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Market Power as a Threshold Requirement in Antitrust Summary Judgments: *Assam Drug Co. v. Miller Brewing Co.*

The United States Court of Appeals for the Eighth Circuit recently created a new requirement for plaintiffs under the Sherman Act. Plaintiffs must now first prove that a defendant possesses substantial market power[1] before they will be allowed to proceed with their antitrust cases.[2] While this requirement obviously increases the burden upon plaintiffs, it also has the potential for making that burden overwhelming. For example, because Federal Rule of Civil Procedure 11 requires the plaintiff to have a sufficient factual basis before filing the complaint, courts could require plaintiffs to have proof of market power before filing a complaint—without the benefit of discovery. The Ninth Circuit recently affirmed a case under these circumstances.[3] In fact, the Ninth Circuit[4] has also followed the Eighth Circuit's lead in imposing the market power requirement, as has the Seventh Circuit;[5] other courts may follow as well.

The first case to impose a preliminary requirement of showing substantial market power was an earlier Eighth Circuit case affirming the summary judgment of a case brought under South Dakota's antitrust statute, *Assam Drug Co. v. Miller Brewing Co.*[6] Because of the similarity between the South Dakota statute and the Sherman Act,[7] the court employed the same basic analysis applied to actions brought under the federal antitrust laws.[8] This similarity allowed the Eighth Circuit to extend the market power requirement to federal cases under

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1. Market power is simply the ability of a firm to control the disposition of a product.

2. Ryko Mfg. v. Eden Servs., 821 F.2d 1215 (8th Cir. 1987).

3. Continental Maritime v. Pacific Coast Metal Trades, 817 F.2d 1391 (9th Cir. 1987); *See* Popofsky & Goodwin, *The "Hard-Boiled" Rule of Reason Revisited,* 56 ANTITRUST L. J. 195, 209-12 (1988).

4. R.C. Dick Geothermal Corp. v. Thermogenics, Inc., 1987-1 Trade Cas. (CCH) ¶ 67,483 *reh'g granted* 841 F.2d 1010 (9th Cir. 1988).

5. Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987).

6. 798 F.2d 311 (8th Cir. 1986).

7. S.D. Codified Laws Ann. § 37-1-3.1 (1977), provides in part: "A contract, combination, or conspiracy between two or more persons in restraint of trade or commerce any part of which is within this state is unlawful."

Section One of the Sherman Act, 15 U.S.C. § 1 (1982), provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

8. 798 F.2d at 313.

the Sherman Act.[9] Because the rationale of *Assam Drug* has been extended to Sherman Act cases by the Eighth Circuit, with other circuits following suit, and because the rationale upsets the traditional balance in antitrust litigation by creating a possibly insurmountable burden for plaintiffs, the case merits critical examination.

This casenote begins with a brief review of the applicable antitrust law. The note then examines the rationale of the Assam Drug decision and concludes that it is flawed because it conflicts with Supreme Court precedent. The note argues further that the court has instead imposed its own set of political beliefs which turn out to be less than satisfactory. This note concludes that since both the decision and the philosophy it is based on are misguided, the case should not be followed.

I. INTRODUCTION

The antitrust laws, and specifically Section One of the Sherman Act, are designed to prevent restraint of trade.[10] In fact, read literally, they prohibit *any* restraint of trade.[11] But in reality, all contracts restrain or restrict in some way. Not surprisingly, a "judicial gloss" has been placed on these prohibitions whereby only unreasonable restraints are prohibited.[12]

To determine whether restraints are unreasonable, they are first classified as either horizontal or vertical. Horizontal restraints are agreements among competitors while vertical restraints are agreements within the chain of distribution.[13] There are different types of vertical restraints as well. Vertical price restraints are things such as minimum retail prices imposed upon distributors or retailers by manufacturers. Examples of vertical nonprice restraints are restrictions on customers a distributor may sell to or areas in which he may sell.

