BEFORE THE
FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Re: Petition for Rulemaking to Prohibit Exclusionary Contracts

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PETITION FOR RULEMAKING

BY

OPEN MARKETS INSTITUTE, AMERICAN ECONOMIC LIBERTIES PROJECT, AMERICAN GRASSFED ASSOCIATION, AMIBA, BOLD ALLIANCE, COLOR OF CHANGE, COMMUNITY COALITION FOR REAL MEALS, CORNUCOPIA INSTITUTE, DEMAND PROGRESS EDUCATION FUND, FAIR WORLD PROJECT, FAMILY FARM ACTION ALLIANCE, FARM AID, FARMWORKER ASSOCIATION OF FLORIDA, FOOD & WATER ACTION, FRIENDS OF FAMILY FARMERS, FRIENDS OF THE EARTH, HEAL, IN THE PUBLIC INTEREST, INITIATIVE FOR MEDICINES, ACCESS & KNOWLEDGE (I-MAK), INSTITUTE FOR LOCAL SELF-RELIANCE (ILSR), JOHNS HOPKINS CENTER FOR A LIVABLE FUTURE, NORTHERN PLAINS RESOURCE COUNCIL, OKLAHOMA STEWARDSHIP COUNCIL, ORGANIZATION FOR COMPETITIVE MARKETS, PEOPLE'S PARITY PROJECT, PUBLIC JUSTICE, RURAL ADVANCEMENT FOUNDATION INTERNATIONAL-USA (RAFI-USA), SAN LUIS VALLEY LOCAL FOODS COALITION, SERVICE EMPLOYEES INTERNATIONAL UNION, SOCIALLY RESPONSIBLE AGRICULTURAL PROJECT & WAREHOUSE WORKER RESOURCE CENTER

AND IN THEIR INDIVIDUAL CAPACITIES

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Petition for Rulemaking

The Open Markets Institute, thirty farm and food justice, independent business, labor, public interest, and worker rights organizations and five scholars submit this petition, pursuant to the Administrative Procedure Act and the Federal Trade Commission Act, to request the Federal Trade Commission ("FTC") initiate a rulemaking to prohibit businesses from using exclusive dealing, exclusionary payments, and other similar practices (hereafter "exclusionary contracts" or "exclusive arrangements") that substantially foreclose rivals from customers, distributors, or suppliers of critical inputs. Under the requested rule, the FTC could bring enforcement actions against firms that engage in any of the conduct described below.

Introduction

Monopolists and other dominant firms across the economy use exclusive arrangements to marginalize rivals and preserve their own power over customers, distributors, suppliers, and workers. Firms with dominance can coerce or induce customers, distributors, and suppliers into limiting their dealing with rivals or not dealing with rivals altogether. In concentrated markets, monopolists and oligopolists can use exclusive dealing, exclusionary payments, and related practices to thwart the entry and success of new and small firms and to restrict the freedom of their trading partners. This exclusionary conduct, by stifling or reducing business rivalry on the merits, can inflict substantial injury on consumers and sellers, in the form of higher prices, lower quality products for purchasers and lower prices and other less favorable terms of trade for suppliers.

In the past two decades, the FTC, the Department of Justice ("DOJ"), and private antitrust enforcers have successfully litigated and settled many monopolization suits alleging

improper exclusionary contracts, including against dominant firms in credit card networks,[1] hospitals,[2] iron pipe fittings,[3] microprocessors,[4] personal computer operating systems,[5] pet diagnostic equipment,[6] and transmissions for large trucks.[7] As of June 2020, the FTC had three pending cases involving exclusionary contracts by dominant firms manufacturing or offering anti-parasitic medication,[8] prescription routing,[9] and wireless modem chips.[10] In addition to these litigated or settled matters, public reports suggest improper exclusive dealing by dominant firms in many other industries, such as beer,[11] food distribution,[12] medical instruments,[13] and professional sports.[14]

Dominant firms' justifications for exclusivity are unpersuasive. The commonly cited rationales for exclusive dealing are securing loyal and dedicated distributors, protecting seller investments in a dealer network, defending manufacturer brands and products against passing-off, and achieving economies of scale. The dealer commitment and economies of scale

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[1] United States v. Visa U.S.A., Inc., 344 F.3d 229, 234 (2nd Cir. 2003).
[2] Complaint at 1–2, United States v. United Regional Health Care System, (No. 11-00030) [hereinafter United Regional Complaint], https://www.justice.gov/atr/case-document/file/514171/download.
[3] McWane, Inc. v. FTC, 783 F.3d 814, 840–42 (11th Cir. 2015).
[4] Intel Corp., 2010 WL 4542454. Complaint at 2–5, Intel Corp. (November 2, 2010) (No. 9341), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf.
[5] United States v. Microsoft Corp., 253 F.3d 34, 76–77 (D.C. Cir. 2001) (en banc).
[6] Idexx Labs., Inc. (*Idexx Labs*), 155 F.T.C. 241 (2013), 2013 WL 8364897, *1–3.
[7] ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 286–89 (3d Cir. 2012).
[8] *See* Redacted Amended Complaint for Injunctive and Other Equitable Relief at 19, FTC v. Vyera Pharmaceuticals, (No. 20-00706) [hereinafter Vyera Complaint], https://www.ftc.gov/system/files/documents/cases/161_0001_vyera_amended_complaint.pdf.
[9] Complaint at 1, FTC v. Surescripts (D.D.C. Apr. 17, 2019) (No. 19-01080) (stating routing is the transmission of prescription and prescription-related information from a prescriber (via the prescriber's electronic health record ("EHR") system) to a pharmacy) [hereinafter Surescripts Complaint], https://www.ftc.gov/system/files/documents/cases/surescripts_redacted_complaint_4-24-19.pdf.
[10] FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019).
[11] Tripp Mickle, *Craft Brewers Take Issue With AB InBev Distribution Plan,* WALL ST. J. (Dec. 7, 2015), https://www.wsj.com/articles/craft-brewers-take-issue-with-ab-inbev-distribution-plan-1449227668.
[12] Claire Fitch & Raychel Santo, *Instituting Change: An Overview of Institutional Food Procurement and Recommendations for Improvement*, JOHNS HOPKINS CTR. FOR LIVABLE FUTURE 24 (Feb. 2016), https://clf.jhsph.edu/publications/instituting-change-overview-institutional-food-procurement-and-recommendations.
[13] Marion Healthcare, LLC v. Becton Dickinson & Co., 952 F.3d 832 (7th Cir. 2020).
[14] Antitrust Class Action Complaint at 7, Cung Le v. Zuffa, LLC, 108 F. Supp. 3d 768 (N.D. Cal. 2015) (No. 14-05484) [hereinafter UFC Complaint], https://bergermontague.com/wp-content/uploads/2018/03/0001-2014-12-16-complaint.pdf.

justifications are especially limited for dominant firms. They typically offer products that are essential for dealers to carry and sell and have likely achieved scale economies in their production already. Furthermore, for all these objectives, dominant firms have alternatives that are less restrictive than exclusive arrangements with their distributors. For instance, to secure dealer commitment, dominant firms can attract dealer interest by producing high-quality products that customers demand and that provide attractive margins to retailers and other distributors. To protect against free riding by dealers motivated by short-term gains, dominant firms can require dealers to pay an upfront fee for training and services and recoup their investment this way.

Even as enforcers have succeeded in challenging the exclusive dealing of some dominant firms, the government and private plaintiffs have had to labor under the rule of reason standard.[15] With the present rule of reason approach under the Sherman Act, exclusive dealing even by monopolists enjoys an effective presumption of validity and legality. Antitrust enforcers must devote substantial time and resources developing and prosecuting a case against a dominant firm's exclusionary conduct. Due to the defendant-friendly legal standard, many dominant firms likely avoid liability for harmful exclusive dealing and, at a minimum, can rely on a legal process that is structured in their favor. And even under the best-case scenario, the rule of reason prevents quick, effective termination of exclusionary contracts, meaning the public bears the burden of monopoly and oligopoly power for an extended period. Courts justify the present rule

[15] *See* 11 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1820b, at 177 ("Most decisions follow the language in the Supreme Court's *Tampa Electric* decision indicating that a complete rule of reason analysis is essential, and foreclosure percentages represent only a first step in the inquiry.").

of reason approach to exclusionary contracting by dominant firms by citing the purported benefits of exclusive dealing.[16]

Given the prevalence of exclusive arrangements by dominant firms, the FTC should initiate a rulemaking to prohibit this practice using its unfair methods of competition authority and the Administrative Procedure Act.[17] The FTC should build on the implicit rules of fair competition embodied in Sherman Act case law and the FTC's explicit authority to identify and prohibit unfair methods of competition.[18] Because of the very real harms from exclusivity and its limited and unpersuasive justifications, the FTC should prohibit, as a per se violation of the FTC Act, exclusive dealing, exclusionary payments, and related practices that substantially foreclose rivals from customers, distributors, or suppliers of essential inputs. The Supreme Court, in interpreting the Clayton Act's restrictions on exclusive dealing, adopted this test in the 1949 decision *Standard Oil Co. of California v. United States*.[19] To provide guidance to business and the public, the FTC should define "substantial foreclosure" and establish that it can be shown through firm dominance, quantitative foreclosure, or qualitative foreclosure. This rule would provide greater legal clarity to businesses of all sizes. It would encourage dominant firms to compete through means other than besides exclusive dealing and associated practices. At the same time, this rule would allow small or non-dominant firms to use exclusivity as they see fit, in light of the minimal risk of exclusion of rivals and coercion of trading partners.

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[16] *See ZF Meritor*, 696 F.3d at 271 ("Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason.").
[17] *See* 15 U.S.C. § 45 (granting Commission power to declare and prohibit "unfair methods of competition in or affecting commerce").
[18] The Magnuson-Moss Warranty Act imposes special procedures on FTC rules on unfair or deceptive acts and practices but it does not apply to rules on unfair methods of competition. 15 U.S.C. § 57a(a)(2). As a result, FTC rules on unfair methods of competition are governed by the Administrative Procedure Act's general notice-and-comment requirements for rulemakings. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).
[19] 337 U.S. 293 (1949).

I. Theory: Monopolistic and Oligopolistic Firms Can Use Exclusionary Contracts to Foreclose Rivals and Control Trading Partners

A. Firms Can Maintain and Fortify Dominance Through Actual and Effective Exclusive Dealing

For monopolistic and other dominant firms, exclusivity arrangements with customers, distributors, and suppliers can be a powerful instrument of entrenching their power. Dominant manufacturers, for example, can prohibit their distributors from carrying rivals' products. In a similar fashion, distributors can maintain their power by prohibiting suppliers from dealing with rivals.[20] Manufacturers can also use incentives and penalties to encourage distributors not to sell the goods of competitors. By tying up customers, distribution outlets, or suppliers, dominant firms can marginalize and exclude competitors as well as potential entrants from their markets and maintain their power over consumers and suppliers.

Conventional exclusive dealing by a dominant firm entails the use of economic coercion. A monopolist can demand that a distributor or customer not deal with the monopolist's actual and potential competitors. When this purchaser is dependent on the monopolist, the purchaser has no choice but to accept the monopolist's terms.[21] Otherwise, the purchaser may have to forgo purchasing a product or service essential for their well-being as a customer or viability as a distributor. A dominant purchaser can similarly demand exclusivity from a supplier and condition continued dealing on the supplier not selling its output to rivals of that dominant purchaser. For the supplier, the practical choice may be to sell to its largest and potentially only

[20] For an example from the 19th century, see RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 101, 146 (2010) (describing how Western Union, the then-dominant provider of telegraph messages, entered into an exclusive agreement with the New York Associated Press ("NYAP"), which required NYAP's members to exclusively use Western Union's telegraph service and prohibited them from creating their own telegraph network). An 1874 Senate investigation concluded that Western Union's exclusive agreements "amalgamate[d] rival [telegraph] lines, and thereby end[ed] all competition, and reduce[d] the press to entire subjection to its power."). *See* S. REP. NO. 43-242, at 3 (1874).

[21] Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 141, 150 (Robert Pitofsky ed., 2008).

customer on its restrictive terms or suffer a substantial loss of revenue.[22] For the dominant firm, exclusive dealing can function as a form of "cheaper exclusion" or "naked exclusion" in which it marginalizes rivals at only a modest cost to itself and confers little or no benefit to consumers and the public.[23]

Dominant firms can obtain effective exclusivity or near exclusivity from customers, distributors, and suppliers through other means. A common tactic is to offer incentives for not dealing with rivals or limiting business with them—alternatively framed as penalties for dealing with rivals. These practices are known as disloyalty penalties, loyalty rebates, or exclusionary payments (hereafter collectively "exclusionary payments").[24] This type of contract can prompt trading parties to do most or all their business with the dominant firm. Under this pricing contract, a purchaser that reaches the specified threshold can receive per-unit rebates on all its purchases up to and including the final unit.[25]

Consider a hypothetical market share penalty involving a dominant maker of steel tubing and its distributors. This firm offers distributors a lower price per unit if the distributor purchases 90% or more of its yearly steel tubing requirements from the dominant firm. The dominant firm sells steel tubing at $1,000 per ton if the distributor purchases 90% or more of its needs from the firm and it will sell at $1,100 per ton if the distributor purchases less than 90%. Assume one of

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[22] *Id.*

[23] STEVEN C. SALOP, CONDITIONAL PRICING PRACTICES AND THE TWO ANTICOMPETITIVE EXCLUSION PARADIGMS 18 (June 23, 2014), https://www.ftc.gov/system/files/documents/public_events/302251/salop_0.pdf.; Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 360–61 (2002); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON REV. 296, 296 (2000).

[24] Einer Elhauge, *How Loyalty Discounts Can Perversely Discourage Discounting*, 5 J. COMPETITION L. & ECON. 189 (2009). As Elhauge notes, "Without some comparison to but-for prices [prices charged in absence of loyalty requirement], any loyalty discount or rebate could equally be called a disloyalty penalty imposed on buyers who refuse to restrict purchases from the seller's rivals." *See* EINER ELHAUGE, UNITED STATES ANTITRUST LAW AND ECONOMICS 404 (2d ed. 2011).

[25] Willard K. Tom, David A. Balto, & Neil W. Averitt, *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 627–29 (2000).

the distributors purchases 100 tons per year. If it purchases 90 tons from the dominant firm, it will pay a total of $90,000. If, however, it purchases 89 tons from the dominant firm, it will pay $97,900. Accordingly, the distributor firm has a strong enticement to purchase 90% or more of its steel tubing requirement from the dominant firm. The alternative is to pay a higher price for every unit purchase and potentially pay more for less. The manufacturer penalizes the distributor for purchasing less than this threshold share of its needs. In other words, the distributor has to pay an effective tax to the dominant firm to purchase 15% or 20% of its steel tubing requirements from the rival.

A dominant firm's use of exclusionary contracts, regardless of the mechanism it uses,[26] can marginalize and exclude actual and would-be competitors from markets. Exclusive arrangements can block customer access. They can also close off distribution outlets. In many industries, firms may be unable to reach end-use customers directly (at a reasonable cost) and so are dependent on wholesalers and other distributors.[27] Even when not completely foreclosed from a market, rivals may be relegated to a market fringe and unable to grow and succeed on the merits against the dominant incumbent.[28] Upstream exclusivity can similarly harm rivals. A dominant firm can deprive rivals of access to an essential input and force them to leave markets.[29]

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[26] *See* Richard Brunell, General Counsel, Am. Antitrust Inst., Federal Trade Commission and U.S. Department of Justice Workshop on Conditional Pricing Practices: Economic Analysis & Policy Implications 136 (June 23, 2014) ("When you have a true exclusive dealing arrangement, it doesn't matter whether the exclusive dealing arrangement is purchased with a rebate, or a benefit, or is the product of coercion or threat."), https://www.ftc.gov/system/files/documents/public_events/302251/cpp_workshop_transcript.pdf.

[27] Jacobson, *supra* note 22, at 355–56; Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371, 386–87 (2017).

[28] Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 59–60 (2004); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837, 839–40 (1990).

[29] Salop, *supra* note 27, at 384.

Just as a single dominant firm can use exclusivity to marginalize rivals, a small group of firms with collective dominance can use exclusive arrangements toward the same end. Either through direct collusion[30] or conscious parallelism,[31] multiple firms in concentrated markets can together adopt exclusivity with their distributors, customers, or suppliers.[32] Through these contractual barriers, small firms and entrants may be unable to obtain the customers, access the distributional channels, or purchase the inputs they need to grow and compete effectively against the incumbents.[33] With exclusive arrangements upstream or downstream, oligopolistic firms can block and marginalize rivals and prevent entry and thereby maintain their market control.[34]

By blocking rivals and restricting their growth, dominant firms can maintain power over customers and suppliers. Through the foreclosure of rivals, they can impede competition on price and non-price terms to the detriment of purchasers and sellers. Dominant firms insulated from rivalry can maintain high prices to purchasers (including end-use consumers)[35] and low prices

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[30] *See* Fashion Originators' Guild of Am., Inc. v. FTC (*Fashion Originators*), 312 U.S. 457 (1941) (involving association of dress makers who agreed not to sell to retailers who bought from competing manufacturers of "knockoff" clothing).
[31] *See* Am. Tobacco Co. v. United States, 328 U.S. 781, 803–04 (1946) ("Big Three" cigarette makers overbought lower-cost tobacco that discount cigarette manufacturers used).
[32] Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 527, 541 (2013).
[33] C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1185–86.
[34] *See id.* at 1210 ("Effective, anticompetitive parallel exclusion generates several distinct harms. First, like parallel pricing, parallel exclusion allows the excluders to sustain higher prices, which deflects some consumers, who value the good at or above its marginal cost, to less desired substitutes. In fact, exclusion preserves and reinforces parallel pricing. After all, if the insiders are unable to maintain an elevated price on account of easy entry, there is no deadweight loss to worry about. Exclusion therefore can be closely linked to price elevation. Our contention, however, is that price elevation is not the only harm caused by exclusion. The additional harms of parallel exclusion come from slowing or blocking product innovation of two types: the introduction of higher-quality substitutes and lower-cost substitutes.").
[35] Gustavo Grullon, Yelena Larkin, & Roni Michaely, *Are U.S. Industries Becomes More Concentrated?*, 23 REV. FIN. 697, 734–35 (2019); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* 10–11 (Nat'l Bureau of Econ. Research Working Paper No. 25583, 2017). *See also* Jan De Loecker, Jan Eeckhout, & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q. J. ECON. 561, 626 (2020) ("We find that from 1980 onward, markups have risen from 21% to nearly 61% in 2014, an increase of 40 points. For the same period, average profit rates have increased from 1% of sales to 8%. We attribute this rise in market power nearly exclusively to the increase for the firms with the highest markups already.").

and wages to suppliers and workers.[36] In the absence of serious competitors, dominant firms may also feel less pressure to improve the quality (such as durability and functionality) and other non-price features of their products.[37]

B. Antitrust Law Historically Restricted Firms' Ability to Exercise Coercive Power Over Trading Partners Through Exclusive and Other Vertical Arrangements

Vertical restraints are an instrument by which corporations can control less powerful economic actors. Through contract and contract-like arrangements, a powerful manufacturer can restrict the autonomy of a distributor, limiting its freedom to select trading partners and the terms on which it sells its goods. For instance, under exclusive dealing, a manufacturer can bar its distributors from handling the products of manufacturing rivals and prohibit suppliers from selling inputs to competing manufacturers. McDonald's founder Ray Kroc described, and indeed boasted, about how McDonald's controlled franchisees through contract, stating "the only way we can positively know what these [franchisees] are doing what they are supposed to do ... is to give them no alternative whatsoever. You can't give them an inch."[38] Through vertical restraints, firms can vertically integrate in effect,[39] and often shed legal responsibilities that come with traditional vertical integration through ownership and control.[40] Historically, the Supreme Court,

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[36] *See* José Azar, Ioana Marinescu, & Marshall Steinbaum, *Labor Market Concentration*, 12 J. HUMAN RES. 2 (2020) ("Going from the 25th to the 75th level of concentration decreases posted wages by 17% in the baseline IV specification, and by 5% in the baseline OLS specifications."); Efraim Benmelech, Nittai Bergman, & Hyunseob Kim, *Strong Employers and Weak Employees: How Does Employer Concentration Affect Wages?* 3 (Nat'l Bureau of Econ. Research Working Paper No. 24,307, 2018) ("Employers operating in areas with more concentrated labor markets thus appear able to exploit monopsony power in order to reduce employee wages.").

[37] Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation—Update*, SYNTHESIS PROJECT 3 (2012), https://www.researchgate.net/profile/Martin_Gaynor/publication/283910115_The_Impact_of_Hospital_Consolidation_-_Update/links/564a017508ae44e7a28d805e.pdf.

[38] JOHN F. LOVE, MCDONALD'S: BEHIND THE ARCHES 144 (1995).

[39] *See Marion Healthcare*, 952 F.3d at 838–39 ("Vertical integration can occur either by internalizing functions within one firm, ... , or by contract. But contractual vertical integration presupposes independent firms.").

[40] *See* Brian Callaci, *Control without Responsibility: The Legal Creation of Franchising 1960-1980*, at 27 (2018), https://economics.utah.edu/antitrust-conference/session_material/callaci_control.pdf ("By 1980, franchisors had succeeded in establishing their organizational innovation under the law, giving them rights to coordination and

in interpreting the antitrust laws, limited firms' ability to dominate trading partners using vertical restraints.

