

**CONTRACTS THAT REFERENCE RIVALS
AS AN ANTITRUST CATEGORY**

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AND COSTS OF MFNS”

Jonathan M. Jacobson
Daniel P. Weick

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I. Introduction

Some vertical arrangements affect more than the terms of dealing between the contracting parties themselves; they also affect, directly or indirectly, the terms available to a contracting party’s competitors. So, for example, an agreement between a supplier and a customer that the customer will purchase from that supplier exclusively necessarily means that, for the duration of the agreement, rivals of the supplier will be unable to contract with the customer in question. Policymakers at the Department of Justice’s Antitrust Division have recently focused on a wide variety of these “contracts that reference rivals” (CRRs) as a source of potential antitrust concern, at least when deployed by firms with market power.¹ The policymakers recognize the various efficiency justifications that exist for the many different types of contracts in issue. The expressed concern, however, is that, because *all* types of CRRs affect the contract terms that may be available to the contracting party’s rivals, these agreements may all diminish the ability of rivals to compete and thereby lead to the anticompetitive extraction of surplus from consumers.² It is this concern that appears to have informed recent DOJ enforcement actions against “most-favored nations” (MFN) clauses (which require one party to guarantee the other that it is receiving contractual terms as good

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¹ *E.g.*, Fiona Scott-Morton, Contracts That Reference Rivals, ABA Section of Antitrust Law Fall Forum, November 17, 2011.

² *Id.*

or better than any arrangement made by its rivals),³ and “non-discrimination” clauses (which require a party to guarantee that it will not disfavor the contracting party’s products relative to those of its competitors).⁴

As policymakers have noted correctly, CRRs can be deployed as a mechanism for raising rivals’ costs. However, as with all practices that happen to raise rivals’ costs, it is often difficult to distinguish between efficient contracting activities and truly exclusionary practices. Few things raise rivals’ costs more than intense competition; but that does not mean that anything wrong is afoot. Practices that raise rivals’ costs are anticompetitive only when they do not reflect competition on the merits and artificially create or enhance power over price or output.⁵

Many types of contracts reference rivals, at least implicitly, and the analysis of each type of contract will be highly dependent on factual context – even when deployed by dominant firms. This becomes clear when the varieties of CRR are disaggregated and the differences in their justifications and potential pitfalls are considered. There is no question that much of the new CRR analysis provides valuable insights in analyzing some of the effects of contractual provisions. But a close look into the specific type of practice and the actual factual context in which it is used is still required even after identifying a practice as CRR.

The next section of this paper, Part II, discusses the wide variety of contracts that at least implicitly reference rivals, and then focuses on three specific examples: “most favored nation”

³ See, e.g., *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-15155 (E.D. Mich.) (challenging Blue Cross Blue Shield of Michigan’s use of MFNs).

⁴ See, e.g., *Complaint, United States v. American Express Co.*, Civil Action No. CV-10-4496 (E.D.N.Y., filed Oct. 4, 2010) (challenging non-discrimination provisions).

⁵ See, e.g., T.G. Krattenmaker & S.C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 211-22 (1986) (noting difficulty of defining standards for exclusionary conduct).

(MFN) clauses, non-discrimination clauses, and retail preference agreements. Part III outlines the limited case law governing each of these three types of agreement. Part IV then analyzes their varying harms and benefits, and the associated competition policy concerns. Part V offers a few concluding observations.

II. Some Varieties of CRR

Any number of contracts contain at least an implicit reference to rivals. As noted, exclusive deals implicitly state that the party agreeing to exclusivity will not deal with the other party's competitors for the agreement's duration. Loyalty discounts provide that buyers will purchase a minimum of a stated percentage of their requirements in return for the discount and, therefore, will not purchase that portion from anyone else. Even a simple purchase of, say, an automobile in most cases implies that the buyer will not purchase a car from a rival dealer for at least a year or two.

Unsurprisingly, these contracts are ordinarily lawful. To the extent competitive concerns exist, they arise when a firm with market power uses contractual terms that may impair materially the ability of rivals to enter and expand. Impairment of rivals is a necessary condition for anticompetitive effects to occur; but it is not a sufficient condition. The normal rule of reason still governs to determine whether the net effect of the arrangement is materially harmful to consumers, for entry can be deterred by exclusionary conduct or by aggressive but legitimate competition.

