MARKET REALITIES DO NOT EMBODY NECESSARY ECONOMIC THEORY: WHY DEFENDANTS DESERVE A SAFE HARBOR UNDER SECTION 2 OF THE SHERMAN ACT FOR EXCLUSIVE DEALING

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I. INTRODUCTION

For more than ten years, a Korean-based company worked to develop a synthetic fiber of sufficient strength to be incorporated into products as diverse as bullet-proof vests, audio equipment, and automotive brake pads.[1] Despite the lack of commercial success, the company has made significant strides in the past several years to refine the product into one that can compete well in the market.[2] The Korean company, however, faces a formidable competitor in the form of an American chemical company that dominates approximately 70% of that market.[3] In addition to formulating this particular type of synthetic fiber, commonly known in the market as para-aramid, the American company has over forty years of experience developing and marketing the product.[4]

Although a single company may dominate a relevant market, the American economy typically encourages new innovators to enter the market if they can provide a superior product or lower prices to consumers.[5] In short, the American economy thrives on competition. What should have been a promising opportunity for the Korean company quickly turned into a disappointing venture as it discovered an inaccessible market.[6]

Supply agreements between the American company and a significant amount of the highest volume para-aramid fiber customers in the United States prohibit the customers from purchasing these fibers from other manufacturers, including the Korean company, and incorporating them into the products the

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[1] *See* E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 447 (E.D. Va. 2009), *rev'd on other grounds*, 637 F.3d 435 (4th Cir. 2011). E.I. du Pont de Nemours & Co. is most commonly known as DuPont and will be referred to as such where the company is discussed in the text and where the case is cited in short form.

[2] *DuPont*, 688 F. Supp. 2d at 447.

[3] *Id.* at 459–60.

[4] *Id.* at 447.

[5] *See* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *are Misguided*, 68 ANTITRUST L.J. 659, 673–74 (2001) (explaining that new products represent a gain to society and are "responsible for the high standard of living enjoyed in the United States").

[6] *DuPont*, 688 F. Supp. 2d at 458.

customers make.[7] Thus, the Korean company is unable to overcome these barriers to entry, capturing less than 1% of the American market.[8] Are these agreements between the American company and its consumers a restraint on trade or a justifiable business practice?

These facts were alleged in *E.I. du Pont de Nemours & Co. v. Kolon Industries, Inc.*[9] Noting that the purpose of antitrust law is to protect the process of competition rather than the competitors themselves,[10] the district court held that the existence of an additional competitor with close to a 30% share of the relevant market was a clear indication that DuPont was not harming the competitive process.[11] The court pointed to the absence of "exceptional" factors that would demonstrate DuPont was harming the competitive process when it foreclosed only 25% of the market for para-aramid fibers.[12]

The Fourth Circuit subsequently reversed the district court's decision to grant DuPont's motion to dismiss, finding that Kolon adequately pled its monopolization and attempted monopolization claims.[13] This decision exemplifies the inconsistent analysis of exclusive dealing agreements by courts and the inability of companies to structure their agreements to comply with the current state of the law.

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[7] *Id.*

[8] *Id.* at 460–61.

[9] In the complaint filed by DuPont, the company alleged misappropriation of trade secrets and confidential information. *Id.* at 447–48. Kolon alleged in its counterclaim that DuPont violated section 2 of the Sherman Act and section 16 of the Clayton Act for monopolization and attempted monopolization. *Id.* at 449. This Note will deal exclusively with the antitrust violations alleged by Kolon.

[10] *Id.* at 460 (citing Thompson Everett, Inc. v. Nat'l Cable Adver., 57 F.3d 1317, 1325 (4th Cir. 1995)).

[11] *See* E.I. du Pont De Nemours & Co. v. Kolon Indus., Inc., 683 F. Supp. 2d 401, 424–25 (E.D. Va. 2009), *rev'd*, 637 F.3d 435 (4th Cir. 2011) (stating that the relationship between DuPont and its competitor, Teijin, was "almost oligopolistic" and that "Teijin suppl[ied] a serious check on DuPont's market power").

[12] *Id.* at 425.

[13] *DuPont*, 637 F.3d at 453.

Exclusive dealing agreements are not unique to the para-aramid fiber industry. A manufacturer/supplier will often require that a distributor/retailer deal exclusively or purchase a large share of its requirements as a means to compete for distribution.[14] Exclusive dealing agreements may have anticompetitive effects on the relevant market, but they are often procompetitive.[15] As a result, they are presumptively legal.[16]

A claim that an exclusive dealing agreement is predominantly anticompetitive is subject to a multitude of tests. Courts have failed to identify a single rule or standard to analyze these agreements.[17] This problem is compounded by the fact that antitrust claims can be pursued against exclusive dealing agreements under numerous antitrust laws, including sections 1 and 2 of the Sherman Act,[18] section 3 of the Clayton Act,[19] and section 5 of the Federal Trade Commission (FTC) Act.[20] Each act focuses on a different aspect of an agreement's effects on competition.

A recent development in antitrust litigation surrounding exclusive dealing is the increased use of section 2 of the Sherman Act to pursue claims.[21] Although no uniform test exists to

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[14] U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 131 (2008), *available at* http://www.usdoj.gov/atr/public/reports/236681.pdf.

[15] *Id.*

[16] *See* Alison Smith, Evaluating the Competitive Effects of Exclusive Dealing Agreements, Remarks at ABA Section of Antitrust Law & ABA Center for continuing Legal Education Telesiminar (June 24, 2005), *in* ANTITRUST SOURCE, Nov. 2005, at 8, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Nov05_FullSource11_29.authcheckdam.pdf (stating that the potential for procompetitive effects outweighs an agreement's potential to be anticompetitive).

[17] *See* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 163 (2010) ("[T]he fundamental challenge for antitrust is one that is created by having 'too many theories' without methodological commitments from regulators and courts on how to select between them."); Joshua D. Wright, *Antitrust Law and Competition for Distribution*, 23 YALE J. ON REG. 169, 169 (2006) ("The regulation of the competitive process for product distribution and promotion is an unsettled and incoherent area of antitrust law.").

[18] 15 U.S.C. §§ 1–2 (2006).

[19] *Id.* § 14.

[20] *Id.* § 45(a)(1).

[21] Herbert Hovenkamp, *The Obama Administration and Section 2 of the Sherman Act*, 90

determine whether an agreement is illegal, all courts evaluate the percentage of distribution channels foreclosed to rivals of an established competitor.[22] Section 2 of the Sherman Act, however, requires a smaller percentage of foreclosure to show an antitrust violation than section 1 of the Sherman Act or section 3 of the Clayton Act.[23]

While analysis under section 2 of the Sherman Act focuses on the actual effects of exclusive dealing on the relevant market, analysis under section 1 of the Sherman Act and section 3 of the Clayton Act focuses on the percentage of foreclosure—typically 40% under these latter two.[24] Determining the agreement's actual effects on the relevant market requires weighing the procompetitive benefits of the agreement against any anticompetitive effects.[25] Unfortunately for defendants, anticompetitive effects are easier to allege and demonstrate through hard data than potential procompetitive benefits, which often rest on economic theory.[26] Given that courts today have indicated a desire to base their decisions on market realities rather than economic theory,[27] defendants are at a disadvantage under section 2 of the Sherman Act.

A fundamental principle of antitrust law is to avoid false positives at the expense of false negatives.[28] For example, courts would rather risk allowing anticompetitive behavior to continue than impose liability that could ultimately injure consumers if the court is not convinced by the evidence that such behavior is

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B.U. L. REV. 1611, 1614 (2010).

[22] *See* discussion *infra* Part II.D–E (outlining decisions by the Supreme Court and lower federal courts on exclusive dealing agreements).

[23] *See* discussion *infra* Part II.F.

[24] J. Bruce McDonald, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Evaluating the Competitive Effects of Exclusive Dealing Agreements, Remarks at ABA Section of Antitrust Law & ABA Center for Continuing Legal Education Teleseminar (June 24, 2005), *in* ANTITRUST SOURCE, Nov. 2005, at 15, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Nov05_FullSource11_29.authcheckdam.pdf.

[25] U.S. DEP'T OF JUSTICE, *supra* note 14, at 140.

[26] Manne & Wright, *supra* note 17, at 198.

[27] *See* discussion *infra* Part III.B (discussing the shift by the Supreme Court and lower federal courts to evaluate antitrust claims based on market realities).

