ARE WE EXCLUSIVE? DOES IT MATTER?: AN ANTITRUST-INSPIRED FRAMEWORK FOR UNDERSTANDING ANTI-EXCLUSIVE DEALING STATUTES AND THE MEANING OF COERCION

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INTRODUCTION

Exclusive dealing is a desirable practice in many industries.[1] It is also the subject of numerous antitrust lawsuits and opinions. Despite the abundance of exclusive dealing commentary, broad anti-exclusive dealing statutes have escaped analysis until recently. In 2006 and 2007, however, the Courts of Appeals for the Sixth[2] and Eighth Circuits[3] addressed Minnesota's[4] and Tennessee's[5] anti-exclusive dealing laws. In both opinions, the courts tried to reconcile the viability of exclusive deal clauses with statutes that prohibit manufacturers from "coercing" dealers into entering into exclusive contracts. This Article examines those decisions and offers an antitrust-inspired framework for analyzing alleged "coercion."

Part I defines exclusive dealing and then turns to the emergence of state anti-exclusive dealing statutes. This Part explains that although many states have enacted such statutes, it is difficult to discern what legislatures meant when they forbade coercive demands for exclusive deals.

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1. *See, e.g.*, Standard Oil Co. of California v. United States, 337 U.S. 293, 306–07 (1949).

2. *See* NACCO Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc., 246 F.App'x 929 (6th Cir. 2007).

3. *See* Minnesota Supply Co. v. Raymond Corp., 472 F.3d 524 (8th Cir. 2006).

4. MINN. STAT. ANN. § 325E.0682(b)(2) (West 2007).

5. TENN. CODE ANN. § 47-25-1304(3) (West 2007).

From there, this Article in Part II examines the Sixth and Eighth Circuit anti-exclusive dealing statute cases. The federal district courts and circuit courts of appeals all faced the same dilemma: how to balance the manufacturers' right to ask for and receive an exclusive deal with legislative prohibitions. The two Circuits reached facially different results: one overturning the district court's finding that the manufacturer violated the anti-exclusive dealing statute and the other upholding the district court's finding of a violation. Both courts, however, focused on whether the manufacturer "coerced" the dealer into complying with the parties' latest exclusive deal. We believe that focus caused the Eighth Circuit to ignore legislative intent in favor of upholding exclusive deals[6] and caused the Sixth Circuit to defer fully addressing the coercion dilemma.[7]

In Part III, the authors explain how to solve the coercion dilemma. We begin by using antitrust analysis to identify the proper niche for anti-exclusive dealing statutes. We then show how identifying that niche and antitrust analysis leads to several conclusions and ultimately a framework that courts can follow to properly assess whether a manufacturer coerced a dealer into entering into an exclusive deal.

Finally, in Part IV, this Article applies the suggested framework to the Sixth and Eighth Circuit cases and, in so doing, shows that those courts did not actually determine whether the manufacturers coerced their respective dealers.

I. THE EMERGENCE OF ANTI-EXCLUSIVE DEALING STATUTES AND THE COERCION QUESTION

"Exclusive dealing" is a dealer's promise to a manufacturer that it will not sell competing products.[8] It offers a variety of potential benefits to manufacturers, including reduced *intra*brand competition (which enhances *inter*brand competition),[9] lower transaction costs,[10] and a greater ability to protect confidential information from competitors.[11]

Like any other vertical restraint, exclusive dealing can harm society by reducing competition. Thus, exclusive dealing is probably illegal when practiced by a monopolist to exclude rivals and when enough of the market is foreclosed to harm the competitive process.[12] Short of such foreclosure, the Supreme Court "has recognized

6. *See infra* notes 44–50 and accompanying text.

7. *See infra* notes 73–77 and accompanying text.

8. *See, e.g.*, LEE N. ABRAMS, *The Standard of Legality: Per Se or Rule of Reason?*, *in* LEGAL ASPECTS OF SELLING AND BUYING § 1:29, 1-35–36 (Philip F. Zeidman, ed., West 3d ed. 2006) (1993).

9. *Cf.* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007) (discussing the procompetitive effects of reduced *intra*brand competition on *inter*brand competition).

10. Jonathan M. Jacobson & Scott A. Sher, *"No Economic Sense" Makes No Sense for Exclusive Dealing*, 73 ANTITRUST L.J. 779, 784–85 (2006).

11. *See* NACCO Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc., 366 F. Supp. 2d 597, 603–04 (W.D. Tenn. 2004), *aff'd in part, rev'd on other grounds*, 246 F.App'x 929 (6th Cir. 2007).

12. *See* Clayton Act § 3, 15 U.S.C. § 14 (2000) (prohibiting exclusive dealing that "substantially lessen[s] competition or tend[s] to create a monopoly"). When applying the Clayton Act to exclusive dealing, courts usually "pose two basic questions: (1) whether there was actually a sale conditioned on Buyer's agreement . . . and (2) whether that agreement foreclosed a significant portion of the market to [competitors]." HARVEY M. APPLEBAUM, *May Seller Restrict What Buyer Buys and Resells?*, *in* LEGAL ASPECTS OF SELLING AND BUYING, *supra* note 8, § 4:40, at 4-95–96; *see also* Jonathan M. Jacobson, *Exclusive Dealing*,

that [exclusive dealing] arrangements may have procompetitive effects and may be motivated by other than anticompetitive desires on the part of the seller."[13] Accordingly, since the 1980s, courts have routinely upheld exclusive dealing arrangements.[14]

Yet this judicial approval has not spread to state legislatures. The number of state anti-exclusive dealing statutes is increasing.[15] State anti-exclusive dealing statutes prevent manufacturers from "coercing" dealers into refusing to purchase products from a manufacturer's competitor.[16] Since 2000, ten states have enacted anti-exclusive dealing laws.[17] The addition of these ten states means that now nearly half of the country prevents manufacturer-coerced exclusive dealing in equipment dealership contracts.[18] What it means for a manufacturer to "coerce" a dealer into accepting an

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"Foreclosure," and Consumer Harm, 70 ANTITRUST L.J. 311, 327 (2002) (noting that courts now look to whether exclusive dealing raised prices or decreased output, not to simple foreclosure). Courts also look at the overall impact on competition. *See* APPLEBAUM, *supra*, at 4-96.

13. ABA SEC. ANTITRUST L., ANTITRUST LAW DEVELOPMENTS 215 (5th ed. 2002).

14. *See* Jacobson, *supra* note 12, at 324 (noting that Supreme Court rulings coupled with the Chicago School's laissez-faire approach to vertical economic restraints contributed to a trend towards upholding exclusive dealing arrangements).

