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Antitrust Law and Proof of Consumer Injury

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ANTITRUST LAW AND PROOF OF CONSUMER INJURY

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INTRODUCTION

The antitrust laws are intended to protect the market system by preserving competition.[1] The two principal antitrust laws are sections one and two of the Sherman Act. Section one is directed against restraints of trade.[2] Although section one stipulates that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal,"[3] it is evident that this law cannot be read literally. Contract law, "that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively," would be outlawed if courts read section one literally.[4] The statute has been interpreted to prohibit only unreasonable restraints of trade.[5]

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[1] *See* United States v. Syufy Enters., 903 F.2d 659, 662–63 (9th Cir. 1990).

[2] Section one of the Sherman Act was complemented by section seven of the Clayton Act in 1914. Concerned about the Supreme Court's permissive stance towards mergers, Congress enacted the Clayton Act to prevent mergers between competing firms that lessened competition. *See* E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 271–72 (1994). Section seven of the Clayton Act was amended in 1950 to proscribe any purchases of stock or assets by any person where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1994). Although the legislative history of the statute includes a number of noneconomic goals such as the protection of small businesses and the preservation of local control, the economic effect of a decrease in competition has been the concern that has guided the application of this statute. *See* 4 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 903b (1998).

[3] 15 U.S.C. § 1 (1994).

[4] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

[5] *See* 7 PHILIP E. AREEDA, ANTITRUST LAW, ¶ 1501 (1986).

Section two is directed against monopolization, actual or attempted.[6] Although the language in the Sherman Act is amenable to a number of interpretations, courts have narrowed the meaning of these statutes considerably. The discussion that follows will demonstrate that two principles guide the courts' application of these laws. First, the objective of the antitrust laws is the prevention of injury to consumers. Second, the antitrust laws are intended to protect competition, not competitors. Requiring some evidence of consumer injury ensures that the antitrust laws are applied in a fashion that is directly consistent with the fundamental objectives.

The consumer injury requirement can be understood as an element to be proved before liability can be found under the antitrust laws. This requirement serves two purposes in addition to the protection of consumers from truly anticompetitive practices. First, the requirement facilitates the expeditious resolution of legal disputes. Second, the requirement establishes clearer guidelines for businesses that are wary of running afoul of the antitrust laws. These effects are particularly important because of the threat of lawsuits by competitors. The Clayton Act permits private plaintiffs to seek monetary and injunctive relief for violations of the antitrust laws. Under section four, any person who has been injured in his business or property by "anything forbidden in the antitrust laws" may recover "threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."[7] Section sixteen of the Clayton Act provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief... against threatened loss or damage by a violation of the antitrust laws . . . ."[8]

Permissive legal standards, which prevent courts from screening out frivolous lawsuits, give rise to conduct and legal rulings that subvert the purpose of the antitrust laws. Requiring proof of injury to consumers furthers the objectives of the antitrust laws by facilitating the dismissal of meritless claims at an earlier stage in the course of legal proceedings.

One can argue that the government should not be required to prove injury to consumers because the anticompetitive motive

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[6] *See* 15 U.S.C. § 2 (1994).
[7] 15 U.S.C. § 15 (1994).
[8] 15 U.S.C. § 26 (1994).

that is often present in actions brought by private plaintiffs is absent in actions initiated by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). This position overlooks the costs of uncertainty that would be created if the requirements for finding liability under the antitrust law depended upon the identity of the party filing suit. A consumer injury requirement provides a clearer benchmark that can be used by decision makers to determine whether a business decision is legal or illegal under the antitrust laws. The existence of a recognized standard for conduct reduces costs associated with uncertainty. More certain knowledge that conduct that injures consumers is illegal under the antitrust laws enables firms to develop business strategies with greater confidence.

The following discussion will explore the effect that making more explicit a consumer injury requirement would have on antitrust law, as well as methods for implementing a consumer injury requirement.

