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Antitrust Jurisprudence in the Second Circuit

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INTRODUCTION

Although the U.S. Supreme Court ultimately defines the standards by which marketplace conduct is to be judged under the antitrust laws, and other circuit and district courts make significant contributions to the law's development, there is no question that the Second Circuit and the district courts within it often have led the way in developing the nation's antitrust jurisprudence. Routinely cited, the Second Circuit's decisions have often broken new analytical ground and either set the standard by which other courts judge similar questions or set the table for resolution by the Supreme Court.

A running thread through Second Circuit antitrust jurisprudence is a willingness to examine market participants' real-world conduct and the consequences of that conduct in seeking out the balance between incentivizing robust competition and protecting the market—and ultimately consumers—from distortions caused by anticompetitive conduct. Thus, the Second Circuit has arguably led the way in defining how we determine whether a monopoly violates the law and what constraints apply to the conduct of one who holds a lawfully acquired monopoly.

Similarly, the circuit has laid the groundwork for national adoption of a damages analysis for violations of the Robinson-Patman Act that recognized the difference between the harm Congress sought to remedy by that law and the harm caused by conspiracy and monopolization under sections 1 and 2 of the Sherman Act. In other areas, the court has provided important input into the national conversation about areas of antitrust law in

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the wake of Supreme Court decisions that changed the direction of the law, helping to fill in the blanks left by those decisions.

This Article collects and describes rulings that, in the authors' view, reflect these themes in Second Circuit antitrust jurisprudence. The court's long history in this substantive space, its likely continued exposure to critical antitrust questions, and the importance of this area of the law to our national economy assure that others will be examining and shedding further light on the Second Circuit's important work in antitrust well into the future.

I. MONOPOLIZATION

The extent of the Second Circuit's influence is no more apparent than in cases of alleged monopolization. The words of the Sherman Act paint broad strokes, leaving to the courts the task of applying its guidance to the real world of commerce and markets. Section 2 of the Sherman Act is no exception, stating that it is unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" trade or commerce.[1] While the statute could be read to outlaw any monopoly, it did not take long for courts to realize that such a broad prohibition might cause more harm than good. Such prohibition could deprive businesses from attracting customers by rewarding their loyalty with good value, thereby removing an important incentive essential to robust competition. This inherent ambiguity left it to the courts to navigate the tension between preventing the unlawful acquisition of monopoly power and allowing monopolies formed through honest competition to exist and even to thrive. The Second Circuit jumped into that issue in *United States v. Aluminum Co. of America*[2] (*Alcoa*) and *Berkey Photo, Inc. v. Eastman Kodak Co.*,[3] two opinions that have shaped this country's approach to monopolization in antitrust enforcement nationwide and laid the groundwork for later decisions on the boundaries imposed on what the owners of lawfully acquired monopolies may do.

A. Establishing a Framework for Considering Monopolization Cases: Alcoa

Judge Learned Hand's 1945 opinion for the court in *Alcoa* serves as the basis for analysis of alleged section 2 violations of the Sherman Act. In that case, the Second Circuit had to decide whether Aluminum Company of America ("Alcoa") had monopolized the virgin aluminum ingot market—of which it controlled more than 90 percent—in violation of section 2.[4] The case came before the Second Circuit after the trial court ruled that Alcoa had not monopolized the market.[5] Judge Hand examined the distinction

1. 15 U.S.C. § 2 (2012).
2. 148 F.2d 416 (2d Cir. 1945).
3. 603 F.2d 263 (2d Cir. 1979).
4. *Alcoa*, 148 F.2d at 423.
5. *Id.* at 436.

between acquiring a monopoly by competing successfully and acquiring a monopoly unlawfully.[6]

First, the court had to determine whether Alcoa was a monopoly by considering the company's size and control within the marketplace.[7] The *Alcoa* opinion articulated a framework by which courts should consider whether a monopoly exists—a rubric that remains the standard today. Under this framework, courts must determine the relevant market in which the alleged monopolist operates and then assess the alleged monopolist's power within that defined market. Accordingly, different definitions of the relevant market could yield different conclusions regarding the existence of a monopoly.[8] In *Alcoa*, if the market included only virgin aluminum ingot sold in the United States, purchasers would have little choice but to buy from Alcoa because the company had more than a 90 percent market share.[9] If secondary aluminum ingot—aluminum salvaged from initial usage and repurposed—could be substituted for virgin aluminum, and therefore included in the relevant market, Alcoa's share would have fallen to 64 percent.[10] Finally, if the part of Alcoa's ingot production that it fabricated into products—and therefore did not sell as ingot—were excluded from the market, then Alcoa's share would have fallen to about 33 percent.[11]

Judge Hand defined the relevant market as the total amount of virgin aluminum ingot available for sale in the United States, excluding secondary aluminum ingot and including Alcoa's captive sales, which resulted in a market share in the relevant market of more than 90 percent.[12] The *Alcoa* decision set the standard for monopolization cases; courts must define the relevant market in order to determine the market power of a potential monopolist.[13] Judge Hand reasoned that controlling 90 percent of the market allowed Alcoa to control prices within the market[14] and thus found that Alcoa had sufficient market power to be a monopolist.

The opinion also set some broad guideposts as to what would, and would not, be sufficient market share to create risk of a monopoly, stating that "it is doubtful whether sixty or sixty-four percent would be enough [market share to constitute a monopoly]; and certainly thirty-three per cent is not."[15] Judge Hand did not articulate the reasoning behind these guideposts, nor did he identify a threshold market share amount that would indicate a monopoly. Nevertheless, the *Alcoa* decision created an unprecedented framework for assessing whether a monopoly exists—a framework that remains the starting point in assessing monopolization claims. To this day, U.S. antitrust jurisprudence includes no fixed definition of how much

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6. *Id.* at 429.
7. *See id.* at 429–30.
8. *Id.* at 424–25.
9. *Id.* at 425.
10. *See id.* at 424.
11. *Id.*
12. *Id.* at 425.
13. *See id.* at 422–32.
14. *Id.* at 425.
15. *Id.* at 424.

market share indicates monopoly. Monopoly power is defined by *Alcoa*'s rule: whether a company has the power to control prices and exclude competition.

The *Alcoa* decision is also notable for its discussion of the circumstances under which a monopolist is guilty of monopolization under section 2 of the Sherman Act, cementing the distinction between merely being a monopolist and having "monopolized" unlawfully in violation of section 2. Judge Hand noted that Alcoa "may not have *achieved* monopoly; monopoly may have been *thrust upon* it."[16] In particular, Judge Hand's opinion argued against a reading of section 2 of the Sherman Act that would create a blanket prohibition of monopolies, identifying three scenarios in which a monopoly was "thrust upon" a company, rather than obtained through unlawful monopolizing activity by the company: First, a "natural monopoly," when the nature of the industry only supports one seller. Second, when changes to taste or cost drive a seller's competition out of the market. Third, when a seller becomes a monopoly by virtue of being the most successful competitor in a given market.[17] In discussing this third scenario, Judge Hand noted that

> a strong argument can be made that, although the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins.[18]

In considering whether a monopoly had been "thrust upon" Alcoa, Judge Hand reasoned that a company is not guilty of monopolization when it is but a "passive beneficiary of a monopoly."[19] Judge Hand determined that Alcoa had not been a passive beneficiary because it had actively pursued its monopoly status by "progressively [embracing] each new opportunity as it opened" and thereby "fac[ing] every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel."[20] Thus, Judge Hand found Alcoa to have engaged in monopolization and thereby to have violated section 2 of the Sherman Act.[21]

Judge Hand's application of the principles he articulated to Alcoa arguably crossed the line he had drawn and created a per se rule prohibiting dominant firms within a market from using the benefit of their size and skill to compete in that market, even if their dominance has been won by fair and effective competition. As some critics have noted, "after *Alcoa*, the successful competitor may indeed be 'turned upon' because he may not

16. *Id.* at 429 (emphases added).
17. *See id.* at 429–30.
18. *Id.* at 430.
19. *Id.*
20. *Id.* at 431.
21. *See id.*

compete."[22] For that reason, the application of the principle to the specific facts in *Alcoa* has been revisited over time. However, Judge Hand's principle lives on—courts recognize that one can lawfully acquire monopoly power and that monopoly power is not an unfair reward for successful competition. As a result, Judge Hand's distinction between merely being a monopolist and unlawfully monopolizing under section 2 of the Sherman Act has been broadly cited by monopolization decisions issued throughout the country over many decades.

B. The Next Phase in Determining a Test for Unlawful Monopolization: Berkey

Alcoa generally went unchallenged across circuits until 1979, when the Second Circuit issued its historic antitrust opinion in *Berkey*, written by then-Chief Judge Kaufman.[23] Kodak was a fully integrated manufacturer of cameras, light-sensitive film, photographic paper on which the film could be printed, and the various processing chemicals used to develop film and paper.[24] Kodak was a leader in the industry and regularly introduced new products, including new types of amateur cameras and films, often in new sizes.[25] Berkey was a much smaller competitor in those markets and complained that Kodak's introduction of new products without warning allowed Kodak to thwart competition by preventing others from offering competing products on a timely basis.

It was uncontested in *Berkey* that Kodak had a monopoly in the sale of cameras, film, and color paper.[26] However, *Berkey* presented an opportunity for the court to revisit the issue of when a monopoly is lawfully acquired and thus address whether and how section 2 of the Sherman Act limited a dominant company's ability to compete. The *Berkey* Court began by abandoning *Alcoa*'s arguably narrow view of when a monopoly is lawfully acquired, stating that "[a]s an operative rule of law . . . the 'thrust upon' phrase does not suffice."[27] Instead, based on a comprehensive analysis of previous case law discussing the facets of section 2 of the

22. Edward D. Cavanagh, *Antitrust in the Second Circuit*, 65 ST. JOHN'S L. REV. 795, 799 (1991).

23. Berkey Photo Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979).

24. Before the invention of digital cameras, which capture photographs on a built-in sensor, photographers relied on plastic film coated with chemicals that, when exposed to light, recorded images that became visible (in negative image) when treated with other chemicals. Those images could be projected onto similarly coated paper, which could then be treated to develop the image as it appeared in the real world (i.e., the opposite of the negative image on the film). Thus, to take photographs, a photographer needed a camera and film, and someone (either the photographer or a photofinishing lab) had to develop the film and print paper photographs to finish the process. Kodak made and sold all of the necessary products and offered photofinishing services to amateurs who could not, or did not want to, do it themselves after taking pictures.

