

Michigan Law Review

Volume 90 | Issue 3

1991

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Recommended Citation

Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

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MISUSE OF THE ANTITRUST LAWS: THE COMPETITOR PLAINTIFF

*Edward A. Snyder**
and *Thomas E. Kauper***

INTRODUCTION

Richard Posner,¹ Frank Easterbrook,² and William Baumol and Janusz Ordover³ argue that the private antitrust remedy⁴ can be used to subvert competition. Cases filed by competitors may be particularly harmful, as firms may sue to prevent their rivals from realizing efficiencies through mergers and other contractual arrangements, to restrain aggressive pricing, or merely to burden their rivals with litigation costs.⁵ Nevertheless, competitor plaintiffs historically have been entitled to a prominent role in private antitrust enforcement,⁶ and there are reasons to believe that they may become more active in the future. Recent economic literature has identified conditions whereby firms, either by entering into exclusionary contracts or by vertically integrating with suppliers, can foreclose rivals and harm competition.⁷ The generality of some of these theories exposes a large

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We acknowledge helpful discussions with Steve Calkins, Paul Denis, Steve Margolis, Scott Masten, Howard Marvel, James Meehan, Jr., Todd Miller, Craig Pirrong, and Eric Rasmusen. We thank Robert Oakley of Georgetown University Law Library for assistance with the case files and James Bohn for his research assistance. Professor Snyder acknowledges support for this and related research from the Earhart Foundation.

1. RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 228 (1976).

2. Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEXAS L. REV.* 1, 37 (1984).

3. William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 *J.L. & ECON.* 247, 256-59 (1985).

4. Clayton Act, §§ 4, 16, 15 U.S.C. §§ 15, 26 (1988).

5. As Judge Easterbrook states:

Firms seek to enhance price when they can. One way to do so is to impose costs on rivals, for when rivals have higher costs the price on the market rises. (The price is set by the costs of the highest cost producer able to stay in the business.) Antitrust may be useful in raising rivals' costs.

Easterbrook, *supra* note 2, at 33 (footnote omitted).

6. See Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 *MICH. L. REV.* 1, 21-22, 44-46 (1989).

7. See, e.g., Thomas Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 *GEO. L.J.* 241, 254, 263-64 (1987) (arguing that courts should routinely evaluate poten-

set of business practices to potential antitrust challenges.⁸ Moreover, recently decided cases offer guidance to competitor plaintiffs in crafting complaints against firms who engage in such practices.⁹ Unless courts are able effectively to confine suits by competitor plaintiffs to those that are truly meritorious, and to do so relatively early in the litigation process, such suits may have significant anticompetitive consequences.

In this article we ask (1) under what circumstances are competitor suits meritorious, and (2) do existing rules, such as those requiring proof of market power or other so-called filters and the requirement that plaintiffs suffer "antitrust injury," afford a reasonable prospect of eliminating anticompetitive misuses of the remedy by competitor plaintiffs? We evaluate a sample of seventy-four cases in which plaintiffs sued their rivals to learn how competitor plaintiffs use the private antitrust remedy. And because many of these cases allege anticompetitive exclusionary practices, we consider how recent theories of exclusionary practices may be used to support competitor claims. The sample, which was drawn from over 1900 private antitrust cases filed in five federal district courts over an eleven-year period, offers three advantages. First, we can avoid the biases associated with studies that rely exclusively on litigated cases. As is well known, these do not represent the population of claims filed and, as a result, research that relies solely on published opinions cannot offer accurate insights into the overall character of private antitrust enforcement.¹⁰ Second, the time period covered by our sample permits an inquiry into the effectiveness

tially exclusionary practices to determine whether firms have acquired and exercised the power to restrict their rivals' output).

8. For a discussion, see Scott E. Masten & Edward A. Snyder, *The Design and Duration of Contracts: Strategic and Efficiency Considerations*, LAW & CONTEMP. PROBS., Winter 1989, at 63, 63-64.

9. See *Monfort of Colo., Inc. v. Cargill, Inc.*, 591 F. Supp. 683 (D. Colo. 1983), *aff'd.*, 761 F.2d 570 (10th Cir. 1985), *rev'd.*, 479 U.S. 104 (1986); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987). In *Monfort*, a meat packing firm sought to enjoin one of its larger competitors from acquiring another large meatpacking firm, arguing it would be caught in a "price-cost 'squeeze.'" 591 F. Supp. at 691. The Supreme Court ultimately ruled against the plaintiff, but soon thereafter the district court in *Tasty Baking* used an expansive reading of antitrust injury to confer standing to pursue both Sherman Act § 2 and Clayton Act § 7 claims. 15 U.S.C. §§ 2, 18 (1982), respectively. The plaintiff argued that the defendant's merger, by removing an important competitor, would allow the merged firm to reap monopoly profits, which would be used to finance predatory pricing in other markets. The district court also found that the plaintiff was likely to prevail on the claims of monopolization, some of which dealt with improved ability to negotiate for retail shelf space.

10. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 14-16 (1984). Priest and Klein argue that litigated cases will involve disputes that are concentrated around the relevant decision rule. Wittman has challenged the generality of this result, but the problem of selection bias in analyses of litigated cases is not in dispute. See Donald Wittman, *Dispute Resolution, Bargaining, and the Selection of Cases for Trial: A Study of the Generation of Biased and Unbiased Data*, 17 J. LEGAL STUD. 313 (1988).

of the Supreme Court's 1977 decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,¹¹ which articulated the principle that plaintiffs must allege that they suffered "antitrust injury"¹² in preventing misuse (at least from the viewpoint of economic efficiency) of the remedy by competitors. Third, a substantial number of the competitor cases in the sample involve claims of anticompetitive exclusion and so allow us to gauge the quality of such claims.

In Part I we categorize the nature of the claims competitor plaintiffs made in our sample of cases.¹³ A substantial proportion involve claims of anticompetitive exclusion. Plaintiffs complain, for example, that contracts between their rivals and other parties deny them access to inputs or to particular customers. Our aim in Part II is to assess whether these competitor cases meet the *necessary* conditions for anticompetitive exclusion to occur as indicated by the relevant theories. Given the information available, we find that a majority of the claims alleging anticompetitive exclusion do *not* appear to meet these conditions, suggesting that many of the competitor cases are not intended to deter or undo harm to consumers. This analysis also indicates that consistent use of screens or filters derived from these theories, such as the need to establish market power at the outset, would help deter the filing of poor quality claims.

In light of the poor quality of the claims in many of the cases reviewed, the obvious policy question is how to limit competitor cases to those that are truly meritorious.¹⁴ Indeed, our discussion is premised on the belief that the mere filing of poor quality claims and even the threat to file such claims may impose substantial costs on particular defendants and on competition in general. In Part III, we investigate whether *Brunswick* had a significant effect on the relative frequency of competitor cases and their disposition within the time frame covered by our sample. While the expectation might have been that the *Brunswick* rule would limit misuse of the private remedy, we find that it had little effect on the frequency of competitor cases and their disposition.

In Part IV we analyze the prospective problems the courts will face

11. 429 U.S. 477 (1977).

12. 429 U.S. at 489.

13. Our focus on competitor cases alleging horizontal restraints should not imply that we have a favorable opinion of other private antitrust cases. Claims of price predation by customer plaintiffs, for example, may also be suspect because at least for the period of predation customers pay below-cost prices. Customers may be motivated to file suits to force dealing or to gain price concessions.

14. For a discussion of the tradeoffs associated with exposing contractual arrangements that often enhance efficiency to antitrust scrutiny, see Oliver E. Williamson, *Delimiting Antitrust*, 76 GEO. L.J. 271 (1987).

in evaluating competitors' allegations of anticompetitive exclusion that rely on the recently developed economic theories. In particular, what should be done with the cases where competitors offer coherent and potentially valid claims that a rival's practice harms their ability to compete? We argue that the application of the recent theories, especially those asserting that vertical integration by merger or contract may foreclose competitors, will be particularly difficult. The models of behavior upon which such claims are based offer little guidance in distinguishing strategic conduct from efficiency-motivated conduct. In fact, the conditions under which vertical integration might foreclose rivals are the same conditions that establish well-known efficiency motivations for integration. The burden on the courts to assess whether the claims meet the *sufficient* conditions for the practices to harm competition and cause antitrust injury is truly daunting, and in large part motivates the policy suggestions we offer in Part V concerning restrictions on the use of the private antitrust remedy by competitor plaintiffs.

I. COMPETITOR CASES: ALLEGATIONS AND DISPOSITION

What is the frequency of private claims against competitor rivals? When competitors initiate "horizontal" claims, what is the nature of their allegations? Do such claims tend to succeed? To begin to answer these questions, we analyze a sample of private antitrust cases drawn from the Georgetown Private Antitrust Litigation Project,¹⁵ which collected detailed information on 1935 claims filed in five federal district courts¹⁶ during the period 1973-1983. Most of these case records indicate the plaintiff's business relationship to the defendant and other relevant information such as the product and geographic markets. Competitors filed about one third of the cases for which the plaintiff's business relationship to the defendant is known.¹⁷

15. The Georgetown Private Antitrust Litigation Project [hereinafter Georgetown Project] was initiated in 1983 by a group of antitrust lawyers. Work on the Georgetown Project culminated in the Georgetown Conference on Private Antitrust Litigation. A copy of the Georgetown Project is on file at the offices of the *Georgetown Law Journal*. See the appendix for further details about the sample of 74 competitor cases alleging illegal horizontal restraints. For additional information about the Georgetown Project, see Lawrence J. White, *The Georgetown Study of Private Antitrust Litigation*, 54 ANTITRUST L.J. 59 (1985). Conference papers appear in two sources: PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (Lawrence J. White ed., 1988); Symposium, *Private Antitrust Litigation*, 74 GEO. L.J. 999 (1986).

16. These five districts include three (the Northern District of California, the Northern District of Illinois, and the Southern District of New York) with a high frequency of private antitrust cases and two (the Northern District of Georgia and the Western District of Missouri) where antitrust litigation is less frequent. Each is in a different circuit.

17. Plaintiffs who are dealers account for 28% of the filings; customers filed 22% of the cases.

Competitor plaintiffs were also prominent in the subset of 311 cases alleging "horizontal price-fixing and market allocation by horizontal competitors."¹⁸ As indicated in Table 1, which groups these cases by plaintiff's business relationship to the defendant (competitor, customer, supplier, dealer, and other), competitor plaintiffs filed twenty-four percent of these "horizontal" claims.¹⁹ This was a surprise to us, given that exercising classical market power does not harm rivals. Indeed, when a firm or group of firms exercises such market power, that is, restricts output to increase price, a competitor who does not join in the action benefits from both the price increase and the opportunity to gain additional sales. The anomaly of competitors alleging horizontal violations in large part motivated our inquiry into how competitor plaintiffs use the antitrust remedy.

TABLE 1. PLAINTIFF'S BUSINESS RELATIONSHIP TO DEFENDANT
IN HORIZONTAL RESTRAINT CASES

	Plaintiff's Business Relationship to Defendant					Total
	Competitor	Customer	Supplier	Dealer	Other	
All Horizontal Cases	74	146	12	54	25	311
Row %	24%	48%	4%	17%	8%	
Independently Initiated Cases	70	76	10	43	21	220
Row %	32%	35%	5%	20%	10%	
Follow-on Cases	4	70	2	11	4	91
Row %	4%	77%	2%	12%	4%	

Table 1 also distinguishes cases that *followed on* either Antitrust Division or Federal Trade Commission cases from those that were *independently initiated*.²⁰ This classification is useful in providing a preliminary indication as to the nature of the competitor claims in this

18. Georgetown Project, *supra* note 15 (Court Records Questionnaire 5 (June 1, 1984)).

19. Georgetown Project, *supra* note 15, at 3. The questionnaire used 18 categories. We classified the cases for which business relationship data are available into five overall categories defined as follows: *competitor* (competitor, same product; competitor, similar or substitute product; other competitor), *customer* (final customer or end user, defendant supplier to plaintiff), *supplier* (supplier), *dealer* (dealer, agent, distributor), and *other* (licensee, franchisee, employee, state or local government, labor union, stockholder, lessee, trade association).

20. In a previous article, we used the indices for Antitrust Division and Federal Trade Commission reporters to match defendant names and then compared information on the violations alleged, the statutory authorities relied upon, the time period of violations alleged, the product markets, the relationship of the plaintiff to the defendant, the timing of the private suit, and the districts in which the cases were filed. Thomas E. Kauper & Edward A. Snyder, *An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-On and Independently Initiated Cases Compared*, 74 GEO. L.J. 1163 (1986). We found a higher success rate for follow-on plaintiffs, which we attributed to the signal provided by government action and the legal and practical benefits the signal confers and, consistent with our findings here, to the fact that follow-on plaintiffs typically are customers of the defendant. *Id.* at 1223.

category. Most of the government cases that are followed by private plaintiffs target the exercise of classical market power.²¹ If lax standing rules permitted competitor plaintiffs to follow the government actions, then we would expect to see a similar proportion of competitor follow-on cases as is observed in independently initiated cases. But we find from Table 1 that nearly all of the competitor actions are initiated independently and that the federal enforcement actions generate primarily customer suits. The distribution of plaintiff type in follow-on cases is significantly different from that for independently initiated cases.²²

In these respects the data in Table 1 suggest that classical exercises of market power did not generate most of the seventy-four competitor cases within the category of horizontal restraints. For this reason, a distinction made by Krattenmaker, Lande, and Salop²³ between classical market power and "Bainian" market power²⁴ is relevant. They state that a firm "may raise price above the competitive level . . . by raising its rivals' costs and thereby causing them to restrain their output."²⁵ As the review that follows indicates, many of the competitor cases in our sample involve such claims.

A. Allegations

To learn the nature of the seventy-four competitor cases in the category of horizontal violations, we examined the original Georgetown Project data files (responses to questionnaire, excerpts from complaints, descriptions of motions, and notes by paralegal research assistants), that identify the plaintiff and defendant(s), the filing date, and the jurisdiction, and also provide information about the specific violations alleged and the outcome of the case.²⁶ We also identified pub-

21. *Id.*

22. Within the group of cases alleging horizontal violations, the distribution of competitor cases into the follow-on and independently initiated subsets is statistically different from the analogous distribution for the other cases. (The Chi-Square statistic is 24.4, with one degree of freedom, and is significant at the one percent level. The Chi-Square statistic summarizes the standard test for the independence of cells in contingency tables where observations are divided according to various attributes. Higher values of the statistic indicate deviations from independence.) Observing this difference is reassuring insofar as potential errors in the data are concerned. A large number of researchers using actual court records collected the Georgetown data. Errors are unavoidable in this sort of effort. However, if data errors were severe, differences of the type indicated by Table 1 would not be found.

23. Krattenmaker et al., *supra* note 7, at 249.

24. The term "Bainian" market power is derived from the pioneering industrial organization research of Professor Joe Bain. His work analyzed barriers to entry, including the possibility that small firms would be at a cost disadvantage relative to large firms. See JOE S. BAIN, BARRIERS TO NEW COMPETITION (1956).

25. Krattenmaker et al., *supra* note 7, at 249.

26. The Georgetown University Law Library retained the original files for the full sample of

lished opinions — not necessarily final opinions — for twenty-four cases. Many of these offer further information about the nature and likely merit of the allegations. Finally, the *Antitrust & Trade Regulation Reporter* provided summaries of various aspects of twenty-five cases.

