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Worst US Antitrust Decisions...Ever - Part Two

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Abstract

Last month we invited a panel of three US lawyers to discuss some of the worst antitrust decisions of all time. We now conclude that series, with the second set of candidates for the 'Hall of Shame'. Read the opinions carefully–we'll be picking the worst of the worst in a website survey next month.

Worst US antitrust decisions... ever – part two

So enjoyable was last month's debate on the worst US antitrust decisions of all time, we're bringing you another parade of misfits. JAMES CLASPER explains

The next 10:

- Board of Trade of the City of Chicago v United States (1918)
- Associated Press v United States (1945)
- United States v Philadelphia National Bank (1963)
- United States v Pabst Brewing (1966)
- United States v Arnold, Schwinn & Co (1967)
- Utah Pie Co v Continental Baking Co (1967)
- Federal Trade Commission v Procter & Gamble (1967)
- Albrecht v Herald Company (1968)
- Illinois Brick Co v Illinois (1977)
- Aspen Skiing Co v Aspen Highlands Skiing Corp (1985)

Last month we invited a panel of three US lawyers to discuss some of the worst antitrust decisions of all time. We now conclude that series, with the second set of candidates for the 'Hall of Shame'. Read the opinions carefully—we'll be picking the worst of the worst in a website survey next month.

As with the last batch, the list was chosen by *GCR*, in collaboration with our US readers. This has led to a healthy amount of dissent even between our panellists. They often don't agree on why the decision is wrong—or even if it is—which makes for interesting reading.

Over-intervention is the most common error here, covering seven of the 10. In each case, the Supreme Court blocked a merger or joint venture which should, in hindsight, have been cleared.

Illinois Brick, meanwhile, is a classic case of under-intervention: the Supreme Court flew in the face of modern tort law and barred indirect purchasers from suing an antitrust defendant. Two cases—Chicago Board of Trade and Philadelphia National Bank—dwell in the twilight zone of antitrust law. Neither demonstrably bad nor unequivocally wrong, they nevertheless altered the course of US antitrust law.

To some, it might seem unfair to criticise America's highest court for its faulty antitrust jurisprudence. Notwithstanding the luxury of hindsight, even brilliant jurists struggle with complex issues. As the celebrated Supreme Court justice Oliver Wendell Holmes famously wrote: "Great cases, like hard cases, make bad law."

And even the Supreme Court's venerable members are aware of the consequences of their decisions. "One does not forget how much may depend on the decision," Justice Brennan wrote. "More than the litigants may be affected. The course of vital social, economic and political currents may be directed."

Each of these 10 decisions illustrates the fallibility of American jurisprudence. But, far from laughing at the folly of the Supreme Court, we should perhaps celebrate the fluidity of a law and a system that allows such egregious errors to be erased—as entertainingly bad as they may be.

Panellists

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Board of Trade of the City of Chicago v United States

1918

United States Supreme Court

Written by Justice Brandeis

Facts: The government challenged a rule that prohibited members of the Chicago Board of Trade from purchasing or offering to purchase grain that arrived in the city between the end of one day's trading session and the beginning of the next, at a price other than the closing bid of the previous day.

The Supreme Court announced an oft-cited standard: "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." It then held that the rule's resulting restraint of trade was reasonable for two basic reasons.

The court found that because of its limited scope, the rule had no appreciable effect on general market prices and did not restrict the volume of grain coming into Chicago. The court also found that the rule served several legitimate business purposes. The rationale was that most of the night traders were big players and allowing them to make new price bids at night would disadvantage the ordinary traders who only traded when the exchange was open.

BAKER: This landmark decision, written by a celebrated jurist, gets at least honourary membership of the 'Hall of Shame'. It is both famous and infamous for elegantly setting forth the factors to be considered in a 'rule of reason' analysis under section 1 of the Sherman Act.

The problem is that it gives future courts and enforcers no idea as to how weigh and balance the various factors listed. *Chicago Board of Trade* is regularly included in the jury instructions in private antitrust cases. It involves a high degree of uncertainty and confusion—which has only increased as private antitrust litigation has grown in importance.

The decision would have been much better had Justice Brandeis come up with a more limited list of factors, with at least some weights and presumptions that would have helped in the future. However, had Brandeis done that, he would have created something that did not allow the court to decide the *Chicago Board of Trade* case as he wanted to decide it. Fortunately, this piece of vintage populism has been overtaken by history and the era of global electronic markets.

BRIGGS: I disagree: this case doesn't belong on this list. As Don says, the main criticism of it is that it provided a list of factors to be considered under a full-blown rule of reason, without in any way suggesting which factors were most important and how they ought be weighted. That is not, in this case, decided early in the life of the Sherman Act, a wholly fair criticism.

Our legal system springs from the common law tradition. This sort of identification of factors, leaving later courts to flesh out the details decade by decade, was quite suitable then—as it is now. True, the court did not tell us in 1918 how economics should interact with antitrust in great detail, but had the court then done so, the case probably would be seen today as truly misguided, rather than as a good starting point.

