DEPARTMENT OF JUSTICE

The Gales of Creative Destruction: The Need for Clear and Objective Standards for Enforcing Section 2 of the Sherman Act

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Opening Remarks for the
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Hearings Regarding Section 2 of the Sherman Act
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Introductory Remarks for the Section 2 Hearings

On behalf of the Antitrust Division, I thank the Chairman of the Federal Trade Commission, Debbie Majoras, Commissioners Pamela Jones Harbour, Jon Leibowitz, Bill Kovacic, and Thomas Rosch, and all Federal Trade Commission staff helping to sponsor these hearings. Not only are they gracious hosts, but, in the process of developing these hearings, they have already shared productive insights regarding many difficult issues surrounding the treatment of unilateral conduct under the antitrust laws. The Federal Trade Commission and the Antitrust Division share a common goal of protecting competition and promoting consumer welfare, and these hearings will help both agencies better fulfill that mission.

I also want to thank Professor Herbert Hovenkamp and Professor Dennis Carlton for joining Chairman Majoras and me at this opening session and providing their insights and perspectives in this critical area of antitrust enforcement.

Finally, I also thank the Antitrust Division staff who have helped and will continue to help organize what promises to be fruitful discussion about unilateral conduct throughout the remainder of the year.

My remarks today will address why the Antitrust Division is co-sponsoring hearings on unilateral conduct and also touch on some of the more difficult issues facing the Antitrust Division, the courts, the antitrust bar, and the business community.

Why is the Antitrust Division co-sponsoring hearings about unilateral conduct?

The Antitrust Division is co-sponsoring these hearings to help advance our own thinking about unilateral conduct and better inform our judgment about when it is appropriate for the United States to bring enforcement actions under Section 2 of the Sherman Act. Antitrust experts continue to advance the understanding of the different ways that firms unilaterally can—and cannot—harm competition. The Antitrust Division tries to incorporate the latest scholarship and economic thinking into its enforcement decisions, and these hearings will help us meet that goal by providing a forum for experts to review the literature, the business practices, and the law and to speak directly to each other and to us. A number of prominent practitioners and economists have committed to participate in these hearings, and the Antitrust Division is grateful to them for agreeing to share their insights. We are also seeking the views of the business community, consumer groups, and business historians. Those views are significant to our understanding of the real-world implications of various business practices and their potential impact on competition. Improving the legal system helps us all, and I commend those who contribute through either written submissions or panel participation for rendering a valuable public service.

A second reason for these hearings is to advance the development of the law, particularly by articulating points of consensus. Developing the law—or, more accurately, influencing the development of the law—in ways that help competition is an important goal for the Antitrust Division. Courts routinely rely on the Antitrust Division's views when construing the antitrust laws.

That reliance benefits us all. For example, one of the Antitrust Division's greatest achievements is the merger guidelines, for which great credit goes to former Assistant Attorneys General Don Turner, for the first merger guidelines in 1968, and Bill Baxter for his highly influential 1982 formulation. These merger guidelines and their subsequent iterations have increased transparency regarding merger-enforcement policy and improved merger-enforcement practice. But they have also had a profound effect on the rational development of merger law. Today, courts, commentators, and practitioners ground merger analysis within the sound framework of the merger guidelines.

Other Antitrust Division policy statements, particularly those where the Federal Trade Commission and the Antitrust Division speak together, have also had significant influence. Indeed, the Supreme Court and courts from each judicial circuit have relied on Antitrust Division enforcement policy when construing the antitrust laws.[1] I hope that these hearings and the report that the Federal Trade Commission and the Antitrust Division intend to publish together after they conclude will be helpful to courts when they are called upon to review unilateral conduct. Similarly, I hope the hearings generate helpful guidance for businesses seeking to comport with antitrust law's obligations.