[28] *See* discussion *infra* Part III.C.*1*.

actually having anticompetitive effects. In its Single-Firm Conduct Report, the Department of Justice (DOJ) responded to the resurgence of litigation under section 2 of the Sherman Act when it endorsed a safe harbor provision for exclusive dealing agreements that foreclosed less than 30% of existing customers or distribution.[29] Despite the retraction of the safe harbor under the Obama Administration,[30] the district court in *DuPont* essentially followed the analysis set forth in the DOJ Report.[31]

This Note argues that, in light of the defendant's inherent disadvantage in demonstrating that the procompetitive benefits of its exclusive dealing agreements are more than just pure economic theory, courts should recognize a safe harbor when less than 30% of existing customers or distribution is foreclosed to reduce the risk of a false positive. In doing so, this Note will examine the treatment of exclusive dealing agreements under section 2 of the Sherman Act and offer a workable solution for contracts foreclosing less than 30% of the market. Parts II.A and II.B outline the procompetitive and anticompetitive aspects of exclusive dealing agreements. Part II.C describes the four antitrust statutes to which exclusionary contracts have been subjected. Parts II.D and II.E present opinions by the Supreme Court and lower federal courts analyzing exclusive dealing agreements under the various antitrust provisions. Part II concludes by outlining the most recent approaches as to these agreements under section 2 of the Sherman Act.

Part III.A establishes that anticompetitive effects are easier to demonstrate than procompetitive benefits. This difference can determine the outcome of a case, given that modern courts analyze exclusive dealing agreements through market realities rather than economic theory, as discussed in Part III.B. Part III.C examines economic theory underlying exclusive dealing agreements and its

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[29] U.S. DEP'T OF JUSTICE, *supra* note 14, at 141.

[30] Hovenkamp, *supra* note 21, at 1612.

[31] *See* E.I. du Pont Nemours & Co. v. Kolon Indus., Inc., 683 F. Supp. 2d 401, 425 (E.D. Va. 2009), *rev'd*, 637 F.3d 435 (4th Cir. 2011) (declining to weigh the anticompetitive effects against the procompetitive benefits of DuPont's exclusive agreements once the court estimated that DuPont foreclosed only 25% of the market).

current state under section 2 of the Sherman Act. Part III.D demonstrates how courts determine the percentage of foreclosure of distribution channels under section 2. Part III.E concludes that a safe harbor for defendants who foreclose less than 30% of the relevant market would achieve the goals of antitrust law and remove the disadvantage defendants currently face in antitrust litigation.

II. BACKGROUND

Exclusive dealing is a vertical restraint that limits a party's ability to purchase.[32] Similar to a requirements contract, an exclusive dealing agreement requires one party to deal with another party exclusively or to purchase a large portion of its requirements from the other party.[33] These agreements are often made between a manufacturer/supplier and a distributor/retailer.[34]

A. PROCOMPETITIVE BENEFITS OF EXCLUSIVE DEALING AGREEMENTS

Exclusive dealing agreements frequently have procompetitive benefits not only for parties to the agreement but also for consumers. Exclusive dealing encourages manufacturers to invest in their distributors by providing training and capital investments.[35] Without these agreements, distributors have an incentive to free-ride by using investments made by one manufacturer to sell products made by competing manufacturers.[36] In addition to deterring free-riding, exclusive dealing agreements reduce transaction costs between suppliers and distributors because long-term contracts allow parties to avoid the expenses of entering into agreements for each transaction.[37] These contracts

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[32] Richard M. Steuer, *Exclusive Dealing in Distribution*, 69 CORNELL L. REV. 101, 101 (1983).

[33] U.S. DEP'T OF JUSTICE, *supra* note 14, at 131.

[34] *Id.*

[35] *Id.*; Wanda Jane Rogers, Note, *Beyond Economic Theory: A Model for Analyzing the Antitrust Implications of Exclusive Dealing Arrangements*, 45 DUKE L.J. 1009, 1019–20 (1996).

[36] U.S. DEP'T OF JUSTICE, *supra* note 14, at 131.

[37] Rogers, *supra* note 35, at 1019.

give manufacturers the ability to control the quality of their products.[38] Exclusive dealing also fosters trust between parties by protecting trade secrets and trademarks.[39]

Exclusive dealing further allows manufacturers to avoid vertical integration into distribution, promoting a free market.[40] By making these agreements, manufacturers and suppliers can "guarantee a market" and reduce the risk of entering or expanding within the market, which ultimately creates more competition, thereby benefitting consumers.[41]

Distributors often take the initiative to seek out these agreements as a way to guard against price increases by fixing input costs.[42] Exclusive dealing agreements also reduce the need for distributors to hold large amounts of inventory.[43] Theoretically, these agreements increase interbrand competition by encouraging other distributors to enter into similar arrangements with manufacturers, resulting in increased distribution and sales to consumers.[44] Consequently, these arrangements are presumptively legal.[45]

B. ANTICOMPTETITIVE EFFECTS OF EXCLUSIVE DEALING AGREEMENTS

Exclusive dealing can also lead to anticompetitive effects. Firms may use contracts to maintain monopoly power by preventing other manufacturers from achieving economies of scale

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[38] Willard K. Tom et al., *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615, 617 (2000).

[39] *Id.*; *see also* Christopher E. Ware & Alison A. Hill, *Are We Exclusive? Does It Matter?: An Antitrust-Inspired Framework for Understanding Anti-Exclusive Dealing Statutes and the Meaning of Coercion*, 34 J. LEGIS. 38, 39 (2008) (observing that an additional benefit of exclusive dealing is "a greater ability to protect confidential information from competitors").

[40] Smith, *supra* note 16, at 8.

[41] *Id.*

[42] *Id.* ("A buyer can ensure a steady supply of input at a known cost by entering an exclusive dealing arrangement with a supplier and therefore protect against price increases.").

[43] *Id.*

[44] *Id.* at 9.

[45] *See id.* at 8 (stating that the potential for procompetitive effects outweighs an agreement's potential to be anticompetitive).

or large enough capacity to challenge the dominant firm's market share.[46] An entity may also use exclusive dealing agreements to foreclose distribution channels from existing competitors or to deter potential competitors from entering the market by establishing barriers to entry.[47] These barriers to entry allow the existing firm to raise prices above the "competitive level" because of the deterrent effect on potential competitors, ultimately harming the consumer.[48]

C. ANTITRUST STATUTES RELEVANT TO EXCLUSIVE DEALING

Courts have struck down exclusive dealing agreements under four statutory provisions of antitrust laws: (1) section 1 of the Sherman Act, which prohibits agreements "in restraint of trade";[49] (2) section 2 of the Sherman Act, which prohibits monopolization or attempted monopolization;[50] (3) section 3 of the Clayton Act, which proscribes contracts that "substantially lessen competition" by fixing a price or discount on the condition that the distributor will not deal with competitors of the manufacturer;[51] and (4) section 5 of the FTC Act, which provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are . . . unlawful."[52]

1. Section 1 of the Sherman Antitrust Act. The Supreme Court declared the purpose of the Sherman Act was not to prohibit "conduct which is competitive, even severely so, but . . . [to prohibit] conduct which unfairly tends to destroy competition itself."[53] Section 1 declares "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

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[46] U.S. DEP'T OF JUSTICE, *supra* note 14, at 137.

[47] Rogers, *supra* note 35, at 1020.

[48] U.S. DEP'T OF JUSTICE, *supra* note 14, at 131–32 (citing Interface Grp., Inc. v. Mass. Port Auth., 816 F.2d 9, 11 (1st Cir. 1987)).

[49] 15 U.S.C. § 1 (2006).

[50] *Id.* § 2.

[51] *Id.* § 14.

[52] *Id.* § 45(a)(1).

[53] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

commerce . . . to be illegal."[54] This provision applies only to agreements that are "*unreasonable* restraints of trade."[55]

Courts developed two models for determining whether an exclusive dealing agreement is unreasonable under section 1: the per se illegality rule and the "rule-of-reason" standard.[56] Under the per se illegality rule, courts condemn conduct likely to always or almost always restrict competition and decrease economic efficiency.[57] Under the rule-of-reason standard, courts consider many factors but focus on three: (1) the percentage of foreclosure in the defined market, (2) the existence of barriers to entry, and (3) the duration and ease of terminability of the contracts.[58]

2. Section 2 of the Sherman Antitrust Act. Section 2 of the Sherman Act provides that "[e]very person who shall monopolize, or attempt to monopolize, . . . any part of the trade or commerce . . . shall be deemed guilty of a felony."[59] The allegation of actual monopolization requires the plaintiff to establish two elements: (1) the defendant exercises monopoly power in the defined market, and (2) the defendant willfully maintains the monopoly power "as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[60] Monopoly power can be measured directly from evidence of price control or the absence of competition, or it can be inferred from the firm's substantial market share.[61] To allege attempted monopolization, the plaintiff must establish three elements: (1) the defendant's specific intent to monopolize the defined market, (2) the defendant's anticompetitive or predatory actions, and (3) "a dangerous probability of success."[62] Antitrust

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[54] 15 U.S.C. § 1 (2006).

[55] Kevin L. Spark, Note, *Format War, Antitrust Casualties: The Sherman Act and the Blu-Ray-HD DVD Format War*, 83 S. CAL. L. REV. 173, 189 (2009).

[56] *Id.*

[57] *Id.*

[58] Rogers, *supra* note 35, at 1029.

[59] 15 U.S.C. § 2 (2006).

[60] Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 710 (4th Cir. 1991) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 596 n.19 (1985)).

[61] Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97–98 (2d Cir. 1998).

