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THE PAST, PRESENT, AND FUTURE OF MONOPOLIZATION REMEDIES

SPENCER WEBER WALLER*

I. INTRODUCTION

A well-understood theory of remedies in monopolization and abuse of dominance cases does not exist at present in either the case law or the academic literature and may not even be possible. For example, the most recent edition of *Antitrust Law Developments* published by the Antitrust Section of the American Bar Association has no specific section dealing with this issue.¹ The Second Edition of the Areeda-Hovenkamp treatise discusses the topic, but at a high degree of generality:

No particular type of relief is “automatic” in a Sherman Act § 2 case. The statutes contain no such warrant, and our observations elsewhere are particularly relevant to § 2—namely, that remedies for the same statutory violation vary considerably, depending on the nature of the violation and the identity of the plaintiff. Thus, it never follows automatically from the finding of a § 2 violation that dissolution or divestiture is in order, that criminal sanctions are appropriate, that the plaintiff is entitled to treble damages, or in some cases that an injunction against future conduct is justified.²

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¹ ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* (6th ed. 2007). The general topic of public and private remedies is discussed in other sections but not specifically in connection with Section 2 violations. This is the case with numerous other U.S. antitrust treatises, which rarely discuss the topic at length. See, e.g., WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK 2008–09 EDITION*, §§ 9.25–9.28; LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 90–92 (2d ed. 2006); STEPHEN F. ROSS, *PRINCIPLES OF ANTITRUST LAW* 34–36 (1993).

² 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 653a (2d ed. 2002).

Most other antitrust treatises approach the topic of remedies in monopolization cases by ignoring it as a separate category, or treating it in a cursory manner. The most likely explanation is that monopolization cases and abuse of dominance cases (particularly successful ones) are relatively rare birds. While these cases are of great importance, they arise only episodically, and rarely in the same industries, making comparisons between different industries and time periods not very helpful.

In this essay, I first survey the principal types of remedies that have been imposed in monopolization cases over the past century. I then look at the current state of monopolization law and remedies. Finally, I briefly address a likely future that focuses on information and access as a form of virtual, rather than physical, divestiture as a critical issue for the courts and enforcers to resolve through innovative compliance mechanisms.

II. LOGIC AND EXPERIENCE

We are left with logic and experience as the principal bases for an intelligent policy toward monopolization remedies.³ Logic tells us that the point of a remedy should be some blend of punishment, deterrence, restitution, compensation, and restoration of the status quo ante, but does not tell what proportion of each item should be in the recipe.⁴ Logic further tells us that the merits of any chosen remedy should not be markedly outweighed by its costs or its harm to innocent parties and should be in the overall public interest.⁵

Experience tells us that the enforcement agencies and judges in the U.S. system, as well as the European Commission and the reviewing courts in the EU system, must fashion relief in cases of extraordinary importance, but often *sui generis* in nature. A brief tour of that experience can show us some guideposts, but cannot fully illuminate the path going forward.

A. COMMON LAW AND STATE PRACTICE

The earliest remedies for monopolization under American law can be found prior to the passage of the Sherman Act. Sadly, the Founding Fathers did not accept Thomas Jefferson's proposal for inclusion in the

³ *But cf.* OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881) ("The life of the law has not been logic: it has been experience.").

⁴ This is a problem in U.S. antitrust law generally. *See generally* Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 208 (2003).

⁵ Jerrold Van Cise, *Limitations Upon Divestiture*, 19 GEO. WASH. L. REV. 147, 148-53 (1950).

Bill of Rights of a freedom from monopoly.⁶ However, even under the common law, monopolistic agreements were void,⁷ although by its very nature this ban pertained more to trust- and cartel-type agreements and not to truly unilateral conduct. Most states also had some constitutional and/or statutory prohibitions on monopolies by the time of the passage of the Sherman Act.⁸ These antimonopoly statutes typically provided for prison terms, fines, recovery of damages, special fees for prosecutors, revocation of corporate charters, voiding of contracts, injunctions, and other equitable remedies. Despite this laundry list of impressive sanctions, state antitrust law proved to be of little use in addressing the behavior of dominant national firms that were effectively beyond the reach of any single state government.⁹ Finally, the Commerce Clause imposed federal constitutional limitations on state-granted monopolies that affected interstate commerce.¹⁰

B. HISTORICAL REMEDIES FOR MONOPOLIZATION UNDER THE SHERMAN ACT

Remedies for truly unilateral conduct were an afterthought in the passage of the Sherman Act. Congress seemed to assume that monopolies would most often arise through trust-like arrangements or mergers.¹¹ It was widely believed that monopolies could be prevented or remedied by preventing the creation of trusts in the first place, and/or by punishing the trusts that had grown to dominate many aspects of American economic life.¹²

⁶ See Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), available at <http://press-pubs.uchicago.edu/founders/>; Letter from Thomas Jefferson to James Madison (July 31, 1788), available at <http://press-pubs.uchicago.edu/founders/>. Along those lines, perhaps the Boston Tea Party should be considered as a monopolization remedy aimed at the East India Tea Company.

⁷ HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 17 (1954) (surveying common law).

⁸ *Id.* at 155–59; James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880–1918*, 50 OHIO ST. L.J. 257 (1989); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495 (1987); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979).