The Court in *U.S. v. Richfield Oil Corp*. held certain contract and contract-like agreements as per se illegal on the grounds that they interfere with business autonomy.[41] The Court noted the general independence of businesses bound by these restraints, stating that these proprietors "in the performance of a particular contract, or in the conduct of his business, acts chiefly for himself and for his own benefit and profit, and not others and the benefit and profit of others."[42] Vertical restraints that "exercised de facto control over these 'independent business men'"[43] contravened antitrust law, which Congress enacted to secure "equality of opportunity."[44]

The Court subsequently affirmed the purpose of antitrust law as standing "against coercion of non-employees by vertical supply contract"[45] in *Simpson v. Union Oil Co.* The Court emphasized how the contractual agreements shift the risk and liability from the dominant firm to the subordinated firm.[46] These agreements, in attempting to establish resale price maintenance, deprived "independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices."[47] In *FTC v. Brown Shoe Co.*, the Court wrote that the exclusive dealing arrangement at issue "obviously conflicts

control consistent with vertical integration without triggering the responsibilities, under employment and other laws, that traditionally accompanied integration.").

[41] United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd sub nom.* Richfield Oil Corp v. U S, 343 U.S. 922 (1952).

[42] *Id.* at 288.

[43] Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. CONTEMP. PROBS. 45, 49 (2019).

[44] *Richfield,* 99 F. Supp. at 282.

[45] Steinbaum, *supra* note 42, at 49.

[46] Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 16 (1964) ("[W]hile the company pays all property taxes on all gasoline in possession of Simpson, he must carry personal liability and property damage insurance by reason of the 'consigned' gasoline and is responsible for all losses of the 'consigned' gasoline in his possession.").

[47] *Id.*

with the central policy of both s 1 of the Sherman Act and s 3 of the Clayton Act *against contracts which take away freedom of purchasers to buy in an open market*."[48]

In a trilogy of cases regarding the prevailing tying agreements[49] between independent dealers, major oil suppliers, and tire, battery, and accessories ("TBA") manufacturers, the Supreme Court and a federal court of appeals relied on a principle of anti-coercion as a primary objective of antitrust law. The first of these cases, *Atlantic Refining Co. v. FTC* involved contractual agreements with independent service stations in which Atlantic effectively tied its petroleum products to TBA manufactured by Goodyear. The Seventh Circuit held such agreements per se illegal, characterizing the service station dealers, under these contracts, as resembling "more of an economic serf than a businessman."[50] The Supreme Court affirmed the Seventh Circuit's emphasis on anti-coercion, holding that "substantial evidence supports the conclusion that notwithstanding Atlantic's contention that it and its dealers are mutually dependent upon each other, they simply do not bargain as equals."[51]

Further cases in this trilogy affirmed the federal judiciary's anti-coercion principle regarding antitrust law. In *Shell Oil Co. v. FTC*, regarding a similar arrangement between Shell and Firestone, a federal court of appeals once more held effective tying to be per se illegal, noting the imbalance of power in the relationship between Shell and its service station dealers:

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[48] 384 U.S. 316, 321 (1966) (emphasis added).

[49] Some forms of tying can function as an exclusive dealing arrangement, and vice-versa. For example, a hospital that enters into an exclusive dealing arrangement with a group of anesthesiologists restricts patients' freedom to pick their own anesthesiologist and, in effect, imposes a tied package on them. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 33 (1984) (O'Connor, J., concurring).

[50] Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 400 (7th Cir. 1964) ("[T]he heart of this case is the economic power Atlantic possesses over its service station dealers. Ostensibly, they are independent businessmen; but behind the legalistic facade of independence, there exists a servitude caused by the coercive pressures which Atlantic exerts upon its dealers.").

[51] Atlantic Refining Co. v. FTC, 381 U.S. 357, 368 (1965).

> A man operating a gas station is bound to be overawed by the great corporation that is his supplier, his banker, and his landlord. When he hears that Shell will benefit from his patronage of sponsored TBA outlets, the velvet glove of request has within it the mailed fist of command.[52]

Finally, in holding per se illegal a similar arrangement between Texaco and Goodrich, the Supreme Court in *FTC v. Texaco* held that vertical restraints imposed by Texaco on its service station dealers were "inherently coercive"[53] and rejected Texaco's assertion that "the dealer is 'perfectly free' to reject Texaco's chosen brand of TBA."[54]

These decisions from the 1940s through the 1960s were rooted in an economic framework expressed in the legislative history of the antitrust laws. The drafters of the Sherman Act drew from existing common law frameworks around fair trade, economic and vocational liberty, and economic governance by workers and small firms.[55] Denizens of 19th century America believed that a just distribution of control over one's own work would secure economic liberty and political liberty for all without fear of domination.[56] Legislators, well aware of this

[52] Shell Oil Co. v. FTC, 360 F.2d 470, 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967). The court further concluded, "While it is true that it is expensive for Shell to switch dealers, it is far more expensive, in relative terms, for a dealer to lose his station." *See also* FTC v. Texaco, Inc., 393 U.S. 223, 227 (1968) ("The average dealer is a man of limited means who has what is for him a sizable investment in his station. He stands to lose much if he incurs the ill will of Texaco.").

[53] *Texaco*, 393 U.S. at 432.

[54] *Id.* at 433.

[55] James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 296 (1989) (quoting Senator Reed during Senate deliberation of the Sherman Act: "We are trying to keep it so that the feet of the men of to-day may travel along an open path, so that all may have a fair chance to gain a livelihood and to embark in business.").

[56] *Id.* at 295 ("For most of the nineteenth century, however, small proprietors were considered to be the vibrant heart of economic life, indeed, archetypical examples of the 'free laborers' who were thought to be central to the natural economic order of classical economic theory."). *See also* Sanjukta Paul, *Reconsidering Judicial Supremacy in Antitrust* (forthcoming), https://ssrn.com/abstract=3564452.

substantial common law background, expressed an anti-domination principle and a desire to resist concentration of economic power through antitrust law.[57]

In a similar spirit, the drafters of the Federal Trade Commission Act of 1914 expressed an anti-domination principle as an important objective of antitrust law.[58] For example, Sen. Cummins urged his colleagues deliberating on the FTC Act that:

> We must do something to preserve the independence of the man as distinguished from the power of the corporation; that we must do something to perpetuate the individual initiative. … I think we can purchase cheapness at altogether too high a price, if it involves the surrender of the individual, the subjugation of a great mass of people to a single master mind.[59]

As discussed above, in its mid-20th century rulings on vertical restraints and tying, the Court applied one of the Congressional purposes of antitrust law: to prevent powerful firms from coercing their trading partners.

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[57] May, *supra* note 53, at 296. ("While contemporary constitutional analysts denounced state paternalism as a threat to the critical vigor of American individualism and a danger to political and economic independence, congressional antitrust advocates warned that industrial consolidation likewise threatened to create dangerous permanent hierarchies of dominance and subordination among individuals in the economic realm"). *See also* *id.* at 295 n.325 (quoting Senator George during deliberation of the Sherman Act: "We find everywhere over our land the wrecks of small, independent enterprises thrown in our pathway. So now the American Congress and the American people are brought face to face with this sad, this great problem: Is production, is trade, to be taken away from the great mass of the people and concentrated in the hands of a few men …?").

[58] *Id.* at 296. *See also* Zephyr Teachout & Lina Khan, *Market Structure and Political Law: A Taxonomy of Power*, 9 DUKE J. CONST. L. & PUB. POL'Y 37, 62 (2014).

[59] 51 CONG. REC 12742 (1914). Senator Cummins was not alone in raising the issue of subjugation among his colleagues. *See* Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 J. BUS. L. 645, 660 (2018). ("Senator Burton sought to ensure 'a free field for all' in business and warned against irresistible corporate power under which 'equality of opportunity shall be destroyed or the deserving competitor driven out of business.' Senator Lane worried that, without the FTC, the typical small enterprise would be 'driven out of business by his larger or more crafty rival.'").

II. Evidence: Dominant Firms Have Used Exclusionary Contracting: Judgments, Settlements, and Allegations

Antitrust enforcers have alleged and successfully litigated and settled many lawsuits against dominant firms that used exclusionary contracts to marginalize competitors. Based on lawsuits and public reports, exclusionary contracts appear to be pervasive in the U.S. economy and have been employed by powerful firms across sectors.[60]

A. Litigated Cases

The cases that follow in this section were litigated to a final judgment in which a court found the defendant corporation liable for exclusionary conduct.

United States v. Microsoft Corp.

Microsoft was (and still is) the dominant provider of desktop computer operating systems. [61] Microsoft's operating system, Windows, had a market share of over 90%.[62] At the time, the market for internet browsers was in its infancy. Microsoft sought to prevent the development of middleware. [63] Middleware is software that layers on top of existing software and provides an additional development environment. [64] Middleware can be constructed to be interoperable with other operating systems, which, in this case, would threaten Microsoft's monopoly.[65]

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[60] The examples presented in this petition are not intended to be exhaustive. For an allegation of exclusionary contracting not summarized in the text of the petition, see Lina Khan, *How Monsanto Outfoxed the Obama Administration*, SALON, Mar. 15, 2013, https://www.salon.com/2013/03/15/how_did_monsanto_outfox_the_obama_administration/ ("Monsanto also promised significant rebates to seed companies that agreed to ensure its products made up at least 70 percent of certain lines of inventory. Many seed dealers have said Monsanto's policies dissuaded them from promoting competitors' products.").

[61] *Microsoft*, 253 F.3d at 51–57.

[62] *Id.*

[63] *Id.* at 53–54, 70.

[64] *Id.*

[65] *Id.*

In response to increased competition and the threat of middleware, Microsoft formed exclusive deals with 14 of the top 15 internet access providers ("IAPs"), which includes internet service providers ("ISPs") and online services ("OLSs") such as AOL.[66] Microsoft's agreements prohibited OLSs from promoting or providing alternatives to Microsoft's Internet Explorer.[67] Microsoft also engaged in exclusive deals with Apple, which was Microsoft's primary, albeit much smaller, rival in operating systems for desktop computers.[68] In the agreement, Microsoft would develop Office (a word processing suite) for the Mac OS operating system.[69] In exchange, Apple was prohibited from installing a competitor's internet browser on Apple's operating system and from encouraging consumers to use a browser other than Internet Explorer.[70] Microsoft also engaged in exclusive deals with independent software vendors ("ISVs"). Microsoft's agreements required ISVs to use Internet Explorer as the default browser for any software developed with a "hypertext-based user interface" and required the usage of other Microsoft technologies for their applications.[71] Microsoft's agreements with ISVs were meant to ensure that current and future web-centric applications would only rely on browsing technologies found in Windows and provided by Microsoft.[72]

Microsoft's agreements prohibited rival browsers from obtaining sufficient scale needed to become a viable long-term middleware competitor. The agreements also specifically maintained Microsoft's monopoly and discouraged software developers from writing and marketing rival software.[73]

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[66] *Id.* at 67, 71.
[67] *Id.* at 68.
[68] *Id.* at 73.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 71.
[72] *Id.* at 71–72.
[73] *Id.* at 73.

United States v. Visa U.S.A., Inc.

Visa and MasterCard were and remain two of the four dominant providers of network systems in the payment card industry.[74] The payment card industry has several layers. Visa and MasterCard are open joint ventures that are comprised of thousands of member banks.[75] Banks can be members of both networks.[76] The member banks act as issuers of cards, acquirers of the transactional information, or both.[77] Visa and MasterCard are networks that receive the transactional information and then approve or deny the user's transaction for the issuing bank.[78] The issuing bank then sends the approval to the acquiring bank relaying the transaction to the merchant accepting the consumer's transaction with the card they used.[79] At the time the government filed its lawsuit, Visa and MasterCard had 47% and 26% market share, respectively, for payment card transactions.[80]

Visa in 1991, and MasterCard in 1996, adopted policies that prohibited their member banks from issuing American Express or Discover cards.[81] American Express and Discover were the only other competitors in the payment card industry. Additionally, Visa's and MasterCard's agreements stated that, in the event a member bank chose not to abide by the provisions, Visa and MasterCard would stop supporting that institution's card program.[82]

Visa and MasterCard's agreements foreclosed both American Express and Discover from thousands of banks.[83] American Express and Discover had market shares of 20% and 6%,

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[74] *Visa*, 344 F.3d at 234.
[75] *Id.* at 235.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 240.
[81] *Id.* at 235–36.
[82] *Id.* at 236.
[83] *Id.* at 238.

respectively. No bank in the United States was willing to give up its membership in the Visa and MasterCard networks.[84] Through these agreements, Visa and MasterCard restricted competition on fees for merchants' businesses, limited consumers' choice of cards, and impeded innovation in the card network business.[85]

LePage's Inc. v. 3M

3M was the dominant provider of the transparent tape market in the United States, with a market share of more than 90%.[86] Transparent tape manufacturers sell their product to retailers, who sell the product to household and business customers.

In the early 1990s, 3M adopted a series of exclusionary policies in response to increased competition and changing retailer demands in the private label transparent tape market (tape sold under a retailer's name rather than under the name of the manufacturer). 3M's policies include two separate but intertwined practices. First, 3M entered into a series of exclusive agreements with LePage's retail customers.[87] Second, 3M provided substantial rebates to LePage's customers.[88] 3M offered rebates to retailers on the condition the retailer purchased 3M's other product lines.[89] The rebates were structured as all-or-nothing discounts, whereby if the retailer did not meet its target for any one product, the retailer would lose its rebate for the entire set of goods purchased.[90] Thus, 3M encouraged retailers to purchase most or all their requirements across multiple product lines from 3M. Due to these bundled rebates, retailers could maximize

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[84] *Id.*
[85] *Id.* at 240–43.
[86] LePage's Inc. v. 3M, 324 F. 3d 141, 144 (3rd Cir. 2003) (en banc).
[87] *Id.* at 157–59.
[88] *Id.* at 154–57.
[89] *Id.* at 154.
[90] *Id.*

their discounts by dealing exclusively with 3M and purchasing goods from as many 3M product lines as possible.[91]

3M's agreements foreclosed LePage's and prevented other firms from obtaining sufficient and necessary scale to be effective competitors.[92] These contracts also restricted new entry in the market.[93]

United States v. Dentsply International, Inc.

Dentsply was the largest manufacturer of artificial teeth for use in dentures and other restorative appliances.[94] Dentsply had a market share of 75% in 2005.[95] Manufacturers, such as Dentsply, sell artificial teeth to dental product dealers. The dealers, in turn, sell the teeth and other materials to dental laboratories, who serve dentists.[96]

In 1993, Dentsply adopted "Dealer Criterion 6," which explicitly prohibited its 23 dealers from adding rival product offerings, including teeth and other items.[97] If Dentsply discovered that a dealer desired to use a competitor's product, Dentsply threatened to stop supplying dealers that violated the provision.[98] Essentially, these provisions were "all-or-nothing."[99]

Dentsply's exclusionary condition substantially foreclosed rivals from accessing essential dealer networks. Rivals faced obstacles to entry and growth and could not obtain the necessary

[91] *Id.* at 157–59, 162 ("The anticompetitive effect of *3M's exclusive dealing arrangements, whether explicit or inferred, cannot be separated from the effect of its bundled rebates*. 3M's bundling of its products via its rebate programs reinforced the exclusionary effect of those programs.") (emphasis added).
[92] *Id.* at 159.
[93] *Id.* at 162–63.
[94] United States v. Dentsply Int., Inc., 399 F.3d 181, 184 (2005).
[95] *Id.*
[96] *Id*.
[97] *Id.* at 185, 196.
[98] *Id.* at 195.
[99] *Id.* at 196.

scale.[100] The agreements insulated Dentsply from price competition and restricted the freedom of purchasers to obtain teeth and other supplies from Dentsply's competitors.[101]

ZF Meritor, LLC v. Eaton Corp.

Eaton was the largest producer of HD transmissions.[102] Eaton possessed more than 80% market share.[103] HD transmissions are transmissions for class 8 trucks, which include 18-wheelers and industrial trucks such as cement mixers and garbage trucks.[104] The North American market only had four original equipment manufacturers ("OEMs") that purchased HD transmissions from manufacturers.[105] Consumers purchase vehicles from OEMs with the selected HD transmission.[106]

In response to industry-wide decline and a transmission manufacturing joint venture between Meritor and ZF AG, Eaton entered into exclusive dealing agreements with all of the OEM purchasers.[107] The contracts varied slightly but had five-year terms and included a provision under which the purchaser would only receive rebates if it bought a specified percentage of its requirements from Eaton or required a specific market share penetration target.[108] The minimum thresholds ranged from 87% to 97.5% for required purchases and 70% to 95% market share penetration in selected markets.[109]

The agreements also required the purchaser to label Eaton's products as the standard HD transmission in their respective data books.[110] Data books are an important reference for truck

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[100] *Id.* at 191, 195. Dealer Criterion 6 had a narrow "grandfather clause." See *id.* at 185.
[101] *Id.* at 194.
[102] *ZF Meritor*, 696 F.3d at 264.
[103] *Id.* at 264.
[104] *Id.* at 263.
[105] *Id.* at 263–64.
[106] *Id.* at 263.
[107] *Id.* at 264–65.
[108] *Id.* at 265.
[109] *Id.*
[110] *Id.*

drivers to find parts and so component manufacturers rely on their products being listed in these books.[111]

Eaton's agreements foreclosed 90% of the market for its competitors.[112] The agreements prevented Eaton's rivals from successfully marketing and displaying their products in the purchasers' data books and increased the barriers to entry for the HD transmission market, which was already highly concentrated.[113]

McWane, Inc. v. FTC

McWane was the dominant producer of domestic iron pipe fittings ("DIPFs") with a market share of 100% from 2006 until a competitor entered into the market in 2009.[114] McWane's market share was approximately 95% in 2010 and around 90% in 2011.[115] Manufacturers, such as McWane, sell pipe fittings that join pipes together to direct the flow of pressurized water. However, manufacturers rarely sell to end users, which are typically municipal water authorities and their contractors. Instead, manufacturers sell pipe fittings to distributors.[116]

In 2009, as a response to a competitor's forthcoming entry into the domestic DIPF market, McWane implemented its "Full Support Program" in order "[t]o protect [its] domestic brands and market position."[117] The Full Support Program stated that distributors who bought domestic fittings from other competitors might lose their rebates or be cut off from purchasing McWane's domestic fittings for up to three months.[118] Internal documents revealed that

[111] *Id.* at 264.
[112] *Id.* at 267.
[113] *Id.* at 284–86.
[114] *McWane*, 783 F.3d at 819, 830.
[115] *Id.* at 830.
[116] *Id.* at 819.
[117] *Id.* at 820.
[118] *Id.* at 821.

McWane's express purpose was to impede rivals from attaining the scale to become strong competitors.[119]

McWane's agreements foreclosed a substantial share of the distribution of DIPF.[120] The FTC noted that the two largest distributors, which together controlled approximately 50%-60% of distribution, prohibited their branches from purchasing DIPFs from McWane's competitors.[121] These harms were exacerbated by the fact that there were no practical or feasible alternative channels for the distribution of DIPFs.[122] The Full Support Program also allowed McWane to raise prices for domestic fittings and increase its gross profits despite flat production costs. McWane did this across states, regardless of whether its competitors had entered a specific geographic market.[123]

B. Settled Cases

The cases that follow in this section were settled, whereby the defendant agreed to various remedies including not to engage in the exclusionary conduct at issue.

FTC v. Mylan Labs, Inc.

Mylan Laboratories ("Mylan") is a large generic drug manufacturer that had monopoly power in the manufacturing of lorazepam and clorazepate.[124] Lorazepam is used to treat anxiety, tension, agitation, and insomnia.[125] Clorazepate is used to treat anxiety and is an adjunct therapy

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[119] *Id.*
[120] *Id.* at 837.
[121] *Id.* McWane's agreement only had narrow exception for dealing with their competitors. *See id.* at 821.
[122] *Id.* at 839–40.
[123] *Id.* at 824.
[124] FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 33 (D.D.C. 1999), *on reconsideration in part sub nom*. FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999); Complaint at ¶¶ 15, 50, FTC v. Mylan Labs., Inc, (No. 98-03114) [hereinafter Mylan Complaint].
[125] *Mylan Labs*, 62 F. Supp. 2d. at 33–34.

for nicotine and opiate withdrawal.[126] To manufacture these drugs, a manufacturer must be able to obtain the active pharmaceutical ingredient (“API”).[127]

Seeking to raise prices in the absence of patent protection and other market exclusivities,[128] Mylan entered into a series of exclusive agreements with API suppliers in 1997.[129] The agreements required that no other generic drug manufacturer could obtain the API for lorazepam and clorazepate.[130] The agreements were to last 10 years.[131] Due to the restrictive agreements, Mylan was able to raise the cost of clorazepate between 1,900%-3,200%.[132] Mylan was also able to increase the cost of lorazepam by 1,900%-2,600%.[133]

Mylan foreclosed rivals and maintained its monopoly over the two drugs through this exclusionary contracting. Mylan’s conduct raised prices for the two drugs to pharmacies, hospitals, insurers, managed care organizations, wholesalers, government agencies, consumers, and other purchasers.[134] Because of higher prices, some consumers were deprived of necessary pharmaceuticals and thereby suffered harm to their health.[135]

Intel Corporation

Intel Corporation (“Intel”) was and still is the dominant manufacturer of central processing units (“CPUs”) for personal computers.[136] Intel had a monopoly position in the markets for personal computer and server CPUs, and maintained a 75%-85% unit share of these

[126] *Id.*
[127] *Id.* at 34.
[128] *Id.* at 33.
[129] *Id.* at 34.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] Mylan Complaint at ¶ 35.
[135] *Id.*
[136] *Intel*, 2010 WL 4542454. Complaint at 2–5, Intel Corporation (November 2, 2010) (No. 9341), https://www.ftc.gov/sites/default/files/documents/cases/091216intelcmpt.pdf [hereinafter Intel Complaint].

markets since 1999.[137] Intel's share of the revenues in these markets consistently exceeded 80%, and Intel did not face effective competition from any CPU manufacturer.[138] Intel was the only firm with the breadth of CPU products to meet all the requirements of, and be the sole supplier to, most personal computer OEMs.[139] Intel was also the only CPU supplier then with the capability to supply all or nearly all of the requirements of the largest OEMs.[140]

To maintain its monopoly position, Intel engaged in several exclusionary practices,[141] including entering into exclusive deals with OEMs.[142] Intel's exclusionary actions and threats caused some OEMs to reasonably fear that purchasing too many non-Intel CPUs would expose their companies to retaliation from Intel.[143] OEMs were particularly susceptible to retaliation because Intel is a "must-have" or essential supplier for every top OEM.[144] As a result, the OEMs could not shift all, or even most, of their CPU purchases away from Intel; to the contrary, OEMs needed Intel as a primary supplier.[145] Intel used OEMs that were exclusive to Intel to discipline and punish OEMs that chose to deal with Intel's competitors.[146] Intel gave OEMs that agreed to buy CPUs exclusively from Intel the best pricing, supply guarantees in times of shortage, and indemnification from liability relating to the patent litigation initiated by a rival of Intel against several OEMs.[147] Intel also offered these OEMs a slush fund of hundreds of millions of dollars to be used in bidding competitions against OEMs that offered non-Intel-based computers.[148] These

[137] Intel Complaint at 2, 7.
[138] *Id.*
[139] *Id.* at 8.
[140] *Id.*
[141] Other exclusionary conduct included: Punishing customers who did business with Intel's competitors; offering discounts and promotions to loyal customers; paying suppliers not to do business with its competitors; implementing design changes to reduce performance of competitors' products; deceiving customers. *See* Intel Complaint at 2–5.
[142] *Id.* at 8.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 9.
[147] *Id.*
[148] *Id.*

payments were contingent on the OEMs purchasing CPUs exclusively or almost exclusively from Intel.[149]

Intel's actions foreclosed at least 60% of the market.[150] Intel's actions prevented Intel's rivals from effectively marketing their products to customers, harmed competition at the OEM level, and ultimately deprived consumers of their choice of CPUs and graphical processing units.[151]

Transitions Optical, Inc.

