Brother, may I?: the challenge of competitor control over market entry

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ABSTRACT

Those concerned with restrictions on innovative technologies and business models often decry the stultifying effects of a •Mother, May I?• approach, whereby the innovator needs government permission to enter a market. These are worthy concerns that regulators ought to take seriously. This article focuses on a related issue, which the authors call the •Brother, May I?• problem or the challenge of competitor control over market entry. This problem arises when would-be entrants are effectively required to obtain permission from incumbent competitors to enter or expand within a market.

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intellectual property area,[6] by foreign antitrust agencies. Rather, this article argues that firms should not have to obtain their competitors• permission to compete and that the FTC•s enforcement and advocacy efforts should seek to eliminate such anti-competitive market distortions. Interestingly, three recent victories by the FTC in the courts,[7] North Carolina Dental, Phoebe Putney,[8] and McWane,[9] all in some way involved the need to seek the permission of competitors to enter a market, and this article addresses each case in turn.

This article proceeds as follows. Section II addresses the Supreme Court•s recent decision in North Carolina Dental and its potential impact on state licensing boards, including in particular those comprised of active participants in the markets regulated by such boards, as well as the licensing of professionals more generally. Section III discusses the Court•s 2013 decision in Phoebe Putney and argues for the elimination of state certificate-of-need (CON) laws, which, among other things, prevented the Commission from obtaining a complete remedy in the Phoebe Putney merger matter. Section IV explores the recent Eleventh Circuit decision in the FTC•s monopolization case against McWane Inc and its implications for exclusive dealing by monopolists. Section V concludes this article.

II. NORTH CAROLINA DENTAL AND STATE LICENSING BOARDS

One of the clearest examples of the •Brother, May I?• challenge arises in the state licensing of professionals. Here, our,„and the Commission•s,„concern has been that artificial and unjustified barriers to entry erected by some State licensing boards, including, in particular, those comprised of active participants in the very markets they regulate. This issue came to a head in the Commission•s successful Sherman Act section 1 case against the North Carolina Board of Dental Examiners (the Board).

A. North Carolina Dental

In North Carolina Dental, the FTC filed an administrative complaint, alleging that the Board,„through its dentist-members,„was •colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services•.[10] After deciding that whitening teeth constitutes the practice of dentistry, the Board issued letters to non-dentist providers, stating they were illegally practicing dentistry

6 See eg Maureen K Ohlhausen, Commissioner, US Federal Trade Commission, Testimony on •The Foreign Investment Climate in China• before the US-China Economic and Security Review Commission (28 January 2015) 5…6 (expressing concern that decisions by US antitrust enforcers are being interpreted in China as endorsing the essential facilities doctrine, a result that would devalue intellectual property rights around the world), https://www.ftc.gov/system/files/documents/public_statements/621411/150128chinatestimony.pdf, accessed 27 July 2015.

7 NC State Bd of Dental Exam•rs v FTC, 135 S Ct 1101 (2015) (North Carolina Dental).

8 FTC v Phoebe Putney Health Sys, Inc, 133 S Ct 1003 (2013) (Phoebe Putney).

9 McWane Inc v FTC, No 14-11363 2015 WL 1652200 (11th Cir 15 April 2015).

10 In re NC Bd of Dental Exam•rs, Dkt No 9343 Complaint at 1 (17 June 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf, accessed 27 July 2015. The Board consists of six licensed dentists, one licensed hygienist, and one •consumer member,• who is neither a dentist nor a hygienist. ibid ¶ 2.

without a license and ordering them to cease and desist.[11] The Board also issued letters to several third parties with interests in shopping malls, stating that teeth whitening services offered at mall kiosks are illegal.[12]

The Commission alleged that the Board•s activities constituted an unlawful restraint of trade under the standards governing section 1 of the Sherman Act and thus an unfair method of competition under the FTC Act.[13] The result of this concerted effort, as alleged in the complaint, was to deprive consumers of the benefits of price competition and increased choice provided by non-dentist teeth whiteners.[14]

