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THOUGHTS ON EXCLUSIVE DEALING & RELATED PRACTICES[1]

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Exclusive dealing is a practice that can either enhance or harm competition. It can enhance competition by, among other things, providing an incentive for distributors to focus attention on a manufacturer's products to the possible benefit of overall interbrand competition in the market. It can harm competition by foreclosing access by other competitors to such a significant part of the market that overall interbrand competition in the market suffers.

Under recent case decisions, the antitrust analysis of exclusive dealing agreements varies dramatically depending upon whether the case is brought under Section 1 or Section 2 of the Sherman Act. Some decisions applying Section 1 have recognized a zone of *per se* legality where exclusive dealing is legal *unless* the plaintiff proves that resulting foreclosure rises above a high threshold level. In contrast, in decisions applying Section 2, monopolists have been held liable even though the plaintiff's proof failed to establish the extent of the resulting foreclosure and even though there were significant alternative channels of distribution that were not affected by the exclusive dealing agreements. While it is generally accepted that a monopolist may be liable for practices that would not be illegal if done by a non-monopolist, the extent of the current disconnection between the two sections is surprising.

In the discussion that follows, I raise a number of questions about the state of the law in this area. I recognize that I ask more questions than I answer and that the paper is far from a comprehensive treatment of the subject. It has been written for the upcoming 2005 Sedona Antitrust Conference, and I hope merely to stimulate discussion on these important issues at the conference.

SECTION 1: THE RULE OF REASON AND SUBSTANTIAL FORECLOSURE

Under Section 1,[2] the law is clear that exclusive dealing is not among the small category of practices that are *per se* illegal. This is appropriate, because exclusive dealing clearly does not meet the demanding standard for *per se* treatment of almost always being anti-competitive. In many contexts, exclusive dealing could not harm competition, and there are legitimate business reasons for such agreements.

The traditional alternative to *per se* analysis is the rule of reason under which the competitive harms and benefits are both considered and weighed. The rule of reason typically requires that a plaintiff define a market and show actual harm to competition in that market, significantly increasing both the expense and the risk of the case and therefore reducing the number of situations in which a challenge is likely to occur. It is worth noting, however, that if a plaintiff makes a sufficient showing to get to the jury, reversal on appeal is much more difficult. This is important, because in my experience with both actual cases and jury studies, juries do not like exclusive dealing, especially where the plaintiff is a smaller player whose products were stocked and promoted by retailers before they signed the exclusive dealing agreements.

1 I appreciate the assistance of Chris Walton in finalizing this paper.
2 A similar, if not identical, standard of analysis now applies for Section 3 of the Clayton Act. Some courts have held that an identical standard applies to both statutes. However, the cases are divided, with a likely majority stating that the Clayton Act requires a smaller showing of anticompetitive effects. See Herbert Hovenkamp, Antitrust Law, Paragraph 1800, at 17 (2d ed. 2005). *See also Tampa Electric Co. v. Nashville Coal Co*., 365 U.S. 320, 335 (1961) (indicating that the Clayton Act has a "broader proscription" than the Sherman Act, but not elaborating on the difference); *United States v. Microsoft Corp*., 253 F.3d 34, 69 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001) (Sherman Act test is less aggressive; quoting Professor Hovenkamp); *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380, 393 (7th Cir. 1984) (suggesting same rule of reason test under both statutes).

Rule of reason analysis is inherently open-textured. Virtually anything that bears on the competitive risk or benefit of the practice is fair game. Because the rule of reason is the "default standard" when a *per se* rule does not apply, it also applies to exclusive dealing agreements. However, from an early time in the development of the law, the central question in exclusive dealing cases has been phrased predominantly in terms of whether there has been substantial foreclosure of the defendant's competitors.[3] The underlying assumption obviously is that the extent of the foreclosure is the best measure of the likely competitive effect. However, it is not entirely clear that the full range of rule of reason factors-both pro and con-make their way into this focus on foreclosure, or, if they do, how they do.

The extent of the foreclosure is usually described in terms of the percentage of the total relevant capacity at the distributor level. This measure is obviously relevant to the competitive effect of the practice, but, even assuming it is easy to measure,[4] other factors may significantly influence the competitive effect of any given percentage of foreclosure. Nevertheless, in exclusive dealing cases, the game is largely played on the field of foreclosure.

