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WISCONSIN'S ANTITRUST LAW: OUTSOURCING THE LEGAL STANDARD

MICHAEL P. WAXMAN*

Since its first commentary about the Wisconsin Antitrust Act (Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 147 N.W. 1058 ((1914)) the Supreme Court of Wisconsin has regularly reiterated its policy that interpretations of the Act must follow absolutely “federal [antitrust] decisions.” This policy is driven neither by federal preemption nor by state legislative enactment or pronouncement. The Supreme Court of Wisconsin’s commentaries on this policy for almost a century since the Pulp Wood decision have provided very little counsel to state courts much less businesspersons and their legal advisors. Indeed, one may still reasonably ask whether “federal decisions” includes judicial decisions by all federal courts wherever situated and all federal agencies deciding cases, administering rules and providing “guidelines” applying “federal [antitrust] law.” Moreover, the Court has not even provided guidance as to how to resolve conflicts in the application of “federal decisions.”

In an age of “activist” federal courts and administrative agencies that have upended traditional concepts and decisions of federal antitrust law, it is very important that generalized policies applying lockstep application of “federal decisions” be jettisoned and replaced by reasoned judicial decisions applying Wisconsin antitrust law. Of course, where appropriate, Wisconsin courts may choose to follow federal decisions (whatever that term means) and thereby assure that Wisconsin antitrust law comports with an overall federal antitrust design. Yet, by replacing the current inflexible policy with legal analysis that best suits the interests and needs of Wisconsin’s citizenry Wisconsin courts may effectively steer a course that avoids the antitrust activism that roils the federal courts and federal administrative agencies and thereby provide security in long term judicial interpretations.

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I. INTRODUCTION

The Sherman Antitrust Act¹ (Sherman Act) was passed in 1890. The Sherman Act declares as illegal anticompetitive acts involving contracts, combinations, and conspiracies in restraint of trade² and monopolization and attempts to monopolize.³ By writing the Sherman Act using general terms rather than supplying a “laundry list” of anticompetitive activities, Congress chose to leave the determination of illegality to the federal courts and eventually to government agencies.⁴ Within a few years, many states passed their own antitrust laws. Some states (including Wisconsin) adopted language similar to the Sherman Act.⁵

Since the enactment of the Wisconsin Antitrust Act over a century ago,⁶ Wisconsin courts have consistently declared that state court interpretations of the Wisconsin Antitrust Act are governed by federal decisions construing the Sherman Act.⁷ Although it is necessary to coordinate federal and state antitrust law to avoid a disjointed and conflicting system of enforcement, the judicially created policy that Wisconsin courts must follow in lockstep with federal decisions construing the Sherman Act has never received support from the state legislature and may be disadvantageous to the best interests of the state. Indeed, while the Wisconsin legislature has neither addressed the relationship between the state and federal acts nor directed the Wisconsin courts to slavishly follow federal decisions construing the Sherman Act, the state legislature did direct that Wisconsin’s antitrust law “[be given] the most liberal construction to achieve the aim of

1. 15 U.S.C. §§ 1–2 (2006).

2. *Id.* § 1.

3. *Id.* § 2.

4. *See infra* notes 19–20.

5. WIS. STAT. § 133.03 (2009–2010); *see also* Pulp Wood Co. v. Green Bay Paper & Fiber Co., 157 Wis. 604, 625, 147 N.W. 1058, 1066 (1914).

Section 1747e, Stats. of Wisconsin, is a copy of the federal statute It originally appeared as Chapter 319, Laws of 1893. Since then it has received substantially the same construction, sub silentio at least, that was placed on the federal law If the above statute has any application to the facts in this case, it should receive the same interpretation that was placed on the federal act, from which it was taken, by the Supreme Court of the United States.

Id.

6. Law of April 17, 1893, ch. 219, 1893 Wis. Laws ch. 219, 264–67 (current version at WIS. STAT. §§ 133.01–18); *see also* State v. Milwaukee Braves, Inc., 31 Wis. 2d 699, 715–16, 144 N.W.2d 1, 9 (1966).

7. *See infra* note 29.

competition.”⁸ Despite the Wisconsin legislature’s direction, Wisconsin Supreme Court decisions have clearly and strongly stated that since the wording of the Wisconsin Antitrust Act follows so closely that of the Sherman Act, the intent of the drafters of the Wisconsin Antitrust Act was that the Wisconsin courts doggedly follow federal decisions construing the Sherman Act.⁹

Although the Wisconsin Supreme Court’s election to strictly follow federal decisions has been clear and consistent, the Wisconsin Supreme Court has failed to address several important issues that are essential for effective application of the law. For example, beyond the similarity of language used in the Wisconsin Antitrust Act and the Sherman Act, what rationale is there for this lockstep approach? Since neither the Sherman Act itself nor federal decisions declare that federal antitrust law preempts state antitrust law there is no mandatory external requirement that the state law absolutely follow federal decisions construing the Sherman Act.¹⁰ In fact, over the years, legal scholars and practitioners have expressed a strong sentiment in favor of continuing a dual system of federal and state antitrust law enforcement with active enforcement of state laws.¹¹ Based on these factors it seems incongruous for state law to be so absolutely tethered to federal interpretations of the Sherman Act. Indeed, considering that many state antitrust laws

8. WIS. STAT. § 133.01.

9. See discussion *infra* Part II.B.

10. State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 295, 101 N.W.2d 133, 135 (1960). “There is no language in the federal enactments that pre-empts the field of regulation and enforcement in the federal government or that precludes the states from enacting effective legislation dealing with such unlawful practices.” *Id.*

11. See, e.g., STEPHEN D. HOUCK, TRANSITION REPORT, THE STATE OF STATE ANTITRUST ENFORCEMENT 5–6 (2009), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=153771&rtcontentdisposition=filename%3DTRANSITION%20REPORT.pdf; Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 322 (stating that state antitrust law and enforcement are needed to reach anticompetitive intrastate conduct and those cases the federal government are unwilling to pursue); Robert F. Roach, *Bank Mergers and the Antitrust Laws: The Case for Dual State and Federal Enforcement*, 36 WM. & MARY L. REV. 95, 145 (1994). But cf. Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT’L L. 501, 532 (1994) (expressing concern that dual enforcement will “lead to competition among the states to create the most restrictive antitrust policy against takeovers as a means of encouraging companies to locate or incorporate in that state.”); Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 413, 425 (1983); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL’Y 5, 12–13 (2004) (weighing pros and cons of state antitrust law enforcement).

apply to both interstate and intrastate commerce,¹² why would these scholars encourage state antitrust law enforcement if the result will only be to give the same applications as that given by federal courts and federal government agencies under the Sherman Act? Therefore, although it is important that there be some level of consistency between interpretations of federal and state antitrust law, there is neither a compulsion nor an expectation that the Wisconsin Antitrust Act be read in lockstep with the Sherman Act.

