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When a Monopolist Deceives

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WHEN A MONOPOLIST DECEIVES

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Although U.S. federal courts frequently address whether a monopolist's deception violates the federal competition laws,[1] the legal standards they employ to evaluate such deception differ. Some courts readily condemn a monopolist's deceptive advertising. Others presume that a monopolist's deceptive advertising has a de minimis effect on competition. Since I discuss in greater detail elsewhere a monopolist's deception in various contexts, including deceptive product announcements (vaporware) and in standard-setting organizations,[2] this essay uses one context—a monopolist's deceptive advertising or product disparagement—to illustrate how competition authorities and courts should evaluate a monopolist's deception under the federal antitrust laws.

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[1] In the United States, private plaintiffs bring most federal antitrust claims. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS tbl. 5.41 (Ann L. Pastore & Kathleen Maguire eds., 2008), *available at* http://www.albany.edu/sourcebook/pdf/t5412008.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" categories). William F. Adkinson, Jr. et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, at tbl. 2 (FTC Working Paper 2008), *available at* http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf.

[2] Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. (forthcoming July 2010).

I. COMBATING DECEPTION: 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."[3] Deception includes knowingly withholding facts basic to a transaction.[4]

Deception does not occur in a perfectly competitive market, which has 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."[5] Consequently, deception requires two important deviations from the competitive ideal: (1) falsity is not quickly exposed in the marketplace of ideas,[6] and (2) competition itself cannot work perfectly. 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 altogether). Deception's anticompetitive effects include

- raising the search costs for consumers in choosing products;[7]
- leaving consumers who purchased the wrong or inferior product worse off;[8]

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[3] BLACK'S LAW DICTIONARY 406 (6th ed. 1990).

[4] *See* RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977).

[5] Assoc. Press v. United States, 326 U.S. 1, 20 (1945) (explaining that the 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").

[6] *See* Robert H. Lande, *Market Power Without a Large Market Share: The Role of Imperfect Information and Other "Consumer Protection" Market Failures* (AAI Working Paper No. 07-06, 2007), *available at* http://ssrn.com/abstract=1103613. For the role of antitrust in preventing market failure in the marketplace of ideas, see 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 (2009); Maurice E. Stucke & Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L.J. 249 (2001).

[7] Deception, for example, can cause consumers to disregard valuable and truthful information (such as the product's brand name) and rely on more expensive, time-consuming product searches. *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 cmt. a (1995); Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163, 1234 (1996); Gwendolyn Bounds, *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. *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995).

[8] *See* Prentice, *supra* note 7, at 1234.

- increasing the transaction costs for honest sellers to differentiate their products and to reap the financial, reputation-related rewards associated with their desirable products;
- raising rival's costs (in having to respond to a competitor's deceptive statements);
- creating market distortions and causing a deadweight welfare loss as consumers forgo or minimize purchases;[9]
- tipping sales to the deceptive firm, which in markets with network effects can lead to the exercise of monopoly power;
- increasing entry barriers for new products (whose qualities and risks cannot be quickly assessed);[10]
- preventing some markets or services (such as standard setting) from developing; and
- creating "lemon" markets where lower-quality goods or services drive out higher-quality goods or services,[11] thereby inhibiting innovation in these markets.

Deception lacks any redeeming economic qualities or cognizable efficiency justifications.[12] Consequently, competition law and consumer

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[9] *See* Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029, 1056 (1991).

[10] *See id.* at 1068.

[11] *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 619 (7th ed. 2009); George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488 (1970).

[12] *See* RESTATEMENT (SECOND) OF TORTS § 552 cmt. a (1977) ("[N]o interest of society is served by promoting the flow of information not genuinely believed by its maker to be true."); ARTHUR C. PIGOU, THE ECONOMICS OF WELFARE pt. II ch. IX § 17 (4th ed. 1932) ("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."); Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 977 (2005); A Program Proposed by the Am. Med. Ass'n & the Chicago Med. Soc'y Involving Peer Review of Physician Fees Is Not Likely to Violate Fed. Antitrust Laws, 117 F.T.C. 1091, 1097–98 (FTC Advisory Op. 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 (1979) (explaining that rules banning false or deceptive advertising and unfair solicitation may enhance competition)).

protection policy reinforce each other: both empower consumers to exercise the power of informed choice.[13]

II. FALSE ADVERTISING AND PRODUCT DISPARAGEMENT

Today some U.S. federal courts applying the Sherman Act readily condemn a monopolist's deception involving advertising and product disparagement, while others are reluctant to condemn it. Nearly every court recognizes, however, that a monopolist's deceptive advertising and product disparagement under certain factual circumstances can violate the federal antitrust laws.[14] A more restrictive view of deception by a monopolist as a Sherman Act violation is taken by Professors Areeda, Turner, and later Hovenkamp in their *Antitrust Law* treatise (the *Treatise*).[15] Even the *Treatise* recognizes, however, that the antitrust laws extend to deception.[16] The U.S. Courts of Appeals 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 have 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,[17] this section will focus primarily on the *Treatise*. The three circuits have never examined critically, as this essay does, the *Treatise*'s presumption. Those circuits have never inquired whether the presumption against competitive harm, and the six elements offered by the *Trea-*

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[13] *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, 44 (1998); Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713 (1997).

