Another Way to Skin the Cat?
Perspectives on Using Section 2 to Challenge the Acquisition of Nascent Competitors

By Timothy Snyder and Jimmy Moore[1]

I. Introduction

In the last year, various leaders at the Federal Trade Commission and the Antitrust Division of the Department of Justice have held out Section 2 of the Sherman Act as a vehicle for targeting acquisitions involving nascent competitors—including consummated mergers—that raise potential antitrust concerns.[2] Three propositions, in particular, have invited controversy: (1) claims under Section 2 challenging the acquisition of a nascent competitor by a monopolist (or would-be monopolist) present a lower bar than Section 7 with respect to proving competitive effects and causation; (2) evidence of intent may be used as a proxy for probable harm; and (3) Section 2 may aid enforcers in challenging serial acquisitions—of targets with low market shares

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[2] *A Lesser Hurdle? Exploring Section 2 as Applied to Consummated Mergers*, American Bar Association (May 19, 2020) (Remarks from Ian Conner), https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/may-2020/at-051920-lesserhurdle/; Prepared Statement of the Federal Trade Commission, Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, 116th Cong. 15 (Sept. 24, 2019) (statement of Bruce Hoffman), https://www.ftc.gov/system/files/documents/public_statements/1545208/p180101_testimony_-_acquisitions_of_nascent_or_potential_competitors_by_digital_platforms.pdf [hereinafter "Prepared Statement of Hoffman"]; Jeffrey M. Wilder, Acting Deputy Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at Hal White Antitrust Conference: Potential Competition in Platform Markets (June 10, 2019), https://www.justice.gov/opa/speech/file/1176236/download [hereinafter, "Wilder Remarks"]; Bruce Hoffman, Dir., Bureau of Competition, Fed. Trade Comm'n, Remarks at Global Competition Review Live Antitrust in the Digital Economy: A Snapshot of FTC Issues (May 22, 2019), https://www.ftc.gov/system/files/documents/public_statements/1522327/hoffman_-_gcr_live_san_francisco_2019_speech_5-22-19.pdf [hereinafter, "Hoffman Remarks"].

or start-ups outside of the acquirer's primary market—on a course-of-conduct or "monopoly broth" theory.[3]

These three points merit careful discussion. In May 2020, the American Bar Association Section of Antitrust Law ("ABA") hosted an important panel, entitled *A Lesser Hurdle? Exploring Section 2 as Applied to Consummated Mergers*, to discuss competing views on this topic.[4] In a similar spirit, this paper summarizes the key arguments on the topic to date, drawing on both the ABA panel discussion and recent scholarship. Rather than attempt to resolve the debate here, we capture the key points on both sides of each controversy to serve as a departure point for future discussion.

II. Does Section 2 Require a Lower Standard of Proof Than Section 7 With Respect to Acquisitions of Nascent Competitors by A Monopolist?

FTC officials have asserted that Section 2 may be a promising tool to challenge a monopolist's acquisitions that would otherwise escape challenge under Section 7.[5] On the one hand, proponents of this view recognize that Section 2 can only apply to the limited set of mergers that involve a monopolist (or attempted monopolist).[6] On the other hand, drawing on language from the *Microsoft* opinion, they argue that Section 2 provides a relaxed standard of proof for competitive effects and causation in this context.[7] Last year, then-Director of the Bureau of

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[3] FTC leadership has expressed each of these three views, and DOJ leadership the third. *See supra*, note 2 for a compilation of remarks by agency leaders.

[4] *A Lesser Hurdle*, *supra* note 2. Speakers were Koren Wong-Ervin of Axinn, Veltrop & Harkrider LLP (moderator); Ian Conner, Director of the Bureau of Competition at the Federal Trade Commission; Eleanor Fox of New York University School of Law; the Honorable Douglas Ginsburg of the U.S. Court of Appeals for the D.C. Circuit; and Jonathan Jacobson of Wilson Sonsini Goodrich & Rosati.

[5] *See generally supra*, note 2 (citing to remarks from agency leadership).

[6] As a reminder, any monopolization claim under Section 2 requires "(1) monopoly power and (2) 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." Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act 5, https://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter1.pdf (citing cases). An attempted monopolization claim requires "(1) anticompetitive conduct, (2) a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power." *Id.* at 6 (citing cases). The same basic principles are applied to both monopolization and attempted monopolization claims.

