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Chapter 5

BURDEN OF PROOF IN U.S. ANTITRUST LAW

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The content of U.S. antitrust law remains in large part the work of courts. Those courts are guided today by both traditional procedural norms and more modern economic models of decision making. The choice of model of decision making can affect not only the selection of a substantive legal standard, but also a court's approach to fixing the burdens on the parties as well as the allocation of those burdens—burdens of pleading, production, and proof. And, as is true of all litigation, the height and allocation of these burdens is a critical and often outcome determinative component of the judicial process. An analysis of antitrust decisions reveals that the state of antitrust law with respect to establishing burdens, utilizing presumptions, and defining the conditions under which burdens can shift from one party to another are surprisingly unsettled. As a consequence, antitrust disputes have become needlessly complex and expensive to resolve in many cases.

1. Introduction

Despite the increasingly influential role of hearings, reports, guidelines, speeches, and administrative processes, publicly and privately initiated adversarial proceedings before federal courts are the primary vehicle for formulating the substantive standards of antitrust law in the United States. Such proceedings are conducted by generalist judges, who reach their decisions in antitrust cases by applying transsubstantive procedural rules, such as the Federal Rule of Civil Procedure and the Federal Rules of Evidence, and transsubstantive litigation conventions, such as burdens of pleading, burdens of production, burdens of proof, and the related device of presumptions, which are used in law to shift burdens from one party to another.[1] This has essentially been true since the Sherman Act became law in 1890, followed by the Clayton and Federal Trade Commission Acts in 1914.

With more than a century of litigating behind us, one might expect that U.S. law would be clear on how various burdens are allocated in antitrust cases—and in many ways they are. For example, to pursue a violation of Section 1 of the Sherman Act, a plaintiff must allege and ultimately prove that the defendant entered into a "contract, combination, or conspiracy" and that it resulted in an "unreasonable restraint of trade." A plaintiff who initiates a monopolization claim under Section 2 of the Sherman Act must allege and prove both "monopoly power" and "exclusionary conduct."

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1. These conventions have been described by one commentator as the "other" federal rules of civil procedure. *See* Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79 (2006). Walker identifies burdens of pleading, burdens of production and persuasion, and preclusion doctrines as examples of these other rules. *Id*. at 80.

Simple recitation of the elements of various antitrust offenses, however, intimates a greater degree of clarity in the current state of antitrust law than in fact exists. A lack of clarity was inherent in the legal framework embraced by the U.S. Supreme Court from the earliest days of the Sherman Act in the "rule of reason." It has been amplified more recently by efforts to integrate more rigorous economic analysis into antitrust's legal standards, often through reliance on legal and economic commentary. That commentary often proceeds very theoretically, focusing on the economic analysis of specific elements of antitrust claims and defenses. The legal standards that emerge from the integration process have not always been developed with specific regard for how they can be implemented through a system of adversarial litigation, i.e., with due regard for the demands of a model of *legal* decision making that depends upon rules of procedure and evidence, as well as burdens of pleading, production, and proof. As a consequence, the movement towards greater reliance on economics has generated a gap between the theoretical and operational side of antitrust law.

The mechanics of executing a standard litigation approach to antitrust, therefore, are surprisingly unsettled. For example, how much and what kind of evidence is sufficient to shift a burden of production from a plaintiff to a defendant in a rule of reason case under Section 1 of the Sherman Act? Another way of posing the question is to ask, "at what point should a presumption of unreasonableness arise, such that the burden of production should shift from the plaintiff to the defendant?" Similarly, how much and what kind of evidence is sufficient to shift a burden of production back to the plaintiff, who of course bears the ultimate burden of proof? A related set of issues involves the recognition of defenses and affirmative defenses to specific antitrust offenses. These, too, often implicate both questions of burden and the choice of welfare standard to be used in resolving antitrust disputes.

This chapter examines how courts have sought to integrate the increasingly economically rooted standards of antitrust law into the traditional legal system used to decide actual antitrust disputes. The chapter will argue that although economically grounded definitions of basic antitrust concepts—e.g., market power, exclusionary conduct, conditions of entry, and efficiencies—are essential and have advanced the precision of antitrust decision making, standing alone they can be inadequate for use by courts to decide specific cases. Definitions derived from economic analysis must be translated into a structured and process-based approach better suited to legal decision making. To focus the discussion, the chapter will look at (1) some basic questions of decision making methodology; (2) the current state of discussions in cases and commentary on structuring the antitrust inquiry, especially under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act; and (3) the treatment of defenses and affirmative defenses. To illustrate this final area, the chapter examines how conditions of entry and efficiencies each are factored into antitrust litigation and how the approach for doing so implicates the welfare standard at work.

2. Allocating burdens of pleading, production, and proof: Some foundation questions of methodology

An essential task of any system of decision making based on litigation is to assign burdens of pleading, production, and proof. Allocating burdens is so essential to the

process of judicial decision making that there are well developed and long standing conventions for doing so. There are also alternate models based on economic analysis. Both traditional and economic models share a common goal, however, which is to balance the interests of the parties, the institutions tasked with resolving their disputes, and the goals of the substantive law that brings the dispute to court.

2.1. The traditional procedural model for allocating burdens

The substantive law generally defines the elements of specific offenses and defenses and thus is the traditional starting point for allocating burdens of pleading, production, and proof. For example, Section 1 of the Sherman Act has two recognized elements: concerted action and anticompetitive effect. Although the Sherman Act is silent about specific defenses or affirmative defenses, it would be possible to construct a list of all facts that could be relevant to determining whether the defendants acted in concert and whether their conduct had unreasonably anticompetitive effects.[2] Such a list, however, would only begin the inquiry. Further decisions would have to be made as to which party should bear the burden of pleading specific facts, which party must meet a burden of production as to specific facts and issues, and which party must bear a burden of proof, sometimes referred to as the "risk of non-persuasion."[3]

In traditional process theory, the decision to allocate burdens of pleading and proof is guided by a number of factors.[4] When a statute is involved, as is the case with federal antitrust offenses, the language and policy of the statute provide an essential starting point. Regardless of the presence of a statute, however, all legal offenses (and defenses) have an inherent analytical framework that may also influence the identification of elements of offenses and defenses and the allocation of burdens. Such a framework may flow from the assumption that certain rights, duties, or obligations exist, and that when they are transgressed a right of action will lie for damages linked to the breach. The plaintiff would typically bear the burden of alleging and proving the specified elements of an "offense" and the defendant would at the least need to plead any specified "defense." Although the burden of production would shift between the parties, the burden of proof, sometimes also referred to as the burden of persuasion, would remain at all times with the plaintiff, with the exception of some affirmative defenses.

Allocating burdens, however, may also be influenced by other factors, such as specific policy concerns, convenience, and access to relevant evidence.[5] In antitrust, for example, it is arguable that to implement the goal of promoting consumer welfare, evidence of efficiencies should be considered before a court reaches a conclusion as to

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2. As discussed *infra*, this is largely an accurate description of what the Supreme Court did in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), which is frequently cited as the benchmark for defining rule of reason analysis.
3. *See* FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 198-204, 247-50, 420-23 (5th ed. 2001).
4. *Id*.
5. Here and elsewhere, this chapter uses "relevance" as it is defined in the Federal Rules of Evidence. Under Federal Rule 401, "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

the "reasonableness" of any challenged conduct—even though the statute itself does not mention efficiencies. Hence, evidence of efficiencies is deemed "relevant," i.e., it tends to make the fact of anticompetitive effect more or less probable. The burden of pleading efficiencies related to the defendant's conduct could in theory be allocated either to the plaintiff (to establish the absence of efficiencies) or to the defendant (to establish the presence of efficiencies). The decision to allocate the burden might be informed by both the specific policies of the statute and considerations of access to proof. For example, because the defendant is far more likely than the plaintiff to have access to most if not all of the relevant information, the burden of production with regard to efficiencies might be allocated to the defendant.

Reflecting the substantive polices of a rule of law, burdens also can be used to "handicap against [a] disfavored contention."[6] Such a handicap could be implemented by allocating the burdens of production and proof to the party asserting the disfavored contention and/or by imposing an elevated level of burden, regardless of its likely access to the necessary evidence. A rule of pleading that allocates the burden to the plaintiff in such a case could heavily handicap the plaintiff, subjecting complaints to more frequent and more frequently successful motions to dismiss. The "clear and convincing evidence" standard of proof, which is more demanding than the presumptive civil standard of "preponderance of the evidence," is an example. It is applied in some instances, such as cases involving the First Amendment, to guard against substantive error in the application of the law, as well as the probable consequences of error.[7] In antitrust, the elevated standards developed to establish conspiracy to fix minimum resale prices and predatory pricing conspiracies in *Monsanto*[8] and *Matsushita*[9] may be examples of use of an elevated burden to handicap a disfavored contention.[10]

A final traditional procedural element involves the use of presumptions.[11] Presumptions can be irrebuttable, as is true with per se rules, or rebuttable, as with the *Philadelphia National Bank* "presumption."[12] They can also be of various degrees of strength, even when rebuttable.[13] Establishing presumptions is critical to the process of allocating burdens of production and, perhaps most importantly, to the process of shifting burdens from one party to another.[14]

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6. JAMES ET AL., *supra* note 3, at 422.
7. *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (discussing impact of elevated clear and convincing standard on assessment of burden of production in connection with motions for summary judgment).
8. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).
9. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
10. *See infra* Section 3.1.
11. "The term 'presumption' involves a relationship between a proven or admitted fact or group of facts (A) and another fact or conclusion of fact (B) sought to be proved. The basic idea is that when A is established, then through a presumption it may be concluded that B occurred." JAMES ET AL., *supra* note 3, at 423.
12. United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963).
13. "The strength and effect of various presumptions, however, is itself various." JAMES ET AL., *supra* note 3, at 423.
14. For an extensive discussion, see JAMES ET AL., *supra* note 3, at 423-35.

2.2. An economic approach to antitrust rules development and burden allocation

Economics influences more today than just the analysis of allegedly anticompetitive conduct. Economic models for decision making have been especially appealing in antitrust, which for more than a generation has been moving towards greater reliance on economic analysis. An economic analysis of legal rules focuses on two factors: (1) error costs; and (2) processing, information, and administrative costs, sometimes referred to as "direct" costs. It postulates that legal commands, here rules of competitive conduct, should be designed to minimize the incidence of false positives and false negatives (incorrect decisions), while also taking into account the costs of gathering, presenting, and processing the information needed to decide cases.[15] This is not to say that traditional approaches to procedure were unmindful of economic issues. They were simply less explicit.

