

OH CANADA!:

ANTITRUST GEOGRAPHIC MARKET DEFINITION AND THE REIMPORTATION OF PRESCRIPTION DRUGS

Abstract: In recent years, public attention has focused on the need for affordable prescription drugs. Although Congress has recently enacted a Medicare Prescription Drug Plan, many private citizens and state and local governments continue to reimport prescription drugs from Canada to take advantage of the lower drug prices available in Canada. Many pharmaceutical companies have responded to this phenomenon by cutting off supplies of their drugs to Canadian pharmacies engaging in reimportation. As a result, some state and local governments have initiated litigation alleging state antitrust violations. This Note addresses one of the first questions raised in U.S. antitrust litigation under the Rule of Reason—the definition of the geographic market. First, this Note surveys the current caselaw standard and the academic approaches to geographic market definition. This Note then applies these approaches, concluding that Canada may be included in any geographic market when addressing the legality of reimportation in an antitrust context.

INTRODUCTION

Although global drug manufacturing companies with operations in the United States ship and sell their products all over the world, including Canada, certain drug manufacturing companies have recently threatened to reduce their drug supplies to Canadian distributors because the distributors are redirecting the products to U.S. consumers.¹ For example, in a letter dated January 14, 2005, Merck & Co. officials threatened to block supplies of their drugs to Canadian pharmacies that continued to directly or indirectly sell Merck products to U.S. residents.² Other pharmaceutical companies, such as Pfizer, AstraZeneca International, and Wyeth have also stated similar intentions.³

¹ *Merck Tightens Sales to Canada*, BOSTON GLOBE, Jan. 20, 2005, at C2, available at http://www.boston.com/yourlife/health/diseases/articles/2005/01/20/merck_tightens_sales_to_canada/.

² *Id.*

³ *Id.*

The present trend of levying supply threats to Canadian pharmacies and wholesale suppliers comes in the wake of continued evidence that numerous U.S. customers are turning to Canada, rather than to domestic suppliers, to purchase their prescription drugs.⁴ This practice has come to be known as reimportation, as it involves individuals purchasing prescription drugs made in the United States that are sent to Canada and then brought back into the United States.⁵ The allure of reimportation lies in the differing pricing structures for prescription drugs in the United States and other countries.⁶ Because of the Canadian government's price regulations, prices for the same prescription drugs are often thirty to fifty percent cheaper in Canada than in the United States.⁷ Drug manufacturers' recent threats are an effort to stem the flow of drugs across the Canadian border and back into the United States.⁸ For pharmaceutical companies, the continued supply of the Canadian market, which is one-twentieth the size of the United States market and regulated at lower prices, could lead to the loss of billions of dollars in U.S. sales without any comparable gains.⁹

Although levying threats to Canadian suppliers might seem to be a rational business practice for the drug companies, such behavior could create potential antitrust liability, if such actions are shown to be an unreasonable restraint on trade that lack any redeeming virtue—and, more importantly, if such actions can be reached by U.S. antitrust laws.¹⁰ In fact, the Minnesota Attorney General is currently

⁴ HHS TASK FORCE ON DRUG IMP., U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT ON PRESCRIPTION DRUG IMPORTATION 11-12 (2004).

⁵ *Id.* at 3.

⁶ See DAVID GROSS, PRESCRIPTION DRUG PRICES IN CANADA 11-14 (AARP Pub. Pol'y Inst., Issue Brief, 2003), available at http://www.allhealth.org/recent/audio_07-22-04/ib62_can_rx.pdf.

⁷ *Id.*

⁸ See *Merck Tightens Sales to Canada*, *supra* note 1, at C2.

⁹ John E. Calfee, *The High Price of Cheap Drugs*, WKLY. STANDARD, July 21, 2003, at 20, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/002/879jlaia.asp>.

¹⁰ See Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1 (West 2005). Antitrust liability would stem from the Sherman Anti-Trust Act, which prohibits agreements that unreasonably restrain trade:

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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person,

seeking to obtain internal documents from GlaxoSmithKline in relation to the office's investigation of such conduct as a potential violation of Minnesota's state antitrust laws.¹¹ One potential allegation is that GlaxoSmithKline engaged in vertical restraints—between firms at different levels in the production and distribution network, such as between a wholesaler and retailer—in violation of section 1 of the Sherman Anti-Trust Act.¹² Alternatively, drug companies could also be exposed to antitrust liability if they colluded with each other, as a horizontal restraint, to stop the importation of drugs from Canada by collectively threatening to cut off supplies to Canadian distributors.¹³ Such actions could constitute a concerted refusal to deal, also known as a group boycott, in violation of section 1 of the Sherman Act.¹⁴ In seeking documents from GlaxoSmithKline, the Minnesota Attorney

\$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id. The underlying purpose of U.S. antitrust laws is to promote and protect competition. PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 100 (2d ed. 2000). Optimal competition occurs when market price equals manufacturers' marginal costs. *Id.* Thus, optimal competition exists when the market reaches equilibrium. *Id.* Market equilibrium is achieved when market supply equals market demand. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS* 51–54 (5th ed. 2004).

¹¹ See generally *In re GlaxoSmithKline PLC*, 699 N.W.2d 749 (Minn. 2005).

¹² See Sherman Anti-Trust Act § 1; *N. Pac. Ry. v. United States*, 356 U.S. 1, 7 (1958) (prohibiting the defendant's tying arrangement, which required lessees or grantees of its land to ship all commodities produced on the land over the defendant's railroad lines); *Lorain Journal Co. v. United States*, 342 U.S. 143, 152–55 (1951) (prohibiting refusals to deal as violating section 2 of the Sherman Anti-Trust Act); *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373, 408 (1911) (prohibiting resale price maintenance, also known as vertical price restrictions, as per se illegal because such agreements, "having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void"). An example of a vertical restraint is when a manufacturer limits distributors to an exclusive territory or allocates customers to distributors, thereby precluding the distributors from selling outside their designated areas or to customers of another distributor. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (holding a franchise agreement between a manufacturer of television sets and a retailer, which barred the retailer from selling franchised products from locations other than those specified in the agreement, to be an unreasonable restraint of trade as analyzed under the Rule of Reason).

¹³ See *Klor's Inc., v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 208–09 (1959) (concluding that a horizontal refusal to deal, or group boycott, existed, based on the fact that manufacturers and distributors had conspired with each other).

¹⁴ See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (reaffirming the idea that horizontal price fixing is per se illegal). If so, concerted collusion would raise additional section 1 concerns as an example of a horizontal restraint—agreements between competitors within a market. *Id.*; see also ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 104 (4th ed. 1997).

General has claimed there is some evidence of collusion among the major pharmaceutical companies.¹⁵

Assuming evidence exists either of collective involvement by drug companies in limiting supplies to Canadian markets or of particular drug companies engaging in vertical territorial restraints by prohibiting distributors from selling to particular categories of customers, such actions still do not violate antitrust laws under the Rule of Reason analysis unless they have an anticompetitive effect.¹⁶ Before a court can analyze whether such actions have an anticompetitive effect, the court must define the geographic market that is potentially affected by drug manufacturers' actions.¹⁷ This Note argues that the nature of the pharmaceutical industry requires courts analyzing antitrust claims against drug manufacturers to define the relevant geographic market to include Canada and the United States.¹⁸ If courts determine the pharmaceutical companies violated antitrust laws, then drug manufacturers would have to discontinue the challenged practice—in this case the horizontal collective refusal to deal with Canadian pharmacies or the vertical territorial restraints.¹⁹

Part I of this Note provides a brief overview of the present status of the prescription drug industry in the United States and Canada, including their respective pricing schemes.²⁰ Part I also outlines some of the trends in consumption of prescription drugs by the U.S. market

¹⁵ America's Seniors, Today'sSeniorsNetwork.com, Documents Show Glaxo Antitrust Violations, Attorney General Hatch Says (Dec. 15, 2004), http://todaysseniorsnetwork.com/glaxo_evidence.htm. In the state's appeal after a trial court initially decided the documents had to remain confidential, the Minnesota Attorney General argued that "[t]he 45 documents at issue . . . contain direct evidence of unlawful concerted action by GSK and other drug companies to block the importation of prescription drugs from Canada." *Id.*

¹⁶ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (explaining that the Rule of Reason is limited to whether the restraint "is one that promotes competition or one that suppresses competition").

¹⁷ See *infra* notes 72–76 and accompanying text.

¹⁸ See *infra* notes 215–328 and accompanying text.

¹⁹ See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (holding a horizontal refusal to deal, evinced by an agreement between dentists and insurance companies, was illegal under section 1); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 691–95 (holding that a professional association's canon of ethics prohibiting competitive bidding was illegal under section 1); *Cont'l T.V., Inc.*, 433 U.S. at 46 (holding that a manufacturer's territorial restrictions on retailers were illegal under section 1). The term "horizontal" refers to agreements among actual or potential competitors, *AREEDA & HOVENKAMP*, *supra* note 10, ¶ 1901b, whereas the term "vertical" refers to agreements among those in different levels of the chain of production, such as producers, distributors, wholesalers, and retailers. *Id.* ¶ 1902d.

²⁰ See *infra* notes 29–77 and accompanying text.

in comparison to the worldwide market.²¹ Part II begins by providing an overview of the antitrust legal framework.²² Part II then surveys three main theoretical approaches to geographic market definition in antitrust law.²³ This Part also illustrates how the federal courts utilize each of these approaches.²⁴ Finally, drawing on this background, Part III argues that courts should include Canada as part of the relevant geographic market in antitrust litigation arising when pharmaceutical companies limit drug supplies to Canadian pharmacies that participate in reimportation to U.S. customers.²⁵ Thus, the relevant geographic market for antitrust purposes should consist of at least Canada and the United States, with the possibility of expansion to a worldwide scale.²⁶ By this argument, the pharmaceutical companies' refusal to deal with Canadian wholesalers and distributors could constitute action violative of Section 1 of the Sherman Act, either as a horizontal or vertical restraint of trade.²⁷ Without the inclusion of Canada into an antitrust analysis, the geographic market would be limited to the United States—precluding oversight of drug manufacturers' potentially anticompetitive behavior.²⁸

I. PRESENT STATUS OF THE PRESCRIPTION DRUG INDUSTRY IN THE UNITED STATES AND CANADA

A. Spending, Price, and Prescription Drug Markets

In the modern global community, the pharmaceutical industry has undergone a series of dramatic changes.²⁹ For example, several large-scale international mergers have created global drug companies.³⁰ Despite the expanded reach of drug manufacturing companies, these companies have narrowed their focus to the U.S. markets

²¹ See *infra* notes 31–42, 50, and accompanying text.

²² See *infra* notes 78–95 and accompanying text.

²³ See *infra* notes 96–195 and accompanying text.

²⁴ See *infra* notes 96–195 and accompanying text.

²⁵ See *infra* notes 215–328 and accompanying text.

²⁶ See *infra* notes 215–328 and accompanying text.

²⁷ See *Ind. Fed'n of Dentists*, 476 U.S. at 459 (1986) (holding that a horizontal refusal to deal between dentists and insurance companies was illegal under section 1); *Cont'l T.V., Inc.*, 433 U.S. at 46 (holding that a manufacturer's territorial restrictions on retailers were illegal under section 1).

²⁸ AREEDA & HOVENKAMP, *supra* note 10, ¶ 530a.

²⁹ ROY LEVY, FED. TRADE COMM'N, *THE PHARMACEUTICAL INDUSTRY: A DISCUSSION OF COMPETITIVE AND ANTITRUST ISSUES IN AN ENVIRONMENT OF CHANGE* 37–38 (1999).

³⁰ *Id.*

as a major source of overall revenue and profits generation.³¹ The U.S. share of drug makers' worldwide revenues rose from almost one-third of global revenues in 1996 to almost one-half in 2002—an increase of fifty percent.³² Sales in the United States were roughly ninety-five percent of the North American total.³³ Attempting to capitalize on this reality, the global drug manufacturers have adopted a global perspective to their businesses.³⁴ The pharmaceutical companies' reliance on global business plans is most evident in two aspects of their businesses: their financing structure of research and development for new drugs, and their global structure for manufacturing drugs.³⁵ With the U.S. drug market now comprising one-half of the drug manufacturers' total revenues, the pharmaceutical industry relies on U.S. revenues to support the expensive process of researching and developing new drugs for use throughout the world.³⁶

While pharmaceutical companies reaped greater profits from the U.S. market in the late 1990s, U.S. consumers also found themselves spending more and more on prescription drugs.³⁷ Between 1990 and 2003, spending on prescription drugs by the U.S. public increased

³¹ ALAN SAGER & DEBORAH SOCOLAR, HEALTH REFORM PROGRAM, LOWER U.S. PRESCRIPTION DRUG PRICES ARE VITAL TO BOTH PATIENTS AND DRUG MAKERS—BUT INSTEAD, U.S. PRICES HAVE BEEN RISING RAPIDLY RELATIVE TO THOSE IN OTHER WEALTHY NATIONS 5–6 (2003), <http://dcc2.bumc.bu.edu/hs/pdfs/Lower%20drug%20prices.pdf> (revealing that U.S.-generated revenues for drug manufacturers during the period from 1996 to 2002 increased from 34.7% to 50.8%).

