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There is currently confusion in the United States over the proper causation standard under Section 2 of the Sherman Act, with some failing to understand that the default standard (at least in the D.C. Circuit) is the but-for causation standard from the court's 2008 decision in *Rambus v. FTC*,[1] which is in turn drawn from the analysis in *U.S. v Microsoft*.[2]

In *Rambus*—a Section 2 case the D.C. Circuit decided after its 2001 decision in *U.S. v. Microsoft*—the court held that the agency failed to prove that "but-for" the defendant's conduct, there would not have been harm to the competitive process.[3] As in *Microsoft*, the "but-for" world in *Rambus* was highly uncertain. In both cases, one could reasonably find the defendant's conduct may have caused the defendant to acquire or maintain its monopoly power. At the same time, it was also possible that the defendants in those cases would have acquired or maintained their monopoly power even absent their anticompetitive behavior. The court in *Rambus* held the government must bear the burden of that uncertainty. This burden applies as the de facto standard in all Section 2 cases.

One possible argument to the contrary is that *Rambus* is limited to the specific factual context in which the case arose; specifically, monopolization in the development of a standard involving patents alleged to be essential to that standard. Another argument is that the decision applies somewhat more broadly to cover cases alleging fraud or deception. These arguments are misplaced. For one thing, they ignore the fact that the court itself did not limit its decision, but rather stated:

> [T]he Commission expressly limited its theory of liability to Rambus's unlawful monopolization of four markets in violation of § 2 of the Sherman Act. Therefore, we apply principles of antitrust law developed under the Sherman Act."[4]

The court found no liability under Section 2 on the ground that the FTC failed to prove that, but for the defendant's alleged conduct, the defendant would not have acquired monopoly power or been able to exclude rival technologies, thereby allowing it to harm consumers through higher prices. In so holding, the court relied upon the Supreme Court's decision in *NYNEX v. Discon*, in which the Court had vacated the lower court's finding of liability under Sherman Act Sections 1 and 2, explaining that the anticompetitive effects must flow from a "less competitive market" and not "from the exercise of market power that is *lawfully* in the hands of a monopolist."[5]

The argument that a decision applying Section 2 precedent should be narrowly applied to one specific factual context also ignores the *Rambus* court's rationale for its holding, which is equally applicable outside the standards-development and fraud or deception contexts. Specifically, the court reasoned that, to apply a different causation standard would risk punishing a

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

[2] *United States v. Microsoft*, 253 F.3d 34, 58-78 (D.C. Cir. 2001) (en banc) (per curiam).

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

[4] *Id.* at 462 (internal citations omitted).

[5] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 136 (1998).

lawfully acquired monopoly, for example, one achieved through the creation of a superior technology (or product or service).[6] Such conduct (and result) is beyond the reach of U.S. antitrust law.

[6] *Id.* at 463-64.