Ohio Northern University Law Review

Volume 48 | Issue 2 Article 2

2022

The "Rarely Discussed and More Rarely Applied" Antitrust Implications of Contractual Releases of Antitrust Liability, with a Modest Proposal

Jared S. Sunshine

The "Rarely Discussed and More Rarely Applied" Antitrust Implications of Contractual Releases of Antitrust Liability, with a Modest Proposal

JARED S. SUNSHINE*

* * *

ABSTRACT

One would think that a contractual release of liability for antitrust violations would be subject to exacting scrutiny, lest the violator buy its way into blamelessness. One would be wrong. Whether an antitrust action can be brought despite such releases is governed by the judicially-created "part-and-parcel" doctrine, which asks how integral the release is in the anticompetitive conspiracy. Like so many precepts of American antitrust, the results are not too predictable, and many decades of fitful evolution have only muddied the waters further. At base, the riddle reduces to a conflict between priorities: the private settlement of disputes, conserving judicial resources and respecting individual autonomy, versus the public protection of competition by so-called "private attorneys general" whose suits expose violations. Mindfulness of these competing values, however, points towards a potentially more serviceable and justifiable rule of decision than the part-and-parcel doctrine currently offers.

* J.D., *cum laude*, Fordham University School of Law, 2008; B.A., Columbia College of Columbia University in the City of New York, 2004. Grateful acknowledgements are made to the editors and staff of the Ohio Northern University Law Review, who provided thoughtful comments on earlier drafts of this Article. The views expressed in this Article are the author's alone and do not represent those of the abovesaid persons or any other.

TABLE OF CONTENTS

* * *

> "Rarely discussed and more rarely applied, 'part and parcel's' roots are traced to Justice Cardozo's statement in *Radio Corp. of Am. v. Raytheon Mfg. Co.* that a release to an antitrust claim may be invalid 'when it is so much a part of an illegal transaction as to be void in its inception.'"[1]

> "The law regarding the various substantive ways a settlement can have antitrust implications is little developed. Much of what is suggested is therefore a discussion of theoretical principles not refined in the crucible of actual litigation in this area."[2]

I. INTRODUCTION

Imagine that in the fabled land of Blackacre where *homo economicus* thrives, a troika of widget-makers have long happily co-existed in a glorious state of profit, mutually enjoying a cozy relationship with the primary supplier of widget parts. Widget parts are extraordinarily difficult to bring to market, even if they are not patented per se, and in deference to this, the trio has long agreed not to try to exact price concessions from the single major supplier of any volume but rather to allow their friend to set the price, simply passing on the difference to their ultimate consumers. Widgets are quite popular, it has proven, and the customers are willing to pay the inflated price. An imaginative entrepreneuse comes to believe that she could make widget parts more efficiently, albeit only after great initial investment. She finds some believers in her plan and, with their help, constructs a factory. She immediately runs into a problem, however: despite her lower prices, none of

1. VKK Corp. v. Nat'l Football League, 244 F.3d 114, 125 (2d Cir. 2001) (quoting Radio Corp. of Am. v. Raytheon Mfg. Co., 296 U.S. 459, 462 (1935)) (citation omitted).

2. Harry M. Reasoner & Scott J. Atlas, *The Settlement of Litigation as a Ground for Antitrust Liability*, 50 ANTITRUST L.J. 115, 116 (1981).

the widget-makers will purchase her parts. Even when the price is lowered further, they say only that they are satisfied with their current supplier. It seems baffling!

Even after decreasing her price to the barest modicum of a profit margin, there are still no takers, and, at last, she is forced to declare her enterprise a loss, seeking to sell it and its fixtures at fire sale price to the evidently more popular incumbent. Still, she smells a rat: the incumbent must have been kicking back money to the widget-makers to keep her out of the market, she supposes—or is that just sour grapes? Her suspicions are accentuated when the incumbent approaches her half a year after they have reached an agreement in principle and offers her a fine premium to release any and all prior-arising claims, asserted or unasserted, "from the beginning of time" (including antitrust complaints, she thinks darkly) that her enterprise might have had against it. Though she feels morally vindicated, the price is so rich (and she is so in debt after losing everything in her foray into the dog-eat-dog world of business) that she agrees to the offer, including the non-disclosure clause that comes along with it.

A week later, she was feeling lousy. Sure, she needed the money, but she had let the big boys squeeze her into letting them get away with blatant market manipulation, as she now frames it mentally. She spent a year in law school before dropping out to pursue an M.B.A. instead and knows that she could renounce the contract, claiming economic coercion. Almost as soon as she had signed, she realized there could be no other explanation but that there must have been a conspiracy. With the contract renounced, she would have to give back all that money—or she could tattle to the government in hopes of a public prosecution, but that has its own downsides. If the release contract were held void as against public policy, there went her money again. If it were upheld, then the non-disclosure clause would—once again—claw back the loot. The only reason she needed the money so badly was because of what the conspiracy had done! How could it be possible they could ensure her silence with the very proceeds of their conspiracy? It was no wonder she felt so lousy about the whole thing. But looking at her mortgage balance, she takes a deep breath and resolves to move on. At best, she might renounce the contract and be able to sue for antitrust damages, but she has a good deal of money in hand—perhaps more than even treble damages would yield—and the possibility of victory in such a lawsuit, she realizes, is very uncertain and very far away. Her evidence thus far is only the release and her own sullen suppositions, after all. Maybe she should have just finished law school, she concludes wistfully.

Surely, one might think, the release contemplated in this sorry parable must somehow violate the antitrust laws, as it quite transparently operated to shield and conceal the (suppositious) antitrust violations afoot. Alas, as with

most canons of antitrust law, the truth is not so simple. This Article explores the precedent regarding the potential antitrust implications of contractual releases of liability in antitrust, an intriguing sort of self-referential kōan that has puzzled courts and (perhaps not coincidentally) received fairly little scrutiny or elaboration. Part II presents the Supreme Court case that first raised obliquely the possibility that antitrust releases might themselves run afoul of antitrust law, and Part III then reviews, from varying perspectives, the lower court decisions that followed to give flesh to the concept, including the coining of the "part-and-parcel" doctrine to describe it. Part IV turns to the uneasy tension raised in some cases between public policy opposing competitive abuses and encouraging the consensual resolution of disputes, culminating in Part V with a sketch of how these priorities have played out in the current compromises embodied in the part-and-parcel cases. Part VI offers a modest proposal to better balance these competing values than the underutilized and misinterpreted "part and parcel" doctrine presently accomplishes. A brief conclusion locates this ostensibly minor constellation of the law within the broader firmament of regulatory theory and the greater common weal.

II. A MOMENTOUS HYPOTHETICAL BY MR. JUSTICE CARDOZO

Radio Corp. of America v. Raytheon Manufacturing Co.[3] (*Raytheon*) is not, at first blush, an odd case from which to derive a theory of the potential nullity of an antitrust release, but it is so upon greater scrutiny. The plaintiff, Raytheon, had accused RCA of having illegally monopolized their mutual sector of the newborn electronics industry by 1928, to the natural detriment of Raytheon's business, and claimed damages in excess of three million dollars[4]—north of $44m in 2020 dollars.[5] RCA interposed in defense a release of liability that Raytheon had executed in its favor when it agreed to purchase a license from RCA, but Raytheon in turn argued the release to be void because it had been procured under the economic duress imposed by the illegal monopoly.[6] RCA then succeeded in having the case transferred from the courts of law to those of equity so that it might argue for the validity of the release, which Raytheon opposed and, thereafter, sought unsuccessfully in chancery to revoke, disclaiming any right or remedy that could not be had at law.[7] A decree was ultimately issued in chancery confirming the release's

3. *Radio Corp*., 296 U.S. 459.
4. *Id.* at 460.
5. CPI Inflation Calculator, U.S. BUREAU OF LABOR STATISTICS, www.bls.gov/data/inflation_calculator.htm (input original dollar amount; then original month and year; then current month and year; then select "calculate") [hereinfater "LABOR"].
6. *Radio Corp.*, 296 U.S. at 460.
7. *Id.* at 460-61.

validity and returning the case to law to adjudicate the availability of relief.[8] The First Circuit reversed on appeal, finding the release "so connected with the unlawful combination and monopoly as to be inoperative at law, irrespective of the possibility of avoiding it in equity."[9] RCA appealed to the Supreme Court, which granted certiorari on the question of whether the release's validity was properly triable in equity.[10]

Although the case itself turned on the legitimacy of an antitrust release, the actual issue before the justices regarded the purviews of the divided courts of law and equity,[11] a division long since rendered a nullity.[12] Justice Benjamin Cardozo's unanimous opinion, therefore, addressed that issue foremost, holding that as Raytheon had conceded it had no relief in equity and did not seek it, "no one would have insisted that a suitor who refused to file a bill in chancery could be sent there against his will," though at the loss of any remedy that equity might offer.[13] It was enough for Cardozo to find there to be issues remaining to try at law and none to be had in equity given Raytheon's disclaimer.[14] For good measure, and in avoidance of overreaching, he added that the Court "d[id] not attempt to say whether the release will collapse upon the showing of an illegal combination or will retain an independent life," leaving the gravamen of the case for the courts below to reexamine at law in the first instance.[15]

En route to his genuine holding, however, Cardozo penned the dictum that would launch a thousand cases,[16] distinguishing when the defense of a release might be void at law versus in equity:

> A release under seal is a good defense at law, unless its effect is overcome by new matter in avoidance. This will happen, for

8. *Id.* at 461.

9. *Id.* at 461-62.

10. *Id.* at 459 ("The question is whether in the circumstances here exhibited the validity of a release pleaded by a defendant as a bar to a cause of action at law is triable in equity.").

11. *Radio Corp.*, 296 U.S. at 459.

12. *See* Liberty Oil Co. v. Condon Bank, 260 U.S. 235, 242 (1922) ("[T]he formal distinction between proceedings in law and equity is abolished and remedies at law and in equity are available to the parties in the same court and the same cause."); Ellis v. Davis, 109 U.S. 485, 497 (1883); *see generally* Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283 (1928).

13. *Radio Corp.*, 296 U.S. at 462-63 ("Accepting the disavowal, a court of equity must decline at this stage to adjudicate the validity of the release or its effect upon the parties, leaving that issue along with others to adjudication at law.").

14. *Id.* at 463.

15. *Id.* ("That is matter for the trial at law, where the bond between monopoly and surrender can be shown with certainty and fulness. Till then it will be best to put aside as premature not a little that is said in the opinion of the court below.").

16. Kit Marlowe, of course, famously wrote of Helen of Troy: "Was this the face that launch'd a thousand ships / And burnt the topless towers of Ilium?" CHRISTOPHER MARLOWE, THE TRAGICAL HISTORY OF THE LIFE AND DEATH OF DR. FAUSTUS 61, act 5, sc.1 (Project Gutenberg ed. 1997) (Rev. Alexander Dyce ed., 1624).

> illustration, *when it is so much a part of an illegal transaction as to be void in its inception. If it is subject to that taint, a court of law is competent to put it out of the way*. We assume that a like competence exists in other circumstances. True there are times when a release, unassailable at law, is voidable in equity, and in equity only. If the plaintiff were demanding relief upon that basis, the equitable issue would have to be disposed of at the beginning.[17]

But by its own terms, the Supreme Court's own emphasized language is collateral to the holding, hypothetical, and given only by way of "illustration."[18] Nonetheless, as is so often the fate of dicta,[19] Justice Cardozo's idle speculation would subsequently be taken by some courts as the Supreme Court's imprimatur that a release of antitrust liability could be disregarded should it constitute an integral part of the antitrust violation itself.[20] Several of the few secondary sources to comment on the case identified its holding without deviation.[21] But courts were not alone in elevating Justice Cardozo's brief aside into precedent: Williston's justly lauded treatise on contracts cites *Raytheon* for the rule that "a contract closely connected with some unlawful plan or act is not enforceable,"[22] and some academic commentaries, too, have transmuted the aside from dictum to dictate[23] though others have explicitly recognized it for what it is.[24]

---

17. *Radio Corp.*, 296 U.S. at 462 (emphasis added).

18. *Id.* Indeed, Justice Cardozo had later labored to be clear beyond peradventure that the Court was *not* deciding whether the release was proper held void or not. *See Radio Corp.*, 296 U.S. at 463; *supra* notes 14-15.

19. *See* Andrew C. Michaels, *The Holding-Dicta Spectrum*, GWU LAW SCHOOL PUBLIC LAW RESEARCH PAPER No. 2017-1 (2016), https://ssrn.com/abstract=2863989; Judith M. Stinson, *Why Dicta Becomes Holding and Why It Matters*, 76 BROOK. L. REV. (2010); Pierre N. Leval, *Judging Under The Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249 (2006).

20. *See infra* Part III. A.

21. *See, e.g.*, 9 ARTHUR R. MILLER ET AL., FEDERAL PRACTICE & PROCEDURE § 2311, n.21 (4th ed. 1986) (citing *Radio Corp.* as commenting on the "elaborate distinctions between the circumstances and grounds on which a release could be challenged at law and those available only in equity"); W.M. Moldoff, Annotation, *Right to Jury Trial on Issue of Validity of Release*, 43 A.L.R. 2d 786 (1955) (recapitulating the holding as centering on the purview of a court in equity).

22. RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:11 n.2 (4th ed. 2004).

23. *E.g.*, Robert J. Ritacco, *Contracts and Antitrust - Economic Duress and Anti-Competitive Practices - Coercive Tactics Utilized by the National Football League to Prevent Franchise Relocation* - V.K.K. Corporation v. National Football League*, 244 F.3d 114 (2d Cir. 2001),* 12 SETON HALL J. SPORT L. 149, 158 n.77 (2002).

24. *See, e.g.*, Bernard E. Gegan, *Is There A Constitutional Right to Jury Trial of Equitable Defenses in New York?*, 74 ST. JOHN'S L. REV. 1, 50 n.269 (2000) (denominating as "dictum").

III. THE PRECARIOUS PART-AND-PARCEL DOCTRINE OF ANTITRUST RELEASES

A. Judicial Creation and Development of the Part-and-Parcel Doctrine

It was predominantly the lower courts, however, that deftly molded the unhewn stone of Justice Cardozo's opinion into a fully-formed figure of antitrust law, in the fullness of time to be known as the "part-and-parcel" doctrine after its characterization in a series of cases in the Ninth Circuit in the decade from 1965 to 1975.[25] To install rhetorical structure, the story of the slow emergence of the doctrine that follows is fancifully framed by the Three-Age Model of antiquity—Stone, Bronze, and Iron—first intimated by Lucretius,[26] and popularized in contemporary usage by the Danish archaeologist Christian Jürgensen Thomsen.[27] The conceit of legal history as archaeology and of cases as artifacts of erstwhile eras for study is hardly novel[28] and lends itself well to the waxing sophistication of the courts shaping the tools innovated by the part-and-parcel doctrine.

1. 1935 to 1965 — Anteprehistory[29] — Describing a Theory Before It Had a Name

In the most embryonic of relevant cases, the part-and-parcel theory was discernible, but the nomenclature of "part and parcel" had not yet emerged.

---

25. *See infra* Part III. A. 2.

26. TITUS LUCRETIUS CARI, DE RERUM NATURA, LIBER QUINTUS 40, *ll*.1283-1296 (James D. Duff ed., 1889) ("Arma antiqua manus ungues dentesque fuerunt / Et lapides et item silvarum fragmina rami, / Et flamma atque ignes, postquam sunt cognita primum. / Posterius ferri vis est aerisque reperta. / Et prior aeris erat quam ferri cognitus usus, / Quo facilis magis est natura et copia maior. / Aere solum terrae tractabant, aereque belli / Miscebant fluctus et vulnera vasta serebant / Et pecus atque agros adimebant ; nam facile ollis / Omnia cedebant armatis nuda et inerma. / Inde minutatim processit ferreus ensis / Versaque in opprobrium species est falcis aenae, / Et ferro coepere solum proscindere terrae / Exaequataque sunt creperi certamina belli.").

27. *See* BO GRÄSLUND, THE BIRTH OF PREHISTORIC CHRONOLOGY 17-18 (1987) ("Many proposals were presented for the division of past time, often in terms of a two- or three-period system, with a stone age, a copper or bronze age, and an iron age. This is not particularly surprising. During antiquity, there was a living tradition according to which a bronze age had preceded antiquity's own iron age. . . . It has long been clear that Thomsen was not only the first archaeologist to formulate and define in a clear and unambiguous manner the Three-Age System, but the first to publish it."); *see generally* PETER ROWLEY-CONWY, FROM GENESIS TO PREHISTORY: THE ARCHAEOLOGICAL THREE AGE SYSTEM AND ITS CONTESTED RECEPTION IN DENMARK, BRITAIN, AND IRELAND (2007).

28. "A reported case does in some ways resemble those traces of past human activity . . . from which the archaeologist attempts, by excavation, scientific testing, comparison, and analysis to reconstruct and make sense of the past. Cases need to be treated as what they are, fragments of antiquity." Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 188 (2000) (quoting A.W. BRIAN SIMPSON, LEADING CASES IN THE COMMON LAW 12 (1995)); *accord* Debora L. Threedy, *Legal Archaeology: Excavating Cases, Reconstructing Context*, 80 TUL. L. REV. 1197 (2006); Judith L. Maute, *Response: The Values of Legal Archaeology*, 2000 UTAH L. REV. 223 (2000).

29. *See, e.g.,* JOSEPH YOUNG BERGEN JR. & FANNY DICKERSON BERGEN, THE DEVELOPMENT THEORY 198 (1884) ("Of the existence of what one might call ante-prehistoric men, many are no less

In fairness, the First Circuit panel that the Supreme Court had affirmed in *Raytheon* had already been considerably more explicit than the high court about the nature of this innominate theory in its own dictum to the law-versus-equity procedural issue.[30] Raytheon had alleged that its sizable business in rectifying tubes had been "totally destroyed" by RCA through "manipulation and conspiracy" with others to establish a monopoly in the product.[31] Moreover, Raytheon urged that the contract, embodying the ensuing release, was voidable by virtue of fraud and duress committed by the victorious RCA, and the panel had agreed in principle (and dictum).[32] The appellate court went further, however, in observing that although "in ordinary cases an instrument executed under duress is voidable not void, this cannot be so if the effect would be to give life and substance to an illegal contract."[33] This was precisely the circumstance that Raytheon argued was at hand:

> In the case before us the release alleged to have been signed under duress enters into and forms an integral part of an agreement alleged to be illegal because establishing a monopoly in restraint of interstate trade. If the agreement is void the release is void, and requires no court of equity to so declare it. The primary issue is the validity or invalidity of the contract.[34]

The first case to follow *Raytheon*, *Westmoreland Asbestos Co. v. Johns-Manville Corp.*,[35] provided its forebear succinct approbation in denying dismissal to an antitrust defendant who proffered an executed release as a shield against the claims lodged of attempted monopoly.[36] The court thought that in order to operate as a "complete defense" meriting dismissal, a release would need to cover both past and future misdeeds, and that "if the instrument purported to absolve defendants from liability for future violation of the anti-trust statutes, I should hold it void as against public policy."[37] As the release in question was solely retrospective, no such holding was needed, and the court rounded out its own laconic dicta by observing enigmatically (presumably with approval?) that *Raytheon*'s dictum was "apropos" to

certain than if their bones have been discovered; for, as Sir John Lubbock has well said, the question is not whether these men had bones, but whether they actually existed; and that they did exist is amply proven by the rude flakes of flint which they left.").

30. Raytheon Mfg. Co. v. Radio Corp. of Am., 76 F.2d 943, 949-50 (1st Cir. 1935), *aff'd*, 296 U.S. 459, 463 (1935).

31. *Raytheon*, 76 F.2d at 944.

32. *Id.* at 948-49.

33. *Id.* at 949.

34. *Id.*

35. Westmoreland Abestos Co. v. Johns-Manville Corp., 39 F. Supp. 117 (S.D.N.Y. 1941), *aff'd*, 136 F.2d 844 (2d. Cir. 1943).

36. *Westmoreland*, 39 F. Supp. at 120.

37. *Id.* at 119.

plaintiff's further "contention that the release is void and inoperative because it forms an integral part, of, and was obtained with the intent to further the monopolistic conspiracy itself."[38] Whatever this observation meant was left unsaid; the Second Circuit made no mention of *Raytheon* or the release in its affirmance after the eventual trial.[39]

Only two decades after *Raytheon* and its terse (to the point of opacity[40]) adherence in *Westmoreland*, the Western District of Missouri in *Carter v. Twentieth Century-Fox Film Corp.*[41] offered what would with time prove to be the rare instance of a release found void on antitrust grounds.[42] The sole plaintiff had been the proprietress of two theaters in Sedalia, Missouri, bequeathed to her by her deceased husband, which had long been leased to a Fox affiliate.[43] When it came time to renew, Fox pressed for far lower rents, and Carter declined to extend the lease on such terms.[44] Carter attempted to operate the theaters herself, but when distributors refused to furnish her first-run films, she was forced to close the venues in 1941.[45] Fox, meanwhile, had leased another theater in Sedalia, and after Carter's folded, obtained an agreement providing an option to lease the theaters at a much-reduced price and to purchase them within two years (and forbidding the properties use for entertainment if they were sold to anyone else), including a release from all claims to that date in 1942.[46] Subsequently, Carter's representatives filed suit, alleging conspiracy to monopolize the theater industry in Sedalia and to foreclose her from competing via the distributors' boycott.[47] Fox, predictably, sought summary judgment in its favor on the 1942 release.[48]

Taking Carter's well-pled allegations as true, the court found the contract embodying the lease option and release was itself the very object of Fox's antitrust conspiracy: to gain control of the remaining theaters.[49] That the release might have been an "ancillary" clause to the primary (illegal)

38. *Id.* at 120 (quoting *Radio Corp.*, 296 U.S. at 462).

39. *See generally* Westmoreland Asbestos Co. v. Johns-Manville Corp., 136 F.2d 844 (2d Cir. 1943).

40. *See* Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 827 (C.D. Cal. 1968) (discussing and distinguishing *Westmoreland*).

41. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675 (W.D. Mo. 1955).

42. *Id.* at 680.

43. *Id.* at 677.

44. *Id.*

45. *Id.*

46. *Carter*, 127 F. Supp. at 677.

47. *Id.* at 678.

48. *Id.*

49. *Id.* at 678-79 ("As above noted, the release was integrated into the lease contract, the end result of which, if plaintiff's theory of action is sustained, can only be said to have been the culmination of the conspiracy to effectively remove plaintiff from competition in the business of exhibiting motion pictures in the Sedalia, Missouri, area. As such, said lease contract is just one of the many acts charged in the complaint by which defendants are alleged to have been able to establish the impact of the conspiracy and that caused the unreasonable restraint of interstate trade on which this action is based.").

objective was immaterial: the point of the contract was to preclude Carter from using the theater in competition or selling it to competitor, and "the consideration for that provision in the lease, as well as that given for the release clause, are so connected with the whole consideration, and other provisions of the agreement, as to make the same inseparable."[50] Nor was it material that the release clause, standing alone, might have been unobjectionable, for when it was subsumed within a contract whose execution violated the Sherman Act, the entire contract and all its provisions was void.[51] The court neatly distinguished cases where releases were upheld as independent transactions driven by financial necessity but untethered to the acts forbidden by the antitrust laws.[52] Finally, it invoked the First Circuit's views in *Raytheon* and Justice Cardozo's dictum to cement its view that Carter must have the opportunity to prove with "certainty and fullness" the connection between the alleged monopoly and the offending release.[53] Summary judgment was denied, and the case allowed to proceed.[54]

If these initial results seem to suggest plaintiffs trod an easy road in urging the invalidation of antitrust releases, the Ninth Circuit in 1950's *Suckow Borax Mines Consolidated v. Borax Consolidated*[55] must have disabused any such misconceptions.[56] Most of the Suckow plaintiffs' antitrust claims of monopolization of the borax industry were foreclosed by a statute of limitations; only the final sale of their failed enterprise to Borax Consolidated and accompanying release remained outside.[57] Plaintiffs, therefore, sought to avoid the release by arguing that the purportedly forced sales transaction were "'overt acts' in furtherance of a continuing conspiracy," rendering the release void.[58] The court frankly called this argument "difficult to understand,"[59] for plaintiffs had received hundreds of thousands of dollars in exchange, strongly suspected as monopolistic

50. *Id.* at 679.

51. *Carter*, 127 F. Supp. at 679-80 ("If such an illegal end is accomplished by use of restrictive contracts, such contracts cannot be given any legal effect. . . . That the particular contractual provision with which we are here concerned is a release does not thereby render it valid. Whether the release portion can be separated out from the other provisions of the contract or not, the contract is invalid in all its parts if it is found that it formed part of the plan used to obtain a monopoly.") (citations omitted).

52. *Id.* at 680; *see also id.* at 680-81 ("The present case, as we have viewed it, is not one in which the plaintiff is seeking to avoid a release solely by a plea of duress, as defendant assumes, but one where she maintains that the release was void in its pactum. Whether releases obtained by duress be void or voidable under the law of Missouri does not now concern us . . . for we believe this contract is made void, if it is void, by express provision of federal law concerning which state decisions are in no way binding on us.") (citations omitted).

53. *Id.* at 680.

54. *Id.* at 681.

55. Suckow Borax Mines Consol. v. Borax Consol., 185 F. 2d 196 (9th Cir. 1950).

56. *See generally id*.

57. *Id.* at 207-08.

58. *Id.* at 206.

59. *Id.*

behavior at the time, and freely entered into the transaction and release anyway[60]—and, to boot, failed to exclude antitrust claims from the general release despite their suspicions and accusations.[61] The court simply could not fathom how the bargained-for transaction years after the alleged conspiratorial acts could be viewed as part of that long-ago scheme.[62] Rather, the record suggested the parties sought to "voluntarily 'wip[e] the slate completely clean'" via the 1942 agreement, and the panel felt firmly that "we cannot and should not characterize the act of appellees in entering into a voluntary 'peace pact' with appellants as an illegal or 'overt act.'"[63] Even though *Carter* had briskly distinguished *Suckow*,[64] the logic of the latter case would prove the more influential in the years to come.

Only a year after *Carter*, a hopeful plaintiff relied heavily on *Raytheon* in a failed attempt to defeat a general release in *Michael Rose Productions, Inc. v. Loew's Inc.*[65] In a treble-damages antitrust action, the plaintiff, Michael Rose, sought to avoid a release it had executed in favor of Loew's on the grounds that it was limited to a specific cause in breach of contract, fraud, and mutual mistake.[66] In short, the plaintiff argued it intended only to release a particular claim pending in New York and was defrauded into providing a broader general release.[67] After a bench trial, the court granted summary judgment for the defendant.[68] The court noted that, paradoxically, what Michael Rose really seemed to want was equitable reformation of the contract to pare back the general release, even as it disclaimed any remedy in equity.[69] Although Michael Rose had pointed repeatedly to *Raytheon* in its arguments, the court—even reading the Supreme Court case as having *held*

60. *Suckow*, 185 F.2d at 206-07.

61. *Suckow*, 185 F.2d at 207 ("[H]ad appellants intended to exclude this kind of a cause of action from the broad ambit of the releases . . . they would (in view of their oft-repeated prior accusations concerning appellees' unlawful attempts to destroy them and to throttle competition) have specifically excepted antitrust actions from the broad and all-inclusive terms of the general releases which they executed.").

62. *Suckow*, 185 F.2d at 208 ("[W]e cannot understand how these actions can logically be said to be illegal 'overt acts' committed by appellees to the damage of appellants. In exchange for the sale of their proprietary interests and for the execution of the 1942 release appellants received $350,000 in cash."). Three hundred fifty thousand dollars in 1942 would be worth roughly $5.4m in 2020. LABOR, *supra* note 5.

63. *Suckow*, 185 F.2d at 208-09 (initial letter altered to minuscule).

64. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 680-81 (W.D. Mo. 1955). (quoted *supra* note 52).

65. Michael Rose Productions, Inc v. Loew's Inc., 19 F.R.D. 508, 511 (S.D.N.Y. 1956), *app. dismissed,* 246 F.2d 605, 606 (2nd Cir. 1957) (finding no jurisdiction for interlocutory appeal).

66. *Michael Rose*, 19 F.R.D. at 509.

67. *Id.* at 510.

68. *Id.* at 511.

69. *Id.* at 510.

that a release arising out of an illegal transaction was void[70]—found *Raytheon*'s supposed holding inapplicable because the facts in the case at bar, where the fraud in inducing the more general release had only even been alleged rather late in the day (and unconvincingly at that[71]), clearly fell "outside its rationale."[72]

The Third Circuit shared similar incredulity as the Ninth[73] in reviewing allegations of a rather straightforward antitrust conspiracy complicated by an intervening release in *Taxin v. Food Fair Stores, Inc*.[74] Plaintiffs John and Bernard Taxin, wholesalers of fruit in Philadelphia, brought suit in 1960 against a wide-ranging group of defendants, including Food Fair Stores and the Samuel P Mandell Co., on charges that they had conspired to monopolize the interstate trade in fruit and produce.[75] In 1958, however, the Taxins had entered a general release of liability with Food Fair for all antitrust claims in exchange for $18,000 and—the Taxins claimed—an undertaking that Food Fair would place orders with their business in the future.[76] When this undertaking failed to prove out, the suit ensued, and the co-conspirator defendants collectively raised the release in defense.[77] Mandell strenuously argued that whatever bad faith Food Fair might have had in its undertaking to further its monopolistic interests, the release was good as to Mandell, which had nothing to do with that promise, with which the district court had agreed.[78] In the Third Circuit, plaintiffs-appellants further argued that "the alleged release was obtained by defendants as part of and in furtherance of the continuing conspiracy among the defendants about which plaintiffs complain," making summary judgment on the release inappropriate.[79] Without any mention of *Raytheon*, the Third Circuit found the theory far-fetched and unsupported by the evidence, reasoning tautologically that the

70. *Michael Rose*, 19 F.R.D. at 511 ("The Supreme Court, in affirming the Circuit Court of Appeals, held: (1) The effect of a release is overcome 'when it is so much a part of an illegal transaction as to be void in its inception. If it is subject to that taint, a court of law is competent to put it out of the way', (2) Since the plaintiff contends that 'the release is void at law' because 'tainted with the same illegality as the illegal combination,' that issue should be tried at law along with the other issue of illegal combination, at which trial 'the bond between monopoly and surrender can be shown with certainty and fulness'") (citations omitted).

71. *Michael Rose*, 19 F.R.D. at 510 ("Plaintiff's theory of fraud seems to have evolved to suit the exigencies of the litigation, and was simply tacked on to the original and fundamental thesis of plaintiff that the release was executed through mutual mistake.").

72. *Id.* at 511.

73. A district court would later observe the similarity between the reasoning of the two opinions. *See* Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54, 57-58 & n.1 (D. Or. 1973).

74. *See generally* Taxin v. Food Fair Stores, Inc., 287 F.2d 448 (3d Cir. 1961).

75. *Id.* at 449.

76. *Taxin*, 287 F.2d at 449-50. Eighteen thousand dollars in 1958 would be worth roughly $162,000 in 2020. LABOR, *supra* note 5.

77. *Taxin*, 287 F.2d at 449-50.

78. *Id.* at 449-50.

79. *Id.* at 451 (quoting appellants' reply).

release could not further conspiratorial acts that had already occurred, and the release had no effect on offenses committed after its execution:[80]

> In such circumstances, we hold that it was at least incumbent upon plaintiffs, in opposing the motion for summary judgment, to state any special or unusual relation which the release may have borne to the general conspiracy. Since nothing of that sort appears in the affidavits or was even suggested during the discussion of this point on oral argument, plaintiffs' unexplained and unsupported allegation that the obtaining of the release was part of or in furtherance of the original conspiracy does not suffice to prevent the granting of summary judgment.[81]

2. 1965 to 1975 — The Stone Age — Crafting the First Tools to Assay Releases

So much for the Third Circuit; it was only in the courts of *Suckow*'s Ninth Circuit that the nascent theory would finally garner a name.[82] Seven years after *Taxin*, *California Concrete Pipe Co. v. American Pipe & Construction Co.* obligingly supplied one.[83] In late 1963, after a year or so in the business of manufacturing and selling concrete pipe, California Concrete Pipe (CCP) agreed to sell essentially all its equipment to American Pipe, together with executing a general release of liability in the latter's favor.[84] Five years later, apparently having second thoughts, CCP filed suit on claims of conspiracy to monopolize in the Central District of California.[85] American Pipe interposed the release in defense, which CCP claimed was void in law or equity, and the court denied summary judgment after severing the voidability question and seeking briefing on whether (*inter alia*) the question of the releases validity required jury findings under *Raytheon.*[86] After a brief bench trial, the court held the release to be valid in equity,[87] and plaintiffs subsequently renewed their argument for a full jury trial because "the release . . . was 'inextricably connected with the conspiracy,' was 'an act in furtherance" thereof [sic] and is thus 'tainted by the conspiracy and hence void,'" on the supposed authority of *Raytheon* and *Westmoreland*.[88] The court readily rejected the authorities

80. *Id.* at 451.
81. *Id.* at 451-52.
82. *See* Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 827 (C.D. Cal. 1968).
83. *Id.*
84. *Id.* at 822-24.
85. *Id.* at 824, 826 n.9.
86. *Id.* at 824.
87. *Cal. Concrete*, 288 F. Supp. at 824.
88. *Id.* at 826 (quoting plaintiffs' papers).

proffered as saying no such thing.[89] All the same, plaintiff reasoned it was entitled to trial on the question of the release, giving rise to a useful enunciation of the part-and-parcel theory:

> Acts which normally are legal may become illegal if part of, or in furtherance of, an illegal conspiracy. A release, if it be an illegal contract, or a contract to achieve an illegal purpose, is void. A release even though valid, if secured as part of or in furtherance of an illegal conspiracy becomes tainted thereby and becomes void. (There is, of course, nothing wrong with the above logical analysis of the state of the law.) Plaintiff here has pleaded that the defendants participated in a conspiracy, one aim of which was to eliminate competition. Logically, elimination of competition carries with it the implication that the competitor will quit his business. A reasonable foreseeable result of eliminating CCP would be the acquisition of its capital assets with a like reasonable foreseeable result of demanding a release. Therefore, plaintiff concludes, only a jury can determine if defendants participated in a conspiracy to eliminate CCP as a competitor; only a jury has the right to determine whether the defendants acquired CCP's fixed assets in implementation of the conspiracy; only a jury could determine, since the release has already been found to be a condition of the equipment sale, whether or not the release was but an act in furtherance of the conspiracy and hence illegal; only a jury could determine after a full trial, from evidence both circumstantial and direct, whether this release was so tainted and therefore void. Such is the hypothesis upon which plaintiff maintains that Raytheon forecloses a summary judgment and demands a jury trial on its 'part and parcel' theory.[90]

The court remained unconvinced, notwithstanding the more fulsomely pled theory, declaring that discovery had changed seismically since *Raytheon*, and that it was no longer sufficient to defeat summary judgment for a plaintiff to barely plead a release to be void without supplying further evidence.[91] Despite the ample tools of discovery at its disposal, the court chided, plaintiff had adduced nothing suggesting an antitrust conspiracy *to*

89. *Id.* at 826.

90. *Id.* at 827-28.

