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David S. Copeland

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ARTICLES

THE CRITICAL IMPORTANCE OF PROVING MARKET IMPACT IN SHERMAN ACT ANTITRUST CASES: A REVIEW OF THE SECOND CIRCUIT'S RECENT ANTITRUST DECISIONS*

David S. Copeland†

INTRODUCTION: THE SIGNIFICANCE OF MARKET ANALYSIS TO ANTITRUST

It cannot be denied that antitrust has recovered resoundingly from the doldrums of the 1980s, during which the principal academic debate was whether the so-called "Chicago School" had so completely persuaded the United States Supreme Court and federal appellate courts to correct the perceived mistakes of the past that there was hardly any meaningful antitrust law left.¹ Renewed antitrust enforcement by federal and state governmental agencies in the 1990s, coupled with a resurgence of civil litigation brought by private plaintiffs, has brought our society to the point where the previously arcane jargon of antitrust is regularly bandied about on network and cable television news programs, and the *Microsoft*

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† Member of the New York Bar and of Kaye, Scholer, Fierman, Hays & Handler, LLP. The author thanks his partners Michael Malina and Richard Steuer for their insightful comments on a draft of this Article, as well as his associate Mercer Givhan for his assistance in the Article's preparation.

¹ See, e.g., Eleanor M. Fox, *The Battle For The Soul Of Antitrust*, 75 CAL. L. REV. 917 (1987); Milton Handler, *Is Antitrust's Centennial A Time For Obsequies Or For Renewed Faith In Its National Policy?*, 10 CARDOZO L. REV. 1933 (1989) (arguing, *inter alia*, that "non-enforcement as a matter of deliberate policy is a subversion of the rule of law"); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985). The basic texts of the Chicago School include: ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. (1984); and Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

case has become so famous that it has been the subject of a cartoon parody in *Mad* magazine.²

Nonetheless, even if antitrust has made a loud and public comeback, the criticism which led to its brief downturn has had a lasting effect. No government official today would dream of condemning a merger of two companies with less than a 10% joint share of an unconcentrated market, though it was not so long ago that the Supreme Court did exactly that.³ To make the same point in more precise terms, there is now a broad recognition among practitioners and courts that in order to prove civil liability under the most commonly litigated federal antitrust statutes, there must be proof of market impact, that is, harm to competition via higher prices or the exclusion of competitors.⁴

Thus, under the existing precedent of the Supreme Court and, in particular, the Second Circuit Court of Appeals, proof of an actual adverse effect on competition in the relevant market is generally required in cases brought under § 1 of the Sherman Act, which condemns contracts, combinations or conspiracies in unreasonable restraint of trade.⁵ Likewise, in a claim for actual or attempted monopolization under § 2 of the Sherman Act, Supreme Court and Second Circuit precedents require proof that the defendant has actual or imminent monopoly power (typically, though not exclusively, shown by dominance of the relevant market) and has engaged in actual anticompetitive conduct.⁶

² See Desmond Devlin, *Settling the Microsoft Lawsuit on Judge Judy*, No. 386 MAD MAGAZINE, Oct. 1999, at 21, 23 (wherein the court declares that "Sometimes a monopoly IS a good thing!" albeit in the context of "court show[s] on TV").

³ See *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

⁴ By "most commonly litigated federal antitrust statutes," I mean to include §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1997), as well as § 7 of the Clayton Act, 15 U.S.C. § 18 (1997). I am intentionally excluding the Robinson-Patman Act, 15 U.S.C. § 13 (1997), under which price discrimination can be declared illegal if the statutory criteria are met, regardless of whether the challenged conduct is truly anticompetitive.

⁵ See 15 U.S.C. § 1 (1997); see also *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999), cert. denied, 120 S. Ct. 526 (1999).

⁶ See, e.g., *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97-98 (2d Cir. 1998). The requirements for a § 2 conspiracy to monopolize claim are somewhat distinct. See *International Distribution Ctrs. v. Walsh Trucking Co.*, 812 F.2d 786, 795 & n.8 (2d Cir. 1987) (emphasizing importance of a shared specific intent to monopolize).

In short, market analysis in general and the issue of market impact in particular has become increasingly important to antitrust. It is within that context that this Article reviews the recent antitrust jurisprudence of the Second Circuit.⁷

I. THE IMPORTANCE OF ESTABLISHING MARKET IMPACT IN SHERMAN ACT § 1 CASES: THE SECOND CIRCUIT MAINTAINS THE ANTITRUST STATUS QUO

A. *The Basic Requirement of Adverse Effect on Competition*

If one recent Second Circuit opinion had to be selected to represent traditional antitrust principles in the context of a claim brought under § 1 of the Sherman Act, it might well be Judge Cardamone's opinion in *Tops Markets, Inc. v. Quality Markets, Inc.*,⁸ a case involving an alleged conspiracy between a leading local supermarket owner and a local developer pursuant to which the developer agreed to breach its contract to sell parcels of land to another supermarket owner who planned to build competing stores.⁹ Starting with the basic elements of the plaintiff's claim, the court in *Tops Markets* explained that:

To establish a § 1 violation, a plaintiff must produce evidence sufficient to show: (1) a combination or some form of concerted action between at least two legally distinct economic entities; and (2) such combination or conduct constituted an unreasonable restraint of trade either per se or under the rule of reason.¹⁰

⁷ Much of the ground ploughed in this Article was explored with greater erudition and thoroughness nearly 20 years ago by my mentor and partner Michael Malina in *The Antitrust Jurisprudence of the Second Circuit*, 37 REC. A.B. CITY N.Y. 436 (1982). New crops have grown since then, however, and therefore this Article—which focuses on Second Circuit antitrust opinions within the past two years where the decision was based to some material extent on market analysis—is timely. It should be noted that this Article does not discuss several recent and interesting Second Circuit antitrust cases dealing with issues unrelated to market analysis. See, e.g., *Omega Homes, Inc. v. Buffalo*, 171 F.3d 755 (2d Cir. 1999) (holding city of Buffalo immune from antitrust liability under state action doctrine and private defendants immune under *Noerr-Pennington* doctrine), cert. denied, 120 S. Ct. 179 (1999). The Article also does not directly address the substantial and continuing contribution to antitrust law of the district courts in the Second Circuit.

⁸ 142 F.3d 90 (2d Cir. 1998).

⁹ See *id.* at 96.

¹⁰ *Id.* at 95-96.

