United States v. Dentsply International: Putting Teeth Into Exclusive-Dealing Claims?

*By John K. Bush**

Introduction

In many courts, an antitrust challenge to an exclusive contract can be called a "Rodney Dangerfield": it gets no respect. As the First Circuit observed, "[d]espite some initial confusion, today exclusive dealing contracts are not disfavored by the antitrust laws."[1] They are not *per se* illegal in vertical relationships but rather are judged under the rule of reason.[2] And, as the Second Circuit noted, they are "presumptively legal."[3]

It is understandable why courts uphold many exclusive-dealing contracts. As the D.C. Circuit explained, "exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm."[4] In the right circumstances exclusive dealing can promote inter-brand competition and "enable a manufacturer to prevent dealers from taking a free ride"[5] on efforts such as national advertising.[6] Exclusivity also can sometimes be applauded for "assuring steady supply, affording protection against price fluctuations, reducing selling expenses, and promoting stable, long-term business relationships."[7]

In the last several years, however, conventional wisdom has been challenged by a string of high-profile federal appellate decisions. These opinions have affirmed jaw-dropping judgments on antitrust claims challenging certain exclusive-dealing arrangements or have held that such claims had to go to trial. The most recent example is the Third Circuit's decision in *United States v. Dentsply International, Inc*., which is the subject of a pending *certiorari* petition.[8] In *Dentsply*, the appellate court reversed summary judgment for Dentsply International, a manufacturer of prefabricated artificial teeth, and held that the Department of Justice had sufficient evidence to proceed on an illegal monopolization claim under § 2 of the Sherman Act[9] allegedly arising from exclusive contracts entered into between Dentsply and its dealers.

Dentsply comes on the heels of *LePage's Incorporated v. 3M*,[10] where the Third Circuit, sitting *en banc*, affirmed a $68 million judgment against 3M on a Sherman Act § 2 claim based on its exclusive dealing and other alleged exclusionary conduct in the transparent tape market. Last year, in *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories Inc*.,[11] the Second Circuit reversed summary judgment for a drug manufacturer and the supplier of a key chemical ingredient for a generic drug on a claim that their exclusive supply arrangement was an illegal restraint of trade under § 1 of the Sherman Act.[12]

Exclusive-dealing contracts were also successfully challenged in *United States v. Microsoft Corp*., in which the D.C. Circuit affirmed the district court's holding that Microsoft's exclusive contracts with internet-access providers were "exclusionary devices, in violation of § 2 of the Sherman Act,"[13] and in *Conwood Company, L.P. v. United States Tobacco Company*, in which the Sixth Circuit affirmed the largest antitrust judgment in U.S. history—$1.05 billion—against a manufacturer of moist snuff tobacco on a Sherman Act § 2 claim based upon alleged exclusionary conduct that included contracts with retailers for "exclusive racks" for product display.[14]

Dentsply and these other cases since 2000 stand in contrast to the almost universal judicial skepticism during the 1980s and 1990s of antitrust attacks on exclusive dealing. The Seventh Circuit, in particular, was an outspoken critic, in cases such as *Roland Machinery Company v. Dresser Industries, Inc*.,[15] and *Paddock Publications, Inc. v. Chicago Tribune Company*,[16] which rejected Sherman Act § 1 claims against exclusive agreements relating to construction equipment dealers and news service licensees, respectively.

The Seventh Circuit was not alone. Significant cases in the Second, Eighth and Ninth Circuits—for example, *CDC Technologies, Inc. v. IDEXX Laboratories, Inc*.,[17] *Omega Environmental, Inc. v. Gilbarco, Inc.*,[18] *Balaklaw v. Lovell*,[19] *Ryko Manufacturing v. Eden Services*[20] and *General Business Systems v. North American Philips Corporation*[21]—all upheld various exclusive contracts, and in *Barry Wright Corp. v. ITT Grinnell Corp*., then-Judge Stephen Breyer wrote the First Circuit opinion that affirmed judgment for the defendant on a Sherman Act § 2 claim arising from a requirements contract.[22]

