
NOTE

DECEPTION AS AN ANTITRUST VIOLATION

Company *A* and Company *B* compete in the market for drugs that treat a particular disease. Company *A* created the market by inventing Drug *A* and soon realized significant sales. Shortly thereafter, Company *B* entered the market by introducing Drug *B*. Drug *B* was cheaper and had fewer side effects than Drug *A*, and Company *B* claimed that Drug *B*'s therapeutic capability was equal to that of Drug *A*. Not surprisingly, Drug *B* steadily gained a greater share of the market until Company *B* was on the cusp of monopoly and Company *A* was on the cusp of financial ruin.

This story seems like a classic example of competition in the American free enterprise system. The two firms competed on equal terms, and Company *B* won out. Company *B* seemed destined to achieve monopoly because of its “superior skill, foresight and industry”¹: that is, by developing a quality product at a lower price than its competitor did.

There is only one problem: Drug *B* didn't work. Drug *B*'s ability to alleviate the disorder was speculative at best. Yet Company *B* dominated the market by willfully deceiving the Food and Drug Administration (FDA) and subsequently deceiving the patients who bought the drug. Had Company *B*'s customers been aware of the deception, most would have bought Drug *A* instead. Patients who used Drug *B* were at risk of unhealthful outcomes after taking the ineffective drug.

Clearly, Company *B*'s deceptions raise concerns across several legal regimes. The deceptions may constitute common law fraud² and may violate state unfair competition statutes,³ the federal Lanham Act,⁴ and FDA regulations.⁵ But are they an antitrust concern? Do these deceptions constitute exclusionary conduct that forms the basis of an offense for monopolization under section 2 of the Sherman Act?⁶ More generally, does deception cause the kind of anticompetitive harms that the antitrust laws are designed to combat?

¹ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

² See RESTATEMENT (SECOND) OF TORTS § 525 (1977); 3 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 664 (2d ed. 2011).

³ See, e.g., Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. § 501.204 (West 2010); Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.46 (West 2011).

⁴ Lanham Act, ch. 540, § 43(a), 60 Stat. 427, 441 (1946) (codified as amended at 15 U.S.C. § 1125(a) (2006)).

⁵ See, e.g., 21 C.F.R. § 201.56 (2006).

⁶ Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 2 (2006)). This Note uses “Section 1” to refer to section 1 of the Sherman Act and “Section 2” to refer to section 2 of the Sherman Act.

Several courts have found antitrust violations or allowed antitrust claims based on deception,⁷ and even the Supreme Court has suggested that deception can constitute an antitrust violation under certain circumstances.⁸ Professor Maurice Stucke has advocated a standard that would make it relatively easy to classify deception as a monopolization offense, arguing that a *prima facie* violation exists when a court determines after a “quick look” that a monopolist’s deception appears reasonably capable of significantly contributing to monopoly power.⁹ However, a number of scholars and commentators have suggested that deception and other business torts do not generally cause anticompetitive harm and are not within the proper purview of antitrust law. In particular, Professors Phillip Areeda and Herbert Hovenkamp have advocated for a nearly insurmountable presumption against recognizing deception as an antitrust violation,¹⁰ a presumption that many courts have adopted.¹¹ Given these conflicts, the current status of deception in antitrust law is confused and indeterminate.

This Note proposes a framework for determining when courts should consider deception as an antitrust violation, offering a middle ground between Stucke’s approach and Areeda and Hovenkamp’s approach. Part I presents the arguments for and against recognizing deception as an antitrust violation. Deception can cause a myriad of anticompetitive harms to both economic efficiency and consumer welfare, with no countervailing procompetitive justifications. However, much deception does not cause meaningful anticompetitive harm; allowing antitrust claims and their accompanying treble damages too broadly could lead to the proliferation of barely colorable yet costly antitrust litigation, thus overdetering truthful and procompetitive speech.

Part II proposes a framework for determining when to consider deception as an antitrust violation that aims to mediate these competing

⁷ See *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 303 (3d Cir. 2007) (reversing dismissal of a Section 2 claim based on deception of a standard-setting organization); *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001) (finding a violation of Section 2 where Microsoft deceived software developers into developing software that would only work with Microsoft’s operating system); *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 396–97 (3d Cir. 2000) (reversing dismissal of a Section 2 claim based in part on a deceptive marketing campaign disparaging a competitor); *Nat’l Ass’n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 914–17 (2d Cir. 1988) (reversing dismissal of a Section 2 claim based on letters sent to pharmacists disparaging a rival drug company); *Int’l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1257–58 (8th Cir. 1980) (affirming a finding of Section 1 and Section 2 violations based on a deceptive advertising campaign).

⁸ The Supreme Court has held that procuring a patent by fraud can constitute a Section 2 violation. *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965).

⁹ Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?*, 63 SMU L. REV. 1069, 1113 (2010).

¹⁰ See III B PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 782b, at 327 (3d ed. 2008).

¹¹ See sources cited *infra* notes 48–49.

policy concerns. In the context of monopolization, deception would constitute a prima facie antitrust violation when the plaintiff can show that the deception was reasonably capable of contributing significantly to the defendant's monopoly power. However, a defendant would be able to rebut this prima facie case by demonstrating that the deception did not contribute to its monopoly power. Agreements to deceive would constitute violations of Sherman Act section 1 when the plaintiff can demonstrate under the rule of reason that the deception had a significant anticompetitive effect. These tests provide the proper role for antitrust laws in combating deception by isolating the types of deception that cause anticompetitive harm while being stringent enough to reduce false positives and minimize the potential costs.

I. THE COMPETITIVE EFFECTS OF DECEPTION

A. *The Anticompetitive Harms of Deception*

Business deception can take a variety of forms. These forms include, but are not limited to: lying to consumers (either by falsely touting one's product or by falsely disparaging a rival),¹² lying to government regulators,¹³ and lying to other market participants such as developers of complementary products¹⁴ or standard-setting organizations.¹⁵ Under some circumstances, deception can cause a myriad of anticompetitive harms, such as fostering monopoly, raising prices, constricting output, and reducing consumer surplus. This section first considers the harms caused by deception of consumers, both because these harms are somewhat unique and because they have occupied the bulk of scholarly attention on this topic;¹⁶ the Note then turns to consider harms from other, less-remarked-upon forms of deception.

1. *Deception of Consumers.* — First, deception of consumers can lead a deceiver to win sales sufficient to achieve or maintain monopoly power. No one would dispute that a deceiver can win an individual sale by falsely persuading a customer that its product is superior to its rivals' products. If one buyer can be taken in by a deception, there is

¹² See, e.g., *Int'l Travel Arrangers*, 623 F.2d at 1260–65.

