Potential Competition: A "Never Embraced" Antitrust Theory's Standing through 60 Years of Jurisprudence

I. INTRODUCTION

Antitrust has taken a prominent position in the present-day American political landscape.[1] In the last several years, the United States has seen increasing concentration in some of its largest markets, and the resulting symptoms thereof.[2] Particularly evident in big tech, consumers have observed aggressive acquisition tactics, carelessness—if not maliciousness—with data collection practices, and arguable attacks on free speech through corporate censorship.[3] As one response, scholars on the progressive edge of antitrust, or "hipster" edge according to some, have suggested that traditional price effects analysis is no longer wholly sufficient to prevent consumer harm and should be expanded to include more exotic price derivatives like consumer data.[4] Regardless of this assertion's validity, potential competition stands as a logical complement to it in the antitrust toolbox as politicians and regulatory agencies work to confront

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[1] *See generally* Elizabeth Warren, *It's Time to Break Up Amazon, Google, and Facebook*, MEDIUM.COM, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c (Mar. 8, 2019) (proposing several strategies to break up big tech); Tim Wu, *Antitrust Returns to American Politics*, THENEWYORKTIMES.COM (Mar. 13, 2019) https://www.nytimes.com/2019/03/13/opinion/antitrust-2020-campaign.html; John Micklethwait et. al., *Trump Says Amazon, Facebook, and Google May Be "Very Antitrust Situation,"* BLOOMBERG.COM (Aug. 30, 2018) https://www.bloomberg.com/news/articles/2018-08-30/google-under-fire-again-on-search-as-hatch-calls-for-ftc-probe.

[2] *See generally* Emily Stewart, *America's Monopoly Problem, in One Chart*, VOX.COM (Nov. 26, 2018) https://www.vox.com/2018/11/26/18112651/monopoly-open-markets-institute-report-concentration; Lina M. Khan, *Amazon's Antitrust Paradox*, 123 YALE L.J. 564 (2017); Barak D. Richman, *Concentration in Health Care Markets: Chronic Problems and Better Solutions* 4 (June 2012) https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5378&context=faculty_scholarship (health care providers enjoy relatively higher freedom in pricing).

[3] *See* Elaine Ou, *Internet Consolidation Opened the Door to Censorship*, BLOOMBERG.COM (Apr. 10, 2019) https://www.bloomberg.com/opinion/articles/2019-04-11/facebook-and-google-made-themselves-vulnerable-to-regulation; Issie Laposwski, *How Cambridge Analytica Sparked the Great Privacy Awakening*, WIRED.COM (Mar. 17, 2019) https://www.wired.com/story/cambridge-analytica-facebook-privacy-awakening/; Mike Driscoll, *American tech giants are making life tough for startups*, THE ECONOMIST, https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups (June 2, 2018) ("Venture capitalists try to dodge spaces where the tech giants might step … [t]he tech giants try to squash startups by copying them, or they pay to scoop them up early to eliminate a threat.").

[4] *See Generally* Lina M. Khan, *Amazon's Antitrust Paradox*, 123 YALE L.J. 564 (2017) (acknowledging antitrust's current focus on consumer price effects); TIM WU, THE CURSE OF BIGNESS 120 (2018); *but see* Joshua D. Wright, Jonathan Klick et. al., *The Dubious Rise and Inevitable Fall of Hipster Antitrust*, THECLSBLUESKYBLOG.COM (Oct. 15, 2018) http://clsbluesky.law.columbia.edu/2018/10/15/the-dubious-rise-and-inevitable-fall-of-hipster-antitrust/.

the nation's concerns. Because potential competition tightens merger scrutiny outside of a company's direct line of business, it could help prevent aggressive acquisition practices used by powerful companies to avoid future competition and its pro-consumer effects on these non-price derivative metrics. This survey will provide an overview of potential competition and consider whether this antitrust theory should have relevance in the contemporarily antitrust landscape.