In *Jefferson Parish Hospital District No. 2 v. Hyde*, the Supreme Court enumerated some potential evils of exclusives: they "in some circumstances, create or extend market power of a supplier or the purchaser party to the exclusive-dealing arrangement, and may thus restrain horizontal competition," and "[e]xclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods, or by allowing one buyer of goods unreasonably to deprive other buyers of a needed source of supply."[23] Nevertheless, while paying lip service to these concerns, lower courts in the 1980s and 1990s usually upheld such arrangements, whether challenged under § 1 or § 2 of the Sherman Act or under § 3 of the Clayton Act.[24]

Courts evaluate the legality of exclusive contracts based on business justifications for the arrangement and on the level of market "foreclosure" caused by the exclusive contract, but, as Judge Breyer observed, "virtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers

from *some* portion of the market, namely the portion consisting of what was bought."[25] In this sense foreclosure of competitors who did not get the sale is a logical and justified result of the competitive process, and courts have been reluctant to disrupt this natural consequence. In recent exclusive-dealing cases, however, many courts seem to have given foreclosure a closer look and have approached with greater skepticism the reasons proffered for exclusivity.

Given the historically dismal record of plaintiffs in exclusive-dealing litigation, what explains their success of late in cases like *Dentsply*? Are the ostensibly divergent outcomes in recent cases versus prior decisions caused by conflicting legal standards? Are the different results explained simply by the defendant's market share—with a higher number invalidating the exclusive contract even if other factors support its legal validity? Is Supreme Court intervention required in this area? *Dentsply* is a helpful case on point to consider these questions.

Dentsply's Market Share and Exclusive Contracts

Dentsply makes artificial teeth that it sells to dealers, which, "in turn, supply the teeth and other products to dental laboratories, which fabricate dentures for sale to dentists."[26] The relevant market defined by the district court and accepted by the Third Circuit was "the sale of prefabricated artificial teeth in the United States."[27] This market—"marked by a low or no growth potential" as a result of "advances in dental medicine"[28]—includes "total sales of artificial teeth to the laboratories and the dealers combined."[29]

The Third Circuit left undisturbed the district court's findings that Dentsply "enjoys a 75%-80% market share on a revenue basis, 67% on a unit basis, and is about 15 times larger than its next closest competitor."[30] According to those findings, "Dentsply has long dominated the industry consisting of 12-13 manufacturers."[31] Each of the seven "significant manufacturers" against which it competes has a market share of 5% or less.[32]

For over fifteen years, Dentsply has "discouraged its dealers from adding competitors' teeth to their lines of products."[33] In 1993, Dentsply formalized its position in a policy known as "Dealer Criterion 6," which states that Dentsply will not sell its teeth to any distributors who carry a competitor's products, except for competing products already carried by its dealers before 1993.[34] Other than with respect to these "grandfathered" competing products, Dentsply has enforced its exclusivity policy against all dealers and "rebuffed attempts . . . to expand . . . lines of competing products beyond the grandfathered ones."[35] The exclusive contracts, however, do not on their face lock up the dealers for long; indeed, they are "essentially terminable at will" because "Dentsply operates on a purchase order basis."[36]

The District Court's Ruling

The district court granted Dentsply's motion for summary judgment on all of the DOJ's claims brought under §§ 1 and 2 of the Sherman Act and § 3 of the Clayton Act. The only part of the district court's ruling before the Third Circuit was the Sherman Act § 2 claim for illegal monopolization, as the government decided not to appeal its other claims.

Dentsply successfully persuaded the district court that despite its predominant market share, its "tactics did not preclude competition from marketing their products directly to the dental laboratories."[37] As the district court found, "direct sales to laboratories was a viable method" for competitors to do business, in addition to sales through dealers not under contract with Dentsply.[38] Because the exclusive dealer agreements did not preclude such alternative distribution, the district court found that "'Dentsply does not have the power to exclude competitors from the ultimate consumer.'"[39]

The district court found that the failure of Dentsply's "two main rivals" to obtain greater market shares resulted not from any illegal activity on Dentsply's part, but rather from "their own business decisions to concentrate on other products lines, rather than implement active sales efforts for teeth."[40] By contrast, Dentsply had "implemented aggressive sales campaigns, including efforts to promote its teeth in dental schools, providing rebates for laboratories' increased usage, and deploying a sales force dedicated to teeth, rather than the entire product mix."[41]

