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Federal Trade Commission
Office of the Secretary, Room H-135 (Annex P)
600 Pennsylvania Avenue NW,
Washington, DC 20580

Re: **HMG Review Project – Comment, Project No. P092900.** Submission of Geoffrey A. Manne to FTC & DOJ Workshop on the Horizontal Merger Guidelines

Dear Mr. Secretary:

This comment is submitted by Geoffrey A. Manne. I respectfully request an opportunity to participate in the upcoming workshop to be conducted by the Commission and the Department of Justice.

I am the Executive Director of the International Center for Law & Economics. The ICLE is a new entity—a sort of global think tank—aimed at building an international network of institutions and academics devoted to methodologies and research agendas that will inject rigorous, evidence-based thinking into important policy debates. The ICLE and its affiliates will pursue policy analysis using the most successful and rigorous aspects of law and economics, dynamic competition analysis, New Institutional Economics and similar approaches to law, economics and policy. I am also a Lecturer in Law at Lewis & Clark Law School, and a former Assistant Professor of Law at Lewis & Clark Law School.

Attached to the following brief comment is my article, co-authored with Marc Williamson, entitled, "Hot Docs v. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication," published in the Arizona Law Review. The article presents the basis for my proposed remarks.

The central problem addressed in the article is the problem of proof of harm in unconsummated merger cases. Tied up in this theme are questions relating to the use by courts and by enforcers (and guidance to both under the Merger Guidelines) of various types of evidence and the permissible inferences that can be drawn from them. As well, the article addresses problems inherent in the conceptual case that the Merger Guidelines lay out, focusing centrally on the problem of defining and using an economically-relevant market.

The most important implications of the article are the following:

1. Three types of commonly-relied-upon evidence in merger reviews—intent evidence, accounting evidence and market-characterizing or market-defining evidence—raise serious concerns that are not well addressed by either agencies or courts in undertaking merger reviews under the Merger Guidelines.
2. Proper error cost analysis requires an effective shifting of burdens, one that is hampered by the agencies' and courts' reliance on intent evidence—evidence that presents only a one-way ratchet (the presence of intent evidence can condemn behavior as anticompetitive, but its absence (or the presence of procompetitive intent) does not exonerate).
3. Non-economic evidence of market definition (from, e.g., customer statements or organizational documents) tends to propagate the questionable position of the Merger Guidelines that relegates producer effects to secondary status in market definition.
4. The language of business and the language and process of accounting are unreliable guides to economic effect, although they are uniformly used to demonstrate it.

The article develops these and other ideas in great detail.

These evidentiary, proof and conceptual problems should be debated in the context of a revisiting of the Merger Guidelines. Revision of the Guidelines could address some of these problems for future cases and especially future enforcement decisions. Most importantly, the Guidelines should be revised to mitigate the effect of these problems on the market definition determination.

Judge Posner, in the first edition of his justly-celebrated <u>Antitrust Law</u>, noted that market definition was an unfortunate means to an end, a necessity given the inability of our analytical tools effectively to assess the effects of mergers beyond a circumscribed boundary. As Posner noted,

> The importance attached to defining a market in which to appraise the competitive effects of a challenged merger is on more example of the law's failure to have developed a genuinely economic approach to the problem of monopoly. If we knew the elasticity of demand facing a group of sellers, it would be redundant to ask whether the group constituted an economically meaningful market. . . . It is only because we lack confidence in our ability to measure elasticities, or perhaps because we do not think of adopting so explicitly economic an approach, that we have to define markets instead.

I doubt we would shun the approach for being too explicitly economic today, but I think a very small number of cases permit us to identify competitive effects with sufficient confidence—*Staples* being the paradigmatic case. We may be stuck with market definition, but the outdated conception enshrined in the Guidelines–of measuring concentration in a static market defined essentially by demand-side elasticities and using non-economic evidence–can surely be improved upon.

In the first instance, we should remove any hint of a concentration/price presumption so intimately tied to measuring market definition and HHIs. Although the Guidelines attempt to cabin the market definition and market share analyses as "starting points," in practice they are the beginning and end of most merger cases. The Merger Guidelines (and, importantly, agency practice) should be revised to limit reliance on market definition and market share, at a minimum by stating explicitly that the definition of the market and the calculation of market shares are not sufficient to indicate adverse competitive effects, and perhaps also by removing HHI threshold discussions which seem to imply the same. Even if the agencies and the Guidelines don't *mean* these tools to be used in this way, courts haven't really gotten the message.

At the same time, the Guidelines should explicitly incorporate supply side elasticity into the market definition inquiry. There is little defense of the Guideline's statement that "Market definition focuses solely on demand substitution factors—i.e., possible consumer responses." While the Guidelines and actual practice do attempt to make some allowance for supply-side effects, these allowances seem like afterthoughts, and I think it is rare that HHIs are calculated to incorporate production capacity not currently devoted to the narrowly-demand-defined product market, especially outside of the commodity realm. Meanwhile, even a small bias against supply substitution, entry and unforeseen competitors (and/or new products) is a particular problem in fast-shifting, innovative industries where this is precisely whence the most significant competitive threat will come.

To the extent (and it is a large extent) that market definition and market share are far-removed from competitive effects, they should be more carefully circumscribed by the Guidelines. The economic irrelevance of much of the evidence used to define markets and the general disregard for supply-side response help to ensure that market definition, while incredibly *important* in litigation, is not actually all that *helpful*. At the same time, the general lack of correlation between concentration and unilateral effects makes reliance on the calculation of market shares (of crabbed markets, often disregarding supply-side effects) similarly misleading and prejudicial.

As noted, the attached article develops these ideas more fully, and I would be pleased to discuss any of these issues in the upcoming Workshops.

Best regards,

Geoffrey A. Mane

HOT DOCS VS. COLD ECONOMICS

GEOFFREY A. MANNE[*] *& E. MARCELLUS WILLIAMSON*[**]

The use of business documents to prove antitrust violations can be troubling. This article identifies three classes of business documents that are used by courts and antitrust agencies to determine whether antitrust violations have occurred: Accounting documents, market definition documents, and intent documents. Each is problematic. Accounting information is sufficiently disconnected from underlying economic reality that it presents a distorted and unreliable picture of economic consequences. Businesses characterize markets for myriad reasons, most having nothing to do with elasticity, the criterion of market definition relevant to the antitrust laws. Likewise, corporate actors express intentions and motivations for rhetorical and other purposes, not necessarily because they possess the capacity to achieve their "intended" effect. Principled antitrust enforcement must rely on evidence of actual economic effect, rather than flawed characterizations of business conduct.

INTRODUCTION

It is beyond dispute that antitrust adjudication is difficult.[1] Where it is

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[1] As one commentator recently described modern antitrust adjudication:

Under the Chicago School approach, antitrust cases have become more tenuous to expect individual business people to understand the real economic effect of their decisions, it is perhaps even more troubling to impose that burden on courts. But it does not follow that we should abandon the attempt to achieve principled, accurate adjudication for the sake of a faulty, yet facile, alternative.[2] The use of business documents to prove antitrust violations, however, can be just that. Reliance by courts and regulators on accounting information, business rhetoric and expressions of intent to prove antitrust violations is misplaced. And the likelihood of error resulting from the use of business documents is substantial.

Nevertheless, there is a regulatory and scholarly effort to bring business documents and business rhetoric to bear in proving antitrust cases.[3] This approach has a "the light's better over here" feel to it.[4] It is undoubtedly

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> complicated and less predictable. Proving economic issues requires extensive documentary evidence and endless testimony from economists and other experts. Most judges, and nearly all juries, lack the training necessary to make economic determinations. Although fact finders are adept at determining 'who did what, when, and why,' they lack the experience necessary to determine the significance of specific economic conditions. Economists themselves cannot agree on the economic impact of many types of business conduct. If economists cannot effectively evaluate the market effects of particular competitive practices, certainly judges and juries cannot be expected to do so.

Thomas A Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 40-41 (2004) (quoting Mark Crane, *The Future Direction of Antitrust,* 56 ANTITRUST L.J. 3, 15 (1987)) (other citations omitted).

[2] As Justice Holmes observed, "[i]f justice requires the fact to be ascertained, the difficulty of doing so is no ground for refusing to try." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 48 (1880).

[3] *See, e.g.*, Albert A. Foer, *The Third Leg of the Antitrust Stool: What the Business Schools Have to Offer to Antitrust*, 47 N.Y.L. SCH. L. REV. 21 (2003) (______); Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151 (2004); Norman W. Hawker, *Antitrust Insights from Strategic Management*, 47 N.Y.L. SCH. L. REV. 67 (2003) (suggesting that the antitrust community should consider and research strategic management, which "may create a new antitrust revolution"); Spencer Weber Waller, *The Use of Business Theory in Antitrust Litigation*, 47 N.Y.L. SCH. L. REV. 119, 122 (2003) Spencer Weber Waller, *The Language of the Law and the Language of Business*, 52 CASE W. RES. L. REV. 283 (2001) (antitrust has devalued business "discourse" and theory and antitrust has been impoverished by this choice); Harry S. Gerla, *A Micro-Microeconomic Approach to Antitrust Law: Games Managers Play*, 86 MICH. L. REV. 892, 929 (1988) (attempting to "construct. . . a theory of antitrust law in which the key actors are the real-world human managers of the firms rather than the theoretical profit-maximizing firms posited by classical microeconomic theory"). Professor Waller notes, among other things, that "[s]ophisticated corporations expend too many resources in their strategic planning and marketing decisions not to take seriously the results of that work." *Id*. at 334.

[4] *See* Ronald A. Cass, *Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough for Government Work?*, 21 LAW & POL'Y INT'L BUS. 609, 618 n. 40 (1990) (commenting on the use of accounting data in dumping cases and likening it to "the joke

easier to "discover" anticompetitive behavior and relevant markets by inferences from business language than it is from rigorous economic analysis. Not only regulators but also courts (to say nothing of juries) are moved by business rhetoric. However, it is not clear that business rhetoric bears much relationship to economic reality. Business managers are not, generally, economists; nor are they antitrust lawyers. Accounting, accountability, personal incentives and other concerns that do not relate in an obvious way to the maximization of the firm's profits influence the daily operation of business — and the language of business — far more than do underlying economic and legal concepts.

Antitrust law must chart a narrow course between fostering and restraining competition. Because the same economic activity can have desirable or undesirable consequences depending on the circumstances, by its nature antitrust analysis is constrained to outlaw not, generally, specific conduct, but rather *conduct that has specific economic characteristics*.[5] Identifying conduct that has – or is likely to have in the future – anticompetitive effect is difficult. It is an inherently economic exercise, and one that is somewhat at odds with the courts' traditional reliance on documentary evidence to demonstrate actus reus or mens rea.

At the same time, the effort to identify business documents to make out an antitrust case is extremely burdensome. "[S]earching out intent tends to make antitrust litigation interminable with the massive discovery or trial that threatens to overburden the system. . . . [E]ven seemingly irrelevant fragments are introduced in the hope that they might add up to something. Even worse, emphasizing purpose frequently masks a failure to analyze the conduct."[6] Particularly in the arena of merger enforcement, federal antitrust regulators, using their power under the Hart-Scott-Rodino Antitrust Improvements Act, have access to and make use of business documents in making enforcement decisions and proving their prima facie antitrust cases.[7] The issue for present purposes is not the cost of obtaining these documents

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about the drunk looking for his car keys not where he dropped them but under the lamppost where the light is better").

[5] Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 975 (1986) ("It takes economists years, sometimes decades, to understand why certain business practices work, to determine whether they work because of increased efficiency or exclusion."). *See also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-95 (1986) (antitrust violation may not be inferred from conduct that potentially has both procompetitive and anticompetitive effects).

[6] 7 PHILLIP E. AREEDA, ANTITRUST LAW §1506 (p. 393) (1986).

[7] 15 U.S.C. § 18a (2000).

per se, although that is itself a difficulty.[8] Rather the issue is in the use of these documents – the perennial quest for the smoking gun, the "hot doc" that makes the case. The problem is that the analytical value of such documents is often quite limited, even though their persuasive value is quite substantial. As one prominent accounting scholar has noted, business documents and public filings containing accounting data "are useful for internal control, but are not designed or often useful for the measurements demanded by economists and lawyers."[9]

For example, firms routinely designate "markets" in their business documents. Antitrust regulators and plaintiffs, given the green light by the Supreme Court's *Brown Shoe* decision,[10] often use this business language to make out their product and geographic market definitions, even though the "market" identified by the business may bear little or no resemblance to an economically-relevant market defined by the tests mandated by the courts and by the antitrust agencies' own merger guidelines.[11] Antitrust cases can turn on whether the courts accept such use of business language, and thus "what is said in a company's documents may shape its destiny in an antitrust or unfair competition case."[12]

To be sure, business documents can be useful to regulators, and appropriately so. Business documents may be indispensable in an

[8] Compliance with Hart-Scott-Rodino is notoriously costly: "It is not unusual for the expense of complying with a Second Request alone to run into the millions of dollars on top of the very significant cost of litigation in the event the agencies seek to enjoin the transaction." ABCNY Antitrust Committee, *Supplement to the 2002 Milton Handler Annual Antitrust Review Proceedings*, 2003 COLUM. BUS. L. REV 451, 458. *See also* Brian Mohr, *"Drowning in a Sea of Gigabytes,"* Antitrust Report ([March] 2005) (detailing burdens of second request); Memorandum of Points and Authorities by Defendant in Opposition to Plaintiff's Motion for an Order pursuant to Section 7A(g)(2) of the Clayton Act at 12, in *Federal Trade Commission v. Blockbuster, Inc.*, Civ. No. 1:05 CV 00463 (ESH) (D.D.C. March 7, 2005) (response to second request included the equivalent of 1,900 boxes of documents and took nearly 16,000 hours of work by outside counsel). Particularly in light of the limited probative value of much of the information discovered through the HSR filing and second request processes, these costs may often outweigh the benefits. *See* William J. Kolasky, Jr. & James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 909 (1997).

[9] George J. Benston, *Accounting Numbers and Economic Values,* 27 ANTITRUST BULL. 161, 162 (1982).

[10] *Brown Shoe v. United States*, 370 U.S. 294 (1962).

[11] U.S. Dep't of Justice & Fed. Trade Comm'n, 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552 §3.0 (1992), [hereinafter Merger Guidelines], *available at* www ftc.gov/bc/doc/horizmer htm (last visited February 20, 2005).

[12] Don T. Hibner Jr. & Suzanne B. Drennon, *What Lawyers Should Know About Markets: The Good, The Bad and The Ugly*, 50-APR FED. LAW. 38 (March/April 2003).

appropriate and appropriately-economic market analysis.[13] Likewise business documents also serve to provide a basic picture of the industry under scrutiny. This article argues, on the other hand, that some uses of these documents are inappropriate. In many cases antitrust regulators and plaintiffs attribute to the language of corporate managers unjustified economic and legal significance. The upshot is that regulators and courts are writing out the economic content of the antitrust laws and substituting a rhetorical or accounting content instead. This can lead to misguided enforcement that chills the competitive activity that antitrust is intended to foster.

This article considers the implications of the relationship between business rhetoric and economic analysis for antitrust law and policy. We maintain that antitrust analysis should remain firmly rooted in economics and that to do so it must recognize the distinction between economic reality and business rhetoric. This article thus argues that courts and regulators should be wary of the role of business rhetoric in antitrust analysis and adjudication. This is not to say that "market realities" reflected in business documents and testimony should not be considered in antitrust cases. Rather, this article argues that courts and policy makers should recognize the distinction between the market realities themselves and expressions or characterizations of those realities for business purposes. An important implication is that regulators' and courts' reliance on business documents is misplaced and may lead to undesirable results. A further implication is that, in some cases, much of this material should be excluded from consideration by courts.

