Summer 2010

# How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?

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## INTRODUCTION

COMPETITION authorities are increasingly concerned about the anticompetitive effects of deception.[1] In December 2009, for example, the U.S. Federal Trade Commission (FTC) alleged that Intel maintained its dominance in the worldwide microprocessor markets by, among other things, engaging in a decade-long campaign of deceit.[2] This followed the European Commission imposing a _1.06 billion fine,[3] Intel's $1.25 billion antitrust settlement with its competitor,[4] and the state of New York's antitrust complaint.[5] Among the various alleged deceptive practices, Intel misrepresented industry benchmarks to favorably reflect the performance of its central processing units relative to its competitors' products, and it pressured independent software vendors to label their products as compatible with Intel and not to similarly label the names or logos of a competitor's products, even though these products were compatible.[6]

A key issue is how the antitrust agencies and federal courts will evaluate a monopolist's deception. The courts frequently address whether a monopolist's deception violates the federal competition laws.[7] But when

1. *See, e.g.*, Susan A. Creighton, Cheap Exclusion: Deception as a Case Study, Hearings before the Dep't of Justice and the FTC on Exclusionary Conduct 10 (Dec. 6, 2006), http://www.usdoj.gov/atr/public/hearings/single_firm/docs/220348.pdf (former FTC official testifying that deception and similar types of anticompetitive abuses "should be at the heart of government enforcement of Section 2"); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Section 2 and Standard Setting: Rambus, N-Data & the Role of Causation (Oct. 2, 2008), http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf (noting how deceptive single-firm conduct in the standard-setting context has been a priority for the FTC for over a decade).

2. Complaint at 3, Intel Corp., No. 9341 (FTC filed Dec. 16, 2009), http://www.ftc.gov/os/adjpro/d9341/091216intelcmpt.pdf [hereinafter *Intel Compl.*]. Intel subsequently settled with the FTC. Decision and Order, Intel Corp., No. 9341 (FTC filed Aug. 4, 2010), http://www.ftc.gov/os/adjpro/d9341/100804intelagree.pdf. Sections VI, VII, and VIII of the Proposed Consent Order prohibit, among other things, Intel from engaging in deception related to its product road maps, its compilers, and its product benchmarking.

3. Summary of European Commission Decision of 13 May 2009 Relating to a Proceeding Under Article 82 of the EC Treaty and Article 54 of the EEA Agreement, 2009 O.J. (C 227) 13, 17, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:227:0013:0017:EN:PDF.

4. Arik Hesseldahl, *The Intel-AMD Settlement: A Play-by-Play*, BUS. WK., Nov. 15, 2009, http://www.businessweek.com/technology/content/nov2009/tc20091115_692400.htm.

5. Complaint at 78, New York v. Intel Corp., No. 09-00827-JJF (D. Del. filed Nov. 4, 2009), *available at* http://www.oag.state.ny.us/media_center/2009/nov/NYAG_v_Intel_COMPLAINT_FINAL.pdf.

6. *Intel Compl.*, *supra* note 2, at 10–11, 13.

7. In the United States, private plaintiffs bring most federal antitrust claims. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.41 (2007), http://www.albany.edu/sourcebook/pdf/t5412007.pdf. The FTC survey of private Section 2 claims decided between January 2000 and July 1, 2007 identified "Business Torts" as the third most popular theory of liability (following "Other" and "Refusals to Deal With Non-Rivals"

it comes to the legal standards to determine what is permissible or impermissible for a monopolist under Section 2 of the Sherman Act,[8] courts have yet to arrive at a workable legal standard that yields predictable results. The courts employ different legal standards to evaluate a monopolist's deception involving advertising and product disparagement, vaporware, standard-setting organizations, and other conduct.[9] Even for false advertising, the legal standards differ. Some courts, for example, readily condemn a monopolist's deceptive advertising.[10] Others presume that deceptive advertising has a *de minimis* effect on competition.[11] One court opined that deceptive advertising never violates the antitrust laws.[12]

Other countries' competition authorities have addressed this issue infrequently. But by recently settling a case involving deception to a standard-setting organization, the European Commission said it will continue to investigate and intervene in such cases.[13] So foreign competition agencies must also decide what legal standard to employ. To promote greater convergence on the legal standard, this Article examines a monopolist's deception across different factual settings and provides a framework for evaluating the monopolist's deception under the competition laws. Such clarity is needed. Unlike other monopolistic practices that may or may not be anticompetitive depending on the circumstances, deception is rarely, if ever, procompetitive.[14] But at times, a monopolist's deception, while immoral, may not (or only remotely) impair competition, and thus does not violate the competition laws.[15] Even if deception affects competition, it may not contribute significantly to a firm's maintaining or attaining monopoly power. At other times, deception raises significant anticompetitive risks.[16] In these cases, antitrust plaintiffs should be able to prosecute this deception quickly (rather than ramble through the protracted litigation under antitrust's rule-of-reason standard).[17]

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categories). William F. Adkinson, Jr. et al., Enforcement of Section 2 of the Sherman Act: Theory and Practice app., tbl. 1 (Nov. 3, 2008) (unpublished paper), http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf.

8. 15 U.S.C. § 2 (2006).

9. *See infra* Part III.A.

10. *Id.*

11. *Id.*

12. *Id.*

13. Press Release, European Comm'n, Antitrust: Comm'n Accepts Commitments from Rambus Lowering Memory Chip Royalty Rates, IP/09/1897 (Dec. 9, 2009), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1897&format=HTML&aged=0&language=EN&guiLanguage=EN.

14. *See infra* Part I.A–B.

15. *Id.*

16. *Id.*

17. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (noting that rule-of-reason standard involves a flexible factual inquiry into restraint's overall competitive effect and "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed"); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977) ("Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."). *See generally* Maurice E. Stucke, *Does the Rule of Reason*

Part I of this Article discusses deception and its potential anticompetitive effects. Since deception lacks any redeeming ethical, moral, or economic justifications, and trust in the marketplace is paramount, multiple laws seek to deter and punish deception. Part II discusses the legislative aim of Section 2 of the Sherman Act. Although the federal antitrust laws seek to deter acts of unfair competition, which historically included a competitor's deception, some federal courts, as Part III discusses, have recently erected hurdles for antitrust plaintiffs injured by a monopolist's deception. Such hurdles, as this Part discusses, are contrary to Section 2's legislative aim, the common law antecedents of the Sherman Act, and other congressional policies. Part IV proposes a "quick-look" legal standard for evaluating a monopolist's alleged deception. It addresses how the standard promotes several rule-of-law principles and responds to several concerns about using the antitrust laws to combat deception.

## I. COMBATING DECEPTION

### A. Deception and Its Harms

Deception means "[k]nowingly and willfully making a false statement or representation, express or implied, pertaining to a present or past existing fact."[18] It includes knowingly withholding "facts basic to a transaction."[19] Deception does not occur in perfectly competitive markets, which have transparent prices, highly elastic demand curves, easy entry and exit, and perfectly-informed, profit-maximizing buyers and sellers who are so numerous that each can act as a price-taker. Similarly, in the perfectly competitive marketplace of ideas, truth quickly and costlessly prevails through "the widest possible dissemination of information from diverse and antagonistic sources."[20] Consequently, deception requires two important deviations from the competitive ideal: (1) falsity is not quickly exposed in the marketplace of ideas, and (2) competition itself cannot work effectively.[21] Market participants do not act with full and perfect knowledge (either buyers or sellers know less than their counterpart) and enter suboptimal transactions (or forgo transactions alto-

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*Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375 (2009) (discussing and collecting criticisms of rule-of-reason standard) [hereinafter Stucke, *Rule of Reason*].

18. Black's Law Dictionary 406 (6th ed. 1990).

19. Restatement (Second) of Torts § 551(2)(e) (1977).

20. Associated Press v. United States, 326 U.S. 1, 20 (1945) (explaining that an essential goal of the First Amendment of the U.S. Constitution is promoting a marketplace of ideas by restricting governmental restraints on speech and achieving "the widest possible dissemination of information from diverse and antagonistic sources").

21. *See* Robert H. Lande, *Market Power Without a Large Market Share: The Role of Imperfect Information and Other "Consumer Protection" Market Failures* 2–5 (Am. Antitrust Inst. Working Paper No. 07-06, 2007), *available at* http://www.antitrustinstitute.org/archives/wp07-06.ashx; *see also* Maurice E. Stucke & Allen P. Grunes, *Toward A Better Competition Policy for the Media: The Challenge of Developing Antitrust Policies that Support the Media Sector's Unique Role in our Democracy*, 42 Conn. L. Rev. 101, 105–29 (2009), *and* Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L.J. 249, 256–88 (2001) (discussing the role of antitrust in preventing market failure in the marketplace of ideas).

gether).[22] Deception's anticompetitive effects include the following:

- raising the search costs for consumers in choosing products;[23]
- leaving consumers who purchased the wrong or inferior product worse off;[24]
- increasing the transaction costs for honest sellers to differentiate their products and to reap the financial, reputation-related rewards associated with their desirable products;[25]
- raising rivals' costs (in having to respond to a competitor's deceptive statements);[26]
- creating market distortions and causing a deadweight welfare loss as consumers forgo or minimize purchases;[27]
- tipping sales to the deceptive firm, which in markets with network effects[28] can lead to the exercise of monopoly power;[29]
- increasing entry barriers for new products (whose qualities and risks cannot be quickly assessed);[30]
- preventing some markets or services (such as standard setting) from developing;[31] and
- creating "lemon" markets where dishonest dealers for goods or ser-

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22. *See* Lande, *supra* note 21, at 2.

23. Deception, for example, can cause consumers "to disregard valuable and truthful information [such as the product's brand name] to rely on more expensive, time-consuming product searches." Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163, 1234 (1996); *see, e.g.*, Gwendolyn Bounds, *What Do Labels Really Tell You? As Eco-Seals Proliferate So Do Doubts*, WALL ST. J., Apr. 2, 2009, at D1. This effect of deception was a concern when a competitor palmed off its goods as that of its competitors. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 160–66 (1995); *see also* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. a (1995) ("As confidence in the truth of advertising diminishes, prospective purchasers may be forced to expend additional resources . . . .").

24. *See* Prentice, *supra* note 23, at 1234.

25. *See, e.g.*, *Qualitex*, 514 U.S. at 164.

26. Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 340 n.116 (2006); Prentice, *supra* note 23, at 1242.

27. Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029, 1055–56 (1991).

28. Marina Lao, *Networks, Access, and "Essential Facilities": From Terminal Railroad to Microsoft*, 62 SMU L. REV. 557, 560–61 (2009) ("The defining characteristic of network industries is the increasing value of their products to users as the number of users increases, a phenomenon called 'network effects' or demand-side economies of scale"; the increased value can come directly (having more interconnections as a result of more users (e.g., telephones)) or indirectly (having more supporting complements developed for that product as the number of users increases (e.g., Windows operating system))); *see also* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999) (discussing the "positive network effect" of Windows); Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601 (discussing the indirect network effects of streaming media players).

29. *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 313–14 (3d Cir. 2007) (discussing network effects for deception in standard-setting process).

30. Gerla, *supra* note 27, at 1068.

31. U.S. DEP'T OF JUSTICE & FTC, ANTITRUST ENFORCEMENT & INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION & COMPETITION 35 n.11 (Apr. 2007) [hereinafter PROMOTING INNOVATION & COMPETITION] (discussing hold-up problem).

vices drive out honest dealers,[32] thereby inhibiting innovation in these markets.

Deception lacks any redeeming economic qualities or cognizable efficiency justifications.[33] Consequently, competition law and consumer protection policy reinforce each other: both empower consumers to exercise the power of informed choice.[34]

Deception corrodes a market economy. In some markets, consumers can easily discover and swiftly punish deception (such as a deceptive meteorologist claiming that it is sunny on a rainy day). But in many markets, it is time-consuming and costly to verify (if one could) every material statement's trustworthiness independently.[35] As the financial crisis shows, many markets operate on trust.[36] With increasing specialization and dispersal of knowledge, society relies on human cooperation, which depends in part on trust and on citizens' general adherence to cer-

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32. FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922) ("The honest manufacturer's business may suffer, not merely through a competitor's deceiving his direct customer, the retailer, but also through the competitor's putting into the hands of the retailer an unlawful instrument, which enables the retailer to increase his own sales of the dishonest goods, thereby lessening the market for the honest product."); George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 495 (1970) (nothing that the cost of dishonesty includes "loss incurred from driving legitimate business out of existence").

33. Re: A Program Proposed by the American Medical Association & the Chicago Medical Society Involving Peer Review of Physician Fees Is Not Likely To Violate Federal Antitrust Laws, 117 F.T.C. 1091, 1097–98 (1994) ("Nothing in the antitrust laws prohibits competitors from engaging in self-regulation to protect consumers from fraud, deception, undue influence, and other abusive practices. Such regulation is likely to promote, rather than impede, competition, by enabling consumer purchase decisions to be made free from deceptive practices. Such practices distort the operation of a market economy, and their elimination enhances competition and consumer welfare.") (citing Am. Med. Ass'n, 94 F.T.C. 701, 1009); RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 552 cmt. a ("[N]o interest of society is served by promoting the flow of information not genuinely believed by its maker to be true"); Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977, 982-83 (2005) (cheap exclusion "unambiguously fails to enhance any party's efficiency, provides no benefits (short or long-term) to consumers, and in its economic effect produces only costs for the victims and wealth transfers to the firms engaging in the conduct"); ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE (Transaction Publishers 2002) (1952) ("As a rule, however, the social net product of any dose of resources invested in a deceptive activity is negative. Consequently, as with bargaining, no tax that yields a revenue, though it may effect an improvement, can provide a complete remedy, and absolute prohibition of the activity is required.").

34. *See* Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV., 44, 47–49 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713–14 (1997).

35. *See, e.g.*, Lynn A. Stout, *Trust Behavior: The Essential Foundation of Securities Markets* 12–13 (UCLA School of Law, Law of Econ Research Paper No. 09-15, 2009), http://ssrn.com/abstract=1442023. For example, one cannot expect investors to verify independently that the companies' financial statements are accurate, which, in turn, depends on verifying the value of assets (including arcane investments such as CDOs which the companies may not fully comprehend) and liabilities. *Id.* at 4–5.

36. Stout, *Trust Behavior*, *supra* note 35, at 14; *see* Amartya Sen, *Adam Smith's Market Never Stood Alone*, FIN. TIMES, Mar. 11, 2009, at 11; *see also* Nava Ashraf et al., *Adam Smith, Behavioral Economist*, 19 J. ECON. PERSP. 131, 136–37 (2005) (collecting some of the literature on importance of trust in market economies).

tain legal, social, and moral norms, such as truthfulness.[37] If buyers, for example, presume sellers are lying, commerce slows as buyers invest in self-education (or otherwise insure against losses).[38] Over the past twenty years, the Internet and global commerce have increased and broadened social relationships. To evolve, economies must rely increasingly on complex, large-scale cooperation and interdependence among citizens throughout the world. Many markets' health depends on the extent to which such legal, moral, and social norms of truthfulness are internalized.

Rampant market fraud corrodes trust.[39] The Secretary-General of the Organisation for Economic Co-operation and Development (OECD) placed the failure of business ethics at the recent financial crisis's epicenter.[40] Deception played an important role in the subprime lending crisis.[41] Trust in markets was further weakened as evidence of Ponzi schemes and other financial deceptions emerged and the failure of government regulators to deter fraud became known.[42] As the OECD Secretary-General observed, the global financial crisis "was created by the system itself; by the system which we created; and by a toxic combination of unethical behavior by companies and a faulty regulation and supervision of their activities."[43]

A free-market economy can withstand some deceit without seriously damaging the necessary degree of trust.[44] But markets may not be as durable in withstanding (or exposing) deception as some laissez-faire the-

37. DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE 73–75 (2005).

38. *See* sources cited *supra* note 23.

39. *See* OECD, OECD GUIDELINES FOR PROTECTING CONSUMERS FROM FRAUDULENT AND DECEPTIVE COMMERCIAL PRACTICES ACROSS BORDERS 9 (2003), http://www.oecd.org/dataoecd/24/33/2956464.pdf (noting that fraudulent and deceptive commercial practices can cause substantial harm to consumers, or pose an imminent threat of such harm if not prevented by undermining consumer confidence in markets).

40. Angel Gurria, OECD Sec'y-Gen., Remarks at the European Bus. Ethics Forum in Paris, Fr. (Jan. 22, 2009), *available at* http://www.oecd.org/document/3/0,3343,en_2649_201185_42033219_1_1_1_1,00.html. This loss of trust was reflected in the tenth edition of the Edelman Trust Barometer, a survey of almost 4,500 "opinion leaders" across 20 countries. Sixty-two percent said they trusted companies less in 2009 than in 2008. In the United States and Japan, more than 75% had lost faith in business in 2009. Only 38% (down 20 percentage points from 2008 and the lowest since the poll began) said they trusted business; only 36% trusted the banking sector (down from 68% in 2008). EDELMAN, EXECUTIVE SUMMARY, EDELMAN TRUST BAROMETER: THE TENTH GLOBAL OPINION LEADERS SURVEY 1 (10th ed. 2009), *available at* http://www.edelman.com/trust/2009/docs/Trust_Barometer_Executive_Summary_FINAL.pdf; Andrew Edgecliffe-Johnson, *Davos Confronted by Peak of Distrust*, FIN. TIMES, Jan. 27, 2009, at 14.

41. *See* U.S. GEN. ACCOUNTING OFFICE, CONSUMER PROTECTION: FEDERAL AND STATE AGENCIES FACE CHALLENGES IN COMBATING PREDATORY LENDING 3–4 (2004) (noting problem of "outright fraud or deception—for example, falsifying documents or intentionally misinforming borrowers about the terms of a loan.").

42. Maurice E. Stucke, *Lessons from the Financial Crisis*, ANTITRUST L.J. (forthcoming 2010).

43. Gurria, *supra* note 40.

44. *See* sources cited *supra* note 36.

orists suppose. Once fraud corrodes trust, free markets break down. As the latter-day Cassandra in the Madoff fraud testified,

> in the capital markets, you have to increase the risk of protection of the frauds, and right now, in such high reward, low risk to commit fraud, the markets feel green lighted because they have gotten away with it for so long and until you have trust, the American investor isn't coming back into our markets, and worse, foreign investors won't either.[45]

Besides its corrosive effect on trust, deceit is morally objectionable.[46] Deception is unfair to ethical companies that lose sales to a deceptive competitor. It violates the moral norm of treating others as one would like to be treated,[47] and it is understood as the origin of evil.[48] As F.A.

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45. *CNN Newsroom: Executive Compensation; Debating Stimulus; Madoff Whistleblower Testifies on Capitol Hill—Part 1* (CNN television broadcast Feb. 4, 2009) (comment of Harry Markopolos), *available at* 2009 WLNR 2287734 transcript.

46. The only justifiable instances are the extremes: an unimportant lie (told to be tactful or polite) or a ticking time bomb scenario (e.g., terrorists ask you where the power plant is—you deceive them).

