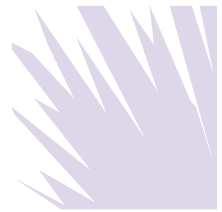
The Sedona Conference Journal

Volume 5 2004

Consumer Harm after *Dentsply*: Not a Toothless Tiger

Robert W. Doyle Jr. & Suzanne B. Drennon



Recommended Citation: Robert W. Doyle Jr. & Suzanne B. Drennon, *Consumer Harm after Dentsply: Not a Toothless Tiger*, 5 SEDONA CONF. J. 65 (2004).

Copyright 2004, The Sedona Conference

For this and additional publications see:
https://thesedonaconference.org/publications

CONSUMER HARM AFTER *DENTSPLY*: NOT A TOOTHLESS TIGER

Robert W. Doyle, Jr. & Suzanne B. Drennon[1]
Sheppard Mullin Richter & Hampton, LLP
Washington, DC

I. INTRODUCTION

Antitrust injury requires "injury of the type the antitrust laws were intended to prevent."[2] Stated differently, antitrust injury requires injury to competition, not injury to competitors. Or as provided in the Clayton Act, a party suffers injury "by reason of anything forbidden in the antitrust laws."[3] For the newcomer, each of these statements has a certain deceptive logic, until one tries to discern what, exactly, the antitrust laws were intended to prevent. The Supreme Court stated eloquently that:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[4]

However, this statement does not help the average business person or non-antitrust lawyer know if certain actions will generally run afoul of the antitrust laws. One way to simplify the antitrust injury requirement is to tie it to consumer harm. Borrowing from *Northern Pacific Railway*, consumers are harmed by the inefficient allocation of economic resources and high prices because these practices cost more money.[5] Moreover, poor quality and progress harm consumers' health and material welfare. Thus, for the average person, if an action causes consumer harm, it is most likely "forbidden by the antitrust laws" and thus "the type of injury the antitrust laws were intended to prevent".

---

1 Robert W. Doyle, Jr. is a partner in the Washington, DC office of Sheppard, Mullin, Richter & Hampton LLP and Suzanne B. Drennon is an associate in the Los Angeles office of Sheppard, Mullin, Richter & Hampton LLP. Both are members of the Antitrust and Trade Regulation Practice Group. We are indebted to Andre P. Barlow and Camelia C. Mazard and Don T. Hibner for their helpful comments on this paper.

2 *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Cargill Inc. v. Monfort of Colo., Inc.* 479 U.S. 104, 109-10 (1986).

3 15 U.S.C. Section 15(a) (2002).

4 *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

5 *Id.*

The first part of this paper addresses consumer harm generally in the context of Sherman Act, Section 1 per se and rule of reason actions and causes of action under Section 2 of the Sherman Act. The second part of this paper explains how it is possible, at least in Delaware, for a defendant to defeat a Section 2 action where it has over 66% of the market, and where the court found it has engaged in anticompetitive exclusionary conduct, but where the court found that it did not cause consumer harm.

II. CURRENT REQUIREMENTS OF CONSUMER HARM

A. Sherman Act, Section 1

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is declared to be illegal."[6] The Supreme Court has recognized that "the legality of an agreement or regulation cannot be determined by so simple a test as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains."[7] As a result, the Court has found that only restraints of trade that *unreasonably* restrict competition violate Section 1[8] *Per se* offenses are presumed to unreasonably restrict competition. Therefore, proof of consumer harm is not required to show an unreasonable restriction of competition, and thus a Section 1 violation. Rule of reason offenses, however, require a more delicate balancing act. In considering the balance of harms, the Supreme Court recently advised that the trier of fact consider empirical evidence of consumer harm.

1. *Per Se* Violations of Section 1 of Sherman Act Do Not Require Proof of Consumer Harm

Per se offenses, such as price fixing and agreements to restrain trade do not require proof of consumer harm. Where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" instead of "one designed to increase economic efficiency and render markets more, rather than less, competitive" it is "*per se* illegal."[9] In other words, *per se* offenses are agreements "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[10] Thus, proof of consumer harm is not required because the activity, by its nature, is presumed to cause consumer harm.

