



Research Ideas in Antitrust and Consumer Protection: A View from the FTC

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These are my views and do not necessarily represent those of the Federal Trade Commission or any of the Individual Commissioners

The FTC

Three missions work hand-in-hand to achieve the FTC's goal of enhancing consumer welfare

- Competition (Antitrust)
- Consumer Protection
- Public Policy/Advocacy/R&D

Sample of Recent Antitrust Work

- Whole Foods/Wild Oats (on Appeal)
- Google/DoubleClick (Closed)
- Cephalon (in Litigation)
- Inova/Prince William (in Litigation)

Sample of Recent Consumer Protection Work

- Mortgage Disclosures
- FACTA Study
- Upcoming Mortgage Conference (May 29)

Important Areas for Additional Research

- Economic research has played an important role in shaping the antitrust and consumer protection landscape
- Four areas where additional academic research would be especially helpful:
 - Resale Price Maintenance
 - Bundled Discounts
 - Oil Markets
 - Online Behavioral Advertising

Resale Price Maintenance

- Legal History

- Supreme Court in *Dr. Miles* (1911) made minimum RPM *per se* illegal
- Supreme Court in *Leegin* (2007) overturned *Dr. Miles* in favor of rule of reason
 - 5-4 majority
- Contentious issue still
 - Legislation sponsored by Senator Kohl and co-sponsored by Senators Biden and Clinton would reinstate the *per se* prohibition
- FTC's Nine West Order Modification

Role of Economics in RPM

- Theoretical
- Empirical
 - Includes work by Pauline Ippolito (*JLE* 1991) and other BE economists, cited in the Supreme Court's Leegin decision
- General consensus among economists that RPM should not be per se illegal
 - Jeremy Bulow, former Director of the Bureau of Economics, on the Supreme Court's 5-4 Decision in Leegin (*Wall Street Journal*):

“As much as I hate to go along with the conservatives on the court, I think they got it right.”

Research Opportunities on RPM

- In his dissent, Justice Breyer called for research:
 - “I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?”
 - “How often, for example, will the benefits to which the Court points occur in practice?”
 - “The question is how often the “free riding problem” is serious enough to significantly deter dealer investment.”
 - “...the ultimate question is not whether, but how much, “free riding” of this sort takes place.”
- The change in regime from *per se* illegality to rule of reason provides opportunities for quantitative research on agency/efficiencies/free rider effects

Bundled Discounts and All Unit Discounts

- Bundled discounts ubiquitous and generally efficient
- However, three theories where bundling might be exclusionary
 - A form of predatory pricing
 - De facto tying
 - Entry deterring exclusionary conduct

Recent History: LePage's

- **LePage's v. 3M (3rd Circuit) condemned bundled discounts as violation of Section 2**
 - Did not assess whether 3M's bundled discounts were competition on the merits
 - Did not consider whether 3M's bundled pricing was above cost, no matter how cost was calculated
 - Unclear what would have been sufficient to show competition on the merits

PeaceHealth Decision (2007)

- 9th Circuit explicitly disagreed with 3rd Circuit and refused to follow it
- Adopted a cost-based standard for bundled discounts
 - “Discount attribution standard” in which the full amount of the discounts given by the defendant on the bundle are allocated to the competitive product or products
 - If the resulting price of the competitive product is below the defendant’s incremental costs to produce them, the trier of fact may find the bundled discount exclusionary

Antitrust Modernization Commission (2007)

- Concerned that 3M decision too vague and will chill welfare-enhancing discounts or rebates
- Proposed a 3 prong test for plaintiff:
 - After allocating all discounts and rebates attributable to the entire bundle to the competitive product, the defendant sold the competitive product below the competitive product's incremental costs
 - Defendant is likely to recoup these short term losses
 - Bundled discount or rebate program likely to have adverse effect on competition
- Recognized that the first test is not perfect and may result in further scrutiny of bundled discounts with no anticompetitive effects
- Carlton, in his separate statement, observed that the analogy of single product predatory pricing and multiproduct bundled discounts is faulty
 - Price discrimination rationale for bundling

Research Opportunities on Bundled Discounts

- Calls from the legal and policy communities for additional empirical research into bundled discounts
 - Solicitor General in amicus brief in *LePage's*
 - Antitrust Modernization Commission
 - 9th Circuit in *PeaceHealth*
- Complex cost allocation issues
- Effects on competition
- Implementable “screens” or “tests”

Oil and Gas Market Research

- An area where the FTC has tremendous expertise
 - Antitrust cases
 - Commission Reports
 - Advocacy
 - Research
 - Gasoline price monitoring
 - 20 wholesale regions and approximately 360 retail areas nationwide
- Significant Utility of Quantitative Studies

Online Behavioral Advertising

- Tracking of a consumer's online activities in order to allow businesses to deliver targeted advertising that more closely match the interests of particular consumers
 - Provides benefits to consumers
 - May harm consumer privacy
- Commission recently requested comments on self-regulatory principles for online behavioral advertising
- Some examples of recent comments:

Consumer Federation of America

- “Because behavioral targeting involves practices that are inherently deceptive they distort consumption. The inherently deceptive practices that pervade the behavioral marketing space include suggestions of relationships that do not exist and use of information about the consumer that the consumer has not willingly divulged to the seller.”

Yahoo!

- “The advertising model has made Internet content and services available to millions of people in the United States and around the world—for free. The business model of relying on advertising revenue to fund websites has meant that vast amounts of information on the Internet has been fully accessible to people of all ages and income levels.”

Research Opportunities: Online Behavioral Advertising

- Quantifying the costs and benefits of online behavioral advertising, and implications of competing proposals to restrict such advertising
- Quantifying positive and negative externalities associated with behavioral advertising and/or proposals to restrict such advertising

FTC Microeconomics Conference

- November 6-7, 2008
- Conference to bring together scholars working in industrial organization, information economics, game theory, quantitative marketing, consumer behavior, and other areas related to the FTC's antitrust and consumer policy missions
- Examples of potentially relevant topics include online advertising, information disclosure, horizontal and vertical mergers, bundling, loyalty and other discounts, dynamic oligopoly, intellectual property, and behavioral and experimental economics
- Interested participants should send an abstract or completed paper to BE-IOC@ftc.gov by July 7, 2008