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Reclaiming Specific-Intent Under Section 2 of the Sherman Antitrust Act: A Business Theoretical Approach

Elias T. Xenos
Michigan State University College of Law

RECLAIMING SPECIFIC-INTENT UNDER SECTION 2 OF THE SHERMAN ANTITRUST ACT: A BUSINESS THEORETICAL APPROACH

Elias T. Xenos
Michigan State University – Detroit College of Law
(King Fellows Seminar)

I. Introduction

There is much controversy over what shades and magnitudes of intent are necessary to prove the variegated antitrust violations under Section 2 of the Sherman Antitrust Act. One standard of intent that is relatively easy to articulate in theoretical terms, yet notoriously difficult to apply to actual factual scenarios, is "specific-intent." The literature in this area furnishes a cacophony of discordant voices, and the field of antitrust is such that a case can be found to support almost any viewpoint. My purpose in this paper is not to restate all of the conflicting definitions of specific-intent or, heaven forbid, to purpose yet another. Rather, my concern is with debunking the inferences within the vernacular used by most federal courts in assessing specific-intent. Moreover, my analysis is limited to the context of mergers and acquisitions, since theses events provide uniquely fertile opportunities for misapprehending the true intentions of the relevant parties.

Current antitrust jurisprudence under Section 2 fundamentally ignores the possibility that corporations may be acting not for their legitimate competitive advantage or the illegitimate harm of their competitors, but for the personal benefit of their executives. That a particular corporation may eventually garner monopoly profits from an executive's present self-dealing is a logical red herring; the *intent* that resulted in the alleged anticompetitive conduct is of a nature completely discrete from the “anticompetitive animus” bespoken by the architects of our antitrust laws. To the extent that intent remains an indispensable element of all criminal cases, in Justice Jackson’s words, “as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil,”[1] it is incumbent on the antitrust community to refine its understanding of intent in criminal antitrust violations. Admittedly, it is of less import in civil contexts, since courts in civil antitrust suits are concerned primarily with the *effect* of the challenged behavior. Nevertheless, as well noted in *United States v. U.S. Gypsum Co.*,[2] “consideration of intent may play an important role in diving the actual nature and effect of the alleged anticompetitive conduct.” It is axiomatic that the less parity there exists between the mental element constituting intent and punishment for the proscribed act, the less efficient will be efforts to deter and reform.

I begin by outlining the framework of Section 2 jurisprudence, paying particular attention to how the specific-intent element of the attempted monopolization charge has evolved through the case law. Next, I suggest two reasons why this inquiry is not only important, but quite timely. Afterward, I identify the analytic flaw that flows naturally from the current vernacular of antitrust law, microeconomics: inferring specific-intent absent a valid business purpose. This flaw, I explain, is the ugly stepchild of a highly problematic assumption of microeconomic theory—that a distinction between the firm and those who manage the firm is nonexistent (or otherwise insignificant). I propose a more realistic set of assumptions upon which to assess Section 2 cases, based on Bebchuck, Fried, and Walker’s Managerial Power Approach. Against the backdrop of this approach, I demonstrate how some behaviors may appear to have been driven by anticompetitive animus—indeed, may have resulted in a monopoly—but are in fact episodes of mangerialism, that is, efforts to extract excess power, pay, and privilege from the corporation (excess "rents"). My concern here is with scenarios in which the methods the executive uses to advance his own personal interests coincide with—but are not essential to—those that lead to monopoly power. I offer an alternative explanation for why an executive would choose to combine with a company within a related industry—thus, drawing the attention of antitrust regulators—when rent extraction can be obtained through a corporation in a non-related industry. My purpose is not to provoke laxer or tighter enforcement of Section 2, but to provoke additional edification on the subject of specific-intent so as to enroot it with the meaning its architects envisioned.

II. Framework of Section 2

Section 2 of the Sherman Act is written as follows:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 10,000,000 if a corporation, or, if any other person, $ 350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.[3]

In essence, the provision bans both unilateral and concerted conduct that produce either a monopoly or a monopsony,[4] or that constitute an attempt to achieve monopoly or monopsony power.[5] The first element of unlawful monopolization under Section 2 is the possession of monopoly power, or, in attempted monopolization cases, a dangerous probability of success in achieving monopoly power.[6] My focus will be on the second element of attempted monopolization, specific-intent, which requires specific intent both do to the prohibited acts and to achieve the prohibited result of monopolization.[7]

The intense controversy over the intent element in attempted monopolization cases finds its origin in *Swift v. United States*.[8] Justice Holmes' opinion in that case contains the following passage:

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require for their acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Commonwealth v. Peaslee, 177 Massachusetts 246, 272 [59 N.E. 55, 56 (1901)]. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result."[9]