Table 2 summarizes, as best as we can determine, the primary allegations.²⁷ Only four cases appear to relate to classical horizontal price-fixing agreements, with the plaintiffs objecting to agreements among other competitors that at least in theory could both facilitate the exercise of market power and harm the plaintiff — for example, boycotts or concerted efforts to deny entry.²⁸ Thirty-seven cases allege various exclusionary practices by a single competitor with the focus on contractual agreements between the competitor defendant and either its customers, suppliers, or distributors.²⁹ Competitor plaintiffs appear to characterize such practices as illegal horizontal restraints of trade under section 1 of the Sherman Act.³⁰ Given that such practices may reduce competition, these claims may be viewed as alleging a horizontal effect, but they are clearly different from classical horizontal restraints. Often the plaintiffs seek relief in the form of “requirement of dealing or purchases” or “cease and desist from joint action” rulings.³¹

1935 private antitrust cases. The authors requested copies of the files for the subset of competitor cases alleging “horizontal” violations.

27. The appendix lists the full set of cases using the same categories. The names of the parties, the filing date, and jurisdiction for these cases were obtained from the June 1, 1984 *Court Records Questionnaire* (page 1) used by the Georgetown Antitrust Project.

28. In theory, denying competitors membership in a trade association and conducting boycotts could police a horizontal agreement and injure a competitor. See *Vogel v. American Socy. of Appraisers*, 744 F.2d 598, 600 (7th Cir. 1984).

29. These plaintiffs typically do not name more than one defendant within a given line of business, but often charge both a manufacturer and either a customer, supplier, or dealer with whom the manufacturer has a business relationship. We should note that nine of the 74 competitor plaintiffs were also either dealers or customers, and so in theory could be directly injured by a classical price-fixing violation, but the fact that the plaintiff’s primary relationship is that of a competitor suggests otherwise. Another indicator is that seven of these nine price-fixing cases are among a larger subset of 44 cases in which the plaintiffs also allege tying, vertical price-fixing, vertical price-discrimination, or refusals to deal as secondary offenses.

30. 15 U.S.C. § 1 (1988).

31. The Georgetown Project’s *Court Records Questionnaire* requesting information on the type of relief sought generated these responses.

TABLE 2. CLASSIFICATION OF COMPETITOR CASES ALLEGING
ILLEGAL HORIZONTAL RESTRAINTS OF TRADE

Nature of Allegations:	
Anti-Competitive Exclusion	37
Access to inputs	4
Access to retail outlets or distribution networks	10
Exclusive contracts with buyers	13
Price Predation	10
Classical Horizontal Agreement	4
Vertical Price Fixing, Vertical Price Discrimination	9
Brandname/Patent Infringement	7
No Sherman Act Issue	9
Insufficient Information to Classify Claim	8
TOTAL	74

Table 2 also provides a more detailed breakdown of the thirty-seven cases involving exclusionary practices. In four cases, the plaintiffs complained of a lack of access to input markets. In ten others, the plaintiffs claimed they were denied access to distribution outlets. The third subcategory includes a variety of disputes concerning exclusionary features of relationships between buyers and sellers, but plaintiffs do not appear to argue they lack access to either an input market as a whole or to a large number of distribution outlets. Several of the cases in this group involve transportation services. Finally, ten cases involve allegations of below-cost pricing aimed at deterring entry or driving a rival out of the market.³²

The balance of cases involve a wide range of practices. For the nine cases in the "No Sherman Act Issue" category, plaintiffs make claims clearly outside of the realm of the Sherman Act.³³ An additional seven cases are fundamentally brandname or patent infringement cases. For eight other cases in the "Miscellaneous/Insufficient Information" category, the claims cannot be usefully categorized or we have insufficient information about the case to identify and evaluate the claim.³⁴

32. See, e.g., *Hoyt Heater Co. v. American Appliance Mfg. Co.*, 502 F. Supp. 1383 (N.D. Cal. 1980).

33. Claims in those cases include deception, false and misleading advertising, waste of corporate assets, and securities violations.

34. For example, it is difficult to classify *American Basketball Assn. v. National Basketball Assn.*, No. 75-6184 (S.D.N.Y. filed Dec. 9, 1975) (concerning NBA's draft of ABA's players), *in Georgetown Project*, *supra* note 15.

B. *Disposition*

In Table 3 we compare disposition data for the horizontal restraint cases filed by competitors to horizontal restraint cases filed by other plaintiffs. Of the seventy-four cases filed by competitors, we have meaningful outcome data on sixty-seven cases. Of the 237 cases filed by other types of plaintiffs, we have meaningful outcome data for 183 cases. The table reports case totals in four categories of outcomes: dismissed, pretrial stipulation, settled, litigated.³⁵ Unfortunately, there is a substantial degree of uncertainty concerning cases identified as ending in pretrial stipulations, a category available on the original Georgetown Project form. In our best judgment, these probably do not involve payments to plaintiffs in most cases, and when payments are made the dollar amounts likely are small. Likewise, if the stipulation includes some relief to plaintiff, it is usually not substantial. In this sense, pretrial stipulations are probably more similar to dismissals, where plaintiffs are granted no relief, than to settlements.³⁶ Also of note, we include in the "Litigated" category cases ended by the granting of a defendant's motion for summary judgment and by directed verdicts, which is consistent with the view that these outcomes reflect a determination on the merits.³⁷ Of the cases in the "Litigated" category, more than seventy percent resulted in judgments for defendants.³⁸

35. A fifth general category, other outcomes, includes cases without meaningful disposition — such as cases remanded to state courts or whose file is missing — and so Table 3 excludes these cases. The Georgetown Project used 17 mutually exclusive subcategories. Our classification scheme groups the 17 subcategories as follows: *dismissed* (dismissed on pretrial motion, pretrial withdrawal, dismissal by court, dismissal by other means), *pretrial stipulation* (pretrial stipulation and order), *settled* (settled), *litigated* (judgment for all plaintiffs, judgment for some plaintiffs, judgment for all defendants, judgment for some defendants, judgment for some plaintiffs and some defendants), and *other* (statistically closed, consolidated, file missing, transferred or remanded to state court, outcome unknown, pending).

36. Consistent with this distinction between settlements and pretrial stipulations, of cases in the overall sample we found the following: 44% of those resulting in pretrial stipulations ended within one year of filing, compared with 23% of settled cases. We considered categorizing pretrial stipulations as dismissals. However, a cross-check of cases ending in pretrial stipulations and data on whether cases ended with or without prejudice indicated that some pretrial stipulations are settlements, albeit of lower average value to the plaintiff. Therefore, we retain the separate category even though the typical stipulation is similar to a dismissal.

37. Stephen Calkins found a greater willingness of the courts in recent years to grant defendant motions to dismiss and for summary judgment, although the number of motions granted is still low. Calkins did not find significant differences between the frequency of summary judgments in competitor cases versus cases filed by other plaintiffs for the full population of cases. He did not, however, investigate whether competitor claims differ in this regard within categories of claims, e.g., cases alleging horizontal restraints. Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986).

38. The proportion of plaintiff successes was independent of the factors we checked, such as violation alleged, plaintiff's business relationship to the defendant, whether the case followed a government case, and the outcome of the government case. Thus, the litigated cases in the Ge-

TABLE 3. OUTCOMES OF CASES ALLEGING ILLEGAL HORIZONTAL RESTRAINTS

	Method of Disposition				Total
	Dismissal	Pre-Trial Stipulation	Settlement	Litigation	
Competitor Plaintiffs	25	18	6	18	67
Row %	37%	27%	9%	27%	
Other Plaintiffs	39	74	43	27	183
Row %	21%	40%	24%	15%	

Note:

This table excludes cases with dispositions categorized as Other Outcomes. See footnote 35.

As indicated in Table 3, the proportion of cases that were litigated or dismissed is higher for competitor filings than for other filings. One problem in comparing the two distributions is that the additional information we collected regarding the competitor cases allowed us to reclassify some of the case outcomes, including eight cases in the "Pre-trial Stipulation" category.³⁹ For the cases filed by other types of plaintiffs, however, we have only the original classification from the Georgetown Project. But even without the additional information, the difference in the distribution of cases by method of disposition for the two plaintiff groups — competitor plaintiffs and other plaintiffs — is statistically significant, with more of the competitor cases being dismissed and fewer ending in settlements.⁴⁰ Moreover, ten of the competitor cases in the "Litigated" category were ended by grants of defendant motions for summary judgment. Thus, the disposition data appear to indicate that the courts discriminate against competitor suits alleging horizontal restraints. If the claims lack merit, this treatment reduces the efficiency losses from the competitor claims as well as the costs they impose on defendants.⁴¹

Georgetown sample are consistent with Priest and Klein, whose model predicts that the plaintiff's probability of success in cases selected for litigation will be within a small range, and that this range will not vary with factors such as the particular legal standard employed. Priest & Klein, *supra* note 10, at 19.

39. Of the 74 competitor cases, we found that 19 case outcomes should be reclassified. Two cases that were pending were reclassified as litigated. Within the pretrial stipulation category, we found that six cases were in fact dismissed and two were litigated. Finally, of those originally identified as dismissals, we found eight litigated cases and one settlement.

40. Based on the data in Table 3, the Chi-Square statistic is 16.7 with three degrees of freedom and is significant at the one percent level. Using the unadjusted Georgetown Project data, the Chi-Square statistic is 15.5 with three degrees of freedom and is also significant at the one percent level.

41. Similar findings for competitor cases attempting to block mergers would not be as mean-

II. ASSESSING THE PROBLEM OF MISUSE OF THE ANTITRUST LAWS

Since many of the seventy-four cases filed by competitors involve claims of anticompetitive exclusion, we begin this Part by reviewing some of the relevant economic theories and identifying the necessary conditions under which exclusion of efficient rivals may occur. We then assess the potential merit of the competitor claims in our sample. This review in some respects follows that of Judge Frank Easterbrook, who argues that filters can be used to identify antitrust claims that lack merit.⁴²

A. *Theories of Anticompetitive Exclusion*

Traditionally, economic analysis of exclusion has focused on predatory pricing, selling tactics such as tying, and vertical restraints such as exclusive dealing. At least in the case of price predation, a consensus concerning when such tactics may succeed has emerged. It is understood that some sort of reentry barriers, possibly including the fear of a predatory response, must exist for the strategy to work. Otherwise, the predator cannot earn above normal profits sufficient to recoup lost profits sustained during the predation, after rivals are eliminated.⁴³ Other conditions that increase the likelihood of successful predation are cost advantages and low marginal costs of expanding output. A high market share is also necessary since without it the costs of expanding output to drive out rivals is high and the potential profits afterward are small.⁴⁴

Recently a quite extensive literature most closely associated with Steven Salop has evaluated *nonpredatory* practices that may permit firms to exclude otherwise efficient rivals.⁴⁵ This literature, often re-

ingful because anything except an immediate dismissal of a merger case may jeopardize the acquisition.

42. Easterbrook's criteria include the plaintiff's business relationship to the defendant and the defendant's market power. See Easterbrook, *supra* note 2, at 16-17, 36. We note that we do not embrace the proposition that all competitor claims that meet the necessary conditions should be allowed to proceed. See Part IV for a discussion.

43. See Wesley J. Leibeler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052 (1986).

44. The view that price predation is not a profitable tactic in most circumstances has been qualified when the objective of the predator is to acquire the rival. See Malcolm R. Burns, *Predatory Pricing and the Acquisition Cost of Competitors*, 94 J. POL. ECON. 266, 270-71, 275-78 (1986); Garth Saloner, *Predation, Mergers, and Incomplete Information*, 18 RAND J. ECON. 165, 176-79 (1987).

45. Contributors include Oliver Hart & Jean Tirole, *Integration and Market Foreclosure*, in BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1990, at 205 (1990); Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345 (1988); IAN AYRES, *VERTICAL INTEGRATION AND OVERBUYING: AN ANALYSIS OF FORECLOSURE VIA RAISING*

ferred to as “raising rivals’ costs” theories, broadens considerably the scope of practices that may be thought to deter entry or limit a rival’s effectiveness. The models indicate that vertical integration via merger or contractual arrangements may have anticompetitive effects by altering buying patterns. In contrast to the more settled views on predation, “the debate about the conditions under which vertical mergers are anticompetitive,” in the words of Oliver Hart and Jean Tirole, “is far from settled.”⁴⁶

Nevertheless, the premise underlying the raising rivals’ costs literature is straightforward. The demand curve facing a firm can be thought of as the difference between the market demand and the combined supply of its rivals. Firms gain an advantage when their rivals experience a cost increase. The greater costs may lead rivals to exit or, prospectively, may prevent entry. When the effect is less dramatic — rivals remain but have higher marginal costs — the firm’s demand still improves: at a given market price its rivals supply a smaller quantity, leaving a larger residual for the firm. Alternatively, holding constant the quantity supplied by the firm, the price it receives will rise when its rivals experience a cost increase.

According to developers of the theories, anticompetitive exclusion may occur in a variety of market contexts. Krattenmaker and Salop argue that manufacturers may acquire exclusive rights to inputs and thereby raise their rivals’ costs of procuring inputs.⁴⁷ In one scenario, with an oligopoly input market, Salinger models the case where following vertical integration between some input suppliers and downstream firms, the remaining independent suppliers raise input prices to the unintegrated downstream firms.⁴⁸ By eliminating some supply from input market, the vertical mergers in effect move the oligopoly equilibrium closer to that of a pure monopoly. In a second scenario modeled by Ayres,⁴⁹ input supply is competitive but is less than perfectly elastic, i.e., there is an upward sloping input supply curve. By vertically integrating, a downstream manufacturer may both use inputs produced internally and purchase inputs from nonintegrated input suppliers. Ayres shows that if a manufacturer acquires rights to a

RIVAL’S COSTS (American Bar Foundation Working Paper No. 8803, 1988); Janusz A. Ordover et al., *Equilibrium Vertical Foreclosure*, 80 AM. ECON. REV. 127 (1990); and Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990).

46. See Hart & Tirole, *supra* note 45, at 205.

47. Thomas G. Krattenmaker & Steven C. Salop, *Anti-Competitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

48. See Salinger, *supra* note 45.

49. AYRES, *supra* note 45, illustrates the foreclosure effect in the case where one of two manufacturers acquires half of the input industry’s capacity.

large share of the available inputs, then input prices to other manufacturers will rise, which in turn limits their ability to compete.

Other recent theories of anticompetitive exclusion focus on the potentially anticompetitive role of certain types of contracts. Some of these are thematically related to the raising rivals' cost scenarios since the exclusionary contracts may affect the ability of rivals to achieve economies of scale.⁵⁰ Others focus on how specific contractual provisions limit the ability of rivals to compete for buyers. According to a prominent theory developed by Aghion and Bolton,⁵¹ contracts with liquidated damage clauses might exclude efficient rivals. They posit that an incumbent seller and buyer who anticipate possible entry will agree to a contract with excessively high level of liquidated damages — that is, greater than the lost profits for the incumbent seller — to be paid to the incumbent if the buyer switches suppliers.⁵² By assumption, the incumbent and the buyer are in a monopoly position, but cannot set a discriminatory entrance fee for the potential entrant, whose costs are unknown to them. The transactors' choice of liquidated damages, as a result, balances the gains from a higher entrance fee with the losses associated with the likelihood that potential rivals will not enter. The exclusion of a more efficient supplier occurs when an entrant's cost advantage over the incumbent is too small to pay the liquidated damages.

B. *Necessary Conditions for Anticompetitive Exclusion*

The recent economic literature demonstrates that firms may use exclusionary practices to their advantage. But the economic analyses are only useful in guiding antitrust policy if their insights into how to strengthen competition translate into legal rules that can be applied systematically by the courts. In principle, the first step toward application is to identify the necessary conditions under which the practices may exclude a rival or conversely, to identify when the practices in question will not cause anticompetitive exclusion.⁵³

This first step is not easy. The sets of necessary conditions for the

50. See the second model in Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388 (1987), and the analysis in § 5 of ERIC RASMUSEN, RECENT DEVELOPMENTS IN THE ECONOMIES OF EXCLUSIONARY CONTRACTS (UCLA Working Paper No. 89-15, 1989), in THE CENTENARY OF COMPETITION LAW IN CANADA (R.S. Khemani & W.T. Stanbury eds., forthcoming 1992).

