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Collusion over Rules

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AS THE ANTITRUST AGENCIES have moved vigorously to attack traditional collusive activities designed to raise prices and or restrict output, and as penalties for such collusion have risen dramatically, it should not be surprising that the locus of collusion is shifting to more subtle forms of cooperation among rivals. The agencies have in turn become increasingly concerned with a new category of collusive activity—collusion designed not to affect prices and output directly, but rather to shape the rules under which competition takes place.

In an interview appearing in the Fall 2001 issue of this magazine, the FTC's Chairman, Timothy Muris, identified three high priority areas for his new administration. For two of the areas, "restraints among professionals" and "[s]tandard setting," Chairman Muris suggested an expansion of long-standing Commission interests. A third, concern over the possibility that in the "pharmaceutical industry, anticompetitive strategies . . . [may have] involved agreements between generic and branded manufacturers," was new, but warranted in part because he allowed for the possibility that "[a] branded manufacturer could engage in a series of actions that have the effect of excluding generic competition."[1] Each of these priorities involves agreements among competitors, but none can be classified as traditional cartel behavior designed to impose a monopoly solution directly on the target product.

Chairman Muris is not alone in his concern for about the impact of nontraditional agreements among rivals. FTC Commissioner Thomas B. Leary similarly noted that automobile dealers, often operating under significant state-mandated restrictions on competition, seek even stronger regulations to harm Internet-based rivals.[2] Such restrictions allow for increased ease of comparison among options available to consumers, and hence can cause existing rivals to compete harder, changing market outcomes, even though dealer rivalry determines prices either with or without the regulations.

It is striking that, with few exceptions, these areas do not involve traditional collusive agreements to raise prices directly. Groups of professionals, rivals, trade associations, and standard-setting bodies have long been on notice to avoid even the appearance that they are engaging in traditional collusion. Not surprisingly, their members know enough about antitrust law to choose pricing and production levels independently of one another. Similarly, pharmaceutical manufacturers realize that as their intellectual property protections expire, the antitrust laws forbid them from entering into output or pricing agreements with their new generic competitors. In case after case involving these areas, firms have instead sought agreement over the rules under which competition takes place. Instead of collusion directly over outcomes, firms attuned to the strategic impact of their activities now usually attempt to agree on ways in which to shape their environments in order to soften competition and to insulate themselves from hard competition in ways that will lead to higher prices.

The appetite of businesses for techniques that can alter their environment without running afoul of antitrust policy is being fed by new developments in economics. After a lengthy gestation period, the abstract theoretical findings of game theory—the study of strategic, typically non-cooperative, behavior—are being distilled by academics, business consultants, and hands-on managers into practical suggestions for business conduct. These suggestions focus on actions that firms can take to affect the responses of their rivals, often with the goal of softening competition. One prominent effort suggests that decision makers should reduce their emphasis on business-as-war metaphors, recognizing that warfare can be destructive not only to one's rivals, but also to one's own profitability.[3] Indeed, the authors of this argument adopted the term "Co-opetition" for the program they advocate, offering it as a way of ameliorating such "evils" as "price warfare." No wonder the FTC is concerned.

We believe that while not every instance of agreement among rivals is necessarily anticompetitive, every agreement that is anticompetitive falls within one of three categories.[4] Type I collusion encompasses traditional agreements to affect price and/or output directly or fairly directly.[5] Type II collusion consists of agreements to disadvantage rivals.[6] And Type III collusion gathers together and explains the types of agreements to which Chairman Muris now proposes to make a higher FTC enforcement priority, as well as many more. Such agreements typically do not set prices directly, but instead help to cushion competitors from hard competition through such "rules" as restraints on advertising, sham ethical codes, or bans on discounts, coupons, "free" services, or extended hours of operation.[7] These restraints are becoming commonplace due to the rapid fall in the cost of transmitting and interpreting information occasioned by technological advances in computation and the rise of the Internet. Firms now find themselves in competition with a wider array of rivals who can readily and effectively put their wares in front of consumers and fulfill orders from remote locations. A natural response by firms threatened by heightened competition has been to attempt to formulate rules that restrict such

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information flows in order to mitigate the competitive pressure they induce. The result has been a surge in the importance of Type III collusion.

