

# DOJ / FTC Hearings on Single Firm Conduct

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# Overview

1. The Importance of an Active Section 2 Jurisprudence
2. The Legacy of *U.S. v. Microsoft*
3. The Legacy of *LePage's v. 3M*

# References

Daniel L. Rubinfeld and Douglas A. Melamed, “*U.S. v. Microsoft: Lessons Learned and Issues Raised*,” in Daniel Crane and Eleanor Fox (eds.), *Antitrust Stories*, forthcoming.

Daniel L. Rubinfeld, “3M’s Bundled Rebates: An Economic Perspective,” 72 *U. of Chicago Law Review* 243 (Winter 2005).

# The Legacy of U.S. v. Microsoft

1. Network Effects
2. The Applications Barrier to Entry
3. Non-Leverage Tying (bundling the browser with the operating system)
4. Market Definition and Market Power (treatment of nascent competition)

# Legal Issues Resolved

## 1. Principles

The same antitrust principles apply in dynamic, high technology industries.

(Posner (ALJ (2001): “antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy.”)

# Legal Issues Resolved

## 2. Intellectual Property

The same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of property under the antitrust laws, nor particularly suspect under them.

# Legal Issues Resolved

## 3. Product Design

Where particular aspects of Microsoft's product design excluded rivals, the court required Microsoft to establish a pro-competitive justification for the design. There is no safe harbor.

# Legal Issues Resolved

## 4. **Broad Brush or Fine Tooth Comb**

Any discrete aspect of a monopolist's conduct that tends to exclude rivals *may* be illegal unless there is a legitimate, pro-competitive justification for that particular aspect of the conduct.

# Legal Issues Resolved

## 5. The Role of Rules

Case-based facts are important. The per se rule against tying did not apply because of the particular attributes of “platform software.”

# Legal Issues Resolved

## 6. Causation

Conduct can violate the antitrust laws only if it injures competition in the market as a whole. Causation can be inferred “when exclusionary conduct is aimed at producers of nascent competitive technologies” as well as when it is aimed at producers of established substitutes.

# Legal Issues Resolved

## 7. Profit Sacrifice?

- a) DOJ: Conduct is anticompetitive when it would not make business sense for the defendant but for its tendency to exclude rivals and thus create or maintain market power for the defendant (the “profit sacrifice test”).
- b) The Court: Conduct is anticompetitive if (i) it harms the competitive process and (ii) either (a) is not shown to further efficiency or to have some other pro-competitive justification or (b) the anticompetitive harm outweighs its pro-competitive benefit.
- c) If conduct harms competition and furthers a legitimate purpose, should there be a balancing test?

# The Legacy of *LePage's v. 3M*

1. Bundling is ubiquitous, and often generates pro-competitive benefits.
2. However, bundling can be anticompetitive in particular circumstances.
3. A legal rule that lacks clarity can impose unreasonable costs and deter legitimate pro-competitive activity.

# 3M's Bundled Rebate Programs

1. Executive Growth Fund (EGF) – a pilot program for a small number of customers, with customized growth targets in six separate divisions, including transparent tape.
2. Partnership Growth Fund (PGF) – a broad program with discounts based on overall purchases in six divisions, with no transparent tape targets.

# The *LePage's* Trial

1. No testimony with respect to economies of scale and/or scope in the manufacture and distribution of transparent tape.
2. No predatory pricing claim. No showing that 3M sold its tape at below-cost prices, even if the full discount (across all products) is attributed to tape.
3. No testimony with respect to profit sacrifice.

# The LePage's Trial

4. No tying claim.
5. No showing of market power with respect to any product other than transparent tape.
6. Jury: Finding of monopoly maintenance (but no exclusion under Section 1).

# When Might Bundled Rebates Be Anticompetitive?

1. General principle: If the rebates reduce consumer welfare by impairing rivals' ability to make competitive offers to potential customers
  - a) Takes into account program efficiencies
  - b) Price increases by dominant firms that do not impair rivals' ability to compete are not anticompetitive.

# When Can Bundled Rebates Be Anticompetitive?

2. There are conditions under which bundling may be anticompetitive, but none fit the LePage's case.
  - a) Contractual tying (e.g., *Jefferson Parish*)
  - b) Predation through profit sacrifice (e.g., *Microsoft*)
  - c) Monopoly maintenance through the creation of barriers to entry (*SmithKline v. Eli Lilly* – sales of monopoly product used to harm competition in a non-monopoly market)

# Towards a Workable Test

1. Weakening a rival should not be sufficient to condemn a monopolist's conduct.
2. An incremental cost-benefit test would be desirable, but the specifics associated with such a test raise difficult analytical issues.

# Towards a Workable Test

3. One possibility: For a bundled rebate program to be anticompetitive, a necessary condition is that the incremental costs associated with the available discounts exceed the incremental profits associated with the incremental sales that are generated.
  - a) But, this should not condemn nondiscriminatory price cuts in single markets;
  - b) In addition, this could penalize policies that exclude less efficient competitors.
4. A workable rule should be one that is clear and manageable from the perspective of the business community.

# Antitrust Modernization Commission (tentative recommendations)

- No need to revised the antitrust laws to apply to ... industries in which innovation, intellectual property, and technological innovation are central features
- No need for Congress to legislatively amend Section 2.
- Additional clarity and improvement in Section 2 ... is desirable ... particularly with respect to areas ... such as bundling.