



Vertical Restraints Part 5 (Review)

Antitrust
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Review Questions

1. Are courts more skeptical, in an antitrust sense, of horizontal or vertical deal?
2. What are some procompetitive justifications for vertical deals?
3. A exclusive contract whereby Apple computer will buy all of the microprocessors for its next generation of iPhone from Hexetron Semiconductor. Suppose this forecloses 20% of the market for phone-appropriate microprocessors. Do you see legal risk from antitrust liability?

Requirements contracts / exclusive supply contracts (2/2)

Re-run

- Later, SCOTUS moved to a regular rule-of-reason analysis in *Tampa Electric v. Nashville Coal* (1961):

“To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.”
- Lower courts have gone further, holding that “[e]xclusive-dealing contracts terminable in less than a year are presumptively lawful.” *Roland Machinery v. Dresser Industries* (7th Cir. 1984) (Posner, J.).

Exclusive dealing - market share foreclosed

Re-run

After *Tampa Electric v. Nashville Coal* (1961), the emphasis is qualitative. But lower courts have developed a pro-defendant quantitative take: Without a large percentage of a market share being foreclosed, courts will generally refuse to find exclusive dealing to be exclusionary or unreasonable.

- Some courts indicate a minimum of 30-40% of the market must be foreclosed by an exclusive dealing arrangement for antitrust liability.
 - foreclosure of 24% **unlawful** (*Twin City* (9th Cir. 1982))
 - foreclosure of 38% **lawful** (*Omega Envtl.* (9th Cir. 1997))
 - foreclosure of 40% **lawful** (*Gonzalez* (N.D. Ga. 1985))
- Courts typically require less foreclosure for § 2 than for § 1. (*Microsoft*, EE^{3d}@404):
- foreclosure of roughly 40-50% usually needed for § 1.
 - foreclosure of less needed for § 2.

4. Okay, let's say the deal forecloses 55% of the market. And let's say it's a three-year deal. Brainstorm some procompetitive justifications Apple might plausibly advance ...



sky lasso

Problem

Re-run

- Sky Lasso provides on-ramp cabin services for passenger airlines, including cleaning, lavatory servicing, restocking of in-flight magazines, etc.
- Currently, neither Sky Lasso nor Oceanic Airlines have any operations at DFW. DFW has many airlines and two on-ramp cabin services firms.
- Oceanic Airlines and Sky Lasso want to expand to DFW.
- They are contemplating a deal where Sky Lasso will be the exclusive supplier to Oceanic Airlines for three years at DFW.

Putting aside the market power issue ...

What are possible procompetitive justifications for this?

- This commitment could ensure that Sky Lasso will recover its investment on fixed costs of starting operations at DFW - office space, apron space, trucks, start-up hiring/training, etc.
- Maybe Oceanic needs to incentivize Sky Lasso to make relation-specific investments, like special equipment for servicing A380s.