DEVELOPMENTS

Dentsply—Monopolization Enforcement with Teeth

BY RONALD W. DAVIS AND RICHARD WOLFRAM

TWO YEARS AGO, IN *UNITED STATES v. Dentsply International Inc.*, 277 F. Supp. 2d 387 (D. Del. 2003), the Antitrust Division suffered a surprising defeat when the district court found no liability for Dentsply's exclusive dealing policy. Yes, the defendant had monopoly power (in the manufacture and sale of artificial teeth); yes, its market share was high and stable, and it had no trouble keeping prices up, even when competitors declined to follow its price increases; yes, it had deliberately foreclosed a significant share of distribution to its competitors, and raised its rivals' cost of doing business; and no, its claim to be concerned about interbrand competition and free riding—traditional justifications for vertical non-price restraints—was unfounded, a mere pretext for its desire to harm its competitors.

How, then, did the defendant snatch victory from the jaws of defeat in the district court? By arguing, to the satisfaction of District Judge Robinson, that Dentsply's competitors in the manufacture of artificial teeth could have—with more initiative and better business strategies—readily worked around the defendant's lock on the best dealers, simply by selling directly to dental laboratories. No harm, no foul, ruled the court.

Defendant's luck, however, ran out in the Third Circuit, which rejected the defendant's incompetent competitor story, and found instead that Dentsply's practices had no legitimate business justification, prevented its competitors from increasing their very small market shares, and contributed materially to Dentsply's ability to raise prices to supracompetitive levels. 399 F.3d 181 (3d Cir. 2005). Perceiving significant consumer harm and real injury to competitors, the appellate court readily found the defendant liable for monopolization.

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The Third Circuit's decision, however, is worthy of note in several respects, including its treatment of exclusive dealing under Clayton Act Section 3 (and Sherman Act Section 1) versus under Sherman 2. In particular, the court of appeals said, the fact that exclusivity passes muster under Sherman 1 and Clayton 3 does not necessarily mean that a monopolist gets off the hook under Section 2. Also of interest is the Third Circuit panel's respectful—yet careful, delicate, and stand-offish—use of that circuit's recent, controversial en banc decision in *LePage's*.[1]

All About False Teeth

Monopoly Power. The district court took 58 pages to describe the false teeth business. 277 F. Supp. 2d at 390–448. We extract the highlights from the district and appellate decisions. The defendant, Dentsply, manufactures and sells false teeth, which dental laboratories incorporate into dentures "and other restorative appliances." 399 F.3d at 184. A dozen competitors sell artificial teeth in or into the United States, but the largest of these, after *Dentsply*, has only 5 percent of the U.S. market—compared with Dentsply's 75 to 80 percent share (in dollars) and 67 percent (in units). *Id.*

The market for artificial teeth is stagnant, and Dentsply's high market share has persisted for over a decade. 277 F. Supp. 2d at 423. Dentsply sees itself as the price leader, periodically increases its prices by about 1–1.5 percent over the Consumer Price Index, and sticks with its higher price even if smaller competitors do not follow. *Id.* at 422. Its profit margin ranges from 80 to 90 percent. Profits increased by 32 percent between 1990 and 1996. *Id.* at 423.

Dealers as the Cost-Efficient Channel of Distribution. Dentsply *could* sell directly to the thousands of dental laboratories that need false teeth, and, indeed, some (but not all) of its smaller competitors do sell directly. 399 F.3d at 184.[2] But selling directly, manufacturer to laboratories, turns out to be much less efficient than selling through dealers. Labs need not only teeth but also "a full range of metals, porcelains, acrylics, waxes, and other materials required to fabricate fixed or removal restorations." Thus, dealers carry thousands of products made by hundreds of manufacturers. With a vast and assorted inventory, dealers are able quickly to supply their many customers' needs, on a one-stop shopping basis. In addition, dealers extend credit to laboratories (and bear the associated risks and costs), accept returns, and offer discounts across product lines. It is a win-win proposition for all levels in the supply chain. The laboratories' needs are met on a cost-efficient basis. The manufacturers avoid the hassle of dealing individually with thousands of laboratories. The dealers enjoy economies of scope and scale. *See id.* at 192.

Dealers, however, are faced with the challenge of efficiently managing an unusually complex business. Moreover, the presence of "hundreds" of dealers in the marketplace, and the potential threat that manufacturers may do an end-run by selling directly to the labs, discipline any particular dealer's ability to raise prices. Only a limited number of dealers have excelled at meeting these challenges by finding ways to operate on a highly efficient basis, and in recent years there has been "significant consolidation with several large national and regional [dealers] emerging."[3]

Preempting the Efficient Distribution Channel: Dealer Criterion 6. According to the Government, Dentsply found a way to exploit these market conditions in order to lock its competitors out of the most desirable dealers and thus protect its high market share. Dentsply sold only indirectly, through dealers—and only through 23 of the hundreds of dealers in the marketplace. The Government argued, however, that Dentsply's dealer network consisted of "key dealers," whose foreclosure to some or all competing manufacturers had "a significant effect in preserving Dentsply's monopoly." *Id.* at 191.