The framework for economic analysis of legal rules has its roots in earlier writings on law and economics, especially the work of Judge Richard A. Posner.[16] These works proceed from the assumption that "[a]n important purpose of substantive legal rules . . . is to increase economic efficiency."[17] "It follows," in this view, "that mistaken imposition of legal liability, or mistaken failure to impose liability, will reduce efficiency. Judicial error is therefore a source of social costs and the reduction of error is a goal of the procedural system."[18] Relevant to the equation are both the "probability of error" and "the cost if an error occurs."[19]

All legal process involves direct costs, however, so the pursuit of zero error costs through demands for more and better proof might prove to be expensive from the point of view of time and effort for both parties and institutions charged with resolving disputes. In more economic terms, the question would be whether the marginal contribution to accuracy of outcome (reduction of error) derived from additional process would be outweighed by the costs required to gather, present, and evaluate additional information. Judge Posner noted that such costs—what he termed "direct costs"—"are just as real as the costs resulting from error . . . . The economic goal is thus to minimize

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15. For a more complete discussion and application of the model, see C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999). *See also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 65-68 (2004). For a discussion of how decision theory can be utilized to determine appropriate standards for defining exclusionary conduct under § 2 of the Sherman Act, see Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006) [hereinafter *Exclusionary Conduct*].
16. *See, e.g.*, William M. Landes, *An Economic Analysis of the Courts*, 14 J. LAW & ECON. 61 (1971); Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEG. STUDIES 305 (1972); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEG. STUDIES 399 (1973) [hereinafter *Economic Approach to Procedure*].
17. Posner, *Economic Approach to Procedure*, *supra* note 16, at 399.
18. *Id*. at 399-400.
19. *Id*. at 400.

the sum of error costs and direct costs."[20] Posner then used this framework specifically to analyze how courts allocate burdens of proof.[21]

In many ways the traditional approach to allocating burdens of production and proof is aligned with an economic approach. For example, the traditional concern with access to evidence can be viewed as promoting efficiency and serving to reduce direct costs. Similarly, the use of elevated standards in cases of disfavored contentions also can be viewed as an effort to reduce error costs.

Despite its seductive promise of mathematical precision, however, the economic model has its limits, internal and external. First, as Posner himself observed, "[t]he cost inquiries required by the economic approach are not simple and will rarely yield better than crude approximations, but at the very least they serve to place questions of legal policy in a framework of rational inquiry."[22] The economic model, therefore, might be easily subject to manipulation through exaggeration of error or processing costs. As will be discussed at greater length below, lack of hard empirical data on error costs has not stopped courts or commentators from advocating more stringent rules based on presumptions about the frequency and likely severity of judicial error that derive primarily from debatable intuitions. Arguably, fear of false positives today should be adjusted to account for large scale corrections in antitrust law over the last generation, such as rigid standards for establishing private party standing,[23] more ready access to procedural devices for terminating litigation, such as summary judgment[24] and judgment as a matter of law,[25] screens on unreliable expert testimony,[26] and elevated burdens of proof of varying kinds as reliance on per se rules has receded. All of these developments have combined to greatly reduce the potential incidence of false positives.

Second, there will always be something of a trade off between reduction of error and direct costs. It can frequently be argued, for example, that the cure for error is additional information: more and better economic evidence can almost always be imagined and hence demanded. But is it always necessary? The cost of the pursuit of "zero error costs" could be high, leading to significant instances of false negatives, simply because

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20. *Id*. at 401. It is of course also obvious that all false positives could be eliminated through repeal of all prohibitions. Likewise, all false negatives could be eliminated through sole reliance on per se prohibitions. The challenge in antitrust law as elsewhere is to optimize antitrust rules, taking into account the judicial process used to implement them, to balance the incidence of both false positives and negatives. For a discussion of this point, see Beckner & Salop, *supra* note 15, at 50 & n.21. *See also* Am. Hosp. Supply Corp. v. Hosp. Prods., 780 F.2d 589 (7th Cir. 1986) (using decision theoretic approach to determine whether to grant a preliminary injunction against an allegedly anticompetitive merger).
21. Posner, *Economic Approach to Procedure*, *supra* note 16, at 408-10.
22. *Id*. at 402.
23. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. 429 U.S. 477, 489 (1977) (private plaintiffs must demonstrate "antitrust injury"); Ill. Brick Co. v. Illinois, 431 U.S. 720, 723 (1977) (precluding antitrust treble damage suits by indirect purchasers); Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters, 459 U.S. 519 (1983) (limiting antitrust standing for remote injuries).
24. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (reviving use of summary judgment in antitrust cases).
25. Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) (reversing denial of judgment as a matter of law).
26. Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993); FED. R. EVID. 702.

the evidence demanded is costly or not reasonably available.[27] Moreover, increased information might have diminishing returns for accurate decision making. Decision makers, both courts and juries, can be overwhelmed, which will tend to favor defendants and contribute to the incidence of false negatives. Achieving zero error costs might also be an illusory goal. Even in a world of limitless economic evidence and limitless resources, "certainty" may not be obtainable in some antitrust cases because of imperfect information.[28]

More broadly, "efficiency" may not be the sole objective of a formal, state run system of dispute resolution. Courts help to maintain social order by providing parties with a forum in which to resolve their disputes without resort to self-help. The ability of a court system to deliver social order, however, depends largely on the perception by litigants—especially losers—that the courts produce fair and consistent results. If losers do not walk away satisfied with the outcome, they may resort to self-help, and respect for rule of law can erode. The sense of satisfaction that allows losers to walk away from disputes is sometimes euphemistically referred to as "having had my day in court." What produces that perception?

2.3. A third perspective: Procedural justice

In the 1970s, the pioneering work of Professors John Thibault and Laurens Walker yielded some answers to that question. Based on their research into the social psychology of conflict resolution, Thibault and Walker sought to determine whether there was a relationship between specific types of systems of procedure and objectives of conflict resolution.[29] Through their research, they found that "control over the decision and control over the process"[30] together "determine the essential character of the procedures."[31] Thibault and Walker also found that the degree of user satisfaction with adversarial civil proceedings turned significantly on the allocation of control of the presentation of the cases and control of the decision. Parties were more satisfied with the results of civil proceedings, and hence more likely to accept even adverse decisions, when (1) they had control over the preparation and presentation of their respective views, and (2) decisions were reached by an impartial decision maker, over whom neither party had any control. Such decisions were deemed by the parties to be "just":

> [T]he procedural model best suited to the attainment of distributive justice in disputes entailing high conflict of interest is arbitration, or more specifically in legal settings, the Anglo-American adversary model. Most of the process control rests with the disputants, who are able to present their claims from their own perspectives, with full particularities

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27. Because of asymmetrical access to relevant information, demands for more information may also bias decision making towards one or the other party. This will usually handicap the plaintiff more than the defendant in an antitrust case, because the defendant is often in possession of far more of the most relevant information about the conduct at issue, its market impact, and the justifications for its use.
28. *See, e.g.*, Salop, *Exclusionary Conduct*, *supra* note 15, at 345 ("The best the decision maker can do is to make the optimal decision in light of the limited information available.").
29. *See, e.g.*, John Thibault & Laurens Walker, *A Theory of Procedure*, 66 CAL. L. REV. 541 (1978). For a comprehensive collection of the essential works, see PROCEDURAL JUSTICE (Tom R. Tyler ed., 2005).
30. Thibault & Walker, *supra* note 29, at 546.
31. *Id.*

> and contexts. The impartial decisionmaker hears the contending presentations, evaluates the relative weights of the input claims, and renders the decision that distributes the outcomes. *The freedom of the disputants to control the statement of their claims constitutes the best assurance that they will subsequently believe that justice has been done regardless of the verdict*.[32]

Thibault and Walker's methodology and observations suggest that there are limits to the value of purely economic analysis. The operation of dispute resolution systems is not guided, as the law and economics literature suggests, solely by the pursuit of efficiency. If a system of procedure does not produce a perception of justice in disputants, it will fail in one of its most fundamental missions: to maintain social order by facilitating the peaceful resolution of private disputes.[33] Of course, the maxim that "justice delayed is justice denied" reflects a desire that process be relatively economical and that justice cannot be delivered without some degree of economy. But Thibault and Walker's findings suggest that some degree of "diseconomy" might be tolerable, even desirable, if it produces the kind of control of process that is more likely to lead to litigant satisfaction.

2.4. Concluding thoughts on the role of methodology

As will be demonstrated in the remainder of this chapter, the choice of methodology has very practical and profound consequences for decisions about the allocation of burdens in antitrust, as in other areas of law. A balanced approach would seek to combine the teachings of all three perspectives—the traditional procedural model, the economic, decision-theoretic model, and the procedural justice model. Doing so in practice quite obviously complicates the process of antitrust decision making. Yet the Federal Rules of Civil Procedure embrace this diversity of goals in Rule 1, which commands that the rules be read to facilitate the "just, speedy, and inexpensive determination of every action." The next section will turn to several specific examples of how antitrust law today allocates burdens of production and proof, taking into account the degree to which current rules account for different methodologies of decision making.

3. Burden allocation and burden shifting in antitrust: Some case studies

3.1 Conspiracy and predatory pricing

In *Monsanto*[34] and *Matsushita*,[35] the Supreme Court established elevated burdens of production[36] on plaintiffs alleging two specific kinds of conspiracy. *Monsanto* involved

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32. *Id*. at 551 (footnote omitted) (emphasis added).
33. The perception of fairness of procedures may also be affected by perceived structural and institutional biases. For example, there has been considerable research demonstrating that across a wide range of disputes repeat players—parties who litigate more frequently—have a decided advantage over new, one-time litigants and are far more likely to secure favorable settlements or prevail in court. For a collection of some of the relevant literature, see IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan Silbey eds., 2003).
34. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).
35. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

an alleged conspiracy between a product supplier and its dealers to fix minimum resale prices. *Matsushita* involved an alleged conspiracy among 21 rivals to engage in predatory pricing over a period of two decades. In both decisions, the Court required plaintiffs to introduce evidence "tending to exclude the possibility" that the defendants acted unilaterally before they would be permitted to present their cases to a jury.[37] To reach that result, the Court used both decision theory and traditional process theory with regard to the establishment of antitrust rules and standards for burden shifting. But *Matsushita* is far more explicit in its reliance on decision-theoretic analysis and affects both conspiracy and predatory pricing standards.

In *Monsanto*, the Court was concerned that adoption of a lenient standard of proof for establishing a per se unlawful conspiracy to fix minimum resale prices[38] could erode the Court's still relatively recent decision in *Sylvania*, which held that nonprice vertical intrabrand restraints should be judged under the rule of reason.[39] The solution, in the Court's view, was the adoption of an elevated burden of production with respect to the fact of a resale price maintenance conspiracy.[40] It reasoned that a lenient standard for establishing a conspiracy to fix minimum resale prices would increase the likelihood of judicial error—of false positives—because of the similarity of competitive consequences of price and nonprice vertical intrabrand restraints and the disparity of treatment accorded each under *Dr. Miles*[41] and *Sylvania*, respectively. Because price restraints can have the same effect as nonprice restraints, they could be mistaken for price restraints by a jury and erroneously condemned under the per se rule of *Dr. Mile*s.

