CPI's North America Column Presents:

Challenging Consummated Mergers Under Section 2

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In the last year, officials at the U.S. Antitrust Agencies have taken a number of troubling positions with respect to what is required to challenge consummated mergers under Section 2 of the Sherman Act. These include: (1) the contention that Section 2 presents a "lower bar" than Section 7 of the Clayton Act in that Section 2 requires mere proof that the merger was "reasonably capable of" contributing significantly to the acquisition or maintenance of monopoly power;[1] (2) suggestions that evidence of intent may be used as a proxy for probable harm;[2] and (3) the idea that Section 2 can be used to challenge a series of acquisitions no one of which by itself was problematic but which together form an anticompetitive course of conduct.[3] In this Article we explain why these contentions are unfounded.

Section 2 as a "Lower Bar" Than Section 7

In the Fall of 2019, the Federal Trade Commission (FTC) for the first time took the position that Section 2 imposes a "somewhat relaxed causation requirement (as compared to the causation requirements imposed under Section 1 of the Sherman Act or Section 7 of the Clayton Act)."[4] Earlier that year, Bruce Hoffman, then Director of the Bureau of Competition, had claimed that, under the D.C. Circuit's *Microsoft* decision, Section 2

> doesn't turn on the actual effects in the specific case at issue. It's a matter of general tendency: the kind of effects that can broadly be expected from conduct of this kind across the great run of cases. Second, even through this lens of generalization, a plaintiff need not show but-for causation of the monopoly. What matters is that conduct is reasonably capable (in general) of making a significant contribution to monopoly: that is, that it would tend to make the acquisition or maintenance of monopoly power more likely, or more durable, or more substantial, by some meaningful amount. That is enough.[5]

These contentions are flawed for four reasons.

First, the assertion that Section 2 does not require proof of anticompetitive effects is based upon a misreading of the D.C. Circuit's decision in *United States v. Microsoft*.[6] The assertion conflates the *Microsoft* court's standard for proving competitive effects with its standard for establishing causation. The claim ignores the court's explicit statement that "the plaintiff, on whom the burden of proof of course rests . . . must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect."[7] The court went on to devote fully 20 pages to a careful analysis of the actual effects of each type of Microsoft's allegedly anticompetitive conduct.[8] Only after finding that each type of conduct indeed had an anticompetitive effect did the court turn to the separate and distinct question of causation: Was there a causal link between Microsoft's anticompetitive conduct and the alleged maintenance of its operating system monopoly? It was in addressing this question that the court said it was appropriate, in a government enforcement action, to "infer causation when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes."[9]

Of critical importance is that the court's causation standard was conditioned on its having found anticompetitive effects.

There is some debate over what the court meant by anticompetitive effects. In his 2019 speech, Hoffman acknowledged that, in addition to monopoly power, "Section 2 also requires anticompetitive conduct—often referred to as 'exclusionary,' 'anticompetitive' or 'predatory' conduct, or, as it's sometimes known, conduct that isn't 'competition on the merits.'"[10]

Hoffman's contention that *Microsoft* does not require actual effects appears to be based upon his conclusion that what the court described as the "requisite anticompetitive effects" analysis really amounted to a determination of whether the conduct was exclusionary in that it was likely to harm competition. But this ignores the court's findings that, as a matter of fact, most of the alleged conduct resulted in substantial foreclosure, thereby "keeping rival browsers from gaining the critical mass of users necessary to attract developer attention away from Windows as the platform for software development."[11] The court found that Microsoft's conduct "help[ed] keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."[12] The court inferred harm to the competitive process from these findings, in essence recognizing that minimum-efficient scale is the mechanism by which exclusionary conduct harms competition.[13] For other conduct, Microsoft "acknowledged" the anticompetitive effects, arguing only that there were offsetting procompetitive justifications, an argument rejected by the court.[14] No quantification or other assessment of the magnitude of that harm was necessary given Microsoft's lack of cognizable business justifications. Therefore, there was no need to balance anticompetitive effects against procompetitive effects to determine the net effect of the conduct.

