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You Keep On Knocking But You Can't Come In: Evaluating Restrictions On Access To Input Joint Ventures

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The University of Chicago
the Economy and the State
Center for the Study of

Dennis W. Carlton
Steven C. Salop

**YOU KEEP ON KNOCKING BUT YOU CAN'T
COME IN: EVALUATING RESTRICTIONS ON
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Working Paper No. 111

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April 1995

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Dennis W. Carlton

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Abstract

The antitrust treatment of restrictions on access to joint ventures has raised controversy. We formulate an economic framework that explains how joint venture access rules provide efficiency benefits and can cause competitive harm. We discuss the usefulness of alternative legal standards for evaluating access restrictions and propose our own standards which strike a balance between *per se* and rule of reason treatment. We pay special attention to network joint ventures and the type of evidence probative for evaluating allegations of anticompetitive harms and efficiency justifications.

Key Words: Antitrust, Joint Ventures, Exclusion

JEL Classification: K21, L40

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Dennis W. Carlton

Steven C. Salop¹

I. INTRODUCTION

Antitrust analysis of joint venture rules governing access is both controversial and confused. Confusion arises over the theoretical and factual circumstances in which denial of access can injure competition. This confusion leads to controversy over the proper antitrust standards to govern restrictions on access (exclusionary access). This controversy is not new. For example, in the Antitrust Paradox, Robert Bork heaps intense criticism on Associated Press, the classic joint venture access case.² Nor has commentary and judicial analysis eliminated the controversy and confusion. Fewer than ten years after the Supreme Court moved to

¹ The authors are, respectively, Professor of Economics, University of Chicago and Professor of Economics and Law, Georgetown University Law Center. Support for this research was provided by Dean Witter Discover & Co. ("Dean Witter"). The authors consulted with Dean Witter in its antitrust suit against Visa USA. However, the opinions expressed here are our own and do not necessarily express the views of Dean Witter. The authors would like to thank Rick Beckner, Jeffrey Cashdan, Alan Frankel, James Sonda and Thomas Krattenmaker for helpful conversations and comments on an earlier draft.

² Robert H. Bork, The Antitrust Paradox at 339-40 (questioning failure to carry out "the factual investigation required by the issues pleaded").

clarify the per se rule of illegality in *Northwest Stationers*,³ courts and commentators are proposing new standards of per se legitimacy to replace the rules set down in that case.⁴ Indeed, in his recent paper, Phillip Areeda treats the essential facilities doctrine which courts sometimes use to compel access as mere epithet rather than as a carefully formulated legal standard.⁵ There have been a number of recent articles concerning joint venture formation and ancillary restraints that discuss the confusion involved in analyzing joint ventures.⁶ In this paper, we eliminate this confusion by taking a strictly economic approach to the design of access rules and the legal standards governing those rules. We formulate an economic framework for analyzing joint venture access rules. Based on this framework, we develop a conceptual foundation for evaluating legal standards and designing

³ *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing, Co.*, 472 U.S. 284 (1985).

⁴ See, e.g., *VISA U.S.A., Inc. v. SCFC ILC, Inc.*, 36 F.3d 958 (10th Cir. 1994); Thomas M. Jorde & David J. Teece, Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology, 61 *Antitrust L.J.* 579 (1993); Donald I. Baker, Compulsory Access To Network Joint Ventures Under the Sherman Act: Rules Or Roulette?, 1993 *Utah Law Review* 999 (1993).

⁵ Phillip Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 *Antitrust L.J.* 841 (1990).

⁶ For example, see Brodley, *Joint Ventures and Antitrust Policy*, 95 *Harv. Law Rev.* 1523 (1982); Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 *Georgetown L.J.* 1605 (1986); Pitaino, *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 *Minnesota L.Rev.* 1 (1991) and the many references cited therein.

Group boycott law concerns two distinct types of refusals to deal. Cases like Northwest Stationers and Associated Press are exclusionary group boycotts in which a venture refuses to deal with a firm or firms that compete with members. Cases like Indiana Federation and Superior Court Trial Lawyers Assoc. are collusive group boycotts in which a venture refuses to deal with certain customers of its members. The latter raise issues of cartelization and price fixing, not vertical foreclosure.

standards that will serve the economic interests of consumers and competition.

Joint venture access rules cover two main issues -- who can have access to the venture and at what price. Access rule disputes often arise in situations where the joint ventures are entities that facilitate vertical integration by its members. Such ventures provide a product or service to their members which the members use in providing some product or service of their own. That is, the venture provides an input that the members use in producing outputs independently that they sell in the market, often in competition with other members of the venture. In this situation, a joint venture may wish to deny access to firms that compete with its members in the output market.

Joint venture access cases typically are litigated under the group boycott rubric.⁷ For example, in Northwest Stationers, the cooperative was an input joint venture that provided wholesale services to the retail stores that were its members. It chose to deny access to the plaintiff Pacific Stationary by expelling it from membership. Similarly, in Associated Press, the venture provided non-local news to members as an input into the sale of

Similarly, a research joint venture among pharmaceutical companies might create the formula for a new drug that is an input into the independent manufacture market of versions of the drug by the companies. Cite to Case. A joint venture among residential real estate brokers might provide listing information that is used as an input by the members in brokering houses. Realty Multilist...

Associated Press is a bit more complicated in that this input was itself supplied to the venture by members.

When joint ventures provide inputs to members who then compete in the output market, exclusionary access rules raise issues similar to those involved in the analysis of vertical integration or restricted distribution. On the one hand, exclusionary access rules may increase economic efficiency by improving coordination and reducing the input costs of members, deterring free riding and maintaining investment incentives. Exclusionary access rules also may protect competition by preventing a venture from becoming too large. On the other hand, exclusionary access rules may raise competitive concerns. Such rules may harm consumers by disadvantaging rivals so much that competition in the input or output market is adversely affected. They also may harm

The venture wished to deny access to certain new newspapers. The venture wished to deny access to certain new applicants who competed with current members. In NCAA, the association formulated schedules, rules of football and eligibility and so on as inputs in the production of college football games and television rights to those games. This venture also marketed the television rights output to the television networks. The venture wished to terminate the membership and deny access to members who competed independently in the sale of television rights.

This paper evaluates exclusionary access rules by carrying out an economic analysis of input joint ventures and an economic analysis of alternative legal standards. In Section II, we present cases.

raise the likelihood of reaching erroneous outcomes in particular legality. Such rules can reduce legal process costs but also could Tenth Circuit in the Visa case have proposed rules of per se access rules. More recently, a number of commentators and the states a standard of per se illegality to govern exclusionary harms in particular cases. For example, Northwest Stationers for simple rules to eliminate the need to balance benefits and competitive impact of exclusionary access rules, courts have looked Because it sometimes is difficult to evaluate the net concerns, are the focus of this article.

ventures, which raise the most interesting and difficult antitrust cooperation to restrict competition can arise. These joint members, the tension between cooperation for efficiency and ventures become large and encompass a large fraction of industry responses to consumer demand. But sometimes, especially when joint antitrust laws, instead representing efficient organizational Most joint ventures raise no anticompetitive issues under the other competitive benefits.

involves balancing of competitive concerns against efficiency and negative effects, so that evaluation of the net competitive impact circumstances, exclusionary access rules may have both positive and competition by facilitating pricing coordination. Under certain

a rigorous economic analysis of input joint venture access rules. We analyze both the potential contribution of joint venture access rules to efficiency and the potential competitive harm such rules can cause. Joint venture access rules can improve consumer welfare by increasing the economic efficiency of the production, distribution and transactions process, as well as by protecting competition from an overinclusive joint venture. Conversely, exclusionary access rules can reduce consumer welfare by reducing competition in the markets in which the joint venture and its members operate. This economic analysis of benefits and harms can be used to evaluate the net competitive impact of particular exclusionary access rules. We identify the types of economic evidence that can be used to assess the possible efficiencies and harms flowing from the access restraints.

We identify and evaluate a number of potential efficiency benefits from joint ventures in general and exclusionary access rules in particular. Exclusionary access rules can contribute directly to the efficiency of joint ventures in the input and output markets in two distinct ways. First, the rules can reduce costs. Costs can be reduced by realizing scale and scope economies and eliminating duplicative activities. Second, exclusionary access rules can play a role in maintaining investment incentives. This involves permitting more of the returns to investment to be captured by investors.

Exclusionary access rules also can create competitive concerns. We identify and evaluate three potential sources of

We then illustrate our framework with issues raised in the Visa antitrust case. In that matter, Visa denied membership to Dean Witter, the firm that also issues the Discover charge card. We explain that Dean Witter made two anticompetitive allegations, output market exclusion and input market exclusion. Visa justified its conduct on the basis of claims that the exclusionary access

competition may benefit the venture and its members. credibility of such claims in light of the fact that reducing consumers. In evaluating such claims, we stress the issue of the vigorously, then preventing such a combination would benefit If a venture combines firms that otherwise would compete competition by preventing joint ventures from becoming too large. competitive benefit of exclusionary access rules -- to protect We also identify and evaluate an additional potential welfare.

price of output paid by consumers and, as a result, reduce consumer members who compete too intensely. Each of these can raise the coordination involves using joint venture rules to discipline their ability to supply joint venture members. Supporting pricing involves disadvantaging input market competitors by restricting input produced by the joint venture. Input market exclusion competitors in the output market by restricting their access to the coordination. Output market exclusion involves disadvantaging market exclusion, input market exclusion, and supporting pricing competitive harm. We characterize these three sources as output

rule was necessary to prevent free riding and maintain investment incentives as well as to prevent Visa from becoming overinclusive. In Part III, we discuss alternative legal standards that can be applied by courts to joint venture access rules. After analyzing the benefits and costs of per se standards in general, we analyze and evaluate a number of potential rules of per se illegality and a number of potential rules on per se legality. We focus particular attention on the standards proposed in Northwest Stationers, Rothery and Visa. In particular, we discuss the proper role in the legal process for findings regarding the market power of the venture and its members and the essentiality or importance of the input provided by the venture.

We are sympathetic to the use of per se standards, especially standards based on the collective market power of the venture and its members. In particular, we propose a new test based on the likely impact of a hypothetical merger of members of the venture plus excluded firms. However, based on our economic analysis, we recognize that the application of per se standards in many cases, will be neither simple nor relatively error free. In those cases, we recommend using our economic framework to apply a structured rule of reason standard.

