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Antitrust and Consumer Protection

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ANTITRUST AND CONSUMER PROTECTION

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I. INTRODUCTION

CONSUMER welfare is the common concern of the antitrust laws and the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA).¹ Antitrust laws, however, primarily address the misuse of market power to harm consumers, while the DTPA focuses on

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1. TEX. BUS. & COM. CODE ANN. §§ 17.41–17.63 (West 2011).

consumer harm brought about through deception.² The antitrust laws and the DTPA therefore are best viewed as focusing on complementary aspects of consumer welfare.

This Article covers significant developments under federal and Texas antitrust laws and the DTPA during the Survey period, November 1, 2009 through October 31, 2010.

II. ANTITRUST

The one antitrust case from the U.S. Supreme Court this term addressed whether the National Football League (NFL) and its teams are capable of illegal concerted action. Lower federal courts in Texas considered the Louisiana tobacco settlement and antitrust pleading standards. The one reported antitrust decision from the Texas state courts involved antitrust standing and antitrust injury.

A. CONCERTED ACTION

In *American Needle, Inc. v. National Football League*,³ the Supreme Court considered whether, when licensing intellectual property, the thirty-two teams of the NFL are separate economic actors capable of conspiring with each other or whether they constitute a single economic actor incapable of concerted action among themselves. The teams formed National Football League Properties (NFLP) in 1963 to develop, license, and market their intellectual property. The teams are able to withdraw from the arrangement, and at various times, some have sought to do so. Most of the revenues generated by NFLP have been donated to charity or shared equally among the teams.⁴

In 2000, NFLP began to grant exclusive licenses, including one specifically to Reebok. American Needle previously had a nonexclusive license, but in 2000 NFLP declined to renew the license. American Needle, sued alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated the Sherman Act.⁵ The defendants responded that the teams, NFL, and NFLP were incapable of conspiring within the meaning of Sherman Act § 1 “because they are a single economic enterprise, at least with respect to the conduct challenged.”⁶

The district court granted summary judgment on this point, holding that for purposes of exploiting their intellectual property, the NFL defendants “have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose.”⁷ The Seventh Circuit affirmed, and the Supreme Court granted

2. *Reiter v. Sonotone*, 442 U.S. 330, 342 (1979); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1382 (5th Cir. 1994); TEX. BUS. & COM. CODE ANN. § 17.44(a).

3. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2206 (2010).

4. *Id.* at 2207.

5. *Id.*

6. *Id.*

7. *Id.*

certiorari.⁸

The Supreme Court explained that the inquiry was a functional one that did not rely on whether the parties involved were legally distinct entities.⁹ Members of a single entity are capable of violating § 1 when the entity is “controlled by a group of competitors and serve[s], in essence, as a vehicle for ongoing concerted activity.”¹⁰ On the other hand, “there is not necessarily concerted action simply because more than one legally distinct entity is involved.”¹¹ The relevant inquiry is whether the action in question joins together separate economic interests, or “independent centers of decisionmaking,” and thus deprives the marketplace of actual or potential competition.¹²

The Court held that the NFL’s thirty-two teams did “not possess either the unitary decisionmaking quality or the single aggregation of economic power” so as to render them a single economic actor.¹³ In addition to being separately and independently owned and managed, the teams compete for fans, managers, and players and compete in the market for intellectual property.¹⁴ The Court rejected the argument that the formation of NFLP changed this analysis.¹⁵ NFLP’s existence as a single entity is nondispositive and “[a]n ongoing § 1 violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label.”¹⁶ The teams’ “interests in licensing [their] team trademarks are not necessarily aligned,” and the teams, while presumably all interested in promoting the NFL brand, “have distinct, potentially competing interests.”¹⁷

The defendants argued that their actions were immune because NFLP pursued the “common interests of the whole.”¹⁸ The Court rejected this argument, holding that “illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties.”¹⁹ The Court likewise rejected the defendants’ reliance on the fact that NFLP had operated since 1963 on the ground that “a history of concerted activity does not immunize conduct from § 1 scrutiny.”²⁰ Nor was the Court moved by the defendants’ justification for their cooperation, holding that “[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action.”²¹

The Court acknowledged that because NFLP is a separate corporation with its own management, and because most revenues generated by

8. *Id.* at 2207–08.

9. *Id.* at 2209.

10. *Id.*

11. *Id.* at 2210.

12. *Id.* at 2211–12.

13. *Id.* at 2212.

14. *Id.* at 2212–13.

15. *Id.* at 2214.

16. *Id.* at 2213.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 2214.

NFLP are shared by the teams on an equal basis, the question of whether NFLP decisions can constitute concerted activity was a close call.²² Absent an agreement to cooperate in exploiting their intellectual property, however, nothing would prevent the teams from making their own market decisions regarding intellectual property.²³ The Court recognized: "agreements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm" ²⁴ Here, the teams, operating through NFLP, remain "potential competitors with economic interests that are distinct from NFLP's financial well-being."²⁵ The Court concluded that NFLP was "an instrumentality" of the teams in making the licensing decisions.²⁶ While the teams shared in NFLP's profits or losses, competitors cannot simply create a joint venture to "get around" antitrust review.²⁷

The Court did indicate that while the defendants' actions were not immune from antitrust scrutiny, American Needle would face a nearly insurmountable hurdle on remand because the nature of the NFL would "provide[] a perfectly sensible justification for making a host of collective decisions."²⁸ Where cooperation and restraints on competition are required to ensure business survival, such agreements are likely to survive the rule of reason and "depending upon the concerted activity in question," the rule of reason may not require detailed analysis.²⁹ In the case of the NFL, the Court concluded, the interest in maintaining a competitive balance among athletic teams "may well justify a variety of collective decisions made by the teams."³⁰

Justice Stevens wrote for a unanimous majority, and the opinion suggests that the price of unanimity was a calculated vagueness in specifying the standard by which an arrangement among competitors is deemed unilateral or concerted action under § 1. Although the Court's opinion recites a familiar list of characteristics that are insufficient to automatically classify an arrangement as either unilateral or concerted action,³¹ the Court's opinion describes its "functional analysis" as an inquiry into "whether there is a 'contract, combination . . . or conspiracy' amongst 'separate economic actors pursuing separate economic interests,' such

22. *Id.*

23. *Id.* at 2214–15.

24. *Id.* at 2215.

25. *Id.*

26. *Id.*

27. *Id.* at 2215–16.

28. *Id.* at 2216.

29. *Id.* at 2216–17.

30. *Id.* at 2217.

31. *Id.* at 2214 ("[F]or many such [joint] ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action The mere fact that the teams operate jointly in some sense does not mean that they are immune."); *id.* at 2215–16 ("competitors 'cannot simply get around' antitrust liability by acting 'through a third-party intermediary or 'joint venture'" (quoting *Major League Baseball Prop., Inc. v. Salvino, Inc.*, 542 F.3d 290, 336 (2d Cir. 2008)) (Sotomayor, J., concurring in judgment)); *see also supra* notes 8–10, 13–14 and accompanying text.

that the agreement ‘deprives the marketplace of independent centers of decisionmaking,’ and therefore of ‘diversity of entrepreneurial interests,’ and thus of actual or potential competition.”³²

As a workable test, this is not much better than saying concerted action is joint action because parties have separate economic interests. The Court’s reasons for finding plurality in NFLP’s licensing arrangement do, however, offer useful clues. The opinion notes that the teams’ arrangement lacked both a “unitary decisionmaking quality” and a “single aggregation of economic power,” suggesting that the Court found it important that the teams were free to individually license outside of joint arrangement and that NFLP’s licensing decisions required the assent of more than a “mere majority” of its members.³³

The Court’s emphasis on these factors appropriately suggests that competitor collaborations, short of an outright merger, will almost always be subject to § 1 analysis. This interpretation is supported by the Court’s refusal to “pass upon” the government’s suggestion that concerted action should not be found if the parties “have effectively merged the relevant aspect of their operations, thereby eliminating actual and potential competition . . . in that operational sphere” and the arrangement “[does] not significantly affect actual or potential competition . . . outside their merged operations.”³⁴ “[B]ecause the teams still own their own trademarks and are free to market those trademarks as they see fit,” NFLP did not represent an effective merger of the teams’ trademark interests.³⁵

The opinion’s closing observations, which assured the teams that a plurality finding does not mean they are “trapped by antitrust law,” noted that “‘the special characteristics of this industry may provide a justification’ for many kinds of agreements.”³⁶ The Court’s elaboration on this theme, however, may offer defendants less comfort than it first appears. The Court observes that “[w]hen ‘restraints on competition are essential if the product is to be available at all,’” condemnation of these restraints as per se illegal is not appropriate, and in such instances the arrangement is likely to survive the rule of reason.³⁷ It is far from clear, however, that NFLP’s licensing activities are “necessary to market the product at all.”³⁸ Indeed, the Court’s opinion seems to recognize that “[o]ther features of the NFL may also save agreements amongst the teams,” such as “‘the interest in maintaining a competitive balance’” among them.³⁹ It is noteworthy that the case cited by the Court for this proposition, *NCAA v.*

32. *Am. Needle*, 130 S. Ct. at 2212 (citations omitted).

33. *Id.*

34. *Id.* at 2211 n.9.

35. *Id.*

36. *Id.* at 2216 (quoting *Brown v. Pro Football, Inc.*, 518 U.S. 231, 252 (1996) (Stevens, J., dissenting)).

37. *Id.* (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984)).

38. *Id.* (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23 (1979)).

39. *Id.* at 2217 (quoting *NCAA*, 468 U.S. at 117).