Once a restraint is classified, its reasonableness is analyzed under one of two different standards: the per se rule or the rule of reason. Horizontal restraints and vertical price restraints are traditionally governed by per se rules;[14] vertical nonprice restraints are governed by the rule of reason.[15]

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9. Ryko Mfg. v. Eden Servs., 823 F.2d 1215, 1231 (8th Cir. 1987), *cert. denied* 108 S. Ct. 751 (1988).

10. 15 U.S.C. § 1 (1982).

11. Section One of the Sherman Act, 15 U.S.C. § 1 (1982), provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

12. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

13. The chain of distribution involves the supplier, distributor and retailer.

14. United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

15. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).

Per se violations are "certain agreements or practices 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."[16] Per se rules treat the restraint as being illegal without need of any further inquiry. "The per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score."[17]

Rule of reason treatment, on the other hand, rather than making a restraint automatically illegal, invites the court to examine a restraint in the light of various factors and determine its reasonableness.[18] Under the rule of reason "the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[19]

While the law in this area has changed dramatically over the last two decades, changes concerning vertical nonprice restraints have been most spectacular. In *White Motor Co. v. United States,*[20] the United States Supreme Court refused to apply a per se rule to a vertical nonprice agreement. Four years later, however, in *United States v. Arnold, Schwinn & Co.,*[21] the Court held that vertical nonprice restrictions were per se violations of the Sherman Act.[22] Nevertheless, this rule was overturned ten years later in *Continental T.V., Inc. v. GTE Sylvania Inc.,*[23] in favor of rule of reason analysis for vertical nonprice agreements.[24] This does not mean that vertical nonprice restraints are never analyzed under per se rules; as will be seen, per se rules are used in some circumstances.[25] *GTE Sylvania* merely holds that there is a presumption of rule of reason treatment for vertical nonprice restraints.[26]

Concurrent with all of the activity involving vertical nonprice restraints, the role of summary judgment in antitrust has undergone dramatic changes as well. Following *Poller v. Columbia Broadcasting System, Inc.,*[27] summary judgment of antitrust cases became disfavored. Six years later, however, in *First National Bank v. Cities Service*

16. Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958).
17. United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362-63 (5th Cir. 1980).
18. The rule of reason is discussed in detail in Part III.
19. 433 U.S. at 49.
20. 372 U.S. 253 (1963).
21. 388 U.S. 365 (1967).
22. *Id.*
23. 433 U.S. 36 (1977).
24. *Id.*
25. *See infra* note 51 and accompanying text.
26. *Id.*
27. 368 U.S. 464 (1962).

Co.,[28] the Court made it clear that antitrust cases are not exempt from summary judgment.

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.[29]

The Court's newfound approbation of summary judgment in antitrust was made clear in 1986 with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[30] one of three decisions that term encouraging the use of the procedure in all types of cases.[31] Nevertheless, *Poller,* which held that summary judgment should be used "sparingly" in antitrust has never been overruled and summary judgment is still used conservatively in antitrust cases because the issues tend to be complex and difficult.[32]

These two controversial areas of antitrust law, treatment of vertical nonprice restraints and summary judgment, converged in *Assam Drug Co. v. Miller Brewing Co.*[33] There the court of Appeals for the Eighth Circuit ruled against the plaintiff in an antitrust case holding that a showing of a defendant's market power was a preliminary requirement. Specifically, the court stated that "a defendant who establishes, in accordance with the rules governing summary judgment, that it lacks market power a fortiori establishes that no genuine issue of material fact exists and is entitled to entry of judgment in its favor as a matter of law."[34] The court's reasoning was as follows: The alleged misconduct involved a vertical nonprice restraint. Such restraints are governed by the rule of reason. The rule of reason requires a showing of market power. Summary judgment applies to antitrust cases. Therefore the market power test applies to this antitrust summary judgment motion.

This argument fails in two respects. First, the premise that market power is a threshold requirement of the rule of reason is false. Second, even if that premise is true, the conclusion that the market power test

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28. 391 U.S. 253 (1968).

