

Legal Framework for Evaluating MFNs Under the Antitrust Laws

Outline of Remarks
by
Andrew I. Gavil
Director, Office of Policy Planning
Federal Trade Commission
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Most-Favored-Nation Clauses
and Antitrust Enforcement and Policy

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Scope of Remarks and Disclaimer

- Scope of Remarks:
 - Framework for Analyzing MFNs based on Existing Case Law (with a few added observations)
- Rookie Disclaimer:
 - REALLY My Personal Views
 - Not the Views of the Commission or any Commissioner



Some Preliminary Observations

- Antitrust claims directed at MFNs have arisen in a number of *different industries* (not just health care)
- Courts have evolved towards more consistent recognition of anticompetitive and procompetitive potential
 - Trend away from uncritical acceptance to a more balanced approach
 - *Cases are catching up to the commentary; becoming more sophisticated in analysis*
 - Few if any cases provide a complete analysis on the merits based on evidence
- MFNs should not be evaluated as “specialized” restraint
 - Guidance can be gleaned from broader developments in analysis of distribution strategies
 - MFNs share some common features with variety of other restraints
 - Perhaps a problem with most common “justification”



How Have MFN Issues Arisen at the Agencies and in the Courts

- Consent Decrees
 - FTC -- RxCare of Tenn (1996))
 - DOJ – Lykes Bros. (1995); Delta Dental (AZ 1995; RI 1997); Vision Service (1995); Medical Mutual of OH (1998)
- Motion Practice
- Dicta – Passing Comments
- Settlement Agreements
 - A distinct subset of issues
- New Attention in Light of Recent Enforcement Actions
 - E-Books – facilitating collusion
 - BCBS of Michigan - exclusion



Some Key Decisions

Anticompetitive Effects

- ***Facilitating Collusion:***
 - Starr v. Sony (2d Cir. 2010)
 - Brand Name Prescription Drugs (7th Cir. 2002)
- ***Exclusionary:***
 - BCBS of Michigan (E.D. Mich. 2011)
- **Evidence of Market Power**
 - Reazin (10th Cir. 1990)

Procompetitive Effects

- Marshfield Clinic (7th Cir. 1995)(reduced costs)
- Ocean State (1st Cir. 1989)(reduced cost and was not exclusionary)

But since *Ocean State*, no post-trial evaluation of MFN in any reported case.



Drilling Down on Common “Motive” For MFN

- From *Ocean State*: “the record amply supports Blue Cross’s view that [the MFN policy] was a bona fide policy to ensure that Blue Cross would not pay more than any competitor paid for the same services.”
- *Rationale*: Use MFN as defensive strategy (“contract around”) to avoid becoming victim of price discrimination
 - Don’t want to be a disfavored purchaser
- ***Is this an “efficiency” defense?***
 - What if price discrimination is efficient?
 - How do we square support for this rationale with critique of prohibition of secondary line price discrimination?
 - Tension – How do we compare the active vs. the dormant MFN?
 - Active: Cost savings only occur if MFN kicks in due to sale at lower price to rival
 - Dormant: Actual entry deterrence may occur from supplier’s refusal to agree to lower prices; in that event there will be no reduction of costs



Consider MFNs in Light of Broader Trends in the Treatment of Distribution

Old School – “Pigeon-Holing”

- Vertical Intrabrand
 - Price/Non-price
- Vertical Interbrand
 - Tying
 - Exclusive Dealing
 - Flavor du Jour: Bundled Rebates
 - MFNs
- Analysis Changed with Form; Not Always Keyed to Substance



New School

- Substance > Form
- Focus on *Like Effects and Justifications*
- Structured Analysis
- Critical First Step: What is the Anticompetitive Theory?
 - Collusion/Exclusion
- *Risk of Retrogression with “New” Categories, Unless Driven By Like Effects and Efficiencies*



Modeling a Modern Legal Approach: Two Examples

Leegin (U.S. 2007)

- Anticompetitive Theories
 - Collusion
 - Facilitate mfr cartel
 - Facilitate dlr cartel
 - Exclusion
 - Impair rivals of dominant seller
 - Impair rivals of dominant buyer/dealer
- Procompetitive Theories

Microsoft (D.C. Cir. 2001)

- General Burden Shifting Framework
 - Anticompetitive Effects
 - Procompetitive Effects



What Would a “Structured Rule of Reason” for MFNs Look Like?

- Step 1: *Theory of Anticompetitive Effect*
 - Facilitate collusion?
 - Exclusion?
- Step 2: *Mechanism of Anticompetitive Effect*
 - For Collusion: How will it make coordination more likely?
 - For Exclusion: How will it (1) impact rivals; and (2) competition?
 - RRC? RRR? Otherwise impair entry? Discourage innovation?
- Step 3: *Cognizable Justifications*
 - Procompetitive effects



Visualizing the Framework

First Principles

Does the MFN arise in a context that indicates it has the potential for significant anticompetitive effects?
(What are the relevant factors?)

Nature of Anticompetitive Effect

Collusive

Exclusionary

Mechanism of Anticompetitive Effect

In what ways will the MFN facilitate coordinated interaction?

How might the MFN impact rival? Enough to also impair competition?

Cognizable Justifications?

What are the efficiency justifications for MFNs?

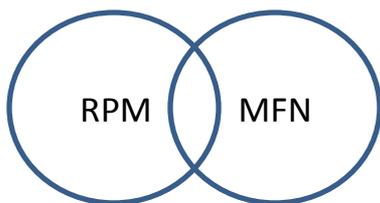
Do they differ by type of anticompetitive effect?



Constructing “New Categories” Based on Common Effects and Justifications

- Comparing/Contrasting Distribution Restrictions – An Example

Anticompetitive Effects



Both can facilitate coordination. Analyze alike?

Procompetitive Effects
(Defeat Free-Riding)



“Free-riding” not typically relevant to MFNs; but RPM and exclusive dealing both often raise. Analyze alike?





The End

Thanks for Your Attention!

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