Towards a Consistent Antitrust Policy for Unilateral Conduct

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The recent Department of Justice Report[1] and a Federal Trade Commission Statement[2] articulate sharply divergent approaches to antitrust policy for unilateral conduct. The point of this article is that those approaches can, with modifications, be reconciled. To some, that may seem like suggesting reconciliation between a lit match and a stick of dynamite. But, as we will see, if the outer edges of the two approaches are smoothed, some reasonable reconciliation—or at least a coherent compromise—is possible. And it is entirely clear that some agency consensus is essential to convey a strong and unified message to the public and the courts, emphasizing the importance of unilateral conduct enforcement.

The agencies would enhance enforcement by adopting an approach: (1) that rejects the DOJ's default "disproportionality" test and replaces it with the rule of reason analysis urged by the FTC; and (2) that accepts the DOJ's notion of appropriate "safe harbors" to provide guidance to businesses on what they can do, safely, without risking antitrust liability. By adopting an approach embracing these two propositions, the agencies can commence the process of prodding the courts and other stakeholders into understanding that aggressive unilateral conduct antitrust enforcement is important to our national economy, and that enforcement can be productive without any undue chilling effect on the ability of companies to compete effectively in the marketplace.

Monopolization Matters

Some of the recent critiques of Section 2 enforcement question whether unilateral conduct ever really harms consumers.[3] The doubts raised by these commentators appear to have had some significant impact, especially in the Supreme Court.[4] But are the criticisms valid? The view here is that they are not.

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[1] U.S. Dep't of Justice, Competition & Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf [DOJ Report].

[2] Statement of Commissioners Harbour, Leibowitz & Rosch on the Issuance of the Section 2 Report by the Department of Justice (Fed. Trade Comm'n Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf (FTC Statement). FTC Chairman William E. Kovacic did not join in the FTC Statement and wrote separately. Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf. The FTC has released four staff working papers that helped inform the analysis. They are available at http://ftc.gov/os/sectiontwohearings/index.shtm.

[3] *E.g.*, Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 Colum. Bus. L. Rev. 345, 345–48.

[4] *E.g.*, Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The opportunity to charge monopoly prices . . . induces risk taking that produces innovation and economic growth.").

History tells us that unchecked monopoly power can endure for many years—far longer than almost any cartel—and can inflict substantial economic harm. Examples include the Pullman sleeper car monopoly, secured and maintained through exclusive dealing, which lasted from the 1870s through the 1950s; United Shoe's monopoly of shoe-making machinery, also maintained through exclusive dealing, which lasted from the early 1900s through the 1960s; the Motion Picture Patents Company, whose tying arrangements cartelized the motion picture industry for several decades and continue to affect the industry's structure even today; AT&T's refusals to interconnect, which monopolized long distance service and slowed innovation for many years; and Microsoft's control of PC operating systems, enhanced by a number of practices, starting with its per processor (exclusive dealing) license, which has distorted competition in many software markets for almost twenty years.[5] In each of these (and many other) instances, more timely antitrust intervention would have lowered prices to millions of consumers and spurred far greater levels of output and innovation.

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Unilateral conduct antitrust enforcement is a priority of the highest order. The calls for judicial repeal (or radical curtailment) of Section 2, however effective they may seem to be now, are unfortunate and short-sighted.

The Agency Statements

The DOJ Report takes a stance not far from the laissez-faire approach to single-firm conduct set forth in the writings of critics like Judge Frank Easterbrook. Although the Report agrees with the majority of current commentators that there is no general single test for evaluating unilateral conduct, it adopts as its baseline or default analysis a "disproportionality test," under which conduct violates Section 2 only where "its likely anticompetitive harms substantially outweigh its likely procompetitive benefits."[6] The Report's rationale for tipping the scales in a defendant's favor is that the dangers of false positives outweigh the dangers of false negatives and that the alternative approach of applying the traditional rule of reason is too "burdensome" and "open-ended."[7]

