

# The Market Power Requirement in Antitrust Rule of Reason Cases: A Rhetorical History

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## I. INTRODUCTION

Market power is often said to be central to antitrust analysis.<sup>1</sup> Conceptually, this makes sense, of course. Without market power, a seller cannot impose anticompetitive terms and therefore need not be kept in check by the antitrust laws.<sup>2</sup> As a practical matter, though, the focus on market power is not so obviously appropriate. The market power inquiry is generally acknowledged to be one of the most difficult and inconclusive in antitrust law,<sup>3</sup> and market definition, which is often a

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1. See, e.g., George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 807 (1991) ("The concept of market power is at the core of antitrust."); William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981) ("Market power is a key concept in antitrust law."). This Article focuses particularly on section 1 of the Sherman Act cases brought under the rule of reason, where market power is particularly important. See Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n, 95 F.3d 593, 600 (7th Cir. 1996) ("Substantial market power is an indispensable ingredient of every claim under the full [r]ule of [r]eason."); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 79 (1994) ("Today most courts require a showing of market power in cases alleging unlawful vertical restrictions or dealer terminations.").

"The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." Landes & Posner, *supra*, at 937.

2. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984) ("Firms that lack power cannot injure competition no matter how hard they try."); Hay, *supra* note 1, at 808:

If we accept the notion that the point of antitrust is promoting consumer welfare, then it is clear why the concept of market power plays such a prominent role in antitrust analysis. If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers.

*Id.*; see Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per se Legality*, 48 U. CHI. L. REV. 6, 16 (1981) [hereinafter Posner, *Next Step*] ("[I]f a firm lacks market power, it cannot affect the price of its product; that price is determined by the market.").

3. See *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983) ("[M]arket power is not well suited to presentation in an adversary proceeding."); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) ("Since market power can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography."); see also Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 312 (1987) ("Just as courts may err in thinking that a practice is harmful, so they may err in thinking that a firm does not have market power.").

prerequisite to the evaluation of market power, is similarly problematic.<sup>4</sup> Therefore, although it is clear why market power plays a central role in antitrust analysis, it is unclear why it should occupy a role so central—indeed, so often dispositive<sup>5</sup>—in antitrust litigation.

Under section 1 of the Sherman Act,<sup>6</sup> on which this Article will focus, a central position for market power has been mandated neither by statute nor by the Supreme Court. Section 1 refers only to “contract[s] . . . in restraint of trade,”<sup>7</sup> language that suggests no market power requirement. Nor has the Supreme Court imposed any general market power requirement under section 1. To be sure, the Court has imposed market power requirements in certain categories of section 1 cases, but they are only those cases in which the plaintiff proceeds under a per se theory.<sup>8</sup> Indeed, the Court has on several occasions specifically rejected a market power requirement in section 1 rule of reason cases.<sup>9</sup>

4. Robert Pitofsky has emphasized this point:

Unfortunately, no aspect of antitrust enforcement has been handled nearly as badly as market definition. This failure has resulted in part because of persistent and unreconciled conflicts of approach in important judicial opinions. It also reflects the fact that the critical issues in relevant market definition—(1) what products are sufficiently close substitutes to compete effectively in each other's market (definition of “relevant product market”); (2) what firms are sufficiently proximate to others in spatial terms to compete effectively (definition of “relevant geographic market”); and (3) what substitute sources of supply can be diverted promptly and economically to offer effective competition (“supply substitutability”)—are all matters of degree that are extremely difficult to measure.

Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 COLUM. L. REV. 1805, 1807 (1990) (footnote omitted). As the cases cited *supra* at note 3 point out, market share is frequently used as a proxy for market power, but market share cannot be determined without first defining the market.

5. See Hay, *supra* note 1, at 807 (“Operationally, assessing whether a firm or firms have market power or any reasonable prospect for achieving it is often the first (and sometimes, the only) step in performing an antitrust analysis.”).

6. For discussions of the role of market power under section 2 of the Sherman Act and section 7 of the Clayton Act, see *infra* Part II.B.

7. 15 U.S.C. § 1 (1994). Section 1 of the Sherman Act condemns “[e]very 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 . . .” *Id.*

8. See *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992) (condemning tying arrangements); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (excluding competitor from joint venture); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-16 (1984) (condemning tying arrangement); see also Hay, *supra* note 1, at 811-12 (discussing requirements of market power in *Jefferson Parish* and *Northwest Wholesale Stationers*, and noting that the Supreme Court did not require market power in rule of reason cases).

9. See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986); *NCAA v.*

The apparent ascendancy of market power under section 1 is thus a phenomenon of the lower courts. More specifically, it is a rhetorical triumph of Richard Posner and to a lesser extent Frank Easterbrook, initially in their roles as professors at the University of Chicago Law School and later as judges on the Seventh Circuit Court of Appeals.<sup>10</sup> The history of this triumph is somewhat disconcerting, in that some of the leading Seventh Circuit cases supported their adoption of a market power requirement by pointing to cases in other circuits that they said had already adopted such a requirement, when those earlier cases had not in fact done so.<sup>11</sup> In this way, the current role of market power has been built on a shaky foundation.

That role, moreover, is not nearly as significant as it often is said to be. Despite occasional claims that most circuits have adopted a market power requirement in rule of reason cases,<sup>12</sup> only three—the Seventh,

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Board of Regents, 468 U.S. 85, 109-10 (1984). Both *Indiana Federation of Dentists* and *NCAA* were horizontal cases, but the Court has seemed equally reluctant to adopt a market power requirement in vertical cases. In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), Justice White in concurrence argued strongly for the use of such a requirement to distinguish vertical restraints that are subject to a per se rule from those subject to the rule of reason. See *id.* at 70 (White, J., concurring). However, the Court declined to adopt a market power test. The Court also could have adopted a market power test in its discussions of rule of reason claims in tying cases, but it has declined to do so. See *Jefferson Parish*, 466 U.S. at 36 (O'Connor, J., concurring).

10. For examples of the academic advocacy of Posner and Easterbrook, see *supra* note 2. As evidence of their judicial role, note that the Seventh Circuit provides eight of the twenty-two cases cited by the ABA Section of Antitrust Law's *Antitrust Law Developments* for the claim that "[c]ourts have generally held that proof of a defendant's market power is an absolute prerequisite for a plaintiff seeking to use market analysis to satisfy its burden of proving likely anticompetitive effect." 1 ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 60-61 n.313 (4th ed. 1997) [hereinafter ABA SECTION OF ANTITRUST LAW]. None of the twenty-two cases is from the Supreme Court. See *id.*

11. See *infra* Part III.C.

12. See Appeal of Toys "R" Us, Inc. to the FTC (Public Record Version) at 49, In re Toys "R" Us, Inc., Docket No. 9278 (Nov. 20, 1997) ("In vertical nonprice cases, most courts of appeals have required a plaintiff to make a threshold showing that the defendant imposing the restrictions had market power in order to establish the required adverse effect on competition."); *The Supreme Court, 1997 Term: Leading Cases*, 112 HARV. L. REV. 122, 299 n.43 (1998) ("Indeed, in many circuits a showing of market power or market share is a threshold requirement for rule of reason cases."); *The Supreme Court, 1983 Term: Leading Cases*, 98 HARV. L. REV. 87, 260 (1984) ("The rule of reason generally includes an analysis of both market power and procompetitive justifications. . . . A showing of market power has normally been required because a group of competitors without such power cannot impose a restraint that will harm consumers.") (footnote omitted); see also Michael L. Denger & M. Sean Royall, *Vertical Price, Customer and Territorial Limitations*, in 39TH ANNUAL ANTITRUST LAW INSTITUTE 723, 797 (PLI Corp. Law & Practice Course Handbook Series No. B-1049, 1998):

To establish that the supplier imposing the restrictions has the market power to bring about the required adverse effect on competition, courts have increasingly required plaintiffs to make a threshold showing that the supplier's

Fourth, and Eighth—ever did so unequivocally, and the Eighth has since retreated. The other circuits that are said to have adopted a market power requirement have actually drawn up short of that position in various ways: by merely saying that adoption of a market power requirement would be a good idea, without clearly adopting one;<sup>13</sup> by stating they were adopting such a requirement, but only in cases that did not turn on the issue;<sup>14</sup> or, most commonly, by emphasizing that in the absence of market power anticompetitive effect is impossible, but not explicitly requiring the plaintiff to prove power.<sup>15</sup>

Of course, one could read any of these positions loosely as an adoption of market power. To do so, however, would be to overlook the fact that these courts could easily have adopted a market power requirement clearly and explicitly. Instead, they have carefully avoided doing so. The frequency with which courts have *almost* said that proof of market power is required cannot be merely accidental; some other factor must be at work. Perhaps courts find a failure to show market power a convenient basis on which to dispose of weak cases. Or perhaps the courts either would like to require market power or would like to defer to other courts that do so, but are uncomfortable with actually imposing such a requirement, particularly in the absence of Supreme Court authority.

Part II of this Article describes the limited place of market power in antitrust law as the Supreme Court has interpreted it. Part III describes how market power has acquired a more expansive role in the lower courts. The point of the section is not to diminish the legitimate role that market power plays in antitrust law, but to suggest that the greater role it now plays, or is said to play, is neither inevitable nor especially well supported. Part IV surveys the use of a market power requirement in the circuits, demonstrating that the requirement was and is more limited than has often been said. Part V offers some comments on the theoretical justifications that have been offered for a market power requirement, and the Article concludes with some final observations.

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market share (used as a proxy for market power) is sufficiently high that the overall market could be impacted.

*Id.*

13. See *infra* Part IV.C. (regarding the D.C. Circuit).

14. See *infra* Part IV.C. (regarding the Eleventh Circuit).

15. See *infra* Part IV.C. (regarding the Fifth Circuit).

## II. THE MARKET POWER CONCEPT IN THE SUPREME COURT

### A. Market Power in Section 1 of the Sherman Act Cases

Section 1 of the Sherman Act contains no reference at all to market power, or even, more generally, to market structure; its prohibition of any "contract, combination . . . , or conspiracy, in restraint of trade" is focused entirely on conduct.<sup>16</sup> Early on, though, the Supreme Court determined that the language of section 1 is insufficient as a guide to its enforcement. In *Standard Oil Company v. United States*,<sup>17</sup> the Court established reasonableness as the basic section 1 test,<sup>18</sup> and in *Board of Trade v. United States*<sup>19</sup> it set out a number of factors to be considered in applying this "rule of reason."<sup>20</sup> Among those factors then, and in subsequent guides to the rule of reason,<sup>21</sup> were several related to market power.<sup>22</sup>

The Court, however, has never required that a plaintiff prove the defendant's market power in a rule of reason case; market power has been only one factor among many to be considered. Under section 1, the Court has required proof of power only in two categories of per se cases, those involving tying arrangements<sup>23</sup> and those involving exclusions of competitors from joint ventures.<sup>24</sup> In per se cases, where actual

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16. 15 U.S.C. § 1 (1994).

17. 221 U.S. 1 (1911).

18. *See id.* at 63-64.

19. 246 U.S. 231 (1918).

20. The inquiry is all-encompassing:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

*Id.* at 238.

21. *See, e.g., United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948) ("In determining what constitutes unreasonable restraint, we . . . look . . . to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market.").

22. In the statement quoted in the preceding footnote, the reference to "the percentage of business controlled," and perhaps also that to "the strength of the remaining competition," point to factors that are usually considered important in evaluating market power.

23. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984) (stating that the Court has condemned tying arrangements per se "when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market").

24. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*,

anticompetitive effects need not be shown, a requirement of proof of power makes sense. The proof of power, together with proof of a particular sort of restraint, substitutes for the proof of anticompetitive effect that is required under the rule of reason.

Furthermore, in the two per se contexts in which the Court has required proof of market power, the nature of the power the Court required was tailored to the nature of the case.<sup>25</sup> The specificity of the Court's use of market power is emphasized in *Jefferson Parish Hospital District No. 2 v. Hyde*.<sup>26</sup> After the Court required market power for the application of the per se rule, its discussion of the defendant's liability under the rule of reason did not mention market power in general or the defendant's market share in particular, noting only that the plaintiff had failed to meet its burden of "showing . . . actual adverse effect on competition."<sup>27</sup> This all suggests that to the extent the Court sees a role for market power under section 1, that role is to be tailored to particular sorts of cases, and perhaps only to per se cases, not applied as an indiscriminate screen to all section 1 cases.<sup>28</sup>

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472 U.S. 284, 296 (1985) (considering whether the per se rule or the rule of reason was the appropriate analysis for the expulsion of a member of a joint venture cooperative, and concluding that the per se rule was inappropriate "[u]nless the cooperative possesses market power or exclusive access to an element essential to effective competition").

25. In *Jefferson Parish*, the Court offered this gloss on tying market power: "This type of market power has sometimes been referred to as 'leverage.' . . . 'Leverage' is loosely defined here as a supplier's power to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of the second product." *Jefferson Parish*, 466 U.S. at 14 n.20 (quoting 5 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1134a, at 202 (1980)).

In *Northwest Wholesale Stationers*, the per se test established by the Court turned on whether the "the cooperative possesses market power or exclusive access to an element essential to effective competition." *Northwest Wholesale Stationers*, 472 U.S. at 296. As Professor Hay has said, the latter part of this test—"unique access to a business element necessary to effective competition"—seems to be a description of a particular kind of market power. Hay, *supra* note 1, at 812 (quoting *Northwest Wholesale Stationers*, 472 U.S. at 298).

26. 466 U.S. 2 (1984).

27. *Id.* at 31. The Court pointed out that the relevant market could have involved either the "market in which hospitals compete in offering services to patients"—that is, the market relevant to its per se discussion—or the market for "competition among anesthesiologists for exclusive contracts" with hospitals. *Id.* at 29.

