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The Effect of White Motor Co. on Exclusive Selling Arrangements

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NOTE

The Effect of *White Motor Co.* on Exclusive Selling Arrangements

Exclusive selling arrangements with territorial and customer limitations are increasingly being attacked under the antitrust laws.[1] In this note the validity of these arrangements will be discussed in the context of the recent case of *White Motor Co. v. United States*.[2] In Part I, *White Motor* and other general considerations will be discussed. Relevant factors in determining the validity of territorial limitations and customer limitations will be discussed in Parts II and III, respectively.

I. White Motor and General Considerations

Exclusive selling arrangements, frequently denominated as exclusive franchises or dealerships,[3] are arrangements whereby the supplier agrees with the buyer not to sell to other buyers in the same market. Since these arrangements frequently incorporate territorial restrictions, customer restrictions, covenants not to compete, or other types of ancillary restraints,[4] the initial question presented to the courts is whether to analyze and adjust the effects of each individual limiting feature or to assess the total effect of the manufacturer's entire distribution system. In *United States v. Bausch & Lomb Optical Co.*,[5] the Supreme Court held that illegal contracts should not be considered separately but must be considered as "an integral part of the whole distribution system."[6] But in *Snap-On Tools Corp. v. Federal Trade Commission*,[7] the Seventh Circuit Court of Appeals held that the

1. See, *e.g.*, White Motor Co. v. United States, 372 U.S. 253 (1963); Snap-on Tools Corp. v. Federal Trade Comm'n, 321 F.2d 825 (7th Cir. 1963); Sandura Co., Trade Reg. Rep. (1961-63 Trade Cas.) ¶ 15945 (FTC 1962); In the Matter of Dictograph Prods., Inc., 50 F.T.C. 281 (1953).

2. 372 U.S. 253 (1963).

3. Exclusive selling arrangements take various forms. See Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 801-23 (1962). Exclusive selling arrangements have been characterized as quasi-integration, Cole, General Discussion of Vertical Integration in Marketing, Ill. Bureau of Economic and Business Research Bull. 6, #74 (1952), or as a nonproprietary kind of vertical integration. Dirlam & Kahn, Fair Competition: The Law and Economics of Antitrust Policy 173 (1954).

4. See, *e.g.*, Snap-On Tools Corp. v. Federal Trade Comm'n, *supra* note 1; Sandura Co., *supra* note 1.

5. 321 U.S. 707 (1944).

6. *Id.* at 720.

7. 321 F.2d 825 (7th Cir. 1963).

provisions in the dealer agreements must be considered seriatim, not in their entirety, because no substantial evidence was introduced to show that the provisions constituted a unitary device to foster anticompetitive practices.[8] However, analysis and adjudication of the limitations in the context of the entire distribution system is preferable; otherwise any cumulative effect of the restraints may escape judicial scrutiny.[9] This is especially true in the price fixing cases since price fixing arrangements often utilize exclusive selling arrangements with numerous auxiliary provisions.

The question whether an exclusive selling arrangement with territorial and customer limitations is valid necessitates consideration of three statutes. The arrangement will violate the antitrust laws if: (1) it constitutes a "restraint of trade" under section 1 of the Sherman Antitrust Act,[10] or (2) the effects of the arrangement "may be substantially to lessen competition or tend to create a monopoly" within the meaning of section 3 of the Clayton Act,[11] or (3) it is an "unfair method of competition" under the provisions of section 5 of the Federal Trade Commission Act.[12] Since an exclusive selling arrangement may fall within the ambit of one or more of these statutes, it is important when analyzing the relevant decisional law to keep in mind the different statutory standards.[13]

Territorial and customer limitations may be used in conjunction with a scheme of price fixing arrangements. In *United States v. Bausch & Lomb Optical Co.*,[14] the Supreme Court held Soft-Lite's distribution system to be a per se violation of the Sherman Antitrust Act because substantial price fixing was involved. Soft-Lite's distribution system involved retail outlet licensing, resale price control, contract enforcement by means of inspections, and refusal to sell to license agreement violators.

Relying on a dictum in *Bausch & Lomb*, the Justice Department has viewed the two ancillary restraints involving territorial and cus-

8. *Id.* at 830. It was argued that the restrictions should be analyzed in toto because they were all incorporated into one document, but the court rejected this argument.