The FTC Statement agrees that there is no appropriate single "test" for evaluating unilateral conduct issues, and it also agrees that a default test is appropriate. But the Statement differs vigorously on what that test should be. The FTC Statement's proposed default standard is the traditional rule of reason as applied in the Section 2 context in such cases as *Microsoft*.[8] As the Statement points out, "The existing rule of reason standard already poses a significant hurdle to liability, unless care is taken to ensure that a Section 2 plaintiff does not bear a prohibitively high burden of proof."[9]

The agencies also differ on the treatment to be accorded to specific types of conduct. In summary, the DOJ Report urges safe harbors for most all practices, some of which amount to rules of

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5 *See, e.g.*, United States v. Pullman Co., 50 F. Supp. 123 (E.D. Pa. 1943); Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917); United Shoe Mach. Corp. v. United States, 347 U.S. 521 (1954); MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam); *see generally* Jonathan M. Jacobson, Challenges to Dominant Firm Exclusionary Conduct, Speech Before the Conference Board 2007 Antitrust Conference: Tying—Antitrust Law and Policy (Mar. 2007), *available at* http://wsgr.com/publications/pdfsearch/jacobson0307.pdf; Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 779 & n.1 (2006).

6 DOJ REPORT, *supra* note 1, at 45.

7 *See id.* at 45-47.

8 United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

9 FTC Statement, *supra* note 2, at 5.

de facto per se legality. The FTC Statement appears to reject any safe harbors, relying instead on the rule of reason as the decision guide for all practices.

A Middle Ground

Any articulation of a consistent enforcement policy for unilateral conduct will require a consensus on the treatment of specific practices and agreement on a default test for illegality where specific decision rules do not apply. Both should be possible.

An Appropriate Default Test. The key disagreement between the agencies' approaches is with respect to the default test of illegality. The DOJ applies a "disproportionality standard," under which conduct is prohibited only when the anticompetitive effects outweigh any procompetitive benefits by a very substantial margin. The FTC Statement, in contrast, relies on the basic rule of reason, under which the plaintiff need demonstrate only that the net effect of the challenged practice is anticompetitive. But, notwithstanding that divergence, the distance between the two approaches is not quite as vast as it might seem.

First, both approaches reject the various alternative "no economic sense" and "profit sacrifice" tests that some commentators have proposed.[10] Second, both statements embrace a standard that asks the same basic question; that is, whether the conduct at issue produces adverse effects on competition that outweigh any beneficial effects. Indeed, the two standards are effectively the same with one major exception: under the rule of reason standard, the plaintiff need show only that there is, on balance, an adverse effect on competition while, under the disproportionality test, the plaintiff must show that the anticompetitive effects "substantially" outweigh the asserted procompetitive benefits.

The only question, then, is whether to apply a standard that is purposefully tipped in favor of the defendant or one that asks whether the net effect on competition is adverse. And it seems apparent that the standard rule of reason approach is preferable. There are several reasons:

- Monopoly power can cause great harm to the national economy through higher prices, lower output, reduced choice, and stunted innovation. The premise underlying the disproportionality test is that monopoly is not really harmful. That premise is unsupported and, in any event, contrary to the fundamental purposes underlying Section 2.
- The risk of harmful false positives is ephemeral. The DOJ Report cites no example of a harmful false positive over the entire 118-year history of Section 2, and none comes to mind. Reasonable observers can differ over the correctness of the outcomes in particular cases, but there is simply no reason to believe that false positives are any more prevalent than false negatives. The available evidence suggests, on the contrary, that false negatives significantly outnumber false positives.[11]

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[10] *See* Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006) (profit sacrifice test); *cf.* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003) (efficiency standard). For a critique, see Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antirust Rules*, 73 ANTITRUST L.J. 435 (2006).

