VIEWPOINT:

Do We Need More Certainty In Section 2 Policy And Law?: Presentation Before The Federal Trade Commission/Department Of Justice Hearings On Single Firm Conduct

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An eCCP Publication

March 2007

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By

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March 7, 2007

Let me begin with a point about my perspective. I have been practicing antitrust law for about 1/3 of the time that the antitrust laws have existed – a slightly depressing thought, but true none the less. No one has ever confused me with a scholar; I can't cite footnotes in cases and I have been known to even get confused about the precise holding from time to time. I don't write law review articles, I write commentaries – a less taxing discipline but more enjoyable. So on this distinguished panel of academics and scholars, I am the lonely practicing lawyer (I have always viewed Tom Krattenmaker as an academic because of the quality of his intellectual output, regardless of his particular home at the moment). So I have approached this panel discussion in that light, focusing not on the theory but on the practice.

Such success as I have had in my career to date is primarily the result of the fact that (luckily for me) the jurisprudence, and for that matter the economics, in antitrust almost always take a back seat to the facts. Antitrust law (at least in the US, where it really is law enforcement and not regulation) is mostly about the facts, and how the facts are presented. This is true whether it is before an agency or before a judge, and it is especially true when it is before a jury. Of course, the case law is important, and bad case law is certainly not desirable. And it is a good thing to have competent and intelligent people running the antitrust agencies. But overriding everything else in importance in antitrust is the critical importance of the unique facts at play in every single matter.

During my time in practice, we have moved steadily away from antitrust by slogan to careful analysis of the facts. Remember Derek Bok's call for more certainty and clear rules in Section 7 cases? While that had some resonance for some time, that concept was seriously injured by Bill Baxter's Merger Guidelines, and then finally killed by the 1992 edition of the Merger Guidelines by Jim Rill and Charles James. When the analysis is focused on competitive effects, and not market shares or concentration, the notion of broadly applicable bright lines disappears. Today there are virtually no clear rules in merger matters; all facts are in play, and while the outcome needs to comport generally with the stated case law and regulatory guidance, the key word there is "generally." And while it may not be so obvious, I submit this is equally true in Sherman Act Section 2 ("Section 2") matters. We have come a long way from *American Tobacco,*[1]

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[1] *U.S. v. American Tobacco,* 221 U.S. 106 (1911).

or *Alcoa,*[2] or even *Grinnell,*[3] which was decided just 4 years before I graduated from law school. And with some obvious exceptions like *Aspen Skiing*[4] and *Kodak,*[5] the general direction of Supreme Court Section 2 decisions over my practicing lifetime has been to cabin in the reach of Section 2 by focusing on the facts– a sharp contrast to the rather populist rhetoric about market dominance and relative size that seemed to dominate Section 2 jurisprudence in earlier times. Of course, a good deal of this reflects the maturation of markets – the fact that most markets today are truly contestable, which was not always the case. But whatever the reason, there are few clear rules in Section 2 today.

This is generally a good thing, but it inevitably carries with it uncertainty of outcomes in particular cases. I noticed that the Microsoft representative in an earlier hearing took the common business position of urging that there be more clarity in the law. This is perhaps understandable given that company's recent history, but it is a common business position – just tell me the rules and I will follow them. I have always thought that was a relatively short-sighted position by business. More clarity will not always (or even generally) mean better law, and in this area of law it will almost inevitably mean more restrictive rules than are justified by the facts, and probably long term adverse economic effects. It would make the advisory job easier, but probably is not in the long term public interest or in the long run interest of business generally. But unfortunately, in many areas businesses today are driven to concentrate on the short run, and don't have much incentive to take the long view.

Given this context, hearings like this, trying to take the long view of any important area of law, are a good idea. More discussion will produce more understanding of the critical role of facts, and will also demonstrate – as these hearings clearly have – that there are a great many views on Section 2 jurisprudence and policy. This may be more true today than ever before; there are still strong populist supporters of more aggressive Section 2 enforcement, and plenty of conservative, let-the-market-work advocates of minimal Section 2 enforcement, but now we have an incredible variety of economists and law professors and others who articulate an amazing range of possible approaches to the identification and analysis of monopoly power. Tom Krattenmaker and his colleague Steve Salop are responsible for the single most visible such effort with their "raising rivals' costs" article in the Yale Law Journal,[6] but the list of other ideas and economic theories (game theory, *et al.*) is long and growing every year. Some of those imaginative approaches have been discussed by their originators or proponents in earlier iterations of these hearings.