EFFECTS OF A CONSUMER INJURY REQUIREMENT

A consumer injury requirement should become a more explicit part of the elements that must be proved by plaintiffs in cases arising under the antitrust laws.

A. *Claims Arising Under the Sherman Act, Section One*

The two major analytical frameworks for examining the legality of horizontal agreements are the per se rule and the rule of reason.[9] The application of the per se rule is guided by an empirical assessment of the effect of the restraint in question on

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[9] A third mode of analysis known as the "quick look" has also been used by courts. The "quick look" rule of reason is applied in situations where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." Cal. Dental Ass'n. v. FTC, 526 U.S. 756, 770 (1999). In cases where the restraint can be characterized in this manner, a defendant may have an opportunity to offer a procompetitive justification for the challenged restraint. If a legitimate justification is demonstrated, analysis proceeds under the rule of reason. If the defendant fails to provide a legitimate procompetitive justification, the challenged measure is invalidated under the per se rule. *See* James A. Keyte, *What It Is and How It Is Being Applied: The "Quick Look" Rule of Reason*, 11 ANTITRUST 21 (1997); *see also* United States v. Brown Univ., 5 F.3d 658, 669 (1993) (discussing application of the "quick look" rule of reason).

economic efficiency.[10] Courts routinely condemn "naked" restraints that have the sole purpose of restricting competition and reducing output because their deleterious effect can be predicted with near certainty.[11] In essence, under the per se rule, the anticompetitive effects, including those on consumers, are presumed, because practices, such as price fixing, are universally thought to be without the possibility of redeeming virtue.

The rule of reason is the residual category that is used to assess the legality of restraints which are not proscribed under the per se rule. In *Chicago Board of Trade v. United States*,[12] the Supreme Court set forth the principles that would guide judicial inquiry under the rule of reason. The Court stated "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[13] This test has been given greater definition in recent years. Inquiry under the rule of reason typically asks whether "the challenged restraint has a substantially adverse effect on competition [and] . . . whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts."[14] Stated otherwise, the rule of reason requires courts to consider the efficiency implications of horizontal agreements by examining their effect on competition. A plaintiff can establish anticompetitive effect through proof of increased prices, reduced output, or decreased quality.[15]

The Supreme Court has indicated that the Sherman Act is based on the legislature's belief that competition yields desirable economic outcomes.[16] Restraints such as agreements to fix prices

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[10] *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 100 (1984) ("[A] *per se* rule is applied when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' ") (quoting Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 19–20 (1979)).

[11] *See id.* at 109–10.

[12] 246 U.S. 231 (1918).

[13] *Id.* at 238.

[14] Law v. Nat'l Collegiate Athletic Ass'n, 134 F.3d 1010, 1017 (10th Cir. 1998).

[15] *See, e.g.*, Virgin Atl. Airways Ltd. v. British Airways, PLC., 257 F.3d 256, 264 (2d Cir. 2001).

[16] "The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." Nat'l Soc'y of

or rig bids are deemed undesirable from a societal viewpoint because they reduce the level of competition in the economy.[17]

The emphasis on efficiency in the Supreme Court's treatment of claims arising under section one is evident in opinions such as *Broadcast Music Inc. v. CBS*[18] Consider the Court's discussion of the appropriate scope of per se rules in *Broadcast Music.*

> [I]n characterizing... conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, ... the purpose of the practice [is] to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive".[19]

The Court appears to identify protection of competition and promotion of efficiency as the two objectives of antitrust law.