51. See the first model in Aghion & Bolton, *supra* note 50.

52. Alternatively, the contract may specify an excessive up front payment to the seller and a relatively low per unit charge for each unit sold. Hence, the argument can be extended to two-part pricing.

53. We discuss the questions concerning sufficient conditions in Part IV.

various exclusionary tactics are in fact both complex and varied. Moreover, the theories indicating exclusionary effects rely on requirements that are particularly difficult to assess, e.g., asymmetries in the values of purchase rights, scale economies, and the credibility of conditional contracts. These considerations would appear to make application of these theories an exacting task. Yet both reviewers of the raising rivals' costs literature and some of its contributors have come to a particularly useful conclusion: *Firms that exclude otherwise efficient rivals either must exercise classical market power in the input or product market, or help orchestrate such an effect.*⁵⁴

If this conclusion is correct, then anticompetitive exclusion (where otherwise efficient rivals are impaired) typically requires that two market conditions exist. First, the market must exhibit a high enough degree of market concentration to permit firms to orchestrate and exercise market power. Second, barriers to entry must limit the ability of potential entrants and fringe competitors to increase substantially their output in response to that action. Moreover, the "core" conditions — the ones that constitute the substance of most standard anti-trust analysis — can be used to evaluate the validity of exclusionary claims. Brennan⁵⁵ was the first, or among the first, to sound this theme. He argues that the tactics of raising rivals' costs should be viewed as *facilitating devices* for the exercise of classical market power. For example, in the input oligopoly scenario discussed above, nonintegrated suppliers could not charge the unintegrated rival manufacturers higher prices absent barriers to entry. In this light, a vertical merger that establishes exclusive rights to a portion of the input supply is the critical enhancement of the ability of remaining input suppliers to exercise latent market power.⁵⁶ Rasmusen, when describing the closely related and aptly named "Cartel Ringmaster" model, states the proposition clearly: "The intermediary [manufacturer] then restricts output to the ultimate consumers. The point is not especially to exclude rival intermediaries, but to cartelize the suppliers."⁵⁷ Coate and Kleit emphasize a related proposition, that firms who stand to benefit from raising rivals' cost strategies must themselves be protected from

54. As we discuss next, examples include RASMUSEN, *supra* note 50, at 9-10, and Timothy J. Brennan, *Understanding "Raising Rivals' Costs,"* 33 ANTITRUST BULL. 95, 99 (1988).

55. Brennan, *supra* note 54, at 99 (1988).

56. One feature of the adverse effects of exclusive rights contracts in common with several examples suggested by Krattenmaker & Salop, *supra* note 47, is regulation of the input market, e.g., telephone service or electricity. Such regulation might explain why a downstream party could facilitate the exercise of market power while the supplier could not or would not do so.

57. RASMUSEN, *supra* note 50, at 11-12. Rasmusen also points out that the vertical integration would not occur if input suppliers could collude.

new entry by, for example, cost advantages.⁵⁸

Krattenmaker, Lande, and Salop argue against using the core of standard antitrust analysis to evaluate exclusionary claims.⁵⁹ But it is revealing that the formal models of foreclosure invariably assume oligopoly conditions, and then proceed to analyze the effects of mergers or exclusionary contracts between firms with large market shares in at least the input or product markets.⁶⁰ Indeed, most formal models are set in a duopoly context and, in the game theoretic formulations that are used to develop these theories, the possibility of entry is not considered.

The question may arise, why are these models constructed in such a restrictive manner? It should be understood that their purpose is to demonstrate rigorously that various claims of anticompetitive exclusion may be valid. To obtain results and at the same time avoid multiple equilibria, the models can only entertain simple market structures such as duopoly and analyze determinate firm behavior. In principle, the models could be adapted to allow for alternative market structures, the possibility of entry, and a richer variety of firm behavior. Introducing such features would, however, yield a broader set of outcomes and so detract from their exemplifying purpose.⁶¹ We accept the validity of the models, but recognize that care must be exercised in deriving policy implications from them. In this regard, it is revealing that no models, to our knowledge, have demonstrated how vertical integration can harm unintegrated rivals when the integrated firm or firms do not control a substantial market share.

The need for classical market power is present, for example, in Hart and Tirole's "ex post monopolization" scenario whereby vertical integration leads to monopolization of the downstream market.⁶² A relatively efficient input supplier integrates to regulate input

58. MALCOLM B. COATE & ANDREW N. KLEIT, EXCLUSION, COLLUSION AND CONFUSION: THE LIMITS OF RAISING RIVAL'S COSTS (Federal Trade Commission Working Paper, Oct. 1990).

59. Krattenmaker et al., *supra* note 7, at 254-56.

60. See the works cited in *supra* note 45.

61. Franklin Fisher uses the term "exemplifying theory" to characterize such models and distinguish them from "generalizing theory." He states:

Exemplifying theory does not tell us what *must* happen. Rather it tells us what *can* happen. In a good exemplifying-theory paper, the model is stripped bare, with specializing assumptions made so that one can concentrate on the phenomena at issue. . . . When well handled, exemplifying theory can be very illuminating indeed, suggestively revealing the possibility of certain phenomena. What such theory lacks, of course, is generality. The very stripping-down of the model that makes it easy (or even possible) to see what is going on also prevents us from knowing how the results will stand up in more general settings.

Franklin M. Fisher, *Games Economists Play: A Noncooperative View*, 20 RAND J. ECON. 113, 117-18 (1989).

62. See Hart & Tirole, *supra* note 45, at 220-32.

purchases. The underlying premise is that absent the vertical integration, the downstream firms could not exercise their market power, that is, could not restrict their output. In the model, vertical integration and the regulation of input purchases is the best (least costly) means of achieving a collusive outcome. Such an outcome is possible only when market conditions including seller concentration and entry barriers would allow for the exercise of market power.⁶³

The utility of the well-worn tools of antitrust analysis such as measures of market concentration and barriers to entry also extends, in our view, to claims that contractual relationships may cause anticompetitive exclusion. As indicated in Aghion and Bolton's scenario, the incumbent seller and buyer are in a monopoly position when they enter into the contract with excessively high liquidated damages.⁶⁴ Their results also rest on other assumptions that are related to standard analysis: potential entrants must be few in number yet also potentially more efficient than the incumbent. Otherwise an entrant would not expect the above-normal profits that motivate the use of excessive liquidated damages.⁶⁵

As indicated above, some further necessary conditions must be met for particular practices to exclude otherwise efficient rivals. Screening cases using only the core necessary conditions, therefore, will only identify some of the cases that lack merit. For example, it may be the case that a vertically integrated firm has a large enough market share so that a claim of exclusion is potentially valid. But whether further conditions are met, such as firms placing different values on exclusive rights contracts, may not be known.⁶⁶ Similarly, incumbent firms employing contracts with liquidated damages may be viewed as attempting to exclude rivals, but whether the damages constitute a penalty and whether such contracts could sustain a legal challenge would be difficult to discern.⁶⁷

With this caveat in mind, we return to our sample of competitor

63. RASMUSEN, *supra* note 50, at 21, observes that the U.S. Justice Department's 1985 Guidelines on Vertical Restraints (50 Fed. Reg. 6263) are also consistent with this proposition. Practices such as exclusive dealing may exclude an otherwise efficient rival, but only when "(1) [t]he 'nonforeclosed' market is concentrated and leading firms in the market use the restraint; (2) [t]he firms subject to the restraint control a large share of the 'foreclosed market'; and (3) [e]ntry into the foreclosed market is difficult."

64. Aghion & Bolton, *supra* note 50.

65. For a more detailed discussion, see Masten & Snyder, *supra* note 8, at 69-73.

66. See RASMUSEN, *supra* note 50 (evaluating the potential for vertical integration and exclusive rights contracts to cause anticompetitive exclusion).

67. Of note, liquidated damages may yield efficiency benefits by protecting parties who make transaction-specific investments. Aghion & Bolton, *supra* note 50, at 390-91, ignore such considerations by assuming that there is no time interval between production and trade and hence no potential for hold-up problems.

claims and attempt to assess their potential merit. We focus primarily on the claims alleging anticompetitive exclusion. These may involve access to inputs or distribution outlets, cite exclusionary features of contracts, or allege classical price predation. Our primary objective is to determine whether these claims meet the "core" necessary conditions described above. We also review other types of claims and offer comments on their likely merit.

C. Detailed Review of Competitor Cases

1. Claims Alleging Anticompetitive Exclusion

Claims involving access to inputs. One of the four cases that involve access to inputs, *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*,⁶⁸ matches one of the Krattenmaker and Salop scenarios quite well and, moreover, appears to meet the necessary core conditions for exclusionary tactics to succeed. Plaintiff Nasso and defendant DIC competed for concrete work on New York City construction projects. Prior to 1973, two suppliers, Certified Industries and Transit Mix, accounted for most of the ready-mix concrete and other building supplies sold to area subcontractors. Nasso complained that a 1973 joint venture agreement between its rival, DIC, and one of the input suppliers, Certified, resulted in higher input prices to Nasso and thereby excluded Nasso from competing effectively for large construction subcontracts.⁶⁹

While one might argue that entry into a local input market would be relatively easy, the Justice Department has filed a disproportionately large number (relative to the industry's size) of Sherman Act section 1⁷⁰ cases against cement and concrete suppliers,⁷¹ which suggests that these firms attempt to exercise market power with some frequency. Moreover, antitrust authorities have had longstanding concerns about the exclusionary effects of vertical mergers in the cement industry.⁷² The joint venture between DIC and Certified may have (1) facilitated a price-fixing agreement, or (2) led Transit Mix, independent of an agreement, to raise prices to Nasso. Nasso argued the latter.⁷³

68. 467 F. Supp. 1016 (S.D.N.Y. 1979).

69. 467 F. Supp. at 1021. Nasso bought exclusively from the other input supplier, Transit Mix. 467 F. Supp. at 1021.

70. 15 U.S.C. § 1 (1988).

71. See Jon Joyce, *Effect of Firm Organizational Structures on the Incentives to Engage in Price Fixing*, CONTEMP. POLY. ISSUES, Oct. 1989, at 19, 25-27.

72. See FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON MERGERS AND VERTICAL INTEGRATION IN THE CEMENT INDUSTRY (1966).

73. It appears that the plaintiff, who bought exclusively from the nonintegrated supplier,

In two of the other cases,⁷⁴ there are no indications of barriers to entry into the input markets (film processing equipment and zipper slides), nor that the supply contracts in question accounted for a substantial share of inputs supplied. Hence, it is unlikely that the defendants in these cases were engaged in anticompetitive conduct. We do not have sufficient information to evaluate the plaintiff's claims in the remaining case involving access to computer disk drive filters.⁷⁵

Claims involving access to retail outlets. In the ten cases in which competitor plaintiffs complain of contracts with retailers, the inquiry regarding necessary conditions focuses on barriers to entry into the retail market. Absent barriers, exclusive dealing contracts could not inhibit an effective competitor. If barriers do exist and exclusive contracts are in place, then the remaining retailers in principle may charge higher prices for their services to rival manufacturers. Presumably this coordination requires a relatively small number of unconstrained retail outlets and a lack of alternative means for the manufacturer to distribute the product.

In *Budget Rent-A-Car Corp. v. Hertz Corp.*,⁷⁶ which relates to Federal Trade Commission enforcement actions against the major car rental companies, the plaintiff complained that established car rental companies bribed airport officers to control access to the within-airport floor space devoted to the companies' retail operations.⁷⁷ Due to government control, floor space for car rental companies at airports is restricted. In principle, then, overbuying could raise rivals' costs. Plaintiff did not prevail, however, as defendants' efforts to influence the allocation of the airport floor space were judged to be protected by the Noerr-Pennington doctrine,⁷⁸ which shields from the antitrust

erred in characterizing these as Robinson-Patman (15 U.S.C. § 13) claims rather than Sherman Act § 2 (15 U.S.C. § 2) claims. See *Private Plaintiff May Seek Divestiture under Clayton § 7, Antitrust & Trade Reg. Rep. (BNA) No. 908, at A-19, A-21 (Apr. 5, 1979)*.

74. Consolidated Intl. Corp. v. Prefexray Div., Litton Medical Prods., Inc., No. 73-1499 (N.D. Ill. filed June 12, 1973), and Edlon Indus., Inc. v. Slide-Rite Mfg. Corp., No. 76-0249 (S.D.N.Y. filed Jan. 4, 1976), in *Georgetown Project, supra* note 15.

75. *International Filter Corp. v. Cambridge Filter Corp.*, No. 82-4918 (N.D. Cal. filed Sept. 14, 1982), in *Georgetown Project, supra* note 15.

76. No. 77-0876 (N.D. Cal. filed Feb. 29, 1977), in *Georgetown Project, supra* note 15.

77. Note that the exercise of classical market power by a cartel may or may not involve efforts to exclude competitors, but when it occurs it is distinguishable from the exercise of Bainian market power. The difference lies in whether or not there is an agreement among horizontal competitors to restrict output and raise price. Here, because floor space devoted to car rental companies at airports is limited, competitors may exercise Bainian market power by acquiring or leasing an excessive amount of space, with the result that some or all competitors are excluded. Such action may also be taken to maintain an agreement among the incumbent rivals to restrict output.

78. See *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), *rehg. denied*, 393 U.S.

laws private parties' efforts to lobby or petition government for favorable economic treatment.

Of the other nine cases involving access to distribution outlets, the necessary conditions appear to be met only in *The American Film Theatre, Inc. v. Universal Film Exchanges, Inc.*⁷⁹ The plaintiff complained that because of pressure from major film distributors, exhibitors refused to schedule its film series. The exhibitors nevertheless permitted interruptions of their feature presentations for other special events such as children's films.⁸⁰ Presumably the harsher treatment toward the plaintiff reflects a higher elasticity of demand between its offerings (artistic movies appealing to adults) and major first-run films. No additional information concerning the likely merit of the claim is available, and the Georgetown case records indicate the claim was dismissed. But we allow for the possibility that the denial of access to a substantial number of outlets could prevent the plaintiff from realizing economies in the distribution and exhibition of its product.

The other cases involving access to retail markets do not appear to meet the essential requirements for anticompetitive exclusion. The product market and geographic markets include retail liquor products,⁸¹ toys and candy in the Chicago area,⁸² milk and related products in New York City,⁸³ pharmaceuticals in the New York City area,⁸⁴ artistic supplies in the United States,⁸⁵ and groceries in California.⁸⁶

One case in this group illustrates the potential for misuse of the antitrust laws. In *Warehouse Wines & Spirits v. Safeway Inc.*,⁸⁷ plaintiff complained of lack of access to retail outlets, but the claim in fact was triggered by defendant Safeway's entry into the retail liquor busi-

1045 (1969); *Eastern R.R. Conference Presidents v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), *rehg. denied*, 365 U.S. 875 (1961).

79. No. 75-0033 (S.D.N.Y. filed Jan. 6, 1975), *in Georgetown Project, supra* note 15.

80. *American Film Theater Charges Major Motion Picture Companies with Exhibition Black Listing*, Antitrust & Trade Reg. Rep. (BNA) No. 699, at A-23 (Feb. 4, 1975).

81. *J.W.T., Inc. v. Sichel, Inc.*, No. 73-1195 (N.D. Ill. filed May 9, 1973), *in Georgetown Project, supra* note 15.

82. *Irwin Askenazy dba Ash Dist. v. The B. Manischewitz Co.*, No. 77-4757 (N.D. Ill. filed Dec. 23, 1977), *in Georgetown Project, supra* note 15.

83. *Dairy Chain, Inc. v. Waldbaum's, Inc.*, No. 73-4337 (S.D.N.Y. filed Oct. 11, 1973), *in Georgetown Project, supra* note 15.

84. *Charles Labs, Inc. v. Banner*, No. 74-4395 (S.D.N.Y. filed Oct. 7, 1974), *in Georgetown Project, supra* note 15.

