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# CONSUMER WELFARE AND GROUP BOYCOTT LAW

C. Paul Rogers III\*

## I. INTRODUCTION

**A**LTHOUGH the Supreme Court has long espoused the view that “[i]t is competition, not competitors which the [Sherman] Act protects,” it has not always meant it.<sup>1</sup> It certainly has not always meant it in the group boycott context.<sup>2</sup> But today, if the enhancement of consumer welfare is to be the sole goal of modern antitrust policy, where does that leave boycott law? At least some types of concerted refusals to deal, often called group boycotts or boycotts in antitrust parlance, have long attracted the per se label. The courts have traditionally deemed it anticompetitive, or at least unfair, for a group of competitors to conspire to eliminate an unwanted rival. The resulting per se rule, however, appears to have developed without any consideration of consumer harm. In fact, a number of established boycott precedents are based on the protection of a competitor or competitors rather than competition itself.<sup>3</sup>

Lower courts have predictably been all over the lot. The Supreme Court has given precious little guidance recently, having not decided a boycott case involving the exclusion of a competitor in well over twenty years. In that decision, *Northwest Wholesale Stationers v. Pacific Stationary and Printing Co.*, the Court backed off the per se rule and applied the rule of reason,<sup>4</sup> but with parameters that remain unclear and with no

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1. *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

2. *See, e.g.*, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas & Coke Co.*, 364 U.S. 656 (1961); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

3. One might argue that the protection of competition means or at least encompasses the right or opportunity to compete. It is at least a political argument that can be advanced. *See, e.g.*, F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 13 (2d ed. 1980); CARL KAYSER & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 19 (1959). The problem is that such a broad interpretation creates a tautology because it does nothing more than work to protect competitors, often at the expense of competition and consumer welfare.

4. 472 U.S. 284 (1985). The Court acknowledged in *Northwest Stationers* “that there is more confusion about the scope and operation of the per se rule against group boycotts

mention of consumer welfare.<sup>5</sup>

Of course, the last thirty years have been a time of slow but certain change in antitrust law. In the last decade especially the rule of reason has expanded at the expense of the *per se* rule, and consumer welfare has taken center stage. Efficiency gains are thought to promote consumer welfare and the rule of reason has looked to market power as an integral part of its application.

If a showing of consumer harm is now to be required for (1) the *per se* rule and/or (2) a finding of unreasonableness under the rule of reason, it would appear that a good deal of boycott precedent is effectively overruled. But if it isn't, should it be, or is there any reason why an exception to the consumer welfare model should be carved out for some kinds of boycotts? Should prior cases be ignored or overruled? And how are lower federal courts now dealing with the question of consumer harm in concerted refusal to deal cases, given the paucity of guidance from the Supreme Court on the question? These are all questions which this Article will seek to address.

## II. HISTORICAL OVERVIEW

Although boycotts<sup>6</sup> can take many forms, "classic group boycotts" involve conspiring competitors who "cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete."<sup>7</sup> It is important to note that this very definition focuses on the effect of the concerted action on the targeted competitor rather than competition or the effect on the consumer. Often the conspirators are in competition with the boycott target and are seeking to exclude the target from the market or at least render it more difficult for the target to continue to compete. Sometimes, however, the conspirators are in a vertical relationship with the target and are collectively seeking more advantageous trade terms. Thus, while all boycotts must contain a horizontal conspiracy,<sup>8</sup> their effect may be horizontal or vertical in nature.<sup>9</sup>

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than in reference to any other aspect of the *per se* doctrine." *Id.* at 294 (quoting LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 83, at 229-30 (1977)).

5. See also, e.g., *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) ("The scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law."); *CHA-Car, Inc. v. Calder Race Course, Inc.*, 752 F.2d 609, 613 (11th Cir. 1985) ("A concerted refusal to deal is generally subject to a rule of *per se* illegality" but with "a confusing array of exceptions and qualifications . . .").

6. The term "boycott" apparently originated in 1880 when Irish peasantry retaliated against a land agent, Captain Boycott, who paid starvation wages and evicted any who protested. The tenants called a meeting and secured the pledges of all of Captain Boycott's servants, herders and drivers to cease all relations with Boycott and his family. See generally H. LAIDER, *BOYCOTTS AND THE LABOR STRUGGLE* 23-25 (1913).

7. *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 294 (1985).

8. See *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (limiting "the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors").

9. Indeed, one central problem with the term "group boycott" is that courts have used it to describe such a wide range and variety of collective action. One court has ob-

The Supreme Court has applied section 1 of the Sherman Act to outlaw boycotts since 1904.<sup>10</sup> Certainly through the Warren Court years, the Court was steadfast in its condemnation of collective refusals to deal, whether the effect was horizontal or vertical. Not surprisingly, the Warren Court applied the per se rule to boycotts, giving effect to what was assumed all along.<sup>11</sup>

All of the decisions involving exclusion of competitors have, without exception, focused on the exclusionary effect on the target rather than the impact of the collective action on the market.<sup>12</sup> As early as *Associated Press v. United States*, decided in 1945, the Court appeared to reject the relevance of consumer welfare where an exclusionary effect was shown.<sup>13</sup> There the Court held illegal an Associated Press (AP) by-law that prohibited member newspapers from selling or distributing news to non-AP papers. AP defended on an absence of “indispensability” theory; since AP news was available to the reading public throughout the United States, there was no public harm resulting from the by-law.<sup>14</sup> That argument, the Court held, “would fly in the face of . . . the Sherman Act . . . and would make that law a dead letter in all fields of business.”<sup>15</sup> According to the Court, Congress intended the Sherman Act to be “an essential safeguard to the kind of private competitive business economy this country has sought to maintain.”<sup>16</sup>

The nadir occurred in the *Klor’s* decision where the Supreme Court specifically rejected a requirement of a showing of harm to consumers<sup>17</sup> and ruled that the defendants’ alleged conduct was “not to be tolerated

served that using the term is “the equivalent of yelling ‘fire’ in the halls of traditional jurisprudence.” *Universal Amusements Co. v. Gen. Cinema Corp.*, 635 F. Supp. 1505, 1523 (S.D. Tex. 1985); see also Kenneth Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1 (2002).

10. See *W.W. Montague & Co. v. Lowry*, 193 U.S. 38 (1904); see also *E. Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600, 611 (1914). See generally Charles F. Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 872-73 (1955).

11. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961) (finding that an alleged conspiracy to refuse gas for plaintiff’s gas burners has, “by its ‘nature’ and ‘character,’ a ‘monopolistic tendency.’ As such it is not to be tolerated merely because the victim is just one . . . .”); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). See also *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 250 (1968) (“[Under] the Sherman Act, any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se.”).

12. See, e.g., *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc.*, 364 U.S. at 656; *Klor’s, Inc.*, 359 U.S. at 207; *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457 (1941); *E. States Retail Lumber Dealers’ Ass’n v. United States*, 234 U.S. 600 (1914); *W. W. Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

13. 326 U.S. 1 (1945).

14. *Id.* at 18-20.

15. *Id.* at 18.

16. *Id.* Thus, one can argue that the Court here was looking out for competitors, not consumers. On the other hand, it remains a compelling question as to whether a group of competitors who control a large segment of the market can collectively act to attempt to oust others if no discernible consumer harm results.

17. Defendants had submitted without challenge that there were hundreds of competitors in San Francisco within a few blocks of the targeted store. *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-10 (1959).

merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy."<sup>18</sup> There the Court distinguished its *Apex Hosiery Co. v. Leader* decision, where it had held that Congress's intent in enacting the Sherman Act "was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services."<sup>19</sup> According to the Court in *Klor's*, the *Apex Hosiery* Court was simply noting that the Sherman Act had limited applicability to the labor union which was the defendant in that case.<sup>20</sup>

The Court closely followed *Klor's* in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*<sup>21</sup> In that case, the Seventh Circuit had declined to apply the per se rule to an alleged conspiracy to keep plaintiff's ceramic gas burners from the market by manipulation of the safety testing methods of the American Gas Association, which placed its "seal of approval" on gas burners passing muster.<sup>22</sup> The Seventh Circuit affirmed the district court's dismissal of the complaint, holding that "[i]n the absence of a per se violation the Sherman Act protects the individual competitor . . . only under circumstances where there is such general injury to the competitive process that the public at large suffers economic harm."<sup>23</sup> It noted that the plaintiff alleged no public injury because its "complaint fail[ed] to establish that there has been any appreciable lessening in the sale of conversion gas burners . . . or that the public has been deprived of a product of over-all superiority."<sup>24</sup>

The Supreme Court, in a brief per curiam opinion, firmly disagreed. It declared that the allegations did support a per se offense because plaintiff "cannot sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers cannot buy gas for use in those burners."<sup>25</sup> The Court then quoted the language from *Klor's* about the protection by antitrust laws of even one small business even though there is no impact on the economy.<sup>26</sup>

Similarly in *Silver v. New York Stock Exchange*, the Court in dicta stated that the removal by the New York Stock Exchange and its members of the private telephone wires of a non-member broker-dealer was, but for the federal regulatory overlay, a per se violation of section 1 of

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18. *Id.* at 213.

19. 310 U.S. 469, 493 (1940).

20. *Klor's*, 359 U.S. at 213 n.7. It also noted that "cases subsequent to *Apex* have made clear that an effect on prices is not essential to a Sherman Act violation." *Id.* (citing *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 466 (1941)).

21. 364 U.S. 656 (1961).

22. *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 273 F.2d 196 (7th Cir. 1959).

23. *Id.* at 200.

24. *Id.*

25. *Radiant Burners*, 364 U.S. at 659. Although the Court's mention of "purchasers" of gas might be construed as a sop to consumers, the context of the sentence makes it clear that the Court's concern was solely on the competitive harm to the plaintiff.