Dentsply operated on a purchase order basis with its dealers, rather than through long-term contracts. In 1993 it announced—and thereafter, apparently, consistently and rigidly enforced—its "Dealer Criterion 6," which recited that "[i]n order to effectively promote Dentsply/York products, dealers that are recognized as authorized distributors may not add further tooth lines to their product offering." 277 F. Supp. 2d at 412. Accordingly, dealers that were carrying competing lines as of 1993 were allowed to keep on selling those "grandfathered" brands, but not to add new ones, and dealers that were not carrying competing lines were required to continue buying exclusively from Dentsply—the penalty for violation being the refusal to fill any more orders.

Justifications or Excuses? Often, a manufacturer's exclusive dealing arrangements with a limited set of dealers provide an essential incentive to encourage the dealers to promote the manufacturer's brand, thus increasing competition among brands to the benefit of consumers.[4] Although Dentsply offered this argument as justification for its policy, it was unable to substantiate its case. Dentsply employed a "pull through" method of promotion—relying mainly on its own efforts, not those of its dealers, to create demand for its teeth among dental laboratories and dentists. 277 F. Supp. 2d at 429–35. For this reason and others, Dentsply's promotion-of-interbrand-competition rationale was found to be pretextual, as the district court explained at length. *Id.* at 440–48; *see also* 399 F.3d at 196–97. The courts were aided by the customary "hot documents," evidencing subjective intent to harm competitors. *E.g.*, 277 F. Supp. 2d at 419.

By enforcing Dealer Criterion 6, Dentsply foreclosed access by its competitors to the most efficient channel of distribution, a channel found by the court of appeals to be essential to effective competition. In contrast, the district court based its no-harm, no-foul conclusion both on the availability of other attractive dealers, outside the Dentsply network, and on the "viability" of a competing manufacturer's option to sell directly to labs and bypass the dealer system altogether. 277 F. Supp.2d at 452. The appellate court vigorously disagreed on both points. 399 F.3d at 191–93.

Though the district court's opinion was not unpersuasive on its face, the appellate court's discussion of the business facts seems to us more plausible. Some may detect an ideological difference between the two courts, perhaps combined with a different understanding of economic theory. That is as may be: To us, the question whether smaller competitors could have worked around Dentsply's constraint on major dealers appears to be an intensely factual controversy, of little general interest. In any event, we have neither the basis[5] nor the inclination to express any definitive judgment on the dispute about the competitive significance of the 23 dealers that Dentsply locked up.

The District Court Ruling: Clayton 3 and Sherman 1

Where a series of exclusive dealing arrangements is alleged to contribute to a manufacturer's monopoly power, it is customary to charge not only monopolization in violation of Sherman Act Section 2, 15 U.S.C. § 2, but also a violation of Section 3 of the Clayton Act, 15 U.S.C. § 14 (and, for good measure, Section 1 of the Sherman Act, 15 U.S.C. § 1). The Antitrust Division alleged all three violations in *Dentsply*.

Unlike Sherman Act Section 2, Clayton 3 and Sherman 1 do not require the defendant to be a monopolist, or highly likely to become a monopolist. Moreover, Clayton 3 is traditionally understood as a "prophylactic" provision that may be violated by demonstrating an "incipient" injury to competition.[6] For these two reasons, one might well suppose that a Clayton 3/Sherman 1 exclusive dealing case should be easier to prove than a Sherman 2 case. But are Clayton 3 and Sherman 1 more encompassing in all respects than Sherman 2? Or, on the contrary, may an essentially unilateral business policy of exclusive dealing escape scrutiny under Clayton 3 and Sherman 1, yet remain subject to review under Section 2—which condemns any and all business policies, whatever we call them, that create, preserve, or extend monopoly power without benefit to consumers?

Clayton 3 provides in pertinent part:

> It shall be unlawful for any person . . . to . . . make a sale or contract for sale of goods . . . on the condition, agreement or understanding that the . . . purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Because exclusive dealing arrangements often have procompetitive effects, they are analyzed under the rule of reason and generally are deemed illegal only when they foreclose competitors from a substantial portion of the market, e.g., *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961)—thus making it impossible for would-be competitors to distribute their products, or substantially raising competitors' costs and thus crippling them. Here, the Government needed to show at a minimum that the *probable* effect would be a substantial lessening of competition, because Clayton 3's language arguably applies an incipiency standard of injury to competition.

