I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY

Against Simplicity in Antitrust

Comments on CHRIS SAGERS, APPLE, ANTITRUST, AND IRONY (Harvard University Press, 2018)

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I. INTRODUCTION

Chris Sagers's book, *Apple, Antitrust, and Irony*, does a beautiful job of interweaving several histories that provide wonderful context to the Apple e-books antitrust case. In addition to chronicling the recent history of Apple and the major publishers' efforts to combat Amazon in the e-book market, Sagers explains how the publishers' complaints in the e-books case were reminiscent of arguments they have been making about the book industry for over a century. He then overlays this history with a brief history of the role of antitrust in American history.

Sagers is a wonderful storyteller. His narrative is both rich in relevant factual information and entertaining stories. The reader will

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come away from this book with a much deeper understanding of the book industry, the role of antitrust in American society, and the relationship between the two. In addition, Sagers makes the very important point that while nearly everyone in our recent history extols the virtues of a competitive marketplace in general, there is often a great deal of ambivalence about competition in particular cases. This point is important because, for the most part, these particular objections to competition are self-serving. By making clear that we have seen these objections continually throughout our history, Sagers reminds us to be wary when industries suggest that their case is different.

While this message is an important one, in my view, Sagers pushes it too far. Markets and competition are complicated. While we can safely say that garden-variety price fixing is almost always detrimental to consumers and society, most antitrust questions do not have such easy answers. Particular market or production characteristics can make a big difference in whether many types of conduct are anti-competitive or pro-competitive. This means that to ensure a reasonable level of accuracy, there is no substitute for detailed, case-by-case, adjudication of the conduct in question. The quest for simple rules or relying heavily on precedent or labels will almost certainly lead to either substantially less deterrence of harmful conduct or more chilling of benign conduct (or both) than we could get by committing to undertake a detailed, careful analysis of most cases that go to trial. Where I disagree with Sagers in his book and where I will focus most of my comments, is where he makes broad claims about the desirability of certain antitrust rules or broad criticisms about the utility of modern, nuanced theories of markets or competition.

II. AGAINST SIMPLICITY

Antitrust is complicated. Outside of naked price fixing or market division, there are plausible pro-competitive arguments, at least in some circumstances, for almost all conduct that can also be anti-competitive. That doesn't mean that conduct is always, or even usually, desirable. It just means that blanket prohibitions will chill a great deal of desirable conduct. As a result, the United States' antitrust laws have, sensibly, scaled back on many of the *per se* rules that used to dominate antitrust cases. There are many examples of this, of which the *Leegin*[1] decision that overturned the almost century-long *per se*

[1] Leegin Creative Leather Products v. PSKS, 551 U.S. 877 (2007).

prohibition against resale price maintenance ("RPM") is just the latest example. Since Sagers's book has an extensive discussion of this issue, I will discuss this example in more detail later. Here, I will just provide a selection of other antitrust issues for which there are both plausible, at least in the abstract, pro- and anti-competitive arguments.

Many other vertical arrangements, besides RPM, have credible pro- and anti-competitive arguments. Initially, courts were very skeptical of exclusive dealing contracts, especially by firms with significant market power.[2] The Chicago school criticized the hostile view of exclusive dealing by making two points. The first is the basic Coasean argument that because exclusive dealing is a contract, a seller will only get a buyer to agree to an exclusive deal by providing the buyer with at least its reservation value from the contract. That is all the seller would have to provide without an exclusive deal as well. So, to the extent that exclusive dealing diminishes the buyer's welfare relative to the non-exclusive deal, the seller must be offering a lower price that makes up for this loss. If she wasn't, the seller would either not be able to get the buyer to agree or could have charged a higher price for the non-exclusive deal. Second, the Chicago school provided many reasons why exclusive dealing might encourage relationship-specific investments or promote competition.[3] This provided some rationale for why an exclusive deal might increase the joint value of the contract to the buyer and seller.

