Understanding the Antitrust Jurisprudence of Justice Gorsuch: *Conwood*'s Continuing Influence

Jeffrey Klenk and Jeffrey Armstrong

A review of newly appointed Supreme Court Justice Neil Gorsuch's antitrust opinions shows that his jurisprudence with respect to antitrust issues is well within mainstream legal thinking and that he is keenly familiar with the economic theory underpinning such cases. In fact, a careful reading of his most prominent antitrust decision, *Novell*, indicates that his judicial philosophy is informed not only by economic theory but also by his days in private practice as an antitrust attorney. Specifically, in *Novell*, Gorsuch makes reference to *Conwood*, a case that still stands as one of the largest antitrust damages awards ever and in which he was one of the lead attorneys for the plaintiff. Gorsuch's use of *Conwood* as an example of anticompetitive conduct and his involvement as an attorney in that case suggests his experience on that matter continues to influence his approach to antitrust and that he understands the challenges which antitrust plaintiffs often face. *Conwood* also sparked new ways of thinking about and testing for alleged anticompetitive conduct in a variety of cases, some of which could percolate up to the Supreme Court during Gorsuch's tenure.

■

***Jeffrey Klenk** is an Associate Director and **Jeffrey Armstrong** is a Director in the Economics & Damages practice of Berkeley Research Group. Armstrong worked as a consulting economist for United States Tobacco in several post-*Conwood* antitrust cases, including alleged monopolization lawsuits brought by Swedish Match and state consumer class actions. The views and opinions expressed here are those of the authors and do not necessarily reflect the opinions, position, or policy of Berkeley Research Group, LLC or its other employees and affiliates.*

Time in Private Practice

Gorsuch joined the Washington, DC firm Kellogg Huber in 1995 and made partner just two years later. Reflecting back on Gorsuch's time at the firm, Mark Hansen, one of the name partners there, observed that Gorsuch is not "afraid of antitrust; he understands it and is comfortable with it."[1] Hansen went on to conclude that Gorsuch is "quite familiar with both sides of the "v." in the antitrust world."[2]

Gorsuch's familiarity with the plaintiff's side of the "v." undoubtedly comes from his experience on *Conwood*.[3] While at Kellogg Huber, Gorsuch was part of a team that filed suit on behalf of Conwood Co., a moist snuff manufacturer, against rival United States Tobacco (UST). Gorsuch served as second chair at trial and helped manage and run several aspects of the case, including investigating the facts, drafting the complaint, examining witnesses, and writing post-trial motions and briefs.[4] As part of this work, Gorsuch appears to have been involved in working with Conwood's expert witnesses, defending the deposition of at least one of them.[5]

---

[1] Eric Kroh, *Gorsuch Would Lend Antitrust Legal Chops to High Court*, LAW360 (Feb. 1, 2017).

[2] *Id.*

[3] Conwood Co. v. U.S. Tobacco Co., No. 5:98-CV-108-R, 2000 WL 33176054 (W.D. Ky. 2000); Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002).

[4] NEIL GORSUCH'S RESPONSES, QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT, S. COMM. ON THE JUDICIARY 53 (2017) [hereinafter GORSUCH'S RESPONSES].

[5] Conwood Co. v. U.S. Tobacco Co., 2000 WL 35370353 (W.D. Ky. Mar. 5, 2000) (deposition of Richard Leftwich).

After being filed in 1998, the case proceeded to trial in 2000 and resulted in a damages award of $350 million—$1.05 billion after trebling. The verdict was upheld by the Sixth Circuit in 2002. As part of the appeals process, Gorsuch co-authored a brief providing insight into the allegations and arguments of the case that he would later refer to in his *Novell* decision.[6]