The most commonly-disputed types of CRR provisions, including exclusive dealing, loyalty discounts, and bundling, have been discussed extensively elsewhere.⁶ With the notable exception of

⁶ Commentary and case law on these types of agreements are discussed in J.M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311 (2002); J.M. Jacobson, *A Note on Loyalty Discounts*, THE ANTITRUST SOURCE (June 2010), available at http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_Jacobson6_24f.

the outlier *LePage's* case on bundling,⁷ the general approach to vertical agreements used by dominant firms tracks the D.C. Circuit's opinion in *United States v. Microsoft*.⁸ Courts recognize that "imposing upon a firm with market power the risk of an antitrust suit every time it enters into [an exclusive] contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm."⁹ And they therefore apply the rule of reason to determine whether the restraints have a plausible procompetitive justification and, if so, whether the procompetitive benefits of such contracts are outweighed by their anticompetitive effects.¹⁰ Importantly, the burden of proof stays with the plaintiff. The burden of presenting justifications will shift *if* the plaintiff demonstrates anticompetitive effects. But even there, the burden of proof will remain on the plaintiff.¹¹

This paper focuses on three less commonly challenged arrangements: MFNs, non-discrimination clauses, and retail preference agreements. MFNs are used by buyers to ensure that they receive equally favorable prices from sellers on their purchases, and by sellers to make sure that their buyers are not paying others any more. They are prominent in the healthcare sector, where

authcheckdam.pdf (June 2010); J.M. Jacobson, *Exploring the Antitrust Modernization Commission's Proposed Test for Bundling*, ANTITRUST, Summer 2007, at 23.

⁷ *LePage's Inc. v. 3M*, 324 F.3d 141, 154-57 (3d Cir. 2003) (*en banc*) (condemning above-cost bundled discounts). *Contra, e.g.*, *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 900-03 (9th Cir. 2008) (rejecting *LePage's* and requiring proof of below-cost pricing to condemn bundled discounts); ANTITRUST MODERNIZATION COMMISSION, REPORT & RECOMMENDATIONS 94-100 (2007) (criticizing *LePage's*).

⁸ 253 F.3d 34 (D.C. Cir. 2001) (*per curiam*).

⁹ *Id.* at 70; *accord, e.g.*, *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300, 304 (5th Cir. 2004).

¹⁰ *See* 253 F.3d at 70-71 (condemning Microsoft's exclusive contracts in light of Microsoft's market power and its lack of procompetitive justifications).

¹¹ *See* Jacobson, *Exclusive Dealing*, 70 ANTITRUST L.J. at 367.

health insurers have frequently required healthcare providers to guarantee that they receive the lowest rates the provider offers.¹² Non-discrimination clauses typically require the customer to refrain from steering its customers to a competing alternative. One prominent example of such clauses has been in agreements between merchants and credit card companies, where the credit card companies require merchants who accept the card to refrain from disparaging their cards, from steering consumers to other payment methods, or from charging a fee for the use of the supplier's card.¹³ Finally, retail preference agreements are used to secure access to the best shelf placement, promotional periods, or types of promotional treatment. Many of the cases on these agreements arise from food or beverage company agreements with food retailers to ensure that the supplier's products are promoted and displayed more prominently than those of rivals.¹⁴

The question addressed here is whether these agreements should be treated more harshly than other (non-CRR) types of vertical agreements because of their impact on rivals. As discussed below, there is no one-size-fits-all answer. There are significant differences in the respective effects and efficiencies of these different agreements. Care must be taken to ensure that these differences are considered when grouping them all into a single CRR category for antitrust analysis, and to avoid condemning practices without real proof of anticompetitive harm.

¹² *See generally* Blue Cross Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1415 (7th Cir. 1995) (approving HMO's MFN agreements).

¹³ *See, e.g.*, Amended Compl. ¶¶ 28-29, United States v. American Express Co., Civil Action No. CV-10-4496, Dkt. No. 57 (E.D.N.Y. Dec. 21, 2010) (describing American Express's non-discrimination provisions).