The dispute in *Broadcast Music* revolved around a blanket license issued by a group of corporations consisting of owners of performance rights to musical compositions.[20] The blanket license permitted the licensee to play any composition in Broadcast Music Incorporated's (BMI) collection.[21] This practice was challenged under section one of the Sherman Act as an unlawful restraint of trade.[22] The Court ruled that the practice would not be condemned under the per se prohibition against price fixing because of the efficiency implications of the arrangement developed by BMI.[23] Although the blanket license had the effect of restraining price competition, the arrangement generated

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Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

[17] *See* Dennis O. Doherty, Note, Business Electronics Corp. v. Sharp Elecs. Corp.: Monsanto's *Progeny and the Congressional Proposal to Codify the Per Se Rule Against Vertical Price Fixing*, 38 CATH. U. L. REV. 963, 988–1000 (1989) (discussing price fixing reducing competition); James T. Halverson, *An Overview of Legal and Economic Issues and the Relevance of the Vertical Merger Guidelines*, 52 ANTITRUST L.J 49, 64–66 (1983) (discussing price fixing resulting in reduction of interband and intraband competition).

[18] 441 U.S. 1 (1979).

[19] *Id.* at 19–20 (citations and footnotes omitted).

[20] *See id.* at 5–6.

[21] *See id.* at 5.

[22] *Id.* at 6.

[23] *See id.* at 19–24.

significant efficiencies. Hovenkamp succinctly summarizes the efficiencies generated by the arrangement as follows:

> The blanket license arrangement saved untold millions of dollars in transactions costs. Few radio stations could afford to negotiate individually for the right to perform every piece of music they played on the air. If they did, advertising costs would soar and the amount of music played would drop.... Furthermore, the "shelf life" of many popular songs is rather short. The performance right might become worthless while the station was negotiating for the right to play it.[24]

The challenged measure escaped invalidation under the per se prohibition against price fixing because it promoted competition and increased efficiency. The Court went so far as to suggest that the substantial reduction in costs differentiated the blanket license from individual use licenses.[25] Consumers of music were benefited by a new good—the blanket license.[26] The decrease in transaction costs made possible by the blanket license increased the "consumption" of music by listeners.

The case, however, demonstrates the problem with focusing only on the "effect on competition." The blanket license clearly reduces competition. Only by focusing on the effect on consumers of music while also taking into account efficiencies do you reach the result reached by the Supreme Court and find the arrangements lawful.

Subsequent opinions have been premised on a similar analysis of injury to competition, i.e. one where there is, after taking into account efficiencies, an impact on consumers. *California Dental Ass'n v. FTC*[27] has added a great deal of definition to the nature of the injury that must be proved to establish a successful claim under section one. In *California Dental* a nonprofit professional association of dentists sought judicial review of a FTC cease and desist order directed at

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[24] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 193 (1994).

[25] *Broad. Music*, 441 U.S. at 21–22.

[26] This interpretation of the Court's discussion has been adopted by lower courts. *See, e.g.*, United States v. A. Lanoy Alston, 974 F.2d 1206, 1209 (9th Cir. 1992) (noting that the *Broad. Music* case describes an industry in which horizontal restraints on competition are essential if the product is to be available at all).

[27] 526 U.S. 756 (1999).

advertising restrictions that had been adopted by the California Dental Association (CDA).[28] In a proceeding initiated by the FTC, an administrative law judge had found that restrictions on certain forms of advertisement were an unlawful restraint of trade.[29] The Supreme Court was critical of the lower court's analysis of the challenged restraint. The Court indicated that the examination of the restraint should have proceeded under the following terms: "The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services."[30] The opinion directs courts to treat higher prices or reduced supply as indicia of anticompetitive effect.[31] These are the hallmarks of consumer injury. Indeed, the Court suggests the test is whether "the arrangements in question would have an anticompetitive *effect on customers* and markets."[32]

In disputes arising under section one, the consumer injury requirement forces courts to determine whether restraints on commerce are conducive to the welfare of consumers, i.e., whether they are reasonable. The test ensures that output and pricing decisions are made autonomously by economic entities unless the efficiency implications of coordination clearly favor consumers, as in the case of *Broadcast Music*

B. Claims Arising Under the Sherman Act, Section Two

A consumer injury requirement is particularly important in claims arising under section two of the Sherman Act. The offense of monopolization contains two elements: "(1) the possession of monopoly power in the relevant market and (2) the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[33] Efforts to add definition to this second element of the offense have proven to be challenging for courts, litigants, and commentators alike because

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[28] *Id.* at 761–62.