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[1] *E.g.*, *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 126 S. Ct. 1281, 1292 (2006); *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1364 (Fed. Cir. 2004), *rev'd on other grounds*, 126 S. Ct. 980 (2006); *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1155 (9th Cir. 2003); *Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 71 (1st Cir. 2002); *SBC Commc'ns Inc. v. FCC*, 56 F.3d 1484, 1493-94 (D.C. Cir. 1995); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 & n.8 (10th Cir. 1994); *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1223 (11th Cir. 1991); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *Allis-Chalmers Mfg. Co. v. White Consol. Indus., Inc.*, 414 F.2d 506, 524 (3d Cir. 1969); *Natsource LLC v. GFI Group, Inc.*, 332 F. Supp. 2d 626, 636 (S.D.N.Y. 2004); *Cmty. Publishers, Inc. v. Donrey Corp.*, 892 F. Supp. 1146, 1153 n.6 (W.D. Ark. 1995); *Drs. Steuer & Latham, P.A. v. Nat'l Med. Enters., Inc.*, 672 F. Supp. 1489, 1510 n.17 (D.S.C. 1987).

It is also worth noting that Federal Trade Commission and Antitrust Division policy affects not just antitrust law here in the United States but also antitrust law around the world. Many countries have adopted competition laws, and they often draw upon the antitrust traditions of the United States when both promulgating and construing their own laws. By demonstrating areas of consensus and framing open questions in a manner that focuses on consumer welfare, these hearings will provide a valuable resource for countries looking to develop sound antitrust laws of their own—and help all countries converge on procompetitive principles even in those areas where there is not yet a consensus.

Finally, as I will shortly discuss in more detail, the Supreme Court's recent decision in *Trinko*[2] and request for the views of the United States in *Weyerhaeuser*[3] indicate the Court's renewed interest in unilateral-conduct issues and make these hearings particularly timely.

Substantive Comments

Now for some substantive observations. The Supreme Court rendered its first significant decision construing Section 2 of the Sherman Act 96 years ago. In *Standard Oil*, the Court identified three "evils which led to the public outcry against monopolies" and, ultimately, to Section 2 of the Sherman Act: first, the power "to fix the price and thereby injure the public"; second, the power "of enabling a limitation on production"; and

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2 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398 (2004).

3 *Weyerhaeuser Co. v. Ross-Simmons Harwood Lumber Co.*, No. 05-381 (U.S. Nov. 28, 2005).

third, the "danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production."[4]

Those same concerns—price increases, output reductions, and quality deterioration—are still crucial to our thinking about monopoly. Conduct that does no more than permit price increases and output reductions unambiguously hurts competition and consumers. To illustrate that harm, economics provides the helpful visual of the deadweight loss triangle that is familiar to all students of antitrust.[5]

But the effects of monopoly with respect to product development and innovation are less clear. Considerable tension between two ideas exists. On one hand, monopoly has the potential to inhibit competitive zeal. As Nobel laureate John Hicks noted over 70 years ago:

> It seems not at all unlikely that people in monopolistic positions . . . are likely to exploit their advantage much more by not bothering to get very near the position of maximum profit, than by straining themselves to get very close to it. The best of all monopoly profits is a quiet life.[6]

In other words, new products and cost reductions that would help consumers may come either late or not at all as a result of monopoly's potential to inhibit competitive fervor.

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4 *Standard Oil Co. v. United States*, 221 U.S. 1, 52 (1911).

5 *See, e.g.*, Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 91 (4th ed. 2005).

6 J.R. Hicks, *Annual Survey of Economic Theory: The Theory of Monopoly*, 3 ECONOMETRICA 1, 8 (1935).

But there is another side to monopoly. The potential to obtain monopoly profits serves as an important incentive to create better products for consumers. As the Supreme Court has observed:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth.[7]

That feature of monopoly is in accord with Harvard economist Joseph Schumpeter's observation that high profits serve as "baits that lure capital on to untried trails," thereby producing a "perennial gale of creative destruction" resulting in better ways to satisfy our needs and desires.[8] The existence of firms with large market shares does not necessarily or even typically reflect competitive harm—to the contrary, firms typically obtain large market shares by offering products that consumers prefer over other firms' offerings.