I. ECONOMICS AND ANTITRUST

The purpose of antitrust has been said to be to ensure a dynamic marketplace in which buyers and sellers can interact and "to perfect the operation of competitive markets."[14] As Judge Posner stated in *Chesapeake & O.R. Co. v. United States*, "the allocative-efficiency or consumer-welfare concept of competition dominates current thinking, judicial and academic, in the antitrust field."[15] It has not always been this way. The historical maximand in antitrust law has been some conception of small-business

[13] *See, e.g., FTC v. Staples*, 970 F. Supp. 1066, 1075-77 (D.D.C. 1997).

[14] Frank H. Easterbrook, *The Limits of Antitrust,* 63 TEX. L. REV. 1, 1 (1984). S*ee also* BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1993).

[15] 704 F.2d 373, 376 (7th Cir. 1983).

protection or other variant of social welfare rooted in the populism of the era that spawned our federal antitrust statutes.[16] While this view may not be entirely gone, it is certainly greatly diminished in modern antitrust jurisprudence.[17]

Economic analysis is the primary tool for all aspects of antitrust analysis. "[R]igorous economic analysis of markets has become the norm for both the agencies and the courts. . . . Today, courts and antitrust enforcers rely much less on structural presumptions and more on the consumer welfare standard of anticompetitive harm. . . . The result is a body of law that relies on certain core principles of neo-classical economic theory and that has widespread political support."[18] Importantly, economics is not consigned only to adjudication in antitrust. It also, in principle at least, forms the backbone of investigation and enforcement decisions undertaken by the Antitrust Division and the FTC.[19]

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[16] *See, e.g.,* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 19-22 (1st ed. 1976).

[17] *See, e.g., id.* (discussing and criticizing the notion that antitrust policy can and should be used to protect small businesses); ANDREW I. GAVIL, ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 31 ff. (2002) ("The U.S. and other nations sometimes have used antitrust to promote non-economic goals, too, such as fairness, protection of small businesses, social justice, equity, and political stability."). As these authors note, the non-economic conception of antitrust law has largely disappeared today. *See* POSNER, ANTITRUST LAW viii (2nd ed. 2001) [hereinafter POSNER, ANTITRUST LAW 2ND] ("Today, antitrust law is a body of economically rational principles largely though not entirely congruent with the principles set forth in the first edition [of his book]."); GAVIL, ET AL., *supra* at 38 ("It is important to realize at the outset of our study of antitrust law that contemporary U.S. antitrust analysis focuses almost solely on economic goals . . . ."). For a good general history of the use of economics in antitrust law, see William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, Competition Policy Center Working Paper (October 1999), *available at* http://repositories.cdlib.org/iber/cpc/CPC99-009/. On the continuing role of politics in antitrust enforcement see, for example, Fred S. McChesney, *Economics Versus Politics in Antitrust*, 23 HARV. J.L. & PUB. POL'Y 133 (1999). *See also* KENNETH W. CLARKSON AND TIMOTHY J. MURIS, EDS., THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 98 (1981).

[18] William J. Baer and David A. Balto, *The Politics of Federal Antitrust Enforcement*, 23 HARV. J.L. & PUB. POL'Y 113, 120 (1999) (citing 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶110, at 97 (rev. ed. 1997) ("economic concerns have generally dominated antitrust policy, and trumped competing 'populist' concerns")). *See also* JOHN E. KWOKA, JR. AND LAWRENCE J. WHITE, THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 1 (3rd ed. 1999) ("Courts have endorsed a central role for economics in rendering their own decisions."); Abbott B. Lipsky, Jr., *Antitrust Economics – Making Progress, Avoiding Regression*, 12 GEO. MASON L. REV 163, 165 (2003) ("[T]he rapid assimilation of microeconomics into antitrust thinking makes almost every antitrust controversy an exercise in microeconomic analysis.").

[19] KWOKA & WHITE, *id*, at 1. ("Economics frames the central issue for investigation

As Judge Posner notes in the Preface to the second edition of his influential *Antitrust Law*, "The first edition of this book, published a quarter of a century ago, bore the subtitle, 'An Economic Perspective,' implying there were other perspectives. . . . In the intervening years, the other perspectives have largely fallen away, a change that I have marked by dropping the subtitle from this new edition."[20] He continues: "Almost everyone professionally involved in antitrust today . . . not only agrees that the only goal of the antitrust laws should be to promote economic welfare, but also agrees on the essential tenets of economic theory that should be used to determine the consistency of specific business practices with that goal."[21]

The general ascendancy of economics in antitrust was inevitable. Proscriptions against anticompetitive behavior make sense only where the term "anticompetitive" can be given determinate meaning. That meaning must be economic.[22] Absent economic grounding, "anticompetitive" acts are merely acts arbitrarily and tautologically determined to be "anticompetitive."[23] As Derek Bok noted more than 40 years ago:

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and, on the basis of data analysis and theory, structures the examination of the likely competitive effects of various practices or structural changes in companies and the industries in which they operate.").

[20] POSNER, ANTITRUST LAW 2ND, *supra* note 17, at vii.

[21] Id. at ix.

[22] *See* Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 ANTITRUST L. J. 21, 23 (1985) ("[U]nder the present antitrust statutes as they are written, the pact between law and economics . . . is inevitable. There is no other way for courts to proceed and produce beneficial results – or, indeed, to produce anything that deserves the name of law. . . . [A]ntitrust has no alternative . . . to do anything but rest on economics.").

[23] And it is worth noting, of course, that the Sherman Act does not on its face even circumscribe a set of actions as limiting as those that may be described as "anticompetitive." Rather, it provides quite broadly that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Sherman Antitrust Act, 15 U.S.C. § 1 (2000). The only operative phrase here is "restraint of trade," and, as has been frequently noted, absent economic guidance, this could prohibit a welter of facially-desirable economic activity. *See, e.g., Nat'l Collegiate Athletic Assn v. Bd. of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 98 (1984) (noting that, "every contract is a restraint of trade," and holding that the Act's purpose is to "prohibit only unreasonable restraints of trade"); *U.S. v. Am. Tobacco Co.*, 221 U.S. 106, 180 (1911) (noting that the over-breadth of the Act threatened "all liberty of contract and all substantial right to trade"); *Chicago Bd. of Trade v. U.S.*, 246 U.S. 231, 238 (1918) ("But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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."). Section 2 of the Act gives little

> Economic theory has provided us with much of what little sophistication we now possess in identifying and measuring market power and in comprehending the interdependence, and its significance, of large, powerful firms. The aims and applications of section 7 are rooted in these concepts, and it would be arrogant to suppose that we could muddle through without further assistance.[24]

It is a truism (although no less true for being so) that the antirust rules are constructed and interpreted in such a way that any number of activities that would be facially illegal when engaged in across firms are perfectly legal when engaged in within a single firm. Even the putative goal of fostering competition is ambiguous: "competition between firms can be made more effective if competition between persons within firms, as between partners, is suppressed. . . . One form of competition is necessarily substituted for another . . . ."[25] In the face of this complexity, the goal of fostering competition—the goal of the antitrust statutes—can be given purchase only through rigorous economic analysis.[26] Legal distinctions uninformed by economics are insufficient in an arena where almost any potentially-anticompetitive action is also potentially-procompetitive.[27]

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more guidance, providing only that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." Sherman Antitrust Act, 15 U.S.C. § 2 (2000). At least here "monopolize" may be a somewhat more intelligible and more limited category, although "attempt to monopolize" certainly has opened up a can of indeterminate worms. Section 7 of the Clayton Act is likewise imprecise. It provides that "No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18. The phrase, "tend to create a monopoly," begs of an economic interpretation – on what other grounds may a proposed merger *tend* to create a monopoly if it does not obviously do so *ab initio*? *See* Harold Demsetz, *How Many Cheers for Antitrust's 100 Years?*, 30 ECONOMIC INQUIRY 207, 207 (1992).

[24] Derek Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 227 (1960).

[25] Demsetz, *supra* note 23, at 207.

[26] *See* Bork, *Role of the Courts*, *supra* note 22.

[27] A remaining few forms of business conduct are deemed per se illegal by the courts under the antitrust laws, but, at least in principle, all other behavior is analyzed with respect to its competitive effect. And, of course, even conduct deemed *per se* illegal is so labeled because of its presumed anticompetitive *effect*. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) ("[I]n characterizing this conduct under the per se rule, our inquiry must focus on whether the effect . . . of the practice [is] 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, . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" (citations and footnote

II. THE BUSINESS MIND VS. ECONOMICS

While the ascendancy of *Chicago* economics has come under attack by the "post-Chicago" school, the ascendancy of economics in antitrust analysis has not been seriously and openly challenged. "[P]ost-Chicago economics is very much a part of the 'antitrust revolution.' Economics constitutes its foundation just as much as economics did for the new learning . . . ." [28] Post-Chicago economics does pose some challenges to the neoclassical paradigm, but its challenges are not essentially foundational.[29]

Nonetheless, the effort, by some commentators sympathetic to the post-Chicago school, to "focus on the firm itself and (it follows) the individual decision makers within the firm"[30] is an implicit rejection of economic

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omitted)).

[28] KWOKA & WHITE, *supra* note 17, at 4. For a survey of the rise and import of post-Chicago economics, see Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257. *See also, e.g.,* Lipsky, *supra* note 17, at 177 ("But antitrust litigation is still bitterly contested and schools of opposing economic thought continue to struggle for the hearts and minds of enforcers, policy makers, judges and juries in many of the most critical areas that govern the most important antitrust disputes.").

[29] The post-Chicago school stresses a more fact-specific and malleable approach. *See, e.g.*, KWOKA AND WHITE, *supra* note 17, at 4. The post-Chicago paradigm also self-consciously incorporates an ideological counterweight to the Chicago school's trust of the pervasive role of market discipline in maintaining competition in contestable markets. *See, e.g.,* Hovenkamp, *supra* note 28, at 267:

> By contrast, 'post-Chicago' antitrust has relatively less confidence in markets as such, is more fearful of strategic anticompetitive behavior by dominant firms, and has a significantly restored faith in the efficacy of government intervention. But anyone who takes the long view should see that 'Post-Chicago' antitrust policy represents little more than another swing in antitrust's ideological pendulum.

See also KWOKA & WHITE, supra note 17, at 4. ("And it [post-Chicago economics] is far more skeptical of the ability of the market to discipline firms and thereby negate the anticompetitive potential of mergers and various practices.").

There is some debate whether some of the nominally economic post-Chicago approaches to antitrust are not in fact thinly-veiled populism instead. *See, e.g.*, Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 261 (1995) (Suggesting that post-Chicago economics has taken over the "Modern Populist" mantle); *see also* POSNER, ANTITRUST LAW 2[ND], supra note 17, at vii. The decidedly post-Chicago notion of "consumer choice" or "consumer sovereignty," for example, as antitrust's animating principle may be populism disguised as economics. For a representative example, see Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503 (2001) (ascribing to antitrust the role of preserving "media diversity"). *See also, e.g.,* John D. Blum, *A Consumer Perspective on the Pros and Cons of Antitrust Enforcement in Healthcare: An Introduction* 8 LOY. CONSUMER L. REV. 76 (1996).

[30] Albert A. Foer, *The Third Leg of the Antitrust Stool: What the Business Schools*

analysis. Some recent academic literature advocates particularly the use of business theory and business rhetoric in antitrust analysis as a corrective to idealized economic models.[31] Relatedly, the contention that the neoclassical model of economic analysis is not well-suited to antitrust analysis because business actors are constrained in their knowledge[32] (where the model presumes perfect information) is similarly a rejection of the maxim that "good" and "bad" business behavior must be determined with reference to the *characteristics* of such behaviors. In fact, the disconnect between a model's assumptions and the limitations of individual business managers in no way condemns the model if its predictive power remains intact.[33] The teachings of behavioral psychology, now so generously applied to all things economic, do not undermine the *goal* of antitrust enforcement, nor do they effectively alter the mechanics.[34] That individual business people may not behave in obvious accordance with a model of perfect competition does not undermine either the quest for social welfare itself or the utility of the traditional models in locating it. Moreover, the very "boundedness" of decision-making actually counsels *against* using actors' own characterizations of their own behavior as a guide to antitrust enforcement.[35]

Have to Offer to Antitrust, 47 N.Y.L. SCH. L. REV. 21 (2003).

[31] *See* note 3 *supra*.

[32] *See generally,* Avishalom Tor, *The Fable of Entry: Bounded Rationality and the Efficacy of Competition*, 101 MICH. L. REV. 482 (2002).

[33] *See* Milton Friedman, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 14 (1953) (describing and criticizing this form of condemnation as "fundamentally wrong and productive of much mischief"); Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 303-04 (1979) (describing and criticizing this "misunderstanding").

[34] It bears remarking, too, that the limits of human cognition exhibited by putative monopolists and would-be competitors are applicable as well to regulators and jurists, to say nothing of the law professors who write about them. *See*, *e.g.*, Stephen J. Choi & A.C. Pritchard, *Behavioral Economics and the SEC*, 56 STAN. L. REV. 1, 20-36 (2003) ("Behavioralists must account for cognitive biases among regulators (and the likelihood that such biases are often greater in magnitude than those facing investors)."). *See also* Kent D. Daniel, David A. Hirshleifer and Siew Hong Teoh, *Investor Psychology in Capital Markets: Evidence and Policy Implications* (July, 2001), *available at* http://ssrn.com/abstract=278848.

[35] In fact, of course, a useful application of human psychology in economic modeling would incorporate certain behavioral assumptions into a model of general applicability, but an individual actor's specific motivations in a given context would still be irrelevant. In large measure the transactions cost approach does just this. Examples abound, but Oliver Williamson's MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS (1975) remains the *locus classicus*. *See also* Oliver E. Williamson, *The Economics of Antitrust: Transaction Cost Considerations*, 122 U. PA. L. REV. 1439 (1974). The transactions cost approach (a branch of the "New Institutional Economics") has made its way into standard antitrust economics. *See* Timothy J. Muris, *Improving the Economic*

The inherent contradiction in this way of thinking is that the fact that actors may have the wrong aspirations, or may fail to achieve their aspirations, does not alter the *effect* of their actions. In other words, it hardly matters whether individual business people strive to obtain market dominance or efficiency or simply more BMWs than their neighbors. It is for this reason that intent is such a touchy subject in antitrust circles. In theory intent is not an element of an antitrust violation (except attempted monopolization[36]), but nevertheless in practice it seems to matter quite a bit.[37]

Some critics of traditional economic analysis in antitrust adjudication have relied heavily on empirical analyses of purportedly irrational behavior to suggest refinements in accepted antitrust economics.[38] The critics claim, in effect, that our models do not perfectly describe reality and thus we should wait for more information before administering conclusions based on our bounded information. This claim is restrained but also uninteresting; of course we would all prefer to know everything before undertaking costly actions. Nevertheless, taking into account human and physical limitations that may increase the risk that certain decisions will be wrong is an inherent part of even the standard economic models.[39]

The existence of uncertainty does not mean the model is wrong. Assertions that the model does not comport with reality might reflect a flawed model, or they might reflect a flawed interpretation. Foer, for example, suggests that "[t]he very fact that a high proportion of mergers fail may be an indication that the current paradigm, assuming rational profit maximizing, is flawed."[40] The qualification "may" may salvage the sentence, but the apparent claim is facially unsound: rational profit maximizing requires nothing more than a risk-adjusted expectation of an adequate return

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Foundations of Competition Policy, 12 GEO. MASON L. REV. 1, 11-23 (2003).