While the Chicago school argued for an almost *per se* legal treatment for exclusive dealing, their two basic points did not justify such a conclusion. The second point suggests that rule of reason treatment may be appropriate, but the first point does not rule out anti-competitive exclusive dealing for two reasons. First, as later, more sophisticated, game theoretic models of vertical relationships showed, due to contracting externalities, an exclusive dealing contract in isolation could increase the joint welfare for a particular buyer and the seller but still hurt the welfare of buyers as a whole. As a result, it could be both profitable for a dominant firm and anti-competitive.[4] In

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[2] *See* Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 314 (1948).

[3] *See, e.g.*, ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 303-09 (1978); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 174-75 (1976).

[4] *See, e.g.*, Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388, 389 (1987); Eric B. Rasmusen et al., *Naked Exclusion*, 81 AM. ECON. REV. 1137, 1137 (1991); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296, 296-97 (2000); John Simpson & Abraham L. Wickelgren, *Naked*

addition, the Chicago school story assumes that the seller can always extract all the surplus from the buyer. But, if that is not the case, and the exclusive deal enables the seller to extract more of the surplus from the buyer for some reason (maybe by making its demand less elastic or providing some information rents) then it could be profitable for the seller even if it does not raise joint welfare.

It is important to note, however, that while these new models explained why we might see anti-competitive exclusive dealing, they did not overturn the potential pro-competitive benefits from exclusive dealing. That is, they provide guidance for courts for where to look for anti-competitive effects, but they do not guarantee that those anti-competitive effects either explain any given instance of exclusive dealing or that those effects, where present, necessarily outweigh potential pro-competitive efficiencies. This is exactly the type of situation for which a robust rule of reason approach is optimal. The current literature makes clear that any other approach will risk either a substantial tolerance of anti-competitive exclusive dealing or a substantial chilling of efficiencies from pro-competitive exclusive dealing.

A very similar story applies to tying. Tying, where a firm sells two distinct products together, has long been considered *per se* illegal.[5] Over the past few decades, however, the courts have gradually narrowed the scope of this *per se* prohibition as the potential efficiencies associated with tying become clear. In *Jefferson Parrish*,[6] the Court held that tying was only *per se* illegal if the tie really involved two separate products and if there was some anti-competitive forcing of consumers to purchase a product they otherwise did not wish to buy. In *Microsoft*,[7] the DC Circuit, while accepting that tying is sometimes *per se* illegal, said that this prohibition should not extend to markets characterized by rapid innovation.

The scholarly analysis of tying roughly parallels that of exclusive dealing. In the 1970s, the Chicago school's one monopoly profit theorem argued that concerns about a dominant firm using tying to leverage its market power from one market to another was misguided. Instead, they argued that tying must be explained by efficiency

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Exclusion, Efficient Breach, and Downstream Competition, 97 AM. ECON. REV. 1305, 1307 (2007).

[5] This began with Int'l Salt Co. v. United States, 332 U.S. 392, 394-96 (1947).

[6] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-18 (1984).

[7] United States v. Microsoft Corp., 253 F.3d 34, 92-94 (D.C. Cir. 2001).

reasons, for which they provided several. Armed with game theoretic tools, economists later showed that the one monopoly profit argument, while an important baseline, held only under certain conditions.[8] If, for example, the tied good was characterized by economies of scale, a tying arrangement could preclude an entrant in that market from having sufficient scale to effectively compete for consumers who only desired the tied product. Tying could also affect the competitive interaction in situations in which the goods were not perfect complements to make entry less attractive.[9] Lastly, even when tying does not leverage monopoly power, it could be used to enable a dominant firm to extract more surplus from its monopoly, thereby hurting consumers and possibly reducing efficiency.[10] It is important to note, however, that while these arguments effectively rebut the Chicago school claims that tying must be efficient, they do not suggest that the efficiency rationales for tying are baseless. Rather, what they indicate is that tying is a complicated issue for which it is easy to conceive of plausible pro- and anti-competitive effects which only a robust rule of reason can adequately sort out.