⁹ For a summary of public and private enforcement under state antitrust laws, see THORELLI, *supra* note 7, at 259–67.

¹⁰ *Gibbons v. Odgen*, 22 U.S. 1 (1824).

¹¹ See Maurice Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497.

¹² THORELLI, *supra* note 7, at 329–43; Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 6–7 (2003).

Congress thus criminalized agreements in restraint of trade, monopolization, attempts to monopolize, and conspiracies to monopolize; authorized the federal government to seek injunctive relief; authorized persons injured in their business and property to sue for treble damages, attorneys' fees, and costs; and then left it to the federal courts to work out the details on a common law basis. What follows is a brief survey of the remedies that have characterized U.S. antitrust law under the Sherman Act at different times throughout our history.¹³

1. *Criminal Penalties*

Section 2 contains identical criminal penalties to Section 1. Originally, these criminal penalties were only misdemeanors, as opposed to their current status as felonies. The government used these provisions to fine corporations modest amounts. No individuals were sentenced to jail under these provisions.¹⁴ Criminal enforcement of Section 2 was also used periodically in the late 1930s and 1940s to leverage defendants into signing civil consent decrees requiring various structural and behavioral changes.¹⁵ There have been no criminal Section 2 cases for truly unilateral conduct since the early 1970s,¹⁶ and there is little prospect of this remedy being revived.

2. *Divestiture*

Because many of the early monopolies were accumulations of previously separate enterprises, it is not surprising that the courts ordered the dissolution of a defendant found in violation of Section 2.¹⁷ For example, Standard Oil was dissolved into separate regional enterprises.¹⁸ But in Section 2 cases, the courts have been reluctant to dissolve inte-

¹³ See also William E. Kovacic, *Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1287-1310 (1999) (discussing other approaches to monopolization remedies, including industry-specific statutes).

¹⁴ Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 116 (2001).

¹⁵ See SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 85-86, 92 (2005).

¹⁶ The most recent criminal indictment based solely on unilateral conduct under Section 2 appears to be from 1972. *United States v. Empire Gas Corp.*, Crim. No. 23917-1 (W.D. Mo. 1972). The defendant was acquitted and later found not liable in a subsequent civil monopolization action by the government. See *United States v. Empire Gas Corp.*, 537 F.2d 296, 304 (8th Cir. 1976).

¹⁷ There are technical distinctions between divestiture, dissolution, and divorcement. S. Chesterfield Oppenheim, *Economic Background*, 19 GEO. WASH. L. REV. 120, 120-21 (1950) (defining and differentiating between the three). Like most commentators, I use these concepts interchangeably.

¹⁸ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911). See also *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); see generally JAMES MAY, *STANDARD OIL CO. V. UNITED STATES: THE SUPREME COURT AND THE FOUNDATIONS OF A NEW AMERICAN SOCIETY*

grated entities because of the practical and theoretical difficulties of such a procedure, the speculative nature of the benefits, and the harm to corporate, shareholder, labor, and other interests.¹⁹ This is in marked contrast to the practice in merger cases, where divestiture is the natural remedy for breaking apart what never should have been joined together in the first place.²⁰ One study found only four or five cases in which divestiture was ordered where the defendant had not attained its market position through mergers or other combinations.²¹

The D.C. Circuit in *Microsoft* indicated that divestiture should be applied to unitary companies with great caution and only when “tailored to fit the wrong creating the occasion for the remedy.”²² Nonetheless, one of the greatest recent successes was the 1984 consent decree requiring dissolution of the Bell System into a series of regulated regional local telephone operating companies and a new unregulated AT&T consisting of long distance communications, equipment manufacturing, and research and development.²³ While the law permits divestiture as a

(University Press of Kansas, forthcoming); James May, *The Story of Standard Oil Co. v. United States*, in *ANTITRUST STORIES* 7 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

¹⁹ See *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953).

²⁰ For the presumption that divestiture is the appropriate remedy in the merger context, see *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 327 (1961). Although beyond the scope of this brief survey, divestiture in merger cases does provide important lessons that should be applied in structuring relief in Section 2 cases. See DG COMPETITION EUROPEAN COMMISSION, *MERGER REMEDIES STUDY* (Oct. 2005) (public version), available at http://ec.europa.eu/comm/competition/mergers/studies_reports/remedies_study.pdf; U.S. DEP'T OF JUSTICE, *ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES* 7–8 (2004), available at <http://www.usdoj.gov/atr/public/guidelines/205108.pdf>; Press Release, Competition Bureau, Canada, Competition Bureau Publishes Bulletin on Merger Remedies (Sept. 22, 2006), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02169.html>; Fed. Trade Comm'n, Statement of the FTC's Bureau of Competition on Negotiating Merger Remedies (2003), available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm>. Much of the need for divestiture, even in merger cases, has been eliminated with the passage of pre-merger notification requirements and the tendency of the government to challenge or require the restructuring of a transaction prior to closing.

²¹ Crandall, *supra* note 14, at 120–22.

²² *United States v. Microsoft Corp.*, 253 F.3d 34, 106 (D.C. Cir. 2001). Note the dramatic change from earlier generations, when a noted commentator offered: “Divestiture is the indicated remedy, in my opinion, where the structure of the monopolizing defendant is such that failing to divest will mean a continuance of old monopolistic practices or a resurgence of new monopolistic practices.” Sigmund Timberg, *Some Justifications for Divestiture*, 19 GEO. WASH. L. REV. 132, 136 (1950).

