Three Key Distinctions Under Section 2:

Written Testimony of Kenneth L. Glazer
Before the Antitrust Modernization Commission

Proper analysis of Section 2 of the Sherman Act turns on three key distinctions: (i) excluding vs. exploiting; (ii) horizontal vs. vertical; and (iii) coercing vs. incentivizing.

The first distinction is well recognized. As *Trinko*[1] has now finally confirmed, it is not illegal under Section 2 for a monopolist to *exploit* its monopoly by charging high prices; Section 2 is only concerned with conduct designed to *exclude* rivals.

The second distinction is well known in antitrust law generally but, strangely, has not been recognized as critical in the Sherman 2 arena. It should be, because there is a fundamental difference between refusing to deal with a rival and refusing to deal with customers: generally, whereas we don't want firms, even monopolists, doing business with their rivals, we do want firms to be doing business with their customers and suppliers. By recognizing that forced sharing among competitors might undermine the central goals of antitrust, *Trinko* has gone a long way toward acceptance of the distinction. But the distinction needs to be an express part of our Sherman 2 jurisprudence.

The third distinction is virtually unknown but in my view is the key to proper analysis in the "vertical" area. There are two fundamentally different ways a firm can get a customer or supplier to confer an advantage on it: one is by refusing to deal with any firm that does *not* confer that advantage (e.g., exclusivity); the second is by offering incentives to firms that confer the advantage. The problem with the vertical area is that this distinction has not been recognized and applied. That shortcoming needs to be fixed.

I believe that much if not most of the confusion and uncertainty that has beclouded Sherman 2 in recent years can be dispelled by recognizing and applying these distinctions. Intellectually they are correct and would greatly promote public policy. As an in-house lawyer, I also believe that they would make the law in this area much easier to understand and follow, furnishing companies with much-needed certainty and predictability. In other words, they have the virtue of being workable as well as right.

1. Excluding vs. Exploiting

The distinction between excluding on the one hand and exploiting on the other is well recognized. "Excluding" refers to conduct designed to eliminate rivals, enabling the surviving firm or firms to reap the benefits of less competition. I use the term "excluding" rather than "exclusionary" because the latter is used synonymously with

[1] Verizon Communications Inc. v. Trinko, 540 U.S. 398 (2004).

"predatory" or "illegal," and not everything that is designed to exclude rivals is necessarily illegal or predatory. So by "excluding" I simply mean that the conduct is designed, or allegedly designed, to eliminate rivals, not that it is necessarily illegal. "Exploiting," on the other hand, refers to the post-elimination stage when the monopolist can take advantage of its monopoly, regardless of how that monopoly was achieved.

The difference between the two is stark. While an effort to *exclude* rivals can perpetuate a monopolist's hold on the market, *exploiting* the monopoly has the opposite effect: it undermines the monopoly. As the Ninth Circuit once explained: "Every act exploiting monopoly power to the disadvantage of the monopoly's customers hastens the monopoly's end by making the potential competition more attractive."[2] Besides, how are courts supposed to prohibit "high pricing" without becoming public utility regulators?

Though this distinction has been well known for a long time, it was not enshrined in any Supreme Court decision until last year's *Trinko*. For decades U.S. antitrust lawyers considered it black letter law that a monopolist does not violate Section 2 of the Sherman Act simply by charging a monopoly price.[3] Several lower courts recognized that principle.[4] But as far as I am aware, the Supreme Court had never said so. And as recently as 2002, just two years before *Trinko*, one district court rendered a decision that appeared to condemn the mere charging of a monopoly price by an airline.[5]

In *Trinko*, the Court finally confirmed that monopoly pricing is not unlawful:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[6]

This principle is at the heart of Section 2 jurisprudence, but should not be taken for granted, for it is not recognized in other parts of the world—most notably, the European Union. Nevertheless, because it is relatively well understood and accepted in the U.S., I will not spend anymore time on it.

