COUNTERING EXCLUSION: THE COMPLAINANT'S OBLIGATION

JONATHAN M. JACOBSON
DANIEL P. WEICK*

A dominant firm enters into written agreements with customers representing 90 percent of the relevant market. The agreements all require the customer to purchase the firm's products exclusively. Big problem, right? What if the agreements are all terminable at will on a week's notice? You would have to look further. And what if the only consequence of a customer's election to terminate were the loss of a modest discount? That would be quite a different story, would it not? You would want to know whether, notwithstanding 90 percent "foreclosure," rivals could profitably compete for some or all of the business in question.

There has been an explosion of literature on exclusive dealing and other "contracts referencing rivals" (CRRs) since then-Deputy Assistant Attorney General Fiona Scott Morton popularized the phrase in 2012.[1] Much of the analysis has focused on the behavior of the defendant and whether the CRRs it has adopted foreclose a substantial share of the relevant market or otherwise raise rivals' costs.[2] Less attention has been paid to an issue we believe is

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* Members, New York Bar. Many thanks to Elyse Dorsey for assistance in preparing this article. The authors represent parties in cases raising the issues addressed here. The views expressed are the authors' own and do not purport to represent the views of their law firm or any of its clients.

[1] *See* Fiona Scott Morton, Deputy Assistant Att'y Gen. for Econ. Analysis, Antitrust Div., U.S. Dep't of Justice, Presentation at Georgetown Univ. Law Ctr. Antitrust Seminar, Contracts that Reference Rivals 2 (Apr. 5, 2012), www.justice.gov/atr/public/speeches/281965.pdf. For a sampling of the literature, see the papers and presentations made at the Public Workshop on Conditional Pricing Practices hosted by the DOJ and FTC. Fed. Trade Comm'n & Dep't of Justice, Public Workshop: Conditional Pricing Practices (June 23, 2014), www.justice.gov/atr/events/public-workshop-conditional-pricing-practices.

[2] *See, e.g.*, Kevin Murphy et al., *Competitive Discounts in Antitrust Policy*, *in* 2 OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 89, 102 (Roger D. Blair & D. Daniel Sokol eds., 2014); Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 ANTITRUST L.J. 528 (2013); Fiona Scott Morton, *supra* note 1, at 7–9; Fiona M. Scott Morton, *Contracts that Reference Rivals*, ANTITRUST, Summer 2013, at 72–73; W. Stephen Smith, *When Most-*

equally relevant: whether any foreclosure can be defeated, or at least mitigated, by reasonable countermeasures.[3]

The issue is important and, in many cases, may be dispositive. A practice that raises rivals' costs is not necessarily, or even usually, anticompetitive. Aggressive competition costs rivals money in almost every case—such as by forcing rivals to dig deeper to discount, to spend more on marketing, or otherwise to improve their product offering. At least in that sense, therefore, competition itself raises rivals' "costs." Practices are problematic *only* when rivals' costs are raised in a manner that allows the dominant firm to achieve or maintain power over price.[4] But if a rival can defeat or undermine the dominant firm's tactics, and do so profitably, the likelihood that the tactics will result in power over price may be diminished or eliminated.[5] To determine whether a firm's practice is exclusionary and harms competition, therefore, an analysis of the availability of effective rival counterstrategies is essential.

The essay explores what the rival plaintiff need prove to demonstrate that a CRR is in fact foreclosing in a meaningful way. It explores the meaning of "foreclosure"; the allocation of burdens of proof and production in a CRR case; the role of "equally-efficient rival" analysis; how to evaluate claims by firms that are not yet equally-efficient but may become efficient competitors; and, importantly, the types of proof that will or will not demonstrate that the effect of a given CRR will be harmful to consumers.

I. FORECLOSURE

We know that "in all cases the plaintiff must define the relevant market and prove the degree of foreclosure."[6] But what does that mean?

The term "foreclosure," as used in exclusionary conduct cases, appears to have originated in the late 1940s in cases such as *International Salt*[7] (a tying case) and *Griffith*[8] (a monopolization case involving some exclusive dealing). It was the primary focus of an exclusive dealing decision for the first time in

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Favored Is Disfavored: A Counselor's Guide to MFNs, ANTITRUST, Spring 2013, at 10–11 (2013).

[3] For a preliminary discussion of this issue, see Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 ST. JOHN'S L. REV. 101 (2015).

[4] The classic work on the subject says just that in its title. Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986).

[5] *See, e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 997 (9th Cir. 2010) (no foreclosure when a rival need offer just "a better product or a better deal" to gain the business).

[6] United States v. Microsoft Corp., 253 F.3d 34, 69 (D.C. Cir. 2001) (en banc).

[7] Int'l Salt Co. v. United States, 332 U.S. 392, 396 (1947).

[8] United States v. Griffith, 334 U.S. 100, 107 (1948).

the famous *Standard Stations*[9] decision of 1949. There, the Supreme Court held that "proof that competition has been foreclosed in a substantial share of the line of commerce affected" was all that mattered to find a violation.[10] Although that standard of "quantitative substantiality" was revised into more of a rule of reason inquiry in *Tampa Electric*[11] in 1961, proof that a "substantial share of the relevant market" be "foreclosed" remained essential for the plaintiff to prevail.[12] It was clear in these contexts that "substantial foreclosure" meant only the percentage of the market subject to exclusive contracts—regardless of the contracts' duration, the degree of competition for the contract, or anything else.[13] As a result, the complainant's ability to counter the CRR was given little attention. Given the myopic focus on the simple *coverage* of the challenged agreements, this use of the term "foreclosure" was relevant to the question of consumer harm only by happenstance.

To overcome these semantic and ultimately substantive difficulties, one of the present writers urged abolition of the word "foreclosure" in this context, with a focus instead on the degree to which rivals were actually impaired from acting as a competitive constraint.[14] As compelling as that argument seemed then—and now—it can safely be said that the plea to abolish the word has been completely ignored. Cases today consistently use the term "foreclosure."[15] The very good news, however, is that, notwithstanding persistent use of the term, most courts have in fact revised their focus to center on the degree of actual rival impairment and the likelihood of consumer harm.

A good example is the Eleventh Circuit's decision in *McWane*. Notwithstanding exclusive contracts covering over 50 percent of the market, and a defendant with a market share of over 90 percent, the court agreed that "foreclosure is no longer sufficient by itself," but "is one of several factors we now examine in determining whether the conduct harmed competition."[16] In *McWane*, the FTC prevailed, not simply because the contracts affected a large portion of the relevant market, but because the contracts prevented the most important rival, Star, from achieving sufficient scale to warrant construction of a plant—which, had it been constructed, would have operated as a significant constraint on McWane.[17]

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[9] Standard Oil Co. v. United States, 337 U.S. 293 (1949).

[10] *Id.* at 314.

[11] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 328–29 (1961).

[12] *Id.*

[13] The progression of the case law is traced in Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 320–26 (2002).

[14] *Id.* at 311, 349–57.

[15] *See, e.g.*, Eisai, Inc. v. Sanofi-Aventis U.S., LLC, 821 F.3d 394, 403 (3d Cir. 2016); McWane, Inc. v. FTC, 783 F.3d 814, 823 *passim* (11th Cir. 2015) (using the term 33 times).

[16] *McWane*, 783 F.3d at 835–36.

[17] *Id.* at 839.

