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FEDERAL ANTITRUST LAW AND TRADE AND PROFESSIONAL ASSOCIATION STANDARDS AND CERTIFICATION

*Harry S. Gerla**

I. INTRODUCTION

The creation of standards and the certification of products, services, or providers as being in compliance with those standards are processes that often benefit consumers enormously. For example, a lover of music may wish to listen to compact discs. The adoption of standards for compact discs assures the consumer that any compact disc player will be able to utilize any compact disc the consumer may purchase. A consumer might need to utilize the services of a specialized physician, such as an allergist. The consumer is in no position to judge whether someone who holds him or herself out as an allergist is even a minimally competent allergist. The existence of a certification program by a professional association of allergists might provide some information and perhaps even assurance to the consumer that the allergist she has chosen meets certain minimum standards.

In the United States, some work on standardization and certification is performed by the government.[1] Much of the work of creating standards and certifying products, services, and providers that meet those standards, however, has been left to private organizations, including trade and professional associations.[2] This delegation of standardization and certification to such organizations can create problems for consumers. The members of trade and professional associations often have a strong motive to suppress competition. Indeed, trade and professional associations have frequently used standardization and certification programs to injure competition and deprive consumers of its benefits. Not surprisingly, when standards and certification programs are used in this manner, the federal antitrust laws come into play.

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1. Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1332 n.2 (1978).

2. *Id.* at 1332, 1336; David J. Teece, *Information Sharing, Innovation and Antitrust*, 62 ANTITRUST L.J. 465, 475 (1994).

Unfortunately, the application of federal antitrust laws to professional and trade association standardization and certification programs is rife with uncertainty and outright confusion. For example, some courts have suggested that public health and safety concerns should not play a role in evaluating standards (or other acts or practices) under the antitrust laws. Other courts, however, have developed a role for such considerations to determine whether a practice passes muster under those laws. In most cases, standards and certification procedures receive a thorough examination to see if their procompetitive effects outweigh their anticompetitive effects. Yet in some cases, courts summarily condemn certain standards and certification decisions as violative of the antitrust laws. Many courts and commentators suggest that an erroneous certification decision can injure competition and give rise to liability under the antitrust laws. Other courts and commentators disagree, maintaining that such errors rarely injure competition and therefore should not give rise to antitrust liability.

This Article is an attempt to explain some of these contradictions and to elucidate systematically federal antitrust law as it controls standards and certification procedures. Section II of the Article will define and categorize the various types of standards and certification procedures.[3] Section III will detail what considerations courts should take into account to determine whether a standard or certification decision violates the federal antitrust laws.[4] The theoretical procompetitive and anticompetitive effects of various types of standards are discussed in Section IV of the Article.[5] Section V of the Article discusses practical factors that can be used to judge whether various types of standards are, on balance, procompetitive or anticompetitive.[6] Finally, Section VI of the Article discusses whether antitrust laws can be violated by erroneous certification decisions and, if so, the requirements for proving such a violation.[7]

II. STANDARDS AND CERTIFICATION—BASIC DEFINITIONS

No exact definition exists for the term "standard."[8] Economist David Hemenway gives a broad "working" definition of a standard as "something taken for a basis of comparison, or that which is accepted for current use through authority, custom or general consent."[9] Au-

3. *See infra* notes 8-13 and accompanying text.
4. *See infra* notes 14-74 and accompanying text.
5. *See infra* notes 75-119 and accompanying text.
6. *See infra* notes 120-233 and accompanying text.
7. *See infra* notes 234-297 and accompanying text.
8. DAVID HEMENWAY, INDUSTRYWIDE VOLUNTARY PRODUCT STANDARDS 8 (1975).
9. *Id.*

thorities are also not in agreement on how to classify the various types of standards. While a variety of different classification schemes have been proposed,[10] this Article adopts a simplified scheme of classification loosely based upon the categories suggested by Hemenway.[11]

Under this scheme, standards are divided into two basic categories: uniformity standards and quality standards. Uniformity standards are further divided into two categories: variety simplification standards and interchangeability standards. Variety simplification standards are standards designed to reduce the variety of products or services that are offered. If a variety simplification standard specifies a single product or service, it is a "single variety" standard. Interchangeability standards are designed to ensure that one product or service may be substituted for, or works with, another product or service.

The other main category of standard is the quality standard. This category contains four subcategories: terminology standards, measurement standards, testing standards, and minimum quality standards. A terminology standard is, as the name indicates, an agreement on uniform definitions or terminology. A measurement standard is a standard that creates a benchmark by which various characteristics of products or services may be measured. A testing standard creates a uniform methodology for testing various characteristics of products or services. Finally, a minimum quality standard is a standard that draws a line indicating that some providers, products, or services are "better" or "worse" than the standard.[12]

In contrast to the meaning of "standard," more agreement exists on the meaning of "certification." Certification is a decision on whether a particular product, service, or provider meets a standard.[13] The certification decision may come from a governmental or trade association charged with reviewing such products, services, or providers.

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10. *See, e.g.*, INTERNATIONAL STANDARDS ORG., THE AIMS AND PRINCIPLES OF STANDARDIZATION 17-19 (T.R.B. Sanders ed. 1972); Hamilton, *supra* note 1, at 1332 (discussing the classification of standards developed by the American Society for Testing and Materials).

11. *See generally* HEMENWAY, *supra* note 8.

12. *Cf.* HEMENWAY, *supra* note 8, at 59 (Hemenway's definition of minimum product quality standards).

13. William J. Curran, III, *Volunteers . . . Not Profiteers: The Hydrolevel Myth*, 33 CATH. U. L. REV. 147, 149 n.11 (1983); Tedd Blecher, *Product Standards and Certification Programs*, 46 BROOK. L. REV. 223, 223 n.5 (1980).

III. THE LEGAL ANALYSIS OF STANDARDS—THE "RULE OF REASON" ANALYSIS

A. In General

Courts test most voluntary standardization and certification programs under the "Rule of Reason."[14] Under the Rule of Reason, a restraint will pass muster under section 1 of the Sherman Act if its procompetitive effects outweigh its anticompetitive effects.[15] This formulation raises the obvious issue of the meaning of "competition." The issue has divided both courts and commentators. Some courts and commentators argue that competition means the rivalrous process through which competitors seek to divert business from rivals by offering superior products and services to consumers.[16] Others, however, maintain that the only meaningful definition of competition is aggregate net output of goods and services.[17] Thus, if a restraint does not negatively impact net output, it does not adversely affect competition. Conversely, if a restraint enhances output, it is procompetitive.

Which definition of competition a court chooses can, at least in theory, make a difference in deciding whether a standardization or certification program, on balance, suppresses or promotes "competition." For example, consider the type of standardization known as "variety simplification standards." Simplification refers to "the reduction of the number of types of products [or services] within a definite range to that number which is adequate to meet prevailing needs at a given time."[18] A variety simplification program would, of course, allow manufacturers to produce fewer types of a particular product. This in turn, might en-

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14. Indian Head, Inc. v. Allied Tube & Conduit Corp., 486 U.S. 492, 501 (1988).

15. *See* 15 U.S.C. § 1 (Supp. IV 1992); *see also, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 691 (1978); Board of Trade v. United States, 246 U.S. 231, 238 (1918); Stratmore v. Goodbody, 866 F.2d 189, 194 (6th Cir.), *cert. denied*, 490 U.S. 1066 (1989).

16. *See, e.g.*, Carleton v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 933 (D. Vt. 1991) (rejecting a requirement that plaintiff establish the existence of higher prices or reduced supplies); Association of Retail Travel Agents v. Air Transp. Ass'n, 1987-1 Trade Cas. (CCH) 59,884, 59,885 (D.D.C. 1987) (rejecting notion that antitrust laws protect efficiency rather than competition); Louis Kaplow, *Antitrust Law and Economics and the Courts*, 50 LAW & CONTEMP. PROBS. 181, 209-12 (1987).

17. *See, e.g.*, Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 395 (7th Cir. 1984) (arguing that output, not rivalry, is the hallmark of competition); *see also* General Leaseways, Inc. v. National Truck Ass'n, 744 F.2d 588, 596-97 (7th Cir. 1984); ROBERT H. BORK, THE ANTITRUST PARADOX, 58-61 (1978); Peter M. Gerhart, *The Supreme Court and Antitrust Analysis: The (Near) Triumph of the Chicago School*, 1982 SUP. CT. REV. 319, 331; William H. Landes, *Harm to Competition: Cartels, Mergers and Joint Ventures*, 52 ANTITRUST L.J. 625, 625-27 (1983).

18. LAL VERMAN, STANDARDIZATION 25 (1973); INTERNATIONAL STANDARDS ORG., *supra* note 10, at 18.

hance productive efficiency[19] and output by "allowing longer production runs, greater use of equipment, lower labor-training costs, and lower inventory costs."[20] On the other hand, variety simplification, by definition, restricts consumer and producer choice by forcing them to accept an "alternative that they would not have selected except for the standard."[21] The elimination of these "excluded variations" may also diminish competitive pressures on makers of "accepted alternatives" to improve those alternatives.

If competition is defined solely in terms of effect on the competitive process, then the gains in productive efficiency engendered by the simplification program are relatively unimportant. What matters is enhancement of rivalry, not the gains in efficiency that may not be reflected in or be symptomatic of increased rivalry.[22] If output is the sole measure of competition, the restriction of consumer and producer choice would not in itself constitute an injury to competition. Output might still be unaffected if unhappy consumers merely substituted accepted varieties of the product for the excluded varieties they were formerly purchasing.[23]

The consequences of the debate over the proper definition of "competition" may, however, be more theoretical than real. Using a Rule of Reason analysis, most antitrust courts would consider the diminution in consumer choice an anticompetitive effect and the enhancement of productive efficiency a procompetitive effect. For better or worse, the majority of federal courts, including the United States Supreme Court, have refused to choose between the different definitions of "competition." Instead, they have fashioned a pragmatic compromise. Under the terms of this compromise, injury to the competitive process, diminution of rivalry, and output restrictions are all anticompetitive effects. En-

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19. Productive efficiency, also known as operational efficiency, is the production of goods and services at the lowest possible cost per unit of input. HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 45 (1985); WALTER ADAMS & JAMES BROCK, THE BIGNESS COMPLEX 33 (1986); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 67 (1982).

20. BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, STANDARDS AND CERTIFICATION—FINAL STAFF REPORT 55 (1983) (footnote omitted) [hereinafter FTC STAFF REPORT].

21. *Id.* at 60.

22. This is not to say that a simplification program could not enhance rivalry. Such a program could enhance rivalry by making comparison shopping easier for consumers and by facilitating market entry by new competitors. *See infra* notes 75-78 and accompanying text.

23. Again, this does not mean that efficiency and output cannot be adversely affected by product simplification programs. Some consumers might simply choose to forego purchasing the product at all rather than tolerate the accepted varieties. Moreover, consumers lose any special "efficiencies, advantages, or unique properties that the excluded varieties might have possessed." FTC STAFF REPORT, *supra* note 20, at 59; *see generally infra* notes 79-87 and accompanying text.

hancement of rivalry, maintenance of consumer sovereignty, and the creation of economic efficiencies are all procompetitive effects.

While courts have, by and large, reached a pragmatic compromise on the issue of efficiency versus competitive process, they have not reached a consensus on another fundamental issue, the role of public health and safety considerations in a Rule of Reason analysis.

B. Do Safety and Health Justifications Matter in a Rule of Reason Analysis?

The issue of the significance of public safety and health considerations in a Rule of Reason analysis is particularly important in the area of standards and certification. Many standards are promulgated and certification decisions made specifically to protect public health and safety.[24] Public health and safety concerns are problematic because measures to satisfy those concerns sometimes will neither promote the competitive process nor improve economic efficiency.

To illustrate this point, consider a standard that requires specific safety devices be installed on certain types of industrial machinery. The trade association of machinery producers put the standard into place because each year machines without the safety devices injure several operators. Unfortunately, the safety devices increase the expense of the machine.[25] Thus, if manufacturers adhere to the standard, some machines, which are cheaper because they lack the safety devices, will be removed from the market. The standard requiring the installation of the safety devices can hardly be said to benefit the competitive process. Indeed, the standard seems to diminish consumer choice and injure the price competition provided by the machines without the safety devices. Also, the standard is not likely to increase efficiency or output. Basic microeconomic theory would suggest that the elimination of lower priced machines would lead to fewer machines being purchased.[26]

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24. Michael Goldenberg, *Standards, Public Welfare Defenses, and the Antitrust Laws*, 42 BUS. LAW. 629, 642 (1987).

25. In general, most safety devices increase the cost of products or services. *See, e.g.*, Ann Carroll, *Candid Bus Cameras Watch Unruly Students*, (MONTREAL) GAZETTE, Apr. 15, 1993, at G1 (video cameras to control unruly students on school buses cost $2,000); Ernest Holsendolph, *U.S. to Delay Requirement for Airbags and Automatic Protection in Cars*, N.Y. TIMES, Feb. 10, 1981, at A20 (air bags for automobiles estimated to cost between $250 and $500); Nora Zamichow, *Metrolink Accident Revives Old Questions*, L.A. TIMES, Nov. 26, 1992, at B1 (flashing lights for railroad crossings cost approximately $150,000); *Safety Switch Ordered on Heaters*, N.Y. TIMES, Sept. 4, 1980, at B12 (safety switches to prevent fires from tip-overs of space heaters cost between $10 and $17.50); *School Bus Safety Devices Urged*, WASH. POST, Mar. 4, 1987, at C2 (protective arms on school buses to provide a safe path across a street cost $137 each).

26. This effect is caused by the economic "law of downward sloping demand." That principle in part states that "when the price of a commodity is raised . . . buyers tend to buy less of the commodity." PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 57 (13th ed. 1989).

Moreover, the Supreme Court's decision in *National Society of Professional Engineers v. United States* ("*NSPE*")[27] can be interpreted to rule out the consideration of health and safety considerations in a Rule of Reason analysis. In that case, the defendant professional association attempted to justify its ban on competitive bidding by claiming that competitive bidding would lead to "deceptively low bids, and would tempt individual engineers to do inferior work with consequent risk to public safety and health."[28] The Court rejected the proffered justification and emphasized that, in a Rule of Reason analysis, effect on competition was the standard for judging a challenged act or practice.[29]

The Court again seemed to reject the legitimacy of public health and safety concerns in *FTC v. Indiana Federation of Dentists* ("*Indiana Dentists*").[30] *Indiana Dentists* involved an attempt by the Indiana Federation of Dentists (Federation) to combat insurers' attempts at cost containment. The Federation passed a rule making it unethical for any member to submit X-rays to insurers to enable the insurer to gauge the appropriateness of dental treatment. The FTC issued a cease and desist order against the Federation's enforcement of the rule. In defending its rule, the Federation argued that the FTC had failed to consider noncompetitive "quality of care" justifications for the rule.[31] The Court dismissed the Federation's argument as "flawed both *legally* and factually."[32] If public safety and health considerations do not further competition (however defined), then *NSPE* and *Indiana Dentists* would seem to indicate that they are irrelevant in a Rule of Reason analysis. In spite of *NSPE* and *Indiana Dentists*, the irrelevancy of public safety and health considerations is not a foregone conclusion.

The Court has been far from consistent in its treatment of the role of health and safety considerations in the Rule of Reason analysis. The Court's inconsistency traces back to its decision in *Board of Trade v. United States* ("*CBOT*").[33] In that case, the government challenged a Board of Trade rule that required traders on the exchange to maintain overnight the closing bids they had made at the exchange's closing "call session."[34] The Court ordered the dismissal of the government's suit. In doing so, the Court articulated what is still the most frequently

27. 435 U.S. 679 (1978).
28. *Id.* at 693.
29. *Id.* at 690-91, 694-95.
30. 476 U.S. 447 (1986).
31. *Id.* at 462.
32. *Id.* at 463 (emphasis added).
33. 246 U.S. 231 (1918).
34. *Id.* at 237.

cited "test" for the Rule of Reason. Justice Brandeis stated that "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."[35] In applying the *CBOT* test, Justice Brandeis cited as a procompetitive virtue the rule's effect of "shortening the working day or, at least, limit[ing] the period of most exacting activity."[36] The shortening of working days may be a laudable objective; however, it has little to do with enhancing competition either in the sense of economic efficiency or rivalry. Indeed, the ability to shorten working hours may be a sign of diminished competition and cartelization.[37]

In spite of its decisions in *NSPE* and *Indiana Dentists*, the modern Court has also vacillated on the importance of noncompetitive health and safety considerations in antitrust analysis. In *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*,[38] the Court put forth as a justification for giving Rule of Reason treatment to vertical, territorial restraints the need for manufacturers to "assume direct responsibility for the minimum *safety* and quality of their products."[39] In *Arizona v. Maricopa Medical Society*,[40] the Court took pains to state that the practice being challenged (setting maximum charges to health insurers) did not involve issues of patient care.[41] Even in *Indiana Dentists*, the Court was not completely clear in rejecting the relevancy of noncompetitive factors. The Court in *Indiana Dentists* did say that the defendant's "quality of care" justification was legally flawed. The Court did not, however, stop at this point. It went on to discuss why the defendant's justification was not factually correct and upheld the Commission's finding that the defendant "had failed to introduce sufficient evidence to establish such a justification."[42]

The proponents of allowing public safety and welfare considerations to be weighed in a Rule of Reason analysis of trade or professional standards can also make several policy arguments on behalf of their position. First, they can argue that serving public safety and wel-

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35. *Id.* at 238.

36. *Id.* at 241.

37. *See* Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457, 477 (6th Cir.) (Ryan, J., dissenting), *cert. denied*, 113 S. Ct. 461 (interim ed. 1992) (pointing out the equivalence between a cartel agreement to fix prices and a cartel agreement to shorten operating hours); BORK, *supra* note 17, at 85-86 (same); *see also* 7 PHILLIP E. AREEDA, ANTITRUST LAW 385 (1986) (expressing doubt as to whether reducing business hours is a legitimate procompetitive objective).

