

# Exclusive Dealing: Substance and Process

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FTC/DOJ Hearings

November 15, 2006

# Well-Informed Analysis

- Both efficiency and anticompetitive effects/explanations are very possible
- On each side, analysis is subtle
  - Efficiency: for example, investment-incentive theory
  - Anticompetitive: for example, divide-and-conquer theory

# Investment Incentives

- Segal/Whinston (Rand J. Econ. 2000)
- Relationship-specific investments are NOT an efficiency rationale for exclusivity
- Investments with spillover to customer-entrant deals MIGHT BE – it is very complex
  - Who invests, how it spills over, bias absent ED
- How well could one disentangle this?

# Divide-and-conquer exclusion

- RRW-SW (Amer. Econ. Rev. 1991/2000) shows that such exclusion can (profitably and harmfully) work against end users
- Usually exclusive dealing is with firms who then compete to sell to end users
  - That can seriously affect buyer incentives

# Divide-and-conquer

- Fumagalli and Motta (Amer. Econ. Rev.)
- Simpson and Wickelgren; Yong; Shaffer?
- Which is right and when?
  - My attempted diagnosis and their reaction
  - Presumably an intellectual resolution will emerge
  - How likely is one to be able to prove?

# Antitrust under Uncertainty

- (Bayesian thoughts)
- Role of presumptions and burdens of proof
- The two presumptions

# Two presumptions

- *Laissez-faire*: don't intervene unless reasonably sure intervention will help
- *Competition*: protect “competition” unless reasonably sure alternative is better

# “Competition”

- Have drifted towards making “competition” simply mean “the good outcome”
  - Towards, not yet “to”. Eyebrows, but not guffaws, at “pro-competitive monopoly”
- Law protects “competition,” so tautologically that linguistic shift would be good if we knew all
- But a *presumption* in favor of competition then has no meaning!
  - Merger between major rivals must be proven to be “loss of competition”? [Philadelphia Bank...]

# The shoe on the other foot

- What if “laissez-faire” were redefined as “the good outcome”?
  - Explicating idea, not proposing policy
- Would redefine “intervention” as “bad intervention”
  - Opponents of intervention would have to *prove how* it is bad
  - Strict government rules would be “not necessarily intervention”
- Pretty stupid, huh?
  - Words should mean what they mean...

# Antitrust Intellectual History

- The bad old days
- The good new days
- The not so good new days??!
- International perspective

# Dark Matter

- Good idea: intervene only if intervention benefits efficiency/consumers
- Maybe not such a good idea: only if *can specifically prove that* it would do so
- Benefits of competition
  - Concrete, predictable, provable price effects
  - Dark matter

# Words and Presumption

- “Competition” means competition
- Competition usually serves efficiency and consumers, but that’s a fact, not a definition
- Pretending it’s a definition, while helpful in some ways, guts the crucial antitrust *presumption*

# What *does* “competition” mean??

- Hard question
  - Part of motive to redefine as “good stuff”
    - Exclusive dealing as example
  - But that has huge dangers, maybe coming to roost
- Beyond the study of words...
  - Want laissez-faire presumption
  - Want pro-competition presumption too
  - What to do?