In the early cases, relatively small percentages of foreclosure were characterized as substantial, with the result that the exclusive dealing agreements were rather easily held to be illegal. In *Standard Oil Co. v. U.S.*,[5] for example, the actual foreclosure was only 6.7%.[6] More recently, however, courts have increased the level of foreclosure necessary to qualify as "substantial." In *U.S. v. Microsoft*, for example, Judge Jackson held that Microsoft's exclusive dealing arrangements were legal under Section 1 because they did not foreclose as much as 40% of the market.[7] On Microsoft's appeal, the D.C. Circuit stated in passing that a "40% or 50% share [is] usually required" in order to establish a Section 1 violation. However, this language is only dicta because the United States did not appeal Microsoft's victory on this issue.[8]

In general, the raising of the bar of proof of foreclosure necessary to establish liability is clearly a movement in the right direction. Small percentages of foreclosure seem highly unlikely to harm competition and probably have an efficiency explanation. The interesting question is whether the shift has gone so far as to essentially immunize conduct that actually may harm competition.

The idea of a safe harbor within which companies may engage in practices without the expense and risk of a full-scale rule of reason trial is intuitively attractive. Like all complex litigation, antitrust cases are expensive to defend, and this is especially true under the rule of reason. Except in extreme cases, however, the gain in litigation efficiency may be somewhat illusory. In order to determine the extent of foreclosure, detailed economic analysis will be necessary in order to define and "size" the affected market and calculate the percentage of foreclosure.[9] These are classic fact questions that will usually require expert analysis.

By requiring foreclosure to exceed 40% before a Section 1 violation can possibly exist, Judge Jackson's standard significantly narrows the range in which the rule of reason operates. It may not be possible to define with a single variable the conditions under which a particular practice *cannot* harm competition across a broad range of market conditions. The challenge, of course, is the obverse of defining the conditions sufficient to hold a practice to be illegal *per se*. Judge Jackson's approach uses an "on/off" switch. If foreclosure is below 40%, then no Section 1 violation can occur, regardless of the presence of other factors that create a risk to competition. At low percentages of foreclosure, one can be reasonably confident that harm to competition is not likely. The hard question, of course,

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3 Foreclosure can also apply to supply of necessary inputs, but for convenience I focus on distribution.
4 As discussed in more detail below, the question of what capacity is to be counted is often a contentious one.
5 337 U.S. 293 (1949).
6 As mentioned in note 1, although *Standard Stations* dealt with Section 3 of the Clayton Act, it is generally accepted that a similar foreclosure percentage analysis applies to Section 1 of the Sherman Act.
7 1998 U.S. Dist. LEXIS 14231, 61 (1998) ("[P]laintiffs must establish foreclosure on the order of greater than 40% to prevail on their exclusive dealing claims.").
8 *U.S. v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001).
9 In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the Supreme Court interjected an element of the rule of reason into the supposedly *per se* rule against tying. In order to have the benefit of the *per se* rule, a plaintiff must show that the tying product has at least 30% of its market. However, once issues of market definition are introduced into the analysis, it becomes difficult to say the rule is one of *per se* illegality. Moreover, the rule seems to require the effort at the wrong place. If a detailed economic analysis is necessary, why not just look directly at the tied product market, where the competitive harm supposedly happens?

is where to draw the line. In *Continental TV v. GTE Sylvania*, the Supreme Court required demonstrable economic support for *per se* rules.[10] Does the current economic literature support the drawing the line at 40% regardless of other facts? As the level of foreclosure increases, the presence or absence of other factors arguably becomes more important. The particular factor that has come to play an increasingly important role in rule of reason cases is, of course, market power.

The ultimate reason for being concerned with foreclosure is the prospect that the exclusive dealing will enable the defendant to obtain or maintain market power in the primary market. Obviously, a firm that can foreclose 40% of the distribution of a product must control a high percentage of that product, although it does not necessarily follow that the firm necessarily would have market power. Are there economic studies that relate market power in a primary market with the ability to foreclose distribution in a secondary market?[11] Other things being equal, the greater the defendant's market power, the less foreclosure one might require before becoming concerned about harm to competition.