The upshot today is that the percentage of the market affected is a necessary condition, and an important factor, in assessing the likelihood of consumer harm. But it is neither sufficient nor dispositive. The key question instead is whether rivals are constrained to such a degree that the defendant can raise prices or otherwise harm consumers.

II. THE COMPLAINANT'S CASE

If proof that a large portion of the market is covered by the CRR is not sufficient without more, what is the "more" that is required? We articulate the necessary components of the complainant's case as follows.[18]

Requirements. First, there must be proof that the CRR does in fact cover a significant portion of the market in question. A large percentage is not sufficient in itself, but a small portion should be dispositive. As the court in *Microsoft* put it, "[A]n exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect on competition"; so "the requirement of a significant decree of foreclosure serves a useful screening function."[19] Regardless of the strategy employed (exclusive dealing, loyalty discounts, MFNs, etc.), CRRs covering a small portion of the affected business are so unlikely to harm competition that the courts should not waste their time on further scrutiny.

Second, the complainant must show that the CRR materially impairs the ability of rivals, including the complainant, to constrain attempts by the defendant to exercise market power. Even 100 percent "foreclosure" will not suffice if the complainant still has a real ability to compete for and win the customers' business profitably.[20] Some cases may be subject to particular screens to rule out condemnation of conduct that is highly likely to be benign. For example, the Sixth and Ninth Circuits (following in part the recommendations of the Antitrust Modernization Commission) have both held that bundled discounting (referred to in the Sixth Circuit as "non-explicit tying")[21] should be subject to a modified price-cost test to screen out discounts unlikely to

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[18] These components should be viewed as part of the initial burden of a complainant to show harm to competition under the rule of reason standard applicable to both Section 1 and Section 2 claims. *See* United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001).

[19] *Microsoft*, 253 F.3d at 69; *accord*, *e.g.*, *McWane*, 783 F.3d at 835; Sterling Merch. v. Nestlé, S.A., 656 F.3d 112, 124 (1st Cir. 2011).

[20] *E.g.*, *McWane*, 783 F.3d at 840; Jacobson, *supra* note 13, at 349–54.

[21] Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 272–73 (6th Cir. 2015); Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 900–15 (9th Cir. 2008). Bundling may properly be treated as a CRR because the effect may be to condition discounts for buying the noncompetitive products on the purchase of the competitive product from the bundle seller rather than its rivals.

harm competition.[22] And, beyond any specific screens, complainants should bear the burden of establishing that market rivals could not, as a practical matter, compete meaningfully for the allegedly foreclosed business.

Third, the complainant must demonstrate that, because competitive constraints have been weakened, the probable effect of the CRR will be to cause consumer harm by limiting market-wide output, raising price, or otherwise harming consumers market-wide. The point of antitrust enforcement is to protect the competitive process.[23] Since competition for contracts (including exclusive ones) can be a key part of the competitive process, the bare fact that a contract is a CRR and that rivals are unable to provide a similarly attractive offer does not resolve the question of whether the market as a whole (and hence consumers) would be better off without the CRR in place.[24] If, however, the complainant demonstrated the propensity of the contracting strategy at issue to restrict market-wide output or otherwise harm consumers, that would show a nexus between harm to the competitive process, harm to rivals, and harm to consumers sufficient to justify forcing the defendant to justify its contracting practices under the rule of reason.

Application. The first of these suggested requirements—"foreclosure"—is familiar ground, as explained above. The others are more recent developments in the law and in economics, but no less key. Proof that a commanding portion of the relevant market is covered or otherwise affected by the CRR cannot be enough. An important inquiry is whether competitors have truly been impaired. If one or more rivals retain the ability to compete—profitably—for some, most, or all of the business in question, they retain (to that extent) the ability to constrain any exercise of market power. So if rivals are not impaired materially, neither the complainant nor the government should have a case.

To illustrate the point, consider the dominant firm for which loyal distribution is a central part of its go-to-market strategy. If the firm enters into partially or entirely exclusive agreements with enough distributors, the ability of rivals to compete effectively may well be impaired. There is no such effect, however, if the agreements are terminable on relatively short notice (or if expiration dates are staggered) and the distributors face no economically sig-

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[22] *See PeaceHealth*, 515 F.3d at 900–15; *Collins Inkjet*, 781 F.3d at 272–77. The test is referred to as the discount attribution test. *PeaceHealth*, 515 F.3d at 900–15. To the extent relevant, co-author Jacobson was a commissioner of the Antitrust Modernization Commission.

[23] *See* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 718–23 (2014); Jonathan M. Jacobson, *Another Take on the Relevant Welfare Standard for Antitrust*, ANTITRUST SOURCE 6–8 (Aug. 2015), www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_full_source.authcheckdam.pdf.

[24] *See* Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661, 663 (7th Cir. 2004); Paddock Pubs. v. Chicago Trib. Co., 103 F.3d 42, 45 (7th Cir. 1996).

nificant consequences for terminating.[25] What makes termination of an exclusive relationship practical will necessarily vary from case to case. But if all it takes for an agreement to be terminated is the offer of a better deal, and the complainant can make such an offer profitably, then the agreement is not actually foreclosing and is, instead, a spur to more competition.[26]

The proposition that a plaintiff should be barred from recovering when it can avoid the damage caused by a tortfeasor is by no means new. In tort cases of all kinds, the long-established doctrine of "avoidable consequences" bars recovery where the losses claimed "could have [been] avoided by the use of reasonable effort or expenditure."[27] The doctrine is typically employed to bar the *portion* of the damages that could have been avoided, but it also bars recovery outright if all of the harm asserted results from "a voluntary exercise of the complaining party's own personal business judgment."[28] In the antitrust context, a complainant that elects not to cut prices further or otherwise improve its offering is not impaired—or "foreclosed"—when the lost business could have been captured with reasonable effort.

These requirements—proving a material impairment of rivals and consequent consumer harm—go to the substantive basis for a claim. If those requirements have not been met, there is no violation of the antitrust laws, whether the plaintiff is the government, a customer, or an aggrieved rival. In private cases, however, there is of course an additional requirement: proof of "antitrust injury," injury reflecting the anticompetitive effect of the asserted violation.[29] The antitrust injury requirement focuses directly on the relation between the impact on consumers and the injury claimed by the private litigant. Impairment of rivals alone is insufficient. The plaintiff must show that its injury arises from an impairment of rivals that leads to higher prices, reduced quality, or restricted output. In the absence of such proof, the harm to rivals may well be the byproduct of healthy competition.[30]

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[25] *E.g.*, W. Parcel Express v. UPS, 190 F.3d 974, 976 (9th Cir. 1999); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380, 392–93 (7th Cir. 1984); Ticketmaster Corp. v. Tickets.com, 99 Civ. 7654, 2003 WL 21397701 (C.D. Cal. 2003), *aff'd*, 127 Fed. App'x 346 (9th Cir. 2005).

[26] *E.g.*, McWane, Inc. v. FTC, 783 F.3d 814, 840 (11th Cir. 2015); Jacobson, *supra* note 13, at 349–54; *see also* Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP, 592 F.3d 991, 997 (9th Cir. 2010); CDC Techs., Inc. v. IDEXX Labs., 186 F.3d 74, 80 (2d Cir. 1999), *aff'g* 7 F. Supp. 2d 119, 121 (D. Conn. 1998); Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1163 (9th Cir. 1997).

