

Seventeen Years Later: Thoughts on Revising the Horizontal Merger Guidelines

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On September 22, 2009, the Federal Trade Commission and the Department of Justice announced plans to hold joint workshops to explore the possibility of updating the Horizontal Merger Guidelines.¹ According to the agencies' press release, the workshops are intended to determine whether the Guidelines "accurately reflect the current practice of merger review at the FTC and DOJ, as well as to take into account legal and economic developments that have occurred since the last significant Guidelines revision in 1992."² The agencies plan to solicit comments on particular topics and to hold a series of five public workshops in December 2009 and January 2010. The goal is to complete the review within six to ten months.³

The agencies anticipate retaining much of the existing structure of the Guidelines, including the hypothetical monopolist test, the use of the Herfindahl-Hirschman Index (HHI) for establishing an initial structural presumption, the timeliness-likelihood-sufficiency approach to entry analysis, consideration of efficiencies, and a failing firm defense.⁴ Many of the proposed revisions appear to have come directly from the 2006 Merger Guidelines Commentary and should not be a surprise to practitioners.⁵

Nevertheless, the announcement may presage fundamental changes to the Guidelines. The agencies are contemplating adding several new topics to the Guidelines, such as the use of direct effects evidence, the role of power buyers, acquisitions of minority interests, and merger remedies.⁶ Also under consideration are several noteworthy changes to the current Guidelines' framework. For example, the agencies are considering revising the step-by-step approach to the Guidelines, adjusting the HHI thresholds (which have remained unchanged since the 1982 Guidelines), increasing the default size of the SSNIP test from 5 to 10 percent (which would result in

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¹ Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice to Hold Workshops Concerning Horizontal Merger Guidelines (Sept. 22, 2009), available at <http://www.ftc.gov/opa/2009/09/mgr.shtm>. The announcement did not indicate any plans to address non-horizontal merger enforcement guidelines.

² *Id.*

³ See John D. McKinnon & Brent Kendall, *Regulators Weigh New Merger Rules*, WALL ST. J., Sept. 23, 2009, at A10.

⁴ See Fed. Trade Comm'n & U.S. Dep't of Justice, Horizontal Merger Guidelines: Questions for Public Comment 1–2 (Sept. 22, 2009), <http://www.ftc.gov/bc/workshops/hmg/hmg-questions.pdf> [hereinafter Questions for Public Comment]; Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Merger Guidelines Workshops 10 (Sept. 22, 2009), available at <http://www.usdoj.gov/atr/public/speeches/250238.pdf>.

⁵ U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the 1992 Horizontal Merger Guidelines (2006), available at <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf> [hereinafter Commentary].

⁶ See Questions for Public Comment, *supra* note 4, at 2–6.

broader markets), downplaying the role of concentration in a unilateral effects analysis, and giving greater weight to fixed cost savings.⁷

The agencies' announcement was a welcome development. In the seventeen years since the last major revision to the Guidelines, there have been significant advancements in agency practice, merger economics, and federal court case law. This article describes twelve ways that the Guidelines should be revised to better reflect current agency practice, to incorporate aspects of merger analysis absent from the 1992 Guidelines, and to clarify certain aspects of the 1992 Guidelines.

History of the Merger Guidelines and Need for Revision

The DOJ issued the first merger enforcement guidelines in 1968. These relied on concentration, measured in terms of the four-firm concentration ratio, as the yardstick by which to evaluate horizontal mergers.⁸ In 1982, the DOJ, under the leadership of Assistant Attorney General William Baxter, issued revised guidelines that introduced the now-familiar SSNIP test for market definition, established new concentration thresholds based on the HHI, and included factors relevant to an assessment of the competitive effects and the likelihood of entry.⁹

On the same day the DOJ announced its 1982 Guidelines, the FTC issued a statement explaining its approach to horizontal merger enforcement.¹⁰ The FTC's statement was less detailed than the DOJ's 1982 Guidelines but noted that the DOJ's Guidelines would "be given considerable weight by the Commission and its staff in their evaluation of horizontal mergers and in the development of the Commission's overall approach to horizontal mergers."¹¹ In 1984, the DOJ issued revised Guidelines making some modest changes, including placing less weight on HHI concentration statistics and adjusting the treatment of imports.¹²

In 1992, the FTC and DOJ issued their first joint merger enforcement guidelines.¹³ The most significant change from previous iterations was the addition of unilateral effects theories. The 1992 Guidelines also reduced the significance of the HHI thresholds (again) and revised the discussion of entry requirements, partly in response to the D.C. Circuit's *Baker Hughes* decision.¹⁴ In 1997, the agencies updated the Guidelines to take greater account of efficiencies. With the exception of the 1997 efficiencies revision, the Guidelines have been untouched in seventeen years—the longest gap since they were first introduced.

The 1968, 1982, and 1984 Guidelines discussed both horizontal and non-horizontal theories of harm. In contrast, the 1992 Guidelines did not include a discussion of non-horizontal theories,

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⁷ See *id.*

⁸ U.S. Dep't of Justice, Merger Guidelines § 4 (1968), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,101 ("In enforcing Section 7 against horizontal mergers, the Department accords primary significance to the size of the market share held by both the acquiring and the acquired firms."). Each iteration of the U.S. merger guidelines is available at <http://www.usdoj.gov/atr/hmerger.htm#guidelines>.

⁹ U.S. Dep't of Justice, Merger Guidelines (1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,102 [hereinafter 1982 Guidelines].

¹⁰ Statement of the Federal Trade Commission Concerning Horizontal Mergers (1982), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,200. Unlike the DOJ's 1982 Guidelines, the FTC's statement did not address non-horizontal concerns.

¹¹ *Id.* § 1.

¹² U.S. Dep't of Justice, Merger Guidelines (1984), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,103 [hereinafter 1984 Guidelines].

¹³ U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992, rev. 1997), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 [hereinafter 1992 Guidelines].

¹⁴ *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990). The 1992 Guidelines added the three-part timely, likely, and sufficiency requirements, replacing the "likelihood and probable magnitude" test in Section 3.3 of the 1984 Guidelines.

leaving the 1984 Guidelines as the last word on the agencies' enforcement policy for vertical mergers and mergers raising potential competition concerns.¹⁵

Since the 1992 and 1997 revisions, the agencies have sought to explain their application of the Guidelines and impose some transparency on their decision making process through the use of closing statements,¹⁶ speeches,¹⁷ workshops,¹⁸ merger enforcement data,¹⁹ and perhaps most significantly, the Merger Guidelines Commentary. The Commentary, which explains how the agencies applied the Guidelines in specific investigations, was intended to be an alternative to new merger guidelines, which the agencies concluded were "neither needed nor widely desired" at that time because of the flexibility of the Guidelines.²⁰

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But notwithstanding the agencies' efforts to keep the public informed as to their evolving interpretation of the Guidelines, it has become increasingly clear that the growing patchwork of glosses on the Guidelines has become unwieldy for all but the most seasoned veterans of the antitrust agencies. This is because the agencies' approach to horizontal merger investigations has moved beyond the Guidelines' approach in a number of respects.²¹ There have been sufficient advancements in economic analysis and agency practice, not to mention a host of important federal court

¹⁵ See U.S. Department of Justice and Federal Trade Commission Statement Accompanying Release of Revised Merger Guidelines (1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 ("Neither agency has changed its policy with respect to non-horizontal mergers. Specific guidance on non-horizontal mergers is provided in Section 4 of the Department's 1984 *Merger Guidelines*, read in the context of today's revisions to the treatment of horizontal mergers.").

¹⁶ See, e.g., Press Release, Dep't of Justice Antitrust Div. Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag (Mar. 29, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/215326.pdf; Statement of the Federal Trade Commission concerning Royal Caribbean Cruises, Ltd./P&O Princess Cruises plc & Carnival Corp./P&O Princess Cruises plc, FTC File No. 021 0041 (Oct. 4, 2002), available at <http://www.ftc.gov/os/2002/10/cruisestatement.htm>. See generally Antitrust Division, U.S. Dep't of Justice, Issuance of Public Statements Upon Closing of Investigations, available at <http://www.usdoj.gov/atr/public/guidelines/201888.htm>.

¹⁷ See, e.g., Deborah Platt Majoras, Chairman, Fed. Trade Comm'n, Remarks at the ABA Antitrust Section Fall Forum (Nov. 18, 2004), available at <http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf> (describing recent developments in merger enforcement policy, merger remedies, merger process reforms, and cooperation with foreign competition authorities).

¹⁸ See, e.g., FTC Unilateral Effects Analysis and Litigation Workshop (Feb. 12, 2008), <http://www.ftc.gov/bc/unilateral/index.shtml>; FTC/DOJ Joint Workshop on Merger Enforcement (Feb. 17–19, 2004), <http://www.ftc.gov/bc/mergerenforce>.

¹⁹ See, e.g., Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2007 (Dec. 1, 2008), available at <http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf>; Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2005 (Jan. 25, 2007), available at <http://www.ftc.gov/os/2007/01/P035603horizmergerinvestigationdata1996-2005.pdf>; Fed. Trade Comm'n, Horizontal Merger Investigation Data, Fiscal Years 1996–2003 (Feb. 2, 2004, revised Aug. 31, 2004), available at <http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf>; Fed. Trade Comm'n & U.S. Dept. of Justice, Merger Challenges Data, Fiscal Years 1999–2003 (Dec. 18, 2003), available at <http://www.ftc.gov/os/2003/12/mdp.pdf>.

²⁰ Commentary, *supra* note 5, at v.

²¹ Accord ABA SECTION OF ANTITRUST LAW, 2008 TRANSITION REPORT 33 (2008) [hereinafter ABA TRANSITION REPORT] ("[T]here are concerns that some parts of the Guidelines no longer reflect current economic thinking and the approach taken by the agencies or do not adequately address certain issues that arise in merger cases."); Ilene Knable Gotts & Étienne Renaudeau, *Through the Looking Glass: Ruminations on Improving the Current U.S. Merger Enforcement Guidelines*, ANTITRUST SOURCE, Apr. 2009, at 2, <http://www.abanet.org/antitrust/at-source/09/04/Apr09-Gotts4-28f.pdf> (contending that the merger guidelines "have the potential to mislead the business and legal community"); *Roundtable Discussion: Developments—and Divergence—in Merger Enforcement*, ANTITRUST, Fall 2008, at 9, 22 [hereinafter *Merger Roundtable*] (William Kolasky: "[A]gency practice has moved well beyond the Guidelines, so that for unsophisticated clients and lawyers who do not appear before the agencies regularly, the Guidelines are now affirmatively misleading."); John Kwoka, *Some Thoughts on Concentration, Market Shares, and Merger Enforcement Policy* 7 (FTC/DOJ Workshop on Merger Enforcement 2004), available at <http://www.ftc.gov/bc/mergerenforce/presentations/040217kwoka.pdf> ("It is well understood that a gap exists between the Merger Guidelines as written and actual enforcement practice by the FTC and DOJ.").

decisions, to justify a new version of the Guidelines.²² Revised Guidelines would help practitioners and the business community by describing in a single document the agencies' approach to horizontal mergers.

Revised Guidelines would have benefits beyond the U.S. antitrust community. Updated Guidelines could help influence the development of merger control systems in other countries and other U.S. agencies with competition mandates.²³ Updated Guidelines would also help federal courts in Section 7 cases, which often follow the Guidelines and which may not recognize where the Guidelines have become outdated.²⁴

Challenges

Should the agencies move forward with their plans to revise the Guidelines, a number of challenges await. The most important is the need for consensus between the FTC and DOJ. The agencies have had a number of high-profile disputes in recent years.²⁵ These differences have generally not been in the area of merger enforcement, but there is certainly potential for disagreements there as well. The likely addition of two new FTC Commissioners in the near future also adds uncertainty to the process.

Another challenge is the need for political consensus. The 1992 Guidelines have been successful in part because of their acceptance by both Democratic and Republican administrations since their issuance. While different administrations have emphasized different aspects of the Guidelines as part of their enforcement efforts, there has not been any serious quarrel with the overall approach of the Guidelines. The next version of the Guidelines will need to attain a similar level of consensus to be successful.

Assuming consensus on the general approach to revised Guidelines can be achieved, subordinate issues will also confront drafters. Should the Guidelines contain economic formulae to better explain, for example, critical loss analysis? To what extent should post-Chicago economic thinking be incorporated?²⁶ Should the Guidelines attempt to adhere to recent court decisions, or

²² The Guidelines themselves suggest that revisions should be made "from time to time as necessary to reflect any significant changes in enforcement policy or to clarify aspects of existing policy." 1992 Guidelines, *supra* note 13, § 0 n.4.

²³ See Gotts & Renaudeau, *supra* note 21, at 1 & n.4 (identifying non-U.S. merger enforcement guidelines that have adopted the concepts in the U.S. merger guidelines).

²⁴ See *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 431 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws."); *United States v. Kinder*, 64 F.3d 757, 771 & n.22 (2d Cir. 1995) ("Although it is widely acknowledged that the Merger Guidelines do not bind the judiciary in determining whether to sanction a corporate merger or acquisition for anticompetitive effect, courts commonly cite them as a benchmark of legality."); Hillary Greene, *Guidelines Institutionalization: The Role of Merger Guidelines in Antitrust Discourse*, 48 WM. & MARY L. REV. 771, 776 (2006) (concluding that the Merger Guidelines "have acted as a stealth force on the development of antitrust merger law").

²⁵ For example, three of the four FTC Commissioners issued a statement criticizing the DOJ's 2008 Single-Firm Conduct Report as a "blueprint for radically weakened enforcement of Section 2 of the Sherman Act." Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>. See generally U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008); *Merger Roundtable*, *supra* note 21, at 22 (Deborah Feinberg: "I am not particularly eager to see an attempt at new Merger Guidelines if the agencies are going to have trouble agreeing, as happened with Section 2 guidelines.").

²⁶ See Remarks of FTC Chairman Jon Leibowitz as Prepared for Delivery at the Third Annual Georgetown Law Global Antitrust Enforcement Symposium 3 (Sept. 22, 2009), available at <http://www.ftc.gov/speeches/leibowitz/090922mergerguideleibowitzremarks.pdf> ("I've been a critic of the extent to which the Chicago School's optimism about efficiencies and about oligopoly conduct has affected merger reviews—as well as antitrust law more generally. But from my perspective, this effort isn't about giving precedence to one antitrust approach or another: it is really about good government, and making sure that the rules of the road are clear and easily understood, especially by those who enforce them.").

conversely, eschew precedent that does not accord with the agencies' views? What role should practitioners and the public play in revising the Guidelines? Should the agencies engage in any studies as a prelude to revised Guidelines?²⁷

Notwithstanding these potential challenges, the agencies appear to have picked an opportune time to revise the Guidelines. The current chief economists of both agencies are former colleagues and have penned a number of merger-enforcement-related articles together. And despite the differences between the agencies in the past few years, arguably the agencies are closer aligned on substantive merger policy than they have been in years. The private bar also supports revising the Guidelines. Both the Antitrust Modernization Commission and the ABA Section of Antitrust Law have encouraged the agencies to update the Guidelines.²⁸

Proposals

Below are twelve proposed reforms to the Guidelines. For each of these, the Guidelines do not appear to reflect current agency practice or offer little, if any, guidance on an important aspect of merger analysis. Nine of these proposals address topics to be discussed at the agencies' upcoming workshops. The other three proposals—revising the coordinated effects “checklist,” adding a discussion of potential competition theories, and clarifying monopsony standards—should also be considered. These proposals are listed in the same order as the underlying subject matter in the Guidelines.

Update the Overall Analytical Framework. Defining the relevant market and determining concentration levels are the initial steps under both the Guidelines and Supreme Court precedent. The Guidelines describe a five-step process to determine whether an agency will challenge a horizontal merger, starting with defining the market and determining concentration levels.²⁹ This is consistent with Supreme Court precedent that “[d]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act.”³⁰

Nevertheless, the agencies and, to a lesser extent, the courts have moved away from the rigid structural analysis described in the Guidelines and now focus more on the analysis of market power and competitive effects. The Commentary explains that “the Agencies do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and

²⁷ See Gotts & Renaudeau, *supra* note 21, at 13 (“An important preparatory step could be for the agencies to assess the actual effects of the ‘close-call’ consummated mergers. An ex post evaluation of a significant and relevant set of enforcement decisions may help the agencies to gain deeper insight into whether or not their merger analysis always fits with the market conditions and the evidence at hand, and to identify potential rooms for further improvements, if any.”).

²⁸ See ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS Recommendation 11 (2007) [hereinafter AMC REPORT]; ABA TRANSITION REPORT, *supra* note 21, at 32–38 (2008) (“The agencies should consider revisions to the Merger Guidelines, and ensure that they remain up-to-date on an ongoing basis.”); see also Gotts & Renaudeau, *supra* note 21 (suggestions from the 2009–2010 Chair of the ABA Section of Antitrust Law on ways to revise the merger guidelines); Larry Fullerton, *Divergence at the Agencies*, ANTITRUST, Fall 2008, at 8 (noting that in a recent roundtable of leading practitioners organized by *Antitrust* magazine “most of our panelists agreed that the agencies should revisit and update the Merger Guidelines”).

²⁹ 1992 Guidelines, *supra* note 13, § 0.2.

³⁰ *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957); see also *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 510 (1974) (“a delineation of proper geographic and product markets is a necessary precondition to” a Section 7 claim); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1051 (8th Cir. 1999) (“[D]etermination of a relevant market is a necessary predicate to the finding of an antitrust violation. Without a well-defined relevant market, a merger’s effect on competition cannot be evaluated.”); *United States v. Engelhard Corp.*, 126 F.3d 1302, 1305 (11th Cir. 1997) (“Establishing the relevant product market is an essential element in the Government’s case.”).

ends with efficiencies or failing assets.”³¹ Rather the agencies favor “an integrated approach” where the emphasis is on competitive effects.³²

In addition, in some mergers, the need to determine the concentration level within a properly defined market may be unnecessary, or at least not very important. For example, concentration may be uninformative in a unilateral effects analysis,³³ which focuses on the loss of localized competition and other competitors’ ability to reposition. The number of other competitors and the extent of concentration have little bearing on these questions.³⁴ Likewise, where anticompetitive effects are unlikely in any plausible relevant market, market definition is an unnecessary exercise.

The need for a structural analysis may also be unnecessary where direct effects evidence indicates that a merger will or will not substantially reduce competition. The Commentary appears to agree, noting that “evidence of effects may be the analytical starting point.”³⁵ Examples of direct effects evidence include a natural experiment showing the effect of a change in concentration or the number of competitors, documentary or other evidence showing an acquiring company’s post-merger plans, and changes in prices or output from a consummated merger. Direct effects evidence may also be helpful in “backing into” the appropriate market definition.³⁶

The Supreme Court has held that direct effects evidence can establish a violation of the Sherman Act in a non-merger case, even without proof of market power in a relevant market.³⁷ The D.C. Circuit has twice suggested that a Section 7 violation could be predicated on direct effects evidence. In *Baker Hughes*, Judge (now Justice) Thomas stated that “[m]arket share is just a way

³¹ Commentary, *supra* note 5, at 2; *see also* Opinion of the Commission at 54, *Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (Aug. 6, 2007), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf> [hereinafter *Evanston* Commission Opinion] (“Although the courts discuss merger analysis as a step-by-step process, the steps are, in reality, interrelated factors, each designed to enable the factfinder to determine whether a transaction is likely to create or enhance existing market power.”); Leibowitz, *supra* note 26, at 3 (“[T]he Guidelines exaggerate the extent to which the agencies follow a single, rigid, step-by-step approach in merger analysis.”).

³² *See* Commentary, *supra* note 5, at 2.

³³ *Id.* at 16 (“[T]he question in a unilateral effects analysis is whether the merged firm likely would exercise market power absent any coordinated response from rival market incumbents. The concentration of the remainder of the market often has little impact on the answer to that question.”); Kwoka, *supra* note 21, at 6 (“[U]nilateral effects depend upon elasticities and diversion, factors which are at best partially informed by market shares but otherwise not closely related to traditional structural characteristics.”); Jonathan B. Baker & Steven C. Salop, *Should Concentration Be Dropped from the Merger Guidelines?*, 33 *UWLA L. REV.* 3, 11–12 (2001) (“Concentration matters least in predicting the consequence of an acquisition when the competitive concern involves the loss of localized competition among sellers of differentiated products. . . . It is now widely accepted among economists that unilateral effects analysis does not strictly require a single discrete relevant market to be defined with the SSNIP test; demand elasticities and diversion ratios are sufficient.”).

³⁴ The 1982 Merger Guidelines introduced the SSNIP market definition test and associated HHIs in the context of coordinated effects analysis. *See Baker & Salop, supra* note 33, at 11–12. The addition of unilateral effects theories to the 1992 Guidelines was superimposed on this coordinated effects framework. *See id.*; *see also* Kwoka, *supra* note 21, at 7 (“[T]he current Guidelines are organized in a manner that seems misleading. Their logical structure is strictly correct only for concern with coordinated effects, even as they note the importance of unilateral effects.”).

³⁵ Commentary, *supra* note 5, at 10; *see also id.* at 11 (“In some cases, competitive effects analysis may eliminate the need to identify with specificity the appropriate relevant market . . .”).

³⁶ *See Evanston* Commission Opinion, *supra* note 31, at 60 (“[I]f a merger enables the combined firm unilaterally to raise prices by a SSNIP for a non-transitory period due to the loss of competition between the merging parties, the merger plainly is anticompetitive, and the merging firms comprise a relevant antitrust market”); Commentary, *supra* note 5, at 10 (“Evidence pertaining more directly to a merger’s actual or likely competitive effects also may be useful in determining the relevant market in which effects are likely. Such evidence may identify potential relevant markets and significantly reinforce or undermine other evidence relating to market definition.”).

³⁷ *See FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 460–61 (1986) (“Since the purpose of the inquires into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.” (quotations omitted)).

of estimating market power, which is the ultimate consideration When there are better ways to estimate market power, the court should use them.”³⁸ In the D.C. Circuit’s *Whole Foods* decision, Judge Brown stated that “defining a market and showing undue concentration in that market . . . does not exhaust the possible ways to prove a § 7 violation on the merits.”³⁹ In particular, “it might not be necessary to understand the market definition” in a unilateral effects case involving differentiated products, at least at the preliminary injunction stage.⁴⁰

A recent FTC merger decision picks up on the theme that direct effects evidence could supplant market definition in some cases. In *Evanston Northwestern*, the Commission stated that “we do not rule out the possibility that a future merger case may lead us to consider whether complaint counsel must always prove a relevant market.”⁴¹ The Commission explained that market definition “is potentially much less important in merger cases in which the availability of natural experiments allows for direct observation of the effects of competition between the merging parties.”⁴²

The Guidelines should recognize the possible use of direct effects evidence, the circumstances under which it could be used, and its potential to supplement or replace the market definition-concentration structural paradigm in certain cases. This would for the most part be a formal recognition of what the agencies have said in a variety of less formal contexts. Nevertheless, such an important development should not be left for practitioners and other interested parties to discover in a speech or agency report; it should be front and center in the Guidelines.

Revise the HHI Thresholds. Perhaps the greatest divergence between the Guidelines and actual agency practice involves the role of HHIs. Section 1.51 of the Guidelines states that mergers producing an increase in HHI of more than 100 points in a “moderately concentrated” market (one with a most-merger HHI between 1,000 and 1,800) or an increase of more than 50 points in a “highly concentrated” market (one with a most-merger HHI of more than 1,800) “potentially raise significant competitive concerns.” An HHI increase of more than 100 points in a “highly concentrated” market will result in a presumption that the merger will “create or enhance market power or facilitate its exercise.”

In practice, however, the agencies frequently clear transactions with a post-merger HHI exceeding 1,800 and usually challenge mergers only at far higher levels of concentration.⁴³ A recent report indicates that the majority of FTC enforcement actions involve post-merger concentration levels above 4,000 and over two-thirds involve post-merger concentration levels above 3,000.⁴⁴ Except for the politically charged petroleum and grocery store industries, challenges in markets with post-merger HHIs below 2,400 are exceptionally rare.⁴⁵ As then-Chairman Muris explained in connection with the release of a related report, “I hope the data we released . . . will finally put to rest

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³⁸ *United States v. Baker Hughes Inc.*, 908 F.2d at 992 (quoting *Ball Memorial Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986)). Judge (now Justice) Ruth Bader Ginsburg was also on the *Baker Hughes* panel.

³⁹ *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.) (dicta).

⁴⁰ *Id.* at 1036 n.1 (Brown, J.) (dicta).

⁴¹ See *Evanston* Commission Opinion, *supra* note 31, at 88 (dicta).

⁴² *Id.* at 86–87 (dicta).

⁴³ See Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 9 (2007) (“In actual practice, the U.S. antitrust agencies tend to challenge mergers only at concentration levels much higher than 1800.”).

⁴⁴ Fed. Trade Comm’n, Horizontal Merger Investigation Data, Fiscal Years 1996–2007 at Table 3.1 (Dec. 1, 2008), available at <http://www.ftc.gov/os/2008/12/081201hsrmergerdata.pdf>. According to an analysis of earlier data provided by both agencies, the median HHI for a challenged transaction was 4,500 with a median increase of 1,200. See Kwoka, *supra* note 21, at 8.

⁴⁵ See Horizontal Merger Investigation Data 1996–2007, *supra* note 44, at Tables 3.1–3.5.

the notion that HHI levels have any specific significance, except at very high levels.”⁴⁶

Given the wide divergence between the Guidelines and actual agency practice, the agencies should give strong consideration to revising the current concentration thresholds. While most practitioners seem to be aware of the significance of the current concentration thresholds, the federal courts, other U.S. agencies with competition mandates, and foreign competition authorities that look to the Guidelines may not.⁴⁷ For example, courts frequently cite to the 1,800/100 concentration thresholds in the Guidelines without recognizing that these thresholds are outdated and not reflective of agency practice.⁴⁸

Alternatively, the Guidelines should clarify that the HHI thresholds are merely safe harbors and that failure to meet a safe harbor does not carry with it a presumption of competitive concerns or the enhancement of market power.⁴⁹ Either approach would be consistent with the gradual de-emphasis of concentration since the 1982 Guidelines.⁵⁰

Clarify the Role of the Coordinated Effects “Checklist.” Coordinated effects analysis under the Guidelines involves defining the relevant market, determining the extent of and increase in concentration, and then assessing whether the relevant market is conducive to coordinated behavior. This final step is done in accordance with an assortment of factors based on the work of Stigler and Posner.⁵¹

This “Checklist” approach is problematic because it does not explain how the transaction increases the incentive or ability of incumbent firms to coordinate their behavior. The ultimate issue in coordinated effects analysis is the extent to which a transaction mitigates existing impediments to coordinated behavior.⁵² The presence or absence of any particular Checklist factor or factors

⁴⁶ Timothy J. Muris, Chairman, Fed. Trade Comm’n, Prepared Remarks at the Workshop on Horizontal Merger Guidelines (Feb. 17, 2004), available at <http://www.ftc.gov/speeches/muris/040217hmgwksp.shtm>; see also Timothy J. Muris, Chairman, Fed. Trade Comm’n, Antitrust Enforcement at the Federal Trade Commission: In a Word, Continuity, Remarks Before ABA Section of Antitrust Law Annual Meeting (Aug. 7, 2001), available at <http://www.ftc.gov/speeches/muris/murisaba.shtm> (“Rigid reliance on concentration statistics and structural presumptions . . . no longer suffice; we . . . have to look at the competitive dynamics of the market.”); Varney, *supra* note 4, at 7 (“It is no secret that today the HHI thresholds offer little in the way of meaningful guidance to businesses considering merging.”).

⁴⁷ See *Merger Roundtable*, *supra* note 21, at 22 (William Kolasky: “I agree that revising the Merger Guidelines so that they reflect actual agency practice would help with getting other jurisdictions around the world to move away from an overly formalistic structural approach.”); Darren S. Tucker & Bilal Sayyed, *The Merger Guidelines Commentary: Practical Guidance and Missed Opportunities*, ANTITRUST SOURCE, May 2006, <http://www.abanet.org/antitrust/at-source/06/05/May06-Tucker5=24f.pdf> (“The agencies, having adopted the HHI thresholds in 1982, have sufficient experience to support an increase in the thresholds to a level consistent with actual practice; this would have the benefit of encouraging other federal agencies to rethink their reliance on the current numbers.”).

⁴⁸ See, e.g., *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 431 (5th Cir. 2008) (citing to the Guidelines for the proposition that a post-merger HHI of 1,800 with an increase of 100 points or more creates “a presumption of adverse competitive consequences”); *FTC v. Foster*, No. CIV 07-352 JBACT, 2007 WL 1793441, at *54 (D.N.M. May 29, 2007) (similar). But see *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 129 (D.D.C. 2004) (observing that the agencies typically challenge transactions with concentrations that “dwarf” the Guidelines’ thresholds).

⁴⁹ *Accord* *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1112 (N.D. Cal. 2004) (describing the Guidelines’ HHI thresholds as establishing safe harbors).

