



# Federal Trade Commission

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## **The Common Law of Section 2: Is It Still Alive and Well?**

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at the  
George Mason Law Review  
11<sup>th</sup> Annual Antitrust Symposium  
Washington, D.C.  
October 31, 2007

### **INTRODUCTION**

The Supreme Court has given the antitrust community much to chew on with nine decisions in the last four years. These recent decisions, after a decade of relative silence on antitrust issues at the Court, have spurred debate and raised a number of important questions about the future contours of antitrust. For example, one question is whether these decisions reflect a victory for the Chicago School – at least in the Supreme Court.<sup>2</sup> For years, scholars have debated the influences underpinning the Court's antitrust jurisprudence. Some find the fingerprints of the conservative Chicago School, while others point to the more moderate Harvard School. My colleague Commissioner Bill Kovacic finds the influence of both schools

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<sup>1</sup> The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Kyle Andeer, for his invaluable assistance in preparing this paper.

<sup>2</sup> See Thomas A. Piraino, Jr. Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century 82 IND. L.J. 345 (2007); Einer Elhauge, Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions? 3 COMPETITION POLICY INTERNATIONAL 2 (2007); Herbert Hovenkamp, The Harvard and Chicago Schools and the Dominant Firm, University of Iowa Legal Studies Research Paper (Sept. 2007).

and opines that the two schools form a “double helix” which accounts for the DNA of current American antitrust jurisprudence.<sup>3</sup>

Frankly, I have difficulty distinguishing between the views of the two schools on some subjects. For example, Judge (now Mr. Justice) Breyer is often thought of as a Harvard School principal. However, his exposition on tying in *Grappone*<sup>4</sup> seems mighty close to the “one profit” thesis propounded by Professor (now Judge) Posner, a Chicago School principal, in his seminal antitrust treatise.<sup>5</sup> And Professor Areeda in his later years criticized the essential facilities doctrine as vigorously as any Chicago School principal.<sup>6</sup>

All that said, I tend to come down on the side of those who find the stamp of the Chicago School on the Court’s recent antitrust jurisprudence. It seems to me that these decisions reflect Chicago School scholarship such as skepticism about the benefits of antitrust enforcement, concerns over the costs of litigation, and the risk of false positives. That influence suggests that section 2 enforcement is not alive and well at the Supreme Court.<sup>7</sup> While there is some room for concern (or hope depending on your perspective), I believe it is too early to write off section 2.

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<sup>3</sup> William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 51-54 (2007).

<sup>4</sup> *Grappone, Inc. v. Subaru of New England*, 858 F.2d 792 (1st. Cir. 1988).

<sup>5</sup> RICHARD POSNER, *ANTITRUST LAW, AN ECONOMIC PERSPECTIVE*, Chicago: University of Chicago Press, 1976.

<sup>6</sup> Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

<sup>7</sup> See J. Thomas Rosch, “Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence” Remarks at the Bates White Fourth Annual Antitrust Conference Washington, D.C. (June 2007) *available at* <http://www.ftc.gov/speeches/rosch/070625pendulum.pdf>

First, the Supreme Court’s recent decisions, while certainly influenced by the teachings of the Chicago School, do not fully embrace those teachings. Take for example the Court’s decision in *Weyerhaeuser* last term. As I have discussed in the past, the meaning of consumer welfare – and hence the underlying goal of antitrust – was an important subtext in that case.<sup>8</sup> The meaning of consumer welfare has been the subject of some debate ever since Judge Bork published *The Antitrust Paradox*. Judge Bork, and others in the Chicago School, argue that consumer welfare is maximized when total (societal) surplus is maximized and thus the antitrust laws should be applied in a way that maximizes society’s wealth as a whole.<sup>9</sup> In *Weyerhaeuser*, a unanimous Supreme Court held that only higher bidding that leads to below-cost pricing in the ***relevant output market*** will suffice as a basis for liability for predatory bidding.<sup>10</sup> The Court focused on *consumers* in the output market and implicitly rejected the argument that the antitrust

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<sup>8</sup> See J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, “Monopsony and the Meaning of ‘Consumer Welfare’ A Closer Look at *Weyerhaeuser*,” Address Before the 2006 Milton Handler Annual Antitrust Review (Dec. 7, 2006), *available at* <http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf>.

