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Applying the Rule of Reason: A Survey of Recent Cases and Comment

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APPLYING THE RULE OF REASON: A SURVEY OF RECENT CASES AND COMMENT

The Sherman Act is not a cure-all for every social or economic injustice perverting the American economy. It is specific legislation designed to protect competition in a free market economy. When used as designed, the Sherman Act can effectively protect the market place from scheming entrepreneurs trying to profit at the consumers' expense from other than their competitive ingenuity.

This Comment examines recent applications of the rule of reason in relation to the legislative purpose behind the Sherman Act. The author concludes that such application should be guided by economic analysis and the design to protect competition in the marketplace.

Section 1 of the Sherman Act declares all contracts, combinations, or conspiracies in restraint of trade unlawful. A strict construction of such broad language would invalidate almost every contract. Every agreement binding parties is a restraint by its very essence. Therefore, courts have applied section 1 only to concerted action which "unreasonably" restrains trade. Unreasonable restraints have been divided into two categories: per se

1. 15 U.S.C. § 1 (1976) provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal. . . ."
4. Concerted action refers to a contract, combination or conspiracy, the existence of which will be assumed for purposes of this article.
violations and those analyzed under the rule of reason. The per se standard applies to those types of restraints “which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”

The scope of this Comment is limited to restraints the legality of which must be judged under the rule of reason. Recent cases indicate that courts are reluctant to expand the per se standard; thus by necessity more cases will be analyzed under the rule of reason. The Supreme Court has stated that the rule of reason “does not open the field of . . . inquiry to any argument . . . that may fall within the realm of reason.” However, the Court has not supplied an applicable definition of “reasonable.” Without a clear definition of “reasonable”, it is difficult for businessmen to conform their conduct to the law and for courts to reach consistent results.

The purpose of this Comment is to survey recent cases applying the rule of reason and extrapolate from them the relevant criteria used to determine whether or not a restraint is “unreasonable.” This analysis necessarily involves inquiry into the legislative intent and policy behind the Sherman Act as well as into the historical development of its application.

**LEGISLATIVE INTENT AND ANTI TRUST POLICY**

The Supreme Court and commentators agree that economic efficiency is a major goal of antitrust law.10 Recent leading cases and

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10. See National Soc'y of Prof. Eng'men v. United States, 435 U.S. 679, 695 (1978);
articles indicate that economic efficiency is the exclusive guiding policy.11 However, another view is that deconcentration of economic power also reflects a legislative intent underlying the Sherman Act and that this goal occasionally supersedes the concern for pure economic efficiency.12 In many instances both policies would guide the application of the rule of reason to the same result. However, there are trade practices which may increase marketplace efficiency by restricting small business freedom, thus leading to greater economic concentration.13 To achieve consistent results under the rule of reason, consistent guiding policies must be articulated.

The concept of deconcentration is best illustrated by Judge Learned Hand in United States v. Aluminum Co. of America.14 Judge Hand stated that “among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them.”15 Under such a theory, “reasonableness” may be influenced not only by a concern for competition but also by a concern for the individual competitor.16

Professor Bork, a leading antitrust scholar, takes issue with Judge Hand’s reference to the Congressional Record and interprets those and other passages from the Congressional Record to express Congress’ intention that consumer welfare is the exclusive guiding policy behind the Sherman Act.17 One reason the ef-

12. Id. at 428 (citing 21 CONG. REC. 2457, 2460, 2598 (1890)).
13. Id. at 428 (citing 21 CONG. REC. 2457, 2460, 2598 (1890)).
15. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON.
iciency policy is preferred is its ability to achieve tolerable certainty in results, something notably absent from current applications of the rule of reason. The reliance of recent Supreme Court cases upon economic analysis, specifically articles by Professors Bork and Posner, indicates that the economic efficiency goal is the exclusive guiding policy behind the Sherman Act.

Professor Posner recently argued that inquiry into economic efficiency should not be limited to an analysis of competition. He recognized that some restraints, while reducing competition, may increase efficiency. However, the Supreme Court, subsequent to Professor Posner’s article, has stated that the Sherman Act reflects a legislative judgment that competition will produce economic efficiency. This is a clear indication that inquiry into efficiency is limited to the competitive model. An argument that a given restraint is better than competition is improper, absent a congressional exemption from the Sherman Act. Conversely, under the economic efficiency theory, reasonableness must be measured by injury to the marketplace, not to the individual competitor.