The fact that the outcome was probably wrong, at least by today's standards of competition law and economics, is not a reason to pillory Justice Brandeis or the decision.

KOLASKY: I agree with Don that *Chicago Board* belongs in a 'Hall of Shame' But unlike many others, I don't think the case was wrongly decided.

The court found that the prohibition on trading between sessions of the exchange helped create a public market for grain yet to arrive. In the past, most grain had been traded in privately-negotiated transactions in which 'country dealers' were at a disadvantage because of the informational advantages possessed by dealers in Chicago. Assuming the facts supported this finding, Brandeis was right that the restraint was pro-competitive because it created a more liquid and transparent market for grain.

My problem with the decision is its oft-quoted reformulation of the rule of reason: "whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." It is hard to imagine a formulation more devoid of meaningful guidance for later courts.

Justice Brandeis confused the issue even further by going on to articulate a 'kitchen sink' approach in which virtually everything was relevant to this question. His unhelpful reformulation of the rule of reason contributed greatly to later courts seeking refuge in the deceptively simple world of per se rules—leading to many of the other cases in the 'Hall of Shame'.

The trouble is, Justice Brandeis was a better wordsmith than Chief Justice White, who first conceived the rule of reason in his 1911 decision in *Standard Oil*. White correctly focused the inquiry on one simple question—namely, whether the restraint would serve to restrain the flow of commerce (ie restrict output) and bring about the enhancement of prices or would instead serve to develop trade (ie expand output).

Unfortunately, White's prolixity lost out to Brandeis's eloquence—and we've since had to endure more than 50 years of bad antitrust jurisprudence before the court, in *GTE Sylvania*, began to refocus the rule of reason inquiry on Chief Justice White's straightforward inquiry into the effect of the restraint on output and prices.

Associated Press v United States

1945

United States Supreme Court

Written by Justice Black

Facts: In 1944, the Associated Press—whose members included the publishers of more than 1,200 newspapers—collected and distributed news information.

AP's by-laws prohibited its members from selling AP news or news of any member to non-members, and effectively allowed members to veto the prospective membership of newspapers that directly competed with them. Newspapers that did not compete with existing members were freely admitted.

The court held that the by-laws violated the Sherman Act. Justice Black relied on the size and power of the AP, the purpose of the by-laws (allegedly to limit competition), and the possibility of "most serious effects' on competitive newspapers unable to buy news from the "largest news agency".

The court viewed access to the AP news service as a "competitive advantage" for AP members over their rivals, where AP was "the chief single source of news for the American press, universally agreed to be of great consequence", and could not be duplicated by a single newspaper on its own.

But, with respect to the remedy, the court did not say that the AP couldn't prohibit distribution to non-members, only that it must allow non-discriminatory access to membership.

KOLASKY: Associated Press belongs in the 'Hall of Shame' not because it was wrongly decided, but because of the way the court reached what was probably the right result.

There is much in the Supreme Court's opinion to suggest both that AP had market power and that excluded papers would have difficulty forming a competing cooperative with anything like the news-gathering capability of AP. Had the court rested its decision on these facts, most of us would probably agree that the AP's exclusivity rules could be found to violate section 1—without a strong business justification, which AP apparently failed to proffer.

The problem with the decision is that it purports to hold AP's by-laws unlawful without any real inquiry into whether AP had market power or whether it would have been feasible for competing newspapers to find or create an alternative news source that would have enabled them to compete effectively with AP newspapers.

The court's opinion is, therefore, an early manifestation of what, during the later Warren Court years, became a flood of decisions holding that almost any conduct that disadvantaged other, smaller competitors was virtually per se unlawful.

BAKER: This is a prime candidate because it generated so much confusion and mischief in the joint venture area. At the time, there were three competing wire services (Associated Press, International News Service, and United Press). AP was the largest of the three and was a joint venture. Because it was designed to offer its member newspapers an ability to differentiate themselves in their local markets, AP allowed a member to veto admission of a new member in the same local market.

The Supreme Court, using a 'boycott' theory, said that because AP was "the best" and news is important to a democracy, AP had to admit all newspapers that wanted to join on non-discriminatory terms. This compulsory access was ordered despite the fact that, while AP was larger, it was nowhere close to being dominant in the 'wire services' market. The decision ultimately turned AP into a utility, while the other wire services withered and eventually disappeared. Meanwhile, AP's leading members (such as The New York Times and The Chicago Tribune) created their own proprietary services as a source of product differentiation.

Associated Press has simply become the worst US case in the difficult 'essential facilities' area. The message to future joint venture pioneers is this: "If you create something successful, you will probably be charged with a boycott if you try to exclude from membership latecomers who now want to take advantage of your success. It is sufficient for such liability that the venture has created something distinctive and yet does not have monopoly power."

BRIGGS: Yes, this was a pretty bad essential facilities case, decided as if it were a group boycott case. But it did no lasting damage. The essential facilities doctrine is now narrow and limited, and it never got out of hand as a result of this case.