<sup>9</sup> ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978) (Judge Bork believed that consumer welfare could only be maximized when total (societal) surplus is maximized. In his view, antitrust policy and rules should guard against all practices and transactions creating allocative inefficiencies; in that way, the antitrust laws could and would facilitate the maximization of consumer wealth in the aggregate without regard for its distribution.); Charles (Rick) Rule, “Consumer Welfare, Efficiencies, and Mergers,” Statement for the Hearing of the Antitrust Modernization Commission, (Nov. 17, 2005); Charles (Rick) Rule and David Meyer, “An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers” 33 *ANTITRUST BULLETIN* 677 (1988).

<sup>10</sup> *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

laws protect suppliers and buyers alike.<sup>11</sup> By defining consumer welfare in terms of the welfare of consumers in the output market, this definition of consumer welfare mirrors the way that consumer welfare is defined in Europe.<sup>12</sup> That in turn may facilitate convergence respecting the treatment of facially predatory conduct by dominant firms in the two regimes.

Beyond that, at the conclusion of *Weyerhaeuser*, the Court said that liability in predatory buying cases, as in predatory selling cases, must take account of what the scheme attributed to the defendant really was.<sup>13</sup> This seemingly innocuous (at least to a litigator) passage may in fact end up being highly significant. Far from making Section 2 liability turn exclusively on rigid rules designed to avoid false positives above all else, it may signal that liability can and should take into account what the defendant thought it was doing, as exhibited in its documents (or what its employees and former employees have said).

There are surely limiting principles involved. For example, liability should depend on effects rather than intent, and the statements of the defendant should be relevant to the specific elements of the offense (for example, pricing below cost and the likelihood of recoupment, in predatory pricing cases). But the passage suggests that, contrary to decisions like *A.A. Poultry*

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<sup>11</sup> Id. at 1078 (“A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs.”).

<sup>12</sup> See J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, *I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?* at the International Bar Association’s Antitrust Section Conference, at pp. 14-15 (Sept. 6, 2007) available at <http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf>.

<sup>13</sup> *Weyerhaeuser*, 127 S. Ct. at 1078 (“As with predatory pricing, making a showing on the recoupment prong will require ‘a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.’”).

*Farms*,<sup>14</sup> inferences can properly be drawn from evidence about a defendant's state of mind even in predatory pricing cases under Section 2.<sup>15</sup>

The Supreme Court has an obvious influence on the application of the antitrust laws, but it is important that influence not be overstated. The Court has only rarely granted cert to cases raising antitrust issues over the last thirty years and it remains to be seen whether the recent spurt of cases is a renewed focus on antitrust or simply a statistical blip.<sup>16</sup> As a result, there are only a handful of Supreme Court decisions that address section 2 of the Sherman Act and it is unclear whether even those decisions have general application. That brings me to the second reason for why I believe there is still life in section 2 – the lower federal appellate courts.

The lack of clear guidance from the Supreme Court and the common law nature of the Sherman Act means that those appellate courts play a particularly important role in shaping the

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<sup>14</sup> A.A. Poultry Farms v. Rose Acre Farms, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.), *cert. denied*, 494 U.S. 1019 (1990).

<sup>15</sup> Aspen Skiing Co. v. Aspen Highlands Skiing Corp. 472 U.S. 585, 602 (1985) (“Evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as ‘exclusionary’ or ‘anticompetitive’ -- to use the words in the trial court's instructions -- or ‘predatory,’ to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that ‘no monopolist monopolizes unconscious of what he is doing.’ As Judge Bork stated more recently: ‘Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.’”). United States Football League v. National Football League, 842 F.2d 1335, 1359 (2d Cir. 1988) (“Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.”).