An additional problem is which federal antitrust laws and federal decisions must the Wisconsin courts follow? If the basis for looking to federal decision-making is due to the similarity of language in the Sherman Antitrust Act and the Wisconsin Antitrust Act,¹³ are the Wisconsin courts not bound by federal decisions based on other federal antitrust laws such as the Clayton Act¹⁴ and the Federal Trade Commission Act?¹⁵ Also, to which decision-making bodies are Wisconsin courts bound? For example, after the mid-twentieth century the Wisconsin Supreme Court shifted from a command to follow the United States Supreme Court interpretations of the Sherman Act to one that directs Wisconsin courts to follow the interpretations of “federal decisions.”¹⁶

An examination of the Wisconsin Supreme Court’s rationale for its policy to abjectly follow federal decisions construing federal antitrust law and the problems that it creates is long overdue. This article will address, first, the development of the judicial requirement that the Wisconsin Antitrust Act unquestioningly follow federal decisions construing “federal law.” Next, this article will examine significant substantive and procedural issues that arise due to the absolute binding of Wisconsin Antitrust Act to the Sherman Act. Finally, alternative ways will be recommended to address the need for independence when

12. The Wisconsin Supreme Court has clearly declared that the Wisconsin Antitrust Act applies to both interstate and intrastate commerce. See *Meyers v. Bayer*, A.G., 2007 WI 99, ¶3, 303 Wis. 2d 295, 300, 735 N.W.2d 448, 451; *Olstad v. Microsoft Corp.*, 2005 WI 121, ¶ 1, 284 Wis. 2d 224, 229, 700 N.W.2d 139, 141.

13. See *infra* note 34.

14. 15 U.S.C. § 15 (2006).

15. *Id.* § 45.

16. Beginning with the *Pulp Wood* case in 1914 the Wisconsin Supreme Court cited the United States Supreme Court interpretations of the Sherman Act as the source for interpretations of the Wisconsin Antitrust Act. However, in *State v. Lewis & Leidersdorf Co.*, 201 Wis. 543, 549, 230 N.W. 692, 694 (1930), the Wisconsin Supreme Court changed its source for interpreting the Wisconsin Antitrust Act to the “federal decisions.” This shift in the source of interpretation has remained fairly constant since then. See *infra* notes 28–29.

Wisconsin courts interpret the Wisconsin Antitrust Act while keeping the state and federal antitrust law in concert.

II. THE HISTORICAL DEVELOPMENT OF WISCONSIN ANTITRUST LAW

A. *The Sherman Act*

The Sherman Act focuses primarily on two areas of “anticompetitive” practices: Section 1 addresses agreements by two or more parties who act through a contract, combination, or conspiracy to coordinate practices that would harm competition, and Section 2 addresses acts of monopolization that would harm competition.¹⁷ Recognizing the ingenuity of business people and lawyers to circumvent any specific list of anticompetitive practices and the potential advances in the science of economics, Congress wrote the Sherman Act prohibitions in a general form to permit the courts to address anticompetitive practices as they arise.¹⁸ Despite Congressional actions over time to supplement the Sherman Act with more specific additional sections and significant increases in the penalties for violations, Sherman Act sections one and two have remained general in form.

In the twentieth century, Congress supplemented the judicial powers under the Sherman Act to interpret what constitutes anticompetitive practices by creating administrative agencies and endowing them with the responsibility and power to address anticompetitive practices. For example, Congress created the Federal Trade Commission in 1914 and gave it powers beyond the Sherman Act to address possible anticompetitive acts under the Clayton Antitrust Act and the Federal Trade Commission Act through the broader language of “unfair methods of competition.”¹⁹ By the latter part of the twentieth century, federal government agencies were propounding interpretations of federal antitrust law through rules and guidelines.²⁰ Finally, Congress provided state attorneys general and private parties with both the power

17. See *supra* notes 2 & 3.

18. *Assoc. Gen. Contractors v. Cal. State Council of Carpenters*, 459 U.S. 519, 530–31 (1983) (stating that the Sherman Act’s legislative history supported broad construction of the statute); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 550 (1978) (noting that the language of § 3(b) is broad and unqualified, and if Congress intended certain limitation, it would have done so explicitly).

19. 15 U.S.C. § 45.

20. See, e.g., U.S. DEPARTMENT OF JUSTICE & THE FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (2010), available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>.

to enforce the Sherman Act as well as incentives for these private parties to act as “private attorneys general” by giving successful plaintiffs the ability to recover treble damages, court costs, and reasonable attorney’s fees.²¹

In the modern era, taking their cue from Congress, the federal courts and administrative agencies have applied their interpretations of economic and social policies to determine what constitutes an anticompetitive activity. However, because there are several quite divergent economic theories for many antitrust issues, federal judges have sometimes used economic theories that suit their beliefs as the basis for their decisions.²² As a result of this diversity of economic thought, many United States Supreme Court and lower federal appellate court decisions have been decided by a bare majority of votes. Also, federal agency decisions, rules, and policies are subject to the political leanings of the executive branch and Congress.

B. Wisconsin Antitrust Law

In 1893 Wisconsin passed its own antitrust law²³ and adopted language for its antitrust act that is very similar to the Sherman Act.²⁴ Although the state legislature probably used the Sherman Act as a template for the creation of the Wisconsin Antitrust Act,²⁵ the legislature has never restricted the interpretation and application of the Wisconsin Antitrust Act to that of the federal antitrust law.²⁶ Yet, as early as 1914, the Wisconsin Supreme Court commanded that state court interpretations of the Wisconsin antitrust law must follow the

21. 15 U.S.C. § 15(a); see 2007 ANTITRUST MODERNIZATION COMMISSION: REPORT AND RECOMMENDATIONS 189–190 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm [hereinafter Antitrust Modernization]. The Antitrust Modernization Commission is a product of the Antitrust Modernization Act of 2002, Pub. L. No. 107–273, § 11052, 116 Stat. 1856 (2002) (codified as amended at 15 U.S.C. § 1).

22. See *infra* note 61.

23. Law of April 17, 1893, ch. 219, 1893 Wis. Laws ch. 219, 264–67 (current version at WIS. STAT. §§ 133.01–18 (2009–2010)).

24. The antitrust act was restated in WIS. STAT. § 1747 (1898). The Wisconsin Antitrust Act was completely restructured in 1979. See 1979 Wis. Laws 209, § 2 (enacted). Although the revised act specifically permitted indirect purchaser claims for the most part, the language and substance of the act and the Wisconsin Supreme Court views as to its application remained substantially the same.

25. See *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 625, 147 N.W. 1058, 1066 (1914). For subsequent reiterations of this view, see, for example, *Patti-Marshall, LLC v. Four Winds Subdivision, LLC*, No. 2009AP2741, 2010 Wisc. App. LEXIS 710, at *5 n.4.

26. See *Olstad v. Microsoft Corp.*, 2005 WI 121, ¶ 55, 284 Wis. 2d 224, 700 N.W. 2d 139.

Supreme Court of the United States interpretations of the federal law.²⁷ The Wisconsin Supreme Court regularly repeated this dogmatic order to follow the United States Supreme Court until the mid-twentieth century.²⁸ However, since then the Wisconsin Supreme Court has altered its direction and fairly consistently stated that the Wisconsin courts must follow “federal decisions” that interpret federal law.²⁹ Directed to follow federal decisions absolutely, Wisconsin courts face some major quandaries: does the Wisconsin Supreme Court mean all federal bodies construing federal law? What happens when federal decisions are in conflict? Must the Wisconsin courts follow the hierarchy of the federal courts? What about decisions by federal agencies and federal agency rules and guidelines? The Wisconsin Supreme Court has never removed any of these stumbling blocks to provide effective guidance as to the application of “federal decisions” construing federal law.