[29] *See* Cal. Dental Ass'n v. FTC, 128 F.3d 720, 724–25 (9th Cir. 1997).

[30] *Id.* at 776.

[31] *See id.* at 777; *see also* Gen. Leaseways, Inc., v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 594–95 (7th Cir. 1984) (asserting that raising prices, reducing supply, and dividing markets all have the same anti-competitive effect).

[32] *Cal. Dental*, 526 U.S. at 770 (emphasis added).

[33] United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

the conduct which gives rise to monopolization claims is often similar to conduct that is widely regarded as procompetitive.[34] Mistaken condemnation of procompetitive conduct threatens to chill conduct in the marketplace that is conducive to the attainment of efficient results. The challenge facing courts, commentators, and practitioners is promulgating legal standards that will enable adjudicators to reliably differentiate between these two types of conduct. Judge Posner's description of the conduct of those in business provides a useful point of departure:

> Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.[35]

This conception of the permissible bounds of conduct for businesses is compatible with our current understanding of the purposes of antitrust law–the promotion of efficiency. Courts have repeatedly reminded litigants that the antitrust laws are not intended to deal with conduct that is merely amenable to characterizations such as "unfair" or "predatory."[36]

Similar principles have guided the development of antitrust standing law. In order to assert a private cause of action under section four of the Clayton Act, plaintiffs must demonstrate antitrust injury.[37] The Supreme Court has defined antitrust injury as "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts

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[34] *See* Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) ("Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.").

[35] Olympia Equip. Leasing Co. v. Western Union Tel., 797 F.2d 370, 379 (7th Cir. 1986).

[36] *See, e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993). The *Brooke Group* court stated:

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

Id. (quoting Hunt v. Crumboch, 325 U.S. 821, 826 (1945)).

[37] Section four of the Clayton Act provides a private cause of action to any person who has been injured by "anything forbidden in the antitrust laws." 15 U.S.C. § 15 (2000).

unlawful."[38] At least one court has ruled that in order to satisfy this requirement, a private plaintiff must demonstrate that its loss is attributable to conduct which raises price or reduces output for consumers.[39] Although a discussion of the antitrust injury requirement would fall beyond the scope of this paper, it is useful to recognize the pervasiveness of the belief that actions brought pursuant to the antitrust laws should have the effect of promoting its objectives.

It has been suggested that a requirement that plaintiffs submit proof of consumer injury in the form of circumstances such as higher prices or reduced output suffers from a logical flaw.[40] If an incumbent monopolist engages in anticompetitive practices in defense of its monopoly, there will be no change in prices if it succeeds—monopoly prices will simply persist.[41] This criticism misconstrues the nature of the inquiry demanded by the consumer injury requirement. When a section two action is initiated against an incumbent firm for conduct that is intended to preserve monopoly power, some connection must be found between the exclusionary act and the welfare of consumers. Courts must ask how consumers have been made worse off by the challenged practice. Predatory pricing, if it prevents entry or lower long run pricing would result in consumer injury and be illegal. There is no logical flaw in employing the test.

The notion of consumer injury has been an implicit part of the Supreme Court's treatment of claims arising under section two. The requirement ensures that only practices that are inimical to the welfare of consumers are condemned.[42] The relationship between consumer injury and two causes of action will be examined in turn: (1) predatory pricing and (2) exclusionary conduct.

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[38] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

[39] *See* Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992).

[40] See David A. Balto & Ernest A. Nagata, Proof of Competitive Effects in Monopolization Cases: A Response to Professor Muris, 68 ANTITRUST L.J. 309, 311–12 (2000).

[41] *See id.* at 312.

[42] Others have also noted the need to explicate a connection between conduct and anticompetitive effect. *See, e.g.*, Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 696–97 (2000).