We expect this trend to continue. As antitrust scrutiny falls increasingly on instances of agreements to shape competition, rather than to supplant it, the need for sophisticated economic analysis will grow apace, for not all agreements to shape the marketplace are anticompetitive. Distinguishing those that have effects that reduce welfare from those that provide benefits has been and will continue to be difficult.[8] The tools for analyzing such situations are likely to be provided by developments in non-cooperative game theory, developments that have previously had limited impact on antitrust policy, but which are likely now to attract much more attention. The need to avoid obviously anticompetitive collusion, the increase in agency focus on marketplace rules, and the expansion of the tools necessary to evaluate such indirect collusion will likely result in a central role for Type III collusion in future antitrust policy.

Collusion to Fix the Rules of Competition

Type III collusion occurs when cartel members agree upon and implement practices that insulate cartel members to some degree from hard competition with one another. The restrictions cause a cushion or space in which cartel members have some degree of pricing freedom. They are able to exploit this cushion by charging higher prices.

These cartels limit competition and prices rise even though cartel members never agree to set price or output directly. Instead, cartel members compete less vigorously in the collusively-altered environment; they compete along fewer dimensions. The agreed-upon practices limit, soften, or channel competition, but the firms still compete, in the sense that their ultimate choices of prices or output levels are made independently. However this additional cushion or space between the cartel members and their nearest competitors, and the subsequent isolation of consumers, gives cartel members the power to raise price within this space. Type III collusion can be summed up by the phrase "isolate and exploit consumers."

When the cartel is unable to achieve a total monopoly-like outcome, either because its firms do not adhere to a cartel agreement or because they are prevented from doing so by fear of prosecution, the cartel may resort to Type III collusion as an imperfect, partial substitute for Type I collusion. Recognizing that this category consists of more than simply a few unusual cases, but is rather one of only three general explanations for cartels is an important step for several reasons. Cases in this category present a much more difficult set of challenges to enforcement agencies, since the restraints employed often consist of attempts to place distance between rivals by limiting competition through very indirect means. Impairing the ability of consumers or their agents to assess options easily and cheaply can lead to undesirable outcomes even when price or output competition continues to take place among rivals in a collusively-altered environment. Yet agreements to set rules can also give consumers the opportunity to make more transparent comparisons among rival products, and indeed, agreements can also protect and encourage competitive promotion by rivals. In order to distinguish among procompetitive and anticompetitive restrictions, modern tools of economic analysis, including the game-theoretic analysis of non-cooperative behavior, will need to be deployed in order to predict effects of restrictions on subsequent competition. Thus far, such analyses have had at most a modest impact on antitrust policy,[9] but the growth of Type III collusion cases will likely lead to a major expansion in the penetration of new economic tools. Thus far, however, the cases that can be categorized as Type III have been characterized by rough-and-ready economic analyses of the effect of the challenged restrictions on competition.[10]

Examples of rule fixing demonstrate that there are a number of avenues available to rivals who wish to shape the environment in which they compete without actually agreeing directly on the outcome of their competition. The most direct approach is through trade or professional association rule making. Similar results can be obtained by restricting advertising. A different approach involves not price setting, but rather restrictions on price deviations, such as price discrimination, so that base prices are not fixed, but opportunities to compete are restrained. Each of these approaches can be illustrated by examples drawn from recent cases.

Professional Associations: Pricing and Output Rules

National Society of Professional Engineers v. United States, 435 U.S. 679 (1978), involved some of the provisions of the ethical code promulgated by a group of consulting engineers. These provisions forbade engineers from discussing price with their customers until just before contracts were signed. Customers could decline to sign after they learned what the price of the contract was, but only after they had made a considerable investment of time working with a particular engineer. *See id.* at 684 n.6. The ethical code made it much more difficult for customers to engage in comparative shopping for engineering services. *See id.* at 692–93.

A group of dentists in *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), had agreed not to provide patients' X-rays to insurance companies. *Id.* at 450–51. The X-rays helped insurers determine whether certain dental procedures were necessary. *See id.* at 449. Instead, the dentists agreed to require the insurance companies to visit each dentist's office to examine patient records. *See id.* at 456. This made it much more difficult for the insurers to detect fraud and unnecessary dental work. *See id.* at 457.

Neither of these cases falls within the rubric of Type I collusion. Neither involved an agreement on prices or output. There was no agreement upon a monopoly-like outcome.

Nor was either case Type II collusion. The organizations imposed restrictions on their owns members, not on outside rivals, and rivals were not hurt.

Both cases, however, involved Type III collusion. The engineers' ethical code involved customers directly while the dentists' refusal to provide X-rays directly involved third party insurers. But the practices had very similar effects insofar as they served to establish cushions from hard competition for cartel members,[11] and these cushions allowed revenue and prices to rise.[12] The practices allowed cartel members to "isolate and exploit" consumers to a large extent.

