EXCLUSIVE DEALING*

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I. Introduction

Exclusive dealing can be defined as a contractual requirement by which retailers or distributors promise a supplier that they will not handle the goods of competing producers. Though it is a member of a class of arrangements which Richard Posner has lumped under the heading of restricted distribution, exclusive dealing differs from other members in that it need not entail limits on competition among dealers handling a particular brand. For example, while exclusive territories and resale price maintenance have both been interpreted as devices to insulate dealers from intrabrand competition, a manufacturer could, in principle, insist that dealers handle its products exclusively while simultaneously refusing to restrict either the number or pricing policies of those dealers.[1] Other members of this class have lately been subjected to a considerable amount of attention in the economics literature and, partly in response to this attention, the legal status of restricted distribution has proven remarkably fluid. Though exclusive dealing has not attracted as much interest as other restricted distribution arrangements,[2] it is often found in conjunction with

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[1] The terminology commonly employed to describe restricted distribution can be quite confusing. For example, a manufacturer may grant an exclusive dealership by reserving a class of customers or marketing territory for the dealer in question; the dealer need not be prohibited from carrying the products of rival manufacturers. In contrast, a dealer entering into an exclusive dealing clause agrees not to handle the products of rival manufacturers but may face competition from other exclusive dealers of the same brand.

[2] Posner, in his call for a change in the treatment of restricted distribution to per se legality, ignores exclusive dealing and chooses instead to concentrate on restrictions on intrabrand competition. For details on the analysis of other aspects of restricted distribution, see Richard A. Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6 (1981).

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other, more suspect restrictions of dealers and, indeed, has been intimately associated with those practices in some economic analyses. Accordingly, a clear understanding of, for example, territorial restrictions requires an analysis of the purpose and effect of the exclusive dealing clauses which so often accompany territorial restraints. Moreover, it is argued below that efficiency explanations commonly offered for other forms of restricted distribution do not apply to exclusive dealing. Since these efficiency explanations serve as the basis for calls for a change in the status of restricted distribution to per se legality,[3] it is clear that the case for the per se approach is seriously incomplete without an efficiency explanation for exclusive dealing.

The purpose of this paper is to provide this efficiency explanation. The analysis presented below interprets exclusive dealing as a device used to create a property right to information concerning potential customers for a manufacturer's product. The dealer-services argument often adduced to explain resale price maintenance (RPM) and exclusive territories differs in important ways as to whose property rights—dealer's or manufacturer's—are at issue. Exclusive territories and RPM are commonly interpreted as attempts to ensure dealers that the fruits of product-connected services they provide are not usurped by cut-rate, no-frills competitors. Exclusive dealing arrangements are interpreted below as devices to ensure that dealers do not act opportunistically so as to avoid paying the manufacturer for valuable ancillary services provided in a tie-in to the product sold.

The paper is organized as follows. First, conventional explanations of exclusive dealing are shown to be incapable of explaining an important class of such contracts. The textbook explanation for the existence of such contracts holds that they are devices used to elicit added promotional effort from dealers by forcing them to concentrate on a single product line. This approach is shown to be inconsistent with profit maximization on the part of manufacturers. The same reasoning demonstrates that the dealer-services argument employed to explain other vertical restraints does not apply to exclusive dealing.

Section III presents the manufacturers' property rights argument in detail. The analysis is used to explain the purpose of other vertical restraints sometimes found in conjunction with exclusive dealing. These include cooperative advertising allowances, warranty restrictions, and, in some circumstances, sales quotas. Exclusive territories and RPM are also often found in conjunction with exclusive dealing, but as noted above,

[3] See *id.* and Robert Bork, Vertical Restraints: Schwinn Overruled, 1977 Sup. Ct. Rev. 171.

these practices arise from a different source. The analysis of exclusive dealing indicates that a requirement for the practice is that in its absence dealers must be able to switch customers from brand to brand. This dealer ability suggests that an informed dealer recommendation is valued by the customer for guidance to the purchase of the product in question. This is very close to the requirement for exclusive territories that stipulates that dealers provide special services. In accordance with this, it should not be surprising to find exclusive dealing and exclusive territories appearing in tandem.

Section IV presents examples of industries where exclusive and multiline dealers coexist and distinguishes the producer characteristics which lead to exclusive dealing. This section also applies the analysis to a well-known antitrust case in which exclusive dealing was held to be exclusionary and, hence, anticompetitive. Section V concludes the paper with a summary and some remarks concerning the legal status of exclusive dealing contracts.

II. Exclusive Dealing: Conventional Explanations

The most commonly expressed view of exclusive dealing in the literature portrays it as a device to obtain increased dealer promotional effort. According to a leading textbook, "[f]or manufacturers, exclusive dealing arrangements are often appealing, because they ensure that their products will be merchandised with maximum energy and enthusiasm."[4] In other words, exclusive dealing is designed by manufacturers to elicit dealer services, a view echoed in a number of court cases concerning the practice. Though this motivation has not generally been viewed as leading to harmful consequences, exclusive dealing has also been interpreted in the literature as having been sought in order to erect a barrier to the entry of competing producers.[5] The supposed exclusionary effect of a requirements contract for tires, batteries, and accessories led the Supreme Court to hold that contract illegal in *Standard Stations*,[6] while exclusive dealing contracts were permitted in *J. I. Case*[7] and *Tampa Electric*,[8] apparently due to the lack of significant market foreclosure.

Both of these explanations for exclusive dealing credit its benefits to the manufacturer. Given that one is hard pressed to see how a dealer or

[4] F. M. Scherer, Industrial Market Structure and Economic Performance 586 (1980).

[5] See Lee E. Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 L. & Contemp. Prob. 506 (1965).

[6] Standard Oil Co. of Calif., *et al.* v. U.S., 337 U.S. 293 (1949).