47. *See, e.g.*, C.S. Lewis, The Abolition of Man 51–61 (MacMillan Co. 1947) (providing illustrations of Tao, which represents the sole source of all value judgments); *see also Ecclesiastes* 37:3 (King James) ("O wicked imagination, whence camest though in to cover the earth with deceit?"); *Exodus* 20:16 (NIV) ("You shall not give false testimony against your neighbor."); *Mark* 7:18–23 (NIV) ("'Are you so dull?' he asked. 'Don't you see that nothing that enters a man from the outside can make him unclean? For it doesn't go into his heart but into his stomach, and then out of his body.'... He went on: 'What comes out of a man is what makes him unclean. For from within, out of men's hearts, come evil thoughts, sexual immorality, theft, murder, adultery, greed, malice, deceit, lewdness, envy, slander, arrogance and folly. All these evils come from inside and make a man "unclean."'"); *I Peter* 2:1 (NIV) ("Therefore, rid yourselves of all malice and all deceit, hypocrisy, envy, and slander of every kind."); *Proverbs* 12:5 (NIV) ("The plans of the righteous are just but the advice of the wicked is deceitful."); *Psalm* 119:29 (NIV) ("Keep me from deceitful ways; be gracious to me through your law."); World Scripture: A Comparative Anthology of Sacred Texts pt.2, ch.9 (Dr. Andrew Wilson ed., Int'l Religious Found. 1991) ("O you who believe, wherefore do you say what you do not? Very hateful is it to God, that you say what you do not." (quoting *Qur'an* 61.2–3)) (Islam); *Hadith of Muslim* ("There are three characteristics of a hypocrite: when he speaks, he lies; when he makes a promise, he acts treacherously; and when he is trusted, he betrays.") (Islam); *Dhammapada* 176 ("There is no evil that cannot be done by the liar, who has transgressed the one law of truthfulness and who is indifferent to the world beyond.") (Buddhism); *Laws of Manu* 4.256 ("All things are determined by speech; speech is their root, and from speech they proceed. Therefore he who is dishonest with respect to speech is dishonest in everything.") (Hinduism)).

48. In the eighth circle of hell, for example, Dante recounted how the fraudsters were punished. In this circle, the demon Malacoda lied to Dante and Virgil about a bridge they could take. In hearing this deception, the Friar Catalano was nonplussed: "'Of the devil's iniquities/ Once in Bologna I heard told, and heard/ That he is a liar and the father of lies.'" Dante Alighieri, The Divine Comedy: Inferno (Laurence Binyon trans., MacMillan 1943) *reprinted in* The Portable Dante 125 (Paulo Milano ed., Viking Press 1947); *see also* William Blake, *A Poison Tree, in* Songs of Innocence and of Experience 89, 89 (Filiquarian Pub. 2007) (1794) ("I was angry with my friend:/ I told my wrath, my wrath did end./ I was angry with my foe:/ I told it not, my wrath did grow./ And I watered it in fears/ Night and morning with my tears/ And I sunned it with smiles/ And with soft deceitful wiles/ And it grew both day and night./ Till it bore an apple bright/ And my foe behold it shine,/ And he knew that it was mine,/ And into my garden stole/ When the night had veiled the pole/ In the morning, glad, I see/ My foe outstretched beneath the tree."); World Scripture *supra* note 47 (quoting *Maharatnakuta Sutra* to say that: "A

Hayek observed, totalitarian propaganda is destructive of all morals because it undermines "one of the foundations of all morals: the sense of and the respect for truth."[49]

### B. Criminal and Civil Statutes To Combat Deception

Because of the importance of trust in the global economy and the harms from deceit, legal institutions play a key role in preventing and punishing deception as well as encouraging more complex global trade and exchange.[50] Social sanctions may deter deception in personal dealings but not always in the commercial marketplace. Profit-maximizers do not always expose or punish fraudsters and reward truthful companies. Thus, the marketplace of ideas is not always self-correcting and self-policing. As Professor Tamar Frankel testified on the Madoff Ponzi scheme, "Investors will trust the institutions only if the law and other mechanisms guarantee their trustworthiness, that is—that they will tell the truth and abide by their promises."[51]

Accordingly, legal institutions and informal social and ethical norms should promote ethical behavior; protect honest businesses and consumers from deceit; and be "at the center of any new road-map for the global economy."[52] Many market economies seek to deter and punish deception with criminal and civil penalties. In the United States, for example, numerous federal laws (such as prohibitions on false statements;[53] and bank,[54] mail,[55] wire,[56] and securities fraud[57]) and state laws (such as forgery;[58] fraudulent use of a credit or debit card;[59] and deceptive business practices[60]) criminalize deception.[61] The FTC's mission, as Commissioner Rosch discussed in the context of the financial meltdown, "is to protect markets from anticompetitive, fraudulent, or deceptive conduct

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liar lies to himself as well as to the gods. Lying is the origin of all evils; it leads to rebirth in the miserable planes of existence, to breach of the pure precepts, and to corruption of the body.") (quoting *Maharatnakuta Sutra*) (Bodhisattva suarata's Discourse).

49. F.A. Hayek, *The Road to Serfdom*, *in* II The Collected Works of F.A. Hayek 172 (Bruce Caldwell ed., Univ. of Chi. Press 2007).

50. North, *supra* note 37, at 74–75.

51. *Madoff Ponzi Scheme and Need for Regulatory Changes, Hearing Before the H. Comm. on Fin. Serv.*, 11th Cong. (Jan. 6, 2009) (testimony of Prof. Tamar Frankel), *available at* 2009 WLNR 252887 (Westlaw).

52. Gurria, *supra* note 40.

53. 18 U.S.C. § 1001 (2006).

54. *Id.* §§ 1005–06 (False Entries), 1914 (False Statements), 1344.

55. *Id.* § 1341.

56. *Id.* § 1343.

57. *Id.* § 1348.

58. *See, e.g.*, Tenn. Code Ann. § 39-14-114(a).

59. *See, e.g.*, *id.* § 39-14-118.

60. *See, e.g.*, *id.* § 39-14-127.

61. *See* 1A Louis Altman & Malla Pollack, Callmann on Unfair Competition, Trademarks & Monopolies § 5:4 (4th ed. 2008); *see also* Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A (2006) (mandating restitution for victims of an offense against property under title 18, including any offense committed by fraud or deceit).

that prevents those markets from functioning properly."[62]

Given deception's moral and economic evils, its persistence, and its myriad manifestations, the legal standards involving deceit continue to evolve in the United States from their common law origins. This evolution is attributable in part to the difficulties in deterring deception under the common law torts of fraud[63] and product disparagement.[64] Historically courts were inclined to apply the doctrine of *caveat emptor* (let the buyer beware) and reserved liability to egregious instances of fraud.[65] Consequently, common law fraud was, and remains, ineffective in deterring false advertising of less expensive consumer goods.[66] To make it easier for consumers[67] (and in some states, competitors) to challenge marketplace deception, many state legislatures in the 1960s and 1970s enacted Unfair and Deceptive Acts and Practices ("UDAP") statutes.[68] Such state statutes seek "to secure an honest market place where trust, and not deception, prevails."[69] Many UDAP statutes are modeled after Section 5 of the Federal Trade Commission Act,[70] which itself arose as a result of Congressional dissatisfaction with the Supreme Court's rule-of-reason standard for the Sherman Act.[71] To prove a deceptive act under Section 5, the FTC must show that (1) the "representation, omission, or practice that is likely to mislead the consumer," (2) consumers are inter-

62. J. Thomas Rosch, Comm'r, FTC, Speech at New York Bar Ass'n Annual Dinner: Implications of the Financial Meltdown for the FTC (Jan. 29, 2009), http://ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf.

63. The common law tort of fraud requires proof that (i) defendant "made a false representation of a material fact" (or in certain cases an omission of a material fact); (ii) with scienter (defendant's knowing that the statement is false or in reckless disregard of its truth or falsity); (iii) intending to induce the plaintiff to rely on the misrepresentation; (iv) which the plaintiff actually relied in a "manner justifiable under the circumstances"; and (v) plaintiff "suffered damages as a result of such reliance." DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 2.2, at 19 (2007).

64. A product disparagement claim requires that (i) defendant communicated or published to a third-party a false statement disparaging plaintiff's property or title; (ii) with scienter; (iii) intending or unreasonably risking harm to plaintiff's pecuniary interests (calculated to prevent others from dealing with plaintiff) and (iv) plaintiff suffers special damages from defendant's actions. *See* Auvil v. CBS "60 Minutes," 67 F.3d 816, 820 (9th Cir. 1995).

65. PRIDGEN & ALDERMAN, *supra* note 63, § 2.1.

66. *Id.*

67. Twenty-five states and the District of Columbia limit the right to sue to consumers with respect to their personal or household purchases. *Id.* § 4:2 n.1.

68. *See, e.g.*, Consumer Protection Act of 1977, TENN. CODE ANN. § 47-18-104(b)(8) (2001) (prohibiting "disparaging the goods, services or business of another by false or misleading representations of fact"); Nat'l Conference of Comm'rs on Uniform State Laws, Revised Uniform Deceptive Trade Practices Act § 2(a)(8) (1966) (stating that Uniform Act is "designed to bring state law up to date by removing undue restrictions on the common law action for deceptive trade practices"), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/rudtpa66.pdf; PRIDGEN & ALDERMAN, *supra* note 63, § 3:2.

69. Leider v. Ralfe, 387 F. Supp. 2d 283, 295 (S.D.N.Y. 2005) (internal quotation marks and citations omitted).

70. Lawrence R. Fullerton & Jane E. Larson, *Using FTC Act Precedents in State Consumer Protection Cases*, 3 ANTITRUST L.J. 24, 24 (1988).

71. Jon Leibowitz, Comm'r, FTC, Remarks at Section 5 Workshop: Tales from the Crypt 2 (Oct. 17, 2008), http://www.ftc.gov/bc/workshops/section5/docs/jleibowitz.pdf (discussing congressional response to the "rule of reason" analysis in the *Standard Oil* case).

preting the message reasonably under the circumstances, and (3) the misleading effects are material, i.e., "likely to affect consumer's conduct or decision."[72] Unlike common law fraud, the FTC (and private plaintiffs under many state UDAPs) need not prove scienter[73] or that consumers were actually deceived.[74] Besides making it easier to prosecute deception, many UDAP laws increase the private plaintiffs' economic incentives to prosecute deception: private plaintiffs can recover their costs, reasonable attorney's fees, and multiplied damages.[75]

Given the strong public policy to deter acts of unfair competition, Congress also provided additional protections for competitors under the Lanham Act.[76] A seller's deception, besides harming consumers, is also an unfair method of competition. Deception diverts trade from honest competitors.[77] The marketplace of ideas, even in industries with marketing-savvy competitors, does not always expose deception.[78] To deter false or misleading advertising, the Lanham Act (like the FTC Act and state

72. *See* FTC Policy Statement on Deception, *appended to In re* Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984).

73. RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 526 (stating that a misrepresentation is fraudulent "if the maker (a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of his representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies."); Donald C. Langevoort, *Reflections on Scienter, in* MARTHA STEWART'S LEGAL TROUBLES 225, 228–32 (Joan MacLeod Heminway ed., 2007) (discussing law and a cognitive perspective of scienter).

74. PRIDGEN & ALDERMAN, *supra* note 63, § 3:14. Private plaintiffs under a majority of UDAP statutes need only show their actual reliance on the false statement (unlike the common law where plaintiffs must prove that their reliance was justifiable). *Id.*

75. *Id.* at 571–73 (app. 6A). Twenty-five states and the District of Columbia provide multiplied damages. *Id.* Nineteen states and the District of Columbia also provide for statutory damages, which vary between $25 and $1000. *Id.* Hawaii and California award additional damages if the victim is elderly. *Id.* All but six states award attorney's fees. CAROLYN L. CARTER, NAT'L CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (Feb. 2009), http://www.consumerlaw.org/issues/udap/content/UDAP_Report_Feb09.pdf.

76. 15 U.S.C. §1125(a) (2006); Coca-Cola Co. v. Procter & Gamble Co., 822 F.2d 28, 31 (6th Cir. 1987) ("Under our economic system, competitors have the greatest interest in stopping misleading advertising, and a private cause of action under section 43(a) allows those parties with the greatest interest in enforcement, and in many situations with the greatest resources to devote to a lawsuit, to enforce the statute rigorously."). Congress amended the Lanham Act to clarify its application to misrepresentations about a competitor's products. Trademark Law Revision Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988); *see also* S. REP. NO. 100-515, 5603 (1988) ("Since its enactment in 1946 . . . it has been widely interpreted as creating, in essence, a federal law of unfair competition . . . . In one important area, however, the courts have refused to apply the section. Based on a 1969 seventh circuit decision, the courts have held that Section 43(a) applies only to misrepresentations about one's own products or services; it does not extend to misrepresentations about competitor's products or services. The committee agrees that this effect is illogical on both practical and public policy levels and that the public policy of deterring acts of unfair competition will be served if Section 43(a) is amended to make clear that misrepresentations about another's products are as actionable as misrepresentations about one's own.") (citations omitted).

77. FTC v. Winsted Hosiery Co., 258 U.S. 483, 493 (1922).

78. *Coca-Cola*, 822 F.2d at 31 (rejecting the claim that "the advertising industry is a self-policing industry that considers claims of misrepresentations of quality").

UDAP laws) makes it easier to punish such advertising. Plaintiffs need not prove scienter or that consumers justifiably relied on a misrepresentation.[79] Congress also increased an injured plaintiff's incentives to challenge a competitor's deceit. A plaintiff, in the district court's discretion, can receive up to three times the amount of the plaintiff's actual damages.[80] Thus, the "trial court's primary function is to make violations of the Lanham Act unprofitable to the infringing party."[81] As a consequence, competitors have recovered under the Lanham Act for a variety of deceptive commercial practices, including palming off, false advertising, commercial defamation, and misappropriation.[82]

## II. DECEIT UNDER THE U.S. ANTITRUST LAWS

As Part I discussed, deception lacks any redeeming ethical, moral, or economic justifications, and at times leads to anticompetitive outcomes. Given the importance of trust in the marketplace, the United States deploys various legal weapons to deter and punish deception.[83] It logically follows that the U.S. competition laws, which most directly delineate between fair and unfair competitive behavior, also would take a hard line against deception, when anticompetitive. As this Part discusses, the legislative aim of Section 2 of the Sherman Act is to deter acts of unfair competition, which historically included a competitor's deception. This legislative aim furthers the general public policy to deter and punish deception.

### A. Sherman Act's Legislative History

A good starting point is to examine the purpose of Section 2 of the Sherman Act, which prohibits any person from "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other

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79. ABA Section of Antitrust Law, Business Torts and Unfair Competition Handbook 64–65 (2d ed. 2006) [hereinafter ABA Handbook]; Altman & Pollack, *supra* note 61, § 5.5. Courts distinguish between actual false statements and statements that, while literally true, may be considered misleading. Johnson & Johnson Merck Consumer Pharm. Co. v. Smithkline Beecham Corp., 960 F.2d 294, 297 (2d Cir. 1992). Where its "theory of recovery is premised upon a claim of implied falsehood, [the] plaintiff must demonstrate, by extrinsic evidence, that the challenged commercials tend to mislead or confuse consumers." *Id.* However, if plaintiff

> adequately demonstrates that [the] defendant . . . intentionally set out to deceive the public,' and the defendant's 'deliberate conduct' in this regard is of an 'egregious nature,' a presumption arises 'that consumers were, in fact, deceived. . . . In such a case, once a plaintiff establishes deceptive intent,' the burden shifts to the defendant to demonstrate the absence of consumer confusion.

*Id.* at 298–99.

80. 15 U.S.C. § 1117(a) (2006). Subject to the principles of equity, the Lanham Act also allows the successful litigant "to recover defendant's profits, any damages sustained by the plaintiff, and the costs of the action," and "in exceptional cases may award reasonable attorney fees to the prevailing party." *Id.*

81. Otis Clapp & Son, Inc. v. Filmore Vitamin Co., 754 F.2d 738, 744 (7th Cir. 1985).

82. ABA Handbook, *supra* note 79, at 65.

83. *See supra* Part I.

person or persons, to monopolize any part of the trade or commerce" among the several States, or with foreign nations.[84]

Senator Kenna's hypothetical, which concerned a citizen who obtained a monopoly in shorthorn cattle by virtue of his superior skill, generated the most extensive legislative debate on Section 2.[85] The other Senators agreed that the monopolist did not violate the Sherman Act.[86] Seeking to preserve economic opportunity,[87] the Sherman Act does not criminalize bigness. It is not intended to target, as Judge Learned Hand later characterized, the "single producer [who] may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry."[88]

Instead, as the legislative history shows, Section 2 reaches "means which prevent other men from engaging in fair competition with him," and which include "engrossing, the buying up of all other persons engaged in the same business."[89] Section 2 thus targets monopolistic practices that make "it impossible for other persons to engage in fair competition."[90] The widespread belief was "that the great trusts had acquired their power, in the main, through destroying or overreaching their weaker rivals by resort[ing] to unfair practices."[91]

Consequently Section 2's purpose is to combat unfair methods of competition, which historically included a competitor's deception. Congress focused not on the end—monopoly—but the means of attaining (or maintaining) that end. Were the means normatively fair (by virtue of the monopolist's superior skill in that particular product) or unfair (actions making it impossible for other persons to engage in fair competition, such as engrossing—acquiring—all other persons engaged in the same business)?

Congress did not expect the courts to define de novo what unfair methods of competition fell under the term "monopolize," and thereby force the parties and lower courts to "ramble through the wilds of economic theory."[92] Instead the courts were expected to use the existing common law as guidance.[93] As Senator Hoar noted, "the word 'monopoly' is a

84. 15 U.S.C. § 2 (2006).

85. 21 CONG. REC. 1351, 3151–52 (1890).

86. *Id.*

87. The Sherman Act, at its broadest level, seeks to preserve a person's right to freely trade and "to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade." Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 42 (1930) (quoting Charles A. Ramsay Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923)).

88. United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

89. 21 CONG. REC. 3151, 1352 (1890) (statement of Sen. Hoar).

90. *Id.*

91. FTC v. Gratz, 253 U.S. 421, 434 (1920) (citing William S. Stevens, *Unfair Competition*, POL. SCI. Q. 283 (1914); H. B. REED, THE MORALS OF MONOPOLY AND COMPETITION (1916)).

92. United States v. Topco Assocs., Inc., 405 U.S. 596, 609 n.10 (1972).

93. WILLIAM H. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 3 (Fred B. Rothman & Co. 1993) (1913) (stating that the Sherman Act was drafted by "great lawyers

merely technical term that has a clear and legal signification," namely "the use of means which made it impossible for other persons to engage in fair competition."[94] Section 2 of the Sherman Act, continued Senator Hoar, sought "to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States."[95]

The Supreme Court agreed. The prevailing common law on unfair trade practices was to provide some certainty for determining anticompetitive practices under the Sherman Act.[96]

"Unfair competition" in the common law when the Sherman Act was enacted (and which the Sherman Act sought to incorporate) was grounded in preventing injury to a rival competitor by misrepresentation.[97] Unfair competition involved not only passing off one's goods as those of another but "all cases where fraud is practiced by one in securing the trade of a rival dealer."[98] Besides protecting the purchasing public,

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who may be presumed to have used those expressions with the intention that they should be interpreted in the light of common law").

94. 21 CONG. REC. 1351, 3152 (1890).

95. *Id.*

96. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) ("[T]he standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether, in a given case, a particular act had or had not brought about the wrong against which the statute provided."); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211 (1959) (stating that Sherman Act prohibitions included undue restraints of trade under the common law); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI-KENT L. REV. 207, 207–09 (2003) ("Antitrust began [as] the common law tort of restraint of trade."). Whether the common law provided this certainty was itself questioned. Herbert Pope, *The Reason for the Continued Uncertainty of the Sherman Act*, 7 U. ILL. L. REV. 201, 201–02 (1912).

97. Charles Grove Haines, *Efforts to Define Unfair Competition*, 29 YALE L.J. 1, 6 (1919); Alfred E. Kahn, *Standards for Antitrust Policy*, 67 HARV. L. REV. 28, 32 (1953); *see also* Klingel's Pharmacy of Baltimore City v. Sharp & Dohme, 64 A. 1029, 1030 (Md. 1906) ("[A]n action will lie for a combination or conspiracy by fraudulent and malicious acts to drive a trader out of business, resulting in damage.") (citing Van Horn v. Van Horn, 20 A. 485, 486 (1890)); Messerole v. Tynberg, 36 How. Pr. 14 (N.Y.C.P. Special Term 1868) ("The market is closed against no one who, in a fair and honest spirit of rivalry, seeks to monopolize the entire trade in one or more articles of merchandise, but the elements of fraud, deceit, or malappropriation of another's rights can receive no countenance from courts of equitable jurisdiction.").

