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Type 1 Error and Uncertainty: Holding the Antitrust Enforcement Pendulum Steady

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Type 1 Error and Uncertainty: Holding the Antitrust Pendulum Steady

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I. INTRODUCTION

Recent pronouncements by the leaders of the federal antitrust agencies have brought into sharper focus the debate over how best to balance the risks of Type 1 error (or over-enforcement error) against the risks of Type 2 error (or under-enforcement error) in antitrust enforcement. In this paper, we examine the literature surrounding the debate and suggest that the harm resulting from Type 1 error more likely and more often exceeds that stemming from Type 2 error. Indeed, the Supreme Court has recognized this imbalance in its antitrust jurisprudence, repeatedly insisting on rules that give more weight to avoiding over-deterrence of procompetitive conduct.

Especially in the area of single-firm conduct analyzed under Section 2 of the Sherman Act or Section 5 of the FTC Act, the dangers of overly interventionist antitrust rules are not limited to actual government enforcement and private actions that lead to punishing and enjoining procompetitive conduct. Such rules create uncertainty and fear resulting in constructive Type 1 error; that is, businesses forego aggressive competition that benefits consumers for fear of becoming embroiled in government or private enforcement actions. These threats to consumer welfare are compounded by amorphous antitrust rules that make it impossible for businesses to know *ex ante* whether their conduct will be deemed violative of the antitrust laws. Such legal ambiguity can deter businesses from engaging in efficient, procompetitive conduct; even conduct that would ultimately be found to be legal.

II. THE AGENCIES' NEW ENFORCEMENT AGENDAS

In May 2009, Christine Varney, the new Assistant Attorney General for Antitrust, made her first public statement on enforcement policy during the Obama administration. AAG Varney's speech, "Vigorous Antitrust Enforcement in this Challenging Era," portends a significant change in the Department of Justice's approach to antitrust enforcement, particularly regarding unilateral conduct, one that may be consistent with the more aggressive approach already espoused by the Federal Trade Commission. AAG Varney expressly withdrew the 2008 Department of Justice Report on Section 2 enforcement, which advocated a cautious approach grounded in concerns about striking a balance between the risks of Type 1 and Type 2 errors.[2] The AAG expressed her view that the Report was too concerned with "the risks of over-

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[2] U.S. Dep't of Justice, Competition and Monopoly: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (2008), available at http://www.usdoj.gov/atr/public/reports/236681.pdf.

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deterrence" and too deferential towards the efficiencies associated with conduct that, if taken too far, can tip from procompetitive to anticompetitive.[3] AAG Varney did acknowledge, however, that much of the research and substantive analysis in the Report is worthy of further consideration.[4] And her favorable citation of *Lorain Journal v. United States*[5], *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[6], and *United States v. Microsoft*[7] suggests that she is not advocating a radical enforcement regime.

As noted above, a majority of FTC Commissioners have also indicated their intention to enforce the antitrust laws with more focus on avoiding Type 2 errors. Commissioners Rosch, Harbour, and Leibowitz strongly criticized the Section 2 Report for "downplay[ing] the risks of under-enforcement" and concluding that the "risks of under-enforcement are outweighed by the risks of over-enforcement."[8] And, as importantly, FTC Chairman Jon Leibowitz and other Commissioners are strong proponents of a broadened interpretation and use of Section 5 of the FTC Act.[9] Unless applied with circumspection, that provision could chill procompetitive business practices by introducing an added element of uncertainty for firms assessing whether aggressive competitive conduct might result in an FTC investigation. The FTC was reasonably active in bringing cases involving unilateral conduct during the previous administration, and it seems likely to continue this policy.