Legislative intent and antitrust policy demonstrate that the application of the rule of reason should be guided by economic analysis under the presumption that competition, as an economic principle, will best produce economic efficiency. “Reasonableness” in many recent cases has therefore correctly focused on anticompetitive effect with no discussion of an aim toward deconcentration.

7, 39-42 (1966). Professor Bork’s comprehensive study of the legislative intent behind the Sherman Act need not be duplicated here, and readers may refer to his article for exhaustive citations to the Congressional Record supporting his position.


21. Id.


23. Id.

24. See Natrona Service, Inc. v. Continental Oil Co., 598 F.2d 1294, 1297-98 (10th Cir. 1979).

25. See text accompanying notes 47-75 infra.
HISTORICAL DEVELOPMENT OF THE RULE

The language of the Sherman Act is purposefully vague, and it was apparently the legislature's intent that courts apply the Act by drawing from common law traditions. The origins of the rule of reason have been attributed to the 1711 case of Mitchell v. Reynolds. Applying the common law of restraints of trade, the English court upheld an agreement not to compete, made by the seller of an ongoing business, as reasonable. The contract was reasonable because the long run benefit derived from enhancing the marketability of the business outweighed the harm to the public from the deprivation of potential competition. The court in Nordenfelt v. Maxim Nordenfelt, a later English case, pointed out that reasonableness under the common law was determined with reference to the interests of the public and the parties.

Using Mitchell v. Reynolds as precedent, the United States Supreme Court, in National Society of Professional Engineers v. United States, noted that the focus of the rule is directly upon the challenged restraint's impact on competitive conditions. The Court ignored the fact that the pre-Sherman Act common law also expressed concern for the individual competitor.

The post-Sherman Act rule of reason has been attributed to Standard Oil Co. v. United States. The Court in Standard Oil held that a restraint is “unreasonable” if it is anticompetitive in purpose or effect. In an attempt to further clarify the meaning of “unreasonable,” Justice Brandeis, in Chicago Board of Trade v. United States, provided the most often cited formulation of the rule:

[T]he true test of legality is whether the restraint imposed is such as

27. 24 ENg. Rep. 347 (1711).
28. Id. at 352. For a detailed discussion of the common law of restraints of trade, see 1 W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 44-45 (1965); A. STICKELLS, FEDERAL CONTROL OF BUSINESS—ANTITRUST LAWS 1-45 (1972).
29. [1894] A.C. 535 (Eng.).
30. Id. at 565.
32. Id.
33. 221 U.S. 1 (1911).
34. Id. at 55.
35. 246 U.S. 231 (1918).
merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.  

The criteria listed by Justice Brandeis did not evolve into a workable rule. Instead courts adopted a variety of tests or simply quoted the language of either Standard Oil Co. or Chicago Board of Trade and decided the issue of reasonableness without analysis of competitive effects.

Prior to the recent case of Continental T.V., Inc. v. GTE Sylvania, Inc., the rule of reason was most viable as a defense and was used primarily as a rationale for dismissing complaints which did not fit into a per se category. The Court's statement that the rule of reason has been established "as the prevailing standard of analysis" is misleading and perhaps should be interpreted to

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36. Id. at 238. The court upheld as "reasonable" a regulation imposed by the Chicago Board of Trade prohibiting members from trading at a price other than the closing price until the opening of the next regular session.

37. As late as 1977, Professor Posner concluded that the content of the rule was still largely unknown. Posner, supra note 11, at 14. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 1), 74 YALE L.J. 775, 815 (1965).


41. See, e.g., E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973). Research of cases citing Justice Brandeis' formulation of the rule revealed only one case from 1970 to 1977 in which the plaintiff successfully maintained an action under the rule of reason: Mackey v. National Football League, 543 F.2d 606 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977) (invalidating the Rozelle Rule). Only two cases were remanded for a new trial under the rule of reason: Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3d Cir. 1977), cert. denied, 434 U.S. 823 (1977) (trial court erroneously excluded evidence of the challenged restraints' effect upon the relevant market); Blankenship v. Hearst Corp., 519 F.2d 410 (9th Cir. 1975).

42. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 49. The Court cites Justice Brandeis' formulation as the rule. Id. n.15.

43. Professor Posner plainly states that the Court's statement is not true. Posner, supra note 11, at 14. He accurately notes that the rule of reason was rarely used to decide cases.
mean that the rule of reason is now the prevailing standard. To apply the rule with consistency it is necessary to determine what is meant by an “unreasonable restraint of trade.”

RECENT DEVELOPMENTS IN APPLYING THE RULE OF REASON

A flood of rule of reason cases over the past two years has brought about a dramatic change in rule of reason analysis. The rule is no longer solely a shield for the defendant and has been successfully used by plaintiffs. The cases do not provide a consistent pattern to be followed in determining reasonableness. Several courts absolutely require some degree of anticompetitive impact on the marketplace. Others have considered restraints unreasonable upon finding anticompetitive effect or upon finding a purpose or intent to eliminate competition.

Anticompetitive Effect: Actual or Potential

In Magnus Petroleum Co. v. Skelly Oil Co., the Seventh Circuit Court of Appeals held that in order to violate the rule of reason, there must be a substantial adverse effect upon competition. The trial court in Magnus Petroleum found a violation of the rule of reason, basing its finding of “unreasonableness” on the defendant’s anticompetitive purpose. The Seventh Circuit reversed, finding that the effect upon competition was not “substantially” adverse. The court did not indicate what basis should be used in assessing substantiality nor did it indicate what constitutes anticompetitive effect. However, the court did state that because less than one percent of the market was affected the

44. See National Soc’y of Prof. Eng’rs v. United States, 435 U.S. 679 (1978); Smith v. Pro Football, Inc., 593 F.2d 1173 (D.C. Cir. 1978). See also Sherman v. British Leyland Motors, Ltd., 601 F.2d 429 (9th Cir. 1979) (genuine issues of material fact exist with respect to a possible rule of reason violation).
45. Magnus Petroleum Co. v. Skelly Oil Co., 599 F.2d 196 (7th Cir. 1979); Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979).
47. 599 F.2d 196 (7th Cir. 1979).
49. 446 F. Supp. 874, 880 (E.D. Wis. 1978), rev’d, 599 F.2d 196 (7th Cir. 1979).
50. 599 F.2d at 204.
arrangement must be considered "reasonable." To apply the "substantially adverse" test, one must determine what constitutes an anticompetitive effect and what qualifies as a "substantial" effect.

In *Northwest Power Products, Inc. v. Omark Industries*, the Fifth Circuit Court of Appeals indicated that it too requires a substantial anticompetitive effect and that anticompetitive effect entails an actual lessening of competition within the market. The court noted that the mere substitution of one competitor for another does not have an anticompetitive effect on the market. Apparently, the court's position is that competition in the market has not been lessened because the new competitor has taken the place of the old competitor. Requiring such an actual lessening of competition ignores the fact that if the new competitor had entered the market without destroying the existing competitor there would have been additional competition. This restraint on additional competition should be equally considered an actual anticompetitive effect.

What constitutes a "substantial" effect is unclear. However, the Fifth Circuit in *Northwest Power Products* indicated that it was looking to the law of mergers, stating that antitrust law is inapplicable if the defendant could have achieved the same result through merger. Courts interpreting the law of mergers have adopted a functional, as opposed to a merely quantitative, approach to finding substantiality. The functional approach involves quantitative economic analysis of the market, inquiry into the nature of the industry affected, and a consideration of the purpose.