Since *Swift*, most courts to visit the issue have included a specific-intent component in attempted monopolization cases, though typically by implication; courts have not routinely separated the test into a conduct component and an intent component.[10] Illustrative of the modern construction is the Supreme Court's decision in *Spectrum Sports v McQuillan*.[11] The central issue in *Spectrum* was whether a manufacturer's distributor can, without any evidence of market power (monopoly) or specific-intent, be found liable for attempting to monopolize solely on the basis of predatory conduct with a dangerous probability of success.[12] Rejecting the lower Court's reasoning, the Supreme Court held that, "absent proof of a dangerous probability that [the distributor] would monopolize a particular market and specific intent to monopolize," there is no liability for attempted monopolization under Section 2.[13]

Like *Swift* and *Spectrum,* most attempted monopolization cases involve allegations of well-defined predatory business practices, namely, price-fixing, territorial allocations, vertical integrations, and tie-in arrangements.[14] Where compelling evidence of predatory practices is presented, a court will usually *infer* the presence of specific-intent. Only a true advocate would question this inferential relationship. Nevertheless, this analytic approach does involve a logical stretch: "Even when intent is used in a manner favorable to the defendant—inviting the jury to find no specific intent to monopolize when the defendant intended to achieve a legitimate purpose—the jury speculates about the defendant's soul."[15] As mentioned earlier, mergers and acquisitions in this respect engender heightened concern.

III. Why the Inquiry into Section 2?

In recent times, mergers and acquisitions have been regulated primarily through Section 7 of the Clayton Act, because of the lower scienter burden for the plaintiff/prosecution; the "effect" of the corporate combination is the lodestar for determining legality, notwithstanding the subjective or specific-intent of the parties. This is not to say that corporate combinations that tend to increase market share in a particular industry have not been attacked through Section 2. Indeed, they have. One such case is *United Steel v Columbia Steel Company*.[16] In this case, the United States Steel Corporation attempted to purchase the assets of an independent steel maker. The Government challenged the acquisition on the grounds that it was an attempt by U.S. Steel to monopolize the market in certain fabricated steel products, and so would unlawfully restrain competition. Reasoning that the defendant company exhibited a "normal business purpose," the Supreme Court concluded that the specific-intent element of the Section 2 charge was lacking. Accordingly, the Court found that there was no attempted monopolization.[17]

Why, then, is it important to struggle through determining the real intent of the corporate decision makers when these activities are usually regulated through other statutory schemes? The reason is two-fold. First, the unique insights gleaned from applying the Section 2 framework to mergers and acquisitions in the hypothetical can be extrapolated to *advance our understanding of specific-intent* in other contexts—where Section 2 is in fact rigorously enforced.

The second, and more important reason, is that *criminal* penalties for anticompetitive motivations with respect to mergers and acquisitions are available only through the Sherman Act—and not Section 7. As our quest to quench our thirst for enhanced corporate scrutiny accelerates with every exposure of brazen managerial self-dealing, we are likely to rekindle the policies of a more vigilant antitrust era. This author predicts that *criminal* prosecution will become more prevalent for all categories of antitrust violations, including mergers and acquisitions. When asked in any interview about any "changes, improvements, or differences in the way [the Department of Justice] goes about criminal enforcement," current Assistant Attorney General Charles James stated the following: "[W]e want to transform a largely reactive enforcement regime to something that's more proactive…. We have tried to be very visible and reach out to people who might have information or concerns about potentially anticompetitive conduct."[18] His words likely form a prologue to what is ahead for the Division.

To be sure, James' posturing is part of a larger historical pattern that has evolved since the late 20th century: scandal on the heels of a bull market, and then a zealous crackdown.[19] In reaction to the abuses of the late 1920s stock market swindlers, lawmakers passed the Securities Act of 1933 and Securities Exchange Act of 1934.[20] Likewise, the Sherman Act was enacted after a decade of violence among laborers and farmers culminating in widespread violence.[21] It was a volatile period in which new economic systems were debated—even Marxist solutions.[22] Most recently, the Sarbanes-Oxley legislation was passed, which requires new corporate governance standards and increases criminal penalties for securities laws violations. Sound familiar?

It makes sense that mergers and acquisitions may be the subject of intensified reform efforts. After all, it was ill-advised—some would say, knowingly destructive—corporate combinations and divestitures that fueled many of the false illusions of the 1990's, resulting in a market collapse. Marcia Vickers and Mike France of *Business Week* illuminate the link between mergers and acquisitions and the stock market collapse in their cover story, "How Corrupt is Wall Street?"[23] During the late 1990s, the authors point out, investment bank analysts' pay was tied to how much investment banking business they could bring in. Compensation consultant Alan Johnson of Johnson Associates, Inc. concurs: "the sales [mergers and acquisitions] part of the analysts' jobs become huge." In one such "sale," Enron paid $323 million investment banking fees.

