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CHEAP EXCLUSION: ROLE AND LIMITS

By Patricia Schultheiss and William E. Cohen*

I. INTRODUCTION

In recent years, several prominent antitrust cases have included allegations challenging single-firm conduct of types typically addressed under other theories of law, including fraud and breach of contract. Antitrust theories also have been applied to an expanding range of activities that confer market-wide advantage through the abuse of government processes. One session of the FTC/Department of Justice Hearings on Section 2 of the Sherman Act focused directly on these types of cases and theories.[1]

The courts and the federal antitrust agencies have found that tortious behavior, including deception and like practices, may constitute exclusionary conduct that can support a section 2 claim under appropriate circumstances. *Microsoft*[2] and *Broadcom*[3] are examples of recent cases in which deceptive conduct was considered to have the potential to be exclusionary under the standards of section 2 of the Sherman Act. In other cases, discussed below, conduct ranging from tortious destruction of property to abuse of governmental processes has been found to violate section 2.

A number of antitrust commentators have accepted the underlying theory. Professors Areeda and Hovenkamp recognize that in some circumstances tortious conduct may serve as a foundation for section 2 liability.[4] Their treatise states that a "monopolist's misrepresentations encouraging the purchase of its product can fit [their] general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of

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* The views expressed are those of the authors and Policy Studies' staff and do not necessarily reflect the views of the Commission or any individual Commissioner.

1 *See generally* Sherman Act Section 2 Joint Hearing: Misleading and Deceptive Conduct Hr'g Tr., Dec. 6, 2006 [hereinafter Dec. 6 Hr'g Tr.].

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

3 Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 314 (3d Cir. 2007) (holding that, in the proper context, allegations based on an "intentionally false promise" stated a claim for monopolization).

4 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 782a–b, at 320–31 (3d ed. 2008).

rivals."[5] "[M]isrepresentations and organized deception by a dominant firm," the treatise continues, "may have §2 implications when used against a nascent firm just as it is entering the market."[6] Nonetheless, the treatise urges considerable caution in this area and suggests ways to carefully limit application of section 2 in these circumstances.[7] Other commentators agree that "[t]ortious conduct is [a] form of abusive behavior that can, in certain circumstances, constitute an element of a Sherman Act claim . . . ."[8] They refer to tortious conduct and other like practices as "Cheap Exclusion."[9]

This paper examines the legal and policy issues related to using section 2 to prosecute such cases. Section II elaborates on the nature of "cheap exclusion," briefly describes the principal lines of cases that could be characterized as cheap exclusion, and identifies the policy reasons for, and concerns with, applying antitrust theories in such cases. Section III highlights key principles and limits for determining when cheap exclusion is an appropriate candidate for antitrust review, and Section IV discusses how these considerations have interacted in practice. Section V addresses the framework for analyzing cheap exclusion allegations. Section VI summarizes our conclusions.

II. THE POLICY ISSUES

A. Cheap Exclusion

Creighton, et al., have focused attention on the analysis of tortious or like conduct under the rubric "cheap exclusion." Cheap exclusion, they explain, has two components. First, the exclusionary conduct is "cheap" in that the firm that engages in the conduct incurs very few costs or risks. Second, the low-cost exclusionary conduct "does not raise any cognizable efficiency claims; that is, [it is] 'cheap' in that it has little positive value."[10] The authors note:

> [C]heap exclusion frequently involves opportunistic or otherwise harmful behavior in both public and private settings – behavior that unambiguously fails to enhance any party's efficiency, provides no benefits (short or long-term) to consumers, and in its economic

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5 *Id.* ¶ 782b, at 326.

6 *Id.* ¶ 782b, at 329 (explaining that a new firm "has no established customer base and typically lacks the resources to answer the dominant firm's deception effectively").

7 *See Id.* ¶¶ 782a–d, at 321–33.

8 Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker & Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975, 989 (2005).

9 *Id.* passim.

10 *Id.* at 977.

> effect produces only costs for the victims and wealth transfers to the firm(s) engaging in the conduct (apart from its contribution to market power). . . .
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> [C]heap exclusion focuses on practices that are facially unlikely to generate efficiencies, such as opportunistic rent seeking, or deceptive or fraudulent conduct, rather than practices that are facially likely to generate efficiencies . . . such as exclusive dealing, bundling, and price cutting.[11]

They emphasize, however, that even in cheap exclusion cases, a plaintiff seeking to show actual monopolization "must prove that the alleged predator has acquired monopoly power and that the effect of the conduct is anticompetitive exclusion . . . ."[12] Thus, an antitrust plaintiff must prove harm to competition, not just to a competitor.

During the December 6th hearing session, Creighton noted that there should be relatively little concern about false positives resulting from cases that focus on cheap exclusion. She explained that because cheap exclusion ordinarily has no efficiency or other procompetitive benefits, it does not pose "the same type of trade-off that we see with respect to most other forms of exclusionary conduct . . . [such as] predatory pricing, bundling, exclusive dealing and the like."[13] Consequently, she suggested, "[C]heap exclusion may be viewed as something like the section 2 analog to section 1 price fixing; that is, we are not unduly concerned with overdeterrence of this behavior . . . ."[14]

Other hearing panelists agreed that the focus on cheap exclusion can be a useful way of identifying appropriate challenges to anticompetitive single-firm conduct. One panelist found cheap exclusion "an extraordinarily useful way for the government to think about monopolization . . . [because] it means fishing where the fish are."[15] Another panelist lauded the cheap exclusion

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11 *Id*. at 982–83.

12 *Id.* at 990.

13 Dec. 6 Hr'g Tr. at 11 (Creighton).

14 *Id.* at 12. *But cf. infra* Section II.D. (discussing policy concerns that arise when section 2 is applied in cheap exclusion contexts).

15 Sherman Act Section 2 Joint Hearing: Concluding Session Hr'g Tr. 127, May 8, 2007 [hereinafter May 8 Hr'g Tr.] (Muris); *see also* Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 15, Feb. 13, 2007 [hereinafter Feb. 13 Hr'g Tr.] (Balto) (asserting that the pharmaceutical industry's regulatory environment "provides a remarkable number of opportunities for engaging in what's been called by the FTC cheap exclusion"). *But cf.* Dec. 6 Hr'g Tr. at 42–52 (Rozek) (suggesting that the regulatory structure and need to encourage R&D and innovation in the pharmaceutical industry caution against aggressive antitrust enforcement).

framework, viewing its focus on incidents of anticompetitive conduct "where antitrust enforcement is likely to do as little harm as possible" as "a prototype for how to make prosecutorial decisions going forward."[16]

B. The Principal Lines of Cases

Cases that might be characterized as cheap exclusion have addressed tortious conduct, which includes misleading and deceptive conduct, in both the commercial sector and in the standard-setting context; breach of contract; and abuses of government processes. Although the categories are not always sharply delineated, they are useful for general discussion.

Many of the cases have involved misleading and deceptive conduct.[17] In several cases, plaintiffs asserted that false advertising by rivals constituted exclusionary conduct.[18] Most of these claims have been rejected.[19] Although courts and commentators typically have accepted

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16 Dec. 6 Hr'g Tr. at 91 (Cary); *see also* May 8 Hr'g Tr. at 125–26 (Melamed) (noting that misleading or deceptive conduct can be anticompetitive and that cheap exclusion "points enforcers and plaintiffs in the direction of conduct that is more likely to be mischievous," but adding that labeling conduct "deceptive doesn't really advance the question of whether it is anticompetitive," which "depends on how [the conduct] measures up against the preexisting antitrust test").

17 The Federal Trade Commission defined "deception" in 1983, noting that the FTC "will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." Fed. Trade Comm'n, *Policy Statement on Deception* (1983), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,205 at 20,911–12, *available at* http://www.ftc.gov/bcp/policystmt/ad-decept.htm. The Commission has used this definition – supplemented with a requirement that defendant's actions be willful, as opposed to inadvertent or negligent – in discussing deception as exclusionary conduct under section 2 analysis. *See In re* Rambus, Inc., No. 9302, slip op. at 29–30 (F.T.C. July 31, 2006), *order set aside on other grounds sub nom.* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2007), *petition for cert. filed*, 77 U.S.L.W. 3346 (Nov. 24, 2008) (No. 08-694), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

18 *See, e.g.*, Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1268, 1270 (8th Cir. 1980); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087, 1089 (D.C. Cir. 1998).

19 *See, e.g.*, Sanderson v. Culligan Int'l Co., 415 F.3d 620 (7th Cir. 2005) (Easterbrook, J.); Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989) (Easterbrook, J.).

that misrepresentation and deception could in theory be exclusionary,[20] they generally have concluded that such incidents are unlikely to cause substantial or durable harm to competition.[21]

More recently, the focus has shifted to standard-setting activities, where some commentators have found greater cause for antitrust concern.[22] Indeed, in a series of enforcement proceedings, the Federal Trade Commission has alleged that patentees have misled standard-setting bodies about the existence of relevant patents/patent applications and/or about the patentee's intentions to enforce its patent rights. Two of the cases have been resolved by consent orders;[23] one resulted in a Commission enforcement order that subsequently was set aside by the reviewing court of appeals and that is the topic of a pending petition for certiorari.[24] One case currently in private litigation alleges that the defendant violated a commitment to standard-setting bodies to license its intellectual property on fair, reasonable, and nondiscriminatory (FRAND) terms. Whereas the district court discussed the allegations in terms of breach of a FRAND

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20 *See, e.g.*, Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) (reinstating section 2 claims based upon Qualcomm's alleged false promise to a standard-setting organization ("SSO") to license technology on fair, reasonable, and non-discriminatory terms); Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916–17 (2d Cir. 1988); 3B AREEDA & HOVENKAMP, *supra* note 4, ¶¶ 782b–d, at 326–33; Dec. 6 Hr'g Tr. at 15–16, 95–96 (Creighton).

21 *See Sanderson*, 415 F.3d 620; *Schachar*, 870 F.2d 397; 3B AREEDA & HOVENKAMP, *supra* note 4, ¶¶ 782b–d at 327–33; *see also infra* Section IV.A.

