’s interest in not being the victim of free riding by rival dealers, the dealers’ interests should generally be regarded as illegitimate.”).

The Plaintiff's Prima Facie Case. Although *Leegin* suggests several factors that would be relevant to determining whether the RPM is anticompetitive, the Court did not establish a standard for the plaintiff's prima facie case. What is clear from the Court's opinion, however, is that the plaintiff's prima facie showing cannot consist only of proof that the RPM raised prices. As the majority was careful to explain, the price effect of RPM, standing alone, tells us nothing about consumer welfare.⁵⁰ After all, the point of RPM is to prevent harmful price cutting that would deprive consumers of services and choices they desire.

Writing long before the *Leegin* decision, Professors Areeda and Hovenkamp recommended a structured rule of reason approach for RPM under which the plaintiff's prima facie case consists of showing the presence of one or more of the following "adverse factors," which are consistent with the *Leegin* analysis:

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- Manufacturer concentration;
- Dealer concentration;
- Widespread market coverage;
- The RPM was initiated by a dealer or group of dealers;
- The RPM covers a powerful brand;
- The RPM was requested by a powerful dealer that a manufacturer could not readily replace;
- The RPM is used only in select markets (suggesting dealer power in those markets accounts for the restraint); or
- The RPM is used for a homogeneous product (suggesting that there could be no free rider or enhanced service justification for the restraint).⁵¹

The presence of only one of these factors may not be sufficient to establish that there is a danger of competitive harm and satisfy the plaintiff's prima facie case.⁵² Nor is this list of "adverse factors" necessarily exhaustive. Nevertheless, the list provides a useful starting point for courts to consider in determining whether the plaintiff has shown that the RPM is likely to harm competition by perpetuating inefficient distribution; suppressing competition to enhance dealer profits; facilitating manufacturer coordination; or promoting some other anticompetitive interest.⁵³

The Defendant's Rebuttal and Procompetitive Justifications. In a typical rule of reason case, once the plaintiff makes out a prima facie case that the restraint is anticompetitive, the burden shifts to the defendant to explain why the restraint in fact does not harm competition. The defendant can meet this burden in one of two ways. First, the defendant can show that the RPM does not have the harmful effect on competition suggested by the plaintiff's prima facie showing. Circumstances in the particular market may mean that RPM is not harmful despite the presence of one or more adverse factors. For example, the defendant might offer evidence that consumers were not denied a full range of retailers selling competing products at various prices and levels of service. Or a manufacturer-defendant may show that it needed to introduce RPM to gain or maintain a toehold in a new market, a widely agreed upon procompetitive use of RPM.⁵⁴

⁵⁰ *Leegin*, 127 S. Ct. at 2718.

⁵¹ AREEDA, *supra* note 24, ¶¶ 1633c1 & 1633e.

⁵² A possible variation on this would be to require the plaintiff to show one or more of these factors in addition to the factors already incorporated into the modified market power screen discussed above.

⁵³ See AREEDA, *supra* note 24, ¶ 1632, at 316.

⁵⁴ See *Leegin*, 127 S. Ct. at 2716; *id.* at 2728 (Breyer, J., dissenting). Cases involving new market entrants and small companies using RPM to survive in the face of dominant competitors should be eliminated by the modified market power screen discussed above.

Second, the defendant may offer evidence of efficiencies to justify its use of RPM despite any potential harmful effects. In some cases, it may be obvious that the RPM serves no legitimate purpose. For example, if RPM is used to raise prices of homogeneous products, it is unlikely that there is any procompetitive justification for the restraint.⁵⁵ There also may not be a legitimate justification in circumstances where a manufacturer is coerced by a retailer into adopting RPM.⁵⁶ But in many cases, the defendant will be able to offer a plausible efficiency justification for RPM. The principal justification offered is that RPM is necessary to support retail and distributor services that consumers value.⁵⁷ Without RPM some dealers might “free ride” on the investment in those services made by other dealers. In the long run, as a result of free riding, all dealers might stop investing in services that benefit the seller and consumers.⁵⁸ Other potentially legitimate justifications for RPM include giving retailers an incentive to provide valuable services even in the absence of free riding,⁵⁹ or encouraging prestigious retailers to stock a manufacturer’s product and give it an implicit “quality certification.”⁶⁰ Another possible efficiency justification is to help stabilize demand for a product and thereby encourage retailers to maintain adequate inventories.⁶¹ Retailers’ interests—at least where they diverge from those of the manufacturer—are generally suspect.⁶²

Balancing. Assuming that the defendant offers a legitimate and non-pretextual efficiency justification for the RPM, under traditional rule of reason analysis the court should balance the competing interests and determine whether the challenged restraint should be allowed to stand. Such balancing is often fraught with difficulties, and RPM is no different than other rule of reason cases in that respect.

In the first place, the court could try to assess the competitive significance of the defendant’s justification. The court could analyze the seriousness of the business problem that the RPM is designed to address and the effectiveness of RPM in solving that problem.⁶³ If it is clear that the free riding (or other business) problem is minimal or that the business problem could be better addressed by other less harmful means, the defendant’s justification should be given relatively little weight in the balancing. In most cases, though, it may be difficult to assess whether RPM is an effective means of addressing the business problem at issue.

⁵⁵ AREEDA, *supra* note 24, ¶ 1633c3(D), at 334 (“Product homogeneity is an easily observable fact that is inconsistent with known legitimate uses of RPM.”).

⁵⁶ *Id.* ¶ 1632e3 (discussing dealer power over manufacturer).

⁵⁷ The other most widely accepted justification is that RPM can facilitate new entry. *See, e.g., Leegin*, 127 S. Ct. at 2728 (Breyer, J., dissenting) (discussing how a new producer may use RPM to convince dealers to help it enter the market and the “result might be increased competition at the producer level, i.e., greater *inter*-brand competition, that brings with it net consumer benefits”). As we have already mentioned, cases involving that reason for RPM should not get past the modified market power screen.

⁵⁸ *See, e.g., id.* at 2715–16; *id.* at 2728 (Breyer, J., dissenting); Brief Amici Curiae of Economists at 5–10, *Leegin* (No. 06-480) [hereinafter Economists’ Brief] (detailing the relationship between RPM and the prevention of harmful free riding). The authors’ law firm, Heller Ehrman LLP, served as counsel for the amici economists.

⁵⁹ *See Leegin*, 127 S. Ct. at 2716; Economists’ Brief, *supra* note 58, at 11.

⁶⁰ *See* Brief Amicus Curiae of United States at 14, *Leegin* (No. 06-480) [hereinafter U.S. Brief]; Howard P. Marvel, *The Resale Price Maintenance Controversy: Beyond the Conventional Wisdom*, 63 ANTITRUST L.J. 59, 65–68 (1994). *But cf. AREEDA, supra* note 24, ¶ 1631c3(A), at 311 (“Although [the quality certification] argument cannot be categorically rejected, we question its persuasiveness and suggest that it may reflect the market power of elite stores rather than a consumer benefit.”).

⁶¹ *See* U.S. Brief, *supra* note 60, at 15–16; Economists’ Brief, *supra* note 58, at 11.

⁶² *See, e.g., AREEDA, supra* note 24, ¶ 1633d2, at 335.

⁶³ *See id.*

An even more serious concern is that it may be very difficult in RPM cases to determine the relative weight that should be given to the plaintiff's proof of harm. Assume that the plaintiff has shown that a manufacturer with market power has introduced RPM and the result has been higher prices throughout the relevant market. The defendant then offered credible evidence that without RPM, retailers were not providing the level of service desired by consumers and the defendant's sales increased after it introduced RPM. The plaintiff might argue that the balancing in this case must go in its favor because the price effects reflect actual consumer harm. The extent to which higher prices from RPM reflect consumer harm, however, is difficult to determine. On the one hand, the so-called "inframarginal consumers," i.e., consumers who would have purchased without any additional services, likely will have been made worse off by the RPM. On the other hand, consumers who value the enhanced retail services may have been made better off by the RPM even though prices increased. Unless the court can assess the effect of the RPM on aggregate consumer welfare in the relevant market, it may be difficult to engage in any meaningful balancing of the plaintiff's showing of harm to competition and the defendant's proffered procompetitive justification.

Unless the court can assess the effect of the RPM on aggregate consumer welfare in the relevant market, it may be difficult to engage in any meaningful balancing of the plaintiff's showing of harm to competition and the defendant's proffered procompetitive justification.

Some might argue that the fact the defendant's sales increased after it introduced RPM answers the question—i.e., if RPM causes sales to increase, on balance consumers are better off.⁶⁴ Even if sales increase after RPM is introduced, however, the true competitive effects of the RPM might not be clear. For example, there may be difficult questions of causation (did the RPM cause the rise in sales?). Merely looking to whether the defendant's sales increased after it introduced RPM might go too far in the direction of creating a presumption of per se legality for RPM. That said, it seems appropriate to tip the scale in favor of a defendant who can show that the RPM was legitimately intended to address a serious business concern such as the prevention of free riding in a market for highly differentiated goods.

Conclusion

The full impact of the Supreme Court's decision in *Leegin* will depend on how the lower courts apply the rule of reason and what sorts of presumptions and rules of proof they adopt. *Leegin* suggests that there is not one obviously correct approach. What is clear, however, is that any rule of reason framework should recognize that, in Justice Breyer's words, "sometimes resale price maintenance can prove harmful; sometimes it can bring benefits."⁶⁵ In keeping with the Court's opinion, lower courts should strive to develop a rule of reason framework that (1) leads to predictable and efficient results and (2) strikes an appropriate balance between the recognized potential harms and benefits of RPM.