91. *Id.* at 828 ("Pleadings, standing alone, cannot now stay the impact of a motion for summary judgment when accompanied by an overwhelming mass of evidentiary material—even in the hypersensitive area of antitrust litigation. It is no longer a sufficient resistance to a motion for summary judgment for plaintiff simply and bleakly to contend that the obtaining of a release was a part and parcel of the antitrust conspiracy.") (citations omitted).

obtain the release.[92] The court concluded that "it was at least incumbent upon the plaintiff, in opposing the motion for summary judgment, to show some special or unusual tie-in of the release with the alleged general conspiracy," for after all, invoking *Taxin*, "[a] release applying only to past acts could not facilitate any restraint of trade which had already been accomplished."[93]

Mere months later, the Central District of California returned to the issue of antitrust releases in *S.E. Rondon Co. v. Atlantic Richfield Co*.[94] Gasoline distributor plaintiffs filed suit against Atlantic Richfield and other co-conspirators alleging they had fixed the prices exacted for the fuel purchased throughout most of the 1960s.[95] In partial exchange for a loan of $25,000, however, Rondon had granted a general release of liability in 1967, which the defendants now raised in defense.[96] On motion for summary judgment, the court admitted that the parties disputed the motivation for the release, but found the fact immaterial, for "even if the release was demanded and obtained, as plaintiffs' counsel urged in argument, with the specific intent and purpose of preventing plaintiffs from filing an antitrust action, that fact would not invalidate the release."[97] Plaintiffs sought to avoid the release by arguing they had been financially coerced into granting it by the long course of price-fixing in service of the antitrust conspiracy, but the court would have none of the "so-called 'part and parcel' concept."[98] Unlike *Carter*, the release was far later and wholly separate from the agreements effectuating the price concessions, and there was no evidence of a "tie-in" between the two.[99] And if mere motivation by dire financial straits—even those arising in some sense from earlier misdeeds—were allowed to vitiate an otherwise valid contract, courts would face no end of claimants, and parties no ability to depend upon their agreements, just as the Ninth Circuit had held in *Suckow*.[100]

---

92. *Cal. Concrete*, 288 F. Supp. at 828-29.

93. *Id.* at 829 (quoting Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961)).

94. *See generally* S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968).

95. *Id.* at 880.

96. *Id*. Twenty-five thousand dollars in 1967 would be worth roughly $192,000 in 2020. LABOR, *supra* note 5.

97. *S.E. Rondon Co*., 288 F. Supp. at 881 (majuscules reduced to minuscule).

98. *Id.* at 881-82.

99. *Id.* at 882.

100. *Id.* ("If Plaintiffs' reasoning were accepted on this point, it would involve courts in the almost impossible task of reconstructing a releasor's mental process as of the date of his executing a release document. The court would have to determine whether a release was executed because the signer felt the settlement to be a favorable one, or because of his strained financial condition. Certainly every release executed as consideration for a needed loan, is motivated in some respects by the financial condition of the releasor. To hold a release void because of the releasee's pre-existing wrong which resulted in financial hardship to the releasor would be to invite an attempt to void almost every such settlement and release. It would greatly impair the policy of encouraging private settlements. Parties negotiating such settlements need to have confidence in the enforceability of the settlement they reach.") (citing *Suckow*, 185 F.2d at 208).

Five years on but still within the Ninth Circuit, a 1973 case in the District Court of Oregon, *Dobbins v. Kawasaki Motors Corp., U.S.A.*,[101] did not stray far from its brethren.[102] The dispute involved claims by Joe and Jerry Dobbins, who had renegotiated their dealership agreement with Kawasaki and subsequently claimed damages in antitrust for monopoly and conspiracy to the same in connection with territorial restrictions.[103] As part of that renegotiation, however, the Dobbinses had executed a general release of liability in favor of Kawasaki in an "attempt to resolve previous differences," and Kawasaki raised the release in defense to the instant suit, seeking summary judgment.[104] In the main, *Dobbins* disavowed reliance on *Raytheon*, seeing that case properly read as a commentary on a "limited procedural issue [that] has little relevance today, separate courts of law and equity having been abolished."[105] Nonetheless, despite the "presumption in favor of the validity of releases . . . even in antitrust cases," the court entertained plaintiffs' argument that the release in favor of Kawasaki was invalid under the part and parcel doctrine,[106] noting the authority of *Taxin*,[107] *Carter*,[108] and *S.E. Rondon*.[109] It concluded that "a part and parcel argument may be used by a plaintiff to avoid a release in an antitrust action where it is shown that the release was an object of the combination or conspiracy or where it was an integral part of the scheme in restraint of trade."[110] On the facts, however, plaintiffs had not proven any such nexus, nor were they able to show any "tie-in between the [release] and the prohibited conduct."[111]

3. 1970 to 1990 — The Bronze Age — Honing a Test with Sharper Edges

As the 1970s proceeded towards the 1980s, the baton of thought leadership in this peculiar niche of the law passed to the Fifth Circuit with two pivotal decisions that delimited the voidability of antitrust releases and sharpened the contours of a doctrine that had theretofore largely been

101. Dobbins v. Kawaski Motors Corp., U.S.A., 362 F. Supp. 54 (D. Or. 1973).
102. *See generally Dobbins*, 362 F. Supp. 54.
103. *Id.* at 55-56.
104. *Id.* at 56.
105. *Id.* at 57.
106. *Id.* at 56-57 ("Plaintiffs here, however, attempt to avoid the effect of this release by contending that the release itself was 'part and parcel' of KMC's antitrust scheme.").
107. *Dobbins*, 362 F. Supp. at 57 (discussing Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961)).
108. *Id.* (discussing Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 675 (W.D. Mo. 1955)).
109. *Id.* (discussing *S.E. Rondon Co.*, 288 F. Supp. 879, 882).
110. *Id.* at 58.
111. *Id.* (analogizing the release to a consignment agreement).

circumscribed by the plaintiffs who had fruitlessly pled its protection, fleetingly stated and briskly denied.[112]

a. 1970 to 1980 — The Early Bronze — Carving Guardrails Against Abuse

In 1974, a turning point in the philosophical evolution underpinning the emergent part-and-parcel doctrine was marked by *Redel's Inc. v. General Electric Co*.[113] The Fifth Circuit panel begins its narration of the case as sweetly as "once upon a time": "Redel's was for many years a franchised dealer of G.E. merchandise."[114] In 1969, the franchise agreement subject to annual renewal was replaced with a new agreement intended to apply indefinitely unless terminated, and this new contract incorporated a general release provision "as of the date of the execution."[115] In order to account for minor alterations in sales specifications, addenda were executed by the parties annually, including one in 1971.[116] This happy arrangement ended in 1972 when Redel's filed a lawsuit alleging price discrimination continuing through the previous year, and impelled by the resultant losses, sold its business to another franchisee.[117] The district court, however, found all claims barred by the release, which it thought to have been renewed by the annual addenda through 1971, the last such supplement.[118] The Fifth Circuit in the main assigned "grave error" in finding the release renewed and its effective date advanced with each effective renewal, which raised the question of whether the original clause of 1969 could be read to operate prospectively.[119] The Fifth Circuit held it clearly could not,[120] adding for good measure that if it did, it would unmistakably run afoul of public policy and citing considerable authority in her sister courts of appeals as well as some district courts, including *Westmoreland*, which had said just that.[121] This left the clause barring Redel's claims though 1969, for the general release was broad and

112. *See infra* Part III. 3. a-b.
113. *See generally* Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95 (5th Cir. 1974).
114. *Id.* at 97.
115. *Id.* at 97-98.
116. *Id.* at 98.
117. *Id.*
118. *Redel's Inc*., 498 F.2d at 98.
119. *Id.*
120. *Id.* at 98-99.
121. *Id.* at 99 (citing Lawlor v. National Screen Service, 349 U.S. 322, 329 (1955); Gaines v. Carrollton Tobacco Board of Trade, Inc., 386 F.2d 757 (6th Cir. 1967); Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (8th Cir. 1955); Westmoreland Abestos Co. v. Johns-Manville Corp., 39 F. Supp. 117, 119 (S.D.N.Y. 1941), *aff'd*, 136 F.2d 844 (2d. Cir. 1943); Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc., 338 F. Supp. 1019, 1022 (S.D. Tex. 1972)); *see supra* text accompanying note 37 (quoting *Westmoreland*).

unambiguous, showing the parties "apparently desired to settle all matters" previously between them.[122]

Straying sharply from previous cases, however, the Fifth Circuit cautioned that "it should not be concluded that this Court condones the use of the general release as a device to immunize parties with superior economic power from the penalties and restraints imposed by the enforcement of our antitrust laws."[123] This was a far cry from the courts who despaired of considering such economic inequities in earlier antitrust cases, fatalistically observing that *every* contract involved parties of disparate means.[124] Although not present in the instant case, the panel warned that an advantaged draftsman who sought to surreptitiously divest a counterparty of rights sounding in antitrust "may well set forth facts which require jury consideration of claims that the release itself was an integral part of a scheme to violate the antitrust laws," citing a wide array of part-and-parcel cases from *Carter* to *Dobbins* to make its cautionary threat abundantly clear.[125]

The panel also marked its mindfulness that the very problem of just such a devious draftsman had been raised in the Fourth Circuit only recently, albeit in dissent.[126] In *Virginia Impression Products Co. v. SCM Corp.*,[127] the majority thought the language was clearly that of a general and capacious release, and both parties had entered into it with eyes wide open, contrary to the district court's allowance of a jury trial on the parties' intent.[128] That the release of antitrust claims might not have been pellucid, or even misunderstood, was immaterial: "The law imposes no obligation on a party to a general release, dealing at arms length, to reveal all the possible legal theories that the other may possibly use against him," and antitrust theories enjoyed no rarefied aegis.[129] Judge Harrison Winter dissented volubly.[130] He described the artful machinations at play succinctly: "SCM intended to obtain a release of its antitrust liability. VIP did not know, and did not realize until well after the release was executed, that SCM's motive for terminating the dealership contract was its desire to enforce territorial restrictions"—the very

122. *Redel's Inc*., 498 F.2d at 99-100.

123. *Id.* at 100.

124. *See, e.g.*, Suckow Borax Mines Consol. v. Borax Consol., 185 F. 2d 196, 208 (9th Cir. 1950); S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968) (quoted *supra* note 100).

125. *Redel's Inc*., 498 F.2d at 100-01 (citing Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961); Dobbins v. Kawaski Motors Corp., U.S.A., 362 F. Supp. 54, 58 (D. Or. 1973); *S.E. Rondon Co.*, 288 F. Supp. at 882; *Cal. Concrete*, 288 F. Supp. 823; *Carter*, 127 F. Supp. 675).

126. *Redel's Inc*., 498 F.2d at 100.

127. *See generally* Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262 (4th Cir. 1971).

128. *Id.* at 265.

129. *Id.* at 265-66.

130. *Id.* at 267-271 (Winter, J., dissenting).

restrictions that formed the basis of VIP's eventual antitrust suit.[131] Beside the fact that Judge Winter thought the contractual language rather more equivocal than the majority,[132] he saw a more potent reason to allow a jury to consider the parties' motivations: to prevent sharp tactics under state contract law of releases from trammeling the federal public policy against antitrust abuses.[133] Allowing extrinsic evidence of the parties' motivation before a jury would thus permit the narrowing of purported general releases that are in and of themselves "inimical to federal policy" for antitrust.[134] His view, of course, did not carry the day, whatever mindfulness *Redel's* professed.[135]

b. 1980 to 1990 — The Late Bronze — Forging Solidity for Contractants

The Fifth Circuit rejoined the question a decade later in 1983 in *Ingram Corp. v. J. Ray McDermott & Co.*[136], a magisterially sweeping survey of the law that took a less sympathetic view of the doctrine than had *Ridel's* briefer examination a decade before.[137] Ingram was initially a minnow in the marine construction industry but quickly grew into a formidable player by the 1970s, challenging "worldwide competitors" McDermott and Brown & Root.[138] Threatened by the upstart, these incumbents conspired to allocate and rig bids for jobs worldwide in an effort to drive Ingram out of business by forestalling it from obtaining contracts for a price at which it could plausibly turn a profit.[139] In service of the conspiracy, McDermott and Brown & Root divided jobs between them, opted not to compete with one another, and divided the spoils of inflated bids they were able to command.[140] In a familiar denouement, Ingram was indeed forced out of the industry, and in 1971 sought to sell its assets and open contracts to McDermott.[141] Numerous

131. *Id.* at 271. Judge Winter elaborated: "Hence, it could well be concluded that VIP had no intention of releasing its antitrust claim because it was not aware that it had the claim at the time that it executed the release . . . . [U]nknown claims for commissions or under warranties or even for parts sold or repair work performed . . . it seems to me, are what were intended to be given up and not the antitrust claim, unknown to VIP, which SCM feared, but artfully refrained from making explicit when its counsel drafted the release." *Va. Impression Prod. Co.*, 448 F.2d at 271.

132. *Va. Impression Prod. Co.*, 448 F.2d at 267-69.

133. *Id.* at 269-70.

134. *Id.* at 270.

135. Redel's Inc. v. Gen. Elec. Co., 498 F.2d 100 (5th Cir. 1974).

136. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983), rev'g 495 F. Supp. 1321 (E.D. La. 1980).

137. *See generally Ingram Corp*., 698 F.2d 1295. Including its incisive recapitulation of events in the District Court, the sprawling opinion occupies nearly thirty pages of the official reporter.

138. *Ingram Corp*., 698 F.2d at 1299.

139. *Id*. The text omits the usual hedge of "allegedly" or the like given the companies' eventual convictions. *See id.* at 1301.

140. *Id.* at 1299-1300.

141. *Id.* at 1300.

picayune details of responsibility for warranties and subcontracting arrangements led to protracted negotiations involving "a cadre of lawyers from throughout the country," concluding in 1973 when Ingram agreed to give up $1.2 million in value and provide a general release of liability to McDermott (who executed a reciprocal release) in exchange for settlement of the outstanding issues and consummation of the larger sale.[142]

Five years later, Ingram's suspicions were proven true when McDermott and Brown & Root were convicted upon pleas of *nolo contendere* to an array of antitrust violations.[143] A year after these convictions, and six years after the release was executed, Ingram nonetheless filed suit for like antitrust injuries, in defense of which the defendants proffered the far-reaching general release, seeking summary judgment.[144] "Various pretrial machinations ensued," narrated the Fifth Circuit, resulting in four relevant holdings by the district court.[145] In the first decision of January 1980, the court rejected Ingram's claims of lack of intent to release antitrust claims as foreclosed by circuit precedent; duress and coercion as failing in fact; and "very significantly," invocation of part-and-parcel because "Ingram had not alleged a single thing in its complaint which would indicate the release 'in any way furthered the goals of the conspiracy,'" albeit allowing thirty days for Ingram to develop its claims of defendants' fraudulent concealment.[146] Ingram indeed presented various evidence that McDermott had been less than transparent in their protracted negotiations, but the district court was unconvinced in its second ruling, as these omissions "did not make "the failure to disclose possible antitrust violations particularly significant."[147] Arguably, Ingram had even shown that McDermott had concealed its antitrust violations, but these were "irrelevant to the validity of the releases," which remained uninfected by a claim of fraud that had to be alleged with particularity—Ingram's new submission really amounted only to a reargument of its already-rejected part-and-parcel argument.[148] Summary judgment of dismissal was granted: "Mere fraudulent concealment of an antitrust conspiracy, unrelated to the negotiations which brought about the execution of the releases, did not, by itself, establish fraud to render such broad releases ineffectual."[149]

142. *Id.* at 1300-01.
143. *Ingram Corp*., 698 F.2d at 1302.
144. *Id.*
145. *Id.*
146. *Id.* at 1303-04 (quoting district court) (emphasis removed).
147. *Id.* at 1304-06.
148. *Ingram Corp*., 698 F.2d at 1304-06.
149. *Id.* at 1306.

Ingram urged reconsideration on grounds of the public policy in favor of antitrust enforcement.[150] In some ways echoing *Redel's*, in its third ruling, the district court reversed itself, holding that "the issue was really not one of whether or not the releases were valid. Rather, the issue was whether or not the *public interest* was served by enforcing a release against an antitrust plaintiff who had no knowledge of an antitrust conspiracy before he entered into a release agreement with an antitrust conspirator."[151] Following further discovery after this setback, McDermott renewed its motion for summary judgment, arguing that Ingram itself had engaged in bid rigging and accordingly had not exercised due diligence in investigating its suspicions before entering into the release, both of which Ingram hotly contested.[152] Finding Ingram's potentially unclean hands and diligence to be factual disputes eminently suitable to jury resolution, "reiterated his prior ruling that the releases would be void if Ingram could establish McDermott's fraudulent concealment."[153] Summary judgment was denied, and, with a trial looming, McDermott took an interlocutory appeal.[154]

McDermott found a more receptive audience in the Fifth Circuit, which reversed.[155] Right off the bat, the panel confirmed that *Redel's* "squarely controls this case."[156] Accordingly, the court reiterated that antitrust claims enjoyed no immunity from general releases like the instant one that covered "every claim between the parties under the sun,"[157] regardless of whether "Ingram may have not known" of its antitrust injuries or even considered such claims discretely in negotiations—especially given the phalanx of counsel advising on the settlement.[158] As for the district court's elevation of antitrust policy over the finality of settlements, the Fifth Circuit found this priority "quite correct" but only "[i]n the abstract":[159] buttressed by an impressive list

150. *Id.* at 1306.

151. *Id.* at 1307.

152. *Id.* at 1308-09.

153. *Ingram Corp*., 698 F.2d at 1309 ("I cannot conclude that an antitrust plaintiff who suspects he has been injured by the defendant's wrongful conduct yet executes a release in favor of the defendant has failed, as a matter of law, to exercise due diligence. It is possible that he executed the release only after satisfying himself that his suspicions were groundless. At that point, ignorant of the antitrust violations that in fact have occurred, the plaintiff stands in the same shoes as the victim who never suspected wrongdoing in the first place. His exercise of due diligence has not necessarily been diminished by the decision to enter into the release, although certainly that is an inference a jury might draw.") (quoting District Court).

154. *Id.* at 1309.

155. *Id.* at 1323.

156. *Id.* at 1310.

157. *Id.* at 1310-11.

158. *Ingram Corp*., 698 F.2d at 1312 ("Ingram, with its battery of executives and counsel, was not impotent when pitted against McDermott. It is inconsequential and unavailing for Ingram to now assert, years after negotiation and execution of its release contracts, that it did not intend to release antitrust claims.") (citing *Redel's Inc.*, 498 F.2d 95, 100).

159. *Id.*

of appellate precedents, "our view is that an adequately drawn and validly executed release will bar antitrust claims."[160] Whilst the all-too-common fraudulent concealment of an antitrust conspiracy may toll the statute of limitations on public policy grounds, "*that is all it does*;" it does not *ipso facto* vitiate an otherwise valid release of liability, even antitrust liability, as Ingram had urged.[161] As the district court had distinguished and previous cases had stated, failure to disclose potential antitrust claims to a counterparty at arms' length cannot be the basis for voiding a release, and despite many opportunities, Ingram failed to prove anything more.[162] This left only the unvarnished part-and-parcel claims that the district court had rejected for lack of any nexus between the release itself and the conspiracy.[163] "Under *Redel's*," recalled the panel, "we intimated that another case may someday arise where 'the release itself was an integral part of a scheme to violate antitrust laws' and therefore will not be construed to extinguish antitrust claims. This case has not ushered in that day."[164] Declining the invitation to

160. *Id.* at 1313 (citing Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95 (5th Cir. 1974); Richards Lumber & Supply Co. v. United States Gypsum Co., 545 F.2d 18 (7th Cir.1976); Oskey Gasoline and Oil Co., Inc. v. Continental Oil Co., 534 F.2d 1281 (8th Cir.1976); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885 (3d Cir.1975); Schott Enterprises, Inc. v. Pepsico, Inc., 520 F.2d 1298 (6th Cir.1975); Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262 (4th Cir. 1971); Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc., 208 F.2d 316 (10th Cir.1953); and Suckow Borax Mines Consol. v. Borax Consol., 185 F. 2d 196 (9th Cir. 1950)).

161. *Id.* at 1314 ("It gives a plaintiff who has been injured by a defendant's antitrust violations a chance to bring his action outside of the ordinary four-year limitations period. It does *not* allow a plaintiff the opportunity to escape the consequences of his bargain with a defendant to release antitrust claims. We decline to read into the tolling doctrine of the antitrust laws any such curative provision.").

162. *Id.* at 1314-15 ("McDermott's silence as to possible antitrust claims is not the same thing as fraudulent inducement. When given opportunities—and several were granted—to present evidence that McDermott fraudulently induced it to enter into the releases, Ingram failed to do so.").

163. *Ingram Corp*., 698 F.2d at 1315.

164. *Id.* at 1315-16 ("Judge Sear explicitly recognized that McDermott's procurement of the releases was not part and parcel of a conspiracy. He observed that Ingram was out of the marine construction business in 1973, the year the releases were executed. . . . The releases clearly were not designed to force Ingram out of the business. It already was. Neither were the releases essential to McDermott acquiring Ingram's business. It had already accomplished this. *The releases were an outgrowth—a result, not a cause of the acquisition*. Ingram made the offer to settle. McDermott accepted. Under these circumstances—unlike those where a party with superior economic power forces unfounded provisions of a release on the other party—Ingram should not be allowed to undermine the provisions of valid releases to which it agreed.") (emphasis added).

The emphasized language would animate a frequently quoted formulation of the test for integrality in the context of another federal statute two years later in *Northern Oil Co. v. Standard Oil Co. of California*, 761 F.2d 699, 706 (Temp. Emer. Ct. App. 1985) ("plaintiffs contend that the release is void because it is part of an integral scheme to violate federal law and to perpetuate that violation. They rely on *Ingram Corp.,* 698 F.2d 1295, an antitrust conspiracy case which discussed the possible application of such a standard to a future case whose facts merited it. Even were we to assume that this language provided another means in addition to a fraudulent inducement claim to attack the validity of a release, which we do not, plaintiffs have not shown on the facts of this case that the release is part of any such scheme. As the court noted in *Ingram*, *if the release is merely an outgrowth, rather than a cause, of the violation, it cannot be part of any such scheme*") (emphasis added).

query the parol motivations of the parties *à la* the concerns of *Redel's* and *SCM*, the court concluded with an adamant flourish:

> Finally, we find it important to stress again that at the time the releases were negotiated the parties to this dispute were three major forces within the marine construction industry. Their assets were worth millions. Their counsel were among the finest the legal profession could offer. They were corporations staffed by high level executives whose knowledge about the nuts and bolts of the marine construction industry was substantial. Neither was a novice. Neither was so incompetent as to be without means of discovering possible antitrust violations. Neither was, or if it was, it should not have been, so convinced of the other's business integrity to justify failure to inquire as to the possibility that the releases would cover antitrust claims. And from the looks of it, neither was above conspiring to violate the antitrust laws. . . . Due to its unmistakably important position in the marine construction business in 1971, Ingram cannot look back on its undeniably protracted negotiations with McDermott, which resulted in the execution of releases that extinguished all claims "arising out of, based upon, or any way relating to" its untriumphant exit from the marine construction business, and yell "foul play, release me from the bane of the releases." We cannot and will not allow this result.[165]

4. 1990 to 2000 — The Iron Age — Refining an Analysis from Diffuse Ores

Armed with a clearer understanding of the underpinnings, metes, and bounds of the part-and-parcel doctrine by virtue of the Fifth Circuit's industrious work, district courts nationwide returned to the scrum in the 1990s to apply the doctrine in an expanding diversity of circumstances, with a correspondingly expansive diversity of results.

The long-serving Judge Morey Sear of the Eastern District of Louisiana (he of the *Ingram* district court) next had occasion to apply the Fifth Circuit's treatment of his earlier work a decade later in *Traffic Scan Network, Inc. v. Winston* (*Winston I*).[166] Judge Sear once again faced an antitrust defendant interposing a release,[167] this time against Traffic Scan Network, who had

165. *Ingram Corp*., 698 F.2d at 1322 (citations omitted).

166. *See generally* Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 9080 (E.D. La. Jan. 13, 1993) [hereinafter *Winston I*].

167. The similarity did not escape Judge Sears. *Winston I*, 1993 WL 9080, at *1 ("Defendants wish to limit discovery to the issue of the release's validity. I have previously utilized this type of discovery limitation, and the Fifth Circuit approved of the limitation in *Ingram Corp. v. J. Ray McDermott & Co.*

(wisely) complained of antitrust violations not only leading up to but in the very transaction in which it sold its business and executed the release in question.[168] In considering motions anent the proper scope of discovery, the court reconfirmed that the Fifth Circuit had accepted the part-and-parcel doctrine asserted by the plaintiff, quoting both *Ingram* and *Redel's*: that "where 'release itself was an integral part of a scheme to violate antitrust laws' it will not be construed to dismiss antitrust claims."[169] To avoid the release under Fifth Circuit precedent, continued the court, a plaintiff must show fraudulent concealment, coercion, or duress in service of the antitrust conspiracy, not "merely allege that defendants failed to disclose possible antitrust claims during the negotiations leading up to the execution of the release."[170] Given these premises, the court held discovery should be limited to grounds for fraud or duress in the formation of the contract, not a free-wheeling fishing expedition seeking to uncover any wrongdoing whatsoever on the basis of a "general, unsupported allegation."[171]

Nine months later, with this limited discovery complete, Judge Sear had denied invocation of the part-and-parcel theory, and defendants sought reconsideration (*Winston II*).[172] Parsing the plaintiff's arguments, the court clarified that fraudulent inducement, duress, and part-and-parcel were separate and independently sufficient methods of attacking a release, looking to *Ingram* and even as far back as *Carter* for the distinction.[173] The defendant contended that it was similarly situated to that in *Ingram*, but the court disagreed: there, the release survived "because it was executed almost two years *after* the alleged antitrust violations occurred and plaintiff sold its business to the defendant. Therefore, the release could not be 'part and parcel' of the scheme to violate the antitrust laws; the release was an

---

The issues before me in that case were similar in that the plaintiff had also charged the defendant with antitrust violations, and the defendant had raised the affirmative defense that a release was executed by the plaintiff.) (citation omitted).

168. *Winston I*, 1993 WL 9080, at *1.

169. *Id.* at *2 ("The examples cited by the Fifth Circuit as demonstrative of this type of invalid release concern releases executed by parties of unequal bargaining power. The court has stated that it is 'wary' of situations in which an 'unsuspecting victim' signs a general release when the draftsman of the release has failed to disclose either the factual predicate to an antitrust claim or the fact that antitrust claims are even embraced in the release.") (omitting citations to *Redel's* and *Ingram*).

170. *Id.* at *3.

171. *Id.* ("Plaintiff should not be allowed to avoid an otherwise prudential limitation to discovery in this case merely by making the general, unsupported allegation that the release is 'part and parcel' to defendants' alleged antitrust violation. Thus, discovery on plaintiff's 'part and parcel' challenge to the release's validity should be limited to the issues of fraudulent concealment and economic coercion and duress. . . .").

172. *See generally* Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144 (E.D. La. May 24, 1993) [hereinafter *Winston II*].

173. *Id.* at *1 (citing Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983), rev'g 495 F. Supp. 1321, 1323 (E.D. La. 1980); Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 680-81 (W.D. Mo. 1955)).

outgrowth, not a cause of the acquisition."[174] By contrast, the instant plaintiff maintained that the release was inserted into the transaction "at the 'eleventh hour'" as an adjunct to the sale—and accepted only because plaintiff had no choice to demur or chance to negotiate.[175] Finding these facts sufficient to substantiate that the release "*may* be invalid as an integral part of the alleged antitrust scheme," the court denied summary judgment.[176] Further, perhaps mindful of the last interlocutory appeal he had allowed in *Ingram*, Judge Sear denied leave under 28 U.S.C. § 1292, finding no exceptional circumstances given that the "*Ingram* court has clearly established the law regarding the determination of whether a release is 'part and parcel.'"[177]

Next to the trough was the Middle District of Florida a year later in *G.E.E.N. Corp. v. Southeast Toyota Distributors, Inc.*[178] The plaintiff, Joe Englander, with and through various corporate entities, including G.E.E.N., had operated multiple Toyota dealerships in the Orlando area of Florida, with the financial and logistical assistance of local distributor J.M. Family Enterprises (JM).[179] Englander's enterprises had not been faring well, however, and, in January 1990, he closed on the sale of one of the dealerships to JM Family.[180] Notwithstanding the change in management, in February 1990, contractual disputes led the regional distributor, Southeast Toyota (SET), to file suit, eventually explained to a multiplicity of claims and counterclaims against JM Family and other financiers that were (by the standards of such things) settled fairly quickly with a mutual exchange of general releases and a stipulated order of dismissal later that year.[181] In large part, this haste was driven by G.E.E.N.'s primary financier, WOFCO, threatening to terminate their arrangements after an audit found the business underfunded.[182] Sadly, the rapprochement did not last, and, in 1993, G.E.E.N. and the other Englander parties filed their own suit against SET and its alleged conspirators on largely the same claims of antitrust and other violations as counterclaimed in the 1990 suit.[183]

The defendants offered the release as a shield whilst G.E.E.N. argued it was void under fraudulent concealment, coercion, and part-and-parcel

174. *Id.* at *2.
175. *Id.*
176. *Id.*
177. *Winston II*, 1993 WL 390144, at *3 ("Moreover, at this point in the litigation I have not decided that as a matter of law the release agreement executed by Traffic Scan is part and parcel to the alleged antitrust violations; only, that presently there is a genuine factual dispute as to this issue.").
178. *See generally* G.E.E.N. Corp. v. Southeast Toyota Distributors, Inc., No. 93–632–CIV–ORL–19, 1994 WL 695364 (M.D. Fla. Aug 31, 1994).
179. *Id.* at *1.
180. *Id.*
181. *Id.*
182. *Id.* at *1-2.
183. *G.E.E.N.*, 1994 WL 695364, at *2.

principles.[184] The court swiftly addressed the issue of fraud and held that it was unreasonable for G.E.E.N. to rely on WOFCO's misrepresentations about termination of the contract, given the acrimonious dispute underway and ample advice of counsel at hand.[185] The duress claimed under WOFCO's same threat fared no better, as the right to terminate was contractually clear,[186] and, in any case, Englander had tarried far too long to repudiate the release, availing himself of the benefits of the bargain long after the alleged coercion was manifest.[187] This left only the part-and-parcel claims, which parroted those for fraud: that defendants' meddling with G.E.E.N.'s financing to obtain the release "was part of a larger antitrust conspiracy to derive illegal profits and drive Plaintiffs out of business."[188] The court once again conceded the principle that "a release which was secured as part of an anticompetitive attempt to drive the other party out of business can be voided on the ground that it is 'part and parcel' of an antitrust conspiracy," but found that Englander had shown no nexus between the release and any conspiracy, notwithstanding their "sweeping allegations."[189] Ironically, noted the court, "in fact, the release allowed Plaintiffs to remain in business. There is no evidence to show that the release was anything other than a bargained for settlement of the parties' claims, entered into knowingly and voluntarily."[190]

Rounding out the pre-millennial cases was *St. Louis Convention and Visitors Commission v. National Football League*,[191] in the same state as the antediluvian *Carter* forty years before.[192] The then-Los-Angeles Rams had agreed with St. Louis to relocate, and their pact contemplated the possibility of a lawsuit should the NFL disallow the relocation.[193] Happily, the NFL agreed, subject to certain conditions, including the execution in June 1995 of a release of claims arising theretofore in connection with the negotiated move,

184. *Id.*

185. *Id.* at *3 ("Both sides were represented by separate counsel. Englander and Englander Toyota made many of the same factual allegations regarding Defendants' illegal and unethical conduct in the original case as they now make in the instant case. Under those circumstances it defies logic and the case law for Plaintiffs to assert that they reasonably relied on Defendants' assertions about WOFCO's right to terminate Trail's floorplan.").

186. *Id.* at *5-6.

187. *Id.* at *7 ("Additionally, a party who retains the benefits of a contract cannot escape the obligations imposed by the contract. If a releasor retains the consideration after learning that the release is voidable, the continued retention of the benefits constitutes a ratification of the release. . . . There is no evidence that Englander promptly denied the release's effect and followed a course of conduct manifesting a disavowal of it. To the contrary, it appears that Englander remained silent while retaining the benefits of the release for three years.") (citations omitted).

188. *G.E.E.N.*, 1994 WL 695364, at *3.

189. *Id.* at *3-4.

190. *Id.* at *4.

191. St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 46 F. Supp. 2d 1058 (E.D. Mo. 1997).

192. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675 (W.D. Mo. 1955).

193. *St. Louis*, 46 F. Supp. 2d at 1058-59.

along with which $20 million was moved into an escrow account.[194] By December, however, the agreeable mood had soured, and when St. Louis sued in December, the NFL raised the June letter in support of summary judgment in its favor.[195] Noting that "several courts have held that a plaintiff may use a 'part and parcel' argument to avoid a release in an antitrust action 'where it is shown that the release was an object of the combination or conspiracy or where it was an integral part of the scheme in restraint of trade,"[196] the court rejected defendants' attempts to liken the factual posture to *Ingram*, where the release was executed two years after the alleged violations, and therefore an "outgrowth" rather than "part and parcel" of those violations.[197] Rather, the scheme at hand was more like *Winston II* (or *Carter*, for that matter):[198] if the plaintiffs' claims were true, the "alleged release, executed simultaneously with the relocation agreements, would be considered an integral part of the scheme to violate the antitrust laws."[199] As the release "may be invalid as a cause of the violation," the court denied the NFL's motion for summary judgment.[200]

5. 2000 to 2020 — The Modern Era — Regathering the Lessons of History

The continuing discussion of the part and parcel doctrine in the modern era of the twenty-first century is bestridden by the colossal edifice[201] of the Second Circuit on the cusp of the century in 2001, *VKK Corp. v. National Football League*.[202] It was no coincidence that the National Football League was reappearing in court on charges of collusion a second time in less than five years after *St. Louis* if, as the plaintiffs had argued, the League was

194. *Id.* at 1059.

195. *Id.* at 1059-60.

196. *Id.* at 1060-61 (quoting Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54, 58 (D. Or. 1973)) (citing Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1315 (5th Cir. 1983)).

197. *Id.* at 1061.

198. *St. Louis*, 46 F. Supp. 2d at 1061 (citing *See generally* Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, *2 (E.D. La. May 24, 1993) [hereinafter *Winston II*]; Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 680 (W.D. Mo. 1955)).

199. *Id.* at 1061.

200. *Id.*

201. *Cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR, act 1, sc. 2,. 143-49 (Barbara A. Mowat & Paul Werstine eds., 2011) ("Why, man, he doth bestride the narrow world / Like a Colossus, and we petty men / Walk under his huge legs and peep about / To find ourselves dishonorable graves. / Men at some time are masters of their fates. / The fault, dear Brutus, is not in our stars, / But in ourselves, that we are underlings.").

202. VKK Corp. v. Nat'l Football League, 244 F.3d 114 (2d Cir. 2001).

nothing less than an unapologetic monopoly patrolling the allocation of its territory.[203]

a. "Rarely Discussed and More Rarely Applied"

Victor Kiam II, through VKK Corp., had been the owner of the New England Patriots for some time, but after attempts to purchase their stadium fell through, he began to explore the possibility of moving the money-losing team elsewhere, specifically to Jacksonville or Baltimore, which were seeking to attract an NFL franchise.[204] The NFL opposed any move and worked with VKK to bolster the club's finances as Kiam was forced to infuse the team with funds to stay afloat.[205] Impelled by the pay-out demanded by a minority owner exercising a buy-out option, Kiam finally resolved to sell the team in 1992 and found a buyer in one James Orthwein.[206] The NFL supplied the required approval in April, subject to Kiam and VKK granting a liability release, which Kiam executed in May[207]—saliently, the release explicitly stated that Kiam was releasing state and federal antitrust claims.[208] Directly thereafter, Kiam confirmed the sale to Orthwein, exiting NFL ownership on apparently good terms from a valedictory letter he wrote only a couple months later.[209] Over two years later, however, apparently more rueful, VKK filed suit against the NFL, its member clubs, and the Jacksonville Jaguars expansion team entity, alleging they had conspired in violation of the antitrust laws to prevent his relocation from New England.[210] The defendants pressed the release of 1992, but VKK claimed it vitiated by duress; after a jury trial in the Southern District of New York, however, the court directed a verdict against plaintiffs for lack of proffered evidence.[211]

---

203. VKK Corp. v. Nat'l Football League, 55 F. Supp. 2d 196, 197-98 (S.D.N.Y. 1999), *aff'd*, 244 F.3d 114 (2d Cir. 2001); *see also* Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183 (2010) (holding NFL teams to be separate economic actors capable of antitrust conspiracy).