<sup>16</sup> Indeed, the Court has denied cert in several recent cases that provided an opportunity for the Court to weigh in on several important section 2 issues. See, e.g., *Dentsply Int’l, Inc. v. United States*, 126 S. Ct. 1023 (2006); *3M v. LePage’s Inc.*, 124 S. Ct. 2932 (2003); *Microsoft Corp. v. United States*, 534 U.S. 952 (2001); *Concord Boat Corp. v. Brunswick Corp.* 531 U.S. 979 (2000). The true test may be in the coming years as there are a number of interesting section 2 cases winding their way through the appellate courts. See, e.g., *Broadcom, Cascade Health Solutions v. PeaceHealth*, 2007 U.S. App. LEXIS 21075, \* 40 (9th Cir. 2007) *Rambus v. FTC*, (D.C. Cir.); *linkLine Communications, Inc. v. California, Inc.*, 2007 U.S. App. LEXIS 21719 (9th Cir. 2007).

contours of section 2. Those courts have picked up the gauntlet and run with it. In the last ten years, courts around the country have issued a number of important decisions that have expanded the scope of liability under section 2 and have often read Supreme Court precedent fairly narrowly.

Let me begin with the most sacred of the cows – *Brooke Group*. Almost fifteen years ago now, the Supreme Court articulated a test for predatory pricing claims that reflected the Chicago School’s perspective.<sup>17</sup> After *Brooke Group*, predatory pricing plaintiffs must prove that the alleged predator priced below its cost and that it would recoup those losses after driving out its competition (taking into account the market power of the defendant and the barriers to entry into the market).<sup>18</sup> The Court in *Brooke Group* observed that “these prerequisites to recovery are not easy to establish” but justified the standard on the grounds that “predatory pricing schemes are rarely tried, and even more rarely successful” and the “costs of an erroneous finding of liability” are particularly high.<sup>19</sup> In the wake of *Brooke Group*, very few predatory pricing claims have survived summary judgment and some have argued that predatory pricing is largely a dead letter in American antitrust.

Yet the Supreme Court did not completely slam the door on challenges to the pricing practices of monopolists or would-be monopolists under section 2. Indeed, the Court did not

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<sup>17</sup> *Brooke Group Ltd., v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993); see also *United States v. AMR Corp.*, 335 F.3d 1109, 1114 (10th Cir. 2003) (“In two seminal antitrust opinions, the Supreme Court adopted the skepticism of Chicago scholars, observing that ‘there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.’ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993).”).

<sup>18</sup> *Brooke Group*, 509 U.S. at 222-224.

<sup>19</sup> *Id.* at 226.

hold that the requirements for predatory pricing liability could *never* be met in the real world. In the years subsequent to *Brooke Group*, new scholarship building on game theory emerged that challenged the assumptions underpinning that decision.<sup>20</sup> Several courts have expressed some unease with the *Brooke Group* standard in light of that scholarship – though that unease has rarely led them to allow a predatory pricing claim to proceed to trial.<sup>21</sup> However, in the Sixth Circuit’s decision in *Spirit Airlines*, the court reversed a grant of summary judgment in favor of the defendant and sent the case back for trial.<sup>22</sup> The Sixth Circuit declared:

“To be sure, the antitrust laws are for ‘the protection of competition, not competitors.’ *Brooke Group*, 509 at 224. Yet, in a concentrated market with very high barriers to entry, competition will not exist without competitors. See Andrew I. Gavil, ‘Exclusionary Distribution Strategies by Dominant Firms: Striking A Better Balance’ 72 *Antitrust L. J.* 3, 81 (2004).”<sup>23</sup>

It then went on to conclude:

Contrary to the district court's conclusion that proof of Northwest's revenues exceeding its average variable costs effectively ends the inquiry, *Brooke Group* emphasized that even where theory suggests that predatory pricing is rare, ‘however unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate

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<sup>20</sup> See, e.g., Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 *Antitrust L.J.* 585 (1994); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 *Geo. L.J.* 2239 (2000); Aaron S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 *Yale L.J.* 941 (2002).

