Power, Process and Policy in Antitrust

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It's About Anticompetitive Effects

- Common Core Issue in Antitrust
  - Irrebuttable Presumptions (per se rules)
  - Rebuttable Presumptions
    - Direct Evidence of Actual Exercise of Market Power
      - E.g. "quick look," "inherently suspect"
      - Equivalents for Section 2?
    - Circumstantial Evidence ("Double Inference")
      - Market Definition
      - Market Share
      - Inference of Market Power

Symbiosis Between Power and Effects

- Power is a Condition Precedent of Effects
  - Easy Cases
    - Direct and Circumstantial Evidence are aligned
      - Significant, actual effects and high market shares
      - De minimus or no effects and low market shares
  - Hard Cases
    - Direct and Circumstantial Point in Different Directions
      - No actual effects, but high market shares
      - Significant actual effects, but low market shares
- But Evidence of Power and Effects are Interrelated
  - Traditional §2 tests can obscure connections

Differentiating and Managing Direct and Circumstantial Evidence of Effects

- Benchmark for Circumstantial Evidence: Horizontal Merger Guidelines – Role in § 2?
  - Recall that *Cellophane* was a Section 2 Case
  - Prospective vs. retrospective methods may differ
- We Need a Similar Effort to Refine "Actual Exercise" Standards and Harmonize Across Offenses
  - How much and what kinds of effects evidence should be sufficient to shift a burden?
    - Section 1: *NSPE, NCAA, IFD, CDA, TRU, Polygram*
    - Section 2: *AMR, LePages, Microsoft*

The Weight of the *Alcoa* Paradigm

- Are we ready/do we want to move beyond total reliance on market shares in Section 2?
  - The *Copperweld* "gap" fallacy
  - Role of direct evidence outside Section 1 horizontal?
    - *Re/Max* and Section 2
    - But see *Republic Tobacco* re vertical
    - Clayton §7 – *Staples*?
- Is the Monopoly vs. Market Power Distinction Viable? Economically? Legally?
  - Only when linked to market share thresholds?
  - Workable when direct evidence is available?

The Role of Decision Theory

- Fear of Error Costs often motivates calls for more and better evidence in antitrust cases, especially as to power and effects
  - Market power and effects? Efficiencies?
- Decision theory also requires consideration of process and information costs
  - Is "more" really better? Always?
  - Is "zero error" obtainable? At what cost?

An Integrated Legal and Economic Approach to Evidence and Burdens

- Proposed Test:
  - When does the marginal value of additional evidence in terms of economic certainty (minimizing error costs) outweigh the costs of obtaining and processing that evidence, taking into account whether it is reasonably accessible to the party bearing the risk of non-persuasion?
  - Some other factors:
    - Information overload and diminishing returns
- Application to Monopoly Power
  - Market definition and market share evidence always necessary?
  - Actual exercise evidence ever enough alone?
    - Definitions and thresholds needed?

Antitrust and Rocket Science

- Safe Harbors and False Positives
  - Filters for minimal or non-existent threats to competition
- Danger Zones and False Negatives
  - Burden Shifting Devices to protect against more obvious threats to competition
- Sliding Scales
  - Not all burden shifts are created equally

Legal Standards and Decision-making

- "Balancing of Effects" is a straw man
- Courts and enforcers "weigh evidence"; they don't "balance effects" and shouldn't try
  - No Section 1 examples despite rhetoric of "rule of reason balancing"
  - *Microsoft* mischaracterized by critics
  - Implications for welfare standard

Conclusion: Of Caricatures and Corrosion of the Rule of Law

Incompetents	Untrustworthy Self-Interesteds	Trustworthy Self-Interesteds
Judges	Rivals	Dominant Firms
Juries	Dealers	Other Defendants
Enforcers* (especially states)	Plaintiffs (all, but especially class action reps)	(Especially when asserting "efficiencies")