9. Standing alone a territorial limitation may not be very restrictive. But when it is considered in conjunction with a covenant not to compete (a customer limitation) the totality of effect may result in a very restrictive distribution system because the provisions tend to reinforce one another. See Sandura Co., *supra* note 1, at 20772-73.

10. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

11. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).

12. 66 Stat. 632 (1952), 15 U.S.C. § 45(a) (1958).

13. See notes 11, 12 *supra*, and accompanying text. See generally REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 12 (1955); Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); 61 MICH. L. REV. 589 (1963).

14. 321 U.S. 707 (1944).

tomer limitation, as illegal per se.[15] After successfully procuring many consent decrees without judicial review,[16] the Justice Department challenged the legality of White Motor Company's distribution system.[17] White's selling arrangement granted its distributors and dealers the exclusive right to sell White products in a specified territory, restricting the sales of each dealer or distributor to customers located in his territory. White also reserved certain accounts, designated as national or fleet accounts, to itself unless specific permission was granted to sell to these accounts at set prices.[18] The district court

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15. See *id.* at 721; *Hearings Before the Subcommittee on Automobile Marketing Legislation of the House Committee on Interstate and Foreign Commerce,* 84th Cong., 1st Sess. 362 (1955).

16. See, *e.g.,* United States v. Sperry Rand Corp., 1962 Trade Cas. ¶ 70495 (W.D.N.Y. 1962); United States v. Dempster Bros., 202 F. Supp. 798 (E.D. Tenn. 1962); United States v. Hamilton Mfg. Co., 1960 Trade Cas. ¶ 69882 (E.D. Wis. 1960); United States v. Bostitch, Inc., 1958 Trade Cas. ¶ 69207 (D.R.I. 1958); United States v. The Rudolph Wurlitzer Co., 1958 Trade Cas. ¶ 69011 (W.D.N.Y. 1958); United States v. J. P. Seeburg Corp., 1957 Trade Cas. ¶ 68613 (N.D. Ill. 1957); United States v. Philco Corp., 1956 Trade Cas. ¶ 68409 (E.D. Pa. 1956).

17. United States v. White Motor Co., 194 F. Supp. 562 (N.D. Ohio 1961).

18. Paragraph 23 of the Distributor Selling Agreements provided: *"Right of Cancellation.* This agreement and any renewal or extention thereof may be cancelled and terminated as below provided: (d) Notwithstanding the provisions of paragraph (b) and (c) next preceding, Company may, at its option, cancel and terminate this agreement at any time without any notice whatsoever to Distributor . . . in case of breach of this agreement on the part of Distributor." *Id.* at 568.

The dealer sales agreement contained the following performance condition: "It is further understood and agreed that full performance of this agreement by [Type of Dealer] is a condition precedent to performance thereof by [Company or Distributor] and that any failure by [Company or Distributor] to enforce or to require performance by [Type of Dealer] of any provision of this agreement or to exercise any option herein granted, shall in no way affect the validity of this agreement or impair the right of [Company or Distributor] later on to enforce any such provision or exercise any such option." *Id.* at 569 *"Parts Sales to National and Fleet Accounts.* Distributor agrees to extend to firms and corporations, and subsidiaries of the latter, designated by Company as 'National Accounts' or 'Fleet Accounts' and to Federal and State Governments and departments and political subdivisions thereof, the same disconnts on parts and accessories as authorized and allowed the aforementioned accounts by Company." *Id.* at 568.

The following provisions were contained in the dealer agreements: *"Prices, Discounts and Terms.* [Company or Distributor] agrees to sell to [Type of Dealer] at Company's factory at Cleveland, Ohio, new White truck standard chassis, including standard equipment and accessories mounted thereon, for cash in par funds at the respective prices and subject to the discounts, terms and provisions or at the [Type of Dealer] net priees and subject to the terms and provisions set forth in [Type of Dealer] 'Price List–Appendix A,' 'Price List–Appendix B,' and the latest issue of Company's sales handbook, all of whieh are subject to change without advance notice. The 'Price List–Appendix A' and 'Price List–Appendix B,' will be issued by Company from time to time and the latest issue thereof shall become and be a part of this agreement." . . . . *"Part Sales to National and Fleet Accounts.* [Type of Dealer] agrees to extend to firms and corporations, and subsidiaries of the latter, designated by The White Motor Company as 'National Accounts' or 'Fleet Accounts,' and to the Federal and State Governments and departments and political subdivisions thereof, the same discounts on parts and aecessories as authorized and allowed them by The White Motor Company."