[11] *See* William F. Adkinson, Jr. et al., *Enforcement of Section 2 of the Sherman Act: Theory and Practice*, App. at 5–6 (Fed. Trade Comm'n Working Paper, Nov. 3, 2008), *available at* http://ftc.gov/os/sectiontwohearings/docs/section2overview.pdf (reporting on an FTC staff survey of Section 2 opinions from 2000 through 2007; 539 cases were reviewed, with 344 involving a judicial resolution of the claim(s); "[o]f these, 335 cases [97.4%] were decided for defendants and nine [2.6%] were decided for plaintiffs"); *see also* Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, ANTITRUST, Fall 2007, at 21, 22 (asking whether "false negatives [are] becoming the problem that false positives once were").

- The risk of false positives due to the uncertainty of balancing under the rule of reason is ephemeral as well. Substantially all applications of the rule of reason involve no balancing. Cases typically are resolved either by a failure of the plaintiff to demonstrate harm to competition or by a failure of the defendant to demonstrate a cognizable justification.[12] Instances where there is a genuine need to balance are exceedingly rare and cannot provide a reasoned basis for systematically favoring the monopolist.
- The rule of reason is not too complex. It is the standard of analysis applied in Section 1 cases every day and mirrors closely the analysis of mergers under Section 7 of the Clayton Act. Moreover, the asserted complexity is not a basis for differentiating the rule of reason from the disproportionality test. The two tests are the same—with the only difference being the burden of proof imposed on the challenger.
- In applying the rule of reason, the burden of proof already rests with the plaintiff. Sustaining that burden is difficult enough without the overcompensation the disproportionality test is designed to achieve. For many, the rule of reason has been associated over the years with the idea that "the defendant always wins." That indeed was the common reaction to the original articulation of the rule of reason in *Standard Oil*,[13] leading to the enactment of the Clayton Act in an effort to restore the balance. Tipping the scales even further is just not necessary.
- Finally, the imposition of a heightened burden on the plaintiff makes no sense as an antitrust enforcement policy. The agencies have ample prosecutorial discretion as to what cases should, or should not, be brought. It makes little sense to add to their burden once they get to court by heightening the showing they are required to make.

The standard rule of reason is a test designed to reach the correct outcome in every case. The disproportionality test, in contrast, is a test that inevitably will be wrong in many close cases and that will prove wrong in some that are, in fact, not that close. On this aspect of the divergence between the agencies, the FTC Statement's view is clearly the better one.[14]

Safe Harbors Generally. The agencies' disagreement is not limited to the default standard. The agencies disagree on the treatment of specific practices as well. The core dispute is that the DOJ believes that various safe harbors are appropriate so that businesses can have some certainty as to the practices that will not be subject to legitimate challenge under the antitrust laws. The FTC Statement, in contrast, would apply the rule of reason in all cases, apparently without any safe harbors.[15]

On the broad question of whether safe harbors are appropriate, the DOJ has the better of the argument. While one can legitimately object to several of the specific safe harbors the DOJ advances, there is surely a high value to be placed on relative certainty. Advising businesses on antitrust compliance is difficult, but competition is enhanced when firms are given leeway to engage in conduct that poses little or no threat to competition.

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[12] *See, e.g.*, *Microsoft*, 253 F.3d at 58–59.

[13] Standard Oil Co. v. United States, 221 U.S. 1 (1911).

[14] *See also* Jacobson & Sher, *supra* note 5, at 799–801; Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006).

[15] However, the FTC Statement does acknowledge that the Supreme Court has adopted safe harbors relating to predatory pricing and bidding due to "the unique threat to consumer welfare that otherwise might result from challenges to low prices." FTC Statement, *supra* note 2, at 4–5 & n.16 (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226–27 (1993)).

