BOTH SIDES NOW: BUYER DAMAGE CLAIMS IN ANTITRUST ACTIONS INVOLVING "TWO-SIDED" MARKETS

Stephen V. Bomse*

Scott A. Westrich*

I. INTRODUCTION

In his article *The Antitrust Economics of Multi-Sided Platform Markets*, David Evans explains why antitrust regulators and other decisionmakers need to consider the unique characteristics of interdependent network markets when evaluating businesses ranging from Japanese "love" clubs to video game software developers to shopping malls.[1] Evans identifies three "necessary" conditions for the "emergence of a platform business."[2] The first of these conditions is that "there are two or more distinct groups of

---

* The authors are shareholders in Heller Ehrman LLP. They wish to thank David E. Jones, Russell P. Cohen, and Jonathan R. Dowell for their invaluable research assistance. Heller Ehrman was counsel to Visa U.S.A. Inc. in several of the cases referred to in this paper. However, the views expressed herein are those of the authors alone.

[1] David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REG. 325 (2003) [hereinafter *Evans I*].

[2] *Id.* at 331.

customers."[3] While this criterion may seem prosaic, if not tautological, this "condition" has important implications for private antitrust litigation.

Uniquely—in scope, if not in kind—American antitrust enforcement is a creature of private litigation. Under Section 4 of the Clayton Act, anyone injured by reason of an antitrust violation is entitled to recover treble damages, as well as attorneys' fees and costs.[4] Given the seemingly limitless breadth of this statutory language, much judicial attention has focused on limiting treble damage liability, either by adopting rules to restrict antitrust standing,[5] prohibiting suits by indirect purchasers[6] (for all the good *that* did),[7] or requiring plaintiffs to demonstrate separately that the illegal activity was the "but for" cause of the plaintiff's injury and that the injury resulted from the reasons that the conduct in question is considered anticompetitive ("antitrust injury").[8] A common factor among these closely related legal

---

[3] *Id.* at 331-32. The other two conditions are the existence of "externalities associated with [the two customer groups] becoming connected or coordinated" and the need for some "intermediary" to "internalize the externalities created by one group for the other group." *Id.* at 332-33.

[4] 15 U.S.C. § 15 (2000).

[5] *See, e.g.*, Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

[6] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

[7] *See* California v. ARC Am. Corp., 490 U.S. 93, 105-06 (1989) (holding that federal law does not preempt state laws that allow actions by indirect purchasers); *see also, e.g.*, Hyde v. Abbott Labs., Inc., 473 S.E.2d 680, 686-88 (N.C. Ct. App. 1996) (concluding that the "*Illinois Brick* limitation does not apply in North Carolina"); Bunker's Glass Co. v. Pilkington, PLC, 75 P.3d 99, 104-05 & nn.2-7 (Ariz. 2003) (noting the lack of uniformity in state approaches to indirect purchaser suits and stating that twenty-five states and the District of Columbia "allow some form of indirect purchaser actions"). *But see* Crouch v. Crompton Corp., Nos. 02 CVS 4375, 03 CVS 25142004, WL 2414027, at *12 (N.C. Oct. 28, 2004) (criticizing "state indirect purchaser" actions as "generally parasitic" because they are "not self-generating or supporting but almost always are dependent on some triggering federal action for their genesis"); Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5, 119 Stat 4 (2005).

[8] *See infra* notes 28-32.

rules is that they deny recovery on policy or prudential grounds to parties who, in fact, have been adversely affected by a defendant's conduct.

In general, treble damage actions are brought either by an allegedly disadvantaged, horizontal competitor of the defendant or by a buyer who is vertically situated, either directly or indirectly, in relation to the defendant—although that by no means exhausts the universe of antitrust claimants.[9] While both competitors and customers may be appropriate antitrust plaintiffs in cases involving two-sided markets, claims by buyers on one "side" of such markets present the most interesting new challenges.

In virtually every private damages case, the court must determine the nature of the "but for" world, to wit: What would have happened to the plaintiff if the illegal conduct had never occurred? Sometimes this exercise is merely a debate over the amount of price inflation and/or the extent of restricted output. In other instances, the question is whether the plaintiff's situation would have been materially different but for the defendant's conduct, "all things" considered.[10] However, in cases involving two-sided markets, the analysis is more complicated because courts must consider a second group of customers whose participation was necessary for the transaction to occur. These buyers are

---

[9] Suppliers, or would-be suppliers, occasionally bring suits to the defendant. *See, e.g.,* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (stating there is no question regarding standing of a doctor to challenge exclusive arrangements between a hospital and competing doctors); *see generally* 2 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 350 (2d ed. 2000). Other would-be plaintiffs—often unsuccessful on "standing" grounds—include employees, shareholders, and creditors. *See generally id.* ¶¶ 352-353.

[10] *See, e.g.*, Murphy Tugboat Co. v. Crowley, 658 F.2d 1256, 1260-63 (9th Cir. 1981) (finding insufficient evidence to award damages for lost future profits because a "reasonable jury could not . . . indulge in the assumption that a competitor would follow a course of behavior other than that which it believed would maximize its profits"); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1352-53 (3d Cir. 1975) (concluding that proposed damages model was inadmissible because it did not take into account lawful competition).

not only absent from the suit, but they may have economic interests that are in direct conflict with those of the plaintiff. In addition, as Evans and others have demonstrated, the differences in pricing strategies between two-sided markets and standard markets affect both liability and damage issues.[11]

This Article attempts to outline some of the complexities that arise when buyers on one side of a two-sided market bring an action for treble damages. In particular, careful attention must be paid to the requirement of "antitrust injury," which demands that the purported harm that the plaintiff-buyer suffered be real not only in a "but for" sense, but also that it has resulted from an injury to competition that was a product of "that which makes the defendant's conduct unlawful."[12] To that end, in Part II we present a brief overview of antitrust damage law as applied to "buyer" claims generally. Part III then applies these general antitrust principles and the economics of multi-sided markets to two "real world" problems in the payment card industry. We selected examples from the payment card industry because it is the one industry in which antitrust issues surrounding two-sided markets have been directly presented, though not necessarily addressed or resolved, in actual litigation. Finally, Part IV offers some brief conclusions.