United States v Philadelphia National Bank

1963
United States Supreme Court
Written by Justice Brennan

Facts: The Supreme Court reversed a lower court's approval of a bank merger between the second- and third-largest commercial banks in the Philadelphia area. The deal would have resulted in a combined market share of approximately 36 per cent of the area's banks' total assets, 36 per cent of deposits and 34 per cent of net loans.

The court set forth a 'simple' test for illegality: a merger that "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market" is "so inherently likely" to lessen competition that it must be enjoined, unless there is evidence clearly showing the lack of anti-competitive effects.

The court said that combined shares of at least 30 per cent would permit such an inference. It rejected the banks' rebuttal that competition post-merger would remain vigorous, customers could turn to one of the 40 other banks if dissatisfied with the merged bank, and that governmental regulation and the 'intangible' nature of banking services rendered the merger immune from the effects of concentration.

The court also rejected the banks' argument that the merger was necessary to attract customers in the suburbs—the banks could individually open branches there. It also rejected the argument that the merger would enable the combined bank to compete better against large out-of-state banks, holding that pro-competitive effects in one geographic market cannot offset anti-competitive effects in another. Finally, the court rejected the notion that a larger bank was necessary to stimulate economic development.

BAKER: This decision does not belong in the 'Hall of Shame'. It made an important contribution to a very confusing legal scene: section 7 of the Clayton Act had been amended in 1950 to expand its scope and was crying out for some ordering principles. *PNB* merely sought to apply them.

The Supreme Court's earlier effort, *Brown Shoe* [see 'Worst Decisions', *GCR*, August 2005], had articulated a completely unstructured and unpredictable approach to merger case inquiries. In *PNB*, the court established some presumptions of illegality on horizontal mergers based on market shares, in the context of market definitions (based heavily on bank regulatory barriers) which were more realistic than many of the markets accepted in subsequent cases.

I believed at the time—and still believe—that market shares provide a useful device for testing horizontal mergers, and *PNB* got the enforcers and the courts moving in that direction. What was wrong, though, was that the *PNB* presumptions became entirely determinative in other cases, until the Supreme Court backed off in *General Dynamics*, making clear that other factors could and should be considered.

KOLASKY: I agree that this case shouldn't appear in the 'Hall of Shame'. I also agree with Don, that to appreciate the decision, one has to view it in its historical context. *PNB* was only the second merger case to come before the court under section 7 of the Clayton Act after it was substantially broadened in 1950.

Brown Shoe, though, was truly awful. It found a largely vertical merger, in which the combined shares of the two companies were under ten per cent nationally, unlawful without articulating any sensible standard whatsoever.

Painting on this surface, *PNB* is a virtual masterpiece. Drawing on industrial organisation economics, the court imported the structure-conduct-performance paradigm into section 7, holding that the government could make a prima facie case by proving that the merger would significantly increase concentration in an already concentrated market, and that the defendants would then have the burden of rebutting the resulting presumption that the merger would lessen competition.

I would even argue that this analytical framework has served us well over the years, and that *PNB* should be praised, not condemned.

BRIGGS: Yes, PNB really isn't such a bad case. True, it changed the rules of the game in mergers. But the rule of law it laid down—at a time when there was no form of pre-merger notification and not a great deal of analysis either—was serviceable and sufficiently elastic to accommodate nearly any policy tilt, as long as its language isn't taken too literally.

Where people find fertile ground for criticism is in the court's subsidiary findings that the absence of anti-competitive effects could not be shown either by vigorous post-merger competition by virtue of scores of remaining rivals or the need for greater size to compete better with out-of-state banks.

But the core of the decision was based on the received wisdom of the Harvard School, which said that concentration is bad because studies showed a correlation between concentration and higher prices. On these grounds, mergers in industries moving towards concentration should be stopped. The decision also rested on the clear intention of section 7 to arrest concentration and anti-competitive effects in their incipiency, rather than awaiting full-blown effects.

PNB perhaps led to the short-lived 'potential competition' doctrine and many failed cases thereunder, which in turn brought to prominence the highly influential Chicago School. If it did this much, one should see *PNB* as an important case, if not a great one. If it didn't do this, neither did it do any damage.

United States v Pabst Brewing

1966
United States Supreme Court
Written by Justice Black

Facts: In 1959, Pabst Brewing, the United States' 10th-largest brewer, acquired Blatz, the 18th-largest. It became the nation's fifth-largest brewer with 4.5 per cent of the industry's total sales, and 24 per cent of sales in Wisconsin.

The following year the government challenged the acquisition under section 7 of the Clayton Act, alleging that the merger may have anti-competitive effects in either Wisconsin, the tri-state area of Wisconsin, Illinois and Michigan, or the United States.

The district court dismissed the case, concluding that government had failed to show that either Wisconsin or the tri-state area constituted a relevant section of the country, and that it had failed to show a lessening of competition in the national market. The Supreme Court reversed this, reasoning that the requirement to prove anti-competitive effects "in any section of the country" "merely" required proof of a substantial anti-competitive effect "somewhere" in the United States.