In other words, once some form of concerted conduct has been established, a court must decide whether the conduct at issue falls within the few types of agreements that are so inherently anticompetitive that they have been condemned as per se illegal.¹¹ If not, then the concerted conduct is evaluated under the rule of reason, which provides that an agreement or other concerted conduct is deemed to violate the antitrust laws if it possesses anticompetitive effects that outweigh its procompetitive benefits.¹² In *Tops Markets*, the court explained that "before a factfinder may consider the harms and benefits of the challenged behavior," the plaintiff must as a threshold matter prove that "the challenged action had an actual adverse effect on competition as a whole in the relevant market; to prove it has been harmed as an individual competitor will not suffice."¹³

Thus, the Second Circuit endorsed the fundamental principle that market impact must be proved in § 1 cases decided under the rule of reason. The court explained that the requisite adverse effect may be shown in one of two ways. First, the plaintiff may show an actual anticompetitive effect, such as re-

¹¹ Price-fixing and territorial allocation agreements between competitors are per se illegal under virtually any circumstances, without regard to whether the parties to the agreement collectively possess market power. *See, e.g.,* *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam) (reiterating per se rule against market allocation agreements in case involving bar review courses); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927) (classic statement on price fixing). Boycotts among competitors that are designed to affect prices are treated as per se illegal. *See* *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435-36 & n.19 (1990). In other contexts, however, courts have required a threshold showing of market power before condemning a competitor boycott. *See* *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295-96 (1985) (boycott to exclude plaintiff from membership in trade association). Similarly, tying arrangements, where a seller refuses to sell the tying product unless the purchaser also buys the tied product, are per se illegal only if the seller has market power in the tying product. *See* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). Finally, in the area of agreement between suppliers and dealers, the only type of agreement that is per se illegal is a resale price maintenance agreement establishing a minimum (as opposed to a maximum) resale price. *Compare* *Business Elec. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 720 (1988) (reaffirming that resale price maintenance is per se illegal), *with* *State Oil Co. v. Khan*, 118 S. Ct. 275, 285 (1997) (holding that vertical *maximum* price fixing is not a per se violation of the Sherman Act).

¹² *See* *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

¹³ *Tops Mkts.*, 142 F.3d at 96 (quoting *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 541 (2d Cir. 1993)).

duced output in the relevant market.¹⁴ Second, a plaintiff may rely on proof of the defendant's market power (typically shown by reference to market share) "as a proxy for adverse effect," but the plaintiff must also establish "some other ground for believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the interbrand market."¹⁵

Applying the foregoing legal standard, the Second Circuit determined that the plaintiff had failed to establish that the defendant supermarket's agreement with a local land developer, which had prevented the plaintiff supermarket from acquiring some desirable land, had the requisite adverse effect on competition.¹⁶ In fact, the plaintiff had presented no evidence of actual adverse effect, such as higher prices in the relevant market, decreased quality of service, or exclusion of other supermarkets.¹⁷ With respect to the use of market power to measure actual adverse effect, the court assumed, *arguendo*, that the defendant's 72% market share implied the possession of market power, but found no other evidence from which an adverse competitive effect could be inferred.¹⁸ Accordingly, the court affirmed the district court's grant of summary judgment in the defendant's favor on the plaintiff's Sherman Act § 1 claim.¹⁹

B. *The Second Circuit's Recent Application of Market Impact Principles in Sherman Act § 1 Cases Involving Supplier-Dealer Agreements*

The underlying philosophical premise of the basic antitrust rules governing agreements between suppliers and dealers is

¹⁴ See *id.* (citations omitted).

¹⁵ *Id.* at 97.

¹⁶ See *id.* at 94-95.

¹⁷ See *id.* at 96.

¹⁸ See *Tops Mkts.*, 142 F.3d at 97. Basically, the court found that while the defendant's one-time purchase of land from the developer may have blocked the plaintiff from acquiring a choice site, it did nothing to "foreclose other prospective competitors from entering the market in desirable locations." *Id.* In fact, another supermarket was able to build a 100,000 square foot store in the local market and acquire a 26% market share within a year of doing so. See *id.*

¹⁹ See *id.*

that such "vertical" arrangements are often procompetitive because they typically serve to enhance the supplier's ability to engage in "interbrand" competition with other suppliers.²⁰ In contrast, "horizontal" agreements between competitors are typically perceived as adverse to robust interbrand competition; accordingly, the per se rule of illegality is most often applied in antitrust cases involving horizontal agreements between competitors (such as price-fixing agreements).²¹

To be sure, a supplier-dealer agreement, such as an agreement restricting the geographic territory in which the dealer may sell the supplier's goods, may also adversely affect "intra-brand" competition between dealers.²² Nonetheless, United States antitrust law in its present incarnation recognizes a hierarchy in which intra-brand competition runs a distant second to interbrand competition on the assumption that consumers are more likely to benefit, and will benefit more directly, from the latter type of competition as opposed to the former. In the recent words of the Second Circuit, "antitrust law shows more concern to protect inter- rather than intra-brand competition."²³

Given this context, it is not surprising that, as the law now stands, virtually all supplier-dealer agreements are governed by the rule of reason.²⁴ The only settled exception relates to resale price maintenance ("RPM") agreements which, under the Supreme Court's 90-year-old holding in *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*,²⁵ remain per se illegal. But even the exception has an exception: if the RPM

²⁰ See, e.g., *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988) (recognizing that vertical non-price restraints have "real potential to stimulate interbrand competition").

²¹ See *supra* note 11 and accompanying text.

²² See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51-52 (1977).

²³ *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (citing *NYNEX Corp. v. Discov. Inc.*, 525 U.S. 128 (1998)), *cert. denied*, 120 S. Ct. 526 (1999).

²⁴ That is certainly true with respect to vertical non-price restraints such as an exclusive territorial agreement between a supplier and a dealer. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Moreover, under the Supreme Court's decision in *Business Electronics Corp.*, a vertical agreement will be considered non-price "unless it includes some agreement on price or price levels." 485 U.S. at 735-36.

²⁵ 220 U.S. 373 (1911).

agreement sets a ceiling rather than a floor, thereby creating a "maximum" RPM agreement, the rule of reason applies.²⁶

1. The *Discon* Saga: The Second Circuit's Brief Departure from the Antitrust Mainstream

In *Discon, Inc. v. NYNEX Corp.*,²⁷ the Second Circuit challenged the presumption of legality in supplier-dealer arrangements in two ways. First, in *Discon I*, the court declared that an agreement between a supplier and one of its dealers to eliminate another dealer could "possibly" be governed by "the *per se* rule applied to [horizontal] group boycotts . . . , if the restraint of trade has "no purpose except stifling competition."²⁸ Second, in *Discon II*—after the Supreme Court had declared that the *per se* rule could have no application to the situation where a supplier replaces one dealer with another pursuant to an agreement between the supplier and the favored dealer²⁹—the Second Circuit on remand held that the plaintiff should still be given the opportunity to prove that the alleged supplier-dealer agreement at issue was illegal under the rule of reason, which will require a threshold showing of injury to competition.³⁰

The *Discon* case arose following the restructuring of the telephone service industry in the late 1980s. Prior to 1984, American Telegraph and Telephone ("AT&T") was the nation's primary telephone service provider and, through its subsidiaries, also supplied a substantial portion of the nation's telephone equipment.³¹ A 1984 antitrust consent decree ended AT&T's participation in the local telephone service business, limiting AT&T to providing long distance service in competition with companies like MCI and Sprint.³² As a result of the

²⁶ See *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

²⁷ *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996) [hereinafter *Discon I*], *aff'd in part, rev'd in part, and remanded*, *NYNEX Corp. v. Discon, Inc.*, 119 S. Ct. 493 (1998), *on remand*, *Discon, Inc. v. NYNEX Corp.*, 184 F.3d 111 (2d Cir. 1999) [hereinafter *Discon II*].

²⁸ *Discon I*, 93 F.3d at 1061 (citations omitted).

²⁹ See *Discon*, 119 S. Ct. at 499-500.

