EXTINGUISHING THE NEW GREAT FIRE OF CHICAGO: WHY COURTS SHOULD RELY ON THE "CHICAGO THEORY" TO PROMOTE PETROLEUM MERGERS

Christopher L. Lucas[*]

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[*] J.D., cum laude, 2004, Michigan State University College of Law; B.A., Economics and Business, with distinction, 2000, Virginia Military Institute. The author is an associate with Troutman Sanders LLP in its Tysons Corner, Virginia office. Before attending law school, the author worked as an economic analyst in Washington, D.C. While attending law school, the author was an editor for the *Michigan State Law Review*. The author would like to thank Professor Elliot Spoon for his meaningful insight and helpful comments on this article, and would also like to give a special thanks to his parents, family, friends and colleagues for their continuous support.

INTRODUCTION

Almost everyone over the age of sixteen has been there: the numbers on the meter quickly move higher and higher as more gasoline flows into your car. The more gallons you put into the car, the more dollars you take out of your wallet. As consumers, we pay for commodities such as gasoline, so we can drive our cars. We rely so heavily on this commodity as consumers that we are willing to tolerate the recent continual rising cost of the product.[1] But do we rely on it too much?

The United States consumes so much oil in the production of gasoline (as well as other end products) that it cannot produce enough of it from its own soil, and is forced to import about eight million barrels a day.[2] The significant reliance on this commodity leaves consumers disadvantaged because the price of oil directly affects the price of a gallon of gas.[3] Oil is expensive. It is expensive to search for, it is expensive to drill for, it is expensive to refine, and it is expensive to ship. In fact, it costs massive corporations in this capital-intensive industry such as ExxonMobil, ChevronTexaco and BP-Amoco, anywhere from $10 to $30 per barrel of crude oil.[4] These hefty costs of oil are incurred so consumers can have gasoline to fuel their cars, planes, boats, and other means of transportation.

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[1] *See Remembering the Oil Embargo…and Preparing for the Next Storm*, ALTERNATIVE FUEL NEWS, Vol. 2. No. 5, *available at* http://www.eere.energy.gov/cleancities/ccn/archive /2_5cover.html.

[2] *See id.*

[3] *See Statement of J. S. Carter, Regional Director of ExxonMobil Fuels Marketing Company: Hearing Before the Senate Permanent Subcomm. on Investigations*, 107th Cong. (2002), *at* http://www.senate.gov/~gov_affairs/043002carter.htm (statement of J.S. Carter, Regional Director, United States ExxonMobil Fuels Marketing Company). "Every one dollar change in the price of a 42-gallon barrel of crude oil results in a two to three cent per gallon increase in the cost to produce a gallon of gasoline." *Id.* ¶ 19.

[4] *See id. See also* Patrice Hill, *World Crises Send Oil Prices Soaring*, THE WASHINGTON TIMES, Jan. 21, 2003, *at* http://nucnews.net/nucnews/2003nn/0301nn/030121nn.htm#610. Externalities such as war, can cause oil prices to continually rise to higher levels. With a potential conflict between the United States and Iraq, oil prices rose to $34 a barrel in late January 2003, and are expected to rise to $35 per barrel in February 2003, and could rise above the record set during the 1991 Gulf War of $40 per barrel, should the U.S. use military action against Iraq. *Id.*

In considering these exorbitant costs, it is often a question of how these corporations can have and maintain the capital necessary to purchase such an expensive good. Therefore, what would happen if these large corporations were broken up and subsequently had less money to spend for that oil? The old economic theory of supply and demand would explain that the price of oil would be determined by what the consumers were willing to pay for it in their consumption of the end product made from that oil.[5] Therefore, assuming that consumer demand keeps the cost of oil high, if all the oil companies were smaller and less capitalized, there would only be so much they could spend in oil production to maintain profitability. With this in mind, it is questionable whether a smaller oil company (perhaps a startup oil company) could be able to afford the inescapable high costs of oil production to produce the end product of gasoline. If it could, then theoretically, the firm would likely have to raise prices higher than they are now just to make a small profit. In essence, whether the consumer is really better off with smaller firms in a capital-intensive industry like the oil and petroleum industry is a matter of significant debate.

On August 30, 2002, Phillips Petroleum Company and Conoco completed a merger worth $15.1 billion after receiving unanimous approval from the Federal Trade Commission (FTC).[6] This merger made PhillipsConoco the third-largest oil and gas company in the United States, behind ExxonMobil and ChevronTexaco.[7] Moreover, on October 1, 2002, Shell Oil Company acquired Pennzoil Quaker State Company for $1.8 billion, after receiving approval from the

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[5] *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 98-99 (2d ed. 1994). Elasticities of supply and demand are determined by certain economic factors, "such as the level of output, the availability of substitute products, and the ease with which suppliers can alter production." *Id.* at 99. Therefore, if the price of a good, such as oil, rises 1 percent, a demand curve would be "elastic" as the demand of oil would fall more than 1 percent. *See id.* at 98-99.

[6] *See* David Ho, *$15.1 Billion Phillips/Conoco Merger Approved*, TOPEKA CAPITAL J., Aug. 30, 2002, *available at* http://cjonline.com/stories/083102/bus_merger.shtml.

[7] *See id.*

FTC.[8] These are the latest mergers in an industry that has been consolidating for the last five years.[9]

What is causing this "merger mania" within the oil industry? It could be that firms are trying to find a better way to compete. Moreover, they may be trying to cut the exorbitant costs of producing oil. Should we as consumers worry about the creation of massive billion dollar corporations, like the oil conglomerates described above? Additionally, why are the FTC, Department of Justice (DOJ) and Supreme Court allowing such mergers?

Corporate consolidation is nothing new in the United States. Since the 1890s, mergers and acquisitions have been a significant part of American commerce.[10] It was also during the timeframe of the 1890s when the U.S. saw rapid growth in businesses from railroads to manufacturing.[11] From this growth came businesspersons who wished to create organizations that were able to literally buy out competitors and essentially starve out remaining competition.[12] A classic example of this type of "businessperson" was John D. Rockefeller. Rockefeller created the Standard Oil Company, which was a massive oil company formed in the late 1800s that eventually controlled ninety percent of the industry's refining capacity. In 1911, the Standard Oil Company was broken up into thirty-eight companies after the Supreme Court held that the company was a monopoly.[13] Exxon, Mobil, Amoco and Chevron are among some of the more prominent oil companies that were formed from the broken up company.[14]

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[8] *See* Associated Press, *Shell-Pennzoil Merger Approved*, *at* http://investmentsmagazine.com/managearticle.asp?c=100&a=474 (Sept. 29, 2002). Pennzoil Quaker State Company is the largest motor oil manufacturer in the United States. *See id.*
[9] *See id.*
[10] *See* Richard Jensen, *Bill Gates – Another Rockefeller or Another Ford?*, HISTORY NEWS SERVICE, June 23, 2000, ¶ 5, *at* http://www.h-net.org/~hns/articles/2000/062300a.html.
[11] *See id.* ¶ 7.
[12] *See id.* ¶¶ 7-8
[13] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 80-82 (1911).
[14] *See* Jensen, *supra* note 10, ¶ 9.

The decision in *Standard Oil Co. of New Jersey v. United States*[15] was one of a few cases that set the tone for the next fifty years of antitrust law.[16] While mergers and acquisitions continued to take place, they did not happen very often, and if they were ever reviewed, the courts applied strict scrutiny.[17] It was not until the late 1970s and early 1980s that the government began to alter its analysis of antitrust.[18] This new form of thinking brought in a new form of antitrust policy and analysis that relied on economic theory.[19] Arguing that the market protects itself from predatory pricing and therefore courts should be more tolerant of a firm's use of low pricing tactics to compete more effectively, the new theory's simplified economic models convinced courts to follow its thinking.[20] This theory of economic analysis, which began in 1958 by a group of University of Chicago professors, is now known as the "Chicago Theory."[21]

Arguing that antitrust laws are aimed at the "sole goal of consumer welfare or efficiency," during the decades of the 1970s and 1980s, the Chicago Theory became *the* source of economic analysis for influencing numerous courts in the nation, including the U.S. Supreme Court.[22] Because the Chicago Theory offered a more amicable economic analysis in support of

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[15] Other important cases decided by the Supreme Court included N. Sec. Co. v. United States, 193 U.S. 197 (1904) and Bd. of Trade of Chicago v. United States, 246 U.S. 231 (1918).

[16] *Standard Oil* was a landmark antitrust case because it was the first case to introduce the rule of reason analysis. *See* CARLTON & PERLOFF, *supra* note 5, at 819. With this analysis, the Court would have to "investigate whether the resulting effect of the merger was an unreasonable restraint of trade." *Id.* The Court, however, still "vigorously" [applied] antitrust laws to enjoin merger activity." *Id.*

[17] In United States v. United States Steel Corp., 251 U.S. 417 (1920) and United States v. Columbia Steel Co., 334 U.S. 495 (1948), the Court refused to find either firm in violation of antitrust law; and as a result, in 1950 Congress passed the Celler-Kefauver Act, which made Section 7 of the Clayton Act more strict in enforcing merger activity regulations. *See* CARLTON & PERLOFF, *supra* note 5, at 819. *See also* 15 U.S.C. § 15 (2001).

[18] *See* M. Sean Royall, *Symposium on Post-Chicago Economics*, 63 ANTITRUST L.J. 445, 445 (1995).

[19] See *id*.

[20] *See id. See also* Donald J. Boudreaux & Andrew N. Kleit, *How the Market Self-Polices Against Predatory Pricing*, ANTITRUST REFORM PROJECT 4, 5 (1996) *at* http://www.cei.org/gencon/025,01470.cfm. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (With a New Introduction and Epilogue, 1993) (1978).

[21] *See* Boudreaux & Kleit, *supra* note 20, at 2.

[22] RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS (2d ed. 1981). *But see* Gordon B. Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, *in* ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 104-05 (Eleanor M. Fox & James T. Halverson eds., 1984) (arguing that while Chicagoans are correct in their argument that

the consolidation of various industries, it was during this time period when the United States experienced a rise in the number of mergers and acquisitions.[23] While Chicago Theory support grew rapidly in the 1980s, skeptics began calling for a "'post-Chicago' antitrust policy that would take the best that the Chicago [Theory] had to offer…and then develop an antitrust policy that was more sensitive to market imperfections."[24] This new theory began to gain more attention over time, and by the 1990s, this post-Chicago thinking (the Post-Chicago Theory) became a second theory of analysis for courts to use in ruling on antitrust cases.[25]

Today, the Chicago Theory remains strong, but nevertheless has lost some ground.[26] Thus, with all of these recent mergers in the petroleum industry, the question is whether the Chicago Theory is the best economic analysis for commerce in the United States today. This comment seeks to evaluate both the Chicago and Post-Chicago Theories and will explain (1) why the Chicago Theory is the best form of economic analysis for our courts in making the appropriate decisions in antitrust suits; (2) why the Supreme Court's (as well as the FTC, DOJ and other courts') use of the Chicago Theory to analyze antitrust concerns in capital-intensive industries (such as the petroleum industry) is more beneficial to commerce and the nation's economy than its use of the Post-Chicago Theory; and (3) why the theories of Chicago protect both consumers and commerce through the "efficiencies" of running businesses.

I. BACKGROUND

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their Theory has influenced the Supreme Court's decisions in antitrust cases, there is nothing in the Court's decisions to show that the Chicago Theory is the only economic theory that influences the Court in making its decisions).

[23] *See* BORK, *supra* note 20, at xi ("The Chicagoans applied economic analysis more rigorously than was common at the time to test the propositions of the law and to understand the impact of business behavior on consumer welfare.").

[24] Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 258 (2001).

[25] *See id. See also* Malcome B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795, 795 (2001). *See also* Royall, *supra* note 18, at 445.

[26] *See* Hovenkamp, *supra* note 24, at 258.