2. After *California Dental*, Plaintiffs Should Submit Empirical Evidence of Consumer Harm for a Rule of Reason Analysis

Section 1 allegations that do not rise to the level of *per se* illegality are analyzed under the rule of reason. Under a rule of reason analysis, "[t]he true test of legality is whether the restraint imposed is such as merely regulates and thereby promotes competition or whether it is such as may suppress or even destroy competition."[11] In other words, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including the specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature and *effect*."[12]

6 15 U.S.C. Section 1 (2002).
7 *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).
8 *State Oil v. Khan*, 522 U.S. 3, 10 (1997).
9 *Broadcast Music Inc. v. CBS*, 441 U.S. 1, 19-20 (1979).
10 Northern Pac. Ry., 356 U.S. at 5; *see also NCAA v. Bd. of Regents*, 468 U.S. 85, 103-04 (1984)("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.")
11 Chicago Bd. of Trade, 246 U.S. at 238.
12 State Oil, 522 U.S. at 10 (emphasis added).

The recent *California Dental Association v. FTC*[13] decision clarified the nature of injury that the moving party must establish under the rule of reason in a Section 1 claim. In *California Dental*, a nonprofit professional association of dentists sought review of a cease and desist order regarding the California Dental Association's advertising restrictions.[14] Before an FTC administrative hearing, the administrative law judge found that the advertising restrictions violated Section 1.[15] In that proceeding, however, the FTC staff did not offer economic evidence of consumer harm. The Ninth Circuit affirmed the FTC administrative judge's decision. The Circuit Court, however, was overturned by the Supreme Court who insisted on empirical evidence of consumer harm.[16] The Court said that the FTC should have looked at whether "the arrangements in question would have had an anticompetitive effect on customers and markets."[17] "The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services."[18]

B. Courts Consider Consumer Harm When Analyzing Claims Under Section 2 of the Sherman Act

A monopolization claim under Section 2 of the Sherman Act requires proof of monopoly power in the relevant market, i.e., the power to control prices or to exclude competition; and the willful acquisition or maintenance of that power, i.e., anticompetitive conduct that contributes to that power, not power that is the natural result of superior business practices or knowledge.[19]

Courts focus on the necessity of predatory conduct. In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[20] the Supreme Court focused on whether the defendant "attempt[ed] to exclude rivals on some basis other than efficiency.[21] Similarly, in *Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*,[22] the First Circuit noted that a "desire to crush a competitor standing alone is insufficient to violate the antitrust laws."[23] An examination of the case law regarding exclusionary conduct and predation shows that evidence of consumer harm is a significant factor to determine whether a defendant has violated Section 2 of the Sherman Act.

1. Predation Requires Evidence of Consumer Harm.

Predation is the practice of setting artificially low prices to drive competitors out of the market, and then raising prices to recoup this earlier loss. In *Brooke Group v. Brown & Williamson Tobacco Corp.*,[24] the Supreme Court addressed consumer harm in a predation case. It is not enough to show that a competitor charged low prices, because standing alone, lower prices are a benefit to consumers. A plaintiff must also show that the defendant "had a reasonable prospect, or, under Section 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices."[25] Hence, it is not enough to show that competitors were forced out of business by the artificially low prices; a plaintiff must show that there would ultimately be consumer harm in the form of higher prices:

13 526 U.S. 756 (1999).
14 *Id.*
15 *Cal. Dental Ass'n v. FTC*, 128 F.3d 720, 724-25 (9th Cir. 1997).
16 Cal. Dental Ass'n, 526 U.S. at 774.
17 *Id.* at 770.
18 *Id.* at 776; *see also id.* at 777 (directing courts to treat higher prices or reduced supply as evidence of anticompetitive effect).
19 *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1996).
20 472 U.S. 585 (1985).
21 *Id.* at 605.
22 883 F.2d 1101 (1st Cir. 1989), *cert denied*, 494 U.S. 1027 (1990).
23 *Id.* at 1113
24 509 U.S. 209 (1993).
25 *Id.* at 224.