Predatory pricing is another antitrust issue that should not be resolved by reference to simple rules. As I have written elsewhere,[11] proper analysis predatory pricing is necessarily complex. While the Court has attempted to streamline its analysis with the use of the two requirements of pricing below cost and recoupment, this approach only provides the illusion of simplicity while not accurately deterring harmful predation without chilling desirable competition. As Aaron Edlin has pointed out,[12] there is no reason to think that above-cost predatory pricing is less damaging to competition than below-cost predatory pricing. In fact, it is more likely to be credible and

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[8] *See, e.g.*, Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 837-39 (1990).

[9] *Id.* at 839; Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159, 161-62 (2004).

[10] Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 400-01 (2009).

[11] Abraham L. Wickelgren, *The Necessary Complexity of Predatory Pricing Analysis: A Comment on Richard S. Markovits's Treatment of Predatory Pricing in Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law*, 61 ANTITRUST BULL. 186, 197 (2016).

[12] Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 941-42 (2002).

sustainable, thus more likely to actually force firms to exit. Louis Kaplow has noted that the recoupment requirement (that the dominant firm can likely recoup its losses from predation by earning supra-competitive profits in the future) doesn't do a good job of distinguishing anti-competitive below cost pricing from pro-competitive below cost pricing (e.g., promotional pricing or moving down the learning curve) because both are only rational if the firm can recoup those losses later.[13]

The current approach to simplifying predatory pricing adjudication suffers from other, less remarked on, problems as well. While the requirement that a firm prices below cost was meant to reduce the problem of mistakenly chilling desirable competition, it might actually have the opposite effect. Note that the biggest concern about predatory pricing actions is that the threat of those actions will deter firms from lowering prices to compete aggressively. If costs can be measured perfectly, then the requirement that prices must be below cost would provide a safe harbor for firms to lower prices as long as they remained above costs. However, costs cannot be easily measured. As an example, the main issue in the *AMR*[14] litigation was how to properly measure American Airlines' costs on certain routes. This uncertainty means that there is no absolute safe harbor. Rather, the lower the price that a firm charges, the higher the probability that a court will find the price to be below cost. This can actually discourage a firm from aggressively lowering prices to compete with a rival. Moreover, as the *AMR* case demonstrates, it does so without necessarily easing the adjudication burden on the courts.

What is needed, as was discussed above with reference to tying and exclusive dealing, is for courts to focus on addressing the fundamental, admittedly difficult, question in any antitrust case: is the pricing strategy on balance beneficial or harmful to competition or consumers? Using imperfect proxies such as pricing below cost and recoupment only leads to less accurate decisions, perverse incentives, and litigation expenses devoted to establishing whether the conduct meets the proxies rather than the ultimate question of interest. Instead of looking for a way to simplify a fundamentally difficult

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[13] LOUIS KAPLOW, RECOUPMENT AND PREDATORY PRICING ANALYSIS 1 (Apr. 27, 2017), http://www.law.northwestern.edu/research-faculty/searlecenter/events/antitrust/documents/Kaplow_MPRecoup6.417.pdf [https://perma.cc/4LHV-FC25].

[14] United States v. AMR Corp., 335 F.3d 1109, 1115 (10th Cir. 2003).

question, courts should simply do the best they can to answer the question society ultimately cares about, is the action anti-competitive or pro-competitive. Had the Department of Justice been able to focus its argument on the actual competitive effects of American Airlines' pricing strategy, rather than how to measure American's cost, the court would have been forced to confront the issues that antitrust law is meant to address.

