



BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE SYDNEY TOKYO WASHINGTON, DC



Overview of U.S. Antitrust Law
Antitrust & Intellectual Property Class 276.2
Fall 2012

Samuel R. Miller
Sidley Austin LLP

Three Pillars of Antitrust Enforcement

- Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits contracts, combinations and conspiracies “in restraint of trade”.
- Section 2 of the Sherman Act, 15 U.S.C. §2, makes it illegal to “monopolize or attempt to monopolize”, or to “combine or conspire” with others to monopolize any relevant market.
- Section 7 in the Clayton Act, 15 U.S.C. §18, prohibits acquisitions where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”

2


Sherman Act Section 1

- Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits contracts, combinations and conspiracies “in restraint of trade”.
- Not all agreements or combinations between companies are forbidden under section 1.
- We distinguish between “horizontal” agreements and “vertical” agreements.
- “Horizontal” agreements are between competitors at the same level – for example, two different manufacturers of cell phones.
- “Vertical” agreements or arrangements are between companies at different levels of the distribution chain – for example, between a manufacturer and a distributor.
- We distinguish between agreements which are “per se” illegal and those which are judged under the “rule of reason”.

3


Per Se Offenses Under Section 1 Of The Sherman Act

- Price-fixing or bid-rigging among horizontal competitors.
- Horizontal agreements among competitors to divide markets or allocate customers.
- Agreements among horizontal competitors to restrict output or limit the quantity of production or supply of goods or services (output restraints)
- Agreements among horizontal competitors to collectively refuse to deal with a customer or supplier (group boycotts).
- See Antitrust Division Primer on "Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look For", (<http://www.justice.gov/atr/public/guidelines/211578.htm>)

4



Rule Of Reason Analysis

- Whether the restraint promotes or suppresses competition
- Facts peculiar to the business to which the restraint is applied
- Condition of the business before and after the restraint
- The nature of the restraint and its effect, actual or probable
- History of the restraint and the reason for adopting it. See *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918)
- The basic inquiry under Rule of Reason analysis is whether the restraint is likely to have anti-competitive effects, and, if so, whether the restraint is reasonably necessary to achieve pro-competitive benefits that outweigh those anti-competitive effects. DOJ IP Guidelines §3.4

5



Prohibitions Against Cartels

- A "cartel" is broadly defined to include any agreement or "mutual understanding" between horizontal competitors to stabilize or fix prices, to divide markets, or to avoid real competition.
- A "price fixing" agreement among horizontal competitors would be considered a classic "cartel" case and would be viewed as a "per se" violation of § 1.
- In the U.S., companies engaged in a cartel can be prosecuted criminally and be subject to civil suits for treble damages.
- In the EU, "cartel" enforcement is administrative, and is pursued by the Directorate General For Competition of the EU ("DG Competition") (referred to as "EU").

6



Prohibitions Against Cartels (Cont.)

- In civil suits in the U.S., defendants engaged in price fixing face damages of 3 times the damages sustained.
- In the U.S., the Antitrust Division can impose fines only in criminal cases. There is no statutory authority for fines or administrative penalties in civil cases under federal antitrust laws. The only available remedy is an injunction.

7



What Antitrust (Competition) Laws Prohibit

- The U.S. and EU have strict rules prohibiting cartels.
- A "cartel" agreement can be prosecuted even if it is not successful and prices continue to decline. Prosecutors would assert that communications between competitors to "go easy on each other" or "work together to stop price declines" is an illegal price-fixing "agreement."
- U.S. and EU government officials have vigorously prosecuted many companies selling into these markets from other countries, including from Germany, Korea, Japan, Thailand and Taiwan.

8



Dramatic Increase In Antitrust Enforcement In The U.S. And The EU

- The criminal enforcement of antitrust laws has dramatically increased in the last twenty (20) years. See speech by Scott D. Hammond, Head of Criminal Enforcement for the Antitrust Division, entitled "The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades" presented on February 25, 2010 (<http://www.justice.gov/atr/public/speeches/255515.htm>)
- The largest corporate fine imposed in the U.S. is \$500M against Hoffman-LaRoche in the Vitamins cartel.
- The Antitrust Division has obtained 18 fines above \$100M per company.
- Companies involved in the Air Transportation cartel have been fined a total of more than \$1.6B; companies in the LCD cartel have been fined \$860M; and companies in the DRAM cartel have been fined more than \$730M.

9



Dramatic Increase in Antitrust Enforcement In The U.S. And The EU (Cont.)

- In the EU, the European Commission imposed fines of more than \$1.3B Euros against four car glass manufacturers.
- More than 40 individual defendants had been convicted and served jail time in the U.S. for participation in price fixing cartels. Foreign nationals from France, Germany, Japan, Korean, Norway, the Netherlands, Sweden, Switzerland, Taiwan and the United Kingdom have gone to jail in the U.S.
- Many other countries are making price-fixing or other cartel behavior illegal.

10



A Cartel Does Not Have To Be Effective To Be Prosecuted In The U.S. Or EU

- Contrary to what most businessmen think, a company and its executives can be prosecuted for price-fixing, *even if an alleged cartel is not effective or prices continue to decline.*
- The essence of the crime in the U.S. and EU is merely reaching a "mutual understanding" or "consensus" with a competitor with respect to price levels or limiting output.
- It is not a defense that the parties may have acted with good motives (for example, to keep production going and stop a company from going out of business).
- All that is required is that employees of one company reach a "mutual understanding" or "consensus" with employees of a competitor to stabilize price levels or fix the price of a product sold in the U.S.

11



A Cartel Does Not Have To Be Effective To Be Prosecuted In The U.S. Or EU (Cont.)

