

# Market Power and Monopoly Power in Antitrust Analysis

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## MARKET POWER AND MONOPOLY POWER IN ANTITRUST ANALYSIS

One of the most vexing and pervasive problems courts confront in antitrust litigation is determining how much control over price a firm must possess to justify imposing liability for allegedly anticompetitive behavior. In recent years this determination has taken on added significance because courts have shown a willingness to excuse firms lacking sufficient control over price from antitrust liability.

Courts, legal scholars, and economists define market power as the ability to raise prices above the competitive market level for a period of time long enough to make doing so profitable. Legal scholars and economists generally regard a substantial amount of market power as monopoly power. Courts, in contrast, only implicitly recognize that monopoly power is some substantial degree of control over the market, and traditionally define monopoly power as the ability to control prices or exclude competition.

In *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*<sup>1</sup> and *Westman Commission Co. v. Hobart International Co.*,<sup>2</sup> the Tenth Circuit set forth tests for determining whether a firm has market power and for distinguishing market power from monopoly power. This Note examines those tests and argues that the Tenth Circuit's monopoly power test is an improvement over the traditional legal test because it focuses the inquiry on the underlying economic principles. This Note also shows, however, that the court's market power test, although somewhat ambiguous, fails to correctly discern the presence of market power.

The first section of this Note discusses the role of market power and monopoly power in antitrust litigation and examines how courts have defined the two terms. Section II evaluates the legal basis for the Tenth Circuit's market power and monopoly power tests. Section III discusses an independent economic rationale for the Tenth Circuit's tests and evaluates the tests on that basis. Finally, the contribution of the Tenth Circuit's tests to the body of antitrust law is assessed.

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<sup>1</sup> 783 F.2d 159 (10th Cir. 1986).

<sup>2</sup> 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988).

## 1

## BACKGROUND

Since its inception, antitrust law has sought to define the limits of acceptable exercises of economic power by business. Commentators still debate the underlying goals of the Sherman Antitrust Act<sup>3</sup> and other antitrust laws,<sup>4</sup> and interpretations of the goals of the antitrust laws have changed over time,<sup>5</sup> but recent Supreme Court de-

<sup>3</sup> 15 U.S.C. §§ 1-7 (1982). The Sherman Act is the foundation of U.S. antitrust law.

<sup>4</sup> The other major antitrust statutes include the Clayton Act, 15 U.S.C. §§ 12-27 (1982 & Supp. V 1987) (as amended by the Robinson-Patman Act, *id.* §§ 13-13b, 21a (1982 & Supp. V 1987)), and the Federal Trade Commission Act, *id.* §§ 41-58 (1982 & Supp. V 1987). The significant sections of the Sherman Act include Section 1, which states that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is hereby declared . . . illegal," 15 U.S.C. § 1 (1982), and section 2, which makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize . . . trade," *id.* § 2. The Clayton Act, as amended by the Robinson-Patman Act, generally makes it "unlawful . . . to discriminate in price . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly." *Id.* § 13. The Federal Trade Commission Act makes unlawful "[u]nfair methods of competition . . . and unfair or deceptive acts or practices." *Id.* § 45.

Some commentators argue that the antitrust laws were mainly intended to embody political values while others believe that the laws' purpose is to maximize economic efficiency. For example, Professor Pitofsky argues that the antitrust laws are premised on the belief that excessive concentrations of economic power create antidemocratic political pressures and thus if a few corporate giants dominate the economy, then the state will be forced to play a more intrusive role in the economy to maintain the democratic system. Pitofsky explains that economic efficiency is also an important goal of antitrust law but contends that concentrating on economic efficiency to the exclusion of any focus on the underlying political purpose misinterprets the goals of the antitrust laws. Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979). Professors Areeda and Turner believe that the antitrust laws may embody a commitment to both economic efficiency and other populist objectives such as limiting the size of business, dispersing wealth, and furthering entrepreneurial opportunities. They believe, however, that courts are ill-equipped to promote populist goals through antitrust policy except when those goals and the promotion of efficiency coincide. 1 P. AREEDA & D. TURNER, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶¶ 103-13 (1978). Professor Fox contends that besides dispersing economic power, assuring the satisfaction of consumers, and creating the opportunity to compete in the market, the antitrust laws were designed to protect the competitive process. She takes a somewhat broader view of efficiency and feels that protecting opportunities for small entrepreneurs may be warranted on efficiency grounds if it serves long-run consumer interests. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1176-90 (1981). Professor Bork believes that maximizing economic efficiency is and ought to be the only goal of antitrust policy. R. BORK, *THE ANTITRUST PARADOX* 81-89 (1978).

<sup>5</sup> Some early Supreme Court decisions manifested a concern for the continued existence of competitors and at one point the Court seemed willing to sacrifice economic efficiency to help ensure the survival of competitors. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897), the Court noted that "[m]ere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of . . . a class [of small dealers and worthy men] and the absorption of control over one commodity by an all-powerful combination of capital." The Court expressed a similar sentiment in *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), where it recognized "Congress' desire to promote competition through the protection of viable, small, lo-

cisions suggest that the primary goal of antitrust law is to promote consumer welfare.<sup>6</sup> Thus, many current judicial inquiries about business behavior focus on whether consumers have suffered or potentially will suffer adverse effects from a particular business practice.

To assess the impact of a firm's behavior on consumers, courts in many antitrust cases examine not only the firm's behavior but also the extent of the firm's control over its market. A firm with no power to control the market price cannot systematically harm consumers.<sup>7</sup> Invariably, under the judicially-created doctrines designed to implement the broad provisions of the antitrust laws, this inquiry leads courts to examine the extent of a firm's control over market price. This inquiry is designed to determine whether a firm possesses "market power," "monopoly power," or no power at all.

### A. Market Power

Legal scholars generally define market power as the "ability of a firm . . . to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."<sup>8</sup> The Supreme Court has set forth an essentially identical definition recognizing that "[a]s an economic matter,

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cally owned businesses [even though] occasional higher costs and prices might result." On other occasions, however, the Court argued that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

<sup>6</sup> In more recent decisions, the Court has asserted that antitrust law should be regarded as a "consumer welfare prescription," *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), implying that efficiency is the standard by which courts should judge business behavior. See also *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979) (when examining alleged anticompetitive practice, Court inquires "whether the practice . . . tend[s] to restrict competition and decrease output [or] 'increase economic efficiency and render markets more . . . competitive'" (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978))). For a further discussion of the role of consumer welfare in antitrust law, see *Fishman v. Estate of Wirtz*, 807 F.2d 520, 566 (7th Cir. 1986) (Easterbrook, J., dissenting in part) (citing cases).

<sup>7</sup> Without power to control the market, a firm that raises the price of its product cannot maintain that increase because other firms will offer consumers lower prices thereby forcing the price-raising firms either to alter their practices or to lose sales. Although in the short run, a firm raising its price may injure some consumers, other competitors, or even itself, the market prevents these firms from imposing harm on consumers for any significant period of time. As a result, such a firm cannot systematically harm consumers. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984).

<sup>8</sup> Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981); see also 2 P. AREEDA & D. TURNER, *supra* note 4, ¶ 501 ("market power . . . is the ability to raise price without a total loss of sales"); Easterbrook, *supra* note 7, at 20 ("Market power is the ability to raise price significantly without losing so many sales that the increase is unprofitable.").

market power exists whenever prices can be raised above the levels that would be charged in a competitive market.”<sup>9</sup> Numerous lower courts have adopted the Court’s standard market power definition<sup>10</sup> and employ various methods to determine whether a firm has market power.<sup>11</sup>

Courts have examined market power when judging the reasona-

<sup>9</sup> *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984).

<sup>10</sup> *E.g.*, *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 495 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) (“market power [is] the ability to raise prices above levels that would exist in a perfectly competitive market”); *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1435 (7th Cir. 1986) (“market power . . . [is the] power to raise price above the competitive level without losing so many sales that the price increase would be unprofitable”); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) (“market power . . . is [the] power to raise prices significantly above the competitive level without losing all of one’s business”), *cert. denied*, 484 U.S. 977 (1987); *Marathon Oil Co. v. Mobil Corp.*, 669 F.2d 378, 380 (6th Cir. 1981) (“market power [is] the power to raise prices above . . . levels that would occur in a competitive marketplace”).

<sup>11</sup> Although market power and monopoly power are distinct legal concepts, courts use the same methods for determining whether a firm has market power as they do when determining whether a firm possesses monopoly power. Applications of the courts’ methods differ for the two types of power, however, as the complaining party must convince the court of a greater degree of control in a monopolization case than in a case involving market power. Professors Areeda and Turner adopt this same approach. *Compare* P. AREEDA & D. TURNER, *supra* note 4, ¶¶ 507-16 (proving market power) *with* 3 *id.* at ¶¶ 801-07 (proving “substantial,” *i.e.*, monopoly power).

