DEVELOPMENTS IN EXCLUSIVE DEALING[*]

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Introduction

Exclusive dealing, for over a decade the least visible of the generally overlooked family of vertical restraints, is coming of age as a focus of United States government enforcement. Since 1993, the Antitrust Division of the United States Department of Justice (the "Division") has brought complaints targeting the exclusive dealing practices of five different companies. Most recently, the Federal Trade Commission (the "Commission") dramatically joined the fray when, with great media fanfare, it issued a complaint against the exclusive dealing practices of Toys "R" Us, the largest retail toy store chain in the United States. Observers of antitrust developments might do well to remember the "little cloud out of the sea, no bigger than a man's hand," that presaged a great rain. (1 Kings XVIII.44)

In the decade preceding l993 the Division brought few complaints against vertical restraints, price and nonprice alike. [1] The

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Department of Justice's 1985 Vertical Restraints Guidelines[2] articulated the analytical standards that led to this de facto "hands-off" policy.[3] The Guidelines were infused with "Chicago School" economic theory which generally views all vertical arrangements as either benign or efficient (except where they accompany horizontal restraints). [4]

The Federal Trade Commission, while never endorsing the Vertical Restraints Guidelines, followed a similar "hands-off" policy towards vertical restraints in the nine years between its challenges to the conduct of *Beltone Electronics Corp*., 100 F.T.C. 68 (1982) (exclusive dealing) and *Kreepy Krauly USA, Inc.,* 114 F.T.C. 777 (1991) (resale price maintenance).

However, the 1990s brought a change in policy and in theory. Former Assistant Attorney General Anne Bingaman withdrew the Vertical Restraints Guidelines in 1993, "based on the belief that the Guidelines unduly elevate theory at the expense of factual analysis and reflect a continued resistance to case law that, at this point in our

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[1] .The Division also advocated repealing the per se rule against resale price maintenance.· See Amicus Curiae Brief for Petitioner, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

[2] .U.S. Department of Justice Vertical Restraints Guidelines (1985), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,105.

[3] .Ostensibly a two-step evaluation, the Vertical Restraints Guidelines actually set out eight questions that had to be answered before, "on balance," a nonprice vertical restraint could “appear” to be anticompetitive.

[4].See Robert H. Bork, THE ANTITRUST PARADOX 297 (1978) .

history, is inappropriate." Henceforth, she noted, "non-price fixing restraints [would be] subject to a meaningful rule of reason analysis."[5]

Seemingly driving this changed perception of vertical nonprice restraints is the received wisdom of the "Post-Chicago School" of economics, which advocates analyzing vertical nonprice restraints through the prism of foreclosure.[6]

Both the Division and the Commission have manifested their general concern with foreclosure and vertical non-price restraints by issuing three sets of health care guidelines[7] and the Intellectual

5.Anne K. Bingaman, Antitrust Enforcement, Some Initial Thoughts and Actions, Address Before the ABA Antitrust Section 7, 9 (Aug. 10, 1993), reprinted in 65 Antitrust & Trade Reg. Rep. (BNA) 250, 251 (Aug. 12, 1993) .

6.See generally Thomas G. Krattenmaker & Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price, 96 YALE L.J. 209 (1986); Rebecca P. Dick, Chief of the Antitrust Division Civil Task Force, Antitrust Enforcement in Vertical Restraints, Remarks Before ABA Antitrust Section (Nov. 4, 1994).

7.U.S. Department of Justice and Federal Trade Commission, Antitrust Enforcement Policy Statements in the Health Care Area (1993), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,151, superseded by Department of Justice and Federal Trade Commission Statements of Enforcement Policy and Analytical Principles Relating to Healthcare and Antitrust (1994), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152, superseded by Department of Justice and Federal Trade Commission Statements of Antitrust Enforcement Policy in Health Care (1996), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,153.