15. *See infra* notes 17–18 and accompanying text.

16. For purposes of this Article, "anti-exclusive dealing statutes" refers only to those laws preventing manufacturers from "coercing" dealers into selling inventory solely from that manufacturer. There are other provisions in state equipment dealership statutes preventing dealer coercion. For example, statutes prevent suppliers from "coercing" dealers into signing supplemental agreements unless imposed on all similarly situated dealers in the state. *See, e.g.*, CAL. BUS. & PROF. CODE § 22902(b) (West 2006). Additionally, there are laws preventing manufacturers from "coercing" dealers into purchasing additional inventory that the dealer has not voluntarily ordered. *See, e.g.*, KY. REV. STAT. ANN. § 365.832(1) (West 2006). These dealer "coercion" laws are outside the scope of this Article.

17. *See* Act of July 1, 2004, ch. 2004-257, § 9(3)(j), 2004 Fla. Laws 873, 885 (codified at § 686.413(3)(j)); Act of April 1, 2005, ch. 238, § 7(11), 2005 Idaho Sess. Laws 730, 737 (codified at § 28-24-103(11)); Act of April 22, 2004, ch. 144, § 11(3), 2004 Ky. Acts 545, 548 (codified at § 365.832(3)); Equipment Dealer Contract Act, ch. 433, § 2, 2005 Md. Laws 1999, 2010 (codified at § 19-301(3)); Act of June 12, 2003, ch. 503, § 11(3), 2003 Nev. Stat. 3399, 3402 (codified at § 597.115.3); Act of July 24, 2001, ch. 66, § 1, 2001 N.C. Sess. Laws 1022, 1031 (codified at § 66-187.1(3)); Fair Practices of Farm, Construction, Industrial, and Outdoor Power Equipment Manufacturers, Distributors, Wholesalers, and Dealers, ch. 6, § 1, 2000 S.C. Acts 2495, 2508 (codified at § 39-6-110(B)); Act of May 2, 2002, § 2(3), 2002 Vt. Acts & Resolves 25, 26 (codified at § 4077a(3)); Equipment Dealers Protection Act, ch. 898, § 1, 2002 Va. Acts 2217, 2220 (codified at § 59.1-352.9(3)); Fair Practices of Equipment Dealers Act, ch. 107, § 1, 2006 Wyo. Sess. Laws 357, 360 (codified at § 40-20-114(a)(iii)).

18. Provisions preventing exclusivity are also found in other types of industry-specific statutes not reviewed here. *See, e.g.*, Florida Motor Vehicle Licenses Act, FLA. STAT. ANN. § 320.64(6) (West Supp. 2008) (effective July 1, 2007). This Article reflects research conducted under state general equipment and farm equipment dealership statutes. Heavy industrial and construction dealership statutes were not included, with the exception of Minnesota's Heavy and Utility Equipment Manufacturers and Dealers Act (HUEMDA). *See* MINN. STAT. ANN. § 325E.0682(b)(2) (West 2007). We included HUEMDA for the simple fact that it was the statute at issue in *Minnesota Supply Co. v. Raymond Corp.* 472 F.3d 524 (8th Cir. 2006) (interpreting MINN. STAT. ANN. § 325E.0682(b)(2) (West 2007)). For a discussion of *Minnesota Supply*, see *infra* Part II.A.

Presently, twenty-three states have anti-exclusive dealing laws in their equipment dealership statutes: Alabama, Arkansas, California, Florida, Idaho, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nevada, North Carolina, North Dakota, South Carolina, Tennessee, Texas, Vermont, Virginia, and Wyoming.

Additionally, New York and Oklahoma have pending anti-exclusive dealing legislation in both branches of their legislatures. *See* Assemb. B. 8657, 230th Leg., Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=A08657; S.B. 6166, 230th Leg., Reg. Sess. (N.Y. 2007), *available at* http://assembly.state.ny.us/leg/?bn=S06166; H.B. 1454, 51st Leg., Reg. Sess. (Okla. 2007), *available at* http://www.lsb.state.ok.us/ (click on "Status of Measures," then click on "Basic Search Form," then enter exclusive deal, however, remains unclear. Is merely asking for an exclusive deal illegal, or must a dealer actually comply with the manufacturer's request for there to be "coercion"? Similarly, does a manufacturer violate an anti-exclusive dealing law if it threatens litigation to enforce an exclusive dealing clause?

There is no easy answer. The statutes[19] themselves do not provide guidance, and most state legislatures passed their laws without any commentary.[20] Although many of

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HB1454 in the 2007 Regular Session); S.B. 1069, 51st Leg., Reg. Sess. (Okla. 2007), *available at* http://www.lsb.state.ok.us/ (click on "Status of Measures," then click on "Basic Search Form," then enter SB1069 in the 2007 Regular Session).

19. There are three types of anti-exclusive dealing statutes. For purposes of this Article, the salient feature of each law is that they prevent a manufacturer from "coercing" a distributor into accepting exclusive dealing.

(1) Under the basic anti-exclusive dealing laws, dealers are protected from manufacturers coercing them into refusing to purchase equipment from another manufacturer. Maryland's statute provides an instructive example of the basic anti-exclusive dealing law: "A supplier may not . . . [c]oerce a dealer into refusing to purchase equipment manufactured by another supplier . . . ." MD. CODE ANN., COM. LAW § 19-301(3) (LexisNexis 2005); *see also* CAL. BUS. & PROF. CODE § 22902(k) (West Supp. 2008); IOWA CODE ANN. § 322F.7.5 (West 2005); KY. REV. STAT. ANN. § 365.832(3) (West 2006); LA. REV. STAT. ANN. § 51:483(3) (2003); MINN. STAT. ANN. § 325E.063(b)(2) (West 2004); MISS. CODE ANN. § 75-77-4(c) (West 1999); NEV. REV. STAT. ANN. § 597.115.3 (LexisNexis 2004); N.C. GEN. STAT. § 66-187.1(3) (2007); TENN. CODE ANN. § 47-25-1304(3) (2001); TEX. BUS. & COM. CODE ANN. § 19.22(b) (Vernon 2002); VT. STAT. ANN. tit. 9, § 4077a(3) (2006); VA. CODE ANN. § 59.1-352.9.3 (2006); WYO. STAT. ANN. § 40-20-114(a)(iii) (2007). Recall that Minnesota also has an identical provision in HUEMDA. *See* MINN. STAT. ANN. § 325E.0682(b)(2) (West 2004); *see also supra* note 18.