In addition, the district court considered it significant that the terminable-at-will nature of the exclusivity created a condition in which "dealers were free to leave the network at any time."[42] Moreover, the district court determined "that Dentsply had not created a market with supra competitive pricing."[43] All of these findings led the district court to hold that "the Government failed to prove that Dentsply's actions have been or could be successful in preventing new or potential competitors from gaining a foothold in the market."[44]

The Third Circuit's Reasoning

Contrary to the district court, the Third Circuit panel found that Dentsply had market power. Not only was "Dentsply's share of the market . . . more than adequate to establish a prima facie case of power," but Dentsply had "held its dominant share for more than ten years and . . . fought aggressively to maintain that imbalance."[45]

The Third Circuit heavily discounted the factors that had led the district court to conclude that Dentsply's dominant market share resulted from greater competitive efforts rather than illegal activity. According to the appellate court, "[t]he reality is that over a period of years, because of Dentsply's domination of dealers, direct sales have not been a practical alternative for most manufacturers."[46] In the Third Circuit's view, "[i]t has not been so much the competitors' less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to key dealers."[47] The court of appeals explained "[t]he apparent lack of aggressiveness by competitors" as "not a matter of apathy,

but a reflection of the effectiveness of Dentsply's exclusionary policy."[48]

The appellate court also cited testimony of two former managerial employees of Dentsply. Statements by these witnesses such as "[d]o not allow competition to achieve toeholds in dealers; tie up dealers; do not 'free up' key players," and "[y]ou don't want your competition with your distributors, you don't want to give the distributors an opportunity to sell a competitive product"—which might have been dismissed as simply aggressive sales talk—were deemed instead by the Third Circuit to be "clear expressions of a plan to maintain monopolistic power."[49]

Also significant to the appellate court's finding of market power were "some ten separate incidents in which Dentsply required agreement by new as well as longstanding dealers not to handle competitors' teeth," and the termination of at least one dealer that refused to follow Dentsply's exclusivity requirements.[50]

The Third Circuit dismissed the district court's holding that Dentsply's contracts with dealers did not preclude direct sales to laboratories because "[a]lthough some sales were made by manufacturers to the laboratories, overwhelming numbers were made to dealers."[51] Thus, according to the court of appeals, Dentsply's exclusivity arrangements were analogous to 3M's "lock[] up [of] high volume distribution channels" in *LePage's* and the foreclosure of "a substantial percentage of the available opportunities for product distribution" in *Microsoft*.[52]

The Third Circuit further noted Dentsply's "reputation for aggressive price increases in the market," expert testimony for both parties "that were Dealer Criterion 6 abolished, prices would fall," the testimony of a former sales manager for Dentsply "that the company's share of the market would diminish should Dealer Criterion 6 no longer be in effect," evidence that "[l]arge scale distributors observed that Dentsply's policy created a high price umbrella," and proof that "Dentsply did not reduce its prices when competitors elected not to follow its increases."[53]

This record was enough to persuade the appellate court that the government had made a showing of market power, the first element of its monopolization claim, even though the Third Circuit noted that Dentsply's prices fell "between those of" the "premium tooth lines" of its chief competitors, and even though the panel implicitly acknowledged the absence of evidence that Dentsply had charged a monopoly price.[54]

The Third Circuit also found sufficient evidence for the case to proceed on the second element of a Sherman Act § 2 claim: "that the power was used 'to foreclose competition.'"[55] This standard was described as not requiring "total foreclosure" but rather simply proof that "the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."[56]

The government had sufficient evidence to make this showing, the appellate court found, because "[b]y ensuring that the key dealers offer Dentsply teeth either as the only or dominant choice, Dealer Criterion 6 has a significant effect in preserving Dentsply's monopoly."[57] In this regard, the Third Circuit noted that "Dentsply has always sold its teeth through dealers" and "[f]or a great number of dental laboratories, the dealer is the preferred source for artificial teeth" because of, among other advantages, "the benefit of 'one stop-shopping' and extensive credit services" and discounts.[58]