1. Predatory Pricing

A predatory pricing claim consists of two elements. First, the plaintiff must prove that a rival has set its price below cost.[43] Second, the plaintiff must demonstrate that "the competitor had a reasonable prospect, or, under section 2 of the Sherman Act, a dangerous probability of recouping its investment in below-cost prices."[44] To satisfy this element, evidence must be adduced to demonstrate either that the alleged predator has recouped its investment through the elevation of price or that recoupment is likely.[45] The second element ensures that conduct that benefits consumers is not condemned under the antitrust laws. If there is no recoupment of the "investment" in lower prices in the form of monopoly or supracompetitive rents in the time period following successful predation, consumers are benefit by the lower prices that existed during the period of aggressive pricing.[46] The Supreme Court has adopted this line of reasoning in recent opinions. In *Brooke Group Ltd. v. Brown & Williamson Tabacco Corp.* , the Court observed that "[a]lthough unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers."[47]

The stringency of the current standard reflects the skepticism of the judiciary about the plausibility of predatory pricing. Influenced to no small extent by the scholarship of the Chicago School of antitrust analysis, the Supreme Court's current skepticism is based on an empirical assessment of the frequency of predatory pricing.[48] The Court has treated predatory pricing as

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[43] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–25 (1993).

[44] *Brooke Group*, 509 U.S. at 224 (citations omitted).

[45] The requirement that the plaintiff demonstrate that recoupment has occurred or is likely should be distinguished from a requirement that the plaintiff demonstrate present harm to consumers. Conceptually, the two requirements are distinct. A present harm requirement would prevent plaintiffs from asserting claims under section two until monopolization was successful and actual injury was suffered by consumers. *See* FRANKLIN M. FISHER & DANIEL L. RUBINFELD, *Misconceptions, Misdirections, and Mistakes, in* DID MICROSOFT HARM CONSUMERS?: TWO OPPOSING VIEWS 87, 88 (2000), *available at* http://www.aei-brookings.org/publications/books/consumers.pdf. I am not arguing for such a test. Likely harm is sufficient.

[46] *See Brooke Group*, 509 U.S. at 224.

[47] *Id.*

[48] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589–90 (1986).

an uncommon practice—one that is "rarely tried, and even more rarely successful."[49]

This position has been challenged in recent years as antitrust scholars have embraced the scholarship of economists who have developed models that suggest that predatory pricing is a rational and plausible strategy.[50] For example, economists have attempted to demonstrate the relationship between a firm's pricing practices and its reputation among competitors.[51] This new approach suggests that aggressive pricing could be used to create a reputation for irrationality that will deter other competitors from entering a market or competing on the basis of price.[52] This reasoning is often applied in the context of a model with multiple markets.[53] The investment in establishing a reputation for irrationality through below-cost pricing in one or a few markets is offset by the increased returns in other markets where competitors have learned about the reputation for irrational behavior.[54] Under this model, pricing that is below cost and unremunerative in a single market may be a part of a multimarket predatory pricing strategy. Although this claim might be plausible, it is unclear how this model could be used to generate a legal standard.[55] A court would be hard-pressed to distinguish between vigorous price competition and predation.

In the absence of a reliable and widely accepted adjudicatory methodology for distinguishing between these two types of practices, a legal standard that imposes criminal or civil liability

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[49] *Id.* at 589. In *Matsushita Elec.*, the Supreme Court cites with approval the scholarship of Chicago School commentators such as Robert Bork, Frank Easterbrook, and John McGee. *Id.*

[50] *See* Ind. Grocery Co. v. Super Valu Stores, Inc., 684 F. Supp. 561, 575–76 (S.D. Ind. 1988).

[51] *See* Jonathan B. Baker, *Challenges To The Chicago School Approach: Recent Developments in Economics That Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 649 (1989).

[52] *See id.*

[53] *See id.*

[54] *See id.* (noting how "rivals" that have not been exposed to predatory competition may fear that the irrational firms will predate against them).