The Supreme Court raised the right issues about monopoly a century ago in *Standard Oil*. Now it behooves us to ask how the antitrust community has done creating appropriate standards for assessing unilateral conduct. Two of antitrust's most distinguished scholars examined that question last year and gave somewhat disheartening answers. Judge Posner offered that antitrust policy toward "unilateral abuses of market

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7 *Trinko*, 540 U.S. at 407.

8 Joseph A. Schumpeter, CAPITALISM, SOCIALISM AND DEMOCRACY 90, 87 (Harper Perennial 1976) (1942).

power" is "the biggest *substantive* issue facing antitrust,"[9] and Professor Hovenkamp—who will likely reiterate it today—concluded that "[n]otwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined."[10]

R.W. Grant provided a lighthearted critique of these problems in his 1964 verse detailing the rise and fall of Tom Smith and his Incredible Bread Machine. Mr. Smith invented a machine that would bake, slice, and wrap bread for less than a penny. His invention leads him to dominate the bread market—until he is brought down by an antitrust suit. In a poem, the "men in Antitrust" provide Tom the following "simple guidelines" for complying with the antitrust laws:

> You're gouging on your prices if
> You charge more than the rest.
> But it's unfair competition
> If you think you can charge less!
> A second point that we would make
> To help avoid confusion:
> Don't try to charge the same amount!
> That would be collusion.
> You must compete—but not too much
> For, if you do, you see
> Then the market would be yours—
> and that would be monopoly![11]

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9 Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U. CHI. L. REV. 229, 229 (2005) (emphasis in original).

10 Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147, 147-48 (2005).

11 R.W. Grant, TOM SMITH AND HIS INCREDIBLE BREAD MACHINE 32-37 (Competitive Enter. Inst. 1998) (1964).

As you probably discern, these guidelines express the frustration of a successful entrepreneur who does not know how to conform his behavior to the antitrust laws—at least without abandoning his machine that brought cheap bread to millions of the world's hungry.[12]

While things have progressed since 1964, confusion about Section 2 still exists because discerning whether a monopolist's actions have hurt or helped competition can be extremely difficult. Conduct that does no more than enable a monopolist to restrict output and maintain price above the competitive level unambiguously hurts competition and consumers. As former Deputy Assistant Attorney General Douglas Melamed noted in a recent article, these forms of "naked exclusion" are an obvious and easy target.[13] At the other end of the spectrum, conduct that simply reduces a monopolist's own costs is an obvious and easy candidate for a safe harbor. The trouble is knowing when more is at stake and designing sensible rules for those situations where challenged conduct potentially has both beneficial and exclusionary effects.

The Supreme Court's two most recent significant decisions concerning Section 2 of the Sherman Act—*Brooke Group*[14] and *Trinko*—take important steps toward unraveling

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12 *See also, e.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (L. Hand, J.) ("The successful competitor, having been urged to compete, must not be turned upon when he wins.").

13 A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 377 (2006).

14 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

these difficulties. Although the holdings in both are narrow, the reasons for those holdings have significantly broader applicability.

Brooke Group concerned predatory pricing, and the Court's specific holding was that Liggett had not demonstrated that recoupment—an essential element of any predatory pricing claim—was likely.[15] But the steps leading to that conclusion are important in many Section 2 contexts.

One of those steps was the Court's recognition that it is a mistake to reflexively infer harm to competition from harm to a competitor. Even though "volume rebates directed at Liggett's biggest wholesalers" plainly hurt Liggett, the Supreme Court found no harm to competition, correctly noting that a competitor's "painful losses" are "of no moment to the antitrust laws if competition is not injured."[16]

Two other important points are implicit in the Court's recognition of a safe harbor for pricing that is above "an appropriate measure of . . . costs."[17] The first concerns the Court's consideration of the "practical ability of a judicial tribunal" to control the anticompetitive effect of prices above a relevant measure of cost without "chilling legitimate price cutting."[18]

The second, related point is that good antitrust policy sometimes requires recognizing safe harbors that insulate from liability some conduct that might hurt

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15 509 U.S. at 232.