Many horizontal agreement cases, under Section 1 of the Sherman Act, raise the same issues. While Sagers is surely correct that cases such as *Apple*[15] that involve horizontal price fixing or market division do not require an elaborate inquiry into the pro- and anti-competitive effects, most other cases do. In famous cases, such as *Board of Trade of Chicago*[16] or *BMI*,[17] the Court addressed agreements that had a superficial similarity to price fixing but whose competitive effects were much more complicated. As a result, the Court ruled that *per se* treatment in both cases was inappropriate. Because of the particular features of the nature of the restraint on pricing or the product in question, the Court held that simply applying the label of price fixing to the defendants' conduct should not end the inquiry. Instead, the Court required a more in-depth analysis.

In many markets, there are plausibly pro-competitive reasons for firms to cooperate over some issues. In *Board of Trade*, for example, the existence of the grain exchange itself requires that there be some agreements on the rules of the exchange. While one can easily imagine that the members of the exchange may have incentives to set anti-competitive rules that enrich their profits at the expense of others, not all rules will have that character. Some rules, such as some of those at issue in that case, are necessary to create a thick market (one with many traders on both sides) that lowers transaction costs and generates price transparency and competition. In *BMI*, the blanket license at issue in this case is a product that could only be created through cooperation.[18] While there are potential anti-competitive effects from that cooperation, it is far from obvious that those anti-competitive effects are so large as to prohibit the existence of a product that some consumers clearly value.

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[15] United States v. Apple, Inc., 952 F.Supp.2d 638, 691 (S.D.N.Y. 2013).

[16] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1917).

[17] Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 23 (1979).

[18] *Id.*

Granted, rule of reason cases are more expensive and harder to win than *per se* cases. But, they can be viable. For example, in the *NCAA v. Board of Regents*[19] case, the Court acknowledged that collegiate sports do have special features that can justify agreements among the competing firms (colleges), but it still found that the broadcast limits that the NCAA imposed in that case were clearly anti-competitive after doing a rule of reason analysis. Even in the *Apple* case, the government made rule of reason and *per se* arguments and the court ruled for the government on both. In fact, this case is illustrative of why one of the main arguments in favor of broader *per se* rules is not particularly convincing. In a great many cases, particularly important ones, plaintiffs do not only make *per se* arguments, they also make a rule of reason case. In such situations, as we saw in *Apple*, there is really no litigation costs savings from the *per se* rule if the parties are going to litigate the rule of reason case in the event they lose the *per se* case.

The main point here is that antitrust should not proceed by catechism.[20] The competitive effects of a great many agreements, actions, and restraints depend heavily on their particular features and particular features of the product and market in question. This doesn't mean, as the Court pointed out in *Maricopa*[21] that the *per se* prohibition against price fixing has to be re-established for every new industry. Rather, it means that courts should carefully evaluate claims of plausible pro-competitive effect.

Of course, Sagers is correct that many of the nuanced theories of how certain restraints can be pro-competitive are misused by defendants for their own purposes. By the same token, plaintiffs also misuse many of the post-Chicago theories of harm as well. This type of problem is not unique to antitrust. The fact that parties will misuse or mischaracterize legitimate theories of the likely effect of some action does not mean courts should simply ignore any mention of those theories.

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[19] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 117-20 (1984).

[20] Daniel Crane argued as a factual matter that it often does. *See* Daniel A. Crane, *Bargaining over Loyalty*, 92 TEX. L. REV. 253, 274-75 (2013). This author has argued in that context that this is a mistake. *See* Abraham L. Wickelgren, *Detailed Analysis, Not Catechism: A Comment on Crane's Bargaining over Loyalty,* 92 TEX. L. REV. 1, 2 (2013).

[21] Ariz. v. Maricopa Cty. Med. Soc'y, 457 U.S. 332, 349 (1982).