¹³ See, e.g., *Walker Process Equip.*, 382 U.S. at 174. When unaccompanied by other forms of deception, the deception of regulators may sometimes escape antitrust liability under the doctrine that attempts to procure government action are immune from antitrust scrutiny. See *United Mine Workers v. Pennington*, 381 U.S. 657, 669–70 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135–38 (1961).

¹⁴ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 76–77 (D.C. Cir. 2001).

¹⁵ See, e.g., *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 303 (3d Cir. 2007).

¹⁶ See, e.g., IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 326 (addressing “deception of buyers”); Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 823 (2010) (addressing “a monopolist’s deceptive advertising or product disparagement”).

no reason that a deceiver could not win a broader portion of the market with a particularly persuasive deception.

Because promulgating falsehoods may be far cheaper than actually developing a superior product, deception can be a particularly efficacious method of gaining sales and excluding rivals.¹⁷ Deception can be especially effective in markets in which quality claims are difficult to verify, such as high-tech industries. Deception by a dominant firm on the cusp of achieving monopoly power — or by a monopolist hoping to maintain its monopoly power — would likely be all the more effective because a large firm would have the resources to promulgate a deception widely and efficiently.

Second, deception of consumers raises rivals' costs by forcing rivals to respond to the deception. Chief Judge Easterbrook has suggested that the free market is capable of correcting the harmful effects of deception because a deceiver's rival can effectively combat the deception by promulgating its own advertisements in "the marketplace of ideas."¹⁸ Yet even if one believed the questionable notion that a rival could always effectively rebut a deceiver's claims, deception would still cause anticompetitive harm because of its tendency to raise rivals' costs in forcing them to respond to a competitor's falsehoods.¹⁹ These costs of responding to deception shift the supply curve for the rival, leading to higher prices and lower output.

Third, deception of consumers impairs rivals' efficiency by depriving them of economies of scale. In most industries, a firm must reach a certain volume of sales — the "minimum efficient scale" — to achieve its highest potential efficiency.²⁰ When a deception steals sales away from a rival, it can deprive that rival of the sales needed to achieve its minimum efficient scale. As a result, the rival will have higher costs that it will pass on to consumers through higher prices.²¹ Because deception furthers monopoly power not by increasing the de-

¹⁷ See Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 281 (2003) ("Lying is cheap in the short run, and can immediately shift buyers away from rivals. The costs of lying are, if anything, likely to come in the long run, when the consumers figure out the lies, which should diminish the reputation of the lying firm in a way that may make consumers more reluctant to buy from it. But by then the anticompetitive exclusion of the rival may have already been achieved."); see also Stucke, *supra* note 16, at 829 ("If product disparagement is ineffectual, why would any firm, much less a monopolist, engage in it? . . . A monopolist would not falsely disparage a rival's products unless its anticipated gains (maintaining or attaining profits) outweigh its costs.")

¹⁸ *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.).

¹⁹ See Stucke, *supra* note 9, at 1073.

²⁰ See Elhauge, *supra* note 17, at 321.

²¹ *Id.*

ceiver's efficiency but by impairing rivals' efficiency, it constitutes exclusionary conduct that is worthy of condemnation.²²

Finally, deception of consumers harms consumer welfare by reducing consumer surplus. When a firm wins a customer through deception, it leads the customer to deviate from the preference he would have otherwise exhibited. In a world of perfect information, a consumer will choose the product that maximizes his consumer surplus: that is, the difference between the consumer's subjective valuation of the product and the product's price.²³ Maximizing consumer surplus is a primary goal of antitrust law.²⁴ Deception can distort the consumer's subjective valuations, leading the consumer to choose a product that actually provides a lower surplus than a rival product does.²⁵

2. *Other Forms of Deception.* — While deception of consumers causes anticompetitive harm by distorting consumer choice, other forms of deception cause anticompetitive harm by distorting the competitive process. For example, deception of a standard-setting organization can lead the organization to set standards unfavorable to rival products, which tends to exclude rivals or raise rivals' costs, thereby reducing output and raising prices.²⁶ Similarly, deception of developers of complementary products can lead those developers to make products that work only with the deceiver's product and not with rivals' products, thus advancing the deceiver's monopoly power.²⁷ Deceiving a regulator can produce regulations that disfavor rivals (much like deception of a standard-setting organization) or that directly grant the deceiver monopoly power.²⁸ These deceptions all distort the competitive process to favor the deceiver and/or to disfavor its rivals.

3. *Lack of Procompetitive Justification.* — While deception can cause anticompetitive harm, it has no redeeming value or procompetitive justifications.²⁹ That deception lacks procompetitive

²² See *id.* at 256 (“Exclusionary conduct should be illegal if it would further monopoly power by impairing the efficiency of rivals even if the defendant did not successfully enhance its own efficiency.”).

²³ RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 9.3, at 279 (6th ed. 2003).

²⁴ See Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 HARV. L. REV. 397, 436 (2009).

²⁵ See Stucke, *supra* note 16, at 824 (noting that deception “leav[es] consumers who purchased the wrong or inferior product worse off”).

²⁶ See Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 ANTITRUST L.J. 1, 51–55 (1997); *cf.* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) (noting that “the product standards set by such [standard-setting] associations have a serious potential for anticompetitive harm”).

²⁷ See *United States v. Microsoft Corp.*, 253 F.3d 34, 76–78 (D.C. Cir. 2001).

²⁸ See *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965).

²⁹ IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 326 (“There is no redeeming virtue in deception . . .”); Elhauge, *supra* note 17, at 281 (“Such deceptive conduct [of falsely disparaging rival products] by a monopolist to enhance or maintain its monopoly power is patently un-

value is relevant to two areas of antitrust doctrine. The first regards agreements in restraint of trade under Section 1.³⁰ Many categories of business agreements are evaluated under the “rule of reason,” which broadly considers an agreement’s potential procompetitive and anti-competitive effects in judging whether it constitutes an unreasonable restraint of trade.³¹ Agreements to deceive cannot be saved by procompetitive effects in rule of reason analysis because no such effects exist. Second, courts will only find an offense of monopolization under Section 2 if the defendant committed some sort of wrongful conduct;³² in contrast, courts excuse and even applaud the attainment of monopoly power through “a superior product” or “business acumen.”³³ Even if a plaintiff demonstrates an anticompetitive effect of the defendant’s conduct, “the monopolist may proffer a ‘procompetitive justification’ for its conduct.”³⁴ Because deception has no redeeming virtues, no such justifications will be available.

4. *A Hypothetical Example.* — To make the anticompetitive effects of deception more concrete, consider a hypothetical example. Suppose that in a highly concentrated market for cell phone service, a leading company runs a series of prominent television commercials that falsely state that a rival’s network has poor reception.³⁵ In actu-

desirable . . .”); Stucke, *supra* note 16, at 825 (“Deception lacks any redeeming economic qualities or cognizable efficiency justifications.”).

³⁰ See 15 U.S.C. § 1 (2006) (“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”).