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51. Id.
52. 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). Northwest alleged that the defendants conspired to strip it of its dealership and to deprive it of its customers through tortious and unfair means. Accepting the allegations as true, the court found no violation of the rule of reason.
53. The court stated that "absent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise." Id. at 89. The Clayton Act, governing the law of mergers, requires that the effect "be substantially to lessen competition . . . ." 15 U.S.C. § 18 (1976).
54. 576 F.2d at 90.
55. On the facts of *Northwest Power Products*, the old competitor was not put out of business. Thus, two competitors existed where formerly there had been only one, and the language in the opinion regarding substitution of competitors is really dicta. Id. at 91.
56. For example, in the situation in which concerted action increases barriers to entry within the market, it seems illogical to say such conduct is "reasonable" because there is no lessening of competition, and it is hoped that one would conclude that there was an actual anticompetitive effect.
57. 576 F.2d at 89.
pose for which the arrangement was adopted. Whether or not the Fifth Circuit intends a similar functional analysis of substantiability to apply under the rule of reason is unclear, but the court did note that purpose may be relevant in assessing the market impact of the restraint. Thus, “reasonableness” in the above courts entails a finding not only that the conduct produces an anticompetitive effect, but also that the effect is substantial.

Recent decisions by the Ninth and District of Columbia Circuits have required, in rule of reason cases, a determination that the restraint has “significant” anticompetitive effects. In Smith v. Pro Football, Inc., the court held that the NFL player draft constituted an unreasonable restraint of trade. The court found no significant procompetitive results, and in balancing the anticompetitive evils against the procompetitive virtues, the outcome was plain without elaborate market analysis. Additionally, the court noted the existence of significantly less restrictive alternatives.

The Ninth Circuit adheres to the view that significant anticompetitive impact in a relevant market is essential to a plaintiff’s case under the rule of reason. What amounts to a significant effect is unclear. In Gough v. Rossmoor Corp., the Ninth Circuit used the term “more than a trivial effect.” Whether this indicates the requirement of a lesser impact than that of other courts that require a substantial effect is unclear, but the common meaning of “more than trivial” would seem to require less than a substantial effect. Requiring “more than a trivial” effect may not

59. Id. at 468.
61. Sherman v. British Leyland Motors, Ltd., 611 F.2d 429, 449 (9th Cir. 1979); Catalano, Inc. v. Target Sales, Inc., 606 F.2d 1097, 1100 (9th Cir. 1979); Smith v. Pro Football, Inc., 593 F.2d 1173, 1183 (D.C. Cir. 1978).
62. 593 F.2d 1173 (D.C. Cir. 1978).
63. Id. at 1184-85.
64. Id. at 1187. However, the dissenting judge criticized at length the majority’s simplistic balancing test. Id. at 1205 (MacKinnon, J., concurring in part and dissenting in part).
65. Id. at 1187.
66. Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 449, 450 n.38 (9th Cir. 1979); Gough v. Rossmoor Corp., 585 F.2d 381, 385-86 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979). The court recognized that the purpose of §1 is to protect competition, not competitors. But cf. Fount-Wip v. Reddi-Wip, Inc., 558 F.2d 1298 (9th Cir. 1978) (holding that an attempt to drive a competitor out of business violates §1).
67. 585 F.2d 381 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979).
68. Id. at 389.
relate to reasonableness under the rule, but may instead reflect a judicial attitude that such cases do not belong in court.

Recent cases from the Sixth and Tenth Circuits have recognized that even trivial effects on competition may violate the rule of reason.\textsuperscript{69} Other courts have noted that a restraint is unreasonable if it is evident from the circumstances that there is a sufficient anticompetitive potential.\textsuperscript{70} Further authority for the idea that potential anticompetitive effect can render a restraint unreasonable can be found in Justice Brandeis' opinion in \textit{Chicago Board of Trade}, in which he recognized "effect, actual or probable" as relevant.\textsuperscript{71}

Some restraints, especially vertical restraints, may have both procompetitive effects and anticompetitive effects.\textsuperscript{72} The Supreme Court, in \textit{Continental T.V., Inc. v. GTE Sylvania},\textsuperscript{73} indicated that courts must balance the procompetitive with the anticompetitive effects.\textsuperscript{74} If the procompetitive effects outweigh the anticompetitive effects, there is no violation of the rule unless there is clearly a less restrictive alternative which does not entail the same anticompetitive results.\textsuperscript{75}

There is no clear answer as to what type and how much anticompetitive effect is required to render a restraint "unreasonable." Some courts require a "substantial" anticompetitive impact on the relevant market, others demand a significant or "more than trivial" effect, and still others seem to require only some actual or potential anticompetitive effect. In fact, as discussed below, there is disagreement concerning whether or not anticompetitive effect,

\textsuperscript{69} See Mac Adjustment, Inc. v. General Adjustment Bureau, 597 F.2d 1318, 1321 (10th Cir. 1979). See also McDonnell v. Michigan Chapter # 10 Am. Inst. of Real Estate Appraisers of the Nat'l Ass'n of Realtors, 587 F.2d 7, 9 (6th Cir. 1978).