The Court's decision in *Monsanto* to impose an elevated burden of production as to the fact of a resale price maintenance conspiracy, therefore, can be understood as an effort to reduce error costs in the form of both false positives and the deterrence of

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36. *Monsanto* arose following postverdict motions for judgment as a matter of law, whereas *Matsushita* involved summary judgment. As the Supreme Court has pointed out, however, the standard under Federal Rules 50 and 56 are the same—both involve the burden of production.

37. *Monsanto*, 465 U.S. at 762; *Matsushita*, 475 U.S. at 597.

38. The court of appeals in *Monsanto* concluded that conspiracy to fix minimum resale prices could be inferred from evidence of dealer complaints to a supplier about a discounting dealer followed by termination of the discounter by the supplier. *Monsanto*, 465 U.S. at 763-64.

39. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and reestablishing rule of reason as standard for judging nonprice vertical intrabrand restraints).

40. Significant evidence supports the view that the tending to exclude the possibility standard was adopted in *Monsanto* as a second best option to overruling the per se rule against resale price maintenance. In his papers, Justice Powell specifically talked of his desire to protect "*my* opinion in *Sylvania*." *See* Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 10 (discussing internal Supreme Court deliberations in *Monsanto*) (emphasis added). Powell and others appeared willing at the time to overrule *Dr. Miles*, yet he concluded that *Monsanto* did not provide an appropriate vehicle for doing so for two reasons: first, the issue had not been preserved by the parties, and second, because there was evident congressional support for the rule of *Dr. Miles*. *Id.*

41. Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). *Dr. Miles* was overruled by *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

legitimate conduct owing to fear of antitrust liability.[42] It also can be analyzed as an example of how decision theory and more traditional procedural theory can interrelate. Decision theory provided the mechanism for explaining why an allegation should be deemed "disfavored," which under traditional process theory might also warrant the use of an elevated burden.

Similarly, in *Matsushita*, the Court concluded, based upon an analysis of potential error costs, that allegations of conspiracy to engage in predatory pricing should be disfavored and hence subject to an elevated burden of production. In *Matsushita*, the concern was that plaintiffs might too easily allege conspiracy to reduce prices under circumstances where such a conspiracy was economically "implausible."[43] To guard against that result, it extended the *Monsanto* "tending to exclude the possibility" standard to an alleged conspiracy by 21 rivals to engage in collective predatory pricing over a period of two decades. Critical to the Court's assessment of error costs was its belief that predatory pricing generally was an unlikely course of action for even a single firm owing to its sheer cost and the uncertainty of recoupment. The allegation that 21 firms would do so for two decades was, in the Court's view, economically implausible.[44] In the context of summary judgment, the Court concluded that "if the factual context renders [plaintiffs'] . . . claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] . . . must come forward with more persuasive evidence to support their claim than would otherwise be necessary" to defeat a motion for summary judgment.[45] As in *Monsanto*, any more lenient rule would potentially lead to the erroneous imposition of liability and risk chilling legitimate price reductions.[46] Lower

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42. "Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Id.* at 763; *see also* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988) (further elevating the standard of proof for a conspiracy to fix minimum resale prices).

43. Professor Hovenkamp has argued that plausibility can be used to allocate burdens of proof:

> The burden of proof should generally be given to the party with the claim that is hardest to believe. If the plaintiff's claim is implausible, make him prove it. If a defense seems far-fetched, make the defendant come forward with the evidence supporting it. If market structure makes anticompetitive results seem highly unlikely, then require that the plaintiff prove the contrary; or alternatively, if structural evidence makes the practice look suspicious, force the defendant to show why it should be exonerated.

HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 146 (2005).

44. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588-91 (1986). The Supreme Court appeared to extend *Matsushita*'s plausibility standard to the burden of pleading in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

45. *Id*. at 587. For a discussion of *Matsushita* as an example of the Court's efforts to equilibrate, see Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986). The idea of using economic plausibility as a filtering device had broader ramifications as antitrust moved towards greater reliance on economic evidence. As one commentator has observed, "plausibility" became "an important factor in deciding how proof burdens should be assigned." HOVENKAMP, *supra* note 43, at 146.

46. "In *Monsanto*, we emphasized that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Matsushita*, 475 U.S. at 593.

prices benefit consumers, at least in the short run. Hence, a lower burden could in effect permit more frequent challenges to beneficial conduct.

Viewed through a more traditional lens, the Court's requirement that a plaintiff in a predatory pricing case allege and prove both below cost pricing and a dangerous probability of recoupment also reflects the Court's view that antitrust challenges to practices that result in lower prices are in a sense "disfavored." Indeed, the most obvious remedy for such a violation, an order to raise prices, sounds anomalous, inherently inconsistent with the purposes of antitrust laws.

As a procedural matter, *Matsushita* involves more, however, than just elevating the burden of production. It also involves a shift of burden. By requiring plaintiffs to allege that the defendant's prices are "below cost," the Court in effect *shifted* the burden with regard to efficiencies. Instead of requiring the defendant to allege and meet a burden of production with regard to the efficiency of its pricing, the plaintiff must produce evidence that the pricing was presumptively inefficient, i.e., below cost. *Matsushita* thus adds to *Monsanto*'s use of burden elevation an element of burden shifting. *Matsushita* illustrates not only how courts can adjust burdens upward to equilibrate for disfavored contentions, but also how the decision-theoretic model can be used to justify a shift of traditional burdens.

Due to its narrow focus on error costs, however, *Matsushita* arguably failed to implement fully a true economic approach. In addition to considering error costs, the Court also should have inquired as to the process and information costs associated with implementing the "below cost/recoupment" standard. If it had done so, it would have asked whether the perceived reduction in the incidence of false positives outweighed the costs of implementing the rule judicially. Also relevant was the question whether owing to high information and processing costs, the rule could lead to false negatives.

Once reinforced by *Brooke Group*,[47] the predatory pricing standard has proven to be almost impenetrable. Since *Matsushita*, virtually no plaintiff has succeeded in satisfying the two-part predatory pricing standard.[48] Predatory pricing is virtually per se legal. One possibility is that, as critics charged prior to *Matsushita*, price predation is rarely successful and hence rarely tried. Plaintiffs lose because they do not have substantial antitrust claims—they largely complain about greater competition, and are not trying to protect or restore it. It is also worth considering, however, whether the burdens imposed by the *Matsushita-Brooke Group* test are simply too difficult to satisfy and hence tend towards underdeterrence.[49] It is a truism to assert that more false positives are eliminated when a standard is elevated, but in this case the consequence may be

47. Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

48. *See, e.g.*, Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2241 (2000) ("[S]ince *Brooke* was decided in 1993, no predatory pricing plaintiff has prevailed on the merits in the federal courts.").

49. For a recent discussion of the U.S. experience in this regard, with reference to current discussions of predatory pricing standards in the EU, see J. Thomas Rosch, Reflections on the DG Competition Discussion Paper on the Application of Article 82 to Exclusionary Abuses, Remarks before the 13th Annual International Competition Law Forum, St. Gallen University, St. Gallen, Switzerland, at 8-9 (May 11, 2006), http://www.ftc.gov/speeches/rosch/060511RoschStGallenRemarks.pdf (last visited Mar. 27, 2007).

significantly increased processing and information costs and a likely increase in the risk of false negatives.[50] Over time, the near impossibility of satisfying the test likely also erodes the perception that it is just, revealing that it also may be objectionable from the perspective of procedural justice. Plaintiffs, both public and private, can spend literally years trying to assemble the necessary data to establish that a firm's prices were below some appropriate measure of cost, only to have the court grant summary judgment.

Finally, it is also worth noting that today the *Monsanto*/*Matsushita* standard has been invoked in the very economically plausible context of price fixing by alleged cartels. In stark contrast to the price lowering cartel alleged in *Matsushita*, as a matter of substantive economic analysis the challenged conduct in these cases is presumptively harmful to competition, not potentially beneficial. This indiscriminate extension of the "tending to exclude the possibility" standard defies decision theory. There is no possibility of short-run benefit to consumers from cartels. To the contrary, the threat to consumers may be substantial. Hence, the possibility of false negatives, not false positives, should be a greater concern. If the burden of production is elevated in such cases, competitively alarming price-raising strategies by cartels may go unpunished and, hence, undeterred. The tending to exclude the possibility standard simply cannot be justified in this context—yet defendants and some courts have applied it as if it were rote,[51] and the Supreme Court now appears to have implicitly endorsed it for all horizontal conspiracy cases.[52]

The current standards for conspiracy and predatory pricing illustrate the importance of evaluating both sides of the error cost component of decision theory: false positives and false negatives. They also illuminate the consequences of failing to evaluate the

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50. The government's ultimately unsuccessful prosecution of American Airlines for predatory pricing illustrates the problem. *See* United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003). Like an audience entranced by a magician's diversionary trick, the government and the court became obsessed with the question whether American Airlines had priced below some appropriate measure of cost. Lost was an appropriate focus on the unambiguous effects of the defendant's conduct: a vanquished low-cost new rival and higher airfares. For additional discussion of the limits of the *Matsushita-Brooke Group* test for predatory pricing, see Andrew I. Gavil, *Competition Policy, Economics, and Economists: Are We Expecting Too Much?*, *in* INTERNATIONAL ANTITRUST LAW AND POLICY 575, 590-93 (2005 Fordham Corp. L. Inst., Barry E. Hawk ed., 2006).

51. *See, e.g.*, Blomkest Fertilizer v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1032 (8th Cir. 2000) ("[W]e are among the majority of circuits to apply *Matsushita* broadly."). *But see In re* Flat Glass Antitrust Litig., 385 F.3d 350, 357-59 (3d Cir. 2004); *In re* Brand Name Prescription Drugs Antitrust Litig., 186 F.3d 781, 787 (7th Cir. 1999) (rejecting broad application of *Matsushita*'s "exclude the possibility" standard in price-raising cartel case); Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1232 (3d Cir. 1993) (characterizing *Matsushita* as holding only that "the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences"). Some commentators, too, have challenged the extension of *Matsushita* to economically plausible cartels. *See* HOVENKAMP, *supra* note 43, at 135-36. Hovenkamp observes that "*Matsushita* itself said very little about proof requirements when structural evidence indicates that the offense is quite plausible and would be profitable for the defendants." *Id*. at 136 (footnote omitted). Moreover, he concluded that in the case of typical allegations of price fixing by rivals, "[t]here is little danger that a false positive is going to discourage socially useful conduct." *Id.*

52. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007) (extending *Matsushita* "plausibility" standard to the pleading stage of allegations of horizontal conspiracy to impair entry and divide markets).