Transitions Optical ("Transitions") was the nation's leading manufacturer of photochromic lens treatment. Treated lenses darken when exposed to UV light and fade back to clear when no longer exposed to it.[152] Transitions had a market share of 80% from 2007 to 2012 and possessed monopoly power.[153]

In response to a rival introducing its own photochromic lens treatment, Transitions began entering into exclusivity agreements with certain lens casters in 1999.[154] To ensure casters would sign the agreements, Transitions stopped selling photochromic lens treatment to Signet Armorlite, a lens caster that started selling lenses using photochromic treatments from a rival of Transitions.[155] Other lens casters took this action to mean that Transitions would refuse to deal with them if they sold or promoted a competing photochromic lens treatment.[156]

Transitions also entered into exclusive and other restrictive agreements with its indirect customers, including retailers and wholesale labs, with the purpose and effect of impeding entry

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[149] *Id.*
[150] *Intel*, at *3.
[151] Intel Complaint at 16.
[152] Transitions Optical, Inc., (No. 91-0062), 2010 WL 780378, *1 (Mar. 3, 2010).
[153] *Id.* at *2.
[154] *Id.* at *3–4.
[155] *Id.* at *21.
[156] *Id.* at *3–4. Transitions also terminated another lens caster, Vision-Ease Lens, because Vision-Ease Lens planned to sell a competing photochromic lens, LifeRx. See *id.*

into the market.[157] These agreements foreclosed downstream outlets for photochromic lenses and created significant barriers to entry.[158] Specifically, Transitions entered into agreements with 23 of the top 30 independent wholesale labs that restricted the ability of rivals to promote and sell their photochromic lenses to independent eye care practitioners.[159] The agreements required wholesale labs to sell Transitions' lenses as their "preferred" photochromic lenses and not to promote any competing photochromic lens.[160]

Transitions' exclusionary practices foreclosed its rivals from a substantial share—40% or more—of the entire downstream photochromic lens market.[161] Transitions' exclusive and restrictive agreements with indirect customers also deprived its rivals of access to outlets for the distribution and sale of competing photochromic lenses and impaired their ability to compete effectively with Transitions.[162] Transitions' conduct also increased the prices and reduced the output of photochromic lenses.[163] The agreements also deterred, delayed, and impeded the ability of Transitions' actual or potential competitors to enter or to expand their sales in the photochromic lens market, and reduced consumer choice among competing photochromic lenses.[164]

United States v. United Regional Health Care System

United Regional Health Care ("United Regional") had monopoly power in two relevant markets.[165] First, United Regional had monopoly power in general acute-care inpatient hospital

[157] *Id.* at *5.
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] *Id.* at *6.
[164] *Id.*
[165] Complaint at 1–2, United States v. United Regional Health Care System, (No. 11-00030), https://www.justice.gov/atr/case-document/file/514171/download [hereinafter United Regional Complaint].

services in Wichita Falls, Texas.[166] United Regional maintained a 90% market share in inpatient hospital services. Second, United Regional also had monopoly power in outpatient surgical services.[167] United Regional maintained at least a 65% market share for outpatient surgical services.[168]

United Regional entered into exclusionary contracts with health insurers that excluded United Regional's competitors in the relevant market of Wichita Falls.[169] The contracts required insurers to pay a substantial pricing penalty of 13% to 27% for United Regional's services if they included a competitor of United Regional in their provider network.[170]

United Regional's agreement foreclosed at least 35% of the market.[171] The agreements likely delayed and prevented competitors from expanding in, or entering, the relevant markets, leading to higher health care costs and higher health insurance premiums.[172] By restricting insurers' freedom to contract with rival hospitals and clinics, United Regional's contracts dampened competition on price and quality with existing providers.[173] United's agreements hobbled rivals' efforts to grow and obtain necessary scale.[174]

Pool Corp.

Pool Corp. was the world's largest distributor of pool products.[175] Distributors purchase products from manufacturers and resell them to dealers.[176] Pool Corp. had a national market share of approximately 50% and was the nation's largest buyer of pool products, representing

[166] *Id.*
[167] *Id.* at 1.
[168] *Id.* at 2.
[169] *Id.* at 2.
[170] *Id.*
[171] *Id.* at 19.
[172] *Id.* at 21.
[173] *Id.* at 24–25.
[174] *Id.* at 25–26.
[175] Complaint at *3, Pool Corp., 2011 WL 5881164 (No. 101-0115).
[176] *Id.* at *3–4.

30% to 50% of a manufacturer's total sales.[177] In some local markets, Pool Corp. had a market share of at least 80% or higher and has maintained its monopoly power for at least five years.[178]

After Pool Corp. acquired a competitor and soon after shut it down, a former dealer entered into the distribution business in a local market to compete with Pool Corp.[179] In response to this new competition, Pool Corp. notified all the major manufacturers (three of which represented 50% of the market) in 2003 that Pool Corp. would stop dealing with any manufacturer that sold any of its products to the new entrant and threatened to terminate the purchase and sales of all manufacturers products nationwide.[180] The manufacturers would not be able to replace the volume of lost sales to Pool Corp. with increased sales to another distributor.[181]

Due to Pool Corp.'s exclusionary terms with manufacturers, Pool Corp.'s distributor rivals were foreclosed from 70% of the market.[182] Pool Corp's actions also increased the prices and reduced the output of pool products; deterred, delayed, and impeded the ability of actual or potential competitors to enter or to expand their sales in the wholesale distribution market; and reduced the choice of suppliers available to pool dealers.[183]

IDEXX Labs., Inc.

IDEXX Laboratories ("IDEXX") had a 70% market share in the development, manufacture, and sale of point-of-care ("POC") diagnostic products used by veterinarians who treat companion animals for certain health conditions.[184] The POC market has five distributors

[177] *Id.* at *3.
[178] *Id.*
[179] *Id.* at *4.
[180] *Id.* at *4.
[181] *Id.*
[182] *Id.*
[183] *Id.* at *5.
[184] *Idexx Labs*, 155 F.T.C. 241 (2013), 2013 WL 8364897, *1–3.

that supply veterinarians with POC products.[185] Veterinarians prefer to purchase POC products through distributors because it is often the lowest cost option.[186]

IDEXX contracted with its distributors to sell its products to veterinarians and other users.[187] In particular, IDEXX used all-or-nothing provisions that required distributors to exclusively deal with them or face complete withholding of IDEXX products.

IDEXX's agreements foreclosed 85% of the market.[188] IDEXX's contracts and the tactics reduced the output of POC Diagnostic Products.[189] IDEXX's contracts also deterred, delayed, and impeded the ability of IDEXX's actual or potential competitors to enter or to expand their sales in the market for POC Diagnostic Products.[190] Consumer choice for POC Diagnostic Products was also reduced as a result of IDEXX's contracts.[191]

FTC v. Cardinal Health, Inc.

Cardinal Health was the largest purchaser and distributor of radiopharmaceutical inputs from manufacturers.[192] Radiopharmaceuticals are drugs that contain a radioactive isotope that is used to perform various diagnostic imaging procedures.[193] Radiopharmaceuticals are highly dependent on heart perfusion agents, which are used for heart stress tests,[194] and which cannot operate viably without these agents.[195]

In response to heart perfusion manufacturers seeking alternative radiopharmaceutical distributors, Cardinal Health coerced the only two heart perfusion manufacturers to sign

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[185] *Id.* at *1.
[186] *Id.* at *2.
[187] *Id.* at *4.
[188] *Id.* at *4, *11–13.
[189] *Id.* at *5.
[190] *Id.*
[191] *Id.*
[192] Complaint at 1, 4, FTC v. Cardinal Health, Inc., (No. 15-3031) [hereinafter Cardinal Health Complaint].
[193] *Id.* at 1–2.
[194] *Id.* at 2.
[195] *Id.* at 2.

exclusive distribution rights.[196] As a result of Cardinal's agreements, Cardinal excluded potential entrants and maintained its monopoly over the distribution of radiopharmaceutical inputs in 25 geographic markets.[197] Thus, these agreements allowed Cardinal Health to charge monopolistic prices in 25 geographic markets.[198]

Victrex plc

Victrex plc ("Victrex"), through its wholly owned subsidiary of Invibio, was the dominant supplier of implant-grade polyetheretherketone ("PEEK"). PEEK is a specialty polymer used by medical device makers to construct spinal, orthopedic, and other human implants.[199] Victrex had a market share of 90%.[200] PEEK is sold to medical device manufacturers.[201]

Victrex supplied PEEK to medical device makers primarily pursuant to long-term supply contracts.[202] In response to the threat of increased rivalry, Invibio coerced or induced device makers to accede to exclusivity terms by threatening to discontinue PEEK supply and to withhold regulatory support.[203] The agreements included nearly all device makers that purchase PEEK and all agreements contained some form of exclusivity requirement.[204] This conduct also had the effect of inducing fear in other device makers of potential retaliation from Invibio.[205] Moreover, adequate substitutes did not exist due to high barriers to entry.[206]

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[196] *Id.* at 2, 8–9.
[197] *Id.* at 2.
[198] *Id.* at 2.
[199] Victrex Plc, A Corp., Invibio Ltd., A Corp., & Invibio, Inc., A Corp., (No. 141-0042), 2016 WL 3913333, *1 (MSNET July 13, 2016).
[200] *Id.* at *4.
[201] *Id.* at *1.
[202] *Id.*
[203] *Id.* at *1, *3.
[204] *Id.* at *4.
[205] *Id.*
[206] *Id.*

Victrex's behavior allowed it to maintain monopolistic prices, reduced consumer choice, and impeded rivals from becoming effective competitors.[207] Victrex offered no credible business justifications.[208]

Dial Corp. v. News Corp.

News Corp. was the dominant provider in the in-store promotions market, having a market share over 90%.[209] In-store promoters provide direct marketing materials for retailers, which includes print and electronic signage, end-of-aisle displays, shelf-mounted displays, freezer displays, and floor signage.[210] Retailers purchase in-store promotions from providers and display these materials to consumers.

The plaintiffs alleged that News Corp. engaged in a series of exclusive deals with retailers. Through these contracts, News Corp. allegedly prevented competitors from obtaining a critical mass of distribution necessary to become a viable competitor.[211] The plaintiffs alleged that the agreements foreclosed 73% of the market.[212] Additionally, the agreements were staggered so that only 18%-25% of the total business was available in any given year.[213]

Since the court could not conclude as a matter of law that the consumers benefits of the agreements outweigh the harm to competitors and consumers, the court denied News Corp.'s motion for summary judgment.[214] News Corp. soon after settled the matter with the plaintiffs for $250 million.[215]

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[207] *Id.* at *5.
[208] *Id.*
[209] Dial Corp. v. News Corp., 165 F. Supp. 3d 25, 28 (S.D.N.Y. 2016).
[210] Dial Corp. v. News Corp., 314 F.R.D. 108, 111 (S.D.N.Y. 2015), *amended*, (No. 13-6802), 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016).
[211] *Dial Corp.*, 165 F. Supp. at 29, 31.
[212] *Id.* at 33.
[213] *Id.*
[214] *Id.* 33–34.
[215] Nate Raymond, *News Corp to Settle In-Store Promotions Litigation for $280 Million*, REUTERS (Feb. 29, 2016), https://www.reuters.com/article/us-news-corp-lawsuit-idUSKCN0W2224.

C. Pending Cases

The cases that follow in this section are ongoing and are at different stages of litigation.

FTC v. Qualcomm, Inc.

Qualcomm manufactures baseband processors and other semiconductor devices used in cell phones and tablets (collectively "handsets") and owns and licenses relevant patents.[216] During this time, Qualcomm had a market share of 100% for the Premium LTE modem chipset.[217]

In 2011, Qualcomm offered Apple rebates to make Qualcomm its sole supplier of chips.[218] Qualcomm was focused on exclusivity to hamper rivals.[219] Apple disengaged from Qualcomm's rivals.[220] After a renewal of the agreement in 2014, Apple tried to create a deal with Intel to reduce Apple's dependence on Qualcomm but recognized that returning rebates to Qualcomm (potentially as much as $645 million) made working with Qualcomm's rivals infeasible.[221] Apple did subsequently work with Intel by using its modem chip in one Apple handset model in 2016.[222] Qualcomm then refused to provide Apple with any chips for new devices.[223]

The exclusive agreement between Qualcomm and Apple foreclosed chip rivals from Apple, a leading innovator in smartphones and a major source of sales revenue. This conduct, along with other exclusionary and unfair practices, allowed Qualcomm to maintain its monopoly

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[216] Complaint at 5, FTC v. Qualcomm Inc., (No. 17-00220) (N.D. Cal. May 21, 2019), https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf [hereinafter Qualcomm Complaint]. *Qualcomm*, 411 F. Supp. 3d at 658 (N.D. Cal. 2019).
[217] *Qualcomm*, 411 F. Supp. 3d at 821.
[218] *Id.* at 658.
[219] *Id.* at 728.
[220] *Id.* at 732.
[221] *Id.* at 734–35.
[222] *Id.* at 735–36.
[223] *Id.* at 737–38.

power in the CDMA and premium LTE modem chip markets and maintain unreasonably high royalty rates.[224]

The district court granted permanent injunctive relief.[225] The court held that Qualcomm violated Section 5 of the FTC Act.[226] The case is currently pending on appeal before the Ninth Circuit.[227]

FTC v. Surescripts LLC

Surescripts is a health information technology company that had monopoly power in two separate but complementary markets: electronic prescription routing ("routing")[228] and eligibility,[229] which are often collectively referred to as "e-prescribing."[230] E-prescribing is an accurate and more efficient means for prescribers, pharmacies, and pharmacy benefit managers to file and process patient prescriptions.[231] In 2009, Surescripts had a market share of 95% (of transaction volume) in both the routing and the eligibility markets.[232]

In response to the threat of competition, Surescripts engaged in exclusionary practices beginning in 2009. First, Surescripts changed its pricing policies to encourage long-term exclusivity. [233] These contracts had terms of three years and renewed automatically.[234]

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[224] *Id.* at 762–63.
[225] *Id.* at 812–13.
[226] *Id.*
[227] Disclosure: The Open Markets Institute filed a brief in support of the Federal Trade Commission. *See* Brief of Amicus Curiae Open Markets Institute in Support of Plaintiff-Appellee, *Qualcomm*, 411 F. Supp. 3d 658, https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa173111eef77c8b33cf47/1588205369230/OMI-Brief-in-FTC-v.-Qualcomm-FILED.pdf.
[228] Surescripts Complaint at 1 (stating routing is the transmission of prescription and prescription-related information from a prescriber (via the prescriber's electronic health record ("EHR") system) to a pharmacy).
[229] *Id.* (stating eligibility is the transmission of a patient's formulary and benefit information from a payer (usually the patient's pharmacy benefit manager ("PBM")) to a prescriber's EHR).
[230] *Id.*
[231] *Id.* at 5.
[232] *Id.* at 2.
[233] *Id.* at 18–19.
[234] *Id.* at 18–19.

Surescripts entered into exclusivity agreements with nearly all of its routing and eligibility customers.[235]

Surescripts also reached a four-year exclusive deal with Allscripts, a large electronic health records company and a customer of Surescripts.[236] This deal prevented any rival of Surescripts from obtaining market share and scale with an entity necessary for success in the e-prescribing market.[237] The deal with Allscripts was renewed in 2015 as Allscripts needed access to Surescripts' "must-have" e-prescribing network.[238]

Surescripts implemented these policies because it knew that no competitor could ever offer customers enough savings to compensate customers for the increasing costs customers would face by paying Surescripts' higher non-exclusive prices on the Surescripts transactions.[239] These policies ensured that its customers would pay a higher price on all of Surescripts' transactions unless they used Surescripts exclusively.[240]

Collectively, these contracts foreclosed 80% of the market.[241] Surescripts also leveraged its loyalty contracts to inhibit and prevent competitors from attaining a critical mass of customers, which was necessary to become a viable competitor in the first place.[242] The agreements also led to higher prices, reduced quality, and reduced innovation for routing and eligibility services.[243] Currently, an FTC suit against Surescripts is pending before a federal district judge in Washington, D.C. In March, the court denied Surescripts' motion to dismiss.[244]

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[235] *Id.*
[236] *Id.* at 22.
[237] *Id.*
[238] *Id.*
[239] *Id.* at 2.
[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.* at 44.
[244] FTC v. Surescripts, LLC, 424 F.Supp.3d 92 (D.D.C. 2020).

FTC v. Vyera Pharmaceuticals, LLC

Vyera Pharmaceuticals ("Vyera") sold Daraprim,[245] a life-saving drug for the treatment of Toxoplasmosis. Toxoplasmosis is a parasitic infection that afflicts patients with HIV/AIDS and cancer and organ transplant recipients.[246] Vyera has monopoly power in the market for Daraprim, with a market share of 100% from 2015 to 2020.[247]

In response to the threat of entry after its 4,000% increase in the price for Daraprim, among other things, Vyera entered into a series of exclusive agreements with manufacturers of pyrimethamine. [248] Pyrimethamine is the main ingredient needed to produce Daraprim.[249] Manufacturers need a sufficient amount of Daraprim to create a generic version and obtain FDA approval.[250] Vyera also entered into exclusive agreements with distributors that prevented them from selling samples to rivals.[251]Vyera's agreements extended to nearly every aspect of the distribution chain, including distributors, hospitals, and pharmacies.[252]

These exclusive agreements, due to the lack of substitutes, forced pharmacy benefit managers, which are the administrator of health plans' pharmaceutical benefits, to continue to include Daraprim in their formularies despite the substantial price increases.[253] The agreements also delayed and excluded numerous potential generic competitors, depriving consumers of cheaper alternatives.[254] Currently, an FTC lawsuit against Vyera is pending before the United States District Court for the Southern District of New York.

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[245] Daraprim is the branded name for pyrimethamine. Vyera Complaint at 19.
[246] *Id.* at 15. 19.
[247] *Id.* at 62.
[248] *Id.* at 4, 22–23.
[249] *Id.*
[250] *Id.* at 23–24.
[251] *Id.* at 23.
[252] *Id.* at 24–31.
[253] *Id.* at 63–64.
[254] *Id.* at 43–61.

European Commission Decision Against Google Android

Google was and still is the dominant provider of general internet search and smartphone operating systems (OSs) with its Android OS.[255] Google's market share was 90% in the market for licensable smart mobile OSs and more than 80% in various European countries in 2012 for general search.[256] OSs, such as Android, are licensed to OEMs to install on smartphones, which are then sold to consumers directly or via a mobile network operator (MNO).[257] Smartphone OSs can be loaded with software by OEMs or MNOs to allow consumers to use a variety of features and perform various tasks on their selected devices.[258] Consumers use general search applications and services to locate information on the internet through smartphone software.[259]

In 2011, Google engaged in a series of portfolio-based revenue-sharing payments with OEMs.[260] These agreements provided payments from Google to OEMs and MNOs on the condition that they did *not* install any competing general search service on any device.[261] Internal documents revealed that Google knew that these agreements would result in exclusivity.[262] Google reportedly pays Apple $1.5 billion annually to be the default search engine on Apple mobile devices sold in the United Kingdom.[263]

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[255] Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement, C(2018) 4761 final, 63, 149 (July 18, 2018) [hereinafter Google Android EC Decision], https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf.
[256] *Id.*
[257] *Id.* at 20.
[258] *Id.* at 38–39.
[259] *Id.* at 24.
[260] *Id.* at 270.
[261] *Id.*
[262] *Id.* at 271.
[263] Nick Statt, *Google Is Still Paying Apple Billions To Be the Default Search Engine in Safari*, VERGE, July 1, 2020, https://www.theverge.com/2020/7/1/21310591/apple-google-search-engine-safari-iphone-deal-billions-regulation-antitrust.

Google agreements foreclosed rival search engines from at least 40%-50% of the smartphones sold in Europe in 2011 and 2012.[264] Google's agreements also suppressed innovation by preventing search rivals from obtaining sufficient scale and revenue to become viable competitors.[265] Google agreements also reduced the incentives of OEMs and MNOs to install competing general search services that may have resulted in improved consumer services and features.[266]

In re Keurig Green Mountain Single-Serve Coffee Antitrust Litigation

Keurig is the dominant manufacturer of single-cup brewers with nearly 90% market share.[267] It is also the dominant seller of coffee pods for its single-cup (K-Cup) brewing machines with a 73% market share.[268]

To maintain its monopoly position after Keurig's patent on K-Cups expired in 2012, Keurig enacted exclusive contracts at every stage of the coffee pod manufacturing supply chain, to prevent competitors from making reasonably priced coffee pods for Keurig machines.[269] To become an approved Keurig dealer, distributors were required to sign long-term agreements to not carry competing brands. Keurig's also entered exclusive licensing agreements with major brands such as Starbucks and Dunkin' Donuts, preventing these companies from selling coffee or licensing their brands to any of Keurig's K-Cup or brewing machine competitors.