Board of Regents,⁴⁰ is one where the Court held the need to maintain competitive balance among football teams was insufficient to justify the restraint involved.

B. TOBACCO SETTLEMENT LEGISLATION

In *Xcaliber International Limited LLC v. Attorney General of Louisiana*⁴¹ and *S&M Brands, Inc. v. Caldwell*,⁴² two Fifth Circuit panels considered antitrust challenges to the Master Settlement Agreement (MSA) that resolved litigation regarding tobacco-related health care costs. Several states had previously sued the four largest tobacco manufacturers (the Original Participating Manufacturers or OPMs). The states alleged that the marketing and use of tobacco products cost the states billions of dollars in increased health care costs.⁴³ The MSA was the result of a settlement between the OPMs and a number of governmental entities (the Settling States), one of which was Louisiana.⁴⁴ The MSA released the OPMs from past, present, and future tobacco-related claims in exchange for, among other things, annual payments into a MSA fund. The settlement permitted non-OPM tobacco manufacturers to join the MSA as Subsequent Participating Manufacturers (SPMs).⁴⁵ SPMs were also required to make payments into the MSA fund, although the amount and timing of the payments varies depending on when they obtained SPM status.⁴⁶

Because the MSA required OPMs and SPMs to pay for costs not incurred by tobacco manufacturers that sold tobacco products in the state but did not participate in the MSA, the MSA encourages the Settling States to pass the "Escrow Statute" addressing obligations of Non-Participating Manufacturers (NPMs).⁴⁷ Louisiana passed such a statute, under which an NPM is required to either join the MSA or make an annual deposit into a qualified escrow account based on the quantity of cigarettes that NPM sold in the state during the prior calendar year.⁴⁸ The interest earned on the escrow account is paid out to the NPM, while the principal is held for twenty-five years or paid to the State of Louisiana to satisfy a judgment against the NPM, whichever comes first.⁴⁹

The Escrow Statute also provides that the account returns to an NPM monies deemed as overpaid compared to OPMs and SPMs. In 2003, this provision was amended (the 2003 Amendment) to close a perceived loophole that would allow certain NPMs to pay less than OPMs and SPMs.⁵⁰

40. *NCAA*, 468 U.S. at 88.

41. *Xcaliber Int'l Ltd. v. Att'y Gen. of La.*, 612 F.3d 368, 371 (5th Cir. 2010).

42. *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 173–74 (5th Cir. 2010).

43. *Id.* at 174; *Xcaliber Int'l*, 612 F.3d at 371.

44. *S&M Brands*, 612 F.3d at 174.

45. *Id.*

46. *Xcaliber Int'l*, 612 F.3d at 371–72; *S&M Brands*, 614 F.3d at 174.

47. *S&M Brands*, 614 F.3d at 174.

48. *Id.*

49. *Xcaliber Int'l*, 612 F.3d at 372; *S&M Brands*, 614 F.3d at 174–75.

50. *Xcaliber Int'l*, 612 F.3d at 373.

The 2003 Amendment thus changed the amount released back to the NPM, not the per cigarette amount paid in.⁵¹

Xcaliber, an NPM, filed suit against the Louisiana Attorney General seeking a declaration that the 2003 Amendment violated, and was preempted by, the Sherman Act. The district court granted summary judgment for the Attorney General, and Xcaliber appealed.⁵²

Applying the two-step analysis of *Rice v. Norman Williams Co.*,⁵³ the Fifth Circuit considered (1) whether the Escrow Statute “mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute;” and (2) “whether the statute [was] saved from preemption by the state action immunity doctrine.”⁵⁴ The court concluded that the 2003 Amendment did not “force or allow private parties to collude, set prices, divide markets, or in any other manner violate antitrust law,” and that the statute therefore, did not “mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases.”⁵⁵ Nor did the 2003 Amendment “place[] irresistible pressure on a private party to violate the antitrust law in order to comply with the statute” as it did not pressure NPMs to conspire in violation of antitrust laws.⁵⁶ The court rejected Xcaliber’s argument that the 2003 Amendment violated the Sherman Act under a hybrid restraint analysis.⁵⁷ A hybrid violation occurs when a private price-fixing conspiracy is concealed by a purported state-administered price stabilization scheme.⁵⁸ The court concluded that because violations based on hybrid restraints arise when the government gives regulatory authority to private parties, which was not the case with the 2003 Amendment, there was no violation.⁵⁹

Although the court found that Xcaliber failed to establish the first prong of the *Rice* test, it went on to consider whether the 2003 Amendment could be saved from preemption by the state action doctrine.⁶⁰ Xcaliber alleged that the 2003 Amendment, together with the MSA and statutes implementing it, facilitated a cartel intentionally protecting the market shares of the OPMs and SPMs and driving NPMs out of business.⁶¹ Xcaliber further alleged that Louisiana acted at the behest of the OPMs in enacting the legislation and therefore had “attempted to authorize a private conspiracy that would clearly violate the antitrust laws but

51. *Id.* at 372–73.

52. *Id.* at 373.

53. *See Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

54. *Xcaliber Int’l*, 612 F.3d at 374 (quoting *Rice*, 458 U.S. at 661).

55. *Id.* at 375.

56. *Id.* (quoting *Rice*, 458 U.S. at 661).

57. *Id.* at 376.

58. *Id.*

59. *Id.* at 376–77.

60. *Id.* at 377.

61. *Id.*

for the State's involvement."⁶²

The court concluded that Xcaliber's evidence of the OPMs' involvement in the legislation's enactment "amount[ed] to little more than speculation," particularly when contrasted with Louisiana's stated reasons for entering into the MSA and the 2003 Amendment, as well as the actual effect of the statute, which already reduced cigarette consumption and reimbursement to the states for public costs of cigarette consumption.⁶³ The fact that the OPMs and SPMs may have lobbied in favor of the legislation did not establish "that the Louisiana legislature acted solely at their behest."⁶⁴ Recognizing that lobbying efforts are protected from antitrust liability, the court concluded that it would be highly incongruous for a "legislature to run afoul of antitrust law when it passes a statute after lobbying by private parties."⁶⁵

The plaintiffs in *S&M Brands* alleged that "the MSA creates a national cigarette cartel designed to increase the prices paid out to the OPMs and protect the OPMs market share."⁶⁶ They further asserted that the only defense even potentially available to the attorney general was *Parker v. Brown* immunity, but that such immunity did not apply because Louisiana was acting as a private player when it agreed to restrain trade.⁶⁷ The district court granted summary judgment in favor of the defendant.⁶⁸

The Fifth Circuit held that *Xcaliber* foreclosed the plaintiffs' argument that the Escrow Statute was a per se violation of the Sherman Act.⁶⁹ The court then joined the Sixth, Eighth, and Ninth Circuits in rejecting the argument that the MSA and Escrow Statute working together created an antitrust violation.⁷⁰ The plaintiffs unsuccessfully tried to argue that the statutory scheme provided a disincentive for the NPMs to engage in price competition with the OPMs and SPMs. Quoting at length from the Sixth Circuit's opinion in *Tritent International Corp. v. Kentucky*, the court held that the plaintiffs' complaint was really with the behavior of the OPMs and SPMs following the MSA's enactment, which was neither mandated nor explicitly authorized by Louisiana's legislation.⁷¹ Accordingly, the court found no merit to the plaintiffs' arguments that the MSA and Escrow Statute violated federal antitrust laws.⁷²

C. PLEADING FEDERAL ANTITRUST CLAIMS

In 2007, the U.S. Supreme Court in *Leegin Creative Leather Products*,

62. *Id.* at 378.

63. *Id.* at 379.

64. *Id.*

65. *Id.* at 380.

66. *S&M Brands, Inc. v. Caldwell*, 614 F.3d 172, 176 (5th Cir. 2010).

67. *Id.* (implied state action immunity).

68. *Id.* at 173.

69. *Id.* at 176.

70. *Id.* at 177.

71. *Id.* (citing *Tritent Int'l Corp. v. Ky.*, 467 F.3d 547, 557 (6th Cir. 2006)).

72. *Id.*

*Inc. v. PSKS, Inc.*⁷³ overturned ninety-six years of precedent to hold that minimum resale price maintenance should be judged under the Rule of Reason. The case was remanded to the district court, which granted the defendant's motion to dismiss. During the Survey period, the Fifth Circuit affirmed the dismissal, and the Supreme Court thereafter denied certiorari.⁷⁴

Leegin manufactures the Brighton line of women's accessories, which are sold both in company stores and in independently-owned boutiques that purchase the goods from Leegin at wholesale. Leegin sold Brighton products to the plaintiff, a women's clothing and accessories specialty store.⁷⁵ In 1997, the plaintiff violated a resale price maintenance (RPM) policy instituted by Leegin.⁷⁶ When the plaintiff refused to stop discounting, Leegin suspended all shipments of Brighton products to the plaintiff.⁷⁷ The plaintiff sued, alleging that Leegin violated § 1 of the Sherman Act by entering into illegal agreements with retailers to fix the prices of Brighton products and by terminating the plaintiff as a result of those agreements.⁷⁸

After the Supreme Court's decision, the plaintiff filed an amended complaint alleging: (1) Leegin's RPM policy was an unreasonable restraint of trade under both *per se* and Rule of Reason analysis; (2) Leegin's most successful retailers had "reached a consensus regarding special occasion discounts and enticements," and the agreement was adopted by Leegin; (3) Leegin was the hub in a hub-and-spoke conspiracy; and (4) Leegin was involved in a horizontal price-fixing conspiracy at the retail level because it agreed on prices with other retailers.⁷⁹ The plaintiff also alleged that RPM should be analyzed differently than other vertical restraints in the dual distribution context.⁸⁰ The district court granted Leegin's motion to dismiss, holding that the plaintiff "failed to plead a plausible relevant market" and that the plaintiff's newly-pled horizontal claims were barred by the mandate rule and failed as a matter of law.⁸¹

The plaintiff alleged "(1) the 'retail market for Brighton's women's accessories' and (2) the 'wholesale sale of brand-name women's accessories to independent retailers'" as the relevant product markets.⁸² It claimed that "Leegin had market power [in these markets] based on its 'highly

73. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007). The Supreme Court's decision was reported in the 2008 Survey. See 61 SMU L. Rev. 531, 533–37 (2008).

74. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 615 F.3d 412, 414 (5th Cir. 2010), *cert. denied*, 79 U.S.L.W. 3329 (U.S. Feb. 22, 2011) (No. 10-653).

75. *Id.*

76. *Id.* at 414–15.

77. *Id.* at 415.

78. *Id.* at 414–15.

79. *Id.* at 416.

80. *Id.*

81. *Id.*

82. *Id.*

differentiated products,' its large showroom at the Dallas trade show, and its alleged position as the largest among an unspecified number of manufacturers in the proposed wholesale market."⁸³

Finding these allegations inadequate, the Fifth Circuit held that an anti-trust plaintiff must plead a "proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand."⁸⁴ A "proposed relevant market [allegation] that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor" is legally insufficient.⁸⁵ The court concluded that neither of the plaintiff's proposed relevant markets met this test.⁸⁶

While in certain "rare circumstances, a single brand . . . can constitute a relevant market for antitrust purposes," the court held that a single-brand market was appropriate only where "consumers are 'locked in' to a specific brand by the nature of the product."⁸⁷ According to the court, the plaintiff failed to allege any "structural barrier to the interchangeability of Brighton products with goods produced by competing manufacturers" and failed to properly allege that Brighton products were a submarket.⁸⁸

The plaintiff's second proposed relevant market definition failed because: (1) "wholesale sale" improperly focused on the distribution level, not the product; (2) the plaintiff failed to "sufficiently" allege why Brighton goods were not interchangeable with non-brand name products; (3) there was no relevance to the use of "independent retailers" in the market definition because the plaintiff failed to allege facts that established why independent retailers do not compete with larger chain stores in distribution of Brighton products; and (4) "women's accessories" was not sufficiently specific to constitute a market over which Leegin had power⁸⁹ because pleading a vertical restraint claim requires a plausible allegation of a defendant's market power.⁹⁰

The Fifth Circuit also found flaws in the plaintiff's allegations of anticompetitive harm, holding that the allegation that the "RPM program forced consumers to pay 'artificially' high prices for Brighton products . . . defie[d] the basic laws of economics."⁹¹ The court determined, apparently from its own experience, that a price increase by Leegin would

83. *Id.*

84. *Id.* at 417 (quoting *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 628 (5th Cir. 2002)).

85. *Id.* at 417-18.

86. *Id.* at 418.

87. *Id.*

88. *Id.*

89. *Id.* The plaintiff alleged, among other things, that Leegin "is viewed as the preferred supplier to stores offering women's accessories because of the selection and nature of the product offerings, and the fact that it has decided to offer its products through a large network of independent retailers." Second Amended Complaint at ¶ 18, *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010) (No. 2:03-CV-107-TJW), 2008 WL 7715339 [hereinafter "PSKS Amended Complaint"].

90. *Leegin*, 615 F.3d at 419.

91. *Id.*

merely cause loss of sales to its competitors.⁹² Similarly, while the plaintiff alleged that the “RPM policy deprived consumers of ‘free and open competition in the purchase of Brighton-brand products,’” the court determined that interbrand competition would press “Brighton retailers to offer a combination of price and service that attracts consumers away from competing products.”⁹³ The court finally noted that the plaintiff “never asserted that a cartel of retailers or one dominant retailer [was] the ‘source’ of Leegin’s RPM program.”⁹⁴ The court concluded that even if it accepted the plaintiff’s factual allegations as true, there was no plausible allegation of harm to interbrand competition.⁹⁵

Because the Fifth Circuit found that the plaintiff’s market definition and allegations of competitive harm were fatally flawed, it declined to address three arguments made by amicus American Antitrust Institute: (1) that the rule of reason amounts to a rule of per se legality for RPM arrangements;⁹⁶ (2) that RPM arrangements should be treated as “inherently suspect” because they lead to higher prices or reduced output, and (3) that dual distribution systems should be presumptively illegal.⁹⁷

Regarding the plaintiff’s horizontal restraint claim, the court reiterated its holding that the plaintiff failed to allege that retailers were the source of price restraint explaining that a manufacturer’s discussion of a pricing policy with its retailers, and its subsequent decision to adjust that pricing policy, does not give rise to an antitrust claim.⁹⁸ The court rejected the plaintiff’s allegation of a hub-and-spoke conspiracy on similar grounds that the plaintiff had not alleged that a dominant retailer imposed the RPM policy or that retailers agreed on the policy amongst themselves.⁹⁹ Finally, the court rejected the plaintiff’s argument that a restraint by a dual distributor on its retailers should be analyzed as a horizontal restraint.¹⁰⁰ Because Leegin must share its retail profits with other retailers, “economic logic” indicated that Leegin would increase its own profits by raising prices at the wholesale level and would “normally seek to minimize retailer margins as much as possible, including at its own retail stores.”¹⁰¹

Four years ago, in the course of overruling¹⁰² its ninety-six year old precedent in *Dr. Miles Medical Co. v. John D. Park & Sons*,¹⁰³ a five-to-four Supreme Court majority offered assurance that rule of reason scru-

92. *Id.*

93. *Id.*

94. *Id.* The plaintiff had, in fact, alleged that Leegin made changes to its pricing policies and started enforcing those policies “at the insistence of many of its most faithful retail dealers.” PSKS Amended Complaint, *supra* note 89, at ¶ 13.

95. *Id.*

96. *Id.* at 417.

97. *Id.*

98. *Id.* at 420.

99. *Id.*

100. *Id.* at 420–21.

101. *Id.*

102. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007).

103. *Dr. Miles Med. Co. v. John D. Parks & Sons*, 220 U.S. 373, 384–85 (1911).

tiny regarding resale price maintenance arrangements would be adequate to detect and correct anticompetitive restraints:

As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.¹⁰⁴

If the Fifth Circuit's *Leegin* opinion on remand is any indication, this process of "courts gain[ing] experience considering the effects of these restraints by applying the rule of reason over the course of decisions,"¹⁰⁵ may have both commenced and ended with *Leegin* itself. Affirming the district court's Rule 12(b)(6) dismissal of the plaintiff's complaint on remand,¹⁰⁶ the Fifth Circuit's *Leegin* opinion invoked the Supreme Court's decisions in *Ashcroft v. Iqbal*¹⁰⁷ and *Bell Atlantic Corp. v. Twombly*¹⁰⁸ to justify its conclusion that the plaintiff's allegations were implausible and "defie[d] the basic laws of economics,"¹⁰⁹ and therefore unworthy of further judicial attention.

The Fifth Circuit reached this result by concluding that neither of the plaintiff's proposed relevant markets "encompasses interchangeable substitute products or recognizes the cross-elasticity of demand."¹¹⁰ Remarkably, even though the Supreme Court charged the Fifth Circuit with commencing the process of "applying the rule of reason over the course of decisions . . . [to] establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints,"¹¹¹ the court failed to acknowledge, much less address, specific allegations in the plaintiff's complaint regarding substitute products and cross-elasticity. These allegations include:

16. *Leegin* products are differentiated from other products by virtue of carrying the "Brighton" brand. On its website, *Leegin* acknowledges and boasts of how it is different from other products:

Today Brighton is the only major accessories line featuring products that coordinate from head to toe. A customer might choose a lipstick case that matches a wallet, jewelry that matches a pair of sunglasses, a handbag that matches her footwear, or an entire coordinating collection consisting of multiple accessories.

The Company prides itself on the "Brighton Difference," which is rooted in the philosophy that the difference is in the details.

104. *Leegin*, 551 U.S. at 898–99.

105. *Id.* at 898.

106. *Leegin*, 615 F.3d at 414.

107. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

108. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

109. *Leegin*, 615 F.3d at 419.

110. *Id.* at 418.

111. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007).

17. Because Leegin offers products that are highly differentiated, it has market power.

....

25. Brighton-brand products are unique. Many customers do not consider other accessories suitable substitutes for their use of Brighton-brand products, nor would they substitute other accessories for Brighton-brand products, nor would they do so even in response to a significant, non-transitory increase in the price of Brighton-brand products.