[7] *See* Prepared Statement of Hoffman, *supra* note 2, at 15 (testifying that Section 2 "imposes a stringent requirement—the existence of monopoly power or the dangerous probability of its acquisition—along

Competition, Bruce Hoffman, delivered a speech that set forth this basic argument: that Section 2 presents both a higher bar (proof of monopolization) and a lower bar (on effects and causation) than Section 7 with respect to acquisitions of nascent competitors by firms with existing monopoly power.[8] This latter point—the lower-bar position—has been criticized as a misreading of *Microsoft*. Before delving into the arguments on both sides of the topic, it is worth asking why FTC leadership has been exploring the application of Section 2 to the acquisition of nascent competitors in the first place.

Why Has FTC Leadership Been Exploring the Use of Section 2 to Target Acquisitions Involving Nascent Competitors?

Some, including former FTC Chairman Timothy Muris and former FTC General Counsel Jon Neuchterlein, have pointed to Supreme Court precedent and legislative history to emphasize that Section 7 was adopted to enable the Agencies to prohibit potentially anticompetitive mergers in their incipiency.[9] In their view, the incipiency standard was self-consciously less restrictive than

with 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)").

[8] Hoffman Remarks, *supra* note 2, at 9. Director Conner recently cautioned against an imprecise characterization of Hoffman's position that claims Section 2 offers a lower threshold than Section 7. *A Lesser Hurdle*, *supra* note 2 (Remarks from Ian Conner).

[9] *See* Timothy J. Muris & Jonathan E. Neuchterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 38–39 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486469 ("As a threshold matter, any suggestion that Sherman Act causation standards are easier to meet than Clayton Act standards in merger cases ignores the historical relationship between these two statutes."); Douglas Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, George Mason University Law & Economics Paper Series at 5 (May 2020), www.ssrn.com/abstract=3590703 (arguing that a lower bar under Section 2 "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'" (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 328–29 (1962)); Jonathan Jacobson & Christopher Mufarrige, *Acquisition of "Nascent" Competitors*, ANTITRUST SOURCE (forthcoming 2020) (draft as of Feb. 19, 2020), at 11 ("In fact, the fundamental purpose of amended section 7 was to outlaw acquisitions that sections 1 and 2 of the Sherman Act did not reach."); *but see* Phillip E. Areeda (late) & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 912(b) (emphasizing that in one way, at least, Section 2 presents a lower standard under monopoly maintenance theories, which do not require proof that competition has been lessened as required under Section 7).

Section 2. Why, then, would the FTC turn to Section 2 to fill perceived gaps in Section 7 enforcement? Recent statements by FTC leadership suggest two rationales.

First, to some, application of Section 2 to mergers involving nascent competitors simply reflects the logical outgrowth of applying law to the facts. To them, applying a flexible standard of proof for Section 2 cases of this type is evolutionary and not revolutionary.[10] Ian Conner, the Director of the Bureau of Competition at the FTC, articulated this position at the ABA panel on this topic. According to Director Conner, rather than categorically preclude any given statute based on academic theory, the FTC looks at the facts of a given case, compares them to the antitrust statutes, and applies the statutes that fit the facts. Under this approach, the FTC does not foreclose application of Section 2 without considering its applicability to the facts of the case.[11]

To critics of the FTC leadership's views on Section 2, this position misses the essential point that the history and context of a statute help determine its meaning and proper application.[12] To them, an interpretation of Section 2 that produces a less strict standard than Section 7 is inconsistent with Section 7's purpose. As two of the speakers on the ABA panel—including Judge Douglas Ginsburg, the author of the *Microsoft* decision—argued in a paper on the topic: "[T]o claim that Section 2 presents a 'lower bar' than Section 7 ignores . . . the historical relationship between the Clayton and Sherman Acts . . . ."[13]

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[10] *See A Lesser Hurdle*, *supra* note 2 (Remarks from Ian Conner) (quoting *Microsoft* to support applying a lighter standard of causation and stating that "[t]his approach was consistent at the time of the ruling . . . in other circuits as well, and was not seen as revolutionary but rather evolutionary").