---

[11] *See, e.g.*, *Evans I*, *supra* note 1; Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 1029 (2003); Mark Armstrong, Competition in Two-Sided Markets (Feb. 2004), http://www.econ.ucl.ac.uk/downloads/armstrong/venice.pdf; Bernard Caillaud & Bruno Jullien, Chicken & Egg: Competing Matchmakers on the Internet (Apr. 24, 2001), http://idei.fr/CORE/articles/caillaud_jullien.pdf; David S. Evans, AEI-Brookings Joint Center for Regulatory Studies, The Antitrust Economics of Two-Sided Markets (Sept. 2002), http://aei.brookings.org/admin/pdffiles/phpMt.pdf [hereinafter *Evans II*].

[12] Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).

II. BUYER DAMAGE CLAIMS UNDER THE ANTITRUST LAWS

To establish standing under Section 4 of the Clayton Act, a private plaintiff, whether a buyer or a competitor, must prove: (1) injury-in-fact by reason of the antitrust violation; (2) that the injury is not unduly remote from the violation; (3) "antitrust injury"; and (4) cognizable and reasonably quantifiable damages.[13] As between private plaintiffs, buyers are frequently in the best position to prove antitrust injury,[14] ordinarily in the form of higher prices,[15] but consumers also can be harmed by conduct that reduces output or limits choice.[16] Although buyers are often

---

[13] *See, e.g.*, AREEDA ET AL., *supra* note 9, ¶ 335c.

[14] *See, e.g.*, Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 372 (9th Cir. 2003) ("Consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury."); *In re* Cardizem CD Antitrust Litig., 332 F.3d 896, 910-11 (6th Cir. 2003) (preventing the same type of harm in this case where defendants deprived consumers of a lower-priced generic option as a result of a per se illegal horizontal restraint "was undoubtedly a *raison d'être* of the Sherman Act"); Arroyo-Melecio v. Puerto Rican Am. Ins. Co., 398 F.3d 56, 72 (1st Cir. 2005) (quoting SAS of P.R., Inc. v. P.R. Tel. Co., 48 F.3d 39, 44-5 (1st Cir. 1995)) ("The plaintiffs here are consumers and as such are presumptively favored as appropriate plaintiffs to assert antitrust injury."); AREEDA ET AL., *supra* note 9, ¶ 345 ("Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted.").

[15] *See* Goldwasser v. Ameritech Corp., 222 F.3d 390, 398 (7th Cir. 2000) (holding that when purchasers plead that they are "forced to pay an alleged monopolistic overcharge, they have described the kind of injury the antitrust laws are designed to redress, which is to say they have satisfied the 'antitrust injury' requirement"); Davis v. Pacific Bell, 204 F. Supp. 2d 1236, 1240 (N.D. Cal. 2002) ("Consumers have been held to have standing to sue under the antitrust laws when they suffer a price increase as a result of anticompetitive conduct.").

[16] The leading case in the latter area is *Blue Shield of Va. v. McCready*, 457 U.S. 465, 482-84 (1982), in which the Supreme Court held that an individual consumer had suffered antitrust injury when her insurer denied coverage for psychologist services pursuant to a policy that

appropriate plaintiffs in treble damage actions, there are some important limitations on buyer claims.

For example, most buyers in tying cases attempt to base their damage claims on proof that the tie forced them to pay a higher price for the tied product.[17] Although some courts have awarded damages on this basis, "[i]ncreasingly... courts recognize that an illegal tie does not actually injure a buyer unless the sum of prices for the tying and tied products exceeds the bundle's market value."[18] The reason is that a high price charged for the tied product is often accompanied by a reduction in the price of the tying product, such that the price for the two products together is equal to or less than what the buyer would have paid for each of the two products separately.[19]

Similarly, the circumstances in which buyers can sue for predatory pricing are more limited than for competitors (or for the government). The two elements of a predatory pricing claim are: (1) below-cost pricing; and (2) a dangerous probability of recoupment.[20] Although a competitor can prove antitrust injury if these two elements are met, a buyer must prove *actual* recoupment, not merely a dangerous

---

resulted from an unlawful conspiracy between the insurer and psychiatrists. The Court pointed to the plaintiff's out-of-pocket expenses for unreimbursed psychologist services as the amount of damages caused by the reduction in consumer choice. *Id.* at 483. However, in other "consumer choice" cases, the buyer might find it "difficult . . . to prove damages in a certain amount or to demonstrate the 'direct' or causation element for antitrust standing." *Glen Holly,* 352 F.3d at 378 n.5.

[17] *See* 10 PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 1769c, at 413 (2d ed. 2004).

[18] AREEDA ET AL., *supra* note 17, ¶ 1769a, at 410.