The recently issued Model Jury Instructions blend the factors of market power and foreclosure in a way that seems to leave more room for the plaintiff to reach a jury. The instructions state that "[w]here the resulting foreclosure is less than 20% of the market, this is an indicator that the harm from the foreclosure is not substantial because there are alternatives available."[12] They also tell the jury that it should consider the defendant's market power and that, in the absence of market power, exclusive dealing cannot result in substantial harm to competition.[13]

Compounding the difficulty of applying any standard based on the percentage of foreclosure is the likely factual dispute about what goes into the denominator of the fraction. With exclusive dealing agreements, one can fairly easily total up the amount of distribution covered by the agreements. But the question remains of how to calculate the total market of which exclusive agreements are a part. This is not an easy question because there are often multiple channels of distribution that may differ in their importance to ultimate competitive success. For example, when a food product is sold in both supermarkets and convenience stores, should both be included in the denominator, or is it enough for liability that the defendant's agreements have secured a very high percentage of the available capacity in convenience stores alone? Will a competitor suffer more harm by being kept out of supermarkets or convenience stores? What if there is much more profit per unit sold in convenience stores? What if the cost of the promotional deals means that there is very little profit per unit sold in supermarkets? Yet, despite that low profit per unit, what conclusion follows from the fact that the major competitors compete vigorously to lock up as many supermarkets as possible? Answering these questions requires detailed examination of how the particular business operates, an examination that would involve many of the issues in a rule of reason analysis, and thus throws into question how much litigation efficiency is achieved by a focus on foreclosure alone. The reality is that calculating foreclosure is not always as easy as it might seem.

In evaluating foreclosure, some courts have assigned particular significance to the question whether the exclusivity provision is subject to either a short term or is terminable on short notice.[14] The economic logic of considering this factor is obvious: To the extent that the exclusivity is subject to being ended as a result of another competitor offering a better deal, the concern about foreclosure of competitors should be assigned less weight. The competitors merely need to make better offers to avoid being foreclosed. Some cases have gone so far as to hold that exclusive dealing provisions that

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10 433 U.S. 36, 55 (1977).

11 *See* ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 Edition, B-125 (2005). ("In determining if defendant's exclusive dealing contracts substantially harmed competition, you should also consider defendant's market power. If the defendant does not possess market power, then there cannot be substantial harm to competition from an exclusive dealing agreement…")

12 *Id* at B-124.

13 *See* Herbert Hovenkamp, Antitrust Law, Paragraph 1821, at 176 (2d ed. 2005) (Professor Hovenkamp concludes that picking the correct number is somewhat arbitrary, and picks a number between the Model Instructions and Judge Jackson, stating that a foreclosure percentages of less than 30 percent appears to impose only benign effects on competition.).

14 *E.g. Omega Envt'l, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), *cert denied*, 525 U.S. 812 (1998) (holding that "because all of Gilbarco's distributor's are available within one year, and most…are available on 60 days notice, a competing manufacturer need only offer a better product or a better deal to acquire their services."); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74, 81 (2nd Cir. 1999); *Roland Mach.*, 749 F.2d at 395.

have a term of less than one year are ipso facto reasonable.[15] While the short term and easy terminability of the challenged agreements are certainly highly relevant, the underlying assumptions deserve closer scrutiny.

The focus on the effective length of the term of the exclusivity rests on the notion that competition in the market properly includes competition for the privilege of exclusivity. In other words, the competition is for the contract that grants the exclusivity.[16] So long as other competitors are not precluded for too long from the opportunity to make competing bids, the assumption is that overall competition in the market will not suffer. Implicit in this analysis is the notion that there is generally something socially useful in the desire to obtain exclusive rights - or, at least a strong presumption that what happens in a free market is likely to be efficient. Also implicit is the notion that it is a good thing that the exclusive rights should go to the competitor who is willing to pay the most for them and to whom, presumably, they have the greatest value. As a general proposition, these assumptions make sense. In a market economy, resources are generally allocated by the willingness and ability to pay. Are there circumstances under which the nominal opportunity for other companies to bid for the exclusive rights is not enough to assure a competitive result? For example, if short term agreements foreclose a large percentage of the market in favor of a company with apparent market power, should it matter that, in fact, the same company wins the contract repeatedly, such that there is little or no turnover? Should it matter that a number of would-be competitors are not able to bid because they do not have the geographic scope demanded for the program as structured by the retailer?