[27] RESTATEMENT (SECOND) OF TORTS § 918 (1979); *see* Dep't of Health Servs. v. Superior Court, 79 P.3d 556 (Cal. 2003) (applying doctrine to a statutory cause of action).

[28] King v. City of Seattle, 525 P.2d 228, 235–36 (Wash. 1974).

[29] *E.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); NicSand, Inc. v. 3M Co., 507 F.3d 442, 451–57 (6th Cir. 2007).

[30] *E.g.*, Ball Mem'l Hosp. v. Mutual Hosp. Ins., 784 F.2d 1325, 1338 (7th Cir. 1986) ("The deeper the injury to rivals, the greater the potential benefit.").

Barring recovery for injuries that would not have occurred had the complainant just competed for the business in question is consistent with sound policy as well as longstanding doctrine. The more difficult issue is in evaluating the scope of the complainant's obligation. We address that next.

III. THE COMPLAINANT'S ABILITY TO COUNTER

In evaluating the complainant's burden, one could take an interventionist approach, an approach using filters to screen out unmeritorious cases, or apply a presumption-free competitive effects analysis. We address these different approaches here.

A. INTERVENTIONIST APPROACHES

Intel *Approach.* Perhaps the most extreme, pro-intervention view of CRRs is the one expressed by the EU General Court in the *Intel* case.[31] There, the General Court took the position that the presence of a dominant firm in a market is such an inherent distortion that any inducement to full or partial exclusivity (i.e., any CRR) by a dominant firm is suspect to the extent it has the potential to make entry more difficult. The General Court held that a dominant undertaking's use of rebates to induce exclusivity is virtually per se unlawful, holding that the rule "is justified by the special responsibility that an undertaking in a dominant position has not to allow its conduct to impair genuine undistorted competition in the common market and by the fact that, where an economic operator holds a strong position in the market, exclusive supply conditions in respect of a substantial proportion of purchases by a customer constitute an unacceptable obstacle to access to the market."[32]

Advocate General Kokott expressed a similar view in the *Post Danmark II* case, finding that retroactive rebates for achieving a certain distribution threshold infringe the EU's restrictions on abuse of dominance if they are "capable of producing an economically unjustified exclusionary effect," and rejecting the "mounting calls for European competition law to adopt a more economic approach."[33] The European Court of Justice went on to accept the

[31] Case T-286/09, Intel v. Comm'n, ECLI:EU:T:2014:547 (GC June 12, 2014).

[32] *Id.* ¶ 90. Intel appealed the General Court's judgment to the European Court of Justice, and Advocate General Wahl issued an opinion rejecting the General Court's approach, endorsing a rule of reason approach, and calling for a remand so that the General Court may conduct "an examination of all the circumstances of the case and, as the case may be, of the actual or potential effect of Intel's conduct on competition within the internal market." Case C-413/14 P, Intel Corp. v. Comm'n, ECLI:EU:C:2016:788, ¶ 346 (CJ Oct. 20, 2016) (Opinion of Advocate General Wahl). The Court of Justice's judgment in the case had yet to issue at the time this article was submitted for publication.

[33] *See* Case C-23/14, Post Danmark A/S v. Konkurrencerådet, ECLI:EU:C:2015:343, ¶¶ 4, 30 (CJ May 21, 2015) (Opinion of Advocate General Kokott), curia.europa.eu/juris/liste.jsf?num=C-23/14#.

Advocate General's approach in that case, holding that a loyalty discount program by a dominant undertaking "which, without tying customers to that undertaking by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing undertakings, produces an anticompetitive exclusionary effect" and that "it is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test."[34] It in fact ruled out such an approach for cases involving monopolistic market shares, holding that:

> in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.[35]

The court did, however, say that its "conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme," deeming the "as-efficient-competitor test" to be "one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme" (presumably for cases where the allegedly infringing firm has a lower market share and/or fewer statutory prerogatives).[36]

In both *Post Danmark II* and *Intel*, the reasoning suggests a focus on whether the CRRs at issue have any potential to make entry harder (i.e., harm competitors) without asking whether the challenges to (potentially less efficient) entry actually translate to harm to the competitive process resulting in actual or likely harm to consumers. The complainant's ability to counter is not even relevant under this approach. This mode of analysis, if accepted by the European Court of Justice, would represent a divergence between U.S. and EU competition law principles at a fundamental level.

Monopoly Power Theory. A theory similar to *Intel* that has been offered in the United States is that, if the defendant has monopoly power, the power itself is proof enough to show customer coercion, i.e., that the CRRs are foreclosing without any need to assess the plaintiff's ability to counter if the defendant has monopoly power. Such a theory was advanced on appeal, but

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[34] Case C-23/14, Post Danmark A/S v. Konkurrencerådet, ECLI:EU:C:2015:651, ¶ 42, 57 (CJ Oct. 6, 2015) (Judgment of the Court), curia.europa.eu/juris/celex.jsf?celex=62014CJ0023&lang1=en&type=TXT&ancre=.

[35] *Id.* ¶ 59.

[36] *Id.* ¶ 61.

rejected, in the *Eisai* case.[37] The court held that, where customers could terminate their agreements without any threat of losing supply or penalties (beyond losing the agreement benefits), the loyalty discount agreements were not coercive and not exclusionary—regardless of the defendant's market power.[38]

Tax Theory. It is sometimes argued that it should not matter whether the claimant *could* meet or better the inducement; the question should be whether, in light of the CRR, it *would* do so.[39] Put differently, the argument is that the availability of a countermeasure should not matter unless pursuing the countermeasure would be *more* profitable for the rival than sitting back and doing nothing. That is the theory of the tax approach, a less-extreme (but still highly interventionist) view that has been advocated (largely unsuccessfully) in recent antitrust cases concerning loyalty or shelf space discounts.

The essence of the theory is that CRRs should be condemned to the extent that they "tax" new entry by forcing competitors to both undercut a monopolist's prices and further compensate the customer for the forgone discounts. A formal model supporting that theory was articulated by economist Joseph Farrell and his co-authors in a review of their work while at the FTC's Bureau of Economics.[40] The model posits that, where the dominant firm sets a discount based on the share of purchases a customer makes from the firm rather than from its rivals, "the effective (overall) marginal cost to the buyer of one more unit from that rival" is the rival's price plus an additional cost reflecting the potential loss of the market share discount (i.e., a tax term).[41] According to the model, the pricing constraint on the dominant firm is lessened because the effective price the customer pays to buy from the rival is increased from the price the rival charges (r) to r plus the tax. Hypothetically, the dominant firm in this situation "can charge a true marginal price that exceeds its rival's cost . . . without opening up a marginal opportunity for a rival willing to price down to its cost."[42]

One could potentially find a competitive problem in the hypothetical underlying the model if the retroactive discount was indeed so dramatic that an efficient rival could not win the business even if it priced down to its cost. But the cases where the model has been invoked have by and large not presented

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[37] Eisai, Inc. v. Sanofi Aventis U.S., LLC, 821 F.3d 394, 407 (3d Cir. 2016).

[38] *Id.* at 406–07.

[39] *See, e.g.*, Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 989 (2002) ("Monopolies that cut prices dramatically in response to entry are exclusionary because the behavior discourages entry. This observation holds even if they are only matching rivals' prices, and even if they are charging prices that exceed their costs.").

[40] *See* Joseph Farrell et al., *Economics at the FTC: Mergers, Dominant-Firm Conduct, and Consumer Behavior*, 37 REV. INDUS. ORG. 263, 267–68 (2010).