The classic argument in favor of safe harbors was made by Justice Brandeis, then a practicing lawyer, in the hearings leading to the enactment of the Clayton Act:

> I have been asked many times as regard to particular practices or agreements as to whether they were legal or illegal under the Sherman law. One [group of] gentlemen said to me, "we do not know where we can go." To which I replied, "I think your lawyers or anyone else can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go to that precipice without falling over, because you may stumble on a loose stone, you may slip and go over; but anybody can tell you where you can walk perfectly safe within convenient distance of that precipice." The difficulty which men have felt generally in regard to the Sherman law has been that they have wanted to go the limit rather than that they have wanted to go safely.[16]

As Brandeis suggested, it is of great practical importance to know which types of activities are "perfectly safe."

Specific Practices. Notwithstanding the desirability of safe harbors in principle, the FTC commissioners have reason to object to some of the safe harbors the DOJ has offered. It is useful to address each of the practices in turn.

Predatory Pricing. Price predation is the practice of charging unduly low prices to eliminate or weaken competition so as to enhance the defendant's market power once the competition has been removed. The courts since the mid-1970s have recognized that predatory pricing is one area in which defendants should be given ample leeway because price cutting is the essence of competition and distinguishing predation from intense competition can be extremely difficult.[17] Most courts have therefore limited pricing challenges to instances where the defendant's prices are below a measure of incremental cost, typically average variable cost.[18]

The DOJ Report articulates a standard of permitting prices in excess of "average avoidable cost."[19] The FTC Statement criticizes this standard as too lenient, but does not propose a specific alternative.[20] In this instance, the DOJ's standard appears to be one that is more plaintiff-oriented than the standard applied by the courts, and seems specifically designed to overturn the outcome in *United States v. AMR Corp.*[21] There, the DOJ's challenge to American Airlines' efforts to exclude low-cost carriers from various city-pair routes was rejected because the company's prices were not below average variable cost. The DOJ argued in *AMR* that a traditional application of the average variable cost standard was unsound on the facts presented and that a more accurate assessment of competitive impact would entail considering at least some portion of the profits American lost on other routes when it shifted capacity to the competitive routes in issue. The DOJ Report's "avoidable cost" standard would include at least some portion of the opportunity costs the Tenth Circuit declined to consider in *AMR*. Given that the courts have already installed a safe harbor for price predation that is even broader than that suggested by the DOJ, this is one area where the FTC commissioners might beneficially yield to the narrower safe harbor advocated in the DOJ Report.

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16 *Hearings on S. Res. No. 98*, Sen. Comm. on Interstate Commerce, 62d Cong., 1st Sess. 1161 (1911) (statement of Louis Brandeis).

17 *See* ABA Section Of Antitrust Law, Antitrust Law Developments 272–88 (6th ed. 2007) [hereinafter Antitrust Law Developments]; *see generally* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

18 *See* Antitrust Law Developments, *supra* note 17, at 274–81.

19 DOJ Report, *supra* note 1, at 65–67.

20 *See* FTC Statement, *supra* note 2, at 6.

21 335 F.3d 1109 (10th Cir. 2003).

Exclusive Dealing. Exclusive dealing arrangements—pursuant to which a customer or supplier agrees to deal exclusively with the defendant on the product in question—have long been a subject of antitrust interest. The courts routinely analyze exclusive dealing under a general rule of reason analysis.[22] The DOJ would permit exclusive dealing where the foreclosure is 30 percent of the market or less and otherwise apply the disproportionality test. The FTC Statement would apply the rule of reason with no safe harbor. As a practical matter, the DOJ safe harbor is reasonable. No case has been decided in a plaintiff's favor in over twenty years involving foreclosure of less than 30 percent. [23] If cases involving foreclosure levels lower than 30 percent are so likely to fail anyway, some safe harbor again seems desirable. If 30 percent is too high, the agencies can select another number, such as 25 percent, or perhaps as low as 20 percent.