In making enforcement decisions, we urge both antitrust agencies to bear in mind three considerations in balancing the risks of Type 1 and Type 2 errors, which are discussed in the Section 2 Report:[10]

1. First, compared to errors of over-enforcement, Type 1 errors are much more difficult to correct and hence more likely to distort the operation of the market over the longer-term—to the detriment of consumers and competition.
2. Second, indeterminate standards – such as open-ended balancing tests—that businesses cannot accurately apply in real time create uncertainty that discourages hard competition, ultimately redounding to the detriment of consumers. For these reasons, the agencies must carefully consider the implications of enforcement decisions that would put concerns about under-enforcement ahead of concerns about over-deterrence.
3. Third, as the Report put it, "the Supreme Court has consistently emphasized the potential dangers of over-deterrence," lest fear of antitrust liability chill efficiency-creating conduct.[11] Regardless of the standards invoked by the agencies in deciding to bring cases, the courts will ultimately assess any actions they bring under Supreme Court and other judicial precedent. In the interests of efficiency and sending effective messages to business and the public about antitrust enforcement, the agencies need to

[3] Christine A. Varney, Vigorous Antitrust Enforcement in this Challenging Era, May 11, 2009, at 8, http://www.usdoj.gov/atr/public/speeches/245711.pdf.

[4] *Id.*

[5] 342 U.S. 143 (1951).

[6] 472 U.S. 585 (1985).

[7] 253 F.3d 34 (D.C. Cir. 2001) (en banc).

[8] Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice at 3.

[9] *See*, e.g., Jon Leibowitz, Tales from the Crypt: Episodes '09 and '09: The Return of Section 5, remarks before the Section 5 Workshop (October 17, 2008), http://www.ftc.gov/speeches/leibowitz/081017section5.pdf.

[10] *Supra* note 2.

[11] *Id.* at 14-15.

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consider carefully the clearly articulated underpinnings of Supreme Court jurisprudence.

It is clear that we are living through challenging economic times. But, while Deputy AAG for Economics Carl Shapiro is certainly correct that "reducing antitrust enforcement during economic hard times does not promote economic recovery,"[12] it is also true that over-enforcement of the antitrust laws poses great danger of harming the economy by deterring procompetitive conduct. Accordingly, as we discuss in more detail below, the agencies should exercise their powers judiciously, enforcing the antitrust laws in a manner that does not exacerbate the current financial difficulties through either Type 1 or Type 2 error.

Both the law and sound antitrust policy dictate vigilance in avoiding Type 1 errors. Indeed, in a litigious world where private treble damage antitrust claims and class actions are endemic, the economic costs associated with false positives will have a cascading effect throughout the market and the economy at large. The agencies have a duty to vigorously and rationally enforce the antitrust laws with regard to exclusionary conduct by dominant firms. However, the agencies must also take care not to swing the pendulum so far that the ramifications from over-enforcement exceed any benefits resulting from an interventionist enforcement approach.

This balancing act is difficult, particularly in the area of unilateral conduct where the legal principles are, to say the least, unsettled, and the line between procompetitive and anticompetitive behavior is quite thin. It is important that the agencies consider carefully the "tipping point"[13] for enforcement and avoid reaching that point where enforcement extends beyond its optimal societal benefit.[14]

III. WHAT ARE TYPE 1 AND TYPE 2 ERRORS?

Some common definitions are in order. In economic terms, Type 1 errors, or false positives, are inferences leading to a false positive conclusion, rejecting a properly hypothesized value. In the antitrust context, such errors may be chilling by raising the desirable level of competitive intensity, increasing the degree of uncertainty, or lowering the decision-making threshold for enforcement. As one commentator has noted, the result of antitrust rules that result in frequent Type 1 errors is to discourage firms from starting or continuing aggressive competitive behavior: "As the frequency of over-deterrence increases, even those potential defendants who are complying with the standard will be compelled to change their conduct in order to reduce the risk of being held liable."[15]

Type 2 errors, or false negatives are essentially the inverse, where erroneous inferences lead to a false conclusion, or the acceptance of a false hypothesis. Such errors occur where

[12] Carl Shapiro, Competition Policy in Distressed Industries, remarks before ABA Antitrust Symposium: Competition as Public Policy (May 13, 2009).

[13] MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE, 12 (2002).

[14] Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1 (2005), 12-18.

[15] KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION, 130 (2003); *see also* Fred S. McChesney, Easterbrook on Errors, Research Roundtable on the Limits of Antitrust Revisited, September 29-30, 2009, at 5-7 [*hereinafter* Easterbrook on Errors].