[41] *Id.* at 267.

[42] *Id.* at 267–68.

such dramatic circumstances. For example, in *Church & Dwight Co. v. Mayer Laboratories, Inc.*, the plaintiff's expert economist argued that a product supplier's series of retroactive discounts for allocating different tiers of shelf space (65, 70, and 75 percent) that included a relatively large retroactive discount (7 percent) for meeting the first tier represented a tax on retailers' purchases of products from smaller competitors. The court rejected the claim because it found the plaintiff had failed to support its tax theory with "competent evidence of an actual coercive effect that substantially foreclosed competition" given the evidence of retailers buying more than needed to qualify for the discounts and/or choosing not to participate in the discount programs.[43]

The argument for treating conduct like that described above as anticompetitive hinges on the proposition that such conduct can reduce rivals' incentive to enter or reduce prices. Einer Elhauge posited in a 2009 paper (the underlying theory of which he has since refined) that loyalty discounts can deaden the dominant firm's incentive to pursue non-loyal customers and reduce other firms' incentives to pursue the dominant firm's customers, resulting in monopolistic pricing.[44] He rejected the equally-efficient rival standard for judging loyalty discounts on the grounds that, in the model he formulated, "the loyalty discounts have anticompetitive effects even though the conduct is always profitable, would remain profitable even without eliminating or impairing rivals, and whether or not the rival is equally efficient and stays in the market" and "loyalty discounts can discourage discounting even if they do not affect rival efficiency at all."[45] Separately, Steven Salop has argued that the equally-efficient rival standard should not be used in assessing a defendant's conduct because "the unencumbered (potential) entry of less-efficient compet-

[43] 868 F. Supp. 2d 876, 906 (N.D. Cal. 2012); *see also* Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000). *But see* Insight Equity A.P. X. LP v. Transitions Optical, Inc., No. 10-635-RGA, 2016 WL 3610155, at *7 (D. Del. July 1, 2016). (The authors are counsel for the defendant in this case.)

[44] *See* Einer Elhauge, *How Loyalty Discounts Can Perversely Discourage Discounting*, 5 J. COMPETITION L. & ECON. 189 (2009) [hereinafter Elhauge, *Loyalty Discounts*]. In more recent work, Elhauge and Wickelgren developed models of loyalty discounts where the discounts would result in the exclusion of an equally efficient (or even more efficient) competitor. *Compare* Einer Elhauge & Abraham L. Wickelgren, *Anti-Competitive Exclusion and Market Division Through Loyalty Discounts* (U. Tex. Sch. of Law, Law & Econ. Research Paper No. 216, 2011), *and* Einer Elhauge & Abraham L. Wickelgren, *Anticompetitive Market Division Through Loyalty Discounts Without Buyer Commitment* (John M. Olin Ctr. for Law, Econ. & Bus. Discussion Paper No. 723, 2012), *with* Daniel A. Crane, *Bargaining over Loyalty*, 92 TEX. L. REV. 293 (2013) (disputing models); *see also* Abraham L. Wickelgren, *Detailed Analysis, not Catechism: A Comment on Crane's "Bargaining Over Loyalty,"* 92 TEX. L. REV. 1 (2013) (responding to Crane). Were the unusual economic conditions on which the Elhauge/Wickelgren models rely to be established in a given case, the legal framework we advocate here might well support condemnation of a loyalty discount scheme.

[45] Elhauge, *Loyalty Discounts*, *supra* note 44, at 216–17.

itors often raises consumer welfare" and failing to protect less-efficient entry may result in less restraint on a monopolist's prices.[46]

These arguments seem unconvincing as applied to the antitrust analysis of exclusion claims based on CRRs.[47] Antitrust policy is aimed at encouraging competition. Nothing *requires* the claimant to improve its offering. But a rule of law that allows a firm that chooses to forgo a profitable countermeasure then to sue and recover treble (or any) damages is a rule of law that actively discourages rivals from competing.[48] It is certainly true that an equally-efficient rival analysis may be inappropriate (or even make no sense) in the context of blunter strategies like sham patent litigation. Still, the potential efficiencies of CRRs justify insisting that CRRs not be condemned absent evidence that the allegedly excluded competitors actually could not contest the alleged foreclosure through more vigorous, but profitable competition.[49]

B. APPROACHES APPLYING FILTERS

A different approach would be to determine and apply safe harbors, permitting dominant (or alleged-to-be-dominant) firms to know what kind of conduct will surely pass antitrust scrutiny. There are a wide variety of possible safe harbors in CRR cases. We address the three most prominent here.

1. *Complainant Profitability*

The first is a simple screen based on profitability to the complainant. The premise is that, if the complainant can profitably compete for business, that business should not be considered "foreclosed." Applying the simple intuition of the avoidable consequences doctrine, a claimant that could have avoided the foreclosure, but elected not to, would not have a claim. The analysis here

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[46] Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 328–29 (2006).

[47] Indeed, Professor Elhauge's theory seems to imply a competitive problem of tacit collusion, not exclusion, since rivals in his model are not necessarily impaired, and they may even benefit from not having to compete with the dominant firm on price. Absent an agreement going beyond conscious parallelism, such a circumstance would be beyond the Sherman Act as a legal matter. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 553 (2007). Any consumer harm would therefore need to be addressed by other means.

[48] *But see Insight Equity*, 2016 WL 3610155. There, the district court held that the plaintiff could maintain a challenge to certain discounting agreements with various market actors despite the plaintiff's admission that it could profitably have met the discounts. *Id.* at *7.

[49] It may be suggested that this issue should be addressed in the context of antitrust injury rather than fact of violation. But a generalized requirement for proof of equal efficiency to maintain a private action under the Clayton Act would prove unworkable. As an example, in the Hatch-Waxman context, there is no good policy reason to deprive a generic pharmaceutical competitor that was excluded by a sham patent litigation of its lost profits from that exclusion, even if the generic competitor were deemed "less efficient" than the brand for some reason.

focuses on the complainant's costs. If a countermeasure would be profitable for the complainant, this screen would rule out any claim.

The facts of *Eisai, Inc. v. Sanofi-Aventis U.S. LLC*[50] provide a good example. The theory of competitive harm advanced by the plaintiff was that Sanofi-Aventis' market share discounts created a "dead zone" in which "it was more expensive for hospitals to use [the plaintiff's product] for 10% to 62% of its needs" than to purchase Sanofi-Aventis' product even though the plaintiff's product was less expensive.[51] The district court found this theory insufficient to justify treating the discounts as harmful, in large measure because "[a]ny alleged incontestable demand did not prevent Eisai from reducing its 85% profit margins to decrease the span of the dead zone and increase its market share."[52] The fact that Eisai could profitably meet or beat the challenged discounts was dispositive.

The court of appeals agreed, with emphasis on different points. It concluded that the "incontestable demand" was not supported by the evidence.[53] More broadly, the court concluded that the short term nature of the agreements was dispositive. Termination of the agreements would have led to a loss of the discounts under the agreement, but no other consequences, and supply would still continue without any threat of termination or other penalties.[54] The decision is consistent with the view that the actual plaintiff's ability profitably to overcome the exclusivity incentives should be dispositive.

2. *The Equally-efficient Rival Approach*

A stricter screen would eliminate any claim in which a hypothetical rival, as efficient as the defendant, could compete profitably for the business in

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[50] No. 08-4168, 2014 WL 1343254 (D.N.J. Mar. 28, 2014), *aff'd*, 821 F.3d 394 (3d Cir. 2016).