[19] Id. ¶ 1769c, at 413; Kypta v. McDonald's Corp., 671 F.2d 1282, 1285 (11th Cir. 1982); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 51-52 (9th Cir. 1971). *But cf. In re* Visa Check/Mastermoney Antitrust Litig., 280 F.3d 124 (2d Cir. 2001) ("*Wal-Mart*"). In certifying a class over a divided panel, the majority believed either that overcharges for the tied product alone was sufficient for antitrust injury or that the case presented special circumstances. For further discussion of the *Wal-Mart* case, see *infra* Section III.A.

[20] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993).

probability of recoupment. The rationale is that if the defendant has not yet eliminated competition and raised its prices to supracompetitive levels, the buyer will not be harmed, but rather will benefit from the defendant's pricing below cost. As the Supreme Court has noted, "unsuccessful predation is in general a boon to consumers."[21] Thus, before the actual recoupment period begins, the buyer has not suffered antitrust injury or injury-in-fact.[22] While a buyer might be able to bring an action for injunctive relief prior to actual recoupment,[23] it should not be able to sue for damages.

More generally, buyers ordinarily should not be able to bring a damage claim for attempted monopolization because they would not be harmed until the monopolization scheme comes to fruition. In contrast, a competitor can more easily prove antitrust injury during the "attempt phase."[24] Buyers

---

[21] *Id.* at 224.

[22] *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 723e, at 282 (2d ed. 2002) ("Although consumers are predation's ultimate victims, they almost never complain of predatory pricing. During the predation campaign itself prices are low rather than high, and consumers have little incentive to sue. Indeed, given their lack of injury they could not obtain damages, although they might be able to obtain an injunction."); *see also Brooke Group*, 509 U.S. at 224 ("Without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."); Advo, Inc. v. Phila. Newspapers, Inc., 51 F.3d 1191, 1200 (3d Cir. 1995) ("Predatory pricing schemes that fail at the recoupment stage may injure specific competitors like Advo, but do not injure competition (i.e., they do not injure consumers) and so produce no antitrust injury. Such futile below-cost pricing effectively bestows a gift on consumers, and the Sherman Act does not condemn such inadvertent charity.") (internal citations omitted).

[23] *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130 (1969) ("The remedy of injunctive relief under Clayton Act § 16 is characteristically available even though the plaintiff has not yet suffered actual injury; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.") (internal citations omitted); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 121-22 (1986) (a private plaintiff may seek injunction to prevent future predatory pricing).

[24] *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 n.14 (1977) (noting in dicta that "competitors may be able to prove antitrust injury before they are driven from the market and competition is

are harmed only when a firm raises prices above competitive levels or reduces output, which, by definition, it cannot do unless it has market power.[25] For that reason, a number of courts have held that "when defendants engage in... anticompetitive acts in an attempt to gain a monopoly, the competitor who is being driven out of the market is the party with standing."[26] Again, however, buyers may be able to bring an action for injunctive relief based on attempted monopolization if they can show a "significant threat" that they will have to pay supracompetitive prices.[27]

---

thereby lessened"); *Cargill*, 479 U.S. at 118 n.13 (quoting *Brunswick Corp.*, 429 U.S. at 489 n. 14) (noting in dicta that predatory pricing is capable of producing antitrust injury to competitors before recoupment); *see also* Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 746-47 (2003).

[25] *See In re* Air Passenger Computer Reservation Sys., 727 F. Supp. 564, 569 (C.D. Cal. 1989) ("As a matter of economic theory, supracompetitive rates are the result of monopoly, not attempted monopoly."); 2A PHILLIP E. AREEDA, ET AL., ANTITRUST LAW ¶ 501 (2d ed. 2001).

[26] *In re Air Passenger*, 727 F. Supp. at 568-69 (holding that buyers lack standing to assert claims for attempted monopolization and noting that "[o]nly when the defendants achieve a monopoly and are in a position to harm consumers by engaging in monopoly overcharging, is there harm to the consumers"); Wojcieszek v. New England Tel. & Tel. Co., 977 F. Supp. 527, 534-35 (D. Mass. 1997); Simpson v. US West Commc'ns, Inc., 957 F. Supp. 201, 205-06 (D. Or. 1997); Davis v. Southern Bell Tel. & Tel. Co., No. 89-2839, 1994 WL 912242, at *16 (S.D. Fla. Feb. 1, 1994).

Unlike consumer buyers, distributors may have standing to bring claims for attempted monopolization where the harm is not connected to the purchase itself but to some other aspect of the distribution relationship or in a situation where the distributor is also a competitor of the seller. *See, e.g.*, Gen. Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987) (holding a manufacturer liable for attempted monopolization where it terminated a distributor that began selling a competitor's products); H.J., Inc. v. Int'l Tel. & Tel. Corp., 867 F.2d 1531, 1541-42 (8th Cir. 1989) (holding evidence of predatory pricing designed to squeeze distributor out of the market as sufficient to sustain attempted monopolization verdict).

[27] *See In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395, 399 (3d Cir. 2000) (permitting indirect purchaser action for injunctive relief to halt an attempted monopolization).