38. 433 U.S. 36 (1977).

39. *Id.* at 55 n.23 (emphasis added).

40. 457 U.S. 332 (1982).

41. *Id.* at 348-49.

42. 476 U.S. 447, 464 (1986).

fare through the promulgation of standards promotes competition. The proponents are likely to claim that safety and health standards create two specific procompetitive "market effects." The first market effect is an increase in demand for the products or services that are controlled by the standards. Allegedly, this will occur because consumer confidence in approved products increases.[43]

The other procompetitive market effect is the correction of the market's failure to supply the consumer with necessary information. Market participants may not produce sufficient information about product safety for consumers to make an informed judgment on which product or service to purchase.[44] Even if sufficient information is produced, consumers may simply not be in a position to ascertain adequately the quality or safety of particular goods or services that they are offered.[45] In such situations, enforced safety standards "reduce[] the consumer's search [and information] costs and enable[] the consumer to avoid unwelcome surprises."[46]

In addition, those who urge that public safety and welfare considerations be weighed will argue that private safety standards are preferable to the likely alternative, governmental regulation.[47] Private self-regulators have the advantages of superior technical expertise, more intimate familiarity with current developments in their field, and more rapid and flexible procedures than their governmental counterparts.[48] Indeed, these advantages frequently lead government regulators to rely on private, self-regulatory standards to fashion governmental standards.[49]

The arguments that allowing health and safety considerations to come into play in the Rule of Reason analysis can remedy market imperfections and avoid governmental regulation seem sound. They do not, however, sweep the field. The claim that consumer confidence will be increased is not self-evident. A defendant in an antitrust action is likely to have a difficult time establishing that a private welfare or

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43. FTC STAFF REPORT, *supra* note 20, at 51; Goldenberg, *supra* note 24, at 647.

44. E. KIP VICUSI, REFORMING PRODUCT LIABILITY 64 (1989); John A. Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 MICH. L. REV. 1820, 1823-25 (1987).

45. STEPHEN BREYER, REGULATION AND ITS REFORM 25-26 (1982); Siliciano, *supra* note 44, at 1822-24. For a comprehensive survey of research on the limitations of human judgment and reason in making marketplace decisions, see Bailey H. Kulkin, *Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893, 966-93 (1990).

46. Robert Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott"*, 39 VAND. L. REV. 1507, 1555 (1986) (footnote omitted).

47. *Id.* at 1561; *see* Curran, *supra* note 13, at 150.

48. Heidt, *supra* note 46, at 1561-63.

49. Hamilton, *supra* note 1, at 1386-436.

safety standard has boosted consumer confidence or increased output or rivalry.[50]

The claim that safety standards remedy the failure to provide consumers with adequate information is much easier to credit on an a priori basis. The trouble with the argument is that, in reality, many standards and certification procedures go beyond what is needed to provide consumers with adequate information. Many standards and certification procedures contain implicit or explicit agreements not to produce a product, thereby banning it. The problem of lack of consumer information can frequently be remedied by the simple expedient of directly providing the consumer with the necessary information.[51] As one commentator has stated:

> Instead of merely denying a product standards approval, the standards organization, in appropriate cases, could require warning labels or could use grading standards that rank products according to their test performance, leaving consumers to decide what grade they want. As an example, rather than banning certain tires, their durability could be reflected in a grading system.[52]

The argument that private self-regulation in the interest of public safety and welfare is needed to avoid wasteful government regulation also should be treated with some skepticism. As Justice Black pointed out more than half a century ago, self-regulation is a form of "extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations . . . ."[53] While governmental regulators may sometimes be criticized as unaccountable to the body politic, their unaccountability pales next to that of private self-regulators. Private self-regulators are accountable to no one but themselves.[54]

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50. Goldenberg, *supra* note 24, at 647.

51. Frequently, however, is not always. At times, true standards or other exclusion regulation can be justified on the grounds that information cannot be given to consumers, or that consumers are for some reason incapable of utilizing the information. *See infra* notes 194-97 and accompanying text.

52. Goldenberg, *supra* note 24, at 656 (footnote omitted).

53. Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941).

54. *Cf.* Roberta Lynch & Ann Markusen, *Can Markets Govern?*, *in* THE AMERICAN PROSPECT, 125, 129-30 (1994) (noting that private firms in general, and private firms trying to carry out governmental functions in particular, are often wasteful, mismanaged, and subject to graft and programmatic failures).

One could argue that private self-regulators, unlike governmental regulators, are accountable to the "market." The problem with this argument is that it presupposes a vigilant and competitive market. If a standardization program must be justified on the basis of public welfare and safety considerations, rather than on purely competitive considerations, then the existence of such a market cannot be presumed. By definition, such standardization programs do not further competition

If governmental regulators are accused of being "captured" by the entities that they regulate,[55] no resort to capture theory is necessary in the case of private self-regulators. By definition, self-regulators have their own private interests at heart. The history of private self-regulation is replete with examples of such regulation being used to stifle competition and advance the regulators' private interests at the expense of consumers and the general public.[56]

The somewhat inconsistent positions of the Supreme Court and the inconclusiveness of policy arguments have led to a division among lower courts on the status of noncompetitive public safety and welfare considerations in a Rule of Reason analysis. Some lower courts have taken the Court at its word in *NSPE* and *Indiana Dentists* and have held that noncompetitive justifications have no place in a Rule of Reason analysis. For example, in *COMPACT v. Metropolitan Government of Nashville*,[57] a federal district court rejected a claim that overcoming the effects of racial discrimination justified joint bargaining by minority architects. In *United States v. National Ass'n of Broadcasters*,[58] the United States District Court for the District of Columbia rejected an argument that restrictions on the number of commercials benefitted the public by increasing the "quality" of commercial television. Both courts cited *NSPE* as authority for their rejection of the proffered justifications.[59]

At least one federal appellate court, however, has recently authorized use of explicit noncompetitive social welfare justifications in a Rule of Reason analysis. In *United States v. Brown University*,[60] the Third Circuit reversed and remanded a ruling by the district court that an arrangement among colleges and universities to set uniform levels of scholarship assistance violated section 1 of the Sherman Act. In remanding the decision to the district court, the court specifically instructed the district court to consider the social welfare justification that the arrangement allowed the schools involved to give more scholar-

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as such. If they did, no resort to public welfare and safety considerations would be necessary. Very often, these programs injure the very competition that is supposed to make private self-regulators accountable to the "market." *See infra* text accompanying notes 79-87, 94-98, 103-06.

55. For a discussion of the various forms of "capture theory," see John Shephard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 723-28 (1986).

56. *See, e.g.*, FTC STAFF REPORT, *supra* note 20, at 69-110, 188-230 (describing numerous cases in which private standards and certification procedures deprived consumers of meaningful choices, kept superior products out of the market, and misled consumers).

57. 594 F. Supp. 1567 (M.D. Tenn. 1984).

58. 536 F. Supp. 149 (D.D.C. 1982).

59. *COMPACT*, 594 F. Supp. at 1573; *National Ass'n of Broadcasters*, 536 F. Supp. at 166-68.

60. 5 F.3d 658 (3d Cir. 1993).

ship aid to needy students by avoiding bidding wars for "talented" students.[61]

Use of *Brown University* to support the broad-based inclusion of noncompetitive values in a Rule of Reason analysis may be a mistake. First, the Third Circuit attempted to distinguish the case before it from both *NSPE* and *Indiana Dentists* on the basis that the colleges that created the scholarship arrangement were charitable organizations, rather than the profit-making entities involved in the latter two cases.[62] This, of course, suggests that the court would not allow noncompetitive social justifications in cases involving profit-making entities.[63] Second, the court made a somewhat weak attempt to cast the social justifications for the arrangement in competitive terms. The court implied that the arrangement could enhance output by "extend[ing] a service to students who are financially 'needy' and would not otherwise be able to afford the high cost of an education [at the defendant institutions]."[64] This indicates that the court was not entirely comfortable with its holding that noncompetitive social justification could be factored into a Rule of Reason analysis.

Other courts, in cases involving health care, have also allowed noncompetitive health and safety considerations to come into play. These courts, however, have not recognized an explicit role for noncompetitive safety and welfare justifications in a strict Rule of Reason analysis. Instead, these courts have allowed such justifications to be advanced in the form of an affirmative defense.[65] The leading case in this regard is *Wilk v. American Medical Ass'n*.[66] *Wilk* involved a challenge by chiro-

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61. *Id.* at 673, 678-79.

62. *Id.* at 677-78.

63. *See also* Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1054 (interim ed. 1994). *Hertz* involved a challenge to a New York City ordinance that prohibited car rental companies from surcharging renters with residences in New York City. *Id.* at 123-24. The appellants claimed that the statute was invalid on a number of grounds, including that the ordinance violated § 1 of the Sherman Act. *Id.* at 124. The Second Circuit reversed a district court's holding that the ordinance was outside the scope of the Sherman Act. *Id.* at 132. In doing so, the appeals court ruled that the ordinance was to be tested under the Rule of Reason. *Id.* The court also stated that the noncompetitive justification of preventing discrimination against city residents could be considered by the trial court in applying the Rule of Reason. *Id.* at 130-31. However, the *Hertz* court noted that it was allowing the noncompetitive justification to be put forth only because the activity challenged was undertaken by a municipality and indicated that such a justification would not be allowed if the actions of private parties were being challenged. *Id.*

64. *Brown University*, 5 F.3d at 677.

65. One commentator terms this defense the "public benefit defense." Goldenberg, *supra* note 24, at 643.

66. 895 F.2d 352 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990) [hereinafter *Wilk II*]; Wilk v. American Medical Ass'n, 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984) [hereinafter *Wilk I*].

practors of the rules promulgated by the American Medical Association, the Joint Committee on Hospital Accreditation, and several other professional associations. These rules made it a breach of professional ethics for any member to voluntarily associate with a chiropractor or allow their facilities to be used by chiropractors. The United States Court of Appeals for the Seventh Circuit held that the rules were to be evaluated under a Rule of Reason analysis and that the sole factor in such an analysis was the effect of the rules on "competition."[67]

The court, however, also allowed the defendants to justify their actions on the basis that these rules were needed to protect the quality of care provided to patients.[68] To establish this defense, which later came to be known as the "quality of care defense," the defendants were required to establish that (1) "they genuinely entertained a concern for what they perceive[d] as a scientific method in the care of each person with whom they entered into a doctor-patient relationship"; (2) "this concern [was] objectively reasonable"; (3) "this concern [was] the dominant motivating factor" in defendant's promulgation and implementation of the challenged rules; and (4) "this concern for scientific method in care could not have been adequately satisfied in a manner less restrictive of competition."[69]

What then is the status of public health and safety concerns in a Rule of Reason analysis? The "technical" answer to that question seems to be that, with possible exceptions that are of little help to most trade and professional associations, the concerns are irrelevant unless they can be directly tied to some competitive effect.[70] On the other hand, the Supreme Court, most lower courts, and antitrust enforcement authorities are unlikely to find that a standard or certification procedure that is genuinely necessary to protect human life, health, or safety is proscribed by the antitrust laws.[71]

Courts and enforcement authorities are likely to recognize the relevance of noncompetitive health and safety considerations in the form of a narrow and difficult-to-prove public health and safety defense. In addition, they are also likely to require that the defendant prove that the following conditions exist in order to establish the public health and

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67. *Wilk I*, 719 F.2d at 225.

68. *Wilk II*, 895 F.2d at 362; *Wilk I*, 719 F.2d at 227.

69. *Wilk II*, 895 F.2d at 362; *Wilk I*, 719 F.2d at 227. The court in *Wilk II* noted that Supreme Court decisions rendered after *Wilk I*, notably Patrick v. Burget, 486 U.S. 94 (1988), and FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986), may have undermined the "quality of care defense" articulated in *Wilk I*. *Wilk II*, 895 F.2d at 362. The *Wilk II* court also noted that the quality of care defense had been subject to a great deal of academic criticism. *Id.*

70. *See supra* notes 22-29, 57-59 and accompanying text.

71. *Cf.* 7 AREEDA, *supra* note 37, at 381 (expressing doubt that the Supreme Court would condemn a restraint that actually saved lives).

safety defense. First, the standard or certification decision must promote public health or safety. Other noncompetitive social policy goals, worthy as they may be, will not serve as justifications for what is on balance an anticompetitive restraint.[72] Second, a plausible link should exist between the standard or certification decision and the promotion of public health or safety.[73] Third, the public health and safety objectives cannot be attained in any manner which is less injurious to competition.[74] A standard or certification procedure that complies with these requirements will likely fall within the defense and pass muster under antitrust laws.

IV. THE COMPETITIVE EFFECTS OF STANDARDS—A THEORETICAL ANALYSIS

A. Variety Simplification Standards

Variety simplification standards, which reduce the variety of products sold or services offered, can have a number of procompetitive effects. Variety reduction can increase competition by facilitating consumer comparison shopping, including price comparisons.[75] For example, if detergents are available in standard-sized boxes, it is relatively easy for consumers to make price comparisons among competing brands. In contrast, if producers offer each brand in a variety of sizes, the consumer's "search costs" would be increased because the consumer would have to calculate "unit costs" to make price comparisons between different brands in different-sized boxes.[76]

Variety simplification standards can also enhance productive efficiencies. Such standards, by definition, reduce the variety of products

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72. *See supra* notes 55-56 and accompanying text.

73. This is merely a specific application of the general principle that a restraint must promote the claimed justifications if it is to pass muster under the Rule of Reason. *See generally* 7 AREEDA, *supra* note 37, ¶ 1505(a).

74. *Cf. Wilk II*, 895 F.2d 352, 362 (7th Cir. 1990), *cert. denied*, 496 U.S. 927 (1990); *Wilk I*, 719 F.2d 207, 227 (7th Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984); Goldenberg, *supra* note 24, at 656.

75. HEMENWAY, *supra* note 8, at 27.

76. The benefits of reducing consumer search costs should not be overestimated. A cartel that fixes prices can argue that it is reducing consumer search costs by eliminating the need for consumers to spend time searching out the best price. Something akin to such an argument was made by the defendants in *Catalano, Inc. v. Target Sales*. 446 U.S. 643 (1980) (per curiam). The defendants, beer wholesalers, argued that an agreement among themselves not to grant short-term trade credit, ought not be per se illegal under § 1 of the Sherman Act. Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097, 1099 (9th Cir. 1979), *rev'd*, 446 U.S. 643 (1980). The defendants argued that they enhanced competition by "increasing the visibility of price." *Id.* A divided panel of the United States Court of Appeals for the Ninth Circuit accepted the defendant's argument. *Id.* That decision was reversed, per curiam, by the Supreme Court, which held that the agreement was illegal per se. *Catalano*, 446 U.S. at 649-50.

that are made. This reduction in variety can increase the productive efficiency of firms by allowing them to take advantage of "longer production runs, greater use of equipment, lower labor-training costs, and lower inventory costs."[77] In addition, reducing the variety of products allows both producers and consumers to accumulate greater experience about the products remaining on the market.[78] This will enhance the productive efficiency and allow the consumer to make more intelligent and informed consumption decisions.

Lower production costs and enhanced productivity can in turn trigger competition-enhancing new market entry. The cost efficiencies engendered by variety reduction make market entry cheaper and more profitable. This may be just the right combination to encourage risk-averse managers to bring their firms into the market and risk-averse investors to supply capital for new market entry.

The promulgation and implementation of variety simplification standards unfortunately can also have serious anticompetitive effects. The most obvious anticompetitive effect is a reduction in consumer choice. Variety simplification standards, by agreement among competitors, remove products and services from the market that at least some consumers find specially desirable.[79] The removal of the products or services also leads to a loss of any special characteristics or advantages the excluded varieties may have had.[80] The disappearance of these characteristics or advantages is a direct loss to consumers. Their disappearance, however, may also cause indirect loss by diminishing competitive pressure on the producers of approved varieties to replicate or improve upon the characteristics and advantages of the now-excluded varieties.

Variety simplification standards can injure competition by preventing innovative or superior products from being brought to the market and by making it more difficult for a new firm to enter the market. As a practical matter, innovative or otherwise superior designs may be excluded from the market if they are not among the chosen varieties in-

77. FTC STAFF REPORT, *supra* note 20, at 55; *see also* Johnathan T. Howe & Leland J. Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 WASH. U. L.Q. 357, 378 (1982) (simplification standards reduce production costs).

78. HEMENWAY, *supra* note 8, at 27.

79. 7 AREEDA, *supra* note 37, at 373. Presumably, if consumers did not find some special merit in a particular variety of product, they would not purchase it and firms would remove it from the market on their own initiative. *But see* HEMENWAY, *supra* note 8, at 31 (suggesting that the problem of removal of varieties desired by consumers is more a theoretical problem than a real problem).

80. FTC STAFF REPORT, *supra* note 20, at 59.

corporated into the standard.[81] Standards may also hinder entry into the market if the chosen varieties embody "the most capital-intensive version of an emerging technology," thus making it more expensive and difficult for firms to enter the market.[82]

The promulgation of variety simplification standards also can injure competition by facilitating price fixing or oligopolistic coordination among ostensibly competing firms. Uniform, standardized products greatly facilitate outright price-fixing agreements by cartels.[83] The production of individualized, nonuniform products hinder such price fixing because of increased difficulty of coordination and detection of firms that "cheat" on the cartel agreement.[84]

Variety reduction also helps facilitate oligopolistic coordination. Firms that are engaging in oligopolistic coordination behave and price their products in accordance with what other firms in the market are doing, rather than in their own estimate of market conditions.[85] Product simplification standards can ease the task of oligopolistic coordination.[86] Product simplification entails a reduction in the variety of products, hence fewer activities need to be coordinated. Oligopolistic price parallelism is particularly assisted by product simplification standards. The greater the similarity among competitors' products, the easier it is for firms to set their prices by emulating other firms in the market. As one commentator has noted, "[t]he role of standards for uniformity is that since price is per something, by creating fewer 'somethings,' [oligopolistic price coordination] may be facilitated, and industry self-enforcement made easier."[87]

B. Interchangeability Standards

The adoption and implementation of product interchangeability standards creates several procompetitive effects. Product interchangeability standards often act as variety simplification standards. Requiring producers to make their products interchangeable with complementary or competing products often leads to a reduction in the variety of products sold.[88] Thus, it should not be surprising that product interchangea-

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81. FTC STAFF REPORT, *supra* note 20, at 62.