[51] *Id.* at *27. The district court explained:

> Boiled down, Eisai's argument is that . . . [e]ven if hospitals wanted to use a rival drug or to conduct a therapeutic interchange to a rival . . . drug, hospitals would continue to have some demand for [defendant's] Lovenox® because of this unique indication. And hospitals would have to pay more for the Lovenox® required for this unique usage because of the loss of, or decrease in, the discount.
>
> . . . .
>
> Professor Elhauge calculated that there was a "dead zone" in which it would cost hospitals more to switch from Lovenox® to [Eisai's] Fragmin® even though Fragmin® was less expensive. This dead zone . . . [meant] that it was more expensive for hospitals to use Fragmin® for 10% to 62% of its needs in the [relevant] market. This was because hospitals using Fragmin® would still need to carry Lovenox® for the incontestable demand, but the increased market share of another [relevant] drug would make Lovenox® more expensive because of the loss of, or decrease in, the discount.

Id. (citations omitted).

[52] *Id.*

[53] *Eisai*, 821 F.3d at 406.

[54] *Id.* at 406–07.

issue. In asking the question whether an "equally-efficient rival" could effectively counter the impact of the CRR, the focus is on the defendant's costs, rather than the particular plaintiff's costs (as in *Eisai*). The basic approach, in the words of Areeda and Hovenkamp, is to call for "a showing not merely that a particular rival cannot compete effectively, but that no equally-efficient rival can."[55]

Judge Richard A. Posner, one of the leading proponents of this approach, has offered the following justification:

> The fact that a firm has monopoly power doesn't mean that the law should prevent it from competing. It would be absurd to require the firm to hold a price umbrella over less efficient entrants. . . . Only when monopoly power is used to discourage equally or more efficient firms and thus perpetuate a monopoly not supported by superior efficiency should the law step in.[56]

In other words, the law should incentivize efficient conduct that benefits consumers, even when it strengthens the competitive advantages of incumbent firms, so only practices that obstruct efficient market operations should be subject to condemnation.

The genesis of this approach has been catalogued elsewhere.[57] In brief, following the Chicago School's critique of pre-1970s antitrust policy, which tended to focus on preserving competitors without accounting for economic theory, empirical evidence, and consumer welfare, courts began to move toward a more economically rigorous approach to monopolization cases.[58] Although the courts largely accepted the need for closer attention to economic evidence as well as the concern with chilling procompetitive behavior through erroneous antitrust condemnation, they did not embrace the more extreme Chicago School positions (such as complete denial of competitor standing in merger cases or per se legality for vertical restraints).[59] A variety of "Harvard" and "Post-Chicago" scholars developed models showing that many restraints the Chicago School would exempt from scrutiny can in fact be used to anticompetitive ends by dominant firms.[60] The rule of reason approach exemplified by the *Microsoft* case has thus won the day, with courts largely approaching monopolization cases with an eye to the specific facts of each case and the evidence of any given strategy's anticompetitive effects and po-

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[55] 3A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 749a (4th ed. 2015).

[56] RICHARD A. POSNER, ANTITRUST LAW 196 (2d ed. 2001).

[57] Dorsey & Jacobson, *supra* note 3, at 123–29.

[58] *Id.* at 117–20.

[59] *See*, *e.g.*, Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

[60] *See, e.g.*, Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990) (showing tying could profitably be used to exclude competitors without substantial offsetting consumer benefits); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 AM. ECON. REV. 296 (2000) (same for exclusive dealing).

tential efficiency justifications.[61] The equally-efficient rival concept has evolved out of the various attempts to give more content and structure to the rule of reason framework.[62]

3. *Full* Brooke Group *Approach*

A third type of screen, highly anti-interventionist, is the "full *Brooke Group*" approach.[63] For example, the Department of Justice's 2008 report on monopolization standards (which the Federal Trade Commission pointedly refused to endorse and the Obama administration promptly withdrew) attempted to fit most CRR analysis into a *Brooke Group* framework that would only condemn CRRs as exclusionary if the inducements to secure them resulted in below-cost pricing over the full set of products or services being sold.[64]

In applying this approach, a bundled discount would be lawful without further scrutiny if the price for all the products in the bundle were above the incremental cost of all such products. Similarly, in a loyalty discount case, a discount for any given percentage of customers' business would be lawful so long as the pricing for all the volume in issue was above incremental costs.

C. UNFILTERED RULE OF REASON

Yet another approach is to forgo any screens, and apply competitive effects balancing under the rule of reason.[65] The question in every case would be whether the CRR in fact raises prices or otherwise harms consumers—whether or not the complainant could compete profitably for the business at issue, the CRR is capable of excluding equally-efficient rivals, or the CRR involves pricing of the full product set below cost.

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[61] *See, e.g.*, New York *ex rel.* Schneiderman v. Actavis PLC, 787 F.3d 638, 652 (2d Cir. 2015) (adopting *Microsoft* framework for Section 2 analysis); McWane, Inc. v. FTC, 783 F.3d 814, 833 (11th Cir. 2015) (same).

[62] Dorsey & Jacobson, *supra* note 3, at 129–36; *see* Eisai, Inc. v. Sanofi-Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) (applying equally efficient rival analysis).

[63] *See generally* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[64] *See* U.S. DEP'T OF JUSTICE, COMPETITION & MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 18 (2008) (withdrawn 2009); *see* Press Release, U.S. Dep't of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), www.usdoj.gov//atr/public/press_releases/2009/245710.pdf; Statement of Commissioners Harbour, Leibowitz & Rosch on the Issuance of the Section 2 Report by the Department of Justice 4–5 (Sept. 8, 2008), www.ftc.gov/sites/default/files/attachments/press-releases/ftc-commissioners-react-department-justice-report-competition-monopoly-single-firm-conduct-under/080908section2stmt.pdf.

[65] *See* Salop, *supra* note 46, at 328–29 *passim*.

D. EVALUATING THE APPROACHES

In our view, the best approach to evaluating CRRs is to apply a combination of the complainant profitability and equally-efficient rival safe harbors. Specifically, if a rival could profitably compete for enough of the business in question to constrain the defendant's market power, a safe harbor would apply. If the defendant failed that safe harbor but the evidence showed that the conduct would not exclude a (hypothetical) equally-efficient rival, the defendant would again prevail without any need for further analysis. Only if the CRR failed these two screens would there be a need to analyze further, to prove that the CRR harmed marketwide competition.[66]

All of the other approaches are problematic. Neither of the interventionist approaches we have described, nor unfiltered competitive effects analysis, is appropriate for evaluating CRRs. All of these approaches allow complainants potentially to prevail even if they have made no effort to counteract or overcome the CRR in question. As a result, they discourage competition for the contract and encourage rivals to sit back, do nothing, and then assert a treble damage claim.

The competitive effects balancing approach is much less problematic than the interventionist approaches; but it too has problems. Although a careful application of this approach would find an absence of adverse competitive effects in most cases if the complainant were able to counteract the effects of the CRR, companies would adopt efficient CRRs at their peril—without the level of assurance that our proposed screens allow. The net effect would be to chill some procompetitive strategies as firms avoid them to minimize antitrust risk.