II. POTENTIAL COMPETITION DOCTRINE

Whereas standard merger review considers business combinations of direct competitors to project future harm to competition,[5] potential competition doctrine looks to prevent future harm caused by mergers between non-competitors.[6] Sub-divided into two variants, "actual," and "perceived," potential competition is applicable to concentrated markets where few equivalent potential entrants exist.[7]

The actual potential competition theory suggests that a company can harm competition by acquiring a target within a market that it would have nevertheless entered de novo "but for" the acquisition.[8] The Supreme Court has reserved judgement on whether a claim can succeed on this theory alone, but has, however, doubted its viability based on concerns with finding sufficient proof.[9] Circuit court standards of proof for actual potential competition vary from requiring "a

[5] *See* ANDREW GAVIL ET. AL., ANTITRUST LAW IN PERSPECTIVE 671 (3d ed. 2017).
[6] *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623–24 (1974); United States v. Aetna Inc., 240 F.Supp.3d 1, 75 (2017); ANTITRUST LAW DEVELOPMENTS (EIGHTH) 389 (Darren S. Tucker et al. eds., 2017).
[7] *See* Marine Bancorporation., 418 U.S. at 624–25; Tucker et al. eds., *supra* note 6 at 390–91 (finding that markets where three or four firms hold between 60 to 90 percent of market share are usually sufficiently concentrated; equivalent potential entrants are easily found where market entry barriers are low, but more heavily scrutinized in markets with high barriers to entry).
[8] *See* Aetna, 240 F.Supp.3d at 75; Tucker et al. eds., *supra* note 6 at 393 (a claim under actual potential competition speculatively requires: (1) proof the company entering the market had a feasible means of entry other than through a merger, and (2) "proof that those alternative means offer a substantial likelihood of producing deconcentration in the target market or other pro-competitive effects.").
[9] *See* Marine Bancorporation, 418 U.S. at 623–624 ("Unequivocal proof that an acquiring firm would actually have entered de novo but for a merger is rarely available. Thus, the principal focus of [potential competition] doctrine is [perceived potential competition]"); Aetna, 240 F.Supp.3d at 75; Tucker et al. eds., *supra* note 6 at 390.

reasonable probability" that a company would have entered a target market to effectively considering its application a victory for the defendants.[10]

Perceived potential competition posits that a company capable of entering a concentrated target market curbs anticompetitive behavior in that market due to its even-present threat of entry.[11] Perceived potential competition has also been called the "wings" theory, which helps visualize its core thesis that companies "waiting on the wings" of a market help keep current market participants honest.[12] The Supreme Court has squarely accepted this theory, but it is far from a ringer.[13] Only three mergers have ultimately been found unlawful on perceived potential competition grounds, with one being later reversed.[14] Unlike actual potential competition, an acquiring company's intent is less relevant than the way participants in a target market view it. If market participants check their behavior based on a given company, then it may be considered "waiting on the wings" of the market absent highly compelling reasons for non-entrance.[15] Despite receiving significant attention in its first decade of existence, potential competition doctrine has yet to reach the nation's highest court since.[16] By the 21st century, the theory that

[10] *See* Aetna, 240 F.Supp.3d at 76 ("The necessary implication of adopting that framework would be that the government's case fails."); Tucker et al. eds., *supra* note 6 at 393–95.
[11] *See* Aetna, 240 F.Supp.3d at 75; Tucker et al. eds., *supra* note 6 at 392–93 (a perceived potential competition claim requires showing that: (1) a market is substantially concentrated, (2) that the acquiring firm has the target characteristics, capabilities, and economic incentive to enter the market de novo, and (3) that the acquiring firm's premerger presence on the fringe of the target market in fact tempered oligopolistic behavior on the part of existing participants in that market).
[12] *See* Marine Bancorporation, 418 U.S. at 625.
[13] *Id.* at 623–25 (1974); United States v. Falstaff Brewing Corp., 410 U.S. 526, 531–32 (1973); Tucker et al. eds., *supra* note 6 at 392 ("Perceived Potential Competition cases have not enjoyed widespread success in the courts").
[14] *See* Tucker et al. eds., *supra* note 6 at 392 ("Perceived Potential Competition cases have not enjoyed widespread success in the courts. Mergers have been found unlawful by the courts based on the theory of perceived potential competition in only three cases, all of which also based liability on the actual potential competition theory, and one of which was subsequently reversed.").
[15] *See* F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).
[16] *See* Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1234 (8th Cir. 2010) [hereinafter "Ginsburg Appeal"].