[55] At least one court has acknowledged the plausibility of a predatory pricing scheme that is effectuated through the development of reputation for aggressive pricing. *See* Advo Inc. v. Phila. Newspapers, 51 F.3d 1191, 1196 n.4 (3d Cir. 1995). The court used the multiple market scenario to illustrate the plausibility of predation in a context where a predator needs to make a relatively small investment to reap large rewards. In *Advo* the plaintiff failed to adduce facts sufficient to withstand summary judgment. *Id.*

on the basis of injury to the competitive process broadly understood may prove to be undesirable from a societal standpoint. Consider the Supreme Court's discussion of the welfare implications of relaxing the current legal standard for predatory pricing claims:

> [T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[56]

The current recoupment requirement ensures that the predatory pricing claims are resolved in a manner that is consistent with the objectives of the antitrust laws. In a successful predation scheme, the injury to consumers arises from the monopoly that is enjoyed by the predator—prices are increased, and the quantity of output that is consumed decreases.[57] For consumers to suffer injury, the losses that are inflicted by the post-predation behavior of the monopolist must exceed any gains that accrued to them during the period of low pricing.[58] The recoupment requirement ensures that courts will not condemn bouts of aggressive pricing that occur during a course of conduct that is, on balance, beneficial to consumers.

2. Exclusionary Conduct

A second type of section two claim that is subject to the rule of reason analysis arises from practices that are perceived to be exclusionary. A well-known example of this cause of action is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[59] *Aspen Skiing* arose from a dispute between the owners of downhill ski facilities

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[56] Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 n.17 (1986) (internal quotations and citations omitted).

[57] *See* William H. Jordan, Comment, *Predatory Pricing After Brooke Group: The Problem of State "Sales Below Cost" Statutes*, 44 EMORY L.J. 267, 289 (1995) ("The injury to . . . consumers . . . occurs only when a firm, after having driving its competitors out of the market, uses its newly acquired market share or monopoly power to restrict output and raise prices to supracompetitive levels.").

[58] *See id.* ([I]n order to injure consumers, the prices set by the surviving firm must not increase merely to a level above that which would prevail in a competitive market, but the prices must rise to a supracompetitive level for a time period sufficient to allow the predator firm to recover its investment . . . .").

[59] 472 U.S. 585 (1985).

in Aspen, Colorado. Aspen Highlands Skiing Corporation ("Highlands") filed a claim under section two alleging that Aspen Skiing Company ("Skiing Co.") had monopolized the market for downhill skiing in the area.[60] Highlands owned one of four downhill skiing facilities in the region. Skiing Co. owned the remaining three facilities. The suit arose from the termination of a joint venture in which the two firms offered an "All Aspen" ticket that permitted holders to ski at all four facilities.[61] Skiing Co. withdrew from the joint venture, making it extremely difficult for Highlands to compete.[62]

The Supreme Court upheld the lower court's finding that Skiing Co. had engaged in conduct that violated the Sherman Act.[63] The Supreme Court's decision to affirm rested on two bases. First, defendant Skiing Co. failed to offer any efficiency justification for its conduct.[64] Second, Skiing Co.'s conduct injured the plaintiff and consumers.[65] Ample evidence was offered at trial that demonstrated that consumers preferred the "All Aspen" package that was eliminated by defendant's challenged action.[66] The Court found that "the evidence supports an inference that Ski[ing] Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill, in exchange for a perceived long-run impact on its smaller rival."[67] The finding of liability in *Aspen Skiing.* appears to be based on the connection between conduct that is injurious to competitors and the detrimental effects of such conduct on consumers. The consumer injury requirement helps to establish constraints on the types of unilateral conduct that could be employed by a dominant firm in a market. Making more explicit a requirement of consumer injury would ensure that only conduct that is injurious to consumers would be condemned.