In the situations described above, the buyer's damage claim is deficient because it has suffered no injury-in-fact. Ordinarily, a buyer is no worse off because of a tie and, pre-recoupment, is generally better off as a result of a defendant's below-cost pricing. Even if a plaintiff demonstrates that it is worse off in fact, courts will deny recovery if the plaintiff cannot also prove that its harm resulted from that which made the defendant's conduct unlawful. This latter requirement, first discussed in the *Brunswick* case, is termed "antitrust injury." There, the Court defined the term to mean "(1) injury of the type the antitrust laws were intended to prevent and (2) that flows from that which makes defendants' acts unlawful."[28]

In *Brunswick,* the plaintiff argued that the defendant's acquisition of several failing bowling centers caused it harm because, if the defendant had not acquired the centers, then there would have been less competition, and the plaintiff would have earned greater profits.[29] Even though the acquisition itself was a violation of the antitrust laws, the Court held that the plaintiff had not suffered "antitrust injury" because the profits that it lost as a result of enhanced competition were not of the type of injury that the antitrust laws are designed to prevent.[30] As *Brunswick* shows, "[a]t its most fundamental level, the antitrust injury requirement precludes recovery for losses from competition, even though such competition was actually caused by conduct violating

---

[28] *Brunswick Corp.*, 429 U.S. at 489.

[29] *Id.* at 480-81.

[30] *Id.* at 487-88. *See also* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 122 (1986) (reversing injunction to prevent merger for lack of antitrust injury where plaintiff claimed that it would be harmed by increased competition for market share); Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 336-37 (1990) (holding that competitor suit based on alleged conspiracy between ARCO and its dealers to fix maximum retail prices failed because maximum retail price fixing is "unlawful because of its potential effects on dealers and consumers, not because of its effect on *competitors*;" plaintiff did not suffer antitrust injury, "since its losses do not flow from the aspects of vertical, maximum price fixing that render it illegal").

the antitrust laws."[31] Put differently, "every plaintiff [must] show that its loss comes from acts that reduce output or raise prices to consumers."[32]

Antitrust injury is not ordinarily a significant issue in buyer, as opposed to competitor, cases because increased prices or restricted output are generally the essence of the buyer-plaintiff's damage claim, and they are the very injuries with which antitrust law is most directly concerned. However, in cases involving two-sided markets, which have two or more distinct groups of customers, the antitrust injury principle may play a more important role.

Nearly all two-sided markets exhibit network effects.[33] Thus, the platform firm must solve the "chicken and egg" problem by assembling a critical mass of customers on one side of the market to attract customers on the other side of the market.[34] Pricing structure is typically an important component of the platform firm's business model, which is designed to solve this interdependency issue.[35] Unlike a business operating in a single-sided market, a platform business must choose both a pricing *structure* and a price *level* for each side of the market. The optimal pricing structure for a platform business is "often heavily skewed toward one side of the market," with that side paying much more than the other.[36] For example, sellers of real estate typically pay the brokers' fees on both sides of the transaction, whereas buyers typically pay nothing. Similarly, newspapers and magazines often sell their publications for far less than their costs because they earn most of their revenues from advertisers.

Economists who have written about multi-sided markets provide a central insight: it is impossible to assess the

---

[31] AREEDA ET AL., *supra* note 9, ¶ 337a, at 305-06.

[32] Chi. Prof'l Sports L.P. v. NBA, 961 F.2d 667, 670 (7th Cir. 1992).

[33] *See* Rochet & Tirole, *supra* note 11, at 1024.

[34] *See Evans I*, *supra* note 1, at 35; *Evans II*, *supra* note 11, at 34.

[35] *See*, *e.g.*, *Evans I*, *supra* note 1, at 350; Rochet & Tirole, *supra* note 11, at 1018.

[36] *Evans I*, *supra* note 1, at 351.

competitive effects of conduct within a multi-sided market without considering all sides of the market. Predatory pricing claims provide a straightforward example. One cannot determine whether a defendant's prices are predatory by comparing the defendant's prices on one side of the market to the costs associated with that side of the market. Rather, the relevant question is whether the defendant's *total* prices are below the appropriate measure of its costs on both sides of the market.[37]

Tying arrangements provide another useful example. Platform businesses may use ties and other forms of integration to attract both sides of the market to the platform.[38] Although tying presents the same potential for harm in a two-sided market as it does in a standard single-sided market, ties that harm one set of consumers may actually benefit consumers on the other side of the market. In such situations, the tie may enhance overall consumer welfare, although such measures would appear to be unlawful if the analysis focused on only one side of a two-sided market.[39]

As the following Section illustrates, these issues, particularly the notion of antitrust injury, have a potentially important impact on treble damage claims brought by buyers on one side of a two-sided market.

III. TWO CASES IN POINT: *WAL-MART* AND "INTERCHANGE FEES"

The examples that follow, which we drew from the payment systems industry, illustrate how some of the issues described above can unfold in the context of an actual litigation. A large proportion of the economic literature on multi-sided markets has focused on issues arising in the payment card business. In fact, as Evans notes, the late Professor William Baxter of Stanford offered the first insights on two-sided markets following his work in an early

[37] *Evans II*, *supra* note 11, at 64-65; *Evans I*, *supra* note 1, at 367.

[38] *See Evans I*, *supra* note 1, at 371-73.

[39] *See id.* at 373.

antitrust case for Visa that involved interchange fees.[40] Furthermore, for a number of reasons, including sheer ubiquity, much of the antitrust litigation to date involving two-sided market issues has concerned payment cards. Therefore, it is useful to study the payment card industry to illustrate the issues discussed in the prior section.