(2) Some states protect against even *attempted* dealer coercion. Arkansas provides an example. *See* ARK. CODE ANN. § 4-72-310(b)(2) (2001); KAN. STAT. ANN. § 16-1205(b)(2) (1995); MO. ANN. STAT. § 407.844(3) (West 2001); N.D. CENT. CODE § 51-07-01.2.3 (1999). These laws are usually phrased like the statute in Arkansas: "It is a violation . . . for a manufacturer to . . . [c]oerce or attempt to coerce a dealer into refusing to purchase the equipment manufactured by another equipment manufacturer . . . ." ARK. CODE ANN. § 4-72-310(b)(2) (2001).

(3) The third type of anti-exclusive dealing statute protects dealer investment interests in other manufacturers. Alabama, Florida, Idaho, Maine, and South Carolina all have this type of law. *See* ALA. CODE § 8-21A-3(11) (LexisNexis Supp. 2007); FLA. STAT. ANN. § 686.413(3)(j) (West Supp. 2008) (effective July 1, 2008); IDAHO CODE ANN. § 28-24-103(11) (2005); ME. REV. STAT. ANN. tit. 10, § 1243(3)(L) (Supp. 2007); S.C. CODE ANN. § 39-6-110(B) (Supp. 2007). While each state's law is slightly different, South Carolina's law provides the simplest example: "A manufacturer may not prevent a dealer from having an investment in or holding a dealership contract for the sale of competing product lines or makes of equipment." S.C. CODE ANN. § 39-6-110(B) (Supp. 2007).

20. Many states do not keep records of legislative debates, committee meetings, or committee hearings. As to the ten states that passed anti-exclusive dealing statutes from 2000 to 2007, *see supra* note 17, we were only able to locate brief comments from the minutes of the Idaho House Business Committee meeting on March 1, 2005. *See Hearing on H.B. 197 Before the H. Bus. Comm.*, 58th Leg. 1 (2005) [hereinafter *Hearing on H.B. 197*]; *see also* H.B. 197, 58th Leg., Reg. Sess. (Idaho 2005), 2005 Idaho Sess. Laws 730. One of the Committee members posited that "it seems odd to be manipulating the marketplace and getting involved in contracts between retailers and wholesalers by manipulating their agreements." *Hearing on H.B. 197*, *supra*, at 2. Representative Block, the bill's sponsor, "explained that in the current climate, the few major farm equipment manufacturers are able to manipulate dealer contracts with few restrictions, and dealers need these protections to remain viable businesses." *Id.* The Committee also heard testimony in favor of the bill from Ron Moore, a representative from the Pacific Northwest Hardware and Implement Association. *See id.* at 1. According to Mr. Moore, "dealers are in a poor bargaining position with manufacturers. In most cases, the dealers have to accept whatever terms are presented to them by the manufacturers." *Id* at 1–2. This concern is evident in many dealer protection statutes. *See, e.g.*, Wisconsin Fair Dealership Law, WIS. STAT.

these laws have existed for several years, dealers did not resort to them and, until now, courts did not interpret them.[21]

II. RECENT GUIDANCE FROM THE SIXTH AND EIGHTH CIRCUITS

Recently, two dealers claimed that manufacturers violated anti-exclusive dealing statutes by enforcing exclusive dealing provisions.

The two circuit courts of appeals reviewing the applicable statutes reached at least partly conflicting results. The Eighth Circuit, in *Minnesota Supply Co. v. Raymond Corp.*,[22] upheld a manufacturer's right to terminate its dealer that violated an exclusive dealing clause because the dealer eventually bought from the competing manufacturer.[23] Hence, according to the court, there was only "attempted," not actual, i.e., actionable, coercion.[24] The Sixth Circuit, though, in *NACCO Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc.*,[25] upheld a preliminary injunction ruling that deemed an exclusive dealing agreement potentially "coercive" despite the dealer's purchases from a competing manufacturer.[26] Both courts sought to enforce state anti-exclusive dealing laws without invalidating all exclusive dealing clauses. Trying to balance these conflicting goals led the Eighth Circuit to largely eviscerate the Minnesota anti-exclusive dealing statute[27] and caused the Sixth Circuit to defer defining coercion under the Tennessee law to another day.[28]

A. *Minnesota Supply: A Limited View of Coercive Exclusive Dealing*

Minnesota Supply was a dealer of Raymond lift trucks.[29] Minnesota Supply was the only Raymond dealer in Minnesota and the parties worked without an exclusive deal for several decades.[30] The parties "updated" their agreement in 1990.[31] A new provision in the agreement allowed Raymond to terminate Minnesota Supply's dealership if it sold competing lift trucks without Raymond's consent.[32]

In 1992, Minnesota Supply decided to add a competing line of Caterpillar lift

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§ 135.025(2)(b) (2006) (providing that the purpose of the Wisconsin Fair Dealership Law is "[t]o protect dealers against unfair treatment by grantors, who inherently have superior economic power and superior bargaining power in the negotiation of dealerships").

21. *See, e.g., NACCO*, 366 F. Supp. 2d at 606 (noting the "absence" of case law interpreting anti-exclusive dealing statutes).

22. 472 F.3d 524 (8th Cir. 2006).

23. *Id.* at 539 ("Because § 325E.0682(b)(2) only prohibits coercion that results in a dealer's refusal to purchase equipment manufactured by another manufacturer and it is undisputed that [Minnesota] Supply did not refuse to purchase the Caterpillar lift trucks, we reverse . . . .").

24. *See id.* at 538.

25. 246 F. App'x 929 (6th Cir. 2007).

26. *See id.* at 947–50.

27. *See infra* notes 44–50 and accompanying text.

28. *See infra* notes 73–77 and accompanying text.

29. *Minnesota Supply*, 472 F.3d at 529.

30. *See* Brief of Appellant at 12, *Minnesota Supply*, 472 F.3d 524 (No. 04-1416) [hereinafter Raymond Brief]; Brief of Plaintiff/Appellee/Cross Appellant at 7, *Minnesota Supply*, 472 F.3d 524 (No. 04-1416).

31. *Minnesota Supply*, 472 F.3d at 529.