"direct cost" component of decision theory as well as more traditional procedural conventions for allocating burdens. Elevated burdens of pleading, production, or proof invariably impose additional costs on the parties and the institutions charged with resolving disputes. Such increases in processing and information costs may be warranted to reduce error costs in instances where the threat of error is high, the consequences of error are substantial and adverse, and the costs are relatively reasonable given the benefits. But when both the threat of error and the consequences are reduced, as is the case with more traditional price-stabilizing or price-raising conspiracies, those additional costs may be not only unwarranted, but may in fact lead to negative error costs. Meritorious cases may be dismissed because unreasonably elevated burdens can not be satisfied.[53] In more traditional terms, if the courts are insensitive to such factors as the parties' likely access to the evidence necessary to meet an assigned burden, the imposition of elevated burdens may overcorrect, i.e., it may lead to significant false negatives and significant litigant disaffection. Similarly, when courts adopt standards that shift and/or elevate burdens of production and proof, they should carefully assess whether the resultant allocation of burdens, taking into account such factors as positive and negative error, the consequences of such errors, and likely access to evidence, will yield an optimally balanced and operative rule of decision.

3.2. The traditional rule of reason: From Chicago Board of Trade *to* California Dental Association *and beyond*

Since its *Standard Oil* decision in 1911, the Supreme Court has interpreted Section 1 of the Sherman Act to require demonstration of an "unreasonable" restraint of trade.[54] The Court did not elaborate upon the content of that rule of reason, however, until its decision seven years later in *Chicago Board of Trade*, in which it set forth its most enduring and complete statement of the rule: "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[55] The Court then enumerated a set of relevant factors, emphasizing the need to evaluate a restraint's "history," "purpose," "nature," and "effects." In doing so, the Court set down the path of what today is referred to as the "unstructured" or "full blown" rule of reason analysis. Many facts can be relevant, but none decisively so.

Neither *Standard Oil* nor *Chicago Board of Trade* directly addressed the allocation of the burdens of production and proof. *Chicago Board of Trade* illustrates the problem that results. Despite the fact that the case was tried under a per se approach,[56] the record before the Supreme Court included both "exonerating" and "incriminating" facts and the Supreme Court's discussion is very fact specific. Unclear is which party introduced the evidence from which those facts were drawn and whether it was introduced at trial or

53. Professor Hovenkamp criticizes the Eighth Circuit's decision in *Blomkest* as an example of this sort of error. *See* HOVENKAMP, *supra* note 43, at 135.

54. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

55. Chi. Bd. of Trade v. United States, 246 U.S. 231, 238-39 (1918).

56. *Id*. at 237 ("On motion of the government the [defendant's] allegations concerning the purpose of establishing the regulation were stricken from the record.").

merely through the briefs. The decision is silent as to which party had the burden of producing specific evidence and whether the Court's ultimate conclusion that the challenged conduct—the "call rule"—was based on one or the other party's success or failure in satisfying its burden.

As a consequence, three issues very basic to the operation of the rule of reason were left largely unaddressed. First, beyond a very general inquiry into a given restraint's history, nature, purpose, and effects, what particular factors are relevant to a rule of reason inquiry, and why? Further, once those factors have been identified, how are they to be weighted relative to each other? And, finally, once the relevant factors are isolated and weighted, how are burdens of production and proof to be allocated among the plaintiff and the defendant, factor by factor?

The search for answers to these fundamental questions was stunted almost immediately. After *Chicago Board of Trade*, the Court moved towards greater reliance on per se rules from *Trenton Potteries*[57] through *Topco*.[58] As a consequence, for some 50 years the courts failed to develop a more meaningful rule of reason—one crafted to reflect the needs of litigation and sensitive to the needs of burden allocation and burden shifting.

In fact, the Court did not seriously address the content of the rule of reason again until the late 1970s in cases like *Sylvania*,[59] *National Society of Professional Engineers* (*NSPE*),[60] and *Broadcast Music, Inc.* (*BMI*).[61] By that time, the Court had seemingly developed a bipolar approach to Section 1. Antitrust claims could be categorized as falling under either the per se rule or the rule of reason. As the Court explained in *NSPE:*

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.[62]

This bipolar rule of reason had a significant impact on the allocation of the burdens of production and proof in antitrust cases. For cases falling under the per se rule, plaintiffs needed only to establish concerted action of a kind that fell within one of the recognized per se categories, like price fixing, division of markets, or certain group boycotts. The courts would then presume that such conduct had the requisite unreasonable anticompetitive effect. In evidentiary terms, the per se rule created an irrebuttable presumption of unreasonableness.[63]

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57. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).
58. United States v. Topco Assocs., 405 U.S. 596 (1972).
59. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).
60. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).
61. Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1979).
62. 435 U.S. at 692.
63. Another interpretation of the per se rule is that it was more concerned with defenses, than offenses. As Professor Krattenmaker has argued, cases in which the Court invoked the per se rule tended to follow from its conclusion that the defense raised by the defendant, such as "we fixed reasonable prices," was not cognizable. *See* Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses*

For cases falling under the rule of reason, there was initially no guidance beyond the *Chicago Board* unstructured approach, which called for a more thorough going, multifactored analysis to prove that a given restraint was in fact unreasonable. This clearly required more of plaintiffs compared to the per se approach and permitted the defendant to introduce evidence to rebut the plaintiff's case, but the requirements of burden shifting remained to be addressed. "Categorization" of the case, as falling within or without a category of per se conduct, often was outcome determinative.

The Court in *NSPE* focused the categorization framework conceptually, twice emphasizing that whether the per se or rule of reason is applied, "the purpose of the analysis is to form a judgment about the competitive significance of the restraint."[64] So, in fact, despite the suggestion that the rule of reason and per se rule were distinct, the Court made clear that they represented two paths to implementing the same standard, the standard of "unreasonableness."

Whereas *NSPE* emphasized the primacy of anticompetitive effects for all alleged violations of Section 1, additional guidance came in the Court's decisions in *BMI* and *Sylvania*, both of which introduced important core conceptual content to the rule of reason. *Sylvania*'s conclusion that interbrand competition is the "primary concern of antitrust law" implicitly endorsed the idea that market power was a prerequisite to anticompetitive effects.[65] Moreover, *Sylvania* and *BMI* together appeared to mandate consideration of efficiencies.[66] In fact, the Court concluded in *BMI* that the presence of plausible efficiencies—cost reducing and output expanding tendencies—could justify moving a case out from under the per se label. The three cases combined to send a powerful message of change for antitrust: (1) the core issue for antitrust (especially

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with Defenses, 77 GEO. L. REV. 165 (1988). Under a litigation process approach, however, the court would not consider any evidence of a defense (and the defendant would not be required to proffer any defense) until after the plaintiff had already met a burden of production and effectively shifted its burden to defendants. In per se cases, plaintiffs accomplished that burden shift by presumption—in establishing concerted action that involved a category of conduct that the Court had found to be "always or almost always" likely to produce anticompetitive effects. The Court's unwillingness at that point to entertain any particular defense illustrates the irrebuttable nature of the presumption of unreasonableness.

64. 435 U.S. at 692; *see also* Steven C. Salop, *The First Principles Approach to Antitrust, Kodak, and Antitrust at the Millennium*, 68 ANTITRUST L.J. 187 (2000).

65. *Sylvania*, 433 U.S. at 52 n.19 ("Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law."). Although the majority did not specifically define interbrand market power, in his concurring opinion Justice White cited to two economic treatises for the proposition that product differentiation and market shares could be used to establish the interbrand market power. *Id*. at 64 & n.4 (White, J., concurring).

66. In *Sylvania*, the Court observed that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id*. at 54. Likewise, the Court indicated the relevance of efficiencies in *Broadcast Music:*

> [I]n characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "*increase economic efficiency and render markets more, rather than less, competitive*."

Broadcast Music, 441 U.S. at 19-20 (footnotes and citations omitted) (emphasis added).

Section 1 of the Sherman Act) was anticompetitive effect; (2) such effects are unlikely to arise absent significant interbrand market power; and (3) before condemning conduct, consideration must also be given to its potential to generate efficiencies—lower costs and increased output.

Like *Standard Oil* and *Chicago Board of Trade* before them, however, *Sylvania*, *BMI*, and *NSPE* failed to specify the plaintiffs' and defendants' relative burdens. It was difficult to predict how a plaintiff could meet its burden of production (establish a rebuttable presumption of unreasonableness) and shift that burden to the defendants. It was also difficult to predict how a defendant could meet its own burden of production and shift that burden back to the plaintiff.

In *Sylvania*, for example, the Court reasoned that vertical, intrabrand, nonprice restraints could pose no threat to competition absent supplier market power.[67] From the point of view of process, the case analysis could have stopped there: the Court could have reasoned that given Sylvania's diminutive market shares and obvious lack of market power, the plaintiff failed to shift a burden of production to the defendant. Nothing warranted demanding evidence of justification for Sylvania's conduct and summary disposition of the case might have been proper. Yet the Court went on to evaluate at length—at least as a theoretical matter—the economic justifications a supplier might have for imposing such restraints on its dealers.[68] This was in part required to justify abandoning the per se rule for nonprice restraints, but the Court did not explore how burdens would be allocated in future rule of reason cases. In fact, it offered few citations to the record during its discussion of efficiencies, drawing instead largely on the literature of the time and the briefs filed in the case.

Similarly, in *BMI*, the Court eschewed a literal application of the per se price fixing label and appeared to hold that a defendant could halt the burden shift from the plaintiff associated with a per se case if it could articulate a cognizable efficiency justification for its conduct.[69] As a procedural matter, however, it was not clear by what means a defendant could do so. Was an allegation in the answer enough? Would it have to meet a burden of production? A burden of proof? The decision whether a case should proceed as a per se or rule of reason case could be made at various points in the proceedings, from pleading, to discovery, to summary judgment, or even as late as trial when jury instructions are prepared. In short, the procedural ramifications of the economic ideas being embraced in cases like *Sylvania*, *NSPE*, and *BMI* were not directly addressed by the Court.

In the aftermath of *Sylvania*, *NSPE*, and *BMI*, courts and commentators began to think more intently about ways to structure the rule of reason inquiry, particularly about ways to abbreviate it. Although some of these efforts focused on the development of

67. Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977) ("[W]hen interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.").

68. *Id*. at 54-57.

69. *Broadcast Music*, 441 U.S. at 20-21.

"filters" that could weed out weak cases,[70] the courts looked more to filters that suggested substantiality to the point of warranting a burden shift.

"Market power" became a critical divining rod for identifying potentially anticompetitive conduct and it was even used to qualify some traditional per se rules.[71] Another significant and related development was the "quick look" or "truncated rule of reason," which was specifically endorsed by the Supreme Court in *NCAA*[72] and *Indiana Federation of Dentists* (*IFD*),[73] and later in *California Dental Association* (*CDA*).[74] With origins in Professor Areeda's famed "twinkling of an eye" allusion,[75] the quick look was designed to acknowledge that there were alternatives to both per se condemnation and full blown rule of reason analysis, which had come to be associated with extensive discovery and in-depth analysis of relevant markets, i.e., with excessive direct costs. Just as evident efficiencies in cases like *BMI* demonstrated that rote application of the per se rule was unwarranted, harm to competition from challenged conduct can be so evident that a court will be justified in shifting the burden of production to the defendant to justify its conduct.