\textsuperscript{71} Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). See text accompanying note 36 supra.

\textsuperscript{72} See Posner, note 11 supra. Professor Posner discusses vertical distributions arrangements, resale price maintenance, tie-ins, and the procompetitive effect each may have.


actual or potential, is necessarily the only path to finding unreasonableness.

**Anticompetitive Purpose or Intent**

Justice Brandeis, in his formulation of the rule of reason, included purpose or intent to restrain trade as a relevant factor under the rule, but, in the same paragraph, he stated that good or bad intent alone may not constitute reasonableness. It is unclear to what extent legitimate or improper purposes affect the application of the rule of reason. Purpose must be analyzed in two contexts: first, the effect a benign or innocent purpose has on the application of the rule, and second, the effect an anticompetitive purpose has on “reasonableness.”

In *National Society of Professional Engineers v. United States*, the Supreme Court analyzed the relevance of a benign purpose to “reasonableness.” The Court held that a good and bona fide purpose to protect the public, a benign as opposed to an anticompetitive purpose, is irrelevant to whether the restraint is “reasonable” if the effect is anticompetitive. The Court based its decision on the legislative assumption that competition best promotes economic efficiency and that quality, service, safety, and durability, as elements of a bargain, are all favorably affected by free competition. Recognizing a restraint as “reasonable” because it was imposed for a benign purpose would exempt that conduct from the reach of the Sherman Act. The Court held that such an exemption must be left to Congress.

Thus, the professional engineers were precluded from arguing that portions of their ethics code were reasonably related to protecting the public and therefore a “reasonable” restraint of trade. The presence of an innocent or benign purpose could not purge the taint of the restraint’s anticompetitive impact. However, the

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76. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).
78. Id. at 689, 695.
79. Id. at 695. This is an apparent adoption of the consumer sovereignty idea. See note 22 supra.
80. Id. The Court went on to state that the “[e]xceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute.” Id.
81. Id. See also Ackerman-Chillingworth, Div. of Marsh & McLennan, Inc. v. Pacific Elec. Contractors Ass’n, 579 F.2d 484, 492 (9th Cir. 1978), cert. denied, 439 U.S. 1089 (1979).
Court did not discuss what relevance a legitimate business purpose may have on the issue of whether the anticompetitive effect is "substantial" or "more than trivial." Thus, the argument that a restraint was imposed for a legitimate reason may still have a significant impact on the finding of reasonableness.82

The presence of an anticompetitive purpose has been analyzed in two contexts: first, whether the anticompetitive purpose in itself is a basis for unreasonableness,83 and second, whether such a purpose is relevant to finding substantiality of the anticompetitive effect.84 In Foster v. Maryland State Savings and Loan Association,85 the District of Columbia Circuit expressed the traditional view that was expressed in Standard Oil Co. v. United States:86 that there is a violation of the rule of reason if the restraint is anticompetitive in purpose or effect.87 Judge Leventhal, in a concurring opinion, explicitly recognized that the existence of an anticompetitive purpose, inferred from the lack of a legitimate business purpose, may alone render a restraint "unreasonable."88

The significance of anticompetitive purpose is perhaps most frequently analyzed in the context of concerted action designed to drive a competitor out of business. In American Motor Inns, Inc. v. Holiday Inns,89 the Third Circuit Court of Appeals held that a contract, regardless of actual effect, constitutes a violation if it is intended as part of a scheme to drive a competitor out of the market.90 Whether or not the Third Circuit still subscribes to the position that such anticompetitive intent alone can constitute a violation was left unclear in Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.91 The court in Columbia Metal