32. *Id.*

trucks to its product line.[33] Instead of terminating Minnesota Supply's license to sell Raymond products or forcing it to drop the Caterpillar line, Raymond proposed (or demanded, depending upon one's vantage point) changes to the dealership agreement.[34] In an amendment to the parties' agreement, Minnesota Supply agreed to create a new division for the sale of the competing Caterpillar products and maintain Raymond's existing market share for Raymond lift trucks.[35] If Minnesota Supply did not comply, Raymond had the right to terminate.[36]

After agreeing to the new provision, Minnesota Supply began selling the competing line of Caterpillar lift trucks.[37] When Raymond's market share dropped, it terminated the agreement.[38]

Minnesota Supply sued Raymond, claiming that Raymond violated three provisions in Minnesota's Heavy and Utility Equipment Manufacturers and Dealers Act (HUEMDA).[39] The anti-exclusive dealing part of HUEMDA makes it illegal to "coerce an equipment dealer into a refusal to purchase the equipment manufactured by another equipment manufacturer."[40] Minnesota Supply argued that Raymond's termination threat coerced it into choosing between agreeing to the market share amendment or refusing to sell Caterpillar trucks.[41] Raymond countered that since Minnesota Supply did purchase and sell Caterpillar trucks, there was no coercion prohibited by HUEMDA; it was simply enforcing the parties' agreement.[42] Minnesota Supply won a jury verdict.[43]

The Eighth Circuit, however, sided with Raymond.[44] To violate HUEMDA, the court held, "a manufacturer's action must be coercive and its result must be a dealer's *refusal* to purchase another manufacturer's equipment."[45] In the present case, HUEMDA did not protect Minnesota Supply because it did not "refuse" to purchase another manufacturer's equipment.[46] Instead, Raymond consented to Minnesota Supply's sale of Caterpillar lift trucks, provided Minnesota Supply met market share requirements and created a new division.[47] Raymond's threats to terminate, therefore,

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33. *Id.* at 529–30.

34. *See id.* at 530.

35. *Id.*

36. *Minnesota Supply*, 472 F.3d at 530.

37. *Id.*

38. *Id.*

39. *Id.* at 531; MINN. STAT. ANN. § 325E.0682(b)(2) (West 2007). In addition to its allegation that Raymond violated HUEMDA's anti-coercion provision, Minnesota Supply also claimed that (1) the amended agreement was a change in competitive circumstances imposed without good cause; and (2) Raymond's termination of the dealership agreement was without good cause because it was based on Minnesota Supply's failure to meet unreasonable terms set forth in the amended agreement. 472 F.3d at 531.

40. MINN. STAT. ANN. § 325E.0682(b)(2).

41. *Minnesota Supply*, 472 F.3d at 531.

42. *Cf. id.* at 538.

43. *See id.* at 536–37. The district court instructed the jury that coercion is "conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it." *Id.* at 536 (quoting Trial Tr. at 1908).

44. *Id.* at 538–39.

45. *Id.* at 538 (emphasis added).

46. *Minnesota Supply*, 472 F.3d at 538.

47. *Id.*

"did not coerce [Minnesota] Supply into refusing to purchase another manufacturer's equipment."[48]

The court went on to explain what Minnesota's statute did *not* prevent: "[w]e do not believe that HUEMDA prohibits a manufacturer from terminating a dealership agreement with a dealer who chooses to offer competing equipment where that termination was expressly provided for in the agreement."[49] Then, the court reached its core objection in a footnote:

> [Minnesota] Supply's interpretation of HUEMDA would effectively render exclusivity provisions ineffectual because any provision allowing a manufacturer to terminate an agreement once it became nonexclusive would be deemed coercive, void, and unenforceable. Further, any attempt to bargain for an exclusivity provision or to sue for its breach would not only be futile but could also be deemed coercive inasmuch as it would seek to prevent the purchase of another manufacturer's equipment.[50]

The Eighth Circuit did not explain when, if ever, a manufacturer's demand is coercion that violates HUEMDA.

B. NACCO*: Same Approach, Different Result*

NACCO manufactured and sold Yale forklifts.[51] Lilly Co. was the exclusive Yale forklift dealer in Memphis and Nashville.[52] The parties had a non-exclusive dealing relationship for years, but in 1992, the parties added a clause that "prohibited Lilly from 'sell[ing] or offer[ing] for sale . . . new equipment which competes directly with Yale Products' during the term of the [agreement]."[53] When NACCO heard rumors that Lilly was planning on becoming a Toyota dealer as well, it threatened to terminate and litigate against Lilly and its officers "for estimated large sums of money."[54]

Still, Lilly decided to contract with Toyota in Memphis.[55] NACCO immediately tried to terminate Lilly's Memphis and Nashville dealerships because of Lilly's breach of the exclusive dealing provision.[56] Lilly sought a preliminary injunction to prevent

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48. *Id.*

49. *Id.*

50. *Id.* at 538, n.3. "Exclusivity" is a general term for a vertical restraint that (usually) refers to a manufacturer's agreement to grant the sole right to sell a product in a certain arena. *See* THOMAS V. VAKERICS, ANTITRUST BASICS § 7.10, at 7-29 (Law Journal Press 1997). The term "exclusivity" is often used interchangeably with "exclusive dealing." We have tried to maintain the distinction in this Article, but have deferred to the courts when quoting specific passages. The manufacturer might limit the distributor to a defined territory or customer base, to certain areas of primary responsibility, or obligate a distributor to share profits if it sells outside its defined arena. The key is that the distributor is restricted in some manner if it sells outside of the chosen arena.

51. *NACCO*, 246 Fed. App'x at 932.

52. *NACCO*, 366 F. Supp. 2d at 599.

53. *NACCO*, 246 Fed. App'x. at 933 (alteration in original) (quoting the parties' Dealer Marketing Agreement).

54. *Id.*

55. *See id.*

56. *Id.* at 934. The court mentions that NACCO sued before Lilly entered into the contract, but offered

early termination,[57] citing Tennessee's Repurchase of Terminated Franchise Inventory Act.[58] That statute forbids a manufacturer from terminating a dealer without "good cause"[59] and from "[c]oerc[ing] a retailer into refusing to purchase equipment manufactured by another supplier."[60] Lilly argued that NACCO violated Tennessee's statute when it threatened Lilly.[61] NACCO argued that it had "good cause" because Lilly violated the exclusive dealing section of their agreement.[62]

Finding that Lilly had "a strong likelihood of success" on the merits,[63] the district court granted the preliminary injunction for Lilly.[64] The district court reasoned that "Yale's conduct in threatening to sue Lilly's officers and to terminate the... agreements is coercive conduct because Yale is seeking to restrain Lilly's unwaivable right to purchase equipment from another supplier by such threats."[65] Swayed by Lilly's argument that the statutory "coercion" provision could not be a nullity,[66] the court added that its interpretation "comports with the ordinary meaning of 'coerce.'"[67] In short, Lilly's violation of the exclusive dealing section was not "good cause" for termination because the clause was illegal.[68]

The parties honed in on the coercion issue on appeal.[69] NACCO argued that the district court's reading would void all exclusive dealing provisions, and that Lilly (like the plaintiff in *Minnesota Supply*) was not protected because it actually contracted with the competing manufacturer, Toyota.[70] NACCO further reasoned that "as a dealer for a competing forklift brand, Lilly should no longer be privy to NACCO's marketing strategy for Yale forklifts."[71] Lilly responded that if NACCO were correct, manufacturers could "skirt the protections set forth by the legislature by forcing retailers to agree to exclusivity provisions in non-negotiable contracts."[72]

According to the Sixth Circuit, "[w]hether NACCO engaged in unlawful coercion in its methods enforcing the Exclusivity Provision or NACCO lawfully sought to

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to withdraw the complaint if Lilly decided not to pursue a contract with Toyota. *Id.* Such tactics are unsurprising since parties that continue to do business together are less likely to want to pursue litigation.