³¹ See *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007); *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

³² See PHILLIP AREEDA, LOUIS KAPLOW & AARON EDLIN, *ANTITRUST ANALYSIS* ¶ 302, at 368 (6th ed. 2004) (“At this point in time, courts and commentators are in uncommon accord that monopolization entails something more than monopoly. Monopolization requires exclusionary conduct.”); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* § 6.3, at 296 (4th ed. 1994) (“Today illegal monopolization still requires monopoly power *plus* some form of anticompetitive conduct.”).

³³ *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (“The successful competitor, having been urged to compete, must not be turned upon when he wins.”).

³⁴ *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001).

³⁵ Of course, this example is not far from reality. Verizon recently ran a prominent ad campaign disparaging AT&T’s cellular network. See, e.g., *Verizon vs. AT&T — “There’s a Map for That” Commercial*, YOUTUBE, <http://www.youtube.com/watch?v=VZPjJIok7Bk> (uploaded Oct. 7, 2009) (using a map of the United States with most of the country uncovered to illustrate AT&T’s “spotty 3G coverage”). AT&T contended that these advertisements were “blatantly false and misleading.” *AT&T Sets the Record Straight on Verizon Ads*, AT&T, <http://www.att.com/gen/press-room?pid=14002> (last visited Jan. 29, 2012). Although this Note will use Verizon’s advertisements and AT&T’s response as an example, it does not suggest that Verizon’s claims were actually deceptive. AT&T dropped a lawsuit against Verizon for misleading advertising after a judge refused to grant an order forcing Verizon to cease the advertisements. See Marguerite Reardon, *AT&T Gives Up on Verizon Ad Lawsuit*, CNET (Dec. 2, 2009, 9:26 AM), http://news.cnet.com/8301-1035_3-10407717-94.html.

ality, the two companies' networks are of equal quality, and they charge the same price for service. In a market with accurate information, the companies would be expected to achieve equal market share at a competitive price. However, if these commercials prove persuasive, then rational consumers will believe that the deceiver offers better-quality service at the same price and thus will prefer the deceiver's phone service. The deceiver could thereby win significant market share at its rival's expense. The added market share gained from the deception could result in the acquisition of monopoly power, particularly if the deceiver already had a large market share before the deception.

Numerous other anticompetitive harms could result as well. The deception could harm the rival's efficiency in two ways. First, the rival would need to respond to the deceptive advertising campaign by launching an expensive advertising campaign of its own, defending the quality of its cellular network.³⁶ Second, the deceiver's sales won through deception could deprive the rival of economies of scale, which are especially important in the cell phone industry given the high fixed costs of building and maintaining a network.

Finally, the deception could reduce consumer surplus. Suppose that consumers value a network with clear reception at \$60 per month and a network with spotty reception at \$40 per month. Both the rival and the deceiver have clear networks, and the competition between them drives the price down to their marginal cost of \$50 per month. Thus, each buyer receives a consumer surplus of \$10 per month. However, if the deceiver persuades consumers that its rival's network is spotty, consumers will no longer be willing to pay \$50 for the rival's service. With weakened competition, the deceiver will be able to raise its prices to the full consumer valuation of \$60, thus depriving consumers of the surplus they would have enjoyed in a world without deception.

B. The Case Against Deception as an Antitrust Violation

Despite these potential harms, many leading antitrust scholars have argued that deception and other business torts are never or almost never proper concerns for antitrust scrutiny.³⁷ The crux of these schol-

³⁶ AT&T responded to Verizon's advertisements with a series of ads defending its network, including one advertisement featuring actor Luke Wilson. *Postcards*, YOUTUBE, <http://www.youtube.com/watch?v=toihCyoTjzo&> (uploaded Dec. 2, 2009) (claiming to "set the record straight" that AT&T's network "covers ninety-seven percent of all Americans" and displaying postcards from cities covered by AT&T's network).

³⁷ See IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 327 ("[T]he courts would be wise to regard misrepresentations as presumptively *de minimis* for § 2 purposes."); HOVENKAMP, *supra* note 32, § 7.13, at 366 ("[M]ost business torts have only a *de minimis* effect or no effect at all on competition."); RICHARD A. POSNER, *ANTITRUST LAW* 195 (2d ed. 2001) (noting that

ars' arguments is that while deception may harm individual consumers or competitors, it does not generally cause the kind of anticompetitive harm with which antitrust law concerns itself.³⁸ According to an oft-repeated maxim from the Supreme Court, the goal of antitrust law is "the protection of *competition*, not *competitors*."³⁹ Thus, the Supreme Court has declared that the antitrust laws "do not create a federal law of unfair competition or 'purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.'"⁴⁰ Most scholars believe that the animating purpose of the antitrust laws is to promote either consumer welfare⁴¹ or overall economic efficiency;⁴² many scholars, particularly in the influential Chicago School, thus stress that practices that curtail output and raise prices are the primary concern of antitrust law.⁴³

In a leading antitrust treatise, Areeda and Hovenkamp offer the most influential skeptical account of business torts as antitrust concerns. The treatise notes that while "antitrust carries with it the requirement of *market* harm," business torts generally require merely "[p]roof of harm to a specific competitor, which . . . is almost never sufficient to meet the antitrust concern."⁴⁴ They argue that a firm's typi-

tactics such as "acquiring a patent by fraud" and "falsely disparaging the competitor's products" are "adequately punished under other laws"; *cf.* *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.) ("If such statements should be false or misleading . . . , the remedy is not antitrust litigation but more speech — the marketplace of ideas.")

³⁸ See, e.g., IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782a, at 321 (expressing the authors' "doubt that [business] torts . . . would very often seriously impair the competitive opportunities of rivals in any significant or permanent way").

³⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *accord* *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe*, 370 U.S. at 320); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe*, 370 U.S. at 320). Ironically, the case that introduced this maxim, *Brown Shoe Co. v. United States*, 370 U.S. 294, has been widely condemned for protecting small competitors by banning a merger that would have benefited competition overall. See, e.g., ROBERT H. BORK, *THE ANTI-TRUST PARADOX* 215–16 (1993); POSNER, *supra* note 37, at 124–26.

⁴⁰ *Brooke Grp.*, 509 U.S. at 225 (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)); see also *Brunswick Corp.*, 429 U.S. at 489 ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.")

⁴¹ See I PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 100a, at 4 (3d ed. 2006) ("[T]he principal objective of antitrust policy is to maximize consumer welfare . . ."); Robert Pitofsky, *Introduction to HOW THE CHICAGO SCHOOL OVERSHOT THE MARK* 3, 5 (Robert Pitofsky ed., 2008) ("[Antitrust] is . . . a 'consumer welfare' system of laws.")