- A government can prosecute a company and its employees for entering into a "price-fixing conspiracy," even if there is no formal written agreement; no written notes or document is required. *The agreement may have been entirely oral.*

12



A Price-Fixing Agreement Is Illegal Under U.S. And EU Law Even If It Is Targeted At Some Customers, Not The Entire Market

- A company and its employees can be prosecuted for a “price-fixing conspiracy” even if the “mutual understanding” was limited to specific customers. The conspiracy does not have to be directed at all customers or the entire market.
- A company and its employees can be prosecuted for conspiracy relating to specific products. It is no defense that the conspirators actually competed with each other in some manner, and even if the agreement did not extend to all products sold by the conspirators or did not affect all of their customers.

13

CRIMINAL JUSTICE
SIDLEY

A Price-Fixing Conspiracy Can Be Prosecuted Even If Prices Continued To Decline Or Competitors Who Agreed to Fix Prices Cheated On Each Other

- If one company reached a “mutual understanding” to keep prices above a certain level with a competitor, the company can be charged even if one of the competitors did not abide by the agreement or started under-cutting the other right away, or offered prices lower than agreed upon to customers it did not want to lose.
- Even if the effort to keep prices from continuing to fall was totally ineffective, the government can still try to prosecute a company and its employees who communicated with a competitor and reached a “consensus” the prices should be above a certain level.

14

CRIMINAL JUSTICE
SIDLEY

A Price-Fixing Conspiracy Can Be Prosecuted Even If Prices Continued To Decline Or Competitors Who Agreed to Fix Prices Cheated On Each Other (Cont.)

- It is no defense if the defendant entered into a “consensus” or “mutual understanding” to fix prices, even if the defendant did not observe the agreement, or may not have lived up to some aspect of the agreement, or may not have been successful in achieving the objectives of the “agreement.”
- According to government prosecutors, “The agreement to act together is the crime, even if it was never carried out.”

15

CRIMINAL JUSTICE
SIDLEY

Even Minor Participation Or Participation For A Short Time In A Price-Fixing Conspiracy Is Illegal

- Under U.S. law, it is no defense that a company or employee's participation in a price-fixing conspiracy was "minor or for a short period of time."

16



In The U.S., A Company Manager Can Be Criminally Prosecuted Based On The Acts Of Lower-level Employees Reporting To The Executive if:

- The executive knowingly authorized, ordered or consented to the participation of a subordinate in the conspiracy; or
- The executive was in a position to stop a subordinate who he knew was participating in the conspiracy from further participation, but failed to do so.

17



Examples of Real Documents Relied On By The Government Or Plaintiffs In Price-Fixing Cases

- In a recent trial, e-mails were introduced from Hynix stating that "Samsung is in the same mood to raise prices" to a customer of both companies. The government argued this was enough for an agreement.
- The government argued that an agreement was reached when one company responded to the suggestion of a competitor to keep prices above a certain level by saying "sounds good" or "sounds okay".
- It is legal and proper for salesmen and other company employees to ask customers what a competitor is charging – what is dangerous is getting that information directly from a competitor.

18



Examples of Real Documents Relied On By The Government Or Plaintiffs In Price-Fixing Cases (Cont.)

- It is legal and proper to get market information from third-party sources like Display Search or iSuppli – what is dangerous is getting such information directly from a competitor.
- E-mails from employee stating "I received information that both Micron and Infineon will be raising prices tomorrow at Gateway" arguably suggests an agreement between companies regarding future prices.
- E-mails in a recent price-fixing case stated that an executive from a competitor "wanted to discuss with us measures to stabilize the market price." The government argued that this was evidence of an illegal agreement.

19



Be Alert For Public Statements About Collective Efforts To Stabilize Price

- In the private LCD class actions, plaintiffs refer to statements made to the press in Taiwan that certain Taiwanese LCD panel makers were seeking "closer cooperation" with competitors. This suggests communications between competitors which the government or class action lawyers can argue were improper.
- In the same class action complaint, plaintiffs allege that an executive of a AU-Optronics publicly announced that it was reducing capacity and "we will see some parity among different panel suppliers". Plaintiff argued that this suggests an agreement among suppliers to limit capacity.
- Another Taiwanese executive was quoted in the paper as stating that "both Taiwanese and South Korean TFT-LCD panel makers should avoid the fierce price competition and build a money-making environment." This is a statement that the government or class action lawyers could try to use as evidence of an agreement.

20



Be Alert For Public Statements About Collective Efforts To Stabilize Price (Cont.)

- Plaintiffs in the class action also allege that "another AU-Optronics" executive stated in the newspaper "the local TFT-LCD industry should move to set up a reasonable and healthy pricing strategy thus avoiding price fluctuations." Again, this is a statement which the government or class action lawyers could try to cite as evidence of an agreement.

21



Language of Section 2

- Section 2 of the Sherman Act, 15 U.S.C. §2, makes it illegal to "monopolize or attempt to monopolize", or to "combine or conspire" with others to monopolize any relevant market.

22

SIDLEY AUSTIN LLP
SIDLEY

What is Prohibited by Section 2

- Under U.S. law, it is not illegal to acquire or maintain a dominant market share, even 100% of the market.
- Section 2 recognizes that a company may lawfully acquire a large market share because it is first to introduce a product, because it has better marketing, or even because of luck.

23

SIDLEY AUSTIN LLP
SIDLEY

Elements of a Claim For Unlawful Monopolization

- Defendant possesses monopoly power;
- Within a properly defined relevant market;
- Which it acquired, maintained or enhanced by the use of exclusionary or predatory conduct.
- *U.S. v. Grinnell*, 384 U.S. 563 (1966); *Aspen Highlands Skiing Corp v. Aspen Skiing Co.*, 472 U.S. 585 (1985)

24

SIDLEY AUSTIN LLP
SIDLEY

Elements of a Monopolization Claim (Cont.)

- Without exclusionary or predatory conduct, a dominant firm is not guilty of monopolization.
 "The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period— is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive [exclusionary or predatory] conduct." *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*. 540 U.S. 398 (2004).

25

SIDLEY AUSTIN LLP
SIDLEY

What is Monopoly Power?