These professional association cases demonstrate that one cannot readily bring conventional welfare analysis to bear on instances of collusion designed to fix the rules of competition. Ethical codes and advertising restrictions will typically be defended as attempts to increase demand and consumer satisfaction by protecting the provision of consistent, high quality products.[13] The shorthand welfare test of whether the restrictions at issue raise or lower output will often work in such instances, but not always. The refusal of dentists to supply X-rays was due to fear that insurers would deny authorization for procedures that the dentists would otherwise provide—the restriction was thus intended to be demand-increasing. Yet any consumer unlucky enough to be fitted with an unnecessary crown would not likely agree that demand increasing was necessarily welfare increasing.[14]

Advertising Restrictions

Perhaps the most common anticompetitive attempts to agree on the rules of competition involve restrictions on advertising. Some of these collusion cases, such as *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), challenged a nearly total advertising prohibition (on lawyer advertising).[15] Other advertising restriction cases, such as *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988), involved severe restrictions on advertising (of optometric services).

The advertising restriction cases also were not Type I collusion. They did not involve monopoly-like agreement on prices. In fact, classic cartels often would be impossible for lawyers or optometrists. Too many independent entities would be involved, and the products or services at issue would often be unduly heterogeneous.

Nor could the advertising restrictions be classified as Type II collusion. Neither the primary motivation behind nor the effect of these restrictions involved outside firms. There was no plan to target rivals by raising their costs or reducing their revenues. Raising rivals' costs cases and reducing rivals revenues cases are outward looking, while Type III cartels are inward looking, with the cartel imposing restrictions up on its own members.

Type III collusion, however, describes these cases well. Less advertising leads to less competition and some pricing freedom.[16] Cartel members obtain some ability to "isolate and exploit" consumers. Cartel members do not enter into any agreement on prices, yet prices and profits rise.

Automobile Dealers

As we noted earlier, Commissioner Leary has expressed concern with efforts by automobile dealers to restrict competition-enhancing information flows enabled by the Internet. His concern is well placed; automobile retailing provides a number of past examples of restrictions designed to change the rules of competition. In one case, *FTC v. Detroit Auto Dealers Ass'n*, 955 F.2d 457 (6th Cir. 1992), members of the Detroit Auto Dealers Association, consisting of every new car dealer in the Detroit metropolitan area, entered into an agreement to severely restrict the evening and weekend hours that they would be open. *Id.* at 458–59. This caused shopping for a new car to become significantly more difficult.[17]

The second case involved a newspaper, the *San Jose Mercury News*, which ran an article advising buyers how to purchase cars more effectively.[18] In retaliation, the local car dealers' association, the Santa Clara Automobile Dealers' Association, agreed to withhold member advertising from the newspaper.[19] This boycott was an apparently successful attempt to convince the newspaper not to run similar articles in the future.[20]

The facts of these cases differ, but their effects were similar. Neither case involved a Type I agreement—there were no agreements on prices or cars and no agreements to limit the output or sale of cars. Nor did either case involve any Type II agreements-none of the practices were directed at any rivals of the members of the cartels.

Both cases can readily be analyzed as examples of Type III collusion. By making shopping or negotiating more difficult, the practices provided insulation for cartel members from hard competition with one another.[21] The practices helped the cartel isolate and exploit consumers to a significant degree, so that the resulting "competitive" (independently determined) prices would thereby be higher.

Price Discrimination

The examples above each involved a reduction in the efficiency of consumer search or comparison shopping, either by making information more expensive or by impairing consumers' ability to process information. The latter was the effect both of the punishment meted out by auto dealers distressed by a newspaper story teaching consumers to be more effective negotiators and, in the case of X-rays, of the attempt to prevent consumers from employing expert purchasers (insurers) as agents in acquiring dental services.

Rules can be set in other ways to shape, as opposed to supplant, competition. *United States v. Brown University*, 5 F.3d 658, 662 (3d Cir. 1993) (the Ivy Overlap Case) involved a number of agreements among competing universities. First, they agreed to fix the net discounts (and therefore the net charges) to needy students, an agreement that can be interpreted as straightforward price fixing.[22] But in addition, they agreed not to engage in price competition for especially talented students by agreeing not to offer merit-based scholarships to wealthy students.[23] Since tuition differed from institution to institution, and since tuition levels were apparently set independently, this rule obviously did not fix prices, but it did curtail competition for the high ability students that could enhance each institution's reputation and ranking and thereby shift the demand for its services.