²³ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982). See Edward Cavanagh, *Antitrust Remedies Revisited*, 84 OR. L. REV. 147, 197 (2005); Stanley M. Gorinson, *Deregulation in Telecommunications: Competition or Confusion*, 47-APR FED. LAW., Mar./Apr. 2000, at 24 (discussing success of breakup).

remedy in private antitrust suits, as a practical matter this remedy has only been applied, if at all, in public enforcement actions.²⁴

3. *Creation of New Competition*

Despite a venerable history of 19th and early 20th century populist fervor on questions of public ownership,²⁵ there has been little use of governmental ownership to create new competition as a counter to private monopoly. The controversy over the creation of the Tennessee Valley Authority during the Great Depression in the 1930s to bring electric power to underserved rural areas to remedy the lack of investment by the private sector suggests the rarity of such an undertaking and the political will necessary to pursue this strategy. Perhaps the closest approach in antitrust law at the Supreme Court level was the *Otter Tail* decision of the 1970s, where the Court affirmed liability under Section 2 and required a private electrical transmission company to sell power to competing publicly owned municipal electrical distribution companies.²⁶

The greatest success in the creation of competition where once there was none occurred in the long-running *Alcoa* litigation, although the final remedy was the result of legislation rather than judicial opinion. In *Alcoa*, the government established that Alcoa both enjoyed monopoly power and had unlawfully excluded competitors through a pattern of relentless expansion and exclusive supply contracts with hydroelectric power companies (a key input for the production of aluminum from bauxite). Alcoa also benefited from worldwide market division schemes with European producers.²⁷

However, the Court deferred the question of remedy until after the end of World War II. Congress stepped in and created a statutory scheme through which government-owned aluminum production facilities were sold off at relatively bargain prices to the Reynolds and Kaiser companies, creating three U.S. aluminum producers in place of the literal monopoly Alcoa previously had enjoyed. In a subsequent proceed-

²⁴ David S. Wise, *Comment: Divestiture as a Private Remedy*, 20 DUQ. L. REV. 613, 617–22 (1981–1982); David S. Wise, *Comment: Private Divestiture: Antitrust's Latest Problem Child*, 41 FORDHAM L. REV. 569 (1973).

²⁵ See generally LAWRENCE GOODWYN, *THE POPULIST MOVEMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* 109, 211 (1978) (inclusion in different populist party platforms).

²⁶ *Otter Tail Power Co. v. United States*, 410 U.S. 366, 381–82 (1973).

²⁷ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 437, 444 (1945). See generally Spencer Weber Waller, *The Story of Alcoa: The Enduring Questions of Market Power, Conduct, and Remedy in Monopolization Cases*, in *ANTITRUST STORIES* 121 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

ing, the district court further required the separation of ownership and management links between Alcoa and its Canadian subsidiary Alcan, creating over time a fourth viable competitor serving the U.S. market. Finally, the government created additional new competitors after the Korean War through the sale of other publicly owned facilities.²⁸

Despite the success of the *Alcoa* experience, this proved to be a nearly *sui generis* approach. The federal government simply does not own that much (even in war time) that can be sold, leased, or privatized to create competition in highly concentrated industries. Finally, the U.S. government appears to lack the ability or the inclination to use its purchasing power to achieve similar ends.²⁹

4. *Voiding of Contracts*

The Supreme Court has held contracts void to remedy actual or attempted monopolization in a series of uncontroversial older cases.³⁰ Where an unlawful monopolization was accomplished through exclusive contracts or other anticompetitive agreements, the agreements were voided or modified to permit competition to resume as before the unlawful conduct.³¹ In the famous *United Shoe Machinery* decision, the lower court initially refused to order the dissolution or divestiture of an integrated shoe machinery company. Instead it voided lease-only contracts with shoe manufacturers and issued a detailed injunction designed to create, over time, a viable sale or lease option for customers and to foster the eventual development of a secondary market for shoe machinery.³²

²⁸ *United States v. Aluminum Co. of Am.*, 153 F. Supp. 132 (S.D.N.Y. 1957); *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333, 392–99, 418–19 (S.D.N.Y. 1950).

²⁹ An example of such a policy was Brazil's decision in 2005 to adopt open source software for government ministries and state-run enterprise. Steve Kingstone, *Brazil Adopts Open-source Software*, BBC News Channel, available at <http://news.bbc.co.uk/1/hi/business/4602325.stm>.

³⁰ See, e.g., *United States v. Reading Co.*, 226 U.S. 324 (1912) (canceling contracts and enjoining future executions of contracts); *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U.S. 227, 261 (1909) (refusal to enforce contract as part of attempt to monopolize); *Shawnee Compress Co. v. Anderson*, 209 U.S. 423, 435 (1908) (lease in furtherance of a monopoly void).

³¹ See, e.g., *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 197 (3d Cir. 2005).

³² *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954). But see *United States v. United Shoe Mach. Corp.*, 391 U.S. 244, 252 (1968) (reversing and remanding trial court's denial of government's later petition for divestiture); *United States v. United Shoe Mach. Corp.*, 1969 Trade Cas. (CCH) ¶ 72,688 (D. Mass. 1969) (defendant agreeing to sell assets to reduce its share to one-third of the market and agreeing to additional patent licensing).

