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# Developments in Section Two of the Sherman Act

## Foreword

*Joseph P. Bauer\**

The issues raised in this Symposium are of great interest and timeliness. During the 1940s and 1950s, the Supreme Court explored the role of section 2 of the Sherman Act<sup>1</sup> as an essential element in the antitrust regime.<sup>2</sup> As was true with antitrust generally, courts expanded the reach of section 2, frequently concluding that the complained-of conduct constituted unlawful monopolization or attempts to monopolize, and approving injunctions forbidding the continuation of exclusionary or predatory practices<sup>3</sup> and orders leading to the breakup of the monopoly itself.<sup>4</sup> However, after the *Grinnell* decision<sup>5</sup> in 1966, and the *Otter Tail* case<sup>6</sup> almost a decade later, the Supreme Court seemed to strike section 2 from its agenda. Finally, in the *Aspen Skiing* case<sup>7</sup> in 1985 and the *Matsushita* decision<sup>8</sup> this year, the Court has resumed grappling with some of the thorny issues raised by section 2.

The different outcome of these two recent decisions indicates the uncertain direction of section 2 enforcement. In *Aspen Skiing*, the Court unanimously upheld the lower court's finding that the defendant's exclusionary behavior was a sufficient predicate for a finding of unlawful monopolization. Yet, the next Term, in a 5-4 decision, the Court in *Matsushita* ordered the dismissal of a complaint asserting that the defendants' allegedly predatorily low prices were evidentiary of a conspiracy to monopolize. The difference in these results, the different standards of review applied by the Court, and the differing reliance on economic theory all indicate a

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1 15 U.S.C. § 1 (1982).

2 See, e.g., *International Boxing Club v. United States*, 358 U.S. 242 (1959); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); *United States v. United Shoe Mach. Corp.*, 347 U.S. 521 (1954) (per curiam); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948); *United States v. Griffith*, 334 U.S. 100 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

3 See, e.g., *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

4 See, e.g., *United States v. United Shoe Mach. Corp.* 347 U.S. 521 (1954) (per curiam); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

5 *United States v. Grinnell Corp.*, 384 U.S. 563 (1966).

6 *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

7 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S. Ct. 2847 (1985).

8 *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

need to analyze the past, to criticize at least some of the present, and to hazard some predictions and suggestions as to the future. The eight articles in this Symposium advance this cause.

As a former Assistant Attorney General in charge of the Antitrust Division, and presently a partner in a large Washington, D.C. law firm, Donald I. Baker has a special perspective on the topic of his article: government enforcement of section 2.<sup>9</sup> Mr. Baker begins with a crucial observation—that the government is significantly different from a private plaintiff in its enforcement role. It seeks neither monetary damages nor attorneys fees, and is not concerned with its own competitive situation. Rather, it is seeking to establish particular legal principles which will apply to the market at large, or to create structural conditions in a particular industry. In addition, it must take account of political interests, fiscal considerations, and bureaucratic factors notably different from those affecting a private plaintiff.

As noted by Mr. Baker, the history of the government's section 2 enforcement has been uneven: there are cases that should not have been brought, cases were lost which should have been won, cases were won which with hindsight would better have been lost, and cases were won on the merits but satisfactory relief was not obtained. The result is that the case law today is often unclear. Large companies cannot be sure either whether they will be sued by the government or whether the courts will uphold the government's challenge. Mr. Baker observes that this is the product not only of the special character of the government as litigator, but also of evolving attitudes and philosophies towards antitrust and of changes in the judiciary and presidency.

In reviewing many of the important section 2 cases over the past four decades, Mr. Baker focuses on the two substantially different kinds of actions brought: those in which structure is attacked, where the government usually seeks divestiture as the principal form of relief; and those involving challenges to particular conduct, where injunctive relief is more appropriate. A number of conclusions flow from this difference. First, the latter cases are far more likely than the former to provide broad rules which can serve as precedents for subsequent litigation. Second, while challenges to conduct can deter other monopolists, attacks on structure will have little such effect; the monopolist can only wait, hoping that it will not also be sued. Third, in most cases injunctive relief can be more precise, making it more likely to enhance long-run competition and meet with political approval.

