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Controlling the Competitor Plaintiff in Antitrust Litigation

*William H. Page**
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In *Misuse of the Antitrust Laws: The Competitor Plaintiff,*[1] Edward Snyder and Thomas Kauper survey a sample of private antitrust cases from the period 1973-1983 and review critically the recent economic literature on raising rivals' costs as an exclusionary practice. Measuring the sample against the theory, they find relatively few meritorious suits brought by competitors of the alleged offenders.[2] They also find that the antitrust injury doctrine announced in 1977 in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[3] had no significant effect on the relative frequency of competitor suits filed during the period covered by the sample.[4] This result, they conclude, suggests that *Brunswick* does not curb misuse of the antitrust laws. Turning to the present interpretation of the law, they find that careful pleading can so easily circumvent the antitrust injury doctrine that the doctrine holds no prospect for stemming the tide of perverse competitors' suits.[5] Plaintiffs, they argue, may easily get past the pleading stage to the merits by modifying their complaints to include the necessary allegations of anticompetitive exclusion. Snyder and Kauper therefore recommend that the private competitor's suit be abolished and replaced by a form of *parens patriae* suit on behalf of the few legitimately aggrieved competitors.[6]

Much in Snyder and Kauper's study is worthy of comment. They

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

2. *See id.* at 575-76.

3. 429 U.S. 477 (1977).

4. *See* Snyder & Kauper, *supra* note 1, at 581.

5. *See id.* at 581-88.

6. *See id.* at 597-98. For an early argument in favor of *parens patriae* suits in some circumstances, see Roger D. Blair, *The Sherman Act and the Incentive to Collude,* 17 ANTITRUST BULL. 433 (1972).

have given us a useful picture of private antitrust litigation during the period covered by the sample, one that may be more accurate than a reading of reported cases from that period would suggest.[7] Moreover, their generally critical treatment of the literature on raising rivals' costs is clear and focused on the need to draw administrable policy conclusions.[8] Most noteworthy, however, is their critique of the antitrust injury doctrine as a means of controlling unmeritorious or perverse suits by competitors. Their argument on this score — based upon their analysis of the 1973-1983 data and some more recent antitrust injury decisions — is deeply flawed and does not support their conclusion that competitor suits should be abolished. We argue here that the antitrust injury requirement[9] and related procedural devices have evolved to address the problem of perverse competitor suits. Moreover, the solution that Snyder and Kauper offer for the problem will not likely improve upon the traditional methods of the legal system.

I. THE *BRUNSWICK* DECISION AND THE EVOLUTION OF ANTITRUST

That Snyder and Kauper found no significant difference between the relative number of competitors' suits filed before and after the *Brunswick* decision in their sample period is neither surprising nor consequential. The development of antitrust law — including the antitrust injury doctrine — is evolutionary. As one commentator has noted, "the Sherman Act can be regarded as 'enabling' legislation — an invitation to the federal courts to learn how businesses and markets work and formulate a set of rules that will make them work in socially

7. For extensive examination of the Georgetown antitrust project data described in Snyder & Kauper, *supra* note 1, at 554 & n.15, see PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (Lawrence J. White ed., 1988).

8. Snyder and Kauper's objection that the raising rivals' costs theories are essentially special cases with no strong policy consequences is being voiced with increased frequency. They cite, for example, Franklin M. Fisher, *Games Economists Play: A Noncooperative View,* 20 RAND J. ECON. 113 (1989). *See also* Sam Peltzman, *The Handbook of Industrial Organization: A Review Article,* 99 J. POL. ECON. 201, 206 (1991) (observing "the seeming inability of the recent theory to lead to any powerful generalization. This is especially true in the area of game theory, where this problem seems beyond remediation.").