[36] *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

[37] *See, e.g., LePage's v. 3M*, 324 F.3d 141 (3d Cir. 2003) (finding exclusionary conduct on the basis, *inter alia*, of anticompetitive intent).

[38] *See, e.g.,* Tor, *supra* note 32, at 498.

[39] *See* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1553 (1998) ("The latter phenomenon ["positive information costs"] conventional rational-choice theory has no difficulty assimilating. Rationality does not imply omniscience. Indeed, it would be profoundly irrational to spend all one's time in the acquisition of information."). *See also* George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961); Milton Friedman, *The Methodology of Positive Economics*, *supra* note 33; Richard A. Posner, *Some Uses and Abuses of Economics in Law*, *supra* note 33.

[40] Foer, *supra* note 30, at 39.

ex ante. Actual failure—even a "high proportion" of it—is perfectly consistent with that.

It is not hard to be sympathetic with the desire to undertake an analysis of business behavior from inside the mind of the business actor. The difficulty is that such knowledge is feeble: Motivations, intentions and rhetoric simply do not render economic activity anticompetitive (or procompetitive) or otherwise socially detrimental (or beneficial).

A. Business vs. Efficiency

The disconnect between the economic analysis of antitrust adjudication and the business behavior of business people is in part attributable to this difference of perception by each group. Business people are boundedly rational.[41] They make mistakes, they focus on idiosyncratic things, they are limited in their capacity to collect and process information. Economic analysis is also bounded, but differently. Information is always costly and even scientific analysis may be flawed. And the many agents involved in the antitrust analysis—from economists to lawyers to regulators—are themselves bounded. It should not be surprising that economists and lawyers engaged in economic analysis utilize different language and different methodology than business people engaged in business. Economic analysis has the luxury of its removed position in time and place. It is, of course, imperfect, but not because it fails to map perfectly onto the language of the business person—steeped in the moment, constrained by time and financial pressure, and finding little value in the contemporaneous application of economic models.

Even where business people perform their own competitive analyses and express not only their aspirations but also their reasoned expectations of economic effect, these analyses are still at a disadvantage compared to the analyses performed by government agencies or litigants. No matter how well-performed, the business analysis is always at an informational disadvantage because, with few exceptions, business analyses must be performed solely on the basis of a firm's own information and publicly-available information. Businesses do not have access to highly-relevant economic data internal to other companies. In contrast, regulators and litigants enjoy the subpoena power, which gives them access to price, cost,

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[41] *See supra* notes 33-34; *see also* H.A. Simon, *Theories of Decision Making in Economics and Behavioral Science*, 49 AM. ECON. REV. 253 (1959).

capacity and other data for all industry participants. For this reason even a relatively well-informed business analysis is likely flawed, and whatever probative value it might have must be duplicative (and insignificantly so) of that inherent in a subsequent, economic analysis prepared for an enforcement determination or litigation.

And in the end, whatever business people think they are maximizing, whatever they do or wish to do, survival is ultimately measured in economic terms. Given the limitations on knowledge and intention, it is not surprising that business people would speak a different language and use a different methodology in order to achieve their desired results. But if strategic marketing theories and the like are tools for successfully inducing non-economists to maximize efficiency, then ultimately we are all on the same page.

This idea that business behavior serves efficiency, even when not consciously or explicitly in accord with the nominal postulates of neoclassical economics, is not new.[42] There is considerable affinity between this notion and the classical law and economics conception of efficient corporate behavior. Most modern corporate law scholarship espouses the contractarian viewpoint of corporate relationships, whereby corporate

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[42] The basic notion, underlying all traditional economic analysis, has its most prominent explication in Milton Friedman, *The Methodology of Positive Economics*, *supra* note 33, at 20-21:

> [U]nder a wide range of circumstances individual firm behave *as if* they were seeking rationally to maximize their expected returns (generally if misleadingly called "profits") and had full knowledge of the data needed to succeed in this attempt; *as if,* that is, they knew the relevant cost and demand functions, calculated marginal cost and marginal revenue from all actions open to them, and pushed each line of action to the point at which the relevant marginal cost and marginal revenue were equal. Now, of course, businessmen do not actually and literally solve the system of simultaneous equations . . . any more than leaves or billiard players explicitly go through complicated mathematical calculations or falling bodies decide to create a vacuum. . . .
>
> [U]nless the behavior of businessmen in some way or other approximated behavior consistent with the maximization of returns, it seems unlikely that they would remain in business for long. Let the apparent immediate determinant of business behavior be anything at all - habitual reaction, random chance, or whatnot. Whenever this determinant happens to lead to behavior consistent with rational and informed maximization of returns, the business will prosper and acquire resources with which to expand; whenever it does not, the business will tend to lose resources and can be kept in existence only by the addition of resources from outside. The process of "natural selection" thus helps to validate the hypothesis - or, rather, given natural selection, acceptance of the hypothesis can be based largely on the judgment that it summarizes appropriately the conditions for survival.

managers are subject to powerful market constraints on their activity.[43] This process drives inexorably toward greater efficiency (or greater shareholder welfare) not because corporate managers (or even corporate shareholders) know best how to achieve efficiency or shareholder welfare, but because those who fail to do so are punished in the market.[44]

The principle of accidental efficiency has its roots in an important article by Armen Alchian.[45] In *Uncertainty, Evolution and Economic Theory* Alchian challenges the notion of intended efficiency ("profit maximization" in his locution) and identifies evolution through trial-and-error as the source of long-term economic gain.[46] As Alchian notes, profit maximization as a predicate for efficiency-maximizing behavior makes little sense where economic actors are hampered by "imperfect foresight and human inability to solve complex problems containing a host of variables even when an optimum is definable."[47] He suggests instead "a Marshallian type of analysis combined with the essentials of Darwinian evolutionary natural selection."[48] Under this conception it is not necessary to ascribe to economic actors any prescience or superhuman facility. Instead each pursues whatever he chooses to pursue according to his own preferences and motivations, and the "impersonal market system . . . selects survivors: those who realize *positive profits* are the survivors; those who suffer losses disappear."[49]

Importantly, although Alchian recognizes that the behavior of managers

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[43] For one classic and expansive account, see FRANK H. EASTERBROOK AND DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

[44] *See, e.g.*, *id*. at 6 ("[S]elf-interested entrepreneurs and managers, just like other investors, are driven to find the devices most likely to maximize net profits. If they do not, they pay for their mistakes because they receive lower prices for corporate paper. . . . The firms and managers that make the choices investors prefer will prosper relative to others.").

[45] It has, perhaps, even deeper intellectual roots in the work of F.A. Hayek, particularly his essay, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (noting that central planning (either by government or by managers) is hampered by limits on information).

[46] Armen Alchian, *Uncertainty, Evolution and Economic Theory*, 58 J. POL. ECON. 211 (1950) *reprinted in* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK 15 (1977).

[47] *Id*. at 212, *reprinted in* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK at 17 (citing, e.g., G. Tintner, *The Theory of Choice under Subjective Risk and Uncertainty*, 9 ECONOMETRICA 298 (1941), and G. Tintner, *The Pure Theory of Production under Technological Risk and Uncertainty*, 9 ECONOMETRICA 305 (1941)).

[48] *Id*. at 213 note 7, *reprinted in* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK at 19, note 7.

[49] *Id*. at 213, *reprinted in* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK at 19-20 (emphasis in original).

may not be well-described by the classical, "full-information" model, he stresses that traditional economic analysis remains singularly useful in analyzing business activity:

> [T]he economist, using the present analytical tools developed in the analysis of the firm under certainty, can predict the more adoptable or viable types of economic interrelationships that will be induced by environmental change even if the individuals themselves are unable to ascertain them. That is, although individual participants may not know their cost and revenue situations, the economist can predict the consequences of higher wage rates, taxes, government policy, etc. . . . . [T]he economist need not assume that each participant is aware of, or acts according to, his cost and demand situation. These are concepts for the economist's use and not necessarily for the individual participant's, who may have other analytic or customary devices which, while of interest to the economist, serve as data and not as analytic methods.[50]

Judge Easterbrook echoes this evolutionary conception of welfare maximization and its relationship with economic analysis:

> Wisdom lags far behind the market. It is useful for many purposes to think of market behavior as random. Firms try dozens of practices. Most of them are flops, and the firms must try something else or disappear. Other practices offer something extra to consumers – they reduce costs or improve quality – and so they survive. In a competitive struggle the firms that use the best practices survive. Mistakes are buried.
>
> Why do particular practices work? The firms that selected the practices may or may not know what is special about them. They can describe what they do, but the why is more difficult. Only someone with a very detailed knowledge of the market process, as well as the time and data needed for evaluation, would be able to answer that question. Sometimes no one can answer it.[51]

The relevance for antitrust is clear: To the extent that antitrust analysis inquires into the business actor's motivations or evaluates suspect activity based on the business actor's own description, the answers must be unreliable and the conclusions foregone.[52]

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[50] *Id.* at 220–1, *reprinted in* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK at 34.

[51] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5 (1984) (citing Alchian and Becker).

[52] *See id.* at 4-6 (criticizing the "inhospitality tradition" in antitrust, whereby "judges view each business practice with suspicion, always wondering how firms are using it to harm consumers. If the defendant cannot convince the judge that its practices are an essential feature of competition, the judge forbids their use."). Since 1984 – when Easterbrook penned these lines – much has changed, and this characterization is undoubtedly too strong now. *See, e.g.*, William H. Page, *Antitrust Review of Mergers in Transition Economies: A Comment, With Some Lessons from Brazil*, 66 U. CIN. L. REV.

With this understanding, it is clear that the curricula of business schools and the rhetoric learned in those schools are irrelevant to antitrust analysis. Let us assume, *arguendo*, that business schools do educate people to strive for market power; that perhaps they do so in an environment that may not always stress the legal limits on such behavior; that business schools also teach students to behave as if they have full information,[53] and that there is a language and a culture that permeates business that originates in business schools.[54] Even assuming that the content of formal business education is

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1113, 1124 (1998) ("This approach is widely discredited in modern American antitrust because courts, recognizing the limits of their powers of evaluation and remediation, have come to respect the dynamism of the market, and to hesitate before prohibiting complex practices."). *But see* Alan J. Meese, *Price Theory, Competition and the Rule of Reason,* 2003 U. ILL. L. REV. 77, 143 ("This reliance upon a new economic paradigm led some to proclaim the death of the inhospitality tradition. The tradition is alive, if not entirely well, however.") (citation omitted). Agreement on this point is far from universal, and current efforts by some regulators and commentators to focus more concretely on "business explanations" for potentially anticompetitive conduct are indeed troublingly reminiscent of this tradition.

[53] A representative example of a business school experience:

> So what was lacking in my MBA program? Unconventional thinking. Variety. Substance. Sure I learned how to keep the books, how to evaluate risk and return, how to motivate employees, and all about the four P's of marketing. But a lot of that is bullshit. It is not what running a business is all about. It is really about making good fast decisions with limited information. They don't teach you that in business school (not at mine anyway). They act like you always have the information you need to make a decision.

"My MBA Experience," BusinessPundit.com, *available at* www.businesspundit.com/archives/001369.html (last visited February 20, 2005) (emphasis in original).

[54] There is no actual evidence to support this contention. Indeed, many business leaders have not attended business school. *See, e.g.,* Jeffrey Pfeffer & Christina T. Fong, *The End of Business Schools? Less Success than Meets the Eye*, 1 ACAD. OF MGMT. LEARNING & EDU. 1 (2002), *available at* http://www.aomonline.org/Publications/Articles/BSchools.asp (last visited February 21, 2005) (noting that MBAs are of little importance in predicting business success); Tom Neff & Dayton Ogden, *Anatomy of a CEO*, CHIEF EXECUTIVE MAGAZINE, Jan/Feb 2001, *available at* http://www.chiefexecutive net/depts/routetop/anatomyofaceo html (last visited February 21, 2005) ("37 percent of current Fortune 300 CEOs have an MBA, as compared to only 33 percent of 1999's Fortune 300 CEOs. The number declines to 28.5 percent among the remaining Fortune 700 companies." *See also* "But Can You Teach It?" THE ECONOMIST, May 20, 2004:

> Maybe that is why . . . a list of America's most-admired business leaders (Warren Buffett, Herb Kelleher, Michael Dell, Bill Gates, Jack Welch and Oprah Winfrey) contains not a single MBA. And that is in spite of the fact that a growing proportion of chief executives, at least in America, now has an MBA. A study by the Leadership Initiative at Harvard Business School found that about 10% of America's chief executives or founders of large companies had an MBA in the 1960s, compared with almost 60% in the 1990s.

insufficiently nuanced or even misguided, it does not follow that business itself is likewise impaired. As Alchian notes, in an adaptive, evolving environment, "decisions and criteria dictated by the economic *system* [are] more important than those made by the individuals in it."[55] Viewed from the perspective of economic natural selection, even a "misguided" MBA curriculum is perfectly intelligible: It should be judged not by its intentions but rather by its effects. If business people following business school prescriptions end up with relative efficiency, it matters little that they did so attempting to achieve the purportedly taught goal of market domination. Their relative success is enough to perpetuate the maligned curriculum. Moreover, given the very limitations on knowledge that some commentators point to, there is no reason to believe that even a pervasive ethos (whether in business school or in business itself) of market dominance is actually attainable by those who pursue it. It is hard to know how to be efficient; it is hard to know how to attain lasting dominance, as well.

B. Economics vs. Law

But does an antitrust analysis, itself steeped in the "perfect competition" models of neoclassical economics, fail to capture the reality of underlying business where business people are trained in anti-economic models and are successful only in spite of the absence of perfect information in the environment in which they operate?

A fundamental distinction between antitrust law along with its attendant methodology and business planning along with its methodology is that the former is inherently retrospective and the latter prospective. Antitrust analysis and adjudication entails an ex post economic analysis of some challenged business behavior. In merger cases subject to pre-merger review, this analysis may be nominally prospective (that is, it may be undertaken prior to the consummation of the proposed merger), but even here the analysis reflects upon an already-considered business decision (the decision to merge) and utilizes historical information. In other words, the business person considering a potential business action lacks the knowledge of his own condition (and *a fortiori* the knowledge of the actual outcome of his decision) sufficient to make a purposefully-maximizing decision; the economist evaluating business decisions, although surely bound by other

[55] Alchian, *supra* note 46, at 213, *reprinted in* ARMEN A. ALCHIAN, ECONOMIC FORCES AT WORK at 19.

constraints, at least has the benefit of informed hindsight and greater information.