Work on *Conwood*

At issue in *Conwood* was the conduct of UST, the dominant branded manufacturer, in exerting control at the retail level over a product category known as "moist snuff" smokeless tobacco. Conwood, Gorsuch's client, claimed that UST engaged in a "systematic abuse of its undisputed monopoly power" by, among other actions, throwing away Conwood's display racks and more generally monopolizing the moist snuff category by abuse of category management and incentivizing retailers to drop Conwood's moist snuff products.[7] As Gorsuch would later observe in his *Novell* decision,[8] Conwood exemplifies one of the "common forms of alleged misconduct" in which a monopolist might engage, along with a number of other forms of unilateral conduct, such as exclusive dealing (*Microsoft*)[9] and tying (*Eastman Kodak*).[10] In citing these cases together as examples of anticompetitive practices, Gorsuch places *Conwood* alongside some of the most significant antitrust cases in recent history.

As argued by Conwood in its appellate brief, UST unlawfully monopolized the U.S. market for moist snuff in three main ways: (1) unlawful removal of Conwood's products and display racks from stores; (2) abuse of its position as "category captain" over retailers; and (3) paying retailers to grant UST exclusive vending rights and subordinate Conwood's presence in stores. Conwood's legal team argued that all of these actions were orchestrated by senior executives at UST on a scale that was so extreme that "only a monopolist could do these things."[11]

According to Conwood's first allegation, UST removed as many as 20,000 Conwood display racks per month, costing up to $100,000 in replacement costs (not counting lost sales while the racks or products were missing).[12] Gorsuch and the other authors of Conwood's brief also claimed that UST either disposed of Conwood's products or positioned them in UST's display racks to hide their visibility, as well as removing Conwood's point-of-sale signage.

UST's second area of alleged misconduct was the abuse of its position as category captain for retailers. In a category management arrangement, a retailer often appoints a manufacturer as the "category captain" that takes the lead in assisting the retailer with pricing, assortment, and merchandising decisions for the entire category, including rivals' products. As explained by Gorsuch and his colleagues, however, UST "wielded substantial power" over retailers such that it was able to exploit the "trust" of retailers to block both retailers and consumers from having material information about products and prices. For example, a less expensive variety of moist snuff known as "price value" was "buried" within UST's display rack and its signage removed, thus making it dif-

---

6 *See* Final Brief for Appellees, Conwood Co. v. U.S. Tobacco Co., 2001 WL 34624907 (6th Cir. 2001) [hereinafter Conwood Appellate Brief].

7 *Id.* at 2. Neither Conwood nor UST owned retail outlets but rather, like other moist snuff manufacturers, such as Swedish Match and Swisher Sweets, they distributed their product through wholesalers and retailers.

8 Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1072 (10th Cir. 2013).

9 United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001).

10 Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461–62 (1992).

11 Conwood Appellate Brief, *supra* note 6, at 16.

12 *Id.* at 13.

ficult for consumers to observe "price differential[s]" among different brands.[13] UST also reported biased sales statistics to retailers that understated the sales potential of Conwood's products and overstated its own.[14] These actions served to limit consumers' awareness of and access to alternatives in stores that may have been more affordable.

The third area of challenged conduct concerned exclusive vending rights.[15] As Gorsuch and his colleagues noted in their brief, UST paid stores to "eliminate competitors' racks and advertising" under the guise of its Customer Alliance Program (CAP).[16] Under CAP, UST paid retailers to give its racks more favorable placement in stores. CAP also required retailers to furnish UST with their stores' moist snuff sales data, and recorded the specific functions performed by retailers in order to calculate their compensation.[17] Retailers that were part of CAP came to comprise "80 percent of UST's sales volume."[18]

[A] comprehensive and systematic building of an antitrust case, grounded in factual evidence, is something that Gorsuch would come to demand as an appellate judge.

In support of these allegations, the Conwood brief co-authored by Gorsuch recounts a fact-intensive investigation, including testimony by over 60 retailers, affidavits from 241 Conwood field representatives, and admissions from UST field representatives and executives.[19] Gorsuch described this in his Senate confirmation questionnaire as a "massive discovery" effort.[20] He even spent time in the field with retailers and store owners to develop evidence of UST's conduct.[21] Such a comprehensive and systematic building of an antitrust case, grounded in factual evidence, is something that Gorsuch would come to demand as an appellate judge.