[14] 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." West Penn Allegheny Health Sys. v. UPMC, No. 09-0480, 2009 WL 3601600, at *35 (W.D. Pa. 2009) (citing Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005)). Judge Easterbrook's assumption of a self-correcting and self-policing marketplace of ideas, however, is sui generis.

[15] 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 782b, at 326–31 (3d ed. 2008).

[16] *See id.* at 326.

[17] *See* Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, 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). *Cf.* Patricia Schultheiss & William E. Cohen, *Cheap Exclusion: Role & Limits* 18 (FTC Working Paper 2009) (noting how courts rarely find a Section 2 violation based solely on false statements in public advertisements or comments that disparage a rival or its products), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/section2cheapexclusion.pdf.

tise 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.[18] In *Berkey Photo*, 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.[19] The Second Circuit held that it need not decide whether this amounted to deceptive advertising or whether and under what circumstances such deception might violate Section 2.[20] The court added, in dicta, that "[t]he Sherman Act is not a panacea for all evils that may infect business life."[21] And if the court were to decide the issue, it would most likely follow the *Treatise* and require the antitrust plaintiff to overcome a presumption that such practice had a de minimis effect on competition.[22]

Nearly a decade later, the Second Circuit in *Ayerst* cited the dictum and adopted, without any analysis, Areeda and Turner's six elements.[23] The Ninth Circuit, thereafter, simply cited *Ayerst* and the *Treatise*, without offering any independent rationale.[24] The Sixth Circuit likewise followed the Ninth and Second Circuits' adoption of the presumption, but formally required only two of the six elements.[25] 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."[26] Thus, the Sixth Circuit stated that all six factors 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

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[18] *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 288 n.41 (2d Cir. 1979). A few days before *Berkey Photo*, a district court also, without much analysis, cited the *Treatise*'s presumption and elements. *See* 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, however, must be subject to a de minimis rule, if the antitrust courts are not to become the battleground for a variety of intentional-tort suits." *Id.* at 180. Subsequent courts have not cited *Pezetel* as their basis for adopting the *Treatise*.

[19] *Berkey Photo*, 603 F.2d at 288 n.41.

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *See* Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988).

[24] *See* Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997).

[25] *See* Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc., 323 F.3d 366, 371 (6th Cir. 2003).

[26] *Id.* at 371 n.7.

minimis presumption.[27] 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.[28]

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. Antitrust defendants 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 of these three circuits, especially since there is no alternative legal standard dealing specifically with a monopolist's deceit. In this essay, I offer an alternative legal standard that is consistent with the case law and the Sherman Act's legislative policies. Moreover, the three circuits, prodded perhaps by the federal antitrust agencies, should critically evaluate their empirically unsupported legal presumption and infirm rebuttal elements.

A. THE DEFICIENCIES OF THE THREE CIRCUITS' LEGAL PRESUMPTION OF DE MINIMIS HARM

Some U.S. courts recognize deceptive advertising and disparagement of a competitor's product as generally indefensible, and readily condemn a monopolist's anticompetitive deceit. 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. Courts in these three circuits adopted the *Treatise*'s legal presumption that a monopolist's deceptive advertising and product disparagement have a de minimis impact on

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[27] *Id.* at 371.

[28] *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 that it could potentially exclude competition." *Id.* at 372.

competition.[29] Several district courts outside these three circuits have also cited, without expressly adopting, the factors.[30]

The legal presumption of de minimis harm from deception makes little economic sense (other than to deter injured victims from challenging a monopolist's deceit under the Sherman Act). First, the *Treatise* does not provide empirical support for its presumption that monopolies' deceptive practices generally have a de minimis impact on competition. Legal presumptions that do not rest on "actual market realities are generally disfavored in antitrust law."[31] Before adopting it, courts should examine whether the presumption is empirically supported. The *Treatise* only states that "[m]any buyers . . . recognize disparagement as nonobjective and highly biased,"[32] while recognizing that this is not a justification for "isolated" examples of falsehood. Consequently, according to the *Treatise*, deception employed by a monopolist in disparaging a smaller competitor's products "should presumably be ignored."[33]

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 incur casually 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

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[29] *American Council*, 323 F.3d at 370; *American Professional Testing*, 108 F.3d at 1151; Nat'l Ass'n of Pharm. Mfrs. v. Ayerst Labs., 850 F.2d 904, 916 (2d Cir. 1988); *see also* Alternative Electrodes, LLC v. EMPI, Inc., 597 F. Supp. 2d 322, 331–33 (E.D.N.Y. 2009); Kinderstart.com, LLC v. Google, Inc., No. 06-2057, 2007 WL 831806, at *8 (N.D. Cal. 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. 99-1877, 2000 WL 986995, at *21 (C.D. Cal. 2000); Multivideo Labs., Inc. v. Intel Corp., No. 99-3908, 2000 WL 12122, at *15 (S.D.N.Y. 2000).