85. *Robert Simmons, Inc. v. Binney & Smith, Inc.*, No. 75-4741 (S.D.N.Y. filed Sept. 26, 1975), *in Georgetown Project, supra* note 15.

86. *Boardwalk Markets, Inc. v. Associated Food Stores*, No. 76-0365 (N.D. Cal. filed Feb. 20, 1976), *in Georgetown Project, supra* note 15.

87. No. 81-4788 (N.D. Cal. filed Feb. 20, 1976), *in Georgetown Project, supra* note 15.

ness through wholly owned "liquor barns." Hence, the substantive complaint derived not from a restriction of input supply, but from an increase in the retail space devoted to the product and the competition that followed. The case was dismissed with prejudice.

In sum, only two of the ten cases involving claims of harm to rivals through denial of access to distribution outlets appear to have met the core necessary conditions for such claims. It is reasonable to conclude that many of the other cases represent misuse of the antitrust remedy.

Cases involving exclusive contractual arrangements. Thirteen of the competitor cases focus on exclusive contracts between buyers and sellers. In two of the three cases involving transportation services,⁸⁸ the services were not regulated and the defendants were not in monopoly-like positions. Moreover, the services did not require any special skills, which reduces the probability of entry by new sellers with significantly different costs — a necessary condition for the Aghion and Bolton scenario.⁸⁹ In the other case involving transportation services,⁹⁰ plaintiff sought entry into the business of transferring air freight to and from airline terminals at Chicago's O'Hare airport. The Civil Aeronautics Board approved a process whereby the defendant, the air carriers' agent, would contract with local carriers to provide the services. The plaintiff complained that despite the parties' satisfaction with the contracts between the defendant and five local carriers, its application to share in the business should have been accepted.⁹¹ Defendant's motion for summary judgment, which argued that the Federal Aviation Act permitted such practices, was granted. But the extensive opinion on the motion indicates that the litigation involved considerable resources and addressed in detail the question of whether the contracting procedures were consistent with overall public policy goals.

Two cases involving exclusive contracts are clear-cut examples of misuse of the private antitrust remedy. Rather than the situation envisioned by Aghion and Bolton of a more efficient entrant denied access to markets, these cases were filed by *incumbent* firms, which were displaced by competitors. In *Diners' Club, Inc. v. Air Canada*,⁹² plaintiff sought to continue a contract offering credit card services. Similarly,

88. *Big T Lines, Inc. v. Navajo Freight Lines, Inc.*, No. 76-0862 (N.D. Cal. filed Apr. 26, 1976); *C.W. Limousine, Inc. v. Rothengast*, No. 76-0791 (N.D. Ill. filed Mar. 2, 1976), in *Georgetown Project*, *supra* note 15.

89. *See Aghion & Bolton*, *supra* note 50, at 389-90.

90. *Big Bear Cartage, Inc. v. Air Cargo, Inc.*, 419 F. Supp. 982 (N.D. Ill. 1976).

91. 419 F. Supp. at 984-85.

92. No. 78-6209 (S.D.N.Y. filed Dec. 27, 1978), in *Georgetown Project*, *supra* note 15.

in *Abadir & Co. v. Industria Quimicas de Mexico*,⁹³ the plaintiff, a former exclusive agent of the defendant chemical producers, sought reinstatement. The Aghion and Bolton scenario, concerned as it is with the efficiency losses that occur when prospective entrants are deterred not because of their costs but because of the artificial barriers created by the liquidated damages contracts, has no applicability to the case of an incumbent seller ousted by the entry of new competitors.

*M.K. Metals, Inc. v. National Steel Co.*⁹⁴ better fits the Aghion and Bolton scenario. The plaintiff objected to the use of exclusive contracts between major steel companies and recyclers of aluminum, steel, and other metals used in various containers including beverage cans. The plaintiff claimed it had developed a new and more efficient technology, and argued that the contracts prevented it from obtaining raw inputs and from selling recycled products back to the steel companies. However, *M.K. Metals* fails to meet the core necessary conditions for the Aghion and Bolton scenario. The parties to these contracts were not in a monopoly position of any consequence. In fact, metal container producers have limited market power due to the degree of substitutability with glass, plastics, and paper. Suppliers of recycled metals have even less power to bargain for excessive liquidated damage provisions. Hence, it is more likely that the parties would enter into exclusive contracts, not to exclude more efficient recyclers of metals, but for efficiency reasons.⁹⁵

One case in this group raises the issue of contract duration. In *Variety Theater and Dinner Club Inc. v. Carriage Trade Advertising Corp.*,⁹⁶ plaintiff objected to six-month exclusive contracts between advertisers and a coupon book publisher. Since advertisers have good alternative means of offering discounts, for example, through newspaper advertising and direct mailings, the advertisers would not agree to unfavorable terms such as a prohibition of dealing with rival publishers unless the contract offered advantages. The likelihood that six-month contracts in this context inhibit entry is very low, and the exclusive contracts may yield benefits from increased circulation and effectiveness.

93. No. 76-1938 (N.D. Cal. filed Sept. 10, 1976), in Georgetown Project, *supra* note 15.

94. No. 79-1661 (N.D. Ill. filed Apr. 12, 1979), in Georgetown Project, *supra* note 15.

95. One reason might be that the quality of inputs may vary, which, if exclusive contracts are not used, tends to raise transaction costs. In the tuna processing industry, as analyzed by Edward Gallick, agreements to sell all inputs (metals to be recycled) limit the incentives of suppliers to adjust the quality mix of inputs. EDWARD C. GALLICK, U.S. FED. TRADE COMMN., EXCLUSIVE DEALING AND VERTICAL INTEGRATION: THE EFFICIENCY OF CONTRACTS IN THE TUNA INDUSTRY 93, 93-94 (1984).

96. No. 78-0704 (N.D. Ga. filed Apr. 19, 1978), in Georgetown Project, *supra* note 15.

In sum, our analysis indicates that virtually none of these cases could be meritorious and that several are clear-cut misuses of the private antitrust remedy.⁹⁷

Claims of predation. Ten cases allege price predation.⁹⁸ Arguing that such conduct amounts to a horizontal restraint of trade in violation of Sherman Act section 1⁹⁹ requires that the plaintiffs complain of joint price-cutting, as did the plaintiff in *DiGiorgio Corp. v. Amstar Corp.*¹⁰⁰ But it is not clear how many of the remaining cases could be viewed as horizontal restraints in violation of section 1. Rather, in substantive terms, the plaintiffs allege attempted monopolization in violation of section 2 of the Sherman Act.¹⁰¹ The effects of the conduct are allegedly horizontal.

The elementary conditions for successful predation, namely substantial market share and entry barriers in the product market, are not met in most of these cases. In the *DiGiorgio* case, the product market was individual servings of sugar and condiments. Excluding one or many rivals by predation would not permit the exercise of market power, as the inputs (sugar, condiments, packaging) are in abundant supply relative to the product market. In *Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co.*,¹⁰² the allegations concerned the U.S. beer market. The plaintiff's naming Schlitz, then a struggling firm with a small and dwindling market share, as a defendant is in itself nearly sufficient to indicate that a predation claim lacked merit. The plaintiff, which complained that Schlitz "discriminated in price among different wholesale purchasers of their malt beverages,"¹⁰³ sought damages from an unsuccessful attempt to enter the market. In *M & R Laboratories, Inc. v. Trewax Co.*,¹⁰⁴ plaintiff sued an upstream supplier

97. In *Poirot Exhibitors Serv. Corp. v. Chicago Auto. Trade Assn.*, No. 78-0672 (N.D. Ill. filed Feb. 22, 1978), in *Georgetown Project*, *supra* note 15, for example, the product market is labor services for trade shows. In *SRA-Triumvera v. B. Polisky & J. Agrest*, No. 82-3191 (N.D. Ill. filed May 26, 1982), in *Georgetown Project*, *supra* note 15, the product market is real estate agent services. In each case, the labor services provided are in abundant supply relative to the specific uses cited in the litigation. Exclusive contractual arrangements, therefore, could not cause an increase in the market price of the labor services to other uses nor could they limit in any significant way the market opportunities for rival suppliers of the services.

98. Two cases in this subset involve the pricing of cars by independent auto dealers. The remaining cases deal with the retail pricing of liquor, soft drinks, and designer jeans.

99. 15 U.S.C. § 1 (1988).

100. No. 76-0544 (N.D. Cal. filed Mar. 16, 1976), in *Georgetown Project*, *supra* note 15.

101. 15 U.S.C. § 2 (1988).

102. 629 F.2d 1183 (7th Cir. 1980); see also *Canadian Ace Brewing Co. v. Anheuser-Busch, Inc.*, 448 F. Supp. 769 (N.D. Ill. 1978), *aff'd.*, 601 F.2d 593 (7th Cir. 1979), *cert. denied*, 444 U.S. 884 (1979).

103. *Schlitz*, 629 F.2d at 1184.

104. No. 78-1224 (N.D. Cal. filed Apr. 7, 1978), in *Georgetown Project*, *supra* note 15.

as well as rival agents as a means to force dealing.

Other product markets cited in this group of cases include (1) mobile check cashing services,¹⁰⁵ (2) management services for musicians,¹⁰⁶ (3) plastic produce bags,¹⁰⁷ (4) residential hot water heaters,¹⁰⁸ (5) rental of cleaning equipment,¹⁰⁹ and (6) package delivery services.¹¹⁰ Of these, the two claims alleging predation in package delivery services are comparatively strong given the defendant, U.P.S.,¹¹¹ had substantial market share in the product market (transportation of garments in New York City and other local markets) and that network and scale economies might constitute a reentry barrier.¹¹²

In the last case, *Consolidated Terminal Systems, Inc. v. ITT World Communications Inc.*,¹¹³ it appears that the judge correctly granted the defendants' motion to dismiss: plaintiff complained that the five telex companies authorized by the FCC to provide international telex services had cut prices on related equipment below cost. Since the telex equipment market includes large national markets as well, the alleged cross-subsidization could not have led to monopolization of the equipment market.¹¹⁴

2. Other Claims

Agreements among competitors. Four of the cases deal with agreements among competitors and so resemble classical horizontal re-

105. *Thillens, Inc. v. Community Currency Exch. Assn. of Ill., Inc.*, 729 F.2d 1128 (7th Cir. 1984), *cert. dismissed*, *Thillens, Inc. v. Wall*, 469 U.S. 976 (1984).

106. *Shaw Concerts, Inc. v. Columbia Artists Management, Inc.*, No. 75-4278 (S.D.N.Y. filed Aug. 28, 1975), *in Georgetown Project*, *supra* note 15.

107. *Trans-International Trading Co. v. Mobil Oil Corp.*, No. 77-0858 (N.D. Cal. filed Apr. 27, 1977), *in Georgetown Project*, *supra* note 15.

108. *Hoyt Heater Co. of N. Cal. v. American Appliance Mfg. Co.*, 502 F. Supp. 1383 (N.D. Cal. 1980).

109. *M & R Lab., Inc. v. Trewax Co.*, No. 78-1224 (N.D. Cal. filed Apr. 7, 1978), *in Georgetown Project*, *supra* note 15.

110. *Broadway Delivery Corp. v. United Parcel Serv. of Am., Inc.*, 651 F.2d 122 (2d Cir. 1981), *cert. denied*, 454 U.S. 968 (1981); *Barnet's Express, Inc. v. United Parcel Serv. of Am., Inc.*, No. 80-2260 (S.D.N.Y. filed Apr. 23, 1980), *in Georgetown Project*, *supra* note 15. The disputes concerned the transportation of garments in New York City and other local markets.

111. *Broadway Delivery*, 651 F.2d 122; *Barnet's Express*, No. 80-2260. The disputes concerned the transportation of garments in New York City and other local markets.

112. These same economies also suggest, however, that the costs of an additional account might be quite low, in which case prices can be cut substantially yet still not be below cost.

113. 535 F. Supp. 225 (S.D.N.Y. 1982).

114. The court, however, misapplied the case law on tie-ins in evaluating the plaintiff's claims. Specifically, in the course of rejecting the plaintiff's claims of injury in its attempts to compete for international accounts, the court viewed telex equipment as the "tying" product rather than the international services where entry was regulated by the FCC. 535 F. Supp. at 229-30.

straints. But, as might be expected, the plaintiffs' interests in the matters differ from those of fringe competitors. A unique claim arose out of efforts by foreign firms that export coffee to the United States to raise and fix the price of Angolan coffee to limit their losses from long positions they had taken in futures market trading.¹¹⁵ Competing U.S. importers had taken short positions that, absent the conspiracy, would have produced substantial profits.

*GAF Corp. v. Eastman Kodak Co.*¹¹⁶ yielded the only substantial settlement (\$16.6 million) that became known to the public from the seventy-four competitor cases. GAF, a designer of cameras, alleged that Kodak, Sylvania, and General Electric had conspired to deny the flow of technical information concerning new product developments (the "magicube" and "flipflash") to GAF. According to the claim, the conspiracy allowed Kodak to introduce cameras embodying the new technologies in advance of GAF.

Ace Agencies v. Seaboard Shipping Co.,¹¹⁷ involves allegations of the exercise of classical market power and efforts to restrain noncompliant competitors. The plaintiff leased blocks of cargo space from shippers in the Trans-Atlantic Ocean Shipping Conference and from those outside of the conference, and then supplied these services in competition with the shippers. The plaintiff complained of coercive efforts by defendant members of the conference to enforce the pricing structure.

*Shannon v. Crowley*¹¹⁸ is one of two cases¹¹⁹ advancing similar claims by competitor plaintiffs with respect to conduct of two defendants that were under common ownership and together accounted for seventy percent of the tugboat service business in San Francisco harbors. Plaintiffs asserted that defendants violated the Sherman Act by refusing to cooperate with plaintiffs and other rivals when assistance was needed in moving large vessels.¹²⁰ Plaintiffs also challenged

115. *Cofinco, Inc. v. Angola Coffee Co.*, No. 74-5191 (S.D.N.Y. filed Nov. 26, 1974), in *Georgetown Project*, *supra* note 15.

116. 519 F. Supp. 1203 (S.D.N.Y. 1981).

117. No. 81-1391 (N.D. Ill. filed Mar. 12, 1981), in *Georgetown Project*, *supra* note 15.

118. 538 F. Supp. 476 (N.D. Cal. 1981). The case was originally filed, and appeared in *The Georgetown Sample*, as *Murphy Pacific Marine Salvage Co. v. Thomas B. Crowley*, No 74-0562 (N.D. Cal. filed Mar. 12, 1974). Plaintiff Shannon was trustee in bankruptcy for *Murphy Pacific Marine Salvage Company*, which brought an antitrust action against Crowley for the period March 1970 to October 1971. *Shannon*, 538 F. Supp. at 479.

119. The second case covering the period from October 1971 to September 1975, is *Murphy Tugboat Co. v. Crowley*, 454 F. Supp. 847 (N.D. Cal. 1978) (*Murphy I*), *sub nom.* *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979) (*Murphy II*), *affid.* *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981) *cert. denied*, 455 U.S. 1018 (1982). The two cases were consolidated for discovery purposes. The relationship between the two cases is explained in *Shannon*, 538 F. Supp. at 479.

