

# *Section 2 of the Sherman Act*

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Antitrust Division and Federal Trade Commission  
Hearings Regarding Section 2 of the Sherman Act

Washington, DC

*June 20, 2006*



# Reasons for Sponsoring Hearings

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- Enhance Division Understanding of Unilateral Conduct
- Advance the Development of the Law
  - Provide helpful guidance for courts
  - Provide helpful guidance for businesses
  - Provide helpful guidance for international community



# Monopoly 96 Years Ago

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## ■ *Standard Oil* and the 3 Evils of Monopoly



- Price Increases
- Output Reductions
- Quality Deterioration



# Product Development and Innovation

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The Quiet Life:  
Inhibiting Competitive Zeal

-- v. --

Gales of Creative Destruction:  
Incentives to Innovate



# *R.W. Grant, Tom Smith and His Incredible Bread Machine*

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You're gouging on your prices if  
You charge more than the rest.  
But it's unfair competition  
If you think you can charge less!  
A second point that we would make  
To help avoid confusion:  
Don't try to charge the same amount!  
That would be collusion.  
You must compete—but not too much  
For, if you do, you see  
Then the market would be yours—  
and that would be monopoly!



# Monopoly Today

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Judge Posner: Antitrust policy toward “unilateral abuses of market power” is “the biggest substantive issue facing antitrust.”  
72 U. Chi. L. Rev. 229, 229 (2005).



# Monopoly Today

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Professor Hovenkamp: “Notwithstanding a century of litigation, the scope and meaning of exclusionary conduct under the Sherman Act remain poorly defined.” 72 U. Chi. L. Rev. 147, 147-48 (2005)



# *Brooke Group*

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- Harm to a Competitor Does Not Demonstrate Harm to Competition
- The “Practical Ability of a Judicial Tribunal” to Regulate a Problem and Avoid “Chilling Legitimate Price Cutting”
- The Importance of Safe Harbors



# *Trinko*

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- Cost of False Positives
  - Underscores need for administrable rules
- Remedy
  - Not all problems have antitrust solutions



# Future Panels

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- Predatory Pricing and Predatory Buying
  - Appropriate cost measure
  - Relief
  - *Weyerhaeuser*
- Refusals to Deal
  - When if ever should a firm be compelled to deal with a competitor?
  - Relief



# Future Panels

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## ■ Loyalty Discounts

- Brief for the United States as Amicus Curiae in *LePage's*
- Predatory pricing, exclusive dealing, or tying?
- Safe harbors

## ■ Tying and Exclusive Dealing

- Identifying and assessing efficiencies
- Relief



# Future Panels

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- General Principles

- Is there an overarching standard for Section 2?
- Proposed Tests
- Different duties under different provisions of the antitrust laws?



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*"I'll be happy to give you innovative thinking. What are the guidelines?"*



# Six Principles Informing Section 2 Enforcement

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- Anticompetitive Exclusionary Conduct Should Be Prosecuted
- Mere Size Does Not Demonstrate Competitive Harm
- Injury to Competitors Does Not Demonstrate Competitive Harm
- Need for Clear, Objective, and Administrable Rules
- Avoid Chilling Procompetitive Conduct
- Remedy Must Promote Competition



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