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EXCLUSIVE DEALING

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Exclusive Dealing In Distribution

(Cornell Law Review, 1983)

History

- **Per Se – Prior to *Standard Fashion Co. v. Magrane Houston Co.*, 258 U.S. 346 (1922), the FTC applied a virtual rule of per se illegality to exclusive dealing under § 3 of the Clayton Act. *Standard Elec. Mfg. Co.*, 5 F.T.C. 376 (1923); *B.S. Pearsall Butter Co.*, 5 F.T.C. 127 (1922); *Stanley Booking Corp.*, 1 F.T.C. 212 (1918)**
- **Quantitative Substantiality – *Standard Stations* (1949); *FTC v. Brown Shoe* (1966)**
- **Qualitative Substantiality – *Tampa Electric* (1961)**
- **Modern Rule of Reason; Interbrand Competition/Free Riding – *Beltone* (1982); *Jefferson Parish* (1984); *California Dental* (1999)**

Measuring Foreclosure More Complex and Nuanced Than Originally Thought

- Level of Distribution –Wholesalers; Retailers; End-Users
- Type of Product – Shopping Products; Convenience Products (“Delivering” customers)
- Alternate Channels of Distribution – Intertype Competition
- Establishing New Distributors – Versus “Piggybacking”
- *Compare* measuring foreclosure for other offenses

Pro-competitive Effects

- Combating manufacturer-level free riding
- Stimulating Distributors – commodities versus differentiated products
- Stimulating Suppliers (Different from resale restraints)
- Protecting Trade Secrets
- Quality Control
- *Compare* Resale Restraints

Discounts and Exclusive Dealing

(Antitrust Magazine, 1993)

Single Product Discounts Conditioned on Exclusive Dealing

- *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922)
- *NicSand, Inc. v. 3M Co.*, 457 F.3d 534 (6th Cir. 2006)
- *Nutrasweet* (Canadian Competition Tribunal, 1990)
- *Tetra Pak* (EU Commission 1991)
- “Offer you can’t refuse” (Need for particular supplier’s products)

Bundling

- *SmithKline Corp., v. Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir.), cert. denied, 439 U.S. 838 (1978)
- *LePages v. 3M*, 324 F.3d 141 (3d Cir. 2003)
- *Ortho v. Abbott*, 920 F. Supp. 455 (S.D.N.Y. 1996)

Customer-Instigated Exclusive Dealing

(Antitrust Law Journal, 2000)

Mixed Motivations re Number of Suppliers

- End-Users
 - Assure survival of multiple suppliers
 - Requirements contracts creating competitive advantage if fewer suppliers exist
- Resellers
 - Short Term: Threat of alternate brands
 - Long Term: Value of alternative brands

Reasons for Customers to Instigate Exclusive Dealing

- Inducing lower prices
- Assuring dependable supply (requirements contracts)
- Assuring quality (qualifying suppliers)
- Assuring uniformity (auto racing example)
- Achieving logistical efficiencies (fewer vendors = greater efficiency)

Finding an Appropriate Legal Analysis

- Supplier's Objectives
 - Foreclosure of Competitors
 - Distributional Efficiencies
- Reseller's Objectives – Better Pricing; assured supply; quality; uniformity; achieving efficiencies
 - Mixed motives re strength of alternate suppliers and brands
- End-Users Objectives – Better Pricing; delivery; quality; uniformity; efficiencies
 - Less likely to favor weakened interbrand competition

Finding an Appropriate Legal Analysis

- When should courts second guess buyers that instigate exclusive dealing?

When the buyer has a motive to eliminate competition at the supplier level, such as to foreclose its own competitors.

Unifying Principles vs. Intellectual Laziness