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undesirable conduct goes unremedied. In antitrust terms, such errors take place when anticompetitive practices or behaviors are not punished.[16]

IV. THE "TIPPING POINT" DILEMMA

A dilemma inherent in Section 2 enforcement results from the fact that much of the targeted behaviors are procompetitive and benefit consumers up to a certain point—a "tipping point"—after which the behavior begins to distort the competitive process and becomes detrimental to consumers in the long-term. There is a strong assumption from economic theory that social welfare is optimized by competitive behavior that drives prices down toward a long-run marginal cost equilibrium.[17] In other words, the more closely pricing tracks marginal cost in a sustainable manner, the more that efficiency is optimized and the more that pricing approximates a socially optimal point.[18] As such, price cuts, even by a dominant firm, result in ever-increasing gains until they reach a sudden tipping point where they exclude efficient competitors and threaten to cause long-run price increases.

While price decreases beyond this "tipping point" may benefit consumers in the short-term, as prices decrease further—and thus increase the likelihood that efficient competitors will be excluded and the dominant firm will be able to raise prices in the long-term—overall consumer welfare may decrease. Although many other considerations are relevant when establishing legal rules, one challenge facing antitrust courts and agencies is accurately identifying that tipping point where procompetitive, lawful conduct that benefits consumers may turn into anticompetitive conduct that harms consumers in the long term and increases the power of the dominant firms to charge supra-competitive prices.

V. BALANCING TYPE 1 AND TYPE 2 ERROR RISK

Both Type 1 and Type 2 errors are common in legal decision-making.[19] In the antitrust context, however, there is a fundamental distinction between the consequences of Type 1 and Type 2 errors with important implications for establishing rules that appropriately balance the two risks. Most significantly, the market typically will self-correct Type 2 errors over time, which is generally not the case with Type 1 errors.[20] Consider, for example, above-cost discounting by a monopolist that may drive a rival from the market. If the rival in fact exits and the monopolist then raises prices further above competitive levels, those higher prices will often bring about new entry or expansion by existing rivals, thereby bidding market prices back down towards competitive levels. If, however, the law prohibits the discounting, consumers are denied for all time the benefits of the lower prices.[21]

As one commentator noted, "the costs of Type 2 errors ... will be low, as long as barriers to entering markets plagued by suspected anticompetition (sic) are also low. As prices rise

[16] *See*, e.g., Fred McChesney, *Talking 'Bout My Antitrust Generation: Competition For and In the Field of Competition Law*, 52 EMORY L.J. 1401, 1412 (2003) [*hereinafter Talking 'Bout*]; *see also* Easterbrook on Errors, *Id*, at 5-7.

[17] *Talking 'Bout*, *Id*, 1412.

[18] Crane, *supra* note 6, at 33-35.

[19] *See Talking 'Bout, supra* note 17, at 1412.

[20] *See* Easterbrook on Errors, *supra* note 15, at 8 ("In other words, the cost of Type II errors will be reduced by the market. Unpunished anticompetitive practices, ones that result in higher prices, will only attract new entry. Type II errors are largely self-correcting. But punishing behavior that is actually beneficial (Type I error), especially by use of per se rules, takes the behavior out of any market correction. The court, not the market, decides.").

[21] *See Id.* at 29.

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because of anticompetitive contracts or practices, new entrants emerge to alleviate or even eradicate the problem. Letting the guilty go free in antitrust is generally a self-correcting problem."[22] Although this statement may be overly generalized, economic and decisional theory supports an enforcement approach that is particularly assiduous in avoiding Type 1 errors.

