[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney a

and opines that the two schools form a "double helix" which accounts for the DNA of current American antitrust jurisprudence.[3]

Frankly, I have difficulty distinguishing between the views of the two schools on some subjects. For example, Judge (now Mr. Justice) Breyer is often thought of as a Harvard School principal. However, his exposition on tying in *Grappone*[4] seems mighty close to the "one profit" thesis propounded by Professor (now Judge) Posner, a Chicago School principal.[5] And Professor Areeda in his later years criticized the essential facilities doctrine as vigorously as any Chicago School principal.[6]

All that said, I tend to come down on the side of those who find the stamp of the Chicago School on the Court's recent antitrust jurisprudence. Chicago school scholarship is reflected in these recent decisions when the Court voices skepticism about the benefits of antitrust enforcement, concerns over the costs of litigation, and the risk of false positives. That influence suggests that Section 2 is not alive and well at the Supreme Court.[7] While there is some room for concern (or hope depending on your perspective), I believe it is too early to write off Section 2.

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[3] William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix, 2007 COLUM. BUS. L. REV. 1, 51-54 (2007).

[4] Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792 (1st. Cir. 1988).

[5] RICHARD POSNER, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE, Chicago: University of Chicago Press, 1976.

[6] Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 ANTITRUST L.J. 841 (1989).

[7] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Has The Pendulum Swung Too Far? Some Reflections on U.S. and EC Jurisprudence" Remarks at the Bates White Fourth Annual Antitrust Conference (June 2007) *available at* http://www.ftc.gov/speeches/rosch/070625pendulum.pdf.

[8] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Monopsony and the Meaning of 'Consumer Welfare' A Closer Look at Weyerhaeuser," Address Before the 2006 Milton Handler Annual Antitrust Review (Dec. 7, 2006), *available at* http://www.ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf.

[9] *See* ROBERT BORK, THE ANTITRUST PARADOX 66 (1978) (Judge Bork believed antitrust policy and rules should guard against all practices and transactions creating allocative inefficiencies; in that way, the antitrust laws could and would facilitate the maximization of consumer wealth in the aggre

this definition of consumer welfare mirrors the way that consumer welfare is defined in Europe.

[11] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, I say Monopoly, You say Dominance: The Continuing Divide on the Treatment of Dominant Firms, is it the Economics?" at the International Bar Association's Antitrust Section Conference, at pp. 14-15 (Sept. 6, 2007) *available at* http://www.ftc.gov/speeches/rosch/070908isaymonopolyiba.pdf.

[12] Weyerhaeuser, 127 S. Ct. at 1078 ("As with predatory pricing, making a showing on the recoupment prong will require 'a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.'").

[13] A.A. Poultry Farms v. Rose Acre Farms, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.), *cert. denied*, 494 U.S. 1019 (1990).

in predatory pricing cases under Section 2.[14]

The Supreme Court has an obvious influence on the application of the antitrust laws, but it is important that influence not be overstated. The Court has rarely granted cert on antitrust issues over the last thirty years and it remains to be seen whether the recent spurt of cases is a renewed focus on antitrust or simply a statistical blip.[15] As a result, there are only a handful of Supreme Court decisions that address Section 2 of the Sherman Act and it is unclear whether even those decisions have general application. That brings me to the second reason for why I believe there is still life in Section 2 – the lower federal appellate courts.

The lack of clear guidance from the Supreme Court and the common law nature of the Sherman Act means that the appellate courts play an important role in shaping the contours of Section 2. In the last ten years, courts around the country have issued a number of important decisions that have expanded the scope of liability under Section 2 and have often read Supreme

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[14] Aspen Skiing Co. v. Aspen Highlands Skiing Corp. 472 U.S. 585, 602 (1985) ("Evidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' -- to use the words in the trial court's instructions -- or 'predatory,' to use a word that scholars seem to favor. Whichever label is used, there is agreement on the proposition that 'no monopolist monopolizes unconscious of what he is doing.' As Judge Bork stated more recently: 'Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended."); United States Football League v. National Football League, 842 F.2d 1335, 1359 (2d Cir. 1988) ("Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.").

[15] The Court has denied cert in several recent cases that provided an opportunity for the Court to weigh in on several important Section 2 issues. *See, e.g.*, Dentsply Int'l, Inc. v. United States, 126 S. Ct. 1023 (2006); 3M v. LePage's Inc., 124 S. Ct. 2932 (2003); Microsoft Corp. v. United States, 534 U.S. 952 (2001); Concord Boat Corp. v. Brunswick Corp. 531 U.S. 979 (2000). The true test may be in the coming years as there are a number of interesting Section 2 cases winding their way through the appellate courts. *See, e.g.*, Broadcom, Cascade Health Solutions v. PeaceHealth, 2007 U.S. App. LEXIS 21075, * 40 (9th Cir. 2007); Rambus v. FTC, (D.C. Cir.); linkLine Communications, Inc. v. California, Inc., 2007 U.S. App. LEXIS 21719 (9th Cir. 2007).