28. Another indication that the Court favors specific conceptions of market power in its per se rules can be found in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In *Sylvania*, the Court had an opportunity to rely on market power in deciding when the per se rule would apply to nonprice vertical restraints. The case involved a location restriction imposed on its dealers by Sylvania, a television

The Court's rule of reason cases also indicate that its confinement of the market power requirement to per se cases is no accident. In two cases in which the Court considered arguments that market power should be required under the rule of reason, it rejected those arguments.<sup>29</sup> In the most recent of the cases, *FTC v. Indiana Federation of Dentists*,<sup>30</sup> the defendant argued that the FTC had failed to show market power.<sup>31</sup> The Court responded that a showing of market power was not necessary when anticompetitive effects had been shown. The Court explained:

Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output," can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."<sup>32</sup>

Both *Indiana Federation of Dentists* and *NCAA v. Board of Regents*,<sup>33</sup> the other case in which the Court rejected a market power requirement, were horizontal cases. The market power requirement is equally important in vertical cases, however, so one might question whether the Court's statements in its horizontal cases are more broadly relevant. That is especially so in that vertical cases are generally thought to

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manufacturer with a single-digit market share, and Justice White, relying primarily on *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), said that "[i]n other areas of antitrust law, this Court has not hesitated to base its rules of per se illegality in part on the defendant's market power." *Sylvania*, 433 U.S. at 65 (White, J., concurring). The Court, however, approached the case by asking, following its prescription from *Northern Pacific* for application of the per se rule, whether the challenged restraint was one that "because of [its] pernicious effect on competition and lack of any redeeming virtue [should be] conclusively presumed to be unreasonable." *Id.* at 50 (quoting *Northern Pac.*, 356 U.S. at 5). It answered that question not by reference to the importance of market power, or by reference to *Sylvania*'s very small market share, but by reference to the variety of circumstances in which vertical restraints can be procompetitive. *See id.* at 55.

29. Those who argue that the Court would support such a requirement often cite an observation that the Court made in *Sylvania*: "[W]hen interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Sylvania*, 433 U.S. at 52 n.19. There are three reasons, however, why reading this statement as an endorsement of a market power requirement would be incorrect. First, the Court made it only in a footnote defining interbrand competition. Second, *Sylvania* did not involve an application of the rule of reason, but a determination of whether the rule of reason or per se rule was the proper standard. Third, and most important, the crucial question is not whether market power is important in theory—it clearly is, as the Court's observation acknowledges—but whether proof of it should be required in litigation—a question on which the Court's observation sheds no light.

30. 476 U.S. 447 (1986).

31. *See id.* at 460.

32. *Id.* at 460-61 (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1511, at 429 (1986)).

33. 468 U.S. 5 (1984).



present less of a competitive danger than horizontal ones,<sup>34</sup> so that using market power to screen out vertical cases could be viewed as desirable. But there is another way to look at the matter: the form of market power present in horizontal cases—aggregation of market share—is much easier to measure in litigation than market power in vertical cases, which usually derives from product differentiation.<sup>35</sup> Therefore, as a matter of litigation accuracy and efficiency, it might be less sensible to use a market power requirement in vertical cases. That possibility is in fact consistent with the Supreme Court's limited uses of market power in *per se* cases, where the forms of power on which the Court has relied have been horizontal.<sup>36</sup>

The Supreme Court's most recent opportunity to clarify the position of market power came last term, in *California Dental Ass'n v. FTC*.<sup>37</sup> In that case, the Court rejected the Ninth Circuit's use of a "quick look" to condemn certain advertising restrictions imposed by the California Dental Association.<sup>38</sup> The Court indicated that because the restrictions were not ones whose "great likelihood of anticompetitive effects [could] easily be ascertained,"<sup>39</sup> a fuller rule of reason analysis was necessary. The Court, however, did not describe such an analysis in detail, or make market power a required part of it, stating only that the degree of market analysis required will differ with the nature of the restraint.<sup>40</sup>

Justice Breyer's concurring opinion, in which three other justices joined, was more explicit on the issue of market power. Justice Breyer suggested that "a traditional application of the rule of reason" comprised the following questions: "(1) What is the specific restraint at issue? (2)

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34. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-55 (1977); *The Supreme Court, 1987 Term: Leading Cases*, 102 HARV. L. REV. 143, 308 (1988) ("All vertical agreements, even beneficial ones, have horizontal effects, but, because the anticompetitive danger is greater when direct competitors agree than when noncompetitors agree, the Court [in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988)] properly advised lower courts to treat horizontal agreements more suspiciously than vertical agreements.") (footnote omitted).

35. See Peter M. Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis*, 1981 DUKE L.J. 417, 441-43 (1981) (describing how the relevant source of market power in vertical restraints is product differentiation).

36. That is true not only in the joint venture context of *Northwest Wholesale Stationers*, but also in the tying context, where the sort of coercive power on which the Court has focused is generally a function of market share, not of product differentiation.

37. 119 S. Ct. 1604 (1999).

38. See *id.* at 1618.

39. *Id.* at 1613.

40. See *id.* at 1617.

What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?”<sup>41</sup> The location of the market power inquiry, last in this series of questions, suggests that Justice Breyer does not see it as a threshold issue. More support for that reading is found in his statement that he only “assume[d]” that the FTC was required under the rule of reason to prove market power.<sup>42</sup> Even more interesting is that Justice Breyer does not adopt the Chicago School view that without market power any restraint must be procompetitive, but instead appears to assume that the restraint is anticompetitive and looks to market power only to determine whether it is of a magnitude sufficient to implicate the antitrust laws.<sup>43</sup>

### *B. The Place of Market Power in the Court’s Antitrust Jurisprudence*

The Court’s use of market power in section 1 cases is consistent with its role in the Court’s other antitrust cases. In section 2 monopolization cases, of course, the Court has required a showing of power. In *United States v. Grinnell Corp.*,<sup>44</sup> it set out the basic test under section 2,<sup>45</sup> which the Court said “has two elements: (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.”<sup>46</sup> But the Court’s reasons for requiring power under section 2 do not justify a similar requirement under section 1.<sup>47</sup>

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41. *Id.* at 1618 (Breyer, J., concurring in part and dissenting in part).

42. *Id.* at 1621 (Breyer, J., concurring in part and dissenting in part) (“I shall assume that the Commission must prove one additional circumstance, namely, that the Association’s restraints would likely have made a real difference in the marketplace.”) (citing AREEDA, *supra* note 32, at 376-77).

43. *See id.*

44. 384 U.S. 563 (1966).

45. Section 2 of the Sherman Act makes illegal the acts of “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 2 (1994).

46. *Grinnell*, 384 U.S. at 570-71.

47. Indeed, one recent case has held the converse, that the Court’s failure to require power under section 1 means that it also should not be required under section 2. The Sixth Circuit in *Re/Max International, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 17, 1999) (No. 99-294), said that “[t]he Supreme Court has noted on at least two occasions that direct evidence of monopoly power will support an antitrust claim.” *Id.* at 1019. The two cases the court cited as standing for the proposition that proof of effects is sufficient were *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), and *Indiana Federation of Dentists*, both of which the court acknowledged supported the proposition only in the section 1 context, but the court said that it saw “no reason to believe that

The Court's section 2 opinions do not indicate that it believes that possession of market power is necessary for an act to be anticompetitive. The offense of monopolization can be proven for a trade practice imposed by a seller that does not initially possess market power. This is because the willful *acquisition* of monopoly power is a section 2 violation. Mergers to monopoly are the obvious example,<sup>48</sup> but there are other acquisitions of monopoly power that resemble those section 1 violations that are usually evaluated under the rule of reason. For example, a seller that enters into an exclusive arrangement with a supplier can foreclose its competitors from access to the supplier and thus gain monopoly power (if access to the supplier is important).<sup>49</sup> Additionally, misleading customers in certain ways has been found to constitute monopolization.<sup>50</sup> In neither of these circumstances does the seller need monopoly power, or market power, to accomplish its anticompetitive goal.<sup>51</sup>

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monopoly power in the [section] 1 context is any different from the [section] 2 monopoly power the plaintiffs allege here." *Id.* at 1019.

48. See *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

49. This is the conduct alleged in the recent FTC complaint against Mylan Laboratories, Inc.:

Mylan acted with a specific intent to monopolize, and to destroy competition in, the generic lorazepam tablets market. Mylan devised and implemented a calculated campaign to raise the price and profitability of lorazepam by locking up the supply of lorazepam API, the most essential ingredient for making generic lorazepam tablets.

Amended Complaint for Injunctive and Other Equitable Relief ¶ 63, *FTC v. Mylan Laboratories, Inc.*, Case No. 1:98CV03114 (D.D.C. Feb. 8, 1999), available at <<http://www.ftc.gov/os/1999/9902/mylanamencmp.htm>>. It was also one of the forms of conduct challenged in the *Alcoa* case. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 422 (2d Cir. 1945); see also 3A PHILLIP E. AREEDA & DONALD F. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 768a, at 147 (1996) ("It is presumptively exclusionary for a monopolist to extract a supplier's promise that . . . [it] will not supply any of the monopolist's rivals—as, for example, *Alcoa* did in its early years with its suppliers of electric power.").

50. See *Oahu Gas Serv., Inc. v. Pacific Resources Inc.*, 829 F.2d 1471 (9th Cir. 1987).

51. In the exclusive dealing example, the seller need only be willing to share the resulting monopoly profits with its exclusive supplier. See *Director of Investigation & Research v. D&B Cos. of Canada Ltd.*, 64 C.P.R. 3d 216, 255 (1995) (observing, where defendant had entered into exclusive arrangements to purchase scanner data from retailers, that "the sole relevance of the market position of the retailers lies in their ability to command a share of any monopoly returns that [the defendant] may be able to obtain" and that "[t]he position of the retailers does not detract from [the defendant's] ability to exercise any market power it may hold . . ."). Where the seller misleads customers, even that is not necessary, because the deception, by increasing demand for the seller's

One might object to this analysis on the ground that the Supreme Court requires power to establish an attempt to monopolize, which might be interpreted to suggest that it believes power is necessary to acquire a monopoly. Indeed, in *Spectrum Sports, Inc. v. McQuillan*,<sup>52</sup> where the Court required a dangerous probability of success in attempt cases, the Court's primary concern appeared to be the difficulty of distinguishing procompetitive from anticompetitive conduct,<sup>53</sup> which might suggest that the Court viewed market power as necessary for anticompetitive effect. The Court did not, however, rely on a claim that anticompetitive conduct is impossible without economic power.<sup>54</sup> Instead, its concern was with the particular problem of identifying anticompetitive *unilateral* activity, and it adopted a market power requirement only in that particular context. The Court explicitly distinguished unilateral action from "concerted activity covered by [section] 1, which 'inherently is fraught with anticompetitive risk,'"<sup>55</sup> suggesting that no similar market power requirement would be necessary in the section 1 context.

Even in the Court's Clayton Act merger cases, where the structural focus would lead one to expect an emphasis on market power, the role of power is limited. In *United States v. Philadelphia National Bank*,<sup>56</sup> which is still the Court's leading merger case, the Court said that the "ultimate question under [section 7 is] whether the effect of the merger 'may be substantially to lessen competition' in the relevant market."<sup>57</sup> It then established a role for market power, in the form of market share measures, but not as a necessary element in proving the likelihood of a lessening of competition. Instead, as in the per se context under section 1, the Court allowed proof of market power to substitute for proof of

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product, creates its own market power. See Mark R. Patterson, *Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law*, 66 ANTITRUST L.J. 1, 16-20 (1997).

52. 506 U.S. 447 (1993).

53. See HOVENKAMP, *supra* note 1, at 244-45.

54. The Court did point out, though, that in *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), it had stated that it was "necessary to appraise the exclusionary power of the illegal patent claim in terms of the relevant market for the product involved" because "[w]ithout a definition of that market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Spectrum Sports*, 506 U.S. at 456 (quoting *Walker Process*, 382 U.S. at 177) (alteration in original).

55. *Spectrum Sports*, 506 U.S. at 459 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69 (1984)).

56. 374 U.S. 321 (1963).

57. *Id.* at 362 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 312 n.18 (1962)). Section 7 of the Clayton Act condemns acquisitions of stock or assets "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1994). The significance of the Court's omission of the monopoly language is unclear.

likely competitive effect:

[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.<sup>58</sup>

In sum, the Court's cases dealing with section 2 of the Sherman Act and section 7 of the Clayton Act echo two basic themes from its section 1 cases. First, the role of market power is tailored to particular categories of cases; it is not applied indiscriminately as a determinant of anticompetitive effect. Thus, the forms of power that are at issue in tying cases and cases of exclusions from joint ventures are specific to the competitive problems presented in those cases. In addition, power, or a dangerous probability of monopolization, is used in attempted monopolization cases because of the particular problems in evaluating unilateral activity. Second, when the Court does establish a role for proof of market power, it is often used as an alternative to evaluating anticompetitive effect, rather than as an element in the proof of such effect. In none of the Court's cases, under any of the antitrust statutes, does it suggest that proof of market power is generally necessary to establish proof of anticompetitive effect.

