

# Quantifying damages in exclusionary conduct cases – lessons from the US

Robert Stillman

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**CRA** Charles River  
Associates

## General principles for calculating damages in US antitrust cases

1. Because the victim of antitrust injury is often unable to produce exact proof of his monetary damages, such damages may be awarded even when they have not been proven with precision. See *J. Truett Payne Co v Chrysler Motors Corp*, 451 U.S. 557, 565-67 (1981).
2. Because antitrust defendants are entitled to a fair trial on damages as well as liability, the jury "may not render a verdict based on speculation or guesswork." *Bigelow v RKO Radio Pictures*, 327 U.S. 251, 264 (1946).

## Selected cases

- United States Football League v National Football League, 842 F.2d 1335 (2nd Cir. 1988)
- Concord Boat Corp v Brunswick Corp, 207 F.3d 1039 (2000)
- Conwood Company v United States Tobacco Company, 290 F.3d 768 (2002)
- Insignia Systems v News America Marketing In-Store, Decision on Motions for Summary Judgment (Sep 30, 2009) and Decision on Motions to Exclude (Jan 14, 2011)

## USFL v NFL (1988) – summary of case

- In the mid-1980s, a new league (USFL) attempted to enter to compete against the NFL
- Began play in March 1983; filed antitrust suit in October 1984
- Originally played in spring, but wanted to migrate to autumn games
- Complained about structure of the NFL's contracts with the three main TV networks
- Also complained about miscellaneous other conduct, e.g. attempts to co-opt certain USFL owners, an NFL supplemental draft of key USFL players
- Jury rejected TV claims but concluded that other conduct constituted illegal monopolization of major-league professional football

## USFL case - damages

- USFL's expert based damages on experience of the American Football League when it entered in the 1960s – unlike the USFL, the AFL was able to get network TV coverage for games in the autumn
  - The USFL expert also extrapolated from an internal analysis prepared by the CBS TV network of the costs it would suffer if it carried USFL games in the autumn
- The jury awarded damages of only \$1
- The judge rejected the USFL's motion for a new trial on damages, ruling that a nominal award was completely understandable given the limitations of the USFL's damages analysis:
  - The analysis could not isolate the losses due to the subset of conduct found illegal
  - The analysis did not consider the possibility of USFL mismanagement

## Concord Boat et al v Brunswick (2000) – summary of case

- Brunswick was the leading producer of inboard engines for recreational power boats. Had 75% share as of 1983. Introduced market share discount scheme in 1984 (continued into 1997)
- Rival manufacturer, OMC, introduced Cobra model in about 1985. Brunswick's share fell to 50%
- Brunswick purchased (1986) two of the largest boat builders
- Cobra turned out to have defective shift cable; 1989 product recall; Brunswick share recovered
- Brunswick's share rose further following mistakes made by Volvo and OMC following their merger in 1993
- A group of boat builders (Concord Boat et al) sued in 1995, focusing on Brunswick's vertical mergers and its market share discount scheme
- Jury found for plaintiffs (\$44.4 million); reversed on appeal

## Concord Boat case – damages analysis

- Plaintiffs' expert used a simulation model – assumed that “but for” world could be captured by Cournot competition, where the rival had the same costs as Brunswick
  - This set-up implies a 50-50 split of the market
  - With information on marginal costs and assumptions regarding market demand elasticity, one could estimate “but for” price
- The expert assumed that anytime Brunswick's share exceeded 50%, this reflected the exercise of improperly attained market power – with overcharge based on difference between actual price and “but for” price

## Concord Boat case – appellate decision

- The Court of Appeals pointed to various weaknesses in this analysis and ruled that it was so speculative that it never should have been presented to the jury:
  - Re the 50% benchmark, the Court pointed out that Brunswick had achieved a 75% share in the mid 1980s before it started the market share discounts and before it acquired the boat builders
  - The analysis did not take account of the Cobra recall
  - The analysis did not take account of the problems with Volvo/OMC merger
- The Court separately overturned the jury’s findings with respect to liability

## Conwood v United States Tobacco Company (2002) – summary of case

- Conwood and USTC are manufacturers of moist snuff
  - Advertising restrictions
  - Point-of-sale advertising is critical
- Conwood and two other firms entered in the late 1970s; by 1990, USTC's share had fallen to 87%
- USTC's share continued to fall during the 1990s (77% by 1998), but Conwood alleged that its share would have fallen by even more but for anti-competitive conduct by USTC that allegedly intensified in the 1990s

## Conwood – details on the conduct

- Conwood alleged a variety of misconduct. The “juiciest” was that when USTC sales representatives restocked or rearranged their own displays, they allegedly would routinely discard Conwood racks and point-of-sale advertising. The Conwood product would be buried at the bottom of the USTC racks
- According to Conwood, about 50% of sales representatives' time was spent repairing racks destroyed by USTC representatives. Because two to three months would sometimes pass before a sales representative could return to the same store, Conwood lost sales even when it was able to restore racks.

## Conwood – damages analysis

- A Conwood business witness testified that the impact of USTC’s conduct was most severe in states where Conwood had not already established a “foothold” as of 1990 (defined alternatively as 15% or 20% of local sales)
- Conwood’s damages expert tested (and confirmed) this hypothesis by using regression analysis to see whether the change in Conwood’s state-wide market share between 1990 and 1997 was related to whether Conwood had a “foothold” as of 1990
- Conwood’s damages estimate was derived from this same regression analysis. The estimate appears to have been based on the growth that Conwood would have realized in states where it was “vulnerable” if instead it had had a market position such that it would not have been vulnerable to USTC’s tactics
- Conwood’s expert estimated damages at between \$313 million and \$488 million. The jury awarded damages of \$350 million. This verdict was upheld on appeal

# Insignia Systems v News America Marketing In-Store (2011)

– summary of the case

- Insignia and NAMI provide third-party (in-store) promotion (TPP) services to consumer packaged good suppliers (CPGs)
- TPP providers purchase right to display from retailers
- Insignia complained in 2004 that NAMI made baseless allegations to CPGs regarding TPP's "compliance rate" – i.e. the % of promotions that it committed to display that were actually displayed
  - This conduct began in late 2002
- Insignia complained more generally about exclusive contracts that NAMI signed with retailers
- Case settled in Feb 2011 on the eve of trial – NAMI agreed to pay \$125 million (low end of damage range presented by Insignia's expert)

## Insignia Systems – damages analysis

- Insignia’s damages analysis was not tested at trial; but it was the subject of a motion to exclude, and the court ruled that it seemed good enough to be presented to the jury
- Insignia’s expert used two methods:
  - Stock market event study
  - Discounted cash flow analysis based on “what if” projections provided by Insignia (where the assumptions were reviewed and challenged by Insignia’s expert)

# Additional slides

# Antitrust injury

- To get a finding of liability, plaintiff must first show “antitrust injury”.
  - Must show that it suffered “injury in fact” as the result of conduct that the antitrust laws are designed to prohibit
  - Where multiple factors at work, plaintiff must show that antitrust violation was a material cause of the injury, but does not have to estimate exactly how much.
  - Standard of proof required for “injury in fact” more rigorous than for quantification
- Comparison with the analysis of effects in the typical EC decision?