was once referred to as "[T]he Justice Department's weapon under Section 7" was dismissively referred to as a "never embraced antitrust theory."[17]

III. JURISPRUDENCE AND PRINCIPLES

A detailed history of potential competition's origins is beyond the scope of this survey and largely unnecessary as modern caselaw embodies the end-result of formulative Supreme Court Cases.[18] Notably, however, the Supreme Court has not heard a potential competition case,[19] much less a standard horizontal merger case, since 1974.[20] Its silence has been attributed to both judicial and economic factors. First, the composition of the Supreme Court shifted in the mid-1970s from the populist, intervention-minded Warren court[21] to a more even-handed Burger court.[22] This tempered composition was more willing to align with the rapidly-growing Chicago School's economic efficiency arguments while lessening the court's previous emphasis on market structure.[23] External forces may have also played a role in this transition from market structure to an emphasis on economics and price effects. As foreign markets became more competitive, U.S. courts became more receptive to efficiency arguments.[24]

A. Contemporary Applications of Potential Competition from 2009 to 2019

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[17] *See* United States v. Aetna Inc., 240 F.Supp.3d 1, 74 (2017) (referring to the potential competition theory as "a never embraced theory of antitrust liability"); William E. Dorigan, *The Potential Competition Doctrine: The Justice Department's Antitrust Weapon Under Section 7 of the Clayton Act*, 8 J. MARSHALL J. PRAC. & PROC. 415 (1975).
[18] *See generally* Dorigan, *supra* note 17.
[19] *See* Ginsburg Appeal, 623 F.3d 1229, 1234 (8th Cir. 2010).
[20] *See* GAVIL ET. AL., *supra* note 5 at 697.
[21] *See* Tony A. Freyer, *What Was Warren Court Antitrust?* 2009 SUP. CT. REV. 1, 347 (2009) ("The Warren Court's antitrust jurisprudence provoked caricature, both as "coonskin cap" frontier law and as sentimental guardianship of mom and pop stores in an age of managerial imperialism.").
[22] *See* WILLIAM E. KOVACIC & CARL SHAPIRO, ANTITRUST POLICY: A CENTURY OF ECONOMIC AND LEGAL THINKING 14 (Oct. 1999); Richard A. Posner, *The Antitrust Decisions of the Burger Court*, 47 ANTITRUST L. J. 3, 819 (1978) ("Only with the replacement of Douglas by Stevens in December 1975 did the bloc of [antitrust] hawks shrink to three.").
[23] *See* GAVIL ET. AL., *supra* note 5 at 699.
[24] *See* WILLIAM E. KOVACIC & CARL SHAPIRO, ANTITRUST POLICY: A CENTURY OF ECONOMIC AND LEGAL THINKING 14 (Oct. 1999).

In 2009, the Eastern District of Missouri generously considered both potential competition theories before finding wholly insufficient facts to apply either in a judgement for defendants on the pleadings.[25] The plaintiffs had opposed the merger of Anheuser-Busch and InBev NV/SA in a class action, alleging that the large international brewer InBev was more than well-equipped to enter the United States on its own accord.[26] The court held that plaintiffs' perceived-potential claim was implausible based upon the facts alleged because the record instead showed that InBev actively publicly withdrew from, rather than pursued, the U.S. market before the merger.[27] On the actual-potential theory, the court focused on the lack of InBev management's intent to enter the U.S. market de novo.[28] The court's emphasis on the importance of heightened contemporary pleading standards under Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal was evident in the InBev opinion as well.[29] On appeal, the Eight Circuit's language reinforced the District Court's skepticism with proving potential competition underscored by the new pleading standards, writing: "Neither we [nor the Supreme Court] have applied [potential competition] theories since [1974]. Whatever else may be said [about potential competition], proof of liability under either theory is certain to entail expensive, uncertain litigation, even if, as here, the acquiring firm is rich and powerful and the acquired firm's market highly concentrated."[30]