Part IV summarizes and sets out our conclusions regarding the proper use of per se rules and the structured rule of reason.

joint venture efficiency and the contribution of access rules to In this section, we begin by briefly describing sources of

A. Potential Efficiency Benefits of Joint Venture Rules

case.

illustrate our framework with claims raised in the recent Vista Justifications for exclusionary access rules. Finally, we exclusionary access rules. Next, we analyze other competitive We then analyze theories of competitive harm flowing from ventures in general and joint venture access rules in particular. analyzing the efficiency benefits created by the existence of joint net competitive impact of access rule provisions. We begin by This section sets out the analytic framework for analyzing the

errors into the legal process.

designed to reduce legal process costs without introducing large general results of a full economic analysis can legal rules be harms that may be created by the rules. Only by understanding the to understand the potential efficiency benefits and competitive to analyze the economic implications of these rules, we first need in which the joint venture and its members operate. Thus, in order can reduce consumer welfare by reducing competition in the markets and transactions process. Conversely, exclusionary access rules increasing the economic efficiency of the production, distribution joint venture access rules can improve consumer welfare by

II. ECONOMIC ANALYSIS OF EXCLUSIONARY ACCESS RULES

10 For a sampling of the many articles discussing efficiency benefits from joint ventures, see Joseph F. Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521 (1982); Carlton and Klamer, The Need for Coordination Among Firms, with Special Reference to Network Industries, 50 Univ. of Chicago L.R. 446 (1983); Carlton, Electronic Services Networks, in Guerin-Calvert and Wildman, eds., . . . ; Gene Grossman and Carl Shapiro, Research Joint Ventures: An Antitrust Analysis, 2 J. Law, Econ. Org. 215 (1986); Jorde and Teece, supra note —; Areeda, supra note —; Joseph Katzan, Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation, 61 Antitrust L. J. 937 (1993); Riordan and Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, Antitrust Law Journal — (1995).

those efficiencies. There is a key distinction between a venture's efficiency and an access rule's contribution to that efficiency. A venture can be highly efficient and, yet, a particular access rule might contribute little or nothing to the venture's efficiency.

1. Sources of Joint Venture Efficiency

Collaboration in the provision of inputs often is efficient.¹⁰ Cooperation can lead to increased output, lower prices, and the creation of new or better products. Two underlying sources of these joint venture efficiencies are reduced costs and increased investment incentives.

Joint ventures can reduce the costs of production, distribution and transactions. Joint ventures can reduce production and distribution costs by realizing potential scale and scope economies and eliminating duplicative activities. For example, joint research ventures can coordinate R&D activities and speed development of new products at lower cost. Joint ownership of a single large production facility can allow the venture to achieve scale economies.

Network externalities occur when the benefits created by a product to one user increases as the number of other users grows. See Carlton and Klammer, *supra* note ___; Katz and Shapiro, XXX; Farrell and Saloner, XXX; Liebowitz and Margolis, *Network Externalities: An Uncommon Tragedy*, *Journal of Economic Perspectives* ___ (1994). Besen and Saloner, XXX, *Journal of Economic Perspectives* ___. Network externalities are not unusual in joint ventures, especially those involving open entry. For example, credit card associations like Visa and MasterCard, ATM networks and real estate multiple listing services each are joint ventures in industries where there may be network externalities, at least up to some level. For example, in ATM networks, an increase in the number of ATM card holders raises the value to banks of providing more ATMs, which benefits all ATM users. Salop, *Deregulating Self-Regulated ATM Networks*, *Journal of Innovation and New Technology* ___. Where the potential for positive network externalities is significant, it is expected that joint ventures would tend to have a general open entry policy.

In principle, restricting competition may spur innovation, as in the rationale for our patent system. For example, a joint permit more of these benefits to be captured by the innovator. Incentives to invest will be diminished. A joint venture may so as to capture an adequate return on their investments, investors are unable to protect their intellectual property rights generation of increased investment incentives. If initial A second possible source of joint venture efficiency is the firms.

using a common product standard than through negotiations among implement through an input joint venture that produces the product free riding.¹¹ For example, it may be more efficient to develop and network externalities, skill and locational complementarities, and coordination issues such as those relating to standardization, influence the ability of firms to deal efficiently with interfirm joint ventures also can reduce the transaction costs that

12 In addition, joint ventures sometimes threaten denial of access as a means of enforcing compliance with other rules. The efficiency of these access rules depends on the efficiency of the underlying rules and using denial of access as an enforcement mechanism.

General Motors is under no general obligation to allow Ford to use rarely is forced to share its assets with its rivals. For example, a private firm develops a new product or is simply successful, it whether access rules should ever be questioned by the courts. If these potential efficiencies raise the fundamental question of investment incentives.

Exclusionary access rules can play a role in maintaining adequate rules can increase efficiency and reduce costs. Second, competition in the two distinct ways discussed earlier. First, the Exclusionary access rules potentially can increase efficiency and efficiency of joint ventures in the input and output markets.¹² Exclusionary access rules can contribute directly to the

2. Access Rules and Joint Venture Efficiency

incentives difficult. as efficiency benefits that can make the analysis of investment incentives. It is this potential for anticompetitive harms as well effects that outweigh the benefits of increased investment occurred anyway. Instead, it may have significant anticompetitive investment or restrict competition, where investment would have returns may not be efficient because it may overstimulate Of course, limiting competition in order to increase investment by restricting competition among the members of the joint venture. venture might efficiently increase incentives for firms to invest

14 See Areeda, supra note — for a similar argument.

13 As discussed in this article, output could be restricted if the joint venture restricts access to the input it produces, if it restricts the ability of other input suppliers to sell inputs to members, it restricts members' outputs.

Access rules vary greatly. Access rules may affect the size of the joint venture, the timing of member entry, the identity of members or with whom the members may deal. Access fees may vary by scrutiny.

access rules are not and should not be immune from antitrust anticompetitive benefits. For all these reasons, joint venture inefficient access rules might be selected for their necessary for its efficiency or even contribute positively to it. does not necessarily imply that the access rules it uses are of property is feasible.¹⁴ Even if a venture is efficient, that a remedy that requires cooperation among firms and the common use reason is that the very existence of the joint venture shows that product, as do cartels engaged in naked price fixing. Another unrelated to or unnecessary for the efficient provision of the could be used as a vehicle to suppress competition in ways a joint venture involves coordination among competing firms and from a collective restriction of output.¹³ The main reason is that unlimited property right to capture the profits that might arise under the antitrust laws. Members of joint ventures do not have an joint ventures are not given the same leeway as single firms efficient to do so.

its manufacturing facilities, even if Ford claims that it is

15 Similarly, standardization efficiencies might increase with the percentage of output market transactions that use the input produced by the venture. Positive network externalities also may increase with the number of firms that are attached to a venture network or the extent to which the network actually is used.

potential complementary efficiencies are realized. Joint venture location, skills, or market position can affect the degree to which economic interests. Differences among members with respect to some cases. Coordination costs can be affected by divergent The identity of members also can affect venture efficiency in members later on.

members of these joint ventures benefit from the addition of new externalities and do not have large and risky investments. Early primary function is to take advantage of network or standardization issues are less likely to be as important for joint ventures whose after such investments have been made. In contrast, free riding joint venture to close or increase application fees to new members and risky investments made by the founding members might lead a benefits. Concerns that later applicants will free ride on large Regulation of timing similarly may lead to efficiency

for example, as in the case of many research joint ventures. smaller number of members might incur smaller coordination costs, order to take advantage of scale economies.¹⁵ In contrast, a may need to produce a large volume of its product or service in result, joint ventures come in all sizes. For example, a venture There is no single efficient size for all ventures and, as a incentives.

size or time of entry and these fees will affect members'

18 National Soc'y Prof. Eng'rs v. United States, 435 U.S. 679 (1978).

17 Carlton and Frankel, —

16 We discuss the potential competitive benefits from preventing creation of an overinclusive joint venture in a later section.

If a joint venture has created an anticompetitive harm, one must consider the potential efficiency rationales for its rules before one can decide whether the rules are anticompetitive. The credibility and validity of various efficiency claims depend on the type of joint venture and other facts discussed in the previous section.¹⁶ Efficiency justifications may be evaluated by a number of different methods. One important caveat deserves emphasis. It often can be difficult for outsiders to evaluate the efficiency that results from internal rules of operation. Courts should exercise caution in intervening in the operations of joint ventures.¹⁷ However, this does not mean that every efficiency claim should be blindly accepted. Some justifications are not cognizable under the antitrust laws.¹⁸ Some will not be plausible or logical, and some plausible justifications may conflict with the evidence. Important evidence about efficiencies often will come from the operating history of the venture itself or the experience of similar ventures. For example, a claim that a firm cannot be allowed in the venture because it is too hard to protect trade

3. Evaluating Efficiency Justifications for Exclusionary Access Rules

rules regulating the identity of members are one potential mechanism for generating these kinds of efficiencies.

19 Sometimes investment incentives claims lack credibility on the basis of the type of venture, its past membership policies, or other evidence. The history of the venture may be relevant to this analysis. After a joint venture is formed, its members subsequently may gain an incentive to use the venture structure to limit competition in ways that were not necessary for formation and do not increase efficiency. For example, facilitating collusion among members might only become profitable after the venture gains a large collective market share. Thus, existing ventures should not be immune from antitrust scrutiny, especially if they seek to impose restrictions subsequent to their formation. In such situations, the past behavior of the joint venture can assist in the evaluation of the efficiency justifications.

There are a number of approaches to evaluating this efficiency claim. For example, if the venture has been structured as open, then there already has been little or no protection of the right to exercise market power through exclusion. This suggests that such such claims.

the sweep of this defense increases the importance of scrutinizing competition solely to generate supra-competitive profits. Indeed, antitrust laws should not permit joint ventures to restrict joint ventures are not a substitute for the patent system. The justification for a broad array of anticompetitive restraints of general plausibility, it has the potential to be used as a power and incentives to invest.¹⁹ If accepted merely on the basis claim to evaluate because it raises the tension between market joint venture. This is generally the most difficult efficiency order to maintain adequate investment incentives for members of the Consider the claim that access restraints are necessary in or others like it belonged to this or similar ventures. secrets could be tested by observing what happened when this firm

21 This also means that antitrust should not permit ventures to form as closed entities where anticompetitive harm results and there is no valid efficiency justification. (But, see Section II.C. on overinclusiveness.)

20 A difficult and subtle problem arises when an open access joint venture sets a fee to join the venture and some firm complains that the fee is too high. The reason that pricing of access can raise vexing antitrust questions is because some joint ventures that raise access concerns have elements of natural monopoly. The venture will be concerned with its profits in setting up its access fees. Policy makers will be concerned with economic efficiency. The two do not necessarily coincide.