To some degree, the desire to use readily-available and conceptually uncomplicated information to settle antitrust disputes is understandable. But it is simply unreliable as a means of enforcing the antitrust laws. As one influential treatise notes:

> Unfortunately the world we live in is characterized by flawed and incomplete information and decision processes that are both imperfect and very costly. To be sure, we may well be able to articulate numerous factors that could be relevant to the competitive consequences of any merger. . . . But assigning weight or significance to individual factors in a real case poses enormous difficulties, both empirical and conceptual. For that reason, the effort to employ many factors often degenerates into a focus on a key fact supplemented by loose and usually unpersuasive talk about other evidence, some relevant and some not.[56]

Moreover, consistent with the economic goals of antitrust, the Supreme Court has warned that the mistaken punishment of competitive conduct is "especially costly, because [it] chill[s] the very conduct the antitrust laws are designed to protect."[57] Antitrust law cannot condemn efficient practices on the ground that they are accompanied by expressions of animus toward a competitor or by the use of terms such as "market," "dominance" or "entry barrier." Rather, antitrust must be based on clearly articulated and non-arbitrary rules to guide businesses without stifling competition. As the Second Circuit stated when it adopted the bright-line Areeda-Turner test of predatory pricing: "Especially when the costs of a misjudgment are high and the prevalence of the conduct the law seeks to deter is low, simpler rules are preferable . . .. Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote."[58]

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[56] 4 AREEDA, & HOVENKAMP, ANTITRUST LAW ¶ 905c, at 31 (rev. ed. 1998).

[57] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). The Court has reaffirmed its belief that caution must be exercised in the application of the antitrust laws to potentially-welfare-enhancing behavior (in this case, application of Section 2 to a competitor's refusal to deal):

> "Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.' *United States v. Microsoft Corp.*, 253 F. 3d 34, 58 (D.C. Cir. 2001) (en banc) *(per curiam)*. . . . The cost of false positives counsels against an undue expansion of § 2 liability."

Verizon Comm., Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 414 (2004).

[58] *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 651 F.2d 76, 88 (2d Cir.

In terms of both evidentiary rules and common sense, courts should refrain from using potentially unreliable, confusing or prejudicial documents unless their probative value outweighs their deleterious effect. The mere assertion that business documents are probative of such inherently economic antitrust issues as market definition, monopoly power or anticompetitive effects is insufficient. In fact, there are systemic reasons why such documents are unlikely to be probative, and likely to be misleading. While bad documents may sometimes be taken on their face, and business documents can be useful in demonstrating "economic realities" relevant to making out an antitrust case, there is also a serious Type I (false-positive) error risk to their use in proving antitrust injury.[59]

Antitrust rules – like all legal rules – are applied under conditions of imperfect information: We can never be sure ex ante whether the adoption and application of a particular standard of review will tend to deter inefficient conduct sufficiently to offset both the cost of enforcement as well as the cost of efficient conduct deterred.[60] The particular problem in antitrust review is that the line between anticompetitive and pro-competitive behavior is exceedingly murky, and the cost of over-deterring the latter exceedingly high.

1981). *See also ADVO, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1197 (3d Cir. 1995); *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, at 231-32, 236 (1st Cir. 1983) ("There is also general agreement that the antitrust courts' major task is to set rules and precedents that can segregate the economically harmful price-cutting goats from the more ordinary price-cutting sheep, in a manner precise enough to avoid discouraging price-cutting activity."); BORK, *supra* note 14, at 81; Easterbrook, *supra* note 14, at 5; Edward A. Snyder & Thomas E. Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 553, 596 (1991); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972, 977 (1986).

[59] "Type I error refers to a 'false positive,' analogous in the legal context to mistakenly imposing liability on an innocent defendant. Type II error is a 'false negative,' or failing to punish a guilty party." Fred. S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Antitrust Law*, 52 EMORY L.J. 1401, 1412-13 (2003) (noting that the Type I errors in antitrust impose substantially larger costs than Type II errors because there is no market corrective for the former).

[60] This is the central trade-off at issue in all legal adjudication:

> In a world where error has not been banished, an optimal framework of legal rules minimizes the overall expected cost of error by making tradeoffs among different types of error and different costs – tradeoffs that would be unnecessary in an error-free regime. For example, given a choice between two rules, one with a high probability of a false acquittal and the other with a high probability of a false conviction, error costs may be minimized by choosing the rule with the higher false acquittal rate if the cost of a false acquittal is smaller than that of false conviction.

Ronald A. Cass and Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 695-6 (2001).

III. THE BUSINESS DOCUMENT VS. ECONOMICS

Notwithstanding the ascension of economics in antitrust analysis and increasing recognition of the dangers of false positives,[61] antitrust regulators and courts have been open to accepting evidence of all types.[62] In particular, courts have relied on business documents in deciding disputes and the discovery process is dominated by the search for the proverbial "smoking gun" evidence.[63] Unfortunately, a number of antitrust cases demonstrate that "smoking gun" evidence is frequently not given a very nuanced analysis. These cases ignore the distinction between using business documents to *establish economic facts* and using business documents to *create the impression that the particular words used by a defendant are themselves analytically relevant*.

There are at least three types of "hot docs" of interest to antitrust regulators and plaintiffs. The first type is documents containing accounting information. This is (as all accounting must be) a largely impressionistic – yet quantified – analysis of a wide range of internal relationships and cost assumptions. Internal accounting information can make or break an antitrust case by suggesting narrow or broad markets, by supporting or undermining contentions of existing levels of market concentration, or by demonstrating or defeating claimed efficiencies resulting from a prospective merger.

The second type of document is those that characterize "markets." These are typically business plans, presentations and offering memoranda in which business people describe the "markets" in which they compete and the position of their firm in those markets. In general, the markets identified in these documents reflect internal hierarchies and corporate and geographic divisions necessitated by centralized decision-making.

The third type of document of interest to antitrust regulators is those

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[61] *See* McChesney, *supra* note 59 at 1413-14 (and cases cited therein).

[62] "The general rule favoring admissibility of evidence is particularly applicable to antitrust cases where the liberal reception of evidence [may be] necessary for the just determination of singularly complex disputes." *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 40 F.R.D. 96, 100 (N.D. Ill. 1966); *see also United States v. E.I. Du Pont De Nemours & Co.*, 126 F. Supp. 27, 29 (N.D. Ill. 1954) (in antitrust cases "broad discretion and great latitude toward the reception of evidence should be exercised").

[63] *See* Spencer Weber Waller, *The Use of Business Theory*, *supra* note 3 at 122 (2003) ("Too often, discovery focuses on the location of the so-called 'smoking gun' which is touted as the key to the case by plaintiffs, and dismissed by the defendants as either just locker room talk by lower level employees or dismissed outright as legally or economically irrelevant.").

that contain intent information. This is – like accounting data – impressionistic information. Intent information, unlike accounting information, however, relates to corporate actors' states of mind rather than an accountant's perception of a firm's economic state. It may cast a legally ambivalent, but practically very significant, overarching pall on the conduct at issue.

The use of all three types of documents is troubling. Accounting evidence, while legally more relevant than intent evidence, is itself subject to important and overlooked limitations. If accounting evidence really demonstrated what it is believed to demonstrate it would be unambiguously useful in antitrust litigation. That it does not is a problem, made all the more troublesome because it is not perceived as such. Market-characterizing documents are similarly misleading. The term is heavily context-dependent (a fact often overlooked by antitrust authorities and courts), and the mischief occasioned by blurring unrelated uses of the term is substantial. Finally, intent is not an element of antitrust causes of action (except in attempt to monopolize cases arising under Section 2 of the Sherman Act) – at least not nominally.[64] But evidence of intent plays an important – and, again, misleading – role in actual antitrust adjudication, nevertheless.

A. Accounting Documents

Accounting information is tailored for certain audiences. This fact alone should suggest its limited utility for antitrust analysis. Information adduced for the benefit of equity investors, for example, is geared to enable them to project future cash flows using backward-looking balance sheets and income statements.[65] This information need not be intrinsically wrong for it to be misleading in antitrust adjudication. In particular, the assumptions made by

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[64] *See Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

[65] *See, e.g.,* GEORGE BENSTON, ET AL., FOLLOWING THE MONEY: THE ENRON FAILURE AND THE STATE OF CORPORATE DISCLOSURE 5-7 (2003). Firms know this as well, and this knowledge, interestingly, adds another wrinkle. To the extent that firms seek to manipulate information, there may be a strong incentive to do so along this dimension in the interest of raising capital and, not incidentally, the value of existing equity (some of which may be owned or optioned by corporate managers themselves). *See* George J. Benston, *The Validity of Profits-Structure Studies with Particular Reference to the FTC's Line of Business Data*, 75 AM. ECON. REV. 37, 40 (1985) ("[I]t may be that executives who manage lines of business with large market shares are compensated, in part, with a share of accounting profits. In a particular year, they (and their bosses) may find it desirable to show larger profits.").

an accountant in amassing, assessing and presenting this data for investors, particularly with respect to determinations of "fair market value" and cost allocations, yield results different than those that would obtain with different assumptions. These assumptions are merely an indeterminate but intrinsic aspect of accounting.[66] Balance sheets and other measures of historical values are also themselves necessarily inaccurate:

> [M]any balance sheet numbers do not reflect current values well and often are subject to substantial errors of measurement. For example, fixed assets, such as buildings and equipment, are stated at their original (historical) costs less depreciation. These numbers are not adjusted for changes in price levels. They do not measure the cost of replacing the assets, the value of the fixed assets to the company, or the amounts that could be obtained if these assets were sold.[67]

As the FTC's (now defunct) line of business data gathering program in the late 1970s demonstrates, there has long been a presumption among antitrust regulators (and many others) that accounting data actually reflect economic values.[68] The program, which collected accounting data from 450 companies on their revenues, expenses and assets, allocated to 267 FTC-designated lines of business, sought to assist in the assessment of actual industry performance and the determination of the extent, in particular later cases, of monopoly power.[69] Firm level data contained in annual reports

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[66] Ronald Coase, in his characteristically colorful fashion, describes his introduction to accounting in university:

> Take accounting. We were told about the different but acceptable ways in which depreciation or the cost of materials taken from stock could be calculated, or the value of goodwill determined. This was extremely flexible. It never seems to have bothered these accountants that these different procedures all resulted in different profit figures. It was a perfect course for an Enron accountant.

Ronald Coase, Centennial Coase Lecture delivered at the University of Chicago Law School, [April 1, 2003], *available at* http://www.law.uchicago.edu/events/coase_lecture html (last visited, February 20, 2005).

[67] BENSTON, ET AL, *supra* note 65 at 38. Where these problems are "corrected" by fair-value accounting (in those cases where actual market values are unavailable), the fair values are themselves suspect. Fair values determined without reference to market values are subject to manipulation for capital-raising and stock-value-increasing reasons. The SEC's mandatory disclosure requirements have been criticized for exacerbating this tendency by cloaking inherently suspect numbers in a veneer of respectability where it may not be deserved. *See, e.g.*, id. at 38-41. *See also* George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132, 137 (1973).

[68] *See* FEDERAL TRADE COMMISSION, STATISTICAL REPORT: ANNUAL LINE OF BUSINESS REPORT, 1974 (1981).

[69] Benston, *Validity of Profits-Structure Studies, supra* note 65, at 38. On the aims of the FTC program generally, see William Breit & Kenneth G. Elzinga, *Information for Antitrust and Business Activity: Line-of-Business Reporting, in*, THE FEDERAL TRADE

and SEC submissions continues to be scrutinized.[70]

But accounting data bears, at best, a coincidental relationship to economic reality.[71] And although, in theory, the difference between accounting numbers and true economic value can be determined, if only the direction and the magnitude of the biases of accounting data are known, the reality is that they cannot. The problem is that "differences between accounting measures and economic market values are likely to be significant and very difficult (in many important instances, impossible) to determine."[72] "[T]he use of accounting profit data as a proxy for economic profit presumes a coherence between accounting numbers and economic value that does not exist."[73] As a result, "there is no way in which one can look at accounting rates of return and infer anything about relative economic profitability or, a fortiori, about the presence or absence of monopoly profits."[74]

That accounting data differ from economic market values is well-known (although quite often disregarded). Unless systematic biases may be identified and corrected for,[75] accounting data are of questionable value in determining economically-significant matters of the type relevant to antitrust analysis. Among the reasons for the divergence in values are:

1. Accounting rules seek *uniformity*, often at the expense of descriptive *accuracy*. Accounting rules are narrow conventions that serve consistency; they are not (despite their name)

COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR 98 (KENNETH W. CLARKSON AND TIMOTHY J. MURIS, EDS., 1981); George J. Benston, *The Federal Trade Commission's Line of Business Report Program: A Benefit-Cost Analysis in* BUSINESS DISCLOSURE: GOVERNMENT'S NEED TO KNOW 58 (HARVEY GOLDSCHMID, ED., 1979) .

[70] *See* the FTC's Bureau of Economics repots collected at http://www ftc.gov/be/econrpt.htm (last visited February 28, 2005).

[71] *See generally*, Franklin M. Fisher & John J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 AM. ECON. REV. 82 (1983); George J. Benston, *Accounting Numbers and Economic Values*, 27 ANTITRUST BULL. 161 (1982); Breit & Elzinga, *supra* note 69.

[72] Benston, *Validity of Profits-Structure Studies*, *supra* note 65 at 39. Benston goes on to demonstrate why large accounting profits may correlate with high market concentration even where causation is entirely absent. *See Id.* at 39-52.

[73] Breit & Elzinga, *supra* note 69, at 98, 104. *See also generally*, Benston, *Accounting Numbers*, *supra* note 71.

[74] Fisher & McGowan, *supra* note 71, at 90.

[75] Benston quite compellingly explains why this caveat is almost never overcome. *See* Benston, *Validity of Profits-Structure Studies*, *supra* note 65. For a contrary view, see F.M. Scherer, et al., *The Validity of Studies with Line of Business Data: Comment*, 77 AM. ECON. REV. 205 (1987). And for a reply, see George J. Benston, *The Validity of Studies with Line of Business Data: Reply*, 77 AM. ECON. REV. 218 (1987).

principles aimed at fostering perfect description.[76]

2. Accountants do not record the economic value of a purchased asset, but rather its purchase price—a value which likely systematically *understates* real economic value.[77]
3. Accountants (following GAAP rules) record amounts expended on intangible assets as expenses and do not capitalize the value of such assets.[78]
4. Inventory accounting does not record the cost of goods sold at their opportunity costs and thus diverges from economic value. Relatedly, the use of standard costing to assign company-wide or overhead costs to manufactured inventory is arbitrary "because there is no conceptually meaningful way to assign costs that . . . are joint among outputs."[79]
5. "Intrafirm transfers that are not priced at the opportunity value of the goods impart a mismeasurement of the sales of the sending business unit and the expenses of the receiving unit."[80]
6. Finally and importantly for data segregated by lines of business, the FTC-defined "markets" (following the Standard Industrial Classifications or North American Industrial Classification System[81]) "conform very poorly to the economic definition of

[76] "Traditionally, uniformity of standards and detailed rules have been championed because they allegedly enhance credibility. . . . Yet increasing uniformity also decreases the flexibility of management in making accounting choices . . . . In other words, compulsory uniformity of standards or detailed rules constrains managers' ability to "best" convey their superior knowledge about the past, present, and future. Restricting [the manager's] choice to a single method or even to a specific menu of such methods limits his ability to convey truthful information if he has incentives to do so." Joshua Ronen, *Post-Enron Reform: Financial Statement Insurance, and GAAP Re-visited*, 8 STAN. J. L. BUS. & FIN. 39, 62 (2002).

[77] Benston, *The Validity of Profits-Structure Studies*, *supra* note 65, at 43. *See also Id.* at note 13 (referring to economists such as James Buchanan who "believe that economic values (particularly costs) cannot be measured conceptually, since they depend on subjective evaluation of alternatives"). Economic value must be greater than or equal to market value (purchase price) or else an exchange would not occur. The consistent use of market value will thus undervalue the economic worth of these assets. Moreover, the extent of the undervaluation is impossible to determine.