- The power to raise prices in the relevant market above competitive levels.
- The power to exclude competition in the relevant market.

26

SIDLEY AUSTIN LLP
SIDLEY

Elements of an Attempted Monopolization Claim

- Defendant engaged in predatory or exclusionary conduct;
 - With a specific intent to monopolize;
 - In a properly-defined relevant market; and
 - There is a dangerous probability that it would succeed in achieving monopoly power.
- Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993); *Lorain Journal Co. v U.S.*, 342 U.S. 1431 (1951)

27

SIDLEY AUSTIN LLP
SIDLEY

The "Relevant Market" Element

- Defining the relevant market is an essential element of a Section 2 claim.
- Without a definition of a market, there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equip. v. Food Mach & Chem Corp.*, 382 U.S. 172 (1965)
- Relevant markets are defined in terms of products and geographical area.

28

SIDLEY AUSTIN LLP
SIDLEY

The "Relevant Market" Element (Cont.)

- Products are considered in the same relevant market if consumers would consider them potential alternatives to each other –in other words, if a consumer can turn to an alternative product if the price of another product increased, the products would likely be considered in the same "relevant market". Courts look to the "cross-elasticity" of demand to determine if products are in the same relevant market. Thus, a product market consists of "commodities reasonably interchangeable by consumers for the same purposes."
- With respect to the geographic market, for many high technology products, the geographic market is the entire world or the entire country.

29

SIDLEY AUSTIN LLP
SIDLEY

How is Monopoly Power Proven

- Courts do look at market share in determining whether a company may have "monopoly power". As a rule of thumb, a market share of 70% or more is considered a reasonably threshold.
- With a market share of less than 50%, "monopoly power" would probably not be found.
- Whether a company with a market share between 50% and 70% would be found to have "monopoly power" would depend on the facts.
- Direct proof that a firm can profitably raise or maintain prices substantially above competitive levels would be proof of "monopoly power". *U.S. v. Microsoft*, 253 F.3d 341 (D.C. Cir. 2001).

30

SIDLEY AUSTIN LLP
SIDLEY

Other Evidence Relevant to Monopoly Power

- Market share alone is not determinative –a court would look to whether there are barriers to entry and/or expansion.
- The issue is whether rivals could expand their output to defeat a price increase by a monopolist.
- Courts also look to the market structure
 - The relative size and strength of competitors
 - The elasticity of consumer demand
 - The speed of technological change
 - The presence of “power buyers” who could resist a price increase.

31



Other Evidence Relevant to Monopoly Power (Cont.)

- Market performance would also be considered.
 - Price trends
 - Stability of market shares or market share trends
 - Abnormally “high” profits

32



What is “Exclusionary” Conduct?

- “Anticompetitive”, “predatory”, or “exclusionary” are interchangeable labels.
- Aggressive competition is not “exclusionary” even if it forces rivals out of business.
- “The question whether [the defendant’s] conduct may properly be characterized as exclusionary cannot be answered by simply considering its effect on the plaintiff, but must consider its effects on competition.” *Aspen Skiing*.
- The anticompetitive act must harm the competitive process and thereby harm consumers –in contrast, harm to one or more competitors will not suffice. *U.S. v. Microsoft*, 253 F.3d 341 (D.C. Cir. 2001).

33



What is "Exclusionary" Conduct? (Cont.)

- A major challenge for government enforcers is to distinguish proper, but hard-ball competition (which should be encouraged) from "exclusionary acts" which harm the competitive process.

34

SIDLEY AUSTIN LLP
SIDLEY

The Definition of "Exclusionary Conduct" Has Been Elusive

"[E]xclusionary comprehends, at the most, behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competitive on the merits or does so in an unnecessarily restrictive way." Areeda & Turner (1978); *Aspen Skiing*.

"'Exclusionary' conduct is conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power." Areeda & Turner (1978).

"Conduct is 'exclusionary' or 'predatory' in antitrust jurisprudence if the conduct would not make economic sense for the defendant but for its elimination or softening of competition." Gov't Brief in *Verizon v. Trinko*.

35

SIDLEY AUSTIN LLP
SIDLEY

ABA Model Jury Instruction on Monopolization (2005)

- "In determining whether defendant's conduct was anticompetitive or whether it was legitimate business conduct, you should determine whether the conduct is consistent with competition on the merits, whether the conduct provides benefits to consumers, and whether the conduct would make business sense apart from any effect it has on excluding competition or harming competitors."

36

SIDLEY AUSTIN LLP
SIDLEY

Specific Categories of Potentially Exclusionary Conduct

- Predatory Pricing
- Refusing Access to Competitors
- Vertical Arrangements that Foreclose Competitors from Suppliers or Customers
- Abuse of Product Designs or Introductions
- Abuse of Governmental Process
- Abuse of Standards Setting
- Tortious Conduct
- Coordination with Competitors to Gain Monopoly

37

SIDLEY AUSTIN LLP
SIDLEY

Predatory Pricing

- Historic problem: How to distinguish low prices that benefit consumers from low prices that hurt competition by driving out the competitors.
- *Brooke Group v. Brown & Williamson*, 509 U.S. 209 (1993): Plaintiff must establish two (2) elements to show that low prices are "exclusionary":
 - (1) Below-Cost Pricing
 - "[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect."
 - "[A] plaintiff seeking to establish competitive injury from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's [the defendant's] costs."

38

SIDLEY AUSTIN LLP
SIDLEY

Predatory Pricing (Cont.)

- The Supreme Court rejected "the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflicts injury to competitors under the antitrust laws."
- The Court recognized that above-cost, low prices could be used anticompetitively, but it "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting."
- (2) A market structure that makes it likely that below-cost pricing will drive a rival from the market and that it is probable that the monopolist will be able to recoup the losses sustained after the rival is driven from the market.

39

SIDLEY AUSTIN LLP
SIDLEY

Predatory Pricing (Cont.)