Where does this leave businesses in the meantime? Manufacturers have two options. They may continue to rely on the *Colgate/Monsanto*⁶⁶ line of cases under which they may unilaterally announce and enforce a retail pricing policy so long as they do not enter into an agreement with buyers. This strategy is now less risky than it was in the past because, under *Leegin*, the manufacturer is no longer subject to potential per se liability (at least under federal law for U.S. sales) if it crosses the somewhat artificial line that courts have drawn between wholly legal unilateral conduct and an agreement that may be actionable under Section 1.

⁶⁴ See, e.g., Easterbrook, *supra* note 25, at 163–64.

⁶⁵ *Leegin*, 127 S. Ct. at 2729 (Breyer, J., dissenting).

⁶⁶ *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

Alternatively, companies now may choose to enter into direct agreements with U.S. buyers to adhere to their retail pricing policy. Manufacturers may determine that direct agreements are more efficient and effective than the old way of doing business, and worth the risk of potential rule of reason litigation. This strategy may be appropriate where the risk of successful rule of reason challenges to RPM are low: for example, if the manufacturer has a small market share; the market is not highly concentrated; the manufacturer sells a differentiated product; and the manufacturer introduces RPM to address a legitimate business problem such as free riding. However, an important caveat is that businesses will need to take into account the possibility that some states may maintain per se rules against RPM, which may complicate nationwide retail pricing policies. If and when the position of the states to follow *Leegin* becomes clear, and lower courts have developed rules and presumptions designed to streamline rule of reason litigation involving RPM, including potentially the use of various forms of market power screens, the risks associated with RPM policies should decline for many manufacturers. If, however, any significant number of states decide to maintain the per se rule, *Leegin* may have little practical effect on manufacturers' pricing strategies. ●

The Supreme Court Curbs Antitrust Lawsuits Challenging Securities-Related Conduct

Andrew J. Frackman and Brendan J. Dowd

*Credit Suisse Securities (USA) LLC v. Billing*¹ is the Supreme Court's first implied immunity decision concerning the interface of the federal securities statutes with the federal antitrust laws in nearly three decades. In *Billing*, the Court expanded the scope of the immunity doctrine and clarified the standard that lower courts should apply when plaintiffs bring antitrust claims challenging conduct that is regulated under the securities laws. While *Billing* is certainly not the last chapter in this story, the Court's decision provides flexible, pragmatic standards designed to ensure both that: (a) there is an enforcement mechanism to redress the challenged conduct; and (b) defendants are not subject to potentially conflicting standards of conduct, which could chill certain conduct that the Securities and Exchange Commission (SEC) deems beneficial.

Implied immunity is a defense exempting a defendant from antitrust liability in cases involving the application of the antitrust laws to conduct subject to another statutory and/or regulatory scheme, where that application could result in conflicting norms for defendants. The implied immunity doctrine is, thus, an exception to the traditional principle of statutory interpretation that "the existence of duties under one federal statute does not, absent express congressional intent to the contrary, preclude the imposition of overlapping duties under another federal statutory regime."² The overarching question in the implied immunity analysis is whether a "repugnance" exists between the antitrust laws' "competition-first" principles and the more nuanced norms prescribed by the other relevant regulatory scheme. Repugnance often turns on whether the regulator in question has the power to permit the conduct that plaintiffs challenge under the antitrust laws. For this reason, *Billing* presented a tougher challenge for the Court than most implied immunity cases because plaintiffs contended that the SEC could never permit the core challenged conduct.

The Supreme Court overcame this hurdle by grounding its decision largely in the novel "chilling effect" rationale. The SEC had made the chilling effect argument in its amicus submission to the district court, arguing that applying the Sherman Act and the treble damages remedy to the allegedly illegal manipulative conduct would cause underwriters to steer so clear of the allegedly illegal conduct that they would be chilled from engaging in conduct that the SEC permits. The danger of this happening, the Court explained, was very real because the difference between permissible and forbidden conduct in this context often turns on fine line-drawing that often involves ambiguous evidence. The Court believed that, in some circumstances, only the SEC would be competent to draw the appropriate lines between the forbidden and permissible. Ultimately, this potential over-deterrence troubled the Court because it meant that underwriters might avoid engaging in conduct beneficial to the capital formation process and impede the function of the nation's vital capital markets.

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¹ 127 S. Ct. 2383 (2007).

² *In re Worldcom, Inc. ERISA Litig.*, 263 F. Supp. 2d 745, 767 (S.D.N.Y. 2003).

Notably, *Billing* was one of four major antitrust cases the Court decided this term. In all four—*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,³ *Bell Atlantic Corp. v. Twombly*,⁴ *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,⁵ and *Billing*—the Solicitor General filed an amicus brief in support of the petitions for certiorari, urged reversal in favor of the defendants, and the Supreme Court reversed. As discussed more fully below, the Solicitor General's position in favor of the defendants in *Billing* was somewhat equivocal, stopping short of advocating immunity for the challenged conduct. But, in light of the Court's recent history of taking the course urged by the SG's office, the SG's position urging reversal in *Billing* certainly helped the defendants.

The Plaintiffs' Claims

The plaintiffs' claims arose out of the decline of the dot-com boom of the late 1990s and 2000. In December 2000, the *Wall Street Journal* reported that the SEC was investigating certain underwriters concerning alleged misconduct in connection with certain "hot" initial public offerings (IPOs) during the tech boom. The SEC was investigating claims that some banks required investors to pay large commissions to obtain allocations in hot offerings. In addition, the SEC was investigating whether the banks also required investors, as a condition of getting allocations, to buy additional shares in the aftermarket at agreed-upon escalating prices once public trading began. These agreements were purportedly reached in the course of the underwriters' "book-building" process, by which they solicit indications of interest from potential investors in the IPO in the course of road shows⁶ and other communications. As the SEC has recognized, by collecting these indications of interest, underwriters are able to assess the demand for the offering and better price the offering.⁷

Just four weeks after the *Wall Street Journal* initially reported the SEC's investigations, the plaintiffs filed the first of more than 1000 securities class actions alleging that 55 of the leading investment banks manipulated the aftermarket prices of the stocks of 310 companies that the banks took public between August 1998 and November 2000. The actions were eventually consolidated around the 310 different offerings at issue, and the 310 putative class actions were coordinated for pre-trial purposes, known as *In re Initial Public Offering Securities Litigation*.⁸ The core claim in all cases was that the defendants manipulated the aftermarket prices of the underwritten stocks by requiring investors to buy additional shares in the aftermarket as a condition of getting an IPO allocation.

In March 2001, still in the early stages of the onslaught of securities class action filings, one plaintiff filed an action under the Sherman Act based on the identical misconduct alleged in the securities class actions. Rather than alleging misconduct by the underwriters for a single IPO, the complaint alleged that ten underwriters conspired across IPOs to require investors to: (a) pay excessive commissions (later labeled by plaintiffs as "anticompetitive charges"); and (b) buy

³ 127 S. Ct. 2705 (2007).

⁴ 127 S. Ct. 1955 (2007).

⁵ 127 S. Ct. 1069 (2007).

⁶ Road shows involve the underwriters traveling throughout the country with the issuer's management to market the company to potential investors.

⁷ *Guidance Regarding Prohibited Conduct In Connection with IPO Allocations*, 70 Fed. Reg. 19,672 (2005).

⁸ These cases have had a lengthy history. Most recently, the court of appeals vacated the district court's order certifying classes in six test cases. *See* 471 F.3d 24 (2d Cir. 2006); *see also* 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (granting in part, and denying in part defendants' motions to dismiss).

additional shares in the aftermarket (labeled “tie-in” or “laddering” agreements) for the purpose of raising the compensation the banks received for underwriting the IPOs. The conspiracy claims rested on allegations, among others, that the defendants: (a) “worked together as co-underwriters and members of underwriting syndicates”; (b) were members of the Securities Industry Association; and (c) jointly and individually conducted “road shows.”

The Prior Cases

The plaintiffs were not pleading on a clean slate. The implied immunity doctrine is most developed in the context of Sherman Act claims challenging conduct in the heavily regulated securities industry. Anticipating an implied immunity defense, the plaintiff alleged that “[t]he defendants’ secret combination and conspiracy was not disclosed to, approved by, or regulated by the NASD or SEC.”⁹

The Supreme Court’s first decision in this arena, *Silver v. New York Stock Exchange*,¹⁰ concerned an alleged collective refusal to deal. There, the plaintiff challenged a New York Stock Exchange (NYSE) rule requiring members to immediately terminate, without explanation, private communications wires between member and non-member broker-dealers. The plaintiff, a non-member municipal securities dealer, saw its business plummet once NYSE members terminated their wires with plaintiff’s business. The Court found that the NYSE rule’s goal—protecting the investing public from, among others, boiler room brokers¹¹—furthered the NYSE’s regulatory mandate to protect the integrity of the markets. But the Court held that the NYSE rule’s provisions forbidding members to provide an explanation to non-members why the wires were terminated actually undermined the regulatory mandate to promote confidence in the integrity of the markets and also harmed competition. Thus, NYSE could not justify the notice provisions under its mandate from the Securities Exchange Act. Because the SEC provided no check on the anticompetitive aspect of any NYSE rules, the Court held that the antitrust laws could apply to the challenged conduct.

The Court’s next foray into implied immunity in the antitrust/securities context came twelve years later, when it handed down two cases on the same day. In *Gordon v. New York Stock Exchange*,¹² a small investor sued the NYSE, the American Stock Exchange, and two broker-dealers under the Sherman Act, challenging rules that fixed commissions for trades less than \$500,000. This time the Court held that the exchanges were immune from antitrust liability. The Court focused on: (a) Congress’s decision to entrust in the SEC the supervision of “the fixing” of reasonable commissions; and (b) the SEC’s active study and oversight of fixing commissions, including the competitive effects of switching from fixed to market-determined commissions. If exchanges and broker-dealers were subject to antitrust liability for charging fixed commissions, they would be subject to standards that conflict with those articulated by the SEC, and, indeed, “would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates.”¹³

⁹ *Billing Complaint*, ¶ 41.