Moreover, Gorsuch and his colleagues had a firm grasp on the economic theory and empirical analyses done by their experts. For example, the damages model put forward by Conwood's economic expert garnered much scrutiny, including an amicus brief authored, in part, by a Nobel Prize winning economist.[22] Despite this scrutiny—namely, assertions that Conwood's expert failed to construct a damages model adequately related to Conwood's theory of injury[23]—Gorsuch and his colleagues were able to present factual evidence supporting the model's causal connection between UST's alleged conduct and Conwood's claimed injury.[24] Another criticism of Conwood's

---

[13] *Id.* at 11–12, 14–15.

[14] *Conwood*, 290 F.3d at 776.

[15] The syllabus of an antitrust course taught by Gorsuch in fact lists *Conwood* under the topic of exclusive dealing. *See* GORSUCH'S RESPONSES, *supra* note 4, appendix 19.

[16] Conwood Appellate Brief, *supra* note 6, at 15.

[17] The participating retailers, the agreement dates, and the merchandising functions stores performed were memorialized in standardized CAP worksheets. *Id.* at 16.

[18] *Id.* at 15, 16.

[19] *Id.* at 17.

[20] GORSUCH'S RESPONSES, *supra* note 4, at 53.

[21] *See, e.g.*, John Pfeifer, *Supreme Court Nominee Helped Win Big Award Here*, PADUCAH SUN, May 3, 2017, at 1A.

[22] Brief for Washington Legal Foundation, Stephen E. Fienberg, Franklin M. Fisher, Daniel L. McFadden and Daniel L. Rubinfeld as Amici Curiae in Support of Petitioners, Conwood Co., v. U.S. Tobacco Co., 290 F.3d 768 (6th Cir. 2002). Another in-depth review of the criticisms of Conwood's model is presented in David H. Kaye, *The Dynamics of* Daubert*: Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 VA. L. REV. 1933 (2001).

[23] Conwood's expert, Richard Leftwich, employed a regression model to analyze Conwood's change in market shares over time as a function of Conwood's initial "foothold" shares in each state in the continental U.S. *See* Conwood Appellate Brief, *supra* note 6, at 29–31.

[24] For example, documents from UST's senior management and field representatives stated: "Once established, Conwood was difficult to dislodge," and "I hope that we can act quickly . . . to put [Conwood] away before they get a bigger foothold in the market." *See* Conwood Appellate Brief, *supra* note 6, at 9–10. These statements indicate UST intensified its exclusionary activity where Conwood's foothold was low—the explanatory variable in the regression model—to deprive Conwood of gaining sales momentum in stores—the dependent variable.

damages model was that it failed to control for various "competitive factors" in the marketplace.[25] Yet again, though, Gorsuch and his colleagues carefully connected the model's framework with a number of competitive factors, including all factors proposed by the opposing expert.[26] The Sixth Circuit agreed that the work of Conwood's expert was reliable and declined to exclude his testimony.[27]

Decision in *Novell*

Gorsuch has authored three antitrust opinions.[28] The most prominent—and controversial—of these decisions was rendered in a dispute between Novell and Microsoft. Although Gorsuch's reasoning in that decision hewed closely to Supreme Court precedents and can be considered well within the legal mainstream, it attracted much criticism for evincing too pro-defendant a bias. Yet, much of what Gorsuch demanded out of Novell, as the plaintiff, was similar to what he had previously presented as a plaintiff's attorney for Conwood.

[Gorsuch's reasoning in Novell] attracted much criticism for evincing too pro-defendant a bias. Yet, much of what Gorsuch demanded out of Novell, as the plaintiff, was similar to what he had previously presented as a plaintiff's attorney for Conwood.