⁵⁰ See Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 116–17, 121 (2002) (“The strong concentration presumptions in the 1982 Guidelines were soon seen to be impractical and began to be softened only two years later.”). Leary notes that the 1982, 1984, and 1992 merger guidelines all contained the “basic tripartite split” between markets that are unconcentrated, moderately concentrated, and highly concentrated, but that the presumption of anticompetitive effects of mergers falling in the highly concentrated category was softened with each revision. *Id.* at 116–17.

⁵¹ RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); George Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

⁵² Janusz A. Ordover, *Coordinated Effects in Merger Analysis: An Introduction*, 2007 COLUM. BUS. L. REV. 411, 418 (2007).

sheds little light on this inquiry.⁵³ This is not to say the Stigler-Posner factors should be irrelevant to merger analysis. Rather, they should be considered in the context of determining “what factors make coordination difficult and how might the merger change things.”⁵⁴ Clarification of the role of the Checklist factors could help avoid the all-too-common view that a tabulation of the applicable pre-merger Stigler-Posner factors is somehow relevant.⁵⁵

The discussion of coordinated effects also needs to highlight the important role of mavericks. Unlike the other Checklist factors, the elimination (or creation) of a maverick is a merger-specific event that can affect incumbents’ ability to coordinate. As the *Arch Coal* court noted, “An important consideration when analyzing possible anticompetitive effects is whether the acquisition would result in the elimination of a particularly aggressive competitor in a highly concentrated market. . . . The loss of a firm that does not behave as a maverick is unlikely to lead to increased coordination.”⁵⁶ Likewise, the Commentary recognizes that the loss of a maverick firm “may make coordination more likely because the nature and intensity of competition may change significantly.”⁵⁷

Another factor that should be highlighted is a history of prior coordination or attempted coordination, not because it necessarily indicates the likely mechanism of coordination, but because of the tendency for recidivism and because of the likelihood that ongoing coordination will be exacerbated by consolidation. The courts and the agencies have noted the importance of the industry’s history in coordinated effects analysis.⁵⁸

⁵³ See David T. Scheffman & Mary Coleman, *Quantitative Analyses of Potential Competitive Effects from a Merger*, 12 GEO. MASON L. REV. 319, 327 (2003) (“[S]uch Check Lists are too crude to provide much assistance in determining whether a coordinated interaction theory is relevant. Specifically, many industries that fit the Check List do not appear to exhibit outcomes that are consistent with coordinated interaction. Moreover, this approach does not focus on why the merger should affect the likelihood of coordination.”); ABA TRANSITION REPORT, *supra* note 21, at 35 (stating that the “checklist approach” does not explain “how the merger would change the potential for coordination”).

⁵⁴ See Scheffman & Coleman, *supra* note 53, at 329; see also Ordoover, *supra* note 52, at 424 (stating that the Merger Guidelines’ Checklist is relevant “to the ‘mechanism’ of coordination”). A good example of this approach is the DOJ’s investigation of the Premdore/Masonite merger, in which the Department explained that “the evidence developed in the investigation of the proposed transaction revealed at least four significant factors in the current structure of these markets that make coordination less likely. Based upon the evidence specific to this case, including documents obtained from the defendants, each of these factors would be lessened or eliminated if the proposed transaction were consummated.” *United States v. Premdor Inc.*, 66 Fed. Reg. 45,326, 45,337 (Aug. 28, 2001) (Competitive Impact Statement).

⁵⁵ The Commentary appears to recognize this problem, explaining that the various industry characteristics “are not simply put on the left or right side of a ledger and balanced against one another.” Commentary, *supra* note 5, at 21.

⁵⁶ See *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 146 (D.D.C. 2004) (quoting *FTC v. Libbey, Inc.*, 211 F. Supp. 2d 34, 47 (D.D.C. 2002), *FTC v. Staples Inc.*, 970 F. Supp. 1066, 1083 (D.D.C. 1997), and William J. Kolasky, Deputy Ass’t Att’y Gen., Antitrust Div., Coordinated Effects in Merger Review: From Dead Frenchman to Beautiful Minds and Mavericks, Remarks Before the ABA Section of Antitrust Law Spring Meeting (Apr. 24, 2002) (“[M]averick status is becoming a more important factor in the agencies’ evaluation of coordinated effects in merger cases.”)); see also Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135 (2002); *Foster*, 2007 WL 1793441, at *48–*49 (finding that coordinated effects were unlikely because of a lack of “evidence of past competitor coordination or the ability of firms to coordinate in the future. There is also no evidence that Giant has acted as a maverick . . .”).

⁵⁷ Commentary, *supra* note 5, at 24–25; see also Paul T. Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, ANTITRUST, Summer 2006, at 51, 53 (“It is unclear from the Commentary what else, beyond acquisition of a maverick, can facilitate coordinated effects.”).

⁵⁸ See, e.g., *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 724 (D.C. Cir. 2001) (finding that the likelihood of tacit collusion was enhanced by “record evidence of past price leadership in the baby food industry”); *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 905 (7th Cir. 1989) (“there is a history of efforts to fix prices in the industry”); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1388 (7th Cir. 1986) (“there is a tradition . . . of cooperation between competing hospitals in Chattanooga”); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009) (the lack of “evidence of past coordination” weighs against a risk of coordinated effects); *Arch Coal*, 329 F. Supp. 2d at 132–140 (extensive analysis of whether prior coordination occurred in the relevant market); Commentary, *supra* note 5, at 22–23; see also Denis, *supra* note 57, at 54 (“The only other approach to coordinated effects theories illustrated in the Commentary is through use of evidence of past and ongoing coordination.”); Kolasky, *supra* note 56, at 20 (stating that “cartel participants tend to be recidivists”).

Describe Additional Unilateral Effects Models. Revised Guidelines should identify the unilateral effects models that the agencies regularly employ. The Guidelines currently describe two theories of unilateral effects—one for the pricing of differentiated products and one for capacity and output of a homogeneous product—yet the agencies frequently apply other models. Given the important role unilateral effects theories have played in enforcement actions since the promulgation of the 1992 Guidelines, adding a brief description of additional unilateral effects models that the agencies frequently employ would benefit practitioners, courts, and agency staff.⁵⁹ Two examples come to mind: auction models and bargaining models, both of which have played a prominent role in recent enforcement decisions.⁶⁰

Buyers sometimes procure industrial or customized products through a single- or multi-stage auction format that may involve the use of requests for proposal or quotation. The agencies have developed auction models designed to describe the effect of a merger involving products purchased through one of these formats. The FTC's challenge in *CCC* and the DOJ's challenge in *Oracle* are recent examples of cases involving potential unilateral effects relating to auctions.⁶¹

Unilateral effects may also arise in markets where purchases are made as a result of individual negotiations between buyers and sellers. In these markets, the combination of two sellers may give the merged firm the ability to obtain a more favorable bargain. The FTC frequently uses bargaining theory to analyze the effects of hospital mergers on the prices to managed care organizations.⁶² Recent examples include the *Evanston* and *Inova* cases.⁶³

Given the agencies' frequent use of auction and bargaining models, some description of these models in the Guidelines would fill an existing gap. Explanation of how the agencies' might resolve some of the "sticky and unsettled issues"⁶⁴ (the FTC's words) they present would also be helpful.

Provide a Better Description of Key Econometric Tools. The agencies should consider describing the econometric methods that they often use to define relevant markets and competitive effects. Clarification would aid not only practitioners but also the courts, which have become

⁵⁹ It would, of course, be impractical for revised Guidelines to address every conceivable unilateral effects model. See Thomas O. Barnett, *Substantial Lessening of Competition—The Section 7 Standard*, 2005 COLUM. BUS. L. REV. 293, 301 (2005) (noting that there has been a "proliferation of unilateral effects theories over the past decade").

⁶⁰ Consideration should also be given to including monopoly and dominant firm models, both of which are mentioned in the Commentary.

⁶¹ *CCC*, 605 F. Supp. 2d at 68–72 (discussing the government's auction models for the sale of the relevant products to insurance companies); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1169–70 (N.D. Cal. 2004) (noting that the government's expert used an English auction model to predict a unilateral price effect). The Guidelines contain a brief discussion of one type of auction model in a footnote. See 1992 Guidelines, *supra* note 13, § 2.21 n.21.

⁶² See Commentary, *supra* note 5, at 34; *Evanston* Commission Opinion, *supra* note 31, at 62 (noting that "bargaining markets are quite common" and that "bargaining models are appropriate for hospital markets because bilateral negotiations between MCOs and hospitals determine price that often are unique to the particular negotiation").

⁶³ See *Evanston* Commission Opinion, *supra* note 31, at 62–63; Administrative Complaint ¶¶ 15, 28–29, *Inova Health Sys. Found.*, FTC Docket No. 9326 (May 8, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080509admincomplaint.pdf> (alleging that hospital merger would adversely affect bargaining strength of health plans, resulting in higher prices).

⁶⁴ *Evanston* Commission Opinion, *supra* note 31, at 63 ("The potential for a merger in a bargaining market to have disparate effects on different customers potentially creates sticky and unsettled issues for merger analysis, most significantly, determining the percentage of a merged firm's revenues that must come from customers who are harmed by the merger for the transaction to violate Section 7."); see also ABA TRANSITION REPORT, *supra* note 21, at 34 ("[W]e believe that it is important that the agencies provide greater clarity and understanding to the use of unilateral effects theories.").

increasingly comfortable with the use of econometrics. Two economic tools in particular stand out as worthy of additional discussion: critical loss analysis and diversion ratios.⁶⁵

Critical loss analysis is used at both agencies to help define relevant markets and model competitive effects.⁶⁶ Critical loss analysis seeks to identify the level of lost sales needed to make a price increase by a hypothetical monopolist unprofitable. A number of courts have accepted—or at least acknowledged—critical loss analysis.⁶⁷ As two leading economists note, “[m]erging parties have used Critical Loss Analysis regularly, and with considerable success, to argue in court for a broader market than the government asserts.”⁶⁸

Likewise, including a description of diversion ratios in the Guidelines would provide greater transparency as to how the agencies assess unilateral effects and provide guidance to courts when faced with expert testimony on the subject. In a differentiated products merger, diversion ratios can be an important part of the analysis.⁶⁹ Under Section 2.21 of the Guidelines, unilateral effects may occur when “a significant share of sales in the market [is] accounted for by consumers who regard the products of the merging firms as their first and second choices.” In practice, the agencies frequently measure the closeness of the merging firms’ products through diversion ratios, which identify the proportion of sales gained by a product relative to the sales loss from an increase in price of a similar product. The greater the diversion ratios between the merging parties’ products, the greater the risk of unilateral effects.⁷⁰ Several recent federal court merger decisions relied on diversion ratios in their analysis.⁷¹

Including an explanation of diversion ratios may also help eliminate some confusion as to the significance of the merging parties being (or not being) closest substitutes.⁷² Merging parties sometimes contend that their products are not closest substitutes, pointing to a third competitor that

⁶⁵ Other possibilities include natural experiments, which can provide insight into the competitive effects of a merger by viewing prior changes in concentration in the relevant market, and simulation models.

⁶⁶ David Scheffman, Malcolm Coate & Louis Silvia, *Twenty Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective*, 71 ANTITRUST L.J. 277, 285 (2003) (“Critical loss’ analysis is regularly used at both the FTC and DOJ . . .”); Michael L. Katz & Carl Shapiro, *Critical Loss: Let’s Tell the Whole Story*, ANTITRUST, Spring 2003, at 49, 50 (“Critical loss analysis is commonly used, both by economists for private parties and by economists in the DOJ and the FTC.”).

⁶⁷ See, e.g., *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (Brown, J.); *id.* at 1047–48 (Tatel, J.); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1050, 1053 (8th Cir. 1999); *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 40–41 & n.16 (D.D.C. 2009) (“Critical loss analysis is a standard tool used by economists to study potentially relevant markets.”); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 120–22 & n.7 (D.D.C. 2004) (“To measure the volume of diverted sales needed to make a particular price increase unprofitable under the hypothetical monopolist test, economists generally perform a critical loss analysis.”); *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1128–32 (N.D. Cal. 2001) (lengthy discussion and application of critical loss analysis); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 160–61 (D.D.C. 2000).

⁶⁸ Joseph Farrell & Carl Shapiro, *Improving Critical Loss*, ANTITRUST SOURCE, Feb. 2008, <http://www.abanet.org/antitrust/at-source/08/02/Feb08-Farrell-Shapiro.pdf>.

⁶⁹ Commentary, *supra* note 5, at 27–31; Carl Shapiro, *Mergers with Differentiated Products*, ANTITRUST, Spring 1996, at 23, 27 (“Diversion Ratios and Gross Margins are key variables to explore in a merger investigation involving differentiated products . . .”).

⁷⁰ Shapiro, *supra* note 69, at 26 (“[H]igh Gross Margins and high Diversion Ratios suggest large post-merger price increases.”).

⁷¹ See, e.g., *Whole Foods*, 548 F.3d at 1044 (Tatel, J.), 1056 n.4 (Kavanaugh, J.); *CCC*, 605 F. Supp. 2d at 70–71 (discussing diversion ratios); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1113–18, 1172–73 (N.D. Cal. 2004) (extensive discussion of economics behind unilateral effects and diversion ratios); *Swedish Match*, 131 F. Supp. 2d at 169 (“[T]he diversion ratio is important because it calculates the percentage of lost sales that go to National. High margins and high diversion ratios support large price increases, a tenet endorsed by most economists.”).

⁷² See Baker & Salop, *supra* note 33, at 12 (“[W]e think that the Merger Guidelines should explain more carefully the proper role of diversion ratios, demand elasticities, and relevant market definition in unilateral effects analysis, so that economically extraneous arguments about market definition and concentration can be avoided in the analysis of unilateral competitive effects of mergers among sellers of differentiated products.”).

allegedly offers the most similar products or the most aggressive competition. Implicit in this argument is that only if the merging parties are closest competitors can unilateral effects arise. The agencies themselves have occasionally suggested that a “closest competitor” standard is appropriate.⁷³

But in fact, unilateral effects can arise where the merging parties are not closest competitors if the diversion ratios between them are sufficiently high.⁷⁴ Likewise, parties could be closest competitors yet not raise unilateral effects concerns if the diversion ratios are sufficiently low.⁷⁵

Better explanation of diversion ratios might also help clear some of the confusion regarding the 35 percent unilateral effects threshold.⁷⁶ The Guidelines state that the agencies will presume the existence of unilateral effects when the combined share of the merging companies exceeds 35 percent and market shares reflect consumers’ first and second product choices.⁷⁷ Practitioners have generally viewed combined market shares short of 35 percent as falling within a safe harbor. The Commentary indicates that this view is misplaced and that “the Agencies may challenge mergers when the combined share falls below 35% if . . . the merging products are especially close substitutes.”⁷⁸

Revised Guidelines should clarify the significance, if any, of the 35 percent threshold. Despite some concerns with the economic significance of this figure,⁷⁹ a market-share-based safe harbor for unilateral effects—even if at a lower percentage—would be a helpful bright-line test. And as the Commentary itself notes, the 35 percent test has worked well in practice.⁸⁰ On the other hand, if the agencies do not follow a safe harbor approach, there seems to be little reason to retain the 35 percent threshold.

Include a Discussion of Innovation Markets. Revised Guidelines would benefit from an explanation of how the agencies analyze innovation competition. The 1995 Intellectual Property Guidelines first identified innovation markets as potential relevant markets,⁸¹ but noted that the acqui-

⁷³ See Denis, *supra* note 57, at 55 & n.4 (identifying FTC closing statements that applied a “closest competitor” standard). Some DOJ competitive impact statements describe heightened concern because the merging parties were “closest competitors.” See, e.g., Competitive Impact Statement at 8, *United States v. Verizon Commc’ns Inc.*, Civil Action No 1:08-cv-993-EGS (D.D.C. June 10, 2008); Competitive Impact Statement at 9, *United States v. CBS Corp.*, Civil Action No. 1:99-CV3212 (D.D.C. Dec. 6, 1999).

⁷⁴ Commentary, *supra* note 5, at 27–28; Shapiro, *supra* note 69, at 26 (“Nor is a merger immunized merely because the merging brands are not next-closest substitutes, as some parties claim, any more than a merger is immunized merely because the merged entity still faces some post-merger competition.”).

⁷⁵ This might occur, for example, where there are a large number of non-merging competitors, each with a diversion ratio slightly below that of the acquired company.

⁷⁶ See Baker & Salop, *supra* note 33, at 12.

⁷⁷ 1992 Guidelines, *supra* note 13, § 2.211.

⁷⁸ Commentary, *supra* note 5, at 26.

⁷⁹ See Baker & Salop, *supra* note 33, at 12 (“[W]e recommend that the Merger Guidelines remove any suggestion of a 35% market share ‘safe harbor’ . . . in the evaluation of the possibility of unilateral effects among firms selling differentiated products.”).

⁸⁰ See Commentary, *supra* note 5, at 26 (“As an empirical matter, the unilateral effects challenges made by the Agencies nearly always have involved combined shares greater than 35%.”).

⁸¹ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.3 (1995), *reprinted* in 4 Trade Reg. Rep. (CCH) ¶ 13,132, available at <http://www.ftc.gov/bc/0558.pdf> [hereinafter IP Guidelines]. Section 3.2.3 of the IP Guidelines defines an innovation market as follows:

An innovation market consists of the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development. The close substitutes are research and development efforts, technologies, and goods that significantly constrain the exercise of market power with respect to the relevant research and development, for example by limiting the ability and incentive of a hypothetical monopolist to retard the pace of research and development. The Agencies will delineate an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms.

tion of intellectual property rights should be analyzed through application of the Guidelines. A 1996 FTC staff report advocated the use of innovation markets in merger analysis and proposed standards with respect to several aspects of a Guidelines analysis.⁸² The Competitor Collaboration Guidelines also discuss innovation markets, but note that its guidance does not apply to “competitor collaborations to which a merger analysis is applied.”⁸³ Both agencies have challenged a number of mergers on an innovation market theory,⁸⁴ although the DOJ has not challenged any mergers on this basis in a number of years.⁸⁵

After more than fifteen years of analyzing the effects of mergers on innovation, guidance in this area would be appropriate if the agencies continue to believe that innovation markets are a useful component of merger analysis.⁸⁶ Some key questions include:

- How should participants in an innovation market be identified?
- Are innovation market concerns exclusively unilateral—that a merged firm will have less incentive to devote resources to innovation generally, or to innovation related to a specific future good? Or are the agencies also concerned about coordination in research and development, and under what factual circumstances?⁸⁷

⁸² 1 FED. TRADE COMM’N, OFFICE OF POLICY PLANNING, ANTICIPATING THE 21ST CENTURY: COMPETITION POLICY IN THE NEW HIGH-TECH GLOBAL MARKETPLACE ch. 7 (May 1996) [hereinafter FTC GLOBAL COMPETITION REPORT], available at http://www.ftc.gov/opp/global/report/gc_v1.pdf.

⁸³ U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for Collaborations Among Competitors § 4.3 (2000), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,161.

⁸⁴ See Katz & Shelanski, *supra* note 43, at 64–76 (describing key innovation market cases); Ronald W. Davis, *Innovation Markets and Merger Enforcement: Current Practice in Perspective*, 71 ANTITRUST L.J. 677, 687–93 (2003) (same); Richard J. Gilbert & Willard K. Tom, *Is Innovation King at the Antitrust Agencies? The Intellectual Property Guidelines Five Years Later*, 69 ANTITRUST L.J. 43 (2001) (same).

⁸⁵ This may change given the support for innovation market analysis by the new Assistant Attorney General for Antitrust. See Christine A. Varney, *Antitrust and the Drive to Innovate: Innovation Markets in Merger Review Analysis*, ANTITRUST, Summer 1995, at 16 (“[I]nnovation market analysis is a necessary and proper inquiry within the existing antitrust regime. . . . This [enforcement] role is especially vital in the area of merger policy, where the merger of two innovating corporations can, depending on the circumstances, have either pro- or anti-competitive effects.”); see also Sean Gates, *Obama’s Antitrust Enforcers: What Can We Expect?*, ANTITRUST SOURCE, Apr. 2009, <http://www.abanet.org/antitrust/at-source/09/04/Apr09-Gates4-28f.pdf> (“During her tenure at the FTC, Ms. Varney was on the leading edge of the development of innovation market analysis. . . . She also joined in several decisions applying innovation market analysis to require that merging parties make divestitures to protect innovation.”).

⁸⁶ *Accord* AMC REPORT, *supra* note 28, Recommendation 11c (“The agencies should update the Merger Guidelines to explain more extensively how they evaluate the potential impact of a merger on innovation.”); ABA TRANSITION REPORT, *supra* note 21, at 37 (“If the agencies undertake revisions to the Guidelines, then they should consider addressing the issues of potential competition and innovation competition.”); *Merger Roundtable*, *supra* note 21, at 23 (William Kolasky: “[I]nnovation markets are an area that is of growing concern. . . . I think the agencies have developed a coherent way of looking at innovation markets and that this should be embodied in the Guidelines.”). *But see Merger Roundtable*, *supra* note 21, at 23 (Deborah Feinstein: arguing that prior agency enforcement in innovation markets has been questionable and that “before the agencies launch an exercise of codifying what it is that they have done, they ought to conduct a retrospective look as to what has happened in the industries where they have taken enforcement action”).

⁸⁷ See FTC GLOBAL COMPETITION REPORT, *supra* note 82, ch. 7 at 35 (“The hearings testimony clearly stressed that unilateral anticompetitive effects, rather than coordinated interaction, are much more likely to be the problem in the context of innovation combinations. . . . Nevertheless, coordinated interaction regarding innovation is clearly not impossible.”).

- Does the five-firm safe harbor identified in the IP Guidelines or the four-firm safe harbor identified in the Competitor Collaboration Guidelines apply in the merger context?⁸⁸
- Should there be any structural presumption in innovation market mergers?⁸⁹
- Do the Guidelines' usual entry requirements apply and, if so, how should the likelihood and timeliness standards be applied in the context of future research and development efforts?⁹⁰

Include a Discussion of Potential Competition Theories. Given the importance of potential competition theories—at least in certain industries—and the considerable time since the agencies have provided relevant enforcement guidelines, updated guidelines for potential competition theories are in order.⁹¹ The agencies have not provided formal guidance on potential competition theories of harm in over twenty-five years, during which time they have challenged a number of mergers on that basis, particularly in the technology⁹² and health care⁹³ industries. In the last year, the

⁸⁸ See IP Guidelines § 4.3 (“Absent extraordinary circumstances, the Agencies will not challenge a restraint in an intellectual property licensing arrangement that may affect competition in an innovation market if (1) the restraint is not facially anticompetitive and (2) four or more independently controlled entities in addition to the parties to the licensing arrangement possess the required specialized assets or characteristics and the incentive to engage in research and development that is a close substitute of the research and development activities of the parties to the licensing agreement.”); Competitor Collaboration Guidelines, *supra* note 83, § 4.3 (“Absent extraordinary circumstances, the Agencies do not challenge a competitor collaboration on the basis of effects on competition in an innovation market where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration.”). The Competitor Collaboration Guidelines specifically note that the safe harbor does not apply “to competitor collaborations to which a merger analysis is applied.” Competitor Collaboration Guidelines, *supra* note 83, § 4.3. A 1995 FTC staff report on global competition calls for applying the IP Guidelines’ five-firm safe harbor to mergers. See FTC GLOBAL COMPETITION REPORT, *supra* note 82, ch. 7 at 33.

⁸⁹ See Katz & Shelanski, *supra* note 43, at 5 (“Even those who favor the use of innovation markets by merger authorities divide over whether, once such markets are defined, the anti-concentration presumptions of merger law should apply to them or should instead be withdrawn in favor of a neutral, fact-intensive inquiry into whether the merger will hinder innovation.”). Compare Statement of Chairman Timothy J. Muris, Genzyme Corporation/Novazyme Pharmaceuticals, Inc., FTC File No. 021 0026 (Jan. 13, 2004), available at <http://www.ftc.gov/os/2004/01/murisgenzymestmt.pdf> (“[N]either economic theory nor empirical research supports an inference regarding the merger’s likely effect on innovation (and hence patient welfare) based simply on observing how the merger changed the number of independent R&D programs. Rather, one must examine whether the merged firm was likely to have a reduced incentive to invest in R&D, and also whether it was likely to have the ability to conduct R&D more successfully.”), with Dissenting Statement of Commissioner Mozelle W. Thompson, Genzyme Corporation/Novazyme Pharmaceuticals, Inc., FTC File No. 021 0026 (Jan. 13, 2004), available at <http://www.ftc.gov/os/2004/01/thompsongenzymestmt.pdf> (“One important feature of the Horizontal Merger Guidelines is that they establish a rebuttable presumption of competitive effects for mergers if the change in, and resulting level of, market concentration is significant. I see no compelling reason why innovation mergers should be exempt from the Horizontal Merger Guidelines or the presumption of anticompetitive effects for mergers to monopoly and other mergers as discussed therein.”).

⁹⁰ See FTC GLOBAL COMPETITION REPORT, *supra* note 82, ch. 7 at 36–38 (noting that some question “whether entry analysis could be transferred to innovation market analysis” and that “additional research into the mechanisms that induce firms to enter into new innovation efforts” is needed before creating entry standards for innovation markets).

⁹¹ Accord ABA TRANSITION REPORT, *supra* note 21, at 37 (“If the agencies undertake revisions to the Guidelines, then they should consider addressing the issues of potential competition and innovation competition.”); *Merger Roundtable*, *supra* note 21, at 23 (Kolasky: “Potential competition is another area of growing concern that needs more focus and that is not receiving as much attention as it should.”).

⁹² See, e.g., Statement of Federal Trade Commission Concerning Google/DoubleClick 8–9, FTC File No. 071-0170, available at <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf> (closing merger investigation involving Internet advertising that was premised in part on potential competition theory); ABB AB, 64 Fed. Reg. 3130 (FTC Jan. 20, 1999) (analysis to aid public comment) (potential competition for process mass spectrometers); Analysis to Aid Public Comment on the Provisionally Accepted Consent Order, In the Matter of AutoDesk, Inc./SoftDesk, Inc., FTC File No. 971 0049, Docket No. C-3756 (Mar. 31, 1997), available at <http://www.ftc.gov/os/1997/03/autodesk.pdf> (computer aided design).

⁹³ See, e.g., Allergan Inc., 71 Fed. Reg. 13,128 (FTC Mar. 14, 2006) (analysis to aid public comment) (cosmetic botulinum toxins for treatment of wrinkles); Cephalon Inc., 138 F.T.C. 583, 635-36 (2004) (prescription drug treatments for cancer pain); Pfizer Inc., 135 F.T.C. 608, 779-80 (2003) (extended-release OAB products); Baxter Int’l, 135 F.T.C. 49, 97-99 (2003) (propofol); Amgen Inc., 134 F.T.C. 333, 404 (2002) (soluble TNF receptor products); Press Release, Fed. Trade Comm’n, FTC Seeks to Block Cytoc Corp.’s Acquisition of Digene Corp. (June 24, 2002) (cervical cancer test); Zeneca Group, 64 Fed. Reg. 15,166 (FTC Mar. 30, 1999) (analysis to aid public comment) (long-lasting local anesthetics); see also Statement of the Federal Trade Commission Concerning Pfizer/Wyeth 2–3, FTC File No. 091-0053 (Oct. 14, 2009), available at <http://www.ftc.gov/os/caselist/0910053/091014pwyethstmt.pdf> (noting that investigation considered “whether the evidence supported a challenge based upon a theory that the transaction threatened to eliminate potential future competition in any relevant market”).

agencies have brought three cases (Thoratec/Heartware, Microsemi/Semicoa, Ovation/Merck)⁹⁴ and settled another one (Inverness/Acon)⁹⁵ under a potential competition theory (at least in part). Yet, the 1984 Merger Guidelines remain the most recent explanation of the agencies' treatment of potential competition theories.⁹⁶ Updated guidelines could help clarify several issues not addressed by the 1984 Guidelines, including:

- How likely must it be for a potential competitor to enter?⁹⁷ In particular, for products regulated by the FDA, is there a particular developmental milestone, e.g., beginning critical clinical trials, at which point the agencies will presume entry is likely?⁹⁸
- To what extent do the agencies consider unilateral or coordinated effects as part of their analysis?
- How should markets be defined for future goods?

Some might dispute the idea of including potential competition theories in horizontal merger guidelines, given that they are sometimes classified as conglomerate or non-horizontal theories.⁹⁹ However, the better approach would be to consider potential competition theories under the rubric of horizontal mergers, given that, as the 1984 Guidelines note, the analysis of potential competition concerns is "analogous to that applied in horizontal mergers."¹⁰⁰

Add a Discussion of Power Buyers. One of the revisions under consideration by the agencies is adding a discussion of so-called power buyers to the Guidelines.¹⁰¹ Several courts have held that the sophistication and bargaining power of buyers is an important consideration in assess-

⁹⁴ See, e.g., Press Release, Fed. Trade Comm'n, FTC Challenges Thoratec's Proposed Acquisition of HeartWare International (July 30, 2009), available at <http://www.ftc.gov/opa/2009/07/thoratec.shtm> (announcing challenge to medical device maker whose competing product was in clinical trials); Verified Complaint ¶¶ 33–36, 40–42, United States v. Microsemi Corp., Case No. 8:09-cv-00275-AG-AN (C.D. Cal. Dec. 18, 2008), available at <http://www.usdoj.gov/atr/cases/t240500/240537.htm> (challenging consummated acquisition partly on the ground that the acquired company was likely to obtain qualification and compete against Microsemi for certain diodes); Press Release, Fed. Trade Comm'n, FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition (Dec. 16, 2008), available at <http://www.ftc.gov/opa/2008/12/ovation.shtm> (announcing challenge to acquisition of rights to competing drug for treatment of patent ductus arteriosus six months before its launch).