accepted the government's contention of illegality per se and held that White's exclusive selling arrangement with territorial and customer limitations violated sections 1 and 3 of the Sherman Antitrust Act.[19] Reversing, the Supreme Court held that vertical territorial and customer limitations are not illegal per se; their validity can be determined only after a full trial.[20]

Justice Douglas, speaking for the majority, stated: "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us."[21] On retrial, it will be necessary for the Court to consider if the price fixing bar of *Bausch & Lomb* applies.[22] Assuming it will not, White's territorial limitations must be examined in light of existing decisions in the area, including those involving horizontal territorial division.

II. Territorial Limitations

When competitors agree not to compete in specified territories, the consequence is to reduce the number of sellers in each affected market; this in turn necessarily reduces competition if the agreeing competitors possess substantial or dominant market power.[23] Such agreements, therefore, are traditionally illegal per se.[24]

Whether the cases involving horizontal division of market, *e.g.*, *Timken Roller Bearing Co. v. United States*,[25] extend to a vertical arrangement by one manufacturer which restricts his dealers' or distributors' territories is a question not free from doubt. The majority in *White Motor* expressed no opinion on this question.[26] Justice Brennan, concurring, addressed himself to this question and proposed the

"*Part Sales and Discounts.* [Company or Distributor] will sell to [Type of Dealer] new White parts and accessories listed in the latest revised parts books of the White Motor Company at the prices and discounts and on the terms and conditions as provided in the aforementioned 'Price List—Appendix A,' and (or) 'Price List—Appendix B.'" *Id.* at 568-69.

19. United States v. White Motor Co., *supra* note 17.

20. White Motor Co. v. United States, 372 U.S. 253 (1963).

21. *Id.* at 261.

22. The majority left open the question whether price fixing was an integral part of White's distribution system and within the bar of *Bausch & Lomb*. *Id.* at 260.

23. Report of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

24. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951). See United States v. United States Alkali Export Ass'n, 86 F. Supp. 59 (S.D.N.Y. 1949); United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y. 1945), *aff'd*, 332 U.S. 319 (1947); Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 176 (E.D. Tenn. 1940).

25. 341 U.S. 593 (1951).

26. White Motor Co. v. United States, 372 U.S. 253, 261 (1963).

following test: "The crucial question [is] whether, despite the differences in form, these restraints serve the same pernicious purposes and have the same inhibitory effects upon competition as horizontal divisions of markets . . . ."[27]

Although horizontal division of markets by competitors and a vertical arrangement (exclusive selling arrangement with territorial limitations) by one manufacturer restricting dealers' or distributors' territories may have some similarity in form, they are essentially different. Agreements for horizontal division of a market, if successful, will directly eliminate competitors or inhibit entry into the market. Although it will eliminate competition between a manufacturer's own retail outlets, a vertical exclusive selling arrangement with territorial limitations at the retail level will not directly eliminate a competing manufacturer. It may, however, indirectly affect the competitor if his distribution system cannot acquire outlets equivalent to those of the manufacturer employing the territorial limitations. If the territorial limitations thus restrict entry into the market by the second seller, competition is inhibited.

No economic justifications will save horizontal division of markets. On the other hand, economic considerations may be offered to justify the use of an exclusive selling arrangement with territorial limitations.[28] For example, a new manufacturer attempting to enter the market may have a legitimate interest in attracting market outlets (dealers) by employing an exclusive selling arrangement with territorial limitations. Also it may be economically necessary for a manufacturer to use this arrangement in order to retain a valuable market outlet.[29] Thus, competition may actually increase rather than decrease.

Territorial limitations may have varying effects on competition depending on the type of limitation employed.[30] Basically there are

27. *Id.* at 267-68.