¹⁰ 373 U.S. 341 (1963).

¹¹ A boiler room broker is “usually a physically small operation which employs high pressure telephone salesmanship to oversell to the public by quantity, and in many cases by quality.” *Id.* at 354 n.10.

¹² 422 U.S. 659 (1975).

¹³ *Id.* at 691.

Finally, in *United States v. National Association of Securities Dealers*,¹⁴ the Department of Justice challenged the arrangements among the National Association of Securities Dealers (NASD), various mutual funds, mutual fund underwriters, and broker-dealers concerning the sale of mutual fund shares in the secondary market. The Court first held that the challenged vertical restraints that mutual funds placed on the negotiability and transferability of their shares were permitted by the Investment Company Act of 1940 (ICA), provided the restraints were disclosed to investors in fund prospectuses. The Court concluded that Congress had contemplated mutual funds employing the challenged restraints. The conduct was deemed immune from scrutiny to avoid subjecting the defendants to “the competing mandate of the antitrust laws.”¹⁵ Despite the DOJ’s prosecution of the action, the SEC urged the Court to find immunity because “its authority [to regulate the mutual fund industry] will be compromised seriously if these agreements are deemed actionable under the Sherman Act.”¹⁶ The Court agreed, and next wrestled with the claim that there was a horizontal agreement between the NASD and its members to thwart the growth of the secondary market for the resale of mutual fund shares. Though the Court agreed that the ICA neither required nor authorized the challenged conduct, it still found immunity to make the regulatory scheme work. The Court explained that the SEC had a lengthy history of pervasive oversight of the defendants and the challenged conduct. As part of that oversight, the SEC weighed competitive concerns. Once again, the Court held that applying the antitrust laws to the alleged conspiracy “poses a substantial danger that [the defendants] would be subjected to duplicative and inconsistent standards.”¹⁷

Against this backdrop, the defendants in *Billing* filed the expected motion to dismiss.

The District Court Proceedings

Two notable aspects of the district court proceedings were: (a) the divergent positions taken by the SEC and the DOJ on the implied immunity issue, and (b) the court’s holding that the conduct was impliedly immune even though it could not identify any statute or regulation providing the SEC the power to permit the alleged “tie-ins.”

Before ruling, the district court requested amicus curiae briefs from the SEC and the DOJ on the issue of implied immunity. The SEC urged the district court to find the challenged conduct impliedly immune, “noting its past and continuing regulation of the IPO process, the syndicate system, and various nominally anticompetitive price stabilization techniques.”¹⁸ And in a passage that would become critical to the Supreme Court’s decision, the SEC argued “that a ‘failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission’s ability to exercise its regulatory authority,’ adding that it would have a ‘chilling effect’ on lawful joint activities . . . of tremendous importance to the economy of the country.”¹⁹ The DOJ, by contrast, opposed implied immunity, arguing that in the absence of express or implied authorization for the

¹⁴ 422 U.S. 694 (1975).

¹⁵ *Id.* at 722.

¹⁶ *Id.* at 729.

¹⁷ *Id.* at 735.

¹⁸ *In re Initial Public Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 506 (S.D.N.Y. 2003) (internal citations omitted).

¹⁹ 127 S. Ct. at 2396 (quoting SEC’s brief to district court. *See Memorandum Amicus Curiae of the Securities Exchange Commission, In re Initial Public Offering Antitrust Litig.*, No. 01 CIV 2014 (WHP) (S.D.N.Y. Dec. 20, 2002), 2002 WL 32153495).

banks to engage in the challenged conduct, no repugnancy exists between the antitrust laws and securities laws.²⁰

The district court granted the motion to dismiss and held that the alleged misconduct was immune from antitrust scrutiny because the SEC “either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct such that a failure to find implied immunity would ‘conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit.’”²¹

With respect to the more challenging allegations concerning conduct that could theoretically be deemed prohibited under both the antitrust and securities regimes—the alleged tie-ins and anticompetitive charges—the court held that, even if the conduct was prohibited under both schemes, immunity was appropriate because of the potential conflicts that applying the antitrust laws could present. Because of the SEC’s (a) power to regulate tie-ins, underwriter compensation, and broker-dealer compensation, (b) active regulation of those activities, (c) present rule-making activity with respect to those activities, and (d) recent enforcement actions against some of the same defendants for the same alleged misconduct, the court found that the application of antitrust law’s “competition-first” standards created too great of a potential for conflicting mandates.

The Second Circuit Decision

The Second Circuit, like the district court, sought the views of the SEC and the DOJ, posing specific questions to those agencies concerning whether the SEC has the authority to permit the banks to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices. The SEC “offer[ed] a qualified double negative—that, in its view, ‘[c]urrent precedent does *not* . . . foreclose [its] ability in response to future developments to authorize conduct by underwriters that *could be characterized* as a tie-in or laddering.”²² The DOJ differed, “find[ing] it very difficult to imagine circumstances” under which the SEC could permit such conduct.

The Second Circuit reversed the district court in a 68-page opinion. The court held that the defendants had not demonstrated “that Congress clearly intended a repeal of the antitrust laws.”²³ Rather than determine whether Congress’s creation of the regulatory scheme “implied” a repeal of the antitrust laws, the court explained, “we will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed.”²⁴ The court’s framing of the issue in this fashion arguably brought the implied immunity analysis closer to an *express* immunity inquiry.

The court’s sifting of the case law found the following factors instructive:

- (1) congressional intent as reflected in legislative history and a statute’s structure;
- (2) the possibility for conflicting mandates;
- (3) the possibility that application of the antitrust laws would moot a regulatory provision;
- (4) the history of agency regulation of the anticompetitive conduct; and

²⁰ Memorandum of the United States as Amicus Curiae, *In re Initial Public Offering Antitrust Litig.*, No. 01 CIV 2014 (WHP) (S.D.N.Y. Dec. 20, 2002), 2002 WL 32153494.

²¹ 287 F. Supp. 2d at 523 (quoting *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003)).

²² *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 168 (2d Cir. 2005) (quoting SEC letter (alterations by court)).

²³ *Id.* at 168–69.

²⁴ *Id.* at 164.

(5) any other evidence indicating that the statute implies a repeal.²⁵

The court found that none of these factors suggested that the alleged misconduct was immune from antitrust scrutiny.²⁶ The court's ruling turned almost entirely on the SEC's inability to authorize the tie-ins or anticompetitive charges.²⁷

The Certiorari Petition

The certiorari process was notable because, in contrast to the briefing below, the United States submitted a single brief, attempting to harmonize the divergent positions of the SEC and the DOJ. The Solicitor General urged the Court to grant certiorari, arguing that while the banks were not entitled to “the sweeping immunity they advocate,” the Second Circuit’s immunity standard was too stingy.²⁸ It contended that courts should dismiss if a complaint’s alleged collaborative activities are either permitted by the regulatory scheme or “inextricably intertwined” with such permitted conduct.²⁹ Because the alleged collaborative activity in this case rested in large part on expressly permitted conduct, the Solicitor General advocated dismissing the complaint and directing the plaintiffs to re-plead to clarify that they are not relying upon permitted conduct to sustain their Section 1 claim.³⁰

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The Supreme Court’s Decision

In a 7–1 decision, the Supreme Court reversed the Second Circuit, holding that the challenged conduct was impliedly immune from antitrust scrutiny.³¹ The Court reaffirmed the overarching “plain repugnancy” standard but simplified the analysis, distilling four “critical” factors from the *Silver, Gordon*, and *NASD* trilogy:

- (1) the existence of regulatory authority under the securities law to supervise the activities in question;
- (2) evidence that the responsible regulatory entities exercise that authority; . . .
- (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct[; and . . .]
- (4) . . . [whether] the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.³²

The Court easily dispensed with three of these factors.

²⁵ *Id.* at 164–65.

²⁶ *Id.* at 169–70.

²⁷ The court also rejected the defendants’ “pervasive regulation” defense. The court interpreted the pervasiveness prong of the immunity defense to apply only when: (1) there is a particular pervasive relationship, such as between the SEC’s oversight of the NASD, and (2) the conduct is “not only impliedly immune but actively encouraged by the SEC.” *Id.* at 171.

²⁸ Memorandum of the United States as Amicus Curiae, *Credit Suisse First Boston Ltd. v. Billing*, No. 05-1157 (U.S. Nov. 9, 2006), 2006 WL 3309862.

²⁹ *Id.*

³⁰ *Id.*

³¹ 127 S. Ct. at 2397. Only six justices joined in the implied immunity opinion. Justice Stevens concurred in the judgment, but wrote that given the patent lack of merit to the antitrust claim, the Court should hold that the plaintiffs failed to state a claim, rather than reach the implied immunity argument. Indeed, he wrote that plaintiffs’ suggestion that underwriters “can restrain trade in [the aftermarket trading] by manipulating the terms of IPOs is frivolous.” 127 S. Ct. at 2398.

³² *Id.* at 2392.

First, the Court found that the allegations concerning syndicated public offerings “lie at the very heart of the securities marketing enterprise.”³³ It noted that the SEC “consider[s] the general kind of joint underwriting activity at issue in this case, including road shows and book-building efforts essential to the successful marketing of an IPO.”³⁴

Second, the Court found it indisputable that the SEC possessed authority to “supervise . . . forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage.”³⁵

Third, there was no doubt that the SEC exercised its authority to regulate the conduct at issue. The SEC had recently issued guidance concerning underwriter conduct in IPO allocations and had brought enforcement actions against underwriters that the SEC found to be out of compliance with the agency’s regulations.³⁶ The Court also added here that private litigants had brought securities claims challenging the identical conduct.