Second, even as a pure causation standard (which we have shown is not a substitute for *Microsoft's* anticompetitive effects standard), it is important to understand the limited applicability of the "reasonably capable of" standard. The court fully explicated its reasoning on causation in the course of rejecting Microsoft's argument that, "as to § 2 liability in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct"[15] The court pointed out that "neither plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world *absent the defendant's exclusionary conduct.*"[16] Given this "underlying proof problem,"[17] the Court may infer causation. "To some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct,'"[18] i.e., the practices that had been shown to have had anticompetitive effects. In these carefully limited circumstances, the questions were "(1) whether as a general matter the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power and (2) whether Java and Navigator reasonably constituted nascent threats at the time Microsoft engaged in the anticompetitive conduct at issue."[19]

In *Rambus v. FTC*—a Section 2 case the D.C. Circuit decided after *Microsoft*—the court held that the agency failed to prove that "but-for" the defendant's conduct, there would have been harm to the competitive process.[20] As in *Microsoft*, the "but-for" world in *Rambus* was highly uncertain. In both cases, one could reasonably find the defendant's conduct may have caused the defendant to acquire or maintain its monopoly power. At the same time, it was also possible that the defendants in those cases would have acquired or maintained their monopoly power even absent their anticompetitive behavior. The court in *Rambus* held the government must bear the burden of that uncertainty. This burden applies in all Section 2 cases, whether the allegations involve conduct or acquisitions.

As former FTC Chairman Tim Muris and former FTC General Counsel John Nuechterlein explain, the *Microsoft* court's more lenient "reasonably capable" standard applies by its terms only to exclusionary conduct lacking any procompetitive justification—and, therefore, not to the typical merger, particularly if it was reviewed and approved by the Department of Justice ("DoJ") or the FTC itself before consummation.[21] Recall that *Microsoft* was a case of attempted monopoly maintenance involving allegations that the company had engaged in several types of exclusionary conduct with no efficiency justifications solely in order to suppress nascent technological threats to its Windows operating system monopoly.[22] Reading *Microsoft* and *Rambus* together, the key takeaway is that only when anticompetitive effects are shown (as required by *Microsoft* and *Rambus*) does the "reasonably capable of" causation standard apply to allegations that exclusionary conduct killed a nascent threat. Only when these conditions are met may the government avoid having to show that the threat would have become a real competitor but for the alleged exclusionary conduct.[23]

Without requiring proof of but-for causation, there is great risk of erroneously condemning acquisitions that may be procompetitive. Consider, for example, Herbert Hovenkamp's proposal presumptively to condemn acquisitions by a monopolist of "any firm that has the economic capabilities for entry and is a more-than-fanciful possible entrant, unless the acquired firm is no different from many other firms in these respects."[24] "More-than-fanciful" is an invitation to speculate, not a standard of proof.

Third, the contention that Section 2 presents a "lower bar" than Section 7 ignores the Supreme Court's decision in *Brown Shoe v. United States*, in which the court held that "the tests for measuring the legality of any particular economic arrangement under the Clayton Act are to be less stringent than those used in applying the Sherman Act."[25] The Court explained that the Clayton Act was enacted to lower the burdens in merger cases, quoting the Senate Report on the original Act: "The intent here . . . is to cope with monopolistic tendencies in their incipiency, and well before they have attained such effects as would justify a Sherman Act proceeding."[26]