⁴² See POSNER, *supra* note 37, at ix ("Almost everyone professionally involved in antitrust today . . . agrees that the only goal of the antitrust laws should be to promote economic welfare . . ."). Professor Robert Bork advocates a "[c]onsumer [w]elfare [m]odel" for antitrust policy, see BORK, *supra* note 39, at 107, but he states that "owners . . . are also consumers," *id.* at 110, meaning that his consumer welfare model is effectively a total welfare model.

⁴³ See *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989) (Easterbrook, J.).

⁴⁴ IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782a, at 321.

cal misrepresentation touting its products is committed on a small scale that has no meaningful impact on market power.⁴⁵ Areeda and Hovenkamp therefore suggest that courts should view the anticompetitive harm of misrepresentations as “presumptively de minimis,” a presumption that a claimant could overcome only by proving six factors.⁴⁶ For false statements disparaging a rival, Areeda and Hovenkamp “suggest that such claims should presumably be ignored.”⁴⁷ The treatise’s presumption has proved enormously influential among courts: three circuit courts⁴⁸ and numerous district courts⁴⁹ have relied on the treatise’s presumption that deception causes de minimis anticompetitive harm.

Besides the belief that deception generally does not cause meaningful economic harm — a disputed empirical question⁵⁰ — several practical considerations caution against broad antitrust liability for deception. First, given mandatory treble damages in antitrust cases,⁵¹ an overly broad standard could deter companies from truthful and procompetitive speech (such as ordinary advertising) due to their fear that it will be mistaken for deception.⁵² Second, antitrust litigation is particularly expensive, so allowing antitrust litigation for ordinary business torts that do not typically involve serious anticompetitive effects may have more costs than benefits.⁵³ Third, since a number of

⁴⁵ *Id.* ¶ 782b, at 327 (“The more typical deception defendant is the smaller firm or recent entrant that makes its false claims, collects the payments from deceived consumers, and then disappears or becomes judgment-proof. The false claim leading to or perpetuating durable market power by a firm capable of being sued is much less likely.”).

⁴⁶ *Id.* For a discussion of the six factors, see *infra* section II.A.2.

⁴⁷ IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782d, at 332.

⁴⁸ See *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 370–71 (6th Cir. 2003); *Am. Prof’l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Publ’ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 288 n.41 (2d Cir. 1979).

⁴⁹ See *Walgreen Co. v. AstraZeneca Pharm. L.P.*, 534 F. Supp. 2d 146, 152 (D.D.C. 2008); *In re Indep. Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1158 (D. Kan. 2000); *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 748–49 (S.D. Tex. 1998); *Picker Int’l, Inc. v. Leavitt*, 865 F. Supp. 951, 963–64 (D. Mass. 1994).

⁵⁰ See Stucke, *supra* note 16, at 829 (“[B]esides lacking empirical support, the *Treatise*’s assertion [that deception causes de minimis harm] does not make economic sense. If product disparagement is ineffectual, why would any firm, much less a monopolist, engage in it?”).

⁵¹ Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15(a) (2006)).

⁵² *Cf.* IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 780, at 316 (“[T]he prospect of treble damages will attract many barely colorable challenges if § 2 comes to recognize [business torts] as exclusionary.”).

⁵³ See KEITH N. HYLTON, ANTITRUST LAW 49 (2003) (“[The treble damages provision] is an unusually generous statute to plaintiffs. It is no wonder that the federal courts have been on guard for plaintiffs who have tried to convert ordinary business torts (and even mundane gripes) into antitrust claims.”); *cf.* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (“[P]roceeding to antitrust discovery can be expensive.”); IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 326 (“There is no redeeming virtue in deception, but there is a social cost in litigation over it.”).

other legal regimes already address deception — including common law fraud,⁵⁴ state unfair competition statutes,⁵⁵ and the Lanham Act⁵⁶ — one might wonder why antitrust scrutiny is necessary.⁵⁷ Finally, some deception can be effectively addressed through counterspeech by rivals. Chief Judge Easterbrook has been particularly vocal on this point, suggesting that antitrust scrutiny is never appropriate for product disparagement because “the remedy is not antitrust litigation but more speech — the marketplace of ideas.”⁵⁸

II. A DOCTRINAL FRAMEWORK FOR DECEPTION IN ANTITRUST LAW

To some degree, participants in this debate have talked past each other. The skeptics ignore or deny the anticompetitive harms of deception, while their opponents give short shrift to the legitimate concerns that caution against broad antitrust liability. Not surprisingly, these judges and scholars have put forward wide-ranging proposals for handling antitrust claims based on deception. At the most skeptical extreme, Chief Judge Easterbrook would apparently foreclose all antitrust claims based on deception. Slightly less skeptical, Areeda and Hovenkamp would impose a presumption of de minimis anticompetitive harm that could only be overcome by demonstrating the existence of six difficult-to-prove factors.⁵⁹ Far more permissive, Stucke would impose only a “‘quick-look’ standard” under which it would be much easier for a plaintiff to make out a prima facie case for a Section 2 violation.⁶⁰

⁵⁴ See 3 DOBBS ET AL., *supra* note 2, § 664, at 643–44.

⁵⁵ See, e.g., Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. ANN. § 501.204(1) (West 2010) (“[U]nfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”); Deceptive Trade Practices–Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.46(a) (West 2011) (“False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful . . .”).

⁵⁶ 15 U.S.C. § 1125(a) (2006) (creating a civil cause of action against one who uses a “false or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities”).

⁵⁷ See POSNER, *supra* note 37, at 195 (“[A]cquiring a patent by fraud . . . or falsely disparaging the competitor’s products . . . are [actions] adequately punished under other laws.”).

⁵⁸ *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.); see also *Sanderson v. Culligan Int’l Co.*, 415 F.3d 620, 623 (7th Cir. 2005) (Easterbrook, J.) (“Antitrust law condemns practices that drive up prices by curtailing output. False statements about a rival’s goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market.” (citations omitted)). *But cf.* Stucke, *supra* note 16, at 826 n.14 (“Judge Easterbrook’s assumption of a self-correcting and self-policing marketplace of ideas, however, is *sui generis*.”).

⁵⁹ IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 327.

⁶⁰ Stucke, *supra* note 16, at 841.

A middle approach between these extremes is needed. Deception can cause significant economic harm, and allowing antitrust claims based on anticompetitive deception is essential to fulfilling the purposes of antitrust law. Yet many deceptions do not impact price, output, or market power, and the prospect of antitrust treble damages could incentivize barely colorable challenges and lead to the proliferation of costly antitrust litigation. This Part proposes a doctrinal framework for addressing monopolization through deception and agreements to deceive⁶¹ that aims to strike a balance between these competing policy concerns. Although the resulting framework most closely resembles Stucke's permissive proposal, it introduces a note of caution that allows consideration of the concerns raised by Areeda and Hovenkamp.