Property Guide-lines;[8] co-sponsoring a conference to showcase the Post-Chicago School;[9] and bringing cases.[10]

To date neither agency has produced a comprehensive description of its analytical framework for exclusive dealing. References in the various Guidelines to the dangers of foreclosure are quite general, and the Post-Chicago School conference papers can only be taken as a potential influence upon the policy makers, not their current views. Certain insights into both agencies' thinking, however, may be drawn from the cases described below. The cases indicate that the Division is concerned, at a minimum, with excessive duration of exclusive dealing contracts and is defining "excessive" in a new way. The Commission is currently silent on the issue of duration, but has brought a case which is intended to redefine "market power" in the exclusive dealing context. Moreover, both agencies, when assessing the impact of exclusive dealing, are looking to the actual practice and its effects, not merely the formal terms of the arrangement.

[8] U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property (1995), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,132.

[9] FTC/DOJ/ABA/GULC Conference, Post-Chicago Economics: New Theories - New Cases?, Washington, D.C., May 26- 27, 1994.

[10]..For example, foreclosure concerns have surfaced in Division and FTC enforcement actions against both vertical mergers and tying arrangements. See, e.g., Eli Lilly & Co., 59 Fed. Reg. 60,815 (Nov. 28, 1994) (vertical merger); United States v. Electronic Payment Servs., Inc., 59 Fed. Reg. 24,711 (May 12, 1994)(tying); Sandoz Pharmaceuticals Corp., 57 Fed. Reg. 36,403 (Aug. 13, 1992) (tying).

To understand the importance of these changes, it is first necessary to review the law of exclusive dealing, as it has developed in United States jurisprudence.

Analysis of Exclusive Dealing: The Rule of Reason

An exclusive dealing agreement is generally one in which a buyer agrees to buy goods or services exclusively from one supplier for a time specified in the agreement. Like other vertical non-price restraints, exclusive dealing arrangements have a Dr. Jekyll and Mr. Hyde potential with regard to competition. In many circumstances, exclusive dealing agreements generate procompetitive efficiencies.[11] However, when they foreclose a substantial amount of competition in a line of commerce, exclusive dealing arrangements can be anticompetitive.[12]

[11] The United States Supreme Court has identified several procompetitive efficiencies generated by exclusive dealing arrangements:

In the case of the buyer, they may assume supply, afford protection against rises in price, enable long- term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, [they] may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and offer the possibility of a predictable market.
Standard Oil Co. v. United States, 337 U.S. 293, 306- 07 (1949) (Standard Stations) (footnote omitted) .

[12] . Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply-

Initially, the United States Supreme Court gauged the reasonableness of an exclusive practice by considering only the extent of market foreclosure: all anticompetitive effects were assumed to flow from substantial foreclosure. In *Standard Stations*, the case which established this "quantitative substantiality" approach, the Court considered what percentage would amount to substantial foreclosure. *Standard Oi1* Co. v. United States, 337 U.S. 293, 313-14 (1949). Significantly, the Court considered not just the effects of the defendant's own exclusive contracts; it aggregated the foreclosure effects of all of the market players' exclusive contracts. Thus, in *Standard Stations*, the Court found that the 6.7 percent foreclosure created by the defendant's exclusive dealing arrangements was unreasonable because it contributed to an aggregated industry-wide 67 percent foreclosure effect. Id. at 309, 314.

The strictly numerical *Standard Stations* analysis was eventually displaced, in *Tampa Electric Co*. v. *Nashville Coa1 Co*., 365 U.S. 320, 329 (1961), by the "qualitative substantiality" test, which was in essence a rule of reason analysis. In applying this analysis, the courts and the agencies examine a number of factors, chief among them the percentage of the market foreclosed, the duration of the exclusive arrangement, and the "notice of termination" period.[13]

[13] See, e.g., Heltone Elecs. Corp., 100 F.T.C. 68, 204 (1982)("[A] proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity.") (footnote omitted).