In most cases, the issue is whether a particular company (the defendant) has harmed competition through its exclusive dealing agreements. To what extent is it relevant that other companies in the market are also using exclusive dealing agreements? That fact could point to quite different conclusions. First, the fact that other companies are using the same practice could suggest that the practice has efficiency justifications, which should add weight to the pro-competition side of the ledger. On the other hand, if a market is dominated by a relatively few companies and all those companies use exclusive dealing, the result may be to crowd out other competitors and make entry more difficult, and there could even be a tacit understanding to that effect. These considerations are presumably relevant in a rule of reason analysis, but they have an obvious potential to expand and complicate a case.

OTHER PROMOTIONAL PRACTICES THAT HAVE ELEMENTS OF EXCLUSIVITY

The economic logic of the exclusive dealing cases should apply to distribution practices that resemble exclusive dealing but are different in material ways. A variety of promotional programs may give the favored supplier advantages that are denied to its competitors. Such programs may squeeze the competitors in ways that affect their ability to distribute their products in the ways that they prefer and have used in the past. The programs may have elements of exclusivity, such as the requiring that only the favored product be promoted in the retailers' normal advertising media or that only the favored company's product be included in special racks or containers near a check-out area. For certain products sold through supermarkets and other types of food stores, for example, promotional programs are common in which suppliers compete for certain types of promotional advantages, such as preferred display locations, guaranteed shelf space, and exclusive placement in the grocer's advertising media. These programs do not typically involve pure exclusivity, but competitors who do not have the benefits of the programs often complain bitterly that they are marginalized to a point very close to being excluded. It is at least possible that the total effect of such agreements has a long term effect similar to pure exclusive dealing, but the disfavored products are usually still on the shelves and available to consumers who are willing to spend the time and energy to find them.

Presumably, the appropriate analytical framework is to focus on foreclosure in some form, but how is it to be measured? For example, where the programs guarantee shelf space, should it matter

15 *See, e.g.*, *Thompson Everett, Inc. v. National Cable Adver., L.P.*, 57 F.3d 1317, 1326 (4th Cir. 1995) (exclusive contracts terminable after thirty days to one year do not have substantial anticompetitive effects); *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1983) (thirty-day exclusivity clause is normally a *de minimis* constraint).

16 *See Paddock Publ'g, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996).

that the defendant did not ask for more than its current market share? Some courts have viewed that fact as favorable to the defendant, presumably on the theory that a rational grocer would allocate that percentage of the shelf space for the product category in order to keep the shelves fully stocked to meet demand. On the other hand, if all the current vendors "buy" their share of the available space for that product, new entry could be difficult in the absence of the retailer taking space from other product categories.

An interesting question is whether a plaintiff in a case involving these types of agreements with elements of exclusivity must show the same level of foreclosure as in a case of pure exclusive dealing. Assuming that the exclusive dealing cases have stated the correct standard, it seems that agreements bearing a resemblance to exclusive dealing should have to meet the same test. The argument with such agreements is that "in effect" they foreclose competitors. It seems, therefore, that they should have to show that the "effective" foreclosure is comparable to that required for pure exclusive dealing. Such proof is likely to be difficult, because the harmful effect is likely to be more gradual, and the causal link between the agreement and harm more tenuous. When a new exclusive dealing agreement goes into effect, the foreclosure is immediate. In contrast, when competitors are denied promotional opportunities the effect is a gradual diminution of competitive vigor as their products become marginalized from lack of effective promotion. Perhaps the best way to establish foreclosure in such cases is to show a "before and after" comparison over a reasonable period of time, but the analysis in inherently more complicated.

To what extent is it relevant to show that the product enjoying the exclusivity is so important to the merchant that it cannot realistically accept a similar offer from another competitor? For example, suppose that the defendant has a large share of the market and that its product is frequently used as a promotional product to draw customers into the store where they will buy other products. If the money for the promotional program is used to reduce the price to the consumer, the refusal to participate in the dominant company's program might make it difficult for the retailer to compete with other retailers who are participating. It is not obvious that a retailer could not substitute other products for the same purpose, but what if the facts bear out the argument? The power of the promotional programs to "compel" retailer participation may be increased even further by pricing schemes that link discounts on all products to the retailer's achieving certain volume or even share-of-purchase goals for that product. Ultimately the question is whether these programs are anti-competitive because of their tendency to block new entry and entrench the existing competitors. An interesting question in this regard is how the competitors would use the large sums spent on these programs if they were required to promote in a different manner. Because the European Union antitrust rules are more restrictive than in the United States, there may be some "natural experiments" that could compare the practices in the United States to those in the European Union.