120. *Murphy II*, 467 F. Supp. at 847.

an agreement between defendants and defendants' employee pilots pursuant to which the pilots supplied complementary inland piloting services only to the defendants' customers at prices lower than those charged by independent pilots.¹²¹ As a result, plaintiffs were required to lower tugboat fees to remain competitive. In *Shannon* (the case in the Georgetown sample), the district court dismissed the complaint on the ground that the damage claim was too speculative.¹²² In the related case (*Murphy Tugboat*), the district court granted defendant's motion for judgment notwithstanding the verdict after the jury found for plaintiff on both of its claims. The court found that the pilots' agreement was within the labor exemption from the antitrust laws,¹²³ and that the damage verdict was "too speculative to stand."¹²⁴

Vertical restraints. The defendant in *Alloy International Co. v. Hoover-Nsk Bearings, Inc.*¹²⁵ refused to sell bearings to the distributor plaintiff due to an agreement between the defendant and another distributor. But like many vertical restraints cases, the refusal apparently was intended to establish property rights for the other distributor to develop the market. In *Olympic Distributors, Inc. v. Steinlauf*¹²⁶ which is representative of the other cases in this category, the plaintiff complained of coercion to force the plaintiff to adopt the retail price structure for sports equipment. Although such cases may ultimately involve exclusion,¹²⁷ we classified these cases separately because often the primary goal of such behavior is to influence the marketing efforts and the downstream prices of a manufacturer's product. It is beyond the scope of this article to evaluate the likely merit of such claims, and such an exercise would duplicate extensive research in the area of resale price maintenance and related vertical restraints.

D. Summary Evaluation of Competitor Cases

Evaluating the likely merit of a large sample of cases is difficult,

121. 467 F. Supp. at 848.

122. *Shannon*, 538 F. Supp. at 484.

123. *Murphy II*, 467 F. Supp. at 855-56.

124. *Murphy II*, 467 F. Supp. at 850-52. *Murphy I* is of some particular interest because in a preliminary ruling the court relied on *Brunswick* in holding that plaintiff could not recover damages suffered when defendant priced at levels below plaintiff's prices but above its own variable costs. The court concluded that recovery of damages measured by the price level plaintiff would have charged had defendant raised its prices above its total costs would be inconsistent with the antitrust injury requirement. 454 F. Supp. at 852-56.

125. 635 F.2d 1222 (7th Cir. 1980).

126. *Olympic Distrib., Inc. v. Steinlauf*, No. 74-3217 (N.D. Ill. filed Nov. 8, 1974), in *Georgetown Project*, *supra* note 15.

127. In fact, the plaintiff in *Olympic Distributors* claimed that a key element of the coercion was an attempt to discourage suppliers from dealing with the plaintiff.

but less so given that the basic principles of antitrust economics are, as we argued in section II.B, relevant to most models of exclusionary behavior. The benefit from such a review lies in deriving a sense of the distribution of merit in the sample of cases. For some cases, we did not find any information indicative of likely merit. Among the balance of cases for which information is available, the proportion of apparently low merit cases that allege exclusion is large. Indeed, the available evidence indicates that only a small minority of the cases filed by competitors in the category of horizontal restraints appears to meet the fundamental necessary conditions as identified above to permit exclusionary practices. In several cases, it is clear that the plaintiffs object to actions that represent increases in competition. Whether further research along these lines would corroborate these findings is not known, but they provide a reasonable basis for generalizations about the merit of competitor cases.¹²⁸

It also appears from our review of seventy-four competitor cases that screens and filters based on "core" necessary conditions could be used to eliminate many low merit cases. This would further protect against unnecessary private antitrust actions. Nevertheless, the review identified several cases that would survive screening and would require, therefore, an evaluation on the merits. Overall, our analysis raises two questions. First, can standing and injury rules or other rules that encourage the use of screens be developed to eliminate in the early stages of litigation those cases lacking merit? Second, can the courts effectively deal with those cases where plaintiffs succeed in making plausible claims concerning exclusionary conduct? We address these questions in the two Parts that follow.

III. *BRUNSWICK'S* EFFECT ON COMPETITOR CLAIMS

The Supreme Court's 1977 decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,¹²⁹ establishes that plaintiffs in private treble damage actions may not recover damages for any and every injury that can somehow be said to relate to an antitrust violation. Plaintiff must establish "antitrust injury," that is, "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."¹³⁰ In *Brunswick*, plaintiff challenged the acquisition of several bowling centers by a competitor. Plaintiff claimed injury of lost profits that plaintiff would have made had the acquired

128. An exception concerns competitor claims regarding tie-ins; these were not part of our sample.

129. 429 U.S. 477 (1977).

130. 429 U.S. at 489.

centers closed. Plaintiff's claim of injury thus rested on the premise that the acquisition *increased* competition. For this reason, the Court ruled that the plaintiff suffered no antitrust injury and therefore could not recover damages.¹³¹

Clearly, the *Brunswick* antitrust injury requirement is no bar to actions brought by customers or suppliers seeking to recover for overcharges. It could, however, be a significant barrier to actions brought by competitors. A competitor asserting that other competitors in the same market have restricted output and raised prices through collusion, for example, has not suffered antitrust injury. Other cases, including *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*,¹³² affirmed this point. Similarly, a competitor may not challenge a merger or joint venture on the conventional ground that it will increase concentration, facilitate collusion, and thus raise prices.

Because the *Brunswick* opinion was rendered in the middle of the time period covered by the sample, the Georgetown project data permit an inquiry into the rule's effect on the relative frequency of competitor cases and their disposition. If *Brunswick* did limit the ability of plaintiffs to allege certain violations, then the distribution of violations alleged and the pattern of dispositions might change as a result. Using the data presented below to investigate *Brunswick's* effectiveness, however, presents a number of difficulties. First and foremost, the consequences we might observe depend on the legal rules, particularly those relating to standing to sue, that were in effect in the districts covered by the Georgetown project sample. *Brunswick* may have caused a significant change in some districts but not in others. As a practical matter, this requires an examination of the governing law in each federal judicial circuit. Unfortunately, a review of the case law does not provide a good basis for categorizing the jurisdictions as either *Brunswick*-like or not.¹³³

Second, *Brunswick's* effect will depend on the substantive rules defining illegal practices, including predation and monopolization. If those rules are not strict, competitors can meet the antitrust injury requirement by alleging, for example, that a prospective merger will

131. 429 U.S. at 488-89.

132. 475 U.S. 574, 583 (1986).

133. This is in contrast to other circumstances. For example, both before and after the *Illinois Brick* decision, the circuit courts split on the relevant standing and injury rules. Beforehand, the courts differed on whether *Hanover Shoe* barred indirect purchaser suits, and disagreed afterwards on the meaning of the cost-plus exception to the rule against such suits. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehg. denied*, 434 U.S. 881 (1977); *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481, *rehg. denied*, 393 U.S. 901 (1968).

either result in monopolization or predation. In such a legal environment, rather than deterring competitor claims *Brunswick* would encourage competitor plaintiffs to add allegations of monopolization, predation, and other forms of market exclusion to their complaints.¹³⁴ On the other hand, in settings where the courts are critical of such claims, *Brunswick* might serve to reduce the frequency of competitor claims.

Finally, changes in federal enforcement in the periods before and after *Brunswick* may confound the analysis. As Table 1 indicates, federal price-fixing cases tend to generate follow-on suits by customer plaintiffs. We would therefore expect the relative frequencies of competitor and customer cases to vary as a function of the number, type, and success of federal price-fixing cases. Roughly coincident with the Supreme Court's *Brunswick* decision, criminal penalties for price-fixing cases were increased from the misdemeanor to the felony level.¹³⁵ In prior research, we have found (1) that this change led to reductions both in the number of significant price-fixing cases filed by the Antitrust Division and in the government's success rate,¹³⁶ and (2) that since the late 1970s the proportion of follow-on to independently initiated cases has fallen.¹³⁷ The higher proportion of independently initiated cases alleging price-fixing since that time period would, other things being equal, increase the proportion of competitor suits, and so will tend to bias against observing *Brunswick's* influence in the gross statistics on plaintiff type.

Because of the caveats noted above and the complexity and variety of factors influencing the measurement, the data we present in Table 4 are only suggestive of *Brunswick's* effect. The table reports the pre- and post-*Brunswick* distributions of plaintiff type for cases in the Georgetown Project sample that allege illegal horizontal restraints. (The

134. For example, plaintiffs may argue that any price cut following a merger is predatory. Consumer and competitor interests diverge here, and the Supreme Court has noted that "cutting prices in order to increase business often is the very essence of competition." *Matsushita*, 475 U.S. at 594. In *Cargill, Inc. v. Monfort of Colo., Inc.*, 591 F. Supp. 683 (D. Colo. 1983), *affd.*, 761 F.2d 570 (10th Cir. 1985), *revd.*, 479 U.S. 104 (1986), the plaintiff was concerned that the merged firm would expand output by working Saturdays, that this would cause a "price-cost" squeeze, and that this problem had persisted for twenty years. See U.S. Amicus Brief in *Cargill*, at 19 n.24 (referring to Record at 133-34).

135. The penalties were increased to their current levels by the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 3, 88 Stat. 1708 (1974).

136. Edward A. Snyder, *The Effect of Higher Criminal Penalties on Antitrust Enforcement*, 33 J.L. & ECON. 439 (1990).

137. Kauper & Snyder, *supra* note 20, at 1178. Specifically we found, using the Georgetown Project data, that follow-on cases accounted for 11% of cases in the period 1973-1977 and 6% in the period 1978-1983. (These figures exclude Multi-District Litigation cases.) More relevant, follow-on cases accounted for 37% of horizontal restraint cases in the period 1973-1977 and 20% of the same in the period 1978-1983. See Kauper & Snyder, *supra* note 20, at 1181-83.

pre- and post-*Brunswick* categories are based on the filing date.) Consistent with expectations, the percentage of competitor plaintiffs in the horizontal restraints category fell from 28% to 20%, with the percentage of customer plaintiffs rising from 42% to 51%. But the difference in the before and after distributions of plaintiffs is not statistically significant.

TABLE 4. PLAINTIFF'S BUSINESS RELATIONSHIP TO DEFENDANT,
PRE- AND POST-*Brunswick*

Horizontal Restraint Cases

	Plaintiff's Business Relationship to Defendant					Total
	Competitor	Customer	Supplier	Dealer	Other	
Pre- <i>Brunswick</i>	38	57	5	23	12	135
row %	28%	42%	4%	17%	9%	
Post- <i>Brunswick</i>	36	89	7	31	13	176
row %	20%	51%	4%	18%	7%	
Both Periods	74	146	12	54	25	311
row %	24%	47%	4%	17%	8%	

All Other Cases

	Plaintiff's Business Relationship to Defendant					Total
	Competitor	Customer	Supplier	Dealer	Other	
Pre- <i>Brunswick</i>	170	81	16	170	59	496
row %	34%	16%	3%	34%	12%	
Post- <i>Brunswick</i>	301	127	33	218	97	776
row %	39%	16%	4%	28%	13%	
Both Periods	471	208	49	388	156	1272
row %	37%	16%	4%	31%	12%	

Table 5 shows the distributions of cases filed by all types of plaintiffs for the most common types of alleged violations. The data do not indicate that *Brunswick* shifted the distribution of violations alleged. The percentage of cases in the "Horizontal Restraints" category remained at 20%; the percentage of cases in the "Merger, Joint Venture, Asset Accumulation" category remained at 7%. As suggested above, without detailed information about the substantive rules in place, one could not predict *Brunswick's* effect in this regard.

TABLE 5. DISTRIBUTION OF ALLEGED PRIMARY VIOLATIONS
PRE- AND POST-BRUNSWICK

Violation	Pre-Brunswick	Post-Brunswick	Pre- and Post Brunswick
Horizontal Restraints	139	190	329
% of column total	20%	20%	20%
Merger, Joint Venture or Asset Accumulation	49	66	115
% of column total	7%	7%	7%
Price Discrimination	70	76	146
% of column total	10%	8%	9%
Predatory Pricing	35	49	84
% of column total	5%	5%	5%
Tying	101	121	222
% of column total	15%	13%	14%
Refusal to Deal/ Dealer Termination	143	237	380
% of column total	21%	25%	23%
Vertical Price Discrimination	22	28	50
% of column total	3%	3%	3%
Vertical Price-Fixing/ RPM	51	51	102
% of column total	7%	5%	6%
Monopoly	12	21	33
% of column total	2%	2%	2%
Other	62	119	181
% of column total	9%	12%	11%
Total	684	958	1642

Regarding claim disposition, we present in Table 6 a breakdown of the outcomes for the competitor cases filed pre- and post-*Brunswick*. No clear pattern emerges from the data. Of course, we might not expect to see an increase in dismissals or successful defendant motions for summary judgment given adjustments in the filing decisions and the way plaintiffs plead their claims. Moreover, compared to the disposition of other claims in the Georgetown sample, the pre-*Brunswick* competitor claims include a relatively high proportion of dismissals.¹³⁸

138. See Table 3 *supra*.

TABLE 6. OUTCOMES OF COMPETITOR CASES ALLEGING ILLEGAL HORIZONTAL RESTRAINTS

	Method of Disposition				Total
	Dismissal	Pre-Trial Stipulation	Settlement	Litigation	
Pre- <i>Brunswick</i>	13	9	4	10 ^a	36
Row %	36%	25%	11%	28%	
Post- <i>Brunswick</i>	12	9	2	8 ^b	31
Row %	39%	29%	6%	26%	

Note:

This table excludes cases with dispositions categorized as Other Outcomes. See footnote 35.

^a Includes 5 grants of defendant motions for summary judgment.

^b Includes 3 grants of defendant motions for summary judgment.

Overall, these data suggest that *Brunswick* did not have a significant effect either in limiting competitor cases in the suspect category or in changing the distribution of cases by violation alleged.¹³⁹ The division of the sample into pre- and post-*Brunswick* periods is, however, a crude test. Factors such as changes in federal enforcement actions, district-specific effects, and forum shopping may obscure the effects of *Brunswick*.

IV. PROSPECTIVE ISSUES

Our analysis to this point has identified two factors that favor allowing competitor claims to go forward, and against changing the standing, injury, and liability standards that apply to such cases. First, a fairly high proportion of competitor cases are dismissed or end in a granting of defendant's motion for summary judgment, indicating that the courts already treat competitor cases with a healthy skepticism. Second, the lack of competitor plaintiffs in private actions that follow federal enforcement actions suggests, as one would hope, that standing and injury rules do not allow plaintiffs to proceed with claims against their rivals that allege the exercise of classical market power. Indeed, the review of the claims in our sample indicates that competitor claims most often raise the issue of anticompetitive exclusion.

We believe, however, that under the current legal framework the

139. One additional test might be performed. Though the distribution of case dispositions did not change much after *Brunswick*, it is possible that the dispositions correlated better with case merit. For example, following the decision, a higher percentage of the low-merit cases might have been dismissed and a lower percentage of the same might have proceeded to settlement or litigation.

constraints on plaintiffs seeking to initiate improper claims are quite weak. With the incentives of competitors to impose costs on their rivals and alter their behavior, claims of anticompetitive exclusion will likely be made more frequently than actual conditions justify. The question arises how well the courts will be able to deal with the claims that survive the types of screening suggested in Part II. Attempting to evaluate business practices on a case-by-case basis requires, of course, substantial resources. But even more troubling, in our view, are the difficulties the courts face in distinguishing between "exclusionary" actions that are likely to harm welfare from those that enhance it. In the balance of this Part, we elaborate on the legal issues concerning the antitrust injury requirement, and then analyze the severe problems the courts will encounter in making use of the recent literature on anticompetitive exclusion.

A. *Legal Issues*

A private litigant's ability to pursue an antitrust claim is dependent not only upon establishing that defendant's conduct violated an antitrust statute, but also upon proof that the plaintiff is an appropriate claimant injured in fact by the violation. As required by *Brunswick*, plaintiffs must have standing to sue and must have suffered antitrust injury. Assessment of the potential for misuse of the private remedy must take into account the antitrust injury requirement, which is one of the available policy tools for curbing its use.¹⁴⁰ While our sample of cases contains little evidence that the antitrust injury requirement formulated in *Brunswick* had an immediate effect on competitor claims, the question remains whether the requirement as now interpreted or as logically compelled will or can serve this function.