Loyalty Discounts. Loyalty (or "market share") discounts are agreements in which the seller conditions a discount on the buyer's agreement to purchase a stated percentage of its requirements from the seller. Some such discounts, called "first dollar" discounts, may provide especially strong inducements—in some instances, outright coercion—because they apply not only to the contested volume but to all of the customer's purchases, enhancing a loss if the percentage commitment is not fulfilled. The DOJ Report suggests that further research on this subject would be useful but, in the meantime, urges a "standard predatory pricing test," even to "first dollar" loyalty discounts. The FTC Statement, in contrast, would treat these arrangements as exclusive dealing and apply a standard rule of reason. On these arrangements, the FTC Statement seems correct. The issue with loyalty discounts is not the price level, as is the case with predatory pricing; the issue is the conditioning of the discount on partial or complete exclusivity. Exclusive dealing analysis is therefore appropriate.[24] Applying that analysis, the same 20–30 percent foreclosure safe harbor for exclusive dealing seems equally applicable.

Bundling. Bundled discounts are arrangements under which the seller of two (or more) products offers buyers a discount if they take both (or more) of the products offered. A variety of approaches to this practice have been proposed, ranging from the Third Circuit's ruling in *LePage's*, which appeared to base liability solely on the adverse effect on rivals,[25] to a virtual rule of per se legality under which the bundled pricing would be lawful unless it were shown that the price for all the products was below the average variable cost of the full product line.[26]

One alternative approach urged by a number of commentators involves application of an "attributed cost" safe harbor. Under this approach, the sum of the discounts on all the bundled products is deducted from the cost of the single product on which the defendant faces competition from its single-product rival. If the defendant's price on the competitive product remains above cost on that basis, the safe harbor applies and the conduct is lawful without further analysis. Variants of this test have been proposed by the Antitrust Modernization Commission and

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22 *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327–29, 333–35 (1961); United States v. Dentsply Int'l, Inc., 399 F.3d 181, 193–94 (3d Cir. 2005); *see generally* Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311 (2002).

23 *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 17, at 217.

24 *See* Jacobson, *supra* note 22, at 338–40. In fact, an argument can be made for a harsher standard because traditional exclusive dealing agreements are almost always associated with some efficiencies; loyalty discounts, in contrast, are typically accompanied by no efficiencies.

25 *See* LePage's Inc. v. 3M, 324 F.3d 141, 154–57 (3d Cir. 2003) (en banc).

26 *E.g.*, Timothy J. Muris, *Exclusionary Behavior & Bundled Discounts*, Submitted on Behalf of the United States Telecom Ass'n (Nov. 29, 2006) (advocating *Brooke Group* test applied to revenues and costs for the total package).

adopted by the Ninth Circuit in the *PeaceHealth* case.[27] The DOJ Report agrees with an application of the attributed cost safe harbor; for bundling outside the safe harbor, the DOJ would apply its disproportionality test. The FTC Statement, again, urges application of the standard rule of reason.

Although there can be complexities in determining the appropriate costs to consider, especially for products with extremely low marginal costs, such as pharmaceuticals or software,[28] the attributed cost standard has gained a broad range of adherents.[29] If costs are calculated properly, this standard stands as an appropriate safe harbor. For conduct falling outside the safe harbor, however, the disproportionality test remains inappropriate as the default standard. If the defendant's prices are below attributed cost (and thus outside the safe harbor), it should still be the plaintiff's burden to demonstrate that the effect of the bundling on competition is adverse. But there is no reason to elevate that burden to the level the disproportionality standard would impose.

Unilateral Refusals to Deal. As the Supreme Court has said, "'[B]oycotts are not a unitary phenomenon.'"[30] The types of practices that can be characterized as "refusals to deal" are indeed far too numerous to mention. One broad set involves refusals to deal, except on condition, with customers or suppliers. In this category, refusals to deal except on condition that the customer award some or all of its business on another product are best viewed as tying; and refusals to deal unless all or a large portion of the customer's business is provided are best viewed as exclusive dealing.[31] Another broad set consists of refusals to deal with rivals. Some of these refusals to deal, like AT&T's refusals to connect with competing long distance carriers, represent the use of monopoly power in one market to attempt to monopolize another. Others, as in *Aspen*, fall into the less common category of refusals to deal with a rival in the same market.[32]

