A Return to Reason for Price Restraints

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I. INTRODUCTION

The rule of law that declares resale price maintenance, or vertical price fixing,1 per se unlawful under section 1 of the Sherman Act2 should be overturned in favor of the rule of reason.3 The Supreme Court declared vertical price restraints per se unlawful over eighty years ago based upon factual assumptions which were incorrect at the time and upon economic doctrines which have long since been repudiated. Instead of overturning the per se rule, the Court has artificially narrowed the scope of so-called “price” restraints, and has expanded the range of so-called “non-price” restraints subject to the rule of reason. The result is increasing incoherence and inconsistency in the antitrust law. The struggle in the lower courts to avoid the per se rule and its often inequitable results compounds this incoherence and renders the per se

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1. The terms “resale price maintenance,” “vertical price fixing” and “vertical price restraints” all refer to restraints of trade imposed by a supplier or manufacturer on a reseller which restrict or control the price at which goods may be resold. Vertically imposed price restraints are distinguished from vertically imposed restraints of trade that control other elements of trade, e.g., manufacturer-imposed restrictions on its distributors concerning customers to whom they can sell or territories in which they can sell.

Vertically imposed restraints of trade are distinguished from horizontally imposed restraints of trade. Vertical restraints of trade are those effected between parties at different—but typically adjacent—levels along the chain of distribution, e.g., a manufacturer and a distributor. Horizontal restraints of trade are those effected between parties at the same level of distribution, e.g., competing retailers.

This Article demonstrates that the current legal distinction between vertical price and non-price restraints is indefensible and that all vertically imposed restraints of trade should be analyzed under the rule of reason.


3. For a discussion of the rule of reason and per se rules, see infra part II.A-C.
rule impotent as a viable rule of decision. The ultimate result of this state of affairs is that the business community, and the practitioners to whom it turns for advice, are left without clear guidance or meaningful standards by which to pursue legitimate business goals without falling into the trap of *per se* condemnation.

Section 1 of the Sherman Act provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." The decisions of the Supreme Court interpreting this provision have consistently recognized that it was intended to prohibit only unreasonable restraints of trade. Whether particular conduct violates section 1 of the Sherman Act typically is determined, therefore, on a case by case basis where the trier of fact "weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"—the rule of reason. Certain categories of practices, however, have been conclusively presumed to violate section 1 of the Act and are declared unlawful *per se*, without the need for a case by case evaluation—the so called *per se* rule.

Resale price maintenance has been held by the Supreme Court to be *per se* violative of section 1 of the Sherman Act since 1911. The factual assumptions and common law rule against restraints on alienation that underlied the Court's condemnation of resale price maintenance, however, probably made no sense in 1911 and surely is inconsistent with modern antitrust jurisprudence which is based primarily on market impact and economic effect. It is widely recognized today that vertical restraints of trade, including resale price maintenance, often have significant procompetitive potential that can increase economic efficiency and serve the public interest. The Supreme Court has implicitly

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8. *See*, *e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911).
recognized this wisdom in a number of cases decided over the past fifteen years but has refrained from overturning the per se rule against resale price maintenance. Instead, the Supreme Court has strained to narrow the scope of activities subject to the per se rule and to expand the range of business practices subject to the rule of reason. All that is presently left to the per se rule’s condemnation of vertical practices is an artificially and narrowly defined category of “price” restraints that is unconnected to any relevant economic effect or competitive impact and which does not distinguish legitimate procompetitive practices from the most restrictive business practices. Ultimately, “out of the single term ‘restraint of trade’ a chronologically schizoid statute [has been created], in which a ‘rule of reason’ evolves with new circumstances and new wisdom, but a line of per se illegality remains forever fixed where it was.”11 This renders the per se rule against resale price maintenance ineffective as a viable rule of decision. It also makes the per se rule a trap for the unwary or uncounseled executive.

The circuit courts have compounded this problem by struggling to avoid illogical applications of the per se rule that would produce inconsistent and inequitable results. In what are plainly judgment-driven decisions, the courts have strained to distinguish indirect, yet overt, price restrictions on distribution from resale price maintenance. They have also relied on heightened evidentiary standards concerning the sufficiency of evidence from which an inference of concerted action is allowed to avoid per se condemnation of restraints of trade despite clear price motivations. Most recently, the courts have relied on a new narrow definition of what constitutes a “price” restraint in order to subject numerous price restrictions to rule of reason analysis.12

As noted at the outset, the tortured treatment received by the per se rule in the lower courts leaves the business community, and the practitioners to whom it turns for advice, without any clear guidance or meaningful standards by which to pursue their legitimate business goals. Numerous legitimate business practices are often suggested by clients who are prepared to act but fear that their conduct may be per se unlawful. The current confusion in both the Supreme Court and the lower courts—condemning vertical price restraints as per se unlawful, but treating certain price restraints as non-price to avoid per se treatment of procompetitive practices—has made it impossible to give clear guidance

12. See infra part III.
to clients. This confusion has chilled businesses from engaging in procompetitive practices. This confusion should come to an end.

This Article demonstrates that the solution to the problems outlined above is to overturn the *per se* rule against resale price maintenance in favor of the rule of reason. Part II traces and analyzes in detail the Supreme Court’s development and application of the *per se* rule against vertical price restraints, demonstrates its inconsistency with modern antitrust jurisprudence and highlights its incoherence. Part III examines how this problem has been dealt with in the lower courts. Part IV illustrates the difficulties and obstacles that the business community currently encounters in pursuing its legitimate business goals while trying to avoid the pitfall of *per se* condemnation and highlights why the only workable solution is abandonment of the *per se* rule against vertical price restraints.

II. THE PER SE RULE IN THE SUPREME COURT: FROM DR. MILES TO BUSINESS ELECTRONICS

A. Dr. Miles, Colgate and Colgate Revisited

The Supreme Court first declared resale price maintenance *per se* unlawful under section 1 of the Sherman Act in 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 13 In *Dr. Miles*, the plaintiff was a drug and medicine manufacturer who brought suit against one of its wholesale dealers, complaining that the dealer had interfered with certain contractual relations between Dr. Miles and various other wholesale dealers and retail vendors. 14 The contracts at issue were a collection of “Consignment” and “Retail Agency” contracts, between Dr. Miles and over four hundred wholesale dealers and 25,000 retail vendors, which gave Dr. Miles effective control over the prices at which its goods were resold to the public. 15 The defendant dealer, John D. Park & Sons Co., countered by claiming that the contracts in question were invalid both at common law and under the Sherman Act. 16 In its antitrust analysis, the Supreme Court observed that Dr. Miles’s activity was categorically impermissible at early common law as an unlawful restraint on alien-

13. 220 U.S. 373 (1911).
14. See id. at 394-95.
15. Id. at 394.
16. See id. at 400.
The Court concluded its analysis by characterizing the agreements as an unreasonable "system of interlocking restrictions\(^7\) designed to "maintain prices . . . and to prevent competition among those who trade in [the medicines]."\(^8\) Based on this conclusion, the Supreme Court held that the agreements were "invalid both at common law and under [section 1 of the Sherman Act]" and affirmed the lower court’s dismissal of Dr. Miles’s complaint.\(^9\)

In language prescient of the proper analysis of vertical price restraints, Justice Holmes dissented. He warned that there was insufficient experience with vertical price restraints to condemn them without further inquiry:

> The sale to the retailers is made by the plaintiff, and the only question is whether the law forbids a purchaser to contract with his vendor that he will not sell below a certain price. This is the important question in this case. I suppose that in the case of a single object such as a painting or a statue the right of the artist to make such a stipulation hardly would be denied. In other words, I suppose that the reason why the contract is held bad is that it is part of a scheme embracing other similar contracts each of which applies to a number of similar things, with the object of fixing a general market price. This reason seems to me inadequate in the case before the court. In the first place by a slight change in the form of the contract the plaintiff can accomplish the result in a way that would be beyond successful attack. If it should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights. It seems to me that this consideration by itself ought to give us pause.

> But I go farther. There is no statute covering the case; there is no body of precedent that by ineluctable logic requires the conclusion to which the court has come. The conclusion is reached by extending a certain conception of public policy to a new sphere. On such matters we are in perilous country. I think that, at least, it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. What then is the ground upon which we interfere in the present

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18. Dr. Miles, 220 U.S. at 399.
19. Id. at 407.
20. Id. at 409.
case? Of course, it is not the interest of the producer. No one, I judge, cares for that. It hardly can be the interest of subordinate vendors, as there seems to be no particular reason for preferring them to the originator and first vendor of the product. Perhaps it may be assumed to be the interest of the consumers and the public. On that point I confess that I am in a minority as to larger issues than are concerned here. I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article (here it is only distribution), as fixing a fair price. What really fixes that is the competition of conflicting desires. We, none of us, can have as much as we want of all the things that we want. Therefore, we have to choose. As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. Of course, I am speaking of things that we can get along without. There may be necessaries that sooner or later must be dealt with like short rations in a shipwreck, but they are not Dr. Miles's medicines. With regard to things like the latter it seems to me that the point of most profitable returns marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable, for it is so alleged and the case is here on demurrer; so I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan. I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.\footnote{21}{Id. at 410-12 (Holmes, J., dissenting).}

Despite Justice Holmes's prescience, since Dr. Miles, resale price maintenance has been conclusively presumed to violate section 1 of the Sherman Act as an unreasonable restraint of trade.

Just eight years later in United States v. Colgate & Co.,\footnote{22}{250 U.S. 300 (1919).} a decision of broad antitrust significance, the Court took a half-step back from its holding in Dr. Miles—the first in a series of vacillations over the scope of Dr. Miles's \textit{per se} rule against resale price maintenance. In Colgate, the defendant, Colgate & Co., was engaged in the manufacture and sale of soap and toilet articles. The government's indictment charged Colgate with violating section 1 of the Sherman Act under the \textit{per se} rule
of *Dr. Miles* by fixing the prices at which its products were resold to the public.\(^\text{23}\) This was accomplished, as charged by the indictment, by distributing mandatory price lists to dealers through notices stating that no sales would be made to dealers who did not adhere to such prices, and by investigating and suspending non-complying dealers.\(^\text{24}\) The Supreme Court found, however, that the indictment failed to charge any contract, combination or agreement between Colgate and any of its distributors. The Court explained that the purpose of the Sherman Act is to prohibit "contracts and combinations" that unduly interfere with free trade, but that the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."\(^\text{25}\) It followed that a manufacturer could unilaterally announce a price policy and refuse to deal with any party who would not comply, and remain free from section 1 scrutiny.\(^\text{26}\) Accordingly, the Court reasoned that unilaterally imposed restraints of trade cannot violate section 1 of the Sherman Act and affirmed the lower court's dismissal of the government's complaint.\(^\text{27}\)

In order to understand the interaction of *Dr. Miles* and *Colgate* with subsequent cases, it is important to remember that each case brought under section 1 of the Sherman Act contains three basic elements: (1) proof of concerted action between the defendant and some other party; (2) proof showing the type of restrictive practice of which the plaintiff complains; and (3) the resulting rule of decision, either the rule of reason or a *per se* rule. The third element, the rule of decision, depends upon the second element, the type of restrictive practice at issue. In many cases brought under section 1 of the Sherman Act, the dispute focuses upon the second and third elements, with the parties arguing over the legal status of a given restrictive practice. For example, *Dr. Miles* focused on the third element, raising the issue of the legal status of resale price maintenance under the Sherman Act. The Supreme Court's decision established the rule that resale price maintenance is *per se* unlawful under section 1 of the Sherman Act.\(^\text{28}\) *Colgate*, however, focused on the first element. The Supreme Court's decision there emphasized that concerted

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\(^{23}\) See id. at 302-03.

\(^{24}\) See id. at 303.

\(^{25}\) Id. at 307.

\(^{26}\) See id.

\(^{27}\) See id. at 306-08.

\(^{28}\) See Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911).
action is a required threshold element of any claim under section 1 of the Sherman Act and explored the contours of the definition of concerted action. The ruling in *Colgate*—that the absence of concerted action renders the per se rule of *Dr. Miles* inapplicable—necessarily limits the scope of *Dr. Miles* by removing a broad range of activity from its scrutiny. The extent to which *Colgate* limits the scope of *Dr. Miles* turns on the question of what constitutes concerted action under section 1 of the Sherman Act, a question with which courts have wrestled since *Colgate*.

In a series of subsequent decisions, the Supreme Court responded to *Colgate* by expanding the scope of activity from which an inference of concerted action could be drawn, thereby expanding the scope of activity subject to the per se rule of *Dr. Miles* and narrowing the scope of *Colgate*’s protection. In *Federal Trade Commission v. Beech-Nut Packing Co.*, the Supreme Court held that where a producer coerced its customers to comply with its resale price policy, such coercion ran afoul of the Sherman Act. An “agreement,” in the common understanding of the word, was no longer necessary to create an unlawful combination; “coercion” would now suffice. In *United States v. Bausch & Lomb Optical Co.*, the Court held further that a conspiracy or combination was achieved by the acquiescence of customers in a producer’s resale price policy coupled with their assistance in effectuating its purpose to maintain resale prices. That decision was totally contrary to *Colgate*. The acquiescence of customers is an inherent element in any successful unilaterally imposed resale price policy. The Court’s holding in *Bausch & Lomb*, therefore, was, at the very least, that any affirmative assistance from one’s customers converted otherwise unilateral activity into concerted activity; at most, it sought to overrule *Colgate*.

Further apparent, in *United States v. Parke, Davis & Co.*, the Court sounded the death knell for *Colgate* by limiting the scope of *Colgate*’s protection to no more than a simple refusal to deal with customers who do not adhere to a seller’s suggested resale prices.

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29. See *Colgate*, 250 U.S. at 304-06.
30. 257 U.S. 441 (1922).
31. See id. at 454-56.
33. See id. at 723.
35. Id. at 43.
From a lengthy discussion and analysis of prior case law, including Beech-Nut and Bausch & Lomb, the Court found that concerted action could be inferred from any affirmative action on the part of a seller that went beyond the mere refusal to sell to customers who do not observe an announced price policy.36 The majority in Parke, Davis expressly called into question the continuing wisdom of the Colgate doctrine.37

B. The Zenith of the Per Se Rule

In a line of decisions beginning in the late 1950s and continuing through the late 1960s, the Supreme Court was called upon to decide the legal status of various types of restrictive business practices under section 1 of the Sherman Act. In Northern Pacific Railway Co. v. United States,38 the Supreme Court reviewed Northern Pacific Railway’s “preferential routing” agreements. The preferential routing agreements compelled grantees or lessees of land owned by Northern Pacific to use Northern Pacific’s railroad lines when shipping goods produced or manufactured on the land.39 The government sued for a declaration that the agreements were unlawful as unreasonable restraints of trade under section 1 of the Sherman Act.40 The Supreme Court characterized the routing agreements as “tying arrangements,” in which a party agrees to sell a product “on the condition that the buyer also purchases a different (or tied) product.”41 The Court explained that tying arrangements were per se unlawful “whenever a [seller] has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.”42 Finding that Northern Pacific had sufficient economic power with respect to land to appreciably restrain free competition in the shipping market,43 the Supreme Court held that Northern Pacific’s preferential routing agreements were per se unlawful

36. Id. In a vigorous dissent, however, Justice Harlan posited that Beech-Nut and Bausch & Lomb did not limit Colgate, and argued that the majority in Parke, Davis was guilty of “introducing a new narrowing concept into the Colgate doctrine.” Id. at 52.