204. *VKK*, 55 F. Supp. at 200-02 (undisputed facts).

205. *Id.* at 203-04 (undisputed facts).

206. *Id.* at 204 (undisputed facts).

207. *Id.* (undisputed facts).

208. *Id* at 204-05 (releasing all claims "occurring from the beginning of the world to the date of this Release, future claims, demands, obligations, suits, damages, levies, executions, judgments, debts, charges, actions, or causes of action, at law or in equity, whether arising by statute, common law, or otherwise, both direct and indirect, of whatever kind or nature arising out of or in any way relating to the Releasors' ownership interest in KMS Patriots L.P., save and except therefrom only . . . claims, other than **claims under federal or state antitrust laws (which are hereby released)**, arising out of a League decision to approve a relocation of the KMS Patriots L.P. NFL franchise or playing site to a location outside of New England prior to January 1, 1995. . . .") (emphasis omitted).

209. *VKK*, 55 F. Supp. at 205-06.

210. *Id.* at 197.

211. *Id.*

With duress foreclosed, VKK raised the part-and-parcel theory to resist the release and dismissal on summary judgment.[212] The court reiterated the general dictate that a general release given on advice of counsel is effective even to release antitrust claims and expressed some doubt whether the part-and-parcel theory was even viable.[213] For the first time, a court traced its "genesis" to *Raytheon*, even as it acknowledged that the relevant passage was dictum, and the Supreme Court had refused to reach the part-and-parcel question.[214] Moving forward, the district court catalogued several of the many appellate decisions (*Taxin*, *Ingram*, and *Northern Oil*) that had declined to apply the doctrine.[215] Disarmed of their duress claim, the plaintiffs had themselves alit only on *Winston II*, which the court readily distinguished and disregarded (questionably) as dictum.[216] And even assuming the sustainability of part-and-parcel along with some measure of duress, the court found no evidence that the release was the "*object*" of or bore a "special and unusual relation" to the conspiracy, as the established formulations of the doctrine demanded.[217] After reviewing the thorough evidentiary record disproving plaintiffs' argument, the district court summed up:

> The plaintiffs argue that because the NFL has a policy of obtaining releases in order to limit antitrust litigation, the Release is void because it is an "integral part" of a larger conspiracy to prevent NFL teams from relocating. However, every release is designed to prevent litigation, and releases are often sought in order to limit particular classes of liability. It goes too far to argue that a policy of obtaining releases transforms an otherwise valid release into a legal nullity. Even if the Court were to accept the part and parcel theory, it finds

212. *Id.* at 197-98.

213. *Id.* at 206.

214. *VKK*, 55 F. Supp. at 206 ("The genesis of the part and parcel theory appears to be dictum from a 1935 decision in which the Supreme Court refused to reach the part and parcel issue. *Radio Corp. v. Raytheon Mfg. Co.*, 296 U.S. 459 (1935). In that case, filed at law, the defendant sought to force the case into a court of equity. The Supreme Court expressly refused to address plaintiffs' argument that its release 'was so connected with the unlawful combination and monopoly as to be inoperative at law.' See *id*. at 462, 463. The Court held that 'a court of equity must decline at this stage to adjudicate the validity of the release . . . , leaving that issue along with others to adjudication at law.' *Id*. at 463.") (parallel citations omitted).

215. *Id.* at 206-07 (discussing Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1315 (5th Cir. 1983); Northern Oil Co. v. Standard Oil Co. of California, 761 F.2d 699, 706 (Temp. Emer. Ct. App. 1985) (quoted *supra* note 164)).

216. *Id.* at 207 (citing Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, *2 (E.D. La. May 24, 1993) [hereinafter *Winston II*]).

217. *Id.* at 207. (quoting Dobbins v. Kawaski Motors Corp., U.S.A., 362 F. Supp. 54, 58 (D. Or. 1973); Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961)) (citing Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 828 (C.D. Cal. 1968)).

> no precedent supporting such a broad expansion of the theory's reach.
>
> In short, the Release was not obtained until the sale transaction had closed, after which Kiam was powerless to relocate the Patriots, *not* because of any conspiracy, but rather because he no longer owned the club. Therefore, the Release could not have been an "integral part" of a conspiracy to keep the Patriots from relocating out of New England. The Release was at most "merely an outgrowth, rather than a cause," of the alleged conspiracy. As in virtually every other case to address the "part and parcel theory" in the last fifty years, summary judgment for the defendants thereon will be granted.[218]

VKK appealed, but to little avail, as the Second Circuit hewed to much the same path.[219] The jury finding against duress was at length affirmed, in large part because VKK failed to promptly renounce the ostensibly coerced release and delayed so long to sue even after the facts underlying the alleged conspiracy were apparent[220]—even if they were not at the time of the release, which the Second Circuit also doubted.[221] So too went analysis of part-and-parcel: despite the rejection of reliance on *Raytheon* in *California Concrete*[222] and *Dobbins*,[223] and its notable absence from some of the earliest cases,[224] the Second Circuit first echoed its district court that "rarely discussed and more rarely applied, 'part and parcel's' roots are traced to Justice Cardozo's statement in *Radio Corp. of Am. v. Raytheon Mfg. Co.*, that a release to an antitrust claim may be invalid 'when it is so much a part of an illegal transaction as to be void in its inception.'"[225] As in the district court, the doctrine would apply only where the release was "an object of the combination or conspiracy" or "an integral part of the scheme," and not "merely an outgrowth, rather than a cause of the violation."[226] But an outgrowth was precisely what VKK had signed: "insofar as VKK is

---

218. *Id.* at 207-208.
219. *VKK*, 244 F.3d at 121.
220. *Id.* at 121-124.
221. *Id.* at 124-25.
222. Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 826 (C.D. Cal. 1968); *see supra* note 90 and accompanying text.
223. Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 57 (D. Or. 1973); *see supra* note 106 and accompanying text.
224. *See, e.g.*, Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208 (9th Cir. 1950); Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 680 (W.D. Mo. 1955).
225. *VKK*, 244 F.3d at 125 (quoting *Radio Corp.*, 296 U.S. at 462) (citation omitted) (initial majuscule reduced to minuscule).
226. *Id.* (quoting *Dobbins*, 362 F. Supp. at 58) *Northern Oil Co. v. Standard Oil Co. of California*, 761 F.2d 699, 706 (Temp. Emer. Ct. App. 1985) (quoted *supra* note 164)).

concerned, the conspiracy was complete when it agreed to sell the Patriots to Orthwein because VKK could not move the team. The Release therefore was not part and parcel . . . . It only stopped VKK from bringing suit to recover treble damages."[227]

Undeterred, VKK maintained that the release did directly serve the conspiracy by preventing his suit to provide precedent for future owners to escape the NFL's anticompetitive restraints on relocation, and the release itself "[exposed] the member clubs to liability if they allowed Mr. Orthwein to move."[228] In the first case, reasoned the panel, nothing stopped VKK from lodging suit during the protracted period in which the NFL was allegedly preventing it from relocating the team, prior to the Orthwein sale—the release was of a right VKK had long held and never exercised nonetheless.[229] Moreover, "VKK's argument also proves too much," for *every* release prevents suit against a continuing conspiracy, and it would be overreaching to think "the part and parcel doctrine can be read so broadly as thus to render void all releases relating to conspiracies alleged to continue post-release."[230] As for the second argument, Orthwein was already separately forbidden from moving the team, and so the release scarcely advanced any NFL scheme.[231] Taken together, the district court was amply justified in finding that VKK had failed to show the integrality of the release to any aspect of the alleged conspiracy.[232] The judgment of the district court as to the release's voidability was affirmed, as was summary judgment as to the NFL entities whom the release protected.[233]

Bespeaking its oversize stature (and perhaps the hypertrophy of the academic commentariat in modern times), *VKK* inspired somewhat more commentary than its predecessors.[234] Particularly incisive is Robert J. Ritacco's note in the Seton Hall Journal of Sport Law.[235] By way of

227. *Id.* at 126.

228. *Id.* (alteration in original) (quoting Appellants' Br. at 26.).

229. *Id.*

230. *VKK*, 244 F.3d at 126 ("It is not uncommon, we assume, for a release to prevent the releaser from bringing suit against the releasee for engaging in a conspiracy that is later alleged to have continued after the release's execution. Such a release would seem always to protect the ongoing conspiracy because it always prevents the releasor from beginning litigation that would establish the scheme's illegality.").

231. *Id.* at 126-27.

232. *Id.* at 127.

233. Plaintiffs did gain one substantial victory: in the alternative, the District Court had ruled for summary judgement on the merits because plaintiffs had raised no reasonable inference of an antitrust conspiracy in the main. The Second Circuit disagreed, finding the issue susceptible of competing inferences and thus ripe for a jury, allowing the case to proceed against the unshielded Jacksonville entities. *Id.* at 131-32.

234. *See, e.g.*, Claudia G. Catalano, J.D., *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d 1, § 123 (2013); Ritacco, *supra* note 23; *2d Cir. Dismisses Patriots Owner's Claims Against NFL,* 8 No. 10 ANDREWS ANTITRUST LITIG. REP. 5 (2001); *NFL Eludes Antitrust Blitz from Former Patriots Owner*, 7 No. 2 ANDREWS ANTITRUST LITIG. REP. 3 (1999).

235. Ritacco, *supra* note 23.

introduction, Ritacco lamented that *VKK* opted to protect the NFL's "rights under the release and chose not to offer safeguards for the injured party."[236] Acknowledging that the time that VKK delayed in the suit was substantial, he thought the court was perhaps too harsh and deferential to the storied benefits of hindsight: "it is reasonable to infer from the circumstances that a plaintiff did not understand the consequences of signing a release of all claims until much later. Often, when parties enter into a contract, they do not realize that they have been placed in an inferior bargaining position."[237] Ritacco was particularly critical of the court's rejection of part-and-parcel, concluding after his lengthy study that

> under the part and parcel doctrine the release was integral to the transaction. But for the signing of the release, the sale would not have been consummated. The release was a major component to the illegal conspiracy between the NFL and [the Jacksonville entity], for it sanctioned their illicit behavior. The court questioned the vitality of the doctrine as being suspect. The part and parcel doctrine has found support, however, in situations similar to the present matter. Therefore, the contract for release should have been voided.[238]

b. The Loyal Progeny of VKK

The next case followed even as such commentaries were being published, when the Eastern District of Pennsylvania adjudicated a long-running dispute in *Fresh Made, Inc. v. Lifeway Foods, Inc*.[239] A rather more humdrum antitrust case than the high stakes of major-league football, Fresh Made and Lifeway were competitors in the market for specialty dairy products such a kefir, a fermented drink akin to yogurt.[240] Fresh Made alleged that the larger Lifeway had been engaging in a campaign to destroy its business by threatening distributors with pulling its own orders if they supplied Fresh Made and grocers with calling in lines of credit if they stocked Fresh Made products.[241] The situation was complicated by Lifeway's parallel crusade of vexatious litigation in various fora concerning trade dress and trademarks, one of which was settled in 2000 for a modest payment and an exchange of mutual global releases from liability.[242] When Lifeway continued to threaten

236. *Id.* at 162.
237. *Id.* at 162-63.
238. *Id.* at 163 (citations omitted).
239. Fresh Made, Inc. v. Lifeway Foods, Inc., No. Civ. A. 01–4254, 2002 WL 31246922 (E.D. Pa. Aug. 9, 2002).
240. *Id.* at *1.
241. *Id.*
242. *Id.* at *1-2.

Fresh Made with litigation, the latter finally filed suit for numerous violations of the Sherman Act and other torts; Lifeway, of course, sought summary judgment on the 2000 release.[243] Precedent squarely foreclosed the argument that the waiver of antitrust claims was itself against public policy, and so Fresh Made pivoted to a part-and-parcel argument.[244]

The court looked to the recently-decided precedent of *VKK* for the rule of decision, noting that a proper part-and-parcel claim cannot rest in a mere "outgrowth" of the alleged conspiracy, and cannot be stretched to encompass all continuing conspiracies.[245] But, Fresh Made did "not explain how the release was integral to the vexatious use of litigation or the attempts to prevent Fresh Made from competing with Lifeway, nor d[id] the plaintiff argue that the alleged conspiracy could not have proceeded without the release."[246] Indeed, Fresh Made was simultaneously arguing that Lifeway had continued its strategy of vexatious litigation *in violation of that very release*, which ought to have put it a halt to the litany of lawsuits.[247] The court declined Fresh Made's invitation to "go behind the language to determine what the intent of the parties was," finding the release clear and retrospective.[248] No part-and-parcel exemption from the release was found available.[249]

In 2009, the Southern District of New York gave a thorough airing to the view that antitrust releases might be voided for antitrust public policy in

243. Lifeway's president evidently also warned direly that "in America, it was the destiny of a big company to swallow up a little company like Fresh Made." *Id.* at *2.

244. *Fresh Made*, 2002 WL 31246922, at *3.

245. *Id.* at *3 (citing VKK Corp. v. Nat'l Football League, 244 F.3d 114, 121-22 (2d Cir. 2001)).

246. *Id.* (citing *VKK,* 244 F.3d at 126).

247. *Id.* at *4 ("Fresh Made also asserts that Lifeway's filing of the May 2001 suit in Illinois breached the terms of the settlement agreement, suspending Fresh Made's obligations under the release.").

248. *See id.* at *4 n.7 ("The caselaw relied on by Fresh Made, however, merely holds that when parties enter into a release 'purporting to exempt a party from liability for injuries *which may occur in the future*', the release covers only those claims which were 'within the contemplation of the parties at the time' of execution. The release in this case does not seek to exempt either party from liability for future conduct, but releases only past claims. Therefore, because the release language is clear and unambiguous on its face, the Court need not look to extrinsic evidence to give meaning to its terms.") (citations omitted).

249. *Fresh Made*, 2002 WL 31246922, at *3-4. Fresh Made did offer sufficient evidence to avoid summary judgment based on its free-standing alternate theory that the release was voidable as fraudulently induced. The case was later raised in a futile attempt to assail a release that barred claims of employment discrimination in *Romero v. Allstate Ins. Co.*, 143 F. Supp. 3d 271, 282 (E.D. Pa. 2015). The court was perplexed by the doctrine's invocation, for [a]lthough "the part and parcel theory inexplicably remains part of this case, it is abundantly obvious that this theory has no applicability" in the employment discrimination realm. The court otherwise affirmed the part-and-parcel theory's ongoing vitality in cases where the release was "integral" to or the "object" of an antitrust scheme, noting the "clarity of the sparse case law limiting this doctrine to an antitrust setting," and observing that it "had its inception and sole application in antitrust jurisprudence." *Romero*, 143 F. Supp. 3d at 282 (citing *VKK*, 244 F.3d at 125; Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1315 (5th Cir. 1983); Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100-01 (5th Cir. 1974); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 58 (D. Or. 1973); *Fresh Made,* 2002 WL 31246922, at *3)).

Xerox Corp. v. Media Sciences, Inc.[250] As usual, Media Sciences argued that to bar its antitrust claims anent printer ink cartridges based on a release embodied in a settlement with Xerox would traduce public policy.[251] The court first recited the widely held consensus that courts should refuse to enforce a release of *future* antitrust liability[252] but noted that "courts have enforced even general releases to bar antitrust claims predicated on continuing violations of pre-release conduct," citing *VKK*,[253] and the compelling need to encourage amicable settlements even (or particularly) in antitrust suits.[254] The settlement clearly allowed and intended Xerox to issue rebates and distribute warnings that Media Sciences' ink replacements could cause malfunctions in Xerox printers as long as such problems persisted, and Media Sciences had agreed not to sue on that basis without first arbitrating the question.[255] "It is the substance of the conditional covenant-not-to-sue," thought the court, "that distinguishes this case from those in which courts have refused to enforce releases in the antitrust context for public policy reasons."[256] This was not a release "forever extinguish[ing]" recourse to lawsuit or sanctioning future violations; it was a contingent clause that targeted a specific issue, "nor d[id] it provide Xerox with 'de facto immunity' from suit."[257] The court granted Xerox's motion for summary judgment on the release in favor of the bargained-for arbitration.[258]

It is fitting that the most recent part-and-parcel case (as of this Article's writing) recurred once again to the court where it all began nearly a century before in *Westmoreland*, the Southern District of New York in *QS Holdco Inc. v. Bank of America Corp*.[259] Offering a twist on the old release fact

250. Xerox Corp. v. Media Scis., Inc., 609 F. Supp. 2d 319 (S.D.N.Y. 2009).
251. *Id.* at 325.
252. *Id.* at 325-26.
253. *Id.* at 326 (citing *VKK*, 244 F.3d at 126).
254. *Id.* at 326-27.
255. *Xerox*, 609 F. Supp. 2d at 327.
256. *Id.*
257. *Id.* at 327-28.
258. *Id.* at 328-29. *Xerox* followed and cited a case from the same court a year earlier in which the judge had granted summary judgment on a release notwithstanding it blocked many of the antitrust claims made by Madison Square Garden against the NHL. *See id.* at 326; Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07 CV 8455 (LAP), 2008 WL 4547518 (S.D.N.Y. Oct. 10, 2008) ("MSG"). In *MSG*, the court reasoned that only wholly prospective releases of such liability contravened public policy, and retrospective releases were allowable in antitrust matters. *MSG,* 2008 WL 4547518, at *7. There was no question to the court that the NHL was a legitimate joint and no fig leaf for a collusive cartel. *Id.* at *7. And after MSG "concede[d] that the logical corollary of its position regarding the Release being 'prospective' in nature is that parties can never settle antitrust claims predicated on 'ongoing violations' even if they are based on 'the same kind of acts repeated in the subsequent period,'" the court found that approach squarely foreclosed by *VKK*. *Id.* at *8. As the NHL's complained-of behavior was simply the unchanged continuance of policies that existed long before the release was executed, no public policy defense was available. *Id.* at *8-9. Summary judgment on the release was granted. *Id.* at *10.
259. QS Holdco Inc. v. Bank of Am. Corp., No. 18-cv-824(RJS), 2019 WL 3716443 (S.D.N.Y. Aug. 6, 2019).

pattern, QS Holdco sued seven financial services companies over an alleged group boycott of its stock lending platform, AQS.[260] As an automated matching program between borrowers and lenders, AQS threatened the powerful and lucrative position the seven defendants held as intermediaries for that business, and defendants allegedly "feigned interest" only to steer their clients away from the platform and attempt to foreclose its use.[261] Despite initial interest from consumers, AQS's owners were eventually compelled to sell at a loss to defendant EquiLend in 2016 after the most logical acquirer inexplicably cut off negotiations, leaving QS Holdco holding the bag in a "desperate situation."[262]

The defendants jointly raised in defense the general assignment of all claims that QS Holdco had executed as part of the sale to EquiLend, arguing that QS Holdco no longer had any right to bring such a suit.[263] Although assuring itself of Article III standing (though noting the plaintiff was "susceptible to a real-party-in-interest challenge"), the court found the remarkably capacious transfer of claims language could only be read to encompass antitrust claims as well.[264] This left QS Holdco to argue that such a transfer to be void under a somewhat novel application of the part-and-parcel doctrine.[265] The court, however, was dubious, finding the doctrine had been seldom applied and that the facts to "closely resemble those in *VKK*," where the court held that the release was valid.[266] "The same is true here," opined the court: the conspiracy's goal was "boycott of the AQS platform with the goal of driving AQS out of the market," and by the time of the sale, that goal had been achieved, and the accompanying release was itself only "incidental to EquiLend's purchase of AQS."[267] And just like in *VKK*, AQS's original owner was well aware of the boycott and had every opportunity to sue before transferring its claims; it chose to take the sure money of a sale instead.[268] As in so many previous cases, the court was left with the clear conviction that the plaintiff had simply "alleged no facts" to support its contentions.[269]

---

260. *Id.* at *1

261. *Id.* at *1-2.

262. *Id.* at *2.

263. *Id.* Needless to say, as a named defendant in the conspiracy, EquiLend had little interest in asserting antitrustclaims against itself or its fellow defendants.

264. *See QS Holdco*, 2019 WL 3716443, at *3-4.

265. *Id.* at *4-5.

266. *Id.* at *4.

267. *Id.* at *5.

268. *Id.* ("Furthermore, as in *VKK Corp.*, nothing prevented Plaintiff—or Quadriserv, for that matter—from pursuing its antitrust claims prior to the sale, particularly since Quadriserv, the original owner of AQS, was on notice of the conspiracy as early as 2009.")

269. *QS Holdco*, 2019 WL 3716443, at *5 ("In short, Plaintiff has alleged no facts to support an application of this rare doctrine—'whatever [its] status' may be, —or any other basis to invalidate the

Even after QS Holdco moved to amend the judgment in light of supplementary submissions, the court was unmoved, believing the "'new facts' are hardly dispositive" and represented only a futile attempt to "plead its way around the Court's decision regarding the part and parcel doctrine—a rare doctrine, the viability of which has been questioned by the Second Circuit."[270] QS Holdco's final desperate gambit offered only "the conclusory assertion that the release was 'integral to the perpetuating of the conspiracy,'" belated hand-waving that was "clearly not enough to justify application of such a rare doctrine."[271]

B. No Pygmalions: A Largely Lifeless Judicial Creation

It is natural that a sculpture of the law be only as skillful as its sculptor, and, in this instance, the lower courts proved no Pygmalions.[272] The court-fashioned part-and-parcel doctrine never fully came to life: despite all the promising possibilities of relief one day from invidious antitrust releases in "another case" that "may someday arise,"[273] the Southern District of New York rightly observed that "the majority of courts to address the part and parcel theory have declined to apply it."[274] Going further on appeal, the Second Circuit in *VKK* added mordantly that "no United States Court of Appeals has *ever* applied the part and parcel theory to invalidate a release,"[275] and seemingly toyed with declaring the doctrine a dead letter.[276] This appellate skepticism was nothing new; forty years earlier, the Third Circuit in *Taxin* had "expressed grave doubt" whether the nascent doctrine was even a serious concern in actual practice.[277] The Supreme Court has since cautioned against allowing a doctrine never applied in practice to stubbornly

---

legitimate transfer of claims reflected in agreements for which Plaintiff received consideration.") (alteration in original) (citation omitted) (citing *VKK*, 244 F.3d at 127).

270. QS Holdco Inc. v. Bank of Am. Corp., No. 18-CV-824 (RJS), 2019 WL 10959922, at *2 (S.D.N.Y. Sept. 10, 2019).

271. *Id.*

272. *See* THOMAS BULFINCH, THE AGE OF FABLE 64-66 (The Heritage Press 1942) (narrating the ancient Greek and later Roman tale of Pygmalion, a sculptor whose "art was so perfect" that Venus granted his wish that his beloved masterpiece come to life as a real woman).

273. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1315-16 (5th Cir. 1983).

274. VKK Corp. v. Nat'l Football League, 55 F. Supp. 2d 196, 206 (S.D.N.Y. 1999) (initial majuscule reduced to minuscule).

275. VKK Corp. v. Nat'l Football League, 244 F.3d 114, at 126 (2d Cir. 2001) (emphasis added) (initial majuscule reduced to minuscule).

276. *Id.* at 126 ("We see no reason, however, to decide for this Circuit whether the doctrine is viable. If it is, it does not apply in this case."); *see supra* note 270 and accompanying text (quoting *QS Holdco*, 2019 WL 10959922, at *2).

277. *VKK*, 244 F.3d at 126 (*quoting* Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961)) ("[W]e are not able to imagine any meaningful way in which the obtaining of a release could be, in appellants' own words, 'part of and in furtherance of the continuing conspiracy among the defendants about which plaintiffs complain.'").

persist in theory, squandering the time and hopes of litigants on a practically foregone conclusion.[278] Such concerns are not unjustified with the part-and-parcel doctrine; in 1994, the Middle District of Florida in *G.E.E.N.* had determined after an extensive survey that the long-ago "*Carter*[279] is the only case the Court has been able to find in which a release has been invalidated for being 'part and parcel' of an antitrust conspiracy, and it is obviously distinguishable" because there "the release was one clause of a contract which itself was the very restraint of trade complained of by the plaintiff."[280] A quarter century later, the situation is little changed, as the 2019 *QS Holdco* court still found that "courts have rarely applied this doctrine to invalidate releases,"[281] adding itself to that number.[282] Table 1 illustrates and quantifies this undeniable trend in dispositions:

TABLE 1 · CHRONOLOGY OF PART-AND-PARCEL SUMMARY JUDGMENT DISPOSITIONS

Pg	Caption	Year	Court	Release
243	*Raytheon Mfg. Co. v. Radio Corp. of Am.*	1935	1st Cir.	Undecided*
247	*Westmoreland Asbestos Co. v. Johns-Manville Corp.*	1943	S.D.N.Y.	Set Aside
249	*Suckow Borax Mines Consol. v. Borax Consol.*	1950	9th Cir.	Upheld
248	*Carter v. Twentieth Century-Fox Film Corp.*	1955	W.D. Mo.	Voided
250	*Michael Rose Productions, Inc. v. Loew's Inc.*	1956	S.D.N.Y.	Upheld
251	*Taxin v. Food Fair Stores, Inc*.	1961	3d Cir.	Upheld
252	*Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co.*	1968	C.D. Cal.	Upheld
254	*S.E. Rondon Co. v. Atlantic Richfield Co*.	1968	C.D. Cal.	Upheld
257	*Va. Impression Prod. Co. v. SCM Corp.*	1971	4th Cir.	Upheld†

278. Edwards v. Vannoy, 141 S.Ct. 1547, 1560 (2021) ("Continuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts.").

279. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 681 (W.D. Mo. 1955).

280. G.E.E.N. Corp. v. Se. Toyota Distribs., Inc., No. 93–632–CIV–ORL–19, 1994 WL 695364, at *4 (M.D. Fla. Aug 31, 1994).

281. *QS Holdco*, 2019 WL 3716443, at *4 (citing *VKK*, 244 F.3d at 125; Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 58 (D. Or. 1973)).

282. *Id.* at *5.

255	*Dobbins v. Kawasaki Motors Corp., U.S.A.*	1973	D. Or.	Upheld
256	*Redel's Inc. v. Gen. Elec. Co.*	1974	5th Cir.	Upheld
258	*Ingram Corp. v. J. Ray McDermott & Co.*	1983	5th Cir.	Upheld
261‡	*Northern Oil Co. v. Standard Oil Co. of California*	1985	Temp. Emer. Ct. App.	Upheld^
262	*Traffic Scan Network, Inc. v. Winston*	1993	E.D. La.	Set Aside
264	*G.E.E.N. Corp. v. Southeast Toyota Distributors, Inc.*	1994	M.D. Fla.	Upheld
265	*St. Louis Convention & Visitors Comm'n v. Nat'l Football League*	1997	E.D. Mo.	Set Aside
266	*VKK Corp. v. Nat'l Football League*	2001	2d Cir.	Upheld
271	*Fresh Made, Inc. v. Lifeway Foods, Inc.*	2002	E.D. Pa.	Set Aside*
273‡	*Madison Square Garden, L.P. v. Nat'l Hockey League*	2008	S.D.N.Y.	Upheld
273	*Xerox Corp. v. Media Sciences, Inc.*	2009	S.D.N.Y.	Upheld
272‡	*Romero v. Allstate Ins. Co.*	2015	E.D. Pa.	Upheld^
273	*QS Holdco Inc. v. Bank of Am. Corp.*	2019	S.D.N.Y.	Upheld

*On grounds other than part and parcel †With noted dissent
‡Discussed only in footnote ^Not sounding in antitrust

It is true that this supposedly singular case, *Carter*, is palpably egregious.[283] The plaintiff was a widow who had (to put it mildly) been treated rather shabbily by a national conglomerate, which sought first to bully her into favorable terms and then resorted to allegedly anticompetitive tactics to snatch away her livelihood when brute force failed;[284] such a plight could hardly fail to garner sympathy from even the most stoic jury or jurist.[285] Like

283. *Carter*, 127 F. Supp. 675.

284. *Id.* at 677-78.

285. *See* Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 609 (1974) (observing of a widow seeking duplicative damages for wrongful death that "[a]s anyone who has tried jury cases knows, jury sympathy commonly overcomes a theoretical inability to recover"); *see also* Estate of Carter v. Comm'r, 453 F.2d 61 (2d Cir. 1971) (considering whether payment to a widow was a gift arising out of sympathy or compensation); *cf. Exodus* 22:22 (King James) ("Ye shall not afflict any widow"); *Psalms* 146:9 (King James) ("The LORD preserveth the strangers; he relieveth the fatherless and widow"); *Isaiah* 1:17 (King

G.E.E.N., later cases strained to explain how *Carter*'s facts were so plainly contrary to the policy of the Sherman and Clayton Acts, so much so that they had little persuasive power to counsel the more ambivalent fact postures faced by those later courts.[286] It is also true that *Carter* predates the emergence of the more robustly defined part-and-parcel doctrine in the late 1960s and thereafter,[287] leaving an open question as to whether the case would yield the same results in modern times. And *G.E.E.N.*'s search may not have been the most painstaking possible: Judge Sear in *Winston II* surely thought that an ample enough case for voidness to defeat summary judgment had been made[288] though the *G.E.E.N.* court can hardly be faulted for failing to prophesize the result in the then-unfiled *St. Louis* case.[289]

In any case, the singularity of *Carter* (and its few close cohorts) is likely due as much to the doctrine's infrequent invocation as its failure to convince: part-and-parcel is not a theory that has launched a thousand cases, but instead, perhaps a mere dozen or two.[290] It is not surprising that with so small a sample size, most invocations by plaintiffs are brought to try any means to evade a seemingly insuperable release simply failed by the facts on the record.[291] The Stone Age cases of *S.E. Rondon*, *California Concrete*, and *Dobbins* all spoke damningly on the lack of a demonstrated "tie-in" between the release and the underlying conspiracy: the keystone that would support an inference that the release was not merely an outgrowth, collateral convenience, or afterthought, but instead was an integral element in the nefarious plan.[292] Again and again, plaintiffs were taken to task for suggesting a release ought to be presumed to be part-and-parcel of an antitrust

James) ("Learn to do well; seek judgment, relieve the oppressed, judge the fatherless, plead for the widow."); *1 Timothy* 5:3 (King James) ("Honour widows that are widows indeed.").

286. *See, e.g.*, S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968); *Dobbins*, 362 F. Supp. at 57.

287. *Carter*, 127 F. Supp. at 675; *see supra* Parts III. A. 2-5.

288. Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, at *2 (E.D. La. May 24, 1993) [hereinafter *Winston II*].

289. St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 46 F. Supp. 2d 1058 (E.D. Mo. 1997).

290. *See supra* Part III. A.; *cf. supra* note 16 and accompanying text. One doubts that Ilium would have fallen nor the Iliad been written had so few ships hied to Helen's ravishment.

291. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1314-15 (5th Cir. 1983); QS Holdco Inc. v. Bank of Am. Corp., No. 18-CV-824 (RJS), 2019 WL 10959922, at *5 (S.D.N.Y. Sept. 10, 2019); Fresh Made, Inc. v. Lifeway Foods, Inc., No. Civ.A. 01–4254, 2002 WL 31246922, at *3 (E.D. Pa. Aug. 9, 2002); VKK Corp. v. Nat'l Football League, 55 F. Supp. 2d 196, 207-08 (S.D.N.Y. 1999); G.E.E.N. Corp. v. Se. Toyota Distribs., Inc., No. 93–632–CIV–ORL–19, 1994 WL 695364, at *4 (M.D. Fla. Aug 31, 1994); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 58 (D. Or. 1973).; S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968); Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 829 (C.D. Cal. 1968); Michael Rose Productions, Inc v. Loew's Inc., 19 F.R.D. 508, 511 (S.D.N.Y. 1956); *see also, e.g.*, Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451-52 (3d Cir. 1961).

292. *Dobbins*, 362 F. Supp. at 58 (quoted *supra* note 111); *S.E. Rondon*, 288 F. Supp. at 882; *California Concrete*, 288 F. Supp. at 829.

conspiracy afoot, without more.[293] Courts also adverted often to the fact that suspicions or even disputes were already in the air when the release was negotiated[294] and that the releasor was well-represented by knowledgeable counsel.[295] This assuaged any concern that the release had been extracted unawares of its consequences for potential antitrust claims.[296] Finally, plaintiffs who all-too-often sat overlong on their claims received a hostile reception, deriving from fears that the plaintiffs sought to have their cake and eat it too: to sample the consideration for the putatively void release and to later press for rescission only if the rewards of a lawsuit seemed preferable.[297]

All the same, there have been some signs of life astir amidst the meandering monotony of summary dismissals. The decisions denying summary judgment despite the proffered release in *Carter*, *Winston II*, and *St. Louis* had significant force, even if the ultimate voidability remained an open question pending demonstration of the alleged conspiracy itself.[298] Realistically, the motivating force of the part-and-parcel doctrine is expended when it is pled and proven sufficiently to escape summary judgment, for the case will then typically proceed to the merits of the antitrust claim

293. *E.g.*, *Taxin*, 287 F.2d at 451-52 (quoted *supra* note 81); *G.E.E.N.*, 1994 WL 695364, at *4; *California Concrete*, 288 F. Supp. at 828 (quoted *supra* note 90).

294. *E.g.*, *Ingram*, 698 F.2d at 1322 n.29 ("We find it noteworthy that the parties' counsel had a meeting in 1971 to discuss the implications of the antitrust laws on Ingram's sale of assets to McDermott. This meeting should have at least demonstrated to Ingram that antitrust was not a foreclosed topic[.]"); *VKK*, 244 F.3d at 124 ("the undisputed facts make plain that Kiam had sufficient knowledge of the conspiracy as a whole at the time he executed the Release"); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 206-07 (9th Cir. 1950) ("Suckow and his attorneys had repeatedly accused certain of appellees, both in and out of court, of violating the antitrust laws for the specific purpose of damaging Suckow"); *QS Holdco*, 2019 WL 3716443, at *5 ("Quadriserv, the original owner of AQS, was on notice of the conspiracy as early as 2009"); *G.E.E.N.*, 1994 WL 695364, at *3 ("At the time the settlement agreement was signed, Englander and Englander Toyota were involved in a bitter lawsuit with Defendants in which they accused Defendants of fraud, breach of contract, tortious interference with business relationships, and antitrust violations.").

295. *E.g.*, *Ingram*, 698 F.2d at 1322 ("Their counsel were among the finest the legal profession could offer."); *VKK*, 55 F. Supp. 2d at 206 ("experienced businessmen with sophisticated legal counsel"); *G.E.E.N.*, 1994 WL 695364, at *3 ("Both sides were represented by separate counsel.").

296. *See* Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100 (5th Cir. 1974); Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262, 269-70 (4th Cir. 1971) (Winter, J., dissenting).

297. *E.g.*, *VKK*, 244 F.3d at 125 ("VKK was required to challenge its validity promptly after that execution, or not at all. We hold that as a matter of law, thirty months was not 'prompt.' "); *QS Holdco*, 2019 WL 3716443, at *5 (quoted *supra* note 294); *G.E.E.N.*, 1994 WL 695364, at *7 ("To the contrary, it appears that Englander remained silent while retaining the benefits of the release for three years. The Court has not found an instance where a party's claim for recision [*sic*] of a release or contract was upheld after a delay of three years. In the instant case, Plaintiffs' allegations of duress are simply too little, too late.").