³² *Id.* at 6.

³³ *Id.* at 5.

³⁴ See, e.g., Lisa McTigue Pierce, *Building a Solid GlaxoSmithKline: Corporate Profile, FOOD & DRUG PACKAGING*, Dec. 2004, at 22, 25–26, available at http://www.agile.com/news/2004/fooddrugpack_122004.pdf (quoting GlaxoSmithKline representatives as stating they have a “global” manufacturing and packaging outfit); Careers with Pfizer Global Manufacturing (PGM), More About PGM: Manufacturing Plants, http://www.pfizer.com/subsites/pgm/more/mn_plants.html (last visited Sept. 16, 2005) (describing its global manufacturing plants).

³⁵ See, e.g., Pierce, *supra* note 34, at 22, 25–26 (quoting GlaxoSmithKline representatives as having a “global” manufacturing and packaging outfit); Careers with Pfizer Global Manufacturing (PGM), *supra* note 34 (describing Pfizer's global manufacturing plants).

³⁶ SAGER & SOCOLAR, *supra* note 31, at 5–6 (estimating that drug manufacturers secure about two-thirds to three-fourths of their profits from U.S. citizens and that some industry sources have found drug manufacturers' investment in research and development to be roughly equal to their U.S. profits). In fact, drug manufacturers' reliance on the U.S. market for providing the pharmaceutical industry with the sufficient funds to maintain current levels for research and development of new drugs is one of the main justifications provided by the industry for the price differentials. PHARM. RESEARCH & MFRS. OF AM., THE MINNESOTA ATTORNEY GENERAL'S REPORT ON PHARMACEUTICALS: CORRECTING THE RECORD 2–3 (2003), available at <http://www.phrma.org/publications/policy/2003-10-31.862.pdf>.

³⁷ SAGER & SOCOLAR, *supra* note 31, at 4–5.

almost five-fold, from \$40.3 billion to \$189.1 billion.³⁸ The reasons for this increase are varied, ranging from higher prices on existing drugs, the introduction of new drugs with high retail prices, and changes in the rate of drug usage.³⁹

In addition to increased domestic spending on prescription drugs, U.S. consumers also pay higher prices than do foreign consumers for the same pharmaceutical products.⁴⁰ The fundamental cause of pricing differentials between the U.S. market and other foreign markets relates to the respective countries' wholesale drug pricing systems.⁴¹ In other industrialized countries, such as Canada and European Union nations, the national governments regulate the wholesale price charged by the drug manufacturers.⁴² For example, in Canada, the national Patented Medicine Prices Review Board (the "PMPRB") regulates the prices of patented drugs.⁴³ The PMPRB establishes the maximum prices that drug manufacturers can charge in Canada for their patented drugs.⁴⁴ To arrive at the wholesale price for each drug, the PMPRB considers several factors, including the median price charged in other specified industrial countries and a comparison of price increases to the Canadian Consumer Price Index (the "CPI").⁴⁵ In addition to setting a target wholesale price, the PMPRB also polices the wholesale prices that drug manufacturers quote to wholesalers, hospitals, and pharmacies, in an effort to ensure that the price is not excessive in comparison to the PMPRB's calculated price.⁴⁶

³⁸ *Id.* at 4.

³⁹ *Id.* at 5.

⁴⁰ *Id.*

⁴¹ See SENATE REPUBLICAN POLICY COMM., 108TH CONG., THERE IS A BETTER WAY TO HELP U.S. CONSUMERS: PHARMACEUTICAL PRICE CONTROLS ABROAD: AN UNFAIR TRADE POLICY 5 (Comm. Print 2003), available at http://rpc.senate.gov/_files/hc110603.pdf.

⁴² *Id.*

⁴³ Patented Medicine Prices Review Board Website [hereinafter PMPRB Website], About the PMPRB, Mandate and Jurisdiction, <http://www.pmprb-cepmb.gc.ca/english/view.asp?x=175&mp=87> (last visited Sept. 16, 2005).

⁴⁴ PMPRB Website, *supra* note 43, Frequently Asked Questions, <http://www.pmprb-cepmb.gc.ca/english/view.asp?x=272#1> (last visited Sept. 16, 2005).

⁴⁵ *Id.* CPI is the measure of consumer goods and services. *Prescription Drug Coverage for Seniors: Hearing Before the House Comm. on Commerce, Subcomm. on Health and Environment*, 106th Cong. 2 (1999) (statement of the American Academy of Actuaries), available at <http://www.actuary.org/pdf/medicare/rxstatement.pdf>. In the United States, the CPI increased 2.3 percent between 1989 and 1999. *Id.* In comparison, the CPI for prescription drugs and medical supplies increased 5.9 percent during the same period. *Id.*

⁴⁶ PMPRB Website, *supra* note 43, About the PMPRB, Mandate and Jurisdiction, <http://www.pmprb-cepmb.gc.ca/english/View.asp?x=175&mp=87> (last visited Sept. 16, 2005).

In the United States, however, Congress simply requires each drug manufacturer to report their average wholesale price (the "AWP") to third-party compilers, such as the *Drug Topics Red Book*, *American Druggist First Database Annual Director of Pharmaceuticals*, or the *Essential Director of Pharmaceuticals (Blue Book)*, which in turn report AWP data for use by healthcare professionals, Medicare, and Medicaid for reimbursement calculations.⁴⁷ Each prescription drug's AWP represents the average price at which manufacturers sell drugs to physicians, pharmacies, and other customers.⁴⁸ Despite its name, however, the AWP is not an accurate reflection of actual market prices for drugs; rather, it is a price derived from self-reported manufacturer data for both patented and generic drugs, with no external oversight or determination that such prices accurately reflect drug manufacturers' actual costs.⁴⁹ There are no governmental requirements or industry-wide conventions requiring the AWP to reflect the price of any actual sale of drugs by a manufacturer.⁵⁰ Thus, according to the U.S. Government Accountability Office, the AWP may be neither "average" nor "wholesale."⁵¹

In a recent investigation, the U.S. Department of Justice (the "DOJ") and the National Association of Medicaid Fraud Control Units further debunked the illusion of accurate wholesale price reporting.⁵² By comparing actual wholesale pricing information, based upon wholesalers' price lists, with the AWP price reported by the drug manufacturers, investigators found numerous instances in which the AWP price was considerably higher than the actual wholesale price.⁵³

The study's findings of inflated pricing were utilized in 2003, in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, when the

⁴⁷ DAWN M. GENCARELLI, AVERAGE WHOLESALE PRICE FOR PRESCRIPTION DRUGS: IS THERE A MORE APPROPRIATE PRICING MECHANISM? 2-3 (Nat'l Health Policy Forum, Issue Brief No. 775, 2002), available at http://www.nhpf.org/pdfs_ib/IB775%5FAWP%5F6%2D7%2D02%2Epdf.

⁴⁸ *Id.*

⁴⁹ *Id.* at 3.

⁵⁰ *Id.*

⁵¹ *Medicare Part B Drugs: Program Payments Should Reflect Market Prices: Hearing Before the Subcomm. on Health and the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 107th Cong. 2 (2001) (testimony of William J. Scanlon, Director, Health Care Issues), available at <http://www.gao.gov/new.items/d011142t.pdf>.

⁵² See *Reimbursement and Access to Prescription Drugs Under Medicare Part B: Hearing Before the Subcomm. on Health of the Senate Finance Comm.*, 107th Cong. 7 (2002) (testimony of Thomas Scully, Administrator, Center for Medicare & Medicaid Services), available at <http://finance.senate.gov/hearings/testimony/031402ttest.pdf>.

⁵³ *Id.*

U.S. District Court of Massachusetts evaluated a class action complaint alleging fraud and violation of section 1 of the Sherman Anti-Trust Act.⁵⁴ The complaint detailed specific discrepancies between the actual wholesale price, as calculated by the DOJ, and the AWP indicated by the drug manufacturer.⁵⁵ At times, the data revealed the drug manufacturer's AWP was thousands of percentage points higher than the DOJ-calculated wholesale price.⁵⁶

This difference between the AWP and the actual wholesale price, also known as the "spread," allows drug manufacturers to realize profits in the United States that elude them in other markets, where governmental regulations force drug manufacturers to charge wholesale prices closer to actual cost, thereby decreasing the spread in those markets.⁵⁷ As a result, U.S. consumers face higher retail costs for prescription drugs than do foreign consumers whose governments prevent such pricing abuses—giving U.S. consumers reason to view reimportation as a way to benefit from the lower prices charged in foreign countries.⁵⁸

The increased U.S. demand for prescription drugs, coupled with higher relative prices as compared to other countries, has led the U.S. public to seek means of obtaining cheaper prescription drugs from foreign countries.⁵⁹ One approach taken by U.S. consumers is to pressure their state and local governments to propose legislation and policies allowing for reimportation; state and local communities, such as Illinois, Iowa, Maine, Michigan, Minnesota, and Springfield, Massachusetts, have already proposed measures to establish drug reimporta-

⁵⁴ Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1 (West 2005); Complaint ¶¶ 699–704, *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172 (D. Mass. 2003) (No. 1456, Civ.A. 01-12257-PBS).

⁵⁵ Complaint, *supra* note 54 ¶¶ 187, 208, 260, 280, 293, 311, 323, 336, 343, 353, 359, 371, 415, 431, 466, 501, 534.

⁵⁶ *Id.* ¶¶ 187, 208, 280, 311, 466, 501, 534.

⁵⁷ See SENATE REPUBLICAN POLICY COMM., *supra* note 41, at 5.

⁵⁸ *Id.*

⁵⁹ See e.g., Lindsay McLaughlin & Brian Davidson, *An Injury to One Is an Injury to All: Drug Reimportation*, ILWU WARRIOR 2004 (Int'l Longshore & Warehouse Union, AFL-CIO, S.F., Cal.) July 9, 2004, <http://www.ilwu.org/political/warrior/04/vol4no5.cfm> (urging members to pressure their senators to take action on drug reimportation legislation); *Reimportation Update: HHS Report Released, Grassley Plans to Reintroduce Legislation, Hearing to be Held on Dorgan/Snowe Bill*, HOTLINE NEWSLETTER (Society for Women's Health Research, D.C.), Jan. 2005, http://www.womenshealthresearch.org/policy/hotline_0105.htm [hereinafter *Reimportation Update*] (quoting Sen. Grassley as stating, "American consumers are demanding lower prices on prescription drugs . . .").

tion programs for state employees and retirees.⁶⁰ Meanwhile, another approach taken by U.S. consumers is to reimport prescription drugs personally.⁶¹ Typically, these individuals obtain these prescription drugs either by physically traveling across the border or by ordering from online Canadian pharmacies.⁶² The majority of reimported drugs are mailed from Canada into the United States, with recent estimates placing the total volume at approximately twelve million prescription drug products, valued at approximately \$700 million in 2003 alone.⁶³ Additionally, about the same amount of prescription drugs enter the United States from the rest of the world through mail and courier services offered by traditional Canadian pharmacies.⁶⁴ In recent years, estimates suggest that up to one million Americans a year travel across the border to purchase their prescription drugs from Canada for a fraction of the U.S. domestic price.⁶⁵

⁶⁰ William M. Welch, *Once Just a Trickle, Canada's Rx Drugs Pouring into USA*, USA TODAY, Oct. 7, 2003, at 1A, available at http://www.usatoday.com/news/nation/2003-10-06-canada-drugs-usat_x.htm.

⁶¹ COLIN BAKER, WOULD PRESCRIPTION DRUG IMPORTATION REDUCE U.S. DRUG SPENDING? 1 (Cong. Budget Office, Econ. & Budget Issue Brief, 2004), available at <http://www.cbo.gov/ftpdocs/54xx/doc5406/04-29-PrescriptionDrugs.pdf>. More than one million U.S. customers are buying prescription drugs from Canada and other foreign markets via the Internet or by physically traveling there. Joan Indian Rigdon, *Why Do Prescription Drugs Cost So Much?*, WASHINGTON LAWYER, Dec. 2004, at 22, 24, available at http://www.dcbarr.org/for_lawyers/washington_lawyer/december_2004/drugs.cfm.

⁶² See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 11-12 (stating that in 2003, about \$408 million of the total prescription drug sales to U.S. consumers from Canada was derived from Internet pharmacy sales, while the remaining \$287 million was due to personal travel). Many Canadian online pharmacies actively cater to U.S. consumers by allowing a consumer to place an order that will be delivered to the consumer's home simply by inputting a drug name and quantity and filling out an order form. See generally Canada Pharmacy Home Page, <http://www.canadapharmacy.com> (last visited Sept. 17, 2005); Canadian Pharmacy Trust Home Page, <http://www.canadianpharmacytrust.com> (last visited Sept. 17, 2005); CanadaRX Home Page, <http://www.canadarx.com> (last visited Sept. 17, 2005). Recent speculation has suggested that the Canadian government may alter its domestic laws to prohibit individuals from receiving prescription medication unless they have first met with a Canadian doctor. Joel B. Finkelstein, *Drug Reimportation Situation Is Shifting as Canada Could Cut Availability*, AM. MED. NEWS (Am. Med. Ass'n, Chi., Ill.), Jan. 24, 2005, at 5, available at <http://www.ama-assn.org/amednews/2005/01/24/gvsa0124.htm>. If so, then those currently reimporting prescription drugs via the Internet may lose their current sources. *Id.*

⁶³ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 11-12.

