The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever

Stephen Calkins
Wayne State University, calkins@wayne.edu
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STEPHEN CALKINS*

Time and again the Rehnquist Court has favored antitrust certainty. When faced with a choice between achieving individualized justice and adhering to relatively clear, generalized rules, it has usually chosen the latter. The certainty of objective evidence has been preferred to the more customized resort to subjective evidence.¹


This article will discuss each case in turn. It will be seen that especially in terms of the litigation process at the Court and the quality of the decisions, it was an unsatisfying antitrust year.

I. PROFESSIONAL REAL ESTATE INVESTORS

At issue in Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. was the “sham” exception to the Noerr-Pennington doctrine's

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³ 113 S. Ct. 884 (Jan. 25, 1993).
⁴ 113 S. Ct. 2891 (June 28, 1993).
⁵ 113 S. Ct. 2578 (June 21, 1993).
protection of certain petitioning for government action. Before Professional Real Estate (PRE), plaintiffs had to satisfy a subjective test to establish that litigation was sham (and therefore unprotected from the antitrust laws). In PRE, the Court supplemented that subjective test with an objective test—and required plaintiffs to satisfy both. Unfortunately, the Court's opinion, by Justice Thomas, failed to achieve the clarity it sought.

A. The Litigation

The litigation in PRE featured a shootout between subjective and objective standards. Even with the Solicitor General joining petitioners in preferring subjectivity, it was not a fair fight. Perhaps it was because the odds were so against them that petitioners kept changing strategy right up until oral argument.

Petitioners were in trouble from the beginning. The suit concerned videodiscs, an ill-fated home-entertainment technology. When a resort hotel operator started renting videodiscs to patrons for in-room viewing without payment of royalties, eight movie studios filed a single, apparently reasonable lawsuit alleging copyright infringement. The movie studios lost in a controversial copyright decision, and then had to confront the antitrust counterclaim that had been filed with the answer to their original lawsuit.

The district court granted summary judgment on the counterclaim. The Noerr-Pennington doctrine protects a "legitimate effort to influence government action," it explained. That the suit in question was a legitimate effort was clear because the original plaintiffs had sought and expected a favorable outcome, the merits had been difficult to re-

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6 The Noerr-Pennington doctrine and its sham exception are discussed in Calkins, Toward Certainty, supra note 1, at 615–18; and Stephen Calkins, Developments in Antitrust and the First Amendment: The Disaggregation of Noerr, 57 ANTITRUST L.J. 327 (1988).

7 All nine Justices voted to affirm the court of appeals. Justice Souter concurred and filed an opinion. Justice Stevens, with Justice O'Connor, concurred in the judgment and filed an opinion.

8 The studios presumably were concerned about lost potential royalties, but they also may have worried about a possible threat to their competitive system for delivering movies to hotel rooms through a wired cable system. 113 S. Ct. at 1923.


10 1990-1 Trade Cas. (CCH) ¶ 68,971 (C.D. Cal. 1990).

11 Id. at 63,243 (quoting Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240, 1255 (9th Cir. 1982)).

12 References to "plaintiffs" and "defendants" hereinafter will refer to parties in the original suit; the parties in the antitrust counterclaim will be referred to as "counter-plaintiffs" and "counter-defendants."
solve, and "there was probable cause for bringing the action." The Ninth Circuit affirmed. It interpreted Ninth Circuit precedents as erecting a "two-part test": to prove "sham" litigation, counter-plaintiffs must prove "(1) that the suit is baseless—a legal question . . . and (2) that the suit was brought as part of an anticompetitive plan external to the underlying litigation—a question of fact." Since the counter-plaintiff did not "challenge the district court's finding that the infringement action was brought with probable cause, i.e., that the suit was not baseless," there was no need for discovery on subjective intent before granting summary judgment.

The Petition for Certiorari's "question presented" was whether the court should have considered evidence "that the lawsuit in question was not pursued with a genuine desire to obtain a favorable judgment." By the Brief on the Merits, petitioners had changed the question to whether the court should have refused to consider evidence that the lawsuit "was pursued with indifference to its outcome." By the middle of oral argument, petitioners had switched to a "but-for" test asking whether the suit would have been brought but for a predatory motive.

The Solicitor General joined petitioners in favoring a subjective intent based test but disagreed as to the test and the outcome. He argued that the test should turn on whether "litigation was brought to inflict harm through the process alone, without regard to the outcome." He called for rejecting the Ninth Circuit's test but affirming on other grounds.

Respondents argued that lawsuits should be sham only if they flunk both an objective and a subjective test. Respondents' objective test would have limited the sham exception to "objectively unreasonable" lawsuits. "Objective misconduct" such as "serious misrepresentations" would satisfy this. Absent such misconduct, however, a lawsuit "can be a sham

13 1990-1 Trade Cas. (CCH) at 63,243.
14 944 F.2d at 1525 (9th Cir. 1991).
15 944 F.2d at 1532. The Ninth Circuit recognized two types of sham activity: certain baseless suits, and "misrepresentations . . . in the adjudicatory process." 944 F.2d at 1529 (quoting California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)). It did not discuss misrepresentations, which were not in issue.
16 944 F.2d at 1530.
17 Petition for Certiorari at i.
18 Petitioners' Brief on the Merits at i.
19 Transcript at 10.
21 Brief for the Respondents at 41.
22 Brief for the Respondents at 41. Other misconduct that would satisfy this objective test would include "flagrant abuses in the litigation process; a pattern of baseless or unsuc-
only if it lacked a reasonable basis." At oral argument, respondents' lawyer was emphatic on the importance of a two-part, objective-subjective test but was vague about each part. Once he said that "[b]aselessness is one way to satisfy that [objective] standard." Later he seemed to use "baselessness" and lack of probable cause as interchangeable phrasings of the test.

The petitioners fared badly in oral argument. The Court was clearly disconcerted by the midstream switch of standards. Beyond that, however, the Court appeared anxious about the implications of any subjective standard. Chief Justice Rehnquist worried aloud about the consequences for summary judgment: "But you seldom get a summary judgment in a case like this if you can go through a corporation's files on a question of intent. The Ninth Circuit approach is "at least much more easily administrable I think, than the one you're urging." Later, after the petitioners' lawyer advocated the measuring of a plaintiff's conflicted motivations, the Chief Justice observed, "One thing is clear, isn't it, that we'll never have summary judgment in one of these cases?"

B. The Court's Opinion

From such an array of protean tests it would be a challenge to construct an opinion of shining clarity and wisdom. It is disappointing, nonetheless,
that the Court perpetuated the culture of capriciousness that infected this case. Neither the Court's reasoning nor its result is satisfying. The Court's analysis consisted of (1) a review of its previous decisions that was rife with mischaracterizations and non sequiturs, and (2) unpersuasive resort to a dictionary.

Previously, sham litigation was defined in one of two ways: (1) "private action that is not genuinely aimed at procuring favorable government action," or (2) "situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon." As a result of PRE, inquiry into the litigant's subjective motivation, which requires proof that the plaintiff sought to harm competition with the "governmental process," is just the second step. The new first step was phrased more than a half-dozen ways: only "objectively baseless" litigation can be sham; an objectively reasonable effort to litigate cannot be sham; a sham lawsuit "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits;" a lawsuit is immunized if "an objective litigant could not buying: "But that still isn't going to do a whit for you on summary judgment." Id. at 14.

The Court even started unfortunately. Citing cases, it wrote that the "array of definitions adopted by lower courts demonstrates" that the Court was "prescient" when it "once observed that 'sham' might become 'no more than a label courts could apply to activity they deem unworthy of antitrust immunity.'" 113 S. Ct. at 1925 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 508 n.10). Any such prescience would deserve only limited credit, however, because only 3 of the 10 cited cases were decided after Allied Tube. The Allied Tube Court had not made a prediction at all; rather, it had complained about the lower court ("the Ninth Circuit's approach renders 'sham' no more than a label courts could apply . . .").

Allied Tube, 486 U.S. at 500 n.4 (1988); cf. Lawrence A. Sullivan, Developments in the Noerr Doctrine, 56 ANTITRUST L.J. 361, 362 (1987) ("A petition is not a sham, in this purpose-centered sense, unless petitioner is really not looking for government action at all.").


Under this second part of our definition of sham, the court should focus on whether the baseless lawsuit conceals "an attempt to interfere directly with the business relationships of a competitor" through the "use [of] the governmental process—as opposed to the outcome of that process as an anticompetitive weapon." (citing first Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961) (emphasis added) and then Omni (emphasis in original). This second step differs from the Ninth Circuit's, which had required "that the suit was brought as part of an anticompetitive plan external to the underlying litigation." 944 F.2d at 1532.

113 S. Ct. at 1928.

Id. at 1923.

Id. at 1926.

Id. at 1928.
conclude that the suit is reasonably calculated to elicit a favorable outcome;"\textsuperscript{37} "sham litigation must constitute the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief;"\textsuperscript{38} a lawsuit cannot be sham if there was "probable cause to institute legal proceedings," which "requires no more than a 'reasonable[ly] belie[f] that there is a chance that [a] claim may be held valid upon adjudication';"\textsuperscript{39} it is sufficient that "[a]ny reasonable copyright owner . . . could have believed that it had some chance of winning an infringement suit;"\textsuperscript{40} it is sufficient that "a similarly situated reasonable litigant could have perceived some likelihood of success;"\textsuperscript{41} and it is sufficient that a "court could reasonably conclude" that the suit "was an objectively plausible effort to enforce rights."\textsuperscript{42} And this listing of alternative versions of the test ignores the Court's puzzling reference to Rule 11 of the Federal Rules of Civil Procedure.\textsuperscript{43}

The Court asserted that its "original formulation of antitrust petitioning immunity required that unprotected activity lack objective reasonableness."\textsuperscript{44} Yet this claim was supported merely by pointing to \textit{Noerr}'s holding that an anticompetitive animus does not make otherwise valid petitioning illegal.\textsuperscript{45} A holding that persons may ask the government to harm their rivals says nothing about whether petitioning is immune even when not genuinely motivated by an interest in seeking the petitioned-for redress.\textsuperscript{46}

Most of the Court's justification for its alternatively phrased objective test consisted of an unpersuasive review of post-\textit{Noerr} precedent. The

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} \textit{Id.} at 1929.

\textsuperscript{39} \textit{Id.} (citation omitted).

\textsuperscript{40} \textit{Id.} at 1930.

\textsuperscript{41} \textit{Id.} at 1931.

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} Without explaining the importance of the point, the Court wrote, "Even though it did not survive PRE's motion for summary judgment, Columbia's copyright action was arguably 'warranted by existing law' or at the very least was based on an objectively 'good faith argument for the extension, modification, or reversal of existing law.' \textit{Fed. Rule Civ. Proc. 11.}'' \textit{Id.} at 1930-31.

\textsuperscript{44} 113 S. Ct. at 1926.

\textsuperscript{45} \textit{Id.} at 1926-27 (citing \textit{Noerr}, 365 U.S. at 138-39, 143). Similarly, \textit{United Mine Workers v. Pennington}, 381 U.S. 657, 670 (1965), which was quoted as saying that petitioning is protected "regardless of intent or purpose," was rejecting an assertion that a conspiracy intended to violate a statute was unprotected, 381 U.S. at 669-70.

\textsuperscript{46} This limitation was recognized in \textit{Noerr} itself:

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a
Court claimed that California Motor Transport Co. v. Trucking Unlimited\(^4\) drew a line “separating objectively reasonable claims from ‘a pattern of baseless, repetitive claims,’”\(^5\) whereas California Motor Transport actually drew quite a different line.\(^6\) The PRE Court wrote that its “recognition of a sham in that case [California Motor Transport] signifies that the institution of legal proceedings ‘without probable cause’ will give rise to a sham if such activity effectively ‘bar[s]... competitors from meaningful access to adjudicatory tribunals and so... usurp[s] th[e] decisionmaking process.’”\(^7\) But this assertion took words out of context and, by doing so, misread precedent. The essence of California Motor Transport is not that actions were instituted “‘without probable cause,’” but rather that they were instituted “‘with or without probable cause.’”\(^8\) That Court was untroubled by the plaintiffs having prevailed in a majority of the actions.\(^9\) Although California Motor Transport did refer to “baseless” filings, and some have read the opinion as supporting a “baselessness” test,\(^10\) that Court’s holding turned squarely on plaintiffs’ intent.\(^11\)

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\(^4\) 404 U.S. 508 (1972).

\(^5\) 113 S. Ct. at 1927 (quoting 404 U.S. at 513).

\(^6\) 404 U.S. at 513 (“One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused.”).

\(^7\) 113 S. Ct. at 1927 (quoting 404 U.S. at 512) (brackets by PRE Court).

\(^8\) 404 U.S. at 512 (emphasis added). The charge in California Motor Transport was that one group of truckers reflexively challenged virtually every request by a competitor for additional operating rights. The discussion from which PRE plucked snippets is as follows: Petitioners rely on our statement in Pennington that “Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.” 381 U.S., at 670. In the present case, however, the allegations are not that the conspirators sought “to influence public officials,” but that they sought to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp that decisionmaking process. It is alleged that petitioners “instituted the proceedings and actions... with or without probable cause, and regardless of the merits of the cases.” The nature of the views pressed does not, of course, determine whether First Amendment rights may be invoked; but they may bear upon a purpose to deprive the competitors of meaningful access to the agencies and the courts. As stated in the opinion concurring in the judgment, such a purpose or intent, if shown, would be “to discourage and ultimately to prevent the respondents from invoking” the processes of the administrative agencies and courts and thus fall within the exception to Noerr.

\(^9\) 52 Trucking Unlimited v. California Motor Transport Co., 1967 Trade Cas. (CCH) ¶ 72,298, at 84,744 (N.D. Cal. 1967) (21 of 40 proceedings “resulted in action favorable to [counter-]defendants”).

\(^10\) \textit{E.g.}, ABA \textit{Antitrust Section}, \textit{Antitrust Law Developments} 999 (3d ed. 1992) [hereinafter \textit{Antitrust Law Developments}].

The PRE Court wrote that ever since Noerr and California Motor Transport it had "consistently assumed that the sham exception contains an indispensable objective component." Any such assumption, however, is not manifested in the written opinions, the excerpts quoted by the Court notwithstanding. The Court highlighted cases holding that an anticompetitive purpose is not sufficient to make petitioning sham, but such cases do not lend support. The Court quoted at length Omni Outdoor Advertising's explanation that anticompetitive intentions do not make a sham, but such language does not show that Omni "held that challenges to allegedly sham petitioning activity must be resolved according to objective criteria." Instead, Omni was a source of what had been relatively settled law on the sham doctrine. When the Court concentrated of intent is made especially clear in Justice Stewart's concurring opinion in California Motor Transport, on which the majority twice relied, 404 U.S. at 512, 515. Justice Stewart reviewed the complaint and reasoned that "the respondents are entitled to prove that the real intent of the conspirators was not to invoke the processes of the administrative agencies and courts, but to discourage and ultimately to prevent the respondents from invoking those processes. Such an intent would make the conspiracy 'an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.'" Id. at 518 (emphasis in original) (quoting Noerr, 365 U.S. at 144).

PRE noted some of California Motor Transport's references to purpose, but responded merely by observing as follows: "That a sham depends on the existence of anticompetitive intent, however, does not transform the sham inquiry into a purely subjective investigation." 113 S. Ct. at 1926 n.4.

CENTRALITY OF INTENT

Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973), referred to proceedings where "the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims" (italicized words omitted by PRE Court), and it was merely describing the holding in California Motor Transport. In his concurring opinion in Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623, 645 (1977), Justice Blackmun was not "describing a successful lawsuit as a 'genuine attempt[ ] to use the . . . adjudicative process legitimately,'" as suggested, 113 S. Ct. at 1927; rather, Justice Blackmun wrote that the District Court "believed that it was enough that Vendo's activities . . . were not genuine attempts," etc., whereas he concluded that a single state court proceeding leading to a "considered affirmandance" by the Illinois Supreme Court of a $7 million judgment could not be said to be "using the state-court proceeding as an anticompetitive device in and of itself." 433 U.S. at 645. The only case providing solid support for PRE is Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 743-44 (1983), the NLRB case reasoning by analogy to Noerr's sham exception and declining to permit the NLRB to enjoin the prosecution of nonbaseless state court lawsuits.

Seesupra note 46 and accompanying text. Confusion about purposes permeated the oral argument. One question suggested that "if there was no intent to harm competition, that's the end of the case." Another, that if "there is intent to harm competition, it doesn't make any difference how well based the case was or even if it was won." Transcript at 6-7. One Justice asked, "[w]hen does anybody bring suit against a competitor without hoping to harm the competitor?" Transcript at 11. Another question put twice that anyone filing a copyright suit desires to harm the defendant's business. Transcript at 38.

See supra note 32; see also Omni, 111 S. Ct. at 1355 (sham exception should not apply to "a genuine attempt to influence governmental action").
cluded its review of previous cases by declaring that "fidelity to precedent compels us to reject a purely subjective definition of 'sham,'" the Court was engaging in a certain amount of overstatement. 61

In addition to its review of precedent, the Court found support for its new two-part test in a dictionary. The Court claimed that "the apparent confusion" about the sham exception "may stem from our use of the word 'genuine' to denote the opposite of 'sham.'" 62 The Court then explained that "'genuine' has both objective and subjective connotations." It can mean "'actually having the reputed or apparent qualities or character,'" or it can mean "'sincerely and honestly felt or experienced.'" 63 The Court found in these two meanings support for adding an objective test: "To be sham, therefore, litigation must fail to be 'genuine' in both senses of the word." 64

With all due respect, that conclusion does not follow. In the referenced cases the word "genuine" (or "genuinely") is followed by "aimed," "attempt(s)," and "effort." No definition of "genuine" can transform an inquiry about whether litigation was a "genuine attempt to influence governmental action" into the Court's new, varying, subjective-and-objective test; but that test is now law.

C. The Meaning of Professional Real Estate 65

Clarity is impossible when a court offers such a smorgasbord of standards. Three Justices recoiled from the seeming casualness of the Court's

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61 113 S. Ct. at 1928.
62 See also Daralyn J. Durie & Mark A. Lemley, The Antitrust Liability of Labor Unions for Anticompetitive Litigation, 80 CAL. L. REV. 757, 797 (1992) (Allied Tube rejected objective tests); Earl W. Kintner & Joseph P. Bauer, Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine, 17 U. CAL. DAVIS L. REV. 549, 571 (1984) ("courts have held that the defendants' intent is the principal criterion in determining whether attempts to obtain governmental relief are a sham"); cf. Hurwitz, supra note 54, at 102 ("The weight both of prevailing authority and sound policy ... supports a requirement of baselessness, except where petitioning is supported by unethical conduct, undertaken in complete disregard of the merits, or part of an overarching unlawful scheme.") (emphasis added); Milton Handler & Richard A. De Sevo, The Noerr Doctrine and Its Sham Exception, 6 CARDOZO L. REV. 1, 55 (1984) (calling for the sham exception to be narrowed and limited by a "dual standard" to include only (1) frivolous petitioning where (2) plaintiff knew it lacked legal or factual basis). But cf. ANTITRUST LAW DEVELOPMENTS, supra note 53, at 999 n.207 (lower court cases adopting baselessness requirement).
63 113 S. Ct. at 1928 (citing Omni, 111 S. Ct. at 1355; Allied Tube, 486 U.S. at 500 n.4; Noerr, 365 U.S. at 144; and Vendo Co., 433 U.S. at 645 (Blackmun, J., concurring in the result)).
64 113 S. Ct. at 1928–29 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 948 (1986)).
65 113 S. Ct. at 1929 (footnote omitted).
66 For other discussions of the case, which raise some points related to the material that follows, see Maxwell M. Blecher, A Plaintiff's Survival Guide in the Post-Columbia Pictures
drafting. Justice Souter, concurring, asserted that the Court had held "that a person cannot incur antitrust liability merely by bringing a lawsuit as long as the suit is not 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits.'" 67 But he worried that lower courts might not find this test among the cloud of proffered standards. Justice Stevens, joined by Justice O'Connor, found a different holding in PRE, namely, "that an objectively reasonable effort to litigate cannot be sham regardless of subjective intent." 68 He quoted four different phrasings of the Court's new test and wondered whether the Court meant to suggest that counter-plaintiffs had to satisfy one, some, or all of them.

Nor do PRE's facts clarify its holding. The case involved a single lawsuit that was "obviously legitimate," according even to Justice Stevens, the Justice apparently most sympathetic to the defendants' position. 69 Yet nothing in the Court's discussion prevents application of its test to two, three, or many lawsuits. The PRE dispute focused sharply on litigation rather than petitioning more generally; yet it is not clear that the Court's discussion does not apply to other forms of petitioning as well. Also uncertain is the fate of the line of authority declining to protect unethical petitioning conduct such as fraud and misrepresentation. 70 It is not even clear that the Court has eliminated exclusive reliance on subjective motivation in the "sham" exception or for Noerr immunity more generally.

1. Possible Continued Subjectivity in Identifying Shams

However the Court's "baselessness" test is phrased, it could incorporate an element of subjectivity. The Ninth Circuit, for instance, found that the suit was not "baseless" because the district court found "probable cause"; but the district court emphasized that "[i]t was clear from the manner in which the case was presented that the plaintiff was seeking and expecting a favorable judgment." 71 The specific holding of PRE thus would not apply to a different kind of suit. The Solicitor General pointed out this constraint on the meaning of "baselessness," arguing that "the inquiry into baselessness is malleable enough to reflect a judge's perception of whether a particular litigant was 'really' engaged in a sham—an inquiry that boils down to subjective intent." 72

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67 113 S. Ct. at 1931 (Souter, J., concurring) (quoting 113 S. Ct. at 1928).
68 Id. at 1932 (Stevens, J., concurring in the judgment) (quoting 113 S. Ct. at 1926).
69 Id. at 1933 (Stevens, J., concurring in the judgment).
70 See infra note 95.
71 1990-1 Trade Cas. (CCH) at 63,243.
72 Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Respondents at 17 n.15.
That subjective intent might continue to be an issue also is suggested by the Court's application of its new test. The Court wrote that "sham" requires "the pursuit of claims so baseless that no reasonable litigant could realistically expect to secure favorable relief," but then, in the next sentence, wrote that "[t]he existence of probable cause to institute legal proceedings precludes a finding that an antitrust defendant has engaged in sham litigation." The heart of the Court's reasoning consisted of proof of the existence of probable cause "as understood and applied in the commonlaw tort of wrongful civil proceedings."

This part of the opinion may be a fountainhead of confusion. Perhaps the existence of "probable cause" is the critical test, since that was the issue on which the Court focused. Alternatively, perhaps proof of probable cause is merely one way a counter-defendant can prevail on the objective test, i.e., probable cause is sufficient but not necessary to disprove baselessness. Equally troubling, it is not clear whether any probable cause test should turn on the common law (1) as described by the Court, (2) as commonly understood, or (3) as applied by the Court. Unfortunately, while the first two understandings of probable cause are very similar, the third appears quite different.

The Court wrote that probable cause in the civil context "requires no more than a 'reasonable believe[f] that there is a chance that [a] claim may be held valid upon adjudication.'" The Court said that where the

75 113 S. Ct. at 1929.

74 Id. The Court noted that the better-known tort of "malicious prosecution" actually refers to the wrongful instigation of criminal proceedings, but it dismissed concern about distinctions between the two by explaining that the "threshold for showing probable cause is no higher in the civil context than in the criminal." 113 S. Ct. at 1929 n.7 (citing RESTATEMENT (SECOND) OF TORTS § 674, Comment e at 454–55 (1977)).

The Court highlighted this tort largely on its own initiative. The subject barely arose at oral argument. Of the 14 torts authorities cited by the Court, only 5 (including the RESTATEMENT and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 893 (5th ed. 1984) [hereinafter PROSSER & KEETON]) were cited in a brief.

The Court did not explain why it looked to the tort of wrongful use of civil proceedings rather than the related tort of abuse of process. Cf. Brief for the Respondents, at 36–38 (drawing analogies to both common law torts); Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Respondents at 14–15 n.11 (noting that probable cause does not prevent a finding of abuse of process).