98. Nat'l Lead Co. v. Wolfe, 223 F.2d 195, 205 (9th Cir. 1955); California Fig-Syrup Co. v. Frederick Stearns & Co., 73 F. 812, 817 (6th Cir. 1896) ("It is well settled that if a person wishes his trade mark property to be protected by a court of equity he must come into court with clean hands, and if it appears that the trade mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentation in advertisements, all relief will be denied to him."); Apollinaris Co. v. Scherer, 27 F. 18, 22 (S.D.N.Y. 1886) ("All practices between rivals in business which tend to engender unfair competition are odious and will be suppressed by injunction. . . . [M]erchant or trader is entitled to protection only against dishonest or perfidious rivalry in business. He will be protected against the fraudulent or deceitful simulations by a competitor of tokens which tend to confuse the identity or business of the one with the other, and against the false representation of facts which tend to mislead the public and divert custom from the one to the other."); *see* BFI Group Divino Corp. v. JSC Russian Aluminum, 481 F. Supp. 2d 274, 282 (S.D.N.Y. 2007); Colson Corp. v. Pierce Mfg. Corp., 37 F. Supp. 900, 901 (W.D.N.Y. 1941).

the common law sought to protect honest businesses from dishonest and fraudulent practices and "to promote honesty and fair dealing."[99]

Consequently, in *Nash v. United States*, the Court had little difficulty dispensing with the indicted defendants' argument that the Sherman Act was unconstitutionally vague.[100] Writing for the Court, Justice Holmes (a skeptic of the Sherman Act[101]) noted that the restraints at issue, which included the defendants' fraudulent and deceptive practices, were commonly understood under the common law to be unreasonable practices.[102]

The Federal Trade Commission Act, for example, specifically proscribes "unfair methods of competition,"[103] as well as "unfair and deceptive acts or practices."[104] In the context of discussing the FTC's unfairness jurisdiction in consumer protection, FTC Commissioner Douglass said "unfairness is the set of general principles of which deception is a particularly well-established and streamlined subset."[105]

## III. MODERN TRENDS IN DETERRING DECEPTION UNDER THE SHERMAN ACT

A Section 2 monopolization claim requires today "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[106] Many courts had little difficulty in condemning a monopolist's anticompetitive deception as "willful" conduct.[107] Other courts, however, have erected hurdles for antitrust plaintiffs injured by a monopolist's deception.[108] Such hurdles, as this Part discusses, are contrary to Section 2's legislative aim, the common law antecedents of the Sherman Act, other congressional policies, and the legal maxim *deceptis non decipientibus, jura subveniunt* (the law helps "persons who are deceived,

99. Haines, *supra* note 97, at 9–10.

100. 229 U.S. 373, 376–78 (1913).

101. Spencer Weber Waller, *The Antitrust Philosophy of Justice Holmes*, 18 S. ILL. U. L.J. 283, 312–13 (1994).

102. *Nash*, 299 U.S. at 377–78. The defendants allegedly conspired to restrain commerce by, among other things: (1) "bidding down turpentine and rosin so that competitors could sell them only at ruinous prices;" (2) "circulating false statements as to naval stores production and stocks on hand;" (3) "issuing fraudulent warehouse receipts;" (4) "fraudulently grading, regrading, and raising grades of rosins, and falsely gauging spirits of turpentine;" and (5) "attempting to bribe employees of competitors so as to obtain information concerning their business and stocks." *Id.* at 375.

103. 15 U.S.C. § 45 (2006).

104. Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 111 (1938) (amending Section 5, 15 U.S.C. § 45, to prohibit "unfair *or deceptive* acts or practices" and adding Section 12 of the FTC Act to prohibit false advertising of "food, drugs, devices, or cosmetics") (emphasis added).

105. Int'l Harvester Co., 104 F.T.C. 949 (1984).

106. United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

107. *See infra* note 125.

108. *See infra* Part III.A.

not those deceiving").[109] This Part examines the courts' varying legal standards for evaluating a monopolist's deception involving: (1) advertising and product disparagement, (2) vaporware, (3) standard-setting organizations, and (4) other contexts.

### A. FALSE ADVERTISING AND PRODUCT DISPARAGEMENT

Nearly every court recognizes that a monopolist's deceptive advertising and product disparagement under certain factual circumstances can violate the U.S. antitrust laws.[110] Professors Areeda, Turner, and later Hovenkamp in their Antitrust Law treatise (the Treatise) take a more restrictive view of deception by a monopolist as a Sherman Act violation.[111] Even the Treatise recognizes, however, that the antitrust laws extend to deception.[112] The U.S. Courts of Appeal in the Second, Sixth, and Ninth Circuits rely upon the Treatise and presume that the competitive harm from deception is generally *de minimis*, but other circuits do not make such a presumption. The difference, then, among the courts is the legal standard for evaluating deceit by a monopolist under the antitrust laws.

Because the Second, Sixth, and Ninth Circuits, besides citing the Treatise, offer little, if any, independent analysis for their presumptions and elements,[113] this section focuses primarily on the Treatise. The three circuits have never examined critically, as this Article does, the Treatise's presumption. Those circuits have never inquired whether the presumption against competitive harm, and the six elements offered by the Treatise to overcome the presumption, can be reconciled with the Sherman Act's legislative aim.

In fact, the Treatise's legal presumption came into antitrust jurisprudence largely via the Second Circuit's dictum in one footnote.[114] In *Ber-*

109. JOHN TRAYNER, LATIN PHRASES AND MAXIMS: COLLECTED FROM THE INSTITUTIONAL AND OTHER WRITERS ON SCOTCH LAW 73 (1861).

110. *See infra* note 125. As one district court recently noted, "One approach, followed by the Seventh Circuit, is that false and defamatory statements never constitute a violation of the antitrust laws." W. Penn Allegheny Health Sys., Inc. v. UPMC, No. 09-CV-0480, 2009 WL 3601600, at *35 (W.D. Pa. Oct. 29, 2009) (citing Sanderson v. Culligan Int'l. Co., 415 F.3d 620, 623 (7th Cir. 2005) (Easterbrook, J.)) (citation omitted). Judge Easterbrook's assumption of a self-correcting and self-policing marketplace of ideas, however, is *sui generis*.

111. IIIB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 782b, at 326–31 (3d ed. 2008) [hereinafter TREATISE].

112. *Id.*

113. *See, e.g.*, Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 370–71 (6th Cir. 2003); Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1151–52 (9th Cir. 1997); Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916–17 (2d Cir. 1988).

114. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979). A few days before *Berkey*, a district court also, without much analysis, relied on the Treatise's presumption and elements. Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 180–81 (D. Del. 1979). The court simply said such deception, "even if taken in concert, must be subject to a de minimis rule, if the antitrust courts are not to become the battleground for a

*key Photo, Inc. v. Eastman Kodak Co.*, Kodak indicated on its Kodacolor II film boxes that its film had a fourteen-month shelf life, when the film actually "lost half its speed within three to six months."[115] The Second Circuit said it "need not decide whether this . . . amounted to deceptive advertising or whether and under what circumstances such deception might violate" Section 2.[116] The court added, in dicta, that "[t]he Sherman Act is not a panacea for all evils that may infect business life."[117] And if the court were to decide the issue, it would follow the Treatise and require the antitrust plaintiff to overcome a presumption that such practice had a *de minimis* effect on competition.[118]

Nearly a decade later, the Second Circuit in *Ayerst* cited the dictum and adopted, without analysis, Areeda and Turner's six elements.[119] The Ninth Circuit, thereafter, simply cited *Ayerst* and the Treatise, without offering any independent rationale.[120] The Sixth Circuit likewise followed the Ninth and Second Circuits' adoption of the presumption, but formally required only two of the six elements.[121] The Second and Ninth Circuits' earlier legal analysis was so deficient that the Sixth Circuit found it "unclear whether [the Second Circuit] thought each requirement was mandatory."[122] Thus, the Sixth Circuit stated that all six elements were relevant, but declined, given the facts before the lower court on summary judgment, to consider each element or hold that an antitrust plaintiff must satisfy all six elements to rebut its newly-adopted *de minimis* presumption.[123] Thus, in the Sixth Circuit, to survive summary judgment, an antitrust "plaintiff must show a genuine issue of material fact regarding at least two elements . . . (1) the advertising was clearly false, and (2) it would be difficult or costly for the plaintiff to counter the false advertising."[124]

Given this uncritical reliance on the Treatise, the basis for the three circuits' legal presumption and rebuttal elements is infirm if the Treatise's reasoning is infirm. Monopolists will continue to urge upon other courts outside these three circuits that they similarly adopt the Treatise's presumption and elements. Some courts will be tempted to follow the lead

variety of intentional-tort suits." *Id.* at 180. Subsequent courts have not cited *Pezetel* as their basis for adopting the Treatise.

115. *Berkey*, 603 F.2d at 288 n.41.

116. *Id.*

117. *Id.*

118. *Id.*

119. Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988).

120. Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publn's, Inc., 108 F.3d 1147, 1152 (9th Cir. 2003).

121. Am. Council of Certified Pediatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003).

122. *Id.* at 371 n.6.

123. *Id.* at 371.

124. *Id.* While recognizing that false advertising cannot benefit competition, the Sixth Circuit felt that false advertising could not harm competition "unless it was so difficult for the plaintiff to counter." *Id.* at 371–72.

of the three circuits, especially when there is no alternative legal standard dealing specifically with a monopolist's deceit.

### 1. *The Deficiencies of the Three Circuits' Legal Presumption of* De Minimis *Harm*

Some courts recognize deceptive advertising and disparagement of a competitor's product as generally indefensible and readily condemn a monopolist's anticompetitive deceit.[125] Although these courts do not cite a legal standard specifically addressing a monopolist's deceit, their results are generally consistent with Section 2's legislative aim and the overall trend of taking a harder line against deceptive advertising and promotions in the marketplace. But the courts in the Second, Sixth, and Ninth Circuits following the Treatise are reluctant to use the Sherman Act to punish such deception. They simply assume, like the Treatise, that a monopolist's deceptive advertising and product disparagement have a *de minimis* impact on competition.[126] In several cases, district courts outside these three circuits cite the factors.[127]

125. *See, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395, 401 (3d Cir. 2000); Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1257–58, 1278 (8th Cir. 1980) (upholding Sherman Act violation for deceptive marketing campaign to prevent travel group charters from becoming a competitive threat); Caldon, Inc. v. Advanced Measurement & Analysis Grp., Inc., 515 F. Supp. 2d 565, 580 (W.D. Pa. 2007) (denying motion to dismiss plaintiff's claims that defendant attained monopoly through deception); W. Duplicating, Inc. v. Riso Kagaku Corp., No. Civ. S98-208 FCD GGH, 2000 WL 1780288, at *7 (E.D. Cal. Nov. 21, 2000) (finding monopolist's fear, uncertainty, doubt (FUD) marketing campaign to discourage customers from buying competitor's ink and masters was actionable under Sherman Act); Addamax Corp. v. Open Software Found., Inc., 888 F. Supp. 274, 285 (D. Mass. 1995) (denying summary judgment on allegations of FUD and vaporware campaign); Davis v. S. Bell Tel. & Tel. Co., No. 89-2839-CIV-NESBIT, 1994 WL 912242, at *2, *7, *15 (S.D. Fla. 1994) (denying summary judgment on allegations of deception to maintain monopoly); Brownlee v. Applied Biosystems, Inc., No. C-88-20672-RPA, 1989 WL 53864, at *5–6 (N.D. Cal. Jan. 9, 1989) (denying motion to dismiss complaint alleging defendants' deceit to potential customers and other third parties along with other anticompetitive conduct); Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872, 897 (E.D. Pa. 1973); *see also* Xerox Corp., 86 F.T.C. 364 (1975) (finding that falsely disparaging competitive supplies were among Xerox's anticompetitive practices to maintain its monopoly illegally).

126. *Am. Council*, 323 F.3d at 370; Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publn's, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997); Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2nd Cir. 1988); TYR Sport Inc. v. Warnaco Swimwear Inc., 679 F. Supp. 2d 1120, 1132 (C.D. Cal. 2009); Alternative Electrodes, LLC v. EMPI, Inc., 597 F. Supp. 2d 322, 332 (E.D.N.Y. 2009); Kinderstart.com, LLC v. Google, Inc., No. C-06-2057-JF (RS), 2007 WL 831806, at *8 (N.D. Cal. Mar. 16, 2007); Applera Corp. v. MJ Research, Inc., 349 F. Supp. 2d 338, 344 (D. Conn. 2004); Tate v. Pac. Gas & Elec. Co., 230 F. Supp. 2d 1072, 1079–80 (N.D. Cal. 2002); Avery Dennison Corp. v. Acco Brands, Inc., No. CV99-1877DT(MCX), 2000 WL 986995, at *21 (C.D. Cal. Feb. 22, 2000); Multivideo Labs, Inc. v. Intel Corp., No. 99 CIV. 3908(DLC), 2000 WL 12122, at *15 (S.D.N.Y. Jan. 7, 2000).

127. L-3 Commc'ns Integrated Sys., L.P. v. Lockheed Martin Corp., No. 07-CV-0341-B, 2008 WL 4391020, at *7 (N.D. Tex. Sept. 29, 2008); Walgreen Co. v. Astrazeneca Pharm. L.P., 534 F. Supp. 2d 146, 152 (D.D.C. 2008); Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc., 331 F. Supp. 2d 513, 530–32 (E.D. Tex. 2004); *In re* Indep. Serv. Orgs. Antitrust Litig., 85 F. Supp. 2d 1130, 1158 (D. Kan. 2000); David L. Aldridge Co. v. Microsoft Corp., 995 F. Supp. 728, 749 (S.D. Tex. 1998); Picker Int'l, Inc. v. Leavitt, 865 F. Supp. 951, 963 (D. Mass. 1994); Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 180–81 (D. Del. 1979).

The Treatise's legal presumption of *de minimis* harm from deception makes little sense (other than to deter injured victims from challenging a monopolist's deceit under the Sherman Act). First, legal presumptions that do not rest on "actual market realities are generally disfavored in antitrust law."[128] Accordingly, courts first should examine whether the Treatise provides empirical support for its presumption that monopolies' deceptive practices generally have a *de minimis* impact on competition. The Treatise does not offer any empirical basis. The Treatise only states that while not a justification for "isolated" examples of falsehood, "[m]any buyers . . . recognize disparagement as nonobjective and highly biased."[129] Consequently, according to the Treatise, deception employed by a monopolist in disparaging a smaller competitor's products "should presumably be ignored."[130]

Second, besides lacking empirical support, the Treatise's assertion does not make economic sense. If product disparagement is ineffectual, why would any firm, much less a monopolist, engage in it? A rational profit-maximizing monopolist recognizes that deceit has costs, including the costs for the deceptive advertising and promotional campaign and the potential loss of sales, goodwill, and competitive advantage if the deceit is discovered. A monopolist would not falsely disparage a rival's products unless its anticipated gains (maintaining or attaining profits) outweigh its costs. A profit-maximizer would not casually incur advertising costs to falsely disparage a rival's products and expose itself to criminal and civil liability if buyers, as the Treatise claims, dismiss such ads as "nonobjective and highly biased."[131] Accordingly, the Lanham Act recognizes that a competitor can profit in falsely disparaging a rival's product.[132] Indeed, a plaintiff, under certain conditions, can recover a defendant's profits in addition to any damages the plaintiff sustained.[133]

Third, the Treatise's presumption is inconsistent with the Sherman Act's legislative aim to proscribe unfair methods of competition, which historically included a competitor's anticompetitive deception. By definition, maintaining a monopoly through "false, misleading and deceptive advertising" is unfair competition.[134] The Treatise recognizes that deception lacks any redeeming virtue, but points to the social costs in litigating it.[135] The evidence, however, suggests that despite the extensive federal

128. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 466–67 (1992).

129. TREATISE, *supra* note 111, ¶ 782d, at 332.

130. *Id. But see id.* at 333 (recognizing a possible exception where the monopolist, because of its market position contracts, to test or evaluate a rival's product).

131. *Id.* at 332.

132. 15 U.S.C. § 1125(a) (2006).

133. *Id.* § 1117(a); *see also* Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1322 (N.D. Ga. 2008) (citing factors as to when to award a defendant's profits to the plaintiff).

134. Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1268 (8th Cir. 1980).

135. TREATISE, *supra* note 111, ¶ 782b, at 326.

and state legislation, fraud is under litigated rather than over litigated.[136]

In defense of the presumption, the Ninth Circuit quoted an earlier edition of the Treatise, which stated that the tort of product disparagement was difficult to prove at common law and, thus, generally disfavored.[137] This argument ignores the tort's origin. Its requirement of special damages arose—not from any judicial distrust of product disparagement—but "as a result of the friction between the ecclesiastical and common law courts of England when the common law courts sought to assume jurisdiction over actions for defamation."[138] Because "slander of any kind was a sin, church courts alone could punish unless temporal damage could be shown to have resulted from the defamatory words."[139] Moreover, this argument does not account for the later legislative policies, such as the Lanham Act and state UDAP laws, which make prosecuting deceptive conduct easier and increase private plaintiffs' economic incentives to bring product disparagement cases.

Fourth, the Treatise's presumption is inconsistent with other U.S. congressional directives regarding false advertising claims. Both the Sherman and Lanham Acts address unfair competition. Under the Lanham Act, courts "routinely presume that literally false [comparative] advertising actually deceives consumers."[140] But when evaluating the same false ad-

136. The FTC, for example, found that 13.5% of adults in the U.S. (30.2 million consumers) were the victim of one of sixteen types of fraud included in its 2005 survey. FTC, CONSUMER FRAUD IN THE UNITED STATES: THE SECOND FTC SURVEY 55 (2007).

137. Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997) ("Even at common law, this is 'a tort that never has been greatly favored.'" (quoting III PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 737b, at 280–81 (1978))). This language does not appear in the Treatise's third edition. TREATISE, *supra* note 111, ¶ 782d, at 332.

138. Testing Sys., Inc. v. Magnaflux Corp., 251 F. Supp. 286, 290 (E.D. Pa. 1966). As the court noted:

> Until the 19th Century the requirement did not impose any untoward burden on the litigant. The early business community was devoid of the complexities that characterize the modern market place, and it was the rule, rather than the exception, that tradesmen knew their customers well. It was not too difficult, therefore, to determine just when and why one's customers began to favor a competitor. As is so often the case, however, the rule respecting special damages continued in force long after its *raison d'etre* had passed.

*Id.*

139. *Id.*

140. Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1320–21 (N.D. Ga. 2008). "[A] growing number of courts have also adopted a presumption, in cases where money damages are sought, that willfully deceptive, comparative advertisements cause financial injury to the party whose product the advertisement targets." *Id.*; *see also* Johnson & Johnson Vision Care, Inc. v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002) (noting that if advertisement is literally false, movant need not present evidence of consumer deception); Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave., 284 F.3d 302, 314–15 (1st Cir. 2002) ("[A]pplying a presumption of consumer deception to all literal falsity claims, irrespective of the type of relief sought, makes sense. . . Common sense and practical experience tell us that we can presume, without reservation, that consumers have been deceived when a defendant has explicitly misrepresented a fact that relates to an inherent quality or characteristic of the article sold."); Porous Media Corp. v. Pall Corp., 110 F.3d 1329, 1336 (8th Cir. 1997) ("A predicate finding of intentional deception, as a major part of the defendant's marketing efforts, *contained in comparative advertising*, en-

vertising under the Sherman Act, a court, in applying the Treatise's presumption, would presume the contrary: namely, the same buyers recognize the disparagement as nonobjective and highly biased and thus are not misled.[141]

Cases exist where a company salesperson at a trade show casually disparages a competitor's products.[142] The Treatise is justified in considering such isolated comments as presumptively harmless. But courts typically dismiss such claims anyway.[143] Puffery is not actionable under the common law,[144] the FTC Act,[145] the state UDAP laws,[146] or the Lanham Act.[147] Moreover, as the Treatise recognizes, deceptive statements are not per se illegal under the Sherman Act.[148] Antitrust plaintiffs must prove the other Section 2 elements, including causation, antitrust injury, and damages.[149]

### 2. *Critique of the Courts' Six Elements*

To rebut its empirically unsupported presumption that deceptive advertising and product disparagement have a *de minimis* effect on competi-

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compasses sufficient harm to justify a rebuttable presumption of causation and injury in fact."); HipSaver Co. v. J.T. Posey Co., 497 F. Supp. 2d 96, 106 (D. Mass. 2007) (recognizing a "rebuttable presumption of causation and injury for willful literally false [comparative] advertising in a two firm market"); Iams Co. v. Nutro Prod., No. 3:00-CV-566, 2004 WL 5779999, slip op. at *5 (S.D. Ohio July 6, 2004) (finding that statements' literal falsity give rise to "a presumption of actual deception" and "[i]n instances of comparative advertising, where the competitor's products are specifically targeted, a plaintiff is also entitled to a presumption of money damages"); Heidi Ott A.G. v. Target Corp., 153 F. Supp. 2d 1055, 1072 (D. Minn. 2001) (noting that a presumption of causation and injury applied when "defendant deliberately engaged in deceptive comparative advertising").