[30] *See* L-3 Commc'ns Integrated Sys. v. Lockheed Martin Corp., No. 07-0341, 2008 WL 4391020, at *7–*8 (N.D. Tex. 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, 963–64 (D. Mass. 1994); Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 180–81 (D. Del. 1979).

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

[32] 3B AREEDA & HOVENKAMP, *supra* note 15, ¶ 782d, at 332.

[33] *Id.* The *Treatise* recognizes a possible exception when the monopolist, because of its market position, contracts to test or evaluate the product of a rival. *Id.* at 333.

"nonobjective and highly biased." Accordingly, the Lanham Act recognizes that a competitor can profit in falsely disparaging a rival's product.[34] Indeed, a plaintiff under certain conditions can recover a defendant's *profits* in addition to any damages a plaintiff sustained.[35]

Third, the *Treatise*'s presumption is inconsistent with the Sherman Act's legislative aim to proscribe unfair methods of competition,[36] which historically included a competitor's anticompetitive deception. By definition, maintaining a monopoly through false, misleading, and deceptive advertising is unfair competition.[37] The *Treatise* recognizes that deception lacks any redeeming virtue, but points to the social costs in litigating it.[38] The evidence, however, suggests that despite the extensive federal and state legislation, fraud is under- rather than over-litigated.[39]

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.[40] This argument ignores the tort's origin. Its requirement of special damages arose—not from any judicial distrust of the tort 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."[41] Be-

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[34] *See* 15 U.S.C. § 1125(a).

[35] 15 U.S.C. § 1117(a); *see also* Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1322–24 (N.D. Ga. 2008) (citing factors as to when to award the defendant's profits).

[36] 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar) (stating that the word "monopoly" is a "merely technical term which has a clear and legal signification," namely, "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition").

[37] *See* Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1268 (8th Cir. 1980).

[38] 3B AREEDA & HOVENKAMP, *supra* note 15, ¶ 782b, at 326.

[39] The FTC, for example, found that 13.5 percent of adults in the United States (30.2 million consumers) were the victim of one of sixteen types of fraud included in its 2005 survey. FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: THE SECOND FTC SURVEY 55 (2007), *available at* http://www.ftc.gov/opa/2007/10/fraud.pdf.

[40] Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997); *see* 3 PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW ¶ 738c, at 280–81 (1978) ("Even at common law, this is 'a tort that never has been greatly favored.'"). This language does not appear in the *Treatise*'s third edition. *See* 3B AREEDA & HOVENKAMP, *supra* note 15, ¶ 782d, at 332.

[41] 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,

cause "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."[42] Moreover, this argument does not account for the later legislative policies, such as the Lanham Act and state Unfair and Deceptive Acts and Practices (UDAP) laws,[43] 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."[44] But when evaluating the same false advertising under the Sherman Act, a court, in applying the *Treatise*'s

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> therefore, to determine just when and why one's customers began to favor a competitor.
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> As is so often the case, however, the rule respecting special damages continued in force long after its *raison d'etre* had passed.

Id.

[42] *Id.* (emphasis added) (quoting Note, *Injury Trade Relations by a Non-Competitor*, 41 ILL. L. REV. 661, 662 (1947)).

[43] *See, e.g.*, TENN. CODE ANN. § 47-18-104(b)(8) (2001) (prohibiting "[d]isparaging the goods, services or business of another by false or misleading representations of fact"); REV. UNIFORM DECEPTIVE TRADE PRACTICES ACT § 2(a)(8) (1966), *available at* http://www.law.upenn.edu/bill/archives/ulc/fnact99/1920-69/rudtpa66/htm.

[44] 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."); *see also* Johnson & Johnson Vision Care v. 1-800 Contacts, Inc., 299 F.3d 1242, 1247 (11th Cir. 2002) ("[O]nce a court deems an advertisement to be literally false, the 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) (holding that a predicate finding of intentional deception, as a major part of the defendant's marketing efforts, contained in comparative advertising, encompasses sufficient harm to justify rebuttable presumption of causation and injury in fact); HipSaver Co. v. J.T. Posey Co., 497 F. Supp. 2d 96, 106–10 (D. Mass. 2007) (applying a rebuttable presumption of causation and injury for willful, literally false comparative advertising in two-player market); Iams Co. v. Nutro Prods., No. 00-566, 2004 U.S. Dist. LEXIS 15134, at *14 (S.D. Ohio July 3, 2004) (noting that the "assumed literal falsity of the statements in issue 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) ("[A] presumption of causation and injury sufficient to entitle the plaintiff to damages will arise if the defendant deliberately engaged in deceptive comparative advertising.").

presumption, would presume the contrary: namely, the same buyers recognize the disparagement as nonobjective and highly biased and thus are not misled.

