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The theme of this symposium is exploration of some of the many ways that business law incorporates the public interest. This Essay illustrates how antitrust law fits within the ambit of public interest law, and invites law students (and lawyers) to consider studying and practicing antitrust law. For those law students who are interested in business law but are also driven to protect the interests of the less privileged and more vulnerable members of society, antitrust law provides an avenue for satisfying both aspirations.

Definitions of "public interest" abound. One could make the case for antitrust law as public interest law using political[1] or economic[2] arguments. For some, one's definition of the public interest reflects one's political viewpoint.[3] To avoid the risk of using a loaded description of public interest, the Essay will employ a narrow conception of public interest: providing access to affordable

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1. On the political front, the U.S. Supreme Court has expressed the public importance of antitrust law by calling it "the Magna Carta of free enterprise" and explaining that antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

2. The economic case for antitrust generally invokes efficiency as the sole goal of antitrust law. *See* RICHARD A. POSNER, ANTITRUST LAW, at ix (2001).

3. *See* ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION (2008).

food and medicine. With this principle as my guide, this Essay reviews some of the ways that antitrust law helps make food and medicine more accessible to the public.

Antitrust law is the law of competition. Competition in the marketplace generally improves the lives of consumers by expanding output and reducing the price of products and services, as well as by increasing quality and innovation. Monopolies and cartels distort competitive markets by reducing output in order to create artificial scarcity, which allows sellers to raise prices. As a result, some consumers will not be able to acquire the product or service at all because of the contrived shortages. Those consumers who continue to purchase the product or service are forced to pay elevated prices. Thus, all consumers are made worse off.

Antitrust law provides the legal rules for free market economies. At first glance, antitrust law may not seem like public interest law. In antitrust litigation, economists define markets using economic concepts like cross-elasticity of demand and cross-elasticity of supply; they debate issues of marginal cost versus average variable cost, and which costs are, in fact, variable. As antitrust law has come to rely more on economics, it has become less populist. Looking past the economic concepts and jargon, however, one discovers a body of law devoted to the public interest.

This Essay is anecdotal by design; it is intended to give a sense of the many ways that anticompetitive behavior can distort access to food and healthcare. Part I provides a brief overview of antitrust history, principles, and statutes. Antitrust law addresses three major areas of concern: collusion, monopolization, and anticompetitive mergers. Each of these areas implicates the public interest. The Sherman Act of 1890[4] is the foundational statute of federal antitrust law. Section 1 of the Sherman Act addresses concerted action, such as price fixing by cartels.[5] Section 2 of the Sherman Act condemns illegal monopolization and attempted monopolization.[6] In addition to the Sherman Act, Congress enacted the Clayton Act in 1914, Section 7 of which condemns mergers that risk substantially lessening competition.[7] Although anticompetitive mergers can also violate the provisions of the Sherman Act, they are generally analyzed under Section 7 of the Clayton Act. Thus, antitrust law addresses three major areas of concern, each which implicates the public interest: collusion, monopolization, and anticompetitive mergers.

Part II discusses the economics of the first area of concern, collusion, and explains how cartels profit by reducing access to the necessities of life. A cartel exists when a group of competitors conspire to not compete against each other. In addition to price fixing by cartels, collusive agreements include bid rigging, group

4. 15 U.S.C. §§ 1–7 (2006).

5. *Id.* § 1.

6. *Id.* § 2. Section 2 also condemns conspiracies to monopolize, but this is largely redundant with Section 1 and is irrelevant to this Essay.

7. 15 U.S.C. § 18 (2006).

boycotts, and market division. This Part examines examples of collusive agreements in markets related to agriculture and healthcare, and demonstrates how enforcment of antitrust law in these areas affects the public interest.

Part III shows how illegal monopolization injures the public interest. By interfering with the competitive process, illegal monopolization often results in higher prices and reduced output of goods and services. While some may quibble whether the public interest is implicated by the monopolization of luxury goods, the public interest is certainly injured when affordable food and medicine become less available. This Part provides examples of such injuries, and demonstrates how antitrust law can help prevent them.

Finally, Part IV explains how mergers can affect access to food and medical care. This Part provides examples of both successful and failed antitrust actions challenging mergers in order to demonstrate the importance of antitrust accuracy. Merger enforcement has been uneven over the years, resulting in many markets being overconcentrated. Consumers are injured as food and healthcare become more expensive, sometimes prohibitively so. As this Part explains, this harms the public interest.

I. FREE MARKETS AND THE PUBLIC INTEREST

The Sherman Act, America's foundational antitrust law, began life as a quintessential public interest statute. The agricultural fields of the American South and Midwest sowed the seeds of federal antitrust law. Cartels—groups comprised of competitors who agree not to compete against each other—distorted agricultural markets not just by cornering the market in a particular foodstuff or commodity, but also by controlling the markets in which farmers bought their supplies, such as sturdy cloth bags and seeds.[8] This significantly reduced farmers' income and kept farmers in an impoverished class.[9]

During the latter half of the nineteenth century, farmers advocated for anti-cartel laws through the Granger movement, which mobilized farmers to oppose the various interests that distorted agricultural markets. The Grange educated the public and focused attention on the problem of agricultural monopolies in the post-Civil War era, popularizing political slogans like "[d]own with monopolies."[10] While the Grangers lost some of their steam as a political movement by 1880, they

8. WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 59 (1965) ("The low income of farmers, for which remedies were constantly being considered, was often said to be aggravated by various trusts, such as those that sold farmers bags and bought their linseed and cottonseed. The general problem of poverty, a great concern of the time, was regularly said to be accentuated by the trusts, which were accused of dividing the country into two classes, the very rich and the very poor.").

9. *Id.* at 59.

10. *Id.* at 67.

succeeded in putting a national spotlight on the problem of cartels such that other grassroots organizations took up the cause.[11]

In the 1880s, cartels began taking the form of trusts, in which competitors consolidated themselves into a new business entity. While the Standard Oil trust remains the most infamous, the Sugar Trust and Whiskey Trust—both formed in 1887—were widely and wildly loathed by the American public.[12] The ire of farmers—especially those in the South angered by the Cotton Oil Trust, among others—continued to keep pressure on southern Congressmen to enact federal antitrust protections.[13] Economists F.M. Scherer and David Ross explained:

> Burdened with rising real debt repayment costs and perceiving themselves to be squeezed between the high prices charged for inputs by powerful trusts and the falling prices of their own outputs, farmers and small business owners clamored for legislation that would constrain the trusts' behavior and redress the balance of economic power.[14]

Powerful trusts had already taken over the markets in salt, cordage, oilcloth, paving-pitch, slate, gas, and meats.[15] The trusts were pinching both farmers and consumers.

As the American public cried out against the trusts, Congress had to take action and show that it, too, was alarmed by the growing power of the trusts. In response to public concerns about trusts, Congress enacted the Sherman Antitrust Act of 1890.[16] The Sherman Act contains two substantive provisions. Section 1 of the Sherman Act condemns agreements in restraint of trade.[17] Section 2 of the Sherman Act condemns monopolization, attempted monopolization, and conspiracies to monopolize.[18] Although founded upon a statute, antitrust law is essentially common law because the Sherman Act is, by design, skeletal.[19] The Sherman Act is both a civil statute and a criminal statute.

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11. *Id.* at 68. ("Although the Grange had lost much of its power by 1880, it had served to stimulate a revival of antimonopoly sentiments which had been obscured by the more dramatic events of the Civil War.").

12. *Id.* at 69–70.

13. *Id.* at 69 ("The Cotton Oil Trust was organized in 1884 and the Linseed Oil Trust in the following year. The former is said to have angered Southern farmers and to have strengthened the demand for a Federal antitrust law . . . .").

14. F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 12 (3d ed. 1990).

15. LETWIN, *supra* note 8, at 69–70.

16. 15 U.S.C. §§ 1–7 (2006).

17. *Id.* § 1.