⁹⁵ Inverness Med. Innovations, Inc., 74 Fed. Reg. 293 (Jan. 5, 2009) (analysis to aid public comment for consent decree resolving FTC claim that acquisition between makers of consumer pregnancy tests would prevent future competition).

⁹⁶ The portion of the 1984 Guidelines relating to potential competition represents the official position of both agencies today. See Statement Accompanying Release of Revised Merger Guidelines, *supra* note 15 ("Neither agency has changed its policy with respect to non-horizontal mergers. Specific guidance on non-horizontal mergers is provided in § 4 of the Department's 1984 *Merger Guidelines*, read in the context of today's revisions to the treatment of horizontal mergers.").

⁹⁷ The courts of appeals' answer to this question has run the gamut. See, e.g., *FTC v. Atl. Richfield Co.*, 549 F.2d 289, 294–95 (4th Cir. 1977) (requiring "clear proof" of entry absent the merger); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (requiring that entry "would likely" have occurred in the relevant market); *Mercantile Tex. Corp. v. Board of Governors*, 638 F.2d 1255, 1268–69 (5th Cir. 1981) (adopting "reasonable probability" of entry standard); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 1121b (3d ed. 2007) (suggesting that the standard should be that the potential entrant "would probably have entered the market within a reasonable period of time").

⁹⁸ ABA TRANSITION REPORT, *supra* note 21, at 37 ("[P]articularly in deals involving pipeline pharmaceutical and medical device products, there is not a clear basis for identifying the circumstances under which concerns should be raised when there is a great deal of uncertainty as to which products will succeed and how products are likely to compete.").

⁹⁹ See, e.g., 1984 Guidelines, *supra* note 12, § 4; ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* ch. 3.C.1 (6th ed. 2007).

¹⁰⁰ 1984 Guidelines, *supra* note 12, § 4.13; see also ABA TRANSITION REPORT, *supra* note 21, at 37 (advocating the addition of potential competition to the 1992 Guidelines). This is also consistent with the Guidelines' treating any firm as "in the market" that could enter within a year. See 1992 Guidelines, *supra* note 13, § 1.32. Likewise, innovation market analysis, which typically is concerned with the development of products even further out than under a potential competition theory, is widely viewed as falling under the horizontal merger rubric.

¹⁰¹ See Questions for Public Comment, *supra* note 4, at 5.

ing the effects of a proposed transaction. In *Baker Hughes*, the D.C. Circuit held that the existence of power buyers, along with the ease of entry, was sufficient to rebut the government's prima facie case.¹⁰² In *Chicago Bridge*, the Fifth Circuit noted that “courts have found that the existence of power buyers can be considered in their evaluation of an antitrust case”¹⁰³ and went on to assess whether several factors suggestive of buyer power existed in the relevant market. In *Elders Grain*, the Eleventh Circuit explained that a “concentrated and knowledgeable buying side makes collusion by sellers more difficult.”¹⁰⁴ Several district courts have also acknowledged that the existence of a sophisticated or concentrated customer base is a relevant consideration in the competitive effects analysis.¹⁰⁵

The Guidelines contain no discussion of a power buyer defense, and the Commentary expresses considerable skepticism. The Commentary claims that even the largest buyers can fall victim to the exercise of market power by merging suppliers.¹⁰⁶ Furthermore, even if large buyers could protect themselves, there are invariably smaller customers against which market power can be exercised, according to the Commentary.¹⁰⁷ The Commentary does leave the door open to one type of power buyer argument: a customer's ability to sponsor new entry.¹⁰⁸

Several courts have held that the sophistication and bargaining power of buyers is an important consideration in assessing the effects of a proposed transaction.

¹⁰² *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990).

¹⁰³ *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 439–40 (5th Cir. 2008) (quoting *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 58 (D.D.C. 1998)). The Fifth Circuit adopted the test for power buyers set forth in *United States v. Archer-Daniels-Midland, Co.*, 781 F. Supp. 1400, 1417–18 (S.D. Iowa 1991). Under *Archer-Daniels*, factors suggestive of a sophisticated customer include:

- (a) Refusing to reveal the prices quoted by other suppliers and the price which a supplier must meet to obtain or retain business, creating uncertainty among suppliers.
- (b) Swinging large volume back and forth among suppliers to show each supplier that it better quote a lower price to obtain and keep large volume sales.
- (c) Delaying agreement to a contract and refusing to purchase product until a supplier accedes to acceptable terms.
- (d) Holding out the threat of inducing a new entrant into [relevant product] production and assuring the new entrant adequate volume and returns.

Id. at 1418. The Guidelines consider the first *Archer-Daniels* factor—the extent of price transparency—as part of a coordinated effects analysis, and the Commentary considers the fourth *Archer-Daniels* factor—the ability to sponsor entry—a relevant consideration as to the likelihood of entry. See Commentary, *supra* note 5, at 39–42.

¹⁰⁴ *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 908 (7th Cir. 1989).

¹⁰⁵ *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 64 (D.D.C. 2009) (“A sophisticated customer base makes price coordination more difficult.”); *FTC v. Foster*, No. civ. 07-352 JBACT, 2007 WL 1793441, at *37–*38 (D.N.M. May 29, 2007) (finding that some customers have “substantial buyer-power” and that customers could “discipline any unilateral attempt to reduce output”); *Cardinal Health*, 12 F. Supp. 2d at 58–59 (“Although the courts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness, courts have found that the existence of power buyers can be considered in their evaluation of an anti-trust case, along with such other factors as the ease of entry and likely efficiencies.”); *Archer-Daniels*, 781 F. Supp. at 1417–22 (approving a merger in part because of “the negotiating power of the power buyers and large buyers”); *FTC v. RR Donnelley & Sons Co.*, 1990-2 Trade Cas. (CCH) ¶ 69,239, at 64,885 (D.D.C. 1990) (“Well-established precedent and the [1984] *United States Department of Justice Merger Guidelines* recognize that the sophistication and bargaining power of buyers play a significant role in assessing the effects of a proposed transaction. Here the evidence demonstrates that even if these customers constituted a separate market, their own size and economic power, and the other characteristics of the ‘market,’ make any anticompetitive consequences very unlikely.” (citations omitted)); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 674 (D. Minn. 1990) (refusing to enjoin merger where three large customers that had the ability to monitor prices and seek alternative sources of supply outside the relevant geographic market accounted for nearly all purchases in the relevant market). *But see* *United States v. United Tote, Inc.*, 768 F. Supp. 1064 (D. Del. 1991) (holding that the existence of some power buyers would not protect numerous smaller customers from potentially anticompetitive pricing postmerger).

¹⁰⁶ See Commentary, *supra* note 5, at 17–18 (“[E]ven very large buyers may be unable to thwart the exercise of [market power].”).

¹⁰⁷ See *id.*

¹⁰⁸ See *id.* at 39–42.

It seems unlikely that in practice the agencies take such a narrow view of power buyer claims.¹⁰⁹ And given the fairly widespread adoption of the defense by the federal courts, including a discussion of the subject in the Guidelines might help shape the development of the subject in the federal courts. In any event, the absence of a discussion of power buyers in the Guidelines omits an important element of merger analysis, even if it is not determinative.¹¹⁰

Eliminating the distinction between committed and uncommitted entry would align the Guidelines with agency practice and also eliminate unnecessary complexity.

Eliminate the Concept of Uncommitted Entrants. The Guidelines make a distinction between so-called uncommitted entrants, which can enter a market within a year without significant sunk costs,¹¹¹ and committed entrants, which take at least a year to enter and at significant sunk cost. Uncommitted entrants are considered to be current market participants and are included in the calculation of concentration. Committed entrants are not part of the concentration calculation but may rebut competitive concerns if entry is timely, likely, and sufficient.¹¹² To muddy things further, uncommitted entrants may be analyzed as committed entrants if they meet the standard entry tests of timeliness, likelihood, and sufficiency.¹¹³

Eliminating the distinction between committed and uncommitted entry would align the Guidelines with agency practice and also eliminate unnecessary complexity. Aside from the practical difficulty of pigeonholing potential entrants into one of these categories, it seems unlikely that the agencies are devoting serious attention to mergers in industries where entry can readily occur in less than a year.¹¹⁴ Furthermore, uncommitted entry analysis requires a number of time-consuming inquiries—including an examination of a potential entrant’s sunk costs, the likelihood that consumers will purchase its product, and the profitability of alternative uses of its assets—which seem ill-suited for an initial concentration screen.¹¹⁵

Another aspect of entry analysis that should be reconsidered is the twenty-four month requirement for entry. With only minor exceptions, the Guidelines require entry to occur within twenty-four months of the merger.¹¹⁶ This is inconsistent with the analysis of competitive effects, which has no

¹⁰⁹ Tucker & Sayyed, *supra* note 47, at 4 (“The Commentary does not appear to reflect current enforcement patterns in cases involving power buyer claims.”).

¹¹⁰ Accord ABA TRANSITION REPORT, *supra* note 21, at 36 (“Other areas for future clarification include . . . countervailing buyer power”).

¹¹¹ 1992 Guidelines, *supra* note 13, § 1.32.

¹¹² *Id.* § 3.0.

¹¹³ *Id.* § 1.32 n.13.

¹¹⁴ See Leary, *supra* note 50, at 121 (“The hypothetical ‘uncommitted entrants,’ which can enter and exit without incurring significant costs, have proven as elusive as the Abominable Snowman; the category appears to be an empty box.”); A. Douglas Melamed, Outline of Comments Regarding Uncommitted Entry 1 (Draft Presentation to DOJ/FTC Merger Workshop Feb. 9, 2004), available at <http://www.ftc.gov/bc/mergerenforce/presentations/040218melamed%20.pdf> (“uncommitted entrant[s] are likely to be rare”); see also Jonathan B. Baker, *Responding to Developments in Economics and the Courts: Entry in the Merger Guidelines*, 71 ANTITRUST L.J. 189, 203 (2003) (“When a merger takes place in a market in which entry requires little in the way of sunk investments or time, and the number of prospective entrants are not limited, the agency likely recognizes the situation right away and allows the merger to proceed without the need for an extensive investigation.”).

¹¹⁵ See Timothy P. Daniel, Uncommitted Entry in the Merger Guidelines: It’s Not Whether—It’s When, Presentation to Department of Justice/Federal Trade Commission Merger Workshop 4 (Feb. 18, 2004), available at <http://www.ftc.gov/bc/mergerenforce/presentations/040218daniel.pdf>; Melamed, *supra* note 114, at 1–2 (stating that “the notion of uncommitted entry neither streamlines the process nor enhances the analysis”).

¹¹⁶ 1992 Guidelines, *supra* note 13, § 3.2 (“The Agency generally will consider timely only those committed entry alternatives that can be achieved within two years from initial planning to significant part impact.”); see also Commentary, *supra* note 5, at 45 (indicating that the two-year period specified in the Guidelines remains operative).

such time restriction, and with the SSNIP test, which is adjusted to reflect the industry at issue.¹¹⁷ The Antitrust Modernization Commission has called for flexibility in the twenty-four-month rule so that the agencies can “appropriately take account of competitive dynamics in the markets at issue and [so] that they will not seek to block mergers that, as a result of innovation, may not present a longer-term threat to competition and consumer welfare.”¹¹⁸ While the AMC’s suggestion appears to be focused on extending the twenty-four-month period, consideration should also be given to situations where the twenty-four-month cutoff may be too long.

Greater Recognition of Fixed-Cost Savings. The Guidelines were revised in 1997 to recognize the importance of efficiencies in merger analysis. The Guidelines acknowledge that “the primary benefit of mergers to the economy is their potential to generate . . . efficiencies.”¹¹⁹ Updated Guidelines should acknowledge that fixed-cost savings, like incremental cost savings, offer significant benefits to both consumers and producers and should be accorded significant weight in the efficiencies analysis.

The current Guidelines place the greatest weight on efficiencies that reduce marginal costs in the short run because these savings may “reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases.”¹²⁰ Nevertheless, a footnote in the Guidelines states that the agencies will also consider fixed-cost savings and other “efficiencies with no short-term, direct effect on price” but that these benefits “will be given less weight.”¹²¹

In practice, however, the agencies appear to give fixed-cost savings substantially more weight than the Guidelines would suggest. A recent study by two FTC economists of efficiencies claims from 1997 to 2007 found that FTC staff “were as likely to accept fixed-cost savings as they were to accept claims of variable-cost savings.”¹²² Recent closing statements confirm that fixed-cost savings played a role in closing several DOJ investigations.¹²³ Likewise, the Commentary notes that the agencies credit fixed-cost efficiencies and describe several types of fixed cost savings that should be given particular weight.¹²⁴

The Antitrust Modernization Commission and ABA Section of Antitrust Law have urged that the agencies give greater recognition to fixed-cost efficiencies, particularly in high-technology indus-

¹¹⁷ See 1992 Guidelines, *supra* note 13, § 1.11 (“[W]hat constitutes a ‘small but significant and nontransitory’ increase in price will depend on the nature of the industry, and the Agency at times may use a price increase that is larger or smaller than five percent.”).

¹¹⁸ AMC REPORT, *supra* note 28, at 60; see also *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 59 (D.D.C. 2009) (suggesting that “two years may be a short time frame by which to judge successful entry in this industry”); *Gotts & Renaudeau*, *supra* note 21, at 7 (observing that “there have been other situations in which entry beyond two years was considered relevant”).

¹¹⁹ 1992 Guidelines, *supra* note 13, § 4.0.

¹²⁰ *Id.*

¹²¹ *Id.* § 4 n.37.

¹²² Malcolm B. Coate & Andrew J. Heimert, *Merger Efficiencies at the Federal Trade Commission 1997–2007*, at vi (FTC Bureau of Economics Feb. 2009), available at <http://www.ftc.gov/os/2009/02/0902mergerefficiencies.pdf>. The same study found that that agency staff accepted dynamic efficiency claims at a higher rate than variable and fixed cost efficiency claims. See *id.* at Tables 2, 3. If the agencies are, in fact, acknowledging so many dynamic efficiency claims, the Guidelines should describe what evidence may help to substantiate such a claim.

¹²³ See, e.g., Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of XM Satellite Radio Holdings Inc.’s Merger with Sirius Satellite Radio Inc. (Mar. 24, 2008), available at http://www.usdoj.gov/atr/public/press_releases/2008/231467.pdf (“The Division’s investigation confirmed that the parties are likely to realize significant variable and fixed cost savings through the merger.”); see also Commentary, *supra* note 5, at 57–59 (identifying merger investigations in which the DOJ took fixed cost savings into consideration).

¹²⁴ See Commentary, *supra* note 5, at 57–59 (stating that fixed cost savings should be given weight where prices are determined on a cost-plus basis or where cost savings are required to be passed through by contract).

tries where marginal costs are typically low but where mergers have the potential to stimulate innovation.¹²⁵ Indeed, fixed-cost savings can provide a variety of benefits, including societal welfare enhancement and funding for new products, that can benefit consumers in the long run.

Clarifying how the agencies actually consider fixed-cost savings and how they weigh these benefits against the potential competitive harm would provide significant guidance to lawyers and economists that practice before the agencies. Acknowledging the importance of these efficiencies may also encourage parties to make more of an effort to develop supporting evidence in presentation to the agencies¹²⁶ and for courts to be more willing to consider this type of efficiency.¹²⁷

Clarifying Monopsony Concerns. While the Guidelines' framework for analyzing monopsony concerns is essentially sound, the Guidelines would benefit from clarifying procompetitive buying power (i.e., merger-specific efficiencies) from anticompetitive buyer power. The Guidelines recognize that mergers can create or enhance market power on the part of buyers as well as sellers and state that "to assess potential monopsony concerns, the Agency will apply an analytical framework analogous to the framework of the Guidelines."¹²⁸ The Commentary offers little more guidance, explaining only that by "eliminating an important alternative for input suppliers, a merger can lessen competition for an input significantly."¹²⁹ The agencies have challenged a handful of mergers on the basis of creating or exercising market power by buyers.¹³⁰

The Guidelines should clarify that a monopsony count in a merger challenge makes sense only if the merger will allow the merged entity to drive price down *and* reduce the quantity demanded from input suppliers. This reduced price is a welfare loss, rather than an efficiency. The agencies

¹²⁵ AMC REPORT, *supra* note 28, Recommendation 7 ("The Federal Trade Commission and the Antitrust Department of Justice should increase the weight they give to certain types of efficiencies. For example, the agencies and courts should give greater credit for certain fixed-cost efficiencies, such as research and development expenses, in dynamic, innovation-driven industries where marginal costs are low relative to typical prices."); *see also id.* at 58 ("In the longer run, however, some (if not all) [fixed-cost] efficiencies are also likely to benefit consumers in the form of lower prices or improved quality."); ABA TRANSITION REPORT, *supra* note 21, at 33 ("In the context of a transaction involving high-technology companies, the merger often will benefit consumers primarily by making innovation more likely or less costly—not by reducing marginal costs, which typically are already very low in such industries.")

¹²⁶ *See* William H. Page & John R. Woodbury, *Paper Trail: Working Papers and Recent Scholarship*, ANTITRUST SOURCE, Aug. 2009, <http://www.abanet.org/antitrust/at-source/09/08/Aug09-pTrail8-12f.pdf> (reviewing Coate & Heimert study, *supra* note 122) ("My experience has been that economists typically focus on the variable cost savings, with little or no analysis of the fixed cost savings."); Denis, *supra* note 57, at 56 ("Parties, based on their understanding of past practice, tend to be skeptical that the agencies will give much weight to efficiencies evidence and therefore often do not expend the effort to bring forward a strong efficiencies case.")

¹²⁷ *See, e.g.*, FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26, 74 (D.D.C. 2009) (discounting alleged fixed cost savings because "these advantages could show up in higher profits instead of benefiting customers or competition").

¹²⁸ 1992 Guidelines, *supra* note 13, § 0.1.

¹²⁹ Commentary, *supra* note 5, at 36.

¹³⁰ *See, e.g.*, United States v. Syufy Enters., 903 F.2d 659, 663–71 (9th Cir. 1990) (rejecting claim that merger of movie exhibitors resulted in reduced competition for movie licensing rights); United States v. Rice Growers Ass'n of Cal., 1986-2 Trade Cas. (CCH) ¶ 67,288 (E.D. Cal. 1986) (finding that merger of rice millers violated Section 7 based on elimination of competition for the purchase of paddy rice in California); Complaint ¶ 36, United States v. JBS S.A., Case No. 08CV5992 (N.D. Ill. Oct. 20, 2008) ("JBS's purchase of National would reduce the number of competitively significant actual or potential bidders for fed cattle from 4 to 3 in the High Plains, resulting in less aggressive competition and lower prices for feedlots and producers of fed cattle."); United States v. UnitedHealth Group Inc., 71 Fed. Reg. 13,991 (2006) (competitive impact statement) (merger of health plans caused competitive effects in the purchase of physician services); BP Amoco, p.l.c., 65 Fed. Reg. 21,434 (Apr. 21, 2000) (analysis to aid public comment) (merger of oil companies would substantially lessen competition for certain oil field bidding rights); United States v. Aetna Inc., 64 Fed. Reg. 44,946 (1999) (competitive impact statement) (similar); United States v. Cargill, Inc. 64 Fed. Reg. 44,046 (1999) (competitive impact statement) (merger of grain processors would substantially lessen competition for purchase of certain grains).

appear to have adopted this approach outside of the merger context. The Competitor Collaboration Guidelines characterize monopsony power as a decrease in both price and output of the purchased product.¹³¹ Likewise, the Supreme Court in *Weyerhaeuser* explained that a monopsonist seeks to “restrict its input purchases below the competitive level, thus reduc[ing] the unit price.”¹³²

Consummated Mergers. The agencies should clarify how the analysis of consummated mergers differs from unconsummated mergers, in particular the weight given to different types of post-consummation evidence. Since the Hart-Scott-Rodino filing threshold increased in 2001, both agencies have made a priority of investigating consummated mergers. During the Bush administration, the agencies brought eighteen post-consummation merger challenges.¹³³ The agencies’ interest in consummated acquisitions has continued into the Obama Administration.¹³⁴

The Guidelines and Commentary are silent on the analysis of consummated mergers. Given the agencies’ continuing interest in reviewing consummated transactions, guidance on how, if at all, the analysis of these transactions varies from unconsummated transactions would be helpful. Practitioners would benefit, for example, from understanding what post-consummation evidence the agencies find probative. Agency closing statements for consummated mergers often refer to post-acquisition evidence as a basis for closing the investigation.¹³⁵ Likewise, in the FTC’s *Evanston* decision, the Commission considered post-acquisition evidence suggesting anticompetitive effects, as well as potentially exculpatory post-acquisition evidence.¹³⁶ Yet the Fifth Circuit’s *Chicago Bridge* decision suggests that most post-acquisition evidence put forth by the respondent is of limited probative value because it can be subject to manipulation.¹³⁷ Given this precedent, practitioners would benefit from clarification of how the agencies evaluate post-consummation evidence, particularly evidence suggesting a lack of competitive harm.

Given the agencies’ continuing interest in reviewing consummated transactions, guidance on how, if at all, the analysis of these transactions varies from unconsummated transactions would be helpful.

¹³¹ Competitor Collaboration Guidelines, *supra* note 83, § 3.31(a), at 14 (explaining that monopsony is “the ability or incentive to drive the price of the purchased product, and thereby depress output, below what likely would prevail in the absence of the relevant agreement”).

¹³² *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber Co.*, 549 U.S. 312, 320–21 (2007) (quoting Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 ANTITRUST L.J. 669, 672 (2005)).

¹³³ See Ilene Knable Gotts & James F. Rill, *Reflections on Bush Administration M&A Antitrust Enforcement and Beyond*, COMPETITION POL’Y INT’L, Spring 2009, at 101, 108.

¹³⁴ See, e.g., Carillion Clinic, FTC Docket No. 9338 (July 23, 2009) (complaint), available at <http://www.ftc.gov/os/adjpro/d9338/090724carillioncmpt.pdf> (challenging consummated acquisition of outpatient imaging services and outpatient surgical services in Roanoke, Virginia).

¹³⁵ See, e.g., Muris Statement in Genzyme/Novazyme, *supra* note 89, at 16–17 (closing investigation of consummated merger in part because there “is no evidence that the merger reduced R&D spending on either the Genzyme or the Novazyme program or slowed progress along either of the R&D programs”); Statement of the Federal Trade Commission, Victory Memorial Hospital/Provena St. Therese Medical Center, FTC File No. 011 0225 (July 1, 2004), available at <http://www.ftc.gov/os/caselist/0110225/040630ftcstatement0110225.shtm> (closing investigation of consummated hospital merger in part based on lack of actual anticompetitive effects such as price increases or a stronger negotiating position with payors).

¹³⁶ *Evanston* Commission Opinion, *supra* note 31, at 16–18, 64–67 (finding that transaction led to a merger-induced price increase), 70 (considering claim that transaction did not result in decline in output), 70–2 and 81–85 (considering claim that transaction resulted in substantial efficiencies), 74–75 (considering claim that entry or expansion reduced *Evanston*’s post-acquisition market power).

¹³⁷ *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434–35 (5th Cir. 2008) (“The probative value of such evidence is deemed limited not just when evidence is actually subject to manipulation, but rather is deemed of limited value whenever such evidence *could arguably* be subject to manipulation.” (emphasis in original)). This standard leads to the absurd result that the agencies could cite to post-merger price effects as evidence of the transaction’s illegality, but the respondent would not be able to counter with evidence of new entry. See *id.* at 435. Under the Fifth Circuit’s standard, virtually any pro-competitive outcome of a transaction—including lower prices, increased output, actual entry, or achievement of cost savings—will be disregarded or given little weight, because these developments “could arguably” be subject to manipulation.

Conclusion

The agencies' decision to study whether to update the Guidelines is a laudable development at an appropriate time. Updated Guidelines have the potential to provide better transparency into agency decision making, to clarify the existing Guidelines' framework, and to help ensure that the Guidelines continue to serve as a model for enforcement agencies around the globe.

Some of the agencies' proposals for revising the Guidelines should be uncontroversial and adopted with relative ease, particularly for those that closely track the discussion in the Commentary. Consensus may be more challenging on other proposals that seek to break new ground (e.g., direct effects evidence and power buyers) or that address topics that have stirred controversy in the past (e.g., innovation markets). While the agencies should not shy away from addressing the more challenging topics, they should strive to revise the Guidelines in a way that will engender widespread support within the agencies and the private bar and across the political spectrum. ●

State Resale Price Maintenance Laws After *Leegin*

Michael A. Lindsay

Two years ago the U.S. Supreme Court overruled the longstanding per se rule against minimum resale price maintenance (RPM) agreements.¹ Since then, news media have reported a resurgence of RPM policies with headlines like “Price-Fixing Makes Comeback After Supreme Court Ruling”² and “The Legacy of *Leegin*: Price-Fixing, the Comeback Kid of Antitrust Law.”³ Meanwhile, the Federal Trade Commission has conducted several sessions of a workshop on RPM under the Sherman Act and the Federal Trade Commission Act,⁴ and Congress held hearings on legislation seeking to repeal the *Leegin* decision.⁵ And just this month, Assistant Attorney General Christine Varney proposed a structure for using rule of reason analysis in RPM cases.⁶ In short, the future of *Leegin* and federal enforcement remains in flux.

Whatever is happening at the federal level, however, *Leegin* did not directly address the status of minimum RPM agreements under state law,⁷ and on remand the state law claims were abandoned.⁸ Practitioners still need to consider whether there are state law prohibitions on RPM agreements. For that reason, two years ago, *The Antitrust Source* published a chart providing relevant authorities for each of the 50 states, and that chart has remained available through *The Source's* home page since then.⁹ The chart accompanied an article that originally appeared in *Antitrust* magazine.¹⁰

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¹ Dr. Miles Med. Co. v. John D. Park & Sons, 220 U.S. 373 (1911), overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

² Joseph Pereira, *Price-Fixing Makes Comeback After Supreme Court Ruling*, WALL ST. J., Aug. 10, 2008, at A1, available at http://online.wsj.com/article/SB121901920116148325.html?mod=hps_us_pageone. For a follow-up on RPM policies and the use of third-party monitors, see Joseph Pereira, *Discounters, Monitors Face Battle on Minimum Pricing*, WALL ST. J., Dec. 4, 2008 at A1, available at <http://online.wsj.com/article/SB122835660256478297.html>.

³ Dan Slater, *The Legacy of Leegin: Price-Fixing, the Comeback Kid of Antitrust Law*, WALL ST. J. LAW BLOG, <http://blogs.wsj.com/law/2008/08/18/the-legacy-of-leegin-price-fixing-the-comeback-kid-of-antitrust-law/>.

⁴ Sessions of the workshop were held on February 17 and 19 and May 20–21, 2009, but the FTC has not announced whether any further sessions will be held. Materials from the ongoing workshop are available at <http://www.ftc.gov/opp/workshops/rpm/>.

⁵ See, e.g., *Bye Bye Bargains? Retail Price Fixing, the Leegin Decision, and Its Impact on Consumer Prices: Hearing Before the Subcomm. on Courts and Competition Policy of the Comm. on the Judiciary*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/hear_090428_1.html.

⁶ Christine A. Varney, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust Federalism: Enhancing Federal/State Cooperation, Remarks Prepared for the National Ass’n of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009), available at <http://www.usdoj.gov/atr/public/speeches/250635.pdf>.

⁷ Michael Lindsay, *Resale Price Maintenance and the World After Leegin*, ANTITRUST, Fall 2007, at 1, 32 (2007) [hereinafter *World After Leegin*], available at http://www.dorsey.com/files/upload/Antitrust_Lindsay_Fall07.pdf; see also Michael Lindsay, *Leegin and RPM [Nearly] One Year Later*, [http://www.mnbar.org/sections/antitrust/Leegin%20and%20RPM%20\(MSBA%20Presentation\).ppt](http://www.mnbar.org/sections/antitrust/Leegin%20and%20RPM%20(MSBA%20Presentation).ppt). Cf. Fed. Trade Comm’n, *FTC Modifies Order in Nine West Resale Price Maintenance Case* (May 6, 2008), available at <http://www.ftc.gov/opa/2008/05/ninewest.shtm> (modifying prior FTC order but noting that modification does not affect consent orders that Nine West had agreed to with states).

⁸ *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, File No. 03-CV-107, 2009 WL 938561 at *8 (E.D. Tex. Apr. 6, 2009).

⁹ Michael A. Lindsay, *Overview of State RPM (Complete)* (2007), available at http://www.abanet.org/antitrust/at-source/07/12/Lindsay_FullChart11-29.pdf.

¹⁰ See Lindsay, *World After Leegin*, *supra* note 7.