A. The Chicago Theory

The 1970s and 1980s brought great opportunities to corporations seeking simpler ways of growth, as competition began to expand beyond into the global arena. Firms seeking to gain an edge on their competitors found that merging or acquiring other companies with similar core competencies would create faster growth in order to remain dominant in their respective industries. Many economists say that industry consolidation was attributed to the Chicago Theory's stance on various anticompetitive acts including predatory pricing.[27]

At the time of its inception, the Chicago Theory of economic analysis was unlike any other kind of thinking. "Until the 1950s, economists and legal experts agreed predatory pricing was an effective means of monopolizing markets."[28] The old theory of predatory pricing was that a firm could achieve a monopoly by pricing below the cost to produce the good, thus allowing the "predator" (i.e., the firm pricing below cost) to force its competitors to price below cost in order to effectively compete.[29] Theoretically, the predator would have enough assets to sustain a protracted loss as a result of the artificially low prices, and would thereby drive its rivals out of business since the rivals could not sustain the matching of low prices for a long period of time.[30] Therefore, with its competitor's no longer in business, the predator would then gain monopoly power in its respective industry, and in turn would have the ability to raise the artificially low prices to very high levels, without having to worry about other competitors trying to undercut the monopolist in prices.[31] Economists and legal scholars alike felt that the only way to combat such predatory tactics, was for courts and federal antitrust agencies to stop companies

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[27] *See, e.g.,* Richard J. Pierce, Jr., *Is Post-Chicago Economics Ready for the Courtroom? A Response to Professor Brennan*, 69 GEO. WASH. L. REV. 1103, 1105-6 (2001).
[28] Boudreaux & Kleit, *supra* note 20, at 2.
[29] *See id.*
[30] *See id.*
[31] *See id.*

from charging such artificially low prices in the first place.[32] As a result, for more than half a century, the federal government and many courts believed that these tactics were what they should look for when policing commerce.[33]

Although this was logical thinking in theory, economists at the University of Chicago, felt that this way to combat monopolies (as a result of predatory pricing) was incorrect in the actual marketplace.[34] The Chicago theorists felt that the regulation of predatory pricing was doing more harm than good as it threatened competition by giving less efficient firms the ability to sue more efficient rivals because the tactic of predatory pricing could not actually work in real life.[35] Thus, the backbone of thinking behind the Chicago Theory is that while the concept of predatory pricing is an understandable concern on paper, in reality predatory pricing cannot work, because even if a predatory-pricing firm succeeds in causing its competitors to go out of business, new competitors will enter once the predatory-pricing firm begins charging monopoly prices to recoup its price war losses.[36] "This new competition keeps the predator from recouping the losses it necessarily incurred by pricing below cost during the predation period."[37] Therefore, the Chicago Theory believes that it is because of this threat of new competition that keeps firms from predatorily pricing.[38] Furthermore, the Chicago Theory argues that predatory pricing cannot survive in today's competitive market, as it is an inefficient way of forcing competitors out of business. A predatory-pricing firm not only incurs substantial losses resulting

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[32] *See id.*
[33] *See id.*
[34] *See* Boudreaux & Kleit, *supra* note 20, at 2. S*ee also* John McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 137-69 (1958). *See also* Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 648 (1989). *See generally* BORK, *supra* note 20.
[35] *See* Boudreaux & Kleit, *supra* note 20, at 3-4.
[36] *See id.* at 3. *See also* Baker, *supra* note 34, at 648-49. Even if a predatory pricing forces its competitors to exit the market, the resulting high monopoly price by the predator will bring back new competitors offering lower prices. *See id.*
[37] Boudreaux & Kleit, *supra* note 20, at 3. *See also* Baker, *supra* note 34, at 648-49.
[38] *See id.*

from its below-cost sales during the price war, but its losses can be larger than its rivals.[39] This is because these non-predator rivals can *reduce* the amounts they sell below cost, while the predator has to *expand* its output during the predation period, in order to hurt its non-predator rivals by taking away their customers.[40] In essence, the firm committing the predatory pricing is actually only causing an early death for itself as entrepreneurs eager to make money will venture into the monopolized industry.[41]

What proponents of the Chicago Theory pointed out was startling to lawmakers and judges alike. Chicago Theory economists were basically asserting that plaintiffs crying foul against their competitors for predatory pricing, were actually more willing to do battle in the courtroom than in the marketplace.[42] Chicagoans pointed out that it was more convenient for a faltering company to sue a dominant competitor than to figure out better ways to catch up with the market leaders.[43] Thus, the heart of the Chicago Theory was that the regulation of predatory pricing was actually harming competition by giving less efficient firms undeserving advantages.[44] Such tactics would not only hurt competition, but would also hurt consumers as the less efficient plaintiff could now effectively compete without having to strive for lower prices and more innovative products. Thus, the Chicago Theory felt that courts needed to understand that a firm's pricing tactic resembling predatory pricing should not be automatically be determined to be illegal.

The courts' form of analysis in predatory pricing cases was not the only antitrust violation challenged by the Chicago Theory. Before the Chicago Theory's influence on courts,

[39] *See id.*
[40] *See id.*
[41] *See id.* "[T]he later monopoly price will not be high enough for long enough to make the predation enterprise profitable." Baker, *supra* note 34, at 649.
[42] *See* Boudreaux & Kleit, *supra* note 20, at 3.
[43] *See id.* at 3-4.
[44] *See id.*

antitrust cases regarding vertical restrictions (also known as vertical restraints)[45] were judged by the "per se rule."[46] Prior to the Chicago Theory, it was typically presumed that vertical restrictions were a violation of antitrust laws because of the per se rule used to analyze them.

In regard to vertical restrictions, the Chicago Theory views such vertical contractual arrangements as an efficient way of doing business. To achieve these efficiencies, firms usually look for a stable source of supply or output by entering into a contractual agreement requiring the party or parties buying the manufacturer's product to resell it in a specific area or region assigned by the manufacturer.[47] Chicagoans argue that in addition to increasing efficiency, vertical restrictions can also help a firm compete more effectively by enhancing a firm's market power.[48] Therefore, the Chicago Theory believes that because such restrictions can actually have some benefit to competition, instead of being considered immediately per se illegal, a court should look into why a defendant firm implemented the vertical restrictions.[49] Thus, if the defendant firm enacted such vertical restrictions in order to remain more competitive in a given industry, then the firm should not be found guilty of an antitrust violation.

In summary, Chicagoans believe that there are four major rules a court should follow in performing its analysis in an antitrust action: First, that markets and competition are not fragile and therefore, the market can protect itself; second, that economic theory without the support of facts remains sufficient to determine the existence of a competitive market; third, that a competitive market can be determined before its respective commerce begins between sellers and

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[45] Vertical restrictions are "contractual limitations on price, other terms, or behavior that one non-integrated firm imposes upon another firm from which it buys or to which it sells." CARLTON & PERLOFF, *supra* note 5, at 926. Vertical restraints are agreements between firms at different levels of distribution in the supply chain that impose restraints of trade on one another. *See* BLACK'S LAW DICTIONARY 1316 (7th ed. 1999).

[46] *See infra* notes 69 & 79 and accompanying text.

[47] *See* ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 290 (4th ed. 1994).

[48] *See id.* at 291. *See also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977).

[49] *See infra* note 70.

purchasers of products; and fourth, that one brand of product will not define a competitive market.[50] Therefore, armed with these "rules" and "economic theories," Chicago theorists essentially believed that courts should use such "rules" and "theories" in lieu of having a judge who would hear facts and expert testimony and often make an incorrect decision because he or she lacked a comprehensive understanding of economics.[51] To keep these judges from making the wrong decisions, Chicago theorists argued that using economic theory (such as explaining how predatory pricing only hurts the predator, as explained above) without having to hear confusing facts or expert testimony on economic analysis would suffice for judges in making their decisions. Thus, courts began implementing the "summary judgment rule." The "summary judgment rule," as introduced in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[52] enabled courts to give a summary judgment ruling in favor of the defendants in an antitrust suit if either rational economic theory could explain the defendant firm's reasons for doing the alleged anticompetitive act, or the plaintiff's theory did not make sense.[53]

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[50] *See* Timothy J. Brennan, *Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in* United States v. Microsoft, 69 GEO. WASH. L. REV. 1042 (2001). *See also* Ronald S. Katz & Janet S. Arnold, Eastman Kodak Co. v. Image Technical Services, Inc.*: Downfall of the Chicago School of Antitrust Economics*, *in* NEW DIRECTIONS IN ANTITRUST LAW AFTER KODAK AND TICOR: MARKET DEFINITION, SUMMARY JUDGMENT, ECONOMIC THEORY, AND STATE ACTION 3 (1993).

[51] *See* Pierce, *supra* note 27, at 1104. In an article discussing why the Post-Chicago theory of economics is not fit for the courtroom, Professor Richard J. Pierce wrote that:

> Economically naïve judges and Justices approved or disapproved of forms of behavior based on their untutored general impressions that the conduct at issue was good or bad. These results were not pretty. The Supreme Court often approved of conduct that had extreme adverse effects on consumer welfare, including classic price-fixing cartels, and even more often, it prohibited conduct that could only improve the performance of a market and enhance consumer welfare.

Id. (footnote omitted).

[52] 475 U.S. 574 (1986).

[53] *See* GELLHORN & KOVACIC, *supra* note 47, at 233-34, 469-70; *see also* Ronald S. Katz & Douglas E. Rosenthal, *The Benefits and Burdens of Kodak from a Litigant's Perspective*, *in* NEW DIRECTIONS IN ANTITRUST LAW AFTER KODAK AND TICOR: MARKET DEFINITION, SUMMARY JUDGMENT, ECONOMIC THEORY, AND STATE ACTION 90 (1993).

1. *The Supreme Court's Promotion of The Chicago Theory*

Over time, the Chicago Theory's critical view of predatory pricing claims began to attract the eyes of both state and federal courts and by the 1970s, almost eighty years of precedent was altered or overturned.[54] The Supreme Court has followed the guidance of the Chicago Theory since 1977, after using Chicago Theory economic analysis in *Continental T.V., Inc. v. GTE Sylvania Inc* (as will be explained below) to allow a television manufacturer / retailer to keep other retailers from selling franchised products in places other than in specified locations.[55] Since *Sylvania*, the Supreme Court has looked to the Chicago Theory in primarily eight other landmark decisions, from 1977 to 1993.[56] For almost two decades, the Chicago Theory influenced the holding of numerous antitrust cases heard by the Supreme Court. During this timeframe, the Chicago Theory reached its peak.[57]

2. *Case Law Influenced by the Chicago Theory*

While the Chicago Theory has influence numerous decisions handed down by the Supreme Court since the late 1970s, *Continental T.V., Inc. v. GTE Sylvania Inc.* and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* are perhaps two of the more significant cases the Chicago Theory had an influence on in their holdings. In fact, it is argued that the two cases are pillars to the Chicago Theory and without them, "the Chicago School is greatly weakened."[58]

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[54] *See* Baker, *supra* note 34, at 645. *See also* Boudreaux & Kleit, *supra* note 20, at 4.

[55] 433 U.S. 36 (1977). *See also* Katz & Arnold, *supra* note 50, at 3 (pointing out that "manufacturers had enjoyed wide latitude in imposing vertical restraints on their products" as a result of the *Sylvania* holding).

[56] *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Jefferson Parish Hospital Dist. v. Hyde, 466 U.S. 2 (1984); Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574 (1986); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Bus. Elecs. v. Sharp Elecs., 485 U.S. 717 (1988); Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[57] *See* Timothy J. Brennan, *supra* note 50, at 1052. "In the policy arena, the Chicago school perspective reached an apex under William Baxter as Assistant Attorney General for Antitrust in the Department of Justice from 1981 to 1983." *Id.*

[58] *See* Katz & Arnold, *supra* note 50, at 3.