28. When a product is going through the early stages of formulating good will, investing in it may require a substantial sum, yet the risk of consumer acceptance is great; thus the distributor or dealer may demand a great deal of security before he will undertake the risk. Stone, *Closed Territorial Distribution: An Opening Question in the Sherman Act*, 30 U. CHI. L. REV. 286, 312 (1962). Some commentators agree with Prof. Handler that territorial security clauses and vertical assignments of the channels of trade through which goods may be marketed enable the supplies to more effectively compete with other products and are in the interest of orderly marketing. It is suggested that "enforcement policy may be attempting to outlaw some of the acts by which competing is done, and upon which enforcement self-restraint should have been exercised." Kaapcke, *How to Distribute Your Products*, 1962 N.Y. STATE BAR ASS'N ANTITRUST LAW SYMPOSIUM 55, 59.

29. See Jordan, *Exclusive and Restricted Sales Areas Under the Antitrust Laws*, 9 U.C.L.A.L. REV. 111, 136 (1962).

30. See Day, *Exclusive Territorial Arrangements Under the Antitrust Laws—A Reappraisal*, 40 N.C.L. REV. 223 (1961).

three types of such limitations: (1) *Exclusive Selling.*[31] The manufacturer assigns the dealer an exclusive area and agrees not to sell to another outlet in this area. This arrangement does not preclude the dealer from selling in other areas; it only restricts the number of dealers in a particular area. (2) *Closed Territory.*[32] Under this arrangement the dealer is prohibited from soliciting or selling in other areas, yet is allowed to deal with anyone coming into his area. This arrangement, unlike an exclusive selling agreement, eliminates intra-brand competition within a closed territory, but it permits intra-brand competition between closed territories. (3) *Geographical Customer Allocation.*[33] Each distributor is prohibited from selling to customers not residing within his assigned area. Provisions usually are made for cross-over profits and franchise cancellation; thus intra-brand competition is eliminated and consumers' choice in selecting their dealer is restricted.

Because territorial limitations have differing competitive effects and may have valid commercial bases without necessarily generating anti-competitive effects, it would seem unwise to ban all such arrangements under an illegal per se rule.[34] Assuming that the horizontal division-of-market cases do not extend to exclusive selling arrangements with territorial limitations, the only decision bearing on such arrangements other than *White Motor* is *Snap-On Tools Corp. v. Federal Trade Commission*[35] (decided subsequent to *White Motor*), although several pre-*White* decisions considered the problem where express territorial limitations were not present.

White Motor Co. employed a geographical customer allocation system and attempted to justify its use on the grounds[36] that the territorial limitation was necessary to enable White to compete effectively with other large truck manufacturers. Because of inadequate financial resources, White could not utilize direct selling arrangements and had to rely on a dealership system. An effective dealership system requires that dealers make vigorous and intensive efforts to develop their respective territories. If a dealer is to be responsible to the manufacturer for energetic performance, White argued, it is fair, reasonable, and necessary to protect his territory from invasion by other White

31. *Id.* at 226.
32. *Id.* at 227.
33. *Ibid.*
34. Territorial restrictions should not be deemed illegal per se but rather should be governed by the rule of reason. "I submit further, that the Government's *per se* approach to this problem may have the ultimate effect of inhibiting competition by small business and thereby subvert one important purpose of the antitrust laws." Lewis, *Orderly Marketing and the Small Business Man*, 16 ABA Section of Antitrust Law, Proceedings 73, 80 (1960).
35. 321 F.2d 825 (7th Cir. 1963).
36. White Motor Co. v. United States, 372 U.S. 253, 256-57 (1963).

dealers. Furthermore, to maximize sales, it is necessary for White to deter intra-dealer rivalry and encourage its dealers to compete with those of competitors.

The majority, mentioning the "rule of reason"[37] and quoting the undue restraint test set forth in *Board of Trade of City of Chicago v. United States*,[38] expressed no opinion on the validity of White's arrangement. Justice Brennan, concurring, suggested three inquiries necessary to determine the validity of White's system.[39] *First.* Is there any merit in the manufacturer's alleged economic justification for use of the limitations? *Second.* Assuming the limitation is justified, is its operation "reasonably related to the need which brought them into being"—*i.e.*, is the restraint "more restrictive than necessary, or excessively anticompetitive, when viewed in light of the extenuating interests"? *Third.* Are less restrictive alternatives available?