298. *See* St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 46 F. Supp. 2d 1058, 1061 (E.D. Mo. 1997); Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, at *2 (E.D. La. May 24, 1993) [hereinafter *Winston II*]; Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 681 (W.D. Mo. 1955).

notwithstanding the release, whatever its ultimate fate.[299] For that reason, judicious courts have often granted limited discovery bifurcated from the merits specifically to first address the validity of the release.[300] Antitrust defendants, after all, have amply shown the tremendous costs and rigors of wholesale discovery in antitrust actions, costs that may drive them to settle *in terrorem* rather than on the merits.[301] The preliminary overriding of a release thus deprives that shield of much, if not all, of its value.[302]

Nevertheless, for all the ink spilled over arguments pro and con, there are only two passably reliable lessons from the extenuated line of part-and-parcel cases: public policy will not tolerate prospective waivers of antitrust liability,[303] but retrospective releases may stand so long as they are not embodied within the very instruments effecting the antitrust conspiracy, as they were in *Carter*.[304] Even this latter prong seems somewhat precarious, given the instances in which releases nearly, if not wholly, concurrent with the market exit alleged to be the conspiracy's objective, were allowed to stand

---

299. *See, e.g., St. Louis Convention*, 154 F.3d 851; Estate of Carter v. Comm'r, 453 F.2d 61, 194 (2d Cir. 1971); *aff'g* 35 T.C. 326; *see generally* Twentieth Century-Fox Film Corp. v. Brookside, 194 F.2d 846 (8th Cir. 1952); *Winston II*, 1995 WL 317307.

300. *See, e.g.*, *Ingram*, 698 F.2d at 1308 ("Resisting Ingram's attempt to go on a 'fishing expedition', the District Court restricted the scope of discovery to discern facts regarding Ingram's knowledge of the conspiracy") (citations omitted); *VKK*, 244 F.3d at 121 ("The action was originally assigned to Judge John E. Sprizzo, who stayed all merits discovery, allowing discovery to proceed only on the issues concerning the validity of the Release, pending resolution of a motion for summary judgment made by the defendants."); Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 9080, at *3 (E.D. La. Jan. 13, 1993) [hereinafter *Winston I*]; *see also* Michael Rose Productions, Inc v. Loew's Inc., 19 F.R.D. 508, 509 (S.D.N.Y. 1956) ("It is well established that where release issues may be tried without inevitably bringing in all the issues raised in the complaint, the Court may . . . grant a separate trial on the issues raised by the release.").

301. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558-59 (2007) ("Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.").

302. *See Ingram*, 698 F.2d at 1308 n.22 ("Full blown discovery would thus have had two possible effects: (i) forcing McDermott to a trial on the merits, or (ii) accumulation by Ingram of a vast amount of information mainly pertinent to a trial on the merits, but would have meant, in the event of early resolution of the suit on legal grounds, wasted time, resources, and efforts of all parties and the District Court."); *Id.* at 1304 n.13 (finding a "decision to prevent unnecessary discovery because the case could well be decided on the parties' motions is not, on its face, fundamentally unfair to a party desiring discovery."); *see also Winston I*, 1993 WL 9080, at *1 (discussing *Ingram* and the burdens on a defendant forced into merits discovery).

303. *See* Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 99 (5th Cir. 1974) (quoting Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (8th Cir. 1955) ("The prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy. . . . Releases may not be executed which absolve a party from liability for future violations of our antitrust laws."); Xerox Corp. v. Media Scis., Inc., 609 F. Supp. 2d 319, 325-26 (S.D.N.Y. 2009); Westmoreland Abestos Co. v. Johns-Manville Corp., 39 F. Supp. 117, 119 (S.D.N.Y. 1941) (quoted supra text accompanying note 37), *aff'd*, 136 F.2d 844 (2d Cir. 1943).

304. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 681 (W.D. Mo. 1955); *see also* cases cited *supra* notes 280 & 286 (distinguishing *Carter* on the basis of the contemporaneity of the release and antitrust violation).

as technically distinct.[305] It remains difficult to square *Carter* with such entries in the litany of later rejections.[306] Conspicuously, however, whilst the First, Second, Third, Fourth, Fifth, and Ninth Circuits have all passed on the standards for public policy voidness of antitrust releases,[307] *Carter*'s (and *St. Louis*'s) own Eighth Circuit has not yet opined directly on part-and-parcel as of 2020, leaving its district courts unconstrained in flying the flag of a freer hand in overriding releases. Much seems to depend rather shakily not necessarily on the facts but on the attitude and era of the court deciding the case.

C. The Legal Archaeology of a Judicially-Created Antitrust Doctrine

Legal archaeology is not merely a felicitous metaphor for the organization of these antiquarian cases; it is a full-fledged academic discipline and methodology in analyzing those cases of yore, emphasizing environment, detailed history, motivation, and secondary sources to limn a more complete picture of a case.[308] The discipline recognizes that although our government is famously "a government of laws and not of men,"[309] it is swayable men and women who serve on courts, from the lowliest to the highest.[310] Legal (like physical) archaeology is intrinsically speculative,

---

305. *See, e.g.*, QS Holdco Inc. v. Bank of Am. Corp., No. 18-cv-824(RJS), 2019 WL 3716443, at *4-5 (S.D.N.Y. Aug. 6, 2019); VKK Corp. v. Nat'l Football League, 55 F. Supp. 2d 196, 204 (S.D.N.Y. 1999).

306. *See* Ritacco, *supra* note 23, at 163 & n.109 (noting of *VKK* that "[t]he part and parcel doctrine has found support, however, in situations similar to the present matter").

307. *See Raytheon*, 76 F.2d at 950; *VKK*, 244 F.3d 114; Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961); Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262 (4th Cir. 1971); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196 (9th Cir. 1950).

308. *See* William Twining, *What Is the Point of Legal Archaeology*, 3 TRANSNAT'L LEGAL THEORY 166, 170-171 (2012) (Legal archaeology is "designed to set in context already familiar landmark cases" because "[o]nly by looking at victims and defendants, counsel and judges themselves, is the history of any legal matter properly understood."); Paul A. Lombardo, *Teaching Health Law - Legal Archaeology: Recovering the Stories behind the Cases*, 36 J.L. MED. & ETHICS 589, 590 (2008) ("[Legal archaeology] depends on using a more expanded set of source documents than those most commonly referenced in legal scholarship, in an attempt to unearth details of events that resulted in important litigation and to move beyond the appellate opinion. Doing legal archaeology helps us understand the context of seminal cases more completely[.]"); Patricia D. White, *Afterword and Response: What Digging Does and Does Not Do*, 2000 UTAH L. REV. 301, 302-03 (2000).

309. John Adams, *Novanglus*, *in* THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 226 (C. Bradley Thompson ed., 2000); MASS. CONST. of 1780, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive or judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men.").

310. *See* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT 10 (2014) ("There is thus the sense that it is the 'law,' not the justices, that is responsible for the Court's decisions. This is nonsense and always has been. The Court is made up of men, and now finally women, who inevitably base their decisions on their own values, views, and prejudices.").

drawing inferences from a spotty historical record and the unknowable workings of often long-dead actors' minds.[311] However, its contextualizing approach is well-suited to inquiring into the salient question of why three disparate district judges strewn across time and space favored (however provisionally) part-and-parcel considerations, when so many of their peers did not.[312]

By virtue of its relative antiquity and obscurity, the context and motivations behind *Carter* are perhaps the hardest to unpack. The sympathy likely to be aroused by the plaintiff and the circumstances of the case has already been related.[313] These tendencies may well have found purchase with Judge Albert A. Ridge: only a few years before *Carter*, Judge Ridge had penned a lengthy encomium to "time-tested moral values, taught throughout 5,000 years of Judaic-Christian philosophy" condemning "the shyster, the barratiously inclined, the ambulance chaser" who spurn the "most sacred duties and obligations" entrusted to the bar,[314] along with a testimonial to pre-trial conferences that could only lead to "efficient courts, swift and inexpensive justice and a highly appreciated profession,"[315] whilst cautioning stridently against the coercive imposition of settlements upon the hesitant.[316] Only a few years after, he published an article pleading the cause of indigent defendants with considerable compassion for the archetypal little guy in court.[317] "The crux of the problem," declared Judge Ridge, "appears to lie in the midst of a head-on clash of the ideal with the practical. . . . Regardless, too much heed to practicalities cannot be permitted to encroach upon the declared right[.]"[318] These bookends paint the picture of a jurist greatly concerned with the morality of the law and the vicissitudes of the common man over the looming institutions of state and profession, one to whom the

311. *See* Twining, *supra* note 308, at 172 (positing that "the subject-matters of our discipline involve much more than litigation and that understanding such subject-matters requires multiple perspectives"); Lombardo, *supra* note 308, at 589 (noting that many "question the value of what they characterize as emotive, non-logical, personalized (and sometimes fictional) exposition as a vehicle for understanding the law.").

312. St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 46 F. Supp. 2d 1058, 1061 (E.D. Mo. 1997); Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, at *2 (E.D. La. May 24, 1993) [hereinafter *Winston II*]; Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 681 (W.D. Mo. 1955). *See also*, Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 829 (C.D. Cal. 1968) (further exegesis of *Westmoreland* is omitted in the interest of brevity).

313. *See supra* text accompanying notes 283-89.

314. Albert A. Ridge, *Legal Ethics: Missouri History and Current Diagnosis*, 8 J. MO. B. 51, 53 (1952).

315. Albert A. Ridge, *What Do Judges and Lawyers Want from the Mandatory Pre-Trial Conference Practice*, 17 U. KAN. CITY L. REV. 83, 92 (1949)

316. *Id.* at 90-91 ("Without question, there is a great sentiment by the bar against the judge who persists in trying to make the function a medium for coercion of settlements, and rightly so.")

317. Albert A. Ridge, *The Indigent Dilemma: A Procedural Dilemma for the Courts*, 24 F.R.D. 241 (1959).

318. *Id.* at 254.

faceless and voracious Fox conglomerate might have readily seemed the oppressor of the industrious dowager Carter.[319] Even after his elevation to the Eighth Circuit, Judge Ridge comported himself self-consciously a man of the people,[320] having seen the "grim realities" of World War I serving under that most plebeian of (future) presidents, Harry S. Truman.[321] As Judge Ridge wrote in 1962, eulogizing Justice Charles Evan Whittaker:

> A good lawyer has a profound knowledge of jurisprudence; is informed in a multitude of related sciences; has something of wisdom that is not learned from books, and has love for the law. One does not acquire those qualities when he becomes a lawyer or is elevated to the bench. He brings them along with him. And it is love of law which distinguishes a judge, as an administrator of justice, from a tyrant. . . . [E]ach member of the judiciary must sift the facts and law (much like placer mining) until the nuggets of gold (truth and stare decisis) are found and deposited in the vault of sound judgment.[322]

Deciding in the early days of part-and-parcel reasoning, Judge Ridge had the benefit of only the Supreme Court's dictum and a handful of uncertain precedents,[323] with no sure guidance from his own court of appeals (to which he would ascend six years later)[324]. The provincial doings of Sedalia, Missouri inspired no throng of press. Only his own instincts for "sound judgment" could thus be his cicerones in a novel backwater of the law, and those led him inexorably to voiding the release to which Mrs. Carter had "finally 'capitulated.'"[325]

---

319. *See* Ridge, *supra* note 314, at 51 ("The free and unthinking tendency to criticize our profession is as old as the profession itself, all because the venality of a few lawyers is always the favorite theme for indicting all. . . . So the Literature of almost all the civilizations of history, past and present, is replete with libels on the legal profession as a whole, and these continue to multiply. Thus the profession has been pictured as a society of predatory creatures, plunderers, without any sense of moral values and sans all intellectual honesty.").

320. Board of Govs. of the Mo. Bar, *Memorial to Judge Albert A. Ridge*, 23 J. MO. B. 536 (1967) ("Honored and respected as a gentleman, a, judge, a citizen and a patriot, he enriched the lives of those whose privilege it was to know him. Cognizant of the imperfections of man, he tempered stern justice with a kindly understanding.").

321. *Id.*

322. Albert A. Ridge, *Charles Evans Whittaker—A Personal Tribute*, 40 TEX. L. REV. 749, 749-50 (1962).

323. *See generally* Raytheon Mfg. Co. v. Radio Corp. of Am., 76 F.2d 943 (1st Cir. 1935); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196 (9th Cir. 1950); Westmoreland Abestos Co. v. Johns-Manville Corp., 39 F. Supp. 117 (S.D.N.Y. 1941).

324. Board of Govs. of the Mo. Bar, *supra* note 320, at 536.

325. Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 678 (W.D. Mo. 1955).

Some forty years later, one might have thought Judge Morey Sear in *Winston* would feel chastened after his reversal in *Ingram*.[326] To the contrary, however, the judge seemed empowered by his previous experience with so similar a case in managing the claims anent the release.[327] In a mirror image of the *Carter* court's stance, he reveled in *Redel's* and *Ingram* clear and direct recent guidance from the governing court of appeals on the rule that he was to apply, providing some surety that its application to the facts could withstand appeal.[328] (This time, it did.)[329] Judge Sear, moreover, was unusually "prominent and influential in the national affairs of the federal judiciary," serving for many years as a "confidante of Chief Justice William Rehnquist."[330] Revealing the independence that such stature grants, he had a long-standing reputation as an inventive and forward-thinking jurist mindful of concerns of public policy, particularly for his heralded work as the lone judge assigned to manage the orderly wind-up of 800 cases pending in the U.S. Panama Canal Zone court consequent to its transfer to Panama.[331] By 1993, he was in the waning years of a career of over three decades in the federal judiciary,[332] experience that could have bolstered his confidence in taking the road less traveled by,[333] as compared to a novice in the office.[334]

---

326. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295 (5th Cir. 1983), rev'g 495 F. Supp. 1321 (E.D. La. 1980).

327. Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 9080, at *1-2 (E.D. La. Jan. 13, 1993) [hereinafter *Winston I*].

329. Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, at *3 (E.D. La. May 24, 1993) [hereinafter *Winston II*] (quoted *supra* text accompanying note 177).

329. *Winston*, 79 F.3d 1145, *aff'*g WL 1995 317307 (1995).

330. *Morey L. Sear*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, https://www.laed.uscourts. gov/court-history/judges/sear (last visited Feb. 01, 2022) [hereinafter E.D. La. Morey Bio].

331. *See* 128 CONG. REC. 24,553 (Sept. 21, 1982) (remarks of Rep. Bob Livingston of La.) ("With his characteristic dedication and enthusiasm, Judge Sear brought a structure and direction to the court in its final years of authority that should be a model for Judges everywhere. . . . Equally important, Mr. Speaker, Judge Sear was an outstanding representative of the United States during a rather difficult period. His deep and sincere interest in the affairs of the Canal Zone and his ability to interact harmoniously with Panamanian officials were important factors in maintaining smooth relations with our neighbors to the south."); *see also* Gustavo A. Gelpi, *An Experiment in US Territorial Governance*, 63 FED. LAW. 40, 41 (2016).

332. E.D. La. Morey Bio, *supra* note 330 ("In 1971, he became one of the first United States Magistrate Judges in the Eastern District. A Republican, he served in that position until May 7, 1976, when he became United States District Judge after nomination by President Gerald R. Ford. . . . Judge Sear died on September 6, 2004[.]").

333. Robert Frost, *Mountain Interval*, *in* COLLECTED POEMS, PROSE & PLAYS 103 (Richard Poirier & Mark Richardson eds., 1995) ("Two roads diverged in a wood, and I— / I took the one less traveled by, / And that has made all the difference.").

334. *See* Irving L. Goldberg, U.S. Cir. J., *Meanderings of a Judicial Novice*, 30 TEX. B.J. 596, 596 (1967) ("Responding to my duties, I began the attempt to explore these areas of the law of which I had been ignorant or uninformed, or worse, which I had known only by rote. I was of course, immediately reminded of how much of the law is a learning process."); *id.* at 597-98 ("I do not under-estimate for one moment the necessity for legal and judicial predictability but simply submit that there is a small place and a minute time for forsaking predictability. In some cases, intellectually dishonest distinctions should yield

Around the time of *Winston*, Judge Morey described himself as a "creature[] of practice and habit," like all judges "who have been on the bench for any length of time."[335] Substantively, the judge had considered at length the details of public policy against the evasion of antitrust law in *Ingram*, suggesting he was less likely to elide over such concerns in the future.[336] Contrariwise, he was also historically wary of private settlements that disserved the public interest,[337] notably in rejecting several proposals in a prominent Ford product liability case as "not sufficiently fair, reasonable and adequate."[338] This earned him plaudits from the New Orleans Times-Picayune as "a shining example of how a no-nonsense judge can protect the public even absent systemic reform," and the newspaper further declared that "the public interest was carefully served by Judge Sear."[339] Procedurally, after emphasizing the importance of briefing in summary judgment motions in trial practice,[340] he had written that "conclusory allegations" and "a scintilla of evidence" would not do to avoid dismissal.[341] But the *Winston* plaintiffs had been attentive, taking advantage of the limited discovery afforded to marshal a considerable record to create a record deserving of trial.[342] That Judge Sear accepted the effort can seem almost predictable from his predilections and publications.

---

to forthright repudication [*sic*]. . . . Dissent is difficult because any disharmony is unpleasant. It is unsettling to be out of step."); *see also* 112 CONG. REC. 10,246 (May 10, 1966) (remarks of Asst. Sec. State Joseph J. Sisco) ("A generation or two ago most of the major problems of government could be understood by almost every citizen. Today, even many well-informed people do not feel fully competent to judge many public issues. Too many persons simply shy away from their consideration altogether. Let the expert, the man with specialized knowledge, decide them. Yet these decisions, the complex no less than the simple, determine the future of our Nation.").

335. Morey L. Sear, *Briefing in the United States District Court for the Eastern District of Louisiana*, 70 TUL. L. REV. 207, 208 (1995).

336. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1328-30 (5th Cir. 1983), rev'g 495 F. Supp. 1321 (E.D. La. 1980).

337. *See, e.g.*, Associated Press, *Around the Nation; Judge Rejects Quotas for New Orleans Police*, N.Y. TIMES, at 30 (Jun. 13, 1982), https://www.nytimes.com/1982/06/13/us/around-the-nation-judge-rejects-quotas-for-new-orleans-police.html.

338. Milo Geyelin, *Second Ford Pact to End Bronco Suit Is Thrown Out*, WALL ST. J. (Feb. 6, 1997), https://www.wsj.com/articles/SB855198143303001500.

339. E.D. La. Morey Bio, *supra* note 330.

340. Sear, *supra* note 335, at 208. ("At least two types of trial court briefing—briefs in support of dispositive motions and trial briefs—offer opportunities for swaying the trial judge, opportunities which approach, if not equal, the central role of the appellate brief.").

341. *Id.* at 216 ("Mere 'legal conclusions' and 'conclusory allegations' will not suffice, nor will a 'scintilla of evidence' in support of the plaintiff's position serve to defeat a properly supported motion for summary judgment.").

342. Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 390144, at *2 (E.D. La. May 24, 1993) [hereinafter *Winston II*] ("However, the affidavits and depositions presented by Traffic Scan in this instance support a finding that it has sufficiently alleged a 'part and parcel' defense to the release . . . . Defendant has simply claimed that Traffic Scan has failed to put forth any evidence that the release agreement was 'part and parcel' to the alleged antitrust violations and, therefore, summary judgment is proper. However, drawing on inferences from the underlying facts viewed in a light most

Meanwhile, as *St. Louis* was being decided in 1997, the National Football League was embroiled in a long-simmering legal debate over whether and to what extent the league could be held accountable for collusive conspiracy with and amongst its member clubs.[343] Press coverage of the Rams' impending move to St. Louis percolated robustly even as the case was argued,[344] including a "giddy" sixteen-page special edition of the hometown St. Louis newspaper that envisioned how "kids may ask the parents and grandparents to tell them all about how St. Louis got this football team. And what a story it will be. Where do we start? This is a complex tale of heartbreak and happiness. How will the story end? We have no idea."[345] Monday-morning quarterbacks of the legal issues soon abounded.[346]

---

favorable to Traffic Scan, I disagree. Traffic Scan has set forth specific facts showing that this is a genuine issue for trial.") (citations omitted).

343. *See, e.g.*, Warnock v. Nat'l Football League, 154 Fed. Appx. 291, 294 (3d Cir. 2005) (taxpayer lacked standing to assert claims that NFL clubs had conspired to compel municipalities to finance and construct football stadia); Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994) (NFL teams were capable of conspiring under the Sherman Act, notwithstanding argument they functioned as a single economic entity); Sullivan v. Tagliabue, 25 F.3d 43, 52 (1st Cir. 1994) (team owner lacked standing to challenge NFL rule against sale of teams to entities not exclusive engaged in the business of professional football); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1365 (9th Cir. 1986) (both stadium and team had standing to sue the NFL for refusal to allow relocation); L.A. Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1388 (9th Cir. 1984) (NFL was not a "single entity" and substantial evidence supported jury finding that the rule requiring three-quarters vote of member clubs to permit relocation was an unreasonable restraint of trade); N. Am. Soccer League v. Nat'l Football League, 670 F.2d 1249, 1260 (2d Cir. 1982) (NFL teams did not act as a "single economic entity" immune to the Sherman Act in banning cross-ownership of football and soccer teams); Smith v. Pro Football, Inc., 593 F.2d 1173, 1195 (D.C. Cir. 1978) (finding NFL structure "as a single entity" authorized by Congress); Shaw v. Dallas Cowboys Football Club, Ltd., No. Civ. A. 97—5784, 1998 WL 419765, at *5 (E.D. Pa. 1998), *aff'd on other grounds*, 172 F.3d 299 (3d Cir. 1999) (rejecting single entity defense); McNeil v. Nat'l Football League, 790 F. Supp. 871, 881 (D. Minn. 1992) (same); *see generally* Claudia G. Catalano, *Application of Federal Antitrust Laws to Professional Sports*, 79 A.L.R. Fed. 2d 1, § 38 (2013).

344. *See, e.g.*, Vincent J. Schodolski, *Yawning Memories If Raiders Leave L.A.*, CHI. TRIB. (June 22, 1995), https//www.chicagotribune.com/news/ct-xpm-1995-06-22-9506220080-story.html; T.J. Simers, *NFL Owners OK Rams' Move to St. Louis*, L.A. TIMES (Apr. 13, 1995), https://www.latimes.com/archives/la-xpm-1995-04-13-mn-54268-story.html; Thomas George, *Rams Given Green Light for St. Louis Move*, N.Y. TIMES, at B11 (Apr. 13, 1995), https://www.nytimes.com/1995/04/13/sports/pro-football-rams-given-green-light-for-st-louis-move.html; Leonard Shapiro, *Rams Approved for St. Louis Move*, WASH. POST (Apr. 13, 1995), https://www.washingtonpost.com/archive/sports/1995/04/13/rams-approved-for-st-louis-move/e2167293-a69f-431e-aaca-cb57ec13296c/; Thomas George, *N.F.L. Owners Reject Rams' Bid to Move to St. Louis*, N.Y. TIMES, at B15 (Mar. 16, 1995), https://www.nytimes.com/1995/03/16/sports/pro-football-nfl-owners-reject-rams-bid-to-move-to-st-louis.html; Vito Stellino, *Rams' Moving Saga is a Matter of Money, Not Sense or Tradition*, BALT. SUN (Mar. 12, 1995), https://www.baltimoresun.com/news/bs-xpm-1995-03-12-1995071141-story.html; *Report: Rams Headed for St. Louis*, UNITED PRESS (Jan. 14, 2015), https://www.upi.com/Archives/1995/01/14/Report-Rams-headed-for-St-Louis/3289790059600/?u3L=1

345. Editorial Board, *Jan. 17, 1995: We Were All a Bit Giddy as the Rams Announced They Were Coming to St. Louis*, ST. LOUIS POST-DISPATCH, https://www. stltoday.com/news/archives/jan-17-1995-we-were-all-a-bit-giddy-as-the-rams-announced-they-were/collection_6ee0078b-25ac-55b5-9493-103df3a86b31.html (last visited Jan. 17, 2021), *reprinting* Jim Thomas, *Hollywood Hit Tries a Sequel in St. Louis*, ST. LOUIS POST-DISPATCH, at 2FB (Jan. 18, 1995).

346. *See generally*, Kristen E. Knauf, *If You Build It, Will They Stay: An Examination of State-of-the-Art Clauses in NFL Stadium Leases*, 20 MARQ. SPORTS L. REV. 479, 479-94 (2010); Bradley J.

The judge presiding, Jean C. Hamilton, who in 2002 described a good judge as "being patient, listening well with an open mind, and making judicious decisions" whilst helping "people in society as a whole," may well have felt uncomfortable in allowing the NFL to preemptively escape scrutiny under a questionable release when its eligibility as an antitrust conspirator remained so unsettled, especially as a comparative newcomer to the federal bench.[347] As for why the *VKK* district court in the Southern District of New York was less diffident only two years after *St. Louis*:[348] akin to part-and-parcel itself, the Second Circuit had reached the question of the NFL's "single entity" defense, whilst the Eighth Circuit remained silent.[349] It was not until *American Needle* in 2010 that the Supreme Court finally resolved once and for all that the NFL enjoyed no overarching immunity from ordinary principles of antitrust law and that its teams could indeed conspire with one another.[350] Indeed, Judge Hamilton's circumspection was well-received: the Eighth Circuit affirmed the eventual judgment as a matter of law for the NFL after a full jury trial, as well as the district court's refusal to adopt the "single entity" defense to antitrust conspiracy, finally staking out a position on that issue, even if not on part-and-parcel, which was by that point quite moot.[351]

Context surely matters and fills lacunae in the official reporters, but legal archaeology unlocks no secret cipher to predicting or determining outcomes.[352] The holdings in all three cases averred that plaintiffs had succeeded in developing facts sufficient to substantiate their claims, and it is in such factual development that future plaintiffs must focus their faith and

---

Stein, *How the Home Team Can Keep from Getting Sacked: A City's Best Defense to Franchise Free Agency in Professional Football*, 5 TEX. REV. ENT. & SPORTS L. 1, 4-5 (2003); Franklin M. Fisher, Christopher Maxwell & Evan Sue Schouten, *The Economics of Sports Leagues and the Relocation of Teams: The Case of the St. Louis Rams*, 10 MARQ. SPORTS L.J. 193 (2000); Whitney Ricketts, *Johnny Blastoff, Inc. v. Los Angeles Rams Football Company, St. Louis Rams Partnership, NFL Properties, Inc., 188 F.3d 427 (7th Cir. 1999)*, 10 DEPAUL-LCA J. ART & ENT. L. 209 (1999); David Burke, *The Stop Tax-Exempt Arena Debt Issuance Act*, 23 J. LEGIS. 149, 149-51 (1997).

347. Nancy Belt, *Serving Citizens Through the Legal System*, WASH. U. IN ST. LOUIS MAGAZINE, Fall 2002, https://magazine-archives.wustl.edu/Fall02/JeanHamilton.html.

348. VKK Corp. v. Nat'l Football League, 55 F. Supp. 2d 196, 208 (S.D.N.Y. 1999).

349. *Compare N. Am. Soccer League*, 670 F.2d at 1256, *with* Powell v. Nat'l Football League, 930 F.2d 1293, 1304 (8th Cir. 1989) (reversing denial of summary judgment in favor of NFL and declining to address antitrust claims because federal labor law precluded judicial intervention whilst negotiations were underway); *cf. supra* note 307 and accompanying text (observing that by 2020, the Second but not Eighth Circuit had opined on part-and-parcel).

350. Am. Needle, Inc. v. Nat'l Football League, 560 U.S. 183, 186 (2010).

351. St. Louis Convention & Visitors Com'n v. Nat'l Football League, 154 F.3d, 852 853 (1998); *see also supra* text accompanying note 299 (mootness).

352. White, *supra* note 308, at 303 (Legal archaeology "teaches us about our institutional blind spots and it gives us both diagnostic tools and suggestions for remediation. But that is all. I think it is very important to understand that that is what we are doing when we are doing legal archaeology as scholars.").

efforts to achieve success, not the happenstance of zeitgeist, milieu, or judicial proclivity.[353]

IV. PUBLIC POLICIES IN CONFLICT, PRIVATE PACTS BETWEEN COMPETITORS

Beyond the particularized facts of every case, a recurring theme throughout the cases demurring from the part-and-parcel doctrine is a conflict of priorities: between public policies against antitrust exploitation and in favor of harmonious settlements and, more broadly, between governmental imposition and private prerogatives.[354] Before delving into this vexing morass of a melee, however, it is crucial to fully comprehend the common weal thought to derive from the values that have vied so vigorously with antitrust law for primacy.

A. The Superlative Significance of Consensual Settlements to Courts

1. Settlement as an End unto Itself

Myriad courts have underscored the validity of consensual resolutions to disputes and their vitality to the practice of law, even in the guarded realm of antitrust[355]—including many of the part-and-parcel cases, dating back to its Stone Age and beyond.[356] *S.E. Rondon* proclaimed in 1968 (citing *Suckow*): "It is the policy of the law to encourage the settlement of disputes both before litigation has commenced and thereafter. This policy extends to the settlement of antitrust litigation."[357] Thirty years later, *G.E.E.N.* confirmed that the policy had only become more entrenched: "Federal courts have supported a policy which encourages the amicable settlement and release of antitrust claims. The Courts have repeatedly held that an adequately drawn and validly

353. St. Louis Convention & Visitors Comm'n v. Nat'l Football League, 46 F. Supp. 2d 1058, 1061 (E.D. Mo. 1997).; *Winston II*, 1993 WL 390144, at *6; Carter v. Twentieth Century-Fox Film Corp., 127 F. Supp. 675, 679 (W.D. Mo. 1955).

354. *See supra* Part III.

355. *E.g.*, Richard's Lumber & Supply Co. v. United States Gypsum Co., 545 F.2d 18, 21 (7th Cir.1976) ("A general release, or a broad covenant not to sue, is not ordinarily contrary to public policy simply because it involves antitrust claims."), *cert. denied*, 430 U.S. 915 (1977); Oskey Gasoline and Oil Co., Inc. v. Continental Oil Co., 534 F.2d 1281, 1282 (8th Cir.1976); *Three Rivers Motors*, 522 F.2d at 891-92; *Schott Enterprises*, 520 F.2d at 1300 ("Releases of anti-trust claims are treated the same as releases of other claims. There is no public policy against the release of any anti-trust claim."); Fabert Motors, Inc. v. Ford Motor Co., 355 F.2d 888, 890 (7th Cir. 1966); *Duffy Theatres*, 208 F.2d at 324 ("A release of a civil claim for damages for violation of the anti-trust laws is not invalid because of illegality. Such a release violates no law and is not contrary to public policy.").

356. *E.g.*, Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1323 (5th Cir. 1983); Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262, 266 (4th Cir. 1971); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208 (9th Cir. 1950); G.E.E.N. Corp. v. Se. Toyota Distribs., Inc., No. 93–632–CIV–ORL–19, 1994 WL 695364, at *3 (M.D. Fla. Aug 31, 1994).; S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 881 (C.D. Cal. 1968).

357. *S.E. Rondon*, 288 F. Supp. at 881 (C.D. Cal. 1968) (citing *Suckow*, 185 F.2d at 208).

executed release will bar antitrust claims," citing half of the regional courts of appeals.[358] The Fifth Circuit in *Ingram* had already cited eight in 1983, counting itself amongst them.[359] A contemporaneous survey of the law of antitrust settlements presented by Harry M. Reasoner and Scott J. Atlas at a symposium on the subject endorsed such judicial restraint forcefully:

> What standards should be applied in scrutinizing settlements under the antitrust laws? Settlements are contracts—but contracts of a peculiar kind highly favored by and essential to the administration of justice. We should be loathe to adopt any principles that discourage the settlement of good faith litigation. Even in the simplest case where the parties make a private contractual settlement and the court simply enters a pro forma judgment of dismissal, the parties' conduct should be judged in light of the great need to foster settlements.[360]

Whence comes this "great need to foster settlements" that has achieved such broad judicial consensus?[361] All too many courts, like those in the part-and-parcel cases,[362] have begged the question: "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation."[363] Others, albeit outside the realm of antitrust, have been more forthcoming. First, there is the overarching principle of noninterference with ordinary state principles of contract law, settlements or no.[364] There too is also the protection of individual prerogatives in contract, which would be contravened by a public policy to void bargained-for consensual releases.[365] In order to override the "essential freedoms of . . . the right to bargain and contract," those rights must be "clearly outweighed" by public policy.[366] In

358. *G.E.E.N.*, 1994 WL 695364, at *3.

359. *Ingram*, 698 F.2d at 1333 (cited *supra* note 158).

360. Reasoner & Atlas, *supra* note 2, at 123 (hard line breaks omitted).

361. *Id.*

362. *See* cases cited *supra* note 356.

363. Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (citing Williams v. First Nat'l Bank, 216 U.S. 582, 595 (1910)); Clarion Corp. v. American Home Products Corp., 494 F.2d 860, 863 (7th Cir. 1974); Cities Service Oil v. Coleman Oil Co., 470 F.2d 925, 929 (1st Cir. 1972), *cert. denied*, 411 U.S. 967, (1972); Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969); and Richards Construction Co. v. Air Conditioning Co. of Hawaii, 318 F.2d 410, 414 (9th Cir. 1963)).

364. Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 891-92 (3d Cir.1975) ("Absent a substantial reason for doing so, the law of private contracts should not be burdened with the complication of a separate federal rule for releasing an antitrust cause of action.") (quoting United States v. Yazell, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests . . . . They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.")).

365. Schott Enterprises, Inc. v. Pepsico, Inc., 520 F.2d 1298, 1300 (6th Cir.1975) ("The parties had a right to settle whatever claims either had against the other and such settlement operates as a release.").

366. Arline v. Am. Fam. Mut. Ins. Co., 431 P.3d 670 (Colo. App. 2018) (quoting Superior Oil Co. v. W. Slope Gas Co., 549 F. Supp. 463, 468 (D. Colo. 1982), *aff'd*, 758 F.2d 500 (10th Cir. 1985)).

some arenas like employment discrimination, Congressional acts have expressly made voluntary conciliation the preferred resolution.[367] But even where compromise is legislatively favored, settlements must still ostensibly bow to other strictures of the law.[368] Nevertheless, explaining the tenacity of the generalized principle in courts favoring settlements, the Fifth Circuit was uncommonly frank in 1977: after reaffirming that "it is often said that litigants should be encouraged to determine their respective rights between themselves" the panel admitted forthrightly that the "overriding public interest in favor of settlement" arises because "in these days of increasing congestion within the federal court system, settlements contribute greatly to the efficient utilization of our scarce judicial resources."[369] Or, as the Eleventh Circuit confessed more curtly: "Settlement is generally favored because it conserves scarce judicial resources."[370]

This preference can be seen vividly in the palpable discomfort with attempted rescissions of long-established releases after a great length of time, resurrecting hoary old disputes to harry the courts.[371] It would defeat the purpose of settlements in achieving litigation peace and preserving courts' time to permit the accompanying releases to be challenged years after their inception.[372] Indeed, blithely allowing any collateral attacks on releases thus inherently compromises the public benefit of an efficiently functioning judiciary:

> Any party who enters into a general release, thereby releasing all claims, both known and unknown, takes a calculated risk, and it cannot rely on the other party to save it from the consequences of its act should it later find them more severe than anticipated. Indeed,

---

367. *See, e.g.*, Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 846-47 (5th Cir. 1975).

368. Atl. Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1944) ("Though settlements in accord and satisfaction are favored in law, they may not be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress.")

369. Cotton v. Hinton, 559 F.2d 1326, 1330-31 (5th Cir. 1977) (initial majuscules reduced to minuscule).

370. *In re* Smith, 926 F.2d 1027, 1029 (11th Cir. 1991) (citing *Cotton*, 559 F.2d at 1330).

371. Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc., 208 F.2d 316, 324 (10th Cir.1953) ("Duffy could have brought this action, sought rescission of the release, and offered to credit on the judgment that part of the consideration paid attributable to the release. He was free so to do at all times after the contract was executed. . . . Duffy waited more than 13 years after the contract containing the release was executed before commencing the instant action. Under such circumstances it must be held to have ratified the release.") (citations omitted).

372. G.E.E.N. Corp. v. Se. Toyota Distribs., Inc., No. 93–632–CIV–ORL–19, 1994 WL 695364, at *7 (M.D. Fla. Aug 31, 1994) ("The Court has not found an instance where a party's claim for recision of a release or contract was upheld after a delay of three years. In the instant case, Plaintiffs' allegations of duress are simply too little, too late. To allow Plaintiffs to rescind this settlement agreement would undermine the well-established policy favoring settlement of disputes and would inject an element of uncertainty into all settlement agreements.").

> were the law otherwise it would be virtually impossible for the courts ever to enforce a general release, a result which would greatly undermine the public policy which encourages compromise of differences.[373]

No negotiators could possibly have confidence in a settlement readily rejected at a judge's whim or a release "virtually impossible for the courts ever to enforce,"[374] reducing if not eliminating their incentives to even pursue, let alone effect, real conciliation.[375] Forestalling avoidable litigation before it even begins can only be an even greater virtue under the judicial-resources rationale.[376] At base, if parties in dispute are amenable to a compromise that saves the beleaguered courts work, judges should usually avoid looking a gift horse in the mouth absent an insuperable defect, as the Fifth Circuit admonished its district courts sharply: "A refusal to sign a consent decree based on generalized notions of unfairness is unacceptable. . . . When the remedy that is jointly proposed by these parties is within reasonable bounds and is not illegal, unconstitutional, or against public policy, the courts should give it a chance to work."[377]

2. An Apt Analogue in the Supreme Court's Apologetics for Arbitration

Despite superficial appearances, courts upholding releases ought not be seen as trying to shirk their duties to decide under some ignoble institutionalized scheme of high-minded goldbricking. An apt analogue recommends itself in the Supreme Court's well-documented affection for and defense of private arbitration agreements against arguments of public policy.[378] Indeed, "the Supreme Court has encouraged the use of arbitration

373. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1328 (5th Cir. 1983).

374. *Id.*

375. *See* S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968) ("To hold a release void because of the releasee's pre-existing wrong which resulted in financial hardship to the releasor would be to invite an attempt to void almost every such settlement and release. It would greatly impair the policy of encouraging private settlements. Parties negotiating such settlements need to have confidence in the enforceability of the settlement they reach.").

376. *S.E. Rondon Co*., 288 F. Supp. at 882 ("There is no precedent for such a distinction and there is no logical basis for applying a different rule of law to a release signed before litigation starts than to a release signed afterwards. Settlement of controversies before litigation commences is even more to be encouraged.").

377. United States v. City of Miami, 614 F.2d 1322, 1333 (5th Cir. 1980).

378. *See generally, e.g.*, Imre S. Szalai, *DIRECTV, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO ST. J. ON DISP. RESOL. 75, 95 (2017); Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23, 25 (2016); Christopher R. Drahozal, *Error Correction and the Supreme Court's Arbitration Docket*, 29 OHIO ST. J. ON DISP. RESOL. 1, 11 (2014); Richard Frankel, Concepcion *and Mis*-Concepcion*: Why Unconscionability Survives the Supreme Court's Arbitration Jurisprudence*, 2014 J. DISP. RESOL. 225, 227 (2014); John R. Snyder, *Supreme Court Stays Active in the*

of extremely complex disputes such as those arising under the antitrust laws."[379] Read in this context, the federal judicial policy favoring voluntary settlements serves the nobler purpose of allowing individuals to adjust their own differences on mutually satisfactory terms without the heavy hand of the compulsory system of state-sponsored justice, which should be the disputants' last resort rather than an initial redoubt.[380]

The Supreme Court's warm embrace of arbitration began surprisingly early. Although the touted Federal Arbitration Act of 1925 (FAA) provided that a written contract to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[381] the Court initially found in *Wilko v. Swan* that an integrated federal statutory regime not admitting of waivers trumped the FAA's mandate.[382] By the 1970s, however, the Court began migrating towards its modern defense of arbitration, reasoning that "agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause" whose enforcement was inoffensive to the vindication of clams, but whose disallowance "would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a 'parochial concept that all disputes must be resolved under our laws and in our courts. . . ,'"[383] The remaining decades of the twentieth century saw the multiplication of cases affirming that even complex statutory schemes could be compelled into arbitration if the parties had agreed.[384] *Wilko*'s reservation to the courts of securities lawsuits was overruled.[385] RICO was found not to foreclose arbitration under public policy despite its design to rely upon private suits, on the novel reasoning that "the special incentives necessary to encourage civil enforcement actions against organized crime do not support nonarbitrability of run-of-the-mill civil RICO claims brought against legitimate enterprises,"

Arbitration Arena, 130 BANKING L.J. 234 (2013); George A. Bermann, *Arbitration in the Roberts Supreme Court*, 27 AM. U. INT'L L. REV. 893 (2012); James L. Stone & Jonathan Boonin, *The Supreme Court's Emerging Endorsement of Arbitration*, 30 COLO. LAW. 67 (2001); Franklin B. Snyder, *What Has the Supreme Court Done to Arbitration*, 12 LAB. L.J. 93 (1961).

379. Timothy A. Carney, *New Supreme Court Arbitration Rulings — Expanding Federal Preemption and the Scope of Arbitrable Issues*, 66 OKLA. B.J. 2939, 2943 (1995) (citation omitted) (initial majuscule in minuscule).

380. *Cf. infra* notes 423-434 and accompanying text.

381. 9 U.S.C. § 2 (2018).

382. Wilko v. Swan, 346 U.S. 427, 434-35 (1953) (Securities Act of 1933), *overruled by* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 485 (1989).

383. Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974).

384. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (employment law); *Rodriguez de Quijas*, 490 U.S. at 480 (Securities Act); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987) (Securities Act and RICO); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) (holding state securities claims arbitrable and federal claims an open question); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 29 (1983) (contractual disputes).

385. *Rodriguez de Quijas*, 490 U.S. at 484-85.

that there was no evidence that RICO claims could not be vindicated in an arbitral forum or of contrary congressional intent, and thus that plaintiffs, "'having made the bargain to arbitrate,' will be held to their bargain."[386]

a. Antitrust and Arbitrations

And in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the court found that even antitrust claims must bow before arbitration.[387] Although the courts of appeals theretofore "uniformly had held that the rights conferred by the antitrust laws were 'of a character inappropriate for enforcement by arbitration,'" the Court disagreed.[388] Allowing that Congress *may* express its disfavor of arbitration in a statutory scheme,[389] the Court held that no such expression was manifest in antitrust law, rejecting the decades-old *American Safety* doctrine enunciated by the Second Circuit.[390] That doctrine had rested on four factors: that private litigation was necessary to combat antitrust abuses, the likelihood of contracts of adhesion, the complexity of antitrust analysis, and that antitrust matters were too grave to be vested in the hands of private enterprise.[391] The Court rejected each in turn: it was presumptuous to infer every arbitration contract to be adhesive, demeaning to imply arbitrators unequal to intricate cases, and insolent to suggest an arbitration panel would improperly favor business interests.[392] This left standing only "the core of the *American Safety* doctrine—the fundamental importance to American democratic capitalism of the regime of the antitrust laws" and their private enforcement.[393] The Court found "no reason," however, to assume that an arbitral forum could not afford antitrust relief given it is "bound to decide that dispute in accord with the national law giving rise to the claim[]," even if it "owes no prior allegiance to the legal

386. *McMahon*, 482 U.S. at 241-42 (1987).

387. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985); *see also* Stone & Boonin, *supra* note 378, at 67 (citation omitted) ("[T]he Court reversed course and began taking a pro-arbitration stance in cases involving statutory claims. . . . [including] pre-dispute arbitration agreements between parties relating to claims arising under federal antitrust laws").

388. *Mitsubishi Motors Corp.*, 473 U.S. at 621.

389. *Id.* at 627-28 ("Just as it is the congressional policy manifested in the Federal Arbitration Act that requires courts liberally to construe the scope of arbitration agreements covered by that Act, it is the congressional intention expressed in some other statute on which the courts must rely to identify any category of claims as to which agreements to arbitrate will be held unenforceable. . . . We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.").

390. *Id.* at 632-33 (discussing American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)).

391. *Id.*

392. *Id.* at 632-34.

393. *Mitsubishi Motors Corp.*, 473 U.S. at 634.

norms of particular states[.]"[394] As an added failsafe, the Court reasoned that the national courts ultimately responsible for dispensing any award could easily enough "ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."[395]

In the 2000s, the Supreme Court established that the burden lies with the party seeking to avoid contractual arbitration to establish that the alternative forum would be unable to properly vindicate the claims at issue.[396] Questions of whether the forum could do so, moreover, were to be decided by the arbitrators themselves, as, for example, whether the forum allowed for the imposition of the treble damages called for by RICO violations.[397] In the 2010s, the Court returned with renewed vigor to its rationale that "courts must 'rigorously enforce' arbitration agreements according to their terms" as freely negotiated contracts.[398] This soon meant that states' public policy specifying that contractual waivers of class actions were unconscionable was preempted by the contrary policy in favor of the arbitration contract's provisions.[399] So too was generally applicable state unconscionability doctrine overridden when it had the effect of voiding arbitration contracts.[400] Those resistant to setting aside their traditional concerns anent unconscionable or ambiguous terms were herded into line by the Supreme Court if not with reversal then with GVR dispositions.[401]

---

394. *Id.* at 636-37.

395. *Id.* at 638.

396. Green Tree Fin. Corp.-Ala. V. Randolph, 531 U.S. 79, 91-92 (2000) ("[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration. We have held that the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue.").

397. PacifiCare Health Sys., Inc. v. Book, 538 U.S. 401, 406-07 (2003).

398. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 233 (2013).

399. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010); *see also* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

400. DIRECTV, Inc. v. Imburgia, 577 U.S. 47, 53 (2015).

401. *Compare, e.g.,* Narayan v. Ritz-Carlton Dev. Co., 350 P.3d 995, 998 (Haw. 2015), *cert. granted, vacated, and remanded by* Ritz-Carlton Dev. Co. v. Narayan, 577 U.S. 1056 (mem.) (2016), *and* Am. Express Co., 559 U.S. 1103 (mem.) (2010) (GVRing), *with* Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 600 (6th Cir. 2013) (finding contract so "one-sided" as to ordinarily be unconscionable but denying relief under the unconscionability precedent of *Italian Colors*), *and* Khan v. Dell Inc., 669 F.3d 350, 356 (3d Cir. 2012) (ordering arbitration even where the contractually specified arbitral forum was unavailable under deference to FAA); *see also, e.g.*, Zaborowski v. MHN Gov't Services (9th Cir. 2014), *cert. granted,* 576 U.S. 1095 (2015), *cert. dismissed by joint stipulation,* 136 S. Ct. 1539 (2016); Malin, *supra* 378, at 61 (opining that "the Court's grant of certiorari in *Zaborowski* suggested it was poised to hold that the FAA mandates that courts reform unconscionable arbitration provisions rather than deny enforcement of arbitration mandates."). *But see, e.g.*, Hayes v. Delbert Servs. Corp., 811 F.3d 666, 675 (4th Cir. 2016) (reversing order to arbitrate as unconscionable); Jackson v. Payday Fin., LLC, 764 F.3d 765, 781 (7th Cir. 2014) (voiding unconscionable arbitration clause); Chavarria v. Ralphs Grocery Co., 733 F.3d 916, 927 (9th Cir. 2013) (reversing order to arbitrate as unconscionable).

Even where plaintiffs sought to show that the cost of arbitrating antitrust claims individually rather than via class action practically foreclosed relief contra the promise of *Mitsubishi*, the Court in *American Express Co. v. Italian Colors Restaurant* found that the free choice to arbitrate (and to bar class actions) prevailed under the FAA.[402] The Court held that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim[]" notwithstanding plaintiffs' appeal to public policy; Congress had carefully chosen a few specific tools (e.g. treble damages) to incentivize antitrust lawsuits, not the entire toolbox.[403] The Sherman and Clayton Acts, enacted decades before the rules permitting class actions, intimated no exception that forced an arbitration to allow that late-breaking procedural mechanism.[404] Nor must an arbitral forum offer "effective vindication" of antitrust claims, as urged: *Mitsubishi*'s insinuation otherwise was dictum, and the Court had never voided an arbitration agreement on that basis.[405] Asking courts to superimpose hypotheses of how effectively a case might be brought trenched too far on the FAA's dictate, especially given the legendary complexity of antitrust practice.[406]

Plaintiffs in other arbitrations involving antitrust claims had fared no better since *Mitsubishi*; in the granddaddy of them all, the Supreme Court had straightforwardly ruled in 1948 that, however expedient, arbitration could not be forced on non-consenting antitrust defendants by a court desirous of its efficiencies.[407] But by 1994, the courts recognized that one who had consented to arbitration generally must bring any antitrust claims in the chosen forum, for after *Mistubishi*, the *American Safety* doctrine was wholly defunct.[408] In 2003, the Seventh Circuit agreed, declining under *Mitsubishi* to reach antitrust issues in an arbitration award favoring a licensee against a licensor who had argued the antitrust laws forbade a ruling that it could not compete with its own licensee.[409] The plaintiff was aggrieved with the

402. *Italian Colors Rest.*, 570 U.S. at 239.

403. *Id.* at 233-34 ("In enacting such measures, Congress has told us that it is willing to go, in certain respects, beyond the normal limits of law in advancing its goals of deterring and remedying unlawful trade practice. But to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. '[N]o legislation pursues its purposes at all costs.'").

404. *Id.*

405. *Id.* at 235. It might be thought snarky to add that the Court has only disfavored arbitration agreements twice on *any* basis in the last few decades. *See* Malin, *supra* note 378, at 25 & n.12 ("In only two of the numerous cases concerning enforcement of arbitration agreements during this period has the Court favored the party resisting arbitration.") (citing EEOC v. Waffle House, Inc., 534 U.S. 279, 295 (2002), and Volt Info. Scis., Inc. v. Bd. Of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 470 (1989)).

406. *Italian Colors Rest.*, 570 U.S. at 237-39.

407. United States v. Paramount Pictures, 334 U.S. 131, 176-77 (1948).

408. Nghiem v. NEC Electronic, Inc., 25 F.3d 1437, 1442 (9th Cir. 1994) ("We hold that *Mitsubishi* effectively overruled *American Safety* and its progeny").

409. Baxter Int'l, Inc. v. Abbott Laboratories, 315 F.3d 829, 832 (7th Cir. 2003) ("*Mitsubishi* did not contemplate that, once arbitration was over, the federal courts would throw the result in the waste

arbitral finding that there was no competitive harm, but the panel observed that the government or other consumers were free to bring their own claims if it felt the tribunal had erred.[410] A dissent (and dissent from rehearing en banc) highlighted that the panel had in fact expanded *Mitsubishi* significantly in dodging any real judicial scrutiny despite Baxter's complaint that the arbitral forum had ordered the parties to engage in antitrust violations, calling unsuccessfully on the full court to reexamine the case.[411]

The appellate courts were not alone in confronting the intersection of antitrust and arbitration. More familiarly, in 1998, the Eastern District of Pennsylvania ruled against the New England Patriots' minority owner from *VKK*, who had urged that the NFL's mandatory arbitration policy itself effected an "injury to competition" by inhibiting the relocation of teams by its calculated protraction.[412] The court, however, found that although arbitration was indeed required, the NFL had in no way withheld the opportunity to arbitrate and the delays complained of were the plaintiff's own doing.[413] And only two years before *Italian Colors* in 2011, the defendants in a class action antitrust suit were permitted to compel arbitration over plaintiffs' objection that they had waived their right through inaction.[414] The court saw no prejudice, and in any case, before *Concepcion*, plaintiffs could not have been compelled into class-action arbitration absent clear language allowing for it.[415] After *Concepcion* was decided, the defendants had availed

---

basket and litigate the antitrust issues anew. That would just be another way of saying that antitrust matters are not arbitrable. Yet this is Baxter's position. It wants us to disregard the panel's award and make our own decision. The Supreme Court's approach in *Mitsubishi* was different."), *reh'g en banc denied*, 325 F.3d 954 (mem. en banc) (7th Cir. 2003).

410. *Id.* ("Treating Baxter as bound (vis-à-vis Abbott) by the tribunal's conclusion that the license (as construed to provide strong exclusivity) is lawful does not condemn the public to tolerate a monopoly. If the three-corner arrangement among Baxter, Maruishi, and Abbott really does offend the Sherman Act, then the United States, the FTC, or any purchaser of sevoflurane is free to sue and obtain relief. None of them would be bound by the award. As far as we can see, however, only Baxter is distressed by the award—and Baxter, as a producer, is a poor champion of consumers.").

411. *Id.* at 833-36 (Cudahy, J. dissenting) ("It is not my role to critique the arbitration decision—however flawed—except in this case to object to its anticompetitive outcome, which orders the parties to violate the antitrust laws. The interest of consumers was not represented on the arbitration panel and the panel's decision ignored consumer interests. Defense of public interests is sometimes better fulfilled by courts than by arbitration panels."); *reh'g en banc denied*, 325 F.3d 954, 955 (en banc) (7th Cir. 2003) (Ripple, J., dissenting) ("Now, the majority has taken the process one giant step further and has found that Mitsubishi not only allows submission of statutory and antitrust claims to arbitration, but denies our prerogative to refuse to enforce awards that command unlawful conduct.").

412. Murray v. National Football League, No. Civ. A. 94–5971, 1998 WL 205596, at *7 (E.D. Pa. Apr. 28, 1998).

413. *Id.* at *8.

414. In re California Title Ins. Antitrust Litig., No. Civ. 08-1341-JSW, 2011 WL 2566449, at *1 (N.D. Cal. June 27, 2011).

415. *Id.* at *3 ("Therefore, prior to the ruling in *Concepcion*, in the absence of class-wide arbitration provision, class arbitration would not have been available. It therefore would indeed have been futile for Defendants in this matter to have moved to compel arbitration prior to the decision in *Concepcion*.

themselves of their new option with due diligence.[416] Also in 2011, faced with a plaintiff claiming that an arbitrators award of fees to the defendant undercut antitrust public policy, the district court found that the rules of the arbitral forum controlled.[417] Just as instructed, courts had ensured that arbitration was unmistakably the favored result.

b. Rationales and Rationalizations

As originally formulated, the congressional purpose in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[418] With time, however, arbitration agreements were to be upheld in the face of general public policies that had the incidental effect of deterring or disfavoring arbitration, suggesting that—like settlements[419]—agreements to arbitrate were some sort of most-favored-contract.[420] The Tenth Circuit explained that any ambiguities, rather than being neutrally evaluated or construed against the drafter, were to be resolved in favor of arbitration.[421] This was putatively a directive of the FAA itself, as interpreted by the Supreme Court two decades before: "The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[422]

Accordingly, the Court finds that Plaintiffs have failed to meet their burden to demonstrate that Defendants had an existing—and therefore waivable—right to compel arbitration.").

416. *Id.*

417. ESCO Corp. v. Bradken Res. Pty Ltd., No. CIV. 10-788-AC, 2011 WL 1625815, at *12 (D. Or. Jan. 31, 2011) ("Although, as Bradken asserts, the Deutscher court commented that an award of attorney fees to a successful defendant in antitrust would be contrary to the policies underlying federal antitrust laws . . . [t]he court concludes that the public policy favoring enforcement of arbitration awards must prevail in this case. There is an absence of an identifiable, explicit public policy prohibiting that would prohibit an award of attorney fees to ESCO under the circumstances of the current case. In contrast, there is clearly established countervailing public policy favoring enforcement of arbitration agreements."), *report and recommendation adopted*, No. CV 10-788-AC, 2011 WL 1630355 (D. Or. Apr. 27, 2011).

418. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217, 220 n.6 (1985); *see also* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974).

419. *See* Reasoner & Atlas, *supra* note 2, at 123 (quoted *supra* note 360).

420. *See* D.R. Horton, Inc. v. NLRB, 737 F.3d 344, 364 (5th Cir. 2013) (Graves, J., dissenting); Szalai, *supra* note 378, at 99; Malin, *supra* note 378, at 38 ("The newly found purpose of enforcing arbitration agreements in accordance with their terms places them on a different footing from other contracts by making them immune to being struck or reformed under generally applicable contract doctrine.").

421. Sanchez v. Nitro-Lift Techs., LLC, 762 F.3d 1139, 1147 (10th Cir. 2014) ("We need not decide this difficult question, for we have stated that 'to acknowledge the ambiguity is to resolve the issue, because all ambiguities must be resolved *in favor* of arbitrability.'") (quoting Armijo v. Prudential Ins. Co. of Am., 72 F.3d 793, 798 (10th Cir. 1995)).

422. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983).

Stated more imperiously by the Court, "our cases place it beyond dispute that the FAA was designed to promote arbitration."[423] The "general mandate" was accordingly "the requirement to construe arbitration clauses broadly where possible."[424] Unlike with settlements, however, the disconcerting emphasis on judicial resources was absent; in its place was naked solicitude for the private right to contract for the salutary option of arbitration given congressional imprimatur by the FAA.[425] "The choice is one to be made by the parties themselves," wrote an arbitrator back in 1961: "Having made their choice and having reflected it in suitable contract language, the parties have a right to the fulfillment of their joint expectations from arbitration. Neither arbitrators nor courts should fail to respect the choice."[426]

Other interests were undoubtedly in play, along with a certain degree of question-begging.[427] Of course, legislators could not have been blind to the feature that more removals to arbitration meant fewer cases in court.[428] Neither were judges, nor pundits.[429] No doubt, courts and commentators have both expressed optimism that arbitration will provide more tailored and

423. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 345 (2011).

424. *Armijo*, 72 F.3d at 799.

425. *Concepcion*, 563 U.S. at 344 ("The 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms." (quoting *Volt*)); Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 22 (1985) ("The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate. . . . By compelling arbitration of state-law claims, a district court successfully protects the contractual rights of the parties and their rights under the Arbitration Act.").

426. Harold W. Davey, *Supreme Court and Arbitration: The Musings of an Arbitrator*, 36 NOTRE DAME L. REV. 138 (1961).

427. *See* Agnieszka Ason, *Antitrust Arbitration and Public Policy*, 3 QUEEN MARY L.J. 1, 4 (2013) ("First of all, it should be emphasized that there is no such notion as an absolute finality of arbitral awards. This principle is subject to a limited number of exceptions, one of these being public policy. Therefore, '[t]o start with the argument that the principle of finality forbids any detailed public policy review of the award is nothing but petitio principii.'") (citations omitted).

428. *Volt*, 489 U.S. at 478 (quoted *infra* note 432); *Dean Witter Reynolds*, 470 U.S. at 220 ("This is not to say that Congress was blind to the potential benefit of the legislation for expedited resolution of disputes.").

429. *See* Ason, *supra* note 427, at 8 ("At one point, for various reasons, with a heavy backlog of cases, the courts decided to grant trust to the antitrust arbitration. They are able to rethink this position at any time and to take back what they gave up in favour of arbitral tribunals, ie the exclusive jurisdiction over antitrust disputes."); Robert Pitofsky, *Arbitration and Antitrust Enforcement*, 44 N.Y.U. L. REV. 1072, 1072 (1969) ("Finally, the opportunity to remove from our already over-burdened federal judiciary a class of litigation that sometimes threatens to swamp the system with protracted multiple litigations would surely be a welcome development.").

efficient resolution of disputes.[430] But, to borrow a distinction,[431] these benefits were not the chief *object* of the policy in favor of arbitration but instead a fortuitous *outgrowth* of respecting the right of private contract.[432] What has elevated arbitration (and perhaps settlements-*cum*-releases too[433]) above the mine run of contracts is that the means of adjudication lies at the very core of contractual self-determination, a fundament to be left untrammeled by judges jealous of the power.[434] The public policy enunciated by other laws, unless explicitly forbidding arbitration, does "not mean that individual attempts at conciliation were intended to be barred."[435]

B. Beyond Releases: Settlements qua Collusion by Once-Warring Competitors

Analogy to arbitration aside, courts quite properly defer only so far to parties' asseverations of mutual satisfaction: sometimes the parties are *too* satisfied. "In determining whether to approve a proposed settlement," the

---

430. *Concepcion*, 563 U.S. at 344-45 ("The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. It can be specified, for example, that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets. And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.") (citing 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009)); *Dean Witter Reynolds*, 470 U.S. at 220 (quoted *infra* note 432); Malin, *supra* note 378, at 26 (observing that cultivation might "allow arbitration to develop into a faster and more accessible option for claimants"); *id.* at 59 (describing the "vision that judicially policed arbitration mandates could provide a win-win for all parties to the arbitration agreement" and "would insulate the stronger party—imposing the agreement from the risk of outlier jury awards—while providing the weaker party on whom the agreement was imposed with a speedy, efficient, and less formal forum that would be more accessible than litigation, particularly for low-dollar-value claims."); Pitofsky, *supra* note 429, at 1072 ("[I]f arbitration can lead to a more efficient and economical disposition of antitrust litigation, that too would be an important improvement over current enforcement.")

431. *Cf. VKK*, 244 F.3d at 125 (distinguishing between invalid releases that are the "object" of a conspiracy and valid releases that are merely an "outgrowth").

432. *See Concepcion*, 563 U.S. at 344-45 (quoted *supra* note 430); *Volt*, 489 U.S. at 478 ("While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'"); *Dean Witter Reynolds*, 470 U.S. at 219-20 ("The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement. . . . we must not overlook this principal objective when construing the statute, or allow the fortuitous impact of the Act on efficient dispute resolution to overshadow the underlying motivation.")

433. *See supra* notes 365-66 and accompanying text.

434. *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) ("Just as judicial antagonism toward arbitration before the Arbitration Act's enactment 'manifested itself in a great variety of devices and formulas declaring arbitration against public policy,' *Concepcion* teaches that we must be alert to new devices and formulas that would achieve much the same result today.") (quoting *Concepcion*, 563 U.S. at 342); *Volt*, 489 U.S. at 477-78 (quoting *Dean Witter Reynolds*, 470 U.S. at 219-20).

435. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 237 (2013) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 32 (1991)).

Fifth Circuit has instructed, notwithstanding the vaunted public good of judicial efficiency, "the cardinal rule is that the District Court must find that the settlement is fair, adequate and reasonable *and is not the product of collusion between the parties*."[436] This last concern is obviously not at issue where a plaintiff is seeking to circumvent a release (or arbitration) agreement over the defendant's objections, the stance thus far seen in the part-and-parcel (and arbitration) cases.[437] In other circumstances, however, when repairing their differences, some competitors have collaborated too far to their mutual benefit for antitrust law to tolerate.

Forty years ago, Texas practitioners Harry Reasoner and Scott Atlas expatiated on the reasoning behind the Fifth Circuit's final condition, offering a wide-ranging atlas of such outright collusion between parties to a settlement in antitrust cases.[438] In the main, the authors are skeptical of training the powerful microscope of antitrust scrutiny to settlements, for fear of dissuading such conciliation, without which no justice system could survive.[439] Their well-collated roll call of contrary cases, however, provides its own compelling argument,[440] despite patent cases predominating, which the authors warn must be read as precedent "with caution," given "the fact that not merely the parties' 'private ends' are at issue, but also the public interest in limiting the grant of patent monopolies to 'novel and useful invention[s].'"[441]

By all accounts, the leading case on the subject remains *United States v. Singer Manufacturing Co*.[442] The district court had dismissed an action in antitrust, and the Supreme Court accepted a direct appeal.[443] Singer was active in the then-vibrant market for sewing machines and their patented inner

436. *In re* Smith, 926 F.2d 1027, 1028-29 (11th Cir. 1991) (emphasis added) (quoting Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977) and citing Piambino v. Bailey, 757 F.2d 1112, 1139 (11th Cir. 1985), and United States v. City of Miami, 614 F.2d 1322, 1330 (5th Cir. 1980)); *see* C. Scott Hemphill, *Collusive and Exclusive Settlements of Intellectual Property Litigation*, 2010 COLUM. BUS. L. REV. 685, 700 n.63 (2010) ("In an antitrust class action, a judge is obliged under Rule 23(e) to worry about a collusive settlement that sells out the antitrust plaintiffs by failing to do anything about the asserted antitrust harm. But that evaluation is entirely consistent with a focus on the parties' interests in an antitrust case.").

437. *See supra* Part III.

438. Reasoner & Atlas, *supra* note 2; *see also supra* text accompanying note 360 (quoting same). This author gratefully acknowledges his debt to these authors and begs forgiveness for any recapitulation that strays too near to duplication in this Section. As with most things, the original is surely the best.

439. Reasoner & Atlas, *supra* note 2 ("The notion that the settlement of litigation—a practice so favored in the administration of justice—is in itself a ground of antitrust liability rings strange to the ear. If the administration of justice is to survive, we must encourage litigants to settle everything, good cases, bad cases, indifferent cases.").

440. *Id.* at 117-23.

441. *Id.* at 116. (quoting United States v. Singer Mfg. Co., 374 U.S. 174, 199 (1963) (White, J., concurring)).

442. *Singer Mfg. Co.*, 374 U.S. at 174.

443. *Id.* at 175.

workings.[444] As part of its international machinations to protect its models, Singer agreed with a Italian manufacturer, Vigorelli, to a settlement granting cross-licenses and mutually withdrawing their claims of infringement and agreeing to support one another in defending their designs.[445] An overlapping Swiss patent held by Gegauf, however, threatened to ruin this carefully orchestrated plan, and so at Vigorelli's suggestion, Singer moved swiftly to incorporate Gegauf into the settlement.[446] With these agreements in place, the three companies agreed to cooperate to defend their cross-licensed patents against all comers.[447] In 1959, as the American member of the impromptu triumvirate, Singer brought claims to exclude a Japanese model as infringing upon the Gegauf patent, alleging that "tremendous" number of Japanese imports threatened to extirpate the domestic market for such machines.[448] In response, the United States itself sued that the settlement consortium's concerted use of the interlocking patents and licenses restrained the competition of the Japanese manufacturers.[449]

The Court reasoned that "by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of merely protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees under the patent at the time, under the same umbrella. This the Sherman Act will not permit."[450] What mattered was the trio's "concerted action" to "destroy the Japanese sale of infringing machines"; that this was accomplished by a settlement of their own differences was of no moment.[451] The Court shooed away Singer's jingoistic pleas for the protection of American industry as a political matter,[452] finding it "well settled" that the patent monopoly in no wise insulates against the Sherman Act beyond the patent monopoly itself.[453] "That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage," the Court

444. *Id.* at 176-77.
445. *Id.* at 177-78.
446. *Id.* at 178-79.
447. *Singer Mfg. Co.*, 374 U.S. at 181, 191. Much more detail is to be found in the official reporter, which devotes almost idolatrous attentions to the intricacies of the sewing machine market and the various players' maneuvering. Id. at 180-88.
448. *Id.* at 187-88.
449. *Id.* at 189.
450. *Id.* at 194.
451. *Id.* at 195.
452. *Singer Mfg. Co.*, 374 U.S. at 196 ("It is strongly urged upon us that application of the antitrust laws in this case will have a significantly deleterious effect on Singer's position as the sole remaining domestic producer of zigzag sewing machines for household use, the market for which has been increasingly preempted by foreign manufacturers. Whether economic consequences of this character warrant relaxation of the scope of enforcement of the antitrust laws, however, is a policy matter committed to congressional or executive resolution. It is not within the province of the courts, whose function is to apply the existing law.")
453. *Id.* at 196-97.

concluded, "and those limitations have been exceeded in this case."[454] Justice Byron White concurred to observe that the conspiracy reached both to exclusion of the Japanese competitors and attempted coopting of the patent office to expand the jointly-defended patents as widely as possible to debar competition.[455] The settlement of their mutual patent claims was, therefore, not simply a resolution of a private dispute:

> In itself the desire to secure broad claims in a patent may well be unexceptionable—when purely unilateral action is involved. . . . There is a public interest here, which the parties have subordinated to their private ends—the public interest in granting patent monopolies only when the progress of the useful arts and of science will be furthered because as the consideration for its grant the public is given a novel and useful invention. When there is no novelty and the public parts with the monopoly grant for no return, the public has been imposed upon and the patent clause subverted. Whatever may be the duty of a single party to draw the prior art to the Office's attention, clearly collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade—if not bad per se, then such agreements are at least presumptively bad. The patent laws do not authorize, and the Sherman Act does not permit, such agreements between business rivals to encroach upon the public domain and usurp it to themselves.[456]

Justice White relied upon a cavalcade of cases, prescribing that the methodology of an antitrust offense "cannot screen such agreements from court scrutiny, and that federal courts must, in the public interest, keep the way open for the challenge of patents which are utilized for price-fixing of interstate goods."[457]

These precepts were revisited in the years that followed. In *Duplan v. Deering Millikin Inc.*, the Fourth Circuit first affirmed in an interlocutory

454. *Id.* at 197.
455. *Id.* (White, J., concurring).
456. *Id.* at 199-200 (citations omitted).
457. *See, e.g.*, Edward Katzinger Co. v. Chi. Metallic Mfg. Co., 329 U.S. 394, 399 (1947) (cited in *Singer*, 374 U.S. at 200; Atlantic Works v. Brady, 107 U.S. 192, 17 Otto 192, 200 (1883) (holding that "an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts.").

appeal to the trial court's denial of discovery of documents pertaining to the defendants' motivations.[458] In 1964, the holders of patents in yarn throwing, each fearful its might be found infringing, agreed to a settlement of their ongoing claims.[459] Much later, the plaintiff sublicensees of the patents resisted contractual and infringement claims on ground the settlement violated antitrust law.[460] Considering *Singer*, the panel thought that the mere confidence by one litigant of success could not make out a prima facie case for collusion warranting discovery; it was the intent of the parties to a settlement to violate the antitrust laws that controlled, lest the courts "discourage settlement in future patent litigation and thereby increase both the number and complexity of these already massive proceedings even where the parties preferred not to litigate."[461] On remand for the merits, the district court recounted that the settlement had initially contained provisions that would tie the royalty rate charged by one patent-holder to the other before it was deleted "in view of its antitrust implications."[462] Reciting the maxim that "settlements of patent litigation are normally as desirable as settlements of other types of litigation," the court reminded that "settlements of such litigation are not sanctioned by the courts when they are attended by anti-competitive results."[463] Under that rule, the court held that the patent-holders had conspired as to royalties and monopolized the market by means of the settlement, which violated the antitrust laws.[464] Rather than dispute whose patent would survive, they had agreed to avoid the perils of an unmonopolized market that could harm them both.[465]

---

458. Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1216 (4th Cir. 1976)

459. *Id.* at 1217.

460. *Id.*

461. *Id.* at 1221 ("If an attorney were to advise a litigant at any point during the course of patent litigation that he might successfully prosecute his action, under the theory contended for by [plaintiffs], settlement should, *prima facie*, expose that party to criminal prosecution and treble damages under the antitrust laws. To unnecessarily place the parties involved in patent litigation in such a position would be contrary to sound judicial policy which requires that settlements be encouraged, not discouraged.").

462. Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648, 680 (D.S.C. 1977), *aff'd*, 594 F.2d 979 (4th Cir. 1979) (per curiam).

463. *Id.* at 683 (citing United States v. New Wrinkle, Inc., 342 U.S. 371 (1952); United States v. Line Material Company, 333 U.S. 287 (1948); Standard Oil Company v. United States, 283 U.S. 163 (1931); *Duplan Corp.*, 540 F.2d 1215; and Westinghouse Electric Corporation v. Bulldog Electric Products Company, 179 F.2d 139 (4th Cir. 1950)).