The DOJ Report suggests virtual per se legality for all refusals to deal with rivals. The FTC Statement urges a standard based on the *Colgate* case, allowing refusals to deal except where the defendant's "purpose [is] to create or maintain a monopoly."[33] A reasoned reconciliation of these views would apply a rule of reason approach to attempts to monopolize an adjacent market. Efforts to extend monopoly from one market to another based on means other than competition on the merits in the adjacent product market warrant no special protection. For the unusual case of a refusal to deal with a rival in the same market, some variant of Professor Einer Elhauge's efficiency test could be applied.[34] If there is no efficiency justification for a refusal to deal such that

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27 *See* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 906–09 (9th Cir. 2008); ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 99–100 (2007), *available at* http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

28 *See* Meijer, Inc. v. Abbott Labs., 544 F. Supp. 2d 995, 1000–05 & n.7 (N.D. Cal. 2008). In cases involving such products as pharmaceuticals or software, it is important to choose a measure that encompasses at least some research and development costs. *See* Einer Elhauge, *Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Cost and Market Power*, 112 YALE L.J. 681, 703–26 (2003) ("defin[ing] 'costs' as whatever measure of costs would prevent an incumbent pricing at cost from inflicting losses on an equally efficient entrant or rival"); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239, 2250 (2000) (long run incremental costs).

29 *See* Jonathan M. Jacobson, *Exploring the Antitrust Modernization Commission's Proposed Test for Bundled Pricing*, ANTITRUST, Summer 2007, at 23, 25 & n.21 (citing sources).

30 St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 543 (1978) (citation omitted).

31 *See* Kenneth L. Glazer, *Concerted Refusals to Deal Under Section 1 of the Sherman Act*, 70 ANTITRUST L.J. 1 (2002).

32 *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

33 United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

34 *See* Elhauge, *supra* note 10.

Moving the courts in the direction of supporting unilateral conduct enforcement may be difficult under any circumstances. But it will be especially difficult if the agencies remain so distantly at odds on fundamental principles.

the only effect is the impairment of rivals, and the refusal contributes significantly to the maintenance of monopoly power, condemnation seems appropriate.

Other Practices. The DOJ does not specifically address other types of conduct. The FTC Statement is critical of the DOJ in that respect. This is understandable given the FTC's recent focus on varieties of cheap and deceptive conduct—practices that may create or enhance market power at little cost and with few, if any, accompanying efficiencies. The FTC rightly has devoted significant resources to these practices.[35] Application of a standard rule of reason approach to the various types of "cheap exclusion" seems appropriate.

Convincing the Courts

As the *Trinko* decision suggests, the Supreme Court has moved away from the long-held view that the Sherman Act is "the Magna Carta of free enterprise."[36] Today, several of the Court's opinions suggest an almost overt hostility to antitrust. In this environment, it is especially critical that both of our federal antitrust agencies act to bring the judicial system back to its historical role as a place where the antitrust laws will be enforced and competition allowed to flourish.

The Supreme Court respects the views of antitrust policy articulated by the Solicitor General, and the circuit courts respect the views of the agencies when they appear as amici curiae. If the agencies can speak with a unified voice, their pro-enforcement positions will carry more weight. Moving the courts in the direction of supporting unilateral conduct enforcement may be difficult under any circumstances. But it will be especially difficult if the agencies remain so distantly at odds on fundamental principles. ●

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35 *See* FTC Statement, *supra* note 2, at 10 & n.53 (citing Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005)). One example is gaming the standard-setting process.

36 United States v. Topco Assocs., 405 U.S. 596, 610 (1972). The *Trinko* Court, in fact, quoted this passage, but only in stressing that the Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition." Verizon Commc'ns, Inc. v. Law Offices of Curtis v. Trinko, LLP, 504 U.S. 398, 415–16 (2004).