These facts led the Third Circuit to call the dealers "the 'gateways' . . . to the artificial teeth market."[59] This was confirmed by the "miniscule" market shares achieved by competitors who directly sold to laboratories.[60] In addition, although the appellate court acknowledged "the legal ease with which the relationship can be terminated, the dealers have a strong economic incentive to continue carrying Dentsply's teeth," which in the Third Circuit's view created circumstances analogous to "3M's aggressive rebate program" and "discounts" in *LePage's*.[61] The panel was convinced that, notwithstanding that alternative means of access to the customer theoretically existed for Dentsply's competitors, those were not really viable options: "The paltry penetration in the market by competitors over the years has been a refutation of theory by tangible and measurable results in the real world."[62]

Is There Any Inconsistency Here?

Most of the arguments raised by Dentsply and accepted by the district court, but rejected by the Third Circuit, were keys to the reasoning of earlier cases that upheld exclusivity arrangements. This raises the question of why the difference, which is not entirely explained by the *Dentsply* appellate opinion.

For example, as the Third Circuit acknowledged, in many earlier cases, "courts . . . indicated that exclusive-dealing contracts of short duration are not violations of the antitrust laws."[63] In fact, the Second Circuit in a 1994 decision opined that exclusivity arrangements of a relatively short duration "may actually encourage, rather than discourage competition."[64] That is because, among other reasons, the limited term allows competitors the opportunity to approach dealers with better offers to break the exclusivity without fear of interfering with a long-term contractual relationship.

Dentsply's exclusive contracts are as short as they can be: they are terminable-at-will purchase orders. Yet, the Third Circuit summarily dismissed as "distinguishable" prior case law upholding short-term exclusive contracts, but provided no explanation for this conclusion.[65]

Similarly, the Third Circuit gave short shrift to the fact that there were alternatives to Dentsply's exclusive distributors for making sales—another argument that was a winner in prior exclusive-dealing cases. In *Omega Environmental*, for example, the Ninth Circuit upheld exclusive-dealer contracts based, in part, on the rationale

that "[c]ompetitors are free to sell directly, to develop alternative distributors, or to compete for the services of existing distributors."[66] Similarly, in *Ryko Manufacturing*, the Eighth Circuit upheld exclusive-dealing provisions because, among other reasons, the plaintiff failed to produce evidence suggesting that the provisions "generally prevented . . . competitors from finding effective distributors for (or other means of promoting and selling) their products."[67] Dentsply's competitors distribute teeth either "directly to dental labs" or "through dental dealers" not under contract with Dentsply, or through both sales methods.[68] In the past, these alternative avenues would seem to have swayed other Circuits against a finding of market foreclosure, but they did nothing to alter the conclusion of the court of appeals in *Dentsply*.

The Third Circuit attempted to justify its skepticism of sales alternatives by pointing to evidence of the supposed superiority of dealers because of the breadth of their product and service offerings.[69] Yet the *Omega Environmental* court rejected a similar "dealers as gateways to the market" argument. In that case, the Ninth Circuit concluded that the "proven finances, abilities and customer relationships" of dealers did make them indispensable for sales.[70] The fact that the defendant in *Omega Environmental* had exclusives with "almost all" of the distributors in the market did not matter because competitors could still sell directly to customers or develop new distributor relationships.[71]

According to the Ninth Circuit, the defendant, "having succeeded in legitimately controlling the best, most efficient and cheapest source of supply, '. . . [did] not have to share the fruits of its superior acumen and industry.'"[72] This sentiment is consistent with the Supreme Court's recent observation that the antitrust laws contain "no duty to aid competitors."[73]

Another key to decisions upholding exclusivity arrangements is the absence of proof of monopoly profits.[74] Although the *Dentsply* appellate opinion cited evidence of price increases and a "high price umbrella," Dentsply's prices were lower in fact than those of at least one competitor and there was no proof of monopoly profits or supra-competitive pricing. The Third Circuit was nonetheless convinced there was sufficient proof of market power, where other Circuits in the past might have found it lacking.