The dispute between Novell and Microsoft arose when Microsoft withdrew access to some of its intellectual property, namely application programming interfaces (known as APIs), that could be used by third-party programmers (like Novell) to better integrate their own products with Microsoft's products. As alleged by Novell, Microsoft's withdrawal of these APIs helped it "maintain its monopoly in the market for Intel-compatible personal computer operating systems."[29] Novell provided a putative explanation for Microsoft's conduct by claiming that, since the withdrawal of APIs prevented it from reaching the marketplace sooner with its own product, Microsoft's competing product attracted a "larger group of consumers" and further entrenched that group of consumers' reliance on Microsoft's operating system rather than a competing operating system.

Accepting that Microsoft possessed market power, Gorsuch crystallized the issue to be addressed as whether Microsoft's actions were themselves anticompetitive. In doing so, he observed that the "proper focus" for addressing this issue, based both on Supreme Court and Tenth Circuit precedent, should not be on "protecting competitors" but rather on "protecting the process of competition," thus shifting concern away from competitors and towards consumers.[30] This was also Gorsuch's own focus when litigating *Conwood*.

In laying out his framework for addressing Microsoft's conduct, Gorsuch was simply endorsing the well-established view that antitrust laws exist for the protection of competition, not competitors.[31] As explained by Gorsuch:

> The antitrust laws don't turn private parties into bounty hunters entitled to a windfall anytime they can

---

[25] Conwood Appellate Brief, *supra* note 6, at 9–10.

[26] *Id.* at 31–33.

[27] *Conwood*, 290 F.3d at 791–94.

[28] *See Novell*, 731 F.3d 1064; Four Corners Nephrology Assocs. v. Mercy Med. Ctr. of Durango, 582 F.3d 1216 (10th Cir. 2009) (dealing with a hospital refusing to offer consulting privileges to a rival nephrology practice); Kay Elec. Co-op. v. City of Newkirk, Okla., 647 F.3d 1039, 1041 (10th Cir. 2011) (dealing with whether a municipality enjoyed antitrust immunity from the Sherman Act). Gorsuch authored an additional decision, *Griffin v. Smith*, 572 Fed. App'x 625 (10th Cir. 2014), stemming from a contention that prison officials violated federal antitrust laws, but concluded that the prisoner's claims were frivolous and noted that his opinion would count as a second strike for purposes of the Prison Litigation Reform Act.

[29] *Novell*, 731 F.3d at 1075.

[30] *Id.*

[31] *See, e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co., v. United States, 370 U.S. 294, 320 (1962)).

> ferret out anticompetitive conduct lurking somewhere in the marketplace. To prevail, a private party must establish some link between the defendant's alleged anticompetitive conduct, on the one hand, and its injuries and the consumer's, on the other.[32]

With such observations in hand, Gorsuch takes a narrow view of the circumstances in which the refusal of one firm to deal with another constitutes anticompetitive behavior.

In *Colgate*, a decision now over 90 years old, the Supreme Court concluded that the Sherman Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[33] Robert Bork, echoing the Supreme Court's sentiments, argued that a "presumption of freedom" with respect to whom competitors might deal "seems appropriate to a free market economy" and concluded that refusals to deal should generally be permitted unless pursued in furtherance of other anticompetitive behavior.[34] The Supreme Court has more recently addressed allegations stemming from refusals to deal, culminating in its decisions in *Aspen Skiing* and *Trinko*, authored by Justices Stevens and Scalia, respectively.[35]

In deciding *Novell*, Gorsuch favorably cited Scalia's logic: for a firm's conduct to be anticompetitive, its refusal to deal must "suggest . . . a willingness to forsake short-term profits to achieve an anticompetitive end."[36] Gorsuch further compared refusal to deal cases to ones involving claims of predatory pricing, and concluded that to "avoid penalizing normal competitive conduct" a "showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise" was also necessary.[37] As summed up by Gorsuch, "Put simply, the monopolist's conduct must be irrational but for its anticompetitive effect."[38]

Unfortunately for Novell, Gorsuch could find "no evidence from which a reasonable jury could infer that Microsoft's discontinuation [of its prior relationship with Novell] suggested a willingness to sacrifice short-term profits, let alone in a manner that was irrational but for its tendency to harm competition."[39] In fact, Gorsuch pointed to evidence proffered by Novell itself that, in his opinion, suggested that Microsoft's conduct may have yielded immediate *increases* in its profitability, particularly for applications software. To the extent that Microsoft's conduct may have allowed it to better compete against Novell in that arena, inhibiting such conduct could have chilled the very benefits to consumers Gorsuch was seeking to protect. Thus, Gorsuch declined to overturn the district court's ruling that Microsoft's conduct did not violate Section 2.