Cases exist where a company salesperson at a trade show casually disparages a competitor's products. The *Treatise* is justified in considering such isolated comments as presumptively harmless. But courts typically dismiss such opinions anyway. Puffery is not actionable under the common law,[45] FTC Act,[46] state UDAP laws,[47] or Lanham Act.[48] Moreover, as the *Treatise* recognizes, deceptive statements are not per se illegal under the Sherman Act.[49] Antitrust plaintiffs must prove the other Section 2 elements, including causation, antitrust injury, and damages.

B. CRITIQUE OF THE SIX ELEMENTS

To rebut its empirically unsupported presumption that deceptive advertising and product disparagement have a de minimis effect on competition, 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."[50] Again neither the *Treatise* nor the courts

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[45] For example, the *Restatement* explains:

> 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.

RESTATEMENT (SECOND) OF TORTS § 649 (1977).

[46] Statement of Basis and Purpose of Trade Regulation Rule, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8324, 8351 (1964) (explaining that puffing is "expressions the consumer clearly understands to be pure sales rhetoric on which he should not rely in deciding whether to purchase the seller's product").

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

[48] Newcal Indus., Inc. v. Ikon Office Solution, 513 F.3d 1038, 1053 (9th Cir. 2008) (upholding district court's finding that challenged statement was puffery, which cannot support Lanham Act claim).

[49] *See* 3B AREEDA & HOVENKAMP, *supra* note 15, ¶ 782b, at 326–27 (applying a rebuttable presumption, rather than a per se rule).

[50] *Id.* at 327; *see* Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997) (citing factors). 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

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. 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, and do not significantly reduce the risk of false positives.[51] 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 and Lanham Acts, UDAP statutes, the Racketeer Influenced and Corrupt Organizations Act (RICO), or common law fraud. 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 attorneys' fees (or punitive damages under the common law). 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 trebled 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.[52]

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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).

[51] *See* discussion *infra* Part III. 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.'") (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).

[52] 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

The *Treatise*'s fourth element—requiring buyers to be "without knowledge of the subject matter"—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 laws 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 obvious or one is aware of specific facts that makes reliance unjustifiable.[53] Even when victims could investigate "without any considerable trouble or expense,"[54] the common law does not impose a duty to investigate.

One district court has noted the paradox. If sophisticated buyers have general knowledge about the subject matter, they arguably would dis-

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fact highly probable, which differs from requiring the statement to be "clearly" false or material. *See* 37 AM. JUR. 2D *Fraud and Deceit* § 493 (2001). 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) (concluding 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), the False Claims Act, as one example of Congress choosing a preponderance standard for a substantive action for fraud); Herman & MacLean v. Huddleston, 459 U.S. 375, 388–91 (1983) (applying a preponderance standard to civil enforcement of the antifraud provisions of the securities laws); Steadman v. SEC, 450 U.S. 91, 96 (1981) (finding Congressional intent to apply a preponderance standard in administrative proceedings concerning violation of antifraud provisions of the securities laws); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 355 (1943) (applying a preponderance standard in an action brought under Section 17(a) of the Securities Act of 1933); First Nat'l Monetary Corp. v. Weinberger, 819 F.2d 1334, 1341–42 (6th Cir. 1987) (applying preponderance standard to 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); World Wide Ass'n of Specialty Programs v. Pure, Inc., 450 F.3d 1132, 1140 (10th Cir. 2006) (applying preponderance standard to false advertising claims under Lanham Act); Rambus, Inc., FTC Docket No. 9302, 2006-2 Trade Cas. (CCH) ¶ 75,364 (Aug. 2, 2006) (holding that the clear and convincing standard does not apply to the elements of antitrust case because it happens to involve a patent and that "[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, at 556 (2006) (explaining that proof by a preponderance of the evidence generally is sufficient for consumer protection statutes).

[53] RESTATEMENT (SECOND) OF TORTS § 541A cmt. a (1977).

[54] *Id.* § 540 cmt. a.

count (and possibly punish) any deception. Knowing that the buyer has such knowledge, a rational monopolist would not deceive them.[55] One then can draw three 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 are at times overconfident and can be duped.[56] 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.[57] As Professor Robert Prentice found, "[T]here 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."[58] Monopolists may exploit such shortcomings in the buyers' knowledge or reasoning.[59] In *Conwood*, for example, the moist snuff monopoly was the category manager for moist snuff for many retailers.[60] The plaintiff alleged, and the factfinder found, that the monopolist abused its position as category manager by providing retailers misleading information. 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 mo-

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[55] *See* Avery Dennison v. Acco Brands, No. 99-1877, 2000 WL 986995, at *21 (C.D. Cal. 2000) (denying motion for summary judgment).

[56] 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 supracompetitive 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).

[57] Kristy Holtfreter et al., *Sociolegal Change in Consumer Fraud: From Victim-Offender Interactions to Global Networks*, 44 CRIME, L. & SOC. CHANGE 251, 263 (2006); Michael Levi, *White-Collar Crime Victimization*, *in* WHITE-COLLAR CRIME RECONSIDERED 169, 172–73 (Kip Schlegel & David Weisburd eds., 1992) (majority of fraud victims in the United Kingdom were corporate entities).