82. FTC STAFF REPORT, *supra* note 20, at 63.

83. RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST LAW 377 (2d ed. 1981); STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 188 (1993); *see also* HOVENKAMP, *supra* note 19, at 87 (noting that cartels often use standardization of products as a method of enforcing price fixing agreements).

84. HEMENWAY, *supra* note 8, at 31.

85. HEMENWAY, *supra* note 8, at 31.

86. 7 AREEDA, *supra* note 37, at 373; HEMENWAY, *supra* note 8, at 31.

87. HEMENWAY, *supra* note 8, at 31.

88. HEMENWAY, *supra* note 8, at 37.

bility standards can create some of the same productive efficiencies as variety simplification standards: allowing longer production runs, creating economies of scale, lowering labor-training and inventory costs, and allowing producers to gain more in-depth knowledge of the products on the market.[89] Product interchangeability standards also supply the same informational benefits to consumers as variety simplification standards. Product interchangeability standards make it easier for the consumer to comparison shop and to develop more extensive knowledge of the products on the market.

Interchangeability standards have procompetitive effects that they do not share with variety simplification standards. The existence of the standards are a rather obvious boon to consumers. For example, the consumer does not need to concern herself with whether the light bulb she buys will fit into the socket of her lamp, or whether the lamp itself will properly plug into the electrical outlet. Product compatibility need not enter into a purchasing decision. In economic terms, the existence of the interchangeability standard reduces the consumer's search costs.

Interchangeability standards not only are a convenience to consumers, they free consumers from dependence on any one source of supply.[90] For example, if a consumer is not satisfied with the performance or price of one brand of floppy computer disk, the consumer may turn to a myriad of competing brands with the assurance that they will fit her personal computer. Eliminating dependence on a single source enhances competition between the alternative sources for the consumer's business and prevents single-source arrogance toward captive consumers.

Product interchangeability standards can also enhance competition by facilitating new entry into markets and frustrating certain types of anticompetitive tying arrangements. Interchangeability standards facilitate new entry because a new entrant, by adhering to the standard, knows that its product will work with other products the consumer already possesses.[91] This assurance cuts down the risk of market entry by broadening the new entrant's potential market and by reducing the ability of existing market participants to retaliate against the new entrant.[92]

Adherence to interchangeability standards also prevents the imposition of physical tying arrangements. A physical tying arrangement exists when the maker of a product forces the consumer to buy a sec-

89. HEMENWAY, *supra* note 8, at 37. For a discussion of the benefits of product simplification standards for productive efficiency, see *supra* notes 14-23 and accompanying text.

90. HEMENWAY, *supra* note 8, at 38; Heidt, *supra* note 46, at 1554.

91. HEMENWAY, *supra* note 8, at 38.

92. HEMENWAY, *supra* note 8, at 38.

ond product by making the second product the only one that is physically compatible with the first product.[93] Under some circumstances, physical tying arrangements can be quite injurious to competition.[94] Physical tying arrangements are totally inconsistent with adherence to an interchangeability standard. Hence, such standards prevent the imposition of physical tying arrangements.

Theoretically, interchangeability standards have much of the same potential for injuring competition as their variety simplification cousins.[95] Consumers will be denied the noninterchangeable varieties and any special characteristics or advantages they might possess. The elimination of noninterchangeable varieties could possibly facilitate price fixing or oligopolistic coordination. One commentator, David Hemenway, suggests, however, that these ill effects are more theoretical than real.[96] Hemenway suggests that the "principal real world problem" of interchangeability standards is that they stifle innovation.[97] Innovative and superior products may be kept off the market if they do not meet the interchangeability standard. Hemenway gives the example of razor blades. He points out that if "safety razors and blades were made by different manufacturers . . . and there was great interchangeability, it might have been harder for a single razor company to have introduced the injector or double blade concept."[98]

C. Quality Standards—Terminology and Measurement Standards, and Testing Standards

Terminology and measurement standards and testing standards tend to present relatively few serious antitrust problems. Both types of standards tend to have the procompetitive effects of providing consumers with more information and facilitating consumer comparison of products and services.[99] Testing standards also offer the additional benefit of decreasing producer costs by eliminating the need for individual producers to design and implement their own tests.[100] The only serious danger that can arise from the creation and implementation of definitional, measurement, or testing standards is that producers can use them to mislead consumers. For example, a professional or trade association's selection of characteristics to be measured implies to consum-

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93. Donald W. Jordan, Comment, *Physical Tie-Ins as Antitrust Violations*, 1975 U. ILL. L. REV. 224, 224.

94. *Id.* at 233-34.

95. FTC STAFF REPORT, *supra* note 20, at 62-63; HEMENWAY, *supra* note 8, at 38.

96. HEMENWAY, *supra* note 8, at 39.

97. HEMENWAY, *supra* note 8, at 39.

98. HEMENWAY, *supra* note 8, at 39.

99. FTC STAFF REPORT, *supra* note 20, at 49; HEMENWAY, *supra* note 8, at 57-59.

100. HEMENWAY, *supra* note 8, at 59.

ers that those characteristics are the ones of most importance to consumers or, at the very least, are of significant interest to consumers. If those characteristics are trivial, however, competition can be injured if consumers believe the implied representation and are diverted from purchasing superior products or services. So long as terminology and measurement standards and testing standards are not misleading, they are generally procompetitive and unobjectionable on antitrust grounds.

D. Quality Standards—Minimum Quality Standards

Minimum quality standards, including safety standards, are some of the most common standards in use. Unfortunately, they also raise what are, by far, the most difficult analytical issues in a Rule of Reason analysis. As discussed above, proponents of minimum quality standards frequently justify them on the basis of noncompetitive health and safety justifications.[101] The legal relevancy of these justifications is certainly open to dispute.[102] Testing a minimum quality standard is a tricky proposition, even if it does not raise an issue of the relevancy of health and safety concerns. The most serious problem involved in testing minimum quality standards under the Rule of Reason is that a judgment must be made on whether the standards are informational or are part of an explicit or implicit agreement not to produce certain products or services. This distinction is extremely difficult to make in practice.

The information/agreement distinction arises because of the potential anticompetitive and procompetitive effects of minimum quality standards. Minimum quality standards have a number of potential anticompetitive vices. Such standards can restrict consumer choice, stifle the introduction of innovative new products and techniques, increase prices, and decrease output.[103] An examination of a hypothetical quality standard will illustrate this point.

Assume that the manufacturers of widget-making machinery establish a standard in which the critical components of the machine have a mean time between failures ("MTBF") of at least 100,000 hours. If the standard is followed, this may well raise the price of the machinery because possibly less expensive, but less durable, materials cannot be used in making the critical components. Indeed, if manufacturers adhere to the standard, any machines that are less expensive because of their less durable materials may disappear from the market.

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101. *See supra* note 24, and accompanying text.

102. *See supra* notes 24-29 and accompanying text.

103. FTC STAFF REPORT, *supra* note 20, at 64; HEMENWAY, *supra* note 8, at 77; *see also* Goldenberg, *supra* note 24, at 633, 653-54 (emphasizing that standards inhibit consumer's own weighing of product attributes).

This development will lead to a rise in the price of the machinery and possibly to a decrease in output of machines.[104] Moreover, buyers of the machinery will be denied the choice of trading off decreased durability for lower price, a tradeoff consumers often make.[105] Innovative designs that do not meet the 100,000-hour MTBF standard will not be produced. The inhibiting effect on innovation is even worse if the standard is a design standard that specifies the materials necessary to meet the 100,000-hour criterion. In that case innovative machinery using new materials which meet the 100,000-hour criterion will still not be acceptable under the standard.[106]

Perhaps the most crucial variable in determining whether this parade of anticompetitive effects will come to pass is the existence of an explicit or implicit agreement among competitors to utilize the standard.[107] Without such an agreement, many of the anticompetitive effects may never occur. A continued examination of the hypothetical widget machine durability standard illustrates this point.

The managers of various firms face the a choice of adhering to the standard or continuing to produce nonstandardized goods. If the managers believe that demand exists for less durable machines and that the manufacture of such products will be profitable, they are likely to continue manufacturing such products. Without some form of coordination with other firms, abandoning the profitable manufacturing of nonstandardized products is simply too risky. Too much risk exists for the firm that adheres to the standard and does not make cheaper, less durable machines. The company could lose business and profits to its rivals. The continued manufacture and sale of the less durable machines would avoid most of the anticompetitive effects of the standards.

On the other hand, an express or implied agreement to adhere to standards could provide business managers the assurances they need that their rivals will not "undercut" them by continuing to make less durable, less expensive machines. With these assurances, the managers of the firms in the market could afford to cease producing the machines that do not meet a new standard without fear that a rival will take

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104. *See supra* note 25.

105. Goldenberg, *supra* note 24, at 651, 653-54.

106. HEMENWAY, *supra* note 8, at 77; *see also* FTC STAFF REPORT, *supra* note 20, at 69-86 (detailing instances where product specification standards kept equivalent or even superior designs from penetrating the market).

107. *Cf.* Clark C. Havighurst, *Professional Peer Review and the Antitrust Laws*, 36 CASE W. RES. L. REV. 1117, 1132-33 (1986) (recognizing that agreements which implement or enforce standards rather than the standards themselves create injury to competition); Phillip C. Kissim, *Government Policy Toward Medical Accreditation and Certification: The Antitrust Laws and Other Procompetitive Strategies*, 1983 WIS. L. REV. 1, 48-49 (noting the greater anticompetitive potential of product standardization than of certification).

away business by continuing to make the cheaper variety of machine. In turn, this development could lead to uniform behavior on the part of firms in a particular market and the creation of the anticompetitive effects described above.

Of course, the same lock-step uniformity and apparent anticompetitive effects could exist without some form of agreement. If all managers independently decided that no significant consumer demand existed for nonstandard machines or that insufficient demand existed to make the manufacture and sale of such machines profitable, then all competitors would choose to adhere to the standard without an agreement. If the managers are correct in their view of demand and profitability, no competitive harm occurs. Independent decisions to eliminate products that cannot be made profitably or for which insufficient consumer demand exists are not threats to competition.

Of course, managers may make an incorrect analysis of the market.[108] However, unless they and any potential new entrants into the market unanimously make that incorrect analysis and adhere to their view over the long run, someone is likely to produce and successfully market nonstandard machines.[109] This development will tend to ameliorate many of the anticompetitive effects of the standard.

In sum, the most important issue in judging anticompetitive potential of quality or safety standards is the existence of some form of agreement among the competitors to adhere to the standards. If no such agreement exists, there may be no anticompetitive effects, or any negative effects may be outweighed by the procompetitive effects of the standards. Minimum quality standards, as long as they do not give a false or misleading impression to consumers, can have procompetitive effects.

The principal procompetitive effect of a minimum quality standard is to supply valuable information to all consumers.[110] Consumers are unable to judge the characteristics of many products or services.[111] Unfortunately, markets sometimes do not provide consumers with ade-

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108. Managers, like other human beings, do make mistakes. Indeed, if the view is mistaken the existence of the standard itself may encourage managers following the herd instinct to take the incorrect view of market demand.

109. Contrary to some microeconomic theorists, managers can harbor widespread mistaken beliefs over a very long period.

110. FTC STAFF REPORT, *supra* note 20, at 50; HOVENKAMP, *supra* note 19, at 85; Heidt, *supra* note 46, at 1555; Howe & Badger, *supra* note 77, at 378.

111. See *supra* note 45 and accompanying text.

quate information on those characteristics.[112] This is particularly true of the safety attributes of a product or service.[113]

A minimum quality standard can provide consumers with information on the subject of the standard. Take the example of the hypothetical widget machine durability standard. For many buyers, durability would be an important characteristic; but durability would not be necessarily the only one they weigh. Unfortunately, widget makers may have no way to judge a priori the durability of the machines they are purchasing. The durability standard, when coupled with some mechanism for communicating compliance or noncompliance to buyers such as a certification procedure, can supply the missing information about durability.[114]

The informational benefits of minimum quality standards do not flow to consumers alone. Competitors in the market can also receive valuable information. As a Federal Trade Commission Staff Report pointed out, "[b]y centralizing results of costly research and development activity into a single document, standards can facilitate the transfer of technology throughout industries. In this way standards may provide useful information about the risks of investing in capital equipment or pursuing research into product or process innovations."[115]

The informational benefits of minimum quality standards may also engender a second competitive benefit: facilitating new market entry. A new entrant into a market may have to assure potential buyers that its goods or services have qualities that consumers find desirable. If the new entrant can meet preset standards, its difficult burden of convincing consumers will be lightened. This reduction in the burden of per-

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112. A number of reasons may account for the failure of markets to produce adequate consumer information. First, a "free riding" problem may exist with respect to consumer information since such information is often expensive to produce and disseminate. However, feasible methods to make the consumer pay for such information rarely exist. Thus, the producer of the information cannot recoup its costs, while its competitors take a "free ride" at the expense of the producer. BREYER, *supra* note 45, at 27; ROGER N. WAUD, ECONOMICS 670-71 (4th ed. 1989). Other reasons why consumer information may be underproduced include: a lack of competition in the market, BREYER, *supra* note 45, at 28; Robert Pitofsky, *Advertising Regulation and the Consumer Movement*, *in* ISSUES IN ADVERTISING 30-31 (David Tuerck ed., 1978), a belief by firms that accumulation of the data is unjustifiably expensive, and a belief by firms that consumers will simply not understand the information. Pitofsky, *supra*, at 30-31.

113. *See supra* note 44 and accompanying text.

114. The benefits to competition and otherwise of providing consumers with accurate product and service information are somewhat self-evident. These benefits can be cast into economic terms. The information helps reduce risk of purchase to consumers and consumer search costs. Heidt, *supra* note 46, at 1555; HEMENWAY, *supra* note 8, at 71. The standards, in a world where consumers can only judge the average quality of all industry products, can also prevent those making goods that do not meet the standards from free-riding on the efforts of those making goods that do meet the standard. HEMENWAY, *supra* note 8, at 71; Heidt, *supra* note 46, at 1555.

115. FTC STAFF REPORT, *supra* note 20, at 52.

suasion can make entry cheaper and less risky, thereby encouraging firms to enter the market.[116]

The prime anticompetitive danger from minimum quality standards arises when competitors implicitly or explicitly agree to follow them. The prime competitive benefit of minimum quality standards is the spread of information to market participants. This is the genesis of the agreement/information distinction.

Unfortunately, while the agreement/information distinction is fairly easy to articulate, applying it in practice is a far more daunting task. Do the accreditation standards of an association of colleges and universities represent a mere informational expression of their opinion on the qualities of members and would-be members, or do they represent an implicit agreement among the members to adhere to the standard?[117] Do the standards for peer review, and decisions applying those standards, of a professional medical association represent public information for consumers on practitioner quality, or an agreement by practitioners to follow those standards?[118]

Even if a court can determine whether an explicit or implicit agreement exists, the court is still faced with the difficult tasks of (a) ascertaining the extent to which the agreement injures competition; (b) whether any offsetting informational benefits to competition exist; and (c) if such benefits exist, weighing the benefits to competition against the amount of injury to competition created by the agreement.[119] All these effects may be difficult to establish, let alone measure in some meaningful way.

Minimum quality standards are not alone in creating this problem for courts. A court, in evaluating variety simplification and interchangeability standards under the Rule of Reason, faces the problem of weighing effects whose existence is uncertain, and whose extent is even less certain. Fortunately, for both courts and counselors, certain "common sense" indicia exist that can be used as surrogates for direct proof of procompetitive or anticompetitive effects of standards. This Article now turns to a consideration of those practical surrogates.

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116. FTC STAFF REPORT, *supra* note 20, at 52; Heidt, *supra* note 46, at 1555-56.

117. *Compare* Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1048, 1048-88 (1979) (emphasizing uniformity of behavior caused by law school accreditation standards) *with* Kissim, *supra* note 107, at 39 (emphasizing informational aspects of medical school accreditation process); *see also* Havighurst, *supra* note 107, at 1142-45 (noting the difficulty in distinguishing standard making and agreements to abide by those standards).

118. *See supra* note 117.

119. *See supra* note 15 and accompanying text.

V. PRACTICAL FACTORS IN ANALYZING STANDARDIZATION PROGRAMS

A. Factors That Can Cause a Standardization Program to be Treated De Facto as Per Se Illegal

Courts usually analyze standards promulgated by trade and professional associations under the Rule of Reason.[120] Nonetheless, some standards can be condemned so quickly under the Rule of Reason that, for all intents and purposes, those standards are treated as per se illegal. It may seem paradoxical to begin a section on practical factors for applying the Rule of Reason to standards with a discussion of factors that will result in the summary condemnation of a standard. This approach should, however, not be surprising. If a trade or professional association attempted to develop a "standard" for pricing for its members goods or services, that standard would quickly be held to be per se illegal price fixing.[121] Other ancillary practices exist that are apt to result in the rapid condemnation of a challenged standard.

Four specific practices are particularly likely to result in a de facto finding that a standardization program is per se illegal. The first practice is the creation of explicit or implicit agreements to standardize terms of trade offered to consumers. The second practice is the use of coercive boycotts against third parties in an attempt to enforce a standard. The third practice is the adoption of a standard in the face of substantial consumer opposition. The fourth practice is the adoption of arbitrary standards that lack a reasonable basis. This Article will now explore these four practices.