37. Id. at 44; see also id. at 49 (Stewart, J., concurring). For further discussion of cases dealing with this issue, see infra text accompanying notes 65-87 (discussing Albrecht v. Herald Co., 390 U.S. 145 (1968)) and infra text accompanying notes 136-148 (discussing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984)).


39. Id. at 3.

40. Id. at 3-4.

41. Id. at 5.

42. Id. at 6.

43. Id. at 7.
and affirmed summary judgment for the government.\textsuperscript{44}

In \textit{Northern Pacific}, the Supreme Court articulated a standard for evaluating when a \textit{per se} rule is the appropriate rule of decision. The Court declared: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."\textsuperscript{45} This has become the authoritative standard for \textit{per se} condemnation. Since \textit{Northern Pacific}, restrictive business practices that have come before the Court sometimes have been—and always should be—examined in light of this standard.

That was the case in \textit{White Motor Co. v. United States},\textsuperscript{46} where the Supreme Court addressed the antitrust status of certain exclusive territory and customer agreements between a manufacturer and approximately 300 distributors and dealers. The agreements provided, \textit{inter alia}, that each distributor would have the exclusive right to sell trucks manufactured by White Motor within a described territory, and that each distributor could not sell to certain customers without White Motor's written permission.\textsuperscript{47} The government brought a civil action under section 1 of the Sherman Act challenging the legality of these restrictive agreements.\textsuperscript{48} The district court ruled that these restrictions were \textit{per se} violations of the Sherman Act and granted summary judgment to the government.\textsuperscript{49} The Supreme Court reversed, reasoning that vertical exclusive territory and customer restrictions could not be \textit{per se} unlawful since the Court did "not know enough of the economic and business stuff out of which these arrangements emerge[d] to be certain [whether they stifled competition]."\textsuperscript{50} Citing the standard articulated in \textit{Northern Pacific}, the Court explained that it needed to "know more... about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack... any redeeming

\begin{itemize}
  \item \textsuperscript{44} See id. at 12.
  \item \textsuperscript{45} Id. at 5.
  \item \textsuperscript{46} 372 U.S. 253 (1963).
  \item \textsuperscript{47} See id. at 255-56.
  \item \textsuperscript{48} Id. at 255.
  \item \textsuperscript{49} Id. at 256.
  \item \textsuperscript{50} Id. at 263.
\end{itemize}
virtue"") such that they should be condemned as *per se* violations of the Sherman Act.\(^5\)

The Supreme Court’s analysis of the territory and customer restrictions in *White Motor* under the *per se* standard of *Northern Pacific* is precisely the type of analysis that the Court should have performed at some point in time with respect to resale price maintenance. The Supreme Court declared resale price maintenance *per se* unlawful in 1911 without any analysis of the business reasons and economic effects of such a practice.\(^5\) And that conclusion has been repeatedly reiterated, but never examined. By continuously presuming *per se* illegality, the Supreme Court has failed to examine the “economic and business stuff” out of which resale price maintenance emerges. *Dr. Miles* and its progeny have concerned themselves with none of the essential elements of the *Northern Pacific* standard and, therefore, are wholly inadequate authorities upon which to base any conclusions about resale price maintenance. To be sure, “*Dr. Miles* is not the model for the classification of new business arrangements.”\(^5\)

The Supreme Court’s willingness to resort to *per se* rules of condemnation as an appropriate rule of decision for an increasing variety of restrictive business practices reached its zenith in two notable decisions in the late 1960s, both of which have since been repudiated. In *United States v. Arnold, Schwinn & Co.*,\(^5\) the Supreme Court again addressed the legal status of exclusive territory and customer agreements. Arnold, Schwinn & Co., a manufacturer of bicycles and bicycle parts, distributed its products through agency and consignment agreements with twenty-two wholesale distributors and by sale to wholesale distributors, to each of whom it assigned specific territories and customers.\(^5\) The government challenged Schwinn’s distribution practices under section 1 of the Sherman Act. The district court held that the agreements to divide territories were *per se* violations of the Sherman Act with respect to products sold to distributors, but not with respect to the agency and consignment transactions. On appeal, the Supreme Court found that both the agreements to divide territories and the customer restrictions were

\(^{51}\) *Id.* (second alteration in original) (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

\(^{52}\) *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407-09 (1911).


\(^{54}\) 388 U.S. 365 (1967).

\(^{55}\) *Id.* at 371.
illegal. “Under the Sherman Act,” the Court concluded, “it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it.” To allow such a practice “would violate the ancient rule against restraints on alienation.” Thus, the Court held that resale restraints on territories or customer selection were per se unlawful.

Maintaining the lower court’s distinction between sale and non-sale transactions, however, the Supreme Court did not condemn the same practices in the context of an agency or consignment agreement. The Court reasoned that section 1 of the Sherman Act required a distinction between situations where the manufacturer parted with title, dominion or risk and situations where it retained ownership and risk of loss. The Court observed that a per se rule against vertical territory and customer restrictions in all contexts was far too inflexible and might hamper competition.

Such analysis, however, was “an abrupt and largely unexplained departure” from the antitrust jurisprudence of Northern Pacific and White Motor, stepping back into the common law rationale of Dr. Miles. The Court based its decision on the common law rule against restraints on alienation, in which the pivotal factor was the passage of title. There was no analysis of the anticompetitive affect of Schwinn’s practices, nor any evaluation of any countervailing procompetitive merit, as required by Northern Pacific. Indeed, only four years after White Motor, the Court “announced its sweeping per se rule without even a reference to [Northern Pacific] and with no explanation of its sudden change in position.”

56. Id. at 378.
57. Id. at 379.
58. Id. at 380.
59. Id. at 378-79.
60. Id. at 379-80.
61. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47 (1977). In the Schwinn opinion, the Court purports to allow for White Motor’s rule-of-reason analysis in cases where the manufacturer retains ownership of the product. In his dissent, however, Justice Stewart correctly argues that no previous decision of the Court justifies its decision, which instead, “completely repudiates the only case in point, White Motor.” Arnold, Schwinn & Co., 388 U.S. at 388-89 (Stewart, J., dissenting).
62. See GTE Sylvania, 433 U.S. at 52.
63. Id. at 51.
Moreover, the Schwinn Court itself pointed out the irrationality of per se condemnation, albeit supposedly in the context of agency and consignment agreements:

On the other hand, as indicated in White Motor, we are not prepared to introduce the inflexibility which a per se rule might bring if it were applied to prohibit all vertical restrictions of territory and all franchising, in the sense of designating specified distributors and retailers as the chosen instruments through which the manufacturer, retaining ownership of the goods, will distribute them to the public. Such a rule might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers, and it might sharply accelerate the trend towards vertical integration of the distribution process.

... Where the manufacturer retains title, dominion, and risk with respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from those of an agent or salesman of the manufacturer, it is only if the impact of the confinement is “unreasonably” restrictive of competition that a violation of § 1 results from such confinement, unencumbered by culpable price fixing. Simpson v. Union Oil Co., 377 U.S. 13 (1964). As the District Court found, Schwinn adopted the challenged distribution programs in a competitive situation dominated by mass merchandisers which command access to large-scale advertising and promotion, choice of retail outlets, both owned and franchised, and adequate sources of supply. It is not claimed that Schwinn’s practices or other circumstances resulted in an inadequate competitive situation with respect to the bicycle market; and there is nothing in this record—after elimination of the price-fixing issue—to lead us to conclude that Schwinn’s program exceeded the limits reasonably necessary to meet the competitive problems posed by its more powerful competitors. In these circumstances, the rule of reason is satisfied.64

If the Court had paused to consider its own reasoning, it would have retained the rule of reason for all of the challenged restraints since there was no competitive significance to the retention (or release) of legal title.

Perhaps the most notable expansion of the per se doctrine is found in Albrecht v. Herald Co.,65 where the Supreme Court reviewed a maximum price fixing arrangement combined with exclusive territories. In Albrecht, the Herald Co. published a morning newspaper which was

distributed to homes in the St. Louis metropolitan area by independent carriers. Each carrier distributed within an exclusive territory subject to termination if the price charged to subscribers exceeded Herald’s suggested maximum. The plaintiff, Albrecht, a carrier for a home delivery route, adhered to Herald’s price policy for some time but then began to raise his prices. In response, Herald hired Milne Circulation Sales, Inc. to solicit residents on the route away from Albrecht, and then gave a portion of the route to another carrier, George Kroner. Albrecht then brought suit against Herald, challenging the maximum price restriction under section 1 of the Sherman Act. The Eighth Circuit Court of Appeals affirmed the district court’s judgment for Herald, holding that Herald’s conduct was “wholly unilateral and [that] there was no restraint of trade.” The Supreme Court reversed, disagreeing with the court of appeals on both grounds, and held that Herald’s hiring of outside agents to take over Albrecht’s delivery route, in response to Albrecht’s violation of Herald’s price policy, constituted a combination to fix resale prices—a per se violation of section 1 of the Sherman Act. The Court concluded:

It is our view, therefore, that the combination formed by [Herald, Milne and Kroner] in this case to force [Albrecht] to maintain a specified price for the resale of the newspapers which he had purchased from [Herald] constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

The Supreme Court’s ruling in Albrecht basically eliminated the requirement of concerted action from section 1 of the Sherman Act. To support its finding of concerted action, the Court relied on its decision in United States v. Parke, Davis & Co., where it held that an illegal combination to fix prices results if a seller secures compliance to his suggested resale prices by means that go beyond the “mere announcement of his policy and the simple refusal to deal.” In Parke, Davis, a manufacturer of pharmaceutical products specified resale prices for both

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66. Id. at 147.
67. Id.
68. Id.
69. Id. at 147-48.
70. Id. at 148.
71. Id. at 149.
72. Id.
73. Id. at 153.
75. Id. at 44.
wholesalers and retailers and required wholesalers to refuse to deal with non-complying retailers. The manufacturer was found to have created a combination with retailers and wholesalers to maintain prices. In Albrecht, the Court explained that in Parke, Davis "[t]he combination with retailers arose because their acquiescence in the suggested prices was secured by threats of termination; the combination with wholesalers arose because they cooperated in terminating price-cutting retailers." The Court reasoned that if a combination arose under those circumstances, then a combination also arose between Herald, Milne and Kroner to force Albrecht to conform to the advertised retail price.

But if the Court were inclined to a rule of reason analysis, it would have been easy to limit Parke, Davis and not expand it, as the Court chose to do in Albrecht. In Parke, Davis, the manufacturer ultimately sought to control the prices of the retailers with whom it had no direct dealings, and the cooperation of the wholesalers was essential to effect its policy and to police offending retailers. In Albrecht, however, there was no intermediary between Herald and its carriers, and Herald required no assistance to control the prices at which the distributors resold their papers to subscribers nor to police offenders. Instead, Herald hired Milne for its own convenience so that it could compete for Albrecht's customers. The Court suggests that Milne's and Kroner's awareness of Herald's purpose to induce Albrecht's compliance was material, but fails to explain why that might be so. The Court's reasoning fails to draw a distinction between genuine concerted action and what can be described, at worst, as two outsiders having knowledge of the purpose of unilateral action. Moreover, the Court failed to even make note of the Northern Pacific standard or to examine in light of that standard whether vertically imposed price ceilings deserve per se treatment.

As if the Court's holding did not do sufficient violence to section 1 jurisprudence, in footnote six of the Albrecht opinion, the Court cites three additional theories of concerted action that Albrecht might have

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76. See id. at 31-33.
77. Id. at 45.
79. Id.
80. 362 U.S. at 45 ("Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices.").
81. See Albrecht, 390 U.S. at 147.
82. See id. at 150.
Each of these theories further eviscerates whatever integrity was left of the Colgate doctrine after Parke, Davis. First, footnote six suggests that Albrecht might have "claimed a combination between [Herald] and himself... as of the day he unwillingly complied with [Herald’s price policy]." Colgate’s concept of a seller’s unilateral action rests on the seller’s right to announce a price policy with the hope that dealers will comply. If unilateral action becomes “concerted” and illegal, except if the buyer’s compliance is “willing,” then any Colgate defense is subject to the fatal claim that the aggrieved plaintiff’s compliance was unwilling. It is one thing to suggest that “coercion” converts unilateral conduct into concerted action; it is quite another to hold that mere “unwilling” compliance on the part of the customer converts a lawful price policy into an illegal conspiracy. Consider the illogic of that result: Usually the hallmark of a conspiracy is that the parties are willing participants; in Albrecht, willing acquiescence was the only way to escape the conspiracy.

Second, footnote six suggests that Albrecht might have claimed that Herald combined with all other carriers because they acquiesced in Herald’s price policy. Once again, this theory eradicates any requirement to prove concerted action. According to this theory, if a supplier announces a price policy and most customers acquiesce in it—even willingly—that converts unilateral conduct into concerted action. Simply put, if willing compliance by dealers is enough to establish concerted action, then Colgate is meaningless.

Third, footnote six observes that an unlawful combination between Herald and Albrecht’s customers was not a frivolous claim. If this is a valid claim, then any seller can be held liable for violating the Sherman Act when a consumer chooses to make an economically advantageous purchase at a lower price. This is a manifestly perverse result.

Once over the concerted action hurdle, the Albrecht Court faced the issue of the legal status of maximum price fixing—i.e., price ceilings—under section 1 of the Sherman Act. In a brief analysis without any measure of economic or competitive effects nor any reference to Northern Pacific or its standard, the Court condemned maximum price fixing as a per se violation of the Act, grouping such practices with

83. Id. at 150 n.6.
84. Id.
85. Id.
86. Id.
87. See id. at 152-54.
minimum price fixing. Maximum price fixing, however, differs significantly from minimum price fixing. In the latter, there is at least a concern that consumers will be subject to price gouging. A price ceiling, however, when used in conjunction with an exclusive territory arrangement, protects consumers from being gouged by dealers who enjoy intrabrand "monopoly" power within their exclusive territories, and may have important procompetitive effects on interbrand competition. This critical distinction was the basis of the Albrecht court of appeals' ruling. The Supreme Court rejected this distinction, however, by suggesting that exclusive territories themselves were of dubious antitrust validity under Schwinn.