For a justification to be valid, the efficiency benefits must result from the access restraints, not simply from the existence of the joint venture. The fact that it is efficient to permit a joint venture does not imply that every possible access restraint also is efficient. For example, the efficiency benefits of copyright collectives like ASCAP and BMI do not by themselves imply that it would be efficient to fix the price of records or exclude composers that either write too many songs or sometimes negotiate

protection has not been essential for the success of the venture.²⁰ Alternatively, if the venture is structured as a non-profit input supplier and its many members compete in the output market based on an input price that yields competitive profits to the members of the venture, this structure suggests that additional protection of property rights (specifically, the right to further restrict competition in order to earn supra-competitive returns) is not essential to the venture's existence. In short, closed ventures are more likely to have a valid efficiency justification for access restraints based on the need to generate profits by restricting competition.²¹

Similarly, a research joint venture among pharmaceutical companies might create the formula for a new drug (the "input") so that each member of the venture individually then could manufacture and market a version of the drug (the "output"). A joint venture among residential real estate brokers might provide listing information (the "input") for use by the members in brokering houses (the "output"). In credit cards, a network joint venture provides standard interfaces, communications protocols and an

In this section, we analyze the ways in which access restrictions can harm consumers and competition. Access rule issues often arise in situations where the joint ventures are entities that facilitate vertical integration by their members. Such ventures provide a product or service to their members which the members use in providing some product or service of their own. That is, the venture provides an input that the members use in producing outputs that they sell in the market. For example, a consider a production joint venture among computer firms to manufacture semiconductors (the "input") for use in the computers independently manufactured and marketed by the venturers (the "output").

B. Potential Competitive Harms From Exclusionary Joint Venture Access Rules In Input Joint Ventures

Independently with users outside the blanket license. In short, there must be a connection between the exclusionary conduct and the claimed efficiency benefits.

Exclusionary joint venture access rules can harm competition by facilitating the exercise of collective market power. There are three possible sources of competitive harm: (i) output market exclusion; (ii) input market exclusion; and (iii) supporting pricing coordination. All of these sources of competitive harm can raise the price of output paid by consumer and, as a result, reduce

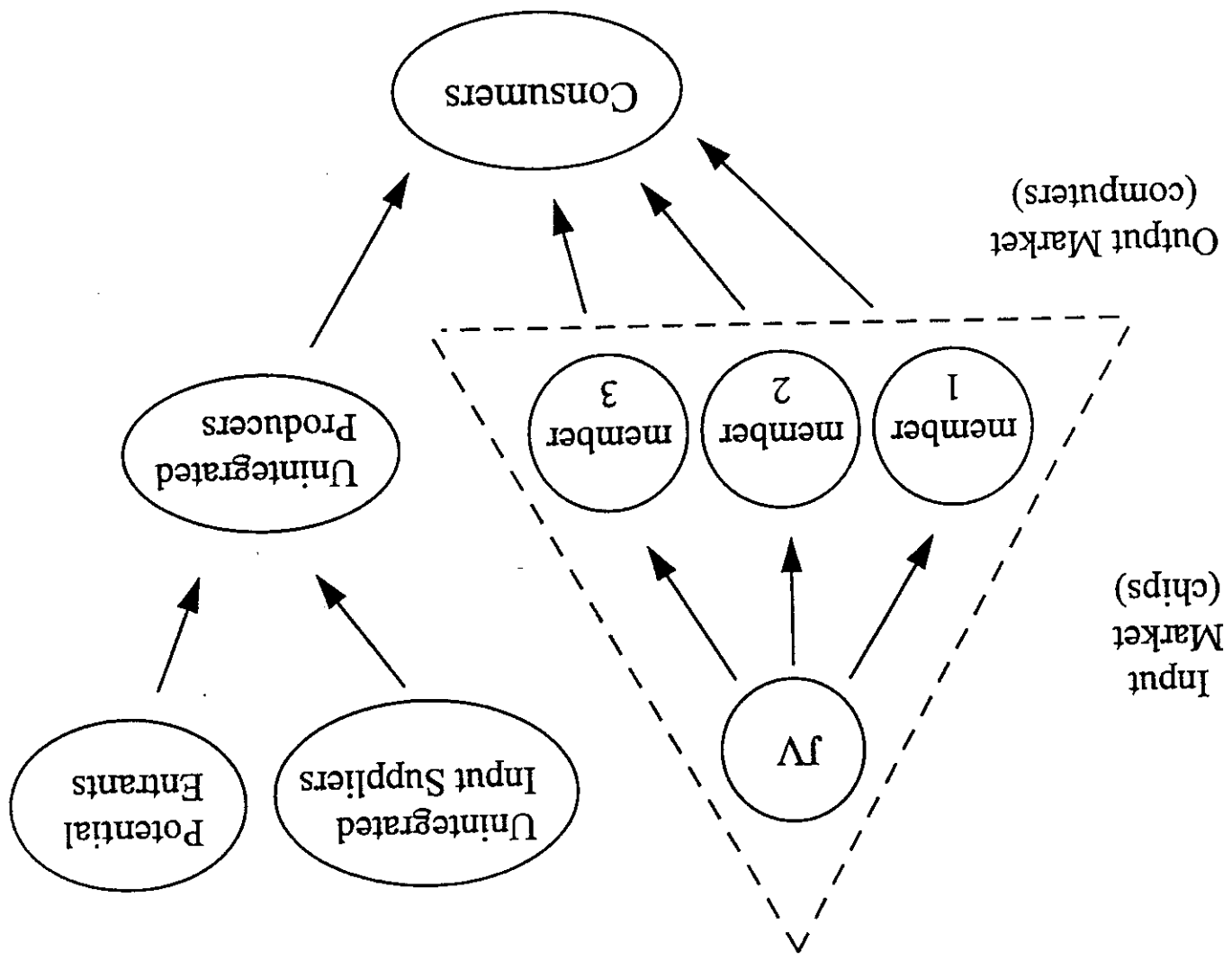
the venture produces semiconductors independently of the venture or purchases them from other semiconductor suppliers. As drawn, none of the members of semiconductor joint venture also is a manufacturer of computers, as indicated by the dotted outline. That is, each member in the facilitates vertical integration. The venture competitors sell to consumers, as shown at the bottom. The venture market (computers), as shown in the middle. The output market competitors supply the input to firms that compete in the output top of the diagram. The joint venture and its unintegrated competitors in the input market (semiconductors) are shown at the relationship of input and output market competition. In Figure 1, Figure 1 is a shorthand way to illustrate the structure and

(Bubble Diagram)

Insert Figure 1

interchange mechanism (the "input") and members then compete in issuing credit cards and dealing with merchants (the "outputs").

Figure 1



24 In Fashion Originators Guild of America, 312 U.S. 457 (1941), various characterizations of input and output markets may be relevant to the analysts. Treating wholesale dresses as an input and retailing as an output market, the "red card" retailers allegedly were denied access to the dresses produced by FOGA members. Treating retail services and textiles as inputs into the production of dresses and treating the sale of dresses as an output market, the "style pirate" dress manufacturers were denied access to the retail services of the "white card" retailers and the textiles produced by FOGA members.

23 Radiant Burners, Inc. v. People's Gas Light & Coke Co., 364 U.S. 656 (1961).

22 In addition, even if output prices do not rise, exclusion or an increase in input prices may reduce production efficiency. Further, an increase in input market share could lead to monopsony of supply of factors of production for the input.

A joint venture access rule can harm competition by raising the costs or otherwise disadvantaging the rivals of its members in the output market. This can reduce competition and lead to higher prices than would occur otherwise. For example, denying access to low cost firms in the output market can keep prices higher than they would be otherwise.

Numerous cases have raised issues of output market exclusion. In Radiant Burners,²³ the input Radiant was unable to obtain was the AGA certification that it needed to market its burner.²⁴ In

1. The Competitive Harm of Output Market Exclusion: Disadvantaging Output Market Competitors

We now focus on these three sources of consumer harm. It is important that litigants and courts distinguish among them, which each is likely to reduce consumer welfare differently. Therefore, consumer welfare.²² However, the exact factual circumstances under

N o r t h w e s t S t a t i o n e r s , I n c .

plaintiff Pacific Stationers apparently was complaining that exclusion from the wholesale cooperative would raise its costs of supplying stationary to retail consumers.²⁵ In Associated Press, the government essentially complained that the members of the association were denying rival newspapers access to non-local news that would disadvantage or raise barriers to entry to these competitors.²⁷

To analyze when such claims will harm consumers, consider an exclusionary access rule by the hypothetical semiconductor joint venture. Suppose that the semiconductor joint venture refuses to sell its products to non-members who compete with its members. This exclusion could only be a profitable and anticompetitive strategy under certain conditions in the input and output markets.²⁸

25 Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

26 It is not at all clear that this alleged cost disadvantage was very significant. Apparently, in fiscal year 1978, Pacific earned rebates of only \$10,000 on sales of approximately \$7.6 million. Northwest Wholesale Stationers, 472 U.S. at 287.

27 Associated Press, 326 U.S. 1 (1945).

28 For more detailed discussions of these conditions, see Thomas G. Krattenmaker and Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price, 96 Yale L. J. 209 (1986); Ordover, Sykes and Willig, Nonprice Anticompetitive Behavior by Dominant Firms Towards the Producers of Complementary Products, in ANTITRUST AND REGULATION: ESSAYS IN MEMORY OF JOHN J. McGowan 115-130 (Franklin Fisher ed., 1985); Ordover, Saloner and Salop, Equilibrium Vertical Foreclosure, 80 Amer. Econ. Rev. 127 (1990); Riordan and Salop, supra note —; Carlton and Perloff, INDUSTRIAL ORGANIZATION (Chapter 13).

29 This point abstracts from the issue of efficiency losses or monopsony, of course. See *supra*, note —.

This analysis suggests that expulsion of a member from a joint venture with a low market share in the input and output markets is unlikely to create any competitive harm. If the joint venture has a small share of the input market or if its members have a small

price from rising.

the joint venture face outside competition, competition may prevent market, and if membership is unconcentrated or if the members of the joint venture face no barriers to expansion in the output harm to competitors but not to competition.²⁹ Thus, if members of any upward price effect from occurring. In that case, there may be disadvantaged, including members of the joint venture, may prevent harmed. In particular, competition among the firms who are not rivals' costs were raised by the strategy, consumers may not be In the computer output market, even assuming that certain

be enhanced by the additional input market competition. be no anticompetitive effects possible; moreover, competition could equally efficient competing input joint venture. There then would could efficiently vertically integrate themselves or form an output market either. Similarly, suppose the excluded applicants such a case, there also could be no anticompetitive impact in the price and quality as provided by the venture to its members. In could supply the input to rival computer manufacturers at the same competitors if other actual and potential semiconductor producers In the input market, the strategy would fail to harm

30 The exclusion can harm consumers and competition only if the excluded firms would be able to compete effectively in the output market even in the event that they do gain access to the input produced by the venture.

In the input market, harm to excluded firms will occur only if these excluded firms' costs are increased by the exclusion.³⁰ In evaluating this issue, the mere fact that inputs are available elsewhere does not mean that the excluded competitors are not disadvantaged by the exclusion. Harm to excluded competitors can occur if alternative input suppliers are less efficient, if the input provided by the joint venture is differentiated from those of other suppliers, or if the exclusion facilitates coordinated pricing by the remaining input suppliers.