75 113 S. Ct. at 1929 (brackets by the Court) (citing "Hubbard v. Beaty & Hyde, Inc., 343 Mass. 258, 262, 178 N.E.2d 485, 488 (1961); RESTATEMENT (SECOND) OF TORTS § 675, Comment e, at 454–55 (1977)"). Although the Court failed to note this, the quoted language from Hubbard itself was a quotation, from Comment e to RESTATEMENT (FIRST) § 675. The comparable sentence in Comment e to RESTATEMENT (SECOND) § 675, at 459–60, says that for civil proceedings, "all that is necessary is that the claimant reasonably believe that there is a sound chance that his claim may be held legally valid upon adjudication." It is not clear whether the Court meant to cite this, since it cited Section 675, but different pages (454–55) which contain Comment e to Section 674 (which states, at 454, that "a reasonable belief in the possibility that the claim may be held valid is sufficient to give probable cause for the initiation of civil proceedings").
predicate facts are undisputed, "a court may decide probable cause as a matter of law."76 Although these are not the only formulations of common law wrongful use of civil proceedings, neither statement is remarkable.77 But the Court went on to say that the "question is not whether [the defendant] thought the facts to constitute probable cause, but whether the court thinks they did."78 The only "fact" at which PRE looked was the state of copyright law in early 1986, when the district court granted summary judgment on the copyright claim.79 The Court pronounced that law very unsettled as shown by two opinions going the other way,80 by subsequent scholarly criticism of the Ninth Circuit's decision,81 and by the Seventh Circuit's refusal to follow the Ninth Circuit's lead.82 PRE concluded that "in light of the unsettled condition of the law, Columbia plainly had probable cause to sue."83

That is not the way a common law court would likely analyze a charge of wrongful use of civil litigation, in three respects. First, probable cause for initiation of a proceeding is measured as of the date of its commencement84

76 113 S. Ct. at 1930.
77 Cf. Prosser & Keeton, supra note 74, at 893 (one "is justified in bringing a civil suit when he reasonably believes that he has a good chance of establishing it to the satisfaction of the court or the jury").
78 113 S. Ct. at 1930 (quoting a false imprisonment case, Director General v. Kastenbaum, 263 U.S. 25, 28 (1923)).
79 113 S. Ct. at 1930.
80 Id. (citing Columbia Pictures Indus., Inc. v. Redd Horne, Inc., 749 F.2d 154 (3d Cir. 1984); Columbia Pictures Indus., Inc. v. Aveco, Inc., 612 F. Supp. 315 (M.D. Pa. 1985), aff'd, 800 F.2d 59 (3d Cir. 1986)).
81 113 S. Ct. at 1930 (citing 1 Paul Goldstein, Copyright: Principles, Law and Practice § 5.7.2.2, at 616–19 (1989); and 2 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.14[C][3], at 8-168–73 (1992)).
82 113 S. Ct. at 1930 (citing Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020 (7th Cir.), cert. denied, 112 S. Ct. 181 (1991)).
83 113 S. Ct. at 1930.
84 Restatement (Second) of the Law of Torts § 662, Comment f (1977) ("The question of probable cause is to be determined in the light of those facts that the accuser knows or reasonably believes to exist at the time when he acts. . . . [H]is position cannot be improved by his subsequent discovery of incriminating facts" unless they result in conviction (since conviction is a complete defense)); cf. Restatement (Second) of the Law of Torts § 675, Comment c (Comments e–g to § 662 (malicious prosecution) are generally applicable to wrongful use of civil proceedings); Stewart v. Sonneborn, 98 U.S. 187, 195 (1879) (case cited three times by Court) ("The conduct of the defendants is to be weighed in view of what appeared to them when they filed their petition in the bankrupt court—not in the light of subsequently appearing facts. Had they reasonable cause for their action when they took it? Not what the actual fact was, but what they had reason to believe it was.") (citations omitted); Nelson v. Miller, 227 Kan. 271, 277 (1980) (case cited by Court) ("In cases of malicious prosecution [there, of a civil action], the inquiry as to want of probable cause is limited to the facts and circumstances as they appeared to defendant at the time the prosecution was commenced.") (citations omitted); Thomas M. Cooley, A Treatise on the Law of Torts 183 (1879) (discussion of malicious prosecution cited twice by Court)
—here, April 25, 1983\textsuperscript{85}—rather than the 1986 date chosen by the Court.\textsuperscript{86}

Second, the common law tort turns on facts that the plaintiff personally knows or believes he or she can establish. For instance, in \textit{Director General v. Kastenbaum},\textsuperscript{87} the case quoted by \textit{PRE} for the proposition that it is up to the court to decide whether “the facts” constitute probable cause, the Court wrote that “probable cause . . . is measured by the state of the defendant’s knowledge, not by his intent. It means the absence of probable cause known to the defendant when he instituted his suit.”\textsuperscript{88} Although the \textit{PRE} Court was imprecise on this point, it appeared to have had little interest in what the plaintiffs knew in 1983 (or, for that matter, in 1986). Since there was no suggestion that the plaintiffs’ information was flawed, the Court’s failure to address the question may have been an oversight; but the Court departed from the common law.

Third, and more controversial, the more accepted view is that to establish probable cause a plaintiff must subjectively believe in his or her case.\textsuperscript{89} This is most clear for the tort of malicious prosecution (of criminal

\textsuperscript{85} 228 U.S.P.Q. at 745 (copyright infringement claim filed).
\textsuperscript{86} Even 1986 was before issuance of the two contrary opinions mentioned by the Court. Although the Court could have meant to say that the 1984 and 1985 opinions and the criticism that followed the Ninth Circuit’s 1989 decision showed that the law was unsettled in 1983, that is not what the Court said.
\textsuperscript{87} 263 U.S. 25 (1923).
\textsuperscript{88} \textit{Id.} at 27–28. To the language quoted by \textit{PRE} is appended a citation to \textit{OLIVER W. HOLMES, THE COMMON LAW} 140 (1923), where Holmes explained the point nicely: “The want of probable cause refers, of course, only to the state of the defendant’s knowledge, not to his intent. It means the absence of probable cause in the facts known to the defendant when he instituted the suit.”; \textit{see also} sources cited supra note 84.
\textsuperscript{89} In this respect, probable cause in tort law appears to differ from probable cause in criminal procedure. A good discussion of the point is included in \textit{1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT} § 3.2(b) (2d ed. 1987 & Supp. 1993). Noting that the question will arise rarely, LaFave posits the case where the individual (typically a police officer) does not subjectively believe that there is probable cause, even though in fact there is. Although LaFave notes dictum going the other way, he sets forth, as the “correct view,” that police doubts about probable cause should not prevent a search or arrest from being upheld. That LaFave’s view is sound is made clear by reading the referenced cases. Not infrequently, it seems, a police officer will claim not to have made an arrest or a search, only to have a court find that he or she did—but, unbeknownst to the officer, with probable cause.
proceedings),\textsuperscript{90} which the Court treated interchangeably with the tort of wrongful use of civil proceedings. But for civil proceedings, too, the more accepted view is that a plaintiff should possess a specific belief in the likely, or at least the possible, merits of his or her case.\textsuperscript{91} A suit filed without such a reasonable belief is protected if it succeeds since failure usually is an element of the tort;\textsuperscript{92} but a failed suit usually is protected only if there was an actual belief.

The definition of probable cause that the Court quoted, requiring a reasonable belief in the chance that a claim may be upheld, is consistent with the more accepted view that (1) the question is asked as of the date proceedings were initiated, (2) the answer turns on facts the plaintiff actually knew or believed he or she could establish, and (3) the plaintiff must actually have had the belief that his or her claim may be valid. But the Court's application of the standard to the facts relied on events occurring after the initiation of proceedings and showed no apparent interest in what the plaintiff knew or believed. Thus, the test as phrased

\begin{footnotes}
\footnote{\textsuperscript{90} \textit{Restatement (Second) of Torts} § 662 (1977); see also \textit{Joel Prentiss Bishop, Commentaries on the Non-Contract Law} § 239, at 95 (1889) (treatise cited by Court) ("Probable cause . . . is any such combination of facts and proofs as may fairly lead the reasonable mind to the belief (and the person relying on it must believe) that, in the absence of hitherto unknown qualifying or rebutting evidence, the prosecution . . . ought to be successful.") (footnotes omitted); \textit{Cooley}, supra note 84, at 183 ("Neither is he justified if he knew the facts, but did not believe them."); \textit{John G. Fleming, The Law of Torts} 582 (6th ed. 1983) ("It is not enough that a discreet and reasonable man would have believed in the guilt of the accused, unless the defendant himself honestly shared it. There must be both actual and reasonable belief.") (footnote omitted). For criticism of the \textit{Restatement}'s subjective rule and a highlighting of some cases going the other way, see \textit{Prosser & Keeton, supra note 74, at 877; Dan B. Dobbs, Belief and Doubt in Malicious Prosecution and Libel, 21 Ariz. L. Rev. 607 (1979).} \footnote{\textsuperscript{91} \textit{The Restatement (Second)} states the black letter law of probable cause as requiring that the plaintiff "reasonably believes in the existence of the facts upon which the claim is based, and either (a) correctly or reasonably believes that under those facts the claim may be valid under the applicable law, or (b) believes to this effect in reliance upon the advice of counsel, sought in good faith . . . ." \textit{Restatement (Second) of Torts} § 675 (1977). The Comment to this section indicates that the plaintiff must "reasonably believe that there is a sound chance that his claim may be held legally valid upon adjudication." Comment c, at 459–60. See also, e.g., \textit{Bradshaw v. State Farm Mutual Automobile Ins. Co.}, 758 P.2d 1313, 1319 (Ariz. 1988) ("The proper test is subjective and objective. The initiator of the action must honestly believe in its possible merits; and, in light of the facts, that belief must be objectively reasonable.") (citations omitted); 1 \textit{Fowler V. Harper et al., The Law of Torts} 462 (2d ed. 1986) ("the initiator of civil litigation is justified in terms of probable cause by a reasonable belief in the possibility that the claim may be held valid").} \footnote{\textsuperscript{92} \textit{Contra Note, Limiting the Antitrust Immunity for Concerted Attempts to Influence Courts and Adjudicatory Agencies: Analogies to Malicious Prosecution and Abuse of Process, 86 Harv. L. Rev. 715, 729 (1973) (note blending malicious prosecution of criminal and civil actions asserts that "common law courts generally have avoided determining whether the defendant subjectively believed in the merit of his case; rather, the standard is fundamentally objective").} \textit{Restatement (Second) of Torts} § 674; see also \textit{Prosser and Keeton, supra note 74, at 892.}}
\end{footnotes}
and as drawing on common law sources retains a subjective element; the

2. Subjective Intent as an Element in Petitioning Immunity Other than Through the Sham Exception

However much PRE limited the sham exception, it only did that—limit an exception. The importance of the change depends on the importance of the exception. At one time the sham exception played a leading role in litigation about petitioning since sham was regarded as a broad, malleable concept that condemned improper petitioning. Were the exception that central, narrowing it would make quite a difference.

The effect of the Court's decision in Allied Tube & Conduit, Corp. v. Indian Head, Inc., however, was to reduce significantly the scope and importance of the sham exception. Once the sham exception was limited to "activity that was not genuinely intended to influence governmental action," the exception became irrelevant to such unethical conduct as misrepresentation, bribery, and conspiracy. The applicability of Noerr to such behavior turned not on any exception to Noerr but on whether Noerr applied initially at all; the applicability of Noerr depended, in turn, on whether a restraint resulting from petitioning was "'incidental' to a valid effort to influence governmental action"—and that depended "not only on its impact, but also on the context and nature of the activity." The critical issues, of course, turn on the determination of what restraints are "incidental" and what petitioning efforts are "valid." To the extent that antitrust challenges to petitioning turn on these issues rather than on the sham exception, PRE's limitation of the sham exception will have less impact.

3. The Basis of Noerr

In PRE the Court again failed to address explicitly the perennial question of whether Noerr is a First Amendment-based exemption from the

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93 486 U.S. 492 (1988). This aspect of Allied Tube is discussed in Calkins, First Amendment, supra note 6, at 338–40; see also Elhauge, supra note 54, at 1215. But cf. Calkins, Toward Certainty, supra note 1, at 615–16 (Omni lessened clarity by unnecessarily presuming the "sham" exception was at issue).
94 Allied Tube, 486 U.S. at 508 n.10.
95 PRE neither confirmed nor rejected this when it reserved the question of Noerr's applicability to fraud and misrepresentation. 113 S. Ct. at 1929 n.6 ("We need not decide here whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.") (citations omitted). Respondents' Brief at 41, in contrast, had assumed that such behavior would be considered sham. Supra note 22 and accompanying text.
96 486 U.S. at 499.
97 Id. at 504.
98 For a thorough analysis of these issues see Elhauge, supra note 54, at 1215–40.
antitrust laws, or simply an interpretation of those laws. Respondents stressed the "fundamental point[]" that Noerr was interpreting a statute, so the Court "has a much freer hand to fashion sensible rules." Petitioners objected. The Court exercised the free hand urged by respondents without making clear its basis for doing so. The opinion's tone is one of statutory construction, however, and to the extent that the Court has implied an answer to this question the case has implications beyond the sham exception.

D. Conclusion

The above criticism of the Court's reasoning and result is not premised on the Court's overlooking some obviously correct test for identifying sham petitioning. There is no such test—which is why the Court should have waited for a better vehicle to address the issue. The notion of scrutinizing litigators' intent is frightening; yet litigation sometimes is filed solely to impose litigation costs on competitors. Many courts and commentators have advanced creative solutions to the dilemma, but a completely satisfactory approach has eluded all. Right or wrong, the Court adopted a two-part, subjective-and-objective test. There may well

99 This question is explicated in Calkins, First Amendment, supra note 6, at 329–32.
100 Respondents' Brief at 18–19; see also Transcript at 27 (lawyer opened with this argument, emphasizing the Court's "broader latitude").
101 Petitioners' Reply Brief on the Merits at 8.
102 See also 113 S. Ct. at 1926 ("Nor did we 'impute to Congress an intent to invade' the First Amendment right to petition.") (quoting Noerr); id. ("Noerr, however, withheld immunity from 'sham' activities because 'application of the Sherman Act would be justified' when petitioning activity . . . is a mere sham . . . . "). But see id. at 1926–28, 1930–31 (repeated references to Noerr "immunity").
103 The Court's opinion in Omni similarly failed to make clear the basis of Noerr's protection but implied a statutory origin (there, by suggesting that even bribery can be protected petitioning). See Calkins, Toward Certainty, supra note 1, at 616–18.
104 Respondents' Brief did a masterful job of arguing that guidance to courts and litigants "hardly will exist if objectively reasonable lawsuits are left in the hands of juries deconstructing the subjective intent of collective actors." Respondents' Brief at 22–23.
105 Elhauge, supra note 54, at 1229–30 ("strategic litigation is actually a far more useful tool for driving competitors out of business than predatory pricing"); Gary Myers, Litigation as a Predatory Practice, 80 KY. L.J. 565 (1991–92); cf. Lucian A. Bebchuk, Suing Solely to Extract a Settlement Offer, 17 J. LEGAL STUDIES 437 (1988) (plaintiffs file even non-cost-justified suits, hoping to extract settlements). But cf. Christopher C. Klein, Predation in the Courts: Legal Versus Economic Analysis in Sham Litigation Cases, 10 INT’L REV. L. & ECON. 29 (1990) (relative paucity of countersuits suggests that sham litigation may be less common than had been thought).
106 Various tests are discussed in Calkins, First Amendment, supra note 6; Elhauge, supra note 54; Handler & De Sevo, supra note 62; Hurwitiz, supra note 54; Kintner & Bauer, supra note 62; Gary Minda, Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine, 41 HASTINGS L.J. 905 (1990) (no persuasive theory of sham litigation is possible); and Myers, supra note 105.
be good reasons for this, but the Court failed to set forth those reasons persuasively. Although the Court sought objectivity and clarity, it failed to establish a single, clear version of its test or to explicate the implications of its decision. 107

II. SPECTRUM SPORTS

But if it's a question of a permissible inference of intent, I would think it would be difficult to throw many of them out on summary judgment.

Because intent is very much a subjective thing. 108

Even before oral argument in Spectrum Sports, Inc. v. McQuillan, the plaintiffs-respondents' chances were modest. Any remaining optimism should have been dampened when Chief Justice Rehnquist asked that question. Plaintiffs do not fare well when the Chief Justice expresses concern about the difficulty of resolving cases on summary judgment. 109

At issue in Spectrum Sports was the Ninth Circuit's unique rule for attempted monopolization. 110 This rule, which originated in Lessig v. Tidewater Oil Co., permitted plaintiffs to prevail by showing unfair or predatory conduct; specifically, the fact finder could infer from such conduct the "dangerous probability" of successful monopolization that

107 One perhaps unforeseen result of PRE is that a lower court has reacted to PRE by declaring sham litigation per se illegal. El Cajon Cinemas, Inc. v. American Multi-Cinema, Inc., 7 Trade Reg. Rep. (CCH) ¶ 70,367, at 70,937 (S.D. Cal. Aug. 20, 1993) (noting that "there is no redeeming value to the practice"). This change would be consistent with the equilibrating tendencies of the law, including antitrust law; if sham litigation is very difficult to prove, courts might rely more heavily on it to find an antitrust violation. See generally Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L.J. 1065 (1986).

108 Transcript, Spectrum Sports, at 48 (Comment of Chief Justice Rehnquist, as identified by lawyer's response).


110 The attempted monopolization offense is set out in Sherman Act § 2, 15 U.S.C.A. § 2 (Supp. 1993) ("Every 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 . . . .").

was an independent element of the offense in other circuits. The Ninth Circuit's rule had become so controversial that the respondents spent more time arguing that Lessig was not in issue than defending it. Their effort to deflect the Court's inquiry was unavailing, and the Court squarely rejected Lessig and ruled that attempted monopolization requires a dangerous probability of success. Although unsurprising given the tide of lower court opinions, this result was not compelled by Supreme Court precedent and it departs from criminal law attempts by preferring what is known as the "objectivist" approach. Spectrum Sports makes objective evidence of market power of central importance in every attempted monopolization case, but since hard issues were not raised by the case, however, the opinion leaves many questions unanswered.

Perhaps most remarkable about Spectrum Sports is that the Court granted plenary review at all, especially over the opposition of the Solicitor General. Eight years ago Justice White complained that the Court ought to address Lessig to resolve what had become a "longstanding conflict among the circuits." Yet time and again, as the Ninth Circuit massaged, explained, elaborated, and limited Lessig, the Supreme Court declined to intervene. It is fitting that in his final year on the Court Justice White was permitted to author a unanimous opinion retiring Lessig.

A. IN THE LOWER COURTS

Stripped of its frills, this was an acrimonious dealer-substitution suit colored by a suggestion of nepotism and a claim of resale price maintenance. The McQuillans had learned of a new British-patented elastic

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112 113 S. Ct. at 891 ("there is little if any support for it [Lessig] in the statute or the case law, and the notion that proof of unfair or predatory conduct alone is sufficient to make out the offense of attempted monopolization is contrary to the purpose and policy of the Sherman Act").

113 The Solicitor General argued that although the Ninth Circuit's opinion made "three manifest errors in legal analysis," Brief for the United States as Amicus Curiae on Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Spectrum Sports, at 6, plenary review was not warranted. The Solicitor General noted that the opinion was unpublished and lacked precedential importance. Review of the Lessig-based ruling was unnecessary because other Ninth Circuit decisions mitigate Lessig's harm; moreover, the plaintiff might well have deserved to win on monopolization or conspiracy to monopolize, on which the jury was properly instructed. Id. at 15–16. The Solicitor General actually was more troubled by the non-Lessig errors (on the intra-enterprise conspiracy doctrine and antitrust injury) on which certiorari was denied.


115 It had become standard practice to discuss attempted monopolization law in terms of a majority and a Ninth Circuit view. E.g., ANTITRUST LAW DEVELOPMENTS, supra note 53, at 262–69.
polymer and conceived of using the polymer for horseshoe pads. The licensed manufacturer (Hamilton-Kent Manufacturing Co., later to be succeeded by a sister corporation, Sorbothane, Inc.) had made the McQuillans exclusive distributors for equestrian purposes and, shortly thereafter, for all uses in the Southwest. Within a year or two, however, Hamilton-Kent was pressuring the McQuillans to sell their nonequestrian distribution rights to Spectrum Sports, Inc., a firm half-owned by the son of Hamilton-Kent's president. When the McQuillans refused, Hamilton-Kent shortly terminated their distribution rights in favor of Spectrum Sports. The McQuillans alleged that the changes were made partly to bolster a rigid system of resale price maintenance.116

A jury found that Spectrum Sports and its half-owner had not violated Sherman Act Section 1 (a finding which the McQuillans' lawyer blamed on a flawed but unchallenged jury instruction) but had violated Sherman Act Section 2. The verdict sheet discloses that these defendants were found liable for "'monopolizing, attempting to monopolize, and/or conspiring to monopolize.' "117 The jury had been instructed that the plaintiffs had to prove, among other things, that the defendants had "'engaged in exclusionary or restrictive conduct' " and "'that there was a dangerous probability that Defendants could sooner or later achieve [their] goal of monopoly power in the relevant market.' " The instructions went on to state, however, that "'[i]f the Plaintiff has shown that the Defendant engaged in predatory conduct, you may infer from that evidence the specific intent and the dangerous probability element of the offense without any proof of the relevant market or the Defendants' marketing power.' "118

The Ninth Circuit affirmed in an unreported opinion. Its only basis for affirming the Section 2 verdict was that the instruction was proper under Lessig and the jury had applied it correctly.119

116 The facts are set out in Spectrum Sports, 113 S. Ct. at 887, and in the Ninth Circuit's opinion. The McQuillans also alleged (and the jury found) an illegal horizontal agreement between Sorbothane, Inc., and a British sister corporation to refuse to supply the McQuillans. This violation of Sherman Act §1 was not a factor in the dispute before the Court.

117 113 S. Ct. at 888 (quoting verdict sheet).

118 Id. at 888 n.4. Although the Ninth Circuit originally wrote that there was no objection to the invitation to infer power from conduct, McQuillan v. Sorbothane, Inc., Nos. 89-55326, -55329, -55332, slip op. at 22 (9th Cir. July 3, 1990), the sentence denying the existence of an objection was subsequently deleted, McQuillan v. Sorbothane, Inc., Nos. 89-55326, -55329, -55332 (9th Cir. Apr. 1, 1991) (amending memorandum opinion, denying petition for rehearing, and reporting rejection of suggestion for rehearing en banc).

119 Slip op. at 24 ("There is sufficient evidence from which the jury could conclude that the S.I. Group and the Spectrum Group engaged in unfair or predatory conduct and thus inferred that they had the specific intent and the dangerous probability of success and, therefore, McQuillan did not have to prove relevant market or the defendant's marketing [sic] power."); see also Slip op. at 21 ("We are satisfied that if evidence of unfair or predatory
In the end, the Supreme Court decided to adhere to what it said was the standard formulation of the attempt offense. This generally requires "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopolization." In an opinion patterned closely after the Solicitor General's brief on the merits, the Court favored this majority view for reasons of precedent and policy.

The petitioners had billed the case as a trial of Lessig. Respondents would have none of it. Without saying a good word about Lessig, respondents argued that the jury had been required to find a dangerous probability of success, and Lessig was "unnecessary" to the decision below because the jury found monopolization as well as attempted monopolization. Courts should require proof of a dangerous probability of monopoly, they said. Ninth Circuit law assertedly had limited Lessig merely to permit a rare, rebuttable inference of specific intent and probability of success from conduct that is "plainly injurious to competition." Respondents' lawyer commenced oral argument by backing away from Lessig. He did not begin addressing "the point

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120 113 S. Ct. at 890-91 (citation omitted).
121 The petition for certiorari mentioned the case by name in four of its five key headings. Petition for a Writ of Certiorari, Spectrum Sports, at iii.
122 Opposition to Petition for Writ of Certiorari at 4, Sorbothane, Inc. v. McQuillan, 113 S. Ct. 1558 (1993) (Dkt. 91-32) ("The jury was instructed that it had to find specific intent and dangerous probability of success on the attempt to monopolize claim. It was merely instructed that it was permitted to infer these elements from petitioners' predatory conduct. . . . [T]he Lessig inference was unnecessary to the attempt to monopolize finding."). (In Spectrum Sports (Dkt. 91-10), respondents dealt with Lessig largely by cross-referencing their opposition in Sorbothane (Dkt. 91-32), which had requested review of Lessig and other issues. Opposition to Petition for a Writ of Certiorari, Spectrum Sports, at 1-2.) See also Brief [by Respondents] in Response to Brief for the United States as Amicus Curiae, Spectrum Sports, at 10 ("any alleged Lessig error does not justify any action by this Court"). A month after deciding Spectrum Sports, the Court denied certiorari and a motion for summary reversal in Sorbothane. 113 S. Ct. 1358 (Feb. 22, 1993).
123 Brief on the Merits by Respondents at 14 ("Dangerous probability of success is the element of an attempt to monopolize claim . . . that ensures the defendant's conduct poses a threat to competition, not merely to competitors.") (footnote omitted); id. at 26 ("To the extent Lessig holds dangerous probability of success is not an element of a claim for attempt to monopolize, it indeed violates basic antitrust principles.") (citing Justice White's dissent from the Court's refusal to address Lessig in Mobil Oil Corp. v. Blanton, 471 U.S. 1007 (1985)).
124 Brief on the Merits by Respondents at 29.
125 He raised the "very important point" that "[t]he controversial Lessig inference . . . does not have to be reached in this case." Transcript at 24. [T]hat may be so," a Justice interjected, "but . . . if we insist on reviewing what the Ninth Circuit decided, are you defending it?" Id. at 25. "I'm saying it's superfluous," the lawyer replied. This led to a
that the Court granted certiorari on" until more than half his time was gone.  