C. GTE Sylvania: A Return to Reason

The pinnacle of the per se rule under Schwinn and Albrecht lasted a decade, until the Supreme Court's landmark decision in Continental T.V., Inc. v. GTE Sylvania Inc., where the Court overruled Schwinn and signaled a new approach to antitrust rules of decision "based upon demonstrable economic effect rather than . . . upon formalistic line drawing." GTE Sylvania Inc. manufactured television sets and sold them to both independent and company-owned distributors who in turn resold them to a number of different retailers. Due to a decline in market share, Sylvania intensively reviewed its marketing strategy and decided to eliminate its wholesale distributors and to sell its televisions directly to a small group of select franchisees. To attract a reduced number of retailers who would be more aggressive and competent, "Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised."

88. See id. at 152.
89. See id. at 152-53.
90. Id. at 153.
91. Id. at 153-54. Now that Schwinn has been overruled, and in light of the Court's decisions in Monsanto Co. v. Spray-Rite Serv. Corp., see infra text accompanying notes 144-57, and Business Elecs. Corp. v. Sharp Elecs. Corp., see infra text accompanying notes 174-84, it is unclear how much validity is left to Albrecht's analysis. See Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 706-07 (7th Cir.), cert. denied, 469 U.S. 1018 (1984); see also discussion infra part III.
93. Id. at 59.
94. Id. at 38.
95. Id.
96. Id.
Continental T.V., Inc. was a franchised retailer operating out of San Francisco and was one of Sylvania’s most successful franchisees.97 After several business disputes between the parties, Sylvania terminated Continental’s franchise, and Sylvania’s finance company filed a diversity action against Continental to recover money owed and secured merchandise held by Continental.98 Continental brought a cross-claim against Sylvania challenging the location restriction in the franchise agreement under section 1 of the Sherman Act.99 Relying on Schwinn, the district court held that Sylvania’s restriction of the locations from which retailers could sell Sylvania’s products was a per se violation of section 1 of the Sherman Act.100 The Ninth Circuit reversed, distinguishing the territory and customer restrictions in Schwinn from Sylvania’s location restrictions and holding that Sylvania’s restrictions should be analyzed under the rule of reason.101

The Supreme Court was “unable to find a principled basis for distinguishing” Sylvania’s distribution restrictions from the distribution restrictions in Schwinn.102 In a lengthy review and analysis of Schwinn, the Court found Schwinn’s distinction between sale and non-sale transactions to be unrelated to any relevant economic or competitive effects.103 In analyzing the merits of such distribution restrictions, the Court observed that they have significant procompetitive potential.104 The Court found, therefore, that Schwinn’s per se rule was inconsistent with Northern Pacific’s per se standard—which applies a per se rule only to restraints that are likely to have a “‘pernicious effect on competition’” or “‘lack . . . any redeeming virtue.’”105 Accordingly, the Supreme Court overruled Schwinn and held that vertical distribution restraints should be analyzed under the rule of reason.106

Indeed, the Court’s sweep was so broad as to suggest that all

97. Id. at 39.
98. See id. at 39-40.
99. Id. at 40. Although Sylvania originally contended that its policy was unilaterally enforced, it ultimately conceded that “its location restriction involved understandings or agreements with [its] retailers.” Id. at 40 n.8.
100. Id. at 40-41.
101. Id. at 41.
102. Id. at 46.
103. Id. at 56.
104. Id. at 46.
105. Id. at 58 (alteration in original) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958)).
106. Id. at 57-59.
vertical restraints would be subject to rule-of-reason analysis. As the Court concluded:

Accordingly, we conclude that the \textit{per se} rule stated in \textit{Schwinn} must be overruled. In so holding we do not foreclose the possibility that particular applications of vertical restraints might justify \textit{per se} prohibition under \textit{Northern Pac. R. Co}. But we do make clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in \textit{Schwinn}—upon formalistic line drawing.\textsuperscript{107}

At the heart of the Supreme Court's decision in \textit{GTE Sylvania} lies its attention to both intrabrand and interbrand competition and its recognition that vertical restraints of trade have different effects in each area of competition. As the opinion explains, "[t]he market impact of vertical restrictions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."\textsuperscript{108} On the one hand, "[v]ertical restrictions reduce intrabrand competition by limiting the number of [competing] sellers of a particular product."\textsuperscript{109} This can be the result, for example, of territory or location restrictions. On the other hand, such restrictions "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products."\textsuperscript{110} New manufacturers entering the market can use such restrictions to induce distributors and retailers to make the capital and labor investments often required to introduce a new product.\textsuperscript{111} In addition, distribution restrictions can help established manufacturers overcome the "free-rider" effect.\textsuperscript{112} Moreover, the Court in \textit{GTE Sylvania} recognized that robust interbrand competition provides important checks on the exploitation of intrabrand market power because of customers' ability to substitute a competing

\textsuperscript{107} Id. at 58-59 (footnote omitted).
\textsuperscript{108} Id. at 51-52 (footnote omitted).
\textsuperscript{109} Id. at 54.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 55.
\textsuperscript{112} Id. The "free rider" effect arises where a dealer who offered pre-sale services could then be undersold by competing dealers offering no (or fewer) services. A potential customer could take advantage of the first dealer's services and then make his purchase with the underselling dealer. Such market imperfection is referred to as the "free-rider" effect. The price-cutting dealer who offers few or no services free-rides on the full service dealer's provision of such services. See Richard A. Posner, \textit{Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions}, 75 \textit{COLUM. L. REV.} 282, 285 (1975).
brand of the same product. Finally, the Court counseled that, in balancing the net effect of these two conflicting market impacts, the promotion of interbrand competition is to be accorded the greatest weight since "[i]nterbrand competition . . . is the primary concern of antitrust law."

Reconciling those competing effects necessarily led to the Court's conclusion that antitrust plaintiffs should be required to prove that such restrictions are unreasonably anticompetitive on balance in each situation where they are employed. Any presumption of *per se* illegality is inappropriate.

The Supreme Court noted that its holding in *GTE Sylvania* was limited to non-price vertical restrictions, indicating that the "*per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." The distinctions relied on by the Court, however, are insufficient to justify the disparate treatment of vertical price and non-price restrictions. The leading authority cited by the Court to support its distinction between price and non-price restrictions wrote that "industry-wide resale price maintenance might facilitate [horizontal] cartelizing" at the manufacturer level, an undisputed *per se* violation of the Act. Although industry-wide resale price maintenance may theoretically be manipulated to facilitate such a horizontal cartel, it has never been found to have actually done so. The Court has held, both before and since, that *per se* rules should be based upon prior experience that reveals a given restrictive practice to be always or almost always anticompetitive, not on theoretical speculation.

113. *GTE Sylvania*, 433 U.S. at 55. This analysis is similar to Justice Holmes's observations in his dissent in *Dr. Miles*. See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409-13 (1911) (Holmes, J., dissenting); *supra* text accompanying note 21.


115. *See id.* at 58-59. On remand, the Ninth Circuit Court of Appeals found that Sylvania's restrictions were reasonable, holding that "[t]he restraint was likely to promote interbrand competition given the market structure in the television manufacturing industry." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 694 F.2d 1132, 1140 (9th Cir. 1982).


Moreover, certain non-price restrictions, such as exclusive territories, can be similarly manipulated to produce the same effect and yet they are analyzed under the rule of reason. In addition, an industry-wide horizontal cartel would be itself unlawful per se; and its existence would require little investigation to discover.

Indeed, the market impact and economic effect of vertical price and non-price restrictions are similar. As Justice White observed in his concurrence in *GTE Sylvania*, any argument that can be made on behalf of non-price restrictions can also be made on behalf of price restrictions. For example, resale price maintenance may be the only practical method of overcoming the free-rider problem where effective retail distribution requires that dealers be located close to one another. Moreover, both price and non-price restrictions can have an impact on price. For example, *GTE Sylvania* squarely holds that it is not per se unlawful for a manufacturer to require its distributors to sell only from a particular location—a "non-price" restriction. Through judicious spacing of such distributors, however, a manufacturer can effectively limit price competition among them. Given the similar effects of vertical price and non-price restrictions, the Court's sanction of the rule of reason for non-price restrictions necessarily calls into question the per se rule against price restrictions. Since many scholars have observed


120. This point was argued by the Solicitor General (by brief only) and several other amici in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 n.7 (1984), infra text accompanying notes 144-57.


123. Id. at 11-12.

124. See 433 U.S. at 70 (White, J., concurring).
that all vertical restrictions of trade are, as a rule, "beneficial to consumers and ought not be condemned lightly or ever," that analysis should be applied to vertical price restraints as well.

D. Analysis of Price Restraints After GTE Sylvania

While GTE Sylvania is considered a non-price case, since then the Supreme Court has shown greater reliance on the rule of reason to analyze new business practices with overt restrictions on price; it has refused, however, to totally jettison the per se rule against vertical price restraints. For example, in NCAA v. Board of Regents, the Court analyzed under the rule of reason the NCAA's restrictive practices with respect to the televising of college football games. In 1981, the National Collegiate Athletic Association ("NCAA") adopted a plan for the televising of the football games of its member institutions for the 1982-85 seasons. The plan placed a ceiling on the total number of games that could be televised and the number of games that each member institution could telecast. In separate agreements with each of the carrying broadcast networks—the American Broadcasting Company ("ABC") and the Columbia Broadcasting System ("CBS")—the NCAA granted the right to telecast games for a "minimum aggregate compensation" payable to the participating member schools.

Some time before, five of the major conferences and major football-playing institutions within the NCAA organized the College Football
Association ("CFA") to promote the special interests of major football-playing institutions within the NCAA.\textsuperscript{130} Claiming that they should have a greater voice in the formulation of football television policy than the NCAA plan allowed, the CFA negotiated a separate contract with the third national broadcasting network, the National Broadcasting Company ("NBC").\textsuperscript{131} The contract allowed for a more liberal number of televised games and "would have increased the overall revenues" to CFA members.\textsuperscript{132} Respondents Universities of Oklahoma and Georgia were members of the CFA.\textsuperscript{133} In response to the threat of disciplinary action by the NCAA against any CFA member that complied with the CFA-NBC contract, the respondents brought an action challenging the NCAA plan under section 1 of the Sherman Act.\textsuperscript{134} The district court held that the NCAA plan violated the Sherman Act,\textsuperscript{135} and the Tenth Circuit affirmed, holding that the NCAA television plan constituted price fixing and was illegal \textit{per se}.\textsuperscript{136}

When reviewing the case, the Supreme Court characterized the NCAA plan as horizontal price fixing because it precluded any price negotiation between broadcasters and institutions and as a limitation on output, because it limited the number of televised games.\textsuperscript{137} Despite the fact that such horizontal price fixing and output limitations are ordinarily condemned as \textit{per se} unlawful,\textsuperscript{138} the Court decided that it would be inappropriate to apply a \textit{per se} rule in this case.\textsuperscript{139} The Court observed that the nature of televised college football was such that some measure of horizontal restraint was necessary if televised college football was to be available at all, since the organization of any league sport necessarily involves horizontal collusion.\textsuperscript{140} The Court decided, therefore, that the rule of reason was the appropriate rule of decision. This "victory" for the NCAA plan was short-lived; applying the rule of reason, the Court found that the NCAA's limitation of output, preclusion of price negotiation, and unresponsiveness to viewer choice imposed an unreasonable restraint on

\textsuperscript{130} Id. at 89.
\textsuperscript{131} Id. at 94-95.
\textsuperscript{132} Id. at 95.
\textsuperscript{133} Id. at 88.
\textsuperscript{134} Id. at 95.
\textsuperscript{135} See Board of Regents v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982).
\textsuperscript{136} See Board of Regents v. NCAA, 707 F.2d 1147, 1152 (10th Cir. 1983).
\textsuperscript{137} See NCAA, 468 U.S. at 99-100.
\textsuperscript{138} Horizontal price fixing is "perhaps the paradigm of an unreasonable restraint of trade." Id. at 100.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 101 (citing Bork, supra note 125, at 278); see also id. at 117.
competition and affirmed the decision of the court of appeals.\textsuperscript{141}

The Supreme Court’s rejection of a \textit{per se} rule in favor of the rule of reason for an outright horizontal price restriction in \textit{NCAA} further calls into question the Court’s refusal to extend the rule of reason vertical price restrictions. Moreover, it further compounds the doctrinal inconsistency in the disparate treatment of price and non-price distribution restrictions. In \textit{NCAA}, the Court reasoned that since the very organization of a league sport involves some measure of horizontal collusion (and clearly does not automatically run afoul of the antitrust laws), it was appropriate to analyze under the rule of reason a league plan for the televising of its games.\textsuperscript{142} In other words, the Court recognized that such a plan may be procompetitive on balance despite its obvious anticompetitive restrictive features, and this warranted more probing analysis than a \textit{per se} rule allows. That is the same reasoning the Court used in \textit{GTE Sylvania} to justify its decision to apply the rule of reason to vertical non-price restrictions.\textsuperscript{143} It recognized that vertical restraints can be procompetitive on balance and reasoned that those procompetitive effects must be considered and balanced against its anticompetitive features, and that this warranted more probing analysis than a \textit{per se} rule allows. However, if consideration of countervailing procompetitive effects was sufficient to warrant rule of reason analysis for a horizontal price restriction in \textit{NCAA}, there is no principled basis for rejecting the \textit{per se} rule with respect to vertical price restraints. Instead of confronting this inconsistency directly and overturning the \textit{per se} rule against vertical price restraints, the Supreme Court has chosen to narrow the application of the \textit{per se} rule in subsequent decisions by revitalizing the concerted action requirement and narrowing the class of “price” restrictions subject to \textit{per se} condemnation.