*A. Monopolization and Attempted Monopolization
Through Deception*

This section addresses the standard for recognizing deception as an offense of monopolization or attempted monopolization under Section 2. It briefly summarizes basic Section 2 doctrine and describes two divergent approaches in the scholarship to deception and Section 2. Finally, it proposes a standard that lies between these two approaches. Under this standard, a plaintiff would state a prima facie case for monopolization by showing that a defendant with monopoly power engaged in deception (defined as an intentionally false and material misrepresentation with an intent to induce reliance) that was reasonably capable of causing monopoly power. The defendant could rebut this prima facie case by showing that its deception did not actually cause its monopoly power.

1. *Basic Doctrine of Monopolization.* — Section 2 of the Sherman Act makes it illegal to “monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States.”⁶² The two elements of monopolization are: “(1) [T]he 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 acci-

⁶¹ Much of the scholarly analysis regarding deception and antitrust law has concerned the question of whether deception can constitute a monopolization or attempted monopolization offense under section 2 of the Sherman Act. For example, Areeda and Hovenkamp's analysis of business torts aims to “illuminate the relationship between the law of torts and the law of monopolization under Sherman Act § 2.” IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782a, at 320; *see also* Stucke, *supra* note 9, at 1070 (“A key issue is how the antitrust agencies and federal courts will evaluate a monopolist's deception.”). Some of this scholarly analysis of deception in the monopolization context would also apply in the context of agreements to deceive under Section 1. This Note proposes a doctrinal framework for both monopolization through deception and agreements to deceive.

⁶² 15 U.S.C. § 2 (2006).

dent.”⁶³ The second element requires some sort of wrongful conduct, often referred to as “exclusionary conduct.”⁶⁴ In addition, the anti-competitive conduct must be causally related to the monopoly power. This causation requirement is implicit in the phrase “willful acquisition or maintenance of [monopoly] power,”⁶⁵ as well as in the statute’s use of the verb “monopolize.”⁶⁶ Courts typically infer causation as long as the plaintiff can “prove the exclusionary conduct was reasonably capable of making a significant causal contribution to the acquisition or maintenance of monopoly power.”⁶⁷ Thus, in analyzing deception as monopolization or attempted monopolization,⁶⁸ the key issues are classifying the forms of deception that qualify as exclusionary conduct and determining a standard of causation.⁶⁹

2. *Two Existing Approaches.* — Areeda and Hovenkamp believe that, in theory, deception can qualify as exclusionary conduct;⁷⁰ however, they posit that in practice business torts rarely lead to monopoly power.⁷¹ They therefore advocate a difficult legal standard in the context of misrepresentations to consumers, presuming that such misrepresentations cause de minimis harm unless the plaintiff furnishes “cumulative proof that the representations were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance[,] (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals.”⁷²

⁶³ United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966).

⁶⁴ See, e.g., EINER ELHAUGE & DAMIEN GERADIN, GLOBAL ANTITRUST LAW AND ECONOMICS 265 (2d ed. 2011); see also Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

⁶⁵ Grinnell, 384 U.S. at 570–71.

⁶⁶ Elhauge, *supra* note 17, at 331.

⁶⁷ *Id.*; see also United States v. Microsoft Corp., 253 F.3d 34, 79 (D.C. Cir. 2001).

⁶⁸ The Supreme Court has established three elements for attempted monopolization: “(1) [T]hat the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993). Because the anticompetitive conduct itself often goes a long way toward establishing intent to monopolize, attempted monopolization is analytically similar to monopolization, with “dangerous probability” taking the place of the monopoly power element. *Cf. id.* at 459 (“[D]emonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market and the defendant’s economic power in that market.”).

⁶⁹ Analysis of the monopoly power element is no different in deception cases than in Section 2 cases generally, so no further discussion of that element is necessary here. See, e.g., Microsoft, 253 F.3d at 76–77 (analyzing deception along with other exclusionary conduct without conducting a separate analysis of the monopoly power element).

⁷⁰ IIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 326 (“A monopolist’s misrepresentations encouraging the purchase of its product can fit our general test for an exclusionary practice when the impact on rivals is significant . . .”).

⁷¹ *Id.* ¶ 782a, at 321.

⁷² *Id.* ¶ 782b, at 327.

Stucke disputes Areeda and Hovenkamp's empirical premise that deception almost never causes anticompetitive harm⁷³ and argues that in fact deception can cause a plethora of such harms.⁷⁴ Stucke therefore argues for a much looser "'quick-look' legal standard: if a monopolist's deceit reasonably appears capable of making a significant contribution to its attaining or maintaining monopoly power, then a prima facie violation of Section 2 of the Sherman Act has been established."⁷⁵

3. *A Middle Path.* — The two approaches described above provide strikingly different standards for recognizing deception as a Section 2 offense, though both are motivated by legitimate policy concerns. A middle path between these two approaches is needed.⁷⁶

As a starting point for analysis, deception sometimes has anticompetitive effects and never has procompetitive effects. Thus, it would be undesirable to adopt a standard so difficult to meet that it would foreclose condemning many deceptions that cause the acquisition or maintenance of monopoly power. Yet Stucke demonstrates that the standard from Areeda and Hovenkamp's treatise suffers from precisely this infirmity: it produces significant "false negatives."⁷⁷ The treatise's fourth factor, requiring lack of "knowledge of the subject matter,"⁷⁸ produces false negatives because even those with such knowledge can be successfully deceived.⁷⁹ For example, when Microsoft deceived Java developers into developing programs that would only work with Microsoft's Windows operating system,⁸⁰ those developers surely had knowledge of the subject of computer programming. Likewise, the "continued for prolonged periods"⁸¹ factor creates false negatives because even a brief misrepresentation can cause harm if it is sufficiently persuasive.⁸²

Stucke's standard has the advantage of eliminating false negatives by allowing condemnation of anticompetitive deceptions after a "quick look." Yet legitimate policy concerns about the broad condemnation of deception suggest a need for limitations. Foremost among these con-

⁷³ See Stucke, *supra* note 16, at 829.

⁷⁴ *Id.* at 824–25.

⁷⁵ Stucke, *supra* note 9, at 1113.

⁷⁶ Areeda and Hovenkamp propose their standard while discussing misrepresentations to consumers. See IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 326–31. Stucke's standard applies more broadly to all deceptions by a monopolist. See Stucke, *supra* note 9, at 1113–14. This Note's test would apply to all business deceptions.

⁷⁷ Stucke, *supra* note 16, at 833.

⁷⁸ IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 327.

⁷⁹ Stucke, *supra* note 16, at 835 ("[E]ven sophisticated purchasers are at times overconfident and can be duped.").

⁸⁰ See *United States v. Microsoft Corp.*, 253 F.3d 34, 76 (D.C. Cir. 2001).

⁸¹ IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 782b, at 327.