> The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation . . .'[i]n order to recoup their losses, [defendants] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what earlier gave up in below-cost prices.'[26]

If a firm simply decided to sell its product at an artificially low rate in perpetuity, this decision would benefit consumers because ultimately a low price is a significant factor in determining consumer welfare. Thus, it is the inevitable upswing in prices to recoup lost profits from the below-cost sales that harms consumers. As such, evidence of this consumer harm upswing is a necessary part of a predation action.

2. Exclusionary Conduct Requires Proof of Consumer Harm

Defining the relevant market is the key to determining whether an exclusive dealership will cause antitrust injury.[27] In general, courts presume that if an exclusive dealing arrangement forecloses less than 20% of the market, the agreement is legal. Similarly, if an arrangement forecloses more than 50% of the market, it is presumptively illegal. For exclusive dealing arrangements that fall between these guidelines, courts generally conduct a full rule of reason analysis to determine the effects of foreclosure on the market.

At the Fourth Annual Sedona Conference of Antitrust Law & Litigation, Jonathan M. Jacobson analyzed the nexus between market power, consumer harm, and exclusive dealing with competitors.[28] Mr. Jacobson reviewed four exclusionary conduct actions: *United States v. Microsoft Corporation*,[29] *Pepsi Co. v. Coca Cola Co.*,[30] *United States v. Visa USA*,[31] and *United States v. Dentsply, Inc*.[32]

Mr. Jacobson concluded that in each case where the court found defendants liable for exclusionary conduct, there was substantial proof of consumer harm.[33] In *Pepsi Co.*, plaintiffs' failure to prove market power, combined with undisputed evidence of competitive pricing demonstrated an absence of consumer injury.[34] In *Visa*, the court found that the conduct led to higher prices and reduced output.[35] Finally, in *Microsoft*, the court found that the possession of monopoly power in computer operating systems harms consumers through increased prices.[36] Thus, these cases, and Mr. Jacobson's analysis demonstrate that consumer harm is a necessary consideration when dealing with claims of exclusionary conduct.

In Mr. Jacobson's discussion of *Dentsply* at last year's conference, the government had recently defeated a motion for summary judgment by offering direct evidence of increased prices and poor quality as a result of a an artificial tooth manufacturer's exclusive dealing practices. In August 2003, the United States District Court for the District of Delaware reversed this tack and entered judgment for defendant manufacturer.[37] The court based this decision on the fact that the government had not demonstrated consumer harm.[38]

26 *Id.* at 225-26 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590-91 (1986).
27 *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961).
28 Jonathan M. Jacobson, *Market Power, Consumer Harm & Exclusive Dealing with Distributors*, THE SEDONA CONFERENCE JOURNAL, Fall 2002.
29 253 F.3d 34 (D.C. Cir.)(*en banc*), cert denied, 70 U.S.L.W. 3107 (U.S. 2001)(No. 01-236).
30 114 F.Supp.2d 243 (S.D.N.Y. 2000).
31 2001-2 Trade Cas. (CCH) ¶ 74,440 (S.D.N.Y. Oct. 9, 2001).
32 2001-1 Trade Cas. (CCH) ¶ 73,247 (D.Del. 2000), *superceded by United States v. Dentsply*, 277 F.Supp.2d 387 (D.Del. 2003) discussed *infra*.
33 *See supra*, note 26, at 33.
34 *Id.*
35 *Id.*
36 *Id.*
37 Dentsply, 277 F.Supp.2d at 454.
38 *Id.* at 452.