⁶⁴ See *id.* at 12.

⁶⁵ *Pharmaceutical Reimportation from Canada: Hearing Before the House Gov't Reform Subcomm. on Wellness and Human Rights*, 108th Cong. (2003) [hereinafter *Pharmaceutical Reimportation from Canada*] (statement of Vermont's U.S. Rep. Bernie Sanders), available at <http://bernie.house.gov/statements/20030403171059.asp>.

B. Prescription Drugs Under the Federal Antitrust Statutory Framework

The pricing structure of pharmaceutical companies in the U.S. market has spurred both political and social outrage and consumer attempts to circumvent U.S. pricing.⁶⁶ To impose legal antitrust liability for the companies' behavior, however, courts must first determine that the pharmaceutical companies engaged in conduct that unlawfully restrains trade.⁶⁷ As mentioned previously, such conduct could take the form either of a horizontal collective agreement among all the pharmaceutical companies to refuse to deal with Canadian wholesalers who sell to U.S. customers, or of a vertical refusal deal in which each company independently refuses to deal with particular Canadian wholesalers who sell to U.S. customers.⁶⁸

Although a classic horizontal group boycott is traditionally deemed per se illegal under U.S. caselaw interpreting the Sherman Act, modern courts have narrowed the per se category in favor of applying a Rule of Reason analysis.⁶⁹ Furthermore, vertical territorial restraints are ana-

⁶⁶ Rigdon, *supra* note 61, at 22, 24, 27.

⁶⁷ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) (stating that under the Rule of Reason, courts will determine whether the restraint "promotes competition or [is] one that suppresses competition"); see also *Levine v. Cent. Fla. Med. Affiliates*, 72 F.3d 1538, 1552 (11th Cir. 1996) (stating that "[t]he rule of reason analysis is concerned with the actual or likely effects of defendants' behavior, not with the intent behind that behavior"); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 969 (10th Cir. 1994) (finding intent alone insufficient to invoke antitrust laws). See generally *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521 (6th Cir. 2001) (holding that without proof of an antitrust injury, malicious intent alone is an insufficient basis for antitrust liability).

⁶⁸ See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (holding that the horizontal refusal to deal by a group of dentists with insurance companies was illegal under section 1 of the Sherman Anti-Trust Act); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 46 (1977) (holding that a manufacturer's territorial restrictions on retailers were illegal under section 1).

⁶⁹ Compare *United States v. Gen. Motors Corp.*, 384 U.S. 127, 145 (1966) (holding an agreement between a car manufacturer and dealers to refuse to deal with discount dealers was per se illegal), and *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959) (holding an agreement among retailers, wholesalers, and manufacturers to refuse to deal with retail competitor was per se illegal), with *Nw. Wholesaler Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (holding the Rule of Reason applied to a wholesale purchaser cooperative's decision to expel a member), and *Ind. Fed'n of Dentists*, 476 U.S. at 459-65 (holding the "quick look" Rule of Reason applied to a refusal to deal with insurance companies on the part of a group of dentists). The Court has stated that horizontal refusals to deal will remain per se illegal if the boycotting party "possesses market power or exclusive access to an element essential to effective competition." *Nw. Wholesaler Stationers*, 472 U.S. at 296.

lyzed under the Rule of Reason as well.⁷⁰ Thus, regardless of whether drug manufacturers are targeted under antitrust statutes for collectively refusing to deal with Canadian distributors or for imposing vertical territorial restraints, courts will most likely engage in a Rule of Reason analysis.⁷¹

Essentially, the Rule of Reason analysis seeks to determine whether the restraint's anticompetitive effects substantially outweigh the procompetitive justifications offered by the defendant.⁷² In most Rule of Reason cases, the plaintiff must prove that the identified restraint is likely to have a substantial, adverse impact on competition, as indicated through a market analysis of the restraint's effects.⁷³ Such market analysis begins with a definition of the relevant market to determine the relative impact of the contested action on the overall market.⁷⁴ In the antitrust context, the relevant market is defined from two perspectives: the market for the product and the geographic market.⁷⁵ The remainder of this Note describes the differing approaches to defining geographic markets and then applies these approaches to the issue of reimportation of prescription drugs.⁷⁶ The Note concludes that Canada should be included as part of any geographic market considered in an antitrust claim against drug manufacturers operating in the U.S.⁷⁷

⁷⁰ See *Cont'l T.V., Inc.*, 433 U.S. at 57–59 (holding the Rule of Reason applied to vertical nonprice restraints).

⁷¹ See *supra* notes 69–70 and accompanying text. This Note does not discuss the “quick look” Rule of Reason, in which the plaintiff does not have to prove every aspect of anticompetitive effect, including a market power analysis. See *Ind. Fed’n of Dentists*, 476 U.S. at 460–61 (applying the “quick look” Rule of Reason to a group of dentists’ refusal to submit patient’s X-rays to insurance companies); *NCAA v. Bd. of Regents*, 468 U.S. 85, 100–03, 109 (1984) (applying the “quick look” Rule of Reason to the NCAA’s restrictions on the number of football games that members could televise and its agreement on the minimum price member schools would receive for broadcasting rights). Rather, it is sufficient to note that the Court has deemed the “quick look” version of the Rule of Reason appropriate “when the great likelihood of anticompetitive effects can easily be ascertained.” *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 777 (1999). As such, because it is uncertain whether the “quick look” version would be applied to actions of drug manufacturers, this Note will analyze the topic assuming the case falls under the full Rule of Reason. See *infra* notes 215–328 and accompanying text.

⁷² See *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 691.

⁷³ See *Cont’l T.V., Inc.*, 433 U.S. at 58–59; *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931).

⁷⁴ See, e.g., *Times-Picayune Publ’g Co. v. United States*, 345 U.S. 594, 611–13 (1953); *United States v. Microsoft Corp.*, 252 F.3d 34, 51–52 (D.C. Cir. 2001).

⁷⁵ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962).

⁷⁶ See *infra* notes 81–206, 215–328, and accompanying text.

⁷⁷ See *infra* notes 215–328 and accompanying text.

II. CURRENT APPROACHES TO GEOGRAPHIC MARKET DEFINITION

A. General Theory of U.S. Antitrust Laws

The underlying philosophy of U.S. antitrust laws is to protect free and fair market competition.⁷⁸ Thus, when anticompetitive practices by private businesses hinder open competition to a substantial degree, antitrust laws allow courts to step in to regulate practices to protect competition.⁷⁹

As stated above, before a court can apply the Rule of Reason analysis and evaluate a practice's potentially anticompetitive effects, a plaintiff first must define a legally sufficient market.⁸⁰ Market definition has both a product and geographic aspect.⁸¹ Thus, the relevant product market consists of all products that are "reasonably interchangeable" with—that is, are economic substitutes for—the product at issue.⁸² The geographic market consists of the geographic area within which competition occurs.⁸³

Market definition is a critical first step in an analysis of an antitrust claim because courts determine if the defendant has market power according to the defendant's role in the defined market.⁸⁴ If an antitrust plaintiff fails to identify a relevant market, then the defendants are entitled to a dismissal as a matter of law.⁸⁵ The U.S. Supreme

⁷⁸ See, e.g., *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549 (1966); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428–29 (2d Cir. 1945) (drawing on legislative intent to preserve competition and limit the aggregation of capital in select hands because such behavior hinders free markets).

⁷⁹ See Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1 (West 2005) (prohibiting agreements that unreasonably restrain trade); *id.* § 2 (prohibiting monopolization or attempt to monopolize); Clayton Act § 2, 15 U.S.C. § 13 (2000) (prohibiting price discrimination); *id.* § 3 (prohibiting tying and exclusive dealing agreements that lessen competition); *id.* § 7 (prohibiting mergers and acquisitions that tend to create monopolies); Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2000) (prohibiting unfair methods of competition).

⁸⁰ See *supra* notes 16–17 and accompanying text.

⁸¹ *Bathke v. Casey's Gen. Stores, Inc.*, 64 F.3d 340, 344–45 (8th Cir. 1995) (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993)). Although this Note deals solely with geographic market analysis, the complementary product market definition is recognized as being crucial to the Rule of Reason analysis. *Id.*

⁸² *Id.*

⁸³ *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

⁸⁴ See Sherman Anti-Trust Act § 1; *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (holding franchise agreement between a manufacturer of television sets and a retailer, which barred the retailer from selling franchised products from locations other than those specified in the agreement, was an unreasonable restraint of trade under section 1 of the Sherman Anti-Trust Act as analyzed under the Rule of Reason).

⁸⁵ See *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 858–59 (E.D. Va. 1999); see also ABA SECTION OF ANTITRUST LAW, *supra* note 14, at 544–45 (citing *TV Commc'ns*

Court has defined market power as "the ability to raise prices above those that would be charged in a competitive market."⁸⁶ Without market power, defendants cannot be liable for anticompetitive behavior, on the rationale that any anticompetitive conduct will not negatively affect the competitive marketplace.⁸⁷ In assessing market power, most courts refer to the defendant's market share (within the defined geographic and product markets) as a proxy for market power.⁸⁸ The relevant geographic market area translates into the denominator out of which the particular firm's market share is calculated.⁸⁹ The larger the market share held by a firm, the more market power it is said to hold.⁹⁰

Network v. Turner Network Television, 964 F.2d 1022, 1028 (10th Cir. 1992), where the Tenth Circuit affirmed the defendant's motion to dismiss because the plaintiff "did not allege a relevant product market which TNT was capable of monopolizing, attempting to, or conspiring to monopolize").

⁸⁶ *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.38 (1984); *see also* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984).

⁸⁷ *See, e.g., Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984) ("[P]laintiff [must] first prove that the defendant has sufficient market power to restrain competition substantially. . . . If not, the inquiry is at an end; the practice is lawful.") (citations omitted); *Davis-Watkins Co. v. Service Merch.*, 686 F.2d 1190, 1202 (6th Cir. 1982) ("Without market power, a firm cannot have an adverse effect on competition.").

⁸⁸ *Flegel v. Christian Hosp., Ne.-Nw.*, 4 F.3d 682, 689 (8th Cir. 1993) ("To establish . . . market power, . . . [it must be] show[n] that the defendants have a dominant market share in a well-defined relevant market." (internal quotation and citation omitted)). For example, if a defendant has a low market share (typically below thirty percent), courts are precluded from concluding that the defendant maintains market power. *See, e.g., Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 547 (2d Cir. 1993) (holding that a market share of only 1.15% was so "de minimis" as to lack proof of market power); *Hassam v. Indep. Practice Assocs., P.C.*, 698 F. Supp. 679, 694-95 (E.D. Mich. 1988) (finding the market power held by a firm was insufficient, where the firm had a market share of only twenty percent in a market with low barriers to entry and no evidence of the defendant's ability to impose above-market prices). On the other hand, if a defendant has a high market share, it is an indication that the defendant may command market power. *See, e.g., Graphics Prod. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1570-71 (11th Cir. 1983) (holding that the defendants' average seventy-percent market share was sufficient to prove market power in a non-price, vertical restraint on trade); *Barrett v. Fields*, 924 F. Supp. 1063, 1075 (D. Kan. 1996) (finding the defendants' fifty-percent market share was sufficient to prove market power in case regarding an attempted conspiracy to monopolize).

⁸⁹ *See* Charles Carson Eblen, *Defining the Geographic Market in Modern Commerce: The Effect of Globalization and E-Commerce on Tampa Electric and Its Progeny*, 56 BAYLOR L. REV. 49, 54-55 (2004).