9. We have both discussed antitrust injury at length elsewhere. For Page's work, see William H. Page, *Optimal Antitrust Penalties and Competitors' Injury,* 88 MICH. L. REV. 2151 (1990); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency,* 75 VA. L. REV. 1221 (1989) [hereinafter Page, *Chicago School*]; William H. Page, *The Scope of Liability for Antitrust Violations,* 37 STAN. L. REV. 1445 (1985); William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury,* 47 U. CHI. L. REV. 467 (1980) [hereinafter Page, *Damages and Efficiency*]. For Blair's work, see, e.g., Roger D. Blair & Gordon L. Lang, Albrecht *After* ARCO: *Maximum Resale Price Fixing Moves Toward the Rule of Reason,* 44 VAND. L. REV. 1007 (1991); Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury,* 42 VAND. L. REV. 1539 (1989).

efficient ways."[10] In developing antitrust law, the federal courts follow the familiar decisional methods of common law courts.[11] This process requires the gradual development of standards based upon the accumulated knowledge of antitrust cases and the prevailing economic wisdom. Consequently, no single decision — especially *Brunswick* — can be expected obviously and immediately to affect private plaintiffs' gross filing rates. In dismissing the antitrust injury doctrine based on their empirical results, Snyder and Kauper lose sight of this fundamental feature of antitrust law.

Brunswick, in particular, had little immediate impact because even informed observers did not view it as an important decision in 1977. Consider the following table showing the relative frequency with which the antitrust decisions of the 1977 Supreme Court term were noted in law reviews:[12]

Antitrust Cases, 1977 Supreme Court Term	Times Noted in Law Reviews
Continental T.V., Inc. v. GTE Sylvania, Inc.[13]	28
Bates v. State Bar[14]	26
Illinois Brick Co. v. Illinois[15]	25
United States Steel Corp. v. Fortner Enterprises[16]	6
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.	2

These figures indicate starkly that *Brunswick* was not viewed as a particularly important or interesting decision. The reasons are apparent from the opinion itself. The decision denied recovery to bowling centers that sought treble damages for the loss of profits they would have made had their competitors gone under instead of merging illegally with the defendant Brunswick. The Court held that plaintiffs' harms, although causally related to an antitrust violation, were not compensable under section 4 of the Clayton Act. Because plaintiffs were seeking damages for an increase in competition, to permit recov-

10. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 52 (1985); *see also* William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1, 36 (1991). For criticism of this tradition in antitrust law, see Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CAL. L. REV. 263 (1986).

11. *See, e.g.*, HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY 228-29 (1954) ("[I]n adopting the standard of the common law Congress expected the courts not only to apply a set of somewhat vague doctrines but also in so doing to make use of that 'certain technique of judicial reasoning' characteristic of common law courts."). *See generally* Page, *Chicago School*, *supra* note 9.

12. The figures are drawn from the *Table of Cases Commented Upon*, *in* 18 INDEX TO LEGAL PERIODICALS: SEPTEMBER 1976 TO AUGUST 1979, at 1481 (1980).

13. 433 U.S. 36 (1977).

14. 433 U.S. 350 (1977).

15. 431 U.S. 720 (1977).

16. 429 U.S. 610 (1977).

ery would, the Court said, be inconsistent with the antitrust laws.[17] The decision seemed perfectly reasonable under virtually any interpretation of the antitrust laws.

Brunswick also, of course, announced the principle that plaintiffs must have suffered *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. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[18] In retrospect, we can see that this passage announced a very fertile doctrine. But that doctrine, as presently understood, did not spring fully formed from the *Brunswick* opinion itself like Athena from the head of Zeus; instead, *Brunswick* was a step in an evolutionary process that began before the case and has continued ever since. As Snyder and Kauper seem to recognize, nascent forms of the antitrust injury doctrine appeared in earlier appellate decisions.[19] Moreover, the absurdity of the theory of damages in *Brunswick* obscured the reach of the antitrust injury principle for years.

Following *Brunswick*, some reason existed to think that the antitrust injury doctrine might be limited to cases in which the statute at issue, like section 7 of the Clayton Act, barred practices with only an incipient effect on competition.[20] The antitrust injury doctrine might also have barred recovery only when the alleged offense actually increased competition. The first full-length article attempting to extend the principle to all antitrust damage actions under an economic efficiency rationale did not appear until 1980.[21] The Supreme Court resolved basic issues under the doctrine in 1981,[22] 1986,[23] and 1990;[24] some fundamental aspects of the principle remain in doubt. During this period, the practical importance of antitrust injury in antitrust decisionmaking has increased substantially.[25]

17. 429 U.S. at 487-88.

18. 429 U.S. at 489.

19. *See, e.g.*, Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 COLUM. L. REV. 979, 989 (1977) (describing *Brunswick* as a "[c]larification of the [c]oncept of [a]ntitrust [i]njury" and speculating on future developments).

20. *See, e.g., id.* at 992 n.76.

21. *See* Page, *Damages and Efficiency, supra* note 9.

22. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981).

23. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

24. Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990).

25. The term *antitrust injury* appeared in only 16 district court opinions in 1978, but its use per year increased steadily thereafter, reaching a high of 58 in 1987. The figures are 1978 (16); 1979 (17); 1980 (21); 1981 (35); 1982 (36); 1983 (39); 1984 (39); 1985 (46); 1986 (54); 1987 (58); 1988 (53); 1989 (41); 1990 (39); 1991 (41). The figures are based on a Westlaw search of the

Given the fact that the antitrust injury principle has emerged through an evolutionary process and was not "legislated" in full form on the date *Brunswick* was handed down, one would hardly expect to see much difference between the relative frequency of filings by competitor plaintiffs shortly before and shortly after the decision. Because antitrust injury was a relatively unformed doctrine in those years, one can draw few conclusions from Snyder and Kauper's data about its *prospective* efficacy as a means of controlling strategic or perverse suits by competitors.

II. ANTITRUST INJURY IN PRACTICE

The second part of Snyder and Kauper's critique of antitrust injury does consider the present interpretation of the doctrine, but is no more persuasive than their empirical results. After a brief review of the doctrine's requirements and its application by the courts, Snyder and Kauper state that antitrust injury does not effectively bar improper competitor suits.[26] Their principal basis for this conclusion is a comparison of the Supreme Court's decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*,[27] and the district court's decision in *Tasty Baking Co. v. Ralston Purina Inc.*[28] In *Cargill*, the Court extended the antitrust injury requirement to injunction actions, holding that competitors of merging firms could not enjoin the merger if the only harm that the merger caused them was the result of increased efficiency. Snyder and Kauper state that the Court "clearly indicated . . . that had there been proper allegation and proof of threatened predation, the antitrust injury requirement would have been met."[29] They then point to *Tasty Baking*, a case decided shortly after *Cargill*, in which the district court upheld competitor standing to challenge a merger, where the plaintiff did allege a threat of predatory pricing by the defendant after the merger. Snyder and Kauper continue: "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

FATR-DCT library for the term *antitrust injury* in each year. This increase occurred during a period in which filings of private antitrust cases dropped from 1,457 in 1980 to 521 in 1990. *See* Maxwell M. Blecher, *The Impact of* GTE Sylvania *on Antitrust Jurisprudence*, 60 ANTITRUST L.J. 17, 17 & n.2 (1991), (citing GENERAL ACCOUNTING OFFICE, JUSTICE DEPARTMENT CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 15 (1990), *reprinted in* 2 Trade Reg. Reports (CCH) No. 137 (Dec. 18, 1990)).

26. *See* Snyder & Kauper, *supra* note 1, at 582-88.

27. 479 U.S. 104 (1986).

28. 653 F. Supp. 1250 (E.D. Pa. 1987).

29. Snyder & Kauper, *supra* note 1, at 585.

must proceed to the merits."[30] In a similar vein, they state:

> In cases seeking to enjoin mergers of firms competing with the plaintiff, courts must struggle with proof of potential predation. . . . How proximate must such acts be? 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.[31]

This account of the state of the law is at best incomplete. Although *Cargill* rejected the contention that competitor plaintiffs should never be permitted to challenge mergers, it did, contrary to Snyder and Kauper's suggestion, provide extended dicta "offering guidance" on how to identify antitrust injury in such a setting.[32] The Court made clear, as it had already done in *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.,*[33] that it generally accepted the Chicago analysis of predatory pricing, which views claims of predatory pricing with great skepticism: "Claims of threatened injury from predatory pricing must, of course, be evaluated with care."[34] In *Matsushita,* the Court required a greater than usual evidentiary showing to survive a summary judgment motion where the plaintiff's allegations were inherently implausible, as in the case of predatory pricing.[35] Likewise, under *Cargill's* standards, bare allegations of threatened predatory pricing are inadequate to establish antitrust injury; the circumstances must be such as to make such an allegation credible. "Courts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."[36] The Court in *Cargill* emphasized that the merging firms' 28.4% postmerger market share would have made predatory pricing impossible. Moreover, the Court specifically admonished courts hearing such cases to take account of postmerger entry barriers, because an allegation of likely *successful* predatory pricing would be implausible if firms could easily reenter the market when the alleged predator would supposedly be seeking to recoup.[37] One district court's dubious inter-

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30. *Id.*

31. *Id.* at 587 (footnote omitted).

