Tuesday, October 21
2:30 pm-4:00 pm

605 Designing a Distribution System that Complies with U.S. and Canadian Antitrust Laws

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Faculty Biographies

A. Neil Campbell

Neil Campbell is a partner in McMillan's competition group. His practice focuses primarily on competition law, including domestic and international mergers, cartel and abuse of dominance proceedings, marketing and distribution advice, and compliance programs. Mr. Campbell also handles grey marketing, international trade, and Investment Canada Act matters. He advises Canadian and international clients in diverse industries with particular emphasis on financial services, broadcasting and entertainment, health care, pharmaceuticals and chemicals, mining and transportation, as well as other industrial and consumer products.

Mr. Campbell is the author of *Merger Law and Practice: The Regulation of Mergers under the Competition Act*, has published numerous articles on competition law topics and has made presentations to the OECD, PECC, the NAFTA 1504 Working Group, ICPAC, and the Industry Committee of the Canadian Parliament. He speaks regularly at Canadian and international competition law conferences. He is a past chair of the International Competition and Trade Committee of the Canadian Bar Association Competition Law Section and the senior vice-chair of the antitrust committee of the International Bar Association. He has taught at the University of Western Ontario School of Business Administration, York University, the University of Toronto Faculty of Law and Osgoode Hall Law School's LLM program in trade and competition law.

Mr. Campbell was the gold medalist in his HBA, University of Western Ontario, LLB, Osgoode Hall, and MBA, York University, studies and is also a certified management accountant. He also completed a doctorate at the University of Toronto.

Lynda Marshall

Lynda Marshall is a partner at Hogan & Hartson LLP, where she focuses on antitrust and trade regulation issues, with significant experience in the insurance and telecommunications industries. She counsels clients on a wide range of antitrust matters, including mergers and acquisitions, joint ventures, distribution issues, trade association matters, antitrust compliance, and unfair trade practices. She has coordinated worldwide regulatory approvals for multinational corporations involved in mergers and acquisitions, as well as advised clients on potential antitrust risks with such transactions. She has substantial experience advising clients on government conduct investigations, with particular emphasis in dealing with national and global investigations by multiple authorities.

Previously, she was counsel to Paciolan, Inc., in its acquisition by Ticketmaster Corp. and counsel to a large property casualty insurer in an industry wide market practices investigation by state and federal regulators. Prior to that, Ms. Marhsall was counsel to Carnival Corporation in its merger with P&O Princess and counsel to British Telecommunications in its joint venture with AT&T.

Ms. Marshall has served as chair, Sherman Act Section 1 Committee, ABA Section of Antitrust Law, chair/co-chair, ABA Section of Antitrust Law Spring Meeting, and vice chair, international and foreign competition law committee, ABA Section of Antitrust Law.

Ms. Marshall earned her BA, high honors, from University of Notre Dame and her JD from University of Virginia School of Law.

Jerome A. Swindell

Jerome (Jerry) A. Swindell is senior counsel at Johnson & Johnson in New Brunswick, NJ. Johnson & Johnson, a comprehensive healthcare company, markets products in the pharmaceutical, medical device, and consumer products markets. Mr. Swindell's practice includes advising the company in connection with a wide variety of competition issues, including mergers and acquisitions, litigation, and pricing programs in all of the company's business segments.

Prior to joining Johnson & Johnson, Mr. Swindell was associate director for the bureau of competition at the Federal Trade Commission in Washington, DC.

Mr. Swindell graduated from Georgetown University. He received his JD from the University of Texas School of Law.

VERTICAL RESTRAINTS OF TRADE AND RESTRICTIVE DISTRIBUTION PRACTICES

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Washington, D.C.
June 2008

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I. INTRODUCTION

This outline reviews the legality of various types of vertical restraints (or restrictive distribution practices), under the U.S. federal and state antitrust laws. Vertical restraints involve firms at different levels within the chain of distribution (*i.e.*, an agreement between a manufacturer and a distributor, or an agreement between a wholesaler and a retailer). Vertical restraints are designed to limit the conditions under which firms may resell products or the conditions under which customers may purchase products.

Vertical restrictions can take many forms and whether a particular vertical restriction is illegal depends both on the type of vertical restraint and the presence of concerted action. *Section II* provides an overview of the law applicable to vertical restraints, a brief history of enforcement of these laws against vertical restraints, and the standards by which vertical restraints are judged (*per se* and rule of reason). Later sections review various types of vertical restraints including: (1) vertical price restrictions[1] (including consignment arrangements, maximum and minimum resale price fixing, and dealer terminations and refusals to deal) (*Section III*); (2) vertical non-price restrictions[2] (including exclusive distributorships, territorial and customer restrictions, restrictions imposed under a dual distribution system, location clauses, areas of primary responsibility, and profit pass-over arrangements, group boycotts, and vertical bid-rigging) (*Section IV*); (3) exclusive dealing arrangements (*Section V*); (4) tying arrangements (including full-line forcing)

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[1] The term “price” includes such price-related items as discounts, credit, and allowances, and such price-influencing items as premiums, trading stamps and rebates.

[2] The term “non-price” includes provisions as to such things as the quality, service and delivery of the products, or the area in, or customers to which the distributor sells.

(*Section VI*); (5) reciprocal dealing arrangements (*Section VII*); and (6) vertical refusals to deal (*Section VIII*).

II. AN OVERVIEW OF VERTICAL RESTRAINTS

A. Applicable Laws.

The federal and state antitrust laws applicable to vertical restraints of trade include:

1. Section 1 Sherman Act.[3]

Section 1 of the Sherman Act ("Section 1") provides: "Every contract, combination, in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

2. Section 2 Sherman Act.[4]

Section 2 of the Sherman Act ("Section 2") provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

3. Section 3 Clayton Act.

Section 3 of the Clayton Act ("Section 3") provides:

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities . . . on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

4. Section 5 Federal Trade Commission Act.

Section 5 of the Federal Trade Commission Act ("Section 5")[5] prohibits: "[U]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce. . . ."

5. State Laws.

State laws also may govern vertical restraints of trade including tying, full-line forcing, and exclusive dealing. *See* ABA Antitrust Section, *State Antitrust Practice and Statutes* (1991).[6]

B. Enforcement.

1. Enforcement of Section 1 of Sherman Act.

Section 1 can be enforced by (1) criminal or civil actions by the United States Department of Justice, or (2) civil actions by private parties or state officials.

a. No Enforcement During the Reagan Administration.

(i.) *No Cases Filed*. Neither the Department of Justice ("DOJ") nor the Federal Trade Commission ("FTC") filed a single vertical restraint case. During this time DOJ adopted the Vertical Restraint Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,105 (1985) ("Vertical Restraint Guidelines"), describing its

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[3] 15 U.S.C. § 1.

[4] 15 U.S.C. § 2. Some plaintiffs have relied upon Section 2 in vertical restraint cases and claimed that the defendant used the vertical restraint to obtain or maintain a monopoly. *See, e.g.*, Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Am. Passage Media Corp. v. Cass Commc'ns, Inc., 750 F.2d 1470 (9th Cir. 1985); Luria Bros. & Co. v. FTC, 389 F.2d 847 (3d Cir. 1968); United States v. Microsoft Corp., 65 F. Supp. 2d 1 (D.D.C. 1999); Minn. Mining and Mfg. Co. v. Appleton Papers Inc., 35 F. Supp. 2d 1138 (D. Minn. 1999); Bepco, Inc. v. Allied-Signal, Inc., 106 F. Supp. 2d 814 (M.D.N.C. 2000).

[5] 15 U.S.C. § 45 (A)(1).

[6] This outline focuses mainly on the federal antitrust aspects of vertical restraints. Although the antitrust laws in many states are based on federal antitrust law, state antitrust law can go beyond the scope of federal law. *See, e.g.*, Cal. v. ARC Am. Corp., 490 U.S. 93 (1989). There are state antitrust statutes (*e.g.*, Ohio Valentine Act, O.R.C. 1331.01 *et seq.*) as well as state franchise relationship laws (*e.g.*, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, Ohio, Virginia, Washington, and Wisconsin). In addition to state antitrust statutes there are industry specific federal statutes establishing special rules (*e.g.*, Automobile Dealers Day in Court Act, 15 U.S.C. § 122, *et seq.*; Petroleum Marketing Practices Act, 15 U.S.C. § 2801, *et seq.*; and Soft Drink Interbrand Competition Act, 15 U.S.C. § 3501).

enforcement policy with respect to vertical restraints. *See also* Guidelines for International Operations, 4 Trade Reg. Rep. (CCH) ¶ 13,109 (1985). The standards by which the Department analyzes vertical mergers are set forth in U.S. Department of Justice 1984 Merger Guidelines. In the mid 1990s, DOJ and FTC filed consent decrees in several vertical mergers that articulated new theories of competitive harm.[7]

b. Little Enforcement During the First Bush Administration.

The DOJ did not file a vertical resale price maintenance case, but the FTC did challenge several resale price maintenance agreements. *See, e.g.*, *Nintendo of America, Inc.*, FTC File No. 901-0028, 1991 FTC LEXIS 113 (1991); *Kreepy Krauly USA, Inc.*, FTC File No. 901-0089, 1991 FTC LEXIS 536 (1991). The Vertical Restraint Guidelines adopted during the Reagan Administration largely were ignored during the Bush Administration.

c. The Clinton Administration Re-invigorated Vertical Enforcement.

(i.) Anne K. Bingaman, Assistant Attorney General for the Antitrust Division in the Clinton Administration, withdrew the Vertical Restraint Guidelines[8] and announced that she wanted to bring new cases involving vertical restraints.[9] In April 1998, A. Douglas Melamed, Principal Deputy Assistant Attorney General for the Antitrust Division, stated that most of the Antitrust Division's contested, civil non-merger cases have involved what are in substance exclusionary vertical agreements. Mr. Melamed laid out a four step process for evaluating exclusionary vertical agreements:

1. Are the agreements exclusionary, *i.e.,* do they exclude rivals from the market or materially diminish their competitive efficacy by raising their costs or denying them inputs? (If not they are harmless and should be lawful.)

2. If the agreements are exclusionary, are there plausible efficiencies? (If there are no efficiencies, Mr. Melamed suggests that in some cases it may be appropriate to find them simply unlawful.)

3. If these are plausible efficiencies, are the exclusionary agreements likely to create or preserve market power for the manufacturer? (If not, the agreement should be lawful.)

4. If market power is implicated, are some or all of the exclusionary aspects of the agreements not reasonably necessary to achieve the efficiencies? (If so, the unnecessary agreements should be illegal.)

5. In the remaining instances, *i.e.*, in cases in which the agreements are likely to exclude or harm rivals, create or preserve market power and create genuine efficiencies, Mr. Melamed suggests a more comprehensive rule of reason analysis — one that weighs the anticompetitive consequences of the agreements against their procompetitive or efficiency-enhancing implications.[10]

(ii.) DOJ was more vigilant in its investigation and prosecution of vertical price-fixing cases.[11] DOJ also became more active in challenging vertical non-price restraints:

[7] *See, e.g.*, In the Matter of Lockheed Corp., No. 951-0005 (1995); In the Matter of Eli Lilly & Co., No. 941-0102 (1994); United States v. AT&T, Civil Action No. 94-CV01555 (D.D.C. 1994); United States v. MCI Commun'cs. Corp., Civil Action No. 94-1317 (D.D.C. 1994); In the Matter of Martin Marietta Corp., No. C-3500 (1994).