26. Brighton-brand products are distinct products characterized by an inelasticity in demand, and little cross-elasticity of demand between Brighton-brand products and demand for competing products.¹¹²

Plainly, these are not mere “labels and conclusions”¹¹³ to which no deference is due under *Twombly*. Nor are they equally compatible with a broader market, and hence “implausible” within the meaning of *Twombly*¹¹⁴ or *Iqbal*.¹¹⁵ Plausibility, however, implies a frame of reference and here, the Fifth Circuit’s dismissal of the plaintiff’s market definition as “implausible”¹¹⁶ is undoubtedly explained less by reference to the court’s experience with women’s accessories than as an inexorable product of a particular economic philosophy the court chose to invoke. Under the Chicago School brand of economics (repeatedly invoked in the court’s opinion), antitrust claims based on vertical restraints of trade are *inherently implausible*.¹¹⁷

Indeed, although the Fifth Circuit elected to elide the issue (raised by amici), the effect of reassigning vertical restraints to rule of reason analysis is to deem them *per se legal*. Lest anyone be tempted to dismiss this argument as a hyperbole, attention is invited to Judge Posner’s prescient (if perhaps premature) 1981 Chicago Law Review article, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*.¹¹⁸

Ironically, the *Leegin* panel declined to join issue with the amici’s suggestion that absent a presumption of illegality, the rule of reason amounts to a rule of *per se* legality, yet, that is precisely what the remainder of the Fifth Circuit’s opinion managed to demonstrate.¹¹⁹ As the plaintiff ar-

112. PSKS Amended Complaint *supra* note 89, at ¶¶ 16–17, 25–26 (emphasis added).

113. *Twombly*, 550 U.S. at 555.

114. *Id.* at 556–57.

115. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

116. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 615 F.3d 412, 417–19 (5th Cir. 2010).

117. ROBERT H. BORK, *THE ANTITRUST PARADOX*, 280, 291, 299, 365 (1978).

118. Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

119. See *Leegin*, 615 F.3d at 417. Actually, the amici argued that the court should draw instruction from the FTC’s litigation structure by treating a RPM arrangement generally as “inherently suspect” when it raises prices and at least “one of the factors identified by the [Supreme] Court as likely to create significant anticompetitive risks is present.” Brief for the American Antitrust Institute as Amici Curiae in Support of Appellant and Reversal at *5–15, *PSKS, Inc. v. Leegin Creative Products, Inc.*, 615 F.3d 412 (5th Cir. 2010) (No. 09-

gued unsuccessfully in its petition for certiorari, the Fifth Circuit's opinion raises a general legal conflict about whether courts can reject economic proof as a basis for defining markets and market power.¹²⁰ In particular:

- The Fifth Circuit's opinion conflicts with rulings by the Supreme Court¹²¹ and several circuits,¹²² whose tests for finding single-brand markets do not make a lock-in necessary but do make the SSNIP test¹²³ or low cross-elasticity sufficient.
- The Fifth Circuit's holding that wholesale provision of products cannot be a relevant market conflicts with the law of several other circuits.¹²⁴
- The Fifth Circuit's holding that market power cannot be proven directly but requires proving market definition and a large market share, conflicts with several other circuits.¹²⁵
- The Fifth Circuit's imposition of a market power screen in the face of direct evidence of anticompetitive effects likewise conflicts with decisions of the Supreme Court¹²⁶ and several other Circuits.¹²⁷

As the petition for certiorari aptly observed, the Fifth Circuit's *Leegin* opinion "raises an even more fundamental question: will modern anti-trust jurisprudence live up to its aspiration of replacing arid formalisms

40506), 2009 WL 6479731 [hereinafter "Amicus Brief"]. Once the conduct was deemed inherently suspect, the burden would shift to the defendant to come forward with a plausible legally plausible justification for the restraint. *Id.* at *5.

120. Petition for Writ of Certiorari, *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412 (5th Cir. 2010) (No. 10-653), 2010 WL 4688107 [hereinafter "Petition for Certiorari"].

121. See *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482 (1992) ("This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market.") (citing cases not involving lock-ins); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 19 (1984) ("[W]hether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.").

122. See, e.g., *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 129 F.3d 430, 439 (3d Cir. 1997); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 107 (3d Cir. 1980); *Ky. Speedway, LLC v. NASCAR, Inc.*, 588 F.3d 908, 917-18 (6th Cir. 2009); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 786-87 (7th Cir. 1999).

123. "SSNIP" is an acronym for a "small but significant nontransitory increase in price," and is used to identify competing products for purposes of market definition. U.S. Dep't of Justice & Fed. Trade Comm'n, *MERGER GUIDELINES 9* (2010) [hereinafter *Merger Guidelines*] available at <http://ftc.gov/os/2010/08/100819hmg.pdf>.

124. See, e.g., *Schuykill Energy Res., Inc. v. Pa. Power & Light Co.*, 113 F.3d 405, 416 n.14 (3d Cir. 1997); *City of Cleveland v. Cleveland Elec. Illuminating*, 734 F.2d 1157, 1166 (6th Cir. 1984); *Paschall v. Kan. City Star Co.*, 727 F.2d 692, 696 (8th Cir. 1984); *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983); *Ad-Vantage Tel. Directory Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1345 (11th Cir. 1987).

125. See, e.g., *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018 (6th Cir. 1999) (citing cases from the First, Eighth, Ninth and Tenth Circuits); *Todd v. Exxon Corp.*, 275 F.3d 191, 206-07 (2d Cir. 2001); *Allen-Myland, Inc. v. IBM*, 33 F.3d 194, 209 (3d Cir. 1994) (citing cases from the Seventh Circuit); *Brand Name*, 186 F.3d at 786. It also conflicts with the *Merger Guidelines*. See *Merger Guidelines*, *supra* note 123, at 7.

126. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986).

127. *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 128-29 (2d Cir. 1995); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 n.14 (8th Cir. 1987); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988).

with sound economics, or will it have the more dismal legacy of replacing old pro-plaintiff formalisms with new pro-defendant formalisms equally lacking in economic merit?"¹²⁸ Inasmuch as the Supreme Court's denial of certiorari "imports no expression of opinion upon the merits of the case,"¹²⁹ this question remains (outside the Fifth Circuit at least) unanswered, just as the important inter-circuit conflicts highlighted in the petition for certiorari¹³⁰ remain unresolved.

In *Wampler v. Southwestern Bell Telephone Co.*¹³¹ the Fifth Circuit considered whether a complaint identifying a single multiple dwelling unit (MDU) as a relevant geographic market could survive a motion to dismiss. The plaintiffs were residents of an MDU. The MDU's owner entered into "SmartMoves" contracts with AT&T, under which AT&T held the exclusive right to provide video, voice, and broadband Internet services to MDU residents.¹³² The plaintiffs sued on behalf of themselves and a class of residents of MDUs with similar arrangements, alleging that the MDU/AT&T contracts violated the Sherman Act.¹³³ The trial court granted the defendants' motion to dismiss for failure to plead a plausible geographic market.¹³⁴

A relevant geographic market is one "in which the seller operates and to which buyers can practicably turn for supplies."¹³⁵ This market must "correspond to the commercial realities of the industry," including size, characteristics of the product in question, and regulatory constraints.¹³⁶ The market must also be "economically significant," which entails consideration of the degree to which the market is affected by or independent from competition outside the market.¹³⁷

Applying these principles to the proposed market of a single MDU, the Fifth Circuit held that the competitive forces bearing on a SmartMoves contract for a single MDU keep such a market from being sufficiently isolated to be economically significant.¹³⁸ First, because MDUs compete with each other for tenants, an MDU owner has an incentive to provide low cost/high quality services to attract tenants.¹³⁹ Second, service providers such as AT&T compete with each other for service contracts with MDUs and thus have incentives to provide lower-cost and higher-quality services.¹⁴⁰ Finally, a prospective tenant who does not like the services

128. Petition for Certiorari, *supra* note 120, at *35.

129. *Missouri v. Jackson*, 515 U.S. 70, 85 (1995) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

130. See Petition for Certiorari, *supra* note 120, at *28–31.

131. *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 743 (5th Cir. 2010).

132. *Id.*

133. *Id.*

134. *Id.* at 744.

135. *Id.* (quoting *Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 626 (5th Cir. 2002)).

136. *Id.* (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962)).

137. *Id.* at 744–45.

138. *Id.* at 745.

139. *Id.*

140. *Id.*

provided by a particular MDU may simply choose to live elsewhere.¹⁴¹ The court concluded that given the competition between MDU owners, the competition between service providers, and “the highly mobile nature of today’s society, . . . a single MDU is [not] so segregated as to be economically significant and thus cannot represent a plausible geographic market.”¹⁴² The Fifth Circuit therefore affirmed the lower court’s dismissal of the plaintiffs’ complaint.¹⁴³

D. ANTITRUST STANDING AND ANTITRUST INJURY

*Marlin v. Robertson*¹⁴⁴ was filed by two board-certified pediatric neurosurgeons who practiced at Methodist Children’s Hospital of South Texas (Methodist Children’s) in San Antonio. One plaintiff was the hospital’s CEO from 1998 through March 2003. In the summer of 2003, the plaintiffs began to move their practice to North Central Baptist Hospital. In December 2003, one plaintiff resigned her privileges at Methodist Children’s and the other took a leave of absence. In August 2004, the plaintiff who took a leave of absence applied to Methodist Children’s to reinstate his privileges, but later withdrew his application. The plaintiffs also had privileges at Christus Santa Rosa Health Care (“Christus”) until they resigned in 2000 and 2001. Both reapplied to Christus for their privileges in July 2004, but later withdrew their applications. In November 2004, the plaintiffs closed their practice at North Central Baptist and later closed their practice in San Antonio and moved to Florida in March 2005.¹⁴⁵

The plaintiffs sued Methodist Children’s, Christus, and various doctors and doctor groups for violations of the Texas Free Enterprise and Antitrust Act, claiming that the hospitals’ peer review or administrative review process ultimately resulted in the plaintiffs’ applications for reinstatement at Methodist Children’s and for privileges at Christus being denied.¹⁴⁶ The plaintiffs alleged a conspiracy in restraint of free trade and monopolization of, or attempts to monopolize, the practice of pediatric neurosurgery in Bexar County, Texas.¹⁴⁷

The trial court granted the defendants’ motions for summary judgment.¹⁴⁸ On appeal, the Fourth Court of Appeals first considered the defendants’ argument that the plaintiffs lacked antitrust standing.¹⁴⁹ Antitrust standing requires a demonstration of (1) injury-in-fact; (2) antitrust injury; and (3) proper plaintiff status, which assures that other parties are

141. *Id.*

142. *Id.* at 746.