¹⁴ *See generally* Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671 (Tex. 2006) (finding no antitrust violation in Coke's "calendar marketing agreements"); Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metropolitan Bottling Co., 94 F. Supp. 2d 804 (E.D. Ky. 1999) (same for Pepsi); El Aguila Food Prods. v. Gruma Corp., 301 F. Supp. 2d 612 (S.D. Tex. 2003), *aff'd*, 131 Fed. Appx. 450 (5th Cir. 2005) (tortillas).

III. Judicial Approaches

MFNs. MFN clauses have been the subject of a fair number of antitrust challenges, and a fairly substantial body of case law has developed around them. While most government suits have ended in consent decrees prohibiting enforcement of the challenged MFNs,¹⁵ several private cases and a few government proceedings have gone through trial court and appellate litigation. Early cases tended to dismiss challenges to MFNs out of hand. In *Ocean State*, for example, the First Circuit held that “a policy of insisting on a supplier’s lowest price – assuming that the price is not ‘predatory’ or below the supplier’s incremental cost – tends to further competition on the merits and, as a matter of law, is not exclusionary.”¹⁶ The Seventh Circuit similarly indicated that “[m]ost favored nations’ clauses are standard devices by which buyers try to bargain for low prices” – although, on rehearing, it did allow that “[p]erhaps, as the Department of Justice believes, these clauses are misused to anticompetitive ends in some cases”¹⁷

Several more recent cases, however, have gone the other way. One important case was the Justice Department’s challenge to MFNs used by an insurer in the *Delta Dental* case.¹⁸ The concern there was that, through the use of MFNs, the insurer blocked entry by lower-cost, lower-premium

¹⁵ See, e.g., *United States v. Or. Dental Servs.*, 1995 WL 481363 (N.D. Cal. 1995); *RxCare of Tenn.*, 121 F.T.C. 762 (1996).

¹⁶ *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of Rhode Island*, 883 F.2d 1101, 1110 (1st Cir. 1989); see also *Kartell v. Blue Shield of Mass.*, 749 F.2d 922, 929 (1st Cir. 1984) (“[E]ven if the buyer has monopoly power, an antitrust court . . . will not interfere with a buyer’s (nonpredatory) determination of price.”). But see *United States v. Delta Dental of R.I.*, 943 F. Supp. 172, 176-80 (D.R.I. 1996) (denying motion to dismiss and distinguishing *Kartell* and *Ocean State* on the grounds, *inter alia*, that the government alleged the MFNs at issue increased consumer prices whereas prior cases involved lower consumer prices).

¹⁷ *Blue Cross & Blue Shield of Wisc. v. Marshfield Clinic*, 65 F.3d at 1415. The latter phrase was added to the opinion after DOJ and the FTC filed an amicus brief in support of rehearing.

¹⁸ *United States v. Delta Dental, of R.I.*, 943 F. Supp. 172 (D.R.I. 1996).

insurers. The MFN provided that, if dentists offered lowered prices to other insurers (or even to uninsured patients), the same lower prices would have to be offered to Delta. Delta represented the dominant portion of dentist revenue. So saying that Delta would get the same lower prices meant that dentists had no incentive to reduce their prices to others to encourage entry or expansion by another insurer. Doing so would decrease the dentist's revenues across the board. The district court distinguished *Ocean State* on this basis, denied the defense motion to dismiss,¹⁹ and the case settled soon afterwards.²⁰

The most important recent development is DOJ's suit against Blue Cross Blue Shield of Michigan (BCBSM). The claim is that the insurer used a combination of standard MFNs and "MFN plus" clauses (requiring that healthcare providers charge competing insurers *more* than they charge BCBSM) to enhance its market power in various local health insurance markets.²¹ The problem identified in the complaint is that, if a dominant insurer can insist on the use by all or most health care providers of MFNs that prevent them from giving more favorable rates to new entrants or smaller firms seeking to expand – as in *Delta Dental* – competitive entry and expansion will be impeded and the dominant firm will be protected from the prospect of competition. The district court denied the defendant's motion to dismiss, finding "it is plausible that the MFNs entered into by

¹⁹ *Id.* at 189.