The likelihood of harm depends on conditions in the input and output markets. In other circumstances, competition and consumers may be harmed. Competition and consumers in the computer market would be harmed if, as a result of the exclusionary access rules, the input costs of certain actual and potential competitors are increased and, as a result, output prices are left higher than otherwise. In other circumstances, competition and consumers may be harmed. Competition and consumers in the computer market would be harmed if, as a result of the exclusionary access rules, the input costs of certain actual and potential competitors are increased and, as a result, output prices are left higher than otherwise. The likelihood of harm depends on conditions in the input and output markets.

share of the output market, those facts suggest that expelled firms are unlikely to suffer large disadvantages from exclusion. More importantly, if prior to the expulsion the members of the venture have a low collective market share in the output market, the potential for expansion by non-members is likely to prevent significant output price increases despite the expulsion.

31 See Krattenmaker and Salop, supra note — for a more detailed discussion of this standard.

Even if the individual members of a joint venture lack market power, the joint venture nonetheless may have market power if the members can act collectively to restrict total market output. For example, if by expelling a group of competitors, the joint venture can cause the output of these expelled firms to decline and if the output of its own members do not offset this decline, then total market output will fall and the joint venture will have exercised market power. Even if the remaining members of the joint venture continue to compete against each other, as long as they face either

result.

in the market, higher prices and consumer harm nonetheless can firms who are disadvantaged by denial of access continue to compete exclusion. Thus, it should be clear that even if the excluded total market output compared to what it would have been without the depends on whether or not the exclusion results in a reduction in collective action can result in elevated output prices. The answer enforcing the exclusion, the relevant issue is whether this Because the joint venture members can act collectively in involves analysis of the effect on the output market.³¹

Thus, proper evaluation of the competitive harm from exclusion exclusion also leads to an impact on price in the output market. and consumers. Consumers are not harmed significantly unless the competitors who are excluded is not the same as harm to competition Of course, it is now well recognized that harm to those

Classical market power by a group of firms is the power profitably to set raise price at a supra-competitive level by restricting the outputs of members of the group. Classical market power is the main focus of analysis of price fixing cartels. Exclusionary market power by a group of firms is the power profitably to set price at a supra-competitive level by disadvantaging competitors and causing those competitors to restrict their output. Exclusionary market power can exist independently of or in conjunction with classical market power.

33 The concept of exclusionary market power is straightforward. Market power is usually defined as the ability of a firm (or group of firms acting collectively) to restrict total market output so as to set price profitably above competitive levels. In the context of a joint venture, restrictions in market output can arise either because the joint venture members under scrutiny restrict their own outputs or because the joint venture causes members outside the venture to have lower outputs than they would otherwise have. Thus, it is possible to distinguish two ways in which market power can be exercised through an output restriction. Krattenmaker, Lande and Salop use the terms classical and exclusionary market power to identify this distinction. Krattenmaker, Lande and Salop, Monopoly Power and Market Power in Antitrust Law, 76 Geo. L. J. 241 (1987).

32 This reasoning explains, for instance, why a joint venture that expels low cost members can restrict total market output. Of course, this assumes that the expelled members cannot form a new, equally efficient input joint venture themselves.

Therefore, the lack of unilateral market power by individual venture members does not prevent the exercise of collective market power through exclusion by the joint venture. Accordingly, a joint venture can exercise market power even if the individual market shares of each of its members is low. Because this market power arises from exclusionary conduct, it can be referred to as exclusionary market power.³³

32 expelled firms.
output expansion cannot be expected to replace the lost output from higher costs than the expelled firms or rising supply curves, their

36 For example, see 1992 Horizontal Merger Guidelines.

35 Even if the joint venture has no power to raise prices (as reflected perhaps by a low collective market share), it may be incorrect to conclude that the joint venture lacks the ability to exercise market power by excluding rivals, and thereby prevent price from falling. This error is simply a variant of the Gellophane fallacy; there may be many substitutes at the higher price, but few at the lower price. See Carlton and Perloff at _____ and Krattenmaker, Lande and Salop, supra note _____ at _____.

34 The excluded competitors need not be more efficient than most or all of the remaining competitors for their exclusion to matter. At a minimum, they must be more efficient than the marginal established competitor. However, their entry (absent the exclusion) would have a more significant impact on competition and prices in the output market the lower are their costs, relative to established competitors. Of course, these lower costs also would translate into higher post-entry market shares for the excluded applicants.

36 The same is true in joint ventures. For

It is well known that market shares can provide an unreliable

exercise of (exclusionary) market power.³⁵

lower level. Thus, excluding these new applicants represents the firms would gain equal access to the input, prices would fall to a higher than they would be otherwise.³⁴ If, instead, the excluded input supplied by the venture may lead to output prices that are competitors, then preventing these applicants from purchasing the If the excluded applicants are especially low cost or disruptive are not all equally efficient or equally aggressive competitors. applicants. For example, suppose that output market competitors involve preventing output prices from falling by rejecting new expulsion of current members. Exclusionary conduct also may limited solely to increases in output prices, as could occur from It is important to emphasize that competitive harm is not

42 This also can deter two-tier entry of vertically integrated competitors and entry of unintegrated output market competitors.

41 The use of an all-or-nothing contract to deter entry formed the basis of the allegations in Lorain Journal. In that case, however, concerted action and vertical integration were not issues. <cite> For one economic analysis of the unilateral conduct case, see Rasmussen, Ramsmeyer & Wiley, Naked Exclusion, 81 Amer. Econ. Rev. 1137 (1991).

40 Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) (elimination of competition from businesses that sell out of hotels and residential quarters, as well as those stores that deal with stylists).

39 Id. Similarly, if ASCAP and BMI had exclusivity rules that prevented members from purchasing negotiation services from outsiders or negotiating with users themselves, the Court more likely would have invalidated the blanket license. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979). See also Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 236 (1994) (noting importance of non-exclusivity to BMI decision).

38 Northwest, 472 U.S. at 296 n. 7.

the members of the venture are important customers of input market suppliers' costs or deter entry of input market competitors.⁴² I alternative competitors. As a result, it can raise rival input thereby decrease demand for the inputs supplied by these decision to obtain inputs from alternative sources more costly, and venture or from input market competitors.⁴¹ This can make the all-or-nothing choices between obtaining their inputs from the Exclusivity requirements force members of the venture to make providing retail services.⁴⁰

involved elimination of competition in the input market for Similarly, one of the allegations in the Fashion Originators Guild to say that such competitive animus would be troubling.³⁹ engage in an independent wholesale operation."³⁸ The Court went on

46 See National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma, 468 U.S. 85 (1984). See also Fashion Originators Guild Association, 312 U.S. at 462-63. The Association adopted a variety of restraints on competition, including prohibitions on advertising, price discounts, and special sales. These restraints were supported by rules that imposed substantial fines on members who violated the Guild requirements.

45 For other discussions, see Brodley, supra note —; Pitofsky, supra note —; Piraino, supra note —.

44 This is because even perfectly competitive firms raise prices when their costs increase.

43 For a detailed analysis of the conditions under which this harm is likely, see Rasmussen, supra note —; Krattenmaker and Salop, supra note —; Riordan and Salop, supra note —.

Joint ventures can directly limit member competition in the output market in order to raise prices and reduce output.⁴⁵ A venture might directly control member output prices or output levels and set them at non-competitive levels, as alleged in NCAA.⁴⁶ A venture also could influence output market prices indirectly, by raising input prices or restricting input usage. To illustrate, suppose the semiconductor joint venture illustrated in Figure 1

3. The Competitive Harm of Supporting Pricing Coordination

output market is unconcentrated.⁴⁷

pressure on output prices. Output prices may rise, even if the venture and input market competitors could rise, placing cost input market entry.⁴⁸ Thus, the input prices charged by the the costs of the foreclosed input market competitors or deter new Where scale economies are important, this could significantly raise the potential market available to the input market competitors. rivals, then the exclusivity requirement could significantly reduce

sets a very high price for its semiconductors. In this case, the high input price will push up the price of the computers sold by the members.⁴⁷

Exclusionary joint venture access rules can play a key role in supporting pricing coordination in three ways. First, the venture can enforce anticompetitive rules by threatening to terminate the membership of those members that do not obey its anticompetitive rules, for example, by competing intensely instead of maintaining high output prices.⁴⁸ If the input is provided to members by the venture at lower effective cost than by other input suppliers, or if membership in the venture is important for other reasons, then threats to discipline or even terminate the membership of firms that deviate from these restraints on competitive conduct could succeed in deterring such attempts to compete.⁴⁹

47 In this case, the profits are taken upstream in the input market rather than in the output market. Of course, the profits must not be distributed in proportion to input purchases. Otherwise, members will realize that their marginal input costs have not really increased. See Shapiro & Willig, On the Antitrust Treatment of Production Joint Ventures, 4 J. Econ. Perspectives 113 (1990); Salop, When and How Is It Proper for Competitors to Collude, in Osservatorio "Giordano El'Amore sui rapporti tra diritto ed economica del Centro Nazionale di Prevenzione e Difesa Sociale, The Value of Competition, International Congress, Milan (1992).

48 For example, in *NCAA*, 468 U.S. at 95, the Court noted the ability of the NCAA to discipline members that did not obey its anticompetitive rules.

49 Fashion Originators Guild is perhaps the best example of this type of exclusionary access rules. In that case, if dress manufacturer members who competed too intensely were terminated, they would lose access to the retailers and textile manufacturers who were guild members. See also, e.g., *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Radian* *Burners*, 364 U.S. 656.

The structure of the venture can be probative of the incentive to inflict competitive harm. For example, where a venture is structured so that the similarly situated firms compete away all

theory of consumer harm must be well stated. demonstrated with somewhat different evidence. In short, the competitor. This is because the different mechanisms of harm are competition, as well as demonstrate harm to the excluded the mechanism by which the access rule is alleged to reduce important to require the excluded applicant to carefully specify injury to a competitor with injury to competition. It therefore is General allegations of boycott and exclusion often confuse

4. Evaluating Competitive Harm Allegations

market competition also would be eliminated. inputs produced by the venture. If so, that source of output produced by the joint venture, even if they do not embody the members from offering other products that compete with the output independently in the output market. Such a rule could prevent the competitive harm by preventing venture members from competing Third, exclusivity rules could contribute to the magnitude of

sold by the venture. inputs on the outside, instead of purchasing the high cost inputs eliminate members' abilities to achieve lower costs by purchasing facilitate pricing coordination. Such a rule would, for example, members exclusively use the inputs produced by the venture also may or outputs are indirect, an exclusionary access rule requiring that Second, where the venture's controls on members' output prices

50 Such a case is more likely for open access joint ventures or closed joint ventures with many similar members than it is for closed joint ventures with few members. In cases where firms are not similarly situated, even though competition may eliminate any gains to the marginal firm from the exercise of the joint venture's market power, there nonetheless would be gains to inframarginal firms who earn rents. In cases where there are fixed and sunk costs, exclusion of more efficient rivals can protect the profits on those sunk costs.