25. *See Berkey*, 603 F.2d at 269.

26. *Id.* at 269–71.

27. *Id.* at 274.

Sherman Act, the court recognized that even a monopolist should be permitted to compete and not be limited to succeeding by accident.[28]

As a preliminary matter, the *Berkey* Court adopted the Supreme Court's rule in *United States v. E.I. du Pont de Nemours & Co.*[29] that the first step in analyzing a section 2 claim is to define the relevant market.[30] Consistent with Judge Hand's approach in *Alcoa*, the *du Pont* Court's analysis of whether a monopoly existed began with the Court's determination of the appropriate market. The *Berkey* Court similarly adopted the Supreme Court's 1966 pronouncement in *United States v. Grinnell Corp.*[31] that "after monopoly . . . power is found, the second element of the [section] 2 offense is 'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'"[32] *Grinnell*'s articulation of the section 2 offense was, of course, a slightly different way of stating the principle Judge Hand articulated in *Alcoa*—a monopoly won by competing effectively is not unlawful.[33] Expanding on the jurisprudence of *Alcoa* and *Grinnell*, the *Berkey* Court then went a step further, holding that "the law's hostility to monopoly power extends beyond the means of its acquisition. Even if that power has been legitimately acquired, the monopolist may not wield it to prevent or impede competition."[34] The Second Circuit in *Berkey* thus articulated a gloss on the *Alcoa-Grinnell* principle. While a lawful monopolist was free to reap the benefits of success, it could not use its monopoly power to entrench itself:

> The mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of [section] 2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when kept dormant. And it is no less true that a firm with legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.[35]

Having stated that broad principle, the *Berkey* Court examined whether Kodak's monopoly position obliged it to disclose its new product developments in the camera and film industries to competitors like Berkey in advance, enabling them to introduce compatible products when Kodak did, rather than forcing competitors to play catch up.[36] The court determined that Kodak was not obligated to do so.[37] The *Berkey* Court noted that withholding advance knowledge of one's new products and

28. *Id.* at 274–75.
29. 351 U.S. 377 (1956). In *du Pont*, the dissenting opinion identifies Judge Hand's *Alcoa* decision as a "landmark section 2 case." *Id.* at 424 (Warren, C.J., dissenting).
30. *See Berkey*, 603 F.2d at 268–69 (citing *du Pont*, 351 U.S. at 391–93).
31. 384 U.S. 563 (1966).
32. *Berkey*, 603 F.2d at 274 (quoting *Grinnell*, 384 U.S. at 570–71).
33. *Grinnell*, 384 U.S. at 571.
34. *Id.*
35. *Id.* at 275.
36. *See id.* at 279–85.
37. *Id.* at 284.

advancements is typically valid competitive conduct.[38] The court observed that "a monopolist is permitted, and indeed encouraged, by [section] 2 to compete aggressively on the merits, any success that it may achieve through 'the process of invention and innovation' is clearly tolerated by the antitrust laws."[39] Thus, the *Berkey* Court declined to require monopolists to help smaller firms, making it clear that lawfully acquired monopolies are entitled to the benefits of their dominant market share.

The *Berkey* Court did, however, recognize limits to using lawfully acquired power in one market to acquire dominance in other markets. Stating that "[i]t is clear that a firm may not employ its market position as a lever to create—or attempt to create—a monopoly in another market," the *Berkey* Court examined whether Kodak had leveraged its monopoly power in the film and camera markets to gain illicit advantages in the photofinishing equipment market, where Kodak was not a monopolist.[40] The *Berkey* Court determined that Kodak did not gain competitive advantage in the photofinishing market when it introduced Kodacolor II film, which required a new photofinishing process, along with its 110 camera.[41] Further, the *Berkey* Court clarified that, because Kodak was an integrated firm, the advantages the company gained from selling equipment required for the new photofinishing process used in its new film and camera did not constitute monopolization.[42]

The *Berkey* decision clarified many important principles within the law of monopolization. It established that a monopolist may compete vigorously on the merits with smaller rivals and may capitalize on economies of scale resulting from its larger size.[43] This was a shift from earlier thinking, as seen in *Alcoa*, that a monopoly had to exercise special restraint.[44] Instead, the *Berkey* decision employed competition laws to promote economic efficiency rather than to shield inefficient competitors. However, while a monopolist may exploit efficiencies arising from its integration in multiple markets, the Second Circuit made clear that there was a limit: a monopolist may not use its monopoly power to block competition or to grow its power in other markets in which it does not have monopoly power. Because it found for Kodak on the facts, the *Berkey* Court did not have the opportunity to articulate where that limit lies.[45] That task was left to later cases, many of which—including those in other circuits—to this day still start their analysis where *Berkey* left off.[46]

38. *Id.* at 281.
39. *Id.*
40. *Id.* at 275 (citing United States v. Griffith, 334 U.S. 100 (1948); SmithKline Corp. v. Eli Lilly & Co., 575 F.2d 1056 (3d Cir. 1978)).
41. *Id.* at 281.
42. *Id.*
43. *See id.*
44. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 423 (2d Cir. 1945).
45. Cavanagh, *supra* note 22, at 807.
46. *See, e.g.*, Catlin v. Wash. Energy Co., 791 F.2d 1343 (9th Cir. 1986).

C. Regulating the Behavior of a Monopolist: What Constitutes Illicit Monopolization?

Since *Alcoa* and *Berkey*, the Second Circuit has, on several occasions, had the opportunity to define the lawful limits on what lawful monopolists may do to "protect their turf."

1. Predatory Pricing

In 1981, in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*[47] (*AT&T*), Judge Kaufman of the Second Circuit applied the rationale of *Berkey* to consider the difference between "engag[ing] in vigorous competition" and "subvert[ing] the competitive process by unfair or unreasonable means."[48] In *AT&T*, the plaintiff, Northeastern Telephone Company, a relatively small supplier of telephone equipment, alleged that the defendants AT&T and its affiliates serving the Connecticut area were selling their public branch exchanges (PBX) and key telephones below cost, and that the two-tier pricing schemes that the defendants were offering to certain business customers were anticompetitive.[49] The Second Circuit considered whether such activities constituted "predatory pricing," which it defined as "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition."[50] The court acknowledged that "[p]redatory pricing is difficult to distinguish from vigorous price competition" and is likely rare.[51] The court also expressed concern that "[i]nadvertently condemning [price] competition as an instance of predation [would] undoubtedly chill the very behavior the antitrust laws seek to promote."[52] Thus, in *AT&T*, the court found that, while predatory pricing was certainly anticompetitive, "the rarity of the phenomenon" must inform a court's definition of such activity.[53]

Balancing these considerations, the Second Circuit shied away from creating a complex analysis for determining predatory pricing.[54] Instead, the court endorsed a bright-line rule directing courts to compare a firm's marginal costs to the prices it charges to determine whether those prices are predatory.[55] If average or typical marginal costs exceed prices, those prices are presumptively predatory.[56] If not, they are presumptively competitive.[57]

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47. 651 F.2d 76 (2d Cir. 1981).
48. *Id.* at 79.
49. *See id.* at 81.
50. *Id.* at 86 (quoting Phillip E. Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975)).
51. *Id.* at 88.
52. *Id.*
53. *Id.*
54. *See id.*
55. *Id.*
56. *Id.*
57. *Id.*

Applying this newly articulated test for determining whether the defendants had engaged in predatory pricing, the court in *AT&T* found no showing that the defendants' conduct was beyond the bounds of competitive propriety as laid out in *Berkey*, noting that the record contained no evidence that the defendants had priced below marginal cost.[58] The court noted, however, that pricing schemes similar to those of the *AT&T* defendants might be predatory if a plaintiff could show that a defendant omitted direct costs, the inclusion of which would cause marginal cost to exceed price.[59] The court rejected the plaintiff's assertion that average or fully distributed costs should be considered.[60] Throughout its *AT&T* decision, the Second Circuit tied the determination of predatory pricing to marginal cost, a crucial step in the development of the law in this area.[61]

2. "Product Hopping"

A patent is effectively a limited-duration lawful monopoly over the market for the patented invention. When a patent is close to expiring, some companies seek to preserve their market position by inducing customers to transition to a new product, or new version of the product that is protected by a longer-term patent. Recently, in *New York ex rel. Schneiderman v. Actavis PLC*,[62] the Second Circuit became the first circuit to explore when "product improvement" crosses the line into "product hopping" in violation of section 1 or 2 of the Sherman Act.[63] For years, Actavis had marketed Namenda IR, a treatment for Alzheimer's disease taken twice a day.[64] As the patent term for Namenda IR was coming to an end, Actavis introduced Namenda XR, a formulation that could be taken once daily—an improvement in the eyes of some.[65] Namenda XR enjoys patent protection through 2029.[66]

Typically, when a pharmaceutical patent term expires, generic manufacturers enter the market, and pharmacists are either permitted or required to fill prescriptions with lower-cost generic versions of the originally patented drug.[67] Thus, patients taking Namenda IR after July 2015 would, in many instances, receive a less-expensive generic version if one were introduced. However, for regulatory reasons, pharmacies would

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58. *Id.* at 90–91.

59. *Id.* at 91.

60. *Id.* at 89–90.

61. The Second Circuit's *AT&T* decision has been discussed with approval by other circuits addressing similar questions regarding predatory pricing. *See, e.g.*, United States. v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081 (7th Cir. 1983).

62. 787 F.3d 638 (2d Cir. 2015).

63. *Id.* at 643 n.2. An appeal on product hopping claims has recently been filed in the Third Circuit. *See* Mylan Pharm. Inc., v. Warner Chilcott Pub. Ltd., No. 12-3824, 2015 WL 1736957 (E.D. Pa. Apr. 16, 2015), *appeal docketed*, No. 15-2236 (3d Cir. May 20, 2015).