### III. THE DEVELOPMENT OF A MARKET POWER REQUIREMENT

#### A. *Early Commentary*

The first commentary advocating the use of market power in section 1 rule of reason cases appeared in 1977. In its monograph of that year on vertical restraints, the American Bar Association's Section on Antitrust Law said that "[t]o determine the significance of the effects of an intrabrand restraint on overall competition, the market power of the product on which the intrabrand restriction has been placed must be assessed."<sup>59</sup> Notably, this statement did not go so far as to require a

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58. *Philadelphia Nat'l Bank*, 374 U.S. at 363. The Court observed that "[s]uch a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' [s] design in [section] 7 to prevent undue concentration." *Id.*

59. ABA SECTION OF ANTITRUST LAW, MONOGRAPH NO. 2, VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION 62 (1977). Richard Posner

showing of market power; it only said that power should be “assessed.” To that extent, it was consistent with the expressed views of the Supreme Court, which had included market power, or factors related to it, among factors to be considered.<sup>60</sup>

On the other hand, the ABA monograph said that market power “must be” assessed. In this, it went beyond the Supreme Court’s statements, as evidenced by its failure to cite any Supreme Court cases in support of its assertion. Indeed, neither of the two lower-court cases that it cited supports the statement. One, *United States v. Columbia Pictures Corp.*,<sup>61</sup> said only that the “portion of the market” is a factor in determining the competitive effect of a restraint;<sup>62</sup> although one could interpret this statement to imply that all such factors must be examined, the case does not go that far explicitly. The second case, *Carter-Wallace, Inc. v. United States*,<sup>63</sup> specifically stated that examination of market power can be forgone.<sup>64</sup>

The second, and more prominent, 1977 commentary on the market power issue was then-Professor Richard Posner’s article, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*. In this article, Posner suggested an approach that “would automatically preclude liability unless the manufacturer had a very large market share or unless all or most of the manufacturers in the market imposed uniform restrictions on their dealers so that (in either case) the dealers had a monopoly position in a genuine economic market.”<sup>65</sup> Thus, Posner emphasized market share, but the share that he said is relevant was that occupied by the challenged restriction, not the defendant.<sup>66</sup> Later, he abandoned that approach and focused only on the share of the defendant.<sup>67</sup> In any event, in the 1977 article, he identified no Supreme Court case in support of his view, citing only the circuit court opinion in

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characterizes this monograph as “an exhaustive analysis of the evolution of restricted distribution law to the eve of *Sylvania*.” Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 3 n.10 (1977) [hereinafter Posner, *Economic Approach*].

60. See *supra* text accompanying notes 17-22.

61. 189 F. Supp. 153 (S.D.N.Y. 1960).

62. *Id.* at 178.

63. 449 F.2d 1374 (Ct. Cl. 1971).

64. See *id.* at 1381.

65. Posner, *Economic Approach*, *supra* note 59, at 17.

66. This approach is similar to those of the National Association of Attorneys General in its Vertical Restraint Guidelines, 49 Antitrust & Trade Reg. Rep. (BNA) 996 (Dec. 5, 1985), and of the European Commission in its recent revision of its approach to vertical restraints, Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints (Follow-Up to the Green Paper on Vertical Restraints), 1998 O.J. (C 365) 3.

67. See *infra* text accompanying note 111.

*United States v. Addyston Pipe & Steel Co.*,<sup>68</sup> a horizontal price-fixing case.<sup>69</sup>

### B. Posner's 1981 Article and the Pre-Valley Liquors Cases

In 1981, one year before he wrote the Seventh Circuit's opinion in *Valley Liquors, Inc. v. Renfield Importers, Ltd.*,<sup>70</sup> which is discussed in the next section of this Article, Professor Posner published a second article addressing vertical restraints.<sup>71</sup> In the article, Posner said that "[s]ome courts have narrowed the defendant's risk by requiring that the plaintiff in a [r]ule of [r]eason case prove substantial market power in a relevant market."<sup>72</sup> He cited seven cases in the footnote to this statement.<sup>73</sup> In fact, although two of these cases came close to doing so, none clearly established market power as a requirement. An appreciation of how far the cases were from adequately supporting Posner's statement requires that they be examined individually.

Four of the cases not only did not themselves require a showing of market power, but made clear their views that proof of market power is *not* required. One of these, *Kestenbaum v. Falstaff Brewing Corp.*,<sup>74</sup>

68. 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899)).

69. See Posner, *Economic Approach*, *supra* note 59, at 17 n.50 (citing *Addyston Pipe & Steel Co.*, 85 F. at 271). This citation may be reasonable in light of Posner's exclusive focus on the harm of cartelization. The "vastly superior" approach, Posner opines, "is to focus on the single question whether the restriction is intended to cartelize distribution or, on the contrary, to promote the manufacturer's own interests." *Id.* at 17.

70. 678 F.2d 742 (7th Cir. 1982), *later proceeding*, 822 F.2d 656 (7th Cir. 1987).

71. See Posner, *Next Step*, *supra* note 2, at 6.

72. *Id.* at 16. In contrast to Posner's earlier view that the relevant measure of market power was that possessed by all sellers imposing the same restriction, see *supra* text accompanying notes 65-69, the relevant power referred to by Posner in this article is that possessed by the defendant. See Posner, *Next Step*, *supra* note 2, at 16 ("In practice, this means that the plaintiff must prove that the defendant has a large market share—how large is unclear.").

73. See *id.* at 16 n.39. Most of the same cases are cited in the article on market power that Posner co-authored the same year with William Landes. See Landes & Posner, *supra* note 1, at 956 n.35 (citing *Gough v. Rossmoor Corp.*, 585 F.2d 381, 388-89 (9th Cir. 1978); *Northwest Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 90-91 (5th Cir. 1978); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 130 n.5 (2d Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 562 (1st Cir. 1974)). In the Landes and Posner article, however, the authors also cited cases taking the contrary position. See *id.* at 956 n.35 (citing *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068, 1081 (2d Cir. 1980); *Harold Friedman Inc. v. Thorofare Markets Inc.*, 587 F.2d 127, 143 (3d Cir. 1978)).

74. 575 F.2d 564 (5th Cir. 1978).

made only a general comment to this effect,<sup>75</sup> but the other three discussed the issue more specifically. *Oreck Corp. v. Whirlpool Corp.*<sup>76</sup> was most explicit.<sup>77</sup> The court in *Oreck* noted that the plaintiff had not shown that the defendant's share of the market was sufficient to allow an anticompetitive interbrand effect,<sup>78</sup> which might on a quick reading suggest that it found market power to be dispositive. But the court also said that the challenged action—a manufacturer's elimination of one dealer in favor of another—had not given the remaining dealer “a market position from which it could raise retail prices even in the face of interbrand competition.”<sup>79</sup> That is, even with interbrand competition—a lack of interbrand market power—the court was willing to consider the possibility of presumably intrabrand anticompetitive effects.<sup>80</sup>

Somewhat similar was *Northwest Power Products, Inc. v. Omark Industries, Inc.*,<sup>81</sup> which also involved the substitution of one dealer for another. The court of appeals called “impeccably correct” the district court's conclusion that in showing only this sort of substitution, the plaintiff “had failed to produce facts which would demonstrate anticompetitive effect.”<sup>82</sup> But the appeals court then went on to examine market power in order to distinguish the case from another in which “an anticompetitive effect was said to exist when the new distributor, if effective in driving out the old, would become a monopolist.”<sup>83</sup> Thus, the court was apparently willing to consider the attainment of intrabrand market power as a violation in itself; whether the court would have been willing to find liability on that basis is not clear, but its mention of interbrand power in what seems to have been an afterthought is suggestive.<sup>84</sup>

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75. “Increased concentration, as shown by a change in relative market shares, *may* be an indicator, or a change in prices, output or quality which evinces market power *may* be significant.” *Id.* at 571 (emphasis added). This statement is consistent with the Supreme Court's characterization of market share as a factor to be considered, rather than a requirement. See *supra* text accompanying notes 17-22.

76. 579 F.2d 126 (2d Cir. 1978).

77. Other commentators have noted this, which makes Posner's citation of the case peculiar.

78. See *Oreck*, 579 F.2d at 130 n.5.

79. *Id.*

80. This interpretation of *Oreck* is supported by a later Second Circuit case, *Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1980). In *Eiberger*, the defendant argued that the plaintiff was required to show anticompetitive effect on the interbrand market and that “an anticompetitive impact on intrabrand competition cannot alone support a finding that [section] 1 has been violated,” but the court rejected that argument. *Id.* at 1081.

81. 576 F.2d 83 (5th Cir. 1978).

82. *Id.* at 90.

83. *Id.* (citing *Cherokee Lab., Inc. v. Rotary Drilling Servs., Inc.*, 383 F.2d 97 (5th Cir. 1967)).

84. At the end of the paragraph in which the court presents the analysis described



*H & B Equipment Co. v. International Harvester Co.*<sup>85</sup> was also decided on the basis of the plaintiff's failure to show even intrabrand effect. The court did not even use the term "market power," and it said that under section 1, proof of "[a]n unreasonably anticompetitive effect, or conduct presumed under the per se rubric to have that effect, is all that is required."<sup>86</sup> It did point out that interbrand competition in the case "appear[ed] to have been healthy,"<sup>87</sup> which might reasonably be taken to have expressed the view that the defendant did not have interbrand market power, but the court did not dispose of the case on that ground. Instead, it focused on the fact that the defendant-manufacturer had eliminated only one dealer among many,<sup>88</sup> and the court made the point that there were an adequate number of remaining dealers to preserve sufficient intrabrand competition.<sup>89</sup> It is certainly true that if a plaintiff fails even to show an anticompetitive intrabrand effect it should not prevail, but that is so regardless of whether the defendant has interbrand market power.

It is unclear how Judge Posner could have misread these cases to require market power. One could perhaps read the latter three cases—*Oreck*, *Northwest Power*, and *H&B Equipment*—to require either interbrand or intrabrand market power, but one cannot reasonably read them to require interbrand market power. Posner's position is that intrabrand power is not enough; in the statement quoted above,<sup>90</sup> he would not consider the intrabrand market a relevant antitrust market.

Another of the cases cited by Posner, *George R. Whitten, Jr., Inc., v. Paddock Pool Builders, Inc.*,<sup>91</sup> does not go as far as the four cases just discussed, in that it does not explicitly state that market power is not required in a rule of reason case, but it is most fairly read to suggest so. The main issue in the case was whether the per se rule or rule of reason

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in the text, the court states that *Northwest Power*, "like *Cherokee Laboratories, Inc.*, entails interbrand as well as intrabrand competition." *Id.* at 90. This analysis makes clear the point of the court's earlier statement that "[t]he market power of the defendant charged with a *Pick-Barth* violation [i.e., the substitution of one dealer for another] is crucial." *Id.* at 89. The defendants in *Northwest Power* included both the manufacturer and the substituted dealer, and the court's view was that the power of *each* was important.

85. 577 F.2d 239 (5th Cir. 1978).

86. *Id.* at 243.

87. *Id.* at 246.

88. *See id.*

89. *See id.*

90. *See supra* text accompanying notes 71-72.

91. 508 F.2d 547 (1st Cir. 1974).

was applicable.<sup>92</sup> The court distinguished the two rules by noting the greater importance of market power in the *per se* context. It said that “a ‘rule of reason’ analysis, involv[es], among other factors, a study of the consequences of the conduct on the affected market. . . . On the other hand, analysis of market power as opposed to effect is required for most *per se* violations.”<sup>93</sup> As described above, this analysis is consistent with the Supreme Court’s requirements of market power in section 1 *per se* cases; it does not, however, advocate the use of, let alone require, market power in rule of reason cases.

The final two of the seven cases come close to supporting the point for which Posner cites them. One of them, *Gough v. Rossmoor Corp.*,<sup>94</sup> requires the plaintiff to define a relevant market in a rule of reason case.<sup>95</sup> Definition of the relevant market is usually a step in the determination of market power, and later in the case the court’s opinion could be read to suggest such a requirement.<sup>96</sup> That suggestion comes, however, in the court’s section 2 discussion; the court does not include or even suggest such a requirement in the section 1 portion of its opinion.<sup>97</sup> Moreover, the only support the court cites for its requirement of market definition is a very general statement from *Sylvania*: “[A]n antitrust policy divorced from market considerations would lack any objective benchmarks.”<sup>98</sup> From this statement, the court draws the unobjectionable gloss that “[b]efore this study can even be commenced, however, we must know with what field of competition we are concerned and the dimensions of that field.”<sup>99</sup> These very general statements, together with the court’s failure to explicitly require proof of

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92. *See id.* at 559.

93. *Id.*

94. 585 F.2d 381 (9th Cir. 1978).

95. *See id.* at 389.

96. The court is hardly clear:

[N]o inference of intent to monopolize can be drawn from the anticompetitive conduct in question unless it amounted to an unreasonable restraint of trade under [section] 1. While conduct which would, in the case of a conspiracy, amount to a *per se* violation of [section] 1 would constitute an unreasonable restraint of trade without proof of market or market power, under the rule of reason market definition is required to establish a [section] 1 violation, as we have previously noted. Thus, in the absence of proof of relevant market and market power, the plaintiff must prove either predatory conduct or a *per se* violation of [section] 1 to prove an attempt to monopolize.

*Id.* at 390.

97. *See R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407, 1987 U.S. App. LEXIS 11681, at \*20 (9th Cir. Mar. 16, 1987) (describing as “dictum” the statement in *Gough v. Rossmoor Corp.* that market power is a necessary element of a rule of reason claim), *opinion on rehearing en banc*, 890 F.2d 139 (9th Cir. 1989).

98. *Gough*, 585 F.2d at 389, quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

99. *Id.*

market power, suggest that the court's real concern was with the plaintiff's failure to focus carefully on the nature of the market, not on market power. To read the case as supporting a market power requirement demands at the same time a close reading of the case to find its mention of market power and a casual willingness to ignore the actual basis of its decision.

The final case cited by Posner, which perhaps not coincidentally is the only district court case, *Donald B. Rice Tire Co. v. Michelin Tire Corp.*,<sup>100</sup> came quite close to requiring proof of market power. What the case explicitly said, however, was only that market power is necessary to restrain competition.<sup>101</sup> One can accept that proposition, of course, without believing that proof of market power is required.<sup>102</sup> But the court did conclude that the defendant lacked power, and it appeared to find that fact very important.<sup>103</sup> It then went on, however, to describe why the plaintiff's claims were implausible on other grounds,<sup>104</sup> thus leading one to wonder whether an absence of market power alone would have been sufficient.

In the end, it might be fair to say that *Donald B. Rice*, as Posner said, "requir[ed] that the plaintiff in a [r]ule of [r]eason case prove substantial market power in a relevant market."<sup>105</sup> It is inaccurate to say the same of *Gough*, but that case at least seemed as if it would agree with such a requirement.<sup>106</sup> The other five cases cited by Posner do not, however, support his point. Indeed, they all would be better cited for the proposition that proof of interbrand market power is *not* a requirement in section 1 rule of reason cases. Nevertheless, Posner's article may have laid the groundwork for such a requirement, as the next section shows.