Under the well-established "qualitative substantiality" test set forth by the Supreme Court in *Tampa Electric*, courts typically assess a number of factors in balancing the anticompetitive effects and procompetitive benefits of the restraint. These may include the percentage of the market foreclosed, barriers to entry, duration of the agreement, the right to terminate, the existence of alternative distribution channels, competitors' use of exclusive dealing, whether the purchaser is an end-user or a distributor, the degree of complexity of the product, actual competitive impact, and business justifications.[7]

Applying this test, the district court reasoned that the "viability" of direct distribution by teeth manufacturers and Dentsply's terminable-at-will, purchase-order relationships with dealers precluded Dentsply from foreclosing a substantial amount of commerce in the sale of false teeth. 277 F. Supp. 2d at 448–51. First, it is intuitively obvious that the availability of alternative distribution channels would weaken any anticompetitive effects caused by exclusive dealing. Indeed, numerous courts have placed key reliance on the existence—as distinguished from the mere theoretical possibility—of such alternative channels in evaluating the legality of exclusive dealing arrangements.[8] The district court found direct sales by manufacturers (other than Dentsply) to dental laboratories to be not only "a viable [but also], in some ways, advantageous method of distribution." *Id.* at 449. It stressed that "the DOJ's expert agreed that competing manufacturers are not foreclosed from a substantial share of the dental laboratories," that many other dealers were available besides the 23 used by Dentsply, and that the DOJ had "failed to provide any evidence that dental laboratories feel 'precluded from dealing with other manufacturers.'" *Id.* at 450.[9]

On this point, the district court hinted at the broader policy argument over the proper role of antitrust in assessing the legality of conditions imposed by dominant suppliers on distributors. The court stated:

> The DOJ asserts that Dentsply's rivals cannot compete effectively absent access to Dentsply's dealers. The court disagrees. While it may be easier for Dentsply's rivals to compete through Dentsply's dealers, it is not the function of the antitrust laws to ease the burden of competing with an established and focused rival.

Id.[10] According to the district court, then, a dominant supplier may foreclose all channels of distribution that might create an immediate competitive threat to the seller's market position, as long as competing suppliers have some "viable" means of selling to ultimate customers.

Second, the district court explained that the short duration and easy terminability of Dentsply's purchase order arrangements with dealers, under which "nothing contractually obligates a dealer to continue with this arrangement . . . [and] . . . dealers are free to leave Dentsply whenever they choose," substantially negated their potential to foreclose competition.[11] The rationale is that where an exclusive dealing agreement is terminable at will (or on short notice), it cannot inflict harm on a competing seller, for that seller has only to offer a dealer a better deal than the defendant's, and the dealer will snap it up, free of any contractual obligation to the original exclusive supplier.[12] But, the appellate court observed, this rationale does not apply "in this case, [where] 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. Dealer Criterion 6 is not edentulous." 399 F.3d at 194.

The district court did not analyze the monopolization claim separately. It ruled, however, that because the Sherman 2 standard for liability for exclusive dealing is more difficult to meet than the Clayton 3/Sherman 1 test, its finding of no liability under the easier standard meant that the Sherman 2 claim must be dismissed as well. 277 F. Supp. 2d at 451.

The Government's Appeal

Though it strongly disagreed with the district court's ruling on all these issues, the Government declined to appeal the Clayton 3/Sherman 1 ruling, and (successfully) put all its appellate eggs in the Sherman 2 basket. Why? We have no inside knowledge, but several points come to mind.

First, the district court was on solid ground in concluding that the terminable-at-will nature of the arrangements between Dentsply and its dealers precluded liability under Clayton Act Section 3. Case law supports this conclusion,[13] as do policy considerations. Clayton 3 applies to monopolists and non-monopolists alike. Where a firm has no monopoly, and no dangerous probability of achieving monopoly, it seems excessive to characterize as unlawful "exclusive dealing" a relationship that is terminable at will—and thus permits competition to break out at any time. By contrast, scrutinizing a monopolist's use of practices like Dealer Criterion 6 under the law of monopolization is a different kettle of fish: under Section 2 *any* business strategy, regardless of its label, that creates, sustains, or expands monopoly power, and that lacks a legitimate justification, is subject to challenge.[14]

A second reason that may have given pause to the Government in appealing the non-Section 2 claims was the fact that the evidence of "agreement" or "concerted action" between Dentsply and its dealers was thin. To be sure, Dentsply went beyond a mere unilateral announcement of business policy: it took vigorous and affirmative steps to enforce its policy, including browbeating its dealers. But in a vertical context such behavior does not prove concerted action unless overt assurance of a dealer's compliance is sought, and overt assurance of compliance is received.[15] Whether Dentsply crossed this line is debatable. And even if Dentsply *did* cross the line for vertical agreements laid down in *Monsanto*, the injury to competition arose mainly from Dentsply's unilateral business policy.[16] Whether a dealer mumbled a coerced, legally unenforceable promise not to buy from Dentsply's competitors or, alternatively, held out against any such "overt assurance" of compliance with Dealer Criterion 6, probably made little difference in the real world. Promise or no promise, unless a dealer knuckled under, Dentsply still would refuse to fill the next order.