In general, commentators agree that "antitrust should intervene only when it can be confident that it will not do more harm than good to competitive processes, and this may entail that at least some anticompetitive acts go unpunished."[23] Professor Daniel Crane has explained that, in the predatory pricing context, antitrust rules should tilt towards the under-inclusive because of the risk that predatory pricing rules will impede price-cutting that benefits consumers:

> Courts and antitrust enforcement agencies should adopt a decisional rule with respect to predatory pricing that mandates deliberate underinclusion in the specification of the liability rule. The degree of the deliberate underinclusion should be determined not only by the court's certainty in the soundness of its decision-making but also by an appreciation of the degree to which the predatory pricing law discourages innocent price-cuts. If, as I have suggested here, predatory pricing law's tendency to induce deviations from optimal pricing is strong, then the additive factor should be substantial.[24]

The Supreme Court has recognized as much in establishing a safe harbor for above-cost pricing. And it has done so not because above-costs discounts could never harm competition, but rather because anticompetitive above-cost discounting is "beyond the practical ability of a judicial tribunal to control without creating intolerable risks of chilling legitimate price cutting."[25] As then-Judge Breyer stated in *Barry Wright Corp. v. ITT Grinnell Corp.*,[26] a rule that would permit liability for above-cost pricing would improvidently sacrifice the "bird[] in the hand" of immediate, above-cost price cuts for the "bird[] in the bush" of lower prices sometime in the future, and it would be too difficult for judges and juries to distinguish between "a firm that is cutting prices to 'discipline' or to displace a rival and one cutting prices 'better to compete'"— with errors having grave consequences for consumers.[27]

The seminal works on the dangers of Type 1 over-enforcement appeared during the 1970s-80s. In *The Limits of Antitrust*, Judge Frank Easterbrook set forth a compelling economic basis underscoring the dangers of over-enforcement. Simply put, he explained that when most examples of a particular category of conduct are procompetitive, antitrust rules should not ensnare innumerable instances of procompetitive conduct in hopes of making sure a small amount of anticompetitive is caught.[28] Judge Easterbrook observed that the economic system operates in such a manner as to correct monopolistic behavior more readily than over-enforcement of the antitrust laws, particularly in high-tech, fast-moving innovative industries,

[22] *See Talking 'Bout, supra* note 16; *see also* Easterbrook on Errors, at 29 ("Type II error is largely self correcting, but Type I error is not).

[23] Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUMBIA BUS. L. REV. 257, 313 (2001).

[24] Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1 (2005), 57.

[25] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993),

[26] 724 F.2d 227 (1st Cir. 1983).

[27] *Id.* at 234.

[28] Frank T. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984).

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which are much more prevalent today than when he wrote in 1984.[29] It is at least as true today as twenty-five years ago that enforcement "errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not."[30]

Professors Areeda and Turner similarly highlighted the dangers of over-enforcement in the Section 2 context nearly a decade earlier. In *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, they recognized that the self-correcting nature of the marketplace made "predatory pricing seem[] highly unlikely."[31] As a result, they cautioned courts and agencies to exercise "extreme care [] in formulating [predatory pricing] rules, lest the threat of litigation, particularly by private parties, materially deter legitimate, competitive pricing."[32] In addition, Professors Areeda and Turner noted that aggressive enforcement seeking to parse between procompetitive and anticompetitive above-cost pricing would not only raise a number of administrative problems,[33] but also would result in lost consumer benefits and create market inefficiencies.[34] Thus, in order to foster lawful competition in the marketplace while tempering the risks associated with over-enforcement, Professors Areeda and Turner endorsed a number of administrable rules protective of procompetitive practices that ultimately benefit consumers.[35]

Consistent with the work of Judge Easterbrook, as well as Professors Areeda and Turner, many economists have identified a number of reasons why Type 1 errors are so much more costly than Type 2. First and foremost, many commentators agree with Judge Easterbrook's view that market forces typically constrain the extent to which a firm can exploit a monopoly position. Profit opportunities from rising prices encourage new entry. Consumers, meanwhile, would very often turn to substitutes. Thus, "[i]n the long run, firms would enter to compete until economic profits are driven to zero."[36]

Professor Keith Hylton provides a helpful example, which we paraphrase.[37] Consider a dominant firm that changes the design of its product to increase competition barriers due to incompatibility. In this hypothetical, consumer valuation increases by $5, cost by $3, and price by $50. Of the $47 net profit, $45 is attributable to the new competition barriers, and $2 to efficiencies. Therefore, with over 90 percent of the profit attributable to the temporary barriers, the market "will provide a strong inducement to existing competitors and new entrants to compete for a share of the profits."[38] Entry will continue, in fact, until the dominant firm's price

[29] See *Id.* at 2-3, 15-17.