16 *Id.* at 231, 224.

17 *Id.* at 223.

18 *Id.*

competition. A safe harbor that may permit some anticompetitive conduct is appropriate if adopting the safe harbor promotes even greater competitive benefits. In *Brooke Group*, the Court recognized the possibility that above-cost pricing might hurt competition but nonetheless insulated above-cost pricing from liability to avoid the greater harm of a legal regime that would cause firms to hesitate before lowering their prices or not to lower prices at all.[19] Our panelists will consider whether similar safe harbors would be appropriate in other areas of single-firm conduct where firms might hesitate to reduce prices or introduce new products out of fear of antitrust liability.

Trinko is the Supreme Court's most recent decision under Section 2, and it too contains a number of important observations beyond its specific holding. The Court held that Verizon's alleged refusal to provide services to its rivals did not violate Section 2 because, among other things, (1) assessing the challenged conduct posed a risk of "[m]istaken inferences and . . . resulting false condemnations" and (2) a federal court was "unlikely to be an effective day-to-day enforcer of the[] detailed sharing obligations" requested by plaintiff.[20] Although that holding is tied to the specifics of plaintiffs' claims and the requested relief, the policies underlying it again have broad applicability.

First, the Court recognized that the "costs" of "antitrust intervention" must be weighed against its "benefits."[21] The anticompetitive conduct alleged—violations of Verizon's regulatory obligations—was not obviously procompetitive like the low pricing

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19 *Id.* at 223-24.

20 540 U.S. at 414, 415.

21 540 U.S. at 414.

at issue in *Brooke Group*. But the Court nonetheless viewed the "cost of false positives" as a factor favoring dismissal.[22] That underscores the need for robust tests allowing accurate assessments of when challenged conduct does, and does not, hurt competition.

A second element of the *Trinko* holding cutting across many Section 2 areas concerns the issue of remedy. Agreeing with Professor Areeda that "'[n]o court should impose a duty to deal that it cannot explain or adequately and reasonably supervise,'" the Court counted plaintiffs' request for "continuing supervision of a highly detailed decree" as a factor weighing in favor of dismissal.[23] Although the issue of relief was not itself dispositive, the Court's discussion recognizes that not all problems have antitrust solutions.

Another recent Supreme Court development also worth noting is a pending request for review of the Ninth Circuit's *Weyerhaeuser* decision.[24] That case specifically involves the issue of predatory bidding. Although allegations of predatory bidding are infrequent, the decision nonetheless presents important questions regarding Section 2. Specifically, asking a jury whether a firm purchased a scarce resource at a "fair price"[25] is an unsound way to apply the antitrust laws. As the United States and the Federal Trade Commission urged in our brief supporting the request for certiorari, the Supreme Court has the opportunity to make a significant contribution to Section 2 jurisprudence by clarifying that

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22 *Id.*

23 *Id.* at 415 (quoting Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841, 853 (1990)).

24 *Confederated Tribes of Siletz Indians v. Weyerhaeuser Co.*, 411 F.3d 1030 (9th Cir.), *petition for cert. filed*, 74 U.S.L.W. 3213 (U.S. Sept. 23, 2005) (No. 05-381).

25 411 F.3d at 1040 n.30.

simply asking whether a business practice comports with a jury's sense of fairness is not appropriate.

Notwithstanding these recent Supreme Court cases, there are still many areas of uncertainty regarding the implications of single-firm conduct. This is partially because firms constantly try new ways of doing things, and our understanding of new business practices is often dim at first. As Judge Easterbrook observed over twenty years ago, "[t]he gale of creative destruction produces victims before it produces economic theories and proof of what is beneficial."[26] That is why it is important to discuss not only existing business practices but also broad principles that can readily be applied to new developments in the business world.