5. Behavioral Remedies

The majority of monopolization cases in U.S. history have ended with some sort of behavioral relief.³³ Under the Clayton Act and the general equitable power of the U.S. courts, both preliminary and final injunctions are available in antitrust cases as in any other type of case.³⁴ On a case-by-case basis, courts have issued both positive and negative injunctions to prevent future violations of Section 2 of the Sherman Act, remedy past violations, and restore the state of competition that existed prior to the violation.³⁵ Typically, the courts have issued injunctions against the continuation of the conduct found to be illegal and have included provisions to eliminate the effects of the unlawful conduct in the marketplace.³⁶ The injunctions often have included the compulsory licensing of patents and other intellectual property for reasonable royalties, and occasionally on a royalty-free basis.³⁷ As the controversy over remedies in *Microsoft* shows, conduct remedies will remain the weapon of choice for the foreseeable future despite lingering questions of administration and effectiveness.³⁸

6. Private Treble Damage Suits

Private parties injured in their business or property by reason of an antitrust violation may sue for treble damages, attorneys' fees, and costs. Early on, the Supreme Court decision in *Eastman Kodak Co. v. Southern Photo Materials Co.*³⁹ affirmed such a damage award in a monopolization case despite the impossibility of precisely ascertaining the exact damages

³³ Crandall, *supra* note 14, at 116 (of civil cases through 1996, 51.2% had behavioral remedies, 20.5% compulsory licensing, and 28.3% structural relief).

³⁴ 15 U.S.C. §§ 25–26. See generally John J. Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344 (discussing recurrent problems with injunctive relief).

³⁵ *United Shoe*, 110 F. Supp. at 348.

³⁶ *Int'l Boxing Club of N.Y., Inc. v. United States*, 358 U.S. 242, 261–62 (1959); *Loraine Journal Co. v. United States*, 342 U.S. 143, 156–57 (1951); *Schine Chain Theatres v. United States*, 334 U.S. 110, 128–29 (1948); *Allen Bradley & Co. v. Local Union, No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 812 (1945); *Swift & Co. v. United States*, 196 U.S. 375, 401 (1905); *Northern Sec. v. United States*, 193 U.S. 197, 356–57 (1904). But see *United States v. Grinnell Corp.*, 384 U.S. 563, 579 (1966) (limiting injunction barring employment of individual in the industry as unnecessary and unduly harsh).

³⁷ See Crandall, *supra* note 14, at 116 (compulsory licensing comprised 20.5% of relief granted in reported civil monopolization cases through 1996). See, e.g., *Hartford-Empire Co. v. United States*, 323 U.S. 386, 413–18 (1945). For examples of mandatory licensing with and without reasonable royalties, see 2 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1162–63 (6th ed. 2007) (citing cases).

³⁸ See Kevin J. O'Connor, *The Divestiture Remedy in Sherman Act § 2 Cases*, 13 HARV J. LEGIS. 687 (1976) (arguing that conduct remedies are more costly to administer and less effective).

³⁹ 273 U.S. 359 (1927).

suffered by the plaintiff. In a private case that preceded the conclusion of the government's historic case against the old Bell System, MCI won treble damages based on its unlawful exclusion from the long-distance market by AT&T.⁴⁰ More recently, both LePage's and Conwood Tobacco won substantial treble damage verdicts in private treble damage Section 2 actions that did not raise other significant remedy issues.⁴¹ Damage awards are easy to administer and do not involve any complex role for a reviewing court, other than the usual appellate review of the legal rulings of the proceeding below.

Virtually all of the recent Supreme Court cases on monopolization have arisen in the context of private treble damage litigation. The Court has had little opportunity (perhaps by design) to opine more generally on remedies for monopolization.⁴² While the Supreme Court has held that a successful private plaintiff also can obtain the full array of equitable remedies,⁴³ no court to my knowledge has required divestiture or dissolution in a private monopolization case, and courts have limited equitable relief to more narrowly drawn injunctions.

7. *Restitution/Disgorgement*

In a small number of situations, the Federal Trade Commission and the courts have required antitrust defendants, including monopolists, to provide restitution to consumers who were overcharged by reason of an antitrust violation. The FTC's restitution power is derived from Section 13(b) of the FTC Act and is often invoked in consumer fraud matters, but only more recently has been invoked in a handful of competition cases. For example, in *Mylan* the FTC and a coalition of state antitrust enforcers settled charges that a pharmaceutical company unlawfully monopolized the market for certain drugs by cornering the market on the raw ingredients for those medications.⁴⁴ Restitution is an extremely useful approach in the proper case, but it is largely untested in court. By its

⁴⁰ MCI Commc'ns Corp. v. AT&T, 708 F. 2d 1081 (7th Cir. 1983).

⁴¹ LePage's Inc. v. 3M, 324 F.3d 141, 154 (3d Cir. 2003); Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

⁴² See, e.g., Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993); Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451 (1992); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

⁴³ California v. Am. Stores Co., 495 U.S. 271, 295-96 (1990).

⁴⁴ FTC v. Mylan Labs, 62 F. Supp. 2d 25 (D.D.C. 1999). See generally Fed. Trade Comm'n, Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementftrn.htm>; Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 173-76 (2002).

very nature, this remedy is limited to overcharge cases and is not available in most cases of exclusionary conduct.