- 3) The Supreme Court's most recent discussion of predatory pricing is in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S.Ct. 1109 (2009). This case involved a claim by retail providers of high-speed DSL internet service that defendant AT&T charged them too much at the wholesale level for DSL transport services, and that AT&T charged too low a retail price for its own high-speed DSL internet service to consumers. Plaintiffs argued this was an illegal "price squeeze". The Supreme Court rejected this theory because plaintiffs could not show that AT&T's retail DSL prices were below cost; and, further, that AT&T was not required to offer wholesale DSL transport services to the plaintiffs at wholesale prices which guaranteed the plaintiffs an assured profit margin. According to the Supreme Court, "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."

40



Refusing to Provide Competitors Access to Inputs

- Essential Facilities Doctrine
- Denials of Access or Cooperation
- Refusals to License Intellectual Property

41



Essential Facilities Doctrine

- A business may generally decide unilaterally (*i.e.*, not pursuant to a conspiracy) not to deal with the producer of complementary or competitive products.
- Can a monopolist refuse to provide a competitor access to an "essential facility" (an essential input) on reasonable terms?
 - *Terminal Railroad Ass'n. and Associated Press*: Joint venture of competitors cannot deny their competitor access to a facility or service that is essential for market presence. More like boycott claim.
 - Extended to unilateral refusal in *MCI v. AT&T*, 708 F.2d 1081 (7th Cir. 1983): "Such a refusal may be unlawful because a monopolist's control of an essential facility (sometimes called a 'bottleneck') can extend monopoly power from one stage of production to another, and from one market into another. Thus, the antitrust laws have imposed on firms controlling an essential facility the obligation to make the facility available on nondiscriminatory terms." *MCI v. AT&T*

42



Essential Facilities Doctrine – Four Essential Elements

- (1) Control of the essential facility by monopolist(s)
- (2) Competitor's inability practically or reasonably to duplicate the facility
 - Reasonableness considered in light of the cost of duplicating the facility, compared to the value of new market entry
 - *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986) – Bulls' franchise (\$3.3MM) vs. Stadium (\$19MM)
- (3) Monopolist's denial of the use of the facility to the competitor
 - Refusal may be found on the basis of unreasonable terms
- (4) The feasibility of providing access to the facility

43

SIDLEY AUSTIN LLP
SIDLEY

Refusals to License Intellectual Property

- The holder of intellectual property – even a monopolist - may refuse to license it, if that refusal stands alone.

"In the absence of any indication of illegal tying, fraud on the Patent and Trademark Office, or sham litigation, the patent holder may enforce the statutory right to exclude others from making, using, or selling the claimed invention free from liability under the antitrust laws." *In re Independent Service Organization* 203 F.3d 1322 (Fed. Cir. 2000)
- Refusal to license intellectual property that was illegally acquired will be deemed "exclusionary."
- Some appellate courts allow plaintiffs more leeway to challenge a refusal to license intellectual property by allowing plaintiffs to argue that the business justification was really a pretext. *Kodak v. Image Technical Services*, 125 F. 3d 1195 (9th Cir. 1997).

44

SIDLEY AUSTIN LLP
SIDLEY

Impact of Supreme Court Decision in *Verizon Communications v. Trinko*

- In 2004, the U.S. Supreme Court significantly limited scenarios in which a refusal to provide access by a dominant firm may constitute a violation of Section 2 of the Sherman Act.
- The Supreme Court expressly refused to adopt or repudiate the "essential facilities" doctrine.
- The Supreme Court did note that requiring competitors to "share the source of their advantage" would lessen incentives to invest.
- The *Trinko* case has been read to limit *Aspen Skiing* to its facts and emphasized that it was "at or near the outer boundary" of Section 2 liability.
- The Supreme Court in *Trinko* noted that the dominant firm in *Aspen Skiing* stopped a pre-existing profitable course of dealing while giving up short-term profits to eliminate a competitor.

45

SIDLEY AUSTIN LLP
SIDLEY

Differences in U.S. and EU Law Today

- After *Trinko*, the circumstances where a dominant firm can be held liable under Section 2 for a refusal to deal or refusal to license IP is arguably limited to circumstances where there was a change in a pre-existing course of conduct.
- In the EU, potential liability for a refusal to license IP may be broader today because of the *Microsoft* decision from the Court of First Instance.
- Before the *Microsoft* decision, potential liability for "abuse of a dominant position" based upon a refusal to license IP was narrowly construed:
 - Access to the license must be "indispensable", not merely convenient;
 - Plaintiff must show that "all" competition in the complimentary market would be eliminated, not just that there was a disadvantage to competition;
 - In an IP case, plaintiff must show that the refusal to license prevented a new product from emerging for which consumer demand already existed;
 - No objective justification for the refusal

46

SIDLEY AUSTIN LLP
SIDLEY

The EU Standard Today Under the Microsoft Decision

- Indispensable for "carrying on business"
 - CFI Microsoft judgment: must be "capable of inter-operating on equal footing... to be marketed viably"
- Exclude "all" competition in neighboring market (objective test)
 - CFI Microsoft judgment: exclude "effective" competition
- Prevents appearance of new product
 - CFI Microsoft Judgment: if the refusal somehow limits technical development", that is sufficient to meet the standard
- Not objectively justified
 - CFI Microsoft Judgment: no change, but no clarity on what constitutes an objective justification in IP context (merely desire to own and control your own IP may be insufficient)

47

SIDLEY AUSTIN LLP
SIDLEY

Vertical Arrangements That Foreclose Competitors From Suppliers or Customers

- Exclusive Dealing with Suppliers or Customers
- Refusals to Deal with "Disloyal" Customers or Suppliers
- Tying

48

SIDLEY AUSTIN LLP
SIDLEY

Exclusive Dealing With Customers And Suppliers

- Exclusive arrangements with suppliers or customers may violate Section 2 if they substantially foreclose the market to competitors and cause consumer harm.
 - (1) The arrangements must "foreclose" a substantial portion of the market. *Allied Orthopedic v. Tyco*, 592 F.3d 991 (9th Cir. 2010)
 - "The recent cases uniformly favor defendants where foreclosure levels are 40% or less, and so it is fair to say that foreclosure in excess of that amount is a threshold requirement where foreclosure is the asserted basis for the antitrust violation." Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L. J. 311 (2002).
 - "[W]hile low [foreclosure] numbers make dismissal easy, high numbers do not automatically condemn, but only encourage closer scrutiny." *Stop & Shop v. Blue Cross*, 373 F.3d 57 (1st Cir. 2004).
 - "The requirement of a significant degree of foreclosure serves a useful screening function." *Microsoft*.