Fourth, in a consummated merger setting, the focus naturally should be on the real-world evidence of what happened in the market following the acquisition (e.g., effects on price, output, and innovation). Such real-world evidence was relied upon by the DoJ in its 2008 complaint against Microsemi Corporation, a case in which the government alleged that, post-acquisition, Microsemi significantly raised prices.[27] In contrast, evidence that post-merger prices decreased or output expanded would suggest a procompetitive outcome. As former FTC economist John Yun stated in his Senate Judiciary Committee testimony: "To treat the success and associated exponential output expansion of an acquired product as evidence of an anticompetitive acquisition severely twists the meaning of 'anticompetitive.' When properly formulated, the central forces driving anticompetitive conduct are reductions in output, quality, innovation, and transfers away from consumers to producers."[28] While one could argue that the but-for world without the acquisition would have exhibited even lower prices or greater output, the burden would be on the challenger to make that showing. In other words, the plaintiff would need to prove that the but-for world absent the merger would likely be more competitive than the actual world with the merger.

In addition, it seems the DoJ and the FTC want to combine the causation standard of *Microsoft* and the efficiency standard of Section 7. In contrast to Section 2 cases, in which procompetitive or legitimate business justifications, as in *Microsoft* itself,[29] may defeat liability,[30] efficiencies have rarely been credited in Section 7 cases.[31]

Intent Evidence as a Proxy for Probable Harm

In a 2019 speech, Acting Deputy Assistant Attorney General Jeffrey Wilder proposed Section 2 as a "solution" to the difficulties of bringing nascent and potential competition cases under Section 7 of the Clayton Act.[32] Wilder suggested the presence of network effects, along with substantial barriers to entry, "could be useful in proving such a case."[33] Wilder went on to say that when evaluating a firm's acquisition or series of acquisitions, strategic documents "may well suffice to show a specific intent to monopolize and block future entry."[34]

The FTC has arguably gone further, suggesting in its 2017 complaint against Mallinckrodt that intent can serve as a substitute for probable harm.[35] In that case, the FTC's only allegation of an anticompetitive effect was that, but for Mallinckrodt's acquisition of a drug, another bidder would have acquired the license and developed a competing drug. The remainder of the complaint involved allegations of anticompetitive intent, including that the company viewed its target as a "possible future competitor" and "feared that if another company were to acquire [the target] . . . it could decimate its business."[36] The claim is, in other words, that unlike Section 7, Section 2 makes it unnecessary for the plaintiff to show that a consummated merger actually created monopoly power—i.e., enabled the company to raise prices or reduce quantity—and instead permits a court to rely upon evidence of anticompetitive intent.

Relying solely upon evidence of intent is inconsistent with Section 2, which requires proof that the merger had anticompetitive effects. Indeed, more than 30 years of case law makes clear that "[a]nticompetitive intent alone, no matter how virulent, is insufficient to give rise to an antitrust violation,"[37] and that "[a]nimosity, even if rephrased as 'anticompetitive intent[,]' is not illegal without anticompetitive effects."[38]

This is not to say evidence that the acquirer viewed its target as a viable threat is wholly irrelevant. Evidence to that effect could be combined with other evidence to show the only plausible explanation for an acquisition was the suppression of potential competition. "Such an acquisition might well fall within the scope of the *Microsoft* standard for purely 'undesirable' conduct. But such cases would be very rare and are unlikely to involve mergers that were subject to and survived HSR scrutiny."[39] Of course, the government would still have to prove the merger had actual anticompetitive effects for, as the Supreme Court has held, plaintiffs "must allege and prove harm . . . to the competitive process, i.e., to competition itself."[40]

In backward-looking cases there will be post-merger facts and data from which to determine what actually happened in the marketplace. For example, "post-merger market statistics may indicate what the actual situation was at the time of merger, and post-acquisition evidence might show that anticompetitive threats that seemed probable at merger time were not, in fact, probable."[41] Indeed, it may well be that nascent or potential competitors engage in strategic behavior to make themselves look like actual or potential competitors in order to make themselves attractive as acquisition targets. But when their intentions and incentives are tested, it may become clear that they lacked the ability to mature into truly viable competitors.

