The Merit of *Meritor*

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The Predominant Mechanism of Exclusion

- Begin with point of agreement: As Dan Crane's amicus brief on *Meritor* noted, *Meritor* held that a price-cost test should be applied to loyalty discounts only "when price is the clearly predominant mechanism of exclusion."
- Our disagreement is over whether *Meritor* was right to cabin price-cost tests to such cases.
- To me, *Meritor* had it right. Every loyalty "discount" has 2 features:
  - **The defendant's prices**, which defenders focus on to analogize to predatory pricing
  - **The condition restricting rival purchases**, which opponents analogize to exclusive dealing
- Question is: how determine what is mainly creating the exclusion at issue?

Factors *Meritor* Held Showed Price Not Clearly The Predominant Mechanism Of Exclusion

1. Condition bundles contestable & incontestable demand.
   - ***Meritor***, 696 F.3d at 278 ("even if an OEM decided to forgo the rebates and purchase a significant portion of its requirements from another supplier, there would still have been a significant demand from truck buyers for Eaton product"); *id.* at 283 ("no OEM could satisfy customer demand without at least some Eaton products"); *also* ***LePage's*** **(**bundle of incontestable branded tape and contestable private label tape in single tape market)
2. Condition raises rival's costs (e.g., prevents economies of scale)
   - ***Meritor***, 696 F.3d at 287 (buyer freedom to buy from lower priced rival did not matter "because Eaton had assured that there would be no other supplier that could fulfill the OEMs' needs or offer a lower price."); *id.* at 281 (excluding "potentially" equally efficient rivals as bad as excluding equally efficient one); *also* ***LePage's*** (rival lost economies of scale)
3. Condition raises buyer switching costs
   - ***Meritor***, 696 F.3d at 287 (fact that "truck buyers always remained free to request unlisted transmissions … is insufficient to demonstrate that Plaintiffs' opportunities to compete were not foreclosed" because "doing so involved additional transaction costs")

Some Other Factors Showing Price Not Clearly The Predominant Mechanism Of Exclusion

4. If loyalty condition excludes sales of equivalent rival product that is lower priced or better rival product that is equally priced
   - ***Meritor*** was harder case because "Eaton's average prices were lower than Plaintiffs". 696 F.3d at 266.
5. If prices > but-for prices, so really disloyalty penalty rather than loyalty discount. Crane argues impossible because sacrifices profits to charge price > monopoly price but:
   - Economic models show it is profit maximizing, and Crane logic equally implies tying and exclusive dealing threats are impossible
   - *RTI* (in 188 times, loyal price never lowered; disloyal price raised 187 times)
   - Cartel Ringmaster: Granitz & Klein showed Standard Oil paid RRs 15% more than before though less than even higher price paid by rival oil refiners
6. Loyalty "discount" effectively divides market in way that raises prices. Elhauge-Wickelgren models. Crane argues do not exist:
   - I know of many cases. E.g. seller agreements with GPOs commits seller to maintain different discounts from list prices for loyal and disloyal members.
   - No reason to ignore theory whenever it can be shown

Price-Cost Tests Ignore that Loyalty Condition…

- Are usually anticompetitive when they ***inflate prices***, not lower them. Perverse Catch-22: if don't show condition increases prices, say no antitrust injury, but if show condition does increase prices, price-cost test claims cannot be illegal.
- May raise rival costs in way that prevents rival from pricing at incumbent costs.
- Means that at equivalent prices, defendant can get sales it did not deserve on the merits.
- Means defendant can offset rival price cuts with increased penalties. Price-cost tests assumes implausibly static defendant.
- Can remove rival incentives to cut prices to cost.
- Can harm consumers by excluding less efficient rivals.
- Requires some justification as long as it produces any anticompetitive effect.

Administrability

- If show any of 6 factors, price not the "clearly predominant mechanism of exclusion." Triggers rule of reason, similar to exclusive dealing. Anticompetitive if loyalty condition covers significant market share or anticompetitive effects directly shown, unless fully offset by procompetitive effects.
- Factors administrable. Show either: (1) some significant incontestable demand creating a "dead zone" where rival product cannot win contestable sales at same price as defendant; (2) effect on rival sales that raises rival costs; (3) increased buyer switching costs; (4) actual exclusion of rival sales with better price or quality; (5) disloyal price > but-for price; or (6) effective market division.
- What creates administrability problems are price-cost tests, like the discount attribution test.
- True procompetitive justification rarely offered. Lowering price rarely procompetitive justification because LRA to lower price without condition unless condition lowers costs in way that allows a true discount that is otherwise not possible.

Buyer Willingness or Terminability Irrelevant

- Each buyer agrees to loyalty condition that contributes to a rise in marketwide prices because each buyer gets 100% of loyalty discount/avoided penalty for agreeing but externalizes the bulk of his individual contribution to the marketwide price increase onto other buyers in their market or onto downstream buyers.
- In Cartel Ringmaster/Coasian bargain cases the seller and intermediate buyers inflict supracompetitive prices on downstream buyers and split the resulting gain in profits.
- Thus, whether buyers want or even initiate loyalty conditions is irrelevant because anticompetitive loyalty conditions are individually beneficial to them.
- Terminability irrelevant because same externalities that incentivize buyers to agree to anticompetitive conditions also mean buyers won’t want to terminate them.
- Tragedy of the Commons was not negated by fact that farmers voluntarily brought their goats to commons and could have terminated doing so at any time.

Oft-Ignored Supreme Court Precedent

- Many relevant Supreme Court cases are ignored even though they were never overruled and remain binding.
- *International Salt &Northern Pacific*: condition that bars sales by rival at equal prices "forecloses" those sales even though rival could win sale by pricing 1 ¢ below defendant above-cost price if defendant did not respond.
- *FTC v. Brown Shoe*: 75% loyalty discount foreclosing even though freely terminable and no evidence it flunked price-cost test.
- *Standard Fashion*: 100% loyalty discount illegal even though no evidence it was below cost.
- *Loew's*: above-cost bundled discount that combined incontestable "Gone with the Wind" with contestable "Getting Gertie's Garter" was anticompetitive absent bundled cost-savings that equaled the discount.