

# Power, Process and Policy in Antitrust

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# It's About Anticompetitive Effects

- Common Core Issue in Antitrust
  - Irrebuttable Presumptions (per se rules)
  - Rebuttable Presumptions
    - **Direct Evidence** of Actual Exercise of Market Power
      - E.g. “quick look,” “inherently suspect”
      - Equivalents for Section 2?
    - **Circumstantial Evidence (“Double Inference”)**
      - Market Definition
      - Market Share
      - Inference of Market Power

# Symbiosis Between Power and Effects

- Power is a Condition Precedent of Effects
  - **Easy Cases**
    - Direct and Circumstantial Evidence are aligned
      - Significant, actual effects and high market shares
      - De minimus or no effects and low market shares
  - **Hard Cases**
    - Direct and Circumstantial Point in Different Directions
      - No actual effects, but high market shares
      - Significant actual effects, but low market shares
- But Evidence of Power and Effects are Interrelated
  - Traditional §2 tests can obscure connections

# Differentiating and Managing Direct and Circumstantial Evidence of Effects

- **Benchmark for Circumstantial Evidence: Horizontal Merger Guidelines – Role in § 2?**
  - Recall that *Cellophane* was a Section 2 Case
  - Prospective vs. retrospective methods may differ
- **We Need a Similar Effort to Refine “Actual Exercise” Standards and Harmonize Across Offenses**
  - How much and what kinds of effects evidence should be sufficient to shift a burden?
    - Section 1: *NSPE, NCAA, IFD, CDA, TRU, Polygram*
    - Section 2: *AMR, LePages, Microsoft*

# The Weight of the *Alcoa* Paradigm

- Are we ready/do we want to move beyond total reliance on market shares in Section 2?
  - The *Copperweld* “gap” fallacy
  - Role of direct evidence outside Section 1 horizontal?
    - *Re/Max* and Section 2
    - But see *Republic Tobacco* re vertical
    - Clayton §7 – *Staples*?
- Is the **Monopoly vs. Market Power** Distinction Viable? Economically? Legally?
  - Only when linked to market share thresholds?
  - Workable when direct evidence is available?

# The Role of Decision Theory

- Fear of **Error Costs** often motivates calls for **more and better evidence** in antitrust cases, especially as to power and effects
  - Market power and effects? Efficiencies?
- Decision theory also requires consideration of **process and information costs**
  - Is “more” really better? Always?
  - Is “zero error” obtainable? At what cost?

# An Integrated Legal and Economic Approach to Evidence and Burdens

- Proposed Test:
  - When does **the marginal value of additional evidence in terms of economic certainty** (minimizing error costs) **outweigh the costs of obtaining and processing that evidence**, taking into account whether it is **reasonably accessible to the party bearing the risk of non-persuasion**?
  - Some other factors:
    - Information overload and diminishing returns
- **Application to Monopoly Power**
  - Market definition and market share evidence always necessary?
  - Actual exercise evidence ever enough alone?
    - Definitions and thresholds needed?

# Antitrust and Rocket Science

## ■ Safe Harbors and False Positives

- Filters for minimal or non-existent threats to competition

## ■ Danger Zones and False Negatives

- **Burden Shifting Devices** to protect against more obvious threats to competition

## ■ Sliding Scales

- Not all burden shifts are created equally

# Legal Standards and Decision-making

- “Balancing of Effects” is a straw man
- Courts and enforcers “weigh evidence”; they don’t “balance effects” and shouldn’t try
  - No Section 1 examples despite rhetoric of “rule of reason balancing”
  - *Microsoft* mischaracterized by critics
  - Implications for welfare standard

# Conclusion: Of Caricatures and Corrosion of the Rule of Law

<u>Incompetents</u>	<u>Untrustworthy Self-Interesteds</u>	<u>Trustworthy Self-Interesteds</u>
Judges	Rivals	Dominant Firms
Juries	Dealers	Other Defendants
Enforcers* (especially states)	Plaintiffs (all, but especially class action reps)	(Especially when asserting “efficiencies”)