26. *Id.* at 659.

the Sherman Act.<sup>27</sup> According to the Court, the concerted action deprived the plaintiff of a valuable business service which it needed to compete in the over-the-counter securities market.<sup>28</sup>

*Klor's*, *Radiant Burners*, and *Silver* aside, the Court's focus on competitors rather than competition in the group boycott area does not mean that it would have decided all of its boycott cases differently under a consumer welfare model. For example, in *Fashion Originators' Guild of America, Inc. v. FTC*, the Court ruled unlawful a plan of textile and garment manufacturers which sought to prohibit the sale of garments to stores that sold "style pirated" garments.<sup>29</sup> The Court gave a litany of reasons as to why the plan was contrary to the policy of the Sherman Act including, lastly, that it had "as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs."<sup>30</sup> Presumably, the Court was recognizing that consumers would be harmed by the elimination of the choice of pirated garments from retail outlets, although it did not say so in those words.

Likewise, the very early decision in *Eastern States Retail Lumber Dealers' Ass'n v. United States*<sup>31</sup> appears consistent with a consumer welfare model of antitrust. In *Eastern States*, retail lumber dealers were charged with conspiring to prevent wholesale dealers from selling directly to consumers.<sup>32</sup> Although the opinion focused on the impact of the concerted action on the targeted wholesalers rather than on the reduction of consumer choice through the elimination of wholesalers as retail sellers, the finding of a section 1 violation at least indirectly protected that consumer choice.

Consumer choice was also inadvertently protected in *United States v. General Motors*,<sup>33</sup> where the Court found an agreement between franchised Chevrolet dealers and General Motors to curtail car sales by authorized dealers to so-called "discount houses" to be illegal. In so holding, the Court focused on the inhibition of the free choice of franchise dealers to sell to whom they wished as well as the attempt to insulate dealers from price competition. Relying heavily on *Klor's*, the Court also pointed to the effect of the conspiracy in removing the discounters from the market.<sup>34</sup>

Of course, those concerns, at least on the *General Motors* facts, likewise protect consumer choice. The Court's language, however, specifically targeted the impact on the discounting sellers, not the purchasing public.

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27. 373 U.S. 341 (1963).

28. *Id.* at 347-48.

29. 312 U.S. 668 (1941).

30. *Id.* at 707.

31. 234 U.S. 600 (1914).

32. *Id.* at 605.

33. 384 U.S. 127 (1966).

34. *Id.* at 145, 147-48.

In spite of the fact that some boycott precedent is at least not inconsistent with a consumer welfare model of antitrust, decisions like *Klor's*, *Radiant Burners*, and to a lesser degree *Silver*, have remained important horizontal boycott precedents. In spite of more recent Supreme Court group boycott decisions, the older cases have, not surprisingly, spawned decisions protecting competitors or sellers in the lower courts.<sup>35</sup>

In keeping with its more proscriptive view of the per se rule in the last thirty years, in 1985 in *Northwest Stationers v. Pacific Stationery & Printing Co.*, the Court held that not all boycotts which exclude competitors are subject to per se scrutiny.<sup>36</sup> There the Court ruled that the expulsion by a retail office supply purchasing cooperative of one of its members was not per se illegal absent a showing that "the cooperative possesse[d] market power or exclusive access to an element essential to effective competition."<sup>37</sup>

While *Northwest Stationers* is considered a landmark decision,<sup>38</sup> the breadth of its holding remains unclear. The Court took pains to note the economies of scale inherent in buying cooperatives which "are not a form of concerted activity characteristically likely to result in predominately anticompetitive effects."<sup>39</sup> But is proof of market power or access to something in the market necessary to compete effectively always required for illegality or only required when a purchasing cooperative or other efficiency producing collective activity is involved?<sup>40</sup> In any event, the Court did not directly mention consumer welfare, although it did note that the cost savings of the cooperative would enable smaller retailers to reduce prices and maintain their stock so as to better compete with larger sellers.<sup>41</sup> If the cooperative does indeed have that effect, consumers benefit substantially.

A year after *Northwest Stationers*, the Court considered *FTC v. Indiana Federation of Dentists*, where a group of dentists refused to submit dental x-rays to insurance companies for use in determining benefits to be paid.<sup>42</sup> Although the Court declined to "pigeonhole" the collective action as a boycott and applied the rule of reason,<sup>43</sup> it quickly found the

35. See, e.g., *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971) (per se rule applied to a National Basketball Association (NBA) rule which prohibited a player from playing for an NBA team until at least four years after the graduation of his high school class).

36. 472 U.S. 284 (1985).

37. *Id.* at 296.

38. See, e.g., Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance after Northwest Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof, and Boycotts*, 72 VA. L. REV. 1015, 1015-16 (1986) ("[T]he first group boycott case in the last eighty years in which the Supreme Court unequivocally applied the rule of reason" was *Northwest Wholesale Stationers.*).

39. *Nw. Stationers*, 472 U.S. at 295.

40. See *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000) (finding some market power necessary to establish a per se boycott).

41. *Nw. Stationers*, 472 U.S. at 295.

42. 476 U.S. 447, 448 (1986).

43. *Id.* at 459 (noting that the Court has been "slow to condemn rules adopted by professional associations as unreasonable per se, and, in general, to extend per se analysis

dentists' refusal unreasonable under the rule of reason because it limited consumer choice "by impeding the 'ordinary give and take of the market place.'"<sup>44</sup>

Thus, *Indiana Federation of Dentists* does advance the consumer welfare model in the boycott arena, but to an uncertain degree, since it declined to label the dentists' collective action as a boycott, although recognizing that their conduct "resembles practices that have been labeled 'group boycotts.'"<sup>45</sup> Collective action that does not involve the attempted exclusion of a competitor but rather seeks a collective benefit from refusing to deal is often labeled a vertical boycott by lower courts, which have tended to apply the rule of reason.<sup>46</sup> The collective activity in *Indiana Federation of Dentists* certainly falls under this description; thus, it would be a stretch to argue that the case mandates a finding of consumer harm for so-called horizontal boycott activity to be unlawful. In fact, the Court carefully distanced itself from the so-called per se boycotts.

Four years later in *FTC v. Superior Court Trial Lawyers Ass'n*,<sup>47</sup> the Court did little to stem the confusion about the appropriate analytical constructs for the different types of boycotts. In *Superior Court Trial Lawyers*, a group of lawyers who regularly served as court-appointed counsel for indigent defendants in the District of Columbia agreed to cease accepting appointments until the District increased their hourly compensation.<sup>48</sup> The Court characterized the conduct as both price fixing and a boycott and applied the per se rule.<sup>49</sup> In a footnote written in response to Justice Brennan's opinion, which concurred in part and dissented in part, the Court acknowledged that while some group boycotts may not merit the per se rule, the one before it did because it also in-

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to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious" (internal citations omitted).

44. *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

45. *Id.* at 458. In fact, in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541-44 (1978), the Court had specifically ruled that the alleged boycotters and the ultimate target did not have to be in a competitive relationship with each other for the activity to be labeled a boycott. See also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 (1930); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44 (1930).

46. See, e.g., *Smith v. Pro-Football, Inc.*, 593 F.2d 1173, 1180 (D.C. Cir. 1978) ("The 'group boycott' designation . . . is properly restricted to concerted attempts by competitors to exclude horizontal competitors; it should not be applied, and has never been applied by the Supreme Court, to concerted refusals that are not designed to drive out competitors . . ."); see also *M & H Tire Co. v. Hoosier Racing Tire Corp.*, 733 F.2d 973 (1st Cir. 1984); *Mackey v. NFL*, 543 F.2d 606 (8th Cir. 1976); *Deesen v. PGA*, 358 F.2d 165 (9th Cir. 1966); *Fraser v. Major League Soccer*, 7 F. Supp. 2d 73 (D. Mass. 1998). But see *NCAA v. Bd. of Regents of the Univ. of Okla.*, 707 F.2d 1147, 1160 (10th Cir. 1983) (holding that the NCAA television plan did not involve a group boycott because the football playing universities subject to the plan did not compete with the television networks but had only a vertical relationship with them), *aff'd on other grounds*, 468 U.S. 85 (1984).

47. 493 U.S. 411 (1990).

48. *Id.* at 422.

49. *Id.* at 422-23.



volved horizontal price fixing.<sup>50</sup>

Of course, the collective action in *Superior Court Trial Lawyers Ass'n* constituted a vertical rather than exclusionary boycott since the lawyers were simply seeking better rates and not attempting to exclude competitors. Thus, the Court still has not made it clear whether or when the per se rule applies to vertical effect boycott conduct. It did note, however, that the only customer or consumer in this case, the District of Columbia, which purchased the defendants' services, was indeed harmed since higher fees would result.<sup>51</sup>

Thus, one can argue that, pursuant to *Indiana Federation of Dentists* and *Superior Court Trial Lawyers Ass'n*, proof of consumer harm is required where boycott activity has a vertical (downstream or upstream), non-exclusionary effect. Unfortunately, the specter of the *Klor's*, *Radiant Burners*, and *Silver* decisions' focus on competitors rather than competition and consumers remains, although the Court did reign in *Klor's* in its 1998 decision in *NYNEX Corp. v. Discor, Inc.*<sup>52</sup> There the question was whether an agreement by a purchaser to buy goods or services from one supplier rather than another constituted a per se boycott if there was no legitimate business reason for the purchasing decision.<sup>53</sup> The Court ruled that the per se rule did not apply absent proof of a horizontal agreement, making it clear that a decision by a buyer to switch suppliers was typically not anticompetitive but was rather "close to the heart of the competitive process that the antitrust laws seek to encourage."<sup>54</sup>

The Court in *NYNEX* declined to overrule *Klor's* directly and danced around its language about protecting a single competitor by asserting that the *Klor's* Court "thereby inferred injury to the competitive process itself from the nature of the boycott agreement."<sup>55</sup> In the next paragraph, the *NYNEX* Court effectively jettisoned *Klor's* as a meaningful precedent by stating that "the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition it-

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50. *Id.* at 436 n.19.

51. *Id.* at 423 n.19.

52. 525 U.S. 128 (1998).