[7] U. S. v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

[8] Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

distributor could benefit by the reduction in options that exclusive dealing entails, it is difficult to understand why downstream firms would acquiesce to exclusive dealing clauses. The customary answer in the literature is that dealers are often compensated through other vertical restrictions which serve to enhance their margins and to insulate them from intrabrand competition. "Exclusive dealing is, indeed, the obverse of customer-territorial restriction, and there may well be cases in which a supplier desires . . . the elimination of interbrand competition within individual distribution outlets. The territorial restriction is then the distributor's *quid pro quo;* if he is to give up the distribution of competitive products, he must be guaranteed a market in which intrabrand competition is eliminated."[9] This linkage between exclusive dealing is often cited in the textbooks as an explanation for the dealers' willingness to restrict themselves to a single product line.[10]

The difficulty with the *quid pro quo* explanation is that it is symmetrically incorrect: There is neither "*quid*" nor "*quo*." The special services argument provides an affirmative explanation for the existence of territorial restrictions as well as RPM, one which explains why such restrictions are in the manufacturer's as well as the dealer's interest. This argument suggests that these restrictions are each designed to enforce dealers' property rights to the services which they provide, promotional services which benefit the manufacturer as well as the dealer. This explanation is clearly preferable to a *quid pro quo* approach since it is capable of explaining why exclusive territories are often adopted by manufacturers in the absence of exclusive dealing. This lack of linkage was observed in *Sylvania,*[11] a prototypical example of exclusive territories to ensure dealer-service provision.

More directly to the point, exclusive dealing is not an efficient means by which to promote increases in dealer services. Consider a manufacturer choosing between dealing through a network of exclusive dealers and marketing through multiline outlets. There may, of course, be circumstances under which dealers would choose to handle one manufacturer's products exclusively, even in the absence of a contractual stipulation to that effect. These would include, for example, instances when the costs of multiline inventories were substantial, such as in gasoline retailing.[12] The

[9] Preston, *supra* note 5, at 521.

[10] See Scherer, *supra* note 4, at 586; and Douglas F. Greer, Industrial Organization and Public Policy 368 (1980).

[11] Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

[12] See Lester G. Telser, Abusive Trade Practices, 30 L. & Contemp. Prob. 489, 492 (1965).

more interesting cases for our purposes are those when dealers would prefer to market more than one line. That preference would presumably be derived from the expectation of increased dealer profits flowing from the addition of the alternative brands. Assuming that all brands sold for identical retail prices and that the quantity of services provided by exclusive and multiline dealers were identical, the lower dealer profits of exclusive dealers would be the result of lowered unit sales, implying a higher cost per unit of dealer services. Manufacturers selling through exclusive dealers would, therefore, need to compensate those dealers by providing larger margins through lower wholesale prices, implying lower profits to the manufacturer. There is a possibility that the promotional services provided by an exclusive dealer might be superior to those of a multiline dealer, but were this the case, exclusive dealing would be adopted by the dealer voluntarily, and the case as a result would not concern us.

This argument demonstrates that the special services approach so useful in explaining exclusive territories cannot be carried over to exclusive dealing. The free-rider problems facing exclusive and multiline dealers are identical. Accordingly, a manufacturer can obtain additional dealer promotional services only by paying for those services directly, and the opportunity to do so is independent of whether the dealer handles one or several lines. It is in the interest of the manufacturing firm to see its product distributed as efficiently as possible, so that efficiency-reducing restrictions such as exclusive dealers will not be adopted unless they have some other function independent of their impact on dealer services.

There remains one other argument to explain exclusive dealing, namely, the possibility that it may be pursued in order to erect barriers to entry by competing manufacturers. Exclusive dealing will not pose an important barrier to entry unless a substantial portion of an industry's retail outlets are thereby foreclosed. In most markets, this requirement for an entry barrier implies that, not only the market's dominant seller, but also its smaller existent competitors engage in the practice.[13] Absent some sort of horizontal conspiracy,[14] it is hard to see why a smaller rival would choose to do so. Recall that enforced exclusive dealing can be expected to increase the per-unit cost of dealer promotional services when compared

[13] If the market leader is sufficiently dominant, its own exclusive dealing, in league with substantial economies of scale at the producer level, may be sufficient to erect a workable entry barrier. Director and Levi suggest that Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922), may have been such a case. See Aaron Director & Edward H. Levi, Law & the Future: Trade Regulation, 51 Nw. U. L. Rev. 281, 293 (1956). We will return to this case below.

[14] See Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941), for a case in which horizontal agreement may have posed a competitive problem.

with multiline dealers. Secondary suppliers can thus obtain a competitive advantage over the industry leader by failing to require exclusive dealing and allowing dealers to carry the products of other small rivals or to bootleg the products of the leader. One can therefore infer that when exclusive dealing is a widespread practice, it is likely to arise from a source other than the desire on the part of manufacturers to raise entry barriers. It is also, of course, apparent that if exclusive dealing is practiced only by a subset of suppliers while a significant fraction of sales are handled by multiline dealers, exclusive dealing cannot be expected to raise significant entry barriers and, once again, its source must be sought elsewhere.

A second reason to doubt that exclusive dealing has an exclusionary effect is that the contracts involved seem commonly to be of short duration.[15] Clearly, even if the manufacturing-level scale economies for a product were substantial enough to require a large-scale distribution for that product, short-duration contracts would permit a new entrant to obtain such a system with relatively slight difficulty.[16]

Though it is difficult, in the absence of details about the particular case at issue, to evaluate the merits of an argument alleging an exclusionary effect of exclusive dealing, these considerations suggest that when contracts are of short duration, or when exclusive dealing is adopted not only by market leaders but also by smaller firms in an industry, or when a significant share of a product's sales are accounted for by multiline dealers, exclusive dealing does not seem suited as a device to limit competition. Since it also appears not to induce the provision of dealers' promotional services, still another explanation of the practice is required. That explanation is the subject of the next section.

III. Exclusive Dealing: An Efficiency Rationale

If exclusive territories and resale price maintenance can be interpreted as manufacturer attempts to enforce dealers' property rights to the services which they, the dealers, provide, then it seems reasonable to look for a property rights explanation of exclusive dealing as well. The argument of this paper holds that exclusive dealing is a device which is used to create not the dealers', but rather the manufacturer's, property rights. Manufacturers are assumed to wish to generate customers for their products through advertising and other promotional and brand-enhancement

[15] Of the leading court cases concerning exclusive dealing, only Tampa Electric (see note 8 *supra*) and U.S. v. United Shoe Mchry Corp., 110 F. Supp. 295 (D. Mass. 1953), appear to have involved contracts in excess of two years.

[16] See also Posner, Antitrust Law: An Economic Perspective 201 (1976).

efforts most efficiently carried out at the manufacturer, rather than dealer, level. These customer-generating investments create business from which the dealer can readily profit, but there remains for the manufacturer the problem of charging its dealers for the additional custom. The simplest way to do so is by incorporating the charge for the manufacturer promotional effort into the wholesale price of the good. That is, the manufacturer offers the dealer a tie-in sale—the physical product together with a set of likely customers for that product. A problem with this tie-in arises if the dealer is able to benefit from the manufacturer's promotional effort while avoiding the promotional charge. If, for example, the additional customers are generated by advertising investments, the promotional charge is avoided if the dealer substitutes a similar, but unadvertised, brand for the advertised product. Exclusive dealing, by preventing this sort of substitution, provides the manufacturer with a property right to his promotional investment.