The Court was particularly concerned with the “chilling effect” that the application of antitrust law, with its treble damages remedy, could have on certain permissible, beneficial conduct under the securities laws.

“Is There a Conflict that Rises to the Level of Incompatibility?” The bulk of the Court’s analysis addressed the third factor—whether the application of the antitrust laws would create conflicting standards for the defendants sufficient to rise to the level of “incompatibility.” Put another way, would the application of the antitrust laws to the challenged conduct “prove practically incompatible with the SEC’s administration of the Nation’s securities laws?”³⁷ The Court answered these questions with an emphatic “yes.”

The Chilling Effect. First, even assuming that the SEC could never permit the defendants to engage in tie-ins, the Court was particularly concerned with the “chilling effect” that the application of antitrust law, with its treble damages remedy, could have on certain permissible, beneficial conduct under the securities laws. An underwriter may avoid engaging in certain conduct the SEC permits as part of the book-building process for fear that if its actions are misinterpreted, it could be subject to treble damages under the antitrust laws. This was especially the case in *Billing* because proving the alleged tie-ins hinged on fine line-drawing about often ambiguous conduct. As the Court illustrated, the SEC, on the one hand, encourages underwriters to ask investors about their long-term demand (e.g., three-to-six months) for shares in the issuer’s stock and the price the investors might be willing to pay for the shares. But the SEC’s interpretive guidance, on the other hand, suggests that soliciting orders for the immediate aftermarket before the completion of the distribution, would violate SEC Regulation M.³⁸

The Court also expressed concern that an antitrust jury would have to sift through evidence that is likely to be ambiguous as to whether the conduct is permissible under the securities laws. For example, an underwriter’s conversation with an investor “that elicits comments concerning both the investor’s short and longer term plans . . . might, as [the antitrust] plaintiff sees it, provide evidence of an underwriter’s insistence upon ‘laddering’ or, as a defendant sees it provide evidence of a lawful effort to allocate shares to those who will hold them for a longer time.”³⁹ This type of

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 2393.

³⁷ *Id.*

³⁸ *Id.* at 2394 (citing 17 C.F.R. §§ 242.100–242.105).

³⁹ *Id.* at 2395 (citing Brief for United States as Amicus Curiae, *In re Initial Public Offering Antitrust Litig.*, 127 S. Ct. 2383 (2007) (No. 05-1157), 2006 WL 3309862).

ambiguous evidence will tend to make it “difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted).”⁴⁰

For the excessive compensation allegations, the Court noted that on the one hand the SEC had proposed a rule that would “prohibit an underwriter ‘from demanding . . . an offer from their customers of any payment or other consideration [such as the purchase of a different security] in addition to the security’s stated consideration.’”⁴¹ But, on the other hand, “the SEC would permit a firm to ‘allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services.’”⁴² The fine line-drawing that these standards articulate “requires an understanding of just when, in relation to services provided, a commission is ‘excessive,’ indeed, so ‘excessive’ that it will remain *permanently* forbidden.”⁴³ The Court suggested that only the SEC could do so with confidence.⁴⁴

But if the conduct were not impliedly immune from antitrust scrutiny, plaintiffs could bring the claims in different courts throughout the country, with different juries potentially reaching different results about what the ambiguous evidence showed. The inevitable divergent results create a real threat of the defendants being subject to divergent standards.

Thus, the Court found these factors— “[1] the fine securities-related line separating the permissible from the impermissible; [2] the need for securities-related expertise (particularly to determine whether an SEC rule is likely permanent); [3] the overlapping evidence from which reasonable but contradictory inferences may be drawn; and [4] the risk of inconsistent court results”—mean that it would be impossible for an antitrust jury to consider only conduct that was both presently and likely to remain forbidden under the securities laws.⁴⁵ Because the inquiry cannot reasonably be limited to permanently forbidden conduct, the application of the antitrust laws to the alleged misconduct “means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages).”⁴⁶

The Court acknowledged that a chilling effect “exists to some degree in respect to other antitrust lawsuits” but that “the role that joint conduct plays in respect to the marketing of IPOs, along with the important role IPOs themselves [play in relation to the effective functioning of capital markets, means that the securities-related costs of mistakes is unusually high.”⁴⁷ Given the SEC’s concern about the “chilling effect” that the application of the antitrust laws would have on permissible, beneficial conduct that came close to the impermissible, there was a repugnancy between the two regimes.

⁴⁰ *Id.* at 2394.

⁴¹ *Id.* (quoting 69 Fed. Reg. 75,785 (2004)).

⁴² *Id.*

⁴³ *Id.* at 2395.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 2396.

⁴⁷ *Id.*

The Court found that the pervasive regulation by the SEC and remedies provided by the securities laws made application of the antitrust laws unnecessary.

The Lack of Necessity. The Court found that the pervasive regulation by the SEC and remedies provided by the securities laws made application of the antitrust laws unnecessary. The Court explained that: (1) “the SEC actively enforces the rules and regulations that forbid the conduct in question”; (2) “investors harmed by underwriters’ unlawful practices may bring lawsuits and obtain damages under the securities law”; and (3) “the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations.”⁴⁸ The Court noted that in light of Congress’s efforts to “weed out unmeritorious securities lawsuits” through, among other things, the heightened pleading standards of the Private Securities Litigation Reform Act of 1995 (PSLRA), permitting an antitrust lawsuit in this context would permit the plaintiffs to skirt those Congressionally mandated requirements.⁴⁹

The Court Rejects the Solicitor General’s “Inextricably Intertwined” Test. The Court rejected the Solicitor General’s “compromise” position: reversal, but remand to determine whether the “inextricably intertwined” test was met. The Court explained that the fine line-drawing necessary to segregate the permissible from the forbidden requires securities-related expertise. Because federal district courts applying the antitrust laws lack the securities expertise of the SEC, the danger of “inconsistent results . . . will overly deter syndicate practices important in the marketing of new issues.”⁵⁰

Billing’s Implications for Antitrust Claims Challenging Securities-Related Conduct

Billing’s “chilling-effect” rationale is a new path in the Court’s implied immunity analysis for securities-related conduct, as neither *Silver, Gordon*, nor *NASD* focused on it as a basis for implied repeal. And neither of the lower courts addressed this argument even though the SEC made the point in its district court submission. Rather than focus on the abstract principles of “repugnancy” and the potential for “conflicting standards,” the Court grounded its reasoning in the over-deterrence that can result from applying the antitrust treble damages remedy even to conduct that the Court agreed was forbidden under both the securities and antitrust laws.

Justice Breyer, *Billing’s* author, zeroed in on the chilling effect at oral argument immediately after the plaintiffs’ counsel began his argument. In response to counsel’s argument that immunity “is not necessary to make the securities laws work,” Justice Breyer gave a preview of the opinion he would ultimately write:

Well, it might well be, because the reasoning would be, which I find very strong, is that as soon as you . . . bring an antitrust court in, you’re talking about juries and treble damages. And as soon as that happens, the people who are subject to it stay miles away from the conduct that, in fact, would subject them to liability. And yet staying miles away, they will not engage in conduct that, A, the SEC might believe is permissible, or, B, actually favor.

Where you get a complex complaint like yours, that begins to ring true, that argument. And that’s what’s concerning me.⁵¹

The “chilling effect” rationale expands the breadth of securities-related conduct subject to an implied immunity defense. Under previous Second Circuit law (where the vast majority of implied

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 2397.

⁵¹ Transcript of Oral Argument at 27–28, *In re Initial Public Offering Antitrust Litig.*, 127 S. Ct. 2383 (2007) (No. 05-1157), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-1157.pdf.

immunity battles have been fought), courts flatly rejected an immunity defense if the conduct was permanently prohibited under both enforcement regimes.⁵² But the Court's new articulation of the standard provides a buffer surrounding even permanently forbidden conduct, provided it has the hallmarks the Court found present here: (1) the fine, securities-related line-drawing; (2) the need for securities-related expertise to separate the permissible from the impermissible; (3) overlapping, ambiguous evidence; and (4) a danger of inconsistent verdicts.

The real question is whether the *Billing* decision will, in practice, deter plaintiffs from bringing antitrust claims for securities-related conduct. Historically, plaintiffs have not brought a significant number of antitrust lawsuits in this area. But the increased number of cases wrestling with the implied immunity question in the early part of this decade suggested a growing trend.⁵³ The Court was mindful that the plaintiffs filed *Billing* against the backdrop of Congress's passage of the PSLRA, which provided new incentives for private plaintiffs, as Justice Breyer put it, "to dress what is essentially a securities complaint in antitrust clothing."⁵⁴ Before the Court's decision this term in *Bell Atlantic Corp. v. Twombly*,⁵⁵ plaintiffs had a relatively easy burden pleading a Section 1 conspiracy claim in most circuits. Unless a plaintiff grounded its conspiracy claim in fraud, it was excused from the heightened pleading burdens under Federal Rule of Civil Procedure 9(b). And the federal courts' recent string of decisions tightening the pleading and class certification requirements for securities' plaintiffs⁵⁶ only magnified the incentive to find an antitrust angle. Despite these significant incentives, we believe that *Billing* will greatly reduce the number of complaints challenging securities-related conduct under the antitrust laws. ●

⁵² *Billing*, 426 F.3d at 162 (citing *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27–28 (2d Cir.1985)).

⁵³ See, e.g., *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002) (alleging under the Sherman Act that defendants' restriction of the supply of stock manipulated its price and caused plaintiffs to pay higher prices).