22 *See* 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 712d, at 370 (3d ed. 2008) (noting that "the conduct requirement for the monopolization offense seems clear if defendant's misrepresentations induce[] . . . [a standard-setting organization] to adopt its technology" rather than an alternative). *See generally* 2 HERBERT HOVENKAMP, MARK D. JANIS & MARK A. LEMLEY, IP AND ANTITRUST § 35.5b at 35-44 (2007 Supp.) (stating, in a standard-setting context, that "[m]isrepresentations can constitute anticompetitive conduct in appropriate circumstances"); Creighton, et al., *supra* note 8, at 987 ("An area in which the risk of opportunistic conduct has come to the fore is in the private standard-setting process.").

23 *In re* Union Oil Co. of Cal., 138 F.T.C. 1 (2004) ("*Unocal*"); *In re* Dell Computer Corp., 121 F.T.C. 616 (1996) (alleging a violation of section 5 of the FTC Act).

24 *In re* Rambus, Inc., No. 9302 (F.T.C. July 31, 2006), *order set aside sub nom.* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2007), *petition for cert. filed*, 77 U.S.L.W. 3346 (Nov. 24, 2008) (No. 08-694), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.; *see infra* section IV.B.

commitment,[25] the court of appeals viewed the suspect conduct as making a deceptive commitment.[26] In addition, the D.C. Circuit found that Microsoft unlawfully maintained its operating system monopoly by, among other things, misrepresenting its software development tools in ways that channeled key software development to sustain Windows as the industry's *de facto* standard.[27]

Other forms of tortious conduct have formed the basis for antitrust allegations and liability in some cases.[28] For example, in *Conwood Co., L.P. v. United States Tobacco Co.*, the court affirmed liability, noting that there was ample evidence upon which "the jury could have found, and apparently did find, that [defendant's] pervasive practice of destroying Conwood's racks and [point of sale] materials . . . and misrepresentations to retailers was exclusionary conduct without a sufficient justification."[29] The appellate court recited evidence that the defendant had misinformed retailers about its and its competitors' sales data and trained its employees to destroy competitors' racks and products by taking advantage of inattentive store clerks or by obtaining a retailer's permission to reorganize or neaten the moist snuff tobacco section.[30]

Finally, as Judge Bork has noted, "[m]isuse of courts and governmental agencies is a particularly effective means of delaying or stifling competition."[31] Abuse of government process may occur under various circumstances. For example, in *Unocal*, the company allegedly misled a government standard-setting board about the patents it owned and its intentions concerning

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25 Broadcom Corp. v. Qualcomm Inc., No. 05-3350, 2006 WL 2528545, at *11 (D.N.J. Aug. 31, 2006) (dismissing the complaint).

26 Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3rd Cir. 2007) (reinstating portions of the complaint, described as alleging "intentional concealment" to a standard setting organization and "breach" of an "intentionally false" promise).

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

28 A business tort is "an act that improperly harms a rival either directly or by improperly winning a customer." 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 320. *See generally* Creighton et al., *supra* note 8, at 975.

29 Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 788 (6th Cir. 2002). This case involved the moist snuff tobacco market, and the court noted that because of restrictions on advertising tobacco products, point-of-sale advertising and display racks were the primary means of communicating product information to consumers. *Id.* at 774.

30 *Id.* at 778.

31 ROBERT H. BORK, THE ANTITRUST PARADOX 159 (1978); *see also* Creighton et al., *supra* note 8, at 990 ("One of the most effective ways for a firm to acquire or maintain market power is to use the rules of government against its competitors.").

enforcement of those patent rights.[32] Alleged manipulation by pharmaceutical companies of "Orange Book" listings under the Hatch-Waxman Act[33] is another area of potential abuse.[34] One panelist maintained that the FDA's Citizen Petition process also has been used by branded pharmaceutical manufacturers to delay generic entry.[35] In addition, section 2 liability has been found based on efforts to enforce patents procured by fraud[36] or known to be invalid.[37]

C. Policy Considerations Favoring Application of Section 2

Although some panelists suggested that the ability to challenge most cheap exclusion cases under other branches of the law should provide sufficient protection,[38] there are several reasons why a section 2 action may be warranted.[39] First, harm to competition is not necessarily

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32 *In re* Union Oil Co. of Cal., 138 F.T.C. 1 (2004) ("*Unocal*").

33 21 U.S.C. § 355.

34 Pursuant to the Hatch-Waxman Act, the FDA lists approved drugs and their related patents in a publication commonly known as the "Orange Book." If a branded drug manufacturer files a timely patent infringement suit against a generic version of a listed drug, FDA approval to market the generic drug is automatically stayed for 30 months. Consequently, manipulation of Orange Book listings may present opportunities for forestalling generic entry. See *infra* Section IV.D.; s*ee also* Feb. 13 Hr'g Tr. at 17–21 (Balto) (arguing that the filing of so-called product-line extensions in the FDA Orange Book, sometimes accompanied by de-listing the original branded drug, is an abuse of government process designed to delay generic entry).

35 Feb. 13 Hr'g Tr. at 25–28 (Balto) (noting that none of the citizens petitions filed within the 4-month period just prior to generic entry was successful on the merits, yet those petitions delayed generic entry by an average of 10 months). *But see* Dec. 6 Hr'g Tr. at 42–52 (Rozek) (arguing that FDA Citizen Petitions, product-line extensions, improvements near the end of the patent life cycle, and authorized generics are all procompetitive activities).

36 *E.g.,*Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172 (1965); Nobelpharma Ab v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir. 1998).

37 Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282 (9th Cir. 1984).

38 *See, e.g.,* May 8 Hr'g Tr. at 132–33 (Rule) (if an SSO requires its members to enter contractual commitments to make certain disclosures, then there is a contractual remedy).

39 *See* Dec. 6 Hr'g Tr. at 19 (Creighton) ("The right question to ask is, is an inefficient exclusionary act that is likely to have caused market power nonetheless excused under Section 2 because it also violates another law or statute?"); *see also* May 8 Hr'g Tr. at 134 (Creighton) (arguing that conduct that may be a tort should not be immunized if it is

considered by the other causes of action. Areeda and Hovenkamp have observed that "the tort standard is not the exclusive nor even the appropriate test of 'exclusionary' behavior. . . . [T]he objects, history, and dynamics of tort law are generally not responsive to the concerns of Sherman Act §2."[40] Similarly, other antitrust commentators have noted that "business torts and contract rights vindicate the rights of the wrong people. In a standard-setting organization, for example, we are not concerned ultimately with the rights of the standard-setting organization or its participants, but [with the rights of] consumers."[41]

Second, the remedies available in antitrust cases differ from those available in commercial disputes, such as actual damages to an individual competitor, specific performance, and corrective advertising. According to Areeda and Hovenkamp, "[T]he existence of a tort remedy does not necessarily obviate antitrust concern, . . . where antitrust concerns are substantial, antitrust provides greater damages and attorney's fees and thus greater incentives to sue. Moreover, broader equitable remedies will sometimes be appropriate under the antitrust laws."[42] Other commentators have noted that " [a]ntitrust advances certain policy goals and vindicates certain interests, notably the interest in protecting the competitive process and thereby garnering economic benefits for consumers. It is not at all clear that the business tort and other remedies potentially available in the cases . . . are well-designed to protect those interests and advance those goals."[43] One panelist suggested that contract remedies are inherently insufficient to protect against harms to competition, innovation, and the economy as a whole, whereas antitrust and its

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also an antitrust violation); Sherman Act Section 2 Joint Hearing: Monopoly Power Hr'g Tr. 52, Mar. 8, 2007 [hereinafter Mar. 8 Hr'g Tr.] (Lande) ("Deception, imperfect information, and other consumer protection problems, when they have market-wide effects and are not likely to be prevented by competition in the relevant market, should give rise to antitrust violations.").

40 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 320–21.

41 Dec. 6 Hr'g Tr. at 19 (Creighton); *see also* Sherman Act Section 2 Joint Hearing: Business Testimony Hr'g Tr. 168, Jan. 30, 2007 [hereinafter Jan. 30 Hr'g Tr.] (Dull) (noting that whereas contract law looks toward private remedies, "FRAND violations can eliminate competition and hurt consumers, competitors, innovation and the economy as a whole.").

42 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 320.

43 Creighton et al., *supra* note 8, at 994.

remedies are specifically designed with those concerns in mind.[44] Another panelist argued that antitrust remedies, including treble damages, are appropriate in these situations.[45]

Third, potential plaintiffs may lack the economic incentive or legal ability to pursue actions in contract or tort. Competitors who are able to pass along the costs of an overcharge may not be good representatives for the consumers who ultimately absorb the impact,[46] but consumers may not have standing to bring a tort or other type of claim under state law.[47] According to one panelist, "business torts may have elements that do not fit well with the proper issue from an antitrust perspective . . . ."[48] Indeed, the law of business torts varies from state to state, which could result in inconsistent case law if anticompetitive conduct is challenged under those legal theories.[49]

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44 Jan. 30 Hr'g Tr. at 168 (Dull). One case currently in litigation suggests that broad injunctive remedies sometimes may be available under patent law doctrines. *See* Qualcomm, Inc. v. Broadcom Corp., 548 F.3d 1004 (Fed. Cir. 2008) (finding that a patentee's intentional failure to disclose relevant patents while participating in SSO activities, in violation of a duty to disclose, impliedly waived those patents and rendered them unenforceable against products compliant with the ensuing standard).

45 *See* Mar. 8 Hr'g Tr. at 52–53 (Lande).

46 *See* Alden F. Abbott and Theodore A. Gebhard, *Standard-Setting Disclosure Policies: Evaluating Antitrust Concerns in Light of Rambus*, ANTITRUST, Summer 2002, at 29, 32 ("Litigation is expensive, and outcomes are uncertain. Paying a royalty for the life of the standard may be the cheaper and, thus, rational course, particularly if most of the royalty can be passed onto downstream consumers."); Dec. 6 Hr'g Tr. at 19–20 (Creighton).