Course of Conduct Theories

DoJ and FTC officials have also taken the position that Section 2 may be used to overcome the difficulties of challenging serial acquisitions involving targets with market shares of as little as 5-10% and acquisitions by platform companies of start-ups operating outside their core market.[42] Wilder explained that the DoJ "is concerned about acquisitions of nascent competitors in platform industries because these markets are prone to tipping, and with tipping comes the potential for durable market power and substantial barriers to entry."[43] He went on to say that using Section 2 to challenge acquisitions in platform markets is a possible "solution" because it would allow the government to "put greater emphasis on a pattern of conduct."[44]

A focus on a course of conduct essentially amounts to a "monopoly broth" theory, which, as Professor Daniel Crane has explained, "is susceptible to misuse, particularly if applied to species of conduct whose legality depends on a developed conduct-specific test."[45] More specifically, "[i]n such cases, the prima facie legality of the conduct should be determined on a practice-by-practice basis. Any conduct that does not meet the relevant conduct-specific test should not be allowed to count toward liability or any other issue. In particular, plaintiffs should not be allowed to invoke 'monopoly broth' rhetoric in order to defeat established legal tests applicable to different kinds of conduct."[46] In other words, while the aggregation principle may correctly be applied to a series of exclusive-dealing arrangements that in combination resulted in foreclosure, it should not be used when the allegations involve disparate types of conduct. Disparate allegations, such as refusals to deal and predatory pricing or separate and distinct acquisitions, will each have its own conduct-specific test.

A number of circuits have rejected the argument that disparate types of conduct, none of which is anticompetitive by itself, can be combined to create antitrust liability. For example, the Fifth Circuit in *Retractable Technologies. v. Dickinson* held that "[e]ach of the[] theories must be separately analyzed in light of settled principles of antitrust law."[47] Similarly, the Second Circuit in *City of Groton v. Connecticut Light & Power* held that, "[e]ven though many of the issues the [plaintiffs] raise are interrelated and interdependent, however, we must . . . analyze the various issues individually."[48] The Federal Circuit in *Intergraph v. Intel* adopted the Second Circuit's approach, stating: "we reject the notion that if there is a fraction of validity to each of the basic claims and the sum of the fractions is one or more, the plaintiffs have proved a violation of section 1 or section 2 of the Sherman Act."[49]

And, it is not as if the Agencies are wholly without recourse for dealing with a series of acquisitions; they can challenge the last deal in the series that "tipped" the market to monopoly.

Conclusion

To rely upon the causation standard in *Microsoft* for the proposition that the government in Section 2 cases is absolved of its obligation to prove that a merger resulted in actual anticompetitive effects is to ignore both the explicit wording and the factual context of that decision. Similarly, to claim that Section 2 presents a "lower bar" than Section 7 ignores both the historical relationship between the Clayton and Sherman Acts and the more defense-friendly efficiency standard of Section 2.

Going even further to suggest that evidence of intent is a substitute for evidence of effect, i.e., of actual harm to competition, ignores over 30 years of case law making clear that antitrust is concerned about the actual effects of a merger (or other conduct) in the relevant market. Relying upon intent evidence is particularly problematic in a challenge to a consummated merger because the government should be able to produce actual evidence of what happened in the market; there is no reason to speculate about what could have been possible.

Lastly, relying upon a course of conduct theory to say that two innocuous mergers add to one problematic merger is, at best, a misuse of the theory in that it would apply it to disparate conduct as opposed to conduct such a series of exclusive dealing arrangements. A proper enforcement action would seek to block—or, if consummated, to undo—the last merger in the series that tipped the market into undue monopoly power.

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1 D. Bruce Hoffman, *Antitrust in the Digital Economy: A Snapshot of Fed. Trade Comm'n Issues*, Remarks at GCR Live Antitrust in the Digital Economy (May 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf (Hoffman described Section 2 as presenting both a "higher" and "lower bar" as compared to Section 1 and Section 7—higher in that it requires monopoly power or a "dangerous probability" of its acquisition and lower in that there is a "somewhat relaxed test for the causal relationship between the exclusionary conduct and the acquisition or maintenance of monopoly power.") [hereinafter "Hoffman Speech"].