There likely was nothing respondents could do to win. The more extreme versions of Lessig had been so discredited that even the Ninth Circuit generally had abandoned them. Respondents' dilemma, which they sought to gloss over, was that their case depended on an extreme version of Lessig, since the jury could have based its verdict simply on "predatory conduct." The opinion below showed none of the restraint with which respondents sought to credit the Ninth Circuit. Since the alleged wrong in their case basically was a dealer termination pursuant to alleged resale price maintenance, respondents were reduced to arguing that a Lessig inference was appropriately based on, among other things, any per se violation. Yet not all per se violations imply the existence of market power or the prospect of monopoly power, as some Justices noted during oral argument.

C. THE COURT'S CHOICE OF THE "OBJECTIVIST" VIEW OF ATTEMPTS

By endorsing a universal requirement of a dangerous probability of success, the Court extended to the Ninth Circuit what has been called

stern reminder: "[W]e granted certiorari to decide the question . . . that was presented." Id. at 25. There followed a lengthy discussion of the consequences of reversal and argument that the jury's verdict must have been based on conspiracy.

Id. at 33. One question that was not presented was whether a dangerous probability of success was an element of a charge of conspiracy to monopolize. Yet Justice Stevens inquired about this, one Justice noted his "own understanding" that dangerous probability was required, Justice White expressed disappointment that the lawyer could not point to any cases, and one Justice inquired about the views of petitioners' lawyer. Id. at 26–29, 51–52 (Justices Stevens and White identified by BNA and lawyer's response). At least until now, this writer had been confident that dangerous probability of success was not an element of the offense of conspiracy to monopolize. See Antitrust Law Developments, supra note 53, at 270–73.


127 Chief Justice Rehnquist challenged respondents' lawyer, asking, "[W]ouldn't you at least have to know . . . what the defined market was before you could convict someone of attempting to monopolize it? . . . [T]hat's like saying in a criminal prosecution the State can charge you with attempt to murder because you were running around with a knife without saying who you were going to murder." Transcript at 35–36. The lawyer conceded "that, in fact, no harm . . . can occur except in a relevant market." Id. at 36.

128 Brief on the Merits by Respondents at 27 ("the jury may infer dangerous probability of success from . . . conduct that is predatory or clearly in restraint of competition, such as a per se violation of section 1"). By the end of his oral argument, counsel seemed to be arguing for permitted inferences based on serious violations of Sherman Act § 1.

129 Transcript at 39 (question noting that even price fixing is not anticompetitive in a "fully competitive market"); cf. id. at 45–46 (Justice Stevens asking whether an attempted ineffective price fix should be sufficient).
the "objectivist" view of attempt law.\textsuperscript{131} This extension was not mandated by fidelity to Supreme Court precedent. It confirms that antitrust attempt law has departed significantly from criminal attempt law, which takes a more subjective approach.

1. Precedent

The leading Supreme Court case, and the case principally relied upon by the Spectrum Sports Court, is \textit{Swift & Co. v. United States}.\textsuperscript{132} In \textit{Swift}, the Government had charged a group of meat processors, who together had a 60 percent market share, with conspiring to lessen competition by bid-rigging, price fixing, and securing advantageous rail shipping rates, all for the purpose of monopolizing and attempting to monopolize. The defendants argued that the acts individually were lawful and "that intent can make no difference."\textsuperscript{135} The Court, in an opinion by Justice Holmes, disagreed: The acts "are bound together as the parts of a single plan. The plan may make the parts unlawful."\textsuperscript{134} Later in this paragraph of the opinion there follows the famous, much-quoted language referring to a "dangerous probability":

Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. \textit{Commonwealth v. Peaslee}, 177 Massachusetts, 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.\textsuperscript{135}

But in \textit{Swift & Co.} this language is preceded by a sentence making clear that the Court was focusing not on "dangerous probability" but on intent: "Intent is almost essential to such a combination and essential to such an attempt."\textsuperscript{136}

As Justice Scalia noted during oral argument in Spectrum Sports, \textit{Swift} does not really hold that a dangerous probability of success is a separate element of the offense.\textsuperscript{137} Rather, it explains the key role of intent.\textsuperscript{138}

\textsuperscript{131} See infra note 151.
\textsuperscript{132} 196 U.S. 375 (1905).
\textsuperscript{133} Id. at 396.
\textsuperscript{134} Id. (citation omitted).
\textsuperscript{135} Id., quoted in Spectrum Sports, 113 S. Ct. at 890.
\textsuperscript{136} 196 U.S. at 396.
\textsuperscript{137} Transcript at 19. The question is attributed to Justice Scalia in \textit{Supreme Court Hears Debate on Sherman Act § 2 Analysis}, 63 Antitrust & Trade Reg. Rep. (BNA) 581, 582 (Nov. 12, 1992).
\textsuperscript{138} This is further suggested by considering \textit{Commonwealth v. Peaslee}, 177 Mass. 267 (1901) (Holmes, Ch. J.), the opinion written by Justice Holmes while on the Massachusetts bench and cited by him in \textit{Swift}. The question there was whether placing combustibles in
The Assistant to the Solicitor General conceded that Justice Scalia was correct, although he also pointed to language at the end of the opinion: "Not every act that may be done with intent to produce an unlawful result is unlawful, or constitutes an attempt. It is a question of proximity and degree." \textsuperscript{139} \textit{Spectrum Sports} quoted this "proximity and degree" sentence, too; \textsuperscript{140} but \textit{Swift} was about intent, not dangerous probability. \textsuperscript{141}

\textit{Spectrum Sports} also gave significant weight to \textit{Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.} \textsuperscript{142} This is the famous case suggesting that fraud on the patent office can violate the Sherman Act, but which also added the following:

To establish monopolization or attempt to monopolize a part of trade or commerce under § 2 of the Sherman Act, it would then be necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved. Without a definition of that market there is no way to measure Food Machinery's ability to lessen or destroy competition. \textsuperscript{143}

The language concerning attempts is pure dictum, however, since the counterclaim in issue alleged only monopolization. \textsuperscript{144}

\begin{footnotesize}
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\item a building, without more, constituted attempted arson; the answer was no.
\item \textit{Spectrum Sports} also cited Justice Holmes's dissent in \textit{Hyde v. United States}, 225 U.S. 347, 387–88 (1912), a nonantitrust case where he wrote again that for an unlawful attempt "[t]here must be dangerous proximity to success." But, as noted, this was a dissent in a nonantitrust case.
\item \textit{Spectrum Sports} also quoted from \textit{Copperweld Corp. v. Independence Tube Corp.}, 467
\end{itemize}
\end{footnotesize}
The limited strength of these precedents has been discussed by a number of commentators. These and some other authorities have either supported Lessig or, more typically, advocated balancing the harmfulness of the conduct and the rigor of the required proof of power. Perhaps the best known of the balancing approaches is the Areeda-Turner “exception.” Professors Areeda and Turner suggested that attempts should include certain unusually invidious conduct without proof of market power. Spectrum Sports never mentioned this exception, although the Court’s attention was called to it. None of these balancing approaches would have saved the lower court opinion from reversal because the Ninth Circuit’s decision had been a pure Lessig-based declaration that markets need not be defined, and conduct alone is enough.

U.S. 752, 768 (1984), but again quoted only dictum. As part of its discussion of Sherman Act § 1’s intra-enterprise conspiracy doctrine, Copperweld described a fundamental distinction between unilateral and concerted action:

The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to “restrain trade” unreasonably, for even a vigorous competitor may leave that impression. ... In part because it is sometimes difficult to distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.


147 There also obviously has been widespread criticism of Lessig and its progeny, e.g., Gifford, supra note 111; Milton Handler & Richard M. Steuer, Attempts to Monopolize and No-Fault Monopolization, 129 U. Pa. L. Rev. 125 (1980).

148 See Phillip Areeda & Donald F. Turner, Antitrust Law 352 (1978) (“§ 2 might reasonably be applied, without proof of significant market position, to conduct (1) which is totally unrelated to competition on the merits—that is, lacking any plausible claim to redeeming virtue; (2) which clearly implies the presence or prospect of some degree of durable market power . . .; and (3) which has potentially significant exclusionary effects in the generality of cases”).

149 See Brief on the Merits by Respondents, Spectrum Sports, at 37–38 (describing in detail the Areeda-Turner recommendation of a limited per se rule of attempted monopolization); Brief for the United States as Amicus Curiae, supra note 144, at 19 n.11, 23 n.14 (discussing and rejecting both points); Transcript of Oral Argument, Spectrum Sports, at 19 (Assistant Solicitor General argued that there should not be an Areeda-Turner exception but that issue was not properly presented).
Sherman Act attempt law and the general law of criminal attempts have sharply diverged. In Swift, Justice Holmes merely incorporated part of the substantive criminal law of attempts. Justice Holmes's "dangerous proximity" approach (he seems to have used "proximity" more than "probability") was—and remains—a leading example of what some criminal law commentators have called the "objectivist" approach. In contrast, the "subjectivist" approach, as typified by the Model Penal Code, gives priority to a defendant's intention. An attempt is shown, according to the Code, whenever a person acting with the necessary culpability, among other things, "purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." Conduct is important principally to corroborate purpose: "The primary purpose of punishing attempts is to neutralize dangerous individuals and not to deter dangerous acts." The drafters of the Code deliberately sought to extend liability beyond Justice Holmes's "dangerous proximity" approach. The Code succeeded, and now its subjective "substantial step" approach dominates the criminal law of attempts.

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150 The divergence is highlighted in Roszkowski & Brubaker, supra note 145; see also SHENEFIELD COMMISSION REPORT, supra note 146, at 146; Ponsoldt, supra note 145, at 1139–42.

151 Professor Dressler compares "subjectivism" and "objectivism," crediting Professor Fletcher with the terms. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 27.03 (1987) (citing GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW §§ 3.1, 3.3 (1978)):

Subjectivists believe that the act of attempting a crime does not have significance independent of the target offense. That is, inchoate crimes exist because they provide the state with an opportunity to isolate and punish dangerous persons—persons who subjectively intend to cause social harm.

... In contrast, objectivists believe that in dealing with inchoate conduct society should concern itself initially with the conduct rather than with the actor's intentions and, therefore, should only permit punishment of individuals whose acts are criminal on their face—i.e., acts that objectively manifest criminality at the time that they are committed.

152 MODEL PENAL CODE AND COMMENTARIES § 5.01, Comment 1 (1985):

The literature and the decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should focus on the dangerousness of the actor's conduct, measured by objective standards, and how far it should focus on the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. Both criteria may lead, of course, to the same disposition of a concrete case. When they do not, the proper focus of attention is the actor's disposition.

(footnote omitted).

153 MODEL PENAL CODE § 5.01(1)(c) (1985) (emphasis added).

154 MODEL PENAL CODE AND COMMENTARIES, Comment to § 5.01, at 323 (1985). Thus, the Code states that "[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's criminal purpose." MODEL PENAL CODE § 5.01(2).

Although not mentioned in *Spectrum Sports*, the Supreme Court apparently appreciated how far apart the two notions of attempts had grown.\textsuperscript{156} In one sense this separation is somewhat surprising. Criminal liability is usually narrower than civil liability,\textsuperscript{157} and Sherman Act Section 2 as applied has become a civil statute. Whether through concern about perceived excessive private treble damages litigation, doubts about our ability to identify wrongful antitrust conduct and purposes, or an interest in separating antitrust from the law of business torts, lower antitrust courts and now the Supreme Court have chosen the objectivist approach to attempts.

**D. The Effect of *Spectrum Sports***

Before *Spectrum Sports*, attempted monopolization cases outside the Ninth Circuit typically focused on the defendant's market share and concluded that it was too low to support a finding of a dangerous probability of success. One recent review of the cases found that courts usually find a dangerous probability where shares equal or exceed 50 percent and reject such a finding where shares are below 30 percent; between those amounts courts find a dangerous probability of success only in a minority of cases.\textsuperscript{158}

Now, as a result of *Spectrum Sports*, even in the Ninth Circuit, conduct and intent alone are not sufficient to establish attempted monopolization.

\textsuperscript{156} Chief Justice Rehnquist noted this during a colloquy with the Assistant to the Solicitor General:

\begin{quote}
QUESTION: Your definition of attempt, for purposes of section 2, is much more restrictive than the definition of attempt to commit crimes generally, is it not?

MR. LONG: Yes, that's correct . . . . [W]e certainly don't advocate that as a general criminal law standard.

We think in the special context of the Sherman Act, which is both a civil and a criminal statute with a treble damages remedy, that applying something like the model penal code, the substantial step requirement, would allow too many ordinary business torts to be swept into the coverage and would essentially defeat the purpose of section 2 by allowing, actually, a chilling of vigorous competition.

QUESTION: But you don't advocate that as to crimes generally, including . . . [c]rimes that can lead to a RICO prosecution.

MR. LONG: Certainly not.
\end{quote}

Transcript at 22–23 (initial question attributed to the Chief Justice by BNA). The Solicitor General's brief noted the Model Penal Code's approach, but argued against its adoption for Sherman Act purposes. Brief for the United States as Amicus Curiae Supporting Petitioners at 18 n.10.

\textsuperscript{157} See generally Calkins, *Equilibrating Tendencies*, supra note 107 (penalties affect liability standards).

\textsuperscript{158} *Antitrust Law Developments*, supra note 53, at 264–65 (reviewing cases); cf. 3 *Areeda & Turner*, supra note 148, at 350 (offering "rule of thumb" with presumptions at 50% and higher, and 30% or lower; between those amounts, normally reject claims
Attention must be given to the usually objective measures of market power. But beyond this, the Supreme Court has given little guidance. Discussing the courts of appeals, the *Spectrum Sports* Court wrote as follows:

Consistent with our cases, it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power. In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant’s ability to lessen or destroy competition in that market.\(^\text{159}\)

Considering a firm’s ability to lessen competition may or may not be different from erecting what is in effect a substantial market share screen. The Court paraphrased *Copperweld* by saying that under Section 2, single firm conduct is unlawful "only when it actually monopolizes or dangerously threatens to do so,"\(^\text{160}\) and then explained that "demonstrating the dangerous probability of monopolization . . . requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market."\(^\text{161}\) In its concluding paragraph the Court wrote that there may not be liability "absent proof of a dangerous probability that they would monopolize a particular market."\(^\text{162}\) Since the jury instructions permitted an inference of that dangerous probability from predatory conduct, "without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market," error had been committed.\(^\text{163}\)

Although the opinion includes what is only the latest caution against overly aggressive application of the antitrust laws,\(^\text{164}\) the *Spectrum Sports*
holding leaves unanswered (at the Supreme Court level) many important questions, including, among other things, (1) how precisely must any market be defined; (2) how much market power and/or how great a market share must defendant have before its wrongdoing will be punished; (3) whether the likelihood of achieving monopolization can be shown other than by reliance on market definition and market shares;\footnote{165} (4) how likely must it be that the defendant will achieve monopoly power; and (5) how, if at all, should any of these calculations be affected by the egregiosity of the defendant’s acts or the wrongfulness of its intentions.\footnote{166}

\textit{Spectrum Sports} removes Lessig from the antitrust scene but does little more.\footnote{167} Many Ninth Circuit courts are likely to follow the pattern of courts elsewhere, granting summary judgment in attempted monopolization cases whenever defendants cannot be shown to have significant or even quite substantial market shares. This is not required by \textit{Spectrum Sports}, however, which merely extended to the Ninth Circuit the “objectivist” approach to attempts under Sherman Act Section 2.


\textit{L.} This last point—that conduct can be considered when deciding what level of probability to require—is suggested by Justice Holmes’s original framings of the “dangerous proximity” test. This has been noted before. \textit{E.g.}, \textit{Shenefield Commission Report}, supra note 146, at 147-48. Holmes wrote that the line should be drawn by considering “the nearness of the danger, the greatness of the harm, and the degree of apprehension felt.” \textit{Oliver W. Holmes, The Common Law} 56 (Mark D. Howe ed., 1963). Some observers apparently have focused only on the extent of the harm that would be caused by the contemplated crime. \textit{All}, \textit{Model Penal Code and Commentaries}, Comment on § 5.01, at 323 (1985) (consider “the gravity of the offense intended, the nearness of the act to completion of the crime, and the probability that the conduct would result in the offense intended”). Others have emphasized the seriousness of the act committed. \textit{See, e.g.}, \textit{Lafave & Scott}, supra note 155, at 506. Although not altogether clear, this appears to have been Justice Holmes’s view. \textit{See Commonwealth v. Kennedy}, 170 Mass. 18, 22 (1897) (Holmes, J.):

> Every question of proximity must be determined by its own circumstances . . . . Any unlawful application of poison is an evil which threatens death, according to common apprehension, and the gravity of the crime, the uncertainty of the result, and the seriousness of the apprehension, coupled with the great harm likely to result from poison even if not enough to kill, would warrant holding the liability for an attempt to begin at a point more remote . . . .

Thus, to the extent that the Court has reaffirmed the teaching of \textit{Swift}, the nature of the challenged conduct arguably may be considered when determining whether the now-clearly-required “dangerous probability” test is met.

\textit{I.} In contrast, the Solicitor General’s brief, which the Court appears otherwise to have followed closely, included a discussion of the role of market shares and of the timing of the decision concerning probability of monopolization (arguing it usually should be a “threshold matter”). Brief for the United States as Amicus Curiae Supporting Petitioners at 20–22. The Court conspicuously failed to follow the Solicitor General’s lead in addressing these issues.
III. HARTFORD FIRE INSURANCE

In *Hartford Fire Insurance* the Court entered the massive dispute between the states and the insurance industry. The Court had agreed to resolve a difficult issue involving the so-called boycott exception to the McCarran-Ferguson Act's exemption from the antitrust laws. And for the first time the Court had before it the celebrated international comity-based "jurisdictional rule of reason" associated with *Timberlane Lumber*.

Justice Scalia's majority opinion on the boycott issue sought its answer in a precise definition of the term "boycott." On the comity issue, the entire Court gave *Timberlane* a chilly reception. No Justice expressed support for *Timberlane*'s balancing test. The five-Justice majority side-stepped the issue by straining not to find a triggering conflict. More intriguing, Justice Scalia's four-Justice dissent on this issue argued that the question was not one of discretion (as the parties argued) but one of straightforward, objective statutory construction.

A. BACKGROUND

*Hartford Fire Insurance* somehow managed to be both immensely important and yet quite marginal, at least to antitrust law. As in a grand epic from an earlier era, a cast of thousands was assembled. On one side were the attorneys general of nineteen states plus five plaintiffs' law firms, some quite well known. On the other side were eighty lawyers from thirty-five firms, including some of the nation's most prominent. The parties were aided and abetted by a small army of lawyers working on amicus efforts.

The setting, too, was epic. During the mid-1980s, the country was wracked by an insurance crisis during which the availability of liability coverage was sharply constricted. Also during the 1980s the state attor-

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168 15 U.S.C. § 1013(b) ("Nothing contained in this chapter shall render the ... Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.").

169 15 U.S.C. § 1012:

(a) The business of insurance ... shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ...; Provided, That ... the Sherman Act ... shall be applicable to the business of insurance to the extent that such business is not regulated by State law.


neys general, perceiving a void in national antitrust enforcement, became newly aggressive in asserting a national state antitrust agenda. *Hartford Fire Insurance* resulted from the confluence of these two phenomena. The states saw conspiracy at the root of the insurance crisis, and, believing this conspiracy to be unprotected by the McCarran-Ferguson Act's exemption of the business of insurance from the antitrust laws, sought to do something about it.

The consequences—for the states and the insurance industry—also loomed large. For the states, this was no small resale price-fixing case, easily settled for cash and a promise to sin no more. It was major league litigation that could establish for the foreseeable future that the states were a force with which to reckon. For the insurance industry, the suit threatened (1) fundamentally to change how they did business and (2) massive liability.

Yet, for all the grandeur of the case, *Hartford Fire Insurance* is relatively unimportant to the development of antitrust doctrine. The domestic antitrust law issues before the Court were narrow ones involving the "boycott" exception to McCarran-Ferguson. Ironically, the case even may be relatively unimportant to the future of the insurance industry since the McCarran-Ferguson Act is on the endangered list. The movement to repeal the Act has become a centerpiece of Clinton Administration health care reform, and momentum is growing. The most lasting significance of the case likely lies in its discussion of the application of antitrust law to foreign conduct, a specialized subject that will be debated endlessly in conferences and in print.

B. THE LITIGATION IN THE LOWER COURTS

This complex proceeding has a Never-Never Land quality about it. There was no discovery and there are no facts, only allegations. District Judge Schwarzer, an aficionado of aggressive case management and summary procedures, entered an early order soliciting motions that could dispose of the case without resolving factual disputes. Defendants

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172 Speaking of the two petitions for which certiorari was eventually granted, Professor Geoffrey P. Miller said that "[b]oth are blockbusters in their own right . . . . It's fair to say this is the most important Supreme Court case for the insurance industry since World War II." Henry J. Reske, *Was It Collusion or Just Good Business?*, ABA J., May 1993, at 76, 76 (quoting Miller).

173 Although the Court relied on Sherman Act § 1 boycott cases in interpreting the McCarran-Ferguson boycott exception, there is no suggestion that *Hartford Fire Insurance*’s analysis has applicability for non-McCarran issues.

174 Calkins, *Revenge of the Amici*, supra note 109, at 287–88 (Judge Schwarzer entered the summary judgment that was reversed in *Kodak*).
filed motions on multiple grounds, and the complaints, which had been filed in March 1988 (the so-called California complaints) and June 1988 (the so-called Connecticut complaints), were dismissed in a lengthy opinion filed October 1989.\(^{175}\)

According to the complaints, the origin of the dispute lies in the desire of four major insurance companies (the primary defendants)\(^{176}\) to change several features of commercial general liability insurance policies.\(^{177}\) The two key changes were to switch policies from an "occurrence" basis to a "claims-made" basis and to curtail pollution coverage. Both changes greatly reduce an insurer's risk: It is easier to monitor claims than events that might, at some distant point, lead to claims; and pollution liability is potentially catastrophic. The insurers also sought (1) to include a "retroactive date" in claims policies, i.e., a provision that a claims-basis insurer would bear no responsibility for incidents occurring before a certain date regardless when claims were filed, and (2) to limit responsibility for legal defense costs by including such costs within the policy limits.\(^{178}\) The litigation was conducted as though dramatic changes were effected since allegations must be taken as true—although an occasional comment suggested discovery would have painted quite a different picture.\(^{179}\)

Had the four primary defendants made these changes on their own, there would have been no liability. According to the states, however, such a course was stymied by the unwillingness of competing insurance companies to go along. Frustrated, the primary defendants allegedly used two mechanisms to coerce compliance. First, they pressured defendant Insurance Services Office, Inc. (ISO), the almost exclusive source of actuarial and rating information (claims filed, defense costs, etc.), to deny essential statistical support for disfavored policies. Second, they encouraged domestic and London brokers and reinsurance firms\(^{180}\) to promote these desired changes by denying certain reinsurance and by


\(^{177}\) A sympathetic reading of the complaints can be found in Ian Ayres & Peter Siegelman, The Economics of the Insurance Antitrust Suits: Toward an Exclusionary Theory, 63 Tulane L. Rev. 971 (1989).