The chart has proved to be a valuable resource for practitioners. *The Antitrust Source* thought it would be useful to describe key developments since the chart's publication and to update the chart to include those developments. *The Antitrust Source* would like to continue to publish timely updates to the enclosed chart. If you become aware of a case or statute that should be added, e-mail *The Source* at antitrust@att.net.

The updated chart keeps the same basic organization as the original. Each state's law is divided into two broad categories: "legislation" and "litigation." The chart identifies statutes and cases (including recent developments) in a number of areas: antitrust (providing the state's general principles of antitrust law); price-fixing (identifying statutes or cases specific to prohibitions on price-fixing); and federal harmonization (statutes and cases that describe the role that federal law plays in interpreting the state's antitrust statutes).¹¹ I have not attempted to collect state statutes providing industry-specific RPM prohibitions.¹²

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Several of the recent developments in state RPM law, however, warrant more extended discussion than the chart format permits.

State *Leegin* Repealer Statute and State Deference to Federal Law

Most states (by statute or case law) try to conform their antitrust laws to judicial interpretations of analogous federal law, although the phrasing and strength of the principle varies.¹³ The three most notable developments in this area since the chart's publication were Maryland's enactment of a statute expressly making minimum RPM agreements illegal under state law, and two trial court decisions (one by a Tennessee federal district court and the other by a Kansas state court) rejecting the per se rule for RPM agreements under state antitrust law and instead assessing the state RPM claims under the rule of reason.

In April 2009, the Maryland legislature adopted what is the first and so far only statute expressly rejecting the application of *Leegin* to state law.¹⁴ The Maryland statute became effective on October 1, 2009. Maryland had a general prohibition on contracts, combinations, and conspiracies in restraint of trade, as well as a fairly strong federal harmonization statute and supporting case law,¹⁵ so without the legislature's action, state courts would almost certainly have imported the reasoning of *Leegin* into Maryland law. The new statute added this definition: "[A] contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce."¹⁶

¹¹ The updated chart adds a fourth category: *Illinois Brick* repealer statutes. Knowledge of a specific *Illinois Brick* repealer statute may be useful in predicting whether a state will adopt a *Leegin* repealer as well.

¹² For examples of such statutes, see Thomas B. Leary & Erica S. Mintzer, *The Future of Resale Price Maintenance, Now that Doctor Miles Is Dead*, 4 N.Y.U. J. L. & BUS. 303, 340 n.139 (2007) (citing FLA. STAT. § 526.307(1) (2007) (RPM prohibitions relating to the resale of motor fuel at retail) and KAN. STAT. ANN. § 41-701(f) (2007) (prohibiting fixing resale prices for liquor and beer)), available at <http://www.ftc.gov/opp/workshops/rpm/may09/docs/leary.pdf>.

¹³ See Lindsay, *World After Leegin*, *supra* note 7, at 33–34.

¹⁴ MD. CODE ANN., COM. LAW. § 11-204(a)(1) (2009); Posting of Darius Summer to Trade Regulation Talk Blog, <http://traderegulation.blogspot.com/2009/04/maryland-amends-antitrust-law-to-make.html> (Apr. 28, 2009, 16:58 EST). For a brief legislative history, see Alan M. Barr, *State Challenges to Vertical Price Fixing in the Post-Leegin World*, Comment to 2009 FTC Workshop: Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act 4 n. 31, available at <http://www.ftc.gov/opp/workshops/rpm/may09/docs/abarr.pdf>. For an account of the statute's adoption in the business press, see Joseph Pereira, *State Law Targets "Minimum Pricing,"* WALL ST. J., at D1 (Apr. 28, 2009), available at <http://online.wsj.com/article/SB124087840110661643.html>.

¹⁵ See accompanying chart.

¹⁶ MD. CODE ANN., COM. LAW. § 11-204(a) (2009). Interestingly enough, Maryland has made the opposite policy choice for cigarettes and gasoline, for which the state requires minimum mark-ups. MD. CODE ANN., COM. LAW. § 11-401 (prohibiting below-cost sales of cigarettes; defining cost to include a minimum mark-up of approximately 7 percent); MD. CODE ANN., COM. LAW. § 11-501 (prohibiting below-cost sales of cigarettes; defining cost to include a minimum mark-up of 8 percent).

In *Spahr v. Leegin Creative Leather Products*,¹⁷ the federal district court for the Eastern District of Tennessee considered a Rule 12 motion to dismiss a complaint alleging that Leegin's RPM agreements with independent resellers violated Sherman Act section 1 and its Tennessee state-law equivalent. After dismissing the federal claims,¹⁸ the court considered whether *Leegin's* principles applied to the Tennessee state law claim as well. The court found no pre-*Leegin* state court cases analyzing whether the Tennessee Trade Practice Act prohibited minimum RPM agreements. The court found that there was no good reason to believe that Tennessee courts would not follow *Leegin*. Consequently, the court applied the rule of reason and held that the plaintiff had not adequately pled a relevant market.¹⁹

A Kansas trial court reached a similar result in *O'Brien v. Leegin Creative Leather Products Inc.*²⁰ Relying on two Kansas Supreme Court decisions, the trial court rejected a per se analysis of a minimum RPM agreement and concluded that the state Supreme Court would apply the rule of reason. The trial court observed: "Whether competition is regulated by a contract dictating who can provide a service in a given territory . . . or by an agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses."²¹ The case is now on appeal before the Kansas Supreme Court and will likely provide the first post-*Leegin* state appellate court decision on minimum RPM agreements.²²

Other than Maryland, no state has yet adopted a *Leegin* repealer, and other than Tennessee and Kansas, I have not found a case that directly addresses whether a state will now apply the rule of reason to minimum RPM claims.

State Attorney General Actions

In her recent remarks at the Columbia Law School program for state attorneys general, Assistant Attorney General Varney commented that "one of the most important legal challenges facing State Attorneys General is how to proceed in light of the Supreme Court's decision in *Leegin*."²³ She also observed that "In the wake of *Leegin*, many states are reevaluating their legal oversight over RPM arrangements and considering whether state law may treat them as per se illegal."²⁴ Nevertheless, there have been surprisingly few state attorney general challenges to minimum RPM agreements. The most noteworthy was the case brought by the States of New York, Michigan, and Illinois against Herman Miller Inc., a manufacturer of high-end, ergonomically designed office chairs. The

¹⁷ No. 07-CV-187, 2008 WL 3914461 (E.D.Tenn. Aug. 20, 2008), *appeal dismissed*, File No. 08-6165 (6th Cir. Nov. 20, 2008).

¹⁸ On the federal claims, the court first considered whether to apply the rule of reason or the per se approach. *Leegin* sold both directly through its own retail outlets and indirectly through resellers, and it had RPM agreements with the independent resellers. Although *Leegin* was thus engaged in "dual distribution" (i.e., it was both a supplier to and at least potentially a competitor of its independent resellers), the district court applied the rule of reason, rather than the per se approach. *Spahr*, 2008 WL 3914461 at *7. The court then held that plaintiff had not sufficiently alleged a relevant market or anticompetitive effects. *Id.* at *11–*12.

¹⁹ *Spahr*, 2008 WL 3914461 at *14. On the federal claims the court also found that plaintiff had failed to adequately allege anticompetitive effects. *Id.* at *12.

²⁰ *O'Brien v. Leegin Creative Leather Prods. Inc.*, No. 04-CV-1668 (8th Judicial Dist., Sedgwick County Kan. July 9, 2008), *direct appeal to supreme court granted*, File No. 101,000 (Oct. 6, 2008), docket available at http://judicial.kscourts.org:7780/pls/coa2/CLERKS_OFFICE.list_case_detail?i_case_number=101000&i_case_name=.

²¹ *Id.*, slip op. at 14.

²² *O'Brien*, Appeal No. 101,000. Interestingly, however, the trial court opinion did not cite *Leegin*.

²³ *Antitrust Federalism*, *supra* note 6, at 7.

²⁴ *Id.* at 8.

complaint alleged that certain Herman Miller dealers began advertising Herman Miller's Aeron chair at discounted prices and selling the chair through the Internet, again at discounted prices. In response to this discounting, Herman Miller adopted a minimum advertised price policy. It is not entirely clear from the complaint that the policy applied to actual selling prices (as opposed to advertised prices), but the States did allege that the Suggested Resale Price policy controlled "the prices at which retailers could display any price to the public, including in-store price tags, and on the retailers' own internet websites, thereby uniformly setting the retail price or the retail price level."²⁵ In any event, the complaint alleged that Herman Miller sought and obtained agreements from resellers to comply with the minimum advertised price policy, allegedly resulting in higher prices. The case was resolved through a consent agreement.

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The *Herman Miller* case is remarkable for several reasons. First, the challenged practice was not a clear agreement on actual selling prices, and the States did not distinguish the legal rules that might apply differently to these different practices. Second, the States seem to have taken a per se approach. Although the complaint does allege some anticompetitive effects (higher prices, less information), it does not allege that Herman Miller had market power or that anticompetitive effects outweigh whatever procompetitive benefits the practice may have. Indeed, reading the complaint, one would hardly realize that *Leegin* had been decided. Third, one of the plaintiff states—Illinois—is the only state whose courts have expressly held that minimum RPM agreements are judged under the rule of reason,²⁶ but the complaint does not suggest a different analysis for Illinois law.

Other than the *Herman Miller* case (and one other that barely post-dated the *Leegin* decision²⁷), I have found no state attorney general formal complaints or consent decrees. State attorneys general, however, have remained vocal on the topic of *Leegin*. For example, the attorneys general of 27 states submitted comments opposing a post-*Leegin* petition seeking modification of an FTC order that prohibited Nine West from using vertical pricing agreements with its dealers.²⁸ These attorneys general described their states' "strong interest in preserving adequate remedies for the practice that the Commission's Order is designed to prevent—vertical price-fixing," and they offered examples of their "vigorously prosecut[ing] vertical price-fixing."²⁹ Similarly, Maryland's Assistant Attorney General (and Deputy Chief, Antitrust Division) testified at the FTC's RPM work-

²⁵ Complaint at ¶ 20, *New York v. Herman Miller, Inc.*, 08-cv-2977 (S.D.N.Y. Mar. 25, 2008) (emphasis added).

²⁶ *Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.*, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993) (ruling that vertical price-fixing agreements are to be tested under rule of reason because "per se" violations are normally agreements between competitors or agreements that would restrict competition and decrease output" and also recognizing that federal case law is instructive but not binding), *aff'd*, 642 N.E.2d 470 (Ill. 1994).

²⁷ *North Carolina v. McLeod Oil Co.*, No. 05 CVS 13975 (N.C. Super Ct., Wake County, July 30, 2007). The North Carolina Attorney General had announced the filing of the complaint two years earlier. See Press Release, North Carolina Attorney General, AG Cooper Takes Action on Gas Laws (Oct. 10, 2005), available at <http://www.ncdoj.com/News-and-Alerts/News-Releases-and-Advisories/Press-Releases/AG-Cooper-takes-action-on-gas-prices.aspx> (including the colorful allegation that the gasoline reseller had "refused to hike his prices, asked the representatives to have [the distributor's manager] contact him in the morning, and then left to attend Wednesday evening church services with his wife. When church ended, [the reseller] got a message from a[n] . . . employee that [the distributor] had padlocked the gas pumps.").

²⁸ See *Amended States' Comments Urging Denial of Nine West's Petition*, *Nine West Group Inc.*, FTC Docket No. C-3937 (Jan. 17, 2008), available at http://www.oag.state.ny.us/bureaus/antitrust/pdfs/Amended_State_comments_011708-9west.pdf. The comments were originally submitted on December 28, 2007, and were amended on January 17, 2008, to add additional states. The FTC granted Nine West's petition in part. Order Granting in Part Petition to Reopen and Modify Order Issued April 11, 2000, *Nine West Group Inc.*, FTC Docket No. C-3937 (May 6, 2008), available at <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>.

²⁹ *Amended States' Comments*, *supra* note 28, at 2.

shop. He stated that “attorneys general will not end their pursuit of RPM cases because of a central truth—RPM means higher prices to consumers,” and he identified three courses that the state attorneys general would pursue: “(1) bringing federal antitrust *parens patriae* cases under the *Leegin* regime; (2) advocating legislative repeal of *Leegin* in the United States Congress; and (3) suing under state antitrust law to challenge RPM in state courts.”³⁰

Preemption of State Law

My 2007 article noted, among other things, the possibility that state laws contrary to *Leegin* might be preempted.³¹ The Supreme Court’s *ARC America*³² decision concluded that the procedural rule at issue in that case posed no “obstacle to the accomplishment of the purposes and objectives of Congress,”³³ but *Leegin* dealt with a substantive rule of conduct: whether minimum RPM agreements are automatically illegal. There is an important federal policy that minimum RPM agreements be judged under the rule of reason—that is, that they be judged based on their actual effects in the particular circumstances. A state substantive rule that excludes consideration of the potential procompetitive benefits of minimum RPM agreements would defeat this federal policy.

As seemed likely in 2007, state enforcers have argued that *Leegin* does not preempt contrary state laws.³⁴ Nevertheless, the extent to which federal law preempts state law remains an open question. Indeed, Commissioner Pamela Harbour invited discussion of this issue at the FTC RPM workshop.³⁵ One commentator—a former Assistant Attorney General and Department Head, Antitrust and Consumer Protection, in the Connecticut Attorney General’s office—argued that permitting state laws contrary to *Leegin* would frustrate an important policy of the federal antitrust laws.³⁶

One state trial court has expressly addressed the issue of federal preemption of state antitrust laws, although not specifically in the RPM context. In *Global Reinsurance Corp. v. Equitas Ltd.*,³⁷ a New York court considered whether the Sherman Act preempted New York’s Donnelly Act when the underlying conduct occurred in London and affected both interstate and international conduct. The court cited *ARC America*³⁸ for the proposition that states have traditionally regulated monop-

³⁰ Barr, *supra* note 14, at 1–2, (citations omitted).

³¹ Lindsay, *World After Leegin*, *supra* note 7, at 33.

³² *California v. ARC America Corp.*, 490 U.S. 93 (1989).

³³ *Id.* at 101 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). See also Antitrust Modernization Commission, Report and Recommendations 185 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

³⁴ See, e.g., Barr, *supra* note 14.

³⁵ Pamela Jones Harbour, Commissioner, Fed. Trade Comm’n, Opening Remarks at the Retail Price Maintenance Workshop: Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats? (Feb. 17, 2009) (“What should be the relationship between federal and state law? In states whose laws still condemn RPM as a *per se* violation, should *Leegin* preempt state law?”), available at <http://www.ftc.gov/speeches/harbour/090217rpmwksp.pdf>.

³⁶ Robert M. Langer, Resale Price Maintenance Workshop—P090400, Comment To 2009 Ftc Workshop: Resale Price Maintenance Under the Sherman Act and the Federal Trade Commission Act 10, available at <http://www.ftc.gov/os/comments/resalepricemaintenance/00001.pdf> (“The application of state antitrust law to minimum resale price maintenance agreements after the Supreme Court’s decision in *Leegin* implicates this latter form of conflict preemption: state antitrust law stands as an obstacle to the accomplishment and execution of the Sherman Act’s purposes.”). But see Leary & Mintzer, *supra* note 12, at 339 (“Under [*Arc America*], any state ultimately has the power to nullify the *Leegin* result by express statute.”).

³⁷ No. 600815-2007, 2008 WL 2676805 (N.Y. Sup. Ct., N.Y. County July 3, 2008). In this decision, the court denied a motion to dismiss the Donnelly Act claim but granted the motion as to other claims, with leave to amend. In a later decision, the court granted a motion to dismiss the Donnelly Act claim. *Global Reinsurance Corp. v. Equitas Ltd.*, 876 N.Y.S.2d 325 (N.Y. Sup. Ct., N.Y. County Mar. 3, 2009), *appeal pending* File No. 600815/2007.

³⁸ *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989).

olies, and it concluded that state law is not preempted where there is a significant intrastate anti-competitive impact and minimal interstate consequences.³⁹ In its discussion of *ARC America*, the court also observed that state antitrust laws are not preempted if they are “consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.”⁴⁰ The court did not discuss any tension between the Donnelly Act and the Sherman Act, though, in fact, a state law prohibiting RPM agreements without regard to the actual effects on competition—that is, that deters what federal law might consider procompetitive conduct—may well be considered inconsistent with federal law and thus preempted.⁴¹

Dual Distribution

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In *Leegin*, the plaintiff had also argued that the RPM agreement should be judged under the per se rule because Leegin was a dual distributor—it sold both directly (through stores in which Leegin’s president had an ownership interest) and indirectly (through independent resellers). The Court declined to reach this issue, however, because it had not been raised in the courts below.⁴² On remand, the trial court found that the horizontal price-fixing claims had been waived because they had not been raised in the first trial.⁴³ Nonetheless, the trial court concluded that in general the rule of reason applied to agreements in a dual-distribution system, and it rejected any special rule for price-related dual-distribution agreements.⁴⁴ Both the *Spahr* and *O’Brien* courts reached similar results.⁴⁵

Other Defenses

Even if a state’s law permits a per se challenge to RPM, practitioners should remember that the defenses traditionally available for per se claims remain available today. For example, a manufacturer can adopt a unilateral policy not to deal with discounters, and if truly unilateral in adoption and implementation, thereby negate the “agreement” element of a conspiracy claim.⁴⁶ Likewise a manufacturer can adopt (where it is otherwise feasible and appropriate) an agency business model: the manufacturer retains title, sets the selling price, and pays the selling agent a commission. If the manufacturer otherwise satisfies the requirements for demonstrating a true agency relationship, a ban on resale price maintenance will not apply.⁴⁷

³⁹ *Global Reinsurance*, 2008 WL 2676805 at *8–*9. The court found that there was an intrastate effect and therefore found that the Donnelly Act was not preempted, but the court does not seem to have addressed the second half of its own balancing test—the extent of interstate or international consequences.

⁴⁰ *Id.* at *8–*9 (quoting *California v. ARC America Corp.*, 490 U.S. 93, 102 (1989) (internal quotation marks omitted)).

⁴¹ Practitioners should also consider any potential implications of *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (drug labeling duties resulting from state claims not preempted by the Food, Drug & Cosmetic Act).

⁴² *Leegin*, 127 S. Ct. at 2724. See also Lindsay, *World After Leegin*, *supra* note 7, at 35.

⁴³ *PSKS, Inc.*, 2009 WL 938561 at *5, *8.

⁴⁴ *Id.* at *6–*7.

⁴⁵ *Spahr*, 2008 WL 3914461 at *7; *O’Brien*, slip op. at 14–15, 26.

⁴⁶ *Toledo Mack Sales & Serv., Inc. v. Mack Trucks Inc.*, 530 F.3d 204, 225–26 (3d Cir. 2008) (though unsuccessful, the defense that there was no agreement was raised in a rule of reason challenge to RPM).

⁴⁷ This defense prevailed in *Valuepest.com v. Bayer Corp.*, 561 F.3d 282, 287–88 (4th Cir. 2009), although the case did not appear to involve a state-law claim.

Conclusion

Two years ago practitioners predicted that “[a]bsent legislation, this could be a long and messy slog.”⁴⁸ We are still mid-slog, and unless Congress enacts legislation (either pro-*Leegin* or contra), the slog will continue to be long and messy. To ensure compliance with federal law, a manufacturer designing an RPM program obviously must assess the competitive effects under the rule of reason. A manufacturer must also identify the states in which the program’s effects will be felt and thus the state laws that might apply and the likely substance of those laws. Given the uncertainty and sheer number of potentially different state laws, a manufacturer considering a nationwide program should determine whether the program could be tailored on a state-specific basis, and if not, whether a national program’s potential benefits outweigh the legal risk that some number of states might challenge the program under a per se rule of illegality. ●

⁴⁸ Dr. Miles *officially overruled*, AT-Conversation Archives (June 28, 2007), <http://mail.abanet.org/scripts/wa.exe?A2=ind0706&L=at-conversation&D=0&T=0&P=3460> (comments of Dan Wall, Michael H. Byowitz, and Chris Compton), *quoted in* Lindsay, *World After Leegin*, *supra* note 7, at 32.

Overview of State RPM*

Michael A. Lindsay

STATE	LEGISLATION	LITIGATION
AL	<p>AT: ALA. CODE § 8-10-1 (2009) (providing civil penalty where a person or corporation “engages or agrees with other persons or corporations or enters, directly or indirectly, into any combination, pool, trust, or confederation to regulate or fix the price of any article or commodity”); ALA. CODE § 8-10-3 (declaring it illegal for “any person or corporation . . . [to] restrain or attempt to restrain, the freedom of trade or production, or [to] monopolize, or attempt to monopolize”).</p> <p>IB: Ala. Code § 6-5-60(a) (2009) (providing for the recovery of damages caused by “an unlawful trust, combine, or monopoly, or its effect, direct or indirect”).*</p> <p>* Note: ALA. CODE § 6-5-60(a) is not, strictly speaking, an <i>Illinois Brick</i> repealer statute because the statute was enacted in 1975, two years before the Supreme Court’s decision in <i>Illinois Brick</i>.</p>	<p>H: City of Tuscaloosa v. Harcros Chems., 158 F.3d 548, 555 n.8 (11th Cir. 1998) (finding that federal antitrust law “prescribes the terms of unlawful monopolies and restraints of trade” under Alabama law (citing <i>Ex parte Rice</i>, 67 So. 2d 825, 829 (Ala. 1953))).</p>
AK	<p>AT: ALASKA STAT. § 45.50.562 (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>IB: ALASKA STAT. § 45.50.577 (2009) (authorizing attorney general, as <i>parens patriae</i>, to secure monetary relief “for injuries directly or indirectly sustained by persons by reason of any violation of” state antitrust laws).</p>	<p>H: Alakayak v. B.C. Packers, Ltd., 48 P.3d 432, 448 (Alaska 2002) (holding that federal cases construing the Sherman Act § 1 “will be used as a guide” for Alaska antitrust claims); <i>see also West v. Whitney-Fidalgo Seafoods, Inc., 628 P.2d 10, 14 (Alaska 1981)</i> (finding that Alaska legislature intended Alaska courts to look to Sherman Act for guidance).</p>
AZ	<p>AT: ARIZ. REV. STAT. § 44-1402 (2009) (declaring unlawful “[a] contract, combination or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce”).</p> <p>H: ARIZ. REV. STAT. § 44-1412 (2009) (providing legislative intent that “courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes” and that “[t]his article shall be applied and construed to effectuate its general purpose to make uniform the [antitrust] law” among the states).</p>	<p>H: Bunker’s Glass Co. v. Pilkington PLC, 47 P.3d 1119, 1126-27 (Ariz. Ct. App. 2002) (noting that Arizona appellate courts “typically” follow federal antitrust case law and that 44-1412 permits, but does not require, courts to look to federal case law, rejecting <i>Illinois Brick</i>), <i>aff’d</i>, 75 P.3d 99 (Ariz. 2003).</p>
AR	<p>AT: ARK. CODE ANN. § 4-75-309 (2009) (declaring it illegal “to regulate or fix, either in this state or elsewhere, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever”).</p> <p>IB: ARK. CODE ANN. § 4-75-315(B) (2009) (authorizing attorney general, as <i>parens patriae</i>, to secure monetary relief “for injury, directly or indirectly sustained” because of violations of state antitrust laws).</p>	<p>H: Ft. Smith Light & Traction Co. v. Kelley, 127 S.W. 975, 982 (Ark. 1910) (finding the state antitrust law did not apply to a contract with maximum resale restraint on natural gas because the law “was to prevent a combination among producing competitors to fix the prices to the detriment of consumers” and the contract would not be to the detriment of competitors).</p>

Abbreviation Key: AT = Antitrust Provisions; PF = Price-Fixing Provisions/Cases; H = Federal Harmonization Clauses/Cases; IB = *Illinois Brick* Repealer Statute

* This chart accompanies the article by Michael A. Lindsay, *State Resale Price Maintenance Laws After Leegin*, ANTITRUST SOURCE, Oct. 2009, available at <http://www.abanet.org/antitrust/at-source/09/10/Oct09-Lindsay10-23f.pdf>. The Antitrust Source would like to continue to publish timely updates to this chart. If you become aware of a case or statute that should be added, please contact The Source at antitrust@att.net.