So there is no end to new options for Section 2 approaches, but there is also no obvious consensus on any particular approach, with the possible exception of

[2] *U.S. v. Aluminum Co. of America* (ALCOA), 148 F.2d 416 (2d Cir. 1945).
[3] Data General Corp. v. Grumman Systems Support Co., 36 F.3d 1147 (1st Cir. 1994)
[4] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).
[5] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).
[6] Steven C. Salop & Thomas Krattenmaker, *Antitrust Analysis of Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L. J. 209 (1986).

concentrating on the facts. It is very hard to imagine how we could productively create clear rules or safe harbors for Section 2, using market shares or otherwise, given the complete absence of consensus on where those lines should be drawn, and the truism that markets are demonstrably better at identifying and responding to consumer demand than either courts or regulators. The chances of finding consensus bright lines that really do advance the public interest may be pretty low, but the discussion can nonetheless be worthwhile, and I commend the FTC and DOJ for sponsoring these hearings.

Any legal discipline that is as intensely driven by facts as antitrust is will inevitably be messy and unpredictable. Facts are highly variable, of course, and their perception and analysis by humans even more so. And there is the additional problem that courts and regulators – even thoughtful ones that take the time to listen to and reflect on many points of view – necessarily are better at looking backwards than they are at seeing the future, and thus too often focused on fixing yesterday's problems without any real insight into how it will affect tomorrow. Because of this, in general, we should want to leave as much as possible to the markets, intervening only when we are highly confident that the intervention will make things better. I have previously placed myself strongly in this "do no harm" school of antitrust, and described those who would tend to be more interventionist as the "we can help" school of antitrust, more confident than I about their ability, or a court's ability, to improve market performance and outcomes. The "do no harm" school has clearly been in ascendancy in recent years, both at the federal agencies and in the Supreme Court. This certainly does not mean that it would not be great if these hearings could produce such clear consensus that we can feel comfortable in drawing more bright lines, like the *per se* rule against price fixing, or the "below cost" requirement for finding predatory pricing, to help. My reading of the results to date does not leave me with the impression that such consensus has been found.

This is not necessarily a bad thing. One of the most important – maybe the most important – reason the antitrust laws continue to serve us so well after more than a century is that they are astoundingly flexible. Congress frequently passes statutes that, in effect, buck the problem to the courts or some regulatory agency, but rarely does that approach succeed so well as it has here. The Rule of Reason is, in fact, a pretty accurate description of how the antitrust laws really work: courts and regulators (generally) try to figure out what is reasonable under the circumstances, with a strong bias most of the time (we can excuse the Robinson-Patman Act as an outlier) toward leaving markets free to work their magic. So long as this is the legal regime under Section 2, a consequence will be uncertainty about how a particular case will get decided, or a particular fact pattern analyzed. This uncertainty has costs, of course, including most importantly the inadvertent deterrence of pro-competitive behavior, but I suspect the costs are far lower than the result of either bright line rules that miss the mark or impractical tests that would over-deter because of ambiguity. For all these reasons, trying too hard to fashion universal liability rules, or even to come at it the other way with market share safe harbors, is, in my view, not likely to be successful.

Fortunately, we do not really need any such new rules, since the status quo under Section 2 is just fine – which is not to say that regular tweaks are not useful, especially from the Supreme Court. This is particularly useful if the Supreme Court has a relatively modest view of the proper scope of Section 2, as this one seems to have. A statute like the Sherman Act benefits greatly from regular attention by the Supreme Court, lest we have the thousand flowers blooming problem that we have seen at various times in our history when the Supreme Court basically went AWOL on antitrust. Of course, the Supreme Court gets it wrong sometimes too, but in the last half-century or so, and especially in the last couple of decades, its batting average has been pretty good. This has been, in part, the result of very effective *amicus* briefs from the federal antitrust agencies.

Of course, there are still plenty of examples of misguided court opinions – *LePage's*[7] is a good recent example. But some mistakes are inevitable given the size of the economy and thus the opportunity for errors, the flexibility of the statute, the complexity of factual circumstances, and the significant variation in lawyering skills – all of which combine to produce occasional errors. The losing parties in these matters quite reasonably are not happy with a statutory and judicial scheme that allows these mistakes. But taking the long and broad view, most cases seem to be getting decided according to the Goldilocks rule – just about right. There is no systemic problem in Section 2 jurisprudence.