143. *Id.*

144. 307 S.W.3d 418, 423 (Tex. App.—San Antonio 2009, no pet.).

145. *Id.*

146. *Id.*

147. *Id.* at 426.

148. *Id.* at 424.

149. *Id.*

not better situated to bring suit.¹⁵⁰ In considering the antitrust injury element, the court examined whether the plaintiffs' alleged injury was the type of loss that the claimed violations would likely cause.¹⁵¹ The court rejected the defendants' argument that the plaintiffs were required to show—at the standing stage—that the defendants' "conduct affected the prices, quality, or quantity of a specific product within a relevant market."¹⁵² The court concluded that such a requirement would confuse the distinction between antitrust injury for purposes of standing and the effect on competition necessary to prevail on the merits.¹⁵³ The court quoted the Fifth Circuit's decision in *Doctor's Hospital of Jefferson, Inc. v. Southeast Medical Alliance, Inc.*,¹⁵⁴ which held that "the antitrust laws do not require a plaintiff to establish a market-wide injury to competition," which often is a component of substantive liability, "as an element of standing."¹⁵⁵ Therefore, the court concluded that the defendants' analysis had "too narrowly focused on injury as a component of substantive liability, rather than as an element of standing," and thus the defendants "did not establish their entitlement to summary judgment . . . on the issue of standing."¹⁵⁶

Turning to the merits of the plaintiffs' claims, the defendants argued there was no antitrust injury to the Bexar County pediatric market because the plaintiffs chose to leave Methodist Children's, and later the city, and their privileges were never terminated, revoked, suspended, or denied.¹⁵⁷ The defendants also argued that the plaintiffs could not show any restraint on competition that affected the prices, quantity, or quality of pediatric neurosurgery services in Bexar County.¹⁵⁸

The plaintiffs also alleged a group boycott.¹⁵⁹ The Fourth Court of Appeals first determined that a *per se* analysis of this claim was inappropriate because courts typically hold that a group of physicians who decide not to make referrals to a particular surgeon have not committed a *per se* violation.¹⁶⁰ The court then considered whether the plaintiffs' claims could survive a rule of reason analysis by proof that the defendants' conduct had an economic effect on the relevant market.¹⁶¹

The plaintiffs' evidence included affidavits and deposition testimony showing: (1) the former CEO of Methodist Children's resigned under pressure from the defendant-doctors; (2) the CEO's request for a review

150. *Id.*

151. *Id.* at 425.

152. *Id.*

153. *Id.* at 426.

154. 123 F.3d 301, 305 (5th Cir. 1997).

155. *Marlin v. Robertson*, 307 S.W.3d 418, 425 (Tex. App.—San Antonio 2009, no pet.) (quoting *Doctor's Hosp.*, 123 F.3d at 305).

156. *Id.* at 426.

157. *Id.*

158. *Id.* at 427.

159. *Id.* at 427–28.

160. *Id.* at 428 (citing *Pontius v. Children's Hosp.* 552 F. Supp. 1352, 1370 (W.D. Pa. 1982)).

161. *Id.* at 429.

of his charts for the purpose of clearing his name and reputation was denied; (3) the CEO's "forced" resignation left the other plaintiff with no choice but to take a leave of absence because he was unable to provide the required backup for emergency and on-call coverage; and (4) when he was able to find backup and tried to end his leave of absence, he was informed that he would have to reapply for credentialing.¹⁶² The former CEO then withdrew his request to reinstate his privileges because he was "threatened with being reported to the National Practitioner Data Bank due to a denial of credentials."¹⁶³ The plaintiffs also withdrew their applications for privileges at Christus because the applications were in jeopardy of being denied, which raised "the threat and probability of being reported to the National Practitioner Data Bank."¹⁶⁴ According to the plaintiffs, "it made economic sense for the defendants to replace the plaintiffs with other doctors the defendants could more easily control."¹⁶⁵ The plaintiffs alleged that the relevant product market was for pediatric neurosurgery services, and that the defendants' actions decreased the quality of services available to consumers because the only two remaining neurosurgeons practicing pediatric neurosurgery were not board certified in that specialty.¹⁶⁶

The court found no evidence of harm to competition.¹⁶⁷ There was no proof that the cost of pediatric neurosurgery had risen, and the plaintiffs did not contend that prices for pediatric neurosurgery services would increase over the competitive level.¹⁶⁸ The plaintiffs also conceded that the Board of Neurological Surgeons considered general neurosurgeons qualified to perform pediatric neurosurgery, and the plaintiffs offered no evidence that pediatric patients were unable to obtain necessary services in Bexar County or that consumers' welfare was damaged.¹⁶⁹ The court concluded that the plaintiffs had "failed to carry their burden of submitting summary judgment proof sufficient to raise a fact issue on whether the defendants' alleged actions had an adverse effect on competition in the relevant market."¹⁷⁰

Regarding the monopolization and attempted monopolization claims, the plaintiffs proffered evidence that the defendant doctors worked to eliminate the plaintiffs from their practice and then increased their own business in the relevant market.¹⁷¹ The court concluded that evidence that the defendant hospitals elected to hire or grant privileges to other neurosurgeons did not create a genuine issue of material fact about whether any of the defendants possessed monopoly power in the relevant

162. *Id.*

163. *Id.*

164. *Id.* at 430.

165. *Id.*

166. *Id.*

167. *Id.* at 431.

168. *Id.* at 430-31.

169. *Id.*

170. *Id.* at 431.

171. *Id.* at 432.

market.¹⁷² The court further concluded that the fact that the three remaining pediatric neurosurgeons worked at the two defendant hospitals did not create a genuine issue of material fact whether a dangerous probability existed that any of the defendants would achieve monopoly power.¹⁷³ Finally, the plaintiffs offered no evidence that the defendants prevented other pediatric neurosurgeons from entering the relevant market.¹⁷⁴ The court thus affirmed summary judgment for the defendants.¹⁷⁵

Despite doing so, the court properly rejected the defendants' effort to conflate and confuse the distinction between antitrust injury and harm to competition.¹⁷⁶ As the Fifth Circuit explained several years ago in *Doctor's Hospital*, "the antitrust laws do not require a plaintiff to establish a market-wide injury to competition as an element of standing," and an alleged exclusion from the market "fall[s] easily within the conceptual bounds of antitrust injury."¹⁷⁷ Likewise, the court properly interpreted the defendants' confused reference to no evidence of "antitrust injury to the Bexar County pediatric market" as a challenge to the unreasonable restraint element of a § 1 claim.¹⁷⁸ Correctly noting evidence of harm to a plaintiff is, without more, insufficient to demonstrate an unreasonable restraint on competition, the court invoked the Texas Supreme Court's decision in *Coca-Cola Co. v. Harmar* for the proposition that to establish an unreasonable restraint, the plaintiff must offer "evidence of demonstrable economic effect."¹⁷⁹ As we explained in a prior survey, although a statement to this effect appears in *Harmar*, it is wrong as a matter of substantive antitrust law because an unreasonable restraint may be demonstrated in a variety of other equally valid ways.¹⁸⁰ Absent proof that the defendants possessed market power or that their conduct had more impact on competition than any routine hospital credentialing decision, however, the court correctly held that the plaintiffs failed to substantiate either their § 1 or § 2 claims.¹⁸¹

III. DECEPTIVE TRADE PRACTICES—CONSUMER PROTECTION ACT

Noteworthy DTPA decisions during the Survey period addressed consumer status (particularly in credit situations), DTPA "laundry list" viola-

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 437.

176. *Id.* at 426.

177. *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. Alliance, Inc.*, 123 F.3d 301, 305 (5th Cir. 1997).

178. *Marlin*, 307 S.W.3d at 426–27.

179. *Id.* at 429 (quoting *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 689 (Tex. 2006)).

180. A. Michael Ferrill, Leslie Sara Hyman, & William "Butch" Hulse, *Antitrust and Consumer Protection*, 60 SMU L. REV. 669, 709 (2007).

181. *Marlin*, 307 S.W.3d at 431–32.

tions, warranty violations, causation, survival of DTPA claims, and damages.

A. STANDING AND CONSUMER STATUS

To bring a DTPA claim, a plaintiff must be a “consumer.”¹⁸² During the Survey period, several federal courts in Texas examined whether borrowers had standing to assert DTPA claims against entities servicing or owning their mortgage loans, or whether such claims failed for lack of consumer status.

The U.S. District Court for the Northern District of Texas reaffirmed that a party who seeks only money in a transaction is not a DTPA consumer.¹⁸³ For example, in *Hicks* the court granted summary judgment to Chase on Hicks’ DTPA claims.¹⁸⁴ The court held that Chase, as the mere servicer of Hicks’ mortgage note and from whom Hicks sought an extension of credit, did not provide Hicks with a DTPA good or service.¹⁸⁵ A person who seeks only to borrow money is not a consumer under the DTPA because merely lending money involves neither a good nor a service.¹⁸⁶

In *Huff v. Hirsch*, a divorce action, the Houston Court of Appeals upheld summary judgment in favor of Hirsch, an attorney sued by his client’s ex-wife.¹⁸⁷ Mrs. Huff took issue with a divorce settlement obtained in large part by Hirsch’s efforts. The court held that Mrs. Huff did not have consumer status, and therefore could not maintain her DTPA claims against Hirsch.¹⁸⁸ Although the court held that a third-party beneficiary may qualify as a consumer where the transaction at issue was specifically intended to benefit the third party, and the good or service rendered benefitted the third party, this is not what occurred here.¹⁸⁹ Hirsch’s legal services were not acquired by Mrs. Huff, but instead by Mr. Huff.¹⁹⁰ Moreover, those services were adverse to Mrs. Huff, rather than for her benefit.¹⁹¹

182. TEX. BUS. & COM. CODE ANN. § 17.50 (West 2011) (a consumer is a one who seeks to acquire goods or services by purchase or lease).