Professor Milton Handler believes that once economic justification is shown for the territorial restraint, it should not be incumbent on the manufacturer to prove that some less restrictive alternative could have been used.[40] "Such a requirement would be wholly impractical from both the legal and business points of view."[41] It is quite easy to look back and ascertain the effect of the alternatives; it is another matter to predict the competitive effect of numerous alternatives with the "penalty" for the wrong guess being governmental intervention.

Subsequent to *White Motor*, the Seventh Circuit Court of Appeals in *Snap-On Tools Corp. v. Federal Trade Commission*,[42] sustained Snap-On's exclusive selling arrangement, which involved retail price, territorial and customer limitations, and what was in effect a covenant not to compete. Snap-On, a large hand tool manufacturer, had an express geographical territorial limitation, which, because of nonenforcement, was essentially a closed territorial system.

In sustaining this system under section 3 of the Clayton Act, the

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37. *Id.* at 261.

38. 246 U.S. 231 (1918). "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences." *Id.* at 238.

39. White Motor Co. v. United States, 372 U.S. 253, 268-71 (1963).

40. Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159, 167 (1963).

41. *Id.* at 167.

42. 321 F.2d 825 (7th Cir. 1963).

court applied Justice Brennan's suggested test. *First.* The territorial restraint was economically justified and "not significantly anti-competitive." The hand tool service industry required a continuous customer relationship with the mechanic-consumer, who expected regular and frequent calls at his place of business. If this relationship was not established and maintained, the mechanic would transact business with other firms. To accomplish this, it was necessary for the manufacturer either to have a large sales force of his own or to utilize an exclusive selling arrangement with customer limitations.[43] *Second.* Snap-On's need for its distribution system was reasonably related to the system's operation. Snap-On was not a "manufacturer in a monopolistic position vis-a-vis its inter-brand competitors."[44] Evidence indicated that the eighty competitors in the hand tool industry engaged in "bitter and bloody" competition.[45] In the court's view, Snap-On's survival required these arrangements. *Third.* Requiring Snap-On to rewrite its dealer's agreements by assigning each dealer a "primary zone of influence" is a futile gesture.[46] Snap-On's system in effect accomplishes the same thing because dealers are allowed to sell to anyone coming into their area seeking their services.[47]

The *Snap-On* decision comports with the standards evolved in the pre-*White* cases applying the ancillary restraint doctrine and upholding the assignment of exclusive territories to distributors.[48] In *Schwing Motor Co. v. Hudson Sales Corp.*[49] and *Packard Motor Car Co. v. Webster Motor Car Co.*,[50] geographical limitations through the use of exclusive automobile dealerships (without express territorial limitations) were sustained. One commentator suggests that the *Schwing* and *Packard* cases illustrate that a manufacturer may grant exclusive selling rights to retain a valuable dealer.[51] Specifically, they recognize "that a dealer may demand insulation from competition as the price of continuing a customer."[52]

Since the criteria of "unfair method of competition" under section 5 of the Federal Trade Commission Act are amorphous, section 5 is fre-

43. *Id.* at 832-33.
44. *Id.* at 833.
45. *Ibid.*
46. *Id.* at 832.
47. *Ibid.*
48. See, *e.g.*, Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942), *rehearing denied,* 130 F.2d 196 (2d Cir. 1942), *cert. denied,* 317 U.S. 695 (1943); Phillips v. Iola Portland Cement Co., 125 Fed. 593 (8th Cir. 1903), *cert. denied,* 192 U.S. 606 (1904).
49. 138 F. Supp. 899 (D. Md. 1956), *aff'd on opinion below,* 239 F.2d 176 (4th Cir. 1956), *cert. denied,* 355 U.S. 823 (1957).
50. 243 F.2d 418 (D.C. Cir.), *cert. denied,* 355 U.S. 822 (1957).
51. Jordan, *supra* note 29.
52. *Ibid.*

quently utilized by the government to prevent a manufacturer's questionable practice. After the lower court decision in *White Motor*, an FTC trial examiner in *Sandura Co.*[53] condemned Sandura's distribution system employing territorial and customer limitations as illegal per se. The FTC, sustaining the trial examiner's findings, held that Sandura's distribution system violated section 5 of the Federal Trade Commission Act;[54] even though some aspects of Sandura's distribution system may not have been anticompetitive per se, the system in its entirety was anticompetitive since its cumulative effect was to restrain competition.[55] Sandura, a small manufacturer in the highly competitive floor products industry, because of technical manufacturing difficulties, decline of sales, and reluctance of dealers to handle Sandura's products, had adopted a new distribution system. The new system employed a closed territorial system at the distributor level and a franchise system at the retail level, restricted distributors' sales to an assigned area, and precluded dealers from purchasing from a distributor outside their area. Intra-distributor rivalries were discouraged and border disputes were sometimes settled by elimination of a distributor. Sandura also attempted to enforce a system of retail price maintenance.