29. *Id.* at 290.

30. 475 U.S. 574 (1986).

31. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (antitrust); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (products liability); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (first amendment).

32. *See e.g.,* Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1584 (11th Cir. 1988).

33. 798 F.2d 311 (8th Cir. 1986).

34. *Id.* at 317.

applies to summary judgments in antitrust cases does not necessarily follow from the premises, thus the argument is invalid.

II. THE *Assam Drug* CASE

The plaintiff in this case, Assam Drug Co. (Assam), was a retail seller of beer and other alcoholic beverages in South Dakota. Beginning in 1976 Assam bought its Miller Brewing Co. (Miller) products through a distributor in a different geographical region because that distributor offered a lower price and an attractive discounting policy. In 1983, however, Miller prohibited its distributors from selling outside their limited geographical area and Assam was forced to buy from its local distributor at higher prices. Assam brought suit in South Dakota state court, alleging restraint of trade. Miller removed the case to federal court and filed a motion for summary judgment accompanied by an affidavit that its market share was less than 20%. Assam offered nothing to counter Miller's depiction of market share.[35] Thereupon the district court granted Miller's motion for summary judgment and the Court of Appeals for the Eighth Circuit affirmed. The circuit court stated that in order to narrow the "unlimited inquiry necessary under the rule of reason," it adopted a new requirement "at the threshold that the plaintiff attacking a vertical nonprice restraint prove the defendant's substantial market power in a relevant market."[36] The court concluded that a 20% market share did not amount to substantial market power and thus summary disposition was appropriate.[37]

The restraint involved in *Assam Drug* arose out of Miller's imposition of restrictions on its distributors—preventing them from selling to any distributors from any other geographic area. It was not a horizontal restraint because there was no agreement between competitors. Nor was it a vertical price restraint because there was no specific imposition of a retail price. The restriction was a vertical nonprice restraint, which, as the court correctly determined, should be analyzed under the rule of reason. In its application of the rule of reason, however, the *Assam Drug* court missed the mark.

III. THE RULE OF REASON

There are a number of different ideas, both in scholarly literature and case law, about rule of reason analysis. Professor Areeda indicates that the inquiry is three-pronged: (1) Identify what harm to competi-

35. *Id.*
36. *Id.* at 315-16.
37. *Id.* at 313.

tion results or may result from the collaborators' activities; (2) Determine the nature and magnitude of the 'redeeming virtues' of the challenged collaboration; and (3) Determine whether there are 'less restrictive alternatives' to the challenged restraint.[38]

According to Professor Sullivan, there are five steps in a rule of reason analysis: (1) Identify the specific practice; (2) Determine the purpose of the restraint; (3) Identify the likely effects of the practice; (4) Consider how the challenged practice will affect competitive interaction in the industry; and (5) Determine whether, on balance, the restriction substantially impedes competition.[39]

Judge Posner and Judge Bork, on the other hand, argue that *all* vertical restrictions should be legal per se and suggest complete elimination of the rule.[40] Short of such a drastic alternative, they invite courts to meet them at an intermediate position. At this middle ground between per se legality and traditional rule of reason analysis, they urge courts to take "shortcuts" such as making a plaintiff first show that a "defendant has market power (that is, power to raise prices significantly above the competitive level without losing all of one's business)."[41] They recommend this approach for two reasons: First, because traditional rule of reason analysis is long and complex, any shortcut to avoid that arduous process will be welcome. Second, the shortcut is justified because if a firm does not have market power, it cannot control the market and therefore cannot affect competition. The requirement of a threshold showing of market power is the distinctive feature of the Posner-Bork approach, in contrast to the broad-based approaches advocated by Areeda and Sullivan.

An examination of Supreme Court case law reveals that the Court's approach is more similar to the Areeda and Sullivan approaches than the Posner-Bork approach. The classic statement of the rule of reason was made by Mr. Justice Brandeis in *Chicago Board of Trade v. United States:*

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts

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38. P. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 2 (1981).