[8] *See* Antitrust Enforcement, Some Initial Thoughts and Actions, Address by the Honorable Anne K. Bingaman before the Antitrust Section of the American Bar Association, at 9 (Aug. 10, 1993), *reprinted in* 7 Trade Reg. Rep. (CCH) ¶ 50,110 (1993).

[9] Speech Before ABA Antitrust Section, *reprinted in* Antitrust & Trade Reg. Report, Vol. 66, No. 1659 at 411 (April 14, 1994).

[10] Exclusionary Vertical Agreements, Address by A. Douglas Melamed, Deputy Assistant Attorney General, Antitrust Division, DOJ, Before the Antitrust Section of the American Bar Association, (April 2, 1998).

[11] United States v. Gen. Elec. Co., Civ. No. CV96-121-M-CCL (D. Mont. 1998) (consent decree settling allegations that GE violated § 1); United States v. AnchorShade, Inc., 1996-2 Trade Cas. (CCH) ¶ 71,640 (S.D. Fla. 1996); United States v. Waste Mgmt. Inc., Civil Action No. CV496-35 (S.D. Ga. 1996); United States v. Browning-Ferris Indus. Inc., Civil Action No. 96CV00297 (D.D.C. 1996); United States v. Playmobil, U.S.A., Inc., 1995-1 Trade Cases (CCH) ¶ 71,000 (D.D.C. 1995); United States v. Topa Equities, Civil Action No. 1994-179 (D.V.I. Dec. 7, 1994) (DOJ consent decree resolving Topa's exclusive distribution rights in the Virgin Islands for practically all major brands of distilled spirits); United States v. Cal. Suncare, Inc., 1994-2 Trade Cases (CCH) ¶ 70,843; United States v. Canstar Sports USA, 1993-2 Trade Cas. (CCH) ¶ 70,372 (D. Vt. 1993).

1. In *United States v. Microsoft Corp.*, 59 Fed. Reg. 42845 (Aug. 19, 1994), DOJ challenged Microsoft's *de facto* exclusive dealing arrangements that required computer manufacturers to pay Microsoft for each non-Microsoft operating system they distributed and long-term agreements that required unreasonably large minimum commitments from the computer manufacturers. Microsoft agreed to a consent decree.

   The United States also challenged Microsoft's exclusive dealing agreements and tying agreements under § 2 and § 1. The district court held that Microsoft violated § 2 of the Sherman Act by engaging in anticompetitive conduct to force Netscape and other rivals out of the web browser market. The court also ruled that Microsoft's tying arrangements violated § 1, but held that Microsoft's exclusive dealing arrangement did not violate § 1. *See United States v. Microsoft*, Corp., 87 F. Supp. 2d 30 (D.D.C. 2000). The circuit court reversed, holding that a § 1 tying claim must be evaluated under the rule of reason, not the *per se* rule. *See United States v. Microsoft*, *Corp*., 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

2. In 1995, DOJ filed its first tying cases in more than 10 years. *See, e.g.*, *United States v. El Paso Natural Gas Co.*, Civil Action No. 95-0067 (D.D.C. 1995) (consent decree involving metering of natural gas); *United States v. Elec. Payment Services, Inc.*, 1994-2 Trade Cas. ¶ 70,796 (D. Del. 1994) (DOJ obtained consent decree against operator of largest ATM network in U.S. in which operator agreed to refrain from tying ATM processing to regional ATM network access and operator agreed to open its network to independent ATM processors on nondiscriminatory basis).

3. In *Toys "R" Us v. United States*, Trade Reg. Rep. (CCH) ¶ 24,516 (1998), *aff'd*, 221 F.3d 928 (7th Cir. 2000), the FTC successfully challenged Toys "R" Us' agreements with various toy manufacturers not to sell selected toys to the warehouse clubs.

4. In 1998, DOJ filed an action against Visa and MasterCard alleging that the associations' restrictions prohibiting member banks from issuing any card deemed competitive with Visa or MasterCard, violated § 1 of the Sherman Act. *United States v. Visa U.S.A. Inc., et al.*, 98-Civ. 7076 (D.D.C. 1998) (Complaint). The district court found that exclusivity rules violated the Sherman Act. 163 F. Supp. 2d 322 (S.D.N.Y. 2001), *aff'd United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2nd Cir. 2003), *cert. denied* 125 S.Ct. 45 (2004).

5. In 1999, DOJ filed a complaint against Dentsply alleging that Dentsply's refusal to deal with dealers carrying competing lines of false teeth constitutes an illegal restraint in violation of § 1 of the Sherman Act. *United States v. Dentsply Int'l Inc.,* Civ. No. 99-005 (D. Del. 1999) (Complaint). Dentsply's distribution network constitutes approximately 80% of the outlets distributing artificial teeth. Dentsply's restrictive agreements allegedly deprive rivals of access to the majority of sales outlets for artificial teeth in the United States, resulting in higher prices, loss of choice, less market information and lower quality artificial teeth. The Third Circuit held the agreements were exclusionary. *United States v. Dentsply Int'l., Inc.*, 399 F.3d 181, (3rd Cir. 2005).

d. Second Bush Administration continued enforcement.

(i.) Prior to George W. Bush taking office, antitrust experts predicted no dramatic shifts in federal antitrust enforcement.[12]

(ii.) The Bush administration negotiated a settlement with Microsoft after the D.C. Circuit refused to order a break-up of Microsoft.[13] Under the terms of the decree, Microsoft agreed, among other things, not to restrict OEMs from installing or displaying non-Microsoft icons, shortcuts or middleware on the desktop or Start menu.

(iii.) An important focus of the Bush administration's antitrust enforcement has been vertical arrangements in the health care field. The FTC renewed its focus on pharmaceutical-related investigations. FTC and DOJ's Antitrust Division held hearings on "Health Care and Competition Law and Policy" beginning in February 2003, which focused on hospital merger cases and other joint agreements, horizontal hospital networks and vertical arrangements with other health care providers. In 2004, the DOJ and FTC jointly issued a report noting how competition in the health care sector might be increased.[14]

(iv.) *Intellectual Property Guidelines*. In addition to its enforcement agenda, DOJ and the FTC have issued joint guidelines on the licensing of intellectual property, which have application to vertical restraints, and should be consulted by practitioners.[15] Also, in the spring of 2002, the DOJ and the FTC initiated joint hearings on "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy."[16] The hearings examined the intersection of antitrust law and intellectual property law, focusing on innovation and other aspects of consumer welfare. In the fall of 2003, the FTC issued a report entitled, "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy," examining the interface of antitrust and patent law, also focusing on innovation and recommending changes in the patent system. Federal Trade Commission (Oct. 2003), www.ftc.gov/os/2003/10/innovationrpt.pdf.

[12] Janet L. McDavid and Robert F. Leibenluft, *Antitrust: What Impact Will Bush Have?,* NATIONAL LAW JOURNAL, Feb. 25, 2001.

[13] United States v. Microsoft, Corp., 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

[14] Improving Heath Care: A Dose of Competition (July 2004), *available at* www.usdoj.gov/atr/public/health_care/204694.pdf.

[15] *See* DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property, April 6, 1995 [hereinafter "Intellectual Property Guidelines"].

[16] *See* Press Release, FTC/DOJ Hearings to Highlight the Intersection of Antitrust and Intellectual Property Law and Policy (April 2002), *available at* http://www.ftc.gov/opa/2002/04/iplaw2.htm.

2. Enforcement of Section 2

Section 2 challenges of vertical restraints have sometimes been more successful than Section 1 challenges. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005) (evaluating an exclusive dealing agreement under § 2); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (holding a bundled rebate program, which arguably was a tying agreement, was exclusionary conduct); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (evaluating tying and exclusive dealing agreements under both § 1 and § 2 theories).

3. Enforcement of Section 3 of the Clayton Act.

Section 3 can be enforced in actions by (1) the DOJ, (2) the FTC, (3) state attorneys general, or (4) private parties.

4. Enforcement of Section 5 of the Federal Trade Commission Act.

a. The FTC has exclusive power to enforce Section 5.

There is no private right of action. *See*, *e.g.*, *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

b. Clinton Administration.

The FTC increased vertical restraint enforcement. The FTC entered consent agreements with two dealer associations which had threatened to boycott manufacturers that sold their products through a competing discount catalog. The FTC found a horizontal conspiracy to enforce vertical restraints. *See New England Juvenile Retailers Ass'n,* FTC Dkt. C-3552 and *Baby Furniture Plus Ass'n*, FTC Dkt. C-3553, 5 Trade Reg. Rep. (CCH) ¶ 23,689 (Jan. 18, 1995). The FTC also challenged American Cyanamid's practice of providing rebates to only those distributors of crop protection chemicals who sold at above the wholesale price. *American Cyanamid*, 62 Fed. Reg. 6255 (May 12, 1997) (consent prohibits American Cyanamid from conditioning rebates on distributors' resale prices and also bars American Cyanamid from engaging in RPM practices generally).[17].

c. Bush Administration

In 2002, the FTC ushered in a "new generation of cases" against companies that improperly attempt to stop generic drugs from coming to

[17] The majority statement issued with the consent order, along with the dissent of Commissioner Starek, provide a good overview of current tensions about the *per se* illegality of RPM as well as the difficulties in distinguishing unilateral conduct from concerted action.

market.[18] In April 2002, the FTC accepted a proposed consent order ending its first case of this type. The consent order required Biovail Corp., a Canadian pharmaceutical manufacturer, to refrain from using illegal means to block competition from generic manufacturers, signaling concerns regarding questionable Orange Book listings and patent infringement suits.

In 2003, the FTC continued investigating allegations of drug companies attempting to block generic drugs from entering the market. In *Schering- Plough Corp.*,[19] the FTC held that Schering-Plough's payment of funds to two generic drug companies for them to delay entering the markets for Schering-Plough's drugs created anticompetitive effects and therefore created an agreement to unreasonably restrain trade. The Eleventh Circuit, however, reversed the FTC's decision in *Schering-Plough*, noting that in analyzing patent cases, a court should examine the scope of the patent's exclusionary potential, the extent the agreements exceed that scope, and any resulting anticompetitive effects. *Schering-Plough v. Federal Trade Commission*, 402 F.3d 1056, 1066 (11th Cir. 2005). In an opinion critical of the FTC's failure to evaluate the strength of the patent at issue, the court held that not every agreement will be invalidated in which a generic entry date is negotiated following a patent infringement, and in which other products licensed by the generic are paid for.

4. States Consistently Active in Enforcement.

a. State antitrust laws usually can be enforced by state attorneys general or private parties.

b. State attorneys general have become increasingly active in antitrust issues.

Most recently, it has been the states that brought vertical restraints cases. For example, state attorneys general have filed numerous resale price maintenance lawsuits, particularly in the electronics industry.[20]

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[18] *FTC Settlement With Biovail Will Halt Firm From Blocking Entry by Generic Firms*, Antitrust & Trade Reg. Rep. (BNA) Vol. 82, No. 2054, at 362 (April 26, 2002).