If the dealer's recommendation carries little or no weight with these potential customers, the manufacturing firm does not face a problem in enforcing its tied sale. For this reason, producers of cornflakes, orange juice, aspirin, and the like are unlikely to insist on exclusive dealing. If, however, the dealer's recommendation is of some weight in a consumer's purchase decision, the manufacturer's property right is more difficult to establish. Competing manufacturers can be expected to offer to the dealer a similar, but unadvertised or copied, product at a price reflecting only the opportunity cost of producing the good.[17] The dealers, given the opportunity to sell an essentially identical product to a customer generated by the manufacturer's efforts, will certainly choose to substitute the rival product. To do so harms neither the dealer's reputation nor his sales. If the customer decision is based entirely on dealer recommendation (once the customer has been attracted to the dealer's store), the dealer's margin will increase, as he will obtain the same price at retail for the substitute good while avoiding the information charge at wholesale. If the manufacturer's advertising or trademark has generated some amount of brand loyalty, there nevertheless exists the possibility of dealer retail price cuts on the substitute product sufficient to induce the customer to switch while still

[17] In the absence of rival firms with promotional investments at stake, each individual firm might prefer to follow a promotional, nonprice-cutting strategy. In such a case, no unadvertised substitute product would be available to dealers. However, as soon as one firm or a group of firms chose the promotional strategy, the incentive to "cheat" or "free-ride" on their promotion would presumably bring forth such substitutes, at least if there were difficulties in enforcing exclusive dealing causes. The issue is similar to that raised by collusion. All firms are likely to prefer the collusive solution to competition, but once the collusive agreement is established, some firms may choose to cheat.

leaving the dealer with an increased margin. In either case, the manufacturer of the promoted good suffers a reduction in the value of his now eroded property right to the customers which its advertising or design investments generated, with a corresponding diminution in the incentive to invest. It is this erosion that exclusive dealing is designed to forestall.

This argument does not apply if the promotional investment is purely brand specific. In such cases, the dealer will not be in a position to switch customers from brand to brand. The type of promotional investment that is jeopardized is that which is directly informational. An advertising investment which suggests that elderly persons, veterans, or some other group may wish to consider a particular type of insurance coverage, and that such coverage is available from Brand A's agents is likely to be usurped if Brand A's agents are permitted to recommend Brand B coverage. One likely consequence of a ban on exclusive dealing would be an increase in the trademark-specific content of advertising relative to more directly informational content.

The argument that the generation of intangible capital is often more efficiently carried out at the supplier level than by dealers is familiar from the literature on franchising.[18] The difference between exclusive dealing and franchising is primarily in the methods used to charge dealers for the intangible asset involved. In franchising, the intangible asset or goodwill provided the franchisee is relatively easy to identify. As a result, franchisors are often in a position to charge directly for their goodwill by means of franchise fees, rentals, or other such franchise obligations. In addition, many franchises are by nature exclusive and, as such, do not present the same set of problems faced by a manufacturer contemplating exclusive dealing. Franchising may, on occasion, involve tie-ins analogous to those of exclusive dealing in order to tailor the franchise fee to the franchisee's success and implicit utilization of the franchisor's goodwill. Similarly, limitations on exclusive dealing, by removing the manufacturer's ability to police a tie-in charge for intangible capital, may lead manufacturers to attempt separate up-front charges for that capital. Unfortunately for the manufacturers, these sorts of charges may encounter legal difficulties of their own and, as a result, bans on exclusive dealing clauses may simply yield a decline in intangible capital investment.

There are difficulties with the exclusive dealing approach to property rights protection. One principal drawback is that the dealer is charged a fee for each customer whether or not that customer was obtained as a consequence of the manufacturer's efforts. This is a problem in that

[18] See, for example, Richard E. Caves & William F. Murphy II, Franchising: Firms, Markets, and Intangible Assets, 42 S. Econ. J. 572 (1976).

dealer promotional efforts are apt to be attenuated by this fee. Any dealer who invests in sales effort will find that the manufacturer obtains the benefits of that effort through the tied-in charge for customers. Since dealer sales effort is in the manufacturer's interest generally, this disincentive to dealers presents a serious problem. One way in which it is commonly surmounted is by means of so-called cooperative advertising programs through which a manufacturer undertakes to provide advertising allowances to dealers based either on a dealer's sales or its actual advertising expenditures. The important point to note in this regard is that cooperative advertising programs associated with exclusive dealing do not mean that a manufacturer is financing the dealer's advertising. Quite the contrary. The manufacturer is rebating the charge made to dealers for the manufacturer's promotional efforts on sales attributable to dealer efforts. This is in no sense a subsidy of dealer advertising.

If the relation between the clientele created by a manufacturer's advertising and the advertising itself is less direct than depicted above, other ancillary restraints may be necessary to protect the manufacturer's property right. For example, if the good in question is a repeat-purchase item, at least some portion of its existing users can be expected to return to the dealers from whom they purchased the good initially. The contribution of the manufacturer's intangible capital to generating the initial sale will yield returns based on these repeat sales as well, but only if the dealer maintains its exclusive dealing relationship with its initial supplier. While this manufacturer-dealer stability could be guaranteed by means of long-term contracts, such contracts raise significant problems for manufacturers of policing unsuitable dealers and, perhaps more important, prevent dealers from shopping among competing manufacturers.[19] When short-term contracts are agreed upon, manufacturers may impose additional restraints to limit dealer free-riding on manufacturer goodwill. These restraints can include warranty restrictions and limitations on the dealer's ability to service the product. Warranties may require that the customer register directly with the manufacturer in order that lists of likely repeat customers can be obtained independent of the dealers. Continued customer contact with the manufacturer can be encouraged by refusing to deal in spare parts, thus requiring that service be carried out by the manufacturing firm. Finally, manufacturers may choose to impose inventory clauses by which the dealer's inventory of unsold products re-

[19] Nothing in the argument above prevents a manufacturer from agreeing to supply all dealers who are willing to sign exclusive contracts. Nevertheless, since some form of manufacturers' intangible capital is at issue, it may be necessary for manufacturers to police dealers, so long as dealer services and manufacturer reputation are complementary.

verts to the manufacturer when the relationship between manufacturer and dealer is terminated.[20]

