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Susannah Gagnon
University of Pennsylvania

Herbert J. Hovenkamp
University of Pennsylvania Carey Law School

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Repository Citation

Gagnon, Susannah and Hovenkamp, Herbert J., "Antitrust Liability for False Advertising: A Response to Carrier & Tushnet" (2021). *Faculty Scholarship at Penn Law*. 2770.
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Antitrust Liability for False Advertising: A Response to Carrier & Tushnet

Susannah Gagnon* & Herbert Hovenkamp**

I. Introduction

In *An Antitrust Framework for False Advertising*, Michael Carrier and Rebecca Tushnet propose a rebuttable presumption of antitrust liability under § 2 of the Sherman Act for monopolists and would-be monopolists who engage in false advertising. The presumption, they say, is necessary because the current judicial threshold “essentially makes it impossible to bring a successful antitrust case based on false advertising” and “[a]ntitrust law has been kneecapped by the courts and thus is powerless to act.”¹

First, it is not clear that the courts are in fact “kneecapped,” are hostile to false advertising-based antitrust claims, or lack judicial tools capable of addressing anticompetitive false advertising. Second, the presumption effectively removes the requirement for a plaintiff to show that the false advertising constitutes exclusionary conduct within reach of the antitrust laws, which raises serious causation concerns. There is also the difficulty of tasking courts with distinguishing between false statements that are “puffery” and those that are capable of harming not just a particular rival but also competition itself. Limiting the presumption to monopolists and incorporating the elements of Lanham Act false advertising do not fully resolve these problems. The authors’ framework carries less risk if applied to false statements in certain contexts, *e.g.*, product disparagement of FDA-approved biosimilar and generic drugs in the pharmaceutical industry. Here, the interplay of regulatory and patent law and the characteristics of the healthcare system make false statements more likely to harm new entrants, restrict output, and raise prices relative to false advertising in other markets. Further, the regulatory process may impose expectations of truthful statements that the ordinary give-and-take of advertising lacks.

II. ANTITRUST & FALSE ADVERTISING LAWS HAVE DISPARATE BUT OVERLAPPING AIMS

Carrier and Tushnet suggest a framework in which false advertising presumptively constitutes exclusionary conduct under § 2 of the Sherman Act, and triggers liability when the defendant is a monopolist (or attempted monopolist).² The authors base their proposal on the

* J.D. Candidate and Levy Scholar, Univ. of Pennsylvania Carey Law School, 2022; Ph.D., Biochemistry, University of Victoria, 2019; B.Sc. in Biochemistry, University of Victoria, 2014.

** James G. Dinan University Professor, Univ. of Pennsylvania Carey Law School and the Wharton School.

¹ Michael A. Carrier & Rebecca Tushnet, *An Antitrust Framework for False Advertising*, 106 IOWA L. REV. 1841, 1843–44 (2021).

² Without the authors’ presumption, a plaintiff bringing a claim under § 2 ordinarily must show: “(1) the [defendant’s] 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,

aligned policies of antitrust and false advertising laws, the inadequacy of false advertising remedies, and the gravity of potential harm to consumers and markets that can result from consumer deception. They analogize the proposed presumption with the “quick look” approach to certain § 1 antitrust cases, and they draw on the Supreme Court’s discussion of false or misleading advertising in *Cal. Dental Ass’n v. FTC* for further support.³ But each of these factors highlights the danger of applying a presumptive framework to business torts like false advertising and counsels a more cautious approach.

A. *Divergent Goals of Antitrust & False Advertising Laws*

The judicial decisions that Carrier and Tushnet reference do not really show a refusal to recognize the harms of false advertising, but rather that many instances of false advertising are not cognizable under § 2 of the Sherman Act, which has a different purpose than consumer protection and unfair competition laws.⁴ The authors believe that both antitrust and false advertising laws ultimately are concerned with consumer welfare and argue that courts should be less hesitant to find antitrust violations since false advertising can harm consumers, can “entrench powerful positions that harm consumers and the market as a whole,” and can erode truth in the market, creating a “market for lemons.”⁵ In discussing the importance of truthful advertising in ensuring a competitive market, Carrier and Tushnet assert that “[c]onsumers expecting false advertising are likely to distrust even truthful claims” and outline the harms—economic physical, and moral—that can result from deception.⁶

While consumer welfare is a common concern for both antitrust and false advertising law, antitrust is focused on promoting competition, not policing unfair conduct. A firm may engage in anticompetitive or unfair activities, but that conduct will not come within range of the antitrust

or historical accident.” *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966); *see also* *American Tobacco Co. v. U.S.*, 328 U.S. 781, 809 (1946) (describing monopoly power as the ability to “exclude actual or potential competition from the field”). The second element requires a showing of anticompetitive activity, *i.e.*, conduct that causes unjustified and substantial harm to competition within a relevant market, potentially by raising rivals’ costs or foreclosing competitors.