53. The Second Circuit referred to the scenario as a "two-firm boycott." *Id.* at 133.

54. *Id.* at 137. The *Klor's* case was appealed from a motion to dismiss and, although not at all emphasized in the pleadings or the Court's opinion, did contain an allegation of a conspiracy among manufacturers who were supposedly all agreeing to accede to the demands of a large retailer not to deal with the retailer's competitor. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959). The Supreme Court had previously characterized *Klor's* as not just involving a vertical agreement between supplier and customer. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988). Lower federal courts had also refused to apply *Klor's* to two-firm vertical agreements, *see, e.g.*, *Oreck v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) (en banc), or to a decision by a manufacturer or a supplier to replace a dealer or customer with another, *see, e.g.*, *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802 (6th Cir. 1988); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241 (6th Cir. 1982); *Burdette v. Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975); *Mullis v. ARCO Petroleum Corp.*, 502 F.2d 290 (7th Cir. 1974).

55. *NYNEX*, 525 U.S. at 134. Of course, there was absolutely no relevant market data in *Klor's*, making such an inference a real stretch to say the least.

self.”<sup>56</sup> Thus, while the *NYNEX* Court did not specify that a showing of consumer harm was necessary for illegality, the requirement of harm to competition is arguably the same.<sup>57</sup> Further, by directly contradicting the *Klor's* competitor protectionist language, the Court went a long way to further discredit *Klor's* and a number of earlier lower court decisions which followed.

### III. LOWER COURT DECISIONS

Although antitrust law is increasingly embracing a consumer welfare model,<sup>58</sup> it is not surprising, given the uncertain Supreme Court precedent in the concerted refusal to deal area, that lower court decisions lack consistency. Questionable Supreme Court decisions make for questionable lower court rulings in spite of the best efforts of lower courts to traverse the Supreme Court boycott minefield. Confusion, however, reigns as to what constitutes a boycott<sup>59</sup> as well as its appropriate legal analysis.

Several lower court decisions, twenty years old or more, followed the Supreme Court's lead in *Klor's* and applied group boycott law to protect a competitor rather than competition or consumer welfare. For example, in *Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc.*, the Sec-

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56. *Id.* at 135. Harm to “the competitive process” could be taken to mean protecting the opportunity to compete. Protecting the opportunity to compete typically means protecting competitors. See, e.g., Carl Kaysen & Donald F. Turner, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 19 (1959); Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 369-70 (1965); cf. Harlan M. Blake & William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 439 (1965); Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 381-84 (1965). Thus, it was necessary for the *NYNEX* Court to specify that by harm to the competitive process it meant harm to competition.

57. The Court conceded plaintiff's claim that the defendant purchaser's switching of suppliers had harmed consumers because of the increase in telephone rates that resulted. But the Court noted that consumer injury resulted from the lawful monopoly power of *NYNEX* subsidiary New York Telephone coupled with a deception worked upon the regulatory authority which prevented the authority from controlling New York Telephone's exercise of its monopoly power rather than the mere switching of suppliers. *Id.* at 136.

58. For a recent example, see *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 313 (2007) (holding that predatory bidding presents less of a threat to consumer harm than does predatory pricing). See also, e.g., John B. Kirkwood & Robert H. Lande, *The Chicago School's Foundation is Flawed: Antitrust Protects Consumers, Not Efficiency, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST* 89 (Robert Phofsky ed., 2008); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 48-77 (3d ed. 2005); RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001); Rudolph J. R. Peritz, *Confidential Communiqué from Brussels—Antitrust in America: Fugitive on the Run*, 62 SMU L. REV. 621 (2009).

59. For example, in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), the district court had ruled that the NCAA's threat to expel colleges not adhering to its television plan and the network's refusal to deal with colleges other than in accordance with the plan were per se illegal boycotts. Bd. of Regents of the Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 131-12 (W.D. Okla. 1982). The Tenth Circuit reversed, holding that no group boycott was involved since the schools have only a vertical relationship to, and do not compete with, the networks. Bd. of Regents of the Univ. of Okla. v. NCAA, 707 F.2d 1147, 1160 (10th Cir. 1983). The Supreme Court found the plan to be an unreasonable output limitation but did not mention the possibility of a group boycott as a basis for illegality. *Bd. of Regents*, 468 U.S. at 120.

ond Circuit upheld a jury verdict against New York City taxi fleet owners for conspiring to drive a taxi industry trade paper out of business.<sup>60</sup> Defendants argued that no diminution of competition occurred from the plaintiff's demise because another trade paper soon replaced it.<sup>61</sup> The court ignored the argument, instead focusing on the conspirators' intent to drive plaintiff out of business.<sup>62</sup>

Similarly in *Fishman v. Estate of Wirtz*, the Seventh Circuit, over a vigorous dissent, ruled that the unsuccessful bidder for the Chicago Bulls professional basketball franchise was the subject of an unlawful group boycott by the successful bidder and the owners of the Chicago Stadium, where the team played its home games.<sup>63</sup> The court considered whether consumer harm was required for an antitrust violation and concluded that, although antitrust may be moving in that direction, it was not yet there.<sup>64</sup> It paid lip service to the idea that antitrust was intended to protect competition, not competitors, but concluded, without citation to authority, that "[t]he antitrust laws are concerned with the competitive process."<sup>65</sup> As a result, the court concluded that antitrust "does not depend in each particular case upon the ultimate demonstrable consumer effect."<sup>66</sup>

Judge Easterbrook vigorously dissented, noting that Chicago had one professional basketball team before the allegedly unlawful conduct and one team after it.<sup>67</sup> He observed that the conduct complained of did not reduce quantity, increase price, or affect quality, and that there was "no claim of consumers' injury, actual or potential, now or in the future."<sup>68</sup> At best, according to Easterbrook, the targeted conduct was "a business tort in antitrust clothing."<sup>69</sup>

In spite of cases like *Taxi Weekly* and *Wirtz*, lower courts have increasingly required allegations of consumer harm to withstand a Rule 12(b)(6) motion to dismiss. For example, in *Spanish Broadcasting System of Florida, Inc. v. Clear Channel Communications*, the plaintiff alleged that a conspiracy kept it from competing in the Spanish language radio station

60. 539 F.2d 907 (2d Cir. 1976).

61. *Id.* at 912.

62. *Id.* at 913.

63. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 541 (7th Cir. 1986).

64. *Id.* at 536. The court referenced the Supreme Court's decision in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), as an example of a decision, "in the natural monopoly area at least," where the Supreme Court has not embraced the consumer welfare model. *Id.* Judge Easterbrook's dissent, however, argued that *Otter Tail* was in fact a case where consumer injury was very likely absent the application of section 2 of the Sherman Act. *Id.* at 571 (Easterbrook, J., dissenting in part).

65. *Id.* at 536 (majority opinion).

66. *Id.*

67. *Id.* at 563 (Easterbrook, J., dissenting in part).

68. *Id.* Judge Easterbrook further noted that consumers may have in fact gained from the sale of the Chicago Bulls to one entity rather than the other because the merger of two monopolists (the Bulls and the Chicago Stadium) may result in lower overall prices for consumers than when the monopolists supplied each other (the Bulls supplied fans to the Stadium, and the Stadium supplied an arena for the Bulls). *Id.*

69. *Id.* at 585.

market.<sup>70</sup> In affirming the district court's dismissal of the complaint, the Eleventh Circuit ruled that the plaintiff had failed to allege harm to the competitive process and thereby to consumers as was required.<sup>71</sup>

Both the Tenth and District of Columbia Circuits have also affirmed the requirement of an allegation of consumer harm for a plaintiff to proceed past the filing of the complaint. In *Full Draw Productions v. Easton Sports, Inc.*, an archery trade show producer alleged that a rival trade show producer and a number of archery manufacturers and distributors had conspired to eliminate it from the trade show market.<sup>72</sup> The district court dismissed the complaint, holding that the plaintiffs alleged no harm to the manufacturers and distributors, who were actually the consumers of plaintiff's trade shows.<sup>73</sup> The Tenth Circuit reversed, reaffirming the need for consumer harm but holding that the plaintiff had satisfied the requirement because defendants' alleged conduct had directly reduced the amount of exhibitor space and thus, the ability of consumers of that space to acquire it and display their products.<sup>74</sup>

Some courts have applied *Brunswick Corp. v. Pueblo Bowl-O-Mat*<sup>75</sup> to dismiss putative boycott claims on antitrust injury grounds pursuant to section 4 of the Clayton Act. There the Supreme Court made clear that a private antitrust plaintiff must allege injury to competition and not just harm to itself as a competitor in order to establish a section 4 claim.<sup>76</sup>

Thus, courts in so-called staff privilege or peer review cases, where a physician is claiming an unlawful exclusion, dismiss complaints because the plaintiff is claiming no more than injury to himself as a competitor rather than injury to competition.<sup>77</sup> Most go on to specify that in order to show competitive injury, the plaintiff must show that the exclusion harms consumers.<sup>78</sup> Other courts have declined to dismiss because of a failure

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70. 376 F.3d 1065, 1069 (11th Cir. 2004).

71. *Id.* at 1071. See also *Re/Max Int'l, Inc. v. Smythe, Cramer Co.*, 265 F. Supp. 2d 882, 895 (N.D. Ohio 2003) (dismissing the complaint because of an insufficient allegation of anticompetitive effects or injury to the public).

72. 182 F.3d 745, 747 (10th Cir. 1999).

73. *Id.* at 749.

74. *Id.* at 753-54. The court had first noted that customer boycotts of a producer could be illegal. *Id.* at 752; see also *SCFC LLC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 971-72 (10th Cir. 1994) (holding a Visa bylaw which effectively refused membership to Sears was not illegal because no harm to consumers was shown).

75. 429 U.S. 477 (1977).