Accordingly, the court observed that the number of competitors selling beer had dropped in Wisconsin and nationally: for example, the nation's top 10 brewers had increased their combined shares from about 45 per cent in 1957, to about 52 per cent in 1961.

The court was persuaded that such a decline in the number of competitors and rise in concentration would lead to "greater and greater concentration ... into fewer and fewer hands" unless stopped—enough to condemn the merger.

BRIGGS: 1966 was a practice year for 1967-68, which represented the high-water mark for unsound competition policy. While not as awful as *Von's Grocery* [see 'Worst Decisions', *GCR*, August 2005], *Pabst* was pretty poor.

The Supreme Court held that the government merely needs to find an anti-competitive consequence "somewhere", adding for good measure that "the failure of the Government to prove by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market is not an adequate ground on which to dismiss".

And, to drive the point home, Justice Black intoned that the number of rivals in Wisconsin had dropped precipitously—from 77 to 54! The case has yet to be overruled.

BAKER: This was one of a whole series of cases in which the Supreme Court overturned lower court merger decisions and treated the market share presumptions of *Philadelphia National Bank* as if they were inflexible statutory rules. It was a 'stupid but trivial' decision that does not make it a member of the 'Hall of Shame'.

KOLASKY: Pabst: lousy beer, lousy antitrust decision. It was one of a series of bad merger decisions from the later Warren Court years, which prompted Justice Stewart to observe that the only consistency he could find in the court's decisions was that the government always won.

The court offered no coherent explanation for its decision, which turned largely, if not entirely, on market definition. The decision also relied in part on a trend toward concentration in the industry, without pausing to analyse whether that trend might be the product of economies of scale and that the need to capture those economies in order to compete effectively might have been what was driving the merger.

As Don says, *Pabst* was pretty inconsequential, really, so I'd rather go enjoy my favourite microbrewery beer, rather than spend any more time belabouring why Pabst is a bad decision.

United States v Arnold, Schwinn & Co

1967
United States Supreme Court
Written by Justice Fortas

Facts: In *Schwinn*, the US government challenged vertical customer and territorial restraints imposed by Schwinn, an American bicycle manufacturer, on its distributors and franchised retailers.

In particular, Schwinn sold to distributors, who resold to franchised retailers. Each retailer was franchised only in a designated location, could resell only to consumers, and was obligated to purchase only from distributors authorised to serve the retailer's geographic area. Likewise, the distributors were authorised to sell only to franchised retailers and only to those in their designated territory.

The Supreme Court held that territorial and customer restrictions on distributors and retailers were per se illegal under the Sherman Act when the manufacturer had parted with title to the goods. Such restraints on distributors or retailers would be tested under the rule of reason, however, if the manufacturer retained title and the reseller functioned as an agent or salesman of the manufacturer.

BAKER: The Supreme Court, going off on a frolic of its own, embraced a theory of per se liability for vertical territorial restraints that the government (under the leadership of Donald Turner) had not urged in its briefs. The result, grounded in property law, made no sense whatsoever, caused considerable confusion for a decade and was then completely gone. So bad was it that served as catalyst to the court's constructive modern approach to vertical restraints, articulated in *GTE Sylvania*, which overruled *Schwinn*.

KOLASKY: Don raises an interesting point. As bad as it is, *Schwinn* deserves a special place in every modern antitrust lawyer's heart because of the key role it played as a catalyst to the reform of antitrust jurisprudence over the past quarter century, which began when the Supreme Court overruled *Schwinn* barely a decade later.

One of the most perplexing aspects of *Schwinn* was its formalistic incantation of the common law doctrine of restraints of alienation, with little regard paid to the economic purposes and effects of such geographic restrictions. And the outburst of scholarly criticism of *Schwinn* was overwhelming.

Until *Schwinn*, the Chicago School was generally viewed as a group of cranky outsiders. After *Schwinn*, mainstream antitrust scholars, such as Donald Turner and Philip Areeda from Harvard, joined forces with the Chicago School in subjecting not just *Schwinn* but many other faulty decisions of the Warren Court to close scrutiny under the lens of modern economic science.

Indeed, *GTE Sylvania* was decided largely on the basis of an amicus brief co-authored by Donald Turner. This argued that territorial restrictions limiting intra-brand competition could enhance that competition to the benefit of consumers and should be evaluated under the rule of reason, not condemned as per se unlawful.

And the movement *Schwinn* spawned did not stop there. It led to a series of other decisions that completely reformed antitrust jurisprudence by equating competition with consumer welfare, using economic science as the anvil for judging allegedly anti-competitive business conduct.

BRIGGS: This case enjoyed the shortest life of all the cases on the list. Hijacked by Justice Fortas, the court confused property law with antitrust law, holding that territorial and customer restrictions on distributors and retailers were per se illegal once the manufacturer had parted with title to the goods. The government had not urged this theory and *Schwinn* didn't have much of an opportunity to address it.