2. Horizontal vs. Vertical

The excluding/exploiting distinction tells us that Section 2 is concerned only with *excluding* (leaving aside of course the case of a merger-to-monopoly or a conspiracy to

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[2] Alaska Airlines v. United Airlines, 948 F.2d 536, 548 (9th Cir. 1991). *See also* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 n. 12 (2d Cir. 1979) ("[H]igh prices, far from damaging competition, invite new competitors into the monopolized market.").
[3] *See, e.g.*, Antitrust Law Developments 246 (5th Ed. 2002).
[4] *E.g.*, Alaska Airlines,948 F.2d at 548-49.
[5] *In re* Northwest Airlines Corp, 208 F.R.D. 174, 214 (E.D. Mich. 2002).
[6] 540 U.S. at 407.

monopolize). That much is clear. What has been less understood is that there is a fundamental divide between two kinds of excluding-conduct cases: horizontal and vertical.

It is surprising that this is not better recognized. The horizontal/vertical distinction is one of the fundamental concepts in antitrust law. Indeed, it would be impossible to make any sense of Section 1 law without being aware of the distinction between agreements with competitors and agreements with upstream or downstream partners.[7] Yet when we turn to the Section 2 area, we find that the distinction is often forgotten or overlooked. This has resulted in courts and commentators failing to distinguish between a horizontal and a vertical situation.[8] This needs to be rectified.

The horizontal/vertical distinction in the Section 2 context

By "horizontal" I mean a case in which the excluding conduct at issue consists of a monopolist's direct dealings (or lack thereof) with competitors, in contrast with a "vertical" case in which the challenged conduct concerns relations with customers or suppliers—a refusal to deal, or imposition of a restraint, or the like. The vertical area includes all those cases falling under the rubrics of exclusive dealing, tying, loyalty discounts, bundling, and predatory pricing.

Our free market system rests on the assumption that separate firms behave separately, that competitors compete.[9] Thus, while we like to see firms in our economy selling to their customers and buying from their suppliers—indeed, we wouldn't have much of an economy if they didn't—we generally don't like them to be dealing with their competitors. And so we must view with a jaundiced eye any suggestion that a firm somehow ought to be *forced* to deal with a competitor. In *Trinko*, Justice Scalia made the point about as well as it can be made:

> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.[10]

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[7] *See, e.g.*, Business Electronics Corp. v. Sharp Electronics, 485 U.S. 717, 724-30 (1988).
[8] For a discussion of how courts and commentators have failed to distinguish between the two, see Glazer & Lipsky, "Unilateral Refusals to Deal Under Section 2 of the Sherman Act," 63 Antitrust L. J. 749 (1995).
[9] *See generally* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).
[10] 540 U.S. at 407-08.

Of course, not every instance of competitors cooperating with each other is an antitrust violation. But when we are talking about not just *permitting* competitors to cooperate but *requiring* them to do so, we are in a topsy-turvy world indeed.

It is surprising that the horizontal/vertical distinction is not better accepted in the Section 2 area. The *Trinko* language quoted above goes a long way toward the distinction. But even there the distinction is only implicit. And many courts and commentators fail to draw any sharp separation between the two kinds of cases.[11]

Most Sherman 2 cases involve vertical conduct, which I think is as it should be because that should be the main focus of Section 2. At first that might sound somewhat counterintuitive to antitrust lawyers who are used to the idea, arising in the Section 1 and merger contexts, that antitrust law is primarily concerned with horizontal rather than vertical. But, as we have been discussing, "horizontal" in the Section 2 context translates into "was it a violation for the defendant *not* to deal with its rival?" as opposed to the Section 1 context where the question is the opposite. In my view, vertical cases should be analyzed based on the distinction between coercive and incentivizing conduct, which is discussed in Point 3 below.

How should we deal with "horizontal" cases?

As to horizontal cases, I believe that they should be approached with the recognition that we are dealing with a rare bird. Fortunately, that recognition is now enshrined in a Supreme Court case—namely, *Trinko*. In addition to the language quoted above, the Court also expressly said: "We have been very cautious in recognizing such [cases], because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." And the Court called *Aspen Skiing* "at or near the outer boundary of Sec. 2 liability."