[62] E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 453 (4th Cir. 2011) (citing Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993)).

law, however, does sustain monopolization resulting from lawful competition.[63]

3. Section 3 of the Clayton Act. Prior to more recent decisions analyzing exclusive dealing agreements under section 2 of the Sherman Act, courts based their decisions primarily on section 3 of the Clayton Act.[64] Congress passed section 3 to supersede the Supreme Court's adoption of the rule-of-reason analysis.[65] Section 3 makes unlawful any contract for the sale of goods or other commodities or any act of

> fix[ing] a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce.[66]

The legality of an exclusive dealing agreement under the Clayton Act depends on a large portion of the market being foreclosed by competition.[67]

4. Section 5 of the FTC Act. Section 5 of the FTC Act originated as a form of redress against exclusive dealing available only to the federal government and not to private parties.[68] Although the Supreme Court initially held in the 1960s that section 5 allowed the FTC to pursue conduct that would not constitute a violation under the Sherman Act, courts have more recently evaluated

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[63] *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power . . . is not only not unlawful; it is an important element of the free-market system.").

[64] Steuer, *supra* note 32, at 103–04.

[65] *See id.* at 104, 112 (stating that Congress enacted the Clayton Act in response to the Supreme Court's decision in *Standard Oil Co. v. United States*, which announced the rule-of-reason approach).

[66] 15 U.S.C. § 14 (2006).

[67] Barr Labs. v. Abbott Labs., 978 F.2d 98, 110 (3d Cir. 1992).

[68] Hovenkamp, *supra* note 21, at 1616.

section 5 claims under the same tests used to evaluate violations of section 2 of the Sherman Act.[69]

D. SUPREME COURT ANALYSIS OF EXCLUSIVE DEALING

1. Development of the Quantitative Substantiality Test. The Supreme Court first condemned an exclusive dealing agreement in *Standard Fashion Co. v. Magrane-Houston Co.*[70] The Court found that an arrangement requiring 40% of retailers in the country to purchase sewing patterns exclusively from Standard Fashion lessened competition and violated section 3 of the Clayton Act.[71] Subsequently, the Court continued to draw upon the degree of foreclosure as the foundation for an antitrust violation in *Standard Oil Co. v. United States*.[72] In developing a "quantitative substantiality" test to determine the legality of an exclusive dealing agreement, the Court focused on a numerical value to the exclusion of other factors relevant to antitrust analysis[73] and held that a 6.7% market share was significant enough to conclude the defendant violated section 3 of the Clayton Act.[74]

2. Replacement of the Quantitative Substantiality Test with the Rule-of-Reason Standard. In *Tampa Electric Co. v. Nashville Coal Co.*,[75] the Court abandoned the quantitative substantiality test in favor of the "qualitative substantiality" standard.[76] The three-part standard developed in *Tampa Electric* required courts to: (1) define the appropriate line of commerce, such as the types of products or services involved, (2) identify the relevant geographic market and the degree of foreclosure affecting that market, and (3) determine

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69 *Id.*

70 258 U.S. 346 (1922).

71 Steuer, *supra* note 32, at 105.

72 337 U.S. 293 (1949).

73 *See id.* at 306, 310–11 (noting that exclusive dealing may have procompetitive benefits but finding these justifications irrelevant because (1) Congress did not intend the courts to weigh "the ultimate demands of the 'public interest' " in each case and (2) courts are "ill-suited" to uncover the procompetitive and anticompetitive effects of these deals); Rogers, *supra* note 35, at 1025–26.

74 *Standard Oil*, 337 U.S. at 305, 314.

75 365 U.S. 320 (1961).

76 Steuer, *supra* note 32, at 107.

whether the exclusive dealing agreements comprise a substantial share of the defined market.[77] This standard focuses on qualitative factors by looking at the plausible effects of the agreement on the relevant area of competition rather than relying solely on pure market share or foreclosure data.[78] The Court emphasized specific qualitative factors in evaluating the substantiality of the market foreclosure, including "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 preemption of that share of the market might have on effective competition therein."[79] The Court upheld the agreement because it foreclosed less than 1% of the relevant market and provided a constant source of supply for Tampa Electric while allowing Nashville Coal to reduce its selling expenses.[80] The resulting balancing test, known now as the rule-of-reason standard, requires courts to find substantial market foreclosure in addition to anticompetitive effects and to weigh those effects against any procompetitive benefits of these agreements.[81]

The Supreme Court, in contrast to its earlier decisions, completely ignored percentages of market share or foreclosure in *FTC v. Brown Shoe Co.*[82] The Court condemned the exclusive dealing agreements, which foreclosed about 1% of shoe retailers in the United States, under section 5 of the FTC Act.[83] The Court also found that the agreements "obviously conflict[ed] with the central policy of both [section] 1 of the Sherman Act and [section] 3 of the Clayton Act [prohibiting] contracts which take away freedom of purchasers to buy in an open market."[84] *Brown Shoe* is

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77 *Tampa Elec. Co.*, 365 U.S. at 327–28.
78 *Id.* at 329.
79 *Id.*
80 *Id.* at 333–35 (citing Standard Oil Co. v. United States, 337 U.S. 293, 306–07 (1949)).
81 Rogers, *supra* note 35, at 1027.
82 384 U.S. 316 (1966).
83 U.S. DEP'T OF JUSTICE, *supra* note 14, at 134.
84 384 U.S. at 321.

seldom used in later opinions[85] but remains the Supreme Court's most recent ruling on exclusive dealing.

Additionally, although the majority of the Court in *Jefferson Parish Hospital District No. 2 v. Hyde* decided the case under a tying theory,[86] the concurrence concluded that the contract constituted exclusive dealing.[87] Justice O'Connor's concurring opinion reemphasized the rule-of-reason standard developed in *Tampa Electric* and indicated that the analysis of exclusive agreements must rest in part on "actual economic effects."[88]

E. SUBSEQUENT DECISIONS AMONG LOWER FEDERAL COURTS

Without further guidance from the Supreme Court, the lower courts continue to apply a rule-of-reason standard as opposed to a per se rule when evaluating the legality of exclusive dealing. Despite the potential anticompetitive effects of exclusive dealing agreements, courts routinely upheld them until recently.[89]

1. Decisions Upholding Exclusive Dealing Agreements. The First Circuit upheld the arrangements in *Barry Wright Corp. v. ITT Grinnell Corp.*[90] The court justified its holding upon the fairly short duration of the contracts and the existence of "legitimate business justifications" (i.e., the distributor's need to find a constant supply at an advantageous price and the manufacturer's need to lower costs through planned production), despite the dominant market share held by the manufacturer.[91]

In *U.S. Healthcare, Inc. v. Healthsource, Inc.*, the First Circuit again approved of an exclusivity arrangement challenged under sections 1 and 2 of the Sherman Act.[92] The court held that the

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[85] Steuer, *supra* note 32, at 107.

[86] Tying occurs when a firm either conditions a sale of a product on the purchase of another or related product or requires that the buyer not purchase the additional product from another supplier. U.S. DEP'T OF JUSTICE, *supra* note 14, at 77.

[87] 466 U.S. 2, 44 (1984) (O'Connor, J., concurring).

[88] Rogers, *supra* note 35, at 1028.

[89] Ware & Hill, *supra* note 37, at 40.

[90] 724 F.2d 227 (1st Cir. 1983).

[91] The dominate manufacturer's sales accounted for between 83% and 94% of all sales in the relevant market during the years in question. *Id.* at 229, 236–38.

[92] 986 F.2d 589, 591 (1st Cir. 1993).

allegations failed under section 1 for lack of evidence of substantial foreclosure, which was "the cardinal requirement of a valid [section 1] claim" and that they failed under section 2 for an inability to establish the "properly defined product market" in which the defendant could create a monopoly.[93] The court also noted the "benign" purposes of exclusivity arrangements such as "assurance of supply or outlets, enhanced ability to plan, reduced transaction costs, [and] creation of dealer loyalty."[94]

The Ninth Circuit upheld a manufacturer's policy of refusing to sell to retailers carrying equipment made by competing manufacturers under section 3 of the Clayton Act based on the brief duration and ease of terminability of the arrangement that "negate[d] substantially [its] potential to foreclose competition" when approximately 38% of the market was foreclosed.[95] These decisions indicate the willingness of courts to take theoretical procompetitive benefits of exclusive dealing into account before rendering judgment.