⁹⁰ *See id.* Market power is the ability of a firm to obtain higher profits by reducing output and selling at a higher price. AREEDA & HOVENKAMP, *supra* note 10, ¶ 501. A firm's high market power corresponds to its competitors' inability to constrain the firm's pricing above market equilibrium, skewing the market away from perfect competition. *Id.*

Geographic market definition is also a key strategic decision for the parties.⁹¹ Typically, a large geographic area decreases the probability of finding an anticompetitive practice by the targeted firm because it will have little market power to affect the overall market.⁹² Alternatively, a smaller geographic market increases the firm's market power, which raises the potential that the reviewing court will find that the market can be manipulated for anticompetitive purposes.⁹³ For this reason, parties often attempt to manipulate the boundaries of the geographic market as a means of dictating the direction of the rest of the controversy.⁹⁴ Thus, it is crucial that the court define the relevant geographic market as accurately as possible; failure to do so could result in a misinterpretation of the antitrust claim.⁹⁵

B. Courts' Various Approaches to Geographic Market Definition

In 1961, in *Tampa Electric Co. v. Nashville Coal Co.*, the U.S. Supreme Court articulated the standard for determining the relevant geographic market area as "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies."⁹⁶ Using this standard to identify a geographic region is difficult because it requires both capturing the relevant forces of supply and demand

⁹¹ See, e.g., *Pabst Brewing Co.*, 384 U.S. at 549 (defendant urged the court to adopt a national geographic market to gain clearance for the proposed merger, whereas the government urged a localized geographic market, limited to the state of Wisconsin, in an attempt to block the merger); *United States v. Eastman Kodak Co.*, 63 F.3d 95, 103, 105 (2d Cir. 1995) (defendant urged the court to adopt a global geographic market, so as to dilute its market power, whereas the government urged the court to adopt a national geographic market so as to increase the defendant's market power). The geographic market defines the group of competitors that consumers may turn to as substitutes if a supplier were to raise prices. *Tampa Elec.*, 365 U.S. at 327. Thus, the geographic market represents the competitors that operate as a pricing constraint on the firm in question. *Id.*

⁹² Eblen, *supra* note 89, at 54–55.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See ABA SECTION OF ANTITRUST LAW, *supra* note 14, at 532–43. In their attempts to define the geographic market as accurately as possible, courts tend to focus on six major factors. *Id.* at 533–39. First, actual sales patterns are used to determine whether two areas are within the same market. *Id.* at 533–34. Second, evidence of parallel price movements may suggest two areas are part of the same market. *Id.* at 536. Third, transportation costs, in relation to the price of the product, are an important consideration in determining whether two areas are part of the same market. *Id.* at 536–37. Fourth, governmental barriers to trade, such as licenses, quotas, and tariffs, can limit competition between areas, signifying two separate geographic markets. *Id.* at 537–38. Fifth, industry and firm practices also help courts define the geographic market. *Id.* at 538. Finally, the nature and scope of the anticompetitive effect at issue can also determine the likely market. *Id.* at 538–39.

⁹⁶ 365 U.S. at 327.

and, at the same time, effectively limiting the market so that the actual market power of each firm is measured.⁹⁷ Therefore, a court applying this standard must undertake a detailed examination of the particular supply and demand forces at play in each case.⁹⁸ Although each case must be decided according to its unique factual circumstances, the Court has been inconsistent in identifying and weighing the economic factors to be considered within the *Tampa Electric* framework.⁹⁹

Such analytic inconsistency has led the Supreme Court in opposing directions at times.¹⁰⁰ For example, in *Tampa Electric* itself, even though the Court articulated a standard that accounts for both sides of the market, the Court's ensuing analysis focused solely on the supplier's side.¹⁰¹ *Tampa Electric* involved a utility company, Tampa Electric, which sued the Nashville Coal Company for failure to perform its portion of a requirements contract.¹⁰² Among other provisions, the contract required Nashville Coal to supply Tampa Electric's entire demand for coal for two utility stations for twenty years.¹⁰³ Near the expected performance date of the contract, Nashville Coal informed Tampa Electric that it would not deliver the coal because it believed the contract violated antitrust laws.¹⁰⁴ The Supreme Court diverged from the district court's finding that the geographic market consisted

⁹⁷ See *Brown Shoe Co. v. United States*, 370 U.S. 294, 338-39 (1962) (defining the geographic market to include suppliers in adjacent suburban areas of large metropolitan areas, but to exclude suppliers outside of the immediate reach of the metropolis). In *Brown Shoe Co. v. United States*, the Court stressed that Congress envisioned a "pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Id.* at 336. Furthermore, "[t]he geographic market selected must, therefore, both correspond to the commercial realities of the industry and be economically significant. Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area." *Id.* at 336-37 (internal quotations and citations omitted).

⁹⁸ See *id.* at 331 (describing the identified geographic market as including Tampa-area consumers and national coal producers).

⁹⁹ See, e.g., *Pabst Brewing Co.*, 384 U.S. at 549-52; *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963).

¹⁰⁰ Compare *United States v. Grinnell Corp.*, 384 U.S. 563, 575-76 (1966) (identifying a national market due to the defendants' business operations despite the fact that they provided localized services), with *Phila. Nat'l Bank*, 374 U.S. at 358-61 (identifying a local four-county market due to the localized nature of providing banking services to consumers despite the fact that national banking competitors operated in the same area).

¹⁰¹ 365 U.S. at 331-32 ("[T]he relevant competitive market . . . is of course the area in which respondents and the other 700 producers effectively compete.").

¹⁰² *Id.* at 324.

¹⁰³ *Id.* at 322.

¹⁰⁴ *Id.* at 323.

of only peninsular Florida.¹⁰⁵ Instead, the Court expanded the geographic market area to include several other states that were home to additional producers of coal, available to Tampa Electric.¹⁰⁶ By focusing on supply and expanding the geographic market on that basis alone, the Court only implicitly recognized a national demand and thereby rendered demand analysis seemingly irrelevant to defining a geographic market.¹⁰⁷

Similarly, in 1963, in *United States v. Philadelphia National Bank*, the Supreme Court again held that supply forces were critical in identifying the relevant geographic market.¹⁰⁸ In *Philadelphia National Bank*, the government sought to enjoin a proposed merger between Philadelphia National Bank, the second largest bank in the Philadelphia metropolis, and Girard Trust Corn Exchange Bank, the third largest bank, as illegal under section 1 of the Sherman Act and section 7 of the Clayton Act.¹⁰⁹ The Court held the proposed merger void under the Clayton Act because it would have substantially lessened competition.¹¹⁰ In doing so, the Court concluded that the relevant geographic market was a four-county area, reasoning that the banks (the suppliers) transacted very little business with customers outside of that area.¹¹¹

By contrast, in 1966, in *United States v. Pabst Brewing Co.*, the Supreme Court defined the geographic market by focusing on the market demand forces instead of supply forces.¹¹² In that case, the defendant beer company defined the proper geographic market as the entire United States, whereas the government argued for a smaller market of only Wisconsin or a three-state region of Wisconsin, Illinois, and Michigan.¹¹³ The Court held that due to the high demand for Pabst beer among Wisconsin state residents, the proper geographic market should be limited to Wisconsin.¹¹⁴

Given the Court's inconsistency in focusing alternately on demand or on supply forces when defining the relevant geographic market in a

¹⁰⁵ *Id.* at 331.

¹⁰⁶ *Tampa Elec.*, 365 U.S. at 331–32.

¹⁰⁷ *See id.*

¹⁰⁸ 374 U.S. at 358–61.

¹⁰⁹ *See id.* at 330; *see also* Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1 (West 2005); Clayton Act § 7, 15 U.S.C. § 18 (2000).

¹¹⁰ *Phila. Nat'l Bank*, 374 U.S. at 365.

¹¹¹ *Id.* at 359. The Supreme Court did not define the geographic market as where the banks do business or where they competed with each other, but rather as where the effect of the merger would have been "direct and immediate." *Id.* at 357.

¹¹² *See* 384 U.S. at 550–52.

¹¹³ *Id.* at 550.

¹¹⁴ *Id.* at 550–52.

given case, scholars have taken the lead in attempting to formulate workable solutions that properly and uniformly capture the economic supply and demand forces.¹¹⁵ Three distinct approaches to defining the relevant geographic market area have emerged: the "shipments" approach, the "diversion" approach, and the approach articulated in the U.S. Department of Justice's 1992 Merger Guidelines.¹¹⁶

1. Shipments Approach

Guided by the principle in *Tampa Electric* that the geographic market is comprised of the area in which buyers and sellers operate, scholars developed the shipments approach to focus on the physical locations to which and from which suppliers send shipments.¹¹⁷ Proponents of this school of thought believe that all economic factors affecting price also correlate to the quantity shipped.¹¹⁸ Thus, they use shipping figures as an appropriate proxy indicator to estimate the geographic market.¹¹⁹

Under this methodology, the shipment data is first classified into two categories: destination and origin.¹²⁰ From this starting point, the analysis identifies the areas from where the majority of the product is shipped and where the majority of goods are shipped to consumers.¹²¹ Proponents suggest that measuring these patterns captures both the demand and the supply for the product within a geographic area.¹²² Once that area is defined, the total consumption of shipment in the entire geographic area is calculated to arrive at the total market volume.¹²³ The total market volume then functions as the denominator from which to calculate a particular firm's market share.¹²⁴

¹¹⁵ See Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULL. 45, 72-81 (1973); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 938 (1981).

¹¹⁶ U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 1.21 (1992) [hereinafter 1992 MERGER GUIDELINES], reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104. See generally Elzinga & Hogarty, *supra* note 115 (articulating the shipments approach); Landes & Posner, *supra* note 115 (articulating the diversion approach).

¹¹⁷ *Tampa Elec.*, 365 U.S. at 327; Elzinga & Hogarty, *supra* note 115, at 73.

¹¹⁸ Elzinga & Hogarty, *supra* note 115, at 73-76.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 73.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Elzinga & Hogarty, *supra* note 115, at 73-76.

¹²⁴ *Id.* at 74.

Some federal appellate courts have utilized this approach to define the relevant geographic market.¹²⁵ For example, in 1990, in *United States v. Rockford Memorial Corp.*, the Seventh Circuit Court of Appeals held that the shipments approach should be used to define the geographic market.¹²⁶ In defending a proposed merger between two of the largest hospitals in Rockford, Illinois, the defendant hospitals defined the geographic market as a ten-county region based on the areas in which their patients lived.¹²⁷ The Seventh Circuit, however, defined the relevant geographic market area as the sole county where the hospitals were located.¹²⁸ In doing so, the Seventh Circuit cited the district court's finding that the supply of hospital services provided by the defendant went to approximately eighty-seven percent of the patients in Rockford and Winnebago counties.¹²⁹ Likewise, approximately eighty-three percent of the patient demand in Rockford and Winnebago counties was directed to these hospitals.¹³⁰ In focusing on the physical locations of the supply and demand forces of the industry, the court thus adopted the shipments approach.¹³¹

More recently, in 1995, in *United States v. Eastman Kodak Co.*, the Second Circuit Court of Appeals also adopted the shipments approach to define the relevant geographic market.¹³² In that case, Kodak brought suit to modify or terminate consent decrees that it had entered into in 1921 and 1954 to rectify antitrust violations that existed at that time.¹³³ In holding that a worldwide geographic market existed for the sale of photographic film, the Second Circuit noted that foreign manufacturers supplied one-third of U.S. film.¹³⁴ Characterizing this amount as a "significant" foreign presence in the sale of film, the court turned to the rationale of the shipments approach to

¹²⁵ See, e.g., *Eastman Kodak Inc.*, 63 F.3d at 102-05; *United States v. Rockford Mem'l Corp.*, 898 F.2d 1278, 1284-85 (7th Cir. 1990).

¹²⁶ 898 F.2d at 1284-85.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ See *Rockford Mem'l Corp.*, 898 F.2d at 1284-85; Elzinga & Hogarty, *supra* note 115, at 74 (defining a market based on where the services were directed to, in addition to from where the services were supplied).

¹³² *Eastman Kodak Co.*, 63 F.3d at 103 (citing the Elzinga & Hogarty shipments approach in its geographic market analysis).

¹³³ *Id.* at 97.

¹³⁴ *Id.* at 104.

hold that shipment patterns of both domestic and foreign manufacturers supported a worldwide geographic market.¹³⁵

Although the shipments approach is useful to capture historic and current market behavior, some critics fault this methodology for failing to consider the future effects on the geographic market if a firm attempts to gain further market power.¹³⁶ Because the shipments approach measures the elasticity of demand solely by the demand of current consumers, the methodology fails to capture the effect of the existence of practicable alternatives that would be available to consumers should prices increase.¹³⁷ Acknowledging this criticism, courts have held that practicable alternatives to the potential suppliers should be included in any attempt to define the geographic market.¹³⁸ Thus, although some lower courts have adopted the shipments approach, others have rejected it, citing this deficiency.¹³⁹

For example, in 1994, in *Morgenstern v. Wilson*, the Eighth Circuit Court of Appeals held that the relevant geographic market should be defined to include areas beyond those evident from the current market structure.¹⁴⁰ In that case, Dan Morgenstern, a cardiac surgeon, alleged actual monopolization in violation of section 2 of the Sherman Anti-Trust Act by the defendants, other cardiologists and cardiac surgeons who were members of a professional corporation that referred patients internally.¹⁴¹ Morgenstern focused on where patients actually traveled for such medical treatment and therefore defined the relevant geographic market as Lincoln, Nebraska, and twenty-six surrounding counties, excluding Omaha, Nebraska.¹⁴² The defendants, on the other hand, defined the geographic market to include, at a minimum,

¹³⁵ *Id.* at 103. The court also uses the diversion approach to reach the same conclusion. *Id.*

¹³⁶ See, e.g., *FTC v. Freeman Hosp.*, 69 F.3d 260, 269 (8th Cir. 1995); *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994); *A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1403 (7th Cir. 1989); cf. *Illinois ex rel. Hartigan v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 901 (C.D. Ill. 1990) (market defined narrowly because pipeline's captive customers could not readily switch suppliers), *aff'd sub nom. Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 149 (7th Cir. 1991).