⁸² See Stucke, *supra* note 16, at 837 ("An effective lie need not be repeated to preempt a nascent competitive threat — one misrepresentation may suffice.").

cerns is the danger of overdeterrence. Many antitrust offenses lie on the borderline between anticompetitive conduct and legitimate competition, so avoiding deterrence of lawful and productive activity is a constant concern of antitrust policy.⁸³ One might worry that condemning deception will deter truthful speech and advertising, which are procompetitive.

The solution to this overdeterrence problem is to adopt a high standard in defining deception. A high standard would minimize the risk that innocent conduct will be mistaken for deception and thus limit the risk that the prospect of antitrust liability would chill procompetitive and truthful speech. Borrowing from the elements of common law fraudulent misrepresentation,⁸⁴ a deception would exist when (1) the defendant makes a misrepresentation that is (2) intentional, (3) material, and (4) intended to induce reliance.⁸⁵ Requiring an intentional falsehood mitigates the risk of condemning innocent misstatements,⁸⁶ and the element of intent to induce reliance would exclude mere “puffing.” While it is impossible to prevent courts and juries from making errors, these elements are deemed sufficient to prevent overdeterrence in the context of common law fraud. Similarly, in the defamation context, the Supreme Court has viewed an intent requirement as sufficient to avoid chilling protected political speech.⁸⁷

It is not necessarily the case that the prospect of treble antitrust damages will exacerbate the deterrent effect. Because Section 2 plaintiffs must satisfy the often difficult task of proving monopoly power and causation of monopoly, a plaintiff will likely have a far lower chance of success on a Section 2 claim than on other tort claims. It is not obvious that an unlikely prospect of treble antitrust damages will deter a firm any more than a likely prospect of single damages from a fraud or unfair competition claim would. Thus, the Areeda and Hovenkamp factors requiring *clear* falsehood, materiality, and likeli-

⁸³ See POSNER, *supra* note 37, at 267 (“[G]iven uncertainty in the definition of the prohibited conduct or the application of the definition in particular cases, [excessively severe penalties] may deter lawful conduct at the border of the prohibition. . . . This is a particularly serious problem in the antitrust area, because the line between efficient and inefficient conduct is often fuzzy.”).

⁸⁴ Although state courts differ in their exact framing of the elements of fraud, most agree on the substance of the offense: “(1) [A]n intentional misrepresentation (2) of fact (3) that proximately causes harm and (4) is material, (5) intended to induce and (5) [sic] does induce reliance by the plaintiff, (6) [sic] which is reasonable or ‘justifiable.’” 3 DOBBS ET AL., *supra* note 2, § 664, at 643–44 (footnote omitted). For examples of state cases listing the elements of fraudulent misrepresentation, see *Conroy v. Regents of the University of California*, 203 P.3d 1127, 1135 (Cal. 2009); *Jo Ann Homes at Bellmore, Inc. v. Dworetz*, 250 N.E.2d 214, 217 (N.Y. 1969); and *Ernst & Young, L.L.P. v. Pacific Mutual Life Insurance Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

⁸⁵ This definition is somewhat stricter than Stucke’s, which includes scienter and materiality but not intent to induce reliance. See Stucke, *supra* note 9, at 1113–14.

⁸⁶ *Id.* at 1114.

⁸⁷ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

hood of reliance go further than necessary to avoid overdeterrence. Moreover, they would exclude some deceptions that are most likely to cause anticompetitive harm. For example, because a misrepresentation that is not “clearly false” will likely be more believable than a “clearly false” deception, the former is more likely to successfully persuade consumers and others.

In addition to creating a relatively high standard for defining deception, it is necessary to adopt a somewhat stricter causation standard than Stucke does. This necessity arises for two reasons. First, antitrust litigation is very costly, so it should generally be limited to conduct that one can deem anticompetitive to a reasonable degree of certainty. Second, Stucke’s standard carries a significant risk of false positives, the opposite infirmity of Areeda and Hovenkamp’s standard. This risk stems from the fact that many acts of deception may be *reasonably capable* of contributing to monopoly power yet in actuality have no such impact. Finding a prima facie offense based on a “quick look”⁸⁸ runs the risk of wrongly condemning these acts as monopolization. The risk of false positives is particularly great with false advertising campaigns. Consider again the cell phone company that runs a prominent advertising campaign that falsely disparages the reception of its rival’s network. Certainly, such an advertising campaign is reasonably capable of contributing to monopoly power, since it is plausible that many consumers will be deceived and will therefore switch their cell phone service to the deceiver. However, it is just as plausible that most consumers will reason that nearly all cell phone companies disparage their rivals in advertisements,⁸⁹ and that it is therefore necessary to take all of these advertisements with a grain of salt.

This Note suggests the following modification to Stucke’s approach: In the first stage, as Stucke advocates, a plaintiff could make out a prima facie case for monopolization when the defendant’s deceit

⁸⁸ The phrase “quick look” is often used in the context of Section 1 to refer to courts’ analysis of agreements that seem likely to cause anticompetitive harm but for which the courts have not developed a per se rule of condemnation. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35–37 (D.C. Cir. 2005); HOVENKAMP, *supra* note 32, § 5.6d, at 285–86. Under Section 1 “quick look” analysis, the court condemns the practice unless the defendant can furnish a “justification [that] seems both plausible and sufficient to suggest that the restraint is profitable without regard to any power that the defendant[] might have,” in which case “a full rule of reason inquiry will be necessary.” HOVENKAMP, *supra* note 32, § 5.6d, at 285.

⁸⁹ During the same period in which Verizon ran its advertisements disparaging AT&T, AT&T ran advertisements claiming to have better reception than its rivals, using the slogan “More bars in more places.” See, e.g., “*Sweet Pea*” AT&T Commercial, YOUTUBE, <http://www.youtube.com/watch?v=HoxpudVMLcs> (uploaded Feb. 21, 2009) (claiming that AT&T had the “best coverage worldwide”). Verizon sued AT&T over these advertisements, but Verizon dismissed this lawsuit after AT&T dismissed its lawsuit over Verizon’s “map” advertisements. *There’s an End to That: AT&T Drops Verizon Suit*, MSNBC.COM (Dec. 2, 2009, 3:15 PM), http://www.msnbc.msn.com/id/34241254/ns/business-us_business/t/theres-end-att-drops-verizon-suit.

appears reasonably capable of making a significant contribution to the defendant's monopoly power. Meeting this standard would not require affirmative proof that the deception contributed to monopoly power, but rather a commonsense judgment that the deception was of sufficient scale to be reasonably capable of having such an effect.