39. L. SULLIVAN, LAW OF ANTITRUST 187-88 (1977).

40. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 25 (1981); Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171, 190-92.

41. Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982)(Posner, J.).

> 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.[42]

More recently, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[43] the Court characterized the rule of reason this way: "Under this rule, the factfinder weighs *all of the circumstances* of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[44]

In *National Society of Professional Engineers v. United States*,[45] the Court held that "competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[46]

All of these cases indicate that rule of reason analysis entails the examination of a multitude of factors. Nowhere is market power singled out as a threshold requirement of rule of reason analysis.

Consider the most recent statement by the Court on the subject.

> The Solicitor General correctly observes: "While the reasonableness of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' "[47]

Not only do the Supreme Court cases fail to provide support for the threshold showing of market power requirement, another recent trend in Supreme Court cases suggests that such a requirement would not be approved by the Court. In *GTE Sylvania* the plaintiff argued that the defendant's acts should be treated under a per se analysis rather than rule of reason. The Court, however, held that "departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."[48]

In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,[49] the Court reaffirmed the idea that a showing of market power is required for per se treatment, not rule of reason analysis.

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42. 246 U.S. 231, 238 (1918).

43. 433 U.S. 36 (1977).

44. *Id.* at 49 (emphasis added).

45. 435 U.S. 679, 687-92 (1978).

46. *Id.* at 692.

47. National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 110 n.42 (1984).

48. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

49. 472 U.S. 284 (1985).

"Unless the [firm] possesses market power or exclusive access to an element essential to effective competition, [per se treatment] is not warranted. . . . Absent such a showing . . . courts should apply a rule-of-reason analysis."[50]

Most recently, the Court stated that "there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect . . . ."[51] Thus, although there is a presumption of rule of reason treatment for a vertical nonprice restraint, such a restraint may be analyzed under the per se rule if some economic effect like market power is shown.

These recent Supreme Court cases stand for the proposition that for a plaintiff to get the benefit of per se treatment she must make a threshold showing of economic effect. Horizontal and vertical price restraints are presumed to have that effect; vertical nonprice restraints, however, require an actual showing of economic effect in order to get the benefit of per se analysis. If a vertical nonprice restraint plaintiff is unable to make that showing, she will then have to settle for rule of reason analysis. It would make no sense, however, to also require a threshold showing of market power under the rule of reason because the inability to show market power is what causes a plaintiff to seek rule of reason treatment.

Tacking on a threshold requirement of showing market power under rule of reason results in the vitiation of the rule; the rule becomes redundant in that plaintiffs who can show market power will always neglect rule of reason in favor of the more preferential per se treatment, while plaintiffs who cannot show market power will be prevented from using the rule. As a practical matter, the rule is completely eliminated—the very goal of those who recommend the shortcut.[52] The Supreme Court, however, has not indicated any willingness to do away with the rule of reason. To the contrary, in *GTE Sylvania,* the Court *adopted* rule of reason treatment for vertical nonprice restraints and last term, in *Business Electronics*, the Court said that "rules in this area should be formulated with a view towards protecting the doctrine

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50. *Id.* at 296-97. *See also* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986). Since the purpose of . . . market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for an inquiry into market power . . . . [T]he finding of actual, sustained adverse effects on competition . . . is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.

Id. at 460-61.