64. *Actavis PLC*, 787 F.3d at 646.

65. *See id.*

66. *See id.* at 647.

67. *Id.* at 645 & n.7.

not be permitted to substitute a generic version of Namenda IR for a Namenda XR prescription.[68]

As the patent term on Namenda IR was close to expiring, Actavis used both "soft-switch" and "hard-switch" strategies to transition Namenda IR patients to Namenda XR.[69] Its soft-switch strategies included marketing Namenda XR aggressively to doctors and patients and selling it at a discount.[70] Its hard-switch strategy was to take Namenda IR off the market near the end of its patent term, before generics could enter the market, forcing patients who wanted continuity of treatment to switch to Namenda XR, and to provide Namenda IR only through a mail order pharmacy—but only where continued treatment was "medically necessary."[71] New York State sought a preliminary injunction against the hard-switch strategy, which the trial court granted.[72]

The Second Circuit, in an opinion by Judge John Walker, affirmed the preliminary injunction, analyzing Actavis's conduct under *Berkey*, which held that a monopolist's introduction of a new product is not anticompetitive unless it compels consumers to purchase the new product.[73] In the Second Circuit's view, Actavis's hard-switch strategy crossed this line.[74] Although the court did not explicitly rule on this issue, its reasoning implicitly endorsed the soft-switch strategy.[75] Because evidence that Actavis sought to force the market to switch to the new product before generic substitution could occur made it substantially likely that New York State would succeed on the merits of its monopolization and attempted monopolization claims, the Second Circuit found that it was not an abuse of discretion for the trial court to grant the preliminary injunction.[76] The Second Circuit's ruling was consistent with several previous decisions by district courts in other cases involving alleged "product hopping."[77]

68. *See id.* at 647.
69. *Id.* at 647–48.
70. *Id.*
71. *Id.* at 648.
72. *Id.* at 649.
73. *Id.* at 653 (citing Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 287 n.39 (2d Cir. 1979)).
74. *Id*. at 654.
75. *See id.*
76. *Id.* at 651.
77. *See, e.g.*, Mylan Pharm., Inc. v. Warner Chilcott Pub. Ltd., No. 12-3824, 2015 WL 1736957 (E.D. Pa. Apr. 16, 2015) (granting summary judgment to the defendant even though it withdrew an old product from the market, because the relevant market contained a variety of similar products); *In re* Suboxone Antitrust Litig., 64 F. Supp. 3d 665, 685 (E.D. Pa. 2014) (holding that allegations that a pharmaceutical company threatened to remove a product from the market and did remove it a few weeks after entry of generic into market stated a viable Sherman Act claim); Walgreen Co. v. AstraZeneca Pharm. L.P., 534 F. Supp. 2d 146, 150–52 (D.D.C. 2008) (dismissing Sherman Act claims because the plaintiffs had not alleged that any consumer choices were eliminated).

II. HORIZONTAL RESTRAINTS

The Second Circuit has taken a leading role among the circuits in consistently condemning price fixing among competitors as restraints on trade that are per se unlawful under section 1 of the Sherman Act.[78] At the same time, the Second Circuit has attempted to avoid labels in favor of analyzing the substance of transactions to determine whether they are subject to the per se rule, following the Supreme Court's 1979 decision in *Broadcast Music, Inc. v. CBS, Inc.*[79] (*BMI*), which arose in the Southern District of New York and is one of the most influential decisions relating to price restraints. As the Supreme Court noted in *BMI*, "certain agreements or practices are so 'plainly anticompetitive,' and so often 'lack . . . any redeeming virtue,' that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases."[80]

Nevertheless, what constitutes a per se illegal practice has not always been clear, even when those practices involve "price fixing" in the literal sense. The Supreme Court observed in *BMI* that "easy labels do not always supply ready answers"[81] and warned that a literal approach "does not alone establish that [a] particular practice . . . is 'plainly anticompetitive' and very likely without 'redeeming virtue.'"[82] As business relationships have become increasingly complex, the Second Circuit has grappled with whether the per se rule or rule of reason analysis should apply to various pricing situations, looking to the Supreme Court's *BMI* decision for guidance and analyzing the substance of a transaction to determine whether it is per se illegal. The Second Circuit has adopted a markedly cautious approach to expanding the categories to which the per se rule applies, arguably leading the way in shaping the per se doctrine since *BMI*.

This restraint is evident in the Second Circuit's decisions in *Volvo North American Corp. v. Men's International Professional Tennis Council*[83] and *E.I. du Pont de Nemours & Co. v. FTC*,[84] as well as the Second Circuit's more recent decisions, such as *Major League Baseball Properties, Inc. v. Salvino, Inc.*[85] These cases illustrate a shift toward a focus on the underlying economic rationality of the business arrangement at issue and away from mechanical characterizations. Indeed, the Supreme Court's favorable reference to *Salvino* in its 2010 opinion in *American Needle, Inc.*

78. *See, e.g.*, Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 71 (2d Cir. 1988).

79. 441 U.S. 1 (1979).

80. *Id.* at 8 (first quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978); then quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)). Under the rule of reason analysis, when a particular practice can be justified by legitimate business considerations, courts weigh the benefits of the practice against the negative effects on competition.

81. *Id.*

82. *Id.* at 9.

83. 857 F.2d 55 (2d Cir. 1988).

84. 729 F.2d 128 (2d Cir. 1984).

85. 542 F.3d 290 (2d Cir. 2008).

v. National Football League[86] is a testament to the Second Circuit's influence on this issue. On the other hand, the Second Circuit recently applied the per se rule in its decision in *United States v. Apple, Inc.*,[87] applying the rule to U.S. ebook publishers, noting that the *BMI* line of decisions was "narrow" and "limited" in scope.[88] Whether, and to what extent, *Apple* represents a departure from the restraint evident in the Second Circuit's post-*BMI* jurisprudence remains to be seen.

A. BMI

The evolution of the Second Circuit's cautionary approach to the per se rule as applied to horizontal restraints is best viewed in light of the Supreme Court's decision in *BMI*. The *BMI* case originated in 1975 in the Southern District of New York, when Columbia Broadcasting System, Inc. (CBS) brought suit against two music agencies, the American Society of Composers, Authors and Publishers (ASCAP), and Broadcast Music, Inc. (BMI), challenging their royalty practices.[89] CBS alleged that the system by which these agencies (which act as clearing houses for music copyright owners and users) received fees for their issuance of "blanket licenses" to perform copyrighted musical compositions constituted illegal price fixing.[90] BMI and ASCAP had nonexclusive rights to grant blanket licenses of an artist's work to people or companies that sought to obtain the rights to use a particular work.[91] Artists and composers joined with ASCAP and BMI to set a price for the blanket license.[92] Thus, for an annual fee, a licensee like CBS could gain the rights to use any song in a writer's repertoire but could not license individual works through BMI or ASCAP. It could, however, negotiate licenses for individual works directly through the copyright holders, because BMI and ASCAP were nonexclusive licensors. Nevertheless, CBS argued that the blanket license violated section 1 of the Sherman Act, among other provisions.[93]

The district court dismissed CBS's case following a trial only on liability issues, finding that the blanket license did not constitute a per se violation of section 1.[94] The court also found that the blanket license was not an unreasonable restraint on trade because CBS was free to negotiate with individual copyright holders.[95] The Second Circuit reversed and remanded the decision, holding, in a very literal analysis of the defendant's conduct, that the blanket licensing arrangement was unlawful price fixing because the composers and publishing houses had "joined together into an

86. 560 U.S. 183 (2010).
87. 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).
88. *Id.* at 325–26 (citing *Am. Needle*, 560 U.S. at 203).
89. Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 4–6 (1979).
90. *See id.* at 5.
91. *See id.*
92. *See id.*
93. *See id.* at 5–6.
94. *See id.* at 6.
95. *See id.*

organization that sets its price for the blanket license it sells," which constituted a per se violation of section 1.[96]

The Supreme Court reversed, refusing to apply the per se rule to the blanket license at issue in *BMI*.[97] The Court acknowledged the value of the per se rule, but criticized the Second Circuit's "literal approach" in applying it, explaining that "when two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act."[98] The Court concluded that before a particular practice can be condemned under the per se rule, it must be found to be "plainly anticompetitive."[99] Because the alleged restraint, blanket licensing, was not within the group of business practices to which the per se rule had been applied previously, there was no "nearly universal" view on whether these practices should be subject to "automatic condemnation" rather than "a careful assessment under the rule of reason."[100] Noting that the commerce involved—obtaining the performing rights to copyrighted music—exists only because of copyright law, and that the marketing arrangement was reasonably necessary to monitor the use of thousands of copyrighted materials, the Supreme Court concluded there was no anticompetitive purpose behind the use of the blanket licenses at issue.[101]

B. Buffalo Broadcasting, Volvo *and* du Pont

After the *BMI* decision, the Second Circuit took a cautious approach to the application of the per se rule. First, in an action by local broadcasting affiliates against BMI and ASCAP, raising virtually the same issues as the original *BMI* case, *Buffalo Broadcasting Co. v. American Society of Composers, Authors & Publishers*,[102] the Second Circuit followed the Supreme Court's holding and concluded that blanket licensing to affiliate stations did not constitute an unreasonable restraint on trade subject to the per se rule.[103]

The Second Circuit also took a restrained approach in applying the per se rule to alleged horizontal price fixing and horizontal division of markets in several aspects of men's professional tennis events in its decision in *Volvo*.[104] There, three sponsors of men's professional tennis events brought suit against a tennis governing body, the Men's International Professional Tennis Council (MIPTC), its chairman, and its administrator, claiming that MIPTC had improperly conspired with a rival organization, World Championship Tennis, Inc., to restrain trade in men's tennis in violation of

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96. *Id.* at 8.
97. *Id.* at 7.
98. *Id.* at 9.
99. *Id.*
100. *Id.* at 16.
101. *Id.* at 20–21.
102. 744 F.2d 917 (2d Cir. 1984).
103. *Id.* at 933.
104. Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55 (2d Cir. 1988).