Cooperative advertising, warranty registration, and repair restrictions are examples of vertical restraints ancillary to exclusive dealing that are adopted in order to charge dealers more efficiently for manufacturer promotional efforts. In addition to these restraints, other vertical restrictions may also be observed in conjunction with exclusive dealing owing to a similarity in the necessary conditions for their existence. Recall that a requirement of exclusive dealing is the possibility of a dealer switching customers generated at the manufacturer's expense to a substitute product, one with a wholesale price reflecting only its production costs. In this way, the dealer obtains the benefit of a manufacturer's promotional investment while avoiding the charge levied for that investment. The requisite dealer ability to divert customers from the promoted or advertised brand implies that the dealer provides at least some services which consumers find of value. These services may range from a simple act of certification indicated by the dealer's willingness to stock a particular product to the provision of a competent sales force prepared to offer informed guidance to a consumer's purchase decisions. The more elaborate is the dealer's role in influencing the consumer's purchases, the more likely it is that competing no-frills dealers will arise to free-ride on the full-service dealer's service provision. Manufacturers can prevent such free-riding through grants of exclusive territories to selected full-service dealers. Because the manufacturing firm's vulnerability to erosion of its property right to the benefits of its own promotional expenditures is strongest precisely when dealer services and recommendations are heavily relied on by consumers, it should not be at all surprising that exclusive dealing and exclusive territories are so often found together.

When exclusive territories occur without exclusive dealing, one can anticipate that the manufacturing firm in question has not amassed any significant intangible capital. In *Sylvania,* for example, the manufacturer produced television sets which were not well known to customers, having attracted an insignificant market share. Though Sylvania televisions were advertised, floor traffic at a particular television retailer probably depended more on that retailer's own advertising and stable of leading brands than on the influence of Sylvania's promotion. One would expect

[20] Manufacturers may have a separate motive in requiring that purchasers of their products register with them directly, namely, the prevention of fraudulent warranty claims. The fraud-prevention argument does not explain why manufacturers would wish to prohibit repair services provided by either independent firms or their own dealers. Indeed, manufacturers are likely to prefer competitive provision of such services. Therefore, when warranty registration is combined with limits of service, the property rights argument seems preferable to one based on fraud prevention.

exclusive dealing of television sets to be more likely for market leaders such as Zenith and Sony than for Sylvania.

Similarly, exclusive dealing may occur without exclusive territories, but only if dealer services, while important, are not easily shared by competing retailers. Examples of this circumstance would include cases where the cost of traveling to an additional supplier was high relative to the service charge included in the price of the good at the full-service dealer. In addition, since resale price maintenance is a partial substitute for territorial restriction, one could find exclusive dealing coupled with RPM in lieu of exclusive territories. Finally, exclusive dealing may be adopted in the absence of territorial restrictions when the dealer is close to being an employee of the supplier. A supplier which bears the fixed charges of a dealership is unlikely to permit that dealer to offer its services to rival suppliers at their marginal cost.

The manufacturer's property rights argument developed in this section has the advantage of providing a constructive explanation of exclusive dealing without the need to resort to an anticompetitive motivation or to the apparently incorrect dealer-services argument. Its relevance can best be checked by application to actual instances of the use of exclusive dealing requirements. Accordingly, the following section considers a series of cases and industries where exclusive dealing is of some importance.

IV. Examples

Exclusive dealing has the distinction of having been singled out from other trade practices for special treatment under the Clayton Act. Section 3 of that statute expressly prohibits exclusive dealing subject to the standard proviso that the practice be found "substantially to lessen competition or to tend to create a monopoly."[21] In addition, the Federal Trade Commission has occasionally pressed for provisions invalidating exclusive dealing clauses under its blanket authority provided by section 5 of the Federal Trade Commission Act. This section considers a case decided under the Clayton Act as well as an industry in which exclusive dealing, though prevalent, has not been attacked, probably in consequence of its coexistence with a large set of multiline dealers.

A. *Dress Patterns*

Standard Fashion Co. v. *Magrane-Houston Co.* (258 U.S. 346 [1922]) was one of the earliest cases to be decided under section 3 of the Clayton Act. It is of particular interest because it has been cited by some com-

[21] Clayton Act, 15 U.S.C. § 3, 14 (1970).

mentators as an example in which the exclusionary effect of exclusive dealing may have been an important economic issue.[22] The case, which claimed breach of contract, involved a suit by the leading producer of dress patterns, Standard Fashion, against a Boston dry-goods store. The breach charged was a technical matter—Magrane-Houston had switched to the McCall Company for its patterns and had provided Standard Fashion with insufficient notification of the change. The district court decision held that the Standard Fashion contract was in violation of section 3 of the Clayton Act, since "[i]f the plaintiff could make a contract like the one under consideration with all the proprietors of retail dry-good stores in this district, it would have a complete monopoly of the sale of patterns in it, and there is nothing in the contract to prevent it doing this, or even covering the whole state of Massachusetts, or the whole country."[23] The Circuit Court concurred and ruled that the exclusive dealing clause was, in fact, "obnoxious to the Clayton Act,"[24] and its decision was affirmed by the Supreme Court.

The decisions of the courts were based on the perception that the exclusive dealing clauses required by Standard Fashion had, if not actual, then at least incipient exclusionary effects. Standard Fashion and its affiliated companies had sewn up a rather considerable portion of the market by means of its contracts: Of the approximately 52,000 dress pattern outlets in the United States, roughly 40 percent were bound to Standard Fashion or an affiliate through an exclusive dealing clause. The Supreme Court quoted the Circuit Court's opinion favorably in this regard: "The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands of small communities amount to giving such a single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue may tend to facilitate further combinations, so that the plaintiff, or some other aggressive concern, instead of controlling two fifths, will shortly have almost, if not quite, all the pattern business."[25]

[22] See note 13 *supra*. See also Robert Bork, The Antitrust Paradox 307 (1978). Bork's arguments concern Standard Fashion's advantages owing to its broad pattern line. It is difficult to see how such arguments explain Standard's exclusive dealing requirement, though Bork's comments on the weakness of the barrier to entry interpretation of exclusive dealing are certainly well taken.

[23] Standard Fashion Co. v. Magrane-Houston Co., 254 F. 493, 500 (D. Mass. 1918).

[24] Standard Fashion Co. v. Magrane-Houston Co., 259 F. 793, 798 (1st Cir. 1919).

