



2009

## Antitrust and Consumer Protection

A. Michael Ferrilll

Leslie Sara Hyman

Caleb Rackley

Follow this and additional works at: <https://scholar.smu.edu/smulr>

---

### Recommended Citation

A. Michael Ferrilll, et al., *Antitrust and Consumer Protection*, 62 SMU L. Rev. 855 (2009)  
<https://scholar.smu.edu/smulr/vol62/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# ANTITRUST AND CONSUMER PROTECTION

*A. Michael Ferrill\**  
*Leslie Sara Hyman\*\**  
*Caleb Rackley\*\*\**

## TABLE OF CONTENTS

I. INTRODUCTION .....	856
II. ANTITRUST .....	856
A. THE REPORT .....	856
1. <i>Single-Product Loyalty Discounts</i> .....	857
2. <i>Exclusive Dealing</i> .....	858
3. <i>Bundled Discounts</i> .....	858
B. POST MERGER DIVESTITURE .....	860
C. ORGANIZATIONAL HORIZONTAL PRICE-FIXING .....	862
D. FRANCHISES AND TYING ALLEGATIONS .....	864
E. CONSPIRACY IN THE STANDARD SETTING CONTEXT ...	865
III. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT.....	866
A. STANDING AND CONSUMER STATUS .....	866
B. DECEPTIVE PRACTICES .....	867
1. <i>Laundry List Claims</i> .....	867
2. <i>Section 17.50—Breach of Warranty</i> .....	868
3. <i>Unconscionability</i> .....	868
C. DETERMINING THE MEASURE OF DAMAGES.....	869
1. <i>Actual Damages</i> .....	869
2. <i>Damages for Mental Anguish</i> .....	869
3. <i>Attorneys' Fees</i> .....	870
D. EXEMPTIONS, DEFENSES, AND LIMITATIONS ON RECOVERY .....	870
1. <i>Preemption and Exemption from the DTPA</i> .....	870
2. <i>Adequacy of Pre-Suit Notice</i> .....	871
3. <i>Necessity of Proving Reliance</i> .....	871
4. <i>A "Mere" Breach of Contract is Not Actionable             Under the DTPA</i> .....	873
IV. CONCLUSION .....	873

---

\* B.B.A., St. Mary's University; J.D., Baylor University; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.

\*\* B.A., Brandeis University; J.D., Hastings College of the Law; Shareholder, Cox Smith Matthews Incorporated, San Antonio, Texas.

\*\*\* B.S., Texas A&M University; J.D., St. Mary's University School of Law; Associate, Cox Smith Matthews Incorporated, San Antonio, Texas.

## I. INTRODUCTION

THE intended beneficiary of both the antitrust laws and the Texas Deceptive Trade Practices – Consumer Protection Act (“DTPA”)<sup>1</sup> is the consumer. While the antitrust laws protect consumers by promoting competitive markets,<sup>2</sup> the DTPA is intended “to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty . . . .”<sup>3</sup>

This Survey covers significant developments under the antitrust laws and the DTPA from November 1, 2007 through October 31, 2008.

## II. ANTITRUST

Of note during the Survey period was the September 2008 release by the Department of Justice of the report of its study of the application of the U.S. antitrust laws to dominant firms, as well as its subsequent withdrawal by the new administration shortly before this article went to press. Also of interest were several judicial decisions.

### A. THE REPORT

The Department of Justice report, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Report)*,<sup>4</sup> was the product of a series of hearings jointly sponsored by the Antitrust Division of the Department of Justice and the Federal Trade Commission (FTC). The FTC, however, did not join in the Report. Three of the four sitting FTC Commissioners issued a written statement highly critical of it and the new administration withdrew the Report in full on May 11, 2009.<sup>5</sup> The portions of the Report of particular interest address single-product loyalty discounts, exclusive dealing, and bundled discounts. Inasmuch as vertical restraints are not high on the Justice Department’s list of enforcement initiatives,<sup>6</sup> the Report appeared to be less a statement of enforcement policy than an attempt to influence judicial decisions in private litigation. The Reagan Administration attempted to do this with its 1985

---

1. TEX. BUS. & COM. CODE ANN. §§ 17.41-17.81 (Vernon 2002 & Supp. 2008).

2. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 251 (1993).

3. TEX. BUS. & COM. CODE ANN. § 17.44(a) (Vernon 2002).

4. U.S. DEPT. OF JUSTICE, *COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT* (2008), available at [www.usdoj.gov/atr/public/reports/236681.htm](http://www.usdoj.gov/atr/public/reports/236681.htm) [hereinafter REPORT].

5. FTC, *Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice (2008)*, available at [www.ftc.gov/os/2008/09/080908section2stmt.pdf](http://www.ftc.gov/os/2008/09/080908section2stmt.pdf) [hereinafter STATEMENT]; Press Release, U.S. Dep’t of Justice, *Justice Department Withdraws Report on Antitrust Monopoly Law* (May 11, 2009), available at [http://www.usdoj.gov/art/public/press\\_release/2009/245710.htm](http://www.usdoj.gov/art/public/press_release/2009/245710.htm).

6. There are exceptions, such as the DOJ’s civil antitrust lawsuit challenging Microsoft’s contracting practices. See generally *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc).

Vertical Restraints Guidelines.<sup>7</sup> Those guidelines likewise were rescinded by the Clinton Department of Justice in 1993.<sup>8</sup> Although no longer effective, the Report and its prompt withdrawal by the new administration, as well as the written statement of the three FTC Commissioners explaining their criticisms of it, illuminate several areas of ongoing vigorous debate among the competing schools of antitrust jurisprudence, and provide insight as to how the federal enforcement agencies may be expected to analyze single-firm conduct issues for the foreseeable future.

### 1. *Single-Product Loyalty Discounts*

The Report addressed those instances where a seller offers “discounts (or rebates) on all units of a [particular] product conditioned upon the [buyer’s] level of purchases.”<sup>9</sup> The Report noted that although the Supreme Court has not yet taken a case involving single-product loyalty discounts, several federal courts of appeals and district courts have done so, with varying outcomes.<sup>10</sup> After surveying these cases, the Report stated that the Department “likely” would apply a standard predatory pricing analysis in most cases, which would result in finding the discounts lawful unless they resulted in prices below “average avoidable cost” or average variable cost.<sup>11</sup>

The Report acknowledged the scholarship arguing that above-cost single-product loyalty discounts can be anticompetitive in some cases and concluded “that further assessment of the real-world impact of these discounts is necessary before concluding that standard predatory-pricing analysis” should be used in all cases.<sup>12</sup>

As an alternative to predatory-pricing analysis, however, the Report argued that in any foreclosure-based approach, the plaintiff should be required to prove not only significant foreclosure and harm to competition, but also that the discount has no procompetitive benefits or competitive harm “substantially disproportionate” to any benefits.<sup>13</sup>

FTC Commissioners Harbour, Leibowitz and Rosch (the “Commissioners”) criticized the Report’s price-cost safe harbor on two grounds.<sup>14</sup> First, they argued that it would “permit a firm with monopoly or near-monopoly power to foreclose a weaker rival from” growing to “the minimum . . . scale it would need to constrain the exercise of monopoly

---

7. WILLIAM M. HANNAY, CORP. COMPL. SERIES: ANTITRUST § 1:16, n.1 (2008) (citing 4 TRADE REG. REP. (CCH) ¶ 13, 105 (1985)).