Prior to the administrative trial in this matter, the Board filed a motion to dismiss, arguing that its conduct was protected by the state action doctrine. In a unanimous opinion written by then-Commissioner William Kovacic, the Commission held that •a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of the Midcal test to be exempted from antitrust scrutiny under the state action doctrine.•[15] That is, to benefit from state action immunity, the Board must show not only that the state of North Carolina has •clearly articulated and affirmatively expressed• a state policy in favour of regulation and against competition with respect to teeth whitening services, but that the Board•s activities„like those of private parties„are ••actively supervisedŽ by the State itself•.[16] The Commission further found that the Board failed to demonstrate that •its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board•s conduct into conduct of the state of North Carolina•.[17]

Following that ruling, as well as a trial on the merits, the administrative law judge found the Board had violated the FTC Act,[18] a decision subsequently affirmed by the full Commission.[19] In May 2013, the Fourth Circuit Court of Appeals denied the Board•s petition for review of the Commission•s order, affirming both the state action ruling and the finding of liability.[20] The case ended up at the Supreme Court, which

which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy the active supervision requirement in order to invoke state-action antitrust immunity[21].

A few aspects of the Court's opinion stand out. First, the Court reiterated the crucial role that antitrust plays in our economy, noting that "[f]ederal antitrust law is a central safeguard for the Nation's free market structure."[22] And, citing its recent decision in *Phoebe Putney* (another Commission victory in the state action area), the Court explained that, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication'"[23].

The Court also focused on the important issue of political accountability. As a threshold matter, the Court rejected the idea that State agencies, such as the Board, are sovereign actors that automatically qualify for State action immunity, as the State itself. The Court in *Parker v Brown*[24], in establishing the state action doctrine, recognized the importance of our federal system of government, including the sovereignty of the states. Thus, anticompetitive conduct is immunized only when it legitimately represents the State acting in its sovereign capacity. However, immunity for state agencies, the Court explained, "requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."[25] In other words, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own"[26].

The Court next contrasted state agencies with municipalities, which it has held are not obligated to meet the active supervision prong to benefit from state action immunity. In particular, the Court noted that "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market"[27]. Furthermore, municipalities tend to address issues "across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field."[28] State agencies controlled by market participants, the Court noted, are "more similar to private trade associations vested by States with regulatory authority" than to municipalities[29].

In ruling for the FTC, the Court also rejected concerns raised by the Board and several of its amici that allowing the C7426mi[(ac220)-.5 (r)-378.9 (C38.4503 Tbek

back at least to the Hippocratic Oath.[30] The Court further noted that, to the extent agency officials are concerned about antitrust damage claims, states may defend and indemnify those officials in the event of litigation.[31] Moreover, states can ensure Parker immunity is available to agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active supervision. Those two requirements and their underlying rationale, the Court found, should apply to the Board, just as they were held to apply to the medical peer review board in Patrick v Burget,[32] where the Court directed to the legislative branch any challenges to the wisdom of applying the antitrust laws to the sphere of medical care.[33] That is, any objections to the application of antitrust to the medical professions should be taken up with Congress, not than the courts.

was passed in 1890.[40] Thus, the State statutes that created, and conferred regulatory authority on, the Board •represent precisely the kind of state regulation that the Parker exemption was meant to immunize•.[41]

The dissent also took issue with the practical problems that the majority opinion may create for state regulatory regimes, maintaining that it is unclear what changes to state boards will be necessary in light of the Court•s decision. The dissent further identified several questions left unanswered by the decision, including: (i) •What is a •controlling numberŽ [of decision makers]?•; (ii) •Who is an •active market participantŽ?•; and (iii) •What is the scope of the market in which a member may not participate while serving on the board?•.[42] Finally, the dissent noted that regulatory capture of a state agency can occur in many ways and asked why the inquiry should be limited to the question of whether an agency includes active market participants.[43]