Although we believe screens to be necessary, one screen we would not apply is a "full *Brooke Group"* screen. That approach goes too far in protecting potentially exclusionary conduct, for it is well-established that many CRR strategies can be both profitable in the short-run and capable of excluding otherwise efficient rivals.[67] Many exclusive dealing or most-favored-nations clause strategies do not require a profit sacrifice and recoupment strategy when deployed by a dominant firm, and even bundled discounts can achieve exclusionary effect as to the non-competitive products while still generating

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[66] One would typically get the same result by simply applying the equally-efficient rival screen. A CRR found lawful under complainant profitability analysis would almost always get a pass under the equally-efficient rival screen as well. But the complainant profitability screen is far simpler to apply. We recommend examining the complainant profitability issues first in order to avoid the more complex calculations necessarily involved in equally-efficient rival analysis.

[67] See Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 780–81 (2006).

supracompetitive profits as to the overall bundle.[68] Refusing to scrutinize these kinds of strategies is a prescription for higher consumer prices, reduced output and innovation, and poorly functioning markets. So while evidence that a strategy involves a profit sacrifice that makes no economic sense absent some exclusionary effect may well be probative in showing that the strategy at issue is capable of excluding an equally-efficient rival—what rival can rationally compete with an irrational profit sacrifice?—treating such evidence as the entire inquiry threatens to absolve serious abuses of monopoly power.

Our suggested approach seems in line with the trend of the case law. U.S. appellate courts appear to be converging on the use of equally-efficient rival analysis in many exclusionary conduct cases. The *Collins Inkjet* case (following *PeaceHealth*) adopted a discount attribution approach to bundling/implicit tying based specifically on the equally efficient competitor approach.[69] Similarly, the recent *Eisai*, *ZF Meritor,* and *McWane* decisions emphasized the actual or potential impact of exclusive dealing on equally-efficient rivals.[70]

The standard has also gained some traction outside of the United States. The European Commission in a 2009 guidance on abuse of dominance cases endorsed the equally-efficient rival standard as a principal focus of competitive effects analysis,[71] though it noted it would also consider the constraint imposed by less efficient competitors in certain cases. As noted above, however, the courts of the European Union have held that practices can constitute abuse of dominance even if they would not necessarily exclude an equally-efficient competitor.[72]

[68] *See, e.g.*, Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 904 (9th Cir. 2008) ("[A] defendant offering a bundled discount, without pricing below cost either the individual products in the bundle or the bundle as a whole, can, in some cases, exclude a rival who produces one of the products in the bundle equally or more efficiently than the defendant. Thus, simply asking whether the defendant's prices are below its incremental costs might fail to alert us to bundled discounts that threaten the exclusion of equally-efficient rivals.").

[69] Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 274 (6th Cir. 2015).

[70] *See* Eisai, Inc. v. Sanofi-Aventis U.S., LLC, 821 F.3d 394, 406 (3d Cir. 2016) ("nothing in the record indicates that an equally efficient competitor was unable to compete with Sanofi"); ZF Meritor LLC v. Eaton Corp., 696 F.3d 254, 281 (2012) ("Although prices are unlikely to exclude equally-efficient rivals unless they are below-cost, exclusive dealing arrangements can exclude equally efficient (or potentially equally efficient) rivals, and thereby harm competition, irrespective of below-cost pricing."); McWane, Inc. v. FTC, 783 F.3d 814, 838 (11th Cir. 2015) (affirming antitrust condemnation of program that "deprived [ ] rivals . . . of distribution sufficient to achieve efficient scale, thereby raising costs and slowing or preventing effective entry") (quoting *McWane, Inc.*, 2014-1 Trade Cas. (CCH) ¶ 78,670, 2014 WL 556261, at *22 (FTC Jan. 30, 2014)).

[71] Eur. Comm'n, *Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, 2009 O.J. (C 45) 7, ¶¶ 23–24 (Dec. 3, 2008).

[72] *See supra* notes 31–36 and accompanying text.

The reservations expressed by EU officials and others about equally-efficient rival analysis may have some weight. It is certainly true that inefficient rivals can still exert some competitive pressure on a dominant firm, resulting in consumer benefit. But the Chicago School's critique of error costs, though it can be taken to extremes, still has some resonance in this area, especially given the significant efficiencies that that various types of CRR strategies can have in terms of promoting joint investments, avoiding free riding, and other benign or even beneficial effects. While an equally-efficient rival framework may allow a dominant firm to engage in conduct that excludes some inefficient competition that constrains the dominant firm to some extent, the alternatives would reduce the incentives for inefficient firms to invest in improving their competitive capacities and would likely chill procompetitive conduct by more successful firms fearful of legal troubles. This is especially true in the United States, where the treble damages remedy and the history of aggressive private enforcement may well create substantial incentives for competition through litigation (a form of rent-seeking behavior) rather than competition on the merits,[73] and where market dominance is very easy to allege even if more difficult to prove.

Still, the limitations of equally-efficient rival analysis are real, and should not be swept under a rug. To make the analysis work, use of an equally-efficient rival standard should be flexible in its application. For example, it may be that a nascent competitor is not yet equally efficient, but could be expected to grow to become more efficient. This category of competitors—what the Third Circuit termed "potentially equally efficient [rivals]" in *ZF Meritor*[74]—should still be within the set of rivals considered in evaluating the impact of exclusionary conduct.[75] Courts should therefore adopt a forward-looking approach to assess whether a given practice will preclude hypothetical rivals who are likely to otherwise become efficient competitors in the near term or whether it will solely operate to "exclude" rivals that are inefficient and/or unwilling to invest in competitive strategies that could defeat any claimed foreclosure.

Adding this needed flexibility is important to avoid under-deterrence, but should not materially affect the risk of over-deterrence. The inquiry is still whether the practice in issue will exclude equally-efficient rivals. What the flexibility adds is a more careful definition of the hypothetical "equally-effi-

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[73] *See, e.g.*, D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 690 (2012) (modeling "a subset of cases in which private rights of action may work with public rights as an effective strategy for a firm to raise costs against rival dominant firms.").

[74] 696 F.3d at 281.

[75] *See* Dorsey & Jacobson, *supra* note 3, at 127–29.

cient" firm. Having that flexibility should not require any extensive additional work, and should not materially reduce predictability.

IV. IMPLEMENTING THE EQUALLY-EFFICIENT RIVAL STANDARD IN CRR CASES

The flexible equally-efficient rival framework advocated here should work well for CRR cases. There are certainly other varieties of exclusionary conduct where the existence or absence of countermeasures is much less relevant—contexts such as refusals to deal, product redesign, and "cheap exclusion" strategies like fraudulent patent procurement.[76] But where the concern is that one or more exclusionary contracts have been used to increase the costs of entry/expansion, asking whether an equally-efficient rival could plausibly counter them strikes a good balance between avoiding undue condemnation of vigorous competition and having an analysis so rigid that it fails to condemn seriously anticompetitive conduct.

A. THE COMPETITOR-PLAINTIFF'S BURDEN

In practical implementation, a first cut would be to look at whether the actual complainant had the ability to compete more vigorously but chose not to do so. Proof that the complainant could not have taken steps to reduce or eliminate the effects of the challenged CRRs should be part of the plaintiff's prima facie case, with the plaintiff bearing the burden of proof. Exclusion from a substantial portion of the relevant market—an essential part of the plaintiff's case—cannot be proven without such a showing, so it is properly part of the plaintiff's initial burden.