As with other vertical non-price restraints, the percentage of the market foreclosed is the paramount inquiry. Nonetheless, many commentators and courts have generally viewed a short or moderate duration as capable of competitively redeeming, or at least mitigating, a high percentage of market foreclosure.

Duration is a key element of the analysis because it determines the temporal extent of foreclosure. As explained by Herbert Hovenkamp: "[A] market saturated with exclusive dealing contracts could be fiercely competitive, if the contracts were short term and the parties bid vigorously for the contracts themselves.[14]

Under the rule of reason, the "notice of termination" period is a necessary corollary to the durational aspect of the analysis. The ability to cancel on short notice tends to vitiate any foreclosure effect,[15] so long as other contractual provisions or market pressures do not effectively nullify the short notice period.

Until recently the conventional wisdom was that exclusive contracts of either short to moderate duration, (or at least featuring a limited notice of termination period), would escape antitrust

[14] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 390-91 (1994).

[15] See, e.g., Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994) (upholding contract terminable without cause on six-months' notice); U.S. Healthcare v. Healthsource, Inc., 986 F.2d 589, 596 (lst Cir. 1993) (upholding exclusive status of contracts terminable on 30-days' notice); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984) (upholding contract terminable without cause on 90-days' notice); Beltone, 100 F.T.C. at 210 (up- holding contracts terminable on 30-days' written notice).

censure.[16] "Short-term" agreements (less than one year) were "presumptively lawful;[17] "moderate-term" agreements (less than five years) were of rare concern;[18] and only "long-term" agreements (over five years) bore a significant -- though not certain -- risk of antitrust condemnation.[19]

Enforcement at the Division

In a recent line of consent agreements addressing exclusive dealing, however, the Division has signaled that even moderate-term exclusive dealing arrangements can be anticompetitive when imposed

[16] See, e.g., PHILLIP AREEDA & DONALD F. TURNER, 3 ANTITRUST LAW ¶¶ 731c, 732c3 (1978); HOVENKAMP, supranote 17; ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 177-78 (3d ed. 1992).

[17] Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d at 380, 395 (7th Cir. 1984); accord Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317, 1320, 1324-25 (4th Cir. 1995); U.S. Healthcare v. Healthsource, Inc., 986 F.2d at 589, 596 (lst Cir. 1993); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 395-96 (1953). But see, e.g., United States v. Dairymen, Inc., 1983-2 Trade Cas. (CCH) ¶¶ 65,651 & 65,704 (W.D. Ky. 1983), *aff'd without op*., 758 F.2d 654 (6th Cir.), cert. denied, 474 U.S. 822 (1985) (enjoining requirements contract varying from 30 days to one year in duration, when those contracts foreclosed a large percentage of the market).

[18] See, e.g., Balaklaw v. Lovell, 14 F.3d at 799 (2d Cir. 1994); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 237-38 (lst Cir. 1983); Howerton v. Grace Hosp., 1995-2 Trade Cas. (CCH) ¶ 71,208 at 75,855 (W.D.N.C. 1995), aff'd, 96 F.3d 1438 (4th Cir. 1996).

[19] See, e.g., Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1302 (9th Cir.) (invalidating contract of greater than 10 years), cert. denied, 459 U.S. 1009 (1982); Great Lakes Carbon Corp., 82 F.T.C. 1529, 1668-69 (1973) (invalidating 7- to 20-year contracts; upholding 3- and 5- year contracts). However, even long-term contracts have been upheld where other factors, such as low market share, indicated a lack of competitive impact. See, e.g., Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 334 (1961) (upholding 20-year contract).

by a company with significant market power. Moreover, short notice of termination periods may no longer be considered a safety valve if other contractual terms or the industry structure effectively obviate the termination option. In addition, the Division will look beyond the formal terms of the arrangement to determine whether it is "exclusive" in effect.