⁵⁴ 127 S. Ct. at 2396.

⁵⁵ 127 S. Ct. 1955 (2007) (reversing Second Circuit Court of Appeals' deferential pleading standard for Section 1 claims).

⁵⁶ See, e.g., *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007) (holding plaintiffs must plead "cogent" allegations of scienter that are at least as compelling as any opposing inference); *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005) (requiring plaintiffs to plead more than an inflated purchase price to satisfy loss causation pleading requirement); *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261 (5th Cir. 2007); *Miles v. Merrill Lynch & Co.*, 471 F.3d 24, 41–42 (2d Cir. 2006) ("disavowing" Second Circuit's "some showing" burden of proof for class certification).

Book Review

Workable Antitrust Remedies

Richard A. Epstein

Antitrust Consent Decrees in Theory and Practice: Why Less Is More

AEI Press • 2007

Reviewed by William H. Page

Just over twenty years ago, Frank Easterbrook proposed renaming the Chicago School of antitrust analysis the “Workable Antitrust Policy School,” in recognition of its skepticism about “the ability of courts to make things better even with the best data.”¹ Richard Epstein’s brief study of consent decrees² is in this tradition of circumspection in antitrust matters. Epstein proposes to analyze “the role consent decrees play in the antitrust law” by examining “the factual and legal disputes that gave rise” to various decrees.³ He finds many decrees of the past century misguided in their ambition, but concludes, on the evidence of the 2002 *Microsoft* decree, that the Antitrust Division, for the moment, has learned the virtues of minimalism—that less is more. His goal in the book is to buttress this new approach against any future backsliding by providing “a better understanding of why [the recent changes] count as improvements.”⁴

Epstein begins with a theoretical overview of the legal and practical characteristics of consent decrees. He observes that, although a proposed decree is a negotiated settlement between opposing parties in litigation, the Tunney Act⁵ now requires the court in which the government’s case is pending to determine if the decree is in the public interest before entering it as a final judgment. Measured by the modern understanding of the public interest, Epstein argues, many consent decrees entered over the past century have been overly interventionist and administratively complex. They have also remained in effect too long, in part because of the 1932 *Swift* decision,⁶ which required a showing of “grievous wrong” from changed circumstances before a court could modify or terminate a decree. The lesson Epstein proposes to extract from this history is that consent decrees should be as simple as possible, requiring minimal judicial supervision, and should take account of “the strengths and weaknesses of antitrust law.”⁷

¹ Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986).

² RICHARD A. EPSTEIN, *ANTITRUST CONSENT DECREES IN THEORY AND PRACTICE: WHY LESS IS MORE* (2007).

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ 15 U.S.C. § 16 (2006). Epstein rightly notes a critical “tension” in the Act’s framework: “[w]hile a district judge who is completely passive has failed to discharge his responsibilities under the Tunney Act, a judge who takes over the case displaces (typically) the prosecutor, which may, in turn, raise serious separation of powers issues.” EPSTEIN, *supra* note 2, at 5. See generally Joseph G. Krauss, David J. Saylor & Logan M. Breed, *The Tunney Act: A House Still Standing*, ANTITRUST SOURCE, June 2007, <http://www.abanet.org/antitrust/at-source/07/06/Jun07-Krauss6-20f.pdf>.

⁶ *United States v. Swift & Co.*, 286 U.S. 106, 144 (1932).

⁷ EPSTEIN, *supra* note 2, at 9.

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Epstein briefly surveys traditional common law and equitable remedies in private litigation, discerning in them a judicial predisposition to “maximize the freedom of the parties after the imposition of the remedy, and to minimize the judicial resources needed to keep those parties apart.”⁸ This approach reduces the need for costly ongoing supervision of the parties’ dealings. Although antitrust decrees have broader external effects, they should, he reasons, adopt a similar approach, one that is mainly focused on interdicting demonstrable violations. He maintains that this approach will be relatively easy to implement in cartel cases, where the theory supporting both liability and remedy is clear. In single-firm monopolization cases, however, the theory is less conclusive and the remedial issues correspondingly more challenging. In these latter cases, Epstein suggests, the benefits of “adventurous” decrees are likely to be lower and the costs of administration far higher.⁹

Measured by the modern understanding of the public interest, Epstein argues, many consent decrees entered over the past century have been overly interventionist and administratively complex.

Epstein then surveys the remedies entered in six cases over a span of half a century. In a brief preliminary discussion, Epstein endorses the view that the litigation and remedies in *Standard Oil*¹⁰ and *Alcoa*¹¹ accomplished little, because transformations in the market rendered the remedies unnecessary by the time they were imposed; he notes that the vertical divestiture required in *Paramount*¹² was ill-suited to the underlying cartel case.¹³ He examines the other three cases more closely. He cogently critiques the *Swift* decree’s prohibitions on vertical integration, which had little to do with the alleged horizontal restraints with which the meat packers were charged. Still more convincingly, he attacks the Supreme Court’s insistence, many years after entry of the decree, that these restrictions remain in effect, seemingly in order to protect firms in adjacent markets from the lower cost competition the defendants might bring if allowed to integrate. It was in this decision that the Court announced that consent decrees could not be modified except to correct a grievous wrong.¹⁴

Epstein’s assessment of the *ASCAP/BMI* consent decrees is more favorable. ASCAP and BMI are performing rights organizations that, among other functions, sell licenses to broadcasters and others to perform the songs in the organizations’ libraries. The 1941 consent decrees, Epstein argues, sensibly acknowledged the organizations’ efficiency advantages.¹⁵ Nevertheless, the decrees barred the organizations from including exclusivity provisions in their licenses and required the organizations to offer “per program” licenses in addition to the standard blanket licenses. The main difficulties in implementation of the decrees, according to Epstein, have stemmed from disparities in the treatment of the two organizations under separate decrees and from the complexities of determining the appropriate relationship between the prices of the program and blanket licenses. Despite these ongoing problems, he concludes that the decrees have remained appropriately “tied to the core violations to which they were directed”¹⁶ and have not hindered the efficiency of the organizations.

⁸ *Id.* at 13.

⁹ *Id.* at 14–17.

¹⁰ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

¹¹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

¹² *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹³ EPSTEIN, *supra* note 2, at 18–21.

¹⁴ *Id.* at 22–29.

¹⁵ *Id.* at 34.

¹⁶ *Id.* at 39.

Epstein next turns his attention to the decades-long *United Shoe Machinery* litigation, which focused on the exclusionary effects of United's long-term leases. This choice of subject is somewhat confusing because none of the many lawsuits the government brought against United ended in a consent decree. Perhaps anticipating this objection, Epstein suggests earlier in the book that consent decrees "operate as a close substitute for final judgments, from which they should not be distinguished analytically."¹⁷ Certainly, both consent decrees and judgments in litigated cases are final judgments with similar legal effects. But the very title of Epstein's book assumes that the distinguishing characteristics of consent decrees are sufficiently important to justify a separate study; otherwise, there would be no reason not to extend the scope of the study to countless other final judgments in government antitrust litigation.

Epstein seems to have included *United Shoe Machinery* in his study because of its connections to *Swift*. He largely endorses the early government actions challenging United's exclusive long-term leases as well as the relatively focused remedial orders that followed.¹⁸ He is far more critical of the renewed action that led to Judge Wyzanski's famous 1953 decision holding that United had monopolized the shoe machinery market by similar leasing practices.¹⁹ Judge Wyzanski limited the remedy in that case to conduct orders, sensibly rejecting the government's proposal to break up United, which had a single production facility. In doing so, he famously observed that "it takes no Solomon to see that this organism cannot be cut into three equal and viable parts."²⁰ Nevertheless, Epstein criticizes Judge Wyzanski's remedial orders for making the same mistake as the *Swift* decree by imposing strictures with little connection to the liability rulings.²¹ For example, Wyzanski capped the length of United's equipment leases at five years, even though both parties to the transaction may have preferred a longer term. He also required United to give its customers the option to buy its machines at "reasonable" prices, subject to his review. When these and other provisions failed to reduce United's market share sufficiently after ten years, the government applied for still more onerous relief, which Wyzanski rejected under *Swift*'s "grievous wrong" standard. The Supreme Court, however, reversed, instructing the district court that the *Swift* standard did not apply to efforts by the government to secure the "complete extirpation of the illegal monopoly."²² Epstein describes the "macabre"²³ denouement: United was forced to divest some of its assets, and then declined steadily until it was finally sold to a foreign firm.

Epstein devotes a full chapter to the 1982 AT&T settlement that produced the consent decree known as the "modified final judgment," or MFJ.²⁴ He first recounts the history and rationale of the decree.²⁵ AT&T encompassed the Bell System, a network of regulated monopolies of local and long-distance telephony. When technological changes allowed entry into the long-distance market, AT&T was able to use its control over the local exchange to disadvantage its long-distance

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 43–44.

¹⁹ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953).

²⁰ *Id.* at 348.

²¹ EPSTEIN, *supra* note 2, at 48.

²² *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 251 (1968).

²³ ROBERT H. BORK, *THE ANTITRUST PARADOX* 171 (1978).

²⁴ *United States v. AT&T*, 552 F. Supp. 131, 226–34 (D.D.C. 1982). For an interesting account of the background and negotiations leading to the settlement, see STEPHEN COLL, *THE DEAL OF THE CENTURY: THE BREAKUP OF AT&T* (1986).