8. *Id.*

9. REPORT, *supra* note 4, at 106.

10. *Id.* at 108–09.

11. *Id.* at 116; *see also id.* at 64 (describing average avoidable cost as “all costs, including both variable costs and product-specific fixed costs, that could have been avoided by not engaging in the predatory strategy”). “[A]verage avoidable cost omits all fixed costs that were already sunk before the time of the predation.” The Report acknowledged that average variable test is the prevailing test in the courts. *See id.* at 62–63.

12. *Id.* at 116.

13. *Id.* at 117.

14. STATEMENT *supra* note 5, at 5.

power.”<sup>15</sup> The Commissioners also criticized the Report’s assertion “that if a rival ‘remains in the market,’ (no matter how crippled . . .),” the loyalty discount should be legal.<sup>16</sup>

## 2. *Exclusive Dealing*

The Report defined exclusive dealing as “an arrangement whereby one party’s willingness to deal with another is contingent upon that other party (1) dealing with it exclusively or (2) purchasing a large share of its requirements from it.”<sup>17</sup> The Report agreed with the general premise that exclusive dealing is frequently procompetitive, but acknowledged that, when practiced by a monopolist, “exclusive dealing . . . can be anticompetitive in some circumstances,” such as when it denies rivals access to efficient distribution services<sup>18</sup> or deprives rivals of economies of scale to achieve efficiencies necessary to effectively compete.<sup>19</sup>

Noting that several courts have indicated that foreclosure percentages below thirty to forty percent are generally insufficient to support an exclusive dealing claim, the Report argued that there should be a safe harbor for exclusive deals that foreclose less than thirty percent of the market.<sup>20</sup> And even when actual or probable loss to competition is shown, the Report argued that exclusive dealing should be illegal only if it has no procompetitive benefits, or the anticompetitive effects substantially outweigh any procompetitive benefits shown.<sup>21</sup>

With respect to the Report’s proposed thirty percent safe harbor, the Commissioners noted that “[t]he only ‘safe harbors’ blessed by the Supreme Court” are for “predatory pricing and bidding,”<sup>22</sup> and that “a rival may need greater [than thirty percent] access to the market . . . to achieve sufficient scope.”<sup>23</sup> The Commissioners also criticized the Report’s proposal that exclusive dealing should be deemed lawful even when foreclosure exceeds thirty percent, unless the plaintiff demonstrates that the anticompetitive effects are “disproportionate” to its benefits, instead of showing that they outweigh the procompetitive benefits, which is the test under the rule of reason.<sup>24</sup>

## 3. *Bundled Discounts*

The Report defined bundled discounting as “the practice of offering discounts or rebates” conditioned on the buyer’s purchase of two or more of the manufacturer’s products, including bundled discounts where the

---

15. *Id.* at 6–7.

16. *Id.* at 7.

17. REPORT, *supra* note 4, at 131.

18. *Id.*

19. *Id.* at 137.

20. *Id.* at 141.

21. *Id.* at 140.

22. STATEMENT, *supra* note 5, at 4, 9–10 (citations omitted).

23. *See id.* at 10.

24. *Id.* at 5, 10.

amount of the discount is based on the quantity of multiple products bought during a specified time period.<sup>25</sup> The Report acknowledged that, although such practices are common and usually do not raise antitrust concerns, they can, when practiced by a monopolist, harm competition in some circumstances.<sup>26</sup> After surveying lower court decisions involving a variety of bundled discounting schemes, the Report rejected the approach taken by the Third Circuit in *LePage's, Inc. v. 3M*, in which the jury was instructed that a bundle violates section 2 when it "has made it very difficult or impossible for competitors to engage in fair competition."<sup>27</sup> Instead, the Report proposes a test that included two safe harbors, one applicable when the bundle is analyzed like predatory pricing and the other when the bundle is analyzed like a tying arrangement.<sup>28</sup>

In those situations where it is "reasonably possible" for competitors to match the bundle, the Report argued that the bundle should be analyzed like predatory pricing, and deemed lawful unless the price of the bundle is below incremental cost, and recoupment of the losses incurred in the predatory campaign is likely.<sup>29</sup> In those cases where "bundle-to-bundle competition is not reasonably" likely "because of the inability of any substantial competitor or group of competitors to provide a similar range of [bundled] items," the Report argued that bundled discounting more closely resembles tying than predatory pricing.<sup>30</sup> In such cases the Report argued that "all discounts and rebates attributable to the entire bundle" should be allocated to the competitive product, and that the bundle should be upheld unless the "defendant sold the competitive product at an imputed price that was below its incremental cost of that product."<sup>31</sup>

The Report next argued that a bundle's failure to satisfy this safe harbor does not mean that the bundle is illegal. "A bundled discount that falls outside the discount-allocation safe harbor still has to be analyzed for competitive effects."<sup>32</sup> According to the report, a "plaintiff must demonstrate actual or probable harm to competition. A significant consideration in this regard is whether rivals remain and are likely to remain in the market."<sup>33</sup> "[I]f rivals have not exited the market as a result of the bundled discounting, and if exit is not reasonably imminent, courts should be especially demanding as to the showing of harm to competition."<sup>34</sup> And even if a plaintiff surmounts this hurdle, the Report argued that the bundle should be deemed "illegal only when (1) it has no procompetitive benefits, or (2) if there are procompetitive benefits, the discount pro-

---

25. REPORT, *supra* note 4, at 91.

26. *Id.*

27. *See id.* at 94–95 (quoting *LePage's, Inc. v. 3M*, 324 F.3d 141, 168 (3d Cir. 2003) (en banc)).

28. *Id.* at 101.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 102.

33. *Id.* at 105.

34. *Id.*

duces harms substantially disproportionate to those benefits.”<sup>35</sup>

The Commissioners noted that “no Supreme Court decision has ever blessed the use of . . . price-cost rules . . . for any practice except predatory pricing.”<sup>36</sup> They also again criticized the Report’s “disproportionality” test as inconsistent with the established standard under the rule of reason.<sup>37</sup>

## B. POST MERGER DIVESTITURE

In *Chicago Bridge & Iron Company N.V. v. Federal Trade Commission*,<sup>38</sup> the Fifth Circuit Court of Appeals reviewed an FTC order requiring Chicago Bridge & Iron Company (CB&I) to divest assets acquired from its principal competitor, Pitt-Des Moines. CB&I designs, engineers, and constructs field-erected storage tanks for three types of gasses, as well as thermal vacuum chambers used in the testing of aerospace satellites. Prior to 2001, CB&I and Pitt-Des Moines were the dominant U.S. suppliers in each of these four markets. In late 2000, CB&I notified the FTC that it intended to acquire all of Pitt-Des Moines’s assets in the four markets. The FTC had significant antitrust concerns about the acquisition and said it was conducting an investigation, but took no further action to halt the acquisition. After the acquisition, the FTC issued an administrative complaint, charging that the acquisition violated section 7 of the Clayton Act (15 U.S.C. § 18) and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). After a hearing, an Administrative Law Judge (ALJ) issued an Initial Decision holding that CB&I was in violation of both statutes and ordering a divestiture of the assets. The ALJ’s determination of liability was affirmed upon review and a modified divestiture order was issued.<sup>39</sup>

