

## Focus on exclusionary conduct—Recent U.S. antitrust enforcement actions against refusals to deal with customers or suppliers

By Lauren N. Norris

On January 10, 2011, in the most recent U.S. antitrust enforcement action against exclusionary conduct, the FTC approved a final order settling charges that Pool Corporation (“PoolCorp”) engaged in anticompetitive acts and practices to exclude its rivals from pool product distribution markets. *In re Pool Corp.*, FTC File No. 1010115 (Jan. 12, 2011). More specifically, the FTC alleged that PoolCorp threatened its suppliers that it would no longer distribute a supplier’s products on a nationwide basis if that supplier sold its products to a new distributor that was attempting to enter a local market. *Id.* *In re Pool Corp.* and other recent actions by the United States’ antitrust enforcement agencies have placed an increased focus on conduct by companies with large market shares that forecloses rivals, or potential rivals, from the market by refusing to deal, or incentivizing customers or suppliers to stop dealing, with a rival. These actions underscore that this type of behavior can be risky for companies with large market shares and stress the need for a careful antitrust analysis of any such conduct.

Refusals to deal and other reprisals taken against disloyal customers or suppliers have long been recognized as vertical restraints giving rise to potential liability under Section 2 of the Sherman Act, which prohibits illegal efforts to preserve or acquire a monopoly. One of the forefather cases in this area is *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), in which the Supreme Court held that a newspaper’s refusal to deal with customers that also advertised on a rival radio station was a violation of Section 2 because it harmed the radio station’s ability to compete. The Supreme Court concluded that “[t]he publisher’s attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated Section 2.” *Id.* at 190.

More recent cases have further enunciated what constitutes exclusionary conduct that violates Section 2 of the Sherman Act. In *United States v. Dentsply International, Inc.*, 399 F.3d 131, 190 (3d Cir. 2005), the Third Circuit found that it is not necessary for such a violation that a monopolist foreclose all rivals

from the market. There, the Court of Appeals for the Third Circuit condemned the policy of a dominant manufacturer of artificial teeth that prohibited its independent distributors from carrying competing brands of teeth because it kept competitors below “the critical level necessary for any rival to pose a real threat to Dentsply’s market share.” *Id.* at 191. The court explained that the “test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.” *Id.* The court found that an “all or nothing” ultimatum was exclusionary when it “created a strong economic incentive for dealers to reject competing lines in favor of Dentsply’s teeth.” *Id.* at 195. The court ultimately held that a monopolist forecloses a competitor from the market when it denies or puts the competitor at a significant disadvantage as to its access to significant sources of input or distribution. *Id.* at 189-90.

The FTC and Department of Justice Antitrust Division have used both Section 5 of the FTC Act and Section 2 of the Sherman Act to challenge this type of behavior.

In the last few years, the U.S. antitrust enforcement agencies have challenged this type of conduct by companies with large market shares. In *In re Intel Corp.*, FTC File No. 0610247 (Dec. 16, 2009), the FTC challenged Intel’s restrictive dealings with OEMs under Section 5 of the FTC Act, alleging that such actions cut off rivals’ access to certain Central Processing Unit (“CPU”) markets. Specifically, the FTC alleged that Intel entered into *de facto* exclusive dealing arrangements with OEMs that required the OEMs to forgo adoption or purchases of non-Intel CPUs. *Id.* The FTC found this behavior especially anticompetitive because it raised the barriers to entry in a market where a number of legitimate barriers to entry already existed. *Id.* The FTC approved a settlement with Intel Corporation on August 4, 2010 that resolved the FTC’s charges. *In re Intel Corp.*, FTC File No. 0610247 (Aug. 4, 2010).