1. Standardization of Nonprice Terms of Trade

Any agreement to standardize terms of trade that are offered to consumers or suppliers will probably be summarily condemned under the antitrust laws. The Supreme Court established this principle more than sixty years ago in *Paramount Famous Lasky Corp. v. United States*[122] ("*Paramount Famous Lasky*") and *United States v. First National Pictures, Inc.*[123] ("*First Nat'l Pictures*"). In the former case, the Court held that an agreement among competing film distributors not to deal with anyone who did not adhere to a compulsory arbitration

120. *See supra* note 14 and accompanying text.

121. *See, e.g.*, FTC v. Superior Trial Lawyers Ass'n, 493 U.S. 411, 432-36 (1990); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921); National Elec. Contractors Ass'n v. National Contractors Ass'n, 689 F.2d 1196 (4th Cir. 1982), *cert. dismissed*, 463 U.S. 1234 (1983).

122. 282 U.S. 30 (1930).

123. 282 U.S. 44 (1930).

clause in film exhibition contracts violated section 1 of the Sherman Act.[124] In the latter case, the Court held an agreement among competing film distributors not to deal with any film exhibitor who had not posted a security deposit for films to be a violation of section 1 of the Sherman Act.[125] In both cases, the Court condemned the restraints without any elaborate inquiry into their purposes or effects.

The lesson of *Paramount Famous Lasky* and *First Nat'l Pictures* was reiterated by the Court in the *Indiana Dentists* case. The challenged rule in *Indiana Dentists* declared that it was a breach of ethics for dentists to submit dental X-rays to insurance companies for a review of the appropriateness of the patient's treatment. The defendant association of dentists was attempting, through joint bargaining, to obtain a term of trade, that being not having to submit their patients' X-rays to insurance companies for cost-containment reviews, which they could not obtain through individual bargaining. The Supreme Court upheld a finding by the Federal Trade Commission that the rule was an unreasonable restraint of trade under section 1 of the Sherman Act. While the Court applied the Rule of Reason, it also stated that no elaborate analysis, proof of defendant's market power, or proof of specific anticompetitive effects were necessary to condemn the challenged rule as a violation of section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act.[126]

In *Hartford Fire Insurance Co. v. California*,[127] the Court recently reaffirmed the principle that joint efforts to force customers to accept particular terms of trade violate section 1 of the Sherman Act. In that case, Justice Scalia, writing for the Court, noted that "[o]f course, as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts."[128]

Trade or professional association attempts to standardize any term of trade that a consumer would possibly care to bargain over are thus likely to face summary condemnation under section 1 of the Sherman

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124. *Paramount Famous Lasky*, 282 U.S. at 43-44.

125. *First Nat'l Pictures*, 282 U.S. at 54-55. In both cases the form of the agreement has sometimes led courts and commentators to characterize these cases as group boycott cases. This is a mischaracterization. They are much more akin to price fixing cases. LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 77 (1977). Competitors agreed not to compete in certain ways by allowing exhibitors to utilize courts to settle disputes and by allowing them to escape posting security deposits. In effect, the competitors obtained a term of trade with consumers which they may not have been able to obtain through individual free bargaining.

126. FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986).

127. 113 S. Ct. 2891 (interim ed. 1993).

128. *Id.* at 2913 (citing *Paramount Famous Lasky*, 282 U.S. 30, and *First Nat'l Pictures*, 282 U.S. 44).

Act. The standard may be accorded technical Rule of Reason treatment, but the process and result will be the same — rapid-fire condemnation. One distinguished commentator, Professor Lawrence Sullivan, has suggested that standardized nonprice terms of trade be given full-blown Rule of Reason treatment because such terms may have procompetitive benefits.[129] Professor Sullivan's suggestion is mistaken.

First, the purported distinction between price and nonprice terms of an agreement is tenuous at best.[130] As anyone who has ever negotiated a complex contract is aware, the price terms of an agreement affect and are affected by many of the nonprice terms. Second, the supposed benefits of agreements standardizing nonprice terms are highly dubious.[131] For example, Professor Sullivan mentions facilitating buyer and seller comparison of nonstandardized terms, including price, as a benefit of standardized terms. The problem with this reasoning is that it could be used to justify fixing all other terms of an agreement, including those intimately associated with price. Indeed, in *Catalano v. Target Sales, Inc.*, the defendants attempted to assert that a benefit of an agreement prohibiting the extension of credit to customers enhanced their ability to compare the prices of the beer they were purchasing.[132] The Supreme Court gave that argument the short shrift it deserved.[133]

Standardized terms in contracts can be useful to the parties and socially beneficial. For example, the compulsory arbitration clauses in *Paramount Famous Lasky* may have benefitted the parties to the contract by giving them a relatively expeditious and inexpensive alternative to the judicial resolution of contractual disputes.[134] Also, such clauses may benefit society by saving the judicial resources that would otherwise have been devoted to litigating contractual disputes.[135] In

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129. SULLIVAN, *supra* note 125, at 277. Another commentator, Richard Givens, seems to agree with Professor Sullivan. RICHARD A. GIVENS, ANTITRUST: AN ECONOMIC APPROACH 15-3 (1993). Givens, however, hedges his position by noting that an agreement to fix terms of trade that are readily converted into price, or treated as a "trade-off" for price likely will be deemed per se illegal. *Id.*

130. *Cf.* E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U. PITT. L. REV. 771, 785-92 (1984) (questioning the distinction between price and nonprice competition).

131. Ironically, Professor Sullivan seems to recognize this fact when he admits that it is often difficult to conceive of procompetitive justifications for standardizing aspects of what he calls "competitive style." SULLIVAN, *supra* note 125, at 279. Indeed, Professor Sullivan suggests that in the absence of integration of functions, such standardization can never be procompetitive. *Id.* at 281.

132. 446 U.S. 643, 649 (1980) (per curiam).

133. *Id.* at 649-50.

134. Proponents of arbitration cite its speed and cost savings as two of its major advantages. Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 288 (1990).

other words, the clauses may have been economically efficient for the parties and for society. Indeed, their efficiencies may be so compelling that the parties to most, if not all contracts, would voluntarily include an arbitration clause in their contracts. The efficiencies, however, are generated by the arbitration clauses themselves, not by the agreement among competitors to place arbitration clauses in all their contracts.

The only conceivable argument justifying the agreement among competitors to use arbitration clauses is that, without such an agreement, competitive pressures would force them to accede to the demands of customers who did not want the clauses. This development would cause the loss of the efficiencies of the arbitration clauses. The problem with the argument that competition will vitiate the benefits of arbitration clauses is that, as Justice Stevens put it, it is a "frontal assault on the basic policy of the Sherman Act."[136] The gist of the argument is that competition itself is unreasonable and does not produce socially beneficial outcomes. This argument has been consistently rejected by the Supreme Court and lower federal courts.[137]

Thus, implicit or explicit agreements among competitors to standardize terms of trade with consumers are highly suspect and likely to be deemed a violation of section 1 of the Sherman Act. This strong presumption against validity does not apply to joint actions that might tend to have the effect of standardizing terms, but do not involve an explicit or implicit agreement among competitors to adopt standardized terms. The best example of this phenomenon is the circulation of standard forms and contract clauses by trade and professional associations.[138] These receive much more tolerant treatment under the antitrust laws for two reasons. First, as long as no competitor agreements to utilize the forms or clauses exists competitive pressures may force competitors to drop the clauses at the insistence of customers. Second, the clauses have the procompetitive benefit of spreading knowledge through the industry.[139] For example, suggested standard clauses may be helpful in instructing competitors how to meet legal or regulatory requirements.[140] For these reasons, activities that only tend to standardize the terms of trade offered to consumers are judged under a true Rule of Reason analysis.

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136. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 695 (1978).

137. *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 463 (1986); *National Soc'y of Professional Eng'rs*, 435 U.S. at 695; United States v. Brown University, 5 F.3d 658, 676 (3d Cir. 1993); Smith v. Pro Football, Inc., 593 F.2d 1173, 1186 (D.C. Cir. 1978); Sessions Tank Lines, Inc. v. Joor Mfg., 786 F. Supp. 1518, 1531 (C.D. Cal. 1991), *rev'd*, No. 92-55085, 1994 U.S. LEXIS 3281 (9th Cir. Feb. 25, 1994).

138. SULLIVAN, *supra* note 125, at 278-79.

139. SULLIVAN, *supra* note 125, at 278-79.

140. SULLIVAN, *supra* note 125, at 278-79.

2. Use of Coercive Tactics Against Third Parties to Enforce Standards

Another factor that can cause a seemingly unobjectionable standard to be condemned summarily under the antitrust laws is attempted enforcement of that standard through coercion aimed at third parties. The leading case that supports this proposition is *Fashion Originators' Guild of America v. FTC*[141] ("*FOGA*"). The defendants in *FOGA* were makers of what today would be termed "designer" women's fashions. The defendants, through their trade association, agreed to boycott any retail outlet that carried imitation designs produced by so-called "style pirates."[142] The Federal Trade Commission (FTC) issued a cease and desist order against the defendants and that order was eventually upheld by the Supreme Court. The Court upheld the FTC order even though the FTC "did not find that the combination fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality."[143] In effect, the Court treated the concerted refusal to deal as a per se illegal group boycott.

The suggestion that use of concerted coercion against third parties to enforce standards constitutes a per se violation of the antitrust laws is open to attack. Proponents of a full Rule of Reason standard can make a two-pronged argument: (a) *FOGA* itself has been tacitly overruled or seriously limited by the Court's decision in *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*[144] ("*Northwest Stationers*"); and (b) use of coercion against third parties is, in any event, not a relevant criterion in assessing the competitive impact of a restraint. While both prongs of the attack have a certain degree of surface plausibility, they are wide of the mark.

The Court in *Northwest Stationers* did cut back on the scope of the per se rule against group boycotts. The Court noted that the practices it condemned as per se illegal generally had a number of characteristics such as the boycotters' possession of market power or access to a facility essential for competition and the lack of a plausible procompetitive or efficiency-enhancing justification for the boycott.[145] The Court's holding in *Northwest Stationers* is not, however, likely to be of much comfort to trade or professional associations which seek to enforce standards by coercion aimed at third parties. First, the membership of many trade and professional associations collectively possess

141. 312 U.S. 457 (1941).
142. *Id.* at 461.
143. *Id.* at 466.
144. 472 U.S. 284 (1985).
145. *Id.* at 294.

market power in a relevant market. Second, the Court also noted that per se illegal group boycotts were not necessarily required to have all the characteristics the Court described.[146] Third, *Northwest Stationers* did not involve an attempt to coerce third parties into refusing to deal with a competitor.

The use of coercion against third parties changes the equation completely. As Professor Heidt points out, "a deep-seated tradition of judicial hostility exists toward concerted secondary pressure."[147] This hostility is not only found in antitrust cases, but also in labor and unfair competition cases.[148] The use of coercion against third parties is apt to draw summary condemnation by an antitrust court, in spite of the language in *Northwest Stationers* about the boycotters' possession of market power (or access to a facility essential for effective competition), or the lack of a procompetitive or efficiency-enhancing justification for the boycott.[149]

Summary condemnation by a court is justified. Gaining a competitive advantage by coercing customers or suppliers of competitors is antithetical to competition on the merits, and injures the competitive process.[150] Cartels historically have used such tactics to reduce output, raise prices, and stifle innovation.[151] Moreover, as Professor Heidt also points out, the use of coercion against third parties creates noncompeti-

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146. *Id.* at 295.

147. Heidt, *supra* note 46, at 1587.

148. Heidt, *supra* note 46, at 1587.

149. *See* ES Development, Inc. v. RMW Enters., Inc., 939 F.2d 547 (8th Cir. 1991), *cert. denied*, 112 S. Ct. 1176 (interim ed. 1992) (upholding injunction against group of automobile dealers who sought to block proposed "auto mall" by jointly pressuring manufacturers from whom they held dealership franchises — actions found to be per se illegal).

One case, Rickards v. Canine Eye Registration Found., 783 F.2d 1329 (9th Cir.), *cert. denied*, 479 U.S. 851 (1986), could be read as holding that the use of coercion against third parties will not automatically result in condemnation of a restraint. In that case, a group of noncertified veterinary ophthalmologists tried to organize a boycott among *certified* veterinary ophthalmologists of a canine eye registry that refused to list dogs unless they had been examined by a certified veterinary ophthalmologist. *Id.* at 1332. The Ninth Circuit held that the attempted boycott was not per se illegal under § 1 of the Sherman Act. *Id.* at 1333. The case should, however, furnish no comfort to those who seek to enforce standards by coercion directed against third parties. As John DeQ. Briggs and Stephen Calkins point out, two special facts distinguish that case from the ordinary group boycott case. First, the effort to organize a boycott among *certified* veterinarians of an organization that was benefitting them was quite likely futile. John DeQ. Briggs & Stephen Calkins, *Antitrust 1986-87: Power and Access (Part I)*, 32 ANTITRUST BULL. 275, 287 (1987). Second, the alleged boycott was not aimed at a competitor of the defendants. *Id.*

150. Harry S. Gerla, *Competition on the Merits: A Sound Industrial Policy for Antitrust Law*, 36 U. FLA. L. REV. 553, 564 (1983).

151. CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY 156-57 (1959); *see also* HOVENKAMP, *supra* note 19, at 275-76 (noting use of concerted refusals to deal to further cartels); JOSEPH C. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 45-49 (1955) (discussing the use of boycotts by small-town retailers to inhibit competition by mass retailers).

tive social disutilities, such as polarizing society by increasing the number of persons aligned in a dispute and "highlighting the existence of social conflict."[152] Thus, courts are correct in viewing the use of concerted coercion against third parties to uphold standards as creating virtual automatic antitrust liability.

3. Adoption of a Standard in the Face of Significant Consumer Opposition

The third factor that should lead to summary condemnation of a standard is the adoption of that standard in the face of significant consumer opposition. While no court has formally articulated this proposition, its logic is inescapable.

In a competitive market, businesses cannot afford to alienate economically important groups of customers. A standard adopted in the face of significant consumer opposition is likely to alienate consumers. The ever-present threat of competitors, garnering the business of the disaffected customers, strongly militates against such blunders. The only way a business could afford to alienate a large group of its customers is if it had assurances that its competitors would not pursue their business. The adoption of the standard and adherence to it is the equivalent of assurances by competitors that they will not pursue the business of disaffected customers. These assurances are a hallmark of a cartelized, noncompetitive market. Thus, adoption of the standard under such circumstances is cartel-like behavior that should be summarily declared unlawful under section 1 of the Sherman Act.[153]

Most standards are likely to face some consumer opposition. Some consumers undoubtedly would prefer English-style, three-pronged electrical plugs to the standard American, two-pronged variety or left-handed screw threads to right-handed screw threads. The opposition, however, must be "significant" to warrant summary condemnation. The point at which consumer dissatisfaction with a standard becomes "significant" is a question of fact that must be resolved on a case-by-case basis. Nonetheless, the principle that adoption of a standard in the face of significant consumer opposition should be regarded as essentially a per se violation of section 1 of the Sherman Act is sound.

4. Lack of a Rational Basis for the Standards

The final factor that can result in summary condemnation of standards is a lack of a plausible basis or procompetitive justification for

152. Heidt, *supra* note 46, at 1587.

153. *Cf.* Goldenberg, *supra* note 24, at 661-62 (if consumers or consumer surrogates oppose a standard, it should be "suspect" under the antitrust laws).

those standards.[154] In other words, standards must meet a level of minimum rationality in order to withstand antitrust scrutiny.[155] If a standard lacks at least a minimal rational basis, it is highly unlikely to have any procompetitive or other socially beneficial effects. Given the potential of all standards for at least some anticompetitive effects, a standard with no rational basis should be summarily condemned under the antitrust laws.

The requirement that standards be minimally rational to escape disapproval under the antitrust laws is strongly supported by the Supreme Court's decision in *Radiant Burners, Inc. v. Peoples Light & Gas Co.*[156] In that case, the Court held that the denial of the American Gas Association's seal of approval to a competitor of some members of the association constituted a per se illegal group boycott. Without the seal of approval, many gas companies (including members of the defendant association) would not allow a device to be hooked to their gas lines. Thus, the seal of approval was a de facto requirement for a competitor in the field of gas heating devices.

Technically, *Radiant Burners* did not involve a decision on standards, but was a decision on certification, specifically the denial of a seal of approval. As Professor Sullivan points out, however, the decision in *Radiant Burners* turns upon the lack of objective rational standards.[157] If the seal of approval had been denied pursuant to the honest application of reasonable objective standards, that denial could only have been viewed as procompetitive. The accurate denial of certification to a product that does not meet reasonable objective standards promotes competition by supplying consumers with important information they need to make an informed decision.[158] Thus, *Radiant Burners* supports the concept that a lack of minimal rationality in standards can lead to the summary condemnation of those standards.

B. Factors to be Weighed in Deciding the Competitive Effects of a Standard in a True Rule of Reason Analysis

Assuming that a standard does not entail one of the disabling factors discussed above, it will receive what is in theory an extensive Rule of Reason analysis. As also noted above, a full-blown Rule of Reason

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154. *Cf.* HOVENKAMP, *supra* note 19, at 282 (standards must be "reasonable" and "objective" to withstand antitrust scrutiny); 2 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION 61-19 (1993) (same).

155. *Cf.* Kissim, *supra* note 107, at 49 (suggesting that courts use a "minimum rationality" standard in assessing certification procedures).

156. 364 U.S. 656 (1961) (per curiam).

157. SULLIVAN, *supra* note 125, at 243-44.

158. FTC STAFF REPORT, *supra* note 20, at 50; HOVENKAMP, *supra* note 19, at 85; Heidt, *supra* note 46, at 1555; Howe & Badger, *supra* note 77, at 378.

analysis for a standard (particularly a minimum quality standard or product simplification standard) is a complex undertaking. Moreover, if such a standard is challenged under the federal antitrust laws, both the proponents and opponents of the standard are apt to present an extensive amount of conflicting evidence and claims about the market, and the competitive and economic effects of the challenged standard. The complexity of the process and the likelihood that conflicting technical evidence will be presented make it imperative that courts and counselors be able to examine some surrogates for effect on the market that will simplify the task of assessing a standard under the antitrust laws. Fortunately, several nontechnical factors exist that can aid both antitrust courts and counselors in evaluating the legality of a standard.