In \textit{Monsanto Co. v. Spray-Rite Service Corp.},\textsuperscript{144} the Supreme Court clarified—and perhaps raised—the level of proof from which an allowable inference of concerted action could be made, effectively resurrecting and re-invigorating \textit{Colgate}.\textsuperscript{145} Monsanto Company was a manufacturer of agricultural herbicides.\textsuperscript{146} Spray-Rite Service Corporation was a discount distributor of agricultural chemicals and an autho-

\textsuperscript{141} See \textit{id.} at 103-13, 120.
\textsuperscript{142} \textit{id.} at 101.
\textsuperscript{144} 465 U.S. 752 (1984).
\textsuperscript{145} See \textit{id.} at 763-64; \textit{see also} United States v. \textit{Colgate}, 250 U.S. 300, 307-08 (1919).
\textsuperscript{146} \textit{Monsanto}, 465 U.S. at 755.
rized distributor of Monsanto herbicides from 1957 to 1968. In 1967, Monsanto announced that it would appoint distributors for one-year terms and would renew distributorships only according to specific criteria.\(^{147}\) In 1968, Monsanto declined to renew Spray-Rite’s distributorship.\(^{148}\) Spray-Rite brought an action under section 1 of the Sherman Act alleging that Monsanto and certain of its other distributors conspired to fix the resale prices of Monsanto herbicides and that Spray-Rite was terminated pursuant to this conspiracy for its price cutting practices.\(^{149}\) Monsanto denied engaging in any resale price maintenance scheme and contended that the termination of Spray-Rite’s distributorship was a unilateral act prompted by Spray-Rite’s failure to satisfy Monsanto’s announced distributorship criteria.\(^{150}\)

At trial, the jury returned a verdict for Spray-Rite upon which the district court entered judgment.\(^{151}\) The Seventh Circuit affirmed, holding in substance that an antitrust plaintiff can survive a motion for a directed verdict if it shows that a manufacturer terminated a price cutting distributor in response to or following complaints by other distributors.\(^{152}\) The Supreme Court rejected the court of appeals’s formulation of the level of proof required to submit a distributor-termination case to the jury and concluded that “something more than evidence of complaints” is required.\(^{153}\) The Court held that “[t]here must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently.”\(^{154}\)

The analytic significance of Monsanto is that it expands the previously narrowed scope of the Colgate doctrine in the dealer-termination context—perhaps the most common context in which allegations of resale price maintenance arise. Monsanto provides an enlarged Colgate safe-harbor within which to shield resale price maintenance from \textit{per se} condemnation under \textit{Dr. Miles}. Instead of directly protecting resale price maintenance from unwarranted \textit{per se} condemnation by casting aside the \textit{per se} rule in favor of the rule of reason, the Court indirectly limited the \textit{per se} rule by expanding the

\begin{itemize}
  \item \(^{147}\) Id. at 756.
  \item \(^{148}\) Id. at 757.
  \item \(^{149}\) Id.
  \item \(^{150}\) Id.
  \item \(^{151}\) Id. at 757-58.
  \item \(^{152}\) Id. at 758-59.
  \item \(^{153}\) Id. at 764; see also id. at 759 (explaining that, even though the Court rejected the standard set forth by the court of appeals, the judgment was affirmed under a new standard).
  \item \(^{154}\) Id. at 764.
\end{itemize}
scope of exempt "unilateral" activity.\textsuperscript{155}

In the specific instance of \textit{Monsanto}, the victory for the defendant was short-lived; the Court found that even under this enhanced standard, there was sufficient evidence of concerted action and affirmed the decision of the court of appeals.\textsuperscript{156} However, many cases before \textit{Monsanto} that would have been submitted to the jury under a \textit{per se} theory are now dismissed on a defendant manufacturer's motion for summary judgment. The motion simply recites that summary judgment should be granted because the terminated dealer has produced nothing more than evidence of non-terminated dealers' complaints and/or has failed to produce any evidence that tends to exclude the possibility that the manufacturer was acting independently in terminating the complainant. Indeed, \textit{Monsanto} has left a wake of such summary judgment dismissals in its path.\textsuperscript{157} Thus, the real significance of \textit{Monsanto} is that it has freed an entire category of vertical price restraints—dealer-terminations following other dealers' price complaints—from automatic \textit{per se} condemnation.

The Supreme Court has also avoided application of \textit{per se} rules of illegality by artificially narrowing the scope of restrictions that are classified as "price" restrictions. For example, \textit{Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.},\textsuperscript{158} followed \textit{GTE Sylvania} by only two years and raised the issue of whether certain horizontal agreements concerning the price of licensed copyrighted musical compositions constituted illegal \textit{per se} price fixing in violation of section 1 of the Sherman Act.\textsuperscript{159} Petitioners Broadcast Music, Inc. ("BMI") and the American Society of Composers, Authors and Publishers ("ASCAP") were organizations that operated as "clearing-houses" for owners and users of copyrighted musical compositions.\textsuperscript{160} They issued licenses to users and remitted royalties to owners.\textsuperscript{161} Both organizations operated primarily through blanket licenses which, for a fixed fee, gave licensees the unlimited right to perform any and all of the compositions in the issuing organization's portfolio for a period of time.\textsuperscript{162}

\textsuperscript{155} See id. at 762.
\textsuperscript{156} See id. at 765, 768.
\textsuperscript{157} See, e.g., Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989); see also infra note 264.
\textsuperscript{158} 441 U.S. 1 (1979).
\textsuperscript{159} Id. at 4.
\textsuperscript{160} See id. at 5.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
Respondent Columbia Broadcasting System, Inc. ("CBS") was one of the petitioners' largest licensees, holding blanket licenses from both organizations. CBS filed a complaint against ASCAP and BMI alleging, *inter alia*, that the blanket license was a form of price fixing, illegal *per se* under section 1 of the Sherman Act. The district court rejected this claim and dismissed the complaint. The Second Circuit reversed the district court's judgment and held that the blanket license was a form of price fixing, illegal *per se* under the Sherman Act.

The Supreme Court reversed the judgment of the court of appeals but chose a different formulation that recognized that the price restraint involved warranted rule-of-reason analysis.

Instead of labeling the blanket licenses as simple price fixing, the Court first looked at the nature of the blanket licenses, warning that "easy labels do not always supply ready answers." In so doing, the Court noted the usefulness of *per se* rules for horizontal price restraints:

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977), and so often "lack...any redeeming virtue," *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.

The Court then set upon the task of determining whether the blanket license deserved *per se* treatment by looking at the likely effects of the pricing practice under the test of *Northern Pacific*:

To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses

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163. *Id.* at 4-5.
164. *Id.* at 6.
165. See *id*.
166. See *id.* at 6-7.
167. See *id.* at 24-25.
168. *Id.* at 8.
169. *Id.* at 7-8 (alteration in original) (footnotes omitted).
have joined together into an organization that sets its price for the 
blanket license it sells. But this is not a question simply of determining 
whether two or more potential competitors have literally "fixed" a 
"price." As generally used in the antitrust field, "price fixing" is a 
short-hand way of describing certain categories of business behavior to 
which the per se rule has been held applicable. The Court of Appeals' 
literal approach does not alone establish that this particular practice is 
one of those types or that it is "plainly anticompetitive" and very likely 
without "redeeming virtue." Literalness is overly simplistic and often 
overbroad. When two partners set the price of their goods or services 
they are literally "price fixing," but they are not per se in violation of 
the Sherman Act. Thus, it is necessary to characterize the challenged 
conduct as falling within or without that category of behavior to which 
we apply the label "per se price fixing." That will often, but not 
amways, be a simple matter.

Consequently, as we recognized in United States v. Topco Associ-
ates, Inc., 405 U.S. 596, 607-608 (1972), "[i]t is only after considerable 
experience with certain business relationships that courts classify them 
as per se violations . . . ." We have never examined a practice like this 
one before; indeed, the Court of Appeals recognized that "[i]n dealing 
with performing rights in the music industry we confront conditions 
both in copyright law and in antitrust law which are sui generis." And 
though there has been rather intensive antitrust scrutiny of ASCAP and 
its blanket licenses, that experience hardly counsels that we should 
outlaw the blanket license as a per se restraint of trade.170

After examining nearly thirty years of market experience with 
blanket licenses and the impact of copyright laws in this area, the Court 
concluded that the "blanket license . . . is not a 'naked restrain[t] of trade 
with no purpose except stifling of competition,' but rather accompanies 
the integration of sales, monitoring, and enforcement against unautho-
rized copyright use."171 Further noting the potential procompetitive 
effects of blanket licenses and the need for such licenses, the Court 
reversed the court of appeals and directed the application of the rule of 
reason on remand.172

The Court gave further guidance on the scope of per se price fixing 
analysis:

Finally, we have some doubt—enough to counsel against

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170. Id. at 8-10 (alteration in original) (citations omitted) (footnotes omitted).
171. Id. at 20 (alteration in original) (citation omitted) (quoting White Motor Co. v. United 
States, 372 U.S. 253, 263 (1963)).
172. See id. at 20-25.
application of the per se rule—about the extent to which this practice threatens the "central nervous system of the economy," United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 n.59 (1940), that is, competitive pricing as the free market’s means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are per se violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including price competition, but they are not per se illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.173

In BMI, the Supreme Court avoided applying a per se rule to a horizontal price restraint by effectively labelling the price restraint at issue a non-price restraint. This example was followed nine years later in Business Electronics Corp. v. Sharp Electronics Corp.,174 where the Court trivialized the per se rule against resale price maintenance in the dealer-termination context by adopting an artificially narrow definition of "price" restriction. There, Business Electronics Corp. and Hartwell were both authorized dealers in the Houston area of calculators manufactured by Sharp Electronics Corp.175 The case involved the not-uncommon situation where Sharp terminated Business Electronics after complaints by Hartwell concerning Business Electronics’ discount pricing practices.176 Business Electronics brought an action against Sharp under section 1 of the Sherman Act alleging that Sharp and Hartwell conspired to fix the resale prices of Sharp products and that Business Electronics was terminated pursuant to this conspiracy—if established, a classic vertical price fixing conspiracy per se unlawful under the Act.177

Following a trial in which the case was submitted to the jury on a per se theory, the jury concluded that there was an agreement between Sharp and Hartwell to terminate Business Electronics because of its price cutting.178 The jury awarded $600,000 in damages and the district court entered judgment for Business Electronics for treble damages plus attorney’s fees.179 The Fifth Circuit reversed and remanded for a new

173. Id. at 23.
175. Id. at 721.
176. See id.
177. See id.
178. Id. at 721-22.
179. Id. at 722.
trial, holding that the termination of Business Electronics was not per se illegal because Hartwell, the remaining dealer, did not "expressly or impliedly agree to set its prices" at some price or price level following the termination.\(^{180}\) The Supreme Court affirmed the decision of the court of appeals and held that a manufacturer's termination of a price cutting dealer upon the complaint of another dealer is not subject to per se condemnation as price fixing unless there is an agreement between the manufacturer and the complaining dealer concerning post-termination price or price levels.\(^{181}\)

Similar to BMI, the principal focus of the Court's analysis in Business Electronics involved whether an agreement to terminate a price cutting dealer should be classified as a price or non-price restraint. The Court's conclusion was that, in general, such a restraint should not be classified as a price restraint. The Court engaged in somewhat tortured reasoning, however, to explain why an agreement between a manufacturer and a non-terminated dealer to terminate another dealer for price cutting did not amount to a vertical price fixing conspiracy. This was accomplished by narrowing the definition of price fixing to apply only to situations where there is an express or implied agreement on a future price or price level.\(^{182}\) Such an express or implied agreement between a manufacturer and a non-terminated dealer is very rare, and even where such an agreement exists it presents a formidable evidentiary obstacle for the terminated dealer. The jurisprudential impact of the Court's narrow definition of a "price" restraint is to virtually eliminate application of the per se rule in the dealer complaint context, and to substantially diminish the ability of a terminated dealer to establish an illegal conspiracy subject to per se treatment under section 1 of the Sherman Act.

The practical impact on suppliers, however, is to leave matters unsettled. How is a supplier supposed to determine whether a dealer's complaint and its action will be found by a jury to set a price or price level? How is a supplier to evaluate whether Business Electronics extends to resale price maintenance policies—which set prices—or applies just to dealer complaints? The proper result would have been to jettison the per se rule as applied to vertical price restraints. It is mystifying why the Court did not do so.

Indeed, the Court's opinion in Business Electronics, written by

\(^{180}\) Id. (quoting Business Elecs. Corp. v. Sharp Elecs. Corp., 780 F.2d 1212, 1218 (5th Cir. 1986)).

\(^{181}\) Id. at 735-36.

\(^{182}\) Id.
Justice Scalia, indicates that the Court was quite aware that all of the justifications offered in *GTE Sylvania* to subject vertical non-price restrictions to the rule of reason apply equally to resale price maintenance. Moreover, Justice Scalia cites the proposition—originally cited in *GTE Sylvania*—that resale price maintenance can be used to facilitate cartelizing at the manufacturer level as the *only* distinction between vertical price and non-price restraints, but then goes on to explain that “[c]artels are neither easy to form nor easy to maintain.” Nevertheless, the Court declined to confront directly the difficult issue of the *per se* rule’s obsolescence in the distribution context. Instead, it chose to side-step the confrontation between settled law and manifest reality, and to resolve the dispute by artificially narrowing the definition of vertical price fixing.

The key area of vertical restraints still subject to the *per se* rule is resale price maintenance policies, an area that has haunted the Court and the business community alike, with no clear rule of decision through *Colgate; Bausch & Lomb; Parke, Davis;* and *Albrecht*. It is long since time to tell businesses that the use of resale price maintenance—an important marketing tool—will be judged under the rule of reason, without being subject to *per se* condemnation because of vague concepts such as “coercion,” “unwilling acquiescence” or “compliance by most dealers.” Absent monopoly power, the decision of a supplier to use a resale price maintenance policy is often a rational procompetitive choice, designed to prevent free-riding and to maintain the good will and value of its brand. It should be tested and analyzed under the rule of reason. To be sure, sometimes a resale price maintenance policy—when coupled with other vertical restraints and market power—may run afoul of the rule of reason. That is no excuse to throw the baby out with the bath water, however, and continue the use of *per se* labels where they are not warranted.

The Supreme Court has implicitly recognized that the *per se* rule against resale price maintenance has outlived its usefulness, and *Business Electronics* relegates the rule in the dealer-termination context to the narrow category of vertical restrictions where there is an agreement on price or price levels. The presence or absence of such agreements, however, like the distinction in *Schwinn* between sale and non-sale transactions, is wholly divorced from any relevant economic impact that

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183. *See id.* at 725.
184. *Id.* at 727.
a given distribution restriction might have. In view of the Court’s implicit recognition that the termination of price-cutting dealers does not deserve *per se* treatment, the Court’s backhanded method of dealing with the *per se* rule’s obsolescence in the area of vertical price restraints renders it nothing more than a useless trap for the unwary and uncounseled.

Since *GTE Sylvania*, courts and scholars alike have criticized the difference in treatment between price and non-price restraints. They have also recognized the irrationality of preserving a *per se* rule against vertical price restrictions. The circuit courts of appeals have struggled to avoid this irrational rule and its potentially inequitable results. They have strained to distinguish overt price restrictions from the resale price maintenance formally condemned by the *per se* rule, and have relied on the Supreme Court’s heightened evidentiary standards with respect to concerted action, and the Court’s new and artificially narrow definition of a “price” restraint, in order to subject flagrant price restrictions to the rule of reason.