141. TREATISE, *supra* note 111, ¶ 782d, at 332.

142. *E.g.*, Gilson v. Rainin Instrument, LLC, No. 04-C-852-S, 2005 WL 955251, at *9 (W.D. Wis. Apr. 25, 2005); Breuer Elec. Mfg. Co. v. Tennant Co., Inc., No. 96C1481, 1997 WL 543097, at *9 (N.D. Ill. Aug. 22, 1997).

143. *E.g.*, *Gilson*, 2005 WL 955251, at *10; *Breuer*, 1997 WL 543097, at *9.

144. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 649.

> A competitor is conditionally privileged to make an unduly favorable comparison of the quality of his own land, chattels or other things, with the quality of the competing land, chattels or other things of a rival competitor, although he does not believe that his own things are superior to those of the rival competitor, if the comparison does not contain false assertions of specific unfavorable facts regarding the rival competitor's things.

*Id.*

145. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8351 (July 2, 1964) (to be codified at 16 C.F.R. pt. 300) (explaining that puffing is "expressions that the consumer clearly understands to be pure sales rhetoric on which he should not rely in deciding whether to purchase the seller's product").

146. *See, e.g.*, Evanston Hosp. v. Crane, 627 N.E.2d 29, 36 (Ill. App. Ct. 1993) (holding that hospital's "representations in its publications as to the care it would extend to patients were mere expressions of opinion or 'puffing'. . . . they are not actionable under the Consumer Fraud Act").

147. Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008) (holding that the challenged statement was puffery, which cannot support a Lanham Act claim).

148. TREATISE, *supra* note 111, ¶ 782b, at 327.

149. Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1150 (9th Cir. 1997).

tion, the Treatise requires an antitrust plaintiff to offer cumulative proof as to six elements: "the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals."[150] Again, neither the Treatise nor the courts adopting these six elements explain (1) how they arrived at these elements, (2) the empirical support for these elements, or (3) how these elements further the Sherman Act's legislative aim, make any economic sense, or can be reconciled with the common and statutory law on deception.[151] The six elements go beyond what is required for a Section 5 claim under the FTC Act, the state UDAP laws, the Lanham Act, the common law on unfair competition, and even common law fraud. Further, the six elements do not significantly reduce the risk of false positives.[152] Rather, in deterring victims from challenging a monopolist's anticompetitive deceit under the Sherman Act, the six elements significantly increase the risk of false negatives, are inconsistent with Section 2's legislative aim, and make no economic sense.

As to the first three elements, it would be defensible if the Treatise required that the deception be "clearly" anticompetitive to violate Section 2. But it makes no sense to require a monopolist's deception to be "clearly" false, "clearly" material, and "clearly" likely to induce reasonable reliance under the Sherman Act. No such requirement exists under the FTC Act,[153] the Lanham Act,[154] the UDAP statutes,[155] the Racketeer Influenced and Corrupt Organizations Act (RICO),[156] or common law fraud.[157] It is hard to fathom why the risk of false positives for claims of deception is greater under the antitrust laws than under these other causes of action, especially when a plaintiff in a civil RICO action, or under some state UDAP statutes, may recover treble damages and attor-

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150. *Id.* (citing factors); TREATISE, *supra* note 111, ¶ 782b, at 327. The Sixth Circuit said that all six factors are relevant but to survive summary judgment, a plaintiff must show a genuine issue of material fact that "(1) the advertising was clearly false, and (2) it would be difficult or costly for the plaintiff to counter the false advertising." Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003).

151. *Am. Council*, 323 F.3d at 370; *Harcourt Brace*, 108 F.3d at 1151–52; Nat'l Ass'n of Pharm. Mfrs. v. Ayers Labs, 850 F.2d 904, 916–17 (2d Cir. 1988); TREATISE, *supra* note 111, ¶ 782b, at 327–28.

152. False positives here involve finding antitrust liability for restraints that are competitively neutral or procompetitive. *See* Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004). "Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

153. *See* 15 U.S.C. § 45(a)(1) (2006).

154. *See id.* § 1125(a).

155. *See, e.g.*, 875 ILL. COMP. STAT. ANN. 505/2 (West 2008).

156. *See generally* 18 U.S.C. §§ 1961–1968 (2006).

157. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 649.

neys' fees (or punitive damages under the common law).[158] Courts deal with claims of deception in many different contexts. Given the judiciary's long experience evaluating claims of deception, one would expect that the risk of false positives is lower for deception claims under the Sherman Act than for other less familiar economic behavior, such as tying or bundled rebates. Courts are comfortable sending a local shopkeeper to jail for deception or awarding treble RICO damages for fraudulent activity. It makes no sense to impose the requirement "clearly" on these common law elements when a monopolist engages in similar deceit.[159]

The Treatise's fourth element—requiring buyers to be "without knowledge of the subject matter"[160]—motivates buyers either to remain ignorant of the subject matter or to increase their search costs by verifying the veracity of the monopolist's statement. A victim's general knowledge of the subject matter should not absolve a monopolist of its deception. Accordingly, both common law fraud and the later federal and state statutes do not impose the Treatise's element. They focus on the actor's deception, rather than the victim's capacity to thwart the deception. Under the common law, for example, market participants can "assume that a representation of fact material in affecting his decision to engage or not to engage in the particular transaction is honestly made" unless its falsity is

158. *See, e.g.*, 18 U.S.C. § 1946(c) (2006); WASH. REV. CODE ANN. § 19.86.090 (West 1999 & Supp. 2010).

159. Perhaps this element refers to state jurisdictions where a plaintiff must prove the elements of fraud by clear and convincing evidence, a higher standard than a preponderance of the evidence. But this only requires that sufficient evidence exists to make that fact highly probable, which differs from requiring the statement to be "clearly" false or material. 37 AM. JUR. 2D *Fraud and Deceit* § 493 (2010). A Westlaw search did not identify any state or federal judicial decision that used the Treatise's "clearly" false and misleading elements interchangeably with the "clear and convincing" evidentiary standard. Even if the Treatise's clearly false and material elements were similar to some states' clear and convincing evidentiary standard, the lower preponderance of evidence standard governs federal civil antitrust claims. *See* Harrods Ltd. v. Sixty Internet Domain Names, 302 F.3d 214, 227 (4th Cir. 2002) (noting courts' "presumption that the preponderance standard applies even in civil cases that involve fraud"). Moreover, Congress has chosen the preponderance standard in creating various substantive causes of action for fraud, including the Lanham Act. *See* Grogan v. Garner, 498 U.S. 279, 288–89 (1991) (citing 31 U.S.C. § 3731(c) (1988) (False Claims Act); 12 U.S.C. § 1833a(e) (1988 & Supp. 1989) (civil penalties for fraud involving financial institutions); 42 C.F.R. § 1003.114(a) (1989) (Medicare and Medicaid fraud under 42 U.S.C. § 1320a-7a (1988)); Herman & MacLean v. Huddleston, 459 U.S. 375, 388–90 (1983) (civil enforcement of the antifraud provisions of the securities laws); Steadman v. SEC, 450 U.S. 91, 96 (1981) (administrative proceedings concerning violation of antifraud provisions of the securities laws); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943) (§ 17(a) of the Securities Act of 1933); First Nat'l Monetary Corp. v. Weinberger, 819 F.2d 1334, 1341–42 (6th Cir. 1987) (civil fraud provisions of the Commodity Exchange Act); *cf.* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 491 (1985) (suggesting that the preponderance standard applies to civil RICO actions); *see also* World Wide Ass'n of Specialty Programs v. Pure, Inc., 450 F.3d 1132, 1140 (10th Cir. 2006) (false advertising claims under Lanham Act); *In re* Rambus, Inc., No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006) (finding that the clear and convincing standard does not apply to the elements of antitrust case because it happens to involve a patent and "[n]o court has held that clear and convincing evidence is required to establish Section 5 deception"); 21 C.J.S. *Credit Reporting Agencies* § 112 (2008) ("[p]roof by a preponderance of the evidence generally is sufficient" for consumer protection statutes).

160. TREATISE, *supra* note 111, ¶ 782b, at 327.

obvious to one's senses or one is aware of specific facts that makes reliance unjustifiable.[161] Even when victims could investigate "without any considerable trouble or expense,"[162] the common law does not impose a duty to investigate.[163]

One district court noted the paradox.[164] If sophisticated buyers have general knowledge about the subject matter, they arguably would discount (and possibly punish) any deception.[165] Knowing that the buyer has such knowledge, a rational monopolist would not deceive them.[166] One then can draw several conclusions: (1) the monopolist cannot differentiate between sophisticated and unsophisticated purchasers, (2) the monopolist predicted poorly its ability to deceive the victim, or (3) even sophisticated purchasers at times are overconfident and can be duped.[167] If the monopolist predicted poorly, then the monopolist—while morally culpable—did not violate Section 2, as causation is missing. Otherwise, the monopolist may be liable.

Fraud victims include corporations.[168] As Professor Robert Prentice found, "there is substantial empirical evidence that people are unable to detect when they are being deceived, but, worse still, inaccurately believe that they can do so."[169] Monopolists may exploit such shortcomings in the buyers' knowledge or reasoning.[170] In *Conwood Co. v. U.S. Tobacco Co.*, for example, the moist snuff monopoly was the category manager for moist snuff for many retailers.[171] Plaintiff alleged, and the fact finder found, that the monopolist abused its position as category manager by

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161. RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 541A cmt. a.

162. *Id.* § 540 cmt. a.

163. *Id.* § 540.

164. *See* Avery Dennison Corp. v. Acco Brands, Inc., No. CV99-1877DT (MCX), 2000 WL 986995, at *21, *26 (C.D. Cal. Feb. 22, 2000) (denying motion for summary judgment).

165. *Id.* at *21.

166. *Id.*

167. Some neo-classical economic theorists posit that sophisticated purchasers can use their purchasing clout to avoid cartel prices, but the empirical evidence shows that even corporate America pays supra-competitive prices as a result of price-fixing cartels. *See* Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the Twenty-First Century*, 38 LOY. U. CHI. L.J. 513, 559–63 (2007).

168. Kristy Holtfreter et al., *Sociolegal Change in Consumer Fraud: From Victim-Offender Interactions to Global Networks*, 44 CRIME, LAW & SOCIAL CHANGE 251, 263 (2006); Michael Levi, *White-Collar Crime Victimization*, *in* WHITE-COLLAR CRIME RECONSIDERED 172–73 (Kip Schlegel & David Weisburd eds., 1992) (noting that majority of fraud victims in the United Kingdom were corporate entities).

169. Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 VAND. L. REV. 1663, 1759 n.497 (2003).

170. Max Huffman, *Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection*, 6 EUR. COMPETITION J. 7, 16 (2010), *available at* http://ssrn.com/abstract=1546106.

171. 290 F.3d 768, 775–76 (6th Cir. 2002). The court describes the practice of category management as one that

> varies from store to store, and involves managing product groups and business units and customizing them on a store-by-store basis to satisfy customer demands. The process can determine the quantity of items a store sells. For instance, it allows retailers, based on such data as sales volume, to determine which items should be allocated more shelf space. Manufacturers support the efforts of retailers by presenting to them products or a combination of

providing retailers misleading information.[172] It wanted to dupe the retailers into believing, inter alia, that the monopolist's moist snuff products sold better than the plaintiff's products, so that these retailers would carry the monopolist's moist snuff and discontinue carrying the plaintiff's products.[173] (The monopolist also tortiously removed, discarded, and destroyed the plaintiff's point-of-sale advertising racks without the store management's permission, and trained its employees to take advantage of inattentive store clerks with various ruses such as obtaining nominal permission to reorganize or neaten the store racks in an effort to destroy the plaintiff's racks.)[174]

Under the Treatise's presumption and elements, which the Sixth Circuit subsequently adopted in part,[175] the product disparagement claims should have been summarily dismissed.[176] These retailers, which included Wal-Mart, knew the subject matter and sought to maximize profits from moist snuff sales through the optimal selection of products.[177] Retailers reviewed the monopolist's plan-o-gram proposals as to which moist snuff products should be displayed, and how.[178] Some retailers compared the category captain's proposals with their own independent analysis.[179] Moreover, a Kroger supermarket executive testified that any manufacturer "trying to use category management practices to control competition, in his store anyway, would be 'committing suicide.'"[180]

Recognizing that falsely disparaging a competitor and its financial condition can constitute exclusionary practices under Section 2,[181] the Sixth Circuit in *Conwood* held that the plaintiff presented sufficient evidence that these sophisticated retailers were indeed duped.[182] The monopolist provided retailers "skewed" national sales figures, which did "not always represent local product movement in stores," and false information, such as inflated sales data, in order to get the retailers to maintain the monopolist's poorly-selling items while dropping or "burying" the plaintiff's better-selling products.[183] The plaintiff's expert testified that retailers, while

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> products that are more profitable and "plan-o-grams" describing how, and which, products should be displayed.

*Id.* at 775.

172. *Id.* at 788.
173. *Id.* at 783.
174. *Id.*
175. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 370 (6th Cir. 2003).
176. *See* TREATISE, *supra* note 111, ¶ 782a2, at 324–25.
177. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 775 (6th Cir. 2002).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.* at 784 (citing Byars v. Bluff City News Co., Inc., 609 F.2d 843, 854 n.30 (6th Cir. 1979)); *see* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985) (noting that exclusionary conduct involves behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessary restrictive way).
182. *Conwood*, 290 F.3d at 795.
183. *Id.* at 776, 785–86, 790.

quite sophisticated, nonetheless knew less than the monopolist about the pricing and profitability of moist snuff.[184] The deception had its desired effect. For if retailers actually preferred the monopolist's slower-selling moist snuff products, the monopolist had no need to deceive them.

The Treatise's fifth element[185]—requiring the monopolist's misrepresentation to continue for prolonged periods—is arbitrary. One cannot assume that a monopolist's deception, once exposed and not repeated, is harmless, or that prolonged deception is necessarily harmful.[186] An effective lie need not be repeated to preempt a nascent competitive threat—one misrepresentation may suffice.[187] To increase its market power through network effects, a company may employ deceit to tip demand toward its product.[188] Once attaining a monopoly, the company need not continue to employ deceit to maintain its power.[189] Moreover, the courts and Treatise never explain why society must endure a monopolist's deceit over a long, but not yet prolonged, period.[190] The critical issue is whether the misrepresentation reasonably appears capable of making a significant contribution to maintaining or attaining monopoly power—not how often, or for how long, the monopolist deceived the marketplace.

Finally, the Treatise's sixth element—the misrepresentation is not readily susceptible of neutralization or other offset by rivals[191]—makes little sense. The Sixth Circuit surmised, based on this element, that "false advertising would not damage competition . . . unless it was so difficult for the plaintiff to counter that it could potentially exclude competition."[192] Again, a rational profit-maximizing monopolist recognizes that deceit involves costs. If a smaller rival can effectively neutralize or offset the monopolist's misrepresentations with little cost and effort, neoclassical economic theory predicts that there would be no benefit in engaging in such deception. The monopolist risks the loss of its reputation, goodwill, and sales, while incurring the costs of a futile advertising campaign. Thus a rational monopolist will attempt such deception only where the likely gains exceed the costs (even if rivals attempt to counteract it). The fact that a monopolist invested in a deceptive advertising campaign signals that, despite the attendant risks, the monopolist expected to benefit.[193] Even if the monopolist is behaving irrationally, liability should not de-

184. *Id.* at 776. The court also relied on the testimony of plaintiff's marketing expert that, by deceiving the retailers, the monopolist abused its position of trust as category captain. *Id.* at 786.

185. TREATISE, *supra* note 111, § 782, at 327.

186. *See e.g.*, *infra* note 216 and accompanying text (discussing how a single event can harm a competitor).

187. *See, e.g.*, *infra* note 216 and accompanying text.

188. *See, e.g.*, *infra* note 216 and accompanying text.

189. *See, e.g.*, *infra* note 216 and accompanying text.

190. *See, e.g.*, *supra* note 152.

191. TREATISE, *supra* note 111, § 782, at 327.

192. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 372 (6th Cir. 2003).

193. *E.g.*, *id.*

pend on the rivals' actions. The courts should dismiss the Section 2 claim for lack of causation, if the deception does not appear to be reasonably capable of making a significant contribution to attaining or maintaining monopoly power.

A monopolist can use deception strategically to foreclose certain facets of competition. Suppose, for example, the dominant Internet access provider deceptively advertises high-speed Internet connections to maintain existing customers and enroll new ones. If sufficient widespread confusion ensues as to what constitutes high-speed Internet access and whether the monopoly or its smaller rivals offer faster Internet connections, customers may distrust any competitor's claims about high-speed connections.[194] Thus a monopolist can desensitize consumers to a competitor's advertised claim and thereby blunt an entrant's ability to gain a competitive advantage based on that advertised benefit.

Even if smaller rivals could expose a monopolist's deception, why should courts require them to incur such costs? This burden is inconsistent with the Sherman Act's purpose and contravenes the legal maxim that the law helps those "who are deceived, not those deceiving."[195] Suppose, for example, that a monopolist over several years sent the healthcare community mass mailings that falsely disparaged a smaller rival. Suppose the smaller rival could counter the monopolist's deception, as was the case in *American Council*, by incurring the cost in responding to defendant's three mass mailings to between 7,000 and 8,000 hospitals and insurance companies.[196] Why should the law mandate such an undertaking? The deception directly harms consumers and raises rivals' corrective advertising costs.[197] Moreover, the fringe firm or new entrant is situated differently than the monopolist.[198] A monopolist would prefer an entrant to expend capital defending its image rather than in expanding its business, and thereby threaten the monopoly. Advertising can be an effective entry barrier.[199] Generally, it is costlier for entrants to launch a new

194. This theory arose in a in a case involving a telephone monopolist's furnishing inside wire maintenance service to its residential and certain business customers. *See, e.g.*, Davis v. S. Bell Tel. & Tel. Co., No. 89-CIV-NESBIT, 1994 WL 912242, at *2 (S.D. Fla. Feb. 1, 1994). Plaintiffs alleged that the monopolist created widespread confusion in the market, which thereby raised entry barriers. *Id.* An entrant would have to engage in corrective advertising, which itself was expensive. *Id.* Second, the entrant, despite its corrective advertising efforts, had no assurance of capturing all the business diverted away from the monopoly because customers could switch to another competitor. *Id.* Third, given the low failure rate for a telephone wire, competitors could not quickly recoup the cost of corrective advertising. *Id.* While questioning the amount of evidence in support of the theory, the court accepted the plaintiffs' theory of harm and denied defendant's motion for summary judgment on plaintiffs' two monopolization claims. *Id.* at *15.

195. *See* TRAYNER, *supra* note 109, at 73. One district court went so far as to hold that an antitrust plaintiff could not prove an antitrust injury unless the competitor's deception "threatened to or was driving [plaintiff] out of business." Xerox Corp. v. Media Sciences Int'l, Inc., 511 F. Supp. 2d 372, 382 (S.D.N.Y. 2007).

196. *Am. Council*, 323 F.3d at 368.

197. *See Davis*, 1994 WL 912242, at *2.

198. *See supra* note 145.