section 1.[105] In particular, the sponsors and producers of tennis tournaments alleged that the governing organizations had established agreements with sponsors, producers, and players that dictated tournament scheduling priority, limited player compensation, and discouraged players, sponsors, and producers from participating in independent tennis events.[106] Volvo argued that these agreements limited the number of successful and profitable events that could be sponsored outside of the governing bodies' control.[107]

On appeal from the district court's dismissal of the plaintiff's complaint, the Second Circuit examined the allegations of horizontal restraints—price fixing, horizontal market division, and group boycott—and considered whether the allegations were sufficient to fall under per se illegal conduct. The Second Circuit noted that, normally, price fixing agreements among competitors are considered per se illegal under section 1, but, adding some subtlety to a seemingly simple analysis, the court emphasized that the "relevant inquiry . . . involves more than 'a question simply of determining whether two or more potential competitors have literally "fixed" a "price,"'" because determining when a practice should be characterized as price fixing could be very difficult.[108]

Ultimately, the Second Circuit "express[ed] no opinion" as to whether the conduct was per se unlawful or subject to the rule of reason.[109] Instead, the court directed on remand of the section 1 claim that the district court "carefully consider whatever arguments [the alleged price fixer] may offer in support of [its] practices relating to player compensation before deciding whether the per se rule or the [r]ule of [r]eason should apply."[110] With respect to the horizontal market division and group boycott claims, the court noted that it viewed the claims as adequately alleged, but again remanded the question of whether the per se rule or the rule of reason should apply to the district court.[111]

Similarly, the Second Circuit's decision in *du Pont* illustrates the court's resistance to expanding the per se rule to section 5 of the Federal Trade Commission Act ("the FTC Act").[112] The Federal Trade Commission (FTC) had prohibited du Pont, Ethyl Corporation, and other compound manufacturers from announcing price changes before the thirty days provided by their contracts and from using "most favored nation" clauses regarding the price of their additives.[113] The FTC challenged these practices even though the FTC conceded that the practices were not the result of any collusive agreement.[114] Rather, these practices occurred in an

105. *See id.* at 57–63.
106. *See id.* at 58.
107. *See id.* at 60–61.
108. *Id.* at 71 (quoting Broad. Music, Inc. v. CBS, Inc., 441 U.S. 1, 9 (1979)).
109. *Id.*
110. *Id.* at 72.
111. *See id.* at 72–73.
112. *See E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984).
113. *Id.* at 130–32.
114. *See id.* at 135.

oligopolistic market characterized by high concentration, a small likelihood of new entrants because of a sharply declining market, inelastic demand, and homogeneity of product.[115]

The Second Circuit vacated the FTC's order, finding that the "mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws."[116] The court rejected price signaling as a basis for liability under the FTC Act, noting that the FTC's position could be construed to condemn any price increase by any seller in an oligopolistic market.[117] Before labeling business conduct in an oligopolistic industry (absent tacit agreement) as "unfair" within the meaning of section 5, the court held that the FTC must allege that, at a minimum, "some indicia of oppressiveness" exist.[118] The Second Circuit's decision in *du Pont* has been influential across the country: the Fourth, Seventh, Eighth, and Ninth Circuits have cited this holding from *du Pont* with approval in also rejecting a categorical approach to analyzing antitrust activity involving oligopolies.[119]

C. Salvino, American Needle*, and* Apple

The Second Circuit has continued, for the most part, to take a restrained approach in applying the per se rule in more recent decisions addressing horizontal restraints. Following *BMI*, other circuits adopted similarly cautious approaches to treating business arrangements among would-be competitors—especially business practices with which the court was unfamiliar—as per se restraints on trade.[120] Commentators have noted, however, that some federal appellate courts have gone further than the Second Circuit in eroding traditional prohibitions against horizontal restraints such as the per se rule.[121]

The Second Circuit's restrained approach is evident in its 2008 decision in *Major League Baseball Properties v. Salvino, Inc.*[122] In *Salvino*, the court held that the rule of reason—not the per se rule or quick-look doctrine—was the appropriate analytical tool to use in determining whether an exclusive license of every Major League Baseball (MLB) teams'

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115. *See id.* at 139–40.
116. *Id.* at 139.
117. *Id.* at 137–39.
118. *Id.* at 139.
119. *See* Blomkest Fertilizer, Inc. v Potash Corp. of Saskatchewan, 203 F.3d 1028, 1031 (8th Cir. 2000); Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 971 F.2d 37, 50 (7th Cir. 1992); Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 342 (4th Cir. 1992); *In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 906 F.2d 432, 444 (9th Cir. 1990).
120. *See* California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1136 (9th Cir. 2011); Realcomp II, Ltd. v. FTC, 635 F.3d 815, 825 (6th Cir. 2011); All Care Nursing Serv., Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740, 747 (11th Cir. 1998).
121. *See, e.g.*, Cavanagh, *supra* note 22, at 825–26, 826 n.235.
122. 542 F.3d 290 (2d Cir. 2008).

intellectual property to Major League Baseball Properties (MLBP) illegally restrained trade.[123]

In *Salvino*, a company that made and sold plush bean-filled bears featuring the logo of certain MLB clubs counterclaimed against MLBP, the exclusive licensing agent for MLB intellectual property, claiming that the centralization of the licensing in a single agent and the sharing of profits equally among all the MLB clubs were per se illegal under section 1.[124] The district court granted MLBP's motion for summary judgment dismissing Salvino's section 1 counterclaims, holding that the rule of reason should be used to analyze MLBP's licensing of MLB's intellectual property and that Salvino had failed to show that MLBP and its activities had an actual adverse effect on competition or that MLBP had sufficient market power to inhibit competition market-wide.[125] On appeal, Salvino pressed its contentions that the MLB's centralization of intellectual property licensing for baseball teams and purported output restrictions were "naked horizontal" restraints that were per se illegal.[126] The Second Circuit rejected these claims, recognizing that the centralization of MLB intellectual property licensing was similar to the blanket licensing held not to be per se unlawful in *BMI*.[127] The court affirmed the award of summary judgment to MLBP, concluding that simply making MLBP the exclusive licensor did not restrict or reduce the number of licenses to be used—"it merely alter[ed] the identity of the licenses' issuer."[128] The Second Circuit also emphasized the high threshold for applying the per se rule: "To justify a *per se* prohibition a restraint must have manifestly anticompetitive effects, . . . and lack . . . any redeeming virtue."[129] Concurring in the judgment, then-Circuit Judge Sotomayor noted that the per se and quick-look approaches were "reserved for practices that facially appear to be ones that would always or almost always tend to restrict competition and decrease output."[130] This aspect of then-Judge Sotomayor's concurrence in *Salvino* has been cited by the Ninth and Federal Circuits in requiring scrutiny of joint ventures and profit-sharing arrangements under the rule of reason.[131]

The Second Circuit's opinion, including the concurrence, in *Salvino* has shaped subsequent law in this area, leading other courts to judge similar conduct under the rule of reason. In its 2010 decision in *American Needle, Inc. v. National Football League*,[132] the Supreme Court reviewed similar

123. *Id.*
124. *Id.* at 294–96.
125. *Id.* at 293–94.
126. *Id.* at 318.
127. *See id.* at 321–23.
128. *Id.* at 318.
129. *Id.* at 316 (omissions in original) (quoting Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007)).
130. *Id.* at 340 n.10 (Sotomayer, J., concurring).
131. *See, e.g.*, California *ex rel.* Harris v. Safeway, Inc., 651 F.3d 1118, 1138 (9th Cir. 2011); Princo Corp. v. Int'l Trade Comm'n, 616 F.3d 1318, 1339 (Fed. Cir. 2010).
132. 560 U.S. 183 (2010).

licensing practices by the thirty-two National Football League (NFL) teams, which had formed a separate corporation, National Football League Properties (NFLP), to manage their intellectual property. In finding that the NFLP was not a single economic enterprise capable of taking "independent action" but, rather, that its licensing activities constituted concerted action that must be judged under the rule of reason,[133] the Supreme Court favorably cited then-Circuit Judge Sotomayor's concurrence in *Salvino*, where the Judge departed from her colleagues and found the existence of a price agreement, warning that "competitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or 'joint venture.'"[134] The Court remanded the case to the district court to determine whether the restraint was "essential" or otherwise justified under the rule of reason.[135]

In a recent antitrust action, *United States v. Apple, Inc.*,[136] the Second Circuit once again addressed the per se rule. The majority, applying the per se rule with renewed vigor, affirmed the Southern District's application of the rule to government allegations that Apple, a customer of five of the nation's major ebook publishers, orchestrated a horizontal agreement among the publishers to increase the price of ebooks through the use of an agency distribution model under which the publishers, not resellers, would determine retail prices.[137] Before Apple launched the iPad, it entered into contracts with five of the six major publishing houses.[138] The government asserted that the contracts incentivized the publishers to prevent Amazon from continuing to sell bestsellers and new releases for $9.99, a price that Apple believed was unsustainable.[139]

In a sharply divided decision, two judges of the panel agreed that the per se rule applied to Apple's conduct, rather than the rule of reason.[140] The court emphasized that the conduct at issue was not the individual vertical contracts with Apple, but rather the fact that "Apple's offer to the

133. *See id.* at 186.

134. *See id.* at 202 (quoting *Salvino*, 542 F.3d at 336 (Sotomayor, J., concurring)); *see also* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 372 (4th Cir. 2013) (citing *American Needle*'s quotation of *Salvino* in holding that members of the State Board of Dental Examiners had capacity to conspire under section 1).

135. *Am. Needle*, 560 U.S. at 204.

136. 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016). Author Saul Morgenstern and a team of Kaye Scholer lawyers assisted a publisher in connection with the U.S. Department of Justice investigation that led to the litigation (the client was not named as a defendant in the case), and now represent a publisher in connection with related litigation and compliance with the final judgment resulting from the publisher's settlement of the government's claims.

137. *Id.* at 297.