This Section addresses two specific sets of issues. The first concerns the so-called *Wal-Mart* litigation, a consolidated set of class actions brought on behalf of the several million merchants in the United States that accept Visa and/or MasterCard payment cards.[41] The merchant class in that case sought treble damages of approximately $100 billion based on the theory that Visa and MasterCard required merchants that accepted their credit cards to honor their debit cards as well. Second, we consider claims that Visa's so-called "interchange fee," an internal transfer amount that is "paid" by merchant-acquiring banks to card-issuing banks, represents horizontal price fixing. The *NaBanco* case first addressed this issue. However, the issue has reappeared in a number of proceedings: a *Wal-Mart* opt-out suit filed by Best Buy Stores, two pending class actions in California, and a number of recently-filed merchant class actions that have been consolidated in the Eastern District of New York.[42]

---

[40] See Evans I, supra note 1, at 330 n.14 (citing W.F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, 23 J.L. & Econ. 541 (1983)). The lawsuit was National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc., 596 F. Supp. 1231 (S.D. Fla. 1984), aff'd, 779 F.2d 592 (11th Cir. 1986).

[41] In re Visa Check/MasterMoney Antitrust Litig., 297 F. Supp. 2d 503 (E.D.N.Y. 2003), aff'd, 396 F.3d 96 (2d Cir. 2005).

[42] See Reyn's Pasta Bella, LLC v. Visa U.S.A. Inc., 259 F. Supp. 2d 992 (N.D. Cal. 2003), appeal docketed, No. 04-15581 (9th Cir. Mar. 26, 2004); In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., MDL-1720 (E.D.N.Y. transferred Oct. 19, 2005); Kendall v. Visa U.S.A. Inc., No. C 04-4276 (N.D. Cal. filed Oct. 10, 2004); Best Buy Stores, L.P. v. Visa U.S.A. Inc., No. 03-3384 (D. Minn. filed June 10, 2003), consolidated in In re Visa/MasterCard Antitrust Litig., No. 03-MD-1575 (E.D.N.Y. filed Dec. 11, 2003). Interchange fees also are, or have been, the subject of a number of regulatory proceedings in various other countries.

In the *Wal-Mart* cases, the existence of a two-sided market had important implications for the plaintiffs' damage claims under the antitrust injury doctrine. The same is true of the attacks upon interchange fees. In the latter cases, however, the importance of the two-sided market may be even more fundamental.

A. The *Wal-Mart* Litigation

Visa is a classic two-sided network "matchmaking" platform.[43] Consumers wishing to use a card bearing the Visa logo are matched with merchants willing to accept such cards as payment. Unless both the cardholder and the merchant are "on board," there can be no transaction. The value of the network increases, both to cardholders and merchants, as the size of the network expands on the "other" side.[44] To realize the benefits of the network, merchants must agree to accept all cards bearing the network's common identifier. Visa calls this its "Honor All Cards" rule. This principle of universal acceptance is central to, and a feature of, all payment card systems.[45]

Until relatively recently, the predominant form of general purpose payment card has been a credit card that allows consumers to purchase goods and then either to pay off their balance in full within thirty days or to extend payment, in

See, e.g., *Visa International — Multilateral Interchange Fee*, 2002 O.J. (L 318) 17 (2002) (European Union); RESERVE BANK OF AUSTRALIA, REFORM OF CREDIT CARD SCHEMES IN AUSTRALIA IV (2002), *available at* http://www.rba.gov.au/PaymentsSystem/Reforms/CCSchemes/FinalReforms/complete_statement.pdf; Office of Fair Trading, *MasterCard Interchange Fees: Preliminary Conclusions* (Feb. 2003) (United Kingdom), *available at* http://www.oft.gov.uk/NR/rdonlyres/9F26CE17-08E2-4680-8F4F-56A24980F8B9/0/oft634.pdf.

[43] *See Evans I*, *supra* note 1, at 328 (discussing matchmaking).

[44] However, this was not necessarily on their side. If the cardholder base remained constant, merchants would be better off if they enjoyed exclusivity of acceptance over their competitors.

[45] This includes systems operated as joint ventures, such as Visa, MasterCard and many of the ATM networks, as well as, the so-called "proprietary" networks, such as American Express and Discover.

which case interest accrues on the unpaid balance. By the early 1990s, virtually all significant U.S. merchants accepted Visa and MasterCard credit cards. At that point, credit card associations, particularly Visa, concluded that there was potential consumer interest in debit cards, which allow the transaction amount to be deducted automatically from the cardholder's demand deposit account—in effect, an electronic check.[46]

If Visa had been forced to launch its "off-line debit" product as a new card brand ("Zork"), it would have had to solve anew the familiar "chicken and egg" problem of establishing a product whose value (indeed, existence) depends on the interdependent behavior of two different sets of customers.[47] By contrast, if credit card companies could bring the "chickens" (merchants) into the network immediately, then they would establish at least one important element of the value of the card to potential cardholders (a large acceptance network). Thus, the debit card could compete with other payment devices for cardholder acceptance according to its other attributes.[48] Thus, Visa decided that it would be efficient for it to brand its debit cards with the "Visa" name and logo, thereby

[46] Visa had offered a debit product since 1975, but it did not actively seek to promote it, and the transaction volume was very small. For convenience, therefore, our discussion in the text simplifies history by treating debit as a "new" product as of the promotional "re-launch" in the early 1990s. As a further matter of convenience, we focus on Visa alone even though MasterCard also began to promote its own debit products at about the same time. For reasons that are not relevant here, Visa thus far has been more successful than MasterCard on the debit side of the payment card business.

[47] Cardholders have little or no interest in a card that is not widely accepted by merchants, and merchants only wish to accept cards that a significant number of their customers want to use.

[48] Meanwhile, as the core meaning of Visa "acceptance" to merchants is that they will be paid anytime a valid card bearing the Visa logo is presented, the fact that a Visa debit card has different characteristics *to consumers* than a Visa credit card was, in Visa's view, irrelevant to merchants, for whom it was just another Visa card.

bringing those cards within the company's standard "Honor All Cards" policy.