[78] *Id*. at 45. They do so because of the inherent ambiguity in valuing such assets and the attendant opportunity for manipulation, but whatever the reason, the resulting values are plainly divergent from true, economic value.

[79] *Id*. at 46.

[80] *Id*. at 49. This discrepancy becomes significant when evaluating, say, mergers between units of companies operating in multiple lines of business.

[81] *See* 66 Fed. Reg. 23561 (May 9, 2001) (announcing the use of NAICS for companies reporting business activities in accordance with a required HSR filing).

markets."[82]

Importantly, even despite the immeasurable discrepancy between accounting and economic value, firms do use and find valuable accounting data. In large measure the reason for this is that the numbers are useful for internal accountability, organization and decision-making. Accounting data are also, as noted, useful for investors, at least because audited financials signal to prospective and existing investors that an audit has been performed and because they provide some information that can be mentally adjusted by insiders or knowledgeable analysts to conform with economic reality.[83]

The upshot of all this accounting noise is that evidence based on these data and purporting to demonstrate anticompetitive conduct may demonstrate nothing at all:

> There is, however, no economically defensible way of dividing [joint] costs up among the firm's various products. As is well known, all methods for the allocation of common fixed costs are arbitrary. Before the courts or regulatory agencies, ATC (fully allocated costs) are always manipulated to produce whatever answers are desired by the party that puts them forward. Moreover . . . the amounts by which these contrived cost figures can easily be manipulated is enormous.[84]

And the discrepancies between accounting and economic values pose a particular problem for market definition. Where a firm is engaged in multiple lines of business, or participates in multiple markets simultaneously, supracompetitive profits and other presumed results of prospective mergers within one of those multiple markets, based on available accounting data, are necessarily suspect because any evidence must be based on an arbitrary allocation of costs across markets. Although these divergences may well be in the direction determined by the reviewing agencies (and even of greater magnitude), there is no way to determine this from the data itself.[85]

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[82] Benston, *Reply, supra* note 75, at 218 (citations omitted). Benston's comments refer particularly to the Commerce Department's Standard Industrial Classifications, used by the FTC until 2001 and functionally similar to the NAICS.

[83] *See, e.g.,* Benston, *Accounting Numbers*, *supra* note 71, at 211-215.

[84] William J. Baumol, *Predation and the Logic of the Average Variable Cost Test*, 39 J. L. ECON 49, 51 (1996) (citation omitted). *See also*, Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory – And the Implications for Defining Costs and Market Power*, 112 YALE L. J. 681, 730 n. 145 (2003) (noting that "as an economic matter, any allocation of joint production costs is inherently arbitrary"). *But see* Roman L. Weil, Jr., *Allocating Joint Costs*, 58 AM. ECON. REV. 1342 (1968) (suggesting the possibility of a rational (if cumbersome) method of joint-cost allocation).

[85] *See especially* Breit & Elzinga, *supra* note 69, at 105-109 and sources cited therein. In particular, Breit & Elzinga quote a study by Robert K. Mautz and K. Fred Skousen, which in turn quotes a corporate executive responding to their survey:

> In many cases the method used to allocate costs . . . can have an extremely

The use of accounting data in assessing the likelihood of post-merger entry is similarly problematic.[86] The ease of entry is determined with reference to barriers to entry and the "contestability" of markets.[87] Likelihood of entry is gauged by the attractiveness of entry from the point of view of the potential competitor's profit expectations. The easier and more likely entry is, the less likely a potential monopolist will be able to exercise monopoly power.[88] And it is thus assumed that the existence of profits signals prospective entrants to enter and likewise signals the existence of monopoly rents in the absence of entry.

But "[p]rofits are likely to be poor signals for entry. The appearance of industry profits (in the accounting sense) is not, in itself, an inducement to entry."[89] Rather, firms "maximize returns to entrepreneurial capacity,"[90] a highly subjective endeavor. In other words, firms allocate resources to production in a market when they anticipate that their resources will receive a higher return in that capacity than if they are otherwise employed. This return is dependent on the firm's managers' expectations about their intrinsic abilities to manage, to manufacture, to innovate – in short, to be entrepreneurial.[91] Prospective entrants do not presume to operate with the

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> important effect on the income reported for each of the units involved. High profits and rates of return on one unit . . . can be reversed in many cases merely by changing the method of cost allocation. . . . In light of this it would be possible for a company to manipulate the results to create the impression that they wish to convey.

Robert K. Mautz & K. Fred Skousen, *Common Cost Allocation in Diversified Companies*, FINANCIAL EXECUTIVE (June 1968) 15, 15, cited in Breit & Elzinga, *supra* note 69, at 108. *See also* Benston, *Accounting Numbers*, *supra* note 71, at 190-205.

[86] Entry is important in antitrust analysis because the threat of post-merger entry, exacerbated by the attractiveness of putative monopoly pricing, may ameliorate the negative price effect of a merger: "A merger is not likely to create or enhance market power or to facilitate its exercise, if entry into the market is so easy that market participants, after the merger, either collectively or unilaterally could not profitably maintain a price increase above premerger levels." Merger Guidelines, *supra* note 11, at §3.0.

[87] *See generally* WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982). A contestable market is one in which the threat of entry constrains the behavior of market actors and ensures a "normal rate of profit" even where incumbent competition is scarce. *See* Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WISC. L. REV. 1035, 1040-41.

[88] More directly, where entry is easy and likely, a monopolist will not be able to maintain a "small but significant, non-transitory increase in price." Merger Guidelines, *supra* note 11, at §3.0.

[89] Breit & Elzinga, *supra* note 69, at 116.

[90] *Id*. at 117.

[91] *Id*. at 115 (citing MILTON FRIEDMAN, PRICE THEORY 105 (1976)).

same entrepreneurial capacity as existing market participants. As a result, the existence of accounting profits, which are inherently subjective and critically dependent on assumptions about entrepreneurial capacity, are, in and of themselves, little inducement to potential competitors. Nor does the existence of elevated returns (where they can be effectively identified) necessarily result from the absence of prospective entrants or from the illegal wielding of market power.[92] While it may be convenient to rely on existing industry accounting data to assess the likelihood and likely impact of post-merger entry, this reliance is misplaced.

B. Market Definition Documents

The business documents problem is particularly acute in the area of market definition. Market definition itself has come to define antitrust adjudication, and cases (and investigations that never make it to litigation) frequently turn on market definition. The first step of antitrust analysis is defining the relevant product and geographic markets. Outside of the limited number of per se illegal offenses, market definition is, in the words of the Supreme Court, a "necessary predicate" to deciding whether conduct violates the antitrust laws.[93] The plaintiff carries the burdens of proof and

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[92] *See especially* Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. LAW & ECON. 1 (1973) (noting that high rates of return do not necessarily indicate inefficient markets, and that high concentration does not necessarily indicate inefficiency). *See generally* YALE BROZEN, CONCENTRATION, MERGERS, AND PUBLIC POLICY (1982).

[93] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593 (1957). *See also*, *e.g.*, *Retina Associates, Inc. v. Southern Baptist Hospital of Florida*, 105 F.3d 1376, 1384 (11th Cir. 1997) ("to establish potential anticompetitive effect amounting to a violation of Section 1 under the rule of reason, . . . [plaintiff] must show that the defendants possess market power . . . in properly defined geographic and product markets."); *U.S. Anchor Mfg., Inc. v. Rule Industries,* 7 F.3d 986, 994 (11th Cir. 1993) ("Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization or attempt[ed monopolization] case . . .."); *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1579 (11th Cir. 1985) ("Proof of the relevant product and geographic market is absolutely essential . . .."); *Gough v. Rossmoor Corporation*, 585 F.2d 381, 385 (9th Cir. 1978) ("the fact that the conduct restrained trade in a relevant market is an essential part of a plaintiff's case"); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 922 F. Supp. 1055, 1060 (E.D. Pa. 1996), *aff'd*, 124 F.3d 430 (3rd Cir. 1997) ("to state a Sherman Act claim under either § 1 or § 2, a plaintiff must identify the relevant product and geographic market"); ABA Section of Antitrust Law, Antitrust Law Developments 59 (4th Ed. 1997) ("[W]ithout defining the relevant market, there is no meaningful context within which to assess the restraint's competitive effects.") (footnote omitted).

persuasion regarding market definition,[94] and "[o]bviously, the narrower the market defined by plaintiffs, the easier it is to show possession of monopoly power in the relevant market."[95] Thus, the definition of the relevant market can be dispositive of antitrust cases.[96]

We contend that non-economic sources of information (of the sort called for by the *Brown Shoe* decision's "practical indicia"[97]) do not illuminate the analysis, but rather serve to obscure it. Even placed into a conceptual framework in harmony with business school strategic planning curricula, such information, upon which antitrust cases are frequently won or lost, do not provide economically meaningful information. Principally, to the extent that they reflect strategic, organizational or accounting elements of running a business they remain, as we have suggested, either irrelevant or aspirational. Market definition is, simply, an economic concept:

> "In [section two] cases, the search for 'the relevant market' must be undertaken and pursued with relentless clarity. It is, in essence, an economic task put to the uses of the law. Unless this task is well done, the results will be distorted in terms of the conclusion as to whether the law has been violated and what the decree should contain."[98]

The fact that the *sine qua non* of antitrust enforcement is market definition is itself indicative of the challenge of making out purely economic cases.[99] As Posner notes, elasticity alone, if knowable, ought to be enough to make out an antitrust case: "If we knew what would happen if a group of sellers raised their prices . . . it would be redundant to ask whether the group constituted an economically meaningful market."[100] But, of course, we are

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[94] *See*, *e.g.*, *United States v. Baker Hughes*, 908 F.2d 981, 982-83 (D.C. Cir. 1990); *United States v. Engelhard Corp.*, 970 F. Supp. 1463, 1466 (M.D. Ga. 1997), *aff'd*, 126 F.3d 1302 (11th Cir. 1997).

[95] *Belfiore v. New York Times Co.*, 654 F. Supp. 842, 846 (D. Conn. 1986).

[96] "[M]arket definition generally determines the result of the case." *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 469 n.15 (1992). *See also*, *e.g.*, *FTC v. Staples*, 970 F. Supp. at 1073 ("As with many antitrust cases, the definition of the relevant product market in this case is crucial. In fact, to a great extent, this case hinges on the proper definition of the relevant product market."); *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998) ("Defining the relevant market is critical in an antitrust case because the legality of the proposed mergers in question always depends upon the market power of the parties involved."); *U.S. v. Sunguard Data Systems*, 172 F. Supp. 2d 172 (D.D.C. 2002) ("Not only is the proper definition of the relevant product market the first step in this case, it is also the key to the ultimate resolution of this type of case, since the scope of the market will necessarily impact any analysis of the anticompetitive effects of the transaction.").

[97] See *infra* notes 115-27 and accompanying text.

[98] *United States v. Grinnell*, 384 U.S. 563, 587 (1966) (Fortas, J. dissenting)

[99] *See, e.g.,* POSNER, ANTITRUST LAW 2ND , *supra* note 17, at 147-48.

[100] *Id.* at 147. The increasing use of merger simulations, some of which are performed

limited in our ability to know—constrained by bounded rationality—and we are thus relegated to less-determinate methods of interpreting economic activity. Market definition proscribes an artificial limit to the extent of knowledge needed to interpret certain economic activity; that is, it defines a denominator and permits use of concentration measures to make out an antitrust case (whether monopolization or merger enforcement).[101]

But "the belief that market definition can usually be done precisely and that it can be a precise tool for analysis is mistaken. It is at best a crude guide,"[102] and accurately defining this circumscribed area remains a challenge. In the first place, economic market definition entails identifying both demand- and supply-side effects.[103] On the demand side, this requires the identification of a group of marginal consumers and identification of the effect on this group of a hypothetical price change. On the supply side, it requires the identification of actual and potential competitors—suppliers of the product or products currently consumed by the identified group, as well as those products that are or could be substitutes for the product or products being consumed. This identification itself rests on the presence and degree of substitution—substitution in response to a marginal price increase which would vitiate the potential gains from collusion (or monopolization)—consigning us once again to the world of economics.

Much antitrust analysis reflects a disregard for the notion that market

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without requiring the delineation of relevant markets, may be a step in this direction. "Part of the promise of using empirical methods in merger analysis is that they make market definition less important. Indeed, if a merger can be shown directly to harm competition, antitrust should not need to spend much effort on market definition – a great benefit when the array of products are broad and seamless, making market definition difficult." Jonathan B. Baker, *Contemporary Empirical Merger Analysis*, 5 GEO. MASON L. REV. 347, 351 (1997). *See also* Gregory J. Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy*, 5 GEO MASON L. REV. 363 (1997).

[101] "There is no subject in antitrust law more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify – for working purposes – the very complex economic interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1993) (citing *U.S. v. E.I. du Pont De Nemours & Co,* 351 U.S. 377 (1956)).

[102] Dennis W. Carlton, *Using Economics to Improve Antitrust Policy*, forthcoming in Columbia Business Law Review (Handler Lecture), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=558363.

[103] The Merger Guidelines bifurcate this analysis, first defining the product and geographic markets with reference to demand effects, Merger Guidelines, *supra* note 11, at §§1.1-1.22, and then identifying "firms that participate in the relevant market" through supply effects, *id.* at §1.3.

definition analysis is a means and not an end.[104] As an end in itself, it is quite misleading, and the myopic focus on market definition has served to further divorce it from its underlying economic significance. Rather than viewing market definition in its true, limited and pointed sense, some have come to see it as something to be determined independent of its function. It has hence become a stepping stone *away* from economic reality rather than a necessary and limited tool to obtain it. The focus on business rhetoric and accounting data to make out market definition serves to exacerbate this tendency, and further severs the reality from the practice.

The Supreme Court, in *Brown Shoe v. United States*,[105] articulated the legal test for determining the relevant product market by stating that the "outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[106] A properly-defined product market includes all items "reasonably interchangeable by consumers for the same purpose."[107] Products do not necessarily need to be identical in order to be included within the same product market.[108] The analysis typically is broader, looking to whether items are considered by consumers as adequate substitutes for one another.[109] In addition to defining the relevant product market, courts must also define the relevant geographic market, "that geographic area to which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition."[110]

The Merger Guidelines provide the following procedure for defining a

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[104] See, for example, the characterizations quoted in note 93, *supra*. Moreover, this evidence is further clouded by the limitations inherent in imperfect enforcement and adjudication. "[W]hen lawyers and judges take hold of the concept [of market definition], they impose on it nuances and formulas that reflect administrative and antitrust policy goals. This adaption is legitimate (economists have no patent on the concept), but it means that normative and descriptive ideas become intertwined in the process of market definition." *U.S. Healthcare.*, 986 F.2d at 598.

[105] 370 U.S. 294 (1962)

[106] *Id.* at 325.

[107] *du Pont*, 351 U.S. 377.

[108] *See, e.g., du Pont*, 351 U.S. at 393 (it is not "a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market"); *Olin Corp. v. FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993) (recognizing "that products need not be fungible to be considered in the same market").

[109] *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 307 (7th Cir. 1976) (recognizing that "any test which ignored the buyers and focuses on what sellers do or theoretically can do is not meaningful in determining a relevant product market.") (internal quotations omitted).