On appeal to the Fifth Circuit, CB&I challenged the FTC’s application of the standards for production of evidence and persuasion.<sup>40</sup> Under the applicable burden-shifting framework, the Government first presents “a prima facie case that an acquisition is unlawful.”<sup>41</sup> The respondent rebuts the prima facie case by casting doubt on whether the Government’s case is “predictive of future anti-competitive effects.”<sup>42</sup> “[T]he burden of production [then] shifts back to the Government and merges with the ultimate burden of persuasion.”<sup>43</sup> CB&I argued that the FTC erroneously subjected it to the burden of persuasion in concluding that it had failed to rebut the Government’s prima facie case. Holding that the burden-shifting analysis is a “flexible framework rather than an air-tight rule,” the

---

35. *Id.*

36. STATEMENT, *supra* note 5, at 7.

37. *Id.*

38. 534 F.3d 410 (5th Cir. 2008).

39. *Id.* at 420–22.

40. *Id.* at 422.

41. *Id.* at 423 (citations omitted).

42. *Id.*

43. *Id.*

court concluded that the burden need not shift back to the Government if the respondent's rebuttal evidence, in light of the prima facie case, reveals that the respondent failed to rebut the Government's prima facie case.<sup>44</sup> In determining whether the respondent's burden is met, "the Commission can judge whether the nexus between the rebuttal arguments and the proffered evidence is plausible so as to satisfy the burden of production as a matter of law."<sup>45</sup> Applying these tests, the court affirmed the FTC's conclusion that CB&I failed to satisfy its burden of production on rebuttal, thereby leaving the Government's prima facie case unchallenged.<sup>46</sup>

CB&I next argued that the FTC erred in considering only whether there had already been new entrants sufficient to constrain CB&I from raising prices, when the correct legal standard was whether entry would be sufficient to counteract a supracompetitive price increase. The court disagreed, concluding that the FTC had addressed whether existing entry was sufficient to constrain CB&I from raising prices and also had determined, based upon existing entry and historical patterns, whether future entry would be able to counteract the anticompetitive effects of the acquisition.<sup>47</sup> The court also rejected CB&I's argument that structural changes in the market rendered the history of actual entry distinguishable from evidence of potential entry, concluding that the Government's substantial evidence of barriers to entry that "will continue to exist in the near future" was un rebutted by CB&I.<sup>48</sup>

CB&I also argued that the FTC had not relied on substantial evidence in making its factual findings regarding probable future competitiveness in the markets, "nearly insurmountable" entry barriers, and alternatives to CB&I.<sup>49</sup> The court rejected each argument. Regarding the Government's use of the Herfindahl-Hirshmann Index (HHI) to determine probable future competitiveness, the court held that while HHIs should be used with caution in markets with sporadic sales, they need not be ignored.<sup>50</sup> Here, the FTC's use of an extended sales period due to the sporadic nature of sales in the relevant markets was appropriate, and given the strength of the Government's prima facie case, the HHIs were not the dispositive factor in the finding of a high market concentration.<sup>51</sup> Regarding the evidence of entry barriers, the court held that while "post-acquisition evidence may be useful in determining the possibility that new entrants [will] counteract the anti-competitive effects of an acquisition," if that evidence is subject to manipulation, such as by the respondents' decision not to aggressively oppose new entrants, its probative value is prop-

---

44. *Id.* at 424–25.

45. *Id.* at 425.

46. *Id.* at 426.

47. *Id.* at 427–28.

48. *Id.* at 428–29.

49. *Id.* at 431.

50. *Id.* at 430–33.

51. *Id.* at 432–33.



erly limited.<sup>52</sup> Moreover, CB&I's arguments regarding potential new entrants was insufficient to rebut the Government's substantial evidence of high entry barriers and thus could not rebut the prima facie evidence of the anticompetitive nature of CB&I's acquisition.<sup>53</sup> Regarding customers' alternatives to CB&I, the court held that CB&I had not produced sufficient evidence to rebut the Government's prima facie case that CB&I had successfully used its market power to force even "large and sophisticated customers" into "sole-source contracts without any bidding."<sup>54</sup> And even when the "sophisticated customer" evidence is stronger than that proffered by CB&I, courts have not considered it "independently adequate to rebut a prima facie case."<sup>55</sup>

CB&I's final attack related to the terms of the divestiture order, which required it to divest sufficient assets of Pitt-Des Moines "to create a competitor . . . capable of competing on an equal footing," including assets unrelated to the construction of the products at issue.<sup>56</sup> CB&I argued that the remedial provisions were overbroad and punitive. The court disagreed, holding that, given the wide latitude granted to the FTC, divestiture was consistent with the FTC's goal of creating a viable competitor because the assets unrelated to the products at issue would provide a needed revenue stream.<sup>57</sup>

### C. ORGANIZATIONAL HORIZONTAL PRICE-FIXING

In *North Texas Specialty Physicians v. Federal Trade Commission*, the Fifth Circuit Court of Appeals considered whether an organization of independent physicians and physician groups in the Tarrant Country area had engaged in horizontal price-fixing.<sup>58</sup> North Texas Specialty Physicians (NTSP) negotiated fee-for-service contracts between its members and payors.<sup>59</sup> As part of that process, NTSP and its physicians executed Physician Participation Agreements, which provided that when NTSP entered into an agreement with a payor to disseminate contract offers, NTSP would send the offers to physicians, who could choose to accept or reject them. NTSP negotiated a contract for the physicians if more than fifty percent of them agreed to accept the offer. While the physicians were expected not to negotiate individually with a payor who was engaged in negotiations with NTSP, if it was not negotiating with a payor, or did not have an agreement covering the physician's services, the physician could deal with that payor directly, or through "participation in other independent physician associations."<sup>60</sup> NTSP set the minimum fees-for-

---

52. *Id.* at 434-35 (emphasis omitted).

53. *Id.* at 436-39.

54. *Id.* at 439 (emphasis omitted).

55. *Id.* at 440.

56. *Id.* at 441 (internal quotations omitted).

57. *Id.* at 441-42.

58. 528 F.3d 346 (5th Cir. 2008).

59. *Id.* at 352.