\(^{178}\) 113 S. Ct. at 2896.

\(^{179}\) See Transcript at 8 (When a Justice sought to confirm that occurrence-based insurance was "not offered by anybody," the insurers' lawyer corrected the misunderstanding: "Well, as a matter of fact, 98 percent of the commercial general liability policies today are written on occurrence forms.").

\(^{180}\) In essence, reinsurance firms insure insurers against specific risks, further spreading risks. Reinsurance firms, too, can spread risks through "retrocessional reinsurance."
asking ISO and U.S. insurers to change coverages. The states claimed that this was an unprotected conspiracy in violation of the antitrust laws.

Although it found that the plaintiffs had standing to pursue the claims and had shown causation, the district court found multiple bases for dismissing the suit. The court ruled that it had jurisdiction over the London reinsurers but should dismiss the claims filed exclusively against them for reasons of international comity. The activities in which the domestic defendants allegedly were engaged were protected, the court found, by McCarran-Ferguson. Specifically, the activities engaged in (including reinsurance) were the “business of insurance,” were regulated by the states, and did not consist of unprotected “boycott, coercion, or intimidation.” Finally, the court found that the state action doctrine protected collective form-making efforts in all but four states.

The court of appeals reversed on every issue won by the defendants below. (It affirmed the findings of standing and causation.) It applied the same Timberlane comity factors but found that the balance tipped against abstention. Although it agreed that reinsurance was the business of insurance, the London reinsurers did not enjoy McCarran

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181 113 S. Ct. at 2896-99.
182 The court relied on Timberlane but not without noting significant criticism of it, 723 F. Supp. at 487 n.30 (citing one case and two articles).
183 Id. at 474-79. The court ruled that if its comity ruling was not sustained, it would “be because American regulatory laws apply to them [the London reinsurers] and hence the McCarran Act as well.” Id. at 479. On the boycott issue, the court reasoned that the defendants never engaged in a complete refusal to do business (i.e., on any terms), and never excluded others from the market.
184 Id. at 479-82. The state action doctrine, which is closely associated with Parker v. Brown, 317 U.S. 341 (1934), protects state-imposed restraints on competition where there is a clear state policy and active state supervision. California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980); Antitrust Law Developments, supra note 53, at 965-89. Defendants did not seek this exemption for activities in Alaska, California, Colorado, and Montana—states which lacked a procedure for reviewing and approving insurance forms.
185 In re Insurance Antitrust Litig., 938 F.2d 919 (9th Cir. 1991) (Noonan, J.), noted, 105 Harv. L. Rev. 1414 (1992) (criticizing opinion). The panel included Judge Beezer and District Judge Singleton. Perhaps not too surprisingly, given the size of the Ninth Circuit, the three Ninth Circuit opinions reviewed by the Court this term featured nine different judges.
186 938 F.2d at 931-34. The Ninth Circuit also objected to the district court’s dismissal of the global conspiracy charge linking property and casualty insurance, see supra note 182. It ruled that the plaintiffs deserved an opportunity to amend their complaint. Id. at 931.
immunity because the states did not regulate them. All of the domestic insurers lost whatever immunity they enjoyed, moreover, when they conspired with nonexempt foreign firms. McCarran immunity also was unavailable, according to the Ninth Circuit, because the defendants had engaged in impermissible boycotting. Finally, the state action defense was no protection, it ruled, because any approval by states of submitted forms did nothing to exempt coercive behavior leading to the agreement on the forms to submit.

C. IN THE SUPREME COURT

Four different petitions for certiorari were filed, all of which were opposed by the Solicitor General. In Docket 91-1128, in which certiorari was granted, a group of London reinsurance firms questioned the extraterritorial reach of the antitrust laws. In Docket 91-1111, the U.S. insurance and reinsurance firms posed three issues. Certiorari was granted on the first two, which addressed the two grounds on which the Ninth Circuit denied McCarran-Ferguson Act protection. Certiorari was denied on the third issue, which challenged the Ninth Circuit's ruling that the state action defense was unavailable. Certiorari was denied completely in Dockets 91-1131 and 91-1146, which raised antitrust standing issues but otherwise were duplicative.

187 Id. at 928.
188 Id. at 927–31. The Court ruled that a boycott includes more than refusals to deal regardless of the terms, and included, in this case, denials of insurance coerced by conspiracy-caused unavailability of reinsurance.
189 Id. at 931.
190 Brief for the United States as Amicus Curiae on Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (consolidated opposition). The Court invited the Solicitor General to express the views of the United States. 112 S. Ct. 1469, 1470 (March 23, 1992).
191 Petition for a Writ of Certiorari, Dkt. 91-1111, at i (“Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws ... when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?”).
192 Petition for a Writ of Certiorari, Dkt. 91-1128, at i:

1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance.
2. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a “boycott” outside the exemption of the McCarran-Ferguson Act.
193 121 L. Ed.2d 22 (Oct. 5, 1992) (also granting petition in Dkt. 91-1128 and consolidating cases).
194 113 S. Ct. 3034 (June 28, 1993).
Even the logistics of briefing and argument were challenging. Briefs were filed on one of the two Dkt. 91-1111 issues; on both issues; on those issues plus the Dkt. 91-1128 issue; on all three issues, but supporting petitioners on one and respondents on two; and on the 91-1128 issue alone. Participating in the ninety-minute oral argument were lawyers for the States, the domestic insurers and reinsurers, the London reinsurers, and the United States. The private parties-plaintiffs, and one London reinsurer that claimed a particularly limited role, had to content themselves with briefing.

Tracking the opinions is just as challenging as following the litigants. Hartford Fire Insurance was issued on the last day of the term, and haste is evident. Justice Souter's opinion starts out as a unanimous opinion for the Court (parts I and II-A). Then it loses the votes of the four other most junior Justices and the Chief Justice, and becomes a four to five dissent (part II-B). Finally, it regains the Chief Justice, becoming a five—four majority opinion (parts III and IV). Justice Scalia's opinion conversely begins as a five—four majority opinion (part I), then loses the Chief Justice and becomes a four to five dissent (part II). For clarity this article will refer frequently to the authors of the opinions.

1. Forfeiture of McCarran Immunity

The Court had little trouble with the so-called forfeiture issue. As noted above, the Ninth Circuit held that domestic insurers forfeited whatever McCarran-Ferguson immunity they had when they allegedly conspired with non-state-regulated, nonexempt foreign reinsurers. The Ninth Circuit relied on language in Group Life & Health Insurance Co. v. Royal Drug Co., where the Court wrote that "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties."

This was error, the Supreme Court ruled. Relying on a dictionary (as was common this year), Justice Souter, for a unanimous Court, explained

195 E.g., Brief for the National Conference of Insurance Legislators, as Amicus Curiae Supporting Petitioners.
196 E.g., Brief for the Petitioners in No. 91-111.
197 Brief for Respondents (Private Parties-Plaintiffs).
198 Brief for the United States as Amicus Curiae Supporting Respondents.
199 E.g., Brief for Respondent States in No. 91-1128.
200 113 S. Ct. 402 (Nov. 2, 1992) (extending time from 60 to 90 minutes).
201 938 F.2d at 928.
203 Id. at 231.
that the exempt "business of insurance" refers to activities, not entities.\textsuperscript{204} The \textit{Royal Drug} language was taken out of context; that Court was merely describing how some previous cases had interpreted statutes that had focused on entities. Domestic insurers do not forfeit McCarran immunity by conspiring with (assumedly) nonexempt foreign reinsurers.

This was a critical victory for the defendants and others,\textsuperscript{205} and it may have consequences on remand, but it is unremarkable. Indeed, the States' defense of the Ninth Circuit's ruling on this point was halfhearted at best,\textsuperscript{206} and the Solicitor General, otherwise the States' ally, deserted them on this issue.\textsuperscript{207} The unanimity of the vote is consistent with the difficulty in finding fault with the reasoning or the result.

\textbf{2. International Comity}

The glamorous part of \textit{Hartford Fire Insurance} addressed international comity. Abstention-based balancing tests typified by \textit{Timberlane Lumber} had dominated debates about international antitrust since 1976\textsuperscript{208} but the Supreme Court had not spoken on the matter. In addition to the Ninth Circuit, balancing tests had been offered by the Third Circuit,\textsuperscript{209}

\begin{footnotes}
\footnote{113 S. Ct. at 2901 (quoting \textit{WEBSTER'S NEW INTERNATIONAL DICTIONARY} 362 (2d ed. 1942)).}

\footnote{Two amicus briefs were devoted exclusively to urging reversal on this point. Brief for the National Conference of Insurance Legislators as Amicus Curiae Supporting Petitioners; Brief Amicus Curiae of the National Association of Casualty and Surety Agents, and National Association of Professional Insurance Agents, Independent Insurance Agents of America in Support of Petitioners.}

\footnote{See Brief for Respondent States in No. 91-1111 at 42–45 (only last 4 pages of 45-page brief).}

\footnote{Brief for the United States as Amicus Curiae Supporting Respondents at 10–13.}


\begin{itemize}
\item the degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.
\end{itemize}

\begin{footnotes}
\footnote{549 F.2d at 614 (footnote omitted).}

\footnote{Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1297–98 (3d Cir. 1979).}
\end{footnotes}
a Restatement, and the Antitrust Division. Now, with the matter scheduled to be addressed in the context of a quintessentially British industry, briefs were filed by the parties, the United States, Britain, and Canada.

The three 91-1128 interests represented at oral argument (the States, the London reinsurers, and the Solicitor General) each took a different approach. The London reinsurers and the Solicitor General supported a Timberlane-like balancing test but disagreed, as had the district court and the court of appeals before them, on whether it tipped in favor of or against judicial abstention from exercising jurisdiction.

The reinsurers

Restatement (Third) of the Foreign Relations Law of the United States § 403 (1987) declares that “a state may not exercise jurisdiction to prescribe law . . . when the exercise of such jurisdiction is unreasonable,” and then elaborates as follows:

(2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.

Subsection (3) goes on to specify that “when it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the [ir] prescriptions . . . are in conflict,” a state should defer to one with a “clearly greater” interest based on the Subsection (2) factors.

U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations (1988, amended 1992), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,109.10, at 20,613 n.170. In addition to generally applicable factors, the Department noted that it may, in extraordinary cases, consider implications for U.S. foreign relations, but this factor should not be considered by courts “since the conduct of foreign relations is constitutionally reserved to the Executive Branch.” 4 Trade Reg. Rep. at 20,613 & n.171.

Also filing briefs in 91-1128/91-1111, but emphasizing the McCarran-Ferguson issues, were industry associations, local governments, and 19 states as amici.

Brief at 14–19 (reviewing various tests). The Court quoted from the reinsurers' lawyer's oral argument on this point:

Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the
argued that "extraterritorial jurisdiction by a U.S. court must be tempered by restraint to accommodate principles of international law and comity and to avoid conflict," and that the court of appeals had not appreciated the extent of conflict. They relied on a trio of Supreme Court decisions involving foreign seamen to show that "Congress must be presumed to have acted with respect for principles of international law and comity." They emphasized that the United Kingdom had identified a substantial conflict that existed because the special British insurance market, as designed by British authorities, permitted and even required collaboration.

The Solicitor General agreed that a balancing test was appropriate, even though the court had subject matter jurisdiction. Whatever test

interests of another State are sufficient that the exercise of that jurisdiction should be restrained.

Transcript at 37, quoted at 113 S. Ct. at 2909; see also Brief for Petitioner Sturge Reinsurance Syndicate Management Ltd. in No. 91-1128 (calling for Timberlane-like balancing test). But cf. Brief of the Government of Canada as Amicus Curiae in Support of Certain Petitioners (Ninth Circuit erred in applying a balancing test and should be reversed). Compare Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners on Petition for a Writ of Certiorari, No. 91-1128 (balancing test calls for reversal) with Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners on Writ of Certiorari (no subject matter jurisdiction).

Brief for Petitioners in No. 91-1128 at 8 (heading of first point of argument).

Id. at 19–29 (also arguing that the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, did not control). The FTAIA provides as follows:

Section 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

1. such conduct has a direct, substantial, and reasonably foreseeable effect—
   A. on [domestic] trade or commerce . . . , or on import trade or import commerce with foreign nations; or
   B. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
2. such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section, . . .

Brief at 10–11 (citing Lauritzen v. Larsen, 345 U.S. 571 (1953); Romero v. International Terminal Operating Co., 358 U.S. 354 (1959); and McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)). The reinsurers also quoted from the recent case, EEOC v. Arabian American Oil Co. (Aramco), 111 S. Ct. 1227, 1230 (1991), which reiterated the "long-standing principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " (quoting Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949)).

Transcript at 35 ("The United Kingdom says there is a conflict and their statement should be determinative of their view, at least, that there's a conflict.").

E.g., Reply Brief for Petitioners in No. 91-1128 at 7 ("The subscription nature of the London reinsurance market requires common understandings about the risks perceived to threaten prudent underwriting.").

was adopted would tilt against the reinsurers, according to the Solicitor General, because there was no conflict. A conflict exists only when the defendants act pursuant to orders or when they "could not have avoided engaging in the disputed conduct without frustrating clearly articulated policies of the foreign government."\(^{220}\) No clear policies would have been frustrated had the reinsurance firms not engaged in a boycott, according to the Solicitor General.

Only the States opposed a balancing test.\(^ {221} \) They argued that settled antitrust law required simply an effects test, and that the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) compelled the assertion of jurisdiction.\(^ {222} \) Any balancing test, moreover, should require a genuine conflict, namely, an act of state or foreign sovereign compulsion.\(^ {223} \)

a. Justice Souter's Majority Opinion on Comity

For all the attention to and support of comity and balancing, the Supreme Court gave it short shrift.\(^ {224} \) Both the Justice Souter-led majority and the Justice Scalia-led minority treated comity dismissively, preferring more objective approaches and relying in significant part on analyses not championed by the parties.

The five-Justice majority, per Justice Souter, were even less concerned about comity than the dissenters. Citing an array of cases and secondary authorities, the Court wrote that there is now no doubt, if there ever was, that courts have broad subject matter jurisdiction over Sherman Act claims.\(^ {225} \) There is a "general understanding that the Sherman Act

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\(^ {220} \) Brief for the United States at 28.

\(^ {221} \) *But cf.* Brief Amici Curiae of Service Industry Council and California State Electronics Ass'n in Support of Respondents at 24–29 (arguing that balancing tests support jurisdiction); Brief for Respondents (Private Party Plaintiffs) at 39–49 (calling for Sherman Act jurisdiction but emphasizing application of effects test).

\(^ {222} \) Brief for Respondent States in No. 91-1128 at 12–26; *see supra* note 215.

\(^ {223} \) Brief for Respondent States at 31. The states opened their discussion of the (absence of) conflict by pointing to European authorities supporting an effects test, and arguing that both nations' laws prohibit the questioned conduct. *Id.* at 27–34.

\(^ {224} \) The Court was unusually quiet during the reinsurers' argument, asking only five substantive questions. The Deputy Solicitor General mentioned comity only briefly at oral argument (one and a half pages of eight and a half pages of transcript total), although his brief gave almost as much attention to the 91-1128 issue as the two McCarran issues. The States, which filed a separate brief on Docket 91-1128, also gave little emphasis to the comity issue during oral argument (only 5 of 22 1/2 pages of transcript, beginning when a Justice inquired, "Were you going to get to the comity issue?," Transcript at 68). The Court was even quieter during this comity argument than during the reinsurers', asking only a single substantive question.

\(^ {225} \) Quoting the London Reinsurers' confirmation of this at oral argument, *supra* note 213, the Court noted that "[t]he parties do not question prescriptive jurisdiction . . . , and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act." 113 S. Ct. at 2909 n.22 (citation omitted).
covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.\textsuperscript{226}

There was no need to decide whether comity can ever justify abstention, the Court ruled, because under the facts of this case a comity argument would fail because there is no "true conflict."\textsuperscript{227} The Court read the concept of "conflict" very narrowly. "Since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by the law of the United States [citing brief], or claim that their compliance with the laws of both countries is otherwise impossible, we see no conflict with British law."\textsuperscript{228} This "impossibility of compliance" standard seems even more restrictive than the standard suggested by the Solicitor General.\textsuperscript{229}

b. Justice Scalia’s Dissent Regarding Comity

Justice Scalia, writing for four Justices, assailed the Court’s "breathtakingly broad proposition" concerning the existence of a conflict.\textsuperscript{230} He pointed to Lauritzen v. Larsen,\textsuperscript{231} which had denied a Jones Act claim to a seaman where Denmark had constructed a comprehensive compensation scheme, even though paying Jones Act damages was not prohibited by Denmark. A "conflict-of-laws analysis" is needed, wrote Justice Scalia, whenever "applicable foreign and domestic law provide different substantive rules of decision."\textsuperscript{232} As for the majority's reliance on a Comment to the Restatement (Third), Scalia wrote that the Court "completely misinterpreted this provision."\textsuperscript{233}
Justice Scalia rejected the concept of comity as it had come to be understood in international antitrust and took a more objective, statute-based approach. He identified four distinct issues: (1) the subject matter jurisdiction of a court; (2) the substantive reach of a statute (here, the Sherman Act); (3) "comity of courts," in which judges decide whether to exercise jurisdiction; and (4) "prescriptive comity" or the "comity of nations," whereby sovereign nations show each other respect by substantially limiting the reach of their laws. In a single paragraph he concluded that the first point was satisfied, i.e., the court had subject matter jurisdiction. This conclusion was based not on antitrust law but simply on normal "arising under" jurisdiction. Even more quickly, Justice Scalia dispensed with the third point, "comity of courts," saying that courts had erred by considering balancing tests to be an issue of abstention.

For Justice Scalia, the key was his second issue, the substantive reach of the Sherman Act—the answer to which, he said, should be informed by Subsection (3), which says that when two states reasonably could exercise jurisdiction but their "prescriptions . . . are in conflict," the state with the clearly greater interest should receive deference. See supra note 210. The essential part of the comment is as follows:

Subsection (3) applies when an exercise of jurisdiction by each of two states is not unreasonable, but their regulations conflict . . . .
Subsection (3) applies only when one state requires what another prohibits, or where compliance with the regulations of two states . . . is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . . It does not apply merely because one state has a strong policy to permit or encourage an activity which another state prohibits . . . . Those situations are governed by Subsection (2), but do not constitute conflict within Subsection (3).

That something is not a "conflict within Subsection (3)" does not mean that the Subsection (2) factors quoted supra note 210 have no applicability; indeed, the comment anticipates that they often would apply. It is revealing that only one brief cited Comment (e), and then only in passing on a different point. Reply Brief for Petitioners at 5. The London reinsurers, rather than arguing against applicability of Subsection (3), squarely called for its application, quoting more than half of it. Reply Brief for Petitioners at 9.

The Court also cited Comment j to Section 415, which declares that "[o]rdinarily, the fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws." This contributes little, and was not cited in any brief.

Cf. Diane P. Wood, International Jurisdiction in National Legal Systems: The Case of Antitrust, 10 Nw. J. Int'l L. & Bus. 56, 67 (1989) (the "two primary options" are the "jurisdictional rule of reason" and the "objective effects rule").

Justice Scalia relied on two of the three Jones Act cases emphasized by the London reinsurers in their brief, 113 S. Ct. at 2917 (discussing Lauritzen and citing Romero).

To the argument that the London reinsurers had conceded jurisdiction and Sherman Act applicability, Justice Scalia wrote that decisions by lawyers should not prevent parties from enjoying correct results. Id. at 2920 & n.9.

To the argument that the London reinsurers had conceded jurisdiction and Sherman Act applicability, Justice Scalia wrote that decisions by lawyers should not prevent parties from enjoying correct results. Id. at 2921 ("To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed (and have declined to punish with procedural default) before.") (citations omitted).

Justice Scalia prefigured his position during oral argument. Transcript at 37:
by his fourth issue ("comity of nations"). In an argument structured quite similarly to that in the Canadian amicus brief, he wrote that the interpretation of the Sherman Act should be guided by two canons of construction: First, legislation is normally assumed to apply only within the United States, and second, statutes should be interpreted whenever possible as not violating the "law of nations" (which "includes limitations on a nation's exercise of its jurisdiction to prescribe").

Having developed these canons at length, Justice Scalia then proceeded to apply them without quoting from or even discussing the Sherman Act. He surveyed the same Restatement factors emphasized by the parties as going to abstention; his reading accorded with the district court's; he wrote that "it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion [of legislative jurisdiction]"—and that was it. Whereas the Canadian brief that his argument paralleled discussed the language and the legislative history of the Sherman Act and the FTAIA (and cases interpreting same), the positive part of Justice Scalia's opinion simply ended, seemingly half-finished.

c. A Comment on Comity

The discussion of comity was a disappointing part of a disappointing opinion. When a concept such as comity-based abstention has dominated

QUESTION: Is it the exercise of the jurisdiction, or maybe it's just not an unreasonable restraint of trade? ... [W]e've always had a lot of room not to fiddle around with our jurisdiction but to fiddle around with what constitutes a restraint of trade under the Sherman Act. It's essentially a common law antitrust that we've developed ourselves.

Why couldn't we say that ... the Sherman Act applies fully, and we have full jurisdiction, however, it's not an unreasonable restraint of trade given that these people are acting in England and subject to English regulation?

(Justice identified by BNA, see Insurers and States Engage in Debate on Boycott Issues Before Supreme Court, 64 Antitrust & Trade Reg. Rep. (BNA) 200 (Feb. 25, 1993)). The reinsurers' lawyer expressed contentment with such an outcome but noted that others might not be comfortable with it.

238 113 S. Ct. at 2918–19; cf. Brief of the Government of Canada at 9–10 (same two "canons of construction"). The London reinsurers also discussed these two principles but without highlighting them as canons of construction or employing them to argue that the Sherman Act did not apply. Brief for Petitioners at 10–13. In its amicus brief on the writ of certiorari (unlike its brief on the petition), the United Kingdom reviewed these principles and argued against jurisdiction, although it did not neatly identify two canons of construction. Brief for the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners on Writ of Certiorari.

239 See supra note 210.

240 Brief of the Government of Canada at 14–17; see also Brief (on Writ of Certiorari) for the Government of the United Kingdom (same).

241 The opinion itself continued, but only with criticism of the majority. 113 S. Ct. at 2921–22.
thinking about an issue for fifteen years, it deserves serious consideration. Justice Souter’s opinion for the Court avoided squarely ruling on comity by adopting a narrow definition of conflict not advanced by any party. The opinion gives only an impression that the Court would reject comity-based abstention. Justice Scalia erected a careful structure to re-position balancing as part of substantive law, but then rather hastily applied the Restatement’s version of balancing and never analyzed the statute he purported to be interpreting.

Although both the majority and the dissent distanced themselves from the more amorphous balancing approaches in favor of perceived objectivity, the law cannot be seen as stable. There is no holding on whether courts should abstain in proper cases. Few cases will involve conflicts as that concept has been explained by the Court, but this explanation must be considered vulnerable given how much it departs from prior understandings, how briefly and unpersuasively the Court discussed the question, and the seriousness of the kinds of international tensions that led to comity-based interest balancing in the first place. The majority has lost Justice White, moreover, and nothing in Hartford Fire Insurance is so definitive that stare decisis would prevent Justice Scalia from prevailing by recruiting a fifth vote. Yet although Justice Scalia’s approach would shift the focus to substantive law, he interpreted the Sherman Act with so little attention to it that his approach might seem simply to reintroduce comity-based interest-balancing behind a facade of objective statutory interpretation.

3. The Boycott Exception

The difficult insurance issue required the Court to interpret the boycott exception to the McCarran-Ferguson Act. The plaintiffs charged that the four primary defendants sought to lessen their financial exposure by changing the terms of insurance coverage. When their competitors would not agree to the changes, these four insurers allegedly (and there was disagreement about just what had been alleged) sought to coerce compliance by arranging for reinsurance to be denied in certain circumstances and by ending statistical support for forms not reflecting these changes. The legal question was whether “boycott, coercion, or intimidation” had been adequately pled.