2. Decisions Condemning Exclusive Dealing Agreements. Two recent decisions by circuit courts have condemned exclusive dealing agreements. In 2001, the D.C. Circuit in *United States v. Microsoft Corp.* found that several exclusive dealing agreements violated section 2 of the Sherman Act because they prevented Microsoft's rivals from accessing distribution channels that were cost-efficient.[96] The court distinguished the "very loose [s]ection 2 standard" from the rule under section 1 of the Sherman Act and section 3 of the Clayton Act requiring an agreement to foreclose a substantial portion of the relevant market, approximately 40%–50%.[97] The court then held that the percentage of foreclosure could be less to find a violation of section 2 of the Sherman Act.[98]

In 2005, the Third Circuit in *United States v. Dentsply International, Inc.* held that Dentsply's practice of refusing to sell

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[93] *Id.* at 597, 599.
[94] *Id.* at 595.
[95] Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161–63 (9th Cir. 1997).
[96] 253 F.3d 34, 64 (D.C. Cir. 2001) (en banc) (per curiam).
[97] Smith, *supra* note 16, at 12.
[98] *Id.*

to distributors that carried other manufacturers' artificial teeth violated section 2 of the Sherman Act because the practice unlawfully maintained Dentsply's monopoly power.[99] Despite the contracts being terminable at-will and not requiring exclusivity, Dentsply's distribution methods harmed its competitors by creating "significantly higher transaction costs, extension of credit burdens, and credit risks."[100] Consequently, these agreements prevented rivals from increasing sales to an amount capable of "pos[ing] a real threat to Dentsply's market share."[101]

F. AFTER *MICROSOFT* AND *DENTSPLY*

The holdings under *Microsoft* and *Dentsply* suggest that future analysis of exclusive dealing agreements under antitrust law will be more likely to fall under section 2 of the Sherman Act.[102] Compared to section 1 of the Sherman Act and section 3 of the Clayton Act, a lesser degree of foreclosure is needed to establish a violation of section 2 of the Sherman Act.[103] Although defendants are still likely to win under exclusive dealing cases, the "loose standard" under section 2 indicates that primarily procompetitive agreements could be found illegal.[104] A plaintiff may be more successful bringing a monopoly-maintenance case under section 2

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[99] 399 F.3d 181, 191–93 (3d Cir. 2005).

[100] *Id.* at 193.

[101] *Id.* at 191.

[102] *See* Steve Calkins, Evaluating the Competitive Effects of Exclusive Dealing Agreements, Remarks at ABA Section of Antitrust Law & ABA Center for Continuing Legal Education Teleseminar, *in* ANTITRUST SOURCE, Nov. 2005, at 7, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Nov05_FullSource11_29.authcheckdam.pdf ("I am not sure there is much left of [s]ection 1 [of the Sherman Act] or [section 3 of the] Clayton [Act] in a lot of courts.").

[103] *See* Joe Grinstein, Evaluating the Competitive Effects of Exclusive Dealing Agreements, Remarks at ABA Section of Antitrust Law & ABA Center for Continuing Legal Education Teleseminar, *in* ANTITRUST SOURCE, Nov. 2005, at 6, http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Nov05_FullSource11_29.authcheckdam.pdf (discussing how establishing a violation of section 2 is "a little easier because you are not necessarily within the rule of reason analysis" and, while "no bright line number in [s]ection 2 [exists], . . . the number is probably less than [s]ection 1 or [s]ection 3"); Calkins, *supra* note 102, at 7 (agreeing that "a smaller amount of foreclosure should trigger [more] concern about a monopolist than about a firm with less market power").

[104] Smith, *supra* note 16, at 13.

of the Sherman Act when analysis under section 1 of the Sherman Act or section 3 of the Clayton Act is not preferred.[105] In fact, "a decision that the conduct [does] not violate [s]ections 1 and 3 does not dispose of the [s]ection 2 question."[106]

These recent decision under section 2 of the Sherman Act seemed to focus on fairness to competitors entering the market rather than the competitive process itself.[107] The decisions in *Microsoft* and *Dentsply* also indicate that courts have shifted their approach in recent years by emphasizing market realities rather than relying on pure economic theory. For example, although short-term contracts are less likely to harm competition, courts now recognize that even agreements that are terminable at-will or that do not require exclusivity can be exclusive in practice and have an anticompetitive impact.[108]

G. ANALYSIS OF EXCLUSIVE DEALING UNDER SECTION 2 OF THE SHERMAN ACT BY THE DEPARTMENT OF JUSTICE

In 2008, the DOJ endorsed a safe harbor to hold exclusive dealing agreements lawful when they "foreclose less than [30%] of existing customers or effective distribution."[109] Conversely, it

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[105] *See* McDonald, *supra* note 24, at 15 (explaining that *Dentsply* was well-suited for analysis under section 2 of the Sherman Act because the district court had emphasized that there was a "lack of total foreclosure," and section 1 of the Sherman Act and section 3 of the Clayton Act "focus on foreclosure," while section 2 focuses on "the actual effect of the exclusive policy").

[106] *Id.* at 16.

[107] See Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119, 119 (2003) (suggesting that recent decisions under section 2 of the Sherman Act, like *Microsoft*, condemned agreements solely because of "burden[s] on competitors" that lacked sufficient business justifications).

[108] *See* Grinstein, *supra* note 103, at 5 (arguing that reliance on an exclusive dealing agreement being easily terminable is "one of the defendant's weakest arguments" because the fact that someone entered into the contract suggests that something anticompetitive is happening and that a defendant can only overcome this presumption by showing that "people actually do terminate them"); McDonald, *supra* note 24, at 16 (explaining that although direct sales were available to Dentsply's competitors, they were not a "practical alternative" for them, and Dentsply managed to guard its monopoly by preventing the growth of rivals' sales even though its agreements with dealers were terminable at-will and did not require exclusivity).

[109] U.S. DEP'T OF JUSTICE, *supra* note 14, at 141.

recommended that agreements foreclosing more than 30% "should be neither automatically nor presumptively illegal."[110] The DOJ took current case law into consideration before proposing this safe harbor.[111] The Department also outlined a comprehensive rule-of-reason analysis when the agreement is not found to be per se legal.

Under this approach, when the degree of foreclosure surpasses the 30% safe harbor, courts should first analyze whether the exclusive dealing agreement can potentially harm consumers or competition in the relevant market.[112] Courts should uphold the agreement when harm to competition is not plausible, like when "efficient distribution methods are available in sufficient size and number to rivals."[113] When actual or presumed harm to competition exists, though, courts should find an agreement to be unlawful only if (1) it lacks any procompetitive benefits or (2) the arrangement creates anticompetitive effects that are "substantially disproportionate" to any procompetitive benefits.[114]

The DOJ set forth this standard to solve problems of uncertainty in determining the actual effects of the agreement on competition—i.e., the difficulty courts sometimes experience in evaluating market realities rather than economic theory.[115] The Department also noted the potential to impose "liability on conduct that, while potentially hampering a rival's ability to compete, often lowers costs and benefits consumers."[116]

The Antitrust Division of the DOJ issued the Single-Firm Conduct Report under the administration of President George W. Bush at a time when the Division was "not enthusiastic" about pursuing anticompetitive conduct under section 2 of the Sherman Act.[117] The Conduct Report was extremely defendant-friendly and increased the difficulty plaintiffs faced in proving an antitrust

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[110] *Id.*
[111] *Id.* at 141 nn.101–02.
[112] *Id.* at 140.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] Hovenkamp, *supra* note 21, at 1612.

violation under section 2 of the Sherman Act.[118] Eight months later, the DOJ withdrew the Conduct Report under the Obama Administration, indicating that the Antitrust Division would be more aggressive in pursuing litigation against potentially anticompetitive single-firm conduct under section 2 of the Sherman Act.[119]

H. A RECENT EXAMPLE OF COURTS' INCONSISTENT ANALYSIS OF EXCLUSIVE DEALING UNDER SECTION 2 OF THE SHERMAN ACT

The District Court for the Eastern District of Virginia recently upheld certain exclusive dealing agreements used by DuPont in connection with para-aramid fibers marketed by DuPont under the KEVLAR brand.[120] DuPont claimed that it entered into agreements, lasting from one to several years, requiring four of its twelve largest customers to purchase 80%–100% of their requirements from DuPont.[121]

The court followed the analysis of *Microsoft* in finding that the percentage of foreclosure of the relevant market could violate section 2 of the Sherman Act without being substantial enough to violate section 1 of the same Act because a competitor that lacks monopoly power is less likely to substantially foreclose the market than a monopolist.[122] Despite the fact that section 2 claims under the Sherman Act do not need to rise to the level of foreclosure required in section 1 claims to find a violation, the court stated that this "did not imply that *insubstantial* market foreclosure was actionable."[123]

Ultimately, the court dismissed Kolon's claim for failing to show that DuPont foreclosed a substantial amount of distribution channels and for failing to define the relevant geographic market

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[118] *Id.* at 1613.

[119] *See id.* at 1612–13 (explaining that the Obama Administration had to withdraw the Conduct Report or risk litigating against it when experience "demonstrate[s] that business firms are entitled to rely on antitrust guidelines").

[120] E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 683 F. Supp. 2d 401, 426 (E.D. Va. 2009), *rev'd*, 637 F.3d 435 (4th Cir. 2011).

[121] *Id.* at 420.

[122] *Id.* at 422.