### C. Valley Liquors

The earliest case that is commonly cited for the proposition that a showing of market power is required is *Valley Liquors, Inc. v. Renfield*

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100. 483 F. Supp. 750 (D. Md. 1980).

101. See *id.* at 761 ("Only a firm with market power can effectively restrain competition.").

102. See *infra* text accompanying notes 242-43.

103. See *Donald B. Rice*, 483 F. Supp. at 761.

104. See *id.* at 761-62.

105. Posner, *Next Step*, *supra* note 2, at 16.

106. Just how relevant to Posner's point that agreement would be, given that *Gough*, like *Whitten*, was a horizontal case and not a vertical one, is not clear. See *supra* text accompanying notes 35-36.

*Importers, Ltd.*<sup>107</sup> This case generated two opinions from the Seventh Circuit, both of which treat the market power requirement as well established. In the first opinion, *Valley Liquors I*,<sup>108</sup> Judge Posner said that because weighing the effects of interbrand competition and intrabrand competition was difficult,<sup>109</sup> courts have “looked for shortcuts.”<sup>110</sup> He noted that “[a] popular one is to say that the balance tips in the defendant’s favor if the plaintiff fails to show that the defendant has significant market power.”<sup>111</sup> He then adopted this same approach for the Seventh Circuit.<sup>112</sup>

One might expect, since this proposition is the same one that Professor Posner supported only one year before by citing the cases discussed in the previous section, that Judge Posner would have cited some of the cases in *Valley Liquors I*. He did not. Instead, he said that requiring a showing of market power was “the approach of the Fifth and Ninth Circuits,” and cited one case from each circuit.<sup>113</sup> The Ninth Circuit case, *Cowley v. Braden Industries, Inc.*,<sup>114</sup> does not impose any sort of market power requirement on the plaintiff; the court simply says that even with a showing of market power, the burden of showing that a restraint is unreasonable remains on the plaintiff.<sup>115</sup>

The Fifth Circuit case, *Muenster Butane, Inc. v. Stewart Co.*,<sup>116</sup> also did not impose a market power requirement. To be sure, *Muenster Butane* said that market power is necessary for anticompetitive effect—citing Posner’s 1981 article<sup>117</sup>—but that is not the question.<sup>118</sup> The question is whether we are willing to allow a jury to infer anticompetitive effect from any other evidence, or if the plaintiff must prove, at the outset, that the defendant has market power. *Muenster Butane* was not willing to go that far—it said only that a market power requirement “would have saved the litigants and the courts much expense.”<sup>119</sup> In fact, the court devoted most of its analysis to an

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107. 678 F.2d 742 (7th Cir. 1982), *later proceeding*, 822 F.2d 656 (7th Cir. 1987).

108. 678 F.2d 742 (7th Cir. 1982) [hereinafter *Valley Liquors I*]. The second opinion is discussed *infra* text accompanying notes 135-40.

109. The need for such a weighing derived, he said, from a “suggestive footnote” in *Sylvania*. *Valley Liquors I*, 678 F.2d at 745 (citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 n.27 (1977)).

110. *Id.*

111. *Id.*

112. *See id.*

113. *Id.*

114. 613 F.2d 751 (9th Cir. 1980).

115. *See id.* at 754-56.

116. 651 F.2d 292 (5th Cir. 1981).

117. *See id.* at 298.

118. *See infra* text accompanying notes 242-43.

119. *Muenster Butane*, 651 F.2d at 298.

evaluation of the competitive effects of the challenged restraints, concluding not only that the defendant's actions reduced undesirable "free-riding,"<sup>120</sup> but that "intrabrand competition . . . continued unabated."<sup>121</sup> In light of these conclusions, it is not surprising that the court did not rely on a lack of market power.

*Valley Liquors I*, in contrast, did rely on the lack of market power.<sup>122</sup> Oddly, though, it did not say explicitly that it was doing so. Instead, Posner made some academic-sounding comments about how, without market power, "[e]ven if there is some possibility [of] . . . a substantial anticompetitive effect, it is too small a possibility to warrant trundling out the great machinery of antitrust enforcement."<sup>123</sup> And, as quoted above, it did not actually say that the approach it was adopting was to impose a threshold market power requirement, but "to say that the balance tips in the defendant's favor if the plaintiff fails to show . . . significant market power."<sup>124</sup> This is a somewhat cryptic statement, especially in light of *Valley Liquors I*'s description of *Muenster Butane* as having "held that the effects on intrabrand and on interbrand competition must be balanced in deciding whether a challenged restriction on distribution is unreasonable."<sup>125</sup> That description is accurate, but a balancing approach is inconsistent with a threshold market power requirement.

A market power requirement was advocated more clearly, but only in dictum, in other decisions, mostly from the Seventh Circuit, in the years following *Valley Liquors I*, often with opinions written by Judge Posner. For example, in *General Leaseways, Inc. v. National Truck Leasing Ass'n*,<sup>126</sup> Judge Posner wrote that "some progress has been made toward giving [the rule of reason] some structure by requiring that the plaintiff

120. *Id.* at 297.

121. *Id.* at 298.

122. *See Valley Liquors I*, 678 F.2d 742, 745 (7th Cir. 1982).

123. *Id.* The Supreme Court has disagreed:

A small participant in the market is, obviously, less likely to cause persistent damage than a large participant. . . . For reasons including market inertia and information failures, however, a small conspirator may be able to impede competition over some period of time. Given an appropriate set of circumstances and some luck, the period can be long enough to inflict real injury upon particular consumers or competitors.

*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 434-35 (1990) (footnote omitted).

124. *Valley Liquors I*, 678 F.2d at 745.

125. *Id.*

126. 744 F.2d 588 (7th Cir. 1984).

first prove that the defendant has sufficient market power to restrain competition substantially.”<sup>127</sup> In support of this proposition, the decision cited five cases.<sup>128</sup> In addition to *Valley Liquors I* and *Muenster Butane*,<sup>129</sup> the court cited *Jack Walters & Sons Corp. v. Morton Building, Inc.*<sup>130</sup> and *Lektro-Vend Corp. v. Vendo Co.*<sup>131</sup> from the Seventh Circuit, and *Graphic Products Distributors, Inc. v. Itak Corp.*<sup>132</sup> from the Eleventh Circuit.<sup>133</sup> *Lektro-Vend* did not discuss a market power requirement, and although the other cases—*General Leaseways*, *Jack Walters & Sons*, and *Graphic Products*—did refer to such a requirement, in none of them was it necessary to the decision of the case.<sup>134</sup>

The Seventh Circuit’s first unequivocal holding that a plaintiff must show market power in a rule of reason case came in *Valley Liquors II*,<sup>135</sup> three years after *General Leaseways*. The second opinion cited four cases, in addition to *Valley Liquors I* and *General Leaseways*, in support of its bald statement of the market-power requirement: “A threshold inquiry in any [r]ule of [r]eason case is whether the defendant had market power, that is, the ‘power to raise prices significantly above the competitive level without losing all of one’s business.’”<sup>136</sup> Of those four cases, three were Seventh Circuit decisions that did not in fact adopt a market power requirement.<sup>137</sup> The other case, *Assam Drug Co. v. Miller*

127. *Id.* at 596.

128. *See id.* *General Leaseways* also cited Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 157-68 (1984). *See General Leaseways*, 744 F.2d at 596.

129. Not among the citations was *Cowley v. Braden Industries, Inc.*, 613 F.2d 751 (9th Cir. 1980), the Ninth Circuit case that *Valley Liquors I* incorrectly said adopted a market power requirement. *See Cowley*, 613 F.2d at 755 (rejecting claims of a market power requirement).

130. 737 F.2d 698 (7th Cir. 1984).

131. 660 F.2d 255 (7th Cir. 1981).

132. 717 F.2d 1560 (11th Cir. 1983).

133. *See supra* text accompanying notes 112-13.

134. The concurrence in *Jack Walters & Sons* pointed this out:

Unfortunately, I cannot concur in much of the discussion contained in the majority opinion, not because that discussion may not state correct principles of law, but because I believe it is dicta—dicta that might tend to influence and prejudice decisions in cases yet unborn but which may come to this court for review.

*Jack Walters & Sons*, 737 F.2d at 713 (Swygert, J., concurring).

135. 822 F.2d 656 (7th Cir. 1987) [hereinafter *Valley Liquors II*].

136. *Id.* at 666 (quoting *Valley Liquors I*, 678 F.2d 742, 745 (7th Cir. 1982)).

137. *See Hennessy Indus. Inc. v. FMC Corp.*, 779 F.2d 402, 404-05 (7th Cir. 1985); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 191 (7th Cir. 1985); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 265 (7th Cir. 1984). Actually, far from supporting the court’s point, these cases provide further examples of the peculiarities in the rhetorical development of the market power requirement. First, *Polk Bros.* cited *Brunswick* in support of this statement: “The first step in any [r]ule of [r]eason case is an assessment of market power.” *Polk Bros.*, 776 F.2d at 191. Then, *Hennessy* made the following statement: “This court held in [*Brunswick*] that ‘the first

*Brewing Co.*,<sup>138</sup> was from the Eighth Circuit, and, as discussed below,<sup>139</sup> *Assam Drug* did indeed adopt a market power requirement. It is therefore the first case the Seventh Circuit cites from another circuit that clearly does so,<sup>140</sup> and it is significant that when it became available, the Seventh Circuit not only ceased including its earlier, more questionable citations, but also—finally—explicitly adopted the requirement itself.

Here, then, are the steps in the development of the market power requirement through *Valley Liquors I* and *II*:

1. Professor Posner writes an article claiming that “some courts” have adopted a market power requirement, and cites seven cases. In fact, only one of those cases, a district court case, is fairly described as having adopted such a requirement, though one other of the cases might perhaps have been willing to do so. Five of the cases appear to disagree with the requirement.<sup>141</sup>
2. *Muenster Butane* says that a market power requirement would be appropriate (though it does not adopt one), citing only the misleading Posner article. *Muenster Butane* does not cite any of the cases cited in the Posner article.<sup>142</sup>
3. In *Valley Liquors I*, Judge Posner says that a “popular” shortcut is a market power requirement, citing two cases, one of which

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step in any [r]ule of [r]eason case is an assessment of market power.” *Hennessy*, 779 F.2d at 404-05 (apparently quoting *Brunswick*). However, *Brunswick* did not hold, let alone state, anything of the sort. *Brunswick* (written by Judge Posner) was a section 2 case based on patent fraud, and though *Brunswick* said, as one would expect in that context, that “[t]he patent must dominate a real market,” *Brunswick*, 752 F.2d at 265, that holding simply has nothing to do with the rule of reason under section 1. In *Polk Bros.* (written by Judge Easterbrook), there was also no rule of reason claim, the plaintiff having proceeded only under the per se rule. *Polk Bros.*, 776 F.2d at 191. Hence, Judge Easterbrook’s comments on the rule of reason were dicta. Finally, although *Hennessy* did involve a rule of reason claim, its comments on market power were not made in the context of that claim. See *Hennessy*, 779 F.2d at 404. Instead, they were made in the context of what the court called a “claim for a [r]ule of [r]eason violation under [s]ection 2.” *Id.* Putting aside the fact that section 2 claims generally are not called “rule of reason” claims, there is no question that market power—actually, monopoly power, or the dangerous probability of it—must be proved under section 2. See *supra* text accompanying notes 44-55. But that says nothing about the rule under section 1.

138. 798 F.2d 311 (8th Cir. 1986).

139. See *infra* Part IV.B.

140. Subsequently, however, the Eighth Circuit retreated from its requirement of a showing of market power, see *infra* Part IV.B, and a very recent Seventh Circuit case, *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass’n*, 95 F.3d 593 (7th Cir. 1996), cited only other Seventh Circuit cases.

141. See *supra* Part III.B.

142. See *supra* notes 116-21 and accompanying text.

imposes no such requirement and the other of which is *Muenster Butane*. Despite having only two cases (and only one that comes close to being a valid one) to cite for what he says is a popular position, Posner does not cite any of the cases that he said in his earlier article adopted that position.<sup>143</sup>

4. *Jack Walters & Sons* from the Seventh Circuit and *Graphic Products* from the Eleventh Circuit advocate a market power requirement in dictum. *General Leaseways* then cites those two cases in advocating the requirement in dictum.<sup>144</sup>
5. *Assam Drug* adopts a market power requirement for the Eighth Circuit, relying, as discussed below, on Posner's 1981 article and a number of cases, none of which themselves clearly adopted such a requirement.<sup>145</sup>
6. *Valley Liquors II* cites five Seventh Circuit cases that do not clearly adopt a market power requirement and *Assam Drug* in adopting—for the first time in the Seventh Circuit—the market power requirement.<sup>146</sup>

The sequence of events is striking: the Seventh Circuit built support for a market power requirement by questionable citations in early cases, dropping those citations in favor of more valid ones as other cases came closer to adopting the requirement, often relying on Seventh Circuit precedent, until finally, after *Assam Drug* clearly adopted the requirement, the Seventh Circuit did so as well.

#### IV. THE MARKET POWER REQUIREMENT IN THE CIRCUITS

In the years following *Valley Liquors I*, several other circuits adopted or came close to adopting a market power requirement. Indeed, it has been claimed that the requirement became a more or less general one: “[i]n vertical nonprice cases, most courts of appeals have required a plaintiff to make a threshold showing that the defendant imposing the restrictions had market power in order to establish the required adverse effect on competition.”<sup>147</sup> As will be seen below, however, the adoption of the requirement has been far less general and far more equivocal than

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143. See *supra* notes 107-25 and accompanying text.