1. The Existence of an Implicit or Explicit Agreement to Follow the Standards—A Practical Nonfactor

At first glance, the existence of an explicit or implicit agreement to follow a standard might seem to be the most important factor in determining whether standards are reasonable under the antitrust laws. While this proposition is theoretically sound, it is largely irrelevant in practice.[159] The antitrust laws should not tolerate explicit agreements to follow standards.[160] Explicit, legally enforceable agreements to follow standards are rare, however, and easily avoided by market participants with even the strongest anticompetitive motives. Thus, the existence of an explicit agreement is not a controlling factor with regard to the evaluation of real-world trade and professional association standards.

The existence of implicit agreements is, likewise, an illusory tool to evaluate real-world trade and professional standards under the antitrust laws. As Justice Brennan noted in *Indian Head, Inc. v. Allied Tube & Conduit Corp.*[161] ("*Indian Head*"), implicit in most, if not all, standards is an agreement to adhere to the standards. Thus, if the existence of an implicit agreement to follow a standard tended to render the standard illegal under the antitrust laws, most standards would be in danger of running afoul of those laws. However, this is simply not the

159. The reason the proposition is theoretically sound is that the anticompetitive effects of standards often require the assistance of an explicit or implicit agreement to follow the standard to come into being. *See supra* notes 101-109 and accompanying text.

160. *Cf.* Havighurst, *supra* note 107, at 1144-45 (suggesting that the antitrust laws should not tolerate explicit intraprofessional agreements to abide by ethical or practice standards).

161. 486 U.S. 492, 500 (1988).

case. Antitrust courts generally have been favorably disposed toward trade and professional association standards.[162]

In sum, while the existence of an explicit agreement to follow a standard should and would be fatal under the antitrust laws, real-world practitioners and courts are not likely to encounter such an arrangement. The existence of implicit agreements to follow standards is not a relevant practical factor because the use of such a factor would tend to condemn all trade and professional association standards, a result antitrust courts are not willing to countenance.

2. The "Voluntariness" of the Standard

A vital factor in determining if standards pass muster under the antitrust laws is whether those standards are "voluntary." In a 1971 advisory opinion, the Federal Trade Commission ("FTC") took the position that "all standards must be voluntary."[163] A perusal of requests for Justice Department Antitrust Division business review letters indicates that counsel for trade and professional associations have taken the FTC's suggestion to heart.[164] Unfortunately, the meaning of the term "voluntary" is far from self-evident.

One possible interpretation of the term "voluntary" is that the trade or professional association promulgating the standard is completely passive in enforcing it. In other words, the association must refrain from creating any incentive to follow the standard or providing any disincentive to deviate from the standard. While such an interpretation should be relatively easy to apply, it would tend to make too many procompetitive standards programs illegal under the antitrust laws. For example, an association of widget manufacturers that develops a minimum quality standard for widget durability may establish a certification procedure whereby any product meeting the standard is awarded a seal of approval. No action, other than denial of the seal of approval, is taken against any manufacturer whose product does not meet the standard. Consumers may like the standard and reject prod-

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162. Blecher, *supra* note 13, at 224; *see also* 2 VON KALINOWSKI, *supra* note 154, at 6I-24 (noting that courts routinely uphold standards as valid if those standards are reasonable and objective).

163. *Legality of a Proposed Standard Certification Program*, 78 F.T.C. 1628, 1630 (1971) [hereinafter *FTC Opinion Letter*].

164. Letter from Michael Boudin, Acting Assistant Attorney General, Antitrust Division, to Dennis A. Rendelman, Staff Counsel, Illinois State Bar Ass'n (January 26, 1989), *available in* LEXIS, Trade Library, DOJBRL File; Letter from Charles F. Rule, Assistant Attorney General, Antitrust Division, to Lawrence E. Wzoreke, Esq., General Commerce Counsel, Union Pacific System (November 19, 1987), *available in* LEXIS, Trade Library, DOJBRL File; Letter from Charles F. Rule, Acting Assistant Attorney General, Antitrust Division, to James A. Calderwood, Esq. (January 28, 1987), *available in* LEXIS, Trade Library, DOJBRL File (all emphasizing the voluntary nature of the various standards programs being reviewed).

ucts that do not bear the seal of approval. The association has seemingly created a strong incentive to meet the standard. Nonetheless, the standard and attendant certification program is, on balance, likely to be procompetitive. First, the association has supplied consumers with valuable and accurate information which consumers might not be able to gather on their own. Second, the incentive to adhere is not created by the association, but by the preferences of informed consumers. This is the essence of the competition and free markets which the antitrust laws seek to promote.

The problem of overbreadth on a total ban of incentives to follow standards can be remedied by limiting associational enforcement activity to the provision of accurate information to consumers on whether a product, service, or provider meets a standard.[165] Under this approach, a trade or professional association would be free to hold out its standards as recommendations to the appropriate decision makers, but would be discouraged from taking any other enforcement action or even representing that the standards are anything but advisory.[166] A company that complies with the standards in order to avoid the disapproval of consumers would still be complying "voluntarily." Other associational enforcement methods, such as concerted refusals to deal with the violator, denial of access to competitively useful facilities, and denial of helpful membership in the association may render compliance with the standard involuntary.

As a general principle, use of enforcement devices, other than the dissemination of accurate information on compliance to consumers, should make a standard more likely to be unreasonable under the antitrust laws. A possible exception to this principle involves expulsions from professional associations. Such expulsions may not make compliance with association standards involuntary because association membership often is inseparable from certification that a member meets applicable standards. Hence, expulsion is a necessary step to convey accurate information to consumers on whether a product, service, or provider meets association standards. An examination of the case of college and university accrediting associations will illustrate this point.

The accrediting agencies for colleges and universities are actually associations whose members are accredited colleges and universities.[167] For a college or university to be accredited, it must be admitted to

165. The informational model for enforcement was suggested by Professor Havighurst as an appropriate standard for judging professional peer-review processes under federal antitrust laws. Havighurst, *supra* note 107, at 1142-44.

166. *Cf.* Havighurst, *supra* note 107, at 1145.

167. Douglas R. Richmond, *Antitrust and Higher Education: An Overview*, 61 UMKC L. REV. 417, 447 (1993).

membership in one of the associations. Membership, and therefore accreditation, is contingent upon meeting standards agreed upon by the membership of the association.[168]

If a member does not meet the standards of the association, the member may be subject to punitive actions, such as being placed on probation or even being expelled from membership.[169] At first glance, expulsion from membership might seem to go beyond the steps needed to inform consumers that a college or university does not meet the association's standards.[170] However, membership in the association is inseparable from certification that an institution meets the association's standards. Consumers are not likely to understand that an institution may be a member of the association, but may not meet its standards for approval. Under these circumstances, the standards are not "involuntary" merely because members comply under threat of expulsion from the association.

On the other hand, steps that go beyond those necessary to convey to consumers information that a product or service or provider does not meet the association's standards may result in a finding that the standards are not voluntary. To extend the accreditation example, an association rule that categorically forbade members from accepting students from nonmember institutions or from accepting credits granted to students transferring from nonmember institutions would seem to go

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168. *See, e.g.*, NORTH CENTRAL ASS'N OF COLLEGES AND SCHOOLS—COMM'N ON INSTS. OF HIGHER LEARNING, A HANDBOOK OF ACCREDITATION 3, 13-16 (1983) (indicating that membership is synonymous with accreditation and outlining some of the "criteria" for accreditation, or standards for membership). The North Central Association is one of the six regional accreditation associations for institutional accreditation of colleges and universities. The criteria, structure, and procedures for accreditation among all six associations are quite similar. DAVID A. TIVETT, ACCREDITATION AND INSTITUTIONAL ELIGIBILITY 53 (1976).

169. Elaine El-Khawas, *Accreditation: Self-Regulation*, *in* UNDERSTANDING ACCREDITATION 67 (Kenneth E. Young et al. eds., 1983).

170. It is possible to argue that expulsion does not matter because so many other institutions remain that the market remains competitive from the consumer's point of view. *See, e.g.*, Marrese v. American Academy of Orthopaedic Surgeons, 692 F.2d 1083, 1094-95 (7th Cir. 1982), *vacated*, 706 F.2d 1488 (7th Cir. 1983), *vacated on other grounds*, 726 F.2d 1150 (7th Cir. 1984), *rev'd*, 470 U.S. 373 (1985); Products Liab. Ins. Agency v. Crum & Foster Ins. Co., 682 F.2d 660, 663-64 (7th Cir. 1982). This view, however, ignores the disciplinary effect expulsions would have on the remaining members, such as creating incentives for uniform lock-step behavior. In fact, some free-market-oriented commentators have suggested that accreditation standards are a major impediment to the development of for-profit, inexpensive colleges and universities and represent a major anticompetitive force in the market. Leslie Spencer, *College Education Without the Frills*, FORBES, May 27, 1991, at 290, 294. One commentator has even suggested that the antitrust laws be used to curb the power of college accrediting associations and to open the market for competition. Malcolm S. Forbes, Jr., *Prime Target for Trustbusters*, FORBES, May 27, 1991, at 24. For a similar view on accreditation of law schools by a commentator with a traditional orientation to antitrust law, see generally, First, *supra* note 117; Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978).

beyond merely providing consumers with information that nonmember schools did not meet membership standards. Similarly, a medical association may expel members who do not utilize scientifically valid forms of medical treatment. The association may not forbid members from associating with persons who do not utilize such methods.[171]

3. The Competitive Significance of Varieties Excluded by the Standard

The existence of standards tends to exclude products, services, and providers that do not meet those standards.[172] The greater the competitive significance of excluded options, the more likely a standard will be condemned under the antitrust laws. A standard should not automatically be deemed to violate the antitrust laws merely because it has the effect of excluding varieties of products or services. In 1971, the FTC implied that any standard "used to restrict in any manner the kinds, quantities, sizes, styles or qualities of products" would run afoul of the antitrust laws.[173] The problem with this approach is that it would completely rule out variety simplification standards and interchangeability standards. If adhered to, such standards, by definition, limit kinds, qualities' sizes, and styles.[174] As the FTC staff recognized in its 1983 report, variety simplification and interchangeability standards can have procompetitive effects.[175] A standard can injure competition, however, by reducing the variety of products available. In order to determine whether this potential is fulfilled, the competitive importance of an excluded variety must first be determined.

A number of subfactors can be considered in deciding the competitive significance of an excluded variation. The first subfactor is whether the excluded variation possessed any unusual or even singular characteristics of particular appeal to consumers.[176] The characteristics need not be physical. They can consist of services, modalities of distribution,

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171. *Wilk II* illustrates this point. 895 F.2d 352 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990). The challenged standard in that case did not merely forbid members of the American Medical Association from practicing "unscientific" forms of medicine. *Id.* at 355. It forbade members from associating with anyone who engaged in such practices. *Id.* n.1. This was a broader restraint than one that merely forbade members from practicing "unscientific" forms of medicine. The standard was successfully challenged by a group of chiropractors. *Id.* at 378. A narrower standard that only applied to members might well have passed muster.

172. *See supra* notes 81-87 and accompanying text.

173. *FTC Opinion Letter*, *supra* note 163, at 1630.

174. Quantity limitations are quite another matter. A standard that limited the quantities of an item produced might be suspect because limitation on output (i.e., quantity) is one of the hallmarks of a cartel. HOVENKAMP, *supra* note 19, at 88.

175. FTC STAFF REPORT, *supra* note 20, at 54-55.

176. *Cf.* FTC STAFF REPORT, *supra* note 20, at 60 (identifying the loss of unique properties as one of the prime anticompetitive potentials of standards that eliminate varieties).

or methods of doing business.[177] The more unusual the characteristics, the more problematic the standard, because elimination of those characteristics lessens rivalry among competitors and deprives consumers of desirable options.

Another subfactor that is useful in determining the competitive significance of an excluded variation is the degree to which it has become a point of competition in the particular industry. In other words, the court should examine whether the variation has become a "selling point" to consumers. If the variation has become a selling point, its elimination is more likely to be anticompetitive. Variations that become selling points put tremendous pressure on rivals to improve their products and lower costs to consumers. Elimination of the variation means a diminution of that competitive pressure. If the variation has not become a selling point, its elimination is far less likely to have anticompetitive effects because the variation does not generate much competitive pressure. Its elimination is less likely to be anticompetitive. Consider, for instance, the market for home video camcorders.

Currently, three rival formats exist: VHS, VHS-C, and 8mm.[178] The makers of each format strongly tout the advantages of the particular format; the format has become a selling point. The existence of the rival formats generates tremendous pressures on competitors to improve their product and be responsive to the desires of consumers. For example, one of the advantages of the 8mm format over the VHS-C format is that cassettes for 8mm cameras can record for much longer periods of time.[179] Now, however, under pressure to match the features of 8mm machines, manufacturers of VHS-C equipment are reportedly developing longer recording tapes.[180] These competitive pressures might vanish if manufacturers agreed to standardize camera formats.

In contrast, many camcorders use different shaped control buttons. No manufacturer seems to make a competitive point of the shape of its camera's control buttons. Thus, an agreement to standardize button shapes would not injure consumers or diminish meaningful competitive pressures on video camera manufacturers.

The other subfactor that can assist in ascertaining the competitive significance of an excluded variety is the impact of the exclusion on price. While the distinction between price and other characteristics is

177. For example, the excluded provider or retail outlet might offer consumers alternative channels of distribution, such as discount, mail order, or shop-at-home outlets, or the excluded provider might offer free services and unique terms such as extended warranties or liberal credit arrangements.

178. *Camcorders*, 1993 CONSUMER REP. 151.

179. *Id.*

180. *Id.*

somewhat artificial,[181] antitrust courts are particularly sensitive to developments that raise prices to consumers.[182] If the excluded variety was a low-cost leader, its elimination may well lead a court to conclude that the standard has a significant anticompetitive impact.

4. Exclusion of Competitors

At one time, if a standard had the effect of excluding competitors from the market, it was likely to violate the antitrust laws. In its 1971 advisory opinion on standardization, the FTC stated that "standardization must not have the effect of boycotting or excluding competitors."[183] The suggestion that a standard excluding competitors is automatically suspect under the antitrust laws is simply too broad.

First, even the most procompetitive standards may have the incidental effect of excluding some competitors. For instance, a measurement standard that gives consumers information about product durability may lead to the exclusion of manufacturers who cannot make products that are as durable as consumers demand. The exclusion of these manufacturers is hardly anticompetitive. Indeed, the exclusion is the essence of free and open competition.

As discussed above, product simplification and interchangeability standards may lead to productive efficiencies and enhanced competition. A competitor may not be in a position to produce the now-standard varieties and the market may now exclude it. In spite of the exclusion of the competitor, the standard may, on balance, be quite procompetitive.

Second, not all exclusions of competitors result in injury to competition. As numerous courts have pointed out, the antitrust laws protect competition, not competitors.[184] The exclusion of a competitor who is not producing any competitive pressure in the marketplace does not injure competition. The amount of competitive pressure a firm produces in the market depends largely on two variables. The first variable is market structure. Fewer companies in the market increase the likelihood that each company will produce measurable competitive pressure

181. *See supra* note 130 and accompanying text.

182. *See, e.g.*, Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1448 (9th Cir. 1988) (effect of raising prices to consumers is a key evil meant to be prevented by the antitrust laws); Village of Bollingbrook v. Citizens Util. Co. of Illinois, 864 F.2d 481, 483 (7th Cir. 1988) (same); Eastern Coal Corp. v. Disabled Miners Ass'n, 449 F.2d 616, 618 (6th Cir. 1971) (same).

183. *FTC Opinion Letter*, *supra* note 163, at 1629.

184. *See, e.g.*, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 n.14 (1984); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977); U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 597 (1st Cir. 1993); Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468, 494 (3rd Cir.), *cert. denied*, 113 S. Ct. 196 (interim ed. 1992).

on its rivals.[185] The second variable is the competitive strategy being pursued by the competitor. A business that pursues an asymmetrical business strategy, for example, being a discounter or providing innovative services or methods of distribution, places a great deal more competitive pressure on its rivals than a business that utilizes the same competitive strategy as its rivals.[186]

In sum, the extent to which a standard injures competition by excluding competitors depends very much on who is the excluded competitor. A standard that excludes a competitor, which is just one of many companies in a market all pursuing the same strategy, does not injure competition merely because it is exclusionary.[187] In contrast, a standard that excludes one of just a few firms in a market, or excludes a firm pursuing a business strategy that differs from those of its rivals, can seriously injure competition.

5. The Existence of Less Restrictive Alternatives

In a Rule of Reason analysis, a challenged practice need not be the least restrictive to pass muster.[188] The practice, however, must be "reasonably necessary" to obtain the claimed procompetitive advantages.[189] In practice, this has meant that if a plaintiff shows an obvious and readily understandable, less restrictive alternative, the defendant must demonstrate a convincing justification for its failure to utilize that alternative.[190] The same is true in considering standardization programs under the Rule of Reason.

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185. *Cf.* F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 151-68 (2d ed. 1980) (recognizing the link between market concentration, such as, the number of competitors, and the competitiveness of the market); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554, 574 n.108 (1986) (same).

186. *See generally* Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029, 1071-72 (1991).

187. While the exclusion of such a firm does not injure competition per se, such an exclusionary effect, should be taken into account by antitrust counselors. At the very least, the exclusion generates the possibility of litigation by producing a disgruntled potential plaintiff who has suffered enough of a loss to make it worthwhile to bring an antitrust suit. Counselors for trade and professional associations may wish, as a practical matter, to counsel clients to eschew standards that exclude competitors in order to avoid future litigation.

188. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania, Inc., 694 F.2d 1132, 1138 n.11 (9th Cir. 1982); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90 (3rd Cir.), *cert. denied*, 434 U.S. 823 (1977); National Bancard Corp. v. Visa U.S.A., Inc., 596 F. Supp. 1231, 1256-57 (S.D. Fla. 1984), *aff'd*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986); *accord*, AREEDA, *supra* note 37, at 388.

189. *See supra* note 188 and accompanying text.

190. 7 AREEDA, *supra* note 37, at 429-30.

Specifying all the possible less restrictive alternatives that might arise in any case of standardization is an impossible task. Nonetheless, two particular, less restrictive alternatives are likely to arise frequently in the consideration of minimum quality standards, one of which will often occur in the case of variety simplification standards. The first alternative is the use of a combination of a generally procompetitive measurement standard and certification procedure in place of minimum quality standards.[191]

Variety simplification standards and product interchangeability standards are not vulnerable to an attack based on less restrictive alternatives because measurement standards cannot provide the same benefits as those types of standards. Measurement standards cannot insure that a smaller variety of products will be produced or that products will be made to work with other products. Thus, measurement standards are not viable alternatives to variety simplification standards or interchangeability standards.

On the other hand, minimum quality standards are quite susceptible to a charge that their procompetitive benefits can be attained by a combination of measurement standards and certification procedures. Indeed, one commentator goes so far as to suggest that unless minimum quality standards are justified by health and safety concerns, proponents of such standards "should have an especially clear and convincing basis for concluding that non-safety attributes of a product fall below a minimally satisfactory level."[192] In a similar vein, the FTC has stated that "[c]ertification programs should avoid the use of single standard 'pass/fail' systems and in lieu thereof, employ graded systems which preserve consumer and user options."[193] While these suggestions have merit, they are perhaps a bit too unforgiving of minimum quality standards.

Measurement standards and certification procedures do tend to provide consumers with more information than simple better/worse minimum product quality standards. For example, if a manufacturer is interested in a machine's durability, the manufacturer is better off knowing the machine's exact mean time between failures rather than whether the machine's durability is "better or worse" than some standard. Under some circumstances, however, a conclusion that a product is better or worse than some standard actually provides more useful

191. Michael Goldenberg gives the example of a standard involving wear in automobile tires. Goldenberg suggests that instead of a minimum quality standard for tire wear, manufacturers can adopt a measurement standard in the form of a "grading system." Goldenberg, *supra* note 24, at 656.

192. Goldenberg, *supra* note 24, at 655.

193. *FTC Opinion Letter*, *supra* note 163, at 1630.

information to consumers than the raw data entailed in a measurement standard and attendant certification procedure.

First, a desirable quality may not be amenable to a measurement standard. A minimum quality standard may be the only usable standard. Second, consumers may be unable to understand the significance of a particular measurement standard. Third, consumers may not be able to integrate a melange of measurement standards into a workable judgment of a product, service, or provider. The area of accreditation standards for American legal education furnishes excellent illustrations of all three problems.

The major accreditation association for American law schools is the American Bar Association ("ABA"). One of the ABA's standards for accreditation of law schools requires that members of law school faculties "possess a high degree of competence, as demonstrated by education, classroom teaching ability, experience in teaching or practice, and scholarly research and writing."[194] This standard seems to be a minimum quality standard rather than a measurement standard. The standard calls for an evaluative yes/no judgment on whether the faculty of a given school meets the standard. While a measurement standard might be theoretically superior, such a scale of measurement could not convey to consumers the qualitative judgment called for by the above standard. A minimum quality standard appears to be the only feasible standard.

Another of the ABA's standards requires that a law school have an adequate collection of volumes in its library to meet the program's needs.[195] As an alternative, the ABA could simply publish the number of volumes (or volume equivalents) available in a school's library. This alternative would allow consumers, such as prospective students and authorities controlling admissions to state bars, to rank law schools in terms of how many volumes were in their libraries. However, the consumers would have little idea of the meaning of the raw number of volumes. For example, a school on the lower end of the rankings might have only 75,000 volumes in its library. Consumers, if they did comparisons, would know that the number of volumes placed the school at the lower end of the spectrum of law schools. Without some minimum quality standard, however, they would have no idea if that was adequate for the legal education of the school's students.[196] In contrast, the

194. AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS, Standard 401 (1992) [hereinafter ABA STANDARDS].

195. *Id.* Standard 601.

196. Even outside a comparative context of other law school libraries, the mere volume total may be a meaningless and misleading statistic. For example, a school could have hundreds of

minimum quality standard furnishes important information on what "experts" believe is the adequacy of a school's library.

Finally, the overall decision on whether a law school should be accredited illustrates the problem of melding a melange of standards. Even assuming that one could translate the myriad of ABA standards into understandable measurement standards, how is the consumer able to weigh the various standards? For example, suppose a school has a superb library collection, excellent physical facilities, and a competent faculty. The school, however, also is dependent totally on tuition for its income, and thus faces a potential conflict of interest whenever the need for tuition income conflicts with "the exercise of sound judgment in the application of admission policies or academic standards."[197] Does the conflict of interest outweigh the other positive attributes of the school? How significant is the conflict of interest? Most consumers cannot make these judgments. Thus, an overall accreditation decision, which is in effect a global minimum quality standard, conveys important information to consumers.

In many, if not most, cases, measurement standards will be a feasible alternative to minimum quality standards. A trade or professional association's failure to use a measurement standard will weigh heavily against it. Such a failure should not, however, militate toward a finding that the minimum quality standard violates the antitrust laws where the association demonstrates that a measurement standard is unfeasible or that a minimum quality standard will provide more usable consumer information.

The second less restrictive alternative that is likely to arise is the use of performance standards in place of product specification standards. As a general rule, performance standards are less anticompetitive than product specification standards. In its 1971 advisory opinion on standardization and certification, the FTC cautioned that "construction or specification standards should not be used except in exceptional circumstances and never when performance standards can be developed."[198] Again, the FTC's position may be a bit too categorical in condemning material or product specification standards. Circumstances exist that sometimes make product or material specification standards the only feasible alternative. As David Hemenway has pointed out,

> While, from a social perspective, performance standards are clearly superior to design or material specifications, many standards still contain

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thousands of superseded texts. This would inflate its volume total, but not contribute in any meaningful way to the educational mission of the school.

197. *See* ABA STANDARDS, *supra* note 194, Standard 209.

198. FTC Opinion Letter, *supra* note 41629.

> specific material requirements. The explanation, however, is often less one of anticompetitive intent than of inadequate ability. The technology may simply not be available to either set out the performance required in terms that can be measured, or to carry out the tests needed to evaluate performance. In many areas, good performance standards are impossible (or to use economists' jargon, too costly) to write.[199]

To the extent that the FTC statement suggests that specification standards should be used in place of performance standards *only* when it is literally impossible to create performance standards, the statement goes too far. As Hemenway implies, costs considerations must also come into play. Thus, if significant cost savings can be attained by utilizing specification standards in place of performance standards, the use of the former should not tend to indicate that the standards are, on balance, anticompetitive.

In most cases, however, those who draft standards will be able to create performance standards by a process which is not significantly more costly than the creation of specification standards. In these cases, the possibility of utilizing performance standards as substitutes for construction of specification standards should lead courts to view the utilization of the former two types as a strong factor militating in favor of a finding that the standards are anticompetitive.

6. The Market Power of the Parties Adopting the Standard

An important "practical" factor in determining the anticompetitive potential of a standard is the amount of market power possessed by those adopting the standard. The most commonly used legal definition of "market power" is the power to raise price and decrease output without suffering an injurious loss of business.[200] Some courts mix the definition of market power with the traditional definition of "monopoly power" by defining market power as the power to raise prices or exclude competitors without suffering serious consequences.[201] The essence of both definitions is the power to raise prices, restrict output, or dominate customers or suppliers without losing a major amount of business. Given the essential nature of market power, its relevance in assessing standards is obvious. The possession of great market power by

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199. HEMENWAY, *supra* note 8, at 77.

200. *See, e.g.*, NCAA v. Board of Regents, 486 U.S. 85, 109 n.38 (1986); Storer Cable Communications, Inc. v. City of Montgomery, 826 F. Supp. 1338, 1351 (M.D. Ala. 1993); SCFC, Inc. v. Visa USA, Inc., 819 F. Supp. 956, 969 (D. Utah 1993).

201. *See, e.g.*, Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1446 (9th Cir. 1988); R.E. Dick Geothermal Corp. v. Thermogenics, 812 F.2d 1160, 1167 (9th Cir. 1987); Black & Decker, Inc. v. Hoover Serv. Ctr., 765 F. Supp. 1129, 1139 (D. Conn. 1991); Pontius v. Children's Hosp., 552 F. Supp. 1352, 1366 (D. Pa. 1982).

the firms adopting the standard makes it less likely that the other firms in the market will develop consumer-preferred alternatives and more likely that a standard can be forced on unwilling consumers. A lack of major market power by the firms adopting the standard makes it more likely that firms in the market will develop alternatives favored by consumers and less likely that consumers can be compelled to accept a standard they dislike.

Whether "market power" is truly a "practical" factor is another matter. Courts are frequently less than clear on the precise operational definition of market power.[202] More important, proof of the existence of market power is often a litigation nightmare. The need to prove market power through the establishment of relevant markets is one of the factors that makes merger and monopolization litigation under the antitrust laws such costly, complicated processes.[203] Nonetheless, the logical relevance of market power to the assessment of the legality of a standard under section 1 of the Sherman Act is undeniable.

The real issue on the use of market power in assessing standards is whether the possession of some quantum of market power by the firms adopting the standard should be a necessary condition for liability under section 1 of the Sherman Act. Judge Frank Easterbrook has argued that with rare exceptions, no practice can violate section 1 of the Sherman Act unless the actors collectively or individually possess a "market power."[204] Professor John Lopatka has extended this argument to professional association standards by maintaining that such standards are unlikely to have anticompetitive effects unless the membership of the association possesses "market power."[205] Many commentators have debated the theoretical merits of market power screens in Rule of Reason analyses.[206] That debate will neither be settled, nor even rehashed in the pages of this Article. Regardless of the merits of

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202. For a discussion of the varying definitions used by courts, and the economic ambiguity of the term, see Briggs & Calkins, *supra* note 149, at 294-301.

203. *Cf.* NATIONAL COMM'N FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES, REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL 148 (noting that proof of market definition, a necessary prerequisite to proof of market power, is often extensive and complex); Briggs & Calkins, *supra* note 149, at 300 (noting that requiring proof of the existence of market power may cause most if not all antitrust disputes to resemble "complex merger litigation" — a "regrettable" result).

204. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 19-23 (1984).

205. John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301, 312-13, 383-84 (1991).

206. *Compare* Easterbrook, *supra* note 204 *with* Richard S. Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41, 79-82 (1984) (under certain circumstances, firms with market power can injure competition) *and* Harry S. Gerla, *A Microeconomic Approach to Antitrust Laws: Games Managers Play*, 86 MICH. L. REV. 892, 921-34 (1988) (same).

the various sides in that debate, it would be unwise, or even foolhardy, to counsel a trade or professional association that a lack of "market power" will protect an otherwise anticompetitive standard from condemnation under the antitrust laws. The law, as it now stands, simply does not support such a position.

Several facts justify this conclusion. First, many trade and professional associations possess a significant degree of market power, either directly through their membership or indirectly through the incorporation of their standards into law by various jurisdictions. In such cases, a market power screen does the association little good. Second, the Supreme Court has explicitly stated that substantial market power is not required to find liability under section 1 of the Sherman Act either under a Rule of Reason analysis or under a per se analysis.[207]

Additionally, the facts of many lower court cases that use a market power screen are distinguishable from the facts that will be present in antitrust challenges to most trade and professional association standards. The large majority of lower court cases utilizing market power screens involve vertical restraints, which are restraints imposed between buyers and sellers of goods or services.[208] Trade and professional association standards are, by definition, horizontal restraints, restraints among actual or putative competitors. Courts have been much more hesitant to utilize market power screens in cases involving horizontal restraints.[209] Moreover, the defendants in many of the cases in which market power screens were utilized had de minimis amounts of market power.[210] In contrast, trade and professional associations may well have a more meaningful degree of market power in a relevant market, even if that market power does not rise to the level of monopoly power. For these reasons, while the degree of market power possessed by a trade or professional association is a relevant factor in assessing the legality of a proposed standard, the absence of a large quantity of such power should not be viewed as immunizing the standard against condemnation under the federal antitrust laws.

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207. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 429-31 (1990); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986).

208. Briggs & Calkins, *supra* note 149, at 285.

209. Briggs & Calkins, *supra* note 149, at 285.

210. For example, the defendants in the leading case espousing the application of a market power screen to horizontal practices, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, had a market share in the range of five to six percent. 792 F.2d 210, 217 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). Such a low market share is hardly conducive to a finding that the defendants possessed even a measurable modicum of market power.

7. Who Is Drafting the Standard?

The identity of the parties drafting a standard is another factor which can be used to determine its procompetitive or anticompetitive effects. Standards drafted solely by competitors are the most suspect.[211] When a standard is drafted solely by competitors, it is drafted by parties with a motive to suppress competition and disadvantage consumers. In other words, competitor-drafted standards tend to raise the specter of cartel-like behavior on the part of the drafters. In contrast, courts will likely view standards drafted completely by noncompetitors, such as independent technical experts, as procompetitive.[212] Perhaps courts will look even more favorably upon standards drafted with the participation of consumers who are affected by the standard or surrogate organizations that represent consumers. The participation and acquiescence of consumers in the setting of the standard furnishes some assurance that the standard is not a form of overreaching by a producer or provider cartel because consumers have an interest in avoiding exploitation by producers.[213]

8. Motive and Purpose

The role of the motive[214] or purpose[215] behind the adoption of standards in evaluating them under the antitrust laws is much the same as the role of motive in evaluating any practice under the Rule of Rea-

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211. GIVENS, *supra* note 129, at 14-5 to 14-6.

212. GIVENS, *supra* note 129, at 14-5 to 14-6; 2 VON KALINOWSKI, *supra* note 154, at 61-26-7; *cf.* Consolidated Metal Prods. v. American Petroleum Inst., 846 F.2d 284, 295 (5th Cir. 1988) (emphasizing lack of competitor representation on decision making body); Eliason Corp. v. National Sanitation Found., 614 F.2d 126 (6th Cir. 1980), *cert. denied*, 449 U.S. 826 (1981) (standards by independent nonprofit organization upheld in spite of claim that they allegedly favored larger manufacturers over smaller manufacturers and impeded innovative designs).

213. GIVENS, *supra* note 129, at 14-6. Of course, consumer acquiescence should not be conclusive. Consumers have, for various reasons, such as ignorance, fear, or placing personal convenience over the interests of employers, gone along with blatant cartelization. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271, 293 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899) (buyers of products from cartel allegedly willing to swear that they were charged only "reasonable" prices); Gerla, *supra* note 206, at 926-29 (discussing why employees of insurers might be willing to go along with super-competitive prices imposed by physician cartel); *see also* Goldenberg, *supra* note 24, 660-61 n.17 (noting that consumer representatives on standard-making bodies often are unaware of the meaning of the proceedings and frequently are overwhelmed by industry representatives).

214. The term "motive" in antitrust law tends to mean the possibility of personal financial gain from diminution of competition through adoption of a restraint. When motive is used in this sense, the analysis is largely the same as the analysis of who is drafting the standard. *See supra* notes 211-13 and accompanying text.

215. The word "purpose" in antitrust tends to be used as a synonym for desiring specific competitive results or practically certain that such results will occur. In this sense, "purpose" tends to be synonymous with the terms purpose or knowledge as used in the § 2.02(2)(a)-(b) of the Model Penal Code and the term "intent" as used in § 8A of the Restatement (Second) of

son. The motive or purpose behind the adoption of a restraint is not determinative of its legality. As Justice Brandeis stated, in a much quoted phrase, "a good intention will [not] save an otherwise objectional regulation or the reverse."[216] Courts use the motive or purpose behind adoption of a restraint, however, to predict its probable effects.[217] In evaluating standards, the actors' motives or purpose in adopting the standards takes on added significance because the effects of adoption of the standards are often unclear or disputed. Indeed, many courts have cited the existence of a procompetitive motive or purpose as a reason for upholding a standard against an antitrust challenge and the existence of an anticompetitive motive or purpose as a reason for sustaining an antitrust challenge to a standard.[218]

Evidence that those adopting a standard desired to injure competition should weigh heavily against approving that standard under the antitrust laws. Such evidence tends to confirm the existence of the anticompetitive effects of the standard and to cast doubt on the existence of any claimed procompetitive effects. Even evidence that those adopting a standard had the purpose to injure competitors (as opposed to competition) should weigh heavily against approval of the standard. First, without competitors, there can be no competition.[219] The very fact that competitors promulgate a standard specifically designed to injure mutual competitors is some evidence that the targets were providing discomfiting competition to those adopting the standard.[220] Second, evidence that the purpose of those adopting a standard was to injure a competitor, at the very least, brings into question the existence of any claimed procompetitive virtues of the standard.

Torts. MODEL PENAL CODE § 2.02(2)(a)-(b) (1985); RESTATEMENT (SECOND) OF TORTS § 8A (1965).

216. Board of Trade v. United States, 246 U.S. 231, 238 (1918).

217. *Id.*

218. *See, e.g.*, Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 947 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988) (emphasizing defendants' anticompetitive purpose); Moore v. Boating Indus. Ass'n, 819 F.2d 693, 696 (7th Cir.) (emphasizing defendant's lack of anticompetitive motive or purpose), *cert. denied*, 484 U.S. 854 (1987); National Macaroni Mfrs. v. FTC, 345 F.2d 421, 426 (7th Cir. 1965) (emphasizing defendants' anticompetitive purpose).