76. *Id.* at 487-88. Plaintiff alleged that it would lose business and thus profits because of the defendant's "deep pocket" entry into the market by its acquisition of a competitor. The Court noted that in essence the plaintiff was complaining of its harm from increased competition, rather than of injury flowing from harm to competition itself. *Id.*

77. See, e.g., *Healow v. Anesthesia Partners, Inc.*, No. 95-35241, 1996 WL 442524, at \*5 (9th Cir. Mar. 5, 1996) (unpublished disposition) (noting that injury to one anesthesiologist is not an injury to competition); *Singh v. Mem'l Med. Ctr., Inc.*, 536 F. Supp. 2d 1244, 1252 (D.N.M. 2008) (dismissing a radiologist's complaint where he merely alleged "harm to a single competitor at a single hospital rather than injury to competition," which "does not come within the purview of the antitrust laws").

78. See, e.g., *Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (stating that the focus of the rule of reason analyses is "whether the exclusion reduces competition among providers in the market and thereby harms consumers"); *Lie v.*

to allege competitive injury, while reaffirming that the plaintiff will have to prove consumer harm to withstand summary judgment or to recover at trial.<sup>79</sup> Lower courts have also required consumer injury in boycott cases in the summary judgment context<sup>80</sup> as well as in a motion notwithstanding the verdict.<sup>81</sup>

It seems, especially in cases involving professional sports, that the lower courts have long been off track. For example, in *Denver Rockets v. All-Pro Management, Inc.*,<sup>82</sup> a district court misapplied the *Silver* decision and struck down an NBA rule that prevented a player from playing for an NBA team until four years after the graduation of his high school class.<sup>83</sup> The court applied the per se rule, holding that since the NBA did not permit an individual player to petition for consideration of his specific case and did not provide “even the most rudimentary hearing” before excluding an individual player, the rule of reason “exception” of *Silver* was inapplicable.<sup>84</sup>

Thus, the district court both misapplied *Silver* and the per se rule under the authority of *Silver*. That decision required some semblance of due process only because of the government’s specific delegation of some securities regulatory authority to the New York Stock Exchange.<sup>85</sup> The government delegated no such authority over professional basketball to the NBA.<sup>86</sup> Further, as discussed above, *Silver*’s per se rule protects a competitor, not competition. Similarly, in *All-Pro Management*, the court protected the right of an individual player, Spencer Haywood, without considering the impact of the NBA rule on consumers, who would pre-

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St. Joseph Hosp. of Mount Clemens, Mich., 964 F.2d 567, 570 (6th Cir. 1992) (noting that the plaintiff showed no harm to the consumer and dismissing the case); *Wigod v. Chi. Mercantile Exch.*, 981 F.2d 1510 (7th Cir. 1992); *Perry v. Rado*, 504 F. Supp. 2d 1043, 1047 (E.D. Wash. 2007) (noting that “[r]eduction of competition does not involve the Sherman Act until it harms consumer welfare” (quoting *Rebel Oil Co. v. ARCO*, 51 F.3d 1421, 1433 (9th Cir. 1999)); *J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care*, 999 F. Supp. 1355 (S.D. Cal. 1998); *Fox v. Good Samaritan Hosp.*, No. C-04-00874, 2007 WL 2938175, at \*5 (N.D. Cal. Oct. 9, 2007).

79. See *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876 (3d Cir. 1995).

80. See, e.g., *Wigod*, 981 F.2d 1515.

81. See, e.g., *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994).

82. 325 F. Supp. 1049 (C.D. Cal. 1971).

83. Spencer Haywood was the player actually challenging the rule. He had played one year at Trinidad State Junior College in Colorado before transferring to the University of Detroit, where he played one year before seeking entry into the NBA draft. NBA, NBA Encyclopedia: Playoff Edition: Spencer Haywood, [http://www.nba.com/history/players/haywood\\_bio.html](http://www.nba.com/history/players/haywood_bio.html) (last visited Mar. 13, 2009).

84. *Denver Rockets*, 325 F. Supp. at 1066.

85. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 364-65 (1963) (noting that the Securities Exchange Act instituted a scheme of self-regulation).

86. See also *Moore v. Boating Indus. Ass’ns*, 754 F.2d 698, 707-08 (7th Cir. 1985) (finding a voluntary certification program to violate section 1 because it was arbitrarily applied without due process); *Wash. State Bowling Prop. Ass’n v. Pac. Lanes, Inc.*, 356 F.2d 371, 374, 376 (9th Cir. 1966) (applying a per se rule to a Bowling Proprietors Association of America rule requiring that tournament bowlers restrict their bowling to member establishments where there was no provision for a hearing for nonmember bowling alleys).

sumably be the fans who buy tickets to the games.<sup>87</sup> Were the fans harmed by the four-year rule? Maybe yes, maybe no, but the court did not consider the issue.<sup>88</sup>

Subsequent to the Spencer Haywood decision, similar age-based restrictions were struck down in cases involving professional hockey<sup>89</sup> and football.<sup>90</sup> More recently, Maurice Clarett, a running back at Ohio State, challenged the NFL's rule limiting eligibility for its draft to players who are at least three years removed from their high school graduation.<sup>91</sup> Clarett was suspended by his school and the NCAA after his freshman year and sought unsuccessfully to enter the NFL draft. The district court held that Clarett had demonstrated antitrust injury because he had established that the NFL rule did in fact exclude him and others similarly situated from having an opportunity to compete in the relevant market, professional football.<sup>92</sup> In so holding, the district court noted that the Supreme Court in *Klor's* had ruled that group boycotts were injurious to competition and thus could give rise to antitrust injury even when the conduct does "not affect price or output, or even when [it] affect[s] price or output in a way that is beneficial to competition."<sup>93</sup>

The district court in *Clarett* did recognize that a split exists in the Seventh Circuit as to whether a plaintiff must show that the targeted conduct causes loss arising from reduced output or increased prices to establish antitrust injury.<sup>94</sup> It, however, dismissed the Seventh Circuit's requirement of consumer injury in *Chicago Professional Sports Limited Partner-*

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87. For consideration of whether the players, as sellers of services, should be treated as consumers under the antitrust laws, see *infra* text accompanying notes 152-62.

88. Today the argument for consumer harm would be stronger than when the *Haywood* case was decided since now so many players straight out of high school or with just a year of college have become top caliber NBA players. As a result, they have improved NBA's product and made it more attractive to its fans. In contrast, Spencer Haywood was the first "underclassman" to enter the NBA, and he did so when the conventional wisdom was that an individual needed four full years of college to become mature enough to succeed in the NBA.

89. *Linesman v. World Hockey Ass'n*, 439 F. Supp. 1315 (D. Conn. 1977) (preliminary injunction against rule making players younger than twenty ineligible for league draft). *Cf. Neeld v. Nat'l Hockey League*, 594 F. 2d 1297 (9th Cir. 1979) (rule barring one-eyed players from playing in league games upheld).

90. *Boris v. U.S. Football League*, No. CC 83-4980, 1984 WL 894 (D. Cal. Feb. 28, 1984) (league rule barring players who had not completed college struck down as an unlawful boycott).

91. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 381 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004).

92. *Clarett*, 306 F. Supp. 2d at 403.

93. *Id.* at 399.

94. *Id.* at 398; see *Banks v. NCAA*, 977 F.2d 1081, 1097 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part). The Seventh Circuit specifically rejected the necessity of showing "consumer impact" in *Fishman v. Estate of Wirtz*, 807 F.2d 529, 536 (7th Cir. 1986), a case involving an alleged conspiracy to keep the plaintiff from acquiring the Chicago Bulls basketball franchise. As noted above, Judge Easterbrook's dissent scolded the majority for imposing antitrust liability to what was essentially a business tort with no appreciable consumer harm. *Id.* at 563-64 (Easterbrook, J., dissenting in part); see *supra* text accompanying notes 66-68.

*ship v. NBA*<sup>95</sup> as dicta.<sup>96</sup>

On the merits, the *Clarett* court found that the NFL rule violated the rule of reason,<sup>97</sup> although it viewed the rule as a naked restraint of trade. It focused on the exclusion of "competitors" from the NFL market altogether, finding no solace in the temporary effect of the rule or any of the NFL's purported justifications.<sup>98</sup> The court noted that the alleged harm was not to the consumers who watched the players, but to the players themselves, who were selling their services.<sup>99</sup> It concluded that "age-based eligibility restrictions in professional sports are anticompetitive because they limit competition in the player personnel market by excluding sellers."<sup>100</sup>

In support of its reasoning, the court noted that the Sherman Act at a minimum forbids restraints of trade that were unlawful at common law, including contracts which unreasonably restrict one from practicing his profession or trade.<sup>101</sup> Indeed, the Supreme Court has said as much more than once.<sup>102</sup> Thus, presumably the line of cases outlawing restrictive covenants as restraints of trade that began with *Michell v. Reynolds* in 1711 would be apposite.<sup>103</sup>

95. 961 F.2d 667, 670 (7th Cir. 1992).

96. 306 F. Supp. 2d at 398. In *Chicago Professional Sports* the Seventh Circuit noted that every antitrust plaintiff had "to show that its loss comes from acts that reduce output or raise prices to consumers." *Chicago Prof'l Sports*, 961 F.2d at 670. The district court in *Clarett* pointed out that in *Chicago Professional Sports* the NBA had on appeal dropped its argument that plaintiff could not show antitrust injury and that the Seventh Circuit had noted that the antitrust injury question was not before it. *Clarett*, 306 F. Supp. 2d at 398.

97. The court applied the rule of reason rather than the per se rule on the authority of *NCAA v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 100-01 (1984), which it read as mandating the rule of reason where a sports league is involved. *Clarett*, 306 F. Supp. 2d at 405.

98. *Id.* at 405-09.

99. *Id.* at 402.

100. *Id.* at 405.

101. *Id.* (citing *Gardella v. Chandler*, 172 F.2d 402, 408 (2d Cir. 1949)). The *Gardella* case involved a challenge to baseball's reserve clause by a former player for the New York Giants who had jumped to the Mexican League and then been barred from returning to play in Major League baseball. *Id.* at 403. The three judge panel each wrote separate opinions, with no one joining in another's opinion. *Id.* at 403, 407-08. Judge Hand's opinion was in the majority and cited by the *Clarett* court for the proposition that all restraints of trade unlawful at common law violated the Sherman Act, including "a contract which unreasonably forbids any one to practice his calling." *Id.* at 408; *Clarett*, 306 F. Supp. 2d at 382. Judge Chase disagreed, stating that section 6 of the Clayton Act, which states that the labor of a human being is not a commodity or article of commerce, establishes that Congress did not intend the Sherman Act to cover restraints on employment. *Id.* at 406.