[123] *Id.*

needed to determine DuPont's actual market share.[124] The four suppliers DuPont had exclusive dealing agreements with represented roughly 33% of its customers that were foreclosed from distributing the same product for other competitors.[125] Giving Kolon a "favorable inference" that DuPont controlled 75% of the market, overall foreclosure of distributors amounted to less than 25%, which the court found as not significant enough to violate section 2 of the Sherman Act.[126]

The Fourth Circuit subsequently reversed the district court's decision to grant DuPont's motion to dismiss Kolon's claims of monopolization and attempted monopolization.[127] The court found that Kolon adequately pled that the United States was the relevant geographic market.[128] The court also held that the district court erred by taking into consideration a statement made by DuPont's counsel outside of the pleadings.[129]

The court of appeals acknowledged that exclusive dealing agreements are not per se illegal.[130] Nevertheless, the Fourth Circuit discounted all of DuPont's defenses that their use of exclusive dealing was not anticompetitive.[131] The court further noted that requiring a "significant degree of foreclosure serves a useful screening function" in antitrust cases where exclusive dealing only affects a small amount of the market.[132] The court did not suggest that there were any possible justifications that DuPont could have alleged at the motion to dismiss stage to demonstrate their agreements were not anticompetitive, thus

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[124] *Id.* at 426.
[125] *Id.* at 424.
[126] *Id.*
[127] *DuPont*, 637 F.3d at 453.
[128] *Id.* at 448.
[129] DuPont's counsel had asserted that Kolon had access to all relevant supply agreements and that those were the only agreements in existence. *Id.* at 449. The Fourth Circuit noted that Kolon never stated in its counterclaim that it had received all relevant contracts or that full discovery had taken place. *Id.*
[130] *Id.* at 451.
[131] *See id.* at 452–53 (rejecting DuPont's assertions that its agreements were not anticompetitive because they did not require customers to purchase 100% of their requirements from DuPont, had "meet-or-release" clauses, and were short-term).
[132] *Id.* at 451 (quoting United States v. Microsoft Corp., 253 F.2d 34, 69 (D.C. Cir. 2001)).

rendering the court's statement that exclusive dealing agreements are not per se illegal a mere truism. The court refused to analyze the market share held by DuPont or the percentage of the market DuPont foreclosed despite observing that determining a foreclosure percentage can serve as a useful screening device.[133]

This recent decision by the Fourth Circuit demonstrates the difficulty defendants encounter when attempting to structure exclusive dealing agreements to comply with current antitrust law. Because defendants, at an early stage of the litigation, cannot seemingly demonstrate market realities necessary to justify their agreements, this Note explores economic theory underlying exclusive dealing and argues that a safe harbor drawing upon the error-cost framework would help alleviate the disparities that defendants experience.

III. ANALYSIS

Plaintiffs have several antitrust statutes under which they may bring claims of anticompetitive behavior, but courts are showing a clear trend toward analyzing these claims solely under section 2 of the Sherman Act for exclusive dealing agreements.[134] Unfortunately, defendants are at a disadvantage under this approach compared to the analysis under other antitrust statutes for several reasons. First, section 2 requires a smaller percentage of foreclosure of the relevant market to show a violation.[135] Second, section 2 focuses more on the actual effects of the agreement than the foreclosure percentage.[136]

Because the rule-of-reason standard is the test of choice for section 2 claims,[137] courts will weigh the procompetitive benefits against anticompetitive effects of the agreement. An inherent bias exists against defendants, however, due to the difficulty in demonstrating both an absence of harm to the market and the

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[133] *See id.* at 452 n.12 (fearing Kolon would not have enough information to calculate the exact percentage of foreclosure).

[134] *See discussion supra* Part II.F.

[135] Smith, *supra* note 16, at 12.

[136] *See* discussion *supra* Part II.F.

[137] *See* discussion *supra* Part II.G.

presence of potential benefits to consumers.[138] Plaintiffs are more easily able to find data to support their assertions whereas defendants must often justify their conduct on mere economic theory.[139]

A larger burden is on defendants to overcome the plaintiff's evidence and prove the absence of attempted or actual monopolization.[140] In addition to the shift by courts to evaluating claims of anticompetitive agreements primarily under section 2 of the Sherman Act, modern courts also look to the actual effects of the contract in the market rather than relying on economic theory.[141] Modern analysis of exclusive dealing agreements is at odds with the longstanding principle that upholding an illegal agreement is better than erroneously condemning a lawful agreement.[142] This principle is grounded in economic theory; market forces will correct false negatives but cannot correct false positives.[143]

This Part continues by discussing the challenges that parties behind exclusive dealing agreements confront when defending themselves under the rule-of-reason standard once the plaintiff has met its burden. It then addresses the economic theory underlying exclusive dealing agreements. Because modern courts often discount the economic justifications for a defendant's conduct,[144] a workable solution to this burden would be for courts to permit a safe harbor when the defendant forecloses less than 30% of the relevant market.

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[138] *See* Manne & Wright, *supra* note 17, at 198 ("[E]fficiencies are inherently more difficult to measure and explain to courts than anticompetitive effects.").

[139] *See id.* (expressing concern about "inviting courts to entertain speculative economic theories of harm").

[140] *See* discussion *infra* Part III.A.

[141] *See* discussion *infra* Part III.B.

[142] *See* discussion *infra* Part III.C.

[143] *See* Manne & Wright, *supra* note 17, at 157, 159 (discussing the premise that "false positives are more costly than false negatives, because self-correction mechanisms mitigate the latter but not the former").

[144] *See* discussion *infra* Part III.C.*3*.

A. ANTICOMPETITIVE EFFECTS ARE EASIER TO ALLEGE THAN PROCOMPETITIVE BENEFITS

Manufacturers defending themselves against claims of monopolization or attempted monopolization under section 2 of the Sherman Act must rely on economic theory to assert defenses; therefore, they are at a distinct disadvantage compared to defendants under section 1 of the Sherman Act and section 3 of the Clayton Act, which focus on the percentage of foreclosure. An agreement's procompetitive benefits that a defendant must demonstrate are inherently more arduous to quantify than the anticompetitive consequences in the market.[145]

1. Identifying Anticompetitive Effects. The greatest danger an exclusive dealing agreement presents is its ability to foreclose competitors from entering the market because the capacity to distribute the product has been drastically reduced, potentially raising prices for consumers.[146] The absence of new competition signifies anticompetitive conduct particularly when the potential profit in the relevant market is high.[147] Thus, a plaintiff who can demonstrate that the defendant has tied-up a large amount of distribution is in a strong position from the start.

As long as the exclusionary conduct has existed in the market for a sufficient period of time, plaintiffs can directly assess whether there are higher prices, decreased output, or negative effects on innovation.[148] Plaintiffs can also point to reduced variety of the product available to consumers as a result of exclusive dealing.[149] Furthermore, documentation indicating plans

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[145] Manne & Wright, *supra* note 17, at 198; *see also* Klein, *supra* note 107, at 120 ("[C]onsumer benefits of exclusivity generally are not obvious."); Wright, *supra* note 17, at 193 ("[D]efendants with market power rarely prevail in exclusionary distribution cases by asserting a valid business justification after the plaintiff meets its prima facie burden.").

[146] Rogers, *supra* note 35, at 1020 (citing U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 595 (1st Cir. 1993)).

[147] *See* Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 790 (6th Cir. 2002) (holding that evidence was sufficient to show monopoly power where "no new firm had entered the . . . market, [despite a] high amount of potential profit at stake" in the relevant market).

[148] Manne & Wright, *supra* note 17, at 197–98.

[149] Klein, *supra* note 107, at 156.

to control competition is particularly damaging evidence against defendants.[150]

Plaintiffs may claim that some anticompetitive effects are easier to explain through economic theory than market activity. For example, the use of exclusive dealing agreements by the dominant manufacturer in the market can lead distributors to anticipate a monopoly that they will be left out of if they do not hurry to sign an agreement with the manufacturer.[151] Another theoretical anticompetitive effect is that the initial harm to a competitor of operating at a small scale can be amplified later due to "network dependencies" or "scale economies."[152] A court will likely have difficulty determining whether detrimental effects to the smaller competitor are attributable to the dominant manufacturer's original exclusionary agreements or to the smaller competitor's own business decisions. Nevertheless, plaintiffs may utilize a variety of factors and condense them into data, limited only by their willingness to invest in the litigation.

2. Establishing Procompetitive Benefits. A defendant can allege valid business reasons for using exclusive dealing agreements, but these justifications typically benefit the defendant or buying distributors.[153] Benefits to consumers that theoretically result

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[150] *See, e.g.*, *Conwood*, 290 F.3d at 786 (demonstrating that an e-mail indicating the defendant planned to control the number of brands and other products was significant evidence in establishing anticompetitive conduct).

[151] Theoretically, distributors enjoy greater profits by not entering into agreements, but the dominant manufacturer can overcome this belief by creating expectations that exclusive dealing will be used to drive competitors out of the market. Klein, *supra* note 107, at 134. As a result, distributors that do not enter into an agreement "at an early stage" with the dominant manufacturer will likewise be driven from the market or face buying the dominant manufacturer's product at a higher price. *Id.* at 134–35. As a practical matter, it is "extremely difficult" to incorporate this theoretical economic analysis, and no antitrust cases have discussed these considerations. *Id.* at 135–36.