Indeed, although the Wisconsin courts have decided numerous antitrust cases over the past century, and the number of decisions have increased markedly over the past quarter century, the Wisconsin Supreme Court’s doctrine requiring a lockstep approach to remain in strict concert with “federal decisions” construing “federal law” has not varied. The court has declared that the interpretations and applications of the Wisconsin Antitrust Act are “ruled by” federal law.³⁰ Although the Wisconsin courts have expressed the wording in different ways the concept that federal decisions interpreting federal law controls the interpretation and application of state antitrust law has always been

27. See *Pulp Wood Co.*, 157 Wis. at 625, 147 N.W. at 1066; see also *Henry G. Meigs, Inc. v. Empire Petroleum Co.*, 273 F.2d 424, 430 (7th Cir. 1960) (explaining that the Wisconsin Supreme Court followed the United States Supreme Court’s interpretation of federal law); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 716, 144 N.W.2d 1, 9 (1966).

28. For a case reiterating the requirement that the Wisconsin courts follow the interpretations of the Supreme Court of the United States, see *Milwaukee Braves, Inc.*, 31 Wis. 2d at 716, 144 N.W.2d at 9. “This court, however, in 1914, pointed out that sec. 1747e was taken from the Sherman Act and should receive the same interpretation as that which was placed in the federal act by the Supreme Court of the United States.” *Id.*

29. Note the shift in the cases declaring that the state courts look to “federal court decisions” or “federal decisions.” See *Reese v. Assoc. Hosp. Serv., Inc.*, 45 Wis. 2d 526, 532, 173 N.W.2d 661, 664 (1970); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 410, 198 N.W.2d 363, 367–68 (1972); *State ex rel Nordell v. Kinney*, 62 Wis. 2d 558, 563, 215 N.W.2d 405, 407 (1974); *City of Madison v. Hyland, Hall and Co.*, 73 Wis. 2d 364, 375, 243 N.W.2d 422, 428 (1976); *State v. Waste Mgmt. of Wisconsin, Inc.*, 81 Wis. 2d 555, 569 n.12, 261 N.W.2d 147, 153 n.12 (1978); *Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (1980).

30. See *State v. Lewis & Leidersdorf Co.*, 201 Wis. 543, 549, 230 N.W. 692, 694 (1930); see also *Reese*, 45 Wis. 2d at 532, 173 N.W.2d at 664.

maintained.³¹

In addition, a major question arises as to which federal bodies the Wisconsin courts are referring by using the term “federal decision.” Beginning with the *Pulp Wood* case in 1914 the Wisconsin Supreme Court cited the United States Supreme Court as the source for interpretations of the Wisconsin Antitrust Act.³² However, the Wisconsin Supreme Court changed its source for interpreting the Wisconsin Antitrust Act to “federal decisions.”³³ This shift in the source of interpretation has remained fairly constant since then.³⁴

The rationale given for this long-term policy of lockstep following of federal court interpretations is that since the wording of the Wisconsin Antitrust Act follows closely that of the Sherman Act, the intent of the legislature must have been to follow the federal court interpretations absolutely.³⁵ Yet, despite the Wisconsin Supreme Court’s regular assertions of this policy, the Wisconsin Supreme Court has referred only once in the state’s antitrust cases as to the intent of the Wisconsin

31. See *Nordell*, 62 Wis. at 563, 215 N.W.2d at 407. For cases interpreted “consistently with” federal law see *Milwaukee Braves, Inc.*, 31 Wis. 2d at 716, 144 N.W.2d at 10. For cases “controlled by” federal law see *Prentice v. Title Ins. Co. of Minn.*, 176 Wis. 2d 714, 724, 500 N.W.2d 658, 662 (1993); *Grams*, 97 Wis. 2d at 346, 294 N.W.2d at 480; *Waste Mgmt. of Wisconsin*, 81 Wis. 2d at 569, 261 N.W.2d at 153; *John Mohr & Sons, Inc.*, 55 Wis. 2d at 410, 198 N.W.2d at 367–68; *Am. Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc.*, 148 Wis. 2d 294, 299, 435 N.W.2d 286, 289 (Ct. App. 1988). For cases that “conform with” federal law see *Conley Publ’g Group, Ltd. v. Journal Comm., Inc.*, 2003 WI 119 ¶ 17, 265 Wis. 2d 128, 140, 665 N.W.2d 879, 885; *In re Commitment of Tainter*, 2002 WI App 296, ¶ 22, 259 Wis. 2d 387, 400, 655 N.W.2d 538, 544. For cases “adhering” to federal law see *Carlson & Erickson Builders v. Lampert Yards, Inc.*, 190 Wis. 2d 651, 662, 529 N.W.2d 905, 909 (1995). For cases “governed by” federal law see *Hyland*, 73 Wis. 2d at 375, 243 N.W.2d at 428. For cases stating that federal law is the “law of the land” see *Pulp Wood Co.*, 157 Wis. at 619, 147 N.W. at 1064. This has been reiterated in *Slowiak v. Hudson Foods, No. 91-C-737*, WL 176983, at *9 (W.D. Wis. Apr. 8, 1992) *aff’d on other grounds*, 987 F.2d 1293 (7th Cir. 1993). *But cf.* *Am. Med. Transp., Inc. v. Curtis-Universal, Inc.*, 154 Wis. 2d 135, 145, 452 N.W.2d 575, 579 (1990).

32. See *Pulp Wood*, 157 Wis. at 619, 147 N.W. at 1064 (construing “restraint of trade” as “only acts, contracts, agreements, or combinations which operate to the prejudice of the public interests . . .”).

33. See *supra* note 29.

34. The only post 1970 exception to the shift from the United States Supreme Court decisions to federal decisions was in *Prentice*, 76 Wis. 2d at 724, 500 N.W. at 662. Even then, the Wisconsin Supreme Court returned to its “federal decisions” terminology in *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 665, 529 N.W.2d 905, 910–11 (1995) (citing *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 375, 243 N.W.2d 422, 428 (1976)).

35. *Pulp Wood*, 157 Wis. at 625, 147 N.W. at 1066; see *Lewis & Leidersdorf Co.*, 201 Wis. at 550, 230 N.W. at 695 (“Giving to Sec. 133 the same construction that has been given to sections 1 and 2 of the Sherman Act . . . , which we are required to do under the ruling of the *Pulp Wood* case.”); see also *Milwaukee Braves, Inc.*, 31 Wis. 2d at 716, 144 N.W.2d at 10.

legislature when addressing the relationship between Wisconsin's antitrust law and the Sherman Act. In *Conley Publishing Group, Ltd. v. Journal Communications, Inc.*,³⁶ the Wisconsin Supreme Court stated,

Our adherence to federal antitrust precedent supports important Wisconsin policies. First and foremost, when the Wisconsin legislature enacted the state's mini-Sherman Act, it intended for courts to construe Chapter 133 consistent with the interpretations provided for analogous federal laws. In *Grams v. Boss*³⁷ we explained:

'We have repeatedly stated that section 133.01 . . . was intended as a reenactment of the first two sections of the federal Sherman Act of 1890 . . . with application to intrastate commerce as distinguished from interstate transactions [the restriction to intrastate commerce was successfully challenged and was soundly rejected in *Olstad v. Microsoft Corp.*,³⁸] and that the question of what acts constitute a combination or conspiracy in restraint of trade is controlled by federal court decisions under the Sherman Act.'