Our first panel this Thursday will discuss predatory pricing. While *Brooke Group* established important principles for resolving predatory pricing claims—including the need for recoupment—significant questions still remain. There is still debate regarding the appropriate cost measure against which a firm's pricing decisions should be judged. Another important issue for predatory pricing concerns relief, which is a particularly sensitive issue when assessing whether government enforcement is appropriate. Our second panel Thursday will address predatory bidding and offer perspectives on not only *Weyerhaeuser* but predation schemes in general.

Panels later in the year will address a range of issues. In July, a panel will discuss refusals to deal and the fundamental question of whether a competitor should ever be

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[26] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 5 (1984).

compelled to deal with its rivals and, if so, under what circumstances. Relief in such cases again raises difficult questions, such as setting and monitoring the commercial terms of compelled business relationships.

Subsequent panels will explore other types of single-firm conduct where further guidance is needed. Panelists will explore the difficult issues surrounding bundled discounts, market share discounts, or other kinds of loyalty discounts. Two years ago, the United States and the Federal Trade Commission told the Supreme Court in its amicus brief opposing certiorari in *LePage's* that the legal and economic principles governing this complex area warranted further development before it would be ripe for Court review.[27] Since then, commentators have focused significant attention on these practices, and our panelists will consider whether that outpouring has resulted in any areas of agreement. Panelists will address such questions as whether these rebate arrangements are akin to predatory pricing, tying, or exclusive dealing, and also whether consensus exists as to any safe harbors where harm to competition is unlikely.

Tying and exclusive dealing will also be explored in subsequent panels. An important issue in those sessions will be how procompetitive effects can be detected and assessed accurately. Because these practices frequently occur in competitive markets, it is logical to assume that they frequently generate efficiencies. Yet the economic understanding of these efficiencies is not necessarily well-developed, and our panelists will explore whether any consensus exists regarding the scope of the pro- and anti-competitive

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27 Brief for the United States as Amicus Curiae, *3M v. LePage's Inc.*, No. 02-1865, at 8, 19 (S. Ct. filed May 28, 2004).

effects of these common business practices. In addition, both tying and exclusive dealing arrangements can sometimes take the form of unilateral refusals to deal, again raising sensitive remedial issues.

Our final panels at the end of this year will consider issues cutting across specific business practices that apply generally in any Section 2 matter. There are, of course, many issues that arise in nearly all Section 2 matters that remain unsettled and deserve attention. Among these is an issue as basic as defining the elements of a Section 2 claim. We can all agree, I hope, on the general principle of preventing harm to consumer welfare. Translating that general principle into a more operational definition, however, presents challenges. The Supreme Court's most frequently cited recitation of the elements of a Section 2 claim—"(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident"[28]—is widely criticized for providing insufficient guidance to businesses considering whether to undertake a practice that may not fit neatly within prior precedent.

Whether there is a more precise definition that can be used in all Section 2 contexts has generated significant debate. Different tests for determining whether conduct violates Section 2 have been proposed, but none has achieved consensus yet.[29]

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28 *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

29 *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (Section 2 violated when "the anticompetitive harm" of a business practice "outweighs the procompetitive benefit"); III Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 651a (2d ed. 2002) (proposing that a business

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One of those tests—asking whether the conduct at issue makes economic sense but for its tendency to reduce competition—has been used at the Antitrust Division to guide our prosecutorial discretion in a number of recent Section 2 matters. When conduct does not make economic sense but for its tendency to reduce competition, an enforcement action may well be appropriate, depending on, among other things, the magnitude of the competitive harm, the potential of private litigation to remedy the underlying conduct, the importance of the issue to the economy, and the ability of the courts to grant effective relief. When conduct makes economic sense for reasons other than reducing competition, additional, difficult questions arise, including concerns about the potential to chill procompetitive conduct, the potential of significant anticompetitive harm continuing unabated, and the burdens imposed on courts when they are asked to balance procompetitive and anticompetitive effects. We look forward to an open discussion and debate on the benefits and shortcomings of this test, how it could best be applied, and whether this or some other test leads to the best results for competition.