²⁰ *United States v. Delta Dental of R.I.*, 1997 U.S. Dist. LEXIS 11239 (D.R.I. 1997). Similarly, In *Reazin*, the Tenth Circuit treated the use and effect of MFNs as supporting evidence of market power and left open the possibility that use of MFNs may justify imposition of antitrust liability. *Reazin v. Blue Cross & Blue Shield of Kansas*, 899 F.2d 951, 971 & n.30 (10th Cir. 1990) (observing "[t]here was also considerable testimony on the effect of Blue Cross' most favored nations clauses, and the jury could reasonably have concluded that that clause contributed to Blue Cross' power over price" and reserving judgment on the question "of whether use of the most favored nations clause could itself violate section 2").

²¹ *See* Complaint ¶¶ 1-6, *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-15155, Dkt. No. 1 (E.D. Mich. Oct. 18, 2010).

Blue Cross with various hospitals in Michigan establish anticompetitive effects as to other health insurers and the cost of health services in those areas.”²² A competing insurer, Aetna, has filed a follow-on suit mirroring the DOJ’s allegations.²³

Nondiscrimination. In contrast to the relatively substantial (if divided) case law on MFNs, there have been few challenges to nondiscrimination (NDR) clauses, and no court has ever found that the use of an NDR was unlawful under the antitrust laws. In 2010, the DOJ brought suit against American Express, Visa, and MasterCard challenging the credit card companies’ separate non-discrimination clauses,²⁴ and the clauses have also been the subject of private litigation.²⁵ The core of the allegations made by the DOJ is that a non-discrimination clause may increase total acceptance costs to retailers by preventing retailers from steering consumers to lower-cost methods of paying.²⁶ No dispositive motion or other opportunity for a judicial discussion of the merits has been filed. MasterCard and Visa both entered into consent decrees to resolve the DOJ suit.²⁷ American Express, however, continues to defend against the government and private cases.

²² Memorandum & Order at 13, *United States v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:10-cv-15155, Dkt. No. 66 (E.D. Mich. Aug. 12, 2011).

²³ Complaint ¶¶ 18-19, *Aetna Inc. v. Blue Cross Blue Shield of Mich.*, Civil Action No. 2:11-cv-15346, Dkt. No. 1 (E.D. Mich. Dec. 6, 2011).

²⁴ *United States v. American Express Co.*, Civil Action No. CV-10-4496, Dkt. No. 1, Complaint (E.D.N.Y. Oct. 4, 2010). While the authors represent American Express in certain other matters, they are not counsel in this case or the related private case discussed below. Nothing in this paper expresses the views of American Express.

²⁵ *E.g.*, *In re American Express Anti-Steering Rules Antitrust Litig.*, Case No. 1:11-md-02221 (E.D.N.Y.).

²⁶ Amended Complaint ¶¶ 1-4, *United States v. American Express Co.*, Civil Action No. CV-10-4496, Dkt. No. 57 (E.D.N.Y. Dec. 21, 2010).

²⁷ Final Judgment as to Defendants MasterCard International Incorporated and Visa Inc., *United States v. American Express Co.*, Civil Action No. CV-10-4496, Dkt. No. 143 (E.D.N.Y. July 20, 2011)

Retail preference. Retail preference agreements, like MFNs, have been the subject of multiple antitrust suits, despite (or perhaps because of) their ubiquity in promotional efforts. Courts have generally upheld them as procompetitive, and no court has imposed antitrust liability for such agreements.²⁸ For example, in *Coca-Cola Co. v. Harmar Bottling Co.*,²⁹ litigated under the Texas state antitrust law, the Texas Supreme Court found that Coke’s “calendar marketing agreements” (CMAs), which required, *inter alia*, that retailers provide Coke products with preferential advertising, displays, and shelf space during key selling weeks of the year, did not violate the antitrust laws because they did not have a proven anticompetitive effect. The court found that the plaintiffs had failed to demonstrate “harm to competition in the market,” notwithstanding allegations that Coke had a market share in excess of 75 percent. The court held that “[the] existence of the CMAs *alone* cannot prove Coke engaged in predatory or anticompetitive conduct.”³⁰

The Seventh Circuit, in an opinion authored by Judge Easterbrook, reached a similar conclusion. In *Menasha Corp. v. News America Marketing In-Store*,³¹ the court rejected an antitrust claim based on preferential and exclusive positioning agreements entered by the largest provider of in-store coupon dispensers. The court found that retailers – “the consumers of couponing services” –

²⁸ *Sun-Drop Bottling v. Coca-Cola Bottling Co.*, 604 F. Supp. 1197, 1199-1200 (W.D.N.C. 1985) involved a clause requiring Coca-Cola’s products to be the “lowest” price in the store. The court thought this might be a variety of vertical price-fixing, illegal per se under then-current doctrine; nevertheless, the court denied the requested preliminary injunction for failure to demonstrate irreparable harm and case eventually settled. In the wake of *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007), however, the concern raised by the *Sun-Drop* court should no longer be an issue today.