[152] Essentially, the dominant manufacturer can use its current exclusive dealing agreements to keep its rival confined to a small and inefficient section of the market in the future. Carlton, *supra* note 5, at 668–69.

[153] *See id.* at 659–60 ("[E]xclusionary conduct . . . is difficult to distinguish from beneficial competition because they both result in an increase in sales of one firm at the expense of rivals."); Rogers, *supra* note 35, at 1018–19 (stating that justifiable business practices include the buyer's ability to ensure supply and protect against a rise in price as well as the seller's opportunity to lower transaction costs and operate in a more predictable market) (citing Standard Oil Co. v. United States, 337 U.S. 293, 306–07 (1949)).

from these market efficiencies between manufacturers and distributors are less easily ascertainable because they are indirect.[154] Courts, however, look for the ultimate effect on consumers.[155] Although economic justifications for certain business practices can be identified, economists may take decades to understand them, and plaintiffs may be able to win their claims because a judge or jury may not be an expert on practices in the industry.[156] This concern is particularly pressing when typical jury instructions direct the jury to determine whether the defendant's conduct was in line with the "normal competitive process."[157]

Even when actual procompetitive effects do exist in the market, statistical evidence may be "difficult to establish."[158] For example, a plaintiff can easily point to the defendant's price terms and show that the plaintiff's pricing would in fact be lower for distributors. Although distributors may be accepting these inferior price terms as a result of anticompetitive conduct, a strong possibility also exists that distributors accept higher prices from the established competitor rather than a new entrant because of a perception that the established competitor's product is of superior quality.[159] Unfortunately for the defendant, perception cannot be as easily quantified as price.

3. What Market Realities Can a Defendant Realistically Identify to Overcome the Plaintiff's Allegations? The dominant manufacturer can show that distributors choose to exit agreements that are terminable at-will or to refrain from entering into new

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[154] *See* discussion *supra* Part II.A (explaining how the immediate benefits to the manufacturer theoretically trickle down to benefit consumers).

[155] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 783 (6th Cir. 2002) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985)).

[156] Carlton, *supra* note 5, at 680.

[157] *See Conwood*, 290 F.3d at 787 n.4 (determining that the district court's instructions to the jury to examine whether conduct was "part of the normal competitive process" were proper).

[158] Manne & Wright, *supra* note 17, at 198.

[159] *See* Klein, *supra* note 107, at 135 (explaining the difficulty of determining when manufacturers distort the competitive bidding process because inferior price terms can "reflect higher expected quality of its product").

contracts after the initial agreements expire.[160] Such a fact indicates to a court that distributors voluntarily entered into exclusive dealing agreements and that no exclusionary behavior prohibited competing manufacturers from retaining distribution within a short time period. The court in *Dentsply*, however, found that even at-will agreements could be anticompetitive.[161]

The defendant may demonstrate that contracts with distributors are only partially exclusive and that the plaintiff can compete for the remaining portion of a distributor's business. Depending on the product though, this may not be realistic because a manufacturer that purchases component parts would be unlikely to use multiple suppliers for the same component in order to maintain consistency in the final product.[162]

"Meet-or-release" clauses, which allow distributors to terminate agreements when a competing manufacturer offers a price at a specified rate below the exclusive dealing price and the dominant manufacturer refuses to meet the lower price,[163] serve a similar purpose. These clauses, though, can be so "severely restrictive" that they are just illusory opportunities for competing distributors.[164] Further, a meet-or-release clause gives the dominant manufacturer the ability to "preempt" competing manufacturers by agreeing to meet the competitor's bid while also providing the dominant manufacturer with "competitive information"[165] by affording it insight into the prices competitors are able to offer.

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[160] *See* Grinstein, *supra* note 103, at 5 ("[T]he most damaging evidence that a defendant might bring to bear against a plaintiff . . . [is] proof that in practice people actually do terminate [exclusive dealing contracts].").

[161] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 193 (3d Cir. 2005); *see also* U.S. DEP'T OF JUSTICE, *supra* note 14, at 140–41 (endorsing the holding in *Dentsply* that the actual effects of a terminable agreement could be the same as if it was a binding contract and arguing that the length of an agreement should not be dispositive of its legality).

[162] *See, e.g.*, E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435, 452 (4th Cir. 2011) (agreeing with the district court that it would be "unrealistic to expect consumers to seek out a mere 15 percent of their requirements for a specialized, integrated product like para-aramid fibers from a second supplier").

[163] *DuPont*, 683 F. Supp. 2d at 420, *rev'd on other grounds*, 637 F.3d 435 (4th Cir. 2011).

[164] *Id.* at 423.

[165] *Id.*

The dominant manufacturer can also attempt to overcome the plaintiff's allegation by demonstrating that output in the relevant market expanded during the period of alleged anticompetitive conduct.[166] Nevertheless, a lack of output restriction is not dispositive[167] because a plaintiff can offer contrary evidence that output would have increased even more absent the defendant's conduct.[168]

Finally, a manufacturer or supplier may allege the existence of a sizeable competitor in the relevant market to show that competition does in fact exist. For example, the district court in *DuPont* noted that a competitor with a market share of nearly 30% provided a "serious check" on DuPont's power in the market.[169] The Fourth Circuit, however, did not take the competitor into account when analyzing the monopolization claim against DuPont. Even if courts consistently took this factor into account, it would probably help few defendants. A company can abstain from anticompetitive conduct that would prevent a competitor from gaining a significant market share, but it cannot create a competitor to demonstrate a lack of anticompetitive conduct (and has no incentive to do so).

The absence of one of these market realities in no way indicates that an agreement is unlawful. In fact, it is not in the best interests of the defendant's business to demonstrate continuous turn-over of its distributors. Additionally, a defendant may not be able to structure its business to accommodate these practices to merely demonstrate the legality of its agreements.

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[166] Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1164 (9th Cir. 1997).

[167] Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 234 (1993).

[168] For example, the court in *Conwood* took into account that the plaintiff's market share increased slightly by 2.5% during the relevant period but had increased by 11% during the ten years prior to the alleged anticompetitive conduct. Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 789 (6th Cir. 2002).

[169] *DuPont*, 683 F. Supp. 2d at 424–25.

B. MODERN COURTS PREFER MARKET REALITIES TO ECONOMIC THEORY

Modern analysis of exclusive dealing focuses on the " 'market impact' of the restraints."[170] Although *Eastman Kodak Co. v. Image Technical Services, Inc.* concerned tying, the case indicated a shift by the Supreme Court from relying on economic theory "toward a more fact-intensive approach that results in closer scrutiny of vertical restraints."[171] In *Eastman Kodak*, the Court stated: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law."[172] Lower courts have continued to implement this philosophy in recent cases.[173] Thus, a defendant without market realities to justify its exclusive contracts must fall back on currently disfavored economic theory.

C. ECONOMIC THEORY UNDERLYING EXCLUSIVE DEALING AGREEMENTS

Despite recent skepticism over the existence of false positives in monopolization[174] and doubts about the usefulness of economic theory in antitrust law, the error-cost framework still maintains its advantages by allowing judges and policymakers to incorporate economic theory into the development of safe harbors.[175] Utilizing economic theory is also advantageous because empirical studies have not caught up with theoretical development.[176]

1. False Positives and False Negatives. In antitrust law, a false positive is an incorrect determination that a lawful agreement has

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[170] Wright, *supra* note 17, at 190–91 (citing Cont'l T.V., Inc. v. GTE Sylvania, 433 U.S. 36 (1977)).

[171] Rogers, *supra* note 35, at 1029–30 (citing 504 U.S. 451 (1992)).

[172] 504 U.S. 451, 466–67 (1992).

[173] *See, e.g.*, *DuPont*, 637 F.3d at 442–44 (taking commercial realities into consideration when determining the geographic market).

[174] *See* Manne & Wright, *supra* note 17, at 155 ("There is no such thing as a false positive." (quoting Christine Varney, U.S. Asst. Att'y Gen. for Antitrust, Remarks Before the American Antitrust Institute (Feb. 11, 2008), *available at* http://www.antitrustinstitute.org/files/20080619_pv_aai061908holemanbreakout_020320091323.mp3)).

[175] *Id.* at 163.

[176] Carlton, *supra* note 5, at 660.

anticompetitive effects that outweigh any potential procompetitive benefits; conversely, a false negative is an erroneous conclusion that an anticompetitive agreement does not harm competition.[177] Judge Easterbrook has promulgated an error-cost framework resting on two principles. First, false positives cost more than false negatives because false negatives (i.e., monopolies) can be mitigated by "self-correction mechanisms" in the market, whereas false positives (i.e., judicial errors) cannot be mitigated.[178] Second, anticompetitive behavior is difficult to differentiate from procompetitive behavior (especially when evaluating exclusive dealing agreements), and thus, both false positives and false negatives are unavoidable.[179] A safe harbor ensures that the risk of false positives is minimized by reserving judicial scrutiny for cases where the percentage of distribution channels foreclosed suggests that anticompetitive behavior exists in the market.