Third, it is at least arguable that Dealer Criterion 6 was not even a "condition" within the meaning of Clayton Act Section 3. The issue is theologically vexed. Areeda forcefully argued in 1986 that where a manufacturer refuses to sell to those who are unlikely to deal exclusively and ceases to sell to those who have not dealt exclusively with it—even assuming that "the manufacturer's behavior falls on the non-agreement side of whatever line *Colgate* and *Monsanto* draw"—a Section 3 "condition" is present.[17] But in the current edition of the treatise Professor Hovenkamp asserts with equal vigor that unlawful exclusive dealing always requires proof of agreement.[18]

Moreover, even if Areeda was right in thinking that concerted action is not essential to finding an unlawful "condition" under Clayton 3, a semantic issue remains. If we don't like dealers who sport moustaches, and choose to deal only with the clean shaven, a single sale made to a clean shaven dealer in no way prevents that dealer from growing a moustache at some point after the sale. If the dealer chooses to comply with our wishes following the sale, and goes on shaving every day, it seems more accurate to say that he has succumbed to a *threat* in respect of potential *future* sales than to claim that he complied with some "condition" attached to the *first* sale.

The Government may have—quite understandably—concluded that some or all of these technical concerns over Clayton 3 and Sherman 1 made an appeal on non-Section 2 grounds problematic and inadvisable, given the cleaner state of the law under Section 2. Alternatively, some may believe, the Government may not have wanted to see an appellate decision endorsing an expansive reading of Section 3 of the Clayton Act.

The Third Circuit's Monopolization Ruling: Contrast with *LePage's*?

The Third Circuit's tone in *Dentsply* contrasted strongly with that of that circuit's en banc decision in *LePage's*. Whereas *LePage's* devoted many pages to praise of *Alcoa*[19] and other hoary Section 2 authorities, 377 F.3d at 147–51, and went out of its way scornfully to misread *Brooke Group*,[20] *id.* at 151–53, *Dentsply*'s discussion of the law of monopolization was plodding, methodical, and unexceptional. The court of appeals, per Judge Weis, systematically addressed the elements of a Section 2 case. It concluded that the defendant's high market share in a legally relevant market suffices to infer monopoly power, 399 F.3d at 187–89; discussed how the enforcement of Dealer Criterion 6 helped the defendant to maintain its monopoly power, and how (contrary to the lower court's view of the facts) Dentsply's exclusionary policy crippled its competitors' ability to compete effectively, *id.* at 189–90, 193; explained how Dentsply's pricing behavior confirmed the inference of monopoly power flowing from high market share and showed injury to consumers, *id.* at 190–91; discerned further non-price injury to consumers, in the nature of limitation on freedom of choice, *id.* at 194; found that the arrangements amount to exclusive dealing, at least for purposes of Sherman Act Section 2, *id.* at 193–94; and rejected the defendant's free rider/interbrand competition "business justification" as pretextual, *id.* at 196–97. The decision lent no support for novel, restrictive litmus tests of exclusionary behavior.[21] All in all it was a thoroughly workmanlike, thoroughly mainstream opinion—remarkable mainly, perhaps, for its contrast with the strident, off-center tone the Third Circuit took in *LePage's*.[22]

Two points of contrast between *Dentsply* and *LePage's* are especially salient. The first concerns the significance (or not) of evidence as to whether a small competitor, wounded by a large competitor's business strategy, has or does not have effective ways to fight back, even though it may have to change its own business strategy. In *LePage's* Judge Greenberg's dissent emphasized that "LePage's did not even attempt to show that it could not compete by calculating the discount that it would have had to provide in order to match the discounts offered by 3M through its bundled rebates, and thus its brief does not point to evidence along such lines."[23] Significantly, however, the majority did not deign to respond to the point, either on the facts or on the law. Nor did the *LePage's* majority address the dissent's concern that the plaintiff might have been a less efficient producer than the defendant, *id.*, and hence, at least in the view of some, a poor candidate for antitrust protection against above-cost competition by a (possibly) more efficient rival.[24] In stark contrast, the outcome in *Dentsply turned on* the question whether disadvantaged rivals did or did not have satisfactory alternative strategies available to them.