18. *Id.* § 2. Both sections of the Sherman Act are simultaneously civil and criminal statutes. *See* 15 U.S.C. §§ 1–2 (2006). Section 2, however, has not been enforced though criminal prosecutions in years and few Section 1 violations are treated as criminal.

19. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) ("From the beginning the Court has treated the Sherman Act as a common-law statute.").

In 1914, Congress enacted the Clayton Act and the Federal Trade Commission Act (FTCA).[20] The Clayton Act expanded the reach of the Sherman Act. For example, whereas the Sherman Act does not mention mergers in its text, Section 7 of the Clayton Act explicitly condemns anticompetitive mergers.[21] The FTCA created the Federal Trade Commission (FTC).[22] Along with the Antitrust Division of the Department of Justice (DOJ), the FTC is one of the two major federal antitrust enforcement agencies.[23]

Federal enforcement agencies, state officials, and private plaintiffs enforce American antitrust laws. While both the FTC and the Department of Justice's Antitrust Division are entrusted to enforce federal antitrust laws, only the DOJ may bring criminal antitrust cases.[24] When successful, federal antitrust authorities are entitled to injunctive relief and single damages.[25] In addition, state attorneys general may bring civil antitrust suits as parens patriae actions, which allows state officials to sue in the name of their states' consumers.[26] With limited exceptions, the successful private plaintiff is entitled to treble damages, which means that compensatory damages are automatically tripled.[27] These treble damages provide a powerful incentive for private plaintiffs to pursue litigation against antitrust violators.

This Essay will show how these statutory provisions, and the common law that interprets them, affect the affordability and availability of food and healthcare. In both of these realms, anticompetitive conduct can interfere with markets for inputs, final products, and delivery systems. For example, antitrust in healthcare markets addresses

> numerous industries providing a broad array of products and services, including medical care by licensed physicians and other health care professionals, inpatient and outpatient services of hospitals and other facilities, prescription drugs, durable medical equipment, home health services, and a variety of arrangements for delivering and paying for

20. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 and 29 U.S.C. §§ 52–53 (2006)); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

21. *See infra* Part IV.

22. Section 5 of the FTCA also condemns unfair trade practices. This provision is sometimes interpreted in tandem with the Sherman Act. 15 U.S.C. § 45 (2006); *see, e.g.*, FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986).

23. Other federal agencies are sometimes involved. For example, the Federal Communications Commission plays a role when communications companies seek to merge.

24. Only hard-core price fixing and bid rigging is criminally prosecuted. Individuals convicted of criminal antitrust violations can be sentenced up to ten years in federal prison. 15 U.S.C. § 1 (2006).

25. Pfizer, Inc. v. Gov't of India, 434 U.S. 308, 317 (1978) (Congress "affirmatively intended to exclude the United States from the treble-damages remedy.").

26. Pennsylvania v. Milk Indus. Mgmt. Corp., 812 F. Supp. 500, 506 (E.D. Pa. 1992).

27. A private plaintiff winning an antitrust case may also seek injunctive relief to restore a competitive market. 15 U.S.C. § 26 (2006).

> health care services, ranging from traditional indemnity insurance to health maintenance organizations (HMOs).[28]

Parts II through IV will give examples of collusive agreements, anticompetitive unilateral conduct, and mergers, respectively, that injure the public interest.

II. COLLUSION

Some businesses attempt to increase their profits by entering agreements that artificially increase the price of the necessities of life. Antitrust lawyers can protect consumers against these anticompetitive agreements. Section 1 of the Sherman Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[29] By condemning "every contract . . . in restraint of trade," the text of Section 1 risks invalidating all contracts because every contract restrains trade in some way.[30] To prevent this result, the Supreme Court has interpreted Section 1 to proscribe only *unreasonable* restraints of trade.[31] Subsequently, federal courts have held several categories of contracts to unreasonably restrain trade, including price-fixing agreements, bid rigging, group boycotts, and market division.

In theory, the Sherman Act should have put an end to the trusts' control over agricultural markets. While food markets became more competitive in some respects following the enactment of the Sherman Act,[32] in many ways cartels merely changed their form. Price-fixing cartels took the form of trade associations and industry institutes that performed a variety of legitimate functions. These organizations, however, also served as cartel organizers and enforcers.[33]

Ultimately, many of the cartelized industries that prompted Congress to pass the Sherman Act remained in the control of cartels in the following decades. In the late 1800s and the early part of the 1900s, for example, overconcentration in the meat-packing industry facilitated agreements among the major packers to fix prices and divide markets for beef.[34] Many members of Congress were particularly

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28. ABA SECTION OF ANTITRUST LAW, ANTITRUST HEALTH CARE HANDBOOK 5 (4th ed. 2010).

29. 15 U.S.C. § 1 (2006).

30. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).

31. *Id.*

32. Board of Trade of Chi. v. United States, 246 U.S. 231, 240–41 (1918) (noting the creation of more competitive markets for grain); United States v. E.C. Knight Co., 156 U.S. 1, 17–18 (1896) (holding sugar manufacturers to be beyond the reach of the Sherman Act), *abrogated by* Wickard v. Filburn, 317 U.S. 111, 122–24 (1942).

33. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 TEX. L. REV. 515, 575, 581, 588–90 (2004).

34. 1 SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 29–31 (1958).

concerned about the beef trust.[35] For example, Representative Taylor explained that

> [t]he beef trust fixes arbitrarily the daily price of cattle, from which there is no appeal, for there is no other market. The farmers get from one-third to half of the former value of their cattle and yet beef is as costly as ever. Even if the conscience of the retailer is touched and he reduces his price the trust steps on him and refuses to sell to him or undersells him till he is ruined.[36]

Like Standard Oil, the companies that colluded through the beef-packing cartel (sometimes referred to as the Big Five) received discriminatory rebates from railroads, which the dominant packers used to deny a level playing field to smaller rivals who were consequently driven from the market.[37] A 1918 study of the meat-packing industry by the FTC concluded:

> The power of the Big Five in the United States has been and is being unfairly and illegally used to—manipulate livestock markets; restrict interstate and international supplies of foods; control the prices of dressed meats and other foods; defraud both the producers of food and consumers; crush effective competition; secure special privileges from railroads, stockyard companies, and municipalities; and profiteer.[38]

Much of this conduct arguably would violate Section 1 today, but the contours of the Sherman Act were still ill defined in the early twentieth century.

The passage of the Sherman Act failed to create competitive conditions in agriculture. The blame lies with federal prosecutors (who failed to aggressively enforce antitrust law) and with federal judges (who failed to interpret the Sherman Act in a manner that kept a check on monopolization, cartelization, and overconcentration). In the 1910s, federal courts issued opinions that showed a greater willingness to find antitrust liability and to impose more meaningful

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35. 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 26 (Earl W. Kintner ed., 9th ed. 1978) [hereinafter LEGISLATIVE HISTORY].

36. 21 CONG. REC. 4088, 4098 (May 1, 1890) (statement of Rep. Taylor), *reprinted in* LEGISLATIVE HISTORY, *supra* note 35, at 298, 315; *see also* 21 CONG. REC. 4088, 4099 (May 1, 1890) (statement of Rep. Bland), *reprinted in* LEGISLATIVE HISTORY, *supra* note 35, at 298, 316 ("We know that the contract with the Big Four, so called, covers every state in this Union. They compel butchers in every town of any population, East or West, to purchase of them or else they establish by the side of those butchers other shops for the sale of beef and, by underselling for a short time, they compel the home seller to submit to their dictation.").

37. 1 WHITNEY, *supra* note 34, at 49 ("The big packing companies had been among the many corporations that received rebates from the railroads before the Elkins Act of 1903 outlawed them. According to the Interstate Commerce Commission, the result was that smaller competitors had 'in the main ceased to exist.'"); *see also id.* at 50 ("The Federal Trade Commission also charged that the large packers received preferential treatment on their cars, including prompter return of empties than was given the small packers (who owned less than 10 per cent of private cars).").