In attempting to sustain the legality of its distribution system, Sandura alleged that competitive conditions in the industry and the necessity of attracting new dealers with no prior business experience able to make the heavy capital investment necessary to distribute a new product necessitated the use of a closed territorial system.[56] It argued that rejection of this system would cause it to lose its energetic dealers, thereby impairing rather than promoting competition in the industry.[57]

The FTC assumed *arguendo* that Sandura's argument of economic justification—analogous to the failing company doctrine under section 7 of the Clayton Act[58]—would apply to a section 5 case[59] and rejected it on three grounds: (1) Sandura was not a failing company; (2) there was no causal connection between fiscal success and the distribution system; and (3) there were no similar provisions in distribution systems of Sandura's twenty competitors.[60] This third ground implies that practices of competitors in the industry, though not determina-

53. Sandura Co., TRADE REG. REP. (1961-63 Trade Cas.) ¶ 15424 (FTC 1961).
54. TRADE REG. REP. (1961-63 Trade Cas.) ¶ 15945 (FTC 1962).
55. *Id.* at 20772-73.
56. *Id.* at 20763.
57. *Ibid.*
58. International Shoe Co. v. Federal Trade Comm'n, 280 U.S. 291 (1930).
59. Sandura Co., *supra* note 53, at 20763-64.
60. *Id.* at 20764-65.

tive, are relevant in assessing the legality of a challenged distribution system.[61]

Because territorial limitations may have varying effects and may be economically justified, the Supreme Court's realistic consideration of the problem and its rejection of the per se approach in *White Motor* is undoubtedly correct.[62] An attempt to suggest specific economic justifications for use of territorial limitations appears futile because of the varying effects of these limitations in different industries under different competitive conditions. The following considerations can be said to be meaningful. *Nature of the limitation.* Since a territorial limitation has different competitive effects according to the type of limitation (exclusive selling, closed territory, geographical customer allocations), the nature of the agreement is important; a closed territorial system might be sustained when a geographical customer allocation system would fail. *Competitive nature of the industry.* In a highly competitive industry, territorial limitations may have little, if any, effect; however, the same limitation could be very restrictive in an oligopolistic industry. Other factors are the relevant market[63] and

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61. "Doubtless, long-tolerated trade arrangements acquire no vested immunity under the Sherman Act; no prescriptive rights accrue by the prosecutor's delay. . . . That consideration, however, is not wholly irrelevant when monopolistic purpose rather than effect remains to be gauged." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 623-24 (1953).

62. See note 39 *supra* and accompanying text. The central inquiry in analyzing exclusives is whether newcomers have entry into the market, irrespective of the manufacturer's distribution system. Federal Trade Comm'n v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 395 (1953); REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, 146-47 (1955).

The problem of exclusives has three competitive aspects: (1) the restraint imposed on the parties themselves, (2) the impact of the agreement on competitors of the buyer and/or seller, and (3) the effects on the consuming public. Essentially, this is a process of balancing the interests affected by the exclusive arrangement. DAY, *op. cit. supra* note 30; DIRLAM & KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY 141 (1954). See also Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 HARV. L. REV. 913, 919-31 (1952).

"The prime question is whether the exclusive, i.e., the *act* is unreasonable, or stems merely from socially acceptable methods of vying for customer patronage and from the free decision of buyer and seller." DIRLAM & KAHN, *op. cit. supra* note 62, at 118.

63. In economics, the term market has several meanings. DUDDY & REVZAN, MARKETING 8-9 (1947); Vaile, *Some Concepts of Markets and Marketing Strategy*, in CHANGING STRUCTURE IN MARKETING—UNIVERSITY OF ILLINOIS MARKETING SYMPOSIUM 18-19 (1957). Legally, market is a judicial construct used to resolve three problems under the antitrust laws: (1) whether competition exists between two or more products; (2) whether a particular business organization or organizations have monopoly power; and (3) whether a certain transaction has anti-competitive effects. Note, 54 COLUM. L. REV. 580 (1954). This concept is a tool of factual analysis. *Id.* at 603.