Second, as argued in more detail elsewhere,[25] the court in *LePage's* awarded damages to an injured competitor under Section 2 of the Sherman Act without any proof of past consumer injury—and with little interest in whether future consumer injury was likely. *Dentsply*, by contrast, adduces abundant evidence of injury to consumers, in the form of supracompetitive pricing and reduction of consumer choice. The contrast is all the more remarkable in that *Dentsply* was brought by the Antitrust Division, which need not show injury or standing as a part of its case. *LePage's*, however, was a private action brought by a wounded competitor—not a particularly favored class of antitrust plaintiffs, in view of their incentives to use the law for anticompetitive ends—seeking damages based on the fact that its competitor was not charging prices as high as the plaintiff would like it to charge. One might have thought that it would be in the private action, not the government case, where the greatest skepticism over the nature of the injured competitor's wounds—and the relation of those wounds to consumer injury—would be seen.

The Third Circuit's *Dentsply* opinion found ways to cite *LePage's* in non-controversial ways, and thus paid respectful deference to prior authority. In no way, however, did it manifest *LePage's* extremist tone and spirit.

What If . . . ?

Exclusive dealing arrangements often contribute to competition among brands, by giving dealers an incentive to use their best efforts to promote the brand they exclusively sell. In *Dentsply*, both the district court and the court of appeals found that this justification was pretextual. Suppose, however, that the facts had been different, and that Dentsply's business justification defense of Dealer Criterion 6 was not pretextual but, instead, was motivated largely by a rational desire to induce dealers to promote its product and, thus, to promote interbrand competition, and also that its business justification was non-trivial. And what if we further assume that the other facts in the case remained the same?

Clearly, this is a more challenging legal conundrum, given the procompetitive benefits of the restraint, than that presented by the actual facts of the case. And yet, as classic a monopolization scenario as this hypothetical is, with procompetitive benefits and anticompetitive effects, the case law is not unified over the correct test. Under one approach, set forth by the Supreme Court in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[26] Dentsply's legitimate, non-pretextual, and non-trivial business justification would trump the Government's prima facie showing of anticompetitive harm and thus negate the claim that Dentsply's exclusive dealing violates Section 2. As the Areeda/Hovenkamp treatise explains:

> [O]nce a proffered business purpose has been accepted as asserted in good faith and not as pretense, the defense does not require "balancing" of social gains against competitive harms, except in the sense that justifications that are trivial in relation to the harm should be disregarded . . . . Courts generally express this by saying that if the proffered business justification is "valid," then there is no antitrust liability.[27]

Under the alternative approach, as explained and adopted by the court of appeals in *Microsoft*, "if the monopolist's procompetitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit"[28]—in other words, the court is required to balance the anticompetitive harm against the procompetitive benefit. In *Microsoft*, the court of appeals did indeed balance the company's non-pretextual business justifications against the Government's prima facie showing of anticompetitive harm from exclusionary conduct; however, in the event, the balancing, unlike that performed for a rule of reason Section 1 analysis, was only on a gross order—to use a rough quantitative comparison, 80 points for the anticompetitive harm versus 20 for the procompetitive business justifications, or 90:10—and the court, arguably, thus did not set any clear precedent on the propriety of balancing in the case of much closer calls.[29]

In our hypothetical, the first approach, in which business justifications trump, would result in a finding of no liability under Section 2. Under the second approach a court would go a step further and—subject to the important restriction on open-ended balancing that the court of appeals in *Microsoft* added by its own example—nonetheless engage in a more extensive weighing of the anticompetitive harm relative to the business justification. Given the closeness of the balancing, however, the court presumably would then find no liability under Section 2.

But now suppose we change the hypothetical: instead of purchase orders, Dentsply has eight-year exclusive contracts with its dealers. Would the anticompetitive harm substantially outweigh the non-pretextual (and non-trivial) business justification? Here the two approaches might yield different results—the first, a finding of no liability, because arguably the non-pretextual justification trumps, and the second, a finding of liability, because the anticompetitive harm substantially outweighs the non-pretextual justification.

Conclusion

In *Dentsply*, as well as in its earlier decision in *LePage's*, the Third Circuit awarded victory to a plaintiff claiming violation of Sherman Act Section 2. Despite the similarity in results, however, the tone of the two opinions is quite different. *Dentsply* provides a measure of reassurance that, despite some questionable features of the *LePage's* decision, the Third Circuit is not in fact on an aberrant course in its approach to the law of monopolization.

In our judgment, *Dentsply*, moreover, does not change the calculus of risk with regard to exclusive distribution arrangements. It does not disturb established (and salutary) case law limitations on the scope of Clayton Act Section 3 and Sherman Act Section 1 as applied to exclusive dealing. But, by like token, it reaffirms the principle that behavior lawful for non-monopolists may well be unlawful for monopolists. In so doing, it reminds us that *any* business strategy that protects monopoly without a clear business justification is subject to severe antitrust scrutiny. ■

1 LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004). For another treatment of Dentsply, emphasizing its relationship to other recent Section 2 cases, see Scott A. Sher & Scott D. Russell, *Adding Bite to Exclusive Dealing?: An Analysis of the Third Circuit's* Dentsply *Decision*, ANTITRUST SOURCE, May 2005, *at* http://www.abanet.org/antitrust/source/05-05/may05-sher.pdf.