51. Business Elecs. Corp. v. Sharp Elecs. Corp., 108 S. Ct. 1515, 1520 (1988).

52. *See supra* notes 40-41 and accompanying text.

of *GTE Sylvania.*"[53]

Another practical effect of requiring a threshold showing of market power is to make it more difficult for private plaintiffs to prove their cases. What constitutes a showing of substantial market power is far from clear. Is market share alone sufficient? If not, what else is required? If market share alone is sufficient, is there a bright line percentage? Even if there is a bright line, how do you define the market to apply it to? There are no clear answers to these questions.[54] Plaintiffs are forced to guess at what constitutes substantial market power. The result is to discourage plantiffs and thus discourage private enforcement of the antitrust laws. This is in direct contravention of the Clayton Act.[55] "Congress created the treble-damage remedy of sec[tion] 5 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations."[56]

One final problem with the market power approach is that the different types of restraints (horizontal, vertical price and vertical nonprice) usually do not fit easily into specific categorization. "The dichotomy between the per se and rule of reason categories is far less sharp than first appears."[57] The Court has identified *some* practices as being so heinous that economic effect is just taken for granted.[58] For example, per se rules are used without hesitation if a case involves price fixing.[59] And although the restraint in *Assam Drug* was a territorial restriction, its effects are quite similar to price fixing in that the retailer is restricted to buying from only one distributor, giving that distributor complete control of the price. That control resulted in the retailer being forced to pay a higher price. Because this effect is so much like a price restriction, which would be per se illegal, the operation of the rule of reason in this case should yield a similar result. A threshold require-

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53. 108 S. Ct. at 1521.

54. *See e.g.*, Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, 526 F.2d 1196 (9th Cir. 1975), *cert. denied* 425 U.S. 959. One further complication is that the law on market power is derived from monopolization cases, not restraint of trade cases.

55. 15 U.S.C. §§ 12-27 (1982).

56. Reiter v. Sonotone Corp., 442 U.S. 330 (1979). The legislative history reveals that private treble damage actions were conceived primarily as "open[ing] the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv[ing] the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914) (quoted in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)).

57. P. AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 2 (1981).

58. United States v. Socony-Vacuum, 310 U.S. 150 (1940).

59. *Id.*

ment of showing market power which precludes that similar result is without merit. Because of this, and especially because it goes against the direction the Supreme Court has pointed, the premise that market power is a threshold requirement is false. Because this premise fails, the *Assam Drug* court's entire argument also fails.

IV. Summary Judgment

Nevertheless, even if one grants *arguendo* that the *Assam Drug* court's premises are true, the argument still fails because its conclusion that the market power test applies to antitrust summary judgments does not necessarily follow from those premises.

As discussed above,[60] the court adopted the following argument: The alleged misconduct involved a vertical nonprice restraint. Such restraints are governed by the rule of reason. The rule of reason requires a threshold showing of market power. Summary judgment is available in antitrust cases. Therefore the market power test applies to summary judgment motions in antitrust cases. Assuming that all four premises are true, it still does not follow, however, that just because summary judgment *may* be used in antitrust cases, that the market power test is an appropriate *requirement* in motions for summary judgment of antitrust cases.

The reason is that although summary judgment may be used in antitrust cases, it can only be used in certain conditions and situations outlined in Rule 56 of the Federal Rules of Civil Procedure. Because of the way the market power test works, however, it precludes those conditions from ever being present and thus obviates use of the market power test in antitrust summary judgment.

Rule 56 provides in part that a motion for summary judgment:

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[61]

But the Supreme Court has held that at the summary judgment stage, the judge is not to weigh the evidence, determine the truth of the matter, or even make findings of fact. His only task is to determine whether there is a genuine issue for trial. This amounts to determining whether there are any "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved

60. *See supra* text following note 34.

61. Fed. R. Civ. P. 56.

in favor of either party."[62]

The market power test is itself a factual issue that is to be resolved by the finder of fact.