The nature of this concept does not permit a particularized definition of market for all purposes; it will have to be defined for each individual case. *Id.* at 585. Professor Handler says that "the essential issue in defining a market is the area of effective the competitive position of the manufacturer employing the limitation, *i.e.*, whether it is a dominant producer, a new market entry, or a failing company.

III. Customer Limitations

When granting exclusive selling rights manufacturers frequently reserve the right to sell directly to large accounts.[64] Sometimes these arrangements also prohibit the distributor or dealer from selling to the "reserved" accounts.[65] Such an arrangement was present in *White Motor*—the dealers were prohibited from selling to governmental units and other large consumers. The Supreme Court, without expressing any opinion on the validity of White's customer limitations, held that it was not a per se violation of the Sherman Antitrust Act.[66]

Justice Brennan in his concurring opinion argued that customer limitations are inherently more dangerous than territorial limitations because they "serve to suppress all competition between manufacturer and distributors for the custom of the most desirable accounts"[67] and "seem to lack any of the countervailing tendencies to foster competition between brands which may accompany the territorial limitations."[68] In Justice Brennan's view,

> The crucial question . . . is whether, in any meaningful sense, the distributors could, but for the restrictions, compete with the manufacturer for the reserved outlets. If they could, but are prevented from doing so ouly by the restrictions, then in the absence of some justification neither presented nor suggested by this record, their invalidity would seem to be apparent.[69]

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competition." Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 Colum. L. Rev. 843, 853 (1959).

The market (relevant market as it is generally called) consists of a geographical market and a products market. Macdonald, *Product Competition in the Relevant Market Under the Sherman Act*, 53 Mich. L. Rev. 69, 70-80 (1954). See Hale & Hale, Market Power Size and Shape Under the Sherman Act § 3.7 (1958), and Note, 54 Colum. L. Rev. 580, 594-99 (1954), for factors in the analysis of the geographic market. For discussions of the products market see Hale & Hale, *op. cit. supra* § 3.4 (1958), and Note, 54 Colum. L. Rev. 580, 585-92 (1954).

Macdonald has proposed the following test to determine the market. "[C]*an the average customer change without substantial difficulty from the product of the defendant to the product claimed to be in the same markct with that of the defendant?*" Macdonald, *Product Competition in the Relevant Market Under the Sherman Act*, 53 Mich. L. Rev. 69, 82 (1954). See also Report of the Attorney General's National Committee to Study the Antitrust Laws 1, 44-48 (1955); Rostow, *Problem of Size and Integration in Business Practice Under Federal Antitrust Laws*, 1951 Antitrust L. Symposium N.Y.B.A. 117, 126.

64. See generally Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795, 817-23 (1962).

65. *Id.* at 817-19.

66. White Motor Co. v. United States, 372 U.S. 253 (1963).

67. *Id.* at 272.

68. *Ibid.*

69. *Id.* at 272-73. For a case striking down a customer limitation arrangement see

White Motor, attempting to justify the use of customer limitations, argued that (1) distributors were not competent to handle the intricate process of servicing large accounts;[70] (2) "the only sure way to make certain something really important is done right, is to do it for oneself";[71] and (3) these limitations are necessary to enable White to more effectively compete with its competitors by direct selling.[72] Justice Breman rejected all three arguments.[73]

Justice Breunan's summary dismissal of White's service argument is unfortunate. Undoubtedly a manufacturer has a legitimate interest in servicing, especially in the truck manufacturing industry, where servicing may be the decisive factor in brand selection; the manufacturer should be entitled to protect this interest if a dealer cannot adequately and effectively service large accounts. White's servicing argument may be valid in reference to a dealer in a small community, but it does not follow that the argument is equally valid when applied to White's large dealers in the metropolitan areas of New York and Chicago. Therefore, a court in assessing the merits of a manufacturer's servicing argument should inquire into the servicing facilities and capabilities of each dealer in the manufacturer's distribution system.