The inconsistency of past government litigation makes it diffi-

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9 Baker, *Government Enforcement of Section Two*, 61 NOTRE DAME L. REV. 898 (1986).

cult to predict the future course of section 2 enforcement. Mr. Baker identifies some of the key factors—politics, fiscal imperatives, evolving antitrust philosophies—which point alternately to increased or diminished enforcement activity. Whatever direction it takes, a review of this past activity should make the decisionmaking process of government officials more rational.

The existence of predatory conduct has become an increasingly important issue in section 2 litigation. In his article, Professor Peter C. Carstensen<sup>10</sup> contends that recent case law has proceeded backwards—first determining whether the defendant's conduct (principally its pricing policy) was predatory, and then using the answer to solve the legality/illegality riddle. He instead argues that "predation" is nothing more than a label to be attached after examining numerous factors, of which the firm's pricing practice is merely one.

Professor Carstensen identifies a number of other misapplications of the "predation doctrine." Courts treat predation as a unitary concept, when instead its elements are probably significantly different when the alleged offense is the long-term retention of a monopoly, the conduct leading up to the monopoly, an attempt to monopolize, or merely "unfair competition" by a nonmonopolist. Courts have also misapplied economic learning by failing to recognize that monopoly and monopoly pricing do not take place in the static model employed by many economists. Courts have been transfixed by the Areeda-Turner test,<sup>11</sup> focusing on average variable cost when other costs—long run, and often total rather than variable—may be far more meaningful. Courts have also misused cost information, failing to recognize that accountants treat costs differently than economists or lawyers. Courts have ignored the fact that retaining significant market shares by techniques other than deep price cuts may be more probative of monopoly power than predation, and that in some cases, predatory pricing may turn out, ironically, to evidence a lack of market power. Finally, courts have been either unwilling or unable to probe defendants' motives for their pricing behavior. Professor Carstensen argues that such an analysis would be far more useful than merely comparing cost and price data to determine whether the defendant's pricing is exclusionary or "predatory."

Professor Carstensen also suggests that far more attention

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10 Carstensen, *Predatory Pricing in the Courts: Reflection on Two Decisions*, 61 NOTRE DAME L. REV. 928 (1986).

11 This test was first developed by Professors Donald Turner and Philip Areeda in *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Although it has been modified, criticized, and even reviled over the past decade, its approach has been seminal for recent judicial and scholarly analysis of predatory pricing.

should be given to another factor that is often untouched at the early, violation stage—the availability and utility of a remedy. First, he distinguishes between the two broad kinds of remedy available—structural, which will break up the monopoly power; and conduct, which will prevent the defendant from continuing to enjoy its unlawful monopoly position and will recompense persons injured by the misuse of monopoly power, and which may indirectly erode the monopoly. Second, he notes that different groups of plaintiffs—competitors, customers, and the government—often seek different types of remedies and have different equitable claims to obtaining relief. Professor Carstensen suggests that these differences, and others, should be relevant at the earliest stages of the inquiry. If meaningful and appropriate relief is unattainable, or if the remedy will merely bring the plaintiff-competitor under the umbrella of uncompetitive monopoly prices, courts should be loathe to characterize the conduct as violative of Sherman section 2.

Professor Carstensen is correct that more attention ought to be given to possible remedies when deciding whether to initiate an action,<sup>12</sup> and furthermore that the remedy should truly seek to dissipate the monopoly or stop the exclusionary conduct, with a view towards promoting consumer interests rather than merely rewarding or shielding individual competitors. But, the absence of a completely satisfactory remedy should not be a reason for condoning the monopoly. Apart from a so-called natural monopoly, where efficiencies are obtained by having a single producer, and consumers would be injured by its destruction, the political, social, and economic evils of monopoly make it inadvisable to put the remedy cart before—or even alongside—the legality horse. Rather, after examining the section 2 elements, courts may have to engage in painstaking<sup>13</sup> and imaginative steps to eliminate the monopoly po-

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12 The government's ultimately unsuccessful action against IBM may be the paradigm illustration of this proposition. Initiated in 1968, the government eventually dropped the action in 1982 while the litigation was still in the pretrial stages. The impossibility of obtaining either meaningful structural relief or injunctive relief, as well as the enormous changes in the computer industry, the problems of proof, and the questionable likelihood of judicial victory a decade or two down the road, all contributed to this decision. With the benefit of 20-20 hindsight, it would have been better had this action never been brought.