> This analysis begins by defining the relevant market in which the court is to evaluate market power. It then examines the following characteristics of the market in which the defendant competes: (1) the level of concentration in the industry; (2) the extent of product differentiation; and (3) the height of barriers to entry in the market. Finally, it examines the defendant supplier's position in the market to determine whether it is a core member of a tightly-knit oligopoly detected in the previous inquiry or, if no such oligopoly exists, whether the defendant possesses substantial market power independently . . . The courts have declined, however, to establish a bright-line standard to indicate how great a supplier's market share must be before the restrictions at issue should be considered unreasonable. Although their reluctance to promulgate such a standard is certainly due in part to a need to preserve flexibility, it also indicates their recognition that other factors affect the significance of market share in assessing market power. Perhaps most important are the number and size of the other firms in the industry. For example, a ten percent market share may confer a great deal of power in a severely fragmented industry where there are numerous other suppliers, none of which has a market share even remotely comparable to that held by the largest firm.[63]

According to Professor Sullivan, a thorough analysis of power involves "intricacies and imponderables."[64] Judge Posner says, "Plaintiff must prove that the defendant has a large market share—how large is unclear." He points out two inherent difficulties. First, "relevant-market definition in antitrust cases is uncertain; in many cases a plaintiff may be able to persuade the fact finder to define a market in which the defendant has a substantial share." Second, "there is no agreement as to how great the defendant's market share must be to satisfy the threshold condition of substantial market power."[65]

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62. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

63. Zelek, Stern & Dunfee, *A Rule of Reason Decision Model After Sylvania,* 68 CAL. L. REV. 13, 30-35 (1980).

64. L. SULLIVAN, LAW OF ANTITRUST 187-88 (1977).

65. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality,* 48 U. CHI. L. REV. 6, 16-17 (1981). *But see* Schwarzer, *Making the Rule of Reason Analysis More Manageable—Panel Discussion,* 56 ANTITRUST L. J. 233 (1988):

> Judge Schwarzer: I think most determinations of what is a relevant market and the power of the defendant or defendants within that market are decided on objective economic data and what is in dispute is not the economic data, not the evidence, but the conclusions that are drawn from it. So, I think that in many cases it is susceptible to decision on summary judgment; it is not a jury question at all.

Id. at 234.

The basic problem with the market power test is the identification of market share with market power. Although market share is somewhat easily measured, it does not always give an accurate indication of what actual market power is.

> Market share alone in the beer industry does not reflect the potential for anticompetitive results. . . . For example, in the beer market one of the competitive characteristics is the high cost of entry into the market. Barriers to entry are a significant factor in a participant's power to exert an anticompetitive effect . . . . Since relatively few firms share a large percentage of the beer market, high barriers to entry can magnify the effects of industry-wide vertical agreements, such as the agreements at issue in this case. For this reason alone, the market shares of the individual brewers should not be a basis on which we grant summary judgment. . . . Market share as a threshold question is not determinative of market power.[66]

The *Assam Drug* court, however, seems to ignore this fact. It states that in order to establish market power, "the plaintiff must show that the defendant has a dominant market share in a well-defined relevant market."[67] But, as the case cited by the court goes on to state, "[t]he relevant product and geographic market is a question of fact . . . ."[68] Thus the market power test, because it creates a genuine issue of material fact is not appropriate in motions for summary judgment.

V. Policy

The *Assam Drug* court adopted the market power shortcut in order to narrow the "unlimited inquiry necessary under the rule of reason."[69] This quest for simplification, however, cannot override the guidelines from the Supreme Court. The imposition of a market power test as a threshold requirement for summary judgment of cases involving vertical nonprice restraints is a clear deviation from the direction established by the Court. Such an action by an inferior court is a serious error.

Another serious error, and one for concern, is the *Assam Drug* court's submission to the siren song of the philosophy of economic efficiency. The version of this philosophy adopted by the court is that promulgated by Judge Bork and Judge Posner.[70] By rejecting prece-

66. State of New York *ex rel.* Abrams v. Annheuser-Busch, Inc., 1987-2 Trade Cas. (CCH) ¶ 67,777.

67. Assam Drug Co. v. Miller Brewing Co., 798 F.2d at 318 (8th Cir. 1986).

68. Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560, 1569 (1983).

69. 798 F.2d at 315-16.