The Seventh Circuit Court of Appeals, in sustaining Snap-On's customer limitation,[74] examined all the instances where the restraint was enforced and concluded that:

> Reasoned analysis of *each instance* leads us to the conclusion that at most a *de minimis* restraint on competition was involved and that the entire record fails to afford a substantial basis for the implied finding of the Commission that the practice was widespread, or an integral part of an unlawfully restrictive dealer system.[75]

Prior to *White Motor* a long line of cases recognized the common law right of a private manufacturer engaged in private enterprise to exercise discretion in selecting the outlets of his distribution system.[76]

United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945). See Note, 75 HARV. L. REV. 795, at 817-19; Note, 41 ILL. L. REV. 132 (1946); 14 GEO. WASH. L. REV. 531 (1946).

70. White Motor Co. v. United States, 372 U.S. 253, 273-74 (1963).

71. *Id.* at 274.

72. *Id.* at 274-75.

73. *Id.* at 273-75.

74. Snap-On Tools Corp. v. Federal Trade Comm'n, 321 F.2d 825 (7th Cir. 1963).

75. *Id.* at 836. (Emphasis added.)

76. Federal Trade Comm'n v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924); Federal Trade Comm'n v. Beech-Nut Packing Co., 257 U.S. 441, 452-53 (1922); Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., 224 Fed. 566 (S.D.N.Y.), *aff'd*, 227 Fed. 46 (2d Cir. 1915). See Handler, *Recent Antitrust Developments*, 112 U. PA. L. REV. 159 n.32 (1963).

The Supreme Court, in *United States v. Colgate & Co.*,[77] recognized this right in what has come to be known as the *Colgate* doctrine.[78] Subsequently, the *Colgate* doctrine was clarified[79] and its validity questioned.[80] Then in *United States v. Parke Davis & Co.*,[81] the Supreme Court stated:

> When the manufacturer's actions . . . go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration [manufacturer's right to freely exercise his own independent descretion as to those with whom he will deal] is not present and therefore he has put together a combination in violation of the Sherman Act.[82]

Whether the refusal-to-deal cases extend to customer limitations is an open question. Generally these cases have involved price fixing considerations, which may or may not be present in an exclusive selling arrangement with customer limitations. Both situations are similar in that the manufacturer, generally speaking, is limiting the dealer's right of resale. The situations differ in that the manufacturer in the refusal-to-deal cases is not selecting the ultimate consumer, only those to whom he will sell. When utilizing customer limitations similar to those in *White Motor*, the manufacturer is reserving certain ultimate consumers for himself so that he may either skim "off the cream of the trade for . . . [his] own direct sales,"[83] or protect his reputation and good will.[84] Because of these differences and the different considerations in analyzing each arrangement, the refusal-to-deal cases should not be extended to customer limitations.

In summary, customer limitations—reservation of selected accounts by the manufacturer—are not illegal per se; thus Justice Brennan's suggested analysis of territorial limitations may be used to determine the validity of customer limitations.[85]

77. 250 U.S. 300 (1919).

78. "In the absence of any purpose to create or maintain a monopoly, the act [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." *Id.* at 307.

79. See, *e.g.*, United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Federal Trade Comm'n v. Raymond Bros.-Clark Co., *supra* note 76; Federal Trade Comm'n v. Beech-Nut Packing Co., *supra* note 76.

80. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 684-91 (1962).

81. 362 U.S. 29 (1960).

82. *Id.* at 44.

83. White Motor Co. v. United States, 372 U.S. 254, 274 (1963).

84. See Note, 75 HARV. L. REV. 795, 830-31.

85. The following test has been suggested for determining the legality of customer limitations: "Unless it can be said that the restraint will significantly diminish the vitality of competition in the relevant market, it should be permitted as reasonably

CONCLUSION

At present, the status of exclusive selling arrangements with territorial and/or customer limitations is unsettled. Since these arrangements are not illegal per se, a full trial is necessary to adjudge their validity. Future courts, enlightened by the arguments of lawyers, the analyses of commentators, and the testimony of numerous expert witnesses, will be in a better position to formulate policies and establish guidelines in this area. Legislative proposals may be submitted to Congress to eliminate this uncertainty. Hasty legislation in this area would be unwise, however, for legislative experience in this area, like judicial experience, is limited.

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calculated to strengthen the hand of the manufacturer in competing with others." Robinson, *Restraints on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254, 274 (1960).