199. Robert Smiley, *Empirical Evidence on Strategic Entry Deterrence*, 6 INT'L J. INDUS. ORG. 167, 170–72 (1988). The surveyed executives were asked separately, for new and

product and establish brand recognition than for an entrenched firm to maintain its brand awareness.[200]

The sixth element, like the Treatise's general presumption, can cause courts to draw inconsistent presumptions with respect to false advertising claims under the Sherman and Lanham Acts. When a firm disseminates willfully deceptive, comparative advertising, courts under the Lanham Act do not require the competitor to show that the misrepresentation was not readily susceptible of neutralization or other offset.[201] Instead, under the Lanham Act, courts increasingly presume causation and harm from intentional deception: "Such a presumption forces the willful fabricator—rather than its intended victim—to bear the burden of demonstrating that its deliberate misrepresentations did not result in harm to its competitor. Thus, it discourages companies from engaging in deliberately deceptive advertising campaigns, protecting consumers and competitors alike."[202] While courts under the Lanham Act are increasingly presuming harm from deliberately deceptive comparative advertising campaigns, a smaller rival in a Sherman Act claim faces the opposite presumption: it must first prove that it could not readily neutralize or otherwise offset the monopolist's deception.[203]

Finally, at times, smaller competitors may follow the monopolist's lead by engaging in similar deception rather than exposing it and facing the monopolist's wrath.[204] Antitrust scholar Robert Steiner, who was also the former president of the Kenner Products toy company, described his

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existing mature products, how frequently their company engages in certain behavior, including advertising and promoting the product intensively for the purpose of creating sufficient product loyalty that potential rivals would find entry less attractive. *Id.* Of the seven tactics identified, advertising was the most frequently employed tactic to deter entry of new products, and the second most frequently employed tactic for existing products. *Id.* at 172.

200. Prentice, *supra* note 23, at 1225 n.257 (collecting sources); *see also* U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 703 (Fed. Cir. 1988) (finding that there was sufficient evidence from which the jury could conclude "[t]hat entry barriers to the rotary electric shaver market are substantial, if not high [because of] the need to have a well-known brand with wide consumer acceptance, the limited number of brands that satisfy this requirement, and the substantial advertising expenditures required to attain a foothold in the market"); S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 1002 (D.C. Cir. 1984) (recognizing that the "need to overcome brand preference established by the defendant's having been first in the market or having made extensive 'image' advertising expenditures" constitutes an entry barrier); Complaint at 8, United States v. Kimberly-Clark Corp., No. 3:95-CV-3055-P, 1996 WL 351145, at *8 (N.D. Tex. filed Dec. 12, 1995) ("[e]stablishing a new successful brand of retail facial tissue in the United States is difficult, time-consuming and costly" as "[a]dvertising and promotional expense for a new brand would exceed $25 million over a three-year introductory period").

201. *See supra* notes 68–71 and accompanying text.

202. Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1321 (N.D. Ga. 2008); *see also* ALPO Petfoods, Inc. v. Ralston Purina Co., 997 F.2d 949, 953 (D.C. Cir. 1993) (upholding under the Lanham Act victim's recovery of $3.6 million in advertising costs to respond to competitor's deceptive advertising campaign, which cost only $2.2 million).

203. TREATISE, *supra* note 111, § 782, at 327.

204. *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 474 n.21 (1992) (noting that "in an equipment market with relatively few sellers, competitors may find it more profitable to adopt Kodak's service and parts policy than to inform the consumers"); Ford Motor Co. v. FTC, 120 F.2d 175, 179 (6th Cir. 1941) (reviewing the FTC

concerns about the industry self-regulation of toy commercials in the 1960s and 1970s.[205] Originally favoring industry self-policing, he feared the greater anticompetitive consequences of deceptive advertising.[206] Absent regulation, some toy manufacturers would air deceptive ads, which would pull down the toy industry.[207] Unless his company matched "the exaggerations and sometimes the outright deceptions of certain competitors, our commercials might not be exciting enough to move our toys off the shelves."[208] He foresaw bad commercials driving out the good ones, rendering TV advertising relatively ineffective.[209] The Treatise does not address this marketing dynamic. Instead, it requires the injured consumers (who generally cannot challenge the deception under the Lanham Act) to show why competitors could not readily neutralize or offset the misrepresentation.[210]

### B. Vaporware

Vaporware involves company preannouncements of its products that never materialize or arrive only much later than the announced delivery date.[211] Such pre-announcements, a DOJ official noted, can serve various purposes: "they can inform partners of new products to promote interoperability, they can inform consumers of new products so they will not be left stranded buying inferior or obsolete products, they can favorably influence expectations to help establish new products, and, yes, they can deter the introduction of rival products."[212]

Monopolists can use vaporware to maintain their power. In knowingly and falsely announcing the introduction of new products or technology in the near future, a monopolist can prevent its sales from significantly shifting to an entrant or fringe firm.[213] Business executives in one survey self-

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order finding Ford guilty of following industry leader General Motors in advertising a deceptive six-percent financing plan).

205. Robert L. Steiner, *Double Standards in the Regulation of Toy Advertising*, 56 Cincinnati L. Rev. 1259, 1264 (1988).

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 1264.

210. *See* Treatise, *supra* note 111, § 782, at 327.

211. Andrew V. Leventis & Michelle R. Appelrouth, *Are Section 2 Claims More Than Mere Apparitions? The Legal Viability of Vaporware Claims*, Antitrust, Spring 2001, at 82.

212. Carl Shapiro, Deputy Ass't Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust In Network Industries, Speech Before the American Law Institute and American Bar Association Antitrust/Intellectual Property Claims in High Technology Markets 15 (Jan. 25, 1996), *available at* http://www.usdoj.gov/atr/public/speeches/0593.htm.

213. Addamax Corp. v. Open Software Found., Inc., 888 F. Supp. 274, 285 (D. Mass. 1995) (involving defendants who allegedly used vaporware to paralyze operating systems technology markets and deter users from committing to other systems); *In re* Xerox Corp., 86 F.T.C. 364, at *7 (July 29, 1975) (addressing anticompetitive monopolistic practices such as "announcing new copier models and taking orders thereon before availability of such copiers in response to introduction of competing copiers by actual or potential competitors"); Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. Rev. 809, 878 (2000) (arguing that a monopolist has no rational eco-

identified vaporware as a method designed primarily to prevent or slow down entry.[214]

Vaporware can be especially problematic in markets with network effects.[215] A single event, such as a product pre-announcement, may tip market demand toward a single standard or prevent the sales of a rival's product from gaining momentum.[216] A software monopolist, for example, can foster doubt that its rival's new product will be compatible with its forthcoming technology.[217]

Judge Stanley Sporkin was blunt: "'Vaporware' is a practice that is deceitful on its face and everybody in the business community knows it."[218] If business leaders know that the practice is improper, asked Judge Sporkin, why didn't the DOJ address it in its original antitrust settlement with Microsoft?[219] Judge Sporkin, who foreshadowed several shortcomings of the United States' original consent decree with Microsoft,[220] was "terribly" bothered by the DOJ's failure.[221] The district court was "particularly concerned" that Microsoft unfairly maintained its operating system monopoly by aggressively pre-announcing new products in the face of its competitors' introducing possibly superior products.[222] The United

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nomic reason for knowingly making vaporware "other than to perpetuate or extend its monopoly power").

214. Smiley, *supra* note 199, at 174–75. One empirical study showed how an *entrant's* pre-announcement (Circuit City's preannouncement of DIVX technology) slowed down the adoption of the incumbent DVD technology. David Dranove & Neil Gandal, *The DVD vs. DIVX Standard War: Empirical Evidence of Vaporware* 8–20 (U.C. Berkeley Competition & Policy Ctr., Working Paper No. CPC 00-16, 2000), *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=10104context=iber/cpc. Because an entrant's product preannouncement had such a large effect, the authors suggest that an incumbent's product preannouncement would likely have a larger effect. *Id.* at 20. "Hence the general antitrust concern over vaporware is justified." *Id.*

215. Dranove & Gandal, *supra* note 214, at 1.

216. Leventis & Appelrouth, *supra* note 211, at 84.

217. Dranove & Gandal, *supra* note 214, at 19.

218. United States v. Microsoft Corp. (*Microsoft I*), 159 F.R.D. 318, 337 (D.D.C. 1995), *rev'd per curiam*, 56 F.3d 1448 (D.C. Cir. 1995). Judge Sporkin construed vaporware narrowly as "the public announcement of a computer product before it is ready for market for the sole purpose of causing consumers not to purchase a competitor's product that has been developed and is either currently available for sale or momentarily about to enter the market." *Id.* at 334.

219. *Id.* at 337.

220. *Id.* at 326 n.15. Judge Sporkin, for example, felt the consent decree, which covered "only MS-DOS and Windows and its predecessor and successor products," was too narrow. *Id.* at 333. Given "Microsoft's penchant for narrowly defining the antitrust laws," Judge Sporkin feared "there may be endless debate as to whether a new operating system is covered by the decree." *Id.* Moreover, the United States never showed how its proposed decree "will open the market and remedy the unfair advantage Microsoft gained in the market through its anticompetitive practices." *Id.* at 333–34. Judge Sporkin, at Microsoft's request, was removed for "personal bias" against the company. United States v. Microsoft Corp. (*Microsoft II*), 56 F.3d 1448, 1455 (D.C. Cir. 1995). The United States later unsuccessfully challenged Microsoft's narrow construction of the consent decree. United States v. Microsoft Corp. (*Microsoft III*), 147 F.3d 935, 946–48 (D.C. Cir. 1998). Microsoft's operating software monopoly remains intact.

221. *Microsoft I*, 159 F.R.D. at 337 (expressing that United States was "either incapable or unwilling to deal effectively with a potential threat to this nation's economic well being").

222. *Id.* at 335.

States "refused to disclose what it knew about the [Vaporware] practice or what investigation it had conducted with respect to it."[223] The district court could not "ignore the obvious": a monopolist admittedly preannounced solely to impact a competitor's product adversely.[224] Consequently, the district court considered the government's proposed settlement with Microsoft to be ineffectual.[225] To approve it would leave the message that the "Microsoft is so powerful that neither the market nor the Government is capable of dealing with all of its monopolistic practices."[226]

Allegations of vaporware's anticompetitive effects resurfaced when a competitor, not the United States, sued Microsoft under the Sherman Act.[227] The plaintiff in *Caldera, Inc. v. Microsoft Corp.* (*Caldera I*) alleged that the monopolist's vaporware and other illegal conduct drove it from the market.[228] Plaintiff alleged the following: In the late 1980s, Microsoft was alarmed over the enthusiasm for plaintiff's operating system, which, as Microsoft internally admitted, was "vastly superior" to its operating system.[229] Microsoft sought to bargain for its rival's exit from the market.[230] When that failed, and after plaintiff's software captured six percent of the worldwide operating software market, Microsoft turned to vaporware.[231] The monopolist's vaporware campaign caused computer manufacturers to postpone any decision to switch from Microsoft's

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223. *Id.* Microsoft claimed these vaporware charges were "entirely false."

224. *Id.*

225. *Id.* at 337.

226. *Id.* On appeal, the D.C. Circuit held that the district court exceeded its powers under the Tunney Act, and remanded the case to a different judge with instructions to enter the proposed decree. *Microsoft II*, 56 F.3d at 1464–65. The D.C. Circuit held that the district court need not enter the consent decree if it "appears to make a mockery of judicial power. Short of that eventuality, the Tunney Act cannot be interpreted as an authorization for a district judge to assume the role of Attorney General." *Id.* at 1462. Congress disagreed with the D.C. Circuit's interpretation of the Tunney Act, and Congress amended the Act "to effectuate the original Congressional intent in enacting the Tunney Act and to ensure that United States settlements of civil antitrust suits are in the public interest." Antitrust Criminal Penalty Enforcement Act of 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004). Because "the purpose of the Tunney Act was to ensure that the entry of antitrust consent judgments is in the public interest," it "would misconstrue the meaning and Congressional intent in enacting the Tunney Act to limit the discretion of district courts to review antitrust consent judgments solely to determining whether entry of those consent judgments would make a 'mockery of the judicial function.'" *Id.*

227. Caldera, Inc. v. Microsoft Corp. (*Caldera I*), 72 F. Supp. 2d 1295, 1299 (D. Utah 1999); Caldera, Inc. v. Microsoft Corp. (*Caldera II*), 87 F. Supp. 2d 1244, 1247–48 (D. Utah 1999).

228. *Caldera I*, 72 F. Supp. 2d at 1299.

229. *Id.*

230. *Id.*

231. *Id.* Plaintiff alleged that the monopolist made preemptive false and misleading announcements of its forthcoming, competitive MS-DOS 5.0 and Windows products. *Id.* Microsoft stated that its MS-DOS 5.0 software (which it claimed was similar to plaintiff's software) would be publicly available by September 1990 (which was nine months before the software actually came on the market). *Id.* Plaintiff relied on Microsoft's internal documents that stated one goal of its "aggressive leak" campaign was to "diffuse potential excitement/momentum from the [plaintiff's] DR DOS 5.0 announcement." *Id.* at 1300.

to plaintiff's operating system.[232] To preempt this competitive threat, Microsoft also launched a campaign of "fear, uncertainty, and doubt" (FUD) against plaintiff and its operating software. Microsoft deceived computer manufacturers that plaintiff's and Microsoft's operating software were incompatible.[233] Plaintiff alleged that, as a result of Microsoft's vaporware, FUD campaign, and other anticompetitive conduct, it withdrew from the market.[234] Soon after plaintiff's exit, Microsoft announced that its Chicago (later dubbed Windows 95) software, which Microsoft originally said would be released in 1993 or 1994 (and on which plaintiff's Novell DOS would not run), was delayed and might be unavailable until August 1995.[235]

The district court denied Microsoft's partial summary judgment motion relating to its alleged vaporware activities.[236] Microsoft's vaporware and FUD campaign, when viewed with the other alleged exclusionary behavior, may support a Section 2 violation.[237] Monopolists, the court recognized, have no general duty to predisclose innovations to competitors.[238] But monopolists cannot eradicate their competitors through anticompetitive means, including fraud.[239] Microsoft later settled for an estimated $275 million.[240]

Complaints over companies' vaporware practices have continued. *Wired Magazine* annually announces its Vaporware Awards for the tech industry's biggest, brashest, and most baffling unfulfilled promises.[241] In 2008, Microsoft won a vaporware award for its Internet Explorer 8.[242] Yet few antitrust plaintiffs have challenged vaporware; even fewer claims have survived summary judgment.

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232. *Id.* One Microsoft executive wrote, "virtually all of our OEMs worldwide were informed about DOS 5, which diffused DRI's ability to capitalize on a window of opportunity with these OEMs." *Id.* (quoting Pl.'s Ex. 62).

233. *Id.* at 1301. To "slaughter" plaintiff "before they get stronger," Microsoft repeated its vaporware and FUD campaign when plaintiff released its new operating software. *Id.* at 1302 (quoting Pl.'s Ex. 175). To foster the impression of incompatibility between plaintiff's and Microsoft's software, a Microsoft employee said, "We need to create the reputation for problems and incompatibilities to undermine confidence to [plaintiff's software] drdos6; so people will make judgments against it without knowing details or fa[c]ts." *Id.* at 1303 (quoting Pl.'s Ex. 227).

234. *Id.* at 1304.

235. *Id.*

236. *Caldera II*, 87 F. Supp. 2d 1244, 1249 (D. Utah 1999).

237. *Id.*

238. *Caldera I*, 72 F. Supp. 2d at 1315.

239. *Id.* at 1306, 1317; *Caldera II*, 87 F. Supp. 2d at 1249. As to whether Microsoft made knowingly false statements, plaintiff relied on internal company statements of the problem "motivating people to achieve 'fake' ship dates" and "Lying to people on the team about schedules. Morale hit to the team." *Caldera*, 72 F. Supp. 2d at 1248.

240. *Settlement: Microsoft Settles Unfair Competition Suit By Caldera*, 7 ANDREWS ANTITRUST LITIG. REP., no. 7, Jan. 2000, at 7.

241. *See* Michael Calore, *Vaporware 2009: A Call for Submissions*, WIRED (Dec. 7, 2009, 7:15 PM), http://www.wired.com/epicenter/2009/12/vaporware-2009-a-call-for-submission/.

242. Wired Staff, *Vaporware 2008: Crushing Disappointments, False Promises and Plain Old BS*, WIRED (Dec. 29, 2008), *available at* http://www.wired.com/culture/culturereviews/news/2008/12/YE8_vaporware?currentPage=all.

The issue then is the appropriate antitrust standard for evaluating claims of a monopolist's vaporware. The DOJ recognized that product pre-announcements may violate the Sherman Act if they were knowingly false when made and contributed to the acquisition or maintenance of market share.[243] Judge Sporkin, however, criticized the United States' "rather narrow" view of vaporware: the government had adopted a criminal standard when Microsoft was accused of repeatedly preannouncing products to freeze the current software market and defeat the marketing plans of competitors that had products ready for the market.[244]

But, the DOJ's legal standard was consistent with the standard for common law misrepresentation of intention. Under the common law, a defendant can be liable for its statement of its present intent to carry out a future action, when the defendant in making such a representation had no such intent.[245] Plaintiff must prove that the representation was false and material when made, and the defendant knew it was false (i.e., the defendant knew it did not have the intention to do or not do the particular act) when making the statement.[246] Proof of scienter is critical and cannot be inferred solely by defendant's later nonperformance.[247] Otherwise, a breach of contract for nonperformance can be characterized as deception.[248]

Not surprisingly, the few courts that evaluated antitrust claims premised on vaporware required the antitrust plaintiff to prove that the monopolist's early product announcement was knowingly false or misleading when made.[249] Professor Prentice offered a useful expansion of this standard—namely, plaintiffs should prevail under Section 2 for their vaporware claims if the monopolist "(a) did not really believe the announcement when made, (b) had no reasonable basis to believe the announcement when it was made, or (c) was aware at the time the announcement was made of specific facts that contradicted the announcement."[250]

243. *Microsoft I*, 159 F.R.D. 318, 336 (D.D.C. 1995), *rev'd per curiam*, 56 F.3d 1448 (D.C. Cir. 1995).

244. *Id.*

245. RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 530; *see, e.g.*, Milwaukee Auction Galleries, Ltd. v. Chalk, 13 F.3d 1107, 1109 (7th Cir. 1994).

246. RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 530 cmt. b. "If the statement is honestly made and the intention in fact exists, one who acts in justifiable reliance upon it cannot maintain an action of deceit if the maker for any reason changes his mind and fails or refuses to carry his expressed intention into effect." *Id.*

247. *Id.* at cmt. d.

248. *See id.*

249. *See, e.g.*, AD/SAT v. Associated Press, 920 F. Supp. 1287, 1301 (S.D.N.Y. 1996), *aff'd*, 181 F.3d 216, 231 (2d Cir. 1999) (recognizing that knowingly making a false preannouncement of a product service can constitute predatory conduct); MCI Commc'ns Corp. v. Am. Tel. & Tel. Co., 708 F.2d 1081, 1128–30 (7th Cir. 1983) (stating that to be exclusionary, early announcement must be "knowingly false or misleading"); ILC Peripherals Leasing Corp. v. Int'l Bus. Machines Corp. 458 F. Supp. 423, 442 (N.D. Cal. 1978) (finding no evidence that the product preannouncement was knowingly false), *aff'd per curiam sub nom.* Memorex Corp. v. Int'l Bus. Machines Corp., 636 F.2d 1188 (9th Cir. 1980).

250. Prentice, *supra* note 23, at 1254–55; *see also Caldera II*, 87 F. 87 F. Supp. 2d 1244, 1248 (D. Utah 1999) (noting that since "[p]roving state of mind is a difficult task[,]" "in-

One defense of vaporware is that monopolists are unlikely to repeat their deceptions with rational customers successfully.[251] This claim, as *Caldera I* shows, proves too much.[252] Some monopolists have engaged in vaporware over long periods.[253] Professor Prentice noted that Microsoft's failure to deliver its vaporware promises did not prevent it from dominating for over twenty-five years the operating system market and leveraging itself into a leading position in many markets for applications software.[254] Even isolated incidents of vaporware can be anticompetitive.[255] A monopolist need only deceive occasionally to preempt a nascent competitive threat.[256] As for any ensuing recrimination, a monopolist might prefer a tarnished reputation than competition.

