



Sherman Act § 2: The Role of Efficiencies

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Two general approaches

- The *Microsoft* approach
 - The rule-of-reason back and forth
 - Applies to all cases
 - Therefore, balancing in every case
 - Efficiencies relevant in every case
- “Type of case” approach
 - Role of efficiencies depends on what type of case
 - E.g., predatory pricing vs. refusal to deal with competitor vs. exclusive dealing etc. etc.



Two approaches to “type of case” approach

- The “laundry list” approach
 - Every category imaginable
 - E.g., “bundling,” “loyalty rebates,” etc.
- The “framework” approach
 - Avoids the two extremes
 - Neither unified standard nor laundry list



Framework of Analysis

- Exclusionary vs. Exploitative
- “Horizontal” vs. “Vertical” vs. “Other”
- Coercion vs. Incentivizing



Exclusionary vs. Exploitative

- Fundamental distinction under Sherman 2
- Exploitative = Per Se Lawful
- Efficient from macro point of view:
 - Stimulus to innovation and hard work
 - “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.” (*Trinko*, 2004)
 - “The successful competitor, having been urged to compete, must not be turned upon when he wins.” (*Alcoa*, 1945)
 - New entry attracted by high prices



Exclusionary Conduct

- “To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”
(Trinko, 2004)
- Exclusionary = Anticompetitive
- But what is “anticompetitive conduct”?
- The most vexing question in competition law



“Horizontal” vs. “Vertical” vs. “Other”

- Familiar distinction in multiple-firm conduct
- Unfamiliar in single-firm conduct
- But it is key
- Horizontal = Refusal to deal with rivals
- Vertical = Dealings (or non-dealings) with upstream and downstream firms
- “Other”= everything else (mostly cheap exclusion)



“Horizontal”

- Refusals to deal with rivals
- Verging on per se lawful
- Three reasons:
 - Undermines incentives (efficiencies)
 - Of the monopolist
 - Of the rivals
 - Places court into ratemaking role
 - Produces collusion



“Vertical”

- Dealings or non-dealings with upstream or downstream firms
- The heart of single-firm conduct
 - Predatory pricing
 - Exclusive dealing
 - Tying
 - Refusals to deal with “disloyal” customers
 - Target rebates
 - Etc. etc. etc.
- Some of antitrust’s biggest cases
 - Intel
 - LePage’s v. 3M
 - Microsoft
 - PeaceHealth



“Vertical”: Lumping and splitting

- Variations on the same theme:
 - Inducing customers
 - to favor you over your rival
- Two ways to achieve that objective:
coercion v. incentivizing



“Coercion” v. “incentivizing” (cont’d)

- Coercion = refusing to deal with disloyal customers
- Incentivizing = offering incentives in return for some degree of favoritism or loyalty



“Coercion” and efficiencies

- Relatively harsh treatment
- Leading cases: *Lorain Journal*; *Dentsply*
- No efficiency justification in either
- So no balancing needed
- If balancing needed in future case . . .



“Incentivizing” and efficiencies

- More lenient treatment
- Lower prices = efficient
- Predatory Pricing Test (*Brooke Group*)
- Or foreclosure test (e.g., market-share discount)



“Other” Conduct and efficiencies

- “Cheap exclusion”
- No efficiencies!
- Two key questions:
 - what impact?
 - why treat under antitrust law?