In *NCAA*[76] and *IFD*,[77] the Court concluded that direct evidence of actual anticompetitive effects—of the exercise of market power—such as reduced output, higher prices, or diminished quality, obviates the need for an inquiry into market power as evidenced circumstantially by market shares. As the Court held in *NCAA:*

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."[78]

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70. *See, e.g.*, Easterbrook, *supra* note 15.
71. *See, e.g.*, Nw. Wholesale Stationers v. Pacific Stationery & Printing Co., 472 U.S. 284, 294 (1985) (describing preconditions to application of per se rule to exclusionary group boycotts including market power); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 18 (1984) (tying is per se unlawful, but only upon showing of market power in the tying product).
72. NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 (1984) (applying quick look).
73. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 461 (1986) (applying quick look).
74. Cal. Dental Ass'n v. FTC, 526 U.S. 756 (1999) (rejecting use of quick look under the circumstances).
75. PHILLIP E. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 37-38 (Federal Judicial Center, June 1981) ("The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful . . . . The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye."), *cited with approval in NCAA*, 468 U.S. at 109 n.39; *see also* 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1508a (2d ed. 2003); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 388-89 (1966) (suggesting abbreviated approaches to applying rule of reason).
76. *NCAA*, 468 U.S. at 109-10 (plaintiff need not prove anticompetitive effects by first defining a relevant market, calculating market shares, and inferring market power when evidence of actual anticompetitive effects that could only be perpetrated by a firm with market power is presented).
77. *IFD*, 476 U.S. at 460-61 (market power established through inference from market shares is mere "surrogate" and need not be shown when evidence of actual anticompetitive effects is presented).
78. *NCAA*, 468 U.S. at 109 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978)); *see also IFD*, 476 U.S. at 460.

When direct evidence of actual effects is presented, therefore, there is no need for "elaborate industry analysis" in the form of market definition and market share calculations. In fact, it is qualitatively superior evidence. The Court made this point more clearly in *IFD:*

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects." In this case, we conclude that the finding of actual, sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.[79]

Taken together, *NCAA* and *IFD* made very important contributions to the clarification of burdens in rule of reason cases. Both decisions implement *NSPE*'s direction that the focus of Section 1 should remain on anticompetitive effects. They add that a plaintiff seeking to meet a burden of production, and ultimately to prove such effects, can do so with direct or circumstantial evidence. Direct evidence consists of evidence of actual anticompetitive effects causally linked to the challenged conduct.[80] Circumstantial evidence typically takes the form of substantial market shares in a properly defined relevant market from which anticompetitive effects can be inferred. In either instance, market power is the source of the ability to inflict the harm, but in one case the evidence demonstrates the actual exercise of that power and in the other it is inferred. Evidence of the actual exercise of that power, however, mitigates the need to establish effects circumstantially.[81]

Importantly, the Court rejected in both cases the defendants' demand that plaintiffs relying on direct evidence of actual anticompetitive effects should also bear the burden of defining relevant markets and proving effects circumstantially. The cases thus defined for the first time something quite concrete about the plaintiff's burden of production and proof in non-per se cases brought under Section 1. Like the per se rule,

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79. *IFD*, 476 U.S. at 460-61 (citations omitted).

80. The cases do not specify, however, what kind and how much evidence of actual effects will be sufficient to warrant a burden shift. Actual price effects, for example, could be relatively minor or substantial, and evidence of such effects may be very persuasive or more conjectural. These issues require further consideration and development. For additional discussion of these questions, see Andrew I. Gavil, *A Comment on the Seventh Circuit's* Republic Tobacco *Decision: On the Utility of "Direct Evidence of Anticompetitive Effects,"* ANTITRUST, Spring 2005, at 59.

81. At least one court of appeals has argued that the quick look is a more lenient standard than the more full-blown rule of reason and that its application should be limited to horizontal agreements. In alleged instances of exclusionary vertical agreements, which pose less of a competitive threat, the plaintiff should still be required to show at least the "rough contours" of a relevant market. Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717, 737 (7th Cir. 2004). The court may be incorrect in it's assumption that the quick look is indeed quick. Actual effects evidence may not always and necessarily be easier to muster than circumstantial evidence in the form of a defined relevant market and market share calculations. For a more complete critique of *Republic Tobacco*, see Gavil, *supra* note 80.

the quick look can be understood in evidentiary terms as a burden shifting device: evidence of actual harm to competition gives rise to a presumption that the challenged conduct was an unreasonable restraint of trade and shifts the burden of production to the defendant to offer evidence that the conduct can otherwise be justified. In contrast to the per se rule, however, the quick look created a rebuttable, not an irrebuttable, presumption of unreasonableness. The quick look also narrowed the range of cognizable rebuttal evidence.

As an alternative to forcing plaintiffs to offer circumstantial evidence to corroborate their direct evidence, in both cases the defendants sought to rebut the plaintiff's direct evidence of market power by offering evidence of their diminutive market shares—and the Court twice rejected the approach. Whether reliance on direct evidence is implemented by rejecting the defendant's demand that the plaintiff bear the burden of proving high market shares in a properly defined relevant market or by refusing to credit the defendant's circumstantial evidence as rebutting direct evidence, the consequence is the same: the inference of market power drawn from the direct evidence is given far greater weight than circumstantial evidence based on market shares. It creates a presumption that cannot be rebutted by circumstantial, market share evidence.[82] To rebut the direct evidence of market power, a defendant must challenge the direct evidence on its own terms; it cannot simply rely on contrary, circumstantial evidence in the form of low market shares.

The Court reaffirmed its commitment to the quick look concept in *California Dental*, but with some arguably important limitations on its use and perhaps at the price of clarity in the use of the rule of reason.[83]

The case posed the question whether economic reasoning and the context of a given restraint, in this instance restrictions on advertising by rivals, as opposed to actual effects evidence, can justify the burden shift associated with the quick look. The Federal Trade Commission had not relied on actual effects evidence, but rather on its view that the anticompetitive effects of the restrictions at issue were relatively obvious, so much so that a burden shift to the California Dental Association that would require it to come forward with evidence of the procompetitive justifications for the restrictions was warranted.[84]

CDA highlights the burden shifting role of the quick look. Indeed, the point of difference between the majority and the dissent in part came down to their differing conclusions about the sufficiency of the Federal Trade Commission's theoretical case against advertising restrictions to meet its burden of production and shift that burden to the California Dental Association to prove its assertions of procompetitive justifications.

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82. For an additional application of this framework, see *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

83. The Supreme Court also reiterated the reasoning of *NCAA* and *IFD* in *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 469 & n.15 (1992), a case that involved claims of exclusionary conduct under both §§ 1 and 2.

84. Referring to its prior decisions in *NCAA* and *IFD*, the Court observed that the abbreviated rule of reason applies only when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

As the Court observed, "the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects."[85]

The Court's refusal to invoke quick look burden shifting under the facts of *CDA*, however, indicates that there may be limits to its use. Two important limiting factors in *CDA* appear to be the presence of plausible efficiency claims[86] and the absence of evidence of actual anticompetitive effects.[87] As to actual effects, however, the Court's opinion is equivocal. In praising Justice Stephen Breyer's separate opinion concurring and dissenting in part, the Court appeared to leave open the possibility of a quick look burden shift based on economic reasoning. It simply did not find the reasoning supplied by the court of appeals to be adequate to the task.[88]

The Court concluded its opinion in *CDA* by trying to locate the quick look within the larger context of Section 1—and here an opportunity for clarification of the rule of reason was arguably lost. The Court explained that the quick look connotes a range of choices, not a distinct middle ground between the per se rule and the full blown rule of reason:

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.[89]

While perhaps theoretically defensible, the Court's "enquiry meet for the case" standard can be faulted on the ground that it provides no more guidance than the unstructured rule of reason of *Chicago Board of Trade*. It is simply not responsive to the exigencies of litigation and hardly provides any notice to parties of how much and what kind of evidence will be required to shift a burden of production or satisfy a burden of proof.

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85. *Id.* at 776.

86. "[T]he plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated." *Id.* at 778.

87. "The obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.*; *see also* Stephen Calkins, California Dental Association: *Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495 (2000) (arguing that *CDA*'s reliance on arguments associated with critics of quick look analysis—that it permits plaintiffs to shift their burden of production to defendants too readily and is inappropriate where the defendant can articulate a "plausible" efficiency, a seemingly low threshold—suggests that the Court in fact intended to limit its use).

88. *Id.* at 779 ("had [the court of appeals] confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion"); *see also* Timothy J. Muris, California Dental Association v. Federal Trade Commission: *The Revenge of Footnote 17*, 8 SUP. CT. ECON. REV. 265 (2000) (arguing that the empirical literature concerning the consequences of restraining professional advertising should have been sufficient to support the conclusion that CDA's restraints on advertising were likely to lead to increased prices without any improvement in quality).

89. *Cal. Dental*, 526 U.S. at 781-82.

In a first for the Court, however, Breyer, concurring in part and dissenting in part, articulated a more structured approach to implementing the rule of reason—but even his approach is arguably abstract and detached from the needs of litigation. In his view:

> To determine whether [specific conduct among rivals should be viewed as an unreasonable restraint of trade], I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?[90]

Identifying the right questions to ask certainly can focus an inquiry, and it might even aid an enforcement agency in deciding whether to challenge a particular restraint. But like the majority, Breyer did not undertake to specify how his questions could be integrated into the relative burdens of the parties.

It is nevertheless possible to adapt his questions to a litigation model. For example, the first and second questions might describe the plaintiff's initial burden of production: the plaintiff would have to come forward with evidence of the nature of the restraint and of its effects on competition. The burden could then shift to the defendants, who would need to meet a burden of production to support their assertion of procompetitive justifications. If they succeeded, the burden would shift back to the plaintiff for question four and it would have to demonstrate that owing to market power, the harm is substantial.

Question 4 also could be assigned to the plaintiff as part of its initial burden of production. In fact, it could be argued that it will be a necessary component of the plaintiff's production as to the necessary anticompetitive effects. If that adjustment is made, however, Breyer's formulation fails to provide a basis for resolving the hardest antitrust cases: those involving significant anticompetitive effects and significant procompetitive efficiencies. Perhaps he is asking the right questions, but he provides no framework for allocating them to the parties and formally resolving cases in a litigation context. As a consequence, nearly a century after *Standard Oil* first embraced the rule of reason, the Supreme Court has still not fully developed an operative model for applying it consistently through judicial process.

3.3. The rule of reason in the lower federal courts

For at least the last decade, the lower federal courts have sought to fill the void created by the Supreme Court's lack of attentiveness to the details of Section 1 analysis. In doing so, they have sought to more fully synthesize the prior case law and adapt it for use in litigation. The result has been something of an emerging consensus on a more structured rule of reason that specifically addresses burden shifting.

90. *Id*. at 782 (Breyer, J., concurring in part and dissenting in part).