Courts should therefore demand proof that the complainant could not profitably meet or better whatever inducements (if any) the defendant has offered to secure the CRR. Good examples of this approach can be found in *Eisai* and *NicSand*: the district court in *Eisai* found that the competitor could have largely defeated (or at least mitigated) the exclusionary strategy at issue by sacrificing some of its 85 percent profit margin,[77] and the court in *NicSand* observed that the defendant had merely responded to the (previously-dominant) plaintiff's own exclusive contracting by competing for and winning the exclusive accounts.[78] In those circumstances, the complainant's own circumstances show that it could have countered the exclusionary strategy, so further

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[76] *See, e.g.*, New York *ex rel*. Schneiderman v. Actavis PLC, 787 F.3d 638, 655–56 (2d Cir. 2015) (conduct at issue blocked cost-efficient distribution path created by regulatory regime); Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005); *see generally* Dorsey & Jacobson, *supra* note 3, at 139–40 (discussing refusal to deal and product design cases).

[77] *See* Eisai, Inc. v. Sanofi-Aventis U.S. LLC, No. 08-4168, 2014 WL 1343254, at *27 (D.N.J. Mar. 28, 2014), *aff'd*, 821 F.3d 394 (3d Cir. 2016).

[78] *See* NicSand, Inc. v. 3M Co., 507 F.3d 442, 448–49, 454 (6th Cir. 2007) (en banc).

investigation of whether a hypothetical rival could have done so was unnecessary.[79]

Assuming the evidence shows that the complainant itself could not have defeated the exclusionary CRR strategy, the court should undertake further analysis. One possible scenario is that the complainant can show it is equally or more efficient than the alleged violator but still could not break through, which would naturally satisfy the equally-efficient rival approach advocated here. Alternatively, the complaining party may be less efficient than the defendant. For example, the rival may be so nascent that it would take some time to evolve into an equally efficient competitor, or other market dynamics (such as a need to obtain intellectual property rights) may alter the rival's cost structure in a manner not reflective of the firm's ultimate ability to constrain the defendant's power. While that inefficiency should certainly be considered in assessing fact of injury and amount of damages, it should not be dispositive of the fact of violation. Rather, further analysis of the economic realities of the market and the challenged conduct should be undertaken to establish whether an equally-efficient rival *other than the complainant*—the hypothetical equally-efficient rival—could have challenged the CRR strategy.

B. THE ROLE OF COERCION

One highly relevant proxy for the inability of an efficient competitor to counter a CRR strategy is proof of coercion. If the customers signing the CRRs have no economically rational choice other than to agree to the defendant's proposed terms, it is unlikely that any rival, no matter how efficient, could break the foreclosing effect of the CRRs. Determining whether a countermeasure would be profitable for either the claimant or the hypothetical equally-efficient rival no longer matters at that point, for if, as a practical matter, customers cannot do business (or can only do reduced business) with the rival, then foreclosure has been shown.

Some cases show clear evidence of coercion. In *Lorain Journal*, a noncompliant advertiser would have completely lost access to the most important advertising platform in the market.[80] In *McWane*, the policy at issue expressly cut off non-compliant dealers for as long as 12 weeks.[81] In *Dentsply*, noncompliance with Dealer Criterion 6 would have resulted in a dealer losing access to the only manufacturer of a full line of artificial teeth;[82] in *ZF Mer-*

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[79] *See* Daniel A. Crane, Loyalty Discounts and the Hospitality Tradition 8, Presentation at DOJ/FTC Public Workshop: Conditional Pricing Practices (The Law of Conditional Pricing Practices Session) (June 2014), www.justice.gov/sites/default/files/atr/legacy/2014/07/01/306665.pdf.

[80] Lorain J. Co. v. United States, 342 U.S. 143, 148–49 (1951).

[81] McWane, Inc. v. FTC, 783 F.3d 814, 819 (11th Cir. 2015).

[82] United States v. Dentsply Int'l, Inc., 399 F.3d 181, 189–90 (3d Cir. 2005).

itor, non-compliance would have resulted in massive financial penalties and, crediting the majority's recitation of the record, would likely have resulted in complete loss of access to Eaton's transmissions.[83] These are the easiest cases.

But coercive effect can be more implicit. For example, in the recent *Collins Inkjet* case, the Sixth Circuit found that bundled pricing can be coercive as an economic matter where the significance of the discount makes it "functionally equivalent to the coercion present in an unlawful tying arrangement."[84] The court adopted the *PeaceHealth* discount attribution standard for such cases because "when the discount attribution standard is met, an equally efficient competitor will be unable to compensate buyers for the forgone tying product discount."[85] Such effective coercion certainly satisfies the complainant's burden, for if the complainant (or at least a hypothetical equally-efficient rival) will fail whether it can meet the inducements or not—because customers have no real choice—it has then been foreclosed.

Ultimately, what is essential is some type of customer coercion or the equivalent.[86] Where coercion is plain, such as the all-or-none offers in *McWane* and *Dentsply*, the customer volume at issue should be deemed foreclosed. In addition, a defendant's terms of sale that make it unprofitable for the plaintiff or an equally-efficient rival to compete must be viewed as coercive because, as a practical matter, a firm that can gain business only by incurring losses cannot survive for long. Under either circumstance, the coercion is strong, if not conclusive, evidence that the CRR at issue is competitively problematic (if the requisite market power has been shown).

C. The Defendant's Rebuttal

If the complainant's initial burden has been met, the defendant can respond by attempting to negate the complainant's proof or, alternatively, by offering proof that the complainant could not defeat the CRR because of its inefficiency but that an equally-efficient competitor could have done so. That would suffice to shift the burden back to the plaintiff to demonstrate that foreclosure is significant and real. Notably, the burden on the defendant here is merely to come forward with competent rebuttal evidence; the burden of proof on this prong always remains with the plaintiff.

Should the complainant's initial case stand unrebutted, the court should proceed with the rest of the rule of reason analysis. The defendant may prove

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[83] ZF Meritor LLC v. Eaton Corp., 696 F.3d 254, 282–83 (3d Cir. 2012).

[84] Collins Inkjet Corp. v. Eastman Kodak Co., 781 F.3d 264, 271 (6th Cir. 2015).

[85] *Id.* at 274.

[86] Eisai, Inc. v. Sanofi-Aventis U.S., LLC, 821 F.3d 394, 404–06 (3d Cir. 2016).

the existence of offsetting efficiencies from the conduct to justify it.[87] It is certainly possible that even a network of CRRs which equally efficient competitors could not successfully defeat would have broader benefits to competition and to consumers. For example, a dominant firm may be engaged in intense technological development activities with its distributors, and exclusivity or other restrictive terms would protect the investments, allow for freer exchange of trade secret information, and prevent free riding. Or the incentive might include the dominant firm providing sales leads—which would never be provided absent exclusivity.[88] If the firm can prove that such efficiencies exist, the plaintiff should then be required to rebut the efficiencies, establish a less restrictive but equally effective alternative for achieving the efficiencies, or otherwise show that the anticompetitive effects outweigh the procompetitive benefits. In this way, the equally-efficient rival analysis serves as a starting point to structure the rule of reason inquiry, but it does not alter the fundamental approach.

D. EXAMPLES

The implementation of this analysis will need to account for the specific CRR strategy at issue. Below we briefly review how our approach may be implemented in cases concerning certain common types of CRRs.