32. *Cargill,* 479 U.S. at 119 n.15.

33. 475 U.S. 574, 588-90 (1986).

34. *Cargill,* 479 U.S. at 121 n.17. The Court continued: "[T]he obstacles to the successful execution of a strategy of predation are manifold, and . . . the disincentives to engage in such a strategy are accordingly numerous." 479 U.S. at 121 n.17 (citing the leading Chicago commentators).

35. *See Matsushita,* 475 U.S. at 596-97.

36. *Cargill,* 479 U.S. at 120 n.15.

37. In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist *after* the merged firm

pretation of the Court's admonitions is insufficient to dismiss antitrust injury as a legitimate filter for competitor plaintiffs.

The Court's recent decision in *Atlantic Richfield Co. v. USA Petroleum Co.*[38] *(ARCO)* emphasizes once again that a competitor may not satisfy the antitrust injury requirement merely by alleging that a violation occurred and that it harmed the competitor in some way. More importantly, the case illustrates plaintiffs' difficulties in tailoring allegations to satisfy the antitrust injury requirement. The plaintiff's entire case in *ARCO* rested on ARCO's alleged violation of the *Albrecht*[39] rule prohibiting maximum resale price fixing. The Court found that none of the supposed rationales for the *Albrecht* rule supported a finding of antitrust injury to a competitor. To satisfy *ARCO,* a competitor will have to meet the extraordinary burden of plausibly alleging a campaign of predation against retail service stations.

In our view, *Tasty Baking*'s interpretation of the *Cargill* standards was questionable at best. Similarly disturbing was the Second Circuit's *Bigelow* decision,[40] which reversed the district court's grant of summary judgment to defendants on the competitor's request for a preliminary injunction against a merger. The appellate court found that a merger creating a firm with an eighty-four percent market share created a "presumption" of antitrust injury to competitors,[41] despite the district court's finding in the same case that there was no evidence of a likelihood of predation.[42] *Tasty Baking* and *Bigelow,* however, are of dubious vitality. Other cases have been truer to the Court's admonitions in *Cargill.*[43] It is especially unlikely that *Bigelow*'s presump-

had eliminated some of its rivals, because at that point the remaining firms would begin to charge supracompetitive prices, and the barriers that existed during the competitive conditions might well prove insignificant.

479 U.S. at 120 n.15; *see also* Liggett Group, Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 339 (4th Cir. 1992) ("[P]redatory pricing must involve in addition to some level of below-cost pricing that is harmful to competition, the rational expectation of later realizing monopoly profits. The failure to show this additional aspect is fatal."); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401 (7th Cir. 1989) (Easterbook, J.) (In a predatory pricing case, "[o]nly if a market structure makes recoupment feasible need a court inquire into the relation between price and cost."), *cert. denied,* 494 U.S. 1019 (1990).

38. 495 U.S. 328 (1990).

39. Albrecht v. Herald Co., 390 U.S. 145 (1968).

40. R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102 (2d Cir.), *cert. denied,* 493 U.S. 815 (1989).

41. 867 F.2d at 111 ("Market share data . . . constitute[] sufficient evidence . . . of antitrust injury to a competitor to create a genuine issue for trial.") (citing Tasty Baking Co. v. Ralston Purina, Inc., 653 F. Supp. 1250, 1265 (E.D. Pa. 1987)).

42. *See* R.C. Bigelow, Inc. v. Unilever N.V., 689 F. Supp. 76, 80-81 (D. Conn. 1988), *revd.,* 867 F.2d 102 (2d Cir.), *cert. denied,* 493 U.S. 815 (1989).

43. *See, e.g.,* Phototron Corp. v. Eastman Kodak Co., 842 F.2d 95 (5th Cir.), *cert. denied,* 486 U.S. 1023 (1988); *see also* Ansell Inc. v. Schmid Labs., Inc., 757 F. Supp. 467, 484-85

tion that a high market share implies injury to competitors survives *ARCO.*

The litigation in *Remington Products, Inc. v. North American Philips Corp.*[44] is instructive on this point. There, the plaintiff sought damages as a result of a completed merger of its competitors. The district court initially granted defendant's motion for summary judgment under *Cargill,* then reversed itself following *Bigelow.*[45] Recently, however, the district court reversed itself once again on the basis of *ARCO,* concluding that *Bigelow's* presumption that an illegal merger would inflict antitrust injury on a competitor did not survive *ARCO.*[46] The evolving standards of antitrust injury appear to provide a "lesson for competitor plaintiffs" that is quite different from the one Snyder and Kauper draw. Mere allegations of predatory intent will not suffice, and the likelihood of a court's finding antitrust injury from a merger of one's competitors is remote, even when the defendant's market share is quite high.