<sup>21</sup> See e.g., *AMR Corp.*, 335 F.3d at 1114-1115 (“Recent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational. See, e.g., Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 *Geo. L.J.* 2239, 2241 (2000) (‘Modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational.’). Post-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets. See Baker, *supra*, at 590. Although this court approaches the matter with caution, we do not do so with the incredulity that once prevailed.”).

<sup>22</sup> *Spirit Airlines, Inc. v. Northwest Airlines, Inc.* 431 F.3d 917 (6th Cir. 2005).

<sup>23</sup> *Id.* at 951.

that [a predatory pricing scheme] has occurred and was likely to have succeeded, theory will not stand in the way of liability.’ [Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 229 (1993) (citing Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 466-467 (1992)). . . [W]e [have] adopted the Inglis rule that ‘acknowledges that in certain situations, a firm selling above average variable cost could be guilty of predation.’ [D.E. Rogers Associates, Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1436 (6th Cir. 1983), citing William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014,1035 (9th Cir. 1981)].] More particularly, the Third Circuit has held that a defendant’s sales above its costs does not end the Section 2 analysis. [LePage’s, Inc. v. 3M, 324 F.3d 141 (3rd Cir. 2003)].

In sum, even if the jury were to find that Northwest’s prices exceeded an appropriate measure of average variable costs, the jury must also consider the market structure in this controversy to determine if Northwest’s deep price discounts in response to Spirit’s entry and the accompanying expansion of its capacity on these routes injured competition by causing Spirit’s departure from this market and allowing Northwest to recoup its losses and to enjoy monopoly power as a result.”<sup>24</sup>

Courts will likely continue to grapple with how to reconcile new scholarship and learning on predatory pricing with the Court’s decisions in *Matsushita* and *Brooke Group*. I for one am interested to see how the law might evolve. However, at the same time courts are faced with arguments that seek to apply *Brooke Group* to other pricing practices. Litigants in some cases have argued that “after *Brooke Group*, no conduct by a monopolist who sells its product above cost -- no matter how exclusionary the conduct -- can constitute monopolization in violation of §2 of the Sherman Act.”<sup>25</sup> Courts have generally been reluctant to adopt that reasoning.

For example, the Third Circuit refused to apply the *Brooke Group* test to allegations that 3M willfully maintained its monopoly in transparent tape by bundling its rebates.<sup>26</sup> Instead, it

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<sup>24</sup> Id. at 953

<sup>25</sup> LePage’s Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003).

<sup>26</sup> Id. at 152 (“The opinion does not discuss, much less adopt, the proposition that a monopolist does not violate § 2 unless it sells below cost. Thus, nothing that the Supreme Court has written since *Brooke Group* dilutes the Court’s consistent holdings that a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.”)

held that the record supported the claim that the purpose and effect of the rebates was to foreclose its competitors and eliminate competition, and that that was enough to sustain a jury verdict under Section 2. In so holding, the court appeared to limit *Brooke Group* to its facts.<sup>27</sup> It noted that “[n]othing in any of the Supreme Court’s opinions in the decade since the *Brooke Group* decision suggested that the opinion overturned decades of Supreme Court precedent that evaluated a monopolist’s liability under § 2 by examining its exclusionary, i.e., predatory, conduct.”<sup>28</sup>

Another example is the Ninth Circuit’s recent decision in *PeaceHealth* that also focused on the legality of bundled discounts under section 2.<sup>29</sup> The defendants argued that the jury was incorrectly instructed about the legality of bundled discounting when the district court used instructions that were modeled on those blessed by the Third Circuit in *LePage’s*. The Ninth Circuit found that was an error of law and rejected *LePage’s* – and it was that holding that grabbed the headlines in the days following the decision.<sup>30</sup> The court did indeed adopt a variation of the below-cost pricing requirement in *Brooke Group* in that bundled pricing case, declaring that “[t]o prove that a bundled discount was exclusionary or predatory for the purposes