An insightful passage on what drives criminal prosecution of corporate crooks is found in Neale's The *Antitrust Laws of the U.S.A*:

> [C]ivil remedies do not carry the odium of criminal penalties, and for this reason, even when they are drastic in effect, do not touch the public sense

> of justice in the same way as severe criminal penalties…. [T]he real sanction of the antitrust laws will still lie not so much in the risk of financial penalty as in the sheer fact of criminal indictment as it affects businessmen who have a respected place in their communities. Criminal proceedings under the Sherman Act involve 'going quietly' with the policeman, having your fingerprints taken and all the other unattractive incidents of any crime, together, of course, with a considerable amount of unfavourable publicity and the heavy costs of defending the suit.[24]

With this in mind, the task of refining our understanding of the mental processes incident to mergers and acquisitions could not be timelier, lest we upset Justice Jackson's prescient observations on the human will.

III. An Inferential Leap

Legal scholars Roland A. Cass and Keith N. Hylton convincingly argue that federal courts have shown that a preference for an *objective* approach to determining specific-intent.[25] Not to be confused with general intent, a court makes an inferential connection between the absence of any legitimate business justification and a specific intent to monopolize.[26] By relying on inference, explain the authors, courts dispense with the needs to divine the intent of a corporation and to identify evidence of a natural person's subjective state of mind. The former task is premised on the dubious notion that an inanimate entity can form *any* intent, and the latter is virtually impossible for the simple reason that "[l]awyers will routinely advise their clients not to leave in their files any memoranda or statements suggesting a desire to eliminate competitors."[27] By contrast, the objective approach asks what intent can be attributed to the defendant in light of his observed conduct,[28] a much more realistic endeavor.

Where the attainment of monopoly power is, within the executive's mind, a *necessary step* towards extracting rents for his own behalf, the search for distinctive purposes at each stage is nonsensical. Our concern, rather, is with scenarios in which the methods the executive uses to advance his own personal interests coincide with—but are not essential to—those that lead to monopoly power. To be sure, this is an expedition through murky analytic waters. As early as 1962, a Maryland District Court in *American Football League v. National Football League*,[29] acknowledged the difficulty in discerning specific-intent where two motives are suggested by the evidence, one legal and the other illegal.[30]

What is significant about the inferential leap between observed conduct and a finding of specific-intent is that courts more often than not employ a rigid "if-then" analysis; that is, specific-intent is conclusively presumed absent a finding of a valid business purpose. Correspondingly, as was demonstrated in *Times-Picayune Publishing Co. v. United States*,[31] a valid business purpose will negate specific-intent to monopolize. In *Times-Picayune*, the United States filed a civil suit under Section 2 of the Sherman Act against a newspaper publisher, alleging that the publisher's advertising contracts resulted in the restraint of trade, and were an attempt to monopolize trade.[32] Rejecting the government's allegation, the Supreme Court held that the publisher's contracts were "predominantly motivated by legitimate business aims, [and therefore] this record cannot bear out the specific intent essential to sustain an attempt to monopolize under Section 2."[33]

Aside from *Times-Picayune*, perhaps the best evidence of the relevance of business justifications to absolve defendants of anti-competitive wrongdoing is found in the Supreme Court's decision in *Aspen Skiing Co. v Aspen Highlands Skiing Corp*[34] There, the

Aspen Skiing Co. operated three mountains in the Aspen, Colorado region. Aspen Highlands, which operated only one mountain, sold skiers multiple skiing passes for all four mountains. Eventually, Aspen Skiing took steps to promote its own mountains, to the exclusion of those at Aspen Highlands. The central issue in that case was whether Aspen Skiing presented credible evidence that its actions were motivated by legitimate (i.e., pro-consumer or efficiency) concerns so as to avoid liability for unlawful monopolization under section 2.[35] Cass and Hylton point out that the relevance of pro-consumer or efficiency concerns in negating a Section 2 accusation are most evident in the opinion when the pertinent section is read in conjunction with the lower court's jury instruction:[36]

> In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other…
>
> * * *
>
> [A] company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exist for that refusal…
>
> * * *
>
> We are concerned with conduct which unnecessarily excludes or handicaps competitors. This is conduct which does not benefit consumers by making a better product or service available—or in other ways—and instead has the effect of impairing competition.[37]

The second paragraph, "if valid business reasons exist," is proof positive for Cass and Hylton that "good motives will exculpate."[38]

IV. Distinguishing Microeconomics from Business Theory

The *Aspen* decision is unique because the Supreme Court unapologetically opened the window to forms of antitrust discourse beyond classical microeconomic theory (notwithstanding the general resistance of lower courts to follow this invitation).[39] However, the argument structure employed in that case still reflects a reluctance to incorporate all of what we know about how managerial decisions are actually made. Specifically, business theory as a vernacular reveals a sound, alternative purpose or "intent" underlying managerial decisions in the Section 2 arena. This purpose, scarcely consonant to a "valid business purpose," is the extraction of "rents" over what an executive would receive under an employment arrangement that truly maximized shareholder value. For our purposes, we will define shareholder value as the monetary benefits that accrue to corporate shareholders through share price appreciation and dividend payouts.[40]