Nevertheless, if we could come up with workable rules, it would probably be useful to have limits on Section 2 enforcement. If we can avoid errors without real costs, we should do so. Because the statute, by its literal terms, could reach practically any unilateral behavior, and because much of the behavior that could (and has been) challenged under Section 2 can often be pro-competitive, it would be nice to be sure that we have a real monopolist (or would-be monopolist) on the radar screen and a real, durable competitive problem resulting from the conduct at issue, before we fired the Section 2 cannon.

Unfortunately, market share safe harbors are not likely to do the trick (particularly if an important objective is to enable people to counsel effectively in advance). Market definition is art, not science, and businesses (or even their skilled antitrust advisers) are hard-pressed to comfortably predict how relevant markets will be defined by agencies or courts in the future. Nor are there other apparent useful alternatives. The better course is for the antitrust agencies to continue to help develop the most appropriate case law (and participating where appropriate as *amici*) by insisting that Section 2 be applied only to conduct that (a) makes a significant contribution to the acquisition or maintenance of monopoly power for a significant period of time; and (b) has net anticompetitive effects far outweighing the likely benefits for customers and consumers.

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[7] LePage's v. 3M, 324 F.3d 141 (3d Cir. 2002).

Contemporary Section 2 Law and Policy

I said earlier that Section 2 jurisprudence today generally met the Goldilocks test. Let's look at some specifics. The generally accepted articulation for Section 2 liability is sound: possession of monopoly power coupled with exclusionary conduct likely to contribute to the maintenance or acquisition of monopoly power with little or no benefit for consumers or customers (or in Bork's formulation, excludes on some basis other than efficiency). This is essentially a hybrid of *Grinnell* and Areeda's Treatise. And although the D.C. Circuit in *Microsoft*[8] observed that "[t]he challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts which reduce social welfare and competitive acts which increase it," the real challenge is applying the general rule just stated to specific facts and recognizing when specific types of conduct merit a more specific rule (*e.g.,* sham litigation, *Walker Process*, product design, disparagement). So how have the courts done in applying this fairly broad language?

Unilateral refusals to deal.

The law involving unilateral refusals to deal has, until recently, been the poster child for how Section 2 can be anticompetitive, unpredictable and irrelevant – all at the same time. The Supreme Court went from *Colgate*,[9] to *Kodak I*[10] (1927), to *Lorain Journal*,[11] to *Otter Tail*,[12] to *Aspen*, to *Trinko*.[13] But in the wake of *Trinko*, it is hard to believe there are very many -- if any -- cases where even the most dominant firm would be required to begin dealing with competitors to create competition against itself. That is true whether one characterizes the conduct as a refusal to deal or the denial of an essential facility. And while *Aspen* technically survived *Trinko,*it is not at all clear that even the termination of preexisting relationships between dominant and lesser firms will now give rise to a viable Section 2 claim, given the dicta in *Trinko* on the potential collusive consequences of compulsory dealing with competitors. It has never been clear to me why a change in conduct should be treated so differently than an ordinary refusal to deal. This area was a mess for a long time, but is today in pretty good shape, thanks to the Supreme Court's recent resurgence of interest in antitrust.

Predatory Pricing.

This area has been the model for how Section 2 can and should be limited to unilateral behavior that is both extreme and at least threatens real competitive harm. The test under *Brooke Group*[14] is pretty close to perfect for the very narrow range of conduct that it would proscribe: it is economically sound (based on the intuition that firms do not price below their own costs for an extended period of time absent an intent to exclude rivals); it is largely administrable by businesses and courts (though, as always, there are

[8] U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001).
[9] United States v. Colgate & Co., 250 U.S. 300 (1919).
[10] Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927).
[11] Lorain Journal Co. v. United States, 342 U.S. 143 (1951).
[12] Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).
[13] Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).
[14] Brook Group, Ltd. v. Brown & Williamson Toboacco Corp., 509 U.S. 209 (1993).

ambiguities at the margin – what counts as a variable vs. fixed cost? Is the appropriate measure of cost variable or average total?); and by incorporating a recoupment requirement, it further reduces the likelihood of strike suits by opportunistic plaintiffs. The Supreme Court's recent extension of *Brooke Group* to predatory buying claims in *Weyerhauser*[15] makes both economic and legal sense.