[19] *Schering-Plough Corp.,* No. 9297 (Dec. 8, 2003) (final order),; Schering-Plough Corp., No. 9297 (Dec. 8, 2003) (opinion of the Commission),; Schering-Plough Corp., No. 9297 (June 27, 2002) (initial decision).

[20] *See, e.g.*, Conn. v. Keds Corp., C.V. No. 93, Civ. 6718 (S.D.N.Y. 1993); Md. *ex rel.* J. Joseph Curran, Jr. v. Mitsubishi Elec. Am., Inc., 1992-1 Trade Cas. (CCH) ¶ 69,743 - 744 (D. Md. 1992); N.Y. *ex rel.* Robert Abrams v. Nintendo of Am., Inc., 1991-2 Trade Cas. (CCH) ¶ 69,513 (S.D.N.Y. 1991); In re Panasonic Consumer Elec. Prod. Antitrust Litig., 1989-1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989); Minolta Camera Prods. Antitrust Litig., 668 F. Supp. 456 (D. Md. 1987); *see generally* Richard Blumenthal, Robert Langer and William Rubenstein, *Antitrust Review of Mergers by State Attorneys General: The New Cops on the Beat*, 67 BUS. LAW. 1 (1993).

(i.) The states joined the FTC in the *Reebok* litigation. *See New York v. Reebok Int'l Ltd.*, 96 F.3d 44 (2d Cir. 1996).

(ii.) In *Florida, et al v. Nine West Group*, all the states settled claims against the manufacturer, receiving injunctive relief and $3.5 million for costs.

c. NAAG Guidelines

In 1988, the National Association of Attorneys General issued its own Vertical Restraint Guidelines which contain considerably more restrictive standards than the DOJ's Guidelines. On March 27, 1995, NAAG issued revised Vertical Restraint Guidelines ("NAAG Vertical Restraint Guidelines"). 4 Trade Reg. Rep. (CCH) ¶ 13,5400 (1985)(revised 1988 & 1995).

5. Civil Remedies and Penalties.

The civil remedies for violation of Section 1 and Section 3 include: (1) injunctive relief; (2) costs and attorneys' fees; and (3) treble damages.

C. Standard of Analysis.

1. Horizontal v. Vertical Restraints.

a. Horizontal restraints involve agreements between direct competitors operating at the same level of the market (*e.g.*, competing manufacturers or suppliers of the same product). Horizontal restraints tend to be scrutinized more closely than vertical restraints.

b. Vertical restraints involve agreements between parties at different levels of the market (*e.g.* a manufacturer and its dealers or distributors).

c. *Dual Distribution*. Where a manufacturer markets its products both through its own distribution outlets and through independent dealers or franchisees, there is an issue as to whether restraints imposed by the manufacturer (particularly customer and territorial restraints) should be regarded as vertical or horizontal.

Courts tend to treat such restraints as vertical and apply a rule of reason analysis.[21]

2. *Per Se* Treatment of Some Vertical Restraints.

a. The Standards For Per Se Analysis.

(i) Where a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" rather than "one designed to 'increase economic efficiency and render markets more, rather than less, competitive,'" it is considered "*per se* illegal" and may be condemned without further analysis. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19-20 (1979).[22]

(ii.) A practice is *per se* unlawful if it appears highly likely that it will restrict the output of the collaborators or increase their price and there is no plausible procompetitive justification for the practice. *See National College Athletic Association v. Board of Regents*, 468 U.S. 85 (1984).

(iii.) Because the application of the *per se* rule forecloses an in-depth analysis of the purpose for the restraint or of the effect on the market, the Supreme Court has limited the application of the rule to those categories of restraints for which no elaborate study of an industry is needed to establish that their nature and effect are "plainly" or manifestly "anticompetitive."

(iv.) Once a *per se* agreement is proved, then the defendants are not allowed to present any evidence of justification or reasonableness.[23]

b. Some Vertical Restraints Are Per Se Unlawful.[24]

(i.) Tying arrangements can be *per se* illegal under certain circumstances.

(ii.) Until 2007, minimum vertical resale price fixing was condemned as *per se* unlawful. Today, vertical price fixing schemes are analyzed under the rule of reason, discussed below.[25]

3. Rule of Reason Analysis Generally.

The legality of a vertical restraint depends on its economic effect, which is assessed under a "rule-of-reason" standard. Unlike the *per se* rule, the rule of reason requires the finder of fact to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V. Inc.*, 433 U.S. at 49.

a. As the Supreme Court recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54-57 (1977), vertical restraints may promote competition by allowing a manufacturer to achieve efficiencies in the distribution of its products and by permitting firms to compete through different methods of distribution. The legality of a vertical

[21] *See*, *e.g.*, Ill. Corp. Travel, Inc. v. Am. Airlines, Inc., 889 F.2d 751, 753 (11th Cir. 1989) (dual distributor's restraints have effects no different from purely vertical restraints); Dart Indus., Inc. v. Plunkett Co. of Okla., Inc., 704 F.2d 496, 498-99 (10th Cir. 1983) (manufacturer's dual distribution system lawful); H & B Equip. Co. v. Int'l Harvester Co., 577 F.2d 239, 245-46 (5th Cir. 1978) (conspiracies between a manufacturer and its dealers treated as horizontal only when the source of the conspiracy is a combination of dealers); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977) (agreement not to compete made pursuant to dual distributorship is subject to rule of reason analysis); Beyer Farms, Inc. v. Elmhurst Dairy, Inc., 142 F. Supp. 2d 296 (E.D.N.Y. 2001) (agreement not to compete between manufacturer acting as a dual distributor and one of its distributors is subject to rule of reason analysis).

[22] *See also* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (per se rules applied because experience with the restriction in issue teaches that it has a "substantial potential for impact on competition"); Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 289-90 (1985) (per se rule applied when the practice in issue "always or almost always tend[s] to restrict competition and decrease output"); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16 n.25 (1984)("[t]he rationale for per se rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct"); Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977) (per se rules are appropriate for "conduct that is manifestly anticompetitive").

[23] *See, e.g., United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Portsmouth Paving Corp.*, 694 F.2d 312 (4th Cir. 1982).

[24] The extent of analysis necessary before a restraint conclusively can be presumed *per se* illegal depends upon the character and type of restraint. Certain restrictions rarely have plausible procompetitive justification and are condemned as *per se* illegal without any elaborate inquiry.

[25] *Leegin Creative Leather Products, Inc. v. PKSK, Inc.*, 127 S.Ct 2705 (2007).

restraint depends on its economic effect, which is assessed under a "rule-of-reason" standard.

b. Unlike the *per se* rule, the rule of reason requires the finder of fact to weigh "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc.*, 433 U.S. at 49. As the Supreme Court held in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918), the factors to be considered in evaluating the restraint include the following:

> [T]he facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

c. However, as the Supreme Court warned in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978):

> Contrary to its name, the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of the challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions. . . . In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.

d. The Supreme Court in *Continental T.V., Inc.*, 433 U.S. at 49, distinguished between interbrand competition (*i.e.* competition between sellers of different brands, such as McDonalds, Burger King, and Hardees) from intrabrand competition (*i.e.* competition between sellers of the same brand, such as various McDonalds franchisees).[26] *Id.* at

54-56. The Supreme Court noted that most vertical restraints were designed to promote interbrand competition, although they may restrain intrabrand competition. *Id.* at 54.

(i.) The Court emphasized that interbrand competition should be the principal concern of the antitrust laws. Interbrand competition "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." *Id.* at 52 n.19.

(ii.) The Court recognized that some restraints on intrabrand competition can promote interbrand competition.

4. Rule of Reason Is Two-Step Process.

a. First the defendant must be shown to have the requisite market power in both the relevant product and geographic markets.[27]

(i.) Courts require plaintiffs to make a threshold showing that the supplier's market share is

[26] As explained in these examples, the term "intrabrand competition" refers to competition among distributors reselling the same manufacturer's product and the term "interbrand competition" refers to competition in the sale or resale of the products of different manufacturers, whether sold by the manufacturers or their respective distributors.

[27] *See, e.g.*, Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717 (7th Cir. 2004) (holding that plaintiff failed to define properly the relevant market and to demonstrate defendant's market power); Menasha Corp. v. New Am. Mktg. In-Store, Inc., 354 F.3d 661 (7th Cir. 2004) (holding plaintiff failed to properly define the relevant market because shelf coupon dispensers are not a distinct market when there are many substitutes for the product); White and White, Inc. v. Am. Hosp. Supply Co., 723 F.2d 495, 500 (6th Cir. 1983); Jayco Sys., Inc. v. Savin Bus. Machines Corp., 777 F.2d 306 (5th Cir. 1985); Beyer Farms, Inc. v. Elmhurst Diary, Inc., 142 F.Supp.2d 296 (E.D.N.Y. 2001), *aff'd,* 2002-2 Trade Cases ¶ 73,770 (2nd Cir. 2002) (holding plaintiff failed to properly define the product market because the plaintiff had not discussed the supply of market substitutes, and also holding that plaintiff had failed to demonstrate an injury to the market from the defendant's conduct); Discon Inc. v. Nynex Corp., 86 F. Supp. 2d 154, 159-60 (W.D.N.Y. 2000) (holding plaintiff had failed to define the relevant market in "economically meaningful terms" because a single buyer's purchases are insufficient to define the product market and because the geographic market definition was political in basis, not economic)..

sufficiently high such that the restriction could adversely impact the overall market.[28]

(ii.) Recently, several district courts held that the plaintiff also carries an initial burden of demonstrating an actual adverse effect upon competition as a whole in the relevant market.[29] If the plaintiff meets this burden, the defendant must then provide procompetitive justifications for its actions.[30]

(iii.) Establishing market power requires the plaintiff to allege a relevant market. Failure to define a relevant product market with reference to the rule of cross-elasticity of demand or interchangeable substitute products may be fatal to a plaintiff's claim.[31]

[28] *See, e.g.*, Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, (8th Cir. 1987) (restriction upheld where supplier did not possess requisite market power); Cowley v. Braden Indus., Inc., 651 F.2d 422 (9th Cir. 1979); R.D. Imps. Ryno Indus. v. Mazda Indus., 1986-2 Trade Cas. (CCH) ¶ 67,414 (5th Cir. 1986) (5% market share insufficient as a matter of law); Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311 (8th Cir. 1986) (19.1% market share insufficient); Valley Liquors, Inc. v. Reinfield Imps., Ltd., 678 F.2d 742 (7th Cir. 1982) (must have at least 17 - 25% market share); Winton Hills Frozen Foods & Servs., Inc. v. Haagen Dazs Co., Inc., 691 F. Supp. 539, 547 - 48 (D. Mass. 1988) (43% market share held insufficient where defendant's position was declining); Blanton Enters., Inc. v. Burger King Corp., 680 F. Supp. 753, 767 (D.S.C. 1988) (7.5 - 10% market share too low to affect adversely interbrand competition in a highly competitive industry).

[29] *See e.g.,* E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n. 357 F.3d 1 (1st Cir. 2004) (holding that a set of vending machines on a university campus was too small a portion of all vending machines available for consumers to have a significant anticompetitive effect); Spanish Broad. Sys. of Fla., Inc. v. Clear Channel, 376 F.3d 1065 (11th Cir. 2004) (holding that a plaintiff must prove that a defendant harmed competition in the relevant market to prove an anticompetitive effect); Med. Supply Chain, Inc. v. Gen. Elect. Co., 2004 U.S. Dist. LEXIS 7842 (D. Kan. 2004) (holding that defendant's lack of market power was fatal to plaintiff's claim that defendant's agreements with only certain healthcare suppliers produced anticompetitive market effects).

