RESURRECTING THE INCIPIENCY DOCTRINE RECREATES THE PROBLEM IT WAS DESIGNED TO SOLVE

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Antitrust enforcement relies on economic analysis to determine the likelihood that actions will conflict with existing law. The consumer welfare standard ("CWS") provides a concrete focus for such analysis and has served as a strong component of antitrust law for over five decades. Currently, antitrust agencies seek to move away from this standard in the pursuit of more expansive enforcement. Unfortunately, tools used as an alternative to the CWS, such as the incipiency doctrine ("ID"), risk an antitrust regime that is separated from economic analysis and lacks a clear focus. As shown in FTC v. Brown Shoe Co., antitrust that aims to achieve a wide swathe of protections, risks harming consumer interests. Before attempting to supplant the CWS, regulators should remember that any replacement needs a clear, consistent, and measurable standard of harm. Otherwise, such actions would recreate the problem the CWS originally solved.

I. INTRODUCTION

Antitrust exists in an interdisciplinary landscape that includes law and economic analysis. This creates tension between regulators' attempts to develop predictable bright-line rules for anticompetitive behavior and the more difficult task of using economic analysis so that enforcement reflects the competitive business environment. The consumer welfare standard ("CWS") creates a single measurement to judge potential outcomes and balance current legal requirements.[2]

More expansive antitrust enforcement proponents hope to move away from this doctrine in today's antitrust landscape. Part of the justification for this comes from what is known as the *incipiency doctrine* ("ID").[3]

Referencing the ID does nothing to counteract the roughly five decades that antitrust has been interpreted through the lens of the CWS. The CWS provides a clear definition of harm that can be measured through economic analysis. Returning to the ID and abandoning the CWS, without finding a viable replacement, risks untethering antitrust enforcement from reason entirely.

II. INCIPIENCY AND CONSUMER STANDARDS

The term incipiency has been linked to antitrust for some time. The 1914 Senate Judiciary Report that accompanied the Clayton Act stated:

> "Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the act of July 2, 1890 (the Sherman Act) or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipiency and before consummation."[4]

However, in this case, incipiency was used to justify action before the consummation of a specific harm. Today, incipiency is used to justify an increasingly expansive antitrust regime.

One of the early signals that the new leadership of the Federal Trade Commission (FTC) wanted to shift the enforcement of antitrust was that less than a month after Lina Kahn assumed her position as Chair of the FTC, the FTC repealed the previous policy for enforcement under Section 5 of the FTC Act.[5] This signaled an approach to enforcement that was less limited to the Sherman and Clayton Act.

The previous policy statement emphasized that under Section 5, the agency would be *less likely* to bring complaints if the Sherman and Clayton Act covered the action.[6] In the document repealing the previous policy statement, the FTC quoted not a Congressional mandate but the Supreme Court's assertion that the FTC Act was designed "to stop in their incipiency acts and practices which, when full blown, would violate those Acts."[7]

The Sherman Act requires either the attempt or success in monopolization or restraint of trade.[8] the Clayton Act, requires that an action *may* result in a substantial lessening of competition or *tend* to create a monopoly.[9] However, under the incipiency doctrine and the new interpretation of Section 5, the FTC could justify an action that seeks to prevent a vague idea of potential monopolies as opposed to actual, intended, or imminent ones.

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2 Christine S. Wilson, Commissioner, Fed. Trade Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Remarks at the George Mason Law Review 22nd Annual Antitrust Synposium: Antitrust at the Crossroads? (Feb. 15, 2019).

3 Peter C. Carstensen & Robert H. Lande, The Merger Incipiency Doctrine and the Importance of "Redundant" Competitors, Wisconsin Law Review. 783 – 845 (2018).

4 S. REP. NO. 698, 63d Cong., 2d Sess. 1 (1914)

5 Statement of the Commission, On the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021).

6 Statement, Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2023).

7 *FTC v. Motion Picture Advertising Svc. Co.*, Inc., 344 U.S. 392 (1953).

8 *Sherman Act*, 26 Stat. 209, 15 U.S.C. §§ 1–7.

9 *Clayton Act*, 38 Stat. 730, 15 U.S.C. §§ 12-27.