By far the most common method of assessing a firm’s market power or monopoly power is to examine its share of the properly defined product market. In probably the most famous example of the use of market share, Judge Hand ruled in *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945), that a market share of over ninety percent would be sufficient to support a finding of monopoly. Since that time, courts have used market share to determine if a firm has either monopoly power or market power. *E.g.*, *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 26-27 (30% share of relevant market does not constitute market power); *Pennsylvania Dental Ass’n v. Medical Serv. Ass’n*, 745 F.2d 248, 261 (3d Cir. 1984) (32% to 35% market share insufficient to establish monopoly power), *cert. denied*, 471 U.S. 1016 (1985). In *Board of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147 (10th Cir. 1983), *aff’d*, 468 U.S. 85 (1984), the Tenth Circuit looked to the “‘reasonable interchangeability of use to which two or more products can be put’” and “‘[t]he cross-elasticity of demand, *i.e.*, the extent to which consumer preference shifts freely between two or more products’” as factors indicative of market power. *Id.* at 1158 (quoting 2 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* § 6G.04[1] (1982)). Courts also examine a firm’s profitability. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956) (“‘du Pont’s profits, while liberal . . . [did not] demonstrate the existence of a monopoly’”). Finally, some courts inquire into the existence of barriers to entry, *i.e.*, those costs “borne by a firm which seeks to enter an industry, but . . . not . . . by firms already in the industry,” G. STIGLER, *THE ORGANIZATION OF INDUSTRY* 67 (1968). One of the first decisions to examine barriers to entry was *American Tobacco Co. v. United States*, 328 U.S. 781, 796-97 (1946). For more recent discussions of entry barriers, see, *e.g.*, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 591 n.15 (1986); *California v. American Stores Co.*, 872 F.2d 837, 842-43 (9th Cir. 1989), *cert. granted*, 110 S. Ct. 275 (1989); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335-36 (7th Cir. 1986); *Southern Pac. Communications Co. v. AT&T*, 556 F. Supp. 825, 878-84 (D.D.C. 1982), *aff’d*, 740 F.2d 980 (1984), *cert. denied*, 470 U.S. 1005 (1985).

bleness of allegedly anticompetitive business practices<sup>12</sup> and the legality of mergers.<sup>13</sup> They use the market power inquiry to

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<sup>12</sup> Market power inquiries arise in cases falling under section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). To constitute a violation under Section 1, a court must determine, among other things, that the firm's activities unreasonably restrained trade or commerce. 2 E. KINTNER, FEDERAL ANTITRUST LAW § 9.1, at 5 (1980). The judicial doctrine under which courts analyze market power in these cases is called the Rule of Reason. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 191 (7th Cir. 1985); *Landes & Posner*, *supra* note 8, at 937, 956 n.35.

Those Section 1 cases in which market power is an important part of the analysis include tying arrangements and refusals to deal. A tying arrangement is an "agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different [tied] product." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Courts are concerned about tying arrangements because they fear that firms with "a monopoly . . . of one product [will] obtain[ ] a second, distinct monopoly of a good used in conjunction with the first product." R. POSNER & F. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 802 (2d ed. 1981). But even if a firm lacks a monopoly, there is still concern that "market power from a product in great demand (the tying item) is exercised to influence sales of a different, less desirable product (the tied item)." 2 E. KINTNER, *supra*, § 10.52, at 224.

Judicial treatment of tie-in cases has a *per se* flavor but such condemnation occurs only when the "threshold" of "a substantial potential for impact on competition" is established. *Jefferson Parish Hosp. Dist. No. 2*, 466 U.S. at 16. Absent such a threshold showing, the inquiry focuses on the actual effects of the tie-in arrangements, an approach similar to the Rule of Reason analysis. *E.g.*, *id.* at 29. In *Jefferson Parish* the Court required the plaintiff first to demonstrate the defendant's control (*i.e.*, market power), so that it could determine whether to apply a *per se* analysis. Upon the plaintiff's failure to show market power, the Court turned from a *per se* analysis to an examination of whether the tie-in "unreasonably restrained competition," an approach indicative of a Rule of Reason analysis. *Id.* at 29-30.

In concurrence, four members of the Court argued that a failure to demonstrate an "exclusionary impact in the tied product market . . . or . . . the harmful exercise of market power," *id.* at 35 (O'Connor, J., concurring), indicates that there was no potential for "any adverse impact." *Id.* at 37. Thus, the concurring Justices would dismiss tie-in cases upon the plaintiff's failure to prove market power. Proving market power, however, was not enough for the concurring Justices to condemn the practice. Even if the plaintiff were able to show market power, they would proceed with a Rule of Reason analysis. As a result of the concurrence's approach, the *per se* element of tie-in cases may well disappear. Nonetheless, courts conducting this "threshold" inquiry today consider, among other things, whether the defendant has "market power in the tying product [and] more often than not require some kind of showing of an anticompetitive effect in the tied product market." E. SULLIVAN & H. HOVENKAMP, ANTITRUST LAW, POLICY, AND PROCEDURE: 1986 CUMULATIVE SUPPLEMENT 72 (1986).

An exception to the market power analysis under section 1 of the Sherman Act involves horizontal price-fixing cases where the possession of market power by the defendants is irrelevant. Combinations, conspiracies, and contracts designed to fix prices were declared illegal *per se* in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), where the Court declared that "raising, depressing, fixing, pegging, or stabilizing [prices] is illegal *per se.*" *Id.* at 223.

<sup>13</sup> Merger challenges primarily arise under Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982 & Supp. V 1987). Section 7 regulates mergers by prohibiting the acquisition of "the whole or any part of the stock or . . . assets of another . . . engaged . . . in commerce . . . where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *Id.* The current Department of Justice enforcement policy concerning mergers and acquisitions is outlined in the Department's 1984 Merger Guidelines. United States Department of Justice 1984 Merger Guidelines,

determine whether a firm can restrain competition in the relevant market.<sup>14</sup> If the firm has such power, then a court determines whether the alleged anticompetitive practice tends to harm consumers,<sup>15</sup> and if it does, then the court declares the firm's practice illegal. If the firm lacks market power, then the defendant need not justify the practice.<sup>16</sup> Thus, although possessing market power does not in and of itself subject a firm to liability under the antitrust laws, it is the initial element that courts consider when determining whether a challenged practice allegedly harms consumers.<sup>17</sup>

## B. Monopoly Power

Legal scholars regard monopoly power as "a high degree of market power."<sup>18</sup> Under this formulation, a firm with monopoly power has a greater ability to control price than a firm with mere market power. Courts, on the other hand, do not explicitly define monopoly power in terms of market power. Instead, they traditionally define monopoly power as the "power to control prices or exclude competition."<sup>19</sup> Although it has been implicitly recognized

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46 Antitrust & Trade Reg. Rep. (BNA) No. 1169 Spec. Supp. § 3.3, at S-1 (1984) [hereinafter Merger Guidelines]. Their "unifying theme . . . is that mergers should not be permitted to create or enhance 'market power' or to facilitate its exercise . . . [where market power is defined as the] ability of [a] firm[] profitably to maintain prices above competitive levels for a significant period of time." *Id.* For a typical discussion of market power in the context of a merger case challenged under Section 7 of the Clayton Act, see *United States v. Waste Management, Inc.*, 743 F.2d 976, 983-84 (2d Cir. 1984) (court adopts "market power" definition of Guidelines).

<sup>14</sup> *E.g.*, *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 596 (7th Cir. 1984).

<sup>15</sup> *Id.* at 596. In their consideration of the potential harm to consumers, courts allow defendants to justify their business practices by showing that the challenged practice benefits consumers. *E.g.*, *id.* For antitrust violations involving tie-ins, plaintiffs apparently can still proceed under a Rule of Reason analysis even though there is no showing of market power. See *supra* note 12.

<sup>16</sup> *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334-35 (7th Cir. 1986).

<sup>17</sup> The role of market power is more straight forward in merger cases than in Rule of Reason cases considered under section 1 of the Sherman Act. Mergers challenges arise when there is a fear that combining two previously competing firms will result in reduced competition, enabling the newly formed firm to exercise market power to the detriment of consumers. Thus, if a court finds that a merger of competitors "substantially . . . lessen[s] competition, or . . . tend[s] to create a monopoly," 15 U.S.C. § 18 (1982), then the merger will be forbidden unless the court recognizes an "efficiency" or "failing company" defense. For a discussion of the current role of these two defenses, see Merger Guidelines, *supra* note 13, § 3.3, at S-14 to S-15.

<sup>18</sup> Landes & Posner, *supra* note 8, at 937; see also 3 P. AREEDA & D. TURNER, *supra* note 4, at ¶¶ 800-02 (defining monopoly power as substantial market power).

<sup>19</sup> The Supreme Court first defined monopoly power in *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956), and numerous other decisions have adopted it. *E.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 596 n.20 (1985); *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243, 252 (D.C. Cir. 1987); *Supermarket of Homes, Inc. v. San Fernando Valley Bd. of Realtors*,

that monopoly power is some degree of control greater than mere market power,<sup>20</sup> the relationship between the legal definition of monopoly power and the more general concept of monopoly power developed by legal scholars and economists has not been carefully examined by courts.

Monopoly power becomes an issue in cases alleging monopolistic behavior falling under the prohibition of section 2 of the Sherman Act.<sup>21</sup> Most important of the section 2 violations are monopolization and attempted monopolization.<sup>22</sup> The Supreme Court's formulation of the monopolization offense is twofold: the defendant must possess monopoly power in the relevant market, and the defendant must willfully acquire or maintain that power.<sup>23</sup>

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786 F.2d 1400, 1404 (9th Cir. 1986); *Broadway Delivery Corp. v. United Parcel Service of Am., Inc.*, 651 F.2d 122, 126-27 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981). For a discussion of the methods of proving monopoly power, see *supra* note 11.

<sup>20</sup> Early on the Supreme Court recognized that market power is some lesser degree of control over price than the control that a monopolist possesses. In *du Pont*, the court noted that "in [the production of] every nonstandardized commodity . . . each manufacturer ha[s] power over price . . . [h]owever, this power . . . is not the power that makes an illegal monopoly." *du Pont*, 351 U.S. at 393. *But see* *International Distribution Centers, Inc. v. Welsh Trucking Co., Inc.*, 812 F.2d 786, 791 n.3 (2d Cir.) ("Market power" is a synonym for 'monopoly power.'"), *cert. denied*, 482 U.S. 915 (1987).