One response to an antitrust claim against a manufacturer who has successfully negotiated a series of exclusive dealing agreements (or promotional programs with some exclusionary elements) is that the manufacturer is simply responding to programs established by retailers. It is true that retailers in some industries have come to rely on the large payments they receive for "selling" this kind of advantage and have programs in which manufacturers are expected to submit proposals on a regular schedule. In some ways, the retailers are not unlike a farmer who leases some of his land for a billboard. Their shelf space, advertising space, and display space are assets that they (arguably) are entitled to sell to highest bidder. Should it matter that the instigation for a challenged practice comes from the retailer? Can we assume that the self-interest of retailers will also protect consumers against the development of a monopoly? In theory, retailers should not want to create a situation that subjects them to a monopoly vendor, but their interest in short term profits may overwhelm their interest in a competitive market, and any given retailer may not be able to evaluate the market-wide effect that is the concern of the antitrust laws. There is some indication that "in-store" promotional efforts are taking an increasing percentage of promotional and advertising dollars. This trend may reflect the decreasing effectiveness of "traditional" advertising in light of the increasing fragmentation of media outlets. If true, does this trend make it more important to ensure that those promotional opportunities are not too concentrated in a few, already well-established companies?

Answering many of the questions I have raised requires more focused economic study. However, a few conclusions are reasonably clear for litigation. A plaintiff should not be able to win a case simply by arguing to the jury that such programs are inherently anti-competitive. Indeed, courts have recognized that promotional programs may produce considerable pro-competitive benefits to consumers by enhancing competition and reducing prices.[17] Moreover, the programs are by definition less exclusionary than true exclusive dealing agreements, and the law is clear that exclusive dealing as such is not illegal. The exclusive dealing cases establish that, even where competitive brands are completely excluded from a store or group of stores by an agreement, a plaintiff must prove more in order to win.[18] It follows from the exclusive dealing cases that "the store is not the market."[19] Therefore, it is not enough to prove that a particular program has completely or substantially excluded a plaintiff from a particular store or chain of stores. Such a program may cause undeniable harm to a competitor, but, the antitrust laws protect competition, not competitors. If there are many other stores in the market that are not affected by the agreement, there is not the required market-wide adverse competitive effect. This point is intuitively obvious in some circumstances. For example, it is not surprising that you cannot purchase a Ford at a Chevrolet dealership. If you want a Ford, you simply have to drive to that dealership. Similarly, the antitrust laws do not guarantee the "right" to obtain your favorite brand of soda in every convenience store.

SECTION 2: THE DIFFERENT STANDARD FOR A MONOPOLIST

As discussed above, in at least some courts, a firm with substantial market power can foreclose up to 40% of the distribution for its product category without liability under Section 1. However, if a firm crosses that indistinct line between substantial market power to monopoly power, the standard shifts dramatically. It is clear from a number of recent cases that exclusive dealing is a dangerous strategy for firms with monopoly power. [20] Unlike Section 1, no safe harbor exists for monopolists under Section 2. To the contrary, recent decisions under Section 2 tend to find liability without nearly the same level of concern about calculating the extent of the foreclosure of explaining how the resulting foreclosure actually harms competition or allows the monopolist to obtain or maintain its power.

The cases are factually complex, and exclusive dealing is not the only practice at issue in them. I do not suggest that the results in these cases were necessarily wrong. The fact that the standard for analyzing a practice used by a monopolist should be different than for a company in a more competitive market is not surprising. What is somewhat surprising is the extent to which courts have been willing to hold monopolists liable without requiring a clear statement of the extent of foreclosure necessary in such a market to justify a finding that the practice really made a difference. Even where the defendant has monopoly power, it is important to require the plaintiff-private or government-to prove the extent of the foreclosure and why that foreclosure is likely to harm competition.