70. *Id.* at 316.

dent and substituting for it the position espoused by a particular philosophy, the court is, in effect, substituting its own values for those of society. Interestingly, the court questions the legitimacy of such a move, but is not dissuaded.[71] The problem, however, is not so much judicial activism as it is what the activism is attempting to attain: the philosophy of economic efficiency.

There are a number of problems with this philosophy's approach to jurisprudence and there is a substantial body of literature dealing with those problems.[72] The most common criticism of the philosophy is its reduction of humanity to mere elements of equations.[73] As a result of this reduction the unjust treatment of some members of society is not only ignored, but is legitimated.[74] "[A]dvocacy of law and economics signals a preference for the established order and an ungenerosity toward those outside of the circle of advantage and power."[75] This certainly holds true in the antitrust context. Given the not-so-rare scenario of a plaintiff with limited resources attempting to pursue a claim against a powerful defendant, the antitrust positions advocated by the philosophy of economic efficiency (e.g. the market power requirement) tend to disadvantage plaintiffs—those who are often outside the circle of privilege.

Moreover, market efficiency is only *one* of the goals of the antitrust laws.

> Antitrust should serve consumers' interests and should also serve other, established, non-conflicting objectives. There are four major historical goals of antitrust, and all should continue to be respected. These are: (1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor.[76]

In addition to historical goals, there are also political goals.

> [It] is bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws. By 'political values', I mean,

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71. *Id.* at 316 n.15.

72. *See e.g.*, Kelman, *Trashing,* 36 STAN. L. REV. 293, 347 (1984); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique,* 33 STAN. L. REV. 387 (1981).

73. In an extreme example involving teenage runaways forced into prostitution, Kelman points out that under this way of thinking "[t]he 'transactions' between hooker and john are presumably 'value-maximizing.' The price the john is willing to pay presumably compensates the hooker for whatever disutility she experiences." Kelman, *supra* note 72 at 347.

74. *Id.*

75. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window,* 61 N.Y.U. L. REV. 554, 588 (1986).

76. Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV. 1140, 1182 (1981).

> first, a fear that excessive concentration of economic power will breed antidemocratic political pressures, and second, a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all. A third and overriding political concern is that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.[77]

The Supreme Court has also noted that economic efficiency is not the only goal of the antitrust laws. Justice White points out that another goal is "freedom of the businessman to dispose of his own goods as he sees fit . . . ."[78] Another goal was enunciated by Chief Justice Warren in *Brown Shoe Co. v. United States:*[79]

> It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[80]

The adoption of the market power test as a preliminary requirement rejects all of these other goals in favor of economic efficiency. Incredibly enough, the philosophy of economic efficiency had not even been developed yet in the early part of this century when the Sherman Act was legislated.[81] It is, therefore, hard to see how it could be the sole goal of the antitrust laws. Furthermore, because the philosophy tends to be at odds with many of the values our society cherishes, it should be the last thing we adopt as *a* purpose of antitrust law; we certainly should not adopt it as *the* purpose of the antitrust laws.

VI. CONCLUSION

Showing market power as a threshold requirement for rule of reason analysis is a minority position at odds with the spirit of Supreme

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77. Pitofsky, *The Political Content of Antitrust,* 127 U. PA. L. REV. 1051 (1979).

78. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 67 (1977) (White, J., dissenting).

79. 370 U.S. 294 (1962).

80. *Id.* at 344.

81. The Sherman Act was enacted in 1890. 15 U.S.C. § 1 (1982). Economic efficiency was first used in antitrust analysis in the 1950's. Posner, *The Chicago School of Antitrust,* 127 U. PA. L. REV. 925 (1979).

Court case law and many commentators. It is also inappropriate for use in summary judgment because it is so fact-intensive. More importantly, however, it forecloses the antitrust laws from operating to fulfill their many purposes. Because of these reasons *Assam Drug Co. v. Miller Brewing Co.* should not be used by other courts as precedent and the requirement of an initial showing by plaintiffs of a defendant's market power should be struck down by the Supreme Court.

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