183. See *Hicks v. Chase Home Fin. LLC*, No. 3:09-CV-1652-G, 2010 WL 4274745, at *5 (N.D. Tex. Oct. 21, 2010).

184. *Id.* at *1.

185. *Id.* at *5.

186. *Id.*; see also *Henderson v. WA-MU/Wash. Mut. Home Loans*, No. 4:10-CV-164, 2010 U.S. Dist. LEXIS 86343, at *8 (E.D. Tex. July 26, 2010), *adopted by* *Henderson v. WA-MU/Wash. Mut. Homes Loans*, No. 4:10-CV-164, 2010 U.S. Dist. LEXIS 86318, at *2 (E.D. Tex. Aug. 20, 2010); *Gomez v. Wells Fargo Bank, N.A.*, No. 3:10-CV-0381-B, 2010 U.S. Dist. LEXIS 74329, at *10 (N.D. Tex. July 21, 2010); *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2010 U.S. Dist. LEXIS 24686, at *28 (E.D. Tex. Feb. 16, 2010), *adopted by* *Burnette v. Wells Fargo Bank, N.A.*, No. 4:09-CV-370, 2010 U.S. Dist. LEXIS 24679, at *4 (E.D. Tex. Mar. 17, 2010).

187. *Huff v. Hirsch*, No. 01-09-00517-CV, 2010 Tex. App. LEXIS 6831, at *14–15 (Tex. App.—Houston [1st Dist.] Aug. 19, 2010, no pet.).

188. *Id.*

189. *Id.*

190. *Id.* at *14.

191. *Id.*

Finally, in *Wright v. Nationwide Mutual Insurance Co.*,¹⁹² the U.S. District Court for the Eastern District of Texas granted Nationwide's motion to dismiss Wright's DTPA claims on the basis that Wright, a former Nationwide agent, was not a DTPA consumer. Wright took issue with his termination and its effect on his book of business. Wright asserted a DTPA claim, and tried to establish consumer status by arguing that his claims involved the purchase or lease of goods or services, including training materials, records, computer equipment, and supplies as set forth in his written employment agreement.¹⁹³ The court rejected this argument, holding that Wright did not seek or acquire goods by sale or lease; rather, he was contracted as Nationwide's agent and was merely provided with training and materials to assist him in his duties.¹⁹⁴ The court added that such training and materials did not form a basis for his complaint, which further negated consumer status.¹⁹⁵

B. DECEPTIVE PRACTICES

In addition to establishing consumer status, a DTPA plaintiff must also establish violation of one or more substantive DTPA prohibitions.¹⁹⁶

1. Laundry List Claims

In *Sheehan v. Adams*,¹⁹⁷ the Dallas Court of Appeals examined whether there was sufficient evidence to support a jury verdict finding that Bruce and Sammi Adams violated the DTPA when they sold their house to Sheehan without disclosing the home's alleged foundation problems. Sheehan alleged that the Adams' violated section 17.46(b)(24) of the DTPA.¹⁹⁸ Sheehan admitted, however, that the only representations made to her regarding the house's conditions were contained in the "Seller's Disclosure Notice" completed by Bruce Adams, and that those representations indicated the Adamses were unaware of any conditions regarding the house other than "settling," which was characterized as "normal."¹⁹⁹ The jury returned a verdict in favor of Sheehan, but the trial court rendered a judgment notwithstanding the verdict and ordered Sheehan take nothing on her claims.²⁰⁰

192. No. 6:09 CV 183, 2010 WL 278482, at *1 (E.D. Tex. Jan. 19, 2010).

193. *Id.* at *3.

194. *Id.*

195. *Id.* (following *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 539 (Tex. 1981) (DTPA goods and services must form the basis of the DTPA complaint)).

196. TEX. BUS. & COM. CODE ANN. §§ 17.50(a)(1)–(3) (West 2011). *See generally* TEX. INS. CODE ANN. §§ 541.003–.007 (West 2011).

197. 320 S.W.3d 890, 897 (Tex. App.—Dallas 2010, no pet.).

198. Section 17.46(b)(24) provides that it is a violation of the DTPA to fail to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed. TEX. BUS. & COM. CODE ANN. § 17.46(b)(24).

199. *Sheehan*, 320 S.W.3d at 893. The Seller's Disclosure Notice derives from section 5.008(b) of the Texas Property Code. TEX. PROP. CODE ANN. § 5.008(b) (West 2011).

200. *Sheehan*, 320 S.W.3d at 895.

On appeal, the Dallas Court of Appeals held that to support the jury's verdict, the evidence had to show that the Adamses failed to disclose information they actually knew, rather than information they should have known.²⁰¹ Given the absence of direct evidence that the Adamses were aware of any alleged foundation failure, and that the three-foot exterior crack at issue was non-existent at the time of closing, the court held the evidence legally insufficient to support the jury's verdict under section 17.46(b)(24).²⁰²

2. Section 17.50—Breach of Warranty

Section 17.50 of the DTPA permits actions for breach of express or implied warranties.²⁰³ In *Dinn v. Hooking Bull Boatyard, Inc.*,²⁰⁴ the U.S. District Court for the Southern District of Texas sitting in admiralty, found that although Hooking Bull Boatyard did not breach an express warranty, it violated the DTPA by breaching an implied warranty. The Dinns hired Hooking Bull Boatyard to repair and paint their racing yacht. After admiring the metallic finish on a boat stored next to theirs, the Dinns chose an aquamarine metallic paint for their yacht. The paint dried with unsightly tiger-striped patterns and eventually blistered and “halo-ed.”²⁰⁵

Relying on Texas law, which recognizes “an implied warranty to repair or modify existing tangible goods or property in a good and workmanlike manner [for] consumers suing under the DTPA,” the court found there was an implied warranty with respect to the paint and repair work performed on the Dinns' yacht.²⁰⁶ Good and workmanlike manner is defined “as that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.”²⁰⁷ Inasmuch as Hooking Bull Boatyard's owner, painter, and expert agreed the paint job was unacceptable, a breach of this type of implied warranty was established.²⁰⁸ The court further held it did not matter whether Hooking Bull Boatyard informed the Dinns of its inexperience with the metallic paint at issue because the implied warranty of good and workmanlike performance cannot be waived or disclaimed.²⁰⁹

The court held, however, that the alleged statement by Hooking Bull Boatyard's owner that he had “the best boat painter in the region” did

201. *Id.* at 899.

202. *Id.*

203. TEX. BUS. & COM. CODE ANN. § 17.50(a)(2).

204. No. C-08-309, 2010 U.S. Dist. LEXIS 104814, at *27, *29 (S.D. Tex. Sept. 30, 2010).

205. *Id.* at *11–12. “Halo-ing” results when blistered paint is repaired and spot-painted. *Id.* at *14.

206. *Id.* at *25–26 (quoting *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 354 (Tex. 1987)).

207. *Id.* at *26 (quoting *Melody Homes*, 741 S.W.2d at 354).

208. *Id.*

209. *Id.*

not amount to an express warranty.²¹⁰ Instead, it was mere puffery and thus not actionable under the DTPA.²¹¹ Nor did the existence of another boat on the yard with a successful metallic paint job amount to a model or sample to which Hooking Bull Boatyard agreed to conform.²¹² As such, there was no express warranty claim.²¹³

C. NECESSITY OF PROVING CAUSATION

To recover under the DTPA, a consumer must prove that a defendant's actions were the "producing cause" of the consumer's damage.²¹⁴ "Producing cause" requires proof that the acts in question be both a cause-in-fact and a "substantial factor" in causing injuries that would not have otherwise occurred.²¹⁵

In *Metro Allied Insurance Agency, Inc. v. Lin*,²¹⁶ the Texas Supreme Court held that to establish causation for an alleged failure to procure insurance under a negligence or DTPA theory, a plaintiff must prove availability of appropriate insurance. Lin, an electrical engineer, was required by a government contract to provide a performance bond and procure commercial general liability insurance (CGL). Lin provided Metro with a copy of a CGL quote obtained from another insurer (Elbert) to illustrate the insurance he sought from Metro. The Elbert quote contained a section entitled "conditions" under which the word "contractual" was marked with an "X."²¹⁷ Thereafter, Lin began paying Metro for CGL coverage, but Metro failed to write or procure the CGL policy. Lin's government contract was later terminated, requiring Lin's surety company to complete performance of the contract under the performance bond.²¹⁸

The surety company sued Lin, who in turn, sought defense from Metro.²¹⁹ Metro's errors and omissions insurer refused to defend Lin, so Lin sued Metro under the DTPA for failure to procure insurance.²²⁰ Metro argued that despite its failure to procure the CGL policy, the necessary causation standard was not be met because Lin lacked proof that an available CGL policy would have covered his damages.

The supreme court held that the alleged harm would have occurred only if the CGL policy Metro agreed to procure actually covered the

210. *Id.* at *29.