It appears from several recent cases involving exclusive dealing under Section 2 that courts are willing to make finer distinctions concerning the *quality* of admitted alternative distribution channels when a monopolist is involved. In *Microsoft*, for example, it was undisputed that Netscape had alternative ways to deliver large quantities of its browser to potential users, including downloading and wide-spread distribution of disks containing the program. At least for purposes of the monopolization analysis, however, both the district court and the court[21] of appeals held that some channels counted for more than others and based the liability on Microsoft's substantial foreclosing of the channels that appeared to be more effective.[22]

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17 See, e.g., *Roland Mach.*, 749 F.2d at 395 (7th Cir. 1984) (noting the pro-competitive value of exclusivity in preventing competitors from taking a free ride on another supplier's promotional investment); *Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metro. Bottling Co.*, 94 F.Supp.2d 804, 807 (E.D. Ky. 1999) (addressing the competitive merits of calendar marketing agreements, which govern the promotion of soft drinks by retailers, the court stated that "[e]veryone agrees consumer prices would rise if CMAs were eliminated."); *see also Continental T.V* at 55.

18 *See Gonzalez v. San Jacinto Methodist Hosp.*, 880 S.W.2d 436, 442-43 (Tex.App. - Texarkana 1994, writ denied).

19 *Id.*

20 *See United States v. Microsoft Corp.*, 253 F.3d 34, 82 (D.C. Cir. 2001) ("a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a violation.").

21 *U.S. v. Microsoft Corp.*, 87 F.Supp.2d 30, 53 (D.D.C. 2000) ("Navigator can be downloaded from the Internet. It is available through myriad retail channels. It can (and has been) [be] mailed directly to an unlimited number of households.")

22 *Id* at 39 ("Recognizing that pre-installation by OEMs and bundling with the proprietary software of IAPs led more directly and efficiently to browser usage than any other practices in the industry, Microsoft devoted major efforts to usurping those two channels.").

While it makes sense to exclude (or weight differently) channels that are not effective in reaching customers, counseling is very difficult where the differences are shades of gray, and neither the district court nor the court of appeals did a very good job of explaining why it drew the line where it did. Probably the best explanation is that Microsoft's documents made the strategy surprisingly clear, and the courts simply presumed that Microsoft had chosen to control the channels necessary for the strategy to succeed.[23] Also, the "applications barrier to entry" theory of the monopolization claim did not require that Microsoft would monopolize the browser market. Rather, it was sufficient under that theory to show that Microsoft would obtain a critical mass sufficient to discourage developers from shifting to Netscape and thereby preserve its Windows OS monopoly. Although this argument makes economic sense (and apparently was what motivated Microsoft), the court's opinion lacks objective measures of what would constitute a critical mass or how much the various practices used by Microsoft contributed to it.[24] Although the competitive viability of alternative channels of distribution also arises in Section 1 cases, it seems clear that courts will be more sensitive to differences in the quality of available alternatives in Section 2 cases.

In *LePage's v. 3M*,[25] the Third Circuit considered a case in which 3M, a manufacturer of both branded and unbranded transparent tape, offered customers rebates when they purchased products in a number of 3M's different product lines. In order to obtain the maximum discount, the customers had to buy minimum amounts of 3M's products across several categories. LePage's argued that customers were forced to buy 3M's unbranded tape to the exclusion of LePage's product, which had achieved considerable success prior to the 3M program. In affirming, the Third Circuit cited with approval to the *Microsoft* decision. Without identifying any threshold or foreclosure share standard, the court concluded that 3M used exclusive dealing and bundled rebates with the purpose and effect of excluding the LePage's products in violation of Section 2.[26] 3M defended primarily on the theory that the attack on the bundled rebates was really a predatory pricing argument that required proof that 3M had priced below its average variable cost. 3M also argued that LePage's lost its largest customer, K-Mart, as a result of LePage's own failure to "try hard enough" to retain K-Mart's business.[27] In an opinion that is not a model of precision, the court of appeals rejected 3M's legal analysis and found the proof of resulting exclusion to be sufficient for liability. The court held that the bundled rebates should be analyzed as exclusive dealing agreements because that was their effect. It also rejected the idea that a one-year agreement was *per se* legal.[28] Finally, the court also rejected the argument that LePage's had not tried hard enough to retain Kmart.[29]

U.S. v. Dentsply International, Inc.,[30] is a monopolization case under Section 2, brought against the dominant manufacturer of false teeth by the Antitrust Division of the U.S. Department of Justice. Dentsply had exclusive agreements with a number of the largest distributors of dental supplies. After a bench trial, the district court refused to grant an injunction and entered judgment for the defendant. Reversing, the Third Circuit held that the Department of Justice proved its claim against Dentsply based on an extensive system of exclusive dealing agreements with dental supply houses. The court relied in part on the opinions in *Microsoft* and *LePage's*. The district court had rejected the Government's claim based in part on several of the arguments discussed above in the context of the Section 1 analysis-alternative methods of reaching the customers and the terminability of the agreements. As in *Microsoft*, the court held that the exclusive agreements violated Section 2 even though competitors had alternative ways to sell to the dental supply laboratories that supply false teeth to dentists.[31] The court concluded that direct sales were not, in fact, a viable alternative for competitors, and found that the failure of the distributors to shift their business was evidence of the power of Dentsply, rather than lack of effort from the competing manufacturers.