[30] See *Id.* at 3.

[31] Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698-99 (1975).

[32] *See Id.* at 699.

[33] *See Id.* at 707, 711.

[34] *See Id.* at 706 ("Exclusion by charging prices equal to average cost is also competition on the merits—only those potential entrants who cannot survive at the efficiency-related price are kept out. And the lower prices, higher output, and fuller use of the monopolist's productive capacity are, of course, socially beneficial.").

[35] *See Id.* at 732-33; *see also Id.* at 711 ("To hold the monopolist responsible, after-the-fact, for reasonable miscalculations would be an intolerable burden, and encourage a high-price policy in order to be safe.").

[36] *See*, e.g., Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft*, in MICROSOFT, ANTITRUST AND THE NEW ECONOMY, (David S. Evans, ed., 2006)

[37] This example is derived from Keith N. Hylton, *The Law and Economics of Monopolization Standards*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131250&download =yes (2009)

[38] *See Id.* at 23.

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falls by $44, "at which point its unit profits are attributable entirely to its efficiency advantage over rivals."[39]

Another possible explanation for why Type 2 errors should be a lesser policy concern than Type 1 errors is the Welfare Trade Off Model that Nobel Laureate Oliver Williamson first posited in the late 1960s.[40] This model posits a world of perfect competition transformed through merger into a world of perfect monopoly, while also providing cost savings from increased efficiencies or cost savings. Williamson's model in its traditional form predicts "relatively small gains in efficiency would be sufficient to offset rather large amounts of monopoly profit."[41] Consistent with this prediction is the observation that "the costs of discouraging investments in efficiency are likely to be larger than the social costs of monopoly pricing."[42] Or stated differently, the costs of false convictions are likely to be greater than the costs of false acquittals.

Finally, at least for predatory pricing, the current legal and enforcement landscape, in conjunction with the realities of the market, make the likelihood of anticompetitive conduct small. Within the current regulatory and legal environment, a rational, profit-maximizing firm will only engage in anticompetitive conduct if it believes the expected profits from such conduct exceed the potential litigation and adverse judgment costs resulting from a government investigation or a lawsuit from its competitors and customers.[43] However, given the very real potential for high litigation costs and a potential adverse judgment involving treble damages, not to mention follow-on class action suits, it is unlikely that a firm will attempt such price cuts even if the likelihood of a suit is relatively small.[44] As a result, the current legal and regulatory environment already seems to have established a system with high deterrent value, making it unlikely that Type 2 error occurs on a regular basis with respect to predatory pricing.

The risks of unwarranted and unproductive direct investments in defending against meritless litigations also suggest that antitrust rules should be designed to avoid false condemnations of procompetitive practices. False convictions—whether as a result of private litigation or enforcement actions brought by the agencies—can serve as signaling mechanisms suggesting that antitrust law can be used as an anticompetitive cudgel against a dominant firm. Professor Hylton suggests that such investments will vary "with the efficiency of the defendant's conduct rather than with consumer harm."[45] Thus, antitrust rules that are too likely to ensnare efficient behavior by a dominant firm may result in societal costs based on unproductive investments in unwarranted litigations, or, at a minimum, over-investment in marginally warranted litigations.

The prevalence of follow-on class actions seeking treble damages only magnifies these impacts, further discouraging aggressive, procompetitive conduct in ways that are difficult to correct. Investments in unwarranted litigation turn the Tullock rent-seeking model on its head, diminishing societal resources by punishing legitimate and procompetitive dominant firm

[39] *See Id.*
[40] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE, 27, (2006).
[41] *Id.* at 28.
[42] Hylton, *supra* note 30, at 23.
[43] Crane, *supra* note 15, at 40-43.
[44] *See Id.*
[45] Keith N. Hylton, *supra* note 37, at 24.