38. *Id.* at 36 (quoting FTC, REPORT OF THE FEDERAL TRADE COMMISSION ON THE MEAT PACKING INDUSTRY 32–33 (1919)).

remedies, including dissolution.[39] The following discussion will show how effective antitrust enforcement has improved the lives of consumers by making food and healthcare more affordable.

A. Price Fixing

Courts have applied Section 1 of the Sherman Act to condemn price-fixing agreements among competitors. One of the largest cartels in the modern era is the international vitamins cartel, which began operations in the 1980s and continued until its detection and prosecution in the late 1990s. Because not every vitamin manufacturer makes every vitamin, the international vitamins cartel actually represented a series of sixteen cartels with many overlapping members. Major manufacturers—notably Roche, BASF, and Rhone-Poulenc—participated in most of the individual vitamin cartels. Ultimately, over twenty companies joined together and formed a web of collusion that they referred to as "Vitamins, Inc.," which included every vitamin manufacturer with at least a ten percent market share.[40] Economist John Connor, a leading expert on price-fixing cartels, has described Vitamins, Inc. as "the biggest, most elaborate, longest lasting, and most harmful of the international cartels" discovered in the 1990s.[41]

The vitamin cartels inflicted significant damage. Although estimates vary, Connor has calculated that the overcharges in international vitamin markets exceeded fifteen billion dollars.[42] These overcharges inflated the prices of animal products, of fortified foods, of meat, poultry, and fish, of vitamin supplements and even of cosmetics.[43] Connor noted that it is "particularly reprehensible" to engage in "price-fixing schemes that affect products destined for vulnerable populations. Children, pregnant or lactating mothers, the sick and the elderly often need supplementary vitamins to achieve full health. These groups, as well as practically every household, ultimately paid the price of price-fixing in vitamins."[44] Ultimately, every consumer, including the weakest members of society, was harmed by the vitamin cartels. Antitrust lawyers helped end this injustice.

One of the most notorious recent cartels involves the amino acid lysine, which is added to animal feed. The lysine conspiracy is infamous in large part because the FBI made videotapes of the actual price-fixing meetings, which were played at the criminal trial at which three Archer Daniels Midland (ADM) executives were convicted and sentenced to prison for their roles in the

39. *See, e.g.*, Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911).

40. JOHN M. CONNOR, GLOBAL PRICE FIXING 252–53 (2d ed. 2008).

41. *Id.* at 237.

42. *Id.* at 337 ("Measured in 2005 dollars, the damages from the vitamins cartels of the 1990s amounts to $15.6 billion . . . .").

43. *Id.* at 238.

44. *Id.* at 323.

conspiracy.[45] The lysine cartel reduced output, which in turn reduced farmers' output and the availability of pork and poultry for consumers.[46] During its relatively short three-year span, the lysine cartel overcharged consumers around the globe between $200 and $250 million.[47] Buyers in less well-off nations whose consumers ultimately paid higher prices for pork and chicken suffered a disproportionate share of this quarter-billion dollar overcharge.[48]

Lysine was but one of the international cartels in which ADM participated. In 1978, ADM had pleaded no contest to charges that it had participated in illegal price fixing for food sold as part of international relief programs.[49] More recently, ADM played a key role in operating the international citric acid cartel. Citric acid is an additive in a wide range of foods from yogurt to sausage.[50] For many of its uses, such as in soft drinks, there are no substitutes for citric acid.[51] Economist John Connor estimated that the overcharges borne by American buyers were between $116 million and $309 million.[52] Price fixing in citric acid markets ultimately raises the price of food.[53] Furthermore, because the international citric acid cartel constrained the American participants' ability to export citric acid, the cartel had significantly worsened—by an estimated $200 million—America's trade deficit.[54]

The vitamin, citric acid, and lysine cartels are examples of antitrust law working in that the cartels were discovered and punished, and the injured consumers brought private litigation that brought some measure of recovery. This often requires an understanding of how cartels operate, including the importance of market structure and how cartel members use codes, secretive enforcement mechanisms, and trade associations to cover their illegal activities.

Despite these successes, judges' failure to appreciate how cartels work can lead to bad judicial decisions. This is illustrated by the Eighth Circuit's decision involving the potash cartel.[55] Potash is a fertilizer used to increase the output of agricultural crops. Potash sales total one-half billion dollars annually.[56]

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45. *See generally* KURT EICHENWALD, THE INFORMANT (2000); JAMES B. LIEBER, RATS IN THE GRAIN: THE DIRTY TRICKS AND TRIALS OF ARCHER DANIELS MIDLAND (2000).

46. CONNOR, *supra* note 40, at 224.

47. *Id.* at 235.

48. *Id.* at 235–36.

49. *Id.* at 127.

50. *Id.* at 113. Citric acid sterilizes and stabilizes many foods. *Id.* It is also used by detergent manufacturers as an alternative to phosphorus, which harms waterways. *Id.*

51. *Id.*

52. *Id.* at 165.

53. *See id.* at 159.

54. *Id.* at 163.

55. Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir. 2000).

56. *See* DENNIS S. KOSTICK, U.S. GEOLOGICAL SURVEY, MINERAL COMMODITY SUMMARIES: POTASH 124–25 (2007), *available at* http://minerals.usgs.gov/minerals/pubs/commodity/potash/potasmcs07.pdf.

International cartels have controlled the trade in potash intermittently since the late nineteenth century.[57] A group of potash buyers brought a class action lawsuit in the 1990s, challenging potash sellers for fixing price.[58] The buyers presented "evidence of a market structure ripe for collusion, a sudden change from price war to supra-competitive pricing, price-fixing overtures from one competitor to another, voluntary disclosure of secret price concessions, an explicitly discussed cheater punishment program, and advance knowledge of other producers' price moves."[59] Ignoring this evidence and exhibiting a failure to understand how cartels operate and what market structures lend themselves to price fixing, a narrowly divided en banc Eighth Circuit court affirmed summary judgment for the defendants in an opinion riddled with error.[60] Coincidentally, after the Eighth Circuit exonerated the potash dealers, the price of potash increased almost 300% in a four-year period.[61] Such price increases generally do not occur in the wake of findings of cartel liability. As the price of fertilizer increases, so too does the price of food.[62] The case illustrates that work remains for antitrust lawyers to educate judges about how cartels operate and the harm cartels inflict.

Price fixing can distort healthcare markets as well.[63] Examples abound. In one of the earliest Supreme Court antitrust cases addressing the medical profession, the Court condemned the American Medical Association's efforts to prevent its members from working with health maintenance organizations (HMOs), a model for delivering healthcare at lower cost.[64] More recently, optometrists have illegally fixed the price of eye exams[65] and dentists have conspired to fix the amount of patient copayments,[66] clear violations of antitrust

57. *See* Christopher R. Leslie, *Rationality Analysis in Antitrust*, 158 U. PA. L. REV. 261, 332 (2010).

58. *Blomkest Fertilizer*, 203 F.3d at 1031–32.

59. *Id.* at 1051 (Gibson, J., dissenting).

60. *See* HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 134 (2005) (describing the *Blomkest* opinion as a "[f]ailure to account for the distinction between rational and irrational conspiracies [that] has led several courts to dismiss conspiracy claims incorrectly"); Leslie, *supra* note 57, at 333–34 (criticizing the *Blomkest* opinion).

61. AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 281 (2008) ("Potash is an important fertilizer. Its price increased almost 300% between January 2004 and January 2008.").

62. The potash industry is again in the midst of antitrust litigation. *See* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845 (7th Cir. 2012) (en banc) (affirming a district court order denying a motion to dismiss claims against an alleged international potash cartel).

63. ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 151–52 (noting that "members of a medical society might simply agree on the prices at which they will offer their services; a group of providers, through an association or otherwise, might agree to refuse to contract with a health plan unless it increases reimbursement or copayment amounts; or the group might develop a schedule of minimum fees").