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<sup>27</sup> Id. at 151 (in discussing *Brooke Group*, the court noted that “Unlike 3M, Brown & Williamson was part of an oligopoly . . . Its conduct and pricing were at all times necessarily constrained by the presence of competitors who could, and did, react to its conduct by undertaking similar price cuts or pricing behavior. . . Assuming arguendo that *Brooke Group* should be read for the proposition that a company’s pricing action is legal if its prices are not below its costs, nothing in the decision suggests that its discussion of the issue is applicable to a monopolist with its unconstrained market power.”)

<sup>28</sup> Id. at 152.

<sup>29</sup> *Cascade Health Solutions v. PeaceHealth*, 2007 U.S. App. LEXIS 21075 (9th Cir. 2007).

<sup>30</sup> Id. at \*40 (the court cited the ubiquity of bundling and the Supreme Court’s “solicitude for price competition.” in refusing to apply *LePage’s*).

of a monopolization or attempted monopolization claim under § 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them.”<sup>31</sup> Yet equally significant was the court’s departure from *Brooke Group*. At first the court seemed to warmly embrace *Brooke Group*, but in the end it distinguished *Brooke Group* as involving nothing more than single product predatory pricing and read its application fairly narrowly.<sup>32</sup> Thus, while the Ninth Circuit adopted a cost-based test to assess the legality of bundled discounts (albeit not the one sought by the defendants), it explicitly refused to require proof of recoupment.<sup>33</sup>

The legality of loyalty rebate programs (also labeled fidelity or volume rebates) under section 2 have spurred academic debate and discussion recently – although there are few judicial decisions that squarely address the issue. The Eighth Circuit’s decision in *Concord Boat* stands as the principal case with respect to these kinds of rebates.<sup>34</sup> In that case, the defendant relied on *Brooke Group* and *Matsushita* to argue that its discount programs were legal because there was no proof that they were below cost.<sup>35</sup> While the Eighth Circuit reversed the district court and

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<sup>31</sup> Id. at \*63-64.

<sup>32</sup> Id. at \*36 (“[I]n neither *Brooke Group* nor *Weyerhaeuser* did the Court go so far as to hold that in every case in which a plaintiff challenges low prices as exclusionary conduct the plaintiff must prove that those prices were below cost.”).

<sup>33</sup> Id. at \*63-64.

<sup>34</sup> *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir.), cert. denied, 531 U.S. 749 (2000).

<sup>35</sup> *Concord Boat Corp. v. Brunswick Corp.* Nos. 98-3732 & 98-4042, United States Court of Appeals for the Eighth Circuit, March 22, 1999, Initial Brief: Appellant-Petitioner, Brief for Defendant-Appellant Brunswick Corporation at \*23.

overturned the jury verdict against the defendant, it is by no means clear that the appellate court agreed with the defendant's argument. The Eighth Circuit, to be sure, noted that "the Supreme Court in *Brooke Group* and *Matsushita* illustrate the general rule that above cost discounting is not anticompetitive."<sup>36</sup> However it did not appear to rule out such a challenge, nor did it hold that volume discounts should be evaluated under *Brooke Group* (indeed it is unclear if the Eighth Circuit adopted any standard). In the end, the Eighth Circuit's decision seems to have been driven by its problems with the plaintiff's expert and the facts of the case.<sup>37</sup>

The Supreme Court's decision in *Trinko* seemingly generated more questions than answers.<sup>38</sup> Although the case involved a narrow issue – whether the antitrust laws should be used to enforce a duty to deal arising from the 1996 Telecommunications Act – Justice Scalia's opinion has led many to speculate not only about the viability of refusal to deal claims but even more broadly about the future scope of section 2.<sup>39</sup> For example, he declined to embrace the essential facilities doctrine as an exception to a rule that there is no duty to deal with a competitor.<sup>40</sup> And he described the *Aspen* decision, in which the Court had found a duty to deal with a competitor when the refusal to deal constituted an unexplained change of position, as

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<sup>36</sup> *Concord Boat*, 207 F.3d at 1061.