[110] *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995) (internal quotations omitted).

relevant market:

> Absent price discrimination, the Agency will delineate the product market to be a product or group of products such that the hypothetical profit-maximizing firm that was the only present and future seller of those products ("monopolist") likely would impose at least a "small but significant and nontransitory" increase in price. That is, assuming that buyers likely would respond to an increase in price for a tentatively identified product group only by shifting to other products, what would happen? If the alternatives were, in the aggregate, sufficiently attractive at their existing terms of sale, an attempt to raise prices would result in a reduction of sales large enough that the price increase would not prove profitable, and the tentatively identified product group would prove to be too narrow.
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> * * *
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> In considering the likely reaction of buyers to a price increase, the Agency will take into account all relevant evidence, including, but not limited to, the following:
>
> i. evidence that buyers have shifted or have considered shifting purchases between products in response to relative changes in price or other competitive variables;
>
> ii. evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables;
>
> iii. the influence of downstream competition faced by buyers in their output markets; and
>
> iv. the timing and costs of switching products.[111]

This test and similar approaches to market definition acknowledge that antitrust markets can include firms that are *not* currently competing in the sale of the goods at issue. "Those who can readily shift into offering such [competing] product are in the market."[112] In the parlance of the Merger Guidelines, such firms are "uncommitted" entrants.[113] Because such entry is premised on a *hypothetical* price increase by a *hypothetical* monopolist, business people dealing with day-to-day business issues cannot be expected to include uncommitted entrants in their use of the term "market" or in their memos, pie charts, SWOT (strengths, weaknesses, opportunities and threats) analyses and the like. Thus, business use of technical terms such as

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[111] Merger Guidelines, *supra* note 11, at § 1.11.

[112] 2A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶530a, at 180 (2002).

[113] Merger Guidelines, *supra* note 11, at § 1.0.

"market" is divorced from the economic use of the same word. Indeed, dictionaries offer several definitions of this term, none of which encompass the results of the Merger Guidelines test.[114]

Consistent with this, business people employ the term "market" for numerous reasons and with different meanings, often very different from the true economic use of the term. "Market" for business purposes can mean: product, brand, segment, sector, customer base, customer group, customer type, channel of distribution, city, state, country, region, area of responsibility, or corporate division. Because of the multitudinous variations, how a business person uses the term "market" is meaningless for antitrust purposes.

This problem of the disjunction between the business meaning of "market" and the antitrust meaning is exacerbated by the fact that in the *Brown Shoe* case, the Supreme Court promulgated the notion of a "submarket" and set forth "practical indicia" for defining submarkets which include "industry or public recognition of the []market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[115] Some commentators and courts believe that the practical indicia are useful, if imperfect, measures of relevant antitrust markets in making out a structural argument to challenge a proposed merger.[116] Some courts see the reasonable substitutability test for a market as simply the first step of the analysis, and the *Brown Shoe* factors as the second, narrowing step.[117] Other courts have acknowledged that a

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[114] Among the ten definitions offered in the AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), definition 4d comes closest: "A subdivision of a population considered as buyers." Other definitions, each of them likely intended at some time or another in business discourse, include "A place where goods are offered for sale," "The opportunity to buy or sell; extent of demand for merchandise," and "A geographic region considered as a place for sales."

[115] *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962). Note also that the Merger Guidelines incorporate a similar (but more nuanced) element, permitting "evidence that sellers base business decisions on the prospect of buyer substitution between products in response to relative changes in price or other competitive variables" in determining the extent of demand-side substitution. Merger Guidelines, *supra* note 11, at § 1.11.

[116] "There should be little controversy about the *Brown Shoe* practical indicia to the extent they are used as proxies for demand and supply substitutability." Jonathan B. Baker, *Stepping Out in an Old Brown Shoe: In qualified Praise of Submarkets*, 68 ANTITRUST L. J. 203, 205 n. 7 (2000). *See also Rothery Storage & Van Co., et al. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986).

[117] *See, e.g., FTC v. Swedish Match*, 131 F. Supp. 2d at 156 (D.D.C. 2000).

submarket is in effect the same thing as a market,[118] and that the *Brown Shoe* indicia are a shorthand device for identifying the bounds of substitutability.[119] Either way, the first of the *Brown Shoe* indicia—industry or public recognition of the market—invites the use of business documents and other non-economic evidence by courts in narrowing the relevant market.

Brown Shoe distinguishes in the first instance between the evidence required to make out a product market definition and that required to make out a submarket. While the *Brown Shoe* indicia have been imported by many courts into their larger market analysis, the predominant method of market definition analysis—and that contained in the FTC/DOJ Joint Merger Guidelines—is the price elasticity method. In theory, of course, this analysis requires no qualitative analysis whatever; it requires only a demonstration that consumers will respond to a hypothetical price increase. Nevertheless courts and the enforcement agencies persist in employing the *Brown Shoe* indicia in their market definition analyses.[120]

Importantly, courts have held that "[s]ince the Court described these factors as 'practical indicia' rather than requirements, . . . submarkets can exist even if only some of these factors are present."[121] But it seems self-evident that all indicia are not created equal. Where even the *Brown Shoe* Court noted that the "outer boundaries" of a market are defined by a product's supply- and demand-side substitutes, it seems odd to suggest that a purportedly-relevant economic submarket could be defined by something

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[118] *See*, *e.g.*, *FTC v. Staples*, 970 F. Supp. at 1080 n.11 ("As other courts have noted, use of the term submarket may be confusing. Whatever term is used — market, submarket, relevant product market — the analysis is the same."); *Allen-Myland v. IBM Corp.*, 33 F.3d 194, 208 n. 16 (3rd Cir. 1994) (finding it less confusing to speak in terms of the relevant product market rather than the submarket); *Olin Corp. v. FTC,* 986 F.2d 1295, 1299 (9th Cir. 1993) ("Because every market that encompasses less than all products is, in a sense, a submarket, these factors are relevant even in determining the primary market to be analyzed for antitrust purposes.") (citation omitted); *Smith v. Multi-Flow Dispensers*, 181 F.3d 103, 1999 WL 357784 (6th Cir. 1999, unpub.) (requiring that submarket definition meet same criteria as market definition); *PepsiCo. v. Coca-Cola Co.*, 114 F. Supp. 2d 243, 255-256 (S.D.N.Y. 2000) (using market criteria; suggesting that *Brown Shoe* submarket criteria are not useful for assessing the scope of distribution market); PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 518.1c, at 204 (Supp. 1993) ("nothing would be lost by deleting the word submarket from the antitrust lexicon").

[119] *See Rothery Storage*, 792 F.2d at 218 ("These indicia seem to be evidentiary proxies for direct proof of substitutability.").

[120] *See, e.g., Rothery Storage*, 792 F.2d at 218.

[121] *FTC v. Staples, Inc.*, 970 F. Supp. at 1075 (citing *Beatrice Foods Co. v. FTC*, 540 F.2d 303 (7th Cir. 1976); *ITT Corp. v. GTE Corp*, 518 F.2d 913, 932 (9th Cir. 1975)).

else.[122] As Posner notes, "[t]he 'submarket' approach is unsound . . . . [t]he relevant criteria should already have been considered in defining the 'outer boundaries.'"[123] But this applies in spades when the "something else" is seemingly unconnected to the substitution analysis entirely.[124]

Brown Shoe's focus on "industry or public recognition of the market as a separate economic entity" is particularly unsound. Both industry participants and the public recognize "markets" for myriad reasons not having anything to do with substitutability. As the court in *Staples* noted, "it is difficult to overcome the first blush or initial [negative] gut reaction of many people to the definition of the relevant product market as the sale of consumable office supplies through [a particular market]."[125] A further problem complicating the descriptive content of this evidence is the confusion between description and prescription. Customers testifying about interchangeability of potential market competitors express not only their beliefs about the market but also their preferences among potential competitors. "[T]he issue is not what solutions the customers would *like* or

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[122] *Brown Shoe,* 370 U.S. at 325.

[123] POSNER, ANTITRUST LAW 2[ND], *supra* note 17, at 152. *See also* 2A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶533, at 167 (1995) ("Speaking of 'submarkets' merely confuses the issue . . . A typical result of the confusion is an overly narrow market designation that exaggerates the defendant's power."); *Id.* at 201 ("Speaking of submarkets is both superfluous and confusing in an antitrust case, where the courts correctly search for 'relevant market' . . . .")

[124] For example, the focus on product characteristics is misleading because it does not necessarily bear a relationship to the ability of a hypothetical monopolist to raise its prices. Consumers substitute between products for myriad, complicated reasons, and in many ways. There is little reason to believe that these substitutions occur between products with "similar characteristics," unless the category is defined, tautologically, to mean "products to which the consumer substitutes in response to a price increase." *See* Markku Stenborg, *Biases in the Market Definition Procedure,* 2004 Scandinavian Association of Law and Economics Seminar paper at 10-11, *available at* http://www.joensuu fi/taloustieteet/ott/ scandale/tarto/papers/Markku%20Stenborg.pdf. For other criticisms of the *Brown Shoe* indicia, see, for example, POSNER, ANTITRUST LAW 2[ND], *supra* note 17, at 152; *Rothery Storage*, 792 F.2d at 218 n. 4 (Bork, J.).

[125] *Staples*, 970 F. Supp. at 1075. It is interesting to note that the court in *Staples* both spoke in terms of submarkets and also criticized the *Brown Shoe* indicia. While acknowledging the existence of "abundant . . . industry recognition" evidence, the court relied primarily on direct, econometric evidence to make out its market definition. In that case, in fact, the use of the submarket concept was almost purely rhetorical (if not disingenuous). *See* Baker, *Stepping Out, supra* note 116, at 214:

> Most important, market definition becomes an expositional tool rather than an analytic tool when, as in *Staples*, it is "reverse engineered." The *Staples* court first credited the evidence that direct competition between Staples and Office Depot lowers price where the two were head-to-head (particularly in the absence of OfficeMax), then used that pricing evidence as the main basis for defining a superstore market.

prefer . . . ; the issue is what they *could* do in the event of an anticompetitive price increase by a post-merger [entity]."[126] "[U]nsubstantiated customer apprehensions do not substitute for hard evidence."[127]

The problem of industry recognition reflected in customer and competitor affidavits and recognized in the recent *Oracle*[128] and *Arch Coal*[129] decisions is a particularly thorny one – particularly because this form of evidence is central to the enforcement decision and the agencies' prima facie cases.[130] It is relatively easy evidence to obtain, and, for better or for worse, customers and competitors are often extremely cooperative witnesses. But customer testimony is the "[l]east reliable" form of evidence,[131] and "not a persuasive indication" of future effect.[132]

Nevertheless, the all-important market definition question can be decided by questionable evidence. As one court has put it (resisting the impetus to use questionable market definition evidence):

> In any event, however, PepsiCo's customer definition on this motion begs the question. As PepsiCo counsel conceded at oral argument, 'We limit the definition to this group because . . . this is the group where Coke has, because it excludes competition, market power.' Market power is determined after defining the relevant market, including the customer base, not before. . . . PepsiCo has chosen to define the elements of the relevant market to suit its desire for high Coca-Cola market share, rather than letting the market define itself. Regardless of the substance of the proffered customer definition or the method by which it was arrived at, PepsiCo has not proffered sufficient evidence from which a factfinder could conclude that the customer base should be viewed so narrowly. Accordingly, I reject its latest definition insofar as it creates a 'strange red-haired, bearded, one-eyed man-with-a-limp classification.' United States v. Grinnell, 384 U.S. 563, 590-91 (1966) (Fortas, J. dissenting).[133]

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126 *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004).

127 *Id*.

128 *Id.*

129 *FTC v. Arch Coal, Inc.*, 329 F.Supp.2d 109 (D.D.C. 2004).

130 *See, e.g.,* David Scheffman, "Sources of Information and Evidence in Merger Investigations: An FTC Economist's view," at 3-5, *available at* http://www ftc.gov/speeches/other/sourcesofinfobrussels03.pdf (last visited April 1, 2005) (noting that customer and competitor views are solicited early in the enforcement process, are important in merger investigations and provide important evidence for litigation). *See also Oracle*, 331 F.Supp.2d 1098 at 1125 (noting that customer and industry affidavits (along with expert testimony) constituted the "laboring oar of the plaintiff's case").

131 2A AREEDA & HOVENKAMP, ANTITRUST LAW ¶538b at 239.

132 *Arch Coal*, 329 F.Supp.2d at 146. *See also Oracle*, 331 F.Supp.2d at 1131 (condemning the market definition evidence proffered by the plaintiff's "extremely sophisticated" witnesses with "decades of experience in negotiating in this field").

133 *PepsiCo, Inc. v. The Coca-Cola Co.*, 114 F.Supp.2d 243, 249 (S.D.N.Y. 2000)

This problem is particularly critical and well demonstrated in FTC merger challenges. Section 13(b) of the Federal Trade Commission Act[134] authorizes federal courts to grant to the FTC preliminary injunctive relief against a merger "[u]pon a proper showing that, weighing the equities and considering the FTC's likelihood of ultimate success, such action would be in the public interest . . . . To obtain a preliminary injunction under Section 13(b), the FTC must demonstrate: (1) a likelihood of success on the merits in its case under Section 7 of the Clayton Act; and (2) the equities weigh in favor of granting an injunction."[135] To show a likelihood of success on the merits the Commission must demonstrate the likelihood that it will succeed in proving, after a full administrative trial on the merits, that the effect of the transaction "may be substantially to lessen competition, or to tend to create a monopoly" in violation of Section 7 of the Clayton Act. This does not mean that the Commission must prove at this stage that the proposed merger would in fact violate Section 7 of the Clayton Act.[136] Rather, "[t]he determination of whether the acquisition actually violates the antitrust laws is reserved for the Commission and is, therefore, not before the Court."[137] The question is whether the FTC has made a showing that "raises questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the Commission in the first instance and ultimately by the Court of Appeals."[138] As a practical matter, because of the extraordinary time and expense involved in pursuing a full hearing at the Commission, mergers challenged by the FTC are almost always won or lost at the preliminary injunction stage. Given the exigencies of preliminary injunction litigation, business documents discussing the "market," or even the "industry" or "segment" will often be centerpieces of the FTC's case. And

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(some case citations and citations to the evidentiary record omitted). As Justice Fortas noted in his dissent in *Grinnell*, however, "I do not suggest that wide disparities in quality, price and customer appeal could never affect the definition of the market. But this follows only where the disparities are so great that they create separate and distinct categories of buyers and sellers." *United States v. Grinnell*, 384 U.S. 563, 593 (Fortas, J. dissenting).

[134] 15 U.S.C. § 53(b) (2000).

[135] *Staples*, 970 F. Supp. at 1071. *See also FTC v. Freeman Hospital*, 69 F.3d 260, 267 (8th Cir. 1995); *FTC v. University Health, Inc.*, 938 F.2d 1206, 1217-18 (11th Cir. 1991); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984).

[136] *Id.* at 1070-71.

[137] *Id.* at 1071.

[138] *University Health*, 938 F.2d at 1218; *Warner Communications, Inc.*, 742 F.2d at 1162; *FTC v. National Tea Col*, 603 F. 2d 694, 698 (8th Cir. 1979); *Staples,* 970 F. Supp. at 1071; *Alliant*, 808 F. Supp. at 19.

given this relatively low burden of proof in an FTC preliminary injunction proceeding, such documents can be dispositive of the case.