It is now appropriate to turn to the tortured treatment that the *per se* rule against vertical price restraints has received in the lower courts to shed some light on how the Supreme Court decisions analyzed in this section have been received and applied, and to understand more thoroughly how the *per se* rule currently affects various business litigants.

### III. THE *PER SE* RULE IN THE LOWER COURTS

Recall that in *GTE Sylvania*, the Supreme Court overruled the *per se* rule of *Schwinn* and held that all vertical non-price restrictions should be analyzed under the rule of reason.\(^{185}\) The Court noted in *GTE Sylvania* that *Schwinn* and its distinction between sale and non-sale transactions had been referred to as “‘an exercise in barren formalism,’”\(^{186}\) unrelated to any relevant economic impact and that many lower courts had “‘struggled to distinguish or limit *Schwinn* in ways that [were] a tribute to judicial ingenuity.’”\(^{187}\) In reversing *Schwinn’s* non-market based formalism, the Court required departure from the rule of

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186. *Id.* at 48 n.13 (quoting Donald I. Baker, *Vertical Restraints in Times of Change: From White to Schwinn to Where?,* 44 ANTITRUST L.J. 537, 537 (1975)).
reason to be based upon "demonstrable economic effect rather than . . . upon formalistic line drawing."\footnote{188} However, the Supreme Court drew a formalistic line of its own in *GTE Sylvania* when it preserved the *per se* illegality of vertical price restrictions.\footnote{189} The distinction between vertical price and non-price restrictions is "'artificial and unresponsive to the competitive needs of the real world,'"\footnote{190} and has little basis in "demonstrable economic effect."\footnote{191} Consequently, in the years since *GTE Sylvania*, the lower courts have reacted to the *per se* rule against vertical price restrictions as they did previously to *Schwinn*, struggling to avoid it with equal judicial ingenuity. In this section, we will analyze several of the more illustrative and noteworthy efforts of these courts to avoid the *per se* rule and to treat overt price restrictions under the rule of reason.

In *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*,\footnote{192} one of the first lower court cases decided under *GTE Sylvania*, the First Circuit avoided the *per se* rule by ignoring the distinction between price and non-price restrictions and focusing instead on market impact. The defendant, Wild Heerbrugg Instruments, Inc., was an importer and distributor of scientific equipment.\footnote{193} Wild Heerbrugg distributed its products through various dealers to whom it assigned exclusive sales territories.\footnote{194} Within these territories, Wild Heerbrugg imposed no restrictions upon its dealers’ sales activities.\footnote{195} For extra-territorial sales, however, Wild Heerbrugg required its dealers to sell at no less than a suggested list price. The plaintiff, Eastern Scientific Co., was a scientific instruments dealer that marketed Wild Heerbrugg products from 1961 through 1972 in its assigned territory of Rhode Island. Disagreements then arose between Wild Heerbrugg and Eastern Scientific as to whether Eastern Scientific could sell below list price outside of Rhode Island. These disagreements ultimately led Wild Heerbrugg to terminate its business relationship with Eastern Scientific. In response, Eastern Scientific brought suit against Wild Heerbrugg, challenging its exclusive territory and resale price maintenance policies under section 1 of the Sherman Act. The district court found the policies to be *per se* unlawful.

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\footnote{188} Id. at 59.
\footnote{189} Id. at 51 n.18.
\footnote{190} Id. at 48 n.13 (quoting Baker, *supra* note 186, at 537 (writing in reference to *Schwinn*)).
\footnote{191} Id. at 59; *see also* discussion *supra* part II.
\footnote{192} 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978).
\footnote{193} Id. at 884.
\footnote{194} *See id.*
\footnote{195} Id.
and entered judgment for Eastern Scientific; Wild Heerbrugg appealed.\footnote{Id. (instructing jury that violations were \textit{per se} unlawful).}

The issue on appeal was whether the Supreme Court’s then-recent decision in \textit{GTE Sylvania} required Wild Heerbrugg’s distribution restrictions to be analyzed under the rule of reason or under a \textit{per se} rule.\footnote{\textit{Id.} at 885. The Supreme Court handed down its decision in \textit{GTE Sylvania} a few days after the conclusion of the district court proceedings in \textit{Eastern Scientific}. \textit{Id.} at 884.} Eastern Scientific argued that while \textit{GTE Sylvania} required non-price restrictions to be analyzed under the rule of reason, it also required such restrictions to be subject to \textit{per se} condemnation when combined with resale price maintenance.\footnote{\textit{Id.} at 885.} Eastern Scientific relied on footnote eighteen of \textit{GTE Sylvania}, where the Supreme Court expressly preserved \textit{per se} treatment for vertical price restrictions.\footnote{\textit{Id.}; see \textit{GTE Sylvania}, 433 U.S. at 51 n.18.} The First Circuit disagreed and, in an opinion written by Chief Judge Coffin, held that under the market-based antitrust principles of \textit{GTE Sylvania}, Wild Heerbrugg’s resale price restrictions were “not the kind that require[d] \textit{per se} treatment.”\footnote{\textit{Eastern Scientific}, 572 F.2d at 885.}

The First Circuit’s decision in \textit{Eastern Scientific} purported to be a straightforward application of the general market-based principles of \textit{GTE Sylvania}. The court began its analysis from the position that the “entire thrust of the \textit{GTE Sylvania} opinion is that ‘departure[s] from the rule of reason standard must be based upon demonstrable economic effect . . . .’”\footnote{\textit{Id.} (first alteration in original) (quoting \textit{GTE Sylvania}, 433 U.S. at 57).} To the court, this meant that resorting to a \textit{per se} rule was justified only if the anticompetitive effect of Wild Heerbrugg’s combination of territorial and resale price restrictions was greater than that of a pure territorial restriction, which under \textit{GTE Sylvania} is analyzed under the rule of reason. The court reasoned that even though Wild Heerbrugg’s distribution restrictions appeared in \textit{form} to resemble resale price maintenance, their anticompetitive \textit{effect} was no greater than a pure territorial restriction.\footnote{\textit{Id.}} If Wild Heerbrugg’s instruments were competitive at less than list price, Wild Heerbrugg’s policy accomplished no more than restricting dealers to their territories.\footnote{\textit{Id.} at 885-86.} Conversely, if Wild Heerbrugg’s instruments were competitive at higher than list price, dealers were free to sell outside of their territories at what would be, in

\footnote{196. \textit{Id.} (instructing jury that violations were \textit{per se} unlawful).
197. \textit{See id.} at 885. The Supreme Court handed down its decision in \textit{GTE Sylvania} a few days after the conclusion of the district court proceedings in \textit{Eastern Scientific}. \textit{Id.} at 884.
198. \textit{Id.} at 885.
199. \textit{Id.}; see \textit{GTE Sylvania}, 433 U.S. at 51 n.18.
201. \textit{Id.} (first alteration in original) (quoting \textit{GTE Sylvania}, 433 U.S. at 57).
202. \textit{Id.}
203. \textit{Id.} at 885-86.}
essence, a competitive price. Based on this analysis, the court was unable to see any "reason based on substantive economic effect why [Wild Heerbrugg's] similar but less anticompetitive scheme should be treated differently" than a pure territorial restriction. Accordingly, the court held that under GTE Sylvania Wild Heerbrugg's distribution restrictions should be analyzed under the rule of reason.

While the court properly interpreted and applied the general principles of GTE Sylvania, its limitation of GTE Sylvania to just these principles was entirely result oriented: A reflection on where the GTE Sylvania analysis should lead when price and non-price restraints occur together and produce no difference in effect. The Supreme Court's requirement of "demonstrable economic effect" to justify departure from the rule of reason by its terms applied only to the realm of vertical non-price restrictions. The Court expressly preserved the per se illegality of vertical price restrictions and excluded such restrictions from its general discussion of market impact and economic effect. Indeed, this critical element of GTE Sylvania was the essence of Eastern Scientific's argument on appeal; and the First Circuit was painfully aware that Wild Heerbrugg's minimum resale price policy for extra-territorial sales constituted a paradigmatic resale price restriction. The court was aware, therefore, that under the letter of GTE Sylvania, it should have condemned outright Wild Heerbrugg's resale price restriction under the per se rule. The court, however, correctly perceived the paradox in which it found itself: as a formal matter, Wild Heerbrugg's resale price maintenance scheme was per se unlawful, while as a matter of good sense and economics its reasonableness ought to have been analyzed under the rule of reason. After all, it was, in fact, less anticompetitive than a pure territory restriction. Neither the First Circuit, nor Eastern Scientific, could justify departure from the rule of reason on substantive market-based criteria. Indeed, applying the per se rule would have produced the incomprehensible result of condemning Wild Heerbrugg's less anticompetitive practice while sparing the more anticompetitive alternative of a pure territory restriction. In light of this reality, the court

204. See id. at 885-86.
205. Id. at 886.
206. Id.
207. 433 U.S. at 51 n.18.
208. See supra text accompanying notes 197-200.
209. See 572 F.2d at 884. The court observed, "[t]he practice Eastern complains of can best be described as a policy of territorial restriction enforced by price maintenance restraints." Id.; see also id. at 885 (referring to "[t]he price restrictions at issue" (emphasis added)).
did the only rational and equitable thing it could do and effectively ignored the use of easy labels—as the Supreme Court cautioned in BMI—and, thus, the price nature of Wild Heerbrugg's distribution restrictions and with it the per se rule.

The First Circuit's decision to ignore the per se rule and to analyze Wild Heerbrugg's price restriction under the rule of reason required the court to justify its decision with an analysis of market impact. To that end, the court compared Wild Heerbrugg's distribution restriction to a pure territory restriction and concluded that it produced the same anticompetitive effect, "but to a lesser degree." The court's analysis implicitly made the critical assumption of robust interbrand competition. Based on this assumption, Wild Heerbrugg's restriction was, in fact, less anticompetitive than a pure territory restriction. The court's analysis obscures the fact, however, that without robust interbrand competition, the anticompetitive effect of Wild Heerbrugg's restriction was equivalent to a pure resale price maintenance scheme. By assigning exclusive territories to dealers, Wild Heerbrugg effectively eliminated all intrabrand price competition within each territory. A dealer enjoying monopoly power within an exclusive sales territory would have an incentive to charge a price that maximized its profits, which price is generally above a competitively set price, and would have been above Wild Heerbrugg's suggested list price. By allowing limited price competition on extra-territorial sales, Wild Heerbrugg's policy allowed more competition than there would have been in a monopolistic world of exclusive territories. Restricting price to no less than list price for these extra-territorial sales, however, also had the effect of placing a floor under this limited competition. The result of this limited competition would tend to be sales at list price. Consequently, in the absence of strong interbrand competition, there would have been no functional difference between Wild Heerbrugg's policy and a pure resale price maintenance scheme at list price. This illustrates that there is no inevitable difference between a "price" and "non-price" distribution restriction.

The First Circuit's recognition of the conflict between the sound market-based antitrust principles of GTE Sylvania and the per se rule highlights the fundamental question of whether the per se rule is an appropriate rule of decision for vertical price restrictions. It is a settled

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210. See id. at 886; see also supra text accompanying notes 201-09.
211. See Posner, supra note 117, 8-9 ("[The] distinction between price and nonprice restrictions is indefensible.").

http://scholarlycommons.law.hofstra.edu/hlr/vol24/iss4/3
matter that section 1 of the Sherman Act was intended to prohibit only unreasonable restraints of trade.\textsuperscript{212} \textit{Per se} rules are used to condemn outright only the most perniciously anticompetitive trade restrictions that may be conclusively presumed to impose an unreasonable restraint on competition.\textsuperscript{213} The First Circuit understood the Supreme Court’s preservation of the \textit{per se} rule against vertical price restrictions to rest on the underlying assumption that vertical price restrictions, as a rule, are more anticompetitive than vertical non-price restrictions. By showing that Wild Heerbrugg’s combination of territory and resale price restrictions produced the same or less anticompetitive effect than a pure territory restriction, the court revealed that this underlying assumption supporting the \textit{per se} rule was erroneous. It was clear to the First Circuit that without the support of this assumption, a conclusive presumption of unreasonable anticompetitive effect was unwarranted and, consequently, the \textit{per se} rule was unjustified. It would have been both irrational and inequitable, notwithstanding the letter of the law, to apply the \textit{per se} rule to Wild Heerbrugg’s less anticompetitive restriction while analyzing a more anticompetitive alternative under the rule of reason. To remain faithful to the sound market-based antitrust principles of \textit{GTE Sylvania}, therefore, the court was forced to ignore the formal price nature of Wild Heerbrugg’s distribution restriction, and with it the \textit{per se} rule, and to analyze an explicit resale price restriction under the rule of reason.

The fact that the application of the \textit{per se} rule to vertical price restraints is inconsistent with the general market-based antitrust principles of \textit{GTE Sylvania} and that its application can produce results entirely at odds with those principles, has prompted a fair amount of judgment-driven avoidance of the \textit{per se} rule in the lower courts, of which the First Circuit’s decision in \textit{Eastern Scientific} is only the first example. The Seventh Circuit Court of Appeals’ decision in \textit{Jack Walters & Sons Corp. v. Morton Building, Inc.},\textsuperscript{214} is a vivid example of the lengths to which a court will go to avoid the \textit{per se} rule. The defendant, Morton Building, Inc., was a manufacturer of prefabricated farm buildings.\textsuperscript{215} Several times each year Morton would advertise to the public special discount prices for its buildings. Morton took various steps to see that its dealers sold its products at no more than their advertised prices, including

\textsuperscript{213} See id.; see also supra part II.
\textsuperscript{214} 737 F.2d 698 (7th Cir.), \textit{cert. denied}, 469 U.S. 1018 (1984).
\textsuperscript{215} \textit{Id.} at 701.
threatening dealers with termination if they went above these prices, offering to sell directly to the public at the advertised prices, and checking up on the dealers to see whether they were charging more. In addition, Morton also gave its dealers a discount from its regular wholesale prices to make it easier for them to offer Morton products to consumers at their advertised discount prices. The plaintiff, Jack Walters & Sons, was a franchised dealer of Morton’s prefabricated farm buildings with an exclusive sales territory. Jack Walters brought suit against Morton under section 1 of the Sherman Act alleging, inter alia, that Morton’s attempts to force its dealers to comply with the advertised discount prices constituted unlawful vertical price fixing. The district court granted Morton’s motion for summary judgment and Jack Walters appealed. The Seventh Circuit affirmed the district court’s judgment and held that Morton’s restrictive practices did not constitute unlawful price fixing.