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242 At oral argument the Justices expressed skepticism about the motivation of the reinsurers. When the States’ lawyer said the “reinsurers agreed to provide that muscle” he was asked, “In exchange for what?” To his reply that “[i]n exchange, they would have an American market . . . with less risk and potentially more profit,” Justice Scalia exclaimed, “Someone had to talk them into that. (Laughter.)” Transcript at 54–55 (Justice identified by lawyer’s response).
No party was bold enough to champion a specific standard. Justice Souter's opinion followed the McCarran-Ferguson tradition of imprecision. Justice Scalia's majority opinion, however, sought a clear, generalizable rule in a "precise definition of the word 'boycott.'" The Court's new test, which was not promoted by any party, may or may not bring the clarity the Court sought.

a. Justice Scalia's Majority Opinion Regarding Boycott

The Court first rebuffed petitioners' effort to limit boycotts to unconditional refusals to deal by relying on two dictionaries (neither cited to the Court on this point) and the story of Captain Charles Boycott, who gave the word its name. One dictionary extended the term "boycott" to partial boycotts, and the other dictionary's definition discussed coercing victims to abandon positions. When Captain Boycott refused to accede to a political movement's demand that landlords lower rents (and instead evicted his tenants), the entire citizenry shunned him; but the Court speculated that since he eventually resumed peaceful relations with his boycotters, the boycott might have been conditional.

The Court employed the story of Captain Boycott and two other examples of boycotts to craft a different limitation on "boycott" than the one proposed by petitioners. (The Court explained away "coercion" and

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243 E.g., Brief for Respondent States in No. 91-1111 at 19 ("cases cannot be distilled to a single boycott test").
244 113 S. Ct. at 2911.
245 Although petitioners expended few resources advancing any particular standard, preferring instead to criticize the States and the Court of Appeals, their apparently preferred standard turned significantly on unconditional refusals to deal. See Brief for the Petitioners in No. 91-1111 at 31-32 ("Only when an agreement is accompanied by other anti-competitive conduct—such as an absolute refusal to deal on any terms, or discriminatory activity that excludes competitors or customers from the market—does an alleged antitrust violation fall outside the protection of the statutory safe harbor.") (footnote omitted); Reply Brief for the Petitioners in No. 91-1111 at 12 ("absolute refusals to deal and discrimination are the traditional hallmarks of a boycott"); cf. Transcript at 21 ("Our position is it wasn't a boycott because this was a uniform, nondiscriminatory agreement that applied to everybody the same way.").
246 113 S. Ct. at 2911-12 (quoting 2 THE OXFORD ENGLISH DICTIONARY 468 (2d ed. 1989), and WEBSTER'S NEW INTERNATIONAL DICTIONARY 321 (2d ed. 1950)). Only one brief mentioned the derivation of the word "boycott," apparently as a point of interest. Brief for the United States as Amicus Curiae on Petitions for a Writ of Certiorari at 10 n.9 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 264 (1986)). A good summary of the Captain's story is included as a "word history" in an acclaimed new dictionary not cited by the Court, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 227 (3d ed. 1992).

Although it is a phenomenon that extends well beyond antitrust law, one cannot help noticing the striking discrepancy in Hartford Fire between the enthusiasm for legislative history shown by the brief writers and the opinion writers; so also, dictionaries play a much more prominent role in opinions than in briefs.
"intimidation" as subsumed within "boycott."247) The critical factor in the community's shunning of Captain Boycott, wrote the Court, was the use of "unrelated transactions" as leverage.248 In the classic boycott case, Eastern States Retail Lumber Dealers' Ass'n v. United States,249 retail lumber dealers "refused to buy lumber from wholesale lumber dealers who sold directly to consumers."250 Conditioning trade on an agreement not to sell directly was held "to be an 'artificial condition' . . . . In other words, the associations' activities were a boycott because they sought an objective . . . that was collateral to their transactions with the wholesalers."251 Similarly, in the Pullman Strike252 and other labor disputes, work stoppage is a "boycott" only when it seeks "to obtain action . . . unrelated to the employment contract."253 The Court completed its analysis (apart from some criticism of Justice Souter's opinion) by interpreting the leading McCarran-Ferguson boycott case, St. Paul Fire & Marine Insurance Co. v. Barry,254 as involving an "artificial condition": When three malpractice insurers agreed not to write insurance for former customers of the defendant insurance company, the "condition" was "not being a former [defendant] policyholder."255

The Court then applied its test and concluded that a boycott had been adequately pled in six claims. The Court read the complaints, at times

247 113 S. Ct. at 2915 n.6:
Once it is determined that the actions of the reinsurers did not constitute a "boycott" . . . it follows that their actions do not constitute "coercion" or "intimidation" within the meaning of the statute. That is because, as previously mentioned, such concerted agreements do "not coerc[e] anyone, at least in the usual sense of the word," L. SULLIVAN, LAW OF ANTITRUST 257 (1977), and because they are precisely what is protected by McCarran-Ferguson immunity.

248 113 S. Ct. at 2912 (emphasis added).
249 234 U.S. 600 (1914).
250 113 S. Ct. at 2912.
251 Id. at 2913 (quoting Eastern States, 234 U.S. at 611) (emphasis added; brackets by Hartford Fire Insurance Court).
252 See In re Debts, 158 U.S. 564 (1895).
253 113 S. Ct. at 2913 (emphasis added).
255 113 S. Ct. at 2914. One can find foreshadowing of the Court's test in the briefs. Petitioners' reply brief adhered to the absolute refusal to deal/discrimination test previously mentioned, but distinguished United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), in part because in that case nonmembers were denied reinsurance "for reasons entirely unrelated to the terms on which the primary insurance was written;" whereas here, it was claimed, reinsurance was denied only "for unacceptable primary coverages." Reply Brief for the Petitioners in No. 91-1111 at 13-14 (emphasis in original). One amicus brief recommended an approach congruent to the one the Court adopted, calling for automatic protection of restraints that are "ancillary to standardized rates or terms." Brief of American Insurance Ass'n, National Ass'n of Independent Insurers, etc., as Amici Curiae in Support of Petitioners at 25 ("the allegations should initially be scrutinized to determine whether the conduct resulted in some anti-competitive restraint different from the restrictions that
generously, as having alleged not just that reinsurers agreed or intended not to reinsure risks on objectionable forms (i.e., forms with pollution coverage, or forms with occurrence-based insurance), but that reinsurers planned to boycott entirely any insurance company that used any objectionable form at all.\textsuperscript{256} This might (but might not) be a boycott, the Court said, and did not deserve dismissal at an early stage.

b. Justice Souter's Boycott Opinion

Justice Souter, who would have sustained the same six claims as the majority, issued a somewhat amorphous opinion for four Justices that emphasized that the reinsurers were acting "at the behest of the four primary insurers."\textsuperscript{257} The key for Justice Souter was the existence of so-called enforcement activities that distinguish boycotts from simple agreements on prices and terms. This approach, which was generally advocated by the States and the Solicitor General,\textsuperscript{258} is derived from\textsuperscript{259} Barry.\textsuperscript{259} The Barry Court broadly defined boycotting, explaining (as Justice Souter noted) that the term "does not refer to a unitary

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\item[256] The complaints alleged that several reinsurers "agreed to boycott the [objectionable] 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both forms." California Complaint ¶ 66, Jt. App. at 25; Connecticut Complaint ¶ 70, Jt. App. at 78, quoted at 113 S. Ct. at 2917. "Liberally construed, this allegation may mean that the defendants had linked their demands so that they would . . . refuse to do business on either form until both were changed to their liking. Again, that might amount to a boycott." 113 S. Ct. at 2917. The complaints alleged that a representative of Lloyd's of London announced that Lloyd's "was withdrawing entirely from the business of reinsuring primary U.S. insurers who wrote on the occurrence form." Cal. Complaint ¶ 89, Jt. App. at 31; Conn. Complaint ¶ 93, Jt. App. at 83, quoted in part at 113 S. Ct. at 2916. The Court explained that this could be construed to mean that "primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, even as to risks written on other forms." Id. at 2916 (emphasis in original).

This reading of the complaints was explored at oral argument. A Justice suggested that the complaints alleged that reinsurers "will not reinsure the company if the company writes that [objectionable] kind of insurance that might be reinsured with someone else." Transcript at 15-16. The insurers' lawyer denied that this had been alleged. When asked whether he agreed that "if that were alleged, that would be a boycott," the lawyer responded, "I agree it would be a closer question. I wouldn't concede it's a boycott, but it would be a closer question." A Justice responded, "You agree that you ought to concede it's a boycott. (Laughter.)" Transcript at 17.

\item[257] 113 S. Ct. at 2907. Relying on more traditional case law and legislative history, Justice Souter (as had the Court) ruled partial and conditional boycotts are included within the definition of that term. Justice Souter rejoiced at the "common ground" with the majority on this and three other issues. Id. at 2903-04 (only collective refusals are boycotts; a boycott need not involve unequal treatment of targets and other boycotters; and concerted activity alone is not sufficient to prove an exception).

\item[258] Brief for Respondent States in No. 91-1111 at 20 ("Enforcement conduct is, therefore, the hallmark of a boycott."); Brief for the United States at 15-18.

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phenomenon." Then the Barry Court, responding to criticism in the dissent, denied that any decision had found simple price fixing to be a "boycott" or "coercion" "in the absence of any additional enforcement activity." Justice Souter would have found such "enforcement activity" when the four primary defendants sought and obtained the assistance of reinsurers to force other insurers to change policy coverages. He would have affirmed the Ninth Circuit, sustaining most but not all of the claims.

c. A Comment on the Court's "Collateral" Test

The Court's analysis, which turns on what it says is a precise definition of the term "boycott," has flaws. The Court makes much of a comparison between Eastern States and concerted refusal to deal cases, such as Paramount Famous Lasky Corp. v. United States, and United States v. First National Pictures, Inc., which assertedly did not involve boycotts even though defendants sought better contract terms. Although Eastern States may deserve different antitrust treatment than the other two cases, it is doubtful that when McCarran-Ferguson was written only Eastern States

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260 113 S. Ct. at 2905 (quoting Barry, 438 U.S. at 543).
261 438 U.S. at 545 n.18 (emphasis added).
262 113 S. Ct. at 2905. Justice Souter found support for this view in South-Eastern Underwriters, the case that exposed the insurance industry to the antitrust laws. Justice Souter pointed out that when Congress passed the McCarran-Ferguson Act to restore insurance's protected status, it exempted boycotts, using language from the South-Eastern Underwriters indictment. Id. at 2904 n.14. In South-Eastern Underwriters, an association managed to "cut off [nonmembers] from the opportunity to reinsure their risks;" Justice Souter speculated that this might have been accomplished by the kind of promptings from insurers to reinsurers that occurred in Hartford. Id. at 2905 (quoting South-Eastern Underwriters). Justice Souter also relied on the South-Eastern Underwriters dissent, which would have applied the exception only to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." 438 U.S. at 565 (Stewart, J., dissenting) (quoted at 113 S. Ct. at 2906). Justice Scalia's majority opinion distinguished South-Eastern Underwriters as a case in which willingness to deal turned on membership in an association, a factor "having no discernible bearing upon the terms of the refused reinsurance contracts." 113 S. Ct. at 2915–16.

It is noteworthy that both sides agreed on the importance of South-Eastern Underwriters. In contrast, in Barry the Court specifically rejected the dissent’s reliance on South-Eastern Underwriters as the source of the words at the center of the dispute, 438 U.S. at 549 n.22. For reviews of McCarran's legislative history, see Larry D. Carlson, The Insurance Exemption from the Antitrust Laws, 57 Tex. L. Rev. 1127 (1979); Charles D. Weller, The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy, 1978 Duke L.J. 587.

263 113 S. Ct. at 2906 n.18 (district court correctly dismissed charge of conspiracy to draft restrictive "umbrella" coverages, since plaintiffs had not alleged a refusal to deal).
264 282 U.S. 30 (1930).
265 282 U.S. 44 (1930).
was thought to involve a boycott.²⁶⁶ Nor is it clear that the Eastern States Court attached the same meaning to the words "artificial" and "collateral" as the Hartford Fire Court.²⁶⁷ Hartford Fire buttressed its argument with an assertion that up until 1945, when McCarran-Ferguson was passed, the word "boycott" had been used in only seven Supreme Court nonlabor antitrust opinions, "not once . . . as Justice Souter uses it—to describe a concerted refusal to engage in particular transactions until the terms of

²⁶⁶ Hartford Fire Insurance mentions, as evidence of the different treatment, (1) that a noted article called Eastern States "one of the 'leading case[s] involving commercial boycotts,' " 113 S. Ct. at 2912–13 (quoting Charles F. Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 873 (1955) [bracketed insert by Court], and (2) that the term "boycott" does not appear in the other two opinions.

The reliance on Mr. Barber is misplaced. Barber wrote that the "same reasoning [as in Eastern States] has been echoed in subsequent decisions," including both Paramount Famous Lasky and First National Pictures. Barber specifically included these cases as examples of boycotts; for him, the "distinguishing feature of the group boycott cases is group action to coerce third parties to conform to the pattern of conduct desired by the group or to secure their removal from competition." 103 U. Pa. L. Rev. at 875 (citing all three cases, plus others). If Barber is the test, all three cases involve "boycotts."

So, too, the Court's line cannot be drawn by searching for the word "boycott." Although "boycott" does not appear in Paramount Famous Lasky or First National Pictures, it also does not appear, in any meaningful sense, in Eastern States. It is used only twice, once in a quotation from an earlier case listing ways restraints can be "'occasioned,'" 234 U.S. at 611 (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 438 (1911)), and once while describing another case, 234 U.S. at 610. The analytical part of Eastern States no more includes the word "boycott" than does the analytical part of the other cases. If use of the word "boycott" is the test, none of the three cases involves a "boycott."

²⁶⁷ In Eastern States (quoted supra text at notes 250–51), a retailers' trade association collected the names of wholesalers who sold directly to consumers, and distributed this list of names to its members. "Should any wholesaler desire to have his name removed from the list he can have it done upon satisfactory assurance to the local secretary that he is no longer selling in competition with the retailers." 234 U.S. at 608. The Hartford Fire Insurance Court wrote that the retailers had created an "'artificial condition[ ],' " 113 S. Ct. at 2913 (quoting 234 U.S. at 611–12), by seeking an objective "that was collateral to their transactions with the wholesalers." 113 S. Ct. at 2913. Perhaps; yet the transactions also can be seen as withholding patronage until satisfactory terms and conditions are offered, including a promise of exclusivity for retailers. There is nothing obviously "artificial" or "collateral" about such an arrangement.

Some light is shed by looking behind the word "artificial." Although the Court cited to Eastern States, in fact Eastern States was merely quoting United States v. Patten, 226 U.S. 525, 541 (1913), see 234 U.S. at 611–12. Patten held that "running a corner in cotton," i.e., manipulating prices on the cotton exchange, violated Sherman Act Section 1. To the argument that this was quite unlike an agreement among specific firms to suppress competition, the Court responded with language quoted by Eastern States: "Section 1 of the act . . . is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints, as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade . . . ." 226 U.S. at 541 (emphasis added). The Court added that a "corner" tended "to enhance the price artificially." 226 U.S. at 542 (emphasis added). All that was meant by "artificial," it would seem, is an outcome attained other than by independent action, i.e., not the meaning contemplated by the Court.
those transactions are agreeable." 268 This claim is a matter of interpretation. 269 Finally, there is no suggestion in Barry that the Court even considered whether there was anything resembling an "artificial condition." 270 In short, the reasoning behind the Court's reliance on what it claimed is a precise definition of "boycott" is unpersuasive.

268 113 S. Ct. at 2913 (emphasis in original) (citing cases).

269 The Court described Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941), as involving a "boycott of retailers who sold competitors' products." 113 S. Ct. at 2913 n.4. But Fashion Originators' used terms much closer to Justice Souter's. Fashion Originators' was the challenge to a manufacturer guild's self-regulation of style piracy. Thousands of retailers "signed agreements to 'cooperate' with the Guild's boycott program, but more than half of these signed the agreements only because constrained by threats that Guild members would not sell to retailers who failed to yield to their demands." 312 U.S. at 461-62. The program violated the Sherman Act because, among other things, it "subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott," 312 U.S. at 465 (citing Eastern States). Although Fashion Originators' is distinguishable from Hartford Fire for many reasons, it does not appear that Justice Black, who wrote that opinion, was using the word "boycott" in the Hartford Fire majority's sense.

So, also, the distinction of United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944), is flawed. The Court said "boycott" was "used in reference to a refusal to deal as means of enforcing resale price maintenance," which is accurate as far as it goes. But the details are important. Bausch & Lomb was describing how, in FTC v. Beech-Nut Packing Co., 257 U.S. 441, 451, 454-55 (1922), Beech-Nut had been found to have suppressed competition by, among other things, "boycotts of price cutters." 321 U.S. at 722. But this boycott consisted of terminating discounters "who are only to be reinstated as one whose record is 'clear' and to whom sales may be made upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices." 257 U.S. at 454. This sounds very much like refusing to sell until there are satisfactory terms and conditions.

Finally, the Court's review dismisses Nash v. United States, 229 U.S. 373, 376 (1913), as using the word "boycott" only "in passing." 113 S. Ct. at 2913 n.4. This, too, is true as far as it goes, but there is more. Justice Holmes, for the Court, was summarizing an indictment of a naval stores dealer and others. The defendants allegedly sought to harm competition by predatory pricing and other nefarious acts, including "by inducing consumers, by payments and threats of boycotts, to postpone dates of delivery of contract supplies, and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market." 229 U.S. at 375-76. Although not important to the case, once again the Court used the word "boycott" seemingly to refer to an effort to coerce a contract party's agreement to a desired term or condition.

270 Justice Souter pointed out that the Barry Court wrote that "boycott" is not a "'unitary phenomenon.'" 115 S. Ct. at 2905 (quoting Barry, 438 U.S. at 543, in turn quoting PHILLIP AREEDA, ANTITRUST ANALYSIS 381 (2d ed. 1974)). The majority dismissed this: "'Boycott' is a multifaceted 'phenomenon' that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, social boycotts, etc. It merely does not include refusals to deal because of objections to proposed terms." 113 S. Ct. at 2913 n.3.

But the majority removed the context from the Barry quotation. The quotation came at the end of a paragraph discussing cases giving broad meanings to the term "boycott." E.g., Klor's v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959) ("concerted refusals by traders to deal with other traders"), quoted at 438 U.S. at 543. "Hence," wrote Barry, "boycotts are not a unitary phenomenon." 438 U.S. at 543 (citing the 1974 edition of Areeda's casebook). The 1974 edition of Areeda's casebook clearly contemplated that some concerted refusals to deal except on certain terms could be boycotts. The cited "paragraph," to use Areeda's
Although the Court overtly sought precision and clarity, it may not have succeeded. One can find three tests in the opinion: There is a boycott only if there are “unrelated transactions,” or if the conspirators sought a “collateral objective,” or if the new condition has an “artificial relationship” with the proposed contract. As in Professional Real Estate, one is left to speculate about whether the tests are alternatives or cumulative. Even more confusingly, the opinion leaves open two major questions: Using “collateral” as shorthand for the alternatively phrased test, what is “collateral,” and collateral to what?

Even within the Court’s opinion the ambiguity about the meaning of “collateral” is patent. Some denials of reinsurance would be boycotts, the Court said. But the Court also said that more is protected than simple organizational structure, is as follows:

It is often said that the concerted refusal to deal—or its evil-sounding equivalent, “boycott”—is unlawful per se. But there may be restraints with some boycott characteristics that are not or should not be automatically unlawful. If that be accepted, either the initial position must be abandoned or “boycott” must be so defined as to exclude the possibly permissible situations. Such definitions are not meant to be precluded by the allocation of cases and problems to this section. ....

The order of discussion for this variety of collaboration among competitors is as follows: (1) express agreements which set the terms of dealing with customers and which have certain features beyond those previously considered; (2) collective dissemination of information that tends to similar effects; (3) express agreements which set the terms of dealing with customers and which affect the behavior of competitors; .... As the student will see, boycotts are not a unitary phenomenon.

AREEDA, supra, ¶ 371, at 380–81 (emphasis added). Areeda’s first three “boycott” cases are Paramount Famous Lasky, First National Pictures, and Eastern States.

Nor was Areeda alone back in 1978, when Barry was decided, in thinking of “boycott” as an inclusive term. See, e.g., Robert H. Bork, The Antitrust Paradox 350 (1978) (“According to conventional wisdom, boycotts (or agreements among competitors to refuse to deal) are illegal per se.”) (arguing that the per se label should be reserved for naked boycotts). The Supreme Court shared this thinking. Boycotts and concerted refusals to deal appear to have been equated in Klor’s, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) (“Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.”), and in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953) (“group boycotts, or concerted refusals to deal, clearly run afoul of § 1”) (citing cases). When Barry referred to boycotts as not a “unitary phenomenon,” it was using the term much more broadly, in an antitrust sense, than the Hartford Fire majority.

Hartford Fire quoted Professor Sullivan’s powerful argument that there is no boycott when, for instance, firms agree not to do business without charging a security deposit (an authority that the parties omitted from their briefs but petitioners highlighted at oral argument, see Transcript at 18); and, indeed, Sullivan distinguishes Eastern States from Paramount and First National Pictures, Sullivan, supra note 145, at 257. But Sullivan was not identifying boycotts for McCarran purposes; instead, he was identifying “per se illegal boycotts.” Referring specifically to Sullivan’s analysis, the Barry Court wrote that “the issue before us is whether the conduct in question involves a boycott, not whether it is per se unreasonable.” 438 U.S. at 542. Sullivan’s distinguishing feature, moreover, had nothing to do with “artificiality,” but rather looked to whether a group of firms were seeking to harm competitors by pressuring suppliers or customers to deny them needed relationships. SULLIVAN, supra note 145, at 261–62.
refusals to reinsure risks on certain forms. Focusing on the reinsurers' contracts, the Court said a boycott would be found if the reinsurers refused to write any reinsurance (even on preferred forms) with a primary insurer also using some disfavored forms, but a boycott would not be found if "the primary insurers' other business were relevant to the proposed reinsurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses.)" 271 Were one to take such relatedness to an extreme, little would be collateral, 272 but the opinion gives no guidance on how far one should go.

So, too, ambiguity becomes apparent when one asks, "collateral to what?" The Court's examples principally involved reinsurance decisions. The above example, which inquired into increased risks to which reinsurers would be exposed, is typical. The boycott issue was important because, as the Court noted, McCarran-Ferguson "makes that [reinsurance] conspiracy lawful (assuming reinsurance is state-regulated), unless the refusal to deal is a 'boycott.'" 273 But some or all reinsurance—particularly by foreign reinsurers—may not be state regulated, in which case agreements among reinsurance firms would not be exempt whether boycotts or not. 274 In the pure case, with no reinsurance being exempt, the only boycott question would be whether agreements among primary insurers are boycotts. Presumably the Court's test would focus on the insurance decision, and the question would be whether an agreement that reinsurance should be withheld was collateral to that decision.

Focusing on the insurance decision suggests that agreements on reinsurance might well be "collateral," but the Court apparently assumed

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271 113 S. Ct. at 2916 (citing two reinsurance books not cited in any brief). At oral argument the insurers declined to make this "solvency" argument. "We're not defending that, because here something different is being asserted." Transcript at 22.

272 This point is made by Justice Souter, who wrote that "[o]ne can only imagine the variety of similar arguments that may slowly plug what remains of the [boycott] exception." 113 S. Ct. at 2908 (Souter, J.). At some point, at least in the context of forms-approval, the Court's test would protect everything except unconditional refusals to deal—the standard advocated by petitioners and rejected by the Court, see supra note 245 and accompanying text.

273 113 S. Ct. at 2916.

274 Cf. Brief for the United States as Amicus Curiae Supporting Respondents at 12 n.9 ("The insurance industry has long recognized that there may be no McCarran-Ferguson immunity for agreements among foreign or domestic reinsurers ... because such agreements typically are not subject to state regulation.") (citing authorities). But cf. Reply Brief for the Petitioners in No. 91-111 at 2-6 (domestic petitioners argued that reinsurance, including even by the London reinsurers, is regulated). The Court remanded to the court of appeals the question whether the activities of the domestic reinsurers were regulated and immune; the Ninth Circuit's earlier positive conclusion rested on a flawed analysis. 113 S. Ct. at 2903 n.12 (unanimous opinion). The Supreme Court expressed no opinion on whether the London reinsurers were subject to state regulation, since the issue was not
that most agreements about reinsurance would not be boycotts. This assumption does not appear to have been premised on a view that decisions not to reinsure certain forms are related to the insurance decision; indeed, the Court was willing to consider protecting (as related agreements) reinsurance decisions going well beyond the selection of forms on which to write reinsurance. By assuming that reinsurance agreements would be exempt (if not boycotts), the Court apparently blended insurance and reinsurance decisions, and never considered to which decision a refusal to deal must be related to avoid being a boycott. Such blending might not be feasible if only one of the two decisions is McCarran-protected. This would leave matters quite confused since a court would have to choose whether to be governed by the Court's definition-based test as written or by the conclusion that the Court apparently assumed.