464. *Duplan Corp.*, 444 F. Supp. at 685-86 ("The conduct of the parties following the settlement showed their cooperation in adhering to the program of fixed and stabilized royalty rates and their cooperation in keeping out competition. That they intended the settlement to have this effect is manifest on this record. The court has also concluded that the settlement agreement of March 31, 1964, resulted in monopolization of the market in the sale and licensing of false twist texturing machinery, processes and technology by [defendants] in violation of Section 2 of the Sherman Act.").

465. *Id.* at 687 ("As the case wore on it became more and more apparent to both sides that the results of victory might well be outweighed by the possibility of facing unlicensed competition in the false twist machinery market, a thought epitomized in Leeson's statement to Armitage: "If you win you lose, and if

As *Singer* and *Duplan* noted, the misuse of settlements to circumvent antitrust law was nothing new.[466] The Supreme Court had already held in 1952 that a joint venture organized by the disputants in settlement of a suit over patent priority facially violated the Sherman Act in pooling patents and fixing prices for all.[467] Only a few years earlier, in similar circumstances, the Court had held it "well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent monopoly. By aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act."[468] Justice Harold Burton, joined by Chief Justice Fred Vinson and Justice Felix Frankfurter, offered a spirited dissent hearkening back to Justice Cardozo's opinion in the already-legendary *Standard Oil* case, but they did not carry the day, then or thereafter.[469] In an opinion issued the same day, the Court also held that a settlement of patent claims by gypsum board manufacturers had improperly included an agreement to set prices pursuant to their patents.[470]

Nor did all precedent sound in patent law: in 1973, a district court refused to approve a class settlement for restaurant franchisees that would install by judicial fiat the very franchising framework claimed to be anticompetitive.[471] A second settlement offer reduced the mandatory purchasing agreements (allegedly at a non-competitive mark-up), and although mindful of the axiom that "a court cannot lend its approval to any contract or agreement that

---

you lose, you lose because if the patent is broken, there will be no royalty.' This thinking finally prevailed, and the settlement of March 31, 1964 with its trade-restraining, anti-competitive results soon followed.")

466. *See supra* note 463.

467. *New Wrinkle*, 342 U.S. at 380 ("An arrangement was made between patent holders to pool their patents and fix prices on the products for themselves and their licensees. The purpose and result plainly violate the Sherman Act. The judgment below must be reversed.").

468. United States v. Line Material Company, 333 U.S. 287, 308 (1948).

469. Line Material Company, 333 U.S. at 360 (Burton, J., dissenting, joined by Vinson, C.J., and Frankfurter, J.) ("Such provisions for the division of royalties are not in themselves conclusive evidence of illegality. Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the Act. . . . An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation.") (quoting Standard Oil Co. v. United States, 283 U.S. 163, 170, 171 (1931) (Cardozo, J.)).

470. United States v. U.S. Gypsum Co., 333 U.S. 364, 388-89 (1948). Justice Frankfurter, tartly commenting that "the Court confessedly deals with an issue that 'need not be decided to dispose of this case,'" and that "[d]eliberate dicta, I had supposed, should be deliberately avoided," concurred only in certain portions of the judgment. *Id.* at 402 (Frankfurter, J., concurring).

471. *In re* Int'l House of Pancakes Franchise Litig., No. M.D.L. 77, 1973 WL 839, at *2 (W.D. Mo. July 12) ("If this Court approved this proposed settlement, it would give judicial approval to the exact provisions of these franchise agreements, which plaintiffs have vigorously contended violated the anti-trust laws, and which were, unquestionably, the only provisions of the franchises which involved sufficient sums of money to inspire anticipation of a large monetary recovery in the cases. In addition, the members of this class would be bound, by judicial decree, to continue making those payments for the balance of a twenty-year lease (in most cases at least fifteen years)."), *aff'd*, 487 F.2d 303 (8th Cir. 1973).

violates the antitrust laws," both the district court and Eighth Circuit found no *per se* antitrust violation in its terms.[472] In 1984, the district court gave considerable credence to some class litigants' concerns that a proposed settlement prescribing the natural gas utility defendants' consolidation would only catalyze further antitrust transgressions.[473] After weighing and mostly accounting for the antitrust hazards, however, the court found that the overall benefits outweighed what were in the end speculative risks susceptible of future correction if they materialized.[474] Perhaps with some premonition, Reasoner and Atlas had commented at an early stage of the long-running series of lawsuits that "if a contrary notion prevailed, then the policy toward encouragement of settlements would be dealt a severe blow."[475] Similarly, a district court scrutinized and rejected a preliminary proposed settlement in Microsoft product tying class action antitrust litigation on grounds that the proposed foundation might accentuate competitive concerns and entrench Microsoft's market power.[476]

In the twenty-first century, the proliferation of so-called "pay-for-delay" (or "reverse payment") settlements between pharmaceutical patent-holders and potential generic market entrants yielded widespread critical censure for violating antitrust law, denying consumers the benefit of more robust competition in vital drugs.[477] The courts of appeals were initially slow to interdict such collusion[478] on the notion that "settlements are desirable, while litigation is not,"[479] though some saw the latent antitrust implications.[480] In

472. Grunin v. Int'l House of Pancakes, 513 F.2d 114, 123-24 (8th Cir. 1975) ("'In examining a proposed compromise for approval or disapproval . . . the court does not try the case. The very purpose of compromise is to avoid the delay and expense of such a trial.' Thus, unless the terms of the agreement are per se violations of antitrust law, we must apply a 'reasonableness under the totality of the circumstances' standard to the court's approval. Based on the record before us, we cannot say as a matter of law that the settlement agreement included any such violations.") (citations omitted).

473. *In re* New Mexico Nat. Gas Antitrust Litig., 607 F. Supp. 1491, 1508 (D. Colo. 1984) ("The objectors have presented one argument against approval that, at first glance, has some facial appeal. Several objectors argue that, by allowing the acquisition of Southern Union's gas utility by PNM, the settlement creates the potential for further anticompetitive conduct by an entity with substantial monopoly power over gas and electricity supply in New Mexico.").

474. *Id.* at 1508-09.

475. Reasoner & Atlas, *supra* note 2, at 122 (initial majuscule reduced to minuscule).

476. *In re* Microsoft Corp. Antitrust Litig., 185 F. Supp. 2d 519, 528-30 (2002); *id.* at 520-21 ("I have also concluded, as a substantive matter, that the record as it now exists demonstrates that the charitable foundation contemplated by the agreement is not sufficiently funded both to fulfill the eleemosynary purposes justifying a *cy pres* remedy and to assure that effectuation of the agreement would not have anti-competitive effects.").

477. *See* C. Scott Hemphill, *Collusive and Exclusive Settlements of Intellectual Property Litigation*, 2010 COLUM. BUS. L. REV. 685, 703-05.

478. *See id.* at 705-06 & n.74 (citing Ark. Carpenters Health & Welfare Fund v. Bayer AG, 604 F.3d 98, 110 (2d Cir. 2010) (per curiam), and *In re* Ciprofloxacin Hydrochloride Antitrust Litig., 544 F.3d 1323, 1341 (Fed. Cir. 2008)).

479. *Id.* at 707.

480. *See, e.g.*, *In re* K-Dur Antitrust Litigation, 686 F.3d 197, 214–18 (3d Cir. 2012).

2013, however, the Supreme Court declared in *FTC v. Actavis, Inc.* that "patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by a patent."[481] "In light of the public policy favoring settlement of disputes (among other considerations)," recounted the Court, the Eleventh Circuit had "held that the courts could not require the parties to continue to litigate in order to avoid antitrust liability."[482] Citing *Singer* and its ilk, the Court reminded that its "precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws."[483] Finally, whilst acknowledging the "general legal policy favoring the settlement of disputes,"[484] Justice Stephen Breyer nonetheless held for a 6-3 majority (over a dissent by Chief Justice John Roberts[485]) that the blatant risk of competitive harm overcame "the single strong consideration—the desirability of settlements—that led the Eleventh Circuit to provide near-automatic antitrust immunity to reverse payment settlements."[486]

C. Public Policy for Competition and Its Conscripted Private Prosecutors

Manifestly, despite the avowed value of affording parties free agency in their private contractual relations and the minimization of unneeded exertions via settlements,[487] courts have long recognized the countervailing purpose of public policy in the adherence to antitrust law and promotion of fair competition.[488] Unlike the storied judicial solicitude for settlements (though

481. F.T.C. v. Actavis, Inc., 570 U.S. 136, 148 (2013).

482. *Id.* at 146.

483. *Id.* at 150 ("Similarly, both within the settlement context and without, the Court has struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues.").

484. *Id.* at 153, 154 ("The Circuit's related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties to litigate the validity of the patent in order to demonstrate what would have happened to competition in the absence of the settlement. Any such litigation will prove time consuming, complex, and expensive. The antitrust game, the Circuit may believe, would not be worth that litigation candle. We recognize the value of settlements and the patent litigation problem.").

485. *Id.* at 160 ("A patent carves out an exception to the applicability of antitrust laws. The correct approach should therefore be to ask whether the settlement gives Solvay monopoly power beyond what the patent already gave it. The Court, however, departs from this approach, and would instead use antitrust law's amorphous rule of reason to inquire into the anticompetitive effects of such settlements.") (Roberts, C.J., dissenting).

486. *Actavis, Inc.*, 570 U.S. at 158 (majority). Justice Breyer did, however, resist the FTC's suggestion that *any* payments to a competitor to delay market entry were per se antitrust violations, adverting to the complexity and diversity of markets and competitors. *Actavis, Inc.*, 570 U.S. 136, 159.

487. *See supra* Part IV. A. 1.

488. *See supra* Part IV. B.

like that for arbitration[489]), this public policy is rooted firmly in congressional acts, beginning with the Sherman Antitrust Act of 1890.[490]

1. American Aggrandizement of Antitrust

The United States was the first country to promulgate a national public policy to regulate economic competition, following the lead of its several states who had pioneered the practice.[491] In 1890, the Sherman Act provided as federal policy that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal," and that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony."[492] In 1914, the Federal Trade Commission Act and Clayton Antitrust Act followed suit,[493] as did the Robinson-Patman Act in 1936,[494] all intended to supplement and strengthen the fundamental edicts of the Sherman Act.[495] Half a century and more would pass before other nations began to heed this example and formulate their own statutes in defense of fair competition.[496] Even then, these foreign laws were often responses to legislative and judicial innovations in the United States and their extraterritorial application.[497]

As a term of art, public policy describes the regime of principles, often subscribed into statute, or emanating from the common law tradition inherited

489. *See supra* Part IV. A. 2.

490. Pub. L. 51-647, 26 Stat. 209, *codified at* 15 U.S.C. §§ 1-7 (2018).

491. *See* Jared S. Sunshine, *Observations at the Quinceañero of Intel Corp. v. Amd, Inc. on International Comity in Domestic Discovery for Foreign Antitrust Matters*, 69 DRAKE L. REV. 295, 298-99 (2021).

492. 15 U.S.C. §§ 1-2 (2018) (initial majuscules reduced to minuscule).

493. Pub. L. 63-202, 38 Stat. 717, *codified at* 15 U.S.C. §§ 41-58 (2018) (Federal Trade Commission Act); *id.* § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); Pub. L. 63–212, 38 Stat. 730, *codified at* 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52–53 (2018) (Clayton Act); *id.* § 13(a) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality.");

494. Pub. L. No. 74-692, 49 Stat. 1526, *codified at* 15 U.S.C. § 13.

495. *See The Antitrust Laws*, U.S. FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

496. Sunshine, *supra* note 491, at 299 & n.16 ("But whatever the reason, '[u]ntil the mid-twentieth century, the United States was virtually the only nation in the world with an antitrust regime.'") (quoting Russell W. Damtoft & Ronan Flanagan, *The Development of International Networks in Antitrust*, 43 INT'L LAW. 137, 138 (2009)).

497. *Id.* at 308 ("Ironically, the welcome efflorescence of antitrust laws around the world in the latter part of the twentieth century "is considered to be a direct rebuttal to the United States' extraterritorial enforcement. Indeed, a primary function of these counter legislations is to frustrate or resist foreign enforcement actions in their territories.").

from England, that the government has recognized as supportive of the common weal: philosophies meant to pervade and supersede other considerations.[498] As an imprecise agglomeration of philosophies, however, the contours of public policy are essentially amorphous, perhaps by design:[499]

> You cannot lay down any definition of the term 'public policy,' or say it comprises such and such a proposition, and does not comprise such and such another," says the same learned Judge. "Public policy," he continues, "must be, to a certain extent, a matter of individual opinion, because what one man, or one Judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a Judge might be as to what public policy is.[500]

---

498. *Public Policy*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The collective rules, principles, or approaches to problems that affect the commonwealth or (esp.) promote the general good; specif., principles and standards regarded by the legislature or by the courts as being of fundamental concern to the state and the whole of society"); *see* Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974); Irish v. CNA Ins. Co., No. 20 CV 904, 2020 WL 6273483, at *2 (N.D. Ill. Oct. 26, 2020) ("Illinois courts adhere to 'a narrow definition of public policy.' A public policy 'is to be found in the State's constitution and statutes and, when they are silent, in its judicial decisions' and 'must strike at the heart of a citizen's social rights, duties, and responsibilities before the tort will be allowed.'") (citations omitted); Bondcote Corp. v. Ayers, No. 7:05-CV-00705, 2006 WL 938734, at *4 (W.D. Va. Apr. 11, 2006) ("[W]hatever 'tends to injustice or oppression . . . or to the violation of a statute' is against public policy. The courts have also approved of the definition of public policy as the principle 'which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.'") (citations omitted); Fid. & Deposit Co. of Md. v. Moore, 3 F.2d 652, 653 (D. Or. 1925) (Public policy "is said to be that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good, as declared by the law and decisions of the courts."); *see generally* William Stanley Macbean Knight, *Public Policy in English Law*, 38 L.Q. REV. 207 (1922).

499. Peregoy v. Goodyear Tire & Rubber Co., No. 5:06-CV-107-F, 2007 WL 9718536, at *2 (E.D.N.C. Mar. 22, 2007) ("The North Carolina Supreme Court has defined public policy 'as the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good.' Recognizing the imprecision of this definition, . . . [t]he North Carolina Supreme Court has specifically declined to set forth a more specific definition of public policy, choosing instead to 'allow this still evolving area of the law to mature slowly, deciding each case on the facts. . . .'") (citations omitted); *accord* Buser v. S. Food Serv., Inc., 73 F. Supp. 2d 556, 564-65 (M.D.N.C. 1999); *see* Edmundson v. Cont'l Pipeline Co., No. 90–3089, 1991 WL 149508, at *2 (7th Cir. July 17, 1991) ("There is no precise definition of public policy."); *Bondcote*, 2006 WL 938734, at *4 ("'Public policy has its place in the law of contracts, yet that will-o'-wisp of the law varies and changes with the interests, habits, need, sentiments, and fashions of the day.' Courts are averse to holding contracts against public policy unless their illegality is clear and certain. The meaning of the phrase 'public policy' is vague and variable . . .") (citations omitted); *Moore*, 3 F.2d at 653 ("It is not easy to give a precise definition of public policy."); *see* Ason, *supra* note 427, at 9 ("An essential characteristic of public policy control is unpredictability. This is the reason why public policy is most often described as a 'very unruly horse, which once you get astride it you never know where it will carry you.'") (quoting Richardson v. Mellish, [1824] 2 Bing. 229, 252, 130 Eng. Rep. 294, 303 (CP)).

500. Knight, *supra* note 498, at 213. Knight continued: "And this position, so reminiscent of the 'unruly horse' of Burrough J., is afterwards adopted by Kekewich J.: 'Public policy does not admit of

Notwithstanding such intrinsic indeterminacy, American courts have often accorded antitrust law the highest degree of deference in the legal firmament; in the uncertain hierarchy of public policy, it is habitually seen as a *primus inter pares*.[501] Indeed, antitrust seems to have acquired the status of a "universal" public policy, venerated in some form worldwide.[502] General principles of law and equity have, therefore, tended to yield to the precepts of antitrust when conflict arise.[503] This was particularly so in the courts' uniform rejection of the much-tried defense that an antitrust plaintiff came to the lawsuit "with unclean hands" or *in pari delicto*, an ordinary concern of public policy wholly overridden by the importance of punishing antitrust violators and eliminating competitive restraints.[504] To allow a violator to

---

definition and is not easily explained. . . One thing I take to be clear, and it is this—that public policy is a variable quantity; that it must vary and does—vary with the habits, capacities and opportunities of the public. And in the same case, on appeal, in the words of Fry L.J., "the law with regard to public policy is one of a very different description from the law which is laid down in absolute terms for all time."'" *Id.* at 213-14.

501. *See* Lamp Liquors, Inc. v. Adolph Coors Co., 563 F.2d 425, 433 (10th Cir. 1977) (Markey, C.J., dissenting) (opining that the majority "would so exalt important public policy underlying our antitrust laws as to require what I believe to be the effective nullification of a constitutional provision"); Brintley v. St. Mary Mercy Hosp., No. 2:09-CV-14014, 2010 WL 11492414, at *4 (E.D. Mich. Apr. 19, 2010) ("Taking into account the compelling public policy favoring such antitrust actions, the court found that the privilege should not be recognized when it would prevent the plaintiff from asserting his claim altogether.") (citing Mem'l Hosp. for McHenry Cty. v. Shadur, 664 F.2d 1058, 1061-62 (7th Cir. 1981) ("strong public interest in open and fair competition")); Carpenters Loc. Union No. 1846 of United Bhd. of Carpenters & Joiners of Am., AFL-CIO v. E.I. Dupont De Nemours & Co., No. 80-2763, 1981 WL 2221, at *2 (E.D. La. May 28, 1981) ("Courts have consistently instructed that in antitrust cases where public policy is so vitally involved and the factual issues complex, courts must liberally construe a plaintiff's pleadings.") (citing Poller v. Columbia Broadcast System, 368 U.S. 464, (1962)).

502. Ason, *supra* note 427, at 1 ("The notion of public policy (*ordre public*) encompasses fundamental values and principles, pertaining to justice and morality that states wish to protect. It is universally acknowledged that competition rules, designed to serve essential political, social and economic interests, are part of public policy."). *But see id.* at 7 (noting that as a planned economy, Switzerland has rejected antitrust law as public policy or part of the "universal *valeurs essentielles*").

503. *See, e.g.*, United States v. Firestone Tire & Rubber Co., 374 F. Supp. 431, 433-34 (N.D. Ohio 1974) ("[I]t remains clear, however, that principles of equity may not be applied to the United States in such a manner as to frustrate the purpose of its laws or to thwart its public policy" in enforcing the Sherman Act) (citations omitted); Purex Corp., Ltd. v. Gen. Foods Corp., 318 F. Supp. 322, 324 (C.D. Cal. 1970) ("Whether such a defense is valid in private contract litigation is irrelevant to the question of whether it is permissible in an antitrust action. . . . Also, as discussed above, it establishes quite clearly that the relative equities between private litigants must yield to public policy considerations when antitrust suits are concerned."); United States v. Bayer Co., 135 F. Supp. 65, 72 (S.D.N.Y. 1955) ("The public policy underlying the anti-trust laws is not to be frustrated so easily. Since 'it is the unlawful agreement, whether it is executed or not, which violates the anti-trust laws', the Court is justified in enjoining any action to realize the proceeds of the tainted agreement, particularly so where the action serves to keep the agreement alive and to encourage future violations."); United States v. Shubert, 14 F.R.D. 471, 474 (S.D.N.Y. 1953) ("'Those defenses [estoppel, ratification or laches] do not apply to actions brought by the United States in its sovereign capacity where they would frustrate the purpose of its laws or thwart its public policy'" in Sherman Act case).

504. *See, e.g.*, Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 138 (1968), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 777 (1984); Ring v. Spina, 148 F.2d 647, 653 (2d Cir. 1945) ("Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in pari delicto. . . . Any other conclusion

escape liability and correction by claiming that his accuser was somehow complicit would ignore the powerful public interest in eliminating antisocial behavior, whatever the societal ills (if any) occasioned by recompensing an individually imperfect plaintiff.[505]

As with settlements,[506] the superlative significance of antitrust public policy has sometimes been treated as so self-evident that it needed no explanation: quoting the Supreme Court of Hawaii, the Ninth Circuit commented that one can "discern the relevant public policy from the antitrust laws. The notion that it is the purpose of those laws to protect the public interest in free and unrestrained competition is too well-established to require citation."[507] In 1976, however, a perspicacious district court had explained the underpinnings more explicitly:

> The strong public policies underlying the enactment of the antitrust laws and the public interest to be protected by their vigorous enforcement through private suits demark the guidelines within which antitrust procedure is to be established. For example, the important public concern in combatting an antitrust violation in the courts is the damage that such a violation wreaks upon the competitive market system. Private enforcement is thus premised, in the first instance, on a theory of protecting the desired market status and thereby vindicating the public interest.[508]

---

would mean that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."); Frost v. Shipowners & Merchants Towboat Co., No. 72-2123 GBH, 1974 WL 888, at *4 (N.D. Cal. May 10, 1974) ("Regardless of the rubric of 'unclean hands' or 'illegality,' the countervailing specific public policy favoring private antitrust actions outweighs the general public policy sometimes invoked to withhold relief from a litigant guilty of misconduct.") (quoting Waldron v. Brit. Petroleum Co., 231 F. Supp. 72, 92 (S.D.N.Y. 1964)); Trebuhs Realty Co v. News Syndicate Co, 107 F. Supp. 595, 599 (S.D.N.Y. 1952) ("More specifically, public policy may preclude an application of the doctrine of 'unclean hands.' Whatever equities may be present as between private litigants, they must yield to the overall public policy of the antitrust laws to prevent monopolies and restraint of trade.").

505. *See* Chrysler Corp. v. Gen. Motors Corp., 596 F. Supp. 416, 419 (D.D.C. 1984) ("[C]ourts considering actions under the antitrust laws must be concerned with protection of the public interest as well as redressing private injury. The claim that the plaintiff has himself violated the law cannot be allowed to overshadow plaintiff's cause of action and the potential vindication of the public interest. . . . As in the case with actions at law, actions in equity must yield to the overall public policy of enforcing antitrust laws."); Pearl Brewing Co. v. Joseph Schlitz Brewing Co., 415 F. Supp. 1122, 1130 (S.D. Tex. 1976).

506. *See* Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir. 1976) (citing *Williams*, 216 U.S. at 595); Clarion Corp. v. American Home Products Corp., 494 F.2d 860, 863 (7th Cir. 1974); Cities Service Oil v. Coleman Oil Co., 470 F.2d 925, 929 (1st Cir. 1972), *cert. denied*, 411 U.S. 967, (1972); Autera v. Robinson, 419 F.2d 1197, 1199 (D.C. Cir. 1969); and Richards Construction Co. v. Air Conditioning Co. of Hawaii, 318 F.2d 410, 414 (9th Cir. 1963)).

507. *E.g.*, Franklin v. Delta Air Lines, Inc., No. 90–16118, 1991 WL 270787, at *4 (9th Cir. Nov. 8,1991) (quoting Parnar v. Americana Hotels, Inc., 652 P.2d 625, 652 (Haw. 1982).

508. *Pearl Brewing*, 415 F. Supp. at 1130.

Put more briefly recently, the *raison d'être* of the Sherman Act and all that followed is the cultivation of competition for the benefit of consumers, not the protection of competitors: "the purpose of [antitrust law] is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."[509] This closely parallels the Supreme Court's famous observation that "[i]t is axiomatic that the antitrust laws were passed for 'protection of competition, not competitors.'"[510] The high court has more recently specified the priority of antitrust as "interbrand competition," even though "'[l]ow prices . . . benefit consumers regardless of how those prices are set.'"[511] To this end, "a core purpose of the antitrust law is to scrutinize mergers," on the theory that fewer companies means fewer brands, less competition, reduced output of products, inflated profit margins, and thus higher prices.[512] As early as 1937, the Seventh Circuit thought it "clear[]" that "the purpose of the Sherman Anti-Trust Act is to secure equality of opportunity and to prohibit abnormal contracts and combinations which tend directly to suppress the conflict for advantage called competition."[513] Malice of the heart is beside the point, for the Sherman Act does not proscribe a moralistic peccadillo or mortal sin but rather prescribes a basal "economic policy, violation of which is deemed detrimental to common welfare, irrespective of motive or other wrongful intent."[514] With the "economic wellbeing of the American people" at stake, it is perfectly pellucid how this particular principle, conduced by Congress, merited such a privileged place in the pantheon of public policies.[515]

---

509. Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 4 F. Supp. 3d 1123, 1137 (D. Ariz. 2014) (citing Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal., 190 F.3d 1051, 1055 (9th Cir. 1999); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993)), *aff'd*, 836 F.3d 1171 (9th Cir. 2016).

510. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962).

511. State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) ("Our analysis is also guided by our general view that the primary purpose of the antitrust laws is to protect interbrand competition. . . . Our interpretation of the Sherman Act also incorporates the notion that condemnation of practices resulting in lower prices to consumers is 'especially costly' because 'cutting prices in order to increase business often is the very essence of competition.'") (quoting Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340 (1990) and Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

512. Fed. Trade Comm'n v. Tronox Ltd., 332 F. Supp. 3d 187, 208 (D.D.C. 2018); *see also* Colo. Interstate Gas Co. v. Nat. Gas Pipeline Co. of Am., 661 F. Supp. 1448, 1460-61 (D. Wyo. 1987) ("Congress intended to preserve competition by enacting the antitrust laws. Preserving competition in turn promotes maximum consumer economic welfare through efficient use and allocation of scarce resources.") (citations omitted), *aff'd in part & rev'd in part*, 885 F.2d 683 (10th Cir. 1989).

513. Prairie Farmer Pub. Co. v. Indiana Farmer's Guide Pub. Co., 88 F.2d 979, 982 (7th Cir. 1937).

514. *Id.* at 982 ("And an act which might be done lawfully by one, may, when done by many acting in concert, take on the form of a conspiracy and become a public wrong, violative of the legislative policy and thus prohibited by law, if the result be hurtful to the public or to individuals against whom such concerted action is directed.").

515. United States v. W. Elec. Co., 767 F. Supp. 308, 326 (D.D.C. 1991) ("[T]he most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of

2. The Peculiar Parts Played by "Private Attorneys General"

In the eternal existential struggle for a maximally efficient marketplace, Congress expressly contemplated a robust role for private parties deputized in the Clayton Act to bring civil enforcement actions that would vindicate free and fair competition.[516] The perspicacious district court, quoted earlier, evidently embraced the importance of these self-sponsored suits,[517] as had many others that the reader has already encountered.[518] The conscientious citizens prosecuting the common cause of vigorous competition have long been labelled (with some élan) as "private attorneys general" to reflect their abnormal amalgamation of a calculatedly public purpose with their own very individualistic aims of personal compensation.[519] Exactly what animated this amateur volunteer corps, however, exists in an uneasy superposition of two overlapping theories.

a. Cosseted Creatures of Congressional Command?

The D.C. district court has elaborated further on these peculiar creatures of statute: "Private parties filing suit under the antitrust laws function as 'private attorneys general' representing the public interest. Congress established the private right of action for the very purpose of insuring effective enforcement of the antitrust laws. The public interest in preventing anticompetitive injury would be dampened tremendously" if such quasi-

---

the American people in just a few dominant, collaborative conglomerates, with the captive local telephone monopolies as their base. Such a development would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic wellbeing of the American people."), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993) [hereinafter *W. Elec. Co. II*]; *see* Standard Oil Co. v. Federal Trade Comm'n, 340 U.S. 231, 248-49 (1951) ("The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'"); *Colo. Interstate Gas*, 661 F. Supp. at 1460-61 (quoted *supra* note 512); United States v. W. Elec. Co., No. 82-0025 (PI), 1983 WL 1864, at *1 (D.D.C. Sept. 7, 1983) (advising that "direct Supreme Court consideration is appropriate where the underlying antitrust judgment involves matters of great and general importance to the public interest because of their 'impact on the economic welfare of this nation'") (citation omitted) [hereinafter *W. Elec. Co. I*]; *see also* Washington v. CLA Est. Servs., Inc., No. C18-480 MJP, 2018 WL 2057903, at *1 (W.D. Wash. May 3, 2018) ("There is also widespread legal support for the State's position that its suit to enforce its quasi-sovereign interest in guaranteeing an honest marketplace and the economic welfare of its citizenry bestows 'real party in interest' status upon it.").

516. 15 U.S.C. § 15(a) (2018) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . ."); *id.* at § 26.

517. *See supra* note 508 and accompanying text.

518. *See supra* cases cited notes 503-05.

519. *See, e.g.*, Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977); *In re* Linerboard Antitrust Litig., No. CIV. A. 98-5055, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004), *amended*, 2004 WL 1240775 (E.D. Pa. June 4, 2004); Burnup & Sims, Inc. v. Posner, 688 F. Supp. 1532, 1534-35 (S.D. Fla. 1988); Chrysler Corp. v. Gen. Motors Corp., 596 F. Supp. 416, 419 (D.D.C. 1984).

prosecutors could be evaded through artful contractual preemption.[520] Amongst courts, it was "well recognized that enforcement of the antitrust laws by the state and federal governments is not adequate at this time, mainly due to shortage of staff and especially of trained staff."[521] Public records tell the same tale.[522] Recognition of government inadequacy to the task had thus impelled Congress to recruit private attorneys general, via the incentive of treble damages and the promise of attorneys' fees, to provide a nigh-limitless auxiliary force to uphold the laws.[523] Only by installing "an ever-present threat" of private actions could the public good be fully served, even at the risk of enlisting champions for the free market less immaculate than the white knights of the (overmatched) government regulators.[524] With ever greater demands on the regulators, private attorneys general had already begun to swell in importance by the 1960s and accounted for many seminal decisions in antitrust.[525]

Unlike those selfless white knights, private interests require a strong incentive to spur them to sue, and courts generally viewed the statutory promise of treble damages as providing the requisite enticement.[526] But accounting for attorneys' fees and costs was also vital, to ensure that

520. *Chrysler Corp.*, 596 F. Supp. at 419 (citing Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276, 280 (9th Cir.1976), and Trebuhs Realty Co. v. News Syndicate Co., 107 F.Supp. 595, 599 (S.D.N.Y. 1952)).

521. *In re* Arizona Escrow Fee Antitrust Litig., No. 80-840A PHX CAM, 1983 WL 1784, at *3 (D. Ariz. Feb. 2, 1983) ("Neither federal nor state governments, nor any combination of them, have enough attorneys or investigators to ferret out and to litigate all the cases that could be prosecuted in the courts.") [hereinafter *In re Arizona Escrow Fee Antitrust Litig. II*].

522. *See* Pitofsky, *supra* note 429, at 1074-75 ("The resources of the Antitrust Division of the Department of Justice and of the Federal Trade Commission are simply inadequate to enforce those laws with anything like the thoroughness consistent with the commitment of Congress and the Supreme Court to a free, competitive system. For example, in 1968, the entire appropriation for the Antitrust Division amounted to about eight million dollars, which supported a staff of about 300 lawyers in its Washington office.").

523. *Id.*; *In re Arizona Escrow Fee II*, 1983 WL 1784, at *3 ("Therefore, Congress has expressed a public policy that the antitrust laws be enforced by private action and has evidenced this policy by providing for treble damages and reasonable attorneys' fees for successful plaintiffs.").

524. Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties could only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.") *see* cases cited *supra* note 504 and accompanying text (finding the public good of antitrust to outweigh the use of private plaintiffs who file suit with "unclean hands").

525. Pitofsky, *supra* note 429, at 1075-77 & nn.20-25.

526. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 240 (1987) (quoted *infra* text accompanying note 541); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); *In re Arizona Escrow Fee II*, 1983 WL 1784, at *3 (quoted *supra* note 523).

motivated plaintiffs enjoyed (and could afford) equally motivated counsel.[527] Another case narrated a highly revealing tale of Congress's intentions for private antitrust litigants:

> In 1976 Congress, reacting to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U. S. 241 (1975), amended section 16 of the Clayton Act to authorize an award of attorney's fees to a plaintiff who "substantially prevails" in a suit for injunctive relief. Noting that *Alyeska* created "a significant deterrent to potential plaintiffs bringing and maintaining lawsuits to enjoin antitrust violations," Congress recognized "a compelling public policy to justify the award of attorney fees . . . ." The House Report noted: "Indeed, the need for the awarding of attorneys' fees in § 16 injunction cases is greater than the need in § 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect. A prevailing plaintiff should not have to bear such an expense. Section 3(3) of H. R. 8532, therefore, is intended to reiterate congressional encouragement for private parties to bring and maintain meritorious antitrust injunction cases."[528]

As noted, Congress swiftly responded to *Alyeska*'s holding that the traditional "American rule" demanded that each party bear its own costs of counsel, refusing to override that long-standing public policy without legislative direction.[529] In providing just that direction, Congress once again

---

527. *See* Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 52 (5th Cir. 1976) ("[N]o statute or public policy denying an antitrust plaintiff the privilege enjoyed by plaintiffs in other cases, that of making an assignment [of the right to fees] to his attorneys in order to secure their services in the prosecution of his case. To deny counsel the fees awarded, and to do so at the instance of an antitrust defendant, would, we think, be inconsistent with the purpose of the statute in allowing, if not encouraging, private enforcement of the antitrust laws."); *accord* Goodman v. Heublein, Inc., 682 F.2d 44, 47 (2d Cir. 1982); *see* In re Linerboard Antitrust Litig., 2004 WL 1221350, at *17 ("Providing sufficient incentive to attorneys to undertake class actions . . . is particularly important in antitrust cases. As the Second Circuit has explained, the incentive for 'the private attorney general' is particularly important in the area of antitrust enforcement because public policy relies so heavily on such private action for enforcement of the antitrust laws.") (quoting Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc., 481 F.2d 1045, 1050 (2d Cir.)), *amended*, 2004 WL 1240775 (E.D. Pa. June 4, 2004).

528. *In re* Arizona Escrow Fee Antitrust Litig., No. 80-840A PHX CAM, 1982 WL 1938, at *7 (D. Ariz. Sept. 22, 1982) (citations omitted) [hereinafter *In re Arizona Escrow Fee Antitrust Litig. I*].

529. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975) ("In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser. We are asked to fashion a far-reaching exception to this 'American Rule'; but having considered its origin and development, we are convinced that it would be inappropriate for the Judiciary, without legislative

reaffirmed both the rarefied position of the antitrust laws and the importance of private attorneys general to their practical application.[530] Seldom is congressional intent for public policy so superabundantly clear.[531]

At least in the abstract, the Supreme Court agreed heartily.[532] In 1963, *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.* acknowledged that "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws," and construed tolling provisions in light of "congressional policy objectives" so as to "lend considerable impetus to that policy."[533] Congress strove to place its thumb on the scale as heavily as possible in favor of private litigation: "to minimize the burdens of litigation for injured private suitors" and provide "as large an advantage as the estoppel doctrine would afford."[534] Nearly a decade later, *Zenith Radio Corp. v. Hazeltine Research, Inc.* found public policy little changed, quoting *Minnesota Mining* with approval.[535] For good measure, *Zenith* also confirmed that to wholly foreclose private recovery by a statute or repose would "be contrary to the congressional purpose that private actions serve 'as a bulwark of antitrust enforcement,' and that the antitrust laws fully 'protect the victims of the forbidden practices as well as the public,'" quoting yet another pair of past cases in support.[536] Even *Mitsubishi* had favorably quoted the pro-antitrust *American Security* whilst discarding its misgivings: "A claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-

guidance, to reallocate the burdens of litigation in the manner and to the extent urged by respondents and approved by the Court of Appeals.").

530. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, title III, § 302(3), 90 Stat. 1396, *codified at* 15 U.S.C. § 26 (2018) ("In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.").

531. *E.g.*, Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co., 432 F. Supp. 2d 488, 501 (E.D. Pa. 2006) ("The Court need not wade too deeply into the murky waters of Congressional intent."), *aff'd*, 503 F.3d 339 (3d Cir. 2007); *see* Theresa A. Gabaldon, *State Answers to Federal Questions: The Common Law of Federal Securities Regulation*, 20 J. CORP. L. 155 (1995) ("The fact of the matter is that congressional intent is seldom clear."); *see also supra* notes 499-500 and accompanying text (discussing the essential inscrutability of public policy).

532. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 745-46 (1977) (acknowledging the "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws" and "legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws").

533. Minnesota Min. & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965).

534. *Id.* at 317 ("Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions.").

535. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 336 (1971).

536. *Id.* at 340 (citations omitted).

general who protects the public's interest."[537] It could hardly do otherwise, for the Court had previously explained further quite cogently:

> Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. This system depends on strong competition for its health and vigor, and strong competition depends, in turn, on compliance with antitrust legislation. In enacting these laws, Congress had many means at its disposal to penalize violators. It could have, for example, required violators to compensate federal, state, and local governments for the estimated damage to their respective economies caused by the violations. But, this remedy was not selected. Instead, Congress chose to permit all persons to sue to recover three times their actual damages every time they were injured in their business or property by an antitrust violation. By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as "private attorneys general."[538]

b. Convenient But Not Critical to Securing Competition?

Despite such congenial verbiage historically, however, the contemporary Supreme Court at least has not conceived of private antitrust enforcement as a mechanism to be exalted over all comers—helpful, even important, but hardly indispensable.[539] As *Italian Colors* put it, "to say that Congress must have intended whatever departures from those normal limits advance antitrust goals is simply irrational. '[N]o legislation pursues its purposes at all costs.'"[540] In holding that claims under RICO were arbitrable, the Court offered a short paean to the role of private enforcement in antitrust—a far more vital role, it thought, than even combatting racketeering and corrupt organizations:[541] "Antitrust violations generally have a widespread impact on national markets as a whole, and the antitrust treble-damages provision gives private parties an incentive to bring civil suits that serve to advance the

537. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985) (quoting American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968)).

538. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972) (citations omitted).

539. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 234 (2013) (quoted *supra* note 403 and accompanying text).

540. *Id.* at 233-34.

541. *McMahon*, 482 U.S. 241-42 (1987) ("Not only does *Mitsubishi* support the arbitrability of RICO claims, but there is even more reason to suppose that arbitration will adequately serve the purposes of RICO than that it will adequately protect private enforcement of the antitrust laws. . . . The private attorney general role for the typical RICO plaintiff is simply less plausible than it is for the typical antitrust plaintiff, and does not support a finding that there is an irreconcilable conflict between arbitration and enforcement of the RICO statute.").

national interest in a competitive economy."[542] All the same, the Court reminded, it had still held antitrust claims to be subservient to a valid contract to arbitrate two years before, notwithstanding the vaunted role of treble damages and private attorneys general.[543] "Without doubt, the private cause of action plays a central role in enforcing this regime," the Court admitted, and "[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators."[544] But all the benefits of private enforcement, it had thought then, could be realized well enough (for government work?) in an arbitral forum, ostensibly overseen by watchful Article III judges.[545]

"Notwithstanding its important *incidental* policing function," the Court summarized, "the treble-damages cause of action conferred on private parties by § 4 of the Clayton Act . . . seeks primarily to enable an injured competitor to gain compensation for that injury."[546] Once again, the conscripted army of private attorneys general, however handy, was thought only collateral to the free market economy enforced by the antitrust laws.[547] Ultimately, the Sherman Act's "primary purpose was to prevent undue restraints of interstate commerce in the public interest, and to afford protection of the public from the subversive or coercive influences of monopolistic efforts. The right granted to individual suitors to seek reparation was secondary and subordinate in purpose."[548]

Undoubtedly, not all plaintiffs have the best interests of the economy at heart.[549] Some may be trying to use the powerful cudgel of the antitrust laws to entrench rather than uproot inefficiency in the market when the

---

542. *Id.* at 241.

543. *Id.* at 238-40.

544. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).

545. *Id.* at 637-38 (quoted *supra* text accompanying notes 387-88).

546. *Id.* at 635 (emphasis added).

547. *Cf. supra* text accompanying note 539.

548. Feddersen Motors v. Ward, 180 F.2d 519, 521-22 (10th Cir. 1950) (citations omitted to Shotkin v. General Electric Co., 171 F.2d 236 (10th Cir. 1948); Appalachian Coals, Inc., v. United States, 288 U.S. 344, 359 (1933), *overruled on other grounds by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 763 (1984); Glenn Coal Co. v. Dickinson Fuel Co., 72 F.2d 885 (4th Cir. 1934)); Feddersen Motors,180 F.2d at 521 ("It extended the inhibition to any combination or conspiracy, whatever its form, having injurious effects of that kind upon the competitive system, and it provided both public and private, remedies for the injuries flowing from the restraints.").

549. Pitofsky, *supra* note 429, at 1076 n.15 ("I do not want to slight the fact that there can be an unsavory side to some of these private treble damage actions. Most certainly, there have been instances where they were instituted to harass competitors and undermine the competitive process, and occasionally they have been motivated mainly by a desire to reap windfall profits or avoid honest obligations."); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 (1977) ("Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty.").

inefficiency is their own.[550] Courts wisely rebuffed plaintiffs whose disingenuousness was clear in claiming antitrust violations whilst simultaneously seeking to benefit from them, as was often claimed by unwilling merger targets.[551] Moreover, "tag-along" plaintiffs seeking to intervene in a governmental suit may solely be seeking payouts that would not advance the exposure of malefactors but would rather impede the swift resolution of those select cases so significant that the government has initiated a prosecution—to vindicate the public's interest, not to collect damages.[552] Private plaintiffs also raise the specter of cowing potential witnesses in the same industry whose disclosures would typically include highly sensitive competitive information.[553] Taking these concerns into account, the doctrine of antitrust standing was necessitated to weed out plaintiffs bringing a case where they had not suffered the sort of harm that antitrust law meant to deter.[554] Indeed, such standing is intended to guard against plaintiffs seeking "windfall profits," as the Supreme Court explained in promulgating the doctrine:

> But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. . . . It is inimical to the purposes of these laws to award damages for the type of injury claimed here. Of course, Congress is free, if it desires, to

550. *E.g.*, Burnup & Sims, Inc. v. Posner, 688 F. Supp. 1532, 1534-35 (S.D. Fla. 1988) (The target of an acquisition attempt "is a poor private attorney general because it is not a '"victim"' of the alleged violation. The suit must be understood in its true sense, an attempt by the incumbent management to defend their own positions, not as an attempt to vindicate any public interest. Understanding that premise demonstrates the evils of permitting target companies to make use of the antitrust laws as defensive weapons.").

551. Burlington Indus., Inc. v. Edelman, 666 F. Supp. 799, 805-06 (M.D.N.C. 1987) ("Finally, the court notes that policy considerations also support denying a target company standing to contest a hostile takeover. As Judge Friendly has noted, targets of tender offers routinely seek shelter under Section 7 of the Clayton Act. Accordingly, a court should not interfere with a tender offer unless the target company dispels the inference of disingenuousness by showing that the alleged antitrust violation would expose it to readily identifiable harm."), *aff'd*, No. 87-1622(L), 1987 WL 91498 (4th Cir. June 22, 1987); *see, e.g.*, Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc., 784 F.2d 1325, 1334 (7th Cir. 1986); Central National Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983); Carter Hawley Hale Stores, Inc. v. The Limited, Inc., 587 F. Supp. 246, 250 (C.D. Cal. 1984).

552. *See, e.g.*, United States v. Dentsply Int'l, Inc., 190 F.R.D. 140, 144-45 (D. Del. 1999) (discussing H.R. Rep. No. 90–1130, at 5, 8, *reprinted in* 1968 U.S.C.C.A.N. at 1902, 1905).

553. *See, e.g.*, *Dentsply*, 190 F.R.D. at 146 ("Moreover, it is possible that third party witnesses who are also competitors of Dentsply might not object to Government discovery of their proprietary information. However, they would strenuously fight to avoid disclosure of that information to rivals, causing delay that would necessitate lengthening the discovery schedule.").

554. *See Burlington*, 666 F. Supp. at 804-05 (citing *Brunswick*, 429 U.S. at 489).

> mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of these consequences, "we should insist upon a clear expression of a congressional purpose," before attributing such an intent to Congress.[555]

But perhaps the most serious refutation to the premise that private attorneys general are strictly necessary to effective antitrust enforcement is the most self-evident, enunciated as such by the Supreme Court in *Mistubishi*—"of course, the antitrust cause of action remains at all times under the control of the individual litigant: no citizen is under an obligation to bring an antitrust suit, and the private antitrust plaintiff needs no executive or judicial approval before settling one."[556] A volunteer who freely sets his own terms of participation can scarcely be a stable rock upon which to build the secular church of economic welfare.[557]

V. THE CRUDE AND STILL INCHOATE CONTOURS OF THE CURRENT COMPROMISE

The preceding discussion of public policies in conflict thus comes full circle back to the specific subject of private antitrust plaintiffs who have ostensibly settled and released their claims. Despite the Supreme Court's comment that individual actors (for they are not *really* attorneys general, after all) need no judicial imprimatur to settle,[558] it is unsurprising that the courts assumed the burden of devising a reasoned approach to these private releases of antitrust liability.[559] The core antitrust statutes are aspirational, generalist, and have required long decades of judicial exegesis to make sense of their laconic commands in light of evolving economic theory.[560] Even for the far

555. *Brunswick*, 429 U.S. at 488 (quoting Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 264 (1972)).

556. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985) (citation omitted).

557. *But cf. Matthew* 16:18 (King James) "And I say also unto thee, That thou art Peter, and upon this rock I will build my church; and the gates of hell shall not prevail against it.").

558. *Mitsubishi Motors Corp.*, 473 U.S. at 636.

559. *See supra* Part III. A.

560. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015) ("Congress, we have explained, intended that law's reference to 'restraint of trade' to have 'changing content,' and authorized courts to oversee the term's 'dynamic potential.' We have therefore felt relatively free to revise our legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences.") (citations omitted to State Oil Co. v. Khan, 522 U.S. 3, 20–21 (1997), and Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 732 (1988)); Sanger Ins. Agency v. HUB Int'l, Ltd., 802 F.3d 732, 742 (5th Cir. 2015) ("As with the notoriously terse language in the Sherman Act itself, the McCarran-Ferguson Act necessarily leaves many questions to be answered through the development of case law."); Sunshine, *supra* note 491, at 299 ("The United States first had to put its own house in order, which presented difficulties given the terse dictates

less contentious truism that *prospective* releases are void, "there is no statutory counterpart in the antitrust laws to the provision that invalidates advance releases of potential securities law claims[,]" and therefore, "the courts have developed and applied a corresponding public policy in the antitrust field as a matter of case law."[561]

A. Reductionist Rationalizations in the Part-and-Parcel Cases

It is likewise unsurprising that the resultant judicially-created part-and-parcel doctrine for retrospective releases, however well-intentioned, may seem somewhat crude or inconsistent at times. The courts of appeals addressing the potential conflict between private pacts and public policy in the part-and-parcel cases have avoided a direct clash for primacy in postulating that antitrust releases pose no special impediment to the Congressional scheme of antitrust policy and enforcement.[562] "In the abstract, of course," lectured the Fifth Circuit, "Ingram is quite correct that national antitrust policy favors private enforcement of antitrust claims," acknowledging ("as we must") the Supreme Court's decisions to that effect.[563] But, anticipating the Court's further movement in *Mitsubishi* and beyond,[564] "the existence of the Clayton Act alone and its related devices to assist an antitrust plaintiff prosecute his claims do not determine the issue of whether an antitrust plaintiff ha" sufficiently disproven the defense of a release.[565] After all, appellate courts had quite properly found that private plaintiffs had no affirmative responsibility to the common weal to bring their cases and incur all the costs and burdens.[566]

Others framed their evasion by highlighting the other avenues by which the antitrust laws might be vindicated.[567] The Fifth Circuit added this rationalization to its thorough airing in *Ingram*.[568] So too, the Second Circuit

---

of the Sherman Act. The Supreme Court thus adopted a policy of broad judicial exegesis of congressional purpose to give sinew to the statutory skeleton.").

561. Oberweis Dairy, Inc. v. Associated Milk Producers, Inc., 568 F. Supp. 1096, 1099 n.6 (N.D. Ill. 1983) (initial majuscule reduced to minuscule and citation omitted).

562. *See* VKK Corp. v. Nat'l Football League, 244 F.3d 122 (2d Cir. 2001); Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1312-13 (5th Cir. 1983); Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262, 266 (4th Cir. 1971); Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208 (9th Cir. 1950); *see also* Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100 (5th Cir. 1974).

563. *Ingram*, 698 F.2d at 1312.

564. *See supra* Part IV. C. 2. b.

565. *Ingram*, 698 F.2d at 1313.

566. *See*, *e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 636 (1985) (quoted *supra* text accompanying note 556); Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 892 (3d Cir.1975); Fabert Motors, Inc. v. Ford Motor Co., 355 F.2d 888, 890 (7th Cir. 1966); Duffy Theatres, Inc. v. Griffith Consolidated Theatres, Inc., 208 F.2d 316, 324 (10th Cir.1953).

567. *See, e.g.*, *Ingram*, 698 F.2d at 1316.

568. *Id.* ("Enforcement of a release which covers antitrust claims does not implicate or derogate from the remedial provisions of the federal antitrust laws. Indeed, they remain unaffected by our decision.

reasoned that a private release hardly traduces the government's interest in investigating or prosecuting an antitrust violation.[569] The Ninth Circuit found that "settlements in no wise obstruct possible criminal prosecutions which might be instituted by the Government, nor do they defeat the Congressional purpose of allowing private claimants in this class of actions the right of redress of their grievances in our courts," as most private plaintiffs, after all, have not entered into a voluntary "peace pact" with their putative tormentors, and the courts should not lightly set aside the clear wishes of those who had.[570]

There were yet more resourceful formulations.[571] One district court facing up to the clash of concerns emphasized the particularly strong interest in the negotiated repose of *antitrust* disputes, ingeniously turning antitrust policy against itself with the well-placed invocation of the revered competition scholars Philip E. Areeda and Herbert Hovenkamp.[572] And, there was no shortage of cases baldly expounding the austere rule that antitrust claims are not exempted from a general release on public policy grounds, whether or not a part-and-parcel objection had been raised.[573] One of these from the Third Circuit synthesized the full argument uncommonly well:

> Applying state law [of releases] to interpret private antitrust causes of action will not frustrate the federal enforcement of antitrust violations. The private antitrust cause of action provided by 15 U.S.C.A. § 15 allows a person injured as the result of an antitrust violation to bring a private suit for treble damages against the violator. Congress enacted this private cause of action as a supplemental means for the enforcement of the antitrust laws, paralleling the public cause of action enforceable by the Government. Although there is an unquestioned public interest in the "vigilant

---

The government has convicted McDermott for its antitrust violations. Our decision does not in any way affect those convictions. It has nothing whatsoever to do with future violations or future prosecutions. We preempt no government prosecution under the antitrust laws. Moreover, there is a significant public policy interest in permitting parties to enter into negotiations to settle their differences, even when these include possible antitrust claims.") (citations omitted).

569. VKK Corp. v. Nat'l Football League, 244 F.3d 114, 122 (2d Cir. 2001) ("Although a release from a private antitrust action forecloses that action, it does not immunize the released party from liability under federal antitrust laws for its acts—government enforcement of those laws remains possible.").

570. Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208 (9th Cir. 1950) (quoted in part *supra* text accompanying note 63).

571. *See, e.g.*, Xerox Corp. v. Media Scis., Inc., 609 F. Supp. 2d 319, 325 (S.D.N.Y. 2009).

572. *Id.* ("Further, the Court is also cognizant of the competing policies favoring settlement and the enforcement of arbitration clauses. In general, public policy favors the settlement of disputes. This fact has been specifically noted by a leading antitrust treatise: "Repose is especially valuable in antitrust, where tests of legality are often rather vague, where many business practices can be simultaneously efficient and beneficial to consumers but also challengeable as antitrust violations . . . ." II Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 320a, at 282 (3d ed. 2007)." (case citations omitted)).

573. *See* cases cited *supra* notes 355-59.

> enforcement of the antitrust laws through the instrumentality of the private treble-damage action," this public interest does not prevent the injured party from releasing his claim and foregoing the burden of litigation. Since release of the private cause of action in no way dilutes the government's remedies against the antitrust violator, federal policy would not seem to require the condemnation of releases which are otherwise valid under the various state laws.[574]

The Fifth Circuit's contrary reasoning in *Redel's* is something like the proverbial exception that proves the rule.[575] The panel there recognized clearly the possibility for clashes between public policies: "There are two policies which must be accommodated. The first requires the greatest respect for private enforcement as the hallmark of the federal antitrust regulatory system. The second policy requires us to respect the amicable settlement and release of antitrust claims by the parties themselves."[576] But, as the Fifth Circuit had foreshadowed in according to antitrust the "*greatest* respect," it was not settlement that was the stronger policy: "Where these policies are brought into conflict, the first must prevail."[577] The court also expressed disapproval of schemes to hoodwink a weaker counterpart into unwittingly signing away the right to bring suit in antitrust, and encouraged the clear enunciation of any such waiver.[578] This suggestion found some support in *SCM*, which had quoted a district court for the proposition that the knowing intent to waive antitrust claim was highly germane:

> While the federal policy of jealously regarding the rights of private antitrust claimants should not as a matter of law preclude their being able to release claim—*even unknown claims*—nor protect them, after-the-fact, from their conscious though unwise action, we think it does allow—and is supported by—a rule which requires the court to determine that they *knew and intended* that the release cover all that it is being held to cover.[579]

So too did the dissent in *SCM* advert to the "Congressional policy to rely heavily upon the private attorney general concept for enforcement of the

574. Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 891-92 (3d Cir.1975) (citations omitted).

575. *Cf.* NIGEL WARBURTON, THINKING FROM A TO Z 66 (2007) (explaining how the adage in fact refers to the unusual example that *tests* or *challenges* the general rule rather than corroborates it, as it is commonly misinterpreted).

576. Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100 (5th Cir. 1974).

577. *Id.*

578. *Id.* at 100-01.

579. Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262, 266 (4th Cir. 1971) (quoting Novak v. General Electric Corp., 282 F. Supp. 1010, 1023 (E.D. Pa. 1967)) (emphasis in original).

antitrust laws" and "some authority indicating that in view of this federal policy, federal law should wholly displace state law governing release of antitrust claims," citing to *Zenith*.[580] By the logic of the *Redel's* and *SCM* holdings, antitrust considerations are at least sufficiently significant enough that the court must at least ensure there is an actual conflict—that the release in fact functions by design to block private antitrust claims.[581] And *Redel's* (and the *SCM* dissent, if not the majority) thought that if there were truly a conflict, the antitrust policy must triumph.[582] That prioritization, however, must be read in the context that neither court of appeals found any such lack of intent to waive antitrust claims in the releases under dispute and upheld them.[583] One must also observe that the Fifth Circuit's supposed solicitude for the private enforcement of antitrust professed in *Redel's* did not overcome the release presented a decade thence in *Ingram*.[584]

Redel's aside, the part-and-parcel courts' overall posture of studied evasion is much bolstered by the contemporary inclination in appellate courts (including the Supreme Court) to find private enforcement "incidental," "subordinate," "supplemental," or "secondary" to the "primary" public policy for antitrust, paving the way for another aspect of public policy—respecting consensual resolution of disputes—to carry the day.[585] If private attorneys general are (to borrow some terminology) an unquantifiable plus factor rather than a mandatory quota in sustaining antitrust law, their more nebulous impact can be more easily waved away.[586] As with the Supreme Court in *Mitsubishi*, it is easier to presume that private attorneys general could pursue their purpose notwithstanding the strictures of their contracts[587] than to confront a case like *Italian Colors* arguing directly that they most certainly could not.[588] But when squarely faced with that long-reserved dilemma, the Court ruled just as squarely: private prerogative would prevail over the unalloyed public pursuit of antitrust.[589] The verdict of the highest court was

580. *Id.* at 269-70 (Winter, J., dissenting) (citation omitted).
581. *Id.* at 262; *Redel's*, 498 F.3d at 95.
582. *Redel's*, 498 F.3d at 95.
583. *Id.* at 100; *SCM*, 448 F.2d at 266.
584. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1312-13 (5th Cir. 1983).
585. *See supra* cases cited 546-48 & 574 and accompanying text.
586. *Cf.* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . . Instead, a university may consider race or ethnicity only as a "'plus' in a particular applicant's file."); Regents of Univ. of California v. Bakke, 438 U.S. 265, 317-18 (1978) (Powell, J., concurring).
587. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635-38 (1985).
588. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231-33 (2013).
589. *Id.* at 234.

in: *Ingram* had the analysis right, and *Redel's* ordering of priorities was wrong.[590]

B. The Perplexity of a Settlement Between Public Good and Private Prerogative

Inevitably, the defense of private prerogatives in contract would make strange bedfellows with the public good of a healthy economic system (not to mention a healthy judicial branch) guarded by the diligent sentinels of antitrust.[591] The first order of the Sherman Act, after all, was to forbid "every contract . . . in restraint of trade or commerce."[592] Even with the early judicial gloss that only unreasonable restraints were forbidden,[593] that private objectives in contracts would be sharply scrutinized and sometimes set aside was the *entire point* of the sprawling apparatus of antitrust law.[594] Were private parties' preferences or pacts to reflexively prevail over the common weal, the overweening conglomerate of John D. Rockefeller's Standard Oil and the pertly-named Whiskey Trust, Sugar Trust, Lead Trust, Cotton-Oil Trust, and Linseed-Oil Trust at which the Sherman Act had aimed its crosshairs might still be pleasantly plying their monopolies today, alongside many more.[595] Only, as did the part-and-parcel courts, following the lead of the Supreme Court, by presuming (or pretending) that these strange bedfellows were not tugging at the same blanket could overt conflict be avoided, alongst with the resulting difficult decisions.[596]

Then again, Standard Oil was brought down not by plucky privateers but by governmental trust-busters, as were countless other early cartels.[597]

---

590. *Compare* Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100 (5th Cir. 1974) (quoted *supra* text accompanying notes 576-77, *with* Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1312-13 (5th Cir. 1983) (quoted *supra* text accompanying notes 565 & 567).

591. *Cf.* WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 2.

592. Pub. L. 51-647 § 1, 26 Stat. 209, *codified at* 15 U.S.C. § 1 (2018).

593. Jared S. Sunshine, *Antitrust Precedent & Anti-Fraternity Sentiment: Revisiting Hamilton College*, 39 CAMPBELL L. REV. 59, 69 (2017) ("Despite the sweeping language, the courts quickly concluded that only unreasonable restraints on trade were illegal, lest the most picayune (or procompetitive) agreement give rise to liability.") (citing Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911), and Chi. Bd. of Trade v. United States, 246 U.S. 231, 237-38 (1918)); Jeffrey C. Sun & Philip T.K. Daniel, *The Sherman Act Antitrust Provisions and Collegiate Action: Should There Be a Continued Exception for the Business of the University?*, 25 J. COLL. & UNIV. L. 451, 455 (1998).

594. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 FORDHAM L. REV. 2279, 2334-42 (2013); Sun & Daniel, *supra* note 593, at 453-54.

595. *See Collins*, *supra* note 594, at 2317; *see also* Sun & Daniel, *supra* note 593, at 453-54.

596. *See supra* Part III. B. and Table 1.

597. *E.g.*, Standard Oil Co. v. United States, 283 U.S. 163 (1931); United States v. Am. Linseed Oil Co., 262 U.S. 371, 380-81 (1923); United States v. Am. Tobacco Co., 221 U.S. 106, 142 (1911); *Standard Oil*, 221 U.S. 1; Nat'l Cotton Oil Co. v. Texas, 197 U.S. 115, 127 (1905); Swift & Co. v. U.S., 196 U.S. 375 (1905); N. Sec. Co. v. United States, 193 U.S. 197, 213 (1904) (Morgan Railway Trust). *But see* United States v. E.C. Knight Co., 156 U.S. 1, 17 (1895) (holding the Sugar Trust beyond the Sherman Act because it was a manufacturing rather than distribution monopoly), *abrogated by Swift*, 196 U.S. at 375;

Storied modern monopolies too have bowed before the antitrust watchdogs of the Department of Justice and Federal Trade Commission:[598] the United States has not one but *two* agencies charged with overseeing fair competition.[599] Is this not proof positive of what the Supreme Court has been espousing of late—that there is more than enough blanket to cover both bedfellows once realizing that private prosecutions are only one fickle means to an end and that the government has reserved itself ample authority to protect the public?[600] Nor is the Supreme Court's caution against blithely exegesizing exceptions to contract out of antitrust law a precipitous modern development:

> As a defense to an action based on contract, the plea of illegality based on violation of the Sherman Act has not met with much favor in this Court. This has been notably the case where the plea has been made by a purchaser in an action to recover from him the agreed price of goods sold. In *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, one who had purchased merchandise from a firm allegedly a combination in restraint of trade was not allowed to set up that fact as a defense to an action for the purchase price. In *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165, Corn Products sold merchandise to Wilder with a standing offer, of which the latter apparently had sought to take some advantage, to give Wilder a rebate if it bought exclusively from it. Again, in an action by the seller, Corn Products, to recover the agreed price, the purchaser, Wilder, was denied any defense of illegality based on the Sherman Act. The Court observed that the Sherman Act's express remedies could not be added to judicially by including the avoidance of private contracts as a sanction. Obviously, state law governs in general the rights and duties of sellers and purchasers of goods, and, while the effect of illegality under a federal statute is a matter of federal law, even in diversity actions in the federal courts after *Erie R. Co. v. Tompkins*, 304 U.S. 64, still the federal courts should not be quick to

---

see also Werner Troesken, *Exclusive Dealing and the Whiskey Trust, 1890–1895*, 58 J. ECON. HIST. 755, 756 (1998) (arguing that the Whiskey Trust failed of its own accord because of economic pressures rather than regulation).

598. *E.g.*, United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35 (D.D.C. Apr. 3, 2000), *direct appeal denied*, Microsoft Corp. v. United States, 530 U.S. 1301 (Sept. 26, 2000), *aff'd in part, rev'd in part*, 253 F.3d 34, 47 (D.C. Cir. June 28, 2001), *cert. denied*, Microsoft Corp. v. United States, 534 U.S. 952 (Oct. 9, 2001), *on remand*, 231 F. Supp. 2d 144, 166 (D.D.C. Nov. 1, 2002), *aff'd*, Massachusetts v. United States, 373 F.3d 1199 (D.C. Cir. June 30, 2004); United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

599. *See* Douglas H. Ginsburg, *The Appropriate Role of the Antitrust Enforcement Agencies*, 9 CARDOZO L. REV. 1277, 1277-78 (1988).

600. *See supra* Part IV. C. 2. b.

> create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act.[601]

Part-and-parcel arguments have been mostly rebuffed for most of a century, and antitrust enforcement has continued apace.[602] Arbitration contracts involving antitrust claims were allowed in 1985, and for all the asseverations then and since that the sky was falling, the American economy has hardly atrophied in the interim.[603] The shrillness of those most fearful of private arrangements for dispute resolution has not proven persuasive: "The assessment should remain unbiased by a perspective either in favour of arbitration and competition law. This is precisely the weakness of the current debate, which is marked by irreconcilable differences between arbitration and competition law practitioners. As such, they render the tension between [contractual] finality and [competitive] fairness inescapable."[604] Not every disbelieved doomsayer has the God-given gift of prophecy granted Cassandra:[605] Most are just hysterically hawking false forecasts of apocalypse; most overhyped tensions are susceptible of escape in more measured hands.

Cooler heads, however, have shared some of the trepidations of the more overwrought.[606] The same British author who decried the modern Cassandras also noted that in privately ordained arbitral awards, the "initial impression of conformity is precisely the product that the parties wishing to evade antitrust rules expect the arbitrators to deliver (not to mention the fact that the parties still sharing that wish are least likely ever to seek the intervention of national courts)."[607] Another commentator has observed that private arbitrators are likely to take a "minimalist" approach that condemns only obvious restraints of trade and overlooks those that regulators might have discerned.[608] Meanwhile, judges have doubted whether national regulators,

---

601. Kelly v. Kosuga, 358 U.S. 516, 518-19 (1959) (most citations omitted); *see also* Cont'l Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227, 258-59 (1909).

602. *See supra* Part III. B & Table 1.

603. *See supra* Part IV. A. 2. a.

604. Ason, *supra* note 427, at 4.

605. *Cf.* 3 PUBLIUS VERGILIUS MARO, AENEID 43, *ll.* 182-87 & n.186-87 ("Apollo had punished Cassandra for betraying him by ordaining that her prophecies would be true, but never believed.") (Christine Perkell & Randall T. Ganiban eds., 2009).

606. *See, e.g.*, Ason, *supra* note 427, at 6.

607. *Id.*

608. Carlos Ragazzo & Mariana Binder, *Antitrust and International Arbitration*, 15 U.C. DAVIS BUS. L.J. 173, 189 (2015). ("[O]ne can say that the minimalist approach prevails. In more practical terms, in order for an antitrust violation to be deemed a transgression of public policy, it must be blatant and jeopardize the objectives of the competition policy. As a rule, an [arbitral] award that does not condemn horizontal agreements which lead to more severe competition restrictions, such as price fixing, output restriction and market division amongst competitors will almost certainly be a violation of public policy. The violation of public policy will be less evident, however, in decisions related to vertical restraints, such as exclusivity agreements, where the illegality is less obvious and more subject to an effects test."); *see id.*

even duplicated between plural agencies, would actually rather than hypothetically be ready and able to intervene whenever private contracts went awry or ran amok.[609] Moreover, unlike more entrepreneurial private parties, antitrust agents "may properly use their powers to investigate only if there is a reasonable basis to believe that the investigation will uncover violations of the laws the agencies are authorized to enforce, and the scope and burdens of the investigation should be limited," leaving regulators more reactive rather than proactive.[610] And most saliently, the *SCM* dissent observed that if a state's contract law were "antagonistic to the effective enforcement of private antitrust claims," then federal courts may be needed to displace inimical local law in favor of the nationwide policy,[611] following the path charted by *Zenith*.[612] Some measure of contractual avoidance clearly *is* a "requirement of the Sherman Act"; the great debate is over the proper measure, and who is best situated to make those decisions.[613] Perhaps this is an unavoidable tension after all, as Professor Robert Pitofsky announced in a speech on antitrust arbitration to the New York City Bar in 1969:

---

at 193 ("Arbitrators have as their main goal the resolution of the controversy between the parties, being the decision on the competition issue necessary for the achievement of this goal. On the other hand, the purpose of the competition authority is to ensure and monitor the application of, and compliance with, competition rules. This distinction, even though theoretical, may have practical effects on the performance of each of these bodies.").

609. *See, e.g.*, Baxter Int'l, Inc. v. Abbott Laboratories, 315 F.3d 829, 838-39 (7th Cir. 2003) (Cudahy, J., dissenting) ("Nor am I much reassured by the substitute antitrust enforcement possibilities mentioned by the majority. It is conceivable that the Federal Trade Commission or the Justice Department might attack Abbott's monopoly conferred by the arbitrators or that another competitor might surface to provide competition from a generic sevoflurane manufactured by some process yet to be invented, but these possible sources of law enforcement or of competition are all hypothetical. I know of no authority for the theory that the existence of hypothetical sources of antitrust enforcement or of competition can be a defense to an agreement violative of the antitrust laws or to an arbitration award imposing such an agreement."); *accord* Pitofsky, *supra* note 429, at 1073 (private enforcement "will insure some minimal deterrent against local and not too flagrant violations of law which the public enforcement agencies, because of limited resources, would almost certainly ignore").

610. Frank Pasquale & Jacqueline Green, *Two Politicizations of U.S. Antitrust Law*, 15 BROOK. J. CORP. FIN. & COM. L. 97, 106-07 (2020) (quoting Ryan Goodman, *11 Top Antitrust Experts Alarmed by Whistleblower Complaint Against A.G. Barr and Office of Professional Responsibility's Opinion*, JUST SECURITY (June 26, 2020), https://www.justsecurity.org/71059/top-antitrust-lawyers-assess-john-elias-whistleblower-complaint-against-a-g-ban-including-office-of-professional-responsibilitys-letter/); *see* Pitofsky, *supra* note 429, at 1073.

611. *SCM*, 448 F.2d at 270 (Winters, J., dissenting) ("However, none of the authorities holds that federal law must be applied to govern the applicability of an antitrust release to the parties to the release where, as here, the parties contracted with reference to state law. But even if state law is not wholly displaced, federal policy has some bearing on the question. If the state law governing releases were antagonistic to the effective enforcement of private antitrust claims, for example, the interposition of a federal rule might be appropriate." (citation omitted)).

612. *See* Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

613. Kelly v. Kosuga, 358 U.S. 516, 519 (1959); *see supra* sources cited note 595 and accompanying text.

> The problem is that there is a second policy consideration that must be taken into account with respect to arbitration of antitrust claims, and that involves the increasingly apparent determination of Congress and the courts to facilitate private antitrust enforcement as a complement and supplement to enforcement by public agencies. In several recent cases where private plaintiffs resisted reference of their antitrust claims to the arbitration process, the courts in effect were asked to decide whether Congress' sympathetic support of private antitrust claimants would be completely or substantially undermined by requiring those claimants to dispose of those claims . . . .[614]

But for all these persistent misgivings at deference to private contract and qualms about reliance upon executive law enforcers, there is ample evidence and opportunity for private abusive assertion of antitrust principles to advance antisocial aims.[615] The plaintiffs urging courts to set aside their releases of liability were not likely motivated by the gallant impulse to uphold economic virtue but because those releases stood athwart them and the oodles of (trebled) compensation they craved.[616] That antitrust policy might provide a mechanism to advance their avarice was no doubt as "incidental" as the Supreme Court elsewhere deemed it.[617] Most such pleas have heaped piles of arguments at common law and equity upon the courts in hopes that one would survive, with part and parcel only one frail stick in a hefty bundle: these private attorneys general are not, in the main, particularly principled champions of antitrust, it seems.[618] The observed ubiquitous failure to substantiate part-and-parcel claims is the predictable result.[619] Undoing settlements has a tangible cost.[620] Allowing the invocation of antitrust policy to automatically imply victory for the questionable claimant of that pallium in the face of a clear and consensual contract would not vindicate that policy but reward regretful contractants who had happily made peace long ago but happened to qualify for an unexpected and undeserved windfall:[621] "Too great a willingness to find antitrust violations in settlement arrangements would

614. Pitofsky, *supra* note 429, at 1073.

615. *See id.* at 1076 n.15 (quoted *supra* note 549); *see supra* cases cited notes 550-55 and accompanying text.

616. *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (describing plaintiff's goal as "windfall profits") (quoted *supra* note 555).

617. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 635 (1985).

618. *See, e.g.*, Fresh Made, Inc. v. Lifeway Foods, Inc., No. Civ.A. 01–4254, 2002 WL 31246922, at *3-4 (E.D. Pa. Aug. 9, 2002) (rejecting part-and-parcel argument as a belated and unfounded litigation tactic, although allowing challenge to release to go forward on a separate fraudulent inducement theory); Michael Rose Productions, Inc v. Loew's Inc., 19 F.R.D. 508, 510 (S.D.N.Y. 1956) (quoted *supra* note 71).