One frequently cited example of the typical framework can be found in the Tenth Circuit's decision in *Law v. NCAA*,[91] which itself drew upon a variety of lower court cases and other authorities. It can be viewed as a four-step approach:

> [1] [T]he plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. [2] If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. [3] If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner. [4] Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable.[92]

Law's framework draws upon and seeks to synthesize elements from many different previous decisions and commentators.[93] It is consistent with *NSPE*'s direction that the core purpose of the Section 1 inquiry is to determine whether the challenged conduct caused anticompetitive effects.[94] The second step in the *Law* framework, consideration of the defendant's evidence of procompetitive virtues, demonstrates that the presumption of unreasonableness raised by the evidence of effects is rebuttable, i.e., that the court is proceeding under the rule of reason, not the per se rule. It is also consistent with the dictates of cases like *Sylvania* and *BMI*, which have emphasized the importance of considering the potential competitive benefits of conduct.

The final two elements of the *Law* framework are more complex. Consideration of whether a restraint is "reasonably necessary" to secure the defendant's legitimate objectives derives from the ancillary restraint analysis associated with *Addyston Pipe*.[95] Although it is arguable that ancillary restraint analysis is not a good fit for every case of competitor collaboration, the *Collaboration Guidelines* and a number of other circuits have incorporated it into their framework.[96] Perhaps most importantly, today

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91. 134 F.3d 1010 (10th Cir. 1998); *see also* Gregory v. Fort Bridger Rendezvous Ass'n, 448 F.3d 1195, 1205 (10th Cir. 2006) (reaffirming *Law* framework).

92. 134 F.3d at 1019 (citations omitted).

93. It is similar in important respects to the synthesis attempted by the Department of Justice and the Federal Trade Commission (FTC) in their joint venture guidelines, although those guidelines expressly disclaim any intention to specify burdens of production or proof. *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 1.1 n.3 (2000) [hereinafter GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS]. The FTC's decision in *Polygram* is another important and thoughtful effort to synthesize a modern, structured framework for analyzing agreements under § 1. *See* Polygram Holding, Docket No. 9298 (FTC 2003), *aff'd*, Polygram Holding v. FTC, 416 F.3d 29 (D.C. Cir. 2005).

94. Similar frameworks have been used by a number of other federal circuits. *See, e.g.*, Expert Masonry v. Boone County, Ky., 440 F.3d 336, 343 (6th Cir. 2006); United States v. Visa U.S.A., Inc., 344 F.3d 229, 238 (2d Cir. 2003). For a similar framework proposed for cases under § 2 of the Sherman Act, and similarly beginning with the plaintiff's burden of producing evidence of effects, see United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

95. United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1898).

96. *See, e.g.*, *Expert Masonry*, 440 F.3d at 343; *Visa*, 344 F.3d at 238. In *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), the Supreme Court suggested that ancillary restraint analysis applies only to the nonventure restrictions.

commentators and courts equate *Addyston Pipe* with the importance of concerns for promoting economic efficiency.[97] Finally, the *Law* framework suggests that in cases where both plaintiffs and defendants have met their respective burdens of production, courts, and presumably juries, should "balance" the relative negative effects and benefits. Such "rule of reason balancing" is perhaps the greatest myth in all of U.S. antitrust law. It is almost always described as the final step in the rule of reason analysis, yet few, if any, decisions turned on a true balancing of pro- and anticompetitive effects. Instead, most cases turn on the strength and weight of the evidence of effects or efficiencies.

As the *Law* court observes, for example, anticompetitive effects can be established through direct evidence of actual effects or circumstantially, i.e., through inference from high market shares and perhaps other factors.[98] This reflects the enduring impact of the quick look—a recognition that direct and circumstantial evidence present two different paths to the same conclusion. As noted above, defendants have found it very difficult to rebut a showing of actual anticompetitive effects.

In the alternative, plaintiffs must rely on circumstantial evidence in the form of high market shares in a properly defined relevant market. The theory behind reliance on market share evidence as a measure of market power, and hence a predictor of anticompetitive effect, is straightforward. The ability of a firm or firms to raise price and reduce output depends on likely demand and supply responses: any attempt to charge prices above marginal costs and restrict output can be profitable only if the remaining actual or potential capacity in the relevant market is insufficient to offset the diminished output of the firm or firms raising price. Where new output is available, the attempt to raise price likely will fail, i.e., it will not be profitable. Assuming conditions of entry and/or expansion are favorable, supply will increase, buyer substitution will occur, and prices will return to competitive equilibrium.[99]

Because a high market share suggests the absence of alternate industry capacity, it may justify the inference that a firm or firms can profitably charge prices above marginal cost, and hence the *presumption* that a firm possess market power.[100] To put it in evidentiary terms, a substantial market share constitutes circumstantial evidence of market power—and the exercise of market power to disrupt markets is the

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97. For a discussion of *Addyston Pipe*'s contemporary meaning, specifically its association with the promotion of efficiency, see ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 160-61 (2002).

98. *Law*, 134 F.3d at 1019 ("A plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price.").

99. *See generally* 2A PHILLIP A. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 179-98 (2d ed. 2002) (discussing function of market definition and market share calculations).

100. The ability to do so, however, will depend on the elasticity of demand. The greater the elasticity of demand, i.e., the flatter the demand curve, the less likely it is that a firm with high market shares can restrict output and raise price without losing so many sales that it will prove to be an unprofitable strategy. *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 93 (4th ed. 2005) ("[T]he key element in an investigation of market power is the price elasticity of demand.").

anticompetitive consequence that antitrust is intended to foreclose.[101] Any presumption of market power to be drawn from market shares can be rebutted with evidence that tends to undermine the assumption that market power will be exercised or that supply responses will not be adequate.

Once the circumstantial route to proving anticompetitive effects is understood, it is easier to see why the Court in *NCAA*, *IFD*, *CDA*, and other cases embraced the "direct evidence" option. In the view of the Court, "direct" evidence of actual anticompetitive effects—i.e., that a defendant has in fact exercised market power—eliminates the need for reliance on circumstantial evidence in the form of high market shares in a properly defined relevant market, from which anticompetitive effects can be inferred. As the Supreme Court found in *IFD*, such circumstantial evidence is but a "surrogate" for actual effects.[102] The direct/circumstantial evidence dichotomy also can be understood in terms of both traditional and economic methods of allocating burdens. Once evidence of actual anticompetitive effects is introduced, the fear of false positives is diminished. In a sense, the "burden" shifts to those who fear false positives to demonstrate why in such a case any more evidence should be required of the plaintiff. In this instance, more is less in terms of certainty and accuracy, but more is more in terms of the direct costs of resolving the dispute. A burden shift, therefore, is consistent with both the reduction of error costs—false negatives—and the reduction of direct costs.

Nevertheless, defendants routinely urge courts to impose high burdens, typically demanding that plaintiffs, public and private, meet a burden of production with respect to power and effects based on *both* direct and circumstantial evidence. Error costs are often cited as justification for such heightened burdens, implying that more and better economic information is a cure for the potentiality of false positives. But if a burden does not shift from the plaintiff to the defendant owing to such heightened burdens, the defendant need never present its own evidence of cognizable justifications, such as efficiencies that diminish the likelihood of the alleged anticompetitive effects. If such burdens are imposed indiscriminately on plaintiffs, therefore, they may in turn increase the incidence of false negatives.

When direct evidence of anticompetitive effects is introduced, it is arguable that the various elements of offenses under Section 1 and Section 2, and even Sections 3 and 7 of the Clayton Act, tend to collapse into a unitary inquiry. Evidence that conduct has in fact diminished competition or is very likely to do so (as in the case of mergers), such as lowered output and higher prices, lower product quality, less innovation, or less consumer choice, will tend to establish both the requisite power and effects. Such evidence is hard to rebut because it speaks so powerfully to the essence of the antitrust offense. It also illuminates the common conceptual core of modern antitrust policy.

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101. *See* AREEDA & HOVENKAMP, *supra* note 99, at 187 ("Finding the relevant market and its structure is not a goal in itself but a surrogate for market power."); *cf.* Re/Max Int'l v. Realty One, Inc., 173 F.3d 995, 1016 (6th Cir. 1999) (high market share within a defined market constitutes "circumstantial evidence of monopoly power").

102. Nevertheless, some courts appear to insist that anticompetitive effects can be judged only in the context of a proven relevant market. *See, e.g.*, Expert Masonry v. Boone County, Ky., 440 F.3d 336, 343 (6th Cir. 2006); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187, 201 n.13 (2d Cir. 2006); *see also supra* notes 93-94.

3.4. Horizontal mergers and the sliding scale

Like the *Collaboration Guidelines*, the 1992 *Merger Guidelines* disclaim any intent to specify burdens of production or proof. They purport instead to be limited in scope to establishing the analytical framework to be used by the agencies in the exercise of their prosecutorial discretion, i.e., in deciding whether to initiate an enforcement action.[103]

Despite this stated limitation on the role of guidelines, however—and perhaps to their credit—the various guidelines, especially the 1992 *Merger Guidelines*, have had a very significant impact on courts. Modern merger challenges filed in courts, for example, typically track the various steps of the 1992 *Merger Guidelines*. In order to transform the 1992 *Merger Guidelines* from standards for the exercise of agency discretion to a framework for deciding litigated cases, however, courts have interpolated them in the light of previous case law to assign burdens of production and proof.

This interpolated framework can be illustrated with the decisions of the D.C. Circuit in *Baker Hughes* and *Heinz* and the district courts in *Oracle* and *Arch Coal*. Drawing upon a series of previous Supreme Court decisions, the court in *Baker Hughes* synthesized the following procedural framework for evaluating allegedly anticompetitive mergers:

> By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition. The burden of producing evidence to rebut this presumption then shifts to the defendant. If the defendant successfully rebuts the presumption, the burden of producing additional evidence of anticompetitive effect shifts to the government, and merges with the ultimate burden of persuasion, which remains with the government at all times.[104]

Two things should be noted about the *Baker Hughes* framework. First, similar to the *Law* framework discussed above for Section 1 of the Sherman Act, the court sets forth a basis for shifting burdens of production that is triggered initially by the plaintiff with evidence of likely anticompetitive effects. The burden of production then shifts to the defendants, who can offer evidence of justifications that tend to undermine the plaintiff's evidence of likely or actual effect. The framework resolves with a final step in which the plaintiff must take into account the defendants' exonerating evidence. In contrast to the "balancing" myth under Section 1, this framework more usefully focuses on the need in the final stage to evaluate the strength of the plaintiff's overall case as to anticompetitive effects.

Second, the initial step in merger analysis was traditionally the product of presumption, based solely on an assessment of pre- and postmerger industry concentration, i.e., on circumstantial evidence in the form of market shares in defined

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103. U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 (1992) (with Apr. 8, 1997 revisions to Section 4 on efficiencies) [hereinafter 1992 MERGER GUIDELINES], *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104.

