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By A. Douglas Melamed[1]

In a recent column,[2] Judge Douglas Ginsburg and Koren Wong-Ervin argue that the default causation standard under Section 2 of the Sherman Act is "the but-for causation standard" from *Rambus v. FTC*.[3] The discussion is very abstract and, among other things, does not anchor the analysis in what harm the conduct at issue allegedly caused. The column asserts that the *Rambus* decision is based on the analysis in the *Microsoft* case,[4] but it does not discuss the *Microsoft* case and thus overlooks critical distinctions between these cases that need to be understood in order to avoid confusion about causation.

Rambus involved alleged misrepresentation by a potential entrant that had no market power. The misrepresentation had the potential to distort a specific decision reached by a standard-setting body many years earlier and thereby to create monopoly power for the defendant. The issue in the case was whether Rambus' alleged misrepresentation caused the creation of its monopoly. The FTC explicitly did not find that the conduct actually distorted the decision of the standard-setting body and thus did not find that the conduct caused Rambus' monopoly. In ruling for Rambus, the court declined to adopt the unprecedented principle that ordinary business torts that did not harm competition might be found to violate Section 2 on the ground that the conduct might have harmed competition.[5]

The *Microsoft* case was very different because it involved the maintenance of an existing monopoly. At issue in the case was an array of conduct by Microsoft that harmed Netscape, a competing browser that had the potential to become or facilitate a competitor in the operating system market in which Microsoft had monopoly power. The court did not find that there would have been additional operating system competition in the past but for Microsoft's conduct[6] or even that the government had proven harm to competition in the separate browser market.[7] The court nevertheless held that Microsoft's conduct violated Section 2 because it reduced the likelihood that its monopoly power in the operating system market would be eroded in the future.[8]

Judge Ginsburg and Wong-Ervin are correct that *Rambus* cannot properly be limited to cases involving standards, patents, fraud, or deception. More importantly, they are correct that but-for causation must be established to find a violation of Section 2. But application of that principle depends on the harm that the plaintiff alleges would not have happened but for the defendant's conduct. If, as in *Rambus*, the theory of the case is that the defendant obtained its monopoly by engaging in anticompetitive conduct, the plaintiff must prove a causal connection between that conduct and creation of the monopoly. But if, as in *Microsoft*, the theory of the case is that the defendant's

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[2] Douglas H. Ginsburg & Karen W. Wong-Irvin, *FTC v. Rambus and the De Facto Causation Standard Under Sherman Section 2*, CPI Columns (Nov. 18, 2024).

[3] *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

[4] *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam).

[5] *Rambus*, 522 F.3d. at 464, 466-67.

[6] *Microsoft*, 253 F. 3d at 106-07 (noting that "the District Court expressly did not adopt the position that Microsoft would have lost its position in the OS market but for its anticompetitive behavior").

[7] *Id.* at 81-84 (plaintiffs failed to show dangerous probability of monopolizing the browser market), 95-96 (remanding to the district court the question of whether plaintiffs could demonstrate harm to competition in the browser market from tying Microsoft's browser and its operating system that outweighed any benefits from such tying).

[8] *Id.* at 79-80.

anticompetitive conduct maintained an existing monopoly by reducing the likelihood that the monopoly would be eroded in the future, the plaintiff needs to show for liability purposes only a causal connection between the conduct and a reduced likelihood of future competition. The plaintiff does not need to show what the market would look like but for the defendant's conduct. In such a case, it is sufficient to show that the conduct "reasonably appear[ed] capable of making a significant contribution to … maintaining [defendant's] monopoly power."[9]

[9] *Id*. at 79 (quoting PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651c, at 78 (3d ed. 1996)).