The *Sylvania* case followed Chicago's perspective by eliminating per se illegality for non-price vertical restraints, holding that vertical restrictions would be subject to a rule of reason analysis.[59] *Matsushita*, on the other hand, supported the Chicago Theory's view that summary judgment should be used to limit the number of frivolous lawsuits brought by firms against competing rivals, holding that if a plaintiff could not bring sufficient economic analysis to prove its claim, then the defendant would be granted summary judgment immediately.[60]

a. *Continental T.V., Inc. v. GTE Sylvania Inc.*[61]

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the United States Supreme Court used the Chicago Theory's rule that economic theory, alone, was enough to prove that a competitive market existed, and as a result of this economic theory[62], Sylvania's limitation of "intrabrand" competition[63] actually facilitated Sylvania to be more competitive in the "interbrand"[64] market.[65] Moreover, because antitrust laws protect this interbrand competition, non-price vertical restraints were legal because it was not the interbrand competition that was being harmed.[66] The Chicago Theory's rule on how economic theory can prove that markets exist, influenced the Court's holding that while vertical restrictions, which limit the number of distributors, could reduce intrabrand competition, such restrictions allowing the manufacturer to control its distribution of

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[59] *See infra* note 77 and accompanying text. *See also* IRWIN M. STELZER, SELECTED ANTITRUST CASES 390 (6th ed. 1981).

[60] *See Matsushita*, 475 U.S. at 575.

[61] 433 U.S. 36 (1977).

[62] One of the key sources of the Chicago Theory that the Court relied on was from former University of Chicago law professor, Judge Richard Posner. *See id.* at 55 (citing Richard Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 285 (1975). *See also* Katz & Arnold, *supra* note 50, at 4-5.

[63] The Court defined intrabrand competition as "the competition between the distributors…of the product of a particular manufacturer." *Sylvania*, 433 U.S. at 52 n.19.

[64] The Court defined interbrand competition as "the competition among the manufacturers of the same generic product." *Id.*

[65] *See* Katz & Arnold, *supra* note 50, at 3, 6-7. The Court cited economic theory by Richard Posner to prove the existence of a competitive interbrand market.

[66] *See id.* at 6-7.

its product, in fact, promoted interbrand competition.[67] As a result of this influence by the Chicago Theory, the *Sylvania* Court affirmed a Ninth Circuit Court of Appeals decision that overruled the "per se rule"[68] of analysis and instead opted for the "rule of reason" [69] standard which ultimately made a plaintiff's claim more difficult to prove in court.[70]

i. *The Facts*

Dissatisfied with the sales of its television sets in the San Francisco area, Sylvania (the defendant), decided to franchise another retailer to sell Sylvania television sets in addition to the petitioner and plaintiff, Continental, who had been quite a successful franchisee for Sylvania.[71] Concerned about its profits being cut into by another competitor in a similar locale, Continental sued Sylvania and claimed that the location of the new franchise was a violation of the original agreement between Sylvania and Continental.[72] Continental claimed that this breach of the agreement was a violation of Section 1 of the Sherman Antitrust Act when Sylvania entered into and enforced "franchise agreements that prohibited the sale of Sylvania products other than from

[67] *See id. See also Sylvania,* 433 U.S. at 54.
[68] The "per se rule" of analysis is used when the courts or Agencies consider whether the agreement is "so likely to harm competition and to have no significant procompetitive benefit…[that it would] not warrant the time and expense required for particularized inquiry…." FEDERAL TRADE COMMISSION AND THE UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 3 (2000), *at* www.ftc.gov/os/2000/04/ftcdojguidelines.pdf [hereinafter ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS]. The per se rule is essentially a "bright-line" test that focuses "solely on whether certain conduct took place." GELLHORN & KOVACIC, *supra* note 47, at 165. *See generally* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965) and 75 Yale L.J. 373 (1966); Thomas J. Piraino, *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685 (1991).
[69] Under the "rule of reason" analysis, the Agencies and courts conduct "a factual inquiry into an agreement's overall competitive effect." ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS, *supra* note 68, at 3. They look to see whether the agreement harms competition by increasing the ability or incentive for the firm to raise prices and/or reduce output, quality and service. *See id.* at 4. It is not unusual for agreements where the likelihood of anticompetitive harm is evident from the nature of the agreement, to have shorter analysis. The courts and Agencies will examine an agreement more closely where an agreement raises possible anticompetitive concerns, but it would not be challenged without detailed analysis. *See id.* If there are signs of anticompetitive harm, "the Agencies [and courts] examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms." *Id. See also* GELLHORN & KOVACIC, *supra* note 47, at 165.
[70] *See Sylvania*, 433 U.S. at 38, 41, 59. *See also* Katz & Arnold, *supra* note 50, at 4.
[71] *See id.* at 39.
[72] *See id.*

specified locations."[73] The jury in the district court found that Sylvania had violated the Sherman Antitrust Act by engaging in a conspiracy which restricted the location of trade, and after treble damages pursuant to 15 U.S.C. § 15,[74] produced an award for the plaintiffs of $1,774,515.[75] The Ninth Circuit, sitting en banc, reversed the lower court's decision on appeal. The court concluded that "Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in [*United States v. Arnold, Schwinn & Co.*[76]] and thus should be judged under the 'rule of reason' rather than the per se rule stated in *Schwinn*."[77]

ii. *The Supreme Court Opinion*

After granting certiorari, the United States Supreme Court made a landmark decision that the per se rule of analysis used in *United States v. Arnold, Schwinn & Co.*[78] was not appropriate in this instance, because there was no showing of any vertical restrictions that would have any "pernicious effect on competition."[79] Furthermore, the Court overruled the per se rule used in

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[73] *Id.* at 40. Section 1 of the Sherman Antitrust Act, states:

> 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 hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or if any other person, $1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

Id. (quoting 15 U.S.C. § 1 (2001).

[74] *See* 15 U.S.C. § 15 (2004) (an injured plaintiff "shall recover threefold the damages by him sustained").

[75] *See Sylvania,* 433 U.S. at 41.

[76] 388 U.S. 365 (1967).

[77] *Sylvania,* 433 U.S. at 41. *See also* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967) (stating that "if there were here a finding that the restrictions were part of a scheme involving unlawful price fixing, the result would be a per se violation of the Sherman Act").

[78] *See generally* 388 U.S. 365 (1967). In *Schwinn*, the United States brought a civil antitrust action against Arnold, Schwinn & Co. for violating the Sherman Antitrust Act by implementing vertical restrictions for territories of bicycle dealers. The lower court entered judgment for Schwinn, and the United States appealed. The Supreme Court held that according to the Sherman Act, Schwinn's acts violated the per se rule because it was unreasonable for a manufacturer (Schwinn) to "restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it" and that if "the manufacturer parts with dominion over his product or transfers risk of loss to another, he may not reserve control over its destiny or the conditions of its resale." *Id. at 379.*

[79] *Sylvania*, 433 U.S. 36 at 58.

Schwinn, noting that the rule of reason test could adequately control anticompetitive effects that result from particular vertical restrictions.[80]

At issue before the Supreme Court in *Sylvania* was whether the restriction on location was legal or per se illegal.[81] To aid in its analysis, the Court looked to *Schwinn* as a case similar to that of *Sylvania*. After comparing *Schwinn* and the instant case, the Court found that while Sylvania's location restriction clause was not as restrictive as the restraint clauses in *Schwinn*, the Court nonetheless found that the two clauses were not distinguishable since both involved disputed clauses that restricted *intra*brand competition.[82] But unlike *Schwinn*, the Court took a different approach to this analysis and felt that there were reasons for allowing Sylvania's actions to continue. The Court saw that competition could be enhanced among *inter*brand competitors if Sylvania was allowed to use more efficient distribution methods.[83] Thus, the importance of promoting competition was more applicable at the *inter*brand level than at the *intra*brand level. Therefore, the Court reasoned that so long as competition between television manufacturers was not harmed, a pervasive location restriction clause was reasonable.[84]

Relying on the Chicago Theory, the Court held that non-price related vertical restraints were not judged under the per se rule, and instead would be governed under the rule of reason standard, thus forcing the plaintiffs to have a higher burden of proof.[85] In using this rule of reason analysis, the Court went on to hold that "[t]he location restriction used by Sylvania was

[80] *See id.* at 58-59.
[81] *See id.* at 50.
[82] *See id.* at 46.
[83] *See id.* at 54.
[84] *See id.* at 56.
[85] *See* Katz & Arnold, *supra* note 50, at 6 (stating that the Court relied on the former University of Chicago professor, Judge Richard Posner's analysis on vertical restraints). *See generally* Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

neither the least nor the most restrictive provision that it could have used."[86] In addition, the Court found that Continental failed to make a showing that the vertical restrictions that Sylvania had imposed had any negative effects on competition.[87]

It was this decision that sent shockwaves through the antitrust world. By overruling the per se rule used in *Schwinn*, the Supreme Court helped promote an economic theory that would not be unsaddled until 1992. From this decision, the Chicago Theory became very influential in the Court's future decisions.[88] By allowing judges to only apply the per se rule of illegality "where the conduct posed extreme dangers to competition," and in addition, holding plaintiffs to a higher burden of proof, the Supreme Court had essentially opened up the doors for firms to find new ways to effectively compete.[89]

The Supreme Court's instantaneous promotion of the Chicago Theory after *Sylvania* was a significant factor in helping corporations find effective ways to compete against industry rivals. In addition to overruling the per se rule used in *Schwinn*, and allowing the rule of reason analysis to play a factor in the Court's decisions, the Court also stated in *Sylvania*, that some vertical restrictions[90] were in fact an effective means of promoting competition.[91] The Court's reasoning behind this was that

> [v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in

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86 *Sylvania*, 433 U.S. at 58 n.29.
87 *See id.* at 58.
88 *See* GELLHORN & KOVACIC, *supra* note 47, at 313.

> Sylvania involved several antitrust firsts: it was the first time the Court expressly overruled a major antitrust doctrine; it was the first time the Supreme Court reversed a former colleague sitting as a trial judge for an error of law [(The trial judge was retired Justice Tom Clark)]; and…it was the first explicit adoption by the Court of the Chicago School approach for testing business conduct under the antitrust laws.

Id. at n.3.
89 *Id.* at 287.
90 While the Supreme Court said that vertical restrictions generally "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," there could be exceptions. *Sylvania*, 433 U.S. at 54.
91 *See id.*

> every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.[92]

Prior to the Supreme Court's ruling on *Sylvania* in 1977, vertical restraints were for the most part, judged under a per se rule of illegality.[93] After *Sylvania*, this form of reasoning completely changed.[94] This is the reason why the *Sylvania* case has been placed under a microscope by Post-Chicago theorists since its holding.

b. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[95]

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the United States Supreme Court relied again on the Chicago Theory for its holding. Following the Chicago School's belief that summary judgment should be granted in favor of a defendant when the plaintiff's argument does not make any economic sense, the Court held that the defendant manufacturer was entitled to summary judgment because the plaintiff's arguments did not conform to economic theory.[96] As a result of *Matsushita* decision, a heavier burden of proof was placed on the plaintiff when bringing an antitrust claim.

i. *The Facts*

In the *Matsushita* case, Zenith Corporation (the plaintiff and respondent) brought suit against twenty-one Japanese consumer electronic products manufacturers, alleging that these manufacturers colluded as early as 1953, to fix prices artificially low in the United States, and fix prices artificially high in Japan to cover the losses of the artificially low prices charged in the United States.[97] The plaintiffs argued that upon driving out all of its American competitors, Matsushita and others would cartelize the American market restricting output and raising prices

[92] *Id.* at 54-55.
[93] *See* GELLHORN & KOVACIC, *supra* note 47, at 291.
[94] *See id.*
[95] 475 U.S. 574 (1986).
[96] *See Matsushita*, 475 U.S. at 575, 597-98. *See also* Katz & Arnold, *supra* note 50, at 5-6.
[97] *See id.* at 577-78.

to artificially high levels.[98] The district court held for Matsushita, finding that there was no evidence to support the inference of a conspiracy because