60. *Id.* at 353.

service acceptable to its physicians by polling them on an annual basis and using that data to calculate the mean, median, and mode of acceptable fees, which were reported to participating physicians, both at the time of calculation, and in connection with the following year's solicitation of poll responses.<sup>61</sup>

"The FTC issued an administrative complaint alleging that NTSP restrained competition among its physicians through horizontal price-fixing in violation" of the Federal Trade Commission Act (15 U.S.C. § 45(a)).<sup>62</sup> The ALJ found that NTSP's conduct did constitute horizontal price-fixing and issued a cease and desist order.<sup>63</sup> Using an "inherently suspect" analysis, the FTC affirmed on appeal and entered a cease and desist order requiring NTSP to terminate existing "contracts at the payor's request or at the earliest termination or renewal date."<sup>64</sup>

On appeal to the Fifth Circuit, NTSP challenged the FTC's jurisdiction, findings of concerted action, and breadth of the remedial order, and argued that use of the "inherently suspect" analysis was improper.<sup>65</sup> The court first addressed the jurisdictional challenge, rejecting NTSP's argument that its conduct was not "in or affecting commerce," because establishing jurisdiction requires an analysis of potential harm from the allegedly illegal agreement, not of actual consequences to date.<sup>66</sup> The evidence before the FTC included testimony from payors that an increase in costs for health care services in Tarrant County would affect overall insurance costs for national companies whose Tarrant County employees were covered by the contracts. The court concluded that "[i]f NTSP's efforts to maintain physicians' fees were successful," the effects would be felt by "out-of-state employers and payors."<sup>67</sup> This effect was sufficient to confer jurisdiction on the FTC.<sup>68</sup>

The court next rejected NTSP's argument that it was a "memberless, non-profit corporation and that its actions [therefore were] not the actions of individual physicians."<sup>69</sup> The court concluded that the FTC had correctly held that antitrust "liability does not depend upon a particular form or business structure" and that "NTSP's status as a 'memberless' organization under state law or as an incorporated legal entity does not foreclose a finding of concerted action by the physicians who constitute, use, and control NTSP."<sup>70</sup> The court also agreed with the FTC's conclusion that authorizing "NTSP to take certain actions on [one's] behalf, knowing that [one's competitors] were doing the same thing," constituted the required concerted action, even in the absence of direct communica-

---

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 354.

65. *Id.*

66. *Id.* at 354–55 (internal citations omitted).

67. *Id.* at 355.

68. *Id.*

69. *Id.* at 356 (internal quotations omitted).

70. *Id.*

tion between the competitors.<sup>71</sup>

The court next approved the FTC's use of the "inherently suspect" analysis.<sup>72</sup> The court noted that the Supreme Court has approved the use of an "'abbreviated' or 'quick-look' analysis under the rule of reason" when 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.'"<sup>73</sup>

The court affirmed the FTC's conclusion that NTSP's conduct constituted horizontal price-fixing. Specifically, NTSP's practice of collecting data regarding minimum acceptable fees and then disseminating the mean, median, and mode of such data; the agreements between NTSP and its members that members would not negotiate directly with a payor with whom NTSP was negotiating; evidence "that NTSP actively encouraged [members] to reject . . . offers below the minimum fees indicated in the polls;" and the fact that NTSP rejected offers that fewer than fifty percent of its members approved all reflected a concerted effort by NTSP physicians to increase their bargaining power that was likely to disrupt the proper functioning of the price-setting mechanism of the market.<sup>74</sup> The court rejected NTSP's proffered justifications for its behavior, which related to "spillover efficiencies" from NTSP's negotiations of fee-for-patient contracts for its members.<sup>75</sup> The FTC had noted, and the court agreed, that NTSP failed to address how its alleged efficiencies were "dependent on its price-fixing activities."<sup>76</sup> Nor had NTSP explained how its members' professional services were enhanced by the price restraint.<sup>77</sup>

Finally, the court considered NTSP's challenge to the breadth of the remedial order, which required NTSP to refrain from entering into or participating in any agreement among physicians "to deal, refuse to deal, or threaten to refuse to deal with any payor."<sup>78</sup> The court agreed that this provision was overbroad because, as found by the ALJ, such a provision "could have the effect of compelling Respondent to messenger contracts or become a party to contracts sent to it by payors, regardless of potential risks to Respondent, its member physicians, and its patients."<sup>79</sup>

#### D. FRANCHISES AND TYING ALLEGATIONS

The Fifth Circuit Court of Appeals considered a franchise tying claim in *Schlotsky's, Ltd. v. Sterling Purchasing and National Distribution*

---

71. *Id.* at 357.

72. *Id.* at 358.

73. *Id.* at 360 (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)).

74. *Id.* at 363-66 (internal quotations omitted).

75. *Id.*

76. *Id.* at 369.

77. *Id.*

78. *Id.* at 371.

79. *Id.*

*Co.*<sup>80</sup> Schlotzsky's sued a food distributor, which was the former nonexclusive supply-chain manager for Schlotzsky's branded and proprietary products, for Lanham Act violations. The distributor counterclaimed, alleging that product purchasing agreements between Schlotzsky's and its franchisees setting two approved vendors constituted illegal tying arrangements. At trial, the jury found in favor of Schlotzsky's and the distributor's counterclaims were dismissed.<sup>81</sup>

On appeal, the distributor argued that Schlotzsky's unlawfully "tied the right to use its trademark to the purchase of specific products, forcing franchisees to purchase both proprietary and non-protected products on terms . . . they would not otherwise have accepted."<sup>82</sup> Invoking the U.S. Supreme Court's admonition that a tying claim "must be supported by proof of power in the relevant market rather than by a mere presumption thereof," the court held that the arrangements in question did not constitute tying.<sup>83</sup> The franchise agreement between Schlotzsky's and its franchisees permitted Schlotzsky's to require the franchisees' use of a single product distributor.<sup>84</sup> Thus, Schlotzsky's ability to require franchisees to use the approved distributors stemmed from contractual power, not market power.<sup>85</sup> Moreover, the distributor-use agreements arose after Schlotzsky's had filed for bankruptcy protection and therefore were procompetitive because they assisted the franchisees to return to profitability.<sup>86</sup>

#### E. CONSPIRACY IN THE STANDARD SETTING CONTEXT

*Golden Bridge Tech., Inc. v. Motorola, Inc.*<sup>87</sup> involved communications between members of a standard-setting body. Golden Bridge developed technology for wireless networks that allowed electronic transmission between phones and base stations (CPCH). In 1999, a non-profit standard setting organization, TGPP, included CPCH as an approved optional feature, which "meant that manufacturers did not have to use CPCH, but if they chose to" do so, "they had to follow the [set] standard to ensure compatibility with other equipment and networks."<sup>88</sup> Through a series of meetings and email communications starting in 2004, the members of TGPP discussed simplifying the list of approved technologies and ultimately determined that CPCH would no longer be an approved optional feature. Although Golden Bridge was a member of TGPP, it did not attend the meeting at which the membership voted to remove CPCH from

---

80. 520 F.3d 393 (5th Cir. 2008).

81. *Id.* at 397.

82. *Id.* at 406.

83. *Id.* at 406–08 (quoting *Ill. Tool Works, Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 43 (2006)).

84. *Id.* at 408.

85. *Id.*

86. *See id.*

87. 547 F.3d 266 (5th Cir. 2008).