619. *See supra* cases cited note 291.

620. *See supra* Part IV. A. 1.

621. *See* Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208-09 (9th Cir. 1950).

significantly inhibit settlements of many types of cases at real cost to the administration of justice, with little likelihood of any contervailing benefit to the public interest."[622]

C. Back to the Future: Why the Proscription Against Prospective Releases?

Examining the underpinnings of the broad consensus condemning releases of future antitrust violations is instructive: why are parties' deliberate agreements to forgive future competitive harms reflexively considered unenforceable on antitrust public policy grounds even though they manifestly minimize litigation, evincing the same disrespect of private prerogative and potentially rewarding opportunistic Johnny-come-lately proponents?[623] The part-and-parcel cases themselves holding as much are not overly helpful: *Westmoreland*, one may recall, thought the rule for prospective releases so obvious as to need no explanation.[624] The reasoning of *Redel's*, at first blush, would imply that antitrust claims could never be released—prospectively or retrospectively—if it can be believed that the "right conferred on a private party by federal statute, but granted in the public interest to effectuate legislative policy, may not be released if the legislative policy would be contravened thereby," a formulation that may have something to do with its

622. Reasoner & Atlas, *supra* note 2, at 126.

623. *See* Three Rivers Motors Co. v. Ford Motor Co., 522 F.2d 885, 896 n.27 (3d Cir.1975) (agreeing with the temporal distinction); Gaines v. Carrollton Tobacco Board of Trade, Inc., 386 F.2d 757, 759 (6th Cir. 1967) ("Further, it seems clear as a matter of law that such an agreement, if executed in a fashion calculated to waive damages arising from future violations of the antitrust laws, would be invalid on public policy grounds."); Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (8th Cir. 1955) (quoted *infra* note 627); Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561, 578 (E.D. Pa. 2001); Innovation Data Processing, Inc. v. Int'l Bus. Machines, Corp., 585 F. Supp. 1470, 1477 (D.N.J.) ("Both parties are in agreement that a release purporting to extinguish any and all future claims for violations of the federal antitrust laws is void or voidable as against public policy."), *on reconsideration*, 603 F. Supp. 646 (D.N.J. 1984); Filtrator Apparatus Co. v. Food Enterprises, Inc., 491 F. Supp. 566, 569 n.2 (D.N.J. 1980); Hawkins v. Holiday Inns, Inc., No. 72-217, 1977 WL 1517, at *1 (W.D. Tenn. Dec. 19, 1977); Hunt v. Mobil Oil Corp., 410 F. Supp. 10, 27 n. 59 (S.D.N.Y. 1975); Mktg. Assistance Plan, Inc. v. Assoc'd Milk Producers, Inc., 338 F. Supp. 1019, 1022 (S.D. Tex. 1972); *see also* Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994), *as amended on denial of reh'g* (Jan. 11, 1995).

624. Westmoreland Abestos Co. v. Johns-Manville Corp., 39 F. Supp. 117, 119 (S.D.N.Y. 1941) (quoted *supra* text accompanying note 37). Then again, the *Westmoreland* court did not offer much explanation about anything. *See supra* text accompanying notes 38-39.

guarded skepticism of such releases in general.[625] But the Eighth Circuit case that *Redel's* went on to quote had explained the difference more clearly:[626]

> Any contractual provision which could be argued to absolve one party from liability for future violations of the antitrust statutes against another would to that extent be void as against public policy. This is because the effect of such a release could be to permit a restraint of trade to be engaged in, which would have impact not simply between the parties but upon the public as well. Such a release, if recognized as having any validity of that nature, could therefore itself operatively serve as a contract 'in restraint of trade.' Section 1 of the Sherman Anti-Trust Act, 15 U.S.C.A. 1, of course, brands all contracts in restraint of trade as 'illegal.'[627]

The broad consensus agrees with this etiology: that prospective releases do not merely quiet a dispute between parties already in the history books but proactively license or encourage the commission of violations.[628] A potential antitrust "victim" who agrees to look the other way in exchange for cash, allowing the future competitive harm to befall consumers, looks a good deal like a fellow conspirator sharing in the proceeds of the scheme.[629] (That said, there is something the faintest bit perverse about this neat assignment of blame, as the First Circuit once said in upbraiding the government for its creative argument that the victim had "participated" in his own extortion.[630]).

---

625. Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 99 (5th Cir. 1974). The court was rather transparently begging the question, though, for it introduced its rationale with the premise that "prospective application of a general release to bar private antitrust actions arising from subsequent violations is clearly against public policy" and concluded: "Releases may not be executed which absolve a party from liability for future violations of our antitrust laws." *Redel's Inc.*, 498 F.2d at 99.

626. *See Innovation Data*, 585 F. Supp. at 1477 ("The rationale for this rule was clearly articulated in *Fox Midwest Theatres* . . .").

627. *Fox Midwest Theatres*, 221 F.2d at 180.

628. *See Mktg. Assistance Plan, Inc*., 338 F. Supp. at 1022 ("It did not and could not settle disputes which had not yet arisen or serve as a license to engage in unlawful monopoly activities against the releasors. Such an absolution would violate public policy.").

629. *See* Sanjuan v. Am. Bd. of Psychiatry & Neurology, Inc., 40 F.3d 247, 250 (7th Cir. 1994), *as amended on denial of reh'g* (Jan. 11, 1995) ("Antitrust is a different matter. It is designed to regulate how private parties arrange their affairs—to protect the public from *how* private producers regulate their affairs. A bylaw of the Hardwood Manufacturers' Association committing the members to resolve all differences by appeal to the board of governors would not be effective in antitrust law, which is based on a suspicion that agreements among producers undermine the interests of consumers. A no-suit agreement may be one of the devices for shoring up a cartel. Consumers, strangers to such agreements, gain by turning producers against one another, the better to expose violations.") (citations omitted) (describing American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)).

630. *See* United States v. Rakes, 136 F.3d 1, 4 (1st Cir. 1998) ("Yet, on the government's own version of events, the Rakeses were not participants in the extortion in any capacity other than that of victim. The Rakeses were participants only in the very specialized sense that the victim of a robbery 'participates' by handing over his wallet under threat of violence, or the victim of a rape 'participates' by offering no further resistance when resistance appears futile or dangerous.").

Only when a release threatens to immunize future conduct does it directly present this pitfall.[631] This is precisely why arbitration clauses have caused such angina, for they contemplate the preemptive contractual resolution of future disputes, unlike a settlement of past offenses.[632] The identical logic may be found echoed in the part-and-parcel courts who questioned how a retrospective release could possibly further or catalyze an antitrust conspiracy, given that by definition all that it pardoned or even affected had already happened.[633]

Although the Supreme Court has not squarely answered the question, dicta in *Mitsubishi* did promise that if a contract's clauses "operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."[634] The Court had intimated this result in refusing to grant ill-defined antitrust immunity based on *res judicata* to conspirators, of whom some were previously sued on one theory of harm: "Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action. Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations."[635] Even after *Zenith* resolved that the federal policy promoting antitrust

631. Schwartz v. Dallas Cowboys Football Club, Ltd., 157 F. Supp. 2d 561, 578 (E.D. Pa. 2001) ("The release is also too broad because it bars later claims based on future conduct. Although the law permits a release to bar future claims based on the past conduct of the defendant, *Main Line*, 298 F.2d at 803, this release would bar later claims based not only on past conduct but also future conduct. For example, while the release properly bars future claims regarding the bundling of NFL games on satellite television, which forms the basis of this litigation, it also bars future claims for conduct such as the future bundling of games on cable television and the Internet. As discussed above, the legality of these practices under the antitrust laws was not litigated in the present suit. Because public policy prohibits a release from waiving claims for future violations of antitrust laws, and given that under the proposed release class members would be releasing unlitigated future claims, the releases are too broad."); *see also, e.g.*, *Innovation Data*, 585 F. Supp. at 1477, *on reconsideration*, 603 F. Supp. 646 (D.N.J. 1984)

632. Pitofsky, *supra* note 429, at 1079 ("It might be argued that parties are always free to settle a litigation on whatever terms they see fit, and therefore it follows they can do the lesser thing (less in the sense of undermining the public interest by essentially private disposition) and thus agree to submit a case to arbitration. However, the emphasis on the 'settlement' analogy is misplaced when used to uphold application of broad arbitration clauses to antitrust disputes that have not yet arisen. With respect to settlement, the events leading up to the controversy have already occurred; hence there is no problem (as there often would be with arbitration clauses) of a party, because of unequal bargaining power, agreeing to a waiver of future rights without knowing exactly what those rights will be.").

633. *See, e.g.*, Taxin v. Food Fair Stores, Inc., 287 F.2d 448, 451 (3d Cir. 1961); Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 829 (C.D. Cal. 1968) (quoted *supra* text accompanying note 93).

634. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (citing Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 98-99 (5th Cir. 1974); Gaines v. Carrollton Tobacco Board of Trade, Inc., 386 F.2d 757, 759 (6th Cir. 1967); Fox Midwest Theatres v. Means, 221 F.2d 173, 180 (8th Cir. 1955)).

635. Lawlor v. National Screen Service, 349 U.S. 322, 329 (1955); *see Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 (invoking the comparison of *Lawlor* to releases).

enforcement would supersede the ordinary contract law of releases in favor of the parties' expressed intent,[636] it was still held that all the mutual intent in the world could not overcome the public policy against prospective releases.[637] Nevertheless, the part-and-parcel cases have not read this wide-ranging hostility to have any bearing on the validity of *retrospective* releases.[638]

VI. A MODEST PROPOSAL FOR PREVENTING THE ANTITRUST RELEASES OF POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARTIES OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK[639]

Dean Erwin Chemerinsky's scathing 2014 appraisal of the Supreme Court tells a harrowing tale of a bygone era when the freedom of contract was constitutionally privileged above seemingly compelling matters of public welfare, leading to federal and state laws salutary to modern eyes (e.g. banning child labor) being struck down by the courts in favor of incumbent commercial concerns.[640] Legal history knows this period from the late nineteenth century to 1936 as the *Lochner* era,[641] and it is almost dogmatically held as a credo that the Court strayed for nearly half a century before self-correcting.[642] From this and other examples, Chemerinsky argued that the business of the Court should be to protect disadvantaged minorities against oppressive majoritarianism and privileged parties: powerful business interests ought not be judicially favored, and upholding the rights of the

636. Mktg. Assistance Plan, Inc. v. Assoc'd Milk Producers, Inc., 338 F. Supp. 1019, 1022 (S.D. Tex. 1972) (discussing *Zenith*).

637. Hawkins v. Holiday Inns, Inc., No. 72-217, 1977 WL 1517, at *1 (W.D. Tenn. Dec. 19, 1977) ("Regardless of whether the parties intended this release to extend to any actions upon future anti-trust violations, such an agreement would be found void as against public policy.").

638. *E.g.*, *Redel's Inc*., 498 F.2d at 99-100; Xerox Corp. v. Media Scis., Inc., 609 F. Supp. 2d 319, 325-26 (S.D.N.Y. 2009); Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *8-9 (S.D.N.Y. Oct. 10, 2008).

639. With apologies to Jonathan Swift. *Cf.* JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE FROM BEING A BURTHEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (1729).

640. CHEMERINSKY, *supra* note 310, at 90-119.

641. *Id.* at 95-101.

642. *Id.* at 94-95. ("Both liberals and conservatives—later Supreme Court justices and academics alike—agree that these decisions were terribly misguided. How did this happen? By the late nineteenth century, scholars and judges increasingly espoused a belief in a laissez-faire, unregulated economy."); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT'L J. CONST. L. 1, 2-3 (2004) ("The *Lochner* era exerts a powerful hold over the American constitutional imagination as an example of the dangers of judicial review. As Ronald Dworkin colorfully puts it, *Lochner* is the 'whipping boy' of American constitutional law. Indeed, much of the edifice of the last fifty years of American constitutional jurisprudence is a reaction to, a rejection of, and an attempt to avoid a repetition of, the *Lochner* era.") (quoting RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 82 (1996)). *But see* Barry Cushman, *Teaching the Lochner Era*, 62 ST. LOUIS U. L.J. 537, 540-43 & n.9 (2018) (arguing contra Chemerinsky that laissez-faire freedom of contract was not at the core of the *Lochner* Era's jurisprudence).

economically or socially weaker party must be the overriding concern.[643] But with all due respect to Dean Chemerinsky, this maxim cannot be fully formed, for sometimes the powerful are right, and sometimes the weak are wrong; it is the business of the law to decide which is which as a neutral arbiter, without putting a thumb on the scale.[644]

The Fifth Circuit panel in *Redel's* had intimated this philosophy of skepticism towards dominant economic interests, even if it stopped well short of holding as much in favor of virtue-signaling dicta.[645] So, too, *Redel's* gestured at an answer without mandating it: "While not an absolute requirement, antitrust policy certainly encourages the parties to a general release to evidence their intention to release antitrust claims."[646] In antitrust matters, after all, *Zenith* had held that it was the parties' intent that would control the breadth of a (retrospective) release.[647] Perhaps, however, the Fifth Circuit did not see a requirement as needed because of the inherent incentive to do so for the party seeking the release, as the district court quoted by *SCM* had concluded, "[t]he question of the parties' intent as to the scope of the release is one of fact not readily ascertained on a motion for summary judgment; but which should be determined by the trier of fact after a full hearing."[648] If the beneficiary wishes to avoid such a full hearing in hopes of a summary dismissal on the release, ensuring that the antitrust claims being released are abundantly clear to all parties should be essential.[649] With a nod to Chemerinsky by way of Pitofsky, doing so protects against "a party,

643. CHEMERINSKY, *supra* note 310, at 8-9; *id.* at 6 (proposing that "the Supreme Court usually sides with big business and government power and fails to protect people's rights" and that "throughout American history, the Court has been far more likely to rule in favor of corporations than workers or consumers").

644. *See* M & G Polymers USA, LLC v. Tackett, 574 U.S. 427, 438, (2015) ("As an initial matter, *Yard-Man* violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements. That rule has no basis in ordinary principles of contract law. And it distorts the attempt 'to ascertain the intention of *the parties*.'").

645. Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100 (5th Cir. 1974) (quoted *supra* text accompanying note 123).

646. *Id.* at 101.

647. *Id.* at 98 n.2; Mktg. Assistance Plan, Inc. v. Assoc'd Milk Producers, Inc., 338 F. Supp. 1019, 1022 (S.D. Tex. 1972) ("The Supreme Court's decision in Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971), involved the application of a release in an antitrust action. The Supreme Court held that as a matter of *federal law* the release of several joint tortfeasors did not operate to release another joint tortfeasor who was not a party to the suit. Instead, the Court ruled 'that a party releases only those other parties whom he *intends* to release.' 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d at 97 (emphasis added). The Court's ruling indicates that in the area of federal antitrust law mechanical, common law rules governing releases will be discarded in favor of the intent evidenced by the release itself.").

648. Novak v. General Electric Corp., 282 F. Supp. 1010, 1023 (E.D. Pa. 1967) (quoted in Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262, 266 (4th Cir. 1971); *supra* text accompanying note 579).

649. VKK Corp. v. Nat'l Football League, 55 F. Supp. 2d 196, 204-05 (S.D.N.Y. 1999) (quoted *supra* note 208).

because of unequal bargaining power, agreeing to a waiver of future rights without knowing exactly what those rights will be."[650]

Such an expectation would not wreak too seismic an upheaval in the law. Many part-and-parcel courts already made hay (sometimes hilariously) of purportedly bamboozled plaintiffs painting a self-portrait of babes-in-the-wood, when in fact they had had the benefit of sagacious counsel, experienced executives, and, most determinatively, a pretty good idea of what anticompetitive shenanigans were afoot when the release was signed.[651] These are presumably not the plaintiffs that Chemerinsky or *Redel's* would have the bench protect through special solicitude.[652] The philosophically sympathetic *Redel's*, after all, found that the plangent plaintiff there had all the benefits of size, counsel, and deliberation, and only unconvincingly presented itself as an unwitting dupe; thus that the contractual language was so "unmistakably clear" that it warranted no special hearing.[653] *VKK* addressed a sophisticated billionaire who had battled over the right to relocate for years before entering into a contract that made the release of antitrust claims explicit.[654] Even *California Concrete*, the first case to give a name to the doctrine, made clear that the plaintiff was no sap in the hands of a vicious manipulator:

> The idea of the release did not originate with American's officers. Kearns had the same thought as did American's attorneys. The release was not surreptitiously inserted among the documents to be signed in closing the escrow . . . It was not put in as part of a deliberate financial squeeze play by American. . . . 'The release was the brainchild of American's attorneys, advised as a normal legal defensive action. It was not a nauseous potion pressed upon CCP, which a calculating American knew CCP must drink if its financial thirst was to be assuaged. There is no evidence that American was attempting to take any unfair advantage of the situation brought about by Hooker's financial plight or his health.'[655]

Perhaps mindful of these ersatz naifs, judges have been chary of allowing a free-wheeling comparison of economic circumstance to color their

650. Pitofsky, *supra* note 429, at 1079 (quoted *supra* note 632); *see also id.* at 1083 (disclaiming concern where an arbitral contract is "not imposed on either party as a result of coercive economic pressure generated by the disparate size of the parties.").

651. *See* cases cited *supra* notes 294-96.

652. Redel's Inc. v. Gen. Elec. Co., 498 F.2d 95, 100, n.6 (5th Cir. 1974).

653. *Id.* at 99-100 & n.6 (citing *Novak*).

654. *VKK*, 55 F. Supp. 2d at 201-05.

655. Cal. Concrete Pipe Co. v. Am. Pipe & Constr. Co., 288 F. Supp. 823, 827 (C.D. Cal. 1968) (quoting itself in Decision on Validity of Release, dated June 29, 1967).

adjudication of contracts—especially the part-and-parcel courts—and rightly so.[656] Were courts to accept an invitation to serve as a board of estimate equalizing the fortunes of disparate parties under a fig leaf of antitrust law, state-sponsored socialism (that venerable old bogeyman) might be only a few steps away. Antitrust law *exists* to promote full-throated competitive capitalism, not to cosset certain industrialists.[657] Contract law *exists* to allow people to document and depend upon their agreements.[658] Disavowing the commitments made by a disadvantaged party would only entrench its disadvantage, infantilizing its self-determination and effectively deeming it less than a natural person.[659] Where an element of duress is truly reprehensible, the common law already allows the defense of economic coercion to renounce a contract, a claim often (and not coincidentally) seen raised alongside part and parcel in the cases.[660] Part and parcel, however, should not become only an antitrust-specific end-run around the contours of an existing canon of settled contract law.

But time and again, part-and-parcel courts have turned a blind eye to whether the beneficiary of a release had engineered the releasor's desperation and disadvantage through anticompetitive means,[661] or the releasor's oblivion

656. *See, e.g.*, Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 206-09 (9th Cir. 1950); S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968).

657. *See* Burlington Indus., Inc. v. Edelman, 666 F. Supp. 799, 806 (M.D.N.C. 1987) ("In addition, the courts should not allow the antitrust laws to become a weapon to protect particular competitors since, as the courts often state, the antitrust laws were enacted for 'the protection of *competition*, not *competitors*.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

658. *See* MCA Television Ltd. v. Pub. Int. Corp., 171 F.3d 1265, 1271 (11th Cir. 1999) ("Contract law is designed to protect the expectations of the contracting parties. When a contract is breached, an injured party can look to the legal system for help in achieving the position he or she would have occupied upon the performance of the promise.") (citation omitted); Kel Kim Corp. v. Cent. Mkts., Inc., 519 N.E.2d 295, 296, (N.Y. 1987) ("[O]nce a party to a contract has made a promise, that party must perform or respond in damages for its failure, even when unforeseen circumstances make performance burdensome. . . . [T]he purpose of contract law is to allocate the risks that might affect performance and that performance should be excused only in extreme circumstances."); *see also* Arnold M. Diamond, Inc. v. Gulf Coast Trailing Co., 180 F.3d 518, 522 (3d Cir. 1999) ("Under general principles of contract law, 'the purpose of interpretation is to become aware of the 'intention of the parties.'") (quoting 3 ARTHUR L. CORBIN, CORBIN ON CONTRACTS, § 538, at 55 (1960)).

659. *See* RESTATEMENT (SECOND) OF CONTRACTS § 12(2) (1981) ("A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is (a) under guardianship, or (b) an infant, or (c) mentally ill or defective, or (d) intoxicated.").

660. *E.g.*, *Suckow*, 185 F.2d at 206-09; G.E.E.N. Corp. v. Se. Toyota Distribs., Inc., No. 93–632–CIV–ORL–19, 1994 WL 695364, at *4-7 (M.D. Fla. Aug 31, 1994); Traffic Scan Network, Inc. v. Winston, Civ. A. No. 92–2243, 1993 WL 9080, at *3 (E.D. La. Jan. 13, 1993) [hereinafter *Winston I*]; *S.E. Rondon*, 288 F. Supp. at 881; *Carter*, 127 F. Supp. at 678.

661. *See, e.g.*, *Suckow*, 185 F.2d at 206-09; QS Holdco Inc. v. Bank of Am. Corp., No. 18-cv-824(RJS), 2019 WL 3716443, at *5 (S.D.N.Y. Aug. 6, 2019) (noting that the "conspiracy alleged in the Complaint was a boycott of the AQS platform with the goal of driving AQS out of the market" and "the eventual transfer of claims was incidental to EquiLend's purchase of AQS" even if not the scheme's goal); *S.E. Rondon*, 288 F. Supp. at 881 ("Even if the release was demanded and obtained, as Plaintiffs' counsel urged in argument, with the specific intent and purpose of preventing Plaintiffs from filing an antitrust action, that fact would not invalidate the release as I read the applicable law.").

to a concealed antitrust conspiracy afoot.[662] It would not be difficult to cast off that willful ignorance by adjusting the part-and-parcel doctrine to condemn not only releases that are the *object* of an anticompetitive conspiracy, but are its *outgrowth* as well. This distinction between the two is a relatively recent innovation by *VKK* that has strayed from its genesis, for in either case, an antitrust conspiracy has (allegedly) been effected.[663] Indeed, *VKK* itself acknowledged that the part-and-parcel doctrine seemingly *should* cover releases that served to "protect the ongoing conspiracy," but simply refused to read the law "so broadly as thus to render void all releases relating to conspiracies alleged to continue post-release."[664]

Ironically, the originator of the "outgrowth" terminology and test in which *VKK* sought a paper shield for its refusal was *Northern Oil*,[665] a case whose part-and-parcel argument was likely doomed ab initio,[666] given the attempt to wield it outside the antitrust context.[667] Why should this be the dispositive distinction when the "outgrowth" test bluntly means that the enterprise, having accrued economic power through antitrust violations, is backed by the courts in wielding that power to minimize its liability and perpetuate its existence?[668] True, it is only a minimization rather than a scot-

662. *See, e.g.*, Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1312 (5th Cir. 1983) ("It does not matter that Ingram may not have known of or articulately considered all the possible claims it was relinquishing against McDermott. Nor is this situation altered because the record is equivocal as to whether antitrust claims were ever a primary consideration during either the negotiations to sell Ingram's marine construction business or settlement of the parties' outstanding controversies. . . . Ingram cannot escape the validity of the releases by merely asserting ignorance of its antitrust claim. Indeed, it may be unaware of many claims existing in its favor."). *Compare, e.g.*, Va. Impression Prod. Co. v. SCM Corp., 448 F.2d 262, 265-66 (4th Cir. 1971) ("VIP points to Sexton's desire, which was not expressed to Redman, that a general release be obtained to avoid possible antitrust litigation. The law imposes no obligation on a party to a general release, dealing at arms length, to reveal all the possible legal theories that the other may possibly use against him. The law merely requires one to reveal material facts if they are unknown to the others. . . . Neither VIP's failure to appreciate the significance of the known facts, nor Redman's lack of expertise in the antitrust laws is sufficient to excuse VIP's compliance with the terms of the release."); *Virginia Impression Products*, 448 F.2d at 271. (Winter, J. dissenting) ("SCM intended to obtain a release of its antitrust liability. VIP did not know, and did not realize until well after the release was executed, that SCM's motive for terminating the dealership contract was its desire to enforce territorial restrictions. Hence, it could well be concluded that VIP had no intention of releasing its antitrust claim because it was not aware that it had the claim at the time that it executed the release.").

663. *See* VKK Corp. v. Nat'l Football League, 244 F.3d 114, 126 (2d Cir. 2001); Fresh Made, Inc. v. Lifeway Foods, Inc., No. Civ.A. 01–4254, 2002 WL 31246922, at *3 (E.D. Pa. Aug. 9, 2002) (quoting *VKK*).

664. *VKK*, 244 F.3d at 126.

665. *Id.* at 125.

666. Northern Oil Co. v. Standard Oil Co. of California, 761 F.2d 699, 706 (Temp. Emer. Ct. App. 1985).

667. *See Romero v. Allstate Ins. Co.*, 143 F. Supp. 3d 271, 282 (E.D. Pa. 2015).

668. *See, e.g.*, *VKK*, 244 F.3d at 124-25 ("He knew or should have known that the fact that they had stopped him from relocating had caused him to sell the team at a depressed price. He knew that NFL officials would not permit the owners to approve Orthwein's purchase without his written agreement not to attempt to relocate the team. Kiam knew that the NFL had refused to compromise on obtaining a release from him of all antitrust claims relating to relocation before his sale of the team could close.").

free escape, for the government cannot be so easily bought off.[669] But why sculpt a judicially-created doctrine that permits such malefactors *any* fruits of their wicked labors?[670] Is a release extracted by means of supracompetitive profits that insulates against the discovery and interdiction of the conspiracy (even an ongoing conspiracy![671]) and replevin of those profits any less "in restraint of trade" than those that indemnify future acts?[672]

Private litigants who convincingly show that they were indeed misled or simply ignorant of the antitrust conspiracy that it had contractually forgiven—or of waiving antitrust claims at all via a misleadingly broad release—should have a strong case for retaining the right to sue if it is alleged that its ignorance was the result of the conspiracy's concealment or devious drafting. In *Suckow*, even as it upheld the release at hand, the Ninth Circuit conceded that "it may well be that if appellants had originally possessed all of the evidentiary proof which they now claim to have they would not have sold out or made the release agreements, but would have brought this action long ago."[673] Condoning antitrust harm to plaintiffs hoodwinked by furtive antitrust offenders should not be the result so casually conduced by the courts. The *Ingram* district court reached just such a conclusion in reliance on the Eighth Circuit's reasoning about statutes of limitations:

> While there are some obvious differences between statutes of limitations and releases, they do have one major attribute in common. A statute of limitations accomplishes through operation of positive law the same thing that private parties accomplish on their own through a release—peace through extinction of an otherwise valid claim. For that reason the policy considerations which the Eighth Circuit discussed in Kansas City regarding fraudulent concealment also apply to releases. The policy supporting peaceful settlement of differences is little, if any, advanced by rewarding those antitrust violators who are able to cloak their unlawful activities.[674]

---

669. *See* cases cited *supra* notes 568-69.

670. One early case provides its answer, which accords no special deference to antitrust policy, denoting the alleged violation as any old peccadillo and exalting settlements instead: "To hold a release void because of the releasee's pre-existing wrong which resulted in financial hardship to the releasor would be to invite an attempt to void almost every such settlement and release. It would greatly impair the policy of encouraging private settlements." S.E. Rondon Co. v. Atlantic Richfield Co., 288 F. Supp. 879, 882 (C.D. Cal. 1968).

671. *See infra* cases cited notes 676 & 677.

672. *See supra* Part V. C.

673. Suckow Borax Mines Consol. v. Borax Consol., 185 F.2d 196, 208-09 (9th Cir. 1950) (initial majuscule reduced to minuscule).

674. Ingram Corp. v. J. Ray McDermott & Co., 698 F.2d 1295, 1329 (5th Cir. 1983) ("We are not persuaded that Congress meant to proscribe and outlaw conspiracies and combinations in restraint of trade, only to reverse itself by enacting a statute of limitations that would reward successful conspirators. When

Of course, the Fifth Circuit did not think so.[675] Some also might object that such considerations muddle the bright line between forbidden future releases and permissible past releases. But much muddling is already evident in the current regime championed by *VKK*, in which courts have puzzled over the continuing sequelae of past injuries with little clarity before allowing such releases.[676] As *Xerox* stated openly, under *VKK*'s new regime, "courts have enforced even general releases to bar antitrust claims predicated on *continuing violations of pre-release* conduct, such as 'conspiracies alleged to continue post-release.'"[677] Rejecting releases pertaining to an ongoing but hidden antitrust scheme seems to comport with rather than contort the rationale for proscribing prospective releases: to ensure a release does not have the effect of allowing conspirators to wreak continuing harm on consumers.[678] If anything, removing the artificially rigid construct of objects and outgrowths might lay to rest some of the difficulties that courts face in accounting for the future effects of past wrongs.[679]

Others might say such an adjustment does not go far enough. It would leave giant conglomerates free to propose (or, they would say, *im*pose) adhesive contracts that cement their existing advantages by insulating them from privately-brought antitrust scrutiny. Such proponents might wish that an economically disadvantaged party could never enter into a release of antitrust liability, just as with its prospective subset. But, if those conglomerates have not *already* demonstrably violated the rules of fair

---

the antitrust laws are violated, the wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices should not, when their machinations are discovered, be permitted to use the shield of the statute of limitations to bar redress by those whom they have victimized.") (quoting Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 284 (8th Cir. 1962)), *rev'd*, 698 F.2d 1295 (5th Cir. 1983); *Ingram*, 495 F. Supp. at 1329; *see also Ingram*, 698 F.2d at 1306-07 ("[T]he Judge opined that the primacy of private enforcement of the antitrust statutes led him to the definite conclusion that 'peaceful settlement of differences is little, if any, advanced by rewarding those antitrust violators who are able to cloak their unlawful activities.' He held that a party to a release 'cannot affirmatively act to deprive those with whom [it] negotiate[s] of material information they would otherwise receive.' Thus fraudulent concealment of an antitrust conspiracy from a party with whom a conspirator has negotiated a release was fraud sufficient to void any such release.") (Characterizing the district court's reasoning before ultimately reversing it).

675. *Ingram*, 495 F. Supp. at 1329.

676. *E.g.*, VKK Corp. v. Nat'l Football League, 244 F.3d 114, 126 (2d Cir. 2001) (holding that "the part and parcel doctrine [cannot] be read so broadly as . . . to render void all releases relating to conspiracies alleged to continue post-release."); Xerox Corp. v. Media Scis., Inc., 609 F. Supp. 2d 319, 325-26 (S.D.N.Y. 2009); Madison Square Garden, L.P. v. Nat'l Hockey League, No. 07 CV 8455 (LAP), 2008 WL 4547518, at *8 (S.D.N.Y. Oct. 10, 2008); Fresh Made, Inc. v. Lifeway Foods, Inc., No. Civ.A. 01–4254, 2002 WL 31246922, at *3 (E.D. Pa. Aug. 9, 2002) (quoting *VKK*).

677. *Xerox*, 609 F. Supp. at 326.

678. *Cf. supra* notes 627-31 and accompanying text.

679. *See Madison Square Garden, L.P.*, 2008 WL 4547518, at *8 ("find[ing] considerable support in the caselaw for the distinction relied upon here, namely that the public policy considerations differ when the only 'prospective' application of the release in question is the continued adherence to a pre-release restraint.").

competition, neither is it fair to deny them the same rights (no more, no less) to express their choices through contract because of their success. The dangers requiring a categorical rule for prospective release are different in kind and function.[680] Unshackling the part-and-parcel exception from an antitrust injury would tread too close to the rightly feared transformation of courts from sentinels of equity to enforcers of equalization. More poignantly, such a rule would also add insult to injury for the disadvantaged parties who are theoretically to be protected (from themselves?), denying them free will and foreclosing opportunities for which they might be very eager to transform misfortune into money—theoretical benefits to the public's generalized interest in antitrust be damned! The political body has no entitlement to literally conscript unwilling players in the private market into forgoing rewards to do the hard work its own regulators have not: private attorneys general are and must remain an all-volunteer army.[681]

VII. CONCLUSION

In 2015, Justice Samuel Alito, joined by Chief Justice Roberts and Justice Clarence Thomas, criticized the cryonic preservation of abstruse law that serves to unsettle contractual expectations in the fraught realm of antitrust,[682] just as Justice Brett Kavanaugh would more sharply in later years, albeit in a more generalized sense.[683] Justice Alito's description of the dispute at bar might apply to any of the cases where part-and-parcel was belatedly or half-heartedly raised in an attempt to avoid a bargained release, albeit with the roles switched:

> This case illustrates the point. No one disputes that, when "negotiating the settlement, neither side was aware of *Brulotte*." Without knowledge of our *per se* rule, the parties agreed that Marvel would pay 3% in royalties on all of its future sales involving the Web Blaster and similar products. If the parties had been aware of *Brulotte*, they might have agreed to higher payments during the patent term. Instead, both sides expected the royalty payments to continue until Marvel stopped selling toys that fit the terms of the agreement. But that is not what happened. When Marvel discovered *Brulotte*, it used that decision to nullify a key part of the agreement.

680. *See supra* Part V. C.

681. *See* cases cited *supra* note 566.

682. *See* Kimble v. Marvel Ent., LLC, 576 U.S. 446, 465 (2015) (Alito, J., dissenting). *See also id.* at 471 ("*Brulotte* was an antitrust decision masquerading as a patent case. The Court was principally concerned with patentees improperly leveraging their monopoly power.").

683. *See* Edwards v. Vannoy, 141 S. Ct. 1547 (2021).

> The parties' contractual expectations were shattered, and petitioners' rights were extinguished.[684]

It is important to recall that Justice Alito's views did not carry the day but also to heed his acute apprehension at the outcome.[685] Part and parcel must not become a little-used latent landmine deployed primarily by disgruntled conglomerates advised by well-paid attorneys diligent enough to unearth the doctrine years down the line. At the same time, the courts must not let the disallowance of part-and-parcel objections to allow an antitrust conspiracy to use its very success at non-detection to protect itself and its ill-gotten gains and to silence potential whistleblowers. The most well-disguised collusion poses the greatest challenge to governmental detection and interdiction and thus calls for the greatest degree of entrepreneurial assistance. Even if private attorneys general are only adjuncts to executive action, it seems foolhardy to allow them to be sidelined specifically when they are most needed.

In a widely separated pair of cases, imaginative plaintiffs sought to invoke a part-and-parcel-like principle in escape releases of positive federal laws other than antitrust.[686] Neither succeeded, for as the latter court explained, part and parcel "had its inception and sole application in antitrust jurisprudence."[687] This uniqueness places antitrust law in a world apart, bespeaking its centrality to the American system of governance, even if it was pioneered only after a century of the American experience.[688] In one of the many entanglements with Standard Oil Company, the Supreme Court reminded succinctly: "The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'"[689] In continuing to sculpt the contours of the "rarely discussed and more rarely applied" part-and-parcel doctrine,[690] the courts would be wise to recall just how exceptionally integral antitrust policy is to the life of the body politic, and strive ever more diligently to ensure its precepts are best upheld against all who would traduce them.

* * *

684. *Kimble*, 576 U.S. at 469.
685. *Id.*
686. Northern Oil Co. v. Standard Oil Co. of California, 761 F.2d 699, 706 (Temp. Emer. Ct. App. 1985); Romero v. Allstate Ins. Co., 143 F. Supp. 3d 271, 282 (E.D. Pa. 2015).
687. *Romero*, 143 F. Supp. 3d at 282.
688. *See supra* Part IV. C. 1.
689. Standard Oil Co. v. Fed. Trade Comm'n, 340 U.S. 231, 248-49 (1951).
690. VKK Corp. v. Nat'l Football League, 244 F.3d 114, at 125 (2d Cir. 2001).