> (i) some portions of the evidence suggested that petitioners conspired in ways that did not injure [the plaintiffs], and (ii) the evidence that bore directly on the alleged price-cutting conspiracy did not rebut the more plausible inference that petitioners were cutting prices to compete in the American market and not to monopolize it.[99]

The Third Circuit reversed the district court on appeal, holding that that because evidentiary rulings were incorrect, "a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors."[100]

ii. *The Supreme Court Opinion*

The United States Supreme Court granted certiorari to determine whether the Third Circuit applied the proper standards in evaluating evidentiary proceedings, and whether Matsushita could be held liable under antitrust laws for conspiring to create predatory pricing to drive out American competitors.[101] The Court reversed the Third Circuit and held that the American television manufacturers could not recover damages from Japanese television manufacturers for any conspiracy to charge artificially high prices in the American market.[102] Taking the Chicago Theory to new levels of importance, Justice Powell, in writing for the majority, explained that even if the alleged collusive activity between the Japanese manufacturers was true, it would not only be considered illegal under Section 1 of the Sherman Antitrust Act, but most importantly, upon the success of creating a monopoly, once the Japanese manufactures began raising prices, such activity would only benefit the American television

[98] *See id.* at 584.
[99] *Id.* at 579.
[100] *Id.* at 581.
[101] *See id.* at 582.
[102] *See Matsushita*, 475 U.S. at 582-83.

manufacturers as their prices could be made appropriately lower than the Japanese competition, and the American manufacturers would stand only to gain.[103]

Justice Powell's reasoning behind this was that the alleged conspiracy had been going on for more than two decades, and they had still not succeeded in driving out American manufacturers from the American market as RCA and Zenith still had the two largest shares in the American color television market.[104] Therefore, because of the fact that the alleged conspiracy still had not achieved its goal after two decades, it would be virtually impossible for the Japanese firms to ever recoup their losses.[105] Moreover, if the losses incurred by the Japanese firms were substantial, it would take a significant amount of years for the cartel just to break even.[106] Thus, the Court rationally concluded that the alleged conspiracy simply could not happen because the Japanese firms could not "overcome the economic obstacles to the ultimate success of this alleged predatory conspiracy."[107] Because of this conclusion, Justice Powell followed the Chicago Theory's skepticism of predatory pricing in stating that absent any significant barriers to entry, "predatory pricing schemes are rarely tried, and even more rarely successful."[108]

Additionally, the Court adopted the Chicago Theory's view on summary judgment. In their writing, the Court said that any claim that lacked a plausible economic premise would be vulnerable to summary judgment.[109] Thus, the Court made it more difficult for plaintiffs to bring antitrust claims to court. Known to many as the "summary judgment rule," the Court said that if a claim could not be proven with sufficient economic analysis, then the defendant would be

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[103] *See id.* at 583.
[104] *See id.* at 591.
[105] *See id.* at 592-93.
[106] *See id.*
[107] *Id.* at 593.
[108] *Matsushita*, 475 U.S. at 589.
[109] *See id.* at 597-98.

granted summary judgment in its favor, thereby making it more difficult for antitrust claims to be initially promulgated.[110]

B. The Post-Chicago Theories

1. *Post-Chicago in General*

While the Chicago Theory continued to gather support in federal and state courts throughout the 1970s and 1980s, by the 1990s there were a growing number of economists who felt that there were problems with the Chicago Theory.[111] A whirlwind of criticism by economists and antitrust legal scholars came in full force and by 1992, the federal courts, including the Supreme Court (after its ruling in *Eastman Kodak Co. v. Image Technical Servs., Inc.* [112]), began looking to the Post-Chicago Theories in addition to the Chicago Theory for antitrust analysis to aid in its decision making.[113]

One problem with analyzing whether the Post-Chicago Theory or Chicago Theory is more applicable for today's antitrust laws is that there are numerous factions in the Post-Chicago Theory realm. Some Post-Chicago Theory followers believe that mergers yielding a specific percentage of the market share should be blocked immediately. Other Post-Chicago Theory proponents believe that the Chicago Theory as a whole is correct in its skepticism towards predatory pricing and its view on vertical integration,[114] yet feel that there are certain areas, in general, where the Chicago Theory needs revision. However, it is perhaps the largest Post-Chicago faction that disagrees with the Chicago Theory on how courts should decide antitrust

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[110] *See id.*
[111] *See* Royall, *supra* note 18, at 445.
[112] 504 U.S. 451 (1992).
[113] *See, e.g.,* Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451 (1992); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585(1985). *Kodak* and *Aspen Skiing* are two Supreme Court cases which used the Post-Chicago Theory in its analysis. They are arguably the first cases used by the Supreme Court which removed itself from relying solely on the Chicago Theory for antitrust decisions. *See also* Katz & Arnold, *supra* note 50, at 11-12.
[114] "Vertical integration" is when a firm has more than one stage of production or distribution of its goods or services. *See* CARLTON & PERLOFF, *supra* note 5, at 926.

suits. For example, the Chicago Theory embraces the idea that courts should follow the "summary judgment rule" used in *Matsushita*, which says that summary judgment is granted to a defendant when the plaintiff's claim lacks any economic substance or the plaintiff fails to prove that economic theory does not support the defendant's rationale for acting the way it did in the competitive market.[115] In contrast, Post-Chicagoans believe that exhaustive analysis, such as quantifying cross elasticities of demand or "to distinguish robust price competition from reputation-based predatory pricing, or to apply noncooperative game-theoretic models to markets," is the more appropriate method.[116] Therefore, with so many different Post-Chicago factions, it is a safe assumption that anything that does not support the Chicago Theory could be considered a Post-Chicago faction.[117]

Nevertheless, a popular Post-Chicago argument on predatory pricing is that the Chicagoan "recoupment problem" is the sole reason why predatory pricing cannot work.[118] Chicagoans argue that because the predator cannot "recoup" its losses when it raises its prices, new competitors will enter at prices lower than the monopolistic price charged by the predator.[119] Post-Chicagoans argue on the other hand, that while the theory may make logical sense, in reality many firms may fear that the predator firm may again try to drive off competitors by continuously pricing its goods at an artificially low level to drive off any and all potential and current competitors.[120] This is because

> [W]hen a firm predates against a few rivals, it can create a reputation for irrationality. Other rivals who have not experienced predatory competition will now reasonably fear that if they compete strongly with the crazy firm, it will turn and predate against them. So [all competition will] back off. They [in turn,] cooperate with the predator by charging a high price in their

[115] *See supra* note 53 and accompanying text.
[116] Pierce, *supra* note 27, at 1125.
[117] *See* Royall, *supra* note 18, at 445.
[118] *See* Baker, *supra* note 34, at 649.
[119] *See id.*
[120] *See id.*

market.[121]

Thus, this faction of the Post-Chicago Theorists tends to believe that while the Chicago Theory's analysis makes sense on paper, in reality the market is not structured as perfect as Chicagoans assume.

Post-Chicago Theorists also take a different stance on "efficiency."[122] The Chicago Theory "is more skeptical of market power claims than of efficiency claims."[123] Chicagoans believe that all firms within any particular industry strive to maximize efficiencies at all times.[124] Most Post-Chicagoans, on the other hand, argue that many firms, who at one point in time gained a substantial amount of market share through efficiency, no longer adhere to that efficiency mantra, and use "exclusionary conduct" to maintain that market power.[125] The Supreme Court used this theory in its holding in *Eastman Kodak Co. v. Image Technical Services, Inc.*[126]

2. *Eastman Kodak Co. v. Image Technical Services, Inc.*

After nearly two decades of Chicago Theory reasoning influencing numerous federal courts' decisions in antitrust cases, the Chicago Theory took a critical blow from the United States Supreme Court's 1992 ruling in *Kodak*.[127] In *Eastman Kodak Co. v. Image Technical Services, Inc.*,[128] the United States Supreme Court did a 180-degree turn from Chicago, deciding to go in an entirely different direction. Following the Post-Chicago movement, the Court

[121] *Id.*
[122] *See* Steven C. Salop, *Kodak as Post-Chicago Law and Economics*, *in* NEW DIRECTIONS IN ANTITRUST LAW AFTER KODAK AND TICOR: MARKET DEFINITION, SUMMARY JUDGMENT, ECONOMIC THEORY, AND STATE ACTION 29, 31 (1993).
[123] *Id.* at 42.
[124] *See id.* *See also* Boudreaux & Kleit, *supra* note 20, at 3-4. *See also* BORK, *supra* note 20, at 192. "[The Chicago Theory limits] 'competitive effectiveness' to behavior that both maximizes profits and contributes to consumer welfare. It follows that the most efficient firm is simply the firm that has, without collusion or predation, experienced the most success in the marketplace." *Id.*
[125] *See* Salop, *supra* note 122, at 43.
[126] *See Kodak*, 504 U.S. at 451. *See also* Salop, *supra* note 122, at 31, 42-43.
[127] *See Kodak*, 504 U.S. at 477-79 (overlooking defendant Kodak's argument of the use of the "summary judgment rule" as implemented in *Matsushita*). *See* Royall, *supra* note 18, at 445. *See also* Salop, *supra* note 122, at 29.
[128] 504 U.S. 451 (1992).

rejected the Chicago Theory's "rules"[129] which included the premise that "economic theory unsupported by facts was sufficient to determine the existence of markets."[130] The Court also moved away from the Chicago Theory's influenced holding of the *Matsushita* "summary judgment rule" and moved in a direction of having antitrust cases rely more on facts and expert economic analysis, than just economic theory alone.[131]

a. The Facts

Kodak manufactured and sold business machines such as photocopiers and micrographic equipment, with software programs that were not compatible with competitors' machines.[132] Kodak, who also serviced and provided parts for its machines, competed against numerous independent service organizations (ISO's) that began selling parts, refurbished Kodak equipment, and also began servicing and repairing Kodak equipment in the early 1980's.[133] These ISO's provided service to Kodak equipment at prices lower than Kodak, and in some cases was of higher quality than Kodak.[134] In the mid-1980s, Kodak established a policy of selling replacement parts for its machines to only buyers of Kodak equipment who used Kodak service or repaired their own machines.[135] In addition, Kodak and its independent original-equipment manufacturers (OEM's) agreed not to sell parts that fit Kodak equipment to businesses other than Kodak.[136] Kodak also tried to limit ISO's ability to gain access to Kodak parts by continuously pressuring independent parts distributors from selling Kodak parts to ISO's.[137] Unable to obtain

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[129] *See infra* note 50 and accompanying text.
[130] *See also* Katz & Arnold, *supra* note 50, at 3.
[131] *See id.*
[132] *See Kodak*, 504 U.S. at 456-57.
[133] *See id.* at 455-57.
[134] *See id.* at 457.
[135] *See id.* at 458.
[136] *See id.*
[137] *See id.*

parts, many ISO's were forced to go out of business, causing former ISO customers to switch to Kodak service.[138]

As a result of being harmed, the ISO's claimed that Kodak violated Section 1 of the Sherman Antitrust Act by unlawfully tying[139] the sale of parts and the service of Kodak machines, and violated Section 2 of the Sherman Antitrust Act by unlawfully attempting to monopolize the service for Kodak machines.[140] The district court granted summary judgment to Kodak, holding that the ISO's had not provided enough evidence according to Section 1 of the Sherman Act[141] to prove that Kodak had participated in a tying arrangement.[142] The district court also held that "although Kodak had a 'natural monopoly over the market for parts it sells under its name,' a unilateral refusal to sell those parts to ISO's did not violate [Section 2 of the Sherman Act]."[143]

On appeal, the Ninth Circuit reversed the lower court, by first holding that there was evidence suggesting that a tying arrangement might exist.[144] From there, the court looked to see whether Kodak had "'sufficient economic power in the tying [of] product market [parts] to

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[138] *See Kodak*, 504 U.S. at 458.

[139] "Tying" is when one party agrees to "sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 461 (quoting N. Pac. R. Co. v. United States, 356 U.S. 1, 5-6 (1958)).

