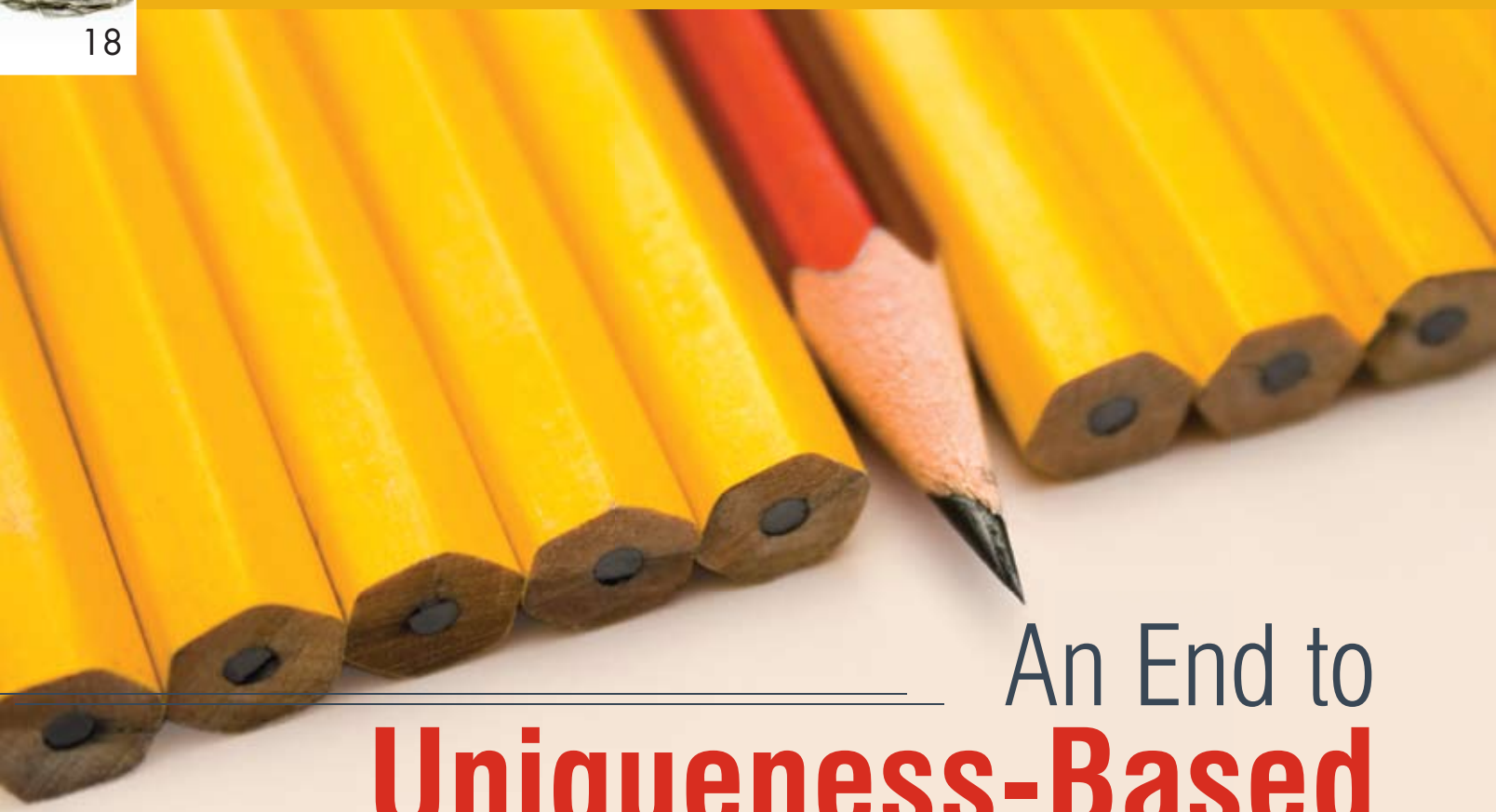


# An End to Uniqueness-Based Presumptions of Market Power

By Rick Juckniess and Kimberly Kefalas

## Beyond *Illinois Tool*

**Fast Facts:**

The Sixth Circuit recently held in *Monument Builders of North America v Michigan Cemetery Ass'n* that presumptions based on uniqueness of land cannot support a valid antitrust claim where plaintiffs argued that each cemetery had market power since each was "unique" land.