2. Two Economic Models Under Antitrust Law. Historically, there have been two competing models of economic analysis of conduct under antitrust law. The Chicago School Efficiency Model[180] presumes that the only objective of enforcing antitrust violations is to maintain economic efficiency.[181] This model supports limited government and judicial interference in the markets because firms are inherently efficient.[182] The Interventionist Model, on the other hand, considers social aims such as "fairness of the competitive process," promotion of innovation, and protection of small firms in addition to economic efficiencies.[183] This model encourages courts to scrutinize

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[177] Manne & Wright, *supra* note 17, at 159.

[178] *Id.* at 157, 159.

[179] *Id.*

[180] The Chicago School model of economic theory behind antitrust supports Judge Easterbrook's view regarding false negatives: The market power of firms obtained through "artificial competitive restraints" will eventually be eroded by market forces. Rogers, *supra* note 35, at 1010.

[181] Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 686 (1991).

[182] *Id.*

[183] *Id.*

exclusive dealing more closely because of the ability of firms to distort natural market forces.[184]

3. The Current State of Economic Theory. The Efficiency Model dominated the thinking of courts for many years.[185] Many antitrust scholars and officials in the DOJ and the FTC, however, have recently expressed that the integration of the error-cost framework into judicial decisions under the Sherman Act under-deters anticompetitive conduct,[186] signaling a shift back to reliance on the Interventionist Model. This shift lends further support to the need for a safe harbor to protect defendants from intense scrutiny under section 2 of the Sherman Act when they face challenges in demonstrating valid business justifications for industry practices.

D. DETERMINING THE FORECLOSURE PERCENTAGE UNDER SECTION 2 OF THE SHERMAN ACT

1. Differences in Foreclosure Rates Under Various Antitrust Laws. As described in Part II.F, courts analyzing exclusive dealing agreements under section 2 of the Sherman Act rather than section 1 of the Sherman Act or section 3 of the Clayton Act require a smaller percentage of foreclosure of the relevant market to find an antitrust violation. Although courts may claim that the substantiality of the foreclosure percentage is not determined by "an arbitrary numerical percentage threshold,"[187] defendants subject to claims under sections 1 and 3 of the Sherman and Clayton Acts, respectively, can generally rely on an unofficial safe harbor of 40%–50%[188] without offering significant justifications for their conduct. Parties defending against section 2 claims, on the

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[184] *Id.* at 686–87.

[185] *See id.* at 686 (stating that "the Efficiency Model has won over more Supreme Court and lower federal court judges," evidenced by their use of the rule-of-reason approach).

[186] These beliefs indicate that courts do not have to worry about the possibility of over-deterrence and that intervention into potential antitrust conduct would not impose costs on consumers. Manne & Wright, *supra* note 17, at 157.

[187] E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 683 F. Supp. 2d 401, 421 (E.D. Va. 2009) (citing Barr Labs. v. Abbott Labs., 978 F.2d 98, 111 (3d Cir. 1992)), *rev'd on other grounds*, 637 F.3d 435 (4th Cir. 2011).

[188] Smith, *supra* note 16, at 12.

other hand, do not have the benefit of a predictable line to avoid crossing.

2. Defining Foreclosure Rates. The foreclosure percentage requires judicial examination because it is the "primary anticompetitive effect"; however, it is not an "exact science."[189] When the parties buying from the manufacturer are final consumers rather than distributors, the measurement is simply the sales to consumers that are foreclosed.[190] The measurement for distributors, however, cannot rest on a similar "one-to-one analysis."[191] Defining the foreclosure rate for distributors is a qualitative analysis requiring courts to evaluate the "restrictiveness and the economic usefulness of the challenged practice" compared to business determinants existing in the market.[192]

To determine the percentage of the market foreclosed, the market must first be defined. The relevant market has two components: (1) the product market, which identifies the product or service at issue, and (2) the geographic market, which is the geographic area where competition takes place.[193] Plaintiffs will have a better chance of succeeding if they can narrow the definition of either component.[194] Courts evaluate these two components to determine a defendant's market share as well as the percentage of the market the defendant forecloses.

3. The Product Market. Several factors are useful in determining the relevant product market, including the interchangeability of use and the cross-elasticity of demand between the product and other substitutes on the market.[195] Interchangeable products depend on the ability and willingness of distributors to substitute the dominant manufacturer's product for

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[189] Steuer, *supra* note 32, at 116.

[190] *Id.* at 116–17.

[191] *Id.* at 117.

[192] *Barr Labs.*, 978 F.2d at 111 (quoting Am. Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1251–52 n.75 (3d Cir. 1992)).

[193] Rogers, *supra* note 35, at 1033.

[194] *Id.*

[195] Matthew A. Ryen, Comment, *Jamming Ticketmaster: Defining the Relevant Market in the Pearl Jam-Ticketmaster Controversy*, 4 COMMLAW CONSPECTUS 119, 123 (1996).

that of its competitors.[196] The evaluation of cross-elasticity looks at whether the change in price of one product alters the demand of another—the rise in the price of one product and a resulting increase in demand in another indicates that the two products are substitutes for each other.[197] As long as the plaintiff's product has been in the market for a sufficient period of time, the plaintiff can demonstrate these market realities to the court through empirical data.

4. The Geographic Market. The geographic market is referred to as the "area of effective competition" where the manufacturer conducts its business and where customers can purchase the product.[198] The Supreme Court requires the defined geographic market to " 'correspond to the commercial realities' of the industry."[199] Difficulty identifying the geographic market occurs when plaintiffs try to artificially narrow the market definition to make the defendant's market power appear more dominant than it is in reality.[200] Accurately defining the geographic market may present an obstacle to the plaintiff's allegations of anticompetitive conduct because the court will look for a realistic assessment of the defendant's market share and foreclosure rate.

Once the product and geographic markets have been defined, courts can then determine the percentage of distribution channels that have been foreclosed. Upon doing so, courts can evaluate whether the foreclosure percentage falls within the safe harbor as a screening device.

E. WHY HAVE A SAFE HARBOR?

Although the rule-of-reason standard has been increasingly used by courts analyzing claims under section 2 of the Sherman

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196 *Id.*

197 *Id.*

198 E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 456 (E.D. Va. 2009) (quoting Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961)), *rev'd on other grounds*, 637 F.3d 435 (4th Cir. 2011).

199 Brown Shoe Co. v. United States, 370 U.S. 294, 336–37 (1962) (quoting Am. Crystal Sugar Co. v. Cuban-Am. Sugar Co., 152 F. Supp. 387, 398 (S.D.N.Y. 1957)).

200 E.I. du Pont De Nemours & Co. v. Kolon Indus., Inc., 683 F. Supp. 2d 401, 410 (E.D. Va. 2009), *rev'd on other grounds*, 637 F.3d 435 (4th Cir. 2011).

Act, a safe harbor can be viewed as an application of the rule-of-reason standard[201] and does not prevent a court from using the rule-of-reason approach when the foreclosure percentage surpasses the safe harbor.

1. Designing a Safe Harbor Under Section 2 of the Sherman Act. The crucial consideration in selecting the appropriate legal test to apply under section 2 of the Sherman Act is whether it reduces "error and enforcement costs" relative to other possible tests.[202] To be a feasible approach, a safe harbor should reduce false positives and preserve judicial economy[203] more than the rule-of-reason approach.

One of the most important factors a court should take into account before adopting a safe harbor is whether the rule would decrease false positives without producing a disproportionate amount of false negatives.[204] Another important factor to consider before implementing a new rule is the conflicting nature of economic theories underlying antitrust law.[205] Thus, a rule that tries to exemplify every possible variation on an economic theory will prove unworkable because it will undermine the economic justifications it aims to support.[206]

A safe harbor focused on a percentage of foreclosure serves exactly these principles. Requiring the plaintiff to show that the defendant forecloses more than 30% of the relevant market ensures that the defendant is in fact exercising its monopoly power

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[201] Mark S. Popofsky, *Section 2, Safe Harbors, and the Rule of Reason*, 15 GEO. MASON L. REV. 1265, 1270, 1272 (2008).

[202] *See id.* at 1275 (concluding that the costs associated with false positives weigh against expanding liability under section 2 of the Sherman Act) (citing Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414, 416 (2004)).

[203] Preserving judicial economy is particularly important for section 2 claims because courts must perform "a thorough analysis of each fact situation" to determine whether a monopolist's conduct is unlawful. Byars v. Bluff City News Co., 609 F.2d 843, 860 (6th Cir. 1979).

[204] *See id.* at 1272–73 (listing factors that courts should consider when designing a safe harbor); *see also* Wright, *supra* note 17, at 196–97 (arguing that a safe harbor for exclusionary contracts foreclosing less than 40% of the market decreases the risk of false positives and ensures that a competitor does not prevent rivals from achieving efficient economies of scale).