Bundling or Packaging.

A good example of an area that is still a bit of a mess is the law of bundling after *LePage's*. Earlier decisions, particularly that of Judge Lew Kaplan (an antitrust lawyer in his previous life) in *Ortho v. Abbott*,[16] assumed that bundling could be anticompetitive but generally analyzed it through the lens of the Areeda-Turner test (adapted to the multi-product context by Ordover with the compensatory pricing test). This is not ideal; unlike single product predatory pricing cases, the focus with this approach is on whether the defendant's bundled price is below the cost of the single-product rival and the price of the unbundled product, which means that a defendant could fail the test without acting in bad faith or pricing below its own costs, and there is little latitude for qualitative or competitive justifications, such as buyer requests or satisfaction, though that certainly should be part of any actual Section 2 trial. *LePage's,* on the other hand, erred much too far in the opposite direction, with an inappropriate focus on intent (which properly is no longer very relevant in Section 2 cases) and a complete disregard for any quantitative analysis at all. The result is a decision that, if broadly applied, would punish bundling even when it could be pro-competitive and even when an equally efficient single-product competitor could have lowered its price to meet the value of the bundle. The recommendation to the Supreme Court not to grant *certiorari* in *LePage's* was unfortunate, since it means that we will probably have a few more years of muddled decisions until the Supreme Court gets a case that allows it to clean up this area, although in fact the lower courts are not doing too badly so far in minimizing the reach of *LePage's.*

Exclusive Dealing/Loyalty Discounts.

The bundling cases raise several different issues relating to what are often described as vertical restraints – tying and exclusive dealing. As a general proposition, the agencies (even when under the direction of the "we can help" school of antitrust) have moved towards challenging this conduct only in the context of Section 2. That follows from the presumption that exclusive dealing and tying undertaken by any firm without monopoly or near-monopoly power is more likely to be pro-competitive than anticompetitive. Even when a monopolist engages in exclusive dealing and tying, however, there may be efficiency benefits and justifications, and Section 2 law generally incorporates these into the analysis.

For example, many exclusive dealing contracts are the result of bidding wars between a larger and smaller firm, and may reflect nothing more than price competition

[15] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. __(2007).
[16] Ortho Diagnostic Sys., Inc. v. Abbott Lab., Inc., 920 F. Supp. 455 (S.D.N.Y. 1996)

that would otherwise be lawful under *Brooke Group*. Similarly, some pricing schemes rewarding buyers for greater shares of purchases from a dominant firm have been challenged as unlawful loyalty discounts under Section 2 (or cliff pricing, as in *Microsoft* I). But even if you try to use the prism of predatory pricing law here, an analysis that tries to calculate what price the smaller firm would have to charge in order to match a dominant firm's superior offer based on higher levels of purchases risks missing the point – the goal here is not letting the smaller firm in but whether the larger firm is doing something unjustified. Offering discounts in order to maintain sales, at least above your costs, should not be subject to ambiguous legality based on how that will or may affect your smaller rivals. So there is some muddy case law out there on this point, but the existing legal framework, if applied properly, will eventually clear it up.

Tying.

Tying is another area that still requires some cleanup. The Supreme Court's long overdue elimination of the presumption of market power from patents in *Independent Ink*[17] was balanced, unfortunately, by its unwillingness to reformulate tying doctrine more broadly. *Per se* illegality remains a doctrinal possibility and most courts still do not permit defendants to offer justifications for their ties, notwithstanding the fact that Section 2 jurisprudence generally permits legitimate business justifications. Absent Supreme Court intervention, we will continue to see silly distinctions drawn by appellate courts to avoid application of the *per se* rule (such as when the Federal Circuit decided recently in *Philips*[18] that patent-to-patent tying should never be *per se* illegal because it is inherently different than product-to-product tying). And given the willingness of most courts to infer ties from circumstances where coercion is less than important – *e.g.*, package offers too good to refuse – the potential for bad tying law to deter or punish pro-competitive behavior is more than a theoretical concern. Judge Easterbrook's recent decision in *Schor v. Abbott Labs.*[19] is a welcome opinion that counters this trend, affirming the dismissal of tying allegations involving two different Abbott products used to treat HIV. Because Abbott continued to offer both products separately (though one was more expensive when purchased separately), the court refused to find that Abbott had tied its products or otherwise unlawfully excluded competition simply by offering a more attractive package price.