13 The difficulty of obtaining meaningful relief is illustrated by the history of the United Shoe Machinery litigation. The district court entered an order in 1953 requiring numerous injunctive steps to break up United's unlawful monopoly, but refused to order dissolution as impractical. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam). The expectation was that these injunctive steps would allow other competitors and even potential entrants to prosper in the market, gradually eroding United's monopoly. Over a decade later, United's position was still entrenched, and the Supreme Court ordered the consideration of additional remedial steps. 391 U.S. 244 (1968). Although monopoly is not easily broken up, and steps to do so may often prove ineffectual, the effort is nonetheless necessary and worthwhile.

sition. These difficulties, however, do not absolve the courts of the duty to undertake the task.

Judge Frank Easterbrook's Symposium contribution<sup>14</sup> employs the *Aspen Skiing* decision<sup>15</sup> to reiterate and explore a theme that he has asserted previously:<sup>16</sup> that antitrust should condemn only truly exclusionary conduct, that distinguishing between exclusionary and desirable competitive conduct is often very difficult, and that courts should adopt a strong pro-defendant bias in evaluating any anti-trust challenge. Under this approach, a private plaintiff can succeed only when it affirmatively demonstrates—under some specifically formulated and tested hypothesis—that the challenged conduct is likely to diminish efficiency and consumer welfare.

Judge Easterbrook recognizes several important characteristics of *Aspen Skiing's* refusal to continue to do business with its smaller rival, *Aspen Highlands*: the prior arrangement had benefited consumers, the discontinuance injured *Highlands*, and there was no business justification for *Skiing's* refusal to continue the arrangement. Notwithstanding this, Judge Easterbrook complains that characterizing *Skiing's* conduct as exclusionary rather than fairly competitive was inappropriate. This is because change is always ambiguous, even fair competition will hurt rivals, some consequences of competition will also cause consumer injury, and other procompetitive explanations for defendant's conduct could be offered.

Judge Easterbrook then makes three basic assertions. First because of the limitations of lawyers, judges (!), and even economists (!!), litigation is an unsatisfactory method of determining whether the defendant's aggressive conduct is competitive, and thus desirable, or exclusionary, and therefore properly condemned. Second, since it is far more harmful to condemn conduct which is truly benign or desirable than to allow anticompetitive behavior to proceed without challenge, the pro-plaintiff bias that Judge Easterbrook perceives—but which has largely been eroded since the end of the Warren Court by the growing ascendancy of the Chicago School—should be reversed. Third, efficiency must be defined and then "courts must approach the task of finding efficiency in the same way a social scientist would"<sup>17</sup> by first formulating a hypothesis and then testing that hypothesis against the facts. If there is more than one plausible hypothesis, all must be evaluated and tested. Until this methodology is followed, there will be no rationality in anti-trust litigation. If the system permits some arbitrariness to prevail,

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14 Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986).

15 See note 7 *supra*.

16 Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

17 61 NOTRE DAME L. REV. at 978.

it is unfair and unwise to make some antitrust defendants pay the price for the resultant lack of certainty.

Yet, Judge Easterbrook's three premises are fundamentally inconsistent. If one accepts the first assertion—that there are fundamental limitations on the courtroom in determining whether the conduct is competitive or exclusionary—then establishing a scientific methodology to resolve the unresolvable wastes everyone's time. Given the logical result of the second premise—the defendant almost always wins—the true significance of Judge Easterbrook's analysis becomes clear: there should be no meaningful enforcement of Sherman section 2. In light of the virtually insuperable barriers to successful maintenance of a treble damage action that Judge Easterbrook would erect, almost no plaintiff will prevail in or even bother filing a Sherman section 2 action.