In *SC Manufactured Homes, Inc v Liebert,* the California Court of Appeals rejected antitrust claims under the Cartwright Act based on the assertion that a mobile home park had market power because it was unique real estate.

Uniqueness may be useful in defining markets, but is no longer a proxy for market power.

Market power is essential to most antitrust actions, and an implausible or overly narrow market definition can doom an antitrust case before it starts.[1] Plaintiffs in the not-so-distant past, however, have successfully overcome market definition challenges by relying on a "uniqueness" presumption as proof of market power. Antitrust plaintiffs challenging defendants' use of patents, for example, have successfully established market power solely on the basis of the uniqueness of the patent itself. Plaintiffs have also successfully supported a single product market for land by claiming that all land is inherently unique. Over the years, claims of market power related to a variety of products and services have been upheld on the basis of little more than a plausible allegation of uniqueness, regardless of the potential existence of reasonably interchangeable substitutes.

Until recently, the line of cases supporting a uniqueness presumption in establishing market power has been in tension with established requirements for market definition. The Supreme Court and other federal decisions have steadily whittled away at the bases for the presumption, and recent developments appear to have eliminated it for good. While proof of a product's unique characteristics should still *inform* market power analysis, the viability of reliance on uniqueness alone may finally be at its end.

## Market Power Presumptions Based on Allegations of Uniqueness

Since *Brown Shoe Co v United States,*[2] courts have typically required that market proofs include evidence of one or more of reasonably interchangeable substitutes, barriers to entry, and the ability to raise prices or limit output without losing market share. Over the years, however, a body of case law developed in which courts, in an attempt to simplify market analyses, assumed market power solely on the basis of uniqueness.

The earliest of these cases related to patents. By 1962, in *United States v Loew's, Inc,*[3] the Supreme Court had afforded patents and copyrights a presumption of uniqueness. In turn, uniqueness itself was afforded a presumption of market power. The uniqueness doctrine seemed logical in that context: if the product was sufficiently novel to warrant a patent, it must be unique and, presumably, would not have readily identifiable substitutes. The *Loew's* Court's resulting pronouncement that "crucial economic power may be inferred from the…product's desirability to consumers *or from uniqueness in its attributes*" became a mantra for plaintiffs attempting to establish market power.[4]

The Supreme Court later appeared to extend the uniqueness presumption to land (in *dicta*), in *Fortner Enterprises, Inc v US Steel Corp* (*Fortner I*),[5] in which it analogized unique parcels of land to patents:

> Uniqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves. Such barriers may be legal, as in the case of patented and copyrighted products…or physical, as when the product is land.[6]

*Fortner I* concerned a tied package of financing and prefabricated houses; the Court found the package unique, and found that uniqueness sufficed as a proxy for evidence of the defendant's market share.[7]

Courts went on to create a presumption of market power in cases relating to land because of the uniqueness inherent to land, relying on *Fortner I* and, with unjustifiably simplistic readings of another Supreme Court case, *Northern Pacific R Co v United States,*[8] examined a tie of land tracts located near the railroad to shipping agreements. The government argued that Northern Pacific had market power over its "product" similar to that enjoyed by patent holders because of the inherent uniqueness of the land, and that each tract could constitute a separate relevant market.

The *Northern Pacific* Court did not expressly adopt the government's argument, and the dissent attempted to clarify that the majority was not adopting a uniqueness-based presumption of market power *solely* because land was involved.[9] The opinion affirmed the market power finding not explicitly because of any uniqueness inherent to land generally, but because of the characteristics of the particular plots of land at issue, which were "strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities… prized by those who purchased or leased it and was frequently essential to their business activities."[10] In other words, market power existed because that particular land was *without competition from any reasonable substitutes*—in other words, market power was established using market analysis applicable to any product.