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The North Carolina Dental decision was a crucial victory for competition and consumers. Under our federal system, individual States can do a lot to meddle with the free market; that is their choice to make. However, States need to be politically accountable for whatever market distortions they impose on consumers.[44] Of course, with a nod to George Stigler•s insights from the 1970s, the North Carolina Dental Board•s conduct can be easily explained as rent-seeking behaviour by incumbents to fend off a new source of competition.[45] Where there is a benefit concentrated in the hands of a relatively small number of incumbent providers, in this case dentists, and the competitive harm is dispersed across all consumers of health care services, public choice theory predicts such incumbent exploitation of State licensing laws and regulations.[46] The adverse competitive results of such behaviour are manifest: some[47]

40 ibid 1119.
41 ibid.
42 ibid 1123.
43 ibid.
44 See eg FTC v Ticor Title Ins Co

those schemes, which could be and are applied to other types of boards, ultimate regulatory decisions are made by legislative committees, umbrella state agencies such as rules review commissions, or other disinterested state officials. And, of course, not every action of a regulatory board will need to be actively supervised; only those that potentially raise antitrust issues would require such attention. As a last resort, States can opt to indemnify individual board members in the event that antitrust damages are imposed on them.[54]

Looking at *North Carolina Dental* and *Phoebe Putney*, which is discussed in the next section, the state action area is one of the best examples of the Commission using its unique institutional features to guide the courts and others in the development of competition law towards better outcomes for competition and consumers.[55] Looking ahead, the Commission should continue to focus both its enforcement and competition advocacy efforts on anticompetitive licensing activities within the States. Nonetheless, the Commission ought to give the States some breathing room to respond to the changed legal landscape that they now face. It will take the States some time to evaluate and modify, if necessary, their licensing boards. In the meantime, as Chairwoman Ramirez announced at the ABA Spring Meeting in April 2015, the Commission has begun an effort to provide guidance to States seeking to satisfy the active supervision prong of the state action doctrine. The authors have had discussions with representatives from state attorneys general offices, and we hope to continue that dialogue in the future.

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More generally, the authors are hopeful that the States, while assessing the sufficiency of their supervision over licensing decisions, will also re-evaluate some of the excessive occupational licensing requirements they have adopted over the years. That is, as the States reconsider the composition and oversight of their regulatory boards, the authors recommend that they also take a very hard look at their occupational licensing regimes to see if they are on balance helping or harming their citizens.

Among the professions subject to state licensure requirements today are florists, interior designers, tour guides, barbers, hair braiders, and even •shampoo specialists•.[56] In fact, roughly 30 per cent of US workers are now required to obtain a

license to pursue their occupation.[57] Multiple studies have found that prices increase by as much as 33 per cent as a result of occupational licensing.[58] That might be tolerable if those price increases reflected improved quality; however, economic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than when it has improved the quality and safety of services.[59] Overall, the drag on the economy of excessive occupational licensing is counted in hundreds of billions of dollars annually.[60] Moreover, the increased costs of excessive occupational licensing falls most heavily on those least able to afford them.[61]

A particular concern is that the "Brother, May I?" aspect of occupational licensing can create unnecessary barriers to entry for entrepreneurs seeking to take their first step on the economic ladder. This is especially true for occupations that draw individuals who are just beginning a professional career. Licensing requirements, which often include educational components, can prevent lower-income workers, who may not be able to pay for additional education, from entering certain fields, even at the lowest rungs of the economic ladder.[62] A recently published study by the Goldwater Institute assessed the relationship between occupational licensing and entrepreneurship rates, including in particular rates for lower-income people, across the States.[63]

"License to Work: A National Study of Burdens from Occupational Licensing" (May 2012) (hereinafter IJ, "License to Work") <https://www.ij.org/licensetowork> accessed 27 July 2015.

57 See Morris M Kleiner and Alan B Krueger, "Analyzing the Extent and Influence of Occupational Licensing on the Labor Market" (2013) 31 J of Labor Economics 175–76 (findings based on 2008 survey conducted as part of Princeton Data Improvement Initiative).