"Rents," in general terms, are returns in excess of the opportunity cost of the resources of the activity."[41] In the context of an employment relationship, we will understand "rents" as constituting the excess pay, power, and privilege that an executive can extract from his corporation over what a genuine arms-length transaction between him and the board directors—his theoretical bosses—would demand. By definition, the extraction of rents in this context is never in the best interests of corporate shareholders for the simple reason that the executive is enjoying more than his fair share of the bargain with his employer. The costs born by the shareholders from such largess are known as "agency costs"—the costs resulting from maintaining an "agency" relationship with those who control corporate decisions. In addition to the residual loss, that is, the welfare from the divergence between agents' decisions and decisions to maximize principals' welfare, agency costs include: 1) costs of structuring a set of contracts; 2) costs of monitoring and controlling the behavior of agents by principals; and 3) costs of bonding to guarantee that agents will make optimal decisions or principals will be compensated for the consequence of suboptimal decisions. [42]

Though it may seem intuitively that agency costs are deep and widespread—certainly, this is what recent anecdotal evidence would suggest—classical microeconomics downplays the existence of agency costs. Under a microeconomic approach, firms are rational and behave in a manner consistent with the profit maximizing interests of their shareholders.[43] Significantly, there is no gap between what managers perceive to be the best methods for maximizing profits and the decisions which in fact will accomplish that objective.[44]

This perspective is what one group of scholars at Harvard's Olin Center aptly call "the optical contracting approach,"[45] and is dominant among microeconomists on the issue of executive decision-making. Proponents of this approach acknowledge that executives may be concerned mostly with advancing their careers, even to the detriment of their companies. However, the theory goes, agency costs are minimal or non-existent because board members, as the ever-vigilant voices of shareholders, are motivated exclusively by a desire to maximize shareholder value, and the executives' compensation packages are in fact designed to serve this purpose.[46]

The above reasoning is also a key assumption of the so-called "Chicago School" of antitrust thought, and was adopted by the Supreme Court in its landmark decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[47] There, the Supreme Court analyzed whether some Japanese manufacturers of television sets had illegally conspired to drive their American competitors from the American market by colluding to simultaneously keep prices for the sets artificially high in Japan and low in the United States.[48] Significantly, the Court ignored "expert opinion evidence of below-cost pricing," opting instead to apply classical microeconomic factors to conclude that "such conduct is irrational."[49]

The microeconomic approach, with its rosy optical contracting scenario, is alluringly amenable to tidy graphical formulations. It is also about as reliable as an Enron 401(k) plan. Its major flaw is that the key economic actor within the context of an antitrust inquiry is the *firm*, insofar as a distinction between shareholders' and executives' incentives does not exist. On the contrary, any undergraduate business student with the slightest training in organizational behavior and competitive strategy will know that agency costs are a very real, inexorable, and weighty element of the management environment of professionally managed corporations—especially publicly held corporations.[50] This reality was known over a half-century ago to famous Columbia University professors Adolf A. Berle and Gardiner C. Means, who made clear the divergence between the owners of the corporation (shareholders) and the professionals (managers) who managed it. They warned that fragmented ownership "released management from the overriding requirement that it serve stockholders."[51] A big irony of the late 1990's, states John A. Byrne, *et al*, in a recent *Business Week* "Special Report," is that "after years of lavish stock-option rewards meant to remedy the problem, this divergence is more extreme than ever."[52] Who could dispute this?

A more realistic perspective on how managers make decisions is well encapsulated in Bebchuck, Fried, and Waller's "Managerial Power Approach"[53]:

> The Managerial Power Approach picks up with our analysis of the limitations of the optimal contracting approach. That analysis indicates that corporate managers have considerable power. Even nominally independent directors are often connected to executives by bonds of interest, collegiality, or affinity… Given the considerable influence of the CEO and CEO's management team over the board, bargaining over executive compensation does not usually approach the arm's length deal. Rather, executives frequently use their power to increase their compensation, and directors cooperate with management at least to some extent… Under the managerial power approach, the greater the CEO's power, the higher the rents with tend to be."[54]

While the object of Bebchuk's, *et al*, study was narrowly focused on the forces that shape executive compensation agreements, the important thing to remember as we move forward is that executives enjoy *considerable* power to affect outcomes in ways that extract rents from their companies. In the next section, we will see how such rent extraction may be confused with attempts at illegal monopolization.

V. Hidden Agendas

Some outcomes are conducive to rent extraction by executives for their personal welfare. An attempt at achieving a certain subset of these outcomes, when viewed only through the lens of microeconomics, appears to be driven by anticompetitive motivations. In fact, predation of any sort is neither necessary nor specifically intended for rent extraction within this subset of outcomes.