47 Dec. 6 Hr'g Tr. at 97–99 (Cary); *see* George S. Cary, Paul S. Hayes, and Larry C. Work-Dembowski, *Antitrust Implications of Abuse of Standard-Setting*, 15 GEO. MASON. L. REV. 1241, 1262 (2008) ("If there are anticompetitive effects flowing from misconduct, the public should have recourse under the antitrust laws, even if it does not have standing to pursue a contract or tort claim."); Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889, 1914, 1936 (2002) (discussed *infra* at note 123).

48 Dec. 6 Hr'g Tr. at 20 (Creighton); *see also* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 321 ("state tort law will not always speak with clarity on the more technical points that are likely to be in dispute . . . [and t]he difficulties necessarily encountered by the federal courts in applying state law in diversity cases should not be unnecessarily imported to complicate already troublesome antitrust litigation").

49 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 321 ("State tort laws differ from state to state, and antitrust courts should not treat two monopolists differently because of these fortuitous differences.").

D. Policy Concerns About Using Section 2

Despite the considerations favoring use of section 2 in appropriate circumstances, courts, commentators, and hearing participants have identified concerns and potential harms that could arise from widespread antitrust intervention in areas already the province of other fields of law.

First, contract and tortious conduct disputes are ubiquitous. Injecting antitrust into any significant portion of them could open flood gates.[50] As Areeda and Hovenkamp point out, "Antitrust law must be concerned lest the mere possibility of an exclusionary tendency permit interminable lawsuits inquiring into the 'reasonableness' of every utterance or 'ordinary' act of the monopolist."[51] One panelist who had conducted a survey of private antitrust suits cited an attorney who acknowledged that "he tried to convert every contract suit into an antitrust suit as his first action, because it gives him access to treble damages, recovery of legal fees, and it is easier to survive summary judgment."[52] Problems may be particularly acute when obligations are ambiguous. For example, because licensors and licensees often have very different ideas about what constitutes a reasonable royalty,[53] a commitment to license on "reasonable" terms may

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[50] *See, e.g.,* May 8 Hr'g Tr. at 129 (Rill) ("I think the danger of adopting an attractive notion such as cheap exclusion and expanding it across a variety of practices tends to produce possibly oversimplistic results that don't fit in the real world and create serious dangers of overenforcement and inefficiencies"); *id.* at 133–34 (Rule) (noting that much of the conduct complained about as cheap exclusion appears to violate other statutes and that "[i]t has never been clear to me why antitrust needs to come along and sort of compound that . . . [and] that maybe leaving it to those other statutes is a better way to go than trying to import it into Section 2"); Broadcom Corp. v. Qualcomm Inc., No. 05-3350, 2006 WL 2528545, at *11–12 (D.N.J. Aug. 31, 2006), *rev'd in pertinent part by* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007) (cautioning against transforming cases involving improper business behavior into treble damage antitrust cases).

[51] 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 322.

[52] Dec. 6 Hr'g Tr. at 24 (McAfee) (further noting that "the incentives for private antitrust litigation are not guided by consumer welfare"); *see also* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 321 ("plaintiffs are often less disciplined in making tort-like claims in antitrust suits than in tort suits," noting that tort plaintiffs must show actual and justifiable reliance upon a misrepresentation and resulting damage, but in an antitrust suit, plaintiffs often claim misrepresentations whenever the defendant has departed from the full truth, without any further showing).

[53] *See generally* May 8 Hr'g Tr. at 129 (Sidak) (noting that the party seeking access to the patented technology wants to pay as low a royalty as possible).

invite dispute,[54] and antitrust claims could arise with great frequency. Other commentators, however, point to limits on invoking antitrust: although "claims of tortious conduct are frequently heard, the elements of actual monopolization under [s]ection 2 . . . are considerably more difficult to establish. The antitrust plaintiff must prove that the alleged predator has acquired monopoly power and that the effect of the conduct is anticompetitive exclusion, not simply the imposition of costs on a competitor."[55]

Second, very few of the potential cases are likely to involve competitive concerns. Areeda & Hovenkamp express doubt that tortious practices "would very often seriously impair the competitive opportunities of rivals in any significant or permanent way."[56] They propose a rebuttable presumption that any anticompetitive harm from such practices is *de minimis*.[57] Thus, Areeda & Hovenkamp "doubt the wisdom of giving much § 2 attention to most [business torts] except in rare and gross cases."[58] Similarly, a hearing panelist argued that a monopolist's misleading and deceptive conduct should be treated as exclusionary "only when the conduct is institutional, pervasive and substantially harms the competitive process."[59] The Sixth Circuit's *Conwood* opinion also recognized that a business tort has to create a "significant and more than a temporary effect on competition."[60]

Third, injecting antitrust into commercial disputes may distort the results of those cases. Plaintiffs may gain a new advantage by using the threat of magnified discovery burdens and treble damages as added leverage to force the defendant to settle.[61] Moreover, placing "bad" or

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54 *See, e.g.,* Jan. 30 Hr'g Tr. at 85 (Hartogs) ("In reality, licensees frequently claim to find licensing rates surprisingly high. It's part of the negotiation process."); *see also infra* Section III.D.

55 Creighton et al., *supra* note 8, at 990.

56 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 321.

57 *Id.* ¶¶ 782a–b, at 322. For misrepresentations to buyers, "The presumption could be overcome by cumulative proof that 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." *Id.* ¶ 782b, at 327.

58 *Id.* ¶ 782a, at 322.

59 Dec. 6 Hr'g Tr. at 40 (Brockmeyer).

60 Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002). *But see infra* notes 63, 73, 101, & 102 (citing critiques of the *Conwood* decision).

61 *See* Dec. 6 Hr'g Tr. at 24–26 (McAfee); *see also* Broadcom Corp. v. Qualcomm Inc., No. 05-3350, 2006 WL 2528545, at *12 (D.N.J. Aug. 31, 2006), *rev'd in pertinent part by*

"unseemly" conduct in front of a jury may invite condemnation based on reactions to the conduct, rather than sound competition analysis.[62] For example, one panelist found it unsurprising that jurors in the *Conwood* litigation, hearing about a monopolist's salespeople ripping out competitors' display racks, found a violation of section 2.[63]

Finally, as with all section 2 theories, there is the possibility of chilling procompetitive conduct.[64] This concern is clearly reduced in cheap exclusion contexts – indeed, the very concept of cheap exclusion is meant to identify settings where the activities at issue have little procompetitive benefit. For example, despite concerns expressed about the antitrust analysis in *Conwood*, one panelist suggested that the result is unlikely to deter efficient conduct by others in the future, because the conduct at issue was not efficient, procompetitive behavior.[65] Nonetheless, in most cheap exclusion contexts some concern with chilling remains, such as affecting conduct close to the line demarcating harmful conduct or not unambiguously distinguishable from conduct that crosses that line.

One panelist noted that chilling advertising might raise particular concerns because truthful advertising is usually encouraged as a procompetitive and relatively inexpensive way to

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Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297 (3d Cir. 2007) (quoting Intergraph Corp. v. Intel Corp., 195 F.3d 1346, 1364 (Fed. Cir. 1999)) (cautioning against permitting resort to treble-damage antitrust litigation "to place the judicial thumb on the scale of business disputes in order to rebalance the risk from that assumed by the parties")

62 *See* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a, at 321 ("We must be aware of the inclination to condemn a monopolist on the basis of antisocial behavior that could not possibly give it an improper advantage in the market.").

63 Dec. 6 Hr'g Tr. at 83–84 (Brockmeyer); *see also* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a2, at 322 (the "court was so overwhelmed with a clear and varied record of tortious business conduct that it largely dispensed with proof that an antitrust violation had occurred"); Mar. 8 Hr'g Tr. at 55 (Silberman) (terming defendant's conduct "terrible behavior," but questioning whether there was monopolization).

64 *See* William F. Adkinson, Jr., Karen L. Grimm & Christopher N. Bryan, *Enforcement of Section 2 of the Sherman Act: Theory and Practice* Section V., FTC Staff Working Paper (2008), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/section2overview.pdf.

65 Dec. 6 Hr'g Tr. at 84, 122–23 (Brockmeyer); *see also id.* at 113–14 (Creighton) (agreeing that there is little concern about chilling a competitor from destroying its rivals' display racks).

provide information to consumers and the marketplace.[66] Arguably, use of the antitrust laws in contractual disputes over FRAND licensing commitments might chill otherwise procompetitive behavior in a standard-setting organization. For example, firms that would be willing to participate in the development of a standard and offer their IP to all who ask at a "fair, reasonable, and non-discriminatory" price may be chilled from doing so by fear that any disagreements over the meaning of FRAND could result, not just in breach-of-contract damages, but in treble antitrust damages as well.[67] More broadly, the risk of private antitrust litigation for breach of contract could cause firms with high market shares to hesitate to enter into economic relationships that yield to flexibility and modification over time (*e.g.*, efficient breaches of contracts and market driven renegotiations).[68] Thus, the specter of treble antitrust damages may deter what

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66 Dec. 6 Hr'g Tr. at 113–114 (Creighton); *cf*. 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782b, at 326 (noting that although "[t]here is no redeeming virtue in deception . . . there is a social cost in litigation over it").

67 *See* Richard S. Taffet, *Ex Ante Licensing in Standards Development: Myths and Reality*, Presentation to AIPLA Spring Meeting 8–9 (May 4, 2006), available at http://www.bingham.com/Media.aspx?MediaID=2742 (arguing that attaching antitrust implications to rules requiring ex ante disclosure of patents and binding, irrevocable license terms could cause patent owners to re-think their willingness to participate in standard-setting activities). *See generally* Jan. 30 Hr'g Tr. at 81 (Hartogs) (antitrust enforcement should be careful not to stifle innovation by favoring one business model over another in the SSO context); *id*. at 83–84, 88 (Hartogs) (stating that proposals for ex ante licensing "run severe risks of driving anticompetitive results and provoking the elimination of innovators willing to participate in the [standard-setting] process"); Robert M. Webb, *There is a Better Way: It's Time to Overhaul the Model for Participation in Private Standard-Setting*, 12 J. INTELL. PROP. L. 163, 173 (2004) (asserting that firms with large IP holdings may hesitate to participate in SSOs when participation carries exposure to antitrust challenge or other litigation).