<sup>21</sup> 15 U.S.C.A. § 2 (West Supp. 1989). This section of the Sherman Act states that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony." *Id.*

<sup>22</sup> Conspiracies to monopolize also fall under Section 2 but generally do not involve monopoly power; rather courts focus on the concerted action of independent entities intent on achieving monopoly power. 2 E. KINTNER, *supra* note 12, § 14.1, at 433. Neither the existence of monopoly power nor the probability of achieving it are essential to establishing a conspiracy. *Id.* § 14.6, at 439; *see also* *United States v. Consolidated Laundries Corp.*, 291 F.2d 563, 573 (2d Cir. 1961).

<sup>23</sup> The mere possession of monopoly power is not illegal under section 2 of the Sherman Act. This includes monopolies acquired or maintained by superior business skill, the introduction of a new or superior product, patents, or economic or technological efficiency. 2 E. KINTNER, *supra* note 12, § 11.8, at 315. The proposition that not all monopoly power is illegal dates to 1911 when the Supreme Court held that the Sherman Act contained no "direct prohibition against monopoly in the concrete." *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62 (1911). To find a monopolist liable for antitrust violations, courts require a monopolist to take some positive action to acquire or maintain its position. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 (1985); *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Requiring willful acquisition or maintenance prevents the imposition of antitrust liability on firms who acquire their monopoly position because of superior business skill, foresight, or acumen, or because they possess a natural monopoly. When a firm acquires a monopoly under these circumstances, it does not intend to place itself in a monopoly position but rather has a monopoly "thrust upon" it. For a general discussion of the "thrust upon" defense and cases examining the defense, see 2 E. KINTNER, *supra* note 12, § 12.14. In addition, section 2 liability requires that the defendant's business activity involve "trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2 (1982). In general, commerce is "broadly defined and includes almost all business transactions." 2 E. KINTNER, *supra* note 12, § 12.1, at 322-23.

The Supreme Court has only infrequently addressed the offense of attempted monopolization,<sup>24</sup> but most lower courts that have considered the offense require that the plaintiff prove three elements: the defendant's specific intent to acquire monopoly power; anticompetitive conduct by the defendant; and a "dangerous probability" that the defendant will actually acquire monopoly power.<sup>25</sup> To establish a "dangerous probability of success," the plaintiff must show that the defendant possesses market power, *i.e.*, control over price. Although courts have not adopted any uniform standard for the degree of market power necessary to find attempted monopolization, it is clear that the defendant need not possess market power as great as that necessary for the completed offense of monopolization;<sup>26</sup>

<sup>24</sup> In one of its more detailed treatments of the attempted monopolization offense, the Supreme Court approved a jury instruction defining "attempt" as "the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it." *American Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946). As Professor Wentz explains, most attempted monopolization cases reaching the Supreme Court are accompanied by charges of "completed monopolization, conspiracy to monopolize, or conspiracy to restrain trade" and thus the attempt charge "has received only incidental treatment." Wentz, *Monopoly Power in Completed and Attempted Monopolization Litigation: The Convergence of Law and Economics*, 90 DICK. L. REV. 261, 278-79 (1985).

<sup>25</sup> E. SULLIVAN & H. HOVENKAMP, *ANTITRUST LAW, POLICY AND PROCEDURE* 497 (1984). The elements required to establish attempted monopolization were derived from *Swift & Co. v. United States*, 196 U.S. 375 (1905), in which the Court stated:

[In] attempts to monopolize . . . [i]ntent . . . is essential . . . Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, [the Sherman Act] directs itself against that dangerous probability as well as against the completed result.

*Id.* at 396 (citations omitted).

The majority of lower courts has adopted the requirement of a "dangerous probability" of success. Wentz, *supra* note 24, at 279 n.140. The Ninth Circuit stands virtually alone in not requiring a showing of dangerous probability. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 993 (1964). *But cf.* *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 832 (9th Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972) (defining elements of attempted monopolization as including "sufficient market power to come dangerously close to success").

<sup>26</sup> As Kintner notes, a plaintiff need not establish that the defendant possesses monopoly power but "there is little consensus . . . as to how [much power is necessary] to find an attempt." 2 E. KINTNER, *supra* note 12, § 13.4, at 423 & n.121. Courts have traditionally relied on market share as a proxy for market power or monopoly power in antitrust cases. *See supra* note 11. Thus, courts have held that the market share necessary to show a "dangerous probability" of monopolization is something less than that necessary to establish the completed offense. *See Wentz, supra* note 24, at 280 & n.145.

Interestingly, some commentators and at least one court have even questioned whether market power is required at all for a showing of attempted monopolization. Professors Sullivan and Hovenkamp suggest that market power in its traditional sense—the ability to raise price above marginal cost—may be completely unnecessary for an attempt to monopolize. They argue that a defendant may attempt monopolization by

rather, the defendant's market power need only be great enough to create a "dangerous probability" of acquiring monopoly power if its attempt to monopolize succeeds.<sup>27</sup>

## II

### COURT TESTS FOR MARKET POWER AND MONOPOLY POWER

Although courts generally agree that the correct definition of market power is the ability to raise prices above the competitive level,<sup>28</sup> differences exist between the Supreme Court and lower courts regarding the appropriate legal definition of monopoly power. In *United States v. E.I. du Pont de Nemours & Co.*<sup>29</sup> and again in more recent decisions,<sup>30</sup> the Supreme Court stated that the test for monopoly power is the "power to control prices or exclude competition."<sup>31</sup> Despite these Supreme Court opinions, however, the language of lower court decisions varies. Some courts have employed the *du Pont* test,<sup>32</sup> while others require that a firm "control prices and exclude competition."<sup>33</sup> The Tenth Circuit had employed both monopoly power tests,<sup>34</sup> never explicitly addressing the appropriateness or implications of either test until it decided *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*<sup>35</sup> and *Westman Commission Co. v. Hobart International Co.*<sup>36</sup> In these cases, the Tenth Circuit explicitly considered

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lowering the price of its product below the market level in hopes of driving its competitors out of the market and thereafter establishing a monopoly price. E. SULLIVAN & H. HOVENKAMP, *supra* note 25, at 498. One court has acknowledged the question of "whether proof of market power is [ ]necessary" in the situation described by Sullivan and Hovenkamp. *Dimmitt Agri Indus., Inc. v. CPC Int'l, Inc.*, 679 F.2d 516, 534 n.21 (5th Cir. 1982), *cert. denied*, 460 U.S. 1082 (1983).

<sup>27</sup> See Wentz, *supra* note 24, at 280.

<sup>28</sup> See *supra* notes 9-10 and accompanying text.

<sup>29</sup> 351 U.S. 377 (1956).

<sup>30</sup> *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); see also *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (affirming jury decision based on *du Pont* test).

<sup>31</sup> *Du Pont*, 351 U.S. at 391 (emphasis added); accord *Grinnell Corp.*, 384 U.S. at 571; see also *Aspen Skiing*, 472 U.S. at 596 n.20.

<sup>32</sup> *E.g.*, *Smith v. Burns Clinic Medical Center*, 779 F.2d 1173, 1175 (6th Cir. 1985); *J.A. Croson Corp. v. City of Richmond*, 779 F.2d 181, 201 (4th Cir. 1985), *cert. granted and vacated*, 478 U.S. 1016 (1986); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 264 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985); *Continental Cablevision v. American Elec. Power Co.*, 715 F.2d 1115, 1120 (6th Cir. 1983).

<sup>33</sup> *White and White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 507 (6th Cir. 1983) (emphasis added); accord *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3rd Cir. 1982); *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982).

<sup>34</sup> Compare *Board of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147 (10th Cir. 1983) ("or" test), *aff'd*, 468 U.S. 85 (1984) with *E.J. Delaney Corp. v. Bonne Bell, Inc.*, 525 F.2d 296 (10th Cir. 1975) ("and" test), *cert. denied*, 425 U.S. 907 (1976).

<sup>35</sup> 783 F.2d 159 (10th Cir. 1986).

<sup>36</sup> 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988).

which monopoly power test was more appropriate and also adopted a new test for market power.

#### A. Monopoly Power and Market Power Tests in the Tenth Circuit

The Tenth Circuit set forth its monopoly power test in *Shoppin' Bag*, an attempted monopolization case.<sup>37</sup> The court first noted that in an attempted monopolization case, the plaintiff must establish the existence of a "dangerous probability of [the defendant] success[fully] . . . monopolizing the relevant market."<sup>38</sup> The trial court had instructed the jury that a "dangerous probability" of success meant "'the probability of attaining the power to control prices in the market and the power to exclude competition from the market.'"<sup>39</sup> Thus, the trial court transformed the "power to control prices or exclude competition" test of *United States v. E.I. du Pont de Nemours & Co.*<sup>40</sup> into one requiring that the plaintiff prove the existence of both elements.<sup>41</sup> On appeal, the Tenth Circuit upheld these instructions over *Shoppin' Bag's* objection that requiring it to prove both the defendant's ability to control prices and exclude competition incorrectly enlarged its burden of proof. According to the *Shoppin' Bag* court, "[T]he [*du Pont*] opinion . . . explains that these two points are so closely related that they must be treated as one."<sup>42</sup> The court reasoned that it is "conceivable that if a company has obtained control over prices that it still may not have the power to

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<sup>37</sup> *Shoppin' Bag* operated a "no frills" grocery warehouse and experienced considerable success competing against other grocery retailers in the Pueblo, Colorado area. One competitor, Dillon Companies, doing business as King Soopers, reduced prices significantly in order to avoid substantial losses and to remain competitive with *Shoppin' Bag*. King Soopers' price reduction threatened the existence of *Shoppin' Bag*. The Federal Trade Commission notified King Soopers that it would investigate its pricing policy. Shortly thereafter, King Soopers raised its prices and the FTC terminated its investigation. *Shoppin' Bag* then filed suit against King Soopers alleging attempted monopolization. A jury found King Soopers innocent of the charge. *Shoppin' Bag*, 783 F.2d at 161.