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behavior.[46] Antitrust rules leading to Type 1 errors create an environment ripe for such unproductive investments, putting "upward pressure on the false conviction costs of monopolization laws."[47]

VI. DETERRENCE THROUGH UNCERTAINTY—COMPOUNDING THE TYPE 1 ERROR EFFECT

Indeterminate antitrust rules that make it difficult or impossible for a dominant firm to determine *ex ante* whether its conduct will be deemed to violate the antitrust laws after the fact, compound the chilling effect of rules that are overly tolerant of Type 2 errors.[48] Dicta in the Court of Appeals *Microsoft* decision[49] provides a good example of how uncertainty can lead a firm to avoid procompetitive conduct. The court suggests that open-ended rule of reason balancing could be an appropriate analytical path for assessing possible exclusionary conduct. But nothing in *Microsoft* or later decisions explains how a firm can determine *ex ante* whether its conduct would pass such a balancing test.

For instance, in the pricing context a monopolist would need to know its rivals' costs to know whether its discounting is likely to drive out or marginalize a rival and, thus, whether to survive antitrust scrutiny, the immediate procompetitive benefits from the discounting would need to outweigh future competitive harm to competition from loss of rivalry. Because monopolists will generally lack such information, they are likely to pull their competitive punches to avoid the risk of treble damage antitrust liability based on factors that are unknowable *ex ante*.

Another example of the danger that indeterminate rules will discourage procompetitive discounting is seen in the heavily criticized ruling in *LePage's, Inc. v. 3M*.[50] In *LePage's*, the Third Circuit (en banc) failed to apply any standard or test to evaluate an above-cost multi-product bundled discount. Such discounts are ubiquitous in today's economy. But, in the light of *LePage's*, firms cannot readily determine if such discounts face potential legal condemnation, chilling procompetitive behavior to the detriment of consumers.

Indeed, in cases like *Brooke Group* and *Weyerhaeuser*, the Supreme Court has repeatedly insisted on clear, bright line rules that enable a monopolist to avoid liability by ensuring that it does not price beneath its own costs—which it knows *ex ante*—rather than those of its rival—which it does not.[51] The antitrust laws deliberately avoid rules that would force firms to be

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[46] *See*, e.g., Gordon Tullock, "The Fundamentals of Rent Seeking," (1998), available at http://www.thelockeinstitute.org/journals/luminary-v1_n2_p1.html.

[47] Hylton, *supra* note 30, at 24.

[48] The chilling effect of the uncertainty created by indeterminate antirust rules is further compounded by globalization and the parallel enforcement of antirust principles by a host of antitrust agencies around the world. See Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 CHICAGO J. INT'L LAW 189, 203-11 (2009). Such parallel enforcement "creates a serious concern that firms might be dissuaded from adopting procompetitive behaviors due to the risk that such behaviors may create antitrust liability in one or several jurisdictions that take a particularly restrictive, and in some cases misguided, approach to the conduct in question." *See Id.* at 206.

[49] 253 F.2d 34.

[50] 324 F.3d 141 (3d Cir. 2003).

[51] Weyerhaeuser, 127 S.Ct. at 1074; Brooke Group, 509 U.S. at 222.

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overly cautious so as not to risk crossing a line that can be accurately drawn only on the basis of information that is unknowable to them when they make their pricing decisions.[52]

The agencies are not unaware of the dangers inherent in uncertainty regarding standards governing unilateral conduct by a dominant firm. AAG Varney recently noted that "members of the antitrust and business communities face uncertainty in evaluating whether, and in what circumstances, certain categories of single firm conduct will be deemed unlawful. Their concerns deserve further attention and discussion."[53]

The spectre of uncertainty is compounded by the recent comments of Federal Trade Commission Chairman Jon Leibowitz and Commissioner J. Thomas Rosch urging increased use of Section 5 of the FTC Act to address unfair methods of competition in unilateral conduct cases. Section 5 proceedings are particularly prone to Type 1 errors. At the threshold, Section 5 may not require the same elements of proof as do claims brought under Section 2 of the Sherman Act. Section 2 requires proof of both possession of market power and the willful maintenance or acquisition of such monopoly power.[54] FTC Act Section 5 more broadly prohibits "unfair methods of competition," a term of art not clearly defined in the statute or by the courts.[55] The FTC Act may be interpreted as extending beyond the borders established by the Sherman Act. As the Supreme Court has held, "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws; nor were unfair practices in commerce confined to purely competitive behavior."[56]

