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CHEAP EXCLUSION: ROLE AND LIMITS

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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

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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

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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

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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).

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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.

[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

[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

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.

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

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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).

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

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

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.*

[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.,

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).

[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.

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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,

[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.

[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

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

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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).

[129] Complaint para. 14, *In re* Negotiated Data Solutions LLC, No. C-4234 (F.T.C. Sept. 22, 2008), *available at*

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).

[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]

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

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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.