### C. Standard-Setting Organizations

Businesses may collaborate through standard-setting organizations to establish industry standards, codes, or product specifications that market participants can rely upon in making products.[257] These standard-setting organizations, like the National Fire Protection Association in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, can have significant market power.[258] Their standard setting can also lead to significant procompetitive[259] or anticompetitive effects.[260] In industries with network effects,

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quiry into reasonableness will most likely be relevant to assessing whether a statement was knowingly false or misleading").

251. Franklin M. Fisher, *Games Economists Play: A Noncooperative View*, 20 Rand J. Econ. 113, 118 (1989).

252. *See generally Caldera I*, 72 F. Supp. 2d 1295 (D. Utah 1999).

253. Prentice, *supra* note 23, at 1208.

254. *Id.*

255. *See supra* notes 215–218 and accompanying text.

256. *See supra* notes 215–217 and accompanying text.

257. Promoting Innovation & Competition, *supra* note 31, at 33.

258. 486 U.S. 492, 492–93 (1988) (holding that a competitor's efforts to affect the product standard-setting process of a private association was not immune from antitrust liability under the *Noerr* doctrine because state and local governments widely adopted the association's standards into law). The private National Fire Protection Association, among other things, set and published highly influential product standards and codes relating to fire protection. *Id.* at 495.

> One of the codes it publishes is the National Electrical Code, which established product and performance requirements for the design and installation of electrical wiring systems . . . was the most influential electrical code in the nation. . . . [P]rivate certification laboratories, such as Underwriters Laboratories, normally will not list and label an electrical product that does not meet Code standards; many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and distributors will not use a product that falls outside the Code.

*Id.* at 495–96.

259. Standards Development Organization Advancement Act of 2004, Pub. L. No. 108–237, § 102, 118 Stat. 661, 661 (2004); Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308–09 (3d Cir. 2007); Promoting Innovation & Competition, *supra* note 31, at 33–34.

260. *See* Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: An Integrated Handbook § 5.7c1, at 282 (2d ed. 2006). If, for example, the standard-setting organization's members agree to purchase only products that comply with their organization's standard, and if the members have sufficient market clout, their group boycott can be anticompetitive. *Id.*

once the standard-setting organization chooses the technology, and its members and others develop products adopting that technology, it can be "time consuming and expensive to adopt a different technology."[261] Because the "process of establishing a standard displaces competition," noted the FTC, the use of deception to influence a standard-setting body can "undermine competition in an entire industry, raise prices to consumers, and reduce choices."[262]

Standard setting often involves information asymmetries that can foster deception. As information is more widely dispersed and as innovation and the quest for productive efficiency lead to further specialization of knowledge, no one completely grasps the details of how products are made and sold.[263] Synthesizing the many areas of expertise is often a time-consuming and costly process.[264] One benefit of standard-setting organizations is their collecting and synthesizing disparate areas of specialized knowledge into a standard, code, or product specification.[265] The private standard-setting organization in *Allied Tube & Conduit*, for example, drew on the expertise of over 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, and government.[266] Few outside the standard-setting organization have the time, resources, or desire to replicate the standard-setting process and draw a different conclusion.[267] Instead, outsiders, like the many state and local governments in *Allied Tube & Conduit*, often will defer to the collective decision of the standard-setting organization and routinely adopt the standard-setting organization's codes "into law with little or no change."[268] Indeed the state and local governments may "lack the resources or technical expertise to second-guess it."[269]

If defendant attains or maintains its monopoly by deceiving the private standard-setting organization (or otherwise manipulating its process), this

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261. Written Submission of the United States, OECD—COMPETITION POLICY ROUNDTABLES: POTENTIAL PRO-COMPETITIVE AND ANTI-COMPETITIVE ASPECTS OF TRADE/BUSINESS ASSOCIATIONS, DAF/COMP (2007) 45, at 218 (2007), *available at* http://www.oecd.org/dataoecd/40/28/41646059.pdf.

262. Statement of the F.T.C., *In re* Negotiated Data Solutions, LLC, No. 0510094, at 2 (Jan. 23, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080122statement.pdf.

263. *See* JOHN KENNETH GALBRAITH, *The Technostructure*, *in* THE ESSENTIAL GALBRAITH 71–72 (2000). The power in a modern corporation, observed John Kenneth Galbraith, lies not with the CEO, but with the internal collective decision-making bodies. *Id.* at 71. To manufacture and sell a new automobile, the carmaker must collect internally many departments' expertise (such as engineering, marketing, finance, sales, etc.). *Id.* at 67–69. The collective decision-making body collects this disparate expertise in determining the car's design, suggested price point, and options. *Id.* Although the CEOs may question some aspects of the decisions, they lack the detailed expertise to effectively replicate the analysis that went into the decisions and draw a different conclusion. *Id.* at 71–72.

264. *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 502 (1988).

265. *See id.* at 495.

266. 486 U.S. at 495.

267. *Id.* at 502.

268. *Id.* at 495.

269. *Id.* at 502.

raises antitrust concerns.[270] One concern is the patent "hold-up" situation.[271] Such deception can stifle the efficiencies gained from standard setting if members hedge their bets for potential hold-up or forego standard setting altogether.[272] To avoid hold-ups, standard-setting organizations can require their members to disclose any current or prospective intellectual property rights at the onset of the standard-setting process and to commit to license any disclosed technologies that are incorporated in the standard on fair, reasonable, and non-discriminatory (FRAND) terms.[273]

An emerging and positive trend is the competition agencies' recognition of the significant anticompetitive risks of deceptive and other independently wrongful conduct in the standard-setting process.[274] One would expect, then, that the courts would also take a hard line. Instead, the Third Circuit and D.C. Circuit have recently applied different legal standards to evaluate such risks.

In *Broadcom Corp. v. Qualcomm Inc.*, the Third Circuit took a hard line in addressing the hold-up problem.[275] By misrepresenting the cost of implementing its technology, the deceiver can obtain "an unfair advan-

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270. To mitigate the antitrust risks, the private association can "promulgate safety standards based on the merits of objective expert judgments" and have procedures to "prevent the standard-setting process from being biased by members with economic interests in stifling product competition." *Id.* at 501.

271. PROMOTING INNOVATION & COMPETITION, *supra* note 31, at 35 n.11. A standard-setting organization must weigh *ex ante* the benefits and costs of using a member's technology versus alternative technologies in a proposed standard. *Id.* at 35–36. To assess accurately the costs and benefits, the organization must know the current or prospective intellectual property (IP) rights in the different technologies. *Id.* If the organization cannot cost effectively ascertain or police its members' current or prospective IP rights in that technology, the organization must rely on its members' truthful disclosures of any IP rights. *Id.* at 36. A member can conceal its IP interests to the standard-setting organization and falsely promise to deal fairly. *See id.* at 7. After the deceiver's intellectual property is incorporated in the standard, other industry participants start designing, testing, and producing goods that conform to the standard. *Id.* at 35. Switching to other technologies or standards becomes increasingly difficult. The greater the switching costs, the greater the deceitful company's market power. *Id.* at 37–38. Once the industry is locked-in, the deceitful company reveals its IP rights and "holds up" the industry participants with monopoly licensing fees. *Id.*

272. *In re* Rambus, Inc., No. 9302, 2006 WL 2330117 (FTC Aug. 2, 2006) (citing concerns from industry participants).

273. PROMOTING INNOVATION & COMPETITION, *supra* note 31, at 36; Daniel G. Swanson & William J. Baumol, *Reasonable & Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 ANTITRUST L.J. 1, 5 (2005).

274. *In re* Union Oil Co. of Cal., No. 9305, 2005 WL 2003365 (F.T.C. Aug. 2, 2005) (FTC consent decree) (finding that defendant, while pursuing a patent, "misrepresented to CARB that certain gasoline research was non-proprietary and in the public domain"; permitting defendant to enforce its patent rights could result, the FTC estimated, "in over $500 million of additional consumer costs annually"); *In re* Dell Computer Corp., 121 F.T.C. 616, 618 (May 20, 1996) (finding that after certifying having no relevant patents, Dell sought to enforce its patents adopted by standard-setting organization); J. Thomas Rosch, *The Common Law of Section 2: Is It Still Alive and Well?*, 15 GEO. MASON L. REV. 1163, 1173 (2008) (stating that the FTC was "not convinced that deceptive conduct in the context of a standard-setting process could or should be considered presumptively legal, much less legal per se").

275. 501 F.3d 297, 310–13 (3d Cir. 2007).

tage and bias the competitive process in favor of that technology's inclusion in the standard."[276] "Deception in a consensus-driven private standard-setting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder."[277] Consequently, the Third Circuit held "that (1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an [standard-setting organization's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct."[278] The Third Circuit did not address the element of causation directly.[279] But its approach was consistent with the common law approach. First, the Third Circuit recognized that a firm's commitment to license on FRAND terms was "a factor—and an important factor—that the [standard-setting organization] will consider in evaluating the suitability of a given proprietary technology vis-a-vis competing technologies."[280] Second, the court recognized that the standard-setting organization "*might have* chosen nonproprietary technologies for inclusion in the standard,"[281] and "even if [defendant's] technology was the only candidate for inclusion in the standard," the organization may still have rejected it.[282] "Thus, the allegations of the Complaint foreclose[d] the possibility" that the inclusion of defendant's technology in the standard "was inevitable."[283]

In contrast to the Third Circuit's hard line approach, the D.C. Circuit in *Rambus Inc. v. F.T.C.* created a new causation standard that undermined the Sherman Act's legislative aim.[284] The FTC, in its administrative proceeding, found Rambus liable for patent hold-up.[285] The D.C. Circuit set aside the FTC's order.[286] This alone was not startling. Other federal courts dismissed related private actions due to evidentiary deficiencies.[287]

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276. *Id.* at 313.
277. *Id.* at 314.
278. *Id.*
279. *Id.* at 313.
280. *Id.*
281. *Id.* at 305 (emphasis added).
282. *Id.* at 316.
283. *Id.*
284. 522 F.3d 456, 464 (D.C. Cir. 2008).
285. *In re* Rambus, Inc., No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006) (finding that "Rambus's conduct was calculated to mislead [the standard-setting organization's] members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced" against products compliant with the standard-setting organization, which required disclosure of relevant intellectual property).
286. Rambus Inc. v. FTC, 522 F.3d at 469.
287. *E.g.*, Rambus Inc. v. Infineon Techs. Ag, 318 F.3d 1081, 1102 (Fed. Cir. 2003) (noting "staggering lack of defining details" in the standard-setting organization's patent policy); Hynix Semiconductor, Inc. v. Rambus Inc., 609 F. Supp. 2d 988, 1026 (N.D. Cal. 2009) (finding that organization's written disclosure policies "did not clearly require members to disclose information" about IP, members never legally agreed to do so, and members never had "clearly defined expectation" of such disclosure requirements).

The D.C. Circuit, like the other courts, could have found that the standard-setting organization's disclosure obligations were ill-defined or that there was insufficient evidence that Rambus fraudulently concealed information. The FTC, while disappointed, could have prosecuted similar violations, when presented with better facts.

Instead, the D.C. Circuit construed the Sherman Act, a law aimed at protecting the public from monopolists' unfair business practices,[288] into a safe-haven for anticompetitive deception. The FTC failed to prove monopolization, the court held, because it "failed to demonstrate that Rambus's conduct was exclusionary under settled principles of antitrust law."[289] Rambus's conduct was not exclusionary, the court argued, because the FTC "expressly left open the likelihood that [the standard-setting organization] would have standardized Rambus's technologies *even if Rambus had disclosed* its intellectual property."[290] Essentially, the FTC had to prove that the standard-setting organization would have acted differently (i.e., standardized other technologies) had it been told the truth (i.e., known the full scope of Rambus's intellectual property). Rather than applying "settled principles of antitrust law," the D.C. Circuit misconstrued the legal standard for causation in two respects.

First, the court misconstrued the causation standard for deception. It is often difficult to predict what the victim would have done but for the deception. Given this difficulty, causation in deception cases often depends on issues of materiality and reliance.[291] For example, in deciding what to do, a reasonable person would not attach importance to immaterial representations.[292] Likewise, a person must rely on the misrepresentation in acting or refraining from acting.[293] So a misrepresentation that is immaterial or that the plaintiff never heard generally cannot cause injury.[294]

Common law fraud, however, does not mandate proof that but for the misrepresentation, the fraud victims would have acted differently.[295] A strict "but for" analysis, said Maryland's highest court in *Nails v. S & R, Inc.*, is one way, but not the only way, fraud victims can establish reliance.[296] Thus, the common law recognizes that other factors besides misrepresentation can influence the tort victim.[297] Plaintiffs need only show that the misrepresentation "played a substantial part, and [was] a sub-

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288. *See supra* Part II.A.
289. Rambus Inc. v. FTC, 522 F.3d at 463.
290. *Id.* at 466.
291. RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 538.
292. *Id.*
293. *Id.* § 537.
294. *Id.* § 538. An exception exists when the defendant knows that the plaintiff likely regards the representation as important (say his horoscope), even though a reasonable person would not. *Id.* § 538 cmt. f.
295. *Id.* § 546 cmt. b. ("It is not even necessary that [plaintiffs] would not have acted or refrained from acting as [they] did unless [they] had relied on the misrepresentation.").
296. 639 A.2d 660, 669 (Md. 1994).
297. *Id.*

stantial factor," in influencing their conduct.[298] Fraud victims do not have to prove that their "reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing [their] conduct."[299]

For example, in *Nails*, the plaintiff employees accused their former employer of deceiving them about their compensation.[300] On cross-examination, each plaintiff was asked, "'if you had been told at the time of hire about the [specific commission practice] you would have still taken the job, would you not?'" Each plaintiff responded, "'I don't know.'"[301] Defendant argued there was no reliance as a matter of law.[302] To establish fraud's reliance element, the defendant argued, plaintiffs had to show that if they were told the truth, then they would not have worked for the defendant.[303] Given plaintiffs' "equivocal answers [during cross-examination], the "but for" test was not met and, therefore, there was no reliance as a matter of law."[304] The Maryland Court of Appeals disagreed.[305] Defendant's strict "but for" analysis was not the only way to establish reliance.[306] The court "long recognized that the misrepresentation need not have been the only motivation for the plaintiff's actions; it is sufficient that the misrepresentation substantially induced the plaintiff to act."[307] For good measure, the court cited the Restatement[308] and Prosser.[309] Because "each plaintiff testified that the amount he or she was to be paid was of the 'utmost importance' in determining to take the job", this "evidence was sufficient for the jury to conclude that each plaintiff relied on the defendant's misrepresentations."[310] Consequently, the D.C. Circuit's causation standard is inconsistent with the common law standard for fraud.[311]

The irony is that the FTC sued under Section 5 of the FTC Act, which

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298. RESTATEMENT (SECOND) OF TORTS, *supra* note 19, § 546 cmt. b.
299. *Id.*
300. *Nails*, 639 A.2d at 661–62.
301. *Id.* at 669.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 546 (1977)).
309. *Id.* at 669–70.

> [I]t is not required that the defendant shall have been the sole cause of the damage; and indeed it is seldom, if ever, that the plaintiff is not influenced to some extent by many other factors, most of which are not connected with the defendant at all. It is enough that the representation has had a material influence upon the plaintiff's conduct, and been a substantial factor in bringing about his action. It is not necessary that the representation be the paramount, or the decisive, inducement which tipped the scales, so long as it plays a substantial part in affecting the plaintiff's decision. . . . The question becomes one of fact, as to whether substantial weight was given to the representation, and it usually is for the jury.

*Id.* at 670 (quoting WILLIAM L. PROSSER, THE LAW OF TORTS § 108, at 715 (4th ed. 1971)).
310. *Id.*
311. *Compare id.*, *with* Rambus v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008).

in the context of deception claims further relaxes the reliance element.[312] Section 5 only requires evidence that the misrepresentation would *likely* deceive consumers acting reasonably under the circumstances in a material respect.[313] Courts do not require proof that consumers actually and justifiably relied on the misrepresentation or would have behaved differently but for the deception.[314]

Thus, the D.C. Circuit misconstrued the causation standard for deception in requiring the FTC to speculate what the standard-setting organization would have done had Rambus truthfully disclosed its intellectual property.[315] One could intelligibly inquire whether the monopolist's deception "had a *tendency* to deceive or was *likely* to influence"[316] the standard-setting organization (or alternatively, as the Court did in *Qualcomm*, whether the monopolist's deception was an important factor in the standard-setting organization's decision).[317] But according to the D.C. Circuit, Rambus's misrepresentation must be the predominant or sole factor, namely "the standard-setting organization would not have adopted the standard in question but for the misrepresentation or omission."[318]

Second, the D.C. Circuit misconstrued the causation standard for a monopolization claim. Rambus's alleged deception, the court reasoned, could not affect competition if it was possible that the standard-setting organization "in the world that would have existed but for Rambus's deception, would have standardized the very same technologies."[319] This standard eviscerates Section 2. The possibility always exists that *but for*

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312. *In re* Rambus, Inc., No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006). Viewing *Rambus* as a monopolization case, the FTC analyzed Rambus's allegedly deceptive conduct under Section 2 of the Sherman Act. *Id.* The FTC applied two modifications to its Section 5 legal standard. First, for Rambus's allegedly deceptive conduct to be actionable, Rambus must have acted "willfully," as opposed to inadvertently or negligently. *Id.* Second, while Section 5 "does not require proof of competitive harm," under Section 2, defendant's deceptive conduct "must harm the competitive process." *Id.* Thus the anticompetitive effect of Rambus's alleged deceptive course of conduct must "outweigh any procompetitive benefit." *Id.* But this last requirement is nonsensical. Deception is morally and legally culpable; balancing is not needed.

313. *See* PRIDGEN & ALDERMAN, *supra* note 63, § 10.3, at 770.

314. FTC v. Colgate-Palmolive Co., 380 U.S. 374, 391–92 (1965); FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963); *see also* PRIDGEN & ALDERMAN, *supra* note 63, § 10.3, at 770 ("Time and again, defendants' pleas that there was no consumer testimony or other evidence of actual deception have been rejected by reviewing courts, because the Commission need only find a tendency to deceive based on its own examination."). Similarly, under the Lanham Act, plaintiffs need only show that the misrepresentation "had a *tendency* to deceive and was *likely* to influence purchasers," but plaintiffs need not prove that purchasers relied *solely* on the misrepresentation. Williams Elec., Inc. v. Bally Mfg. Corp., 568 F. Supp. 1274, 1284 (N.D. Ill. 1983) (finding that there was an issue of fact as to whether manufacturer's representation had tendency to deceive and was likely to influence purchasers even though distributors were sophisticated purchasers who did not make their purchasing decisions solely on the basis of promotional materials).

315. Rambus v. FTC, 522 F.3d at 466.

316. *Williams Elec., Inc.*, 568 F. Supp. at 1284 (emphasis in original).

317. Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007).

318. *Id.* (quoting 2 HOVENKAMP ET AL., IP & ANTITRUST § 35.5, at 35–45 (Supp. 2008)).