Just as in other areas of the law, the role of the courts is not to give up and ignore the fact that the world is complicated. The role of the court is to sort through the facts and decide upon the outcome that provides the best balance of maximizing the deterrence of harmful conduct while minimizing the chilling of desirable conduct. To be clear, this requires that courts view the arguments on both sides with an open mind and do not require any elevated standard of proof for either side. Yes, courts will make mistakes, particularly on issues that involve difficult economic theories. But, as long as those mistakes are not too frequent and (most importantly) relatively hard to predict in advance, the incentives the court creates will be reasonably good. On the other hand, when courts try to simplify their decision calculus by asking the wrong questions, it creates predictable errors that parties can exploit in ways that create undesirable incentives in both directions.

III. IMPLICATIONS FOR ANTITRUST AND IRONY

Just because antitrust is complicated and courts should not avoid careful analysis of the economic effects of the restraints at issue doesn't mean that every case is difficult. I completely agree with Sagers's assessment that the *Apple* case really was just a garden-variety horizontal price-fixing case. As Sagers shows, once one examines the potential pro-competitive claims that Apple and its defenders made for its actions, it is quite clear that none of them hold water.

The larger point, however, is that it is easy to come to that conclusion without having to also come to the conclusion that the economic theories of pro-competitive effects that Apple and its defenders attempted to use are generally baseless. Despite the fact that Apple was in a vertical relationship with the publishers and had contractual provisions that governed the retail price of e-books, the *Apple* case was not really a resale price maintenance case. This means that one can agree with much of what Sagers says about the publishers, Apple, and the e-books case without having to conclude that RPM does not have plausible pro-competitive justifications or that the justifications for RPM do not rest on criticisms of market competition.

Sagers mischaracterizes the justifications for RPM when arguing that they rest on consumers not knowing what they want by missing a subtle, but important, distinction. Many typical arguments for the efficiency of RPM *do* rely on consumers not being perfectly informed about the qualities of the products they are considering, but they *do not* require that consumers do not know the types of attributes they would like in a product. Having limited information is not the same as being irrational. In fact, given that information is costly, it is perfectly rational to not be perfectly informed about all of the products one might be interested in purchasing. Given that consumers have limited information about a product's attributes (even though they know what attributes they desire), it is often in both the manufacturer's and the consumer's interest to provide that information to the consumer. The key to the pro-competitive argument for RPM is that, at least in some situations, the retailer is in the best position to provide that information. If that is the case, the retailer must have some incentive to bear the cost of providing this information. RPM is one way to provide this incentive: by ensuring that the retailer earns positive profits on its sales (by preventing other retailers from undercutting its price), the retailer can profit from providing information to consumers that increases its sales.

Of course, Sagers is correct that this argument doesn't necessarily make sense. In many cases, the retailer may not be the best source of information. Sometimes, the manufacturer may be able to find other ways to incentivize the retailer to provide information. But, whether either of these is the case will require a case-by-case inquiry. The Chicago school's other point, however, is that in general the manufacturer has no incentive to increase retailer profit margin unless this somehow stimulates demand for its product. This creates some alignment between the interests of the manufacturer and final consumer with respect to the behavior of the retailer. Of course, one can (and some associated with the Chicago school frequently did) push this point too far. For example, the manufacturer wants to induce retailer behavior that benefits the marginal consumer—the one who it needs to induce to buy the product or pay a higher price—not the average consumer. Thus, it is certainly possible for resale price maintenance to lead to higher prices so as to induce retailers to provide information that induces the marginal consumer to purchase the product but make the average consumer worse off because most consumers who value the product a great deal did not need that information. But, again, this is merely a possibility result. We cannot come to any general conclusions that manufacturers use RPM only when it is efficient or that it is generally inefficient. There is no way to make this determination in any given case with any degree of accuracy without a detailed analysis of the situation at hand.