64. *See* Am. Med. Ass'n v. United States, 317 U.S. 519, 536 (1943).

65. *See* United States v. Lake Country Optometric Soc'y, 1996 Trade Reg. Rep. (CCH) ¶ 45,095, at 44,781 (W.D. Tex. Dec. 15, 1995).

66. *See* United States v. Alston, 974 F.2d 1206 (9th Cir. 1992).

law. Price fixing in healthcare markets can also take the form of hospitals conspiring to limit the wages of nurses.[67] Suppressing wages can contribute to long-term shortages of nurses, which can put pressure on the healthcare system.[68] Most price-fixing conspiracies, however, are more direct in their anti-consumer effects. For example, price fixing in medical equipment and chemicals used in diagnostic equipment has increased the price of healthcare.[69] Effective antitrust enforcement can deter and remedy such price-fixing schemes and thus reduce the cost of healthcare.

B. Bid Rigging

In addition to conventional price fixing, in which competitors agree to raise price jointly, illegal collusion can also take the form of bid rigging. Bid rigging occurs when rivals for a series of contracts agree on who will get each contract at an inflated price. Instead of bidding against each other, the rivals rotate the winning bids among the conspirators. Although each conspirator agrees to intentionally submit losing bids on most contracts, because each conspirator is also promised to win a share of the contracts at an inflated price, over the long run the conspirators will make more money by rigging than by competing. Bid rigging happens in many large building projects, including bridges, schools, and other public buildings.[70] A case can be made that these examples of bid rigging injure the public interest by increasing the price of public projects, which diverts funds from other needs, such as education and social services.

Perhaps the best bid-rigging example to demonstrate the public interest component for antitrust law involves sustenance for children. For decades, the price of milk for schoolchildren procured through school milk programs has been artificially inflated due to a web of bid-rigging conspiracies across the states.[71] In

67. *See e.g.*, United States v. Ariz. Hosp. & Healthcare Ass'n, 2007-2 Trade Cas. (CCH) ¶ 75,869 (D. Ariz. 2007) (Consent Decree and Competitive Impact Statement); *see also* ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 152.

68. *See* Jeff Miles, *The Nursing Shortage, Wage Information Sharing Among Competing Hospitals, and the Antitrust Laws*, 7 HOUS. J. HEALTH L. & POL'Y 305, 338–39 (2007).

69. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 153 (discussing *United States v. Rhone-Poulenc Biochimie, S.A.*, in which the defendants pled guilty and paid a $5 million fine for fixing the price for "a chemical that decreases rate at which X-ray contrast media disperses in the body during imaging procedures").

70. *See* Patrick Bajari & Lixin Ye, *Deciding Between Competition and Collusion*, 85 REV. ECON. & STAT. 971, 971 (2003).

71. *See, e.g.*, Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 826 (11th Cir. 1999) ("Beginning in the early 1970s, the Dairies conspired and combined to rig their bids for contracts to supply milk to the public school districts in Florida. The Dairies submitted artificial bids and effectively divided the school milk market among themselves."); Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 121 (4th Cir. 1995) ("Marlinton's complaint followed a 1992 investigation by the United States Department of Justice into the milk industry, which had resulted in Valley Rich, Meadow Gold, and Borden pleading guilty to charges that they had rigged school milk bids."); Ohio *ex rel.* Montgomery v. Louis Trauth Dairy, Inc., 925 F. Supp. 1247, 1249

some instances, a successful school milk conspiracy in one state expanded and replicated its success in a neighboring state.[72] While some schemes were explicit, others were less formal, as providers of school milk who should have been competing against each other on price and service instead informed each other "of bidding plans, preferred or targeted customers, and specifics as to future bid prices to particular customers."[73] Regardless of the form of the conspiracy, the effect of this collusion in many markets was to increase the price of school milk.[74] Antitrust lawyers who successfully challenge these bid-rigging schemes are protecting the public interest.

C. Group Boycott

Section 1 of the Sherman Act also condemns group boycotts, also called concerted refusals to deal, that unreasonably restrain trade.[75] Here, too, illegal anticompetitive activity impacts the public interest. The healthcare industry again provides examples. Medical care providers sometimes illegally agree to boycott Medicaid and private insurers unless the payors acquiesce to higher reimbursements.[76] Recently, competing physicians in Boise, Idaho allegedly conspired to refuse to treat patients whose payments were covered by that state's workers' compensation system.[77] The physicians boycotted those particular patients in a bid to increase the reimbursement rates.[78] The DOJ sued and quickly entered a consent decree to stop the offending boycott.[79] Group boycotts among medical providers are condemned because they increase the price of healthcare.[80]

(S.D. Ohio 1996) ("The United States indicted three dairies in southwestern Ohio after an investigation of illegal behavior in school milk procurement programs. Two dairies, Coors and Meyer, plead guilty . . . .").

72. Robert F. Lanzillotti, *The Great School Milk Conspiracies of the 1980s*, 11 REV. INDUS. ORG. 413, 444 n.72 (1996); *see also* Leslie, *supra* note 33, at 591 (discussing cartel creep, including within the southeastern school milk price-fixing cartels).

73. Lanzillotti, *supra* note 72, at 455.

74. *See, e.g.*, Robert H. Porter & J. Douglas Zona, *Ohio School Milk Markets: An Analysis of Bidding*, 30 RAND J. ECON. 263, 264 (1999) (estimating that collusion in the school milk procurement process in Ohio raised the price of school milk about 6.5%).

75. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289 (1985).

76. *See, e.g.*, United States v. Mont. Nursing Home Ass'n, No. CV-80-92-H, 1982 WL 1867 (D. Mont. July 1, 1982) (consent decree decreeing that the defendant nursing home association conspired to not participate in Medicaid unless reimbursements were increased); DeGregorio v. Segal, 443 F. Supp. 1257 (E.D. Pa. 1978) (order denying antitrust defendant nursing homes' motions to dismiss); *see also* Mich. State Med. Soc'y, 101 F.T.C. 191 (1983) (final order requiring a medical society to cease from entering into agreements with its members as to how to calculate reimbursement rates for services).

77. United States v. Idaho Orthopaedic Soc'y, No. 10-268-SEJL (D. Idaho Aug. 30, 2010), *available at* http://www.justice.gov/atr/cases/idortho.htm (final judgment).

78. *Id.*

79. *Id.*

80. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986).

D. Market Division

The final category of Section 1 violation that this Essay will explore is agreements among competitors to divide markets.[81] For example, competitors sometimes allocate territory to each other so that each competitor can raise the price in its assigned territory without worrying that its competitor will enter that market.[82] The Supreme Court has labeled such agreements per se illegal, meaning that they are illegal on their face, regardless of what their effect is and what justifications underly them.[83]

In the context of patented pharmaceuticals, market division agreements are more complicated due to the regulatory regimes designed to ensure drug safety. New drugs must be approved through the New Drug Application (NDA) process. To facilitate the entry of lower-priced generic drugs into the market, Congress enacted the Hatch-Waxman Act, which allows generic drug manufacturers to use a simplified procedure for drug approval called the Abbreviated New Drug Application (ANDA) process. When patents expire or are invalidated, generic versions of those once-patented drugs enter the market and prices plummet, to the benefit of consumers. Similarly, if a generic manufacturer can make a noninfringing version of a patented drug, consumers are better off as health care costs decrease. The Hatch-Waxman provisions are intended to encourage generic drug manufacturers to challenge suspect patents—through the use of a so-called Paragraph IV certification—by rewarding the first entrant into the market with 180 days of exclusivity as the only generic seller of the particular patented drug.[84]

Some pharmaceutical companies with patented drugs have exploited the provisions of Hatch-Waxman to prolong their monopolies. The companies have filed suit against generic drug companies that use the Hatch-Waxman process, alleging patent infringement. Like most civil litigation, these cases settle. But, unlike other forms of litigation, the terms of the settlement require the plaintiff (the patentee) to pay the defendant (the generic drug manufacturer accused of infringement).[85] As a result, these settlements are often called reverse payment

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81. There are many more categories besides the four discussed in this Essay, including resale price maintenance and exclusive dealing arrangements, among others. *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (discussing resale price maintenance); Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961) (discussing exclusive dealing arrangements).