144. See *supra* notes 126-34 and accompanying text.

145. See *infra* note 175.

146. See *supra* notes 135-40 and accompanying text.

147. Appeal of Toys “R” Us, Inc. to the FTC (Public Record Version) at 49, Docket No. 9278 (Nov. 20, 1997) (citing *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 (8th Cir. 1987); *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986); *Graphic Prods. Distribs., Inc. v. Itek Corp.*, 717 F.2d 1560, 1568 (11th Cir.1983)).



is commonly believed, and even where such a requirement has been adopted, the adoption generally has not been accompanied by careful analysis.

In fact, the courts' adoptions of a market power requirement have not always shown the expected respect for binding precedent. Despite the Supreme Court's explicit rejection of the requirement in *Indiana Federation of Dentists*,<sup>148</sup> two circuits retain it. One could perhaps imagine that a court would retain the requirement for vertical cases, but reject it for horizontal ones, since *Indiana Federation of Dentists* was horizontal (as was *NCAA*, which also rejected the requirement), and vertical cases are generally viewed as presenting less danger to competition. But *Indiana Federation of Dentists* applied its rule not only to the rule of reason in horizontal cases, but also to the rule generally, and it might have been appropriate to do so.<sup>149</sup>

In any event, the courts that have flouted *Indiana Federation of Dentists* have not drawn on the distinction between horizontal and vertical cases, nor has the antitrust commentary. For example, the ABA Antitrust Section's *Antitrust Law Developments* said in 1997 that "[c]ourts have generally held that proof of a defendant's market power is an absolute prerequisite for a plaintiff seeking to use market analysis to satisfy its burden of proving likely anticompetitive effect."<sup>150</sup> Perhaps the restriction of this statement to plaintiffs "seeking to use market analysis" is intended to suggest that the statement is confined only to plaintiffs that do not show actual anticompetitive effects, thus conforming to the views of the Supreme Court, but the statement makes no distinction between horizontal and vertical cases.

The two circuits—the Seventh and Fourth—that have continued to require market power despite the Supreme Court's rejection of such a requirement are discussed in the first section below. The second section discusses the two circuits—the Sixth and Eighth—that adopted a market requirement in the wake of *Valley Liquors I*, but abandoned it after *Indiana Federation of Dentists*. The third section describes how the Fifth, District of Columbia, Eleventh, and Tenth Circuits have come close to adopting a market power requirement, without quite doing so. The fourth section discusses two circuits—the First and Ninth—that flirted with a market power requirement in isolated early cases, but then

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148. See *supra* text accompanying notes 29-32.

149. See *supra* text accompanying notes 35-36.

150. ABA SECTION OF ANTITRUST LAW, *supra* note 10, at 60.

rejected it on their own. Finally, there are the Second and Third Circuits, which never adopted a market power requirement. Indeed, in a recent case the Third Circuit appeared to express an understanding of the requirement as a broadening, rather than a narrowing, of potential antitrust liability.

A. *Circuits that Have Adopted and Maintained a  
Market Power Requirement*

Of the two circuits that appear to have maintained a market power requirement even in the face of the Supreme Court's rejection of such a requirement, only one has explained why. Not surprisingly, that circuit is the Seventh. In *Wilk v. American Medical Ass'n*,<sup>151</sup> the Seventh Circuit acknowledged that *Indiana Federation of Dentists* said that proof of anticompetitive effects "can obviate the need for an inquiry into market power,"<sup>152</sup> and it said that the *Wilk* district court's "findings eliminated the need for an inquiry into market power."<sup>153</sup> The court also said, however, consistent with earlier Seventh Circuit decisions, that "[t]he threshold issue in any rule of reason case is market power."<sup>154</sup> The Seventh Circuit has recently reaffirmed that position.<sup>155</sup>

The *Wilk* court apparently felt that it could reconcile the Supreme Court's views with its own in this statement: "The district court also relied on substantial evidence of adverse effects on competition caused by the boycott to establish the [defendant's] market power."<sup>156</sup> In other words, if the plaintiff offers proof of actual detrimental effects, that proof is also proof of market power, and thus meets the threshold market power requirement. But this eliminates any independent role for market power, because independent proof of market power is not necessary.<sup>157</sup>

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151. 895 F.2d 352 (7th Cir. 1990).

152. *Id.* at 360 (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)).

153. *Id.*

154. *Id.* at 359.

155. "Substantial market power is an indispensable ingredient of every claim under the full [r]ule of [r]eason." *Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996).

156. *Wilks*, 895 F.2d at 360.

157. This can present a problem, of course, if the effects at issue are not clearly anticompetitive. Consider a recent Australian case, *Melway Publishing Pty. Ltd. v Robert Hicks Pty. Ltd.*, No. VG 638 of 1998 (Austl. Fed. Ct., Vict. Dist. Registry May 20, 1999) (LEXIS, Aust. Library FCUNR File), in which the court considered a statute providing that "[a] corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of . . . deterring or preventing a person from engaging in competitive conduct in that or any other market." *Id.* The defendant, a monopolist, had withheld its goods from a former dealer, thus preventing it from competing, so the only question was whether it had "take[n] advantage of" its power.

For the court then to continue to insist that proof of market power is a threshold requirement is disingenuous, and seems calculated more to mislead than to guide litigants.

Although the Fourth Circuit has also affirmed a market power requirement since *Indiana Federation of Dentists*, it has made no attempt to reconcile its requirement with the Supreme Court's statements. Oddly, the Fourth Circuit did not even adopt such a requirement until after *Indiana Federation of Dentists*.<sup>158</sup> First, in *Military Services Realty, Inc. v. Realty Consultants of Virginia, Ltd.*,<sup>159</sup> it said that "[i]n proving a [s]ection 1 violation, the plaintiff must show the market shares of the competitors in the relevant market."<sup>160</sup> This seems to require only that the shares of the defendant be put before the court, not that the defendant be proven to have a large share. The following sentence supports this interpretation: "Facts must be presented to the court to enable it to ascertain the market power of the defendant both before and after the alleged anti-competitive conduct."<sup>161</sup> But subsequently, in *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Industries, Inc.*,<sup>162</sup> the Fourth Circuit said that "[a] threshold inquiry in any [r]ule of [r]eason case is whether the defendant had market power."<sup>163</sup>

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*See id.* Two of the three judges concluded that it had, because, they said, if the defendant had not been a monopolist, it would not have withheld the goods and allowed competitors to supply them. *See id.* The problem here is that it is not clear that the prevention of the dealer from entering the market, which was an intrabrand restraint, was in fact anticompetitive. If it was not, then the inference that market power was the source of that conduct would not necessarily be accurate.

This, of course, is the basic motivation for an independent market power requirement. The problem in *Melway*, though, was that the statute at issue did not forbid anticompetitive conduct, but forbade "preventing a person from engaging in competitive conduct in that or any other market," which, if that other market was an intrabrand one, might not be anticompetitive. *Id.* The rule of reason under section 1 of the Sherman Act forbids only anticompetitive conduct, so that a finding of anticompetitive conduct implies market power.

158. However, a district court decision from the Fourth Circuit adopted a market power requirement even before *Valley Liquors I*. *See supra* text accompanying notes 100-04.

159. 823 F.2d 829 (4th Cir. 1987).

160. *Id.* at 832 (citing *Northwest Power Co. v. Omark Indus.*, 576 F.2d 83, 89 (5th Cir. 1978)).

161. *Id.* (citing *Havoco of Am., LTD. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980)).

162. 889 F.2d 524 (4th Cir. 1989).

163. *Id.* at 528 (quoting *Valley Liquors I*, 822 F.2d 656, 666 (7th Cir. 1982); citing *Military Services Realty*, 823 F.2d at 832; *Donald B. Rice Tire Co. v. Michelin Tire*

It is hard to know what to make of these decisions. The Seventh Circuit in *Wilk* acknowledged *Indiana Federation of Dentists*, but seemed to try to avoid, rather than accept, the Supreme Court's views on a market power requirement. Additionally, later Seventh Circuit cases and the Fourth Circuit have required plaintiffs to show market power without even making any attempt to explain how such a requirement can be reconciled with the Supreme Court's views. One hopes that if a plaintiff made a satisfactory showing of anticompetitive effects without first providing independent proof of market power, these courts would accept that showing as meeting the plaintiff's initial burden, but their words suggest otherwise.

### *B. Circuits that Have Adopted but Abandoned a Market Power Requirement*

The Eighth Circuit, and probably the Sixth Circuit, also at one time adopted market power requirements. As described briefly above,<sup>164</sup> the Eighth Circuit became the first court of appeals to clearly and unequivocally adopt a threshold market power requirement in *Assam Drug Co. v. Miller Brewing Co.*<sup>165</sup> The Sixth Circuit has been somewhat less clear, but in *Davis-Watkins Co. v. Service Merchandise*,<sup>166</sup> the court upheld a jury instruction that apparently required the jury to find that the defendant had "substantial market power."<sup>167</sup> The appeals court introduced some ambiguity in stating that "[t]he district court . . . properly instructed the jury to *consider* [the defendant's] market power,"<sup>168</sup> but the court later indicated, though again with some lack of clarity, that a showing of market power is required.<sup>169</sup>

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Corp., 483 F. Supp. 750, 761 (D. Md. 1980), *aff'd*, 638 F.2d 15 (4th Cir. 1981)); *see supra* text accompanying notes 100-04.

164. *See supra* text accompanying notes 138-40.

165. 798 F.2d 311 (8th Cir. 1986). The court was explicit:

The market power approach is a proper method of evaluating vertical nonprice restraints under the rule of reason and is an appropriate basis for summary judgment in such a case. If [the defendant] lacks market power, the territorial restraints it imposed on [its distributor] cannot have an anticompetitive effect on interbrand competition. We agree with the district court that [the plaintiff] has raised no genuine issue of material fact to deter the conclusion that [the defendant] lacks market power. Accordingly, we affirm the summary judgment.

*Id.* at 319 (footnote omitted). Note that *Assam Drug* required a showing of market power only in rule of reason challenges to vertical nonprice restraints.

166. 686 F.2d 1190 (6th Cir. 1982).

167. *Id.* at 1202.

168. *Id.* (emphasis added).

169. *See Hand v. Central Transport, Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (citing *Davis-Watkins*, 686 F.2d at 1202). The ambiguity arose from the court's statement that "[a] defendant must have market power before its conduct can be shown to have an

Both courts explicitly abandoned their market power requirements following *Indiana Federation of Dentists*.<sup>170</sup> The Sixth Circuit recently went even further, in two respects, in *Re/Max International, Inc. v. Realty One, Inc.*<sup>171</sup> First, it stated that after *Indiana Federation of Dentists*, a plaintiff in a rule of reason case was neither required to prove market power nor define a relevant market.<sup>172</sup> Second, *Re/Max* adopted a monopoly power rule for section 2 similar to the section 1 market power rule from *Indiana Federation of Dentists*, stating that a plaintiff that shows the actual anticompetitive effects of monopoly power need not provide independent proof of monopoly power.<sup>173</sup> This approach seems directly contrary to the Supreme Court's test for monopolization set out in *Grinnell*.<sup>174</sup>

Putting aside this section 2 holding, the patterns of decision in the Eighth and Sixth Circuits are exactly what one would expect from courts that adopted market power requirements. One could wish that the courts had engaged in more careful analysis in initially adopting the requirement,<sup>175</sup> but each quickly recognized and conformed to the

adverse effect on competition," *Hand*, 779 F.2d at 11, which falls slightly short of explicitly requiring the plaintiff to make an independent showing of market power.

170. See *Flegel v. Christian Hosp.*, Northeast-Northwest, 4 F.3d 682, 688 (8th Cir. 1993); *Lie v. St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992).

171. 173 F.3d 995 (6th Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3138 (Aug. 17, 1999) (No. 99-294).

172. See *id.* at 1014.

173. See *id.* at 1018 ("We agree that an antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."); see also *supra* text accompanying notes 44-55.

174. See *supra* text accompanying notes 44-46.

175. See, e.g., *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315-16 (8th Cir. 1986) (relying on the purely theoretical point that without power no anticompetitive effect is possible and on its claim that "[s]ome courts" had previously adopted such a requirement); see also *infra* text accompanying notes 242-43. Of the cases that the *Assam Drug* court cited, however, none clearly did adopt the requirement. It cited cases already discussed in this Article: *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984); *Graphic Products Distributors, Inc. v. Itek Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983); *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1202 (6th Cir. 1982); *Valley Liquors I*, 678 F.2d 742, 745 (7th Cir. 1982); and *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981). The decision also cited *Rothery Storage & Van. Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212 (D.C. Cir. 1986) and *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1291 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986) (affirming the lower court's decision, but declining to adopt the requirement). For additional discussion, see *infra* Part IV.E.

rejection of it by the Supreme Court.<sup>176</sup> The section 2 holding of *Re/Max* probably goes too far, however; in that regard, it is consistent with the loose reasoning of other courts in the market power context. As described above,<sup>177</sup> the section 2 context of unilateral conduct is significantly different from the section 1 context. It is inappropriate to casually extend a rule forgoing a showing of market power from section 1 to section 2, just as it is inappropriate to extend a rule requiring it from section 2 to section 1.

### C. Circuits that Have Almost Adopted a Market Power Requirement

Four of the circuits that are often cited as having adopted a market power requirement never quite did so explicitly. The Fifth Circuit's decision in *Muenster Butane* is discussed above,<sup>178</sup> and is interestingly similar to D.C. Circuit and Tenth Circuit cases that are frequently cited as supporting a market power requirement. Like *Muenster Butane*, both the D.C. Circuit opinion, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*,<sup>179</sup> and the Tenth Circuit opinion, *SCFC ILC, Inc. v. VISA USA, Inc.*,<sup>180</sup> devoted much discussion to how challenged restraints enhanced efficiency by eliminating free riding.<sup>181</sup> As in *Muenster Butane*, both circuit courts suggested that a market power requirement would be a good idea but did not adopt one. Recall that *Muenster Butane* held that such a requirement would have "saved the litigants and the courts much expense."<sup>182</sup> Similarly, the *Rothery* court said that its decision in favor of the defendant "might well rest, therefore, upon the absence of market power,"<sup>183</sup> but it did not rest on that absence.<sup>184</sup> *SCFC* said that "many courts" had imposed a market power requirement, while only citing *Valley Liquors II*.<sup>185</sup> Furthermore, the Tenth Circuit observed that this approach had become "helpful,"<sup>186</sup> but it did not explicitly adopt this approach for itself, despite concluding that the evidence of market power

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176. See *supra* note 170 and accompanying text.