58 See eg Morris M Kleiner, "Reforming Occupational Licensing Policies" (2015) The Hamilton Project 17–22 (hereinafter Kleiner, "Reforming Occupational Licensing") <http://www.hamiltonproject.org/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf>

Among other things, the study found that •the states that license more than 50 per cent of the low-income occupations had an average entrepreneurship rate 11 per cent lower than the average for all states, and the states [that] licensed less than a third had an average entrepreneurship rate about 11 percent higher after ad-

more directly„but rather the •need• for a new entrant into the market at issue, as determined by the state regulatory entity.[69] As discussed below, CON laws have outlived their intended use and now effectively serve primarily, if not solely, to assist incumbents in fending off competition from new entrants. The Commission and the

So far, so good for patients in Albany. The FTC complaint counsel resumed the administrative litigation that had been stayed pending the federal court proceedings. It did not take very long, however, before the agency recognized a potentially insurmountable hurdle to a successful resolution of this case: the Georgia CON laws. That is, even if the Commission could have established liability„and that seemed fairly likely, given the facts„the state CON laws would have prevented a divestiture of any hospital assets.

Now, the case took an admittedly circuitous route during its final 18 months. At first, the Commission issued a proposed consent that imposed on Phoebe Putney certain behavioural restrictions related to CON applications in the relevant geographic market, but no divestiture requirement.[75] The Commission later became aware of certain information in connection with the public comments on the proposed consent order, however, that made it second-guess its initial assessment of th CON laws• preclusion of structural relief. During this time, a newly formed health care entity, North Albany Medical Center, LLC (North Albany), filed a request for determination with the Georgia Department of Community Health (DCH), asking whether its potential acquisition of divested hospital assets would be permitted under the CON laws. North Albany obtained a favourable initial determination by DCH staff in June 2014. Thereafter, the Commission withdrew its proposed consent and sent the case back to administrative litigation.[76]

Unfortunately for consumers of hospital services in the Albany area, a state hearing officer subsequently ruled that the CON laws would apply to any divestiture that might take place in this matter.[77] The fact that the Albany region is deemed •overbedded• made it unlikely that any divestiture buyer could obtain the necessary CON approval to operate an independent hospital. After the DCH Commissioner made public comments supporting that finding, North Albany opted not to pursue an appeal and effectively dropped its bid to acquire any divested assets.[78] Thus, last March, the Commission reluctantly finalized its consent agreement with Phoebe Putney without a divestiture.[79]

I Phoebe Putney

What, then, are the takeaways from the Phoebe Putney matter? First, although it is of little solace to consumers in Albany, the Supreme Court decision narrowing the state action doctrine is a significant victory for competition principles and consumer welfare going forward. That decision, along with North Carolina Dental, represents the culmination of a decades-long effort by the Commission to narrow state action immunity from the antitrust laws„an effort in which one of the authors was proud to

75 See In re Phoebe Putney Health Sys Inc D 9348 Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, at 4…6 (22 August 2013) <https://www.ftc.gov/sites/

participate in several roles.[80] Second, *Phoebe* demonstrates the importance of obtaining preliminary relief when challenging hospital mergers in CON states. By maintaining the status quo, injunctive relief prevents the possibility of competitive harm—sometimes, as in *Phoebe*, irremediable harm—from occurring during the Commission's administrative proceedings and any appeals. Similarly, the outcome in *Phoebe* should give the Commission pause in challenging consummated hospital acquisitions in states with CON laws. Finally, this case is a stark reminder of the anticompetitive nature of laws that effectively give competitors veto power over new market entry.

The Commission—both on its own and jointly with the Department of Justice Antitrust Division (DOJ)—has long advocated that states consider the costs that CON laws may impose on health care consumers.[81] More specifically, the Commission has argued that CON laws "impede the efficient performance of health care markets", "create barriers to entry and expansion to the detriment of health care competition and consumers", and "weaken markets' ability to contain health care costs".[82] As a result, the Commission and its staff have expressed support for the repeal or narrowing of such laws.[83]

The antitrust agencies have put forth strong arguments against CON laws. First, the original reason for the adoption of state CON laws during the 1970s is simply no longer valid. Many of those laws trace their origin to a since-repealed federal mandate, the National Health Planning and Resources Development Act of 1974, which offered incentives for States to implement CON programmes. At the time, the