4. Conclusion

On the two most controverted 

\textit{Hartford Fire Insurance} issues, the Court relied on objective approaches not advanced by the parties. On what was known as the "comity issue," the Justice Souter-led majority refused to endorse a balancing test, while the Justice Scalia-led dissent promoted a more objective, statute-based approach. On the boycott issue, the Justice Scalia-led majority sought to rely on a precise definition of the term "boycott," although, as in \textit{Professional Real Estate}, the clarity the Court sought may have eluded it.

IV. BROOKE GROUP LTD. (LIGGETT)

\textit{Brooke Group}\footnote{\textsuperscript{275}} was the oligopoly-recoupment predatory pricing case featuring Liggett & Myers (Liggett) against Brown and Williamson (B&W), and Professor Phillip Areeda against former Judge Robert Bork—an eagerly anticipated "clash of the titans."\footnote{\textsuperscript{276}} But Areeda and Bork spent as much time debating what were their differences as debating the differences themselves. Whether or not the result of this absence of joinder, the Court produced an unsatisfying opinion. As in \textit{Kodak}, an-

\footnote{275} Brooke Group is the successor corporation to Liggett & Myers, but the parties and the Court referred only to Liggett.

\footnote{276} Areeda represented Liggett at the court of appeals and at the Supreme Court; Bork was added as B&W's lead attorney at the Supreme Court, possibly to counter Areeda. At the court of appeals Areeda had faced former Attorney General Griffin Bell (neither appeared at the trial level, although I understand that Liggett consulted Areeda during the trial). Bell, plus Robinson-Patman guru Frederick M. Rowe, were among the lawyers listed on the B&W brief; Areeda was assisted on the briefs by former Solicitor General and fellow Harvard Professor Charles Fried.}
other case that arrived at the Court with a confused past, the Court issued an important opinion that is a challenge to interpret and will often be distinguishable on its unique facts.

Perhaps the case's most important holding was undisputed by the litigants: *Brooke Group* ruled that predatory pricing violations require proof of "recoupment." Plaintiffs must satisfy this objective test in addition to an objective cost-based test. In deciding whether the recoupment had been shown, moreover, the majority placed considerably less weight on subjective evidence than did the dissent.

**A. Background**

*Brooke Group*'s origins lie in the initial fissures in the great cigarette oligopoly. Liggett, which had become a minor player in branded cigarettes, introduced "black and white" generics, and began taking sales away from the majors and disproportionately from B&W. B&W was the third largest U.S. cigarette firm, with a market share that never exceeded 12 percent. B&W responded with its own generic, which closely resembled Liggett's and had the same list price but a lower wholesale price. Even before B&W sold a single generic cigarette, Liggett sued (in 1984), alleging trademark infringement and unfair competition. Eventually Liggett added the Robinson-Patman Act count at issue before the Supreme Court, namely, an allegation that the volume rebates to certain wholesalers constituted illegal price discrimination. Liggett alleged that B&W sought to achieve a sufficient share of the generic business to be in a position to limit and then reduce the spread between generic and regular cigarette prices, thus limiting the growth of generics and helping to maintain sales of supracompetitively priced branded cigarettes for the benefit of B&W and the rest of the cigarette oligopoly.

1. Overview of the Litigation

A 115-day trial beginning in fall 1989 ended in a verdict for Liggett only on the Robinson-Patman claim. Damages were $49.6 million, trebled to $148.8 million. The district court wrote that the documentary evidence was "more voluminous and detailed than any other reported case. This


278 See infra parts IV(B)(1), IV(C)(4).

279 15 U.S.C. § 13(a) provides:

It shall be unlawful for any person engaged in commerce . . ., either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . .
evidence not only indicates B&W wanted to injure Liggett, it also details an extensive plan to slow the growth of the generic cigarette segment.\textsuperscript{280} The court found that B&W priced its generics "well below B&W's average variable cost,"\textsuperscript{281} but granted JNOV for B&W because Liggett had not adequately shown competitive injury, causation, or antitrust injury.\textsuperscript{282} The Fourth Circuit affirmed on the first ground. It expressed grave doubts about the plausibility of a theory of predation based on oligopolistic recoupment.\textsuperscript{283}

Liggett filed a powerful petition for certiorari.\textsuperscript{284} The Supreme Court granted certiorari without asking the Solicitor General for his views. The key to a thorough understanding of the case lies in the questions presented in that petition and in the instructions on which the challenged jury verdict was based.

\textbf{2. The Jury Instructions}

The jury's principal finding (in the form of a yes-or-no question) was that "Brown & Williamson engage[d] in price discrimination that had a reasonable possibility of injuring competition in the cigarette market as a whole in the United States."\textsuperscript{285} The remaining questions went to injury, damages, defenses, and trademark infringement. This meant that the instructions on proof of that "reasonable possibility of injuring competition" were critical.

Parsed carefully, the instructions permitted the jury to find the possibility of competitive injury based solely on B&W's intent; but the instructions were sufficiently ambiguous that Liggett could (and did) insist that they required proof of the real prospect of recoupment.\textsuperscript{286} The opening

\begin{footnotesize}
\textsuperscript{280} 748 F. Supp. 344, 354 (M.D.N.C. 1990).

\textsuperscript{281} Id.

\textsuperscript{282} The court found that Liggett's injuries had been caused by the low prices, not, as required, by the price discrimination, and that antitrust injury was missing because there was no below-cost pricing in the cigarette market as a whole. Id. at 358–64.

\textsuperscript{283} 964 F.2d 335, 342 (4th Cir. 1992) ("To rely on the characteristics of an oligopoly to assure recoupment of losses from a predatory pricing scheme after one oligopolist has made a competitive move is ... economically irrational.").

\textsuperscript{284} See Petition for a Writ of Certiorari at 12–13 ("In conflict with this Court and with other circuits, the Fourth Circuit created a rule of \textit{per se} legality for discriminatory, below-cost pricing by a sophisticated oligopolist undertaken for the express predatory purpose and with the demonstrated effect of raising prices to the detriment of consumers.") (footnote omitted).

\textsuperscript{285} Issue No. 1, Jt. App. at 27; see also Instruction No. 10 ("Competitive Injury Requirement"), Jt. App. at 829 (same).

\textsuperscript{286} Transcript at 4 ("The instructions, fairly read, did require the jury to find that B&W engaged in below-cost pricing with a reasonable prospect of recoupment ... .")
\end{footnotesize}
instruction on competitive injury, on which Liggett placed great weight, was Instruction 12, "Meaning of Injury to Competition":

By injury to competition, I mean the injury to consumer welfare which results when a competitor is able to raise and to maintain prices in a market or well-defined submarket above competitive levels. In order to injure competition in the cigarette market as a whole, Brown and Williamson must be able to create a real possibility of both driving out rivals by loss-creating price cutting and then holding on to that advantage to recoup losses by raising and maintaining prices at higher than competitive levels.

This instruction would seem to require some showing of likely recoupment. As an additional hurdle, the instructions also seemed to require proof that "Brown & Williamson possessed market power," or at least "a realistic prospect of obtaining market power."

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287 The instructions are contaminated with repeated references to a possible "price-value cigarette submarket," *e.g.*, Instruction No. 13, Jt. App. at 830 ("Earlier I instructed you to determine whether price-value cigarettes are a well-defined submarket of the cigarette market. Your decision on that question will be very important in determining whether Brown & Williamson's activity had a reasonable possibility of injuring competition in the cigarette market."). The parties had stipulated that the relevant market was "the entire United States cigarette market," 748 F. Supp. at 351, and in the end the jury was asked only about that market, but the integrity of the jury's decision was lessened by the instructions' erroneous discussion of submarkets.

288 Instruction No. 12, Jt. App. at 829-30; *see* Brief for the Petitioner at 20 & n.22. Instruction 12 continued with the following paragraph:

You must remember that the Robinson-Patman Act was designed to protect competition rather than just competitors and, therefore, injury to competition does not mean injury to a competitor. Liggett & Myers cannot satisfy this element simply by showing that they were injured by Brown & Williamson's conduct. To satisfy this element, Liggett & Myers must show . . . that Brown & Williamson's conduct had a reasonable possibility of injuring competition in the cigarette market and not just a reasonable possibility of injuring a competitor in the cigarette market.

289 "[M]arket power is the power of a company to control prices and to exclude rivals in a market or well-defined submarket. The power to control prices is simply the ability of a company to establish and to maintain higher price points for its products in a market or well-defined submarket without suffering a loss of business to its rivals." Instruction No. 14, Jt. App. at 831-32.

290 In the initial instruction (No. 13) on market power, entitled "Threshold Requirement of Market Power," the instructions seemed to require the fact or the prospect of market power. Jt. App. at 830-31 ("Brown & Williamson could not have had a reasonable possibility of injuring competition in the cigarette market unless Brown & Williamson had market power, or a realistic prospect of obtaining market power, in the cigarette market as a whole.") (instruction repeated for any possible "well-defined price-value submarket"). But this instruction was followed by Instruction No. 15 ("Importance of Market Power"), which referred only to existing market power. Jt. App. at 832 ("If you find that Brown & Williamson did not possess market power, then you must find for Brown & Williamson. . . . This is because Liggett & Myers cannot demonstrate that Brown & Williamson had a reasonable possibility of injuring competition . . . unless Brown & Williamson possessed market power."). Two other instructions also referred to actual rather than actual-or-
But the instructions then abandoned the recoupment requirement. Instruction 16, “Alternative Methods of Proving Reasonable Possibility of Injury to Competition,” said that the necessary possibility of competitive injury could be shown either by actual injury to competition, or by showing “predatory intent, from which you may infer that Brown & Williamson’s price discrimination . . . had a reasonable possibility of injuring competition.”\textsuperscript{291} “Predatory intent, from which a reasonable possibility of injury to competition may be inferred, can be shown in either one of two ways:” pricing below “reasonably anticipated average variable cost,” or “through direct evidence of Brown & Williamson’s statements, documents or conduct.”\textsuperscript{292}

These instructions were unclear, inconsistent, and fatally flawed. They referred repeatedly to submarkets although the parties had stipulated that there were none. Parts of them could be read as requiring proof of current market power. Most serious (and although Liggett argued to the contrary), the instructions seem to have permitted the jury to find for Liggett without finding either below-cost pricing or likely recoupment.

prospective market power. Instruction No. 16 (“Alternative Methods of Proving Reasonable Possibility of Injury to Competition”), Jt. App. at 832 (“If you determine that Brown & Williamson possessed sufficient market power . . . .”); Instruction No. 18 (“Proof of Reasonable Possibility of Injury to Competition through Predatory Intent”), Jt. App. at 835 (liability only if “sufficient market power”).

\textsuperscript{291} Jt. App. at 832–33. This is one of the instructions with the curious reference to actual market power: “If you determine that Brown & Williamson possessed sufficient market power, then a reasonable possibility of injuring competition in the cigarette market can be shown in either one of two ways . . . .”

Instruction No. 18 (“Proof of Reasonable Possibility of Injury to Competition through Predatory Intent”), Jt. App. at 834–35. The instruction then cautioned, however, that a “reasonable possibility of injury to competition” could be inferred only “if you find Brown & Williamson had sufficient market power.”

“Predatory intent” and “predatory pricing” were confusingly defined in Instruction No. 19:

Predatory intent is the state of mind in which a company plans to discipline and to exclude rivals from a market or a well-defined submarket so that it can earn higher than competitive profits on its products in that market or well-defined submarket.

Predatory pricing happens when a company forgoes short-term profits in order to develop a market position such that the company can later raise prices and recoup profits. Predatory pricing differs from healthy competitive pricing in its motive: a predator . . . seeks to impose losses on other firms, not garner gains for itself . . . .

Jt. App. at 835. The independent importance of “direct evidence of predatory intent” was made clear by its role as the title of a separate jury instruction, Instruction No. 29, Jt. App. at 843 (“Direct Evidence of Predatory Intent. The second way that Liggett & Myers can establish predatory intent is through direct evidence of Brown & Williamson’s statements and conduct. Statements that show predatory intent can be oral or written statements by Brown & Williamson personnel . . . .”).
Instruction 12 discussed the "meaning of injury to competition," but the "methods of proving reasonable possibility of injury to competition" were set out in Instructions 16 and 18, where there was no mention of recoupment, and pricing below cost was only an alternative method of showing predatory intent. At the heart of the instructions was the dated double-inference test, which permitted intent to be inferred from direct, subjective evidence, and then permitted likely harm to competition to be inferred from intent.

The instructions were not before the Court—B&W's challenge to them remained pending—but their weakness provided a crucial backdrop to the appeal. The opening nine pages of B&W's brief dissected the jury instructions and concluded triumphantly—with italics in the original—that "[a]bsolutely nothing about the elements of proof of competitive injury can be inferred from the jury's general verdict on that issue." As noted, there is considerable merit to this position. Yet since Liggett persisted in arguing that the jury had made important findings, the jury instructions also served to complicate the briefing and arguing and to distract the litigants and the Court from other issues.

3. The "Questions Presented"

Also important were the "Questions Presented" by petitioner Liggett. After describing the litigation below, the petition for certiorari posed three questions of law:

1. Does the Robinson-Patman Act's prohibition of price discrimination that "may substantially lessen competition or tend to create a monopoly or injure ... competition with [the discriminating seller]" retain independent force or does it address only a monopoly or conspiracy already covered by the Sherman Act?

2. May a court's theoretical speculation about the rational calculations of a hypothetical oligopolist vitiate a jury verdict based on the calculations, conduct, and success of the actual respondent?

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294 748 F. Supp. at 348 (trial court denied alternative motion for new trial based in part on jury instructions).

295 Respondent's Brief on the Merits at 10 [hereinafter "Respondent's Brief"]; see also Transcript at 25 ("I wanted to meet first the assertion that there is a jury verdict here which must be respected.... But in fact... these instructions the judge gave clearly permit the jury to find liability solely on the basis of... generalized bad intent in Brown & Williamson documents.").
3. Even accepting the Court of Appeals' erroneous conclusion that consumers were not injured, must actual injury to consumers—as distinct from a reasonable threat of injury—be demonstrated before Robinson-Patman Act liability can be found?

These simple, compelling questions, perhaps along with the glamour of a price discrimination petition filed by a father of the modern approach to predatory pricing, helped persuade the Court to grant certiorari. But things fell apart for Liggett when, after certiorari had been granted, B&W agreed with Liggett's answer to each question.296

Liggett insisted that the Fourth Circuit had erred as a matter of law;297 B&W said it agreed with Liggett on the law, but the evidence was lacking;296 Liggett denied that B&W agreed with it;299 B&W again reviewed the evidence; and so on. Later, at the 1993 Spring Meeting of the ABA Section of Antitrust Law, Bork quipped that his Supreme Court oral argument was so fact-laden he wondered whether to start with "Mr. Chief Justice, and may it please the Court," or "Ladies and Gentlemen of the jury."300

296 "B&W is prepared to answer each of Liggett's questions as Liggett wants . . . ." Respondent's Brief at 34; see also id. at 31:

This case requires resolution of none of the questions Liggett presents for this Court's consideration. The disputes between the parties are entirely factual. B&W does not maintain, nor did the Court of Appeals . . . hold, (1) that in a primary-line case the Robinson-Patman Act merely duplicates the Sherman Act by requiring a monopoly or a conspiracy, (2) that theory can override facts, or (3) that Robinson-Patman requires actual injury to competition rather than a reasonable possibility of such injury. Thus, there is no legal dispute for this Court to resolve.

297 E.g., Petition for a Writ of Certiorari at 2 ("The Fourth Circuit held that, absent a conspiracy, an oligopolist could never be sufficiently certain of a pay off to threaten competition.").

298 Respondent's Brief at 31 ("there is no legal dispute for this Court to resolve"). At the opening of his argument Bork was asked, by Justice Kennedy, to confirm that "[t]here's no legal difference between you and the petitioner." "I don't think there is, Your Honor." Justice Kennedy suggested that Areeda "would disagree and say that your position is that this sort of suit simply cannot be maintained ... when an oligopolist is the defendant." Bork responded, "But I don't accept it and I hope I am not estopped from denying that that's my position. (Laughter.) No, I think oligopolistic predation could occur in some circumstances." Transcript at 22-23 (Justice identified by BNA, Rival Generic Cigarette Makers Spar Over Predatory Pricing Ruling, 64 Antitrust & Trade Reg. Rep. (BNA) 339 (Apr. 1, 1993)).

299 Areeda's rebuttal opened with Justice Scalia asking whether Areeda agreed with Bork "that this seems to be mostly just an argument about sufficiency of the evidence." Areeda disagreed. The court of appeals's decision, he said, "was not based on facts." Areeda "read the court of appeals ... as saying that only a monopolist or a cartel can successfully predate." Transcript at 43-44 (Justice identified by BNA).

300 B&W's brief on the merits does not turn from its factual counterstatement of the case until page 31, leaving only 16 pages for its legal and policy argument.
B. The Opinions

The Court, in an opinion by Justice Kennedy for a six to three majority,301 made only two specific rulings of law. This article will note these briefly, review the Court's remarkable weighing of the evidence, and discuss Justice Stevens's dissent. The article will then consider more generally the case's implications.

1. Recoupment

The Court held that plaintiffs challenging predatory pricing must show both below-cost pricing and some likelihood (how great a likelihood is discussed below) of the predator's eventually "recouping its investment in below-cost prices."302 Although making recoupment an element of the offense was something of a change in the law—and one that enhances the importance of objective evidence—the Court's action was not too surprising. Courts were increasingly considering recoupment issues303 and, although B&W championed recoupment, Liggett agreed with it.304

2. Oligopoly Recoupment

The Court "decline[d] to create a per se rule of nonliability for predatory price discrimination when recoupment is alleged to take place through supracompetitive oligopoly pricing."305 "A predatory pricing scheme designed to preserve or create a stable oligopoly, if successful,

301 The Chief Justice and Justices O'Connor, Scalia, Souter, and Thomas joined the majority opinion. Justice Stevens dissented in an opinion joined by Justices White and Blackmun.

302 113 S. Ct. at 2588.

303 See ANTITRUST LAW DEVELOPMENTS, supra note 53, at 236-37. Until Brooke Group, recoupment as a separate element of the offense was exceptional. Recoupment was associated most closely with Judge Easterbrook's opinion in A.A. Poultry Farms v. Rose Acre Farms, 881 F.2d 1396 (7th Cir. 1989), cert. denied, 494 U.S. 1019 (1990).

304 Brief for the Petitioner at 40-41, 43 & n.56; Transcript at 5 ("We accept the burden of showing that prices were discriminatory, below average variable cost, and were undertaken with a reasonable prospect of recoupment."). It would have been awkward for Areeda to have done otherwise, since his writings seemed to support a recoupment requirement. 3 Aareeda & Turner, supra note 148, at 151:

- predatory pricing would make little economic sense to a potential predator unless he had (1) greater financial staying power than his rivals, and (2) a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed.),

quoted at Respondent's Brief at 24 and Respondent's Brief in Opposition to Certiorari at 24; see also Phillip Areeda, Monopolization, Mergers, and Markets: A Century Past and the Future, 75 CAL. L. REV. 959, 965 (1987) ("The uncertain future gains must greatly exceed the present actual losses to overcome the uncertainty that rivals will be destroyed or disciplined and that monopoly profits can be reaped in the face of future entry.") (footnote omitted),

quoted at Respondent's Brief at 40.

305 113 S. Ct. at 2591.
can injure consumers in the same way, and to the same extent, as one designed to bring about a monopoly.\textsuperscript{3} This also was not too surprising: it was Liggett's point, but B&W agreed.\textsuperscript{4} The Court viewed oligopoly recoupment as extraordinarily unlikely but not impossible as a matter of law. The Fourth Circuit opinion could be read as making an erroneous legal ruling, the Court said, and, to the extent it did, it was corrected.

3. \textbf{Evidentiary Review}

The astonishing part of the opinion is the evidentiary review. The Court wrote that it "is not customary for this Court to review the sufficiency of the evidence"\textsuperscript{5}—and then, by engaging in such a review, demonstrated why such reviews are so rarely profitable. The Court developed arguments not made by the parties and even delved into parts of the trial record not included in the joint appendix, some of which had not been cited by the parties.

a. B&W's Argument

It is helpful to contrast B&W's argument with the Court's discussion. The argument took sixteen pages of the brief. It included the following points: (i) B&W is willing to answer affirmatively each of Liggett's "question's presented" (two pages); (ii) "oligopoly recoupment" is impossible and "oligopoly predation" is irrational given B&W's small market share and the complicated game that would be required for successful coordination (five and a half pages); (iii) the Robinson-Patman Act was concerned principally with geographic price discrimination, it should not be extended to situations in which plaintiffs and defendants service the same product and geographic markets, and it permits findings of increased competition to overcome inferences of competitive injury (three pages);\textsuperscript{6} (iv) the Fourth Circuit concluded that competition actually increased as a result of B&W's entry into generics (two and a half pages);

\textsuperscript{3} Id.

\textsuperscript{4} See supra note 298. Although B&W agreed that oligopoly recoupment should not be rejected as a matter of law, it based much of its argument on the implausibility of any such theory in general and in the cigarette industry in particular. See, \textit{e.g.}, Respondent's Brief at 39 ("Liggett's economic theory is impossible. . . .").

For an appraisal attaching more weight to the Court's acceptance of the theoretical possibility of oligopoly recoupment, see Jonathan B. Baker, Predatory Pricing After Liggett: An Economic Perspective, 62 ANTITRUST L.J. Issue 3 (forthcoming 1994). B&W's concession would not have prevented the Court from rejecting the theory or refusing to reach the issue, as is clear from the dissent in \textit{Hartford Fire Insurance}, see supra note 237.

\textsuperscript{5} Id.

\textsuperscript{6} 113 S. Ct. at 2591 (adding "but we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard and avoiding the systemic costs associated with further proceedings justify the required expenditure of judicial resources").

\textsuperscript{6} Respondent's Brief at 41–43, 47–48.
and (v) holding B&W liable would chill vigorous price competition (three pages). B&W reported that as evidence of increased competition the Fourth Circuit had relied upon B&W's small market share, testimony from Liggett's executives that competition was increasing, the expansion of the economy share of the cigarette market (from 0.4 percent in 1981 to 15 percent in 1990), and the increase in discounting that followed B&W's entry into generics.

b. The Court's Evidentiary Review

The Court's review of the sufficiency of the evidence was quite different from B&W's argument. (Where similarities exist, they are noted below.) Rejecting many of B&W's claims, the Court ruled that a jury could find that B&W intended to lessen competition by using predatory pricing to get control of the generic segment of the cigarette market, that B&W priced below any appropriate measure of costs, and that this pricing imposed losses on Liggett that Liggett could not sustain given its parent corporation's interest in selling Liggett. But the proof was flawed, according to the Court, because the evidence did not show that B&W "had a reasonable prospect of recovering its losses from below-cost pricing through slowing the growth of generics." Missing from the evidence was any indication that B&W was "likely to obtain the power to raise the prices for generic cigarettes above a competitive level," which, according to the Court, was the "linchpin" of Liggett's scheme because "a slowing of growth in the economy segment, even if it results from an increase in generic prices, is not itself anticompetitive."