The Seventh Circuit addressed Jack Walters’s allegations of price fixing on two levels. First, the court asked whether Morton’s enforcement of a maximum price policy violated the per se rule against vertical price fixing. Recall that in Albrecht v. Herald Co., the Supreme Court had applied the per se rule of Dr. Miles to a scheme of maximum price fixing in the context of exclusive territories. In Jack Walters, however, the Seventh Circuit expressed doubt as to the continued vitality of Albrecht after the Supreme Court held in GTE Sylvania that exclusive territories were no longer per se unlawful. The court reasoned that if exclusive territories were now lawful when reasonable, it may also be lawful in some cases for a manufacturer to impose a price ceiling intended to limit a dealer’s market power within its territory. Like the First Circuit in Eastern Scientific, the Seventh Circuit focused on

216. Id.
217. Id.
218. Id.
219. See id. at 707-08.
220. Id. at 706.
221. 390 U.S. 145 (1968); see also supra text accompanying notes 65-91.
222. See 390 U.S. at 152-53.
223. 737 F.2d at 706.
actual anticompetitive effect and ignored the formal price character of Morton’s restrictive practice.\textsuperscript{225}

The second and more critical issue analyzed by the court, upon which it ultimately based its decision, was whether Morton’s maximum price fixing was properly characterized as “price fixing” in the first place.\textsuperscript{226} In answering this question, the court engaged in some very tortured reasoning to re-characterize Morton’s conduct as something other than price fixing. The court began its analysis from the universal premise that it was perfectly lawful for a manufacturer to advertise its products to the ultimate consumer and to mention a retail price in its advertising. The court reasoned that, since consumer “demand for a manufacturer’s product depends significantly on its retail price,” a “manufacturer has a vital interest in the retail price.”\textsuperscript{227} Even Jack Walters conceded that this vital interest was great enough to allow a manufacturer to advertise a retail price.\textsuperscript{228} To the court, it followed naturally that if it was lawful to advertise a retail price, it ought to be lawful to take at least “the minimum steps” necessary to protect the integrity of such advertising.\textsuperscript{229} In other words, if a manufacturer could advertise a discount price, it could also take steps to ensure that this price was not exceeded, which would otherwise undermine its advertising. In the court’s view, “[t]hese [minimum steps] include[d] trying to persuade dealers to adhere to the advertised price and checking around to make sure [that] they [were] adhering.”\textsuperscript{230} This, of course, was precisely the manner in which Morton was alleged to have violated the Sherman Act. The court, however, re-characterized Morton’s conduct as “the minimum steps” it had to take if its advertising was to have any value at all, and, consequently, it was lawful.\textsuperscript{231} The negative implication of the court’s re-characterization, of course, was that Morton’s conduct was not properly characterized as “price fixing” within the meaning of section 1 of the Sherman Act.

\textsuperscript{225} The court ultimately declined to base its decision on this analysis, however, because the legality of Morton’s exclusive territories had not been decided by the district court. See 737 F.2d at 707. Rather, the court raised the point only to set forth its view that the legal status of maximum price fixing under section 1 of the Sherman Act was “an open question after [GTE] Sylvania.” Id.

\textsuperscript{226} Id.

\textsuperscript{227} Id.

\textsuperscript{228} Id.

\textsuperscript{229} Id. at 708.

\textsuperscript{230} Id.

\textsuperscript{231} Id.
The Seventh Circuit's clever avoidance of the per se rule in *Jack Walters* is a vivid example of judicial ingenuity. Concededly, a manufacturer has a "vital interest" in the retail price of its products, and has the right to advertise a retail price for its products. Indeed, such advertising is a form of constitutionally protected speech.\(^{232}\) It does not follow, necessarily, that this so-called "vital interest" vests a manufacturer with any right to protect its advertising free of the restrictions imposed by the Sherman Act. Morton's advertisement of special discount prices, at most, should have been treated as the announcement of a price policy. It is a settled matter of antitrust law that a manufacturer may unilaterally enforce an announced price policy.\(^{233}\) At the time that *Jack Walters* was before the Seventh Circuit, unilateral action in the resale price maintenance context was confined to no more than a simple announcement of policy and termination of non-complying dealers.\(^{234}\) Under this doctrine, if a seller goes beyond announcing a price policy and refusing to deal with non-complying dealers, it has conspired within the meaning of section 1 of the Sherman Act with any dealer who complies.\(^{235}\) Accordingly, Morton would have been allowed to advertise its special discount retail prices to consumers and to refuse to sell its products to dealers who refused to observe its advertised price. Morton's actual conduct, however, clearly went past this limit. Jack Walters's affidavits, accepted as true by the court for purposes of reviewing the district court's grant of summary judgment, "indicated that Morton ... used [both] persuasion and policing to obtain ... compliance," and that some of Morton's dealers did, in fact, comply.\(^{236}\) Jack Walters was able to show concerted action within the meaning of section 1 of the Sherman Act to fix resale prices.\(^{237}\) Consequently, if pure application of antitrust jurisprudence were the test, the court should have condemned Morton's resale price restriction as a matter of law under the per se rule.

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\(^{233}\) *See Jack Walters, 737 F.2d at 707* ("[W]ithout agreement there can be no violation of section 1 of the Sherman Act."); *see also supra* text accompanying notes 22-29.

\(^{234}\) *Jack Walters, 737 F.2d at 707* (citing United States v. Parke, Davis & Co., 362 U.S. 29 (1960)).

\(^{235}\) *Id.*

\(^{236}\) *Id.; see supra* text accompanying note 216.

\(^{237}\) The district court dismissed Jack Walters's price fixing claim for lack of actual "agreement," but the Seventh Circuit rejected this ground of dismissal as a clear mistake of law. *See Jack Walters, 737 F.2d at 707.*
The court was determined, however, to avoid the per se rule because it felt that Morton’s resale price restriction was reasonable under the circumstances. Offering discounts was clearly a benefit to consumers. Moreover, the fact that Morton’s dealers received the advertised goods from Morton at a correspondingly discounted wholesale price made Jack Walters’s complaint ring somewhat hollow to the court. Jack Walters was essentially complaining that Morton was forcing it to pass along earmarked savings to consumers, instead of allowing dealers to realize greater profits. Morton’s policing tactics were simply the most effective means of ensuring that its promotional discounts were passed along to their intended beneficiaries. In any event, Morton’s conduct could hardly be labeled “perniciously anticompetitive” so as to warrant per se condemnation. A price fixing label, of course, is indifferent to such arguments, so the court had to find some other justification for affirming the district court’s judgment for Morton. The fortuitous fact that Morton happened to advertise its periodic discounts provided the court with the justification for which it was looking. Through its “minimum steps” analysis, the court was able to re-characterize Morton’s conduct as something other than price fixing. In so re-characterizing Morton’s conduct as “the minimum steps” necessary to protect its advertising, the court effectively removed from the scope of the Sherman Act conduct that in reality constituted concerted action to fix resale prices.

Both Eastern Scientific and Jack Walters are illustrative of successful ex post judgment-driven avoidance of the per se rule against vertical price restrictions. The continued existence of the per se rule against vertical price restraints obviously precluded the possibility of either court proceeding doctrinally to its desired judgment. As a result,

238. Jack Walters also charged that Morton made it hard for dealers to comply with its advertised price by giving them a smaller discount from the wholesale price than the difference between the regular retail price and the advertised price. Id. at 706. The court of appeals was unmoved by this argument. Id. at 707.

239. The full implication of the court’s analysis was that any manufacturer could avoid antitrust regulation of its pricing practices simply by advertising its prices to the public. Realizing this unintended implication, the court limited the scope of its analysis by stating that while a manufacturer may take the minimum steps necessary to prevent its dealers from charging more than its advertised price, it could not forbid its dealers from charging less than the advertised price. The court gave no reason for this distinction. See id. at 708. In reality, the court’s basis for distinguishing between forcing compliance with a minimum, as opposed to a maximum, price policy goes back to the court’s comments on Albrecht. See supra text accompanying notes 78-91. The basic notion that none of Morton’s tactics were in the least bit anticompetitive, and that Albrecht’s condemnation of maximum resale price restraints seems particularly anachronistic after GTE Sylvania, is the underlying subtext that runs throughout the court’s analysis of Morton’s alleged price fixing.
neither *Eastern Scientific* nor *Jack Walters* offer very much guidance in terms of standards of behavior safe from *per se* condemnation. Hostility towards the *per se* rule, however, even if universally shared among the lower courts, is insufficient to produce a uniformly coherent and reasonably consistent body of case law and counseled business conduct. In both *Eastern Scientific* and *Jack Walters*, the courts possessed the factual record and the legal flexibility with which to successfully avoid the *per se* rule. Unfortunately, not every antitrust case affords a court the flexibility to review *de novo* the appropriate rule of law or to apply it to a unique factual scenario. A narrow procedural posture or sparse facts can leave a court with little room to avoid, and little choice but to apply, the *per se* rule. This creates both inequity and inconsistency that hardly fosters a rational and efficient economy.

A comparison of *Isaksen v. Vermont Castings, Inc.*, a later decision of the Seventh Circuit involving resale price maintenance with *Jack Walters*, will serve to illustrate this inequity. The plaintiff, Isaksen, was a discount dealer in wood burning stoves supplied by the defendant, Vermont Castings. Isaksen sold his stoves far below Vermont Castings’s suggested list price, in response to which competing dealers bombarded Vermont Castings with complaints of his price-cutting. There was clear evidence that Isaksen was free-riding on Vermont Castings’s full-service dealers who were losing sales to Isaksen after providing costly point-of-sale services to customers. As one of Vermont Castings’s dealers explained in a letter, “The worst disappointment is spending a great deal of time with a customer only to lose him to Applewood [Isaksen] because of price. . . . This letter was precipitated by the loss of three sales of V.C. stoves today [to] people who[m] we educated & spent long hours with.” Beyond this, the evidence in the case was sharply contested. Isaksen alleged that Vermont Castings began to harass and threaten him when it found out how low his prices were. Isaksen further alleged that in September of 1982, Vermont Castings threatened that if he did not raise his prices, Vermont Castings would mix up his orders. According to Isaksen, he raised his prices

241. *Id.* at 1161.
242. *Id.* at 1162.
243. *Id.* at 1161-62 (alterations in original).
244. *Id.* at 1162.
245. *Id.*
246. *Id.* at 1162-63.
in response to this coercion, although a full year had passed between Vermont Castings's threats and Isaksen's "response," during which time Vermont Castings never carried out its threats.\textsuperscript{247}

Isaksen sued Vermont Castings under section 1 of the Sherman Act claiming that by coercing him to raise his prices, Vermont Castings engaged in a \textit{per se} unlawful conspiracy to maintain resale prices.\textsuperscript{248} At trial, the jury returned a verdict for Isaksen, but the district court entered judgment for Vermont Castings on a motion for judgment notwithstanding the verdict.\textsuperscript{249} Isaksen’s appeal to the Seventh Circuit raised only the narrow issue of whether there was sufficient evidence of resale price maintenance conspiracy to submit the case to the jury.\textsuperscript{250} Confined by the procedural posture of the case to reviewing the sufficiency of Isaksen’s evidence in the light most favorable to Isaksen, the court was unable to conclude that the jury’s verdict had no evidentiary basis and reversed the district court’s judgment for Vermont Castings.\textsuperscript{251} The court clearly would have been more satisfied with its decision had it been able to avoid condemning Vermont Castings under the \textit{per se} rule.\textsuperscript{252} In its candid view, Isaksen’s complaint made "a rather sorry excuse for an antitrust case."\textsuperscript{253}

Had the Seventh Circuit been free to decide both \textit{Jack Walters} and \textit{Vermont Castings} on the basis of market impact, the outcomes would have been the same. In neither case did the defendants’ restrictive practices restrain competition unreasonably. Both Morton and Vermont Castings sought to exert some measure of control over their dealers’ resale prices for reasonable and legitimate purposes. Morton sought to ensure that its dealers actually passed along factory discounts intended to benefit consumers, a clear boon for consumers and competition alike. Vermont Castings, as a new company selling a somewhat complex

\begin{itemize}
\item \textsuperscript{247} \textit{Id.} at 1163.
\item \textsuperscript{248} \textit{Id.} at 1161. According to the court, compliance with a price policy procured by threats and coercion constituted concerted action within the meaning of § 1 of the Sherman Act. \textit{Id.} at 1163 (citing Albrecht v. Herald Co., 390 U.S. 145, 150 n.6 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960)).
\item \textsuperscript{249} \textit{Id.} at 1161.
\item \textsuperscript{250} \textit{Id.} at 1162.
\item \textsuperscript{251} \textit{Id.} at 1163.
\item \textsuperscript{252} It is painfully clear from the court’s opinion that the \textit{per se} rule would have been avoided if possible. \textit{See id.} at 1161-62. Despite the fact that its hands were tied, the court invited the district court, in a manner that can be described only as imploring, to grant Vermont Castings’s motion to set aside the verdict as contrary to the clear weight of the evidence and to order a new trial. \textit{Id.} at 1163.
\item \textsuperscript{253} \textit{Id.} at 1161.
\end{itemize}
product, needed its dealers to provide costly educational and sales efforts to persuade customers to purchase its product. Vermont Castings, therefore, had a very legitimate reason to seek to protect itself and its dealers from price-cutting free-riding dealers, such as Isaksen. Furthermore, Vermont Castings had a very small market share, and it was difficult for the court to understand how such a small market share could have been manipulated to have any negative impact on interbrand competition. The availability of so many substitute products effectively precluded Vermont Castings from exploiting its own intrabrand market power. Unfortunately, the formalistic per se rule prevented the Seventh Circuit from deciding either Jack Walters or Vermont Castings directly on the basis of market impact and competitive merit. The contrary treatment of these two defendants—summary judgment dismissal for Morton and the refusal to grant judgment notwithstanding a jury verdict for Vermont Castings—depended entirely on factual quirk and the inability of the Seventh Circuit to exercise its ingenuity in Vermont Castings. Upon appeal in Jack Walters, the court was able to exploit Morton’s advertising to re-characterize Morton’s conduct as something other than price fixing. In Vermont Castings, however, the court chose not to find a way to question the characterization of Vermont Castings’s alleged behavior or find some other way to avoid the per se rule.