An additional issue that arises in many Section 2 cases is whether Section 2 of the Sherman Act imposes duties that are different from the duties imposed by other provisions of the antitrust laws. A number of the business practices to be discussed during these hearings are also subject to other provisions of the antitrust laws. Tying and exclusive

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practice is exclusionary when it is "reasonably capable of . . . prolonging monopoly power" and "produce[s] harms disproportionate to the resulting benefits"); Richard A. Posner, ANTITRUST LAW 194-95 (2d ed. 2001) (proposing rebuttable presumption that conduct is exclusionary when "likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor").

dealing, for instance, have been challenged under Section 1 of the Sherman Act and Section 3 of the Clayton Act as well as Section 2 of the Sherman Act. One question for panelists to consider, therefore, is whether the analysis of the conduct should differ depending on the statutory context.

These hearings will help us to develop clear and objective standards that will apply in all Section 2 matters. As we commence discussions, let me mention six broad principles that already inform Antitrust Division enforcement policy under Section 2. Informing these principles is, among other things, our desire to be credible stewards of the antitrust laws and worthy of the trust the people of the United States have bestowed on us to enforce the antitrust laws in beneficial ways.

First, individual firms with monopoly power can act anticompetitively and harm consumer welfare, and we should seek to identify and prosecute such conduct.

Second, mere size does not demonstrate harm to competition or a violation of the antitrust laws. The proper focus of antitrust law is on anticompetitive conduct and effect, not just size or market share.

Third, mere injury to a firm does not itself show that competition has suffered. Indeed, a firm’s inability to garner sales may indicate no more than the superiority of its competitors’ products. Put another way, recalling Tom Smith and his Incredible Bread Machine, Tom should not have been penalized for inventing a machine that produced great bread at low cost. The goal of the antitrust laws is to protect competition, not competitors.

Fourth, both consumers and the business community benefit from clear, administrable, and objective rules that both allow businesses to assess the legality of a practice before acting and enable enforcers and courts to judge challenged conduct predictably and correctly. This is particularly true in the context of single-firm conduct. At the back end, unclear rules have the potential to condemn some procompetitive conduct yet condone other conduct that harms competition. That leads to a potentially even more significant problem on the front end. Ambiguous rules or rules depending on the intent of a firm's employees or future unknown events may chill businesses from undertaking procompetitive conduct, such as cutting prices, investing, and innovating, in the first place. Thus, the challenge is to develop clear, objective standards that businesses can follow and are also administrable for enforcers, courts, and juries.

Fifth, Section 2 of the Sherman Act should be construed to avoid chilling procompetitive conduct. As our other speaker today, Professor Carlton, has noted, "[e]fficiencies are hard to measure, and the benefit of the doubt should go to defendants, not to plaintiffs; otherwise, the continued generation of the large efficiency benefits responsible for raising our standard of living will be jeopardized."[30] It is important to remember that every time a firm is kept from engaging in aggressive conduct because it fears an unnecessarily expansive interpretation of the antitrust laws, competition is harmed.

The sixth and final point concerns the importance of remedy. A remedy needs to be effective and administrable by courts and agencies without restricting competition. A remedy that harms competition is worse than no remedy at all.

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30 Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 ANTITRUST L.J. 659, 675 (2001).

To conclude, I want again to thank the Federal Trade Commission, our panelists, and particularly Professors Carlton and Hovenkamp for agreeing to kick-off these hearings. After today's presentations, the hearings will continue Thursday with panel discussions concerning predatory pricing and predatory bidding and then proceed through the remainder of the year. All interested parties are cordially invite to attend. Thank you.