88. *Id.* at 269.

the approved list.<sup>89</sup> Golden Bridge sued, alleging a group boycott and arguing that the email communications between the members of TGPP demonstrated a conspiracy. The trial court granted summary judgment for the defendants.<sup>90</sup>

On appeal, the court first concluded that none of the emails or other evidence showed “an explicit understanding between the [defendants] to collude and unlawfully eliminate CPCH from the standard.”<sup>91</sup> Nor was there circumstantial evidence that tended to exclude the possibility that the defendants acted independently.<sup>92</sup> Rather, the evidence indicated only that some of the defendants “communicated their dislike of CPCH to each other, and that each [defendant] hoped CPCH would eventually be removed from the standard.”<sup>93</sup> As such, the evidence reflected, at most, “an exchange of information, followed by parallel conduct” and did “not refute the likelihood of independent action,” particularly given that any standard setting must of necessity exclude some products.<sup>94</sup> While Golden Bridge proffered several possible motives for the alleged conspiracy, the court concluded that it was not sufficient “to simply propose conceivable motives for conspiratorial conduct; [the] evidence must tend to show that the possibility of independent conduct is *excluded*.”<sup>95</sup>

### III. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

Noteworthy DTPA decisions during the Survey period address consumer status and damages.

#### A. STANDING AND CONSUMER STATUS

In order to bring a DTPA claim, a plaintiff must be a “consumer” as that term is defined in the statute.<sup>96</sup> *Service Corp. International v. Aragon*<sup>97</sup> arose from the alleged improper burial of the plaintiffs’ relative. Defendant Service Corporation International (SCI) argued that only the burial plot purchaser, and not other family members, sought goods or services and thus that the purchaser was the only DTPA consumer. Disagreeing, the Eastland Court of Appeals recognized that an intended third-party beneficiary may qualify as a consumer, and thus held that the deceased’s immediate family members were all consumers under the DTPA.<sup>98</sup>

---

89. *Id.* at 270.

90. *Id.*

91. *Id.* at 272.

92. *Id.*

93. *Id.*

94. *Id.* at 272–73.

95. *Id.*

96. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon 2002 & Supp. 2008).

97. 268 S.W.3d 112 (Tex. App.—Eastland 2008, pet. filed).

98. *Id.* at 117. The court reasoned that because immediate family members have standing to bring common law actions for mishandling a corpse, the interment services were intended for the benefit of the immediate family of the deceased. *Id.*

*Allen v. American General Finance, Inc.*<sup>99</sup> stemmed from a homeowner's effort to use a home equity loan to pay property taxes and avoid foreclosure. The homeowner alleged that he obtained the loan with the understanding that the lender would pay the taxes due but the lender did not pay the entire amount. The taxing authorities sued and obtained a default judgment ordering foreclosure, which occurred without notice to the lender.<sup>100</sup> The lender never received payments on the loan, so it also sought foreclosure, not realizing that the taxing authorities already had foreclosed. The homeowner counterclaimed under the DTPA and the trial court granted the lender's motion for summary judgment on the ground that the homeowner was not a consumer.<sup>101</sup>

On appeal, the San Antonio Court of Appeals concluded that while "[a] person who seeks only the extension of credit" is not a DTPA consumer, there was evidence that the homeowner approached the lender "to get the tax suit taken care of," and that the "lender agreed to take care of it and undertook to loan [the homeowner] money and provide escrow services to accomplish [his] objective."<sup>102</sup> Hence, the lender had failed to establish as a matter of law that the homeowner was not a consumer.<sup>103</sup>

In contrast, the Fort Worth Court of Appeals held in *Fix v. Flagstar Bank*<sup>104</sup> that borrowers who refinanced a home equity loan and obtained title insurance were not DTPA consumers. The borrowers had argued that they were consumers because they sought "refinancing services" from the bank and "title insurance services" from the title insurance company.<sup>105</sup> The court held that because the borrowers had already purchased their home and had simply refinanced a previous home equity loan, the bank merely extended credit to them, and the refinance could not qualify as a good or service under the DTPA.<sup>106</sup>

## B. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff must establish a violation of the DTPA.<sup>107</sup>

### I. Laundry List Claims

In *Landing Council of Co-Owners v. Durham*,<sup>108</sup> owners of a condominium sued the condominium association's Governing Council after the

99. 251 S.W.3d 676 (Tex. App.—San Antonio 2007, pet. granted).

100. *Id.* at 683.

101. *Id.* at 694.

102. *Id.* at 695 (citations and internal quotations omitted).

103. *Id.*

104. 242 S.W.3d 147 (Tex. App.—Fort Worth 2007, pet. denied).

105. *Id.* at 160.

106. *Id.* Regarding the purchase of title insurance, the court held that while the insurance may have been a service, it was not the basis of the borrowers' claim. *Id.*

107. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)–(3) (Vernon 2002 & Supp. 2008).

108. 244 S.W.3d 462 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

Council refused to repair floor cracks. Both parties interpreted the Condominium Declaration to require the Council to repair structural defects, but disagreed as to whether the cracks at issue were structural, and the jury found for the plaintiffs.<sup>109</sup>

The Council argued on appeal that misinterpretation of a contract is not a violation of the DTPA.<sup>110</sup> The Houston Court of Appeals concluded that while the Council misrepresented the absence of structural defects, the misrepresentation concerned the nature of the defect and the repairs that were needed, not the terms of the Declaration.<sup>111</sup> Even if the Council implicitly misrepresented whether it was required to repair the cracks, neither that misrepresentation nor any of the acts complained of constituted a “representation that the Declaration confers or involves rights that it did not have or involve.”<sup>112</sup>

## 2. Section 17.50—Breach of Warranty

A DTPA claim may be based on the breach of an express or implied warranty.<sup>113</sup> In *Fieldtech Avionics & Instruments, Inc. v. Component Control Com., Inc.*,<sup>114</sup> the defendant used warranty limitations and disclaimers in a software clickwrap license that a user must accept before the software will install. The Fort Worth Court of Appeals held that the disclaimers were ineffective because they were neither conspicuous nor presented to the buyer before the sale was consummated.<sup>115</sup>

## 3. Unconscionability

The DTPA provides a cause of action for a consumer who is subjected to “an act or practice which, to a consumer’s detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree.”<sup>116</sup> In *Service Corp. International v. Aragon*,<sup>117</sup> discussed above, the plaintiffs alleged that SCI buried their family member in the wrong plot and then without permission, disinterred the body and reburied it in the correct plot. On appeal, SCI argued that there was insufficient evidence that it acted unconscionably or intentionally at the time of the purchase of the burial plot.<sup>118</sup> The Eastland Court of Appeals disagreed with this attempt to limit the transaction, holding that the transaction necessarily included the purchased burial services

---

109. *Id.* at 464–65.

110. *Id.* at 468.

111. *Id.* at 467.

112. *Id.* at 468 (internal quotations omitted).

113. *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 438 (Tex. 1995); see TEX. BUS & COM. CODE ANN. § 17.50(a)(2) (Vernon 2002 & Supp. 2008).

114. 262 S.W.3d 813 (Tex. App.—Fort Worth 2008, no pet.).

115. *Id.* at 829.

116. TEX. BUS. & COM. CODE ANN. §§ 17.45(5), 17.50(a)(3) (Vernon 2002 & Supp. 2008).

117. *Serv. Corp. Int’l v. Aragon*, 268 S.W.3d 112 (Tex. App.—Eastland 2008, pet. filed).