57. *Id.*

58. *NACCO*, 366 F. Supp. 2d at 601; TENN. CODE ANN. §§ 47-25-1301–1314 (West 2006).

59. In addition to several definitions of "good cause" not relevant here, the statute defines "good cause" as "failure by a retailer to comply with requirements imposed upon the retailer by the retail agreement if such requirements are not different from those imposed on other retailers similarly situated in [Tennessee]." TENN. CODE ANN. § 47-25-1302(a).

60. TENN. CODE ANN. § 47-25-1304(3).

61. *NACCO*, 366 F. Supp. 2d at 599.

62. *Id.*; *see supra* note 59 and accompanying text.

63. *NACCO*, 366 F. Supp. 2d at 608.

64. *Id.* at 611.

65. *Id.* at 608.

66. *See id.* at 607–08; *see also infra* note 78 and accompanying text.

67. *NACCO*, 366 F. Supp. 2d at 608; TENN. CODE ANN. §§ 47-25-1301–1314 (West 2006).

68. *See NACCO*, 366 F. Supp. 2d at 608 (finding that while "it is not coercion to enforce a *valid* provision," NACCO's exclusivity clause did not qualify for this protection because "the statute expressly makes the prohibited provision invalid and not subject to waiver" (emphasis added) (distinguishing Cecil Corley Motor Co. v. Gen. Motors Corp., 380 F. Supp. 819, 843 (M.D. Tenn. 1974))).

69. *See NACCO*, 246 Fed. App'x at 936–50.

70. *Id.* at 940 (citing *Minnesota Supply*, 472 F.3d 524); *see also supra* note 46 and accompanying text.

71. *NACCO*, 246 Fed. App'x at 934.

72. *Id.* at 940.

enforce Lilly's contractual obligation is a 'close call.'"[73] The court assumed "for purposes of this appeal that the mere presence of the [parties'] Exclusivity Provision does not constitute coercion and that the Exclusivity Provision is not void and is enforceable."[74]

That said, the court refused to take the entire *Minnesota Supply* approach.[75] Instead, it punted the difficult issue back to the district court: "[r]egardless of whether, under Tennessee law, coercion is only possible if Lilly did not purchase Toyota equipment or the trial court correctly concluded that NACCO could coerce Lilly through its enforcement of the Exclusivity Provision, we cannot determine that Lilly had absolutely no likelihood of success on the merits . . . ."[76] With that, the court upheld the district court's finding that Lilly showed a likelihood of success on the merits in its preliminary injunction claim.[77]

III. HOW SHOULD COURTS DEFINE COERCION?

The *NACCO* and *Minnesota Supply* courts struggled to maintain the viability of exclusive dealing clauses while also giving meaning to the legislative prohibition against coercion. Three courts interpreted coercion in three different ways and another deferred an answer to another day. That is an untenable situation for dealers and manufacturers considering whether to begin or extend an exclusive deal. Parties will take cold comfort in proving that exclusive deal clauses are valid or invalid after spending thousands of dollars battling over their meaning. What does coercion mean, and when should a manufacturer feel safe asking for or enforcing its exclusive dealing clause? The antitrust-inspired framework proposed here answers these questions and, therefore, solves the dilemma faced by the Sixth and Eighth Circuit Courts of Appeals.

First an observation: the laws must mean something.[78] Although that seems obvious, the Eighth Circuit's decision in *Minnesota Supply* raises the possibility that Minnesota's anti-exclusive dealing law is functionally meaningless. According to the court, a dealer that does not comply with a manufacturer's exclusive-deal demands cannot prove a violation of Minnesota's statute, even if it is terminated by the manufacturer.[79] Actual coercion—refusing to purchase from another manufacturer—is

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73. *Id.* at 941.

74. *Id.*

75. *See supra* notes 44–50 and accompanying text.

76. *See NACCO*, 246 Fed. App'x at 941.

77. *Id.*

78. Basic canons of statutory interpretation counsel against courts "reading out" statutory language. *See, e.g.*, GEORGE COSTELLO, CONGRESSIONAL RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 12 (2006) ("[S]tatutes should be construed 'so as to avoid rendering superfluous' any statutory language." (*quoting* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991))). The district court in *NACCO* wrestled with this idea when it noted that "coercion" must mean *something* or else it would "read out" the anti-waiver provision in Tennessee Code Section 47-25-1313. *See NACCO*, 366 F. Supp. 2d at 607 ("Although Yale maintains that it can only 'coerce' Lilly under the statute when the agreement is being entered into, such a construction of the statute would seem to leave § 47-25-1313 with no effect.").

79. Minnesota Supply Co. v. Raymond Corp., 472 F.3d 524, 538 (8th Cir. 2006) (holding that a dealer must "refuse" to purchase another manufacturer's equipment and discussing the viability of exclusive deals); *see also supra* notes 45–46, 49 and accompanying text.

a must.[80] Yet consider that scenario: Manufacturer *A* actually coerces a dealer into refusing to purchase products from Manufacturer *B*. From whom will the dealer then purchase products? Manufacturer *A*, of course. Since the dealer will have to continue to conduct business with Manufacturer *A*, a lawsuit is not a viable option for the dealer.[81]

The next easiest boundary to draw is maintaining the viability of exclusive dealing clauses. Courts will not simply find that all exclusive dealing provisions are void. Instead, most will follow the Sixth and Eighth Circuits' lead and disregard the "ordinary meaning of the term 'coerce'"[82] to avoid invalidating all exclusive dealing provisions. This treatment is reminiscent of judicial views of the Sherman Act's prohibition of "every contract . . . in restraint of trade."[83] That is a sensible result in light of the abundance of exclusive deals throughout industry, although the courts' methods of arriving at that result might deprive the anti-exclusive dealing statutes of meaning.