<sup>37</sup> *Id.* at 1063 ("discount programs were not exclusive dealing contracts and its customers were not required either to purchase 100% from Brunswick or to refrain from purchasing from competitors in order to receive the discount.").

<sup>38</sup> *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

<sup>39</sup> *Id.* at 401 ("In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under § 2 of the Sherman Act.").

<sup>40</sup> *Id.* at 411 ("We have never recognized [the essential facilities doctrine] and we find no need either to recognize it or repudiate it here.").

marking the outer bounds of a firm's duty to deal.<sup>41</sup> These observations have led some to speculate about whether a refusal to deal in any context may give rise to an actionable claim under the Sherman Act.<sup>42</sup>

Yet, the lower federal appellate courts have read *Trinko* fairly narrowly. Refusal to deal claims modeled after *Aspen Skiing*, essential facilities, and price squeezes have survived. For example, less than a year after *Trinko*, the Fifth Circuit upheld an arbitrator's finding that the defendant's refusal to deal violated section 2 and distinguished *Trinko* on the ground that the claim at issue was like the claim in *Aspen* – namely, that the defendant's refusal to deal marked a change in its position.<sup>43</sup> Similarly the essential facility doctrine has survived largely intact. In *Metronet Services*, the Ninth Circuit held that the essential facilities doctrine was still viable in the wake of *Trinko*, although it concluded that it was not applicable in that case after adopting the reasoning in *Trinko*.<sup>44</sup> Subsequently, in *Nobody In Particular Presents, Inc. v. Clear*

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<sup>41</sup> Id. at 409 (describing *Aspen Skiing* as “at or near the outer boundary of § 2 liability.”).

<sup>42</sup> See, e.g., James A. Keyte, The Ripple Effects of *Trinko*: How is it affecting Section 2 Analysis, 20 ANTITRUST 44 (Fall 2005) (“In terms of its most immediate effect, *Trinko* has provided all but antitrust immunity for refusals to deal by monopolists that had not ‘voluntarily’ provided access to rivals, but did so only by regulatory compulsion; has clearly signaled that the demise of the essential facilities doctrine- ‘crafted by some lower courts’ --may be on the horizon; and, by all appearances, has summarily killed off ‘leveraging’ as an independent Section 2 violation.”).

<sup>43</sup> *American Central Eastern Texas Gas Co. v. American Central Gas Companies Inc.*, 93 Fed. Appx. 1, 9-10 (5th Cir. 2004) (“the Court notes that Duke refused to deal in the context of a prior course of dealing with ACET. Further, there was no regulatory regime in this case to ensure Duke's actions were competitive.”); see also, *Covad Communications Co. v. Bell Atlantic*, 398 F.3d 666, 675-76 (D.C. Cir. 2005).

<sup>44</sup> *Metronet Services Corp. v. Metronet Telemanagement Corp.*, 383 F.3d 1124, 1129 (9th Cir. 2004) (“The Court [in *Trinko*] reasoned, ‘the indispensable requirement for invoking the doctrine is the unavailability of access to the ‘essential facilities’; where access exists, the doctrine serves no purpose.’ Thus ‘essential facility claims should . . . be denied

*Channel Communs.*, the Colorado district court held that the doctrine was both viable post-*Trinko* and that it was applicable in the circumstances of that case.<sup>45</sup> In short, although *Trinko* did not embrace the essential facilities doctrine, it did not reject it either, and the lower courts have treated the doctrine as a viable exception to a general rule that a refusal to deal with a competitor does not violate Section 2.