The key issue in all of this is whether courts, using the antitrust injury doctrine to focus litigation on the efficiency consequences of practices, can distinguish anticompetitive exclusion from efficient practices at a sufficiently early stage in the proceedings to prevent perverse competitors' suits. Unmeritorious suits that survive summary judgment increase congestion in an already overburdened court system. Moreover, the cost of defending such suits may lead to inefficient settlements. Courts may ameliorate many of these difficulties by ruling expeditiously on summary judgment motions; Snyder and Kauper suggest, however, that they cannot:

> [P]laintiffs 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

(D.N.J. 1991) (finding injury from "marketing clout" or popularity of competing brand not antitrust injury).

44. 717 F. Supp. 36 (D. Conn. 1989).

45. 717 F. Supp. at 48-49.

46. Remington Prods., Inc. v. North Am. Philips Corp., 755 F. Supp. 52, 57-58 (D. Conn. 1991).

> 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.[47]

This passage again suggests that antitrust injury's requirement that the plaintiff allege some credible link between its harm and a genuinely anticompetitive exclusionary practice is of no consequence, because the plaintiff may simply allege whatever the court wants to hear. But in most cases no credible allegations of what Snyder and Kauper call the "necessary conditions" for successful exclusion will be possible. In *ARCO,* for example, the plaintiffs could hardly have plausibly alleged a predatory pricing scheme given a market with virtually no entry barriers.[48]

Snyder and Kauper suggest that such unmeritorious cases will nonetheless be filed, and that only a rule completely barring competitor suits will be effective.[49] But no rule, not even the one recommended by Snyder and Kauper, can absolutely prevent a firm from filing a baseless lawsuit. The question must be whether the legal system has at its disposal a means of deterring such suits by making the prospective gains from filing them less than the prospective costs. The courts must, in other words, be able to weed out baseless suits at an early stage of the litigation or to impose sanctions that deter their filing in the first place.

Courts need not dismiss cases on the pleadings to meet this condition. Snyder and Kauper indicate that if the plaintiff survives a motion to dismiss the case must proceed "to the merits." But cases may be won on the merits without a trial. Under the Court's current standards, the defendant need only show the absence of adequate proof in the record of an essential element of the plaintiff's claim to win sum-

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47. Snyder & Kauper, *supra* note 1, at 587.

48. Plaintiff will, however, apparently have the opportunity to try. On remand from the Supreme Court's decision in *ARCO,* the Ninth Circuit majority found that the district court must hear plaintiff's predatory pricing claim, despite the dissent's persuasive argument that plaintiff had abandoned it. USA Petroleum Co. v. Atlantic Richfield Co., No. 87-5681, 1992 U.S. App. LEXIS 18445 (9th Cir. Apr. 16, 1992). Still more dubiously, the majority found that plaintiff need not show that there was a dangerous probability that the alleged predatory pricing would succeed, reasoning that the "dangerous probability" standard applies only to § 2 cases. 1992 U.S. App. LEXIS 18445 at *15. Although dangerous probability is indeed a § 2 requirement, in a broader sense it is inseparable from any coherent definition of predatory pricing. A price cannot be predatory unless the defendant will probably be successful in recouping the losses it suffers during the predatory campaign by setting supracompetitive prices after plaintiff is driven from the market.

49. *See* Snyder & Kauper, *supra* note 1, at 587-88, 596-97. For an argument to the opposite effect, from the opposite ideological viewpoint, see John B. McArthur & Thomas W. Paterson, *The Effects of* Monsanto, Matsushita, *and* Sharp *on the Plaintiff's Incentive to Sue,* 23 CONN. L. REV. 333 (1991).

mary judgment.[50] After *ARCO,* discovery can focus on issues of market power and entry barriers, facilitating early disposition of unmeritorious cases.[51]