²⁹ 218 S.W.3d 671 (Tex. 2006).

³⁰ *Id.* at 689-90. To the same effect, see *Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metropolitan Bottling Co.*, 94 F. Supp. 2d 804 (E.D. Ky. 1999); *Beverage Management v. Coca-Cola Bottling Corp.*, 653 F. Supp. 1144 (S.D. Ohio 1986).

³¹ 354 F.3d 661 (7th Cir. 2004).

preferred to have such deals in place, and observed that “[w]hen the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of practice promotes rather than undermines competition”³² Similar claims were also rejected by the Fourth Circuit in *RJR v. Philip Morris*,³³ and by the Fifth Circuit in the *Gruma* case.³⁴

IV. Policy Analysis

Can these disparate practices usefully be grouped under one CRR heading for purposes of antitrust analysis? While at one level it is true that all CRRs are subject to rule of reason analysis, that is as far as the similarity goes. Each of the three kinds of agreements discussed here has its own set of potential efficiencies and potential pitfalls, calling for a focus on their individual features in applying the rule of reason in each instance.³⁵

MFNs. MFNs can carry some serious potential for consumer harm. When used by dominant firms or collectively by the leading firms in an industry, MFNs can stabilize prices at elevated levels by removing seller incentives to discount to other buyers, as in the *Delta Dental*³⁶ case and

³² *Id.* at 663. There have been a number of cases filed against News America advancing similar allegations. One series of cases, brought by Valassis, generated a nine-figure jury verdict before settling. See Order Adopting Special Master Report, *Valassis Commc'ns v. News America Marketing In-Store*, No. 06-10240 (E.D. Mich. June 15, 2011).

³³ *R.J. Reynolds Tobacco Co. v. Philip Morris Inc.*, 199 F. Supp. 2d 362 (M.D.N.C. 2002) (promotional program giving retailers funding incentives to display Marlboro and other Philip Morris cigarettes not unlawful; rivals could gain display space through continuous bidding), *aff'd*, 67 Fed. Appx. 810 (4th Cir. 2003).

³⁴ *El Aguila Food Prods. v. Gruma Corp.*, 301 F. Supp. 2d 612 (S.D. Tex. 2003), *aff'd*, 131 Fed. Appx. 450 (5th Cir. 2005).

³⁵ For a discussion of justifications for exclusive arrangements generally, see Jacobson, *Exclusive Dealing*, 70 ANTITRUST L.J. at 357-60.

³⁶ *United States v. Delta Dental of R.I.*, 943 F. Supp. 172 (D.R.I. 1996) (prices stabilized by dominant firm use of MFNs).

duPont/Ethyl.³⁷ They can also inhibit competitive entry by preventing entrants from gaining access to the more favorable terms they may need to compete, as alleged in *Blue Cross of Michigan*. The clauses can be especially problematic when, as also alleged in *Blue Cross*, the MFN goes beyond merely requiring that the buyer receive the best deal and instead requires that all other buyers pay substantially more for the covered services.³⁸

MFNs are not without competitive justifications. The most prevalent is that they provide an inducement for volume.³⁹ Again using health care as an example, a dominant insurer will be reluctant to provide coverage in its broad network if a provider can help its rivals compete more effectively against it by offering them lower prices. Without the MFN, the provider may not be able to get coverage in the large insurer's network at all. So MFNs in this context can broaden provider access to subscribers by inducing insurers to include the provider in its network. Secondly, MFNs can also address a type of free-rider problem. Suppliers may benefit from association with the buyer's good will and yet buyers will have reduced incentives to include the buyer as part of their

³⁷ *E.I. duPont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984) (MFNs used collectively but without conspiracy by three leading firms, stabilizing market prices; *held*, no violation of FTC Act § 5, reversing FTC).