8. *Doing Nothing*

The actor and philosopher of life, Peter Ustinov, is reported to have offered this advice on a number of topics: "Don't just do something, stand there!"⁴⁵ This may strike some as an odd type of "remedy," but doing nothing is a viable option in a number of situations involving unilateral conduct by dominant firms. First, if you are a believer in Schumpeterian waves of creative destruction, you simply wait and sit back for the next big thing that will swamp the temporary monopoly power that arose from the last big thing.⁴⁶ Second, a number of critics have suggested that inaction is also the proper strategy if the likelihood of erroneous conclusions, the lack of a viable remedy, or the possibility of a quicker market response outweighs the alleged harms and potential gains from the litigation.⁴⁷ Third, sometimes market conditions change over the course of litigation such that what initially looked like a good idea no longer appears to be. This was the basis for the United States abandoning its thirteen-year effort against IBM for unlawful monopolization of the mainframe computer industry as it existed in the late 1960s and early 1970s.⁴⁸ Finally, antitrust agencies (and private parties) cannot pursue every complaint and do not win every case, so at least some allegedly monopolistic abuses will never be successfully challenged in court and any relief will have to come from outside the legal system.⁴⁹

⁴⁵ This quote is alternatively ascribed to Jesus, Buddha, God, Mystery Science Theater 3000, the White Rabbit in the animated film version of *Alice in Wonderland*, Forest Whitaker, and Ronald Reagan. See <http://answers.google.com/answers/threadview/id/186295.html>.

⁴⁶ See JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942); see generally THOMAS K. MCGRAW, *PROPHET OF INNOVATION: JOSEPH SCHUMPETER AND CREATIVE DESTRUCTION* (2007). However, even a true Schumpeterian may be concerned about unlawful monopoly maintenance that prevents the next wave of creative destruction from arising.

⁴⁷ WILLIAM H. PAGE & JOHN E. LOPATKA, *THE MICROSOFT CASE* (2007); Crandall, *supra* note 14, at 112.

⁴⁸ In fairness to the government, IBM's unrelenting defense was a significant contributing factor to the length of the proceedings.

⁴⁹ An example may be U.S. Steel, which prevailed in the U.S. Supreme Court against a government monopolization challenge, *United States v. United States Steel Corp.*, 251 U.S. 417 (1920), but whose market power and market share were ultimately (if slowly) constrained and then reduced by strategic company decisions, the development of new metals, and later foreign imports. See Thomas K. McGraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment Decisions, and Market Share, 1901-1938*, 49 J. ECON. HIST. 593 (1989).

III. REMEDIES FOR THE PRESENT

Despite this rich past, remedies at present are limited by three factors. First, the substance of monopolization law has narrowed, generating fewer cases for which remedies are deemed necessary or desirable. Second, the shadow of the *Microsoft* case looms large in requiring a strong causal connection between the nature of the violation and the appropriate remedy. Finally, cases like *Trinko*⁵⁰ and *Credit Suisse*⁵¹ suggest that we must also look to the regulatory sector, and not just antitrust law, in crafting appropriate remedies for the abuse of monopoly power.

A. THE NARROWING OF MONOPOLIZATION ITSELF

Discerning the state of monopolization remedies at present requires at least brief mention of the state of the substance of monopolization law. Without a successful monopolization judgment, settlement, or consent decree, there is no occasion to craft a judicial remedy.

The supply of successful monopolization cases, while always small, has narrowed further in recent years. The U.S. Department of Justice has not brought any significant monopolization cases since *Microsoft*.⁵² The FTC's monopolization caseload has focused on issues relating to abuses of governmental processes and to standard-setting organizations, with mixed results so far in the courts.⁵³ Post-*Microsoft*, state enforcers have brought few monopolization cases, and/or confined their efforts to highly localized situations, instead focusing their resources on other types of antitrust cases.⁵⁴

Private cases, as noted above, typically involve private treble damages and rarely involve significant injunctive or structural relief. In addition,

⁵⁰ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁵¹ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

⁵² See Thomas O. Barnett, *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, *infra* this issue, 76 ANTITRUST L.J. 31 (2009).

⁵³ But see Peter Whoriskey, *Antitrust Inquiry Launched into Intel; FTC to Review Firm's Practices*, WASH. POST, June 7, 2008, at D1 (reporting FTC investigation into dominant microprocessor manufacturer).

⁵⁴ One example was the Minnesota Attorney General's investigation of Waste Management's contract terms, which allegedly served to entrench the firm's monopoly for waste hauling in that state. As part of a settlement, Waste Management agreed to change its contract terms. Even this case was to some extent a follow-on to previous federal antitrust litigation in the 1990s on the same subject in different markets. See Press Release, Office of the Minnesota Attorney General, Attorney General Lori Swanson Settles Monopolization Charges Against Waste Management of Minnesota, Inc. (Dec. 24, 2007), available at http://www.naag.org/assets/files/pdf/antitrust.MN-Waste_Management_suit.pdf. See generally <http://www.naag.org/antitrust/search/results.php?q=Monopolization&Search=Search> (database of all state cases involving any allegation of monopolization by itself or in combination with other allegations since 1990).

private suits are subject to significant limitations that do not come into play for public monopolization cases—including standing, antitrust injury, the direct purchaser requirement, and higher burdens for injunctive relief, to name a few. Finally, the law has simply changed in ways that make it significantly harder for any plaintiff to win a monopolization case in comparison to decades past.⁵⁵

B. REMEDIES À LA MICROSOFT

The 2001 D.C. Circuit *Microsoft* opinion created a roadmap for a successful modern monopolization case and the resulting remedies. That court established a standard akin to the rule of reason in order to establish a violation of Section 2 of the Sherman Act. The court stated:

First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. "The [Sherman Act] directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."