2 Apparently based on remarks made at oral argument, the appellate court detected a controversy as to whether the relevant product market should include sales made both directly and indirectly to laboratories, or only sales made to dealers. It ruled—correctly, we believe—that both the direct and indirect sales are part of the relevant market. 399 F.3d at 188. Sher & Russell, *supra* note 1, at 4, attribute some large significance to this market definition ruling, but we part company with them in thinking the appellate court's market definition—which seems to us straightforward and non-controversial—led to any improper presumption about whether Dentsply's competitors lacked ways of reaching the laboratories other than by indirect sales through dealers.

[3] The economic circumstances that result in a prominent place for dealers in sales to dental laboratories are much the same as those that lead to a key role for wholesalers in the pharmaceutical industry. *See* FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34 (D.D.C. 1998).

[4] Possible justifications for exclusive dealing are analyzed more fully in Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 357–60 (2002). According to classic antitrust learning, the procompetitive effects of enhanced interbrand competition must then be balanced with other factors, to determine the net effect on competition. *See* ABA Section of Antitrust Law, Antitrust Law Developments 214–15 (5th ed. 2002) [ALD 5]. Jacobson's article sets forth a comprehensive approach to such balancing. *See also* Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3 (2004)—the "better" balance, in Professor Gavil's view, being one that is willing to err on the side of protecting smaller competitors from complex stratagems with ambiguous competitive effects. By contrast, those whose "better balance" involves a thumb on the *defendant's* side of the scale will take heart from Benjamin Klein, *Exclusive Dealing as Competition for Distribution "on the Merits,"* 12 Geo. Mason L. Rev. 119, 161–62 (2003) ("it is important to emphasize that, although the efficiencies of exclusive contracts may sometimes be difficult to understand in specific cases, one must avoid the tendency . . . of condemning conduct one cannot explain without also finding an anticompetitive effect. . . . While the efficiency justification for a particular exclusive distribution contract may sometimes not be obvious, the requirement of anticompetitive effect should continue to be a minimum safeguard in all cases of alleged exclusionary contracts that appear to "raise rivals' costs."). For yet another view, see Kenneth Glazer & Brian R. Henry, *Coercive vs. Incentivizing Conduct: A Way out of the Section 2 Impasse*, Antitrust, Fall 2003, at 45, 46 (characterizing Dentsply's conduct as "coercive" and hence properly subject to enhanced Section 2 scrutiny). Likewise decrying the "forced exclusive dealing contracts" that occur when sellers are "inadequately disciplined by competition" are Sullivan and Grimes. Lawrence A. Sullivan & Warren S. Grimes, The Law of Antitrust: An Integrated Handbook 435 (2000). Finally, Hovenkamp concludes that there is no coherent way to "balance" significant injury to competition arising from exclusive dealing arrangements against distribution efficiencies (that could not be achieved in a less restrictive way). 11 Herbert S. Hovenkamp, Antitrust Law ¶ 1822b (2d ed. 2005).

[5] The district and appellate decisions are both vague about what makes Dentsply's 23 dealers so special. The Justice Department's brief redacts information on the sales of Dentsply's dealers, Brief for the United States at 7, *available at* http://www.usdoj.gov/atr/cases/f202100/202141.pdf, but does state that Dentsply's dealer network have, in the aggregate, 100 "tooth stocks" (locations at which inventories of teeth are maintained), "far exceed[ing] the number of stocks of any [dealer] competitor." *Id.* at 5. But dealers sell lots of things besides teeth, and we have no information on the ratio between the 23 dealers' sales and total dealer sales in all product lines. We do know, however, that Dentsply managed to sell 80 percent of the nation's false teeth through only 23 dealers, so it is reasonable to infer that these dealers were probably much bigger than their hundreds of competitors.

[6] Sherman 1 provides in pertinent part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." It differs from Clayton 3 in four ways. First, it applies to services as well as goods—an immaterial difference here, because false teeth are goods. Second, Sherman 1 applies to arrangements that "affect" interstate commerce, while Clayton 3 addresses only sales "in" interstate commerce, likewise not material in the case under discussion. Third, Sherman 1 clearly requires concerted action, whereas Clayton 3's "condition" language is unclear on that point. Finally, like Clayton 7, Clayton 3 uses language implying a "prophylactic" purpose to prevent "incipient" injury to competition, whereas Sherman 1 is traditionally understood to apply only to a present injury to competition. The continued viability of this last distinction is controversial. *See* Hovenkamp, *supra* note 4, ¶ 1800c4 at 18–19.

[7] *See* ALD 5, *supra* note 4, at 220–25 (reviewing factors); *see also* commentators cited *supra* note 5.