<u>V(1). Size</u>

One such outcome is sheer size, in terms of revenue and numbers of employees.[55] There is a wealth of evidence to support the contention that the pecuniary rewards received by executives, such as salaries, bonuses, and stock options, are positively tied to the revenue growth rates of their firms.[56] The key word here is "revenue." Economist Dennis C. Mueller writes the following: "the prestige and power which managers derive from their occupations are directly related to the size and growth of the companies and not to its profitability."[57] Employee headcount is driven less by pecuniary motives, and more by plain egoism. Like feudal lords of the Middles Ages who measured their own self-worth by how many bodies (servants) they dominated, today's corporate executives derive enormous psychic satisfaction from the mere volume of employees they supervise. Lou Gerstner, former CEO of IBM and author of Who Says Elephants Can't Dance, discusses his company's feudal system of redundant assistants: "I'll never forget my first impression of one IBM meeting. Arranged around a long conference room were all the nobles of IBM's offshore, geographical fiefdoms…. During a coffee break, I asked Ned Lautenbach, 'Who are all these people who are clearly watching but not participating?' He said, 'those are executive AA.' Hundreds, if not thousands, of IBM middle- and senior-level executives had assistants assigned to them.'[58] George Washington University law professor Lawrence Mitchell, author of *Corporate Irresponsibility: America's Newest Export*, takes the feudal analogy even further: "The Ken Lays and Bernie Ebbers were made heroes during the 1990s… like feudal lords, [they] took what they thought they were entitled to and left the peasants what they thought they should get."[59]

The easiest way to increase in both dimensions, size and employee headcount, is by merging with other, preferably large, firms. Whether an actual monopoly of goods or services results from this arrangement is of tangential concern for the rent-maximizing executive. Where there is substantial concern, it is not a question of how to, but of how not to; the managerial power approach suggests that an executive would seldom risk incurring the wrath of antitrust authorities to achieve a monopoly (the enhanced profitability of which would benefit shareholders) when he could extract rents in other, legally acceptable ways.

V(2). Diversification

Another outcome that is conducive to rent extraction, but may arouse suspicion among antitrust authorities, is "diversification." What is meant here is *not* diversification across different industries, such as if McDonalds purchases Sony. This type of acquisition is unlikely to attract attention for the simple fact that market share in either industry will not be increased. Rather, what is meant is diversification of revenue streams. Thus, an intra-industry acquisition would meet this definition, such as if McDonald's acquired Burger King; although still operating within the fast food industry, McDonald's has diversified itself in the sense that the aggregate revenue from all of its pre-existing operations is now less than one hundred percent of the post-merger consolidated revenue.

Shrewd executives know that diversification of revenue streams reduces risk. But what risk in particular? Individual shareholders can easily achieve the same diversification by buying in different firms directly through stock or indirectly through mutual funds. Moreover, a stockholder does not need a company to incur the tremendous transaction costs incident to a merger or acquisition when he can easily achieve the same result for the price of a broker's commission.

The unspoken risk here is the risk to the executive's own career, an asset which is hard to diversify.[60] As one financial scholar poignantly observes, "if a company goes bankrupt or enters a period of financial difficulties, the middle-aged manager pays a heavy economic price. It is reasonable for such a manager to seek a higher level of security by trying to stabilize the income of the corporation."[61]

In addition to their own career interests, points out Bryan Ford, executives often have emotional attachments to their corporations:

> Many executives devote most of their professional lives to one organization. They derive a sense of identity and purpose through their connection with the corporation. Through their loyalty, talent, and hard work, they have risen to the upper reaches of the organization. Naturally, executives often feel a deep attachment to the corporation that is almost of a proprietary nature. In addition, top executives often feel possessory toward the corporation because of the roles they played in the development of the corporation. Executives shape the corporation, in part, through their decisions. They, in essence, helped build the corporation into what it is and feel that this gives them certain ownership rights.

V(3). The Bootstrap Game

The third outcome also serves managerial interests, but involves financial engineering of Enronesque proportions. Many executive compensation packages include an earnings-per-share (EPS) component, that is, an executive's compensation is partly a function of his ability to raise the company's earnings-per-share. Though this component fell into disfavor during the go-go days of the 1990's, it is still being used, and is likely to increase in popularity once again as investors seek more concrete methods of measuring executive performance than stock price appreciation.