This latter issue – when is a tie a tie? – is increasingly important in a high-tech economy where firms face multiple decisions about product design and integration. Take the simplest imaginable question in high-tech industries directly from the Abbott case discussed above. Assume that Abbott chose to offer its separate products only as a single, combined therapy. As a product design decision, this decision would merit significant deference from the agencies and courts, but plaintiffs might challenge something that would otherwise be viewed as a new product as a tie. These, of course, are not new theories – think about the IBM cases in the 1970s and even the Windows/Explorer case against Microsoft. They are potentially dangerous cases under Section 2. Product design

[17] Illinois Tool Works, Inc. v. Independent Ink, Inc., 126 S.Ct. 1281 (2006),
[18] Phillips v. AWH Corp., 415 F.3d 1303 (Fed. Cir. 2005).
[19] Schor v. Abbott Labs., 457 F.3d 608 (7th Cir. 2006).

decisions should ordinarily be given great deference under Section 2, but because some courts will continue to analyze some product designs as ties, bad tying law can ultimately affect the process of product design and integration. Antitrust and the institutions responsible for enforcing Section 2 are extraordinarily ill-equipped to get involved in product design decisions. And because it is predictable that a remedy that will not unduly interfere in the product design process will be extremely hard to devise, this should lead to very cautious application of Section 2 to product integration issues.

The danger of overreaching Section 2 enforcement in this context becomes even worse when what are really unilateral refusals to deal are challenged as ties. Let's assume that a competitor continues to offer two products separately, but each works best with the other as a result of a firm's decision to make them seamlessly interoperable. A refusal to take affirmative steps to enable other firms to obtain compatibility may give rise to tying claims, even though there would be little or no potential for a successful refusal to license claim.

Deceptive Conduct.

One of the more aggressive parts of federal enforcement over the past few years has been in the area of allegedly deceptive conduct, whether it occurs in the context of Orange Book filings or standard-setting. As a general matter, if the agencies are able to show that *Noerr-Pennington* should not apply, I have no problems with cases if other elements of monopolization are shown. But simply ignoring antitrust immunities, as some have suggested that the agencies should with respect to Citizens Petitions in the FDA context, would be an unwarranted and unwise expansion of Section 2 enforcement. So, too, would be any attempt to use Section 5 of the FTC Act to pursue cases involving unilateral conduct where other elements of a Section 2 cannot be met. That has been suggested in some recent speeches and Commissioner Leibowitz's concurrence in *Rambus*.[20] I need not remind people of how long it took the FTC to recover from cases like *Official Airline Guides* and *Ethyl*.[21] It would be a mistake to go down this road again.

Rambus and other recent cases raise a interesting doctrinal question under Section 2 of the Sherman Act – where a monopoly is inevitable, should antitrust law play a role in policing how it is obtained? A district court recently concluded in *Broadcom v. Qualcomm*[22] that it does not matter. Thus, if a defendant would have been a monopolist in the absence of the conduct at issue, or if the absence of the conduct would have resulted only in a different firm holding the monopoly, antitrust law would remain indifferent. This is perhaps one area where courts have recently gone too far in the direction of under-enforcement – the fact that monopoly is inevitable does not mean that the identity of the monopolist or the means of obtaining it are irrelevant as a matter of competition policy, nor that they should be irrelevant under antitrust law. That does not

[20] In the Matter of Rambus, Inc., Docket No. 9302, Concurring Opinion of Commissioner Jon Leibowitz, August 2, 2006.
[21] In the Matter of Ethyl Corp., File No. 971 0004, Docket No. C-3814.
[22] Broadcom Corp. v. Qualcomm Inc., No. 05-3350 (MLC), 2006 U.S. Dist. LEXIS 62090 (D.N.J. Aug. 31, 2006)

necessarily mean that Section 2 should be applied without regard to these other factors, but it does illustrate that courts can occasionally become a little too mechanistic in their interpretation of the Sherman Act – in both directions.

Monopoly Power or Market Share Safe Harbors Are Not Practical

As we can see from this short catalogue of Section 2 theories, most courts have not embraced universal tests for specific claims. Though far from perfect, the various Section 2 tests reflect both judicial precedent and growing recognition over time that some conduct should be analyzed more leniently under Section 2 than other conduct. The general problem in the absence of a universal test is a lack of predictability, but even if we could devise some universal test, it would not likely produce clear answers, at least not if the tests were properly formulated. As with the Rule of Reason and modern merger law, the flexibility of a more open-ended Section 2 inquiry is far preferable to doctrinaire *per se* rules – both because predictability under *per se* rules is less than many might imagine (think about price-setting within joint ventures before *Dagher*[23]) and because a focus on facts and context will usually enable courts and agencies to arrive at better answers.