[25] Standard Fashion v. Magrane-Houston Co., 258 U.S. 346, 357 (1922). The Court's concern about a pattern manufacturer obtaining a monopoly in small communities was

Careful consideration of these contracts suggests that their exclusionary impact was likely to be small. A picture of the typical contract and its variants emerges from a series of cases litigating the performance of pattern contracts in the period prior to the passage of the Clayton Act.[26] Contracts appeared in general to run for two years. At the expiration date, a contract was to be terminable by either party on three-months notice. The pattern manufacturer would agree to provide the dealer, generally a dry-goods store, with an inventory of its new patterns once every six months. In addition, the manufacturer would provide pattern books or catalogs to be consulted by customers within the dry-goods establishment and would prepare pattern pamphlets for sale to customers. The pattern pamphlets described the pattern line in abbreviated form and sold at retail for the price of a pattern. For its part, the dealer agreed to handle one pattern line exclusively, to provide the pattern department with a suitable, generally first-floor location, to furnish a "lady attendant" to assist customers, and to keep its pattern department well stocked. The latter provision could take either the form of a minimum inventory[27] or, in the case of a smaller manufacturer, a requirement that the dealer replenish its stock weekly by reordering all patterns sold during the week.[28] In addition, the retailer agreed to resale price maintenance. Dealers were required to sell the pattern at the price stamped on its face. The wholesale price paid to the pattern manufacturer was ordinarily set at one-half of the retail price. A portion of a dealer's inventory became obsolete once every six months when a new line was issued by the pattern manufacturer. The manufacturer agreed to buy back the dealer's remaining inventory of discontinued patterns at that point at a price equal or close to the wholesale price. This buy-back provision also applied to the entire dealer inventory in the event that either party chose to terminate the contract.

There are several reasons to doubt the exclusionary effect of these contracts. Their two-year duration was relatively short and seems to have

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surely misplaced. In the first place, consumers could obtain patterns through the mail. The leading manufacturers conducted a mail-order business which relied on company-controlled fashion magazines to display their products. In addition, patterns were available from the mail-order houses, though their offerings tended to be more limited and less style conscious than those of the pattern manufacturers. More important, the monopoly in a small community, if any, would be that of the dry-goods store. Pattern manufacturers could be expected to compete to have their lines adopted by such outlets.

[26] Butterick Publishing Co. v. Fisher, 89 N.E. 189 (Mass. 1909).

[27] Magrane-Houston was required to maintain a minimum inventory of $1,000, that is, in excess of 10,000 patterns. The minimum inventories required appeared to depend on the size of the retailer, ranging upward from $100.

[28] Peerless Pattern Co. v. Gauntlett Dry Goods Co., 136 N.W. 1113, 1114 (Mich. 1912).

been chosen to coincide roughly with the expected life of a pattern. The expiration dates of the contracts were staggered so that a new entrant would have been in a position to pick up outlets from rivals rather rapidly. In smaller communities with limited outlets for patterns, the pattern makers occasionally granted exclusive territories as an inducement to leading dry-goods merchants, which implied that other stores may have been available and presumably anxious to carry the line of a competing pattern manufacturer.[29] If these considerations suggest that exclusive dealing was unlikely to exclude rival pattern manufacturers, the willingness of smaller pattern companies to engage in exclusive dealing of their own indicates that the source of the practice was other than a desire to erect entry barriers.[30]

There are two sorts of evidence that exclusive dealing did not have an exclusionary effect in the dress pattern business. The first is contemporary and consists of reports of competition among pattern manufacturers for desirable locations. This competition took place through variations in the terms of sale offered to dry-goods stores. The second piece of evidence is provided by the postdecision experience of the industry. Had exclusive dealing served to hold back potential entrants, the industry should have looked much different subsequent to the ban on exclusive dealing clauses. In fact, the Butterick Company—Standard Fashion's owner—performed poorly in the wake of the order. The Standard Fashion line was dropped in the late nineteen-twenties, and new management was hired to revitalize its Butterick line. It would be a mistake, however, to attribute Butterick's troubles to the lack of exclusive dealing. A more likely cause of its decline was a technological advance by McCall's: the introduction in 1920 of a new process capable of producing printed patterns. Previous patterns had all been perforated. The McCall's printed pattern was an immediate success, at least if one credits the McCall Corporation annual report, and McCall's sales and representation in dry-goods stores grew rapidly subsequent to their introduction.

New entry did occur in the pattern business in the wake of the Supreme Court's decision: Simplicity Pattern Company was formed in 1927. Despite the technological change in the pattern business and this soon to be significant new entrant, the basic structure of the pattern industry was not

[29] See Butterick v. Fisher, 89 N.E. 189, 191 (Mass. 1909). It should be noted that in larger communities, this was not the case. Standard Fashion had contracts both with Magrane-Houston and with the R. H. White Co. located across the street. See Standard Fashion v. Magrane-Houston Co., *supra* note 23.

[30] Peerless and the McCall Company both used exclusive dealing clauses, though McCall's may have modified its attitude in about 1913.

markedly altered with the passage of time. In *Standard Fashion,* the Court had been concerned about the 40 percent share of dress pattern outlets which Standard and Butterick had locked up through exclusive dealing. The next available snapshot of the industry's structure comes with a forty-year lag in *FTC* v. *Simplicity Pattern Co.* (360 U.S. 55 [1959]). This case contains evidence that, by the mid-1950s, Simplicity had captured a market share in excess of 50 percent when measured in units, and close to 50 percent when measured in dollar sales.[31] This was not just a transitory phenomenon. In 1975, Simplicity was reported to have a 50 percent share, McCall's captured 35 percent, and Butterick accounted for the remaining 15 percent.[32]

This discussion indicates that exclusive dealing could not have been expected to serve as a barrier to entry; that it was not, in fact, responsible for the pattern industry's high level of market concentration and, given its widespread use, that it was apparently adopted by pattern manufacturers with some other purpose in mind. That purpose is suggested by the argument advanced above: Exclusive dealing was employed to prevent erosion of a tie-in charge. Pattern prices imply that such a tie-in charge was present in the wholesale price set charged to dealers. Sears, Roebuck and Co., in its mail-order catalog, offered a limited selection of patterns advertised as having been manufactured by a leading pattern manufacturer. Even allowing for Sears's claim that its five-cent pattern price afforded Sears absolutely no profit, it seems unlikely that the Sears price was below the marginal cost of producing a pattern. The wholesale price charged to a dealer was nevertheless at least 50 percent greater than that Sears retail price.[33] This price differential can be taken as a lower-bound estimate of the tie-in fee.