These exclusive deals cut off competitors from the largest and more cost-efficient services in the K-Cup production and distribution chain. Competitors had to turn to less experienced or less efficient manufacturers to make competing K-Cups, and also had to rely on

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[264] Google Android EC Decision, at 295.
[265] *Id.* at 299.
[266] *Id.* at 273–74.
[267] Complaint and Demand for Jury Trial at 2, TreeHouse Foods, Inc. v. Green Mountain Coffee Roasters, Inc. (S.D.N.Y. 2014) (No. 14-0905) [hereinafter Keurig Complaint].
[268] *Id.*
[269] *Id.* at 38–44.

smaller specialty distributors, all of which increase rivals' costs and limited their market access. Keurig's agreements also prevented competing K-Cup manufacturers from working with high-profile, high-demand brands, so anyone who wants a Starbucks coffee from their Keurig machine, for instance, must buy Keurig's K-Cup pods.

Keurig's exclusion and monopolistic control of the market for K-Cups keep prices high and limit coffee selection. For example, in 2016, a liter of coffee brewed from pods was six times as expensive in North America as a liter brewed from standard grounds, whereas in Western Europe pod coffee was only twice as expensive as traditional brewed coffee.[270] Keurig's agreements have thus reduced consumer choice and increased costs for manufacturers.[271]

In re Epipen (Epinephrine Injection, USP) Marketing, Sales Practices, and Antitrust Litigation

In April 2017, Sanofi filed a lawsuit against Mylan, the manufacturer of EpiPens for emergency epinephrine, for conduct including exclusive dealing arrangements. In August 2017, a federal judge consolidated Sanofi's lawsuit and five other lawsuits against Mylan alleging exclusionary conduct.[272] In December 2012, Mylan had a 99% market share in the epinephrine auto-injector market.[273] In 2013, Sanofi developed its own epinephrine autoinjector known as Auvi-Q to compete with Mylan's EpiPen. In response to the launch of Sanofi's new device, Mylan engaged in exclusionary practices to secure its monopoly in the autoinjector market.[274]

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[270] Matthew Barry, *Keurig's Dominance is Proving a Hindrance to Pod Coffee Expansion in North America,* EUROMONITOR INT'L (April 23, 2017), https://blog.euromonitor.com/keurigs-dominance-proving-hindrance-pod-coffee-expansion-north-america/.
[271] *Id.*
[272] In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., (No. 17-2785), 2017 WL 6524839 (D. Kan. Dec. 21, 2017), http://www.ksd.uscourts.gov/wp-content/uploads/2018/05/Memorandum-and-Order-re-Motion-to-Dismiss-Doc.-98.pdf.
[273] *Id.*at *2.
[274] *Id.* at *3.

For the device to reach the relevant market, it must gain contracts through third party entities such as insurance companies, pharmacy benefit managers, and state-based Medicaid agencies. After the launch of Auvi-Q, Mylan offered large rebates to third parties. These rebates were offered on the condition that third parties exclude the option to offer medical devices from other companies, such as Sanofi.[275] Because of this exclusionary rebate scheme, Mylan prevented Auvi-Q from access to 50% of the auto-injector market. Additionally, Mylan prevented schools from signing contracts with Sanofi by conditioning schools' contracts on exclusivity.[276] Sanofi noted in its complaint that, when it launched its injector in Canada, it captured 21% of the market by the end of its first year.[277] Sanofi notes that because Canadian provincial authorities have control over drug plans, Mylan was not able to use monopolistic practices to exclude Sanofi from the relevant market.[278] In August 2018, the U.S. District Court for the District of Kansas granted Mylan's motion to dismiss in part but refused to dismiss several exclusive dealing allegations.[279] In February 2020, the court ruled that the lawsuit could continue as a class action.[280]

Marion Diagnostic Center LLP v. Becton, Dickinson & Co.

Becton Dickinson has a 60% market share in convention syringes, a 60% share in safety syringes, and a 55% market share for safety IV catheters.[281] Group purchasing organizations (GPO) negotiate medical supply prices with manufacturers. The GPOs Vizient and Premier

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[275] *Id.*
[276] *Id.*
[277] *Id.* at *4
[278] *Id.* at *18.
[279] *Id.* at *19.
[280] Dan Margolies, *A Kansas City, Kansas, Ruling Allows Millions to Join a Lawsuit Over the High Cost of EpiPens*, KCUR (Feb. 27, 2020), https://www.kcur.org/health/2020-02-27/a-kansas-city-kansas-ruling-allows-millions-to-join-a-lawsuit-over-the-high-cost-of-epipens.
[281] Amended Class Action Complaint at 9, Marion Diagnostic Ctr., LLC v. Becton, Dickinson, & Co., 2018 WL 6266751 (S.D. Ill. Nov. 30, 2018) (No. 18-01059), *vacated and remanded sub nom. Marion Healthcare*, 952 F.3d 832 [hereinafter Beckton Dickinson Complaint].

garner 75% of yearly spending on medical devices and supplies by healthcare providers. Additionally, medical supply distributors Cardinal, Owens & Minor, McKesson, and Henry Schein have large market shares.[282]

Since 2010, Becton Dickinson has repeatedly entered into exclusive dealing agreements with GPOs and distributors. [283] Becton Dickinson's agreements required that healthcare providers purchase their syringes only from Becton Dickinson or penalized healthcare providers with higher prices for purchasing products from other manufacturers.[284] Becton Dickinson's agreements required health care providers to purchase 80%-95% of their prior year purchases from Becton Dickinson or risk losing their rebates.[285]

Becton Dickinson's agreements increased the prices of syringes and allowed Becton Dickinson to increase and entrench its market share.[286] In November 2018, a private suit brought by medical providers against Becton Dickinson's exclusionary practices was dismissed by the Southern District of Illinois, a ruling that was subsequently reversed by the Seventh Circuit.[287]

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282 *Id.*
283 *Id.* at 16; Mariah Blake, *Dirty Medicine*, WASH. MONTHLY (July/August 2010), https://washingtonmonthly.com/magazine/julyaugust-2010/dirty-medicine-2/.
284 Beckton Dickinson Complaint at 11–12.
285 *Id.* at 12.
286 *Id.*
287 Jeanette Bayoumi, *Seventh Circuit Decision Addresses the Co-Conspirator "Exception" to Illinois Brick*, HAUSFELD (May 20, 2020), https://www.hausfeld.com/news-press/seventh-circuit-decision-addresses-the-co-conspirator-exception-to-illinois-brick. *See also Marion Healthcare*, 952 F.3d 832.
Disclosure: The Open Markets institute wrote an amicus brief in support of the plaintiffs. See Brief of Amicus Curiae Open Markets Institute in Support of Plaintiffs-Appellants, *Marion Healthcare*, 952 F.3d 832 (No. 18-01059), https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5eaa2ce54f2f3e5a01cb7a5b/1588210923276/OMI-Brief-FILED.pdf.

Le v. Zuffa. LLC

UFC is a mixed martial arts (MMA) promotion company that possesses a 90% market share in the market for the promotion of Elite Professional MMA bouts as well as a monopsony for live Elite Professional MMA fighter services.[288]

The plaintiffs alleged that the UFC has used its monopoly and monopsony power to prevent MMA fighters from participating in fights for rival promoters.[289] Specifically, the UFC's agreements include exclusivity provisions that prohibits the fighters from participating in fights that are televised or organized by a competitor of UFC.[290] These agreements thus limit the number of fighters whom rivals can hire when organizing matches.[291] Other contractual provisions such as "Right to First Offer" and "Right to Match" provide UFC the ability to match offers made to a UFC fighter and thus limit a fighter's ability to fight in matches organized by UFC's competitors.[292] "Ancillary Rights" contractual clauses also extend the UFC's exclusive access to a fighter's identity by including rights to "all persons associated with " the fighter *even after* the fighter finishes their contract with the organization.[293] This can include broadcast rights, video game appearances, and other third party commercial entities seeking to market the fighter.[294] The UFC's tolling provisions prolong a fighter's contract when they refuse to participate in a fight, are injured, or retire.[295] The provision prevents athletes from signing with a UFC competitor.[296]

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[288] UFC Complaint at 7.
[289] *Id.* at 110, 112.
[290] *Id.*at 113.
[291] *Id.*
[292] *Id.*
[293] *Id.*
[294] *Id.*
[295] *Id.*
[296] *Id.*

In 2018, the plaintiffs filed a motion for class certification.[297] Class certification hearings finished in September 2019. The decision on whether to certify the class is currently pending.

Pfizer, Inc. v. Johnson & Johnson

Johnson and Johnson (J&J) manufactures Remicade, a drug used to treat autoimmune disorders such as rheumatoid arthritis, Crohn's disease, and ulcerative colitis.[298] J&J has a 90% market share in the relevant market for treating autoimmune conditions and has maintained its position for two decades.[299]

In 2017, Pfizer accused J&J of exclusionary contracting and bundling practices. Pfizer launched a lower priced competitor in 2016 to Remicade called Inflectra and has accused J&J of blocking Inflectra from the market.[300] J&J forced healthcare providers to sign exclusionary contracts.[301] These provided rebates and discounts on Remicade on the condition that Remicade was the only drug bought to deal with autoimmune conditions.[302] Eligibility for rebates was conditioned on buying the same amount of Remicade that was bought the prior year.[303] Health care providers were forced, or significantly encouraged, to give new patients—who account for 30% of prescriptions per year—Remicade if they wanted to obtain J&J's rebates.[304] Pfizer states that J&J entered into agreements with the major health insurers including UnitedHealthcare,

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[297] Paul Git, *the Games Being Played in the UFC Antitrust Lawsuit*, FORBES (Oct 22, 2019), https://www.forbes.com/sites/paulgift/2019/10/22/games-being-played-in-ufc-antitrust-lawsuit-class-certification-hearings-mma-news.

[298] Complaint at 1, Pfizer, Inc. v. Johnson & Johnson (No. 17-04180) [hereinafter Johnson & Johnson Complaint], https://www.docketbird.com/court-documents/Pfizer-Inc-v-Johnson-Johnson-et-al/COMPLAINT-against-JANSSEN-BIOTECH-INC-JOHNSON-JOHNSON-Filing-fee-400-receipt-number-165913-filed-by-PFIZER-INC/paed-2:2017-cv-04180-00001.

[299] *Id.* at 6; Andrew Dunn, *FTC Probing J&J on Remicade, as Biosimilar Market Remains Muted*, BIOPHARMA DRIVE (July 30, 2019), https://www.biopharmadive.com/news/ftc-probe-johnson-remicade-biosimilar-market-competition/559817/.

[300] Johnson & Johnson Complaint at 3–6.

[301] *Id.* at 31.

[302] *Id.* at 3.

[303] *Id.* at 4–6.

[304] *Id.* at 31.

Anthem, Aetna, Cigna, as well as numerous regional insurers.[305] J&J's agreements refused to grant rebates to insurers for Remicade if these insurers covered Pfizer's drug Inflectra. J&J's agreements also required bundling arrangements in which the corporation would only offer rebates on their other products if Inflectra was not covered in the insurance plan of other insurers.[306] J&J mandated that insurers deny coverage for Inflectra or require a fail first provision that mandates that the patient be prescribed the lower-cost medication.[307]

J&J's agreements have prevented almost all national insurance carriers from carrying Inflectra.[308] As a result, J&J was able to increase the price of Remicade for health insurers and consumers without adversely affecting demand for the drug.[309]

In August 2018, a U.S. District Court in Pennsylvania denied J&J's motion to dismiss the lawsuit. The case is still ongoing.[310] In 2019, J&J disclosed that it was part of a civil investigation by the Federal Trade Commission regarding its contracting practices with Remicade.[311]

Shire U.S., Inc. v. Allergan, Inc.

Allergan's Restasis, a drug used to treat dry eye disease, held 90% of the market for dry eye disease in the Medicare Part D prescription drug market in 2017.[312] The drug has been available for 15 years.[313] Competitor Shire, developed a biosimilar for the drug called Xiidra,

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[305] *Id.* at 22–23.
[306] *Id.* at 21–28.
[307] *Id.*
[308] *Id.*at 8, 42.
[309] *Id.* at 9–11.
[310] Goodwin, *Pfizer V. J&J Remicade Antitrust Trial Deadlines Extended Due to Covid-19 Pandemic*, JD SUPRA (Apr. 10, 2020), https://www.jdsupra.com/legalnews/pfizer-v-j-j-remicade-r-antitrust-trial-15589/.
[311] Mark Terry, *Remicade Lawsuit Heats Up as FTC Issues J&J Subpoenas*, BIOSPACE (July 30, 2019), https://www.biospace.com/article/ftc-issued-j-and-j-subpoenas-over-remicade-contracting-practices/.
[312] Shire US, Inc. v. Allergan, Inc., 375 F. Supp. 3d 538, 541 (D.N.J. 2019).
[313] *Id.*

which the FDA approved in 2016.[314] These drugs are the only two FDA approved treatments for dry eye disease.[315] Restasis is approved for symptoms of dry eye disease such as reduced tear fluid volume, while Xiidra has been approved for signs and symptoms.[316] In its first two years on the market, Xiidra held 35% of the commercial dry eye disease market but only 10% of the Medicare Part D market.[317] The Medicare Part D market accounts for 40% of all the prescriptions given for dry eye disease.[318]

Shire's lawsuit against Allergan alleges that Allergan sold Restasis in a bundling arrangement that involved other drugs sold at lower costs. Because Allergan controls the market for other drugs, such as Lumigan, Combigan, and Alphagan P (glaucoma and ocular tension drugs), they have been able to exert leverage over plan administrators.[319] Allergan also carried out exclusive dealing contracts with administrators of prescription drug plans.[320] These drug plans offer Restasis to patients as an option from pharmacies.[321] Rebates and discounts are given to patients and because the plan administrators pay the pharmacies for reimbursement costs on these drugs, this lowers the costs for administrators.[322] These contracts forbade Part D plans from offering other dry eye disease drugs such as Xiidra. The U.S. District Court for the District of New Jersey dismissed the lawsuit in March 2019.[323] Shire filed an amended antitrust complaint in April 2019. [324]

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[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.* at 542.
[320] *Id.*
[321] *Id.*
[322] *Id.*
[323] *Id.* at 558.
[324]Mike Leonard, *Allergan Hit with Amended Antitrust Claims in Restasis Case*, BLOOMBERG LAW (Apr. 26, 2019), https://news.bloomberglaw.com/mergers-and-antitrust/allergan-hit-with-amended-antitrust-claims-in-restasis-case.

Iderstine v. Live Nation Entertainment

Ticketmaster LLC has a 70% market share of the primary ticketing industry for major concerts.[325] Live Nation Entertainment Inc. has a 60% market share in the concert promotion industry.[326] In 2010, Ticketmaster merged with Live Nation, an events promoter and venue operator,[327] and established Live Nation as the parent company of the new entity.

In May 2020, customers filed an antitrust class action complaint against the company.[328] The plaintiffs allege that one of the methods that Ticketmaster has used in gaining and maintaining its market share was long-term exclusive dealing contracts with music venues.[329] Live Nation has threatened to cancel music events at specific concert venues that used competitors of Ticketmaster for their ticketing services.[330] When Live Nation and Ticket Master merged in 2010, the DOJ stipulated that the companies could not threaten music venues to withhold musical acts if competing ticket companies were used.[331] In 2018, Anschutz Entertainment Group, Inc., a venue owner and operator, said that Live Nation threatened to withhold their services if Ticketmaster was not used. [332] The DOJ has claimed that Live Nation was violating this stipulation and had indicated it intends to modify the judgment against the company.[333]

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[325] Jennifer M. Oliver, *Ticketmaster, Live Nation Get Booed: Concert-Goers File Class Action for "Unchecked" Abuse of Market Power*, NAT'L L. REV. (May 5, 2020), https://www.natlawreview.com/article/ticketmaster-live-nation-get-booed-concert-goers-file-class-action-unchecked-abuse.
[326] *Id.*
[327] Jeremy Pelofsky & Yinka Adegoke, *Live Nation, Ticketmaster merge; Agree to U.S. Terms*, REUTERS (Jan. 25, 2010), https://www.reuters.com/article/us-ticketmaster-livenation/live-nation-ticketmaster-merge-agree-to-u-s-terms-idUSTRE60O4E520100126.
[328] Oliver, *supra* note 324.
[329] *Id.*
[330] Complaint at 23, Iderstine v. Live Nation Entm't, Inc. (No. 20-03888) [hereinafter Live Nation Complaint].
[331] Jennifer M. Oliver, *DOJ: Event Powerhouse Live Nation Punished Concert Venues for Using Competing Ticketers Despite Bar*, NAT'L L. REV. (Mar. 19, 2020), https://www.natlawreview.com/article/doj-event-powerhouse-live-nation-punished-concert-venues-using-competing-ticketers.
[332] Ben Sisario & Cecilia Kang, *Citing Violations, U.S. to Toughen Live Nation Accord on Ticketing*, N.Y. TIMES (Dec. 22, 2019), https://www.nytimes.com/2018/04/01/ar.
[333] Oliver, *supra* note 324.

Through exclusive dealing arrangements, Live Nation has suppressed rivals to Ticketmaster and maintained its monopoly in the market for primary ticket sales. Consumers have been forced to pay excessive fees for primary tickets and tickets in the secondary market.[334]

Fusion Elite All Stars v. Varsity Brands

Varsity Brands organizes competitive cheerleading and dance competitions, also known as All-Star Cheer, and sells specific apparel for those competitions. Varsity Brands holds "All-Star Competitions" where teams made up of cheerleaders compete against other teams by performing choreographed gymnastics and dance routines that are scored by judges. All-Star Gyms, some owned by Varsity and some independent, organize teams for the All-Star Competitions. Reports indicate that Varsity Brands holds two monopolies: 90% of the All-Star Competition market and over 80% of the All-Star Apparel market, meaning the specific apparel required for cheer competitions.[335]

According to a class action lawsuit brought by an All-Star Gym, Varsity Brands used exclusivity requirements, loyalty rebates, and disloyalty penalties, as well as tools such as acquisitions and copyright, to entrench its monopoly over the All-Star Competitions market and the All-Star Apparel market. Varsity allegedly used its monopoly over All-Star Competitions to enter into restrictive contracts with All-Star Gyms. Some of these contracts commit gyms and teams to participate exclusively in Varsity All-Star Competitions as well as purchase apparel exclusively from Varsity.[336] Varsity also allegedly uses disloyalty penalties with gyms; gyms and teams have to pay higher fees for competitions as well as higher prices for apparel until they

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[334] *Id.*
[335] Complaint at 20, 25, Fusion Elite All-Stars v. Varsity Brands (No. 20-03521) [hereinafter Varsity Brands Complaint], https://bergermontague.com/wp-content/uploads/2020/05/Fusion-Elite-All-Stars-v-Varsity-Brands-et-al-COMPLAINT-FILED-05-26-20.pdf.
[336] *Id.* at 3.

meet minimum annual purchasing requirements.[337] Some arrangements require gyms to buy all their apparel from Varsity.[338] The lawsuit claims that Varsity even uses its control over judges at All-Star Competitions to reduce scores for teams that do not go to Varsity competitions or use Varsity apparel exclusively.[339]

These exclusive arrangements prevent rival competition organizers from putting on their own events, as well as prevent rival apparel companies from reaching potential customers. These arrangements thus preserve Varsity's monopolies in two markets: the All-Star Competitions market and the All-Star Apparel market. Ultimately, the plaintiffs suing Varsity argue that Varsity's exclusive arrangements drove up the cost of participating in cheerleading, which they estimate ranges from $3,000 to $6,000 per season.[340] The case is currently pending in federal court in California.

Dairy Processing Agreements

Dominant cooperative Dairy Farmers of America ("DFA"), controls roughly 30% of the U.S. raw milk supply and aggregates, markets, and sometimes processes dairy farmers' milk.[341] In addition to processing in house, the co-op sells raw milk to equally large processors, such as Dean Foods, which sells 12% of all U.S. milk.[342]

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[337] *Id.* at 3, 5, 27.
[338] *Id.* at 34.
[339] *Id.* at 17.
[340] *Id.* at 2.
[341] *DFA reports 2018 financial results,* DAIRYBUSINESS (Mar. 28, 2019), https://www.dairybusiness.com/dfa-reports-2018-financial-results-2/.
[342] Amelia Lucas, *5 Charts That Show How Milk Sales Changed and Made it Tough for Dean Foods to Avert Bankruptcy,* CNBC (Nov. 13, 2019), https://www.cnbc.com/2019/11/13/5-charts-that-show-how-milk-sales-have-changed.html.

In the early 2000s DFA allegedly entered into a 20-year agreement to become the exclusive supplier of raw milk for Dean Foods in exchange for not competing with Dean in the milk processing market.[343]

This exclusive supplying agreement harmed both dairy farmers and consumers. Two separate cases brought on behalf of dairy farmers alleged that DFA had used its exclusive supply agreement to force non-DFA members to join DFA or use its marketing services to sell to critical processor Dean. This would limit non-DFA farmers' market access and lower overall prices paid to farmers.[344] A recent suit also alleges DFA and Dean's agreement to avoid competing in exchange for exclusive sourcing also raised prices charged to milk buyers, such as grocery stores.

D. Other Public Allegations of Improper Exclusive Arrangements

On top of these litigated, settled, and pending cases, the media has reported other allegations of improper exclusionary contracts.