Overview of State RPM

STATE	LEGISLATION	LITIGATION
CA	<p>AT: CAL. BUS. & PROF. CODE § 16726 (2009) (providing that “every trust is unlawful, against public policy and void”); CAL. BUS. & PROF. CODE § 16720(A) (defining a trust as a combination “[t]o create or carry out restrictions in trade or commerce”).</p> <p>PF: CAL. BUS. & PROF. CODE § 16720(b) (2009) (defining a trust as a combination “[t]o limit or reduce the production, or increase the price of merchandise or any commodity”); CAL. BUS. & PROF. CODE § 16720(d) (defining a trust as a combination to “fix at any standard or figure, whereby its price to the public or consumer shall be in any manner controlled or established, any article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this State”); CAL. BUS. & PROF. CODE § 16720(e) (defining a trust as a combination to “agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure” or “establish or settle the price of any article, commodity or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any such article or commodity”).</p> <p>IB: CAL. BUS. & PROF. CODE § 16750 (providing that a cause of action may be brought by any person injured by an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</p>	<p>H: <i>State of California ex rel. Van de Kamp v. Texaco, Inc.</i>, 46 Cal.3d 1147, 1164 (1988), <i>overruled in part on other grounds by statute</i> (“Our Supreme Court has noted that “judicial interpretation of the Sherman Act, while often helpful, is not directly probative of the Cartwright drafters’ intent”); <i>Marin County Bd. of Realtors, Inc. v. Palsson</i>, 549 P.2d 833, 835 (Cal. 1976) (recognizing that a “long line of California cases” has recognized that federal cases interpreting the Sherman Act are applicable to state antitrust cases because “both statutes have their roots in the common law”); <i>Clayworth v. Pfizer, Inc.</i>, 83 Cal. Rptr. 3d 45 (Cal. Ct. App. 2008), <i>review granted and opinion vacated</i>, 85 Cal. Rptr. 3d 694 (Cal. Nov 19, 2008); <i>Freeman v. San Diego Assn. of Realtors</i>, 77 Cal.App.4th 171, 183, fn. 9 (1999) (federal precedent should be used “with caution”).</p> <p>PF: <i>Chavez v. Whirlpool Corp.</i>, 113 Cal. Rptr. 2d 175, 179-80 (Cal. Ct. App. 2001) (applying <i>Colgate</i> doctrine to hold that supplier’s unilateral exclusion of distributor did not violate Cartwright Act); <i>see also Mailand v. Burckle</i>, 572 P.2d 1142, 1147-48 (Cal. 1978) (finding resale price maintenance to be per se violation of state antitrust statute because it is a per se violation under the Sherman Act and “federal cases interpreting the Sherman Act are applicable in construing the Cartwright Act”); <i>Harris v. Capitol Records Distrib. Corp.</i>, 413 P.2d 139, 145 (Cal. 1966) (finding that vendor’s resale price maintenance scheme violated the Cartwright Act and the Sherman Act).</p>
CO	<p>AT: COLO. REV. STAT. § 6-4-104 (2002) (declaring illegal “[e]very contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>PF: COLO. REV. STAT. § 6-4-119 (2002) (instructing courts that they “shall” use “comparable” federal court decisions as guidance).</p> <p>IB: COLO. REV. STAT. § 6-4-111(2) (2002) (authorizing attorney general to bring a civil action on behalf of any public entity “injured, either directly or indirectly, in its business or property by reason of” an antitrust violation).</p>	<p>H: <i>See Pomerantz v. Microsoft Corp.</i>, 50 P.3d 929, 933 (Colo. App. 2002) (applying <i>Illinois Brick</i> indirect purchaser rule reasoning; recognizing legislative intent to use federal interpretations to construe state law); <i>see also Confre Cellars, Inc. v. Robinson</i>, No. 01 N 1060, 2002 U.S. Dist. LEXIS 26843, at *62 (D. Colo. Mar. 6, 2002) (federal antitrust cases “provide substantial guidance” to courts interpreting the Colorado statute).</p>
CT	<p>AT: CONN. GEN. STAT. § 35-26 (2005) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of any part of trade or commerce”).</p> <p>PF: CONN. GEN. STAT. § 35-28(A) (2005) (declaring unlawful contracts, combinations or conspiracies that “fix[], control[] or maintain prices, rates, quotations or fees in any part of trade or commerce”).</p> <p>H: CONN. GEN. STAT. § 35-44B (2005) (courts “shall” be guided by federal interpretations).</p>	<p>H: <i>Miller’s Pond Co., LLC v. City of New London</i>, 873 A.2d 965, 978 (Conn. 2005) (Connecticut courts follow federal precedent where the federal statute parallels the Connecticut statute but not where the text of Connecticut’s “antitrust statutes, or other pertinent state law, requires us to interpret it differently”); <i>see also Vacco v. Microsoft Corp.</i>, 793 A.2d 1048 (Conn. 2002) (referring to CONN. GEN. STAT. § 35-44b and following <i>Illinois Brick</i> in finding that “the legislative history makes clear that the legislature intended to [give] Connecticut an [antitrust] [l]aw, similar to the existing [f]ederal [antitrust] law in every respect.”) (quoting 14 H.R. Proc., Pt. 9, 1971 Sess., p. 4182) (Statement of Rep. Neiditz) (brackets in original); <i>Westport Taxi Serv., Inc. v. Westport Transit Dist.</i>, 664 A.2d 719, 728 (Conn. 1995).</p> <p>PF: <i>Elida, Inc. v. Harmor Realty Corp.</i>, 413 A.2d 1226, 1230 (Conn. 1979) (finding purpose of CONN. GEN. STAT. § 35-28 (d) was to codify per se violations of the Sherman Act).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
DE	<p>AT: DEL. CODE ANN. TIT. 6, § 2103 (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>H: DEL. CODE ANN. TIT. 6, § 2113 (2009) (requiring that statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p>H: <i>Hammermill Paper Co. v. Palese</i>, No. 7128, 1983 Del. Ch. LEXIS 400, at *12 (Del. Ch. June 14, 1983) (declaring it “manifestly evident” that state antitrust laws should be construed in harmony with federal antitrust law).</p>
DC	<p>AT: D.C. CODE § 28-4502 (WEST 2009) (“Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce all or any part of which is within the District of Columbia is declared to be illegal.”).</p> <p>H: D.C. CODE § 28-4515 (WEST 2009) (“In construing this chapter, a court of competent jurisdiction may use as a guide interpretations given by federal courts to comparable antitrust statutes.”).</p> <p>IB: D.C. CODE § 28-4509 (WEST 2009) (“Any indirect purchaser in the chain of manufacture, production, or distribution of goods or services, upon proof of payment of all or any part of any overcharge for such goods or services, shall be deemed to be injured . . .”).</p>	<p>H: <i>Peterson v. Visa U.S.A., Inc.</i>, No. Civ. A. 03-8080, 2005 D.C. Super. LEXIS 17, *9 (D.C. Super. April 22, 2005) (citing D.C. CODE § 28-4515) (“The [D.C. Antitrust Act] allows “a court of competent jurisdiction . . . [to] use as a guide interpretations given by federal courts to comparable antitrust statutes.”).</p>
FL	<p>AT: FLA. STAT. § 542.18 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p>H: FLA. STAT. § 542.32 (2009) (describing legislative intent that “due consideration and great weight” be given to federal antitrust case law when interpreting state antitrust statute).</p>	<p>H: <i>Duck Tours Seafari, Inc. v. Key West</i>, 875 So. 2d 650, 653 (Fla. Dist. Ct. App. 2004) (“Under Florida law, ‘Any activity or conduct . . . exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter [542]’”); <i>see also Parts Depot Co., L.P. by & Through Parts Depot Co. v. Fla. Auto Supply</i>, 669 So. 2d 321, 324 (Fla. Dist. Ct. App. 1996) (recognizing that state courts “rely on comparable federal antitrust statutes” to construe state statute and recognizing Florida statute to cover horizontal and vertical restraints).</p>
GA	<p>AT: GA. CODE ANN. § 13-8-2(a)(2) (2009) (declaring unenforceable “contracts in general restraint of trade”).</p>	<p>H: <i>Calhoun v. N. Ga. Elec. Membership Corp.</i>, 213 S.E.2d 596, 602-03 (Ga. 1975) (the test for all restraints of trade is whether the restraint is “injurious to the public interest”).</p>
HI	<p>AT: HAW. REV. STAT. § 480-4(a) (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>PF: HAW. REV. STAT. § 480-4(b)(1) (2009) (no person, partnership, trust or corporation shall “[f]ix, control, or maintain, the price of any commodity”; engage in activities “with the result of fixing, controlling or maintaining its price”; or “[f]ix, control, or maintain, any standard of quality of any commodity for the purpose or with the result of fixing, controlling, or maintaining its price”).</p> <p>H: HAW. REV. STAT. § 480-3 (2009) (requiring Hawaii antitrust statute to be “construed in accordance with judicial interpretations of similar federal antitrust statutes”).</p> <p>IB: HAW. REV. STAT. § 480-13(a)(1) (2009) (providing that “indirect purchasers injured by an illegal overcharge shall recover only compensatory damages, and reasonable attorney’s fees”).</p>	<p>H: <i>Courbat v. Dahana Ranch, Inc.</i>, 141 P.3d 427, 435 n.6 (Haw. 2006) (recognizing that federal interpretations guide the construction of Hawaii statutes “in light of conditions in Hawaii.” (quoting <i>Ai v. Frank Huff Agency</i>, 607 P.2d 1304, 1309 n. 11 (Haw. 1980))); <i>see also Island Tobacco Co. v. R.J. Reynolds Tobacco Co.</i>, 627 P.2d 260, 262, 268 (Haw. 1981) (federal rulings will not be “blindly accepted;” rather they will “serve primarily as guides to the interpretation and application of state law in the light of the economic and business conditions of this State”), <i>rev’d on other grounds, Robert’s Haw. School Bus, Inc. v. Laupahoehoe Transp. Co., Inc.</i>, 982 P.2d 853 (Haw. 1999).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
ID	<p>AT: IDAHO CODE ANN. § 48-104 (2009) (declaring unlawful “[a] contract, combination, or conspiracy between two (2) or more persons in unreasonable restraint of Idaho commerce”).</p> <p>H: IDAHO CODE ANN § 48-102(3) (2000) (providing the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”).</p> <p>IB: IDAHO CODE ANN. § 48-108(2) (2000) (authorizing the attorney general, as parens patriae, to bring a cause of action “for injury directly or indirectly sustained” because of any violation of state antitrust laws).</p>	<p>H: Afton Energy v. Idaho Power Co., 834 P.2d 850, 857 (Idaho 1992) (recognizing that federal antitrust law is traditionally “persuasive” guidance, although not binding (quoting <i>Pope v. Intermountain Gas Co.</i>, 646 P.2d 988, 994 (Idaho 1982))).</p> <p>PF: K. Hefner v. Caremark, Inc., 918 P.2d 595, 599 (Idaho 1996) (requiring vertical price fixing restraint to fix prices for unrelated third parties in order for a per se rule to apply).</p>
IL	<p>AT: 740 ILL. COMP. STAT. 10/3(2) (2009) (declaring unlawful any “contract, combination, or conspiracy with one or more other persons [to] unreasonably restrain trade or commerce”).</p> <p>PF: 740 ILL. COMP. STAT. 10/3(1)(A) (2009) (declaring unlawful “any combination or conspiracy with . . . a competitor . . . for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto”).</p> <p>IB: 740 ILL. COMP. STAT. 10/7 (2009) (providing that “No provision of [the Illinois Antitrust] Act shall deny any person who is an indirect purchaser the right to sue for damages”).</p>	<p>H: People v. Crawford Distrib. Co., 291 N.E.2d 648, 652-53 (Ill. 1972) (declaring that federal antitrust precedent is a “useful guide to our court”).</p> <p>PF: People v. Keystone Auto. Plating Corp., 423 N.E.2d 1246, 1251-52 (Ill. App. Ct. 1981) (reciting legislative intent of 3(1)(a) to conclude that statute does not proscribe vertical price fixing agreements between buyers and sellers); <i>Gilbert’s Ethan Allen Gallery v. Ethan Allen, Inc.</i>, 620 N.E.2d 1349, 1350, 1354 (Ill. App. Ct. 1993) (ruling that vertical price-fixing agreements are to be tested under rule of reason because “per se” violations are normally agreements between competitors or agreements that would restrict competition and decrease output” and also recognizing that federal case law is instructive but not binding), <i>aff’d</i>, 642 N.E.2d 470 (Ill. 1994); <i>but see New York v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p>
IN	<p>AT: IND. CODE § 24-1-2-1 (2006) (declaring illegal “[e]very scheme, contract, or combination in restraint of trade or commerce, or to create or carry out restrictions in trade or commerce”).</p> <p>PF: IND. CODE § 24-1-2-1 (2006) (declaring illegal “[e]very scheme, contract, or combination . . . to deny or refuse to any person participation . . . or to limit or reduce the production, or increase or reduce the price of merchandise or any commodity”).</p>	<p>H: Deich-Keibler v. Bank One, No. 06-3802, 2007 U.S. App. LEXIS 15419, at *10 (7th Cir. 2007) (noting practice of construing IND. CODE § 24-1-2-1 in light of federal antitrust case law); <i>Rumple v. Bloomington Hosp.</i>, 422 N.E.2d 1309, 1315 (Ind. Ct. App. 1981) (recognizing that Indiana antitrust law is modeled after section 1 of the Sherman Antitrust Act and has been interpreted consistent with federal law interpreting it).</p> <p>PF: Ft. Wayne Cleaners & Dyers Ass’n. v. Price, 137 N.E.2d 738 (Ind. Ct. App. 1956) (affirming judgment against defendant dry cleaner association for vertical minimum price fixing).</p>
IA	<p>AT: IOWA CODE § 553.4 (1997) (providing that “[a] contract, combination, or conspiracy between two or more persons shall not restrain or monopolize trade or commerce in a relevant market”).</p> <p>H: IOWA CODE § 553.2 (1997) (requiring courts to construe Iowa statute “to complement and be harmonized with the applied laws of the United States which have the same or similar purpose as this chapter” but not “in such a way as to constitute a delegation of state authority” to the federal courts).</p>	<p>H: Max 100 L.C. v. Iowa Realty Co., 621 N.W.2d 178, 181-182 (Iowa 2001) (recognizing that Iowa Competition law is “patterned” after federal Sherman Act and that IOWA CODE § 553.2 “explicitly requires” state courts to consider federal case law and construe state law “uniformly with the Sherman Act”). <i>But cf. Comes v. Microsoft Corp.</i>, 646 N.W.2d 440, 446 (Iowa 2002) (finding that “Congress intended federal antitrust laws to supplement, not displace, state antitrust remedies” and that IOWA CODE § 553.2 does not require “Iowa courts to interpret the Iowa Competition Law the same way federal courts have interpreted federal law,” thus rejecting <i>Illinois Brick</i>).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
KS	<p>AT/PF: KAN. STAT. ANN. § 50-101 (2009) (declaring unlawful and defining trusts as any “combination of capital, skill, or acts, by two or more persons” carried out for the purpose of, <i>inter alia</i>: restricting trade or commerce; increasing or reducing the price of goods; or preventing competition).</p> <p>PF: KAN. STAT. ANN. § 50-112 (2009) (declaring unlawful “all arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles”).</p> <p>IB: KAN. STAT. ANN. § 50-161(B) (2009) (providing that a cause of action “may be brought by any person who is injured in such person’s business or property by reason of” an antitrust violation, “regardless of whether such injured person dealt directly or indirectly with the defendant”).</p>	<p>H: <i>Bergstrom v. Noah</i>, 974 P.2d 520, 531 (Kan. 1999) (finding federal antitrust case law “persuasive” but “not binding” on the interpretation of the Kansas antitrust statute).</p> <p>PF: <i>Joslin v. Steffen Ice & Ice Cream Co.</i>, 54 P.2d 941, 943 (Kan. 1936) (holding that resale price maintenance scheme by ice cream wholesaler violated KAN. STAT. ANN. § 50-112); <i>O’Brien v. Leegin Creative Leather Prods. Inc.</i>, No. 04 CV 1668, slip op. at 14 (8th Judicial Dist., Sedgwick County Kan. July 9, 2008), appeal pending (applying rule of reason to vertical minimum RPM claim) (“Whether competition is regulated by a contract dictating who can provide a service in a given territory (as in <i>Okerberg v. Crable</i>, 341 P.2d 966 (1959)) or by all agreement to set retail prices for manufactured goods (as is claimed in this case), the impact to the consumer is not sufficiently dissimilar to justify differing legal analyses.”).</p>
KY	<p>AT: KY. REV. STAT. ANN. § 367.175 (WEST 2009) (declaring unlawful “[e]very contract, combination in the form of trust and otherwise, or conspiracy, in restraint of trade or commerce”).</p>	<p>H: <i>Mendell v. Golden-Farley of Hopkinsville, Inc.</i>, 573 S.W.2d 346, 349 (Ky. Ct. App. 1978) (applying federal antitrust case law to interpret Kentucky statute but noting that federal law is not binding).</p>
LA	<p>AT: LA. REV. STAT. ANN. § 51:122 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p>	<p>H: <i>Free v. Abbott Lab.</i>, 982 F. Supp. 1211, 1214 (M.D. La. 1997) (recognizing that “Louisiana courts routinely look to federal anti-trust jurisprudence as ‘a persuasive influence on interpretation of our own state enactments’” (citing <i>La. Power & Light v. United Gas Pipe Line</i>, 493 So. 2d 1149, 1158 (La. 1986))); <i>see also</i> <i>Red Diamond Supply, Inc. v. Liquid Carbonic Corp.</i>, 637 F.2d 1001, 1003, 1005 n.6 (5th Cir. 1981) (finding state antitrust statute was fashioned after federal statute and noting in dicta that vertical price restrictions are per se illegal, relying on federal law).</p>
ME	<p>AT: ME. REV. STAT. ANN. TIT. 10, § 1101 (2009) (declaring illegal “[e]very contract, combination in the form of trusts or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>IB: ME. REV. STAT. ANN. TIT. 10, § 1104(1) (2009) (providing a right of action for any person “injured directly or indirectly in its business or property by any other person or corporation by reason of” an antitrust violation).</p>	<p>H: <i>Davric Maine Corp. v. Rancourt</i>, 216 F.3d 143, 149 (1st Cir. 2000) (noting that the Maine antitrust statutes parallel the Sherman Act, “and analyzing state claims according to federal law” (quoting <i>Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.</i>, 998 F.2d 1073, 1081 (1st Cir. 1993))).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
MD	<p>AT: MD. CODE ANN., COM. LAW § 11-204(a)(1) (WEST 2009) (prohibiting any “contract, combination, or conspiracy” that unreasonably restrains trade).</p> <p>PF: MD. CODE ANN., COM. LAW § 11-204(b) (WEST 2009) (defining any “contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” to be an unreasonable restraint of trade or commerce).</p> <p>H: MD. CODE ANN., COM. LAW § 11-202(a)(2) (WEST 2009) (declaring legislative intent that courts “be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters”).</p> <p>IB: MD. CODE ANN., COM. LAW § 11-209(b)(ii) (WEST 2009) (providing that the State or any political subdivision thereof may maintain an action for damages stemming from an antitrust violation “regardless of whether it dealt directly or indirectly” with the defendant).</p>	<p>H: Davidson v. Microsoft Corp., 792 A.2d 336, 340–41 (Md. Ct. Spec. App. 2002) (citing MD. CODE ANN., COM. LAW § 11-202(A)(2) when applying <i>Illinois Brick</i> indirect purchaser rule to state statute); see also Purity Prod., Inc. v. Tropicana Prod., Inc., 702 F. Supp. 564, 574 (D. Md. 1988) (finding that the Court’s application of the Maryland Antitrust Act “should be guided by the Court’s similar interpretation of the federal antitrust statutes).</p>
MA	<p>AT: MASS. GEN. LAWS CH. 93, § 4 (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>H: MASS. GEN. LAWS CH. 93, § 1 (2009) (requiring the Massachusetts antitrust laws to be “construed in harmony with judicial interpretations of comparable federal statutes insofar as practicable”).</p>	<p>H: Ciardi v. F. Hoffmann La Roche, Ltd., 762 N.E.2d 303, 307-08 (Mass. 2002) (reconciling state antitrust law with <i>Illinois Brick Co. v. Illinois</i>, 431 U.S. 720, 729–736 (1977) because MASS. GEN. LAWS CH. 93, § 1 requires state courts to harmonize state antitrust law with comparable federal law); see also C. R. Bard, Inc. v. Med. Elec. Corp., 529 F. Supp. 1382, 1391 (D. Mass. 1982) (noting that sections 4 and 5 of the Massachusetts Antitrust Act are “directly comparable” to sections 1 and 2 of the Sherman Act).</p>
MI	<p>AT: MICH. COMP. LAWS § 445.772 (2009) (declaring unlawful any “contract, combination, or conspiracy” that is “in restraint of, or to monopolize, trade or commerce in a relevant market”).</p> <p>H: MICH. COMP. LAWS § 445.784(2) (2009) (declaring intent of legislature that “in construing all sections of this act, the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason”).</p> <p>IB: MICH. COMP. LAWS § 445.778 (2009) (providing that the state, any political subdivision, or any other person “threatened with injury or injured directly or indirectly” by an antitrust violation may bring an action for damages and injunctive relief).</p>	<p>H: Little Caesar Enters. v. Smith, 895 F. Supp. 884, 898 (D. Mich. 1995) (finding no practical difference between federal and state vertical price fixing claims because “Michigan antitrust law is identical to federal law and follows the federal precedents”).</p> <p>PF: New York v. Herman Miller, Inc., No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
MN	<p>AT: MINN. STAT. § 325D.51 (2009) (declaring unlawful every “contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce”).</p> <p>PF: MINN. STAT. § 325D.53, SUBDIV. 1(1)(a) (2009) (declaring unlawful any “contract, combination, or conspiracy . . . for the purpose or with the effect of affecting, fixing, controlling or maintaining the market price, rate, or fee of any commodity or service”).</p> <p>IB: MINN. STAT. § 325D.57 (2009) (providing a cause of action and treble damage remedy for any person or governmental body that is “injured directly or indirectly” by an antitrust violation).</p>	<p>H: <i>Lorix v. Crompton Corp.</i>, 736 N.W.2d 619, 627–29 (Minn. 2007) (Minnesota generally follows federal law but rejects <i>Associated Gen. Contractors v. Cal. State Council of Carpenters</i>, 459 U.S. 519 (1983)); see also <i>State by Humphrey v. Road Constructors</i>, 1996 Minn. App. LEXIS 597 at *5 (Minn. Ct. App. 1996) (recognizing that “Minnesota antitrust law is to be interpreted consistently with the federal courts’ construction of federal antitrust law” (quoting <i>State v. Alpine Air Prods.</i>, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) <i>aff’d</i>, 500 N.W.2d 788 (Minn. 1993))</p> <p>PF: <i>State v. Alpine Air Prod., Inc.</i>, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992) (holding vertical minimum price fixing agreement a per se violation and recognizing that Minnesota courts consistently interpret state law in harmony with the federal courts’ construction of federal antitrust law) (citing <i>Keating v. Philip Morris, Inc.</i>, 417 N.W.2d 132, 136 (Minn. App. 1987) and <i>State v. Duluth Board of Trade</i>, 121 N.W. 395, 399 (Minn. 1909)), <i>aff’d</i>, 500 N.W.2d 788 (Minn. 1993).</p>
MS	<p>AT: MISS. CODE ANN. § 75-21-1(a) (2009) (declaring unlawful any trust and defining trusts as a “combination, contract, understanding or agreement” that would be “inimical to public welfare and the effect of which would be . . . to restrain trade”).</p> <p>PF: MISS. CODE ANN. § 75-21-1(c) (2009) (defining a trust as a combination, contract, understanding or agreement that would, among other things, “limit, increase or reduce the price of a commodity”).</p> <p>IB: MISS. CODE ANN. § 75-21-9 (2009) (providing a right of action for any person injured by a trust or combine, “or by its effects direct or indirect”).</p>	<p>H: <i>Futurevision Cable Sys., Inc. v. Multivision Cable TV Corp.</i>, 789 F. Supp. 760, 780 (D. Miss. 1992) (dismissing state law violations because the federal law violations failed) (citing <i>Walker v. U-Haul of Mississippi</i>, 734 F.2d 1068, 1070 n.5 (5th Cir. 1984) (treating Mississippi and federal antitrust claims as “analytically identical”)), <i>aff’d</i>, 986 F.2d 1418 (5th Cir. 1993).</p>
MO	<p>AT: MO. REV. STAT. § 416.031 (2009) (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce” and defining a trust as lease or sale “of any commodity . . . for use, consumption, or resale within this state, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of trade or commerce in this state”).</p> <p>H: MO. REV. STAT. § 416.141 (2009) (requiring that state antitrust statute “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p>H: <i>Hamilton v. Spencer</i>, 929 S.W.2d 762, 767 n.3 (Mo. Ct. App. 1996) (recognizing that MO. REV. STAT. § 416.141 requires Missouri antitrust laws to be harmonized with federal law and therefore citing federal precedent to limit indirect purchasers’ standing to sue); see also <i>Stensto v. Sunset Memorial Park, Inc.</i>, 759 S.W.2d 261, 266 (Mo. App. 1988) (state antitrust laws should be harmonized with federal antitrust laws).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
MT	<p>PF: MONT. CODE ANN. § 30-14-205 (2007) (declaring it unlawful for a person or persons to enter into “an agreement for the purpose of fixing the price or regulating the production of an article of commerce” or to “fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled”).</p>	<p>H: <i>Smith v. Video Lottery Consultants</i>, 858 P.2d 11, 12-13 (Mont. 1993) (recognizing that MONT. CODE ANN. § 30-14-205 is “modeled after § 1 of the Sherman Act,” but broader and therefore prohibits unilateral horizontal refusals to deal).</p>
NE	<p>AT: NEB. REV. STAT. § 59-801 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: NEB. REV. STAT. § 59-829 (2009) (mandating that courts “shall follow the construction given to the federal law by the federal courts” when any provision is the same as or similar to the language of a federal antitrust law).</p> <p>IB: NEB. REV. STAT. § 59-821 (2009) (providing a right of action for any person injured due to an antitrust violation, “whether such injured person dealt directly or indirectly with the defendant”).</p>	<p>H: <i>Heath Consultants, Inc. v. Precision Instruments, Inc.</i>, 527 N.W.2d 596, 601 (Neb. 1995) (explaining that the “legal reality” is that “federal cases interpreting federal legislation which is nearly identical to the Nebraska act constitute persuasive authority”); <i>see also</i> Arthur v. Microsoft Corp., 676 N.W.2d 29, 35 (Neb. 2004) (interpreting NEB. REV. STAT. § 59-829 to require courts to look to federal law unless federal interpretation would not support the state’s statutory purpose).</p> <p>PF: <i>State ex rel. Douglas v. Associated Grocers of Nebraska Coop., Inc.</i>, 332 N.W.2d 690, 693 (Neb. 1983) (citing federal precedent as authority that “[b]oth horizontal price-fixing among wholesalers and vertical price-fixing between wholesalers and retailers are presumed to be in restraint of trade and are per se violations” of state antitrust laws).</p>
NV	<p>AT: NEV. REV. STAT. ANN. § 598A.060 (WEST 2009) (declaring unlawful several categories of activities that constitute a “contract, combination or conspiracy in restraint of trade”).</p> <p>PF: NEV. REV. STAT. ANN. § 598A.060 (WEST 2009) (enumerating unlawful activities including “price fixing, which consists of raising, depressing, fixing, pegging or stabilizing the price of any commodity or service”).</p> <p>H: NEV. REV. STAT. ANN. § 598A.050 (WEST 2009) (declaring provisions “shall be construed in harmony with prevailing judicial interpretations of the federal antitrust statutes”).</p> <p>IB: NEV. REV. STAT. ANN. § 598A.210 (WEST 2009) (providing a right of action and treble damage remedy for “any person injured or damaged directly or indirectly” by an antitrust violation).</p>	<p>H: <i>Boulware v. Nev. Dep’t of Human Res.</i>, 960 F.2d 793, 800–01 (9th Cir. 1992) (finding Nevada statute adopts by reference applicable federal antitrust case law).</p>
NH	<p>AT: N.H. REV. STAT. ANN. § 356:2 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of trade” and expressly making unlawful “fixing, controlling or maintaining prices, rates, quotations or fees in any part of trade or commerce”).</p> <p>H: N.H. REV. STAT. ANN. § 356:14 (2009) (permitting courts to be “guided by interpretations of the United States’ antitrust laws”).</p>	<p>H: <i>Minuteman, LLC v. Microsoft Corp.</i>, 795 A.2d 833, 836 (N.H. 2002) (recognizing that it has “long been the practice” to rely on interpretation of federal antitrust legislation because the legislature “expressly encouraged a uniform construction with federal antitrust law”).</p> <p>PF: <i>Wheeler v. Mobil Chem. Co.</i>, Civ. No. 94-228-B, 1994 U.S. Dist. LEXIS 16697, at *2–*3 (D. N.H. 1994) (relying on federal case law to apply rule of reason to nonprice vertical restraints under N.H. REV. STAT. ANN. § 356:14).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
NJ	<p>AT: N.J. STAT. ANN. § 56:9-3 (WEST 2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>PF: N.J. STAT. ANN. § 56:4-1.1 (WEST 2009) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law”).</p> <p>H: N.J. STAT. ANN. § 56:9-18 (WEST 2009) (requiring that act “shall be construed in harmony” with interpretations of comparable federal antitrust statutes to effectuate uniformity among the states “insofar as practicable”).</p>	<p>H: <i>State v. Lawn King, Inc.</i>, 417 A.2d 1025, 1032-33 (N.J. 1980) (relying on “persuasive” interpretations of federal antitrust laws to hold that vertical price restraints are per se violations but that nonprice vertical restraints are subject to the rule of reason); <i>see also Glasofer Motors v. Osterlund, Inc.</i>, 433 A.2d 780, 787 (N.J. Super. Ct. App. Div. 1981) (New Jersey’s statute “to be construed in harmony with ruling judicial interpretations of federal antitrust statutes.”).</p> <p>PF: <i>Exit A Plus Realty v. Zuniga</i>, 930 A.2d 491, 497 (N.J. Super. Ct. App. Div. 2007) (post-<i>Leegin</i> N.J. STAT. ANN. § 56:4-1.1, declaring vertical price fixing agreements per se unenforceable, but without any discussion of <i>Leegin</i>).</p>
NM	<p>AT: N.M. STAT. ANN. § 57-1-1 (WEST 2009) (declaring unlawful “[e]very contract, agreement, combination or conspiracy in restraint of trade or commerce”).</p> <p>H: N.M. STAT. ANN. § 57-1-15 (WEST 2009) (requiring that act “shall be construed in harmony with judicial interpretations of the federal antitrust laws” in order to achieve uniform application of the state and federal antitrust laws).</p> <p>IB: N.M. STAT. ANN. § 57-1-3 (WEST 2009) (providing a right of action and treble damage remedy for “any person threatened with injury or injured in his business or property, directly or indirectly,” by an antitrust violation).</p>	<p>H: <i>Smith Mach. Corp. v. Hesston, Inc.</i>, 694 P.2d 501, 505 (N.M. 1985) (recognizing that New Mexico courts look to federal antitrust cases “[i]n the absence of New Mexico decisions directly on point”); <i>see also Romero v. Philip Morris, Inc.</i>, 203 P.3d 873, 880 (N.M. Ct. App. 2008) (statute directs court to construe New Mexico statutes “in harmony with judicial interpretations of the federal antitrust laws”).</p>
NY	<p>AT: N.Y. GEN. BUS. LAW § 340 (2009) (declaring unlawful “[e]very contract, agreement, arrangement or combination . . . whereby [c]ompetition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained”).</p> <p>PF: N.Y. GEN. BUS. LAW § 369-a (2009) (“Any contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law”).</p> <p>IB: N.Y. GEN. BUS. LAW § 340 (2009) (providing that a person who sustains damages as a result of an antitrust violation shall not have their recovery limited due to the fact that that person “has not dealt directly with the defendant”).</p>	<p>H: <i>Sperry v. Crompton Corp.</i>, 863 N.E.2d 1012, 1018 (N.Y. 2007) (noting that courts generally construe Donnelly Act in light of federal antitrust case law, but that it is “well settled” that New York courts will interpret Donnelly Act differently “where State policy, differences in the statutory language or the legislative history justify such a result.” (quoting <i>Anheuser-Busch, Inc. v. Abrams</i>, 520 N.E.2d 535, 539 (N.Y. 1988)); <i>see also Aimcee Wholesale Corp. v. Tomar Prod., Inc.</i>, 237 N.E.2d 223, 225 (N.Y. 1968) (recognizing that New York antitrust law was modeled on Sherman Act).</p> <p>PF: <i>Anheuser-Busch, Inc. v. Abrams</i>, 520 N.E.2d 535, 536-37 (N.Y. 1988) (recognizing that vertical restraints are not per se illegal under New York law but may be illegal if they unreasonably restrain trade); <i>Dawn to Dusk, Ltd. v. Frank Brunckhorst Co.</i>, 23 A.D.2d 780, 781 (N.Y. App. Div. 1965) (applying rule of reason to vertical price restraints); <i>New York v. Herman Miller, Inc.</i>, No. 08-2977 (S.D.N.Y. filed Mar. 21, 2008) (Stipulated Final Judgment and Consent Decree) (post-<i>Leegin</i> challenge to minimum RPM agreement under federal, New York, Michigan, and Illinois law).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
NC	<p>AT: N.C. GEN. STAT. § 75-1 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p>	<p>H: <i>Madison Cablevision, Inc. v. Morganton</i>, 386 S.E.2d 200, 213 (N.C. 1989) (finding that the Sherman Act is instructive though not binding when interpreting state antitrust statute) (citing <i>Rose v. Vulcan Materials Co.</i>, 194 S.E.2d 521, 530 (N.C. 1973)); <i>see also North Carolina Steel, Inc. v. Nat’l Council on Comp. Ins.</i>, 472 S.E.2d 578, 582–83 (N.C. App. 1996) (noting extensive North Carolina history of reliance on interpretations of federal antitrust law), <i>aff’d in part and rev’d in part</i>, 496 S.E.2d 369 (N.C. 1998).</p> <p>PF: <i>North Carolina v. McLeod Oil Co.</i>, No 05 CVS 13975 (N.C. Super CL, Wake Co., July 30, 2007) (consent decree in case where state challenged minimum resale price agreements between gasoline distributor and resellers).</p>
ND	<p>AT: N.D. CENT. CODE § 51-08.1-02 (2009) (making unlawful a “contract, combination, or conspiracy between two or more persons in restraint of, or to monopolize, trade or commerce in a relevant market”).</p> <p>IB: N.D. CENT. CODE § 51-08.1-08 (2009) (providing that recovery for damages caused by an antitrust violation shall not be barred because of the fact that the person threatened with injury or injured “has not dealt directly with the defendant”).</p>	<p>No cases on point—statute only.</p>
OH	<p>AT: OHIO REV. CODE ANN. § 1331.01(B)(1) (WEST 2009) (declaring unlawful any trust that is “[t]o create or carry out restrictions in trade or commerce”).</p> <p>PF: OHIO REV. CODE ANN. § 1331.01(B)(4) (WEST 2009) (declaring unlawful any trust that is “[t]o fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use or consumption”); OHIO REV. CODE ANN. § 1331.02.</p> <p>(WEST 2009) (prohibiting any person from entering into a combination, contract or agreement “with the intent to limit or fix the price or lessen the production or sale of an article or service of commerce, use, or consumption, to prevent, restrict, or diminish the manufacture or output of such article or service”).</p>	<p>H: <i>Johnson v. Microsoft Corp.</i>, 834 N.E.2d 791, 794–795 (Ohio 2005) (recognizing that “Ohio has long followed federal law in interpreting the Valentine Act” because the state statute is patterned after the Sherman Act).</p> <p>PF: <i>McCall Co. v. O’Neil</i>, 1914 WL 1669, *4 (Ohio Com. Pl. Nov. 12, 1914) (interpreting statute to prohibit scheme to fix prices at which goods may be resold by the reseller); <i>see also Ohio ex. rel. Brown v. Andrew Palzes, Inc.</i>, 317 N.E.2d 262, 266 (Ohio Com. Pl. 1973) (interprets OHIO REV. CODE ANN. § 1331.01(B) as a per se bar to maximum resale price agreements).</p>
OK	<p>AT: OKLA. STAT. TIT. 79 § 203 (2002) (declaring unlawful “[e]very act, agreement, contract, or combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: OKLA. STAT. TIT. 79 § 212 (2002) (requiring that act “shall be interpreted in a manner consistent with Federal Antitrust Law” and applicable case law).</p>	<p>H: <i>Star Fuel Marts, LLC v. Sam’s E., Inc.</i>, 362 F.3d 639, 648 n.3 (10th Cir. 2004) (Oklahoma’s antitrust act is required by statute to be interpreted in accordance with federal antitrust case law).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
OR	<p>AT: OR. REV. STAT. § 646.725 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: OR. REV. STAT. § 646.715(2) (2009) (declaring legislative intent that federal court decisions interpreting federal antitrust law “shall be persuasive authority”).</p> <p>IB: OR. REV. STAT. § 646.780(1)(a) (2009 Update) (providing a right of action and treble damage remedy for antitrust violations, “regardless of whether the plaintiff dealt directly or indirectly with the adverse party”).</p>	<p>H: Jones v. City of McMinnville, No. 05-35523, 2007 U.S. App. LEXIS 11235 at *8 (9th Cir. 2007) (finding that Oregon and federal antitrust statutes are “almost identical” and that Oregon courts look to federal decisions as “persuasive”) (quoting OR. REV. STAT. § 646.715; <i>Or. Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.</i>, 185 F.3d 957, 963 n.4 (9th Cir. 1999)), cert. denied 528 U.S. 1075 (2000); see also <i>Willamette Dental Group, P.C. v. Oregon Dental Serv. Corp.</i>, 882 P.2d 637, 640 (Or. Ct. App. 1994) (with no reported Oregon decisions on point, “we look to federal decisions interpreting Section 2 of the Sherman Act for persuasive, albeit not binding, guidance”).</p>
PA	<p>No statute—common law remedies only.</p>	<p>PF: Shuman v. Bernie’s Drug Concessions, Inc., 187 A.2d 660, 662 (Pa. 1963) (finding horizontal price-fixing agreements to be unlawful at common law and holding that vertical restraints that are the “incidents or fruits of an unlawful [horizontal] conspiracy . . . are infected with the illegality of the horizontal conspiracy and are hence unenforceable”).</p> <p>H: Collins v. Main Lind Bd. of Realtors, 304 A.2d 493, 496 (Pa. 1973) (court looks to United States Supreme Court case for guidance in determining whether an agreement unreasonably restrains trade).</p>
RI	<p>AT: R.I. GEN. LAWS § 6-36-4 (2009) (declaring unlawful “[e]very contract, combination, or conspiracy in restraint of, or to monopolize, trade or commerce”).</p> <p>H: R.I. GEN. LAWS § 6-36-2(b) (2009) (requiring that act “shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed”).</p> <p>IB: R.I. GEN. LAWS § 6-36-12(g) (2009) (providing that, in an antitrust action, the fact that a person “has not dealt directly with the defendant shall not bar or otherwise limit recovery”).</p>	<p>H: UXB Sand & Gravel, Inc. v. Rosenfeld Concrete Corp., 599 A.2d 1033, 1035 (R.I. 1991) (statute requires court to interpret state antitrust statute in harmony with federal antitrust statutes).</p> <p>PF: Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292, 300 (D.R.I. 1980) (reasoning that “vertical arrangements in general, often are competitive in effect” and therefore subject to the rule of reason), rev’d on other grounds, 659 F.2d 273 (1st Cir. 1981), cert. denied, 455 U.S. 921 (1982).</p>
SC	<p>AT: S.C. CODE ANN. § 39-3-10 (2008) (declaring unlawful arrangements, contracts, agreements, trusts or combinations which “lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</p> <p>PF: S.C. CODE ANN. § 39-3-10 (2008) (declaring unlawful “arrangements, contracts, agreements, trusts or combinations . . . which tend to advance, reduce or control the price or the cost to the producer or consumer of any such product or article”).</p>	<p>H: Drs. Steuer & Latham, P.A. v. Nat’l Med. Enters., 672 F. Supp. 1489, 1521 (D.S.C. 1987) (recognizing that South Carolina has “long adhered to a policy of following federal precedents” in antitrust cases), aff’d, 846 F.2d 70 (4th Cir. 1988) (quoting <i>In re Wiring Device Antitrust Litig.</i>, 498 F.Supp. 79, 87 (E.D.N.Y. 1980)).</p> <p>PF: Walter Wood Mowing & Reaping Co. v. Greenwood Hardware Co., 55 S.E. 973, 975–76 (1906) (analyzing vertical restraint under rule of reason analysis).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
SD	<p>AT: S.D. CODIFIED LAWS § 37-1-3.1 (2009) (making unlawful any “contract, combination, or conspiracy between two or more persons in restraint of trade or commerce”).</p> <p>H: S.D. CODIFIED LAWS § 37-1-22 (2009) (allowing courts to “use as a guide interpretations given by the federal or state courts to comparable antitrust statutes”).</p> <p>IB: S.D. CODIFIED LAWS § 37-1-33 (2009) (providing that “[n]o provision of this chapter may deny any person who is injured directly or indirectly in his business or property” by an antitrust violation).</p>	<p>H: <i>Byre v. City of Chamberlain</i>, 362 N.W.2d 69, 74 (S.D. 1985) (because of the similarity of language between federal and state antitrust statutes and because of the legislative suggestion for interpretation found in S.D. CODIFIED LAWS § 37-1-22, “great weight should be given to the federal cases interpreting the federal statute”); <i>see also In re S.D. Microsoft Antitrust Litig.</i>, 707 N.W.2d 85, 99 (S.D. 2005) (reaffirming that “great weight should be given to the federal cases interpreting the federal statute” and citing <i>Byre</i> for the proposition that, when state courts lack precedent on an issue, they look to federal case law for guidance).</p> <p>PF: <i>Assam Drug Co. v. Miller Brewing Co.</i>, 624 F. Supp. 411, 412–13 (D.S.D. 1985) (applying rule of reason to vertical territorial restraint and suggesting rule of reason is appropriate for all vertical restraints), <i>aff’d</i>, 798 F.2d 311 (8th Cir. 1986).</p>
TN	<p>AT: TENN. CODE ANN. § 47-25-101 (2009) (declaring unlawful “[a]ll arrangements, contracts, agreements, trusts, or combinations . . . to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material”).</p> <p>PF: TENN. CODE ANN. § 47-25-101 (2009) (declaring unlawful “all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article”).</p>	<p>H: <i>Spahr v. Leegin Creative Leather Products</i>, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (recognizing argument that every Tennessee case decided under the Tennessee Trade Practice Act has relied heavily on federal precedent, but noting at least one circumstance where Tennessee Supreme Court has extended the reach of the TTPA beyond that permitted by the Supreme Court’s interpretation of the Sherman Act); <i>Freeman Indus. LLC v. Eastman Chem. Co.</i>, 172 S.W.3d 512, 519 (Tenn. 2005) (declining to follow <i>Illinois Brick</i> when interpreting state statute and noting that Tennessee does not have a statutory “harmony clause” requiring courts to interpret the state antitrust laws consistently with federal law).</p> <p>PF: <i>Spahr v. Leegin Creative Leather Products</i>, 2008 WL 3914461 (E.D. Tenn. Aug. 20, 2008), appeal dismissed, File No. No. 08-6165 (6th Cir. Nov. 20, 2008) (applying rule of reason to antitrust challenge of minimum RPM agreement under Tennessee state law).</p>
TX	<p>AT: TEX. BUS. & COM. CODE ANN. § 15.05(A) (2002) (making unlawful “[e]very contract, combination, or conspiracy in restraint of trade or commerce”).</p> <p>H: TEX. BUS. & COM. CODE ANN. § 15.04 (2002) (declaring that the statute “shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with this purpose”).</p>	<p>H: <i>Star Tobacco, Inc. v. Darilek</i>, 298 F. Supp. 2d 436, 440 (E.D. Tex. 2003) (finding that the Texas antitrust statute is intended to be construed in accordance with federal antitrust statutes (citing <i>Abbot Labs, Inc. v. Segura</i>, 907 S.W.2d 503, 511 (Tex. 1995) (Gonzalez, J., concurring)); <i>see also Gonzalez v. San Jacinto Methodist Hosp.</i>, 880 S.W.2d 436, 441 (Tex. App. 1994) (Texas Antitrust Act “should be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes”); <i>Puentes v. Spohn Health Network</i>, No. 13 08 00100, 2009 Tex. App. LEXIS 4131, at *15 (Tex. App. June 11, 2009) (cites <i>Leegin</i> for principle that a per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
UT	<p>AT: UTAH CODE ANN. § 76-10-914(1) (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: UTAH CODE ANN. § 76-10-926 (2009) (declaring legislative intent that “the courts, in construing this act, will be guided by interpretations given by the federal courts to comparable federal antitrust statutes and by other state courts to comparable state antitrust statutes”).</p>	<p>H: Evans v. State, 963 P.2d 177, 181 (Utah 1998) (citing and following statutory mandate to look to federal and state courts for guidance when construing Utah statute).</p>
VT	<p>AT: VT. STAT. ANN. TIT. 9, § 2453(a) (2009) (declaring unlawful “[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce”).</p> <p>H: VT. STAT. ANN. TIT. 9, § 453(b) (2009) (declaring that in construing the statute, “the courts of this state will be guided by the construction of similar terms contained in Section 5(a)(1) of the Federal Trade Commission Act”).</p> <p>IB: VT. STAT. ANN. TIT. 9, § 2465(b) (2009) (providing that the fact that a person “has not dealt directly with a defendant shall not bar or otherwise limit recovery” for an antitrust action).</p>	<p>H: Elkins v. Microsoft Corp., 817 A.2d 9, 15–17 (Vt. 2002) (holding that “harmonization provision” requiring courts to look to regulations and decisions of the Federal Trade Commission and federal court decisions of the FTC Act does not require courts to look to other federal antitrust statutes or corresponding decisions, thus rejecting <i>Illinois Brick</i>); see also State v. Heritage Realty, 407 A.2d 509, 511 (Vt. 1979) (interpreting VT. STAT. ANN. TIT. 9, § 2453(a) in light of federal case law to find that horizontal price fixing is per se unlawful).</p>
VA	<p>AT: VA. CODE ANN. § 59.1-9.5 (2009) (declaring unlawful “[e]very contract, combination or conspiracy in restraint of trade or commerce”).</p> <p>H: VA. CODE ANN. § 59.1-9.17 (2009) (declaring legislative intent that act “shall be applied and construed to effectuate its general purposes in harmony with judicial interpretation of comparable federal statutory provisions”).</p>	<p>H: Williams v. First Fed. Sav. & Loan Ass’n, 651 F.2d 910, 930 (4th Cir. 1981) (recognizing statutory mandate to harmonize state law with federal interpretations of comparable federal antitrust statutes).</p>
WA	<p>AT: WASH. REV. CODE § 19.86.030 (2009) (declaring unlawful “[e]very contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>H: WASH. REV. CODE § 19.86.920 (2009) (declaring legislative intent that construction of act “be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters” but that the act “shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest, nor be construed to authorize those acts or practices which unreasonably restrain trade or are unreasonable per se”).</p>	<p>H: Blewett v. Abbott Labs., 938 P.2d 842, 846 (Wash. Ct. App. 1997) (recognizing that although federal antitrust precedent is only a “guide,” in practice Washington courts have uniformly followed federal precedent in matters described under the Washington antitrust laws and any departure from federal law “must be for a reason rooted in our own statutes or case law and not in the general policy arguments that this court would weigh if the issue came before us as a matter of first impression”).</p>