2 Jeffrey M. Wilder, *Potential Competition in Platform Markets*, Remarks as Prepared for the Hal White Antitrust Conference (June 10, 2019), https://www.justice.gov/opa/speech/file/1176236/download [hereinafter "Wilder Speech"]; *see also* Complaint for Injunctive and Other Equitable Relief, *FTC v. Mallinckrodt ARD Inc.*, No. 1:17-cv-00120 (D.D.C. Jan. 25, 2017), ECF No. 10-1.

3 Wilder Speech at 2; *see also Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms*, Questions for the Record for Bruce Hoffman Submitted by Senator Richard Blumenthal (Oct. 8, 2019), at 1, https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Responses%20to%20QFRs1.pdf ("We [the FTC] have been analyzing the possible use of Section 2 to address patterns of serial acquisitions designed to thwart potential competition. We believe the legal framework supplied by Section 2 could apply to such conduct and provide a useful vehicle for challenging it in appropriate circumstances.") [hereinafter "Hoffman Questions"].

4 *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms:* Hearing Before the Comm. on the Judiciary S. Comm. on Antitrust, Competition Policy and Consumer Rights (Sept. 24, 2019) (Prepared Statement of the Federal Trade Commission) https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf.

5 Hoffman Speech, *supra* note 1, at 10-11. The FTC relied upon the "reasonably capable of" standard in its 2017 complaint against Mallinckrodt, in which it asserted that the acquisition at issue "eliminated the nascent competitive threat" and "is conduct reasonably capable of contributing significantly" to the maintenance of monopoly power. *Mallinckrodt*, *supra* note 2, ¶¶ 55, 59 (emphasis added).

6 *United States v. Microsoft*, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (en banc) (per curiam).

7 *Id.* at 58.

8 *Id.* at 59-78.

9 *Id.* at 79.

10 Hoffman Speech, *supra* note 1, at 9 (internal citations omitted).

11 *Microsoft*, 253 F.3d at 60; *see also id.* at 76 ("Because Microsoft's agreements foreclosed a substantial portion of the field for JVM distribution and because, in so doing, they protected Microsoft's monopoly from a middleware threat, they are anticompetitive."); *id.* at 72 ("Microsoft's exclusive deals with the ISVs had a substantial effect in further foreclosing rival browsers from the market."); *id.* at 64 ("Microsoft's license restrictions have a significant effect in closing rival browsers out of one of the two primary channels of distribution"): *id.* at 65 ("Because Microsoft's conduct [technological tying], through something other than competition on the merits, has the effect of significantly reducing usage of rivals' products and hence protecting its own operating system monopoly, it is anticompetitive"); *id.* at 66 ("[T]he commingling [Microsoft's decision to bind IE to Windows 98] deters OEMs from pre-installing rival browsers, thereby reducing the rivals' usage share and, hence, developers' interest in rivals' APIs as an alternative to the API set exposed by Microsoft's operating system."); *id.* at 73-74 ("Because Microsoft's exclusive contract with Apple has a substantial effect in restricting distribution of rival browsers, and because (as we have described several times above) reducing usage share of rival browsers serves to protect Microsoft's monopoly, its deal with Apple must be regarded as anticompetitive.").

12 *Id.* at 71 ("By ensuring that the 'majority' of all IAP subscribers are offered IE either as the default browser or as the only browser, Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."). The court explained that "[b]rowser usage share is important because, . . . a browser (or any middleware product, for that matter) must have a critical mass of users in order to attract software developers to

write applications relying upon the APIs it exposes, and away from the APIs exposed by Windows." *Id.* at 60.