[8] Many cases recognize that alternative channels of distribution may vitiate the anticompetitive effect of a manufacturer's "lock" on a subset of distributors. *See id.* at 224 n.1284 (collecting cases).

[9] The court cited *LePage's*, 324 F.3d at 162.

[10] Citing United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945).

[11] 277 F. Supp. 2d at 450 (citing Omega Environmental, Inc., v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997) (agreement with one-year term held lawful); Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 395 (7th Cir. 1984).

[12] *See Roland Machinery*, 749 F.2d at 394. Accordingly, the Seventh Circuit held (or, if you prefer, declared in high Posnerian dictum) that "[e]xclusive-dealing contracts terminable in less than a year are presumptively lawful under section 3." *Id.* at 395. In succeeding years the courts have declined to draw quite that precise a line, but the clear trend is to hold that exclusive dealing contracts of short duration do not trigger Clayton 3/Sherman 1 liability. *See* ALD 5, *supra* note 4, at 223–24.

Significantly, in *Roland* the defendant was not a monopolist, there was no claim under Sherman Act Section 2, and the competitor said to be victimized by the practice had obtained a sizeable share of the U.S. market in a very short time. 749 F.2d at 394. If, contrary to fact, the defendant had been a monopolist, forced to defend a Section 2 claim, the duration question of principal relevance would have been the duration of the defendant's unilateral policy of exclusive dealing—presumably indefinite and eternal, as in *Dentsply*—not the duration of the dealer's contractual commitment not to carry competing products.

[13] Although there is no hard and fast rule regarding duration, the shorter the term, the more likely the agreement is to be found reasonable. *See* ALD 5, *supra* note 4, at 223, n.1279 (collecting cases). Agreements terminable without cause or providing short notice for termination are even more likely to be held reasonable. *See id.* at 223 n.1280 (collecting cases).

[14] Although the role of Sections 1 and 3 is clearly to help assure the existence of "*effective* competition," the Government may well have decided to abandon these claims on appeal based on an assessment that a weaker showing of "effective competition" is needed to negate a claim under Sections 1 or 3 than under Section 2. This is one of the lessons of *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), where Microsoft's exclusive dealing was viewed as predicate conduct for the Section 2 violation but was not found to violate Section 1 and Section 3. As this issue did not reach the Third Circuit in *Dentsply*, however, we cannot know for sure how that court would have ruled.

[15] Monsanto Corp. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 n.9 (1984).

[16] To the extent that Dentsply simply announced the terms on which it was willing to deal and thereafter acted consistently with its unilateral announcement, the case seems analogous to *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (unilateral announcement of pricing policy for dealers not concerted action subject to Sherman Act Section 1). On occasion, though, "enforcement" efforts went beyond the letter of Dealer Criterion 6, as Dentsply threatened not only to withhold teeth from non-compliant dealers but also to refuse to sell other dental supplies. 399 F.3d at 191. In addition, Dentsply is said to have solicited informal "promises" of exclusivity, and Dentsply and its dealers understood themselves to be parties to exclusive dealing "agreements." 277 F. Supp. 2d at 419.

ALD 5, *supra* note 4, at 16–23, takes eight footnote-filled pages to explain what evidence of "agreement" will take a case out of the *Colgate* doctrine—and fails, because the case law makes the question inexplicable. By referring to "promises" and "agreements"—and citing *Monsanto*'s famous footnote finding vertical concerted action where a manufacturer seeks and receives dealer acquiescence in a policy—the Third Circuit in *Dentsply*, 399 F.3d at 193, alluded to *Colgate* and its progeny, in order to be able to label the case as "exclusive dealing," not "unilateral refusal to deal." We think, however, that it does not matter whether Dentsply and its dealers called their arrangement an "agreement" or a "ham sandwich": it is what it is, a course of dealing that was terminable at will by either party. *Id.* To lock out its competitors from these important dealers Dentsply relied neither on claims for breach of contract nor on "carrots" in the form of end-of-the-year rebates "designed to achieve sole-supplier status." *LePage's*, 324 F.3d at 157. *See also* Ronald W. Davis, LePage's v. 3M*: Five Ingredients in Search of a Monopoly Broth*, Antitrust Source, Nov. 2004, at 3–4, *at* http://www.abanet.org/antitrust/source/11-04/Nov04-Davis1129.pdf (arguing that in *LePage's* the concept of "exclusive dealing" is so attenuated as to require nothing more than really good terms of sale, terms so attractive that the buyer has no reason to give any of its business to a competitor).

But in the final analysis, even if "unilateral refusal to deal" rather than "exclusive dealing" might arguably be the better characterization for the facts in *Dentsply*, *Colgate*'s protection only applies in "the absence of any purpose to create or maintain a monopoly." 250 U.S. at 307. It was this bedrock principle of antitrust law that doomed Dentsply's defense to the charge of monopolization. *See* Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004) (monopolist's right to refuse to deal is not unqualified).