Overview of State RPM

STATE	LEGISLATION	LITIGATION
WV	<p>AT: W. VA. CODE § 47-18-3(a) (2009) (declaring unlawful “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce”).</p> <p>PF: W. VA. CODE § 47-18-3(b)(1) (2009) (deeming unlawful certain contracts, combinations or conspiracies including those with “the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service” or “[f]ixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service”).</p> <p>H: W. VA. CODE § 47-18-16 (2009) (declaring legislative intent that statute “shall be construed liberally and in harmony with ruling judicial interpretations of comparable federal antitrust statutes”).</p>	<p>PF: Kessel v. Monongalia County Gen. Hosp. Co., No. 33096, 2007 W. Va. LEXIS 52, at *27-*44 (W. Va. 2007) (holding West Virginia intended to codify existing federal per se violations when it enacted W. VA. CODE § 47-18-3 and setting forth factors for deciding whether to follow modern federal precedent when construing per se categories).</p>
WI	<p>AT: WIS. STAT. § 133.03 (2009) (declaring illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”).</p> <p>IB: WIS. STAT. § 133.18(1)(a) (2009) (providing a right of action and treble damage remedy for “any person injured, directly or indirectly, by reason of” an antitrust violation).</p>	<p>H: Emergency One v. Waterous Co., 23 F. Supp. 2d 959, 962, 970 (D. Wis. 1998) (noting that Wisconsin courts have “repeatedly” stated that federal antitrust law guides the interpretation of WIS. STAT. § 133.03 (citing Grams v. Boss, 294 N.W.2d 473, 480 (Wis. 1980)); <i>but cf. Olistad v. Microsoft Corp., 700 N.W.2d 139, 144, 154-55 (Wis. 2005)</i> (finding that one of the major objectives of revisions made to the state’s antitrust law in 1980 was to reverse the holding in <i>Illinois Brick</i>, and that Wisconsin’s antitrust laws are to be interpreted “in a manner which gives the most liberal construction to achieve the aim of competition”).</p> <p>PF: Slowiak v. Hudson Foods, Inc., No. 91-C-737-2, 1992 U.S. Dist. LEXIS 9387, at *25-*30 (D. Wis. 1992) (holding vertical maximum price restraint lawful because there was no antitrust injury).</p>
WY	<p>AT: WYO. STAT. ANN. § 40-4-101(a)(i) (2009) (prohibiting “any plan, agreement, consolidation or combination of any kind whatsoever to prevent competition or to control or influence production or prices thereof”).</p>	<p>PF: Bulova Watch Co. v. Zale Jewelry Co., 371 P.2d 409, 420 (Wyo. 1962) (declining to hold that Fair Trade Law’s authorization for resale price maintenance violates the state constitution but noting that it is “certainly out of harmony with its spirit”).</p>

Fact Pleading After *Ashcroft v. Iqbal*: The Implications for Section 1 Cartel Cases

John M. Landry

Last term, the Supreme Court, in *Ashcroft v. Iqbal*,¹ offered guidance on upholding the pleading principles underlying the Court's earlier *Bell Atlantic Corp. v. Twombly*² decision. The Court proposed that, in examining a complaint on a motion to dismiss, district courts first distinguish allegations that are statements of fact from those that are conclusions of law, and then consider only the statements of fact in determining whether the complaint states a plausible claim for relief under Federal Rule of Civil Procedure 8(a)(2). The categorization and, in effect, per se condemnation of legal conclusions in a Rule 8(a)(2) analysis—something *Twombly* only hinted at—marks a return to fact pleading, a practice that prevailed before the 1938 adoption of the Federal Rules of Civil Procedure. This has implications for all cases, and in particular, antitrust cartel cases.

As a result of *Iqbal*, efforts by antitrust defendants to convince district courts to classify allegations as legal conclusions, and not statements of fact, will likely increase. In addition, district courts in cartel cases are now more likely to demand a degree of specificity that could preclude all purported direct claims of conspiracy unless the complaint sets forth facts showing the defendant's public admission of collusion or the plaintiff's special insight into the purportedly still-secret cartel. *Iqbal* no longer allows courts to exercise caution in deciding whether to dismiss cartel cases in advance of discovery, something the Supreme Court had previously urged district courts to do when the proof remained largely in the hands of the alleged conspirators.

The Code-Pleading Categories

Before 1938, state codes supplied the civil pleading rules in federal actions at law. Under these rules, the parties identified and developed the facts by which the district court might dispose of the case on the pleadings alone—and often did. A complaint could only state facts, not the evidence from which they derived, nor the conclusion of law they supported. The rules were technical and fostered gamesmanship. And the concepts of evidence, facts and legal conclusions as distinct categories animated code-pleading practice.³

But the pleading categories proved problematic. Evidence, facts and legal conclusions arguably lie on a continuum and differ only by the degree of particularity in the occurrence or event they describe. A conclusion of law, for example, is a generic statement that rests implicitly on the application of some legal rule to a group of operative facts, such as "A owes B \$500," or "she is a single woman." In the words of one commentator, "It is not the less a fact because the fact involves some knowledge or relation of law. There is hardly any fact which does not involve

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¹ 129 S. Ct. 1937 (2009).

² 550 U.S. 544 (2007).

³ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 91–92 (3d ed. 2004).

it.”⁴ In time, a lack of logic and consistency permeated the decisional law governing the application of the code-pleading categories. “Th[e] compartmentalization of pleading categories proved to be a chimera.”⁵

Simplified Pleading Under Rule 8(a)(2)

The Federal Rules of Civil Procedure brought reform. The development of facts would now come later in the case through other pre-trial procedures. Under Rule 8(a)(2), a complaint need only set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶ Mainly, it would just give notice of the claim. And if it failed, the defendant could seek a more definite statement under Rule 12(e).

Notwithstanding the new emphasis on notice rather than fact development, district courts could still narrow or dispose of cases on the pleadings. By its terms, Rule 8(a)(2) required an entitlement-to-relief showing. If the pleading remained silent on an element of the claim, or disclosed facts barring relief, dismissal under Rule 12(b)(6) would follow. But, notably, Rule 8’s drafters omitted any reference to “facts” to avoid the code-pleading categories.⁷ So, although the Rule implicitly required some statement of the event or occurrence at issue to outline or sketch the claim for relief,⁸ whether any allegation (alone or with other allegations) succeeded in that regard would no longer depend on elusive distinctions among evidence, facts and legal conclusions. Indeed, Form 9 of the Federal Rules endorsed a conclusion-of-law level of generality: “On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.”⁹

The Supreme Court’s Pre-*Twombly* Pleading Jurisprudence

Until *Twombly*, the Supreme Court’s pleading jurisprudence largely confirmed Rule 8’s break from the former code-pleading categories. In *United States v. Employing Plasters Association*,¹⁰ the government’s civil complaint accused the defendants of suppressing competition among Chicago plastering contractors in violation of the Sherman Act. The district court read the complaint as asserting only local restraints beyond the reach of the statute and dismissed the case. The Supreme Court disagreed, stating “[t]he complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called ‘allegations of fact’ or ‘mere conclusions of the pleader,’ we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.”¹¹

⁴ Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 420 (1921).

⁵ WRIGHT & MILLER, *supra* note 3, § 1218, at 265.

⁶ Fed. R. Civ. P. 8 (a)(2).

⁷ 5 WRIGHT & MILLER, *supra* note 3, § 1218, at 266–67.

⁸ See *Strong v. David*, 297 F.3d 646, 649 (7th Cir. 2002) (stating “the nature of the claim need only be sketched”); *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (D. Haw. 1953) (stating plaintiff need only “set out sufficient factual matter to outline the elements of the cause of action or claim”); see also *Caribe BMW v. Bayerische Motoren Werke*, 19 F.3d 745, 747–48 (1st Cir. 1994) (noting the “commendable simplicity” of a complaint that alleged “most of the essentials of a [Robinson-Patman Act] violation” and drawing inferences favorable to plaintiff to overcome gaps and ambiguities) (Breyer, J.).

⁹ Form 9, Complaint for Negligence, Appendix of Forms, Fed. R. Civ. Proc. (now revised Form 11).

¹⁰ 347 U.S. 186 (1945).

¹¹ *Id.* at 188.

In other pre-*Twombly* decisions, the Supreme Court stressed the level of generality tolerated, if not encouraged, by Rule 8. It noted the Rule does not require a “claimant to set out in detail the facts upon which he bases his claim.”¹² It rejected efforts by lower courts to impose particularized pleadings in cases other than those governed by Rule 9(b).¹³ It also reminded them of Rule 8’s simplified pleading regime, citing with approval Form 9’s “negligently drove” language as an example of the simplicity and brevity contemplated by the Rule.¹⁴ On one occasion, however, the Court itself avoided deciding whether a fundamental right to a minimally adequate education existed by rejecting, as a legal conclusion, plaintiffs’ bald assertion they were denied a minimally adequate education.¹⁵ The Court stated that a court need not accept the truth of a legal conclusion on a motion to dismiss.¹⁶ This concept, which lower federal courts often invoked to justify certain dismissals even after Rule 8, would later serve as a key pleading principle in *Iqbal*.

Antitrust Pleading in the Lower Courts

A Rule 12(b)(6) dismissal when the pleading itself demonstrates the absence of a claim for relief (by the facts included or the elements omitted) is generally not at odds with Rule 8, nor too controversial. But, beginning in the 1960s, as Professor Richard L. Marcus has observed, many lower federal courts, despite Rule 8, insisted on some heightened degree of factual detail in certain disfavored cases and, absent such detail, disposed of them on that ground.¹⁷ Deeming conclusions of law undeserving of the normal presumption of truth served that effort. Although most notably witnessed in civil rights litigation, the phenomenon also surfaced in antitrust cases, notably after the Supreme Court’s decision in *Associated General Contractors v. California State Council of Carpenters (AGC)*.¹⁸

The issue in *AGC* concerned whether the defendants’ alleged coercion of third parties injured the plaintiff within the meaning of the Clayton Act. To reach that issue, the Court, like the courts that decided the issue below, assumed the alleged coercion might violate the antitrust laws. But, in dicta, it criticized the district court’s failure to require, at the pleading stage, a more particularized description of the conduct because that description might have revealed the absence of a violation: “Certainly in a case of this magnitude, a district court must insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”¹⁹

AGC prompted some lower courts to demand greater factual detail in antitrust pleadings.²⁰ But later Supreme Court guidance insisting on a simplified pleading standard in all cases except those governed by Rule 9(b) tempered those efforts.²¹ Generally, and notwithstanding *AGC*, the call for

¹² *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

¹³ *See Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

¹⁴ *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002).

¹⁵ *See Papasan v. Allain*, 478 U.S. 265, 286 (1986).

¹⁶ *Id.*

¹⁷ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 440–44 (1986).

¹⁸ 459 U.S. 519 (1983).

¹⁹ *Id.* at 528 n.17.

²⁰ *See, e.g., Future Cable Sys. of Wiggins, Inc. v. Multivision Cable TV Corp.*, 789 F. Supp. 760, 771–72 (S.D. Miss. 1992).

²¹ *See, e.g., Hammes v. Aamco Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994) (noting how *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), “scotched” lower court efforts to impose heightened pleading requirements).

Twombly presaged a shift in the Court's disinclination to categorize allegations based on their level of generality. Most of the attention garnered by the 2007 decision centered on its new plausibility standard, i.e., Rule 8(a)(2) requires allegations plausibly suggesting (not merely consistent with) liability.

more specificity in pleadings as a matter of antitrust litigation reform has not been great.²² In cartel cases, in particular, a general sensitivity against demanding specificity can be observed. Indeed, the Supreme Court itself directed lower courts to proceed cautiously when dismissing antitrust cases where the proof rests in the hands of the alleged conspirators.²³ Commentators also observed that even the modest requirement then imposed by some courts that a complaint contain more than a bare-bones statement of conspiracy did not comport with the level of generality contemplated by Rule 8.²⁴

Twombly's Fact-and-Legal-Conclusion Dichotomy

Twombly presaged a shift in the Court's disinclination to categorize allegations based on their level of generality. Most of the attention garnered by the 2007 decision centered on its new plausibility standard, i.e., Rule 8(a)(2) requires allegations plausibly suggesting (not merely consistent with) liability. Under this standard and the limits on permissible inferences imposed by substantive antitrust law, mere allegations of conscious parallelism fail to state a Section 1 claim.²⁵

Less noticed were *Twombly's* various statements harkening back to the elusive code-pleading distinction between facts and conclusions of law. While not per se condemning the use of legal conclusions, the Court noted a "conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."²⁶ It also observed that a naked assertion of "conspiracy" falls on the "borderline" between "the conclusory and the factual," and, as a result, "gets close to stating a claim, but without some further factual enhancement it stops short of the line."²⁷

The Court also found the plaintiff's direct statements of conspiracy, including that the defendants "entered into a contract . . . to prevent competitive entry in their respective local telephone and/or high speed internet service markets and have agreed not to compete with one another," to be, upon "fair reading," legal conclusions that merely summed up the complaint's prior allegations of parallelism—they did not serve as independent allegations of actual agreement. But the problem of distinguishing fact from legal conclusion did not arise because, in the Court's view, the pleading itself "explained" that the plaintiffs' Section 1 claim proceeded exclusively via a theory of parallelism, which the Court deemed the "nub" of the complaint.²⁸ The dissent in *Twombly*, however, found the direct allegation that the defendants "agreed not to compete with one another" to be nothing less than an "allegation describing unlawful conduct,"²⁹ and called the majority's no-agreement-has-been-alleged-at-all position "mind-boggling."³⁰

²² See National Commission for the Review of Antitrust Laws and Procedures, *The Early Narrowing and Resolution of Issues*, 48 ANTITRUST L.J. 1041, 1056 (1980) ("there has been little testimony or comment presented to the Commission favoring increased specificity in antitrust pleadings").

²³ See *Hosp. Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 746 (1976).

²⁴ See 5 WRIGHT & MILLER, *supra* note 3, § 1233, at 374.

²⁵ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007). This aspect of the *Twombly* decision effectively authorized a district court to entertain, on a motion to dismiss, arguments ordinarily reserved for summary judgment.

²⁶ *Id.* at 557.

²⁷ *Id.*

²⁸ *Id.* at 564–65.

²⁹ *Id.* at 573 (Stevens, J., dissenting).

³⁰ *Id.* at 589. Two weeks after deciding *Twombly*, the Court created further uncertainty over the import of its decision by citing *Twombly* for the proposition that a complaint's primary role is to provide notice and "specific facts are not necessary." See *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (citing *Twombly*, 550 U.S. at 555).

Among the *Twombly* commentators, Professor Allan Ides agreed with the majority Court's reading of the *Twombly* complaint, and offered an interpretation of the majority decision that comported with earlier notions of simplified pleading under Rule 8.³¹ In his view, the plaintiffs, having based their Section 1 complaint solely on allegations of conscious parallelism, simply ran into substantive limitations on the allowable inferences that could be drawn to state a claim for relief. But he conceded that some of the majority's statements could also be read as condemning per se any use of generality in pleading that rises to the level of a so-called conclusion of law. According to Professor Ides, such a reading would operate as a "drastic revision" of Rule 8(a)(2) principles.³²

***Iqbal* and the Return of Code-Pleading Categorization**

In contrast to *Twombly*, the Court in *Iqbal* actually confronted the problem of distinguishing a statement of fact from a conclusion of law. The *Iqbal* plaintiff accused defendants John Ashcroft and Robert Mueller, acting as government officials following September 11, of adopting a discriminatory inmate-detention policy designed to deprive him of his constitutional rights. Whether the complaint stated a claim for relief was the issue before the Court.