[30] *See, e.g.*, R.J. Reynolds Tobacco , Inc., 60 F. Supp. 2d 502 (M.D.N.C. 1999); Mover's & Warehousemen's Ass'n v. Long Island Moving & Stor Co. v. Philip Morrisage Ass'n, 1999 WL 1243054 (E.D.N.Y. 1999); Virgin Atl. Airways v. British Airways PLC, 69 F. Supp. 2d 571 (S.D.N.Y. 1999); Granite Partners L.P. v. Bear, Stearns & Co., 58 F. Supp. 2d 228 (S.D.N.Y. 1999).

[31] *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *Bldg. Materials Corp. of Am. v. Rotter*, 535 F. Supp. 2d 518 (E.D. Pa. 2008) (dismissing a counterclaim for failure to reference "the rule of reasonable interchangeability and the cross-elasticity of demand").

(b.) Second, the court must balance the procompetitive and anticompetitive effects to determine if the net effect of the restraint on interbrand competition is measurably and substantially adverse.[32]

5. "Quick Look," "Modified," "Truncated" Rule of Reason.

a. A new standard has emerged falling somewhat between a *per se* analysis and a rule of reason analysis. Although it typically is applied to horizontal restraints, it has been applied to certain vertical restraints such as tying arrangements and boycotts.[33] In the concurring opinion in *Jefferson Parish*, 466 U.S. 2, 12-13 (1984), four Justices agreed that the "*per se*" rule should be abandoned in favor of the rule of reason approach. The rule of reason analysis looks to the effects of the tie in the relevant market for the tied product. Justice O'Connor stated that "[a] tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency." *Jefferson Parish*, 466 U.S. at 42 (O'Connor, J., concurring).

b. The Supreme Court recently put the viability of the "quick look" in doubt, however. In *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), the Court held that an abbreviated or "quick look" rule of rule-of-reason analysis was not appropriate for the association's advertising restrictions. The Supreme Court disagreed with the FTC and Ninth Circuit's quick look analyses, holding that the anticompetitive effects of the restraints were not intuitively obvious given the plausible procompetitive

[32] *See, e.g.*, Capital Imaging Ass'n v. Mohawk Valley Med. Ass'n, 996 F.2d 537 (2d Cir. 1993) (plaintiff bears initial burden of showing that challenged action has had actual adverse effect on competition as a whole in the relevant market); Quaker State Corp. v. Leavitt, 839 F. Supp. 76 (D. Mass. 1993) (to prove non-price vertical restraint violated Section 1 plaintiff must establish agreement which was intended to harm or unreasonable restrain competition and which actually caused injury to competition).

[33] *See, e.g.*, FTC v. Ind. Fed. of Dentists, 476 U.S. 447 (1986); Nat'l College Athletic Ass'n, 468 U.S. 85 (1984); Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 604 (1988); Worldwide Basketball and Sport Tours, Inc. v. NCAA, 388 F.3d 955 (6th Cir. 2004) (holding that "quick look" analysis does not permit a court to bypass the definition of the relevant market and an analysis of any procompetitive justifications); *In re* Northwest Airlines Corp., 208 F.R.D. 174 (E.D. Mich. 2002); *Wallace v. International Business Machines Corp.*, 467 F.3d 1104 (7th Cir. 2006) (dismissing a restraint of trade claim using a "quick look" analysis); *but see Jame Fine Chems., Inc. v. Hi-Tech Pharm. Co., Inc.*, 2007 Wl 927976 (D.N.J. 2007) (holding that vertical nonprice restraints should be analyzed under the rule of reason rather than the "quick look" method).

justifications and, consequently, the rule of reason demanded a more thorough inquiry although, "not necessarily . . . the fullest market analysis." The extent of this analysis and the types of cases that are appropriate for "quick look" analysis versus full rule-of-reason analysis remain unclear. Justice Souter also noted that "categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." *Id.* at 779.

On remand in September of 2000, the Ninth Circuit applied a more thorough rule of reason analysis and ordered the dismissal of the case without remand for further fact-finding. *See California Dental Ass'n v. FTC,* 224 F.3d 942 (9th Cir. 2000).

c. In *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 360 F.3d 865 (8th Cir. 2004), the court cited *California Dental Ass'n* and held that where the defendant claims that its behavior has procompetitive effects, and the claim is sufficiently plausible, the claim gives rise to a rule of reason rather than a "quick look" analysis.

d. The quick look approach was clarified in *Santana Products v. Bobrick Washroom Equipment*, 249 F. Supp. 2d 463 (M.D. Pa. 2003), in which the quick look approach was rejected and rule of reason analysis was applied. The court held that for the quick look approach to be employed, the effect on price and output must be obvious. *Santana Products*, 249 F. Supp. 2d at 511.

e. In *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004), the Sixth Circuit held that the "quick look" analysis does not allow a court to bypass relevant market identification to consider procompetitive effects. The Sixth Circuit held that rule of reason analysis was appropriate to consider the NCAA's practice of prohibiting men's basketball teams from competing in more than two tournaments in a given four year period.

f. *In Polygram Holdings, Inc. v. FTC,* 416 F.3d 29 (D.C Cir. 2005), the D.C. Circuit affirmed the Commission's "quick look" analysis. The Court stated: "[i]f, based upon economic learning and the experience of the market, it is obvious that a restraint of trade likely impairs competition, then the restraint is presumed lawful and, in order to avoid liability, the defendant must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm."

III. VERTICAL PRICE RESTRAINTS

This Section reviews restrictions on the price at which a dealer may resell the supplier's products. This type of vertical price restriction is known as "vertical price fixing," "resale price maintenance," or "RPM." The Section starts with (A) the definition of resale price maintenance, (B) the policy setting of the doctrine, and (C) the doctrine itself. The Section then discusses the two most frequently litigated issues: (D) whether a RPM agreement on price exists; and (E) the related question of whether the supplier falls within the *Colgate* exception. The Section concludes with (F) an analysis of some unique variations of basic RPM agreements and the judicial treatment of each.

Note that this section includes the earlier cases related to resale price maintenance, which applied a per se standard, even though in 2007 the Supreme Court ruled in *Leegin Creative Leather Products, Inc.* v. *PSKS, Inc.*[34] that the rule of reason, as opposed to the per se rule, would be the applicable standard for evaluating resale price maintenance arrangements going forward. This is because the older cases remain relevant as parties grapple with how to apply the rule of reason to resale pricing arrangements. The differing attitudes of enforcement authorities, particularly the position of the majority of the states that resale price maintenance will remain per se illegal in their jurisdiction, increase the pertinence of these cases. Indeed, many companies continue to follow the guidance set out in these cases.

A. Definition of Resale Price Maintenance.

Vertical price fixing or resale price maintenance is an arrangement where a party at one level of distribution (*e.g.*, the manufacturer or franchiser) controls the price at which a product or service is resold by another party at a different distribution level (*e.g.*, the dealer or franchisee).

B. Competitive Effects of Resale Price Maintenance.

[34] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct 2705 (2007).

1. Potential Procompetitive Effects.

Suppliers might wish to specify a minimum resale price to overcome free-rider problems. For example, a specified minimum resale price can enable full-service dealers to provide costly point of sale and post-sale service without being undercut by other low-cost dealers that do not provide those services. To the extent that consumers prefer full-service dealers, this pricing practice facilitates inter-brand competition and is pro-competitive.

2. Potential Anticompetitive Effects.

Specifying a minimum resale price directly interferes with the dealer's freedom to set its own prices. Also, that pricing practice might result in higher prices for customers, especially if it is used as a tool to facilitate or enforce inter-brand collusion between dealers or suppliers.

M*aximum* RPM might facilitate collusion by sending a signal to competitors about the desired price floor. In other words, a maximum RPM can become a price floor rather than a price ceiling. However, this is possible only in markets that are susceptible to collusion, see *supra*.

C. The Doctrine: The Rule of Reason.

1. Vertical price restraints are examined under the rule of reason.[35]

a. An Analysis of *Leegin*

For almost a century, vertical price restrictions were condemned as *per se* unlawful. In 2007, however, the Supreme Court abandoned the *per se* rule in favor of the more lenient rule of reason approach. The Court reasoned that vertical price restraints could induce procompetitive, economically efficient behavior. For instance, price restraints could generate intrabrand competition among retailers for services and eliminate free riding. Additionally, RPM's could stimulate interbrand competition by facilitating market entry and guaranteeing profit margins. Since RPM's are not "always or almost always" anticompetitive, the Court held, the restrictions should be analyzed under the rule of reason.

Nonetheless, the Court was also careful to note that vertical price restraints could have anticompetitive effects. For instance, RPM agreements could facilitate the creation and sustainment of retailer or manufacturer cartels. Additionally, dominant players could use price-fixing agreements to manipulate manufacturers upstream or retailers downstream in a particular market. These anticompetitive arrangements, the Court held, would fall, even under the rule of reason approach.

Notably, in an effort to provide guidance to lower courts, the Supreme Court set out three factors that could be particularly relevant to a vertical price restraint inquiry.

i. The number of manufacturers in a market that use RPM agreements. When only a small number of manufacturers adopt the practice, there is less likelihood that it is sustaining a manufacturer cartel than when a large number of manufacturers adopt RPM's.

ii. The source of the restraint. If retailers have pressured the manufacturer to adopt an RPM scheme, it may be indicative of a retailer cartel.

iii. The dominance of the retailer and manufacturer that are party to the RPM agreement. The greater the market power of the parties, the greater the chance the RPM agreement is anticompetitive.

b. Effects of *Leegin*

The effects of *Leegin* are still unclear. Since lower federal courts have yet to develop a framework with which to analyze RPM agreements, there will be a period of legal turbulence as judges attempt to distinguish between procompetitve and anticompetitive behavior.

Additionally, each state has its own antitrust laws. Which states will amend or interpret their own laws in accordance with

[35] *Id.*

federal law, and which states will maintain a *per se* rule against RPM's, remains an open question.[36]

The Third Circuit, however, recently reversed summary judgment on a truck dealer's claim of a RPM agreement in support of a dealer cartel. In *Toledo Mack Truck Sales & Service, Inc. v. Mack Trucks, Inc.*, 2008 WL 2420729 (3d Cir. June 17, 2008), a truck manufacturer refused to offer financial incentives to dealers who did not participate in the cartel. Citing *Leegin*, the court found the evidence of facilitating an illegal horizontal restraint sufficient to support a vertical minimum price-fixing claim even under the rule of reason.

2. Maximum resale price maintenance is also subject to rule-of-reason analysis. *State Oil v. Kahn*, 522 U.S. 3 (1997). A competitor does not have standing to challenge a vertical *maximum* price-fixing agreement unless the agreement results in predatory pricing. *Atlantic Richfield Co. v. USA Petroleum Co.*, 492 U.S. 328 (1990).