³⁰ *Discon II*, 184 F.3d at 114.

³¹ See *Discon*, 119 S. Ct. at 495.

³² See *id.* (citing *M. KELLOGG ET AL., FEDERAL TELECOMMUNICATIONS LAW* § 4.6, at 222 (1992)).

consent decree, the local telephone companies, formerly owned by AT&T, became independent companies.³³ The consent decree also required that these new independent local telephone companies help assure competitive long distance service by granting long distance companies physical access to their systems and local customers.³⁴ To enable such physical access, some local telephone companies had to install new "call switching" equipment, which often required removal of old equipment.³⁵

Discon, Inc. ("Discon"), a "removal services" provider, was in the business of removing old call switching equipment.³⁶ Discon provided removal services to New York Telephone Company ("NYTel"), a subsidiary of NYNEX Corporation engaged in providing local telephone service throughout New York as well as parts of Connecticut.³⁷ NYNEX also owned Materiel Enterprises Company ("MECo"), a purchasing entity that bought removal services for NYTel.³⁸

Discon's complaint alleged that NYNEX, NYTel, MECo, and several NYNEX-related individuals ("NYNEX Defendants") engaged in a "scheme to defraud the rate paying public" pursuant to which NYNEX and MECo, in procuring removal services for NYTel, discriminated against Discon in favor of its competitor, AT&T Technologies.³⁹ Specifically, Discon alleged that the NYNEX Defendants favored AT&T Technologies because it was willing to participate in a scheme whereby MECo paid inflated prices for removal services, which were then passed on (through NYTel) to consumers, after which the removal services provider would issue a secret rebate to MECo.⁴⁰

³³ See *Discon*, 119 S. Ct. at 495.

³⁴ See *United States v. AT&T*, 552 F. Supp. 131, 225, 227 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983).

³⁵ *Discon*, 119 S. Ct. at 496.

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ *Discon I*, 93 F.3d 1055, 1058 (2d Cir. 1996).

⁴⁰ The Federal Communications Commission ("FCC") conducted an independent regulatory proceeding regarding the alleged actions that served as the basis for Discon's complaint. See *id.* In that proceeding, the FCC determined that the NYNEX Defendant's scheme for generating revenues violated the Communications Act of 1934, 47 U.S.C. § 201(b) (1988). See *id.* The FCC ordered NYTel to issue a rebate to its rate-paying customers for overcharges that occurred between 1984 and 1988. See *id.* The FCC and NYTel ultimately entered into a consent decree,

Discon's amended complaint alleged that the NYNEX Defendants had violated §§ 1 and 2 of the Sherman Act as well as the Racketeer Influenced and Corrupt Organizations Act ("RICO").⁴¹ In June 1995, the district court granted the NYNEX Defendants' motion to dismiss for failure to state a claim and dismissed all of Discon's claims with prejudice.⁴² On appeal, the Second Circuit affirmed the district court's dismissal of Discon's claims for vertical price-fixing under § 1 of the Sherman Act, for monopolization and price-fixing under § 2 of the Sherman Act, and its civil RICO claims.⁴³ The court found, however, that Discon's complaint alleged a "two-firm group boycott" and therefore stated claims of an unlawful boycott under § 1 of the Sherman Act and a conspiracy to monopolize under § 2 of the Sherman Act.⁴⁴

In reversing the lower court's dismissal of Discon's group-boycott claim, the Second Circuit focused on Discon's allegation that MECo had switched its purchases from Discon to AT&T Technologies as part of an attempt to defraud local telephone service customers by deceiving regulators.⁴⁵ The court found that these allegations stated a cause of action under § 1 of the Sherman Act, though under a "different legal theory" from the one articulated by Discon.⁴⁶ While conceding that ordinarily "the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect,"⁴⁷ the court nonetheless found that, in this case, "no such pro-competitive rationale appears on the face of the complaint."⁴⁸ To the contrary, the court found that the complaint alleged that

pursuant to which, without admitting any wrongdoing or violations, NYTel agreed to refund over \$35 million for "unreasonable rates reflecting improper capital costs and expense charges." *Id.* (quoting *In re New York Tel. Co.*, 5 F.C.C.R. 5892 (1990)).

⁴¹ *See Discon I*, 93 F.3d at 1057.

⁴² *See id.*

⁴³ *See id.* at 1064.

⁴⁴ *See id.*

⁴⁵ *See id.* at 1058.

⁴⁶ *See Discon I*, 93 F.3d at 1060.

⁴⁷ *Id.* at 1061.

⁴⁸ *Id.*

MECo's decision to favor AT&T Technologies over Discon for equipment removal services was, and was intended to be, anti-competitive.⁴⁹

The Second Circuit noted that other courts of appeals were uncertain as to whether, or when, the per se group boycott rule applies to a decision by a purchaser to favor one supplier over another, pursuant to a so-called "two-firm group boycott."⁵⁰ The court decided that if the alleged restraint of trade "has no purpose except stifling competition,"⁵¹ then Discon had stated a cause of action under the rule of reason and possibly under the per se group boycott rule articulated in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*⁵²

The Supreme Court granted certiorari to consider whether the per se group boycott rule applied where, as alleged by Discon, a single buyer favors one seller over another, albeit for improper reasons.⁵³ Interestingly, while *NYNEX Corp. v. Discon, Inc.* was pending resolution in the Supreme Court, the Second Circuit was again asked to decide whether the substitution of one dealer or supplier for another could serve as the basis for an antitrust claim, absent a plausible claim of harm to the overall competition in the relevant market. In *Electronics Communications Corp. v. Toshiba American Consumer Products, Inc.*,⁵⁴ a different panel held that such an allegation could not support an antitrust claim because it was not a violation of the antitrust laws for a manufacturer to terminate a distributor and to appoint an exclusive distributor "without a showing of an actual adverse effect on competition market-

⁴⁹ *Id.*

⁵⁰ See *id. Compare* Com-Tel Inc. v. DuKane Corp., 669 F.2d 404, 411-13, 412 n.13, 413 n.16 (6th Cir. 1982), and *Cascade Cabinet Co. v. Western Cabinet & Milwork Inc.*, 710 F.2d 1366, 1370-71 (9th Cir. 1983), with *Construction Aggregate Transp., Inc. v. Florida Rock Indus., Inc.*, 710 F.2d 752, 776-78 (11th Cir. 1983).

⁵¹ *Discon I*, 93 F.3d at 1061.

⁵² 359 U.S. 207 (1959) (quoting *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 131 (2d Cir. 1978) (en banc)). For essentially the same reasons, the court found that Discon's complaint stated a valid claim of conspiracy to monopolize under § 2 of the Sherman Act. See *Discon I*, 93 F.3d at 1062 ("We conclude that the complaint sufficiently alleges that the NYNEX Defendants conspired with AT&T Technologies and performed overt acts intending to assist AT&T Technologies in its monopolization of the market for removal services.")

⁵³ See *NYNEX Corp. v. Discon, Inc.*, 523 U.S. 1019 (1998) (granting certiorari).