In the decades since that approach was adopted, we have relied upon the legislature's power to revise Chapter 133 if Wisconsin court adherence to federal antitrust doctrine is found to be objectionable.³⁹

The *Conley* statements and analysis quoted above suffers from numerous faults. First, *Grams* was cited incorrectly in the *Conley* decision, as the quoted portion of the opinion says nothing about courts construing chapter 133 "consistent with" the Sherman Act. Rather than as quoted in *Conley*, *Grams* described the relationship between chapter 133 and the Sherman Act as one where the state antitrust law is "controlled by" the federal law.⁴⁰ The legal linguistic difference between "consistent with" and "controlled by" is quite significant when one considers the room for difference between judicial interpretations of the two acts. In fact, out of all the Wisconsin cases addressing the Wisconsin Antitrust Act, only *Milwaukee Braves, Inc.* ever uses the term

36. 2003 WI 119, 265 Wis. 2d 128, 665 N.W.2d 879.

37. 97 Wis. 2d at 346, 294 N.W.2d at 480.

38. 2005 WI 121, ¶ 1, 284 Wis. 2d 224, 229, 700 N.W.2d 139, 141.

39. *Conley*, 2003 WI 119, ¶ 18, 265 Wis. 2d 128, 665 N.W.2d 879.

40. *Grams*, 97 Wis. 2d. at 346, 294 N.W.2d at 480.

“consistently with.”⁴¹ Indeed, the *Conley* case opinion seems well aware of the absence of legislative support for its adamant demand that Wisconsin court’s doggedly follow federal decisions construing federal law.⁴² This is reflected in the *Conley* court’s weak assertion that the legislature must have agreed with the court’s interpretation or the legislature would change the law: “In the decades since this approach was adopted, we have relied upon the legislature’s power to revise Chapter 133 if Wisconsin court adherence to federal antitrust doctrine is found to be objectionable.”⁴³

Second, when one considers the generality of the Sherman Act and Chapter 133, it seems unlikely that the state legislature would get into the business of specific redirection of the court’s unilateral historical commandment. Despite the *Conley* court’s assertion that the legislature “intended . . . courts to construe Chapter 133 consistent with the interpretations provided for analogous federal law,”⁴⁴ this claim appears unsupported by any legislative history and does not define what constitutes an interpretation provided by analogous federal law. Indeed, considering the significant breadth of decision-making sources to interpret federal (antitrust) law in the modern era (e.g. the Federal Trade Commission was not established until 1914) and the conflicts in economic interpretation of antitrust law that have evolved, it is highly unlikely that the state legislature in 1893 contemplated the place of state antitrust law in relation to federal antitrust law.

III. WHY DOES THE WISCONSIN SUPREME COURT FOLLOW FEDERAL LAW?

Considering the state of virtual internecine war over antitrust law within the federal judiciary over the past thirty years and occasional significant disputes between federal antitrust enforcement agencies over the appropriate interpretations of federal antitrust law, a serious examination must be made as to why the Wisconsin Supreme Court continues to apply a doctrine of absolute adherence to federal decisions construing the federal antitrust law.

There are two possible rationales that might explain why the Wisconsin Supreme Court chose to follow federal decisions interpreting federal antitrust law: first, if federal law preempted state antitrust law;

41. *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 716, 144 N.W.2d 1, 10 (1966).

42. *Conley*, 2003 WI 119, ¶ 18, 265 Wis. 2d 128, 665 N.W.2d 879.

43. *Id.* ¶ 18.

44. *Id.*

second, if the Wisconsin Antitrust Act and Wisconsin courts were restricted only to consideration of cases involving intrastate commerce. As for the former, since the passage of the Sherman Act, neither the Congress of the United States nor the federal courts have attempted to preempt the states in their creation and enforcement of state antitrust law.⁴⁵ As for the latter, although the federal and state courts initially interpreted that state antitrust laws could be applied only to intrastate commerce,⁴⁶ eventually it was determined that state antitrust laws could be applied to interstate commerce as well.⁴⁷

There is no federal preemption of the Wisconsin Antitrust Act, and state courts are not precluded from hearing disputes involving interstate commerce. Thus, absent state legislative direction, state courts must draw a fine line between becoming a haven for unnecessary conflict with the federal courts and agencies and parroting federal antitrust law as interpreted by the federal courts, thereby making the state law superfluous. Considering the ability of a state to establish its own antitrust law, state courts must constantly be vigilant to avoid the extremes of antitrust thinking that may arise in the federal judiciary. Such extreme shifts in law and economic policy from traditional and well-developed antitrust standards may merely reflect questionable economic theory over the realities in the market place and thereby cause confusion in the business and consumer communities. To draw

45. See *State v. Allied Chemical & Dye Corp.*, 9 Wis. 2d 290, 295, 101 N.W.2d 133, 135 (1960); see also *California v. ARC Am. Corp.*, 490 U.S. 93, 101–102 (1989) (citing *Watson v. Buck*, 313 U.S. 387, 403 (1941)); *Standard Oil of Kentucky v. Tennessee*, 217 U.S. 413, 422 (1910). See generally ANTITRUST MODERNIZATION, *supra* note 21, at 185; NAT'L ASS'N OF ATTORNEYS GEN., RESOLUTION, PRINCIPLES OF STATE ANTITRUST ENFORCEMENT 1–3 (2005), available at <http://www.naag.org/assets/files/pdf/2005.Spring.Antitrust.Resolution.Final.pdf>.

46. *Denison Mattress Factory v. Spring-Air Co.*, 308 F.2d 403, 413 (5th Cir. 1962) (holding that Texas' antitrust statutes would not be applied to interstate activities); *Kosuga v. Kelly*, 257 F.2d 48, 55 (7th Cir. 1958), *aff'd* 358 U.S. 516, 521 (1958) (holding that the Antitrust Act of Illinois applied “only to intrastate commerce”); *In re Wiring Device Antitrust Litigation*, 498 F. Supp. 79, 82 (E.D.N.Y. 1980) (“Where, as here, all defendants are unquestionably engaged in interstate commerce, those who are damaged from an alleged restraint of trade find a remedy in the federal, not the state, antitrust laws. This conclusion is buttressed in this case by the longstanding holding of the South Carolina Supreme Court . . . that the state antitrust statute . . . applies only to intrastate commerce and does not reach interstate commerce of any kind.”); *Grams v. Boss*, 97 Wis. 2d 332, 346, 294 N.W.2d 473, 480 (1980); *John Mohr & Sons, Inc. v. Jahnke*, 55 Wis. 2d 402, 410, 198 N.W.2d 363, 367 (1972); *Reese v. Associated Hosp. Serv., Inc.*, 45 Wis. 2d 526, 532, 173 N.W.2d 661, 664 (1970).