In the previous section, we analyzed the competitive harms that can flow from exclusionary access rules, that is, from rules that deny access to the input produced by the joint venture.

Protecting Competition as a Justification for Exclusionary Access Rules

more limited.

As another example of how structure can be probative, consider the following two joint ventures. In one, the members can purchase unlimited amounts of input at some cost equal to constant marginal cost, while in the other member output levels or input purchases are directly limited by the venture. The first venture should raise fewer antitrust problems than the second because the ability to restrict output (and thereby raise output price) is likely to be less ability to exercise exclusionary market power.⁵⁰

In such a situation the incentive to exclude is reduced or eliminated compared to the case in which the exclusion would allow the members of the venture to earn greater profits with the exclusion than without it. Similarly, a non-profit structure sometimes can reduce the incentive to exercise market power by constraining the additional profits to be earned from exclusion.

As another example of how structure can be probative, consider the following two joint ventures. In one, the members can purchase unlimited amounts of input at some cost equal to constant marginal cost, while in the other member output levels or input purchases are directly limited by the venture. The first venture should raise fewer antitrust problems than the second because the ability to restrict output (and thereby raise output price) is likely to be more limited.

51 These competitive benefits accrue to society, not to the joint venture. In fact, the venture and its members typically would gain from overinclusiveness that reduces competition.

drive down prices and profits also may be false. The applicants applicants that they desire membership in order to compete and protecting competition lacks credibility. Of course, claims by venture that it adopted the exclusionary rule with the purpose of the venture and its members. In that case, however, a claim by the coordination, that reduction in competition normally would benefit membership would reduce competition by facilitating pricing access rule raises related issues of credibility. If increasing The protecting competition justification for an exclusionary

would not be in the economic interest of the members. restricting the size of the joint venture. Of course, such a rule members. An exclusionary access rule could prevent this harm by be profitable in the face of potential competition from non- anticompetitive price and quantity restrictions are more likely to membership to a larger percentage of the input or output market, increasing membership in the joint venture. By increasing role in facilitating such anticompetitive collective conduct by Inclusionary joint venture access practices can play a key

large.⁵¹

competitive benefit by preventing joint ventures from becoming too reduced. Therefore, exclusionary access rules can create a that otherwise would compete more vigorously, competition could be becoming overly inclusive. By combining into the venture firms However, joint ventures sometimes can reduce competition by

52 For a more detailed economic analysis of this case using the economic framework described in this paper, see Carlton and Frankel, The Antitrust Economics of Credit Card Networks, 63 Antitrust Law J. 643 (1995).

The litigation between Dean Witter and Visa illustrates many of the issues raised by our economic analysis.⁵² That litigation revolved around a Visa rule that prevented Dean Witter from issuing

D. Application to SCFC LLC v. Visa USA

competition claims. These two sources of gains must be balanced to evaluate protecting by requiring the excluded firms to remain outside the venture. that there will be more competition in the input and output markets venture. The consumer gain from exclusion involves the likelihood of increased output market competition among members of the The consumer gain from increasing membership is the likelihood consumers and logically consistent with the venture's own actions. claims are both worthy of consideration as an additional benefit to inclusion. Under these circumstances, protection of competition exceed the anticompetitive benefits it would have gained through credible if the efficiency benefits achieved through exclusion protect competition. In that case, the justification could be of achieving legitimate efficiency benefits rather than in order to claims that it adopted the exclusionary access rule for the purpose The situation would be somewhat different if the venture than cut that rival in on the profits. may prefer to face increased competition from an excluded rival may truly desire membership in order to collude. The joint venture

55 VISA U.S.A., Inc. v. SCFC ILC, Inc., 36 F.3d 958 (10th Cir. 1994).

54 SCFC ILC, Inc. v. VISA U.S.A., Inc., 859 F. Supp. 956 (D. Utah 1993). The jury was instructed to use a rule of reason that required Dean Witter to prove substantial harm to competition from Visa's rule. The district judge rejected Visa's motions for judgment as a matter of law, rejecting Visa's argument for a legal standard that would have immunized its Bylaw from rule of reason scrutiny.

53 The Visa rule is set out in Bylaw 2.06. That Bylaw states that Visa membership is unavailable to any bank which issues a card "deemed competitive" by the Visa Board. The Visa Board named American Express and Discover as competitive cards, although it continued to permit members to issue MasterCards, Diners Club and Carte Blanche cards.

market between Visa and MasterCard, which is a joint venture like

There is competition in the network transaction services input

credit card issuing output market.

servicer. The Visa case focused on the impact on consumers in the

and communication links among each card issuer and merchant

These network services provided by the network create contractual

credit cards and servicing the merchants that accept the cards.

themselves and with non-members in two output markets, issuing

inputs to its member banks. Its members then compete among

venture that provides network transaction interchange services as

Visa's credit card operations can be viewed as an input joint

that Visa's justifications should be accepted as a matter of law.⁵⁵

Visa did not have market power evaluated at the issuer level and

Dean Witter.⁵⁴ In 1994, the Tenth Circuit reversed, holding that

Visa members.⁵³ A jury in 1992 reached a rule of reason verdict for

a credit card that competes with the Visa cards issued by other

Visa cards because of Dean Witter's ownership of the Discover Card,

56 Due to space limitations, the Bubble Diagram does not illustrate the Diners Club and Carte Blanche proprietary cards issued by Citibank.

Dean Witter alleged two of the three theories of competitive harm discussed in this article. First, Dean Witter alleged that the Visa's rule disadvantaged Dean Witter and thereby reduced

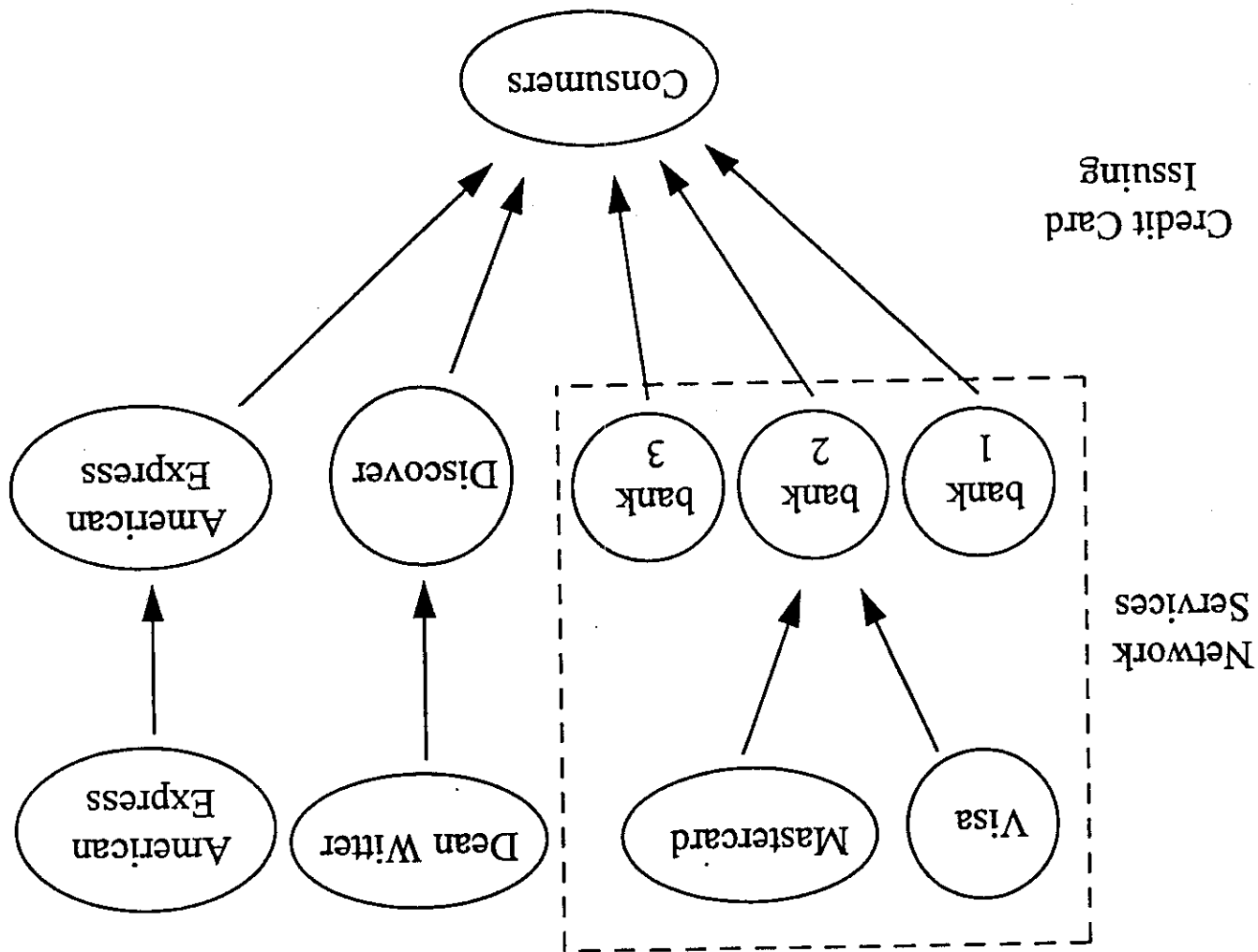
1. Dean Witter's Theories of Competitive Harm

Insert Figure 2

analytic approach in this article.

Figure 2.⁵⁶ The issues raised by both parties illustrate the card issuing markets are illustrated in the Bubble Diagram in Discover Card also are proprietary cards. The network services and credit cards, Diners Club and Carte Blanche, American Express and the largest Visa and MasterCard issuer, also issues two proprietary proprietary card issuer services the merchants itself. Citibank, network transaction and interchange services because the competitive alternative in the output market that do not require Visa cards and MasterCards. Proprietary cards are another that in the output market, Visa members compete by issuing both of the MasterCard association and issue MasterCards as well, so Visa. Virtually all substantial Visa card issuers also are members

Figure 2



59 SCFC LLC, Inc. v. VISA U.S.A., Inc., 859 F. Supp. 956 (D. Utah 1993). Banks also compete in servicing merchants that accept credit cards. However, this market was not at issue in the case.

58 There were three main elements to Dean Witter's first theory. First, it argued that Visa members have collective market power in the market for issuing credit cards, implying that exclusion of competitors could lead to higher prices in the output market. Second, it claimed that Dean Witter would be a low cost, aggressive competitor with its Visa card that would enter on a large scale with national promotion and its competition would cause credit card fees to fall, thereby benefiting consumers. Third, it argued that expansion of the Discover Card would not be equivalent to expansion by issuing a Dean Witter brand of Visa card. This is because credit cards are a differentiated product characterized by economies of scale and scope, as reflected by the fact that most Visa issuers also issue Mastercard.

57 The parties stipulated to general purpose credit cards as the relevant output market. SCFC LLC, Inc., 819 F. Supp. at 966.