Where EPS is used as a compensation criterion, it is important for antitrust observers to understand the ways by which EPS can be manipulated, insofar as a potentially anticompetitive intent may turn out to be nothing more than another episode of managerialism. Known to financial analysts as "the Bootstrap Game," a company increases its EPS by acquiring another firm, yet makes no monopoly profits, indeed, no economic gains whatsoever. Brealy and Myers describe how this works through the fictional acquisition of Muck and Slurry by World Enterprises:

> "Because Muck and Slurry has relatively poor growth prospects, its stock sells at a lower price-earnings ratio [10] than does World Enterprises' stock [20]… The market value of World Enterprises after the merger should be equal to the sum of the separate values of the two firms… Since World Enterprises' stock [$40] is selling for double the price of Muck and Slurry stock [$20]… World Enterprises can acquire the 100,000 Muck and Slurry shares for 50,000 of its own shares. Thus World will have 150,000 shares outstanding after the merger. Total earnings double as a result of the merger… but the number of shares increases by only 50 percent. Earnings *per share* rises… We call this the *bootstrap effect* because there is no real gain created by the merger and no increase in the two firms' combined value. * * * Financial manipulators sometimes try to ensure that the market does *not* understand the deal. Suppose that investors are fooled by the exuberance of the president of World Enterprises and by plans to introduce modern management techniques… They could easily mistake the 33 percent post-merger increase in earnings per share for real growth."[62]

V(4). Spinning

The forth and final outcome which we will examine is called "spinning" by Wall Street insiders.[63] In what would be called "bribing" among more plebian circles, the technique is as simple as it is shameless: Executives of large corporations send investment banks business on behalf of the firms they lead in exchange for *personal* access to hot IPO offerings.[64] Shareholders, unsurprisingly, end up subsidizing the payoffs vis-à-vis retained earnings. The theory here is that executives may be responding not to anticompetitive motivations, but to the hefty incentives created by the analysts whose compensation is largely a function of the mergers and acquisitions (fee-based) business they generate.

The chart below illustrates what some companies paid one investment bank, Solomon Smith Barney, and what their respective CEO's got in return:[65]

Executive	Personal Profits from IPO Stock Sales	Fees Paid to Solomon
Bernard Ebbers (former WorldCom CEO)	$11.5 million	$107 million
Philip Anschultz (former Quest chairman)	$4.8 million	$37 million
Joseph Nacchio (former Question CEO)	$1.0 million	$37 million
Stephen Garofalo (Former Metromedia Fiber CEO)	$1.5 million	$47 million
Clark McLeod (former McLeodUSA CEO)	$9.4 million	$49 million

What type of banking services were provided for these eye-popping fees? In the case of WorldCom, as in most others, the lion's share of the fees were related to mergers and acquisitions deals. Appropriately, WorldCom's CEO, Ebbers, named his gargantuan yacht "The Acquisition." One *Fortune Magazine* reporter describes the aftermath:

> Corporate America is still aching from Wall Street's horrendous M&A advice in the late 1990's. The investment banks championed hordes of misguided deals, from Conseco/Green Tree to WorldCom/MCI to AOL Time Warner… In each case the buyer paid such huge premiums that the deal was dead on arrival, causing enormous losses in shareholder value. Wall Street firms not only collected big fees for selling overpriced deals but also justified the overpayments by writing "fairness opinions" for their clients—for an additional $1 million or so per opinion. In those remarkable documents they dredged up every conceivable bogus rationale to show that their clients were paying a reasonable price. It was the fairness opinions that shielded management from shareholder suits.[66]

The aftermath may have surprised some lawyers, but not corporate governance scholars, most of whom understand that the state of today's corporate governance is the (*dys*functional) equivalent of MTV's Osborne Family: lots of love and no accountability.

VI. Bringing It All Together

For our purposes, what is important to understand from these events is that the mergers and acquisitions were propounded in the names of "efficiency," "synergy," and other fashionable objectives commonly used to defend against accusations of attempted monopolization. We now know that these deals were some the grandest corporate fleecings of all time. They were fleecings not because the promised economic benefits to corporate shareholders failed to materialize—indeed, an honest mistake does not constitute a fleecing. Rather, they were fleecings because the non-relenting barrage of investigations, indictments, guilty pleas, government settlements, and fines seem to indicate that the executives were less than loyal to their fiduciary obligations.

As a result, corporate combinations and divestitures are—at least for the moment—scrutinized diligently and presumptively suspect (as they should be). With an eye towards the heady 1990's, a judge hearing a Section 2 case wherein the defendant proffers "synergy" as the company's "legitimate business purpose" may feel compelled to discount its legitimacy. However, it should be clear by this point that to automatically infer attempted monopolization from the absence of a legitimate business purpose would be inappropriate.

Bearing in mind some non-business purpose ways in which executives personally benefit from corporate combinations, the $64,000 question becomes: Why would executives choose to combine with a company within a related industry when managerial rent extraction can be obtained through a corporate combination in a non-related industry? The only explanation, one might infer, is a specific intent on the part of the executives to monopolize. Indeed, this is the expeditious logic used by countless courts in inferring specific-intent from some observable conduct.[67] As will be demonstrated, however, business theory offers an alternative and more credible explanation for why executives would prefer to combine with a related company.