[140] *See id.* at 459. Section 2 of the Sherman Antitrust Act states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

15 U.S.C. §2 (2004).

[141] Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§1-11 (2001). The Sherman Act gave courts the authority to monitor competitive marketplaces that had little statutory guidance, and create law regarding "permissible practices of market participants." *Pierce, supra* note 27, at 1104.

[142] *See Kodak*, 504 U.S. at 459.

[143] *Id.* (quoting Image Tech. Servs., Inc. v. Eastman Kodak, Co., No. C-87-1686-WWS, at 4, 1988 WL 156332 (N.D.Cal. Apr. 18, 1988) (Memorandum of Opinion and Order Granting Summary Judgment)).

[144] *See id.* at 460.

restrain competition appreciably in the tied product market [service].'"[145] The court reasoned that the district court should not have given Kodak summary judgment, because the court failed to consider the "market power issue."[146] While finding that Kodak's arguments had merit, the court nevertheless found that "'market imperfections can keep economic theories about how consumers will act from mirroring reality'" and therefore market power might be possible.[147] In addition, the Ninth Circuit found that sufficient evidence pointed to Kodak violating Section 2 of the Sherman Act by implementing a parts policy with the intent to monopolize.[148]

b. The Supreme Court Opinion

Granting certiorari, the Supreme Court held in a six to three vote that the ISO's had presented enough facts to prove that Kodak's service and parts policy had monopolistic implications.[149] Furthermore, the Court determined that only after a factual inquiry could proper market definition be given before a summary judgment is granted in favor of Kodak, and that the ISO's had presented enough evidence to prove that Kodak used exclusionary tactics to maintain and strengthen a monopoly on parts and servicing. All of these factors could not be proven by Kodak to be sufficient business justifications.[150]

In affirming the Ninth Circuit's decision to reverse the lower court's issue of summary judgment against claims by ISO's that Kodak had unlawfully tied the service of machines to the sale of replacement parts, the Supreme Court rejected the Chicago Theory's four major "rules"[151]

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[145] *Id.* (quoting Image Tech. Servs. v. Eastman Kodak Co., 903 F.2d 612, 616) [hereinafter *Kodak I*].
[146] *See id.* The Court defines *market power* as "the power to 'force a purchaser to do something that he would not do in a competitive market'…[and would infer] the existence of such power from the seller's possession of a predominant share of the market." *Id.* at 464 (quoting Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 7 (1984).
[147] *Id.* at 460 (quoting *Kodak I*, 903 F.2d at 617).
[148] *See Kodak*, 504 U.S. at 461.
[149] *See id.* at 484-85.
[150] *See id.* at 479-87.
[151] *See infra* note 50 and accompanying text.

that courts were to follow in their rulings in antitrust suits.[152] That is why Kodak's argument that it had a legitimate economic theory which could justify summary judgment against the Plaintiffs, failed.

In the instant case, Kodak argued that even if it had a monopoly share of the parts market, it lacked the necessary market power in the parts market for copiers to violate the Sherman Act.[153] In addition, Kodak (following the Chicago Theory's economic theory that charging monopoly prices will only cause that company charging such prices more harm than good[154]) argued that such acts of tying could in no way be harmful to competition, because it would not have the ability to raise prices above the competitive level, "because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs."[155] The Court disagreed with this argument, and said that Kodak was substituting "particularized facts disclosed by the record" with economic theories.[156]

Kodak argued that it was entitled to be granted summary judgment according to *Matsushita*, because it offered a bona fide economic theory that explained its behavior to be legitimate.[157] This was because many believed that *Matsushita* "imposed a greater burden on plaintiffs in antitrust cases in the summary judgment context than in other cases."[158] The Court felt otherwise, holding that *Matsushita* "did not hold that if the moving party enunciates *any*

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152 *See* Katz & Arnold, *supra* note 50, at 3.
153 *See Kodak*, 504 U.S. at 465.
154 *See infra* notes 36-41 and accompanying text.
155 *Kodak*, 504 U.S. at 466.
156 *Id.* at 467 (quoting Maple Flooring Mfrs. Assn. v. United States, 268 U.S. 563, 579 (1925)). *See also* GELLHORN & KOVACIC, *supra* note 47, at VII-VIII. "*Kodak* indicates doubts about giving decisive effect to economic theory in a limited factual framework, and it suggests how 'post-Chicago' economics may lead courts to sustain theories of competitive harm that the Chicago School disregarded." *Id.*
157 *See Kodak*, 504 U.S. at 465-69.
158 Katz & Arnold, *supra* note 50, at 5. *But see Kodak*, 504 U.S. at 468 (where the Court said that the "requirement in *Matsushita* that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases.")

economic theory supporting its behavior, regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment."[159] Thus, it is the defendant who "bears a substantial burden in showing that it is entitled to summary judgment" when its case is based on economic theory.[160]

C. The Consolidation Trend in the Petroleum Industry

While mergers and acquisitions have been going on for years in corporate America, the late 1990s marked the start of an immense amount of consolidation in industries such as the petroleum industry.[161] The first of this string of mergers came in 1998, when Exxon and Mobil Oil agreed to merge, making it the largest ever undertaken.[162] For this very reason, many skeptics have felt that the FTC should have denied the two massive oil companies the opportunity to merge. However, the FTC nevertheless authorized the merger to go forward with various forced divestments of ExxonMobil's assets, including 2,431 gas stations in the Northeast, Mid-Atlantic, California, and Texas.[163]

Fueled by this consolidation, almost two years later, the FTC approved a merger between British Petroleum (BP) and Amoco. Less than one year later in 2000, the FTC unanimously approved BP Amoco's $27 billion acquisition of Atlantic Richfield Company (ARCO).[164] In accordance with the FTC approval, BP Amoco was forced to divest all of ARCO's oil production

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159 *Kodak*, 504 U.S. at 468.
160 *Id.* at 469.
161 *See* Jensen, *supra* note 10, ¶ 5. *See also* Associated Press, *supra* note 8.
162 *See* Burton W. Folsom, Jr., *The Exxon-Mobil Merger: The Lessons of History, Competitive Enterprise Institute*, *at www.cei.org/gencon/004%2C01463.cfm* (Dec. 21, 1998).
163 *See id. See also Exxon/Mobil Agree to Largest FTC Divestiture Ever in Order to Settle FTC Antitrust Charges; Settlement Requires Extensive Restructuring and Prevents Merger of Significant Competing U.S. Assets,* FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/1999/11/exxonmobil.htm (Nov. 30, 1999); *Commission Action Regarding Applications for Approval,* FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/2000/05/fyi0024.htm (May 2, 2000) (regarding ExxonMobil merger); *Commission Action Regarding Applications for Approval,* FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/2000/12/fyi0064.htm (Dec. 19, 2000) (regarding ExxonMobil merger).
164 *See FTC Clears Merger of BP Amoco and Atlantic Richfield Company*, FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/2000/04/bpamoco1.htm (Apr. 13, 2000).

assets on Alaska's North Slope to Phillips Petroleum Company or another approved purchaser, in addition to ARCO's crude oil assets in Cushing, Oklahoma.[165]

On September 7, 2001, the FTC agreed to allow the $45 billion merger of Chevron and Texaco, two of the world's largest oil companies, after finding that the merger would preserve market competition, so long as Chevron and Texaco divested Texaco's interests in Equilon Enterprises and Motiva Enterprises.[166] Texaco would also be required to divest one-third of its interest in the Discovery natural gas pipeline system in the Gulf of Mexico, its aviation businesses in fourteen states, its interest in the Enterprise fractionating plant in Texas, as well as other interests throughout the United States.[167] Busy approving mergers, on September 17, 2001, the FTC unanimously approved a $7 billion merger between Phillips Petroleum Corporation and Tosco Corporation.

Looking for more advantages to compete in a more consolidated industry, the next major transaction in the oil industry took place in August 30, 2002, with the unanimous approval by the FTC of the $15.1 billion merger between Phillips Petroleum Company and Conoco.[168] In order for the merger to take place, the FTC required Phillips to divest assets including gas stations in Colorado, propane and butane storage plants in Washington, and propane facilities in Missouri and Illinois.[169] Additionally, Conoco was required to sell various natural gas wells in New Mexico and Texas.[170]

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[165] *See id.*
[166] *See FTC Consent Agreement Allows the Merger of Chevron Corp. and Texaco Inc., Preserves Market Competition*, FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/2001/09/chevtex.htm (Sept. 7, 2001) [hereinafter *FTC Consent Agreement*]. *See also Application for Approval of Proposed Divestiture*, FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/2001/12/fyi0163.htm (Dec. 18, 2001) (notice of proposed divestiture for Chevron and Texaco).
[167] *See id.*
[168] *See With Conditions, FTC Approves Merger of Phillips and Conoco*, FEDERAL TRADE COMMISSION, *at* http://www.ftc.gov/opa/2002/08/phillipsconoco.htm (Aug. 30, 2002). *See also* Ho, *supra* note 6.
[169] *See* Ho, *supra* note at 6.
[170] *See id.*

D. To Consolidate or Not To Consolidate, That is the Question

Thus, with all of this history and background on antitrust law, the question remains whether competitive tactics that raise potential antitrust concerns, such as tying agreements, vertical restraints, or even mergers in capital-intensive industries, are actually more beneficial to consumers in the long run. The answer to that question could be argued in the affirmative. Ideally, what is more beneficial to consumers is more beneficial to businesses as well. Most economists believe that some type of "efficiency" is the best way to promote competition while at the same time protecting consumer welfare.[171] However, if this is the case, then another question that comes to mind is what exactly the most effective method is for promoting "efficiency" within corporations. The Chicago Theory contends that the market should be left alone to control itself. Essentially, it is "self-monitoring." Thus, if that is the case, is it better for competing firms in a capital-intensive industry whose fixed and variable costs are exorbitantly high to be able to consolidate in efforts to attain greater economies of scale and economies of scope to maintain charging prices at a competitive level? As this comment will explain, the answer to that question is yes, and because of this, it will be detailed why the Chicago Theory protects both consumers and commerce through *efficiency*. Additionally, as a result of efficiency, it will also be explained why the Chicago Theory is the best form of economic analysis for our courts in making the appropriate decisions in antitrust suits.

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[171] *See* Sheldon Kimmel, *The Supreme Court's Efficiency Defense*, U.S. DEPARTMENT OF JUSTICE ECONOMIC ANALYSIS GROUP DISCUSSION PAPER 1 (2002). "Mergers between competitors that lower costs enough can be good for society as a whole, so an efficiency defense may be reasonable." *Id.* In addition, while a merger between competitors reduces the number of competitors in a respective market, "it increases the total welfare of consumers, stockholders and society as a whole…." *Id.* at 2.