Of course, it would be wonderful if we could devise a rule that permitted no Section 2 case to proceed unless there was a very high likelihood that the defendant had (or was likely to obtain as a result of the conduct) durable monopoly power. But I don't know what criteria we could use that would be workable. Market share is the most obvious candidate, but probably not very useful in most cases, since market definition is generally not intuitively obvious. And if defining markets is hard, recognizing true and durable monopoly power is even harder. There are just too many factors relating to the assessment of market or monopoly power for share-based safe harbors to be meaningful. Debates over how to measure monopoly power – market share, margins, direct price effects, residual demand, etc. – have been going on for years and will continue for the foreseeable future. So the possibility of coming up with workable and effective safe harbors in this intensely factual area seem low to me.

That does not mean that there are not interesting and important questions about monopoly power in Section 2 cases, with significant and meaningful controversy about appropriate legal rules and evidentiary burdens. For example, how much must the conduct in question contribute to the acquisition of monopoly power for there to be a Section 2 violation? What if the defendant would have a monopoly in any event? What about attempted monopolization cases where the defendant is already a monopolist – should antitrust law pursue conduct by a monopolist designed to maintain monopoly power where such conduct eventually fails? These are questions more for the agencies to consider when deciding whether to pursue enforcement actions, not issues that lend themselves to broader principles or guidelines. As a general proposition, however, as Tim Bresnahan discussed in an earlier session, far more attention should be paid by all to what

[23] Texaco, Inc. v. Dagher, 547 U.S.__ (2006).

would have happened in the absence of the conduct at issue – the notorious but-for world – which can illuminate questions of both liability and remedy.

Concluding Thoughts

There is a difference between Section 1 and Section 2 law, and for a very good reason. Section 1 deals only with *joint* conduct; while there are many times when joint conduct is neutral or pro-competitive, there are very real and obvious competitive risks from cartel or similar behavior. In this circumstance, it is tolerable for there to be some potentially overreaching penumbra of illegality, although with cases like *Dagher* even this is gradually receding. But Section 2 is aimed mostly at unilateral conduct, and over-enforcement here threatens the very essence of competition. We want firms to try to be monopolists; the more risky that effort is, the less aggressively firms will pursue that goal.

Leegin[24] is a good illustration of how a rule in this area can be harmful. The *per se* rule against RPM, which notwithstanding the fantasy of agreement can be and frequently is unilateral behavior, was one of those slogan, not analysis, rules. There is no question that RPM can be pro-competitive, and that real anticompetitive stories are harder to tell than one would expect. But the rule is still there, 96 years after it was proclaimed. So we now have a manufacturer of women's accessories, clearly not anywhere close to being a monopolist, forbidden to decide that its most productive competitive strategy is to deal only with retailers who price its products at a certain level consistent with what the manufacturer believes is the product image it is trying to advance. Of course, almost any market share or monopoly power screen would deal with the Brighton's of the world, and perhaps there would be some value in ensuring that obvious non-monopolists are not forced to defend their marketing decisions. (Of course, to help Brighton, we need to eliminate the *per se* rule that prevents any analysis in these cases.) But the danger of a relatively low market share screen is that it may make it more difficult for those who exceed the threshold to avoid inappropriate challenges and burdens. The simple fact is that real monopolists with durable monopoly power are quite rare. How many can you name? Do we really want to continue the extremely costly (both in absolute terms and in over-deterrence of aggressive competitive behavior) process of searching for the occasional valid claim when the result is a distortion of market behavior by the 99+% of commercial entities that do not have durable monopoly power?

Section 2 cases should be hard to bring and harder to win. Successful cases should be rare, because true monopolists with durable monopoly power are rare. If we could devise rules or guidelines to accomplish this result, that would be great. But we probably can't, and so we should just let the market, in this case the market for judicial decisions, create and enforce the rules. The result, in the long run, will be just fine.

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[24] Leegin Creative Leather Products, Inc. v. PSKS, Inc., Docket No. 06-480 (currently pending before the U.S. Supreme Court).