As stated earlier, key corporate decision-makers have a substantial part of their livelihoods and esteem tied up in their firms. They got to the executive-level positions they occupy by investing in a long-term learning effort of their specific company's business. This is consistent with a studies that found that CEO's, on average, are employed at the same corporation for 25 years before becoming CEO, [68] and that more than 42% have never worked for another firm.[69] Given the idiosyncrasies of each company's business model and operations, these executives realize that their value within their respective firms is greater than their market value.[70] Hence, there is a powerful incentive to combine with a company in related field, to the extent that the post-merger entity will continue to value the executives' credentials at a premium.

One might also ask why this argument is never articulated during antitrust suits as a defense to a charge of attempted monopolization. Of course, the main reason is that microeconomics, the vernacular through which antitrust inquiries are made, understates the conflict between the executives' personal interest and the profit-maximizing interests of a company's shareholders. After all, microeconomics views the *firm* as the competitive agent, not the humans who control the firm. The other reason is that setting forth this defense would be suicidal to an executive's career; he would essentially be admitting publicly that although he did not mean to illegitimately harm his company's competition, he did mean to extract rents from his company's shareholders.

VII. Conclusion

The antitrust literature has yet to fully integrate business theory into the current vernacular of microeconomics. This paper is a small step toward understanding whether, and how, managerial self-dealing can explain seemingly anticompetitive conduct on the part of the firm. I use the economically ambiguous realm of mergers and acquisition as a vehicle to demonstrate that corporations may not be acting for their own legitimate competitive advantage or the illegitimate harm of their competitors, but for the personal benefit of their executives. Such an explanation adds another dimension in the search for the true intentions of key decision-makers when analyzing the specific-intent element under Section 2. It is not, however, a justification for laxer enforcement or Section 2. Rather, it is meant to provoke additional research into which set of assumptions we should apply in analyzing specific-intent.

ENDNOTES

[1] *Morissette v. United States*, 342 U.S. 246, 250-51 (1952).
[2] 438 U.S. 422, 436 (1978).
[3] 15 U.S.C.S. § 2 (1890).
[4] Monopsony power is the converse of monopoly power; that is, it is the ability of buyers to reduce competition by restricting purchases or decreasing the price paid for goods. For purposes of this paper, there is no significant functional distinction between the intent requirement in monopsony cases and that in monopoly cases. Thus, for the sake of brevity, I restrict mention to "monopoly," with the understanding that all arguments also apply to monopsony contexts.
[5] Von Kalinowski, *Von Kalinowski on Antitrust* § 2.01.
[6] Some courts bifurcate this element into two separate inquires: (1) whether defendant exhibited predatory conduct in the first instance and (2) whether defendant achieved a dangerous probability of success. The inconsistency here need not concern us.
[7] *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 45 (1993); *Times Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1993).
[8] 196 U.S. 375.
[9] *Id.* at 396.
[10] Ronald A. Cass and Keith N. Hylton, *Antitrust Intent*, 74 S. Cal. L. Rev. 657, 673 (2001).
[11] 506 U.S. 447 (1993).
[12] *Id.*
[13] *Id.* at 459.
[14] *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof. Pub. Inc.*, 63 F.3d 1540 (10th Cir. 1995)(tie-in arrangement); *U.S. Anchor Mfg, Inc. v. Rule Industries, Inc.*, 7 F.3d 986 (11th Cir. 1993)(predatory pricing); *Paschall v. Kansas City Star Company*, 727 F.2d 692 (8th Cir. 1984)(vertical integration); *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217 (7th Cir. 1993)(price-fixing); *TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022 (10th Cir. 1992)(territorial allocation).
[15] Phillip Areeda, *Symposium: Anticipating Antitrust's Centennial: Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 Cal. L. Rev. 959, 963 (1987).
[16] 334 U.S. 495 (1948).
[17] *Id.*
[18] *Interview With Charles James, Assistant Attorney General for Antitrust*, U.S. Department of Justice," Antitrust, Vol. 16, No. 2, Spring 2002, at 16.
[19] Gary Weiss, *A Sorry Legacy the Street Can't Shake*, Bus. Wk. May 13, 2002, at 43.
[20] *Id.*
[21] Robert Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051, 1057 (1979).
[22] *Id.*
[23] Marcia Vickers and Mike France, *How Corrupt is Wall Street?*, Bus. Wk. May 13, 2002.
[24] A.D. Neale, *The Antitrust Laws of the United States of America* 402-03 (1970).
[25] Cass and Hylton, supra note 9, at 676.
[26] *Id.*
[27] *Id.*
[28] *Id*. at 659.
[29] 205 F. Supp. 60 (D.Md. 1962), *aff'd* 323 F.2d 130 (4th Cir. 1963), citing Osborn v. Sinclair Ref. Co., 171 F. Supp. 37, 44 n. 5 (D.Md. 1959), *rev'd on other grounds* 286 F.2d 832 (4th Cir. 1960), *cert. denied* 366 U.S. 963 (1961).
[30] 205 F.Supp 60 (1962),
[31] 345 U.S. 594 (1953).
[32] *Id.*
[33] *Id.* at 627.