68 The theory of efficient breach suggests that there are times when it is more efficient for a party to breach a contract than to perform as promised and that the rules of law should encourage such efficient breaches. *See, e.g.*, Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 630 (1988) (noting that the theory attempts to identify contract remedies and other legal rules that will give promisors an incentive to breach when doing so would be efficient). *See generally* Fred S. McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 185 (1999) (examining the relationship between "efficient" breaches and tortious interference with contracts); John Simpson & Abraham L. Wickelgren, *Naked Exclusion, Efficient Breach, and Downstream Competition*, 97 AM. ECON. REV. 1305 (Sept. 2007) (discussing the role of efficient breach by downstream buyers or consumers in the context of exclusive contracts used by an upstream monopolist to deter upstream entry by a more efficient rival).

some consider desirable, efficiency-enhancing behavior during the competitive process, leading firms to balk at making relationship-specific investments beneficial to consumers.[69]

In sum, although antitrust plays a valuable role in challenging conduct resulting in cheap exclusion, concern with the consequences of excessive intrusion in these contexts makes it important to delineate appropriate boundaries. The following section explores these possible limits.

III. CHEAP EXCLUSION AS A SECTION 2 OFFENSE: GUIDING PRINCIPLES AND LIMITS

As articulated by leading proponents, the key elements of cheap exclusion are that it is inexpensive to undertake; it is without any procompetitive value; and it has a substantial exclusionary impact that enhances market power.[70] Review of the relevant cases, commentary, and hearing testimony reveals several important factors that can be applied as guiding principles and limits to avoid turning garden-variety commercial disputes into antitrust cases.

A. Harm to Competition

One overarching principle is the need to demonstrate a likely, durable effect on market-wide competition.[71] The antitrust laws are designed to prevent harm to competition, not to protect individual competitors.[72] Conduct that is directed at one of several competitors is less likely to

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69 *See, e.g.,* David L. Meyer, Deputy Assistant Attorney General, Antitrust Div., U.S. Dep't of Justice, How to Address "Hold Up" in Standard Setting Without Deterring Innovation: Harness Innovation by SDOs, Remarks at the ABA Section of Antitrust Spring Meeting, Panel on Standards Development Organizations 10–11 (Mar. 26, 2008), *available at* http://www.usdoj.gov/atr/public/speeches/234124.pdf.

70 *See* Susan A. Creighton, Director, FTC Bureau of Competition, *Cheap Exclusion*, Remarks before Charles River Associates 9th Annual Conference (Feb. 8, 2005), *available at* http://www.ftc.gov/speeches/creighton/050425cheapexclusion.pdf; Creighton et al., *supra* note 8, at 977–81.

71 S*ee* Dec. 6 Hr'g Tr. at 33–34 (Brockmeyer) ("it is essential that deciding whether there is substantial harm to the competitive process must be undertaken first").

72 *See, e.g.,* NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 135, 139 (1998) (requiring harm to "the competitive process"); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); Sanderson v. Culligan Int'l. Co., 415 F.3d 620, 623 (7th Cir. 2005) (stressing that the antitrust laws do not forbid "unfair" business tactics without regard to the likelihood that the defendant will "achieve and retain a monopoly at consumers' expense"); Am. Council of Certified

result in harm to competition overall. For example, under most circumstances, destruction of one competitor's display racks is unlikely to harm overall competition. The injured competitor may have a tort action, but not necessarily an antitrust action.[73] Similarly, disparagement of a rival's products may have adverse effects on the targeted firm, but the overall impact on competition may prove trivial. On the other hand, conduct that abuses governmental processes or regulations or that occurs in the context of industry-wide standard-setting may have a greater likelihood of creating durable monopoly power that could harm competition and consumers. Several panelists suggested that the use of a continuum or sliding scale reflecting gradations of likely competitive harm may be a useful way to distinguish cheap exclusionary conduct that is appropriate grist for antitrust review from business torts or misrepresentations better handled under other legal doctrines.[74]

B. Visibility of the Misconduct and Ability of the Plaintiff to Respond

If the conduct at issue is both visible and susceptible to being countered, the impact on competition may be unlikely to entail significant harm. For example, marketing misrepresentations that can be rebutted by competitors' advertisements might be less likely to result in durable monopoly power than a failure to disclose closely held patent information.[75]

Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, 323 F.3d 366, 370 (6th Cir. 2003) ("As the Supreme Court has emphasized, the Sherman Act protects competition, not competitors."); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (requiring "harm [to] the competitive process and thereby [to] consumers" rather than merely to "one or more competitors") (emphasis omitted).

[73] Joshua D. Wright, *Antitrust Analysis of Category Management: Conwood v. United States Tobacco Co.*, 17 SUP. CT. ECON. REV. (forthcoming 2009) (working paper at 28, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=945178) (arguing that the Sixth Circuit failed "to distinguish authorized from unauthorized product removal, or systematic product destruction from limited, one-time events, [and thus] allowed harm to a competitor to substitute for evidence of harm to competition").

[74] *See, e.g.*, Dec. 6 Hr'g Tr. at 91–93 (Cary) (suggesting that conduct can be arrayed along a continuum of the least and most likely to result in competitive harm); *id*. at 95–96 (Creighton) (agreeing that some forms of cheap exclusionary conduct are more likely to result in anticompetitive harm than others); *id*. at 103–104 (Brockmeyer) (agreeing that false advertising might be at the low end of the scale, but cautioning against an absolute position that commercial speech can never be the basis of a section 2 claim).

[75] *See, e.g.*, Dec. 6 Hr'g Tr. at 101 (McAfee) (in an SSO, a company's "ability to impugn alternative technologies seems much more limited than [its] ability to keep secret, for example, that [it has] patents"); *id*. at 104–05 (Ohana) (in the context of an SSO, a misrepresentation about a technology's attributes is less likely to cause durable harm because the SSO members are usually knowledgeable about the technologies); *id*. at

Thus, the transparency of the conduct and the practical availability of effective countermeasures are relevant to whether conduct is suitable material for an antitrust suit.

C. Nature of the Environment

The environment in which the conduct occurred is another important factor.[76] The likelihood that defendant's conduct will give rise to anticompetitive effects may depend critically on the expectations of other market participants. For example, some exaggerations in public advertising may be met with a jaundiced eye that makes any misrepresentation immaterial. In contrast, standard-setting organizations are joint endeavors, and the cooperative nature of that environment, in the context of their policies and practices, may give rise to reasonable expectations that participants' representations are complete and accurate.[77] Deceptive conduct in such an environment may be more likely to result in competitive harm and, therefore, a more likely candidate for antitrust enforcement.[78]

D. Clarity of the Misconduct

Assessing whether the conduct at issue is susceptible of a clear showing of tortious behavior, breach of contract, or other abuses should help to distinguish those cases that deserve

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101–02 (Creighton) (same); Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989) ("If [public disparaging] statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech – the marketplace of ideas.").

76 *See In re* Rambus, Inc., No. 9302, slip op. at 32–33 (F.T.C. July 31, 2006), *order set aside on other grounds sub nom.* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2007), *petition for cert. filed*, 77 U.S.L.W. 3346 (Nov. 24, 2008) (No. 08-694), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf (emphasizing that "[t]he factual context in which the alleged conduct occurred is critical" and explaining that in cooperative relationships, deception may be difficult to detect or counteract, whereas in competitive environments, deception is less likely to be material and more likely to be countered by competitors).

77 *See* Qualcomm, Inc. v. Broadcom Corp., 548 F.3d 1004, 1022 (Fed. Cir. 2008) (finding that "[a] duty to speak can arise from a group relationship in which the working policy of disclosure of related intellectual property rights ('IPR') is treated by the group as a whole as imposing an obligation to disclose information in order to support and advance the purposes of the group") (internal quotation omitted).

78 S*ee* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 314 (3d Cir. 2007) ("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.").

antitrust scrutiny from those that should be left to other statutory regimes. For example, if an SSO member says that it has no relevant patents or that it will not assert any patents, and then brings an infringement action, the misrepresentation is clear. Similarly, if the member states that it will license its intellectual property for a fixed dollar amount but then seeks a greater royalty, the breach is clear.[79] On the other hand, if a firm agrees to license its IP on reasonable terms and then the parties disagree about what is reasonable, the breach or misrepresentation may be less certain.[80]

E. Intent

The intent of the defendant is important in some cheap exclusion contexts. Both commentary and case law suggest that intentional misrepresentation is an element of cases premised on a deceptive failure to disclose IP in the standard-setting environment.[81] For example, in *Rambus*, the FTC's liability ruling was expressly limited to conduct involving intentional misrepresentations or omissions.[82] Similarly, certain abuse of governmental process cases by their very terms require intentional conduct, such as "fraud" on the patent office or prosecuting patents "known to be" invalid.

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[79] *See, generally,* 3 AREEDA & HOVENKAMP, *supra* note 22, ¶ 712d, at 370 ("we would apply §2 to a situation in which a patentee represents that it would charge a low royalty and later insists on a higher royalty, unless it is clear that the standard setters would have taken the patentee's technology even at the higher rate").

[80] The district court opinion in the *Broadcom* litigation expressed concern about the suitability of antitrust review of disputes over the reasonableness of royalties. *See* Broadcom Corp. v. Qualcomm Inc., No. 05-3350, 2006 WL 2528545, at *7 (D.N.J. Aug. 31, 2006) ("reviewing and supervising the terms upon which Qualcomm licenses its patents . . . may be beyond the effective control of the [c]ourt under the antitrust laws"). The court of appeals, however, concluded that such disputes would be manageable, terming the reasonableness of royalties "an inquiry that courts routinely undertake." *Broadcom*, 501 F.3d at 314, n.8.

[81] *See, e.g.,* 2 HOVENKAMP ET AL., *supra* note 22, § 35.5b, at 35-48 to 35-49 (stating that in context of SSOs, plaintiff "must prove that the defendant's failure to disclose its relevant intellectual property rights was intentional and not an oversight" in order to subject defendant to Section 2); Dec. 6 Hr'g Tr. at 29 (McAfee) ("There are many well-intentioned corporations that make mistakes, and the law should not have zero tolerance.").