102. See, e.g., *Apex Hosiery v. Leader*, 310 U.S. 469, 498 (1940); *Standard Oil Co. v. United States*, 221 U.S. 1, 58-59 (1911); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

103. 1 P.Wms. 181, 24 Eng. Rep. 347 (K.B. 1711). Today employee covenants not to compete are subject to reasonableness scrutiny under common law, totally apart from the Sherman Act or state antitrust statutes. See, e.g., *Hopper v. All Pet Animal Clinic*, 861 P.2d 531, 540 (Wyo. 1993) (requiring a showing of reasonableness in duration and geographical limits); *Howard v. Babcock*, 863 P.2d 150, 160 (Cal. 1993) (requiring reasonableness in geographical limitations); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28, 32-22 (Tenn. 1984) (noting that generally, restrictive covenants in employment contracts are only enforceable if reasonable); *Cukjati v. Burkett*, 772 S.W.2d 215, 217 (Tex. 1989); *Ehlers v.*

It is here with its common-law roots, however, that something has to give if antitrust law is to have a pure consumer welfare goal, for the exclusion of a competitor from a market, whether an artisan (or football player) trying to ply his or her trade, or a company seeking to compete in a market, may or may not have an impact on consumers. It would depend on the structure of the market, entry barriers, the size of the excluded entity and other factors. In antitrust injury terms, a plaintiff must show that “its loss comes from acts that reduce output or raise prices to consumers.”<sup>104</sup>

## VI. THE SUPREME COURT AND CONSUMER HARM

The district court in *Clarett* carefully distinguished the “price or output” rule by noting that the claimed harm there was to a seller, not a buyer, of services. But would the Supreme Court agree with the distinction? There is increasing evidence that it would not. The Supreme Court noted thirty years ago that Congress intended the Sherman Act as a “consumer welfare prescription.”<sup>105</sup> In a recent predatory bidding decision, *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*,<sup>106</sup> the Court declined to back away from its allegiance to consumer harm. It refused to apply a more lenient standard for establishing predatory bidding than for predatory pricing, recognizing the danger of false positives in both and noting that failed predatory bidding schemes can benefit consumers.<sup>107</sup> The Court went on to observe that predatory bidding presents less of a direct threat to consumers than does predatory pricing.<sup>108</sup>

Further, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,<sup>109</sup> the Court pointedly resisted interpreting the Robinson-Patman Act in a manner “geared more to the protection of existing competitors than to the stimulation of competition.”<sup>110</sup> That decision involved an allegedly illegal price discrimination from a competitive bidding process among dealers for defendant’s trucks. In holding that the Robinson-Patman Act did not extend to that situation, the Court observed that the

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Iowa Warehouse Co., 188 N.W.2d 368, 370 (Iowa 1971). See also Harlan M. Blake, *Employee Covenants Not to Compete*, 73 HARV. L. REV. 625 (1960).

104. Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 670 (7th Cir. 1992).

105. Reiter v. Sonotone Corp., 442 U.S. 330, 334 (1979).

106. 549 U.S. 312, 313, 325 (2007) (holding that the similarities between predatory pricing and predatory bidding require the same standard to be applied to both and requiring that a plaintiff show a “dangerous probability of recoupment” because failed predatory bidding schemes may actually benefit consumers).

107. *Id.* at 313.

108. Successful predatory pricing depends ultimately on higher prices being charged to consumers to recoup the seller's losses from it below cost sales while chasing its competitors from the market. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993). A predatory bidding scheme, in contrast, could be successful with no effect on consumers because a predatory bidder does not necessarily have to rely on the raising of prices in its output (sales) market to recoup its losses. *Weyerhaeuser*, 549 U.S. at 324.

109. 546 U.S. 164 (2006).

110. *Id.* at 168.



defendant supplier's selective price discounting fostered competition among suppliers of different brands of trucks.<sup>111</sup> Thus, the Court noted that it continued to construe the Act "consistently with the broader policies of the antitrust laws."<sup>112</sup>

Other recent Supreme Court decisions have similarly focused on consumer welfare as the lynchpin of antitrust policy. For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court focused on the impact of resale price maintenance on the consumer in overturning an almost one hundred-year-old per se ban on the practice.<sup>113</sup> The Court noted that "[t]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote inter-brand competition and consumer welfare in a variety of ways."<sup>114</sup> In *State Oil v. Khan*, the Court similarly focused on the benefit to consumers of low prices in overturning the per se rule against maximum resale price maintenance.<sup>115</sup>

Not surprisingly, parallel to the Court's move to a pure consumer welfare model of antitrust law has been its movement away from per se rules and its enlargement of the rule of reason. Beginning with the watershed *Continental T.V., Inc. v. Sylvania, Inc.*<sup>116</sup> decision in 1977, the Court has almost systematically eliminated or narrowed per se rules with respect to non-hard core collective conduct.<sup>117</sup> In *Sylvania*, the Court first focused on the primacy of interbrand competition in overruling use of the per se rule and adopting the rule of reason for vertical non-price restraints.<sup>118</sup>

Thus, it seems highly unlikely that today's Supreme Court would sanction a group boycott cause of action by a single competitor excluded from a market, such as in *Klor's*, or of the exclusion of a seller of inputs to a

111. *Id.* at 172-73.

112. *Id.* at 181 (quoting *Brooke Group*, 509 U.S. at 220; *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).

113. 127 S. Ct. 2705 (2007).

114. *Id.* at 2715 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 9, *Leegin*, 127 S. Ct. 2705 (No. 06-480)).

115. 522 U.S. 3, 15 (1997) (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990)); see also *Brown v. Pro Football, Inc.*, 518 U.S. 231, 252 (1996) (noting that competition produces the best price levels and that collusion may produce prices that harm consumers).

116. 433 U.S. 36 (1977).

117. See *Leegin*, 127 S. Ct. 2705, 2721-23 (rule of reason for minimum resale price maintenance); *State Oil Co. v. Khan*, 522 U.S. 3, 17 (1997) (rule of reason for maximum resale price maintenance); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15-16 (1984) (per se rule for tying arrangements upheld but with requirement of market power in tying product market); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 297 (1985) (rule of reason for some group boycotts which exclude a competitor); *United States v. United States Gypsum Co.*, 438 U.S. 422, 476 (1978) (clarifying that the rule of reason applies to interseller price verification or dissemination); *United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 113 (1975) (rule of reason for interseller price verification); see also *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-28 (1961) (clarifying that the rule of reason applies to exclusive dealing arrangements).

118. 433 U.S. at 52 n.19. The *Sylvania* decision also put to rest another outdated antitrust goal: that of protecting against restraints on alienation. *Id.* at 54 n.21. See generally C. Paul Rogers III, *Restraints on Alienation in Antitrust Law: A Past with No Future*, 49 SMU L. REV. 497 (1996).

market, such as in *Clarett*, absent proof of harm to competition and thus to consumers. *Weyerhaeuser* alone suggests no less, since there the Court made clear its allegiance to consumers in a predatory bidding scheme where the prices of inputs were bid up to exclude a competitor of the alleged predator.

The question remains whether consumer harm is required for so-called per se boycotts, assuming one can ascertain what a per se boycott looks like. We know from *NYNEX* that it must contain a horizontal conspiracy.<sup>119</sup> The *Superior Court Trial Lawyers Ass'n*<sup>120</sup> decision at a minimum leaves open the prospect that a so-called vertical effect boycott, where the providers of a service are seeking higher compensation rather than trying to exclude anyone from the market, may be per se illegal. The court seemed to hold that proof of market power is not always necessary for per se condemnation,<sup>121</sup> but hedged its bet by acknowledging that the case before it involved price fixing as well as a boycott.<sup>122</sup> Thus, it may be that a per se boycott may take different forms, as long as a horizontal conspiracy is present.

So-called vertical effect boycotts such as those in *Indiana Federation of Dentists* and *Superior Court Trial Lawyers Ass'n* have, as noted,<sup>123</sup> acknowledged consumer harm from the targeted conduct. They, like *Clarett*, involved sellers of services although, unlike *Clarett*, the conspiracy involved those sellers rather than the buyers of the services offered. It seems axiomatic that consumers will be harmed when sellers collectively withhold their goods or services or collectively hold buyers up for higher prices, as in *Superior Court Trial Lawyers Ass'n*. No competitor is excluded from the market in that scenario, but buyers have their options limited or must pay a higher price.<sup>124</sup> In these cases, just as with price fixing, consumers of the goods or services sold are adversely affected by the collective action.<sup>125</sup>

It is where market exclusion occurs as a result of collective action that consumer harm is more problematic. The exclusion, for example, of a

119. 525 U.S. 128, 135 (1998) (noting that precedent “limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors”).

120. 493 U.S. 411 (1990).

121. “But an assumption that, absent market proof of market power, the boycott . . . was totally harmless . . . is flatly inconsistent with the clear course of our antitrust jurisprudence.” *Id.* at 435-36.

122. *Id.* at 433 n.15.

123. See *supra* text accompanying notes 45-50.

124. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 771-72 (1992) (involving foreign and U.S. reinsurers allegedly conspiring to reinsure only commercial general liability policies written on a “claims-made” basis); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 535 (1978) (involving medical malpractice insurers allegedly conspiring to restrict coverage to “claims-made” policies); see also *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 42-43 (1930) (noting that the Sherman Act was enacted not to prevent injury to one individual but to prevent harm to the general public and competition); *United States v. First Nat'l Pictures, Inc.*, 282 U.S. 44, 53-54 (1930).

125. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978) (finding the elimination of competitive bidding by professional engineers unlawful under section 1 of the Sherman Act).

single competitor or single seller may not affect consumer welfare if consumer choice or preference is not seriously affected. For example, in *Klor's*, consumer harm would be present only if the exclusion of Klor's from the market for the sales of RCA, General Electric, Admiral, Zenith, and Emerson brand household appliances significantly limited consumer choice in the San Francisco area. This seems unlikely given that there were hundreds of retail outlets for brand name appliances in San Francisco at the time.<sup>126</sup>

It is perhaps even more difficult to see how any potential consumer harm could be generated by the conduct, labeled per se illegal, in the *Silver* decision.<sup>127</sup> The plaintiff was a non-member stockbroker who had his private wire connections to the New York Stock Exchange severed. Presumably, any of Mr. Silver's customers who wished to continue to invest in the stock market would have had many other brokers to choose from.

In *Clarett*, consumers of the NFL would appear to be the fans who attend games or watch them on television.<sup>128</sup> It is unlikely that they are harmed by the NFL's three-year rule since few, if any football players, at least on past experience, are able to play in the league when they are eighteen or nineteen years old.<sup>129</sup> Thus, it would be difficult to establish that the caliber of play is diminished by the rule or that consumers are

126. The *Klor's* defendants had submitted unchallenged affidavits alleging as much. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209-19 (1959). Of course, if Klor's was a discount house, free-riding on the sales and promotional efforts of Broadway-Hale next door, it could claim its exclusion harmed consumers by eliminating the lowest price alternative in the market. While the competitive effect of free-riding is the subject of considerable academic debate, see, e.g., Mark E. Roszkowski, *The Sad Legacy of GTE Sylvania and Its Rule of Reason: The Dealer Termination Cases and the Demise of Section 1 of the Sherman Act*, 22 CONN. L. REV. 129, 147 (1989); William S. Comanor, *Vertical Price Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 987 (1985); Victor P. Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736 (1985); Robert Pitofsky, *Sylvania: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1 (1978), the Supreme Court has viewed it as a drain on interbrand competition because it provides disincentives to the high service retailers which are essential for the manufacturer to compete. See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2716-17 (2007); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *Chi. Prof'l Sports Ltd. v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992).

127. 373 U.S. 341 (1963).

128. The district court, however, viewed the teams of the NFL as the likely consumers. *Clarett v. Nat'l Football League*, 306 F. Supp. 2d 379, 399 n.123 (S.D.N.Y. 2004), *rev'd on other grounds*, 369 F.3d 124 (2d Cir. 2004). It observed that it made little sense to require consumer harm in a labor context where the allegedly conspiring defendants are the consumers of labor. *Id.* at 399. But that view seems to ignore the fact that professional football fans are irrefutably the consumers of the entertainment product that labor and the teams provide and that without them there would be no professional football jobs and no professional football product.

129. While it is relatively common for college football players to subject themselves to the NFL draft after their junior year in college, it is less common for a player to be drafted after just two years in college and very rare for a player to be drafted after just one year in college, in contrast to college basketball. See *infra* note 127.

somehow harmed by the rule.<sup>130</sup>

If the courts are to embrace fully a consumer welfare model of antitrust in the group boycott arena, they must seek to determine whether the exclusionary effect of the collective action has a significant impact on consumers. The first step, then, is to identify who the consumers of the goods or services at issue are; then the analysis should focus on whether those consumers are harmed by the collective conduct at issue.

While the identification of the consumers often seems obvious, it is not always so. For example, college football's Bowl Championship Series (BCS) has come under scrutiny as a possible illegal boycott, since access to the lucrative BCS bowls by Division 1A football teams has been uneven at best.<sup>131</sup> If one focuses on the effective exclusion of certain schools from the BCS bowls by competitors with significant collective market power, an attractive antitrust case can be made. But if consumer harm must be shown, who are the relevant consumers and are they harmed?

The answer to the second part of the question, of course, depends on the answer to the first part. One could argue, as the BCS surely would, that college football fans generally are the consumers and thus benefit, since they have long been clamoring for a national championship game for Division 1A football.<sup>132</sup> Since college football fans typically have strong allegiances to one school, often their alma mater, however, consumer harm in the BCS may come down to "where you stand is where you sit." Fans of non-BCS schools certainly believe they are harmed by their schools being relegated to second class status by the BCS while fans of BCS schools would presumably feel harmed only if they believe their team was wrongly excluded from the national championship game.<sup>133</sup>

One could also argue that the television networks that bid for the right to exclusively telecast the BCS bowl and the national championship games are the appropriate consumers. The winning bidder pays a multi-million dollar rights fee, but are they thus harmed by the BCS's collective action? It would be a stretch to so argue, since the networks' bids are

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130. The outcome might be different if the NBA was to adopt a three-year rule since a number of players, such as Dwight Howard, Kobe Bryant, LeBron James, Kevin Garnett, and Amare Stoudamire, have skipped college and played successfully in the league. Many others have made an impact in the NBA after playing only a year or two in college. Thus, one might successfully assert that the caliber of play and excitement of the league would be diminished under a three-year rule, to the detriment of the fans (consumers) of the league.

131. See, e.g., C. Paul Rogers III, *The Quest for Number One in College Football: The Revised Bowl Championship Series, Antitrust, and the Winner Take All Syndrome*, 18 *MARQUETTE SPORTS L.J.* 285 (2008).

132. The response to this argument would likely be that the BCS system is not the only way in which to achieve a national championship match-up. Other methods, such as a more egalitarian play-off system, could be designed without discriminatory access. See *id.* at 297.

133. A recent example would be the 2008 University of Texas Longhorns, who were not selected to play in the national championship game even though they had defeated the University of Oklahoma, which was selected, 35-25 at a neutral site during the regular season. Fans of the non-BCS University of Utah, which went undefeated in 2008, likewise felt harmed by their school's exclusion from the national championship game in favor of two teams with one loss apiece.

made in a competitive market and are motivated by the networks' assessment of potential advertising revenues. The point is that identifying consumer harm may be difficult in some cases, particularly those involving college or professional sports.<sup>134</sup>

## V. UNFAIR COMPETITION AND ANTITRUST

If the showing of consumer harm is to become a predicate for the illegality of group boycotts, however, can antitrust law live with the prospect of a group of competitors ganging up on one of their ilk to drive them from the market as long as consumer choice is not materially affected?<sup>135</sup> This type of collective action seems to be, at a minimum, mean-spirited and unfair, and was certainly troublesome to the Court in *Klor's*.<sup>136</sup> But of course, as history has shown, antitrust law cannot protect both competition and competitors, although the Court has certainly on more than one occasion tried.<sup>137</sup>

In fact, the goal of antitrust has been increasingly the protection of the competitive process rather than some sort of reckoning of "fair" competi-

134. For example, there is little doubt that salary or wage caps imposed on athletes or coaches by a league or governing association are illegal price fixing. See, e.g., *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998). (Of course, the antitrust labor exemption permits salary caps in professional sports leagues negotiated through the collective bargaining process to stand, see, for example, *Brown v. Pro Football, Inc.*, 518 U.S. 231, 236 (1996); *NBA v. Williams*, 45 F.3d 684 (2d Cir. 1995); *Powell v. NFL*, 930 F.2d 1293 (8th Cir. 1989), cert. denied, 498 U.S. 1040 (1991).) The argument that wage ceilings restrict costs and thus benefit consumers does not wash because it countenances the use of buyer cartel market power to disrupt the price-setting function of the free market. See *Law*, 134 F.3d at 1022-23; see also *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948). One could assert that the consumers in a wage scaling case are actually the athletes themselves as sellers of services in an input market. That argument, however, does violence to the generally accepted notion of consumers as buyers rather than sellers of goods or services. It is also unnecessary since it is well established that monopsonists (buyers with market power) harm consumers by misallocating resources and diminishing consumer choice. See, e.g., *Vogel v. Am. Soc'y of Appraisers*, 744 F.2d 598, 601 (7th Cir. 1984); see also Roger D. Clair & Jeffrey L. Harrison, *Cooperative Buying, Monopsony Power, and Antitrust Policy*, 86 NW. U.L. REV. 331, 342 (1992); Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2644-45 (1996).

135. The answer in *Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc.*, 539 F.2d 907 (2d Cir. 1976), was no. There the Second Circuit held that a conspiracy by an organization of taxi fleet owners to drive a taxi industry trade paper out of business was an unlawful group boycott because of the intent of the conspirators to drive the plaintiff out of business. *Id.* at 912-13. The court ignored the argument that no harm to competition occurred because a rival trade paper was created to replace the plaintiff's. *Id.*; see also *Fishman v. Estate of Wirtz*, 807 F.2d 520, 538 (7th Cir. 1986) ("The fact that the precise impact of defendants' conduct on the broad consuming public has remained unfocused here does not prevent a finding that the antitrust laws have been violated."); *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284 (5th Cir. 1988); *Malley-Duff & Assocs., Inc. v. Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir. 1984).

136. "[This combination] is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).

137. See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) ("It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result . . .").

tion.<sup>138</sup> Cutthroat competition or “ruinous” competition is not a problem unless engaged in by a monopolist. Price cutting, while a pejorative term to competitors or cartel members, is pro-competitive because consumers benefit from the lower prices. Gentlemen’s agreements to not cut prices or enter each others’ markets are per se illegal because of their effect on competition, even though some competitors may be harmed. Competitors may not deem price cutting or reneging on agreements to be fair competition, but such actions are in fact the very essence of the competition the antitrust laws seek to protect.<sup>139</sup>

Unsavory market behaviors such as the theft of trade secrets,<sup>140</sup> style piracy,<sup>141</sup> infringement of a patent,<sup>142</sup> or misappropriation of a trademark<sup>143</sup> are not examples of fair competition, but they are examples of

138. See, e.g., *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) (noting that “unfair competition” laws, business torts and regulatory laws were proper remedies for competitive practices offensive to business morality); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (“Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition. . . .”); see also *Fishman v. Estate of Wirtz*, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting in part) (explaining that “real competition” is not fair but is “bruising rivalry, in which people go out of business under intense pressure”).