To those persons, however, who question the benevolence of competitors or the ability of the marketplace to protect consumers or correct the results of occasionally ambiguous, arguably competitive, arguably predatory, conduct, maintaining the present approach—which permits the plaintiff to offer evidence that the defendant acted in a manner inconsistent either with its own self-interest or with the interests of consumers, and then shifts the burden of proof to the defendant to justify that conduct or suffer the consequences—seems far more desirable. Until Sherman section 2 is repealed, a balance must be struck which continues to allow judges and juries to characterize admittedly ambiguous conduct—for Judge Easterbrook is correct that here uncertainty is inevitable—as predatory or exclusionary, and hence unlawful.

It is a truism that one can learn a great deal about domestic law by comparing it to the experiences and rules of other legal systems. In her article,<sup>18</sup> Professor Eleanor M. Fox describes the approaches taken under Sherman section 2 and article 86 of the Treaty of Rome,<sup>19</sup> and examines the different treatment of monopolization and abuse of market power by the United States and the Common Market's Court of Justice and the European Community Commission. Professor Fox suggests a number of instances in which each system would have profited by considering the analysis and approach taken by the other.

Although both antitrust systems have the common objectives of advancing consumer interests, enhancing the flow of goods and services, and increasing freedom of choice and freedom from undue regulation, they have significantly different historical settings,

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18 Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981 (1986).

19 Treaty Establishing the European Economic Community, March 25, 1957, art. 86, 298 U.N.T.S. 11, 48.

and therefore differ both as to intermediate goals and the means to achieve those common objectives. The United States has had a strong economy for the past century, which has only recently become significantly multinational and increasingly subject to foreign competition. The European experience is one of smaller industries and markets, in which the members of the newly-formed "common market" seek to overcome centuries-old barriers of nationalism, tariffs, and currency differences. Thus, while the American preferences are expressed in a laissez faire system without direct government regulation, intervening only when companies act predatorily or when firm size becomes unduly large, the Europeans opt for more frequent intervention—including control of price—while at the same time tolerating or encouraging certain growth to allow firms to compete with their larger American competitors.

More recently, however, the two systems have converged in their choice of legal standards, and indeed in some areas the American rules may have become more permissive than those under article 86. As Professor Fox notes, this is a product of at least two phenomena—an evolution in American antitrust thinking that recognizes economic efficiency and consumer welfare as the predominant guideposts for antitrust enforcement; and the growing realization that the United States competes in a global market, where size, technological ability, and operating efficiency are increasingly important. This change has been reflected in the increased reluctance to use Sherman section 2 to dissolve or restrict even large American firms. Instead, economic analysis is used to explain the activities of large firms and to demonstrate that much of their conduct is competitively neutral or even beneficial. Professor Fox suggests that much of this new learning might be appropriate for the Common Market as well.

As the United States economy and American firms continue to operate in a multinational setting, increased consideration of the breadth of antitrust values, and of the varying methods which can be used to achieve them, will be necessary. Professor Fox's article, which analyzes the significant experiences of these two different, but parallel, systems, identifies ways of drawing on the best of both.

Few persons will dispute that the law of attempt to monopolize is confusing and inconsistent. Courts and scholars alike have wrestled for years with the elements of this offense, seeking to offer some coherency and predictability. In his article,<sup>20</sup> Professor Daniel J. Gifford reviews the development of the attempt doctrine in the Ninth Circuit over the past two decades, criticizing many of

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<sup>20</sup> Gifford, *The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize*, 61 NOTRE DAME L. REV. 1021 (1986).



the earlier decisions but praising that court's recent attempts to rationalize this area of the law. Professor Gifford's choice of the Ninth Circuit as a microcosm of the internal inconsistencies in much of the case law, and of judicial attempts to synthesize a coherent doctrine, is a sound one, for there is a substantial amount of precedent in the circuit, the court is well-respected, and several of the court's decisions are recognized as "leading cases." And, since for the past quarter century the Supreme Court has rather firmly declined to hear attempt cases, practitioners must look to the law in the circuits for guidance.