²⁵ EPSTEIN, *supra* note 2, at 54–58.

rivals, like MCI. The consent decree separated the local exchanges from AT&T and grouped them into “regional Bell operating companies,” or RBOCs, which were subject to quarantines barring them from entering the long-distance market. AT&T itself was allowed to compete with MCI and others in long-distance services. The breakup/quarantine framework was the brainchild of William Baxter, the Chicago-oriented Stanford law professor who then headed the Antitrust Division. Baxter believed that a regulated local exchange monopoly, if allowed to integrate into competitive markets, would always have an incentive to use its unexploited monopoly power to disadvantage its rivals, and regulators like the FCC would be unable to control the monopolist’s depredations.

Epstein’s Chicago colleague, Richard Posner, has characterized the MFJ as arguably “the most successful antitrust structural remedy in history.”²⁶ Epstein’s assessment is decidedly more negative. Despite the worthy efforts of Baxter and Judge Harold Greene, who oversaw enforcement of the MFJ for twelve years, Epstein argues that “the decree suffered from an excess of ambition and from a lack of focus and finitude. [Greene] could not control the unruly set of forces his divestiture set in motion.”²⁷ Epstein suggests that neither Baxter nor Judge Greene recognized that competition was not possible in telephony because of the need to mandate and regulate interconnection among many firms of widely differing sizes. Consequently, the decree failed adequately to account for the enormous transaction costs in multi-tiered regulation that the breakup and subsequent enforcement would entail. It was overly optimistic, according to Epstein, to think that the breakup, by removing the local exchange companies’ incentive to discriminate in favor of AT&T, would drastically simplify the FCC’s task in regulating the terms of interconnection. Epstein also takes Judge Greene to task for invoking populist nostrums in support of the breakup alternative.

The appropriate response to AT&T’s illegal actions, Epstein argues, “would have been to facilitate new competition at the edges of the Bell System by outlawing discrete, identified contractual provisions and business practices, analogous to the limitation on exclusive-dealing provisions in the early stages of *United Shoe Machinery*.”²⁸ Instead, the government, with the court’s approval, pressed on for a breakup. As a consequence, “Judge Greene operated a de facto administrative agency to respond to a wide range of disputes.”²⁹ Epstein canvasses a series of complex disputes Judge Greene was forced to resolve until the 1996 Telecommunications Act displaced the MFJ with a system of explicitly regulatory obligations.

The final case study of the volume examines the *Microsoft* government litigation. Epstein discloses in an acknowledgments page that Microsoft provided “financial support” for the book, although it “did not review or oversee [the book’s] conclusions.”³⁰ Epstein’s conclusions with respect to the *Microsoft* litigation certainly do not reproduce Microsoft’s litigating positions. The most surprising aspect of this portion of the book, given Epstein’s analytical framework, is its almost complete endorsement of the outcome in the government case.

Epstein begins the chapter inauspiciously by suggesting that the government’s lawsuit should be treated “like a common carrier case” aimed at requiring Microsoft to “supply services to all comers on (1) reasonable and (2) nondiscriminatory terms.”³¹ Even though Epstein qualifies this

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²⁶ RICHARD A. POSNER, *ANTITRUST LAW* 111 (2d ed. 2001).

²⁷ EPSTEIN, *supra* note 2, at 58.

²⁸ *Id.* at 65.

²⁹ *Id.* at 68.

³⁰ *Id.* at xi.

³¹ *Id.* at 74.

statement by noting, first, that the case was not about setting reasonable prices and, second, that Microsoft operates in a two-sided market (marketing its operating system both to users and software developers), the common carrier analogy does not illuminate *Microsoft*.

More fruitfully, Epstein examines in some detail the 1994 consent decree that ended the Antitrust Division's first Microsoft investigation, and describes how that decree's anti-tying provision led to the 1997 contempt action and, ultimately, to the famous 1998 Sherman Act case challenging Microsoft's competitive responses to Netscape's Web browser and Sun's Java technologies.³² Epstein briefly describes the district court and D.C. Circuit analyses, in the consent decree case, of whether Microsoft's Windows and operating system and its Internet Explorer browser were "integrated." He then recounts the government's theory in the 1998 case that Navigator and Java posed a "middleware threat" to Microsoft's Windows monopoly (because they might have evolved into a rival platform that would allow developers to write applications that would run on all operating systems) and that Microsoft sought to stave off the threat by a combination of contractual and design measures aimed at limiting its nascent rivals' usage share. His brief account of the D.C. Circuit's eventual resolution of these contentions is accurate, though remarkably uncritical.³³

The heart of the chapter is a discussion of remedies in the 1998 case. Epstein rightly criticizes Judge Jackson's initial breakup order as both unresponsive to the liability findings and extraordinarily costly on many counts. (Epstein suggests that the order reflected a failure to grasp the hard lessons of the AT&T experience, but its shortcomings went far beyond those of the MFJ.) Epstein also considers the possibility, in principle, of a fine or damage remedy in the case, but suggests any such award would have posed an unacceptable risk of overdeterrence, because it would be impossible to disentangle the competitive effects of Microsoft's benign and malign conduct. This is a fair point, although it is worth mentioning that these difficulties did not prevent Microsoft's rivals and customers from suing and obtaining settlements totaling well into the billions of dollars.³⁴

Epstein endorses the consent decree in the government case, Judge Kollar-Kotelly's approval of the decree, and the D.C. Circuit's affirmance. Consistent with the thesis of the book, he particularly approves the focus of the decree on enjoining acts specifically held unlawful by the D.C. Circuit.³⁵ The decree, for example, prohibits retaliation against firms that deal with Microsoft's rivals, and requires Microsoft to license Windows to computer manufacturers on nondiscriminatory terms,³⁶ while giving the manufacturers flexibility in configuring the Windows desktop and boot sequence.

Interestingly, Epstein even approves the provision of the decree that requires Microsoft to license communications protocols that allow Windows client computers to interoperate with Windows server operating systems.³⁷ This provision, according to Epstein, "only addresses the

³² *Id.* at 76–84.

³³ For a more critical discussion, see WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE* chs. 4 & 5 (2007).

³⁴ *Id.* at 237–42.

³⁵ EPSTEIN, *supra* note 2, at 96–100.

³⁶ The nondiscrimination section includes a proviso that allows Microsoft to offer market development allowances. Epstein cautions that "this provision is not easy to interpret or enforce, and even with the exceptions, may block Microsoft from responding to market conditions. . . . This section will be anticompetitive if read to exclude that option." *Id.* at 97–98.

³⁷ Final Judgment § III.E, *United States v. Microsoft Corp.*, No. 98-1232 (CKK) (D.D.C. Nov. 12, 2002), available at <http://www.usdoj.gov/atr/cases/f200400/200457.htm>.

most important obstacle to open competition, namely, the inability to hook up on equal terms to Microsoft's operating system."³⁸ It is true that this provision was designed to give software developers writing programs for non-Microsoft servers the means to interoperate with Windows as well as programs running on Microsoft servers.³⁹ The difficulty with Epstein's assessment is that the provision violates the core principle that Epstein is advancing in his book: that courts should reserve injunctive relief in antitrust cases for interdiction of unlawful actions. As Judge Kollar-Kotelly⁴⁰ and the court of appeals⁴¹ recognized, this provision is not responsive to any proven violations; indeed the government's case had almost nothing to do with communications protocols or with server operating systems. The provision was explicitly designed to be "forward-looking,"⁴² to preserve the possibility that middleware threats could develop in network computing or the Internet at some point in the future.⁴³ Although well-intentioned, the provision has proven extremely difficult and costly to implement and has attracted only a few licensees, none of which poses any sort of middleware threat.⁴⁴

Epstein is correct, however, that the protocol licensing provision of the U.S. final judgment is preferable to its counterpart in the European Microsoft case. Unlike the U.S. licensing requirement, which is limited to firms legitimately seeking to improve interoperability with Windows, the European order requires Microsoft to license its "interoperability information" to "any undertaking *having an interest* in developing and distributing work group server operating system products,"⁴⁵ for any purpose related to developing those products. This broader scope unmoors the requirement from any appropriate antitrust purpose.

Epstein also defends the approach of the *Microsoft* consent decree against Herbert Hovenkamp's critique in his recent book, *The Antitrust Enterprise*.⁴⁶ Hovenkamp characterizes the *Microsoft* remedy as "too little, too late"⁴⁷ because, among other things, it fails to address all of Microsoft's illegal conduct, particularly "commingling" browser and operating system code.⁴⁸ Epstein, however, endorses Judge Kollar-Kotelly's reasoning in rejecting any code-removal requirement: requiring Microsoft to permit computer manufacturers and end users to remove the visible means of access to the browser was sufficient to address the anticompetitive conse-

³⁸ EPSTEIN, *supra* note 2, at 98.

³⁹ *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 189–90 (D.D.C. 2002).

⁴⁰ *Id.* at 190 (recognizing that "this aspect of the remedy plainly exceeds the scope of liability").

⁴¹ *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1223 (D.C. Cir. 2004) (recognizing "the difficulties inherent in crafting a forward-looking provision concerning a type of business conduct as to which there has not been a violation of the law").

⁴² *Microsoft*, 231 F. Supp. 2d at 190.

⁴³ *Id.* at 192 (reasoning that "given the rapid pace of change in the software industry," without the provision, "it is quite possible that the core of the decree would prove prematurely obsolete").

⁴⁴ See generally William H. Page & Seldon J. Childers, *Software Development as an Antitrust Remedy: Lessons from the Enforcement of the Microsoft Communications Protocol Licensing Requirement*, 14 MICH. TELECOMM. & TECH. L. REV. (forthcoming 2008). The working paper version of this article is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978815.

⁴⁵ Case COMP/C-3/37.792, *Microsoft*, Commission Decision of 24 Mar 2004, Art. 5(a), available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>.

⁴⁶ HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 297–302 (2006).

⁴⁷ *Id.* at 300.