The cases discussed thus far reflect the typically negative judicial attitude towards the per se rule and illustrate the varying degrees of

254. These are precisely the reasons given by the Supreme Court in GTE Sylvania for discarding the per se rule in the context of non-price distribution restrictions. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-55 (1977).
255. See Vermont Castings, 825 F.2d at 1161.
256. Id. Vermont Castings had no more than a ten percent localized market share in a market narrowly defined by the district court as “free-standing woodburning stoves.” Id. The Seventh Circuit questioned with unconcealed bewilderment how this could be a meaningful product-market definition given the many substitute products such as oil and gas-burning furnaces that it failed to take into account. Id.
257. Id. The fact that Vermont Castings involved minimum price fixing and Jack Walters involved maximum price fixing is an insufficient legal basis upon which to distinguish the two cases since both are regarded technically as per se unlawful under Dr. Miles and Albrecht, respectively. At most, this difference might have supported different conclusions as to the reasonableness of Morton’s and Vermont Castings’s respective behavior. In neither case, however, can unreasonableness be said to be a foregone conclusion sufficient to justify a per se rule.
258. See id. at 1162.
260. 825 F.2d at 1161-62.
success with which some lower courts have managed to avoid the rule in the resale price maintenance context. In the dealer-termination context, the Supreme Court itself has taken an active role in limiting the scope of the per se rule, thereby encouraging and fostering aggressive avoidance of the rule in the lower courts. Recall that in Monsanto, the Supreme Court held that proof that a manufacturer terminated a plaintiff’s dealership following, or even in response to, complaints by competing dealers, was legally insufficient to support a jury finding of concerted action. Monsanto required a terminated dealer to produce evidence that tends to exclude the possibility that the manufacturer was acting independently. By raising the level of proof required to establish concerted action, Monsanto effectively protects from per se condemnation most manufacturers who terminate dealers for price-cutting. Similarly, in Business Electronics, the Court narrowed the definition of price fixing in the context of dealer terminations to situations where dealers agree to a post-termination price or price level.

In McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., a fairly unusual pre-Business Electronics case in which a terminated dealer was able to satisfy Monsanto in the district court, the Eighth Circuit Court of Appeals managed to reverse a per se judgment by reinterpreting Monsanto in a way that effectively required the terminated dealer to meet its heightened evidentiary standard twice. The defendant, La-Z-Boy Chair Co., was a furniture manufacturer that distributed its products nationwide in two ways. First, La-Z-Boy sold its products through La-Z-Boy Showcase Shoppes, which were independently owned and operated retail outlets that sold La-Z-Boy products exclusively. The Showcase Shoppes were “full service” outlets whose owners agreed to advertise La-
Z-Boy products and to provide certain point-of-purchase and repair services to customers in exchange for a license to use the La-Z-Boy name. Second, La-Z-Boy sold its products through independent department stores and retail furniture stores that sold a variety of furniture brands, and with whom La-Z-Boy had no agreements concerning advertising, point-of-purchase or repair services.\(^{268}\) La-Z-Boy suggested retail prices to all of its dealers but made no effort to police those prices.\(^{269}\)

The plaintiff, McCabe’s Furniture, Inc., was a discount furniture retailer and one of about a half dozen independent retail furniture stores selling La-Z-Boy products in Little Rock, Arkansas.\(^{270}\) McCabe’s did not advertise its La-Z-Boy products, or provide any point-of-purchase services to its La-Z-Boy customers, nor did it offer repair services for the La-Z-Boy products that it sold.\(^{271}\) McCabe’s marketing approach, instead, was to contain overhead costs and pass the savings to consumers in the form of lower prices.\(^{272}\) In response to frequent and continual complaints concerning McCabe’s from Cyrus Opferman, a Showcase Shoppe owner in the Little Rock area, La-Z-Boy terminated its relationship with McCabe’s Furniture.\(^{273}\) McCabe’s brought suit against La-Z-Boy under section 1 of the Sherman Act alleging that La-Z-Boy conspired with Opferman to maintain the resale price of La-Z-Boy products, pursuant to which La-Z-Boy terminated McCabe’s dealership.\(^{274}\) At trial, the jury returned a verdict for McCabe’s upon which the district court entered judgment over La-Z-Boy’s motion for judgment notwithstanding the verdict.\(^{275}\) La-Z-Boy appealed the district court’s denial of its motion, arguing that McCabe’s Furniture presented insufficient evidence of a resale price maintenance conspiracy under the standard set forth by the Supreme Court in *Monsanto*.\(^{276}\) The Eighth Circuit reversed the district court’s denial of La-Z-Boy’s motion and, foreshadowing *Business Electronics*, held that while McCabe’s Furniture produced sufficient evidence to show that La-Z-Boy and Opferman conspired to terminate McCabe’s dealership, it failed to produce

\(^{268}\) Id.
\(^{269}\) Id. at 326.
\(^{270}\) Id. at 325-26.
\(^{271}\) See id. at 326.
\(^{272}\) Id.
\(^{273}\) Id. at 326-27.
\(^{274}\) Id. at 325.
\(^{275}\) Id. at 327.
\(^{276}\) Id. at 325.
sufficient evidence to show that they terminated McCabe’s dealership pursuant to a conspiracy to maintain the price of La-Z-Boy products in the Little Rock market.\textsuperscript{277}

The Eighth Circuit divided into two steps its analysis of whether McCabe’s Furniture presented enough evidence to satisfy \textit{Monsanto}. The first step in the Court’s analysis asked whether McCabe’s produced sufficient evidence under \textit{Monsanto} to prove that La-Z-Boy conspired with Opferman to terminate McCabe’s dealership.\textsuperscript{278} At trial, Opferman testified that he complained to La-Z-Boy that McCabe’s was free-riding on his various promotional expenditures and efforts, that McCabe’s prices were too low and were cutting into his sales and that McCabe’s display of La-Z-Boy products tarnished their quality image which much of his expenditures and efforts were designed to maintain.\textsuperscript{279} While these complaints alone could not establish concerted action under \textit{Monsanto},\textsuperscript{280} there was also evidence that Opferman personally escorted a La-Z-Boy sales manager to inspect McCabe’s store and that La-Z-Boy was concerned with giving Opferman “every break possible”, as well as with helping him “make a decent profit.”\textsuperscript{281} After McCabe’s termination, La-Z-Boy personnel reported to Opferman that “[the] problem had been taken care of.”\textsuperscript{282} After reviewing the evidence, the circuit court concluded that McCabe’s Furniture had produced sufficient evidence under \textit{Monsanto} to support the jury’s determination that La-Z-Boy and Opferman conspired to terminate McCabe’s dealership.\textsuperscript{283}

In the court’s view, however, this evidence of conspiracy between La-Z-Boy and Opferman to terminate McCabe’s did not settle the second issue of whether their conspiracy was designed to achieve an illegal price fixing purpose. Under the court’s interpretation of \textit{Monsanto}, the required showing of purpose turned on the motives of the conspirators: Whether La-Z-Boy and Opferman conspired to terminate McCabe’s dealership intending to affect price competition or non-price competition. Analyzing the sufficiency of McCabe’s evidence in this regard, the court found that La-Z-Boy presented substantial evidence that its concern with McCabe’s stemmed not from low prices, but from failure to merchandise the La-Z-Boy products.

\begin{footnotesize}
\textsuperscript{277} Id.
\textsuperscript{278} See id. at 328-29.
\textsuperscript{279} Id. at 326.
\textsuperscript{280} Id. at 328.
\textsuperscript{281} Id. at 326.
\textsuperscript{282} Id. at 327.
\textsuperscript{283} Id. at 328-29.
\end{footnotesize}
Boy product in a manner consistent with the high quality image that La-Z-Boy sought to project on a national scale. La-Z-Boy was concerned that McCabe’s “‘low end store’ would discourage higher quality retailers in Little Rock from carrying La-Z-Boy” products. The court reasoned that this evidence, coupled with evidence of Opferman’s like concern that McCabe’s was tarnishing the La-Z-Boy image, showed that it was just as reasonable to conclude that La-Z-Boy and Opferman conspired intending to affect the marketing image of La-Z-Boy products, a non-price concern, as it was to conclude that they conspired intending to affect price competition. The court concluded that since both conclusions were equally plausible, the evidence was too “‘ambiguous’” under Monsanto for a reasonable jury to find that La-Z-Boy and Opferman formed a resale price maintenance conspiracy pursuant to which McCabe’s dealership was terminated.

The Eighth Circuit’s motive test focused on both La-Z-Boy and Opferman. However, a dealer’s motive in complaining to a manufacturer generally should not be at issue, and for at least two reasons: First, typically, only the manufacturer is a party defendant, not the non-terminated dealer. Second, the Eighth Circuit’s observation notwithstanding, a dealer’s motive when complaining about a price-cutting competitor is obvious, namely, the price-cutter’s low prices. Moreover, it was only through a strained interpretation of the facts, and a vast amount of appellate fact-finding—a province typically reserved to the jury—that the court was able to devise a non-price concern from Opferman’s complaints. The critical inquiry for purposes of establishing the nature of

284. Id. at 329 (citing internal memorandum).
285. Id. at 330.
286. Id. at 330-31 (citing Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984)).
287. Id. at 329-30.
288. The court stated that the evidence demonstrated that La-Z-Boy and Opferman were motivated by both marketing and price concerns. Id. at 330. In reality, however, only La-Z-Boy could show a legitimate non-price concern with its marketing image. Opferman, on the other hand, was concerned primarily with the fact that he was losing sales to McCabe’s due to McCabe’s price-cutting. Any concern of Opferman’s regarding La-Z-Boy’s tarnished marketing image stemmed from his overall concern with McCabe’s price-cutting. The simple business reality is that a full-service retailer is concerned with the marketing image of the products he sells primarily to the extent that such image justifies his pricing structure, and in this regard, services are a function of price structure. In other words, Opferman was concerned with La-Z-Boy’s high quality image only to the extent that such image justified his relatively high retail prices and services. There is no other rational reason for Opferman to care about La-Z-Boy’s image. Thus, Opferman’s concerns with McCabe’s could not reasonably be characterized as anything other than price concerns. Even La-Z-Boy understood Opferman’s complaints to express pure price concerns. See id. at 326 (explaining that, in immediate response to Opferman’s complaints, La-Z-Boy’s Arkansas factory manager was instructed to look
the concerted action ought to focus on the manufacturer's motive for terminating the price-cutter and on the competitive effect of that termination. As the Fourth Circuit Court of Appeals recognized in *Garment District, Inc. v. Belk Stores Services, Inc.*, "the critical element in the *Monsanto* analysis is not what motivates the distributors to complain, but rather what motivates the manufacturer to terminate discounters in response to these complaints."\(^{289}\)

The question that arises after examining the Eighth Circuit's construction of *Monsanto* is why the court felt it had to go to all of the trouble in the first place. It would have been far more expedient to reverse the district court's judgment for plaintiff's failure to show concerted action altogether. The Eighth Circuit obviously was concerned that McCabe's had offered a great deal of evidence showing that La-Z-Boy and Opferman's actions were intertwined, perhaps too much evidence for the court to have reversed the district court's judgment for failure to show concerted action under *Monsanto*.\(^{290}\) On the other hand, the court felt that manufacturers ought to be able to choose freely who may market their products and was convinced that dealer-terminations ought not to be subject to the *per se* rule even if motivated by price concerns. The court's interpretation of *Monsanto*, through which it imposed upon McCabe's an additional burden of proof, gave the court a plausible basis upon which to dismiss McCabe's complaint when the evidence otherwise established concerted action. Specifically, the court's motive test took advantage of the fact that both La-Z-Boy and Opferman expressed concern with the marketing image of La-Z-Boy products.\(^{291}\) According to the court, any concerted action rooted in this ostensibly "non-price" concern could not be labeled a "price" conspiracy, and could not be subject to the *per se* rule. Seizing on this fact, the court was able to characterize the totality of evidence as "highly ambiguous" and therefore legally insufficient to satisfy *Monsanto*.\(^{292}\)


\(^{290}\) See *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 878 F.2d 801, 806 n.4 (4th Cir. 1989) (rejecting explicitly the Eighth Circuit's finding of concerted action in *McCabe's Furniture* and its construction of *Monsanto*); see also discussion infra note 292.

\(^{291}\) Id. at 330 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984)).

\(^{292}\) We have not challenged the Eighth Circuit's conclusion that there was sufficient evidence showing that La-Z-Boy and Opferman's actions were intertwined to dismiss the case for failure to show concerted action. *See supra* text accompanying notes 279-83. In *Parkway Gallery Furniture*, however, the Fourth Circuit explicitly rejected the Eighth Circuit's finding of concerted action in
Underlying McCabe's Furniture was the issue whether an agreement between a manufacturer and dealer to terminate a second dealer for price-cutting ought to be *per se* unlawful. By interpreting Monsanto and the concerted action requirement to avoid the *per se* rule, the Eighth Circuit effectively answered this question in the negative. The same question came before the Fifth Circuit Court of Appeals in *Business Electronics Corp. v. Sharp Electronics Corp.* where the court also effectively held that such an agreement ought not to be *per se* unlawful. The Fifth Circuit avoided the *per se* rule by distorting the definition of a “price” restriction. Two years later, the Supreme Court affirmed the Fifth Circuit’s decision in *Business Electronics*, and held, like the Fifth Circuit, that an agreement to terminate a price-cutting dealer is not *per se* unlawful unless the manufacturer and non-terminated dealers also agree on a post-termination resale price or price level. However, an agreement on post-termination resale prices, express or implied, is quite rare. Moreover, the existence of such an agreement would be quite difficult for a terminated dealer to prove. So in restricting the range of distribution restrictions treated as “price” restrictions and subject to the *per se* rule, *Business Electronics* effectively neutralizes the *per se* rule in the dealer-termination context. Naturally, this restriction of the *per se* rule has been received warmly in the lower courts. The Seventh Circuit Court of Appeals’ decision in *Center Video Industrial Co. v. United Media, Inc.*, fairly reflects this warm reception and illustrates how *Business Electronics* effectively precludes a terminated dealer from establishing a *per se* claim under section 1 of the Sherman Act.

In *Center Video*, the defendant, United Media, Inc., manufactured commercial quality video tape editing equipment and distributed it nationally through a network of full-service and discount dealers.

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*McCabe's Furniture*. See 878 F.2d at 806 n.4. In its view, the evidence upon which McCabe's relied to show concerted action did not tend to exclude the possibility that La-Z-Boy was acting independently in terminating McCabe's dealership. *Id.* Rather, the totality of evidence, including the fact that La-Z-Boy reported to Opferman after terminating McCabe’s that the “problem had been taken care of,” *McCabe's Furniture*, 798 F.2d at 327, only rose to the level of being “arguably consistent with the possibility of a conspiracy.” *Parkway Gallery Furniture*, 878 F.2d at 806 n.4.


294. 780 F.2d at 1218.

295. 485 U.S. at 735-36.

296. 995 F.2d 735 (7th Cir. 1993) (Engel, J., Senior Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation and writing for the court).

297. *Id.* at 735.
Discount Video, Walt Davis Enterprises, and the plaintiff Center Video Industrial Co. were three discount dealers of United Media products. In April of 1990, Discount Video complained to United Media about price competition from Center Video, claiming that Center Video was undercutting Discount Video’s prices. The following month, Discount Video suspended sales of United Media equipment in order to pressure United Media into taking effective action concerning Center Video’s prices. After unsuccessfully urging Center Video to raise its prices, United Media terminated Center Video’s dealership. Within a week of this termination, Discount Video resumed purchase and sales of United Media equipment.