A finding of illegality must turn on the nature of the challenged business practice.[68] If there is no legitimate

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[60] *See id.* at 595.
[61] *See id.* at 589–90.
[62] *Id.* at 594–95.
[63] *Id.* at 611.
[64] *See id.* at 608–10.
[65] *See id.* at 610.
[66] *See id.* at 605.
[67] *Id.* at 610–11.
[68] *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986) ("[I]n light of the absence of any rational motive to conspire, neither

procompetitive justification for the practice, a finding of illegality is appropriate.[69] This is analogous to the situation in *Aspen Skiing* where the challenged practice produced no benefits for consumers and could not be explained by any rationale aside from the accretion or maintenance of monopoly power.

If the challenged practice is unprofitable for the incumbent firm but for future monopoly profits, a finding of illegality is clearly appropriate.[70] This is analogous to the recoupment requirement in a predatory pricing case. Harm is suffered by consumers because of the reduction of output, decrease in quality, and/or increase in price to monopoly levels in the post-predation period. The success of the practice depends on the achievement of a result that injures consumers, or the likelihood of such a result. If the challenged practice would have been implemented by the incumbent firm for economic or technological reasons regardless of whether the monopoly would have been preserved, the practice should not be condemned. In this case, the decision to adopt the practice would not depend on the achievement of an outcome that is injurious to consumers. The consumer injury requirement enables the courts to identify practices that are undesirable from a societal standpoint with greater accuracy.

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petitioners' pricing practices, nor their conduct in the Japanese market, nor their agreements respecting prices and distribution in the American market, suffice to create a 'genuine issue for trial.'"); *see also* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 584 (1991) (noting that a plaintiff who alleges the illegality of "adverse price and output effects" must "establish that its injuries result from those same price and output effects").

[69] *See* Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1322–23 (1999) ("If the defendant cannot convince the judge that its practices are an essential feature of competition . . . the judge prohibits the practice.").

[70] *See Matsushita Elec. Indus.*, 475 U.S. at 588–89. The Court in *Matsushita Elec. Indus.* stated:

> Any agreement to price below the competitive level requires conspirators to forgo profits that free competition would offer them. The forgone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.

Id. at 588–89. The Court went on to explain that absent evidence of such an expectation, the accretion of monopoly power would be found unreasonable. *Id.* at 593; *see also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) ("Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment . . . .").

A demonstration of injury to consumers ensures that desirable competition is not condemned under the antitrust laws; without more, the mere absence or demise of competitors will not trigger the application of section two. At least one court has remarked that the Supreme Court's understanding of antitrust policy has shifted from "the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency."[71] Competition is a process that is protected because it yields efficient results. The outcome of the competitive process may be few firms, or even one firm. As one commentator has noted, under the Supreme Court's current antitrust jurisprudence, there is "no stigma attached to victory in the contest for consumers' favor."[72]

Section two is intended to condemn conduct that lessens competition *and* injures consumers through resulting increases in price or decreases in output or reduction in quality.[73] The consumer injury requirement enables courts to distinguish legitimate claims under section two from the results of vigorous competition on the merits.

METHODS FOR IMPLEMENTING A CONSUMER INJURY REQUIREMENT

The adoption of a more explicit consumer injury requirement

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[71] Olympia Equip. Leasing Co., ALFCO v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986); *see also* Prods. Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 664 (7th Cir. 1982) ("The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.").

[72] Frank H. Easterbrook, *Monopolization: Past, Present, Future*, 61 ANTITRUST L.J. 99, 105 (1992).

[73] *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 457–58 (1993). "[T]he notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act." *Id.* at 457. "The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Id.* at 458. *But see* Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1036 (2000). Hovenkamp states,

> Nothing in the debates of the Sherman Act's framers enlightens us further. Section 2 . . . created a new federal offense but provided only the vaguest guidelines as to its meaning or the particular acts that would constitute a violation. The only thing that seems clear is that the monopolizing offense refers to someone who acquires or attempts to acquire all of the business in the market, and that this acquisition could not be the result of superior skill or industry.