Nevertheless, many courts interpreted the decision as an endorsement of a shortcut to finding market power on the basis of land's inherent uniqueness.[11] Individual mobile home parks were found to be relevant markets.[12] Likewise, cemeteries, too, were found to be inherently unique.[13] These issues—and the presumption of market power—were then raised in cases involving even arguably unique products or services, particularly when a lack of evidence or the presence of competition made proving market power difficult.

## Uniqueness is a Poor Proxy for Market Power

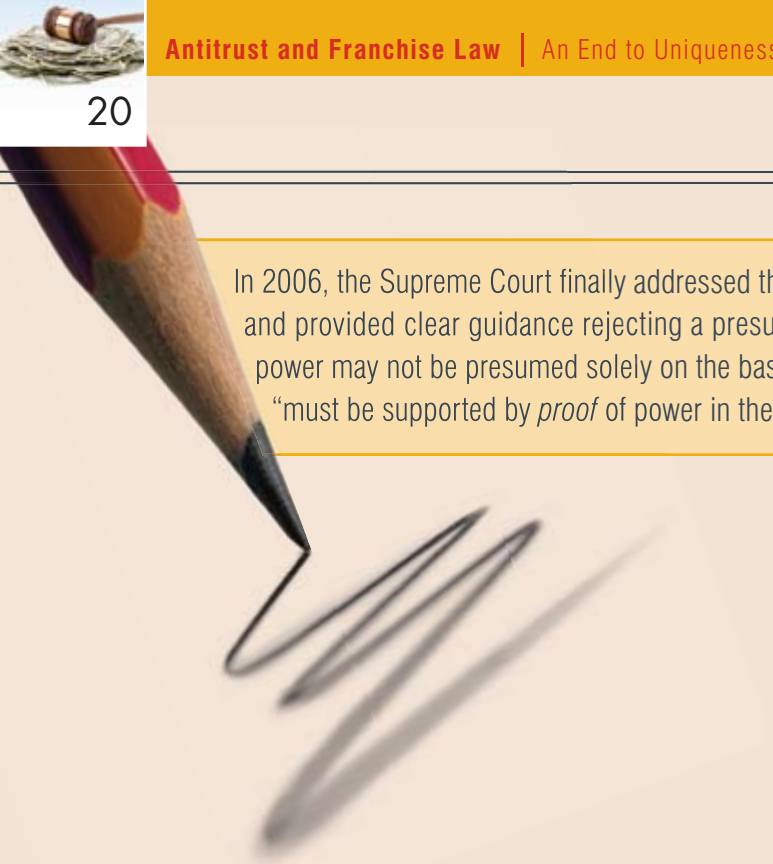
The broad application of the uniqueness presumption when used in connection with land or real estate was questioned and, later, rejected by several courts.[14] Before its rejection, courts had begun to require what were essentially "plus factors" in addition to an allegation of uniqueness; as those factors alone could support a finding of market power, they essentially rendered the uniqueness presumption superfluous.[15] Implicit in the analyses of land markets in antitrust was the recognition that land-related products compete with others suitable for the same purposes in part on the basis of their unique characteristics.

Despite the eventual development of criticism and rejection in federal courts of a uniqueness-based presumption of market power, the inference endured in a California case, *Suburban Mobile Homes, Inc v AMFAC Communications, Inc,* one of the leading cases on tying under the Cartwright Act.[16] *Suburban* appeared to hold that uniqueness of land resulted in a single mobile home relevant market. That decision followed *Loew's* and *Fortner I,* stating "crucial economic power may be inferred from the tying product's desirability to consumers *or from uniqueness in its attributes.*"[17]

Eventually, the Supreme Court itself appeared to question market power deriving from market power presumptions based *solely* on uniqueness. *Jefferson Parish Hosp Dist No 2 v Hyde*[18] involved a tying claim regarding a hospital and anesthesiology services. The plaintiff argued that the defendant hospital's unique location created a consumer preference, and that preference supported a finding of market power. The *Jefferson Parish* court rejected this argument, finding that "[a] preference of this kind, however, is not necessarily probative of significant market power."[19] Unfortunately, the Court had also repeated the statement that uniqueness could be a basis for market power, leaving support for potential presumptions partially intact:

> When the seller's share of the market is high,…***or when the seller offers a unique product that competitors are not able to offer,***…the Court has held that the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation appropriate.[20]

In 2006, the Supreme Court finally addressed the original basis for the uniqueness presumption—patents—and provided clear guidance rejecting a presumption of market power. In *Illinois*



> In 2006, the Supreme Court finally addressed the original basis for the uniqueness presumption—patents—and provided clear guidance rejecting a presumption of market power…the Court expressly held that market power may not be presumed solely on the basis of the existence of a patent, stating that a finding of market power "must be supported by *proof* of power in the relevant market rather than by a mere presumption thereof."

*Tool Works Inc v Independent Ink, Inc,*[21] the Court expressly held that market power may not be presumed solely on the basis of the existence of a patent, stating that a finding of market power "must be supported by *proof* of power in the relevant market rather than by a mere presumption thereof."[22] The Court's holding that a patent cannot be presumed to confer market power entirely undercut the basis for the use of the presumption in land and the other purportedly unique products and services to which it had been extended by analogy.

To some, however, the impact of *Illinois Tool* was less clear; after all, the *Illinois Tool* decision arguably did not *expressly* eliminate all uniqueness-based presumptions of market power. Two recent decisions provide more certainty.

The Sixth Circuit recently affirmed dismissal of a case predicated on such a presumption. In *Michigan Div—Monument Builders of North America v Michigan Cemetery Ass'n,* the United States District Court for the Eastern District of Michigan held that "presumptions, whether based on the uniqueness of a patent or the uniqueness of land, cannot support a valid antitrust claim," and thus dismissed the claims.[23] The plaintiffs' complaint relied on the allegation that the cemeteries were land, and thus unique, and that every cemetery thus constituted its own relevant market—a proposition already rejected by several other courts.[24] Plaintiffs failed to allege any additional facts to support their claim that cemeteries were not interchangeable for the same purposes and did not, therefore, compete. Relying on *Illinois Tool,* as well as other courts that had recognized the economic limitations of market power presumptions, the court examined the realities of the market, taking judicial notice of a map illustrating that there were 3,800 cemeteries in the allegedly relevant geographic area. Without the use of market power presumptions based on inherent uniqueness, the plaintiffs' claim could not survive a motion to dismiss. The Sixth Circuit affirmed, stating that "[t]he idea that all land is unique…is insufficient to support a finding of market power."[25] Instead, more traditional characteristics in defining a market would be required, including "a showing of competitive advantage on the basis of the land's particular characteristics."

In the second case, *SC Manufactured Homes, Inc v Liebert,*[26] the California Court of Appeals recently agreed with the complete eradication of presumptions of market power based on uniqueness, expressly holding that the leading case on the topic was based on "outmoded" concepts and that plaintiffs could no longer rely on presumptions of market power based on inherent uniqueness of land.

The plaintiffs in *SC Manufactured Homes* had asserted that a single mobile home park constituted its own relevant market because, again, the park's land was unique by definition. Thus, they contended, the mobile home had market power over itself, and further examination of other competing parks in the geographic area was unnecessary.

While the California Court of Appeals acknowledged that the California Supreme Court had cautioned that the Cartwright Act was not co-extensive with the Sherman Act, it recognized that California's uniqueness presumption had been derived from federal law—law that had been discredited and finally laid to rest by *Illinois Tool.* The Court explained that any market power presumptions based on a product's uniqueness had been clearly disapproved: "The Supreme Court held in *Illinois Tool Works Inc.* that the uniqueness of an item, such as a patent, cannot by itself be used to *infer* market power."[27]

## Going Forward: Uniqueness In Market Definition

The sensible readings of *Illinois Tool* set forth in both *Monument Builders* and *SC Manufactured Homes* demonstrate the end of uniqueness-based market power presumptions. Uniqueness can still play a role in market definition, however, insofar as it indicates whether reasonably interchangeable substitutes are available to consumers.