[11] *Id.*

[12] Those who acknowledge that Section 7 presents a lower bar than Section 2 also include some who advocate increased scrutiny by the Agencies of acquisitions involving nascent competitors. *See, e.g.*, *A Lesser Hurdle*, *supra* note 2 (Remarks of Eleanor Fox) ("I think that Judge Ginsburg is absolutely right in saying Section 7 can't be a higher standard, tougher to meet, than Section 2. I think that's exactly right. Section 7 is an incipiency standard. Section 2, we know post-*Microsoft* post-*Rambus*, the court is putting a lot of burden on plaintiffs to prove their case, so it's a tough road.").

[13] Ginsburg & Wong-Ervin, *supra* note 9, at 9; *but see* 1-2 ANTITRUST LAW DEVELOPMENTS 3A (indicating that, at least in the Section 1 context, this distinction has been blurred in recent years: "Courts are split, however, as to whether the required showing under the Sherman Act is higher than that under Section 7. Early case law contains statements that Section 7 was intended to reach incipient anticompetitive effects not reached by Section 1 of the Sherman Act. It is unclear whether the distinction persists.").

Second, those who support applying a lower standard of effects and causation for Section 2 have expressed concern that anticompetitive mergers could slip through the cracks under a stricter standard. They argue that proving direct anticompetitive effects for such an acquisition, and then showing the acquisition was the but-for cause of monopolization, presents a difficult problem of proof. For example, Director Conner argued in the recent ABA panel that if a "monopolist acts early enough under the [but-for] causation standards being argued for by recent commentary, we likely could not definitively prove anticompetitive effects" because "the acquired company is gone" after a merger closes.[14] To illustrate his point, he hypothesized a monopolist that targeted every potentially competitive firm that hit a threshold of 35% likelihood of successfully competing with the monopolist. Would Section 2 not apply simply because 35% is less than 50%? To Director Conner, the answer must be no because antitrust law is not so formulaic.[15]

Last year, Acting Deputy Assistant Attorney General (DAAG) Jeffrey Wilder made a related point, positing that buyers who engage in small, serial acquisitions can be difficult to challenge under Section 7: "It is exceptionally hard to establish that any individual acquisition leads to a substantial lessening of competition under the Clayton Act. Yet when we step back and look at the totality of the evidence, it is clear that a focus on individual transactions makes for a very blurry snapshot of what is happening in the market."[16] Thus, he concluded, relying solely on the Clayton Act may lead to under-enforcement of the antitrust laws—a shortcoming that Section 2 could address.[17]

Several commentators have suggested that concerns of under-enforcement are overblown. For example, one of the ABA panelists, Jonathan Jacobson, recently wrote a paper describing how

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[14] *See generally A Lesser Hurdle*, *supra* note 2 (Remarks from Ian Conner).
[15] *Id.*
[16] Wilder Remarks, *supra* note 2, at 2.
[17] *Id.*; *compare* Michael Moiseyev, *Potential and Nascent Competition in FTC Merger Enforcement in Health Care Markets*, COMPETITION POLICY INTERNATIONAL 3–7 (May 11, 2020), https://www.competitionpolicyinternational.com/potential-and-nascent-competition-in-ftc-merger-enforcement-in-health-care-markets/ (summarizing the Section 7 case law on actual potential competition theories and characterizing those opinions as creating "stiff probability requirements" to establish ability and likelihood of entry, arguing in favor of a lower causation standard for Section 2, and concluding that "Section 2 has taken a harsher view of conduct aimed at nascent competitors" than Section 7 has for potential competitors), *with* Jacobson & Mufarrige, *supra* note 9, at 3–7, 12–17 (narrating the case history of actual potential competition theories under Section 7 but subsequently highlighting the procompetitive contributions of certain technology acquisitions that have come under recent criticism).

some of the mergers that have given rise to such concerns have actually provided procompetitive benefits.[18] Others, including Judge Ginsburg, have suggested that over-application of Section 2 invites harmful intervention in innovative markets that exhibit high output growth and low prices.[19] Indeed, FTC leadership also recognizes limitations of evidence underlying concerns regarding under-enforcement. For example, before arguing in favor of a lower Section 2 standard, Hoffman cautioned that he was "not aware of good economic evidence that there is a unique and widespread 'nascent' or 'start-up' acquisition issue in the tech industry."[20]