47. See, e.g., *Meyers v. Bayer, A.G.*, 2007 WI 99, ¶ 3, 303 Wis. 2d 295, 300, 735 N.W.2d 448, 451; and *Olstad v. Microsoft Corp.*, 2005 WI 121, ¶ 1, 284 Wis. 2d 224, 229, 700 N.W.2d 139, 141; see also *Redwood Theatres, Inc. v. Festival Enter., Inc.*, 908 F.2d 477, 480 (9th Cir. 1990); *St. Joe Paper Co. v. Superior Court*, 175 Cal. Rptr. 94, 95–6 (Cal. Ct. App. 1981).

this line, a state legislature and a state court must ensure that there is enough room for the state courts to exercise a fair bit of discretion as to what constitutes an antitrust violation under the state's law.⁴⁸

Several respected legal authorities have expressed the importance of states having and enforcing antitrust laws that respect interpretations of federal law by federal courts while states maintain their independence.⁴⁹ These authors have argued that this independence should not be merely facial, but rather that different ways of thinking, particularly where there are significant distinctions in legal thought, warrant an active state antitrust voice. Assuming that state antitrust law should exist beyond the ability to catch anticompetitive acts that do not fall into the coverage of interstate commerce, it is important to examine the Wisconsin Supreme Court's decision to follow an absolutist and unreflective path.

IV. WHAT DO THE TERMS "FEDERAL COURT" AND "FEDERAL LAW" MEAN?

Because the Wisconsin Supreme Court directed that Wisconsin courts must follow "federal decisions" construing "federal law"⁵⁰ when applying state antitrust law a primary problem is a definitional one—what do federal decisions and federal law mean?

First, what does federal law mean? The Wisconsin Supreme Court's rationale for its lockstep application of the federal law is that the language used in the Wisconsin Antitrust Act and the Sherman Act is very similar. The implication, according to the court, is that this is what the legislature wanted.⁵¹ But, if one accepts the similarity of language

48. See, e.g., *La. Power & Light Co. v. United Gas Pipe Line Co.*, 493 So. 2d 1149, 1158 (La. 1986). The Supreme Court of Louisiana addressed the United States Supreme Court's adoption of the "single-entity defense" over the United States Supreme Court's own previous standard of the "intra-enterprise conspiracy" doctrine. The Louisiana court stated that although the Louisiana statute is a counterpart to Section 1 of the Sherman Act and therefore United States Supreme Court opinions are a persuasive influence on the interpretation of the state's act, the federal analysis is not controlling and especially so "where the relevant ruling of the federal high court is a departure from their own well-established rule, and from a prevailing decision" of the Louisiana Supreme Court. *Id.*; see also ANTITRUST MODERNIZATION, *supra* note 21, at 185.

49. See sources cited *supra* note 11.

50. See, e.g., *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 375, 243 N.W.2d 422, 428 (1976); *Reese*, 45 Wis. 2d at 532, 173 N.W.2d at 664; *State v. Lewis & Leidersdorf Co.*, 201 Wis. 543, 549, 230 N.W. 692, 694 (1930). Some decisions by the Wisconsin courts have added such phrases as "federal court decisions." See *Grams*, 97 Wis. 2d at 346, 294 N.W.2d at 480; *Am. Med. Transp. of Wisconsin, Inc. v. Curtis-Universal, Inc.*, 148 Wis. 2d 294, 299, 435 N.W.2d 286, 289 (Ct. App. 1988).

51. See *supra* note 36 and accompanying text.

argument then does the state law have any direction to include the Clayton Antitrust Act, the Federal Trade Commission Act and other “federal” antitrust related acts as part of federal law? Are federal decisions based on these acts binding on Wisconsin courts?

Second, what does the term federal decision mean? The definitional issue of the Wisconsin Supreme Court’s use of the loose term federal decision goes well beyond a semantic game. This definitional conundrum is particularly perplexing because the Wisconsin Supreme Court has never provided guidance as to what federal courts and federal administrative agencies are included in this term. Does it mean decisions by any federal court or by only some of these courts (e.g. those with direct powers such as the Eastern and Western Districts of Wisconsin, the Seventh Circuit Court of Appeals and the United States Supreme Court)? How is prioritizing among the courts to be done (e.g. does a federal appellate court decision in one circuit trump a federal district court in another circuit)? What if two or more federal judicial decisions are in conflict and the federal courts are on the same level? Does the definition include federal government agency decisions (e.g. Federal Trade Commission decisions)? Does the term federal decisions include administrative rule-makings (e.g. Federal Trade Commission) and federal agency “guidelines” (e.g. those guidelines issued by the Department of Justice-Antitrust Division and the Federal Trade Commission) where a good deal of the interpretation of federal antitrust law occurs and is actually applied?

A very important additional problem arises when Wisconsin courts must resolve state antitrust cases where federal judicial or administrative agency decisions reflect extreme political and economic agendas. Should the Wisconsin courts follow historic legal precedent that is reflected in one set of decisions when it is in conflict with newly emerging analyses? How should the Wisconsin courts handle the hairpin turns of federal judicial and administrative decision-making that has been rampant over the past 30 years—decisions often made by bare majorities or plurality opinions expressing widely divergent views based on very different economic analyses? One need only to review such recent United States Supreme Court decisions as *California Dental Ass’n v. F.T.C.*,⁵² and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,⁵³ to observe a highly contentious core conflict among the Justices of the United States Supreme Court over traditional and practical

52. 526 U.S. 756 (1999).

53. 551 U.S. 877 (2007).

economic theories versus a “modern” theoretical agenda.

In *California Dental Ass’n* and *Leegin*, a bare majority of the Court not only ignored long held legal rationales and stare decisis, but eschewed traditional economic analyses drawn from practical economic experience and traditional administrative law and replaced them with theoretical arguments. Moreover, the majority considered and seemingly endorsed a new concept—the quick look doctrine—that had been introduced by the federal appellate courts a little more than a decade earlier. Yet, the Supreme Court never explained in detail the meaning or the role of the doctrine and has not done so since *California Dental Ass’n*. In *Leegin*, a 5–4 majority overturned an almost 100 year-old precedent [*Dr. Miles Medical Co. v. John D. Park & Sons Co.*] that established a per se standard for vertical price-fixing.⁵⁴ As the four dissenters pointed out, the majority ignored the Court’s historic reinforcement on a regular basis of the analysis in *Dr. Miles* that explained the rationale for a per se application to vertical price-fixing.⁵⁵ Indeed, the Court had recently cited *Dr. Miles* and its principles⁵⁶ (even by some of those Supreme Court Justices now rejecting the *Dr. Miles* principles⁵⁷) as well as noted a strict standard for the doctrine of stare decisis.⁵⁸ Rather, in *Leegin*, the bare majority relied instead on a few economic theories that it agreed with and only tangentially related

54. *Id.* at 881, 906–07.

55. *Id.* at 918 (Breyer, J. dissenting).

56. *Nynex Corp. v. Discon*, 525 U.S. 128, 133, 138 (1998); *State Oil v. Khan*, 522 U.S. 3, 11 (1997).

57. Both the *Nynex* and *State Oil* cases were decided unanimously. See sources *supra* note 56.

58. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (outlining the circumstances under which a court may overrule a previous decision). The Court explained the importance of stare decisis as follows:

[T]he Court must accord [deference] to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and “[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated and Congress remains free to alter what we have done.

California v. FERC, 495 U.S. 490, 499 (1990); see also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) (declining to overrule an earlier decision interpreting Section 4 of the Clayton Act, stating “considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court’s interpretation of its legislation.”) (citations omitted).

recent prior decisions citing those same theories, but without any practical support to overturn the *Dr. Miles* decision.⁵⁹ Interestingly, there has been a significant effort to get Congress to overturn the *Leegin* decision.⁶⁰ There have also been claims filed in the New York and other state courts to disregard the *Leegin* decision when interpreting state antitrust law,⁶¹ a dissent in the United States Court of Appeals for the Eleventh Circuit questioning the application by the majority as to both the *Leegin* and *Twombly* cases,⁶² and a rejection under California's Cartwright Act of part of the *Leegin* analysis.