In *Roland Machinery,* the Seventh Circuit held that, in order to show that an exclusive-dealing contract is unreasonable, the plaintiff must prove (1) "that it is likely to keep at least one significant competitor of the defendant from doing business in the relevant market," and (2) "that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition."[75] Though *Roland Machinery* involved a Sherman Act § 1 claim, while the *Dentsply* appellate opinion focused exclusively on § 2 of the Sherman Act, courts look at market foreclosure as a relevant consideration under each provision. Query whether, had the *Roland Machinery* standard of foreclosure been used by the Third Circuit, the outcome in *Dentsply* would have been different.

An obvious factor that could distinguish *Dentsply* from cases where exclusive dealing has been upheld is Dentsply's predominant market share. Whereas the defendants in many of the earlier pro-exclusivity cases generally had market shares well below 50%, Dentsply's was substantially more than half of the relevant market. The same was the case in many other recent decisions in which courts have taken a hard look at exclusive contracts, but not all. For example, the D.C. Circuit in *Microsoft* stated "that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a [Sherman Act] § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation."[76]

Many recent decisions cannot seem to get past the market-share numbers in evaluating the legality of exclusive contracts under either § 1 or § 2 of the Sherman Act. Their emphasis on "quantitative" rather than "qualitative" analysis harkens back to early case law under which exclusive arrangements were presumed invalid if the defendant had the requisite market share, which sometimes was deemed to be well less than 50%.

In addition, many appellate courts take an ad hoc, fact-intensive approach to evaluating the legality of exclusive contracts under the antitrust laws, with few clear governing legal standards. An exclusive contract can be deemed good or bad simply by the company it keeps. As Chief Judge Beckwith of the Southern District of Ohio recently observed, the Sixth Circuit in Conwood upheld the jury's $1.05 billion verdict because the "exclusive selling agreements with retailers" at issue—though "entirely legal" standing alone—were part of a package of wrongful activities by the defendant, United States Tobacco Company ("USTC"), which included "intentionally remov[ing]" the plaintiff's "package racks from retail stores without permission of store managers," "destroy[ing] or discard[ing] the racks," and "then put[ting]" the plaintiff's "product cans into USTC's own racks in an attempt to 'bury'" the plaintiff's "products"; "train[ing] its sales representatives to trick store representatives and clerks so that" the plaintiff's "racks and products could be moved or destroyed"; "provid[ing] misleading and incorrect information about sales date[s] for USTC and competitors' products"; and "encourag[ing] the retailers to stock more of USTC's products and less of the competitors products."[77]

Chief Judge Beckwith acknowledged that the range of recent appellate decisions in this area present "somewhat imprecise and certainly conflicting standards by which to judge . . . allegations of . . . monopolistic behavior" predicated on the alleged monopolist's exclusive contracts.[78] He refused to follow *LePage* and sought to distinguish *Dentsply* in granting summary judgment on a Sherman Act § 2 claim challenging "rebate and 'access' contracts" between the drug manufacturer Wyeth and pharmacy benefit managers that,

according to the plaintiff, gave Wyeth's Premarin a favorable formulary placement and effectively excluded rival drugs from the market.[79]

Conclusion

It has been almost 45 years since the Supreme Court addressed exclusive dealing in any significant fashion, in *Tampa Electric Co. v. Nashville Coal Co.*[80] *Tampa Electric* was a requirements-contract case in which the Court held that the exclusivity at issue would be valid unless its probable effect was to "foreclose competition in a substantial share of the line of commerce affected."[81] Justice O'Connor rephrased the standard in her concurring opinion in *Jefferson Parish Hospital*, as "when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal."[82] The Court, however, provided little guidance in *Jefferson Parish Hospital* as to factors for determining what constitutes "substantial foreclosure" or a "significant fraction," and as explained, the lower courts appear to have reached differing conclusions as to the relevant considerations (or non-considerations), and the weight to give them.

Dentsply is indicative of recent appellate cases that appear to undertake more rigorous review of exclusive dealing than did earlier case law, albeit under standards that can vary significantly from Circuit to Circuit and even from case to case within the same Circuit. *Dentsply* may be the right opportunity for the Supreme Court once again to take a bite at the antitrust law governing exclusivity arrangements.

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Footnotes

[1] Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 8 (1st Cir. 2004).

[2] *See, e.g.*, Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[3] Electronics Communications Corp. v. Toshiba America Consumer Prods., Inc., 129 F.3d 240, 245 (2d Cir. 1997).