Sagers also argues that the justifications for the efficiency of RPM are somehow anti-market. This is only true if one takes a very extreme view of the role of markets in a market economy. No one who advocates for markets thinks that every economic decision should be left to markets. When a firm hires an employee, the employee usually agrees (within reason) to do what the employer asks for no additional compensation for some period of time. Even though the firm could just use spot market transactions for every task it needs done, we don't say the use of employment contracts is anti-market. In fact, under Sagers position, the entire existence of firms would be an argument against markets. And, in some sense, this is correct. Markets work wonderfully in many situations, but they are not always the best solution to every economic decision. A clerk in a store does not have the expertise to decide how much to sell an item for, so no one suggests that the store owner should sell the items to the clerk and then have the clerk sell them to the customers. Believing that the market is still the best way to ultimately allocate these items does not require a belief that every step of the production chain has to be governed by market transactions. Sometimes contracts work better than spot market transactions (that's why contracts exist). As Coase pointed out, contracts can often enable parties to internalize externalities that might otherwise lead to inefficient outcomes. The argument in favor of RPM is really an argument about using a contract to internalize an externality. Without RPM, retailer investments in informing consumers were costly to the retailer but provided benefits only to the manufacturer. The RPM contract allows the retailer to capture some of that benefit, internalizing the externality and making the market function better.

Lastly, the pro-competitive arguments for RPM are not destructive competition arguments. These are arguments that competitors use to justify horizontal agreements that limit competition between them because horizontal competitors always have an interest in reducing competition. By contrast, in the baseline case, the manufacturer benefits from more competition among its retailers. This competition lowers retail profits which enables the manufacturer to retain a higher share of the profits from the vertical chain of production. To take a simple example, if the manufacturer sells a product that costs five to make to a retailer for ten, it will make a profit of five for every item the retailer sells. The retailer will sell more items the lower its price, so the manufacturer wants the retailer to charge as low a price as possible. The fact that a manufacturer is going against this basic interest in agreeing to a RPM contract suggests that something more complicated is going on. One does not, however, need to introduce any complications to explain why horizontal competitors might want to fix prices at a high level.

Of course, the fact that the pro-competitive arguments for RPM are reasonable does not mean they are right in every, or even most, cases. Furthermore, even if the pro-competitive arguments are correct in a given case, it doesn't mean there can't also be anti-competitive effects that might outweigh the pro-competitive benefits. RPM can help facilitate collusion, either at the retail level or the manufacturer level. If retailers can get manufacturers to impose RPM contracts, they can effectively support a retailer cartel. While this wouldn't be in the interests of the manufacturer, the more competitive the manufacturing market is, the more likely such a cartel would raise industry profits and the retail sector could compensate the manufacturers for their losses. Alternatively, if manufacturers are colluding, then RPM contracts will prevent a cheating manufacturer from benefitting from reducing its wholesale price because it won't be able to expand output due to the retail price being set by the RPM contract. Even in the absence of collusion, Rey and Verge have shown that RPM contracts can enable an industry with a small number of manufacturers and retailers to extract higher combined profits than they could without using RPM contracts if the manufacturers use the same set of retailers.[22]

Once again, what all this means is that a robust rule of reason is the only way to deter firms from using RPM anti-competitively while not chilling their use of RPM in situations where it is pro-competitive. Sagers is correct that there is a huge theoretical literature justifying almost any questioned conduct under the right circumstances. By the same token, however, there is another huge theoretical literature that explains how that same conduct can be anti-competitive. While this is certainly partly due to self-serving incentives on both sides, it is also due to the fact that there is a substantial amount of truth in both literatures. RPM, like most other contentious areas of antitrust, is contentious precisely because there are good reasons to think it can be pro-competitive and good reasons to think it can be anti-competitive. The only way to tell which effect is more important in any particular case is through rule of reason analysis.

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[22] Patrick Rey & Thibaud Verge, *Resale Price Maintenance and Interlocking Relationships*, 58 J. INDUS. ECON. 928, 930 (2010).