III. *UNITED STATES V. DENTSPLY*: OVER TWO-THIRDS MARKET SHARE WITHOUT CONSUMER HARM DOES NOT LEAD TO A SECTION 2 VIOLATION

The government brought an action against Dentsply International, Inc. ("Dentsply") alleging violation of sections 1 and 2 of the Sherman Act, and Section 3 of the Clayton Act.[39] The action focused on two components of Dentsply's business practice: first, Dentsply's dealer agreements, which provided that a dealer would lose its Dentsply account if it added a competing brand of teeth; second, Dentsply's dealer agreements, which required dealers to stop selling competing brands in order to obtain the Dentsply account.[40] Despite these agreements and despite Dentsply's 65% market share, the District Court found that Dentsply did not violate Section 2 of the Sherman Act because the government did not prove that Dentsply's actions caused consumer harm.[41]

A. Factual Background

In an extensive finding of fact section, the court found that the relevant market for purposes of this action was "the sale of prefabricated artificial teeth in the United States."[42]. Participants in this market are divided into four categories: (1) manufacturers; (2) dealers; (3) dental laboratories; and (4) dentists.[43] Dentsply sold to dental laboratories and the court concluded that the laboratories were the consumers for purposes of a consumer harm analysis.[44]

Dentsply was the largest of the roughly 12-13 artificial teeth manufacturers who sell teeth in the United States. Dentsply did not own its own dealers and sells its teeth exclusively to independent dealers.[45] It retained the dominant position in the artificial tooth market and in 2001 had net sales in excess of $40 million.[46] At the time of the lawsuit, Dentsply's revenue market share was between 75-80% and its unit basis market share was 67%.[47]

In 1993, Dentsply adopted a dealer distribution agreement that required dealers, or prospective dealers, to:

(1) provide Dentsply with their financial statements;

(2) place an initial minimal order of $50,000 in teeth and $10,000 in merchandise;

(3) place initial orders of $10,000 if they were merchandise-only dealers;

(4) place orders via the Bar Code Entry Order System;

(5) submit a written plan indicating what incremental business would be gained by Dentsply;

---

39 *Id.* at 390. The Third Circuit is currently reviewing the lower court's decision.
40 *Id.*
41 *Id.* at 452.
42 *Id.* at 390.
43 *Id.* at 391.
44 *Id.* at 452.
45 *Id.* at 392.
46 *Id.* at 395.
47 *Id.* at 451.

(6) not add further tooth lines to the product offering ("Dealer Criterion 6");

(7) make payment within terms Dentsply specified;

(8) resell Trubyte products only to end-users such as dental labs, dental schools and dentists;

(9) report end-user sales by zip-code on a monthly basis; and

(10) limit drop shipments to 10% per quarter.[48]

Dealer Criterion 6 specifically stated that, "[i]n order to effectively promote Dentsply/York products, dealers that are recognized as authorized distributors may not add further tooth lines to their product offering."[49]

Not all consumers purchased their teeth through a dealer. The government's expert economist testified that direct distribution was a "viable" method for distributing artificial teeth.[50] He also testified that Dentsply's rivals were "not foreclosed completely" from the United States market for artificial teeth.[51] At trial, dental laboratory witnesses testified that they preferred to purchase teeth directly from the manufacturer because of the cost savings. Other witnesses testified that purchasing directly from the manufacturer was a more reliable way to purchase teeth.[52]

B. The Government's Evidence that Dentsply Monopolized the Artificial Tooth Market

As mentioned above, the government had earlier defeated Dentsply's motion for summary judgment by offering direct evidence of increased prices and poor quality as a result of Dentsply's exclusive dealing practices.[53] In this trial on the merits, the court found that Dentsply's justification for Dealer Criterion 6 was "pretextual". "Dentsply's prelitigation rationale for Dealer Criterion 6 was expressly to exclude competitors from dealers and not to focus dealers or protect Dentsply's investment in promoting artificial teeth."[54] The court based this conclusion on the government's evidence that:

(1) Dentsply's expert admitted that exclusive dealing with dealers was not necessary to protect promotion with dentists and consumers;

(2) no evidence existed of dealers practicing 'bait and switch' tactics despite years of opportunity with grandfathered brands;

(3) most promotion was brand specific and not free-ridable;

(4) Dentsply enforced Dealer Criterion 6 against a dealer that did not carry Dentsply teeth but only merchandise;

---

48 *Id.* at 412-13.
49 *Id.* at 412.
50 *Id.* at 398.
51 *Id.*
52 *Id.*
53 *Id.*
54 *Id.* at 453 (citing *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3rd Cir. 2003) ("When a monopolist's actions are designed to prevent one or more new or potential competitors from gaining a foothold in the market by exclusionary, i.e. predatory, conduct, its success in that goal is not only injurious to the potential customer but also to competition in general.")