¹³⁷ *Freeman Hosp.*, 69 F.3d at 269.

¹³⁸ *Tampa Elec.*, 365 U.S. at 327.

¹³⁹ See, e.g., *Casey's Gen. Stores, Inc.*, 64 F.3d at 344-45; *United States v. Mercy Health Servs.*, 902 F. Supp. 968, 978 (N.D. Iowa 1995).

¹⁴⁰ 29 F.3d at 1296.

¹⁴¹ *Id.* at 1294; see Sherman Anti-Trust Act § 2, 15 U.S.C.A. § 2 (West 2005).

¹⁴² *Morgenstern*, 29 F.3d at 1296. Morgenstern's private practice was located in Lincoln, Nebraska, which is why he centered his geographic market around that area. *Id.* at 1293, 1296.

Omaha, Nebraska.¹⁴³ The court determined that Omaha was a practicable alternative for patients in Lincoln, even if these consumers were not currently turning to Omaha.¹⁴⁴ After expanding the market to include Omaha, the court reasoned that the defendants lacked sufficient market power to function as a monopoly.¹⁴⁵

Likewise, in 1995, in *Federal Trade Commission v. Freeman Hospital*, the Eighth Circuit reaffirmed its holding that the geographic market must include potential suppliers, even if they are not currently utilized by consumers.¹⁴⁶ The Federal Trade Commission (the "FTC") challenged the proposed merger between two hospitals in Joplin, Missouri, as a violation of section 7 of the Clayton Act.¹⁴⁷ The Eighth Circuit affirmed the district court's conclusion that the FTC's proposed geographic market definition, which was limited to a twenty-seven mile radius around Joplin, was an unreasonably static approach.¹⁴⁸ The court acknowledged that adopting the FTC's approach would mean the geographic market was limited to only a snapshot of the current market.¹⁴⁹ Because these potential suppliers exerted pressure on the defendant by forcing the defendant to maintain competitive prices, these potential suppliers were, in reality, a decisive factor in the market.¹⁵⁰

2. Diversion Approach

Because of the failure of the shipments approach to account for future effects caused by a firm's current practices, some scholars advocate adopting a diversion approach.¹⁵¹ This approach defines market power as "the ability to set price above marginal cost."¹⁵² The underlying economic premise of this approach is that any firm with significant market share would be able to set prices above perfect

¹⁴³ *Id.*

¹⁴⁴ *Id.* The court included Omaha as part of the geographic market by relying on the ease of patients in Lincoln to reach Omaha for cardiac procedures, vigorous competition between health care providers in Lincoln and Omaha, patient referrals by health care professionals in Lincoln to professionals in Omaha for better care, and Morgenstern's own practice of performing cardiac surgery in Omaha by commuting from Lincoln. *Id.* at 1297.

¹⁴⁵ *Id.* at 1297.

¹⁴⁶ 69 F.3d at 269.

¹⁴⁷ *Id.* at 262-63; see Clayton Act § 7, 15 U.S.C. § 18 (2000).

¹⁴⁸ *Freeman Hosp.*, 69 F.3d at 269.

¹⁴⁹ *Id.*

¹⁵⁰ See Landes & Posner, *supra* note 115, at 947.

¹⁵¹ See *id.* at 938.

¹⁵² *Id.* at 939. This concept is formalized in traditional economic theory as the Lerner Index, which measures the "proportional deviation of price at the firm's profit-maximizing output from the firm's marginal cost at that output." *Id.*

market competition circumstances because consumers are unable to turn to cheaper competitors.¹⁵³ In a perfectly competitive market, on the other hand, firms could not set prices above market level.¹⁵⁴

The diversion approach illustrates how the elasticity of demand can affect a firm's supply decisions.¹⁵⁵ A high elasticity of demand indicates greater ease with which consumers are able to switch to a competitor's products at the slightest increase in price, forcing firms to maintain price levels on par with those of their competitors.¹⁵⁶ Alternatively, if a firm faced an inelastic demand for its product, it would act as a rational profit-maximizing entity by raising prices and reducing the quantity produced.¹⁵⁷ Such actions would lower the firm's total costs while increasing profits through higher prices charged to consumers.¹⁵⁸ Consequently, the smaller the market share held by a firm, the greater elasticity of demand facing the firm.¹⁵⁹ A high elasticity of demand may also correlate to a higher elasticity of supply.¹⁶⁰ In terms of market power, a high elasticity of supply manifests itself as small increases in price by any particular firm generating large increases in output production by competing firms, because consumer demand will switch from the high-priced product to the competitor's low-priced product.¹⁶¹

Although most market share analyses measure the elasticities of supply and demand, the unique aspect of the diversion approach is that it incorporates the firm's entire sales when calculating its market power in the local market.¹⁶² The rationale behind this approach is that if a firm has entered a local market with even a single sale, it has done so after calculating the associated costs and determining it to be profitable.¹⁶³ Thus, if the local market's price should rise, then according to the diversion theory, the firm would simply divert its production away from its other markets and to the local market.¹⁶⁴ Under this theory, a distant firm's total production can affect the local geo-

¹⁵³ *Id.* at 949-50.

¹⁵⁴ *Id.* at 941-42.

¹⁵⁵ Landes & Posner, *supra* note 115, at 941-42.

¹⁵⁶ *Id.* at 942.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See Landes & Posner, *supra* note 115, at 942, 945.

¹⁶¹ *Id.*

¹⁶² *Id.* at 962-65.

¹⁶³ *Id.* at 962.

¹⁶⁴ *Id.* at 963.

graphic market's elasticity of supply because the distant firm can divert its total production to the local market at the first sign of a profitable price change.¹⁶⁵ Because the distant seller has overcome transportation or other distance-related costs to sell even one unit in the local market, it follows that the distant seller would not incur additional prohibitive costs if it chose to sell additional quantities in the local market.¹⁶⁶ Following this diversion theory, foreign production often is included in calculating the domestic firm's market share.¹⁶⁷

In addition to using the shipments approach in the 1995 *Eastman Kodak* case, the Second Circuit also drew upon the diversion theory's principles.¹⁶⁸ In looking at the photographic film sale market, the court identified five major manufacturers, naming Kodak as the sole domestic producer.¹⁶⁹ The court reasoned that because the supply of film is elastic and foreign film manufacturers had already established a presence in the U.S. market, foreign film manufacturers would respond to any attempt by Kodak to raise prices by diverting their production to the U.S. market from other locations, allowing them to absorb the increase in consumer demand for cheaper film.¹⁷⁰ With Kodak's major competition coming from foreign film manufacturers, the court held that a worldwide market, as opposed to a national market, best captured the market pressures facing Kodak.¹⁷¹ Thus, the diversion approach defines the relevant geographic market by taking into account the elasticity of demand faced by the particular firm in order to incorporate potential competition faced by the firm.¹⁷²

3. U.S. Department of Justice Merger Guidelines Approach

In the 1992 Merger Guidelines, the DOJ and the FTC offered yet another approach to geographic market definition, which centers on the opportunity for price discrimination.¹⁷³ Similar to the diversion theory, this approach heavily weighs the effect of price changes on a market, although it does not focus as much on the cross-elasticity of

¹⁶⁵ Landes & Posner, *supra* note 115, at 964.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 968.

¹⁶⁸ 63 F.3d at 103 (citing Landes & Posner, *supra* note 115, at 960–66).

¹⁶⁹ *Id.* at 98.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 105.

¹⁷² See *supra* notes 151–71 and accompanying text.

¹⁷³ 1992 MERGER GUIDELINES, *supra* note 116, § 1.2, reprinted in 4 Trade Reg. Rep. (CCH), ¶ 13,104.

supply.¹⁷⁴ The relevant geographic market includes firms with the ability, actual or potential, to increase prices without losing so many buyers that the price increase is unprofitable.¹⁷⁵ To arrive at this definition of the market, a court would estimate the effects of a hypothetical increase in price.¹⁷⁶ If enough buyers would turn to a cheaper alternative, then the location of that alternative supplier is included in the geographic market, and additional alternatives are analyzed and included until an area is identified where a slight increase would not affect the purchasers' choice of supplier.¹⁷⁷ Although this definition leaves open the possibility of a worldwide geographic market, the reality of finding such an expansive market is diminished because the 1992 Merger Guidelines do not allow for geographic price discrimination.¹⁷⁸ Therefore, if the company can differentiate prices on a geographic basis, then the smaller regions in which the company has power to set the prices will be recognized as separate geographic markets.¹⁷⁹

Courts are increasingly adopting this approach.¹⁸⁰ For instance, in 1989, in *FTC v. Elders Grain, Inc.*, the Seventh Circuit Court of Appeals affirmed an injunction preventing the acquisition of one industrial dry corn manufacturer by another.¹⁸¹ The defendants argued that the targeted company was not in the same geographic market because their plants were located in Kansas and the acquirer's plants were in Indiana.¹⁸² The defendants argued that each plant supplied a different demand market by virtue of their locations on different sides of the Mississippi River.¹⁸³ The court, however, viewed the geographic market as covering the entire nation.¹⁸⁴ In defining the geographic market as nationwide, the court followed the 1992 Merger

¹⁷⁴ See *id.* § 1.0.

¹⁷⁵ See *id.*

¹⁷⁶ *Id.* § 1.21.

¹⁷⁷ *Id.*

¹⁷⁸ See 1992 MERGER GUIDELINES, *supra* note 116, § 1.22, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

¹⁷⁹ *Id.*

¹⁸⁰ See, e.g., *Eastman Kodak*, 504 U.S. at 455, 459-79; *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906-07 (7th Cir. 1989); *FTC v. Owens-Ill., Inc.*, 681 F. Supp. 27, 51 (D.D.C.) (explaining the relevant geographic market did not include foreign producers because although foreign producers may have met domestic inelastic demands, foreign production would not have been significant in the short term because foreign producers were not a significant reservoir of capacity), *vacated as moot* 850 F.2d 694 (D.C. Cir. 1988).

¹⁸¹ *Elders Grain, Inc.*, 868 F.2d at 907-08.

¹⁸² *Id.* at 906-07.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 906 ("The defendants and everyone else in their industry ship industrial dry corn all over the United States.").

Guidelines by emphasizing the price-setting power of competitors.¹⁸⁵ Because there were only five suppliers in the United States, the court reasoned that when faced with increased prices from any one manufacturer of dry corn, consumers would turn to any alternative, regardless of that supplier's location.¹⁸⁶ As further evidence of a national market, the court noted that minimal shipping costs allowed suppliers on either side of the Mississippi to meet national demand.¹⁸⁷ The court thus viewed both companies as operating in the same geographic market because either could supply the same product to buyers nationwide if the other increased prices.¹⁸⁸ The court held that if the acquisition were allowed, then an alternate supply source would be eliminated for buyers.¹⁸⁹

Yet courts have not uniformly accepted the 1992 Merger Guidelines' approach to geographic market definition.¹⁹⁰ For example, in *Eastman Kodak*, the Second Circuit rejected this approach.¹⁹¹ Attempting to follow the 1992 Merger Guidelines' approach, the government in that case had pointed out Kodak's ability to engage in price discrimination within the U.S. market by charging a premium.¹⁹² The government alleged Kodak's ability to engage in price discrimination meant that a global market definition would be too broad.¹⁹³ The court rejected this argument, reasoning that although Kodak's domestic wholesale prices were higher than its foreign wholesale prices, there was no evidence to suggest that Kodak's costs were uniform throughout the world.¹⁹⁴ The court concluded that without uniformity of costs, price differentials among geographic regions could not definitively represent multiple markets; additional entry costs experienced in one region but not the next could account for higher prices from region to region.¹⁹⁵

¹⁸⁵ See *id.* at 907; 1992 MERGER GUIDELINES, *supra* note 116, § 1.21, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

¹⁸⁶ *Elders Grain, Inc.*, 868 F.2d at 907.

¹⁸⁷ *Id.* at 906.

¹⁸⁸ *Id.* at 906-07.

¹⁸⁹ *Id.* at 907.

¹⁹⁰ See *Eastman Kodak Co.*, 63 F.3d at 106; 1992 MERGER GUIDELINES, *supra* note 116, §§ 1.0, 1.2, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

¹⁹¹ *Eastman Kodak Co.*, 63 F.3d at 106; 1992 MERGER GUIDELINES, *supra* note 116, § 1.2, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104.

¹⁹² *Eastman Kodak Co.*, 63 F.3d at 106.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 106-07.