177. See *supra* text accompanying notes 52-55.

178. See *supra* text accompanying notes 116-21.

179. 792 F.2d 210 (D.C. Cir. 1986).

180. 36 F.3d 958 (10th Cir. 1994).

181. See *Rothery*, 792 F.2d at 221-23; *SCFC*, 36 F.3d at 969-72. The further examination in *SCFC* is consistent with the court's statement that "whether a firm possesses market power *may* facilitate the determination that the practice harms competition and not simply a single competitor." *Id.* at 965 (emphasis added).

182. *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981).

183. *Rothery*, 792 F.2d at 221.

184. See *id.*

185. *SCFC*, 36 F.3d at 965.

186. *Id.*

was insufficient as a matter of law.<sup>187</sup>

In the Eleventh Circuit, uncertainty developed from a somewhat different source. An Eleventh Circuit case, *Graphic Products Distributors, Inc. v. Itek Corp.*,<sup>188</sup> is also cited often in support of a market power requirement. *Graphic Products* interpreted *Muenster Butane* to have "insist[ed], at the threshold" on a showing of market power in a vertical case.<sup>189</sup> Because *Muenster Butane* was a pre-Fifth Circuit-split case, *Graphic Products* treated such a showing as required in the Eleventh Circuit, post-split, as well. But the *Graphic Products* court concluded that the plaintiff had met its burden of showing market power,<sup>190</sup> so *Graphic Products* is not an instance of a dismissal for failure to show market power. Moreover, the only subsequent Eleventh Circuit case to cite *Graphic Products* for the market power issue is unclear.<sup>191</sup> An even later Eleventh Circuit case treated the market power issue as unresolved.<sup>192</sup>

The equivocal nature of these decisions has not gone entirely unnoticed.<sup>193</sup> The interesting question, though, is why they have so often

187. See *id.* at 969.

188. 717 F.2d 1560 (11th Cir. 1983).

189. *Id.* at 1568; see *id.* at 1568-69 (citing *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981)).

190. See *id.* at 1571.

191. See *L.A. Draper & Son v. Wheelabrator-Frye, Inc.*, 735 F.2d 414 (11th Cir. 1984). The *L.A. Draper* court said that "[a]n antitrust plaintiff . . . makes out a prima facie case under the rule of reason only upon proof of a well-defined relevant market upon which the challenged anticompetitive actions would have substantial impact." *Id.* at 422 (quoting *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 962 (5th Cir. 1978), vacated by stipulation of the parties, 591 F.2d 1206 (5th Cir. 1979)) (internal quotation marks omitted). This statement suggests only that market definition, not proof of market power, is necessary.

192. See *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592 (11th Cir. 1986). The Eleventh Circuit said that "[w]hether the court, in applying the rule of reason, must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law." *Id.* at 603. It also said that "[c]ases can be cited for both sides of the proposition," but cited neither *Graphic Products* nor *L.A. Draper*. *Id.*

193. See *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995) (describing *Rothery* as "suggesting that a showing of market power is a strict prerequisite to recovery in all [section] 1 cases"); see also *SCFC ILC, Inc. v. VISA USA*, 36 F.3d 958, 970 (10th Cir. 1994) (stating that in *Rothery*, "the D.C. Circuit rejected plaintiffs' claim, based not simply on the evidence [the defendant] did not possess market power . . . but also on the conclusion the new rule . . . enhanc[ed] consumer welfare by creating efficiency"); *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 164 (9th Cir. 1989) (Thompson, J., dissenting) (describing *Rothery* as relying on absence of market power in rejecting section 1 claim under rule of reason analysis, but not including it among cases that require a showing of

been cited as having required a showing of market power when they did not in fact do so, or at least did not do so clearly. This question is even more interesting in light of the fact that, as with the Eleventh Circuit, none of the others has reaffirmed its purported imposition of a market power requirement. Although most of the post-*Muenster Butane* cases in the Fifth Circuit have emphasized the importance of interbrand competition,<sup>194</sup> only one of them seems to require that the plaintiff show market power, and that one does so only by what is probably typographical error.<sup>195</sup> Despite frequent citations to *Rothery* elsewhere, the D.C. Circuit apparently has not subsequently cited it in support of a market power requirement. The issue apparently has not yet arisen again in the Tenth Circuit since the 1994 *SCFC* decision.

Whether these circuits will recognize the Supreme Court's rejection of a market power requirement is not certain, except in the Eleventh Circuit, which has done so.<sup>196</sup> The Fifth Circuit has not discussed the implications of *Indiana Federation of Dentists*, but since, as discussed above, the Fifth Circuit may not itself have been committed to a market power requirement, it may be that no alteration in its views is required.

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market power).

194. See, e.g., *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 (5th Cir. 1981); *Daniels v. All Steel Equip., Inc.*, 590 F.2d 111, 113-14 (5th Cir. 1979). *Red Diamond* almost says that proof of less intrabrand competition is not enough. See *Red Diamond*, 637 F.2d at 1005. This could be read to require that a plaintiff also prove a reduction in interbrand competition, which in turn might be read to require that a plaintiff prove an increase in market power. However, a later case, *Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570 (5th Cir. 1982), says that proof of injury to intrabrand competition alone, in limited circumstances, is enough to meet the plaintiff's initial burden. See *id.* at 575.

195. See *Hornsby Oil Co. v. Champion Spark Plug Co.*, 714 F.2d 1384 (5th Cir. 1983). The *Hornsby* court cited *Muenster Butane* in support of the statement that "[a]bsent proof of a diminution [sic] in interbrand market power [sic]... a manufacturer's termination of a single distributor does not contravene the antitrust laws." *Id.* at 1394. The court must either have meant to say "a diminution in interbrand competition" or "an increase in interbrand market power." Judging from the context of the statement, where the same paragraph referred to "[a] reduction in intrabrand competition," *id.*, the court probably meant to refer to a "diminution in interbrand competition." If so, that would leave open the possibility that a plaintiff could prove the reduction in interbrand competition without directly proving market power. Alternatively, the court might have meant to refer to "an increase in interbrand market power," in which it would have required proof of market power. But such a statement would go even farther than other statements of the market power requirement, in that it would presumably require proof of an *increase* in market power.

196. See *Levine v. Central Florida Med. Affiliates, Inc.*, 72 F.3d 1538 (11th Cir. 1996). The *Levine* court took notice of *Indiana Federation of Dentists* in stating that "[i]n order to prove an anticompetitive effect on the market, the plaintiff may either prove that the defendants' behavior had an 'actual detrimental effect' on competition, or that the behavior had 'the potential for genuine adverse effects on competition.'" *Id.* at 1551 (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986)). It is only if the plaintiff chooses to prove the latter that it must prove market power. See *id.*



The Tenth Circuit's decision in *SCFC* is more recent than *Indiana Federation of Dentists*, so even if it is not clear that it required market power, it appears to be more sympathetic to such a requirement than one would expect. Finally, although the D.C. Circuit in *Superior Court Trial Lawyers Ass'n v. FTC*<sup>197</sup> noted that there would have been no need for a showing of market power if "there were no countervailing procompetitive justifications for [a] facially anticompetitive boycott,"<sup>198</sup> the elimination of the market power requirement for facially competitive practices is only one aspect of *NCAA* and *Indiana Federation of Dentists*.<sup>199</sup> The other aspect is the elimination of the requirement when the plaintiff shows actual anticompetitive effects; the D.C. Circuit did not mention that possibility, making unclear how it would treat such a showing.<sup>200</sup>

#### D. Circuits that Have Experimented with a Market Power Requirement

Courts in both the First and Ninth Circuits initially seemed to adopt

197. 856 F.2d 226 (D.C. Cir. 1988), *rev'd in part*, 493 U.S. 411 (1990).

198. *Id.* at 249.

199. See *Indiana Fed'n of Dentists*, 476 U.S. at 460-61; *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 (1984).

200. The D.C. Circuit apparently favors a market power requirement in certain circumstances. In *Superior Court Trial Lawyers*, it relied on the peculiar nature of the boycott in imposing such a requirement, holding "that the evidentiary shortcut to antitrust condemnation without proof of market power is inappropriate as applied to a boycott that served, in part, to make a statement on a matter of public debate." *Superior Court Trial Lawyers*, 856 F.2d at 250. The Supreme Court reversed, holding that the challenged boycott was *per se* illegal. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 (1990).

Interestingly, in the same year the Supreme Court somewhat similarly reversed an Eleventh Circuit decision, *Palmer v. BRG of Georgia, Inc.*, 874 F.2d 1417 (11th Cir. 1990), *rev'd*, 498 U.S. 46 (1990). In that decision, the Eleventh Circuit affirmed a district court decision that had rejected the plaintiffs' effort to meet their burden through proof that the defendants' agreement had caused actual anticompetitive effects, by introducing evidence of a "dramatic price increase" following the challenged agreement. *Id.* at 1437 (Clark, J., dissenting). The dissent objected, pointing out that under *Indiana Federation of Dentists*, the plaintiffs were permitted to show actual detrimental effects, and did not have to provide a detailed market analysis. See *id.* at 1436-37 n.26 (Clark, J., dissenting). Again, the Supreme Court reversed, holding that the challenged restraint was *per se* illegal. See *Palmer*, 498 U.S. at 50.

Of course, the question of whether the *per se* rule or the rule of reason is applicable is not the same question as whether a showing of market power is required under the rule of reason. So, although it is not clear whether the Court's reversals in these decisions have broader implications for a requirement of market power, they certainly do not suggest that the Court is willing to expand the role of market power.

market power requirements when other courts were doing so, but both circuits later apparently abandoned the requirement.<sup>201</sup> The relevant First Circuit case was *CVD, Inc. v. Raytheon Co.*,<sup>202</sup> which said that “[i]n order to prove a contract or combination in restraint of trade in violation of section 1 of the Sherman Act, the plaintiff must . . . prove that the defendant had market power in the relevant market, and the specific intent to restrain competition.”<sup>203</sup> The relevant case from the Ninth Circuit was a California district court case, *O.S.C. Corp. v. Apple Computer, Inc.*,<sup>204</sup> which said that “[a]bsent significant market power, a vertical restriction is reasonable as a matter of law.”<sup>205</sup> Although this statement falls somewhat short of requiring the plaintiff to prove market power in that it does not clearly place the burden of proof on the plaintiff, the court probably intended to impose a market power requirement.<sup>206</sup>

These two cases and their later treatment share interesting similarities. First, each court’s statement came in a context that made it less than compelling. In *CVD*, the problem was that in the same sentence that it required a showing of market power, the court also said that section 1 requires a specific intent to restrain competition,<sup>207</sup> which is clearly

201. The same could perhaps be said of the Fifth Circuit. See *supra* text accompanying notes 194-95.

202. 769 F.2d 842 (1st Cir. 1985). Courts and commentators have incorrectly said that other First Circuit cases adopted a market power requirement. Professor Posner in his 1981 article cited *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), as having adopted a market power requirement when it did not. See *supra* text accompanying notes 91-93. *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274 (C.D. Cal. 1985), *aff’d*, 792 F.2d 1464 (9th Cir. 1986), cited *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982), as having adopted such a requirement when it did not. *Bruce Drug* said that the defendant’s actions “ha[d] the overall effect of promoting vigorous interbrand competition,” so that the court “[was] unable to find that [the defendant’s] conduct diminishe[d] intrabrand competition without producing significant benefits for interbrand competition.” *Bruce Drug*, 688 F.2d at 860.

203. *CVD*, 769 F.2d at 851.

204. 601 F. Supp. 1274 (C.D. Cal. 1985), *aff’d*, 792 F.2d 1464 (9th Cir. 1986).

205. *Id.* at 1291 n.8 (citing *Bruce Drug*, 688 F.2d at 859-60; *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1202 (6th Cir. 1982); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981)).

206. See *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 315-16 (8th Cir. 1986) (citing *O.S.C. Corp.* as among the courts that “have narrowed the unlimited inquiry necessary under the rule of reason by requiring at the threshold that the plaintiff attacking a vertical nonprice restraint prove the defendant’s substantial market power in a relevant market”). Even the Ninth Circuit cites it as having adopted the requirement. See *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407, 1987 U.S. App. LEXIS 11681, at \*19-20 (9th Cir. Mar. 16, 1987) (citing *O.S.C. Corp.* as one of the courts requiring that “[i]n the first step, the claimant must demonstrate that the conspirators had significant market power”), *opinion on rehearing en banc*, 890 F.2d 139 (9th Cir. 1989).

207. See *CVD*, 769 F.2d at 851.

incorrect. This casts doubt on the court's care in making the statement. One explanation is that *CVD* involved primarily a claim of attempted monopolization,<sup>208</sup> for which specific intent is required.<sup>209</sup> Thus, the court may have been confusing the requirements for the two claims.<sup>210</sup> Similarly, *O.S.C.* was also speaking outside the context of the rule of reason. Because the case apparently presented only a *per se* claim<sup>211</sup> and its imposition of a market power requirement appeared in a footnote, the court was apparently only indulging a desire to expound upon the antitrust merits of the case.

Second, the statements of both courts were ignored by later court of appeals cases. First Circuit cases after *CVD* have neither required a showing of market power nor referred to *CVD*'s apparent imposition of such a requirement.<sup>212</sup> A few district courts in the First Circuit have adopted a market power requirement, but with one exception, even they have not cited *CVD* in support of it.<sup>213</sup> For example, *Winter Hill Frozen Foods & Services, Inc. v. Haagen-Dazs Co.*<sup>214</sup> said that "[w]here there are vertical nonprice restraints, some circuits have ruled that a threshold inquiry in rule of reason analysis is whether the defendant has market

208. The case alleged a bad-faith assertion of trade secrets, and the court primarily cited other cases under section 2 that alleged bad-faith assertions of intellectual property. See *id.* at 849 (citing *Walker Process Equip. Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177-78 (1965); *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986 (9th Cir. 1979); *Kobe, Inc. v. Dempsey Pump Co.*, 198 F.2d 416 (10th Cir. 1952)).