211. *Id.*

212. *Id.* An express warranty may be created when a seller uses a sample or model that becomes the basis of the bargain that the goods shall conform to the model. TEX. BUS. COM. CODE ANN. § 2.313(b) (West 2011).

213. *Dinn v. Hooking Bull Boatyard, Inc.*, No. C-08-309, 2010 U.S. Dist. LEXIS 104814, at *27, *29 (S.D. Tex. Sept. 30, 2010).

214. TEX. BUS. & COM. CODE ANN. §§ 17.50(a)(1)-(3) (West 2011). *See generally*, TEX. INS. CODE ANN. § 541.003 (West 2011).

215. *Prudential Ins. Co. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 167 (Tex. 1995).

216. 304 S.W.3d 830, 835-36 (Tex. 2009).

217. *Id.* at 833.

218. *Id.* at 834.

219. *Id.*

220. *Id.*

surety's claim against Lin, and thus Lin had to show that the coverage he sought was available in a CGL policy.²²¹ The supreme court held that Lin's testimony regarding Metro's agent statement that he believed the policy would cover "the claims" against Lin did not amount to evidence that any procured contract would have actually covered the surety company's claims against Lin.²²² No other evidence of any CGL policy potentially covering the surety company's claims was provided, nor was any testimony provided by an Elbert representative or insurance expert explaining the meaning of the policy terms.²²³ Rather, the key witness was Metro's agent, who testified that in his experience a CGL policy does not cover performance under a contract, reasoning "if the coverage was that broad, [Lin] wouldn't have to have performance bonds, all [he] would have to have would be contractual liability."²²⁴ Accordingly, the supreme court held that Lin failed to bring forward any evidence of cause in fact and therefore could not establish DTPA causation.²²⁵

D. EXEMPTIONS, DEFENSES, AND LIMITATIONS ON RECOVERY

The U.S. District Courts for the Northern and Eastern Districts of Texas decided that DTPA claims do not survive a consumer's death. In *Lofton v. McNeil Consumer & Specialty Pharmaceuticals*, the Northern District court made an *Erie* guess as to how the Texas Supreme Court would decide whether Christopher Lofton's DTPA claim survived his death.²²⁶ In *Launius v. Allstate Insurance Co.*,²²⁷ the court analyzed a split among the intermediate Texas appellate courts and the Texas Supreme Court's decision in *PPG Industries, Inc. v. JMB/Houston Centers Partners Ltd.*,²²⁸ finding that DTPA claims do not survive a consumer's death and cannot be brought by the consumer's estate.²²⁹ The *Lofton* court followed the *Launius* decision, which was also followed by the Eastern District in *McCoy v. Pfizer, Inc.*, in holding that a consumer's estate could not pursue a DTPA claim.²³⁰

E. DETERMINING THE MEASURE OF DAMAGES

A prevailing plaintiff in a DTPA action may attempt to recover eco-

221. *Id.* at 835–36.

222. *Id.* at 836.

223. *Id.* at 837.

224. *Id.*

225. *Id.* at 838.

226. *Lofton v. McNeil Consumer & Specialty Pharm.*, 682 F. Supp. 2d 662, 680 (N.D. Tex. Jan. 27, 2010).

227. No. 3:06-CV-0579-B, 2007 U.S. Dist. LEXIS 28286, at *13–14 (N.D. Tex. Apr. 17, 2007).

228. 146 S.W.3d 79, 82 (Tex. 2004) (holding that DTPA claims cannot be assigned).

229. *Launius*, 2007 U.S. Dist. LEXIS 28286, at *18.

230. *McCoy v. Pfizer, Inc.*, No. 4:09cv496, 2010 U.S. Dist. LEXIS 87577, at *2 (E.D. Tex., Aug. 24, 2010) (adopting magistrate's recommendations set forth in *McCoy v. Pfizer, Inc.*, No. 4:09cv496, 2010 U.S. Dist. LEXIS 87579, at *18 (E.D. Tex. Aug. 3, 2010) and collecting cases).

conomic damages.²³¹ If the trier of fact finds that the defendant acted “knowingly,” the plaintiff may also recover damages for mental anguish and statutory damages up to three times the amount of economic damages.²³²

1. Settlement Credits

In *Ramsey v. Spray*,²³³ the Fort Worth Court of Appeals reversed the trial court’s application of settlement moneys paid by settling defendants. The Sprays purchased a home with significant roof leaks from the Ramseys. The Sprays sued the Ramseys and several other parties. The Sprays settled and released their claims against all parties, except the Ramseys, for \$400,000.²³⁴ During jury trial, the Ramseys introduced the settlement agreement to obtain settlement credits offered under section 33.012 of the Texas Civil Practice and Remedies Code.²³⁵ However, the trial court failed to apply the settlement credit to the amount awarded to the Sprays.

An appeal followed, and the court that held section 33.012 is mandatory and requires settlement credits to apply to “damages to be recovered by the claimant.” The court clarified that the credit is applied to the amount of damages awarded in the judgment, not to the amount of damages found by a jury.²³⁶ “A nonsettling defendant has the burden to prove the existence and amount of a settlement credit, and may do so by placing the settlement agreement or some other evidence of the settlement amount in the record,” as the Ramseys had.²³⁷ The burden “then shifts to the plaintiff to show that all or a portion of this settlement amount should not be credited.”²³⁸

A nonsettling defendant may only claim the settlement amount as to causes of action for which all tortfeasors are jointly liable and “is not entitled to credit for amounts paid to settle punitive damages claims.”²³⁹ The burden is on the plaintiff to tender a valid settlement agreement that allocates between actual and punitive damages, and sole and joint liability claims.²⁴⁰ The Sprays’ settlement agreement did not satisfy these requirements; therefore, the Ramseys were entitled to a settlement credit of \$400,000.²⁴¹ The case was remanded to the trial court for proper applica-

231. TEX. BUS. & COM. CODE ANN. § 17.50(b)(1) (West 2011).

232. *Id.*

233. No. 2-08-129-CV, 2009 WL 5064539, at *3 (Tex. App.—Fort Worth 2009, pet. denied) (not reported).

234. *Id.* at *1.

235. *Id.* Section 33.012 of the Texas Civil Practice and Remedies Code governs settlement credits in tort and DTPA cases. TEX. CIV. PRAC. & REM. CODE ANN. § 33.012 (West 2011).

236. *Ramsey*, 2009 WL 5064539, at *1 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(b)).

237. *Id.* at *2.

238. *Id.*

239. *Id.*

240. *Id.* at *3.

241. *Id.*

tion of the credit.²⁴²

2. Restoration

In *Cruz v. Andrew's Restoration, Inc.*,²⁴³ the Dallas Court of Appeals held that a DTPA claimant is not entitled to the equitable remedy of restoration when he has not surrendered or offered to surrender the value of any benefits received. Dr. Cruz enlisted Protech Services to perform mold-remediation work on his house. Dr. Cruz later notified his insurer of unabated mold damage to the home. Thereafter, his insurer agreed to pay for humidity control services from June 2002 to June 2003, but after reaching policy limits in November 2003, the insurer stopped paying and left Protech's remaining invoices unpaid.²⁴⁴ Protech then sued Dr. Cruz and his insurer under several theories, and Dr. Cruz filed a counterclaim asserting DTPA claims against Protech.²⁴⁵ The trial court granted summary judgment in Dr. Cruz's favor on his DTPA claims, ruling it would take approximately \$1 million to restore all the money paid to Protech by Dr. Cruz or on his behalf.²⁴⁶ Dr. Cruz requested restoration, however, the trial court twice denied this request.²⁴⁷

On appeal, Dr. Cruz argued that the trial court erred in denying his motions for restoration and rescission pursuant to section 17.50(b)(3).²⁴⁸ Protech and a third-party defendant argued that the trial court properly denied restoration benefits because Dr. Cruz had not surrendered the benefits he received from them.²⁴⁹ The court agreed, holding that section 17.50(b)(3) incorporated the equitable doctrine of rescission, requiring the claimant to return any benefits received under the contract.²⁵⁰ Dr. Cruz argued that he did not retain any benefits from Protech under their contract because his house was demolished in 2005.²⁵¹ The court disagreed, holding there was some evidence of a benefit because Protech was able to dehumidify the house for approximately a year and demolition did not occur until over eighteen months after the dehumidifying services ceased.²⁵² Accordingly, the trial court did not err in denying Dr. Cruz's request for restoration of consideration under section 17.50(b)(3).²⁵³

242. *Id.* at *7.

243. 323 S.W.3d 564, 581 (Tex. App.—Dallas 2010, pet. filed).

244. *Id.* at 575 (humidity control services incurred a daily rate of approximately \$6,300).

245. *Id.* at 570.

246. *Id.*

247. *Id.* at 580.

248. *Id.* at 580–81. Section 17.50(b)(3) provides that “each consumer who prevails [on a DTPA claim] may obtain orders necessary to restore to any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter.” TEX. BUS. & COM. CODE ANN. § 17.50(b)(3) (West 2011).

249. *Cruz*, 323 S.W.3d at 581.

250. *Id.*

251. *Id.* at 582.