<sup>38</sup> *Id.* The court also required that the plaintiff prove three additional elements: (1) the relevant market in which the alleged attempt occurred; (2) specific intent to monopolize; and (3) conduct in furtherance of an attempt to monopolize. *Id.*

<sup>39</sup> *Id.* at 162 (quoting trial court) (emphasis added). The trial judge further noted that the defendant must possess "market strength [*i.e.*, market power] that approaches monopoly power" in order to establish a dangerous probability of success in achieving actual monopoly power. *Id.* According to the trial judge, a firm's "market strength" is in part indicated by the firm's market share but "[m]arket share alone . . . is not enough [and o]ther factors [to] consider include the number and strength of the defendant's competitors, the difficulty or ease of entry into the market by new competitors, consumer sensitivity to change in prices, innovations or developments in the market, whether the defendant is a multimarket firm, as well as other evidence presented [that is] persuasive regarding defendant's market strength.'" *Id.* (citation omitted).

<sup>40</sup> 351 U.S. 377 (1956).

<sup>41</sup> *Shoppin' Bag*, 783 F.2d at 162.

<sup>42</sup> *Id.* at 163.

exclude other competitors from the market," as it asserted was the case in *du Pont*.<sup>43</sup> Therefore monopoly power, according to the Tenth Circuit, requires the presence of both elements.<sup>44</sup>

In *Westman*, a refusal-to-deal case<sup>45</sup> brought under section 1 of the Sherman Act,<sup>46</sup> the Tenth Circuit reiterated its monopoly power test and distinguished market power from monopoly power.<sup>47</sup> As part of the refusal-to-deal case, the Tenth Circuit required the plaintiff to prove, as one of the elements of its case that the defendant possessed market power sufficient to enable it to harm consumers.<sup>48</sup> The court departed from the traditional definition of market power<sup>49</sup> and held that market power was either the " 'power to control prices' or 'the power to exclude competition.' "<sup>50</sup>

### B. The Legal Basis for the Tenth Circuit's Monopoly Power Test

The *Shoppin' Bag* court correctly noted that *du Pont* specifically recognized that "these two points [control over prices and the power to exclude competition] are so closely related that they must be treated as one."<sup>51</sup> But the *Shoppin' Bag* court failed to acknowledge that the *du Pont* Court also stated that "[p]rice and competition are so intimately entwined that any discussion . . . must treat them as one."<sup>52</sup> Moreover, the *du Pont* Court further noted that "[i]t is inconceivable that price could be controlled without power over competition or vice versa,"<sup>53</sup> implying that a firm lacks power to raise prices unless it can also prevent competitors from capturing its share of sales when the firm raises prices. Thus, the *du Pont* Court evidently believed that no firm possesses one element of the Court's monopoly power test without simultaneously possessing the other and hence the presence of one element of its test indicated the presence of the other. Under *du Pont*, then, proving that the defendant firm possesses either control over prices or the ability to exclude

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<sup>43</sup> *Id.* at 164.

<sup>44</sup> *Id.*

<sup>45</sup> The plaintiff in *Westman* charged that Hobart, a kitchen equipment manufacturer, denied the plaintiff the right to distribute Hobart products and claimed that this denial was part of a conspiracy between Hobart and Nobel, Inc., one of its distributors, to prevent the plaintiff from competing with Nobel. *Westman*, 796 F.2d at 1219-20.

<sup>46</sup> 15 U.S.C. § 1 (1982).

<sup>47</sup> *Westman*, 796 F.2d at 1225 n.3.

<sup>48</sup> *Id.* at 1225-28.

<sup>49</sup> See *supra* notes 9-10 and accompanying text.

<sup>50</sup> *Westman*, 796 F.2d at 1226 n.3 (citing Board of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984)).

<sup>51</sup> *Shoppin' Bag*, 783 F.2d at 163.

<sup>52</sup> United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956) (emphasis added).

<sup>53</sup> *Id.*

competition establishes that the defendant has monopoly power. Thus, under this analysis of the *du Pont* Court's opinion, the plaintiff, Shoppin' Bag, properly, asserted that the trial court incorrectly stated its burden of proof by requiring it to prove both elements rather than just one.

The *Shoppin' Bag* court further supported its position that both elements are required, by noting that "du Pont had power to control prices in cellophane but . . . the company lacked the power to exclude competition from the relevant market" and "[t]herefore, du Pont was not found to possess the requisite market [*i.e.*, monopoly] power even though it possessed one of the elements [and thus] both elements are required."<sup>54</sup> But in fact, neither element was present in *du Pont*. As to du Pont's power to control prices, the Court explained that "the '[g]reat sensitivity of customers . . . to price . . . ' prevented du Pont from possessing monopoly control over price"<sup>55</sup> and thus the Government's proof failed to establish that element of the monopoly power test. After considering whether the Government had shown that du Pont possessed the power to exclude competitors from the relevant market, the Court concluded that "there is no proof du Pont ever has possessed power to exclude any [competitors] from the [relevant] market."<sup>56</sup> Thus, even after finding that du Pont lacked the power to control prices, the Court proceeded to consider whether du Pont possessed the power to exclude

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<sup>54</sup> *Shoppin' Bag*, 783 F.2d at 163.

<sup>55</sup> *Du Pont*, 351 U.S. at 400 (citing *United States v. E. I. du Pont de Nemours & Co.*, 118 F. Supp. 41, 207 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956)). The *du Pont* Court also stated that "[w]e cannot say that . . . du Pont [had] monopoly power over prices in view of the [lower court's] findings of fact." *Id.* at 401.

<sup>56</sup> *Id.* at 403. The Tenth Circuit's interpretation of du Pont's control over prices perhaps resulted from a misunderstanding of the *du Pont* Court's discussion of product differentiation. The Circuit's interpretation may have stemmed from the statement in *du Pont* that "du Pont's power to set the price of cellophane has been limited only by the competition afforded by other flexible packaging materials [and] it may be practically impossible for anyone to commence manufacturing cellophane without full access to du Pont's [cellophane production] technique." *Id.* at 392. The Court explained the import of its statement by noting that as product differentiation increases, a producer's power over price and competition increases but noted that "this power . . . is not the power that makes an illegal monopoly." *Id.* at 393. Thus, the Court recognized that although many producers have some degree of control over price, not all such control constituted monopoly control over price for antitrust liability purposes. Any control du Pont had over the price of cellophane because its product was differentiated from other flexible wrapping materials was acceptable to the Court. *Id.*

In reality, the Court probably underestimated du Pont's control over the price of its product. The Court placed major emphasis on the cross-elasticity of demand for cellophane, that is, the effect of an increase in the price of cellophane on the demand for other wrapping materials. But the Court misunderstood the relevance of the cross-elasticity measure and probably incorrectly concluded that du Pont had no control over price. For a discussion of this point, see R. POSNER & F. EASTERBROOK, *supra* note 12, at 359-62.

competitors from the relevant market. If proof of both elements were necessary for a showing of monopoly power, then the Court's analysis could have ended when it concluded that du Pont lacked control over prices. By also considering whether du Pont could exclude competition, the Court implied that its test for monopoly power requires that the defendant possess one element or the other, but not both as the Tenth Circuit concluded.<sup>57</sup>

### C. The Legal Basis of the Tenth Circuit's Market Power Test

The Tenth Circuit's market power test, as set forth in *Westman* was based on a puzzling interpretation of precedent. The *Westman* court first acknowledged that "[m]arket power is the ability to raise prices above those that would be charged in a competitive market,"<sup>58</sup> the standard test for market power recognized by the Supreme Court.<sup>59</sup> But it then stated that market power can be "demonstrated" by showing that the defendant has "either 'power to control prices' or 'the power to exclude competition,'"<sup>60</sup> thereby effectively adopting the *du Pont* monopoly power test as its test for market power.<sup>61</sup> For its required showing for market power, the Tenth Circuit cited its own decision in *Board of Regents v. NCAA*,<sup>62</sup> a case whose holding the Supreme Court later affirmed<sup>63</sup> without reference to the Tenth Circuit's method for demonstrating market power. Rather, in referring to market power, the Supreme Court employed the standard definition, that is, the ability to raise prices above those charged in a competitive market.<sup>64</sup> The Tenth Circuit's

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<sup>57</sup> The *du Pont* decision may admit of some ambiguity, if not contradiction, as to whether a defendant need possess both elements to have monopoly power. By noting that "[i]t is inconceivable that price could be controlled without power over competition or vice versa," *du Pont*, 351 U.S. at 392, the Court certainly implies that a firm with one element will perforce have the other and that the presence of both elements will allow an assumption of monopoly power. But that is different than saying that a firm must have both elements or holding that a plaintiff need prove both elements in order to establish monopoly power. Moreover, it is difficult to understand why the Court would twice state that a firm must possess one element or the other and reiterate the test for monopoly power as the possession of one element or the other in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), unless it meant to allow proof of one element or the other as sufficient evidence of monopoly power.

<sup>58</sup> *Westman*, 796 F.2d at 1225 (quoting *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)).

<sup>59</sup> Specifically, the quoted definition appears at *Board of Regents*, 468 U.S. at 109 n.38.

<sup>60</sup> 796 F.2d at 1225 n.3 (citing *Board of Regents v. NCAA*, 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984)).

<sup>61</sup> For discussion of the *du Pont* monopoly power test, see *supra* text accompanying note 31.

<sup>62</sup> 707 F.2d 1147, 1158 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

<sup>63</sup> *Board of Regents*, 468 U.S. 85.