Three years later, the eleventh circuit reviewed a merger between battery part manufacturers who produced components for different types of batteries at differing quality

[25] *See* Ginsburg v. InBev NV/SA, 649 F. Supp. 2d 943 (E.D. Mo. 2009), aff'd, 623 F.3d 1229 (8th Cir. 2010).
[26] *Id.* at 945–46.
[27] *Id.* at 949.
[28] *Id.* at 951–52.
[29] *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); Ginsburg, 649 F. Supp. 2d at 946.
[30] *See* Ginsburg Appeal, 623 F.3d 1229, 1234 (8th Cir. 2010).

levels.[31] Polypore, the larger of the two, noticed the smaller Microporous was considering entering Polypore's own market.[32] Viewing it as a threat, Polypore acquired Microporous.[33] In an interesting turn of events, the defendants argued that potential competition *should* in fact be applied.[34] This choice was a strategic move, showing the defendants had noticed how much higher the evidentiary burden was for potential competition than for direct competition.

The court wasn't persuaded however, noting that the difference between the product lines was minimal, particularly when Microporous had been actively investing resources to enter Polypore's own battery market.[35] On these grounds, the court chose to compare the case to United States v. El Paso Natural Gas Co. while differentiating it from United States v. Marine Bancorporation in treating Polypore and Microporous as direct competitors.[36] Using El Paso as a reference-point, the judge found actual competition analysis applicable, vocalizing a hesitance to apply potential competition where lines between competition were very small and the target company was already dipping its toe in the relevant market.[37] Under a direct competition framework, the Eleventh Circuit upheld the FTC's order of divestiture.[38]

The most recent and comprehensive review of potential competition came in a challenge to a merger between two enormous healthcare companies.[39] Potential competition was specifically relevant to 17 counties where one had withdrawn prior to the merger, likely to prevent obvious competitive overlap and to improve their litigation position.[40] Like in Polypore,

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[31] *See* Polypore Intern., Inc. v. F.T.C., 686 F.3d 1208 (11th Cir. 2012).
[32] *Id.* at 1212.
[33] *Id.* at 1211–13.
[34] *Id.* at 1213.
[35] *Id.* at 1215.
[36] *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623–24 (1974); United States v. El Paso Nat. Gas Co., 376 U.S. 651, 659 (1964); *Id*.
[37] Polypore, 686 F.3d at 1214–16.
[38] *Id.* at 1219.
[39] *See* United States v. Aetna Inc., 240 F.Supp.3d 1 (2017).
[40] *Id.* at 74.

the defendants insisted that potential competition should be applied because they were not competitors in that region, likely also hoping to benefit from the high potential competition evidentiary bar.[41] The government insisted on trying the two as actual competitors instead because Aetna had been a competitor in the markets only a year earlier, and the two were proximate to the markets both "geographically" and "conceptually."[42] The court agreed with the government, noting the facts bore far more similarity to El Paso and Polypore than Falstaff.[43]

B. General Principles from Mixed Caselaw

Although the past sixty years have fashioned a complex line of cases with inconsistent holdings, several overarching principles can be extracted from potential competition jurisprudence. First, finding sufficient evidence has always been a cumbersome obstacle, and the bar is now higher than ever. Even under the more forgiving pre-Twombly notice-pleading regime, proving either potential competition theory was cumbersome and expensive on a good day, while being nearly impossible on a bad one.[44] While the "evidence problem" stands somewhat at odds with Section 7's broad proscription of "any merger or acquisition the effect of which *may* be to lessen competition" and the original line of Supreme Court opinions, there can be little doubt today that substantial evidence is critical for a *plaintiff* to attempt a potential competition claim.[45]