138. *See id.* at 296.

139. *See id.* at 305–07.

140. In a separate concurring opinion, Judge Raymond Lohier stated "[i]n my view, Apple's appeal rises or falls based on the application of the per se rule" and that he would affirm on that basis alone. *Id.* at 339 (Lohier, J., concurring). While noting "some surface appeal to Apple's argument that the ebook market, in light of Amazon's virtually uncontested dominance, needed more competition," Judge Lohier admonished that "more corporate bullying is not an appropriate antidote to corporate bullying." *Id*. at 340.

[p]ublisher [d]efendants hinged on whether it could successfully help organize them to force Amazon to an agency model and then to use their newfound collective control to raise ebook prices."[141] This "use of the promise of higher prices as a bargaining chip to induce the [p]ublisher [d]efendants to participate in the iBookstore constituted a conscious commitment to the goal of raising ebook prices."[142] The Second Circuit, in an opinion written by Judge Debra Livingston with a concurrence in part and in the judgment by Judge Raymond Lohier, rejected the argument that Apple should have been permitted to introduce procompetitive justifications for horizontal price-fixing arrangements, stating that its conspiracy to raise prices was squarely in the focus of the per se rule and that the *BMI* line of cases was "limited to situations where the 'restraints on competition are essential if the product is to be available at all.'"[143] Even if *BMI* were read broadly, Judge Livingston continued, the *BMI* line of cases applied the rule of reason "only when the restraint at issue was imposed in connection with some kind of potentially efficient joint venture."[144]

In a strong dissent, Judge Dennis Jacobs argued that the court erred in holding that Apple's conduct fell within the per se rule. He urged that a proper application of the rule of reason test would find that Apple's conduct was "unambiguously and overwhelmingly pro-competitive" because it sought to introduce another player into the ebooks market to challenge Amazon's monopoly.[145]

The sharp differences in the majority and dissenting opinions reflect the difficulties presented where a customer seeks to enter a market by offering similar terms to multiple sellers. Ordinarily, the sellers' parallel conduct in response would not give rise to an inference of conspiracy. The record in *Apple*, however, contained evidence from which the district court concluded that the publishers' parallel conduct was not an accident but rather the result of agreement, which Apple willingly facilitated. The majority opinion was no doubt influenced by those findings.[146]

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141. *Id.* at 317 (majority opinion).

142. *Id.* "[T]he relevant 'agreement in restraint of trade' in this case is not Apple's vertical Contracts with the Publisher Defendants . . . ." *Id.* at 323.

143. *Id.* at 326 (quoting Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 203 (2010)).

144. *Id.*

145. *Id.* at 341 (Jacobs, J., dissenting).

146. The fact that, as the dissent noted, the industry shift to agency may have been necessary to facilitate the creation of competition for a preexisting dominant retailer would not alone rescue collective horizontal action from censure. While it has long been established under federal law that a company is free to deal, or not deal, with whomever it chooses, the Second Circuit in Judge Hand's 1940 opinion in *Fashion Originators Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941), held that a group of competing dress and textile designers could not band together and condition their sales to retailers on the retailers agreeing not to use or sell designs copied from Fashion Originators Guild members' designs, in an effort to prevent other dressmakers and textile manufacturers from copying their designs. *Id.* at 84. Such concerted action constituted illegal group boycott prohibited by the Sherman and Clayton Acts. *Id.*; *see, e.g.*, Am. Fed'n of Tobacco Growers v. Neal, 183 F.2d 869, 873 (4th Cir. 1950); Local 36 of Int'l Fisherman & Allied Workers v. United States, 177 F.2d 320, 331 (9th Cir. 1949). Other circuits have followed

III. DAMAGES UNDER THE ROBINSON-PATMAN ACT

The Second Circuit has played a key role in defining the proper measure of damages under the Robinson-Patman Act of 1936, which prohibits anticompetitive price discrimination and is violated where "the effect of such discrimination *may be* substantially to lessen competition."[147] To recover damages for Robinson-Patman Act violations under the Clayton Act, however, purchasers alleging unlawful price discrimination must demonstrate actual damages attributable to the discrimination. Courts have struggled to determine the proper theory of damages for such price discrimination. The Second Circuit was one of the first circuit courts to take on this issue in its 1957 decision in *Enterprise Industries, Inc. v. Texas Co.*,[148] where Texas Company ("Texaco") was represented on appeal by Professor Milton Handler,[149] one of the leading antitrust practitioners and scholars of the twentieth century. Before *Enterprise*, the Eighth Circuit had adopted the theory that the victim of price discrimination could automatically recover the difference between the higher price it paid and the lower price charged to its favored competitor.[150] Writing for the Second Circuit, Judge Learned Hand rejected that "automatic damages" theory. More than twenty years later, Judge Hand's alternative theory would figure prominently in the Supreme Court's determination of the proper measure of damages for Robinson-Patman Act claims in *J. Truett Payne Co. v. Chrysler Motors Corp.*[151]

The claims in *Enterprise* arose from price wars among competing gas stations along the main commuter route between New York and Hartford. The plaintiff operated one of the stations and brought Robinson-Patman Act claims against Texaco for charging the plaintiff more for gasoline than it charged its own stations positioned along the same commuter route during the price wars.[152] The Connecticut district court concluded that Texaco's pricing scheme was discriminatory and awarded the plaintiff damages measured by the difference between what Texaco charged its own stations and what it charged the plaintiff[153] under the so-called "automatic damages" theory.[154]

Judge Hand's reasoning in *Fashion Originators Guild* that such concerted "self-help" violates the antitrust laws. *See, e.g.*, *Am. Fed'n of Tobacco Growers*, 183 F.2d at 873; *Local 36 of Int'l Fisherman*, 177 F.2d at 331.

147. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 559 n.1 (1981) (emphasis added) (quoting 15 U.S.C. § 13(a) (2012)).

148. 240 F.2d 457 (2d Cir. 1957).

149. In addition to being a member of the faculty of Columbia Law School, Professor Handler was a member of the New York law firm of Kaye, Scholer, Fierman, Hays & Handler, now named Kaye Scholer LLP.

150. *See, e.g.*, Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 990, 996 (8th Cir. 1945) (affirming trial court's award of treble damages on the difference between the price plaintiff was charged and the lower price competitors were charged).

151. 451 U.S. 557, 568 (1981).

152. *See Enterprise*, 240 F.2d at 457–58.

153. *See Truett Payne*, 451 U.S. at 560–61.

154. *See id.* at 561 n.2.

The Second Circuit reversed, finding that, even if Texaco's price structure was discriminatory, the plaintiff had failed to prove not only the amount of damages, but it also failed to prove that it had suffered any damages at all. Judge Hand also rejected the automatic damages theory, concluding that, because the Robinson-Patman Act was aimed at preventing a favored purchaser from siphoning sales from a disfavored purchaser, the proper measure of damages would be the profits from the potential sales the plaintiff lost to competitors because of the defendant's discriminatory pricing scheme, less any profits it made because it was free under Texaco's pricing scheme to charge higher prices for gasoline than its competitors.[155] But, because the plaintiff had failed to introduce at trial reliable figures from which its alleged lost sales and profits could be calculated, the Second Circuit held that no damages could be awarded.[156]

Between 1957 and 1981, the circuits were split on the proper measure of damages under the Robinson-Patman Act. While the Seventh, Eighth and Ninth Circuits adopted the automatic damages measure,[157] the Third, Fourth and Sixth Circuits followed the Second Circuit's lead in *Enterprise*.[158] The Fifth Circuit endorsed the Second Circuit's approach in *Enterprise* in its 1979 decision in *Chrysler Credit Corp. v. J. Truett Payne, Inc.*[159] Truett Payne, a Chrysler dealership, claimed that Chrysler engaged in unlawful price discrimination when it required some dealers to sell more cars than others to qualify for the same bonus. After a jury trial, the district court awarded treble damages based on the difference between the bonus the Truett Payne dealership actually received and what it would have received under a lawful bonus scheme. The Fifth Circuit reversed, but did not decide whether Truett Payne in fact proved that Chrysler had violated the Robinson-Patman Act. Instead, the court went directly to the question of damages and concluded that Truett Payne had "failed to introduce substantial evidence of injury attributable to [Chrysler's program], much less substantial evidence of the amount of such injury."[160] In so holding,

155. *See Enterprise*, 240 F.2d at 459–60.

156. *See id.* at 458–59.

157. *See* Grace v. E.J. Kozin Co., 538 F.2d 170, 174–75 (7th Cir. 1976); Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248, 1251–52 (9th Cir. 1969) (citing *Enterprise* as a leading case for the opposing view on the measure of damages under Robinson-Patman); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 996 (8th Cir. 1945).

158. *See* Dantzler v. Dictograph Prods., Inc., 309 F.2d 326, 330 (4th Cir. 1962) (following *Enterprise* and concluding that a person claiming damages under the Robinson-Patman Act must "show the causal connection between the losses he suffers and the illegal acts of the defendant"); Freedman v. Phila. Terminals Auction Co., 301 F.2d 830, 833–34 (3d Cir. 1962); Kidd v. Esso Standard Oil, 295 F.2d 497, 498 (6th Cir. 1961) (affirming district court's finding that plaintiff was not entitled to a damages award because "[t]he record fails to show that [plaintiff's competitors] . . . lowered the price at which they sold to the public, at all; nor is there proof in the record to show or tend to show that, during the period involved, the plaintiff-appellant lost any customers, or that he lost any profits").

159. 607 F.2d 1133 (5th Cir. 1979). The Fifth Circuit had previously affirmed a district court ruling also applying the *Enterprise* approach without issuing a written opinion. *See* McCaskill v. Texaco, Inc., 351 F. Supp. 1332, 1341 (S.D. Ala. 1972), *aff'd*, 486 F.2d 1400 (5th Cir. 1973).