118. *Id.* at 118.

and perpetual maintenance.<sup>119</sup> The court then held that even assuming that the original burial in the incorrect plot was an innocent mistake, the subsequent moving of the body without the family's permission was intentional and constituted sufficient evidence of an unconscionable act or course of action.<sup>120</sup>

### C. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may recover economic damages.<sup>121</sup> If the trier of fact finds that the defendant acted "knowingly," the plaintiff also may "recover damages for mental anguish" and statutory damages up to three times the amount of economic damages.<sup>122</sup>

#### 1. Actual Damages

*GJP, Inc. v. Ghosh*<sup>123</sup> involved a dispute over Ghosh's purchase of a sports car. The measure of damages submitted to the jury was the difference between the value of the car as delivered and the value as represented. On appeal, the defendants argued there was no evidence of the market value of the car.<sup>124</sup> The Austin Court of Appeals disagreed, holding that "the parties' agreement to transfer ownership of the car for \$35,000 is evidence that the car's market value was \$35,000 as represented," and that "[c]ost of repairs is evidence of the difference in fair market value as delivered and as represented."<sup>125</sup>

#### 2. Damages for Mental Anguish

In *CA Partners v. Spears*,<sup>126</sup> the plaintiff claimed that CA Partners had wrongfully foreclosed on his real and personal property and then brought a forcible entry and detainer action against him. At trial on the DTPA claim, the court found that these actions "were calculated to and did cause Spears to suffer mental anguish, and that this mental anguish continued until the forcible entry and detainer were dismissed" and awarded mental anguish damages.<sup>127</sup> Upholding the award, the Houston Court of Appeals explained that "evidence of a claimant's physical and emotional state, coupled with his/her inability to eat and sleep, constitutes legally and factually sufficient evidence to support the award of mental anguish damages."<sup>128</sup>

In *Service Corp. International v. Aragon*,<sup>129</sup> discussed above, family

---

119. *Id.* at 119.

120. *Id.*

121. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (Vernon 2002 & Supp. 2008).

122. *Id.*

123. 251 S.W.3d 854 (Tex. App.—Austin 2008, no pet.).

124. *Id.* at 888.

125. *Id.*

126. 274 S.W.3d 51 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).

127. *Id.* at 76.

128. *Id.*

129. 268 S.W.3d 112 (Tex. App.—Eastland 2008, pet. filed).



members of the deceased each testified at trial about how SCI's mishandling of the deceased's body impacted them. After reciting this evidence in detail, the Eastland Court of Appeals concluded that there was conflicting evidence concerning the impact the event had on each plaintiff, and that it was the jury's job to resolve such conflicts.<sup>130</sup> The court nonetheless held that while the jury had sufficient evidence to resolve the conflicts in favor of three plaintiffs, the testimony of two other plaintiffs did not establish the required "substantial disruption in daily affairs to constitute mental anguish."<sup>131</sup>

### 3. Attorneys' Fees

A consumer who prevails on a DTPA claim is entitled to an award of "reasonable and necessary attorneys' fees."<sup>132</sup> In *Osborne v. Jauregui*,<sup>133</sup> homeowners discovered alleged construction defects and mold throughout their house. The homeowners' insurer paid \$1,874,687 in mold-related claims. The homeowners then sued their architect/homebuilder and a number of subcontractors, and settled before trial with the subcontractors for more than \$1,000,000. At trial, the homeowners claimed \$2,418,000 in damages, but a jury found that the homeowners suffered \$835,158.78 in damages. The trial court applied a settlement credit in the architect/builder's favor and entered a take-nothing judgment in the homeowners' favor.<sup>134</sup>

On appeal, the Austin Court of Appeals acknowledged that to "prevail" under the DTPA means "to prevail in a claim under the Act, rather than to obtain a net recovery."<sup>135</sup> Because the plaintiffs had received payment of an amount greater than the damages found by the jury, however, the homeowners were not entitled to recover attorneys' fees.<sup>136</sup>

## D. EXEMPTIONS, DEFENSES, AND LIMITATIONS ON RECOVERY

During the Survey period, several courts were called upon to examine various exemptions, defenses, and limitations on recovery under the DTPA.

### 1. Preemption and Exemption from the DTPA

In *Parker v. Simmons*,<sup>137</sup> a dental patient alleged that dentures provided by her dentist caused pain and damaged her mouth and that the dentist made misrepresentations regarding the dentures. The defendants moved for dismissal, arguing that the suit was a medical malpractice claim disguised as a claim under the DTPA, and that the plaintiff had failed to

130. *Id.* at 121.

131. *Id.* (emphasis omitted).

132. TEX. BUS. & COM. CODE ANN. § 17.50(d) (Vernon 2002 & Supp. 2008).

133. 252 S.W.3d 70 (Tex. App.—Austin 2008, pet. denied).

134. *Id.* at 73.

135. *Id.* at 76 (quoting *McKinley v. Drozd*, 685 S.W.2d 7, 9 (Tex. 1985)).

136. *Id.* at 77.

137. 248 S.W.3d 860 (Tex. App.—Texarkana 2008, no pet.).

serve an expert report as required by the Texas Medical Liability and Insurance Improvement Act.<sup>138</sup> Reversing the trial court's refusal to dismiss, the Texarkana Court of Appeals explained that "[w]hen a complaint focuses on the quality of the doctor's treatment, it is inextricably intertwined with medical treatment and the provision of health care" and is therefore a medical malpractice claim.<sup>139</sup>

## 2. Adequacy of Pre-Suit Notice

A plaintiff must give a defendant written notice of a DTPA claim "at least sixty days before filing" suit.<sup>140</sup> In *Richardson v. Foster & Sear, L.L.P.*,<sup>141</sup> LaShun Richardson sued the law firm representing his interests in a personal injury case. He alleged that the law firm settled the case without his approval and withheld settlement proceeds. The trial court granted the law firm's motion to abate the suit until a DTPA notice was tendered.<sup>142</sup> Richardson then served a one-page letter on the law firm, which the trial court found inadequate as notice.<sup>143</sup> Richardson served a second notice letter, which was six pages long and alleged that the firm settled the underlying case and failed to forward Richardson's share of the settlement proceeds to him. He demanded a total of \$500,000 to settle the various claims asserted. The trial court found this notice also inadequate and dismissed the suit.<sup>144</sup>

The Fort Worth Court of Appeals held that the second letter, "while not a model of clarity and eloquence," stated enough detail for a court knowing nothing else of Richardson's allegations "to grasp the basis of his complaints."<sup>145</sup> The letter stated that "after agreeing to represent [Richardson's] interests" in the personal injury suit, the law firm settled "without his permission and refused to divulge his share of the settlement proceeds."<sup>146</sup> As for quantifying damages, the court of appeals held that Richardson had complied with the DTPA by assigning dollar amounts of damages for his various claims and summarizing his claims with a demand for a total of \$500,000.<sup>147</sup>

## 3. Necessity of Proving Reliance

To recover for a "laundry list violation," a consumer must prove that the consumer relied upon the false, misleading, or deceptive act or practice.<sup>148</sup>

---

138. TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon 2005 & Supp. 2008).

139. *Parker*, 248 S.W.3d at 862, 864.