³⁸ A significant concern in health care markets is that a dominant health insurer with a large market share may be able to coerce healthcare providers into paying barely sustainable rates while, at the same time, charging inflated premiums to employers or other insurance purchasers. This can create a circumstance where the providers must charge smaller insurers seeking to enter rates that are substantially higher in order to recoup losses incurred from their dealings with the monopsonist – and can be done with or without MFNs. When providers must charge entrants discriminatorily high rates, potential competitors will be unable to challenge the dominant insurer because their cost structure will be higher and they will not have a practical ability to compete with the dominant firm on rates to be charged to subscribers – even if the rates are excessive. The upshot is the classic collection of competitive harms: reduced output and quality of services, higher consumer prices, and illegitimate extraction of monopoly rents.

³⁹ *See Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d at 1415 (7th Cir. 1995).

marketing efforts if the buyer is paying more to someone else. Third, it has also been argued that, in long-term contracts, MFNs can facilitate efficient price adjustment (as buyers adjust the price paid when the prices of the seller's rivals change); and that, correspondingly, the absence of MFN provisions may deter the entry into stable long-term contractual relationships *ex ante*.⁴⁰

Each of these justifications may prove valid, even important, in any given case. Still, as efficiency justifications go, none of them seems overwhelmingly powerful in the abstract. MFNs are useful when used by smaller firms as a device to attract desirable customers (or suppliers) and to provide them with an incentive to do business they might otherwise forego. But when inserted by dominant firms, the potential for anticompetitive effects can be substantial, and the justifications generally thin. Enforcer skepticism is not entirely unwarranted.

NDR clauses. Non-discrimination clauses are commonly viewed as similar to MFNs⁴¹ but in fact generally have fewer harmful consequences. In health care, a provider's "no steering" clause does not prevent the payer from negotiating whatever reimbursement rates with the provider it may choose; does not prevent the insurer from bargaining to pay lower (or higher) rates to other providers; and does not prevent the provider from negotiating different rates with other insurers. Similarly, a credit card company's NDR clause with merchants prevents the merchant from steering customers to other, possibly lower-priced cards, but has no effect on the price ("interchange fee" or in some cases

⁴⁰ See K.J. Crocker & T.P. Lyon, *What Do Facilitating Practices Facilitate: An Empirical Investigation of Most-Favored-Nation Clauses in Natural Gas Contracts*, 37 J.L. & ECON. 297, 306-08 (1994).

⁴¹ See N. Economides, *Competition Policy Issues in the in Consumer Payments Industry* in MOVING MONEY: THE FUTURE OF CONSUMER PAYMENT 113, 119 (R. Litan & M. Baily, eds., 2009) (conflating non-discrimination and MFN clauses).

“merchant discount”) that the merchant pays when the card is used.⁴² The merchant is free to negotiate higher, lower, or different rates with other card companies as the merchant elects. At the same time, the credit card companies are free to compete in offering different rates to the merchants they seek to sign up.

The justifications for NDR clauses in health care may be significant. A provider that agrees to be “in network” with a given insurer has granted that insurer the good will and promotional benefit associated with the provider’s brand and reputation – benefits that will be appropriated without compensation if the insurer then steers patients to other providers. The provider may have also discounted its rates to the insurer in return for an expectation of volume, but the incentive to do so will be eliminated if the provider then steers the expected volume elsewhere. Cooperative arrangements in the development of new programs and treatments may also be retarded, as a provider will not want to share its proprietary research with a provider that it funneling its business somewhere else.

The justifications in credit cards are similar and substantial. First, there is a traditional free-rider problem when a credit card brand attracts a customer into a store. A store that then steers the customer into using a different card has benefited from the card company’s promotional efforts without paying for it. The upshot is that the company’s incentives to continue investing in activities that bring customers into the store are diminished, with negative effects on competition and card acceptance market output.⁴³ Second, relatedly, notwithstanding the argument that steering to a

⁴² See D.W. Carlton & A.S. Frankel, *The Antitrust Economics of Credit Card Networks*, 63 ANTITRUST L.J. 643, 645-48 (1995) (surveying development of credit card industry payment structures).