319. *Id.* at 466–67.

the monopolist's exclusionary conduct consumers might have purchased the monopolist's product or an entrant might have failed. "[N]either plaintiffs nor the court can confidently reconstruct a product's hypothetical technological development in a world absent the defendant's exclusionary conduct," recognized the unanimous D.C. Circuit sitting en banc in *Microsoft*.[320] To "require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action."[321] Thus, to deter monopolistic abuses, Section 2 largely makes the defendant "'suffer the uncertain consequences of its own undesirable conduct.'"[322] An antitrust plaintiff need only show "the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power."[323]

Consequently, unlike the FTC in *Rambus*, the United States in *Microsoft* never had to prove that but for Microsoft's exclusionary conduct, the original equipment computer manufacturers would have acted differently. It was sufficient for the United States to show that but for Microsoft's exclusionary license restrictions on its Windows software, the original equipment manufacturers *could* have (not necessarily they *would* have) promoted multiple Internet access providers and browsers,[324] and but for Microsoft's integration of its Internet browser with Windows, the original equipment manufacturers *could* have removed Microsoft's Internet browser and "*might* have chosen to pre-install" a competing Internet browser.[325]

The FTC satisfied the causation standard, as applied in *Microsoft*. The FTC found that other companies, which presumably disclosed their IP interests, competed with Rambus to be the technology chosen for the standard.[326] Rambus's deception concerned a material issue, and the standard-setting organization actually relied on this deception in choosing among the alternative technologies.[327]

320. 253 F.3d 34, 79 (D.C. Cir. 2001).
321. *Id.*
322. *Id.* (quoting TREATISE, *supra* note 111, ¶ 651c, at 78).
323. *Id.*
324. *Id.* at 63.
325. *Id.* at 66 (emphasis added).
326. *In re* Rambus, Inc., No. 9302, 2006 WL 2330117 (F.T.C. 2006) (finding that "[a]lternative technologies were available when JEDEC chose the Rambus technologies, and could have been substituted for the Rambus technologies had Rambus disclosed its patent position"). The standard-setting organization members—"the principal buyers of the relevant technologies—gave these alternatives serious, searching consideration; in fact, the technologies as to which Rambus subsequently revealed patent claims sometimes were chosen only after prolonged debate." *Id.*
327. *Id.* (finding the standard-setting organization members in weighing different alternatives considered the potential cost of patents as material: "JEDEC members—DRAM manufacturers and customers—were highly sensitive to costs, and that keeping costs down was a major concern within JEDEC"). According to a report by Rambus, "Compaq (Dave Wooten) like the others, stressed that price was the major concern for all of their systems. They didn't particularly seem to care if the SDRAMs had 1 or two banks so long as they didn't cost any more than conventional DRAMs . . . Sun echoed the concerns about low cost. They really hammered on that point." *Id.*

The court in *Rambus* also erred in assuming that a monopolist that uses deception to obtain higher prices "has no particular tendency to exclude rivals and, thus, to diminish competition."[328] First, the Sherman Act reaches non-exclusionary behavior that enables a monopolist to increase price. When a company obtains or maintains its monopoly power not as a consequence of a superior product, business acumen or historic accident, but by deception (such as misrepresenting its intentions to the standard-setting organization), then its conduct is "willful" and illegal.[329] Second, deception that significantly distorts demand undermines competition. As John Vickers said,

> Competition cannot work effectively unless customers are reasonably well informed about the choices before them. Uninformed choice is not effective choice, and without that there will not be effective competition. Informed choice has two elements—knowing what alternatives there are, and knowing about the characteristics of alternative offerings. In particular, what matters is the ability of customers to judge the prospective value for money, for them, of the alternatives on offer.[330]

The D.C. Circuit's causation standard in *Rambus* raises significant rule-of-law concerns. It requires the parties and lower courts to speculate on

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328. Rambus v. FTC, 522 F.3d 456, 464 (D.C. Cir. 2008). The D.C. Circuit also said that higher monopoly prices would attract, not repel, competitors. *Id.* at 466. This supposition first is inapplicable to markets with strong network effects (enhanced by the adoption of a standard) and where a patent protects the monopoly, and second, rests on the Chicago School theory that rational profit-maximizers, who are attracted to industries characterized with supra-competitive profits, quickly defeat the exercise of market power. In fact market power can persist in markets characterized with low entry barriers. *See* Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 INDIANA L.J. (forthcoming 2011), *available at* http://ssrn.com/abstract=1582720; Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 514–17 [hereinafter Stucke, *Monopolies*]; Stucke, *supra* note 167, at 563–72. In *Conwood*, for example, the moist snuff monopoly had the highest profit margin in the country, and increased prices approximately eight to ten per cent annually between 1979 and 1998; yet the annual price increases and large profit margin did not attract any entry after 1990. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 775 (6th Cir. 2002).

329. *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 77 (D.C. Cir. 2001) (noting that deceptive conduct served "to protect its monopoly . . . in a manner not attributable" either to product's superiority or to business acumen and "therefore was anticompetitive"); Research In Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 798 (N.D. Tex. 2008) (applying *Grinnell* standard to deception in standard-setting organization) (citing United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)). Also suppose a firm with a 75% market share acquires a smaller rival with a 10% share. The merger enables the monopolist to raise prices further. The merger is not exclusionary with respect to the remaining competitors in the market. But nonetheless it violates Section 2 of the Sherman Act (as well as Section 7 of the Clayton Act). Citizen Pub. Co. v. United States, 394 U.S. 131 134–35 (1969); United States v. Grinnell Corp., 384 U.S. 563 (1966); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882, 884 (9th Cir. 1972); United States v. Daily Gazette Co., 567 F. Supp. 2d 859, 863–64 (S.D. W. Va. 2008). So if a merger (which depending on the circumstances can generate efficiencies) that leads to higher prices violates Section 2, it follows that deception (which lacks any efficiencies) that leads to higher prices also violates Section 2.

330. John Vickers, Chairman, Office of Fair Trading, Economics for Consumer Policy, British Academy Keynes Lecture (Oct. 29, 2003), *available at* http://www.oft.gov.uk/shared_oft/speeches/spe0403.pdf.

"the world that would have existed but for [the monopolist's] deception."[331] How can one objectively and predictably determine what would happen in an alternate universe? Moreover, the *Rambus* causation standard is inimical to the Sherman Act's purpose. It allows a company to gain an unfair advantage over its competitors by willfully and intentionally deceiving the standard-setting organization about its highly material intellectual property, based on the possibility that absent the deception, the organization might have adopted the technology anyway. It also permits a monopolist to deceive consumers into making uninformed choices and thereby reap greater profits at the consumers' expense.[332]

### D. Other Deceptive Conduct by a Monopolist

As the prior sections discuss, deception at critical junctures can substantially lessen competition. "[U]nethical and deceptive practices," the Court recognized, "can constitute abuses of administrative or judicial processes that result in antitrust violations."[333] One well-recognized example is when a patentee procures a patent by fraud, and thereafter seeks monopoly rents from its ill-gotten patent,[334] or when branded drug manufacturers deceive the regulatory U.S. Food and Drug Administration to block generic entry.[335]

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331. *Rambus*, 522 F.3d at 466–67.

332. The D.C. Circuit also criticized the FTC for not citing (or distinguishing) *NYNEX Corp. v. Discon, Inc. Id.* at 466. The court was under the misimpression that *NYNEX* somehow held that a monopolist's use of deception to obtain higher prices falls outside the antitrust laws. *Id.* at 464–65. The sole issue in *NYNEX* was "whether the antitrust rule that group boycotts are illegal *per se* as set forth in Klor's, Inc. v. Broadway-Hale Stores, Inc. . . . applies to a buyer's decision to buy from one seller rather than another, when that decision cannot be justified in terms of ordinary competitive objectives." 525 U.S. 128, 130 (1998). The Court held that its *per se* group boycott rule did not apply to instances where a single buyer favors one seller over another, albeit for an improper reason. *Id.* The Court specifically refused Defendants-Petitioners' request "to reach beyond the '*per se*' issues and to hold that Discon's complaint does not allege anywhere that their purchasing decisions harmed the competitive process itself and, for this reason, it should be dismissed." *Id.* at 140. The Court never held that a monopolist under the Sherman Act could employ deception to secure higher prices. *Id.* Such a holding would be plainly inconsistent with the Sherman Act's legislative aim and its precedent. *See supra* Part II.A. Instead the D.C. Circuit latched on to some dictum in *NYNEX*. In passing, the Court accepted that the defendants' regulatory scam had injured consumers by raising telephone service rates. *NYNEX Corp.*, 525 U.S. at 129. But "that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power lawfully in the hands of a monopolist, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling [New York Telephone's] exercise of monopoly power." *Id.* at 136. This dictum does not support the holding that a monopolist's deception to secure higher prices is generally permissible under the Sherman Act. Not all monopolists' prices are regulated. In an unregulated environment, monopolists presumably charge the profit-maximizing price. If a monopolist secures higher prices by deception, that must mean that the deception increased its market power. Besides, Rambus was using deception to attain, not maintain, a monopoly.

333. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988).

334. Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173–79 (1965).

335. Creighton et al., *supra* note 33, at 983–85 (describing FTC challenges).

Deception in other contexts can also be anticompetitive. Sun Microsystems's Java technologies, for example, threatened Microsoft's operating systems monopoly.[336] To defend its monopoly, Microsoft deceived the independent software developers.[337] Microsoft publicly agreed to promote its competitor's cross-platform technologies and cooperate with Sun.[338] The monopolist lured independent software developers to use Microsoft's software development tools in designing Java applications.[339] Based on Microsoft's representations, the independent software vendors thought Microsoft's tools were for cross-platform applications, and thus could be used on any computer with Java technology, not just computers with Microsoft's operating systems.[340] Unbeknownst to the vendors, "Microsoft's tools included 'certain "keywords" and "compiler directives"' that only Microsoft's version of Java could execute properly.[341] Thus, the deceived Java developers "ended up producing applications that would run only on [Microsoft's Windows] operating system."[342] Microsoft publicly denied the accusation, but its internal documents showed the contrary: Microsoft intended to deceive Java developers.[343] Its deception would lead to Windows-dependent Java applications, thereby blunting Java's threat to its operating system monopoly.[344]

Microsoft, alleged a class of computer software buyers, engaged in other deceptive business practices.[345] To inhibit competition and technological development, the monopolist allegedly created "an 'applications barrier' in its Windows software that, unbeknownst to consumers, rejected competitors' Intel-compatible [personal computer] operating systems."[346] Such deception, plaintiffs' alleged, resulted in inflated prices for Microsoft's products and denied consumers access to competitors' in-

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336. *Microsoft's Holy War on Java*, CNET NEWS (Sept. 23, 1998 5:00 AM), http://news.cnet.com/Microsofts-holy-war-on-Java/2009-1001_3-215854.html. With Java, Sun sought to develop a computer programming language that would run on multiple computer platforms. *Id.* "In theory, Java could allow computer users to run Web browsers, word processors, and numerous other applications without the need of [Microsoft's operating system] Windows, a scenario that [Microsoft] chairman and chief executive Bill Gates once said 'scares the hell out of me,' according to email Sun subpoenaed from Microsoft." *Id.*

337. United States v. Microsoft Corp., 253 F.3d 34, 76 (D.C. Cir. 2001).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* at 76–77.

345. Cox v. Microsoft Corp., 778 N.Y.S.2d 147, 147 (App. Div. 2004).

346. *Id.* And "to steer consumers" towards its Internet Explorer browser and away from the competing Navigator browser, Microsoft, plaintiffs alleged, "deliberately engineered a malfunction into Windows 95 . . . when using any other browser, such as Navigator." Cox v. Microsoft Corp., No. 105193/2000, 2005 WL 3288130, at *2 (N.Y. Sup. Ct. July 29, 2005). "The purpose of this engineered defect was to deceive consumers into believing that any dysfunction with other browsers, such as Netscape, was attributable to defects in [the competitor's] browser software." *Id.*

novations, services, and products.[347] The New York appellate court held that plaintiffs' allegations stated a claim under the state UDAP law, and did not dismiss the complaint.[348] Microsoft eventually settled.[349]

In all of these cases, the courts had little difficulty concluding that the monopolist's deception could be anticompetitive.[350] But the D.C. Circuit in *Microsoft* applied a structured rule-of-reason standard, whereby Microsoft could proffer a procompetitive explanation for its deception (which it did not).[351] Had Microsoft offered such an explanation, then the antitrust plaintiff, under the rule-of-reason standard, would have to demonstrate that lesser restrictive alternatives existed or that the deception's anticompetitive harm outweighed its procompetitive benefits.[352] This is wasteful. If a monopolist intentionally engages in independently wrongful anticompetitive conduct, courts need not assess its net competitive effect under a rule-of-reason standard.

## IV. A "QUICK-LOOK" STANDARD FOR EVALUATING DECEPTIVE ANTICOMPETITIVE PRACTICES

As Part III discussed, the federal courts use different legal standards to evaluate a monopolist's deception. A skeptic might agree that the causation standard in *Rambus* and the Treatise's six elements for deceptive advertising suffer from infirmities, but conclude that they remain better than the lower courts' rambling through the full-blown rule-of-reason analysis for Section 2 monopolization claims.[353] A defendant at least can minimize costs by limiting discovery to the Treatise's six elements.

This Part offers an alternative legal standard that minimizes the risks of false positives *and* false negatives and that is consistent with the Sherman Act's legislative policies. Courts can employ the following "quick-look" legal standard: if a monopolist's deceit reasonably appears capable of making a significant contribution to its attaining or maintaining monopoly power, then a prima facie violation of Section 2 of the Sherman Act has been established.

Under this quick-look standard, a plaintiff must show first that the company is a monopolist. Second, antitrust plaintiffs must prove deceit,

347. *Cox*, 788 N.Y.S.2d at 147.

348. *Id.*

349. Under the "platform neutral" settlement, class members could obtain "up to $350 million in vouchers" redeemable for cash against purchases of different "hardware or software manufactured or sold by Microsoft or by many other companies, including companies such as Apple, Dell, or Epson." *See* Brief for Defendant-Respondent at 5–6, Cox v. Microsoft Corp, 850 N.Y.S.2d 103 (App. Div. 2008) (No. 2703), 2007 WL 5917819 at *5–6.

350. *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 173 (1965) (holding that the "maintenance and enforcement of a patent obtained by fraud" may serve as the basis of a Section 2 claim).

351. United States v. Microsoft Corp., 253 F.3d 34, 77, 84 (D.C. Cir. 2001).

352. *Id.* at 58–59.

353. For greater detail on the shortcomings of the Supreme Court's rule-of-reason standard, its failure to provide a workable "quick-look" standard, and several ways to improve the Court's antitrust's legal standards, see Stucke, *Rule of Reason*, *supra* note 17; Stucke, *Monopolies*, *supra* note 328, at 534–42.

which, at a minimum, requires proof of scienter and materiality. The Sixth Circuit expressed concern that antitrust liability for "merely potentially misleading" or "true but misleading statements" might chill procompetitive conduct.[354] Under this Article's and the courts' current standard for evaluating vaporware, an antitrust plaintiff must prove the monopolist's scienter (which by definition should exclude innocent, but mistaken, statements). Thus, the scienter element should reduce the risk of false positives (and mitigate the risk of hindsight bias).

Third, the antitrust plaintiff must prove causation. A firm with market power might violate many laws that

> have little or nothing to do with its position in the market: an agricultural firm might fail to comply with safety or cleanliness standards applicable to food processing; a computer processor firm might violate employment discrimination laws; a pharmaceutical firm might run afoul of the Food and Drug Administration's rules for approval of new drugs.[355]

So even if a defendant's conduct is borderline deceptive, and the fact finder erroneously finds scienter, the antitrust plaintiff must establish that the monopolist's deception is capable of significantly contributing to its attaining or maintaining monopoly power. This causation standard addresses the "key problem" for the Treatise, namely "assessing the connection between any improper representations and the speaker's monopoly power."[356] An antitrust plaintiff claiming monetary damages must also prove an antitrust injury (which generally requires a showing that the statement actually deceived market participants).[357]

This third element distinguishes antitrust violations from ordinary torts. A defamation action against Microsoft for content on its message board is not an antitrust action, since the deceit is incapable of significantly contributing to Microsoft's attaining or maintaining its monopoly.[358] But when Microsoft deceived Java developers to thwart a competitor and maintain its monopoly, as the D.C. Circuit found, it violated the Sherman Act.[359]

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354. Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 n.7 (6th Cir. 2003); *see also* Patricia Schultheiss & William E. Cohen, Cheap Exclusion: Role & Limits 12–13 (F.T.C. Jan. 14, 2009) (unpublished paper), http://www.ftc.gov/os/sectiontwohearings/docs/section2cheapexclusion.pdf (collecting some panelists' concerns at agencies' Section 2 hearings that challenging borderline statements, which are not literally false, may chill truthful advertising).

355. Goldwasser v. Ameritech Corp., 222 F.3d 390, 400 (7th Cir. 2000) (noting that these violations are too attenuated to support an antitrust claim).

356. TREATISE, *supra* note 111, ¶ 782, at 327.

357. *See, e.g.*, Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 185 F.3d 606, 616–17 (6th Cir. 1999). The Sixth Circuit dismissed plaintiff's Lanham Act claim when plaintiff failed to offer adequate proof that consumers were actually deceived by defendant's ambiguous or true-but-misleading statements. *Id.*

358. *See, e.g.*, Eckert v. Microsoft Corp., No. 06-11888, 2007 WL 496692, at *3–4 (E.D. Mich. Feb. 13, 2007).

359. United States v. Microsoft Corp., 253 F.3d 34, 76–77 (D.C. Cir. 2001).

Some may question whether this standard is indeed a "quick-look" when the court must determine monopoly power, which generally "requires the definition of relevant product and geographic markets, [and] is the most elusive and unreliable aspect of antitrust enforcement."[360] But courts can dismiss antitrust complaints that fail to adequately plead these three elements. If the complaint survives a motion to dismiss, the court can lessen the discovery burdens by scheduling discovery initially on the second and third elements and entertain a summary judgment motion (before addressing the issue of monopoly power).[361]

### A. The Standard's Advantages in Evaluating a Monopolist's Deceit

The proposed standard, consistent with rule-of-law principles, promotes (1) accuracy, (2) administrability, (3) consistency and objectivity, and (4) applicability and transparency.

#### *1. Accuracy*

The standard minimizes the risks of false positives and negatives. One general concern is that the prospect of treble antitrust damages may chill procompetitive behavior.[362] But in assessing the risk of false positives, competition authorities must distinguish between socially undesirable conduct generally, and conduct that is undesirable only when undertaken by a monopolist. For the former, there is little, if any, risk of false positives. As a DOJ antitrust official during the Kennedy administration said, "[r]ealistically, the antitrust law is always concerned with a pragmatic judgment about the reasonableness of trade practices from the social viewpoint."[363] Society generally seeks to deter socially undesirable conduct (such as deception, physical violence, and other well-established tortious or illegal conduct). Overall, it does not matter whether a monopolist or fringe firm engages in such behavior. The issue is whether the fraud victim can recover under the Sherman Act.

The risk of false positives for evaluating deception claims is not inherently greater than for other challenged restraints (which depending on the circumstances can be procompetitive). Unlike bundled discounts, predatory pricing, and other alleged monopolistic conduct, courts routinely address claims of deception in different contexts. The common law prohibition against deception has been in force for centuries.[364] If courts

360. Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 Cal. L. Rev. 817, 825 (1987).

361. *See* Fed. R. Civ. P. 16(c)(2), 26(d)(2); Manual for Complex Litigation (Fourth) § 30.1 (2004).

362. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 136–37 (1998) ("To apply the *per se* rule here . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases."); Schultheiss & Cohen, *supra* note 354, at 10 (collecting concerns from some panelists at agencies' Section 2 hearings).

363. Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 Va. L. Rev. 23, 29 (1964).

364. *See supra* Part I.B.

still have difficulties adjudicating deception claims, this calls into question the judiciary's general competence to resolve disputes.