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

[59] Max Huffman, *Bridging the Divide? Theories for Integrating Competition Law and Consumer Protection*, EUR. COMPETITION J. (forthcoming) (manuscript at 11–18), *available at* http://ssrn.com/abstract=1546106.

[60] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 775 (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 products that are more profitable and "plan-o-grams" describing how, and which, products should be displayed.

Id.

nopolist's moist snuff and discontinue carrying the plaintiff's products.[61] (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.)

Under the *Treatise*'s presumption and elements, which the Sixth Circuit subsequently adopted in part,[62] the product disparagement claims should have been summarily dismissed.[63] 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. Retailers reviewed the monopolist's plan-o-gram proposals as to which moist snuff products should be displayed, and how. Some retailers compared the category captain's proposals with their own independent analysis.[64] Moreover, a Kroger supermarket executive testified that any manufacturer trying to use category management practices to control competition in its stores would be "committing suicide."[65]

Recognizing that falsely disparaging a competitor and its financial condition can constitute exclusionary practices under Section 2,[66] the Sixth Circuit in *Conwood* held that the plaintiff presented sufficient evidence that these sophisticated retailers were indeed duped. The monopolist provided retailers "skewed" national sales figures, which did not always represent local product movements 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.[67] The plaintiff's expert testified that retailers, while quite sophisticated, nonetheless knew less than the monopolist about the pricing and profitability of moist snuff.[68] The deception had its desired effect. If retailers actually preferred the

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[61] *Id.* at 783.

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

[63] *See* 3B AREEDA & HOVENKAMP, *supra* note 15, ¶ 782a2, at 324–26.

[64] *Conwood*, 290 F.3d at 775.

[65] *Id.*

[66] *Id.* at 788; *see also id.* at 784 (citing Byars v. Bluff City News Co., 609 F.2d 843, 854 n.30 (6th Cir. 1979)).

[67] *Conwood*, 290 F.3d at 776, 786, 790.

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

monopolist's slower-selling moist snuff products, the monopolist had no need to deceive them.

The *Treatise*'s fifth element—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. An effective lie need not be repeated to preempt a nascent competitive threat—one misrepresentation may suffice. To increase its market power through network effects,[69] a company may employ deceit to tip demand toward its product. Once attaining a monopoly, the company need not continue to employ deceit to maintain its power. Moreover, the courts and *Treatise* never explain why society must endure a monopolist's deceit over a long, but not yet prolonged, period. 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.[70]

Finally, the *Treatise*'s sixth element—the misrepresentation is not readily susceptible to neutralization or other offset by rivals—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."[71] Again a rational profit-maximizing monopolist recognizes that deceit in-

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[69] *See* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 20 (D.D.C. 1999). One complaint is that with its operating system monopoly (enforced by network effects), Microsoft can ward off potential threats by adding (some assert tying) an imitation product. Consumers or OEMs are unlikely to incur the time or cost to add a second media player, Internet browser, or spreadsheet or word processing program because Microsoft can tie an imitation version to its operating system. Once Microsoft adds its version, as the European Commission found for media players, programmers will develop solutions for the Microsoft platform because it will reach automatically 90 percent of client personal computer users and thus save the content providers the costs of supporting different technology platforms. Under this positive feedback loop, more users of a given software platform lead to a greater incentive to develop products compatible with that platform, which reinforces that platform's popularity with end-users (and the software company's market power). *See* Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601 (Ct. First Instance).

[70] For example, 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." Goldwasser v. Ameritech Corp., 222 F.3d 390, 400 (7th Cir. 2000) (noting these violations are too attenuated to competition to support an antitrust claim).

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

volves costs. If a smaller rival effectively can 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. Even if the monopolist is behaving irrationally, liability should not depend 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.

By muddying the waters through deception, a monopolist, for example, 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. 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.[72]

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.[73] Sup-

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[72] This theory arose in a case where a telephone monopolist furnished inside wire maintenance service to its residential and certain business customers. Davis v. S. Bell Tel. & Tel. Co., No. 89-2839, 1994 WL 912242 (S.D. Fla. 1994). The plaintiffs alleged that the monopolist created widespread confusion in the market, which thereby raised entry barriers. An entrant would have needed to engage in corrective advertising, which itself was expensive. Second, the entrant, despite its corrective advertising efforts, had no assurance of capturing all the business diverted from the monopoly. Customers could switch to another competitor. Third, given the low failure rate for a telephone wire, competitors could not recoup quickly the cost of corrective advertising. *Id.* at *2. While questioning the amount of evidence in support of the theory, the court accepted the plaintiffs' theory of harm and denied the defendant's motion for summary judgment on the plaintiffs' two monopolization claims. *Id.* at *15.