Antitrust injury is sometimes said to be but one element of *standing* to sue.¹⁴¹ But it is hard to envision a situation in which a firm suffers antitrust injury at the hands of its direct competitors and simultaneously lacks standing. Considerations of directness of injury and

140. Other policy tools include the definition of antitrust damages and the effective multiplier used to determine the awards paid to successful plaintiffs. Easterbrook proposes that single, rather than treble, damages be awarded to competitor plaintiffs who prevail in their litigation. See Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445 (1985). Others, including Polinsky, have argued that damages be "de-coupled" when private enforcers tend to be too zealous. See Mitchell A. Polinsky, *Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement*, 74 GEO. L.J. 1231, 1235 (1986).

141. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 334.3 (Supp. 1990). Whether or not this is so may be of some consequence with respect to several procedural matters, but is of little relevance here. Regardless of how the antitrust injury requirement is viewed, it is not synonymous with standing, which encompasses considerations of remoteness, complexity, duplication of recoveries and avoidance of multiplicity of lawsuits arising out of the same conduct. See *id.* A plaintiff might have suffered antitrust injury and still lack standing.

duplication of recovery may lead to a denial of standing to such parties as employees, shareholders, or suppliers of injured firms,¹⁴² but have little relevance in suits against direct competitors. The issue here, then, is the ability of courts to limit abuses of antitrust litigation against direct competitors through use of the antitrust injury requirement.

In *Brunswick* itself, the claimed injury derived from conduct that increased competition. In this respect *Brunswick* was an easy case, establishing (or confirming) the principle that conduct which enhanced competition could not cause a cognizable injury.¹⁴³ The requirement, however, is broader than the simple proposition that plaintiffs will not be permitted recoveries or equitable relief based on injuries resulting from competitive behavior. A symmetry must exist between the anticompetitive effects established in proving a violation and the injury suffered by plaintiff. In other words, the injury claimed by plaintiff must match the rationale for finding a violation in the first place.¹⁴⁴

The cases in which the antitrust injury requirement is obviously satisfied include those filed by customers seeking damages for overcharges resulting from a cartel among its suppliers.¹⁴⁵ The same is true of a firm excluded from an essential facility operated by its direct competitors.¹⁴⁶ Conversely, a firm claiming to be injured because its direct competitors conspired to raise prices — the classic cartel — has not, at least in the absence of some additional and cognizable adverse effects, suffered antitrust injury.¹⁴⁷ As a general rule, a plaintiff alleging only that its own competitors have restricted competition among themselves will fail to establish antitrust injury.¹⁴⁸ Competitor plaintiffs must claim an injury arising out of something other than increased prices caused by the enhancement of market power.

142. See PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 336d, 338, 340e (1978); AREEDA & HOVENKAMP, *supra* note 141, ¶¶ 338, 340.1.

143. See AREEDA & HOVENKAMP, *supra* note 141, ¶ 334.2a.

144. See *Atlantic Richfield Co. v. USA Petroleum Co.*, 110 S. Ct. 1884, 1893 (1990) (stating that the antitrust injury requirement “ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation in the first place”). In *Brunswick*, plaintiff retailer claimed, but did not prove, that a merger was unlawful because it enabled the merged firm to engage in predation; it had sought to recover damages on the ground that without the merger plaintiff would have benefited because the acquired firm would not have survived. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 481 (1977).

145. See AREEDA & HOVENKAMP, *supra* note 141, ¶ 337.1.

146. *Cf. id.* at ¶¶ 340.1-2 (plaintiff who is damaged by boycott engaged in by direct competitors suffers antitrust injury; essential facility claim is similar).

147. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986).

148. See AREEDA & HOVENKAMP, *supra* note 141, ¶¶ 340.2c, 340.2d.

If the antitrust injury requirement of *Brunswick*, as now interpreted, precludes suit by firms against direct competitors in those cases where the litigation itself is likely to be an anticompetitive tactic, there would be little reason to fear abuse of antitrust proceedings by competitors and, therefore, little reason to consider further changes in antitrust remedies. Ideally the antitrust injury requirement should preclude plaintiffs from seeking damages or injunctive relief against direct competitors in cases where the only adverse consumer welfare effects are price increases resulting from the elimination of competition among the defendants. This category of cases would include, *inter alia*, conventional cartel conduct and horizontal merger cases where illegality rests on standard likelihood of collusion grounds.

Ultimately, the concept of antitrust injury depends upon the standards courts apply in determining whether the business practices in question constitute a violation. If the violation rests entirely upon proof of likely adverse price and output effects — the standard applied to the issue of liability *today* — then a plaintiff must establish that its injuries result from those same price and output effects.¹⁴⁹ Courts in many cases may establish at the outset of litigation without much discovery or a full trial whether the antitrust injury requirement is met. Where a plaintiff fails to plead a type of injury that “matches” the violation the case will be dismissed. The antitrust injury requirement thus both limits and shapes the types of cases plaintiffs file at the outset. Many cases may also be dismissed later in the litigation process if plaintiffs cannot establish the facts on which their theories of antitrust injury are based. In some cases this may not be evident until the conclusion of the trial.¹⁵⁰

All of the Supreme Court cases in which plaintiffs were held to lack antitrust injury, including its 1990 decision in *Atlantic Richfield Co. v. USA Petroleum Co.*,¹⁵¹ have involved suits brought by competitors. While this may suggest that the Court is aware of the potential misuse of the antitrust remedy by competitors, the antitrust injury re-

149. But tomorrow antitrust standards could shift; the antitrust injury requirement then would change. Suppose that in the future a violation might be found, where price and output effects are beneficial, on the ground that the conduct nevertheless injures small businesses. Low but nonpredatory pricing of exactly the type involved in *Monfort* could be such a case, assuming a shift in standards. If a violation is so established, such harm to a small business plaintiff would constitute antitrust injury. But so long as violation of the antitrust laws rests on proof of adverse price and output effects, a plaintiff's injuries must be directly related to the specific adverse price and output effects on which a finding of violation is based.

150. See the discussion in *AREEDA & HOVENKAMP*, *supra* note 141, ¶ 334.3b.

151. 110 S. Ct. 1884 (1990). In *Atlantic Richfield*, a gasoline retailer brought suit against an integrated refiner that sold through its own retail outlets and to independents as well. Plaintiffs in *Brunswick*, *Matsushita* and *Monfort* were all direct competitors of defendants.

quirement is hardly a bar to *all* such suits. Of most relevance here, competitors who are driven out of the market "along the way" can claim they are victims of the very conduct giving rise to the violation. They have suffered antitrust injury and may seek damages. Competitors threatened by such conduct will be able to seek injunctive relief. This is the effect of the Supreme Court's 1987 ruling in *Cargill, Inc. v. Monfort of Colorado, Inc.*,¹⁵² in which the Court denied injunctive relief to a competitor challenging the merger of two other competitors. The plaintiff alleged that the acquisition would result in a price squeeze of competitors, with prices significantly reduced for some period of time. The Court concluded that if prices would be lower, but still above cost, no antitrust injury would occur. In *Monfort*, plaintiff failed to allege truly predatory pricing or predatory intent. The Court clearly indicated, however, that had there been proper allegation and proof of threatened predation, the antitrust injury requirement would have been met.¹⁵³ Within weeks of the *Monfort* decision, the district court in *Tasty Baking Co. v. Ralston Purina Co., Inc.*¹⁵⁴ found that a competitor challenging a horizontal merger satisfied the *Brunswick* and *Monfort* standards by alleging that the acquisition would likely result in its exclusion from the market and predatory pricing.¹⁵⁵

The lesson for competitor plaintiffs is clear. Allegations of anticompetitive exclusion, if properly framed, will satisfy the antitrust injury requirement. The question then becomes one of proof and, for all practical purposes, the case must proceed to the merits. In section 1 and 2 cases, where the alleged conduct has already taken place, the critical issues are whether the conduct violated antitrust standards. In merger cases the court is confronted with the additional issue of whether the exercise of market power to exclude, which has not yet occurred, is likely to occur. In these circumstances, since careful pleading at the outset can satisfy the antitrust injury requirement, it will not control competitors' spurious and, in many cases, anticompe-

152. 479 U.S. 104 (1986). The plaintiff (*Monfort*) claimed that "IBP and Excel would engage in a price-cost 'squeeze' bidding up the price of necessary raw product input supply (fed cattle) while at the same time lowering the cost of finished output product (boxed beef)." 591 F. Supp. 683, 691 (D. Colo. 1983). The Supreme Court stated that the plaintiff's claim was "nothing more than an allegation of losses due to vigorous competition." 479 U.S. at 108.

153. 479 U.S. at 120-22; see discussion in AREEDA & HOVENKAMP, *supra* note 141, ¶¶ 340.2b, 340.2f.

154. 653 F. Supp. 1250 (E.D. Pa. 1987).

155. The competitor plaintiff's success in *Tasty Baking* is attributable in part to narrow market definition ("snack cakes and pies," which excluded brownies, doughnuts, cookies, and other pastries). 653 F. Supp. at 1257-60. The court found "antitrust injury" both in plaintiff's claim of threatened predation, which it asserted as a grounds for attacking the merger and to support a section 2 claim, and in its allegation that the merged entity would impair plaintiff's business by extracting more shelf space and promotional benefits from retailers. 653 F. Supp. at 1255.

titive litigation. The apparently limited effect of *Brunswick* found in Part III is consistent with this conclusion.

The way the courts have dealt with allegations of predation is instructive. The relationship between such allegations and antitrust injury is problematic. When pricing is predatory, adverse price and output effects occur only if predation is successful, i.e., if defendant or defendants actually drive the plaintiff from the market and thereafter increase price over those previously prevailing. Until this occurs, however, consumers in fact benefit. When prices do rise, consumers suffer antitrust injury and competitors still in the market benefit (and, therefore, do not then suffer antitrust injury). But what of the firm destroyed or otherwise damaged by predation, the firm that is the "victim" along the way? Does the antitrust injury requirement allow only actions for damages arising out of the price increases resulting from successful predation?¹⁵⁶

The *Monfort* decision indicates that a firm could seek to enjoin a merger of two of its direct competitors if the merger posed the threat of future predation. Lower courts have followed this lead, finding the antitrust injury requirement met in such circumstances if the threat of predation is sufficiently real to hold the merger unlawful in the first place.¹⁵⁷ While these are cases seeking injunctive relief, lower court decisions have proceeded similarly in damage actions, holding that while the ultimate reason for condemning predation is consumer harm, the means through which such harm is caused is injury to rivals and that such injury must necessarily satisfy the standards of *Brunswick*.¹⁵⁸ Plaintiffs in these cases are allowed to proceed simply because of the *prospect* of consumer harm. The question of the proximity of adverse consumer effects to time of suit (or the predatory acts) is never addressed. It is sufficient that, within the market in question, acts

156. In such cases customers, but not competitors, would be the parties suffering antitrust injury. See discussion in AREEDA & HOVENKAMP, *supra* note 141, ¶ 340.2b.

157. See *McCaw Personal Communications, Inc. v. Pacific Telesis Group*, 645 F. Supp. 1166 (N.D. Cal. 1986); *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250 (E.D. Pa. 1987).

158. See *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). Cf. *Los Angeles Memorial Coliseum Comm. v. National Football League*, 791 F.2d 1356, 1364 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (stating that where defendant league violated the antitrust laws by preventing the move of the Oakland Raiders professional football team to Los Angeles, thereby depriving Los Angeles consumers of the choice between two teams, the Raiders' claim for damages based on the loss of incremental revenues it would have earned in Los Angeles was not barred by the antitrust injury requirement). Similarly, courts have simply assumed without discussion that a firm injured by predatory pricing may seek damages based on its losses without regard to whether the predation succeeded and thereby brought about higher prices. See, e.g., *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

likely to have such effects sometime might occur and might injure the plaintiff.

In cases seeking to enjoin mergers of firms competing with the plaintiff, courts must struggle with proof of potential predation. In these cases, the predatory acts alleged have not yet occurred. How should courts determine their likelihood? How proximate must such acts be?¹⁵⁹ Presumably plaintiff must do more than allege such future acts. But neither the Supreme Court nor lower courts have offered guidance on such questions. The mere act of pleading that such conduct is likely will apparently carry the plaintiff a long way into the litigation. Damage actions will seldom pose these questions; presumably predatory conduct already will have occurred.

To sum up to this point, plaintiffs claiming injuries through strategic or predatory actions of their competitors are likely to satisfy the antitrust injury requirement once the facts establishing the violation are shown. The courts tend to presume that the factual premise of the claim is valid and then inquire whether the plaintiffs stand to suffer antitrust injury from the alleged behavior. Because the antitrust injury requirement is not likely to serve as a significant limitation on such actions, plaintiffs suing direct competitors may be expected to shape their complaints to conform to current theories of predation or raising rivals' costs. Such complaints are likely to withstand initial scrutiny; the question of antitrust injury in these cases will often be determined only when the underlying question of violation is resolved. As a result, the antitrust injury requirement is not likely to curb the type of suits most likely to be filed against competitors to restrain competition: those based on allegations that what is in reality aggressive and effective competition is a form of predatory or exclusionary conduct.

From an overall public policy perspective, one can argue that the issue of whether private plaintiffs should be allowed to proceed with claims against their rivals should be resolved in such a way that accounts for the potential harms to competition caused by such claims. If this *unconditional* approach were used, the initial scrutiny would consider not only whether the alleged claim, if true, could harm the plaintiff, but also what the probability is that the defendant behavior is efficiency enhancing and that the plaintiff's motive is to reduce compe-

159. In *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F. Supp. 1250, 1275 (E.D. Pa. 1987), the court found only that the merged entity could engage in predatory pricing, that entry barriers were high, and that therefore predatory pricing was "feasible." Coupled with findings that the acquired firm had a "specific intent to monopolize," these findings were thought sufficient to establish likely antitrust injury. 653 F. Supp. at 1272-76. For a discussion of the proximity issue, see AREEDA & HOVENKAMP, *supra* note 141, ¶ 340.2f.

tition. But in fact, the injury requirement provides no basis for making efficiency versus consumer harm tradeoffs independent of the determination of violation.

Remaining questions concerning competitor claims include whether the courts can employ other devices to eliminate cases aimed at limiting competition without full trial, and, more generally, whether the courts can distinguish between good and bad claims. The most obvious control device once the case reaches the merits is the motion for summary judgment. The ability to resolve cases on such motions depends, in turn, on whether the courts develop rational elements of violation that a plaintiff must prove before its case is allowed to proceed further. For example, if a violation cannot be found without proof that the defendant has at least a thirty percent market share, claims failing this test could be disposed of summarily. The use of such a market share or market power screen, often combined with a so-called "quick look," is becoming common in a variety of antitrust cases.¹⁶⁰

But as competitor plaintiffs seek to work their way around the antitrust injury requirement, they are also likely to seize upon evolving theories of nonprice predation based upon proof of conduct that raises rivals' costs. The rationale of the *Monfort* case suggests that such allegations, if proved, may well establish antitrust injury. Control of these actions through summary judgment could prove difficult given the generality of the economics literature on exclusionary practices. Moreover, as we discuss next, even when such firms employ exclusionary devices and the injury to rivals is clear cut, the economics literature on exclusion of rivals indicates that consumers' welfare may be enhanced rather than harmed.

B. *Problems in Applying Theories of Anticompetitive Exclusion*

During the recent decades, scholars have developed frameworks that, if applied with care, stand to guide the courts in evaluating business practices. The various rules for identifying classical predatory pricing are a case on point.¹⁶¹ Unfortunately, the literature on the

160. See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 966-72 (10th Cir. 1990); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), cert. denied, 484 U.S. 977 (1987); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 217 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987). For a general discussion, see Thomas E. Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 905-08 (1987).

161. See, e.g., Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

anticompetitive effects of vertical integration and exclusive contractual arrangements offers little guidance beyond corroborating the value of standard antitrust analysis in screening cases. The courts will need further direction to evaluate claims that meet what we referred to earlier as the necessary core conditions for raising rivals' costs tactics and other exclusionary practices to succeed.