Second, the plaintiff, on whom the burden of proof of course rests, must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by a private plaintiff, the plaintiff must show that its injury is "of 'the type that the statute was intended to forestall,'" no less in a case brought by the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.

Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a "procompetitive justification" for its conduct. If the monopolist asserts a procompetitive justification—a non-pretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim. . . .

Fourth, if the monopolist's procompetitive justification stands un rebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit. In cases arising under § 1 of the Sherman Act, the courts routinely apply a similar balancing approach under the rubric of the "rule of reason." The source of the rule of reason is *Standard Oil Co. v. United States*, in which the Supreme Court used that term to describe the proper inquiry under both sections of the Act. . . .

⁵⁵ See, e.g., *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) (creating rigorous test for predatory pricing and essentially eliminating subsequent successful cases based on this theory); *United States v. Microsoft Corp.*, 253 F. 3d 34, 89–85 (D.C. Cir. 2001) (treating software tying under full rule of reason).

Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.⁵⁶

In reality, the standard is even somewhat more forgiving for defendants, since the *Microsoft* court never really engaged in the final step of balancing the pro- and anticompetitive effects of the defendant's conduct. Whenever Microsoft was able to articulate a factually and legally justifiable business justification, it prevailed. When it did not, the government prevailed. But in no instance did the court explicitly balance anticompetitive harm and procompetitive justification. Nor do most courts do so in most rule of reason cases.⁵⁷ At the end of the day, we end up with something akin to the standard of "no economic sense" that the government and others advocated in the *Trinko* litigation⁵⁸ and a rather limited universe of successful monopolization cases to analyze in terms of remedies.

In terms of remedies, *Microsoft* offers only a few tantalizing, but important, clues. The appellate court's direct task was rather easy since it could reverse with ease the order of dissolution, because of the failure of the trial court to provide an adequate hearing on remedies, and because of the rejection of certain theories of liability that were the apparent basis for the drastic remedy ordered by the trial court. As a result of this double-barreled ruling, the D.C. Circuit did not directly face the issue of what the proper remedy should be on remand. It nonetheless strongly hinted at how inappropriate the dissolution of an integrated unitary defendant was in the absence of unusually strong proof of wrongfully acquired monopoly power.⁵⁹ More significantly, it stressed that any appropriate remedy, whether divestiture, equitable relief, or damages, must be based on a sufficient and significant causal connection between the wrongdoing and the dominant market position of the defendant.⁶⁰

⁵⁶ *Id.* at 58–59 (citations omitted).

⁵⁷ Michael Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265.

⁵⁸ Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner § II.2, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (filed May 23, 2003), available at <http://www.usdoj.gov/atr/public/appellate/appellate.htm#2003>.

⁵⁹ *Microsoft*, 253 F.3d at 105–06.

⁶⁰ *Id.*

C. REGULATORY REMEDIES

As remedies narrow in the traditional antitrust arena, they may well expand in the regulatory arena. The past few years have seen an embrace of regulatory solutions to competition problems that is the reverse of the previous thirty years of deregulatory fervor. Beginning in the 1970s, traditional regulation was challenged as failing to serve efficiency, consumer welfare, or the broader public interest by virtue of capture, abuse, and/or perverse incentives on the part of the firms subject to regulation.⁶¹ Industry after industry—including energy, transportation, and telecommunications—went through a deregulatory process in which increased antitrust enforcement played a prominent role in preserving competition and protecting consumers in newly emerging competitive marketplaces.

The courts already had in place narrow doctrines of preemption, implied immunity, and primary jurisdiction, which aided the substitution of antitrust principles in place of regulatory review. As the Supreme Court noted: “Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.”⁶² As the Court emphasized: “Repeal is to be regarded as implied only if necessary to make [the regulatory regime] work, and even then only to the minimum extent necessary.”⁶³

More recently, the Supreme Court in both *Trinko*⁶⁴ and *Credit Suisse*⁶⁵ suggested a very different attitude toward the relationship between antitrust and regulation. In *Trinko*, the Court accepted that the 1996 Telecommunications Act did not repeal the antitrust laws (in part due to the presence of an antitrust savings clause in the statute), but nonetheless held that the complaint in question stated no cause of action under the antitrust laws and that the remedies, if any, lay under the regulatory regime. The *Trinko* opinion spoke in terms of the value added by antitrust to the regulatory scheme in place and concluded that:

One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided

⁶¹ See e.g., ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1970).

⁶² *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350–51 (1963).

