Abuse of Monopoly Power (or Dominant Position)

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Abuse of Market Dominant Position: Common Types of Conduct

- Monopolization
- Attempted monopolization
- Exclusionary practices

Shared Dominance

- U.S. Sherman Act: “Conspiracy to Monopolize”
- European Union Law
- Difficult to Prove

Market Power

- Dimensions
  - Product Market
  - Geographic Market
- Market Definition: search for close substitutes
- “Cross-elasticity of demand”
- How Much is Too Much?

Dominance vs. Abuse

- Monopoly (or dominant position) in the abstract: No violation
- Abuse, or "monopolization"
  - Unlawful acquisition of monopoly power
  - Unlawful maintenance of monopoly power (in other words, exclusionary practices)
- Crucial to distinguish vigorous competition

Common Exclusionary Practices

- Tying arrangements
- Unilateral refusal to deal
- Exclusive dealing arrangement
- Price squeezes, if there is a duty to deal
- Denial of essential facility (?)
- Predatory pricing

Analytical Tools

- Presumptive illegality – often referred to as *per se* illegality
- Holistic approach: all the facts and circumstances – called the “Rule of Reason” after the 1911 *Standard Oil* decision

The Rule of Reason

***Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231 (1918)**

- Spells out what the Rule of Reason entails.
- Operator of primary grain market instituted rule prohibiting members of the market from buying and selling grain after market hours.
- United States sued, alleging antitrust violation.

The Rule of Reason

***Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231 (1918)**

- The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Applying the Rule of Reason

- Is the economic effect of the practice pro- or anti-competitive?
  - The competitive effect of a business practice may be ambiguous.
  - Under the rule of reason, relevant facts are any facts that tend to establish whether a restraint
    - increases or decreases output or
    - increases or decreases prices.

Applying the Rule of Reason

- Economic analysis guides the inquiry into the likely effect of a challenged practice. Example: *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) on Resale Price Maintenance:
  - "The overall balance between benefits and costs ... is probably close. ... Minimum resale price maintenance can stimulate interbrand competition -- the competition among manufacturers selling different brands of the same type of product-by reducing intrabrand competition-the competition among retailers selling the same brand."
- Analogous approach taken in single-firm cases.

Predatory Pricing

***U.S. v. AMR Corp.* (*American Airlines*), 140 F. Supp. 2d 1141 (D. Kan. 2001)**

- Claim: American Airlines reallocated planes from more-profitable routes to less-profitable routes and lowered prices on the less profitable routes in order to drive out smaller, lower-cost carriers.

- Claim: After driving out competitors American reduced the number of flights on these routes and raised prices.

Predatory Pricing

***U.S. v. AMR Corp.* (*American Airlines*), 140 F. Supp. 2d 1141 (D. Kan. 2001)**

- Unlawful if
  - Prices were below cost **and**
  - American likely could recoup its losses from below-cost pricing after driving out its competitors

- Central economic issues:
  - What is the appropriate measure of “cost”?
  - What is the probability of American Airlines recovering its costs, considering the potential for new entry or reentry of competitors?

Predatory Pricing

***U.S. v. AMR Corp.* (*American Airlines*), 140 F. Supp. 2d 1141 (D. Kan. 2001)**

- Result: American wins on summary judgment. "The government's claims in the present case fail because

1. American did not price below an appropriate measure of cost
2. At most American matched the prices of its competitors, and
3. Even if American did price below cost, there is no dangerous probability of American recovering its losses and then earning profits by raising prices above the competitive level.

Tying

Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006)

- Facts: Trident had market power in patented device to print on cardboard. It licensed patent to manufacturers that agreed to use only Trident's ink.

- Claim: An independent seller of ink sued, claiming Trident was extending its power in the market for printers into the market for inks.

Tying

Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006)

- Court: Plaintiff must show that defendant actually has market power. Patent alone does not necessarily justify a finding of market power
- Economic issues
  - Definition of product: car + radio? Computer operating system + internet browser?
  - Fixed proportions: left shoe + right shoe: consumer values total bundle, not separate parts

Tying

Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28 (2006)

- Some firms tie two products in order to discriminate in price by "metering." For example, a seller of equipment may require the purchaser to use the seller's maintenance services (*Kodak*) or buy supplies from the seller (in this case, ink) rather than allowing the purchaser to use the services and supplies sold by independent firms. These practices alone do not create antitrust liability but the practices may give rise to liability **if** the requirements are **also** deemed an anticompetitive tying of one product to another.

Refusals to Deal

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

- Ski Co. owned three ski mountains in Aspen, Colorado; Highlands owned one ski mountain. Both companies had sold “All Aspen” tickets giving skiers access to all four mountains and divided the revenue from these tickets.
- Ski Co. then refused to continue the All Aspen ticket and instead sold a pass that gave access to only its own three mountains. Ski Co. refused to let Highlands sell tickets to Ski Co.’s mountains even at the full retail price.
- Highlands claimed Ski Co. unlawfully refused to deal with it.

Refusals to Deal

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

- General rule: "In the absence of any purpose to create or maintain a monopoly," a private businessman may freely "exercise his own independent discretion as to parties with whom he will deal." *U.S. v. Colgate & Co* (1919).

- Court: Aspen is liable in damages. "The high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."

Refusals to Deal

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

- Requirements for unlawful refusal to deal under *Aspen*
  - A prior course of dealing.
  - Evidence that the refusal to continue dealing harms not just the plaintiff, but also consumers.
  - Defendant failed to show a legitimate business justification for refusing to deal

Exclusive Dealing

***Toys "R" Us, Inc. v. FTC* (7th Cir. 2000)**

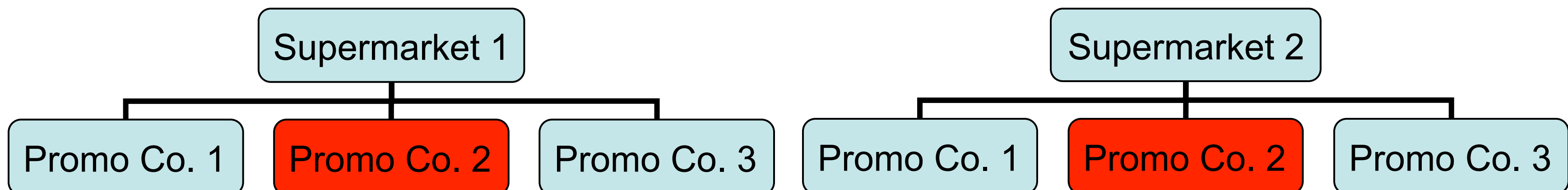
- Claim: Toy store with dominant position in marketplace persuaded toy manufacturers not to sell the same toys to discount stores.

- Court: "Exclusive dealing is an unreasonable restraint on trade ***only*** when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."

Exclusive Dealing

***Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, (7th Cir. 2004).**

- Facts: *Menasha* signed contracts with supermarkets to be the exclusive supplier of in-store promotional coupons; the exclusive contract was held not anticompetitive and was therefore lawful.
- Court: Competition for exclusive contracts is "a vital form of rivalry . . . which the antitrust laws encourage rather than suppress."



Other Types of Violations

***United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)**

- Unique practices may also be anticompetitive.
- The case against Microsoft involved several technology-specific claims of anticompetitive conduct, such as:
  - Restricting ability of computer manufacturers to install competing web browsers
  - Designing software (Microsoft's Java) to be incompatible with other similar software (Java)