160. *Truett Payne*, 607 F.2d. at 1135.

the Fifth Circuit adopted the Second Circuit's theory of price discrimination damages set forth in *Enterprise*.[161]

The Supreme Court affirmed, in an opinion by Justice William Rehnquist, following the Second Circuit in soundly rejecting the "automatic damages theory," and citing the Second Circuit's opinion in *Enterprise* as the "leading case" rejecting the theory.[162] The Court held that to "recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent"[163] and agreed with the Second Circuit's conclusion in *Enterprise* that the mere fact of price discrimination is not by itself evidence of injury.[164] The Court remanded *Truett Payne* to the Fifth Circuit to consider whether Chrysler's bonus scheme actually violated the Robinson-Patman Act.[165] The Second Circuit's influence also extended to the partial dissent in *Truett Payne*: Justice Powell cited favorably to Judge Hand's decision in *Enterprise* for the proposition that plaintiffs can recover damages under section 2(a) of the Robinson-Patman Act only by showing that unlawful price discrimination "allowed a favored competitor to draw sales or profits" from the disfavored competitor.[166] Courts continue to rely on *Enterprise*'s clean articulation of the measure of damages under the Robinson-Patman Act.[167]

161. *See id.* at 1136.

162. J. Truett Payne Co. v. Chrysler Motor Corp., 451 U.S. 557, 561 n.2 (1981).

163. *Id.* at 562.

164. *Id.*

165. Four Justices joined Justice Powell's partial dissent, which favored affirming the Fifth Circuit's conclusion that the plaintiff had "failed to introduce substantial evidence of injury attributable to [respondent's program], much less substantial evidence of the amount of such injury." *Id.* at 569 (Powell, J., dissenting) (alteration in original) (quoting *Truett Payne*, 607 F.2d at 1135).

166. *Id.* On remand, the Fifth Circuit concluded that Truett Payne did not introduce sufficient evidence of the violation or of its injuries to withstand Chrysler's motions for directed verdict. Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 578 (5th Cir. 1982).

167. *See, e.g.*, Dominguez v. UAL Corp., 666 F.3d 1359, 1365 (D.C. Cir. 2012) (citing to Justice Powell's discussion of *Enterprise* in his partial dissent in *Truett Payne*); Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp, 472 F. Supp. 2d 385, 427 (E.D.N.Y. 2007) (citing to *Enterprise* for the proposition that "the pricing margin caused by the illegal discrimination can only be used to quantify damages if the plaintiffs demonstrate that the favored purchasers lowered their prices in an amount equivalent to the illegal benefit they received" in granting defendants' motion for summary judgment—argued by author Saul Morgenstern—dismissing claims of "representative plaintiffs"). *Drug Mart* has a tortured history, during which plaintiffs were at pains to show that the lower prices that defendant pharmaceutical manufacturers gave to favored purchasers actually caused smaller pharmacies to lose sales. Using the *Enterprise* approach to damage analysis, the District Court for the Eastern District of New York crafted a process to identify customers that plaintiff pharmacies lost to a favored competitor. After this process revealed that plaintiffs lost very few customers, the court granted summary judgment to the remaining defendants. *See* Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., No. 93-CV-5148, 2012 WL 3544771, at *1 (E.D.N.Y. August 16, 2012).

IV. ANTITRUST STANDING: WHO CAN SUE FOR AN ANTITRUST VIOLATION?

Antitrust violations can, in certain circumstances, have a ripple effect of injuries throughout the market. The bare language of the Clayton Act gives an apparently unlimited right of action for damages to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[168] Yet, almost from its enactment, courts have narrowed its reach.[169]

A. The Supreme Court's Limitations on Antitrust Standing

Drawing on the legislative history of the Clayton and Sherman Acts and common law principles limiting liability to reasonably foreseeable injuries, the Supreme Court in 1972 set some limits on standing to bring antitrust actions in *Hawaii v. Standard Oil Co. of California*.[170] There, the Court said that states could not sue for damages attributable to violations of antitrust laws because such suits would open the door to "duplicative recovery."[171] Then, in *Blue Shield of Virginia v. McCready*,[172] the Supreme Court squarely addressed the apparent conflict between these court-imposed limits and the Clayton Act's broad language.[173] Antitrust violations can cause cascading injuries throughout the market, and the Court sought to limit antitrust standing to prevent duplicative recovery from defendants to remedy every injury.[174] The Court declined to take a position on the various tests articulated in the circuit courts[175] and refused "to engraft artificial limits on the [s]ection 4 remedy."[176] Instead, the Court set forth a two-step analysis that required courts to look

> (1) [t]o the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was

168. 15 U.S.C. § 15(a) (2012). The Clayton Act amended the Sherman Act's equally broad provision that "any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States." Sherman Act, ch. 647, § 7, 26 Stat. 209 (1890). Persons include corporations and associations existing under the federal law or the law of any State or foreign country. *See* 15 U.S.C. § 7. Although section 4 limits recovery for foreign states to actual damages plus costs and attorney's fees, *see* 15 U.S.C. § 15(b), it otherwise imposes no limits on the persons who can bring suits or the type of damages that injured persons are eligible to recover.

169. *See, e.g.*, Loeb v. Eastman Kodak Co., 183 F. 704, 707 (3d Cir. 1910) (denying recovery to stockholders injured by antitrust violations because they were not directly injured).

170. 405 U.S. 251 (1972); *see id.* at 264.

171. *Id.* at 263–64.

172. 457 U.S. 465 (1982).

173. *Id.* at 472–74 (citing *Standard Oil*, 405 U.S. at 274); *see also* Cavanagh, *supra* note 22, at 810–18.

174. *McCready*, 457 U.S. at 474.

175. *Id.* at 476 n.12, 478 n.14.

176. *Id.* at 472.

> likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under [section] 4.[177]

McCready's insurer refused to reimburse her for psychotherapy because she was treated by a psychologist rather than a psychiatrist.[178] McCready alleged that her insurer had colluded with psychiatrists to exclude psychologists from providing psychotherapy by refusing to cover services that were similar or identical to what a psychiatrist would provide.[179] The Court agreed that McCready's injuries—the denial of insurance benefits—gave her standing to sue.[180] The Court refused to deny a remedy to psychologists, who were the intended target of the conspiracy, concluding that McCready's injury also arose from "that which makes defendants' acts unlawful."[181]

A year later, the Supreme Court muddied the antitrust standing waters in its opinion in *Associated General Contractors v. California State Council of Carpenters*.[182] There, two unions alleged that an association of construction contractors had coerced their members into hiring nonunion workers with the goal of sabotaging union workers and the construction contractors who hired them.[183] The Court held that the unions' injuries, unlike McCready's, were the indirect effects of antitrust violations squarely aimed at construction firms and individual union members.[184] In reaching its decision, the Court set forth a list of six factors relevant to antitrust standing without explicitly stating that the factors constitute a test for standing: (1) the "causal connection between an antitrust violation and harm to the [plaintiff]," (2) "the nature of the plaintiff's injury" and whether it is the type of injury that the antitrust laws were intended to vindicate, (3) "the directness or indirectness of the asserted injury," (4) "the existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in alleged antitrust enforcement" and whether plaintiff is within that class, (5) the speculative nature of the damages claim, and (6) the "potential for duplicative recovery or complex apportionment of damages."[185]

B. Antitrust Standing in the Second Circuit After McCready *and* Associated General Contractors

In 1983, in the wake of *McCready* and *Associated General Contractors*, the Second Circuit, in an opinion by Judge Henry Friendly, took a fresh look at antitrust standing in *Crimpers Promotions, Inc. v. Home Box Office,*

177. *Id.* at 478.
178. *Id.* at 468.
179. *Id.* at 469–70.
180. *Id.* at 479.
181. *Id.* at 484 (quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)).
182. 459 U.S. 519 (1983).
183. *Id.* at 520–21.
184. *Id.* at 539–44.
185. *Id.* at 537–45.

Inc.[186] Judge Friendly explained that *McCready* signaled a liberalization of the notion of antitrust injury, because the Supreme Court explicitly acknowledged that individuals need not be direct competitors of defendants to have standing to bring antitrust claims,[187] and found not only that the standing analysis in *Associated General Contractors* was entirely consistent with *McCready* but that it actually strengthened Crimpers' case.[188]

Crimpers Promotions was formed to host a single trade show that would bring together all producers of cable television programming in a single forum to facilitate purchase of programming from individual producers, rather than simply in packages created by defendants Home Box Office (HBO) and Showtime.[189] Crimpers alleged that HBO and Showtime contacted producers and told them not to attend the show, that it was a "rip-off" and a fraud, and that no exhibitors would attend.[190] The trade show ultimately took place, but with dismal attendance by exhibitors and producers.[191]

Crimpers teaches that the purpose underlying the antitrust laws provides two limitations on antitrust standing: First, antitrust standing should be limited to prevent double recovery. Second, it should exclude those injuries that are "too remote" from the alleged antitrust violation.[192] To assess remoteness, courts should look to the "physical and economic nexus between the alleged violation and the harm" and the relationship between the alleged injuries and the sort of injury Congress sought to prevent in enacting the antitrust laws.[193] The Second Circuit refused to find that Crimpers was not "the victim of a successful boycott" or that Crimpers lacked standing simply because it "was not a buyer or seller but was endeavoring to provide a method whereby buyers and sellers could deal effectively with each other without paying tribute to the defendants."[194] The Court thus concluded that, "free[d] . . . from the miasma of adjectives that has accumulated around the words of [section] 4," *Crimpers* presents a "paradigm of standing."[195] Other circuits have continued to rely on *Crimpers*'s explanation of the factors relevant to antitrust standing and, in particular, on its reconciliation of *McCready* with *Associated General Contractors*.[196]

186. 724 F.2d 290 (2d Cir. 1983).
187. *Id.* at 292.
188. *Id*. at 293.
189. *Id.* at 291.
190. *Id.*
191. *Id.*
192. *Id.* at 294 (citing Blue Shield of Virginia v. McCready, 457 U.S. 465, 477 (1982)).
193. *Id.* (citing *McCready*, 457 U.S. at 466).
194. *Id.* at 297.
195. *Id.*
196. *See, e.g.*, Carpet Grp. Int'l v. Oriental Rug Imps. Ass'n, 227 F.3d 62, 77 (3d Cir. 2000) (finding *Crimpers* "persuasive" in explaining that an injury was a direct consequence of an antitrust violation), *abrogated on other grounds by* Animal Sci. Prods., Inc. v. China Minmetals Corp., 654 F.3d 462, 466 (3d Cir. 2011); Amarel v. Connell, 102 F.3d 1494, 1511–12 (9th Cir. 1996) (following *Crimpers* in concluding that plaintiffs have standing to challenge defendant's antitrust violations even if they are not direct competitors, so long as