[4] United States v. Microsoft, 253 F.3d 34, 70 (D.C. Cir.), *cert. denied*, 534 U.S. 952 (2001).

[5] Roland Machinery Co. v. Dresser Indus., 749 F.2d 380, 395 (7th Cir. 1984).

[6] *See, e.g., id.*

[7] Geneva Pharmaceuticals Technology Corp. v. Barr Labs., Inc., 386 F.3d 485, 508 (2d Cir. 2004).

[8] 399 F.3d 181 (3d Cir. 2005), *petition for certiorari filed* (Sept. 14, 2005) (No. 05-337).

[9] 15 U.S.C. § 2.

[10] 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004).

[11] 386 F.3d 485.

[12] 15 U.S.C. § 1.

[13] 253 F.3d at 71.

[14] 290 F.3d 768 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003).

[15] 749 F.2d 380.

[16] 103 F.3d 42 (7th Cir. 1996).

[17] 186 F.3d 74 (2d Cir. 1999).

[18] 127 F.3d 1157 (9th Cir. 1997).

[19] 14 F.3d 793 (2d Cir. 1994).

[20] 823 F.2d 1215 (7th Cir. 1987).

[21] 699 F.2d 965 (9th Cir. 1983).

[22] 724 F.2d 227 (1st Cir. 1983).

[23] 266 U.S. 2, 45 (1984).

[24] 15 U.S.C. § 14.

[25] *Barry Wright*, 724 F.2d at 236 (emphasis in original).

[26] *Dentsply*, 399 F.3d at 184.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 188.

[30] *Id.*

[31] *Id.* at 184.

[32] *Id.*

[33] *Id.* at 185.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 189.

[38] *Id.* at 185-86.

[39] *Id.* (quoting United States v. Dentsply Int'l, Inc., 277 F. Supp. 2d 387, 452 (D. Del. 2003)).

[40] *Id.* at 189.

[41] *Id.* at 185.

[42] *Id.* at 186.

[43] *Id.*

[44] *Id*. (quoting *Dentsply*, 277 F. Supp. 2d at 453 (quoting *LePage's*, 324 F.3d at 159)) (quotation marks omitted).

[45] *Id*. at 188.

[46] *Id*. at 189.

[47] *Id*.

[48] *Id*.

[49] *See id*. at 189-90 (quotation marks omitted).

[50] *Id*. at 190.

[51] *Id*.

[52] *Id*. (citing *LePage's*, 342 F.3d at 144, 160-62; *Microsoft*, 253 F.3d at 70-71).

[53] *Id*. at 190-91.

[54] *Id*. at 191.

[55] *Id*. (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)).

[56] *Id*.

[57] *Id*.

[58] *See id*. at 191-92.

[59] *Id*. at 193.

[60] *Id*.

[61] *See id*. at 193-94.

[62] *Id*. at 194.

[63] *Id*. at 194 n.2.

[64] Balaklaw v. Lovell, 14 F.3d 793, 799 (2d Cir. 1994).

[65] *See Dentsply*, 399 F.3d at 194 n.2.

[66] 127 F.3d at 1163.

[67] 823 F.2d at 1234.

[68] *Dentsply*, 399 F.3d at 188.

[69] *Id*. at 192-93.

[70] *Omega Environmental*, 127 F.3d at 1163.

[71] *Id*.

[72] *Id*. (quoting *General Business Systems*, 699 F.2d at 979).

[73] Verizon Communications, Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 411 (2004).

[74] *See, e.g*., *CDC Technologies*, 186 F.3d at 81; *Roland Machinery*, 749 F.2d at 394.

[75] *Id*. at 394.

[76] 253 F.3d at 70.

[77] J.B.D.L. Corp. v. Wyeth-Ayerst Labs., Inc., No. 1:01-CV-704, 1:03-CV-781, 2005 WL 1396940, at *16 (S.D. Ohio June 13, 2005).

[78] *Id*., 2005 WL 1396940, at *15.

[79] *Id*., 2005 WL 1396940, at *12-*15.

[80] 365 U.S. 320.

[81] *Id*. at 327.

[82] Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).