But how do you know that you have found that rare bird? I can't claim to have figured out exactly what the right test is, but I don't particularly like some of the tests that have been proposed. One is the test implicit in the following *Trinko* language characterizing *Aspen*:

> The Court there found significance in the defendant's decision to cease participation in a cooperative venture. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end.[12]

There are a couple of problems with this interpretation of *Aspen*. First, it sets up a perverse incentive in which a monopolist is better off never starting down the road of cooperation at all, lest it find itself stuck forever in a bad marriage. As Professor Areeda

[11] *See* Glazer & Lipsky, *supra* note 8.
[12] 540 U.S. at 409.

put it, the Sherman Act is not an antidivorce statute.[13] More fundamentally, it fails to explain why discontinuing a cooperative relationship is necessarily anticompetitive. In fact, it may make the consumer better off, not worse off. More than one commentator has questioned why the ski resorts in *Aspen* were even allowed to joint-venture with each other in the first place.[14]

It has also been suggested that we should put heavy weight on whether the defendant is currently sharing with others, including non-rivals, on the grounds that such sharing proves that sharing is feasible and economical.[15] But that approach ignores the all-important horizontal/vertical distinction. Yes, of course selling to non-rival customers is feasible and economical, but it doesn't follow from that that the monopolist should be forced to sell to a rival, which might not even be profitable. And the fact that selling to that rival would be feasible or economical in a narrow sense doesn't mean enforcing sharing would create the right incentives.

Some simply ask: would forcing the monopolist to share its facility increase consumer welfare? The problem with that approach is that it fails to consider the consequences of the rule itself. Of course the consumer can be made better off in the short run by forcing the monopolist to share with rivals. The consumer can also be made better off by prohibiting the monopolist from charging a monopoly price. But we don't do that, as noted in the previous section, because it would remove the incentive to invest and innovate. The same is true of a rule requiring the monopolist to share its facilities with rivals.

An approach that asks if the monopolist had an "intent" to hurt rivals would be equally misguided. To paraphrase Justice Stevens, it is far too late in the history of antitrust jurisprudence to be shocked at a firm that wants to have the market to itself. We should be focusing on a firm's objective conduct, not its subjective intent—a point to which I return in Point 3.

I suspect that ultimately the right approach will turn on an analysis of incentives. As Scalia put it earlier in the opinion, enforced sharing "may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities." In most if not all instances, enforced sharing *will* have that lessening effect, and maintaining the incentive to invest is one of the most important goals antitrust should be serving. In my view, we should not enforce sharing unless it is clear that incentives will not be lessened. It is not clear when exactly that would be the case, but that is what we should be looking for.

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[13] Phillip E. Areeda, "Esssential Facilities: An Epithet in Need of Limiting Principles," Antitrust L. J. 850 (1990). *See also* Glazer & Lipsky, *supra* note 8, at 800 ("If the plaintiff's true grievance is that the defendant pulled the rug out from under him, he should sue under contract law or rely on other legal mechanisms designed for the purpose.").
[14] *See* Glazer & Lipsky, *supra* note 8, at 798 n. 191.
[15] *See* A. Douglas Melamed, "Refusals to Deal and the Essential Facilities Doctrine" (submitted to this Commission on behalf of the United States Telecom Association, July 15, 2005).

As to *Aspen* itself, it is interesting to note that one aspect of the defendant's conduct there was arguably vertical rather than horizontal. The main focus in *Aspen* (and subsequent discussions thereof) was on the defendant's decision to pull out of the joint marketing relationship. But the defendant went beyond just pulling out, because after pulling out it also refused to honor the cash-equivalent vouchers purchased by skiers as part of an "Adventure Pack" offered by the plaintiff. This comes close to the refusal to deal with a "disloyal" customer discussed in the next section.[16]

3. Coercing vs. Incentivizing

As noted above, most Section 2 cases involve "vertical" conduct, which is as it should be. At the heart of Section 2 are cases in which the monopolist has done something to induce customers or suppliers to favor it in some way over its rivals. This type of case is far more common than the *Trinko/Aspen Skiing* type of case.

The basic problem with this area of Section 2 law is that courts see a situation in which customers or suppliers are favoring the monopolist in some way and fail to ask how that came to pass. Taking an ahistorical approach, they leap to the question of effects. But there are two distinct ways that such favored treatment comes about, and which one of those two was used in a given case is of critical importance, because one way involves conduct that generally ought to be encouraged while the other involves conduct that generally should be forbidden.[17]

What is the difference between the two?