A dissenter might point to section 5 of the Federal Trade Commission Act, which renders illegal “unfair methods of competition.” 15 U.S.C. § 45 (2006) (emphasis added). The Supreme Court has interpreted that provision to cover anticompetitive conduct which might fall short of a Sherman Act violation since “[t]here is no limit to human inventiveness in this field.” *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304, 310-12 (1934). The Court has consistently focused on applying section 5 to conduct which offends “the spirit,” even if not the letter, of the Sherman Act. See, e.g., *FTC v. Superior Court Trial Lawyer Ass’n*, 493 U.S. 411, 421 (1990) (holding a lawyers’ boycott to coerce greater fees to be “unfair”); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953) (noting that Congress left the concept of “unfair methods of competition” in section 5 of the FTC Act flexible, to be defined by cases in the area); *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467-78 (1941) (finding a boycott of style pirates violated section 5). Lower courts have been reluctant to apply section 5 beyond established Sherman Act proscriptions. See, e.g., *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 137 (2d Cir. 1984); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980).

139. See, e.g., *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 313 (2007) (“[A]ctions taken in a predatory-bidding scheme are often ‘the very essence of competition’ because a failed predatory-bidding scheme can be a ‘boon to consumers’” (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993))); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (“[C]utting prices in order to increase business is often the very essence of competition.”).

140. E.g., *Vigoro Indus., Inc. v. Crisp*, 82 F.3d 785, 790 (5th Cir. 1996) (finding a former employee’s use of trade secrets anticompetitive).

141. See *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467-68 (1941) (finding that style piracy was one type of competition and did not justify an unlawful boycott).

142. E.g., *Q-Pharma, Inc. v. Andrew Jergens Co.*, 360 F.3d 1295 (Fed. Cir. 2004) (holding that a patent owner can be subject to antitrust liability if the infringer proves either that 1) the “patent was obtained through knowing and wilfull fraud”; or 2) that the suit was “a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor” (quoting *R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144 (1961))).

143. See *Phi Delta Theta Fraternity v. J. A. Buchroeder & Co.*, 251 F. Supp. 968, 975 (W.D. Mo. 1966) (holding that parties may not use trademarks in a way that violates the antitrust laws).

how some competitors compete in the marketplace.<sup>144</sup> Thus, those types of competitive behavior do not violate the antitrust laws, although they may well run afoul of common law or state proscriptions.<sup>145</sup>

## VI. EXCLUSIONARY CONDUCT

So-called exclusionary conduct is to be reckoned with, when engaged in by a monopolist or near monopolist. Monopolists who engage in untoward conduct in keeping or driving rivals out presumably harm consumers, who are deprived of the fruits of competition.<sup>146</sup> Thus section 2 is, or at least should be, concerned with exclusionary conduct only because consumers will suffer, and not because rivals will be excluded. In that type of case, however, the exclusion of rivals by a monopolist harms both the competitor and consumer. Thus, a competitor of a monopolist typically has antitrust standing to bring a section 2 action since the harm to it as a competitor mirrors the harm consumers will suffer from the exclusionary conduct.<sup>147</sup> In contrast, as noted above, conduct by competitors which has the exclusionary effect of driving out a rival may or may not harm consumers, depending on the shape of the market.

Group boycott activity which excludes a rival from a market with many sellers is likely consumer-neutral. On the other hand, the same joint conduct that excludes a rival from a highly concentrated market is likely to harm consumers by eliminating an important purchasing option.<sup>148</sup> As

144. The so-called *Pick-Barth* doctrine, in which business torts were treated as unlawful per se under the antitrust laws because there was no arguable pro-competitive justification for them, *Albert Pick-Barth Co. v. Mitchell Woodbury Co.*, 57 F.2d 96, 102-03 (1st Cir.), cert. denied, 286 U.S. 552 (1932), has long been abandoned by the First Circuit and not followed elsewhere. See *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 561 (1st Cir. 1974); see also *Havaco of Am., Ltd. v. Shell Oil Co.*, 626 F.2d 549, 554-56 (7th Cir. 1980); *Juneau Square Corp. v. First Wisconsin National Bank*, 624 F.2d 798, 812-13 (7th Cir.), cert. denied, 449 U.S. 1013 (1980); *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 85 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).

145. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984) (urging federal courts to rid themselves of "private state tort suits masquerading as antitrust actions"); see also *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 468 (1941) (deciding whether style piracy is a tort is question of state law); *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945) (stating the Sherman Act does not "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce").

146. In *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 457 (1993) the Supreme Court rejected a line of Ninth Circuit cases which had held that bad acts alone can establish the requisite intent and dangerous probability of success prongs for an attempt to monopolize a claim. See *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474-75 (9th Cir. 1964). According to the Court, "[t]he purpose of the [Sherman] Act is not to protect business from the working of the market, it is to protect the public from the failure of the market." *Spectrum Sports*, 506 U.S. at 458.

147. See, e.g., *Aspen Skiing Co. v. Aspen Highlands, Inc.*, 472 U.S. 585, 610-11 (1985) (finding that a rival of monopolist ski resort company was entitled to section 2 relief); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986); *MCI Commc'ns Corp. v. AT&T Co.*, 708 F.2d 1081 (7th Cir. 1983).

148. As noted above, see *supra* text accompanying notes 36-39, the Court in *Northwest Stationers* recognized the competitive impact of that type of exclusionary conduct by requiring proof of "market power or unique access to a business element necessary for effective competition" for per se liability. *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 298 (1985).

noted, section 2's concern is also with conduct that is labeled exclusionary, but in the hands of a monopolist. For example, in *Spectrum Sports*, the Supreme Court observed that section 2 "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."<sup>149</sup>

Nonetheless, the so-called antitrust gap purposefully differentiates between single firm conduct by a non-monopolist and agreed upon conduct by two or more actors.<sup>150</sup> According to the Supreme Court, single firm conduct by a non-monopolist is placed beyond the antitrust pale to avoid "discourag[ing] the competitive enthusiasm that the antitrust laws seek to promote."<sup>151</sup> On the other hand, "concerted activity inherently is fraught with anticompetitive risk."<sup>152</sup>

True enough, but the question remains whether concerted conduct which simply harms a competitor and does not injure consumers should be actionable under section 1. The answer absolutely depends on the underlying policy of the Sherman Act. To fail to require consumer harm to establish an illegal group boycott would bifurcate antitrust policy and reverse the Supreme Court's course to unify antitrust as "a consumer welfare proscription."<sup>153</sup> It would, in effect, create an exception for group boycotts, since the balance of antitrust does seek to foster consumer welfare.<sup>154</sup>

## VII. GROUP BOYCOTT EXCEPTION TO THE CONSUMER HARM REQUIREMENT?

The creation of an exception to congressional policy as interpreted by the Supreme Court seemingly requires a compelling reason. The protection of competitors or, as in the *Clarett* decision, sellers of a product or service, are the only plausible reasons. Since surely the protection of

149. The Court went on to state that section 2 "does so not out of solicitude for private concerns but out of concern for the public interest." *Spectrum Sports*, 506 U.S. at 459. In fact, the standards for establishing exclusionary conduct in section 2 cases have become more exacting in recent years as the Supreme Court has recognized that "[m]istaken inferences and the resulting false condemnations 'are especially costly because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993) (noting that it is difficult for a court to control price cutting without chilling "legitimate price cutting"); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986).

150. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771-77 (1984).

151. *Id.* at 775.

152. *Id.* at 767-68.

153. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)).

154. One could point to the Robinson-Patman Act, 15 U.S.C. § 13(a) (2006), as an exception to the consumer welfare rule since it does penalize lower prices in some instances. The Supreme Court, however, has made clear its intention "to construe the Act 'consistently with broader policies of the antitrust laws.'" *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 n.13 (1979)).



competitors will not carry the day any longer, is there a persuasive reason to treat sellers differently? That is, should sellers of goods or services be protected against upstream vertical concerted refusals to deal absent any showing of consumer harm?

It is true that, beginning with *Continental T.V., Inc. v. GTE Sylvania, Inc.*<sup>155</sup> more than thirty years ago, the Supreme Court has given manufacturers more freedom to determine how they sell and market their products. But that solicitude was because of the Court's recognition that interbrand competition "is the primary concern of antitrust law."<sup>156</sup> The promotion of interbrand competition protects consumers generally by assuring competition by competing manufacturers as well as protecting against the exploitation of intrabrand market power, which can limit consumer choice.<sup>157</sup>

Thus, *Sylvania* provides no reason for protecting sellers, *qua* sellers, without a showing of consumer harm. If anything, the protection of sellers is even less compelling than the protection of competitors who are typically being excluded from a market or disadvantaged by the actions of rivals, as opposed to the actions of buyers in a vertical relationship. Thus, sellers should be treated like competitors and gain no relief without a showing of consumer harm.<sup>158</sup>

Further, an exception would require a recalibration of antitrust standing and injury requirements in private enforcement actions. As noted, section 4 of the Clayton Act requires that plaintiffs prove injury "by reason of anything forbidden in the antitrust laws."<sup>159</sup> Since the *Brunswick* decision,<sup>160</sup> the courts have required that an antitrust plaintiff show harm to competition, and not just to itself.<sup>161</sup>

For example, it is doubtful whether the plaintiff in *Klor's* could satisfy the *Brunswick* test. To do so, it would have to establish, in addition to the conspiracy alleged,<sup>162</sup> that consumers were harmed by its elimination from the market as a retail outlet for the affected household appliances. The defendant had characterized the dispute as a "purely private quarrel" and had submitted "unchallenged" affidavits alleging that there were

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155. 433 U.S. 36 (1977).

156. *Id.* at 52 n.19.

157. *Id.*; see, e.g., *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 938 (7th Cir. 2000) ("[W]ith respect to the cost of distribution services, the interests of the manufacturer and consumer are aligned."); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 369-70 (7th Cir. 1987) (stating the rationale for restricted distribution policies "depends on the alignment of interests between consumers and manufacturers").