[73] One district court went so far afield 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, 511 F. Supp. 2d 372, 382 (S.D.N.Y. 2007).

pose, for example, that a monopolist over several years sent the health care 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 the defendant's three mass mailings to between 7,000 and 8,000 hospitals and insurance companies.[74] Why should the law mandate such an undertaking? The deception directly harms consumers and raises rivals' corrective advertising costs.[75] Moreover, the fringe firm or new entrant is situated differently than the monopolist. A monopolist would prefer an entrant to expend capital defending its image, rather than in expanding its business, thereby threatening the monopoly. Advertising can be an effective entry barrier.[76] Generally, it is costlier for entrants to launch a new product and establish brand recognition than for an entrenched firm to maintain its brand awareness.[77]

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 to neutralization or other offset.

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[74] *See American Council*, 323 F.3d at 368.

[75] *See* 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 7, at 1242.

[76] Robert Smiley, *Empirical Evidence on Strategic Entry Deterrence*, 6 INT'L J. INDUS. ORG. 167, 171–72 (1988). The surveyed executives were asked separately, for new and 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. Of the seven entry deterrence 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.

[77] Prentice, *supra* note 7, at 1225 n.257 (collecting sources); *see also* U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 703 (Fed. Cir. 1988) (finding sufficient evidence from which jury could conclude that 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) ("[T]he need for large capital outlays and lengthy construction programs in order to enter the market, and the need to overcome brand preference established by the defendant's having been first in the market or having made extensive 'image' advertising expenditures, also constitute barriers to entry."); Complaint at ¶ 25, United States v. Kimberly-Clark Corp., 95-3055 (N.D. Tex. Dec. 12, 1995), *available at* http://www.justice/gov/atr/cases/f0400/0482.htm (concluding that "[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").

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."[78] So courts under the Lanham Act legally presume harm from deliberately deceptive comparative advertising campaigns. But 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.

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.[79] Antitrust scholar Robert Steiner, who was also the former president of the Kenner Products toy company, described his concerns about the industry self-regulation of toy commercials in the 1960s and 1970s. Originally favoring industry self-policing, he feared the greater anticompetitive consequences of deceptive advertising. Absent regulation, some toy manufacturers would air deceptive ads, which would pull down the toy industry. 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."[80] He foresaw bad commercials driving out the good ones, rendering TV advertising relatively ineffective.[81] The *Treatise* does not address this marketing dynamic. Instead it requires the injured con-

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[78] Trilink Saw Chain, LLC v. Blount, Inc., 583 F. Supp. 2d 1293, 1321 (N.D. Ga. 2008). *Cf.* ALPO Petfoods, Inc. v. Ralston Purina Co., 997 F.2d 949, 953 (D.C. Cir. 1993) (remanding case in which district court granted, 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).

[79] *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 474 n.22 (1992). The Court explained:

> To inform consumers about Kodak, the competitor must be willing to forgo the opportunity to reap supracompetitive prices in its own service and parts markets. The competitor may anticipate that charging lower service and parts prices and informing consumers about Kodak in the hopes of gaining future equipment sales will cause Kodak to lower the price on its service and parts, canceling any gains in equipment sales to the competitor and leaving both worse off. Thus, 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.

Id.; *see also* Ford Motor Co. v. FTC, 120 F.2d 175, 178 (6th Cir. 1941) (Ford following industry leader General Motors in advertising a deceptive 6 percent financing plan).

[80] Robert L. Steiner, *Double Standards in the Regulation of Toy Advertising*, 56 U. CIN. L. REV. 1259, 1264 (1988).

[81] *Id.*

sumers (who generally cannot challenge the deception under the Lanham Act) to show why competitors could not readily neutralize or offset the misrepresentation.

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

A skeptic might agree that the *Treatise*'s legal standard suffers from infirmities, but conclude that it remains better than the lower courts' rambling through the full-blown rule of reason analysis for Section 2 monopolization claims.[82] With the *Treatise*'s standard, a defendant at least can minimize discovery costs by limiting discovery to the *Treatise*'s elements. But there is an alternative to the *Treatise*'s standard that minimizes the risks of false positives *and* false negatives. Courts can employ this simpler 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.

There is little risk of false positives under this standard—the challenged behavior is socially undesirable (regardless of the offender's status). If a monopolist intentionally engages in independently wrongful anticompetitive conduct, then courts need not assess the conduct's net effect under a rule of reason standard. As a DOJ antitrust official during the Kennedy administration said, "Realistically, the antitrust law is always concerned with a pragmatic judgment about the reasonableness of trade practices from the social viewpoint."[83] In assessing the risks 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. Society seeks to deter the conduct (such as deception, physical violence, and other well-established tortious or illegal conduct) generally. Overall it does not matter whether a monopolist or fringe firm engages in such behavior. The issue is whether the victim can recover under the Sherman Act for such deceptive conduct.

But unlike a per se rule, a monopolist has greater flexibility in how it chooses to defend itself under this prima facie standard. The plaintiff must prove: first, that the company is a monopolist, second, that the

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[82] 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 Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, pt. II.C (2009); Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 534–42.