⁵⁴ 129 F.3d 240 (2d Cir. 1997).

wide[.]”⁵⁵ In an effort to distinguish the allegations in *Electronics Communications* from the allegations in *Discon*, the *Electronics Communications* court focused on the fraudulent aspects of the defendants’ alleged actions in *Discon*.⁵⁶

The need for the Second Circuit to distinguish *Discon* in future cases is now over, because the Supreme Court reversed the court of appeals’ ruling insofar as it held that a vertical “two-firm” boycott could be per se illegal. In a unanimous opinion, authored by Justice Breyer, the Court held that “precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.”⁵⁷

The Supreme Court’s opinion stressed that “[t]he freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage.”⁵⁸ Accordingly, in cases involving refusals to deal, the plaintiff “must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to the competitive process itself.”⁵⁹ The Court concluded that application of the per se rule (dispensing with such proof) to the substitution of one supplier for another “would discourage firms from changing suppliers—even where the competitive process itself does not suffer harm.”⁶⁰

The Supreme Court criticized the Second Circuit for devising the two-firm group boycott theory, a theory of its own that neither party had argued, according to which an agreement

⁵⁵ *Id.* at 244.

⁵⁶ Thus, the *Electronics Communications* court stated:

True, we recently held [in *Discon*] that an agreement between a supplier and its purchaser that disadvantaged the supplier’s competition could constitute a violation of the antitrust laws, even a per se violation In *Discon*, however, the alleged agreement between the purchaser and the supplier involved a fraudulent scheme to defraud the ratepaying telephone customers whereby the telephone company’s purchasing agent bought services from the conspiring supplier at inflated prices, charged these to customers, and then received a partial rebate from the supplier The Court distinguished the case from one involving a typical exclusive distributorship arrangement because the conduct alleged was manifestly anticompetitive and no procompetitive rationale appeared on the face of the complaint That is not the case here”

Id. at 244-45 (citations omitted).

⁵⁷ *NYNEX Corp. v. Discon, Inc.*, 119 S. Ct. 493, 498 (1998).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 495.

between two firms in a vertical relationship could be characterized as a "horizontal restraint" if it sought to disadvantage a competitor of one of the parties to the agreement and had no purpose except to stifle competition.⁶¹ More significantly, the Court held that it was error for the Second Circuit to hold that such a restraint might fall within the per se rule applicable to group boycotts if it had "no purpose except stifling competition."⁶² To apply the per se rule in circumstances "where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud" would, according to the Court, "transform . . . cases involving nepotism or personal pique, into treble-damages antitrust cases."⁶³

Quoting from its 1988 opinion in *Business Electronics Corp. v. Sharp Electronics Corp.*,⁶⁴ the Court reiterated the rule that a vertical restraint is not per se illegal "unless it includes some agreement on price or price levels."⁶⁵ As for the Second Circuit's suggestion that the restraint at issue was horizontal in nature, the Supreme Court had previously explained in *Business Electronics* that "a restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement."⁶⁶ In *Discon*, the Supreme Court put it somewhat differently, explaining that *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,⁶⁷ the decision on which the Second Circuit had relied, "was a case involving not simply a 'vertical' agreement between supplier and customer, but a case that also involved a 'horizontal' agreement among competitors."⁶⁸

In sum, as far as the Supreme Court was concerned, the agreement alleged in the *Discon* case was vertical and did not include an agreement on price or price levels; therefore, the

⁶¹ *Id.* at 496.

⁶² *Discon*, 119 S. Ct. at 496 (quoting *Discon I*, 93 F.3d 1055, 1061 (2d Cir. 1996)).

⁶³ *Id.* at 495.

⁶⁴ 485 U.S. 717 (1988).

⁶⁵ *Discon*, 119 S. Ct. at 498 (quoting *Business Elecs. Corp.*, 485 U.S. at 735-36).

⁶⁶ *Business Elecs. Corp.*, 485 U.S. at 730 n.4.

⁶⁷ 359 U.S. 207 (1959).

⁶⁸ *Discon*, 119 S. Ct. at 498 (citing *Business Elecs. Corp.*, 485 U.S. at 734).

per se rule should not apply.⁶⁹ Accordingly, the Supreme Court vacated the Second Circuit's judgment and remanded the case for further proceedings consistent with its opinion.⁷⁰

On remand, the Second Circuit first considered whether it was compelled by the Supreme Court's ruling to dismiss Discon's complaint outright or whether the Supreme Court's opinion left open the possibility that the complaint had stated a claim under the rule of reason.⁷¹ The court concluded that the proper course was to remand the case to the district court for further proceedings, emphasizing the Supreme Court's requirement that Discon "must allege and prove harm . . . to the competitive process itself."⁷² In giving Discon an opportunity to amend its complaint in light of the Supreme Court's opinion, the Second Circuit also recognized that it "may well be difficult for Discon to resist a motion by NYNEX for summary judgment on the issue of lack of an adequate showing of injury to competition."⁷³

⁶⁹ See *Discon*, 119 S. Ct. at 494-95.

⁷⁰ Although the NYNEX parties specifically asked the Court to order dismissal of Discon's complaint, the Court declined to do so, stating that the argument for dismissal was "outside the questions presented for certiorari." *Id.* at 500.

⁷¹ See *Discon II*, 184 F.3d 111, 112-13 (2d Cir. 1999). The appellate court explained that:

There are arguments for both outcomes. The main argument for dismissing the complaint is that it is hard to believe that the Supreme Court would have granted certiorari and wrote an opinion just to reject a phrase in a court of appeals opinion that was said to be only a possibility and was explicitly stated, in a footnote to the sentence using that phrase, not to have been the basis for any ruling. The force of that argument is blunted, however, by the fact that the Court's opinion notes the disagreement among the Circuits as to the availability of the per se rule in circumstances where one entity is terminated (as buyer or seller) at the behest of the excluded entity's competitor. The Court was evidently more concerned with what other courts had done than with what our Court had suggested was only a possibility

Id. at 113. The *Discon II* court further stated, however, that "the Court's opinion states several times that the only issue the Court is deciding is whether the circumstances alleged could constitute a per se violation The Court did not state or imply that the challenged agreement could not be shown to be unlawful under the rule of reason." *Id.* (emphasis added).

⁷² *Id.* at 114.

⁷³ *Id.* Indeed, as this Article went to press, Judge Arcara of the Western District of New York had just issued an opinion granting summary judgment to the defendants on, *inter alia*, the grounds suggested by the Second Circuit. See *Discon, Inc. v. NYNEX Corp.*, No. 90-CV-546A, slip op. at 11-27 (W.D.N.Y. Feb. 2, 2000).

Ultimately, *Discon* is significant for reaffirming that in a vertical case the plaintiff must prove market impact, i.e., injury to competition (not just to the plaintiff) in the relevant market. In contrast, in a horizontal case involving agreements among direct competitors, injury to competition may in some instances be presumed under the per se rule.