[205] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983).

[206] *Id.*

before the court delves into balancing the harmful effects of the agreement against its procompetitive aspects. Courts have also vacillated in their incorporation of the Efficiency and Interventionist Models into their assessments of exclusive dealing agreements, partially due to changes in the political landscape. A safe harbor would provide courts with the "administrative virtues of simplicity" that they seek[207] and reduce the risk of erroneously condemning lawful behavior and hurting consumers.

2. Benefits of a Safe Harbor Provision. Defendants in antitrust actions experience uncertainty under a rule-of-reason standard because they are unable to predict whether their exclusive dealing agreements will violate section 2 of the Sherman Act.[208] Both parties may benefit from a safe harbor by avoiding the heightened costs of discovery in antitrust litigation[209] when the suit is unlikely to be successful. A safe harbor benefits the practice of antitrust enforcement by lowering costs.[210] A safe harbor also promotes judicial economy by avoiding the need for extensive economic analysis at trial[211] because some claims can be determined simply by analyzing what percentage of the relevant market is foreclosed without weighing the other effects of the agreement.

3. A Foreclosure Rate of 30% is the Appropriate Safe Harbor Under Section 2 of the Sherman Act. Because the common, unofficial safe harbor under other antitrust laws is 40%–50%, a smaller percentage for a section 2 claim appreciates the dangers of monopoly power or attempted monopolization required to prove these claims but not necessary to prove other antitrust claims.[212]

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[207] *See id.* (stating that some courts found potentially "economically justified" agreements unlawful per se because the need for an administrable rule outweighed "the occasional 'economic' loss").

[208] *Id.* at 1279.

[209] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007).

[210] *See* Popofsky, *supra* note 201, at 1277 (explaining that the burden on courts would be substantial if they had to develop a new test for each claim falling under section 2 of the Sherman Act, and the resulting transaction costs would ultimately outweigh any benefits from attempting to enforce antitrust violations).

[211] Spark, *supra* note 55, at 189.

[212] For example, the court in *Microsoft* considered exclusionary acts by a monopolist as more likely to be anticompetitive than "ordinary" exclusionary acts falling under section 1 of the Sherman Act. LePage's, Inc. v. 3M, 324 F.3d 141, 159 (3d Cir. 2003).

Moreover, factors such as the duration of contracts, barriers to entry, and other available methods of distribution become even more important in a court's analysis as the foreclosure percentage becomes lower.[213] Given the inability of economists—not to mention judges and juries—to understand many business practices until they have been in existence for a significant amount of time,[214] some business factors may ultimately prove to be procompetitive and beneficial to consumers. The damage to the defendant, however, is already done. Thus, a 30% safe harbor will reduce the likelihood of false positives when courts deal with little-understood business practices. Third, recent case law suggests that an exceptional case must be presented to condemn conduct that forecloses less than 30% of the market to support a claim of monopolization.[215]

4. Special Implications for High Technology Industries. A foreclosure safe harbor can be particularly important for manufacturers of innovative products in high technology industries like DuPont. Firms that are initially dominant in their respective markets due to patents may remain dominant after their patents expire because of their ability to exploit "time interdependencies,"[216] not because of anticompetitive conduct. The maintenance of an asymmetrical position in the market after the patent expires can further incentivize firms to create intellectual property. These manufacturers have higher research and development costs to recoup and need market power to survive in the industry.[217]

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[213] R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362, 389 (M.D.N.C. 2002) ("The lower the foreclosure percentage, the more salient these factors become in determining whether there has been substantial foreclosure.").

[214] *See* discussion *supra* Part III.A.*2*.

[215] *See* B & H Med., L.L.C. v. ABP Admin., Inc., 526 F.3d 257, 266 (6th Cir. 2008) (stating that "foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent" for exclusive dealing) (quoting Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 68 (1st Cir. 2004)). For an example of an "exceptional case," see the decision in *Microsoft* where the court held less than 40% of foreclosed distribution channels was significant enough to violate section 2 because of a staggering market share of 95%. United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

[216] *See* Carlton, *supra* note 5, at 670 ("A firm with a head start stays ahead.").

[217] Spark, *supra* note 55, at 196.

On the other hand, exclusive dealing may produce unique anticompetitive effects in innovative industries. For example, conduct and agreements that inhibit innovation or reduce competition in technology-based industries can be unreasonable under the Sherman Act because they amplify harm to the market.[218] Exclusive dealing agreements can also have a negative impact on the quality of products available to consumers.[219]

Innovation is an important factor that should play a role in the outcome of *DuPont* and similar cases if the foreclosure percentage surpasses the safe harbor amount. In that situation, the court would then apply the rule-of-reason standard and weigh a multitude of factors. One important factor to consider is that manufacturers attempting to develop an innovative product face an inherent barrier to entry due to the expense of bringing the product to market.[220] This barrier could partially account for the difficulty Kolon experienced in bringing its para-aramid fiber to the American market.[221] On the other hand, any attempt made by DuPont to justify its exclusive dealing agreements on the grounds that they are necessary to recover the expenses of developing the fiber will be questionable because of the length of time DuPont has manufactured the product.[222] Without a safe harbor in place, DuPont and similar players in technological industries would face more intense scrutiny under a rule-of-reason approach because of the unique factors in innovative markets.

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[218] *Id.* at 197.

[219] *See id.* ("Absent exclusive dealing contracts, consumers may end up with a product superior to any offered by a company currently in the market.").

[220] *Id.*

[221] *See* E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 688 F. Supp. 2d 443, 460 (E.D. Va. 2009) (summarizing Kolon's allegations that DuPont's actions deterred Kolon from entering the market), *rev'd on other grounds*, 637 F.3d 435 (4th Cir. 2011).

[222] *See id.* at 447 (noting that DuPont spent over forty years developing the para-aramid fiber); Klein, *supra* note 107, at 120 (stating that exclusive dealing is "frequently used in circumstances where the most commonly recognized economic efficiency of exclusives, the protection of manufacturer investments, does not fit the facts"); Spark, *supra* note 55, at 197 ("[E]xclusive dealing contracts may promote innovation by ensuring that companies will be able to license the technology and recoup research and development costs when the technology finally goes to market.").

IV. CONCLUSION

Under section 2 of the Sherman Act, the combined effect of judicial fixation with a smaller percentage of foreclosure compared to other antitrust provisions and with the commercial realities of the agreement places a larger burden on defendants than plaintiffs. The resurgence of judicial scrutiny of exclusive dealing agreements under section 2 calls for a feasible rule for several reasons. First, manufacturers and distributors need to be able to identify business practices that will maximize profits while not subjecting them to violations of antitrust law. Second, courts need to preserve judicial economy by limiting their extensive review of claims where foreclosure percentages indicate a likely exercise of monopoly power through exclusionary conduct. Third, discovery in antitrust cases is extremely expensive. Thus, parties have an interest in avoiding litigation when the claim does not look promising.

The most effective method of accomplishing these goals is to adopt the safe harbor initially proposed by the DOJ when the percentage of foreclosure of the relevant market does not exceed 30% for claims under section 2 of the Sherman Act. Although the DOJ Conduct Report noted that courts will typically not condemn exclusive dealing agreements when the foreclosure percentage is less than 30%, the Department did not examine other underlying justifications supporting a safe harbor.

A 30% threshold takes into account the greater dangers of exercising monopoly power under section 2 compared to exclusionary contracts that do not require monopoly power falling under section 1 of the Sherman Act and section 3 of the Clayton Act, which typically uphold agreements foreclosing less than 40% of the market. This percentage also reflects current case law, which often disposes of section 2 claims when the percentage of foreclosure is 30% or lower.

Currently, courts analyze exclusive dealing agreements by balancing the anticompetitive effects of an agreement against the procompetitive benefits under the rule-of-reason analysis. Courts tend to focus on the commercial realities of the market rather than pure economic theory. Because defendants must often rely on establishing that their direct profits ultimately benefit consumers through some sort of trickle-down analysis, defendants are at a disadvantage without the ability to demonstrate either market realities or direct procompetitive benefits to substantiate their claims. The effects of an agreement become even more salient as the percentage of foreclosure decreases. Thus, a 30% safe harbor protects defendants from a disproportionate burden because their justifications often rest on economic theory which can be easily misunderstood by judges and juries.

Excessive enforcement of antitrust claims targeting exclusive dealing agreements decreases incentives to compete in the market, ultimately harming consumers. The aim of antitrust law, however, is to protect consumers and the competitive process, not the individual rivals. Several recent decisions, including *DuPont*, seemed to focus on the fairness to smaller newcomers despite this established principle. By discounting economic theory, the current approach to evaluation of exclusive dealing agreements favors plaintiffs. Yet, one group of competitors should not be inherently favored over another in a court of law. A safe harbor for exclusive dealing agreements that foreclose less than 30% of the relevant market removes some of the disadvantage defendants experience in litigation and provides some stability in an area of law that has seen a substantial amount of instability in the past several decades.

Danielle Nicole Paschal