Two Perspectives on Effects and Causation Under Section 2

FTC officials have suggested two ways that Section 2 claims involving the acquisition of a nascent competitor by a monopolist (or would-be monopolist) require a lower standard. First, Hoffman posits that plaintiffs need only show a *general tendency* of competitive effects, rather than prove actual, anticompetitive effects, from the challenged merger.[21] Second, according to Hoffman, plaintiffs do not need to show but-for causation of monopolization. Instead, citing *Microsoft*, he argues that "[w]hat matters [for proof of causation] 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."[22] Both points—the general tendency requirement for effects and the applicability of *Microsoft's* reasonably capable/significant contribution ("RCSC") causation standard to the acquisition of nascent competitors by monopolists (or would-be monopolists)—have been criticized as a misreading of *Microsoft*. Instead, critics argue that plaintiffs should be required, except in limited circumstances, to show (1) actual competitive effects related to the acquisition, and (2) that the merger was the but-for cause of monopoly acquisition or maintenance.

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[18] Jacobson & Mufarrige, *supra* note 9, at 12–17 (arguing that, at least in the technology space, many of the mergers have been procompetitive).

[19] According to some, when a consummated merger is being analyzed, the focus should be on real-world evidence of what happened following the acquisition, with a focus on price, output, and innovation. *See, e.g.*, Ginsburg & Wong-Ervin, *supra* note 9, at 5.

[20] Hoffman Remarks, *supra* note 2, at 5.

[21] *Id.* at 10.

[22] *Id.* at 10–11.

Anticompetitive Effects. The requirement that plaintiffs show some form of anticompetitive conduct "has long been a part of Section 2 jurisprudence."[23] Proponents of applying the general tendency standard for effects to the acquisition of nascent competitors recognize this requirement exists[24] but seem to blend it into their reading of *Microsoft's* RCSC standard.[25] Thus, Hoffman concludes that *Microsoft's* RCSC test "doesn't turn on the actual effects in the specific case at issue" but instead looks to "general tendency: the kind of effects that can broadly be expected from conduct of this kind across the great run of cases."[26]

Others, including former-Chairman Muris and Judge Ginsburg, however, consider this analysis to be "a misreading" of *Microsoft* because it conflates the *Microsoft* court's standard for proving competitive effects with its standard for causation.[27] They characterize Hoffman's interpretation of *Microsoft* as essentially determining conduct to have anticompetitive effects because it was *likely* to harm competition,[28] rather than by proving the actual competitive effects. To them, the *Microsoft* decision directly contradicts this analytical framework by providing "fully 20 pages [of] careful analysis of the actual effects" of each type of conduct before turning to the separate issue of causation.[29]

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[23] 1-2 ANTITRUST LAW DEVELOPMENTS 2C.

[24] Hoffman Remarks, *supra* note 2, at 9 ("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.'").

[25] For example, Hoffman distinguished Section 2 from Section 1 as follows: "Under Section 1 a plaintiff has to affirmatively show anticompetitive effects, *caused by the challenged agreement in that specific case*, before the burden passes to the defendant to show a procompetitive justification. Under Section 2, the threshold is lower: the general tendency of the conduct must be to make a significant contribution to monopoly in the ordinary run of cases." *Id.* at 11.

[26] *Id.* at 10.

[27] Ginsburg & Wong-Ervin, *supra* note 9, at 2; *see* Douglas Ginsburg & Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2* at 3 (Presentation), Global Antitrust Institute (May 19, 2019). One commentator has interpreted these two sections of the *Microsoft* opinion as a two-part causation test. *See* Ankur Kapoor, *What is the Standard of Causation of Monopoly?*, 23 ANTITRUST 38, 40 (Summer 2009) ("The D.C. Circuit's rulings in *Microsoft* and *Rambus* may be reconciled by focusing on the two distinct links in the chain of causation from conduct to monopoly. The first causal link is between conduct and exclusion; the second is between exclusion and the acquisition or maintenance of monopoly power.").

[28] Ginsburg & Wong-Ervin, *supra* note 9, at 3 ("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.").

[29] *Id.* at 2.