80 Commissioner Ohlhausen was a member of the State Action Task Force, which issued a report in 2003 recommending several means for the Commission to narrow the state action doctrine (see Federal Trade Commission, Office of Policy Planning

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federal government and private insurance reimbursed health care charges primarily on a •cost-plus• basis, which provided incentives for over-investment. CON laws were designed to address this skewed incentive. However, reimbursement methodologies that may in theory have justified CON laws have changed significantly, essentially eliminating the original justification for those laws.[84]

Second, CON laws appear to have generally failed in their intended purpose of containing health care costs. The agencies• advocacies have been grounded in large part on empirical studies of the impact of CON laws conducted by FTC economists.[85] Those studies have found that, rather than keeping health care costs down, CON laws and regulations lead to higher prices and expenditures.[86] For example, one study showed that if states substantially relaxed their CON programmes to subject fewer hospitals to review, annual hospital expenditures would decrease by 1.4 per cent, or approximately $1.3 billion.[87] Studies conducted by several independent commissions appointed by state legislatures to evaluate the impact of CON laws have reached similar conclusions.[88] These results, of course, are rather easily predicted by economic theory. Like any barrier to entry, CON laws prevent or limit the entry of firms that could otherwise provide higher-quality and/or lower-priced services than those offered by incumbents. In other words, output restrictions lead to higher, not lower, costs; they also result in higher profits for incumbent firms.

Another fairly predictable result of CON regimes is the rent-seeking behaviour pursued by incumbents who are able to exploit the regulatory system to their advantage. Using the •Brother, May I?• aspects of the CON process, incumbent hospitals and other health care providers can impose substantial delays on, or thwart altogether, potential entrants into their markets, thus protecting their own supra-competitive revenues.[89] Returning to public choice theory, it readily predicts such

84 See DOJ-FTC Illinois Testimony (n 81) 4…5.

85 The CON area is just one example of empirical work conducted by FTC economists lending support to, and thus increasing the effectiveness of, the Commission•s competition advocacy efforts.

86 See eg DOJ-FTC Illinois Testimony (n 81) 5 n.16 (collecting studies).

87 See Daniel Sherman, Bureau of Economics, Federal Trade Commission, •The Effect of State Certificate-of-Need Laws on Hospital Costs: An Economic Policy Analysis• (January 1988) iv <https://www.ftc.gov/reports/effect-state-certificate-need-laws-hospital-costs-economic-policy-analysis> accessed 28 July 2015; ibid iv (•The study thus finds no evidence that CON programs have led to the resource savings they were designed to promote, but rather indicates that reliance on CON review may raise hospital costs.•).

88 See eg The Lewin Group, •An Evaluation of Illinois• Certificate of Need Program: Prepared for State of Illinois Commission on Government Forecasting and Accountability• (February 2007) 16 (•A review of the evidence indicates that CONs rarely reduce health care costs, and on occasion, increase cost in some states.•); William S Custer and others, •Report of Data Analyses to the Georgia Commission on the Efficacy of the CON Program• (November 2006) 8 (•CON regulation is associated with higher private inpatient costs. The effect is robust with respect to model specification, measures of CON rigor, and diagnoses.•).

89 See eg North Carolina CON Advocacy (n 81) 3; DOJ-FTC Illinois Testimony (n 81) 7; Federal Trade Commission and US Department of Justice (n 83) Exec Summ at 22. Incumbent providers have also entered into anticompetitive agreements that were outside of, but nonetheless facilitated by, the CON laws. See eg DOJ-FTC Illinois Testimony (n 81) 7…8 (discussing DOJ investigations of market allocation by hospitals and home health agencies).

incumbent exploitation of CON laws,[90] as well as incumbent efforts to keep such laws on the books.[91]

We next address what appears to be the primary argument that states make in

pursuing the goal of indigent care. In fact, there is some evidence that CON laws do not actually advance the goal of increasing the level of indigent care.[97] Finally, as the antitrust agencies have noted in their advocacies in this area, CON laws were not adopted as a means of cross-subsidizing health care in the first instance.[98] This is an ex post rationale identified by CON proponents that is inconsistent with free-market principles. More, not less, competition is needed in the health care space to improve quality, control prices, and spur innovation.[99]