D. There Must be an Agreement for a Section 1 Violation.

1. The Requirement

Any violation of Section 1 requires a "contract, combination or conspiracy."[37] The price-fixing agreement must be between the supplier and one or more of its dealers.[38] The requirement of an agreement places suggested unilateral pricing outside the scope of Section 1. *See infra* III.E. The *Colgate* Exception.

2. Plurality of Actors Required.

a. To prove a violation of Section 1, there must be concerted action involving at least two actors.[39]

b. Intra-enterprise combinations are not Section 1 violations.

i. Coordinated action between a corporate parent and its wholly-owned subsidiary is not a violation of Section 1. *Copperweld Corp. v. Independent. Tube Corp.*, 467 U.S. 752 (1984).[40] This is because parent companies and their subsidiaries have a unity of interest. *Cupp v. Alberto-Culver USA, Inc.*, 310 F.Supp.2d 963 (W.D. Tenn. 2004). The difficult question is whether two given entities are a part of the same enterprise. If two agents of a single firm have independent financial interests, then the two agents might be considered separate actors capable of conspiring in violation of Section 1.[41]

ii. In *Visa U.S.A., Inc. v. First Data Corp.*, No. C 02-01786 JSW, 2005 WL 3274105 (N.D. Cal. Aug. 16, 2005), Visa motioned for summary judgment,

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36 "Overview of State RPM (Complete)," accompanying article by Michael A. Lindsay, *Resale Price Maintenance and the World after Leegin*, ANTITRUST, Fall 2007, at 32.

37 *See, e.g.*, Australian Gold v. Hatfield, 436 F.3d 1228 (10th Cir. 2006) (affirming the validity of a contract that withheld the right to terminate the distributorship agreement in the event the dealer deviated from the suggested resale prices); Santana Prod., Inc. v. Bobrick Washroom Equip., Inc., 401 F.3d 1027, 1033 (9th Cir. 2005) ("[An] antitrust plaintiff must first prove concerted action by the defendants."); TRI, Inc. v. Boise Cascade Office Prods., 315 F.3d 915 (8th Cir. 2003) (holding there was no evidence of an agreement among the defendants to restrict the plaintiff's sales and noting that the defendant's lacked any economic motive to conspire to not sell the plaintiff's products); Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320 (5th Cir. 1998) (affirming a grant of summary judgment because the defendant instituted the program unilaterally, and not as part of an agreement); Miles Distribs. v. Specialty Constr. Brands, Inc., 417 F. Supp. 2d 1030 (N.D. Ind. 2006) (finding that plaintiff had plead insufficient evidence of an agreement, despite the fact that supplier had contacted other dealers to find out how they would make up for lost volume if the supplier terminated the price-cutting dealer); Blind Doctor, Inc. v. Hunter Douglas, Inc., No. C-04-2678 MHP, 2004 WL 1976562 (N.D. Cal. Sept. 7, 2004) (holding that the defendant had not engaged in illegal vertical price maintenance because there was no evidence of an agreement to set price and instead the defendant was a "lone manufacturer…acting independently").

38 *See, e.g.,* Pierce v. Ramsay Winch Co., 753 F.2d 416 (5th Cir. 1985); Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894 (5th Cir. 1973); Rochez Bros. Inc. v. N. Am. Salt Co., Inc., 1994-2 Trade Cas. (CCH) ¶ 70,804 (W.D. Pa. 1994) (the alleged conspiracy can be between a manufacturer and the plaintiff dealer).

39 *See, e.g.*, *Ultrasound Imaging Corp. v. Am. Soc'y of Breast Surgeons*, 358 F. Supp. 2d 475, 482 (D. Md. 2005) ("[T]here must be at least two persons acting in concert."); *AT&T Corp. v. JMC Telecom, LLC.*, 470 F.3d 525, 530 (3d. Cir. 2006).

40 *See* Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005) (affirming the dismissal of claims alleging that U-Haul and its independent dealers conspired to fix prices because there was a genuine agency relationship between U-Haul and its dealers); Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1, 309 F.3d 836 (5th Cir. 2002) (holding that a hospital and its managing agent could not conspire to monopolize the outpatient surgical market). *But see* Sullivan v. Nat'l Football League, 34 F.3d 1091, 1099 (1st Cir. 1994) (stating the general rule that two or more actors operating within and for the benefit of the same economic enterprise may constitute an antitrust conspiracy if the alleged conspirators pursue interests different from the interests of the enterprise); Mitchael v. Intracorp, Inc., 179 F.3d 847 (10th Cir. 1999). *Cf.* Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994); Wallis v. Giromex, Inc., No. D039168, 2002 Cal. App. Unpub. LEXIS 11954 (Cal. Ct. App. Dec. 23, 2002).

41 *See, e.g.*, Bolt v. Halifax Med. Center, 891 F.2d 810 (11th Cir. 1990).

arguing that as a single entity it could not possibly conspire with itself. The court found that Visa was not a single entity after discussing the various factors that control the analysis: (1) "the presence of a common, single and unified economic interest", i.e., "common ownership"; (2) whether the entities competed against each other; (3) whether the individual members of each entity separately control the decisions of each entity.

c. Trade Association Conduct as Concerted Action.

i. In *National Hockey League Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462 (6th Cir. 2005), the court held that the NHL members were acting in concert when they acted through the NHL association, citing as important the fact that the association's rules were contrary to the interests of one of the allegedly conspiring defendants.

ii. In a 1995 consent decree, the FTC challenged the actions of two trade associations of juvenile furniture retailers who urged furniture manufacturers not to sell to catalogue sellers who discounted. *In the Matter of New England Juvenile Retailers Ass'n*, 5 Trade Reg. Rep. (CCH) ¶ 23,689 (FTC 1995).

d. Liability after Withdrawing from a Conspiracy.

In an unreported 1999 memorandum and order, an Illinois district court rejected a defendant's contention that he had withdrawn from the conspiracy. The court held that a defendant must communicate his withdrawal to his coconspirators before its withdrawal becomes effective. *United States v. Andreas*, 1999 WL 515484 (N.D. Ill 1999), *aff'd*, 216F.3d 645 (7th Cir. 2000).

4. Proving an Agreement.

a. Circumstantial Proof of an Agreement is Possible.

Direct proof of a written or express agreement is not required to prove an agreement exists. A conspiracy can be inferred from "direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). However, neither conscious parallelism nor other conduct that is "as consistent with permissible competition as with illegal conspiracy" is enough to support an inference of an antitrust conspiracy.[42] To prove an agreement exists, the plaintiff must introduce "direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment designed to achieve an unlawful objective." *Monsanto,* 465 U.S. at 768.

In *Dyno Nobel, Inc. v. Amotech Corp.*, 63 F. Supp. 2d 140 (D.P.R. 1999), the district court, relying on *Monsanto*, rejected Amotech's counterclaim that Dyno Nobel and a third party distributor conspired to control the explosives market. The court concluded that the inference of a conspiracy must be reasonable in light of "competing inferences of independent action." *Id.* at 147.

The Third Circuit noted, however, in *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (3d Cir. 1999), that the plaintiff can normally "exclude the likelihood of independent conduct" if the circumstances indicate that the defendant's actions are contrary to its economic self interest. *Id.* at 1009.

The Ninth Circuit established a two-part test in *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), for when a plaintiff attempts to prove an agreement using only circumstantial evidence. First, the defendant must proffer a legitimate business reason for its activity. If the defendant meets this burden, the plaintiff must then offer

[42] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); *see also* Theater Enter. v. Paramount Film Distrib. Corp., 346 U.S. 537 (1954); Merck-Medco Managed Care, LLC v. Rite Aid Corp., 199-2 Trade Cas. (CCH) ¶ 72,640, at 85,746 (4th Cir. 1999) (stating that the required quantum of evidence to exclude the possibility of independent activity is high where antitrust liability could chill pro-competitive conduct); Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994); The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988); S & S Forage & Equip. Co. v. Up N. Plastics, Inc., 2002 WL 505919 (D. Minn. 2002).

evidence to exclude the possibility that the defendant was merely engaging in independent and permissible competitive behavior.

b. *Monsanto Co.*

The Supreme Court held that evidence of complaints by dealers, followed by the termination of the discounting dealer, without any additional evidence of agreement between the complaining dealers and the manufacturer, was an insufficient basis for finding the existence of an agreement concerning resale prices.

There was direct evidence that the manufacturer approached price cutting dealers and told them that they would not receive adequate supplies of popular new products if they failed to adhere to suggested resale prices. There also was circumstantial evidence of agreement between the manufacturer and dealers: complaints by the manufacturer to other price cutters and subsequent compliance; a meeting among the manufacturer and dealers to "get the market place in order"; and threats to terminate the plaintiff.

The Court was concerned that permitting an agreement to be inferred from complaints by other dealers about price cutting, or even a termination in response to such complaints, could deter legitimate conduct by manufacturers. In particular, there are legitimate reasons for manufacturers and dealers to exchange price information.

The Court established the following guidelines:

(a) an inference of concerted action cannot be based "solely" on evidence that termination of a dealer occurred after the manufacturer received from other dealers "price complaints" involving the terminated dealer;

(b) there must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently;

(c) plaintiff's evidence must prove that the manufacturer and others had a "conscious commitment to a common scheme" or a "meeting of minds" for an unlawful objective or arrangement; and

(d) evidence that other distributors "conformed to the suggested price" is not enough because "evidence must be presented that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id*.

(e) In *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), the Supreme Court interpreted *Monsanto* as also holding that "conduct [that is] as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."

5. Caselaw Examples of Insufficient Evidence of Agreement.

Courts usually conclude that there is insufficient evidence of an agreement and grant motions for summary judgment.[43]

[43] *See, e.g.*, Euromodas, Inc. v. Zanella, Ltd., 368 F.3d 11, 26 (1st Cir. 2004); H.L. Hayden Co. v. Siemens Med. Sys., Inc., 879 F.2d 1005 (2d Cir. 1989) (finding insufficient evidence of an agreement when plaintiff only pled dealer complaints occurred in the lead up to termination of plaintiff-dealer); Parkway Gallery Furniture, Inc., 878 F.2d 801 (4th Cir. 1989) (finding insufficient evidence of an agreement when the only evidence was that the defendant-supplier had formulated its dealing policies with input from other dealers, but had not actually reached agreement on price); Rockholt Furniture, Inc. v. Kincaid Furniture, 188 F.3d 509 (6th Cir. 1999) (unpublished opinion in table of decisions appearing at 1999 WL 717959) (granting summary judgment to defendant, holding that "independent action by a manufacturer in response to distributor's complaints (of price cutting) is permitted under antitrust law"); Campbell v. Austin Air Sys., Ltd., 2005 WL 2405997 (W.D.N.Y. Sept. 29, 2005) (granting defendant-manufacturer summary judgment when plaintiff-dealer failed to prove the defendant-manufacturer terminated the plaintiff under an agreement with the complaining dealers to set prices); Lucas v. Citizens Commc'n, 409 F. Supp. 2d 1206 (D. Haw. 2005) (same); Euromadas Inc v. Zanella, Ltd., 253 F. Supp. 2d 201 (D.P.R. 2003) (finding insufficient evidence of an agreement when the defendant-supplier's termination of plaintiff-dealer was nothing more "than a perfectly legitimate independent business decision"); Ben Sheftall Distrib. Co. v. Mirta de Perales, Inc., 791 F. Supp. 1575 (S.D. Fla. 1992) (finding no agreement when the only evidence was dealer complaints in the lead up to termination of the plaintiff-dealer); Center Video Indus. Co. v. United Media, No. 90-C 6387, 1992 U.S. Dist. (N.D. Ill. 1992), *aff'd*, 995 F.2d 735 (7th Cir. 1993) (granting defendant-supplier summary judgment because plaintiff-dealer had proven only that dealer and defendant-supplier agreed to terminate the plaintiff-dealer, but had not reached an agreement on price); Sancap Abrasives Corp. v. Swiss Indus. Abrasive, 68 F. Supp. 2d 853 (N.D. Ohio 1999), *aff'd*, 19 Fed. Appx. 181 (6th Cir. 2001) (holding that a motive and opportunity to enter agreement does not itself exclude the possibility of independent conduct,

a. In *Garment District v. Belk Store Services, Inc.*, 799 F.2d 905 (4th Cir. 1986), a court found no agreement even though presented with additional evidence besides mere termination. The terminated discount dealer offered evidence showing that a competing dealer had complained to and met with the supplier, and had required the supplier to choose between the discounter and the competing dealer.