The Court then examined whether (1) "oligopolistic price coordination in fact produced supracompetitive prices in the generic segment," and (2) whether "the alleged scheme was likely to have brought about tacit coordination and oligopoly pricing in the generic segment, even if it did

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310 Id. at 43–44, 48–49. Except where noted, the points are made in order, id. at 34–49.
311 Cf. Respondent's Brief at Sections C.4–6 ("B&W Did Not Intend to Price Below Cost" "B&W Did Not in Fact Sell Below Cost" "B&W Had No Plan to Recoup Any Losses on Generic Sales").
312 113 S. Ct. at 2592.
313 Id.; cf. Respondent's Brief at 24–28 (counterstatement of the case) (B&W neither planned to nor did recoup any losses).
314 113 S. Ct. at 2592–93 ("Only if those higher prices are a product of nonmarket forces has competition suffered. If prices rise in response to an excess of demand over supply ... the market is functioning in a competitive manner. Consumers are not injured from the perspective of the antitrust laws by the price increases; they are in fact causing them."). Although true generics are only part of the economy segment, the Court seemed to use the terms "generic" and "economy" interchangeably, see id. at 2582 ("The economy segment of the market, sometimes called the generic segment, is characterized by its bargain prices and comprises a variety of different products . . . .").
not actually do so."\textsuperscript{315} To conclude that generic prices did not become supracompetitive, the Court relied principally on the increase in sales of generics: Their share of the cigarette market increased from 0.4 percent in 1980 to 15 percent in 1989.\textsuperscript{316} The Court noted that one could speculate whether the increase could have been even faster but for B&W, but this was unlikely given that a planning document had predicted a slower growth rate.\textsuperscript{317}

The Court was not persuaded by Liggett's evidence about pricing. Although list prices for generic and branded cigarettes increased by similar dollar amounts twice a year from 1986–89, with generics increasing at the faster percentage rate and with generics and brandeds both increasing faster than inflation, (a) discounts were assuming increased importance, so list prices could be misleading,\textsuperscript{318} (b) a "subgeneric" cigarette had been introduced,\textsuperscript{319} (c) rising generic cigarette prices could be explained by increasing demand, and (d) "an inference of supracOMPetitive pricing would be particularly anomalous in this case" because "Liggett's own officers and directors consistently denied that they or other firms in the industry priced their cigarettes through tacit collusion or reaped supracompetitive profits."\textsuperscript{320}

The Court also concluded that supracompetitive generic pricing was unlikely. The Court pointed to the many product and pricing variations and reasoned that "the inherent limitations of tacit collusion suggest that

\begin{itemize}
  \item \textsuperscript{315} Id. at 2593.
  \item \textsuperscript{316} Id.; cf. Respondent's Brief at 46 (court of appeals relied on same increase in economy segment share); id. at 15 (counterstatement of the case) (same comparison, but adding that the economy segment had more than a 31% share "today"). The evidence on which the Court apparently relied reported shares of the "value for money segment" of the cigarette industry.
  \item \textsuperscript{317} Id. at 2594 (economy segment had 12% share in 1988, compared to a May 1984 B&W projection of 10%); cf. Respondent's Brief at 14 (citing plan's projection as evidence of commitment to the economy segment). The plan had assumed that two-thirds of the economy segment would be represented by "black and white/private labels" and one-third by "branded generics," whereas the evidence from which the Court apparently computed the 12% figure (actually 11.57%, before rounding) showed that in 1988 "plain/private label" cigarettes had only a 2.25% market share. Jt. App. at 354-55. The plan had seriously overestimated the growth of true generics and underestimated the growth of low-price branded cigarettes. B&W's brief does not make the same comparison as the Court and does not address the possibility that true generics or the economy segment in general might have grown faster but for B&W.
  \item \textsuperscript{318} Cf. Respondent's Brief at 26 (counterstatement of the case) ("discounts, rebates and promotions . . . made list prices meaningless").
  \item \textsuperscript{319} Cf. Respondent's Brief at 27 (counterstatement of the case) ("by the time of trial, five manufacturers offered cigarettes at a discount of at least 50%").
  \item \textsuperscript{320} 113 S. Ct. at 2595; see also infra text at notes 342–347; cf. Respondent's Brief at 19 (counterstatement of the case) ("Liggett's senior executives also demolished Liggett's theory.").
\end{itemize}
such multivariable coordination is improbable." R.J. Reynolds had introduced a "branded generic" (Doral) in 1984 and appeared not to be acting as a participating member of the oligopoly. Any claim that B&W was signaling its interest in maintaining prices by offering rebates to wholesalers (rather than by reduced list prices) rang hollow since Liggett already followed that pricing scheme and no evidence suggested that a competing cigarette company had recognized any such signal. Finally, B&W did not act as though it wanted to limit the generic segment since it introduced generics to a thousand wholesalers that had not carried them before; its volume rebates tended to spur sales efforts because generics could not be returned; and B&W spent $10 million placing discount coupons on its generic cartons.

The Court concluded:

We hold that the evidence cannot support a finding that Brown & Williamson's alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing in the generic segment of the national cigarette market. Without this, Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit.

c. Comments on the Comparison

Although, as noted, parts of the Court's analysis draw on B&W's factual recitation, the Court's reasoning differs in important ways from B&W's.

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321 113 S. Ct. at 2596. The Court cited ROBERT DORFMAN, THE PRICE SYSTEM 99–100 & n.10 (1964), and F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 279 (3d ed. 1990), as had Respondent's Brief at 37.

322 113 S. Ct. at 2596; cf. Respondent's Brief at 13–14 (counterstatement of the case) ("Doral radically changed the marketplace.").

323 Cf. Respondent's Brief at 21 (counterstatement of facts) ("Why would competitors read B&W's rebates as a 'signal' when both Liggett and RJR had already used volume rebates on their own generics?").

324 Cf. Respondent's Brief at 20 (counterstatement of case) ("there are no documents, or any other evidence, showing that any of the other four cigarette manufacturers understood B&W to be disciplining Liggett or trying to contain the generic segment").

325 Cf. Respondent's Brief at 21 (counterstatement of the case) ("The signal B&W actually sent—that it intended to compete and thereby expand the segment—was conveyed by B&W's offer to sell generics to one thousand wholesale customers who had never previously purchased generics. B&W reinforced that signal by investing $10 million in stickering on its generics during the alleged period of predation.") (citations omitted).

326 113 S. Ct. at 2597. The Court cited no authority for this point, which was not made in the briefs. The only reference to returns was by respondents, who complained that Liggett publicized its lawsuit to exploit fears that customers "would be left with unsaleable and non-returnable inventory of B&W generics." Respondent's Brief at 28 n.23 (citing record); cf. Liggett Group, 1989-1 Trade Cas. (CCH) ¶ 68,583 at 61,106 (M.D.N.C. 1987) (magistrate's findings and recommendations) (B&W sold only its generics on a nonreturn basis).

327 Supra note 325.

328 113 S. Ct. at 2598.
Critical to the Court's conclusion was its dismissal of the evidence of price increases subsequent to the alleged predation. The Court said that although a reasonable jury could have concluded that net prices rose,\textsuperscript{329} i.e., after discounts, promotions, and introduction of subgenerics,\textsuperscript{330} any price increases simply reflected increasing consumer demand.\textsuperscript{331}

The Court's discussion of price increases is problematic. All cigarette prices—economy and regular—were increasing in the face of excess capacity and declining overall demand.\textsuperscript{332} The Court never asked why, if prices were responding to demand, regular prices were rising. The Court also failed to explain why it analyzed economy cigarette pricing separately from regular pricing. The parties had stipulated to the existence of a single cigarette market without an economy submarket. The existence of a single market at least suggests that manufacturers could accommodate any increase in demand for economy cigarettes by shifting production from regular cigarettes without increasing prices. The Court never discussed whether this should have happened. Instead, the Court merely asserted that economy price increases were demand-driven, a critical assertion that was conspicuously not made by B&W.

Another respect in which the Court differed from B&W's argument was in the Court's sharp focus on the existence and likelihood of supra-competitive pricing in the economy segment. B&W argued that cigarette pricing in general was competitive, that sales of economy cigarettes were increasing, and that no net price increase had been shown, but it did

\textsuperscript{329} Id. at 2594–95; see also id. at 2585 ("at least some portion of the list price increase was reflected in a higher net price to the consumer").

\textsuperscript{330} The Court discussed the introduction of subgenerics at some length without noting that at time of trial they accounted for less than 1% of the market, Jt. App. 354 ("third price point" on market share report relied on by Court).

\textsuperscript{331} The Court's entire discussion is as follows:

[R]ising prices do not themselves permit an inference of a collusive market dynamic. Even in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supra-competitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Cf. Monsanto, 465 U.S., at 763, 104 S. Ct. at 1470.

113 S. Ct. at 2595.

This analysis was foreshadowed during the oral argument. While describing the increase in prices of regular-brand cigarettes and of generics during oral argument, Areeda was challenged by a Justice, "Well, I guess the project wouldn't be successful, though, if the ... price gap was narrowed but the volume of ... generics increased substantially." Areeda responded that although volume was higher, so was the average price, so consumers were "therefore hurt." Transcript at 15–16.

\textsuperscript{332} 113 S. Ct. at 2585, 2595.
not argue that a price increase could be dismissed as competitive.\textsuperscript{353} The Court's conclusion, quoted above,\textsuperscript{354} seems to have required Liggett to show recoupment \textit{in the generic segment}.\textsuperscript{355} Perhaps the Court meant that there could not be recoupment in any segment because there could not be supracompetitive pricing in the economy segment.\textsuperscript{356} Such a proposition, which was not advanced by B&W, would deserve more attention than the Court gave it;\textsuperscript{357} but the Court's great emphasis on the unlikelihood of "sustained supracompetitive pricing" in the economy segment suggests that the Court was looking to that segment for recoupment, which would clearly be error.

4. Justice Stevens's Dissent

Justice Stevens's dissent, which was joined by Justices Blackmun and White, would have accorded substantially greater weight to B&W's subjective intentions. He would have remanded the case to permit resolution of remaining issues, but if there was to be a review of the sufficiency of the evidence, he would have upheld the jury verdict. (Justice Stevens wrote as though the jury instructions had not been flawed.) Justice Stevens relied on the history of supracompetitive pricing, the sharp post-

\textsuperscript{353} During oral argument, Bork summarized Liggett's argument as saying that B&W sought to recoup its investment in predation through slowing the switching of smokers from brandeds to generics. This argument was flawed, he said, because it requires "supracompetitive profits and prices in brandeds," which, he said, did not exist. In addition, he said, B&W never intended to narrow the price gap between brandeds and generics, and never did. See Transcript at 35–41 (adding, "[t]hat's about all I can say, Your Honors."). The Court apparently concluded that B&W did intend to narrow the price gap, and succeeded at narrowing it (although some low-volume "subgenerics" established a new gap), but B&W should prevail anyway.

\textsuperscript{354} \textit{Supra} text at note 328.

\textsuperscript{355} 113 S. Ct. at 2598 (without "oligopolistic price coordination and sustained supracompetitive pricing in the generic segment" B&W "had no reasonable prospect of recouping its predatory losses").

\textsuperscript{356} For this reading of the opinion see Baker, \textit{supra} note 307.

\textsuperscript{357} The Court's view of prices as being demand-driven is problematic, as noted above. Nor is it clear that supracompetitive pricing in generics must be the "linchpin" for recoupment, as the Court said, 113 S. Ct. at 2593. B&W documents set forth a strategy of maintaining high list prices to slow segment growth, while using discounts to slash wholesale prices and build volume. B&W hoped to prevent an increase in the pricing spread between economy and regular cigarettes, and eventually to reduce the spread. It is counterintuitive to think that one can maintain consumer prices by using wholesaler discounts in lieu of price cuts; but not everything counterintuitive should be rejected as a matter of law. And if B&W had set out deliberately to control and then reduce the price spread between economy and regular cigarettes, and had accomplished this by use of below-cost pricing and thereby profited handsomely in sales of supracompetitively priced regular cigarettes, one should hesitate before concluding that as a matter of law no harm was done because pricing in the economy segment was not supracompetitive (even assuming it was not).
predation price increases, and, especially, the well-informed views of B&W. "That B&W executives were willing to accept losses of this magnitude during the entire 18 months is powerful evidence of their belief that prices ultimately could be 'managed up' to a level that would allow B&W to recoup its investment. Under the Robinson-Patman Act a plaintiff need only show a "‘reasonable possibility' of injuring competition," wrote Justice Stevens, and "the jury would surely be entitled to infer that B&W's predatory plan, in which it invested millions of dollars for the purpose of achieving an admittedly anticompetitive result, carried” such a possibility.

C. THE IMPLICATIONS OF BROOKE GROUP

Brooke Group's most important holding was its clear statement that recoupment is an element of a predatory pricing case. The case may also have implications for judicial review of jury verdicts, for antitrust economics, and for other Robinson-Patman Act issues.

Any application of Brooke Group, however, should recognize the many respects in which it was a unique case. As noted above, the challenged jury verdict was contaminated by vulnerable jury instructions. Liggett's case also may have been weakened by doubts about causation. Moreover, the extended debate about whether there was any legal disagreement tended to prevent joinder between the parties on key questions going to evidentiary support for the verdict.

Most important, Liggett was badly hurt by the failure of its executives to agree with its lawyers' depiction of the state of competition in the

538 113 S. Ct. at 2601, 2606 (between the end of 1985 and June 1989, branded cigarette cartons increased from $33.15 to $46.15, generic cartons from $19.75 to $33.75, based on list prices). Justice Stevens said that promotions did not offset these price increases and were used primarily with branded cigarettes, and the jury must have resolved any dispute about pricing in Liggett's favor. Id. at 2604.

539 Id. at 2601.

540 Id. at 2606. Justice Stevens criticized the Court's excessive reliance on theoretical barriers to tacit coordination. The Court relied on the supposition that an "anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly . . . . I would suppose, however, that the professional performers who had danced the minuet for 40 to 50 years would be better able to predict whether their favorite partners would follow them in the future than would an outsider, who might not know the difference between Haydn and Mozart.

Id. at 2605 (footnote omitted).

541 As noted above, the district court had found that the discrimination, as such, did not cause any injury, but the Fourth Circuit did not address this issue. See supra note 282. Areeda was nonetheless peppered with causation questions as he tried to start his argument. Transcript at 9–11.
cigarette business.\textsuperscript{342} This point had been hammered home at oral argument by Bork. 

"[T]hese Liggett executives," he said, "are the people who were authorized by law to bind the company, and they come in and say an essential element of our case is missing and we want triple damages."\textsuperscript{343}

Opposing counsel essentially presented Liggett executives with a choice between undermining their lawsuit or risking conviction in court for a felony or in the court of public opinion for profiteering.\textsuperscript{344} The executives

\textsuperscript{342} See supra text at note 320. The Court dismissed Liggett’s explanation that businesspeople view competition and collusion differently from economists by quoting the lengthy rejoinder provided by the district court:

“This argument was considered at the summary judgment stage since these executives gave basically the same testimony at their depositions. The court allowed the case to go to trial in part because the Liggett executives were not economists and in part because of affidavits from the Liggett executives stating that they were confused by the questions asked by B[rown] & W[illiamson] lawyers and did not mean to contradict the testimony of [their economic expert] Burnett. However, at trial, despite having consulted extensively with Burnett and having had adequate time to familiarize themselves with concepts such as tacit collusion, oligopoly, and monopoly profits, these Liggett executives again contradicted Burnett’s theory.”

113 S. Ct. at 2595 (quoting 748 F. Supp. at 356).

\textsuperscript{343} Transcript at 36. A Justice asked whether “what you’re saying to us is that the management people said the profits were perfectly routine and the expert said that they were... abnormally high, and because the expert and the management disagreed we must agree with management?” Bork responded as follows:

He [the expert] said... profits are abnormally high and it was due to tacit collusion or oligopolistic interdependence. The management denied both of those things. And... it’s not a question of who you believe. I don’t see how a company can come in—the client itself can walk in and deny its own case, and then the lawyers say yes, but I have an economist over here... who will contradict. That just doesn’t make any sense to me.

\textsuperscript{344} Id. at 37–38.

To show that Liggett’s executives had denied the existence of supracompetitive profits, the Court cited parts of the record where witnesses were asked questions such as the following: “Are you aware of any agreement... to fix the prices that are charged for branded cigarettes?” “Does Liggett have any unwritten or unstated understandings with any other tobacco manufacturers to coordinate the prices which it charges for branded cigarettes?” “Do you agree or disagree that cigarette manufacturers are engaged in tacit collusion to fix prices on branded products?” “Do you agree or disagree that Liggett has reaped excessive profits on its branded cigarettes?” “Do you agree or disagree that the major United States cigarette manufacturers including Liggett, have controlled the price... that the public has been denied the benefits of free and open competition... that the prices of cigarettes... have been fixed at artificial and non-competitive levels?” 11 Tr. 170–74, cited at 113 S. Ct. at 2595. “Was the company of which you were a director making higher than competitive profits on its branded products while you were there?” 64 Tr. 53–54, cited at 113 S. Ct. at 2595. “I want to know—yes or no—sir, whether or not you say that the price you charged for branded cigarettes... was a fair and equitable price... .” “I want to know, sir, if you testified under oath that the cigarette industry is not a collusive oligopoly?” Jt. App. at 396, 398, cited at 113 S. Ct. at 2595. “You are aware that Mr. Dey told... the United States Congress that the cigarette industry was, quote, ‘a very, very highly competitive business... that on another part of his testimony before the Congress of the United States... he said, ‘This is a highly competitive business. We fight tooth and nail.’’” “[D]oes Liggett make monopoly profits on its branded cigarettes?
chose to undermine the lawsuit. It is one thing for an academic or the Supreme Court to say that "there was no significant price competition" in cigarettes; that "[l]ist prices for cigarettes increased in lock-step, twice a year . . . irrespective of the rate of inflation;" or that "the industry reaped the benefits of prices above a competitive level." It is another thing for a cigarette company executive to announce that, effectively, to the world. The Supreme Court apparently agreed with Bork that Liggett should not be able to have it both ways, and the Court's conclusion not to consider prices as supracompetitive became an important part of the Court's reasoning.

1. Judicial Review of Jury Verdicts

Some judges may follow the Court's lead and begin reviewing the sufficiency of evidence supporting jury verdicts with new vigor. Although it is clear that the jury instructions were flawed, *Brooke Group* was not a jury instruction case. Instead, the trial court granted JNOV based on a searching review of the evidence; the Court endorsed the JNOV based on its own searching review.

Judges looking to *Brooke Group* to support aggressive review of jury verdicts need only look to the Court's concluding paragraph. A "reasonable jury is presumed to know and understand [1] the law, [2] the facts of the case, and [3] the realities of the market." The wild card, of course is "the realities of the market." The court is the expert on the law; the jury on the facts. If the court views itself as expert on "the realities of the market" (which might formerly have been considered facts), much less deference is required.

*Brooke Group* should not quickly be read to change traditional deference to jury verdicts. Because of the flawed instructions, the verdict here deserved (and received) no deference. Any judge would have been loathe

... do the other tobacco manufacturers make monopoly profits . . . does Liggett make higher than competitive profits on its branded cigarettes?" Jt. App. at 624–29, cited at 113 S. Ct. at 2595.

Justice Stevens pointed out that it made little sense to rely on testimony about modest profits since the testimony "relate[d] to the period before the price war, as well as after," and before the price war "there is no real dispute but that prices were supracompetitive." 113 S. Ct. at 2605 n.15. He added that the jury was free to disregard the executives' testimony—which would have been more compelling were it clearer that the jury had done so.

See *supra* text at note 320. Of course, it may be that prices were not supracompetitive, or were not during the relevant time periods, after adjusting for risks and making allowances for accounting rules. See Respondent's Brief at 20 n.15. But it is hard to imagine any corporate official publicly announcing that his or her firm is charging monopoly prices.

113 S. Ct. at 2598 (bracketed numbering added).
to continue a nine-year-old case challenging pricing in an industry in which traditional pricing seemed to be disintegrating. It would be a mistake to read this part of Brooke too broadly.

2. Antitrust Economics

Brooke Group serves as a rejoinder to commentators who thought Kodak marked the end of Chicago-School dominance of the Supreme Court and the dawning of the “post-Chicago” era. If Brooke Group is any indication, the Court is firmly in the Chicago School. None of the “new new learning” on predation or oligopoly theory was cited.

The Court wrote about the “general implausibility” of predatory pricing by relying principally on its 1986 Matsushita opinion without even a nod to those economists who regard predatory pricing as at least somewhat more plausible than it once seemed. The Court showed less concern than ever about predatory pricing:

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.

Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

... Without [recoupment], predatory pricing produces lower aggregate prices and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

These prerequisites [that the Court had erected] to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather,

549 Cf., e.g., Steven C. Salop, Kodak as Post-Chicago Law and Economics, CHARLES RIVER ASSOCIATES PERSP., April 1993.


For an argument that the Court’s acceptance of the theoretical possibility of oligopoly recoupment indicates that it is stepping away from the Chicago School, see Baker, supra note 307.

they are essential components of real market injury. As we have said in the Sherman Act context, "predatory pricing schemes are rarely tried, and even more rarely successful," and the costs of an erroneous finding of liability are high. . . .

The Court also was inhospitable to claims of oligopolistic coordination. Tacit coordination among cigarette companies in the 1980s (suit was filed in 1984) would have been "unmanageable," the Court said.

Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus. . . . By 1984, however, the cigarette market was in an obvious state of flux. . . .

The larger number of product types and pricing variables also decreased the probability of effective parallel pricing. . . . [T]he inherent limitations of tacit collusion suggest that such multivariable coordination is improbable.

By themselves there is nothing remarkable about the oligopoly factors mentioned by the Court. But it was writing about the cigarette industry, one of the most celebrated oligopolies of all time. Even during the 1980s the cigarette industry was among the most concentrated and profitable of all businesses. A major price break finally came in 1993, but that was nine years later. Nor did the Court discuss theories of oligopolistic behavior facilitated by strong brands (cigarette companies having some of the strongest). Although the Court reconfirmed that Clayton Act Section 7 addresses oligopolistic practices, it did so while relying on analyses of Section 7 to interpret identical wording in the Robinson-Patman Act. Merger defendants can be expected to use this reasoning in reverse by pointing to Brooke Group and explaining how much more competitive their industries are than one about which the Court was not too troubled.

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552 Id. at 2588–89 (citations omitted).
553 Id. at 2596; see also id. at 2590 ("tacit coordination among oligopolists must be considered the least likely means of recouping predatory losses").
554 Scherer & Ross, supra note 321, at 251 (despite falling consumption, between 1980 and 1988 manufacturers increased their profits per thousand cigarettes from $3.80 to $11.55).
555 See infra note 389.
557 113 S. Ct. at 2591 ("In the § 7 context, it has long been settled that excessive concentration, and the oligopolistic price coordination it portends, may be the injury to competition the Act prohibits.") (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963)). The Court added, "We adhere to 'the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.'" Id. (citations omitted).
558 Cf. Petition for Certiorari at 16 (arguing that oligopolistic uncertainty is inevitable but does not preclude an oligopoly-based merger enforcement program). But cf. Respondent's Brief 43 n.33 (Section 7 has a very different text, purpose, and enforcement history).
3. **Robinson-Patman Act**

The Court declared that the Robinson-Patman Act had primary line vitality separate from the Sherman Act (as both B&W and Liggett had agreed), i.e., that there are “differences.” “For example” (its only example), the Sherman Act requires a “dangerous probability” of monopolization, “whereas the Robinson-Patman Act requires only that there be ‘a reasonable possibility’ of substantial injury to competition.” But “the essence of the claim under either statute is the same.” And any difference had effectively dissolved by the end of the Court’s opinion when it concluded, in this Robinson-Patman case, that “Brown & Williamson had no reasonable prospect of recouping its predatory losses and could not inflict the injury to competition the antitrust laws prohibit” because “the evidence cannot support a finding that Brown & Williamson’s alleged scheme was likely to result in oligopolistic price coordination and sustained supracompetitive pricing.” If there was any doubt before, the Court’s ruling that plaintiffs must show “likely” supracompetitive pricing makes clear that *Utah Pie*, which has been subjected to so much criticism, has been buried.

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359 113 S. Ct. at 2587 (citing Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434 (1983)). This distinction became important when the Court addressed oligopoly recoupment. Without mentioning B&W’s argument that primary line Robinson-Patman should be limited to geographic price discrimination or its equivalent, the Court accepted the theoretical validity of oligopoly recoupment as the basis for a Robinson-Patman violation. “Unlike the provisions of the Sherman Act, which speak only of various forms of express agreement and monopoly, the Robinson-Patman Act is phrased in broader, disjunctive terms, prohibiting price discrimination ‘where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.’” *Id.* at 2591 (citations omitted).

360 *Id.* at 2587 (also noting that “it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act”).

361 Query whether the casual use of the phrase “reasonable prospect” elevates the threshold beyond “reasonable possibility.” *Webster’s New World Dictionary* (Second College ed. 1982) defines “prospect” as “something hoped for or expected; anticipated outcome.” “Possibility” is “the quality or condition of being possible.” “Possible” is merely “that can be; capable of existing,” or, second definition, “that can be in the future; that may or may not happen.”