⁶³ *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

⁶⁴ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

⁶⁵ *Credit Suisse Sec. (USA) LLC v. Billing*, 127 S. Ct. 2383 (2007).

by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny.⁶⁶

Similarly, in *Credit Suisse*, the Court discussed the interface between antitrust and regulatory remedies in these terms and found implied preemption and “clear repugnancy,” despite the presence of a general savings clause in the securities litigation in question. The Court implicitly adopted *Trinko*’s valued-added approach to the selection of remedies and noted that “any enforcement-related need for an antitrust lawsuit is unusually small” given the expertise of the complex and comprehensive regulatory system expertly administered by the SEC.⁶⁷

If we take *Trinko* and *Credit Suisse* seriously, we must look first to available regulatory rules and remedies, as opposed to using antitrust as the default system of liability and remedies. Much of the focus of our analysis of remedies then shifts to the regulators, the legislatures that create them, and the courts that interpret their mandates and review their decisions. Regulatory legislation needs greater precision about rights, remedies, savings clauses, and the relationship between the antitrust laws and the regulatory regimes being created or modified. Federal, state, and local regulatory agencies need greater awareness of the role they are being asked to play as the front-line guardians against the abuses of monopoly power. They will also need greater resources, expertise, and commitment to competition principles to do this job effectively. Private remedies under these statutes also need to be effective, lest the current deference to regulation in antitrust cases creates the worst of all possible worlds where the abuse of durable monopoly power falls between the cracks of both antitrust and regulatory regimes.

IV. A FUTURE ABOUT ACCESS AND INFORMATION (AND WHY THAT MIGHT BE A GOOD THING)

The future is likely to look much like the past, with two prominent exceptions relating to access and information.⁶⁸ Public monopolization

⁶⁶ *Trinko*, 540 U.S. at 412.

⁶⁷ *Credit Suisse*, 127 S. Ct. at 2396.

⁶⁸ Some approaches that will not be seen any time soon in the United States include criminal prosecution, civil fines, and forfeitures. Criminal prosecution is the only current means by which the United States can impose fines on an antitrust defendant. In the monopolization area, this approach has been abandoned, and there is no support for its return any time soon. Similarly, statutory amendments to permit the imposition of civil fines as a remedy for monopolization (or other antitrust violations) have been debated from time to time but have been rejected by the recent Antitrust Modernization Commission and stand little chance of adoption. ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 285–91 (2007) (recommending against creating civil fine remedy); Stephen Calkins, *Civil Monetary Remedies Available to Antitrust Enforcers*, 40 U.S.F. L.

cases will remain the primary antitrust enforcement mechanism, but episodic in nature, and with relief almost *sui generis* in each case. Despite the lip service given to the importance of divestiture as a remedy, it will be limited to three main situations. First, where the monopoly was illegally acquired, divestiture will be considered in order to restore the competitive situation that existed before the illegal acts, particularly if other forms of relief are deemed ineffective. Second, divestiture will be more likely where the monopoly power arose out of a merger or other combination and the transaction can be relatively easily unwound, drawing on the accumulated wisdom from relief in Section 7 Clayton Act cases. Third, divestiture will be implemented when the defendant can be broken into separate parts relatively painlessly, either horizontally, vertically, or through the separation of regulated versus unregulated operations.

One is therefore likely to see an increasingly complex series of behavioral remedies and injunctions that require innovative monitoring and compliance obligations that strain the capabilities of courts alone to administer. Courts are likely to turn to special masters, alternative dispute resolution mechanisms, compliance committees, cooperative relationships with sectoral regulators, and private bargaining in the shadow of the law to enforce these obligations to avoid the experience of the court acting as a *de facto* long-term regulator as it did under the Modified Final Judgment in the *AT&T* case.⁶⁹ Finally, parties in antitrust litigation need to draw upon experience in other areas of complex litigation to gain the benefit of that experience in administering and monitoring complex injunctive relief.

Future monopolization cases and their remedies are likely to feature an increased emphasis on information disclosure and non-discriminatory access. Simply put, *disclosure is divestiture* when it comes to our high-tech, information-based, intellectual property-driven economy. Cases like the FTC's consent decree with Intel show the importance of information and disclosure as a remedy for alleged exclusionary conduct in connection with the ongoing relationship between licensors and licen-

REV. 567 (2006) (discussing the Antitrust Modernization Commission Report). For better or worse, the United States will not pursue the path of the European Union and others where a defendant enterprise can be fined up to 10 percent of its annual turnover as a tool in abuse cases. Finally, U.S. law permits forfeiture of a defendant's property in certain circumstances, but this too is a matter of ancient history and only rarely enforced. 15 U.S.C. § 6. See generally Michael A. Duggan, *Some Lesser Penalties of Antitrust*, 8 AM. BUS. L.J. 247 (1971).

⁶⁹ *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

sees.⁷⁰ Similarly, the essence of the relief and compliance issues in the *Microsoft* cases in the United States and the European Union is whether Microsoft has or has not disclosed sufficient information to create a more competitive environment for alternative Windows-based software applications and alternative operating systems. Although not seriously pursued in either jurisdiction, the licensing of the Windows source code would have constituted just such a divestiture by disclosure.