So the concern about false positives does not adhere to claims of deception generally. Instead, the concern implicitly assumes that antitrust plaintiffs somehow have an easier ride with a deception claim under the Sherman Act than under the common law or statutes prohibiting deceit.[365] No empirical evidence supports this claim.[366]

The standard also minimizes the risk of false negatives. For example, in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*,[367] the plaintiff's radio station entered the market to compete against defendants' radio station in the Eastern Caribbean. Plaintiff alleged that the defendants, among other things, deceived advertisers by misrepresenting that their radio station's signal reached the entire Caribbean; therefore, advertisers need not deal with the new entrant.[368] Defendants allegedly succeeded in blocking for over two years "plaintiffs' entry into the relevant Eastern Caribbean broadcasting market"; the defendants used this delay to establish their radio station "as the dominant vehicle by which U.S. companies advertised their goods in the Eastern Caribbean."[369] The plaintiff alleged that U.S. advertisers from the 1980s through the time of appeal in the late 1990s remained unaware of the defendants' deception.[370]

Under the Treatise's presumption and six-element standard, the monopolist need not fear antitrust liability for its deception.[371] No doubt the advertisers (which included Eastman Kodak, Johnson & Johnson, K-Mart, Radio Shack, and Xerox)[372] had knowledge about the relevant advertising market and the advertising vehicles in those markets. These advertisers could have uncovered this deception by personally touring (or surveying residents throughout) the Caribbean. In addition, the plaintiff could have neutralized these misrepresentations. For example, the plain-

365. *See* TREATISE, *supra* note 111, ¶ 782, at 321 (expressing concern that plaintiffs "are often less disciplined in making tort-like claims in antitrust suits than in tort suits").

366. *See, e.g.*, *supra* Part II.A (discussing hurdles that some courts have needlessly erected for antitrust plaintiffs to overcome).

367. 148 F.3d 1080, 1087 (D.C. Cir. 1998).

368. *Id.*; Final Brief for Appellant at 16–17, Caribbean Broad. Sys. Ltd. v. Cable & Wireless, PLC, 148 F.3d 1080 (D.C. Cir. 1998) (No. 96-7246), 1997 WL 34647759 (alleging that defendants' anticompetitive activities included (1) defendants "pervasive manipulation and misuse of BVI regulatory processes through misrepresentations and sham objections to the BVI authorities regarding CBS's license applications, particularly objections that C&W knew or should have known were entirely baseless at the time they were asserted, all with the purpose and effect of delaying CBS's entry into competition with CCC"; and (2) "CCC's pervasive misrepresentations to U.S. advertisers of Radio GEM's coverage and reach, beginning prior to CBS's market entry and continuing to the present, all with the purpose and effect of misleading said advertisers into establishing relationships with CCC prior to CBS's market entry and foreclosing CBS from thereafter obtaining such relationships for CBS").

369. Final Brief for Appellant, *supra* note 368.

370. *Id.*

371. *See* TREATISE, *supra* note 111, ¶ 782, at 326–31.

372. Final Brief for Appellant, *supra* note 368.

tiff could have provided advertisers survey data that showed that the defendants' radio station did not reach the entire Caribbean.

Rather than dismiss plaintiff's advertising claim, Judge Douglas Ginsburg, writing for the D.C. Circuit, recognized that if plaintiff proved at trial that defendants' alleged conduct was indeed deceitful and anticompetitive, then such conduct fell within the category of anticompetitive conduct prohibited under the Sherman Act.[373]

### 2. *Administrability*

Many courts recognize that fraudulent misrepresentations to secure or maintain a monopoly violate the antitrust laws and should be punished. Courts already employ the proposed quick-look standard for vaporware claims. For false advertising claims, courts, without relying on the TREATISE, have little difficulty dismissing antitrust claims where the alleged statements are not deceptive[374] or do not reasonably appear capable of making a significant contribution to the defendant's maintaining or attaining monopoly power.[375]

Likewise courts in the three circuits that apply the Treatise's legal standard could have as easily dismissed those cases where plaintiffs, for example, failed to present evidence of actual deception.[376]

### 3. *Standard Is Objective and Should Yield More Predictable Results*

Not only is the quick-look standard easier to apply than the Treatise's six elements, it should yield more predictable results, as it requires less subjective input from the court. In applying the Treatise's elements, courts could differ over whether the representation is "clearly" false or material (or simply false and material), whether the length of time is sufficiently long to constitute a "prolonged" period, or whether other com-

373. *Caribbean Broad. Sys.*, 148 F.3d at 1087.

374. *See, e.g.*, Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 484 (5th Cir. 2000) ("sham pricing was not predatory because it was not deceptive or fraudulent"); Brookeside Ambulance Serv., Inc. v. Walker Ambulance Serv., Inc., No. 93-4135, 1994 WL 592941, at *3 (6th Cir. Oct. 26, 1994) (recognizing that deception could be anticompetitive but no evidence that defendant made alleged misrepresentations); Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 930 (4th Cir. 1990); Picker Int'l, Inc. v. Leavitt, 865 F. Supp. 951, 964 (D. Mass. 1994) (holding that one negative statement to a customer was not defamatory); EventMedia Int'l, Inc. v. Time Inc. Magazine Co., No. 92 Civ. 0502 (JFK), 1992 WL 321629, at *3 (S.D.N.Y. Oct. 26, 1992); U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155, 1183 (S.D.N.Y. 1986).

375. Briggs & Stratton Corp. v. Kohler Co., 405 F. Supp. 2d 986, 989 (W.D. Wis. 2005) (antitrust complainant conceded that allegedly misleading horsepower rating by itself did not violate antitrust laws); *Picker Int'l, Inc.*, 865 F. Supp. at 964 (finding that there was no showing of causation as customer testified that none of the alleged monopolist's statements caused him to change his mind).

376. *See, e.g.*, Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 369 (6th Cir. 2003); Kinderstart.com, LLC v. Google, Inc., No. C-06-2057 JF (RS), 2007 WL 831806, at *8 (N.D. Cal. Mar. 16, 2007); Applera Corp. v. MJ Research Inc., 349 F. Supp. 2d 338, 345–46 (D. Conn. 2004); Multivideo Labs, Inc. v. Intel Corp., No. 99-CIV-3908(DLC), 2000 WL 12122, at *15 (S.D.N.Y. Jan. 7, 2000).

petitors could readily neutralize the falsehood (an inquiry that can potentially impose needless discovery costs on third-party businesses).

Currently, the litigation's outcome depends on which standard the court employs. So the results can be inconsistent. For example, in *Walgreen Co. v. AstraZeneca Pharmaceuticals L.P.*, the district court concluded, in applying the Treatise's elements, that doctors categorically could not be deceived.[377] But the Third Circuit, on the facts of *In re Warfarin Sodium Antitrust Litigation*, concluded that doctors could be deceived in at least some circumstances.[378] For over thirty years, DuPont's Coumadin product (its brand name for warfarin sodium) "dominated the oral anti-coagulant market."[379] DuPont, however, anticipated losing market share "from the introduction of a cheaper generic [drug] substitute for Coumadin."[380] The U.S. Food and Drug Administration found that the generic drug "was bioequivalent and . . . therapeutically equivalent to [DuPont's] Coumadin."[381] But "to deter doctors, pharmacists, [third-party payors,] and consumers from switching to the generic drug," DuPont allegedly orchestrated a campaign disparaging generic substitutes generally and plaintiff's warfarin sodium particularly.[382] The effect of DuPont's disparagement campaign was allegedly to raise the generic manufacturer's costs to enter the anti-coagulant market and to thwart its market penetration.[383] Despite pharmacists' and doctors' knowledge of the subject matter, "some pharmacies, including some large chains, refused to substitute the generic for Coumadin out of a mistaken belief that generic warfarin sodium was not equivalent to Coumadin"—at least one physician's group instructed its "patients to take only the brand name Coumadin."[384] DuPont later settled with the generic drug manufacturer[385] and with a class of consumers and third-party payors for $44.5 million.[386]

377. 534 F. Supp. 2d at 152 (stating that prescription drug sales "necessarily depended on prescriptions written by medical professionals, that is, persons knowledgeable of the subject matter").

378. *In re* Warfarin Sodium Antitrust Litig. (*Warfarin I*), 214 F.3d 395, 397 (3d Cir. 2000).

379. *Id.* at 396.

380. *Id.* at 397.

381. *In re* Warfarin Sodium Antitrust Litig. (*Warfarin II*), 212 F.R.D. 231, 241 (D. Del. 2002).

382. *Id.* at 241, 248.

383. *Id.* at 292. To show "that defendant's misrepresentations had their desired effect, plaintiffs cited the weak market penetration of generic warfarin sodium." *Id.* Generally about 40% to 70% "of prescriptions for drugs available from multiple sources are filled with less expensive generics within one year of" the generic drug's availability. *Id.* But DuPont's Coumadin filled more than 75% of prescriptions for sodium warfarin "a year after Barr introduced its generic version, and DuPont continued to maintain a [67%] market share up" to when the antitrust complaint was filed. *Id.*

384. *Id.*

385. *Warfarin I*, 214 F.3d at 397 n.2.

386. *Warfarin II*, 212 F.R.D. at 261.

#### 4. *Transparency and Broad Applicability*

The proposed quick-look standard and its objectives are understandable as the standard employs the concepts of deceit and causation, which courts apply across many areas of law. Unlike the Treatise's six elements and the *Rambus* court's "but for" standard for causation,[387] the proposed legal standard is consistent with the aim of Section 2 of the Sherman Act and laws prohibiting deception generally. Similarly, courts would not have to employ conflicting presumptions under the Sherman and Lanham Acts, a scenario that arises when courts apply the Treatise's *de minimis* presumption.

Moreover, the standard reaches as wide a scope of conduct as possible. For example, if a monopolist engages in a media campaign of "fear, uncertainty and doubt" and vaporware, the court would apply the Treatise's legal *de minimis* presumption and six elements to the false advertisements but not necessarily to the vaporware statements in the trade press. It makes no sense to apply different presumptions of anticompetitive harm based on whether or not the vaporware and FUD campaign were in the trade press or in an advertisement. Moreover, as one court recognized, the monopolist's deception should not be viewed in isolation under the Treatise's elements, but in the context of the other alleged anticompetitive behavior.[388] The court accordingly can use one legal standard to evaluate the monopolist's deception across settings.

### B. Concerns in Challenging Deceit Under the Antitrust Laws

No one seriously defends deception. Deception is immoral. For the agnostic, deception lacks any redeeming economic qualities or cognizable efficiency justifications. So skeptics, rather than defend deception, argue that deception should be left to other laws instead. Antitrust courts should focus instead on anticompetitive restraints that other laws do not address.

One oft-cited basis for not converting deceitful and other tortious conduct into antitrust violations is the concern of creating "'a federal common law of unfair competition' which was not the intent of the antitrust laws."[389] It is unclear why some courts have resisted a federal common law of unfair competition when, as the Sherman Act's legislative history

387. Rambus Inc. v. FTC, 522 F.3d 456, 466–67 (D.C. Cir. 2008).

388. Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1249 (D. Utah 1999).

389. Merkle Press Inc. v. Merkle, 519 F. Supp. 50, 54 (D. Md. 1981) ("Courts must be circumspect in converting ordinary business torts into violations of the antitrust laws. To do so would be to 'create a federal common law of unfair competition' which was not the intent of the antitrust laws."); *see also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) (explaining that federal antitrust laws "do not create a federal law of unfair competition"); Byars v. Bluff City News Co., 609 F.2d 843, 855 (6th Cir. 1979) ("Even the use of unfair business practices as part of the termination may not invoke sanction under the antitrust laws.").

shows[390] and as the Supreme Court recently reiterated, the federal antitrust laws, in fact, represent the federal common law on unfair competition.[391]

A second concern is that other laws, such as state "unfair competition" laws and business torts, already provide remedies for various "competitive practices thought to be offensive to proper standards of business morality."[392] The antitrust laws, some argue, are not the "panacea for all evils that may infect business life."[393] In *Conwood*, the Sixth Circuit said that deceptive and other tortious conduct violates the Sherman Act only in "rare gross cases."[394] A related concern is that with so many other federal and state criminal and civil statutes to deter and punish deception, antitrust adds little to the mix.

This concern is justified for independently wrongful acts with no significant competitive effects, such as a monopolist defaming its former employee. But it is illogical to argue that because other statutes address deceit, such antisocial behavior should be of lesser concern under the competition laws.[395] The fact that multiple civil and criminal laws prohibit deception reinforces that the conduct lacks any redeeming social qualities.[396] The fact that deception persists despite the many criminal and civil statutes reflects that no statute by itself can deter deception. Indeed, if the existing statutes optimally deter deception, why do we still have deceit? Why in the aftermath of the financial crisis will there likely be more statutes and higher penalties to punish deceit?[397] Each statute has limits as to scope, who has standing to sue, the circumstances under which one can recover for deception, and the remedies. This suggests that anticompetitive antisocial conduct should be a priority under antitrust enforcement, and legal standards should encourage, not discourage, its prosecution.

Indeed, the U.S. Senate when enacting the Sherman Act rejected the argument that the Act is cumulative.[398] If in 1890 every state's common law prohibited a monopolist's unfair behavior, inquired Senator Kenna, "why should this bill proceed to denounce that very monopoly?"[399] But the availability of common law remedies did not render the Sherman Act

390. *See supra* Part II.A.

391. Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007) (stating that the Sherman Act from its inception was treated "as a common-law statute"); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997) (noting that it is the accepted "view that Congress 'expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition'").

392. NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 137 (1998) (quoting TREATISE, *supra* note 111, ¶ 651d, at 78).

393. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979).

394. *Conwood*, 290 F.3d at 784 (quoting TREATISE, *supra* note 111, ¶ 782(a), at 272).

395. Creighton et al., *supra* note 33, at 993–94.

396. *Id.*

397. *See, e.g.*, 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

398. 21 CONG. REC. 3152 (1890).

399. *Id.*

with its treble damages, plaintiffs' recovery of their attorneys' fees, and federal jurisdiction meaningless. Instead, the Sherman Act, responded Senator Hoar, sought "to extend the common-law principles . . . to international and interstate commerce in the United States."[400]

Moreover, the federal antitrust laws offer several benefits in deterring and punishing deceptive conduct. First, the Sherman Act enables injured consumers who may lack standing under common law fraud (as they did not rely on the deception) and other federal and state statutes to enjoin the anticompetitive deception.[401] Unlike many other statutes, the Sherman Act focuses on the deception's impact on competition.[402] So, for example, standard-setting "participants often may have little incentive to complain about [deceptive patent] hold up[s] because they can pass on the hidden costs . . . to consumers."[403] A second benefit is that the Sherman Act can provide broad structural or behavioral remedies to redress the harms from a monopolist's anticompetitive deception.[404] Third, the possibility that the federal antitrust agencies and injured private plaintiffs can challenge a monopolist's anticompetitive deception increases deterrence.

A third concern is that if antitrust plaintiffs can challenge a monopolist's deception under the Sherman Act, they have an unfair advantage: plaintiffs can use the "threat of magnified discovery burdens and treble damages as added leverage to force [defendants] to settle."[405] Let me address treble damages and abusive discovery separately. It is questionable whether treble antitrust damages are indeed chilling procompetitive activity, given the prospect of business torts potentially excessive punitive damages and multiplied damages for civil RICO and many state UDAP claims.[406] But if the prospect of treble damages, attorney's fees, and costs is forcing companies to settle, this is precisely what Congress intended. If the behavior is independently wrongful and anticompetitive, then "the purpose of giving private parties treble damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."[407]

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400. *Id.*

401. 15 U.S.C. § 4 (2006).

402. *See, e.g.*, Leider v. Ralfe, 387 F. Supp. 2d 283, 295 (S.D.N.Y. 2005) (noting that anticompetitive conduct that is not premised on consumer deception is not within the ambit of New York's UDAP statute); Schultheiss & Cohen, *supra* note 354, at 18.

403. PROMOTING INNOVATION & COMPETITION, *supra* note 31, at 40 (noting some panelists' concerns).

404. Schultheiss & Cohen, *supra* note 354, at 8.

405. *Id.* at 11 (collecting concerns from some panelists at agencies' Section 2 hearings).

406. *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 262 (1989). A private plaintiff was awarded "$153,438 in treble damages and $212,500 in attorney's fees and costs on [its attempted monopolization] antitrust claim, or, in the alternative, $6,066,082.74 in compensatory and punitive damages on the state-law tortious interference claim." *Id.*

407. Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 130–31 (1969); *see also* 21 CONG. REC. 2569 (1890) (statement of Sen. Sherman).

With respect to the threat of oppressive antitrust discovery, it is true that defendants, at times, may find it cheaper to settle a strike suit than engage in the protracted discovery invited under the Supreme Court's rule-of-reason standard. Consequently, this Article seeks a departure from the Court's full-blown rule-of-reason analysis and instead encourages courts to employ a simpler legal standard with respect to deception. The proposed standard enables injured plaintiffs to quickly prosecute a monopolist's anticompetitive deception. Conduct that is not deceptive or does not reasonably appear capable of making a significant contribution to the company's attaining or maintaining monopoly power is not actionable under Section 2. What exactly is the critics' counterfactual? They favor either little (if any) antitrust litigation or alternatively that courts and litigants should remain in litigation's most foul circle of hell—the interminable and costly litigation under the vague rule of reason.

A fourth concern is that a contrary rule requires monopolists to praise smaller rivals' products or services.[408] Under this logic, monopolists should be allowed to blow up their competitors' plants, as a contrary rule would require them to build their competitors' plants. But this concern raises a more disturbing prejudice—the underlying conception of competition as zero-sum "warfare."[409] Competition can deliver its bountiful fruits with its actors behaving civilly. Deception does not yield lower prices, better products or services, or more informed choice.

## CONCLUSION

Prosecuting a monopolist's anticompetitive deception furthers the legislative aims of competition law. Given deception's social and economic harms, its lack of redeeming economic benefits or cognizable efficiencies, and the importance of trust in the marketplace, a hard line is warranted.

The danger today is not that courts will punish deception under the Sherman Act. Rather, the danger is that the courts will not. In advancing their peculiar social policies on deceptive commercial speech and competition generally, courts that do not punish a monopolist's anticompetitive deception contravene the Act's legislative aim. The legal standard for deceptive advertising in three circuits is based on the Treatise, but neither the Treatise's *de minimis* presumption nor its six elements are grounded in the Sherman Act's text, legislative purpose, or legislative history. Instead, the standard represents the views of several respected antitrust scholars. One jurist (and believer in the Chicago School economic theo-

408. Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005) (Easterbrook, J.); Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989) ("To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law.").

409. *Schachar*, 870 F.2d at 399. Defendants in a later case cited the dicta that as a matter of law efforts to disparage a competitor do not harm competition. Alternative Electrodes, LLC v. Empi, Inc., 597 F. Supp. 2d 322, 330 (E.D.N.Y. 2009). The district court sensibly discounted the dicta, as courts have long recognized that false and misleading statements may provide a basis for antitrust claims. *Id.*

ries) took a more extreme view.[410] He assumed that the marketplace of ideas would cure a monopolist's deceptive anticompetitive ads.[411]

The concern today is not whether the courts should apply four or six elements. Courts simply should not erect legal presumptions that frustrate the Act's purpose. The Supreme Court's rule-of-reason analysis, generally, and its monopolization standards, specifically, lead to long litigation times, high costs, and unpredictability. Ideally, enforcers could quickly prosecute monopolistic conduct as presumptively illegal without requiring the full-blown rule-of-reason analysis. Toward that end, this article's legal framework can help courts, injured plaintiffs, and the competition authorities target a monopolist's anticompetitive deception, which courts should treat as a prima facie violation of Section 2 without requiring a full-blown rule-of-reason analysis or an arbitrary, multi-factor standard.

410. *Schachar*, 870 F.2d at 399.

411. *See, e.g.*, *id.* at 397. In *Schachar*, eight ophthalmologists contended that defendant "violated the antitrust laws by attaching the label 'experimental' to radial keratotomy, a surgical procedure for correcting nearsightedness." *Id.* The Seventh Circuit could have rejected summarily the antitrust claim: plaintiffs never demonstrated that the challenged statement was false. *Id.* at 399–400. Instead, Judge Easterbrook, writing for the court, asserted even if the statement were false or misleading, the appropriate "remedy is not antitrust litigation but more speech—the marketplace of ideas." *Id.* at 400. In another case, the plaintiff never showed that the defendant even uttered the allegedly deceptive statements. *Sanderson*, 415 F.3d at 623. But Judge Easterbrook, again writing for the court, expanded on his social philosophies: Deception "just set the stage for competition in a different venue: the advertising market." *Id.*