140. TEX. BUS. & COM. CODE ANN. § 17.505(a) (Vernon 2002).

141. 257 S.W.3d 782 (Tex. App.—Fort Worth 2008, no pet.).

142. *Id.* at 783.

143. *See id.* at 783–84.

144. *Id.* at 784.

145. *Id.* at 786.

146. *Id.*

147. *Id.*

148. TEX. BUS. & COM. CODE ANN. § 17.50(a)(1)(A), (B) (Vernon 2002 & Supp. 2008).

*Brown & Brown of Texas, Inc. v. Omni Metals, Inc.*<sup>149</sup> dealt with whether one who is not a party to an insurance policy, but receives incorrect information regarding the scope of coverage, nonetheless can recover from the insurance company or its agent under the DTPA. A storage company stored steel belonging to a steel supplier. The supplier requested and received certificates of insurance from the insurance provider which falsely indicated coverage, and included a disclaimer stating the certificates conferred no rights on the certificate holder, were furnished for information purposes only, and could not change the terms of the insurance policy.<sup>150</sup> When the warehouse burned down, the insurance provider denied coverage and the supplier sued the provider and its agent. The jury found for the supplier, but the Houston Court of Appeals reversed, holding as a matter of law that a party cannot “detrimentally rely on either . . . [false] certificates of insurance or . . . [false] oral representations in order to recover on . . . DTPA claims” when it has failed to ask for or read the underlying policy.<sup>151</sup>

In *Pleasant v. Bradford*,<sup>152</sup> homebuyers sued the seller’s real estate agent and the realty company, alleging that the defendants overstated the square footage of the home on the Multiple Listing Service (“MLS”). The homebuyers testified that they were drawn to the home because its price-per-square-foot was less than the price-per-square-foot of other houses they viewed. The jury found that the square footage representation constituted a DTPA violation.<sup>153</sup>

On appeal, the defendants attacked the jury-finding of reliance, in part on the ground “that a subsequent source for a misrepresentation will negate reliance on an earlier source” because (1) the couple admitted that they had seen the square footage reported on the appraisal district’s website, and (2) the couple lived in the home for over a month prior to closing.<sup>154</sup> The defendants also argued that any reliance was negated by the fact that the homeowners signed a form provided by their own real estate agent “disclaim[ing] any reliance on statements . . . by ‘the REALTOR.’”<sup>155</sup>

The Austin Court of Appeals concluded that the homebuyer’s access of the appraisal district’s website was not an “independent investigation” because the husband testified “that he accessed the website to learn the property tax amount on the house, and his viewing of the square footage on the website was merely incidental to [this] purpose.”<sup>156</sup> Regarding the pre-closing occupation of the house, the court noted that an “opportunity

---

149. No. 01-05-01100-CV, 2008 WL 746522 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

150. *Id.* at \*1.

151. *Id.* at \*4.

152. 260 S.W.3d 546 (Tex. App.—Austin 2008, pet. denied).

153. *Id.* at 552.

154. *Id.* at 553.

155. *Id.*

156. *Id.* at 555 (quoting *Bartlett v. Schmidt*, 33 S.W.3d 35 (Tex. App.—Corpus Christi 2000, pet. denied)).

to conduct an investigation” does not bar reliance “without evidence that [the] opportunity resulted in an actual investigation.”<sup>157</sup> As to the form disclaiming reliance on “the REALTOR,” the court noted that the form did not define “REALTOR,” and the homebuyers understood “REALTOR” to refer only to their own real estate agent.<sup>158</sup> Accordingly, the court of appeals held that the evidence of reliance was sufficient.<sup>159</sup>

#### 4. A “Mere” Breach of Contract is Not Actionable Under the DTPA

A breach of contract, without more, is not a “false, misleading or deceptive act” and does not violate the DTPA.<sup>160</sup> The Waco Court of Appeals considered this limitation in *State v. Life Partners, Inc.*,<sup>161</sup> which was an action by the State against a viatical settlement company that was in the business of facilitating the sale of life insurance policies to investors. The company entered into contracts with investors that provided that the purchaser would “not incur costs of any type beyond the amount tendered as the policy purchase deposit.”<sup>162</sup> When the company later mailed demand letters notifying investors that an additional fee would be required to keep the policy from lapsing, the State sued. The company moved for summary judgment on the grounds that the State lacked authority to sue because its claim was “based on ambiguous language in the contract, which is not actionable under the DTPA,” and the trial court granted the motion.<sup>163</sup>

Acknowledging that a breach of contract claim is not actionable under the DTPA, the Waco Court of Appeals held that the DTPA is not violated, and therefore, traditional contract principles apply “when [a reasonable] alternative interpretation of the contract is asserted, and the dispute arises out of the performance of the contract.”<sup>164</sup> Concluding that the language in the defendant’s contract with its investors was not ambiguous, the court held that the State’s DTPA claim was actionable.<sup>165</sup>

## IV. CONCLUSION

In contrast to last year, when the United States Supreme Court issued four antitrust decisions,<sup>166</sup> this year neither it nor the Texas Supreme Court decided a single antitrust case. This is not to suggest that high court inattention is necessarily bad for antitrust enforcement. It has now

---

157. *Id.*

158. *Id.* at 556.

159. *Id.*

160. *Ashford Dev., Inc. v. USLife Real Estate Serv. Corp.*, 661 S.W.2d 933, 935 (Tex. 1983) (citations omitted).

161. 243 S.W.3d 236 (Tex. App.—Waco 2007, pet. denied).

162. *Id.* at 239 (internal quotations omitted).

163. *Id.* at 241–42.

164. *Id.* at 242–43 (quoting *Quitta v. Fossati*, 808 S.W.2d 636, 644 (Tex. App.—Corpus Christi 1991, writ denied)).

165. *Id.* at 243.

166. A. Michael Ferrill et al., *Antitrust and Consumer Protection*, 61 SMU L. REV. 531, 563–64 (2008).

been over fifteen years since the U.S. Supreme Court sided with an anti-trust plaintiff,<sup>167</sup> and over twenty-six years since the Texas Supreme Court has done so.<sup>168</sup>

One might expect this observation to invite the extenuation that a lack of solicitude for antitrust plaintiffs is not necessarily inconsistent with a concern for the interests of consumers. An entire branch of antitrust scholarship has been dedicated to pressing this argument,<sup>169</sup> with no small success. Indeed, the U.S. Supreme Court has emphasized that the purpose of the antitrust laws is to protect “*competition, not competitors.*”<sup>170</sup> First articulated by the Supreme Court in 1962,<sup>171</sup> it achieved notoriety fifteen years later when the U.S. Supreme Court used it to introduce the notion of “antitrust injury.” In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>172</sup> the Court rejected a private challenge to a bowling equipment manufacturer’s acquisition of several retail bowling centers.<sup>173</sup> Although the plaintiff was able to show both a probable future injury to competition as well as a present injury to itself, there was a disconnect between the two: the plaintiff’s injury did not flow from the threatened injury to competition; rather, the essence of the plaintiff’s complaint was that, but for the acquisition, one of the acquired bowling centers would have failed and the plaintiff’s bowling center would have benefited from the lessening of local competition.<sup>174</sup> Because such a theory of injury is inconsistent with the purpose of the antitrust laws, it was properly rejected.<sup>175</sup>

Unfortunately, many lower federal courts have only dimly understood *Brunswick’s* concept of antitrust injury.<sup>176</sup> While some courts speak of a lack of antitrust injury to describe a plaintiff’s failure to prove injury in fact, others use the term as shorthand for the conclusion that no injury to competition has occurred.<sup>177</sup> As Professor Hovenkamp has noted, “[n]either of these is ‘antitrust injury’ in the sense that *Brunswick* used the term, where the Court assumed both injury-in-fact and an antitrust violation.”<sup>178</sup>

It has been noted that *Brunswick’s* admonition that antitrust law is con-

167. See *id.* at 566.

168. *Id.*

169. See generally ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

170. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis added).