³ 526 U.S. 756 (1999).

⁴ The authors rely on *Retractable Techs., Inc. v. Becton Dickinson & Co.*, where the court stated that “absent a demonstration that a competitor’s false advertisements had the potential to eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie.” 842 F.3d 883, 895 (5th Cir. 2016). The court also distinguishes one of its earlier cases finding antitrust liability for false statements, since those statements concerned plaintiff firm’s solvency and product quality and threatened to cut off access to distribution channels. *Id.* at 895 n.3 (citing *Multiflex, Inc. v. Samuel Moore & Co.*, 709 F.2d 980 (5th Cir. 1983)). This is an extremely high threshold but not “an abandonment of antitrust analysis” that “completely absolves false advertisers of antitrust liability.” Carrier & Tushnet, *supra* note 1, at 1850.

⁵ Carrier & Tushnet, *supra* note 1, at 1842–43, 1848. The authors describe the facts in *FTC v. AT&T Mobility LLC* as an example of how false advertising can harm consumers and the market overall. 87 F. Supp. 3d 1087 (N.D. Cal., Mar. 31, 2015) *rev’d and remanded*, 835 F.3d 993 (9th Cir. 2016), *reh’g en banc granted*, 864 F.3d 995 (9th Cir. 2017). But in this case, the court engaged in statutory interpretation of § 5 of the Federal Trade Commission Act (“FTCA”), 15 U.S.C.S. § 45(a), and the common carrier exception, and did not address market-wide anticompetitive effects.

⁶ Carrier & Tushnet, *supra* note 1, at 1849.

laws unless there is a broader effect on competition as a whole.⁷ The antitrust laws “do not create a federal law of unfair competition or purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.”⁸ This rationale informs the requirement, under § 2 of the Sherman Act, for a plaintiff to show both power and exclusionary conduct to make a prima facie case of monopolization.⁹

B. Antitrust Liability Is Not the Proper Cure for Inadequate False Advertising Remedies

Carrier and Tushnet argue that antitrust remedies are appropriate because false advertising laws do not fully address the harms that result from deception.¹⁰ But this is irrelevant unless harm to competition can be shown, and the presumption’s focus on monopolists or attempted monopolists is no substitute.¹¹ As several courts have observed, false advertising *generally* does not threaten competition.¹² And though the authors are skeptical that false advertising ever could be pro-competitive, recent economics research suggests that even that proposition has its limitations. In particular, unreasonably harsh penalties could decrease consumer welfare.¹³ And

⁷ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (The Sherman Act “directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.”). See also *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (“Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.”).

⁸ *Id.*

⁹ See 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶651 (5th ed. 2022) (in press). “‘Exclusionary’ comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985). Private plaintiffs also must show causation and harm, where the type of showing depends on whether the complaint requests injunctive relief or damages for past anticompetitive conduct. 15 U.S.C. §§ 15, 16.

¹⁰ Carrier & Tushnet, *supra* note 1, at 1844.

¹¹ Antitrust liability cannot be premised on the inadequacy of false advertising remedies in addressing the injuries of misled or deceived consumers but must be grounded in competitive harm. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (“Plaintiffs must prove antitrust injury . . . of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation.”); see also Phillip E. Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1127 (1976) (“[T]he desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are non-existent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability.”).

¹² The court, in *Retractable Techs.*, noted that “[r]ecord evidence even indicates that some customers . . . increased their purchases . . . after being shown [the defendant’s] erroneous ‘waste space’ comparisons[,]” which were literally false. 842 F.3d at 896 (“Indeed, competition within the overall safety syringe market—particularly between BD, Covidien, and Smiths—has remained robust.”).