¹⁹⁵ See *id.*

4. Other Factors Contributing to Geographic Market Definition

In addition to the aforementioned three approaches, which focus on actual sales patterns, elasticity of supply and demand, and pricing power, courts have identified several other factors that they reason contribute to the definition of the geographic market.¹⁹⁶ Among these additional factors are the nature of the product or service, governmental barriers to trade (such as tariffs, quotas, or differing governmental regulatory practices), transportation costs, parallel price movements between two areas, and industry standards.¹⁹⁷ Courts often consider these factors when defining a geographic market, regardless of the overall approach they use—a practice that can lead to opposite conclusions regarding the proper geographic definition, even within the same approach, depending on the weight courts accord to the various factors.¹⁹⁸

In 1966, in *United States v. Grinnell Corp.*, the Supreme Court held that industry operating standards can be used to arrive at a national geographic market definition.¹⁹⁹ The majority reasoned that in providing burglary and fire protection services, the overall business structure and plan of the defendant corporations was coordinated at a national level.²⁰⁰ Pointing to the recorded national schedule of prices, rates, and terms, the majority concluded that to reflect properly the national scope in which the defendants conducted business, a national geographic market must be adopted.²⁰¹ The dissent, however, argued that the business structure of the defendants was not as essential as the nature of the services they provided.²⁰² In protecting clients

¹⁹⁶ ABA SECTION OF ANTITRUST LAW, *supra* note 14, at 536–39.

¹⁹⁷ *Id.*; see also *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628 (1974) (noting that entrance into the banking industry depends on governmental authorization); *Eastman Kodak Co.*, 63 F.3d at 108 (concluding a worldwide market existed because of parallel pricing movements between U.S. and foreign markets); *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384, 1394 (5th Cir. 1983) (looking to transportation costs, delivery limitations, and customer convenience to define the relevant geographic market); *United States v. Hammermill Paper Co.*, 429 F. Supp. 1271, 1278 (W.D. Pa. 1977) (stating that the fact that there was “no separate delivered pricing zone” established a national market).

¹⁹⁸ Compare *Grinnell Corp.*, 384 U.S. at 575–76 (concluding a national market existed because of the defendants' nationwide planning and contracting systems), with *id.* at 587–90 (Fortas, J., dissenting) (arguing a local market existed because of the localized nature of the services provided by defendants).

¹⁹⁹ *Id.* at 575–76.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 587–90 (Fortas, J., dissenting).

from fire and burglary, the defendants maintained local central service stations that received notification of alarms and in turn notified local police or fire departments.²⁰³ Because each protected house was stationary and the fire and burglary protection ultimately had to be provided at each home's individual location, the dissent reasoned that the proper geographic market should be limited to these discrete local areas.²⁰⁴ Furthermore, buyers contracted directly with the local providers on the basis of local conditions, and each service center only covered a radius of twenty-five miles.²⁰⁵ Calling the business aspects "incidental" to the services the defendants provided, the dissent contended that the majority simply had ignored the economic realities underlying the market at hand.²⁰⁶

C. The Effect of Internet Sales in Geographic Market Definition

Despite a lack of consensus about which economic theory to adopt as the reasoning behind the application of *Tampa Electric* and the identification of other factors outside of those offered by the three scholarly analyses, the one commonality regarding geographic market definition has been adherence to the need to delineate the physical location of the market.²⁰⁷ This practice may be problematic when courts are faced with cases involving the Internet and e-commerce.²⁰⁸ Through the World Wide Web, a company can establish a truly global market for any product.²⁰⁹ Unsurprisingly, when courts have addressed instances of Internet trade, they admittedly have encountered much difficulty in defining the geographic market.²¹⁰ Without defined boundaries or a physical place, the Internet allows millions of people, from throughout the world, to reach each other.²¹¹

²⁰³ *Grinnell Corp.*, 384 U.S. at 588.

²⁰⁴ *See id.* at 589–90 (Fortas, J., dissenting).

²⁰⁵ *Id.* at 588.

²⁰⁶ *Id.* at 589.

²⁰⁷ *Tampa Elec.*, 365 U.S. at 327; *see Eastman Kodak Co.*, 63 F.3d at 103 (defining a global geographic market because producers all over the world held significant market presence); *Morgenstern*, 29 F.3d at 1296–97 (defining the geographic market as the state of Nebraska); *Rockford Mem'l Corp.*, 898 F.2d at 1284–85 (defining the geographic market as Winnebago County, Illinois); *Elders Grain, Inc.*, 868 F.2d at 906–07 (defining the geographic market as the belt of states running from Indiana on the east side of the Mississippi River to Kansas and Nebraska on the west side of the Mississippi River).

²⁰⁸ *See, e.g., GreatDeals.Net*, 49 F. Supp. 2d at 858 (citing *CyberPromotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 456, 459 (1996)).

²⁰⁹ Eblen, *supra* note 89, at 80–81.

²¹⁰ *See GreatDeals.Net*, 49 F. Supp. 2d at 858.

²¹¹ *See CyberPromotions, Inc.*, 948 F. Supp. at 459.

From a commercial market perspective, the Internet allows local suppliers to reach beyond their physical localities, expanding their "geographic" markets.²¹² The obstacle for courts, however, lies in measuring properly the impact of Internet sales—which can occur throughout the world—without diluting the market share of firms by automatically assuming the firm competes within a global geographic market.²¹³ Given that more and more suppliers are turning to the Internet for the very purpose of reaching a broader market of buyers, as seen in the case of reimportation of prescription drugs, the courts soon will have to determine how to incorporate Internet sales into a geographic market analysis.²¹⁴

III. APPLICATION OF THE TRADITIONAL APPROACHES OF GEOGRAPHIC MARKET DEFINITION TO ANTITRUST LITIGATION INVOLVING THE PHARMACEUTICAL INDUSTRY

Drug manufacturers may be subject to antitrust claims, based on section 1 of the Sherman Act, if sufficient evidence exists of coordination among them to limit drug supplies to the Canadian market, in an overall attempt to prevent U.S. consumers from purchasing cheaper drugs.²¹⁵ Because section 1 of the Sherman Anti-Trust Act prohibits *unreasonable* vertical or horizontal price agreements, a court analyzing such a claim would have to find the restraint unreasonable in order to

²¹² Eblen, *supra* note 89, at 80–81.

²¹³ See ABA SECTION OF ANTITRUST LAW, *supra* note 14, at 494 (stating that the starting point of any antitrust analysis is determining the market share of the firm, which can be done only after the overall market has been defined).

²¹⁴ Eblen, *supra* note 89, at 80–81.

²¹⁵ See Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1 (West 2005); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 312 (1897) (interpreting section 1 of the Sherman Act to prohibit horizontal agreements among competitors that affect price or price-related features). It is beyond the scope of this Note to analyze whether there is sufficient evidence to conclude if drug manufacturers have committed an antitrust violation. Rather, this Note presupposes that there is sufficient evidence for a court to engage in a market analysis. The applicability and focus of this Note is limited to the sole issue of geographic market definition. Once the geographic market is defined, a court would continue the market analysis by defining the product market and then calculating the market share held by the defendants. See *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 359–60 (7th Cir. 1990) (stating that "[w]hether market power exists in an appropriately defined market is a fact-bound question" and continuing to define geographic and product markets to determine the defendants had a fifty-percent market share). The market analysis then would allow the court to gauge the anticompetitive effect of the disputed action. *Id.* (agreeing with the district court's findings that the defendant's boycott had anticompetitive effects).

impose legal liability under the Rule of Reason.²¹⁶ Under this analysis, the plaintiffs first must prove that such restrictions on supply have anticompetitive effects.²¹⁷ Then, the defendants would have the opportunity to prove that the restraint in question offers offsetting procompetitive effects.²¹⁸ Should the defendants be successful in presenting such evidence, the burden would shift back to the plaintiffs to demonstrate that the restraint was not reasonably necessary to achieve the purported benefits.²¹⁹

In this Rule of Reason analysis, one of the first issues the plaintiff would face would be defining the relevant market, which includes the relevant geographic market.²²⁰ This Note argues that for the drug manufacturers to have violated the Sherman Act in their attempt to prevent drug reimportation, Canada must be included as part of the relevant geographic market definition analyzed in an antitrust claim.²²¹ Excluding Canada from the geographic market would separate the drug companies' practices into two distinct markets, precluding an antitrust violation because the disputed action would occur in the Canadian market and would therefore have no anticompetitive effect on the U.S. market and would remain unreachable by U.S. oversight—even though the drug manufacturers' actions affect U.S. consumers.²²² In other words, the level of anticompetitive effects due to the targeted conduct can only be measured if the threshold issue of geographic market is defined to include Canada.²²³

This Part applies the various theoretical approaches of geographic market definition to the drug manufacturing industry, in particular, to the practice of drug reimportation.²²⁴ After illustrating how the judicial test, articulated in *Tampa Electric Co. v. Nashville Coal Co.*,

²¹⁶ See *United States v. Topco Assocs.*, 405 U.S. 596, 606 (1972) (referring to Congress's intent that practices that "in some insignificant degree" restrain competition would not be held to violate antitrust laws).

²¹⁷ See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978).

²¹⁸ See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977); *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931).

²¹⁹ See *Sherman Anti-Trust Act* § 1; *Cont'l T.V., Inc.*, 433 U.S. at 49 (holding that the vertical restraint between a manufacturer and retailer of television sets is illegal, as analyzed under the Rule of Reason based on section 1 of Sherman Act); see also *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692–96 (applying first the Rule of Reason to find anticompetitive effects and then continuing to analyze the defendant's purported justifications).

²²⁰ See *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961).

²²¹ See *id.*

²²² See *id.* (inferring that if conduct occurs in a separate market, then it would be outside the area to which "the purchaser can practicably turn" for alternatives).

²²³ See *supra* notes 73, 81–90 and accompanying text.

²²⁴ See *infra* notes 228–75 and accompanying text.

would support inclusion of Canada as part of the geographic market, this Part details how the other theoretical approaches—the shipments approach, the diversion approach, and the 1992 Merger Guidelines approach—also support this conclusion.²²⁵ Finally, this Part addresses some of the additional factors that must be accounted for when defining the relevant geographic market for the unique situation of drug reimportation.²²⁶ This Part argues that these additional factors are essential to any court's geographic market analysis and that any analysis must account for these unique factors.²²⁷

A. *Pharmaceutical Drug Reimportation Under the Tampa Electric Standard for Geographic Market Definition*

In 1961, in *Tampa Electric*, the U.S. Supreme Court held that the relevant geographic market is the area to which consumers can practicably turn for alternatives if suppliers increased prices.²²⁸ Applying the *Tampa Electric* standard to an antitrust claim against drug manufacturers reveals that Canada should be included as part of the geographic market.²²⁹ Current industry practices and evidence of arbitrage are strong indicators that any geographic market should recognize Canada for purposes of applying U.S. antitrust laws to this practice.²³⁰ The first prong of the *Tampa Electric* test—the area in which the seller operates—supports the inclusion of Canada based on the conduct of the major drug companies.²³¹ The most compelling evidence for this argument is the fact that companies such as Merck, GlaxoSmithKline, Roche, and Pfizer maintain manufacturing plants throughout the world to support their global distribution systems.²³²

²²⁵ See *infra* notes 239–75 and accompanying text.

²²⁶ See *infra* notes 276–328 and accompanying text.

²²⁷ See *infra* notes 276–328 and accompanying text.

²²⁸ See 365 U.S. at 327.

²²⁹ See *id.*

²³⁰ See Elzinga & Hogarty, *supra* note 115, at 73; Landes & Posner, *supra* note 115, at 942, 964. Compare *United States v. Grinnell Corp.*, 384 U.S. 574, 575 (1966) (recognizing that the security industry planned and maintained its production process and management on a national level), with *Careers with Pfizer Global Manufacturing (PGM)*, *supra* note 34 (showing that Pfizer maintains a global perspective when manufacturing its products, including those sold in the United States), and *Pierce*, *supra* note 34 (recognizing that the pharmaceutical industry maintains a national perspective in its business planning and production process).

²³¹ See 365 U.S. at 327.

²³² See, e.g., *Pierce*, *supra* note 34 (quoting GlaxoSmithKline representatives as stating they have a “global” manufacturing and packaging outfit); *Careers with Pfizer Global Manufacturing (PGM)*, *supra* note 34 (describing its global manufacturing plants).

In fact, by its very definition, reimportation is limited to only those drugs that are first manufactured in the United States, shipped to the Canadian market in accord with the manufacturer's plans, and then brought back into the United States by sales from Canadian pharmacies.²³³ Thus, Canada is clearly a primary area in which drug manufacturers conduct business.²³⁴

The second prong of the *Tampa Electric* test—the area in which the U.S. consumer (as the purchaser) can practicably turn for supply alternatives—narrows the geographic market from a potentially global market to include only Canada and the United States.²³⁵ An annual \$695 million commercial trade, with consumer pressure for even greater growth, clearly indicates that U.S. consumers are turning to Canadian suppliers for their prescription drugs.²³⁶ Regarding the ease of obtaining prescription drugs from Canada, the presence of online pharmacies has expanded the portion of consumers who can *practicably* turn to Canadian suppliers, a key qualification in the *Tampa Electric* test.²³⁷ A supply option that previously was limited to only those living near the Canadian border or with enough expendable resources to travel to Canada has now become a reality for millions of Americans with access to a computer and a mailing service.²³⁸

B. Academic Approaches to Geographic Market Definition and Reimportation of Prescription Drugs

Beyond the general *Tampa Electric* test, this section applies the three theoretical approaches of geographic market definition to the issue of the reimportation of prescription drugs.²³⁹ Like a court employing the standard *Tampa Electric* approach, Courts using either the shipments and diversion approaches also would conclude that Canada should be included as part of any proper geographic market analysis.²⁴⁰ The geographic market definition under the 1992 Merger Guidelines,

²³³ HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 3.