Statutory antitrust law establishes another boundary that neither *NACCO* nor *Minnesota Supply* discussed. Presumably, anti-exclusive dealing laws are not redundant or superfluous.[84] It is illogical to presume that statutory language discussing the need to protect dealers invalidates only conduct that is already illegal.[85] It is safe to assume that anti-exclusive dealing statutes are not concerned with monopoly, attempted monopoly, or harm to competition through market foreclosure. What's the point? Legislators presumably understand that federal and state antitrust laws already protect competition. The corollary to that point is that legislators are probably not concerned that manufacturers would force distributors to conspire to enforce the manufacturer's monopoly.[86] That conduct is already illegal. In short, because the "essential antitrust issue is how to determine when aggressive conduct . . . destroys 'competition itself,'"[87] anti-exclusive dealing statutes must fill a different niche.

Although antitrust law is not determinative, antitrust analysis helps identify that niche. Antitrust commentators assume that the risks inherent in exclusive deals limit the chance that those deals will harm competition.[88] A manufacturer is unlikely to receive an exclusive deal without compensating a dealer.[89] Hence, it risks finding itself stuck with a dealer to whom it granted exclusivity for the long-term in states with pro-dealer laws[90] or reducing its margins to keep the exclusive deal in place.[91] Dealers

80. *See supra* note 45 and accompanying text.

81. *Cf. supra* note 56 and accompanying text.

82. NACCO Materials Handling Group, Inc. v. Toyota Materials Handling USA, Inc., 366 F. Supp. 2d 597, 608 (W.D. Tenn. 2004), *aff'd in part, rev'd on other grounds*, 246 Fed. App'x 929 (6th Cir. 2007).

83. 15 U.S.C. § 1 (2000); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2713 (2007) ("While § 1 could be interpreted to proscribe all contracts. . ., the Court has never taken a 'literal approach to [its] language.'"(quoting Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006)).

84. *See supra* note 78 and accompanying text.

85. *See* Clayton Act § 3, 15 U.S.C. § 14 (2000); *see also supra* note 12 and accompanying text.

86. Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119, 124–25 (2003).

87. *Id.* at 119.

88. *See* RICHARD A. POSNER, ANTITRUST LAW 231 (2d ed. 2001) (examining *United Shoe Mach. Co v. United States*, 258 U.S. 451 (1922), and noting that United's customers would be unlikely to help United garner a monopoly without sufficient compensation).

89. *See id.*

90. *See, e.g.*, Wisconsin Fair Dealership Law, WIS. STAT. §§ 135.01–.07 (2006).

face an even greater risk. As Richard Posner explains:

> [T]he distributor who agrees to carry the goods of only one producer as part of a scheme to give the producer a monopoly assumes a big risk. Once the producer achieves a monopoly, the distributor will be at [the producer's] mercy unless the terms of [the distributor's] contract with the producer prevent the latter from later charging . . . a monopoly price or compensate . . . for the future exactions.[92]

For present purposes, Posner's explanation of dealer risk raises two obvious questions: (1) What happens to a distributor who agrees to carry the goods of only one producer for some reason other than assisting a manufacturer's monopoly; and (2) What if a manufacturer is not a monopolist, but can force the dealer to agree to unfavorable terms? The answer is that in some cases, those dealers are protected by state anti-exclusive dealing laws.

To help illustrate why, consider a manufacturer who, to enter the market, offers a dealer exclusivity in a chosen territory (a common vertical restraint) and does not demand an exclusive deal.[93] The manufacturer is a recent entrant; falling prey to a monopolist is not a concern for the dealer. The exclusivity will also benefit the dealer and the manufacturer in a number of ways. It will reduce margin-lowering cutthroat competition, ensure that dealers that invest in customer service and promotion are not undercut by free-riders and, in so doing, help the manufacturer build a dealer network.[94]

Notice also that if the manufacturer never offers the possibility of higher profits to sell its product (in our example, the exclusivity vertical restraint), it will probably not overcome the dealer's reluctance to join a distributor network for a new product. Likewise, if a manufacturer does not give a dealer a reason to believe that it will achieve higher profits selling the manufacturer's product, a dealer will be less willing to make extra investments to sell the product.

At the outset of this hypothetical relationship the bargaining power could be on either side. The key is that the parties are on a level playing field in that neither party is invested in the relationship. But once both parties have received the mutual benefit of the contract, the power can shift to one side or the other. Many legislatures, as evidenced by dealer laws, believe that the power usually shifts to the manufacturer.[95] That power shift is of no consequence in antitrust law if a substantial part of the market is not foreclosed.[96] The party with more power will simply continue to extract the best

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91. POSNER, *supra* note 88, at 231.

92. *Id.* at 230.

93. *Cf. supra* note 50.

94. One of the reasons manufacturers have exclusivity agreements is to encourage dealers to promote its product over those of a competitor (i.e., *inter*brand competition). *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2715 (2007); *see also supra* note 9 and accompanying text.

95. *See supra* note 20.

96. *See* Klein, *supra* note 86, at 123; *see also supra* note 12. That is not to say that the "locus of power" is irrelevant to antitrust analysis. Warren Grimes recently recognized that "the locus of power in a vertical relationship strongly affects competitive outcomes in the distribution system." Warren S. Grimes, *The Future of Distribution Restraints Law: Will the New Learning Take Hold?*, 2006 UTAH L. REV. 885, 889. But as he explains, the locus of power is important to judge anticompetitive effects, e.g., exclusion of competitors. *Id.* at 908.

terms it can from the relationship. If no competitors are excluded from selling in the market, life goes on.[97]

Addressing this power shift between a dealer and manufacturer is a logical niche for the state anti-exclusive dealing laws, however. The laws are, in essence, additional protection for dealers facing the risks mentioned above.

That protection is necessary when there is a power shift and after some sort of enticement to enter into the relationship. After the power shift, the manufacturer of an established product has its choice of dealers and can demand an exclusive deal, but the dealer that made mutually beneficial investments cannot demand adequate compensation for the "future exactions."[98] Since it is the power shift that allows statutory coercion, anti-exclusive dealing laws logically must be aimed at the parties' *renegotiation*, not the initial agreement when a dealer can demand future exactions for an exclusive deal without concern over its investments.[99]

Put another way, the laws seek to restore the parties' bargaining position to the time the manufacturer first offered the dealer an enticement to invest in and sell its product. By restoring the parties to a theoretically level playing field, anti-exclusive dealing laws allow a dealer to fairly assess what compensation it wants for an exclusive deal and prevent a manufacturer from using the mutual benefit of dealer investments (made because of the enticement) to its sole advantage.

Thus, to find "coercion" under state anti-exclusive dealing laws, courts should look for the following:

(1) A manufacturer's enticement (e.g, exclusivity) to a dealer to sell the manufacturer's product. If the dealer is never given an enticement to sell the manufacturer's product (beyond a mere license), there is less opportunity for unfairness.