[13] The unifying theme of foreclosure models is "that the potential entrant (or current rival) could, absent the exclusionary contracts, attract a sufficient mass of retailers to cover its fixed costs of entry, but that the monopolist's contracts with retailers prevent the potential entrant from doing so. A consensus has emerged that the necessary condition for anticompetitive harm arising from allegedly exclusionary agreements is that the contracts foreclose rivals from a share of distribution sufficient to achieve minimum efficient scale." Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19:5 GEO. MASON L. REV. 1163, 1166 (2012).

[14] *Microsoft*, 253 F.3d at 62 ("The anticompetitive effect of the license restrictions is, as Microsoft itself recognizes, that OEMs are not able to promote rival browsers, which keeps developers focused upon the APIs in Windows."); *id.* at 65 ("Microsoft does not deny, of course, that overriding the user's preference prevents some people from using other browsers. Because the override reduces rivals' usage share and protects Microsoft's monopoly, it too is anticompetitive.").

[15] *Id.* at 79.

[16] *Id.*

[17] *Id.*

[18] *Id*. (internal citations omitted).

[19] *Id*.

[20] *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008)

[21] *See, e.g.*, Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 30 (2020) [hereinafter "Muris & Nuechterlein"].

[22] While Microsoft did proffer justifications for some (but not all) of its alleged conduct, the court rejected them as "not permissible" or otherwise not cognizable. *Microsoft*, 253 F.3d at 64.

[23] During a May 19, 2020 panel discussion, Ian Conner, the Director of the FTC Bureau of Competition, relied upon two cases—*Realcomp v. FTC* and *McWayne v. FTC*—as support for the propositions that the government need not prove actual effects in a Section 2 consummated merger case, and that post-*Rambus* cases have not relied upon the but-for causation standard. *Realcomp*, however, is a Section 1, not a Section 2, case. In *McWayne*, the court concluded that substantial evidence supported the government's allegations of actual anticompetitive effects and the defendant failed to put forth any legitimate business justifications. As such, *McWayne* falls within the narrow exception created in *Microsoft* for the application of the "reasonably capable" standard. *Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815, 836, 834 (2011); *McWane, Inc. v. F.T.C.*, 783 F.3d 814, 835, 841 (2015).

[24] 3 Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 7A at 204 (4th ed. 2019).

[25] *Brown Shoe Co. v. United* States, 370 U.S. 294, 328-29 (1962).

[26] *Id.* at 318 n.32 (quoting S. Rep. No. 81-1775, at 4296).

[27] Verified Compl. at ¶38, *United States v. Microsemi Corp*., No. 1:08-cv-01311-AJT-JFA (E.D. Va. Dec. 18, 2008), https://www.justice.gov/atr/case-document/verified-complaint-5.

[28] *Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms:* Hearing Before the Comm. on the Judiciary S. Comm. on Antitrust, Competition Policy and Consumer Rights (Sept. 24, 2019) (Prepared Statement of John M. Yun), https://www.judiciary.senate.gov/imo/media/doc/Yun%20Testimony.pdf.

[29] *Microsoft*, 253 F.3d at 63 (exclusionary practice did not violate Section 2 given that a "drastic alteration of Microsoft's copyrighted work . . . outweighs the marginal anti-competitive effects of prohibiting OEMs from substituting a different interface automatically upon completion of the initial boot process").

[30] *See, e.g.*, *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 81 (3d Cir. 2010) (affirming summary judgment for defendants, holding that the Sherman Act does not prohibit exclusive dealing agreements "so long as [defendants] possess, in good faith, sufficient pro-competitive or business justifications for their actions"); *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 550 (8th Cir. 2007) (product design not predatory where justified by ensuring patient safety); *Tech Resource Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1466 (11th Cir. 1998) (affirming a jury verdict against § 2 claims, stating: "A defendant can escape § 2 liability if the defendant's actions can be explained by legitimate business justifications"); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989) (finding defendant's policy requiring that it pay fees to physicians no larger than those paid by other competing insurance policies was legitimately justified by defendant's efforts to reduce its operating costs); *see also Morris Commc'ns Corp. v. PGA Tour, Inc*., 364 F.3d 1288, 1295 (11th Cir. 2004) (holding that refusal to deal claim "cannot prevail because [defendant] has a valid business justification for its actions"); *id.* ("[R]efusal to deal that is designed to protect or further the legitimate business purposes of a defendant does not violate the antitrust laws, even if that refusal injures competition."); *Ill. ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1485 (7th Cir. 1991) (pipeline operator's refusal to transport gas that its customers purchased directly from manufacturers, instead of gas that operator purchased and resold from manufacturers, was justified by