219. John J. Flynn, *Monopolization Under the Sherman Act: The Third Wave and Beyond*, 26 ANTITRUST BULL. 1, 62 (1981).

220. Gerla, *supra* note 186, at 1067 (describing why competitors might set their normal rivalry aside and attack a mutual competitor); *see also* Phillip E. Areeda, *Introduction to Antitrust Economics*, 52 ANTITRUST L.J. 523, 536 (1983) (noting that firms in a market will usually not incur the costs of getting together and boycotting a mutual rival unless such actions would increase profits and decrease output).

9. The Procedures Utilized in Adopting a Standard

At one time, some commentators and enforcement authorities suggested that the utilization of some form of commercial due process in the enactment of standards was a necessary condition for their legality under the antitrust laws.[221] For example, in 1983 the FTC Staff stated that "as self-regulatory organizations, standards developers are obligated to provide procedural safeguards to those whom they competitively injure."[222] This suggestion is no longer valid.

The position that commercial due process is a prerequisite for approval of standards under the antitrust laws can be traced back to the Supreme Court's decision in *Silver v. New York Stock Exchange*,[223] ("*Silver*") and a line of cases following it.[224] In *Silver* the Court held that the unexplained termination of wire privileges by the New York Stock Exchange to a nonmember dealer violated the federal antitrust laws. In rejecting the defendant's claim that the denial was in furtherance of legitimate self-regulation, the Court emphasized the failure of the exchange to provide procedural safeguards.[225]

This aspect of *Silver* was overruled, however, in *Northwest Stationers*.[226] In that case, the Court held that the expulsion of a member of a buying cooperative was not a per se illegal group boycott. In so doing, the Court rejected the plaintiff's claim that *Silver* mandated utilization of some form of commercial due process before a self-regulatory body could expel or discipline a member. Justice Brennan, writing for a unanimous Court, stated that

> the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of [defendants] would amount to a *per se* violation of § 1, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* vio-

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221. *See, e.g.*, 2 EARL W. KINTNER, FEDERAL ANTITRUST LAW 176-77 (1980); AUSTIN T. STICKELLS, FEDERAL CONTROL OF BUSINESS ANTITRUST LAWS 130-31 (1972); Howe & Badger, *supra* note 77, at 381-84; Donald F. Turner, *Consumer Protection by Private Joint Action*, *in* NEW YORK STATE BAR ASSOCIATION ANTITRUST LAW SYMPOSIUM 38-39 (1967) (article by the then Assistant Attorney General in Charge of the Antitrust Division, United States Department of Justice).

222. FTC STAFF REPORT, *supra* note 20, at 272.

223. 373 U.S. 341 (1963).

224. *See, e.g.*, Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc., 715 F.2d 1393, 1397-98 (9th Cir. 1983), *rev'd*, 472 U.S. 284 (1985); McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1019 (S.D. Ill.), *aff'd without opinion*, 506 F.2d 1404 (7th Cir. 1974).

225. *Silver*, 373 U.S. at 361.

226. *Northwest Stationers*, 472 U.S. 284.

lation because the antitrust laws do not themselves impose on joint venturers a requirement of process.[227]

This language would seem to contradict any categorical requirement of commercial due process for standards to pass antitrust muster.[228] Justice Brennan's language is, in fact, so broad that it could be read as ruling out any role for the provision of commercial due process in deciding whether a challenged standard was a reasonable restraint of trade under section 1 of the Sherman Act.[229] This, however, is an overreading of Justice Brennan's language. The opinion in *Northwest Stationers* rules out the existence of procedural protections as a decisive factor in antitrust analysis. It does not say that their existence is irrelevant in determining the competitive effects of a standard, certification decision, or other practice or policy.

The existence of proper procedures in the adoption of a standard (or the making of a certification decision) can be some indication of the probable competitive effect of that standard.[230] Plaintiffs and defendants are likely to produce a welter of contradictory evidence on the competitive effects of a standard. A lack of procedural protections in the adoption of the standard tends to cast doubt on defendants' claims of the existence of procompetitive effects and a lack of anticompetitive effects. Conversely, the utilization of reasonable procedures in adopting a standard gives credibility to claims that the standard will benefit competition while creating few or no detriments to competition.

The components of adequate procedural protection cannot be specified in advance. Nonetheless, several important features of adequate protection can be delineated. First, as already discussed, a broad variety of groups (especially consumers and those who might be injured by

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227. *Id.* at 293.

228. Consolidated Metal Prods., Inc., v. American Petroleum Inst., 846 F.2d 284, 291 n.20 (5th Cir. 1988); Moore v. Boating Indus. Ass'ns, 819 F.2d 693, 710-11 (7th Cir.), *cert. denied*, 484 U.S. 854 (1987); Pretz v. Holstein Friesian Ass'n, 698 F. Supp. 1531, 1540 (D. Kan.), *corrected*, No. 85-2353-0, 1988 U.S. Dist. LEXIS 12149 (D. Kan. Oct. 13, 1988).

229. Edward Brunet & David J. Sweeney, *Integrating Antitrust Procedure and Substance After Northwest Stationers: Evolving Antitrust Approaches to Pleadings, Burden of Proof and Boycotts*, 72 VA. L. REV. 1015, 1035 (1986) (noting and applauding the possibility of such a reading of the language in *Northwest Stationers*); David E. Ledman, Comment, *Northwest Wholesale: Group Boycott Analysis and a Role for Procedural Safeguards in Industrial Self-Regulation*, 47 OHIO ST. L.J. 729, 749-50 (1986) (noting and deploring the possibility of such a reading of the language in *Northwest Stationers*).

Robert Bork has long urged that commercial due process is a waste of time and resources and that whether such process is granted or denied is irrelevant to what he believes to be the sole goal of antitrust law, preventing artificial restrictions on total output. BORK, *supra* note 17, at 343-44.

230. Weight-Rite Golf Corp. v. United States Golf Ass'n, 766 F. Supp. 1104 (M.D. Fla. 1991); Brant v. United States Polo Ass'n, 631 F. Supp. 71, 78 (S.D. Fla. 1986); *see also* Carleton v. Vermont Dairy Herd Improvement Ass'n, 782 F. Supp. 926, 932 (noting that "due process may factor into the Rule-of-Reason analysis"); *accord* Goldenberg, *supra* note 24, at 663-64.

the standard) should be consulted in formulating a standard.[231] Second, a meaningful opportunity must be given to those adversely affected by the standard to challenge its basis.[232] Third, those adopting the standard should create some sort of written record suitable for review.[233]

VI. CERTIFICATION—THE BASIC THEORETICAL AND LEGAL FRAMEWORK

Certification, or a decision on whether a product, service, or provider meets given standards, has obvious procompetitive potential. Assuming no antitrust problem with the underlying standard, an accurate certification decision provides consumers with useful information.[234] An accurate certification decision, therefore, should be per se legal under the antitrust laws.[235] The situation with respect to erroneous certification decisions is much more complex.[236]

Erroneous certification decisions have no competitive or other redeeming social virtues. By definition, such decisions give consumers incorrect information. Thus, if wrong certification decisions injure competition and restrain trade, they will likely violate section 1 of the Sherman Act. Courts (including the Supreme Court) and commentators have long assumed that erroneous certification decisions can have

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231. *See supra* notes 211-213 and accompanying text.

232. FTC STAFF REPORT, *supra* note 20, at 273-74.

233. FTC STAFF REPORT, *supra* note 20, at 273-74.

234. *See supra* note 99 and accompanying text.

235. A possible limited exception to this is where the certification procedures have been misused. Such misuse can give rise to antitrust liability even where the ultimate decision is technically accurate. *Cf.* Indian Head, Inc. v. Allied Tube and Conduit Corp., 817 F.2d 938, 947 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988) (rejecting the "reasonable objective basis" defense for a certification decision in light of the defendant's misuse of the certification procedure). Even with the existence of this exception, the potential to mislead consumers exists. Misuse of certification processes may give consumers the false impression that proper procedures have been used to reach a decision on certification. Gerla, *supra* note 186, at 1043 n.89.

236. An erroneous certification decision can be one of two types. First, it can be a decision that erroneously holds that a product, service, or provider does not meet a particular standard when, in fact, the applicant for certification does meet the standard. Second, it can be a decision that erroneously holds that a product, service, or provider does meet a particular standard when in fact it does not. Only the first type of error is likely to result in an antitrust action because the party who has erroneously granted certification is not likely to complain about that error. Thus, when this Article uses the term "erroneous" or "wrongful" certification, it generally is referring to the erroneous or wrongful *withholding* of certification.

One reported antitrust decision does involve an attempt to establish liability for the erroneous *granting* of certification. In ECOS Elecs. Corp. v. Underwriters Lab., 743 F.2d 498, 501 (7th Cir. 1984), *cert. denied*, 469 U.S. 1210 (1985), the plaintiffs claimed that the decision by the independent Underwriters Laboratories to certify the low cost "testers" made by the plaintiff's competitors violated § 1 of the Sherman Act. The Seventh Circuit upheld the dismissal of the plaintiff's claim, noting that the antitrust suit itself was an attempt to injure competition. *Id.* at 502. Courts are likely to view any antitrust challenge to the granting of certification as an attempt to injure competition and relegate the claim to the same fate as the plaintiff's claim in *ECOS*.

anticompetitive effects.[237] Now, however, another group of courts and commentators have argued that wrongful certification decisions cannot restrain trade or injure competition.[238] If these courts and commentators are correct, then erroneous certification decisions are not actionable under the federal antitrust laws. Thus, the first issue that must be addressed is whether an erroneous certification decision can injure competition or restrain trade. As will be discussed in the next subsection of this Article, the revisionist view of erroneous certification decisions is incorrect.[239] Such decisions can restrain trade and injure competition.

Of course, merely because an erroneous certification decision *can* injure competition and restrain trade does not necessarily mean that wrongful certification decisions *will* have these effects. The second subsection of this discussion of certification addresses the issue of when erroneous certification decisions are likely to engender anticompetitive effects.[240]

Finally, even if a certification decision is wrong and injures competition, we may not necessarily wish to attach antitrust liability to that decision. Certification decisions generally are procompetitive. The threat of antitrust liability with attendant treble damages may deter this socially useful and procompetitive activity. On the other hand, the antitrust laws should be used to deter erroneous certification decisions that injure competition. The optimal way to accommodate both interests is to require the plaintiff to demonstrate that the decision was not made by use of reasonable procedures or that reasonable procedures were not honestly used to arrive at a certification decision. The final subsection discusses the desirability of this requirement, its parameters, and how antitrust courts have in fact adopted such a requirement.[241]

A. Can an Erroneous Certification Decision Ever Give Rise to Antitrust Liability?

Most commentators have long assumed that erroneous certification decisions have the potential of creating antitrust liability for the decision-makers.[242] The position that wrongful certification decisions can violate the antitrust laws would, at first glance, seem to be uncontroversial. Erroneous certification decisions, by definition, convey wrong in-

237. *See infra* notes 239-48 and accompanying text.

238. *See infra* notes 249, 252-55 and accompanying text.

239. See *infra* notes 242-73 and accompanying text.

240. *See infra* notes 274-85 and accompanying text.

241. *See infra* notes 286-97 and accompanying text.

242. Robert W. Bergstrom & Ronald W. Olson, *Trade Associations and Other Associations of Competitors*, *in* ANTITRUST ADVISOR 496 (Carla Hills ed., 3d ed. 1985); FTC STAFF REPORT, *supra* note 20, at 280-81; Blecher, *supra* note 13, at 227; *FTC Opinion Letter*, *supra* note 163, at 1630.

formation to consumers. Thus, like fraudulent statements, they are a dead-weight social loss with no redeeming competitive or other virtue. The view that erroneous certification decisions can give rise to antitrust liability is strongly supported by two Supreme Court decisions, *American Society of Mechanical Engineers v. Hydrolevel Corp.*[243] ("*Hydrolevel*") and *Indian Head, Inc. v. Allied Tube & Conduit Corp.*[244]

In *Hydrolevel*, the Court affirmed a verdict against the American Society of Mechanical Engineers ("ASME"). An official of ASME allegedly conspired with competitors of the plaintiff to wrongfully deny certification that the plaintiff's valve complied with ASME's highly influential Boiler and Pressure Vessel Code.[245] The plaintiffs contended that this conspiracy violated section 1 of the Sherman Act. While the Court's opinion focused mainly on the issue of whether ASME could be held liable on a theory of apparent authority, it did furnish strong support to the concept that a wrongful certification decision can be a violation of the antitrust laws. In affirming the decision of the Second Circuit, the Court noted that misuse of voluntary standards, such as falsely labeling a competitor's product as "unsafe," could lead to economic failure for businesses of all sizes and "frustrate competition in the marketplace."[246]

In *Indian Head*, the Court affirmed a court of appeals decision reversing a district court's grant of a judgment notwithstanding the verdict in favor of the defendants, makers of steel conduit. The defendants allegedly "packed" a meeting of the National Fire Protection Association ("NFPA") to prevent the NFPA from certifying that the polyvinyl chloride electrical conduit made by the plaintiffs met the requirements of the NFPA's National Electrical Code ("NEC").[247] The NEC is routinely incorporated into numerous local, state, and federal regulations and is also extremely influential in private industry, including insurers who refuse to insure structures not built in accordance with the NEC.[248] The plaintiffs alleged that the conspiracy to pack the meeting violated section 1 of the Sherman Act.

In affirming the Second Circuit's decision, the Court discussed whether the defendant's actions were shielded by the *Noerr-Pennington*

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243. 456 U.S. 556 (1982).

244. 486 U.S. 492 (1988).

245. *Hydrolevel*, 456 U.S. at 570-71.

246. *Id.*

247. *Indian Head*, 486 U.S. at 495-96.

248. *Id.*

doctrine.[249] The Court did not specifically rule on whether the actions of the defendants constituted a substantive violation of section 1 of the Sherman Act.[250] The Court, however, repeated its language from *Hydrolevel* about the anticompetitive potential of the misuse of standards.[251]

In spite of the Court's decisions in *Hydrolevel* and *Indian Head*, a trio of recent lower court decisions have suggested, in dictum, that erroneous certification decisions cannot injure competition or give rise to antitrust liability, except in unusual circumstances.[252] In *Consolidated Metal Products v. American Petroleum Institute*[253] ("*Consolidated Metal*"), the Fifth Circuit sustained the dismissal of a complaint that the defendant American Petroleum Institute's delay in granting its seal of approval to plaintiff's three-piece sucker rods (used in oil drilling) violated section 1 of the Sherman Act. In *Schachar v. American Academy of Ophthalmology*[254] ("*Schachar*"), the Seventh Circuit upheld a jury verdict against plaintiffs who claimed that the defendant professional association's labeling of the radial keratotomy technique as "experimental" violated section 1 of the Sherman Act. Finally, in *Zavaletta v. American Bar Association*[255] ("*Zavaletta*"), the district court dismissed a claim by a student of the CBN University School of Law that the American Bar Association's refusal to accredit the school violated section 1 of the Sherman Act.

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249. *Id.* at 505-10. The *Noerr-Pennington* doctrine states that efforts to restrain or monopolize trade by lobbying the government are protected from antitrust liability. *Id.* at 499; *see* Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

250. The Court did agree to review the court of appeal's holding on the defendants' substantive liability, but later dismissed certiorari as having been improvidently granted. *Indian Head*, 486 U.S. at 499 n.3.

251. *Id.* at 500; *see also* text accompanying note 246.

252. Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397 (7th Cir. 1989); Consolidated Metal Prods., Inc. v. American Petroleum Inst., 846 F.2d 284 (5th Cir. 1988); Zavaletta v. American Bar Ass'n, 721 F. Supp. 96 (E.D. Va. 1989).

The trio of cases may now be a quartet by virtue of the Seventh Circuit's decision in Lawline v. American Bar Ass'n, 956 F.2d 1378 (7th Cir. 1992). The case involved, inter alia, a claim by an unincorporated association of lawyers, paralegals, and laypersons that sections 1 and 2 of the Sherman Act were violated by the Illinois and American Bar Associations' opinions that the plaintiff's conduct violated the Illinois Rules of Professional Conduct. *Id.* at 1381. The trial court granted summary judgment for the defendants. *Id.* In upholding the grant of summary judgment, the Seventh Circuit expressly relied on its prior holding in *Schachar*. *Id.* at 1383-84. The decision in *Lawline* adds little to the discussion in this Article for two reasons. First, the court seems to conflate *Noerr-Pennington* petitioning immunity, *see supra* note 249, with the question of whether competition can be injured by the defendants' activities. *See id.* at 1384. Second, and more important, the court simply cites *Schachar* and follows it without further explanation. *Id.* at 1383.

253. 846 F.2d 284 (5th Cir. 1988).

254. 870 F.2d 397 (7th Cir. 1989).

255. 721 F. Supp. 96 (E.D. Va. 1989).

Reliance on these cases to give blanket protection to false certification decisions is unwarranted. The courts' statements with respect to the invulnerability of certification decisions to antitrust challenge are dicta. In both *Schachar* and *Consolidated Metal*, the plaintiffs failed to demonstrate a significant injury to themselves, let alone an injury to competition.[256] In *Zavaletta*, the defendant's conduct may have been protected from antitrust liability by the *Noerr-Pennington* doctrine.[257] More importantly, the courts' reasoning is highly suspect.