<sup>64</sup> *Id.* at 109 n.38.

reliance on *Board of Regents v. NCAA* is also misplaced because the *Board of Regents v. NCAA* court cites *du Pont* as authority for its market power test when in fact *du Pont* specifically set forth a monopoly power test.<sup>65</sup>

### III

#### AN INDEPENDENT RATIONALE FOR THE TENTH CIRCUIT TESTS

Even if the Tenth Circuit misinterpreted existing precedent for its monopoly and market power tests, the question remains whether its tests have independent rationales that make the tests useful. To reflect the economic principles underlying market control, a good monopoly power test should accurately differentiate between monopoly power and market power and a good market power test should distinguish between market power and the absence thereof. In addition, the application of the tests should further the goals of the antitrust laws.

#### A. The Economics of Monopoly Power and Market Power

Economists generally define market power as the ability of a firm to raise the price of its product by restricting output.<sup>66</sup> How much a firm can raise its price depends on the structure of the market in which it competes. A firm in a perfectly competitive market<sup>67</sup> cannot raise its price for any non-negligible length of time because a large number of other firms sell perfect substitutes for its product. When the perfectly competitive firm restricts its output in an attempt to raise the price of its product above the market level, consumers switch to the output of other firms. As a result, the firm reducing its output simply loses sales without affecting the market price of its product. In sum, the firm possesses no market power.<sup>68</sup>

A firm with market power can set the price of its output above the price that would prevail in a perfectly competitive market.<sup>69</sup> In

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<sup>65</sup> In *Board of Regents*, the Tenth Circuit recites the *du Pont* monopoly power test but labels it a test for market power. 707 F.2d at 1158. The district court specifically employed a monopoly power test in the initial phase of the litigation because the issue was whether the NCAA had monopoly power in the college football television market. *Board of Regents*, 546 F. Supp. 1276, 1323 (W.D. Okla. 1982), *aff'd in part*, 707 F.2d 1147 (10th Cir. 1983), *aff'd*, 468 U.S. 85 (1984).

<sup>66</sup> R. BLAIR & D. KASERMAN, *ANTITRUST ECONOMICS* 110 (1985); *see also* M. HOWARD, *ANTITRUST AND TRADE REGULATION* 7-8 (1983); F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 11 (2d ed. 1980).

<sup>67</sup> For a general discussion of firm behavior in competitive markets *see* R. BLAIR & D. KASERMAN, *supra* note 66, at 3-22.

<sup>68</sup> *See* P. ASCH, *INDUSTRIAL ORGANIZATION AND ANTITRUST POLICY* 9-10 (rev. ed. 1983).

<sup>69</sup> *See* Landes & Posner, *supra* note 8, at 939.

reality, most firms can raise their prices some amount simply because no perfect substitutes exist for their products.<sup>70</sup> The extreme example of a firm with the ability to raise the price of its output is a pure monopolist.<sup>71</sup> The pure monopolist can raise prices substantially above the level that would exist in a perfectly competitive market not only because there are no perfect substitutes for the firm's product, but also because by assumption there are not even any close substitutes.<sup>72</sup> Economists sometimes refer to the monopolist's substantial control over price as monopoly power.<sup>73</sup> Thus, the ability to control prices varies between the extremes of a perfectly competitive firm and a monopolist.

A firm with some non-negligible power to raise price possesses what economists sometimes term market power, while a firm with substantial power to raise price possesses what economists sometimes term monopoly power. Economists, however, often use the terms market power and monopoly power interchangeably,<sup>74</sup> as they are generally less concerned about labelling the ability of a firm to raise price than they are with the firm's exercise of its power. Economists prefer to focus on the exercise of market power or monopoly power because when output prices rise above the level that would prevail in a competitive market, resource misallocation results. If the price of output exceeds the marginal cost of production, as can occur when a firm raises the price above the competitive level, then consumers not only pay more for the output produced than they would in a competitive market, but a portion of their demand for the product is left unsatisfied in the sense that consumers are willing to pay more for additional units of output than it costs to produce them.<sup>75</sup> The profit-maximizing decision of the firm with market

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<sup>70</sup> Easterbrook, *supra* note 7, at 20; see also F. FISHER, J. MCGOWAN & J. GREENWOOD, *FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND U.S. v. IBM* 20 (1983).

<sup>71</sup> For a general discussion of monopoly, see R. BLAIR & D. KASERMAN, *supra* note 66, at 25-35.

<sup>72</sup> M. HOWARD, *supra* note 66, at 7.

<sup>73</sup> See *infra* text accompanying notes 78-79.

<sup>74</sup> See, e.g., R. BLAIR & D. KASERMAN, *supra* note 66, at 110-16 (defining market power and then proceeding with discussion of methods by which monopoly power can be measured); F. SCHERER, *supra* note 66, at 11-12 (noting that pure monopolists, oligopolists, and monopolistic competitors all possess "monopoly power or market power" and that sellers in perfectly competitive market possess no monopoly (as opposed to market) power).

<sup>75</sup> Even though a firm with market power raises prices above the competitive market level, no consumer pays more than he or she is willing to pay because no consumer is forced to purchase the firm's product. Thus, high prices are not the problem with monopoly behavior except to the extent that they redistribute income from buyers to sellers in the form of monopoly profits. See P. ASCH, *supra* note 68, at 15-16, 29. Rather, the problem with a monopolist is that it produces too little output, output that is valued more highly than the cost of producing it. See F. SCHERER, *supra* note 66, at 17.

power creates what economists term an efficiency loss<sup>76</sup> because it distorts the use of resources in the economy.<sup>77</sup> Eliminating these distortions tends to improve resource allocation and makes consumers better off.<sup>78</sup> For economists, the interesting and relevant issue is how much market or monopoly power a firm possesses and the size of the efficiency losses that the exercise of that power generates. Unlike courts, economists need not draw lines distinguishing between degrees of control over price. And even though the economist's theoretical constructs aid in understanding the concept of market power or monopoly power, they provide less guidance on how to decide the antitrust litigation issues that courts confront, that is, deciding whether a firm possesses monopoly power, market power, or no power at all.

Nonetheless, an instructive correspondence exists between the legal definitions of market and monopoly power and economic models of market structure. In particular, the legal concept of monopoly power corresponds roughly to the economist's concept of substantial control over price, an amount associated with a firm possessing control approaching that of a pure monopolist.<sup>79</sup> When courts refer to market power, they refer to some nontrivial amount of control over price less than the power a monopolist possesses.<sup>80</sup> The judicial concept corresponds to the economists' notion of a firm with power over price somewhere between the extremes of a perfectly

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<sup>76</sup> Efficiency losses, sometimes termed deadweight welfare losses, are the sum of consumer and producer surplus lost when a firm or firms fail to expand production to the point where marginal cost equals the price of output. K. CLARKSON & R. MILLER, *INDUSTRIAL ORGANIZATION: THEORY, EVIDENCE, AND PUBLIC POLICY* 122-24 (1982). Consumer surplus is the difference between what a consumer is willing to pay for the product and the amount he or she actually pays in the market. *Id.* at 121. Producer surplus is the difference between what a producer would accept for a unit of output and what he or she actually receives for it when selling in the market. *Id.* at 121-22. Both consumer and producer surplus are measured in dollars. In general, the computation of efficiency losses involves some difficult theoretical and empirical issues. For an advanced treatment of the subject, see Willig, *Consumer's Surplus Without Apology*, 66 *AM. ECON. REV.* 589 (1976). For slightly less rigorous treatments of efficiency losses, see Landes & Posner, *supra* note 8, at 991-96 and Schmalensee, *Another Look at Market Power*, 95 *HARV. L. REV.* 1789, 1809-12 (1982).

<sup>77</sup> Distortions occur when resources are not allocated to their highest valued uses. For example, a monopolist creates allocative inefficiency in the use of resources by charging prices that exceed the cost of production. See M. HOWARD, *supra* note 66, at 7-8. Consumers (and society) would be better off with more production of the good because its value exceeds the cost. See P. ASCH, *supra* note 68, at 29. Thus, monopolists devote too few resources to the production of the goods they produce and those resources are then shifted in the economy to the production of less valued goods.

<sup>78</sup> Consumers are made better off by the combination of increased output and lower prices. The increase in consumer surplus measures the extent to which consumers are made better off. See *supra* note 76.

<sup>79</sup> See *supra* text accompanying notes 71-73.

<sup>80</sup> See *supra* text accompanying notes 9-10, and notes 18-20 and accompanying text.

competitive firm and a monopolist.<sup>81</sup>

As a practical matter, the focus in those antitrust cases that turn on the presence or absence of market power is not on whether a firm possesses market power, but rather on how much market power the firm possesses.<sup>82</sup> Firms with inconsequential amounts of market power are unable to cause any significant anticompetitive harm in the market<sup>83</sup> because when they attempt to raise prices, they lose sales to competitors as consumers switch to lower-priced substitutes.<sup>84</sup> Thus, courts do not concern themselves with the mere existence of market power but rather with whether the amount of power possesses is nontrivial.<sup>85</sup>

### B. The Economic Content of the Legal Tests for Monopoly and Market Power

Ideally, legal tests for market power and monopoly power would incorporate and reflect the economic theory underlying these concepts so that antitrust liability is imposed only where harmful efficiency losses result from allegedly anticompetitive behavior. Professors Landes and Posner<sup>86</sup> and Professor Schmalensee<sup>87</sup> have analyzed the economic content of the *du Pont* monopoly power test<sup>88</sup> and, taken in combination, their work indicates that the two elements of the test, the power to control price and the power to exclude competition, reflect a distinction between short-run and long-run control of the market. Furthermore, they suggest that the extent of a firm's control over the market is properly measured by the

<sup>81</sup> See *supra* text accompanying notes 66-70.

