



Cheap Exclusion: Deception as a Case Study

**Hearings before the Department of Justice and the
Federal Trade Commission on Exclusionary
Conduct**

December 6, 2006

Susan A. Creighton

Fraud or Deception as Exclusionary Conduct

- **“The courts have established that deception may constitute ‘exclusionary conduct’ that will support a Section 2 claim in appropriate circumstances.”**
In re Rambus (FTC 2005)
- ***Accord, e.g., In re Microsoft* (D.C. Cir. 2001), *Conwood* (6th Cir. 2002), *Caribbean Broadcasting* (D.C. Cir. 1998), *Walker Process* (S.Ct. 1965)**

Exclusionary Fraud or Deception: Often “Cheap” and Effective

- **Fraud or deception is an important and likely form of exclusionary conduct**
 - Unlike more costly strategies (e.g. predatory pricing) it can be cheap to pursue
 - It is conduct that has no redeeming virtues: it provides no benefit to consumers either in the short or long term
 - It often occurs in circumstances where the potential for creating or maintaining durable market power is high

Exclusionary Fraud or Deception: Little Risk of “Over-deterrence”

- **Because conduct that deceives ordinarily can have no efficiency or pro-competitive effects, it does not raise concerns that justify a prophylactic rule**
 - Fraud is more akin to price-*fixing* than to price-*cutting*: it is not readily subject to concerns regarding undue chilling
- **Tests developed to prevent “type II” error with respect to other types of exclusionary conduct are not appropriate here**
 - “Profit sacrifice,” for example, is not a useful standard as applied to fraud (or other types of cheap exclusion)

Exclusionary Fraud or Deception: If No “Chilling” of Pro-Competitive Conduct, What Other Potential Concerns?

- The classic question posed with regard to many other types of exclusionary conduct – how to distinguish legitimate pro-competitive from anti-competitive conduct – therefore does not arise
- What other concerns are raised regarding fraud as a form of exclusionary conduct?
 - Causation: claim that it seldom leads to durable market power
 - Unnecessary: claim that it solves *ex post* issues that should be addressed *ex ante*
 - Redundant: claim that other laws can address

Exclusionary Fraud or Deception: Frequently Creates Durable Market Power

- **Fraud frequently occurs in an environment conducive to the creation of durable market power**
 - Fraud in government proceedings: e.g. govt standard-setting (*Unocal*), regulations (Orange Book), property grants (*Walker Process*)
 - Fraud in joint ventures, private standard-setting, network markets (e.g. *Rambus, Microsoft*)
- **Is deceptive advertising the exception?**
 - Statements that are detectable and falsifiable subject to self-help? (*Conwood vs Caribbean Broadcasting*)

Exclusionary Fraud or Deception: Not a Simple “Ex Ante” Problem

- **Govt regulations and cooperative commercial ventures are inevitably subject to opportunism (“self-interest with guile”)**
 - *“The general rubric out of which transaction cost economics works is that of hazard mitigation through ex post governance. It being the case that all complex contracts are unavoidably incomplete, the fiction of comprehensive contracting, which concentrates all of the contracting action on ex ante incentive alignment, is untenable.” (O. Williamson)*
- **Just as good faith/fair dealing guards against opportunism in private contract (Muris), antitrust guards against opportunism that eviscerates the procompetitive benefits of government regulations or cooperative ventures and leads to durable market power**
 - *Orange Book cases, Unocal*

Exclusionary Fraud or Deception: Not “Privileged” Because Otherwise Illegal

- **The wrong question: is conduct a business tort, and if so, should it also then be an antitrust violation?**
- **The right question: is an inefficient exclusionary act that is likely to have caused market power nonetheless excused under Section 2 because it also violates another law or statute?**

Exclusionary Fraud or Deception: Not “Privileged” Because Otherwise Illegal (cont’d)

- **Asking the wrong question yields wrong answers: the standard-setting example**
 - Potential contract and tort claims vindicate rights of SSO participants, not consumers
 - Causation and damage measures not directed at creation of durable market power
 - Other tort elements (eg intent) may or may not be pertinent
- **To the extent that hostility is based on concerns regarding private actions, that issue should be addressed directly, not by manipulating substantive standards of Section 2**
 - Sets unnecessary hurdles for govt enforcement
 - May lead to under-enforcement in crucial area

Conclusion

- **Exclusionary fraud or deception, together with other forms of cheap exclusion, should be at the heart of government enforcement of Section 2**
- **Concerns regarding private enforcement should be addressed directly, not through distortions of substantive law of Section 2**