[82] *See In re* Rambus, Inc., No. 9302, slip op. at 30 (F.T.C. July 31, 2006), *order set aside on other grounds sub nom.* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2007), *petition for cert. filed,* 77 U.S.L.W. 3346 (Nov. 24, 2008) (No. 08-694), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

F. Adequacy of Remedies under Other Laws

One additional factor is the adequacy of remedies for the suspect conduct under other legal theories, such as fraud, tortious conduct, or breach of contract. As discussed above, this entails consideration of the availability of alternative remedies; the incentives of private actors to invoke those remedies; and the sufficiency of the remedies to address the relevant harm to competition.[83]

IV. INTERACTION OF THE LIMITING PRINCIPLES IN PRACTICE

Interactions of these factors have shaped the development of case law in different ways in different settings. We examine separately deceptive commercial communications; deception in the context of standard-setting organizations; breach of contract; and conduct that abuses government processes.

A. Deceptive Commercial Communications

As indicated earlier, deceptive communications may be viewed as falling along a continuum, with different factual contexts posing varying levels of threatened harm to competition. Courts rarely find a section 2 violation based solely on false statements in public advertisements or comments that disparage a rival or its products.[84] Indeed, a number of courts have adopted a rebuttable presumption that such communications have only a *de minimis* impact on competition and, therefore, are not actionable as antitrust offenses.[85]

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83 *See supra* Section II.C.

84 *See, e.g.,* Spanish Broad. Sys. v. Clear Channel Commc'ns, Inc., 376 F.3d 1065, 1075–76 (11th Cir. 2004) (affirming dismissal of section 2 claims based on alleged misrepresentations about the plaintiff's finances); Abcor Corp. v. AM Int'l, Inc., 916 F.2d 924, 930 (4th Cir. 1990) (affirming dismissal of section 2 claims based upon dissemination of false information that plaintiff was going out of business); Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989) (Easterbrook, J.). *See generally* Sanderson v. Culligan Int'l Co., 415 F.3d 620 (7th Cir. 2005) (Easterbrook, J.) (rejecting section 1 claim based on defendant's assertion that plaintiff's technology does not work and noting that, absent allegations of monopoly power or a dangerous probability of monopolization, a section 2 claim would fare no better).

85 *See, e.g.*, Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, 323 F.3d 366 (6th Cir. 2003) (citing to its earlier opinion involving the same litigation at 185 F.3d 606, 611–16 (6th Cir. 1999)) (involving three mass mailings to between 7,000 and 8,000 hospitals and insurance companies in which the defendant made statements implying that it was the only approved certifying board for podiatric surgery and that other "self-designated" certifying boards were not legitimate); Am.

Advertising typically does not arise in a cooperative setting,[86] and it is usually visible, which allows competitors the opportunity to rebut any misleading or deceptive statements through counter-advertising.[87] Generally, as one appellate court has emphasized, false statements "just set the stage for competition in a different venue: the advertising market."[88] In another case, the appellate court observed, "Warfare among suppliers and their different products is competition. Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law."[89] Courts also have noted that advertising often involves puffing or somewhat exaggerated claims about the advertiser's or a competitor's product and have reasoned that the public's expectations of such puffing reduce concerns over any impact on competition.[90]

Nonetheless, in a few instances, courts have determined that deceptive marketing did (or might) violate section 2. In these cases the clarity of the misrepresentations and the plausibility of the competitive story appeared to play a role. The monopolist seemed to be using deceptive conduct to eliminate new entrants or nascent competitors.[91]

Other commercial communications are not in the form of public advertisements; rather, they are communications to individuals or groups where the parties expect to be able to rely on

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Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 108 F.3d 1147, 1152 (9th Cir. 1997) (involving the distribution of disparaging advertising fliers on law school campuses); Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904, 916–17 (2d Cir. 1988) (involving a branded drug manufacturer's letter to pharmacists touting its product and raising concerns about the consequences of dispensing generic substitutes).

86 *See Sanderson*, 415 F.3d at 624 ("What producers say about each others' goods in an effort to sway customers is competition in action.").

87 *Id.* at 623.

88 *Id.* at 623 (citation omitted).

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

90 *See Am. Prof'l Testing Serv.*, 108 F.3d at 1152.

91 *See* Int'l Travel Arrangers, Inc. v. W. Airlines, Inc., 623 F.2d 1255, 1268, 1272 (8th Cir. 1980) (emphasizing the defendant's monopoly power in certain air travel markets and how the false statements were intended to, and did, stymie the plaintiff's efforts to enter those markets); Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (allegations of injury to both plaintiff and competition as a result of the defendant's false statements to potential advertisers about the geographic reach of its radio station were sufficient to survive a motion to dismiss).

the truthfulness of the representations made. Misrepresentations in these contexts have raised greater judicial concern.[92]

In *United States v. Microsoft Corp.*,[93] the D.C. Circuit found that Microsoft's campaign to maintain its monopoly power by undermining Sun Microsystem's Java technologies included misrepresenting software development tools as compatible with cross-platform uses by competitors, whereas in fact the tools enabled resulting applications to run properly only on Microsoft's Windows.[94] The evidence clearly demonstrated Microsoft's misrepresentations[95] and its intent to deceive independent software vendors and thereby undermine Java.[96] The misrepresentations were made in a cooperative context of offering tools to aid Java developers, and could not be rebutted, because only Microsoft was aware that its tools favored Windows. By the time the independent software vendors uncovered the deception, their programs were incompatible with Sun's version of Java, and Microsoft had benefitted from positive network effects. No procompetitive explanation was offered, and the conduct caused substantial competitive harm.[97]

Microsoft also illustrates how a separate antitrust action can provide remedial benefits to the public. Sun sued Microsoft for violating Sun's license and infringing its trademarks, resulting in a settlement pursuant to which Microsoft paid Sun $20 million and agreed not to use "Java compatible" trademarks.[98] While the trademark restriction would protect against further infringement, this settlement did not otherwise remedy the competitive injury to the public from maintaining Microsoft's operating system monopoly. By invoking the antitrust laws, DOJ was

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92 *See, e.g., Caribbean*, 148 F.3d at 1089 (suggesting that the statements at issue went beyond public advertising because the plaintiff alleged that defendant "'made sales calls to U.S. companies nationally' and 'disseminated . . . brochures by hand and by the U.S. mail'").

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

94 *Id*. at 76–77.

95 Indeed, Microsoft insisted that its version of Java was "only 'adding rich platform support' to what remained a crossplatform implementation." *Id*. at 76.

96 *Id*.

97 *Id*. (noting that Microsoft's deception was designed "to thwart Java's threat to Microsoft's monopoly in the market for operating systems").

98 *See* Sun Microsystems, Inc. v. Microsoft Corp., 999 F.Supp. 1301, 1302 (N.D. Cal. 1998) (describing Sun's allegations); Settlement Agreement and Mutual Limited Release, *Sun Microsystems*, No. C97-20884 (Jan. 22, 2001), *available at* www.microsoft.com/presspass/legal/01-23settlement.mspx.

able to obtain injunctive relief directed toward protecting middleware platforms and addressed to restoring opportunities for competition in the entire marketplace affected by the misconduct.

In *Conwood Co. v. United States Tobacco Co.*, the plaintiff obtained a $1 billion treble damage verdict under section 2, based on a showing that the defendant had engaged in a campaign of unlawful misconduct to preserve its dominant position in the moist snuff market.[99] The court affirmed antitrust liability, citing evidence that the defendant frequently destroyed its competitors' display racks and point of sale materials and abused its position of "category manager." These abuses included false statements about product sales data, which the defendant then used to convince retailers to carry more of its products and less of its competitors' products.[100] The court also emphasized the defendant's long-held monopoly position, and its intent to use the challenged practices to suppress the growth of new entrants and smaller competitors. Nonetheless, the case has been criticized,[101] with some of the criticism addressed to the Sixth Circuit's perceived failure to distinguish between anticompetitive conduct and conduct that could be efficient and procompetitive.[102]

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99 Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 783–85 (6th Cir. 2002).

100 *Id.* at 785–86.

101 *See, e.g.,* 3B AREEDA & HOVENKAMP, *supra* note 4, ¶ 782a2, at 326 (stating that if the *Conwood* decision is followed, it "will lead to less aggressive competition and to higher prices in retail markets having a dominant firm"); Herbert Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 175–80 (Harvard Univ. Press 2005) (describing *Conwood* as "deeply troublesome and offensive to antitrust policy"); Wright, *supra* note 73, at 4 (arguing that "the decision perversely imposes a greater fiduciary obligation on category managers than on monopolists that use exclusive shelf space contracts"). *See generally* Brendan Dowd, Andrew Frackman, & Matthew Merrick, *Current Developments in Sherman Act Section 2 Exclusionary Conduct Cases*, 2003 COLUM. BUS. L. REV. 526, 527, 530 (2003) (noting, without criticizing the court's analysis, that *Conwood* "demonstrates the substantial risks that large defendants in antitrust actions confront at trial").

102 *See* Dennis Cross, *Monopolization or Competition? Report from the Snuff Wars*, ANTITRUST, Fall 2002, at 61, 65–66 (stating that the "'evidence' [the circuit court] cited seems more like competitive than monopolistic behavior," and that "the Sixth Circuit has increased the risk of doing business for all firms with substantial market shares").