The unique problem that the courts face with claims of anticompetitive exclusion is as follows: the necessary conditions that permit exclusion of rivals by vertical integration or exclusive supply contracts or other means also embody efficiency advantages to the integration. As a result, the claimed adverse strategic effects will be nested in scenarios where efficiency benefits also will be realized. Stated in other terms, meeting the necessary conditions for anticompetitive exclusion is likely to ensure that some efficiency benefits are realized from the business practices in question. In general, when a firm realizes efficiency benefits, it will be able to increase output, and a portion of the gain typically comes at the expense of rivals. This pattern of effects is, of course, fundamentally the same as what is expected from efforts to raise rivals' costs.

The primary source of the efficiency benefits from vertical integration and variations thereof is that the integrated firm will make more efficient use of inputs. Of particular relevance here, it is generally accepted that when firms encounter deviations from competitive market conditions either upstream or downstream, vertical integration enhances efficiency. To be specific, most antitrust economists would agree with the following propositions:

1. Under quite common input supply conditions, downstream manufacturers will purchase and use less than the optimal number of inputs. Consider the case where competitive input suppliers offer a rising supply curve — meaning that additional inputs will be supplied only if higher prices are offered. If a few (unintegrated) firms dominate the downstream industry, they will tend to limit their purchases of inputs to keep the price low.¹⁶² This so-called monopsony or oligopsony problem arises because purchases of additional inputs raise their price. Under competition, the higher prices apply to all transactions, with the result that the cost of the extra input, from the downstream firm's point of view, includes both the price paid for it *and* the increase in price for other ("inframarginal") inputs. In contrast, an integrated firm will base output decisions on the true incremental costs

162. This is a standard result in economics. For a discussion of its implications, see John S. McGee & Lowell R. Basset, *Vertical Integration Revisited*, 19 J.L. & ECON. 17 (1976).

of inputs, which does not include the second component identified above. Vertical integration will, therefore, lead to greater use of the input, higher output of the final product, and improved consumer welfare.¹⁶³

2. When both the upstream and downstream levels deviate from competitive pricing, vertical integration will eliminate the so-called "double-markup problem" and improve efficiency.¹⁶⁴ With noncompetitive pricing by unintegrated firms at both levels, the final product price includes two markups. The first is from the noncompetitive pricing by input suppliers; the second from downstream firms. The double markup problem — also known as double marginalism — refers to the fact that the two markups together exceed the level that maximizes the overall profits. Simply put, the final price is too high. In contrast, a vertically integrated firm will choose the single markup that maximizes profits, resulting in a lower final product price and improved consumer welfare.

3. When input suppliers exercise a degree of market power and charge an above-competitive price, vertical integration will tend to improve efficiency and enhance consumer welfare. The high input price has two adverse effects when firms are not vertically integrated: the downstream firms will underutilize the input and reduce output. The substitution to other inputs is cost-minimizing for the downstream firm, but is inefficient when compared to the input mix firms would choose if input prices reflected their true costs. The only exception is fixed-proportion technology, in which case there is no technical inefficiency.¹⁶⁵ With vertical integration, the firm can set transfer prices of the inputs that reflect their true costs. This will correct the technical inefficiency and encourage more output.¹⁶⁶

The import of these propositions is not that efficiency defenses

163. The rate at which downstream firms will pass on the lower marginal costs of inputs to final consumers depends on the character of the demand curve. But the rate cannot be negative and under common conditions, such as linear demand, the downstream firm will decrease price by *more* than the reduction in input costs. This general effect occurs because firms with market power choose a price and output combination in the elastic part of their demand. Price reductions will, as a result, generate relatively large increases in quantity demanded.

164. See Joseph J. Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950).

165. Given inventory costs and waste of inputs, a characterization of technology as using fixed proportions is only accurate to a degree. The practical issue is the extent to which proportions are variable. When the elasticity of substitution among inputs is extremely low, the characterization is appropriate. It is worth noting, however, that when it is appropriate, the derived demand for the input tends to be inelastic, making downstream firms vulnerable to the exercise of market power.

166. See John M. Vernon & Daniel A. Graham, *Profitability of Monopolization by Vertical Integration*, 79 J. POL. ECON. 924, 925 (1971).

should be entertained in some vertical integration and exclusionary practices cases.¹⁶⁷ Rather, credible efficiency defenses will exist *whenever* a strategic claim can be made. In addition, no economically meaningful tests distinguish *ex ante* the strategic and efficiency motives. Latent or exercised market power at one or both stages, variable proportions technology, and other market conditions specified in the recent theories of exclusionary practices, indicate the potential for efficiency gains as well as the potential for strategic behavior.¹⁶⁸

At this point it is instructive to return to *Julius Nasso Concrete Corp. v. DIC Concrete Corp.*,¹⁶⁹ which we discussed in Part II. We argued that this case matched one of the raising rivals' costs scenarios quite well and met the necessary conditions for anticompetitive exclusion: two suppliers accounted for a substantial proportion of ready-mix concrete and other building supplies sold to New York area subcontractors, including plaintiff Nasso and defendant DIC. Nasso complained that a 1973 joint venture agreement between DIC and one of the input suppliers resulted in higher input prices to Nasso and thereby excluded Nasso from competing effectively for large construction subcontracts. The economic principles identified here suggest, however, that if the two ready-mix suppliers were not offering competitive prices, DIC had an efficiency motive for integrating with the ready-mix concrete supplier, namely to secure purchase rights whereby the marginal input costs would better reflect their true cost. Realizing those efficiencies would allow DIC to purchase more inputs and expand output. Such effects of course would support rival Nasso's claim of exclusion, but they are also the signs of improved competitiveness.

In light of these comments, it is not surprising that economic analyses of the effects of contractual integration and vertical mergers where a strategic advantage is conferred often find that consumer welfare *increases* as a result.¹⁷⁰ Particularly useful is the analysis by Ayres,¹⁷¹ who models the foreclosure of rivals in one of the settings Krattenmaker and Salop discuss. Consistent with the first proposition cited above, oligopolistic manufacturers face a competitive input mar-

167. See Krattenmaker & Salop, *supra* note 47, at 250.

168. Factors such as specialized investments, substantial time intervals required for some transactions, economies of scale, and information externalities often lead to deviations from the idealized competitive market.

169. 467 F. Supp. 1016 (S.D.N.Y. 1979).

170. On a related point, Whinston, *supra* note 45, at 855-56, finds that the welfare effects of tying are ambiguous (even in a duopoly setting where, by assumption, there are no efficiency advantages).

171. See AYRES, *supra* note 45, at 5-17.

ket with a rising supply curve. One of two manufacturers acquires half of the industry capacity at the input level. After the merger, this manufacturer "forecloses" its competitors by (1) producing more inputs, and (2) buying some inputs on the external input market. By overbuying inputs, the integrated firm raises the marginal factor cost to the rival, who then reduces input purchases and its downstream production.

The harm to the rival manufacturer does not, however, lead to consumer injury. The rival reduces output, but the integrated firm increases production for two reasons. First, the motive to foreclose encourages overbuying of inputs, which increases downstream product. Second, the conditions that permit the foreclosure (a noncompetitive product market and a rising input supply) establish an efficiency benefit from the merger — that is, elimination of part of the monopsony effect, which in turn increases the integrated firm's output.¹⁷² Ayres shows that the vertical merger benefits customers even though it forecloses the rival in the sense of reducing its output.¹⁷³ Interestingly, Ayres also demonstrates that an ability to precommit either to a level of internal input production or to a level of external market purchases strengthens the integrated firm's incentive to overbuy on the external input market. Even though the precommitment will increase the extent of foreclosure, output prices fall by a greater amount and consumer welfare is further enhanced.

In another analysis, Salinger¹⁷⁴ addresses the effects of vertical mergers when both stages are oligopsonistic.¹⁷⁵ He focuses on the tradeoff between (1) elimination of the double markup problem described in the second proposition, and (2) the loss of an independent input supplier. This model, like many economic models of oligopoly, relies on the assumption of Cournot behavior,¹⁷⁶ whereby each firm takes the other's output as given when choosing its own output. It follows from this assumption that the reduction in the number of independent suppliers leads to higher input prices and leaves nonintegrated suppliers at a competitive disadvantage. The elimina-

172. Consistent with the first proposition above, a buyer with market power will limit inputs when faced with a rising supply curve because marginal input costs exceed average input costs.

173. The merger does, however, cause a technical inefficiency in that the input capacity owned by the integrated firm is used more extensively than the capacity owned by independent producers.

174. See Salinger, *supra* note 45.

175. See the second proposition above.

176. In a Cournot equilibrium, total industry output equals $N/(N+1)$ times the competitive output, where N is the number of firms. Thus, industry output increases with the number of firms.

tion of the double markup problem, however, may offset this effect, as the integrated firm produces more of the final good. As Salinger shows, the final good price may rise or fall.¹⁷⁷ Nevertheless, Salinger argues that "the primary concern about vertical mergers . . . is their effect on the ability of remaining unintegrated firms to obtain necessary inputs."¹⁷⁸ We disagree, for the same reason that we would not condemn a manufacturer who, after gaining a technological advantage, increases its output, but in doing so uses more inputs and causes input prices to rise.

Hart and Tirole have recently offered a more comprehensive model of vertical foreclosure in which they assume that unintegrated firms can "choose from a full set of arrangements both when they are integrated and when they are not"¹⁷⁹ They cite, for example, the possible use of two-part tariffs whereby the downstream firm may pay a fixed fee and a per unit price for each input it buys. They view the elimination of restrictions on the contracts nonintegrated firms may select as a virtue of their analysis. But this approach assumes away basic efficiency motives for integration, including (1) reducing transaction costs, (2) eliminating technical inefficiencies in the use of inputs by downstream firms, and (3) as they note, eliminating double marginalization.¹⁸⁰ A substantial literature on vertical integration has emphasized such considerations in decisions to integrate either fully or partially through contractual mechanisms.¹⁸¹

Dennis Carlton in commenting on the relevance of Hart and Tirole's analysis to antitrust policy, makes the same point we have made above:

[I]f the relevance of their results for policymaking is to be considered, these standard reasons [for vertical integration] must be taken into account because two-part tariffs may not be in use, and price may exceed marginal cost. Any time an input supplier is charging a downstream firm a price different from marginal cost, there are incentives for vertical integration Hart and Tirole suggest that policymakers should be especially alert to anticompetitive foreclosure when vertical integration occurs and one of the firms is especially efficient. But this is precisely the situation in which efficiency gains are greatest because price exceeds

177. Salinger, *supra* note 45, at 352.

178. *Id.* at 355.

179. See Hart & Tirole, *supra* note 45, at 206 (footnote omitted).

180. *Id.* at 206 n.2, 220 n.18.

181. For a discussion that relates these considerations to antitrust analysis, see Oliver E. Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439 (1974).

marginal cost and there are variable proportions or a double markup.¹⁸² Thus, the courts face the problem that, even when it is known that vertical integration has harmed an unintegrated rival, the effects on consumer welfare are ambiguous. One cannot discern from the models whether reductions in output by the foreclosed firms exceed the increase in output by integrated firms.

Of the formal models of vertical foreclosure with which we are familiar, only Ordoover, Saloner, and Salop¹⁸³ find that vertical integration unambiguously leads to higher prices to consumers.¹⁸⁴ The means by which they reach this conclusion are instructive, however. Only in the extreme circumstances they posit can we expect vertical integration to produce purely strategic effects that ultimately harm consumers. In their analysis, prior to the integration, two input suppliers sell inputs to two downstream manufacturers. By assumption, the two suppliers are "Bertrand"-type competitors, meaning that despite the duopoly, they compete such that price is driven to cost. As with the Hart and Tirole model, the authors state "that the double marginalization does not arise when the firms initially are unintegrated."¹⁸⁵ In this context, a vertical merger between a pair of firms changes the input market from perfectly competitive (whereby input purchases are efficient) to monopoly (which causes suboptimal purchases of inputs).

The conclusion Ordoover, Saloner, and Salop reach — that the merger yields no efficiency gains — is obtained by assuming that having two independent input firms yields a competitive result (the Bertrand assumption). Given that assumption, the adverse strategic effects only occur for the case in which there are two input suppliers initially. Alternatively, if there were three input suppliers, then a vertical merger involving one of them would not foreclose the unintegrated firms because — holding to their assumption — an input market with two suppliers would remain competitive.

Ordoover, Saloner, and Salop's assumption that two suppliers ensures competition but one implies monopoly is critical in another respect. If, in the two supplier case, the two are not Bertrand-type competitors and instead charge prices that exceed their incremental

182. Dennis W. Carlton, *Comments and Discussion*, in *BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 1990*, 277, 279-80 (1990).

183. See Ordoover et al., *supra* note 45. Note also that Whinston models foreclosure due to tying and identifies a case in which overall consumer surplus is reduced even though some consumers are better off. See Whinston, *supra* note 45, at 845-46.

184. Hart & Tirole find that consumer welfare either is left unchanged by vertical foreclosure or is reduced. See Hart & Tirole, *supra* note 45, at 239, 246-47.

185. Ordoover et al., *supra* note 45, at 129.

costs, then a vertical merger would effect efficiency gains. The same holds true in the monopoly-input market/variable proportions case described in the third proposition above. Westfield, for example, demonstrates that vertical integration yields gains in production efficiency except in the limiting case of fixed-proportions technology.¹⁸⁶ Again, while the theories of exclusionary behavior demonstrate that vertical mergers could produce strategic effects, they are not sufficiently detailed to identify conditions when these effects will dominate the efficiency effects that are expected to occur as well.

From this discussion of fundamental economic principles, we conclude that even if one posits a strategic objective, one must then investigate whether vertical integration on net harms consumers. If there is no harm to consumers, the question follows whether the integration constitutes an antitrust violation. If the harm to unintegrated firms does establish a violation, then where does one draw boundaries to identify which types of competitor injuries constitute antitrust injury? The fundamental issue for antitrust policy in this setting is whether exclusionary practices lead to more or less output in the downstream market. From this perspective, it is somewhat remarkable that the models designed to reveal that vertical integration and exclusive contracts may harm rivals fail to demonstrate that harm to *consumers* will follow.

Our discussion also indicates that the usual approach to drawing boundaries between efficient and strategic behavior is not appropriate for vertical mergers and contractual integration aimed at foreclosing competitors. To repeat, even when one is certain that a firm intended to harm a rival and finds evidence of effect (that is, the integrated firm's profits increase and the rival's declines), the practices may enhance consumer welfare. Some scholars might nevertheless favor a search for policies to restrain exclusionary practices, arguing that judgments can be made about whether consumers are better or worse off from the combination of effects. This approach, however, requires both the identification of strategic behavior and the development of tools that will indicate the overall efficiency effects. Any serious effort to distinguish strategic and efficiency motivated integration would be daunting insofar as it would require knowledge at many levels of detail concerning the potential efficiencies gained, for example, from adjustments to changing economic conditions. The information requirements for evaluation *ex ante* of the integration on consumer welfare are particularly severe given that in each of the three contexts identi-

186. Fred M. Westfield, *Vertical Integration: Does Product Price Rise or Fall?*, 71 AM. ECON. REV. 334, 336 (1981).

fied above, the general case is ambiguous. Even *ex post*, the rather simple task of determining why a final product price rose or fell is not one of the economics profession's strengths.

It is therefore altogether appropriate to worry that competitor plaintiffs will misuse rules designed to deter exclusionary practices. In fairness, those who have developed the theories of exclusionary practices are aware of these difficulties. Ordover and Saloner state that some definitions of anticompetitive behavior are likely to "condemn as illegal actions those that (a) elevate consumers' welfare, and (b) are part of innocent competitive interactions."¹⁸⁷ Salop and Scheffman find that firms who rely on the strategic devices may increase their output.¹⁸⁸ For these reasons, forcing the courts to analyze competitor claims of exclusion on the merits is likely to blur rather than define the distinction between exclusionary practices and the natural consequences of competition.