Court precedent fairly narrowly.

Let me begin with the most sacred of the cows – *Brooke Group*. Almost fifteen years ago, the Supreme Court articulated a test for predatory pricing claims that reflected the Chicago School's perspective.[16] After *Brooke Group*, predatory pricing plaintiffs must prove that the alleged predator priced below its cost and that it would recoup those losses after driving out its competition (taking into account the market power of the defendant and the barriers to entry into the market).[17] The Court in *Brooke Group* observed that "these prerequisites to recovery are not easy to establish" but justified the standard on the grou are

[16] Brooke Group Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); *see also* United States v. AMR Corp., 335 F.3d 1109, 1114 (10th Cir. 2003) ("In two seminal antitrust opinions, the Supreme Court adopted the skepticism of Chicago scholars, observing that 'there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful.' Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993).").

[17] Brooke Group, 509 U.S. at 222-224.

[18] Id. at 226.

underpinning that decision.[19] Several courts have expressed some unease with the *Brooke Group* standard in light of that scholarship – though that unease has rarely led them to allow a predatory pricing claim to proceed to trial.[20] An exception is *Spirit Airlines*. The Sixth Circuit in that case reversed a grant of summary judgment in favor of the defendant and sent t

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[19] *See, e.g.*, Jonathan B. Baker, Predatory Pricing After Brooke Group: An Economic Perspective, 62 ANTITRUST L.J. 585 (1994); Patrick Bolton et al., Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L.J. 2239 (2000); Aaron S. Edlin, Stopping Above Cost Predatory Pricing, 111 YALE L.J. 941 (2002).

[20] *See e.g.*, AMR Corp., 335 F.3d at 1114-1115 ("Recent scholarship has challenged the notion that predatory pricing schemes are implausible and irrational. See, e.g., Patrick Bolton et al., Predatory Pricing: Strategic Theory and Legal Policy, 88 GEO. L.J. 2239, 2241 (2000) ('Modern economic analysis has developed coherent theories of predation that contravene earlier economic writing claiming that predatory pricing conduct is irrational.'). Post-Chicago economists have theorized that price predation is not only plausible, but profitable, especially in a multi-market context where predation can occur in one market and recoupment can occur rapidly in other markets. See Baker, supra, at 590. Although this court approaches the matter with caution, we do not do so with the incredulity that once prevailed.").

[21] Spirit Airlines, Inc. v. Northwest Airlines, Inc. 431 F.3d 917 (6th Cir. 2005).

[22] Id. at 951.

Inc., 504 U.S. 451, 466-467 (1992)]. . . [W]e [have] adopted the Inglis rule that 'acknowledges that in ce3d C 9ai sintuTj42.9600 0.0000 TD(ction., n)Tj130.4800 0.0000 TD(that in ce

[23] Id. at 953

[24] LePage's Inc. v. 3M, 324 F.3d 141, 147 (3d Cir. 2003).

[25] Id. at 152 ("The opinion does not discuss, much less adopt, the proposition that a monopolist does not violate § 2 unless it sells below cost. Thus, nothing that the Supreme Court has written since Brooke Group dilutes the Court's consistent holdings that a monopolist will be found to violate § 2 of the Sherman Act if it engages in exclusionary or predatory conduct without a valid business justification.").

[26] Id. at 151 (in discussing *Brooke Group*, the court noted that "Unlike 3M, Brown & Williamson was part of an oligopoly . . . Its conduct and pricing were at all tie at all tie at all tie at all ti

of a monopolization or attempted monopolization claim under § 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them."[30] Yet equally significant was the court's departure from *Brooke Group.* At first the court seemed to warmly embrace *Brooke Group*, but in the end it distinguished *Brooke Group* as involving nothing more than single product predatory pricing and read its application fairly narrowly.[31] Thus, while the Ninth Circuit adopted a cost-based test to assess the legality of bundled discounts (albeit not the one sought by the defendants), it explicitly refused to require proof of recoupment.[32]

The legality of loyalty rebate programs (also labeled fidelity or volume rebates) under Section 2 have spurred academic debate and discussion recently – although there are few judicial decisions that squarely address the issue. The Eighth Circuit's decision in *Concord Boat* stands as the principal case with respect to these kinds of rebates.[33] In that case, the defendant relied on *Brooke Group* and *Matsushita* to argue that its discount programs were legal because there was no proof that they were below cost.[34] While the Eighth Circuit reversed the district court and overturned the jury verdict against the defendant, it is by no means clear that the appellate court

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[30] Id. at *63-64.

[31] Id. at *36 ("[I]n neither *Brooke Group* nor *Weyerhaeuser* did the Court go so far as to hold that in every case in which a plaintiff challenges low prices as exclusionary conduct the plaintiff must prove that those prices were below cost.").

[32] Id. at *63-64.

[33] Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir.).

[34] Brief for Petitioner-Appellant at 23, Concord Boat Corp. v. Brunswick Corp. Nos. 98-3732 & 98-4042 (8th Cir. March 22, 1999).