⁴⁸ *Id.* at 298–99.

Where intervention occurs, however, [Epstein] argues that it should be limited to enjoining the demonstrably anti-competitive conduct because government lacks the wisdom and administrative competence to achieve the positive goal of creating competitive conditions.

quences of integrating the browser and the operating system. Moreover, code removal would have harmed consumers by undermining the integrity of Microsoft's platform.⁴⁹

Hovenkamp also argues that the success of the decree should be judged, not by whether Microsoft had complied with its terms, but by whether the the market has actually become "workably competitive."⁵⁰ Epstein responds that the decree will be successful if it removes illegal impediments to competition. The government never proved that Microsoft's illegal actions prevented the emergence of a significant rival platform; Microsoft's benign and neutral actions in a market characterized by network effects could well have produced the same result. Thus, it would be inappropriate to mandate an "ideal distribution of market shares" as an antitrust remedy.⁵¹ As the experience of *United Shoe Machinery* and *AT&T* shows, Epstein argues, a "more draconian"⁵² decree would likely have been counterproductive.

In a brief concluding chapter, Epstein summarizes the lessons of his study. First, firms should abandon contractual exclusionary terms and rely on their products' characteristics for their market success. Second, decrees should be limited to interdicting illegal actions. Third, antitrust relief should not be superimposed on an existing regulatory structure that addresses the same monopolistic practices. Fourth, antitrust remedies should be limited in duration, and rely more on innovation and entry than government mandates in restoring competition. Finally, in antitrust remedies, "it is always more expensive [in transaction costs and in hindering competition] to do more than it is to do less."⁵³

Epstein's study is an interesting and idiosyncratic analysis of antitrust remedies—primarily, though not exclusively, consent decrees—in government enforcement actions at various stages of antitrust history. In his analysis, he is suspicious of antitrust enforcement generally, but not to the point of denying that some single-firm conduct can be sufficiently anticompetitive to warrant government intervention. Where intervention occurs, however, he argues that it should be limited to enjoining the demonstrably anticompetitive conduct because government lacks the wisdom and administrative competence to achieve the positive goal of creating competitive conditions. Epstein is right that U.S. enforcement officials, at the federal level, have largely accepted these principles. Nevertheless, the book will be valuable, both for the fine texture of its analyses and observations, and as a cautionary tale for antitrust enforcers worldwide. ●

⁴⁹ EPSTEIN, *supra* note 2, at 104–05.

⁵⁰ HOVENKAMP, *supra* note 46, at 300.

⁵¹ EPSTEIN, *supra* note 2, at 104–05.

⁵² *Id.* at 105.

⁵³ *Id.* at 115.

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition, Editor John Woodbury reviews Jonathan Baker and Carl Shapiro's recent indictment of the past decade of antitrust merger enforcement policy. And Dan Crane responds to our summary of his forthcoming article, Antitrust Antifederalism, on the American tradition of opposition to federal incorporation and its consequences for antitrust policy. Send comments and suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Jonathan B. Baker and Carl Shapiro, Reinventing Horizontal Merger Enforcement (June 2007)

<http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf>

This recent (as-yet unpublished) paper by Jonathan Baker (American University) and Carl Shapiro (University of California at Berkeley) (both senior consultants for my employer) offer an assessment, or perhaps more accurately, an indictment of antitrust policy over the last ten and particularly the last five or so years. In addition to being respected academics, both authors have held high-level government positions in antitrust. Baker was the Director of the FTC's Bureau of Economics from 1995 to 1998; Shapiro was a Deputy Assistant Attorney General for Economics in the Antitrust Division of the Justice Department from 1995 to 1996. Thus, their views carry some weight.

The authors argue that the antitrust pendulum has swung far too far from appropriate merger enforcement policy, becoming so permissive as to be ineffective. According to the authors, this outcome has been driven by the failure to accord market structure an appropriate weight in the competitive effects analysis.

The paper has three principal prongs: the evidence of the decline of merger enforcement, particularly at the Department of Justice; the faulty "economics reasoning" which has permitted or served as the intellectual basis for this decline; and recommendations for developing a "post-Chicago" antitrust policy. This analysis is conducted against a backdrop of a description of the historical role of market structure and concentration in particular in merger enforcement and recent court decisions where structural evidence has been dismissed out of hand.

The Evidence

The first piece of evidence that the paper presents is the set of enforcement statistics previously compiled by former FTC Commissioner Thomas Leary, statistics that he interpreted as indicating a general stability in merger enforcement activity for various groups of years between 1982 and 2000 and for each of the antitrust agencies, the FTC and the DOJ. The statistic used by Commissioner Leary is the ratio of enforcement actions (court cases, consents, transactions abandoned or restructured after the filing of a complaint) to HSR filings. The grouping of years roughly corresponds to the two Reagan terms, the term of the first President Bush, and the two Clinton terms.

The authors note that there are numerous factors that could influence the enforcement rate other than enforcement policies, such as changes in the distribution of filings across more or less “troublesome” industries or changes in the extent of management buyouts (which would not raise horizontal concerns). But they regard as most important the endogeneity of the statistic itself—a more stringent enforcement policy will result in fewer HSR filings and therefore fewer enforcement actions (as some transactions that may have previously been cleared are now abandoned in light of the more stringent policy). In a “steady state,” one might expect the ratio to be relatively constant over enforcement regimes, other things equal. Thus, Baker and Shapiro suggest looking instead at swings in the statistic that reflect “surprise” changes in enforcement policy to which merging parties have not yet adapted. For example, they note that the fall in the DOJ enforcement ratio from 0.8 percent in the first Reagan term to 0.4 percent in the second reflected a surprise at how merger-permissive the agency had become. Had acquirers anticipated that the standards would have been more permissive during the second Reagan administration, the number of filings would have increased, along with the number of enforcement actions to drive the enforcement ratio back to a “steady-state” level.

For the authors, the period of most interest is the first term of George W. Bush (the most recent data available). However, the authors note that because of the substantial change in HSR reporting thresholds (the reportable transaction threshold rose from \$15 million to \$50 million in early 2001), no comparable ratio is available for the first term of George W. Bush. To generate a comparable ratio, the authors predict what the number of HSR filings would have been during that first term by regressing the historical data on the quarterly number of HSR filings on the number of transactions, the value of transactions, and a variable indicating when the threshold changed. From that analysis, they infer that the number of filings fell to 40 percent of its pre-rule-change level, and they accordingly increase the denominator of the enforcement ratio, the raw number of filings, during the 2002–2005 period. Of course, some of those additional filings would have also resulted in additional enforcement actions, and the authors use historical averages of enforcement actions per 1,000 filings to adjust the numerator of the enforcement statistic as well.

After these adjustments and considering alternative explanations, the authors conclude that enforcement activity plummeted during the first term of George W. Bush, a decline most apparent in the DOJ statistic (falling from 1.1 percent during Clinton’s second term to 0.4 percent during Bush’s first term). The corresponding statistic for the FTC actually rose a bit over this same period, but the authors don’t explain why the FTC behavior didn’t track that of the DOJ.

More generally, the regression that serves as the basis for their adjustment should have enabled the authors to indicate the width of the confidence interval (the error range) for their estimate. The adjustment to the numerator—the number of enforcement actions per 1,000 filings for transactions less than \$50 million—is not unreasonable on its face, but some sensitivity testing (e.g., how would the ratio have changed if this adjustment focused on more recent pre-2001 time periods rather than the eleven years from 1990–2000) would give one more confidence in the precision of these numbers. It is not obvious why an average was used here instead of a more refined statistical analysis (e.g., regression).

In addition, Baker and Shapiro conduct a survey of twenty experienced antitrust practitioners. Among the respondents, they confirm the perception that over the last ten years, merger enforcement has become more permissive, particularly at the DOJ, consistent with the factual analysis of the enforcement ratio. Against the backdrop of the *Oracle* decision that permitted the challenged Oracle-PeopleSoft transaction (a decision the authors believe may have “severely undermined” unilateral effects analysis) and the DOJ clearance of the Whirlpool/Maytag merger, the

authors find this perception unsurprising. The authors conclude that “the merger enforcement data, our survey of experienced practitioners, the fallout from the *Oracle* case, and the treatment of the Whirlpool/Maytag deal combine to paint a picture of overly lenient horizontal merger enforcement, especially at the current Antitrust Division.”

The Stories the Agencies Have Come to Accept

Baker and Shapiro then turn to addressing three stories that merging parties tell the agencies and about which the agencies (particularly the DOJ) have become “overly receptive” during this perceived period of decline in merger enforcement. First, the authors note that any lingering structural presumption of anticompetitive harm seems to have all but disappeared, as the merging parties argue and the agencies accept that three or even two “strong” rivals are sufficient to ensure effective competition. But the authors note that market structure does matter: “in the absence of entry and merger efficiencies, a merger that leads to a substantial increase in market concentration will tend to raise price, harm consumers and lead to a greater deadweight loss.” Because there are so few theories of oligopoly suggesting that two or three is enough for competition, the authors urge that large increases in concentration “be given real weight.”

The second story is that if one observes some entry (or some imports), that is just sufficient to conclude that any post-merger anticompetitive behavior will be deterred. Again, the authors note that there are very few theoretical circumstances where that will be the case and merely pointing to some entry does not mean (in the words of the Merger Guidelines) that entry will be timely, likely, and sufficient to deter post-merger price increases, “especially when the shares of the merging firms are large and those of the entrants are small.” Baker and Shapiro note that “comparing the entrant to the weaker of the merging firms can be useful in structuring the timeliness and sufficiency analysis.”