For example, in *FTC v. Cardinal Health, Inc.*,[139] the court relied upon internal documents to support a narrow market definition. The FTC sought to enjoin two proposed mergers of wholesale prescription drug distributors, and characterized the relevant product market as the wholesale drug distribution market.[140] The defendants countered that this definition was too narrow and failed to take into account the economic realities of the larger prescription drug market.[141] Citing various pie charts and other documents that limited the "relevant players" in the "market" to wholesale drug distributors only, the court rejected defendants' arguments.[142] "Defendants' documents show that the merging parties clearly viewed their economic competition to be from their fellow drug wholesalers, and not from other drug sources as suggested by the Defendants at trial."[143] Accordingly, the court held that the relevant product market was the more narrow wholesale market, thereby increasing the market share of the defendants and leading to the conclusion that the merger should be enjoined.[144]

Taking an example from private antitrust litigation, in *Ansell Inc. v. Schmid Labs, Inc.*, 757 F. Supp. 467 (D.N.J.), the court found that condoms sold through different distribution channels were in separate product markets. The court based its finding in part on the "industry or public recognition" factor of the *Brown Shoe* test:

> [T]he evidence presented to the Court clearly shows that the industry participants view their sales to the retail trade as a separate economic entity. Ansell has submitted ample documentation in the form of marketing plans and income and expense analyses that treat their sales to U.S. retailers as a separate market. The reference to this market segment is not limited to plaintiff. Schmid's . . . Business Plan makes several references to the U.S. retail condom market . . .. In addition, the Nielsen Company . . . maintains its data separately for sales of latex condoms to U.S. retail outlets. Defendants argue that Nielsen only surveys market statistics in the channels of distribution requested by its corporate clients such as Schmid. This, however, would only support the proposition that the industry participants view this as an economically distinct market segment.[145]

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[139] 12 F.Supp.2d 34 (D.D.C. 1998).
[140] *Id*. at 46-47.
[141] *Id*. at 47-48.
[142] *Id*. at 49 n.10
[143] *Id*. at 49.
[144] *Id*.
[145] *Ansell, Inc. v. Schmid Labs,* 757 F. Supp. 467, 472 (D.N.J. 1991).

Reliance upon business characterizations of a "market" is hardly limited to these two examples.[146]

Notwithstanding *Brown Shoe*, some courts have recognized the limits of business peoples' characterizations of markets in antitrust cases. In *Rothery Storage & Van Co. v. Atlas Van Lines*, the court stated that "'industry or public recognition of the submarket as a separate economic' unit matters because we assume that economic actors usually have accurate perceptions of economic realities."[147] However, the court held that casual remarks of carrier agents that various offices constituted "distinct market areas" and allusions to geographic and product markets are not enough to establish *Brown Shoe*'s industry or public recognition criterion.[148] The court thus appeared to recognize a potential distinction between business people having "accurate perceptions" of "economic realities," and business people accurately expressing those perceptions. In another case, the court rejected the use of language in defendant's Official Statement from its bond offering to establish a narrow relevant geographic market for hospitals in California. The defendants argued that the document did not purport to be an exhaustive review of the relevant market, and pointed to other documents that included additional competitors. The court concluded that it "discerns no common or prevailing perception by market participants regarding the scope of . . . competition."[149]

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[146] *See also, e.g.*, *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 308 (7th Cir. 1976) (affirming market definition of administrative law judge, who "found that the industry recognized brushes and rollers as a separate industry as evidenced by the fact that the Bureau of Census categorizes [them] . . . in the same . . . category"); *FTC v. Staples*, 970 F. Supp. at 1073, 1079 (granting preliminary injunction against merger between two office product superstores; "In document after document, the parties refer to, discuss and make business decisions based upon the assumption that 'competition' refers to other office superstores only."); *Pepsico, Inc. v. The Coca-Cola Co.*, 114 F. Supp. 2d 243, 253 (S.D.N.Y. 2000) (rejecting plaintiff's proposed relevant market because, among other things, plaintiff's president acknowledged broader "market"); *Tasty Baking Co. v. Ralston Purina Inc.*, 653 F.Supp. 1250, 1259-62, 1271 (E.D. Pa. 1987) (relying on categorization of products in business documents to conclude that "bakers treat the snack cake and pie segment as economically significant"); *Moecker v. Honeywell Int'l, Inc.*, 144 F. Supp. 2d 1291, 1303-04 (M.D. Fla. 2001) (industry recognition that seat belts sold to the van conversion industry and those sold to car manufacturers were in different markets suggested the existence of submarkets but the court found a factual question existed precluding summary judgment on the issue of market definition).

[147] 792 F.2d 210, 218 n. 4 (D.C. Cir. 1986)

[148] *Id*. at 219.

[149] *California v. Sutter Health System*, 130 F. Supp. 2d 1109 (N.D. Cal. 2001). *See also Bathke v. Casey's General Stores Inc.*, 64 F.3d 340, 345 (8th Cir. 1995) (evidence of a competitor's perspective was not sufficient to establish a geographic market "because a geographic market is determined by inquiring into the 'commercial realities' faced by

Indeed, assuming it has any validity at all, even taken on its face, the "industry recognition" criterion would seem to require *industry-wide* agreement that a proposed market constituted, in fact, a relevant market. However, conflicting evidence—demonstrating not consensus but rather disagreement—is likely to be the order of the day.[150] In other words, even were the evidence marginally *probative* in an economically-relevant manner, it is difficult to conceive of dispositive evidence in this regard. There is no reason to presume that all or even substantially all of the market actors would recognize an economically-relevant market as such, even if one existed. Even if a court weighed contrary evidence of competitor and customer characterizations of a market and determined that, by some standard of proof, plaintiff's evidence were more persuasive, the result could hardly be said to represent "industry recognition."

There have been cases where courts have expressed greater skepticism of this sort of evidence. *Nobel Scientific Industries, Inc. v. Beckman Instruments, Inc.*[151] involved a claim that the defendant monopolized a chemical reagent market. The plaintiff argued that the market was extremely narrow, essentially consisting of only the products of the defendant's company. In defining the product market, however, the district court recognized that internal references to a market by the defendant do not necessarily evidence a relevant product market. The court wrote:

> Use of the term "product market" has specific connotations for antitrust purposes. Much confusion in this litigation seems to have arisen from the casual use by hospitals and by reagent manufacturers and businessmen, of the term "market" in their ordinary business reports and strategy papers. . . . [T]he fact that a company may refer to a "market" does not necessarily mean that its reference will be to a market for purposes of the Sherman Act.[152]

Accordingly, the court rejected the suggested narrow product market, stating that it made "no economic sense," and concluded that the larger reagent market was the proper market definition.[153] Similarly, another court recognized that internal marketing documents indicating high customer

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consumers.") (emphasis in original); *American Key Corporation v. Cole National Corp.*, 762 F.3d 1569, 1580-81 (11th Cir. 1985) (documents that showed that defendant "may have chosen malls as desirable facilities" did not define the relevant geographic market for antitrust purposes). While fewer cases turn on the question of geographic rather than product market definition, the analysis–and the problems with it–is essentially similar.

[150] *See, e.g., Id.* at 219 n. 5 (noting that plaintiffs failed to demonstrate "industry recognition since plaintiffs as a group had no common recognition of submarkets").

[151] 670 F. Supp. 1313 (D. MD. 1986), *aff'd*, 832 F.2d 537 (4th Cir. 1987).

[152] *Id*. at 1318-19.

[153] *Id*. at 1321-1323.

recognition and sales due to unique product characteristics are not sufficient to establish a relevant product market for "super premium ice cream." The court held that the distinctions made in these documents were "economically meaningless."[154]

In *Home Health Specialists, Inc. v. Liberty Health System*,[155] the plaintiff introduced market research reports, internal documents of the defendants, and other geographic data, all of which suggested that defendant's service area was limited to one county.[156] Rejecting the use of these documents and recognizing that service area and geographic market are not synonymous, the court held that these documents did "not purport to define an antitrust market," but that it defined what made "business sense" for the defendant.[157]

As these few cases demonstrate, some courts are sensitive to the distinction between a relevant antitrust market and the use of the term "market" for business purposes. But even these courts do not go so far as to suggest discarding business documents as relevant evidence. Instead they suggest that, in these cases, the particular evidence proffered was insufficient to achieve the desired result.

In part our criticism is simply that there is a semantic disconnect that is often elided over. The relevant actor, who happens to use terms identical to those used to describe a legally-relevant concept, is, in fact, describing something different. As we have noted, the word "market" is employed to mean many different things. Likewise, the term "profit" has different meanings in different contexts. It is no more appropriate to ascribe to a word a distinct meaning not intended in the context than it is to ascribe to a word another word's meaning. The possibility for confusion is substantial, and thus the likelihood of error is elevated.[158]

C. Intent Documents: "Fighting Words"

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[154] *In re Super Premium Ice Cream Distribution Antitrust Litigation*, 691 F. Supp. 1262, 1268 (N.D. Cal. 1988), *aff'd without op*., 895 F.2d 1417 (9th Cir. 1990).

[155] No. CIV.A.92-3413, 1994 U.S. Dist. LEXIS 11947 (E.D. Pa. Aug. 24, 1994).

[156] *Id*. at *8-9.

[157] *Id*. at *9.

[158] These semantic problems may constitute sufficient grounds for the exclusion of evidence under Fed. R. Evid. 403. FRE 403 precludes the admission of relevant evidence when "its probative value is substantially outweighed by . . . the danger of confusion." It is surely the case that in some circumstances terminological ambiguity is sufficiently confusing to warrant exclusion. *See* CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE § 4.10 (p. 178) (3rd ed. 2003) (citing *Pucalik v. Holiday Inns*, 777 F.2d 359, 363 (7th Cir. 1985).

Another area in which plaintiffs frequently seek to introduce business documents is to prove illicit intent and thus a substantive antitrust violation from "fighting words." Specific intent is an element of an attempted monopolization claim under Section 2 of the Sherman Act. However, the use of fighting words goes beyond simply proving *mens rea* in attempt cases to efforts to use fighting words to prove anticompetitive conduct and effect in other cases.[159] The problem here is in part that the language used may carry technical meanings or emotive force that lends nothing to the economic analysis.[160] Moreover, fiery language used by a company's employees sheds no light on the legality or competitive effects of its conduct:

> Almost all evidence bearing on "intent" tends to show both greed-driven desire to succeed and glee at a rival's predicament. . . . [B]ut drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind competition. . . .
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> Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. It also complicates litigation. Lawyers rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of businesses in search of misleading evidence both increases the cost of litigation and reduces the accuracy of decisions . . ..
>
> Although reference to intent *in principle* could help disambiguate bits of economic evidence in rare cases the cost (in money and error) of searching for these rare cases is too high-in large measure because the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate.[161]

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[159] *See, e.g., United States v. Baker Hughes, Inc.*, 731 F.Supp. 3, 12 n. 8 (D.D.C. 1990) (citations omitted):

> Intent to restrain trade is not a necessary element of a Section 7 violation, but the United States has pointed to what it considers a smoking gun in the case to explain why it seeks to stop a merger of marginal domestic significance and which few customers have protested. The smoking gun is a memo by a Tamrock executive bluntly stating that acquisition of Secoma would allow Tamrock to 'manipulate the market more effectively' and gain 'more flexibility in price setting.' . . . [T]he memo clearly indicates that Tamrock concern about price competition from Secoma focused on the world generally and particularly on markets such as the Soviet Union and China and not on the small U.S. market.

[160] As Professor Areeda noted, "Interpretation involves a double problem: (1) the business person often uses a colorful and combative vocabulary far removed from the lawyer's linguistic niceties, and (2) juries and judges may fail to distinguish a lawful competitive intent from a predatory state of mind." 7 ANTITRUST LAW, *supra* note 8 at §1506.

[161] *A.A. Poultry Farms v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989). *See also Morgan v. Ponder*, 892 F.2d 1355, 1359 (8th Cir. 1989) ("evidence of predatory intent alone can be ambiguous or misleading").

And as Professor Hovenkamp has written:

> Any competitively energetic firm "intends" to prevail over its actual or potential rivals. The firm which drives out or excludes rivals by selling a superior product or producing at substantially lower costs certainly intends to do so. But so to read "purpose or intent" would be to read the behavior requirement out of the monopolization offense altogether and make monopoly unlawful per se, which the courts clearly have not done. More importantly, it confuses the "intent" to behave competitively with the intent to monopolize.
>
> Indeed, in most circumstances involving monopoly, the "intent" to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.[162]

It is surely the case that, as a matter of logic, knowledge of intent to act can be relevant to proof that the action did indeed occur; under some circumstances it makes sense for decision-makers to infer conduct from belief or intent.[163] As a matter of evidentiary standards, it is sometimes permissible to admit and consider evidence of intent or belief (or motivation) to demonstrate that an act occurred–to demonstrate that the act intended did, in fact, happen.[164] But this inference is permissible only where the underlying premise – that an actor's intentions do, in fact, correlate with his actions – is true. With respect to antitrust this is not necessarily the case. There is a significant distinction between the reliability of evidence used to demonstrate that an actor engaged in specific, intended conduct and evidence used to demonstrate that an actor's conduct *had a particular, economic and legal effect.*[165] Moreover, the problem is even more acute in the merger context where there is no particular proscribed conduct (or intent) under

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[162] Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1039 (2000). *See also* William S. Comanor & H.E. Frech III, *Predatory Pricing and the Meaning of Intent*, 38 ANTITRUST BULL. 293, 302 n.30 ("As a casual look at the business trade press will show, businessmen often use sports or military language. Thus, aggressive memos are expected. Finding such documents, without more, is not necessarily evidence of predatory intent.").

[163] For example, evidence of an accused murderer's intent to kill would surely be logically relevant (although, of course, not dispositive) in determining whether, in fact, the accused murderer performed his intended act.

[164] The idea is captured by the *Hillmon* doctrine, which "stand[s] for the proposition that a statement indicating the intent of the speaker to do something may be admitted [as an exception to hearsay] as evidence that he later did it." CHRISTOPHER B. MUELLER AND LAIRD C. KIRKPATRICK, EVIDENCE, *supra* note 158 at § 8.39 (3rd ed. 2003). *See also Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 295-96 (1892).

[165] The reach of the *Hillmon* doctrine seems confined to the former. "[T]he accepted principle today is that the evidence of declarations of a plan, design or intention . . . is . . . admissible *when offered as evidence that the design was carried out by acts or omissions of the declarant*." CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 572 (1954) (emphasis added).

Clayton §7, which, as noted, prohibits actions only when they have a particular effect.[166] In this regard the Sherman Act is a model of concreteness – for while the Sherman Act is itself ambiguous,[167] it at least nominally prohibits more concrete human behavior ("monopolization" and "conspiracy," for example).[168]

In large measure the confusion surrounding the appropriate use of intent evidence (and, for that matter, other forms of evidence as well) in proving antitrust violations stems from the broader conceptual ambivalence surrounding the propriety of business behavior. "[I]n most circumstances involving monopoly, the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively."[169] The same may be said not only of "intent" but also action: The precise business behaviors that lead to anticompetitive results in one case may lead to more vigorous competition in others. The existence of this ambivalence with respect to business behavior complicates efforts consistently to judge the competitive effect of certain conduct, especially by looking at intent:

> '[A]n admitted intention to limit competition will not make illegal conduct that we know to be pro-competitive or otherwise immune from antitrust control.' And, while 'smoking gun' evidence of an intent to restrain competition remains relevant to the court's task of discerning the competitive consequences of a defendant's actions, 'ambiguous indications of intent do not help us "predict [the] consequences [of a defendant's acts]"' and are therefore of no value to a court analyzing a restraint under the rule of reason, where the court's ultimate role is to determine the net effects of those acts. Under such circumstances, we apply the rule of reason without engaging in the relatively fruitless inquiry into a defendant's intent.[170]

This task is particularly difficult when results must be evaluated prospectively, rather than with the benefit of ex post analysis. And unfortunately, conduct must almost always be judged *before* its economic

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[166] *See supra* notes 22-27 and accompanying text.