209. See *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

210. Moreover, the court found that the defendant did in fact have market power, so the court's comments on market power were not necessary to its decision. See *CVD*, 769 F.2d at 851.

211. See *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1291 n.8 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1980) (noting that the plaintiff had not pleaded anticompetitive effect).

212. See *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48 (1st Cir. 1998); *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994); *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525 (1st Cir. 1989).

213. The exception, *Norte Car Corp. v. Firstbank Corp.*, 25 F. Supp. 2d 9 (D.P.R. 1998), cites *CVD* in support of imposing a market power requirement. See *Norte Car*, 25 F. Supp. 2d at 21. But in *Norte Car*, the plaintiff had not even pled market power, and the court dismissed the case without prejudice, with leave to replead. See *id.* at 21.

Another district court case, *Shepherd Intelligence Systems, Inc. v. Defense Technologies, Inc.*, 702 F. Supp. 365 (D. Mass. 1988), may also assume that proof of market power is required, though it refers only to a pleading requirement. In *Shepherd*, the court said that "[t]he defendants also argue that Shepherd has failed to plead substantial market power in the relevant market as required by sec[tion] 1 or a dangerous probability of success in monopolizing the relevant market as required by sec[tion] 2." *Id.* at 369 (citing *CVD*, 769 F.2d at 851).

214. 691 F. Supp. 539 (D. Mass. 1988).

power.”<sup>215</sup> However, it cited only *Assam Drug* from the Eighth Circuit and *Hennessy Industries, Inc. v. FMC Corp.*,<sup>216</sup> from the Seventh Circuit.<sup>217</sup> Subsequent district court cases in the First Circuit either mention but do not apply a market power requirement,<sup>218</sup> refer to a need to consider market power but do not make it a requirement,<sup>219</sup> or impose such a requirement without citing *CVD* or any other First Circuit case.<sup>220</sup>

The Ninth Circuit affirmed the *O.S.C.* holding,<sup>221</sup> but did not repeat the district court’s market power observations. The Ninth Circuit instead noted that “[t]he evidence showed that competition was intense before and increased after the [challenged restraint] was adopted.”<sup>222</sup> This appears to be an assessment of anticompetitive effect. Moreover, later Ninth Circuit cases do not treat the market power requirement as established in the circuit. Although one Ninth Circuit case did state that ordinarily the existence of market power is an essential ingredient in a rule of reason case,<sup>223</sup> another case observed that “[o]ur court has not adopted a specific test for demonstrating in section [1] cases that a conspiracy has had a substantial anticompetitive effect.”<sup>224</sup> More recent cases have made clear that no showing of market power is required after

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215. *Id.* at 547.

216. 779 F.2d 402 (7th Cir. 1985).

217. See *Haagen Dazs*, 691 F. Supp. at 547 (citing *Assam Drug Co. v. Miller Brewing Co.* 798 F.2d 311, 315-16 (8th Cir. 1986); *Hennessy Indus.*, 779 F.2d at 404-05).

218. See *Healthco Int’l, Inc. v. A-dec, Inc.*, 1989 WL 104064, at \*3, 4-6 (D. Mass. Apr. 17, 1989).

219. See *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 1992 WL 59713, at \*5-8 (D.N.H. Jan. 30, 1992), *aff’d*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993).

220. See *Holmes Prods. Corp. v. Dana Lighting, Inc.*, 958 F. Supp. 27, 32 (D. Mass. 1997) (stating that “a vertical restraint would, absent market power on defendant’s part, be perfectly legal,” but citing only *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977), and *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), in support of that statement); see also *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 283 (D. Mass. 1995) (stating that “[a]n essential element of every rule of reason claim is a showing that the defendants exercised market power in some relevant market,” but citing no cases in support of that statement); *AT&T Co. v. IMR Capital Corp.*, 888 F. Supp. 221, 252 (D. Mass. 1995) (stating that “[a]s a preliminary matter, . . . the plaintiff in such a [rule of reason] case must first demonstrate that the defendant is capable of causing antitrust harm by showing that it (the defendant) can exercise ‘market power’ in the relevant market,” and citing tying cases from the First Circuit, a Seventh Circuit case, *Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 251 (7th Cir. 1994), and district court cases).

221. *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1470 (9th Cir. 1986).

222. *Id.* at 1469.

223. See *Hahn v. Oregon Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988).

224. *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 827 F.2d 407, 1987 U.S. App. LEXIS 11681, at \*19 (9th Cir. Mar. 16, 1987), *opinion on rehearing en banc*, 890 F.2d 139 (9th Cir. 1989).

*Indiana Federation of Dentists.*<sup>225</sup>

The explanations for these two short-lived adoptions of a market power requirement appear to be very different. In *CVD*, the explanation seems simply to have been carelessness: the court cited no support for its imposition of the requirement and it did not play an important role in the case.<sup>226</sup> In *O.S.C.*, the explanation appears to have been exactly the opposite. Despite the fact that market power was not at issue, because the plaintiff was apparently pursuing a per se price-fixing case,<sup>227</sup> the court took the opportunity to write a 1300-word footnote on the role of market power under the rule of reason. The court seems to have gotten caught up in the early market power rhetoric, in that it cites many of the early cases.<sup>228</sup> As noted above, although the Ninth Circuit affirmed the district court, it did not affirm on the market power issue.<sup>229</sup>

*E. Circuits that Have Never Adopted a Market Power Requirement*

As described above, although Judge Posner claimed the Second Circuit to have imposed a market power requirement in *Oreck*, that opinion in fact better supports the opposite position.<sup>230</sup> Recently, in *K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co.*,<sup>231</sup> the Second Circuit made its position quite clear: "This court has not made a showing of market power a prerequisite for recovery in all [section] 1 cases. If a plaintiff can show an actual adverse effect on competition, such as reduced output, we do not require a further showing of market power."<sup>232</sup> The Third Circuit's approach has been similar. Early on, in *Harold Friedman Inc. v. Thorofare Markets Inc.*,<sup>233</sup> the Third Circuit said

225. See, e.g., *Nestle Food Co. v. Abbott Lab.*, 1997 U.S. App. LEXIS 494, at \*7 (9th Cir. Jan. 9, 1997); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991).

226. See *CVD, Inc. v. Raytheon Co.*, 769 F.2d 842, 851 (1st Cir. 1985). The claim at issue was one by former employees of a corporation that the corporation had asserted trade secrets in bad faith, and the court focused on the trade secret issues. See *id.* at 847-48. The court resolved the market power issue in one sentence noting that the jury's finding of market power was "amply supported by the evidence." *Id.* at 851.

227. See *O.S.C.*, 601 F. Supp. at 1292. The court noted that the plaintiff had not pled anticompetitive effect. See *id.* at 1291 n.8.

228. See *id.*

229. See *supra* note 175.

230. See *supra* text accompanying notes 76-80.

231. 61 F.3d 123 (2d Cir. 1995).

232. *Id.* at 129 (citation omitted) (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986); *Capital Imaging Assocs. v. Mohawk Valley Med. Assocs.*, 996 F.2d 537, 546 (2d Cir. 1993)).

233. 587 F.2d 127 (3d Cir. 1978).

of the factors on which the rule of reason turns that “no single aspect is dispositive.”<sup>234</sup> It has held this view consistently.<sup>235</sup> Recently, it reaffirmed it in *United States v. Brown University*,<sup>236</sup> where it said that “[t]he rule of reason requires the fact-finder to ‘weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition,’”<sup>237</sup> and that “[t]he plaintiff may satisfy [its] burden by proving the existence of actual anticompetitive effects.”<sup>238</sup>

In addition, *Brown University* offered an interesting approach to the market power issue, observing that because proof of actual effects is not always possible, “courts typically allow proof of the defendant’s ‘market power’ instead.”<sup>239</sup> This appears to present market power as a permissive, rather than restrictive, element. That is, it seems to view the preferred approach under the rule of reason as that of proving actual anticompetitive effect. When that is not possible, the court will “allow” proof of market power, which is presumably intended to show when there is a potential of anticompetitive effects. In this way, market power substitutes for proof of anticompetitive effect, which the court assumes cannot be shown. This seems close to the Supreme Court’s treatment of market power in its per se cases<sup>240</sup> and to *Philadelphia National Bank’s* presumption of anticompetitive effect from market share.<sup>241</sup> It is an approach almost opposite that of a threshold market power requirement.

## V. THE THEORETICAL VALIDITY OF THE MARKET POWER REQUIREMENT

This Article’s purpose is not to argue that a market power requirement is inappropriate; such a requirement might indeed be appropriate, at least in some cases. The purpose instead is simply to point out that the case for the requirement has not been made. The previous sections showed

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234. *Id.* at 143.

235. *See, e.g.,* *Fineman v. Armstrong World Indus. Inc.*, 980 F.2d 171, 202 (3d Cir. 1992) (observing that *Indiana Federation of Dentists* said that market power need not be shown where there is “a naked restriction on price or output without a competitive justification” or where the plaintiff provides “‘proof of actual detrimental effects’”) (quoting *Indiana Fed’n of Dentists*, 476 U.S. at 460-61).

236. 5 F.3d 658 (3d Cir. 1993).

237. *Id.* at 668 (second alteration in original) (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)).

238. *Id.* (citing *Indiana Fed’n of Dentists*, 476 U.S. at 460-61; *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3d Cir. 1992)).

239. *Id.* (citing *NCAA v. Board of Regents*, 468 U.S. 85, 110 (1984); *Tunis Bros.*, 952 F.2d at 727).

240. *See supra* text accompanying notes 23-28.

241. *See supra* text accompanying notes 56-58.

that the Supreme Court has never adopted a market power requirement and that the lower courts have done so on shaky foundations. This section offers a brief discussion of the theoretical justifications that have been offered for the market power requirement.

The justification most commonly offered for a market power requirement is that a seller without market power cannot impose anticompetitive terms.<sup>242</sup> This falls far short of justifying a requirement that a plaintiff prove market power. The question is not whether the defendant must *have* market power, but whether it makes antitrust litigation more accurate and efficient to require that the plaintiff *prove* that the defendant has market power. Given the difficulties of proving market power and even of defining a market,<sup>243</sup> it is not clear that the interests of litigation are best served by requiring a showing of market power. It might well be more accurate and efficient to allow plaintiffs to show anticompetitive effect directly.

To make the case for a market power requirement, it must be shown that proof of market power is more accurate or efficient than proof of anticompetitive effect. Judge Easterbrook has made the most prominent, and perhaps the only, effort in this direction. In his 1984 article *The Limits of Antitrust*,<sup>244</sup> then-Professor Easterbrook advocated the use of a series of "filters," most prominent among them market power,<sup>245</sup> in antitrust cases.<sup>246</sup> He argued that it is difficult for judges to decide the ultimate antitrust question—whether a business practice is procompetitive or anticompetitive—so that filters are desirable in order to screen out weak antitrust claims.<sup>247</sup> Rather startlingly, Easterbrook says that the issue of competitive effect is difficult to decide because antitrust defendants are unable to explain why their actions are procompetitive: "[E]ntrepreneurs often flounder from one practice to another trying to find one that works. When they do, they may not know why it works, whether because of efficiency or exclusion."<sup>248</sup>

242. See *supra* text accompanying note 2.

243. See *supra* text accompanying notes 3-4.

244. See generally Easterbrook, *supra* note 2, at 1.

245. Market power is most prominent in the article, where it is the first of five filters Easterbrook describes. See *id.* at 19-23.

246. See *id.* at 17-39.

247. Others have challenged this claim, arguing that the factual inquiry in antitrust cases is not inherently more difficult than those in other complex cases. See Richard S. Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41, 69 (1984).

248. Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME

Easterbrook's view that businesspeople may not understand or be able to explain their actions is not supported by the business literature. Businesspeople pay a lot of money to business schools and consultants in order to be told what to do, and why it will work. That does not establish, of course, that any individual businessperson knows whether his or her business practices are efficient or exclusionary. But given the broad dissemination of business strategy information, it does mean that it is unwise to casually assert that businesspeople routinely are "floundering."

In any event, the real question is whether Easterbrook's filters—and more particularly the market power filter, which has been widely adopted by courts—do a good job of distinguishing practices that are likely to be anticompetitive from those that are likely to be procompetitive. Or, to put the question in the form in which courts adopting a market power requirement typically put it, is the existence vel non of market power a good means of determining whether a particular practice can be anticompetitive? Even if individual businesspeople might not be able to answer this question, business consultants probably can. After all, business professors and consultants, unlike judges,<sup>249</sup> are presumably selected for their ability to evaluate the likely success of business practices.

To examine how business professionals view the significance of market power, the paragraphs below discuss two works of Michael Porter.<sup>250</sup> Porter is a logical choice, because he is perhaps the most prominent writer on business practices, and is also one whose advice has been recognized as relevant to antitrust issues.<sup>251</sup> Porter describes five

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L. REV. 972, 975 (1986). This Article's research uncovered only one article in which this claim is addressed. See Walter Adams & James W. Brock, *Predation, "Rationality," and Judicial Somnambulism*, 64 U. CIN. L. REV. 811 (1996). Professors Adams and Brock point out that the claim is inconsistent with Easterbrook's contentions elsewhere that potential victims of predatory-pricing strategies have sophisticated responses for defeating those strategies. See *id.* at 860 n.238 (citing Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 269-71 (1981)). Adams and Brock do not, however, discuss the importance of the claim for Easterbrook's "filtering" approach more generally.

249. Cf. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 306 (1987) ("After all, judges are not selected for business acumen and are not penalized for bad decisions.").