171. See *Brown Shoe*, 370 U.S. at 320.

172. *Brunswick Corp.*, 429 U.S. at 477.

173. See generally *id.* The plaintiff, who was a rival of one of the acquired bowling centers, could not yet show injury to competition because the anticipated post-acquisition exclusionary conduct had not yet occurred. It was assumed, however, that but for the acquisition one of the retailers (which happened to compete with the plaintiff) would have gone out of business and the plaintiff would enjoy reduced competition in its absence.

174. See *id.* at 484.

175. *Id.* at 489.

176. II A, P. AREEDA, H. HOVENKAMP, R. BLAIR & C. DURRANCE, *ANTITRUST LAW* ¶ 337, at 83-84 & nn.3 & 4 (3d ed. 2007).

177. *Id.*

178. *Id.* at 84.

cerned with protecting “*competition, not competitors*”<sup>179</sup> has “become one of the most heavily quoted aphorisms in the field of competition law. Incessant, often mechanical repetition by commentators, corporate defendants, and public officials has made it an antitrust cliché.”<sup>180</sup> Of course, there can be no competition without competitors, and it often is the case that a competitor is the market participant most likely to recognize and have the incentive to challenge conduct that threatens the competitive process.

*Brunswick* does not imply a necessary conflict between the goals of protecting competition and protecting competitors, but rather instructs antitrust courts to be alert to the possibility that such a conflict may be present in individual cases. Nonetheless, it has become fashionable for antitrust *cognoscenti* to single out for disapprobation antitrust claims brought by a competitor of the defendant. Antitrust scholars of a certain disposition argue that competitors should be foreclosed from bringing antitrust claims,<sup>181</sup> while others draw upon the same scholarship to argue that the private antitrust remedy be abolished.<sup>182</sup> And then there are those who take laissez faire theology to its logical conclusion, insisting that the antitrust laws be repealed altogether.<sup>183</sup> Underlying these views is the conviction that the “invisible hand” of the market can be trusted to do a better job of correcting anticompetitive behavior than can courts and private plaintiffs, who are apt to engage in rent-seeking behavior by using the litigation process to achieve what they could not earn in the marketplace.<sup>184</sup> According to this view, antitrust courts are likely to condemn “false positives,” *i.e.*, conduct that appears to be anticompetitive but in reality is efficiency enhancing, thereby rendering markets less rather than more competitive.<sup>185</sup> Indeed, it is precisely for this reason that some Chicago School adherents have argued that antitrust enforcement should not be entrusted to private plaintiffs, but rather should be the exclusive province of government regulators.<sup>186</sup>

179. *Brunswick Corp.*, 429 U.S. at 488 (emphasis in original).

180. See 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, 59 (2007).

181. See generally Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991); cf. William H. Page & Regan D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111 (1992).

182. William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 355–56 (1975).

183. EDWIN S. ROCKEFELLER, *THE ANTITRUST RELIGION* pp. 100–103 (2007) (but appearing to conclude that repeal is “politically impossible”); DOMINICK T. ARMENTANO, *ANTITRUST: THE CASE FOR REPEAL* (3d ed. 2007).

184. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 2-3, 9-13, 15-19, 33–40 (1984); see generally *supra* notes 180-82.

185. See, e.g., *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (“The cost of false positives counsels against an undue expansion of § 2 liability.”).

186. See generally *supra* note 181, at 355–56.

As noted in last year's Survey, a majority of the U.S. Supreme Court recently embraced a version of this argument, concluding that antitrust law need not concern itself with the operation of the securities markets, as the Securities and Exchange Commission had the matter well in hand.<sup>187</sup> As we then suggested, "it is at least debatable whether recent experience demonstrates that the SEC's regulatory oversight is sufficient to police manipulation in the securities markets, much less identify and remedy anticompetitive activity."<sup>188</sup> Based on the Antitrust Division's less than vigorous efforts in recent years in the merger area,<sup>189</sup> as well as its attempt in the Report to loosen the rules applicable to exclusionary conduct by dominant firms,<sup>190</sup> the same might be said of markets generally.

As Professor Stiglitz has observed, "the reason that the invisible hand seems invisible is that it is not there."<sup>191</sup> The events that have transpired in the financial markets since last year's Survey have seriously eroded unqualified faith in the market mechanism even among the most ardent advocates of laissez faire economics. Indeed, Alan Greenspan, who once derided the "world of antitrust [as] Alice's Wonderland,"<sup>192</sup> and later enlisted Adam Smith's "invisible hand" in support of his laissez faire legacy,<sup>193</sup> more recently was forced to admit that the present economic crisis revealed a "flaw" in his economic thinking, leaving him in a "state of shocked disbelief."<sup>194</sup> The error? "[L]ook[ing] to the self-interest of lending institutions to protect shareholders' equity."<sup>195</sup> In plainer terms, faith in the "invisible hand," or, perhaps, Alan in Wonderland.

In her testimony before Congress, the President's nominee for the position of Assistant Attorney General in charge of the Antitrust Division raised the question whether "antitrust has failed if we've allowed institutions to be created that are too big to fail."<sup>196</sup> The Justice Department's recent withdrawal of the Section 2 report sends a clear signal that dominant firms will be subject to closer antitrust scrutiny than has prevailed in recent years.

---

187. *Credit Suisse Sec. LLC v. Billing*, 551 U.S. 264 (2007).

188. A. Michael Ferrill et al., *Antitrust and Consumer Protection*, 61 SMU L. REV. 531, 565 (2008).

189. See, e.g., Jonathan B. Baker and Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement* (April 10, 2007), <http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf>.

190. See *supra* notes 10-37 and accompanying text.

191. JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* xiv (2006).

192. Alan Greenspan, *Antitrust* (National Association of Business Economists 1961), reprinted in AYN RAND, *CAPITALISM: THE UNKNOWN IDEAL* p. 63 (Signet 1986).

193. Alan Greenspan, Chairman, Fed. Reserve Comm'n, Remarks at the Adam Smith Memorial Lecture, (Feb. 6, 2005), available at <http://www.federalreserve.gov/boarddocs/speeches/2005/20050206/default.htm>.

194. Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 24, 2008 at B1.

195. *Id.*

196. *Nominations: Senate Judiciary Committee considers Nomination of Varney as DOJ Antitrust Chief*, 96 ATRR 235 (March 13, 2009).