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23 *Id* ("The core of [Microsoft's] strategy was ensuring that the firms comprising the most effective channels for the generation of browser usage would devote their distributional and promotional efforts to Internet Explorer rather than Navigator.").
24 In its opinion, the D.C. Circuit used a highly structured framework of analysis, under which the defendant was required to establish a legitimate business justification after the plaintiff had demonstrated likely harm to competition.
25 324 F.3d 141 (3rd Cir. 2003).
26 *Id* at 158.
27 *Id*.
28 *Id* at 157, n.11.
29 *Id* at 158.
30 399 F.3d 181 (3rd Cir. 2005).
31 *Id* at 192 ("That some manufacturers resort to direct sales [in contrast to selling through dealers] and are even able to stay in business by selling directly is insufficient proof that direct selling is an effective means of competition.").

Finally, in *Conwood v. U.S. Tobacco Co*., the Sixth Circuit upheld a judgment with trebled damages of over $ 1 billion based on a jury's finding that U.S. Tobacco ("USTC") systematically tried to exclude competition from the moist snuff market through the use of, among other things, exclusive dealing agreements. The size and scope of the exclusive dealing agreements were not discussed in any detail. While they were part of the basis for the affirmance, it is also clear that the court was affected by what it viewed as an aggregation of bad acts by USTC, including the following: (1) USTC removed and destroyed or discarded racks that displayed moist snuff products in the stores while placing competitor Conwood's products in USTC racks; (2) trained its "operatives to take advantage of inattentive store clerks with various 'ruses' such as obtaining nominal permission to reorganize or neaten the moist snuff section" in an effort to destroy Conwood racks; and (3) misused its position as category manager by providing misleading information to retailers in an effort to dupe them into carrying USTC products and discontinue carrying Conwood products.[32] It seems clear from the opinion that the court was convinced that USTC had a systematic program of engaging in bad acts to harm competitors. If that conclusion was correct, the result is not surprising. On the other hand, with thousands of USTC sales representatives in the field, there is significant risk that the jury generalized from the bad acts of a relative few to the conclusion that such acts were company policy. With any large company, one can usually find some bad actors in a case spanning thousands of retail outlets over a number of years. The question is whether Conwood turned business torts into the basis for a billion dollar judgment.

CONCLUSION

The standards for evaluating exclusive dealing and similar agreements have made significant strides since *Standard Stations*, but work remains to be done to refine the legal and economic analysis. Exclusive dealing agreements and promotional practices that have a similar effect are widely used, and in many cases originate with the retailers who profit from the payments. In many circumstances, they are not likely to harm competition, although their pro-competitive effects may be hard to measure objectively. If a plaintiff can get a case challenging such practices to a jury-either under the rule of reason of Section 1 or under a monopolization theory under Section 2, there is a serious risk that the jury will find liability. Frequently given instructions allow the jury to find willful monopolization if the challenged practices are not competition "on the merits."[33] Although an economist might conclude that payments for exclusivity or promotional advantages are aspects of competition, many jurors will not see the facts that way. Under Section 2 there is ample evidence from recent cases that jury findings for the plaintiff can be sustained on appeal.

For the future development of the law in this area, it will be important for courts to identify the correct upper limit of the safe harbor within which foreclosure will not be considered unreasonable. Moreover, it remains for courts to flesh out what role, if any, additional factors beyond foreclosure should play in analyzing Section 1 claims with particular emphasis on a defendant's market power. Courts will also have to grapple with questions of how to think about foreclosure in promotional agreements that do not expressly exclude but may have that effect and when it is enough that other competitors have the right to "compete for the contract." Under Section 2, the question is whether the courts can give firms with monopoly power or near monopoly power any more guidance about when they can enter into exclusive dealing agreements without the risk of massive liability.

32 290 F.3d 768, 783 (6th Cir. 2002).
33 *See* MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES at C-26.