49

SIDLEY AUSTIN LLP
SIDLEY

Exclusive Dealing With Customers And Suppliers

- (2) The arrangements must harm competition, i.e., the competitive process, and lead to consumer harm.
 - Making life difficult for competitors is not injury to competition. Injury to competition "does not mean a simple loss of business or even the demise of a competitor but an impairment of the competitive structure of the market." *Stop & Shop*.
 - The plaintiff "must prove that [the exclusive arrangement] is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition." *Roland Mach v. Presser*, 749 F.2d 380 (7th Cir. 1984).

50

SIDLEY AUSTIN LLP
SIDLEY

Exclusive Dealing With Customers And Suppliers

- (3) Exclusive Arrangements Typically Have Numerous Pro-Competitive Justifications
 - Competition for exclusive requirements contracts is procompetitive. "Every year or two, General Motors, Ford, and Chrysler invite tire manufacturers to bid for exclusive rights to have their tires used in the manufacturers' cars. ... Competition of this kind drives down the prices of tires, to the ultimate benefit of consumers." *Paddock Publications v. Chicago Tribune*, 103 F.3d 42 (7th Cir. 1996)
 - "Exclusive distributorship arrangements are presumptively legal," *CDC Tech. v. Idexx*.
 - They encourage distributors to promote the manufacturer's products.
 - "Exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern. ... If the competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition any part of the relevant market." *Omega Envtl. v. Gilbarco, Inc.* 127 F.3d 1157 (9th Cir. 1997).
 - But see *U.S. v. Dentply*, 399 F.3d 181 (3d Cir. 2005) ("The proper inquiry is not whether direct sales enable a competitor to 'survive,' but rather whether direct selling 'poses a real threat' to defendant's monopoly.")

51

SIDLEY AUSTIN LLP
SIDLEY

Refusals to Deal With "Disloyal" Customers or Suppliers

- Refusals to deal (or other reprisals) taken by a monopolist against "disloyal" customers or suppliers which forecloses the market to competitors.
- Similar analysis to exclusive dealing arrangements:
 - What is the extent of market foreclosure?
 - Can the plaintiff show harm to competition, i.e., harm to consumers?
 - Procompetitive justification.

52



"Classic" and "De Facto" Tying

- "Classic" Tying: Typically a Section 1 Concern
 - Defendant will sell a product over which it has monopoly power (the "tying product") but only on the condition that the buyer also purchases a second product (the "tied product"). *Jefferson Parish Hosp.* (O'Connor, dissent).
 - "Technological" tying: One product? Or two?
 - Requires monopoly power over the tying product.
 - May be Section 2 violation if tying is used to get, keep, or grow monopoly power over the tied product (monopoly leveraging). *Microsoft*
 - May also support monopoly power over tying product by raising entry barrier by effectively requiring new firms to enter both markets simultaneously.

53



"Classic" and "De Facto" Tying

- "De Facto" Tying
 - The defendant will sell the products separately but at such a high price that "the only viable economic option is to purchase the tying and tied product in a single package." *Ways & Means, Inc. v. IVAC*, 506 F.Supp. 697, 707 (N.D. Cal. 1979), *aff'd*, 138 F.2d 143 (9th Cir. 1981); *Marts v. Xerox*, 77 F.3d 1109 (8th Cir. 1996) "prohibitively expensive"
 - Theory: The evil of tying is coercion of buyers (to buy a tied product they don't want or want at a lower price).
 - No violation if a nontrivial percentage (>10%) of tied product sales are outside the package: Buyers aren't coerced.
 - De facto tying may violate Section 2 if it has the necessary effects in the market for the tied product (monopoly leveraging).

54



Abuse of Product Design and New Product Introduction

- Product Design Changes
- Failure to Predisclose Technical Information to Competitors
- False Preannouncement of Product Introduction

55



Product Design Changes

- Antitrust laws strongly favor innovation.
- Introduction of new products by a monopolist may make it hard for smaller firms, especially those with "compatible" ancillary products.
- A monopolist's new product introduction is anticompetitive in only limited circumstances and not when the new product improves performance, lowers prices, or achieves consumer acceptance by noncoercive means. *IBM Peripherals Litigation*, 481 F.Supp. 965 (N.D. Cal 1979), *aff'd*, 698 F.3d 1377 (9th Cir. 1983).
 - Courts are reluctant to substitute their judgment for the market's as to whether the new product is a "real" improvement.

"If a monopolist's products gain acceptance in the market, therefore, it is of no importance that a judge or jury may later regard them as inferior, so long as that success was not based on any form of coercion." *Berkey Photo v. Kodak*, 603 F.2d (2d Cir. 1979); *Walgreen v. AstraZeneca*, 534 F.Supp. 2d 146 (D.D.C. 2008).
 - *But see Abbott Labs v. Teva*, 2008 U.S. Dist. LEXIS 63333 (D. Del. 2008) denying motion to dismiss when drug company allegedly introduced new drug formulation and simultaneously withdrew its prior product in order to prevent generic substitution and deny consumer choice.