Id.

in cases arising under sections one and two of the Sherman Act would sharpen the evidentiary requirements for competitive injury.

The *California Dental* opinion defined the type of proof that would be required to assert a viable claim under the antitrust laws.[74] The Supreme Court laid a great deal of stress on the need for plaintiffs to adduce empirical evidence of injury.[75] *California Dental* reflects wariness of the tendency for courts, commentators and litigants to supplant factual inquiry with economic theory. The Court's remarks in *California Dental* are instructive:

> [B]efore a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, . . . there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.[76]

This position is consistent with earlier opinions in which the Court has laid down similar strictures.[77]

Courts should require plaintiffs to set forth evidence of consumer injury in the form of higher prices, reduced output, or deterioration in the quality of goods and services, in addition to evidence of anticompetitive conduct that violates the antitrust laws. Defendants should have an opportunity to rebut plaintiffs' claims by demonstrating that the perceived consumer injury is not attributable to the challenged conduct.

A number of commentators have evinced concern that a heightened evidentiary standard will favor defendants. First, they argue that the factual inquiry demanded under the rule of reason is costly.[78] Inquiry under the rule of reason that is more

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[74] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 759 (1999).

[75] *See id.* at 776.

[76] *Id.* at 775 n.12.

[77] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466–69 (1992); William J. Kolasky, *California Dental Association v. FTC: The New Antitrust Empiricism*, 14 ANTITRUST L.J. 68 (1999).

[78] Concerns about the costs associated with heightened evidentiary requirements under the rule of reason have been discussed widely. *See, e.g.*, Eugene Crew & Richard Grossman, *Antitrust Litigation Reform: A Modest Proposal*, 7 ANTITRUST L.J. 41, 41–42 (1993). The costs may also distort the selection of legal arguments by plaintiffs. *See* Denny's Marina, Inc. v. Renfro

fact intensive may reduce the frequency with which antitrust claims are filed.. A second concern relates to the availability of empirical data that could be used to establish consumer injury. Concerns about the difficulty of measuring and proving increases in price, decreases in supply, or deterioration in the quality of goods and services have been raised by courts.[79]

However, critics who raise these objections to the stringent evidentiary requirements base their claim on an untenable assumption: the rate at which findings of liability currently take place more accurately reflects the incidence of antitrust violations than would be the case under a legal regime that requires explicit proof of consumer injury. To the extent that the current level of liability findings is based on antitrust standards that do not require explicit consideration of consumer injury, it is possible that instances of beneficial, procompetitive activity are being condemned.

CONCLUSION

Although economic theory may provide a useful guide for intuition, it is necessary to ensure that there is correspondence between the world described by the theorist and the world inhabited by the business person making business decisions. The Supreme Court's recent statement in *California Dental* regarding the need to base decisions on empirical evidence of anticompetitive injury underscores the importance of this concern. An explicit consumer injury requirement will force courts and litigants to conduct fact-intensive assessments of the effects of business practices. The task for economists and jurists alike should be the development of analytical techniques which will enhance the ability of courts to discern the true indicia of consumer injury—increases in price, decreases in output, or reduced product quality attributable to the exercise of market power that arises from anticompetitive acts.

Prods., Inc. 8 F.3d 1217, 1221 (7th Cir. 1993) (noting that the plaintiff pursued a legal theory that would trigger the per se rule instead of the rule of reason because it could not afford the market analysis and expert witnesses required to prove anticompetitive effect under the latter).

[79] *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 668 (3d Cir. 1993). The *Brown Univ.* court noted that in light of the fact that "[s]uch proof is often impossible to make . . . courts typically allow proof of the defendant's 'market power' instead." *Id.*

The concern that actions inimical to the competitive process will go undetected and unremedied needs to be balanced against the concern that competition on the merits that injures competition will be confused with pernicious behavior. "Injury to competition" is an amorphous concept that may not take into account efficiencies and other benefits. "Injury to consumers," broadly defined, provides a surer test.