After Gorsuch rendered his *Novell* decision, the American Antitrust Institute (AAI) filed an amicus brief arguing for a rehearing en banc, claiming, "If allowed to stand, the ruling would impair the ability of innovative companies and the government to prevent monopolists that dominate critical sectors of the economy from denying or degrading access to their networks to rivals."[40] AAI,

---

[32] *Novell*, 731 F.3d at 1080.

[33] United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

[34] Robert H. Bork, The Antitrust Paradox 344 (1978).

[35] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472, U.S. 585, 609–11 (1985); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 409 (2004).

[36] *Novell*, 731 F.3d at 1075 (quoting *Trinko*, 540 U.S. at 409).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1076.

[40] Brief for American Antitrust Institute as Amicus Curiae Supporting Plaintiff-Appellant's Petition for Rehearing En Banc at 1, Novell, Inc., v. Microsoft Corp., 731 F.3d 1064 (10th Cir. 2013).

in particular, took exception to Gorsuch's "adoption and misuse of the so-called 'profit sacrifice test' as an essential element of liability for refusal to deal."[41] In its brief, AAI argued that while a sacrifice of short-term profits might be a *sufficient* condition to find anticompetitive behavior it is certainly not a *necessary* condition:

> Profit sacrifice is relevant because it is one way to show anticompetitive intent or lack of a legitimate justification . . . . However, anticompetitive purpose or the lack of a legitimate business justification may be demonstrated in other ways, as Novell apparently did here through documentary evidence and testimony.[42]

Although critical of Gorsuch's decision in *Novell*, in its assessment of his fitness for the Supreme Court, AAI noted that his work in private practice, specifically his work in *Conwood*, was of a "different tenor." Yet, it is not clear that Gorsuch's economic reasoning in *Novell* really marks a break from his work in private practice. Indeed, in explaining his decision in *Novell*, Gorsuch makes a number of references back to *Conwood*.

Influence of *Conwood* on the *Novell* Decision

Gorsuch wrote in *Novell* that as a judge, it is reasonable to look back to "evidence and experience derived from past cases," to glean insight into whether the conduct being challenged is truly anticompetitive or whether a finding for the plaintiff would risk being a "false positive."[43] Indeed, in laying out his reasoning in *Novell*, Gorsuch cites to *Conwood* a number times for examples of what he views as obviously anticompetitive conduct.

In *Novell*, Gorsuch's primary concern with the theory of the case was that there was no evidence of harm to consumers; rather, Novell's claims revolved around its own alleged inability to compete as a result of Microsoft's refusal to deal. Gorsuch viewed Microsoft's actions more as a business tort or as an act of fraud rather than conduct giving rise to an antitrust claim. Likewise, while Conwood presumably would have had legal recourse against UST regardless, its claims only rose to the level of an antitrust violation once it could be shown that UST's conduct resulted in harm to competition, rather than just to Conwood. Explicitly referring back to *Conwood*, Gorsuch observed that it is "when the defendant's deceptive actions . . . are so widespread and long-standing and practically incapable of refutation that they are capable of injuring both consumers and competitors."[44]

One gets the sense that in relying on his experiences in *Conwood* as well as the Sixth Circuit's affirmation of liability and harm in that case, Gorsuch was expecting Novell's counsel to present a fact-based analysis of how Microsoft's conduct either raised consumers' prices or reduced their choices. When such an analysis was not forthcoming, Gorsuch found that Novell's claims did not