With the *Noerr-Pennington*[100] doctrine rightly protecting incumbents' petitioning activity related to CON applications, however, there is little, if any, room for law enforcement action in this area. It is crucial that the Commission engage with state legislatures on the issue of CON laws. Prior to Commission staff's July 2015 letter to a state representative in North Carolina,[101] however, the Commission had not addressed this issue in its competition advocacy since 2008. The Commission ought to continue seeking out opportunities to weigh in on the adverse impact of CON laws on consumer welfare.[102]

IV. MCWANE AND EXCLUSIONARY CONDUCT BY MONOPOLISTS

The remainder of this article addresses a third •Brother, May I?• situation in which a would-be entrant must effectively rely on its competitor•s permission before entering or expanding its business. This one involves not state regulation but rather private conduct by a monopolist that is exclusionary and thus maintains its monopoly and is not justified by a cognizable efficiency. The end result is that a firm looking to enter the market or expand its sales is at the whims of its monopolist-competitor to succeed in such entry or expansion.

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The Commission recently encountered this in its Sherman Act section 2 action against McWane, Inc.[104] In that case, the Commission issued a seven-count administrative complaint against McWane in January 2012.[105] Ultimately, the Commission dismissed six of the seven counts, finding liability solely on the section 2 exclusive dealing count.[106] In particular, the Commission found that McWane had used an exclusive dealing policy to prevent its sole rival, Star Pipe Products, Ltd (Star), from meaningfully competing and thus maintained the monopoly that McWane enjoyed in the market for domestically-manufactured ductile iron pipe fittings.[107] (Although perhaps not the sexiest of markets the Commission has pursued of late, pipe fittings are used by municipal and regional water authorities in crucial waterworks projects.)

The thrust of the case was that McWane, with over 90 per cent market share, had imposed a policy„the Full Support Program„on distributors that required them to purchase all of their domestic fittings from McWane; otherwise, they would lose their rebates and be cut off altogether.[108] There were two exceptions to the Full Support Program under which customers were permitted to purchase competing domestic fittings: (i) where McWane products were not readily available, and (ii) where the customer bought domestic fittings and accessories along with another manufacturer•s ductile iron pipe.[109] The Commission found that, to the extent that Star was able to gain sales, it did so primarily under these limited exceptions, and those sales were insufficient to have a competitive impact.[110]

In finding liability on the exclusive dealing count, the Commission determined that McWane had monopoly power in the domestic fittings market;[111] that the Full

104 See *In re McWane Inc* Dkt No 9351 Opinion of the Commission (6 February 2014) (hereinafter •McWane Commission Opinion•) https://www.ftc.gov/system/files/documents/cases/140206mcwaneopinion_0.pdf accessed 28 July 2015.

105 See *In re McWane Inc* Dkt No 9351, Administrative Complaint (4 January 2012) https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120104ccwanestaradmincmpt.pdf accessed 28 July 2015 (alleging conspiracy, information exchange, invitation to collude, restraint of trade based on distribution agreement, conspiracy to monopolize, monopolization, and attempted monopolization). Commissioner Ohlhausen was not at the Commission when it filed its administrative complaint in McWane.

106 See McWane Commission Opinion (n 104) 2 and n.1.

107 See ibid 20. See also ibid 26 (•Impairing its rivals• ability to threaten McWane•s monopoly was the Full Support Program•s core objective.•).

108 See ibid 9, 16.

109 See ibid 9.

110 See ibid 28…29.

111 See ibid 16…18.

Support Program constituted an exclusive dealing arrangement that substantially foreclosed its rivals• access to the most efficient sales channel,[112] and that this resulted in harm to competition and consumers in the domestic fittings market.[113] As the Commission opinion concluded:

> [T]he evidence that McWane•s exclusive dealing policy significantly impaired the access of McWane•s only rival, Star, to the main channel of distribution, thereby increasing its costs and keeping it below the critical level necessary to pose a real competitive threat, is plainly sufficient to meet the standard of harm to competition set forth in the prevailing case law.[114]

At the same time, the Commission rejected the two efficiency justifications proffered by McWane. First, McWane argued that it engaged in exclusive dealing to generate sufficient sales to operate its last domestic foundry. The Commission did not view this to be •a cognizable procompetitive justification for antitrust purposes•.[115] More specifically, McWane•s increased sales volume did not result from actions, such as a price reduction, that typically promote consumer welfare by increasing overall market output or lowering prices; rather, the increased sales would have come from anticompetitive reductions in Star•s output.

