"EXCLUSIVE DEALING"

REMARKS OF

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According to my private instructions tonight, I am to speak briefly,

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sive dealing. These are the simple instructions of diabolic minds. Without being needlessly grim about the subject, I point out in passing that one Federal Trade Commission trial attorney recently told me that he wouldn't take another exclusive dealing case unless he were given hazardous duty pay. I hasten to add at this point that any opinions which I express tonight are not necessarily those of the Federal Trade Commission.

Since my topic relates primarily to current problems of exclusive dealing,

an entire line of the seller's or lessor's products may be bound together by

the buyer or lessee agrees to take all or a specified amount of a product exclusively from a seller or lessor are a type of exclusive dealing agreement.

Although the illegality of both tying and exclusive arrangements under the statute are conditioned upon a showing that the practices' effect "may

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Most of the present-day exclusive dealing problems swirl around the now-legendary decision of the Supreme Court in the Standard Stations case.

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sider this a restrained characterization. In Standard Stations, it is argued, the Supreme Court laid down the simple, forthright equation of "quantitative substantiality" with the statutory requirement of injury. In other words, proof that a substantial volume of commerce was blanketed by the contracts equalled competitive injury. Or did it?

From all of this, I dissect not a simple quantitative substantiality standard but a test of substantial market foreclosure, though I add honestly that a distinguished array of authority would take issue with me.

Yet, I think my contentions are strengthened by the Supreme Court's sub-

decisions indicate a disquieting reversion to per se theories. Perhaps apropos is the statement of one commentator last week in Washington that per se rules, like the old Bolsheviks, are coming back.

In Dictograph, exclusive-dealing contracts binding some 22 per cent of

the nation's premium hearing-aid dealers were held violative of both Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act. Dictograph was one of the nation's three largest producers of hearing aids

for hearing aids. The Commission found Section 3's test of competitive in