Chairman Leibowitz has indicated that there are a number of categories of cases that might be most susceptible to the application of Section 5.[57] For example, he identifies standards setting as an area where the FTC might seek to use Section 5, in lieu of Sherman Act enforcement. He explained that this approach might be warranted because of the Court's "ever-narrowing of the antitrust laws ... even if the practice is unfair and causes tremendous harm to consumers."[58] Commissioner Rosch, somewhat conversely, would not use Section 5 to attack practices that could be reached under the Sherman Act. Rather, he would employ Section 5 to attack conduct that is in the neighborhood of the Sherman Act, but beyond its boundaries.[59]

To his credit, Chairman Leibowitz has recognized the dangers that overuse of Section 5 would bring, observing that the FTC understands the "excesses" of previous attempts in the

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[52] *See* Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 905 (9th Cir. 2008) (noting dangers of rule requiring monopolist to govern its conduct based on information outside its control); Barry Wright, 724 F.2d at 234 (antitrust laws should not "discourage[e] legitimate price competition" through pricing rules that the monopolist cannot apply ex ante).

[53] Christine A. Varney, Striving for the Optimal Balance in Antitrust Enforcement: Single Firm Conduct, Antitrust Remedies, and Procedural Fairness, Remarks to The Council on Foreign Relations, October 8, 2009.

[54] United States v. Grinnell, 384 U.S. 563 (1966).

[55] A. Douglas Melamed, The Wisdom of Using the "Unfair Method of Competition" Prong of Section 5, November 2008, at http://www.wilmerhale.com/files/Publication/704e2922-6df7-4bb7-bd88-014695e523b1/Presentation/PublicationAttachment/f5c9a3c8-3a90-4b16-900b-2a54a5ba420a/Melamed_Nov_08_1.pdf.

[56] Federal Trade Comm'n v. Sperry & Hutchinson Co., 405 U.S. 233, 243 (1972).

[57] Leibowitz, *supra* note 9, at 6.

[58] *Id.*

[59] J. Thomas Rosch, "The FTC's Section 5 Hearings: New Standards for Unilateral Conduct," Remarks before ABA Antitrust Section Spring Meeting, March 25, 2009, available at http://www.ftc.gov/speeches/rosch/090325abaspring.pdf.

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1970s to extend the reach of Section 5. He goes on to observe that "businesses deserve, if not certainty, then at least a sense of what behavior we are trying to reach."[60]

Providing guidance so that businesses can know with confidence whether their conduct is on the right side of the line is an important part of the agencies' responsibilities. It is critical that businesses be able to engage in procompetitive price-cutting and other consumer-friendly activities without fear of being swept up under the broad umbrella of Section 5. It is important that the FTC must be very circumspect in pursuing cases under Section 5, lest that section complicate even further the challenges dominant firms face in trying to predict the application of the antitrust laws and govern their conduct accordingly.

Moreover, given the nature of their missions, the antitrust agencies likely have institutional biases towards bringing cases in marginal situations. The agencies are attempting to develop and advance long-term policy goals. Without enforcement actions to test their theories of anticompetitive harm, they cannot develop long-term policies with any confidence that the courts will uphold those polices. But there are limitations to what can—or should—be done to effectuate these goals. The agencies should bear in mind that in cases of alleged anticompetitive behavior, there is almost always a "competitor-victim" with a sufficient claim of antitrust injury to file a private, treble-action suit, obviating the need for agency intervention except in certain exceptional outlier cases. Agency resources are scarce, and the agencies need not focus attention on every potential allegation of anticompetitive behavior. Rather, the agencies can often better serve their long-term mission of influencing the antitrust laws in constructive ways by picking enforcement cases carefully, filing amicus briefs in appropriate private litigations, and influencing policy through hearings on the key issues of the day.