[34] 472 U.S. 585 (1984).
[35] *Id.* at 610.
[36] Cass Hylton ??? page 674-75.
[37] *Id.* at 696-97.
[38] *Id.* at 675.
[39] Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 Case W. Res. L. Rev. 283, 334 (2001). This article provides an outstanding discussion of the history and genealogy of the discourse used in the discipline of antitrust law.
[40] Our definition tends to oversimplify a complex topic. Most business theorists would include a temporal component in this definition in order to demonstrate how short-term waste of corporate assets can erode of long-term profitability, and, thus, harm shareholders. We need not concern ourselves with this distinction, because the extraction of rents described in this paper happens both in the short-term and long-term.
[41] Michael C. Jensen, *Agency Costs of Free Cash Flow*, Corporate Finance, and Takeovers, American Economic Review, Vol. 76, Issue 2, Papers and Proceedings of the Ninety-Eighth Annual Meeting of the American Economic Association, 323 (1986).
[42] J. Fred Weston, Kwang S. Chung, and Susan E. Hoag, *Mergers, Restructuring, and Corporate Control* 202 (1990).
[43] Harry S. Gerla, *A Micro-Economic Approach to Antitrust Law: Games Managers Play*, 86 Mich. L. Rev. 892 (1988).
[44] *Id.* at 895.
[45] Lucian Arye Bebchuk, Jesse M. Fried, and David I. Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. Chi. L. Rev. 751, 753 (2002).
[46] *Id.* at 762.
[47] 475 U.S. 574 (1986).
[48] *Id.*
[49] *Id.* at 594 n. 19.
[50] *Waller*, supra note 30, at 317.
[51] Adolf A. Berle, Jr. & Gardiner C. Means, *The Modern Corporation and Private Property* (1932).
[52] John A. Byrne, Louis Lavelle, Nanette Byrnes, Marcia Vickers, and Amy Borrus, "How to Fix Corporate Governance" *Business Week* (May 6, 2002), 70-71.
[53] *Bebchuk*, supra note 36, at 783.
[54] *Id.*
[55] Today's CEO's can be likened to feudal lords of the Middles Ages, who measured their own self-worth by how many bodies (servants) they control. Notice how CEO's often introduce themselves by how many people "report" to them.
[56] Dennis C. Mueller, *A Theory of Conglomerate Mergers* The Quarterly Journal of Economics, Vol. 83, Issue 4 (Nov 1969), 644; Murphy, Kevin J., *Corporate Performance and Managerial Renumeration: An Empirical Analysis* Journal of Accounting and Economics, April 1985, 7, 11-42.
[57] *Mueller*, supra note 45, at 644.
[58] Lou Gerstner, *Who Says Elephants Can't Dance?*, Harper Business: 2002.
[59] Lawrence E. Mitchell*, Corporate Irresponsibility: America's Newest Export*, Yale Univ Press; (November 1, 2001).
[60] Harold Bierman, Jr., *Strategic Financial Planning: A Manager's Guide to Improving Profit Performance* 150 (1980).
[61] *Id.*
[62] Stewart C. Myers and Richard A. Brealey, *Principles of Corporate Finance* 947-48 (6th ed. 2000).
[63] *Spun Gold* The Economist, Finance & Economics (Sep. 7 2002).
[64] *Id.*
[65] Shawn Tully, "Is Wall Street Good for Anything*?" Fortune Magazine* (Sept. 16, 2002), 34.
[66] *Id.*

[67] *E.g.*, *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985)("Anti-competitive conduct is conduct without legitimate business purpose."); *Great W. Directories v. Southwestern Bell Tel. Co.*, 63 F.3d 1378, 1385 (5th Cir. 1995), *modified on other grounds*, 74 F.3d 613 (5th Cir.), *cert. dismissed*, 518 U.S. 1048 (1996)("Exclusionary conduct is conduct that tends to exclude or restrict competition and is not supported by a valid business reason."); *White and White, Inc. v. American Hospital Supply Corp.*, 723 F.2d 495 (6th Cir. 1983); *Midwest Radio Company, Inc. v. Forum Publishing Company*, 942 F.2d 1294 (8th Cir. 1991);

[68] G.R. Bassiry & R. Hrair Dekmejian, "The American Corporate Elite: A Profile" BUS. HORIZONS, May-June 1990, at 59, 60.

[69] Carl T. Bogus, *Excessive Executive Compensation and the Failure of Corporate Democracy*, 41 Buff. L. Rev. 1, 29 (1993).

[70] There is little mobility in the CEO labor market because the expertise of a CEO is not easily transferable, that is, the expertise of running a particular company is often specific to that company, or to a few other companies within its industry. Detlev Vagts, *Challenges to Executive Compensation: For the Markets or the Courts?*, 8 J. Corp. L. 231, 274-76 (1983). Thus, it is unlikely that an executive stolen from say, McDonald's, would be paid the same to head Sony.