No. 16-953

IN THE
Supreme Court of the United States

RETRACTABLE TECHNOLOGIES, INC.
AND THOMAS J. SHAW,
Petitioners,
v.
BECTON, DICKINSON & CO.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF

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REPLY ARGUMENT

It is commonly said that lies have consequences. But can "sustained lying about objectively measurable facts" have Sherman Act § 2 consequences? That is the question before this Court. The circuit courts take three distinctly different approaches to that question. Although the disparity in approaches is apparent even from the Fifth Circuit's opinion, Becton, Dickinson & Co. ("BD") denies there is a conflict among the circuits. The conflict is real. Commentators have written at length about the conflict and suggested different approaches the courts may want to adopt. And, as BD's brief reflects through its litany of case citations, the issue has arisen many times over the course of the last thirty-five years. This case provides an excellent vehicle for addressing the questions presented, and this Court should grant the petition.

I. THERE IS A WELL-DEFINED CONFLICT AMONG THE CIRCUITS THAT THIS COURT SHOULD RESOLVE.

The circuits have split into three groups concerning the approach to be used in determining whether false commercial speech can be exclusionary under Sherman Act § 2. *See* Pet. 9-17. BD insists the circuits are largely in agreement concerning the circumstances under which false commercial speech can constitute exclusionary conduct. Opp. 5-15. But third-party commentators have independently observed the conflict:

- "Although U.S. federal courts frequently address whether a monopolist's deception violates the federal competition laws, the legal standards they employ to evaluate such deception differ." Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823 (2010). "The courts frequently address whether a monopolist's deception violates the federal competition laws. But when it comes to the legal standards to determine what is permissible or impermissible for a monopolist under Section 2 of the Sherman Act, courts have yet to arrive at a workable legal standard that yields predictable results. . . . Even for false advertising, the legal standards differ." Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1070-71 (Summer 2010).
- "In the United States, the circumstances under which a false advertising claim can form the basis of a Section 2 violation are unclear. As detailed below, there are three competing theories . . . ." Bruce Colbath & Nadezhda Nikonova, *False Advertising and Antitrust Law: Sometimes the Twain Should Meet*, CPI Antitrust Chronicle, at 2 (July 2014(2)).
- "Professor Maurice Stucke has advocated a standard that would make it relatively easy to classify deception as a monopolization offense . . . . Professors Phillip Areeda and Herbert Hovenkamp have advocated for a nearly insurmountable presumption against

> recognizing deception as an antitrust violation, a presumption that many courts have adopted." Note, *Deception as an Antitrust Violation*, 125 Harv. L. Rev. 1235, 1236 (Mar. 2012).

These authors merely confirm what is apparent from the circuit court opinions; the courts are applying different standards to determine whether false commercial speech can constitute exclusionary conduct.

BD tries to create the mirage of circuit agreement by quoting cases where the courts agree on broad antitrust principles that are not at stake in this case. The courts generally agree that business torts rarely will form the basis of antitrust liability. Opp. 6-11; *see Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998). They agree that antitrust laws protect competition, not competitors. Opp. 7; *see Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). They agree that false advertising often does not constitute exclusionary conduct sufficient for an antitrust violation. Opp. 6-11. Agreement on these broad principles does not equate to agreement about the standard used to determine when false commercial speech is exclusionary conduct.

False commercial speech, including false advertising, can—under the right set of circumstances—form the basis of an antitrust claim. *See Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1127–28 (10th Cir. 2014); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 108-09 & n.14 (3d Cir. 2010); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080,

1087 (D.C. Cir. 1998); *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1269-70 (8th Cir. 1980); 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, ¶ 782b (3rd ed. 2016 update). The question is: "By what criteria are courts to determine whether false commercial speech constitutes exclusionary conduct?" Case law conflicts on that issue as commentators note. Even BD's opposition cannot help but acknowledge that conflict. Opp. 11 ("some courts have adopted a presumption . . . ."). If only "some courts" have adopted a presumption, necessarily, others have not. BD's discussion drives that point home. It admits "not all circuits adopt the presumption" and those adopting the presumption articulate differently "what is required to overcome it . . . ." Opp. 12.