The Court started with the substantive elements of the claim at issue. The plaintiff had to allege and prove that both Ashcroft and Mueller adopted the alleged policy with a discriminatory purpose, not just willfully or with awareness of the consequences. Turning to the pleading, the Court reiterated some of *Twombly*'s statements regarding the insufficiency of mere labels and formulaic recitations: Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed me accusation."³³ Acknowledging the lower courts' need for guidance, the Court then explained its *Twombly* decision. Among other things, it identified as a key "working principle[]" underlying *Twombly*,³⁴ the tenet that a court need not accept a legal conclusion as true. To test a complaint's sufficiency on a Rule 12(b)(6) motion to dismiss, the Court proposed a two-pronged approach that, first, identifies and disregards all allegations that fall within a conclusion-of-law category and, second, tests whether the remaining allegations plausibly suggest entitlement to relief.³⁵

Applying the first prong, the Court examined the direct allegations of Ashcroft and Mueller's discriminatory purpose. The complaint stated that Ashcroft and Mueller not only "knew of, condoned, and willfully and maliciously agreed" to subject the plaintiff to the detention policy "solely on account of [his] religion, race, and/or national origin," but that Ashcroft was the policy's "principal architect" and Mueller "instrumental" in its adoption and execution. The Court rejected these allegations out of hand and set them aside as nothing more than legal conclusions not entitled to the presumption of truth.³⁶ In making this determination, the Court did not articulate or apply any test. The Court then proceeded to analyze the remaining factual allegations regarding the cir-

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³¹ Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 629–32 (Nov. 2007).

³² *Id.* at 632.

³³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

³⁴ *Id.*

³⁵ *Id.* at 1950.

³⁶ *Id.* at 1951.

cumstances of the plaintiff's detention in the aftermath of September 11 under *Twombly*'s plausibility standard (the second prong) and found no plausible claim of purposeful discrimination.³⁷

Implications for Pleading a Cartel Claim Under *Iqbal*

Conclusions of law in an antitrust complaint have utility. At a minimum, they provide a framework and point the reader in the direction of the claim being asserted. But, under the approach outlined in *Iqbal*, once an allegation is labeled a legal conclusion, it plays no role in the complaint's entitlement-to-relief showing and, thus, is essentially divested of any probative or inferential value. In theory, and to the extent it is possible to identify a pure conclusion of law, this has logical appeal. The most generic expression of what the facts show would have little inferential power to show anything itself. Yet, even a bald statement, "A agreed with B," describes the fact of agreement. It is no more (and perhaps is less) a legal conclusion than Form 11's (previously, Form 9) "defendant negligently drove." The Court in *Iqbal* never ventures to offer a test to discern a legal conclusion from a factual statement. Is the Court chasing a chimera?

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In Section 1 cases, whether a statement of agreement is a fact or a legal conclusion could possibly rest on whether the "nub" of the complaint seeks to advance a direct or a circumstantial claim. That was the Court's approach in *Twombly*. But, there, the pleading itself allowed the court to conclude that the plaintiffs sought to advance a purely circumstantial claim, thereby allowing the Court to find the direct allegations operated only as legal conclusions (supported by allegations of parallelism), not as independent facts of agreement.³⁸ But a Section 1 complaint may not always be so clear. And no rule requires a Section 1 plaintiff to choose between pleading a direct or a circumstantial case.

In addition, the wide latitude that Rule 8 affords antitrust plaintiffs in choosing the mode and style of pleading arguably contemplates the use of allegations of varying specificity and generality that operate synergistically. But the first prong of *Iqbal*'s two-pronged test uses the conclusion-of-law label as a screen to remove certain allegations (those falling within the category "conclusion of law") from the plausibility calculus altogether. By design, this method does not take the complaint as a whole, which is ordinarily the approach when analyzing the sufficiency of pleadings. Certain implications necessarily follow. A complaint alleging a Section 1 violation using direct allegations of agreement will fail unless it discloses sufficient specific information about the purported secret agreement to escape the conclusion-of-law label. Likewise, absent such specific information, a Section 1 complaint seeking to state a claim through a mix of direct and indirect allegations of conspiracy will also fail unless the indirect allegations (statements of conscious parallelism and plus factors) plausibly suggest collusion.

Iqbal is silent on the level of specificity required to plead a direct agreement and trigger the presumption of truth under the first prong. But footnote 10 in *Twombly* may shed light. There, the Court states that had the plaintiffs sought to plead a direct case, it "doubted" the complaint would have provided adequate Rule 8 notice because the complaint identified no specific time, place,

³⁷ *Id.* at 1951–52. Shortly after *Iqbal*, a bill came before the U.S. Senate that is still pending and, if passed, would preclude Rule 12(b)(6) dismissals "except under the standards set forth . . . in *Conley v. Gibson*." Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). Those "standards" would include *Conley*'s statement that Rule 8 does not require a "claimant to set out in detail the facts upon which he bases his claim." *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

³⁸ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564–65 (2007); see also *In re Travel Agent Commission Antitrust Litig.*, No. 07-0464, 2009 U.S. App. LEXIS 21638, at *19 (6th Cir. Oct. 2, 2009) (affirming dismissal because allegations of meetings among defendants' executives responsible for pricing decisions set forth in section of complaint entitled "Opportunities for Defendants to Combine and Conspire" did not state a direct Section 1 claim).

or persons involved in the alleged collusion.³⁹ Although this dicta incorrectly speaks in terms of notice of claim (which was not at issue), it implies the Court would have viewed the direct agreement allegations (were they intended as such) as legal conclusions that failed to show entitlement to relief. The demand for specific dates, places, and names further suggests the Court wanted some indicia that the plaintiffs possessed privileged knowledge about the alleged secret cartel. This means the degree of specificity required under *Iqbal*'s first prong is likely the same that will assure the court that the pleadings have entered the realm of plausibility under *Iqbal*'s second prong. The border between the conclusory and the factual and between the possible and the plausible is the same, and the two-prong test collapses into one.

To be clear, a direct allegation of agreement technically does not require the drawing of any inference, plausible or otherwise, to show agreement. But what is apparently needed after *Iqbal* and *Twombly* are factual allegations that, by virtue of the degree of specificity they employ, give rise to a plausible inference that the plaintiff actually has some evidence in hand or a privileged vantage point into the alleged cartel, such as might be obtained from a public admission of guilt, an incriminating document disclosed to the plaintiff through discovery in another case, or a confidential source within the cartel. Conclusions, or pleading "on information and belief" without identifying the source of the information, will not suffice here.⁴⁰ Thus, *Iqbal*'s fact-pleading regime supplants entirely the caution the Supreme Court previously urged district courts to exercise before dismissing cartel complaints in advance of discovery.⁴¹

As they already do, wherever possible, Section 1 plaintiffs will want to plead in a manner that suggests privileged insight into the purported secret agreement. But, like the statements rejected as conclusions of law in *Iqbal* (i.e., Ashcroft was the "architect," and Mueller was "instrumental"), in many cartel cases, allegations of "secret meetings," "communications," "discussions," and "joint agreement" entered into in "the United States and Europe" by the defendants' representatives "at the highest levels" may now be viewed as *faux* details that merely restate the legal conclusion of agreement and that anyone could postulate without privileged insight. *Twombly* had already motivated some courts to scrutinize, allegation by allegation, Section 1 pleadings in this manner.⁴² *Iqbal* now fully endorses that approach.

Conclusion

Whether or not the drafters of Rule 8(a)(2) envisioned this type of pleading scrutiny on a motion to dismiss when they sought to escape the code-pleading categories, *Iqbal* has now fully formalized such scrutiny—and inevitably resulting allegation-by-allegation categorization—as a critical step in a district court's Rule 8(a)(2) entitlement-to-relief analysis. This presents an opportunity for defendants in cartel cases to seek dismissals by urging courts to carefully parse out and exclude from consideration statements that do not reveal actual factual insight into the alleged cartel but are mere conclusions of law masquerading as facts. ●

³⁹ *Twombly*, 550 U.S. at 565 n.10.

⁴⁰ See, e.g., *In re California Title Ins. Antitrust Litig.*, No. C 08-01341, 2009 U.S. Dist. LEXIS 43323, at *16 (N.D. Cal. May 21, 2009) (citing *Iqbal* and disregarding direct allegation of agreement to fix insurance premium rates at "meetings in New York, New Jersey, Pennsylvania, and Ohio" due to lack of "factual support").

⁴¹ See *Hosp. Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 746 (1976).

⁴² See, e.g., *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50–51 (2d Cir. 2007).

Outsourcing Legal Services in Response to Antitrust “Second Requests” for Information: The Ethics Implications

Steven C. Bennett

Under the premerger notification provisions of the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976,¹ parties to certain mergers or acquisitions are required to provide the federal antitrust authorities with information to allow the agencies to conduct a preliminary antitrust analysis of the proposed transaction prior to its consummation.² Much of the information the agencies require to conduct their preliminary antitrust analyses appears in the notification filings prepared by parties to the transaction. But the agencies may request additional information and documents from any person required to file a notification (commonly known as a Second Request).³

The scope of information produced by companies in response to such Second Requests in recent years has grown steadily.⁴ Despite certain admirable reforms of the HSR Second Request process,⁵ the cost and burden of responding to such requests remains a major concern.⁶

This article briefly outlines a recent development in response to the burdens and costs of Second Requests: “outsourcing” of large parts of the processing of information called for in such requests. This outsourcing phenomenon presents special ethical challenges to the lawyers who must manage the process.

¹ See 15 U.S.C. § 18(a).

² The HSR program became effective on September 5, 1978, after final promulgation of Premerger Notification Rules. See 16 C.F.R. § 803.10(a). For an overview of the HSR program, and statistics on its recent implementation, see the agencies’ annual report on the HSR program. See U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, HART-SCOTT-RODINO ANNUAL REPORT (FY 2008), available at <http://www.ftc.gov/os/2009/07/hsrreport.pdf>.

³ See generally Michael Byowitz & William Rooney, *Second Requests: Suggestions for Reform*, ANTITRUST, Spring 1999, at 43. A typical Second Request seeks details on the sales, facilities, assets, and structures of the businesses involved in a transaction. See FED. TRADE COMM’N, PREMERGER NOTIFICATION OFFICE, MODEL REQUEST FOR ADDITIONAL INFORMATION AND DOCUMENTARY MATERIAL (SECOND REQUEST) (May 2007), available at <http://www.ftc.gov/bc/hsr/introguides/guide3.pdf>.

⁴ See Statement of Mark D. Whitener Before the Antitrust Modernization Commission 1 (Nov. 17, 2005), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Whitener_Statement.pdf (noting “pressing need to reduce the volume of documents that must be collected, reviewed and produced in response to second requests”). As Mr. Whitener noted in 2005, production of information may be “ten times greater” than in past, entailing “several million dollars in direct costs” and “thousands of boxes” of material, or electronic equivalents. *Id.* at 6.

⁵ See Deborah Majoras, Chairman, Fed. Trade Comm’n, Reforms to the Merger Review Process (Feb. 16, 2006), available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>; U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION, BACKGROUND INFORMATION ON THE 2006 AMENDMENTS TO THE MERGER REVIEW PROCESS INITIATIVE (Dec. 15, 2006), available at <http://www.usdoj.gov/atr/public/220241.htm>.

⁶ See Scott Sher & Daryl Teshima, *e-Normous: The Increasing Burden Associated with Electronic Document Production in Second Request Investigations*, ANTITRUST SOURCE, Nov. 2005, <http://www.abanet.org/antitrust/at-source/05/11/Nov05-Sher11=29.pdf>.

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The Burden and Cost of Second Requests

One very significant aspect of the cost and burden of responding to an HSR Second Request is the vast volume of documents (especially email and similar communications) that companies increasingly maintain (for business and regulatory purposes or simply because the cost of storage has greatly declined).⁷

The collection and review of such large quantities of information, even using automated search and other computer-assisted techniques, often requires substantial resources, especially the person-power of skilled document reviewers.⁸ The compressed time frames for response to agency requests, moreover, coupled with the limited ability of parties to negotiate a more narrow scope, may overwhelm the capabilities of even some of the largest companies, and largest law firms, to respond effectively and efficiently.⁹

The effectiveness of outsourcing has been the subject of some spirited debate within the legal community.

These general problems in dealing with enlarged HSR Second Request obligations have perhaps become even more stark in the current regulatory and financial climate. The current administration appears to be dedicated to more vigorous enforcement of the nation's antitrust laws.¹⁰ Meanwhile, economic turbulence has forced companies to economize in many areas, including (in particular) their expenditures on fees and costs for the services of outside counsel.¹¹

The Outsourcing Response

One potential response to the costs and resource pressures affecting companies involved in HSR Second Requests may be the "outsourcing" of document review/information collection services to outside "litigation support" vendors or smaller firms.¹² The effectiveness of outsourcing has been the subject of some spirited debate within the legal community.¹³

⁷ See Steven C. Bennett, *Implications of a "Keep It All" Data World*, N.Y. ST. B.A. J., Feb. 2009, at 42.

⁸ In 2001, an ABA Task Force on Federal Antitrust Agencies reported that obtaining "substantial compliance" with a second request could take "months" and cost "millions" of dollars. See, e.g., ABA SECTION OF ANTITRUST LAW, THE STATE OF FEDERAL ANTITRUST ENFORCEMENT—2001: REPORT OF THE TASK FORCE ON THE FEDERAL ANTITRUST AGENCIES 10, 30 (2001), available at <http://www.abanet.org/antitrust/at-comments/2001/reports/antitrustenforcement.pdf>. The problem has only grown larger in recent years. See D. Bruce Hoffman, *The Digital Age at the FTC: Current Issues in Electronic Document Production and Review*, ANTITRUST SOURCE, Mar. 2004, <http://www.abanet.org/antitrust/at-source/04/03/hoffman.pdf>.

⁹ See Casey R. Triggs, *Effectively Negotiating the Scope of Second Requests*, ANTITRUST, Summer 1999, at 36 (noting limits on party leverage in negotiations with agencies).

¹⁰ See Leslie C. Overton & Ryan C. Thomas, *Antitrust Enforcement in the Obama Administration* (Apr. 2009), available at http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S6176 (noting areas where "more vigorous and aggressive antitrust enforcement seems particularly likely," including "mergers").

¹¹ See ALTMAN WEIL, INC., LAW DEPARTMENT COST CONTROL: AN ALTMAN WEIL FLASH SURVEY OF GENERAL COUNSEL (Dec. 2008), available at http://www.altmanweil.com/dir_docs/resource/d664b2c6-9978-4327-a66e-757972ebd091_document.pdf (80 percent of general counsel surveyed cited outside counsel costs as greatest concern regarding 2009 legal spending); Melissa Maleske & Yesenia Salcedo, *The Rating Game*, INSIDE COUNSEL, July 2008, at 47 (85 percent of inside counsel agreed that economic conditions are increasing pressure to spend less on outside counsel, from the results of 2008 annual survey of general counsel).

¹² Vendors range from all-in-one service providers, who can find, collect, extract, process, analyze, and produce information, down to smaller, segmented firms that specialize in one or more aspects of ediscovery, including certain esoteric functions, such as a forensic retrieval of deleted information and the processing of information in foreign languages. Some outsourcing firms largely offer skilled contract lawyers and paraprofessionals, who can help review masses of information. See generally George Socha & Tom Gelbmann, *Mining for Gold*, L. TECH. NEWS, Aug. 2008, http://www.lawtechnews.com/r5/showkiosk.asp?listing_id=2117297 (describing the results of the Sixth Annual Socha-Gelbmann Electronic Discovery Survey).

¹³ See VALUENOTES, LEGAL SERVICES OUTSOURCING: WHAT DO LAW FIRMS THINK? (May 2009), available at <http://www.valuenotes.com/valuenotes/services/reports.asp> (noting lack of awareness of alternatives and quality and security concerns, among barriers to use of outsourcing).

Why Outsourcing May Be Attractive in the Second Request Context. The employment of non-legal ancillary services to assist clients is nothing new in the practice of law. In theory, traditional professional responsibility models should suffice to handle the issues that can arise from provision of such services. But the value and complexity of discovery-related services can be unique, and the stakes in a proceeding affected by large-scale information production can be quite high.

To take a simple example: a client might directly provide all of the photocopying services that a particular matter requires. This could mean staffing the project with the client's own personnel on the matter; the allocation of the client's copying machines, paper, and other resources; and, perhaps, the client's assumption of responsibility for any errors and omissions that could occur. Alternatively, a law firm might internalize these costs and burdens by assuming for itself all photocopying responsibilities. Under a third model, an outside vendor might provide some or all photocopying services on the matter. This vendor might have a preexisting relationship with the law firm or the client. This third solution represents a simple form of "outsourcing" some of the work that would otherwise be completed by the client or the law firm.

In the information-production arena, outside e-discovery services have become very big (and sometimes very profitable) businesses.¹⁴ Hundreds of third-party vendors represent an emerging industry developed to assist counsel and clients in managing the sometimes elaborate process of fulfilling massive document production requests.¹⁵

This trend in the legal arena follows a larger trend toward outsourcing of business functions in a large array of other business operations, especially those involving management of information.¹⁶ Where a discrete portion of a company's many functions can be performed effectively by a service provider external to the company, at substantially lower cost, the company may choose to outsource that function, retaining for itself more of the core, high-value aspects of its business.

Thus, increasing costs for legal services, wider regulatory obligations (such as Sarbanes-Oxley disclosure requirements), and the explosive growth of electronic discovery as a major factor in corporate litigation have all driven businesses (and law firms) to consider the outsourcing of certain functions as a means to reduce costs, while maintaining high-quality service. The ability to provide "24/7" availability, and offer rapid turn-around for labor-intensive projects, have created additional incentives to consider legal outsourcing.

ABA Opinion on Ethics Outsourcing Legal Services. The ABA Standing Committee on Ethics and Professional Responsibility, in a recent formal opinion, described the trend toward increased outsourcing of legal services as "salutary."¹⁷ As the ABA Committee explained, outsourcing may reduce costs for law firms and their clients. Outsourcing, moreover, may permit smaller firms to perform labor-intensive tasks (such as large-scale e-discovery processing), thus increasing the range of options available to clients in their choice among legal service providers. The ABA Committee, moreover, recognized that legal outsourcing may involve a "global" network of service providers, increasing competition in the market for legal support services. The ABA Committee

¹⁴ A recent Socha-Gelbmann Electronic Discovery Survey, for example, estimates that commercial electronic discovery revenues, already in excess of \$1 billion a year, will rise by 30 percent in 2009 and by another 25 percent in 2010. Socha & Gelbmann, *supra* note 12.

¹⁵ The Socha-Gelbmann survey, for example, lists some 600 vendors of electronic discovery services, but notes several recent "departures" from the market. *Id.*

¹⁶ See generally ERRAN CARMEL & PAUL TJIA, OFFSHORING INFORMATION TECHNOLOGY: SOURCING AND OUTSOURCING TO A GLOBAL WORKFORCE (2005).

¹⁷ A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 08-451 at 2 (Aug. 5, 2008) [hereinafter ABA Outsourcing Op.] (addressing lawyer's obligations when outsourcing legal and non-legal support services).

concluded that there is “nothing unethical” about outsourcing portions of legal services, so long as all services are provided with the “legal knowledge, skill, thoroughness and preparation reasonably necessary” for representation, and the lawyers involved satisfy their other professional obligations.¹⁸ The ABA Committee outlined the various specific ethical obligations of counsel involved in outsourcing which are outlined and illustrated below.

A lawyer cannot bait a client into believing that the lawyer will provide legal services and then switch total responsibility for the matter to a non-lawyer.

Firms Must Actively Supervise Outsourced Work. In considering any outsourcing arrangement in connection with a Second Request, therefore, one of the first considerations should be the lawyer’s involvement in supervision and review of the vendor’s work. A lawyer cannot bait a client into believing that the lawyer will provide legal services and then switch total responsibility for the matter to a non-lawyer. A non-lawyer who falsely offers legal services under the guise of being a lawyer is guilty of unauthorized practice of law in most jurisdictions. And, because licensing of the practice of law is a state matter, a lawyer authorized to practice law in one state cannot, without admission to the other state’s bar or *pro hac vice* admission for purposes of a specific matter, perform unlicensed legal services in a foreign jurisdiction. Nor may a lawyer encourage or abet the unauthorized practice of law by others.¹⁹ For this reason, lawyers and clients who want to outsource services in connection with a Second Request must understand that licensed lawyers must actively supervise all such work.

The precise contours of these ethical and legal prohibitions on the unauthorized practice of law are somewhat ill-defined.²⁰ In the modern economy, for example, business operations and legal concerns of clients often cross state (and international) boundaries. And the fracturing of legal services into various higher and lower level components may mean that portions of legal services are performed by lawyers in multiple jurisdictions or by support staff who lack legal training and who are not subject to the rigors of professional licensing. Typically, although the work may be balkanized, at least one lawyer must maintain overall responsibility for oversight and control of the work.

In the outsourcing context, the ABA Committee and other authorities have declared that supervision of all work by a fully-qualified lawyer is key.²¹ Thus, the supervising lawyer must “independently verify” any work performed, to ensure that competent service is provided.²² The lawyer cannot wholesale delegate a matter to an outsourcing service, and claim the work as his or her own. Wholesale delegation of legal work (without supervision), in the words of one ethics opinion, would make the lawyer the “tail” on the “dog.”²³ The lawyer, moreover, must be “diligent” in supervision of the service provider.²⁴ Supervision must be “direct;” the lawyer must be “readily” available to answer questions concerning the work.²⁵

¹⁸ See *id.* at 2.

¹⁹ See generally STEPHEN GILLERS, REGULATION OF LAWYERS (6th ed. 2001) (summarizing operation and history of unauthorized practice rules).

²⁰ See GEOFFREY C. HAZARD & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 273 (2004) (unauthorized practice rules have been “especially vexed” in the United States).

²¹ See Ass’n of the B. of the City of N.Y. Comm. on Prof. and Jud. Ethics, Formal Op. 2006-3 (Aug. 2006) [hereinafter ABCNY Op.], available at <http://www.nycbar.org/Ethics/eth2006.htm>; ABA Outsourcing Op., *supra* note 17, at 2–3.

²² See, e.g., ABCNY Op., *supra* note 21.

²³ San Diego County B. Ass’n, Ethics Op. 2007-1 (2007) [hereinafter San Diego Op.], available at <https://www.sdcba.org/index.cfm?pg=EthicsOpinion07-1>.

²⁴ See ABCNY Op., *supra* note 21. The ABCNY Opinion suggests that communication during the course of the work is essential, to ensure that the vendor understands the assignment. See *id.*

²⁵ See Fl. B. Ass’n, Opinion 07-2 (Jan. 18, 2008) [hereinafter Fl. Op.], available at <http://www.floridabar.org/tfb/tfbetopin.nsf/SearchView/ETHICS,+OPINION+07-2?opendocument>.

The 2008 ABA opinion noted that the Model Rules of Professional Conduct (Model Rules) require that a lawyer who employs, retains, or associates with non-lawyers must “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”²⁶ The “challenge” for an outsourcing lawyer, as the ABA Committee observed, is to “ensure that tasks are delegated to individuals who are competent to perform them, and then to oversee the execution of the project adequately and appropriately.”²⁷

What seems clear from the ABA opinion is that effective supervision generally requires: (1) pre-hiring inquiry into the capabilities of the vendor, (2) regular communication during the course of the project, (3) some form of quality control, and (4) other “reasonable steps” to ensure that services are rendered “competently” to the client.²⁸ The supervising lawyer, moreover, must know enough about the subject matter of the outsourced work to judge the quality of the work.²⁹

The duty to supervise fully applies in responding to Second Request. The Model Second Request from the FTC requires an affirmative declaration that:

As required by Section 803.6 of the implementing rules for the Hart-Scott-Rodino Antitrust Improvements Act of 1976, this response to the Request for Additional Information and Documentary Material, together with any and all appendices and attachments thereto, was prepared and assembled under my supervision in accordance with instructions issued by the Federal Trade Commission.

Firms Must Consider Potential Conflicts in Outsourcing Functions for a Second Request

Ethical issues may also arise in some situations if the lawyer fails to check for potential conflicts of interest with the outsourcing vendor. A fundamental principle of professional responsibility is the duty of loyalty that attorneys owe their clients. A lawyer generally cannot represent a client if the representation involves a conflict of interest.³⁰ The conflicts of one lawyer in a law firm, moreover, may be attributed to other lawyers in the firm.³¹

The ABA, in an earlier ethics opinion, suggested that even a temporary lawyer in a firm may be treated as being “associated” with a law firm, where the temporary lawyer has access to confidential client information and there is thus a “risk of improper disclosure or misuse of information

²⁶ Model Rules of Prof. Responsibility, R 5.3(b) (1983), available at http://www.abanet.org/cpr/mrpc/rule_5_3.html.

²⁷ This requirement comports with the lawyer’s fundamental duty to provide “competent representation” to the client, and to make “reasonable efforts” to ensure that services provided by the law firm conform to standards of professional conduct. See Model Rules of Prof. Responsibility, R 1.1, 1.5(b) (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_1.html; http://www.abanet.org/cpr/mrpc/rule_1_5.html.

²⁸ See ABA Outsourcing Op., *supra* note 17. The ABCNY Opinion similarly stated: “[T]he lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer’s work and then vet the non-lawyer’s work and ensure its quality.” ABCNY Op., *supra* note 21. See generally Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEORGETOWN J. INT’L L. 401 (2007).

²⁹ See San Diego Op., *supra* note 23 (attorney “must be able to determine for himself or herself whether the work is competently done”). One recent decision in the electronic discovery area, for example, emphasized that Rule 26(g) requires the lawyer signing any discovery responses to certify that, after “reasonable inquiry” the response is “complete and correct.” *Mancia v. Mayflower Textile Services Co.*, 2008 WL 4595175 (D. Md. Oct. 15, 2008).

³⁰ See Model Rule of Prof. Responsibility, R 1.7(a) (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_7.html.

³¹ See Model Rule of Prof. Responsibility, R 1.10(a) (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_10.html (no lawyer in a law firm may represent a client “when any one of them practicing alone would be prohibited from doing so”). The precise application of this Rule is a matter of some subtlety. Law firms, for example, sometimes build “Chinese Walls,” to avoid potential conflicts due to imputed knowledge of the affairs of two clients in potential conflict.

In the Second Request context, although most outsourcing firms are probably doing no work for the government, such vendors may nevertheless have conflicts with some of their other private clients.

relating to representation of other clients of the firm.”³² Although the 2008 ABA opinion does not address the potential for conflicts arising from a law firm’s use of an outsourcing firm, the issue clearly may arise in that context. Just as an expert working for one client might divulge information about that client to a lawyer working for an adverse client,³³ so a contract lawyer (or non-lawyer) working for an outsourcing vendor might gain access to confidential information regarding one client and improperly divulge to, or use such information for, another client.³⁴

The risk of (at least) claims of conflicts of interest, and the attendant disruption and cost that may arise from such claims, suggests that as part of the investigation of the background and capabilities of the outsourcing vendor, the supervising lawyer should address potential conflicts. A recent New York City Bar Association opinion suggested that the supervising lawyer should: inquire as to the vendor’s “conflict-checking procedures and about how it tracks work performed for other clients;” inquire whether the vendor is performing, or has performed, any services for parties adverse to the lawyer’s client; “[p]ursue further inquiry as required;” and remind the vendor, “preferably in writing,” of the need to “safeguard the confidences and secrets” of the vendor’s “other current and former clients.”³⁵ A Florida Bar opinion further suggested that a supervising lawyer should take “extra steps” to make sure that the vendor is familiar with legal conflict rules.³⁶

In the Second Request context, although most outsourcing firms are probably doing no work for the government, such vendors may nevertheless have conflicts with some of their other private clients. The protection of intellectual property and marketing plans, for example, may be very important where a firm does work for competitors in the same industry. Thus, conflict checks must be an essential part of the choice of an outsourcing vendor for Second Request work.

Review of Vendor’s Requirements in Outsourcing Functions for a Second Request. Just as lawyers must do due diligence in the area of conflicts, they must also follow through and ensure that the vendor has adequate confidentiality controls in place before the firm outsources any functions to a vendor that may handle responses to a Second Request. Another fundamental principle inherent in the attorney/client relationship is the duty of lawyers to protect the confidences and secrets of clients.³⁷ The lawyer’s obligation, moreover, extends to persons providing services to a client at the lawyer’s direction. Thus, commentary to the Model Rules states: “A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision.”³⁸

³² See A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 88-356 (Dec. 16, 2008) (addressing conflicts with temporary lawyers); see also ABCNY Op., *supra* note 21 (suggesting that conflicts of contract attorney may be imputed to law firm, depending upon facts and circumstances).