362 113 S. Ct. at 2598 (emphasis added). Before reaching this conclusion, the Court wrote that a plaintiff must demonstrate that its “competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.” *Id.* at 2588. The Court implied that the “reasonable prospect” and “dangerous probability” differ; in the end, the Court seemed to require “likelihood” at least of supracompetitive pricing, which may have a third meaning.

363 *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 704 (1967) (primary line Robinson-Patman violation found based on geographic price discrimination, below apparently total cost pricing, predatory intent, and a “drastically declining price structure”).

364 113 S. Ct. at 2587 (“We do not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors. *Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act.”).
Although the Court indicated at least twice that it was analyzing primary line Robinson-Patman Act law, the intriguing question concerns secondary line Robinson-Patman injury. (Primary line injury is at the seller's level; secondary line injury is at the disfavored customer's level.) Until now, relatively settled law permitted secondary line injury to be shown prima facie by proof of substantial, nontransitory price discrimination, i.e., without proof of pricing below cost or of recoupment. Yet the Court's discussion about the importance of encouraging aggressive pricing would seem equally applicable, as a matter of economics, to secondary line Robinson-Patman litigation. The Court showed no hesitancy in applying Sherman Act reasoning to this Robinson-Patman case; defense lawyers surely will argue that the language and logic of the Court's predatory pricing analysis apply equally to secondary line cases.

Although Brooke Group's holding obviously is limited to primary line litigation, its reasoning is not. In this regard, it is noteworthy that the Court never reiterated its approach to secondary line cases. Separate primary line and secondary line standards have coexisted for quite a while and could continue doing so—but a future Supreme Court or even a lower court might find it tempting to extend Brooke Group's thinking to secondary line cases.

4. Predatory Pricing Law

In 1975 Professors Areeda and Turner revolutionized predatory pricing law by proposing a cost-based, objective test. Areeda and Turner

365 *Id.*


367 113 S. Ct. at 2588 (citations omitted):

Although Cargill and Matsushita reserved as a formal matter the question "whether recovery should ever be available ... when the pricing in question is above some measure of incremental cost," the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices ... inflict injury to competition cognizable under the antitrust laws. See *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990). "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. ... We have adhered to this principle regardless of the type of antitrust claim involved." *Ibid.*

368 *Cf.* 113 S. Ct. at 2603 (Stevens, J., dissenting) (quoting two secondary-line cases that make clear that actual harm is not necessary for a violation).

369 *See* *ANTITRUST LAW DEVELOPMENTS, supra* note 53, at 414–17.

argued that predatory pricing decisions should turn almost exclusively on cost data. This would achieve only rough justice—erroneous outcomes were guaranteed—but it would be administrable. The test was deliberately permissive because its authors (and many others) regarded predatory pricing as rare and were troubled by the anticompetitive potential of threatened litigation.

The cost-based approach to predatory pricing swept the field, and now in every circuit costs play a critical role in predatory pricing cases. There are (or were) generally strong presumptions of illegality below average variable cost and/or marginal cost, and presumptions of legality above average total cost; between these points some courts presume legality, whereas other courts evaluate factors such as entry barriers, the short-run profit-maximizing price, and subjective intent. Brooke Group squarely held that "a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." Although the Court again declined to resolve the conflict over the appropriate measure of cost, the implication appears to be that the appropriate measure is something other than total cost.

When Areeda and Turner proposed their objective test, it was at least in theory a two-way predatory pricing test: Plaintiffs could win or lose on cost data. Prices below marginal (or average variable) costs were conclusively deemed predatory and unlawful; all other prices were


572 See Areeda & Turner, Harvard article, supra note 370, at 698–700.


574 ANTITRUST LAW DEVELOPMENTS, supra note 53, at 227–37.

575 113 S. Ct. at 2587 (footnote omitted).

576 Id. at 2587 n.1.

577 That total cost is not the anticipated answer is suggested by the Court's discussion of the importance of encouraging price-cutting and competition on the merits. Also, the Court noted that it had previously reserved "as a formal matter" on whether ever to permit recovery for prices "above some measure of incremental cost," but "the reasoning in both [those] opinions suggests that only below-cost prices should suffice." 113 S. Ct. at 2588 (quoting Cargill and Matsushita). The Court apparently thought it was now deciding that prices may be illegal only when below some measure of incremental, not total, cost.
deemed nonpredatory and lawful. In practice, however, plaintiffs almost always lost in the end, which made sense to the many commentators who doubted that true predatory pricing was widespread.

Now, in *Brooke Group*, the Court has followed the Seventh Circuit's lead by adding a second objective test and requiring plaintiffs to hurdle both. As B&W's expert has written, "[e]ach is a one-way test." The cost-based pricing test has already proven extremely demanding. The recoupment test could be just as challenging, although the exact structure of it is unclear. The Court appears to have fashioned a two-part recoupment test. First, the specific target of predation must be "likely [to] succumb." This turns on the nature and extent of the predation, and the relative positions of the predator and the target. Second (and in addition), the market must appear conducive to supracompetitive pricing. Predatory pricing suits should be summarily rejected, "for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity."

One can imagine at least three different ways to think about recoupment: (1) whether the defendant reasonably believed recoupment was likely; (2) whether recoupment in fact was likely (measured at the start of the alleged predation); and (3) whether recoupment in fact occurred (or would have occurred but for litigation). The original Supreme Court formulation, in *Matsushita*, seemed to intend the first version. "For the investment to be rational, the [predator] must have a reasonable expectation of recovering . . . more than the losses suffered." *Brooke Group* quoted this language with apparent approval. But as *Brooke Group* stated its test, it seemed to adopt the second meaning, which is slightly different. Four times the Court discussed whether B&W had a "reasonable prospect" of recouping its losses. The focus was

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578 Areeda & Turner, supra note 370, at 792–93.
580 113 S. Ct. at 2589.
581 Id.
582 475 U.S. at 588–89. But cf. id. at 591 (Court relied in part on factual developments subsequent to the commencement of the alleged predatory pricing).
583 113 S. Ct. at 2588.
584 Id. at 2588, 2592–93, 2598. As noted above, supra note 362, the Court indicated that for § 2 the test would turn on whether there was a "dangerous probability" of recoupment. The "dangerous probability" language is out of place here. The attempt violation requires a dangerous probability of achieving monopoly power by one means or another, or a combination of means. But achieving monopoly power and achieving recoupment may be quite different things, depending on the rigor of the latter test. The Court may reasonably
not on B&W's expectations or their reasonableness.\(^{385}\)

As the Court reviewed the evidence, however, it seemed to be using the third meaning, i.e., whether with hindsight recoupment in fact occurred or would have occurred but for litigation. The first half of the Court's analysis explicitly examined post-predation evidence and found no evidence of actual recoupment. Liggett had argued that recoupment had succeeded, so the Court was obliged to address the question; it is disconcerting, nonetheless, to have a case turn so heavily on events occurring during and after trial.\(^{386}\) The second half of the Court's analysis purported to examine whether recoupment was likely in spring 1984, when B&W introduced its generic cigarette. Yet, almost inevitably, the Court relied in part on subsequent events—R.J. Reynolds did not raise generic prices in June 1985, and “no documents appeared that indicated” that R.J. Reynolds or Philip Morris understood B&W's generic pricing to signal an interest in controlling pricing.\(^{387}\) This comes close to using hindsight to conclude that recoupment was not likely to succeed. B&W invited attention to post-trial developments by informing the Court that use of generics continued to soar.\(^{388}\) Although the Court did not mention


\begin{quote}
To prove that a dangerous probability of success existed, Plaintiffs must prove . . . that Defendants had a dangerous probability not only of getting a monopoly, but also of keeping that monopoly long enough to recover or recoup their losses, including a reasonable return on the sum lost, by charging monopoly prices. This is called recoupment. Evidence of below-cost pricing is not enough to show recoupment. Rather, Plaintiffs have the burden of proving that if Defendants had gotten monopoly power by driving other airlines from a relevant market, they could have kept that monopoly long enough, and exercised monopoly power long enough, to recover all their earlier losses, including a reasonable return on the sum lost, by raising and keeping prices above competitive levels.
\end{quote}

\(^{385}\) The Court said that a reasonable jury could conclude that B&W “envisioned or intended” to predare and recoup, but “whatever its intent,” “no evidence suggests that Brown & Williamson . . . was likely to obtain the power to raise the prices for generic cigarettes above a competitive level.” 113 S. Ct. at 2592.

\(^{386}\) Nowhere did the Court discuss the reliability of evidence relating to behavior in the shadow of litigation.

\(^{387}\) 113 S. Ct. at 2596–97; \textit{cf.} Transcript at 32 (Bork) (“Liggett subpoenaed the executives and the documents of Phillip Morris and RJR. And . . . nowhere in . . . those documents or in their testimony, was there any indication that they thought they were getting any kind of a signal from . . . Brown & Williamson.”).

\(^{388}\) Respondent's Brief at 15–16 (“the economy segment has grown from 4% of the market in 1984 to 15% at time of trial and over 31% of the market today”) (emphasis in original) (citing Oct. 30, 1992 sales report); Transcript at 42 (“Then five of the six [cigarette]
post-trial information, it would be difficult for anyone to conclude both that recoupment had utterly failed and that in 1984 it had been likely to succeed.

Although not litigated and not explored in the opinions, there are respectable arguments that pricing below expected incremental cost (whatever the appropriate measure) is harmful, regardless of recoupment, where not justified as promotional. Such pricing cannot continue without bankruptcy, and it can drive an equally or more efficient firm out of business. As the Court acknowledged, "unsuccessful predatory companies sold generics, today all six do. We started with 2.8 billion cigarettes being sold in generics, that jumped to 80 billion, and today it's about twice that." In its reply to B&W's opposition to certiorari, Liggett responded to similar arguments by noting that the evidence is not in the record and by pointing out that cigarette prices, including especially generic prices, continued to increase at substantially more than inflation. Reply Brief for Petitioner on Petition for a Writ of Certiorari at 9 n. 17. Liggett did not include this response in its reply brief on the merits.

The Court voted on the case on Wednesday, March 31, only two days before the Friday that Philip Morris cut the price of Marlboro by 40 cents a pack, leading to a 22% decline in Philip Morris's stock price and a 69 point drop in the Dow Jones Industrial average. Steven Pearlstein, Jobs Report Shakes Faith in Recovery; March Rate Stuck at 7%; Dow Off 69, WASH. POST, Apr. 3, 1993, at A1 (quoting an analyst as saying that "as the very least, this will mean a major price war"); Allen R. Myerson, Philip Morris Cuts Cigarette Prices, Stunning Market, N.Y. TIMES, Apr. 3, 1993, § 1, p. 1, col. 3 (opening sentence described move as "an acknowledgement that its flagship brand was threatened by competition from discount brands and the changing habits of smokers;" article reported analysts' predicting "sharp price cuts" as "all but certain").

The third meaning of recoupment is not necessarily wrong. Assume, for example, that the diamond business is a well-defined market in which there is a dominant firm. Assume further that the dominant firm engaged in pricing below the usual measures of incremental cost specifically to discipline a competitor, after which it planned to raise prices to supracompetitive levels. Assume further that as of the predation all experts agreed this recoupment was certain to succeed—but that just before trial a mother lode of diamonds was discovered and diamond prices plummeted, to remain depressed for the foreseeable future. It is not easy to decide whether the defendant should lose a treble damages predatory pricing suit. If the defendant is liable, for what harm? If it is not liable, does this mean that records should remain perpetually open, legal outcomes should explicitly turn on subsequent events, and wrongful acts should go unpunished?


Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 292 (1st Cir. 1983) (Breyer, J.) ("At a minimum, one would wonder why the firm would cut prices on 'incremental production' below its 'avoidable' costs unless it later expected to raise its prices and recoup its losses."). But cf. Baker, supra note 307 (unless cost is computed correctly, some below-marginal-cost pricing may be consistent with competition on the merits).
pricing may encourage some inefficient substitution toward the product being sold at less than its cost."\textsuperscript{393} The Court's adoption of a universal recoupment requirement has implicitly rejected these arguments. The arguments have less weight if recoupment has the first meaning given above, more weight with the second, and yet greater weight with the third. It is unfortunate that the Court was not clearer about what it meant by recoupment.\textsuperscript{394}

By itself this new recoupment requirement is a potent weapon in defendants' arsenals. Requiring plaintiffs to pass this objective test and to prove pricing below (for instance) average variable cost would make predatory pricing violations rare indeed. Perhaps courts will respond to the addition of the new recoupment test by adjusting their cost tests, e.g., by immunizing only profit-maximizing costs or only average total costs.\textsuperscript{395} Perhaps even more likely, plaintiffs may seek predatory pricing relief in state court,\textsuperscript{396} in trade policy, or in the marketplace.

V. CONCLUSION

It was a disappointing term for Supreme Court antitrust. No outcome was obviously wrong: Lessig had lived too long as an aberration; the copyright suit in \textit{PRE} did not appear sham under any definition; the London reinsurers in \textit{Hartford Fire} probably always expected to be held to account, it was too early in the litigation to invoke the boycott exception, and the Ninth Circuit had simply erred when it ruled that an unprotected agreement forfeits McCarran-Ferguson protection; and most observers thought \textit{Brooke Group} was a close call.

The disappointment lies in the litigation process and the quality of the opinions. The Solicitor General played only a marginal role.\textsuperscript{397} Time

\textsuperscript{393} 113 S. Ct. at 2588 (but adding that "unsuccessful predation is in general a boon to consumers"); \textit{see also} Richard A. Posner, \textit{Exclusionary Practices and the Antitrust Laws}, 41 U. Chi. L. Rev. 506, 519 (1974) ("There is no reason consistent with an interest in efficiency for selling a unit at a price lower than the cost that the seller incurs by the sale.").

\textsuperscript{394} The Court was surprisingly clear and aggressive on one recoupment question not at issue before it. Recoupment could refer generally to the likelihood of post-predation supracompetitive pricing. Although not important to the case, the Court appeared to contemplate considerably more: "The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. 113 S. Ct. at 2589 (emphasis added). Although this is dictum, it already has been followed by a court (in the American Airlines predatory pricing jury instructions quoted \textit{supra} note 384).

\textsuperscript{395} But cf. \textit{supra} note 377 (Court appears to contemplate an incremental cost test).


\textsuperscript{397} The Solicitor General was conspicuously missing from \textit{Brooke Group}, his views not having been sought. He argued unsuccessfully against the grant of certiorari in \textit{Spectrum
and again there was a lack of joinder on key issues, or a lack of advocacy of an anticipated position or a position found persuasive by the Justices. In *Brooke Group*, the parties disagreed even to the end of oral argument on what the case was about, and the Court’s conclusion was based in significant part on an argument (that price increases were demand-driven) not made by a party. The Court heard *Brooke Group* in part to consider a Fourth Circuit holding of law, but the respondent argued vigorously that there was no such holding. The Court heard *Spectrum Sports* to consider a Ninth Circuit *Lessig*-based decision, but the respondent insisted *Lessig* was not in issue. In *PRE*, petitioners changed their recommended legal standard even during oral argument. In *Hartford Fire Insurance* Justice Scalia relied on arguments not made by the parties to interpret McCarran-Ferguson’s boycott exception (a 5-4 majority opinion) and to establish the analytical structure for determining whether to hear antitrust cases involving foreign conduct (a 4-5 dissent).

The Court’s opinions are no more satisfying than the appellate litigation that preceded them. *Spectrum Sports* does little more than remove *Lessig*, leaving many questions unanswered. The analysis in *PRE* is unpersuasive, the announced standards varying, and the consequences unclear. The majority’s approach to the McCarran boycott exception, in *Hartford Fire Insurance*, suffers from some of the same flaws. Also in that case, comity was treated quite cavalierly, the majority’s test for the existence of a conflict was based on an apparent misreading of the Restatement, and the difficult issues were not resolved. In *Brooke Group*, the Court engaged in an ill-advised review of the sufficiency of the evidence.

The single clear lesson from the Term is that the movement toward antitrust objectivity continues. The objectivist view of attempts prevailed in *Spectrum Sports*, and the extension of the requirement of showing a dangerous probability of success increased the importance of objective

*Sports and Hartford Insurance.* On the merits, the Solicitor General prevailed in the unremarkable *Spectrum Sports* but little else. In *Professional Real Estate* his argument for a subjective approach to the “sham” exception was rejected (although the Court and he both thought respondents should win). The Court in *Hartford Fire Insurance* and the Solicitor General both favored continuing the suit against the London reinsurers but only the Solicitor General favored *Timberlane*-type balancing. Also in *Hartford Fire Insurance*, the Solicitor General favored a relatively broad boycott exception but the Court disagreed.

598 The same issue is debated outside antitrust, although a different trend is perceived. See Mark L. Evans, *Business Had Winning Record*, Nat’l L.J., Aug. 23, 1993, at S7: “In several less-important cases, the court carried on an intriguing debate regarding the desirability of crisp and understandable legal rules. But those calling for simple bright-line tests were in the minority, and the court’s apparent affinity for vague, case-by-case balancing tests remained unshaken, at least for now.” (citations omitted). As discussed in a brief appendix, the trend toward antitrust objectivity is unlikely to be slowed by the replacement of Justice White with Justice Ginsburg.
market information. In *Hartford Fire Insurance* both the majority and the
dissent shied away from international comity-based balancing tests. On
the boycott exception the Court sought an answer in a precise definition
of “boycott,” although certainty may prove illusory.

Perhaps most interesting in this respect are *PRE* and *Brooke Group*.
Each case placed an additional objective hurdle in front of antitrust
plaintiffs. Before *PRE*, plaintiffs alleging sham litigation had to pass a
subjective test; now they have to pass that test plus an objective test.
Before *Brooke Group*, many predatory pricing plaintiffs had to pass an
objective test (below-cost pricing). Now all plaintiffs have to pass that
test plus another objective test (recoupment). As the Court keeps adding
one-way-only objective hurdles, one is reminded, with some irony, of
Judge Easterbrook's query, “Is there a ratchet in antitrust law?”

APPENDIX

A Comment on the Replacement of
Justice White by Justice Ginsburg

The trend toward objectivity discussed in the text is unlikely to be
stemmed by the first Democratic Supreme Court appointment since
1967. Justice Ginsburg presents a mixed picture on antitrust issues. She
voted for defendants in *Rothery Van Lines* (joining Judge Robert Bork's
provocative opinion), in *Baker Hughes* (joining then-Judge Thomas's sur-
prising attack on the Justice Department), and in *Weyerhaeuser* (writing
the opinion denying an FTC request for a preliminary injunction).

On the other hand, she voted for the plaintiffs in the Detroit JOA case, which she told the Senate “gives the best picture of my views.” In her
Senate confirmation testimony, she testified in ways quite unlike a Chi-
cago School disciple: “There is also an interest in preserving the indepen-
dence of entrepreneurs . . . . I don't think the antitrust laws are adopting

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(complaining about the one-way movement toward more widespread condemnation of
business practices).

400 United States v. Baker Hughes Inc., 1990-1 Trade Cas. (CCH) ¶ 69,084 (D.C. Cir.
1990) (joining Judge Thomas's opinion denying preliminary injunction); Rothery Storage &
Judge Bork's emphasis on market power to the balancing in Judge Wald's concurrence),

401 Michigan Citizens for an Independent Press v. Thornburgh, 868 F.2d 1285, 1297
(D.C. Cir. 1989) (Ginsburg, J., dissenting), affirmed by equally divided Court, 493 U.S. 38
(1989) (for discussion of the case see Calkins, *First Amendment, supra* note 6, at 375–78,
and Stephen F. Ross, *Reaganist Realism Comes to Detroit*, 1989 U. Ill. L. Rev. 399 (strongly
criticizing majority opinion as ignoring accepted canons of statutory construction)).
any one particular theory." Justice Ginsburg's antitrust views must be considered mixed and not yet fully developed.

In contrast, the antitrust views of Justice White, whom Justice Ginsburg replaced, were well established; and objectivity advocates rarely attracted his vote in close cases. In recent years Justices White and Stevens were the most consistent friends of antitrust plaintiffs on the Court. Many recent antitrust disputes at the Supreme Court have turned on whether to entrust more to rule-creation or more to fact-finding. The leading protagonists for each position have been Justices Scalia and Stevens. Justice Stevens's most reliable ally was Justice White.

Although Justices Brennan and Marshall may have been perceived as allied with liberal causes on many issues, in antitrust cases Justice White was a more consistent supporter of plaintiffs. Justice White voted for

404 These two positions are discussed in Calkins, Toward Certainty, supra note 1, at 615. Ironically, during the 1992–93 Supreme Court Term as a whole Justice White voted least often with Justice Stevens, most often with Chief Justice Rehnquist. The greatest agreement was between Justices Scalia and Thomas (91%), the least between Justices Stevens and Thomas (61%). Voting Alignments: 1992–93 Term, NAT'L L.J., Aug. 23, 1993, at S1. Similar patterns held in earlier years. For the 1991–92 Term, Justice White agreed least often with Justices Blackmun (57.9%) and Stevens (58.8%), most often with Chief Justice Rehnquist (71.9%). The greatest agreement was between Justices Scalia and Thomas (85.9%), the least between Justices Scalia and Stevens (35.1%). The Statistics, 105 HARV. L. REV. 378, 379 (1992) (Table I). For the 1990–91 Term, Justice White again agreed least often with Justice Stevens (59.2%) and most often with Chief Justice Rehnquist (79.2%). With Justice Thomas not on the Court, the greatest agreement was between Justices O'Connor and Souter (88.9%), the least again between Justices Scalia and Stevens (41.2%). The Statistics, 105 HARV. L. REV. 419, 420 (1991) (Table I).

plaintiffs in majorities in Ticor (6–3), Eastman Kodak (6–3), Summit Health (5–4), Jefferson Parish (9–0, but Justice O'Connor and three junior Justices concurred), McCready (5–4), Maricopa County (4–3), Professional Engineers (one of four Justices to join all of Justice Stevens's opinion for the Court), Cantor v. Detroit Edison Co. (one of three Justices to join all of Justice Stevens's opinion for the Court), Otter Tail Power (6–1), S&H (7–0) (authored Court's opinion), California Motor Transport, Albrecht (7–2) (authored Court's opinion), Grinnell Corp. (6–3), Von's Grocery (6–2), Atlantic Refining Co. v. FTC (6–3), Continental Can (7–2; authored Court's opinion), and Continental Ore Co. v. Union Carbide Co. (8–0) (authored Court's opinion).

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406 Ticor Title Ins. v. FTC, 112 S. Ct. 2169 (1992); see Calkins, Revenge of the Amici, supra note 109, at 270–79.
414 Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (Douglas, J., for the Court; Stewart, J., with Ch. J. Burger and J. Rehnquist, concurred in part but dissented in substantial part; Blackmun and Powell, JJ., took no part).
421 381 U.S. 357 (1965) (Justice Clark for the Court; Justice Stewart, with Justice Harlan, dissented; Justice Goldberg dissented).
Justice White joined Justice Stevens's dissent in *Brooke Group* and all of Justice Souter's opinion in *Hartford Fire Insurance*, and dissented, voting for plaintiffs, in *Omni Outdoor Advertising*, *Atlantic Richfield Co. v. USA Petroleum Co.* (7–2), *Kansas v. Utilicorp United Inc.* (5–4) (wrote opinion), *Business Electronics* (6–2), *Cargill v. Monfort* (6–2), *Matsushita* (5–4) (wrote opinion), *Southern Motor Carriers* (7–2), and *General Dynamics* (5–4). Finally, Justice White concurred in the judgment in *GTE Sylvania*, but argued against overruling *Schwinn*.

Although there are exceptions, the pattern is clear. Unless Justice Ginsburg develops an unusual—and not yet evidenced—preference for the subjective approach to antitrust, her replacement of Justice White is likely to maintain or even increase the importance of objective tests in Supreme Court antitrust.

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Justice White also voted in part for the plaintiff in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 85 (1979) (White, J., concurring in part and dissenting in part). Although he joined the Court’s discussion of the legal standard for buyer liability under the Robinson-Patman Act, Justice White objected when the Court, on its own, determined that the pricing at issue was justified by the meeting competition defense. Justice White would have remanded the case back to the Federal Trade Commission for initial determination.