Not surprisingly, the type of judicial activism that rationalized the *Leegin* decision results in judgments that are far from a consensus on both legal and economic doctrines that might light the way for state law and courts. In addition, federal agencies involved in enforcing antitrust law regularly interpret the meaning of antitrust federal law through guidelines and administrative decisions that reflect the political leanings of the current administration.⁶³ Locked into an absolutist requirement,

59. *Leegin*, 551 U.S. at 889–93.

60. Discount Pricing Consumer Protection Act, S. 148, H.R. 3190, 111th Cong. (2009). This bill never passed in 111th Congress; however, it has recently been proposed again in the 112th Congress in the Senate. Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011).

61. *Leegin* did not directly address the status of minimum resale price maintenance under state law. See Michael A. Lindsay, *An Update on State RPM Laws Since Leegin*, THE ANTITRUST SOURCE, Dec. 29, 2010, available at http://www.dorsey.com/files/upload/RPM_Leegin_Lindsay_122110.pdf; see also *Global Reinsurance Corp. v. Equitas Ltd.*, No. 600815/07 (N.Y. App. Div. Jan. 18, 2011); *People v. Tempur-Pedic Int'l, Inc.*, No. 400837/10 (N.Y. Sup. Ct. Jan. 14, 2011); *California v. Bioelements, Inc.*, No. 10011659 (Cal. Super. Ct. Jan. 11, 2011) (final judgment including permanent injunction); *People v. Dermaquest, Inc.* No. RG 10497526 (Cal. Super. Ct. Feb. 23, 2010) (final judgment including permanent injunction); Brief for the State of Kansas as Amicus Curiae, *O'Brien v. Leegin Creative Leather Prod., Inc.* No. 08-1010000-S (Kan. Aug. 12, 2010). *O'Brien* is an undecided case on appeal to the Kansas Supreme Court after a lower court upheld a *Leegin* type overruling of prior per se decisions. See *O'Brien v. Leegin Creative Leather Prods., Inc.*, No. 04-CV-1668 (8th Jud. Dist. Sedgwick County Kansas, July 9, 2008) *direct appeal granted*, File No. 101,000 (Oct. 6, 2008) (trial court opinion did not cite *Leegin*); see also MD. CODE ANN., COMM. LAW § 11-204(b) (West 2009) (defining any “contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service” to be an unreasonable restraint of trade or commerce); *New York v. Herman Miller, Inc.*, No. 08-Civ-2977 (S.D.N.Y. March 25, 2008) (stipulated final judgment and consent decree).

62. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1345–48 (11th Cir. 2010) (Ryskamp, J. dissenting).

63. See generally David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J. L. & PUB. POL'Y 61 (1999) (examining why antitrust enforcement has become more prominent, and in what respects current antitrust enforcement is different than that of earlier administrations); Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41

how can the Wisconsin courts apply federal judicial and administrative decisions that are in conflict with each other or their prior guidelines and decisions? Of course, most state court decisions will follow the reasoned antitrust decisions by the United States Supreme Court. Still, if state law is not preempted, is it reasonable that what was true in Wisconsin yesterday is no longer true today because a federal judge, a federal agency, or even the United States Supreme Court no longer thinks it is a rational policy? For example, what happens if the 5–4 decision in *Leegin* is overturned and the per se doctrine in *Dr. Miles* is reinstated due to Congressional action, or if Wisconsin chooses to follow other states that have chosen not to follow the *Leegin* decision? Indeed, as the doctrine of stare decisis is undone by the federal courts and inconsistency grows in federal judicial and agency policies and rulings, Wisconsin businesspersons and consumers, as well as their attorneys and the Wisconsin courts, have been committed by the Wisconsin Supreme Court to ride a roller coaster of politically motivated legal and economic hairpin turns which the court's doctrine of federal absolutism is incapable of controlling.⁶⁴

V. WISCONSIN TREATMENT OF FEDERAL DECISIONS INVOLVING PROCEDURAL AND SUBSTANTIVE ANTITRUST STANDARDS

Without specific direction from the state legislature, the Wisconsin Supreme Court has not veered from federal court interpretations of federal antitrust law when addressing procedural issues in antitrust cases. In *Illinois Brick Co. v. Illinois*, the United States Supreme Court held that a party alleging that it was harmed indirectly due to anticompetitive practices (e.g. the passing on of increased prices due to price-fixing) would not have standing to sue under federal antitrust statutes in federal courts.⁶⁵ Notably, in a subsequent case, *California v. ARC America Corp.*, the United States Supreme Court held that the

WAYNE L. REV. 71 (1994). For a classic example of conflicting views by federal antitrust enforcement agencies, see U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008) (withdrawn 2009) and the response by the Federal Trade Commission, FTC Release (9/30/08). See also Editorial, *Another Thumb on the Scales*, N.Y. TIMES, Nov. 1, 2008, at A22; Peter Whoriskey, *Justice's Monopoly Guidelines Assailed: Majority of FTC Says Policy Would Weaken Enforcement*, WASH. POST, Sept. 9, 2008, at D1.

64. Whatever the meaning of the requirement to follow federal law, the interpretation of the federal law commandment is not ubiquitous. Although the antitrust statutes and judicial opinions in some states direct that the statute is to be interpreted in concert with federal judicial opinions, the Wisconsin courts have not chosen to provide for this kind of leeway.

65. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977).

Illinois Brick decision did not bind the states in determining whether an indirect purchaser could have standing to sue in a state antitrust case.⁶⁶ Although a Wisconsin court has held that, due to the Wisconsin legislature's amendment of the Wisconsin Antitrust Act, indirect purchaser plaintiffs have standing to sue,⁶⁷ that court also made it clear that the legislature addressed only those claiming the "pass-on offense" and did not permit defendant's to use the "pass-on defense" to claims by a direct purchaser.⁶⁸ Interestingly, a significant part of the *Illinois Brick* decision to not allow indirect purchasers to have standing was based on a concern that since the Court previously denied the use of the pass-on defense by defendants facing possible recoveries by direct purchasers who had passed on the costs of the anticompetitive activity to indirect purchasers, it would be inappropriate to allow indirect purchaser plaintiffs to have standing and thereby expose defendants to possible multiple liabilities.⁶⁹ Does the *K-S Pharmacies* decision⁷⁰ indicate that the Wisconsin courts are willing to forego United States Supreme Court direction and not provide a pass-on defense as a counter balance for the legislature's approval of indirect purchaser actions or is *the K-S Pharmacies* decision merely a strict construction of the amendment to Wisconsin Statute section 133.18?

Although the Wisconsin legislature has enacted "indirect purchaser" legislation that sets forth a standing requirement different than the one set by the United States Supreme Court in *Illinois Brick*, many other procedural antitrust standards set by the United States Supreme Court remain unaddressed by the Wisconsin legislature or by the Wisconsin Supreme Court. For example, in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, the Court qualified the traditional standard of permissible inferences for getting past a motion for summary judgment.⁷¹ In *Bell Atlantic Corp. v. Twombly*, the Court heightened the pleading requirement for federal civil cases.⁷² In *Twombly*, the Court required that plaintiffs plead enough facts to make their claim plausible (rather

66. *California v. ARC Am. Corp.*, 490 U.S. 93, 105–06 (1989).