The first significant attempt to monopolize case in the Ninth Circuit was the 1964 decision in *Lessig v. Tidewater Oil Co.*<sup>21</sup> Taking a highly expansionary view of the attempt offense, the court seemed to dispense with proof of both dangerous probability of success and the relevant market within which the attempt was occurring. As described by Professor Gifford, this led to the "double inference" method of proving an unlawful attempt to monopolize—proof of anticompetitive or predatory conduct meant inferring specific intent to monopolize, which in turn permitted the inference of dangerous probability of success.<sup>22</sup> This approach was undercut, however, by a number of subsequent decisions.<sup>23</sup> Finally, in 1981, in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*,<sup>24</sup> the Ninth Circuit expanded upon the predatory pricing theories of Professors Areeda and Turner<sup>25</sup> to synthesize an attempt to monopolize methodology applicable both to pricing and non-pricing predatory behavior.

Professor Gifford's analysis is valuable for at least two reasons. First, it illustrates the difficulties inherent in judicial resolution of this, or any other, area of antitrust law. Courts must decide the cases before them, and often do not have broad perspective or vision. A body of doctrinal law, which evolves over a period of time, must be seen in context, since a case decided ten or twenty years ago is not necessarily "good law" today. Furthermore, the law is made by different "lawmakers," as the composition of the court, and surely the makeup of each panel hearing the various cases, changes. Second, this article affords an excellent opportunity to understand a very difficult area of the law. By examining the exper-

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21 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964).

22 61 NOTRE DAME L. REV. at 1030.

23 See, e.g., *California Computer Prods., Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Hanson v. Shell Oil Co.*, 541 F.2d 1352 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977).

24 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

25 See note 11 *supra* and accompanying text.

iences of the Ninth Circuit, one can understand and predict the law of attempt to monopolize generally. Perhaps the Supreme Court will soon draw upon the intellectual struggles of the Ninth Court and other courts to clarify some of the lingering questions respecting the attempt offense.

Although there were virtually no predatory pricing claims during the first eight decades of section 2 enforcement, the past decade has seen a tremendous spate of such litigation. In his article, Professor Wesley J. Liebeler<sup>26</sup> concludes that predatory pricing claims are almost never meritorious, and that litigants and society generally are injured even if most defendants eventually prevail on suits asserted against them. He therefore proposes two reforms: first, a series of screens through which the plaintiff would have to pass or suffer summary dismissal; and second, a limitation on the ability of the alleged predator's competitors—as opposed to its customers—to recover antitrust damages.

Professor Liebeler traces the upsurge in predatory pricing litigation to Professors Areeda and Turner's seminal law review article in 1975.<sup>27</sup> Since then, there has been an outpouring of academic literature and at least fifty-five antitrust decisions<sup>28</sup> in the area. Although plaintiffs have been unsuccessful in the substantial majority of these cases, Professor Liebeler properly notes that such litigation nonetheless involves substantial societal costs—the costs of lawyers, economists, judges, witnesses, jurors, and others—and the more important economic cost that benign or competitive conduct may be deterred by fear of litigation and liability. To these costs, Professor Liebeler adds the more debatable assertion that most of the cases in which the plaintiff prevailed were incorrectly decided.

Because of the appeal of the bright-line Areeda-Turner test, which makes the legality of alleged predation turn on an evaluation of price and average variable costs, courts have often focused initially and principally on this element to determine whether the defendant's predatory pricing violates section 2. Professor Liebeler, emphasizing that predation is just one part of the test, would require clear proof of three other elements: a realistic definition of the market which the defendant is allegedly attempting to monopolize; a showing that there is a dangerous probability that monopoly will occur; and the existence of significant barriers to entry, so that the defendant would be in a position to reap the benefits of the monopoly it was attempting to achieve. Professor Liebeler further

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26 Liebeler, *Whither Predatory Pricing? From Areeda & Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052 (1986).

27 See note 11 *supra*.

28 Professor Liebeler's article contains a number of valuable appendices, which summarize and compare these fifty-five decisions. See 61 NOTRE DAME L. REV. at 1077-96.

complains about the common practice of making predation the first inquiry in determining whether the defendant has unlawfully attempted to monopolize. Rather, he would treat it as a necessary, but still not sufficient, element of proof in an attempt case. Professor Liebler concludes that substitution of this four-part screen for the varying tests used by the courts would have resulted in finding a section 2 violation in only one of the fifty-five predatory pricing cases.