[17] 7 Philip E. Areeda, Antitrust Law ¶ 1460b at 201 (1986).

[18] Hovenkamp, *supra* note 4, ¶ 1821a. But he regards the requirement of agreement as "questionable" as "a matter of competition policy." *Id.* ¶ 1800c5 at 20.

[19] United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945).

[20] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). *LePage's* idiosyncratic reading of *Brooke Group* (refusing to admit that Brooke Group applies to Sherman Act Section 2 at all) may be compared with that of the Ninth Circuit in *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 2005 WL 1269668 (9th Cir. May 31, 2005) (recognizing that *Brooke Group* does in fact apply to Section 2 of the Sherman Act, and governs claims of predatory pricing, but finding *Brooke*'s reasoning inapplicable to predatory overbuying).

[21] Some argue that business strategies subject to condemnation under Section 2 are typically unprofitable but for their tendency to harm competition. See R. Hewitt Pate, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, The Common Law Approach and Improving Standards for Analyzing Single Firm Conduct 10, Address to the Thirteenth Annual Conference on International Antitrust Law and Policy, Fordham Corporate L. Inst. (Oct. 23, 2003), *available at* http://www.usdoj.gov/atr/public/speeches/202724.htm, while others emphasize that predatory or exclusionary strategies that raise rivals' costs may be costless to the firm devising the strategy. *See* Steven C. Salop, Section 2 Paradigms and the Flawed Profit-Sacrifice Standard, Remarks at the ABA Antitrust Spring Meeting (Mar. 31, 2005). Here, Dentsply's efforts to make its 23 dealers toe the line on Dealer Criterion 6 were not entirely costless. There was, however, no suggestion that its enforcement costs were so great that it was foregoing present profits in order to recoup future monopoly profits. But even so, if the sole reason for Dentsply to incur the (relatively trivial) costs of enforcing Criterion 6 was to injure rivals, its strategy arguably satisfies the standard of "unprofitability but for the tendency to harm competition."

[22] *Compare* Warren S. Grimes, Dentsply *Decision: Restorative Dental Surgery from the Third Circuit*, FTC:WATCH, Mar. 14, 2005, *available at* http://www.antitrustinstitute.org/recent2/395.cfm (emphasizing the Third Circuit's *Dentsply* decision as a counterweight, not to *LePage's*, but rather to *Trinko*, with its "broad brush picture of innovative, efficient, and unfairly oppressed monopolists").

[23] 324 F.3d at 175.

[24] These issues are more fully discussed in Davis, *supra* note 16, at 5–6.

[25] *Id.* at 6–9.

[26] 472 U.S. 585 (1985). In *Aspen*, the jury was "unambiguously instructed that [defendant's] refusal to deal with [plaintiff] 'does not violate Section 2 if valid business reasons exist for that refusal'," and the Court found no error in this instruction (although the Court ultimately found no valid business justification). *Id.* at 604–05 (quoting jury instruction).

[27] 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 658, at 135 and n.61 (2d ed. 2002). The authors explain that this conclusion (not to balance) is based on several principles: "(1) Courts are not capable of quantifying such gains and losses except in the grossest sense. (2) The monopolist no more than any other firm operates under a duty to maximize social welfare, but it does have a duty to avoid making unnecessarily harmful choices. (3) The purpose of the business justification inquiry is not to measure the degree of net competitive harm but rather to aid the decision maker in characterizing the nature of the defendant's conduct." *Id.*

[28] *Microsoft*, 253 F.3d at 59.

[29] Similarly, the DOJ and FTC, in their amicus brief supporting a petition for certiorari in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), asserted that the correct standard in a Section 2 case "does not entail open-ended 'balancing of social gains against competitive harms,' for 'a firm is under no obligation to sacrifice its own profits' for the public weal. Instead, the harm to competition must be disproportionate to consumer benefits (in terms of providing a superior product, for example) and to the economic benefits to the defendant (aside from benefits that accrue from diminished competition)." Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner at 14 (May 2003) (citing 3 Areeda & Hovenkamp, ¶¶ 651a, 658f, at 72, 131–32, 135). On the other hand, Professor Steven Salop, describing the test employed by the court of appeals in *Microsoft* as the "consumer welfare balancing standard," concludes that the court there engaged in a "rough" balancing and advocates such an approach—apparently a closer balancing than that advocated by the Government or by Areeda & Hovenkamp. *See* Salop, *supra* note 21; *see generally* Michael Naughton & Richard Wolfram, *The Antitrust Risks of Unilateral Conduct in Standard Setting, in the Light of the FTC's Case Against Rambus Inc.*, 49 Antitrust Bull. at 736–40 (2004) (discussing the two approaches).