Causation. Proponents of applying the RCSC standard of causation to the acquisition of nascent competitors point to two passages from *Microsoft*, in particular, to support the position that Section 2 does not require proof of "but for" causation for conduct (including acquisitions) targeting nascent competitors:

1. "To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."[30]

2. "Microsoft points to no case, and we can find none, standing for the proposition 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."[31]

To proponents, these passages are applicable to the acquisition of nascent competitors by those with monopoly power even though the conduct at issue in *Microsoft* did not involve an acquisition. They observe, as a threshold matter, that acquisitions—even of nascent competitors—*can* constitute anticompetitive conduct under Section 2.[32] In their view, the RCSC standard applied by the *Microsoft* court can be applied to conduct targeting nascent competitive threats outside the specific facts of that case. To illustrate the applicability of the *Microsoft* case to acquisitions, Hoffman hypothesized that if Microsoft had decided to acquire Netscape to

[30] *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam).
[31] *Id.*; *see* Hoffman Remarks, *supra* note 2, at 10.
[32] *A Lesser Hurdle*, *supra* note 2 (Remarks from Ian Conner); *see* Areeda & Hovenkamp, *supra* note 9, at ¶ 701(a) ("Historically and today, merging viable competitors to create a monopoly is a clear §2 offense, as illustrated by the venerable *Standard Oil* and *American Tobacco* cases."); *compare id.* at ¶ 912(a) ("The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly."), *with id.* at ¶ 803(c) ("It seems unlikely that a nonmonopolist's acquisition of a potential competitor would contribute significantly to the preservation or enhancement of the acquirer's market power. . . . If the claim of a §2 violation seems marginal in the illustration, it would seem clear that acquisitions involving potential entrants [under §2] would rarely have sufficient effects to make subsequent achievement of a single-firm monopoly unlawful."); *see also* 1-2 ANTITRUST LAW DEVELOPMENTS 3A ("Mergers and acquisitions also may be challenged as . . . monopolization or attempted monopolization under Section 2 of the Sherman Act." (citing cases)).

eliminate it as a competitor, one would expect the court to have analyzed the case similarly and reached comparable results.[33]

Those who advocate for a narrower application of the RCSC standard—including Judge Ginsburg, a member of the *en banc* court in *Microsoft*—read *Microsoft* and subsequent case law as applying the RCSC standard to limited circumstances. Namely, to them the more-relaxed RCSC standard applies only to equitable enforcement actions against conduct with actual anticompetitive effects *that lacks any legitimate business justifications*.[34] In their view, this approach avoids the "great risk of erroneously condemning acquisitions that may be procompetitive."[35] In support of this position, they point to *Rambus v. FTC*, a subsequent decision from the Court of Appeals for the D.C. Circuit.[36] As in *Microsoft*, the but-for world in *Rambus* was uncertain. But rather than apply the RCSC standard, the court required the government to bear the burden of overcoming that uncertainty and found the government failed to prove but-for causation.[37] Those who support a narrow application of the RCSC standard read *Microsoft* and *Rambus* together to conclude that but-for causation continues to be the default standard, and that the RCSC standard only applies to allegations that exclusionary conduct killed a nascent threat "when anticompetitive effects are shown."[38]

III. The Use of Intent as a Proxy for Probable Harm

The Agencies have emphasized the importance of intent evidence when pursuing a Section 2 case against consummated mergers. Some commentators, including two members of the ABA

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[33] Hoffman Remarks, *supra* note 2, at 5–6.

[34] Ginsburg & Wong-Ervin, *supra* note 9, at 4 (citing Muris & Nuechterlein) (concluding that the RCSC 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 [Agencies themselves] before consummation").

[35] *Id.* at 5.

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

[37] *Id.* at 466; *see* Ginsburg & Wong-Ervin, *supra* note 9, at 4–5 (applying *Rambus* to the present topic); Muris & Neuchterlein, *supra* note 9, at 36–37 (summarizing *Rambus* in similar terms).