The agreement at issue in *United States v. The Stop & Shop Cos.*, 1985-2 Trade Cas. (CCH) ¶ 66,689 (1984), prevented grocery stores from offering to redeem manufacturer coupons for double their face value. This restriction did not constitute Type I collusion because the stores still competed on the basis of the prices of the products they sold. Nor was it Type II collusion; no rivals were targeted. But the cartel members did fix an important rule of competition. The agreement not to price discriminate in favor of especially price-sensitive shoppers, thus, falls within the category of Type III collusion.

Welfare Effects of Type III Collusion

Type III collusion lowers consumer welfare in more ways than does traditional collusion, though its impacts typically include those seen from classic Type I collusion. Consumers must pay higher prices, and this causes both a transfer of wealth from consumers to the cartel and to allocative inefficiency.

Type III collusion also can interfere with consumer choice and thereby cause an additional type of loss to consumer welfare. For example, in *Detroit Auto Dealers Association*, consumers might well have purchased a car that was not as optimally suited to their needs, and the dental patients in *Indiana Federation of Dentists* would likely have been provided with services that were not needed, or even fraudulent. Similar problems with uninformed consumer choice are likely to have resulted from the other advertising restriction cases we have analyzed.[24]

In addition, Type III collusion can cause inefficiency as a result of the need for consumers to overcome the barriers that cartel members erected to increase their insulation from vigorous competition. In other words, often consumers will face higher search costs.[25] In *Detroit Auto Dealers' Association*, for example, consumers might have had to take leave from work to shop for a car. Finally, Type III collusion can harm third parties, as, for example, the Santa Clara car dealers' conspiracy not to advertise hurt the *San Jose Mercury News* significantly.

Conclusions

Every example of anticompetitive collusion can be explained in terms of Type I, II, or III collusion, with allowance for some overlap. Focus on Type III collusion can yield a number of practical advantages. Such collusion often affects information flows in markets, either making information more expensive for consumers to obtain or denying them expertise in processing such information. With technology lowering the cost of information, rivals can expect to face more direct and intense competition with rivals, and can therefore expect to seek ever more opportunities to insulate themselves and their customers from the effects of that information.

We expect that a better understanding of each category will help the antitrust profession to distinguish more readily between anticompetitive collusion and the alternative of joint activity that is harmless or beneficial, often because is protects or standardized information. This will clearly be a difficult process, since many Type III cases involve subtle practices, and it often is difficult to explain why the practices at issue are anticompetitive. We hope our articulation will help convince judges and enforcers many, though not all, are indeed anticompetitive.

Further, we expect that our formulation of this framework will assist enforcers in uncovering practices likely to harm consumer welfare significantly. Since Type III collusion usually is used when more traditional collusion is not available, such as in markets with many firms and heterogeneous products. If firms can get together and effectively fix prices using classic Type I collusion, why should they bother with a halfway measure like a ban on advertising? For these reasons, rather than just observing that traditional price fixing is unlikely for lawyers or optometrists and then concluding that they should look for abuses elsewhere, we urge the enforcers to examine these industries for examples of Type III collusion instead. ■

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1 *Interview with Timothy J. Muris, Chairman of the FTC*, Antitrust, Fall 2001, at 52.

2 Thomas B. Leary, State Auto Dealer Regulation: One Man's Preliminary View, Speech to International Franchise Association 34th Annual Legal Symposium (May 8, 2001), *available at* http://www.ftc.gov/speeches/leary/learystateautodealer.htm#N_1_. These state-imposed restrictions, often immunized under the *Noerr-Pennington* doctrine, represent only a portion of the recent attempts by automobile dealers to increase consumer search costs by controlling information flows. See Robert H. Lande & Howard P. Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, 2000 Wis. L. Rev. 941, 964.

3 Adam M. Brandenburger & Barry J. Nalebuff, Co-opetition (1996). Brandenburger and Nalebuff argue that in place of warfare, a modern business must

> listen to customers, work with suppliers, create teams, establish strategic partnerships—even with competitors. That doesn't sound like war. Besides, there are few victors when business is conducted as war. The typical result of a price war is surrendered profits all around. Just look at the U.S. airline industry: it lost more money in the price wars of 1990–93 than it had previously made in all the time since Orville and Wilbur Wright.

Id. at 3. Competition is thus to be ameliorated or avoided when possible, and the remainder of the book includes strategies for doing so, including those that change the rules under which competition takes place. See particularly Chapter 6, "Rules."