II. ANALYSIS

A. Analysis of Case Law

1. *Case Law Influenced by the Chicago Theory*

Though there are nine cases in which the Supreme Court has used the Chicago Theory as a direct influence on their holdings, it was *Continental T.V., Inc. v. GTE Sylvania Inc.*[172] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[173] which collectively put Chicago on the map.[174] While neither of these two decisions had anything to do with mergers or acquisitions, or even the petroleum industry, their decisions were vital to the promotion of the Chicago Theory which helped provide the spark of industry consolidation which began in the 1980s, and exploded in the late 1990s and into the new millennium when the oil and petroleum industries consolidated.[175]

Before *Sylvania* and *Matsushita*, antitrust laws were used to break up the dominance of large corporations and conglomerations that were allegedly conspiring to raise prices beyond the competitive level, and drive out smaller businesses from competing.[176] Since the passing of the Sherman Antitrust Act in 1890, antitrust laws were designed to protect consumers and small businesses against large conglomerates.[177] While it became standard practice among courts to prohibit any behavior that harmed competition, over the years courts realized that it was not always good practice to prohibit all activity that restrained competition, because there may be

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[172] 433 U.S. 36 (1977).
[173] 475 U.S. 574 (1986).
[174] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984); Jefferson Parish Hosp. v. Hyde, 466 U.S. 2 (1984); Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); Bus. Elect. Corp. v. Sharp Elect. Corp., 485 U.S. 717 (1988); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).
[175] *See Sylvania*, 433 U.S. at 36; *Matsushita*, 475 U.S. at 574.
[176] Aurelien Condomines, *The Impact of Economic Theories on Antitrust Laws in the USA and in Europe*, AVOCAT À LA COUR 1-2, (2001), *available at* http://www.jurismag.net/articles/artiGB-economie.htm.
[177] *See id.* at 2.

justifiable reasons for doing so.[178] To aid in this reasoning, courts began to use two different types of analyses in its antitrust rulings: the *per se rule* and the *rule of reason* analysis.[179] Thus, the goals of the Sherman Antitrust Act were upheld as both consumers and competition were protected from anti-competitive behavior, while at the same time corporations were given the opportunity to show the "reasonableness" of certain quasi-anti-competitive acts.[180] The 1960s and 1970s brought a wind of change into the antitrust arena, as the Chicago Theory made its way to the front lines of antitrust analysis.[181] While the Chicago Theory promoted the view that barriers to entry placed a competitive constraint on companies, it also promoted the idea that anti-competitive practices such as predatory pricing could in fact have positive effects for consumer welfare. It also embraced the theory that vertical restraints could often be aimed at improving efficiency in business and therefore should not be prohibited without some type of analysis.[182] The 1977 case of *Continental T.V., Inc. v. GTE Sylvania Inc.* was the first case of its kind to implement the Chicago Theory in its holding.[183] From that point on the Supreme Court wisely realized that by using the Chicago Theory in its analysis, not only would consumer welfare be protected, but also competition between businesses would thrive. Instead of allowing firms to take the easy way out of competing through litigation, the Chicago Theory influenced the Supreme Court, the FTC, and the DOJ, to wisely promote competition in the fashion that capitalism intended.

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[178] *See id.*
[179] *See id.*
[180] *See id.*
[181] *See id.*
[182] *See* Condomines, *supra* note 176, at 1-2.
[183] *Sylvania*, 433 U.S. at 59 (overruling *Schwinn*, to "return to the rule of reason [analysis] that [originally] governed vertical restrictions…."). *See also* Katz & Arnold, *supra* note 50, at 3.

a. *Continental T.V., Inc. v. GTE Sylvania Inc.*[184]

In *Sylvania*, the question was over the validity of a franchise agreement between GTE Sylvania, a manufacturer of television sets, and Young Brothers, a retailer of television sets.[185] Continental T.V., a retailer of television sets, claimed that the franchise agreement implemented by Sylvania violated Section 1 of the Sherman Act by "enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations."[186] The Supreme Court affirmed the Ninth Circuit's opinion, opting for the rule of reason analysis instead of the per se rule.[187] Following Chicago's belief in the use of economic theory in antitrust analysis, the Court showed how the location restriction clause would in fact help Sylvania's ability to compete against other manufacturers.[188] While the Court pointed out that the clause in question would keep each Sylvania dealer from competing against one another in the same location, because each Sylvania dealer essentially competed against each other in different locations, interbrand competition was increased, which was better for consumers overall.[189]

From an economics standpoint, this decision makes complete sense. Prior to 1962, most television manufacturers, including Sylvania, used independent or company owned distributors to sell the televisions to various retailers.[190] After facing a decline in market share, Sylvania looked for more effective ways to compete.[191] Instead of selling televisions through mass distributors, Sylvania decided to sell their televisions to a more select group of franchises in areas directed by Sylvania.[192] The marketing strategy was a success, and by 1965, Sylvania's

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[184] 433 U.S. 36 (1977).
[185] *See id.* at 39.
[186] *Id.* at 40.
[187] *See id.* at 59.
[188] *See id.* at 54-55.
[189] *See id.* at 56-58.
[190] *See Sylvania*, 433 U.S. at 38.
[191] *See id.*
[192] *See id.*

market share had risen to five percent, making it the Nation's eighth largest color television manufacturer.[193] Thus, what this action did was not harm interbrand competition, but it in fact promoted it. Stagnant sales and a falling percentage in market share were doing nothing to help competition, so Sylvania decided to do something about it. Instead of ignorantly sticking with its faltering business plan, Sylvania altered it and quickly grew amongst its competition.[194] The Supreme Court was correct in its holding because it offered stagnant firms other ways to compete more effectively. Had the Court followed the per se rule as used in *Schwinn*, Sylvania would likely have continued to decrease in market share, and may have gone out of business. If that had happened, then not only would thousands of former Sylvania employees be without jobs, but it would also be one less television manufacturer that could compete. Thus, taken in that context, the per se rule could be argued to harm competition. Not only was this decision good for supporters of the Chicago Theory, but it was also good for consumers as well.

b. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[195]

As in *Sylvania*, the Supreme Court's holding in *Matsushita* marked a defining moment for the Chicago Theory; however, unlike *Sylvania*, which was a case regarding the legality of vertical restraints, *Matsushita* concerned predatory pricing.[196] In *Matsushita*, the Supreme Court dismissed claims made by Zenith and another American electronics manufacturer that a group of Japanese television manufacturers had conspired to charge artificially low prices for televisions in the United States, and subsidized that below-cost pricing by charging artificially high prices for televisions in Japan.[197] The Supreme Court affirmed the summary judgment ruling issued by the district court to the Japanese firms, and followed the Chicago Theory line of thinking by

[193] *See id.* at 38-39.
[194] *See id.*
[195] 475 U.S. 574 (1986).
[196] *See Sylvania*, 433 U.S. at 36; *Matsushita*, 475 U.S. at 574.
[197] *See Matsushita*, 475 U.S. at 577-79, 584.

holding that absent any substantial barriers to entry, it would be irrational for any firm to try to use predatory pricing to drive out competition, because new competition could come back into the industry and begin charging competitive prices.[198] The Court said that the plaintiffs could not show sufficient evidence that the Japanese firms had conspired to create predatory pricing, and even if the Japanese firms did conspire, they did not do an effective job.[199]

Matsushita marks another case in which the Chicago Theory influenced the Supreme Court's holding. This decision, like *Sylvania*, makes logical sense. The facts alone in the instant case do make it seem like the twenty-one Japanese firms were conspiring to force its American competitors out of business. After all, it was true that the television prices in Japan were extremely high, and it was also true that the Japanese Government had imposed significant barriers of entry for American firms to enter and sell their televisions in Japan. However, the Third Circuit failed to realize just how difficult it was for such a conspiracy to be successful.[200] Since 1959, the Chicago Theory has viewed predatory pricing with the utmost scrutiny.[201] First, as Justice Powell eloquently pointed out in *Matsushita*, it does not make any sense for a firm (or firms) to commit to predatory pricing, especially when it is an industry with low barriers to entry. Even if we assume that a predator succeeds in running existing rivals out of business, the predator's plan will ultimately have been a waste because new entrants will emerge once the predator begins raising prices to recoup its losses that it incurred during its price war with its former competitors who are now out of business.[202] This new competition keeps the predator from recovering from the price war it started previously, and because of the constant new threats

198 *See id.* at 588-90.
199 *See id.* at 592.
200 *See id.* at 580.
201 *See* Boudreaux & Kleit, *supra* note 20, at 2.
202 *See id.* at 3. Predators incur losses larger than their rivals during their period of charging below cost, because "rivals, after all, can reduce the amounts they sell below cost while the predator must – to hurt rivals by taking away their customers – expand output during the price war." *Id.*

that appear whenever the predator begins to charge monopoly prices, the predator will never be able to fully succeed in its plan to become a monopoly.[203]

The Court was also correct to point out that it would be completely irrational for the Japanese firms to spend twenty years conspiring to drive out American rivals, when the cost to recoup the losses alone would almost drive the Japanese manufacturers out of business themselves.[204] Plain and simple, what Zenith was trying to do was actually harm consumer welfare. The American plaintiffs were finding that the Japanese were producing television sets more efficiently than the American manufacturers. In other words, the Japanese were beating the Americans at their own game. They were producing televisions with the same or superior quality at cheaper prices. Instead of trying to find better ways of producing their televisions to compete with their Japanese rivals, the American firms found it much easier to use the court system to their advantage and mislead

> a judge or jury to conclude that a rival's low prices portend [a] monopoly, [so that] a predation plaintiff avoids the inconvenience of competing through low prices and improved quality… By summoning the force of law to prevent rivals from serving consumers as well as rivals can, plaintiffs in predation cases pose a much greater threat to competition than do firms who vigorously lower their prices.[205]

Thus, the consumers are the ultimate losers whenever predation plaintiffs, such as the American manufactures in *Matsushita*, win predation lawsuits.[206] By following the reasoning of the Chicago Theory, the Supreme Court felt that plaintiffs did not have a valid claim.

2. *Kodak Halts Consolidation by the Influence of the Post-Chicago Theory*

Since the Supreme Court's holding in *Sylvania* in 1977, the Chicago Theory's presence has had a large influence on federal court decisions in antitrust lawsuits.[207] The Chicago Theory

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203 *See id.*
204 *See Matsushita*, 475 U.S. at 590-93.
205 Boudreaux & Kleit, *supra* note 20, at 3-4.
206 *See id.* at 4.
207 *See id*. at 4.

has persuaded courts to take a look at "the big picture" before handing down a decision against a firm for an alleged antitrust infraction. The Chicago Theory encourages courts to take into consideration reasons why the firm would enact measures that have antitrust implications. Furthermore, the Chicago Theory also brings rationality into the equation by explaining for instance, why it does not make sense for a corporation to compete using predatory pricing.[208] Additionally, the Chicago Theory also influences courts on evidentiary requirements imposed on the plaintiffs.[209] For example, in the *Matsushita* case, after the Court dismissed the plaintiff's claims that Japanese firms were conspiring to drive American firms out of business, the Court stated that any claim without economic justification would be vulnerable to summary judgment.[210] This all quickly changed in 1992, however, when the Supreme Court, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, rejected the antitrust "summary judgment rule"[211] as given in *Matsushita*.[212]

In *Eastman Kodak Co. v. Image Technical Services, Inc.*[213] the ultimate question was whether Kodak's tying agreement with its parts producers was illegal. In making its decision, the Court took a surprisingly different approach to this case, diverting itself from more than twenty years of Chicago Theory influence.[214] In *Kodak*, the Supreme Court affirmed a holding made by the Ninth Circuit which denied summary judgment to Kodak, holding that the plaintiff

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[208] *See id.* at 3-5. "Predatory pricing is a futile means of monopolizing markets." *Id.* at 5.
[209] *See* GELLHORN & KOVACIC, *supra* note 47, at 469. "The conservatism of Supreme Court antitrust jurisprudence since Sylvania often has taken the form of imposing formidable evidentiary requirements on plaintiffs…. Supreme Court decisions [such as *Matsushita*] have curbed the ability of plaintiffs to use ambiguous circumstantial proof to reach the jury. " *Id.*
[210] *See id.* *See also Matsushita*, 475 U.S. at 586-88. In his holding, Justice Powell wrote that a plaintiff's claim is "implausible – if the claim is one that simply makes no economic sense – [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.
[211] *See supra* note 110 and accompanying text.
[212] *See Matsushita*, 475 U.S. at 587.
[213] 504 U.S. 451 (1992).
[214] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 462 (1992) [hereinafter *Kodak II*]. *See also* Katz & Arnold, *supra* note 50, at 3.