---

41 *Id.*

42 *Id.* at 6. As support for its claims, AAI references the work of Steven Salop, an antitrust scholar, who observes that since "[a]ntitrust law focuses on consumer welfare" a test based on a consumer welfare standard is "useful" because it more directly matches the challenged conduct with its competitive effects. *See* Steven Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 336 (2006). Salop goes on to conclude that "there is no reason to think that the impact on the defendant's profits in the hypothetical world of the profit-sacrifice test would be a good proxy for the impact on consumers." *Id.* In contrast, the FTC does endorse the use of a profit-sacrifice test stating that "a refusal to aid rivals that makes economic or business sense *apart* from a tendency to impair competition is not exclusionary." *See* Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 16–17, Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

43 *Novell*, 731 F.3d at 1072.

44 *Id.* at 1079–80 (citing *Conwood*, 290 F.3d at 783).

rise to the level of an antitrust violation. Citing to *Conwood*, Gorsuch observed that a "rival is always free to bring a section 2 claim for affirmatively interfering with its business activities in the marketplace."[45] In other words, Gorsuch may have been willing to entertain a claim against Microsoft, just not in the way articulated by Novell's counsel.[46]

Broader Influences of *Conwood*

Conwood appears not only to have had an important influence on Gorsuch but on antitrust as well, prompting scholarly review of the way manufacturers compete for shelf space and how retailers and consumers benefit from this competition. One young economist and law student at the time of the *Conwood* verdict, later FTC Commissioner Joshua Wright, decided to conduct original doctoral research on the economic theory of category management and applied it to the facts of *Conwood*.

Wright postulated that one important reason retailers enter into category management contracts is to grant a single manufacturer priority—but not fully exclusive—shelf space. For product categories where consumers have a strong preference for variety, this arrangement has efficiency advantages for retailers seeking simultaneously to satisfy a wide range of consumer tastes and motivate manufacturers to compete for the best position in retailers' stores.[47]

By framing retailers' shelf space decisions as a competition among manufacturers for favorable product placement, Wright suggested shifting the focus away from the nature of UST's conduct to its effects by analyzing whether or not UST's actions actually moved Conwood's products to less favorable shelf space. Specifically, Wright proposed quantitatively testing whether or not Conwood suffered an actual reduction in shelf-space or "facings" in display racks as a result of UST's misconduct. By contrast, Gorsuch and his colleagues presented systematic qualitative evidence of widespread misconduct by UST and Conwood's lost sales, but not whether these losses impaired Conwood's viability or its ability to compete for shelf space. At the time of *Conwood* though, Wright's economic theory of category captain arrangements had not yet been published and the facings data required for such an analysis may not have been available, so it could not have been used as a guide to assess procompetitive and anticompetitive tradeoffs.

One way the analysis proposed by Wright could have been employed would have been to use information collected from UST's CAP retailers. As part of CAP, retailers were required to furnish UST with highly granular store-level moist snuff sales data. This database was potentially a sizable evidentiary resource as it tracked individual retailers' decisions about shelf space across thousands of stores. Using this data, an economist could have compared Conwood's actual product sales in CAP stores that elected to give UST favorable shelf space (such as priority rack placement or exclusive vending rights) with Conwood's sales in CAP stores that chose neutral merchandising tasks (such as rotating out stale product).[48]

---

[45] *Id.* at 1076 (citing *Conwood*, 290 F.3d at 783–84).

[46] Gorsuch acknowledges that Novell may have been better served by claiming an antitrust violation in the market for "office suite applications," which is a market in which Novell actually competes, but was prevented from doing so due to statute of limitations for conduct that had happened back in the 1990s.

[47] *See* Joshua D. Wright, *Antitrust Analysis of Category Management:* Conwood v. United States Tobacco Co., 17 Sup. Ct. Econ. Rev. 1 (2009).

[48] This type of control-treatment framework has a high degree of statistical reliability. *See* Reference Manual on Scientific Evidence 92–95 (2d ed. 2000). Follow-on cases, such as that involving Swedish Match, in fact adopted such an analysis.