But this was a Supreme Court that, during the tumultuous late 1960s, was prepared to embrace almost any antitrust notion that came along—whether to block mergers, stop big business conduct that smaller folks didn't like, or just intervene generally in the affairs of a rapidly expanding industrial America.

This was a terrible decision, but not inexplicable. It was an populist shriek at the ascendant military-industrial complex that President Eisenhower had warned about when he left the White House in 1956. Luckily, however, even the lower courts largely ignored the case. And, as Don and Bill note, it was so bad that it set in motion equilibrating tendencies that reverberate today.

Utah Pie Co v Continental Baking Co

1967
United States Supreme Court
Written by Justice White

Facts: Utah Pie Co was a frozen pie manufacturer serving only the Salt Lake City market. The defendants—Continental Baking, Carnation, and Pet Milk—were national manufacturers, which also served the Salt Lake City market. In 1958, Utah Pie held a commanding Salt Lake City market share of approximately 66 per cent. But, by 1961, its share had slipped to close to 45 per cent as a result of aggressive price competition by the defendants. Utah Pie was also forced to drop its prices precipitously. Each defendant sold pies in the Salt Lake area for less than elsewhere.

At trial, a jury found the defendants guilty of price discrimination. The Court of Appeals set aside the jury verdict because it found that no reasonable jury could find that the defendants' pricing had injured competition.

But the Supreme Court reversed, notably holding that price discrimination causing a "drastically declining price structure" could support a finding of injury to competition in a competitor's Robinson-Patman suit, notwithstanding evidence that Utah Pie was profitable and had increasing sales in an expanding market.

KOLASKY: Utah Pie certainly belongs in the 'Hall of Shame'. The plaintiff was a local company that entered the market by undercutting the prices of larger national brands. One of those manufacturers responded by cutting prices in Salt Lake City below those it charged in other markets, forcing the plaintiff to cut its prices further. Although Utah Pie lost market share, its overall sales volume grew and it continued to operate profitably.

Today, this sounds like healthy competition, not an antitrust violation. Unfortunately, the Supreme Court saw things differently. But it was this decision, more than any other, that provoked Donald Turner and Philip Areeda to write their seminal 1975 article in the *Harvard Law Review*, in which they formulated a cost-based test for predatory pricing.

They argued that price cuts (including allegedly discriminatory ones) shouldn't be found unlawful unless they resulted in prices that were below marginal cost or, if marginal cost couldn't be readily determined, below average variable cost. Any price cuts that left prices above these levels were simply moving prices toward the levels that would be charged in a perfectly competitive market. As such, they should not be viewed as anti-competitive because they could not exclude an equally efficient competitor from the market.

This proposed test, now commonly known as the Areeda-Turner test, evoked a remarkable debate among antitrust scholars over what the proper test for predatory pricing should be.

This was a Supreme Court that, during the tumultuous late 1960s, was prepared to embrace almost any antitrust notion that came along

BRIGGS: This case, decided a year after *Pabst Brewing*, six weeks after *Procter & Gamble*, and seven days before *Schwinn*, is a reminder that little good came out of the Supreme Court during the dark years of 1966 to 1968.

The Supreme Court held that price discrimination causing a "drastically declining price structure" could support a finding of injury to competition despite evidence that Utah Pie was profitable and enjoying increasing sales in an expanding market. To state this is to articulate why this case makes most top 10 lists.

The case lived to the ripe old age of 26 when, in 1993, it was finally overruled by Brooke Group. It has long been a mystery why the court even accepted the case for review, although a disproportionate percentage of the antitrust cases heard by the court have involved the Robinson-Patman Act. Life is strange.

BAKER: What more can I say? The idea that the Robinson-Patman Act prevents a new entrant from lowering its price in a particular geographic market, to try to compete against a well entrenched local leader with over 60 per cent, is nutty populism.

Federal Trade Commission v Procter & Gamble

1967
United States Supreme Court
Written by Justice Douglas

Facts: In 1957, Procter & Gamble acquired the assets of Clorox Chemical Co, the leading manufacturer of household liquid bleach, with 48 per cent of national sales. Procter & Gamble did not produce household liquid bleach, but accounted for about 54 per cent of all packaged detergent sales.

The FTC ordered Procter & Gamble to divest the Clorox assets, on the grounds that the acquisition violated section 7 of the Clayton Act. The Sixth Circuit reversed this. Ten years after the acquisition, the Supreme Court affirmed the FTC's findings and ordered divestiture.

The court agreed that substitution of Procter & Gamble "with its huge assets and advertising advantages" for the smaller but dominant Clorox might reduce competition in the household bleach industry by making it harder for new companies to enter the market and by dissuading existing firms from aggressively competing against Procter & Gamble.

In sales of packaged detergents and bleach, advertising and promotion were considered 'vital' and Procter & Gamble was the nation's largest advertiser. In particular, the court suggested that Procter & Gamble could use this "major competitive weapon" in marketing bleach to raise barriers to entry, by diverting advertising funds, enhanced by substantial media discounts, to defeat a short-term threat of a new entrant. The court also agreed that the merger eliminated Procter & Gamble as a potential competitor, and rejected the use of "possible economies" as a defence.