83. See Foster v. Maryland State Sav. and Loan Ass'n, 590 F.2d 928, 936 (D.C. Cir. 1978) (Leventhal, J., concurring).
85. 590 F.2d 928 (D.C. Cir. 1978).
86. 221 U.S. 1 (1911).
87. 590 F.2d at 933 n.20.
88. Id. at 936 (Leventhal, J., concurring).
89. 521 F.2d 1230 (3d Cir. 1975).
90. Id. at 1248. See also Fount-Wip v. Reddi-Wip, Inc., 568 F.2d 1296 (9th Cir. 1978); Oreck v. Whirlpool, 563 F.2d 54, 58 (2d Cir. 1977), cert. denied, 439 U.S. 946 (1978). But cf. Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), cert. denied, 440 U.S. 936 (1979) (indicating that the Ninth Circuit may also require more than a trivial effect on competition).
based its decision on the fact that the defendant controlled eighty percent of the market; therefore, driving even a small competitor out of business would have a substantially adverse effect on competition. The court explicitly left open the question whether the same conduct, absent anticompetitive effect, would still be "unreasonable" solely because of the defendant's anticompetitive intent.

Another line of cases dealing with the relevance of anticompetitive intent to violations of section 1 of the Sherman Act deals with the *Pick-Barth* doctrine. In *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, the First Circuit Court of Appeals held that a conspiracy, the purpose or intent of which is to eliminate a competitor through unfair competition, constitutes a violation of section 1. This language was later interpreted to establish per se illegality for conspiracies involving unfair competition. To the extent that it stands for per se illegality, the *Pick-Barth* doctrine has been criticized by many courts, and it has not been so interpreted in the First Circuit. Instead, the trend has been toward analyzing concerted action involving competitive business torts under the rule of reason. However, with the exception of the Seventh Circuit Court of Appeals, it is not clear whether the courts have explicitly rejected the idea that an anticompetitive purpose may alone violate the rule of reason.

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92. Id. at 32.
93. Id. n.47.
94. 57 F.2d 96 (1st Cir. 1911).
95. Id. at 102.
98. See Magnus-Petroleum Co. v. Skelly Oil Co., 599 F.2d 196 (7th Cir. 1979).
99. Compare Northwest Power Prod., Inc. v. Omark Indus., 576 F.2d 83, 88 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979) (anticompetitive intent alone insufficient), with Alladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1115 (5th Cir. 1979) (restraint unreasonable if there is an anticompetitive purpose or effect). See also Gough v. Rossmoor Corp., 585 F.2d 381, 385 (9th Cir. 1978), cert. denied, 440 U.S. 936
The Fifth Circuit, in *Northwest Power Products, Inc. v. Omark Industries*, rejected the notion that anticompetitive intent alone is sufficient to establish a violation under the rule of reason. The court's rationale apparently was that antitrust policy involves public injury, which is protected by competition, and the furtherance of that policy cannot be objectively undertaken without analysis of market effects. However, the court noted that proof of intent may help a court assess the market impact of the challenged restraint. A recent district court case states that competitive effects must be analyzed with respect to the nature of the industry, the history of the restraint, and the reasons it was imposed. This position is consistent with the Fifth Circuit's analogy to the law of mergers. Under the Clayton Act, which governs the law of mergers, the courts take a similar functional approach, in which the purpose behind a merger is relevant to the finding of substantiality.

**A Functional Approach to Applying the Rule of Reason**

If uniform application of the rule of reason is to be achieved, Supreme Court guidance will be necessary in resolving some of the inconsistencies among the circuit courts. The major conflicts over the meaning of “unreasonable” are not subject to resolution by simply requoting the half-century-old language contained in *Standard Oil Co. v. United States* and *Chicago Board of Trade v. United States*. Instead, the Court needs to articulate more clearly the factors that render a given restraint unreasonable.

The current Supreme Court has emphasized economic analysis and competitive impact, while apparently ignoring the social policies presented by Judge Hand thirty-five years ago. Thus, it is clear that a determination of “unreasonableness” must be prem-

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(1979) (anticompetitive impact *essential* element); Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097, 1100 (9th Cir. 1979) (violates § 1 if purpose or effect anticompetitive).
102. 576 F.2d 83 (5th Cir. 1978), cert. denied, 439 U.S. 1116 (1979).
103. Id. at 90. See also Borman's, Inc. v. Great Scott Super Mkt., Inc., 433 F. Supp. 343 (E.D. Mich. 1975).
104. 576 F.2d at 90.
105. Id.
107. See text accompanying notes 57-59 supra.
110. 221 U.S. 1 (1911).
111. 246 U.S. 231 (1918).
112. See cases cited note 19 supra.
ised on the goal of economic efficiency and the presumption that competition will produce that efficiency.113 Rules inconsistent with these underlying policies must be discarded, and a new clear approach to applying the rule of reason should be adopted.