Finally, some have argued that “it makes no sense to prohibit a predatory price squeeze in circumstances where the integrated monopolist is free to refuse to deal.”<sup>46</sup> Yet others, including both the Eleventh and Ninth Circuits, disagree. *Trinko* itself said nothing about a dominant firm's efforts to impair competition by engaging in a price squeeze. In *Covad Communications v. Bell South Corp.*, the Eleventh Circuit held that *Trinko* did not bar such a claim and that it was therefore a viable claim.<sup>47</sup> The Ninth Circuit held the same thing last month in the *linkLine Communications* case.<sup>48</sup> There the court said “*Trinko* took great care to explain that in this particular regulatory context, ‘claims that satisfy established antitrust standards’ are preserved. 540 U.S. at 406. Because a price squeeze theory formed part of the fabric of traditional antitrust

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where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.’”).

<sup>45</sup> *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F.Supp. 2d 1048 (D. Colo. 2004).

<sup>46</sup> See *Covad Communications Co. v. Bell Atlantic*, 398 F.3d 666, 673 (D.C. Cir. 2005) (affirmed the district court’s dismissal of Covad’s § 2 claim based upon a price squeeze); III PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 767c3, at 129-30 (2d ed. 2002).

<sup>47</sup> See *Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044, 1050 (11th Cir. 2004).

<sup>48</sup> *linkLine Communications, Inc. v. California, Inc.*, 2007 U.S. App. LEXIS 21719 (9th Cir. 2007).

law prior to *Trinko*, those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko*.”<sup>49</sup>

Predatory pricing and refusals to deal are only two classes of potential claims that may be brought under section 2. As Justice Ginsburg of the D.C. Circuit has observed “‘Anticompetitive conduct’ can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.”<sup>50</sup> One trend in the appellate courts has been to condemn tying and exclusive dealing arrangements under section 2 – claims that were once traditionally challenged under section 1.<sup>51</sup> Most Chicago School adherents consider those arrangements presumptively or even *per se* legal.

Some of the Court’s decisions on vertical restraints, such as those in *Sylvania* and now *Leegin*, have led some to speculate about the standards for tying and exclusive dealing. The Supreme Court last considered an exclusive dealing claim 45 years ago, and its *Jefferson Parish* decision articulating a standard for tying claims is now over 20 years old.<sup>52</sup> Justice Stevens opinion for a unanimous Court in *Illinois Tool Works* focused solely on whether the courts

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<sup>49</sup> Id. at 19-20.

<sup>50</sup> *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, et al.*, 148 F.3d 1080, 1087 (D.C. Cir. 1998); see also *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 784 (6th Cir. 2002).

<sup>51</sup> See J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, “Vertical Restraints & Sherman Act § 2” presented at the Conference on Current Topics in Antitrust Economics and Competition Policy sponsored by CRA International, (June 13, 2007) available at <http://www.ftc.gov/speeches/rosch/070613verticalrestraints.pdf>

<sup>52</sup> See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

should presume that a patent confers market power in tying cases.<sup>53</sup> Nothing in that case altered the *per se* standard articulated in *Jefferson Parish* (though proof of market power in the tying product was required, making the label weird.). Nevertheless, one might expect, given the Chicago School thinking reflected in the Court’s recent jurisprudence (as well as in Judge Posner’s analysis of exclusive dealing in *Roland Machinery v. Dresser*<sup>54</sup>) that the lower federal appellate courts might take a closer look at tying and exclusive dealing cases.

That has not happened – at least in some cases. For example, in *United States v. Microsoft*, the tying allegations focused on Microsoft’s sale of its operating system and web browser software.<sup>55</sup> Judge Ginsburg (who is commonly considered a Chicago School principal – did not suggest that the practice was either presumptively or *per se* legal under section 1. Speaking for a unanimous court, he found in the unique context of that case – i.e., the tying of software applications with the operating system – the section 1 claim should be assessed under the rule of reason.<sup>56</sup> However, the court did find that certain aspects of Microsoft’s integration of its browser with its operating system was anticompetitive under section 2 – although it refused to attach liability because it found that Microsoft’s justifications were unchallenged by the government.<sup>57</sup>

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<sup>53</sup> Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 31 (2006) (“The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. We conclude that the mere fact that a tying product is patented does not support such a presumption.”).