(5) Dentsply threatened a dealer with losing its dealership of other products beyond artificial teeth; and

(6 Dentsply approved a dealer despite concluding that there was no need for additional distribution.[55]

C. Conclusions of Law

Despite Dentsply's high market share, and the "pretextual" Dealer Criterion 6, the court concluded that Dentsply did not monopolize the market for artificial teeth.[56] "Monopoly power is generally defined as the power to control prices or to exclude competition, and the size of market share is a primary determinant of whether monopoly power exists."[57] Based on Dentsply's market share, the court could infer market power. Dentsply's revenue market share was between 75-80% and its unit basis market share was 67%. Moreover, it had maintained a dominant market share for several years. Under traditional market share analysis, Dentsply met the threshold for market power.[58] The court reasoned, however, that high market share was insufficient in this action. The government also needed to prove that Dentsply had the power to control prices or to exclude competition.[59]

The court first found that although Dentsply's Dealer Criterion 6 clearly intended to exclude competitors from dealers, it did not exclude competitors from the consumer dental laboratories. Direct sales to dental laboratories was "a viable and, in some ways, advantageous method of distribution."[60] The court also noted that Dentsply did not have the power to exclude competitors from selling directly to the dental laboratories. Because the court found that dental laboratories were the consumer, and because Dealer Criterion 6 did not harm the dental laboratories, the court held that Dentsply was not engaged in monopoly behavior.[61]

The court also found that Dealer Criterion 6 did not demonstrate willful acquisition or maintenance of monopoly power. It noted that the government failed to prove that Dentsply had created a market with supra-competitive pricing.[62] Without extensive analysis, the court concluded that "[u]nder the rule of reason…the circumstances of the artificial tooth market require a finding that Dentsply's Dealer Criterion 6 is not an unreasonable restraint on competition."[63] While the government offered evidence of Dentsply's anticompetitive intent, the court concluded that, "because direct distribution is viable, non-Dentsply dealers are available and Dentsply dealers may be converted at any time, the DOJ has failed to prove that Dentsply's action have been or could be successful in preventing 'new or potential competitors from gaining a foothold in the market[.]'"[64] Based on this reasoning, the court entered judgment for defendant.

---

55 *Id.* at 453.
56 *Id.* at 451.
57 *Id.* (quoting *Pennsylvania Dental Ass'n v. Med. Serv. Ass'n of Pennsylvania*, 745 F.2d 248, 260 (3d Cir. 1984); Grinnell, 384 U.S. at 571 ("The existence of such power ordinarily may be inferred from the predominant share of the market.")).
58 *Id.* (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946)(finding that over two-thirds market share is a monopoly) and Grinnell, 384 U.S. at 571).
59 *Id.* at 450-51 (citing *Oahu Gas Serv. Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) ("[M]arket share is just the starting point for assessing market power. A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.")).
60 *Id.* at 452.
61 *Id.*
62 *Id.* at 453.
63 *Id.*
64 *Id.* at 453.

IV. CONCLUSION: *DENTSPLY* INDICATES THAT THE FUTURE OF CONSUMER HARM HAS BITE

In *Dentsply*, there was substantial evidence of anticompetitive, exclusionary intent combined with overt exclusionary acts and market share above 66%, enough to presume monopoly power. The government had succeeded on summary judgment, and by any standard, seemed poised to succeed at trial. The "hole in their boat", however, was defendant's simple explanation of substitutability. The defendant established that consumers could avoid Dentsply's monopolistic actions in the dealer market by buying direct from the manufacturer. Based on the consumers' ability to substitute away from defendants' control of the dealer market, the court found that the defendant was not liable for a violation of Section 2 of the Sherman Act. Here, the lack of consumer harm was fatal to the government's action. Going forward, it remains to be seen whether consumer harm, standing alone, can deliver a similar blow to defendants.