The increased availability of summary judgment, especially since *Matsushita,* has had a dramatic effect on antitrust litigation. One survey of reported summary judgment decisions in antitrust conspiracy cases since *Matsushita* found that sixty-four of the decisions granted summary judgment while only thirteen denied it — and one of those thirteen denials was the Ninth Circuit's decision in *ARCO* that the Supreme Court later reversed.[52] While judges are admittedly more likely to write opinions when granting rather than denying summary judgment, these figures are impressive. Snyder and Kauper's statement that the number of summary judgment motions granted "is still low"[53] is bewildering. To be sure, summary judgment normally comes only after some discovery and so may entail significant costs to the defendant. But few plaintiffs file suit with the knowledge that they will lose on summary judgment. Those who do so risk sanctions under Rule 11.[54] The number of private antitrust cases filed per year has plummeted by almost two thirds since 1980,[55] in part for these reasons.

Even if summary judgment is denied, the proceedings need not be unduly protracted. In *Ansell Inc. v. Schmid Laboratories, Inc.,*[56] a merger agreement was signed on August 28, 1990, and a competitor's suit challenging the merger was filed on September 13, 1990. The court denied summary judgment on November 13, 1990, but began hearings on plaintiff's application for a permanent injunction *the same day.* The court heard evidence on three days over the following three weeks and rendered its decision denying relief (on antitrust injury grounds) on February 27, 1991, barely six months after the signing of

50. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

51. *See* Rebel Oil Co. v. Atlantic Richfield Co., 133 F.R.D. 41, 45 (D. Nev. 1990) (limiting discovery, in light of *ARCO,* to issues of monopoly power and entry barriers, because relevance of other discovery was contingent on these issues).

52. Harry Zirlin, Note, *Summary Judgment in Federal Court: New Maxims for a Familiar Rule,* 34 N.Y.L. SCH. L. REV. 201, 218 & n.125 (1989).

53. Snyder & Kauper, *supra* note 1, at 559 n.37.

54. *See, e.g.,* Eastway Constr. Corp. v. New York, 762 F.2d 243 (2d Cir. 1985). For an argument that the standards for Rule 11 sanctions in antitrust cases are still too lenient, see Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure,* 67 N.C. L. REV. 1023, 1056-59 (1989). Louis recommends increased use of attorney fee shifting. *Id.* at 1059-61. Such a measure may involve chilling some legitimate claims, as Louis recognizes, but it falls far short of cutting off those claims entirely.

55. *See* Blecher, *supra* note 25, at 17 n.2.

56. 757 F. Supp. 467 (D.N.J. 1991).

the merger agreement.[57] Clearly, the federal courts can move expeditiously when the case demands it.

Snyder and Kauper's own data suggest that courts have terminated most competitor suits either on the pleadings or on summary judgment. Moreover, their own review of fairly limited information about the cases leads them to conclude that only a small percentage are meritorious. Why should courts, properly guided by the appropriate economic understanding and the available legal mechanisms, be unable to do the same? If courts were to apply Snyder and Kauper's standards of classical market power and high entry barriers, they might be able to do a more effective job in weeding out perverse suits than they have done in the past using traditional judicial methods.

III. The Problem of Raising Rivals' Costs

Snyder and Kauper concede that summary judgment based upon the requirement of market power "is becoming common in a variety of antitrust cases."[58] They nonetheless believe that summary judgment will be ineffective in the future, even in tandem with the antitrust injury requirement, in controlling perverse competitors' suits because of the special dangers posed by the literature on raising rivals' costs:

> 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, . . . 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.[59]

The argument here appears to be that the problem of perverse suits is likely to get worse in the future because of the ambiguities of the economic literature on raising rivals' costs; therefore, we should cut off all competitors' suits as a prophylactic measure.

This argument faces three difficulties. First, the concept of raising rivals' costs has not yet had a significant effect on antitrust litigation. Despite antitrust scholars' preoccupation with raising rivals' costs, only a few cases have used the term, and the leading law review article advancing the notion as a basis for liability has been cited by a court

57. 757 F. Supp. at 469. Still more impressive, a new judge was assigned to the case after the second hearing day. 757 F. Supp. at 469 n.1.