Five years later, in *Volvo*, the Second Circuit considered whether the organizer of professional men's tennis tournaments could be liable under the antitrust laws to a sponsor of those tournaments.[197] The two governing bodies that oversee men's professional tennis tournaments had entered into an agreement that limited compensation for players, gave certain tournaments scheduling priority, and generally required players participating in prestigious tournaments to agree to participate in certain tournaments organized by either governing body, and not to participate in other tennis events that competed with them.[198] The expenses of running the tournaments were borne by sponsors, such as plaintiff Volvo.[199] Volvo was also a producer of tennis tournaments and had itself entered into certain restrictive agreements with the governing bodies.[200] Nevertheless, Volvo filed an antitrust action against one of the governing bodies, arguing that the agreements limited its ability to produce tennis tournaments in the manner it preferred and caused the events it did produce and sponsor to be less profitable than they otherwise might have been.[201]

The Second Circuit thus had to consider whether Volvo, which voluntarily entered the restrictive cartel of professional tennis tournaments, had standing to challenge the actions of that cartel. Following *McCready*, the court fashioned a two-part test, under which the court first asks whether the plaintiff has prima facie standing, then considers whether any of a range of factors would defeat standing.[202] The primary rationale behind the *Volvo* test is that the antitrust laws were enacted to protect competition, not competitors, so if a member of a cartel would be better off if it were free to compete, and its own interests align with the public interest in competition, then the cartel member has standing to challenge the cartel's antitrust violations.[203] The Second Circuit reiterated that an antitrust injury is an injury of the sort antitrust laws were intended to prevent, and one that flows from the defendant's antitrust violations. Once a plaintiff has sufficiently alleged an antitrust injury, courts then consider whether the factors set forth in *Associated General Contractors* nonetheless defeat plaintiff's standing.[204]

Finally, in *R.C. Bigelow, Inc. v. Unilever N.V.*,[205] the Second Circuit moved more completely toward a holistic, fact-intensive analysis of

they compete in a particular market segment); *see also* Amey, Inc. v. Gulf Abstract & Title, Inc., 758 F.2d 1486, 1495 n.4 (11th Cir. 1985) (noting that, in *Crimpers*, the Second Circuit "has aligned itself with the liberal standing approach of [*McCready*] and distinguished *Associated General* [*Contractors*] as not limiting the application of [*McCready*]").

197. Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 57 (2d Cir. 1988).

198. *Id.* at 59.

199. *Id.* at 58.

200. *Id.* at 59.

201. *Id.* at 60–61.

202. *Id.* at 68.

203. *Id.* at 67.

204. *Id.* at 66 (citing Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 540–45 (1983)).

205. 867 F.2d 102 (2d Cir. 1989).

antitrust standing in the merger area. Bigelow, an herbal tea producer, sought to enjoin the merger of two rival tea sellers—Lipton and Celestial Seasonings, the two largest herbal tea producers in the market—because the merged entity would control 84 percent of the herbal tea market and, therefore, would substantially lessen competition or tend to create a monopoly.[206] The district court granted Unilever's motion for summary judgment, finding that Bigelow's evidence about the amount of the market share was not sufficient to establish standing, and stating that more specific factual allegations and evidence were needed—either evidence of past predatory pricing or of present intent to engage in predatory behavior postmerger.[207] Reversing the district court, the Second Circuit held that Bigelow, as a competitor of the merging parties, had standing to challenge the merger.[208] The court concluded that a postacquisition market share of 84 percent constituted "*prima facie* evidence of monopoly power" and "is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."[209] Although the court declined to adopt a per se rule that an 84 percent market share violates section 7 of the Clayton Act, it concluded that the market share data created a genuine issue of material fact precluding the grant of summary judgment to Unilever.[210] In contrast to their endorsement of *Crimpers*, other circuits have been less inclined to follow the Second Circuit in *Bigelow*.[211]

In sum, as the Second Circuit's jurisprudence on standing has developed, determining whether a particular plaintiff has standing to pursue an antitrust claim has become a highly contextual and fact-intensive inquiry. It has also pushed other circuits toward a more liberal approach to antitrust standing.[212]

V. THE SECOND CIRCUIT'S CONTRIBUTION TO THE LAW OF PLEADING STANDARDS AFTER *BELL ATLANTIC CORP. V. TWOMBLY*

Federal Rule of Civil Procedure 8(a), adopted in 1937, provides that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief."[213] When the rule was adopted, there was discussion of separate, stricter requirements for antitrust, patent, copyright, and other allegedly special types of litigation, but such proposals were rejected in favor of a uniform,

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206. *Id.* at 104, 107–10.
207. *Id.* at 105.
208. *Id.* at 107–11.
209. *Id.* at 108 (quoting United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) (emphasis removed)).
210. *Id.* at 111.
211. *See, e.g.*, Anago, Inc. v. Tecnol Med. Prods., Inc., 976 F.2d 248, 251 (5th Cir. 1992) (noting that the Fifth Circuit has parted company with the Second Circuit on antitrust standing in *Bigelow* and other cases).
212. *See supra* note 196.
213. FED. R. CIV. P. 8(a).

liberal pleading standard. Despite this liberal standard, over the decades since Rule 8(a) was adopted, defense lawyers continued to advocate for, and courts occasionally applied, a heightened pleading rule in antitrust actions because of the great expense often involved, especially in class actions. Those arguments made little headway until the Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*.[214]

In *Twombly*, a class of consumers sued local telephone and internet service providers, alleging an antitrust conspiracy—based on parallel conduct—to prevent competitive entry into local telephone and Internet service markets and to avoid competing with each other in their respective markets.[215] In a 2005 opinion by Judge Robert Sack, the Second Circuit reversed the dismissal of the complaint, holding that the district court had erroneously applied a heightened pleading standard by requiring that "plus factors" be expressly alleged for an antitrust conspiracy based on parallel conduct to survive a motion to dismiss.[216] The Second Circuit stated that the facts alleged in a complaint do "need to include conspiracy among the realm of plausible possibilities," but went on to hold, relying on *Conley v. Gibson*[217] and *Nagler v. Admiral*,[218] that "short of the extremes of 'bare bones' and 'implausibility,' a complaint in an antitrust case need only contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'"[219]

The Supreme Court reversed,[220] sparking a renewed debate in the lower courts about what a plaintiff must plead to state an antitrust claim. While the Supreme Court stated that it was *not* articulating a heightened pleading standard, and reaffirmed *Conley*'s requirement that a complaint provide notice plus grounds for relief, it held that those grounds must be "plausible."[221] Moreover, although the Second Circuit had not expressly relied on the *Conley* holding that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim," the Supreme Court stated that the Second Circuit appeared to have implicitly done so by accepting the plaintiffs' wholly conclusory allegations of conspiracy.[222] Thus, unlike the Second Circuit, the Supreme Court concluded that there was no "plausible suggestion of conspiracy" in the allegations of the *Twombly* complaint.[223]

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214. 550 U.S. 544 (2007).

215. Twombly v. Bell Atl. Corp., 425 F.3d 99, 102–106 (2d Cir. 2005).

216. *Id.* at 116.

217. 355 U.S. 41 (1957).

218. 248 F.2d 319 (2d Cir. 1957).

219. *Twombly*, 425 F.3d at 111 (quoting FED. R. CIV. P. 8(a)).

220. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007). Although *Twombly* was an antitrust case, the pleading standards it set forth apply across the board to all types of cases. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009) (interpreting the plausibility standard of *Twombly* in the context of a federal civil rights action).

221. *Twombly*, 550 U.S. at 556.

222. *Id.* at 561. The Supreme Court went on to overrule the "no set of facts" aspect of *Conley*, holding that the "phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.* at 563.

223. *Id.* at 566.

The Supreme Court further explained that a complaint in an antitrust conspiracy case is "plausible" where it provides "enough factual matter (taken as true) to suggest that an agreement was made," that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[224] However, exactly what the Supreme Court meant by "plausible" is not clear. A complaint that contains conclusory, as opposed to factual, allegations, is not plausible.[225] Additionally, allegations that make the conduct in question merely possible do not meet the plausibility standard.[226] On the other end of the spectrum, plausibility does not demand that the plaintiff show that the conduct is probable.[227] Plausible thus falls somewhere between possible and probable, but the dividing line is not clear.[228]

A. The Second Circuit's Application of Twombly

The task of clarifying *Twombly*'s plausibility standard has been left to the lower courts to develop on a case-by-case basis, and federal courts throughout the country have since attempted to define what constitutes a "plausible" claim. Unsurprisingly, the Second Circuit has had its share of important decisions.