Center Video sued United Media under section 1 of the Sherman Act alleging that United Media terminated Center Video’s dealership pursuant to a resale price maintenance conspiracy with Discount Video. Center Video did not allege, however, that United Media and Discount Video agreed on a post-termination resale price or price level. Relying on Business Electronics, the district court entered summary judgment for United Media and Center Video appealed. In a straightforward analysis of Center Video’s claim under Business Electronics, the Seventh Circuit affirmed the district court’s summary judgment grant for United Media. The court found, after measuring the facts established by Center Video against the standard of Business Electronics, that Center Video failed to set forth facts that would tend to show the existence of an agreement between United Media and Discount Video to set a post-termination resale price or price level.

Center Video vividly illustrates how Business Electronics has trivialized the per se rule against resale price maintenance in the dealer-termination context. Under current law, United Media’s combination with

298. Id. at 736.
299. See id.
300. Id. United Media also terminated its relationship with Walt Davis at that time. Id. at 736 n.2.
301. Id.
302. Id.
303. See id. at 739.
304. Id. at 736. Center Video made much in its appeal of the district court’s seeming requirement of an agreement to set a specific price, which is more stringent than Business Electronics’ requirement of an agreement to set a price or price level. Finding that Center Video failed to allege facts that would tend to prove agreement on either a specific price or price level, the Seventh Circuit found this to be harmless error under Fed. R. Civ. P. 61. Id. at 739.
305. Id. at 739.
306. Id. at 736, 739.
Discount Video is no longer treated as a resale price maintenance conspiracy. Yet United Media terminated Center Video's dealership intending to affect nothing other than the maintenance of Discount Video's resale prices. Indeed, following Center Video's termination, "[w]hen Discount Video resumed sales of United Media products, the prices it charged... were higher than the prices that it was charging while in competition with Center Video." For example, while Discount Video previously sold United Media's UM430 basic edit controller at prices ranging from $2,730 to $3,007 per unit, its prices for the same unit after United Media terminated Center Video ranged from $3,068 to $3,479 per unit. Hence, it defies logic to label any agreement between United Media and Discount Video a "non-price" conspiracy.

However, the Seventh Circuit explained in the course of its analysis that underlying Business Electronics' narrow definition of "price" conspiracy is the recognition that agreements meant to terminate price-cutters do not have the requisite "demonstrable economic effect" to justify departure from the rule of reason. This is so because in the absence of market power, interbrand competition ensures that any given manufacturer's retail sales price does not rise above the competitive level. The same reasoning supported the Supreme Court's decision in GTE Sylvania to overrule Schwinn and hold that all vertical non-price restrictions should be analyzed under the rule of reason. The Supreme Court thus recognized in Business Electronics that agreements to terminate price-cutting dealers are subject to the same competitive market forces as other distribution restrictions. This, alone, should have been sufficient reason to overturn the per se rule altogether instead of artificially restricting the category of practices subject to its draconian

307. Id. at 736.
308. Id.
310. Id. The Seventh Circuit noted the fact that the prices charged by Discount Video for United Media equipment following the termination of Center Video's dealership were generally higher than its pre-termination prices. Id. at 736; see supra text accompanying notes 300-09. This does not undermine the assertion that interbrand competition will ensure that prices do not rise above the competitive level. Discount Video was the only remaining discount dealer of United Media equipment. Prices for United Media equipment from full-service dealers were higher than the prices charged by Discount Video both before and after United Media terminated Center Video's dealership. This, of course, raises the possibility of a free-rider problem; however, there is no indication that there was such a problem, probably because Discount Video was a wholly owned subsidiary of a full-service dealer. 995 F.2d at 736 n.1.
condemnation. Indeed, there is no substantive market-based reason to
distinguish the anticompetitive effect of an agreement to terminate a
price-cutting dealer to remove the effects of his price cutting on other
dealers from an identical agreement coupled with an agreement on a
post-termination resale price. In both situations, the prices set by the
continuing dealers will rise after termination of the price-cutting dealer.
Additionally, the price increase in both cases will be subject to the
market forces of interbrand competition. Consumers will substitute
competing brands of the same product for an overpriced brand, regardless
of whether that price is set by a dealer alone or through an agreement
between a dealer and manufacturer.

The Seventh Circuit in *Center Video* further explained, however,
that according to the Supreme Court, the alleged tendency of resale price
maintenance to facilitate the formation of horizontal cartels justified
preserving its *per se* unlawful status in certain circumstances. That
Seventh Circuit proffered two ways in which resale price maintenance
could be exploited to facilitate the formation of horizontal cartels. First,
at the retail level, competing retailers who desire to form a cartel will
turn to the manufacturer for assistance in policing their cartel against
wayward members. The retailers inform the manufacturer that unless it
imposes resale price restrictions on all of the prospective cartel members,
they will stop purchasing its products. This way, the retailers can foist
resale price maintenance agreements onto manufacturers as a centralized
mechanism of policing their own cartel. A *per se* rule against resale price
maintenance thus denies potential retail-level cartels of an enforcement
mechanism.

That concern does not require that vertical price restraints be subject
to a *per se* rule. Such concerted pressure by retailers is *horizontal* price
fixing under *General Motors.* Thus, the *per se* prohibition of resale
price maintenance cannot be justified on that basis.

The second concern raised by the circuit court was that, at the
manufacturer level, manufacturers may also wish to enter into agreements
with one another governing the prices that they charge their dealers.
These prospective cartel members also lack an effective enforcement

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312. 995 F.2d at 737.
313. See id. (citing *Business Elecs. Corp.*, 485 U.S. at 725-26; *GTE Sylvania*, 433 U.S. at 51
n.18). Of course, the defendant in a vertical price fixing claim in this scenario would be the helpless
and coerced manufacturer, which leads one to question whether a *per se* rule against vertical price
restrictions is an equitable way to police against the formation of horizontal retail cartels. See id.
mechanism since information concerning the prices that they themselves charge is not typically available to the public. By agreeing to impose resale price restrictions on their dealers and retailers, the manufacturers need only monitor the prices of their partners' dealers. Deviation from any given retail price would indicate that a member of the cartel was underselling the agreed upon cartel price. Accordingly, a per se rule denies these potential cartel members of an enforcement mechanism.\footnote{See Center Video Indus., 995 F.2d at 738 (citing Business Elecs. Corp., 485 U.S. at 724; GTE Sylvania, 433 U.S. at 51 n.18).}

Once again, however, a horizontal agreement is present; thus, a per se rule against vertical price restraints is unnecessary to achieve per se condemnation.

In any event, Judge Engel, writing for the court in Center Video, went out of his way to show that there is no economic reason to believe that resale price maintenance facilitates a retail-level or manufacturer-level cartel.\footnote{Id. at 737-38 n.4-5.} First, for the retailers' scheme to be successful, it must be industry-wide, including not only all the retailers of a given manufacturer's products, but all manufacturers of competing products, as well. Otherwise, interbrand competition would foil the cartel members' plans to raise prices above the competitive level by driving customers to the substitutable products of competing manufacturers.\footnote{Id. at n.4 (citing Tyler A. Baker, Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?, 67 VA. L. REV. 1457, 1489 (1981); Jean W. Burns, The New Role of Coercion in Antitrust, 60 FORDHAM L. REV. 379, 397 (1991)).} Second, there must be barriers to entry at the retail level. Otherwise, any manufacturer unwilling to cooperate with the colluding retailers will simply find other retailers to sell its products.\footnote{Id. (citing Baker, supra note 317, at 1489; Burns, supra note 317, at 397; Frank H. Easterbrook, Vertical Arrangements and the Rule of Reason, 53 ANTITRUST L.J. 135, 141-43 (1984)).} In short, any industry-wide retail-level cartel extensive enough to be successful will be readily identifiable, and thus can be easily and effectively attacked directly as a per se illegal horizontal agreement without subjecting resale price maintenance to per se condemnation.\footnote{Id. (citing Thomas A. Piraino, Jr., Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases, 38 EMORY L.J. 311, 318 n.27 (1989)). Horizontal price fixing is "perhaps the paradigm of an unreasonable restraint of trade" and is, therefore, per se unlawful. See NCAA v. Board of Regents, 468 U.S. 85, 100 (1984), discussed supra in text accompanying notes 140-54.}

Similarly, prohibiting resale price maintenance is unnecessary to prevent a manufacturer-level cartel.\footnote{See Center Video, 995 F.2d at 738 n.5.} First, as in the case of the retail-
level cartel, success depends upon the industry-wide participation of virtually all manufacturers of a given product and on barriers to entry in the relevant industry. In addition, as with retail-level cartels, any manufacturer-level cartel pervasive enough to be successful will be readily identifiable, and thus can be attacked directly as a *per se* illegal horizontal agreement.

In *Business Electronics*, the Supreme Court ruled that an agreement between a manufacturer and a dealer to terminate a second dealer for price-cutting does not have the requisite pernicious anticompetitive effect in all circumstances to justify departure from the rule of reason. The Court fell one step short of overturning the *per se* rule, however, and justified its decision to preserve the *per se* rule with a highly tenuous theory connecting resale price maintenance to the formation of horizontal cartels. In *Center Video*, the Seventh Circuit went out of its way to show that this tenuous theoretical justification is completely without merit. *Business Electronics* and *Center Video* thus reinforce the notion that there is no longer any need for a *per se* rule in the dealer-termination context.

The cases analyzed above reflect a consistent judicial preference for the analytic rule of reason over the formalistic *per se* rule when reviewing vertical price restrictions under section 1 of the Sherman Act. Indeed, the past decade and a half of jurisprudence in this area, from *GTE Sylvania* to *Business Electronics*, in both the Supreme Court and the lower courts, is characterized by an ever increasing determination to avoid the *per se* rule. In the post-*GTE Sylvania* cases, courts have often exercised their ingenuity and creativity to avoid the *per se* rule. This sort of judgment-driven *ex post* avoidance of the *per se* rule, while producing more equitable and rational decisions, breeds a great deal of *ex ante* ambiguity and uncertainty in the antitrust law concerning distribution restrictions. This leaves market participants, and their counselors, with precious little certainty, comfort or consistency in a crucial area of business activity. Moreover, the fact that the Supreme Court has stopped unjustifiably one step short of overturning the *per se* rule unfortunately forces manufacturers and distributors to pursue their legitimate business objectives circuitously and inefficiently through so-called non-price restrictions, rather than through a price restriction, which would produce

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321. *Id.* (citing William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 942 (1987)).

322. *Id.* (citing Burns, *supra* note 317, at 395).
the same competitive result more directly and efficiently. In the final section, we will examine case histories of two market participants who were burdened in their efforts to market their products while avoiding the pitfall of per se condemnation.

IV. CASE HISTORIES

Consider the following two actual case histories. A supplier had a history of pressuring its dealers not to discount its products at retail. It did not have a formal resale price maintenance policy, and the enforcement of its informal policy varied. It desired to formalize its non-discounting policy because it believed that the sale of its product at discount stores and at a discount was totally contrary to its brand image as a premium product. It believed that the best way to protect the goodwill in its trademark and name was to stop selling to discounters.

Unfortunately, under existing case law, terminating discounters was a course of action fraught with risks of per se condemnation. The past practice of pressuring dealers to ease discounting created the likelihood that any termination of a discounter would be challenged as per se unlawful under Parke, Davis; Beech-Nut; and Albrecht. Therefore, the supplier examined other ways to reach the same result. It conducted a two-year study to come up with customer selection criteria that all dealers would be required to meet in the future to qualify as a dealer. The criteria that was developed had nothing to do with resale prices, but rather focused on product display and presentation. The program was implemented through a series of complicated contracts and dealer criteria, all of which were monitored by dealer questionnaires and the supplier’s sales force. Numerous dealers were terminated for failure to revise their practices to meet the new dealer criteria.

Although the program was successfully implemented, it would have been far more efficient for the supplier merely to have terminated the discounters without going through a two-year delay and the facade (and reality) of new dealer selection criteria. Simply put, the supplier should not have been required to jump through hoops to implement what it believed to be a resale price policy that would enhance the goodwill of its brand and, therefore, be procompetitive in the arena of interbrand competition. If vertical price restraints were subject to the rule of reason, the supplier could have avoided the inefficiency of the two-year delay and using dealer-selection criteria as a proxy for a price policy without the risk of per se condemnation.
A similar episode involves the manufacturer of products sold through dealers, specialty stores and department stores. The manufacturer wants to avoid discounting and price gouging by its retailers. It wants to do so for several reasons. First, there is an after-sale market for the products in which the products sell at far above suggested retail because they are viewed as collectibles. The manufacturer believes that it would hurt goodwill and depress the after-sale market if the products were discounted at retail. Moreover, the manufacturer believes that sales above suggested retail by retailers would be viewed by collectors as an effort by retailers to capitalize on the after-sale market developed by collectors. This would again harm the goodwill and brand image of the manufacturer and its products. The manufacturer wants to institute a resale price maintenance policy, but has deferred doing so because of the risk that enforcement of such a policy would lead to *per se* condemnation. Eventually, after crafting a policy that attempted to strictly comply with *Colgate*, the manufacturer went forward with a resale price maintenance policy.

The point of these two examples is to recognize that there are numerous situations where manufacturers and suppliers believe that it is procompetitive to interbrand competition to engage in vertical price restraints, because to do so would increase goodwill and the strength of the brand. And those procompetitive virtues do not arise only in the area where manufacturers and suppliers are concerned with the free-rider problem.

V. CONCLUSION

As we have shown, there is a great deal of doctrinal confusion and inconsistency in the treatment of vertical restraints of trade. The reality is that most vertical restraints have legitimate procompetitive virtues as well as anticompetitive effects (at least on intrabrand competition). The current state of the law is that (1) vertical non-price restraints are governed by the rule of reason; (2) vertical price restraints are narrowly defined in the dealer complaints area to situations where the non-terminated dealer agrees to a price or price level; and (3) the precise contours of the level of proof required to establish concerted action in the area of resale price maintenance policies is, at best, unclear under *Colgate*, *Albrecht*, and *Monsanto*.

This creates a vexing problem for suppliers who believe that vertical restraints are useful business tools. Consequently, it is not just a problem for suppliers who are concerned about a free-rider problem. It is also a
recurring problem with manufacturers and suppliers who believe that the value of their brand image is impacted by the sale of their products at discount stores. The current state of the law governing vertical price restraints makes little sense. It is long past the time when the Supreme Court should clarify the law and hold that all vertical restraints challenged under section 1 of the Sherman Act will be analyzed under the rule of reason.