[83] Lee Loevinger, *The Rule of Reason in Antitrust Law*, 50 VA. L. REV. 23, 29 (1964).

monopolist's conduct is actually deceptive, and third, causation—even if the defendant's conduct is clearly or borderline deceptive, the plaintiff still must establish that the monopolist's deception is capable of significantly contributing to its attaining or maintaining monopoly power. This causation standard, which the D.C. Circuit employed in *Microsoft*,[84] should address the "key problem" for the *Treatise*, namely "assessing the connection between any improper representations and the speaker's monopoly power."[85] Consequently, the court can dismiss an antitrust complaint that fails to adequately plead these elements. Even if the complaint survives a motion to dismiss, the court can lessen the discovery expenses by limiting discovery initially to the second and third elements (before addressing the issue of monopoly power and market definition).

This "quick-look" standard distinguishes antitrust violations from ordinary torts. A defamation action against Microsoft for content on its message board is not an antitrust action because the deceit is incapable of significantly contributing to Microsoft's attaining or maintaining its monopoly.[86] But when Microsoft deceived Java developers to thwart a competitive threat and maintain its monopoly, as the D.C. Circuit found, it violated the Sherman Act.[87]

This standard is administrable. Without expressly relying on the *Treatise*'s legal standard, courts dismiss antitrust claims where the alleged statements are not deceptive[88] or do not reasonably appear capable of making a significant contribution to the defendant's maintaining or attaining monopoly power.[89] There is no reason why this simpler standard would not effectively mitigate the risks of false positives. For example, courts in the three circuits that apply the *Treatise*'s legal standard could

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[84] United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001).

[85] 3B AREEDA & HOVENKAMP, *supra* note 15, ¶ 782b, at 327.

[86] *See* Eckert v. Microsoft Corp., No. 06-11888, 2007 WL 496692 (E.D. Mich. 2007).

[87] *Microsoft*, 253 F.3d at 76–77.

[88] *See, e.g.*, Brookeside Ambulance Serv., Inc. v. Walker Ambulance Serv., Inc., 39 F.3d 1181, 1994 WL 592941, at *3–*4 (6th Cir. 1994) (recognizing that deception could be anticompetitive but finding no evidence that the defendant made alleged misrepresentations); Abcor Corp. v. AM Int'l, 916 F.2d 924, 930 (4th Cir. 1990); Picker Int'l v. Leavitt, 865 F. Supp. 951, 964–65 (D. Mass. 1994) (one negative statement to a customer was not defamatory); EventMedia Int'l, Inc. v. Time Inc. Magazine Co., No. 92-0502, 1992 WL 321629 (S.D.N.Y. 1992); U.S. Football League v. Nat'l Football League, 634 F. Supp. 1155, 1182–84 (S.D.N.Y. 1986).

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

have easily dismissed those cases when the plaintiffs failed to present evidence of actual deception.[90]

Not only is the 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 can 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 competitors could readily neutralize the falsehood (an inquiry that can potentially impose needless discovery costs on third-party businesses).

While minimizing the risk of false positives, the proposed legal standard—compared to the *Treatise*'s standard—reduces the risk of false negatives and is consistent with the policy goals of the Sherman Act and laws prohibiting deception generally. Other courts and the FTC[91] recognize that "fraudulent misrepresentations" to secure or maintain a monopoly violate the antitrust laws and should be punished.[92] Moreover, as one court has 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.[93]

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[90] *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. 06-2057, 2007 WL 831806, at *8 (N.D. Cal. 2007); Applera Corp. v. MJ Research Inc., 349 F. Supp. 2d 338, 345–46 (D. Conn. 2004); Multivideo Labs., Inc. v. Intel Corp., No. 99-3908, 2000 WL 12122, at *15 (S.D.N.Y. 2000).

[91] Xerox Corp., 86 F.T.C. 364 (1975) (falsely disparaging competitive supplies were among Xerox's anticompetitive practices to maintain its monopoly illegally) (consent order).

[92] *See, e.g., In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395 (3d Cir. 2000); Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255 (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 Group, Inc., 515 F. Supp. 2d 565 (W.D. Pa. 2007) (denying motion to dismiss the plaintiff's claims that the defendant attained monopoly through deception); W. Duplicating, Inc. v. Riso Kagaku Corp., No. 98-208, 2000 WL 1780288 (E.D. Cal. 2000) (monopolist's fear, uncertainty, doubt (FUD) marketing campaign to discourage customers from buying competitor's ink and masters 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, 1994 WL 912242 (denying summary judgment on allegations of deception to maintain monopoly); Brownlee v. Applied Biosystems Inc., C 88 20672 RPA, 1989 WL 53864 (N.D. Cal. 1989) (denying motion to dismiss complaint alleging the defendants' deceit to potential customers and other third parties along with other anticompetitive conduct); Power Replacements Corp. v. Air Preheater Co., Inc., 356 F. Supp. 872, 897 (E.D. Pa. 1973).

[93] *See* Caldera, Inc. v. Microsoft Corp., 87 F. Supp. 2d 1244, 1249 (D. Utah 1999).