Professor Liebler's other proposal—limiting the availability and amount of damages recoverable by a predator's competitors in order to restrict enforcement usually only to the predator's customers<sup>29</sup>—would further reduce the effectiveness of Sherman section 2. At a minimum, challenges to predatory pricing would be delayed until after the predation period had ended, the predator's competitors were permanently driven from the market (if reentry were possible, the case would fail under one of Professor Liebler's four screens), and the predator sought to reap the benefits of the new-found monopoly. Because of the obstacles of *Illinois Brick*,<sup>30</sup> the small amounts in which many customers purchase, and the difficulties of obtaining evidence, some actions will never be brought. Restoring the market to its previously competitive posture would be difficult (for, to repeat, the violation posits high barriers to entry). In short, not only is the substantive violation reduced to virtually nothing, but also any enforcement will be substantially less frequent and effective.

Professor Liebler shares many of the same views as Judge Easterbrook, and the result of his suggestions would be similar as well—substantial evisceration of the attempt offense as a means of challenging unfair or predatory practices by single entities. Although the *Empire Gas* case<sup>31</sup> may be a particularly extreme example, it illustrates the ease with which even outrageously anticompetitive behavior<sup>32</sup> would pass through the Liebler screens. Therefore, the basic question of whether the attempt offense of section 2 is available to challenge outrageous, anticompetitive behav-

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29 Professor Liebler asserts that a predator's competitors should be allowed to recover damages only if the predator's price falls below its marginal cost, and even then the measure of damages should not exceed three times the difference between the market price of the product and the predator's marginal cost. *See id.* at 1075.

30 *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (indirect purchaser, the price to whom was inflated because of illegal overcharge stemming from antitrust violation, lacks standing under Clayton § 4).

31 *United States v. Empire Gas Corp.*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (threats by defendant that competitor must raise its price or face ruinously low prices not actionable in absence of showing that conduct would probably permit defendant to achieve monopoly power).

32 For example, direct threats to competitors to drive them out of business unless they comply with the defendant's demands that they raise prices.

ior which does not necessarily guarantee monopoly returns to the defendant remains open.

Professor Almarin Phillips<sup>33</sup> reviews a wide range of economic literature on an issue which is of substantial importance not only to section 2 of the Sherman Act, but also to the direction of merger enforcement under section 7 of the Clayton Act:<sup>34</sup> to what extent does market structure<sup>35</sup> determine firm conduct and market performance? Much statistical and econometric research has been performed, but Professor Phillips points to numerous flaws both in the methodology used and in the conflicting conclusions that have been reached. Noting that in *Alcoa*<sup>36</sup> Judge Learned Hand indicated some bright-line tests that could be derived from a defendant's market share,<sup>37</sup> Professor Phillips instead suggests that such an approach may be flawed because high market shares do not necessarily indicate diminished competition in the industry, and because other factors—what Hand referred to as the firm's "superior skill, foresight, and industry"—may also account for differences in performance levels. First, and perhaps foremost in this era of increased judicial deference to economists and particularly to the Chicago School, he argues that these econometric studies are of only limited value in defining public policy and so should not be given undue importance. Second, he suggests that judges and practitioners should recognize the complicated relationship between market structure and performance and not generalize from one industry or study to another, and that they should fully examine the wide range of possible explanations and implications of a given situation. This is a difficult and unsettling prescription, but it may result in a better understanding of the competitive forces in the case under consideration, while also accommodating the conflicting views of economists and lawyers, of the Chicago School and traditional liberals.

The narrower theme of Professor James Ponsoldt's article<sup>38</sup> is that expanded use of private treble damage actions, asserting claims of attempts to monopolize by state-controlled or subsidized foreign manufacturers that have penetrated American markets

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33 Phillips, *Market Concentration and Performance: A Survey of the Evidence*, 61 NOTRE DAME L. REV. 1099 (1986).