²³⁴ See *supra* notes 228–33 and accompanying text.

²³⁵ See *Tampa Elec.*, 365 U.S. at 327; HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 11–12.

²³⁶ HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 11–12.

²³⁷ See *Tampa Elec.*, 365 U.S. at 327 (defining the second prong of the test as “the market area . . . to which the purchaser can practicably turn for supplies”); Eblen, *supra* note 89, at 80–81 (arguing that the Internet has allowed for greater contact between consumers and sellers regardless of the distance of separation).

²³⁸ See Eblen, *supra* note 89, at 80–81.

²³⁹ See *infra* notes 243–75 and accompanying text.

²⁴⁰ See *infra* notes 243–64 and accompanying text.

however, is less definitive.²⁴¹ After this section analyzes drug reimportation under the three scholarly approaches, Part III.C focuses more closely on the unique aspects of reimportation, such as the heavy presence of Internet sales and the existence of governmental barriers, and ultimately concludes that the diversion approach is best suited for defining the geographic market in which drug manufacturers compete.²⁴²

1. Prescription Drug Reimportation Under the Shipments Approach

The shipments approach emphasizes the quantity shipped by the suppliers to various destinations as a proxy indicator of the market share held by the supplier in each destination market.²⁴³ For purposes of the shipments approach, the pharmaceutical industry's international business operation highlights the fact that any geographic market analysis related to this industry cannot be restricted by traditional geographic demarcations because that is simply not how the industry operates.²⁴⁴ In fact, one of the industry's primary arguments against legalizing reimportation has been that it would reduce drug manufacturers' U.S. profits and thereby limit the expenditures invested into the research and development of new pharmaceutical drugs.²⁴⁵ Industry representatives Pharmaceutical Research and Manufacturers of America released a report in 2003 that cited the findings of several economic studies, which indicated that lower prices in the United States due to reimportation from Canada would lead to a 36.1% to 47.5% reduction in overall research and development intensity.²⁴⁶ Thus, there is a close tie and almost an interdependence between the U.S. and Canadian prescription drug supplies.²⁴⁷

Not only does this aspect of the pharmaceutical industry's research and development funding support a broad geographic definition, but the industry's widely dispersed manufacturing system also supports a global geographic market definition.²⁴⁸ Drugs currently supplied in the

²⁴¹ See *infra* notes 265–75 and accompanying text.

²⁴² See *infra* notes 276–328 and accompanying text.

²⁴³ See Elzinga & Hogarty, *supra* note 115, at 73–76.

²⁴⁴ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 3 (describing how reimported drugs are actually manufactured in the United States and then shipped to Canada by the pharmaceutical companies).

²⁴⁵ See *id.*

²⁴⁶ See PHARM. RESEARCH & MFRS. OF AM., *supra* note 36, at 15.

²⁴⁷ See *supra* notes 32–36 and accompanying text.

²⁴⁸ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 37 (discussing the current means through which foreign medicines enter the United States).

United States frequently are manufactured in plants located in foreign countries and shipped to the United States for sale.²⁴⁹ In the specific instance of reimportation, the drugs at issue are manufactured in U.S. plants and then shipped to Canada for retail sales.²⁵⁰ Therefore, the industry's own production process considers Canada and the United States as part of the same geographic market.²⁵¹

The coordination and business structure of the pharmaceutical industry thus mirrors that of the burglary and fire protection industry, which was analyzed by the U.S. Supreme Court in an antitrust claim in 1966.²⁵² In *United States v. Grinnell Corp.*,²⁵³ the Court defined a national market based on the burglary and fire protection industry's national schedule of prices, rates, and terms.²⁵⁴ Similarly, under the shipments approach here, courts should define the geographic market to include Canada based on the pharmaceutical industry's international operation of manufacturing plants, shipping patterns, and allocation of research and development funds.²⁵⁵

2. Prescription Drug Reimportation Under the Diversion Approach

To apply the diversion approach, one must determine the elasticity of supply and demand in the pharmaceutical industry.²⁵⁶ Although calculation of each specific numeric elasticity is beyond the scope of this Note, the evidence of arbitrage in the pharmaceutical industry lends credence to the proposition that domestic demand is fairly elastic.²⁵⁷ Internet sales from Canadian pharmacies have created a truly global market, in which consumers are able to divert their consumption from domestic markets to cheaper alternatives from foreign markets.²⁵⁸ At the same time, retailers in the pharmaceutical industry also exhibit a

²⁴⁹ *Id.*

²⁵⁰ *See id.* at 3.

²⁵¹ *See supra* notes 29–39 and accompanying text.

²⁵² *Compare Grinnell Corp.*, 384 U.S. at 575 (recognizing that the security industry planned and maintained its production process and management on a national level), *with* *Careers with Pfizer Global Manufacturing (PGM)*, *supra* note 34 (showing that Pfizer coordinates among its global facilities to manufacture its products), *and* *Pierce*, *supra* note 34 (recognizing that the pharmaceutical industry maintains a national perspective in its business planning and production process).

²⁵³ *See Grinnell Corp.*, 384 U.S. at 575–76.

²⁵⁴ *Id.* at 575.

²⁵⁵ *See id.*

²⁵⁶ *See* Landes & Posner, *supra* note 115, at 944–45.

²⁵⁷ *See id.* at 942.

²⁵⁸ *See* Eblen, *supra* note 89, at 80–81.

relatively high elasticity of supply.²⁵⁹ This phenomenon is manifested by the fact that many Canadian pharmacies are increasing their output to satisfy the demands of U.S. consumers as U.S. consumers switch from the higher-priced domestic product to the cheaper Canadian product.²⁶⁰ Thus, the Canadian pharmacies' elastic supply of prescription drugs can absorb the excess U.S. consumer demand created as a result of the higher prices of domestic prescription drugs.²⁶¹

Consequently, the prescription drug market exhibits characteristics similar to those of the photographic film market in *United States v. Eastman Kodak Co.* in 1995.²⁶² In that case, the Second Circuit Court of Appeals utilized the diversion approach to define a global geographic market for the photographic film industry.²⁶³ Just as in the pharmaceutical industry with relation to Canadian suppliers, the photographic film industry at the time of the court's decision consisted of international competitors who could easily absorb excess consumer demand as a result of a price increase by Kodak, the defendant firm.²⁶⁴

3. Drug Reimportation Under the 1992 Merger Guidelines

The final major theory of geographic market definition, the 1992 Merger Guidelines, might prove to be the least useful in reference to the pharmaceutical industry, though it still lends some support to including Canada as part of the U.S. market.²⁶⁵ On the one hand, the 1992 Merger Guidelines suggest the inclusion of Canada within the geographic market because empirical evidence seems to show that as domestic prices increase, a greater number of U.S. consumers turn to

²⁵⁹ See Landes & Posner, *supra* note 115, at 945.

²⁶⁰ See *id.* at 947.

²⁶¹ *United States v. Eastman Kodak Co.*, 63 F.3d 95, 104-05 (2d Cir. 1995) (holding that the ability of foreign competitors to absorb the excess demand led to their inclusion as part of the relevant geographic market definition.) By including Kodak's competitors, the court recognized a global geographic market because Kodak's major competitors were located throughout the world, coming from Japan, Europe, and the United States. *Id.*

²⁶² *Id.* (applying the *Tampa Electric* standard to define a worldwide market because Kodak sold on a worldwide basis, its competitors were foreign companies, and its purchasers turned to foreign competitors' film products as alternatives to Kodak's products).

²⁶³ *Id.* at 104.

²⁶⁴ *Id.*

²⁶⁵ See 1992 MERGER GUIDELINES, *supra* note 116, § 1.22, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,104 (incorporating the ability of the firm to set prices higher than perfect competition levels, while at the same time refusing to recognize price discrimination within the geographic market).

cheaper alternatives, including reimportation from Canada.²⁶⁶ In 1988, in *Federal Trade Commission v. Elders Grain, Inc.*, the Seventh Circuit Court of Appeals concluded that a national geographic market existed in the industrial dry corn industry based on evidence that consumers were willing to purchase from any supplier, regardless of their location in the United States.²⁶⁷ Similarly, in the pharmaceutical industry, a court could draw on the evidence that U.S. consumers are uniformly willing to purchase their prescription drugs from Canadian suppliers, regardless of their proximity, or lack thereof, to Canada.²⁶⁸

Although the above analysis would support the inclusion of Canada within the geographic market, the 1992 Merger Guidelines suggests the exclusion of Canada from any geographic market because the Guidelines do not recognize geographic price discrimination.²⁶⁹ The Second Circuit Court of Appeals rejected the government's argument for geographic market definition in *Eastman Kodak*.²⁷⁰ In doing so, the government relied on the 1992 Merger Guidelines to suggest that because of the different prices charged by Kodak in the United States and in foreign markets, the geographic market should be limited to the United States.²⁷¹ Without evidence that Kodak incurred equal costs in the domestic and foreign markets, the court refused to identify the U.S. market as a separate geographic market for purposes of the antitrust analysis.²⁷² Following the court's analysis in *Eastman Kodak*, one could argue that the price differentials between the Canadian and U.S. markets is simply the result of differences in costs experienced by the drug manufacturing industry.²⁷³ For example, the approval process for new drugs, differences in governmental regulations, and per capita income differentials between the U.S. and

²⁶⁶ See *id.*

²⁶⁷ *FTC v. Elders Grain, Inc.*, 868 F.2d 901, 906-07 (7th Cir. 1989).

²⁶⁸ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 11, fig.1.1. A report from the U.S. Department of Health and Human Services found 355 points of entry into the United States for reimported drugs, including mail, courier, and port services. *Id.* Each state, except for South Dakota, had at least one point of entry through which prescription drugs could reach U.S. citizens from Canada. *Id.*

²⁶⁹ See 1992 MERGER GUIDELINES, *supra* note 116, § 1.22, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (arguing that the presence of geographic price discrimination supports the identification of multiple geographic markets, as opposed to a single all-inclusive geographic market).

²⁷⁰ See 63 F.3d at 103, 105.

²⁷¹ See *id.* at 106; 1992 MERGER GUIDELINES, *supra* note 116, § 1.22, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104.

²⁷² See *Eastman Kodak*, 63 F.3d at 106.

²⁷³ See *id.* at 103-06.

Canadian markets all potentially contribute to the industry's differential pricing.²⁷⁴ Because the application of the 1992 Merger Guidelines generates these contradictory outcomes, this approach seems to offer the least insight of the scholarly approaches into defining the relevant geographic market.²⁷⁵

C. Unique Factors of Prescription Drug Reimportation and Its Geographic Market Definition

Besides offering another opportunity for courts to assess the merits of the various approaches to geographic market definition, the factual circumstances of the reimportation issue provide a unique opportunity for the courts to address the difficult and novel issues related to geographic market definition: those arising from the sale of prescription drugs on the Internet and the unpredictable status of governmental barriers to reimportation.²⁷⁶

1. Effect of Internet Sales

Unlike many practices of other industries that are challenged as being potentially anticompetitive, the practice of drug reimportation is fueled by the Internet—meaning the Internet plays a larger role in geographic market definition here than it would for most other industries.²⁷⁷ The entire practice of reimportation is a practicable alternative to most U.S. consumers only because the Internet allows distant consumers (those located within the United States) easy access to distant suppliers (those located within Canada).²⁷⁸ In other words, the presence of the Internet has effectively integrated two otherwise separate and distinct geographic markets for prescription drugs—that of the United States and that of Canada—into a single geographic market.²⁷⁹

2. Effect of Governmental Barriers

In addition to the effect of Internet sales, governmental barriers to trade also must be accounted for in any legal analysis regarding the

²⁷⁴ See BAKER, *supra* note 61, at 2–3.

²⁷⁵ See *id.*

²⁷⁶ See, e.g., *Am. Online, Inc. v. GreatDeals.Net*, 49 F. Supp. 2d 851, 858–59 (E.D. Va., 1999); *CyberPromotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 456, 459 (E.D. Pa., 1996).

²⁷⁷ See *supra* notes 61–65 and accompanying text.

²⁷⁸ See *supra* notes 61–65 and accompanying text.