[167] *See* id.

[168] *But see* Donald F. Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 HARV. L. REV 1313, 1381 (1965). ("The Sherman Act proscribes 'conspiracy' and 'attempt,' while section 7 speaks only of possible anticompetitive effects. Results would probably be the same in virtually all instances, however, since an expressed anticompetitive purpose would be regarded as strong if not conclusive evidence that the requisite ill effects were probable."). Obviously we do not agree with Professor Turner's naked assertion that intent would be regarded as conclusive proof anticompetitive effect.

[169] Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO ST. L.J. 1035, 1039-40 (2000).

[170] *Cal. Dental Ass'n v. FTC*, 224 F.3d 942, 948 (9th Cir. 2000) (quoting 7 ANTITRUST LAW, *supra* note 9 at §1506 (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 239 (1918)))

effect is known (this is emphatically the case in the merger context). This disjunction – and the extreme burden it places on courts confronted with evaluating potentially-anticompetitive conduct – has led some commentators to suggest that courts focus more closely on intent: that they should look where the light is better:

> Instead of considering factors with which they have little expertise, the courts should concentrate on an issue with which they deal every day: the purpose for defendants' behavior. Rather than complex economic factors such as concentration levels and entry characteristics, fact finders should be discerning a defendant's motives for its actions by determining the credibility of its witnesses, its explanation for its conduct, and the relevance and significance of memoranda, minutes, handwritten notes, e-mails and other documents that it has produced. . . . [P]rior to the Chicago School's takeover of antitrust jurisprudence, the Supreme Court had concluded that a defendant's motives may reveal the economic effects of its conduct. In 1962, in *Poller v. Columbia Broadcasting System*, the Court pointed out that 'motive and intent play leading roles' in antitrust litigation. In 1979, the Court concluded, in *Broadcast Music, Inc. v. CBS*, that a defendant's purpose for particular competitive behavior 'tends to show [its] effect.' Most recently, in the 1988 case, *Business Electronics Corp. v. Sharp Electronics Corp.*, Justice Stevens, citing this author's own conclusions, pointed out in a dissenting opinion that 'in antitrust, as in many other areas of the law, motivation matters and fact finders are able to distinguish bad from good intent.' [171]

The core problem is not that courts are unable to discern anticompetitive intent where it is present, nor even that they mistake pro-competitive for anticompetitive intent (although these are problems, to be sure). Rather the problem is the fundamental and inextricable disconnect between intent and effect in complex economic systems.[172] And even were it true that courts are

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[171] Thomas A Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, *supra* note 1, at 42 (citations omitted). *See also* Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, *supra* note 3. Another commentator has suggested that

> [a]n additional salutary effect is to partially reclaim the role of intent in antitrust analysis. Sophisticated corporations expend too many resources in their strategic planning and marketing decisions not to take seriously the results of that work. Looking at the results of strategic planning exercises, brand management, and marketing studies do not necessarily lead to either plaintiff or defendant verdicts. Such evidence should be a fertile source for either plaintiffs or defendants seeking to unravel the purpose and effect of mergers, joint ventures, distribution agreements, and other economically ambiguous conduct being conducted under some form of the rule of reason.

Waller, *Language of Business*, *supra* note 3 at 334-35.

[172] Thus Professor Lao's call to arms in her recent article, *Id.*, is misplaced, rooted as it is in the conviction that "[i]ntent evidence is useful since no one is likely to know better

capable, generally, of discerning economic effect from an actor's motives,[173] it does not follow that a court would do so consistently or successfully enough to outweigh the extreme prejudice that such an inquiry would entail.

As Judge Posner points out, "Any doctrine that relies upon proof of intent is going to be applied erratically at best. Judges and juries don't always understand that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality."[174] Firms whose executives are sensitized to issues of antitrust proof will attempt to cover over any evidence of improper intent; firms whose executives are not so sensitized will fail to do so.[175] When proof of intent is instrumental in proving an antitrust case in court, then, there may be little correlation between the availability of such evidence and the existence of an underlying delict. In fact, the availability to a court of such evidence may be indicative largely of executives' hubris, ineptitude or mere carelessness. By itself this might not be a catastrophic failing if it were also the case that, at least, the evidence were sufficiently probative of underlying anticompetitive behavior. It might result in selective enforcement (against particularly inept rather than particularly anticompetitive firms), but not *erroneous* enforcement. But, as noted, evidence of intent is problematic in proving most antitrust violations.[176]

Evidence of corporate managers' beliefs, intentions, perceptions or motivations regarding their line of business is surely *relevant* as a legal matter to merger analysis. Evidence is relevant if it "render[s] the desired

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the probable effects of a practice than the firm engaging in it." *Id.* at 56. In fact even the firm engaging in the practice is limited in its ability to forecast the effects of its behavior. *See supra* Section II.A; *see also* JAMES SUROWIECKI, THE WISDOM OF CROWDS 33 (2004) (suggesting that "expertise" (like that possessed by a firm analyzing its own behavior) is "unrelated" to accuracy in forecasting) (citing J. Scott Armstrong, *The Seer-Sucker Theory: The Value of Experts in Forecasting*, 83 TECH. REV. 16 (1980)).

[173] And courts and commentators have suggested that intent is useful in determining effect since the Court's dictum in *Chicago Bd. of Trade*, 246 U.S. at 238 ("This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."). There is, however, a big difference between the recognition that evidence of intent may be helpful in "interpret[ing] facts" and the claim that knowledge of intent "tends to show effect." *Broad. Music, Inc.* 41 U.S. at 19.

[174] POSNER, ANTITRUST LAW 2[ND] , *supra* note 17, at 214.

[175] *Id.* at 214-25.

[176] And, to make matters worse, there is an inherent asymmetry that exacerbates the impropriety: "Whenever a restraint appears unreasonable in the light of its redeeming virtues and alternatives, the defendant's innocent mental state will not save it." 7 ANTITRUST LAW at §1506 (p. 390) (and cases cited therein). In other words, courts use intent evidence selectively only to condemn – and never to exculpate – behavior.

inference *more probable than it would be without the evidence*."[177] The determination that evidence makes an inference more probable "must filter through the judge's experience, his judgment, and his knowledge of human conduct and motivation."[178] It would be quite impossible for us to assert that there can be no probative value, in the abstract, of adducing corporate documentary evidence to try to prove anticompetitiveness. Nevertheless, such evidence is potentially prejudicial and certainly insufficient to assess the competitive character of challenged behavior.[179]

In the *William Inglis* decision,[180] the Second Circuit noted that mere "boardroom ruminations" regarding rivals are not sufficient evidence of predatory intent. The opinion continues, "predation exists when the justification of these prices is based, not on their effectiveness in [maximizing profits or] minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses."[181] "[A] price cut to obtain new customers imposes as much harm on rivals as a price cut whose objective is to harm them."[182]

> The statements made by [defendants] "we will not be underbid"; "we'll do whatever it takes"; "name your price" — are prime examples of remarks which, if portrayed by plaintiffs' attorneys as damning evidence of predatory intent, may lead juries to erroneously condemn competitive behavior. These are phrases often legitimately used by business people in the heat of competition. They provide no help in deciding whether a defendant has crossed the elusive line separating aggressive competition from unfair competition.[183]

On the one hand, evidence of intent is not particularly probative of

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[177] MCCORMICK, *supra* note 165, at 318.

[178] Id. at 319.

[179] Here we would note that "preponderance of the evidence," "public interest" and "clear and convincing" are slippery concepts. But more important, for mergers challenged by the FTC, the burden that must be sustained by the Commission in order to enjoin a merger is distinctly low: "Under Section 13(b) of the FTC Act, to secure a preliminary injunction the FTC only needs to demonstrate if it 'raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.'" David Balto, *The Efficiency Defense in Merger Review: Progress or Stagnation?*, 16 ANTITRUST 74, 79 (Fall 2001) (quoting *FTC v. Heinz*, 246 F.3d 708, 713 (D.C. Cir. 2001)). As a practical matter, losing a preliminary injunction motion to the FTC almost certainly ends the merger. *See* id. ("The reality is that, with one exception, no firm has ever continued to litigate a merger in administrative litigation with the FTC after losing the preliminary injunction motion.").

[180] *William Inglis and Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (1982).

[181] *Id.* at 1035.

[182] Harold Demsetz, *Barriers to Entry*, 72 AM. ECON. REV. 45, 54 (1982).

[183] *Morgan v. Ponder*, 892 F.2d 1355, 1359 (8th Cir. 1989) (citation omitted).

underlying economic realities of the sort that almost all antitrust laws are intended to punish and deter. On the other hand, courts' and enforcement agencies' focus on non-technical, qualitative information purportedly demonstrating intent also serves to reward bad-but-careful actors and to deter the creation and dissemination of possibly valuable internal qualitative analyses.

V. CONCLUSION: THE BUSINESS DOCUMENT FALLACY

A distinction must be made between the unencumbered information contained in business documents and the terminology used by business people to describe or manipulate that information. Business people will often characterize information from a business perspective, and these characterizations may seem to have economic implications. However, business actors are subject to numerous forces that influence the rhetoric they use and the conclusions they draw—salesmanship, self-promotion, the need to take credit for successes and deny responsibility for failures, the need to develop consensus, the desire to win support for an initiative or to neutralize its opponents. Furthermore, risk-averse corporate managers may overstate their achievements in order to attract and keep less-risk-averse investors.[184] Similarly, investment bankers only get paid if a deal closes, and thus have incentives to overstate the effects of mergers and acquisitions in their offering memoranda and "bankers' books." Simply put, the words and procedures used by business people do not necessarily reflect "economic realities," and the effort to integrate them further into antitrust analysis is misdirected. There are perfectly good reasons to expect to see "bad" documents in business settings when there is no antitrust violation lurking behind them. Indeed, the ubiquity of "hot docs" supports the notion that that they are meaningless from an antitrust perspective. "[O]rdinary marketing methods available to all in the market" are not anticompetitive.[185] So, too, ordinary rhetoric used by all in the market cannot be used to distinguish bad actors from good.[186]

The notion that business rhetoric should occupy a larger rather than a smaller role in antitrust analysis because it reflects what business schools

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[184] *See, e.g.,* STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 259-60 (2002) (noting that "managers will be averse to risks shareholders are perfectly happy to tolerate").

[185] *Northeastern Telephone*, 651 F.2d at 93 (citation omitted);

[186] *See Houser v. Fox Theatres Mgt. Corp.*, 845 F.2d 1225, 1231 (3d Cir. 1988) ("common practice" could not support "an inference of anticompetitive behavior").

teach is similarly misguided. To infer from the fact that corporate managers are taught (if they are) how to find and maintain market power that every time they try to do so they succeed (or, more realistically, to infer that every time they *claim* to have done so, they have succeeded) is specious. A rational business actor may claim to dominate a particular market not because he has done so, but because the claim itself (or the attempt to dominate even absent success) is a useful and effective tool of business.[187] Because attempts to compete are notoriously close to attempts to monopolize, it is not clear that rhetoric suggesting the latter is not really evidence of the former.

And business people may be wrong rather than malfeasant. Perception filtered through the lens of modern American corporate hierarchy is surely unreliable. Claims of market dominance and even attempts to achieve it may simply be wrong. That the business actor suggests he has engaged in anticompetitive behavior is simply a poor indicator that he actually has.[188]

In the end, it's both unremarkable and irrelevant that business people say these things. Even the corporate failures speak this way. Corporate managers are limited in what they do and what they can know, even if they behave as though they are fully-informed, fully-capable actors. And the problem with the effort to take at face value their actions and words is that it does not present any way to distinguish between actual and merely aspirational or simply wrong evidence of misconduct. Indeed, the then chief economist at the FTC has acknowledged this issue:

> Merger investigations generally turn on factual rather than theoretical issues. Information gleaned from customer, competitor, and third party opinions, documents, and depositions are often used as a basis of conclusions of important factual issues. In my experience, these sources of evidence are not always a reliable basis of factual conclusions. . .
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> For many years now I have taught MBAs, and until returning to the FTC, I was a business consultant. In my experience, business people sometimes do not have the facts right and say or write documents indicating something that is not quite right or sometimes is totally wrong. Indeed, it is often one of the most important tasks of a business

[187] Again, Professor Waller undertakes to make this claim. He suggests that "[i]f economic actors are indeed rational, then such goals [achieving durable market power and supracompetitive returns] must be plausible, at least under certain circumstances, or rational managers would have abandoned them for other techniques . . . ." Waller, *Language of Business, supra* note 3, at 316-317. Waller does not consider that the "techniques" of achieving market dominance might be quite desirable for rational business actors even if they never lead to actual market dominance and supracompetitive profits.

[188] *See supra* notes 45-52 and accompanying text.

> consultant to try to figure out what the facts really are.
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> The economists and accountants at the Commission focus on helping to develop the "hard" facts, *i.e.*, facts that can be developed by "hard" evidence, such as quantitative data. [189]

Of course, the use of business documents to establish "commercial realities" is perfectly appropriate. For example, business documents that indicate that a party was forced to lower prices in response to the introduction of a new product is relevant to the question whether the two products are in the same relevant market. Facts that affect a business decision are relevant to establishing the proper contours of an antitrust market. As a logical extension, so are the business writings that document those facts. But, as we have stressed, this is a limited use of these documents, distinct from the uses contemplated by either *Brown Shoe's* practical indicia or academic commentary seeking to expand the scope of probative antitrust evidence.[190]

The outcome of an antitrust lawsuit should not depend on whether a company was wise enough to avoid using economic terms or "fighting words" in its documents. Indeed, according significance to such documents, or their absence, might have the perverse effect of implicating the innocent firm (which had no reason to watch its language) and exculpating the guilty firm (which would have the incentive to avoid creating incriminating documents).[191] Reliance on accounting data, market characterizations and

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[189] David Scheffman, "Sources of Information and Evidence in Merger Investigations: An FTC Economist's view," *supra* note 130 at 6.

[190] There is one sense in which business perception – and *not* economic reality – might be useful to the enforcement decision. This is the case where a business perceives, although incorrectly, that it faces weaker competition than it actually does, whether because its market is more contestable than it believes, because its known competitors are more agile than it perceives, or because substitution is more likely to occur than it believes. In other words – where the firm has committed a Type I error. *See supra* notes 59 & 60 and accompanying text. The danger here is not that the market will actually be any more susceptible to monopolization; as we have noted, the likelihood of successful monopolization is entirely a function of economic reality and not business perception. Nevertheless, a business that believes (even if wrongly) that it can make supracompetitive returns because it underestimates the strength of competition facing it is more likely to attempt to engage in abusive behavior than a firm that (correctly) perceives that it does not enjoy this advantage. There is a danger, under these circumstances, that until the mechanisms of competition actually kick in, consumers will be harmed, at some net economic cost, by the firm's behavior. In this situation evidence of the firm's belief might be relevant to the enforcement decision, although competition would eventually ameliorate the consequences of mistaken non-enforcement, and, of course, the cost of enforcement may outweigh the short-term harm to consumers anyway.

[191] *See Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 232, (1st Cir. 1983) ("The knowledgeable firm will simply refrain from overt description").

statements of intent by economic actors threatens to undermine the economic foundations of antitrust jurisprudence, and thus the purpose of the antitrust laws.