56



Failure to Pre-disclose Technical Information and False Preannouncement of Product Introduction

- A monopolist is not required to pre-disclose technical information about its new products to competitors to allow them to modify their competing products to be compatible with the new product.
 - Monopolist is entitled to enjoy the "lead time" achieved when new product is not pre-disclosed this way. *Berkey Photo*.
- Courts have almost always rejected claims based on a monopolist's preannouncement of a new product substantially before its availability, allegedly to cause customers to wait for its new product, rather than buy plaintiff's. *AD/SAT v. Associated Press* 181 F.3d 216 (2d Cir. 1999) *ILC Peripherals Leasing Corp. v. IBM*, 458 F.Supp. 423 (N.D. Cal. 1978), *aff'd* 636 F.2d 1188 (9th Cir. 1980).

57



Abuse of Governmental Processes

- Anticompetitive Civil or Administrative Litigation
- Fraudulently-Obtained Intellectual Property
- Fraudulently-Obtained Protection for Competition

58



Anticompetitive Civil or Administrative Litigation

- The Constitution protects the right to petition the government for redress. *Eastern Railroad v. Noerr Motor Freight*, 365 U.S. 127 (1961). This includes lobbying efforts to enact or change government laws on regulations, as well as bringing suit against a competitor.
- On the other hand, litigation can be used for anticompetitive purposes.
- "Sham" litigation claims have two elements.
 - The civil or administrative litigation is "objectively baseless." *Professional Real Estate Investors*, 508 U.S. 49 (1993).
 - The litigation was brought with a subjective intent to use the litigation process to "interfere directly" with the competitor's business relationships, regardless of the outcome of the case.

59



Fraudulently-Obtained Intellectual Property

- Obtaining intellectual property through fraud on the Patent Office and/or attempting in bad faith to assert it constitutes "exclusionary conduct." *Walker Process*, 382 U.S. 172 (1965).
 - Frequent counterclaim in patent suits
 - Other Section 2 elements must be proven: relevant market and monopoly power/likelihood of monopolization. *Walker Process*.
 - No presumption that patents confer market power. *Illinois Toolworks, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281 (2006).

60



Abuse of Standards Setting

- Collaborative setting of industry standards by competitors can be enormously procompetitive, particularly where products need to interoperate.
- Standard setting process presents opportunities for anticompetitive conduct.
 - “[A]ntitrust law historically has been concerned with the risk of one or a small number of participants in a standards setting organization capturing the economic power of an industry-wide standard and turning the SSO into a source of exclusionary power.” *Amer. Soc. of Mech. Engrs*, 456 U.S. 556 (1982).
- Most problems relate to collusive activities to protect colluders from rivals’ innovation. But problematic unilateral activities:
 - Misrepresenting or failing to disclose the existence or scope of intellectual property that covers a proposed standard. *Rambus v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).
 - Petitioning governmental standard-setting organizations for favorable standards is protected by the Noerr doctrine, but deliberate misrepresentations may be actionable. *Broadcomm v. Qualcomm, Inc.* 501 F.3d 297 (3d Cir. 2007).

61



Tortious Conduct

- Tortious or Illegal Conduct
- Product Disparagement

62



Tortious or Illegal Conduct

- Tortious conduct directed toward a competitor can rise to the level of a Section 2 violation in very limited circumstances.
 - In *Conwood v. United States Tobacco*, 290 F.3d. 728 (6th Cir. 2002) the defendant liable for >\$1 billion because it:
 - Removed and moved plaintiffs’ display racks without retailers’ consent
 - Misled retailers about plaintiff’s product
 - Entered exclusive agreements with retailers
- “Isolated tortious activity alone does not constitute exclusionary conduct for purposes of a section 2 violation, absent a significant and more than a temporary effect on competition.” But, “merely because a particular practice might be actionable under tort law does not preclude an action under the antitrust laws as well.”

63



Product Disparagement

- Product disparagement is presumed to have a *de minimus* effect on competition, unless the representations made by the defendant were:
 - clearly false
 - clearly material
 - clearly likely to induce reasonable reliance
 - made to buyers without knowledge of the subject matter
 - continued for prolonged periods, and
 - not readily susceptible of neutralization or other offset by rivals.
 Areeda & Turner (1978).
- All other Section 2 elements must be proven.

64



Overview of Merger Review Process

- The FTC and Antitrust Division of the DOJ have overlapping jurisdiction to review and potentially challenge mergers, and they divide the work between them.
- In 2010, the Antitrust Division and the FTC revised their Horizontal Merger Guidelines (<http://www.ftc.gov/os/2010/08/100819hmq.pdf>).
- The guidelines describe how the federal agencies evaluate the likely competitive effects of mergers or acquisitions between existing or potential competitors.
- The new guidelines reaffirm that the purpose of merger review is to identify and intervene in mergers that "create, enhance, or entrench market power or facilitate its exercise." (§1).
- A merger is a subject to challenge if it is "likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm consumers." (§1).

65



Merger Review Is Usually Triggered By An HSR Filing

- The Hart-Scott-Rodino Amendments to the Clayton Act require formal advance notification of the DOJ and FTC for many acquisitions of assets or equity interests over a certain size (currently \$68.2 million, adjusted annually).
 - The initial HSR filing starts a 30-day waiting period
- If the investigating agency believes there may be a competitive problem, it will issue a "Second Request", which extends the waiting period.
 - Upon certification of "substantial compliance" with a second request, the DOJ or FTC has 30 days to approve the deal or challenge it in court.
- Statistically, only a small percentage of mergers trigger a Second Request, and even a smaller number are actually challenged by the FTC or DOJ.