Second, courts have chosen to differentiate cases to avoid applying potential competition doctrine rather than reject it entirely. Optimistically, this treatment could lie in the facts presented, but realistically, it likely marks a resistance to allow defendants to avail themselves of

[41] *Id.* at 75.
[42] *Id.* at 78.
[43] *Id.* at 77–78.
[44] *See* Ginsburg Appeal, 623 F.3d 1229, 1234 (8th Cir. 2010).
[45] *See* GAVIL ET. AL., *supra* note 5 at 697.

the high evidentiary bar surrounding potential competition. In application, like in Aetna or Polypore, courts have instead found direct lines of competition where the adjacent markets are closely aligned. Finally, potential competition jurisprudence suggests that regulated industries can be harder to challenge under potential competition theories due to regulation and administrative difficulty in market entry. This has been seen in health and banking, sometimes to plaintiffs' advantage, other times to defendants' advantage. At bottom, anyone alleging potential competition on either side should consider regulation in their industry an important factor to their merger analysis.

IV. CONCLUSION

Although potential competition might serve as a useful complement to an antitrust regime where definitions of consumer harm are more diverse, any expansion of antitrust injury or revival of potential competition would likely not be led by courts. The Supreme Court's current composition, with the addition of Justices Kavanaugh and Gorsuch has been deemed unwilling to engage in this type of interventionism. Backing their probable positions on this agenda are forty years of caselaw, genuine difficulties with evidentiary burdens, and concerns about American economic competitiveness on the international stage.[46]

Similarly, lower federal court jurisprudence has not evinced any interest in utilizing potential competition,[47] and the Clayton Act has proven resilient to congressional change over

[46] *See* Chris Sagers, *Antitrust, Political Economy, and the Nomination of Brett Kavanaugh*, HARV L. AND POL'Y REV. Blog (Sept. 19, 2019) https://harvardlpr.com/2018/09/19/antitrust-political-economy-and-the-nomination-of-brett-kavanaugh/ (discussing conservative Justices' historical skepticism with antitrust, but fundamental belief in its goals contrasted with newly-appointed Justice Brett Kavanaugh's more pronounced, cavalier distaste for antitrust as demonstrated by his judicial track record); *See* Jeffrey Rosen, *A Supreme Court Nominee Alert to the Dangers of Big Business*, THEATLANTIC.COM (Mar. 20, 2017) (https://www.theatlantic.com/politics/archive/2017/03/gorsuchs-nuanced-record-on-business/520101/ (suggesting that Justice Gorsuch is effectively pro-big business, but with a more nuanced point of view).

[47] *See* United States v. Aetna Inc., 240 F.Supp.3d 75 (2017); Polypore Intern., Inc. v. F.T.C., 686 F.3d 1208 (11th Cir. 2012); Ginsburg Appeal, 623 F.3d 1229, 1234 (8th Cir. 2010).

its hundred-plus year existence.[48] Accordingly, non-judicial methods of intervention–perhaps beyond antitrust entirely–may ultimately be the proper avenue to address the public's present concerns, superseding potential competition's best shot at renewed relevance. Nevertheless, should public awareness and political fixation on increased antitrust regulation continue to grow, a pro-intervention shift would not necessarily be unprecedented, as was seen in 1914 with the birth of the Clayton Act in a period similarly defined by concentrated markets, income inequality, and political polarization.[49]

[48] Clayton Act of 1914, 15 USC § 18 (2012); Celler-Kefauver Act, Pub. Law. 81-899 (1950) (adding stock acquisitions to the purview of merger review to broaden the scope of transactions the statute could address).
[49] *See* Tim Wu, *Antitrust Returns to American Politics*, THENEWYORKTIMES.COM (Mar. 13, 2019) https://www.nytimes.com/2019/03/13/opinion/antitrust-2020-campaign.html.