82. *See, e.g.*, Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990).

83. United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) ("One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.").

84. This solves the collective action problem, whereby no generic firm would pay the money to challenge a patent if all of the competing generic firms could immediately enter the market and enjoy the benefits of a successful patent challenge without having to bear any of the costs. Christopher R. Leslie, *The Anticompetitive Effects of Unenforced Invalid Patents*, 91 MINN. L. REV. 101, 148–49 (2006).

85. Typically, we would expect the inverse would be true, where an alleged infringer would pay the patentholder to settle the case. Plaintiffs do not generally pay defendants in litigation.

settlements, or simply reverse settlements. In exchange for the payment, the infringement defendant agrees not to sell its generic version of the drug. In essence, the patentee is paying its only rival to exit the market so that the patentee can continue to charge a monopoly price.

In one of the earliest cases involving a reverse settlement, the Sixth Circuit correctly saw the consequences of such settlements and held that the agreement violated Section 1 of the Sherman Act.[86] The Sixth Circuit considered the patentee's payment of "$10 million per quarter [to] refrain from marketing its generic version of Cardizem CD even after it had obtained FDA approval" as "a classic example of a *per se* illegal restraint of trade."[87] In theory, this should have put a damper on reverse settlements. Such was not the case.

In response to the Sixth Circuit's sweeping condemnation of reverse settlement payments, patentees did not cease the arrangements; instead, they simply made them more complicated by, for example, disguising the reverse payment as a recompense for a license on another, unrelated drug.[88] As the FTC has paid greater attention to the issue of patentees making payments to generic drug manufacturers, these so-called pay-for-delay agreements have gotten more complicated, more ambitious, and more lucrative. Professor Scott Hemphill has estimated that the transfer of money from consumers to drug companies for the delay was $12 billion in one year-long period.[89] In a recent report, the FTC estimated that pay-for-delay agreements cost American consumers $3.5 billion every year in overcharges.[90] Only lawyers (and judges) who understand the regulatory structure and the economics of pharmaceutical markets can eliminate these abuses.[91]

When judges failed to appreciate how pharmaceutical firms were constructing pay-for-delay agreements, these anticompetitive schemes flourished and the public interest suffered. In a series of cases, federal courts upheld agreements that delayed competition[92] and, thus, increased the price of essential

86. *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 915 (6th Cir. 2003).

87. *Id.* at 907–08.

88. *See, e.g.*, Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1059–60 (11th Cir. 2005).

89. C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 651 (2009) ("Overall, the $12 billion benchmark estimate is likely to be conservative.").

90. FTC, PAY-FOR-DELAY: HOW DRUG COMPANY PAY-OFFS COST CONSUMERS BILLIONS 2 (2010), *available at* http://www.ftc.gov/os/2010/01/100112payfordelayrpt.pdf.

91. Both the regulatory scheme and the structure of pay-for-delay agreements are more complicated than the thumbnail sketch laid out here. For more in-depth presentations, see Michael A. Carrier, *Unsettling Drug Patent Settlements: A Framework for Presumptive Illegality*, 108 MICH. L. REV. 37, 49 (2009); C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1533, 1560 (2006).

92. *See, e.g.*, *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323 (2nd Cir. 2008); *In re* Tamoxifen Citrate Antitrust Litig., 466 F.3d 187 (2nd Cir. 2006); Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294 (11th Cir. 2003).

medicine. Defendants prevailed and antitrust law seemed incapable of protecting consumers. Despite a string of losses, antitrust attorneys—especially those at the FTC—concerned about the public interest persevered. Their resolve has started to pay dividends, as more recent judicial decisions appear to recognize the dangers of pay-for-delay agreements.[93] If not for the determination of public-interest minded attorneys, pharmaceutical markets would be far less competitive and many medications would be considerably more expensive, some prohibitively so.

III. MONOPOLIZATION

In addition to entering anticompetitive agreements, some firms may attempt to increase their profits by engaging in unilateral anticompetitive conduct. Lawyers can use antitrust law to prevent such conduct and to provide a remedy to victims. Section 2 of the Sherman Act condemns three separate types of conduct: monopolization, attempts to monopolize, and conspiracies to monopolize.[94] Section 2's condemnation of "monopolization" does not actually prohibit monopolies. Rather, it condemns the acquisition or maintenance of monopoly power through anticompetitive conduct.[95] Federal courts have not articulated a single test for what conduct rises to the level of "exclusionary" conduct that violates antitrust laws when done by a monopolist. The Supreme Court has opined that "'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way."[96] This is not a rule so much as a principle that courts have applied to the facts before them.

As with illegal agreements in violation of Section 1 of the Sherman Act, dominant firms sometimes violate Section 2 in a manner that increases the price of food. Monopolies over non-food items often increase the price of food. Litigation over seemingly mundane materials can affect the public interest in ways that are not immediately obvious. For example, in the early twentieth century, the DOJ initiated one of the largest cases in American legal history, an antitrust suit against the American Can Company, which, as its name suggest, manufactured cans used for packaging food.[97] In a trial with over 850 witnesses and over 1,500

93. *See, e.g.*, *In re* K-Dur Antitrust Litig., 686 F.3d 197 (3rd Cir. 2012).

94. The statute reads, in relevant part: "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 . . . ." 15 U.S.C. § 2 (2006).

95. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

96. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (quoting 3 P. AREEDA & D. TURNER, ANTITRUST LAW 78 (1978)).

97. United States v. Am. Can Co., 230 F. 859, 859 (D. Md. 1916).

exhibits, the government sought to prove that American Can had illegally monopolized the market for tin cans in the United States.[98] Through a course of conduct that included denying its competitors access to can-making machinery and tin plate—which compelled its rivals to sell their operations to American Can lest they be driven into bankruptcy—American Can dominated the tin can market. In 1916, the district court held that American Can had violated the antitrust laws, but then denied the government attorneys their requested remedy of dissolution:[99] breaking up American Can into six smaller units that would have competed against each other.[100] This case, thus, left American Can intact.

In the wake of the antitrust liability holding, American Can slowed its acquisitions.[101] Meanwhile, its rival—Continental Can Company—took up the mantle of acquiring smaller makers of tin cans.[102] Continental Can continued its acquisition spree until the market was duopolized—that is, controlled by two major market players.[103] American Can and Continental Can implemented similar pricing and contractual restrictions designed to maximize their profits while creating barriers to entry. For example, the two companies pursued similar policies, including identical pricing, requirements contracts,[104] price discrimination, and tying arrangements between the sale of cans and the lease of can-closing machines.[105] The result was that during the Great Depression, the price of tin cans represented between one-quarter and one-third of a food canners' costs.[106] If the price of cans had been reduced a mere three percent, American consumers could have saved millions of dollars from their limited food budgets every year.[107] The initial judicial failure to impose a meaningful antitrust remedy ultimately hurt the poor and middle classes during America's greatest economic crisis.

In 1946, the DOJ brought civil proceedings against American Can and Continental Can.[108] Again, the court found that American Can violated the

98. *Id.* at 860.

99. *Id.* at 904.

100. 2 WHITNEY, *supra* note 34, at 200.

101. *Id.* at 201.

102. *Id.*

103. *Id.*

104. These required canners to purchase all of their cans from the same supplier for three, five, and sometimes ten years. *Id.* at 203.