To best effectuate antitrust policy, anticompetitive effect must be broadly defined. The competitive model assumes relatively barrier-free entry into the market and a reserve of potential competitors. Limiting the application of the rule of reason to conduct that actually lessens existing competition114 within the market is inconsistent with antitrust policy that assumes the competitive model results in economic efficiency. Thus, the term anticompetitive effect should also include action which forecloses additional competition from the market by either raising barriers to entry or by substituting one competitor for another, and conduct which eliminates the threat of the potential competition.115 Antitrust policy is not furthered by requiring conduct to blossom into an actual lessening of competition.

A distinction must be made between conduct which has an anticompetitive effect on the marketplace and conduct which merely affects a competitor.116 Anticompetitive effect is concerned only with injury to the marketplace.117 Thus, an act that injures a competitor has an anticompetitive effect only if it also injures the marketplace. Unfair competition that injures a competitor does not necessarily have an anticompetitive effect and may be "reasonable" within the meaning of the rule of reason.118 Injury to competition does not always follow from injury to a competitor.

Neither the Sherman Act nor the Congressional Record indicates that Congress intended to limit the application of section 1 to per se violations or restraints that have a "substantially" anticompetitive impact. The "substantially" language contained in section 7 of the Clayton Act,119 governing mergers, is notably ab-

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113. See notes 17-25 and accompanying text supra.
114. An actual lessening of competition refers to the present elimination of competition between two or more competitors.
116. Cases following the Pick-Barth doctrine seem to fail to make this fundamental distinction. See notes 94-96 and accompanying text supra.
sent from the Sherman Act. Amendments to the Sherman Act, since the passage of the Clayton Act, have not added the requirement that a restraint of trade must substantially lessen competition to be illegal. Although lack of congressional action is certainly not determinative of congressional intent, it is perhaps an indication of intent. Thus, Congress probably did not intend to proscribe only restraints that have a substantial anticompetitive effect, but instead intended to outlaw all restraints that adversely affect competition. Therefore, the Fifth Circuit Court of Appeals' analogy to the law of mergers and requirement of "substantial" effect may be inappropriate.

Antitrust policy is best furthered by proscribing all restraints that have some adverse effect on competition and not only those with a substantial effect. Requiring a "substantial" anticompetitive effect before a restraint is deemed illegal hinders antitrust goals by lessening the risk that conduct will be found illegal. Therefore, the deterrent effect of the Sherman Act is frustrated. The compensatory and penal nature of the Act indicates that Congress not only was trying to remedy past restraints, but also was trying to deter future restraints. Thus, the "substantial" requirement may hinder antitrust policy.

Requiring a "substantial" anticompetitive effect does not further antitrust policy, and courts should not so limit the Sherman Act. However, a requirement that the anticompetitive effect on a given marketplace be more than trivial has merit. First, a requirement that the net effect, after market analysis, be more than trivial may be justified as preventing judges, using hindsight, from substituting their judgment for legitimate business decisions. Absent such a requirement, businessmen may forego legitimate arrangements that could increase economic efficiency because they fear civil or criminal liability under an overzealously applied Sherman Act. Second, the realities of judicial administration probably render courts incapable of litigating every case where only a de minimis effect on competition is asserted. The thought of treble damages and attorneys' fees would be a temptation to any attorney to convert the garden variety business suit into an antitrust case in hopes of being able to show a trivial effect on competition or to bargain for a greater settlement. Requiring a more than trivial effect may be a realistic way to limit the scope of the Sherman Act while remaining within the boundaries of the policy for which it was enacted.