In addition to information and disclosure, access and interoperability will be the other key components of monopolization litigation and remedies for the foreseeable future. While I do not go as far as some commentators in suggesting access is the only issue to matter,⁷¹ access to networks, platforms, and other forms of infrastructure is already the focus of the debate in antitrust, telecommunications, and most regulated industries. Antitrust needs new tools and traditional tools like the essential facilities doctrine to determine when access is required, when non-discriminatory access is necessary, when antitrust liability ensues for denials of access without legitimate business justification, and how to create effective remedies for such violations. As I have argued elsewhere,⁷² U.S. antitrust needs a revitalized form of the essential facilities doctrine to address these questions at precisely the time when we appear to be on the verge of jettisoning this traditional tool altogether. Similarly, the European Union needs a sounder foundation for its increasing use of its version of the essential facilities doctrine, so that its decisions and remedies will be applied and enforced on a sound and consistent basis.⁷³

Looking at the *Microsoft* case in both the United States and the European Union from this perspective suggests only a partial victory for competition policy in both jurisdictions. The United States was correct in barring the specific practices that harmed Netscape's access to customers and OEMs, but probably did not go far enough to ensure a future of access and interoperability between Windows and other applications and middleware software products. In the European Union, the required information disclosures in the server operating system market appear to be on the verge of allowing a significant competitor to offer a

⁷⁰ Intel Corp., Decision & Order, FTC Docket No. 9288 (Aug. 3, 1999) (cease and desist consent order), available at <http://www.ftc.gov/os/1999/08/intel.do.htm>.

⁷¹ Kevin Werbach, *Only Connect*, 22 BERKELEY TECH. L.J. 1233 (2007).

⁷² Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTI-TRUST L.J. 1 (2008); Spencer Weber Waller, *Areeda, Epithets, and Essential Facilities*, 2008 WIS. L. REV. 360.

⁷³ Frischmann & Waller, *supra* note 72, at 57–64.

competing server operating system that interfaces seamlessly with Windows, but it is simply too early to tell.⁷⁴

On the bundling side of the EU case, the remedy—requiring an unbundled Windows to be sold alongside the fully bundled Windows at the same price⁷⁵—appears to offer almost nothing to consumers in terms of meaningful choice or access. In this regard, it appears even less effective than the remedy proposed by Microsoft: including a disk containing competing media players with every copy of Windows.

Think for a moment about the important monopolization issues that have arisen but have not yet been decided. They include (1) access to iTunes and its compatibility with other hardware to play downloaded audio and video; (2) potential future questions of access to the Google book project as it becomes a vital tool for basic research;⁷⁶ (3) when a defendant has the obligation to license intellectual property; and (4) more generally, access to the full range of intellectual infrastructure that is being developed and deployed in the global information economy. Non-discriminatory access to the new infrastructure, and the required information disclosures to make it happen, are likely to be the new battleground when these rare, but dramatic, public monopolization cases arise and a violation is found. As the focus of monopolization remedies shifts from physical to virtual divestiture and access/interconnection, there is likely to be an increased focus on innovative compliance mechanisms to assist courts and other tribunals in monitoring disclosure, pricing, and non-discriminatory access. The United States is just beginning to come to grips with the best combination of judicial supervision and

⁷⁴ William H. Page & Seldon J. Childers, *Bargaining in the Shadow of the European Microsoft Decision: The Microsoft-Samba Protocol License*, 102 NW. U. L. REV. COLLOQUY 332, 335 (2008).

⁷⁵ Case COMP/C-3/37.792—Microsoft Corp., Comm'n Decision, 2007 O.J. (L 32) 23, at 300 (art. 6) (Mar. 24, 2004), *available in full at* <http://ec.europa.eu/competition/antitrust/cases/decisions/37792.en.pdf>, *aff'd*, Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601 (Ct. First Instance).

⁷⁶ According to Google: "The Library Project's aim is simple: make it easier for people to find relevant books—specifically, books they wouldn't find any other way such as those that are out of print—while carefully respecting authors' and publishers' copyrights. Our ultimate goal is to work with publishers and libraries to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers." Google, Google Books Library Project: An Enhanced Card Catalog, of the World's Books, <http://www.google.com/googlebooks/library.html>. If Google succeeds in scanning and making available online essentially the entire worldwide library of published books, one can envision issues of access to competitors who provide alternative forms of search capabilities but who cannot legally or practically duplicate the database of scanned books itself. See Brett M. Frischmann, Google Books and the Essential Facilities Doctrine (Feb. 15, 2009), <http://madisonian.net/2009/02/15/google-books-and-the-essential-facilities-doctrine>.

other options—such as special masters, private monitors, compliance committees and trustees, use of expert public regulatory bodies, and alternative dispute mechanisms—to ensure compliance without overburdening the courts. These issues are just a glimmer on the horizon in EU competition jurisprudence at this point, but similarly should be the critical remedy issues as long as the European Commission remains committed to the enforcement of Article 82 and private rights of action in the European Union increase in importance.

V. CONCLUSION

This brief survey of the past, present, and future of monopolization remedies suggests that almost every case of importance has been *sui generis* in terms of remedies and that the courts and agencies have approached the question of monopolization remedies with a combination of creativity, pragmatism, and caution. Future monopolization remedies in traditional industries are likely to reflect a combination of behavioral relief, injunctions, and restitution, with divestiture as a last resort under most circumstances. Regulatory remedies will grow in importance as long as the Supreme Court continues to narrow antitrust law's domain over regulated industries. Most importantly, questions of access, information disclosure, and virtual divestiture will grow in importance as monopolization cases focus on intellectual property and information-related industries.