58. Snyder & Kauper, *supra* note 1, at 588.

59. *Id.*

exactly *once,* five years ago.[60] Moreover, the number of private antitrust cases filed has fallen dramatically in recent years,[61] suggesting that the present federal judiciary is not particularly receptive to innovative theories of liability.[62]

Second, Snyder and Kauper's argument addresses the problem posed by the literature on raising rivals' costs in an indiscriminate way. Let us grant that plaintiffs are likely to assert the new theories of anticompetitive exclusion in the future to circumvent the antitrust injury requirement. Let us also concede Snyder and Kauper's argument that the observable conditions for many of those theories, particularly those dealing with vertical integration or exclusive contracts, are as consistent with enhancement of consumer welfare as with anticompetitive exclusion. These premises do not compel the conclusion that all competitor suits should be foreclosed. The concerns Snyder and Kauper raise relate to the new theories of anticompetitive exclusion themselves, not to the antitrust injury doctrine. Snyder and Kauper recognize that some exclusionary practices are demonstrably anticompetitive. If the practices described in the literature on raising rivals' costs stand outside that category, the proper legal response is to reject those theories as a basis for liability.[63] And again, there seems little reason to fear that the present federal judiciary will not demand the necessary proof of inefficient exclusion.[64]

Finally, Snyder and Kauper's argument against the theories of raising rivals' costs applies regardless of who enforces them, competitors or public enforcement agencies. Their suggestion that competitors are less likely than public enforcers to exercise suitable discretion in filing antitrust suits is therefore irrelevant: The theories, on Snyder

60. Premier Elec. Constr. Co. v. National Elec. Contractors Assn., 814 F.2d 358, 368 (7th Cir. 1987) (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price,* 96 YALE L.J. 209 (1986)). The article has, of course, been cited by dozens of commentators.

61. *See* Blecher, *supra* note 25, at 17 n.2.

62. *See generally* William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s,* 60 FORDHAM L. REV. 49 (1991).

63. Several commentators have criticized the raising rivals' costs theories as adding little or nothing to traditional antitrust analysis of anticompetitive exclusion. *See, e.g.,* Timothy J. Brennan, *Understanding "Raising Rivals' Costs,"* 33 ANTITRUST BULL. 95, 113 (1988); Herbert Hovenkamp, *Antitrust Policy, Restricted Distribution, and the Market for Exclusionary Rights,* 71 MINN. L. REV. 1293, 1295 (1987); Wesley J. Liebeler, *What Are the Alternatives to Chicago?,* 1987 DUKE L.J. 879, 894; *see also* John E. Lopatka & Paul E. Godek, *Another Look at* Alcoa: *Raising Rivals' Costs Does Not Improve the View,* 35 J.L. & ECON. (forthcoming Oct. 1992). For further discussion, see *Nonprice Predation Under Section 2 of the Sherman Act,* 1991 A.B.A. SEC. ANTITRUST L. MONOGRAPH 18.

64. For a good example of the courts' skepticism, see Ansell Inc. v. Schmid Labs., Inc., 757 F. Supp. 467, 484-85 (D.N.J. 1991) (holding that injury from "marketing clout" or popularity of competing brand displacing plaintiff's product from shelves was not antitrust injury).

and Kauper's account, offer no basis for distinguishing anticompetitive from procompetitive practices.[65] Moreover, the enforcement agencies are no more likely to be skeptical of the relevant theories. After all, economists at the Federal Trade Commission — Steven Salop and David Scheffman — have played the leading role in producing and promoting the literature on raising rivals' costs.

CONCLUSION

We have argued that Snyder and Kauper ignored the evolutionary nature of legal change in interpreting from data showing that competitor suits were filed equally frequently before and after *Brunswick*. Snyder and Kauper's proposed solution suffers from the same failing. Cutting off all competitor suits prevents the courts from responding to theoretical developments in traditional ways. Undoubtedly, courts have been misled by fashionable theoretical developments. But antitrust policy and academic industrial organization economics have interacted productively for over a century.[66] Antitrust has provided the subject matter for much of the empirical and theoretical work of industrial organization, which has in turn contributed to the development of antitrust. Snyder and Kauper's argument is insufficient to justify abandonment of a major part of that joint enterprise.

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65. Others have made the same observation. *See, e.g.*, Stephen Calkins, *Comments on Presentation of Steven C. Salop*, 56 ANTITRUST L.J. 65, 68-69 (1987); Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 314 (1987) (arguing that Krattenmaker and Salop's analysis "does not contain a single example that would support a confident conclusion that firms raised rivals' costs in a way that permitted them to increase their own prices and profits").

66. *See generally* Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEXAS L. REV. 105 (1989).