The third story is that the proposed merger will enable the attainment of substantial efficiencies, which serve to offset any otherwise perceived anticompetitive impact. Baker and Shapiro refer to the literature that suggests that managers are systematically over-optimistic about the merger-related efficiencies, and urge “careful analysis,” but actually offer little in the way of guidance as to how to conduct such an analysis.

Post-Chicago Merger Enforcement

To “reinvigorate horizontal merger enforcement,” the authors propose a framework that relies on “partially restoring the structural presumption,” one that could be overcome only by “strong evidence” offered by the merging parties. With respect to coordinated effects, Baker and Shapiro propose that mergers be assessed with an eye towards the effect of the merger on the maverick’s incentives in an antitrust market defined in the usual way. One might identify the maverick by its conduct, or by natural experiments, or “by inference from the features of market structure that tend to suggest a firm would prefer a lower coordinated price than its rivals.”

Having identified the maverick, the focus is then on whether the merger, by reducing the number of sellers or the asymmetries across sellers (e.g., in costs or product characteristics), will tend to make the maverick more accepting of a higher price.

If the proposed merger involves the maverick, then the authors recommend a presumption that the merger is anticompetitive. The government can also establish that presumption by showing that the post-merger market will be less conducive to maverick behavior than pre-merger.

Baker and Shapiro describe a second route to a presumption of competitive harm even if a maverick firm cannot be explicitly identified. If there were a reduction in the number of “significant

firms [i.e., ones that cannot be ignored by a cartel] from, say, four to three, three to two, or two to one,” that change may be enough to presume harm. If identification of significant sellers is difficult, then the authors suggest that mergers generating an HHI of 2800 or more be presumed anti-competitive. Thus, a merger that resulted in a post-merger market served by three significant firms (each with a 30 percent share) and a fourth firm (with a share just under 10 percent) would just pass muster under this presumption. If there is evidence that the merger would significantly reduce asymmetries in costs or product attributes, then the presumptive threshold could be weaker. For example, a merger that reduces the number of significant firms from six to five or an HHI-equivalent threshold could be presumed to generate anticompetitive harm.

The rebuttal of the merging parties could take the form of challenging the market definition, the identification of the maverick or significant firms, the characterization of product attributes, or entry, using the more complete analysis sketched in the paper. Efficiencies too can be a rebuttal, but it must be shown within a coordinated effects framework that the efficiencies will lead to lower prices, i.e., why they effectively create a maverick.

With respect to unilateral effects, Baker and Shapiro also trace two routes to presumptive harm. Both focus on the diversion of sales from one merger partner to the other (i.e., the fraction of total sales lost when one firm increases price that is recaptured by the merging partner), and the gross margin earned on the recaptured sales. The greater the diversion and the higher the margin, the more likely is a post-merger price increase.

Route one defines antitrust markets in the usual way and then effectively assumes that diversion is proportional to pre-merger market shares. Route two looks explicitly at estimates of diversion between the two firms (e.g., estimated own-and cross-price elasticities, “natural experiments” of price increases that reveal substitution patterns). If the data from either of these two routes, along with the pre-merger gross margins, suggest that prices of the merged firms could increase by 5 percent or more post-merger, then there would be a presumption of harm.

Rebuttals with respect to the first route to a presumption of harm include a failure to define the market correctly or to calculate shares correctly. Rebuttals with respect to the second include an incorrect estimate of diversion. In both routes, the parties could rebut the presumption by showing the margins were not calculated correctly or that entry, repositioning, and efficiencies will counteract the effects of the merger.

Postscript

The Baker/Shapiro paper is at its best when it describes the basis for the perception that merger enforcement has been weakened, in terms of both court opinions and agency decisions, and the survey evidence that that perception is widespread (at least among leading antitrust counsel). I am surprised that the paper does not consider changes in merger enforcement as part of a larger tapestry of “revolt” against antitrust, as suggested by the *Microsoft* settlement and the *Trinko* decision.

The paper is a bit less persuasive on the factual case that, recently, merger enforcement has all but disappeared. While it would not make for exciting reading for the non-economist, Baker and Shapiro could have devoted considerably more space to their estimation of their crucial data point—the enforcement ratio during George W. Bush’s first term. That estimate, after all, provides their factual basis for the perception of weakened merger enforcement. Most of that discussion now appears in lengthy but still detail-short footnotes and in an unattached appendix, so it’s difficult to evaluate how sensitive their result is to alternative specification changes or to the use of different time periods for estimating the number of enforcement actions for proposed transactions under \$50 million that would have occurred but for the change in the filing threshold. And the

authors never explain why FTC enforcement behavior appears so different from DOJ enforcement behavior.

While I find the critique of two of the stories credible—the “two firms are sufficient for competition” story and the “any evidence of entry is enough” story—the authors’ response to the efficiencies story is largely uninformative, perhaps because the agencies really don’t count efficiencies even in the so-called tie-breakers (although the survey would disagree).

Finally, the sketch of a more rational antitrust policy offers a number of interesting insights and alternative enforcement guidelines so as to attach a greater weight to structural conditions but, in the end, it is just a sketch. I am a bit surprised by the 5 percent price-increase threshold for unilateral effects, given how sensitive simulated price increases are to the specification of the demand assumption. The authors may be suggesting that the efficiencies must be substantial enough to result in post-merger price increases of less than 5 percent.¹

In any event, perhaps Baker and Shapiro can use this paper as a platform for a more detailed discussion of a post-Chicago approach to merger enforcement.

Notwithstanding my quibbles, this is an important, controversial, but potentially influential, policy critique of current merger enforcement by two prominent antitrust economists. Consequently, this paper should surely be on the antitrust practitioner’s summer reading list.

—JRW

Author’s Response

Many thanks to Bill Page for his thoughtful review of my paper, *Antitrust Antifederalism*, in the last edition of *The Paper Trail*, <http://www.abanet.org/antitrust/at-source/07/06/Jun07-PTrail6-20f.pdf>. Bill rightly notes that the article’s critique of what I call the “crime-tort” model of antitrust fails to propose a better model, other than hinting that there might be advantages in the competing “corporate regulatory model” that was largely rejected as a basis for antitrust enforcement during antitrust’s formative era. Bill also notes that I anticipate some critiques of the corporate regulatory model (such as agency capture and aggrandizement) without presenting an argument as to why those pathologies are less severe than those of the crime-tort model. Bill also notes, again quite fairly, that I fail to compare the features of the U.S. system to those of the European Union, which has followed something more like the corporate regulatory model.

The reason for these gaps (and others) is that this article is the first installment of a much larger project (which I expect will eventually become a book) on the institutional structure of antitrust enforcement. My goal is to rethink the way U.S. antitrust law is enforced not only from abstract first principles but also from the perspective of economic history and legal culture.

In *Antitrust Antifederalism* I describe five “pathologies” of the crime-tort model—suboptimal features of the antitrust enforcement system that took shape as antitrust law interacted with the more general features of the U.S. civil and criminal litigation system. While the article may leave the impression that I favor a larger and more interventionist federal regulatory role, as I explore dif-

¹ Earlier, the authors cite a paper by Greg Werden that offers a solution to this demand sensitivity by focusing on the cost-savings. See Gregory Werden, *A Robust Test for Consumer Welfare Enhancing Mergers Among Differentiated Products*, 44 J. INDUS. ECON. 409 (1996).

ferent models of antitrust enforcement I will not be coming down uniformly on the side of an expanded federal regulatory model. Toward the end of *Antitrust Antifederalism* I argue that the crime-tort model may be perfectly suited for hard-core cartel cases. Perhaps the hard-core cartel should be kept as a separate antitrust regime with damages multipliers, lay juries, severe criminal penalties, and other features of ordinary criminal conspiracy adjudication (like RICO).

That would not have to mean that all other antitrust would be shifted toward a pure corporate regulatory model. For example, as I move forward with this project, I will explore the feasibility of expanding the domain of private or semi-public administrative regimes. Current examples include RAND commitments for patent pools and standard-setting bodies and the rate-setting mechanism under the *BMI* and *ASCAP* consent decrees. Such semi-contractual antitrust remedies may be able to minimize some of the pathologies of the crime-tort model without losing the benefits of incremental common law adjudication and private enforcement. Perhaps the private creation of such administrative regimes should be considered either mandatory or optional with statutory inducements (such as immunity from damages liability) for a broader range of antitrust activities, including certain kinds of mergers, joint ventures, and other competitor collaborations.

One of the aims of this project is to understand antitrust's enforcement mechanisms as social and political institutions. I am currently working on a paper entitled *Technocracy and Antitrust* that analyzes antitrust's shift from democratic to technocratic. I argue that antitrust has lost its broad political saliency even while it has maintained its level of engagement largely because antitrust has come to be seen as technocratic—a field for administration by experts, not politicians. This is a good thing, I argue. If Herbert Hovenkamp is right that antitrust “has no moral content,”¹ then administration of the antitrust laws should proceed in a scientific, expert manner. But what then to do with democratic institutions—like the jury and the Tunney Act—that still infuse antitrust adjudication? Perhaps more of antitrust needs to be shifted away from an adjudicatory model toward an administrative model, which, as I discuss in *Antitrust Antifederalism*, is largely what has happened to merger review in the wake of Hart-Scott-Rodino. The administrative model I describe is similar in many ways to the corporate regulatory model, but the two do not cover exactly the same territory. I will suggest that some mixing and matching of various models may be optimal.

Crime-tort vs. corporate regulatory; democratic vs. technocratic; adjudicatory vs. administrative. Thinking through these and many other conceptual pairings should keep me busy for a few years. As I move forward with this project, I hope to provoke further discussion on the institutional structure of antitrust enforcement. And, of course, I would highly value and welcome any comments on these specific papers or the larger project. ●

—DANIEL CRANE

² HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 10, 54 (2005).