The Division launched its opening salvo on exclusive dealing in United States v. Microsoft, 59 Fed Reg. 42,845 Aug. 19, 1994). The Division challenged Microsoft's practices in licensing its "Windows" personal computer operating system to original equipment manufacturers (“OEMs”) . The Division alleged that Microsoft had maintained its monopoly (stated in the complaint as a greater than 70 percent market share) over PC operating systems by using exclusionary contracts. While the contracts did not explicitly require OEMs to deal solely with Microsoft, they did require OEMs to pay Microsoft a royalty for each computer shipped, regardless of whether it included a Microsoft operating system.

The complaint alleged that this arrangement forced an OEM to pay twice (i.e., first to Microsoft and then again to the competing operating system supplier) to use an alternative operating system, thereby driving up the costs of using the non-Microsoft operating unit. The exclusionary effect was intensified by "minimum commitments" contract provisions, which obligated the OEM to purchase large numbers of operating systems from Microsoft and credited unused balances to future contracts, which further decreased sales opportunities for any competitive operating system. Also found objectionable was the duration of the contracts: at a minimum, it was three years, but through amendment often lasted more than five -- allegedly a period of time equal to or exceeding the product life of most PC operating system products.

Microsoft and the Division entered into a consent agreement, which, as approved by the court,[20] required Microsoft to switch to per system licenses, in which the OEM would pay Microsoft only when the OEM shipped a computer that included a Microsoft operating system. A provision less noticed at the time, but in retrospect significant, prohibited Microsoft from entering into any operating system license for an initial or renewal term of longer than one year.

Almost simultaneously with *Microsoft*, the Division brought another exclusive dealing case, *United States v. Topa Equities* (V.I.), Ltd., 59 Fed. Reg. 67,728 (Dec. 30, 1994). In what might best be characterized as "creeping monopolization," over the course of a decade, Topa Equities had acquired virtually all of its competitors in the wholesale liquor distribution business in the Virgin Islands. Since each acquired distributor held exclusive distribution rights for certain brands, Topa ended up holding exclusive distribution rights to every significant brand of liquor. Retailers were deprived of alternate sources of supply and suppliers were deprived of alternate wholesale distribution outlets.

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[20] United States v. Microsoft Corp., 1995-2 Trade Cas. (CCH) ¶ 71,096 (D.D.C. 1995) see Deborah A. Garza, *The Court of Appeals Sets Strict Limits on Tunney Act Review: The Microsoft Consent Decree*, ANTITRUST, Fall 1995, at 21.

The Division's solution was to ban Topa from any exclusive dealing. To ensure that Topa could not act as a bottleneck between suppliers and retailers, the order required Topa to accede to a thirty-day cancellation notice in its supplier contracts and to refrain from refusing to deal with any retailer who deals with another wholesaler.

In 1995, the Division challenged metes-and-bounds exclusive dealing provisions in United States v. Greyhound Lines, Inc., 60 Fed. Reg. 53,202 (Oct. 12, 1995). In that case, the Greyhound intercity bus line, as a lessor of bus terminals, wrote into its lease agreements restrictions on tenant bus companies doing business from any other location within twenty-five miles, or accepting other bus companies' tickets sold within that radius. According to the Division, although most cities and towns are served only by the Greyhound terminal, in some larger metropolitan areas a second terminal or "non- terminal facilities" (e.g., airports or train stations) provide alternative sites for local bus connections. The "25-mile rule" allegedly prevented Greyhound's carrier tenants from expanding their operations to these alternative locations, restricting actual and potential competition in intercity bus transportation.

The consent order requires Greyhound to expunge the "25-mile rule" from its contracts. The proposed final judgment does not state why the carrier tenants accepted the "25-mile rule" instead of moving their business to an alternate location when one was available. A hint may be found in the description of Greyhound as "the only nationwide intercity bus company." Presumably, bus companies making local-to-long distance connections would have to use Greyhound's bus services and/or terminals in other cities where there were no competitive alternatives. This fact may also explain why a very short (thirty day) notice of termination period did not operate as a safety valve for the exclusivity provision. In short, Greyhound was able to leverage its nationwide monopoly power into locally competitive situations, using exclusive dealing provisions as the means.