<sup>82</sup> These cases include those involving mergers arising under section 7 of the Clayton Act, 15 U.S.C. § 18 (1982), and those cases brought under section 1 of the Sherman Act, 15 U.S.C. § 1 (1982), and considered under the Rule of Reason. See *supra* notes 12-13 & 17 and accompanying text.

<sup>83</sup> Firms may injure some consumers or other firms or may harm themselves by attempting to raise prices. But the market will automatically correct the firm's behavior when consumers switch to firms offering better bargains. See *supra* note 7 and accompanying text.

<sup>84</sup> Many firms have the power to raise their prices some small amount. A manufacturer may exploit the characteristics that differentiate its product from those of competitors. The fewer and less suitable the substitutes, the more the firm can raise its prices. For example, a producer of washing machines may be able to raise the price of its product by a few dollars simply because it has some feature that its competitors do not install on their machines. And with this small price rise, the firm probably need not worry that consumers will switch to the products of its competitors. But the firm cannot increase its prices with impunity because at some point, after some additional price increase, the firm will begin to lose sales to its competitors. Thus, although the manufacturer has market power, it is too trivial in amount to constitute the degree of market power necessary as an element in an antitrust action. See P. ASCH, *supra* note 68, at 135-38.

<sup>85</sup> Landes & Posner, *supra* note 8, at 939; Schmalensee, *supra* note 76, at 1790.

<sup>86</sup> Landes & Posner, *supra* note 8.

<sup>87</sup> Schmalensee, *supra* note 76.

<sup>88</sup> See *supra* text accompanying note 19.

efficiency losses the firm creates.<sup>89</sup> Thus, the theoretically appropriate legal tests would allow a plaintiff to demonstrate that the defendant's short-run and long-run control of the market create efficiency losses indicative of market power or monopoly power.<sup>90</sup>

As noted, the traditional test of monopoly power formulated by the Supreme Court requires that the plaintiff show either the power to control prices or to exclude competition.<sup>91</sup> Professors Landes and Posner note that the first part of the test seems equivalent to the economist's definition of market power.<sup>92</sup> But they profess puzzlement over the second element of the test, suggesting that perhaps the Court meant merely to make "the corollary point that any firm that has and exercises the power to raise price above the competitive level must also be able to exclude entrants" in order to maintain the price increase.<sup>93</sup> Alternatively, they suggest that the Court may have recognized that a firm with monopoly power could lower the monopoly price to the competitive level and thereby exclude other less efficient firms that enter the market under "the 'umbrella' that a monopoly price holds over the competitive fringe in the market."<sup>94</sup> As a final explanation, they suggest that the Court may have been concerned that the monopolist has power to exclude other equally efficient firms by predatory pricing or other exclusionary practices.<sup>95</sup>

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<sup>89</sup> Landes & Posner, *supra* note 8, at 952-55; Schmalensee, *supra* note 76, at 1792. Both Landes & Posner and Schmalensee use the term deadweight loss rather than efficiency loss. See *supra* notes 76-78 and accompanying text.

<sup>90</sup> See *infra* notes 106-07 and accompanying text for a discussion of how courts would actually implement monopoly power and market power tests based on efficiency losses.

<sup>91</sup> *United States v. E.I. du Pont de Nemours*, 351 U.S. 377, 391 (1956).

<sup>92</sup> Landes & Posner, *supra* note 8, at 977. Landes and Posner refer to the *du Pont* monopoly power test as a test for market power. In general, economists use the terms market power and monopoly power interchangeably, see *supra* notes 79-79 and accompanying text, but as legal concepts, monopoly power and market power are distinct and each has its own separate test. See *supra* Section II.

<sup>93</sup> Landes & Posner, *supra* note 8, at 977.

<sup>94</sup> *Id.* A firm capable of raising the market price creates opportunities for other firms in the market to raise their prices if they so desire. Economists believe that the "umbrella" of a higher price occurs in markets where a dominant firm and numerous other smaller firms exist. In a market with this structure, the dominant firm establishes a price above the competitive level and the smaller firms take that price as given in the same way that they would treat the price as given in a competitive market. In this kind of market, dominated by one firm, all firms enjoy positive economic profits and for these profits to continue, entry must be restricted. Whether market behavior of this kind actually exists is the subject of some doubt. For general discussions of the dominant firm model, see P. ASCH, *supra* note 68, at 67-68 and F. SCHERER, *supra* note 66, at 232-36.

<sup>95</sup> Landes & Posner, *supra* note 8, at 977. A firm practicing predatory pricing sells its output in several markets and in some of those markets the firm is assumed to have monopoly power. In the remaining markets, where the firm lacks monopoly power, the firm practices "predatory pricing," *i.e.*, it sells its output below cost in hopes of driving its competitors out of business. The firm attempts to offset the losses suffered in the markets where it sets price below cost with the profits the firm derived in those markets

Professor Schmalensee argues that the *du Pont* test recognizes that a firm may have short-run and long-run<sup>96</sup> control of the market.<sup>97</sup> He notes that in the short run, a firm exercises control of the market equivalent to market power if it can raise prices for some period of time long enough to make it profitable to do so; over the longer run, in order to maintain the price increase, a firm must somehow prevent competing firms from offering output at lower prices.<sup>98</sup> The ability to maintain the price increase in the short run depends on whether existing firms can successfully compete against the firm exercising market power by increasing production of sufficiently close substitutes using their existing production capacity. In the long run, new or existing competitors can increase the output of close substitutes by expanding their production capacity. Thus, a firm's ability to exercise long-run market power depends on its ability to deter successfully the development of additional production capacity.

Although Professors Landes and Posner and Professor Schmalensee differ somewhat in their assessments of the Court's monopoly power test, their analyses are not irreconcilable. Landes and Posner define market power as the ability to raise and maintain

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in which it exercises monopoly power. Once having driven its rivals from the remaining markets, the firm establishes monopoly prices and earns monopoly profits. For a critical assessment of the predatory pricing model, see R. POSNER & F. EASTERBROOK, *supra* note 12, at 680-89. For a judicial analysis of predatory pricing, see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-93 (1986).

<sup>96</sup> Economists consider the long run as that period of time in which all inputs, including plant capacity, are variable. See, e.g., W. BAUMOL, *ECONOMIC THEORY AND OPERATIONS ANALYSIS* 290 (4th ed. 1977). In contrast, some inputs are fixed in the short run. Most important among the fixed inputs is plant capacity because developing new capacity is the primary method by which output expands.

<sup>97</sup> Schmalensee, *supra* note 76, at 1795. Although Schmalensee finds "nothing wrong with [the *du Pont* monopoly power] definition," *id.*, his statement must be interpreted in light of the focus of his analysis, which is the efficiency losses caused by a firm's ability to control prices in the long run and the short run. Because he deals generally with "market power" and does not deal with the separate and distinct legal concept of "monopoly power," he does not directly address the question of whether a plaintiff should prove only one or both elements of the *du Pont* test. Nonetheless, his analysis provides useful insight as to whether the existence of one or both elements is sufficient to prove monopoly power in a legal context.

<sup>98</sup> The need to exclude competitors arises because a firm exercising market power earns positive economic profits by pricing its output above marginal (and average) cost and these profits attract other competitors into the market. As entry occurs, output increases and prices fall. P. ASCH, *supra* note 68, at 11. Unless the firm can deter entry it will not enjoy positive profits for a period of time longer than that required for new firms to establish production capacity and/or the time required for existing firms to increase output. See R. BLAIR & D. KASERMAN, *supra* note 66, at 32. Thus, a firm may enjoy positive economic profits in short run but if entry by new firms occurs in the long run, the production of output expands and the price of output falls, eliminating excess profits. P. ASCH, *supra* note 68, at 9-13.

the higher-than-competitive price by restricting output.<sup>99</sup> This definition, which corresponds to the traditional legal definition of market power,<sup>100</sup> does not explicitly distinguish between long-run and short-run market power and thus they are puzzled by the Court's "corollary point"<sup>101</sup> regarding the exclusion of competitors. Possibly Landes and Posner have implicitly assumed that a firm with the capacity to raise the price of its output has already excluded both its long-run and short-run competition in which case neither existing firms nor potential entrants into the market can reduce the firm's control over price. Although this overlooks the important differences between the long run and the short run pointed out by Schmalensee,<sup>102</sup> this would eliminate the differences between their analyses. Thus, the interpretation of the Court's *du Pont* test by Landes and Posner implicitly focuses on the exercise of long-run market power whereas Schmalensee distinguishes explicitly between short-run and long-run market power.

Regardless of their analyses of *du Pont*, Landes and Posner and Schmalensee agree that efficiency losses are the theoretically correct measure of the deleterious effects associated with the exercise of market power.<sup>103</sup> Taken together, their studies indicate that concentrating on the efficiency losses arising from the exercise of either short-run or long-run market control correctly assesses the firm's impact on the allocation of resources and consumer welfare.<sup>104</sup> Thus, in an antitrust case requiring a party to prove the existence of either market power or monopoly power, a court could theoretically allow the party to establish the existence of such power by showing that the sum of the efficiency losses associated with short-run and long-run control of the market rises to the level indicative of monopoly or market power.

Although a test for market or monopoly power based on efficiency losses would provide a more accurate guide for assessing the anticompetitive impact of a challenged business practice, imple-

<sup>99</sup> Landes & Posner, *supra* note 8, at 937.

<sup>100</sup> See *supra* notes 8-10 and accompanying text.

<sup>101</sup> Landes & Posner, *supra* note 8, at 977.

<sup>102</sup> Schmalensee, *supra* note 76, at 1793-96.

<sup>103</sup> Landes & Posner, *supra* note 8, at 952-55; Schmalensee, *supra* note 76, at 1792.