¹³ While deception may “lower[] credibility and reduce[] buyers’ purchase intentions,” in certain cases “false advertising counteracts monopoly power by lowering buyers’ quality expectations and prompting lower prices.” Andrew Rhodes & Chris M. Wilson, *False Advertising*, 49 RAND J. ECON. 348, 349 (2018); see also Salvator Piccolo et al., *How Limiting Deceptive Practices Harms Consumers*, 46 RAND J. ECON. 611, 611 (2015) (“We show that greater protection against deceptive practices does not necessarily improve the buyer welfare.”); Kenneth S. Corts, *Finite Optimal Penalties For False Advertising*, 62 J. Indus. Econ. 661, 663 (2014) (“[E]xtremely high expected penalties for false claims might induce a firm to undertake costly learning, even when it is not socially optimal to do so[.]”). For a discussion of the potentially harmful market effects of disparate restrictions on false

while the potential development of a “market for lemons” is a concern, the economics and case law do not provide a justification for using § 2 of the Sherman Act as a prophylactic for the generalized harms that may result from false advertising.¹⁴

Finally, the determination of advertising’s exclusionary power depends critically on whether it has a significant long-run component or is purely a variable cost. If the value of advertising lasts only so long as it is ongoing and dissipates after it stops, then it very likely would not be able to create the durable monopoly power that §2 of the Sherman Act requires. This is particularly likely if rivals are able to counter with their own offsetting advertising. By contrast, the harm could be much more substantial if advertising operates as an “investment” that lasts even after expenses for it have stopped.¹⁵

C. *Analogy with “Quick Look” Cases Does Not Apply to False Advertising*

A presumption of antitrust liability for false advertising conduct is not justified by analogy with the “quick look” approach in Sherman Act § 1 cases decided under the rule of reason. Abbreviated analysis is appropriate when “the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.”¹⁶ But false advertising is not so well-understood, and sufficiently diverse that generalization is impossible. The economic literature suggests that we cannot rely on our intuitions about how falsehoods influence consumer decision-making and competition within a relevant market.¹⁷ False advertising constitutes unilateral conduct distinguishable from horizontal agreements to fix prices or limit output, where the courts “require[] some competitive justification even in the absence of a detailed market analysis.”¹⁸

advertising in the context of the FTCA, *see* Roger E. Schechter, *Letting the Right Hand Know What the Left Hand's Doing: The Clash of the FTC's False Advertising and Antitrust Policies*, 64 B.U. L. REV. 265, 266 (1984) (“Antitrust concerns arise when competing firms have disparate freedom to advertise, because consumers may erroneously view the products of the most severely constrained competitor as comparatively unattractive.”).

¹⁴ Carrier & Tushnet, *supra* note 1, at 1865 (explaining that antitrust “offers the more powerful remedies of treble damages” and “automatic attorneys’ fees” and offers injunctive relief that could “more generally target false advertising and marketwide harm to competition”). For an analysis of a similar argument in the context of antitrust’s treatment of labor issues, *see* Herbert Hovenkamp, *Antitrust Harm and Causation*, __ Wash. Univ. L. Rev. __ 30 (2021) (“Like most regulatory goals, they require a degree of legislative or administrative specificity that the antitrust concern for competitive markets does not capture. Further, in every one of these areas legislative systems are in place to address the problem. Even if we agree that these other policies are imperfect, antitrust has neither the mandate nor the toolbox it would need to rule the entire world of labor policy.”).

¹⁵ *See* Kristian S. Palda, *The Measurement of Cumulative Advertising Effects*, 38 J. BUS. 162 (1965) (finding long term effects); Gene M. Grossman & Carl Shapiro, *Informative Advertising with Differentiated Products*, 51 REV. ECON. STUD. 63 (1984) (assuming longer term effects). *Contrast* Leonard M. Lodish, et al., *A Summary of Fifty-Five in-market Experimental Estimates of the Long-Term Effect of TVD advertising*, 14 MARKETING SCIENCE (Supp. 1995), available at <https://pubsonline.informs.org/doi/abs/10.1287/mksc.14.3.g133> (finding that the effects of much advertising dissipate soon after it ceases).

¹⁶ Cal. Dental Ass’n v. FTC, 526 U.S. 756, 781 (1999).

¹⁷ *See supra* note 13 and accompanying text.

¹⁸ National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 82 (1984).