When checking the dates of the cases used to justify incipient enforcement, it becomes clear that this doctrine predates the current standard for enforcement, the CWS. The CWS has come under fire by those who wish to see more aggressive antitrust enforcement against concentration. While the incipiency doctrine offers more flexibility in demonstrating harm, it fails to replace the CWS.

The agency references four court cases in the footnotes for the claim that the FTC should prevent monopolies in their incipiency. The most recent is the *FTC v. Brown Shoe Company*, which took place before the CWS was widely used in the 1970s.[10] In this decision, the U.S. Supreme Court stated that congressional intent was the "protection of viable, small, locally owned business."

The Brown Shoe merger was blocked, and today neither company operates, having been pushed aside by other producers. In the end, consumers were not served by the FTC's actions.

The critical problem is that the FTC has a duty to protect the consumer, and protecting competitors can often be in conflict. Addressing this conflict is the exact purpose of the CWS.

As was noted on the FTC's website, the merger in *FTC v. Brown Shoe Co.* would have benefited consumers by lowering shoe prices.[11] As such, the *FTC v. Brown Shoe Co.* case demonstrates that the benefits to consumers and competitors are different. More than an ideological approach, the CWS is a practical tool for antitrust enforcement. An alternative standard for meeting the FTC's purpose of consumer protection and considering the impacts on small businesses doesn't exist.

In the same statement where the FTC stated its belief that the agency should stop monopolies in their incipiency, the agency wrote that the belief conflicts with a rule of reason analysis, which is tied to the CWS because it would require action "before it becomes likely to harm consumers or competition."[12]

As *Brown Shoe Co.* shows, a liberal interpretation of harm can prevent mergers even with a negligible market share.[13] Depending on the perspective of enforcers, it is possible to paint most successful businesses as something that "may" harm competition or reach monopoly status. If the FTC can paint any business as something that harms competition, then it can use the doctrine to do whatever it wants to those businesses.

This is where the importance of economic analysis and clear harm standards come in, and it was the original problem that the CWS addressed.

III. RULE OF REASON SHOULD PREVAIL

The ID is not inherently problematic as a tool to interpret the Sherman and Clayton Act. What is problematic is how it is being used to justify antitrust enforcement based on vague possibilities of anticompetitive behavior. Tethered to the rule of reason analysis, which requires an analysis of the relevant market and procompetitive justifications, the ID would not be nearly as concerning.[14] However, in practice, it is used beyond protecting a competitive marketplace.

In a *Wisconsin Law Review* article, authors Peter C. Carstensen & Robert H. Lande argue that the purpose of the doctrine is to ensure economic redundancy.[15] In simple terms, if a competitive marketplace is defined as having five firms, then antitrust enforcers should use the doctrine to ensure there are at least six firms. This interpretation essentially argues that since firms can go out of business due to normal market conditions, the incipiency doctrine should be used to dig a moat of protection around the possibility of limiting competition.

10 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

11 Debra A. Valentine, Former General Counsel, The Evolution of U.S. Merge Law, Prepared Remarks before INDECOPI Conference (Aug. 13, 1996).

12 Statement of the Commission, On the Withdrawal of the Statement., *supra* note 5.

13 Bryce J. Jones, *New Thrust of the Antimerger Act: The Brown Shoe Decision*, 38 Notre Dame L. 229, 229-43 (1963).

14 Antitrust Standards of Review: The Per Se, Rule of Reason, and Quick Look Tests, BONA LAW ANTITRUST & COMPETITION (Aug 10, 2018), https://www.bonalaw.com/insights/legal-resources/antitrust-standards-of-review-the-per-se-rule-of-reason-and-quick-look-tests.

15 Peter C. Carstensen & Robert H. Lande, *supra* note 3.

We can see the basic principle played out in FTC actions. In the updated merger guidelines, the FTC repeatedly uses the idea of incipiency as a justification for intervention even when the action isn't anti-competitive in the present.[16] What should also be considered are the potential consumer benefits that are sacrificed in the pursuit of excessively broad protections around potential limits on competition.

CONCLUSION

If enforcers intend to stay as far away from monopolies as possible, then opposing almost all increases in concentration makes sense. However, the very words that gave rise to this doctrine also show why this broad interpretation conflicts with antitrust law as it is written. There is a reason that the drafters of these laws focused on illegal monopolies and not *near monopolies* in the statute.

The FTC shouldn't abuse this doctrine in its efforts to forgo the CWS.

16 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

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