158. See, e.g., *Full Draw Prods. v. Easton Sports, Inc.*, 182 F.3d 745, 753-54 (10th Cir. 1999).

159. 15 U.S.C. § 15 (2000).

160. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

161. See, e.g., *Bassett v. NCAA*, 528 F.3d 426, 431, 434 (6th Cir. 2008); *Perry v. Rado*, 504 F. Supp. 2d 1043, 1047 (E.D. Wash. 2007); *J. Allen Ramey, M.D., Inc. v. Pac. Found. for Med. Care, Inc.*, 999 F. Supp. 1355, 1364 (S.D. Cal. 1998); *Fox v. Good Samaritan Hosp.*, No. C-04-00874, 2007 WL 2938175, at \*5 (N.D. Cal. Oct. 9, 2007).

162. The case was appealed from the dismissal of the complaint; thus the conspiracy had only been alleged, not proven. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959).

hundreds of other household appliance retailers in the area, some within a few blocks of Klor's.<sup>163</sup> Assuming that those affidavits were uncontested, today the plaintiff would quickly be out of court.

Thus, there does not appear to be a principled reason for an exception, unless it might be that antitrust should guard against collections of competitors ganging up to exclude rivals or boycott sellers because such actions offend one's sense of business or marketplace propriety. But that would fundamentally change the nature of the antitrust law and introduce, or rather reintroduce, the concept of competitive fairness as an antitrust goal. It would, in fact, transform the antitrust law into what is essentially a business tort for unsavory behavior towards others in the marketplace.<sup>164</sup>

### VIII. THE PRICE OR OUTPUT APPROACH

Rather than take that step backward, one might hope for more definitive guidance from the Supreme Court. Although the recent Court has not shied from overruling itself,<sup>165</sup> it may be too much to ask it to overrule old group boycott dogs like *Klor's*, *Silver*, and *Radiant Burners*.<sup>166</sup> The Court, however, has proven adept at ignoring precedent it does not like,<sup>167</sup> winnowing away case law it becomes uncomfortable with<sup>168</sup> or, as in *Northwest Stationers*, making standards tougher for the per se rule.<sup>169</sup>

To require a showing of consumer harm as a prerequisite for illegality for all concerted refusal to deal or group boycott conduct does mean parting ways with the idea that all common law restraints of trade are encompassed in the Sherman Act. It means that an individual profes-

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163. *Id.* at 209-10.

164. *See, e.g.*, *Fishman v. Estate of Wirtz*, 807 F.2d 520, 563 (7th Cir. 1986) (Easterbrook, J., dissenting in part) (lambasting the majority for imposing antitrust liability "for what was essentially a business tort with no appreciable consumer harm").

165. *See* *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (overruling *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)); *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)).

166. *See, for example*, *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 9 (1984), where the Court observed that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" It then proceeded to significantly narrow the per se rule as applied to tying arrangements. More recently, however, the Supreme Court, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705, 2712-25 (2007), did overrule a ninety-six year old precedent, the per se rule for vertical price fixing.

167. *See, e.g.*, *United States v. Von's Grocery Co.*, 394 U.S. 270 (1966); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

168. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138-39 (1998) (limiting the possible reach of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)); *see also* *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (characterizing *Aspen Skiing Co. v. Aspen Highlands, Inc.*, 472 U.S. 585 (1985), as "at or near the outer boundary of § 2 liability").

169. *See also* *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610, 617-19 (1977) (limiting the per se rule for tying arrangements); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-29 (1984) (same).

sional or tradesman does not have an antitrust claim absent some showing of harm to consumers of that trade or profession.<sup>170</sup> It also means dispensing with those few cases which hold that an effect on price or output is not required for a Sherman Act violation.<sup>171</sup> For an effect on price or output remains a prerequisite to showing consumer harm.<sup>172</sup>

The price or output approach has the great advantage of bringing order to the chaos which has long accompanied group boycott law. It requires a market analysis in all cases and avoids scenarios which protect only competitors, sometimes at the expense of efficiency gains. It avoids the doctrine without the boundaries (or principles) problem of cases like *Klor's*, *Silver*, and *Wirtz*; if antitrust does sometimes protect competitors without discernible harm to the market generally, how do we know when? Is it all the time, most of the time, or just some of the time? Does it depend on the nastiness of the collective behavior? What is the abiding goal or principle the law is seeking to further? The answers to those questions become straightforward or moot if consumer welfare is the goal.

#### IX. APPLICATION OF PER SE AND RULE OF REASON ANALYSES TO BOTH EXCLUSIONARY EFFECT AND VERTICAL EFFECT GROUP BOYCOTTS

While more analytical precision is called for, it does appear unlikely that the Supreme Court will ever overrule the per se rule for group boycotts or concerted refusals to deal. Nor, arguably, should it. So-called naked boycotts, even Judge Bork recognizes,<sup>173</sup> should be per se illegal. Thus, following the lead of *Northwest Stationers* and as in tying cases after *U.S. Steel v. Fortner Enterprises* and *Hyde*, the per se rule in a classic horizontal effects group boycott should be applied only to circumstances in which the horizontal conspirators control a substantial share of the

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170. See, e.g., *Bassett v. NCAA*, 528 F.3d 426, 431 (6th Cir. 2008) (finding no anticompetitive effect where assistant college football coach barred from coaching by NCAA alleging only injury to himself); *Deesen v. Prof'l Golfers' Ass'n*, 358 F.2d 165, 170 (9th Cir. 1966) (finding a tournament eligibility rule designed to prevent inferior players from competing in PGA tournament reasonable); *Molinas v. NBA*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961) (finding a suspension of NBA player for betting on his team to be "as reasonable a rule as can be imagined").

171. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 214 n.7 (1959) ("[C]ases subsequent to *Apex* have made it clear that an effect on prices is not essential to a Sherman Act violation."). The Court only cited *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 466 (1941), where the point is arguably dicta since it would not be difficult to show an effect on price through the exclusion of style pirates from the market for retail clothing.

172. The price or output approach also accounts for abuses of input markets by buyer cartels which seek to restrict the price paid or volume purchased for goods or services. See *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998); see also HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 2135, at 181 (1999). If the input buyers lack market power, their joint purchasing activity is unlikely to affect the market price or output and will be allowed. See, e.g., *Addamax Corp. v. Open Software Foundation, Inc.*, 152 F.3d 48, 52 (1st Cir. 1998); *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965).

173. ROBERT BORK, THE ANTITRUST PARADOX 334 (1978).

market so that the exclusion of a competitor has a meaningful impact on consumers by materially reducing their purchasing options. In other words, injured competitors who cannot show consumer injury need not apply.

If, however, the alleged boycotters present colorable efficiency claims, as in *Northwest Stationers*, the rule of reason should apply even if defendants do control a large part of the market. Presumably, the balancing required by the rule of reason should sort out the overall competitive effect of the conduct just as in the many other rule of reason applications in antitrust law. If the defendants do not possess an appreciable market share, consumer harm is unlikely, so resort to the quick look<sup>174</sup> should allow a court to quickly dispense of the claim, assuming it has not kicked the plaintiffs out on antitrust injury grounds.

It remains uncertain whether the per se rule applies to so-called vertical effects group boycotts.<sup>175</sup> There is Warren Court dicta indicating that it does.<sup>176</sup> The purpose, while not exclusionary in effect, is for better trade terms or conditions than the conspirators presumably can achieve for themselves. Those advantages will typically affect price or output, if the conspirators command the requisite market share.<sup>177</sup> Thus, there is no discernable reason for analyzing vertical effect boycotts differently than boycotts which exclude a competitor. After all, price fixing conspiracies are not exclusionary in effect, but certainly merit per se treatment because of the elimination of price competition between the conspirators. If the conspirators control the market, such as in *Superior Court Trial Lawyers Ass'n*, and there are no colorable efficiencies, the per se rule should apply since consumers will be adversely impacted.<sup>178</sup>

If, as with exclusionary boycotts, colorable efficiencies exist where the conspirators have market power, the rule of reason should nonetheless

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174. The "quick look" developed in cases such as *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986), *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 110 (1984), and *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). It posits that in some cases, a "quick look" by one "with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

175. See *supra* text accompanying note 50.

176. See *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 250 (1968).

177. For example, in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 457 (1986), the Court noted that the defendant dentists' withholding of x-rays from insurance companies made it more costly for the insurers and their patients to gain information needed to evaluate the dentists' diagnosis.

178. For example, consider the facts of *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 535 (1978), where the four insurance companies writing medical malpractice policies in Rhode Island agreed to only write policies on a more restrictive "claims made" basis rather than providing coverage on the more expansive "occurrence" basis. Since the four conspirators monopolized the medical malpractice insurance market, competition as to the type of medical malpractice insurance available was totally eliminated. *Id.* at 553. Thus, output was limited and insurance premiums were likely to rise, given the reduction in competition. Consumers, whether the physicians purchasing the insurance, or their patients, who would probably have the higher cost of medical malpractice insurance passed on to them, would be harmed.

govern with the understanding that consumer harm will have to be shown for the conduct to be deemed unreasonable. Courts should still utilize the quick look where the conspirators lack market power.

In sum, recognition of the requirement of consumer harm through the prism of injury to competition does not require overruling of the *per se* rule. It does, however, require some market analysis before its application and will alter and narrow when the *per se* rule applies, at least when compared to older Supreme Court precedent.

## X. CONCLUSION

Group boycotts or concerted refusals to deal are one of the few, if not the only, antitrust areas in which some courts persist in using the Sherman Act to protect competitors without regard to the targeted conduct's impact on competition. It is far too late in the day of the movement toward a consumer welfare model of antitrust for rogue applications of competitor protectionism to persist. Antitrust law is designed to give competitors relief only when they are harmed by conduct which also harms competition. Absent that criteria, antitrust law becomes largely formless and unpredictable, a disconcerting prospect when treble damages are at stake. By requiring injury to competition as defined by showing harm to consumers for all types of group boycott activity, however, the great uncertainty that has long surrounded group boycott doctrine greatly dissipates.