66



Settlements and Remedies

- In practice, most merger challenges are settled with consent decrees requiring spin-offs, divestitures or other relief.
- The DOJ/FTC will publish the proposed settlement and explain its reasons for the settlement. A review of these explanations is a useful tool to analyze agency priorities.
- In several recent cases, e.g., *Ticketmaster* and *NBC/Comcast* – the relief included non-discrimination provisions to prevent the acquiring parties from discriminating against actual or potential rivals.
- Such “conduct relief” is most common in vertical mergers. The combined company may agree, for example, to make certain products available to competitors or to set up internal information firewalls.
- “Conduct relief” may also include requirements to refrain from certain conduct – for example, to refrain from enforcing IP rights or discriminating against downstream customers.
- The DOJ just published an updated Policy Guide to Merger Remedies on June 17, 2011 indicating increased receptiveness to conduct remedies in vertical merger cases. (<http://www.justice.gov/atr/public/guidelines/272350.pdf>)

67



Types of Mergers Subject to Review

- Horizontal mergers—between competitors or potential competitors
- Vertical mergers—between companies at different levels of the distribution chain, such as a supplier and a customer (vertical integration)
- Conglomerate mergers—transactions not falling in one of the above categories (rarely challenged in the U.S.)

68



Traditional Approach to Merger Analysis

- Define “relevant markets”: the set of products or services that are good substitutes for the companies’ products and the geographic scope of those markets
- Identify the relevant market participants and estimate the market shares of each participant in the market
- Determine whether the merger will increase concentration significantly and result in a highly concentrated market
 - Calculate pre- and post-merger Herfindah-Hirschman index (“HHI”)
- Evaluate the potential for new entry and expansion by other market participants

69



Traditional Approach to Merger Analysis (Cont.)

- Evaluate whether the merged firm will have the ability on its own to raise prices or reduce output ("unilateral effects")
- Examine whether the transaction will facilitate collusion in the industry ("coordinated effects")
 - Consider the "antitrust" history" of the industry
 - Consider whether structure of industry is conclusive to overt or tacit collusion
- Evaluate costs savings and value improvements resulting from the merger (merger-specific efficiency gains)
- Consider customer and supplier reactions
- Determine whether the "failing firm" defense is applicable

70



Gathering Information From Customers and Competitors

- The reviewing agency will also gather information from affected customers, suppliers and competitors.
- The reviewing agency will place more weight on the views of customers or suppliers than on the views of competitors.
- The reviewing agency should think through who is harmed by the merger—and why
 - Is a competitor complaining about the impact of the merger because the merged firm will be a stronger competitor?
 - Is a customer unhappy about the acquisition of a favored supplier but unlikely to experience an increase in prices or reduction in output?

71



Change and Approach Under the New Merger Guidelines

- In a significant change, under the 2010 Merger Guidelines, the agencies intend to undertake a flexible, integrated analysis of the likely effects of the merger: "merger analysis does not consist of uniform application of a single methodology. Rather, ...the Agencies... apply a range of analytic tools to the reasonably available and reliable evidence to evaluate concerns" (§1)
- In part, this means a reduced emphasis on market definition, market shares, and market concentration in the analysis (§ 2.1).
- While these factors are still relevant, their importance will depend on the circumstances of each case.

72



Change and Approach Under the New Merger Guidelines (Cont.)

- In addition, it means that the reviewing agency will not necessarily follow the step-by-step approach suggested by the traditional analysis—the reviewing agency may take the steps out of order, and in some cases may dispense with them entirely.
- Evidence will not be compartmentalized. Evidence that is used in one part of the analysis (for example, to evaluate any competitive effects) may also be used in other parts (for example, to define markets).

73



Under the New Guidelines, There are Higher HHI Thresholds

- If the post-merger HHI is less than 1,500 or if the increase is less than 100, the merger “ordinarily” requires no further analysis.
- If the post-merger HHI is greater than 1,500 and the increase is between 100 and 200, the merger should be reviewed.
- If the post-merger HHI is greater than 2,500 and the increase is greater than 200, the merger will be “presumed anticompetitive, although this presumption may be rebutted by persuasive evidence” (§ 5.3).

74



Unilateral Effects Analysis Under the New Merger Guidelines

- The new merger guidelines also include an expanded discussion of a theory of unilateral effects, i.e., the theory that by eliminating a close competitor that would otherwise have captured a significant volume of “diverted” sales, a merger may allow the merged company, acting alone, to raise its prices or otherwise harm consumers (§ 6).
- Unilateral effects may arise where: products are differentiated; producers of homogenous products are capacity constrained; prices are determined by negotiations or auctions; or a merger eliminates an innovator or a “maverick” or reduces product variety.

75



Unilateral Effects Analysis Under the New Merger Guidelines (Cont.)

- The Guidelines endorse the use of the "Upward Pricing Pressure" test to assess potential effects in differentiated products (§ 6.1)
- Such effects may arise if the merging parties are "close competitors" even if they are not "closest" competitors.

76



Examples of Documents a Reviewing Agency Should Look Out For

- Under the HSR Rules, the merging companies are required to submit to the government all studies, surveys, reports, or analyses prepared by or for an officer or director for the purpose of analyzing or evaluating the merger or acquisition, discussing market shares, competition, competitors, markets, potential for sales growth or expansion, or other competitive issues.
- The reviewing agencies will look for documents which evidence anticompetitive intent or effect, such as:
 - the acquisition will allow us to "stop the decline in prices"
 - The acquisition will "eliminate a price cutter"
 - The acquisition will "give us more power to resist requests for lower prices from strong customers"

77



Examples of Documents a Reviewing Agency Should Look Out For (Cont.)

- As a real example, the CEO of a company said the following about a competitor it wanted to purchase:

"Eliminating them [by buying the company] means eliminating this threat [the threat that another company would get into the market space] forever, or almost forever." (Whole Foods)

78



Examples of Documents a Reviewing Agency Should Look Out For (Cont.)