1. *In re Elevator Antitrust Litigation*

In September 2007, in the first court of appeals decision to apply *Twombly* to an antitrust complaint, the Second Circuit in *In re Elevator Antitrust Litigation*[229] set a higher bar than it previously had for plaintiffs alleging an antitrust conspiracy. The Second Circuit applied *Twombly* to affirm the dismissal of an antitrust complaint regarding an alleged price-fixing scheme among elevator companies.[230] In this case, a class of consumers who purchased elevators and elevator repair and maintenance services filed a complaint alleging that four major elevator companies engaged in a conspiracy in the United States and Europe to monopolize the market.[231] Specifically, the plaintiffs alleged that the elevator companies participated in meetings to discuss pricing and market divisions, agreed to fix prices, rigged bids for sales and maintenance, exchanged price quotes, and collusively required customers to enter long-term maintenance contracts.[232]

While the Second Circuit wrestled with the Supreme Court's recent mandate in *Twombly*, acknowledging that there is still "considerable

224. *Id.* at 555.
225. *Id.* at 557.
226. *Id.* at 553.
227. *Id.* at 556.
228. *Id.* at 556–67.
229. 502 F.3d 47 (2d Cir. 2007) (per curiam).
230. *Id.* at 50.
231. *Id.* at 48–49.
232. *Id.* at 51.

uncertainty"[233] as to how broadly it should be applied, it nonetheless affirmed the dismissal of the complaint, holding that the complaint's conspiracy allegations provided "no plausible grounds to support the inference of an unlawful agreement."[234] The Second Circuit concluded that plaintiffs' allegations were merely conclusory and that they amounted to "basically every type of conspiratorial activity that one could imagine."[235] Further, the court reasoned that while the alleged parallel conduct was consistent with a conspiracy, it is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[236]

2. *Starr v. SONY BMG Music Entertainment*

Three years later, in *Starr v. SONY BMG Music Entertainment*,[237] the Second Circuit reversed a district court's dismissal of an antitrust challenge brought by a group of consumers alleging an antitrust conspiracy among major record labels to fix the prices and terms under which their music would be sold over the Internet.[238] While the district court had dismissed the complaint for failure to state a claim under section 1 of the Sherman Act, the Second Circuit found that the plaintiffs' factual allegations placed the record labels' parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[239] Unlike the conclusory allegations in the *Elevator* case, the specific facts the plaintiffs in *Sony* alleged included that the prices charged by defendants' two music services were unreasonably high—while their rival charged only $0.25 a song, defendants charged $0.75 a song; defendants all increased prices in the face of substantially reduced costs; defendants "controll[ed] over 80 [percent] of [d]igital [m]usic sold to end purchasers in the United States";[240] defendants used most favored nation (MFN) clauses in their licenses that effectively guaranteed they would receive terms no less favorable than those of other licensors, and then tried to hide the MFNs (including in "secret side letters") because they knew the MFNs "would attract antitrust scrutiny"; and one industry commentator observed that "'nobody in their right mind' would want to use" these services, which suggested to the Second Circuit that "some form of agreement among defendants would have been needed to render the enterprises profitable."[241] Based on these allegations, the court held that the *Sony* complaint "succeeds where *Twombly*'s failed because the complaint alleges specific facts sufficient to plausibly suggest that the

233. *Id.* at 50 (citing Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007)).
234. *Id.* at 48–49.
235. *Id.* at 50.
236. *Id*. at 51.
237. 592 F.3d 314 (2d Cir. 2010).
238. *Id.* at 317.
239. *Id.* at 322–24 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).
240. *Id.* at 323.
241. *Id.* at 324.

parallel conduct alleged was the result of an agreement among the defendants."[242]

Finally, the Second Circuit clarified that—consistent with its pre-*Twombly* jurisprudence—when basing a claim on parallel conduct, a plaintiff is not required to allege facts that tend to exclude independent self-interested conduct on the part of the defendants, nor does the plaintiff have to identify the specific time or place or person involved in the conspiracy at the pleading stage.[243] The Second Circuit's *Sony* decision thus broadened and clarified the type of allegations that can constitute a sufficient plausible factual basis for a Sherman Act section 1 claim under *Twombly*.

3. *Anderson News LLC v. American Media Inc.*

In one of the most recent circuit court decisions to shed light on the *Twombly* pleading standard, the Second Circuit in 2012 vacated the district court's denial of leave to file a proposed amended complaint in *Anderson News L.L.C. v. American Media, Inc.*[244] There, the plaintiff magazine wholesaler claimed that a group of magazine publishers and their distributors violated section 1 by conspiring to drive the plaintiff wholesaler out of business.[245] The plaintiff alleged that the defendant publishers and distributors colluded to monopolize the "single-copy" (nonsubscription) magazine sector, of which the plaintiff was the second largest wholesaler in the United States, by cutting off the plaintiff's and another wholesaler's magazine supply and dividing the wholesale business between two remaining (nonboycotted) wholesalers.[246] Specifically, the plaintiff alleged that because wholesalers had to bear the cost of handling and returning unsold magazines (up to 80 percent of magazines shipped), plaintiffs had implemented a surcharge on all single-copy magazines to be paid by the publisher defendants.[247] In response to that surcharge, the plaintiff alleged that the publisher defendants and the national distributor defendants had "cut off 80 [percent] of Anderson's magazine supply," "sought to acquire Anderson's distribution facilities," and "poached Anderson's employees and their proprietary intellectual property."[248] Plaintiffs further alleged that defendants, who were otherwise competitors, met numerous times during the weeks before the boycott and discussed dividing the U.S. distribution territory into two regions to be controlled by the two remaining wholesalers.[249]

The district court granted the defendants' motion to dismiss, reasoning that the plaintiff's allegations of collusion were precluded by its own

242. *Id.* at 323.
243. *Id.* at 324–25.
244. 680 F.3d 162 (2d Cir. 2012).
245. *Id.* at 167.
246. *Id.* at 171.
247. *Id.*
248. Anderson News, L.L.C. v. Am. Media, Inc., 732 F. Supp. 2d 389, 395, 397–99 & n.9 (S.D.N.Y. 2010), *rev'd*, 680 F.3d 162 (2d Cir. 2012).
249. *Id.* at 395.

conduct in imposing a surcharge, and that the defendants' refusal to do business with the plaintiff thereafter could be attributed to the publisher defendants' independent business decisions in response to the imposition of that surcharge.[250] The district court therefore held that the plaintiff's allegations did not meet *Twombly*'s plausibility standard, finding that "[u]nilateral parallel conduct is completely plausible in this context,"[251] and denied the plaintiff's motion for reconsideration and for leave to file an amended complaint.[252]

On appeal, the Second Circuit held that the district court erred in ruling that the allegations in the plaintiff's proposed amended complaint were facially implausible under *Twombly*. Judge Amalya Kearse addressed the proper application of *Twombly*: "[A]t the pleading stage, a complaint claiming conspiracy, to be plausible, must plead 'enough factual matter (taken as true) to suggest that an agreement was made.'"[253] However, the allegations need not rule out the possibility of independent action. The Second Circuit distinguished the plaintiff's allegations in the proposed amended complaint from the allegations found insufficient in *Twombly* on the grounds that the proposed amended complaint alleged that the defendants "had met or communicated with their competitors and others and made statements that may plausibly be interpreted as evincing their agreement to attempt to eliminate Anderson."[254] The court explained that "[t]he question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question is whether there are sufficient factual allegations to make the complaint's claim plausible."[255] The court admonished that "it is not the province of the court to dismiss the complaint on the basis of the court's choice among plausible alternatives."[256] Accordingly, the Second Circuit held that the district court was incorrect in ruling that the plaintiff did not state a plausible claim.[257]

The Supreme Court denied the defendants' petition for certiorari, choosing not to review the Second Circuit's *Twombly* analysis.[258] This decision thus has the potential to become an influential decision on pleading antitrust conspiracies.

B. Other Circuits Have Followed the Second Circuit's Application of Twombly

The Second Circuit's approach in *Sony* and *Anderson News* created a blueprint for other circuits to follow. For example, the Sixth Circuit in *Erie*

250. *Id.* at 398–99.
251. *Id.* at 399.
252. *Anderson News*, 680 F.3d at 180.
253. *Id.* at 184 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).
254. *Id.* at 187.
255. *Id.* at 189.
256. *Id.* at 190.
257. *Id.* at 194.
258. Curtis Circulation Co. v. Anderson News, L.L.C., 133 S. Ct. 846, 847 (2013).

County v. Morton Salt, Inc.[259] affirmed the dismissal of a complaint alleging price fixing by Ohio salt mine operators.[260] It cited the Second Circuit's decision in *Sony* as the only instance in which a circuit court considered and rejected extending the pleading standard to require plaintiffs to allege facts that exclude the possibility of lawful, independent conduct.[261] The First Circuit followed the analysis set forth in *Anderson News* in its decision in *Evergreen Partnering Group, Inc. v. Pactiv Corp.*[262] There, the court vacated dismissal of a complaint that alleged that food service packaging manufacturers and two trade associations refused, in concert, to deal with the plaintiff.[263] The First Circuit agreed with the Second Circuit's elucidation of *Twombly*'s plausibility standard, stating that a complaint must at least allege "the general contours of when an agreement was made, supporting those allegations with a context that tends to make said agreement plausible."[264]

CONCLUSION

While it has not been possible to cover all of the Second Circuit's significant contributions in the area of antitrust law in these pages, the areas and cases discussed illustrate the Second Circuit's strong and lasting influence on the nation's antitrust jurisprudence. Given the court's location at one of the world's economic centers, and its rich tradition of legal leadership, there is little doubt that it will continue to do so in the future.

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259. 702 F.3d 860 (6th Cir. 2012).
260. *Id.*
261. *Id.* at 869.
262. 720 F.3d 33 (1st Cir. 2013).
263. *Id.* at 35–36.
264. *Id.* at 46–47. The impact of *Sony* and *Anderson News* extend beyond the antitrust context. In *Vector Capital Corp. v. Ness Technologies, Inc.*, 511 F. App'x 101 (2d Cir. 2013), the Second Circuit cited *Anderson* in vacating the district court's dismissal of plaintiff's breach of contract complaint for failure to meet the plausibility standard of *Twombly*, finding it sufficient that plaintiff's allegations allowed for a reasonable inference of the misconduct alleged. *See id.* at 104. Likewise, a number of recent district court decisions applying *Anderson News* and *Sony* have allowed plaintiffs' claims to proceed regardless of whether alternative, more credible inferences could also be drawn from the facts alleged. *See, e.g.*, Teixeria v. St. Jude Med., Inc., No. 14-CV-789A, 2015 WL 902616, at *6 (W.D.N.Y. Mar. 3, 2015); Ramirez v. Hempstead Union Free Sch. Dist. Bd. of Educ., 33 F. Supp. 3d 158, 171 (E.D.N.Y. 2014); Jimmo v. Sebelius, No. 5:11-CV-17, 2011 WL 5104355, at *22 (D. Vt. Oct. 25, 2011).