67. WIS. STAT. § 133.18(1)(a) (2009–2010).

68. *K-S Pharmacies, Inc. v. Abbott Labs.*, No. 94-002384, 1996 WL 33323859, at *11–12 (Wis. Cir. Ct. May 17, 1996); *see also In Re Vitamins Antitrust Litigation*, 259 F. Supp. 2d 1, 5 (D.D.C. 2003) (explaining that Wisconsin analyzed its antitrust statute in a manner that did not allow a pass on defense).

69. *Illinois Brick*, 431 U.S. at 730.

70. *K-S Pharmacies, Inc.*, 1996 WL 33323859, at *11–12.

71. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

72. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

than possible or conceivable).⁷³ Recently, the United States District Court for the Eastern District of Wisconsin discussed the application of the *Twombly* standard in a diversity case.⁷⁴ This case is emblematic of the problems the Wisconsin courts face when considering issues decided by federal courts sitting in diversity and addressing areas of state law which the state courts have not yet addressed. In other words, under the Wisconsin Supreme Court's current philosophy of the absolute binding nature of federal decisions, can a federal court sitting in diversity bind state law? Finally, in *Monsanto Co. v. Spray-Rite Service Corp.*, the Supreme Court established a standard for whether a jury could infer from the termination of a price-cutting distributor in response to complaints from other dealers that there was an illegal conspiracy in violation of Sherman Act Section 1 through a "resale price maintenance" agreement.⁷⁵ The Court established that to prove an illegal conspiracy through complaints by competing dealers to a manufacturer "something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and the non-terminated distributors were acting independently."⁷⁶ The meaning of the Court's requirement that there must be "evidence that tends to exclude the possibility [that the parties] were acting independently"⁷⁷ has been the subject of very different interpretations. Observe the dramatic difference between the interpretations of the *Monsanto* standard in the Second, Fourth, and Eleventh Circuit Courts of Appeals,⁷⁸ and the interpretation applied in the Fifth and Seventh Circuit Courts of Appeals.⁷⁹ In *Toys R Us v.*

73. *Id.* at 556.

74. *See* *Westerfield v. Quiznos Franchise Co.*, 527 F. Supp. 2d 840, 856–57 (E.D. Wis. 2007).

75. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

76. *Id.*

77. *Id.*

78. These cases are examples of Circuit Courts that have interpreted the language of the *Monsanto* standard to mean that if there is any possibility of independent action, the standard for independent action has been met and there is no concerted action. *See* *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1013–14 (2d Cir. 1989); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Grp., Inc.*, 878 F.2d 801, 805 (4th Cir. 1989); *Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532–33 (11th Cir. 1987); *Garment Dist., Inc. v. Belk Stores Servs.*, 799 F.2d 905, 909 (4th Cir. 1986) *cert. denied*, 486 U.S. 1005 (1988).

79. These cases are examples of Circuit Courts that have interpreted the *Monsanto* standard in a fashion that allows a plaintiff to establish concerted action even when there is some evidence of independent action. *Golden Bridge Tech., Inc. v. Motorola, Inc.* 547 F.3d 266, 272–73 (5th Cir. 2008); *Toys "R" Us, Inc., v. Fed. Trade Comm'n*, 221 F.3d 928, 934–35

F.T.C., Judge Wood interprets the *Monsanto* standard as not requiring “to exclude all possibility” that the defendants acted unilaterally but “only that there must be some evidence which, if believed, would support a finding of concerted behavior.”⁸⁰ Note that Judge Wood emphasizes that if there is some evidence that tends to exclude the possibility of independent action then collusion may be established.

A corollary issue to the procedural/substantive distinction is how the courts of Wisconsin should address the application of the per se standard.⁸¹ Over the past century, the United States Supreme Court has declared some anticompetitive acts as so pernicious that the mere doing of the act is illegal per se (i.e. on its face).⁸² An additional consideration for establishing the per se standard was to provide parties and courts with an area of predictability as to what practices are clearly anticompetitive.⁸³ Unfortunately, the Court’s rationale for its decision to create a per se standard, modify it⁸⁴ (e.g. the “quick look rule of reason”), or totally retract the application of the per se standard and substitute a full rule of reason test sometimes appears to be without

(7th Cir. 2000).

80. *Toys “R” Us, Inc.*, 221 F.3d at 935.

81. *Patti-Marshall, LLC v. Four Winds Subdivision, LLC*, No. 2009AP2741, 2010 Wisc. App. LEXIS 710, at *5–6.

82. *See, e.g., Albrecht v. Herald Co.*, 390 U.S. 145, 153–54 (1968) (holding vertical maximum price restrictions illegal per se) *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997); *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967) (holding vertical non-price restrictions illegal per se) *overruled by* *Continental T. V. v. GTE Sylvania*, 433 U.S. 36, 58 (1977); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212–14 (1959) (holding a group boycott illegal per se); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (holding that horizontal price fixing is illegal per se); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911) (holding minimum resale price maintenance illegal per se) *overruled by* *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

83. *See Leegin*, 551 U.S. at 886–87; *Bus. Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988); *Nat’l Soc. of Prof. Eng’r v. United States*, 435 U.S. 679, 692 (1978).

84. The Supreme Court of the United States has shifted the standard of proof for some general subject areas (e.g. horizontal agreements to fix prices or horizontal agreements to limit output) where it had traditionally applied the per se doctrine, to a rule of reason due to the “character” of the facts in a particular case. *See, e.g., NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 109 (1984). Later, the Court redefined for some fact patterns the breadth of the per se doctrine as it applies to concerted refusals to deal. *See Fed. Trade Comm’n v. Ind. Fed’n of Dentists*, 476 U.S. 447, 461–62 (1986); *Nw. Wholesale Stationers, Inc. v. Pac. Stationary and Printing Co.*, 472 U.S. 284, 295–97 (1985). Finally, following an appellate court decision wherein the Third Circuit identified a “quick look rule of reason” standard, *United States v. Brown Univ.*, 5 F.3d 658, 669 (3rd Cir. 1993) (a standard slightly broader than per se but less broad than the rule of reason), the United States Supreme Court has discussed the utility of a quick look rule of reason. *See, e.g., Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 764 (1999); *see also Law v. NCAA*, 134 F.3d 1010, 1016–19 (10th Cir. 1998); *Chicago Prof’l Sports Ltd. P’ship. v. NBA*, 961 F.2d 667, 676 (7th Cir. 1992).

strong support, confusing, and in certain cases appears opportunistic.⁸⁵ The tight reins on the ability of Wisconsin courts to selectively apply federal decisions interpreting federal law leaves open the real possibility that parties before the Wisconsin courts, and even the courts themselves, may be whipsawed by rapidly shifting doctrines that find favor (sometimes temporarily) with the United States Supreme Court, lesser federal courts, or even federal agencies. Although Wisconsin courts have faced numerous cases wherein the facts raised might fall into the per se category when examined by a federal court, Wisconsin courts have never established when an antitrust violation is illegal per se and whether they will follow absolutely federal decisions applying the per se standard.⁸⁶

85. See generally *Leegin*, 551 U.S. 877; *State Oil Co. v. Khan*, 522 U.S. 3 (1997); Peter Carstensen & David Hart, *Khaning the Court: How the Antitrust Establishment Obtained an Advisory Opinion Legalizing "Maximum" Price-Fixing*, 34 U. TOL. L. REV. 241 (2003).