4 *See* Lande & Marvel, *supra* note 2.

5 In Type I (or traditional) collusion, firms coordinate pricing and/or output in order to obtain the monopoly solution either directly or fairly directly. Examples of Type I or classic collusion include price fixing, bid rigging, assignment of customers, and division of territories. Price fixing and bid rigging allow the competitors to achieve the joint monopoly position. Market division and customer assignments give each cartel member a slice of the marketplace over which it possesses a monopoly. Monopoly-like outcomes are achieved, collusively, by each firm. Sometimes Type I collusion manifests itself in ways that help to hold the cartel together to that makes cheating less likely (that is, in agreements that are ancillary to an underlying and perhaps effectively hidden monopoly-like agreement). These variations are less straightforward than simple collusion, but their ultimate goal is the same—raise prices as if the cartel members were monopolists. For a more complete explanation, *see* Lande & Marvel, *supra* note 2, at 944–46.

[6] In Type II collusion one group of cooperating firms targets and disadvantages rivals in a manner that later allows the colluding firms to raise prices. Two general types of practices can disadvantage rivals. The first consists of practices that raise rivals' costs. The targets can be actual or potential rivals of the colluders. These higher costs for a cartel's rivals eventually permit the colluding firms either to raise their own prices or to deter the entry that otherwise would have eroded prices. The second way that a cartel can disadvantage rivals is by reducing rivals' revenues. Boycotts, for example, can be a way for a cartel to deprive their rivals of revenue. This strategy enables the colluders to raise prices later. Both of these methods of disadvantaging rivals are outward-oriented because the direct targets are firms outside of the cartel. Not only do the targeted firms suffer, so too do the customers who are forced to pay higher prices. For a more complete explanation see Lande & Marvel, *supra* note 2, at 947–48.

[7] For examples, see Lande & Marvel, *supra* note 2, Section II.

[8] The difficulties presented are particularly apparent in the FTC's action against restrictions imposed by the California Dental Association. The FTC initially regarded the restrictions in question as needing nothing more than a quick look to condemn, but the Supreme Court held that a more "lingering" assessment was required. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999). On remand, the Ninth Circuit came to the opposite conclusion, 224 F.3d 942 (9th Cir. 2000), holding that the restrictions would benefit customers by preventing misleading advertising. The rapid turnaround in interpretation of these restrictions with no change in the evidentiary record indicates the need for clarification of standards in the area. *See also* Statement of Chairman Robert Pitofsky and Commissioners Sheila F. Anthony and Mozelle W. Thompson Respecting the Commission's Decision Not to Petition for Certiorari in *California Dental Association v. FTC*, http://www.ftc.gov/os/2001/02/cdastmt.htm#N_5_.

[9] See, for example, Bruce Kobayshi, *Game Theory and Antitrust: A Post-Mortem*, 5 Geo. Mason L. Rev. 411 (1997), and Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive* Daubert? 34 Akron L. Rev. 795 (2001).

[10] The lack of an agreed upon economic framework for evaluating such restraints is among the reasons for the dramatic shift in interpretation of such restraints evident in the Ninth Circuit's *California Dental Association* opinions. *See supra* note 8.

[11] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 ("Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace."); *Indiana Federation*, 476 U.S. at 457. The Supreme Court found that the agreement forced insurance companies "to choose between acquiring that information in a more costly manner or foregoing it altogether. To this extent, at least, competition among dentists with respect to cooperation with the requests of insurers was restrained." *Id.*

[12] *See Indiana Federation*, 476 U.S. at 459. The Supreme Court stated, "A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare by ensuring the provision of desired goods and services to consumers at a price approximating the marginal cost of providing them." *Id.*

[13] *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 693. "The Society argue[d] that the restraint [was] justified because bidding on engineering services [was] inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health." *Id. See also Indiana Fed. of Dentists*, 476 U.S. at 452 (The Federation argued, "its policy of withholding x rays was reasonable because the provision of X-rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients . . ."); U.S. v. Brown University, 5 F.3d 658 (3d Cir. 1993) (The Overlap group argued that, "by enabling member schools to maintain a steadfast policy of need-blind admissions and full need-based aid, Overlap promoted the social ideal of equality of educational access and opportunity."); FTC v. Detroit Auto Dealers Ass'n, 955 F.2d 457, 471 (6th Cir. 1992) (The Dealers argued that "efficiency justifications" existed such as: "'(1) lower dealer overhead costs, (2) the ability to attract higher-quality sales personnel, and (3) the prevention of unionization '"); Massachusetts Bd. of Registration in Optometry, 110 F.T.C. 549, 607 (1988) (The Board argued, "such advertisements are inherently deceptive, [and] its ban protects the public from the results of 'undue commercial influence.'")