Contrary to what Sagers suggests, we cannot rely on empirical evidence to provide an easy answer that is applicable to all cases. First, the empirical evidence on RPM is not nearly as conclusive as Sagers claims. MacKay and Smith[23] have an excellent discussion of how difficult it is to empirically measure the effects of RPM. They explain that it can be hard to determine even when RPM exists. One can get around this by exploiting changes in the legal environment. But, as they point out, changes in the legal environment may be a lagging indicator in that a change in the legal treatment of RPM (e.g., a shift away from *per se* illegality) might occur after many actors already know that enforcers are pursuing such cases less aggressively because they are less hostile to the practice. In addition, because the lowest price of a product across retailers is often the modal price, it can be hard to distinguish whether a change in price is due to RPM enforcement or other factors. Even if one can be confident that the effect one has found is attributable to RPM, measuring welfare consequences is still very difficult. Just measuring the effect on the quantity sold does not definitively identify the welfare effect of RPM.[24] If RPM both increases quality and enables collusion, demand could expand while consumer surplus falls as the sellers use RPM to extract more of the surplus from high valuing consumers. On the other hand, RPM could only increase quality but lead to less demand and still potentially increase or decrease consumer welfare or total welfare depending on which consumers value the improved quality more.

Second, even if we were confident that RPM was more often anti-competitive than pro-competitive, that would not necessarily justify *per se* prohibition. We would need to know something about the magnitudes of these effects before even being able to say whether *per se* prohibition were better than *per se* legality. Even if we were to know that RPM generated a net welfare loss, a rule of reason approach that was reasonably accurate could easily still generate even more welfare by deterring most harmful RPM while not chilling the most obviously pro-competitive RPM.

That said, it is important to emphasize that plaintiffs must have a legitimate chance to win rule of reason cases for the rule of reason to work effectively. Courts should not use the high cost of defending antitrust cases as a rationale for making it very hard for plaintiffs to

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[23] Alexander MacKay & David A. Smith, *Challenges for Empirical Research on RPM*, 50 REV. INDUS. ORG. 209, 209 (2017).

[24] *Id.* at 214.

get past dismissal or summary judgment (as the Court did in *Twombly*[25]). Doing so would only encourage more anti-competitive conduct and, because of that, might not even save on litigation costs if the expansion of anti-competitive conduct means that more plaintiffs have very strong cases that have a decent chance of surviving even heightened standards for getting past dismissal or summary judgement.

None of this, however, changes the fact that Sagers is fundamentally right about the *Apple* case. While the contracts between Apple and the publishers included resale price maintenance clauses, that was not the basis of the government's case against *Apple*. As Sagers says, it was a hub and spoke horizontal price fixing case. The publishers wanted to collude to increase the price of e-books, *Apple* knew this and offered to become the hub that would make the hub and spoke conspiracy work. The Department of Justice and the States all made both a *per se* price fixing case and a rule of reason case and won both of them. While I disagree with Sagers's implicit claim that RPM is not complicated in general, I completely agree with him that the *Apple* case was pretty much a plain vanilla price fixing case (full disclosure reminder: I was a consulting expert for the State of Texas on this case). Similarly, while I disagree with Sagers's (implicit) suggestion that courts should not take seriously any claim that this market is different, he is certainly right that neither *Apple* nor the publishers made any convincing economic case for why the e-book market justified any different treatment. Furthermore, as mentioned above, while there are cases where particular features of a product or market justify different antitrust treatment than in the typical market (whatever that is), I fully agree that firms have a strong incentive to make this argument whether or not there is any legitimate economic basis for it. Sagers is surely correct that technological change can be disruptive and existing firms have an incentive to use anti-competitive behavior to deter new entrants from stealing their market. Fortunately, and not surprisingly, the *Apple* court was not fooled by appeals to preserve the dominance of existing modes of production. While courts will sometimes make mistakes, we can expect courts to be right frequently enough that we will be worse off if they abdicate their responsibility to distinguish harmful from benign competitive conduct by turning to blanket rules rather than individual, case-by-case, determinations.

[25] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 557-58 (2007).