ISO's had presented sufficient evidence to show antitrust concerns.[215] Taking a step back from its holding in *Matsushita*, the Supreme Court explained that *Matsushita's* "economic plausibility"[216] standard in making an antitrust claim was a "standard that courts apply in all cases in evaluating arguments of the party opposing a summary judgment motion."[217]

Essentially, what the Court did was ignore the *Matsushita* decision in this instance.[218] Thus, instead of following the *Matsushita* (and the Chicago Theory) analysis which places a heavy burden of proof on the plaintiff in an antitrust case, the Court said that if a defendant makes an attempt to thwart the plaintiff's claim because of a lack of economic theory, it is the defendant who "bears a substantial burden in showing that it is entitled to summary judgment."[219] With this decision, antitrust summary judgment through the eyes of the Chicago Theory now has less of an effect on the Supreme Court's analysis in future cases.[220]

Post-Chicago Theorists claim that this decision is key for the growth of their beliefs. They feel that by dismantling one aspect of the Chicago Theory, many more will follow. So the question is whether the Court made the right decision? The answer to this question is subject to debate. First, the Court's reasoning behind its decision in *Kodak* was rational. By ignoring the *Matsushita* summary judgment standard, the Court has essentially shifted the burden from the plaintiff having to argue a plausible economic argument to an antitrust dispute to now having the

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[215] *See* Image Technical Servs. v. Eastman Kodak Co., 903 F.2d 612, 615, 620 (9th Cir. 1990), *aff'd*, 504 U.S. 451 (1992) [hereinafter *Kodak I*].
[216] *See supra* note 210.
[217] GELLHORN & KOVACIC, *supra* note 47, at 470. *See also Kodak*, 504 U.S. at 468.
[218] *See* Katz & Arnold, *supra* note 50, at 3. The Supreme Court decided not to use *Matsushita's* rule as "mandating summary judgment simply because the plaintiff's argument may not conform to economic theory." *Id. See also Kodak II*, 504 U.S. at 468-69.
[219] *Kodak II*, 504 U.S. at 469. *See also* Katz & Arnold, *supra* note 50, at 6.
[220] *See* Katz & Arnold, *supra* note 50, at 3 (stating that "[w]ithout *Sylvania* and *Matsushita*, the Chicago School is greatly weakened. *Kodak* has returned antitrust to [its] [sic] fact-based roots, which means more trials and fewer summary judgment.")

defendant argue why it is entitled to summary judgment.[221] It is understandable why the Court made this decision. First, it was clear from the facts that the ISO's were actually giving consumers better quality service at a lower price.[222] What this decision did for consumers was that it enabled competition to continue to exist; giving consumes a broader choice of service providers who would compete to maintain the lowest possible prices.[223] Thus, there is a strong argument made by the Post-Chicagoans that had the decision gone the other way, as the Chicago Theory would have had it, then the plaintiff ISOs could have lost the case, thereby ultimately harming consumers.

On the other hand, there are efficiency concerns that are now brought into play as a result of the implementation of the Post-Chicago analysis. In his dissent, Justice Scalia makes the argument that there will be more antitrust litigation as a result of the majority's holding.[224] Post-Chicagoans argue that more litigation is not likely, and contend, "[i]t is more likely that manufacturers will conform their conduct to the teachings of *Kodak*. There will be greatly increased demand for antitrust compliance programs tailored to *Kodak*."[225]

Post-Chicagoans are incorrect with regard to this conclusion for two reasons. First, by ignoring the summary judgment rule set forth in *Matsushita*, it will now be once again easier for weak competitors to file antitrust claims against their more powerful counterparts. Before the *Matsushita* case, it was not a very onerous task for a company to file an antitrust claim against a fellow competitor. Before the *Matsushita* decision, all plaintiffs had to do was state the alleged antitrust infraction, and the defendant would have to argue otherwise.[226] Basically, a competitor

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[221] *See Kodak II*, 504 U.S. at 479.
[222] *See id.* at 457.
[223] *See* Katz & Arnold, *supra* note 50, at 13.
[224] *See Kodak II*, 504 U.S. at 489 (6-3 decision) (Scalia, J. dissenting).
[225] Katz & Arnold, *supra* note 50, at 13-14.
[226] *See* GELLHORN & KOVACIC, *supra* note 47, at 469.

could bring a claim without any plausible economic reasoning behind it and hope for the best. What *Matsushita* did was end the ease of having litigation that lacked merit, by literally forcing the plaintiff to actually prove why the antitrust infraction harms competition.[227] As a result of *Kodak*, the Court is taking a step back to where we were before *Matsushita*.

Second, *Kodak's* decision makes our courts more inefficient. By allowing a party to bring a claim that has only a hint of an antitrust infraction, our courts will now have more specious claims of antitrust infractions than before. *Matsushita* is a perfect example of this. In that case, American television manufacturers were stifled by how cost efficient the Japanese were at producing televisions. Because the Japanese manufacturers were producing televisions at a massive rate, while at a cheaper price than American televisions, the only way the American manufacturers could remain dominant in market share was either to revamp their manufacturing processes, or sue their more efficient competitors for an antitrust claim of predatory pricing that lacked any merit in the first place. By making it easier for plaintiffs to escape the *Matsushita* summary judgment standard, potential plaintiffs in antitrust cases are more willing to compete in the courtroom than in the marketplace.[228] As a result of these suits, not only do the costs of litigation rise, as more claims that lack merit are filed, but these rising litigation costs harm the consumer in the end, as firms find themselves raising the prices of their end products, just to cover the costs of litigation. Furthermore, as judges and juries are given more leeway in determining the outcome of a verdict in an antitrust case, such decisions may not be the correct ones. This is because, generally, most judges and juries do not understand the basic principles of

[227] *See id.* (stating that many courts saw the *Matsushita* rule on summary judgment "as a mandate to weed out claims that lacked a coherent economic theory").
[228] *See* Boudreaux & Kleit, *supra* note 20, at 3-4.

economics.[229] As a result, not only is time being wasted in court by individuals who should not be ruling on such decisions, but also, the verdicts may be held incorrectly, thereby harming not only commerce in the long run, but consumers as well.

3. *Can Chicago Survive After Kodak?*

By the Supreme Court's decision in *Kodak* to split away from the Chicago Theory's "summary judgment rule" made in *Matsushita*, many economists and antitrust experts have claimed that the *Kodak* ruling is the beginning of the end for Chicago.[230] The question is whether such a statement is necessarily correct. While Post-Chicago Theorists are correct that the *Matsushita* summary judgment rule is no longer the standard in antitrust law, what *Kodak* failed to do was limit vertical restrictions.[231] *Kodak* also failed to stop the Chicago Theory's persistence in using economic analysis to prove why some antitrust matters are pro-competitive. In fact, since *Kodak*, the Chicago Theory has still had a significant impact on the decisions by federal courts.[232] For example, a year after the *Kodak* decision was made, the Chicago Theory influenced the Supreme Court's 1993 holding in *Brooke Group Ltd. v. Brown & Williamson Tobacco Co*.[233] In that case, Justice Kennedy, in following the direction of the *Matsushita*

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[229] *See* Pierce, *supra* note 27 at 1109. In discussing the high "costs" that are incurred by society as a result of courts applying the Post-Chicago form of economic analysis in their decisions, Professor Pierce writes that

> [f]ive characteristics of antitrust courts and the body of law they are required to apply suggest that they are unlikely to be effective in applying post-Chicago economics to antitrust disputes: (1) judges and juries are poorly educated in economics; (2) trials provide a poor format for learning and applying complicated economic theories; (3) judicial decisionmaking is too slow to be effective in governing the performance of dynamic markets; (4) the common law nature of antitrust law and the need to reconcile inconsistent precedents creates a cacophony of judicial decisions; and (5) the courts' inexplicable preoccupation with motive often leads them astray.

Id.

[230] *See supra* note 220.

[231] *See* Katz & Rosenthal, *supra* note 53, at 95-96 (stating that interbrand competition was being harmed in *Kodak*, unlike intrabrand competition in *Sylvania*). *See also Sylvania*, 433 U.S. at 55.

[232] *See* Boudreaux & Kleit, *supra* note 20, at 4.

[233] 509 U.S. 209, 242-43 (1993). In *Brooke Group, Ltd.*, the plaintiff generic cigarette manufacturer brought a civil antitrust action against competitor Brown & Williamson, alleging that the defendant violated the Robinson-Patman Act (which prohibits price discrimination *only* if it harms competition), because volume rebates made by Brown & Williamson to wholesalers "amounted to price discrimination that had a reasonable possibility of injuring

holding, wrote that expert testimony should have no basis in determining whether a defendant firm violated an antitrust law.[234] Because of this, the Court held that the expert testimony used by the plaintiff was "insufficient as a matter of law to support a finding of primary-line injury under the Robinson-Patman Act, [and therefore] the expert testimony cannot sustain the jury's verdict."[235] Furthermore, *Brooke Group* requires plaintiffs to "show that the defendant has a reasonable likelihood of recouping its investment in below-cost sales," thereby following both *Continental's* and *Matsushita's* rule of reason analysis which makes it more difficult for plaintiffs to bring antitrust cases that lack merit.[236] In addition, state courts are still influenced by the Chicago Theory.[237] In *Wal-Mart, Inc. v. American Drugs, Inc.*,[238] the Arkansas Supreme Court overturned a trial court's ruling that defendant Wal-Mart had been engaged in predatory pricing, after using economic theories influenced by Chicago in its reasoning.[239]

Furthermore, Post-Chicago analysis requires the courts to be adept in economics. This is because most Post-Chicago theories are difficult to apply in court.[240] Using these theories to

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competition." *Id.* at 216-17. The plaintiffs argued that that the rebates were part of a predatory pricing scheme, in which the defendants set below-cost prices to force the plaintiffs to raise its prices of its generic cigarettes, thus restraining the generic cigarette industry's growth. *See id.* at 217. The Supreme Court held that the defendant's alleged below-cost sales of generic cigarettes through discriminatory volume rebates did not create competitive injury in violation of Robinson-Patman Act. *See id.* at 242. *See also* 15 U.S.C. § 13 (2001).

[234] *See Brooke Group, Ltd.*, 509 U.S. at 242.

[235] *Id.* at 243.

[236] GELLHORN & KOVACIC, *supra* note 47, at 441.

[237] *See* Boudreaux & Kleit, *supra* note 20, at 4.

[238] 891 S.W.2d 30 (Ark. 1995).

[239] *See Wal-Mart, Inc. v. American Drugs, Inc.*, 891 S.W.2d 30, 34-36 (Ark. 1995). In *Wal-Mart*, competitors brought a civil antitrust action against Wal-Mart for an alleged violation of the Arkansas Unfair Practices Act by pricing products below cost. *Wal-Mart, Inc.* 891 S.W.2d at 32. The lower court held for the plaintiffs by enjoining Wal-Mart from engaging in below-cost sales and ordered Wal-Mart to pay treble damages according to the Act. *See id.* On appeal, the Arkansas Supreme Court held that a violation of the Arkansas Unfair Practices Act for below-cost sales required a showing that below-cost sales were made purposely to harm competition. *See id.* at 36. Just because there was evidence of below-cost pricing was not enough to infer that there was a violation of the Act. *See id.* In fact, the court found that "the loss-leader strategy employed by Conway Wal-Mart is readily justifiable as a tool to foster competition and to gain a competitive edge as opposed to simply being viewed as a stratagem to eliminate rivals altogether." *Id.* at 35. Therefore, the plaintiffs' use of a "loss-leader strategy" (as supported by Post-Chicagoans as a factor in determining an antitrust violation) could not be inferred to show intent to destroy competition. *See id.*

[240] *See* Pierce, *supra* note 27, at 1107.

argue a point in court are a "daunting task" because of the "game theoretic models that dominate the post-Chicago literature."[241] These theories are used in court to prove some type of act by a business as being wrong if there are assumptions made about "'information asymmetries, institution-specific commitment abilities, and the timing of interactions among actual and potential entrants.'"[242] In addition, Post-Chicago requires a court to use "a particular set of characteristics" in determining whether a firm's act under review is wrongful.[243] Using these "characteristics" by a court to make a holding is "difficult, perhaps even impossible."[244]

Post-Chicago Theorists argue that instead of having courts rely on economic theories, courts should apply cross elasticities of demand or apply game theory to hypothetical markets in order to determine whether a corporation is violating antitrust law.[245] The problem with this is that it requires the judge or jury to know and understand sophisticated economic theory.[246] As Professor Richard J. Pierce, Jr. pointed out in an argument on why the Chicago Theory should remain influential in court as opposed to the Post-Chicago theories,

> our legal institutions are incapable of applying most of those models and theories with tolerable accuracy and timeliness. If they attempt to do so, they are likely to do far more harm than good in many ways, e.g., by making even more of a muddle of the body of precedents that comprise antitrust law, by inadvertently punishing or deterring socially beneficial conduct, and by imposing many remedies that produce unintended adverse effects that exceed their intended beneficial effects.[247]

Professor Pierce is entirely correct in his statement. While the Post-Chicago theories make valid arguments in analyzing antitrust infractions, the costs of using such methods in the courtroom would far outweigh the benefits of attempting to halt antitrust violations in the first place. Moreover, it is hard to believe that a judge deciding an antitrust case could learn enough

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241 *Id.* at 1107, 1108. *See also* Brennan, *supra* note 50, at 1053-54.
242 Pierce, *supra* note, 27 at 1108 (quoting Brennan, *supra* note 50, at 1054).
243 *Id.*
244 *Id.*
245 *See id.* at 1125.
246 *See id.* at 1109.
247 *Id.* at 1125.

about a particular industry to make a correct holding.[248] Professors Donald Boudreaux and Andrew Kleit summed it up best regarding the difficulty for judges to render the correct decision in an antitrust case, by saying, "[w]e suggest that any judge who generally possesses better insight than market investors into the nature and likely outcome of industry pricing practices could make a good deal of money by resigning his or her seat on the bench and becoming a full-time investor."[249] The judicial system's reliance on the Post-Chicago Theory needs to be placed on the backburner.