Communs., the Colorado district court held that the doctrine was both viable post-*Trinko* and that it was applicable in the circumstances of that case.[44] In shorteontCthough

and terms.'").

[44] Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc., 311 F.Supp. 2d 1048 (D. Colo. 2004).

[45] *See* Covad Communications, 398 F.3d at 673 (affirmed the district court's dismissal of Covad's § 2 claim based upon a price squeeze); III PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 767c3, at 129-30 (2d ed. 2002).

[46] 374 F.3d at 1050.

[47] 2007 U.S. App. LEXIS 21719. did not embraceTjET1.00000 0.00000 0

telecommunications statutes or Trinko."[48]

Predatory pricing and refusals to deal are only two classes of potential claims that may be brought under Section 2. As Justice Ginsburg of the D.C. Circuit observed "'Anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties."[49] One trend in the appellate courts has been to condemn tying and exclusive dealing arrangements under Section 2 – claims that were once traditionally challenged under Section 1.[50] Most Chicago School adherents consider those arrangements presumptively or even per se legal.

Some of the Court's decisions on vertical restraints, such as those in *Sylvania* and now *Leegin*, have led some to speculate about the standards for tying and exclusive dealing. The Supreme Court last considered an exclusive dealing claim 45 years ago, and its *Jefferson Parish* decision articulating a standard for tying claims is now over 20 years old.[51] Justice Stevens opinion for a unanimous Court in *Illinois Took Works* focused solely oc0.00 ve dea9/F11 oc0.w1wbe1o TD(ok V

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[48] Id. at 19-20.

[49] Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, et al., 148 F.3d 1080, 1087 (D.C. Cir. 1998); see also Conwood Co. v. United States Tobacco Co., 290 F.3d 768, 784 (6th Cir. 2002).

[50] *See* J. Thomas Rosch, Commissioner, Fed. Trade Comm'n, "Vertical Restraints & Sherman Act § 2 " Address before the Conference on Current Topics in Antitrust Economics and Competition Policy sponsored by CRA International, (June 13, 2007) available at http://www.ftc.gov/speeches/rosch/070613verticalrestraints.pdf.

[51] *See* Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[52] Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 31 (2006) ("The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. We conclude that the

the *per se* standard articulated in *Jefferson Parish* (though proof of market power in the tying product was required, making the label weird.). Nevertheless, one might expect, given the Chicago School thinking reflected in the Court's recent jurisprudence (as well as in Judge Posner's analysis of exclusive dealing in *Roland Machinery v. Dresser*[53]) that the lower federal appellate courts might take a closer look at tying and exclusive dealing cases.

In *United States v. Microsoft*, the tying allegations focused on Microsoft's sale of its operating system and web browser software.[54] Judge Ginsburg (who is commonly considered a Chicago School principal – did not suggest that the practice was either presumptively or *per se* legal under Section 1. Speaking for a unanimous court, he found in the unique context of that case – *i.e.*, the tying of software applications with the operating system – the Section 1 claim should be assessed under the rule of reason.[55] However, the court did find that certain aspects of Microsoft's integration of its browser with its operating system was anticompetitive under Section 2 – although it refused to attach liability because it found that Microsoft's justifications were unchallenged by the government.[56]

The DC Circuit's analysis of the exclusive dealing claims in *Microsoft* was even more interesting.[57] The exclusive dealing claim brought under Section 1 was dismissed by the district court because Microsoft had not "completely excluded Netscape" from reaching any potential

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mere fact that a tying product is patented does not support such a presumption.").

[53] Roland Machinery Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984).

[54] United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).

[55] Id. at 95.

[56] Id. at 66.

[57] Id. at 70.

user.[58] Yet the exclusive dealing claim under Section 2 survived both the district court and the appellate court despite the dismissal of the Section 1 count. The D.C. Circuit held that a monopolist's use of exclusive dealing to injure competitors could violate Section 2 even if the practice did not foreclose competitors from the 40% to 50% share of the relevant market generally required for a Section 1 violation.[59] It found that Microsoft managed to preserve its monopoly in the market for operating systems by foreclosing a substantial percentage of the available opportunities for browser distribution.

Subsequently, in *Dentsply*, the Third Circuit reversed a district court judgment for the defendant in an exclusive dealing case brought under Section 2 where the practice simply foreclosed competitors from the most important distributors and the monopoly in [60] [61]

[58] Id.

[59] Id.

[60] United States v. Dentsply Int'l Inc., 399 F.3d 181 (3d Cir. 2005).

[61] Roland Machinery, 749 F.2d 380; but see NicSand, Inc. v. 3M Co., 2007 U.S. App. LEXIS 24270 (6th Cir. 2007) (Sixth Circuit en banc decision holding that the plaintiffs' Section 2 claim, which alleged that the defendant had eliminated the plaintiffs from the market by paying sums up-front to buy exclusivity, failed to state a viable claim.).

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