121. See text accompanying notes 57-60 supra.
Overzealous application of antitrust law may deter legitimate business conduct, thus hindering economic efficiency. In cases in which a restraint, motivated by a legitimate business interest, involves procompetitive effects, as well as anticompetitive effects, a detailed market analysis is necessary to determine if the net effect is anticompetitive.123 Market analysis involves a determination of relevant product and geographic markets and the effect of the alleged restraint upon the relative position of competitors within the given markets.124 Market analysis then provides the adequate "benchmarks" to determine if antitrust policy is being furthered or hindered.125

In situations that involve no procompetitive effects, market analysis is still necessary to determine if there is some actual or


124. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953); Overseas Motors, Inc. v. Import Motors, Ltd., 375 F. Supp. 499, 542 (E.D. Mich. 1974). Determining the relevant product market entails analysis of the elasticity of demand among products to determine which products are in fact competing. See Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 450 (9th Cir. 1979) (measuring the functional interchangeability between products). If the product market is too narrowly defined—for example, Chevrolets—the procompetitive effects in the broader market—for example, all automobiles—are ignored, and an economically unsound result may follow.

The geographic market requires a determination of the area in which sellers compete and to which buyers can turn for an alternative source of supply. United States v. Empire Gas Co., 537 F.2d 295, 304 (8th Cir. 1977), cert. denied, 429 U.S. 1122 (1977). A given restraint may have little or no effect on the national market but may have significant effect in, for example, San Diego. See Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 459 n.39 (9th Cir. 1979). In Sherman, appellants argued that the relevant market should be Southern California rather than merely the San Gabriel Valley.

Market analysis also entails consideration of the particular industry involved. Conduct legal in an industry with many competitors may be illegal in an oligopolistic industry. See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 299-300 (2d Cir. 1979) (joint development project between dominant competitors has sufficient anticompetitive potential—raises barriers to entry—to be a violation).

potential anticompetitive effect. However, the same indepth analysis used to compare procompetitive with anticompetitive effects is not necessary because any showing of a more than trivial impact on the market constitutes a violation. Plaintiffs should be given leeway in defining the relevant market in order to show that competition was restricted in some marketplace. Detailed market analysis may in fact hinder antitrust policy by discouraging legitimate litigation. The added legal costs of detailed market analysis and resulting increase in risk of loss will have a deterrent effect on the business decision of whether to litigate.

The position that conduct that was designed to be anticompetitive, but that failed in its object, is “reasonable” is itself perhaps unreasonable. One can argue that the rule of reason should not be a shield for those who fail in their objectives to restrain trade. However, section 1 of the Sherman Act does not outlaw attempts to unreasonably restrain trade, and anticompetitive purpose alone does not injure the competitive model. The Supreme Court’s recent emphasis on the economic significance of a given restraint and the fact that the Court rejected the idea that a good or benign purpose is determinative of reasonableness indicate that the trend toward treating anticompetitive intent as merely one factor to be analyzed with competitive effects may be the law. Although evil purpose alone may not be relevant, it may be relevant to the courts’ determination of what constitutes a more than trivial effect.

If intent is anticompetitive, the “more than trivial” test should be applied liberally. In such cases, enforcement of the Sherman Act does not risk deterring legitimate business conduct, and may provide additional protection to the marketplace by deterring future anticompetitive conduct. However, if the purpose is innocent or benign, courts should impose liability or sanctions only if there is some economic significance. Thus, the “more than trivial” test is a functional, as opposed to a merely quantitative, test.

CONCLUSION

The application of the rule of reason should be guided by eco-

126. See note 124 supra.
127. See Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097, 1100 (9th Cir. 1979) (application of the rule to the facts presented did not require an elaborate inquiry into effects); Smith v. Pro Football, Inc., 593 F.2d 1173, 1187 (D.C. Cir. 1979) (with no procompetitive virtues to balance, the outcome was plain).
128. See note 19 and accompanying text supra.
130. See notes 101-06 and accompanying text supra.
131. See text accompanying notes 58 & 59 supra.
nomic analysis under the presumption that competition, as an economic principle, will best produce economic efficiency. Consistent with that policy, only restraints of trade that have more than a trivial effect on competition within the given marketplace should be declared unreasonable. Taking a fundamental approach to applying the “more than trivial” test, one must consider the market impact of a given restraint with the intent for which it was imposed.

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