B. Why Using the Chicago Theory to Promote Consolidation in the Petroleum Industry Makes Sense

While there is no doubt that the Chicago Theory's influence was harmed by the Supreme Court's holding in *Kodak*, the Chicago Theory still maintains a powerful influence over the Court, the FTC and the DOJ (as evidenced by the large numbers of mergers and acquisitions that have taken place since the mid to late 1990s).[250] While the Chicago Theory is less likely to find corporations guilty of violations of antitrust infractions as a result of the way they compete or whether they try to consolidate with other competitors in the same industry, it is also more friendly to competition and consumer welfare when implemented correctly.

The Chicago Theory has had a significant presence over the surge of mergers in the petroleum industry starting in the late 1990s. By influencing courts and federal agencies to use economic theory as applied by *Matsushita* (as opposed to complicated economic analysis involving game-theory models that a judge may not understand) in antitrust cases, the Chicago Theory has helped aid the oil industry in its consolidation trend. In addition, *Sylvania's* improvement of antitrust analysis has helped industries that rely on extensive vertical integration,

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[248] *See* Boudreaux & Kleit, *supra* note 20, at 13. *See also* Frank H. Easterbrook, *Ignorance in Antitrust*, *in* ANTITRUST, INNOVATION AND COMPETITIVENESS 119-32 (Thomas M. Jorde & David J. Teece eds., 1992).
[249] Boudreaux & Kleit, *supra* note 20, at 21 n.29.
[250] *See* Royall, *supra* note 18, at 445. *See also* Boudreaux & Kleit, *supra* note 20, at 4.

such as oil companies.[251] Furthermore, by using basic economic theory, it is clear that the recent mergers between Exxon and Mobil, Texaco and Chevron, BP and Amoco, and now Conoco and Phillips are beneficial for consumers. This is because as a result of these mergers, the firms are now able to compete more effectively than ever before. As a result of a mass merger between two capital-intensive companies such as Exxon and Mobil, the two firms can combine their resources and assets to produce their products more efficiently.[252] Additionally, when the merged company's assets are combined, excess assets such as each company's respective plants or factories, properties and equipment can be sold as an added benefit to the company's stockholders. With the money earned from the sale of assets, the company can either reinvest the money back into itself, or invest it into other methods of making their final product at a cheaper cost to both themselves and the consumer. Because of this benefit to consumers, the Chicago Theory should still remain the central form of analysis for our courts for capital-intensive industries, such as the petroleum industry. There are four primary reasons for these benefits.

First, high fixed costs will be lowered as the combination of two firms creates efficiency, which ultimately lowers costs for consumers.[253] Upon completion of a merger, vertical integration is improved,[254] therefore giving the newly formed entity the ability to gain a

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[251] *See* GELLHORN & KOVACIC, *supra* note 47, at 286-87. The petroleum industry uses vertical integration to operate because these firms "not only produce and refine crude oil, but also distribute gasoline through a mix of company-owned and franchised service stations." *Id.* at 286.
[252] *See* CARLTON & PERLOFF, *supra* note 5, at 37.
[253] *See id.* at 36-37.
[254] Vertical integration is more than likely to be improved, because if the goal of the acquiring firm was not to increase efficiency, then the merger will ultimately be a failure for two reasons. First, if the goal was just to have a quick change in ownership to produce short term gains in a stock price, then in the long run, such a decision will only come back to harm management as shareholders will either vote to change management in the next annual meeting, or other methods of changing management including tender offers and proxy contests could take place. Additionally, poor management would make the firm susceptible to being acquired by another firm, be it by another competitor or in leveraged buyout situation. Second, if the acquiring firm's goal in acquiring another firm is just to create greater market power to raise prices, such evidence would damage the ability of the merger to be approved when the acquisition is under review by the FTC or DOJ.

competitive advantage downstream by transferring profits from its upstream levels.[255] In addition, distribution is improved significantly (which also improves access to retailers) as the new firm can combine its shipping routes to cover larger areas.[256] Most importantly, however, the merger between two larger petroleum firms lowers the cost of production and refining, which in turn, lowers costs for consumers.[257] The combination of firms also allows easier attainment of supplies (*e.g.*, oil wells for an oil company), as well as property (*e.g.*, land containing oil reserves). For example, when two firms merge, they can use each other's oil wells rather than individually having to search out new areas that have oil, and each bid for their use separately. This separate bidding drives up costs for obtaining the oil well, which in turn increases the ultimate cost of the final product for consumers.[258]

Second, the merger of oil companies provides increases in optimal scale.[259] Combining firms can "reduce duplication or produce other benefits from increased size," because firms can save money by using only one set of managers to effectively manage both firms.[260] Furthermore, a merger between firms that specialize in different areas of oil production and refining can bring a reduction in transaction costs with a merger.[261] This is because companies "that engage in different but complementary activities may benefit from mergers because of *economies of scope*: it is less costly for one firm to perform two activities than for two specialized firms to perform them separately."[262]

[255] *See id.* at 37-38, 510-11.
[256] *See id.* at 501.
[257] *See id.*
[258] *See id.* at 37, 501.
[259] *See* CARLTON & PERLOFF, *supra* note 5, at 37.
[260] *Id*.
[261] *See id.*
[262] *Id.* (emphasis added).

Third, the merger of any two companies, regardless of what industry they may be in is good for both consumers and commerce if the acquired firm is poorly managed.[263] While smaller companies have an easier time replacing inept management, larger corporations (capital-intensive firms, for example) may make it more difficult for stockholders to replace management, especially if some members of the board of directors are also in management as well.[264] Therefore a competitor, or even a leveraged buyout firm, could acquire the inefficiently run company at a low price and improve it with better management. Such an action would be beneficial to shareholders of the inefficient firm, consumers (the efficiencies are likely to bring down the cost of the production or distribution of goods or services, which in turn means a cheaper product in order to be more competitive), and even commerce as a whole.[265] Additionally, a firm that is on the verge of bankruptcy can be purchased by a more profitable firm, who in turn, could keep the unprofitable business financially afloat, while using competitive tactics that have worked for the more efficient acquiring firm, to help the acquired firm emerge from bankruptcy. Professor Donald Dewey has argued that mergers "are merely a civilized alternative to bankruptcy or the voluntary liquidation that transfers assets from falling to rising firms."[266] Dewey believes that mergers are superior to bankruptcy because it essentially allows the faltering firm to stay fiscally afloat, thereby keeping more competitors in the industry.[267] Therefore, after the firm's emergence from bankruptcy, the firm will be a much more competitive business which is not only good for consumers (competition breeds lower

[263] *See id.* "Acquiring a badly run firm and installing better management produces gains." *Id.*
[264] *See* CARLTON & PERLOFF, *supra* note 5, at 37.
[265] *See id.*
[266] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 111 (1965) (quoting Donald Dewey, *Mergers and Cartels: Some Reservations about Policy*, MKT. ECON. REV., LI, 257 (May, 1961)).
[267] *See id.*

prices), but also the employees who could have lost their jobs had the faltering firm dissolved (instead of being kept afloat financially by the acquiring firm) after filing bankruptcy.

Finally, those who argue against the merging of large oil companies often claim that their consolidation is not for efficiency, or for any of the other factors described above, with which the acquiring firm is looking for, but instead the firm (in this case, the oil company) is looking only for an increase in market share, so that it can gain a monopoly power over the market and charge artificially high prices for gas. In conjunction, critics also argue that with the consumer's dependency on the artificially high oil prices by the hypothetical monopolist oil company, consumers will have no choice but to accept those high prices (assuming there are extremely high barriers to entry for other firms to enter and compete). The problem with this argument is that the oil industry has a more inelastic demand curve in the short term than in the long term.[268] When the demand for a good is inelastic in the short term, but elastic in the long term, consumers will eventually substitute away from the monopolized good in the long term.[269] A key example of this was when the price of oil in the early 1970s was raised by OPEC, and while in the short term, consumers were forced to deal with the rising costs of oil, "over the next several years as consumers adjusted to the increased price and began to take energy-saving measures, the quantity of oil demanded fell sharply," which ultimately forced the price of oil down.[270] Therefore, critics of oil company mergers who base their argument solely on greedy executives trying to have "big oil" take a monopolized control over the consumer is unfounded.

Prior to *Sylvania*, the FTC would have likely disapproved a merger of a large scale like Exxon and Mobil. As can be seen in the analysis above, such a disapproval of a merger would have likely caused more harm than good for consumers. With this in mind, it should be of no

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[268] *See* CARLTON & PERLOFF, *supra* note 5, at 139.
[269] *See id.*
[270] *Id.*

doubt that the Chicago Theory is good for not only capital-intensive industries, like the petroleum industry, but also consumer welfare and the United States economy, as it offers insight into whether antitrust infractions are truly anticompetitive or in fact beneficial to consumer welfare and our nation's economy.

Conclusion

For a century, antitrust has struggled in finding a common form of analysis to aid in constructing decisions that are both beneficial to our nation's economy and consumer welfare. For years, antitrust "experts" believed that monopolies were per se illegal, and there were no exceptions. Predatory pricing was considered a tactic used by firms strictly to achieve monopolization, and both the judicial system and government refused to look at any evidence presented by the defendants to prove otherwise. It was not until the 1970s when the wave of influence brought by various University of Chicago professors changed this narrow-minded thinking. Coined the "Chicago Theory," this new form of analysis combined law and economics to bring "reasoning" to the table in order to help aid courts in making a decision. Because of the Chicago Theory, antitrust law has changed dramatically. Instead of finding a defendant corporation guilty of any infraction that hinted towards a violation of the Sherman or Clayton Act, courts opted to look for other influences to see whether there was actually harm being done to competition. By tightening standards on what antitrust claims could even make it to court has been a substantial factor in promoting competition within an industry. Though the Chicago Theory has its critics, it offers a unique form of thinking unlike any other theory. Because the Post-Chicago Theory is spread out into so many different factions, it is difficult to pinpoint who stands for what and why they stand for it. The Chicago Theory is the only consistent reliable source of antitrust analysis. Because of its innovations in analysis, consumer welfare is protected and competition is promoted all while limiting antitrust claims that lack merit out of the court system. Therefore, pumping gas into a car could inevitably be much worse without the Chicago Theory's influence in our courts.