[38] Ginsburg & Wong-Ervin, *supra* note 9, at 5. *McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015), has been cited as a post-*Rambus* Section 2 case that did not rely on the but-for causation standard. *See, e.g.*, *A Lesser Hurdle*, *supra* note 2 (Remarks from Ian Conner). However, proponents of a narrow application of the RCSC standard consider *McWane* to fall within *Microsoft*'s narrow exception because 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." *Id.* at 5 n.23.

panel, have criticized these remarks as suggesting that "intent can serve as a substitute for probable harm," which "ignores over 30 years of case law."[39] Two statements, in particular, have given rise to these concerns. First, Acting DAAG Wilder emphasized in his speech that "strategic business documents . . . may well suffice to show a specific intent to monopolize and block future entry."[40] Second, the FTC stressed the importance of intent in its Mallinckrodt complaint,[41] which a variety of FTC speakers have subsequently highlighted as an example of an acquisition of a nascent competitor that was challenged under Section 2.[42]

Concern that intent evidence will be used to supplant proof of harm may, in fact, end up being a difference of degree rather than principle. Although intent evidence often makes for punchy allegations and framing devices in government complaints, the Agencies have not explicitly adopted the position that intent evidence can *literally* substitute for evidence of harm, rather than simply bolster such evidence. As Wilder explained it, strategic documents *may* show *intent to monopolize* and block entry; he does not take the next step to claim that such evidence itself constitutes sufficient proof of probable harm. And while the Mallinckrodt complaint certainly emphasized Questcor's motivations, it did not explicitly claim that these motivations alone proved probable harm.

And for good reason, given such a position seems unlikely to succeed. First, numerous courts have rejected the proposition that anticompetitive intent is sufficient (or for that matter, necessary) for a finding of an antitrust violation.[43] Even when courts acknowledge the role of intent evidence, that evidence is typically understood as shedding light on planned business practices in the future.[44] Second, and more importantly, while "bad documents" frequently

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[39] Ginsburg & Wong-Ervin, *supra* note 9, at 9.
[40] Wilder Remarks, *supra* note 2, at 6.
[41] Compl., *FTC v. Mallinckrodt ARD, Inc.*, No. 1:17-cv-120 (D.D.C. Jan. 30, 2017), ECF No. 1, https://www.ftc.gov/enforcement/cases-proceedings/1310172/mallinckrodt-ard-inc-questcor-pharmaceuticals.
[42] *See, e.g.* Hoffman Remarks, *supra* note 2, at 6 (using *Mallinckrodt* as an example of FTC enforcement under Section 2); *cf.* Ginsburg & Wong-Ervin, *supra* note 9, at 7 (summarizing that, aside from an allegation that another buyer would have acquired the relevant license, the "remainder of the complaint involved allegations of anticompetitive intent").
[43] Ginsburg & Wong-Ervin, *supra* note 9, at 7 (collecting cases).
[44] *See, e.g., Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918) ("[K]nowledge of intent may help the court to interpret facts and predict consequences."); *Microsoft Corp.*, 253 F.3d at 58–59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the

feature prominently in antitrust cases, their utility can be overstated because such evidence does not answer the ultimate question before the court—whether business practices actually harm competition.[45] This is because "bad intent is easily proven but seldom serves to distinguish situations where the defendant's conduct deserves condemnation from those in which it should be left alone."[46] Judge Frank Easterbrook made much the same observation three decades ago, writing that "[t]raipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions," and concluding that "[s]tripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation."[47] And as Professors Areeda and Hovenkamp observe, while the acquisition of a nascent competitor by a monopolist can constitute an "exclusionary" (or anticompetitive) act, it must be "anticompetitive to the extent that it eliminates competition that might otherwise have dissipated the monopolist's power."[48] In other words, the fact that a defendant *intends* its conduct to obtain or preserve monopoly power does not itself prove that the conduct would do so, though it may provide helpful context.

Defining the contours of the anticompetitive-effect requirement has been called "one of the most vexing questions in antitrust law."[49] Nonetheless, such difficulty does not dispatch with the requirement that the effect of given conduct *in fact be* anticompetitive. Intentions are not enough to cross that line, and it seems unlikely the Agencies will push the argument that far.[50]

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likely effect of the monopolist's conduct."); *cf. Oahu Gas Serv., Inc. v. Pac. Resources, Inc.*, 838 F.2d 360, 370 (9th Cir. 1988) (in a "situation in which conduct with a predatory rationale had a procompetitive effect," holding that "a finding of anticompetitive intent will not sustain a Section 2 claim in the face of evidence of procompetitive effects").

[45] *See generally* Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs v. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609 (2005).

[46] Areeda & Hovenkamp, *supra* note 9, at ¶ 601.

[47] *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403 (7th Cir. 1989).

[48] Areeda & Hovenkamp, *supra* note 9, at ¶ 701.

[49] 1-2 ANTITRUST LAW DEVELOPMENTS 2C.