2. The *CDC Technologies* Case: A Further Demonstration of the Critical Importance of Proving Market Impact in § 1 Cases

In contrast to its brief foray outside the antitrust mainstream in the *Discon* case, the Second Circuit stayed well within it in *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.*⁷⁴ In that case, the court of appeals made it clear that exclusive dealing arrangements—agreements pursuant to which a supplier requires its dealer to purchase goods solely from that supplier—will not be deemed illegal under § 1 of the Sherman Act in the absence of proof that competing suppliers are actually foreclosed from competition as the result of the challenged supplier-dealer agreement.⁷⁵

What made *CDC Technologies* slightly unusual was the ease with which the defendant supplier was able to escape antitrust liability, despite having a roughly 80% market share and having “sewn up” about 50% of the distributor market in exclusive agreements.⁷⁶ Nonetheless, the Second Circuit found that the plaintiff failed to establish “an actual adverse effect on competition as a whole in the relevant market,”⁷⁷ citing undisputed evidence that despite the defendant’s exclusive dealing policy, the plaintiff had “successfully reached customers by a variety of marketing techniques,” had gained nationwide distribution coverage, and had increased its market share.⁷⁸ Nor did the defendant’s apparently dominant market

⁷⁴ 186 F.3d 74 (2d Cir. 1999).

⁷⁵ In a separate ruling, the Second Circuit held that the defendant’s exclusive dealing agreements were not within the purview of § 3 of the Clayton Act because none of the distributors was an actual “purchaser” who acquired title, as § 3 requires. See *id.* at 78.

⁷⁶ *Id.* at 77.

⁷⁷ *Id.* at 80 (citations omitted).

⁷⁸ *Id.*

share, which the court found could serve as a "proxy" or proof of market power,⁷⁹ make a difference. To the contrary, the court held that the plaintiff's Sherman Act § 1 claim could not withstand summary judgment, despite defendant's market share, due to the complete absence of evidence of "other grounds to believe that the defendant's behavior will harm competition *market-wide*."⁸⁰

One aspect of the *CDC Technologies* opinion which may cause unintended confusion is the suggestion that, in the Second Circuit, exclusive dealing arrangements are "presumptively legal."⁸¹ A close reading indicates, however, that the court made this statement in connection with "exclusive distributorships," which were actually not at issue in the case.⁸² An exclusive dealing arrangement, in which a distributor agrees to refrain from dealing in the goods of a supplier's competitors,⁸³ is distinct from an exclusive distributorship, which "typically provides a distributor with the right to be the sole outlet for a manufacturer's products or services in a given geographic area."⁸⁴ Such exclusive distributorships, while not per se lawful under the Sherman Act,⁸⁵ are viewed rather leniently by courts, under the general antitrust principle, echoed by the Supreme Court in *Discon*, that a manufacturer can lawfully replace one distributor with another, and therefore, *a fortiori*, can anoint a single distributor as its only one.⁸⁶

In contrast to exclusive distributorships, it would be an overstatement to say that exclusive dealing arrangements are "presumptively legal." True, the potential benefits to interbrand competition of such arrangements have long been recognized,⁸⁷ and there is probably a "safe harbor" for an ex-

⁷⁹ *CDC Techs.*, 186 F.3d at 81.

⁸⁰ *Id.* (emphasis added) (citations omitted).

⁸¹ *Id.* at 80 (quoting *Electronic Communications Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 245 (2d Cir. 1997)).

⁸² *See id.* at 80.

⁸³ *See* ABA SEC. OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 148 n.816 (4th ed. 1997) [hereinafter ABA ANTITRUST DEVELOPMENTS].

⁸⁴ *Id.*

⁸⁵ *See* *George Haug Co. v. Rolls Royce Co.*, 148 F.3d 136, 140 n.1 (2d Cir. 1998).

⁸⁶ *See* ABA ANTITRUST DEVELOPMENTS, *supra* note 83, at 149 & nn.819-20 (citing cases).

⁸⁷ *See, e.g.*, *Standard Oil Co. v. United States*, 337 U.S. 293, 306-07 (1949). *See generally* Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 CORNELL L.

clusive dealing agreement which forecloses supplies from up to 20% and perhaps as high as 30% of the relevant market.⁸⁸ Nonetheless, there are also cases that have found exclusive dealing arrangements unlawful under § 1 when imposed by a firm with a market share of over 50%, or an even lower market share where the agreements were of an unreasonably long duration.⁸⁹ It is also worth noting that exclusive dealing contracts may, in appropriate cases (and regardless of whether the agreements would have been deemed illegal standing alone), be viewed as part of broader scheme of monopolization or attempted monopolization actionable under § 2.⁹⁰

In any event, while *CDC Technologies* uses loose language that arguably overstates the degree of leniency with which antitrust courts will treat exclusive dealing agreements, the opinion falls solidly within the antitrust mainstream in its refusal to declare a vertical non-price agreement unlawful in the absence of actual anticompetitive impact in the relevant market.⁹¹

II. THE SECOND CIRCUIT CLARIFIES THE TASK OF DETERMINING WHETHER THE DEFENDANT HAS ACTUAL OR NEAR-MONOPOLY POWER IN A SHERMAN ACT § 2 CASE

A. *The Tops Markets Opinion: The Second Circuit Refines the Concept of Monopoly Power*

In the recent *Tops Markets* opinion discussed in Part I of this Article, the Second Circuit set forth the basic require-

REV. 101, 124 (1983).

⁸⁸ See ABA ANTITRUST DEVELOPMENTS, *supra* note 83, at 223 & nn.1240-42 (citing cases establishing a "virtual safe harbor for market foreclosure of 20% or less," and the concurring opinion of four Justices in *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984), as authority for the proposition that an exclusive dealing arrangement that forecloses 30% of the market is lawful).

⁸⁹ See *United States v. Dairymen, Inc.*, 758 F.2d 654 (6th Cir. 1985); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982) (24% of market foreclosed for 10 years).

⁹⁰ See, e.g., *Pepsico, Inc. v. The Coca-Cola Co.*, No. 98 Civ. 3282, 1998 WL 547088, at *17-*18 (S.D.N.Y. Aug. 27, 1998).

⁹¹ See, e.g., *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 488 U.S. 717, 724 (1988) ("[E]specially in the vertical restraint context, 'departure from the rule-of-reason standard must be based on demonstrable economic effect.'") (citation omitted).

ments for proof of claims of actual and attempted monopolization under the Sherman Act and elucidated those requirements in a manner that stressed the importance of assessing whether the defendant has actual or near-monopoly power, i.e., the power to impact the market by raising prices or excluding competition.⁹²

Regarding the elements of a § 2 claim of “completed monopolization,” the court restated the well-settled standard that: “[a] plaintiff must produce evidence sufficient to prove the defendant: (1) possessed monopoly power in the relevant market; and (2) willfully acquired or maintained that power.”⁹³ Thus, in a monopolization case, the initial inquiry is focused not on whether the defendant acted “willfully” in acquiring or maintaining monopoly power (a type of behavior often described as “anticompetitive” or “predatory” conduct), but on whether the defendant actually possesses monopoly power. Absent proof of monopoly power, it is legally irrelevant for purposes of § 2 whether the defendant’s conduct was anticompetitive.

Typically, monopoly power is proved through evidence that the defendant has a large percentage of the relevant market.⁹⁴ As the Supreme Court explained more than 25 years ago: “[w]ithout a definition of th[e] [relevant] market there is no way to measure [the defendant’s] ability to lessen or destroy competition.”⁹⁵ Since then, the Second Circuit and other federal courts of appeals have recognized that in some cases, where there is direct evidence that the defendant has actually controlled prices or excluded competition—that is, where there is proof of actual anticompetitive market impact—additional proof of the relevant market and the defendant’s dominance therein may not be essential.⁹⁶

⁹² Monopoly power has been classically defined as “the power to control market prices or exclude competition.” *United States v. E.I. du Pont de Nemours*, 351 U.S. 377, 391 (1956).