At the second stage, the burden would shift to the defendant to rebut this *prima facie* case by proving that the deceit did not actually contribute to the defendant's acquisition or maintenance of monopoly power in this particular instance.⁹⁰ In mounting such a defense, a decrease or lack of increase in the defendant's market share could provide relevant evidence. In a market with a small number of transactions, testimony by purchasers may prove relevant. In addition, some of the elements proposed by Areeda and Hovenkamp may bear on the question of whether the deceit actually contributed to monopoly power. For example, a misrepresentation that is not clearly material or that is not clearly intended to induce reliance (and thus is on the borderline of "puffing") may be less likely to have had an anticompetitive impact. Such an approach would be capable of avoiding false positives and false negatives. While it may sometimes involve lengthier and costlier litigation than a "quick look" approach would, the extra effort is necessary to separate anticompetitive deception from deception that had no broader competitive impact.

The test for attempted monopolization would be similar, with the "dangerous probability" element doing the work of the causation standard: the causation question addresses whether the conduct has caused monopoly power, while the "dangerous probability" element addresses the likelihood that the conduct would cause monopoly power if unimpeded. A firm's market share is often relevant in establishing dangerous probability,⁹¹ as is the likelihood that the challenged conduct would have an exclusionary effect.⁹² For a company on the cusp of monopoly power, a court should apply the causation test proposed above. For companies with smaller market shares, courts should re-

⁹⁰ The framework of requiring the plaintiff to make a *prima facie* showing and then shifting the burden to the defendant to provide a rebuttal is familiar in federal courts. For example, in an employment discrimination case, the plaintiff must establish a *prima facie* showing of discrimination, which shifts the burden to the defendant to provide a nondiscriminatory justification. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁹¹ *See* II JOSEPH P. BAUER & WILLIAM H. PAGE, *KINTNER FEDERAL ANTITRUST LAW* § 14.37, at 415–16 (2002) ("[A]llegations of dangerous probability are almost never upheld for claims against defendants with shares below 30 percent; they are rarely upheld for claims against defendants with shares between 30 percent and 50 percent; they are often upheld for claims against defendants with shares above 50 percent; and they are almost always upheld for claims against defendants with shares near or above 70 percent." (footnotes omitted)).

⁹² *See* IIIB AREEDA & HOVENKAMP, *supra* note 10, ¶ 807d2, at 444 ("[T]he more successfully exclusionary the conduct is, the less the probability of achieving monopoly depends on the defendant's initial status.").

quire a greater showing of concrete evidence that the challenged conduct has increased the defendant's market share, with stronger evidence required the smaller the defendant's market share.

A causation standard with bite clarifies the proper role for antitrust law as compared to other legal regimes that condemn deception. Although most forms of deception are addressed by some other legal regime, antitrust scrutiny is not superfluous because it provides for increased recovery in the form of treble damages and attorney's fees;⁹³ in addition, the antitrust laws recognize remedies for a broader conception of cognizable injuries than other regimes do, including lost efficiencies from reduced economies of scale and the present value of future profits, which include the plaintiff's estimated growth rate in the "but for" world.⁹⁴ Yet this increased recovery would overdeter garden-variety deceptions. For these deceptions, other laws, such as common law torts and unfair competition statutes, are sufficient. Increased antitrust recovery is only appropriate for deceptions that actually cause the kind of anticompetitive harm that treble damages are meant to address. Thus, a defendant must have the opportunity to avoid antitrust liability by showing that its conduct did not cause monopoly power.

To summarize, a plaintiff could make out a prima facie case for a monopolization offense by showing that a monopolist made an intentional material misrepresentation with intent to induce reliance that was reasonably capable of causing monopoly power. The burden would then shift to the defendant, which could rebut the prima facie case by showing that its deception did not actually contribute to monopoly power.

B. Agreements to Deceive and Section 1

This section addresses the circumstances under which an agreement to deceive can constitute a violation of Section 1, a topic that has received little scholarly attention compared to monopolization by deception. Some types of agreements are condemned as per se violations

⁹³ Clayton Act, ch. 323, § 4, 38 Stat. 730, 731 (1914) (codified as amended at 15 U.S.C. § 15(a) (2006)) (providing that "any person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee"). Treble damages are discretionary under the Lanham Act, 15 U.S.C. § 1117(a) (2006), but through 2005, treble damages had been granted in less than fifteen percent of the cases in which they were requested. See Kenneth L. Port, *Trademark Extortion: The End of Trademark Law*, 65 WASH. & LEE L. REV. 585, 620 graph P (2008). Although a majority of state consumer protection statutes allow for treble damages under certain circumstances, only five states and the District of Columbia provide for mandatory treble damages for all violations. See Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 23–24 (2005).

⁹⁴ See IIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 397, at 417–26 (3d ed. 2007).

of Section 1, while others are analyzed under the rule of reason, which requires an examination of the procompetitive and anticompetitive aspects of an agreement.⁹⁵ Agreements to deceive should be analyzed under a modified rule of reason, such that plaintiffs would need to prove the existence of an anticompetitive effect but defendants would not be permitted to furnish a procompetitive justification.

1. *Basic Section 1 Doctrine.* — An agreement is a necessary element of a Section 1 offense.⁹⁶ Although courts can infer an agreement from sufficient circumstantial evidence,⁹⁷ parallel action — even conscious parallelism — is insufficient to constitute a Section 1 violation.⁹⁸ A plaintiff alleging a Section 1 violation based on deception must therefore prove that the defendant entered into an agreement and that a deception was promulgated as part of that agreement.⁹⁹ The analysis of whether the defendant entered into an agreement to deceive would not differ from such analysis in the Section 1 context generally.

Section 1 of the Sherman Act bars “[e]very contract, combination . . . , or conspiracy, in restraint of trade.”¹⁰⁰ However, the Court does not interpret this categorical prohibition literally; instead, the Court scrutinizes most agreements under the “rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful.”¹⁰¹ Some categories of agreements are declared *per se* illegal, but this status is reserved for “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.”¹⁰²

2. *A Test for Agreements to Deceive.* — Unlike Section 2 offenses, Section 1 offenses typically involve conduct by firms that individually lack monopoly market power and thus have less potential than monopolists to cause anticompetitive harm. Nonetheless, joint enterprise

⁹⁵ Although language in some Section 1 cases suggests a clean dichotomy between *per se* and rule of reason analyses, *see, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (“The rule of reason does not govern all restraints. Some types ‘are deemed unlawful *per se*.’” (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))), actual practice is more complicated. Courts often apply truncated forms of review between *per se* analysis and rule of reason analysis, such that it may be more accurate to describe the forms of review as a “continuum” rather than as a “dichotomy.” *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005); *see also* HOVENKAMP, *supra* note 32, § 5.6d, at 285.

⁹⁶ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 548 (2007).

⁹⁷ *See Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 224–25 (1939) (inferring an agreement from a letter inviting parallel action and the subsequent parallel action).

⁹⁸ *Twombly*, 550 U.S. at 553–54.

⁹⁹ This section adopts the same definition of deception in the antitrust context as that proposed in section II.A.3. *See supra* p. 1248.

¹⁰⁰ 15 U.S.C. § 1 (2006).