KOLASKY: You couldn't find anyone today who would defend either the result or the reasoning of this decision. It is completely wrong, both on the economics and the facts. Clorox accounted for less than half of national bleach sales and faced competition not only from one other major national brand, but also from some 200 smaller regional producers. Clorox's pricing was clearly constrained by horizontal competition from the large number of other bleach manufacturers, not from any speculative concern that P&G might someday enter the bleach market.

And Procter & Gamble's acquisition was a pure conglomerate merger. The court nevertheless held the merger unlawful, principally on a potential competition theory in which the court viewed (with little factual support) the possibility that P&G might someday enter the market as constraining Clorox's current competitive behaviour.

On the economics, if the court were right that P&G could realise important economies of scale in marketing consumer goods through its overall size, including the ability to advertise at a lower per unit cost, the extension of those efficiencies to Clorox's bleach product would plainly benefit the consumers of that product. At least some portion of those lower costs would almost certainly have been passed on to those consumers, given the highly competitive structure of the market for bleach.

Fortunately, the flaws in the court's reasoning were so obvious that the decision's principal impact was to spur reform of antitrust jurisprudence over the next two decades.

BAKER: If this case belongs in the 'Hall of Shame', it is because it introduced the idea that merger-related efficiencies may be a reason to condemn a merger.

The idea that a dominant firm's merger with a potential entrant could cause injury in the market is sometimes relevant, but cases where the potential entrants are so few and the barriers to entry are so high are highly unusual.

The intense concern about losses of potential competition in the wake of Proctor & Gamble also caused the DoJ and the FTC to devote excessive resources to such cases, during the Johnson and the Nixon administrations.

BRIGGS: One of the many interesting things about this case is that a young Richard Posner was the law clerk for Philip Elman on the FTC, who wrote the decision that was ultimately reviewed by the Supreme Court.

The case was responsible for giving birth to a cluster of 'potential competition' cases that were ubiquitous during the 1970s, as well as to the word 'entrenchment'. The cases stopped because the government won none of them and because sensible enforcement put an end to them.

The word 'entrenchment' was equally short-lived—the idea that Procter & Gamble's stewardship of Clorox brand bleach would entrench Clorox's leading market position. The merger was stopped and Clorox is still an independent company and the case has not been overruled.

The case is separately famous for its rejection of the proposition that "possible economies" (that is, efficiencies) could be a defence to an "otherwise unlawful merger". This became the taproot for hostility to efficiencies, a notion that lives on in pockets of the United States, and in far larger swathes of Europe.

Albrecht v Herald Company

1968
United States Supreme Court
Written by Justice White

Facts: In *Albrecht*, the Supreme Court considered an alleged vertical maximum price-fixing conspiracy in the retail newspaper delivery business. Herald Company published a daily newspaper, which was sold in the St Louis metropolitan area.

Herald sold to independent newspaper carriers at wholesale prices, and the carriers sold directly to consumers at retail. Herald, however, advertised a suggested retail price on its newspapers. Carriers sold newspapers in exclusive territories, which Herald could terminate if the carrier exceeded suggested prices.

In establising a per se rule against maximum vertical price fixing, the Supreme Court engaged in another piece of crazy populism.

In 1961, Albrecht began to charge his customers more than Herald's suggested price. Herald notified Albrecht's customers that it would deliver papers to those who wanted to purchase at the lower price. Using a marketer, Herald successfully solicited about 300 of Albrecht's 1200 customers, which it then gave to a new carrier. Eventually, Herald offered Albrecht his customers back—provided he charged the suggested price. Albrecht sued the newspaper, alleging that the price restraint violated the Sherman Act. The court held that a combination (between Herald, the marketer, and the new carrier) to force Albrecht not to charge more than the maximum price was per se illegal.

KOLASKY: *Albrecht* belongs in anyone's 'Hall of Shame'. The decision made no sense as a matter of elementary economics. It was obviously in the interest not only of the newspaper, but also of consumers, for a newspaper to limit the prices its dealers charged to prevent them from exploiting whatever monopoly power their exclusive territorial arrangement gave them.

Albrecht had perverse, and entirely predictable, real world consequences. It prompted most newspapers to move away from their pre-existing system of independent distributors and to replace them with employees of the newspaper who could sell the newspapers at whatever price the publisher set.

To the extent that the decision was driven by a desire to protect the freedom of the distributors, it had the opposite effect—resulting in them losing their status as small independent businessmen altogether and becoming employees of a large business organisation.

Fortunately, the Supreme Court saw the error of its ways 30 years later and overruled *Albrecht* in *State Oil v Kahn*, holding that maximum resale price maintenance could no longer be treated as per se unlawful, but should be evaluated under the rule of reason. But *State Oil* came too late to give businesses back to the newspaper dealers who had since lost their dealerships.