Similarly, in *In re Transitions Optical, Inc.*, FTC File No. 0910062 (April 22, 2010), the FTC challenged the exclusionary conduct of the leading photochromic lens treatment

developer in the United States, Transitions Optical. Photochromic treatments are used on eyeglass lenses for protection against harmful ultraviolet light. *Id.* The FTC charged that Transitions Optical engaged in exclusive dealing at multiple levels of the photochromic lens distribution chain. *Id.* Specifically, Transitions Optical required its customers, manufacturers of corrective lenses, to use its lenses exclusively. *Id.* Transitions Optical also used exclusive agreements with optical retail chains and wholesale optical labs to restrict their ability to sell competing lenses. *Id.* The FTC alleged that since no other supplier of photochromic treatments offered a product line as broad as that of Transitions Optical, rivals were not able to compete for those customers. *Id.* The FTC challenged the contracting practices of Transitions Optical under Section 5 of the FTC Act, alleging that such exclusionary tactics foreclosed rivals from the relevant markets, harming competition and consumers. *Id.*

In the FTC’s most recent challenge to this type of conduct, the exclusionary tactics of PoolCorp, the largest pool products distributor in the United States, were challenged under Section 5 of the FTC Act. *In re Pool Corp.*, FTC File No. 1010115 (Jan. 12, 2011). The FTC contended that PoolCorp used its monopoly power to impede the entry of new competitors by blocking them from buying pool products directly from manufacturers. *Id.* Specifically, the FTC alleged that PoolCorp threatened its suppliers, pool product manufacturers, that it would no longer distribute a manufacturer’s products, either on a local or national scale, if that manufacturer sold any of its products to a new distributor. *Id.* Even though manufacturers preferred to have broad distribution networks and sell to numerous distributors, PoolCorp’s threats were significant enough to keep manufacturers from selling their products to new distributors. *Id.* The FTC also alleged that PoolCorp’s strategy significantly increased the costs incurred by its rivals, which lowered sales, increased prices, and reduced the number of choices available to consumers. *Id.*

In a statement regarding the FTC’s Complaint against PoolCorp, Commissioners

Julie Brill, Jon Leibowitz, and Edith Ramirez stated, “[c]onduct by a monopolist that raises rivals’ costs can harm competition by creating an artificial price floor or deterring investments in quality, service and innovation.” Statement of Commissioners Julia Brill, Jon Leibowitz and Edith Ramirez Regarding the Complaint and Proposed Consent Order in *In re Pool Corporation* (Nov. 21, 2011), available at <<http://www.ftc.gov/speeches/brill/111121poolcorpstatement.pdf>> (accessed Mar. 2, 2012). The Commissioners also commented that even though PoolCorp’s conduct did not target incumbent distributors, new rivals are often the targets of anti-competitive exclusion because incumbents view them as the most likely to create competition in the market and benefit consumers by competing aggressively on price and introducing “innovative services or ways of doing business.” *Id.* The Commissioners’ comments indicate an increased awareness by the FTC that new entrants are likely targets of exclusionary conduct by incumbents and the FTC is therefore likely keeping a close eye on this type of market behavior.

The Department of Justice Antitrust Division has also challenged this type of conduct in recent years. In *United States v. United Regional Health Care System*, Case No. 7:11-cv-00030-O (N.D. Tex. Feb. 25, 2011), an action that underscored the risks involved when a company with a large market share enters into contracts that become *de facto* exclusionary due to the discounts they offer, the Antitrust Division challenged the contracting practices of United Regional Health Care System under Section 2 of the Sherman Act. Specifically, the Antitrust Division alleged

that United Regional unlawfully maintained its monopoly for hospital services in the Wichita Falls, Texas, area through its policy of offering contracts with steep discounts to health insurers in exchange for exclusivity. *Id.* These contracts offered significantly larger discounts for services if United Regional was the only local provider in the insurer’s network. *Id.* Since United Regional was a ‘must have’ hospital for insurers selling health insurance in the Wichita Falls area, and since the penalty for contracting with United Regional’s rivals was so significant, most insurers contracted with United Regional exclusively, making it impossible for United Regional’s rivals to contract with most insurers and substantially impeding the rivals’ ability to compete. *Id.* The Antitrust Division alleged that this contracting practice was exclusionary and effectively prevented insurers from contracting with United Regional’s competitors. *Id.*

All of these actions demonstrate that the U.S. antitrust enforcement agencies are paying close attention to single-firm exclusionary conduct by market share leaders. Companies that have market power and are considering entering into exclusive, or *de facto* exclusive, agreements with customers or suppliers that could foreclose rivals from the market should therefore undertake a careful antitrust analysis of those agreements to avoid potential liability under either Section 5 of the FTC Act or Section 2 of the Sherman Act. ■

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## ANTITRUST & UNFAIR COMPETITION LAW

*Published at least four times per year.*

*Annual subscription rate for ISBA members: \$20.*

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