One is coercion. In a coercion scenario, the monopolist refuses to deal with customers that do business with a rival. *Lorain Journal* is the classic example.[18] The defendant there was the town's only newspaper. For most merchants in town, advertising in the newspaper was essential: it was simply the most effective means of reaching consumers—"an indispensable medium of advertising for many Lorain concerns," as the Court put it. For a long time, in fact, the newspaper had the advertising market pretty much to itself. Then a radio station was formed and it started accepting advertisements. The newspaper responded to this threat to its monopoly by announcing a new policy of refusing to accept advertisements from merchants that were also advertising on the radio station.

What it did, in other words, was the equivalent of the classic group boycott that was present in, among other cases, *Fashion Originators' Guild*.[19] In a classic group boycott, multiple firms agree with each other that they will refuse to do business with any supplier or customer that does business with a rival of the boycotting firms. If the boycotting

[16] *See* Glazer & Lipsky, *supra* note 8, at 764 n. 70.
[17] The argument made in this section is set forth at greater length in Glazer & Henry, "Coercive vs. Incentivizing Conduct: A Way Out of the Section 2 Impasse?" *Antitrust* (Fall 2003).
[18] *See* Lorain Journal Co. v. United States, 342 U.S. 143 (1951).
[19] Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941).

firms have sufficient collective power, they will be able to deprive the non-boycotting firms from sources of supply or customers. Because of its monopoly power, the newspaper was able to achieve the same result as the group of boycotters in *Fashion Originators*. Call it an "individual boycott" rather than a group boycott, but whatever the label, the basic conduct is the same: a refusal to deal with a customer or supplier that does business with a competitor.

"Coercion" scenarios can also be found in *Hartz Mountain*, *Adolph Coors*, and the old *Alcoa* case.[20] The most recent such case is *Dentsply*,[21] where the monopoly manufacturer of artificial teeth refused to sell to dealers that also purchased teeth from the monopolist's rivals. I think the Third Circuit in *Dentsply* was correct in finding a violation, but the court could have gotten there in a much clearer and simpler way had it recognized that it was dealing with *Lorain* - style coercion. Interestingly, not once in the opinion does the court cite *Lorain.*

Apart from outright criminal and tortious conduct such as the proverbial blowing up of the competitor's plant (or destroying its display racks, as in *Conwood*), the *Lorain Journal* type of refusal to deal is just about the clearest case of anticompetitive conduct one can find in the Section 2 literature—a view borne out by the fact that *Lorain* is apparently the only Section 2 case as to which the commentators, from Borke to Posner to Areeda, agree that anticompetitive conduct was truly present. For me, therefore, *Lorain* is the archetype of an anticompetitive "vertical case."

The other way a firm can acquire exclusivity is what I call incentivizing conduct. In an incentivizing scenario, the exclusivity was achieved by the payment of incentives, not the threat of a refusal to deal. The incentivizing firm does not say to its customers: "If you want to deal with me, you have to deal with me alone; you cannot also deal with a competitor." Instead, the incentivizing firm says: "I would like you to buy my product exclusively and not purchase from competitors, but I don't insist on that. If you want to buy from others, that's fine; I'll keep selling to you at the normal price. But if you buy from me exclusively, then I'll give you a better price, an extra discount or bonus." In that situation, the firm is simply using money to buy exclusivity, and it is not refusing to sell to "disloyal" customers. Cases involving incentivizing behavior include *RJR Tobacco* and *Concord Boat.*[22]

Apart from a case of force or fraud, as in *Conwood*, these are the only two ways that a customer can be induced to favor one supplier over another.

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[20] General Indus. Corp. v. Hartz Mountain Corp., 810 F.2d 795 (8th Cir. 1987) (maker of pet supplies terminated disloyal distributor); Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974) (requiring retailers to deal exclusively in Coors draught beer); United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (requiring power companies not to sell power to competitors).
[21] United States v. Dentsply International, Inc., 399 F.3d 181 (3d Cir. 2005).
[22] RJR Tobacco Co. v. Phillip Morris USA, 2003-1 Trade Cas. (CCH) Par. 74,068 (4th Cir. 2003); Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).

Why is this difference important?

There are three principal reasons why this difference is so important.

First, coercion involves the use of monopoly power to achieve the exclusivity whereas incentivizing does not. The firm engaging in incentivizing may be a monopolist—indeed, it must be for a claim to be valid—but the tool it is using to achieve the exclusivity has nothing to do with its monopoly power *per se*. The tool is its checkbook. Everyone has one of those. Not everyone has a monopoly. While a Section 2 plaintiff is not required to show that the challenged conduct could not have taken place absent the defendant having a monopoly—and I am not proposing such a test, as will be clear in a moment—it is clearly more satisfying to punish conduct that fits that description. Such conduct simply has the feel of being closer to the heart of Section 2.