Food Service Management

Aramark, Compass Group, and Sodexo hold more than three-quarters of all contracts in the food service management ("FSM") industry. They operate cafeterias and provide other food services at institutions such as colleges, sports stadiums, business headquarters, and prisons.[345]

[343] Complaint at 1, Food Lion, LLC v. Dairy Farmers of America, Inc., (No. 20-442) [hereinafter DFA Complaint], https://www.courtlistener.com/docket/17175947/1/food-lion-llc-v-dairy-farmers-of-america-inc/.
[344] Se. Milk Antitrust Litig., 801 F. Supp. 2d 705 (E.D. Tenn. 2011); Alan I. Greene & John S. Rhee, *Price Fixing and Enforcement of the Antitrust Laws in the Dairy Industry,* 4 BLOOMBERG L. REP. – ANTITRUST & TRADE (2011), https://www.hinshawlaw.com/media/news/23_AGreene_PriceFixingandEnforcementoftheAntitrustLawsintheDairyIndustry_022111.pdf.
[345] Thi Le, *Food Service Contractors in the US*, IBISWORLD 8 (February 2020).

Together, these three food service corporations have substantial purchasing power and procure over $40 billion worth of foods and goods annually.[346]

Aramark, Compass Group, and Sodexo use their large purchasing power to enter large procurement contracts with major food manufacturers. All three corporations require client-food service institutions to purchase 80% to 100% of their foods from partner food manufacturers, which have negotiated purchasing contracts with the respective FSM corporation.[347] Steep rebate programs are almost always a part of these purchasing contracts with food manufacturers and processors, and FSM corporations' strict contractual purchasing requirements result in effective exclusive dealing agreements with food service institutions. For example, Tyson Foods will offer Aramark a certain percent cashback on all sales, with the understanding that Aramark will require all its chefs to buy at least 80% of more of their chicken from Tyson.[348]

Food corporations may offer FSM firms 5% to 50% cash back on sales.[349] Thus, in addition to the significant rebates, food corporations induce higher purchasing volumes from FSM companies by bundling rebates to the purchase of a combination of their products or increasing the size of a rebate for hitting specific sales volumes.[350] FSM corporations enforce this exclusivity by rewarding or penalizing employees based on their levels of "on-contract" purchasing of preferred brands.[351]

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[346] Puanani Apoliona-Brown et al., *Be-Trayed: How Kickbacks in the Cafeteria Industry Harm Our Communities – And What to Do About It*, REAL FOOD GENERATION 9 (May 2020), https://www.realfoodgen.org/kickbacks-report-2020.

[347] *See* Fitch & Santo, *supra* note 12, at 24.

[348] Lucy Komisar, *Cafeteria Kickbacks,* IN THESE TIMES (Mar. 3, 2009), https://www.theinvestigativefund.org/investigation/2009/03/01/cafeteria-kickbacks/.

[349] Apoliona-Brown et al., *supra* note 345, at 9; Lucy Komisar, *How the Food Industry Eats Your Kid's Lunch,* N.Y TIMES (Dec. 3, 2011), https://www.nytimes.com/2011/12/04/opinion/sunday/school-lunches-and-the-food-industry.html (stating a typical rebate is around 14 percent).

[350] Jennifer Obadia, John Stoddard, & Emily Edmonds, *Setting the Table For Success: A Toolkit for Increasing Local Food Purchasing by Institutional Food Service Management,* FARM TO INSTITUTION NEW ENGLAND, https://www.farmtoinstitution.org/food-service-toolkit (last visited June 7, 2020).

[351] *Id.*

Sizable rebates have now become a fundamental revenue stream and component of FSM corporations' business model, according to an investigation by the New York State attorney general's office.[352] Aramark, Compass Group, and Sodexo may rely on rebates to bring down their management fees and undercut each other for more institutional contracts.[353] These rebates exclude and marginalize existing and potential competitors in the food production and processing markets. This is a particular concern for the Farm to School movement, which hopes to leverage institutional purchases at school cafeterias to invest in more sustainable and local food systems.[354]

Brewing

Exclusive dealing arrangements are common in the alcohol industry. Law in many states mandates separation between production, distribution, and retailing.[355] Dominant beer manufacturers AB-InBev and MillerCoors exert control over independent distributors through exclusive contracts that prohibit or discourage distributors from carrying MillerCoors if they want to carry AB-InBev products, or vice-versa.

Accounts from small brewers and distributors detail that these deals make it hard for new and emerging brewers to secure distribution and get their products on store shelves. In addition to excluding major rivals, these contracts explicitly mandate or heavily incentivize low levels of craft product sales, stifling growth for new entrants. For instance, in 2015 dominant beer manufacturer AB-InBev offered independent distributors as much as $1.5 million in annual reimbursements if 98% of their sales were comprised of AB-InBev brands.[356] Distributors whose

[352] Ed Bruske, John F. Carroll, Jr Speaks at SNA's Legislative Action Conference, VIMEO (Apr. 15, 2011), https://vimeo.com/22455035.
[353] Fitch & Santo, *supra* note 12.
[354] Obadia et al., *supra* note 345; Apoliona-Brown et al, *supra* note 345.
[355] ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 61–78 (Mark H. Moore & Dean R. Gerstein eds., 1981), https://www.ncbi.nlm.nih.gov/books/NBK216427/.
[356] Mickle, *supra* note 11.

sales volumes were made up of 95% AB-InBev brands were also eligible to have half their contractual marketing costs covered.[357] Distributors could carry independent craft brands and qualify for the incentive program *only if* the craft brands in question produced fewer than 15,000 barrels or sold in only one state.[358] Craft brewers reported losing distribution, and thus market access, as a result of the program.[359]

Soda Manufacturing

Together, Coca-Cola and Pepsi control 72% of the soft drink market.[360] In addition to selling bottled sodas for grocery stores and gas stations, they also manage and service general beverage provision at institutions and restaurants, striking deals to provide vending machines, soft drink dispensers, and refrigerators.

Soft drink corporations pay millions for exclusive rights to provide beverages and market their products at institutions such as public school districts, colleges and universities, sport stadiums, and other cultural sites.[361] In education, schools and colleges use millions in cash bonuses and discounts from these contracts to fund other institutional functions, often athletics.[362] By the end of the 1990s, these deals existed in 92% of high schools, 74% of middle

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[357] *Id.*
[358] *Id.*
[359] *Id.* In October 2018, the Department of Justice entered into a merger settlement with Anheuser-Busch InBev that, among other things, prohibits the corporation from engaging in exclusionary contracting with distributors. *See* Modified Final Judgment at 16–17, United States v. Anheuser-Busch InBev SA/NV, (No. 16-01483), https://www.justice.gov/atr/case-document/file/1104016/download.
[360] Jacqueline Hiner, *Soda Production in the US*, IBISWORLD 8 (May 2020); *see also* Isaac Pino, *Soft Drinks: Investing Essentials,* MOTLEY FOOL (Aug. 25, 2014), https://www.fool.com/investing/general/2014/08/25/soft-drinks-investing-essentials.aspx.
[361] *Pouring Rights Contracts: Big Soda's Infiltration of Public Universities*, DIETITIANS FOR PROF. INTEGRITY (June 19, 2017), https://integritydietitians.org/2017/06/19/pouring-rights-contracts-big-sodas-infiltration-public-universities/.
[362] Jeffrey S. Solocheck, *Pasco schools end 15-year exclusive beverage contract experiment,* TAMPA BAY TIMES (Apr. 25, 2014), https://www.tampabay.com/news/education/k12/pasco-schools-end-15-year-exclusive-beverage-contract-experiment/2176950/; Caitlin Essig, *Refreshing or Restricting? Ohio State's $32M Deal With Coca-Cola Brings Up Questions of Transparency,* OHIO ST. LANTERN (Dec. 19, 2013), https://www.thelantern.com/2013/12/refreshing-restricting-ohio-states-32m-deal-coca-cola-brings-questions-transparency-costs-vs-benefits/.

schools, and 43% of elementary schools.[363] Pepsi also owns major snack brands, so these exclusive contracts can also extend their dominant market position to snack dealing.

Soda corporations may also form exclusive advertising agreements with retail outlets including supermarkets and convenience stores, through which retailers receive bonuses for advertising only one brand's products.[364] These deals impair smaller rivals' visibility to customers and inhibit their access to necessary product outlets, hurting consumer choice.[365] The soda companies' exclusionary contracts are also detrimental to public health. Soda corporations may limit beverage selection and push sales of sugar-heavy products at the institutions with which they have agreements and serve. Since the agreements also provide schools and colleges a commission on all sales, these entities are further encouraged to increase the volume of sugary drinks sold to students.

Broadband

In 2016, the City of San Francisco enacted the "Occupant's Right to Choose Communications Services Provider Ordinance." The ordinance prohibits landlords from denying tenants the right to choose their communications provider.[366] The need for this ordinance originated from the reports that internet service providers (ISPs) were entering into exclusive agreements with landlords and other real estate investment trusts to provide internet access.[367] Along with the Federal Communications Commission (FCC), the City of San Francisco noted that exclusive marketing agreements, revenue sharing agreements, and bulk billing arrangements

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[363] TRISTAN DONOVAN, FIZZ: HOW SODA SHOOK UP THE WORLD 223 (2014).
[364] Constance L. Hays, *How Coke Pushed Rivals Off the Shelf,* N.Y. TIMES (Aug. 6, 2000), https://www.nytimes.com/2000/08/06/business/how-coke-pushed-rivals-off-the-shelf.html.
[365] Essig, *supra* note 362.
[366] Comments of the City and County of San Francisco, Improving Competitive Broadband Access to Multiple Tenant Environments, (No. 17-142) [hereinafter San Francisco Comment], https://ecfsapi.fcc.gov/file/1072422761592/CCSF's%20Comments%207-24-17.pdf.
[367] Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, WIRED (June 27, 2016), https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/.

had impeded fair competition among ISPs in serving rental housing.[368] While the FCC in the past has ruled that exclusivity agreements are illegal,[369] ISPs have found ways around the regulations imposed by the FCC.[370] For example, landlords can refuse to sign agreements with other service providers.[371] Landlords can also be compensated through revenue sharing agreements with network providers based on how many of their tenants sign up for a service.[372] Additionally, access to existing wiring in the tenant units impedes entry into the market for telecommunications and cable providers, especially when these wires are owned by landlords.[373]

Foreign Money Transfers

MoneyGram and Western Union are global remittance companies that provide foreign money transfers. The global remittance market is estimated to be worth nearly $700 billion. Western Union is the leader of this market with a market share of 10%-20%.

Western Union and other large remittance companies impose exclusivity on local money transfer providers.[374] These exclusivity agreements limit local money transfer providers from using other remittance companies.[375] By restricting the entry and growth of rival remittance companies, these agreements increase the price of remittance services.[376]

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[368] *See generally* San Francisco Comment.
[369] Cable Television Consumer Protection and Competition Act of 1992, § 19, Pub. L. No. 102-385, 106 Stat. 1460.
[370] *See generally* San Francisco Comment.
[371] Crawford, *supra* note 367.
[372] Ernesto Falcon, *The FCC is Siding with Landlords and Comcast Over Tenants who Want Broadband Choices,* ELECTRONIC FRONTIER FOUND. (June 24, 2019), https://www.eff.org/deeplinks/2019/06/fcc-siding-landlords-and-comcast-over-tenants-who-want-broadband-choices.
[373] Note that San Francisco's ordinance expanded the mandatory access provision by giving communications providers access to this wiring infrastructure. *See* San Francisco Comment.
[374] Olivier Jerusalmy, *Missed Opportunity to Reduce Money-Transfer Fees and to Help Tackle Inequality Worldwide*, FINANCEWATCH (Mar. 2018), https://www.finance-watch.org/wp-content/uploads/2018/08/FW-policy-brief-remittances_March-2018.pdf.
[375] *Id.*
[376] *Bigger But Not Better*, ECONOMIST (May 7, 2018), https://www.economist.com/news/2015/05/07/bigger-but-not-better.

III. The Justifications for Exclusionary Contracts Are Limited and Unpersuasive

The justifications for exclusive dealing are unpersuasive, especially for dominant firms. Four general explanations are often presented in defense of exclusivity, primarily in the context of exclusivity with wholesalers and other distributors carrying the products of a single manufacturer. First, manufacturers can induce loyalty and dedication from dealers because dealers are deprived of the freedom to carry competing products and promote them at the expense of the manufacturer's goods.[377] Second, manufacturers can use exclusive dealing to protect their investment in dealers, such as training of dealer staff, from free riding.[378] In the absence of exclusivity, dealers can use this investment by one manufacturer to market and sell the products of the manufacturer's competitors.[379] Third, manufacturers can employ exclusive dealing to prevent distributors from passing off the products of rivals as the product of the manufacturer.[380] Fourth, exclusivity can permit manufacturers to acquire economies of scale.[381] These justifications rest on questionable assumptions and ignore the availability of targeted, less restrictive alternatives.[382]

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[377] Jacobson, *supra* note 22, at 357–58.
[378] Benjamin Klein & Andres V. Lerner, *The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty*, 74 ANTITRUST L.J. 473, 480 (2007).
[379] *Id.* at 480–81.
[380] FTC v. Sinclair Refining Co., 261 U.S. 463 (1923).
[381] A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct---Are There Unifying Principles*, 73 ANTITRUST L.J. 375, 408 (2006).
[382] Francine LaFontaine and Margaret Slade published a meta-study of the few empirical findings on vertical restraints that have been published in the literature, including exclusive dealing, exclusive territories, regulation of franchisee termination and divorcement, and resale price maintenance. Francine LaFontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed., 2008), http://masonlec.org/site/rte_uploads/files/GAI/Readings/Economics%20Institute/LaFontaine%20and%20Slade_Exclusive%20Contracts.pdf.

The majority of the studies included were not attempting a causal inference. The meta-study, in general, reports a positive association between restraints and consumer welfare in most of the studies it reviews, although it assumes that studies finding both an increase in price and in quantity sold benefited consumers, which is theoretically ambiguous at best. The authors further adduce that higher prices by themselves (i.e., without quantity increases) may be good for consumers. They thus conclude, "If we ignore price effects, the results in the table imply that voluntarily

Dealer loyalty and dedication

The dealer loyalty and dedication rationale has limitations in general and for dominant firms in particular. While exclusive dealing can encourage dealer loyalty and dedication, it is far from the only mechanism by which manufacturers can obtain dealer commitment. Manufacturers can obtain loyalty and dedication by competing on wholesale price and providing an attractive margin for dealers. They can also improve their products through investments in design and functionality, and can generate increased consumer demand through mass marketing. Exclusive dealing is only one form of competition and method of obtaining commitment from distributors.[383]

When manufacturers make high-quality products, dealers, even in the absence of exclusivity, have a powerful incentive to carry and promote them. Dealers can make a healthy margin on selling the manufacturer's goods. Moreover, dealers must carry and have full stocks of popular products. A retailer or other distributor that does not carry a "must-have" product, or is routinely understocked, risks losing patronage.[384] Because of customer demand, a retailer may

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adopted restraints are associated with lower costs, greater consumption, higher stock returns, and better chances of firm survival." *Id.* at 408.

From those findings, the authors of the meta-study assert empirical validation for the theories that hold vertical restraints may be efficiency-enhancing, namely for the Elimination of Double Marginalization and for the idea that constraining options for dealers induces them to exert more effort on behalf of suppliers. There is no independent validation for these particular mechanisms from the bare results reported, and again, few of them even attempt to establish causality by any of the methodologies commonly employed in the empirical economics literature more recently. And any of those findings (lower costs, higher stock returns, and better chances of survival in particular) could very well be signs of greater market power rather than greater productive efficiency.

[383] Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 319 (2012).

[384] Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143, 162–63 (1985). One relatively recent example is the 2010 pricing dispute between online commerce giant Amazon and Macmillan. Amazon delisted Macmillan titles from its site for a period but apparently had to relent given Macmillan's portfolio of popular books. This suggests owners of leading brands have real leverage over even much larger and extremely powerful distributors. Eliot Van Buskirk, *Macmillan's Amazon Beatdown Proves Content Is King*, WIRED (Feb. 1, 2010), https://www.wired.com/2010/02/macmillans-amazon-beatdown-proves-content-is-king/.

even feel compelled to carry a product that it might not otherwise stock and sell.[385] The loyalty rationale fails to grapple with these alternative methods for securing diligent, committed distributors and uses "loyalty" as cover for insulating the exclusivity-conditioned product from head-to-head competition.[386]

In the case of dominant firms, the dealer loyalty problem is especially unlikely. Distributors are typically compelled to carry and sell the products of leading firms, given downstream purchaser dependence. A dealer that fails to carry and sell the product of a leading manufacturer risks losing customers.[387] Exclusive dealing, as a means of obtaining additional dealer loyalty and dedication, is unnecessary and unwarranted for dominant firms because of their status in the market and ability to secure loyalty through competition on the merits.

To the extent that manufacturers want distributors to undertake special promotional efforts, they can contract for them.[388] Manufacturers can directly arrange for special marketing by dealers and pay for additional sales activities.[389]

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[385] *See* Robert L. Steiner, *Exclusive Dealing + Resale Price Maintenance: A Powerful Anticompetitive Combination*, 33 S.W. U. L. REV. 447, 457–58 (2004) (describing how discount and high-end retailers carried the George Foreman grill).

[386] Derek Bok explained the theoretical problems with the loyalty justification:

> Though "loyal" dealers may seem more efficient to the seller, in the sense that they market more of his particular product, it does not follow that such dealers are more efficient from the standpoint of the public. Since dealers will generally be anxious to make as much money as they can, they not likely to push the goods of other producers unless the public desires the other goods or unless the wholesale prices on these goods provide a higher margin of profit. As a result, to insist that dealer sell defendant's product to the exclusion of others will often come close to a bare demand that more competitive goods be suppressed. Moreover if a strong and legitimate business need for exclusive selling actually does exist, it is strange that dealers will not follow this policy without being compelled to do so by contract, for the advantages that result should benefit them as well as the firms from which they buy.

Derek C. Bok, *The* Tampa Electric *Case and the Problem of Exclusive Arrangements under the Clayton Act*, 1961 SUP. CT. REV. 307.

[387] Warren S. Grimes, *Buyer Power and Retail Gatekeeper Power; Protecting Competition and the Atomistic Seller*, 72 ANTITRUST L.J. 563, 578 (2005).

[388] Warren S. Grimes, *Brand Marketing, Intrabrand Competition, and the Multibrand Retailer: The Antitrust Law of Vertical Restraints*, 64 ANTITRUST L.J. 83, 101 (1995).

[389] Robert L. Steiner, *Manufacturers' Promotional Allowances, Free Riders, and Vertical Restraints*, 36 ANTITRUST BULL. 383, 410 (1991).

Free riding on manufacturer investments in distributors

The free rider story is also of limited relevance in the real world. It rests on several questionable assumptions and ignores the availability of less restrictive alternatives.

As a general principle, the free-riding justification incorrectly assumes that a party that invests in producing and sharing knowledge and other intangibles should be entitled to maximal returns on its investment. According to neoclassical economics from which the free riding justification is derived, law should allow a creator of intangibles to cover its costs and obtain a fair return—a return that is sufficient to induce the effort in the first place.[390] Ensuring an *adequate* return is different from providing a *maximal* return. [391] Any return above the adequate return is unnecessary and constitutes a "rent" (in the language of neoclassical economics).[392] For present purposes, if a manufacturer can obtain an adequate return on its training and other investments in dealers without exclusivity, it does not need exclusivity with dealers. While the manufacturer would surely prefer a higher return, providing a higher return is not necessary to induce the investment and to promote social welfare.

On top of this general limitation, the free-rider justification for exclusionary contracts relies on other dubious assumptions. First, it assumes that the manufacturer makes product-specific, as opposed to brand-specific, investment in dealers. To the extent the manufacturer

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[390] Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1046–50 (2005).

[391] Free riding is not a categorical evil that should be stamped out at any cost. A great deal of activity that might be condemned as free riding is the socially beneficial sharing of knowledge, information, and other intangibles. *See, e.g.*, Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 551 U.S. 877, 915 (2007) (Breyer, J., dissenting) ("There is a consensus in the literature that 'free riding' takes place. But 'free riding' often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a 'free ride' on investments that others have made in building a product's name and reputation. The question is how often the 'free riding' problem is serious enough significantly to deter dealer investment.").

[392] *See* A. ALLAN SCHMID, CONFLICT AND COOPERATION INSTITUTIONAL AND BEHAVIORAL ECONOMICS 131 (2004) ("'Economic Rent' is a return above opportunity cost due to natural limits to supply.").

invests in training distributors specific to promoting and selling its own line of products,[393] this training is not useful for promoting and selling rival products and accordingly not susceptible to dealer free riding.[394] Manufacturer-provided training to distributors to sell brand A specifically frequently cannot be used to sell rival brand B.

Notably, in categories in which product differentiation is well developed and in which certain brands have a reputation for high quality, customers are likely to have established preferences that dealers cannot easily modify. Due to customer demand and expectation, dealers may feel compelled to carry these products even though they do not generate high margins.[395] For strong brands, customers are more likely to switch between retailers to find the best price on the brand than to switch between brands at one retailer.[396] Such customer preference is especially probable for established and dominant product manufacturers.