<sup>54</sup> Roland Machinery Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984).

<sup>55</sup> United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

<sup>56</sup> Id. at 95.

<sup>57</sup> Id. at 66.

The DC Circuit’s analysis of the exclusive dealing claims in *Microsoft* was even more interesting.<sup>58</sup> The exclusive dealing claim brought under section 1 was dismissed by the district court because Microsoft had not “completely excluded Netscape” from reaching any potential user.<sup>59</sup> Yet the exclusive dealing claim under section 2 survived both the district court and the appellate court despite the dismissal of the section 1 count. The D.C. Circuit held that a monopolist’s use of exclusive dealing to injure competitors could violate section 2 even if the practice did not foreclose competitors from the 40% to 50% share of the relevant market generally required for a Section 1 violation.<sup>60</sup> It found that Microsoft managed to preserve its monopoly in the market for operating systems by foreclosing a substantial percentage of the available opportunities for browser distribution.

Subsequently, in *Dentsply*, the Third Circuit reversed a district court judgment for the defendant in an exclusive dealing case brought under section 2 where the practice simply foreclosed competitors from the most important distributors and the exclusive dealing contracts were at-will contracts.<sup>61</sup> The decision in that case contrasts sharply with Judge Posner’s decision in *Roland Machinery*, where it was stated that exclusive dealing contracts less than a year in duration were presumptively legal under section 1.<sup>62</sup>

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<sup>58</sup> Id. at 70.

<sup>59</sup> Id.

<sup>60</sup> Id.

<sup>61</sup> *United States v. Dentsply Int’l Inc.*, 399 F.3d 181 (3d Cir. 2005)

<sup>62</sup> *Roland Machinery*, 749 F.2d 380; but see *NicSand, Inc. v. 3M Co.*, 2007 U.S. App. LEXIS 24270 (6th Cir. 2007) (Sixth Circuit en banc decision holding that the plaintiffs’ section 2 claim, which alleged that the defendant had eliminated the plaintiffs from the market by paying sums up-front to buy exclusivity, failed to state a viable claim.).

Finally, there are the standard-setting cases. In *Rambus*, of course, the Commission held that Rambus violated section 2 when, as a member of a standard setting organization, it engaged in a deceptive course of conduct that caused the standard setting organization, and subsequently the industry, to unknowingly adopt several DRAM standards that read on Rambus's intellectual property.<sup>63</sup> In September of this year, the Third Circuit in *Broadcom v. Qualcomm*, building on the decision in *Rambus*, held that section 2 liability could attach where it was alleged that the defendant made false and/or misleading RAND promises in order to procure a standard adopting the defendant's technology.<sup>64</sup>

We at the Commission were very mindful of Chicago School economic thought and of the Supreme Court's recent jurisprudence in deciding *Rambus*, and I assume that the Third Circuit was similarly mindful of it in deciding *Qualcomm*. But we were not convinced that deceptive conduct in the context of a standard-setting process could or should be considered presumptively legal, much less legal *per se*.

To sum up, despite the influence of Chicago School economic thought on recent Supreme Court jurisprudence, many lower appellate courts appear to be heeding the older admonition of the Court in *Kodak* that economic theory does not trump facts in antitrust analysis.<sup>65</sup> They appear to be ready and willing to cabin the Supreme Court's decisions to their facts and to eschew application of doctrinaire Chicago School thought where the Supreme Court has not yet

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<sup>63</sup> In the Matter of Rambus, Inc., No. 9302, 2006 FTC LEXIS 60 (F.T.C. Aug. 2, 2006).

<sup>64</sup> *Broadcom Corp. v. Qualcomm Corp.*, 2007-2 Trade Cas. (CCH) P75,852 (3d Cir. 2007).

<sup>65</sup> *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 466-467 (1992).

embraced it. Any analysis of the law of section 2 that does not fully account for these decisions should be considered incomplete.