Second, while coercive conduct hurts the customer, incentivizing conduct does not. Coercive conduct hurts the customer because the customer is being given no choice. He is given a take-it-or-leave-it proposition—the classic display of monopoly power. He ends up conferring his "loyalty" on the monopolist, but not by choice: he is coerced into doing so. He could not have done without the monopoly product, at least in a proper case such as *Lorain* or *Dentsply*. In *Lorain*, for example, the customers were the merchants who needed to advertise in the newspaper. They obviously would have preferred to have the option of advertising in both the newspaper and the radio station, but they were stripped of that choice. The same was true for the dental-products dealers in *Dentsply*: they would have liked to carry both the defendant's teeth and the rivals' teeth, but were not allowed. In an incentivizing scenario, on the other hand, it is hard to see the injury to the customer. He can be loyal or not, depending on his preferences. True, he doesn't get the discount if he's not loyal, but that can't fairly be characterized as an injury to him, as long as he's not being penalized by having to pay a higher price than the normal stand-alone price.[23]

Third, while a competitor has no good way of responding to a monopolist's coercive strategy, he can respond to the monopolist's incentive by offering his own counter-incentive (except in the case of true predatory pricing, on which more in a moment). When a monopolist refuses to deal with customers that deal with a rival, there is not much that that rival can do. If the customer truly needs the monopolist's product or service, the rival is in a helpless position indeed. He can try offering incentives, but they would have to be awfully big to overcome the refusal to deal: we are dealing with a situation in which presumably the customer can't do business effectively without that product (*e.g.*, advertising space in the Lorain Journal; the artificial tooth brands that make up 75-80% of the market). If on the other hand the monopolist has merely offered an incentive to the customer in return for increased purchases or exclusivity, then the rivals can respond with their own incentives.

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[23] For a discussion of how to tell whether the price is punitive or not, see Glazer & Henry, *supra* note 17, at 46-47, but in a nutshell a price is punitive if it is higher than it was in the period before the defendant allegedly conceived of its scheme to exclude the rival.

How should we treat coercing and incentivizing conduct?

It follows from these differences that coercive conduct should be treated much more harshly than incentivizing conduct. Coercive conduct hurts the customer and leaves the competitor with no real options for responding. It also involves the direct use of the monopolist's monopoly. Incentivizing conduct on the other hand gives customers a choice and can be counteracted by the competitor with its own incentives. And of course we *want* the competitor to counter with its own incentives. We certainly would not want a legal rule that removes the competitor's motivation to engage in counter-incentivizing.

For these reasons, coercive conduct should be presumed unlawful and incentivizing conduct presumed lawful. Coercive conduct wouldn't be *per se* unlawful, just *presumptively* unlawful. The presumption can be overcome by a showing that procompetitive justifications for the conduct outweigh the anticompetitive effect—a Section 2 rule of reason, in other words. Thus, for example, one can imagine a situation in which a monopolist would limit its dealings to "loyal" customers because of free rider concerns: *i.e.*, it is conferring some knowledge or other benefit on its customers that it does not want them to pass along or share with rival suppliers.[24] But once it is established that the defendant has a monopoly and that it has engaged in coercive conduct, the burden should shift to the defendant to prove that its behavior was legitimate.

On the other hand, incentivizing conduct should be lawful unless the incentives are so great as to amount to predatory pricing, the reason being that there is no principled basis for treating incentivizing conduct—even when exclusivity "strings" are attached—any more harshly than alleged below-cost pricing. They should both be tested under the *Brooke Group* predatory pricing standard. This is true of bundled pricing as well, as discussed more fully in the following section.

Advantages of this framework

There are several distinct advantages of approaching vertical cases in this way, aside of course from the fact that it corresponds to an important reality.

First, it focuses on the conduct itself rather than "effects" or "intent" or "foreclosure"—the prevailing foci of the current analysis of vertical cases. By focusing on the conduct itself, we put firms on notice, in advance, as to exactly what they can and cannot do. This removes the enormous amount of uncertainty that is presently hovering over vertical monopolization law.