The free-riding justification also ignores the availability of other less restrictive alternatives for manufacturers to recoup their investment in dealers. In lieu of vertical restraints, manufacturers can—and do—contract for these investments directly.[397] Manufacturers, for instance, can charge dealers for training staff through upfront or periodic payments, such as a

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[393] Only a small fraction of products requires special dealer services. As Marina Lao pointed out in the resale price maintenance context, generalizing from these special cases is a mistake. *See* Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation for Resale Price Maintenance: Where Chicago Has Overshot the Mark*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 196, 200–01 (Robert Pitofsky ed., 2008) ("As Robert Pitofsky and others have noted, very few products require dealer demonstrations, consumer education, operational expertise, special showrooms, and the like for effective marketing, and few dealers actually provide any such services.").
[394] Howard P. Marvel, *Exclusive Dealing*, 25 J. L. & ECON. 1, 8 (1982).
[395] Steiner, *supra* note 384, at 162 ("Writing in an economics journal in 1901, shortly after the advent of strong branding and of the new institution of national advertising by manufacturers, Emily Fogg-Meade reported that in the trade journals "The retail dealers state they are obliged to keep the highly advertised articles on the shelves, although there is no profit in their sale. Moreover these are the articles which are frequently used as loss leaders." . . . These patterns have been consistently repeated as brand advertising successfully spread into each new product category.")
[396] Warren S. Grimes, *The Future of Distribution Restraints: Will the New Learning Take Hold?*, 2006 UTAH L. REV. 885, 888–89.
[397] Steiner, *supra* note 384, at 163.

franchise fee.[398] Through these payments, manufacturers are compensated for the provision of these services and so dealers can no longer free ride on them.

Protection against passing off

The passing off justification for exclusive dealing is weak. The argument is that distributors, in the absence of exclusivity, can pass off a higher-margin but inferior product as a lower-margin, higher quality brand, a problem for products that purchasers cannot easily differentiate on face value. This justification arose in the 1922 Supreme Court decision *FTC v. Sinclair Refining Co*.[399] In that case, the oil company defendant (Sinclair) insisted that gas stations that purchased its pumps must exclusively purchase its branded gasoline.[400] The Court vacated the FTC's order against Sinclair, in part, because the exclusivity gave Sinclair "ample assurance of its [gasoline's] genuineness."[401]

Exclusivity, however, does not solve this passing-off threat and remove the need for direct monitoring of dealers. Even under exclusivity, a dealer determined to pass off, for example, cheaper and higher margin gasoline as a branded version can make stealth purchases from a rival oil company. With or without exclusivity, some manufacturer monitoring of

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[398] Andy C.M. Chen & Keith N. Hylton, *Procompetitive Theories of Vertical Control*, 50 HASTINGS L.J. 574, 607 (1999). For instance, in the FTC's decision dismissing a complaint against a hearing aid manufacturer, the Commission reasoned that the manufacturer needed exclusivity with dealers to ensure that they did not free ride on the sales leads that the manufacturer provided them. Beltone Electronics Corp., 100 F.T.C. 68, 101–02 (1982). The manufacturer could have charged dealers for these sales leads upfront because they appeared to be of value to dealers. By charging for the leads, Beltone could have eliminated the threat of free riding directly. In a concurring statement, Commissioner Bailey expressed skepticism about the free-riding story Beltone presented and wrote:

> Because the Commission's analysis went beyond the simple assessment of competitive effect at the interbrand level, its Opinion might be read to sanitize a system of airtight intrabrand restraints in all interbrand competitive situations as long as some sort of highly predictable free rider danger or other excuse is thrown up to justify the restrictions. I do not believe this record shows that a system of airtight restraints was reasonably necessary to achieve Beltone's competitive goals. Beltone's lead generation system was not unique to Beltone, and the record shows no practical free rider threat, whether real or theoretical. *Id.* at 107.

[399] *Sinclair Refining*, 261 U.S. at 463.
[400] *Id.* at 472.
[401] *Id.* at 475.

distributors is necessary. An oil company concerned about a dealer's passing off must still rely on unscheduled and unannounced inspections.[402] If a dealer is found to be passing off inferior products, it can be terminated and subject to any contractual remedies. This type of monitoring activity is common in manufacturer-distributor relationships and necessary to ensure distributors' compliance with contractual terms.[403]

At a more fundamental level, the passing-off justification overlooks the prohibitions against deceptive marketing and the many laws and remedies available to stop and deter this conduct. Multiple bodies of law, including unfair competition, consumer protection, and trademark, prohibit passing off. Congress recognized the harms from marketplace deception (and the lack of offsetting justifications) and outlawed the practice through multiple statutes.[404] For instance, passing off can violate the Lanham Act and the FTC Act's ban on unfair and deceptive acts and practices.[405] On top of reputational damage and a loss of future business, sellers that engage in deception such as passing off can be subject to damages, civil fines, and even criminal penalties.[406] Given these powerful legal remedies for consumers, competitors, suppliers, and government agencies, the case for exclusivity as a protection against passing off is weak.

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[402] *See* Benjamin Klein, *Exclusive Dealing as Competition for Distribution "on the Merits"*, 12 GEO. MASON L. REV. 119, 153 ("[T]he manufacturer [even with vertical restraints in place] must monitor distributor efforts along noncontractible dimensions, as well as monitor the exclusive and other contracted elements of promotional performance.").

[403] *See, e.g.*, Brian Callaci, *The Historical and Legal Creation of a Fissured Workplace: The Case of Franchising* 28 (2019), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=2719&context=dissertations_2 ("Franchisors also invest in monitoring. They send 'secret shoppers' to franchised establishments, and monitor franchisee cash registers and operations through real time 'point of sale' systems.").

[404] *See* Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. REV. 1069, 1077–80 (2010). *See id.* at 1077 ("In the United States, for example, numerous federal laws (such as prohibitions on false statements; bank, mail, wire, and securities fraud) and state laws (such as forgery; fraudulent use of a credit or debit card; and deceptive business practice) criminalize deception.").

[405] 15 U.S.C. § 45; 15 U.S.C. §1125(a).

[406] *E.g.*, 18 U.S.C. § 2320(a) (criminalizing intentional use of, among other things, "counterfeit mark on or in connection with such goods or services"). *See also* Lexmark Inter., Inc. v. Static Control Components, Inc. 572 U.S. 118, 140 (2014) ("To invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations."); POM Wonderful LLC v. Coca-Cola Co., 573 U.S. 102, 115 (2014) ("Competitors who manufacture or distribute products have detailed knowledge regarding how consumers rely upon certain sales

Economies of scale

Exclusive dealing is not the only, or even least restrictive, way for manufacturers to achieve economies of scale. As a factual matter, a dominant firm may often already operate at or near the level at which it minimizes the average total cost of production. Given its significant market position, a dominant firm is typically in a very different position than a new entrant or small rival that may be operating at a suboptimal scale.

Firms also have less restrictive means of achieving economies of scale. First, firms can grow and achieve production at scale by selling their output at a fair price and with reasonable non-price terms.[407] Firms have broad freedom to discount and capture share through aggressive pricing, so long as it remains above the cost of production. Second, they can also offer true volume discounts, which are based on the lower costs of producing or distributing larger orders, that encourage purchasers to buy a large quantity of product.[408]

Indeed, exclusive arrangements, by blocking competitor entry and growth, can impede the industry-wide attainment of scale economies. The examples discussed in Section II show that dominant firms can prevent the growth of rivals. To the extent that competitors exist and remain in the market, exclusive dealing may confine them to a small peripheral position in the market and stifle their growth. As a result, exclusive dealing can affirmatively thwart entrants and smaller rivals from expanding capacity and achieving scale. Exclusive dealing may produce a market dominated by one or a few firms and fringed by a set of non-threatening, stunted rivals.

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and marketing strategies. Their awareness of unfair competition practices may be far more immediate and accurate than that of agency rulemakers and regulators. Lanham Act suits draw upon this market expertise by empowering private parties to sue competitors to protect their interests on a case-by-case basis.").

[407] *See Grinnell Corp.*, 384 U.S. at 571 (permitting monopolies, under the Sherman Act, if they are "a consequence of a superior product, business acumen, or historic accident").

[408] Tom et al., *supra* note 25, at 629 n.39.

IV. The Antitrust Laws Prohibit Unfair Competitive Practices

The antitrust laws restrict the forms of competition that firms can use to acquire and maintain market share.[409] In banning monopolization and attempted monopolization, the Sherman Act limits the competitive tactics that monopolists and aspiring monopolists can use and functions as a code of fair competition for this subset of corporations. For example, monopolists cannot use exclusive dealing with customers, suppliers, and distributors, some forms of below-cost pricing, and tortious practices such as deception and industrial sabotage to maintain or augment their power. The FTC Act, in banning unfair methods of competition, goes further by virtue of its incipiency standard. It prohibits these listed practices, as well other unfair competitive tactics, even when undertaken by firms not possessing monopoly or near-monopoly power.

A. The Sherman Act's Ban on Monopolization

The Sherman Act establishes rules of fair competition for actual and would-be monopolists. Section 2 of the Sherman Act prohibits monopolizing, attempting to monopolize, and conspiring to monopolize markets.[410] The law prohibits actual and potential monopolists from "the willful acquisition or maintenance of that power."[411] Accordingly, Section 2 bars monopolists and aspiring monopolists from using certain competitive tactics to maintain or

[409] According to the conventional wisdom, the antitrust laws "protect competition, not competitors." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (emphasis in original)). This claim does not grapple with the reality that the antitrust laws and law in general proscribe certain forms of competition. Law structures and shapes competition, allowing firms to use certain strategies and prohibiting them from using others. For a historical analysis on laws defining marketplace competition, *see generally* Milton Handler, *Unfair Competition*, 21 IOWA L. REV. 175 (1936).
[410] Section 2 of the statute is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists." *LePage's*, 324 F.3d at 169.
[411] *Grinnell Corp.*, 384 U.S. at 570–71.

acquire monopoly. At the same time, the statute permits firms to compete through product improvements even if this conduct results in or maintains a monopoly.[412]

Congress, in enacting the Sherman Act, drew a distinction between growth through unfair methods versus growth through fair methods. It aimed to proscribe the former as monopolization and permit the latter as fair and beneficial competition on the merits.[413] In congressional debate over the Sherman Act, Sens. Kenna, Edmunds, and Hoar offered guidance on the meaning of monopolization, employing the example of a hypothetical cattle monopolist to distinguish fair from unfair methods of competition and to identify the circumstances under which the acquisition of a monopoly would *not* violate the soon-to-be-passed Sherman Act.[414]

The Sherman Act, as interpreted by the courts, restricts actual and would-be monopolists from using their market dominance, superior financial power, or tortious and unethical practices to exclude and handicap rivals. Whether certain conduct runs afoul of the Sherman Act depends on whether a firm is or is not a monopolist. This distinction between a monopolist and non-monopolist is important. Conduct undertaken by a monopolist can be illegal even if the same conduct is benign when undertaken by a firm without significant market power.[415] At a high level, the Sherman Act proscribes three categories of conduct.

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[412] *Id.*

[413] As a leading antitrust scholar has written:

> Instead of forcing the parties and the lower courts to ramble through the wilds of economic theory, the legislative intent of section 2 of the Sherman Act is to proscribe specific “means which make it impossible for other persons to engage in fair competition.” Maurice E. Stucke, *Should the Government Prosecute Monopolies?*, 2009 U. ILL. L. REV. 497, 535 (quoting 21 CONG. REC. 3152 (1890)).

[414] 21 CONG. REC. 3151–52 (1890) (discussion among Senators Kenna, Edmunds, and Hoar on permissible versus impermissible acquisition of monopoly involving a hypothetical dealer of shorthorn cattle).

[415] *See* Eastman Kodak Co. v. Image Tech. Services, Inc. (*Kodak*), 504 U.S. 451, 488 (1992) (Scalia, J., dissenting) (“Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist.”); *LePage’s*, 324 F.3d at 151–52 (“[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior.”).

First, monopolists are not permitted to use their market dominance to perpetuate or extend their power. The exercise of monopoly power in an exclusionary manner can take several forms. A monopolist can coerce or induce customers, distributors, and suppliers into accepting terms that exclude or marginalize rivals or simply refusing to deal with rivals as a means of handicapping rivals' ability to compete.

Consider the Sherman Act's restriction on exclusive dealing by a monopolist. A monopolist can impose exclusivity on customers, distributors, and suppliers.[416] Under the Sherman Act, a monopolist cannot employ these forms of exclusivity to foreclose or impair rivals and entrench its own power.[417] As described in Sections I and II, exclusivity can frustrate the entry and growth of rival firms. For instance, through exclusivity with distributors, a monopolist can block or restrict rivals' access to customers and hinder them from competing on price and other dimensions.[418]

Similarly, monopolists cannot use their control of an essential input to hobble rivals in their own market or an adjacent market. While firms have broad freedom to decide with whom to deal under the Sherman Act,[419] this right is qualified in the case of a monopolist because of its extraordinary power in the market.[420] A monopolist that refuses to deal with a rival as a means of

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416 Salop, *supra* note 20, at 141, 150.
417 *McWane*, 783 F.3d at 840–42 (11th Cir. 2015); *Dentsply*, 399 F.3d at 191–97.
418 *See, e.g.*, *McWane*, 783 F.3d at 839 ("[T]he record evidence suggests that [McWane's exclusivity program] stunted the growth of Star—McWane's only rival in the domestic fittings market—and prevented it from emerging as an effective competitor who could challenge McWane's supracompetitive prices."). Section 3 of the Clayton Act prohibits exclusive dealing (as well as tying) when it may "substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 14. Accordingly, under the plain text of the Clayton Act, non-monopolistic firms can be liable for using exclusive dealing to marginalize rivals.
419 The Supreme Court has stated, "As a general rule, businesses are free to choose the parties with whom they will deal." Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 448 (2009). This claim is overbroad, however. For example, the Civil Rights Act of 1964 prohibits hotels, restaurants, and other public accommodations from discriminating on the basis of race, color, gender, and national origin. 42 U.S.C. § 2000.
420 Lorain Journal Co. v. United States, 342 U.S. 143, 155 (1951). See also United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("*In the absence of any purpose to create or maintain a monopoly*, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal[.]") (emphasis added).

excluding it from a market may violate antitrust law.[421] For example, a vertically integrated firm that dominates an upstream market may refuse to supply inputs to a nonintegrated downstream rival, impairing its ability to compete in this market.[422]

Second, the Sherman Act prohibits monopolists from maintaining or acquiring their dominance through their superior financial power alone. An actual or aspiring monopolist cannot use its advantageous access to finance to price its products below the cost of production as a means of driving out rivals from the market.[423] Under the Supreme Court's current interpretation of the Sherman Act, corporations cannot resort to below-cost pricing that threatens to create a dangerous probability of recouping this upfront loss through greater pricing power in the future.[424] Research finds that monopolists have used below-cost pricing and have sustained short-term losses as a means of excluding and disciplining rivals to maintain or extend their dominance.[425]

Third, the Sherman Act bars monopolists from using a panoply of tortious or unethical acts to preserve or acquire their power. Such acts can be a form of "cheap exclusion"—conduct that involves minimal cost or no cost to the monopolist and lacks any redeeming qualities.[426] A monopolist cannot acquire or extend its dominance by engaging in widespread industrial

[421] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610–11 (1985).
[422] *See, e.g.*, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 485 (7th Cir. 2020) ("Viamedia alleged sufficiently, and at summary judgment offered sufficient evidence, that Comcast violated Section 2 of the Sherman Act. Viewing the allegations and evidence in the light most favorable to Viamedia, Comcast abruptly terminated decade-long, profitable agreements and sacrificed short-term profits to obtain and entrench long-term market power, and used its monopoly power in Interconnect services market to force its [multichannel video programming distributor] competitors into a relationship that makes Comcast a gatekeeper of its competitors' advertising revenue.").
[423] Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1717–18 (2013).
[424] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).
[425] For summary of some of the empirical research, see Sandeep Vaheesan, *Reconsidering Brooke Group: Predatory Pricing in Light of the Empirical Learning*, 12 BERKELEY BUS. L.J. 81 (2015). *See, e.g.*, Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F.3d 917, 950 (6th Cir. 2005) ("The trier of fact could reasonably find that Northwest recouped any losses from its predatory pricing quickly after Spirit left these routes. . . . [U]pon Spirit's exit, Northwest increased its prices on these routes to a multiple of seven from its prices during Spirit's presence.").
[426] Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L. J. 975, 977, 989–90 (2005).

sabotage or other acts of property destruction.[427] For example, the National Cash Register Company—a dominant firm a century ago—maintained its monopoly, in part, through acts of sabotage against the machines of rivals.[428] Among other forms of tortious or unethical exclusionary conduct, deception can also be the basis for antitrust liability.[429]

Even as the Sherman Act prohibits monopolists from acquiring, maintaining, or extending their power through exclusionary, predatory, and other unfair methods, it allows them to compete through non-predatory price cutting and product improvements. Monopolists are, in general, free to cut prices (so long as they remain above cost), improve their products, and invest in plants and research and development.[430] In other words, the Sherman Act restricts growth through the use of market dominance, below-cost pricing, and tortious conduct but permits, even for monopolists, growth through new and improved products and investment in productive capacity.

B. The FTC Act's Prohibition on Exclusionary and Predatory Practices in Their Incipiency

The FTC Act proscribes practices that threaten to violate the Sherman and Clayton Acts. Building on norms embedded in the common law and expressed in the congressional debate over the Sherman Act, the drafters of the FTC Act took an expressly moral view of market competition and identified several competitive acts and tactics, including preferential contracts,

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[427] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 787–88 (6th Cir. 2002); Byars v. Bluff City News Co., 609 F.2d 843, 854 n.30 (6th Cir. 1979).
[428] Kenneth P. Brevoort & Howard P. Marvel, *Successful Monopolization Through Predation: The National Cash Register Company*, *in* ANTITRUST LAW AND ECONOMICS 85 (John B. Kirkwood ed., 2004).
[429] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 176–78 (1965); *Microsoft*, 253 F.3d at 76–77.
[430] *See Grinnell*, 384 U.S. at 570–71 ("The offense of monopoly under [Section 2] of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."); United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry.").

as unfair. Like the other landmark antitrust statute of 1914 (the Clayton Act), the FTC Act is an incipiency statute and accordingly prohibits unfair competitive practices well before they actually restrain trade or create, maintain, or extend a monopoly. Consequently, the FTC can identify and prohibit unfair competitive practices before they rise to the level of illegal monopolization under the Sherman Act. The Supreme Court has applied this legislative purpose in its interpretation of the FTC Act. Accordingly, practices like exclusive dealing and tying can violate the FTC Act without necessarily violating the Sherman Act. A reasonable possibility of unfairly excluding rivals or injuring consumers is enough.[431]

In the legislative debates over the FTC Act, the elimination of unfair competitive practices was an important theme. Drafters and proponents of the bill stressed the need for ensuring fair and honest practices in the marketplace in support of a new federal law governing market competition.[432] One Senate supporter likened unfair methods of competition to using brass knuckles in a fight,[433] and another described firms that relied on such methods as "pirates of business."[434] Sen. Newlands, arguably the biggest champion at the time of the FTC Act and the Commission, defined unfair competitive practices as being "against good morals in trade and that tend to give competitors unfair advantage and dishonest advantage."[435] He characterized some unfair practices as so egregious that they "shock the universal conscience of mankind."[436]

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[431] *See* FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 394–95 (1953) ("It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act,—to stop in their incipiency acts and practices which, when full blown, would violate those Acts, as well as to condemn as 'unfair method of competition' existing violations of them.") (internal citations omitted). A former FTC Commissioner and an FTC attorney wrote, "If the test for a Clayton Act violation is mere probability of the proscribed result, the standard of a section 5 violation, to be more inclusive, would be closer to reasonable possibility." *See* A. Everette MacIntyre & Joachim J. Volhard, *Federal Trade Commission and Incipient Unfairness*, 41 GEO. WASH. L. REV. 407, 422 (1973).
[432] Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 3–5 (2003).
[433] 51 CONG. REC. 11,148 (1914).
[434] *Id.* at 12,147.
[435] *Id.* at 11,107.
[436] *Id.* at 11,109.

In articulating the meaning of unfair methods of competition, the drafters looked to existing antitrust precedents, among other sources. They pointed to the Supreme Court's opinion in *Standard Oil Co. v. United States*, as well as to other judicial decisions interpreting the Sherman Act, to illustrate what constitutes unfair methods of competition.[437] Multiple members of Congress, quoting an academic article from political science, characterized the following competitive practices (among others) as unfair:

1. Local price cutting.

2. Operation of bogus 'independent concerns.'

3. Maintenance of 'fighting ships' and 'fighting brands.'

4. Lease, sale, purchase, or use of certain articles as a condition of the lease, sale, purchase or use of other required articles.

5. Exclusive sales and purchase agreement.

6. Rebates and preferential contracts.[438]

According to several members of Congress and influential anti-monopoly voices such as Louis Brandeis, these unfair practices were the principal cause of the growth of monopolies and trusts in the U.S. economy.[439] In contrast to these unfair methods, Sen. Hollis defined fair methods of competition as being "success … through superior efficiency" and used the fair versus unfair methods dichotomy to distinguish healthy from unhealthy business success.[440]

A consistent theme in the congressional debate over the FTC Act was the objective of stopping exclusionary and predatory practices in their incipiency. A former FTC attorney and

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[437] *Id.* at 12,142–44.
[438] *Id.* at 11,230–31, 12,145, 16,329 (quoting William S. Stevens, *Unfair Competition*, 29 POL. SCI. Q. 282, 283 (1914)).
[439] Winerman, *supra* note 433, at 80.
[440] 51 CONG. REC. 12,146–47 (1914).

leading scholar of the Commission, reviewing the legislative record for the FTC Act, wrote, "The goal of halting incipient violations has more support in the legislative history than any of the other . . . categories of Section 5 violations" identified in the article.[441] When debating the FTC and Clayton Acts in 1913 and 1914, many members of Congress expressed frustration with the judicial interpretations of the Sherman Act, which made the statute powerless to address monopolies until they emerged and controlled markets. Sen. Reed stated:

> We are declaring that we intend to do something that will strike a death blow to monopoly; we propose to arrest its progress in its infancy. We are dealing not with honest mistakes in judgment, but with acts which are in their nature malicious, with the same class of conspiracies exactly as the Sherman Antitrust Act deals with, except that we propose to strike those acts in their incipiency instead of after they have been actually worked out into a complete system of monopoly or restraint of trade.[442]

Other members of Congress echoed this aim. For instance, Sen. Newlands, the father of the FTC Act, declared that the purpose of the new law and Commission was "to check monopoly in the embryo."[443] Sen. Cummins also endorsed the FTC Act to stop violations at an early stage and "to seize the offender before his ravages" ran afoul of the Sherman Act.[444] The Conference Committee affirmed this purpose, stating that "the most certain way to stop monopoly *at the threshold is to prevent unfair competition*."[445]

The federal judiciary has recognized that the FTC Act is an incipiency statute. Courts have ruled that the FTC Act proscribes unfair competitive practices before they violate the

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[441] Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 242 (1980).
[442] 51 CONG. REC. 13118 (1914).
[443] *Id.* at 12030.
[444] *Id.* at 11455.
[445] H.R. Rep. No. 1142, 63d Cong., 2d Sess., at 19 (1914) (emphasis added).