(2) Proof that the manufacturer has benefited from the added enticement. If the manufacturer has not benefited from the enticement, it will not have gained leverage at the dealer's expense.

(3) A renegotiation in which the manufacturer demands exclusive dealing.

(4) Finally, proof that the manufacturer insisted on the exclusive deal without giving a dealer compensation close to or equivalent to the "future exactions" the dealer could have demanded at the outset of the relationship.

By using these steps, a court can uphold contractual exclusive deals, while also giving

97. Grimes, *supra* note 96, at 908.

98. POSNER, *supra* note 88, at 230.

99. Indeed, the logic of looking to renegotiation is supported by many of the statutes that require dealers to show a dealership. *See, e.g.*, MINN. STAT. ANN. § 325E.068 (West 2007).

meaning to the word "coercion" and the anti-exclusive dealing statutes generally. It also saves a court from trying to determine whether a dealer actually felt pressured by a manufacturer's actions at the end of the relationship—an inquiry that is more appropriate for criminal or tort law—in favor of looking to the parties' entire relationship.

This framework is also a starting point for answering two tricky questions: (1) what to do with "attempted" or unsuccessful coercion;[100] and (2) how to address a manufacturer's right to enter into an exclusive deal.

Antitrust again provides useful analysis.[101] One commentator recently noted that the key to understanding illegal vertical conduct is whether the manufacturer's request for an exclusive deal involves an incentive or merely a take-it-or-leave-it (refusal to deal) proposition to prevent the distributor from engaging another manufacturer.[102] As Kenneth Glazer, Deputy Director of the Federal Trade Commission Bureau of Competition, explains, the incentivizing manufacturer does not demand an exclusive deal.[103] Instead, it says, "I would like you to buy my product exclusively and not purchase from competitors, but I don't insist on that. . . . But if you buy from me exclusively, then I'll give you a better price, an extra discount or bonus."[104]

Glazer's theory is helpful here. When examining alleged attempted coercion, a court should ask whether the manufacturer sought to stop its distributor from engaging another manufacturer by offering an incentive or by offering take-it-or-leave-it terms. To determine whether conduct is coercive or incentivizing the court should look to the difference between the new offer and the parties' original deal. For example, if an incentivizing manufacturer says upon renegotiation, "I now want an exclusive deal. I am offering our exclusive dealers a cheaper price than we initially negotiated," a dealer cannot complain of actionable coercive conduct. If, on the other hand, a manufacturer says, "I want an exclusive deal. If you do not accept, I am reducing your original territory," the dealer might have a claim. Again, the advantage here is that the court and parties will look to the entire relationship, including the enticement or bait that was initially offered to convince the dealer to invest in selling the manufacturer's product. Moreover, it avoids the *Minnesota Supply* result where a manufacturer was able to force a dealer to choose between allegedly unfair terms and buying from another manufacturer. As discussed, such results deprive the statutes of meaning.

The coercion-versus-incentive scenario also applies to a manufacturer's right to renegotiate an exclusive deal with its distributors. Simply put, a manufacturer that wants to avoid violating anti-exclusive dealing laws should approach existing dealers

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100. Recall that some states' anti-exclusive dealing laws protect against attempted coercion. *See supra* note 19 (describing statutes in Arkansas, Kansas, Missouri, and North Dakota).

101. *See* Kenneth L. Glazer, *Three Key Exceptions Under Section 2*, Antitrust Modernization Comm'n, September 29, 2005, http://www.amc.gov/commission_hearings/pdf/Glazer.pdf [hereinafter *Written Hearing Testimony*]; *see also Exclusionary Conduct: Refusals to Deal and Bundling and Loyalty Discounts: Hearing Before the Antitrust Modernization Comm'n*, http://www.amc.gov/commission_hearings/pdf/050929_Exclus_Conduct_Transcript_reform.pdf (a transcript of the hearing). Mr. Glazer's comments to the Antitrust Modernization Commission were given in his capacity as counsel for Coca-Cola, Co. Mr. Glazer has since been appointed to Deputy Director of the Federal Trade Commission Bureau of Competition.

102. *Written Hearing Testimony*, *supra* note 101, at 8.

103. *Id.* at 7.

104. *Id.*

with carrots rather than sticks.[105] Manufacturers should document and explain the incentive offered to gain an exclusive deal through a renegotiation.[106] To be completely safe, the manufacturer (or its lawyer) would determine what compensation would fairly compensate the dealer for benefits the manufacturer received from investments its dealer made due to the manufacturer's enticements. The closer the manufacturer is to that point the safer it will be, although requiring perfect alignment would be unreasonable.[107] Also, the adequate compensation does not have to be a high number. Certainly, dealers will ask for the moon, but the manufacturer should retain the right to show that it offered a fair incentive when it asked for the exclusive deal. A manufacturer which offers a fair incentive (one tied to the benefits of manufacturer-enticed dealer investments) that is rejected by its dealer is not coercing that dealer if the manufacturer takes its business elsewhere.[108]

A manufacturer's need to determine fair compensation also highlights the importance of the proposed framework's requirements of renegotiation and an enticement. An initial exclusive deal is fair because the requisite compensation is obvious; it is whatever the dealer asks for. Likewise, if a manufacturer never offered an enticement, pegging fair compensation for a new exclusive deal is easy; it is whatever the dealer now accepts, since it was selling the product without any encouragement from the manufacturer to make extra investments. Presumably, the dealer has invested in growing its business and will sell more of whatever is the most profitable product. If a manufacturer wants to extract more of that profit, it can try to do so and the dealer can ask for compensation. If that compensation is insufficient, the dealer will turn to the investments it has made in its own business to sell other, more profitable, products.

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105. *See generally* Willard K. Tom et al., *Anticompetitive Aspects of Market-Share Discounts and Other Incentives to Exclusive Dealing*, 67 ANTITRUST L.J. 615 (2000). However, the manufacturer must not reach the point of violating antitrust laws. *See id.* at 622 (noting that "antitrust laws normally encourage discounts and price reductions," but warning that anticompetitive effects are still possible).

106. *See id.* at 615 ("[R]ather than requiring absolute exclusivity, a manufacturer simply may give a more favorable price to customers who purchase more than a certain percentage of their requirements from the manufacturer."). Other examples include loyalty discounts and rebates. Any incentive short of predatory pricing should escape judicial condemnation under antitrust law or the anti-exclusive dealing statutes. *See Written Hearing Testimony*, *supra* note 101, at 9.