¹⁰¹ *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *see also* *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (announcing the rule of reason).

¹⁰² *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

increases the potential for wrongful conduct to cause anticompetitive harm,¹⁰³ and deception is no exception. When a single firm engages in deception, the simplest way for the market to neutralize the deception is for the firm's competitors to expose the deception and promulgate accurate information.¹⁰⁴ However, such a result is far less likely when some of those competitors are also participating in the deception. For consumers, the existence of multiple deceivers makes it more difficult to sort truth from falsehood, thereby increasing search costs even more than unilateral deception does. Similarly, rivals must expend greater effort combating the joint deception, further increasing their costs. The multilateral nature of the deception leads to a greater likelihood that the deception will be credited by a large portion of consumers, thus distorting the market in a way that could have pervasive anti-competitive effects. Furthermore, a group of joint deceivers is more likely than is a single deceiver to achieve other distortions of the competitive process, such as manipulating standard-setting organizations into creating standards favorable to their products.¹⁰⁵

Nonetheless, a test of *per se* illegality is inappropriate for agreements to deceive. The same concerns that motivate a tougher causation standard for monopolization by deception also support rejection of a *per se* rule for agreements to deceive. "Resort to *per se* rules is confined to restraints . . . 'that would always or almost always tend to restrict competition and decrease output.'"¹⁰⁶ Thus, courts are willing to condemn instances of price fixing or group boycotts with an insignificant competitive impact¹⁰⁷ because of their belief that such false positives are rare. By contrast, a *per se* rule against agreements to deceive would sweep up wide categories of agreements that obviously could not have a broad anticompetitive impact, such as an agreement between a manufacturer and a retailer to defraud a single consumer. Although even small deceptions are wrongful, the treble damages of

¹⁰³ Cf. HOVENKAMP, *supra* note 32, § 5.1b, at 214 (noting that while most attempts at monopolization are unsuccessful, "monopoly power can be created by agreement in a very short time and with little resistance").

¹⁰⁴ See *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989).

¹⁰⁵ Cf. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) ("There is no doubt that the members of such [standard-setting] associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.").

¹⁰⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

¹⁰⁷ See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959) (noting that a group boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy"); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59 (1940) ("[A] conspiracy to fix prices violates § 1 of the Act . . . though it is not established that the conspirators had the means available for accomplishment of their objective . . .").

antitrust law should be reserved for conduct that causes anticompetitive harm beyond the harm to the individuals who are deceived. The high costs of antitrust litigation further militate against creating a rule that sweeps too broadly. Finally, a per se rule of deception would run counter to the Court's trend in recent decades of eliminating per se rules against conduct that does not always or almost always cause anticompetitive harm.¹⁰⁸

Agreements to deceive should therefore be analyzed under the rule of reason. Although the rule of reason is commonly thought to involve the balancing of a practice's procompetitive and anticompetitive effects,¹⁰⁹ Michael Carrier has demonstrated through an extensive empirical study that courts applying the rule of reason go through a multi-step process of burden shifting before they do any balancing.¹¹⁰ In the first step, "the plaintiff must show a significant anticompetitive effect."¹¹¹ If the plaintiff satisfies this burden, the plaintiff prevails unless the defendant can "demonstrate a legitimate procompetitive justification" for the agreement.¹¹² Because deception has no procompetitive justifications, the plaintiff would prevail if and only if the plaintiff could demonstrate a significant anticompetitive effect resulting from the agreement to deceive.

While not exhaustive, the following examples would constitute anticompetitive effects: driving out of business or imperiling the prospects of a nontrivial portion of the market; raising consumers' search costs by a meaningful amount; creating barriers to entry; causing a significant number of consumers to purchase a product they would not have preferred had they possessed accurate information; and manipulating an influential standard-setting organization. Any such anticompetitive effect, with a total lack of countervailing virtue, would result in condemnation of the agreement under Section 1.

The Eighth Circuit demonstrated how to properly analyze agreements to deceive in *International Travel Arrangers, Inc. v. Western Airlines, Inc.*¹¹³ In highly concentrated markets for air travel between the

¹⁰⁸ See *Leegin*, 551 U.S. at 882 (eliminating per se rule against resale price maintenance); *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (eliminating per se rule against maximum vertical price fixing); *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (eliminating per se rule against vertical output restrictions).

¹⁰⁹ See, e.g., Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 864 n.339 (2011) ("[T]he 'rule of reason' used to evaluate combinations and contracts in restraint of trade under section 1 of the Sherman Act is a balancing test: the court asks whether [the] net effect of a restriction on trade is procompetitive.").

¹¹⁰ See Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1268.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 623 F.2d 1255 (8th Cir. 1980).

Twin Cities and both Las Vegas and Hawaii, an airline agreed with an advertising agency to run a deceptive ad campaign disparaging the reliability of the airline's principal competitors: arrangers of group charter flights.¹¹⁴ The court upheld a finding of a Section 1 violation, but only after affirming that the deception had reduced interest in the travel arrangers to such an extent that it undermined their group charter model and substantially inhibited the travel arrangers' ability to compete.¹¹⁵ The court required an anticompetitive effect and properly condemned the practice after finding such an effect.¹¹⁶

CONCLUSION

It is worth repeating that antitrust law exists for “the protection of *competition*, not *competitors*,”¹¹⁷ and that the antitrust laws “do not create a federal law of unfair competition or ‘purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.’”¹¹⁸ That deception is patently undesirable, lacks any redeeming virtues, and is harmful to individual consumers and competitors does not provide sufficient justification to condemn deception as an antitrust violation and allow recovery of treble damages. This Note does not suggest that deception, by itself, can constitute an antitrust violation. However, when a monopolist deceives in order to achieve or maintain monopoly power, or when firms combine or conspire to deceive in a way that causes significant anticompetitive effects, then deception crosses the line from an ordinary business tort to an antitrust violation.

To be sure, deception differs from the typical antitrust violation. While most categories of antitrust violation — such as price fixing, output restrictions, group boycotts, tying, and exclusive dealing contracts — directly interfere with the competitive process or directly distort price and output, deception's impact is indirect. That is, deception can cause anticompetitive harm only after an intervening step: consumers or other market participants must credit the deception and change their behavior accordingly. This indirectness necessitates some level of caution, but it does not justify harsh presumptions against deception-based antitrust claims. Imposing a reasonable, though not draconian, standard of causation strikes the appropriate balance and properly affirms that deception is a legitimate concern of the antitrust laws.

¹¹⁴ *Id.* at 1260–65, 1268–69.

¹¹⁵ *See id.* at 1266–68, 1271–72.

¹¹⁶ *See id.* at 1268 (“The tremendous effect of Western's campaign makes clear the unreasonableness of the restraint of trade inherent in the pervasive anti-TGC campaign.”).

¹¹⁷ *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

¹¹⁸ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (quoting *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945)).