⁹³ *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97 (2d Cir. 1998) (citations omitted).

⁹⁴ *See id.*

⁹⁵ *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965). The relevant market consists of the relevant product market as well as the relevant geographic market. *See ABA ANTITRUST DEVELOPMENTS*, *supra* note 83, at 233.

⁹⁶ *See Tops Mkts.*, 142 F.3d at 97 (stating that monopoly power “may be prov-

In *Tops Markets*, the relevant market inquiry was simplified by the fact that the parties stipulated that the relevant market consisted of the retail sale by supermarkets of predominantly food items (the product market) within a seven to ten mile area in Jamestown, New York and its environs (the geographic market).⁹⁷ As to whether the defendant had monopoly power in that market, the Second Circuit acknowledged that the defendant's 72% market share was a "highly relevant" factor,⁹⁸ which under the Second Circuit's own precedent, would usually constitute "strong evidence" of monopoly power.⁹⁹ Nonetheless, the court noted, an inference of monopoly power based on high market share should only be drawn "after full consideration of the relationship between market share and other relevant market characteristics."¹⁰⁰ "These characteristics," the court explained, "include the 'strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct, and the elasticity of consumer demand.'"¹⁰¹

en directly by evidence of the control of prices or the exclusion of competition"); see also *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) (citing cases in other circuits), *petition for cert. filed*, 68 U.S.L.W. 3138 (U.S. Aug. 17, 1999) (No. 99-294). Dispensing with the need to prove the relevant market probably makes the most sense in cases where the plaintiff alleges monopoly power in a specific geographic region (as in *Re/Max*), or a specific channel of distribution, and additionally offers proof of actual control over price or exclusion of competition. On the other hand, where there is a threshold issue as to whether the relevant market should be limited to a particular product or geographic area (as in *AD/SAT v. Associated Press*, 181 F.3d 216 (2d Cir. 1999), discussed *infra*), the court should remain wary of purported proof of market power that is unhinged from proof of the relevant market, and indeed is meaningful only if it is assumed that additional substitute products or geographic locations are not relevant. Cf. *United States Football League v. National Football League*, 842 F.2d 1335, 1362 (2d Cir. 1988) (requiring "unambiguous evidence" of monopoly power in the alleged relevant product submarket in the absence of market share data).

⁹⁷ See *Tops Mkts.*, 142 F.3d at 93-94.

⁹⁸ *Id.* at 98 (citing, *inter alia*, *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)) ("The existence of [monopoly] power may be inferred from the predominant share of the market.").

⁹⁹ *Id.* at 99 (citing *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 129 (2d Cir. 1981)) (stating the general though not ironclad standard that "a market share below 50% is rarely evidence of monopoly power, a share between 50% and 70% can occasionally show monopoly power, and a share above 70% is usually strong evidence of monopoly power").

¹⁰⁰ *Id.* at 98.

¹⁰¹ *Id.* (quoting *International Distribution Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 792 (2d Cir. 1987)).

Applying those considerations to the case at bar, the court concluded that, apart from the defendant's high market share, all the other evidence in the record indicated the absence, rather than the presence, of monopoly power.¹⁰² In particular, the effective entry of a recent competitor, who had quickly attained more than a 25% share of the market, demonstrated the absence of meaningful barriers to entry.¹⁰³ The court also found no evidence that the defendant could exercise monopoly power by raising prices above their competitive level because, if it did so, "new competitors could and would enter the market, and by undercutting those prices, quickly erode [defendant's] market share."¹⁰⁴ Accordingly, the court found that it could "draw no reasonable inference other than that [defendant] lacks monopoly power" and, therefore, affirmed the district court's dismissal of the plaintiff's monopolization claim on summary judgment.¹⁰⁵

With respect to the attempted monopolization claims, the court in *Tops Markets* explained that, to establish such a claim, the plaintiff must prove: "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."¹⁰⁶ Focusing again on the significance of the defendant's 72% market share, the court held that despite the "evidence of easy market access," the defendant's high market share, coupled with evidence that the defendant engaged in anticompetitive conduct by intentionally interfering with the plaintiff's efforts to purchase desirable real estate on which a competing supermarket would have been built, was enough proof—at the summary judgment stage—to support a finding that the defendant had a "dangerous probability" of achieving monopoly power.¹⁰⁷ Nonetheless, apparently still dubious about the ultimate merits of the attempted monopolization claim, the court of appeals stated that, on remand the trial court should instruct the jury "to consider the impact of

¹⁰² See *Tops Mkts.*, 142 F.3d at 97.

¹⁰³ See *id.* at 99.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 99-100 (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993)).

¹⁰⁷ *Tops Mkts.*, 142 F.3d at 100-01.

other market characteristics, particularly the barriers to entry, on [defendant's] high market share to determine whether a dangerous probability, in fact, existed" and that the jury could in that regard "properly consider [defendant's] subsequent decline in market share attributable to the entry and growth of a competitor."¹⁰⁸

The court's ruling in *Tops Markets* on the attempted monopolization claim is the latest contribution to Second Circuit precedent dealing with the significance of market share in a § 2 attempted monopolization case. Previously, the Second Circuit had stated that a market share below 50% would preclude the finding of a dangerous probability of achieving monopoly power absent "significant evidence concerning the market structure to show that the defendant's share . . . gives it monopoly power."¹⁰⁹ Where the defendant's market share is approximately 50%, the dispositive factor will probably be market structure, specifically the absence or presence of barriers to entry.¹¹⁰ Where, however, the market share is 72% or higher, as in *Tops Markets*, it appears that market share, if coupled with evidence of anticompetitive conduct, will be sufficient to reach the jury in an attempted monopolization case, regardless of market characteristics. This standard seems at odds with cases holding that even a 100% market share will not be enough to prove monopolization if there are no barriers to entry¹¹¹ and at odds with the court's own analysis elsewhere in the *Tops Markets* opinion, which indicates that monopoly power does not exist if the defendant could not raise

¹⁰⁸ *Id.*

¹⁰⁹ *Broadway Delivery Corp. v. United Parcel Serv.*, 651 F.2d 122, 129 (2d Cir. 1981); *see also Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990) (33% insufficient).

¹¹⁰ *Compare International Distribution Ctrs. v. Walsh Trucking Co.*, 812 F.2d 786, 791-93 (2d Cir. 1987) (vacating jury verdict where defendant had a 48% share of a market with no barriers to entry), *with Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404, 408-09 (2d Cir. 1988) (upholding jury verdict where defendant had a 55% share of a market with high barriers to entry).