b. In *Bailey's, Inc. v. Windsor America, Inc.*, 1991-2 Trade Cas. (CCH) ¶ 69,627 (6th Cir. 1991), the plaintiff was terminated as part of an agreement the supplier reached with its full-service dealer, which had agreed to increase their purchases of equipment if the supplier terminated the plaintiff. The Sixth Circuit dismissed after finding no agreement on resale prices.

c. In *Jeffers Vet Supply v. Rose Am. Corp.*, 75 F. Supp. 2d 1332 (M.D. Ala. 1999), the defendant's pricing policy stated that it would "unilaterally" terminate any dealer that failed to sell its products for less than ninety percent of the suggested resale price. The defendant also assisted its dealers in calculating its sales prices under the policy. The district court held that the pricing policy constituted permissible contact between manufactures and dealers under the *Colgate* doctrine.

d. In *Miles Distributors, Inc. v. Specialty Construction Brands, Inc.*, 476 F.3d 442 (7th Cir. 2007), the court granted summary judgment to the defendant, holding there was insufficient evidence of an agreement when the defendant-manufacturer terminated the price-cutting dealer in response to dealer complaints, despite the fact that the defendant-manufacturer had asked the complaining dealers if they could make up for the lost volume in sales if it terminated the price-cutting dealer.

e. In *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249 (10th Cir. 2006), the court found that there was not sufficient evidence of an agreement between an insurance company and a group of its network providers, despite the fact that the insurance company admitted to responding to the group's objections when considering whether or not to panel the plaintiffs.

6. Caselaw Examples of Sufficient Evidence of Agreement.

Occasionally courts find sufficient evidence of concerted action to present a jury question.

a. In *Alvord Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), the court found sufficient evidence of conspiracy to preclude summary judgment. A wallpaper supplier had imposed a 7% "drop shipment" charge on orders placed by customers of the discounting dealers to discourage customers from free-riding on the services of full-price dealers. Although the supplier had a legitimate unilateral reason for imposing the charge, the court concluded that a jury could find that explanation to be pretextual as the supplier failed to perform any accounting analysis to support the 7% figure and internal memos stated that it wanted to support full service dealers by punishing discounters.

b. In *Big Apple BMW v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), the court concluded that plaintiff had proffered sufficient evidence to withstand summary judgment when the evidence suggested that BMW had encouraged plaintiff to acquire a dealership, but when local dealers complained based on plaintiff's reputation as a discount/high volume dealer, BMW later denied plaintiff a franchise on pretextual grounds. In the court's view, the absence of evidence of an agreement on price was relevant only to whether the *per se* rule applied. "Even if this case is on all fours with *Sharp*, the [plaintiff] may still proceed to a jury trial under the rule of reason."

c. In *McCabe's Furniture v. La-Z-Boy Chair*, 798 F.2d 323 (8th Cir. 1986), the court held there was a jury question when a price cutter was terminated and the manufacturer informed the complaining dealer that the problem "had been taken care of."

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and finding that defendant-supplier's termination of dealer-plaintiff was in defendant's independent economic self-interest)

3 605 Vertical Restraints.DOC

d. In *Helicopter Support Systems v Hughes Helicopter, Inc.*, 818 F.2d 1530 (11th Cir. 1987), the court held there was a jury question when a manufacturer notified a competing dealer that "corrective action has been taken" and asked that it be advised of other problems.

7. Existence of a Horizontal Agreement.

Plaintiffs might be able to avoid the rule of reason if they can prove the existence of a horizontal (as opposed to a vertical) agreement among competing dealers.[44]

a. In *Lovett v. General Motors Corp.*, 769 F. Supp. 1506 (D. Minn. 1991), *aff'd on certain grounds*, 975 F.2d 518 (8th Cir. 1992), *rev'd on other grounds*, 998 F.2d 575 (8th Cir. 1993), plaintiffs alleged that various competing dealers conspired with GM to reduce the number of cars GM supplied to the plaintiff. The district court reasoned that the rule of reason analysis applied only in *vertical* restraint cases, in contrast to the horizontal conspiracy it believed existed between GM and the competing dealers. It concluded, therefore, that the *per se* rule was properly applied. Without addressing whether the arrangement was horizontal (*per se* analysis) or vertical (rule of reason analysis), the Eighth Circuit reversed the district court's denial of GM's JNOV motion on the grounds that the dealer failed to produce evidence showing that GM's conduct was as consistent with permissible competition as with illegal conspiracy. *See also ES Development Inc. v. RWM Enterprises, Inc.,* 939 F.2d 547 (8th Cir. 1991) (finding a per se illegal horizontal conspiracy when car dealers pressured suppliers to prevent competing dealers from entering the market).

b. In *Big Apple BMW v. BMW of North America, Inc.*, 974 F.2d 1358 (3d Cir. 1992), the court relied in part on proof of a horizontal conspiracy among competing BMW dealers to deny plaintiff a BMW franchise because of plaintiff's reputation as a discount/high volume dealer.

d. In *Alvord Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994), the court reversed a grant of summary judgment, holding that a reasonable jury could find a horizontal conspiracy among members of an association of full-service wallpaper dealers to compel manufacturers to boycott discount wallpaper dealers. The court considered whether the actions of the association's officers could be imputed to the association as a whole and constitute collective action by the retail dealers. The court concluded that a jury could find that a statement by one of the association's officers constituted a threat by the association (and its members) to boycott manufacturers who supplied the discounting dealers.[45]

E. The *Colgate* Exception

1. The *Colgate* Doctrine.

a. Under *United States v. Colgate*, 250 U.S. 300 (1919), a supplier's unilateral refusal to sell to a dealer does not violate Section 1 of the Sherman Antitrust Act. This is true even when the supplier refuses to deal with a dealer because the dealer has violated the supplier's announced pricing policy. The *Colgate* Doctrine stems from the requirement of an "agreement" for a violation of Section 1, and should be considered an application of the *Monsanto* Doctrine.

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[44] *See, e.g.*, Aventis Envtl. Sci. USA LP v. Scotts Co., 2005 W.L. 82133 (S.D. N.Y. 2005); N. Jackson Pharmacy Inc. v. Express Scripts Inc., 345 F. Supp. 2nd 1279 (N.D. Ala. 2004) (holding that a restraint that is only facially vertical, but is created by a horizontal agreement, is actually a horizontal restraint). *But see* Thompson Everett, Inc. v. Nat. Cable Adver. L.P., 850 F. Supp. 470, 480 (E.D. Va. 1994) (finding that frequent business contact among the defendant [horizontal competitors], joint presentations to industry trade groups were insufficient evidence of concerted action by the defendants). *Accord* Lake Hill Motors, Inc. v. Yamaha Motor Co., 1999-2 Trade Cas. (CCH) ¶72,653 (N.D. Miss. 1999), *aff'd sub. nom.*, Lake Hill Motors, Inc. v. Jim Bennett Yacht Sales, Inc., 246 F.3d 752 (5th Cir. 2001) (plaintiff failed to sow conspiracy); Nichols Motorcycle Supply, Inc. v. Dunlop Tire Corp., 913 F. Supp 1088 (N.D. Ill. 1995) (dealer's claim that it was terminated pursuant to a conspiracy among the manufacturer and competing dealers judged under the rule of reason; no adverse effect on competition shown); Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217 (7th Cir. 1993) (finding a horizontal agreement among competing boat dealers to exclude a discounting dealer, and holding that the participation of the operator of the boat shows in the conspiracy did not convert the conspiracy into a vertical one).

[45] *Accord* AAA Venetian Blind Sales, Inc. v. Beaulieu of America, 1995 U.S. Dist. LEXIS 11243 (W.D. Mich. 1995) (district court denied defendants' motion for summary judgment on the ground that there was sufficient evidence of conspiracy among competing dealers and the manufacturer to cut off supplies to the plaintiff/dealer); Hewlett-Packard Co. v. Arch Assoc. Corp., 1995-2 Trade Cas. (CCH) ¶ 71,201 (E.D. Pa. 1995) (dealer adequately alleged conspiracy among manufacturer and its dealers to restrict sales by each dealer to particular areas).

3 605 Vertical Restraints.DOC

Since the Court's decision in *Leegin*, however, the *Colgate* doctrine has become less significant. Prior to *Leegin*, retail price maintenance agreements were held to be *per se* unlawful. Therefore, defendants who were accused of price fixing could only argue that there was no explicit agreement between the supplier and dealer in regards to the price of the product. Since RPM agreements are now subject to the rule of reason, defendants can argue that no agreement exists, or, in the alternative, that the agreement is still lawful.

b. A supplier can, to some extent, "persuade" dealers to adhere to resale price guidelines. However, a supplier must be careful to refrain from any acts that could be considered an attempt to induce agreement by the dealer to a RPM. *See infra* III.E.4. The issue that typically is litigated is whether the supplier has gone beyond simple unilateral conduct and induced/coerced dealers into agreement.

2. Section 2 Claims.

While a supplier's refusal to deal is not prohibited by Section 1, that refusal to deal still might be actionable *under Section 2*. Specifically, Section 2 prohibits a supplier's refusal to deal if the supplier has the intent to create or maintain a monopoly. *E.g.*, *Lorain Journal*. A refusal to deal is most likely to be considered attempted monopolization when the supplier denies a dealer access to an "essential facility." *E.g.*, *Aspen*.

3. Concerted Refusals to Deal.

If competing suppliers agree to refuse to deal with a dealer, then a potentially anticompetitive agreement exists (unlike in the context of *unilateral* refusals to deal). Thus, Section 1 can attach liability to concerted refusals to deal. *See infra* IV.F.