34 15 U.S.C. § 18 (1982).

35 Market shares and four-firm or eight-firm concentration ratios are the principal determinants of market structure.

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

37 "[Ninety percent] is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three per cent is not." *Id.* at 424.

38 Ponsoldt, *Clarifying the Attempt to Monopolize Offense as an Alternative to Protectionist Legislation: The Conditional Relevance of "Dangerous Probability of Success,"* 61 NOTRE DAME L. REV. 1109 (1986).

through exclusionary or predatory practices while their domestic markets remain monopolized, would be a sound alternative to protectionist activities such as quotas or tariff barriers. One significant impediment to such a strategy, however, is the restrictive reading that attempt to monopolize has received from the courts in the past two decades. Courts recently have required plaintiffs to show specific intent to monopolize, including proof of both the relevant market which the defendant is attempting to dominate and the defendant's power within that market; and of dangerous probability of success, which some courts have held to mean that the defendant's conduct literally puts it on the "brink of success," and that either factual or legal impossibility of monopoly will preclude successful assertion of an attempt to monopolize claim.

Professor Ponsoldt's broader theme is that the attempt offense should integrate the specific intent and dangerous probability requirements by drawing on criminal law as a model. He would do this in two ways. First, while intent alone is not sufficient to establish attempt, it could be inferred from probable monopolization and could be found when the defendant has taken a "substantial step" towards monopolization. Second, while probability of success might be required when the conduct is ambiguous and a monopolistic intent cannot be inferred from the direct evidence, sound policy does not require making probable success an independent element of the attempt offense in all cases. The requirement clearly could be dispensed with when the defendant engages in conduct with no competitively redeeming value, or where the conduct in fact comes very close to an actual monopoly.<sup>39</sup> Professor Ponsoldt argues that this result is justified by precedent, by the original criminal nature of the Sherman Act, and by sound policy considerations. This analysis gives strong support for his argument that the attempt offense is a powerful and appropriate vehicle for attacking predatory or exclusionary conduct in domestic and international settings.

### Conclusion

Recent case law has made it more difficult for plaintiffs to prevail on a large variety of antitrust theories—from rejection of the "bathtub conspiracy doctrine" under section 1 in *Copperweld*<sup>40</sup> to the rejection of the per se doctrine for non-price vertical restraints in *GTE Sylvania*<sup>41</sup> and the higher requirements for market power respecting tying arrangements in *Jefferson Parish*.<sup>42</sup> At the same

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39 The *Empire Gas* case would be one clear example of such conduct. See note 31 *supra*.

40 *Copperweld Corp. v. Independence Tube Corp.*, 104 S. Ct. 2731 (1984).

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

42 *Jefferson Parish Hosp. v. Hyde*, 104 S. Ct. 1551 (1984).

time, the government's enforcement of many portions of the anti-trust laws is diminishing—from relaxed standards for mergers (and particularly non-horizontal transactions)<sup>43</sup> to the toleration of virtually all vertical restraints.<sup>44</sup>

Although requirements for proof of certain section 2 violations have been recently increased by the Supreme Court's decision in *Matsushita*, that provision still provides a vehicle for challenging unfair, predatory, and anticompetitive conduct by single firms, and the structural situations which diminished merger enforcement will produce. The articles in this Symposium discuss the wisdom of such an approach and the paths that such enforcement might take. It will be fascinating for antitrust scholars and practitioners alike to see how the drama is played out over the next decade or two.

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43 See Department of Justice Merger Guidelines, 1 TRADE REG. REP. (CCH) ¶ 4500 (1982). See also Merger Modernization Act of 1986, H.R. No. 4247, 99th Cong., 2d Sess. (1986) (Reagan administration proposal, relaxing standards of Clayton § 7).

44 See Department of Justice Guidelines for Vertical Restraints, 50 Fed. Reg. 6263 (Feb. 14, 1985). See also *Monsanto Co. v. Spray-Rite Serv. Corp.*, 104 S. Ct. 1464, 1469 n.7 (1984) (noting Solicitor General's suggestion that Court reexamine rule of *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), that vertical price restraints are unlawful per se).