What manufacturer investment was the tie-in designed to recoup? Each pattern manufacturer invested a considerable amount in the design of its pattern line. The pattern manufacturers could not simply copy the styles set by the ready-to-wear industry, as that industry was in its infancy. They were themselves style-setters. It was not, however, reasonable to expect that each pattern design within a broad pattern line would be equally successful in catching the public's fancy. Some of the pattern designs were likely to be very successful, even while many others lan-

[31] Simplicity priced its pattern lower than its rivals. See F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 59 (1959).

[32] Alterations Time at Simplicity Pattern, 144 Financial World, Aug. 20, 1975, at 17.

[33] The Sears price is from the 1902 Sears catalog. Pattern prices at that time apparently ranged from fifteen to twenty-five cents at retail, implying wholesale prices of seven and one-half cents and up.

guished. The inventory repurchase clauses in the manufacturer-dealer contracts ensured that dealers were not charged style charges for unsuccessful designs. The problem for the pattern manufacturers was one of protecting their property rights to successful pattern designs. These rights were certainly in jeopardy, for once a design was stamped as successful, it could easily be copied by rivals. A rival could then have offered an essentially identical pattern to dealers at a reduced price which reflected only production costs. The frequency of reordering of successful patterns—weekly in at least one case—combined with the multiyear life of a successful design made this pattern substitution a very real possibility.

The necessary condition for a dealer to have behaved opportunistically in regard to the pattern company's design investment is for it to have been able to switch customers to similar patterns offered by rivals. Had customers simply selected patterns off the shelf, this condition would not have been met. The large pattern inventories held by dealers, combined with the need to reorder frequently, ruled out this form of marketing. The attendants provided by the retailers served to keep the inventories in order, but at the same time allowed dealers to switch customers from brand to brand. Once a customer had chosen a particular style from a pattern catalog or pamphlet, it was a simple matter for an attendant to provide a copy from a rival brand. The perforated patterns themselves were virtually indistinguishable, so that a customer should have been indifferent to the brand of pattern as long as the design was as illustrated. Dealers would certainly have preferred to handle more than one line of patterns. A single attendant could easily have supervised the additional inventory, and the bulk of the cost of that inventory was borne by the manufacturer. Even if the pattern prices charged by rival manufacturers had been identical, the dealer would have been in a position to play one manufacturer off against the other. Pattern prices did, however, vary, with fast-selling designs commanding a premium. Accordingly, exclusive dealing was likely to have been adopted in order to protect a pattern company's design investment.

To the extent that retailers, and not the pattern manufacturers, set styles, the style charge appended to a pattern was inappropriate. This may explain the concessions offered by Standard Fashion to the leading New York City dry-goods store:[34] They served as a style-charge rebate. Style-setting retailers should also have been able to avoid exclusive dealing had they chosen to do so. There were, in fact, instances of special contracts which permitted dealers to carry more than one brand though, not surprisingly, these appear to have been rare.[35]

[34] See Standard Fashion Co. v. Siegel-Cooper Co., 51 N.E. 408 (N.Y. 1898).

[35] Standard Fashion Co. v. Magrane-Houston Co., 259 F. 793, 801 (1st Cir. 1919).

Once exclusive dealing had been outlawed, the pattern manufacturers could have been expected to respond in two ways. Insofar as possible, they would have imposed fixed charges on dealers that wished to carry their line, charges designed to reflect the value of the design component of a pattern. The popularity of exclusive dealing clauses suggests that this option was inferior to a tie-in charge. The tie-in had the advantage of flexibility, levying the largest style charges in areas where a manufacturer's designs were particularly popular. To the extent that fixed charges proved to be an inferior alternative to exclusive dealing, manufacturers should have reduced the style component of their lines. Their options included reducing the variety of patterns offered and responding to styles set elsewhere as opposed to defining style themselves. The success of Simplicity Pattern is consistent with the declining stylishness of the pattern industry. Simplicity concentrated on unadorned, utilitarian designs and priced its patterns below its more fashionable rivals. In view of the rising income levels in the 1920s and the growth of the ready-to-wear industry, it is impossible to attribute Simplicity's success simply to its adaptation to the lack of exclusive dealing.

Simplicity's history contains evidence of the other likely impact of the exclusive dealing ban, namely, the imposition of fixed charges. Indeed, the FTC action against Simplicity arose from these charges.[36] A fabric store wishing to carry Simplicity Patterns was required to purchase from Simplicity special pattern cabinets and display furniture of an expensive design. Had this furniture not included a style charge in its price, Simplicity would presumably have been indifferent if the fabric store had chosen to purchase equivalent furniture from its rivals or directly from the furniture manufacturer. In addition, the fabric stores were charged for their display catalogs, now issued monthly. According to the evidence cited in the Supreme Court opinion, these charges were large relative to the dollar volume of the generally low pattern volume fabric stores. There was thus considerable potential for recovering design investments through their use.

In summary, though the *Standard Fashion* case has been identified as one in which the exclusionary effect of exclusive dealing may have been an important issue, on closer examination, this does not appear to have been the case. The industry structure which emerged in the wake of exclusive dealing was as concentrated as that which preceded the *Standard Fashion* decision. Examination of the exclusive dealing contracts leads to the conclusion that they were neither likely nor intended to

[36] Simplicity was accused of discriminating in favor of variety stores by not imposing its up-front charges. This is consistent with our argument, since these stores did not provide attendants and, thus, were not in a position to shift buyers from brand to brand.

have excluded rivals. Instead, their purpose seems to have been to protect pattern company investment in dress design. In the absence of protection for such investments, the industry responded by moving to less style-conscious designs and by imposing fixed charges on dealers in a position to have eroded design investments. Thus, the evidence from the dress pattern industry supports the view that exclusive dealing was adopted not to limit competition, but rather to protect a manufacturer's property right.

B. Insurance

The coexistence of exclusive and independent agents in the insurance market allows insurance to provide a useful test of the suppliers' property rights theory of exclusive dealing. This section contains two pieces of empirical evidence that support the view that exclusive dealing is designed to protect a supplier's right to profit from its intangible capital investments. The first is a comparison of the incidence of exclusive dealing clauses across various types of insurance coverages. It is shown that insurance is more likely to be marketed through exclusive agents the more diffuse the nature of the customer clientele for a particular type of coverage. The variation in the success of exclusive dealing by type of coverage is interpreted as resulting from differences in the relative efficacy of salesman-initiated contacts and advertising. Direct evidence of the importance of exclusive dealing in protecting suppliers' property rights is provided by a comparison of advertising with premium ratios of exclusive agent companies and those marketing through independent agents. This comparison indicates that advertising is much more important for those companies which rely on exclusive dealing.