Would the outcome differ if the court employs the *Treatise*'s six elements or the simpler standard? If not, a skeptic may ask, why bother? The outcome will depend at times on which standard the court employs, so the ensuing results can be inconsistent. For example, in *AstraZeneca Pharmaceuticals*, the district court concluded, in applying the *Treatise*'s elements, that doctors categorically could not be deceived.[94] But the Third Circuit, on the facts of *Warfarin Sodium Antitrust Litigation*, concluded that doctors could be deceived in at least some circumstances.[95] For over thirty years, DuPont's Coumadin product (its brand name for warfarin sodium) dominated the oral, anti-coagulant market. DuPont, however, anticipated losing market share from the introduction of a cheaper generic drug substitute for Coumadin. The U.S. Food and Drug Administration found that the generic drug was bioequivalent and therapeutically equivalent to DuPont's Coumadin. 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 the plaintiff's warfarin sodium particularly. The alleged 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.[96] Despite pharmacists' and doctors' knowledge of the subject matter, some pharmacies, including some large chains, allegedly 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.[97] DuPont later settled with the generic drug manufacturer[98] and with a class of consumers and third-party payors for $44.5 million.[99]

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[94] Walgreen Co. v. AstraZeneca Pharm., 534 F. Supp. 2d 146, 152 (D.D.C. 2008) (stating that prescription drug sales "necessarily depended on prescriptions written by medical professionals, that is, persons knowledgeable of the subject matter").

[95] *See In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395, 397 (3d Cir. 2000).

[96] *In re* Warfarin Sodium Antitrust Litig., 212 F.R.D. 231, 242 (D. Del. 2002). To show that the defendant's misrepresentations had their desired effect, the

> plaintiffs cited the weak market penetration of generic warfarin sodium. Generally about 40–70% of prescriptions for drugs available from multiple sources are filled with less expensive generics within one year of generic availability. . . . However, more than 75% of prescriptions for sodium warfarin were still filled with Coumadin a year after Barr introduced its generic version, and DuPont continued to maintain a 67% market share up until the date the complaint was filed.

Id. (internal citations omitted).

[97] *Id.*

[98] *Warfarin Sodium Antitrust Litigation*, 214 F.3d at 397 n.2.

[99] *Warfarin Sodium Antitrust Litigation*, 212 F.R.D. at 243. Another example is *Caribbean Broadcasting System v. Cable & Wireless*, 148 F.3d 1080 (D.C. Cir. 1998). The plaintiff's radio station entered the market to compete against the defendants' radio station in the East-

IV. CONCLUSION

Prosecuting a monopolist's anticompetitive deceptive advertising or product disparagement 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 social policies on deceptive commercial speech and competition generally, courts that do not punish a monopolist's anticompetitive deception contravene the Sherman Act's legislative aim. The legal standard in three circuits is based on the *Treatise*, but neither the *Treatise*'s de minimis presumption nor 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's economic theories) took a more

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ern Caribbean. *Id.* at 1087. The plaintiff alleged that the defendants, among other things, deceived advertisers that their radio station's signal reached the entire Caribbean; therefore, advertisers need not deal with the new entrant. The plaintiff alleged that the defendants' anticompetitive activities included (1) the 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." Appellant Br., *Caribbean Broadcasting System*, 148 F.3d 1080 (D.C. Cir. 1998). The defendants allegedly succeeded in blocking for over two years the plaintiff's 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. 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. Under the *Treatise*'s presumption and six-element standard, the monopolist need not have feared antitrust liability for its deception. No doubt the advertisers (which included Eastman Kodak, Johnson & Johnson, K-Mart, Radio Shack, and Xerox) 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 plaintiff could have provided advertisers' survey data that showed that the defendants' radio station did not reach the entire Caribbean. Moreover, after contractually securing the advertisers' business, the monopolist need not have continued its misrepresentations. Instead of dismissing the plaintiff's advertising claim, Judge Ginsburg, writing for the D.C. Circuit, recognized that if the plaintiff proved at trial that the defendants' alleged conduct was deceitful and anticompetitive, then such conduct fell within the category of anticompetitive conduct prohibited under the Sherman Act. *Caribbean Broadcasting System*, 148 F.3d at 1087.

extreme view. He assumed that the marketplace of ideas would cure a monopolist's deceptive anticompetitive practices.[100] 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 U.S. 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 prosecute monopolistic conduct quickly as presumptively illegal without requiring the full-blown rule of reason analysis. Toward that end, competition authorities should 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.

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[100] For example, in *Schachar v. American Academy of Ophthalmology, Inc.*, eight ophthalmologists contended that the defendant violated the antitrust laws by attaching the label "experimental" to radial keratotomy, a surgical procedure for correcting nearsightedness. 870 F.2d 397, 397 (7th Cir. 1989). The Seventh Circuit could have rejected summarily the antitrust claim: the plaintiffs never demonstrated that the challenged statement was false. 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. But Judge Easterbrook, again writing for the court, expanded on his social philosophies: False statements "just set the stage for competition in a different venue: the advertising market." Sanderson v. Culligan Int'l Co., 415 F.3d 620, 623 (7th Cir. 2005).