In 1996, the Division addressed the exclusive contracts used by two large waste disposal companies, Browning-Ferris Industries, Inc., and Waste Management, Inc. Both companies had market shares greater than 60 percent in their respective geographic markets and allegedly required customers to enter into contracts that gave the companies the exclusive right to collect and dispose of all the customer's trash. The contracts used by both companies contained similar terms. Each provided for an initial three-year term plus automatic renewal for an additional three-year term, unless the customer cancelled at least sixty days before the end of any term. Each also contained a liquidated damages provision requiring customers to pay six times their prior monthly charge, which allegedly made it prohibitively expensive for a customer to terminate the contract.

The proposed consent agreements require both companies to limit their exclusive contracts to two years or less, prohibit renewal terms longer than one year, and require that the contracts be terminable on thirty-days' notice. United States v. Browning-Ferris, Inc., 61 Fed. Reg. 8643 (Mar. 5, 1996); United States v. Waste Management, Inc., 61 Fed. Reg. 8653 (Mar. 5, 1996). In addition, the consents severely restrict the amount of liquidated damages available in the event of customer termination.

The recent flurry of activity marks a departure from traditional Division policy on exclusive dealing. While these consents do not constitute a landslide, they do represent a significant shift in ground, particularly given the Division's previous quiescence. In retrospect, Microsoft can be seen as a bellwether signaling a strong distrust of exclusive practices when imposed by a firm with market power, regardless of whether the goal of exclusivity is explicit or achieved implicitly through economic incentives. The Division repeatedly emphasized the interconnecting and reinforcing nature of the various licensing provisions, characterizing the "series" as "exclusionary," rather than defining any one provision as exclusive dealing:

> Per processor licenses are also very similar to exclusive dealing or requirements contracts; the OEM in effect is obtaining the right to use Microsoft's operating system, and is paying an operating system royalty, for all of its operating system 'requirements' for use on PCs using the designated microprocessors. . . .

> While minimum commitments are not in and of themselves illegal, they can be used to achieve a similar effect as that accomplished through per processor licenses or exclusive dealing contracts.

Microsoft, 59 Fed. Reg. at 42,851-52.[21]

These cases suggest that moderate duration will not save a clearly anticompetitive exclusive dealing contract.[22] The Division chose to challenge exclusive contracts that were relatively short-term, ranging from three to five years. Such limited term contracts had rarely been challenged in the past. The consent agreements limit future contracts to less than two years (Browning-Ferris, Waste Management) and even to one year or less (Microsoft, Topa Equities) . This suggests that, absent a compelling procompetitive justification, many companies that thought they were well within durational bounds may be outside them. Greyhound Lines suggests that where the exclusionary intent and effect is extreme enough, even a very short notice of termination period will not salvage the contract.

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[21] Similarly, in a market division case, the Division observed that a licensing agreement, non-exclusive on its face, was exclusive "in effect," because the licensor declined to license the licensee's competitors. See United States v. S.C. Johnson & Son, 59 Fed. Reg. 43,859 (Aug. 25, 1994).

[22] To date, the most expansive statement of the Division's views on duration appears in the Intellectual Property Guidelines. See Intellectual Property Guidelines at § 4.2. The agencies specifically note that they will be alert to ways in which ostensibly short duration can be manipulated to long-term effect. The agencies also emphasize that they will consider whether duration is longer than necessary to achieve any procompetitive efficiency.