⁴³ See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52-57 (1977).

lower-priced card may facilitate expansion by the low-price card company, that very expansion is riddled with free-riding; the defendant card company's promotional efforts encourage its cardholders to enter the store, while the low-price company reaps the benefit – with the same negative effects on investment incentives. Third, a merchant's interchange or discount rate may be based on an expectation of volume; if the volume is not forthcoming, the rate may have to be increased. And, fourth, a smaller credit card company may be vulnerable to the efforts of larger firms to induce merchants to deny acceptance of the smaller rival's brand, in which case NDR rules provide a self-preservation mechanism, important as a defensive measure against strong rivals seeking exclusivity.⁴⁴

These efficiencies all serve to increase output on the card acceptance side of the two-sided market. There are efficiencies on the cardholder acquisition side as well. First, credit card companies have a legitimate interest in preventing the disparagement of their brands from merchants who benefit from accepting the card. A customer steered away from one brand of card is essentially being told that that card is inferior to another card and that the cardholder should not be using it. Second, a card company may reasonably conclude that allowing steering away from its brand will

⁴⁴ In the *American Express* case, the NDR rule protects against opportunistic behavior by its larger rivals, Visa and MasterCard. American Express cards are accepted by far fewer merchants than those that accept Visa and MasterCard, and its network is unusually vulnerable to efforts by those larger firms to induce merchants to decline acceptance of the card. The Justice Department complaint alleges a narrow “travel and entertainment card” submarket in which American Express is supposed to have market power, Am. Compl. ¶¶ 41-50, but it also acknowledges the broader “general purpose credit and charge card” market in which American Express is a comparatively minor player. *Id.* ¶¶ 34-40. Visa and MasterCard are significantly larger than American Express in the broader market and the Justice Department has already demonstrated that they have significant market power in that broader market. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238-39 (2d Cir. 2003). American Express’ “self defense” justification needs to be viewed in that context.

diminish its ability to provide desirable reward programs and other card features, thus harming its ability to sign cardholders – and reducing demand and utilization of cards overall.

The essence of the argument against NDR provisions is that discrimination by customers in rivals' favor would improve rival prospects of expanding more. Preventing that discrimination is harmful, it is argued, because rivals would do better in the clauses' absence; and merchants would pay less for credit cards if they could freely steer.⁴⁵ The argument seems unsound. It ignores (i) the negative effects on market output (on both sides of the market) that are likely to occur if these provisions are banned; and (ii) the competition that occurs before these provisions come into effect. Merchants do not agree to NDR clauses in a vacuum. An NDR clause is just one of many components of a contractual relationship, with benefits and obligations flowing from both sides of the contract, including, importantly, the willingness of cardholders to spend more in establishments that accept their chosen brand of card.⁴⁶ Except in the truly rare case where the defendant faces no competition at all, a merchant who does not want an NDR clause can go elsewhere.

Finally, it seems strange to tell a company it cannot bargain for protection against discrimination. Our country has a long tradition of *prohibiting* discrimination and, even in the business context, some types of discrimination have long been the focus of specific congressional

⁴⁵ Certain complaints also focus on harm to merchants from consumer rewards programs. See A.J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 U.C.L.A. L. Rev. 1321, 1357 (2008) (arguing NDR provisions “make it impossible for merchants to avoid the externality of rewards programs and other perks offered to card users from which merchants derive no benefit”). That argument does not feature prominently in the DOJ complaint and ignores the two-sided nature of competition in the market. Card companies compete against one another, not just for merchant patronage, but for cardholders. Rewards programs are a central feature of that competition, and NDR rules are important to ensure that cardholders get the benefit of that competition when presenting the card to the merchant.

⁴⁶ See S. Chakravorti, *Theory of Credit Card Networks: A Survey of the Literature*, 2 REV. OF NETWORK ECON. 50, 51-54 (2003) (discussing variety of credit card market participants).

prohibition.⁴⁷ In the antitrust context generally, moreover, it is clear that, absent the most unusual circumstances, firms cannot be forced to deal with customers or suppliers who will treat them less favorably.⁴⁸ It is difficult to envisage a scenario in which an NDR clause should be held unlawful.