Zavaletta is a decision that contains almost no analysis. The court merely relies on the Seventh Circuit's decision in *Schachar*. Therefore, it provides no persuasive authority for the proposition that certification decisions are not subject to antitrust law scrutiny. The two court of appeals decisions are much more explicit as to why they reach similar conclusions. Taken together, the two opinions set forth four grounds for why they decide that wrongful denials of certification are not actionable under the federal antitrust laws. First, *Hydrolevel* and *Indian Head* are distinguishable because they involved standards that had been incorporated into government regulations or ancillary agreements among competitors to enforce the standards.[258] Second, a denial of certification is not literally a contract, combination, or conspiracy in restraint of trade and, therefore, is not subject to attack under section 1 of the Sherman Act.[259] Third, a denial of certification, even if wrongful, can rarely, if ever, injure "competition" and thus cannot run afoul of the Sherman Act.[260] Finally, scrutiny of certification decisions under the antitrust laws will deter trade and professional associations from engaging in certification, an abstinence that will injure both consumers and competition.[261]

The points made by the two courts are open to serious question. Commentators have criticized the reasoning of the two courts in exten-

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256. *Schachar*, 870 F.2d at 397-98 (noting that plaintiffs continued to be able to perform radial keratotomies and even receive insurance reimbursement in many cases); *Consolidated Metal*, 846 F.2d at 296-97 (noting that plaintiff's design was accepted by customers in spite of the lack of certification).

257. *Zavaletta*, 721 F. Supp. at 98; see *supra* note 244 for a discussion of the *Noerr-Pennington* doctrine.

258. *Schachar*, 870 F.2d at 399 (use of enforcement devices); *Consolidated Metal*, 846 F.2d at 296 n.43 (incorporation of ASME's standards into law by various jurisdictions).

259. *Schachar*, 870 F.2d at 398-99; *accord* Clark C. Havighurst, *Applying Antitrust Law to Collaboration in the Production of Information: The Case of Medical Technology Assessment*, 51 LAW & CONTEMP. PROBS. 341, 364 (1988).

260. *Schachar*, 870 F.2d at 400; *Consolidated Metal*, 846 F.2d at 296.

261. *Consolidated Metal*, 846 F.2d at 296; *accord* Havighurst, *supra* note 259, at 362-64.

sive detail.[262] Nonetheless, a brief point-by-point critique of the courts' reasoning is in order.

The purported distinction between *Hydrolevel* and *Indian Head* on the one hand, and *Consolidated* and *Schachar* on the other, simply will not hold water. First, in both *Hydrolevel* and *Indian Head*, the plaintiffs alleged and proved injury to themselves and competition totally independent of governmental adoption of the private association standards.[263] Second, *Hydrolevel* and *Indian Head* are devoid of any references to ancillary agreements by competitors to enforce the standards involved in the two cases.[264]

False certification decisions do not restrain trade in the sense that no producer is binding itself not to do business with another party. However, false certification decisions do literally restrain trade by preventing consummation of transactions that would otherwise be made if the certification decision were accurate.[265]

The assertion that wrongful denials of certification cannot injure competition is also erroneous. Whether competition is defined in terms of efficiency and total output, or in terms of psychological pressure and rivalrous process, an erroneous certification decision can injure competition. Such decisions injure all three major types of economic efficiency: allocative, productive, and innovative.

Wrong certification decisions injure allocative efficiency by causing consumers to make purchase decisions that do not maximize their utility.[266] For example, a wrongful denial of certification can lead consumers to demand a smaller quantity of the noncertified product and a greater quantity of certified substitutes. This shift in demand can lead

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262. *See generally* Gerla, *supra* note 186, at 1044-90; *see also* Mark R. Patterson, *Antitrust Liability for Collective Speech*, 27 IND. L. REV. 51, 71-89 (1993) (critiquing *Schachar* along similar lines).

263. American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. at 556, 562, *aff'd*, 486 U.S. 492 (1988); Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 933, 941 n.1 (2d Cir. 1987), *aff'd*, 486 U.S. 492 (1988).

264. Gerla, *supra* note 186, at 1049-51; *accord* Patterson, *supra* note 262, at 72 n.107.

265. FTC STAFF REPORT, *supra* note 20, at 280-81; *accord* Patterson, *supra* note 262, at 72-73. Professor Havighurst criticizes the FTC Staff's position by claiming that it is "unsophisticated" and noting that it was put forth by the Bureau of Consumer Protection rather than the FTC's antitrust arm, the Bureau of Competition. Havighurst, *supra* note 107, at 1130 n.41. Professor Havighurst's critique is deficient even apart from its *ad hominem* nature and condescending tone. Professor Havighurst's criticism of the FTC staff's position is inconsistent with the Court's decisions in both *Hydrolevel* and *Indian Head*. In both cases no one was literally compelled to follow the dictates of the trade associations. No one literally bound themselves or others not to deal with any other party. The standards were merely advisory. *See* Gerla, *supra* note 186, at 1049-51; Patterson, *supra* note 262, at 72 n.107. Thus, under Professor Havighurst's reasoning, no trade was literally restrained and section 1 of the Sherman Act was not violated. In both cases, however, the Court upheld the defendants' liability for violating section 1 of the Sherman Act.

266. *See* Gerla, *supra* note 186, at 1054.

to higher prices for certified substitutes that are in fact no better than, and perhaps worse than, the noncertified variety and decreased total output of the product.[267]

Certification decisions that are wrong can also injure productive efficiency and innovative efficiency.[268] It can injure the former by causing firms to divert resources from productive activities to attempting to obtain or correct incorrect certification decisions.[269] An incorrect certification decision can injure innovative efficiency by preventing the diffusion of new and better products, processes and services.[270]

If competition is defined in terms of rivalrous psychological pressure and process, an erroneous certification decision can still injure competition. A wrongful denial of certification can injure firms or products that are providing vital competitive pressures in the marketplace.[271] Indeed, erroneous certification decisions have had precisely these effects.[272]

The courts' final rationale in *Consolidated Metal* and *Schachar*, that application of the Sherman Act to certification decisions of trade and professional associations will deter those organizations from creating standards and making certification decisions, is more troubling. The courts' concerns, however, are somewhat overstated. Erroneous certification decisions by trade and professional associations are already subject to non-antitrust actions.[273] The marginal deterrent effect of potential federal antitrust liability is questionable. Nonetheless, the threat of treble damages under the antitrust laws might deter some professional and trade associations from engaging in valuable certification activities. Given this possibility, not every trade and professional association certification decision ought to give rise to antitrust liability. In addition to the requirement that plaintiffs prove that the decision was erroneous or made in such a way as to mislead consumers, two limits should be placed upon potential liability. Plaintiffs should be required to demon-

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267. *Id.* at 1054-62; *see* Lopatka, *supra* note 205, at 333-34; Patterson, *supra* note 262, at 79-83.

268. Productive efficiency, also known as operational efficiency, is the production of goods and services at the lowest possible cost per unit of input. ADAMS & BROCK, *supra* note 19, at 33; HOVENKAMP, *supra* note 19, at 45; Lande, *supra* note 19, at 90. Innovative efficiency is the ability to develop and introduce better products and services and to improve their distribution. HOVENKAMP, *supra* note 19, at 48.

269. *See* Gerla, *supra* note 186, at 1062-66.

270. *See* Gerla, *supra* note 186, at 1067-69.

271. *See* Gerla, *supra* note 186, at 1069-80.

272. *See* FTC STAFF REPORT, *supra* note 20, at 166-85 (detailing instances where erroneous certification decisions led to a diminution of rivalry and competitive pressure in various markets).

273. For example, potential plaintiffs may bring actions under state tort law for defamation, or the tort of injurious falsehood, or under state unfair competition laws.

strate an adverse impact on competition from the wrongful certification decision. If plaintiffs prove an adverse impact on competition, they should then be required to prove that the decision was not the product of properly implemented reasonable procedures. This Article now turns to an examination of those requirements.

B. Erroneous Certification Decisions—The Need for Proof of Anticompetitive Effects

Not every erroneous certification decision injures competition. Indeed, at least some erroneous certification decisions do not inflict any significant injury on competitors, let alone competition.[274] In order to challenge a certification decision under the antitrust laws, a plaintiff should be required to demonstrate the decision has injured competition and not just a competitor.

The requirement that a successful antitrust challenge of a certification decision be contingent on proof of anticompetitive effect is based on two principles. First, as discussed in the preceding section, antitrust law with its treble damages could result in excessive deterrence of useful certification activities of trade and professional associations.[275] Second, proof of injury to competition is the hallmark of an antitrust violation. Dispensing with the requirement of such proof would eradicate the distinction between antitrust law and federal and state tort and unfair trade practice law.[276]

The few reported decisions in which trade and professional associations have been held to be liable or potentially liable for erroneous certification decisions all involved actual or alleged injuries to competition as well as to competitors. The erroneous certification decisions that have given rise to actual or potential antitrust liability have deprived consumers of valuable market choices and have increased costs to consumers. Furthermore, they have prevented desirable new products from competing on their merits and placing strong competitive pressures on existing products.

For example, in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*,[277] the defendant's manipulation of the certification procedures

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274. *See supra* note 252 and accompanying text.

275. *See supra* text accompanying note 269.

276. *See, e.g.*, Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 655 (7th Cir. 1984); Military Serv. Realty, Inc. v. Realty Consultants of Virginia, Ltd., 823 F.2d 829, 832 (4th Cir. 1987); Northwest Power Prods., Inc. v. Omark Indus., Inc., 576 F.2d 83, 90 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); Merkle Press, Inc. v. Merkle, 519 F. Supp. 50, 54 (D. Md. 1981) (all emphasizing that antitrust laws are meant to protect competition, not to supplant state unfair competition law).

277. 786 F. Supp. 1518 (C.D. Cal. 1991), *rev'd*, No. 92-55085, 1994 U.S. App. LEXIS 3281 (9th Cir. Feb. 25, 1994).

of the Western Fire Chiefs Association caused the virtual demise of the practice of lining old, leaking gasoline tanks.[278] The technique of lining aging tanks was a cost-saving alternative to the expensive purchase of a new tank.[279] Likewise, in *Hydrolevel*, the erroneous refusal by ASME to certify the plaintiff's valve prevented a superior design from reaching the market.[280]

An erroneous certification decision that affects competition will almost always be one that denies certification. Two key variables determine the degree to which such decisions, in fact, affect competition. The first variable is the certifying organization's influence. A certification that does not influence consumers or others with whom the party denied certification must deal is not likely to have any significant anticompetitive effect. Conversely, a certification that is influential with such persons is much more likely to have an anticompetitive effect.[281] The influence of the certification can stem from acceptance in the market or from the incorporation of the underlying standard into law.[282]

The other key variable in determining whether a denial of certification will create anticompetitive effects is the competitive significance of the product, service, or provider denied certification. Two key factors determine the competitive significance of a person, firm or product denied certification. The first factor is the structure of the market. Fewer competitors or competing products leads to greater adverse impact on output or rivalry in the market as a result of a denial of certification.[283] More difficult entry into the market yields a greater likelihood that the denial of certification will create an anticompetitive effect.

The second factor is the degree to which the product or person denied certification offers consumers something different from what is already on the market. For example, denial of certification to one of hundreds of providers of a service, each of whom offers the same package to consumers, is not apt to engender anticompetitive effects no matter how influential the certification. Even if the denial of certification leads to a complete exclusion of that particular provider, little is likely to be lost either in terms of output or rivalrous pressure in the market.[284] On the other hand, if the product, service, or person denied cer-

278. *Id.* at 1531.

279. *Id.* at 1521.

280. FTC STAFF REPORT, *supra* note 20, at 82-85.

281. HEMENWAY, *supra* note 8 at 77.

282. HEMENWAY, *supra* note 8 at 77.

283. *Cf.* SCHERER, *supra* note 185, at 151-68; Fox, *supra* note 185, at 574 n.108 (both recognizing the link between market concentration, i.e., the number of competitors, and market competitiveness).

284. This conclusion is likely to scandalize some of the author's traditionalist/realist cohorts in the antitrust field who equate competition with the "competitive process." In one sense, an

tification gives consumers in the market "something different," its limitation in, or exclusion from, the market is likely to result in reduced output and reduced rivalrous pressure in that market. The atypical properties that producers offer to consumers can come in a variety of guises. They can be, for example, distinct prices, terms of trade, services, modes of distribution, or product characteristics.[285] Whatever the guise, a failure to certify a product or entity that offers consumers a different option tends to injure competition more than a failure to certify a product or entity that is a mere clone of other products or entities.

C. The Need to Prove that Reasonable Procedures Were Not Used to Make the Certification Decision

Once the plaintiff establishes the adverse impact on competition of a wrongful certification decision, the plaintiff should then be required to demonstrate that the decision was not made through the use of reasonable procedures. The plaintiff may prove alternatively that any reasonable procedures that may have been in place were subverted. A "reasonableness" element is a necessity to prevent the deterrence of trade and professional associations from engaging in procompetitive certification activities.

Given the frailties of human judgment and knowledge, mistakes in certification decisions are inevitable. The possibility that such mistakes would give rise to antitrust liability, with its attendant treble damage remedy, might well deter trade and professional associations from making such decisions.[286] On the other hand, erroneous certification decisions are a dead-weight social loss and can have disastrous consequences for competition.[287] The latter effect has all too often been sought by competitors unhappy with competition. A "reasonableness" standard is a useful middle ground that seeks to avoid excessive deter-

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erroneous denial of certification frustrates the competitive process. The party or item denied certification has been denied the opportunity to compete on the merits of his or her product. On the other hand, every wrongful denial of certification (at least where the certification is influential) has this same effect. Thus, the logic of those who equate competition with a competitive process would lead to every denial of influential certification being deemed a violation of the antitrust laws. For the reasons stated in the text, this is not a desirable outcome. *See supra* text following note 273. Indeed, under this reasoning every successful business tort or unfair practice would be a violation of the antitrust laws because they would frustrate the competitive process by denying the victim the "fair" opportunity to compete on the merits of his or her product or service. Completely incorporating the law of unfair business practices and business torts into the law of antitrust is, likewise, an undesirable end. *See supra* note 276 and accompanying text.

285. For a discussion of the importance of unique business strategies in assuring competitive markets, see generally Gerla, *supra* note 186, at 1071-72 and sources cited therein.

286. *See supra* text accompanying note 273.

287. *See supra* notes 268-73 and accompanying text.

rence of procompetitive certification activities, while preventing deliberate or negligent injuries to competition caused by erroneous certification decisions.[288]

What exactly constitutes a "reasonable basis" for a certification decision cannot be divined in advance. It must be determined as a question of fact on a case-by-case basis. The reasonableness of procedures in making a certification decision is also ultimately a question of fact to be made on a case-by-case basis. Nonetheless, some minimum requirements for reasonable procedures can be articulated. The party seeking certification should be given an opportunity to present evidence before the body deciding the issue of certification. If certification is denied, the party seeking certification should be informed of the reasons for the denial.[289] The certifying organization should provide the party with "an opportunity to challenge the evidence forming the basis of the decision and must create a record for judicial review of the decision."[290] The procedures should be completed in a reasonable time.[291]

An important factor that might impact on a determination of whether a decision has a reasonable basis, or whether reasonable procedures were used in making the decision, is the identity of the parties actually making the certification decision. Where the decision-makers are competitors of the party seeking certification, a court should give heightened scrutiny to whether a reasonable basis exists for the decision and to whether reasonable procedures were followed. Where the decision-makers are independent parties, courts should give the certifying body more discretion in determining what constitutes a reasonable basis and reasonable procedures.[292]

Finally, even the most reasonable procedures cannot be effective if they are not utilized or are undermined. Thus, if a plaintiff can demonstrate that otherwise reasonable certification procedures have not been used, or have been subverted, she should prevail. In fact, in every certification case where an antitrust plaintiff has prevailed, an element of

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288. At least one commentator has suggested that a negligence standard is constitutionally required by First Amendment considerations (at least where the certification decision involves matters of public interest). Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehoods*, 62 TEMP. L.Q. 903, 974 (1989). Other commentators have denied that any constitutional protection exists for false commercial speech in general, e.g., Charles Gardner Geyh, *The Regulation of Speech Incident to the Sale or Promotion of Goods and Services: A Multifactor Approach*, 52 U. PITT. L. REV. 1, 52-60 (1990), and false or misleading professional standards or certification decisions in particular. Patterson, *supra* note 262, at 83-89.

289. FTC STAFF REPORT, *supra* note 20, at 284.

290. FTC STAFF REPORT, *supra* note 20, at 284.

291. FTC STAFF REPORT, *supra* note 20, at 284.

292. In fact, some courts already follow this principle. *See supra* note 212.

subversion or nonutilization of reasonable procedures has been present in some sense.

In *Indian Head*, the defendants packed a meeting with interested parties to deny certification to a competing product.[293] In *Hydrolevel*, the defendant deliberately procured a false opinion from a key participant in the certification process.[294] In *Sessions*, the defendant purposely supplied false and misleading information to the certifying authority.[295] The defendants in *Gilder v. PGA Tour, Inc.*[296] allegedly violated their own by-laws in banning a golf club manufactured by one of the plaintiffs from the Professional Golfer's Association tour. Finally, in *Radiant Burners*, the defendants' denial of the seal of approval to the plaintiff's gas furnace was alleged to be arbitrary and capricious.[297]

The pervasiveness of a lack of reasonable decision-making process, or its subversion in these cases is stunning. This pattern indicates that courts are in fact placing a burden on plaintiffs to demonstrate that reasonable procedures were not used or corrupted in order to prevail in a denial of certification case.

VII. Conclusion

Steering a course between condemning socially useful and procompetitive standards and certification procedures and allowing use of these to frustrate and restrict competition is not an easy task. Nonetheless, given the importance of both standards and certification and competition, it is a task that courts and counselors must undertake. Hopefully, this article has given antitrust counselors who advise trade and professional associations and courts who must judge the legality of their activities some assistance in successfully carrying out that difficult bit of navigation.

293. Indian Head, Inc. v. Allied Tube & Conduit, Inc., 486 U.S. 492, 496-97 (1988).

294. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 561-62 (1982).

295. Sessions Tank Lines, Inc. v. Joor Mfg., 786 F. Supp. 1518, 1522-23 (C.D. Cal. 1991), *rev'd*, No. 92-55085, 1994 U.S. App. LEXIS 3281 (9th Cir. Feb. 25, 1994).

296. 727 F. Supp. 1333, 1336 (D. Ariz. 1989), *aff'd*, 936 F.2d 417 (9th Cir. 1991).

297. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 658 (1961).