³³ See generally David C. Hricik, *Conflicts and Confidentiality: The Ethical and Procedural Issues Concerning Experts* (Mercer Univ., Walter F. George Sch. of L. Working Paper 2006), available at <http://ssrn.com/abstract=917164>.

³⁴ Conversely, where the connection between the temporary lawyer and the matter involving a potential conflict of interest becomes “more remote,” it should become “more appropriate” to refrain from requiring disqualification. See A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 88-356 (Dec. 16, 2008).

³⁵ See ABCNY Op., *supra* note 21.

³⁶ See Fl. Op., *supra* note 25.

³⁷ See Model Rule of Prof. Responsibility, R 1.6 Comment 6 (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_6_comm.html (noting that public interest is usually best served by strict rule regarding confidentiality).

³⁸ *Id.* Comment 16.

These principles logically apply to the outsourcing context. The 2008 ABA opinion on outsourcing, and several other state ethics opinions in this area, have suggested that the client's "informed consent" to the activities of the vendor is a key requirement in outsourcing since "no information protected by [Model] Rule 1.6 [concerning confidentiality] may be revealed [to anyone] without the client's informed consent. The implied authorization [in the Rules] to share confidential information within a firm does not extend to outside entities or to individuals over whom the firm lacks effective supervision and control."³⁹

Beyond informing the client that an outsourcing vendor may obtain access to some of the client's confidential information, the ABA Opinion and other recent opinions offer additional practical suggestions. "Written confidentiality agreements" are "strongly advisable in outsourcing relationships."⁴⁰ The lawyer should limit the vendor's access to information to "only the information necessary to complete the work for the particular client," and should "provide no access to information about other clients of the firm."⁴¹

The extent of such precautions presumably must be "commensurate with the risk" of confidentiality breach involved in the vendor's services for the client. Concerns for data security in telecommunications, and even the coverage of foreign laws regarding data protection, for example, may require additional inquiry by the supervising lawyer.⁴²

Confidentiality may be especially prominent in the context of Second Requests, where vital competitive information may be exposed. Thus, lawyers must take steps to ensure protection of client confidential information.

Transparency/Disclosure with Respect to Fees for Outsourced Functions. The processing of information in response to Second Requests can be extremely expensive. The client must know, and approve, such expenses.

As a general matter, lawyers cannot charge "unreasonable fees" for their services; nor may they collect "an unreasonable amount of expenses."⁴³ Legal ethics also prohibit lawyers from sharing legal fees with non-lawyers; and formation of a "partnership" with a non-lawyer that includes the "practice of law" is forbidden.⁴⁴ For these purposes, as the ABA Standing Committee on Ethics concluded in 1993, third parties providing services in aid of a lawyer (such as a court reporter or a travel agent) must be treated as a non-lawyer whose fees cannot be included in the lawyer's fees.⁴⁵ In 2000, the ABA Committee extended application of the fee rule to temporary lawyers, not-

³⁹ See ABA Outsourcing Op., *supra* note 17, at 5 (citing Model Rule 1.6(a) and Comment 5 to the Rule).

⁴⁰ See *id.* (lawyer must "recognize and minimize the risk" of improper disclosure of confidential information by vendor); see also Los Angeles County B. Ass'n Prof. Responsibility and Ethics Comm., Op. No. 518 (2006) [hereinafter Los Angeles Op.], available at <http://www.lacba.org/Files/LAL/Vol29No9/2317.pdf> ("Confidential information can be disclosed to outside contractors so long as the outside contractors agree to keep the client confidences and secrets inviolate."); ABCNY Op., *supra* note 21 (recommending "contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality").

⁴¹ See Fl. Op., *supra* note 25 (lawyer should require "sufficient and specific assurances" that information, once used for the service requested, "will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service").

⁴² See *id.* (noting "risks inherent to transmittal of information"); ABA Outsourcing Op., *supra* note 17, at 4 (noting risk that documents "may be susceptible to seizure" by authorities in some foreign countries, despite claims of confidentiality).

⁴³ Model Rule of Prof. Responsibility, R 1.5(a) (1983) (listing eight factors to be considered in determining the reasonableness of fees generally including the time and labor required, the novelty and difficulty of the questions presented, the skill required to perform the legal service, and other considerations), available at http://www.abanet.org/cpr/mrpc/rule_1_5.html.

⁴⁴ See Model Rule of Prof. Responsibility, R 5.4(a) & (b) (1983), available at http://www.abanet.org/cpr/mrpc/rule_5_4.html.

⁴⁵ See A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 93-379 (1993) ("A lawyer may not charge a client more than her disbursements for services provided by third parties . . . except to the extent that the lawyer incurs costs additional to the direct cost of the third party services.").

ing that a “surcharge” could be added to the contract lawyer’s costs, but only if the total charge remains “reasonable.”⁴⁶ In substance, although lawyers cannot take a contract lawyer’s work, mark it up as their own, and then charge a premium, a lawyer could use the contract lawyer’s work as the base for the lawyer’s own work, and then charge for the lawyer’s services (paying the contract lawyer separately, out of the lawyer’s own funds).

Predictably, the ABA Committee, in its 2008 opinion on outsourcing applied the same approach as in its 2000 Surcharge Opinion on fees for contract lawyer services.⁴⁷ Other recent opinions, however, offer more restricted views on appropriate billing for outsourced legal support services. The New York City Bar Association, for example, held that “[a]bsent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing,” plus a reasonable allocation of overhead.⁴⁸ The Los Angeles Bar Ethics Committee took the view, under California law, that “the attorney must accurately disclose [to the client] the basis upon which any cost is passed on to the client.”⁴⁹

These suggestions for full disclosure of fee arrangements actually echo some of the suggestions (but not requirements) outlined in the ABA Surcharge Opinion from 2000. That opinion suggested that “in many instances, the fee and cost structure for a legal engagement” is reflected in a formal agreement between client and lawyer.⁵⁰ Such an agreement, the ABA Committee concluded, “or a disclosure concerning fees and costs, may be required by the rules in some circumstances.”⁵¹ Although the ABA Committee found “no requirement under the rules for disclosing the identity of specific personnel assigned to a client’s matter absent client inquiry,” the Committee recognized that “client expectations, and the overall client-lawyer relationship may make such disclosure desirable.”⁵² The Committee opined that the “spirit” of the Rules “best is served by communication whenever the fee basis or rate structure for services provided to a regularly represented client changes.”⁵³

Concerns for potential client misunderstandings about fee structures for outsourcing services, coupled with concerns about client confidentiality and conflicts (discussed above), all suggest that careful discussion with a client on the nature and arrangements for outsourcing support may

⁴⁶ See A.B.A. Comm. on Ethics and Prof. Responsibility, Formal Op. 00-420 (2000) [hereinafter ABA Surcharge Op.]. The ABA Committee noted:

When costs associated with legal services of a contract lawyer are billed to the client as fees for legal services, the amount that may be charged for such services is governed by the requirement of Model Rule 1.5(a) that a lawyer’s fee shall be reasonable. A surcharge to the costs may be added by the billing lawyer if the total charge represents a reasonable fee for services provided to the client. When legal services of a contract lawyer are billed to the client as an expense or cost, in the absence of any understanding to the contrary with the client, the client may be charged only the cost directly associated with the services, including expenses incurred by the billing lawyer to obtain and provide the benefit of the contract lawyer’s services.

⁴⁷ ABA Outsourcing Op., *supra* note 17, at 5–6 (citing ABA Surcharge Op., *supra* note 46).

⁴⁸ ABCNY Op., *supra* note 21 (“inappropriate” to include cost of outsourcing in legal fees).

⁴⁹ Los Angeles Op., *supra* note 40, at 11 (emphasis added) (noting California requirement that client “be kept reasonably informed about significant developments relating to the representation”).

⁵⁰ ABA Surcharge Op., *supra* note 46, at 1 n.1.

⁵¹ *Id.*

⁵² *Id.* at 2 n.1.

⁵³ *Id.* at 4. The ABA Committee also noted several state ethics opinions, which “expressly or impliedly observe[] that it is improper to add surcharges on payments made to a contract lawyer when billed to the client as disbursements unless there is an agreement with the client or disclosure about a markup in advance of the billing.” *Id.* at 6 (citing to ethics opinions from Virginia, Colorado, and the District of Columbia).

be the best way to uphold the lawyer's obligation to provide the client competent and effective services.⁵⁴

The New York City Bar Association, in this regard, has opined on circumstances where disclosure may be essential: (1) Where the outsourcing service will "play a significant role in the matter," for example, where "several non-lawyers are being hired to do an important document review." (2) Where "client confidences and secrets" must be shared. (3) Where "the client expects that only personnel employed by the law firm will handle the matter." (4) Where outsourcing services are to be billed to the client on a basis "other than cost." In short, the client is entitled to know who is providing legal representation and is entitled to know the basis on which an outsourcing service may be assisting the supervising lawyer.⁵⁵

In the Second Request context, where time may be compressed due to the need to complete a deal promptly, advance consideration and disclosure of plans for how to handle large volumes of information may be essential. If outsourcing is an option, the client should be informed, if possible, in advance of expected arrangements for such work.

Conclusion

The burdens and costs involved in responding to Second Requests can be crushing. As a result, the use of outsourcing to ameliorate the difficulties in responding efficiently may become increasingly attractive to clients. Counsel involved in Second Request processing thus must familiarize themselves with the norms of outsourcing practice and learn to recognize the ethical hazards involved in such practices.

The past year has been economically unclear for the legal profession in general, and for in-house counsel in particular. But the ongoing changes in the profession started much earlier than this most recent downturn of the economy. The changing economics of law may well, in time, work a "transformation" in how legal work is staffed and completed.⁵⁶ These changes, however, implicate various ethical concerns, many of which are fundamental to the profession. For lawyers and their clients involved in the transformation of established methods of doing business into new, perhaps more efficient, arrangements, a solid understanding of these fundamental principles is essential. Lawyers and their clients, moreover, must "watch this space," as new ethical opinions and guidelines seek to answer some of the more difficult questions involved in this transformation of the modern profession. ●

⁵⁴ The Model Rules, in this regard, require that a lawyer *shall* "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed about the status of the matter." Model Rule of Prof. Responsibility, R 1.4(a) (2)–(3) (1983), available at http://www.abanet.org/cpr/mrpc/rule_1_4.html. Further, a lawyer must explain a matter to a client, "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rule of Prof. Responsibility, R 1.4 (b).

⁵⁵ The ABCNY Opinion cited an earlier New York State Bar Opinion to the effect that, where a contract lawyer is making "strategic decisions" or performing "other work that the client would expect of the senior lawyers working on the client's matters," the firm should disclose the nature of the work performed, and obtain client consent. ABCNY Op., *supra* note 21 (citing N.Y. St. B. Ass'n Comm. on Prof. Ethics, Op. 715 (1999)); see also ABA Outsourcing Op., *supra* note 17, at 4 ("clients are entitled to know who or what entity is representing them").

⁵⁶ See generally RICHARD SUSSKIND, THE END OF LAWYERS? (2008); RICHARD SUSSKIND, THE FUTURE OF LAW (1996).

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: We review three papers in this edition—two that could be categorized as background reading for the proposed Merger Guidelines revision; and a third that could sound the death knell for plaintiffs in rule of reason cases. The first paper, by Baye and Wright, asks empirically whether the complexity of the antitrust matter and the extent to which judges have grounding in economic analysis affect the likelihood that a trial decision will be appealed; the second, by Sidak and Teece, argues that the Guidelines should better reflect the realities of dynamic, Schumpeterian competition; and the third, by Carrier, examines and classifies the rationales for decision of all of the cases in which courts expressly applied the rule of reason over the past decade. Send suggestions for papers to review, or your comments, to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Michael R. Baye and Joshua Wright, Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals (Aug. 21, 2009)

<http://www.abanet.org/antitrust/at-source/09/10/Oct09-BayeWright10-23.pdf>

Against the backdrop of the FTC and DOJ's announcement that they will consider revisions to the Merger Guidelines, there are two papers that could be categorized as "background reading" for the revision. One of the papers, by Michael R. Baye (former chief economist at the FTC and now at the University of Indiana) and Joshua Wright (George Mason University School of Law), addresses the extent to which the economic complexity of antitrust cases, joined with the "generalist" training of lower court judges, has affected the likelihood of appeal of lower court decisions.

The paper begins by noting that antitrust has moved away from what were in effect per se market share-based rules to identify market or monopoly power to an effects-based analysis. But the effects-based analysis is inherently more complex than calculating market shares, and so the economics have become more "daunting for a generalist judge grappling with questions involving merger simulations, demand elasticity, critical loss analysis, the competitive effects of horizontal mergers or vertical restraints, and evaluating conflicting econometric analyses." The paper also notes that "modern critiques of important antitrust decisions frequently amount to a claim that the judge misunderstood or misapplied the relevant economics, failed to recognize the critical economic issue, or relied on the opinions and analysis of the wrong expert."

This paper puts that view to the test by asking empirically whether the complexity of the antitrust matter and the extent to which judges have grounding in economic analysis affect the likelihood that a trial decision will be appealed. The paper focuses on the likelihood of appeal because "the appeal rate is a signal generated by actual costs incurred by the parties who, informed by their economic experts, are in a good position to evaluate whether the initial court committed . . . 'reversible error.'" The paper subsequently notes that economically complex cases

“are likely to result in larger zones of reasonable factual disagreement on substantive issues and divergent expectations with respect to the likelihood of success on appeal.” The authors acknowledge that while there may be other grounds for appeal, they nonetheless conclude that “a lower appeal rate likely means that the judge issued fewer opinions that left at least one party feeling strongly enough to invest in the opportunity to persuade an appellate court that the initial court committed reversible error.”¹

Problem 1: *Statements in the paper like the last cited above tend to conflate training with complexity. That is, the appeal rate is not, in and of itself, an indicator of the lack or strength of the economic training of the judge or of the complexity of the case. The paper addresses two separate questions, which aren't always clearly distinguished in the text. To wit, is a judge more grounded in the economics of antitrust less likely to render an appealable decision than less well-trained judges, holding constant the complexity of the case? Is a more complex antitrust case likely to result in a greater appeal rate, holding constant the training of the judge? In complex cases like Microsoft, Trinko, or Whole Foods, highly credentialed economists (and lawyers) disagreed ex post with the initial and appealed decisions even of well-trained judges. Thus, it is reasonable to expect that more complex cases are more likely to generate appeals because there will be “larger zones of reasonable factual disagreement on substantive issues.” In short, one would expect higher appeal rates for more complex cases even when the judges have a solid grounding in economics. The only remaining question, then, is whether the economics training reduces the likelihood of appeal in more complex matters.*

The authors use a standard econometric technique (“Probit”) to relate the probability that a decision will be appealed to an array of different factors including the economic complexity of the case, the economic “training” of the judges, the extent to which the judges had prior experience on antitrust cases, identity of the plaintiff, the type of case, and the location of the case, among others.

Bottom line: economically complex antitrust cases are 10 percent more likely to be appealed than “simple” antitrust cases (after controlling for other factors); some grounding in economics significantly reduces the likelihood of appeal in simple cases by 10 percent compared to no training, but has no effect on the appeal rate in complex cases; and repeated exposure to antitrust cases has no effect on the likelihood of appeal. Thus, these results suggest that for complicated cases, training the bench is not an answer, nor is a more specialized court that focuses on antitrust (given the apparent lack of learning-by-doing).

Assessing the credibility of these results requires understanding the data used to reach these conclusions. The authors collected a sample of 714 FTC and district court cases over the period 1996–2006.² The relevant case characteristics included whether or not the decision was appealed, the kind of case (merger, monopolization, price fixing, Robinson-Patman, and multiple claims), and the plaintiff (DOJ, FTC, private party, state AG). All of this seems reasonable.³

¹ To the extent that the variables measuring the economic complexity of the case and the training of the judges in particular are uncorrelated with these other non-substantive (e.g., procedural) reasons for filing an appeal, then the analysis of the authors won't be biased even if other factors are not included.

² There are seventy-three FTC decisions rendered by administrative law judges included in the sample, and nearly 95 percent of them were appealed to the Commission. Given the structure of the FTC—where the Commission itself is the final decision maker, this is probably not surprising. However, there was no noticeable difference in the reported results if these decisions are excluded from the sample.

³ The sample here is not a random sample of antitrust cases, but rather (as the authors note) a sample of “close call” cases. It's possible that the results for the “typical” antitrust case might differ from the close-call sample, but characterizing decisions in cases generally as economically sound or not would require both a substantial amount of effort and a slew of subjective judgments.

To identify the economic complexity of the case, the authors electronically searched the decisions to identify the presence (or not) of fourteen key terms “that one would expect to arise in a complex antitrust case involving sophisticated economic or econometric evidence.” These keywords included (among others) econometrics, economist, statistical evidence, regression, expert witness, expert report, and economic report. The paper defines a case as complex if the decision contains at least one of these fourteen terms. About 500 of the sample cases—nearly 70 percent of the total sample—were “simple” in that they contained none of these keywords.

Problem 2: *While identifying the characteristics of a complex case is complicated, the paper's definition of complexity may be too simplistic. Some “complex” cases will be much more complicated than others and so one would expect the degree of complexity to affect the likelihood of an appeal. One could imagine, for example, identifying cases in which both parties had retained one economist and other cases where multiple economists were retained by one or both parties, signaling more complex cases. However, that admittedly would have required more than just an electronic search of the decisions. Perhaps in future work, the authors might consider a complexity measure that is somewhat less crude. But even with key word identification, the paper could have defined complexity continuously as (for example) the number of times these keywords in the aggregate appeared in the decisions.*

Problem 3: *As noted above, the paper focuses on the likelihood of appeal because “the appeal rate is a signal generated by actual costs incurred by the parties who, informed by their economic experts, are in a good position to evaluate whether the initial court committed . . . ‘reversible error.’” But for “simple” cases, this rationale is not likely relevant. These are cases where the decision failed to mention any of the key words, including economist, Professor of Economics, expert witness, economic expert, or expert report. It seems reasonable to infer that no economist was part of the proceeding, and so the reasons for appeal in the simple cases had to be motivated by something other than an investment in the economic analysis.*

As discussed, a key focus of the paper is on the extent to which economic training of judges renders antitrust decisions sufficiently more clear cut so that appeals are less likely (at least based on the economic complexity of the case). Economic training is measured as whether the judges participated in a workshop sponsored by the George Mason University Law and Economics Center. As noted above, that training apparently was related to a lower appeal rate for simple cases, but had no statistically significant impact for complex matters.

Problem 4: *This definition of the “economic training” variable is obviously quite narrow, its key advantage being (apparently) that with relative ease, the authors could track which of the judges attended the workshop. At best, one would hope that this variable is highly correlated with the “true” economic training of the judges, including undergraduate and graduate-level courses, law school antitrust and economics courses, and other workshops (including, for example, various ABA workshops). It's not obvious why such a correlation would be present. In one variant of its analysis, the paper does include a variable indicating whether the judge has any graduate degrees, and that variable had a statistically insignificant impact on the appeal rate.*

How much weight one places on the results of this paper—that complex cases are significantly more likely to be appealed than simple cases, that the training of judges affects the appeal rate in simple but not complex cases, and that prior antitrust case experience does not affect the appeal rate—depends on the confidence one has in the measures of these variables in the paper. Given how these variables were constructed, the results could be spurious. Still, it is surprising that complexity and training had any effect on the appeal rate. And it's particularly troubling that prior antitrust experience did not affect the likelihood of appeal, holding complexity constant. If

these results were to withstand further empirical scrutiny, searching for greater simplicity in antitrust analysis (perhaps through revisions to the Guidelines), might be worth the candle.

J. Gregory Sidak and David Teece, Rewriting the Horizontal Merger Guidelines in the Name of Dynamic Competition

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1403930

Speaking of Merger Guideline revisions, Gregory Sidak (Criterion Economics) and David Teece (University of California–Berkeley) have drafted a short to-do list for the “Gang of Six” from the FTC and DOJ tasked with revising the Guidelines as an apparent prelude to a longer paper. First, the paper makes the argument that the Guidelines should better reflect the realities of dynamic, Schumpeterian competition, lamenting that the current Guidelines are far too static. A set of Guidelines that accounts for dynamic competition would, for example, substantially eliminate the relevance of market definition and market share.

Second, the authors disagree with Judge Posner and the Antitrust Modernization Committee (among others) that dynamic competition can be addressed within the current Guidelines. They contend that an effort to squeeze the square peg of dynamic competition into the round hole of the Guidelines’ static framework will result in an incoherent policy towards dynamic competition. Indeed, they observe that in a somewhat contradictory fashion, the AMC itself recommended the Guidelines be revised to account for dynamic efficiencies.

The paper argues that incorporating dynamic competition explicitly into the Guidelines is all the more pressing because the Guidelines have become embedded in the legal framework for antitrust analysis, including Section 1 and 2 cases: They are concerned that changes to the Guidelines to better reflect dynamic competition will take considerable time to be accepted by the courts and “it is unlikely that a coherent merger policy that recognizes the role of dynamic competition will emerge if the Antitrust Division and FTC fail to exercise leadership.”

In making this pitch for a revision to the Merger Guidelines, Sidak and Teece introduce the notion of dynamic competition in, well, Schumpeterian terms: Dynamic competition focuses on competition for the market via innovation, rather than competition in the market. But the paper fails to tell us what this means for merger policy—even if the competition is for the market, under what circumstances is a merger between firms competing for the market anticompetitive? It would certainly not be surprising to find that such Guidelines would focus on the same kinds of factors currently used in merger analysis: are the two rivals close competitors, are there other equally close competitors, what are the obstacles to entry and repositioning, what are the efficiencies from the merger?

As judged by their numerous references to the *Microsoft* litigation, Sidak and Teece are clearly playing off of the dynamic efficiency arguments used to explain Microsoft’s adoption of exclusionary practices. Thus, the paper notes that we should be prepared to tolerate a small deadweight (allocative) loss from monopoly if the gains are new products that are preferred by consumers. (Of course, this is not the right calculation—the Guidelines are largely focused on consumer welfare, not total welfare, and so the loss in consumer welfare from anticompetitive practices can be substantially larger than the deadweight loss.)

But even if portions of the Guidelines (e.g., the market definition discussion) are used in the context of Section 1 and 2 cases, the Guidelines are first and foremost about mergers, not about single-firm conduct. And to the extent that the dynamic competition arguments used in *Microsoft* were viewed as cover for exclusionary practices, then there is likely to be considerable skepticism

about the validity of this defense to what would otherwise be an anticompetitive merger. In short, making dynamic competition the central paradigm in the revised Guidelines does not seem very likely. And given what many may view as the typically nebulous nature of these dynamic claims, that outcome may be justified.

This short paper also makes other pitches for Guidelines revisions largely unrelated to tailoring the Guidelines to a dynamically competitive market environment. One is the suggestion that the remedies under the Guidelines should match the two-year horizon considered in merger cases, or the more reasonable suggestion that at least the “agencies should address the issue of developing an appropriate time horizon” for remedies. The authors also suggest that the revised Guidelines address developments in the understanding of two-sided markets (e.g., where firms provide platforms used to match different consumer sets).⁴

In addition, the paper believes that in revising the Guidelines, the agencies should consider the implications of “subtler counterfactuals”—namely, absent a merger, the relevant counterfactual may be “that prices that would otherwise fall might be stabilized” or that quality-adjusted post-merger prices may increase even if nominal prices fall. And a revised set of Guidelines might be more pro-active in identifying alternative merger transactions that would “have a lesser risk of reducing competition.”

Accounting both for mergers that reduce quality and for the extent to which prices would otherwise have fallen would require no more than footnotes to the existing Guidelines—these are factors that now are typically addressed in the course of merger investigations. The call for the agencies to identify more competitively acceptable merger partners is such a large giant step in the direction of industrial engineering that such a call is unlikely to be embraced by the agencies, for the usual panoply of reasons why the government should not second-guess decisions of private investors.

The paper closes by raising the specter that increased sector-specific regulation by the government, as the authors believe is likely to be the case during the Obama administration, could lead to “considerable amounts of bad antitrust analysis.” The paper, in particular, cites the FCC’s review of the XM-Sirius merger as an example of bad antitrust analysis. For that reason, Sidak and Teece believe that if dynamic competition is to have a role in this sector specific analysis, the agencies need to be aggressive in asserting leadership in antitrust enforcement so as to guide the debate.

My suggestion: Wait till the more detailed version of this paper is drafted.

—JRW

Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1480440

In this short paper, Professor Michael Carrier of Rutgers-Camden School of Law clarifies the practical meaning of the rule of reason. He calls his approach empirical because he examines and classifies the rationales for decision of all of the cases in which courts expressly applied the rule of reason over the past decade. But this sort of study is also squarely within the legal realist tradition, because it shows that what courts actually do is at least as important as what they say.⁵ His

⁴ For example, a game system can be considered a platform that matches one set of users (game developers) with another (game players).

⁵ I adopted a similar approach in William H. Page, *The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick*, 67 ANTITRUST L.J. 1 (1999).

results are especially interesting because of the growing prevalence of the rule of reason in antitrust law generally.

The paper updates a similar study Carrier published in 1999 that reviewed 495 cases decided under the rule of reason since 1977.⁶ He concluded in that article that courts applying the rule of reason use a burden-shifting approach. They first require the plaintiff to “show a significant anti-competitive effect.”⁷ If the plaintiff does so, the burden shifts to the defendant to “demonstrate a legitimate procompetitive justification.”⁸ If the defendant carries that burden, the plaintiff is given an opportunity to show that “the restraint is not reasonably necessary or that the defendant’s objectives could be achieved by less restrictive alternatives.” Only if the case passes that gauntlet does the court balance the anticompetitive and procompetitive effects. In 1999, Carrier found that 84 percent of the cases ended in a judgment for the defendant at the first stage of this analysis because the plaintiffs failed to show that the defendant’s conduct was anticompetitive. Only 3 percent of the cases were decided in favor of the plaintiff when the defendant failed to carry its burden of offering a procompetitive justification. In another 1 percent of cases, the plaintiff successfully rebutted the defendant’s justification and in 4 percent, the court actually engaged in balancing.

For the new paper, Carrier identifies 222 cases in which courts disposed of an antitrust case under the rule of reason.⁹ The burden-shifting pattern he found in the 1999 article was equally visible in this new data set.¹⁰ Carrier usefully categorizes the formulations of the test in the various circuits, but concludes that the burden-shifting pattern is almost universally followed, with possible exception of the Eleventh Circuit, which appears to allocate to the plaintiff the burden of proving both anticompetitive effect and the absence of a procompetitive justification.

The results of the study are striking. In the last decade, the courts disposed of an overwhelming 215 of 222 cases on the grounds that the plaintiff failed to show defendant’s conduct was anticompetitive, either because the conduct itself was not objectionable (110 cases) or because there was no market power (66 cases) or both (32 cases). In none did the defendant lose for failing to offer a justification and in only one did the defendant win by offering an un rebutted justification. In only five did the court engage in balancing,¹¹ with defendants winning all but one. The bottom line is that defendants lost only one reported rule of reason case.

The one plaintiffs’ victory was in *United States v. Visa U.S.A. Inc.*,¹² in which the court held that Visa’s rule prohibiting member banks from issuing rival credit cards reduced output and price competition, and was not justified by the goal of fostering network cohesion. In the other balancing cases, including the Ninth Circuit’s decision¹³ after remand of the *California Dental Association*

⁶ Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265.

⁷ *Id.* at 1268.

⁸ *Id.*

⁹ Carrier conducted a Westlaw search using the terms “DA(aft 2/2/1999) & antitrust & (rule +2 reason),” which resulted in 738 hits. Of these, 222 resulted in a dispositive decision. He ignores nondispositive rulings like denials of summary judgment or dismissal on the pleadings, or grants or denials of preliminary injunctions.

¹⁰ See also Thomas A. Lambert, Dr. Miles *Is Dead. Now What?: Structuring a Rule of Reason for Evaluating Minimum Resale Price Maintenance*, 50 WM. & MARY L. REV. 1937, 1997 (2009) (proposing a burden-shift approach to the rule of reason for RPM).

¹¹ He recognizes that there may be unreported cases in which juries balance competitive effects.

¹² 344 F.3d 229 (2d Cir. 2003).

¹³ *Cal. Dental Ass’n v. FTC*, 224 F.3d 942 (9th Cir. 2000).

case,¹⁴ the defendants won, even when the plaintiff made a colorable showing of anticompetitive effects, by offering a more convincing procompetitive justification for its conduct.

These results call to mind Richard Posner's observation over thirty years ago that "in practice" the rule of reason "is little more than a euphemism for nonliability."¹⁵ That observation may not be far off for modern analysis of vertical restraints. For horizontal restraints, the observation would be inaccurate, or at least would be an overstatement of these results, because *Carrier* did not include in this sample cases applying quick-look analysis, which is a species of the rule of reason.¹⁶ More generally, it could be that courts, for better or worse, are essentially deciding these cases at the characterization stage by assigning the losers to the full or fuller rule of reason category. ●

—WHP

¹⁴ *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

¹⁵ Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977).

¹⁶ *See, e.g., N. Texas Speciality Physicians v. FTC.*, 528 F.3d 346, 362–63 (5th Cir. 2008).