105. *Id.* at 203–04. A tying arrangement exists when a seller refuses to sell a desired product (called the tying product) unless consumers agree to purchase a separate product that they do not wish to purchase from that seller (called the tied product). Tying arrangements create inefficiency by shielding the tied product from competition and by reducing incentives to innovate. *See* Christopher R. Leslie, *Patent Tying, Price Discrimination, and Innovation*, 77 ANTITRUST L.J. 811, 814, 823 (2011).

106. 2 WHITNEY, *supra* note 35, at 207.

107. *Id.* One effect of this was that the canners were squeezed because they had to lower the price of food somewhat as consumer buying power diminished but the canners' costs remained high because of the lack of a competitive market for tin cans. *Id.*

108. *Id.* at 216 (citing United States v. Am. Can Co., 87 F. Supp. 18 (N.D. Cal. 1949)).

antitrust laws.[109] This time, instead of no meaningful antitrust remedy, the court issued identical judgments against American and Continental.[110] The judgments required the companies, among other things, to limit their requirements contracts to one year; to not impose tie-ins between cans and can-closing machinery; to offer can-closing machines for sale; to offer royalty-free licenses to patents on can-closing machines; and to not buy out competitors (in metal or fiber containers or in the manufacture of can-closing machinery) without court permission.[111]

As a result of the antitrust remedy, the market became more competitive as smaller can companies won customers.[112] Because of the availability of can-closing machines, some large canners made more of their own cans, which put price pressure on American and Continental.[113] As canners showed greater willingness to switch their patronage, can manufacturers invested more in research and engineering, which resulted in better can-closing machines.[114] This juxtaposition of a scenario in which antitrust law was not enforced and a scenario in which antitrust law was enforced illustrates the moral that effective antitrust enforcement against monopolies can improve markets, which inures to the benefit of consumers, as the price of food decreases.

Illegal monopolization is also a serious problem in many healthcare markets. Firms have illegally monopolized several aspects of the healthcare system in a manner that reduces patient choice and increases healthcare costs. For example, the government challenged a Texas hospital for illegally monopolizing the regional markets for general acute care inpatient hospital services and outpatient surgical services through the use of exclusionary contracts that "financially punished payors if they included other hospitals or surgical centers in their networks."[115] Through these exclusionary contracts, the defendant hospital charged payors fifty to seventy percent more than hospitals in comparable Texas cities, as well as major metropolitan areas like Dallas-Forth Worth.[116] The DOJ negotiated a consent decree, which forbade the defendant from conditioning its contracts with any payor on the latter's agreement to not contract with the defendant's competitors.[117] In doing so, the DOJ's antitrust attorneys helped ensure more affordable healthcare for consumers.

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109. *Id.*

110. *Id.* at 217.

111. *Id.* at 217–18.

112. *Id.* at 220.

113. *Id.* at 219–20.

114. *Id.* at 220–21.

115. THOMAS L. GREANEY & DOUGLAS C. ROSS, SELECTED ANTITRUST DEVELOPMENTS IN HEALTH CARE 24 (2012), *available at* http://www.antitrustinstitute.org/~antitrust/sites/default/files/AHLA-ABA%20Conference%20(May%202012)%20rev.pdf (discussing United States v. United Reg'l Health Care Sys., No. 7:11-cv-00030-O (N.D. Tex. Sept. 29, 2011), *available at* http://www.justice.gov/atr/cases/unitedregional.html).

116. *Id.*

117. *Id.*

Similar to the reverse settlement payments, discussed above,[118] pharmaceutical companies sometimes manipulate the regulatory framework for drug approval in order to extend their monopolies over particular drugs. One example involves conduct sometimes called "product hopping."[119] In *Abbott Laboratories v. Teva Pharmaceuticals USA, Inc.*,[120] Abbott had maintained patents covering various formulations of fenofibrate, a drug used to treat high cholesterol.[121] Abbott sold its drug, TriCor, in capsule form. Abbott had received FDA approval for TriCor after submitting the necessary safety and efficacy data, and the drug information (including relevant patents) was listed in the FDA's Orange Book.[122] A pharmacist can—and in some jurisdictions must[123]—dispense the approved generic version of a branded prescription drug, but "only if the generic drug has been 'AB-rated' by the FDA, which means not only that the generic drug is bioequivalent to the branded drug, but also that the generic has the same form, dosage, and strength."[124]

Teva sought to manufacture and sell a generic version of Abbott's fenofibrate in a manner that did not infringe Abbott's patents. To get its generic version approved by the FDA, however, Teva would need to take advantage of the ANDA process.[125] In response to Teva's Paragraph IV certification, Abbott filed an infringement suit, which triggered a thirty-month stay preventing Teva from entering the market. A district court judge held that Teva's formulation did not infringe Abbott's patents.[126] However, to further thwart Teva's ability to use the ANDA process to market a cheaper generic version of TriCor, Abbott changed the delivery vehicle from a capsule to a tablet, stopped selling TriCor capsules, and changed the National Drug Data File code for TriCor capsules to "obsolete," which prevented pharmacists from prescribing Teva's generic capsules

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118. *See supra* notes 84–91 and accompanying text.

119. *See* Stacey L. Dogan & Mark A. Lemley, *Antitrust Law and Regulatory Gaming*, 87 TEX. L. REV. 685, 687 (2009).

120. Abbott Labs. v. Teva Pharm. USA, Inc., 432 F. Supp. 2d 408 (D. Del. 2006).

121. *Id.* at 415. Abbott had licensed the patents from Fournier, a French company. *Id.*

122. The official title is THE APPROVAL DRUG PRODUCTS WITH THERAPEUTIC EQUIVALENCE EVALUATIONS, a book whose cover is orange, hence its more common name, THE ORANGE BOOK.

123. PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2592 (2011) (Sotomayor, J., dissenting) ("In some States, pharmacists must dispense generic drugs absent instruction to the contrary from a consumer's physician. Even when consumers can request brand-name drugs, the price of the brand-name drug or the consumers' insurance plans may make it impossible to do so."); Warner-Lambert Co. v. Shalala, 202 F.3d 326, 328 (D.C. Cir. 2000) ("When a doctor prescribes a drug by brand name, the pharmacist may (and in some states must) dispense a therapeutically equivalent generic alternative unless the doctor requires that the prescription be dispensed as written.").

124. *Abbott Labs.*, 432 F. Supp. 2d at 415.

125. *See supra* notes 84–91 and accompanying text (describing the ANDA process).

126. Abbott Labs. v. Novopharm Ltd., Nos. 00 C 2141, 00 C 5094, 01 C 1914, 2002 WL 433584 (N.D. Ill. Mar. 20, 2002).

for TriCor prescriptions.[127] This effectively prevented low-cost generic substitution for higher-cost TriCor. It also delayed Teva's entry for several months.[128]

Undiscouraged, Teva developed a generic version of the tablet form of TriCor and submitted the appropriate ANDA, along with a Paragraph IV certification stating that its product did not infringe Abbott's patents.[129] Abbott again filed an infringement suit, which triggered a thirty-month stay preventing Teva from entering the market.[130] The district court, again, held that Teva had not infringed any patents.[131] So, Abbott changed the dosage of its FDA-approved tablets from 160 mg and 54 mg tablets to tablets with dosages of either 145 mg or 48 mg.[132] Again, the effect of these—seemingly artificial—changes barred pharmacists from dispensing Teva's generic version of TriCor.[133]

Teva sued Abbott for illegally monopolizing the market for fenofibrates, among other alleged violations. Teva's case has survived Abbott's motions to dismiss and for summary judgment.[134] Regardless of whether Teva ultimately prevails, the case shows how monopolists can manipulate regulatory regimes to prolong their market power longer than warranted. Even if Teva prevails, consumers will have unneccesarily paid higher prices for fenofibrate in the interim.

These cases involving tin cans, hospitals, and pharmaceuticals are just a few of the hundreds in which dominant firms engage in conduct that increases the price and decreases the availability of food and medicine. In order to challenge these business practices, it is critical that lawyers understand antitrust law, as well as regulatory regimes that effect the operation of free markets.