In *California Dental Ass'n v. FTC*, the Supreme Court declined to support an abbreviated quick look analysis.¹⁹ There, the court acknowledged the potential procompetitive impact of the defendant's restrictions on advertising and rejected the Court of Appeal's quick look approach:

The point is not that the [defendant's] restrictions necessarily have the procompetitive effect claimed by the [defendant]; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims. And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review[.]²⁰

The court's analysis emphasizes the importance of examining the market effects of the defendant's conduct rather than presuming competitive harm.

III. COURTS ARE CONCERNED WITH ESTABLISHING CAUSATION, CLASSIFYING FALSE STATEMENTS, & AVOIDING IMPROPER USE OF ANTITRUST

Carrier and Tushnet believe that the courts are unreasonably reluctant to find antitrust liability for false advertising and "have worried about applying antitrust's robust remedies of treble damages and attorneys' fees" when "not every instance of false advertising violates antitrust law."²¹ However, the courts' reluctance to impose antitrust liability in these cases is not based only on overdeterrence concerns, the idea that false statements are not harmful, or on the availability of other remedies (*e.g.*, those available under the Lanham Act).²² An alternative explanation is that courts are reluctant to find antitrust liability when it is unclear whether false statements really are false and have caused harm to competition in a particular case.²³ In response to these concerns, the U.S. Circuit Courts of Appeals have developed three different approaches to § 2 monopolization based on false advertising.

The Fifth and Seventh Circuits have stated, as a matter of law, that "[f]alse statements about a rival's goods do not curtail output in either the short or the long run[.]" "[c]ommercial speech is not actionable under the antitrust laws[.]" and while "[s]ome other law may require judicial intervention in order to increase the portion of truth in advertising[.] the Sherman Act

¹⁹ Carrier & Tushnet, *supra* note 1, at 1875 ("[T]he court found that an association's broad restrictions on . . . advertising were 'designed to avoid false or deceptive advertising'" (quoting *Cal. Dental Ass'n*, 526 U.S. at 771)).

²⁰ *Cal. Dental Ass'n*, 526 U.S. at 778.

²¹ Carrier & Tushnet, *supra* note 1, at 1843; *see also id.* at 1867 ("We suspect that much of the courts' hostility . . . comes from the conviction that antitrust remedies are harsh, and that false advertising remedies are thus more appropriate[.]").

²² Carrier & Tushnet, *supra* note 1, at 1843, 1850 ("[A]s a baseline principle, the presence of one set of remedies is not preclusive of another set when the facts implicate both[.]").

²³ There is the additional consideration that liability for unilateral false advertising under § 2 of the Sherman Act requires market power and monopolists and attempted monopolists "are a numerically small percentage of businesses (and of false advertising defendants)." Carrier & Tushnet, *supra* note 1, at 1844.

does not[.]”²⁴ Carrier and Tushnet term this first approach the “no-liability rule.”²⁵ In a second approach, the Second, Sixth, Ninth, Tenth, and Eleventh Circuits use the *de minimis* framework, where false advertising presumptively does not cause significant harm and does not violate the antitrust laws.²⁶ A plaintiff can rebut the *de minimis* presumption by satisfying a six-factor test: the advertising must be “(1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offsets by rivals.”²⁷ The third approach is a case-by-case analysis where courts determine whether, “viewed as a whole,” the defendant’s statements could have had an anticompetitive effect.²⁸

One premise of the authors’ proposed framework is that these approaches are inadequate.²⁹ But even in the Seventh Circuit, which has arguably the highest threshold for liability, the courts have recognized when false advertising is exclusionary.³⁰ Regardless, broader application of the antitrust laws via a presumption of liability is not the optimal or proper solution for false advertising conduct, even though such conduct can injure rivals and consumers. It is not the role of antitrust law to police commercial speech that is competitively “on the merits” unless it can be shown to cause anticompetitive harms, such as a price increase flowing from market output restriction or a restraint on innovation. This is particularly true when the challenged conduct is

²⁴ Sanderson v. Culligan Int’l Co., 415 F.3d 620, 624 (7th Cir. 2005); *see also* Retractable Techs., 842 F.3d at 895 (“That false advertising alone hardly ever operates in practice to threaten competition is confirmed not only by a dearth of Fifth Circuit precedent but by two additional considerations. First, false advertising simply ‘set[s] the stage for competition in a different venue: the advertising market.’” (quoting Sanderson, 415 F.3d at 623)).