104. United States v. Baker Hughes Inc. 908 F.2d 981, 982-83 (D.C. Cir. 1990) (footnote and citations omitted); *see also* FTC v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001) (quoting *Baker Hughes*); United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1110 (N.D. Cal. 2004) (citing *Baker Hughes* and *Heinz*); FTC v. Arch Coal, 329 F. Supp. 2d 109, 116 (D.D.C. 2004) (same).

markets. Today, it is less clear that the plaintiff must always rely on circumstantial evidence. As has become true in the case of horizontal restraints under Section 1, more direct measures of likely effect may be sufficient to shift a burden of production.[105]

The first step of the *Baker Hughes* framework corresponds both to the traditional structural presumption drawn from the cases and the first two steps of the framework set out in the 1992 *Merger Guidelines*. A plaintiff can meet its initial burden of production and establish a prima facie case that a merger likely will be anticompetitive by defining a relevant market, calculating market shares and a consequent measure of concentration using the Herfindahl-Hirshman Index (HHI), and demonstrating that the postmerger concentration is above certain thresholds.[106] Under the 1992 *Merger Guidelines* and the case law, once the plaintiff's initial burden has shifted, the merging firms can respond by demonstrating that the inferences drawn from market concentration are unreliable.[107] Specifically, the merging firms can argue that the merger will not be anticompetitive owing to ease of entry (step 3 of the 1992 *Merger Guidelines*) and/or likely efficiencies (step 4 of the 1992 *Merger Guidelines*). Before the agencies, all of these factors are considered in an integrated framework. But in the courts, ease of entry and efficiencies are frequently described as "defenses" that may permit the merging parties to rebut the inference of probable anticompetitive effects established through the statistical case and shift the burden of production back to the plaintiff.[108]

Less clear is how step 3 of the 1992 *Merger Guidelines*—articulating and supporting a specific theory of competitive harm, i.e., coordinated or unilateral effects—fits into the

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105. *See* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997). The district court in *Oracle* also recognized this possibility. *See Oracle*, 331 F. Supp. 2d at 1122 ("In analyzing antitrust claims, courts have considered both 'circumstantial' and 'direct' evidence of anticompetitive effects. Even though 'direct' evidence of the potential for anticompetitive harm from a merger is not literally available, merger analyses range from highly qualitative ('circumstantial') to highly quantitative ('direct'), depending on the data available for a particular market.") (citations omitted).

106. This was the familiar "*Philadelphia National Bank* presumption." *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963); *see also H.J. Heinz*, 246 F.3d at 716 ("Sufficiently large HHI figures establish the FTC's prima facie case that a merger is anti-competitive."); *Oracle*, 331 F. Supp. 2d at 1110 ("plaintiffs establish a prima facie case of a Section 7 violation by 'show[ing] that the merger would produce "a firm controlling an undue percentage share of the relevant market, and [would] result [ ] in a significant increase in the concentration of firms in that market." ' ") (quoting *Heinz,* 246 F.3d at 715, quoting *Phila. Nat'l Bank,* 374 U.S. at 363); *Arch Coal*, 329 F. Supp. 2d at 129 (FTC satisfied its initial burden by demonstrating high level of postmerger concentration).

107. "[A] defendant seeking to rebut a presumption of anticompetitive effect must show that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition. . . . A defendant can make the required showing by affirmatively showing why a given transaction is unlikely to substantially lessen competition, or by discrediting the data underlying the initial presumption in the government's favor." *Baker Hughes*, 908 F.2d at 991.

108. For cases describing ease of entry as a defense that can rebut the prima facie case of anticompetitive effects, see *Baker Hughes*, 908 F.2d at 987 ("The existence and significance of barriers to entry are frequently, of course, crucial considerations in a rebuttal analysis.") and United States v. Waste Management, 743 F.2d 976, 981-83 (2d Cir. 1984) (explicitly discussing ease of entry as rebuttal evidence). For cases discussing efficiency as a defense that can rebut the prima facie case of anticompetitive effects, see *H.J. Heinz*, 246 F.3d at 720-22; United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 137 (E.D.N.Y. 1997); *Staples*, 970 F. Supp. at 1088-89; and FTC v. Univ. Health, 938 F.2d 1206, 1222 (11th Cir. 1991).

framework.[109] Step 3 is a product of more modern economic analysis. One view might be that it is a refinement of the traditional structural model, and that it should be viewed as a necessary component of the plaintiff's initial burden of production: to shift a burden of production to the merging firms, the plaintiff must present statistical evidence *and* evidence to support a specific theory of anticompetitive effect. In the alternative, it could be argued that at the least a plaintiff should meet a burden of pleading, i.e., identify the specific basis for its assertion that the merger will likely be anticompetitive. The strongest case for either a burden of pleading or a burden of production would be in the case of a challenge to a consummated merger, where presumably actual effects can be evaluated.

Another approach, one that seems to be supported by recent case law, is that the statistical case developed in steps 1 and 2 of the 1992 *Merger Guidelines* is still sufficient to shift a burden of production. However, if the merging firms rebut the presumption of harm, i.e., if they meet their burden of production and cast doubt on the predictive capacity of the statistical showing, the plaintiff must in order to satisfy its ultimate burden of proof come forward with evidence to support a specific theory of anticompetitive effects.[110] The burden of proof remains with the plaintiff. The burden of production shifts at specified points in the inquiry.

The cases also hold that not all burden shifts are equal; some are stronger and some weaker: "The more compelling the prima facie case, the more evidence the defendant must present to rebut it successfully."[111] Conversely, "less of a showing is required from defendants to rebut a less than compelling prima facie case."[112] Although this "sliding scale" approach seems intuitively correct, it can be faulted as a general standard because it blurs the line between production and persuasion. Merger challenges typically arise in the context of a government effort to halt a transaction by seeking a preliminary injunction from a district court. In evaluating the likelihood of success requirement for an injunction, a court will evaluate all of the evidence, despite its

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109. 1992 MERGER GUIDELINES, *supra* note 103, § 2.

110. The district court opinions in both *Oracle* and *Arch Coal* can be read to support this view, although given the weight the *Oracle* court placed on the insufficiency of the government's evidence of likely unilateral effects, it comes close to implicitly requiring the plaintiff to support a theory of competitive harm in order to prevail in any challenge. The court's opinion is more ambiguous with respect to whether evidence to support a specific theory of effects should be required before the burden shifts to the merging parties. Whereas it acknowledges and appears to endorse the traditional presumption that concentration can alone shift that burden, its discussion of competitive effects, even though it arises in the context of the court's assessment of government's failure to satisfy its ultimate burden of persuasion, seems to imply that no plaintiff could prevail without it. *See Oracle*, 331 F. Supp. 2d at 1112 ("Notwithstanding these statistical data, the Guidelines next focus on the likely competitive effects of the merger."). The *Oracle* court then quotes *Baker Hughes* for the proposition that "[e]vidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness." *Id.* (quoting *Baker Hughes,* 908 F.2d at 984); *see also* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, at 32, n.129 (Oct. 2007) (discussing role of theory of effects in allocating burdens in merger challenges), http://faculty.haas.berkeley.edu/shapiro/mergerpolicy.pdf.

111. *Baker Hughes*, 908 F.2d at 991; *see also H.J. Heinz*, 246 F.3d at 725 (citing *Baker Hughes* with approval).

112. *Arch Coal*, 329 F. Supp. 2d at 129.

articulation of the shifting burden framework. In doing so, it is also likely to be judging both production and persuasion in reaching a conclusion about whether the burden has shifted weakly, moderately, or with great force. It would be difficult to utilize such an approach at the summary judgment or posttrial motion stage, when the court is limited to a consideration of production, and it is difficult to see how a jury could implement such an approach effectively, consistently, and fairly.

4. Defenses and affirmative defenses in antitrust: The role of evidence of conditions of entry and efficiencies

Analysis of evidence of conditions of entry and efficiencies is today essential to evaluating the likely effects of competitively sensitive conduct. In this final section of the chapter, therefore, I will look at how courts approach such evidence. Two issues will be addressed. First, as to entry, whether plaintiffs should bear the burden of proving that conditions of entry are difficult or whether defendants should bear a burden—at least of production—to demonstrate that conditions of entry are relatively easy. In other words, is *difficult entry* part of the plaintiff's prima facie case of anticompetitive effects or is *ease of entry* a defense to a prima facie case of anticompetitive effects? Second, whether efficiency should be treated as a defense or an affirmative defense. To answer this question, it will be necessary to reflect on some very fundamental questions about the welfare standard that we use to judge conduct under the antitrust laws.

As noted in the previous section, under the case law ease of entry is uniformly treated as a defense to an otherwise anticompetitive merger.[113] If an evaluation of market definition and market concentration gives rise to a presumption that the merger is likely to substantially lessen competition, the burden of production shifts to the merging firms, which may rebut the prima facie case by, inter alia, offering evidence that entry is relatively easy and that as a consequence the predicted anticompetitive effect is unlikely to materialize. Because the plaintiff bears the ultimate burden of proving that the merger will be anticompetitive, it would at that point need to respond with additional evidence, such as evidence of the difficulty of entry, or, as the 1992 *Merger Guidelines* require, that entry will not be timely, likely, or sufficient to offset the likely anticompetitive effect.[114] Similarly, the government's *Competitor Collaborations Guidelines* appear to view ease of entry as a rebuttal factor, evaluating it by the same timely, likely and sufficient standards as the 1992 *Merger Guidelines*, and hence focusing on whether ease of entry will be sufficient to mitigate the effects of otherwise seemingly anticompetitive conduct.[115] In both cases, entry is considered only after it appears that the conduct at issue creates a competitive problem, and the question asked is whether entry is likely to counteract the problem. Analytically, relative ease of entry is clearly viewed as a "defense." Its relevance follows from its tendency to undermine the likely anticompetitive effects of a merger, defeating a key element of any merger challenge.

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113. As discussed in the 1992 *Merger Guidelines*, this section addresses the evaluation of committed entry. *See* 1992 MERGER GUIDELINES, *supra* note 103, § 3.0.

114. *See id.* §§ 3.2-3.4.

115. *See* GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, *supra* note 93, § 3.35.

At least some courts applying the monopolization provisions of Section 2 of the Sherman Act have nevertheless allocated the burdens of pleading, production, and proof with respect to conditions of entry to plaintiffs, linking it to the requirement under Section 2 that a plaintiff allege and prove monopoly power. Instead of ease of entry defeating a claim, establishing "barriers to entry" is deemed an essential element of the claim. For example, in *Image Technical Services v. Eastman Kodak Co.*,[116] the Ninth Circuit held in the context of Section 2 that, "[t]o demonstrate market power by circumstantial evidence, a plaintiff must '(1) define the relevant market, (2) show that the defendant owns a dominant share of that market, and (3) *show that there are significant barriers to entry and show that existing competitors lack the capacity to increase their output in the short run*.'"[117] In explaining the importance of entry related evidence, however, the court drew on previous cases in the merger context, reasoning that "[b]arriers to entry 'must be capable of constraining the normal operation of the market to the extent that the problem is unlikely to be self correcting.'"[118] Like the 1992 *Merger Guidelines* and cases evaluating entry in the context of mergers, therefore, the Ninth Circuit ties the entry inquiry directly to the evaluation of competitive effects. But it clearly differed in its approach to allocating the ultimate burden of proof.