Exclusive Dealing. Exclusive dealing, where the terms of the deal expressly preclude dealing with a firm's rivals, is perhaps the most recognizable CRR. In approaching such a case, the primary focus should be on whether rivals could realistically compete for the contracts needed to attain efficient scale. The scope of the market covered by the contracts is, of course, relevant, but it is not necessarily dispositive. Exclusivity with 90 percent of the market is plainly a greater obstacle than exclusivity with 30 percent. But if the deals are terminable at will and a rival need only accept modestly lower margins to break into the market, even facially high "foreclosure" statistics should not be determinative since the contracts do not prevent efficient competitors from entering or expanding. Conversely, if the 30 percent of the market represents a crucial niche (e.g., where the customers are the sole customers in the market of sufficient size to sponsor new entry) and an efficient competitor lacks the ability to offer sufficient inducements to overcome the contracts (e.g., because the dominant firm's products are essential and it has threatened to completely cut off the customers at issue), the complainant may well be able to make a case. The analysis should not focus rigidly on the scope of market coverage,

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[87] *See* United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001).

[88] *See* Beltone Elecs. Corp., 100 F.T.C. 68, 181 (1982); 11 AREEDA & HOVENKAMP, *supra* note 55, ¶ 1812a.

but should instead be flexible enough to consider whether the complainant could have pushed through had it been willing to compete more vigorously.

Loyalty Discounts. Loyalty discounts raise similar issues to exclusive dealing, and we concur with the commentators who have argued they should be analyzed under a similar framework.[89] The key issue is that the mechanism for inducing exclusivity is through retroactively applying a discount to prior purchase volume for reaching some purchase threshold (or, alternatively, conditioning an up-front discounted price on a commitment to meet the threshold). Once again, the focus of the analysis should not be on the raw share of customer purchases at issue but rather on the practical ability of rivals to compete for business in the presence of the discounts. A firm may offer a 2 percent discount to customers that purchase 75 percent of their needs from the firm. While the headline "foreclosure" number may appear to be 75 percent of the market, if the competitors have sufficient margin to profitably compensate a sufficient number of customers to take their business and gain scale, the fact that the discounts may make competition more expensive (as per the models described above) should not suffice to deem them exclusionary. Rather, the focus should be on whether efficient competitors could compete for the accounts at issue and still make a profit.[90]

Bundling. In the bundled discounting area, the discount attribution standard formulated by *PeaceHealth* and *Collins Inkjet* does much of the analytical work for equally-efficient rival analysis. The first step is necessarily to define the bundle and identify the extent to which equally-efficient rivals could replicate it. If rivals could practically offer the products in the bundle at sufficient scale to match the dominant firm's bundle, then there is no bundling issue. But if the bundle in fact combines a product for which the firm is so dominant that rivals cannot practically compete with a product for which rivals could compete, the question becomes whether the bundle operates to exclude efficient competitors from the competitive product market. The logic of the dis-

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[89] *See*, *e.g.*, Joshua D. Wright, Comm'r, Fed. Trade Comm'n, Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts, Remarks at the Bates White 10th Annual Antitrust Conference (June 3, 2013), www.ftc.gov/sites/default/files/documents/public_statements/simple-wrong-or-complex-more-accurate-case-exclusive-dealing-based-approach-evaluating-loyalty/130603bateswhite.pdf.

[90] Like Professor Wright, we reject the argument that loyalty discounts should be viewed as a species of predatory pricing and subject to a below-cost pricing test. Loyalty discounts can be profitable standing alone, without any need for recoupment. If customers must, as a practical matter, purchase some quantities from the defendant, there are circumstances where they can exclude equally-efficient rivals even if prices are above incremental costs. The competitive harm from loyalty discounts "is not the price level; it is that rivals are denied access to customer volume. If the effect is to prevent rivals from constraining the defendant's market power, consumer harm may result." Jonathan M. Jacobson, *A Note on Loyalty Discounts*, ANTITRUST SOURCE 5 (June 2010), www.americanbar.org/content/dam/aba/publishing/antitrust_source/Jun10_Jacobson6_24f.authcheckdam.pdf.

count attribution standard is that an equally-efficient competitor in the competitive product market could in principle contest the bundling so long as the effective price of the competitive product remains above the dominant firm's costs. The rival would just have to sacrifice margin above efficient cost to contest the practice. But where the effective price on the competitive product is below-cost, an efficient competitor cannot reasonably meet the discount, and the discount also effectively coerces the customers receiving the bundle. This suffices to discharge the plaintiff's initial burden and shift the burden to the defendant to justify the conduct.

MFNs. Most favored nations clauses (MFNs) pose a series of competitive problems. They can be used to facilitate express or tacit collusion—as in the recent *United States v. Apple Inc.*[91] case. The analysis of that type of conduct would be conducted under a different rubric from the one advocated here.

MFNs, however, can also be used as a mechanism for excluding rivals by depriving them of the ability to undercut an incumbent monopolist. A dominant firm may use them with input suppliers to ensure rivals cannot obtain inputs at prices that would allow them to undercut the firm in the downstream market.[92] Likewise, a dominant health insurer may require providers to charge other insurers prices higher than they charge the dominant insurer.[93] Such uses of MFNs can effectively prevent rivals from efficiently undermining the dominant firm's market power.

In these circumstances, rivals may be hard pressed to successfully counter the MFNs, particularly if input suppliers risk losing their largest account or healthcare providers risk falling out of network for the largest insurer in their market. It may be that the MFNs were secured with inducements (like rebates to providers) that competitors could match, in which case a plaintiff may not be able to meet its initial burden—at least absent a showing that meeting or beating the defendant's inducements could not secure the business (as in cases like *Dentsply*). Courts and regulators are justified in examining MFNs by dominant firms with a skeptical eye, and scenarios in which a dominant firm can secure exclusion of efficient rivals through MFNs are relatively easy to envision.[94] Courts should therefore intervene where a network of MFNs effectively precludes rivals from undermining a defendant's market power.

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[91] 791 F.3d 290 (2d Cir. 2015).

[92] *See id.* at 304–05, 308–11.

[93] *E.g.,* United States v. Blue Cross Blue Shield of Mich., 809 F. Supp. 2d 665, 674 (E.D. Mich. 2011); United States v. Delta Dental of R.I., 943 F. Supp. 172, 176–80 (D.R.I. 1996).

[94] *See* Jonathan M. Jacobson & Daniel P. Weick, *Contracts that Reference Rivals as an Antitrust Category*, ANTITRUST SOURCE 6–8 (Apr. 2012), www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr12_jacobson_4_26f.authcheckdam.pdf.

V. CONCLUSION

We know that CRRs can be highly efficient means of achieving legitimate business efficiencies, but recent scholarship has also emphasized their significant potential to harm the competitive process. Adopting a rigid approach, whether one focused solely on covered market volume or one focused solely on profit sacrifice and price-cost tests, risks allowing formalism to trump a realistic assessment of the costs, benefits, and harms of any given strategy in any given case. At the same time, care must be taken to structure antitrust rules to incentivize new entrants to compete vigorously rather than coast through and then look for treble damages actions to prop up their profits. A flexible approach is therefore needed to address CRR cases.

The analysis advocated in this article provides just such a flexible approach. It allows courts to screen out those cases where competitors may be using antitrust rules to avoid competing as vigorously as possible, while still allowing for condemnation of conduct that bars efficient entry without offsetting justifications. It therefore takes account of the legitimate concerns about error costs without countenancing anticompetitive conduct. We believe that courts and regulators would do well to embrace this approach.