Insurance is marketed through parallel multiline and exclusive dealing channels.[37] The multiline dealers are so-called independent agents, and their mode of operation is termed the American Agency System (AAS). The parallel-marketing channel is employed by companies known as direct writers. These companies offer policies to consumers either through exclusive agents or through their own employees, also termed direct writers. There appears, in general, to be little difference between agents in the employ of the company and exclusive agents, and so these two sorts of agents will be termed exclusive agents for our purposes. Whether he or she is an exclusive agent or a company employee, the agent typically receives a commission on new policies and a smaller commission on renewals. "Expirations," records of the expiration dates of the policies of

[37] Insurance is also marketed through mail and telephone solicitation, but systems that do not involve direct customer-agent or customer-company employee contact will not concern us here.

a company's existing policyholders, are the property of the insurance company, not the agent.

This company-agent relationship is in marked contrast to that which governs dealings between independent agencies and their associated companies.[38] Independent agents are generally granted higher commission rates on new policies than are exclusive agents, and the disparity in commission rates is widened on renewals, since the independent agent's commission is unaffected by whether the policy is new or renewed. The ownership of expirations is also very different. Expirations are the sole property of the agent, with companies agreeing not to contact their former policyholders in the event that the company-agent relationship is terminated.[39]

The differences between exclusive and independent agency contracts are readily explained by the type of marketing effort which characterizes each system. Each independent agency is expected to develop its own clientele. As a secondary function, these agents are also expected to provide services of various sorts to policyholders, services which, in some cases, may be significantly greater than those provided by exclusive agents.[40] In contrast, exclusive agents are more passive, functioning as policy writers rather than policy "producers," the industry's term for agents generally.

The lower commission rates of exclusive agents are, thus, readily explained. These agents obtain customers in consequence of the insurance company's reputation and promotional efforts and accordingly are "charged" for this customer traffic by paying a higher price to their supplier for the insurance policies they write. The insurance company pays its agents a commission which constitutes a service fee for their initial efforts in writing a policy. The smaller commissions paid on renewed policies cover the continuing services which agents are expected to provide to policyholders. In contrast, the independent agency provides its own sales effort and collects a return on its promotional investment

[38] The term "independent agency" is used here somewhat loosely to include both true agencies, those representing one or more insurance companies, and brokerages. The brokerages are nominally retained by customers to obtain their desired coverages by shopping among insurance companies, but in practice the two legal forms are virtually indistinguishable to both customers and insurance companies.

[39] These characterizations of company-agent relationships are based on B. L. Webb *et al.*, Insurance Company Operations, chs. 2 & 3 (1978).

[40] See Paul L. Joskow, Cartels, Competition and Regulation in the Property-Liability Insurance Industry, 4 Bell J. Econ. 375, 403 (1973). Joskow argues that the customer services provided by independent agents are inconsequential, and that the American Agency System exists chiefly in consequence of insurance-rate regulation which forces companies to compete by nonprice methods.

through its higher initial commission rates and its continuing customer control provided by the agency's ownership of expirations.

Why is exclusive dealing required by a subset of insurance companies? Once again, the purpose of exclusive dealing is to protect a tie-in charge for promotion. Though there is some evidence that direct writers offer policies at lower premium rates than AAS companies,[41] the promotional charges of exclusive dealing companies are vulnerable to erosion so long as the "wholesale," or net-of-commission prices of their policies are greater than those of AAS insurers. The lower initial commission rates and especially the reduced rates for renewals earned by exclusive agents suggest that they would choose in many instances to place insurance with alternate companies if given the opportunity. The fact that some agencies serve as brokers, representing the consumer in shopping for coverage, suggests that agents would be able to influence the customer's choice of insurance company in the absence of an exclusive dealing requirement. Hence, exclusive dealing is adopted to protect insurance company promotional investments.

This analysis has several clear implications. Since supplier-provided promotion is the source of exclusive dealing restrictions, exclusive dealing companies should be most successful in marketing lines of insurance for which advertising is efficient relative to direct salesperson contacts as a tool for contacting potential customers. The lines into which direct writers have achieved the deepest penetration should be those for which services provided by agents and, hence, commission expenses are of lesser importance than other marketing expenditures. Finally, promotional expenditures of insurance companies should be more important as a fraction of premiums for direct writers than for AAS companies.

Though direct writers and AAS companies coexist in the insurance market, their relative importance varies markedly according to type of coverage. Table 1 reports the market share of independent agency companies by line of insurance. These data show clearly that the independent-agency system has proved far more resistant to direct writer incursions in the business lines than in the personal lines. The contrast is even more distinct when one includes life insurance, a personal line marketed almost universally through exclusive agents. This disparity between personal and commercial lines is probably a consequence of the greater relative efficiency of company-level as opposed to agency-level expenditures in reaching customers for the personal lines. Potential business customers for particular coverages are more readily identified than cus-

[41] *Id.* at 375, 403; and H. E. Frech III & Joseph C. Samprone, Jr., The Welfare Loss of Excess Nonprice Competition: The Case of Property-Liability Insurance Regulation, 23 J. Law & Econ. 429, 438 (1980).

TABLE 1
MARKET SHARES OF COMPANIES WHICH
OPERATE THROUGH THE AMERICAN AGENCY SYSTEM, 1975

Type of Insurance	Independent Agency Market Share, 1975 (%)
Private passenger automobile bodily injury liability	47.4
Homeowners' multiple peril	65.8
Workers' compensation	75.9
Inland marine	83.5
General liability	85.6
Commercial automobile bodily injury liability	88.8
Commercial multiple peril	93.1
Ocean marine	93.2
Surety	96.3

SOURCE.—Best's Executive Data Service, as reported in B. L. Webb *et al.*, Insurance Company Operations tabs. 2-6 through 2-11 (1978).

tomers in the market for personal lines, so that sales effort can be targeted at likely prospects. In addition, business coverages are likely to be more diverse than the personal lines and so may require more agent service, the strong suit of the independent agents.