IV. MERGERS AND ACQUISITIONS

While traditional classes on mergers and acquisitions usually focus on the mechanics, financial aspects, and tax implications of business deals, an antitrust perspective can introduce the public interest into these discussions. Section 7 of the Clayton Act, as amended, condemns mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition or to tend to create monopoly."[135] This Part discusses how market concentration can increase the price of food and medicine, often considerably. When market concentration is the result of efficient internal growth and the operation of a free market, antitrust law does not condemn it. In contrast, when the merger of two firms—or one

127. *Abbott Labs.*, 432 F. Supp. 2d at 415–16.
128. *Id.*
129. *Id.* at 417.
130. *Id.*
131. *Id.*
132. *Id.* at 418.
133. *Id.*
134. *See* Teva Pharm. USA, Inc. v. Abbott Labs., 580 F. Supp. 2d 345 (D. Del. 2008).
135. 15 U.S.C. § 18 (2006).

firm's acquisition of another's assets—will result in overconcentration in a market, the DOJ, the FTC, state attorneys general, or an appropriate private plaintiff may challenge the merger.[136]

The Sherman Act was initially inspired, in part, by middlemen in agricultural and livestock markets colluding—often with the help of railroads—to take advantage of both farmers and consumers.[137] Antitrust law—both the enforcement activity and the substantive common law—ebbs and flows. While in the 1960s, federal antitrust authorities were too harsh on grocery store mergers[138] and disagreement exists today over the level of concentration in American agricultural markets;[139] many commentators argue that antitrust law needs to be invoked to reduce the concentration in the markets for pork, beef, and chicken.[140]

The pincer play in agricultural markets that partly motivated Congress to enact the Sherman Act has returned. On the one hand, overconcentration in the markets for agricultural materials, such as seeds, fertilizer, and animal feed, denies American farmers access to the most affordable inputs.[141] At the same time, overconcentration in the markets for processing and delivering agricultural outputs prevents American farmers from being able to sell their goods in a competitive market. Because middlemen processors absorb the profits, farmers receive low prices while consumers pay high prices.[142]

Weak enforcement of merger law exacerbates the problem in many agricultural markets in part because it has allowed overconcentration in a variety of grain and livestock markets. The American Antitrust Institute has explained one example:

> In 1999, DOJ allowed Cargill, Inc. to acquire Continental Grain's grain operations subject to some modest divestiture. The immediate result was to increase concentration in the business of buying grain such as corn, wheat, and soybeans. Farmers found themselves with less competition at

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136. Remedies for a successful challenger include enjoining the merger altogether or negotiating appropriate divestitures. *See* Reading Int'l, Inc. v. Oaktree Capital Mgmt. LLC, 317 F. Supp. 2d 301, 315 (S.D.N.Y. 2003).

137. *See, e.g.*, 1 WHITNEY, *supra* note 34, at 31.

138. *See, e.g.*, United States v. Von's Grocery Co., 384 U.S. 270 (1966).

139. *See* David A. Domina & C. Robert Taylor, *The Debilitating Effects of Concentration Markets Affecting Agriculture*, 15 DRAKE J. AGRIC. L. 61, 63 (2010) (criticizing a 2009 U.S. General Accounting Office report suggesting agricultural markets were not overconcentrated).

140. AMERICAN ANTITRUST INSTITUTE, *supra* note 61, at 290–99.

141. See Domina & Taylor, *supra* note 139, at 74 ("When America's farmers and ranchers seek to buy needed inputs like seed and fertilizer, they are confronted with concentrated markets and exploitative sellers."); *see also* AMERICAN ANTITRUST INSTITUTE, *supra* note 61, at 285–90 (discussing overconcentration in markets for seeds).

142. Domina & Taylor, *supra* note 139, at 74 ("Consumers are poorly served by existing market structures and practices associated with the production and distribution of agricultural products. The spread between the price paid to the farmer and the price paid by the consumer increases as concentration confirms gains in both food processing and retailing, even after adjusting for increased processing of food.").

the farm gate for their crops. As in the case of pork, the levels of concentration that resulted are such that there is a significantly increased risk of buyer power. Despite the recent increases in the prices for most grains, the point here is that the industry structure facilitates the extraction by intermediaries such as ADM and Cargill of much of the gain that ought to go to the farmer.[143]

A similar dynamic has taken place in the milk industry, in which milk processors have simultaneously depressed the prices paid to dairy farmers while increasing the shelf price for milk at the store. Dairy farmers sell their milk (often through cooperatives) to fluid milk processors who, in turn, distribute the milk, often through supermarket chains. Overconcentration in the related industries of milk processing and supermarkets has created market power that can be employed against both dairy farmers and consumers. Although antitrust laws should prevent this, economists have argued that "antitrust enforcement has failed to challenge successfully horizontal mergers and vertical strategic alliances in many regional milk marketing channels including New England."[144] This is not a regionally unique phenomenon.[145] Farmers are paid less for their milk while consumers are charged an excessive price at retail.[146] The American Antitrust Institute has opined: "The result is an increasing spread between what farmers receive for milk and what consumers pay for it. Thus, the failure of antitrust enforcement in dairy has resulted in harm to both producers and consumers."[147] Some economists worry that divestiture is not enough—that some mergers among supermarkets should be challenged and enjoined, full stop.[148]

The lack of effective competition in so many junctures of our nation's food growing and distribution network injures farmers and consumers alike. Whether one is a carnivore or a herbivore, and whether one's diet is vegan or heavy in egg and dairy products, all consumers are affected. At a 2008 congressional hearing on

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143. AMERICAN ANTITRUST INSTITUTE, *supra* note 61, at 306. Note that ADM was the ringleader of the lysine cartel and that both ADM and Cargill participated in the citric acid cartel. *See* Leslie, *supra* note 57, at 281, 330–31.

144. RONALD W. COTTERILL ET AL., MILK MARKET CHANNEL STRUCTURE: ITS IMPACT ON FARMERS AND CONSUMERS, AND THE INADEQUACIES OF ANTITRUST ENFORCEMENT AS A FOUNDATION FOR DAIRY POLICIES 2 (2003), *available at* http://www.fmpc.uconn.edu/research/milk/Testimony103003.pdf; *see id.* at 3 ("The case study also strongly suggests that market power is being exercised against farmers in the Northeast via low over-order premiums as well as against consumers in Southern New England via higher retail prices.").

145. *See id.* at 3 n.3 ("The current situation is virtually identical in the Pacific Northwest."). In theory, regional supermarket mergers can recreate the bind from the pre-Sherman Act era.

146. *Id.* at vi.

147. AMERICAN ANTITRUST INSTITUTE, *supra* note 61, at 304 (citing COTTERILL ET AL., *supra* note 144).

148. *See* COTTERILL ET AL., *supra* note 144, at 4 ("[T]he antitrust agencies should have challenged this merger rather than attempt to fix it via divestiture.").

overconcentration in agricultural markets, Senator Kohl of Wisconsin summed up the situation:

> Unfortunately, it appears that the Justice Department's antitrust enforcement efforts—both in the agricultural sector and generally—have been much too weak and passive in recent years. In the opinion of many experts, the Justice Department has often failed to take effective action as merger after merger in the pork, milk, and seed markets have sharply increased concentration and reduced competition. Antitrust investigations in the dairy industry have languished with no resolution. While the Justice Department sits largely on the sidelines, agriculture concentration increases and food prices rise.[149]

Some scholars argue that this overconcentration creates a risk to the nation's food supply. For example, because so few meat processors exist, the loss of one supplier could dramatically reduce the amount of chicken and beef available to consumers and create a market panic.[150] Also, to some, it is unclear whether, given issues of market concentration and the pincer effect associated with dominant processors, farmers can earn enough to remain viable.[151]

Overconcentration in healthcare markets has also been a serious problem, receiving significant attention since the latest swell in hospital mergers began in the 1980s.[152] Both federal and state antitrust authorities challenged several hospital mergers as anticompetitive, but such challenges generally lost.[153] This consolidation within healthcare markets has had serious consequences for consumers who have paid higher prices while having fewer choices.[154] In markets where merging hospitals were close by each other, hospital consolidation during the 1990s increased overall prices for inpatient care by five percent to over forty percent.[155]

The wave of hospital mergers was followed by a wave of mergers among health insurance companies.[156] This has led to price increases of almost ninety

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149. *Concentration in Agriculture and an Examination of the JBS/Swift Acquisitions: Hearing Before the S. Comm. on Antitrust, Competition Policy, and Consumer Rights*, 110th Cong. 1 (2008) (statement of Sen. Herb Kohl, Chairman, S. Comm. on Antitrust, Competition Policy, and Consumer Rights), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-110shrg45064/html/CHRG-110shrg45064.htm.