<sup>104</sup> For a general discussion of the estimation of efficiency losses, see Landes & Posner, *supra* note 8, at 952-56; see also *supra* note 76. Professor Schmalensee provides a method for appropriately discounting and weighing short-run and long-run efficiency losses assuming that market power declines exponentially over time. The total efficiency (or deadweight loss) is  $TDW = [1/r][(rDW_s + \delta DW_L)/(r + \delta)]$ . Schmalensee, *supra* note 76, at 1794. TDW is the total efficiency loss,  $r$  is the interest rate at which the losses are discounted to present value,  $\delta$  is the rate at which market power exponentially declines, and  $DW_s$  and  $DW_L$  are the short-run and long-run reductions of consumer plus producer surplus.

menting such a test is impractical.<sup>105</sup> First, the plaintiff faces the difficult task of actually estimating the magnitude of the efficiency losses.<sup>106</sup> Moreover, even if the efficiency losses could be easily and accurately estimated, a court would still have to decide whether the losses meet the legal standard for monopoly power, market power, or are so trivial that antitrust liability is inappropriate. Making this determination requires courts to establish threshold levels of efficiency losses for the various degrees of market control.<sup>107</sup> Because control over price varies in degree, courts will find no "bright-line" tests that allow them to differentiate objectively among monopoly power, market power, and the trivial amount of control over price that does not subject a firm to liability under the antitrust laws. Thus, such an approach is of little practical value.

#### IV

##### AN EVALUATION OF THE TENTH CIRCUIT'S CONTRIBUTION

Although measuring efficiency losses is difficult and does not in and of itself provide courts with "bright-line" distinctions among

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<sup>105</sup> For a discussion of some of the intricate problems encountered in measuring efficiency losses, see F. SCHERER, *supra* note 66, at 459-64.

<sup>106</sup> Plaintiffs would have to estimate both lost consumer and producer surplus, and accurate estimation of these quantities is difficult. See *supra* note 76. For suggestions on how to estimate efficiency losses using data perhaps more readily available, see Landes & Posner, *supra* note 8, at 983-96, and Schmalensee, *supra* note 76, at 1790-93, 1809-10.

<sup>107</sup> Economic theory provides no useful standards for setting these thresholds because control over price varies continuously, with no objectively determinable levels at which to set the dollar value of efficiency losses for monopoly power or market power. See *supra* text accompanying notes 66-73. Drawing these distinctions (between negligible power and market power and between market power and monopoly power) involves difficult policy questions that courts are probably ill-suited to answer. Setting threshold levels of efficiency losses requires a decision as to the size of the efficiency losses that society will tolerate. For example, allowing a firm to exercise its power to raise the price of its product some small fraction of a percent above the price that would exist in a competitive market may not be worth condemning even when accompanied by allegedly anticompetitive behavior because the benefits derived from eliminating this power are too small compared to the cost in judicial resources necessary to eliminate the efficiency loss. Of course, courts implicitly set efficiency loss thresholds every time they decide an antitrust case involving market power or monopoly power because imposing liability for a firm's allegedly anticompetitive behavior necessarily requires deciding whether the firm possesses the required power. But setting "thresholds" in this manner is a less troublesome proposition than requiring that plaintiffs and defendants submit estimates of efficiency losses.

Some economists argue that in some situations consumers are not harmed even when firms exercise some relatively sizeable degree of control over price. They argue that the theory of monopolistic competition demonstrates that firms offering variety can differentiate their products and thus can raise prices above marginal costs only because consumers value variety. In this situation, it is not clear that the exercise of market power is undesirable. *E.g.*, F. SCHERER, *supra* note 66, at 24. In addition, establishing an efficiency loss threshold low enough to impose liability for such minimal exercises of market power inevitably means that more conduct falls within the range of antitrust sanctions and more judicial resources are devoted to the resolution of antitrust claims.

different degrees of control over price, the underlying theory provides a useful framework for evaluating market power and monopoly power tests. And even though neither of the Tenth Circuit's tests are adequate under the efficiency losses criterion, the Tenth Circuit's monopoly power test is of practical value to courts. The Tenth Circuit's market power test, however, proves to be unreliable.

#### A. Validity of the Tests Under the Efficiency Loss Criterion

The Tenth Circuit's monopoly power test in *Shoppin' Bag of Pueblo, Inc. v. Dillon Cos.*,<sup>108</sup> requires a plaintiff to prove the existence of both elements of the *du Pont* Court's test by demonstrating the defendant's control over price and its ability to exclude competition.<sup>109</sup> Even if these two elements are taken to represent short-run and long-run market power, however, Professor Schmalensee's theoretical analysis suggests that the efficiency losses are not necessarily so large that they rise to the judicially defined threshold for monopoly power.<sup>110</sup> And even short-run market power alone conceivably could create efficiency losses so large that they surpass the theoretical threshold that might define monopoly power on the basis of efficiency losses. The Tenth Circuit's requirement that the plaintiff prove that both elements exist fails to recognize explicitly these possibilities.<sup>111</sup> In fact, the *du Pont* test itself is subject to the same criticism because the existence of one element or the other does not necessarily imply efficiency losses of any particular size.

The Tenth Circuit's test for market power offered in *Westman Commission Co. v. Hobart International Co.*<sup>112</sup> accepts the traditional definition of market power as "the ability to raise prices above those that would be charged in a competitive market"<sup>113</sup> but allows the plaintiff to "demonstrate 'market power'" by showing "evi-

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<sup>108</sup> 783 F.2d 159 (10th Cir. 1986).

<sup>109</sup> *Id.* at 164.

<sup>110</sup> Whether a firm possesses market power or monopoly power depends on the level at which thresholds are set. The lower the threshold, the smaller the efficiency loss and the less control over price a firm needs in order to meet any legal standard for monopoly power or market power.

<sup>111</sup> Schmalensee notes that a firm without any long-run market power may still warrant antitrust action. He cites the prescription drug industry as a case in point. If no entry barriers inhibit the development and marketing of new prescription drugs, then persistent excess profits will not be present in the industry as a whole. But because of their ability to patent drug formulas, individual firms may have considerable control over price and also may be capable of imposing substantial efficiency losses in the relatively short run, that is, before their patents run out. Schmalensee, *supra* note 76, at 1795-96. Depending on how low the threshold is set, these losses could rise to the threshold level defining monopoly power and thus potentially result in antitrust liability.

<sup>112</sup> 796 F.2d 1216 (10th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988).

<sup>113</sup> *Id.* at 1225 (quoting *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 109 n.38 (1984)).

dence of *either* 'power to control prices' or 'the power to exclude competition.'"<sup>114</sup> Like the Tenth Circuit's monopoly power test, this test also fails to acknowledge the theoretical possibility that the efficiency loss generated by some combination of long-run and short-run market power, not just one or the other, can combine to justify imposing liability once the additional element of anticompetitive behavior is proven.<sup>115</sup>

## B. The Tenth Circuit's Tests as Practical Guides

### 1. *Monopoly Power*

In practice, estimating efficiency losses is extremely difficult and would require substantial resources.<sup>116</sup> However, the Tenth Circuit's monopoly power test provides a workable alternative that correlates with economic theory. By requiring that a monopolist have both control over price and the ability to exclude competition, the Tenth Circuit implicitly recognized that this combination of power gives the monopolist greater potential for harming consumers than is possible when the firm merely possesses control over price or the ability to exclude competition.<sup>117</sup> It is more likely that a firm able to control price and exclude competitors for some period of time will create efficiency losses corresponding to those theoretically associated with the exercise of monopoly power. On balance, courts using the Tenth Circuit's test will be more likely to distinguish monopoly power from mere market power.<sup>118</sup>

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<sup>114</sup> *Id.* at 1226 n.3.

<sup>115</sup> See *supra* notes 12-17 and accompanying text for a discussion of the role of market power in antitrust cases.

<sup>116</sup> See *supra* notes 105-07 and accompanying text for a discussion of how courts would actually implement monopoly power and market power tests based on efficiency losses and the problems involved in doing so. Landes and Posner suggest a method for estimating market power based on supply and demand elasticities. They show that their measure of market power correlates to efficiency losses, Landes & Posner, *supra* note 8, at 991, but they note that even these elasticities are "not easily determinable (at least by the methods of litigation)," *id.* at 956, and thus they realize that there are difficult problems "that would face a court or enforcement agency in . . . using [this] approach." *Id.* at 943.

<sup>117</sup> Under Schmalensee's efficiency loss analysis, a firm that has control only over price, *i.e.*, short-run market power, will see its profits eroded in the long run because it cannot prevent other firms from entering the market and increasing the supply of output. The lack of long-run control will likely, though not conclusively, create smaller efficiency losses than those attributable to a firm with both control over price and the ability to exclude. See Schmalensee, *supra* note 76, at 1793.

<sup>118</sup> An implicit distinction exists between a monopolist defined by the size of the efficiency loss it creates and a monopolist defined by the Tenth Circuit test. Defining a monopolist by the level of efficiency loss means that some combination of short-run and long-run market power, as Schmalensee defines those terms, Schmalensee, *supra* note 76, at 1793-96, can result in a firm being labelled a "monopolist" even though it might actually have no ability to exclude competition and impose long-run efficiency losses. Depending on the level of efficiency losses chosen by courts as indicative of monopoly

Requiring that a defendant have the ability to exclude competitors acknowledges the distinction in economic theory between a monopolist and a firm with substantially less control over the market, namely that a monopolist lacks competitors offering substitute products even in the long run, and even though the monopolist earns positive economic profits.<sup>119</sup> In this respect, the Tenth Circuit's monopoly power test is superior to the *du Pont* Court's test.