VII. THE SUPREME COURT HAS CONSISTENTLY ANNOUNCED SECTION 2 RULES THAT PROTECT AGAINST TYPE 1 ERRORS AND PROMOTE *EX ANTE* CERTAINTY.

In its Section 2 jurisprudence over the last two decades, the Supreme Court has time and again insisted on clear rules designed to ensure that the antitrust laws do not deter above-cost pricing and other procompetitive behavior. These rules reflect, among other considerations, the Court's concern that companies have predictable, brightline rules that they can follow in real time with confidence that procompetitive conduct will not later be deemed to have violated the antitrust laws. Even putting aside the policy reasons why the agencies should take seriously the dangers of over-deterrence and indeterminate rules in making enforcement decisions, cases they bring will ultimately be subject to the specific rules and broader principles the Court has announced.

In *Brooke Group*,[61] the Court declared a bright line safe harbor for above-cost pricing that businesses can apply *ex ante*. In doing, the Court focused intensively on the dangers of over-enforcement in the pricing context: "[T]he costs of an erroneous finding of liability are high. . . . It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."[62] The Court has very recently reaffirmed the importance of clear rules to avoid over-deterrence in the predatory buying and

[60] Leibowitz, *supra* note 35, at 5.
[61] 509 U.S. 209 (1993)
[62] *Id.* at 226.

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price squeeze contexts. In announcing a bright-line price/cost test for predatory buying claims, in *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc*., the Court wrote: "Given the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in Brooke Group."[63] Similarly, in *Pacific Bell Telegraph Co. v. linkLine Communications, Inc*., the Court was explicit in stressing the importance of safe harbors that firms can rely on *ex ante*: "Perhaps most troubling, firms that seek to avoid price-squeeze liability [would] have no safe harbor for their pricing practices. . . . At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost."[64]

In *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*,[65] the Court again stressed just how critical it is that the antitrust laws not deter procompetitive activity, this time in rejecting a claim that the reach of Section 2 should be expanded to require a monopolist to share its facilities with an incipient rival. The Court explained that firms obtaining monopoly and charging monopoly prices is, standing along, not only lawful but "is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[66] Given the importance to our economy of hard competition in search of monopoly rents, "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' . . . The cost of false positives counsels against an undue expansion of § 2 liability."[67]

VIII. CONCLUSION

The courts have, for sound policy reasons, developed specific rules and broader principles that promote intensive competition and certainty, while minimizing the possibility of Type 1 errors and their attendant harm to competitive process and consumers. The agencies bear the responsibility of ensuring that firms can rely on those rules and principles with confidence and that ambiguous antitrust standards do not deter procompetitive conduct.

The agencies have a difficult mission ahead of them, and they clearly expressed their continued commitment to the principles of consumer welfare and the development of sound antitrust policy.[68] However, the agencies must be cautious in dismissing concerns regarding chilling of procompetitive activity. The costs of Type 2 errors are usually corrected by the market over time. The costs of Type 1 errors are far more difficult to correct and are ultimately borne by the consumer. Effective antitrust enforcement sometimes requires the agencies to draw fine lines. We encourage them to do so in ways that have due regard for dangers of over-

[63] 549 U.S. 312, 325 (2007).

[64] 129 S. Ct. 1109, 1121 (2009)

[65] 540 U.S. 398 (2004)

[66] *Id.* at 407.

[67] *Id.* at 414 (quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)); *see also* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) ("[T]his Court and other courts have been careful to avoid constructions of § 2 which might chill competition, rather than foster it.")

[68] AAG Varney recently stated that "members of the antitrust and business communities face uncertainty in evaluating whether, and in what circumstances, certain categories of single-firm conduct will be deemed unlawful. Their concerns deserve further attention and discussion." Christine A. Varney, Striving for the Optimal Balance in Antitrust Enforcement: Single Firm Conduct, Antitrust Remedies, and Procedural Fairness, Remarks to The Council on Foreign Relations, October 8, 2009.

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deterrence and indeterminate liability rules. This means a tempered and nuanced approach in bringing cases. Ultimately, such an approach will best serve the agencies, competition in the marketplace, and the American consumer.

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