150. *See* Domina & Taylor, *supra* note 139, at 78 ("Concentrated agriculture, food processing, and food retailing are serious threats to economic well being. Loss or destruction of the nation's largest beef slaughter company and chicken company would leave the nation with a woefully inadequate meat supply, likely resulting in mass panic by the public.").

151. *Id.* at 82 ("Farmers receive a shrinking share of the retail food dollar, and the portion they receive will not sustain them.").

152. ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 216–17.

153. *Id.*

154. *Examining Competition in Group Health Care: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 86 (2006) (statement of Sen. Patrick Leahy), *quoted in* AMERICAN ANTITRUST INSTITUTE, *supra* note 61, at 322.

155. AMERICAN ANTITRUST INSTITUTE, *supra* note 61, at 343.

156. *Id.* at 322.

percent over a six-year period.[157] As the federal antitrust agencies did little to stem the tide of health insurer consolidation, the result has been "higher premiums, higher deductibles, higher co-pays, a greater number of uninsured, and a variety of anticompetitive conduct by dominant health insurers. The most severe problems occur when employers or employees simply can no longer afford insurance. Increasingly, employers have been forced to downscale or even eliminate employee insurance benefits."[158]

But the picture is not all bleak. The FTC has also found some success in "challenging mergers among pharmaceutical manufacturers, pharmaceutical wholesalers, commercial laboratories, medical-device manufacturers, dialysis clinics, vendors of medical therapies and other providers of health care products and services."[159] Recently, the FTC has succeeded in enjoining hospital mergers that would have decreased competition in already concentrated markets and, thus, likely would have increased healthcare costs.[160] In some cases, a challenge by the FTC can lead healthcare companies to abandon a merger predicted to have anticompetitive consequences.[161]

Unfortunately, judicial mistakes in application of merger law can be particularly perilous in the context of healthcare. A recent Eighth Circuit case illustrates how judicial error in antitrust merger litigation harms the public interest. Patent ductus arteriosus (PDA) is a life-threatening heart condition that afflicts at least 30,000 newborns every year, primarily low birth-weight babies, most of whom were born prematurely.[162] Although surgical intervention is possible, pharmacological (drug) treatment is preferred.[163] The FDA had approved two drugs for treating PDA: Indocin IV and NeoProfen."[164] The pharmaceutical giant

157. *Id.* ("There were over 400 health insurer mergers in the past decade and now practically every major metropolitan market is highly concentrated. The number of insurers has fallen by just under 20% since 2000. These mergers have not led to benefits for consumers; instead, premiums have skyrocketed, increasing more than 87% over the past six years.").

158. *Id.* at 323.

159. ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 218–19.

160. *See, e.g.*, Evanston Nw. Healthcare, 2007 F.T.C. 210 (2007); *see also* ProMedica Health System, Inc., No. 9346 (FTC Mar. 28, 2012), *available at* http://www.ftc.gov/os/adjpro/d9346/120328promedicabrillopinion.pdf (enjoining a hospital merger predicted to increase price); ABA SECTION OF ANTITRUST LAW, *supra* note 28, at 244 ("In another case, the Division enjoined an agreement between two hospitals by which they agreed that one would not open a cardiac-surgery program to compete with the other's program.") (discussing Consent Decree and Competitive Impact Statement, United States v. Charleston Area Med. Ctr., 2006-1 Trade Cas. (CCH) ¶ 75,313 (S.D. W. Va. 2006)); FTC, FTC CHALLENGES OSF HEALTHCARE SYSTEM PROPOSED ACQUISITION OF ROCKFORD HEALTH SYSTEM AS ANTICOMPETITIVE (2011), *available at* http://www.ftc.gov/opa/2011/11/rockford.shtm (merged entity would have controlled 64% of the relevant market).

161. *See, e.g.*, Omnicare, Inc., No. 9352, File No. 111 0239 (F.T.C. Feb. 23, 2012) (Order Dismissing Complaint), *available at* http://www.ftc.gov/os/adjpro/d9352/120223omnicareorder.pdf (merger between rival pharmacies abandoned due to FTC challenge).

162. FTC v. Lundbeck, Inc., 650 F.3d 1236, 1238 (8th Cir. 2011).

163. *Id.*

164. *Id.* The drugs are not bioequivalents and have different side effects. *Id.*

Merck owned the rights to NeoProfen, for which it charged $77.77 per treatment. Lundbeck owned the rights for Indocin IV, a significantly higher-priced drug. Lundbeck acquired the rights to NeoProfen and within two days of the acquisition raised the price of NeoProfen thirteen-fold, eventually charging $1,522.50 per treatment.[165] The FTC challenged the acquisition as a violation of Section 7 of the Clayton Act.[166] Following a bench trial, the district court held for Lundbeck, concluding that the FTC failed to prove that Indocin IV and NeoProfen competed against each other in the same relevant product market.[167] The Eighth Circuit affirmed.[168] The acquisition was permitted and the price of life-saving medicine skyrocketed. The Lundbeck case demonstrates how the failure to understand antitrust and markets has serious consequences. For some babies, effective antitrust enforcement can literally mean the difference between life and death.

CONCLUSION

A body of law—like antitrust—that makes food, medicine, and the other necessities of life affordable is public interest law. In the context of healthcare, the former chairman of the FTC noted the importance of antitrust law by explaining how "[a]ggressive competition promotes lower prices, higher quality, greater innovation, and enhanced access. More concretely, in health care, competition results in new and improved drugs, cheaper generic drugs, treatments with less pain and fewer side effects, and treatments offered in a manner and location consumers desire."[169] An effective antitrust law regime makes appropriate healthcare both more affordable and more accessible.

As price fixing and other collusive agreements continue to be a problem in many agricultural markets, antitrust law remains necessary to deter and prevent collusion that results in higher food prices. Surely the provision of milk to schoolchildren is a quintessential public interest. Some public interest lawyers, such as those who do children's advocacy, try to feed poor children. Some antitrust lawyers try to achieve the same goal by helping to ensure that the price of milk for school lunch programs is not artificially inflated by illegal price fixing. This helps keep school lunch programs affordable and intact.

All modern economies need an effective antitrust regime to ensure that illegal monopolies and collusion do not displace competition. Antitrust law helps achieve a litany of noble goals. Antitrust law helps get milk to schoolchildren,

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165. *Id.* This was still cheaper than the $1,614.44 that Lundbeck charged for Indocin IV. *Id.*

166. *See id.*

167. *Id.* at 1239.

168. *Id.* at 1243.

169. Timothy J. Muris, Chairman, FTC, Opening Remarks Before the FTC/DOJ Hearings on Health Care and Competition Law and Policy (Feb. 26, 2003) (transcript available at http://www.ftc.gov/ogc/healthcarehearings/docs/030226muris.shtm).

vitamins to the elderly and to pregnant women, fuel to households, and more affordable food to everyone. Antitrust law improves access to lifesaving pharmaceuticals and medical services. Yet antitrust laws could not achieve these results without public interest attorneys committed to enforcing the laws of competition.