Some merchants did not see matters that way. To them, the value of accepting Visa cards lay in incremental sales which, they claimed, existed with credit cards but were largely, if not completely, absent with debit cards. Moreover, merchants felt that the "merchant discount" of approximately two percent that they paid to accept Visa credit cards was unjustified for debit cards because of, among other factors, the lower risk of nonpayment.

In addition, some merchants believed that there was a significant opportunity cost associated with accepting Visa debit cards. While Visa was promoting its new Visa "Check Card," various regional bank networks were creating an alternative "on-line" debit network through which a customer could access his or her account by using a bank-issued ATM card, which, theretofore, bank customers had used primarily to withdraw cash from their depository accounts. Since millions of bank account holders already possessed these ATM cards, the on-line ATM networks came to the point of sale with lots of "eggs." On the other hand, merchants could not accept these new PIN-debit cards without installing PIN pads at the point of sale and training their sales staff to use them. Stated simply, the ATM networks needed "chickens." To induce merchants to purchase and to install PIN pads, the networks predictably had to offer their cards to merchants at, or close to, "par," i.e., with little or no merchant discount, and thus, little or no interchange fee.[49]

While Visa required those merchants that honored its credit cards to add Visa "debit" to the shelf of payment options available to their customers, Visa has never prevented merchants from accepting any and all other forms

---

[49] Even so, merchant penetration was quite slow for a number of years. Because cardholders could use their Visa (or MasterCard) debit cards to make purchases, merchants apparently perceived little reason to install PIN pads. *See, e.g.*, EFT DATA BOOK: THE COMPLETE GUIDE TO THE ATM AND POS DEBIT MARKETS 7 (2002 ed.) (showing growth of PIN-based point of sale terminals and spending volume).

of payment, including competing on-line debit cards. Nonetheless, merchants believed that the Visa "Check Card" operated as a type of Gresham's Law by restricting the growth of what they asserted was a superior, lower cost, debit product.[50]

In 1996, Walmart, the nation's largest retailer, led a group of large national merchants in suing Visa and MasterCard in federal court in Brooklyn, accusing the associations of tying acceptance of their respective debit cards to acceptance of their credit cards. The plaintiffs also argued that the associations attempted to monopolize the market for debit card services to merchants. Numerous "copycat" suits predictably followed, and the Judicial Panel on Multidistrict Litigation consolidated the class actions on behalf of the several million U.S. merchants that accept Visa and/or MasterCard cards.[51] Plaintiffs alleged that but for their respective tying requirements, Visa and MasterCard would not have been able to price their debit cards higher than the competing on-line cards. Plaintiffs claimed that the calculated difference between those rates and the defendants' actual debit interchange rates constituted their damages. The plaintiffs' expert calculated that the post-trebling damages totaled approximately $100 billion.[52]

As noted previously, every tying claim by a buyer involves a "two-sided" pricing issue in that economic harm cannot be measured by looking solely at the price of the tied product. If the seller can increase the price of the tied product above competitive levels only by reducing the price of the tying

---

[50] To anticipate an obvious question, the ATM networks also needed to engage in their own form of "reverse" tying. With no material amount of revenue coming in from merchants, banks had little incentive to allow their ATM cards to be used at the point of sale. To overcome that potentially serious problem, ATM networks typically passed rules that required participating banks to accept all of their ATM cards at the point of sale.

[51] *In re* VISA/MasterCard Antitrust Litig., MDL-1575 (filed in Dec. 2003). Virtually all merchants accept both, along with checks, cash, and other types of payment "cards."

[52] *Walmart,* 280 F.3d 124, 148 (2d Cir. 2001).

product, the buyer has suffered no harm, and therefore, has no recoverable damages. Indeed, most of the cases that have considered this issue have come to such a conclusion.[53] These decisions are not only economically sensible but also address the supposed vice of most tying arrangements: the use of legitimate market power in the tying product to create market power in some other market.

The existence of an interdependent two-sided market introduces additional complexity to the analysis. In ordinary tying cases, requiring the buyer to prove an increase in the "package price" frequently forecloses any damage claim. However, in a two-sided market case, the analysis must consider not only the "package price" that the plaintiff paid for the tying and tied products, but the prices charged to customers on the "other" side of the market as well. Since pricing in a two-sided market reflects judgments about supply and demand on both sides of the market, a buyer on one side may appear to pay an excessive amount when viewed in isolation, i.e., without taking account of the other side of the interdependent market. However, evaluating whether a buyer has been harmed in a two-sided market tying case by considering only one side of the market is as unreasonable and as inappropriate as determining the existence or quantity of damages by looking only at the price of the tied product.

In a standard tying case, the plaintiff is the only purchaser. If the price of the tying product is reduced as part of the "tie," then the plaintiff benefits from the reduction. There is no net harm to the buyer, so no injury in fact exists. By contrast, if the "teeter-totter" price to one of two buyers goes up because the seller elects to reduce the price to the other buyer, the first buyer, to that extent, *is*

---

[53] *See, e.g., id.* at 124. This "package price" issue was presented in *Wal-Mart*. Defendants claimed that any supposed "overcharge" for debit could only reflect a sacrifice of profits that otherwise could have been obtained from credit cards alone. Plaintiffs, of course, disputed that assertion. Like all damage issues in the litigation, this issue remained unresolved as the cases were settled before trial.

worse off. In such cases, the notion of antitrust injury becomes pertinent.