## 2. Market Power

In theory, the correct test for market power should also focus on the magnitude of efficiency losses. But employing a market power test based on efficiency losses is no less difficult than employing an efficiency test for monopoly power.<sup>120</sup>

Alternatively, a court can draw upon economic theory for guidance in distinguishing among firms with mere market power, firms possessing monopoly power, and firms having no market power at all. In economic theory, what distinguishes pure monopolists from other firms is the absence of competition that they face even in the long run.<sup>121</sup> The distinguishing feature of firms without market power, on the other hand, is that they have no ability to raise prices above the level prevailing in the market. Thus, as an alternative to the impractical estimation of efficiency losses, a court's market power test might focus on a firm's ability to raise prices in the short run and on whether it is able to exclude competition in the long run.

On this basis, the Tenth Circuit's market power test is only partially adequate. In *Westman*, the court properly allowed the plaintiff to show that the defendant's control over the market is less than that of a monopolist, and also acknowledged the traditional legal and scholarly definition of market power as the ability to raise prices above the competitive level.<sup>122</sup> The court further stated that a "lesser showing should be required" to establish market power than that necessary to establish monopoly power because a firm "may possess the ability to sustain a supra-competitive price for its prod-

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power, they could find that many firms are monopolists. On the other hand, the Tenth Circuit test is not based explicitly on efficiency losses but instead focuses on the *characteristics* associated with the theoretical model of a monopolist in economic theory. Implicitly, the Tenth Circuit's test assumes that if a firm possesses the characteristics of control over price and the ability to exclude competitors, then there is a stronger probability than there otherwise would be that the efficiency losses the firm creates meet or exceed the threshold defining monopoly power, even if the courts have not explicitly defined that threshold.

<sup>119</sup> See *supra* text accompanying notes 71-73.

<sup>120</sup> See *supra* notes 105-07 for a discussion of the mechanics of implementing a market power test based on efficiency losses.

<sup>121</sup> See R. BLAIR & D. KASERMAN, *supra* note 66, at 31.

<sup>122</sup> 796 F.2d at 1225 & n.3.

ucts, even though the [firm] does not have the direct power to exclude competitors."<sup>123</sup> But the court's market power test, which allows a plaintiff to "demonstrate 'market power' [by] show[ing] evidence of *either* 'power to control prices' *or* 'the power to exclude competition,'"<sup>124</sup> can lead to an incorrect conclusion. Allowing a plaintiff to prove market power by demonstrating the defendant's ability to control the price of output is analytically correct; but permitting proof of market power by a demonstration of the defendant's ability to exclude competition is analytically incorrect because the ability to exclude does not always imply the ability to raise the price of output and thus does not imply that a firm will harm consumers.

A firm with control over price does not necessarily have the ability to exclude competitors. For example, the first firm to enter a market with a new and different product has control over price because no competitors produce viable substitutes. But control over price, in and of itself, does not permit the exclusion of competitors from the market and, in time, control over price will diminish because the firm's profits attract entrants and the resulting competition erodes the firm's power.<sup>125</sup> Thus, permitting a showing of control over price will correctly indicate the presence of market power, as traditionally defined, but will not necessarily imply that a firm possesses monopoly power.

Allowing a plaintiff to prove market power by demonstrating only the power to exclude competition is also problematic. Generally, such power is associated with the exercise of long-run control over price and monopoly.<sup>126</sup> But, the ability to exclude competitors does not necessarily carry with it the power to raise prices above the established market level. For example, suppose a group of doctors practice a particular specialty in a hospital and collectively they exercise the power to admit other doctors to practice that specialty in

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<sup>123</sup> *Id.* at 1226 n.3. It is unclear exactly what the court meant by "direct" power to exclude competitors. The court suggests that entry barriers such as high capital costs, patents or copyrights are not "direct" restrictions on entry because they are independent of a single firm's ability to exclude competition. *Id.* However, this proposition and the distinction it attempts to draw are without support in the existing case law and legal literature. Thus, the court's attempt to distinguish firms on the basis of their "direct" power to exclude competitors remains unclear as does the import of such a distinction.

<sup>124</sup> *Id.*

<sup>125</sup> Professor Schmalensee cites the example of Wilkinson Sword's coated, stainless steel, double-edged razor blades. For about a year, Wilkinson Sword was the only seller of such blades in the United States and presumably had some control over price. But whatever control it may have had was reduced, if not entirely eliminated, by the entry of other competitors. Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994, 1005 (1979).

<sup>126</sup> A monopolist has no competitors even in the long run and thus it can maintain a higher-than-competitive price. See M. HOWARD, *supra* note 66, at 7-8.

the hospital. Although the doctors have the power to exclude others from that hospital, they will not necessarily have any power to harm consumers. The other doctors could continue to offer their services either independently or through other hospitals, thereby providing choices for consumers and generating effective price competition. Thus, the doctors' ability to exclude competitors does not imply the ability to control price.

*Westman* itself illustrates a situation where the ability to exclude competition fails to establish the ability to injure consumers by controlling price. In *Westman* the defendant manufacturer, Hobart, controlled the number of distributorships handling its products.<sup>127</sup> The plaintiff alleged that Nobel, Inc., one of Hobart's distributors, requested that Hobart not deal with *Westman*, that Hobart illegally complied with that request,<sup>128</sup> and that Hobart was guilty of an anti-trust violation<sup>129</sup> because it had conspired with Nobel to exclude *Westman* from the market for Hobart products. In addition, however, Nobel, acting through Hobart, allegedly possessed the ability to exclude competing distributors selling Hobart equipment. Nonetheless, this alleged power to exclude other Hobart distributors did not necessarily create the potential for harming consumers because Nobel still faced competition in the market from other distributors selling products similar to Hobart's,<sup>130</sup> and this competition limited the ability of either Hobart or its distributors to raise prices.<sup>131</sup>

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<sup>127</sup> *Westman*, 796 F.2d at 1219 (noting that Hobart refused to grant *Westman* a distributorship).

<sup>128</sup> *Id.*

<sup>129</sup> *Westman* alleged an illegal agreement in restraint of trade in violation of section one of the Sherman Act, 15 U.S.C. § 1 (1982). *Westman*, 796 F.2d at 1219.

<sup>130</sup> The competition from similar products of other firms is commonly referred to as interbrand competition.

<sup>131</sup> The Tenth Circuit found that "on an interbrand basis, the restaurant equipment supply market in the Denver area is highly competitive" and that "nothing . . . demonstrates that Hobart had market power." *Westman*, 796 F.2d at 1229. Intrabrand competition occurs between distributors or dealers handling the same manufacturer's products. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 6-7 (1981). Many manufacturers of products such as automobiles, consumer electronics, and so forth require that their distributors or dealers offer some service when retailing the product. The optimal combination of price and service offered by the distributor will maximize profits for the manufacturer. For example, it may be important for a manufacturer to have distributors who provide a wide selection of inventory, product demonstrations, and advertising, as well as after-the-sale servicing. However, a manufacturer also will want to minimize the opportunity for some of its distributors to offer lower prices and fewer services, thereby "free riding" on the efforts of other distributors. The manufacturer can do so by limiting the number of distributors or by otherwise restricting their behavior. But as long as the availability of substitutes from other producers constrains the manufacturer's ability to raise the price of its products, consumers will not suffer harm. For a discussion of intrabrand and interbrand competition, see *id.* at 6-7, 11-12, 16. The Supreme Court has acknowledged the argument that "manufacturers have an economic interest in maintaining as much in-

Given that Hobart had no market power, that is, control over price, restricting the number of its distributors has no potential for harming consumers either. If the price of Hobart products increases as a result of limited intrabrand competition among Hobart distributors, Hobart loses sales to its competitors. This potential lack of sales gives Hobart some incentive to maintain competition among its distributors. Thus, even if Hobart's distributors, acting through Hobart, can exclude others from offering Hobart products, consumers will not suffer harm because Hobart products face significant and substantial competition from other producers of restaurant kitchen equipment. This competition prevents Hobart distributors, regardless of their number, from raising prices.

Accordingly, that portion of the Tenth Circuit's test allowing a plaintiff to establish a defendant's market power by proving only the defendant's ability to exclude competitors is unreliable because the ability to exclude competition does not necessarily indicate that the defendant has the power to raise prices above the prevailing market price. The ability to exclude competitors, in and of itself, may have no effect on consumers.

#### CONCLUSION

It is important to acknowledge that the ability to control price in the the market varies from nonexistent for firms in perfectly competitive markets to substantial in the case of a firm with control approaching that of a monopolist. The legal distinctions among firms with different degrees of control are differences that do not exist as "bright lines" in economic theory. Nonetheless, an appreciation of the economic theory of different market structures is useful for courts attempting to discern the potential for harm to consumers from allegedly anticompetitive behavior.

In that respect, although the Tenth Circuit may have misinterpreted the *du Pont* opinion and inappropriately construed the *du Pont* monopoly power test as the correct test for market power, it nonetheless focused attention on the most important difference between market power and monopoly power, i.e., the ability to exclude competition. By requiring plaintiffs to prove monopoly power by demonstrating both an ability to raise price *and* exclude competition, the court more fully embodies the characteristics of a monopolist as described in economic theory. As such, the Tenth Circuit's monopoly power test provides a significantly better guide for courts attempting to ascertain the existence of monopoly power.

However, even though the Tenth Circuit properly attempted to establish a test for market power that enables a plaintiff to show that the defendant's control over the market is less than that of a monopolist, it incorrectly suggested that the ability to exclude competition is an appropriate method by which to establish market power. In fact, the ability to exclude competition, a concept associated with monopoly power, is not necessarily harmful to consumers. A more appropriate definition of market power, as adopted by other courts, is the ability to raise prices above the competitive level for a period of time long enough to make it profitable to do so. The absence of the power to exclude competitors is the element distinguishing market power from monopoly power, and upon which courts should focus in attempting to distinguish firms with market power from those with monopoly power.

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