

Exclusive Dealing

Howard P. Marvel

Department of Economics and Moritz College of Law
The Ohio State University

FTC/DOJ Hearings: Single-Firm Conduct–Exclusive Dealing,
November 15, 2006



Exclusive Dealing: A Brief History

- Exclusive dealing is very common
 - Häagen Dazs
 - Car dealers
 - Gas stations
 - Beer distribution

Exclusive Dealing: A Brief History

- Exclusive dealing is very common
 - Häagen Dazs
 - Car dealers
 - Gas stations
 - Beer distribution
- Most common for market leaders (Anheuser Busch, not smaller brewers)



Exclusive Dealing: A Brief History

- Exclusive dealing is very common
 - Häagen Dazs
 - Car dealers
 - Gas stations
 - Beer distribution
- Most common for market leaders (Anheuser Busch, not smaller brewers)
- Old rule:
Exclusion
plus “dominance”
≡ violation

Exclusive Dealing: A Brief History

- Exclusive dealing is very common
 - Häagen Dazs
 - Car dealers
 - Gas stations
 - Beer distribution
- Most common for market leaders (Anheuser Busch, not smaller brewers)
- Old rule:
Exclusion (*not* foreclosure)
plus “dominance”
≡ violation

Vertical restraints create property rights.

Vertical restraints create property rights.

- Exclusive territories.

Vertical restraints create property rights.

- Exclusive territories.
 - Creates a property right for customers the distributor generates.

Vertical restraints create property rights.

- Exclusive territories.
 - Creates a property right for customers the distributor generates.
- Resale price maintenance.

Vertical restraints create property rights.

- Exclusive territories.
 - Creates a property right for customers the distributor generates.
- Resale price maintenance.
 - Creates a property right for the services that the distributor provides.

Vertical restraints create property rights.

- Exclusive territories.
 - Creates a property right for customers the distributor generates.
- Resale price maintenance.
 - Creates a property right for the services that the distributor provides.
- Exclusive dealing.

Vertical restraints create property rights.

- Exclusive territories.
 - Creates a property right for customers the distributor generates.
- Resale price maintenance.
 - Creates a property right for the services that the distributor provides.
- Exclusive dealing.
 - Creates a property right for customers the supplier pulls in.

The Problem with Exclusive Dealing

- For territories and RPM, supplier creates and polices a restraint for somebody else.

The Problem with Exclusive Dealing

- For territories and RPM, supplier creates and polices a restraint for somebody else.
- For exclusive dealing, the property right is for the creator and monitor of the right.

The Basic Exclusive Dealing Story

- Manufacturer invests in product, reputation, to bring in customers.

The Basic Exclusive Dealing Story

- Manufacturer invests in product, reputation, to bring in customers.
- Manufacturer confers its customers onto dealers cloaked in its reputation.

The Basic Exclusive Dealing Story

- Manufacturer invests in product, reputation, to bring in customers.
- Manufacturer confers its customers onto dealers cloaked in its reputation.
- Customer cost is included in the charge for the product.

The Basic Exclusive Dealing Story

- Manufacturer invests in product, reputation, to bring in customers.
- Manufacturer confers its customers onto dealers cloaked in its reputation.
- Customer cost is included in the charge for the product.
- Dealer avoids charge through “bait-and-switch.”

What's the Evidence

What's the Evidence

- Can you hear me now? Hearing aids.

What's the Evidence

- Can you hear me now? Hearing aids.
- Counterfactual hard to prove until it is too late.

What's the Evidence

- Can you hear me now? Hearing aids.
- Counterfactual hard to prove until it is too late.
Manufacturers did not recognize role of exclusive dealing,
ended up corpses.

Exclusive dealing problems come from lock-in through contracts.

- Aghion-Bolton
- Ramseyer, Rasmussen, and Wiley; Segal and Whinston

No contract, no problem.

Is “Possibility” Enough?

We appreciate the potential reply that it is impossible to say that a given practice “never” could injure consumers. A creative economist could imagine unusual combinations of costs, elasticities, and barriers to entry that would cause injury in the rare situation. . . . But . . . antitrust law applies rules of per se legality to practices that almost never injure consumers.

[T]he literature on anticompetitive exclusive dealing largely has focused on producing “possibility results” in simple market settings . . . to counter Chicago School arguments. . .



Is “Possibility” Enough?

We appreciate the potential reply that it is impossible to say that a given practice “never” could injure consumers. A creative economist could imagine unusual combinations of costs, elasticities, and barriers to entry that would cause injury in the rare situation. . . . But . . . antitrust law applies rules of per se legality to practices that almost never injure consumers.

Frank Easterbrook, *Schor v. Abbott Laboratories* 457 F.3d 608 (7th Cir. 2006)

[T]he literature on anticompetitive exclusive dealing largely has focused on producing “possibility results” in simple market settings . . . to counter Chicago School arguments. . .



Is “Possibility” Enough?

We appreciate the potential reply that it is impossible to say that a given practice “never” could injure consumers. A creative economist could imagine unusual combinations of costs, elasticities, and barriers to entry that would cause injury in the rare situation. . . . But . . . antitrust law applies rules of per se legality to practices that almost never injure consumers.

Frank Easterbrook, *Schor v. Abbott Laboratories* 457 F.3d 608 (7th Cir. 2006)

[T]he literature on anticompetitive exclusive dealing largely has focused on producing “possibility results” in simple market settings . . . to counter Chicago School arguments. . .

Michael D. Whinston, *Lectures on Antitrust Economics*, p. 178.



The Result

The Result

- Problems are possible (foreclosure).

The Result

- Problems are possible (foreclosure).
- Benefits are hard to prove.

The Result

- Problems are possible (foreclosure).
- Benefits are hard to prove.
- Default rule determines outcome.

The Result

- Problems are possible (foreclosure).
- Benefits are hard to prove.
- Default rule determines outcome.
- “Possibility” makes exclusion the default rule.

The Result

- Problems are possible (foreclosure).
- Benefits are hard to prove.
- Default rule determines outcome.
- “Possibility” makes exclusion the default rule.
- Result? Exclusion plus “dominance” \equiv violation.
- **Déjà vu**: Back to where we started.

The Result

- Problems are possible (foreclosure).
- Benefits are hard to prove.
- Default rule determines outcome.
- “Possibility” makes exclusion the default rule.
- Result? Exclusion plus “dominance” \equiv violation.
- **Déjà vu**: Back to where we started.
- Beltone Electronics—only remaining dealer-based supplier.

What to do?

- “Possibility” results basically all depend on contracts.

What to do?

- “Possibility” results basically all depend on contracts.
- Require a contract.

What to do?

- “Possibility” results basically all depend on contracts.
- Require a contract.
- Require a showing of foreclosure.

What to do?

- “Possibility” results basically all depend on contracts.
- Require a contract.
- Require a showing of foreclosure.
- Then, and only then, do the trade-off.