Second, Dean Witter alleged that Visa's rule deters the entry and growth of new proprietary cards and networks, like its Discover Card, and thereby reduces competition in both the network transaction services and card issuing markets.⁵⁹ Dean Witter's second theory involved the impact of Visa's exclusionary access rule on the incentives of current Visa members to develop competing proprietary cards or competing joint ventures. According to Dean Witter, the rule will deter current Visa members from issuing new prevent credit card prices from falling.⁵⁸

Card already competes in issuing credit cards, denying Dean Witter the ability also to issue a Visa card would reduce competition and Witter claimed that, notwithstanding the fact that the Discover Card if it were denied access to Visa membership. Instead, Dean did not argue that it would not be viable with just the Discover competition in the market for issuing credit cards.⁵⁷ Dean Witter

61 In contrast, in denying Dean Witter's allegations of consumer harm, Visa also argued that Dean Witter's entry would have no effect on competition.

60 The jury instructions required Dean Witter to prove that the harm to competition from the exclusion was not outweighed by any efficiency or other competitive benefits.

almost all Visa members issue Mastercards, and Citibank issues the unfair advantage in the market. One issue here was the fact that network and use it to compete through Discover, thereby gaining an would free ride on confidential information created by the Visa Visa's second efficiency justification was that Dean Witter

other joint ventures to organize or invest in the future. Visa to admit Dean Witter would alter the incentives of it and Visa argued, long run economic welfare would fall in that forcing Dean Witter to capture customers of other Visa members.⁶¹ However, increase competition among Visa card issuers and thereby allow

has as its logical premise that Dean Witter's entry into Visa would incentives for Visa and its members to invest. This justification Witter protected its property and was necessary to create first efficiency justification was that denying membership to Dean justifications and a protecting competition justification.⁶⁰ Visa's Visa raised three justifications for its rule, two efficiency

2. Visa's Justifications

Visa would face in providing network services. network services. The rule therefore reduces the competition that terminate their membership and deprive them of access to Visa's members would be deterred by the expectation that Visa would rival proprietary cards or starting or joining new networks. Those

65 Antitrust defendants may not justify their conduct as furthering certain welfare goals that are viewed as being in direct conflict with the Sherman Act. However, the view that certain social welfare goals are not cognizable efficiency benefits goes beyond the *per se* rule. Such justifications would be impermissible under a rule of reason inquiry too. National Soc'y of Prof. Eng'rs, 435 U.S. at 688-92 ("Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to

64 See Northwest Wholesale Stationers, 472 U.S. at 289 ("[E]very commercial agreement restrains trade. Whether this action violates § 1 of the Sherman Act depends on whether it is adjudged an unreasonable restraint of trade.") ; Standard Oil Co. v. United States, 221 U.S. 1, 60-70 (1911).

63 See Carlton and Frankel, *supra* note —, for an explanation of why the benefits of admitting Dean Witter exceed the costs.

62 Sears also owned a Visa issuing bank while it simultaneously issued Discover Cards, with no complaints of leakage of confidential information.

Only unreasonable restraints are condemned by Section One of the Sherman Act.⁶⁴ Some restraints are evaluated under a full fact-based rule of reason balancing analysis. Other restraints are condemned *per se*, without this full balancing analysis.⁶⁵ Under the

III. ECONOMIC ANALYSIS OF ALTERNATIVE LEGAL STANDARDS

competition between the systems.⁶⁶

permitting member non-exclusivity with MasterCard reduced regulation or antitrust attack. In this regard, Visa argued that Discover Card and Visa and exposing Visa to possible government network, thereby reducing competition in network services between granting access to Dean Witter would lead to an overinclusive Visa also raised the protecting competition justification that was the potential for remedies short of exclusion from membership.

Diners' Club and Carte Blanche proprietary cards.⁶⁷ A second issue

67 Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (1992).

66 See U.S. v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940). See also NCAA, 468 U.S. at 103-04 ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct"). As cogently explained by Krattenmaker, a standard that defines certain conduct as a per se offense actually rules out particular defenses, in particular, that the conduct does not lead to a measurable anticompetitive impact. Krattenmaker, Per Se Violations in Antitrust Law: Confusing Offenses with Defenses, 77 Geo. L. J. 165 (1988).

any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions". Non-profit entities may provide an exception under certain circumstances. See United States v. Brown University et al., _____.

of per se legality.

of the merger.⁶⁷ This "safe harbor" constitutes, in effect, a rule anticompetitive impact based a full fact-based competitive analysis without even allowing the government to try to show an unlikely that the merger can safely be permitted per se, that is, designed into the guidelines assumes that net economic harm is so the merger likely exceeds efficiency benefits. The "safe harbor" a fact finding process to determine if the competitive harm from guidelines, a finding that the market is unconcentrated precludes standard. For example, according to the 1992 Horizontal Merger Legality similarly can be determined on the basis of a per se to measurable anticompetitive effects.⁶⁶

per se standard of illegality, plaintiffs do not need to demonstrate anticompetitive effect. Nor may defendants rebut plaintiffs' allegations by showing that the restraints fail to lead

In this sense, all *per se* standards create irrebuttable presumptions. A rule of *per se* illegality involves an irrebuttable presumption that when certain conditions occur, anticompetitive effect is likely.⁶⁸ A rule of *per se* legality creates an irrebuttable presumption that there is no anticompetitive effect when certain conditions occur.

A. The Benefits and Costs of *Per Se* Standards

If accurate calculations of actual net economic impact could be performed costlessly, there would be no reason to spend much time considering alternative legal standards. The antitrust laws simply could forbid any joint venture access rule that produced a negative net economic impact, as set out in the previous section. This would be a fully-specified and unconditional decision-making standard. Because low cost but perfectly reliable calculations of net economic impact are not generally available, however, the choice among legal standards becomes an important, yet complex issue. This complexity is reflected in the tension and confusion that has existed between *per se* standards and the rule of reason. The economic analysis of alternative legal standards is premised on the view that the goal of the legal process is to accurately determine the proper outcome in each case. However, economic analysis recognizes that discovery and fact finding are costly to the participants and the courts. Therefore, the legal process faces an unavoidable tradeoff between judicial economy (i.e., legal process cost) and the cost of erroneous outcomes.

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Legal process should be designed to economize on these twin sources of cost.

In this approach, the benefit of a per se standard involves the reduction in legal process costs relative to the potential for error introduced by truncating the analysis. By eliminating the need to prove (or the ability to disprove) certain allegations with factual evidence, a per se rule reduces the legal process costs of the court and the litigants, relative to a rule of reason standard. However, assuming that more information improves accuracy, per se standards should lead to more error, error that is costly to society.⁶⁹ In economic terms, per se rules are appropriate when the likelihood and social cost of erroneous outcomes (i.e., false convictions and false acquittals) are low relative to the difficulty and cost of gathering further information and then making a decision.⁷⁰

69 Some commentators argue that per se rules are necessary because courts make frequent errors applying the rule of reason. Easterbrook, XXX, Antitrust L.J. (1992). If courts are unable to apply the rule of reason accurately, then per se rules become more attractive.

70 Schwartz, An Overview of the Economics of Antitrust Enforcement, 63 Geo. L.J. 1075 (1980); Erllich & Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257 (1974); Landes, Sequential versus Unitary Trials: An Economic Analysis, "22 Journal of Legal Studies 99 (1993); Beckner & Salop, Issue Sequencing, Summary Disposition and Optimal Legal Procedure (November, 1994) (unpublished manuscript, on file with the authors). Consider, for example, the case of the per se rule condemning naked price fixing, that is, joint pricing that lacks an efficiency justification. The economic rationale for denying the defendant the ability to demonstrate lack of anticompetitive effect is the belief that the

72 Therefore, it is not surprising that one hallmark of per se rules is that they typically cover situations in which the Court feels it has great experience. See generally Northwest Wholesale Stationers, Inc., 472 U.S. at 293-95.

71 Jefferson Parish Hospital No. 2 v. Hyde, 466 U.S. 2, 16 n.25 (1984). See also GTE-Sylvania ("Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. . . . Cases that do not fit the generalization may arise but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.") Continental T.V., Inc. v GTE Sylvania Inc., 433 U.S. 36,50 (1977).

likely benefit from joint price setting is small or nonexistent compared to the likely harm to consumers. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990). The decision calculus changes significantly when there are plausible (and cognizable) efficiency justifications for joint pricing. In this situation, the presumption that consumer welfare will be harmed is weakened or eliminated and the potential harm from false convictions rises accordingly. See NCAA, 468 U.S. 85; Broadcast Music, Inc., 441 U.S. 1; GTE Sylvania, Inc., 433 U.S. 36.

Any proposal to limit the scope of antitrust analysts by applying a per se rule should be examined carefully to make sure that the administrative savings from judicial economy are not likely to be more than offset by an increased incidence of judicial error. This is particularly true when the subject matter to which legal standards are applied is as complex and dynamic as joint ventures and their access rules.⁷²

The rationale for per se rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct.⁷¹

example, in Jefferson Parish, the Court stated
judicial decisions regarding per se standards of illegality. For
This basic economic approach is reflected in a number of

75 For example, see Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1 (1984).

74 The issues considered under the rule of reason also are considered in deciding whether to apply a per se rule. As Justice Stevens wrote in introducing the quick look approach in NCA, "Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." NCA, 468 U.S. at 104 n.26. See also Jefferson Parish, Louisiana v. Hyde, 468 U.S. 2 (market power in tying product an element of per se tying claim). See Eastman Kodak Co., 112 S.Ct. at 2083 n. 15 (market definition, a central issue in assessing market power, sometimes involves an understanding of likely anticompetitive effects). See FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986) (direct evidence of harmful competitive effect "can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects") (citation omitted); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 434-35 & n. 17 (1990); NCA, 468 U.S. at 109.

73 For example, see Kauper, The Sullivan Approach to Horizontal Restraints, Antitrust Law Journal.

In designing the optimal legal standard, one key question is whether the legal process productively can be shortened by focusing as a threshold matter on certain issues that are most significant in gauging the likelihood that a restraint will have a positive or negative net economic impact.⁷⁵ For example, the finding in BMI that significant efficiency benefits likely would flow from joint

time.⁷⁶ and rule of reason antitrust decisions has become less clear over appreciate this point, the operational distinction between per se along a continuum and varies among cases.⁷³ As courts have come to The proper mix of presumption and case-specific fact gathering lies case have to be understood before knowing which standard to apply. not as sharp as might appear. At a minimum, the basic facts of a The distinction between rule of reason and per se standards is

77 Northwest Wholesale Stationers, Inc., 472 U.S. at 296-97. The Court actually stated these conditions in the negative, that per se treatment would not be warranted unless one of these conditions were found.