And there is no question that the divergence in standards produces different results. Courts applying a case-by-case analysis are more likely to hold that false commercial speech can be exclusionary conduct. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1087 (D.C. Cir. 1998) (reversing a dismissal where claims were based on misrepresentations to advertisers); *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1269-70 (8th Cir. 1980) (affirming a Sherman Act § 2 judgment based in part on false commercial speech and false ads). Courts applying the presumption occasionally allow a case involving false commercial speech to proceed. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1127–28 (10th Cir. 2014) (holding that false

commercial speech in that case created fact issues on each of the factors sufficient to defeat summary judgment); *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988) (reversing dismissal of a § 2 claim based on false commercial speech). At the opposite end of the spectrum, as the Fifth Circuit said, the Seventh Circuit "does not recognize Sherman Act claims based on false advertising." Pet. App. 13a. And the Fifth Circuit has "an extremely high bar for a claim that false advertising" can support an antitrust claim, resulting in "a dearth of Fifth Circuit precedent" on the issue. Pet. App. 12a, 15a.

Not only is there a conflict, but it is well-developed and long-standing. "Given these conflicts, the current status of deception in antitrust law is confused and indeterminate." *Deception as an Antitrust Violation*, 125 Harv. L. Rev. at 1236. This Court should grant the petition to resolve the conflict.

II. THE FIFTH CIRCUIT'S DECISION IN THIS CASE CONTRIBUTES TO THE EXISTING CONFLICT.

BD argues that the Fifth Circuit did not adopt a per se rule or a presumption. Opp. 15-18. BD maintains that "[i]f anything, the Fifth Circuit's analysis most closely resembles the "case-by-case" approach of the D.C., Third and Eighth Circuits . . . ." Opp. 18.

BD's argument merely contends the split between the circuits is not 3-5-2, but 4-5-1. Even under BD's analysis, there remains a split between three approaches: (1) case-by-case; (2) an adverse

presumption with a multi-factor test to overcome it; and (3) near per se legality.

But BD is wrong when it argues the Fifth Circuit did not adopt a rule of near per se legality akin to the Seventh Circuit approach. The Fifth Circuit cited to the Seventh Circuit decisions repeatedly, adopting their reasoning that "[c]ommercial speech is not actionable under the antitrust laws . . . ." Pet. App. 14a (citing *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005)). It agreed with the Seventh Circuit that false advertising sets the stage for competition, adding that "sustained lying about objectively measurable facts" is competition "on the merits." Pet. App. 13a, 15a (citing *Sanderson*, 415 F.3d at 624; *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 852 (7th Cir. 2011)). Just as the only exception to the Seventh Circuit's per se rule is the presence of coercive enforcement (*Mercatus*, 641 F.3d at 852), the only exception the Fifth Circuit identified is for false commercial speech that "eliminate[s]" competition—a standard that does not otherwise exist in antitrust law. App. 15a; Pet. 22.

The Fifth Circuit mentioned the other circuits' standards only in passing. Pet. App. 16a. The Fifth Circuit did not adopt those other standards. Pet. App. 16a-17a. It did not adopt, or decide the case under, the case-by-case analysis as BD argues. Opp. 18.

As much as BD may argue otherwise, the Fifth and Seventh Circuits have essentially declared that false commercial speech can never violate § 2 of the Sherman Act. Both courts have expressly stated that it requires some extraordinarily restricted fact

situation—such as coercion or the complete elimination of competition—for false commercial speech to be a form of exclusionary conduct. After all, if false advertising is "competition on the merits," as the Fifth Circuit has announced, then there are virtually no circumstances under which false advertising would *not* be pro-competitive. The Fifth Circuit does not suggest when false speech would not be pro-competitive. Nor does BD.

No matter how one views the Fifth Circuit decision in this case, it contributed to an existing circuit split. This Court should resolve that split.

III. THIS CASE PRESENTS A GOOD VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

BD does not deny it purposefully spread false information about its competitors' products. And BD does not deny it intended to monopolize the U.S. safety syringe market. Nevertheless, it argues the antitrust judgment would have been reversed and rendered regardless what standard is applied. But the evidence plainly supports the jury's verdict under two of the three accepted tests.

BD's discussion of the Fifth Circuit's factual recitation is illuminating. BD recites the facts as set out in the Fifth Circuit's opinion and concludes: "RTI may not agree with these *findings* . . . ." Opp. 16 (emphasis added). And therein lies the problem. This case was tried to a jury. The jury made the findings. It was not the appellate court's function to make "findings."

The jury found for RTI after receiving legally proper instructions:

> [A]nticompetitive conduct is acts or practices, other than competition on the merits, that have the effect of preventing or excluding competition . . . . Harm to competition is to be distinguished from harm to a single competitor or group of competitors . . . .
>
> . . . . [Y]ou should consider whether [BD's] conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors.
>
> . . . . If the challenged conduct has not resulted in higher prices, decreased output, or lower quality, or the loss of some other competitive benefit, then there is no competitive harm.