²⁷⁹ See *supra* notes 207–14 and accompanying text.

pharmaceutical industry.²⁸⁰ Currently, Canada allows its pharmacies to fill patient prescriptions without requiring the patient first to have visited a Canadian doctor.²⁸¹ It is because of this nonregulation that Canadian Internet pharmacies are able to operate.²⁸² There may be reason to believe, however, that the Canadian government will soon erect barriers to the operation of Internet pharmacies in an effort to limit reimportation.²⁸³ Canadian officials have recently begun discussing requiring Canadian physicians to see U.S. patients in person before prescribing their medication.²⁸⁴ Such a change would make it practically impossible for many Americans to receive medications from Canada via the Internet.²⁸⁵ Currently lacking such regulations, however, the Canadian government poses no governmental barriers to reimportation.²⁸⁶

The greater governmental challenge to reimportation comes from the U.S. government, which technically maintains that commercial reimportation is illegal.²⁸⁷ There are signs, however, that this governmental barrier may not be as absolute as it initially appeared.²⁸⁸ The 2003 Medicare Act has in name legalized reimportation; all that remains to effectuate this change is the approval of the Secretary of Health and Human Services.²⁸⁹ In addition, the FDA, the federal agency in charge of enforcing the U.S. laws against reimportation, has not been enforcing these laws.²⁹⁰ Furthermore, increasing public pressure for more affordable prescription drugs has motivated many public representatives to advocate change.²⁹¹ In fact, many state and

²⁸⁰ See *infra* notes 281–328 and accompanying text.

²⁸¹ See Finkelstein, *supra* note 62, at 6.

²⁸² See *id.* (describing how Canadian doctors currently copy and then issue prescriptions written by U.S. doctors without requiring an in-person consultation).

²⁸³ See *id.* at 5.

²⁸⁴ *Id.*

²⁸⁵ See *Tampa Elec.*, 365 U.S. at 327 (including practicable consumer alternatives as part of the calculus for determining the relevant geographic market).

²⁸⁶ See Finkelstein, *supra* note 62, at 5.

²⁸⁷ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 4–5.

²⁸⁸ See *id.* at 1–5.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 20.

²⁹¹ See *Pharmaceutical Reimportation from Canada*, *supra* note 65 (reporting to the House Government Reform Subcommittee on Wellness and Human Rights that prescription drug costs should be lowered and that U.S. Rep. Bernie Sanders had introduced legislation that would prohibit pharmaceutical companies from retaliating against Canadian pharmacies selling to Americans); McLaughlin & Davidson, *supra* note 59 (urging union members to pressure their senators to take action on drug reimportation legislation); *Reimportation Update*, *supra* note 59 (quoting Sen. Grassley as stating, “American consumers are demanding lower prices on prescription drugs . . .”).

local governments have already implemented programs to facilitate the purchase of drugs from Internet sources.²⁹² Finally, and perhaps most indicative of the need to address the situation, a variety of legal challenges raised under state antitrust laws are forcing this issue before the courts for resolution.²⁹³

Under current understanding, governmental barriers, on either the Canadian or the U.S. side, would suggest the exclusion of Canadian sales from any geographic market analysis for purposes of U.S. antitrust laws.²⁹⁴ The traditional understanding rests upon the assumption that such barriers usually indicate separate geographic markets because it is assumed that suppliers would cater their business to the unique regulatory demands of each market.²⁹⁵ The practice of reimportation of pharmaceutical drugs, however, explicitly recognizes that the suppliers' products are the same, regardless of whether the supplier is located in the United States or in Canada.²⁹⁶ In other words, to *reimport* drugs to the United States, the drugs are first produced in the United States (along with drugs that are sold in the United States), exported to Canada, and then sold by Canadian pharmacies back to U.S. consumers.²⁹⁷ Thus, the traditional assumption that suppliers are catering to different markets due to governmental regulations is inapplicable in the context of drug reimportation.²⁹⁸ Rather, in the case of drug reimportation, drug manufacturers produce the prescription drugs that are sold to both the U.S. and Canadian markets in the same factories located in the United States.²⁹⁹ This practice suggests that governmental regulations are not barriers to the industry practice that views both Canada and the United States as a single North American market.³⁰⁰

²⁹² See *Pharmaceutical Reimportation from Canada*, *supra* note 65; McLaughlin & Davidson, *supra* note 59; *Reimportation Update*, *supra* note 59.

²⁹³ See *In re Pharm. Indus. Average Wholesale Price Litig.*, 307 F. Supp. 2d 196, 213-15 (D. Mass. 2004).

²⁹⁴ See *id.*

²⁹⁵ See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 628 (1974) (stating that entrance into the banking industry depends on governmental authorization); ABA SECTION OF ANTITRUST LAW, *supra* note 14, at 537-38.

²⁹⁶ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 3.

²⁹⁷ See *id.*

²⁹⁸ Cf. *Marine Bancorporation*, 418 U.S. at 628 (citing the fact that entrance into the banking industry depends on governmental authorization as a factor in delineating the relevant geographic market area).

²⁹⁹ See HHS TASK FORCE ON DRUG IMP., *supra* note 4, at 3.

³⁰⁰ See *supra* notes 41-51, 280-99 and accompanying text.

An additional governmental barrier that is likewise not to be viewed as an absolute divide is related to the wholesale pharmaceutical pricing schemes between the United States and Canada.³⁰¹ The Canadian government, through the PMPRB, imposes a cap on the wholesale prices pharmaceutical drug manufacturers can charge.³⁰² By contrast, the U.S. government has established only a self-reporting system that allows drug manufacturers to set wholesale prices.³⁰³ Although the Canadian system might seem to be the more anticompetitive model because it injects the heavy hand of government into the free market, the U.S. model, upon closer inspection, does not operate on a free market basis either.³⁰⁴

For example, in 2003, in *In re Pharmaceutical Industry Average Wholesale Price Litigation*, a Federal District Court in Massachusetts was presented with evidence revealing monopolistic pricing tendencies in the United States by the major pharmaceutical companies.³⁰⁵ The plaintiffs' complaint alleged that the exorbitant "spread" between the actual wholesale price and the charged wholesale price violated federal antitrust laws.³⁰⁶ For multiple prescription drugs, the DOJ calculated that the AWP (the drug manufacturer's reported "wholesale" price) exceeded the actual wholesale price by hundreds to thousands of percents.³⁰⁷ Such evidence suggests that the pharmaceutical manufacturers are actually operating as a monopolistic cartel, setting prices higher than would be expected in a purely competitive free market.³⁰⁸

Regardless of whether the U.S. pricing mechanism is an antitrust violation, the pricing scheme does support the idea that the pharmaceutical industry views the Canadian and U.S. markets as a single market.³⁰⁹ As already discussed, the majority of global research and development undertaken by pharmaceutical companies is funded by

³⁰¹ See *supra* notes 41–58 and accompanying text.

³⁰² See *supra* notes 42–46 and accompanying text.

³⁰³ See *supra* notes 47–58 and accompanying text.

³⁰⁴ For examples of the U.S. government's regulation of free markets in the United States, see, e.g., Sherman Anti-Trust Act § 1, 15 U.S.C.A. § 1 (West 2005); Sherman Anti-Trust Act § 2; Clayton Act § 13(a), 15 U.S.C. § 23 (2000); Clayton Act § 14; Clayton Act § 18; Federal Trade Commission Act § 5, 15 U.S.C. § 45 (2000).

³⁰⁵ Complaint ¶¶ 699–703, *In re Pharm. Indus. Average Wholesale Price Litig.*, 263 F. Supp. 2d 172 (D. Mass. 2003).

³⁰⁶ See *id.* ¶¶ 187, 208, 280, 311, 466, 501, 534.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

³⁰⁹ See *Careers with Pfizer Global Manufacturing (PGM)*, *supra* note 34 (describing its global manufacturing plants).

revenues generated in the United States.³¹⁰ Thus, the regulatory nature of the Canadian market does not operate as a wall between Canada and the United States; rather, it highlights the fact that the pharmaceutical companies augment their Canadian sales with profits earned by having a high price spread in the U.S. markets.³¹¹

Although the current regulatory scheme does not prohibit sales between Canada and the United States, potential new legislation could dramatically reduce the commerce between the two countries in the future.³¹²

3. The Best Methodology: The Diversion Approach

Given the deeply political nature of this issue, the diversion approach is the best analytical framework to address the antitrust issues raised by drug manufacturers' attempts to end the practice of reimportation of prescription drugs.³¹³ The shipments approach's focus on the current status of the market means it could misinterpret the actual market if governmental regulations eventually limit transactions between Canadian pharmacies and U.S. drug manufacturers.³¹⁴ Unlike the shipments approach, which includes only current shipment figures in its analysis of the geographic market, the diversion approach is able to measure both the current and future status of any market.³¹⁵ Thus, even if legislation eventually limits the trade between Canadian pharmacies and U.S. drug manufacturers, the diversion approach still will include Canada as part of a single market based on the idea that the U.S. drug companies have entered the Canadian wholesale market through their willingness to continue sales to Canadian wholesalers who do not sell to U.S. customers.³¹⁶ The shipments approach, in contrast, would simply conclude that two markets exist because significant units of product no longer would be shipped to

³¹⁰ See *id.*

³¹¹ See *supra* notes 31–33, 57, and accompanying text.

³¹² See Finkelstein, *supra* note 62, at 5.

³¹³ See *supra* notes 151–72 and accompanying text.

³¹⁴ See *supra* notes 117–50 and accompanying text.

³¹⁵ See *supra* notes 151, 162–67, and accompanying text.

³¹⁶ See *supra* notes 151, 162–67, and accompanying text (explaining that under the diversion approach, if a firm has entered local market with even a single sale, it has done so after calculating the associated costs and thus, that is sufficient evidence to support the claim that if the local market were to increase in profitability, the firm would then divert additional units of product to that local market).

Canada.³¹⁷ Thus, the diversion approach is able to remain flexible in its measurements of the elasticity of supply.³¹⁸

In addition to its ability to deal with future governmental barriers, the diversion approach remains flexible in measuring the elasticity of demand.³¹⁹ Because U.S. pharmaceutical companies often own monopolies in the form of patents over their drugs, the demand for their products is relatively inelastic.³²⁰ Thus, in keeping with general economic thinking, the U.S. pharmaceutical companies, as rational profit-maximizing entities, will reduce the quantity of goods sold to Canadian pharmacies.³²¹ This is because sales by Canadian pharmacies to U.S. consumers cut into the profits drug manufacturers gain when U.S. pharmacies sell the same product to the same U.S. consumer, but at a higher, unregulated price.³²² By focusing on the elasticity of demand, the diversion approach is able to capture the desire of Canadian pharmacies to purchase prescription drugs from U.S. pharmaceutical companies, even if the pharmaceutical companies refuse to sell (and therefore ship) any product.³²³

In addition, the diversion approach is best able to account for demand from U.S. consumers.³²⁴ By incorporating all Canadian suppliers that supply even a single unit of prescription drugs to a U.S. consumer, the diversion approach incorporates all sales of such suppliers and thus more accurately assesses the cross-border flow of prescription drug sales.³²⁵ In this fashion, the diversion approach also properly accounts for the large impact of online sales from Canadian pharmacies to U.S. consumers.³²⁶ By contrast, the shipments approach, which accounts for only those suppliers that currently ship a majority of their products to the defined market, would preclude inclusion of most Canadian pharmacies because their main consumers are not U.S. customers—a rationale that ignores the dynamic reality of prescription drug reimportation.³²⁷

³¹⁷ See *supra* notes 117–24 and accompanying text.

³¹⁸ See *supra* notes 161–67 and accompanying text.

³¹⁹ See *supra* notes 155–61 and accompanying text.

³²⁰ See Landes & Posner, *supra* note 115, at 942.

³²¹ See *id.*

³²² See *id.*

³²³ See *supra* notes 156, 162–67, and accompanying text.

³²⁴ See *supra* notes 155–61 and accompanying text.

³²⁵ See *supra* notes 162–67 and accompanying text.

³²⁶ See *supra* notes 61–65 and accompanying text.

³²⁷ See *supra* notes 120–24 and accompanying text.

Because it maintains flexibility in accounting for both supply and demand forces, the diversion approach is best capable of dealing with the unique role of the Internet, a global market, and governmental barriers in the reimportation of prescription drugs between Canada and the United States.³²⁸

CONCLUSION

Although prescription drug reimportation, in the end, might not be a long-term sustainable option for U.S. consumers aiming to reduce the cost of their prescriptions, the current practice has caused enough concern among the pharmaceutical industry and consumers that both sides have brought their concerns before U.S. courts. As such, numerous questions regarding the current practice of geographic market definition exist when antitrust claims are raised with respect to reimportation. In addition to the ambiguity surrounding the existing methodologies for geographic market definition, the advancement of modern technologies—especially the Internet—is changing how society views its “geography” and thus altering the legal sense of market share based on a physical geographic definition. Rooted in this unique setting, prescription drug reimportation provides an opportunity for courts to recognize the flexibility that the diversion approach offers to geographic market definition. Unlike other approaches, the diversion approach accurately captures the relevant market forces while accommodating any potential governmental barriers subsequently imposed by governments. In short, although the issue of drug reimportation raises some unique considerations under antitrust law, the traditional antitrust methodology and analysis still can be adapted to ensure drug manufacturers’ actions to limit drug reimportation are subjected to antitrust oversight. In turn, such oversight safeguards free competition to the benefit of all U.S. consumers.

MARYAN M. CHIRAYATH

³²⁸ See *supra* notes 155–71 and accompanying text.