250. See MICHAEL E. PORTER, *COMPETITIVE ADVANTAGE: CREATING AND SUSTAINING SUPERIOR PERFORMANCE* (1985) [hereinafter PORTER, ADVANTAGE]; MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* (1980) [hereinafter PORTER, STRATEGY].

251. See *Innovation, Rivalry, and Competitive Advantage: Interview with Professor Michael E. Porter*, ANTITRUST, Spring 1991, at 5, 5 ("Professor Michael Porter has been a leading scholar and author concerning business strategy for years.") (Editor's Note) [hereinafter *Innovation and Rivalry*]; Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163,



forces that “determine[] the ultimate profit potential in [an] industry”<sup>252</sup>: rivalry among existing firms, the threat of new entrants, the threat of substitute products or services, the bargaining power of buyers, and the bargaining power of suppliers.<sup>253</sup> This section focuses on the first two of these.

In Porter’s view, rivalry is the central component of competition.<sup>254</sup> The importance of rivalry in antitrust is also recognized by Chicago School antitrust scholars, if only implicitly.<sup>255</sup> For example, Easterbrook relies on rivalry in the following passage justifying the use of a market power screen:

Firms that lack power cannot injure competition no matter how hard they try. They may injure a few consumers, or a few rivals, or themselves . . . by selecting “anticompetitive” tactics. When the firms lack market power, though, they cannot persist in deleterious practices. Rival firms will offer the consumers better deals.<sup>256</sup>

Thus, Easterbrook’s view is that rivalry always steps in to eliminate inefficient practices.

Porter’s view is different. Rivalry is important in Porter’s analysis because it describes the vigor with which competitors try to take away each other’s business. In Porter’s view, “good” competitors play by the “rules of [the game],”<sup>257</sup> allowing all to profit.<sup>258</sup> Under these circumstances, competitors do not need market power in order to impose supracompetitive terms.<sup>259</sup> That is, whereas Easterbrook assumes—as does Posner—that when a seller without market power imposes anticompetitive terms on its customers, the seller’s competitors will

1195 n.149 (1996) (describing Porter as “[t]he most prominent business strategist”).

252. PORTER, STRATEGY, *supra* note 250, at 3.

253. *See id.* at 3-6.

254. *See id.* at 4-6.

255. Some such scholars make statements that could be interpreted to mean that rivalry is not important. For example, Easterbrook has said that “[a] ‘competitive market’ is not necessarily the one with the most rivalry moment-to-moment.” Easterbrook, *supra* note 2, at 1; *see also* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 58 (1978) (“[The] identification of competition with rivalry will not do for antitrust purposes. It makes rivalry an end in and of itself, no matter how many or how large the benefits flowing from the elimination of rivalry.”). It is surely correct that some level of cooperation among competitors will often provide efficiencies, but it is not this sort of elimination of rivalry that Porter has in mind.

256. Easterbrook, *supra* note 2, at 20.

257. PORTER, ADVANTAGE, *supra* note 250, at 213.

258. *See id.* at 212-18.

259. Alternatively, one could view the sort of implicit cooperation required to eliminate rivalry as a source of market power.

offer the customers better deals, Porter believes that the competitors may instead choose to go along, allowing all of them to profit.

Possible instances of such parallel anticompetitive behavior in antitrust are not difficult to find. Easterbrook, in fact, chooses one as an example of how the courts go wrong. In *Standard Oil Co. v. United States (Standard Stations)*,<sup>260</sup> the government challenged the exclusive dealing arrangements that Standard Oil had with its dealers. Standard Oil had only a sixteen percent share of the market,<sup>261</sup> and therefore did not have market power. For that reason, Easterbrook lists *Standard Stations* as a case that “is easy to knock out . . . at the threshold.”<sup>262</sup> But the Court observed that Standard Oil’s competitors also used similar exclusive dealing arrangements.<sup>263</sup> Easterbrook would argue that this parallel behavior indicates that the practice was efficient, else one or more of the competitors would deviate from it and profit. From Porter’s expert business perspective, though, it might instead be the case that all of the oil companies were “good” competitors playing by the “rules of [the game].”<sup>264</sup> That is, perhaps all of the oil companies do better if they all resist any efforts of gasoline dealers to play one oil company off against another.

There are other variations on the rivalry question. For instance, the market might not be one like that in *Standard Stations*, with a number of sellers of roughly equal size, but might instead have one dominant firm and a number of smaller competitors. In this context, Porter discusses the effect of “good” market leaders. A “good” leader “with high return-on-investment goals, concern for the ‘health of the industry,’ a strategy built upon differentiation, and a disinclination to serve certain industry segments due to mixed motives will offer opportunities for followers to earn attractive returns in a relatively stable industry environment.”<sup>265</sup> That is, even small competitors in industries dominated by a “good” market leader can—at least if they are in segments that the leader is disinclined to serve—earn supracompetitive returns.

The point here, of course, is not that vigorous rivalry does not exist. The point is that there is no way to evaluate the significance of market power without knowing about the conditions of rivalry in the industry. If rivalry is absent or weak, a small market share may not prevent a seller from imposing anticompetitive terms. And even where rivalry appears to exist, as when sellers compete with each other using different

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260. 337 U.S. 293 (1949).

261. *See id.* at 295-96.

262. Easterbrook, *supra* note 2, at 23.

263. *See Standard Stations*, 337 U.S. at 295, 309.

264. PORTER, *ADVANTAGE*, *supra* note 250, at 213.

265. *Id.* at 216.

sales practices, appearances may be misleading: a recent article showed that two sellers can each earn supracompetitive profits if one imposes tying arrangements with its sales and the other does not.<sup>266</sup> Thus, a single-minded focus on market power can be unhelpful and perhaps misleading.

Another perspective from which to look at the business expert's view of market power is from the view of an individual seller seeking to gain a competitive advantage.<sup>267</sup> As Andrew Rosenfield<sup>268</sup> pointed out in a presentation at the 1998 American Bar Association Section of Antitrust Law's Spring Meeting, Porter encourages sellers following his advice to behave anticompetitively. He does so in his discussion of "defensive strategy,"<sup>269</sup> which includes "raising barriers to entry and mobility to make a challenge more difficult."<sup>270</sup> Barriers to entry are a source of market power,<sup>271</sup> so a seller that creates such barriers, at least if they provide no competitive benefits, has behaved anticompetitively. Moreover, the sorts of activities that Porter advocates in this area are exactly the sorts of vertical restraints that are often challenged under the rule of reason: exclusive agreements with dealers and suppliers,<sup>272</sup> bundling (tying),<sup>273</sup> and various sorts of product differentiation, such as advertising<sup>274</sup> and sales assistance to dealers.<sup>275</sup>

Porter does not encourage his readers to engage in defensive tactics indiscriminately, or, as Easterbrook would have it, "randomly." Instead, he "show[s] how a firm can identify the most effective defensive tactics in a particular industry."<sup>276</sup> A view of competition focused on market power would suggest that only sellers with power could engage in defensive tactics. This is not Porter's view. He says that "[t]he effectiveness of a defensive tactic is a function of the asymmetry

266. See Yongmin Chen, *Equilibrium Product Bundling*, 70 J. BUS. 85, 86 (1997).

267. An approach along this line of reasoning is advocated for vertical intrabrand restraints in Gerhart, *supra* note 35, at 442-43.

268. Rosenfield was then the president of Lexecon, Inc., the law-and-economics consulting firm.

269. PORTER, ADVANTAGE, *supra* note 250, at 482; *see id.* at 482-512.

270. *Id.* at 483.

271. See HOVENKAMP, *supra* note 1, at 39 ("For antitrust purposes, a barrier to entry is some factor in a market that permits firms already in the market to earn monopoly profits, while deterring outsiders from coming in.").

272. See PORTER, ADVANTAGE, *supra* note 250, at 489-90, 493.

273. *See id.* at 425-36.

274. *See id.* at 500.

275. *See id.* at 123-24.

276. *Id.* at 483.

between the *cost of the tactic to the firm* and the *cost imposed on the challenger*.<sup>277</sup> Sometimes, it is true, a defensive tactic will be less costly to a firm with more market power; Porter gives the example of advertising, which is usually relatively less costly to a firm with a larger market share.<sup>278</sup> But other practices, such as encouraging or subsidizing dealers' investments in facilities,<sup>279</sup> may actually be less expensive for sellers with smaller market shares.<sup>280</sup>

To be sure, Porter also emphasizes that sellers "should select those defensive tactics which are valuable to buyers,"<sup>281</sup> and presumably it is exactly those practices that are valuable to buyers that would not require market power to impose. But Porter also makes clear that the value to the seller of a defensive tactic cannot be measured only by whether the practice will pay for itself through increased sales, which a practice valuable to buyers presumably would do. He says that the value of the practice must also be measured by whether it forces other sellers to spend more.<sup>282</sup> Thus, one could imagine that a seller might give its dealers exclusive territories and subsidize their investments in facilities in order to impose higher costs on other sellers with more dealers.<sup>283</sup>

Once again, the point of this discussion is not to argue that market power is irrelevant. Market power, at least in the form of cost advantages, is relevant even in Porter's analysis. But the analysis must be a much more careful one than the simple calculation of market share that is now typical. Instead, it requires an examination of the particular practice that is challenged and a determination of whether that practice is less expensive (or at least no more expensive) to the defendant than to the plaintiff that challenges it.<sup>284</sup> If so, the plaintiff's claim may be

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277. *Id.* at 500-01.

278. *See id.* at 501.

279. *See id.* at 125. As Porter says, these sorts of practices function in part as "signals," the factors used by buyers to evaluate a firm's offerings. *Id.* at 139. Such factors include "advertising, reputation, packaging, the professionalism, appearance, and personality of supplier employees, the attractiveness of facilities, and information provided in sales presentations." *Id.* Signaling is particularly important because, as Porter points out, "signaling does not itself create value." *Id.* at 156. Therefore, signaling produces no compensating procompetitive effect to balance its possibly anticompetitive differentiating effect.

280. Imagine, for example, that there are two sellers, one with few dealers and one with many. If the seller with few dealers subsidized those dealers' investments in fancy new facilities, the seller with many dealers could find it more expensive to respond in kind.

281. PORTER, ADVANTAGE, *supra* note 250, at 500.

282. *See id.* at 425, 501.

283. *See supra* note 280.

284. That is, it requires an analysis of whether the defendant is raising its rivals' costs. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209, 230-48 (1986); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*,

plausible even if the defendant does not possess traditional market power. And if the claim is plausible, any anticompetitive effects of the practice must be balanced with any procompetitive effects, as Porter's analysis suggests<sup>285</sup> and the Supreme Court mandates.<sup>286</sup>

## VI. CONCLUSION

The requirement that an antitrust plaintiff show market power in rule of reason cases has an uninspiring history and unconvincing justifications. Such a requirement has never been adopted by the Supreme Court, and is currently imposed by only the Seventh and Fourth Circuits. Indeed, the requirement was never imposed very widely, despite frequent claims to the contrary. More significantly, the Seventh Circuit cases that initially established the requirement, and that continue to be cited for it, did so with misleading citations to cases from other circuits. Furthermore, the justifications that have been offered for the requirement have generally been either theoretically valid but unconnected to litigation, or empirically based but both implausible and unsupported.<sup>287</sup>

Still, the imposition of a market power requirement responds to valid concerns about antitrust litigation. Weak cases *are* brought, and it would be desirable to dismiss them at an early stage, without the expense of a full-blown rule of reason analysis. In this respect, the market power approach's theoretical justification—that cases in which a defendant *cannot* injure competition should be dismissed—may have a role to play. But that role must take into account the variety of contexts in which the rule of reason is applied; it does not mandate the indiscriminate application of a single market power test.<sup>288</sup>

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76 GEO. L.J. 241, 258 (1987).

285. See *supra* text accompanying note 281.

286. See *supra* note 19.

287. See *supra* Part V. Interestingly, some have suggested that the use of market power as a screen is even less valid in the high technology industries that are the subject of much of today's antitrust litigation. See Maija Pesola, *Are High-Tech Industries Really Different?*, GLOBAL COMP. REV., Apr.-May 1999, at 14, 15 (reporting the views of private and government antitrust lawyers that market definition and market share measures are less useful in high technology industries).

288. In this respect, it is worth noting Professor Hovenkamp's observation that in some circumstances, notably "foreclosure" offenses, "[t]he real 'power' basis of the offense . . . is market share, not market power as such." HOVENKAMP, *supra* note 1, at 82. One might think, because market share is so often used as a proxy for market power, that this is an unimportant distinction. But the share that is relevant in foreclosure cases

Some efforts have been made in the direction of a more context-sensitive approach, but one that would still allow the dismissal of weak antitrust cases. For example, shortly after the Supreme Court's decision in *Sylvania*, several commentators proposed approaches that recognized the "sharp differences in competitive effect among the different 'justifications' for vertical restrictions."<sup>289</sup> These articles, however, appear to have been swept away by the *Valley Liquors I* and *II*-led focus on market power, and more recent efforts along the same line<sup>290</sup> seem to have had little effect.<sup>291</sup> Perhaps recognition of the deficiencies in the development of the market power requirement will serve to encourage a more discriminating approach to the rule of reason.

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is the share of the market foreclosed, not the market share of the defendant. Therefore, a focus on market power is misdirected.

289. Robert Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 26 (1978); see *id.* at 26-37; see also Gerhart, *supra* note 35, at 442.

290. See generally Warren S. Grimes, *Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited*, 80 CALIF. L. REV. 815 (1992); Robert L. Steiner, *How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?*, 65 ANTITRUST L.J. 407 (1996).

291. In the European Union, some effort has been made to distinguish formally among the various sorts of vertical restraints with a proposal to use a dual-market power-threshold that "allows an economically justified gradation in the treatment of vertical restraints reflecting differences in their likely anti-competitive effects." Communication from the Commission on the Application of the Community Competition Rules to Vertical Restraints (Follow-Up to the Green Paper on Vertical Restraints), 1998 O.J. (C 365) 3, 19.