4. Going Beyond *Colgate*: the *Parke, Davis* Limits.

a. A supplier that coerces a dealer to adhere to particular prices is considered to have induced an agreement. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).[46] Attempts to influence buyers to adhere to price fixing schemes though "exposition, persuasion, and argument" are not necessarily considered agreements. [47] Under *Leegin*, only explicit RPM agreements are subject to rule of reason analysis.

b. The line between persuasion under the *Colgate* Doctrine and coercion is difficult to draw. Coercion includes: requiring advanced supplier approval of a dealer's deviation from suggested price[48]; supplier's threats to impose penalties for violations of suggested pricing[49]; imposing penalties besides termination of dealership[50].

d. An April 1992 Federal Trade Commission ("FTC") modification of a consent order showed the continued vitality of the *Colgate* Doctrine. In *U.S. Pioneer Electronics Corp.*, Docket No. C-2755 (April 8, 1992),

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46 *See* Merck-Medco Managed Care, 1999-2 Trade Cas. (CCH) ¶ 72,640 (4th Cir. 1999); Americom Distrib. Corp. v. ACS Commc'ns, Inc., 990 F.2d 223 (5th Cir. 1993) (holding that termination of plaintiff-dealer was taken unilaterally); Holabird Sports Discounters v. Tennis Tutor, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,214, 70,005 (4th Cir. 1993) (dismissing plaintiff's claim for failure to prove an agreement because plaintiff "failed to identify sufficient evidence tending to exclude the possibility that [the manufacturer and other] dealers acted independently with regard to the advertising restrictions"); Holabird Sorts Discounters v. Tennis Tutor, Inc., 1993-1 Trade Cas. (CCH) ¶ 70,214 (4th Cir. 1993); Butcher Co. v. Bouthot, 2000 WL 1478400 (D. Me. 2000) (dismissing plaintiff's claims for failure to allege evidence that could prove an agreement); Jeffers Vet Supply, Inc. v. Rose Am. Corp., 75 F. Supp. 2d 1332 (M.D. Ala. 1999) (granting summary judgment to defendant-manufacturer when defendant's policy of terminating discounters was unilateral); Sancap Abrasives Corp., v. Swiss Indus. Abrasives Group, 68 F. Supp. 2d 853 (N.D. Ohio 1999) (finding insufficient evidence of an agreement when terminated plaintiff-dealer had not presented sufficient evidence to show that the defendant was not acting in its independent economic self interest); Glacier Optical, Inc. v. Optique DuMonde, Ltd., 816 F. Supp. 646 (D. Or. 1993); Sports & Travel Mktg. v. Chicago Cutlery, 811 F. Supp. 1372, 1384 (D. Minn. 1993) (dismissing the claim of a terminated dealer because the evidence did not "tend to exclude the possibility of independent action").

47 *See, e.g.*, MCM Partners v. Andrews-Bartlett & Assoc., 62 F.3d 967 (7th Cir. 1995); Aquaire v. Canada Dry Bottling Co., 24 F.3d 401 (2d Cir. 1994); Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980); Sargent-Welch Sci. Co. v. Ventron Corp., 567 F.2d 701 (7th Cir. 1977); Knutson v. Daily Review, Inc., 548 F.2d 795 (9th Cir. 1976).

48 *See, e.g.*, Bender v. Southland Corp., 749 F.2d 1205 (6th Cir. 1984); Pitchford Scient. Instr. Corp. v. PEPI, Inc., 531 F.2d 92 (3d Cir. 1975).

49 *See, e.g.*, *Albrecht*, 390 U.S. at 149; Yentsch v. Texaco, Inc., 630 F.2d 46 (2d Cir. 1980); Bowen v. N.Y. News, Inc., 522 F.2d 1242 (2d Cir. 1975); Greene v. Gen. Foods. Corp., 517 F.2d 635 (5th Cir. 1975); Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir. 1975).

50 *See, e.g.*, Isaksen v. Vt. Castings Inc.; Bender v. Southland Corp., 749 F.2d 1205 (6th Cir. 1984).

3 605 Vertical Restraints.DOC

modifying 86 F.T.C. 1002 (1975), the FTC issued an order modifying a 1975 consent order against Pioneer. The FTC, on its own motion, modified the original order to allow Pioneer to terminate a dealer who sells Pioneer products at prices Pioneer does not find acceptable. *Accord, e.g., London Fog Indus.,* No. C-2929 (March 28, 1995) (order modified to permit unilateral terminations for failure to adhere to previously announced resale prices; also allows price restrictive coop advertising programs).

e. The former Acting Director of the Bureau of Competition of the FTC stated that "three strikes and you're out" programs are being closely scrutinized because there might be an implied agreement if the dealer takes advantage of an opportunity to "cure" its pricing problems. Mary Lou Steptoe, *FTC Vertical Enforcement* (Nov. 4, 1994). *See Reebok International Ltd, et al.,* 5 Trade Reg. Rep. (CCH) ¶ 23,813 (FTC 1995) (FTC challenge to Reebok's three-strikes policy leading to Reebok settlement).

F. Variations on the Basic RPM Agreement.

1. Arrangements With Agents.

a. Genuine Agency Relationships.

The *per se* rule does not apply to "genuine agency relationships" such as arrangements between a supplier and its sales agents or manufacturer representatives.[51] *See also supra* III.D.3 for discussion on intra-enterprise conspiracies.

b. Relationships With Consignment Agents.

(i) *True Consignment Arrangements*. Consignment arrangements do not violate Section 1 if title to the product actually remains with the manufacturer who sets resale prices.[52] *United States v. General Electric Co.*, 272 U.S. 476, 488 (1926). In other words, where a supplier consigns his own products to a dealer and does not transfer title to the dealer, the supplier can, with impunity, establish the price at which the dealer must sell the product.

(ii) *Sham Consignment Arrangements*. Sham consignment arrangements, where the dealer assumes the risk of loss, will not be a basis for avoiding liability under Section 1. *See, e.g.*, *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).[53] Rather, sham consignment arrangements will likely be analyzed under the rule of reason.

2. Suggested Resale Prices.

A supplier may suggest resale list prices to its dealers. *See Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752, 761 (1984). No violation of Section 1 occurs if distributors independently

[51] *See, e.g.*, United States v. Gen. Elec. Co., 272 U.S. 476 (1926); Simpson v. Union Oil, ; Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005); Ill. Corp. Travel v. Am. Airlines, Inc., 1986-2 Trade Cas. (CCH) ¶ 67,362 (7th Cir. 1986); Credit Bureau Reports, Inc. v. Retail Credit Co., 476 F.2d 989 (5th Cir. 1973); Pogue v. Int'l Indus., Inc., 524 F.2d 342 (6th Cir. 1975); Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623 (4th Cir. 1977).

[52] *See, e.g.*, Day v. Taylor, 400 F.3d 1272 (11th Cir. 2005) (affirming the dismissal of claims alleging that U-Haul and its independent dealers conspired to fix prices because there was a genuine agency relationship between U-Haul and its dealers); Ozark Heartland Elec., Inc. v. Radio Shack, 278 F.3d 759 (8th Cir. 2001) (affirming dismissal because plaintiff merely received orders in exchange for a commission and never brought or sold the products at issue); Ill. Corp. Travel, Inc. v. Am. Airlines, 889 F.2d 751, 752 (7th Cir. 1989) (finding that travel agents are "agents" of airlines when selling tickets for airlines' accounts); Kowalski v. Chicago Tribune Co., 854 F.2d 168, 172 (7th Cir. 1988); Ill. Corp. Travel, Inc. v. Am. Airlines, 806 F.2d 722, 724, 729 (7th Cir. 1986); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1436 (7th Cir. 1986); Mesirow v. Pepperidge Farm, 703 F.2d 339, 341-43 (9th Cir. 1983); Marty's Floor Covering Co. v. GAF Corp., 604 F.2d 266, 269 (4th Cir. 1979); Harwick v. Nu-Way Oil Co., 589 F.2d 806, 808-11 (5th Cir. 1979); Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623, 627-28 (4th Cir. 1977); Pogue v. Int'l Indus., 524 F.2d 342, 345 (6th Cir. 1975); Am. Oil Co. v. McMullin, 508 F.2d 1345, 1351-52 (10th Cir. 1975); Miller v. W.H. Bristow, Inc., 739 F. Supp. 1044, 1052-54 (D.S.C. 1990) (listing factors in identifying true consignment arrangement); Ally Gargano/MCA Adver., Ltd. v. Cooke Prop., Inc. 1989-2 Trade Cas. (CCH) ¶ 68,817 (S.D.N.Y. 1989); N. Am. Produce Corp. v. Nick Penachio Co., 705 F. Supp. 746, 750 (E.D. N.Y. 1988); Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 868-87 (D. Del. 1987); U.S. v. Yoder Bros., 1989-2 Trade Cas. (CCH) ¶ 68,723 (N.D. Ohio 1986); Goldinger v. Boron Oil Co., 375 F. Supp. 400, 406-09 (W.D. Pa. 1974), *aff'd without published opinion*, 511 F.2d 1393 (3d Cir.); Loom Crafters, Inc. v. New Cent. Jute Mills Co., 1971 Trade Cas. (CCH) ¶ 73,734 (S.D.N.Y. 1971). *But see* Greene v. Gen. Foods Corp., 517 F.2d 635, 652-53 (5th Cir. 1975) (Simpson outlaws resale price maintenance in consignment arrangement when risk largely borne by otherwise independent distributors).

[53] *See also* Greene v. Gen. Foods Corp., 517 F.2d 635 (5th Cir. 1975); Roberts v. Exxon Corp., 427 F. Supp. 389 (W.D. La. 1977); United States v. Gen. Elec. Co., 358 F. Supp. 731 (S.D.N.Y. 1973).

decide to observe suggested resale prices.[54] Permissible suggested resale prices can take several different forms including:

- Providing price lists of suggested resale prices;[55]
- Printing suggested resale prices on an item or attaching premarked suggested price tags; [56]
- Advertising by supplier that uses suggested resale prices.[57]

In one remarkable case, a court dismissed a dealer's complaint for failure to allege sufficient coercion, although the franchiser's representatives entered the ice cream store and physically changed the displayed prices and cash register prices to conform to the manufacturer's "suggested" resale prices. The court found that this "single act of harassment" was insufficient to establish agreement, absent threats of termination or other adverse consequences of non-compliance. *Curry v. Steve's Franchise Co.*, 1985-2 Trade Cas. (CCH) ¶ 66,877 (D. Mass. 1985).

3. Promotions to Reduce Resale Prices.

[54] *See, e.g.*, Mularkey v. Holsum Bakery, Inc., 146 F.3d 1064 (9th Cir. 1998) (finding valid under the rule reason an agreement between a bread manufacturer and its retailer to set a default price, which would prevail if the retailer were not instructed by the distributor to set a different price); Winn v. Edna Hibel Corp., 858 F.2d 1517 (11th Cir. 1988); AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1023 (10th Cir. 1982) (holding that supplier's requirement that the dealer pass discount through to customers was not "coercion" and thus there was no RPM); Gen. Cinema Corp. v. Buena Vista Distrib. Co., 681 F.2d 594 (9th Cir. 1982); Yentsch v. Texaco, Inc., 630 F.2d 46, 53 (2d Cir. 1980); Santa Clara Valley Distrib. Co. v. Pabst Brewing Co., 556 F.2d 942 (9th Cir. 1977); Campbell v. Austin Air Sys., Ltd., 2005-2 Trade Cas. (CCH) ¶ 75,023 (W.D.N.Y. Sept. 29, 2005); Kingray, Inc. v. N. Basketball Assoc., Inc., 188 F.Supp.2d 1177 (S.D. Ca. 2002); Lubbock Beverage Co. v. Miller Brewing Co., 2002-2 Trade Cas. (CCH) ¶ 73,767 (N.D. Tex. 2002).