Sherman or Clayton Acts. The Supreme Court stated, "It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations."[446] The FTC can look to the purpose of the Sherman and Clayton Acts for guidance in defining an unfair method of competition,[447] but the Commission is not bound by the interpretations of the other primary federal antitrust statutes. It can use its expertise and function as a court of equity in identifying and prohibiting unfair competitive practices that fall outside the scope of the other antitrust laws.[448]

The federal judiciary has applied the incipiency standard to methods of competition with exclusionary or predatory potential. The Supreme Court once invalidated exclusivity arrangements that may not have risen to the level of Sherman Act violations. For instance, the high court ruled that exclusivity arrangements between the leading distributor of motion picture advertisements and theaters was an unfair method of competition.[449] The distributor had obtained exclusivity from about 40% of theaters in the areas it served.[450] The Court ruled these exclusive arrangements illegal under the FTC Act,[451] finding that they also likely rose to the level of a Sherman Act violation.[452]

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[446] FTC v. Cement Institute, 333 U.S. 683, 694 (1948).

[447] *See Fashion Originators*, 312 U.S. at 463 ("If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.").

[448] *See* FTC v. Ind. Fed. of Dentists, 476 U.S. 447, 454 (1986) (internal citations omitted) ("The standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons."). For instance, in a series of actions, the FTC challenged base-point pricing systems among manufacturers. The Supreme Court also ruled that base-point pricing systems that stabilized prices and achieved results comparable to horizontal price fixing was illegal under the FTC Act. These pricing arrangements were struck down even though they did not necessarily involve an inter-firm "agreement" necessary for a violation of the Sherman Act. *E.g.*, FTC v. National Lead Co., 352 U.S. 419 (1957); *Cement Institute*, 333 U.S. 683; Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), *aff'd*, 336 U.S. 956 (1949).

[449] *Motion Picture Advertising Service*, 344 U.S. at 398.

[450] *Id.* at 393.

[451] *Id.* at 394–95.

[452] *See id.* at 394–95 ("It is, we think, plain from the Commission's findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an 'unfair method of competition' within the meaning of s 5(a) of the Federal Trade Commission Act.").

In *FTC v. Brown Shoe Co.*, the Supreme Court invalidated an arrangement in which Brown Shoe had coerced or induced shoe retailers to carry its shoe brands principally or exclusively.[453] Brown Shoe, then the nation's second largest shoe manufacturer, had obtained near-exclusivity from hundreds of shoe retailers, with these franchised stores purchasing about 75% of their requirements from Brown.[454] The Court rejected Brown Shoe's argument that the FTC had to satisfy the requirements of Section 3 of the Clayton Act, which prohibits exclusive dealing that may "substantially lessen competition or tend to create a monopoly in any line of commerce."[455] The Court ruled instead: "[T]he Commission has power under [Section 5 of the FTC Act] to arrest trade restraints in their incipiency without proof that they amount to an outright violation of [Section 3] of the Clayton Act or other provisions of the antitrust laws."[456]

As discussed in Section I.B, the Supreme Court and a court of appeals in the 1960s reviewed the propriety of oil refiners and marketers pressuring their gas stations to carry certain branded tires, batteries, and accessories at the exclusion of rivals.[457] Major tire manufacturers struck deals with oil companies to induce and pressure their station lessees to carry only the brands of the favored tire company.[458] The arrangement was an implicit but effective tie. Recognizing the great power imbalance between a large oil company and its gas station operators, the courts in all three cases held that this conduct violated the FTC Act.[459] In *Texaco*, the Supreme Court viewed this arrangement as the equivalent of conventional tying:

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[453] 384 U.S. 316 (1966).
[454] *Id.* at 319–20.
[455] 15 U.S.C. § 14.
[456] *Brown Shoe*, 384 U.S. at 322.
[457] *Texaco*, 393 U.S. 223; *Atlantic Refining*, 381 U.S. 357; *Shell Oil*, 360 F.2d 470.
[458] *See Atlantic Refining*, 381 U.S. at 365–66 (reviewing partnership between Atlantic and Goodyear to ensure Atlantic stations carried Goodyear products).
[459] *Texaco*, 393 U.S. at 231; *Atlantic Refining*, 381 U.S. at 377; *Shell Oil*, 360 F.2d at 487–88.

> [T]he essential anticompetitive vice of such an arrangement is the utilization of economic power in one market to curtail competition in another. Here the TBA manufacturer has purchased the oil company's economic power and used it as a partial substitute for competitive merit in gaining a major share of the TBA market.[460]

The Fifth Circuit, in reviewing the FTC cease-and-desist order, declared that the FTC Act prohibits practices that *could* ripen into violations of the Sherman and Clayton Acts.[461]

V. The FTC Should Prohibit Exclusionary Contracts That Result in Substantial Foreclosure

Given the real evidence of harm from certain exclusionary contracts and the specious justifications presented in their favor, the FTC should ban exclusivity with customers, distributors, or suppliers that results in substantial market foreclosure as per se illegal under the FTC Act. The present rule of reason governing exclusive dealing by all firms is infirm on multiple grounds.

Through rulemaking, the FTC should hold that such exclusivity is an unfair method of competition.[462] The substantial foreclosure test is consistent with the rule announced by the Supreme Court in *Standard Oil Co. of California v. United States* (hereafter "Standard Stations"), a case concerning Section 3 of the Clayton Act.[463] To offer guidance, the FTC should articulate what "substantial foreclosure" means and define it in relation to:

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[460] *Texaco*, 393 U.S. at 231 (internal citation omitted).

[461] *See Shell Oil*, 360 F.2d at 479 ("Section 5 is intended to halt practices in their incipiency that may show promise of developing into violations of the Sherman and Clayton Acts and to defeat practices not specifically proscribed by those laws but contrary to the principles animating the Sherman and Clayton Acts.").

[462] An FTC rule should *not* preempt relevant state and local statutes and regulations, except to the limited extent there are clear conflicts in which parties cannot comply with both the FTC rule and the state or local law at issue. The Supreme Court has defined this narrow conflict preemption as follows, "[T]he Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements." English v. General Elec. Co., 496 U.S. 72, 79 (1990).

[463] 337 U.S. 293 (1949). The Supreme Court in a subsequent decision purported to follow this test. *See* Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961) ("In practical application, even though a contract is found to be

1) The power of the firm or firms using exclusivity,

2) The fraction of customers, distributors, or suppliers bound by exclusivity, or

3) The significance of the customers, distributors, or suppliers bound by exclusivity.

This rule would clarify the law on exclusive arrangements, encouraging dominant firms to compete on the merits and allowing most firms to use exclusivity in their contracts.

While enforcers can and have successfully challenged exclusive arrangements under the rule of reason,[464] this prevailing legal standard has multiple deficiencies. First, the rule of reason, with its fact-intensive inquiry,[465] is a poor analytical fit for exclusionary contracts by dominant firms. The harms from exclusionary contracting and related practices are real and documented whereas the justifications are of especially limited relevance to dominant firms.[466] Accordingly, antitrust law should heavily restrict the practice.[467] Second, the rule of reason, by placing most of the legal burdens on the plaintiff, requires the government and other enforcers to devote excessive time and resources to developing and litigating a case.[468] Because of these burdens, an

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an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected"). It, however, layered an effects evaluation on top of it that turned the test into something resembling the rule of reason. *See id.* at 329 ("To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.").

[464] *See ZF Meritor*, 696 F.3d at 271 ("Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason.").

[465] *See Microsoft*, 253 F.3d at 58–59 (articulating five-part analytical framework under rule of reason).

[466] *See* Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules vs Rule of Reason"*, J. COMPETITION L. & ECON. 215 (2006) (arguing for simple rules over case-by-case evaluation in antitrust law).

[467] *See supra* Sections I, II & III. The Supreme Court has applied this logic in upholding the per se rule against horizontal price-fixing agreements. *See* Arizona v. Maricopa County Med. Soc., 547 U.S. 332, 351 (1982) ("The respondents' principal argument is that the per se rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some. Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in its general application.").

[468] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1460–65 (2009).

antitrust lawsuit under the rule of reason is extraordinarily difficult to prosecute and win. Indeed, the record suggests that the rule of reason approximates a standard of practical legality.[469] In practice, the rule of reason means that dominant firms can use exclusionary and other unfair competitive practices without the fear of significant legal consequences.

Third, even as the rule of reason frees large corporations with sophisticated counsel to engage in exclusionary contracting, it offers little guidance to risk-averse businesses that cannot spend substantial sums on outside counsel. While it offers some markers on when exclusive dealing may violate the Sherman Act, the rule of reason does not provide prospective clarity to a firm that wants to use exclusivity for beneficial or innocuous ends.[470]

Congress indeed rejected the application of the rule of reason to certain exclusive arrangements. It enacted the Clayton Act to ensure that exclusive arrangements in the sale of goods are governed by a simpler and stronger legal standard than the rule of reason.[471]

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[469] *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827 (2009) (finding that, for antitrust cases producing a final judgment from February 1999 to May 5, 2009, "plaintiffs almost never win under the rule of reason. In 221 of 222 cases . . . . the defendant won.")

[470] Stucke, *supra* note 469, at 1422–29. As Stucke wrote, the overwhelming number of defendant wins on final judgments do not tell the entire story.

> Although many antitrust plaintiffs lose in the decided cases, these surveys do not reflect the number of cases where the parties settle. Defendants whose motion to dismiss is denied may settle when the settlement is cheaper than protracted and costly discovery under the rule of reason. And those defendants who continue with discovery may settle after their summary judgment motion is denied if settling is cheaper than the potential exposure to an unfavorable jury verdict. Thus, one older survey found that antitrust cases have higher rates of settlement and that antitrust plaintiffs prevail in a lower percentage of judgments than is true generally in federal district courts. *id.* at 1424.

[471] *See* Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 CORNELL L. REV. 101, 112 (1983) ("In enacting section 3 of the Clayton Act, Congress intended to supersede the rule of reason that the Court had announced a few years earlier and to replace it with a new standard, interdicting practices 'which may . . . substantially lessen competition or tend to create a monopoly.'").

Given these deficiencies in the current rule of reason approach, the FTC should promulgate a rule[472] and look to the Supreme Court for guidance.[473] The Supreme Court in *Standard Stations*, in interpreting Section 3 of the Clayton Act, announced the substantial foreclosure test for exclusive arrangements.[474] The Court reviewed a large oil company's use of exclusive dealing with its independent gas station owners.[475] It found that the defendant had an important, though non-dominant, share of the gasoline market in the western United States and had used exclusivity with thousands of retail outlets, prohibiting them from carrying rival brands of gasoline and non-authorized vehicle accessories.[476] The Court also noted that other large oil companies in the West used exclusivity with their retail outlets.[477] Given the Clayton Act's text, the Court held that exclusive dealing is illegal when a plaintiff presents "proof that competition has been foreclosed in a substantial share of the line of commerce affected."[478]

Drawing on *Standard Stations*, the FTC should hold that exclusive arrangements that result in substantial foreclosure of customers, distributors, or suppliers are per se illegal under the FTC Act. This test captures when these arrangements are likely to unfairly exclude competitors from the market.[479] By tying up customers, distributors, or suppliers, dominant firms can deprive

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[472] *See* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357, 367–68 (2020) ("First, rulemaking would enable the Commission to issue clear rules to give market participants sufficient notice about what the laws, helping ensure that enforcement is predictable. . . . Second, establishing rules could help relieve antitrust enforcement of steep costs and prolonged trials.").
[473] The FTC has broad discretion to fashion rules on fair competition. *See* FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (emphasis added) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does *not* arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."); *Texaco*, 393 U.S. at 225 ("In large measure the task of defining 'unfair methods of competition' was left to the Commission."). *See generally* Vaheesan, *supra* note 57.
[474] *Standard Stations*, 337 U.S. at 295–96.
[475] *Id.* at 295–96.
[476] *Id.* at 296–97, 302.
[477] *Id.* at 295, 314.
[478] *Id.* at 314.
[479] *See* Bok, *supra* note 386, at 300–02 ("It seems obvious that any inquiry, however narrow, should take note of the proportion of goods in the relevant market that are sold subject to restrictive arrangements. For this fact, more than

rivals and entrants of necessary outlets or inputs. Accordingly, they can marginalize competitors through exclusivity. Substantial foreclosure is consistent with the FTC Act's incipiency standard, which stops exclusionary and other unfair competitive practices before they restrain trade or result in monopolization. Congress enacted the FTC Act to terminate exclusionary conduct well before it resulted in a monopoly.[480]

To provide guidance to businesses and the public, the FTC should articulate quantitative and qualitative criteria for determining substantial foreclosure. Substantial foreclosure should be satisfied through one of three ways.

First, a firm with a share of 30% or more of a relevant market and that uses exclusivity with all its customers, distributors, or suppliers of an essential input engages in substantial foreclosure ("dominance test"). This figure is in line with, and indeed somewhat higher than, some judicial holdings on the share necessary to establish market power under Section 1 of the Sherman Act.[481] The FTC followed this approach in its *Adolph Coors Co.* decision.[482] The following hypothetical examples show when firms would and would not violate the dominance test.

> *Example 1:* Manufacturer A of sheet metal has a 45% share of the national market for sheet metal. Sheet metal is sold to contractors and other end users through distributors.

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any other, serves to give a first, general approximation of the degree to which exclusive contracts interfere both with competition, and with the efforts of rival producers to market their products.").

[480] *See Texaco*, 393 U.S. at 225 ("Congress enacted s 5 of the Federal Trade Commission Act to combat in their incipiency trade practices that exhibit a strong potential for stifling competition."). Averitt, *supra* note 441, at 242.

[481] *See, e.g.*, *Visa*, 344 F.3d at 240 ("[T]he court inferred market power from the defendants' large shares of a highly concentrated market: In 1999, Visa U.S.A. members accounted for approximately 47% of the dollar volume of credit and charge card transactions, while MasterCard members accounted for approximately 26%.").

[482] *See* Adolph Coors Co., 83 FTC 32, 113 (1973), *aff'd in part rev'd in part*, Adolph Coors Co. v. FTC, 497 F.2d 1178 (10th Cir. 1974) ("Particularly in a market, such as that for beer, threatened by diminished competition and increased concentration, the dominant factor cannot be allowed to conspire with its distributors and retailers to foreclose competitors from outlets through which they might build themselves into a position of competitive equality.").

Manufacturer A has required exclusivity from all its distributors and forbids them from carrying the product of rival manufacturers of sheet metal. Because Manufacturer A has a dominant position in sheet metal and uses exclusivity with all its distributors, its exclusionary contracts run afoul of the dominance test.

Example 2: Brewer B accounts for 35% of the market for beer in a Midwestern state. It sells the beer to wholesalers who in turn ship beer to bars, restaurants, and retailers. Brewer B sells beer to 10 distributors. For nine of the distributors, it does not restrict their freedom to carry rivals' brews. The smallest distributor carries only Brewer B's beer as a means of reducing its administrative expenses. While Brewer B has a dominant share of beer in the Midwestern state, it uses exclusivity with only its smallest distributor. Accordingly, it does not violate the dominance test.

Second, a firm that uses exclusivity with customers, distributors, or suppliers of a particular input together accounting for 30% or more of their relevant market engages in substantial foreclosure ("quantitative foreclosure test"). Courts, interpreting the more defendant-friendly standards of the Sherman Act's prohibition on monopolization, have indicated that foreclosure at this level may be sufficient.[483] The following hypothetical examples show when firms would and would not violate the quantitative foreclosure test.

Example 3: Hospital C in a West Coast city grants admitting privileges to cardiologists on the condition that they not serve at other hospitals or ambulatory centers in the city. It has entered exclusive arrangements with 60% of the licensed and active cardiologists in the

[483] *See Microsoft*, 253 F.3d at 70 ("[W]e agree with plaintiffs that 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 § 1 violation.").

city. Hospital C's exclusivity with the cardiologists violates the quantitative foreclosure test.

Example 4: Shoe manufacturer D offers shoe retailers lower wholesale prices if they purchase 95% or more of their basketball shoes from it. Through this inducement, it has obtained exclusivity from three major shoe retailers in the United States. The three retailers together account for 5% of all basketball shoes sold in the country. Given this single-digit rate of foreclosure, manufacturer D does not violate the quantitative foreclosure test.

Third, a firm that ties up the top three or more customers, distributors or suppliers in a concentrated market through exclusivity engages in substantial foreclosure ("qualitative foreclosure test"). The FTC followed this approach in its *McWane* decision.[484] The following hypothetical examples show when firms would and would not violate the qualitative foreclosure test.

Example 5: Drug company E offers a large annual payment to suppliers of an active pharmaceutical ingredient used in its leading unpatented anti-hypertension medication on the condition that they do *not* sell the ingredient to competing manufacturer of this medication. Only seven companies make and sell the ingredient around the world. The top five accept drug company E's exclusionary payment. Drug company E's exclusive arrangement with suppliers of the active pharmaceutical ingredient violates the qualitative foreclosure test.

[484] *See* McWane Inc., 2014 WL 556261, *23, *aff'd*, 783 F.3d 814 (11th Cir. 2015) (describing how McWane tied up leading distributors of ductile iron pipe fittings with exclusive contracts). Although Complaint Counsel estimated a high rate of foreclosure, the Commission stated, "We need not adopt Complaint Counsel's estimate, however, to conclude that foreclosure here was both substantial and problematic." *See id.* at *24 n.10.

Example 6: Record label F signs three artists who had top 40 hits on the radio last year to multiyear contracts under which the three artists will release albums exclusively through record label F. Last year, 120 artists had a top 40 radio single. Based on these facts, record label F's exclusive contracts with the three artists do not violate the qualitative foreclosure test.

Similar tests should also apply to firms in oligopolistic industries that use exclusivity in parallel. This parallel exclusion can have effects similar to exclusion by a single dominant or monopolistic firm. A group of firms in a concentrated industry can use exclusionary contracts with customers, distributors, and suppliers to block entry and growth by rivals.[485] Accordingly, the per se tests should also be satisfied for multiple firms using exclusivity in parallel. First, if the leading three firms have a combined share of 50% or more of a relevant market and use exclusivity with their customers, distributors, or suppliers of a particular input, they engage in substantial foreclosure. Second, if the leading three firms collectively use exclusivity with customers, distributors, or suppliers of a particular input that together account for 50% or more of their relevant market, they engage in substantial foreclosure. Third, if the leading three firms tie up the top five or more customers, distributors, or suppliers in a concentrated market through exclusivity, they engage in substantial foreclosure.

The following hypothetical examples illustrate the application of the substantial foreclosure tests to parallel exclusionary contract.

Example 7: The two leading soccer leagues in the United States employ 55% of American soccer players at the professional level. The two leagues have signed long-term

[485] Hemphill & Wu, *supra* note 33, at 1185–86. *See, e.g.*, *Visa*, 344 F.3d at 236 ("Because of Visa U.S.A.'s and MasterCard's exclusionary rules, any bank that undertook to issue Amex-branded cards would be forced to give up issuing both Visa and MasterCard cards—a move no U.S. bank has been willing to make.").

leases with stadiums that prohibit the venues from hosting the games of another professional soccer league. New and rival leagues accordingly are relegated to small, secondary stadiums. The two leagues together violate the joint dominance test.

Example 8: The three leading manufacturers of orange juice have a national market share of 70%. Orange juice is sold to convenience stores, pharmacies, restaurants, and supermarkets through wholesalers. The third largest manufacturer rewards wholesalers who do not carry rival brands of orange juice, but the other two do not require or encourage exclusivity. The third largest manufacturer has a share of 20% and foreclosed about 15% of the wholesale segment from rivals. Because 85% of the wholesaler segment remains open to rivals, the three firms do not, individually or collectively, violate the quantitative foreclosure test.

The rule should *not* treat exclusivity that is nominally of a short duration or terminable at will more leniently than other exclusive arrangements. The formal terms of a contract may not reflect economic realities. A short-term exclusivity arrangement may be repeatedly renewed because a distributor is dependent on a manufacturer. Similarly, an exclusivity arrangement that is legally terminable at will may not be terminated because a customer or distributor would suffer significant economic harm.[486] A distributor may acquiesce to a dominant manufacturer's demands for exclusivity if the manufacturer has terminated distributors that resisted exclusivity. Under these circumstances, exclusivity in writing may be unnecessary, considering the manufacturer's clear signal.[487] Implicit exclusive dealing can be just as effective and pernicious

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[486] *See, e.g.*, *Dentsply*, 399 F.3d at 194 ("[I]n this case, in spite of the legal ease with which the relationship can be terminated, the dealers have a strong economic incentive to continue carrying Dentsply's teeth.").

