

Sacrifice, Extreme Sacrifice, and No Economic Sense: the case against these necessary and sufficient tests for monopolization

Aaron Edlin*

Richard Jennings Professor, UC Berkeley
Department of Economics and School of Law
Research Associate, NBER

When is Exclusion Anticompetitive? And When is it Not?

- *Easy Case.* A monopoly excludes competitors by *consistently* charging low prices.
 - Not anticompetitive.
 - Essence of Competitive process.
 - Good for Consumers
- What + Exclusion \Leftrightarrow Anticompetitive?
 - “What” \neq *consistently* low prices

Three sacrifice tests (possible “what’s”)

- Sacrifice (Aspen; Trinko)
 - Forgoing profits (now or in one line of business)
 - To make more (later or in another line of business) as a result of lessened competition.
- Extreme sacrifice (Barry Wright; American Airlines)
 - Pricing below cost and losing money
 - To make more (later or in another line of business) as a result of lessened competition.
- No economic sense (DOJ Trinko Brief; Werden; Melamed)
 - Action makes no economic sense but for the lessening of competition.

Sacrifice Tests on the Move

- From pricing cases to non pricing cases
 - Sacrifice Tests first advocated in predatory pricing context (e.g., by Areeda-Turner and Ordover-Willig)
 - Later spread to non pricing contexts (e.g., Aspen, Trinko and Covad).
- From sufficiency (once other elements shown) to necessity
 - Barry Wright (no violation where above cost) says extreme sacrifice necessary in pricing cases
 - DOJ Trinko Brief advocates no economic sense test
 - Covad assumes sacrifice necessary. (“Covad will have to prove Bell Atlantic’s refusal to deal caused Bell Atlantic short-term economic loss.”)
 - Scalia’s Trinko interpretation of Aspen is that Ski Co. sacrifice necessary to violation
 - Werden and Melamed argue “no economic sense” is unifying principle of Section 2 violations.

Sacrifice not needed for anticompetitive effects

- Above Cost Predatory Pricing.
 - Edlin 2001, Yale Law Journal, explains how consumers can be hurt by threats to lower prices even though the prices will remain above cost and may even be profit maximizing.
 - If sacrifice is wrong in predatory pricing, why are we extending it?
- Aspen
 - Suppose Ski Co. refusal to sell at retail price to Highlands increased Ski's retail sales to skiers.
 - Would that mean refusal was any less exclusionary or anticompetitive? No.
 - Aspen Court emphasized consumer harm (the revisionist claims of Trinko about Aspen notwithstanding)
- Submarine Patents
 - Sneaking patented processes into a standard may not involve sacrifice, but that doesn't make it good!
- Firm A blow's up competitor's plant
 - Werden emphasizes that the cost of the dynamite is what triggers liability.
 - What then if Firm A is avoiding a dump fee by disposing of surplus dynamite in this way?
 - No liability? Can't be.
 - Sacrifice Test doesn't look at the right thing.

Extreme Sacrifice (i.e., losses) *certainly* not needed for anticompetitive effects

- American Airlines
 - Extra plane profitable if you ignore effects on other planes.
 - Marginal Revenue less than Price
 - For firms with lots of market power (inelastic demand), marginal revenue much lower than price.
 - Hence, monopolies with lots of market power can sacrifice enormously without losses (i.e., without triggering extreme sacrifice)
 - Very ironic to give such firms a license to exclude.
- Blowing up competitor's factory
 - Violation only if dynamite so expensive that its cost exceeds Firm A's operating profits?
 - Extreme sacrifice test says "Yes"
 - Then firms with large profits have a substantial license to blow up competitors.

Does “No Economic Sense” Test make sense?

- Limit pricing
 - Consider a firm that could charge a high price and make lots of money for a while, but chooses a low price to delay/prevent entry
 - Suppose no economic sense in charging low price (before entry) except that it prevents others from entry
 - Test condemns.
 - But it is essence of competition (see slide 2)
 - Werden doesn't apply test here, instead granting a safe harbour.
 - Suggests test doesn't get at fundamentals
- Blowing up competitor's factory
 - (Werden, ALJ 2006, p. 425); Conwood.
 - Proponents (of test) emphasize that the cost of the dynamite makes it illegal
 - But cost might be negative (dump fee hypothetical)
 - My claim: This is anticompetitive regardless of cost of dynamite ... regardless of “no economic sense” test

Fundamental Problem

- Tests don't flow from first principles
 - Consumer welfare
 - Competitive process
 - A process by which rivals who can offer consumers higher utility get to provide it.
 - Any Other Principles I discern

False Positive Refrain

- Fears and claims that false positives abound are common.
 - Modern examples scarce
- Common argument: need a hurdle
 - Sacrifice (or extreme sacrifice, or no economic sense) not needed for anticompetitive effects but plaintiffs should be required to show anyway in order to prevent an avalanche of cases from chilling legitimate competition.
 - Why not just tax plaintiffs or eliminate section 2?
- Erecting arbitrary hurdles because the right test is difficult to administer properly is wrongheaded
 - Commentators should seek “right” test.
 - If administrative difficulties make false positives a bigger problem than false negatives
 - raise the standard of proof
 - Improve jury instructions
 - Create procedural hurdles like Daubert geared to require rigorous evidence.

Conclusions

- Patience needed
 - Search for right standard or at least better ones.
 - Administrative difficulties don't justify arbitrary tests.