One possible explanation for this seeming anomaly in the case law is that allegations of monopoly power are disfavored compared to challenges to horizontal mergers and other forms of collaborations. To insulate single firm conduct from challenge and to prevent false positives, the plaintiff's burden is elevated. The requirement would seem inappropriate, however, when evidence of actual anticompetitive effects is present, as with actual exclusion and higher prices. In such cases, a requirement that the plaintiff prove that entry is difficult would seem to be redundant—the effects could not have occurred if conditions in fact favored a timely and sufficient supply response. In some cases, this alteration in the allocation of burdens with respect to evidence of entry could be outcome determinative. On the other hand, as a practical matter, given the importance of entry to any assessment of power or effects, both plaintiffs and defendants are likely to proffer evidence related to conditions of entry when it is available and significant.

In contrast to entry, the treatment of efficiency as a defense is uniform throughout antitrust—yet it masks some deeper questions about the choice of welfare standard. To

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116. 125 F.3d 1195 (9th Cir. 1997).

117. *Kodak*, 125 F.3d at 1202 (quoting Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995) (emphasis added); *see also* United States v. Microsoft Corp., 253 F.3d 34, 81 (D.C. Cir. 2001) (to satisfy "dangerous probability of success" requirement for claim of attempted monopolization, plaintiff must "demonstrate that substantial barriers to entry protect that market"); W. Parcel Express v. United Parcel Serv. of Am., 190 F.3d 974, 976 (9th Cir. 1999) (plaintiff "failed to present evidence that there were barriers to expansion in the relevant market"); Tops Mkts. v. Quality Mkts., 142 F.3d 90, 98 (2d Cir. 1998) (barriers to entry are among factors to be considered in deciding whether plaintiff has established monopoly power).

118. 125 F.3d at 1208. The court quoted its earlier decision in *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421 (9th Cir. 1995), which in turn relied upon one of the Ninth Circuit's most significant treatments of entry in the merger context, *United States v. Syufy Enterprises*, 903 F.2d 659, 663 (9th Cir. 1990).

put these deeper questions in context, it is first necessary to consider the differences between defenses and *affirmative* defenses.

The quintessential defense is denial of the allegations. For example, denial of physical touching is a defense to battery and puts the plaintiff's allegations to the test of evidence. By defining the offense of battery to include physical touching, the law has allocated the burden of pleading and proof to the plaintiff, and any evidence that tends to make the fact of a touching more or less probable will under the Federal Rule of Evidence 401 be "relevant." Hence, a complaint for battery can be dismissed for failure to state a claim if it omits an allegation of a touching. If it so alleges, but discovery does not lead to evidence to support the allegation, the defendant can seek summary judgment. And if at trial the plaintiff similarly fails to meet its burden of proof as to a touching, the defendant should prevail.

By way of contrast, consent and self-defense are typical *affirmative* defenses to battery. Under Federal Rule of Civil Procedure 8(c), affirmative defenses operate "by way of avoidance." They admit the plaintiff's underlying allegations, but raise some other circumstance that the law has recognized as an excuse for the conduct. In the cases of consent or self-defense, rather than denying that the touching took place, the defendant is alleging "even if I touched you, the law permitted me to do so." So affirmative defenses differ from defenses in two important respects, one theoretical and one practical. As a theoretical matter, instead of defeating a claim, affirmative defenses admit, but seek to "avoid" or "excuse" a claim. As a practical matter, instead of the proponent of the affirmative defense bearing a burden of pleading alone, it almost always bears the burdens of production and proof, as well.

Neither entry nor efficiency fits neatly into this traditional framework. Entry seems to straddle the fence between defense and affirmative defense. With the exception of the monopolization case law already noted, entry fits the theoretical mold of a defense: ease of entry is relevant because it tends to make anticompetitive effects less probable. But the "timely, likely, and sufficient" standards of both the *Collaboration Guidelines* and 1992 *Merger Guidelines* are at least suggestive of a burden of proof, not merely of pleading or production. In this respect alone, entry appears closer to being an affirmative defense. When the *Guidelines*' standards are translated to the context of litigation, one solution to this aberration might be to consider the defending parties' burden as one of production only. Under such an approach, if the defending parties come forward with evidence tending to show that entry will be timely, likely, and sufficient, the burden would shift back to the plaintiff to *prove* that it will not.

The treatment of efficiency raises both theoretical and practical issues. To expose the theoretical issue, it is helpful to pose the question: what makes efficiency evidence relevant in an antitrust case? If it is relevant because the efficiencies associated with the challenged conduct are likely to counteract the anticompetitive effects, it should be treated as a defense. On the other hand, if it is urged that efficiency, more specifically producer surplus, has independent value, then the theory behind crediting it has more to do with avoidance, and it should be treated as an affirmative defense: regardless of the diminution of consumer surplus associated with the challenged conduct, because it will also lead to increased producer surplus and therefore to greater total welfare (assuming the increase in producer surplus significantly exceeds the loss of consumer surplus), the

immediate impact on consumers should be "excused." Here, the treatment of efficiencies can be seen as a proxy for the continuing debate over the choice of welfare standard for antitrust: consumer welfare vs. total welfare.[119]

Although there are examples in antitrust law of true affirmative defenses,[120] neither the courts nor the 1992 *Merger Guidelines* treat efficiency in this way. By implication, they have thus rejected a total welfare approach in favor of the consumer welfare approach. To be credited, efficiencies generated by the conduct must diminish the likelihood that anticompetitive effects will occur. This can be seen in the "sufficient" language of the 1992 *Merger Guidelines*, which ties the defense directly to its tendency to undermine the likely anticompetitive effects of the conduct:

> The Agency will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agency considers whether cognizable efficiencies *likely would be sufficient to reverse the merger's potential to harm consumers in the relevant market, e.g., by preventing price increases in that market*. In conducting this analysis, the Agency will not simply compare the magnitude of the cognizable efficiencies with the magnitude of the likely harm to competition absent the efficiencies.[121]

A final point reveals, however, how, as with entry, the 1992 *Merger Guidelines* and the cases straddle the fence in treating efficiency as a defense or affirmative defense as a practical matter. As with entry, the 1992 *Merger Guidelines'* standard with respect to efficiencies—"verifiable" and "merger-specific"—sounds like it carries a burden of proof. Indeed, some courts that have rejected efficiency defenses have spoken of the merging firms' failure of "proof."[122] Efficiencies are thus something of a hybrid:

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119. Proponents of crediting producer surplus argue that they are in fact proponents of consumer welfare, asserting that in the long run standards that credit producer surplus will in fact inure to the benefit of consumers. Proponents of consumer welfare are arguably more focused on the short-term consequences of permitting the exercise of market power that could occur when producer surplus is credited for its own sake and is not tied to likely and more immediate benefits to consumer surplus.

120. The two most obvious statutory examples are the meeting competition and cost justification defenses to price discrimination. *See* 15 U.S.C. § 13(a)-(b). Both are clearly affirmative defenses. They do not make the effects of price discrimination less likely; rather, they excuse them for other policy reasons. Some courts have also viewed claims of state action as affirmative defenses. *See, e.g.*, Expert Masonry v. Boone County, Ky., 440 F.3d 336, 345 (6th Cir. 2006) (referring to state action as an "affirmative defense").

121. 1992 MERGER GUIDELINES, *supra* note 103, § 4 (footnotes omitted) (emphasis added); *see also H.J. Heinz*, 246 F.3d at 720 ("'[A] defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.'") (quoting *University Health,* 938 F.2d at 1223).

122. *See, e.g.*, FTC v. H.J. Heinz Co., 246 F.3d 708, 720 (D.C. Cir. 2001) ("the high market concentration levels present in this case require, in rebuttal, proof of extraordinary efficiencies, which the [merging firms] failed to supply"). The district court in *Staples* took an arguably more cautious approach:

> The Court agrees with the defendants that where, as here, the merger has not yet been consummated, it is impossible to quantify precisely the efficiencies that it will generate. In addition, the Court recognizes a difference between efficiencies which are merely speculative and those which are based on a prediction backed by sound business judgment. Nor does the

theoretically they are treated as a defense, credited only when they tend to defeat the likely effects of the conduct, yet practically they may carry with them a burden of proof. This can be justified on several grounds. First, once the plaintiff has satisfied its initial burden of production with respect to anticompetitive effects, the chances of a false positive have been greatly diminished as compared to some random sampling of cases. At that point, the case should be able to survive both a motion to dismiss and a motion for summary judgment. Second, the evidence of efficiencies is almost always likely to be in the control of the defendants. They are thus in the best position to come forward with that evidence, which justifies at least the imposition of a burden of production. Finally, as courts and commentators have observed, especially when analyzed prospectively, efficiencies are notoriously hard to predict with accuracy and are often overstated. Hence, it may be appropriate to impose not only a burden of production, but one of proof on parties asserting efficiency defenses in response to claims of antitrust violations.

5. Conclusion

Antitrust law has evolved considerably under the guidance of economic analysis, especially during the last 30 years. Yet from the review of some critical areas of antitrust provided in this chapter, it is evident that more work needs to be done to refine the analysis for use by adversaries who turn to the courts for resolution of antitrust claims. If it is true that uncertain antitrust rules increase compliance costs, lead parties to settle on uninformed terms, and handicap courts from reaching relatively cost effective resolutions of antitrust disputes, then it is also likely true that a systematic failure to address more precisely the allocation of burdens can have the same consequences.

The search for clarity, however, does not mean, as is often suggested, that courts should default to heightened burdens on plaintiffs or per se rules of legality, both of which systematically favour defendants. A generation ago courts and commentators concluded that the lower processing costs of excessive reliance on per se rules of liability imposed too high a cost in terms of false positives. Today, after a generation of recalibration, there is no empirical basis for concluding that antitrust laws are substantially overdeterring efficient conduct. What does appear to be true is that the kind of economically sophisticated standards that help to reduce false positives are costly to implement. By focusing on the kinds of specific issues discussed in this chapter—guided by the combined perspectives of traditional and economic approaches

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> Court believe that the defendants must prove their efficiencies by "clear and convincing evidence" in order for those efficiencies to be considered by the Court. That would saddle Section 7 defendants with the nearly impossible task of rebutting a possibility with a certainty, a burden which was rejected in *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 992 (D.C. Cir.1990). Instead, like all rebuttal evidence in Section 7 cases, the defendants must simply rebut the presumption that the merger will substantially lessen competition by showing that the Commission's evidence gives an inaccurate prediction of the proposed acquisition's probable effect. *See id.* at 991. Defendants, however, must do this with credible evidence, and the Court with respect to this issue did not find the defendants' evidence to be credible.
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> *Staples*, 970 F. Supp. at 1089.

to burden allocation—courts should be able to strike an appropriate balance among the goals of reducing error costs, reducing direct costs, and producing just and consistent results in antitrust cases that safeguard competitive markets and provide parties with confidence in the rule of law.