[487] *See, e.g., ZF Meritor*, 696 F.3d at 270 (internal cites omitted) ("An express exclusivity requirement, however, is not necessary, because we look past the terms of the contract to ascertain the relationship between the parties and the effect of the agreement in the real world. Thus, de facto exclusive dealing claims are cognizable under the antitrust laws."); Minnesota Mining & Mfg. Co. v. Appleton Papers, Inc., 35 F.Supp.2d 1138, 1144 (D. Minn. 1999) (internal quote omitted) ("[T]here are genuine issues of fact as to whether Appleton's agreements are actually terminable at

as express exclusive dealing.[488] The rule should prohibit effective exclusivity arrangements, regardless of how they are described in contractual language or even committed to writing at all.[489]

By removing exclusivity as a competitive weapon for firms with dominance, an FTC rule would encourage these corporations to compete on the merits. They could no longer rely on exclusivity to ensure customer and distributor "loyalty." Congress did not recognize nor endorse this justification when it enacted the anti-exclusive dealing section of the Clayton Act.[490] Dominant firms could *not* use coercion and inducements with customers, distributors, and suppliers to foreclose rivals and entrants and suppress fair competition. Instead, dominant firms would have to win over customers and distributors by improving their products and competing on price.[491] To the extent that they could not improve their offerings and innovate, they would risk losing business and customers—a sign of healthy, fair competition. And as discussed in Section III, dominant firms have less restrictive alternatives to protect their brands and their investments in distributors and to achieve economies of scale.

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will. When ascertaining the characteristics of an exclusive dealing arrangement, courts look to the practical effect of the agreement, not merely to its form.").

[488] *See, e.g.*, *McWane*, 2014 WL 556261, at *24 ("McWane's Full Support Program required exclusive dealing for as long as McWane desired. The overwhelming evidence shows the practical effect of McWane's program was to make it economically infeasible for distributors to drop McWane's full line of domestic fittings and switch to Star. This reality made McWane's exclusive dealing program as effective and enduring as a long-term contract.").

[489] Justice Brandeis captured how words themselves can exercise a coercive effect under certain circumstances. *See* American Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("Words of advice, seemingly innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to command. For the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises.").

[490] *See* Bok, *supra* note 386, at 308 (emphasis in original) ("[T]hough Congress refused to prohibit *all* exclusive arrangements under Section 3, this decision was not taken in order to safeguard the interests that have been discussed. Indeed, one looks in vain for any concern on the part of the legislature over the desires of established sellers to secure a 'firm' market or to obtain the undivided loyalty of their dealers.").

[491] *See* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007) ("Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive.").

Non-dominant firms would remain free to use exclusive arrangements. This differential treatment of dominant and non-dominant firms is an established principle in antitrust. The Sherman Act applies stricter standards to monopolists than it does to non-dominant firms.[492] When non-dominant businesses use exclusivity with customers, distributors, or suppliers, they raise far less risk of marginalizing competitors and blocking entrants than when dominant firms use exclusivity. Because of their small market presence, they have less power to coerce or induce trading parties to accept exclusivity, and they can compete with other non-dominant firms to secure exclusives. Firms without market power are entitled to use a wider range of competitive strategies than firms with the power to unfairly exclude rivals. For non-dominant firms, the rule that the petitioners request would offer greater legal clarity and certainty than the rule of reason that courts presently apply under the Sherman and Clayton Acts. Whereas the proposed rule would establish clear thresholds on which firms can use exclusivity and to what extent, the current rule of reason, with its open-ended inquiry and totality-of-the-circumstances approach, can be a trap for businesses.[493]

[492] *See Kodak,* 504 U.S. at 488 (Scalia, J., dissenting) ("Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."); *LePage's*, 324 F.3d at 151–52 ("[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior."). One scholar described the heightened duty for monopolists as follows:

> In the movie "Spiderman," Uncle Ben Parker offers the following prescient counsel to his nephew Peter Parker, a.k.a., Spiderman: "With great power comes great responsibility." For the privilege of the license to charge monopoly profits, it is not too much to ask that dominant firms adhere to a higher code of responsibility. Gavil, *supra* note 28, at 81.

[493] *See* Jesse W. Markham Jr. *Sailing A Sea of Doubt: A Critique of the Rule of Reason in U.S. Antitrust Law*, 17 FORDHAM J. CORP. & FIN. L. 591, 656 (2012) ("The failure of antitrust law to provide reasonably clear guidance in this region of activity cannot help but impose pointless costs. Business managers planning their company's affairs can only respond to undecipherable antitrust rules in one of two ways: either by resolving doubt in favor of their proposed conduct, or alternatively resolving doubts against the considered course of action.").

VI. Conclusion

The FTC should initiate a rulemaking to prohibit exclusive arrangements by dominant firms. With the present rule of reason approach, antitrust enforcers must devote undue time and resources developing and prosecuting a case against a dominant firm's exclusionary conduct, meaning that many dominant firms likely avoid liability for harmful exclusive dealing. At the same time, this standard does not provide much guidance to businesses and the public. Because of the very real harms from exclusivity and its limited and unpersuasive justifications, the FTC should prohibit, as a per se violation of the FTC Act, exclusive dealing, exclusionary payments, and related practices that substantially foreclose rivals from customers, distributors, or suppliers. To provide legal guidance, the FTC should define "substantial foreclosure" and hold that it can be shown through firm dominance, quantitative foreclosure, or qualitative foreclosure. Relative to existing legal standards, this rule would provide greater legal clarity to businesses of all sizes. It would encourage dominant firms to compete through means besides exclusive dealing and related practices and, at the same time, would allow small and non-dominant firms to use exclusivity as they see fit.

Certification

The undersigned certifies, that, to the best knowledge and belief of the undersigned, this petition includes all information and views on which the petition relies, and that it includes representative data and information known to the petitioner, including information that is unfavorable to the petition.

Appendix

Table 1: Litigated Cases

Corporation(s) Imposing Exclusionary Contract	Case Name	Year of Decision	Industry	Trading Partner(s) Subject to Exclusionary Contract	Specific Partner(s) Subject to Exclusivity Contract	Citation
Microsoft	United States v. Microsoft Corp.	2001	Operating systems	Distributors	Internet access providers, including internet service providers, and online services	253 F.3d 34 (D.C. Cir. 2001)
Visa & MasterCard	United States v. Visa U.S.A., Inc.	2003	Credit card networks	Distributors	Member banks that distribute credit cards	344 F.3d 229 (2d Cir. 2003)
3M	LePage's Inc. v. 3M	2003	Transparent tape	Distributors	Retail distributors	324 F.3d 141 (3d Cir. 2003)
Dentsply International	United States v. Dentsply Int., Inc.	2005	Artificial teeth	Distributors	Artificial teeth distributors	399 F.3d 181 (3d Cir. 2005)
Eaton	ZF Meritor, LLC v. Eaton Corp.	2012	Heavy-duty truck transmissions	Customers	HD transmission purchasers	696 F.3d 254 (3d Cir. 2012)
McWane	McWane, Inc. v. FTC	2015	Ductile iron pipe fittings	Distributors	Iron pipe distributors	783 F.3d 814 (11th Cir. 2015)

Table 2: Settled Cases

Corporation(s) Imposing Exclusionary Contract	Case Name	Year of Settlement	Industry	Trading Partner(s) Subject to Exclusionary Contract	Specific Partner(s) Subject to Exclusivity Agreement	Citation
Mylan Laboratories	FTC v. Mylan Labs., Inc.	1998	Prescription medication	Suppliers	Active Pharmaceutical Ingredient suppliers	62 F. Supp. 2d 25, 33 (D.D.C. 2010), on reconsideration in part sub nom. FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999)
Intel	In the Matter of Intel Corporation	2010	Central processing units	Manufacturers	Original Equipment Manufacturers	2010 WL 4542454
Transitions Optical	In the Matter of Transitions Optical	2010	Photochromic lens treatment	Distributors	Independent lens wholesalers	(No. 91-0062), 2010 WL 780378
United Regional Health Care System	United States v. United Regional Health Care System	2011	Acute-care inpatient hospital services and outpatient surgical services	Distributors	Health Insurers	(No. 11-00030)
Pool Corporation	In the Matter of Pool Corp.	2011	Pool supply distribution	Manufacturers	Pool supply manufacturers	(No. 101-0115) , 2011 WL 5881164
IDEXX Laboratories	In the Matter of IDEXX Labs., Inc.	2013	Point-of-care veterinarian diagnostic products	Distributors	Point-of-care diagnostic distributers	155 F.T.C. 241 (2013), 2013 WL 8364897
Cardinal Health	FTC v. Cardinal Health, Inc.	2015	Radiopharmaceuticals	Distributors	Radiopharmaceutical distribution	Fed. Trade Comm'n v. Cardinal Health, Inc., (No. 15-3031)
Victrex	In the Matter of Victrex plc	2016	Implant-grade polyetheretherketone	Manufacturers	Medical device manufacturers	In the Matter of Victrex Plc, A Corp., Invibio Ltd., A Corp., & Invibio, Inc., A Corp., (No. 141-0042), 2016 WL 3913333 (July 13, 2016).
News Corp.	Dial Corp. v. News Corp.	2016	In-store promotions	Customers	Retailers	Dial Corp. v. News Corp., 314 F.R.D. 108, 111 (S.D.N.Y. 2015), amended, (No. 13-CV6802), 2016 WL 690895 (S.D.N.Y. Feb. 9, 2016).

Table 3: Pending Cases

Corporation(s) Imposing Exclusionary Contract	Case Name	Year of Complaint or Decision	Industry	Trading Partner(s) Subject to Exclusionary Contract	Specific Partner(s) Subject to Exclusivity Agreement	Citation
Qualcomm	FTC v. Qualcomm, Inc.	2017	Baseband processors	Customer	Apple Inc.	FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019).
Surescripts	FTC v. Surescripts LLC	2019	Electronic medical prescriptions	Customers	Routing and eligibility customers	2019 WL 1785573
Vyera Pharmaceuticals	FTC v. Vyera Pharmaceuticals, LLC	2020	Prescription medication	Manufacturer	Daraprim ingredient manufacturers	(No. 20-00706)
Google	Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement, C(2018) 4761 final	2018	Mobile search	Manufacturers	Original Equipment Manufacturers	Commission Decision of 18.7.2018 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union (the Treaty) and Article 54 of the EEA Agreement, C(2018) 4761 final, 63, 149 (July 18, 2018)
Keurig Green Mountain Single-Serve Coffee	TreeHouse Foods, Inc. v. Green Mountain Coffee Roasters, Inc.	2014	Coffee brewers and pods	Manufacturers	Coffee pod manufacturers	TreeHouse Foods, Inc. v. Green Mountain Coffee Roasters, Inc. (S.D.N.Y. 2014) (No. 14-0905)
Mylan	In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation	2017	Medical devices	Distributors	EpiPen distributors	In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices & Antitrust Litig., (No. 17-2785), 2017 WL 6524839 (D. Kan. Dec. 21, 2017).
Becton Dickinson	Marion Diagnostic Center LLP v. Becton, Dickinson & Co.	2018	Syringes and catheters	Suppliers	Healthcare provider	Marion Diagnostic Ctr., LLC v. Becton, Dickinson, & Co., 2018 WL 6266751 (S.D. Ill. Nov. 30, 2018) (No. 18-01059), vacated and remanded sub nom. Marion Healthcare, 952 F.3d 832
Zuffa LLC	Le v. Zuffa. LLC	2015	Mixed martial arts	Suppliers	Professional fighters and venues	Cung Le v. Zuffa, LLC, 108 F. Supp. 3d 768 (N.D. Cal. 2015) (No. 14-05484)
Johnson and Johnson	Pfizer, Inc. v. Johnson & Johnson	2017	Prescription medication	Suppliers	Healthcare provider	Pfizer, Inc. v. Johnson & Johnson (No. 17-04180)
Allergan	Shire U.S., Inc. v. Allergan, Inc.	2019	Prescription medication	Suppliers	Drug plan administrators	Shire US, Inc. v. Allergan, Inc., 375 F. Supp. 3d 538, 541 (D.N.J. 2019).
Live Nation Entertainment	Iderstine v. Live Nation Entertainment	2020	Ticket distribution	Suppliers	Music venues	Iderstine v. Live Nation Entm't, Inc. (No. 20-03888)
Varsity Brands	Fusion Elite All Stars v. Varsity Brands	2020	Cheerleading competitions and apparel	Suppliers	Cheerleading events and gyms	Fusion Elite All-Stars v. Varsity Brands (No. 20-03521)
Dairy Farmers of America	Food Lion, LLC v. Dairy Farmers of America, Inc.	2020	Milk processing and distribution	Suppliers	Dairy farmers	Food Lion, LLC v. Dairy Farmers of America, Inc., (No. 20-442)

Table 4: Other Public Allegations

Corporation(s) Imposing Exclusionary Contract	Industry	Trading Partner(s) Subject to Exclusionary Contract	Specific Partner(s) Subject to Exclusivity Contract
Food manufacturers	Food	Distributors	Food service management companies
AB-InBev and MillerCoors	Alcohol distribution	Distributors	Beer distributors
Coca-Cola and Pepsi	Soft drinks	Distributors	Public schools, colleges, universities, and retail outlets
Internet service providers	Internet access	Distributors	Rental landlords
MoneyGram and Western Union	Foreign Money Transfers	Distributors	Local money transfer distributors

Organizational Petitioners

The **Open Markets Institute** (OMI) is a non-profit organization dedicated to promoting fair and competitive markets. It does not accept any funding or donations from for-profit corporations. Its mission is to safeguard our political economy from concentrations of private power that undermine fair competition and threaten liberty, democracy, and prosperity. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public.

The **American Economic Liberties Project** (AELP) works to ensure America's system of commerce is structured to advance, rather than undermine, economic liberty, fair commerce, and a secure, inclusive democracy. AELP believes true economic liberty means entrepreneurs and businesses large and small succeed on the merits of their ideas and hard work; commerce empowers consumers, workers, farmers, and engineers instead of subjecting them to discrimination and abuse from financiers and monopolists; foreign trade arrangements support domestic security and democracy; and wealth is broadly distributed to support equitable political power.

The **American Grassfed Association** supports, advocates, and promotes American grass-fed and pasture-based farms and ranches from the farm to the marketplace and in government. It does so by maintaining a credible, transparent national standard for animals humanely raised on pasture and partnering and collaborating to support rural economies.

AMIBA was founded in 2001 to build a movement that supports the development of locally owned and independent businesses. In the past 19 years, AMIBA and its partners have helped form or grow more than 60 independent business alliances (IBAs) that are geographically dispersed around the country. These IBAs count over 20,000 local businesses as members that are united in support of protecting local economies. AMIBA has demonstrated and publicized the importance of local businesses to our national economy. These efforts included educating consumers and policymakers about how small businesses create sustainable jobs and how purchases from small businesses circulate and multiply monies in local communities.

The **Bold Alliance** is a network of "small and mighty" groups in rural states working to protect land and water. We fight fossil fuel projects, protect landowners against eminent domain abuse, and work for clean energy solutions while building an engaged base of citizens who care about the land, water, and climate change.

Color of Change is the nation's largest online racial justice organization. We help people respond effectively to injustice in the world around us. As a national online force driven by millions of members, we move decision-makers in corporations and government to create a more human and less hostile world for Black people in America.

The **Community Coalition for Real Meals** is an intergenerational, multiracial group of farmers, fishers, ranchers, activists, students, and workers calling for a transformation of the way that cafeteria food is sourced.

The **Cornucopia Institute** is a non-profit consumer education and organic watchdog organization. We research brands and investigate the industry to identify and elevate authentic organic foods and farmers, while we scrutinize the USDA National Organic Program's enforcement and application of the organic law.

The **Demand Progress Education Fund** educates its two million members and the general public about matters pertaining to the democratic nature of our nation's communications infrastructure and governance structures, and the impacts of corporate power over our economy and democracy.

The **Fair World Project** educates and advocates for a just global economy where: people are treated fairly with dignity; the environment is respected and nourished; commerce fosters sustainable livelihoods and communities in a global society based on cooperation and solidarity; fair market opportunities and fair government and trade policy defend, and support the contributions of farmers, workers, and artisans to our global society; marketing claims have integrity and promote throughout entire supply chains, and support dedicated brands that put people before profits.

The **Family Farm Action Alliance** is a network of farmers, ranchers, working people throughout the food supply chain, and organizations that represent them. Through sound research and a bold agenda, Family Farm Action Alliance works to expose the abusive nature of monopoly corporate power, develop policy reforms and market opportunities, and advocate for the advancement of an inclusive economy where all people have a right to share in the prosperity they help build.

Farm Aid seeks to keep family farmers on the land. We're best known for our annual music, food and farm festival, but the truth is we work each and every day, year-round to build a system of agriculture that values family farmers, good food, soil and water, and strong communities.

The **Farmworker Association of Florida** is a statewide, grassroots, community-based, non-profit, farmworker membership organization with over 10,000 Haitian, Hispanic, and African American members and five offices in the state of Florida with a 35 year history of working for social and environmental justice with farmworkers.

Food & Water Action mobilizes regular people to build political power to move bold & uncompromised solutions to the most pressing food, water, and climate problems of our time. We work to protect people's health, communities, and democracy from the growing destructive power of the most powerful economic interests.

Friends of Family Farmers builds a strong and united voice for Oregon's independent family farmers, food advocates, and concerned citizens who are working to foster the type of agriculture that respects the land, treats animals humanely, sustains local communities, and provides a viable livelihood for family farmers.

Friends of the Earth, backed by our more than two million members and supporters across the country, fights to create a more healthy and just world. Our current campaigns focus on

promoting clean energy and solutions to climate change, ensuring the food we eat and products we use are safe and sustainable, and protecting marine ecosystems and the people who live and work near them.

HEAL is a multi-sector, multiracial coalition comprising 55 member organizations who represent over 2 million rural and urban farmers, ranchers, fishers, farm and food chain workers, indigenous groups, scientists, public health advocates, policy experts, community organizers, and activists. Together, they are building their collective power to transform food systems so that they are healthy for families, accessible and affordable for all communities, and fair to the people who grow, process, distribute, prepare, and serve our food - while protecting the air, water, and land.

In the Public Interest is a national non-profit research and policy organization that studies public goods and services. We help community organizations, advocacy groups, public officials, researchers, and the general public understand how the privatization of public goods impacts service quality, democracy, equity, and government budgets. We also advocate for reclaiming and building popular support of public institutions that work for all of us.

The **Initiative for Medicines, Access & Knowledge (I-MAK), Inc.** is a global non-profit organization working on systemic changes to intellectual property and the political economy of pharmaceutical innovation in order to increase access to affordable life-saving medicines.

The **Institute for Local Self-Reliance** (ILSR) is a national research and advocacy organization that challenges corporate control and works to build thriving, equitable communities. For 45 years, ILSR has provided research, analysis, and policy expertise to local and national partners to build an American economy driven by local priorities and accountable to people and the planet. Across our initiatives, ILSR advocates for solutions that harness the power of citizens and communities.

The **Johns Hopkins Center for a Livable Future** investigates the interconnections among diet, food production, public health, and the environment. Since 1996, the Center for a Livable Future has applied a public health lens to the ecological, economic, and social considerations across the food system.

The **Northern Plains Resource Council** is a grassroots conservation and family agriculture group that organizes Montanans to protect our water quality, family farms and ranches, and unique quality of life.

The **Oklahoma Stewardship Council** is a coalition of family farmers, community leaders and concerned citizens.

The **Organization for Competitive Markets** (OCM) is a membership-based research and advocacy organization working to expose and break the stranglehold of corporate consolidation in our food and agricultural economy.

The **People's Parity Project** is a nationwide network of law students and new attorneys organizing to unrig the legal system and build a justice system that values people over profits. As members of the legal profession, we believe we have a responsibility to demystify—and dismantle—the coercive legal tools that have stacked the system against the people. We're fighting for a civil legal system that works for working people, especially workers of color, women, and low-wage, precarious, immigrant, disabled, and LGBTQ+ workers.

Public Justice is a non-profit legal advocacy organization dedicated to using high impact litigation to combat social and economic injustice, protect the Earth's sustainability, and challenge predatory corporate conduct and government abuses. The Public Justice Food Project is the only legal project in the country dedicated solely to reforming industrial animal agriculture into a system that is regenerative, just, humane, and enables independent farmers to thrive.

Rural Advancement Foundation International-USA (RAFI-USA) is a 501(c)3 incorporated in 1990. We believe that in order to ensure a safe, adequate supply of healthy food, we must protect farm workers and encourage environmentally sound farming. We see environmental sustainability, economic viability, biodiversity, and social justice as inextricably linked. Therefore, the best way to ensure a just, sustainable future for farming is to create a reality where farmers feel supported and protected and have the resources to thrive.

The **San Luis Valley Local Foods Coalition** works to foster an equitable local food system that restores the health of the people, community, economy, and ecosystem in the San Luis Valley region in Southern Colorado. Its main enterprises include the Valley Roots Food Hub an aggregation and distribution service filling the gap between 65 Southern Colorado producers and their customers; the Rio Grande Farm Park with a farm incubator on 38 acres near the Rio Grande; a Cooking Matters program teaching people to cook and eat healthy on a budget and a Local Foods Local Places initiative complete with a mobile kitchen.

The **Service Employees International Union** is an organization that represents over 2.2 million men and women who work in health care, property services or public employment, united by the belief in the dignity and worth of workers and the services they provide and dedicated to improving the lives of workers and their families and creating a more just and humane society.

The **Socially Responsible Agricultural Project** is a mobilizing force that helps communities oppose the construction of concentrated animal feeding operations, also known as factory farms. SRAP is also building out a food and farm network to support and educate rural residents to advocate for a new and improved food system that's built on regenerative practices, justice, democracy and resilience. Through public education, issue advocacy, and local community organizing, SRAP empowers rural residents to protect their public health, environmental quality, natural resources, and local economies from the damaging impacts of factory farms.

The **Warehouse Worker Resource Center** organizes and supports logistics and goods movement workers and their families across Southern California through education, advocacy, and action.

Individual Petitioners

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Veena Dubal is Professor of Law at the University of California, Hastings College of the Law. Her research focuses on the intersection of law and social change in the work context. She joined the Hastings Faculty in 2015, after a post-doctoral fellowship at Stanford University (also her undergraduate alma mater). Prior to that, she received her J.D. and Ph.D. from UC Berkeley, where she used historical and ethnographic methodologies to study workers and worker collectivities in the San Francisco taxi industry. Her work on taxi workers, Uber drivers, and Silicon Valley tech workers has been featured in top-ranked law reviews and featured in the local and national media.