Some may dismiss the recent line of Division cases as anomalous; that is, absent near monopoly position and patently anticompetitive behavior, industries and companies utilizing exclusive dealing have little to fear, based on case law and certain schools of economics prominent in the 1980s. However, a more cautious view is that these cases signal a significant policy shift by the Division on the issue of exclusive dealing -- from blessing to suspicion. Such shifts are seldom launched with borderline cases.[23] Moreover, since the government agencies continue to recognize that exclusive dealing can carry many procompetitive benefits, the Division is carefully targeting egregious examples in its initial enforcement efforts. The Division is not calling for an end to all exclusive dealing. It is, however, sending a strong signal to firms with high market share in industries with steep entry barriers that their exclusive dealing practices will no longer go unexamined.[24]

Enforcement at the Commission

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[23] For example, when the FTC resumed resale price maintenance enforcement after a decade of inaction, it chose a matter where the vertical price fixing agreement was embodied in written contracts. See Kreepy Krauly USA, Inc., 114 F.T.C. 777, 778 (1991). Subsequent resale price maintenance cases have involved less obvious agreements.

[24] In the wake of these enforcement actions, former Assistant Attorney General Bingaman warned that the Division intends to scrutinize the use of exclusive contracts in other industries as well. U.S. Department of Justice Press Release, Justice Department Puts an End to the Two Largest Solid Waste Hauling and Disposal Companies' Monopolistic Practices (Feb. 15, 1996) .

In contrast with the Division's cautious first steps, the Commission has entered the exclusive dealing arena with a bound in Toys "R" Us. In May 1996, the Commission issued an administrative complaint charging Toys "R" Us with inter alia, "extract[ing] agreements from toy manufacturers to stop selling certain toys to deep discount stores known as "warehouse clubs", or to put the toys into more expensive combination packages, so consumers could not obtain lower-priced toys from the clubs, or compare prices easily."[25]

Like the Division's complaint in Microsoft, the Toys "R" Us complaint indicates that to trigger government concern over foreclosure, a practice need not be termed "exclusive dealing." The practice need only be similar in effect by foreclosing a portion of the market from a competitor.

The Toys "R" Us complaint, however, differs from the Division complaints in one significant respect -- the Division targeted companies with market shares of 60 percent or more, while Toys "R" Us reportedly holds at most 30 percent of the toy store market.[26] According to Commission officials, Toys "R" Us wields significant market power, despite its moderate market share.[27] The Commission

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[25] Toys "R" Us, Inc., Dkt. No. 9278 (May 22, 1996).

[26] See FTC Charges Toys 'R' Us with Inducing Toy Makers to Cut Off Discount Sellers, 70 Antitrust & Trade Reg. Rep. 594 (May 23, 1996). The Commission brought the Toys “R” Us complaint under its enabling statute, the Federal Trade Commission Act, which encompasses and goes beyond the prohibitions of the Sherman Act and Clayton Act, and thus arguably does not require the same high market share thresholds.

[27] Id.

has not yet explained how this could be (the case is in litigation with the administrative law judge's opinion expected sometime in 1997), but one explanation could be the following. Although Toys "R" Us has only a 21-30 percent market share as measured by sales dollars, its size dwarfs all other competitors, none of which has more than 2-3 percent of the market. Thus, Toys "R" Us, as the primary nationwide toy store chain in the United States, provides the most viable means for any toy manufacturer to set up or form the core of a toy distribution network. Replacing that network by aggregating small retail chains and individual toy stores in piecemeal fashion would entail such high search and transaction costs that even the largest toy manufacturers would prefer to capitulate to Toys "R" Us demands than to face the uncertainties of creating their own distribution network.

Although these marketplace dynamics may explain the Commission's willingness to move back the. Market share line, the fact remains that Toys "R" Us markedly changes the exclusive dealing landscape. The concept of market power now rests on qualitative considerations, not merely quantitative measurement of sales dollars. Most companies with 30 percent or less market share are probably still free to engage in exclusive dealing with impunity. However, those that hold 21 to 30 percent of the market, and, like Toys "R" Us, face atomistic competition, should be more cautious.

With the matter currently in administrative litigation, the ultimate outcome remains unclear, as does the extent to which the Toys "R" Us theory will be replicated in future government or private enforcement. Nonetheless, the Toys R" Us complaint indicates that the Commission shares the Division's concern with exclusive dealing and other foreclosure-creating vertical restraints, and is not hesitant to use a novel antitrust theory to address that concern.