An examination of the actual analysis in *Northern Pacific* provides guidance as to the type of uniqueness with economic significance. As noted previously, in that case, the tracts of land subject to the challenged tie had demonstrable strategic significance; the market power conclusion derived from those facts rather than land's *inherent* uniqueness. Indeed, substantial effort by litigants and courts would have been saved over the decades by close attention to the Supreme Court's explanation in *Fortner I,* where it explained:

> **The question is whether the seller has some advantage not shared by his competitors in the market for the tying product.** Without any such advantage differentiating his product from that of his competitors, the seller's product does not have the kind of uniqueness considered relevant in prior tying-clause cases.[28] [Emphasis added.]

The Third Circuit, in *Queen City Pizza, Inc v Domino's Pizza, Inc,* provides a useful analogy for the use of uniqueness in establishing market power. It explained:

> For example, if someone patented a new material for bottling soft drinks, it would certainly be true that there were no other materials just like it. But, provided glass and plastic were still reasonable substitutes, the description "unique" would not be meaningful for antitrust analysis.[29]

The process of establishing a relevant market, and a defendant's market power within that market, includes an analysis of characteristics that might make the product at issue unique—meaning non-interchangeable with other products for the same purposes. But as *Illinois Tool, Monument Builders,* and *SC Manufactured Homes* demonstrate, the concept of uniqueness alone is no longer a proxy for market power. ■

*Rick Jucknies currently serves as vice chairperson for the State Bar Antitrust, Franchising & Trade Regulation Section. He is a principal in the Ann Arbor office of Miller, Canfield, Paddock and Stone, PLC, where his practice focuses on antitrust and intellectual property. He received his JD cum laude from the University of Michigan, Ann Arbor, and received his BA in economics with distinction from the University of Colorado at Boulder.*

*Kimberly Kefalas is an associate in the Ann Arbor office of Miller, Canfield, Paddock & Stone, PLC. Her practice focuses on antitrust and complex litigation.*