107. Another point to consider is whether manufacturers can avoid exclusive dealing statutes in another manner while receiving the same benefits. The Supreme Court's recent *Leegin* decision suggests that the answer is yes. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007). In *Leegin*, the Court said that resale price maintenance (RPM) was not per se illegal. *Id.* at 2725. As the Court noted, "[t]he justifications for vertical price restraints are similar to those for other vertical restraints." *Id.* at 2716. A minimum resale price agreement might encourage a retailer to promote or service certain brands, while ensuring that the high-service retailer is not undercut by free-riders that merely offer a cheaper price or it might facilitate entry into the market by smaller or new brands. *Id.* at 2718. Since RPM offers what vertical exclusivity offers, some manufacturers can avoid entering into exclusive dealership agreements and, instead, retain flexibility in using dealers, avoid dealership laws and so on. Theoretically, assuming the equivalent impact upon margins, a manufacturer that initially offers RPM and then later demands an exclusive deal should be treated the same as a manufacturer that offers exclusivity and then demands an exclusive deal. Practically speaking that probably will not be the case since RPM can be achieved without resort to a dealership contract that is often the starting point for analysis of manufacturer and dealer relationships. Moreover, the manufacturer demanding an exclusive deal will have a stronger hand since it will have other dealers in the same area. Hence, anti-exclusive dealing statutes and *Leegin* should decrease the number of manufacturers granting exclusivity, but will probably increase the number of manufacturers that avoid anti-exclusive dealing statutes.

108. Conceivably, a manufacturer could show that even though it coerced its dealer into accepting an exclusive deal, the dealer had garnered enough benefit to expunge the manufacturer's deeds.

IV. APPLYING THE FRAMEWORK TO *NACCO* AND *MINNESOTA SUPPLY*

If the Sixth and Eighth Circuits had used the rubric outlined above, they might have reached different results. The *Minnesota Supply* court, at the very least, did not consider all of the necessary facts.[109] Recall that in *Minnesota Supply*, the parties entered into an agreement in 1947.[110] Minnesota Supply was given an exclusive territory.[111] Raymond requested an exclusive deal in 1990.[112] In 1993, Raymond enforced its exclusive deal by forcing Minnesota Supply to choose between not selling Caterpillar trucks or selling Caterpillar trucks and then choosing termination or lower profits (lower profits being the obvious result of creating a new division and guaranteeing market share).[113] Faced with these facts the Eighth Circuit focused only on outcomes, i.e., whether Raymond had the right to request an exclusive deal and whether Minnesota Supply actually accepted termination, lower profits, or an exclusive deal with Raymond.

Minnesota Supply wrongly focused on the end result.[114] The dealer's real gripe was that Raymond used the 1990 exclusive deal to exact unfair contract terms after the parties had conducted business without an exclusive deal for several decades. If Raymond never enticed Minnesota Supply to invest in Raymond products, if Raymond never gained power from Minnesota Supply's investments, or if Raymond offered incentives for the exclusive deal in 1990, Raymond's actions to enforce the exclusive deal in 1993 are unimportant. Conversely, if Raymond used the power it gained from Minnesota Supply's investments in the relationship to coerce Minnesota Supply into an exclusive deal in 1990, its continued use of that leverage to extract new promises should not matter either. The Eighth Circuit's analysis ignores all of these fundamental questions.

Although the outcome was slightly different, the *NACCO* approach was similar to the *Minnesota Supply* approach.[115] After a long relationship, NACCO renegotiated the parties' contract in 1992 to include an exclusive dealing clause.[116] NACCO argued that Lilly voluntarily agreed to the new clause,[117] but neither party showed how, if at all, NACCO compensated Lilly for the new exclusive dealing clause. Instead, Lilly argued

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109. *See supra* notes 29–50 and accompanying text.

110. Minnesota Supply Co. v. Raymond Corp., 472 F.3d 524, 529 (8th Cir. 2006).

111. According to Raymond's Court of Appeals Brief, Minnesota Supply was the only Raymond dealer in Minnesota for many years. *See* Raymond Brief, *supra* note 30, at 12.

112. *Minnesota Supply*, 472 F.3d at 529. The court did not say whether Minnesota Supply received any compensation for that change or whether Raymond had benefited through the vertical restraint it offered Minnesota Supply in the previous 43 years.

113. *Id.* at 530.

114. *See id.* at 538 n.3. The court might have signaled that it recognized this issue by stating, "[t]here is no evidence that [Minnesota] Supply was coerced into accepting [the exclusive deal], nor that [Minnesota] Supply ever challenged the legality of [the exclusive deal] while enjoying the benefits of the agreement." *Id.* at 538. Even so, the court probably forced future courts to look only to the end result of possible coercion by requiring that a dealer actually *refuse* to purchase from another supplier.

115. *See supra* notes 51–77 and accompanying text.

116. *NACCO*, 246 Fed. App'x at 934.

117. NACCO's argument refutes a possible objection to the suggested framework. Determining whether a party offered incentives several years after a contract was executed raises evidentiary issues. However, similar evidentiary issues arise whenever contracts are disputed.

that it was coerced when NACCO threatened to terminate and litigate if Lilly violated the clause.[118] Again, whether the manufacturer said it was going to enforce its exclusive deal should not matter. Instead, the manufacturer's framing was correct. If Lilly truly voluntarily agreed to the 1992 change because the manufacturer offered it a fair deal (incentives), then NACCO had every right to enforce the clause. Lilly simply miscalculated the cost (required future exactions) of the exclusive deal. If Lilly was coerced, i.e., did not receive any incentive for entering into the renegotiated exclusive deal that acknowledged its investments, then NACCO's continued attempts to leverage its power add flavor to, but do not change, the outcome.

CONCLUSION

Courts analyzing anti-exclusive dealing laws face a dilemma: how to balance manufacturers' right to use exclusive dealing with legislatures' stated desire to forbid coercive exclusive deals. The *Minnesota Supply* and *NACCO* courts both struggled with that question. *Minnesota Supply* came down firmly on the side of allowing an exclusive deal, but possibly ignored legislative intent. The *NACCO* court seemed to begrudgingly find that the manufacturer might have violated the Tennessee statute and then sent the issue back to the district court. In both cases, the courts looked to the most recent actions by the parties. As is shown above, both courts would have been better served by developing evidence regarding the benefit the parties received from their deals and the manufacturers' actions when the exclusive deal was consummated. If courts look to the entire relationship instead of focusing only on how each manufacturer enforces an exclusive dealing clause in an otherwise valid contract, they will go a long way towards solving the dilemma posed by anti-exclusive dealing statutes.

118. *NACCO*, 246 Fed. App'x at 935.