Retail preference agreements. Retail preference agreements are CRRs but quite different from MFN or NDR provisions. The proponent does not want equal treatment with rivals; it wants *better* treatment. In a typical arrangement, a supplier will bargain with a retailer for preferential shelf space, promotional displays, inclusion in newspaper ads, and/or a reduced price at retail. The agreements often include provisions requiring that the supplier have the only (or most prominent) ad in its category, that it have the best and/or most shelf space and the largest and most prominent display in the store, and that the promotional activity in issue occur during key sales weeks (such as July 4 or Thanksgiving). Promotional activity of this sort is quite valuable and can result in very substantial incremental sales (or “lift”). To get this kind of preferred treatment at retail, suppliers must offer large discounts.

Retail preference agreements are associated with recognized efficiencies. The inducement for the supplier’s steep discount is the preferential treatment over its rivals; without that preference, the discounts would be less and less frequent. Pepsi is not going to provide a supermarket thousands of dollars in discounts for a promotion if the first thing a consumer sees on entering the store is a large display of two-liter Coca-Cola. Exclusivity (or at least preference) is key to inducing the investment Pepsi is making. These agreements, moreover, are almost always associated with intense

⁴⁷ *E.g.*, Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a; Telecommunications Act of 1996, 47 U.S.C. §§ 251(c)(2)(C), (D); FERC, Preventing Undue Discrimination and Preference in Transmission Service, Notice of Inquiry, 70 Fed. Reg. 55,796 (Sept. 23, 2005).

⁴⁸ *See Verizon Commc’ns v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 408 (2004).

“competition for the contract.”⁴⁹ Retailers maximize their own returns by playing one supplier off against another to get the best deal, and preferential treatment is their currency.⁵⁰ Outlawing retail preference agreements would have the perverse effect of eliminating one of the key ways for stimulating competition.⁵¹

V. Conclusion

The concept of CRR as an antitrust category has intuitive appeal and some real utility. The impact on rivals of contractual provisions presents a number of issues common to each case. But there are also key differences from provision to provision in terms both of effects and justifications. No case seems to warrant requiring the defendant to prove justification before actual harm to competition can be shown. As the D.C. Circuit noted in *Microsoft*, there is a social cost to forcing

⁴⁹ See *Paddock Pubs. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) (“Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common.”).

⁵⁰ See B. Klein & K.M. Murphy, *Exclusive Dealing Intensifies Competition for Distribution*, 75 ANTITRUST L.J. 433, 447-48 (2008) (“[W]hen the supermarket informs [two] manufacturers that it will feature only one brand, the supermarket is able to obtain much more favorable terms for its shelf space because it is promising to deliver all of its consumers to the manufacturer of the featured brand. . . . Competition between manufacturers for the exclusive retailer shelf space in our example, therefore, will lead to an equilibrium price of . . . manufacturer marginal cost.”).

⁵¹ The argument has been made that “the procompetitive effect of exclusive dealing is strongest when firms are symmetric, but weaker (or even absent) if the exclusive manufacturer has substantial market power.” H. Zenger, *When Does Exclusive Dealing Intensify Competition for Distribution? Comment on Klein & Murphy*, 77 ANTITRUST L.J. 205, 211 (2010). However, the argument neglects the ability of retailers (even those without market power) to “shift the share of sales in a product category in favor of one or another supplier” and thus induce competition for the contract. See B. Klein & K.M. Murphy, *How Exclusivity is Used to Intensify Competition for Distribution—Reply to Zenger*, 77 ANTITRUST L.J. 691, 691 (2011). This, in fact, appears to have been the case in at least one major appellate decision. See *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 453-55 (6th Cir. 2007) (*en banc*) (noting retailer demands for exclusivity and displacement of once dominant firm as preferred partner).

firms, even dominant ones, to justify every ordinary business agreement they enter.⁵² As such, a careful analysis of each practice and of the facts of each practice in each specific case will always be necessary, and the burden should remain on those claiming a violation to prove the case. A blanket rule for CRRs would likely create confusion and undermine competition by discouraging firms from using all competitive tools at their disposal. Proper analysis requires disaggregating the various types of CRR.

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⁵² 253 F.3d at 70 (“[I]mposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm.”).