## FOOTNOTES

1. See, e.g., *Queen City Pizza, Inc v Domino's Pizza, Inc,* 124 F3d 430, 447 n 6 (CA 6, 1997); *TV Communications Network, Inc v Turner Network Television, Inc,* 964 F2d 1022, 1025 (CA 10, 1992); *Joplin Enterprises v Allen,* No. C91-1035C, 1991 U.S. Dist LEXIS 20771, *8–9 (WD Wash, 1991); *Theatre Party Assoc, Inc v Shubert Org, Inc,* 1988-2 Trade Cases P68,251 (SD NY, 1988); *Belfiore v New York Times Co,* 826 F2d 177, 180 (CA 2, 1987); *Seidenstein v National Medical Enterprises, Inc,* 769 F2d 1100, 1106 (CA 5, 1985).
2. *Brown Shoe Co v United States,* 370 US 294, 325; 82 S Ct 1502, 1523; 8 L Ed 2d 510 (1962) (requiring markets be defined with reference to "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it").
3. *United States v Loew's, Inc,* 371 US 38, 45; 83 S Ct 97, 102; 9 L Ed 2d 11 (1962).
4. *Id.* (emphasis added).
5. *Fortner Enterprises, Inc v US Steel Corp,* 394 US 495; 89 S Ct 1252; 22 L Ed 2d 495 (1959).
6. *Fortner, supra* at 505, n 2 (citing *Northern Pacific R Co v United States,* 356 US 1 (1958)).
7. *Id.*
8. *Northern Pacific R Co v United States,* 356 US 1; 78 S Ct 514; 2 L Ed 2d 545 (1958).
9. *Id.* at 18–19 ("I do not understand the Court to excuse findings as to control by adopting the Government's argument that this case should be brought within *International Salt* by analogy of the ownership of land to that of a patent, so that the particular tract of land involved in each purchase or lease itself constitutes the relevant market. The record in any event is without support for such a theory. No findings were made below as to the uniqueness of any of appellants' lands either because of their location or because of their peculiar qualities enabling production of superior mineral, timber, or agricultural products. Without such an inquiry, I do not see how appellants' supposed dominance of the land market can be based on the theory that their lands were 'unique.'").
10. *Id.* at 7–8.
11. *Ringtown Wilbert Vault Works v Schuylkill Memorial Park, Inc,* 650 F Supp 823 (ED Pa, 1986) ("It is well established that land is sufficiently unique to establish the market power element of a *per se* tying violation.").
12. *Ware v Trailer Mart, Inc,* 623 F2d 1150 (CA 6, 1980) ("The defendant has market power over the mobile home lot sites by virtue of a number of factors including… the defendant's ownership and control of unique mobile sites.").
13. *Baxley-DeLamar Monuments, Inc v American Cemetery Ass'n,* 843 F 2d 1154, 1157 (CA 8, 1988) ("Cemetery lots have been considered unique as all land is unique….").
14. *Florida Monument Builders v All Faiths Memorial Gardens,* 605 F Supp 1320, 1324 (SD Fla, 1984) (rejecting application of "age old notion of the 'uniqueness of land' to provide the basis for" market power).
15. *Moore v Jas H Matthews & Co,* 473 F2d 328, 332 (CA 9, 1973) (defendants accounted for 72 percent of all burials in Lane County, Oregon); *Monument Builders of Greater Kansas City, Inc v America Cemetery Ass'n of Kansas,* 891 F2d 1473 (CA 10, 1989) ("approximately 70–75 percent of interments each year in the Kansas City area take place in these [defendant] cemeteries"; *Baxley-Delamar, supra* (defendants controlled 57 percent of memorial sales in two relevant counties); *Rosebrough Monument Co v Memorial Park Cemetery Ass'n,* 666 F2d 1130, 1143 (CA 8, 1981), cert denied, 457 US 1111 (1982) (defendants accounted for 22 percent of the burials in the geographic market area, which was sufficient to state a tying claim; percentage would no longer pass muster under *Jefferson Parish*).
16. *Suburban Mobile Homes, Inc v AMFAC Communities, Inc,* 101 Cal App 3d 532, 540–41 (Cal App 1980) (holding that the Cartwright Act is "patterned after the Sherman Act" and that "federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act").
17. *Suburban, supra* at 544 (emphasis added).
18. *Jefferson Parish Hosp Dist No 2 v Hyde,* 466 US 2; 104 S Ct 1551; 80 L Ed 2d 2 (1984).
19. *Jefferson Parish, supra* at 26–28.
20. *Jefferson Parish, supra* at 17.
21. *Illinois Tool Works Inc v Independent Ink, Inc,* 547 US 28; 126 S Ct 1281; 164 L Ed 2d 26 (2006).
22. *Illinois Tool, supra* at 42–43 (emphasis added).
23. *Michigan Div—Monument Builders of North America v Michigan Cemetery Ass'n,* 524 F3d 726 (CA 6, 2008), *affirming* 458 F Supp 2d 474, 484 (ED Mich, 2006).
24. *Baxley DeLamar Monuments Inc v American Cemetery Ass'n,* 938 F2d 846, 853 (CA 8, 1991); *Silkworth v Cedar Hill Cemetery, Inc,* No 694, 1993 WL 122104 at *3 (Md App, 1993) (dismissing claim because "cemeteries do not generate market power simply because they are real estate"); *Standard Monument Co v Mount Hope Cemetery & Mausoleum Co,* 369 SW2d 876, 881 (Mo App, 1963) (rejecting that individual cemetery had market power, finding that "[t]he cemetery in question is but one of at least 40 major cemeteries in the St. Louis area").
25. *Monument Builders, supra* at 732.
26. *SC Manufactured Homes, Inc v Liebert,* 162 Cal App 4th 68 (2008). Plaintiffs in this case have filed a petition for review with the California Supreme Court.
27. *Id.* at 91.
28. *United States Steel Corp v Fortner Enterprises, Inc,* 429 US 610, 620–621; 97 S Ct 861; 51 L Ed 2d 80 (1977) (emphasis added).
29. *Queen City Pizza, supra* at 447 n 6.