In the *Wal-Mart* case, the plaintiffs argued that Visa should have been required either: (1) to abandon its "Honor All Cards" rule as applied to debit cards and rely upon pricing inducements to ensure that merchants did not undermine the value of the Visa brand by declining to accept Visa debit; or (2) "start over" with Zork, thereby requiring it to solve the "chicken and egg" problem through some form of "penetration pricing."[54] Under either scenario, plaintiffs claim that merchants would have been better off in a "but for" sense. The plaintiffs relied on this damage theory in the *Wal-Mart* case.

However, these "but for" consequences do not represent antitrust injury for several reasons. First, a seller's decision to raise prices and to charge one set of buyers more than their interdependent counterparts is not unlawful. Such conduct merely reflects pricing strategy, and antitrust policy is not concerned with whether one group of buyers ends up paying "more" than they otherwise would.[55] A plaintiff buyer needs to show that the challenged conduct led to an increase in prices *overall*, and that the proscribed conduct caused the increase.

As a related point, any damage claim should take into account the loss to cardholders from being deprived of a product with the positive externalities of a Visa debit card, such as the card's acceptance at millions of merchant locations. However, because the merchants, by bringing their lawsuit, sought to deprive Visa of those network effects on the issuer side, one cannot calculate damages by comparing a product with no merchant network to a product accepted at millions of locations.

Stated differently, the existence (and dimension) of network effects that resulted from changes in demand is an integral part of the analysis. Even assuming that it is unlawful for Visa to have tied debit to credit, it is

[54] *See Evans I*, *supra* note 1, at 367 n.155.

[55] *See id.* at 355-56.

unreasonable to estimate "but for" prices (on either side) on the assumption that volume would have remained the same. If Visa had been unable to offer cardholders an established network of merchants, demand for its debit product presumably would have been far different. Under certain conditions,[56] merchants might have paid less for payment devices overall. Nonetheless, one cannot translate this potential price reduction into antitrust injury without considering the losses that cardholders would incur if deprived of the benefits of the robust Visa Check network, which was available because of the application of the Honor All Cards rule to Visa's debit product.[57]

Moreover, merchants cannot claim a legitimate interest in shifting the costs of establishing a new brand onto Visa (and cardholders) or in interfering with consumer expectations by avoiding the negative externalities on the brand. Neither measure represents an interest or expectancy that the antitrust laws aim to protect. Or, in the terminology of the cases, it is not a harm that results from that which makes a business practice anticompetitive.

Does all of this mean that there can never be a damage claim in a two-sided market tying case? Not necessarily. The key is to focus on the actual source of antitrust concern.

---

[56] Specifically, the condition of which we are thinking is one in which payment devices truly do cost merchants less, and debit cards do not produce any incremental sales.

[57] Plaintiffs' alternative theory was that if Visa had been forbidden from "tying" debit to credit, then it would have felt compelled to lower its debit prices to the point where all merchants were indifferent between PIN and "signature" debit (Visa debit cards being an example of the latter). According to this theory, Visa would have been motivated to price in that fashion because harm to the Visa brand would result if certain merchants declined debit cards bearing the Visa brand. That argument not only overlooks the fact that Visa would have had the *ex ante* incentive (and ability) to avoid that dilemma by not using the Visa name on its debit card in the first place, but it further mistakenly assumes that it is the purpose of antitrust tying rules to allow consumers to impose such negative network externalities on sellers. Damages premised on that expected "hold up" benefit are no more antitrust injury than lower prices resulting from a less valuable debit product.

In tying cases, that "vice" typically is leverage, i.e., using power in one market to gain market power elsewhere by foreclosing competition.[58] Therefore, the court should have required plaintiffs to demonstrate that the alleged "tie" between debit and credit enabled Visa to acquire *incremental* market power over the debit business, *and* that such incremental power was not attributable to the value that cardholders derived from having access to a larger Visa debit merchant network.

It is doubtful that the *Wal-Mart* plaintiffs could have made such a showing, particularly in light of the availability of "multihoming," i.e., the ability of merchants to accept any and all types and brands of payment products.[59] If Visa had required merchants not merely to accept Visa debit cards, but to do so to the exclusion of ATM debit brands, then Visa would have foreclosed competing debit brands from the market or, at a minimum, inhibited their growth. However, Visa did not impose such exclusivity, and the ATM debit networks have succeeded handsomely. In fact, whatever benefit Visa might have derived from the value of its brand and the size of its network, it transferred this same benefit to the competing ATM networks by virtue of the fact that it included on-line functionality on the same piece of plastic as the Visa debit card. Because consumers use the same card for Visa and on-line (non-Visa) debit transactions, some consumers may even believe that they are using Visa to pay for their purchase when, in fact, they are using an on-line ATM debit network.

---

[58] 9 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1700d1 (2d ed. 2004); *cf.* United States v. Microsoft Corp., 253 F.3d 34, 95-96 (D.C. Cir. 2001) (explaining that the focus of a Section 2 tying claim must be on harm to competition in the tying product market). Recent literature suggests some alternative circumstances in which tying could raise antitrust issues; however, they are not relevant to the discussion here. *See, e.g.*, Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002).

[59] *See Evans II*, *supra* note 11, at 43 (discussing multihoming); *see also Evans I*, *supra* note 1, at 346; Rochet & Tirole, *supra* note 11, at 994.

But our point here is not to revisit the merits or the outcome of the *Wal-Mart* case. It is merely to note that, if the case had gone to trial, the court in that case would have needed to consider the existence of a "two-sided" market. That would have been particularly significant because such analysis likely would have revealed a divergence between the economic consequences to buyers on different sides of the market, as well as, called into question whether competition overall (i.e., on both sides of the market) actually was affected and whether, in any event, these effects constituted antitrust injury.