252. *Id.*

253. *Id.*

3. *Mental Anguish*

In *Norris v. Jackson*,²⁵⁴ the Fort Worth Court of Appeals affirmed the trial court's award of mental anguish damages in favor of Jackson, a seventy-year-old grandmother who contracted with a service company for installation of a new heating and air conditioning unit. At issue was Norris's conduct of calling Jackson a "crook" and a "thief" and threatening to sue Jackson for refusing to pay \$1,000 allegedly owed by her.²⁵⁵ Jackson, however, contended that she executed a completion certificate with the service company in exchange for a promise not to cancel the contract and accepted a \$1,000 reduction in her bill as compensation for damages to her property.²⁵⁶

On appeal, Norris and the service company argued that the evidence was legally and factually insufficient to support the trial court's finding that Jackson was entitled to mental anguish damages.²⁵⁷ A consumer seeking mental anguish damages must present:

[D]irect evidence of the nature, duration, and severity of [the] mental anguish, thus establishing a substantial disruption in [her] daily routine. Proof of a physical manifestation of mental anguish is not required. But a plaintiff's own testimony of extreme fright, constant worry, extreme apprehension, extreme embarrassment, nervousness on a daily basis, and loss of sleep does not, without more, present more than a scintilla of evidence to support an award of mental anguish damages.²⁵⁸

Jackson testified extensively as to the nature, duration, and severity of her mental anguish.²⁵⁹ The court held that such testimony was "'direct evidence of the nature, duration, and severity of mental anguish,' and

254. No. 2-09-265-CV, 2010 Tex. App. LEXIS 8688, at *1 (Tex. App.—Fort Worth Oct. 28, 2010, no pet.).

255. *Id.* at *5.

256. *Id.* at *3–4 (the service company had damaged a door frame and an antique grandfather clock).

257. *Id.* at *24.

258. *Id.* at *24–25 (internal quotations and citations omitted).

259. *Id.* at *26–27 ("Jackson testified . . . that her blood pressure had stayed in the 120s before the June 22 telephone call with Norris; that her blood pressure went up to 180 during and immediately after the telephone call with Norris and was staying way over 140, 160 usually since the call; that there were no factors other than Appellants' actions that caused her high blood pressure; that she believed Norris's threats; that she previously had no trouble sleeping but could not sleep after the telephone call because of her fear that a lien would be placed on her house; that Norris's bully talking made her feel very intimidated, nervous, and very scared; that she is no longer the content and happy person she was before the telephone call; and that she [was] tired from the stress, [was] worried, [was] not as energetic, and [was] irritable with her grandchildren." Another witness testified that "Jackson was very upset and frightened immediately after the telephone call with Norris; that he personally observed how Norris's conduct affected Jackson; that Jackson constantly worried about the situation and was "really, really upset; that she was irritable with her grandchildren to the point where he thought other arrangements for their care should be made for Jackson's sake; that Jackson called him late at night, when she was normally asleep, to talk about what happened; that Jackson's health had gone downhill a lot since the telephone call; and that Jackson was normally a very organized person but had lost control since the telephone call.").

established 'a substantial disruption in [Jackson's] daily routine.'"²⁶⁰ Thus, the court affirmed the award of mental anguish damages.²⁶¹

IV. CONCLUSION

Three years ago, this survey quoted Justice Stevens's dissenting opinion in *Twombly*, posing the question whether "in the quest for avoiding false positives, it is good policy to allow 'lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence.'"²⁶² Whether or not it is good policy, the Fifth Circuit's *Leegin* opinion confirms that such a policy has taken root.²⁶³ Facially rejecting the plaintiffs' claims as "implausible" because they "def[ie]d the basic laws of economics," the Fifth Circuit effectively realized the Chicago School's inexorable twenty-five year pursuit of a per se legality regime for vertical restraints, as amici argued, but the *Leegin* panel declined to acknowledge.²⁶⁴

There is no small irony in the fact that as the courts continue to exclude scientific evidence as unreliable under the *Daubert* and *Kumho* regime,²⁶⁵ they are effectively immunizing from judicial scrutiny a much-criticized school of economic theory by recasting it as "law," with the result that competing theories and evidence are rejected outright. If there is any lesson learned from the last twenty-five years of financial crises, it should be that the notion of markets as rational, informationally efficient, and self-correcting is a dangerous myth. Whether called "hundred-year storms," "Black Swans," or "six sigma" events, catastrophic market failures can and frequently do happen, not just once every hundred or thousand years.²⁶⁶ Even Judge Posner, a leading figure in the Chicago School, conceded that markets are not self-correcting and require government regulation to function.²⁶⁷ Although Judge Posner focused on the

260. *Id.* at *27.

261. *Id.* at *30–31.

262. Ferrill, *supra* note 42, at 566 (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1988 (2007) (Stevens, J., dissenting)).

263. See *PSK, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420–21 (5th Cir. 2010).

264. *Id.* at 418–19.

265. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 158 (1999).

266. See generally Roger Lowenstein, *WHEN GENIUS FAILED, THE RISE AND FALL OF LONG TERM CAPITAL MANAGEMENT* (2002); Nassim Nicholas Taleb, *FOOLED BY RANDOMNESS: THE HIDDEN ROLE OF CHANCE IN THE MARKETS AND IN LIFE* (2001). In the last twenty-five years the financial markets have witnessed at least six such events, including the 1987 stock market crash, the 1994 Mexican debt crisis, the 1997 Asian crisis, the 1998 Russian devaluation, the 2000 Internet bubble, and the 2008 economic crisis. See *id.* at 48–49.

267. Richard A. Posner, *A FAILURE OF CAPITALISM* (Harvard University Press 2009). No doubt recognizing such an admission would threaten to undermine the very foundation of Chicago School theory, Judge Posner offered assurance that "[a]t no stage need irrationality" on the part of market participants be involved to explain market failures, because "the line between the rational and irrational is at best unclear, and this is one reason for not placing much weight on the irrational aspects of market behavior." *Id.* at 85–87. In

macroeconomic picture, the same theoretical assumptions—self-correcting markets populated by rational utility maximizers—are at the core of Chicago School antitrust economics.²⁶⁸

Refusing to admit evidence contrary to dogma is not, of course, without precedent. Four hundred years ago, Galileo Galilei incurred the wrath of both the scientific and the clerical establishments when he advocated Copernican astronomy and its heliocentric view of the solar system.²⁶⁹ Other scientists attacked heliocentrism because it conflicted with Aristotle's model of the universe, while both establishments attacked it as contrary to divine scripture.²⁷⁰ Galileo's critics refused his repeated entreaties that they simply examine the evidence, preferring instead, to adhere to elaborate mathematical models purporting to demonstrate that the sun orbited the earth.²⁷¹ As Galileo complained to Kepler: "What would you say of the learned here, who replete with the pertinacity of the asp, have steadfastly refused to cast a glance through the telescope? What shall we make of all of this? Shall we laugh, or shall we cry?"²⁷² Galileo was subsequently convicted of heresy and the offending Dialogues of Galileo Galilei were banned.²⁷³

Antitrust jurisprudence certainly benefits from the use of economic theory by helping to guide attempts at distinguishing anticompetitive business arrangements from procompetitive or competitively benign ones, and the courts have properly shed any reluctance they once might have had to "ramble through the wilds of economic theory."²⁷⁴ Indeed, the problem with the *Leegin* panel's disposition was not its resort to economic theory, but its blind adherence to one particular model—effectively transmuting it into law—and its refusal to entertain alternative theories or evidence of actual competitive harm. The panel compounded this error by characterizing the plaintiff's pleadings in a way that suggested the plaintiff had not alleged facts supporting its allegations.²⁷⁵

other words, it is easier to pretend that markets are always rational than to grapple with a reality that does not fit the model.

268. See generally *THE GALILEO AFFAIR: A DOCUMENTARY HISTORY* (Maurice A. Finocchiaro ed. & trans., Univ. of Cal. Press 1989).

269. *Id.*

270. See *id.*

271. See *id.*

272. Giorgio de Santillana, *THE CRIME OF GALILEO 9* (Univ. of Chi. Press 1955).

273. See *Sentence of The Tribunal of the Supreme Inquisition Against Galileo Galilei, given the 22nd day of June of the Year 1633*, in *INTERNET MODERN HISTORY SOURCEBOOK* (Paul Halsall ed., 1999) <http://www.fordham.edu/halsall/mod/1630galileo.html>.

274. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972).

275. For example, while the panel opinion suggests that the plaintiff's complaint did not allege facts in support of its proposed market definition, the complaint specifically alleged: (1) *Leegin* products by design were highly differentiated from other products; (2) there was low cross-elasticity of demand such that other products would not qualify as competitors under the DOJ/FTC SSNIP test; and (3) *Leegin* deliberately chose an alternative distribution channel to further differentiate its products. See *supra* notes 112–13, 128 and accompanying text. While *Leegin*'s petition to the Supreme Court charitably did not accuse the panel opinion of misrepresenting the record, it is as if the *Leegin* panel concluded that the plaintiff's allegations did not exist because under the panel's model of the market the facts alleged could not exist. See also Sam D. Johnson & A. Michael Ferrill, *Defining Competi-*

Faced with the choice between theoretical elegance and analytical richness, the courts should be reluctant to choose the former at the risk of stunting the law's ability to develop as new and better ways of analyzing economic questions emerge. In categorically rejecting claims of competitive harm as "implausible" whenever the prevailing dogma denies their possibility, and denying a plaintiff the opportunity to develop evidence of such harm, courts run the risk of inviting comparisons to the Galileo Affair, and in more modern terms, validating the adage that there is a "fine line between stupid and clever."²⁷⁶

tion: Economic Analysis and Antitrust Decisionmaking, 36 BAYLOR L. REV. 584, 620 (1984) (observing that "if that which antitrust seeks to proscribe does not exist because it cannot exist, there is no apparent need for the law's sanction").

276. THIS IS SPINAL TAP (Embassy Pictures 1984).