[14] For an example of a case in which professional restrictions on price setting were procompetitive, see *Vogel v. American Society of Appraisers*, 744 F.2d 598 (1984).

[15] *See Bates*, 433 U.S. at 355 (quoting the text of Arizona's Disciplinary 2-101(B) as follows, "A lawyer shall not publicize himself, or his partner, or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.")

[16] *See Mass. Board*, 110 F.T.C. at 805 (stating, "Banning advertisements of discounts impedes entry by new optometrists that depend on attracting a high volume of patients. Discounts also attract patients during times of low demand. A prohibition on discount advertisements obstructs such efforts to promote efficient use of resources. By preventing optometrists from informing consumers that discounts are available, respondent eliminates a form of price competition." (citations omitted)).

[17] *See Detroit Auto Dealers*, 955 F.2d at 477 (Ryan, J., concurring in part and dissenting in part) (quoting the FTC Commission report which stated, "the restriction reduces efficiency, since without it consumers could reorganize their activities in a way that would increase their overall satisfaction.").

[18] *See A Car Buyer's Guide to Sanity: Here's a Low-Price, Low-Stress Route to Getting the Most for Your Dollar*, San Jose Mercury News, May 22, 1994.

[19] See FTC Press Release, Santa Clara County Auto Dealers Association Settles Charges over Alleged Advertising Boycott, FTC File No. 941 0107, http://www.ftc.gov/opa/1995/9508/scautoad.htm.

[20] *See id.* The FTC asserted that the "boycott" or punishment occurred pursuant to an agreement and was anticompetitive because it "restrains competition among dealers and chills the publication of important consumer information." *Id.*

[21] *See Detroit Auto Dealers*, 955 F.2d at 477 (Ryan, J., concurring in part and dissenting in part) (finding that the FTC case included letters from the dealers demonstrating that they "expected the hours restriction to benefit them by limiting comparison shopping," and this limitation was expected to result directly in higher prices, "with fewer shopping hours, the public can devote less time to shopping, and forcing down prices."); FTC Release, *supra* note 19 (stating, "The car dealers could have made individual decisions to pull their advertising, but an agreement to do so restrains competition among dealers and chills the publication of important consumer information, making it more difficult for consumers to compare dealer prices and services."); *see also* Ian Ayres, *Fair Driving: Gender and Race Discrimination In Retail Car Negotiations*, 104 Harv. L. Rev. 817 (1991). Ayres provides the following example closely tracking our analysis: "One dealer, interviewed informally, espoused a desire to close his showroom in the evening, if his competitors would follow suit. Although forcing consumers to purchase at inconvenient times would seem to reduce the demand for cars, the dealer felt that restricting showroom hours would also reduce the amount of search that buyers undertake. Thus, the dealer believed that although he might not get as many people in his showroom, he would have less competition for those who did arrive." *Id.* at 872 n.90.

[22] *See id.* at 662 n.2. "The purpose of the Overlap agreement is to neutralize the effect of financial aid so that a student may choose among Ivy Group institutions for non-financial reasons." *Id.*

[23] *See id.* at 663. Only differences of less than $500 were permitted. *See id.* As evidence of this agreement regarding wealthy students, the court cited to the retaliatory actions of the Overlap Group when one member awarded scholarships based on merit. *See id.* The court stated:

> All Ivy Overlap Group institutions understood that failing to comply with the Overlap Agreement would result in retaliatory sanctions. Consequently, noncompliance was rare and quickly remedied. For example, in 1986, Princeton began awarding $1,000 research grants to undergraduates based on academic merit. After a series of complaints from other Overlap institutions who viewed these grants as a form of scholarship, Princeton terminated this program.

Id.

[24] As we have pointed out, however, the difficulties of analyzing potentially anticompetitive Type III agreements are significant. Restrictions on advertising can lead to more local consumer choice at convenient locations when the restrictions prevent free riding on those local services. For a particularly difficult case, see United States v. Scuba Retailers Ass'n (Memorandum in Support of Motion for Default Final Judgment), http://www.usdoj.gov/atr/cases/f0800/0896.htm. In this case, retailers boycotted a specialty scuba diving publication for accepting advertising from a manufacturer who offered its wares directly to consumers.

[25] See *supra* note 21 for an example of higher search costs to consumers.