86. Although the appellate court in *Patti-Marshall, LLC v. Four Winds Subdivision, LLC*, No. 2009AP2741, 2010 Wisc. App. LEXIS 710, at *5–6, identified areas that might be considered per se antitrust violations in general, the court did not discuss whether these would be per se violations in Wisconsin. However, in most cases Wisconsin courts have chosen not to address which anti-competitive practices are illegal per se in general much less a per se violation in Wisconsin. In fact, the federal courts considering Wisconsin law as to what constitutes an antitrust violation per se in Wisconsin have had difficulty discerning what violations are illegal per se. See *Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293, 1296 (7th Cir. 1993) ("Is maximum resale price maintenance a per se violation of Wisconsin law?"). The Wisconsin cases (and some federal cases) where the facts involved might be violations under the federal per se standard at the time the cases were decided are grouped below into subject categories where the federal courts have traditionally found some of these practices to be illegal per se:

(1) PRICE FIXING – *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶ 35, 308 Wis. 2d 684, 748 N.W.2d 154, 166; *Meyers v. Bayer, A.G.* 2007 WI 99, ¶ 49, 303 Wis. 2d 295, 322, 735 N.W. 2d 448, 462; *Patti-Marshall LLC*, 2010 Wisc. App. LEXIS 710, at *5–6; *Szukalski v. Crompton Corp.*, 2006 WI App. 195, ¶ 3, 296 Wis. 2d 728, 730, 726 N.W. 2d 304, 306; *Derzon v. Appleton Papers*, No. 00-1808, 2001 Wisc. App. LEXIS 540 at *1; *Derzon v. New Oji Paper Co.*, No. 99-1368 2000 Wisc. App. LEXIS 1060, at *1;

(2) GROUP BOYCOTT–*Fox Valley Thoracic Surgical Assocs. v. Ferrante*, No. 2006AP3201, 2008 Wisc. App. LEXIS 150 at *11–15;

(3) HORIZONTAL MARKET ALLOCATION and TYING ARRANGEMENTS–*In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 656 (E.D. Mich. 2000);

(4) TYING ARRANGEMENTS – *Westerfield v. Quiznos Franchise Co., LLC*, 527 F.Supp. 2d 840, 856 (E. D. Wis. 2007); *Cedarhurst Air Charter, Inc. v. Waukesha County*, 110 F. Supp. 2d 891, 892–93 (E.D. Wis. 2000);

(5) RETAIL PRICE MAINTENANCE – *Praefke Auto Elec. & Battery Co. v. Tecumseh Prods. Co.*, 110 F. Supp. 2d 889, 917 (E.D. Wis. 2000) *rev'd*, 255 F.3d 460, 460 (7th Cir. 2001); *Slowiak v. Hudson Foods*, No. 91-C-737, WL 176983 (W.D. Wis. Apr. 8, 1992), *aff'd*, *Slowiak v. Land O'Lakes*, 987 F.2d 1293, 1298 (7th Cir. 1993); *Scott & Fetzer Co., Kirby Co. Div. v. Peterson*, 1987 U.S. Dist. LEXIS 15289, *1 (W.D. Wis. 1987) *Ahmad v. Milwaukee*, No. 91-0533, 1991 Wisc. App. LEXIS 1427 at *5 n.4 (1991); see also *Indep. Milk Producers Co-op v.*

VI. WHERE IS THE STATE OF WISCONSIN TO GO FROM HERE?

To continue the requirement that Wisconsin courts interpreting the Wisconsin Antitrust Act follow in lockstep the interpretations of federal antitrust law by federal decisions is neither necessary nor advisable. Unless the Wisconsin state legislature chooses to adopt a more specific set of antitrust rules, a problematic practice for the same reasons that the United States Congress has avoided this practice with the Sherman Act, the Wisconsin state courts, much like the federal courts, must evolve their own legal standards for antitrust violations. Necessarily, this does not mean that the state courts must jettison all relationship to the federal law. Rather, Wisconsin state court analyses of what constitutes anticompetitive practices should examine federal doctrines with a broader eye to the evolution of antitrust law, and forego dogmatic application of the most recent federal decisions and government policies where they do not fit the nature of Wisconsin's economic concerns and values. In so doing, the Wisconsin courts applying the Wisconsin Antitrust Act will allow for a set of values and interests that reflect the business and consumer communities in Wisconsin.

As noted above, recent federal decisions that have revealed stark conflicts in economic analysis resulting in close decisions, such as those in *California Dental Ass'n* and *Leegin*, have increased the need for flexibility on the part of Wisconsin courts when considering federal interpretations of federal antitrust law. Also, the differences in interpretation of the United States Supreme Court wording in *Monsanto Co. v. Spray-Rite Service Corp.*,⁸⁷ brings into sharp focus the problems the Wisconsin courts will face if they continue to follow a policy of doggedly following federal decisions. A further problem arises when the Wisconsin courts must address not only the vague language in *Monsanto*, but also must consider whether they are bound by federal district and circuit court decisions within their own circuit or should consider decisions by "foreign" district and appellate courts. Worse still, can federal court decisions in diversity cases where the Wisconsin courts have not spoken bind the state courts under the Wisconsin Supreme Court's federal decision policy? Ultimately, the Wisconsin Supreme Court's failure to provide a priority structure among the decisions by the federal courts as well as the federal agency decisions and guidelines has left Wisconsin antitrust law with very little guidance.

Stoffel, 102 Wis. 2d 1, 10, 298 N.W.2d 102, 106 (Ct. App. 1980).

87. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

Many other states, through legislative action or judicial application, are less tethered to federal court interpretations of antitrust law (in announced policy even if not always in practice). Because the legislatures and courts of many states have opted to be “guided” by federal decisions rather than follow a lockstep approach, these courts have assured their citizenry of both an opportunity to deviate from what they believe are federal decisions inappropriately applying antitrust doctrine and to look to sister state courts for a commonality of interpretation. With greater freedom the Wisconsin courts may sometimes choose to follow other states rather than federal decisions interpreting federal antitrust law.

Finally, some states have taken a more progressive stance. In particular, the Vermont antitrust (and trade) law is patterned after the Federal Trade Commission Act.⁸⁸ The leeway the Act gives the state and its courts is much greater than the “Little Sherman Acts,” yet allows the principles that are embodied in the Sherman Act to continue to play a significant part in the state antitrust law. Other states have followed the Little Sherman Act model but provided their own “spin,” giving courts greater independence without sacrificing the Sherman Act language and application (e.g. California’s Cartwright Act).⁸⁹

Instead of being whipsawed by the hairpin turns of federal judicial policy, Wisconsin should develop its own interpretations of antitrust law where warranted and meet state interests and concerns. Unfortunately, by failing to follow an independent state policy over the past century, Wisconsin has foregone the natural development of state antitrust law. If the Wisconsin Supreme Court could develop an independent voice it could not only reflect state values and interests but return to its historical role as a leader in national economic thinking.

88. VT. STAT. ANN. tit. 9, § 2451 (2010).

89. See, e.g., Cartwright Act, CAL. BUS. & PROF. CODE § 16720 (West 2010).