Such an analysis also may have been enlightening given the potential procompetitive effects, as presented by Wright, of competition by manufacturers for retailers' store space. For example, by paying retailers a fee to move UST's racks from low to high visibility locations in the store, more consumers would have been exposed to the moist snuff category, including former smokers with little or no brand loyalty searching for alternatives like smokeless tobacco. In fact, UST acknowledges this opportunity in its financial filings from that time period.[49] The result is that the net effect on UST's rivals could have been neutral or even positive (e.g., if they were housed in UST's racks or located within sight of UST's products).

Conwood is not just a case about an obscure tobacco product but also can be seen as opening new fields of economic inquiry that have stimulated research resulting in more precise ways for measuring consumer harm.

Conwood may also be the harbinger of a relatively new form of anticompetitive conduct. As Gorsuch notes, *Conwood* is an example of an antitrust violation by a firm with market power that had the effect of distorting market information and thus misleading consumers. Recent scholarship has, in fact, started to focus on the potential market power being conferred on large aggregators of consumer and financial information and other forms of data.[50] Through the manipulation of this data it may be possible, as was done by UST in *Conwood*, to influence consumers' choices in ways that benefit the provider of the information to the detriment of other firms or, especially, consumers. Antitrust lawsuits alleging information distortion or manipulation have already arisen in many industries, including financial market benchmarks like LIBOR.[51] Some of these cases could eventually work their way up to the Supreme Court for consideration by Gorsuch and the other justices.

Thus, *Conwood* is not just a case about an obscure tobacco product but also can be seen as opening new fields of economic inquiry that have stimulated research resulting in more precise ways for measuring consumer harm. With the advent of both offline and online point-of-sale data providing a rich source of information about retailers and consumers' purchases, it will become increasingly possible to analyze and isolate the effects of conduct challenged as anticompetitive at the time and place where the conduct occurred.[52] Given Gorsuch's emphasis on the need to prove harm to competition through higher prices or fewer choices to consumers, it will be interesting to see if he continues to hold plaintiffs' counsel to more rigorous, empirical testing of the claims they are presenting.

Conclusion

Hansen, Gorsuch's partner in private practice, has noted that, in their conversations, Gorsuch has "told him that his experience as a litigator was formative and still influences his thinking as a judge."[53] Gorsuch himself has acknowledged that "[p]racticing in the trial work trenches of the law" impacts the perspective he brings to the bench.[54] These influences from private practice,

---

[49] UST reported in its annual financial statements the opportunity to convert half of 46 to 50 million adult smokers to smokeless tobacco alternatives. *See* UST Inc., SEC Form 10-K at 2 (Feb. 24, 2003).

[50] *See, e.g.*, Mark Patterson, Antitrust Law in the New Economy: Google, Yelp, LIBOR, and the Control of Information (2017).

[51] For a discussion of potential antitrust issues arising from the aggregation of data, see Allen P. Grunes & Maurice E. Stucke, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, Antitrust Source (Apr. 2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr15_grunes_4_22f.pdf.

[52] For a discussion of the use of online and offline sales and advertising data to analyze consumer harm, see Jeffrey S. Armstrong, *The Voice of the Consumer in the Courtroom: How Big Data Can Improve Injury Evidence in Lanham Act False Advertising Cases*, Antitrust Source (Apr. 2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr15_armstrong_4_22f.pdf.

[53] Kroh, *supra* note 1.

[54] *Id.*

most notably from *Conwood*, do indeed appear in Gorsuch's work as a judge. Gorsuch's familiarity with economics has also appeared in his work as a judge, notably his willingness to wrestle with the profit-sacrifice test in *Novell*. Given this background, one can expect Gorsuch to be a Supreme Court Justice who understands the challenges plaintiffs face yet demands that counsel for those plaintiffs engage in rigorous, factual analysis to demonstrate that their claims in fact lead to harm to competition. ●