V. CONCLUSION

Breit and Elzinga recommended a decade and a half ago that the private antitrust remedy be abolished.¹⁸⁹ The extent of the misuse of antitrust laws in the cases we reviewed and the prospect for future misuse based on claims of predatory and exclusionary conduct offer support for this view insofar as competitor cases are concerned. Basically, within the category of competitor cases alleging horizontal restraints we find too few potentially good cases to justify the large majority that appear to lack merit.¹⁹⁰ Our primary concern is that processing claims involving anticompetitive exclusion on a case-by-case basis is likely to be costly and impair economic efficiency given the fundamental difficulties in assessing whether defendants are (1) exploiting existing (or latent) market conditions with the objective of foreclosing rivals, or (2) taking actions to mitigate inefficiencies that derive (or may derive) from the same market conditions.

187. Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 537, 544 (Richard Schmalensee & Robert D. Willig eds., 1989).

188. See Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV., May 1983, at 267, 270 (Papers and Proceedings); Steven C. Salop & David T. Scheffman, *Cost-Raising Strategies*, 36 J. INDUS. ECON. 19, 27-32 (1987).

189. William Breit & Kenneth G. Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 355 (1974).

190. We note that while the competitor claims in our sample — those alleging "horizontal restraints" — constituted only about four percent of the overall population of claims, competitors filed about one out of every four claims. Given the nature of the allegations we reviewed, we doubt that the broader set of competitor claims (with the possible exception of those concerning tie-ins) is substantively different.

Yet even if there were agreement that the fundamental goal of anti-trust policy was to promote economic efficiency, eliminating all private enforcement, as Breit and Elzinga suggested, would pose problems. First, this would require additional budget resources for federal anti-trust agencies. Second and more significant, abolishing the remedy would prevent private parties from filing follow-on cases to recover damages from violations prosecuted by the federal authorities. Aside from concerns regarding compensation, this would reduce the incentive of injured parties to provide information to the federal authorities regarding possible violations and to participate in the proceedings, which in turn would reduce deterrence.

A less drastic policy prescription than Breit and Elzinga's, yet one that addresses the specific problem identified here, is to abolish the private antitrust remedy for competitor plaintiffs, but broaden the authority of the federal antitrust agencies to collect judgments on their behalf in the event an antitrust violation harms competitors. Such judgments would be determined according to existing principles defining damages and they could be transferred to those parties claiming damages.¹⁹¹ Retention of a federal remedy is motivated in part by the recognition that the set of cases reviewed here did not cover the full range of competitor claims. Notable exceptions include claims arising due to illegal tying and denial of access to essential facilities.¹⁹²

The merit of the *paren patriae* approach for alleged competitor injuries ultimately rests on the issue of which institutions should enforce the antitrust laws. Even if the courts choose optimal rules within the given structure of remedies, they cannot achieve what might be a preferred optimum brought about legislatively that relies more on federal enforcers. The Clayton Act's broad language ("any person who shall be injured . . . may sue"¹⁹³) prevents the courts from implementing such a change. Also relevant to the choice are the political pressures that could undermine the policy change. While federal enforcers are presumably more oriented toward economic efficiency than many would-be competitor plaintiffs, the interests of competitors in re-

191. This would eliminate much of the moral hazard problem of paying interest on antitrust damages and also would offer a useful constraint on federal enforcement actions in that the federal authorities would seek to prove actual damages. One need for the rule against payment of interest on antitrust damages is that those who continue to be injured due to an antitrust violation would have an incentive to delay their claims. See Pablo T. Spiller, *Treble Damages and Optimal Suing Time*, 9 RES. L. & ECON. 45, 53-57 (1986).

192. We recognize as well that the courts may be better able to evaluate these other types of competitor claims. If, for example, screens can eliminate claims that lack merit, then it might be appropriate to further temper our conclusion and maintain the private remedy for some types of competitor claims.

193. Clayton Act § 4, 15 U.S.C. § 15a (1988).

straining competition will not be eliminated. One advantage of the proposal to rely on federal enforcers to identify cases of competitor antitrust injury is that while interested parties will lobby for their interests, the decision to file suit would be in the hands of federal enforcers. Under the current regime, the decision to file claims is, of course, unilateral.

More modest reform proposals include (1) reducing the multiplier for competitor plaintiffs from treble to single damages and (2) eliminating the one-way fee shifting (in favor of successful plaintiffs) for competitor plaintiffs.¹⁹⁴ Alternative cost-allocation rules include the American rule, whereby each party bears its own costs independent of the outcome, and the English rule, whereby the loser pays all fees up to a reasonable limit. In light of the evidence we have found — that only a small percentage of competitor plaintiffs in our sample succeeded and the courts frequently dismissed their claims — the English rule might be an attractive means of limiting competitor misuse of the private antitrust remedy.

In sum, we have found from the sample that competitor plaintiffs account for a substantial proportion of filed claims. In our view, neither antitrust injury requirements nor simple screens based on traditional antitrust analysis can control effectively misuse of the remedy by competitors who claim exclusionary conduct. Some further modification and curtailment of the private antitrust remedy, as we suggest or as others may propose, will be necessary to do so.

194. See Clayton Act § 4, 15 U.S.C. § 15a (1988).

APPENDIX

ORIGINS OF THE SAMPLE OF COMPETITOR CASES ALLEGING
ILLEGAL HORIZONTAL RESTRAINTS

Table A lists the seventy-four cases in our sample, the date of their filing, and the district court that reviewed the claim. We identified this group of cases from the original Georgetown data set of 1935 cases by selecting all cases in which (1) the plaintiff's primary business relationship to the defendant was that of a competitor, and (2) one of the primary allegations was "horizontal price-fixing and market allocation by horizontal competitors."¹⁹⁵ Multidistrict litigation cases, some of which organized related private cases that followed important government cases, are not included in the overall sample of 1935 case records.

We eliminated from this set those cases dealing with patent licensing on the grounds that the primary issue in such cases is how to balance gains from innovation with those from diffusion of technology, an issue dealt with extensively in the literature. In three cases within this group, plaintiffs appear to argue they need technical information to participate in the market: film for cameras, assemblies for attaching plastic tags to clothing, and telex terminal equipment. The detailed information we would need to evaluate these claims, e.g., the innovation process, the degree of complementarity among the products, and the difficulty and delays in duplicating new technology, is not available.

The Georgetown sample also includes fifteen cases filed by competitors within the category of mergers, acquisitions, and joint ventures "among horizontal competitors." Based on references in the *Wall Street Journal Index* to announcements of mergers, SEC filings, and defensive suits by targets, seven of the fifteen cases filed by competitor plaintiffs to block mergers appear to have been filed by targets. The other eight cases raise issues similar to those in the competitor cases alleging horizontal restraints, but we do not analyze the merger cases here. Werden¹⁹⁶ carefully analyzed six competitor plaintiff suits alleging Clayton Act section 7 violations and found that five claimed incipient predatory conduct. Two plaintiffs appear to have alleged reduced competition in some areas and increased competitive efforts targeted at rivals.

195. Georgetown Project, *Court Records Questionnaire*, *supra* note 18, at 3, 5.

196. Gregory J. Werden, *Challenges to Horizontal Mergers by Competitors Under Section 7 of the Clayton Act*, 24 AM. BUS. L.J. 213 (1986).

Table A. List of Competitor Cases Classified by Nature of Claim

ANTICOMPETITIVE EXCLUSION CLAIMS

Access to inputs

Consolidated International Corp. v. Prefexray Division, Litton Medical Products, Inc., N.D. Ill., 6/12/73.

Edlon Industries Inc. v. Slide-Rite Mfg. Corp., S.D.N.Y., 1/04/76.

Julius Nasso Concrete Corp. v. DIC Concrete Corp., S.D.N.Y., 6/22/78.

International Filter Corp. v. Cambridge Filter Corp., N.D. Cal., 9/14/82.

Access to retail outlets or distribution network

Budget Rent-a-Car Corp. v. Hertz Corp., Avis Rent-a-Car Inc., N.D. Cal., 4/29/77.

The Big Cheese Inc. v. Kroger Food Stores, N.D. Cal., 8/29/80.

J.W.T., Inc. v. Sichel, Inc., N.D. Ill., 5/09/73.

Irwin Askenazy dba Ash Dist. v. The B. Manischewitz Co., N.D. Ill., 12/23/77.

Dairy Chain Inc, Westchester Processing Corp. v. Waldbaum's Inc., S.D.N.Y., 10/11/73.

Charles Labs Inc. v. Leo Banner, S.D.N.Y., 10/07/74.

Robert Simmons Inc. v. Binney & Smith Inc., S.D.N.Y., 9/26/75.

Boardwalk Markets Inc., Busy Boy Markets Inc. v. Associated Food Stores, N.D. Cal., 2/20/76.

The American Film Theatre Inc. v. Universal Film Exchanges Inc., S.D.N.Y., 1/06/75.

Warehouse Wines & Spirits v. Safeway Inc., N.D. Cal., 12/24/81.

Exclusive Contracts with Buyers

M.K. Metals, Inc. v. National Steel Corp., N.D. Ill., 4/12/79.

Poirot Exhibitors Service Corp. v. Chicago Automobile Trade Assoc., N.D. Ill., 2/22/78.

Variety Theater & Dinner Club Inc. v. Carriage Trade Advertising Corp., N.D. Ga., 4/19/78.

People of the State of Illinois v. University of Illinois, N.D. Ill., 6/18/73.

Big Bear Cartage, Inc. v. Air Cargo, Inc., N.D. Ill., 7/11/75.

C. W. Limousine, Inc. v. Albert A. Rothengast, Jr., N.D. Ill., 3/02/76.

SRA-Triumvera v. B. Polisky & J. Agrest, N.D. Ill., 5/26/82.

The Diners Club, Inc. v. Air Canada, Inc., S.D.N.Y., 12/27/78.

Campbell Plaza Theatres Inc. v. Century Theaters, N.D. Cal., 11/04/75.

Festival Enterprises Inc. v. R. L. Lippert, Sr., N.D. Cal., 3/15/76.

Big T Lines v. Navajo Freight Lines, N.D. Cal., 4/29/76.

Abadir & Co. v. Industrias Quimicas de Mexico, N.D. Cal., 9/10/76.

Oakland Tribune Inc. v. Chronicle Publishing Co., Inc., N.D. Cal., 12/19/83.

Price Predation

Consolidated Terminal Systems Inc. v. ITT World Communications Inc., S.D.N.Y., 10/10/80.

Canadian Ace Brewing Co. v. Joseph Schlitz Brewing Co., N.D. Ill., 11/13/78.

Broadway Delivery Co. v. UPS Inc., S.D.N.Y., 3/14/75.

Barnet's Express Inc. v. UPS of America, S.D.N.Y., 4/23/80.

Thillens Inc. v. The Community Currency Exchange Assoc. of Illinois, N.D. Ill., 6/12/81.

Shaw Concerts Inc. v. Columbia Artists Management Inc., S.D.N.Y., 8/28/75.

DiGiorgio Corp. v. Amstar Corp., N.D. Cal., 3/16/76.

Trans-International Trading Co. v. Mobil Oil Corp., N.D. Cal., 4/27/77.

Hoyt Heater Co. of Northern California v. American Appliance, N.D. Cal., 9/27/77.

M & R Laboratories Inc. v. Trewax Co., N.D. Cal., 4/07/78.

CLASSICAL HORIZONTAL AGREEMENT

Murphy Pacific Marine Salvage Co. v. Thomas B. Crowley, N.D. Cal., 3/12/74.

Cofinco Inc., Imperial Commodities Corp. v. Angola Coffee Co., S.D.N.Y., 11/26/74.

Ace Agencies v. Seaboard Shipping Co., N.D. Ill., 3/12/81.

GAF Corp. v. Eastman Kodak Co., S.D.N.Y., 1/30/73.

VERTICAL PRICE FIXING, VERTICAL PRICE DISCRIMINATION

Alloy International Co. v. Hoover-Nsk Bearings, Inc., N.D. Ill., 8/23/73.

Lee Klinger v. Chrysler Corporation, N.D. Ill., 1/15/73.

Olympic Distributors, Inc., Sportmart, Inc. v. Leonard Steinlauf, N.D. Ill., 11/08/74.

Vogt's Wine Shop v. Joseph E. Seagram & Sons, Inc., N.D. Ill., 1/06/82.

Dyna-Cell Inc. v. Badische Inc., S.D.N.Y., 11/24/75.

Arnie's Place Ltd. v. Jordache Enterprises Inc., R.H. Macy's Inc., S.D.N.Y., 11/26/79.

A & W International Inc. v. E. W. Vierra, N.D. Cal., 3/23/77.

Fred Lautze Inc. v. Ford Motor Co., N.D. Cal., 7/18/78.

Richard A. Harte v. International Diagnostic Technology Inc., N.D. Cal., 5/27/81.

BRANDNAME/PATENT INFRINGEMENT

Grip-Pak, Inc. v. Illinois Tool Works, Inc., N.D. Ill., 7/26/77.

Castcraft Industries, Inc. v. Headliners International Inc., N.D. Ill., 6/23/76.

National Business System v. A.M. International, Inc., N.D. Ill., 11/05/81.

Ben Clements & Son, Inc. v. Dennison Manufacturing Company, S.D.N.Y., 8/19/76.

Premo Pharmaceutical Labs Inc. v. Boehringer Ingelheim Ltd., S.D.N.Y., 1/21/81.

Anti-Monopoly Inc. v. General Mills Inc., N.D. Cal., 8/11/75.

Superior Products v. Thiokol Corp., N.D. Cal., 8/12/76.

NO SHERMAN ACT ISSUE

Martin-Trigona A.R. v. Westinghouse Broadcasting Co., S.D.N.Y., 6/12/80.

Mr. V's Enterprises Inc. v. Willegermand Inc., N.D. Ga., 5/22/81.

McCall Sanders v. Tyson's Food, Inc., N.D. Ill., 2/20/73.

Cargo Safe v. Bruest Industries, N.D. Ill., 5/24/74.

Dan Goldenpaul Associates v. New York Times Inc., Associated Press Inc., S.D.N.Y., 1/05/73.

Guido Sapienza (by his parents) v. New York News, Inc., S.D.N.Y., 10/03/79.

Dominick Berardinelli dba Bernard Assoc. v. Castle & Cooke Inc., N.D. Cal., 2/24/75.

Alta Plaza Market v. Associated Food Stores, N.D. Cal., 1/16/78.

International Travel Club of America, Inc. v. Karageorgis Lines Inc., N.D. Cal., 2/09/81.

MISCELLANEOUS CLAIM OR INSUFFICIENT INFORMATION TO CLASSIFY CLAIM

Coleco Industries Inc. v. Brunswick Corp., S.D.N.Y., 2/03/75.

Depilatron Inc. v. Kree Inst. of Electrolysis Inc., S.D.N.Y., 11/10/75.

Greater Kansas City Independent Taxi Assoc. Inc. v. Kansas City, W.D. Mo., 8/13/81.

American Basketball Assoc. v. National Basketball Assoc., S.D.N.Y., 12/09/75.

Harold T. McCormick v. Bankamerica Corp., N.D. Cal., 1/31/74.

Dacom Inc. v. Ricoh Co. Ltd., N.D. Cal., 1/30/76.

D. A. Richards v. American Veterinary Medical Assoc., N.D. Cal., 10/31/79.

J.M. Dungan, Trustee for ABC Touring Service of Salinas Inc. v. Morgan Drive-Away Inc., N.D. Cal., 8/20/75.

M.K. Metals, Inc. v. National Steel Corp., N.D. Ill., 4/12/79.