B. Deception in the Context of Standard-Setting Organizations

Standard setting is "widely acknowledged to be one of the engines driving the modern economy" and "can increase innovation, efficiency, and consumer choice . . . ."[103] "Standards make networks, such as the Internet and wireless telecommunications, more valuable by allowing products to interoperate."[104] The Supreme Court has warned, however, that SSO members may have the incentive and ability to set standards to unfairly disadvantage rivals, and thus pose "a serious potential for anticompetitive harm."[105] Consequently, while antitrust law generally has been very accommodating to standard-setting activities, and the joint actions they entail, it has not condoned conduct that could bias the process and undermine the anticipated procompetitive benefits.[106]

Once a standard is in place, users may become "locked in" by substantial sunk investments required to design and manufacture products based on the standard. Developing another standard may impose further costs. Therefore, after a standard has been adopted, patents may be used to "hold up" users by charging high royalties that reflect not only the value of the IP itself, but also the lock-in of users to that standard.[107] Many SSOs have taken measures to mitigate hold-up concerns, such as by requiring disclosure of relevant IP prior to adopting a standard and in some cases, imposing limits on license terms (*e.g.*, requiring licensing on reasonable and non-discriminatory ("RAND") or fair, reasonable, and non-discriminatory

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103 U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33 (2007), *available at* http://www.ftc.gov/reports/innovation/P040101PromotingInnovationandCompetitionrpt0704.pdf [hereinafter ANTITRUST/IP REPORT]; Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988) ("private standards can have significant procompetitive advantages").

104 ANTITRUST/IP REPORT, *supra* note 103, at 33.

105 *See Allied Tube*, 486 U.S. at 500; Am. Soc'y of Mech. Engineers v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) ("a standard-setting organization like [defendant] can be rife with opportunities for anticompetitive activity"). *See generally* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 289–92 (6th ed. 2007).

106 *See, e.g.*, *Allied Tube*, 486 U.S. 492; *Hydrolevel*, 456 U.S. 556; Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007).

107 *See* ANTITRUST/IP REPORT, *supra* note 103, at 35–40; Dec. 6 Hr'g Tr. at 66 (Cary) ("when proprietary technology is made an essential element of an industry standard, the owner of that technology gains market power, exclusionary power, beyond what is inherent in the patent itself"); *id*. at 54–55 (Ohana) ("the incorporation of a patent into a standard may confer on that patent significant market power").

("FRAND") terms).[108] Panelists voiced diverse views regarding the appropriate role for antitrust enforcement when firms acquire monopoly power by circumventing SSO's protective measures.[109]

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108 The antitrust treatment of SSO members' joint efforts to ascertain (and potentially discuss) these terms has been the subject of considerable recent discussion. *See, e.g.*, ANTITRUST/IP REPORT, *supra* note 103, at 49–56; Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice, to Robert A. Skitol, Esq. (October 30, 2006), *available at* http://www.usdoj.gov/atr/public/busreview/219380.htm (Business Review Letter stating that the Antitrust Division had no present intention to take action against the VMEbus International Trade Association's proposed policy requiring disclosure of patents and patent applications and ex ante announcement of the most restrictive licensing terms that the IP holder would require); Letter from Thomas O. Barnett, Assistant Attorney Gen., U.S. Dep't of Justice, to Michael A. Lindsay, Esq. (April 30, 2007), *available at* http://www.usdoj.gov/atr/public/busreview/222978.htm (Business Review Letter stating that the Antitrust Division had no present intention to take action against the Institute of Electrical and Electronics Engineers, Inc.'s proposed patent information policy that would (1) give patent holders the option of publicly committing to the most restrictive licensing terms (including the maximum royalty rate) that they would impose for patent claims found to be essential to the standard and (2) permit members to discuss, within certain limits, the relative costs and benefits of alternative technologies); Taffet, *supra* note 67 (discussing the use of FRAND commitments and ex ante licensing practices and expressing concern that some ex ante disclosure/licensing proposals could have significant anticompetitive effects and cause inefficiencies in standards development).

109 *Compare* Jan. 30 Hr'g Tr. at 166 (Dull) (Broadcom representative terming it "imperative that, when a company has made a commitment to license on FRAND terms as a condition of getting its technology included in a standard, it must not then be allowed to exploit the market position it gained through incorporation [of] its IPR [into] the standard, by reneging on that commitment") *and* Dec. 6 Hr'g Tr. at 67–68, 70 (Cary) (counsel for Broadcom urging antitrust attention to violations of "rules designed to constrain exploitation of lock-in") *with* Jan. 30 Hr'g Tr. at 81–90 (Hartogs) (Qualcomm representative suggesting that incidents of patent hold-ups and exploitation are not as common as sometimes suggested and that compulsory *ex ante* licensing may raise competitive concerns); *see also* Dec. 6 Hr'g Tr. at 56–57 (Ohana) (stating his concern with "a patentee's exploitation of monopoly power that results from the success of a standard for which their patent is essential, where that power is created by actions that run contrary to the rules or shared expectations of the participants in standards development"); May 8 Hr'g Tr. at 130–31 (Sidak) (arguing that insufficient weight is given to the lack of upfront due diligence of parties in a standard-setting organization that later want access to patented technology at a lower price than the IP owner is seeking); *id*. at 133 (Rule) (suggesting that an SSO could have its members post a bond or enter a contract concerning required disclosures, so that if there is a violation, then there is a

In recent years, the FTC has brought several actions challenging a firm's efforts to mislead SSO participants regarding its applicable IP holdings in order to induce the SSO to adopt a standard that incorporated that firm's IP. In *Dell Computer Corp.*,[110] the complaint alleged that Dell violated section 5 of the FTC Act by falsely certifying that it did not have IP necessary for practicing a computer bus standard subsequently adopted by an SSO. The Commission Statement that accompanied an ensuing consent order explained that the standard effectively conferred market power on Dell and that the SSO could have chosen an equally effective, non-proprietary standard had it known of Dell's patent.[111] The Commission noted that Dell acted in a cooperative environment, which had created an expectation that members would act in good faith to identify and disclose conflicting IP rights.[112] Moreover, the Commission termed Dell's conduct "not inadvertent" and observed that Dell "failed to act in good faith."[113] Finally, the Commission noted that antitrust remedies were needed in light of the harm to consumers and the need to protect the competitive marketplace.[114] The Commission accepted a consent agreement that, *inter alia*, required Dell to refrain from enforcing its patent.[115]

More recently, the Commission found that Rambus had acquired monopoly power through deceptive, exclusionary conduct during standard setting conducted by the Joint Electron Device Engineering Council ("JEDEC"). According to the Commission's opinion, Rambus engaged in a course of conduct "calculated to mislead JEDEC members by fostering the belief that Rambus neither had, nor was seeking, relevant patents that would be enforced against JEDEC-compliant products."[116] The Commission emphasized that JEDEC created an

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contractual remedy); *id*. at 126 (Melamed) (emphasizing that labeling conduct as deceptive does not answer "the question of whether it is anticompetitive," which depends on how the conduct "measures up against the preexisting antitrust test").

110 *In re* Dell Computer Corp., 121 F.T.C. 616 (1996).

111 *Id.* at 624 n.2 (Comm'n Statement). The complaint, *id*. at 616–18, did not allege that Dell had achieved monopoly power and did not assert that Dell had monopolized or attempted to monopolize a market.

112 *Id.* at 625.

113 *Id*. at 624–26.

114 *Id.* at 626.

115 *Id.* at 620 (Decision and Order).

116 *In re* Rambus, Inc., No. 9302, slip op. at 67 (F.T.C. July 31, 2006), *order set aside on other grounds sub nom.* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2007), *petition for cert. filed*, 77 U.S.L.W. 3346 (Nov. 24, 2008) (No. 08-694), *available at* http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf.

environment in which participants were expected to disclose patent rights.[117] The Commission further found that Rambus's course of conduct distorted JEDEC's decision making process and contributed significantly to the SSO's technology selections[118] and that the SSO's choice of standard contributed significantly to Rambus's acquisition of monopoly power.[119] The Commission concluded that Rambus had unlawfully monopolized the markets for four technologies incorporated into the SSO's standards in violation of section 5 of the FTC Act.[120] Subsequently, the Court of Appeals for the D.C. Circuit set aside the Commission's order. It ruled that failure to reject the possibility that Rambus's technology would have been standardized even if Rambus had disclosed its patent position meant that the Commission had failed to make an adequate showing of anticompetitive effect.[121] The Commission has petitioned for certiorari, arguing, *inter alia*, that the court of appeals applied an erroneous causation standard, ignored the Commission's showing of harm to the competitive process, and took an improperly narrow view of competitive effects.

These cases suggest that the standard-setting environment can provide attractive opportunities for practicing cheap exclusion when intellectual property holdings are involved.[122] The cooperative environment and difficulty of independently identifying and construing a firm's patents and patent applications creates an opportunity for successful misrepresentation. Moreover, many standards govern the product design or production processes for virtually all members participating in a market; in several of the cases, adherence to the standards, once established, was critical for the interoperability of high-technology components, and therefore to participation in the market. By adding the effect of a standard to the rights conferred by its patents, a firm can acquire monopoly power. The potential for lock-in, which flows from the need to maintain interoperability of multiple components, suggests that the monopoly power obtained can be durable.

Finally, the presence of multiple injured parties, some within and some outside of the SSO, suggests that collective action/free-rider and reliance considerations may complicate resort to alternative remedies.[123] Indeed, to the extent that SSO members are able to pass on any

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117 *See id.* at 33, 51–59, 66.

118 *See, e.g.*, *id.* at 68, 74–77, 96–98, 118.

119 *Id.* at 77–79, 118.

120 *Id.* at 3, 118–19.

121 *Rambus*, 522 F.3d at 462–67.

122 *See also infra* Section IV.D.2. (discussing the FTC's *Unocal* case, a challenge to alleged exclusionary conduct in the context of standard-setting by a governmental entity).

123 *See* Abbott & Gebhard, *supra* note 46, at 32–33; Lemley, *supra* note 47, at 1936 (suggesting that "a fraud theory premised on nondisclosure must necessarily be based on

industry-wide price increase, they may lack incentives to optimally guard against or remedy hold-up abuse.[124] The antitrust laws are designed to protect consumers from such consequences.