76 U.S. v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940)

In Northwest Stationers, the Court appears to hold that a joint venture cooperative's membership restriction could be held per se illegal under either of two conditions: either the venture "possesses market power" or, the venture has "exclusive access to an element essential to effective competition."⁷⁷ The Court stated

Circuit.
Northwest Stationers and the recent Vista decision by the Tenth standards to govern exclusionary access rules, most notably in se legality. Courts have proposed a number of potential per se either by a standard of per se illegality or by a standard of per reason inquiry. Alternatively, the inquiry could be foreshortened access restraints could be evaluated factually under a rule of issue of joint venture exclusionary access rules. Joint venture The economic rationale for per se rules can be applied to the

B. Alternative Per Se Standards for Joint Venture Access Restraints

benefits.⁷⁶
 Thus, it was inappropriate to shorten the decision-making process by condemning the blanket license per se, that is, without requiring the plaintiff actually to prove anticompetitive effect. In other cases, Socony Vacuum, for example, the process is shortened when there is no showing of significant efficiency

79 VISA U.S.A., 38 F.3d 958. Some of these rules previously had been proposed by the commentators mentioned earlier. See supra at

78 Id. Although the Court is somewhat ambiguous regarding the role of efficiency considerations, it seems doubtful that many joint venture access rules would be found illegal per se under the Northwest rule. This is because access restraints often raise at least plausible efficiency rationales and such justifications likely would trigger a rule of reason inquiry. Id., at 296 ("Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively. Disclosure rules, such as the one on which Northwest relies, may well provide the cooperative with a needed means for monitoring the creditworthiness of its members.") This approach is not surprising. After all, if efficiency rationales for joint pricing (such as those in BMI) create the need for a fact-based analysis, there is no reason why concerted refusals to deal should be treated more harshly.

that only under these circumstances is it warranted to conclude that "expulsion is virtually always likely to have an anticompetitive effect."⁷⁸ In the Visa case, the Tenth Circuit chose to take a very different approach to market power and essentiality of the input. It adopted neither per se illegality nor the rule of reason. Instead, it adopted a number of standards of per se legality.⁷⁹ Under one standard used by the Visa court, proof that the excluded applicant would be able to survive in the market absent access to the joint venture would provide a complete defense. Under another standard, proof that a low output market concentration measure based on the individual market shares of members of the venture also would provide a complete defense and bar the plaintiff from trying to prove anticompetitive effect.

Both the essential input and competitor viability rules involve the same economic issue: the importance of the input to the competitive effectiveness of the excluded applicants. Both concepts are imprecise proxies for market power and they ignore the direct impact of exclusion on the effectiveness of competition.

1. Criticism of Essential Input and Competitor Viability Standards

We next discuss the problems with these various per se rules. We first evaluate the per se standards based on the related concepts of input essentiality and competitor viability. We then evaluate the per se standards based on market power. We then set forth our recommendations to narrow the application of per se standards in favor of the structured rule of reason.

The Visa court adopted a peculiar, if not outright illogical test of market power. The market power of the venture was gauged only by reference to the concentration in the output market based upon the individual market shares of members, without reference to the collective market power of the venture in the input or output market (as gauged, for example, by the joint venture's collective market share or its ability to raise prices by disadvantaging rivals). The Visa court would measure the market power of the venture only by the output market concentration based on the individual market shares of the members of the venture.

81 In discussing the theory that Northwest's intent was to punish Pacific for competing in the input market, the Court stated that this allegation should be evaluated under the rule of reason. Northwest Wholesale Stationers, 472 U.S. at 296 n. 7. Although recognized by the Court, this limitation may be ignored by others.

80 Northwest Wholesale Stationers, 472 U.S. at 296-97.

a. The Northwest Essential Input Rule of Per Se Illegality

According to Northwest, exclusion is illegal per se if the input is "essential to effective competition."⁸⁰ This standard is problematical in four key ways. First, essentiality is not defined and, as literally stated, this requirement is not a short cut. If the excluded applicant can demonstrate that the effectiveness of competition is reduced by denial of access, that showing on its face demonstrates anticompetitive effect. Demonstrating anticompetitive effect is, of course, the rule of reason standard. Second, this standard is overinclusive. If the standard is taken to mean that the input is essential to the excluded applicant, then the standard appears to ignore the potential for output market competition from firms other than the excluded applicants. Just because the input is essential for one applicant does not mean that it is essential for all.

Third, the rule may be inappropriate for allegations of competitive harm other than the output market exclusion apparently alleged in Northwest. Indeed, this limitation seems to have been recognized by the Court.⁸¹ Fourth, as discussed earlier, the standard does not clearly provide an efficiency defense to application of the rule.

83 Even if access to the input is not absolutely necessary for survival in the output market, denial of access may contribute significantly to competitive harm by disadvantaging an output market competitor. As discussed earlier (Section IIA), the excluded applicant's alternative sources of inputs may be less efficient or input market competition may be reduced by the exclusion.

82 Visa

b. The Competitor Viability Rule of Per Se Legality
The Visa court took the position that if an excluded firm can survive outside the joint venture, the access restriction should be legal.⁸² The "competitor viability" standard of per se legality would allow exclusionary access rules in cases where access is not essential to the viability of the excluded firm but denial of access nonetheless harms competition significantly. The competitor viability rule would immunize the access restraints from the rule of reason inquiry and simply permit the access restraints per se. This standard of per se legality is problematic in three ways. First, as already discussed, the fact that the excluded applicant can survive in the market does not mean that the competition will be unaffected by the access restraint or that the joint venture lacks market power. Mere survival does not imply effective competition.⁸³ Second, the rule is backward-looking in its focus. The proposed rule focuses on the viability and success of the excluded applicant in the past, not on the likely impact of the access rule on prices and market competition in the future. Third, this rule of per se legality is insensitive to the fact that there

84 By collective market power in the output market, we mean that the members of the venture could exercise market power by collective conduct through the venture. For example, expulsion of current members could allow price to rise above current levels. Similarly, exclusion of new applicants could prevent price from falling. Notice that in this latter case, the joint venture may have no power to raise price above the current level because of current competition yet still have the power to prevent price from falling to a lower level. This is a variant of the Gelphane fallacy. See Carlton and Perloff at _____ and Krattenmaker, Lande and Salop, supra note _____ at _____.

Northwest's rule of per se illegality for ventures with collective market power is flawed in a number of ways. First, it does not state whether the relevant market power concept refers to the collective market power of the venture and its members in the input market, the output market or both.⁸⁴ Nor does it appear to recognize that the exercise of market power through exclusion can prevent prices from falling. Second, it does not distinguish the

a. Northwest's Collective Market Rule of Per Se Illegality

Northwest states a rule of per se illegality when a joint venture has market power. Some commentators and the Visa court have suggested a rule of per se legality when a joint venture lacks market power. Both these standards require the court to determine what it means by market power and which market is the focus. The Visa court evaluated market power by measuring the concentration of the individual members of the joint venture in the output market. We critique these different standards in turn.

2. Criticism of Market Power Per Se Rules

market competitors. are theories of competitive harm other than disadvantaging output

86 For example, see Rothery Storage & Van Co., v. Atlas Van Lines, Inc., 792 F. 2d 210, 229 (1986). Easterbrook proposes a market power screen in the context of vertical restraints. Easterbrook, supra note _____. Although Easterbrook's proposal is posed as part of a rule of reason process, it similarly creates an irrebuttable legal presumption of lack of anticompetitive effect where there is no showing of market power.

85 If denial of access to the input raises the costs of the excluded firms and thereby leads to a price increase, then the venture has (exclusionary) market power.

The Rothery Court and some commentators have suggested a standard of per se legality when ventures and their members lack collective market power.⁸⁵ Others have suggested merger-based

b. Merger Tests of Collective Market Power and Per Se Legality

be addressed.

se illegality based on market power, at a minimum these issues must efficiency justifications. In order to create a proper rule of per the per se rule is inapplicable when the access restraint has Fourth, as already discussed, Northwest never makes it clear that competitive harm in the output market under the rule of reason. market power is equivalent to demonstrating the possibility of prices above the level that would otherwise prevail, then showing by excluding applicants, the venture profitably can set output be a significant short cut. If market power is taken to mean that, market are equivalent.⁸⁵ Third, this per se standard may not even It might be thought that essentially and market power in the input relevant market power concept from the essentiality of the input.

87 Thomas M. Jorde & David J. Teece, *supra* note 7; Carlton & Frankel, *supra* note 7. These tests are not equivalent and we discuss important distinctions between them below.

88 This involves the distinction between the unilateral market power of a newly merged firm and the impact of a merger on the likelihood of pricing coordination. See 1992 Merger Guidelines.

(e.g., Jorde and Teece) would evaluate the potential upward effect classical market power. For example, the "usual" merger test conclusions if one ignores the distinction between exclusionary and Second, even a merger-based standard can lead to erroneous

impact of a hypothetical merger of venture members. Rather, at the least, it must focus on the likely competitive market power of the members of the venture examined in isolation. For these problems, the relevant standard cannot be the collective facilitates pricing coordination with non-members.⁸⁸ To account the venture may be able to raise prices with conduct that power. For example, a market share standard ignores the fact that flawed. Market share can overestimate or underestimate market market share of members at current prices in the output market is subtle issues. First, a standard based only on the collective The measurement of collective market power raises a number of market power.

exclusion, then the group of firms collectively has (exclusionary) would lead to higher output prices than would occur absent the could restrict access to their joint venture and that exclusion virtually tautological. If a group of firms acting collectively market power and competitive harm from exclusionary conduct is variants of this rule.⁸⁷ The relationship between collective

89 That is, exclusionary market power permits the venture to maintain prices at the current elevated level, even if venture lacks the classical market power to raise price above that level. See note —, *supra*.

In order to evaluate exclusionary market power, one can use a hypothetical merger test that differs from the usual merger test. Our test gauges the impact of a hypothetical merger of an expanded group of competitors, consisting both of members in good standing

force prices down below the current level.⁸⁹

may prevent price from rising, but it obviously would be unable to thereby prevent the output price from falling. Current competition access rule will disadvantage more efficient competitors and would be irrelevant in evaluating allegations that the exclusionary venture members in good standing would raise price, that standard membership. If one simply asks whether a merger of existing particular, consider the case of exclusion of new applicants for fact does not mean they cannot profit by exclusionary conduct. In outputs (that is, even if they lack classical market power), that standing cannot profitably raise prices by restricting their own This reasoning is not correct. Even if the members in good result, the venture should be permitted to restrict access.

argued that the venture has no collective market power and, as a no predicted price increases above the current level, then it is good standing. If the venture passes this test (i.e., if there is on output prices of a hypothetical merger of the venture members in

The relationships among the tests are as follows. Failing our proposed merger test involves a showing that $P(A') < P(A)$. Failing the usual merger test involves a showing that $P(B') > P(B)$. Passing a test typically involves equality of the relevant pair of prices. If a joint venture passes our proposed merger test, it also will pass the usual merger test. Failing the usual merger test means that our merger test also will be failed. However, a venture may pass the usual merger test but fail our merger test. Our test is superior to the usual merger test. Passing our test also means that $P(B) = P(A)$. Passing the usual merger test does not imply that $P(B) = P(A)$, which is why that test is flawed.