²⁵ Carrier & Tushnet, *supra* note 1, at 1862.

²⁶ *See* Carrier & Tushnet, *supra* note 1, at 1854–62 (reviewing cases from Courts of Appeals following the *de minimis* approach).

²⁷ 3B PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 782b (5th ed. 2022) (in press).

²⁸ W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109–10 (3d Cir. 2010) (reversing the district court’s dismissal of Sherman Act claims because the totality of the defendant’s conduct could have deprived the plaintiff-rival of critical inputs, including patient referrals, employees, and financing at reasonable rates).

²⁹ *See* Carrier & Tushnet, *supra* note 1, at 1863 (“The approaches abandoning antitrust liability and applying a *de minimis* analysis are not justified: The law and practice of false advertising is far more consistent with antitrust’s own general vision of the marketplace. And the case-by-case evaluation could use development.”). The authors do not provide instances of courts denying false advertising-based § 2 liability despite likely exclusionary effects. Instead, they point to (1) Lanham Act cases that did not involve § 2 claims; (2) § 2 cases finding no liability (or no *prima facie* case) where the facts showed no anticompetitive effects, as in Retractable Techs., Inc. v. Becton Dickinson & Co., 842 F.3d 883 (5th Cir. 2016); and (3) § 2 cases finding liability even though the facts showed no anticompetitive effects, as in Conwood Co., L.P. v. United States Tobacco Co., 290 F.3d 768, 789 (6th Cir. 2002), *cert. denied*, 537 U.S. 1198 (2003); *see infra* note 39 and accompanying text.

³⁰ *See, e.g.*, Int’l Equip. Trading, Ltd. v. Illumina, Inc., No. 17 C 5010, 2018 U.S. Dist. LEXIS 136718, at *14 (N.D. Ill. Aug. 14, 2018) (stating that “false statements accompanied with an ‘enforcement mechanism’ can constitute predatory conduct under antitrust law” and denying a motion to dismiss a Sherman Act § 2 attempted monopolization claim); *see also* Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 851 (7th Cir. 2011) (commercial speech cannot support an antitrust claim without “some sort of ‘enforcement mechanism’ designed somehow to coerce or compel the competitor to head the admonition”).

an ordinary part of competition.³¹ Many firms engage in forms of exaggeration or “puffery” that are unlikely to have anticompetitive market effects, even if they harm a particular rival. There is a danger in extending a presumption of liability to include business torts like false advertising, particularly when tort law itself almost never requires an assessment of market power and the likelihood of maintaining or creating monopoly.³² As the Supreme Court stated recently, in the context of a § 1 claim:

Recognizing the inherent limits on a court’s ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to deploy these condemnatory tools until we have amassed “considerable experience with the type of restraint at issue” and “can predict with confidence that it would be invalidated in all or almost all instances.”³³

In many cases, it will be difficult to show that false statements caused harm to competition.³⁴ False statements are incapable of excluding rivals or unlawfully maintaining a monopoly directly³⁵ but must operate through consumers, whose beliefs and decision making determine whether or not the false statement causes harm. When false statements are not “clearly false” but constitute “puffery,” or ordinary exaggerations in advertising, consumers are unlikely to believe or rely on them. This also is true of deceptive statements that are immaterial, that consumers easily can dispel, or that competitors can counteract through advertisements of their own. And even when false advertising succeeds in deceiving consumers, there are no

³¹ The authors express understandable incredulity that courts could describe false or misleading statements as “on the merits.” *Carrier & Tushnet*, *supra*

note 1, at 1853–54. Determining whether competition is on the merits is a mechanism to detect when causation will be difficult or impossible to establish. Consumers generally can consider many sources of information when making decisions. When their choices are unconstrained, it is hard to know what they relied on, but when there is an enforcement mechanism involved (*e.g.*, a bribe or a threat), consumer choices are constrained, which simplifies the causal inquiry. Statements that are on the merits are not necessarily truthful or non-misleading but rather, they are economically rational and do not limit the consumers decisions based on considerations (*e.g.*, a bribe or a threat) external to the product or service. *See Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999) (describing “behavior that—examined without reference to its effects on competitors—is economically irrational” as not “on the merits”); *see also Aspen Skiing*, 472 U.S. at 610–11 (the dominant ski company failed to offer any efficiency justification for its decisions and “was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival”).