C. Breach of Contract

Cheap exclusion theories based on breach of contract have most often arisen in standard-setting contexts. In a private antitrust action, Broadcom Corporation alleged that an SSO incorporated Qualcomm Inc.'s patented technology into certain cellular telephone standards, based upon Qualcomm's written agreement to license its patented technology on FRAND terms, but that Qualcomm then refused to license to Broadcom on FRAND terms.[125] The district court dismissed, treating Broadcom's complaint as alleging a breach of contract.[126] In reinstating Broadcom's monopolization claims, the Third Circuit framed its analysis in a manner that wove together considerations of deception and breach:

> We hold 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 SDO'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.[127]

In another recent proceeding, the Federal Trade Commission issued a consent order resolving allegations that an SSO member's successor had reneged on the member's commitment to license its patented technology for a one-time, flat fee of $1,000.[128] According to the FTC's

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some duty to the plaintiff, which would seem to preclude suits by consumers or by nonmembers of the SSO").

124 *See* Abbott & Gebhard, *supra* note 46, at 32; Creighton et al., *supra* note 8, at 994 (noting SSO members' "opportunity to pass hold-up costs through to consumers").

125 First Amended Complaint, Broadcom Corp. v. Qualcomm Inc., No. 05-3350 (D.N.J. Sept. 29, 2005).

126 Broadcom Corp. v. Qualcomm Inc., No. 05-3350, 2006 WL 2528545 (D.N.J. Aug. 31, 2006).

127 Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 314 (3d Cir. 2007). *But cf.* May 8 Hr'g Tr. at 125 (Melamed) ("*Trinko* made clear that conduct that is a breach of contract and indeed conduct that violates nonantitrust federal law, is not exclusionary or anticompetitive conduct for antitrust purposes. . . . The issue is does it violate and run afoul of some proper antitrust standard.").

128 *In re* Negotiated Data Solutions LLC, No. C-4234 (F.T.C. Sept. 22, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndsdo.pdf (Chairman Kovacic dissenting).

complaint, this commitment was a significant factor contributing to the SSO's determination to include the patented technology in its standard.[129] The complaint alleged that respondent's conduct in breach of the licensing commitment was an unfair method of competition and an unfair act or practice, in violation of section 5 of the FTC Act.[130] The complaint did not allege that the original SSO member had acted deceptively and did not assert that the successor had monopolized or attempted to monopolize a market.[131]

Breaches of contract in standard-setting contexts raise many of the same considerations already discussed. The cooperative environment, the sunk investments, and the difficulty of anticipating the breach of a contractual commitment create fertile ground for opportunistic behavior. When breach occurs in connection with an industry-wide standard, it may well have market-wide competitive effects. Interoperability requirements may raise switching costs, leading to lock-in and durable monopoly power. Clarity of the misconduct may vary—breach of a commitment to license for a fixed price is likely to be considerably easier to demonstrate than breach of a commitment to offer reasonable terms,[132] and this consideration argues strongly for a

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129 Complaint para. 14, *In re* Negotiated Data Solutions LLC, No. C-4234 (F.T.C. Sept. 22, 2008), *available at* http://www.ftc.gov/os/caselist/0510094/080923ndscomplaint.pdf.

130 *Id*. para. 3, 38–39.

131 The accompanying Analysis of Proposed Consent Order to Aid Public Comment stated that "[e]ven if" respondent's actions "do not constitute a violation of the Sherman Act, they threatened to raise prices for an entire industry and to subvert the [SSO's] decisional process . . . ." *Id*. at 4, *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf. One Commissioner, "speaking only for [him]self," has expressed doubt that the successor's revocation of the licensing commitment could be considered exclusionary. According to this Commissioner, the successor's disavowal did not affect ex ante competition and could not be said to have a causal connection to the adoption of the standard or to the successor's acquisition or maintenance of monopoly power. J. Thomas Rosch, Section 2 and Standard-Setting: Rambus, N-Data & the Role of Causation, Remarks at LSI 4th Antitrust Conference on Standard Setting & Patent Pools 13–14 (Oct. 2, 2008), *available at* http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf. A second Commissioner has left the issue open; *cf*. Jon Leibowitz, "Tales from the Crypt." Episodes '08 and '09: The Return of Section 5 ("Unfair Methods of Competition in Commerce are Hereby Declared Unlawful"), Remarks at FTC Section 5 Workshop 5 (Oct. 17, 2008), *available at* http://www.ftc.gov/speeches/leibowitz/081017section5.pdf ("Reasonable people can disagree over whether N-Data violated the Sherman Act because it was never clear whether N-Data's alleged bad conduct actually caused its monopoly power.").

132 *But cf.* Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297, 314, n.8 (terming the reasonableness of royalties "an inquiry that courts routinely undertake"); *accord* Dec. 6,

cautious approach to antitrust intervention in the latter context. Breach may be shown to be intentional or attributable to grossly negligent compliance efforts. Finally, alternative remedies may be inadequate: many of the injured competitors (or consumers) may not have standing to sue under state contract law,[133] and those with standing to bring suit may lack the incentive to do so.[134]

D. Abuse of Government Process

Abuse of government process may be an attractive avenue for practicing cheap exclusion under a variety of circumstances. The cases generally involve misrepresentations designed to influence government action that can confer durable monopoly power. Examples have included fraud on the Patent and Trade Mark Office ("PTO") in obtaining patents and enforcing patents with knowledge that they are invalid; misrepresentations affecting government standard setting; and false listing of patents in the FDA Orange Book under the Hatch-Waxman Act.[135]

2006 Hr'g Tr. at 70–71 (Cary) (counsel for Broadcom arguing that "[a]ntitrust courts are competent to enforce FRAND commitments"); Cary et al., *supra* note 47, at 1261–62 ("Although evaluation of FRAND commitments and licensing terms can be complex and fact-intensive, there should be no doubt that courts and enforcement agencies are competent to apply antitrust law to deceptive FRAND commitments.").

133 *See* Lemley, *supra* note 47, at 1914 ("[N]ot all of the parties who might be accused of infringing the patent are likely to be members of the SSO, and nonmembers presumably lack standing to sue for breach of contract. Even within an SSO, it isn't altogether clear that members of the SSO, rather than the SSO itself, have standing to enforce the agreement."); RESTATEMENT (SECOND) CONTRACTS § 90, comments b and c (1981) (indicating that enforcement of a promise made to one party for the benefit of another may require a showing of reasonable reliance); Abbott & Gebhard, *supra* note 46, at 33 (injured parties who are not SSO members might not have grounds for a private cause of action); Dec. 6 Hr'g Tr. at 99 (Ohana) (noting that in the standard-setting context, for many implementers of the standard, "it is entirely possible that the contractual remedy will not exist"); *id*. at 97 (Cary) (noting that harm might "extend beyond those individuals that might have standing to bring a contract claim").

134 *See, e.g.,* Dec. 6 Hr'g Tr. at 98-99 (Cary) (noting "that people with standing may not have the incentives"); Abbott & Gebhard, *supra* note 46, at 32 (same); Creighton, et al., *supra* note 8, at 994 (same).

135 Cases involving abuse of government processes sometimes raise *Noerr-Pennington* considerations, but discussion of these issues is beyond the scope of this paper. For recent discussion of the *Noerr-Pennington* doctrine, *see* FED. TRADE COMM'N STAFF REPORT: ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE (2006), *available at* http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf.

1. Knowing Enforcement of Invalid or Non-Infringed Patents

The courts have found a patentee's efforts to enforce a fraudulently obtained patent violative of section 2, when the other elements of a monopolization offense have been present.[136] As the U.S. Court of Appeals for the Federal Circuit has stated, "[I]f the evidence shows that the asserted patent was acquired by means of either a fraudulent misrepresentation or a fraudulent omission and that the party asserting the patent was aware of the fraud when bringing suit, such conduct can expose a patentee to liability under the antitrust laws."[137] Similarly, the Ninth Circuit affirmed a jury verdict that the defendant violated section 2 when it pursued a series of patent infringement actions knowing that the patent was invalid.[138]

In each of these cases, factors identified above were present. First, the patent potentially conferred a durable, government-enforced monopoly. Second, the duty to disclose information to the PTO created the expectation of truthful behavior. Third, the *ex parte* nature of the PTO proceedings hid the misrepresentations or omissions, and thus it was difficult, if not impossible, for competitors to rebut the deceptive conduct at the time it occurred. In addition, the requirement of fraud or known invalidity ensured that the requisite intent was present.

2. Government Standard-Setting

Misrepresentations in government standard-setting environments can be anticompetitive, especially when the government has an expectation of truthfulness from those participating in the process. For example, the FTC alleged that Union Oil of California ("Unocal") engaged in deceptive conduct affecting the development of standards for reformulated gasoline ("RFG") by the California Air Resources Board ("CARB"), a government entity.[139] The Commission alleged that "[t]hrough its knowing and willful misrepresentations and other bad faith, deceptive conduct, Unocal created and maintained the materially false and misleading impression that it did not possess, or would not enforce, any relevant intellectual property rights that could undermine the cost-effectiveness and flexibility of the CARB RFG regulations."[140] The Complaint alleged that

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136 *See* Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 174 (1965) (holding that "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2"); Nobelpharma Ab v. Implant Innovations, 141 F.3d 1059, 1070 (Fed. Cir. 1998) (affirming antitrust liability based on enforcement of a patent following intentional failure to disclose information that would have led the PTO to deny the patent application).

137 *Nobelpharma*, 141 F.3d at 1070.

138 *See* Handgards, Inc. v. Ethicon, Inc., 743 F.2d 1282, 1288–89 (9th Cir. 1984).

139 *In re* Union Oil Co. of Cal., 138 F.T.C. 1, 1–2 (2004) ("*Unocal*").