- In another recent case, the government's complaint quoted the buyer's documents as stating that the proposed acquisition would enable it "to regain control of industry pricing and avoid further price erosion" by eliminating the target as a competitor, and leave 84% of the market with two firms that "both obviously have great incentive to keep this channel profitable". (H&R Block)
- In that same case, the government quoted the seller as characterizing itself as a "maverick" and as a "catalyst for change" that has "consistently forced the tax preparation industry to become more competitive, and in doing so [has] forced [its] competitors to change as well." (H&R Block)

79



Examples of Documents a Reviewing Agency Should Look Out For (Cont.)

- In the DOJ's recent suit to block AT&T's acquisition of T-Mobile, the government's complaint quoted a T-Mobile document in which the company described itself as "the No. 1 value challenger of the established big guys in the market and as well positioned in a consolidated 4-player national market." (AT&T/T-Mobile)
- The government's complaint also quoted T-Mobile's Chief Marketing Officer as describing the company as having "led the industry in terms of defining rate plan value." (AT&T/T-Mobile).

80



Recent Merger Transactions of Interest

- Ticketmaster/LiveNation – settled by Consent Decree (<http://www.justice.gov/atr/cases/ticket.htm>)
- Google/ITA – settled by Consent Decree (<http://www.justice.gov/atr/cases/google.html>)
- NBC/Comcast – settled by Consent Decree – settled by Consent Decree (<http://www.justice.gov/atr/cases/comcast.htm>)
- DOJ suit to block VeriFone-Hypercom merger – settled by Consent Decree (<http://www.justice.gov/atr/cases/verifone.html>)

81



Recent Merger Transactions of Interest (Cont.)

- DOJ suit to block H&R Block's acquisition of TaxAct– Gov't blocked merger – *U.S. v. H&R Block, Inc.*, 2011 U.S. Dist. LEXIS 130219 (D. D.C. Nov. 11, 2011).
- DOJ suit to block AT&T's acquisition of T-Mobile – AT&T abandoned merger after DOJ complaint filed. See Second Amended Complaint, *U.S. v. AT&T, Inc.*, Case 1:11-cv-01560, filed 09/30/11 (Dkt. No. 39) (D.D.C) (<http://www.justice.gov/atr/cases/f275700/275756.pdf>)

82

SIDLEY AUSTIN LLP
SIDLEY

Success of Government Challenge Often Depends on Market Definition

- In *U.S. v. Oracle Corp.*, 331 F.Supp. 2d 1098 (N.D. Cal. 2004), the court rejected the DOJ's narrow product definition, and rejected the DOJ's challenge to the merger of Oracle and Peoplesoft.
- In *U.S. v. H&R Block, Inc.*, 2011 U.S. Dist. LEXIS 130219 (D.D.C. Nov. 10, 2011), the court accepted the DOJ's product market definition of digital do-it-yourself tax preparation software products, and enjoined the merger.
- In *FTC v. CCC Holdings, Inc.*, 605 F.Supp. 2d 26 (D.D.C. 2009), the court issued a preliminary injunction, agreeing with the FTC that software to calculate whether an automobile involved in a collision represented a "total loss" was a separate relevant product market. See also *FTC v. Whole Foods Market, Inc.*, 548 F. 3d 1028 (D.C. Cir. 2008).

83

SIDLEY AUSTIN LLP
SIDLEY

Success of Government Challenge Often Depends on Market Definition (Cont.)

- In the *H&R Block* and *CCC Holdings* cases, the government economists applied the "hypothetical monopolist" test and "critical loss" analysis. Under the "hypothetical monopolist" test, the economist asks hypothetically whether it would be profitable to have a monopoly over a given set of substitutable products by asking whether such a hypothetical monopolist would be able to impose at least a small but significant and non-transitory increase in price ("SSNIP") on at least one product in the market. Thus, the question in the *H&R Block* case was whether it would be hypothetically useful to have a monopoly over all digital do-it-yourself tax preparation software products because the monopolist could then profitably raise prices for those products by 5 or 10%; or whether, to the contrary, there would be no reason to monopolize all DDIY tax preparation products because substitution and price competition with other methods of tax preparation would restrain any potential DDIY monopolist from profitably raising prices.

84

SIDLEY AUSTIN LLP
SIDLEY

Success of Government Challenge Often Depends on Market Definition (Cont.)

- The "critical loss" analysis attempts to calculate the largest amount of sales that a monopolist could lose before a price increase becomes unprofitable.

85



Bibliography of Additional Materials

- New DOJ/FTC Horizontal Merger Guidelines (<http://ftc.gov/os/2010/08/100819hmq.pdf>)
- New DOJ Policy Guide to Merger Remedies (<http://www.justice.gov/atr/public/guidelines/272350.pdf>)
- DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property (1995) (www.usdoj.gov/atr/public/guidelines/lpguide.htm)
- DOJ/FTC Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition (2007) (www.usdoj.gov/atr/public/hearings/ip/222655.htm)
- *U.S. v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001)
- *Professional Real Estate Investors v. Columbia Pictures*, 508 U.S. 49 (1993)

86



Bibliography of Additional Materials (Cont.)

- *Verizon Communications Inc. v. Trinko*, 540 U.S. 398 (2004)
- *In re ISO Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2002)
- *Kodak v. Image Technical Services*, 125 F. 3d 1195 (9 th Cir. 1997)
- *Qualcomm Inc. v. Broadcom*, 548 F. 2d 1004 (Fed. Cir. 2008)
- *Rambus v. Federal Trade Commission*, 522 F. 3d 456 (D.C. Cir. 2008)
- *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877(2007)
- *Independent Ink v. Illinois Tool Works*, 547 U.S. 28 (2006)

87



Bibliography of Additional Materials (Cont.)

- *Princo Corp. v. International Trade Commission*, 616 F.3d 1318 (Fed. Cir. 2010)
- *U.S. v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004)
- Competitive Impact Statement in *U.S.A. v. Ticketmaster*
(www.justice.gov/atr/cases/f254500/254544.htm)
- Competitive Impact Statement in *U.S.A. v. Comcast*
(www.justice.gov/atr/cases/f266100/266158.htm)