Conditional Pricing Practices: The Use and Misuse of Analogies

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Analogical Reasoning

• Debate regarding the proper legal construct (predatory pricing, exclusive dealing, tying) is not about putting conditional pricing practices into a “box.”

• Analogical reasoning is a powerful tool used in every intellectual endeavor. Scientists use it. Economists use it. Judges use it.

• *But how do we tell the good from the bad?*
Mapping

• Analogical reasoning maps similarities in relational structures, allowing inferences based on relational pattern completion.
  
  • Gaining consensus among antitrust lawyers is like herding cats.

  • An electrical circuit is like a plumbing system.

• A good analogy maps the elements of the analog to the target such that relational structures are preserved.
Conditional Pricing Analogies

• Conditional pricing practice analogies focus on the conduct.
  • Rebates are like price discounts. Predatory pricing involves price discounts.
  • Bundled rebates are conditioned on purchasing multiple products. Tying involves sales conditioned on purchasing multiple products.
    • We therefore infer the same economic effect.
    • We therefore apply the same legal rule.

• But antitrust rules are a blend of economic, policy, and prudential concerns.
  • Concerns must map to the target to justify analogous legal rule.
  • If concerns do not map, no inference that same legal rule should apply.
Predatory Pricing

- The economic, policy, and prudential concerns animating the predatory pricing price-cost test:
  - The price-cost test is not driven by economics. Above-cost pricing may reduce economic welfare.
  - The price-cost test is driven by skepticism that predatory pricing is a viable strategy — “rarely tried, and even more rarely successful” — because recoupment may be thwarted by competitive entry.
  - The rice-cost test is driven by prudential concerns that the exclusionary effect of above-cost pricing may be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.”
Mapping Predatory Pricing

- Does the skepticism regarding predatory pricing map to conditional pricing?
  - Conditional pricing faces no recoupment problem. “Recoupment” is simultaneous.
  - Based on the evidence, we cannot say that conditional pricing practices are “rarely tried, and even more rarely successful.”

- Do the prudential concerns map to conditional pricing?
  - Extreme caution is merited in the case of unconditioned price discounts.
    - Price cutting is at the heart of the competition – the “very conduct the antitrust laws were intended to protect.”
  - Difficult to characterize conditional pricing as an irreducible element of competition. Firms have procompetitive alternatives to conditional pricing.
    - Decision-theoretic arguments fail to account for alternatives.
  - Supposed “chilling effect” by other legal rules is not empirically supported.
Conclusions

*Though analogy is often misleading, it is the least misleading thing we have.*

Samuel Butler