B. "Interchange"

The central claim of the *Wal-Mart* suit was that "tying" debit to credit enabled Visa to charge merchants more for debit by keeping debit "interchange" rates high.[60] More broadly, interchange fees themselves have been attacked by regulators outside of the United States and in private litigation in the United States, despite the *NaBanco* court's holding that Visa's interchange system was procompetitive.[61] As in *Wal-Mart*, these regulators and merchants claim that, but for agreements by Visa and MasterCard members to set an "interchange" fee, they would have paid less to accept those cards as payment.

As discussed earlier, the credit card platform requires the participation of both a cardholder and a merchant for a credit or debit card transaction to take place. The network platform provides these two participants with certain services, and it incurs costs in doing so. The network aims to price its services such that both buyers will find it attractive to utilize those services. Where the network platform is a single entity, such as Discover or American Express, that entity incurs the costs and determines the prices for both cardholders and merchants. However, where the network is composed of multiple, independent participants that perform

---

[60] *Walmart*, 280 F.3d 124, 129-30 (2d Cir. 2001)

[61] *NaBanco*, 596 F. Supp. 1231, 1231 (S.D. Fla. 1984).

their own issuer and merchant servicing, there is no *a priori* way to allocate responsibilities, risks, and costs between these two independent sellers, nor is there an obvious way to coordinate pricing in a way that adequately takes account of interdependencies or network effects.

Interchange rules, and the interchange fee, serve that function. Specifically, card networks with multiple issuers and acquirers (as merchant-signers are called) universally agree on a set of rules, including a price term, to coordinate their interdependent functions, to allocate risks and responsibilities and to equilibrate two potentially different sets of demand elasticities among cardholders and merchants. However, merchants claim that the networks engage in price-fixing in setting a systemwide internal transfer fee and that, as a result, the networks overcharge them for accepting Visa and MasterCard payment products.

While that assertion raises a number of potential issues, the question here is whether the two-sided character of the payment card business bears upon the analysis of a merchant-side damage claim. Plainly, it does. First, and most obviously, as the prior discussion of the *Wal-Mart* case demonstrates, it is inappropriate to determine damages simply by looking at merchant-side pricing in the "actual" and "but for" worlds. Rather, the pertinent inquiry is whether buyers pay more overall, i.e., taking both sides of the market into account. Simple proof that merchants pay more is, at best, incomplete.

Moreover, focusing on the existence of the two-sided market reveals another weakness in the arguments against interchange fees. Consider the examples of Discover and American Express. As single entities that historically have issued all of their own cards and signed all of their own merchants to accept them, Discover and American Express have no interchange fees, nor any need for them. Yet, just like Visa and MasterCard, they operate in a two-sided environment. Therefore, they must solve the same pricing problem as Visa and MasterCard: how does one price an interdependent service to cardholders and merchants, respectively, in order to get both sides on board? It is *that* question, rather than the legitimacy of interchange fees, that is at issue. Any antitrust "vice" (i.e., that which makes the practice subject to antitrust inquiry), if one exists at all, would not stem from the existence of interchange or interchange fees, but rather from the need to find an appropriate pricing strategy in a two-sided market.

Once that is understood, the antitrust inquiry into interchange fees ought to disappear. Does Discover violate the Sherman Act when it decides that its optimal pricing strategy is to charge cardholders nothing and offer them a cashback bonus? Or, consider American Express. Its charges to merchants historically have been 25% to 50% higher than the fees paid for Visa and MasterCard transactions. Allegations that such internal pricing strategies raise *antitrust* issues effectively represent a challenge to the legitimacy of two-sided market pricing generally. However, such a challenge is utterly without merit. The antitrust laws do not insist that each "side" in a two-sided market must pay its own way (assuming that we could even figure out how to allocate costs between sides to begin with).[62] The antitrust laws do not permit homesellers to claim that they were overcharged as a result of paying real estate commissions that compensate both the buyer's and the seller's agents. Nor does the fact that advertisers "subsidize" newspaper readers remotely constitute an antitrust violation.

For the same reasons, a claim that merchants pay "too much" to accept Visa and MasterCard cards simply because interchange fees are used to solve the same two-sided market pricing problem faced by their proprietary competitors also makes no economic or legal sense, at least not as an antitrust issue. Pricing interdependent products to attract two sets of buyers to the platform does not make interchange fees unlawful. In other words, focusing on the existence of a two-sided market is not only necessary to

[62] *See Evans I*, *supra* note 1, at 345 (noting that any attempt to allocate the fixed costs of a platform to either side of the market is necessarily arbitrary).

assess the existence of antitrust injury, as prices on both sides of the market need to be taken into account, but also to evaluate the legality of interchange fees. Interchange fees do not, in fact, present a real antitrust issue at all. Rather, such fees are merely a perfectly lawful way for the associations to address the two-sided market pricing issue confronted by all payment card systems.

IV. CONCLUSION

Firms can violate the antitrust laws in multi-sided markets as well as in standard markets, so buyers who can prove injuries from those violations are entitled to recover for the consequences they suffer. However, this recognition should not obscure the critical point that, in determining the existence (and the amount) of any alleged damages, we must take account of the "missing" purchasers and be careful not to confuse two-sided pricing strategies with unlawful overcharges. While there is no doubt that such inquiries may complicate treble damage actions by buyers, the zeal to safeguard the competitive process does not justify imposing treble damage liability on parties whose conduct has not led to any actual competitive harm.