[50] Even commentators that support increased scrutiny of consummated mergers agree that something more than intent must be provided to prove anticompetitive effect. *See, e.g.*, *A Lesser Hurdle*, *supra* note 2 (Remarks of Eleanor Fox) ("Intent is never the sole consideration for effect, but it's a great proxy to help you look for effects.").

IV. Using Section 2 to Target Serial Acquisitions

At the outset of this paper, we observed that one motivation for exploring Section 2's applicability to consummated mergers might be to address supposed competitive harms allegedly arising from a series of small transactions that each individually escaped scrutiny under Section 7.[51] To those concerned by such acquisitions, applying an expanded "course-of-conduct" theory of liability to serial acquisitions under Section 2 could bring enhanced antitrust enforcement. To others, it would be an inappropriate, expansive application of the course-of-conduct or "monopoly broth" theory, the history of which can be traced most closely to the Supreme Court's decision in *Continental Ore*.[52]

Since *Continental Ore* was issued in 1962, a spectrum of views has arisen regarding its scope and application. At the least controversial end of the spectrum, it is widely accepted that courts should read circumstantial evidence of conspiracy allegations as a whole when determining whether a plaintiff has sufficiently established the existence of a conspiracy.[53] Another interpretation, also generally accepted, is that a series of exclusive-dealing agreements may be considered collectively in determining whether a defendant has foreclosed the market from competitors.[54]

The disagreements begin in earnest at the next step along the spectrum, and it is also at this step that recent agency statements regarding application of Section 2 to mergers have given

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[51] *Cf.* Questions for the Record for Bruce Hoffman, Competition in Digital Technology Markets: Examining Acquisitions of Nascent or Potential Competitors by Digital Platforms: Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights, 116th Cong. 15 at 1 (Oct. 8, 2019), https://www.judiciary.senate.gov/imo/media/doc/Hoffman%20Responses%20to%20QFRs1.pdf ("We 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.").

[52] *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962).

[53] *See, e.g.*, *U.S. Futures Exchange, LLC v. Bd. of Trade of City of Chi., Inc.*, 346 F. Supp. 3d 1230, 1248 (N.D. Ill. 2018), *aff'd*, 953 F.3d 955 (7th Cir. 2020) ("It is true that courts generally view allegations of antitrust conspiracy as a whole to judge the character of the conspiracy and intent.").

[54] Ginsburg & Wong-Ervin, *supra* note 9, at 9; Daniel Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663 (2010) ("[I]n a certain class of cases—particularly those where the legality of a defendant's contracts depends on whether they foreclose a substantial share of the relevant market—it is necessary to consider the aggregate effect of defendant's conduct in order to determine legality."); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and* Microsoft, 7 GEO. MASON L. REV. 617, 636 (1999).

commentators greatest concern. Some courts have suggested that disparate types of anticompetitive conduct—an exclusive deal, a tie, a predatory-pricing scheme, and acquisitions of several nascent competitors, for example—should be considered together as a sort of "grab bag" of foreclosure.[55] Proponents of such a rule argue that this approach more fully captures the variations of ways that monopolists may exercise their market power. Critics of these course-of-conduct theories have argued that such aggregation risks evasion of the conduct-specific rules crafted by the courts specifically to avoid discouraging procompetitive conduct.[56] Consistent with this principle, courts routinely demand that plaintiffs establish the independent illegality of at least one act.[57]

This brings us to the most controversial end of the spectrum. Some have suggested that courts may find an overall illegal course-of-conduct by either (1) combining effects flowing from acts that violate the antitrust laws under traditional legal conduct tests with effects flowing from other unilateral acts that are not independently unlawful; or (2) at the farthest end of the spectrum, finding a series of instances of conduct—no one of which is illegal on its own—can collectively

[55] *See, e.g.*, *In re Lipitor Antitrust Litig.*, 868 F.3d 231, 274 (3d Cir. 2017) (holding that course of conduct allegation based on *Walker Process* fraud, false listings, sham litigation, and sham citizen positions plausibly constituted overall course of anticompetitive conduct); *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices & Antitrust Litig.*, No. 17-md-2785, 2017 WL 6524839, at *14–15 (D. Kan. Dec. 21, 2017) (conduct including exclusive dealing and deceptive practices may be considered as part of overall scheme).

