

Title: Exclusionary Conduct, Effect on Consumers,
and the Flawed Profit-Sacrifice Standard

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Abstract

There is currently great intellectual ferment over the proper antitrust liability standard governing allegedly exclusionary conduct under Section 2. This article focuses on the two main competing liability standards: the *profit-sacrifice standard* (and the *no economic sense* variant of the test) and the *consumer welfare effect standard*. The central thesis of this article is that the use of either version of the profit-sacrifice standard as the liability standard for exclusionary conduct is fundamentally flawed. These tests may be useful as one type of evidence of anticompetitive purpose, however, but they are not reliable indicators of the impact on consumer welfare -- the primary focus of the antitrust laws. These standards also are prone to several significant pitfalls that would lead to significant legal errors. Instead, a better standard to govern exclusionary conduct is the consumer welfare effect standard, which is focused directly on the anticompetitive effect of exclusionary conduct on price and consumer welfare. This standard can be described in various ways, for example, as conduct that is “unreasonably exclusionary” or “unnecessarily restrictive,” or simply as conduct that causes “consumer harm.” This consumer welfare effect standard can be implemented without causing excessive false positives that might lead to over-deterrence or a welfare-reducing diminution in innovation incentives. Many of the criticisms of the consumer welfare standard are based on a misunderstanding of the workings of the standard relative to the profit-sacrifice standards. In fact, the consumer welfare effect standard exhibits fewer potential over-deterrence and under-deterrence errors in implementation. For example, the profit-sacrifice standard may well be more likely to condemn a cost-reducing investment that leads to market power than would the consumer welfare effect standard.