³² *AREEDA & HOVENKAMP*, *supra* note 27, at ¶ 782a1.

³³ *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2156 (2021) (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U. S. 877, 886–87 (2007)); *see also AREEDA & HOVENKAMP*, *supra* note 27, at ¶ 782a1 (“We must be aware of the inclination to condemn a monopolist on the basis of antisocial behavior that could not possibly give it an improper advantage in the market.”).

³⁴ For a discussion of these principles and a description of such cases, *see AREEDA & HOVENKAMP*, *supra* note 27, at ¶ 782b; *see also Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc’ns, Inc.*, 376 F.3d 1065 (11th Cir. 2004) (without evidence of harm to competition, plaintiff could not state § 2 claim based on misrepresentations where the market as a whole and the plaintiff’s own sales were expanding); *see also Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 638 Fed. Appx. 43 (2d Cir. 2016) (dismissing a false advertising-based § 2 claim where plaintiff could not show that the statements at issue were material to consumer decision-making); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132–33 (3d Cir.), cert. denied, 546 U.S. 1031 (2005) (“It is undisputed that the defendants informed potential customers that [the plaintiff’s] product presented safety hazards. [The plaintiff] has not, however, demonstrated that [the defendant] imposed any restraints on trade.”).

³⁵ In other words, false statements do not operate as direct restraints on output, price, or choice of supplier/distributor.

guarantees that this impacts the market. Consumers may have many reasons for selecting one firm's services instead of another's, and those who are "actually upset about the ultimate prices and services they obtained [can] switch back to another manufacturer."³⁶ The six factors of the "de minimis" framework for false advertising-based § 2 liability are responsive to these concerns.³⁷ In any event, the result is to make actual harm nearly impossible to prove in most settings. In most cases any observed impact on the plaintiff's sales or market share could have been the consequence of any one of numerous factors.

While limiting the presumption to monopolists and attempted monopolists does "narrow[] the universe of false advertising/antitrust claims," this limitation does not go far enough to ensure a causal link between false statements and market-wide harm.³⁸ The Carrier/Tushnet presumption would produce more cases decided along the lines of *Conwood Co., L.P. v. United States Tobacco Co.*, where the court upheld a treble damages judgment of \$1.05 billion based on tortious activity even though market output and product variety were not shown to be impacted during the relevant time period. Further, no causal relationship was established between the defendant's tortious conduct and the plaintiff's sales, and certainly not from the false advertising in particular.³⁹ An unrestrained approach to analysing false advertising risks using antitrust as a tool for regulating truthfulness in the marketplace and as a punishment for bigness when monopolists engage in tortious conduct.

IV. LOWER LIABILITY THRESHOLD FOR PRODUCT DISPARAGEMENT IN THE PHARMACEUTICAL INDUSTRY?

False advertising of physician-prescribed pharmaceuticals is a little different than false advertising generally. The differences roughly resemble protected speech in political and adjudicative settings. Under antitrust's *Noerr-Pennington* doctrine, false statements in the

³⁶ *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 477 n.5 (5th Cir. 2000) (not exclusionary conduct for a firm to lure customers away from a competitor with low price offers, only to later "upgrade" by selling them additional services; plaintiff did not dispute that customers were not forced to accept the upgrades and were not locked into services with the defendant); *see also SMS Sys. Maint. Servs. v. Digital Equip. Corp.*, 188 F.3d 11, 19–20 (1st Cir. 1999) (rejecting § 2 monopolization claim that defendant used generous warranty contracts to lock in customers where the customers' actual behavior indicated they were willing and able to switch to other suppliers).

³⁷ *See supra* note 27 and accompanying text. Justification for the individual factors comes from the concerns with causation and with identifying false statements briefly outlined in this response. For further analysis, *see AREEDA & HOVENKAMP, supra* note 27, at ¶¶ 782a1, 782b; *see generally*, Hovenkamp, *Antitrust Harm and Causation, supra* note 14.

³⁸ *Carrier & Tushnet, supra* note 1, at 1870. It is not clear whether the authors' presumption would import the elements of a Lanham Act claim without including the applicable statutory standing requirements, which address courts' concerns with causation and policy in the false advertising context. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U. S. 118, 133–34 (2014) (holding that "the zone-of-interests test and the proximate-cause requirement suppl[y] the relevant limits on who may sue" and help guard against "suits for alleged harm that is 'too remote' from the defendant's unlawful conduct").