[56] Ginsburg & Wong-Ervin, *supra* note 9, at 8; *see, e.g.*, *3Shape Trios A/S v. Align Tech., Inc.*, No. 18-1332, 2019 WL 3824209, at *11 (D. Del. Aug. 15, 2019), *report and recommendation adopted by* No. 18-1332, 2019 WL 4686614 (D. Del. Sept. 26, 2019) ("The [conduct-specific] rules [for certain types of Section 2 claims] are based on other considerations [than capturing every possible anticompetitive act], including First Amendment rights, the risk of false positives, the inability of courts to administer forced dealing, and the need to give fair notice to businesses.").

[57] *See, e.g.*, *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 839 (7th Cir. 2011) (Principles of *Continental Ore* "do[] not mean, however, that we will aggregate the effects of conduct immunized from antitrust liability with the effects of conduct not so immunized. That approach would nullify the immunity."); *3Shape Trios*, 2019 WL 3824209, at *10 (Case law "do[es] not hold that unilateral acts otherwise insulated from antitrust scrutiny can be plead together to state a Section 2 claim."); *id.* at *12 (noting rule "requiring plaintiffs to plead at least one instance of conduct not otherwise insulated from antitrust scrutiny" in order to state a Section 2 claim); *U.S. Futures Exchange*, 346 F. Supp. 3d at 1249 ("[A]s other courts interpreting *Continental Ore* have made clear, separate theories of antitrust liability must still be assessed individually."); *In re Processed Egg Prods. Antitrust Litig.*, 206 F. Supp. 3d 1033, 1042 (E.D. Pa. 2016) ("Subsequent decisions have acknowledged that the holding in *Continental Ore* was not intended to limit a court's individual assessment of the legality of various components of an alleged conspiracy.").

constitute a single course of illegal monopoly acquisition or maintenance. As relevant here, some, including agency officials, have argued that it can be difficult to prove that any single acquisition violates Section 7, particularly if the relevant transactions involve harm to innovation or acquisitions of nascent competitors.[58] According to these officials, Section 2 may provide an alternative vehicle by which to capture a pattern of conduct that evades scrutiny under Section 7.[59]

Critics of this view observe that the Agencies are not without recourse with respect to serial acquisitions, because the Agencies can still "challenge the last deal in the series that 'tipped' the market to monopoly."[60] Additionally, in their view, failed merger challenges may prove exactly the point—that none of the challenged transactions were illegal on their own.[61] And to the extent the Agencies' failed challenges are attributable to their inability to prove anticompetitive effects at the time of the merger, the agency retains the ability to unwind consummated mergers under Section 7 once such proof materializes.[62]

V. Conclusion

Agency officials have made three suggestions to explain why Section 2, in their view, is a promising tool for challenging acquisitions of nascent competitors by parties with market power (or would-be monopolists): (1) the relaxed standard for showing anticompetitive effects and causation in such cases; (2) the ability to use intent evidence as a proxy for competitive harm; and (3) the availability of a course-of-conduct theory to target series of consummated mergers that have passed scrutiny under Section 7. As we've documented in this essay, these proposals

[58] *See, e.g.*, Wilder Remarks, *supra* note 2, at 1; Questions for the Record for Bruce Hoffman, *supra* note 53, at 1.
[59] *See id*.
[60] Ginsburg & Wong-Ervin, *supra* note 9, at 9.
[61] *Id*. at 8–9; Crane, *supra* note 55, at 663–64.
[62] Ginsburg & Wong-Ervin, *supra* note 9, at 9; *see generally* Analyzing the Scope of Enforcement Actions Against Consummated Mergers in a Time of Heightened Scrutiny 3–8 (Apr. 2020), https://ourcuriousamalgam.com/wp-content/uploads/Consummated-Mergers-Policy-Task-Force-Apr-2020-FINAL.pdf (discussing the tradeoffs inherent in pre- and post-merger regimes).

have elicited a vibrant response that will continue to unfold as the Agencies explore such theories.[63]

[63] Two panelists suggested that revisiting the potential competition line of cases under Section 7 could be an alternative path to scrutinize the acquisitions of nascent competitors. *A Lesser Hurdle, supra* note 2 (Remarks of Eleanor Fox and Jonathan Jacobson). This topic is beyond the scope of this paper.