The second justification offered by McWane was that the Full Support Program prevented customers from cherry-picking the highest-selling items from Star and forced them to purchase McWane•s full line of domestic fittings. That is, if distributors were able to source from multiple suppliers, they would buy the common fittings from the limited supplier (at lower prices) and turn to the full-line supplier for less common products only, which supposedly could lead to the collapse of the full-line seller. The Commission was not convinced that this is a cognizable efficiency under the antitrust laws. To begin with, McWane never explained why it could not compete to sell the more common products by lowering its prices for them and raising its prices for the less common products, thereby reducing an implicit cross-subsidy. In any event, the Commission noted that •[e]ven if selective entry by the full-line supplier•s rivals led to the collapse of the full-line seller, that itself would not constitute a harm to the market (as opposed to a single firm)•.[116]

112 See ibid 20…25.

113 See ibid 25…29.

114 See ibid 26.

115 See ibid 30.

116 ibid 32. Commissioner Wright dissented from the Commission•s decision. See In re McWane Inc Dkt No 9351 Dissenting Statement of Commissioner Joshua D Wright (6 February 2014) <https://www.ftc.gov/system/files/documents/public_statements/202211/140206mcwanestatement.pdf> accessed 28 July 2015. The scope of the disagreement between the majority and the dissent was largely limited to the narrow, but obviously crucial issue of whether harm to competition from McWane•s exclusive dealing had been demonstrated. See eg ibid 7, n.14 (assuming monopoly power); ibid 27…28 and n.38 (agreeing that Full Support Programme amounted to exclusive dealing); ibid 33 n.40 (agreeing that •distributors are a key distribution channel•); ibid 4 (noting the •ample record evidence demonstrating that the Full Support Program harmed McWane•s rival Star•); Leon B Greenfield, •Afterword: Lorain Journal and the Antitrust Legacy of Robert Bork• (2014) 79 Antitrust LJ 1047, 1062 (•The division among the FTC commissioners in the McWane matter illustrates the narrowed

The Eleventh Circuit's McWane Decision

In April 2015, the Court of Appeals for the Eleventh Circuit upheld the Commission•s decision, affirming its determinations regarding market definition, McWane•s monopoly power, and harm to competition.[117] The court endorsed the approach taken by the DC Circuit and several other courts in determining whether a monopolist•s conduct has harmed competition, noting, among other things, that substantial foreclosure is just one of several factors in the analysis and that harm to one or more competitors is insufficient for purposes of section 2.[118] The Eleventh Circuit also endorsed the DC Circuit•s causation standard for assessing exclusive dealing claims.[119]

The Eleventh Circuit identified the pricing evidence in the record as the •most powerful evidence of anticompetitive harm.•[120] More specifically, the court observed that by keeping Star from becoming a more efficient competitor, McWane•s exclusivity policy preserved its ability to charge supracompetitive prices; in fact, McWane was able to raise prices and increase its gross profits, notwithstanding Star•s (limited) entry.[121] Finally, much like the Commission, the Eleventh Circuit was not persuaded by McWane•s efficiency arguments.[122]

Current Economic Thinking

A few points regarding exclusive dealing more generally are in order here. First, there is no question that vertical business arrangements, including exclusive dealing, are much more likely to be procompetitive than anticompetitive. Exclusive dealing can enhance competition in a number of well-documented ways, including by eliminating inter-brand free-riding, reducing the costs associated with demand and supply uncertainty, and intensifying competition for distribution.[123] Exclusive distribution arrangements can be particularly procompetitive where a manufacturer provides dealer support, discounts, or other consideration for the exclusivity, or where there is competition to be the exclusive distributor of a particular product.