³⁹ 290 F.3d 768, 789 (6th Cir. 2002), *cert. denied*, 537 U.S. 1198 (2003) ("There was evidence at trial that total market output increased in the moist snuff industry during the relevant period."); *see also AREEDA & HOVENKAMP, supra* note 27, at ¶ 782b2 (noting that in *Conwood*, the court "was so overwhelmed with a clear and varied record of tortious business conduct that it largely dispensed with proof that an antitrust violation had occurred" and "permitted damages to be based on procompetitive conduct").

commercial arena are given wide berth for all of the reasons enumerated above.⁴⁰ In this context, false statements are taken less seriously, are readily combatted, and proof of causation is very difficult to come by.⁴¹

Things change, however, when speech occurs in a more adjudicative context, as in judicial or administrative settings. Speech in such settings sometimes is given under oath but, even more frequently, occurs in situations where government reliance is anticipated. As a result, speech is taken more seriously in these settings, and there is often a more direct causal chain linking the speech to a particular adverse outcome. For this reason antitrust policy has always been very tolerant of false statements made in political or public arenas but more critical of false statements made to a court or administrative agency operating in an adjudicative capacity.

Carrier and Tushnet identify the serious harm that can result from a dominant firm's false advertising in markets for biologics. These harms also could result in cases of generic disparagement in markets for small-molecule drugs. The pharmaceutical industry has particular characteristics that affect the concerns associated with establishing causation and identifying clearly false statements. Here, a rebuttable presumption of liability still is not suitable—antitrust law should not dispense with requiring evidence that false advertising could harm competition—but the high threshold applicable in the Seventh Circuit also is inadequate.

As Carrier and Tushnet recognize, statements disparaging U.S. Food and Drug Administration (“FDA”)-approved biosimilars and generics typically are clearly false since FDA approval requires equivalence. Doctors are motivated, ethically and professionally, to optimize patient treatment (within the constraints of the healthcare system), and false statements undermining perceptions of a biosimilar or generic's efficacy or safety are material.⁴² Studies on physician prescribing practices show that statements from pharmaceutical industry representatives are capable of inducing reasonable reliance.⁴³ Physicians and patients also lack the resources and knowledge to independently verify the performance of a biosimilar or generic drug compared to the brand name equivalent. On the other hand, physicians have some discretion and may consider multiple factors, including the preferences of their patients, when making decisions, which creates difficulties establishing causation for § 2 liability. Also, competing drug manufacturers are free to inform or persuade prescribers “on the merits.” But even though a biosimilar or generic drug manufacturer theoretically may be able to combat disparaging remarks, the brand name incumbent has an edge with respect to both physician and patient preferences.⁴⁴

⁴⁰ See *Eastern Railroad Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); see also 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶¶ 201-208 (5th ed. 2020) (analyzing the doctrine in both political and adjudicatory contexts).

⁴¹ See *supra* notes 34–37 and accompanying text.

⁴² For an overview of the Hippocratic Tradition, bioethics, and medical-moral philosophy in multiple countries, see Fabrice Jotterand, *The Hippocratic oath and contemporary medicine: dialectic between past ideals and present reality?* 30 J. MED. PHIL. 107(1) (2005).

⁴³ Michael A. Carrier, *Three Challenges for Pharmaceutical Antitrust*, 59 SANTA CLARA L. REV. 615, 616 (2020) (“This disconnect has created a gap that can be exploited. Brand firms can convince doctors to prescribe expensive drugs even if equally effective cheaper drugs are available.”).

⁴⁴ *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787 (7th Cir. 1999) (observing that brand-name drugs may lack perfect substitutes, and “physicians who prescribe the [brand-name] drug may continue to

While these factors do not obviate the concerns underlying the *de minimis* test, a lower threshold for antitrust liability could be sensible for biosimilar and generic drug disparagement. It bears repetition, however, that antitrust liability, as opposed to the more routine penalties that are attached to violations of regulatory penalties, still requires proof of causation and competitive harm.

prescribe the branded version rather than the generic substitute, whether out of inertia, or because they think the branded version may be produced under better quality control” or due to “greater confidence in a familiar brand”).