BAKER: In establishing a per se rule against maximum vertical price fixing, the Supreme Court engaged in another piece of crazy populism. It failed to realise that a newspaper has a legitimate interest in subscribers not being overcharged by local monopoly deliverers, because of the impact that lost subscriptions has on advertising revenues. It was badly reasoned and lasted long enough to deter a lot of efficient conduct.

BRIGGS: *Albrecht* was a certifiably stupid case. It occurred when antitrust in general was in the ascendancy, and no corporate beast was too insignificant for antitrust to slay. In 1968, the idea that antitrust ought to be in service of consumer welfare had not yet developed beyond adolescence.

Albrecht is in this list because it embraced a rule of law that prevented companies from compelling their distributors not to charge more than a set maximum price. By the early 1980s, with the Chicago revolution gaining steam, the case was disparaged by courts and rarely followed. It was overruled in 1997 just shy of its 30th birthday.

Illinois Brick Co v Illinois

1977
United States Supreme Court
Written by Justice White

Facts: Illinois Brick Company sold concrete blocks to masonry contractors, who submitted bids to general contractors for masonry work in construction projects. The general contractors then submitted bids for these projects to the state of Illinois and other local government entities in the Chicago area.

The state alleged that Illinois Brick and other block manufacturers violated section 1 of the Sherman Act by fixing the prices of concrete blocks. The state and localities were indirect customers of the manufacturers and could only be injured if at least part of the overcharge had been passed on.

In a previous case, *Hanover Shoe*, the court had held that except in very limited circumstances, in a suit by a direct customer, an antitrust defendant could not introduce evidence that the direct purchaser had passed on the overcharge to the detriment of indirect customers (so-called 'defensive' use of the pass-on theory).

In *Illinois Brick*, the Supreme Court was confronted with the attempted use of the pass-on theory 'offensively' by indirect customers to prove that alleged overcharges had been passed on and that they had been injured.

The court reasoned that allowing 'offensive' but not 'defensive' use of the pass-on theory would expose defendants to duplicative recoveries by direct and indirect customers, since direct customers were entitled to recover the full amount of the overcharge under the prior decision.

It would also result in unequal treatment of plaintiffs and defendants, and would increase the complexity of proving the amount of pass-on several steps removed from the defendant. Faced with overruling its prior decision or rejecting the ability of indirect purchasers to recover damages, the court opted for the latter.

BRIGGS: One cannot talk about, much less criticise, *Illinois Brick* without saying something about *Hanover Shoe*. There began the fiction that, at least under the Sherman Act, all injury resided in direct purchasers. So when a few years later an indirect purchaser tried to sue an antitrust defendant, the court, in Solomonic fashion, expanded the fiction, holding that only direct purchasers had standing to seek redress for the full injury.

The immediate reaction was wild applause in the defence bar and dismay in the plaintiffs' bar. But as time went on, the status quo changed rather dramatically.

Since *Illinois Brick* involved a construction of the federal Sherman Act, it had nothing to do with principles governing state antitrust laws. States were free to change their laws to accommodate indirect purchaser antitrust suits under their own state law—and many did.

Only recently was a tipping point reached, as class actions proliferated in a wide variety of state courts on behalf of indirect purchasers. Some states have even allowed nationwide indirect purchaser classes to be certified in their own state. It became clear that *Illinois Brick* was the source of a major procedural problem for class actions in general.

BAKER: This decision should be a charter member of the 'Hall of Shame'. It took the wrong approach to an important issue and has had appalling consequences. The court should have recognised that the perceived risk of double recovery by direct and indirect purchasers could have been substantially reduced (even if not altogether eliminated) if indirect purchasers were allowed to bring federal cases that could be consolidated under the multidistrict litigation procedures that have been authorised in the US.

To erect a flat federal bar to some plainly injured private victims who happened to be indirect purchasers was political poison. Not surprisingly, it generated state legislation providing remedies for injured indirect purchasers—opening up double recovery on a recurring basis.

The unsatisfactory result—today's complex antitrust litigation mess—was quite foreseeable to anyone with reasonable political antenna. Even without such antenna, the Supreme Court could have avoided it by sticking to the modern tort rule of foreseeable injury as the basis for standing rather than erecting a flat federal exclusion.

KOLASKY: This case doesn't belong in the 'Hall of Shame'. Given the court's prior decision in *Hanover Shoe*, the court was absolutely right to hold that indirect purchasers shouldn't be able to recover whatever portion of the overcharge may have been passed onto them.

Allowing such claims would have risked duplicative recoveries, as well as given juries the power to award damages on dangerously convoluted and speculative theories of causation. The fact that some 20 state legislatures disagreed and passed what are known as *Illinois Brick* repealers, allowing indirect purchasers to sue under state law, is a testament to the effectiveness of trial lawyers as lobbyists, not evidence that *Illinois Brick* was wrongly decided.

BAKER: Bill and John compare the case to *Hanover Shoe*, but I don't find the two situations comparable, given that there's a clear federal policy of encouraging private actions through the treble damage bounty system. As *Hanover Shoe* recognised, allowing a 'passing on' defence would reduce the original purchaser's incentive to sue, and certainly enable some cartel member defendants to escape any liability.