In short, the economic literature clearly supports the proposition that exclusive dealing is likely to be procompetitive.[124] Exclusive dealing thus should not be a

significant focus of the Commission•s competition enforcement programme. Nonetheless, there are some situations„particularly in monopolized markets„in which exclusive dealing can be anticompetitive and serve to maintain a firm•s monopoly power.[125] That may very well be the case where a monopolist opts to impose exclusivity on its dealers, rather than luring them with lower prices or increased support, any sales by the monopolists• rivals are limited to whatever the monopolist allows them to achieve, such that the rivals are unable to achieve efficient scale, and prices actually increase during the period of the exclusivity.[126] In such a situation, assuming the Commission is able to identify substantial harm to competition that is not outweighed by cognizable efficiencies, it ought to pursue such conduct under the antitrust laws.

Second, as mentioned in the Introduction, this article should not be read as an endorsement of either the essential facilities doctrine or a general duty to assist one•s competitors (beyond that which may exist in the case law). More specifically, opposition to a requirement to obtain permission from one•s competitor to enter and compete in a market should not be confused with support for forced sharing of even a monopolist•s intellectual property, operational facility, distribution system, or any other assets. The Supreme Court in *Trinko* was justifiably concerned about •the uncertain virtue of forced sharing• and refusal-to-deal theories under section 2 of the Sherman Act more generally.[127] Pursuing an exclusive dealing case against a firm with monopoly power whose conduct has been exclusionary and harmful to competition should not raise the same concerns about incentives to innovate and compete as would a section 2 case against a monopolist for refusing to allow a competitor access to its facilities or to sell to a competitor a product that the monopolist is not otherwise selling on the open market.[128]

Finally, to return to the cross-subsidization point: whether one refers to it as cream-skimming or cherry-picking, this rationale is unconvincing as a justification for either certificate-of-need laws or exclusive dealing by a monopolist. While cream-skimming may be a legitimate concern in very limited circumstances, such as a

Policy as a Problem of Inference• (2005) 23 Int•l J Industrial Organ 639, 658 (•Most studies find evidence that vertical restraints/vertical integration are procompetitive[.]•).

125 See *Eastman Kodak Co v Image Tech Servs Inc*, 504 US 451, 488 (1992) (Scalia, J, dissenting) (•Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws„or that might even be viewed as procompetitive„can take on exclusionary connotations when practiced by a monopolist.•).

126 See eg Dennis W Carlton and Ken Heyer, •Appropriate Antitrust Policy Towards Single-Firm Conduct: Extraction vs. Extension• (2008) 22 Antitrust 50, 53 (•Where scale economies matter, conduct that deprives rivals of scale may weaken competitive constraints and thereby (but not necessarily) harm competition. In addition, input monopolization may raise rivals• costs and thereby relax competitive constraints with a resulting harm to competition.•); Dennis W Carlton, •A General Analysis of Exclusionary Conduct and Refusal to Deal„Why *Aspen* and *Kodak* are Misguided• (2001) 68 Antitrust LJ 659, 663, 665 n.15 (explaining how exclusive dealing can impair the competitive effectiveness of a rival and thus harm competition).

127 See *Verizon Commc•ns Inc v Law Offices of Curtis V Trinko LLP*, 540 US 398, 408 (2004).

128 In *Trinko*, the Court distinguished the case before it from both *Aspen Skiing* and *Otter Tail* based in significant part on the fact that the defendants in those two cases had refused to sell a product to a competitor that it already sold at retail. See ibid 409…10 (distinguishing *Aspen Skiing Co v Aspen Highlands Skiing Corp*, 472 US 585 (1985) and *Otter Tail Power Co v United States*, 410 US 366 (1973)).

rate-regulated market with high fixed costs,[129] the authors have not seen any evi-

making licensing decisions that favour incumbent professionals, government regulations that competitors can easily manipulate to fend off new competition, or anti-competitive actions by monopolists looking to maintain their dominant market