¹¹¹ *See, e.g., United States v. Syaty Enters.*, 903 F.2d 659, 664-69 (9th Cir. 1990); *Fabrication Enters. v. Hygienic Corp.*, 848 F. Supp. 1156, 1160 (S.D.N.Y. 1994), *rev'd on other grounds*, 64 F.3d 53 (2d Cir. 1995).

prices above competitive levels without causing entry by “new competitors [who] could and would enter the market and, by undercutting those prices, quickly erode Quality’s market share.”¹¹²

To be sure, in *Tops Markets*, the Second Circuit went out of its way to state that “a lesser degree of market power may establish an attempted monopolization claim than that necessary to establish a completed monopolization claim” and that therefore a “lowered quantum of proof” in terms of market analysis should apply in the context of an attempt claim.¹¹³ Still, given the well-settled principle that single-firm conduct should not be condemned under the antitrust laws absent proof of actual or near-monopoly power, courts within the Second Circuit would be well advised to treat the evidence of market power deemed sufficient to go to the jury in *Tops Markets* as the least amount of proof that will suffice.¹¹⁴

B. *The AD/SAT Case: Relevant Market Definition as an Outcome-Determinative Issue*

Proper market definition is significant in a § 2 antitrust case because the market provides the context for assessing the significance of the defendant’s alleged misconduct. Generally speaking, “the parameters of a market are defined by the cross-elasticity of demand between the product and its substitutes.”¹¹⁵ If the relevant market is deemed to consist of a single product for which there are no reasonably interchangeable substitutes, and the defendant has the predominant share of that market, then the defendant’s alleged misconduct must be analyzed to see whether it is anticompetitive in terms of intent and effect.¹¹⁶ On the other hand, if the relevant market is actually broader than the plaintiff has alleged—because, for example, it includes other substitute products—then the antitrust

¹¹² *Tops Mkts.*, 142 F.3d at 99.

¹¹³ *Id.* at 100-01.

¹¹⁴ See *id.* at 97 (citing evidence of 72% market share in a properly defined relevant market, in which barriers to entry are low but there is proof that the defendant has acted intentionally to exclude competitors from that market).

¹¹⁵ *Bogan v. Hodgkins*, 166 F.3d 509, 516 (2d Cir. 1999) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)), *cert. denied*, 120 S. Ct. 526 (1999).

¹¹⁶ See, e.g., *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 996 (11th Cir. 1993).

significance of defendant's conduct (even conduct which seems superficially anticompetitive or "bad") may actually be marginal, in which case a court is more likely to dismiss the plaintiff's claim as legally insufficient.¹¹⁷

The issue of the proper definition of the relevant market is potentially a question of fact, to be decided by a jury (or a judge in a bench trial), rather than by the court as a matter of law.¹¹⁸ Nevertheless, in appropriate cases, the issue may be resolved by the court (typically on a motion for summary judgment) by applying established antitrust principles to the evidence in the record.¹¹⁹ Thus, for example, the Second Circuit in *Bogan v. Hodgkins*,¹²⁰ affirmed the district court's grant of partial summary judgment on the plaintiff's Sherman Act claim because, *inter alia*, there was no evidentiary support for the purported submarket which was critical to the claim.¹²¹

The issue of relevant market definition was also determined as a matter of law in the recent case of *AD/SAT v. Associated Press*,¹²² in which the Second Circuit brought an apparent end to a five-year dispute between AD/SAT, a pioneer in the electronic delivery of advertisements to newspapers, and the Associated Press ("AP"), the venerable cooperative association of more than 1,500 U.S. newspapers, whose practices have been the subject of antitrust scrutiny for over 50 years.¹²³

The litigation started in 1994, when U.S. District Judge Peter K. Leisure denied AD/SAT's motion for a preliminary injunction to bar AP and other defendants from initiating or participating in AdSEND, an electronic system for the delivery of newspaper advertisements which AP was in the process of launching.¹²⁴ Undeterred by this initial setback, AD/SAT filed

¹¹⁷ See, e.g., *U.S. Healthcare v. Healthsource*, 986 F.2d 589, 599 (1st Cir. 1993).

¹¹⁸ See, e.g., *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307 (3d Cir. 1982).

¹¹⁹ Logically, it would also make sense in an appropriate case for the court to decide the issue of relevant market on a motion for judgment as a matter of law after all the evidence has been heard, provided "there is no legally sufficient evidentiary basis for a reasonable jury to find for th[e] [non-moving] party on that issue." FED. R. CIV. P. 50(a).

¹²⁰ 166 F.3d 509 (2d Cir. 1998), *cert. denied*, 120 S. Ct. 526 (1999).

¹²¹ See *id.* at 516.

¹²² 181 F.3d 216 (2d Cir. 1999).

¹²³ See, e.g., *Associated Press v. United States*, 326 U.S. 1 (1945).

¹²⁴ See *AD/SAT*, 181 F.3d at 224.

an amended complaint later that year in which it alleged that AP had violated §§ 1 and 2 of the Sherman Act.¹²⁵ After extensive discovery (more than 70 depositions), AP and the other defendants each moved for summary judgment, and the motions were granted by the district court.¹²⁶ AD/SAT's appeal was then briefed to the court of appeals, which issued a detailed and lengthy decision affirming the district court's ruling in all respects.¹²⁷

With respect to § 2, AD/SAT alleged that AP had monopoly power in the wire and photo transmission markets, a point which AP conceded for purposes of summary judgment,¹²⁸ perhaps because it anticipated the district court's finding that AD/SAT did not have "standing" to pursue a § 2 claim for monopolization of markets AD/SAT in which it is neither a customer nor competitor of AP.¹²⁹ More significantly, AD/SAT claimed that AP had violated § 2 in two ways: (1) by attempting to monopolize an alleged relevant market consisting of the electronic transmission of advertisements to newspapers; and (2) by leveraging its monopoly power in the wire and photo transmission markets to gain a competitive advantage in the market for electronic transmission of advertisements, a so-called "monopoly leveraging" claim.¹³⁰

With respect to AD/SAT's claim for attempted monopolization, the Second Circuit affirmed summary dismissal of AD/SAT's claim because it failed to prove the existence of a relevant market in which AP had a sufficient market share. As the court explained, one of the essential elements of an attempted monopolization claim is that the defendant has "a

¹²⁵ See *id.* The § 1 claims (as well as the § 2 claim for conspiracy to monopolize) alleged a conspiracy among AD/SAT and numerous trade associations, publishers, newspapers and individuals referred to collectively as the "newspaper defendants." *Id.* at 232. After careful analysis, the court of appeals concluded that there was insufficient evidence of the alleged antitrust conspiracy to survive summary judgment, and therefore affirmed the trial court's dismissal of the conspiracy claims. See *id.* at 232-43.

¹²⁶ See *AD/SAT v. Associated Press*, 920 F. Supp. 1287 (S.D.N.Y. 1996), *aff'd*, 181 F.3d 216 (2d Cir. 1999).

¹²⁷ See *AD/SAT*, 181 F.3d at 221.

¹²⁸ See *id.* at 230-31.

¹²⁹ See *id.* at 225. AD/SAT apparently did not appeal the district court's ruling on standing.