costs to pipeline operator from its own long-term, high-cost contracts with gas manufacturers).

[31] *See, e.g.*, Joint Statement on the Burden of Proof at Trial at ¶ 11, *United States v. AT&T, Inc.*, No. 1:17-cv-02511-RJL (D.D.C. Mar. 13, 2018), ECF No. 87 (United States' Position: "No court has ever found efficiencies that justified the anticompetitive effects of a merger. As a result, the law is unsettled as to whether defendants can defeat a Section 7 case merely by showing the merger creates efficiencies, even if they 'outweigh' the anticompetitive effects proven by the plaintiff."); *FTC v. Penn State Hershey Med. Ctr.*, 838 F.3d 327, 347 (3d Cir. 2016) ("We note at the outset that we have never formally adopted the efficiencies defense. Neither has the Supreme Court. Contrary to endorsing such a defense, the Supreme Court has instead, on three occasions, cast doubt on its availability."); *id.* at 348 (concluding that, regardless whether an efficiencies defense is available, defendants failed to satisfy requirements); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775, 788-91 (9th Cir. 2015) (same); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 720 (D.C. Cir. 2001) (same). *But see New York v. Deutsche Telekom AG*, No. 19 Civ. 5434 (VM), 2020 WL 635499, at *19-26 (S.D.N.Y. Feb. 11, 2020) (noting "uncertainty in the state of the law" but concluding that efficiencies were one factor justifying merger).

[32] Wilder Speech, *supra* note 2, at 5.

[33] *Id.*

[34] *Id*.

[35] *Mallinckrodt, supra* note 2.

[36] *Id.* ¶¶ 37, 39.

[37] *McWane, Inc. v. FTC*, 783 F.3d 814, 840 (11th Cir. 2015).

[38] *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989); *see also e.g.*, *Microsoft*, 253 F.3d at 59 ("[I]n considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it.").

[39] Muris & Nuechterlein, *supra* note 21, at 40 n.49.

[40] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *see also Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act, is not to protect businesses from the working of the market; it is to protect the public from the failure of the market"); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc*., 429 U.S. 477, 488 (1977) ("[A]ntitrust laws . . . were enacted for 'the protection of competition, not competitors . . . '") (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

[41] Muris & Nuechterlein, *supra* note 21, at 45 (citation omitted).

[42] Wilder Speech, *supra* note 2, at 4; *see also* Hoffman Questions, *supra* note 3, at 1 ("We [the FTC] have been analyzing the possible use of Section 2 to address patterns of serial acquisitions designed to thwart potential competition. We believe the legal framework supplied by Section 2 could apply to such conduct and provide a useful vehicle for challenging it in appropriate circumstances.").

[43] Wilder Speech, *supra* note 2, at 4.

[44] *Id*.

[45] Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663, 663-64 (2010); *see also generally* Andrew I. Gavil et al., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 648 (3d ed. 2017) ("Applying the pattern or practice theory poses the challenging task of defining what quantum of individual acts suffices to create the critical mass of legality.").

[46] Crane, *supra* note 45, at 664.

[47] *Retractable Techs., Inc. v. Dickinson & Co.*, 842 F.3d 883, 891 (5th Cir. 2016).

[48] *City of Groton v. Connecticut Light & Power*, 662 F.2d 921, 928 (2d Cir. 1981).

[49] *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1367 (Fed. Cir. 1999).