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**Deception or Disparagement
as Exclusionary Conduct?
Some Observations From the Trenches**

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Can disparagement be exclusion?

- ▶ Theory is that under-informed buyers will believe a false statement about the plaintiff to be true and decline to buy as a result, raising the rival's costs, and enhancing the defendant's market power.
- ▶ But:
 - *Is the statement really false?*
 - *Is the statement really why buyers are going elsewhere, or is it just an excuse?*
 - *Can't the plaintiff counter with contrary facts?*
 - *Does the statement really enhance the defendant's market power in a manner likely to harm consumers?*
- ▶ Very difficult for disparagement or deception to qualify as "exclusionary conduct" in the Section 2 sense.
- ▶ And, yet, product comparisons can be the essence of effective competition; so chilling those comparisons can be a mistake.

Can disparagement be exclusion?

- ▶ Recognizing the problems with deception as a theory of monopolization, Areeda and Turner said long ago that there should be a strong but rebuttable presumption that any effect of a false statement on competition is de minimis.
- ▶ Under their test, to overcome the presumption, the plaintiff has to prove that “the representations were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals.”
- ▶ The Second and Ninth Circuits have adopted that test.
 - *National Ass’n of Pharmaceutical Manufacturers v. Ayerst Laboratories*, 850 F.2d 904 (2d Cir. 1988)
 - *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications*, 108 F.3d 1147, 1152 (9th Cir. 1997)

Can disparagement be exclusion?

▶ But the Areeda-Turner view has not yet been adopted elsewhere:

- *The Sixth Circuit is close; it requires proof that: (1) the advertising was clearly false, and (2) it would be difficult or costly for the plaintiff to counter the false advertising. American Council of Certified Podiatric Physicians and Surgeons v. American Board of Podiatric Surgery, 323 F.3d 366, 371-72 (6th Cir. 2003).*
- *The Seventh Circuit says disparagement can never be actionable under Section 2. Sanderson v. Culligan Int'l Co., 415 F.3d 620 (7th Cir. 2005).*
- *That had been the Third Circuit view until recently (Santana Prods, Inc. v. Bobrick Washroom Equip, Inc., 401 F.3d 123 (3d Cir. 2005)); now that circuit seems to allow any disparagement to be the basis for a Section 2 case, at least if part of a broader course of conduct (West Penn Allegheny Health System, Inc. v. UPMC, 627 F.3d 85, 109 n.14 (3d Cir. 2010)).*
- *If part of a larger course of conduct, the Eighth Circuit also seems to allow the claim. International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 1255 (8th Cir. 1980). So does the FTC under FTCA § 5. Intel Corp., No. 9341, Complaint ¶¶ 62-71, 93-96 (filed Dec. 16, 2009).*

Can disparagement be exclusion?

- ▶ Very sharp conflict in the circuits.
- ▶ Makes choice of venue an important concern – and critical if disparagement is a central issue in the case.
- ▶ And “course of conduct” allegations may also be crucial.
 - *But alleging a course of conduct should not be viewed as a panacea, or as a device to make a bad case into a good one.*

Disparagement as part of a course of conduct

- ▶ It has long been part of antitrust lore that a “course of conduct” can be the basis for an antitrust claim even where the component parts are insufficient by themselves.
- ▶ The doctrine dates back at least to *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) – although that case, in fact, aggregated allegations of injury, not allegations of illegality.
- ▶ The course of conduct theory is problematic, however.
 - *It is easy to assert, hard to disprove, and – if not carefully applied – risks condemning conduct that is either neutral or even procompetitive.*
 - *It is a convenient way for a rival to allege a violation, but devolves often into a theory designed to make harm to a competitor substitute for harm to competition.*

Disparagement as part of a course of conduct

- ▶ The more recent decisions view course of conduct theories with some skepticism.
- ▶ In *Pacific Bell v. linkLine Communications*, 129 S. Ct. 1109, 1123 (2009), the Supreme Court cautioned that an antitrust plaintiff may not “join [one] claim that cannot succeed with [another] claim that cannot succeed, and alchemize them into a new form of antitrust liability.”
- ▶ The decisions in *United States v. Microsoft Corp.*, 253 F.3d 34, 78 (D.C. Cir. 2001); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1366-67 (Fed. Cir. 1999); *City of Groton v. Conn. Light & Power Co.*, 662 F.2d 921, 928-29 (2d Cir. 1981), similarly make clear that a plaintiff looking to combine factually distinct antitrust allegations must first show that “there is a ‘synergistic effect’” between them. *Groton*, 662 F.2d at 929.
 - *Some contrary decisions remain, such as the West Penn case, but these opinions are typically missing any reasoned analysis.*

Disparagement as part of a course of conduct

- ▶ One case that, based at least on the allegations, appears to provide a reasonable theory of synergistic effect – making course of conduct allegations involving deception viable – is the FTC complaint in *Intel*. AMD was a distant rival to Intel in CPUs, but had overcome Intel's long held advantage in processing speed; this gave AMD a chance, for the first time, to make real inroads on Intel with computer manufacturers and consumers.
- ▶ Intel kept AMD out of computer makers through loyalty discounts that operated as exclusive dealing arrangements. Intel also created purportedly objective benchmarks that falsely indicated that Intel CPUs had a greater processing speed than AMD's. In addition, Intel declined to disclose the effects of changes made to its compiler, library, and other software products which had the effect of making non-Intel CPUs, such as AMD's, run more slowly. This “deceptive conduct deprived consumers of an informed choice between Intel chips and rival chips, and between Intel software and rival software, and raised rivals' costs of competing in the relevant CPU markets.”
- ▶ The deceptive conduct added materially to the Intel's other conduct in a way that legitimately made the whole greater than the sum of the parts. To overcome the loyalty discounts, AMD needed to create consumer demand sufficient for computer makers to take on the risk of using AMD CPUs. The deceptive conduct, however, negated AMD's real processing speed advantages. And the area was sophisticated enough that no one questioned Intel's representations.

Disparagement as part of a course of conduct

- ▶ What makes *Intel* unusual is a series of factors that ought to be essential for any course of conduct case involving allegations of deceptive conduct:
 - *Statements that were [1] clearly false, [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, and [5] not readily susceptible of neutralization or other offset by rivals – virtually all of the Areeda-Turner factors.*
 - *A coherent theory of how the deceptive conduct fit in to a larger course of conduct and provided the synergistic effect necessary for the whole to be greater than the sum of the parts.*
- ▶ Plaintiffs relying on deception or disparagement would do well to keep these criteria in mind. Defendants, conversely, should focus on pointing out their absence.

Disparagement as part of a course of conduct

- ▶ The best view as to when disparagement or deception can give rise or contribute to a Section 2 violation is “almost never.” Judge Easterbrook’s view in *Sanderson v. Culligan* that disparagement is simply another form of competition is true almost every time.
- ▶ But in the very rare case where the misrepresentations are truly egregious and not subject to reasonable counter, and where there is a colorable theory as to how they may combine with other aspects of the defendant’s conduct to raise rivals’ costs in a competitively harmful way, there might be a case.
- ▶ Don’t hold your breath waiting for that case to come along. They are quite rare.

Disparagement as part of a course of conduct