¹³⁰ See *id.* at 224.

dangerous probability of achieving monopoly power."¹³¹ That, in turn, requires the plaintiff to make a "threshold showing" that the defendant has a "sufficient market share" to serve as "the primary indicator of the existence of a dangerous probability of success."¹³² However, in order to conduct a proper analysis of whether a particular market share is "sufficient," the plaintiff must first establish the relevant market that is the subject of the attempt to monopolize.¹³³

In *AD/SAT*, the plaintiff argued that the relevant market should be limited to the market for the electronic delivery of advertisements, particularly the "rush" three-hour electronic delivery market, rather than the broader market for delivery of advertisements by any means.¹³⁴ The district court, however, found that, as a matter of law, the only relevant market supported by the evidence was the broader market¹³⁵; the Second Circuit specifically affirmed this finding.¹³⁶

The court of appeals relied on two well-settled and related principles: first, "[t]he relevant market for purposes of anti-trust litigation is the 'area of effective competition' within which the defendant operates"¹³⁷; and second, the relevant market "is composed of products that have reasonable interchangeability for the purposes for which they are produced — price, use and qualities considered."¹³⁸ Applying

¹³¹ *Id.* at 226 (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993)).

¹³² *AD/SAT*, 181 F.3d at 226 (quoting *Twin Labs., Inc. v. Weider Health & Fitness*, 900 F.2d 566, 570 (2d Cir. 1990)).

¹³³ *Id.* (citing *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965)). Although language in the opinion could be misconstrued to mean that market definition is a task for the court, a close reading indicates that the court of appeals was actually assessing whether, in this particular case, there was "a triable issue of fact regarding the definition of the relevant product market." *Id.* at 227. The parties had agreed that the relevant geographic market was the United States. *See id.*

¹³⁴ *Id.*

¹³⁵ *See AD/SAT*, 920 F. Supp. at 1296-97.

¹³⁶ *See AD/SAT*, 181 F.3d at 227.

¹³⁷ *Id.* at 227 (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961)).

¹³⁸ *Id.* (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956)). The court went on to explain that "products and services need not be identical to be part of the same market" because "[i]n economists' terms, two products or services are reasonably interchangeable where there is sufficient cross-elasticity of demand . . . [which] exists if consumers would respond to a slight increase in the price of one product by switching to another product." *Id.*

these criteria, the court found that the following undisputed evidence supported a relevant market, which included physical as well as electronic delivery of advertisements to newspapers: (1) AD/SAT's complaint acknowledged that newspapers currently use both modes of delivery; and (2) AD/SAT's president and management consulting firm believed that AD/SAT's competition included physical delivery services, especially overnight delivery services which represent about 80% of all deliveries to newspapers.¹³⁹

AD/SAT argued that, in light of evidence of "persisting demand for the higher-priced electronic transmission service, despite the availability of lower-priced alternatives," there was at least a triable issue of fact that a separate, relevant market existed for rush electronic delivery.¹⁴⁰ The Second Circuit, however, found that the rush delivery market was such a narrow segment of the newspaper advertising delivery market that it was too "insubstantial" to constitute a relevant market for antitrust purposes.¹⁴¹ In that regard, the court also cited evidence that AD/SAT's marketing consultants believed that "in order to survive" AD/SAT would have to discard its public image as a "last-resort emergency service" and compete in the broader marketplace.¹⁴²

Having found that the relevant product market included physical as well as electronic delivery of newspaper advertisements, it was obvious to the court that any purported dominance by AP of electronic delivery service through its AdSEND service was legally irrelevant, because over 80% of advertisement deliveries were still handled by newspapers.¹⁴³ Thus, under no circumstances was there a "dangerous probability" that AP would, through AdSEND, achieve monopoly power in the relevant market, and accordingly AD/SAT's attempted monopolization claim was properly dismissed on summary judgment.¹⁴⁴

Thus, the *AD/SAT* opinion confirms the often critical significance of establishing actual or imminent monopolization

¹³⁹ See *AD/SAT*, 181 F.3d at 227-28.

¹⁴⁰ *Id.* at 228.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See *id.* at 229.

¹⁴⁴ *AD/SAT*, 181 F.3d at 229.

of the relevant market in cases brought under § 2 of the Sherman Act. One potential exception is a claim for "monopoly leveraging," that is, a claim that the defendant has used monopoly power in one market to gain a competitive advantage in another, even if the defendant does not have monopoly or near-monopoly power in the second market. In *AD/SAT*, the Second Circuit chose not to disavow the dictum from its 1979 *Berkey Photo, Inc. v. Eastman Kodak Co.* decision, in which "[t]his Court first recognized monopoly leveraging as a distinct cause of action."¹⁴⁵ At the same time, the court seemed aware of criticism that the recognition of monopoly leveraging as a distinct § 2 offense is inconsistent with the language of the statute itself, which "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so."¹⁴⁶ Indeed, that same criticism has resulted in a trend among another federal courts of appeals to reject the theory of monopoly leveraging where there is no threat of monopolization in the second market.¹⁴⁷

Rather than reject the concept of monopoly leveraging entirely, the Second Circuit in *AD/SAT* steered a middle course, limiting monopoly leveraging claims to cases where "the plaintiff can demonstrate that the challenged conduct 'threatens the [second] market with the higher prices or reduced output or quality associated with the kind of monopoly that is ordinarily accompanied by a large market share.'"¹⁴⁸ Applying that standard, the Second Circuit found nothing

¹⁴⁵ *Id.* at 230 (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979)).

¹⁴⁶ *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993)); see also Stanley D. Robinson, *Recent Antitrust Developments - 1979*, 80 COLUM. L. REV. 1, 9 n.61 (1980) (noting that while the offense of monopoly leveraging is understandable "[a]s a matter of antitrust policy," it is nonetheless "difficult to reconcile such a theory with the language of § 2, which condemns only monopolizing, attempting to monopolize, or conspiring to monopolize any part of commerce (i.e., a relevant market)").

¹⁴⁷ See *Aquatherm Indus. v. Florida Power & Light Co.*, 145 F.3d 1258 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1356 (1999); *Fineman v. Armstrong World Indus.*, 980 F.2d 171 (3d Cir. 1992); *Alaska Airlines v. United Airlines*, 948 F.2d 536 (9th Cir. 1991); see also *United States v. Microsoft Corp.*, No. Civ. A. 98-1232, 1998 WL 614485 (D.D.C. Sept. 14, 1998) (refusing to dismiss monopolization and attempted monopolization claims against Microsoft, but granting Microsoft's motion for summary judgement on a separate claim of monopoly leveraging).

¹⁴⁸ *AD/SAT*, 181 F.3d at 230 (citation omitted).

illegal about AP's vigorous promotion of AdSEND, which took advantage of synergies with the company's overall operation but did not constitute tying, i.e., conditioning the sale of product or services as to which AP has monopoly power on the sale of product or services as to which AP does not.¹⁴⁹ Accordingly, the Second Circuit affirmed the district court's grant of summary judgment on AD/SAT's monopoly leveraging claim as well.¹⁵⁰

CONCLUSION

The Second Circuit's recent antitrust opinions confirm that sharp business tactics, even by a company with a dominant market position, will not constitute an illegal restraint of trade under Section 1 of the Sherman Act absent proof of an actual adverse effect on competition. Nor will such conduct constitute actual or attempted monopolization under Section 2 absent proof that the defendant possesses actual or near-monopoly power. Although these principles existed before the cases discussed in this Article were decided, the cases remind us that certain antitrust truisms have continuing and practical significance, and that the end result of many antitrust litigations will turn on how those truisms are advocated by attorneys and applied by courts.

¹⁴⁹ See *id.* at 231-32.

¹⁵⁰ See *id.* at 221.