Second, it unifies the vertical monopolization area with the field of tying. Up until now we have treated tying cases as a thing apart. But the coercion concept I'm discussing here is essentially the same thing as the coercion needed to prove tying. In both cases, a firm with a monopoly over in Market A is refusing to sell its Product A to "disloyal"

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[24] *See* Howard Marvel, "Exclusive Dealing," 25 J.L. & Econ. 1 (1982).

customers. The only difference is that in a tying case the disloyalty has to do with a second product. Recognizing that tying is just the application of this coercion concept to a two-market situation helps to resolve one of the more vexing areas of Section 2 of the Sherman Act—so-called bundling cases. That's the next advantage.

Making sense of bundling

Third, it makes sense of the otherwise confused and confusing "bundling" cases. In my view, courts and commentators have made a terrible mess of this whole area. I think the question involved in a "bundling" case is very simple. First we should ask whether the defendant (say, 3M) has coerced the customers into taking Product Y (say, private label tape) from him rather than from the rival. As explained more fully elsewhere, coercion does not have to be express ("I won't sell you X unless you also buy Y from me and stop buying it from my rival"); it could be based on pricing manipulation, making the stand-alone price for X unaffordable. It is not clear from the record if that was the case in *LePage's* or not. If there is no coercion, then the case involves incentivizing, and the only question is whether the incentives are so great that they cross the line into predatory pricing. In answering that question, it makes sense to ask what would happen if we "attributed" the rebates on Product X to Product Y (e.g., attributing all the rebates that were nominally paid on Scotch tape over to 3M's private-label tape).

I disagree with the suggestion made by another panelist in a previously submitted paper that this attribution or allocation approach is unworkable.[25]

4. Practical Implications

What are the practical implications of all this for this Commission?

At a minimum, the courts and the agencies should take these three critical distinctions into account in analyzing Section 2 cases. The agencies can and should promote these concepts in amicus briefs and perhaps even guidelines. Doing so would greatly promote clarity in the law which, not incidentally, would make the job of counseling clients far easier. A chart illustrating the framework deriving from these distinctions is set forth in Appendix A.

Whether any statutory changes are called for is a more difficult question. On the one hand, Section 2 law has generally been moving in the right direction. As noted above, *Trinko* enshrined the excluding/exploiting distinction, clarifying that exploiting conduct is outside the scope of Section 2. And *Trinko* also went a long way toward building the horizontal/vertical distinction into the law by making clear that a refusal to deal with a rival can only rarely violate Section 2. On the other hand, the vertical area remains muddled, especially after *LePage's*, and *Trinko* failed to set forth any clear guidance for determining when a refusal to deal with a rival can violate Section 2. One could even argue that, to avoid judicial backsliding, we ought to build into the statute itself a

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[25] *See* Timothy Muris, "Antitrust Law, Economics and Bundled Discounts" (submitted to this Commission on behalf of the United States Telecom Association, July 15, 2005).

guarantee that exploiting conduct be kept immune from Section 2 (not to mention the even more fundamental point that the mere possession of monopoly should not be illegal).

On balance, however, I think it is unnecessary at this time to amend the statute. It is very unlikely that there will be any judicial backsliding on the excluding/exploiting distinction (though the fact that it was not until just last year that the Supreme Court finally recognized the distinction should give us some pause). And, while it would not be a good thing if the courts were to start finding lots of violations in the horizontal area, it is hard to see any easy statutory fix for that. There is no consensus at this time as to what the standard should be in the horizontal area. And that is even truer in the vertical area.

APPENDIX A

<table>
<tr><th>Exploiting</th><th colspan="3">Excluding</th></tr>
<tr><td rowspan="3">Per se lawful</td><td>Horizontal</td><td colspan="2">Vertical</td></tr>
<tr><td rowspan="2">Presumptively lawful
Trinko
Aspen</td><td>Coercing</td><td>Incentivizing</td></tr>
<tr><td>Presumptively unlawful
Lorain
Dentsply
Traditional, express tying
“Bundling” amounting to a constructive tie</td><td>Tested under Brooke Group
RJR Tobacco
Concord Boat
“Bundling” that does not amount to a constructive tie
Loyalty discount (provided stand-alone price is “normal”)
Below-cost pricing</td></tr>
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