Some evidence as to the differences in expenditure mix across lines is provided by the regression estimates in Table 2. These estimates relate the independent-agency market shares shown in Table 1 to measures of commission and other policy-acquisition expenditures by line incurred by stock-underwriting companies. The expectation is that coverage lines which require extensive dealer services, as indicated by high commission expenditures, will be marketed predominantly through independent agents. When other acquisition expenses—including advertising—are relatively large, exclusive dealing is expected to be attractive. The results presented in Table 2 support this view.[42]

[42] The expense variables in Table 2, eq. (1) are from Best's Aggregates & Averages (1975). They are restricted to stock companies in an attempt to purge those variables of the influence of exclusive dealing companies, the great bulk of which are organized as mutual companies. The expense variables are intended to characterize the various lines according to intrinsic differences in marketing costs that are encountered irrespective of the type of marketing system employed. To the extent that the data reflect the operations of direct writers, the causation hypothesized in the Table 2 estimates may be reversed. The problem arises because a few of the direct-writer companies report their payments to agents not as commissions but as salaries included in other policy-acquisition costs. The inclusion of a direct writer in the New York data may explain the seemingly stronger relations in eq. (2). The bias is probably not of much importance in eq. (1) simply because the stock company data are dominated by AAS companies. Data for later years would more likely be biased owing to the rapid rise of Prudential Insurance Company from a new entrant to an important force in the industry. Prudential, a direct writer, appears to report its agent payments as salaries.

TABLE 2
ESTIMATES OF THE RELATION BETWEEN INDEPENDENT-AGENCY MARKET SHARES AND POLICY-ACQUISITION EXPENDITURES BY TYPE OF INSURANCE (OLS Estimates)

	COEFFICIENTS: EXPENDITURE TO PREMIUM RATIOS				
	Stock Companies (Best's)		N.Y. State Insurance Department		
EQUATION	Commissions	Other Acquisitions	Commissions	Other Acquisitions	CONSTANT
1	3.03 (3.84)	−9.38 (−3.25)	. . .	. . .	74.34 (7.66)
	R^2 = .67				
2	. . .	. . .	4.29 (6.14)	−12.88 (−5.33)	59.88 (7.73)
	R^2 = .76				

SOURCES.—Data for stock company expenditures are from Best's Aggregates & Averages, Property-Liability, 44 (1975). Data for the N.Y. State Insurance Department are from 1974 Loss and Expense Ratios of the Twenty Largest Stock Insurers Licensed in New York, New York State Insurance Department, as reported in B. L. Webb *et al.*, Insurance Company Operations tab. 2-1 (1978).

NOTE.—Figures in parentheses are t-values.

Finally, there is direct evidence that companies which market through independent agencies spend a smaller proportion of the premium dollars on advertising than do the direct writers. Data for advertising expenditures per dollar of net premiums written in 1974 were collected from the 1975 property-liability edition of *Best's Aggregates & Averages* for thirty of the largest property-liability insurance companies and groups.[43] Table 3 reports a comparison of the mean advertising-premium ratios of exclusive dealing and AAS insurers. The differences are statistically significant at the 5 percent level or better and are in the expected direction. It is clear that the exclusive dealing companies are much more heavily reliant on advertising than are other property-liability insurers.

These results have an interesting implication for the welfare analysis of advertising. Several commentators have argued that direct writers are more efficient providers of insurance than AAS system companies.[44] Were it not for the need to protect suppliers' property rights, these latter companies could operate as well through independent agencies simply by expecting less agent promotion of their policies and providing commensurately lower commission rates. The advertising that the direct writers purchase forces them to use the independent-agency system but also permits them to avoid the high independent-agency commission rates that serve as service charges for agent-initiated promotion. If the direct writers are indeed more efficient in promoting their products, the resulting lower policy premiums are a direct consequence of the superiority of advertising over agent sales effort. Advertising is, thus, efficient in this industry relative to other promotional techniques, irrespective of the content of that advertising. It is the direct writers' ability to require exclusive dealing that permits the use of this more efficient system of selling.

V. Conclusion

The argument in this paper suggests that exclusive dealing is not likely to be adopted as a device which serves to erect significant entry barriers. Its purpose is, instead, to protect suppliers' tie-in charges to dealers for the benefits of the supplier's intangible capital investments. Exclusive

[43] Two of the largest thirty-two property-liability insurers were excluded, one because it was a reinsurance company, and one (Farmer's Group) because of missing data. Farmer's Group is a reciprocal, a pool of coverages written by a number of much smaller companies. Insurance groups were represented in the data by the advertising-to-premium ratio of their largest component company. The type of marketing system employed was obtained from Webb *et al., supra* note 39, whenever possible. This source was supplemented with information from the 1975–76 Yearbook of the Insurance Accounting and Statistical Association as necessary.

[44] See Joskow, *supra* note 40; and Frech & Samprone, *supra* note 41.

TABLE 3
COMPARISON OF ADVERTISING/PREMIUM RATIOS: DIRECT WRITERS AND AAS INSURERS

Type of Marketing (number of firms)	Mean Advertising/Premium (SD)	t-statistic for Difference between Means
	Top 30 Insurance Companies and Groups	
Direct writers (7)	.57 (.30)	4.511
AAS insurers (23)	.19 (.16)	
	Top 15 Property-Liability Insurers	
Direct writers (4)	.56 (.30)	2.493
AAS insurers (11)	.26 (.16)	
	Next 15 Largest Property-Liability Insurers	
Direct writers (3)	.58 (.35)	4.008
AAS insurers (12)	.13 (.12)	

dealing will, indeed, be exclusionary, but that exclusion is required if the corresponding capital investment is to occur. It is possible that this exclusion could serve to impair competition, but this outcome is likely to be significant only when the manufacturer requiring such a contract is very nearly a monopolist or when, as in *Fashion Originators' Guild,* the exclusive dealing is enforced by means of a horizontal combination. In either of these cases, more direct remedies than an attack on exclusive dealing are available. If *Standard Fashion* is a guide, outlawing exclusive dealing as practiced in a highly concentrated industry is unlikely to have an important structural effect. When a horizontal combination to enforce exclusive dealing is involved, the agreement among rivals, rather than the exclusive dealing which results, should be the issue. Our analysis suggests that, even in this latter case, a rule-of-reason standard which recognizes the efficiency effects of the exclusive dealing that results from the combination may be preferable to a flat prohibition on all such agreements.

Though one might argue that the increased promotional effort facilitated by exclusive dealing need not always be socially beneficial, we have seen in the insurance case that such promotion supplanted dealer sales efforts of a less efficient form and may have translated into lower premium rates for consumers. Whether the promotion facilitated by exclusive dealing is regarded as desirable, it seems unlikely that the elimination of manufacturers' ability to constrain dealers to sell their products exclusively limits competition in any important sense. From the point of view of the antitrust laws, the exclusive dealing ought therefore to be treated as legal, per se.