One can state these tests and their relationships in symbolic terms as follows. Define situation A as the six firms competing as joint venture members, situation A' as the six firms merging, situation B as the five firms competing as joint venture members with the sixth excluded firm competing outside the joint venture, and situation B' as the five firms merging while the sixth firm competes outside the joint venture. Denote the predicted market price in situation A as $P(A)$, and similarly for the other situations. Given these definitions, the rule of reason would compare $P(A)$ and $P(B)$; exclusion would be anticompetitive if $P(B) > P(A)$. The usual merger test is flawed because it ignores $P(A)$. This is why the usual merger test is insufficient for gauging exclusionary market power.

90 For example, suppose a joint venture with five members refuses membership to a sixth firm. In this case, our merger test would gauge the price impact of a hypothetical merger of the six competitors, compared to the case where all six members are in the joint venture. In contrast, the usual merger test gauges the impact of a merger only of the five original venturers, assuming that the sixth firm is not a member, and compares that impact to the current price. This test is flawed because it ignores the potential competitive impact of the membership of the sixth firm.

and those applicants excluded by the restrictive access rule.⁹⁰ Only if this hypothetical merger fails to increase price, relative to maintaining competition among this expanded group of competitors, could one accurately predict that the exclusion of low cost potential members would lack any price effect. Our merger test is straightforward to understand. Suppose that giving access to low cost applicants would lead to lower prices. In that case, the venture would fail our merger test. A

93 Indiana Federation of Dentists, 476 U.S. 447 (1988) (2500 dentists, 85% of whom participated in concerted refusal to deal); Superior Lawyers Trial Association, 493 U.S. 411 (1990) (1800 lawyers, of which 100 were regulars); Maricopa; Engineers. See also Rothery Storage & Van CO. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (using collective market power screen), cert. denied, 497 U.S. 1005 (1990).

92 VISA U.S.A., 36 F.3d at 958.

91 Carlton and Frankel's merger test gives results similar to this test. It compares a hypothetical merger of the five firms to competition among all six firms. See Carlton and Frankel, *supra* note ___. Failing the Carlton-Frankel test involves a showing that $P(B') > P(A)$. If a joint venture passes our proposed merger test, it also will pass the Carlton-Frankel test. Passing the Carlton-Frankel test implies that $P(B) = P(A)$. However, passing the Carlton-Frankel test does not imply that our test will be passed. Thus, the Carlton-Frankel test is more permissive. Our test may be somewhat easier to implement than the Carlton-Frankel test.

members of the venture each have no market power and if the and enforcing an anticompetitive access rule even if individual the venture can utilize its collective market power in promulgating restrictions are adopted collectively by the venture. As a result, The logical error of this standard is easy to spot. Access inconsistent with economic logic and current case law.⁹³

market power if the membership is unconcentrated.⁹² This rule is market. It held, in effect, that a venture cannot have collective the concentration of the membership of the venture in the output The Visa court adopted a rule of per se legality based on

c. Visa's Membership Concentration Rule of Per Se Legality

merger.⁹¹ If the low cost applicants were given access and there were no low cost applicants, would lead to higher prices than would occur merger of all the members of the venture, including the excluded

94 See Section II.A. *supra*. In that section, we also show that low market concentration in the overall output market can be probative of the absence of probable anticompetitive effect in certain cases.

95 In this section, we focus on the legal analysis of output market exclusion. Analogous reasoning would apply to the evaluation of legal standards dealing with allegations of input market exclusion or allegations of supporting pricing coordination.

The advantage of per se rules is that they can lead to swift and relatively error-free decisions in many cases.⁹⁵ We are generally sympathetic to the goals of per se rules and so per se standards based on collective market power have appeal. For example, a per se standard of legality based on our merger test for lack of collective market power appears reasonable. Consider a hypothetical semiconductor input joint venture of three small computer companies that collectively have a 3% share of an unconcentrated computer market and semiconductor production. If this joint venture were to expel one member with a 1% market share of the computer market, the loss of output is likely to be met with offsetting expansion of other computer competitors, with no

C. Per Se Standards and the Structured Rule of Reason

memberships is unconcentrated. Evaluation of collective market power therefore is relevant. As discussed earlier, even if the joint venture membership is unconcentrated, so that individual members lack unilateral market power, expulsion of current members may harm consumers by raising output prices and exclusion of new competitors may harm consumers by preventing them from falling.⁹⁶

96 In addition, on these facts, the expelled member likely would be able to find other cost-effective sources of semiconductor. A similar result would result if the joint venture were to exclude a new applicant that predictably would obtain a market share of 1%. In addition, proof of antitrust injury suffered by the plaintiff also should be required in order to discourage frivolous suits.

However, the application of per se rules in many cases will be neither simple nor relatively error-free, for three main reasons. First, some per se rules of illegality will apply to few, if any, cases. Many cases of access restrictions that raise anticompetitive concerns also will raise efficiency justifications that are at least plausible. Where valid efficiency claims are made, it is necessary to balance benefits against harms in order to reduce the likelihood of error. Since this balancing requires rule of reason evaluation, few joint venture access cases will be able to be decided by the per se standard of illegality. Second, some proposed per se rules may not really involve much of a reduction in the needed amount of analysis. For example, determining that a hypothetical merger would not harm competition can be quite complicated. Although one could label our merger test

illegality.⁹⁷ Similarly, if the venture and its members have collective market power in both the input and output markets and if there are no efficiency or competitive justifications for the denial of access, little would be lost by enjoining the denial of access through a standard of per se

98 As discussed earlier, the rule of reason also can lead to erroneous decisions. See Easterbrook, *supra* note _____. Our analytic approach should lower the error costs for both types of rules. However, if courts are unable to apply our structured rule of reason without committing serious errors, then expanded use of per se standards may be appropriate.

When our proposed per se standards cannot be applied simply without risking significant error, we recommend using our framework to apply a structured rule of reason standard that contains three elements.⁸⁸ First, the plaintiff must state a logically consistent and plausible claim of anticompetitive harm and antitrust injury.

Similarly, as we have discussed in detail, per se standards that use a measure of concentration based on individual market shares can fail to identify collective market power and can lead to error in many cases. For example, the test may not be relevant for evaluating allegations that the exclusion will prevent price decreases. When our proposed per se standards cannot be applied simply

themselves form the basis for a per se standard. indicators of anticompetitive effect. Thus, they should not by proxies for market power and in any event are not necessarily good power in the input market. However, these are at best imperfect demonstrating (or rebutting) claims that the venture has market on their exact definitions, these concepts may be probative for for per se standards based on essentiality or viability. Depending could entail significant error costs. For example, we see no role Third, other per se standards such as those proposed by courts considerable detailed analysis is entailed in the test. as a per se standard, that label would not be appropriate if

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

100 For example, Carlton and Frankel, *supra* note —, argue that courts face inevitable difficulties in understanding how particular rules affect the operating efficiency of joint ventures. In light of this, they conclude that courts should be wary of intervening and therefore should give the benefit of the doubt to efficiency justifications in close cases.

99 Of course, a particular concern with the network joint ventures that are one focus of this article is that many have economies of scale and sunk costs that reduce the likelihood of entry by rival networks.

The decision on how to do the balancing in a complicated rule of reason case should depend on how error prone a decision is likely to be and the welfare consequences of potential errors. In this regard, the cost of error includes the precedential effect of the decision on the operation of other ventures as well as its effect on the venture at issue. It also includes the likelihood that the market will quickly correct judicial error through entry.⁹⁹ As a result, courts may choose to tip the balance in close cases.¹⁰⁰ Analysts under our structured rule of reason should not mean that every joint venture access matter will involve endless fact finding, as might be imagined from the exhaustive and unstructured list of factors set out in *Chicago Board of Trade*.¹⁰¹ Instead, the inquiry should be focused and structured around specific theories of any anti-competitive harm.

Second, the court should determine whether the anti-competitive harm is likely to be significant. Third, the court should evaluate the magnitude of any efficiency or other competitive benefits claimed for the access restrictions and balance them against the magnitude

103 Areeda, The Rule of Reason, in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981), cited in NCAA, supra note —.

102 In Section II.

In this paper, we have formulated an analytic framework for evaluating the competitive impact of exclusionary access rules adopted by input joint ventures. This framework involves

IV. CONCLUSIONS

For evaluating efficiency benefits, reason and exonerate the joint venture, thereby obviating the need to conclude lack of competitive harm under our structured rule of computer market. It likely would be simple for the court quickly companies that collectively have a 3% share of an unconcentrated hypothetical semi-conductor input joint venture of three computer other competitive benefits. In this regard, consider again the from exclusionary access rules, even ignoring any efficiency or cases, analysts will indicate that there is no competitive harm provisions that would not lead to anticompetitive harms. In other turn out to be pretextual or clearly be achievable by other access protecting competition benefits of the access rule provisions will significant anticompetitive harm, the claimed efficiency and For example, in some cases in which there is evidence of a out in the now-proverbial "tinkling of an eye."¹⁰³ Indeed, in many cases, the structured rule of reason can be carried article.¹⁰² Moreover, balancing often will be unnecessary. of competitive harm and efficiency benefits set out in this

It is important to emphasize that the plaintiff be required to state its claims of anticompetitive effect with specificity. This suggestion may seem obvious, but it is so often ignored that it is

analysis.

identify, as part of a more focused and structured rule of reason one should use our analysis, and the key factual issues we cases, per se standards will not be appropriate. In these cases, without leading to excessive erroneous outcomes. However, in many order to decrease the cost of the legal decisionmaking process have explained how per se standards sometimes may be appropriate in alternative standards of per se illegality and per se legality. We concepts formulated here. We also have considered a number of competitive benefits and harms using the analytic framework and The structured rule of reason carries out investigation of the evaluating the net competitive impact of particular access rules. We have distinguished between two legal procedures for evaluate both the benefits and the harms.

collusion. We also have identified evidence that can be used to output market, exclusion from the input market, and supporting identified three sources of competitive harm -- exclusion from the also have identified a protecting competition benefit. We have costs and creating investment incentives to develop products. We We have identified two main efficiency benefits -- reducing

competitive harms that exclusionary access rules can create. competitive benefits of such rules as well as the potential identification and evaluation of potential efficiency and other

worth emphasizing. In order for courts to streamline litigation, eliminate frivolous cases and carry out a proper and focused analysis, they require knowledge of the particular anticompetitive theory being claimed. In order to specify the proof needed, it is essential that the theory be well stated.

Our approach should not lead to a flood of litigation with endless fact finding. What will determine the likelihood of litigation and the amount of fact finding is not what label one attaches to the analysis but how consistently courts strike the balance between harms and benefits of intervention in deciding cases and the economic framework they use to determine whether and how to evaluate the relevant evidence. However that balance is struck, the economic framework we have proposed is the right one to use.