Faced with a choice between allowing a potential windfall to a price-fixing defendant or to a purchasing plaintiff, the court had opted for the latter—a result that was entirely consistent with the Clayton Act's policies of assisting plaintiffs. *Hanover Shoe* didn't compel the *Illinois Brick* decision, which for me represents a slavish adherence to a not-quite-applicable model.

Aspen Skiing Co v Aspen Highlands Skiing Corp

1985
United States Supreme Court
Written by Justice Stevens

Facts: Aspen Highlands owned one of the four mountains for downhill skiing in the Aspen area, while Aspen Skiing owned the other three. The competitors sold tickets for their own mountains and, in every season but one from 1962 to 1977, an interchangeable six-day All-Aspen ticket that permitted skiers to choose among the mountains.

With Aspen Skiing's growing dislike of the all-Aspen ticket, in 1978 it offered Highlands a revenue split below its historical average, which Highlands rejected. Regarding the all-Aspen ticket as 'dead', Aspen Skiing promoted its three mountains, and made it difficult for Highlands to offer its own multi-mountain package. Without an alternative, Highlands became a destination for day skiers, and its revenues declined.

Highlands sued, and prevailed at trial on its monopolisation claim. The Supreme Court sided initially with Aspen Skiing, holding that a monopolist has no general duty to deal with rivals—but it added that the right was not unqualified. Aspen Skiing's refusal to deal represented "an important change in a pattern of distribution that had originated in a competitive market". Its lawfulness rested on whether Aspen Skiing had a valid business reason for refusing to deal.

Finding harm to consumers and Highlands, a failure to prove an efficiency justification, and facts suggesting that Aspen Skiing "was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival", the court affirmed the lower court's decision that Aspen Skiing's refusal to deal amounted to unlawful monopolisation.

BRIGGS: *Aspen* is a bit like *Roe v Wade* [the Supreme Court case establishing a woman's right to an abortion]: people are greatly divided about the outcome but troubled by the logic with which the outcome was reached. That logic created at least two decades of litigation that probably would not have occurred otherwise, much of which was terminated after great expense before trial.

The most troubling thing about the decision is that it exacerbated the need for lawyers and their clients to pretend that gaining market share or otherwise pushing around a rival is not a valid business reason for anything. In the wake of *Aspen*, companies came into court with all manner of reasons for their actions, but they did not much mention gaining market share, eliminating rivals, or other politically incorrect reasons that benefit shareholders.

Instead, they stuck to pablum reasons: consultants recommended a course of conduct; it would make them more efficient; it would make customers happier. But there were always documents indicating that—gasp—their conduct would increase market share and might disadvantage rivals.

Courts began instructing juries that if they found the validity of the business reason(s) advanced by the defendant to be 'pretextual', then they could find in favour of the plaintiff. Business conduct in the best interest of management and shareholders has often been defended on grounds that are politically correct, but which run the risk of being found pretextual.

Aspen has bequeathed a fear of the truth and an incentive to present disingenuous arguments in the defence of conduct that may be entirely reasonable.

KOLASKY: The result was undeniably wrong, but I wouldn't characterise *Aspen* as a bad antitrust decision. On the issue that was before the court—exclusionary conduct—both the court's reasoning and the result were correct.

Indeed, the court applied the correct standard for exclusionary conduct, markedly improving on earlier articulations. The court also asked the right questions in applying this standard: whether the alleged monopolist was foregoing short-term revenue and customer goodwill to exclude a rival; and whether there are any legitimate reasons for the alleged conduct, other than exclusion.

Aspen Skiing failed to explain its refusal or rebut the natural inference that its sole purpose was exclusion, so the court was right to conclude that its conduct was exclusionary.

But the reason the result was wrong is that, as anyone who skis in North America knows, it's laughable to think that Aspen Skiing would have monopoly power even if it owned all four of the skiable mountains around the town. Aspen is a quintessential destination resort, drawing skiers from all over the country. It must compete with many other destination resorts throughout the country. So Aspen Skiing should have won the case because the plaintiff could not establish the first prerequisite to monopolisation—monopoly power.

Unfortunately that issue was not before the court. This may have been a failure of advocacy on the part of Aspen Skiing's lawyers. However, the court shouldn't be faulted for the poor advocacy of the defendant's lawyers.

BAKER: The problem with the decision is that it gave little precise guidance on when, and under what terms, a monopolist might have to deal with its competitors in future situations. However, it doesn't belong in the 'Hall of Shame'.

It was a fact-driven decision based on a jury verdict. The dominant defendant set out to destroy a joint product valued by consumers by refusing to continue providing input to its partner on the same terms as it was providing that input to other wholesale buyers. The defendant's conduct clearly justified a jury verdict that it had sought to exclude its competitor from the market.

The Supreme Court's 2004 decision in *Verizon Communications v Trinko* made it clear that *Aspen* should be read narrowly—which underscores that *Aspen* was a fact-driven case and not a great hazard on the antitrust landscape.

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