ROA.5992-5993.[1] The jury heard the evidence and, following these instructions, rendered its verdict that "BD engaged in anticompetitive conduct with the intent to, and the dangerous probability that it would, acquire or maintain monopoly power . . . ." ROA.6113.

BD asserts that "RTI departs from the Fifth Circuit's recitation of the facts to give, without citation, its own conflicting account," but conspicuously does not say RTI misrepresented the

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[1] The record references are to the record as it was filed in the Fifth Circuit.

record. Opp. 1 n.1; *see also* Opp. 19 n.9. All the facts recited in the petition for certiorari are supported in the record and support the jury's verdict. For example:

- Conservative assessments placed BD's share of the safety-syringe market at 50%; other assessments placed it at 60%. ROA.9254; PX0315 at 02574667; PX0277-47. *See* Pet. 24; Opp. 1 n.1.
- The email stating that BD's misrepresentations were "foundational, differentiating claims" and that "[l]osing them would potentially have a devastating effect on [BD's] ability to command premium pricing . . ." was sent by Kathy Sullivan, BD's Senior Director of Marketing. PX0697 at 03733225. *See* Pet. 23 n.1; Opp. 19-20 n.9. Ms. Sullivan's email was in response to an email sent by Marcia Fusilli, BD's Senior Product Manager, Safety Hypodermic-Marketing, who said the data was too old to use. PX0697 at 03733226.
- Determining whether the wastespace and sharpest needle statements were false required complicated laboratory testing with the assistance of specially-written computer programs. ROA.10602 (Dr. Beaman, BD's expert mechanical engineer, testified he used a "computer program I helped write" to conduct his tests of the syringe needles). *See* Pet. 27; Opp. 20 n.9.

RTI can provide record citations for every statement it made in the petition. Those facts

support the jury verdict under the instructions given. And those facts satisfy the tests employed by courts using a case-by-case approach and those relying on the presumption and multi-factor test.

IV. THERE IS ALSO A CIRCUIT SPLIT ON WHETHER TAINTING A MARKET TO CREATE A BARRIER TO ENTRY CAN BE EXCLUSIONARY CONDUCT

The D.C. Circuit has held that a § 2 claim exists when a company creates a barrier to new technology by placing tools and applications into commerce that do not work properly. *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (en banc) (per curiam). The Fifth Circuit called similar actions "illogical" and rejected the theory. Pet. App. 19a.

BD argues the Fifth Circuit did not make a categorical decision regarding tainting, but the Fifth Circuit's opinion shows that is exactly what it did. Opp. 22; Pet. App. 20a. After declaring the "tainting theory is entirely illogical," the Fifth Circuit explained that no one would ever engage in such behavior. "Would Kellogg's sell a 'nutritional' cereal that tastes like sawdust in order to discourage consumers from sampling Quaker Oats's competing product?" Pet. App. 20a. That statement, and the accompanying discussion, is a categorical dismissal of the theory. Yet, the D.C. Circuit affirmed a judgment basing liability on a finding that Microsoft intentionally tainted the incipient market for a non-Microsoft operating system to protect the existing monopoly of its Windows operating system.

Categorically rejecting a tainting theory ignores the real world of innovative products. BD had a

stable of more profitable "safety" syringes. When BD attempted to manufacture automatically-retracting safety syringes, it created defective products. *See* Pet. App. 36a. But BD's defective products managed to suppress the demand for all retracting syringes, which BD believed would take over half the safety-syringe market. That allowed BD to continue to sell its more profitable safety syringes that employed inferior technology.

RTI presented this evidence and theory to the jury. The jury instructions stated RTI's allegations that BD had infringed RTI's patents to sell "a product that allegedly exhibited design flaws and allegedly tainted the market with respect to all retractable syringe products." ROA.5993. Viewed through the prism of the evidence before the jury, BD's actions cannot be dismissed as categorically illogical.

Both the tainting theory and false commercial speech issues raise questions regarding the extent to which courts may use specialized antitrust-only presumptions to shield certain classes of conduct from § 2 liability. Are courts free to presume that advertising rarely sways its intended audience, despite the billions of dollars spent on advertising every year? Are courts free to presume that nascent companies with limited resources can effectively combat misinformation campaigns waged by multi-national corporate conglomerates with monopoly or near-monopoly power? Are courts free to presume that no rational person would taint a market by selling malfunctioning products to protect an existing dominant market position and preclude a

jury from concluding otherwise? Or should courts take a more nuanced approach to these issues? This case calls for this Court to defend nuance and fact-based assessments against spurious bright-line rules.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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