140 *In re* Union Oil Co. of Cal., 140 F.T.C. 123, 125 (complaint).

after rival gasoline producers in California had invested billions of dollars to update their refineries to make gasoline compliant with the standard, Unocal attempted to enforce its patents, thereby inflicting durable, market-wide harm to competition. The deception—involving proprietary patent applications and Unocal's enforcement intentions–was not visible to outsiders and was made during a government standard-setting process where both the government and the industry participants had an expectation of truthfulness.[141] Moreover, the alleged misconduct was intentional and susceptible to clear evaluation—Unocal allegedly was enforcing patents that it had indicated it did not have or would not enforce. The matter settled when Chevron acquired Unocal, with the parties agreeing not to enforce the patents at issue.[142]

3. Orange Book Manipulations

The Hatch-Waxman Act established certain rights and procedures that apply when a company seeks approval from the FDA to market a generic drug prior to the expiration of a patent or patents relating to the branded drug upon which the generic is based. The FDA lists approved drugs and their related patents in a publication entitled "Approved Drug Products with Therapeutic Equivalence Evaluations," commonly known as the "Orange Book."[143]

The listing of patents in the Orange Book plays a substantial role in the timing of FDA approval of generic drugs. A manufacturer that seeks approval of a generic drug before the expiration of all listed patents must certify that the patents listed in the Orange Book by the brand manufacturer either are invalid or will not be infringed by the proposed generic drug. If the holder of patent rights to the branded drug files a timely patent infringement suit against a generic drug that has been so certified, FDA approval to market the generic drug is *automatically* stayed for 30 months. Even when a generic applicant disputes a patent listing, the FDA will not remove the listing from the Orange Book.[144] Because the listing automatically triggers a 30-month stay,

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141 *Id.* at 130 (stating that "[g]iven the scientific and technical nature of the issues involved, CARB relies on the accuracy of the data and information presented to it in the course of rulemaking proceedings").

142 *See In re* Chevron Corp., 140 F.T.C. 100 (2005).

143 Not all patents are eligible for listing in the Orange Book and the special 30-month stay that the Hatch-Waxman Act provides. 21 U.S.C. §§ 355 (b)(1); 355(c)(2); 355 (j)(7)(A)(iii) (2003). For example, in the Administrative Complaint filed by the FTC in Bristol-Myers Squibb, 135 F.T.C. 444 (2003), discussed *infra*, BMS obtained a patent on a metabolite of one of its drugs that was about to go off patent, and listed that patent in the Orange Book even though it was not eligible for listing because it did not cover the underlying drug or its uses. *Id.* at 456–59.

144 *See, e.g.,* Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1080 (D.C. Cir. 2001) (recognizing that the FDA "has refused to become involved in patent listing disputes, accepting at face value the accuracy of [new drug application] holders' patent

listing patents which do not meet the statutory requirement can be exclusionary conduct with durable, market-wide effects.

Both the courts and the FTC have issued decisions regarding improper Orange Book listings. For example, multiple lawsuits filed by private parties and states, as well as an FTC investigation and consent order, successfully challenged Bristol-Myers Squibb's ("BMS") Orange Book listing of certain patents that supposedly covered the drug buspirone.[145] The various plaintiffs alleged, *inter alia*, that BMS monopolized, or attempted to monopolize, the market for the drug buspirone by fraudulently representing to the FDA that its new patent covered uses of buspirone, when BMS knew that the new patent did not cover such uses, and then using the Orange Book listing to trigger the automatic 30 month stay.[146] Similarly, in *Biovail Corp.*, the FTC alleged that Biovail unlawfully maintained a monopoly through a wrongful Orange Book listing related to the drug Tiazac and a lawsuit against a generic manufacturer that triggered the automatic 30-month stay.[147] The FTC alleged that "[t]he purpose or effect of Biovail's actions was to block . . . manufacturer[s] of generic Tiazac from entering the relevant market and thereby lowering the price consumers pay for the drug."[148] The matter was settled by a consent agreement.[149]

The improper listing of patents with the FDA in order to unlawfully extend the life of a drug patent monopoly fits well within the limiting factors suggested for assessing cheap exclusion cases. First, it gives rise to durable and market-wide anticompetitive effects by government fiat. Second, injured parties have only limited ability to undo the effects of the misconduct because the

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declarations and following their listing instructions").

145 *In re* Buspirone Patent & Antitrust Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002) (denying a motion to dismiss, other than for those acts outside the statute of limitations); *In re* Bristol-Myers Squibb Co., 135 F.T.C. 444 (2003) (alleging that BMS monopolized the markets for three of its drug products: BuSpar (Count 2), Taxol (Count 3), and Platinol (Count 5)).

146 *Buspirone*, 185 F. Supp. 2d at 366; *see also id*. at 373 (applying *Walker Process* principles to BMS's fraudulent representation to the FDA); *id*. at 371 (emphasizing that the FDA's actions were ministerial and did not "reflect any decision as to the validity of the representations," in finding that BMS's conduct was not sheltered by *Noerr-Pennington* principles).

147 *In re* Biovail Corp., 134 F.T.C. 407 (2002) (complaint at para. 55) (alleging that Biovail's listing of a second patent for 'Tiazac' was improper because it did not cover the FDA-approved Tiazac but rather Biovail's revised, and unapproved, form of the product, which was not eligible for listing).

148 *Id.* at para. 48.

149 *In re.* Biovail Corp., 134 F.T.C. 407, 421 (2002) (decision and order).

FDA views its role of listing patents as merely ministerial and the effects flow automatically.[150] Finally, a private damage suit for recovery of lost generic profits would not necessarily vindicate the public interest in competition. Indeed, the profit lost by generic producers is unlikely to correlate well with the harm experienced by consumers, whose injury derives from the absence of price reductions that flow from generic competition.

V. THE NATURE OF THE INQUIRY

As discussed in an accompanying working paper,[151] absent any conduct-specific safe harbors or analytical formats, the rule of reason provides an appropriate framework for analysis of single-firm conduct. Under the rule of reason, the plaintiff must first show an adverse effect on competition. The burden then shifts to the defendant to present a non-pretextual business justification for its conduct. If the defendant meets its burden, the plaintiff must either rebut the business justification on the merits, or show that the anticompetitive effects, on balance, outweigh the procompetitive benefit.[152]

The rule of reason works particularly well in assessing cheap exclusion because efficiencies are limited or non-existent, making any balancing relatively easy. For example, in its *Microsoft* opinion, the D.C. Circuit stated that "Unsurprisingly, Microsoft offers no procompetitive explanation for its campaign to deceive [Java] developers."[153] Moreover, the lack of efficiencies suggests that the risk of chilling procompetitive activity by pursuing misleading or deceptive conduct and abuses of government processes is less than with most other forms of exclusionary conduct.[154]

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150 *See* Mylan Pharms., Inc. v. Thompson, 268 F.3d 1323, 1329–33 (Fed. Cir. 2001) (holding that generic manufacturers do not have the right to bring declaratory judgment actions to challenge Orange Book listings). As of late 2003, a defendant in a patent infringement suit can bring a counterclaim requesting deletion of the patent from the Orange Book, *see* 21 U.S.C. § 355(c)(3)(D)(ii) (2005), but an independent declaratory judgment action still is not allowed except under a very narrow set of circumstances. *See* 21 U.S.C. § 355(c)(3)(D)(i) (2005).

151 Karen L. Grimm, *General Standards for Exclusionary Conduct*, FTC Staff Working Paper (2008), *available at* http://www.ftc.gov/os/sectiontwohearings/docs/section2generalstandards.pdf.

152 United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001). *See generally* Grimm, *supra* note 151, at 1-3, 13-20 (discussing *Microsoft* and the rule-of-reason framework).

153 *Microsoft*, 253 F.3d at 77.

154 *But cf. supra* at Section II.D (noting that even in cheap exclusion contexts, some concern over discouraging procompetitive conduct persists).

Before reaching these issues, however, the plaintiff would have to demonstrate anticompetitive effects. Previous discussion has highlighted the distinction between harming competitors and harming competition. This is especially important in assessing cheap exclusion, where the ubiquitous nature of contract disputes and claims of misrepresentation makes it essential to closely confine antitrust intervention to settings with significant effects on competition.

The anticompetitive effects inquiry requires careful attention to the causal effect of the challenged conduct, *i.e.*, the need to show that the misrepresentation or other conduct was likely to contribute significantly to the acquisition or maintenance of durable monopoly power.[155] Indeed, several factors relevant to overcoming the *de minimis* presumptions that have been urged by commentators and adopted by a number of courts reflect a concern with causation.[156] For example, considerations of whether misrepresentations are clearly material, made to firms without knowledge of the subject matter, and likely to induce reasonable reliance, all go to establishing a causal link between the conduct and the effect on competition. Similarly, the fact that a practice is not readily susceptible of neutralization by rivals contributes to its causal effect.[157] Attention to whether a misrepresentation was continued for prolonged periods may provide insights into both causal effect and durability of any ensuing monopoly power. These and other factors relating to causation in a given setting all contribute to any conclusion that cheap exclusionary conduct is adequately linked to the acquisition or maintenance of monopoly power.

VI. CONCLUSION

Under appropriate circumstances cheap exclusion can and should be actionable under section 2 of the Sherman Act. Although this conduct often might be challenged under other theories, such as fraud, breach of contract, or business torts, antitrust intervention sometimes may be needed to fully protect the competitive process and consumers. Application of limiting principles to confine antitrust review to appropriate contexts is important. The consensus among most panelists was that antitrust intervention should focus on areas where the likelihood of harm to competition, not just competitors, is greatest. Thus, enforcement efforts are likely to continue

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155 *See Microsoft*, 253 F.3d at 78–79; 3 AREEDA & HOVENKAMP, *supra* note 22, ¶¶ 650c at 92–93, 651g at 124. *But see* Rambus Inc. v. Federal Trade Commission, 522 F.3d 456, 463–67 (D.C. C ir. 2008), *petition for cert. filed*, 77 U.S.L.W. 3346 (U.S. Nov. 24, 2008) (No. 08-694) (requiring a more definitive causal link—a demonstration that but for the deceptive conduct the SSO necessarily would have chosen a different technology).

156 *See supra* notes 57 and 85 and accompanying text.

157 *See* Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, 323 F.3d 366, 372 (6th Cir. 2003) ("There can be no harm to competition, such as the exclusion of competitors, when the victims of false advertising are easily able to counter it.").

to be most effective in settings involving, or similar to, industry-wide standard-setting or the misuse of governmental entities, rather than deceptive advertising or public disparagement of rivals. Clarity of the misconduct, intent, and inadequacy of remedies under other laws are additional, important factors. Finally, in many cheap exclusion contexts, concern with chilling procompetitive behavior is significantly reduced because the relevant conduct is rarely efficient or procompetitive. This eases application of the rule of reason, provided that both harm to competition and causation have been adequately established.