[55] *See, e.g.*, Isaksen v. Vt. Castings, Inc., 825 F.2d 1158 (7th Cir. 1985); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964); Campbell v. Austin Air Sys., Ltd., 2005-2 Trade Cas. (CCH) ¶ 75,023 (W.D.N.Y. Sept. 29, 2005) (finding no agreement to fix prices when supplier required that the dealer list its price in its advertisements and also required that the dealer's advertised price be greater than the supplier's required price); United States v. O.M. Scott & Sons, 303 F. Supp. 141 (D.D.C. 1969).

[56] *See, e.g.*, Klein v. Am. Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963); Regina Corp. v. FTC, 322 F.2d 765 (3d Cir. 1963); Mesirow v. Pepperidge Farm Inc., 1981-2 Trade Cas. (CCH) ¶ 64,292 (N.D. Cal. 1981), *aff'd*, 703 F.2d 339 (9th Cir.); Belk-Avery, Inc. v. Henry I. Siegel Co., 457 F. Supp. 1330 (M.D. Ala. 1978).

[57] *See, e.g.*, Acquaire v. Ca. Dry Bottling Co., 24 F.3d 401 (2d Cir. 1994); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984); Dunn v. Phoenix Newspapers, Inc., 735 F.2d 1184 (9th Cir. 1984); Martindell v. News Group Publ'n, Inc., 621 F. Supp. 672 (E.D.N.Y. 1985); United States v. O.M. Scott & Sons Co., 303 F. Supp. 141 (D.D.C. 1969); Engbrecht v. Dairy Queen Co., 203 F. Supp. 714 (D. Kan. 1962).

Promotional programs that reduce prices to dealers are not subject to antitrust scrutiny if the dealer is free to determine whether or not to reduce its resale prices.[58] Permissible promotional programs can take several different forms including:

a. Programs in which manufacturers provide rebates directly to customers have been upheld where the dealer remains free to set the price to the customer.[59]

b. Dealer assistance programs involving temporary wholesale price reductions that permit dealers to meet low retail prices charged by competitors have been permitted.[60]

c. A supplier can ensure that participating distributors pass along promotional allowances to customers by requiring that the distributors obtain customer signatures on a pre-printed invoice that lists wholesale prices for both promotional and nonpromotional items. [61]

d. A supplier can condition a reduction in wholesale prices to a dealer on that dealer's agreement to reduce similar retail prices.[62]

e. It is lawful for a manufacturer/franchiser to advertise resale prices and the dealer/franchisees from whom the product is available.[63]

[58] *See, e.g.*, Aquaire v. Can. Dry Bottling Co. 24 F.3d 401 (2d Cir. 1994); Akzo N.V. v. U.S. Int'l Trade Comm'n, 808 F.2d 1471 (Fed. Cir. 1986); Santa Clara Valley Distrib. Co. v. Pabst Brewing Co., 556 F.2d 942 (9th Cir. 1977); FLM Collision Parts, Inc., v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976); O.M. Droney Beverage Co. v. Miller Brewing Co., 365 F. Supp. 1067, 1072 (D. Minn. 1973).

[59] *See, e.g.*, Checker Motors Corp. v. Chrysler Corp., 283 F. Supp. 876 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir. 1968). *Cf.* Merit Motors, Inc. v. Chrysler Corp., 417 F. Supp. 263 (D.D.C. 1976), aff'd, 569 F.2d 666 (D.C. Cir. 1977); Armstrong Cork, 104 F.T.C. 540 (1984).

[60] *See, e.g.*, Lattice Semiconductor Corp. v. Interface Elec. Corp., 1994-2 Trade Cases (CCH) ¶ 70,779 (9th Cir. 1994); Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976).

[61] *See, e.g.*, Aquaire v. Can. Dry Bottling Co., 24 F.3d 401, 410 (2d Cir. 1994).

[62] *See, e.g.*, Lewis Serv. Cntr., Inc. v. Mack Trucks, Inc., 714 F.2d 842 (8th Cir. 1983); AAA Liquors Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203 (10th Cir. 1982).

[63] *See, e.g.*, Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984).

f. Franchisers have been permitted to deny cooperative advertising benefits to franchisees who refuse to adhere to suggested resale prices.[64]

g. However, the consent decree in the *Playmobil* case prohibits the manufacturer from withholding advertising rebates from discounting dealers. [65]

h. In 1999, the plaintiff in *Lake Hill Motors, Inc. v. Yamaha Motor Co.*, 1999-2 Trade Cas. (CCH) ¶ 72,653 (N.D. Miss. 1999), alleged that Yamaha threatened to deny reimbursements unless it ceased selling below Yamaha's suggested retail price. The district court granted Yamaha's motion for summary judgment after concluding that the plaintiff failed to prove an anticompetitive effect of the alleged agreement.

On appeal, the Fifth Circuit affirmed the district court's grant of summary judgment. Reviewing the judgment de novo, the court found that Lake Hill had failed to show any injury or threat of injury pursuant to its resale price maintenance claim.[66]

4. Restrictions on Pricing Freedom.

a. In *Great Clips, Inc. v. Levine*, 1991-2 Trade Cas. (CCH) ¶ 69,627 (D. Minn. 1991), a Minnesota district court upheld a vertical restraint that restricted a dealer's pricing freedom. The supplier did not set a specific retail price, but the dealer was required to charge one price for its services to all of its customers, and that price had to be an even dollar amount. The court acknowledged that the policy restricted the franchisees' pricing freedom, but found that it had no anticompetitive effects. In a subsequent decision, the court upheld a slightly more restrictive policy, which limited the number of days on which a franchisee could discount from even dollar prices. 1993-2 Trade Cas. (CCH) ¶ 70,390 (D. Minn. 1993).

[64] *See, e.g., In re* Nissan Antitrust Litig., 577 F.2d 910 (5th Cir. 1978).

[65] *See, e.g.*, United States v. Playmobil, U.S.A., Inc., 1995-1 Trade Cases (CCH) ¶ 71,000 (D.D.C. 1995).

[66] *See, e.g.*, Lake Hill Motors, Inc v. Jim Bennett Yacht Sales, Inc., 246 F.3d 752 (5th Cir. 2001).

b. In *United States v. Delta Dental*, 1997-2 Trade Cas. (CCH) ¶ 71,860 (D.R.I. 1997), a consent decree, Rhode Island's largest dental insurer, Delta Dental, agreed to cease maintaining, adopting or enforcing in its agreements with dentists a most-favored nation (MFN) clause designed to ensure that Delta Dental enjoyed the benefit of the lowest prices the dentists charged to any other insurance plan. According to DOJ, the effect of the MFN clause was to prevent other plans that wanted to offer patients lower prices from forming competitive networks of dentists. Most dentists were members of Delta Dental and were unwilling to suffer the income loss that would result if they had to lower prices to Delta Dental as well.

c. In 1999, Medical Mutual of Ohio entered into a consent decree with the DOJ requiring it cease enforcement of a "most favored rates requirement." The condition had required participating hospitals to charge third party payors rates that are equal to or higher than the rates charged to Medical Mutual. *United States v. Medical Mutual*, 1999-1 Trade Cas. (CCH) ¶72,465 (N.D. Ohio 1999).

5. Maximum Resale Pricing.

In *State Oil Co. v. Khan*, 118 S. Ct. 275 (1997), the Court overruled *Albrecht v. Herald Co.,* 390 U.S. 145 (1968),[67] and applied a rule of reason analysis to maximum resale pricing. The plaintiff in *Khan* had an agreement with the defendant to lease and operate a gas station and convenience store. The defendant allowed the plaintiff to sell gasoline purchased from the defendant at any price as long as any revenues in excess of the suggested retail price were rebated back to the defendant. The Court held that maximum resale pricing outlined by this agreement was not *per se* illegal because low prices always

[67] In *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), the Supreme Court held that the *per se* rule against resale price maintenance encompasses agreements establishing maximum resale prices. The Supreme Court stated "agreements to fix maximum prices 'no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'" *Id.* at 152. In its holding in *Albrecht*, the Supreme Court quoted its earlier decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213, (1951), which held that horizontal agreements to fix maximum prices were *per se* illegal.

benefit consumers unless they are set at predatory levels. Furthermore, suppliers have an economic incentive not to overuse maximum resale price maintenance and only monopolist suppliers can reduce dealer margins below the competitive level.

6. Minimum Advertised Prices.

a. Overview.

Under a minimum advertised price program, a supplier warns a dealer not to advertise the supplier's product below a specified price, although the dealer remains free to charge any price it wants once a customer walks in the door. Suppliers sometimes enforce a minimum advertised price by refusing to share the cost of cooperative advertising with dealers who advertise at some lower price. Suppliers also sometimes terminate dealers who violate the policy.

b. Minimum Advertised Price Programs Subject to Rule of Reason.

A company's adoption and enforcement of a minimum advertised price policy will not be subject to Section 1 if it is unilateral.[68] However, if that policy is deemed to be concerted, the results are somewhat more difficult to predict. Both the FTC in recent Guidelines and courts have suggested that minimum advertised pricing programs should be analyzed under the rule of reason.

c. The FTC Guides.

On August 17, 1990, the FTC published its revised "Guides for Advertising Allowances and Other Merchandising Payments and Services" to help businesses comply with the requirements of Sections 2(d) and 2(e) of the Robinson-Patman Act[69] regarding a supplier's use of promotional allowances or services to assist its dealers in reselling the supplier's products. *See* 55 Fed. Reg. ¶ 33,651 (August 17, 1990).[70] Sections 2(d) and 2(e) are designed to prohibit suppliers from providing promotional payments or services to its dealers reselling its products *unless* the supplier also makes the promotional payments or services available to competing dealers on proportionally equal terms.

In the revised Guide, the FTC stated that a supplier's decision to condition availability of cooperative advertising funds on the dealer's use of the supplier's suggested retail price in advertisements paid for through the cooperative advertising funds should be analyzed under the rule of reason and deemed illegal only where it is shown to injure competition. [71]

d. *FTC Rulings*. In *In the Matter of U.S. Pioneer Electronics Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 23,172 (F.T.C. 1992), *modifying* 86 F.T.C. 1002 (1975), the FTC allowed Pioneer to terminate dealers who advertise below its suggested retail prices. The FTC modified a 1975 consent decree allowing Pioneer to impose minimum advertised prices on its dealers (as distinguished from minimum sale prices). While noting that the particular provision governing minimum advertising price programs were part of an overall scheme regulating retail price maintenance, the FTC permitted the modification because other firms in the industry were engaging in cooperative advertising programs which are legal outside of a resale price maintenance scheme.[72] *Accord In the Matter of London Fog Indus.*, No. C-2929 (March 28, 1995).

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[68] *Cf.* Russell Stover Candies, Inc. v. FTC, 718 F.2d 256 (8th Cir. 1983).

[69] 15 U.S.C. §§ 13 - 13b, 21a (1988). The principal provision of the Robinson-Patman Act is Section 2(a), which bans direct or indirect discrimination in price when a specified competitive injury might result. Sections 2(d) and 2(e) are intended as complements to Section 2(a). Sections 2(d) and 2(e) are virtually *per se* sections and, unlike Section 2(a), do not require proof of likely adverse competitive effects nor do they permit a cost justification defense.

[70] The Guides are not binding regulations but, rather, advisory interpretations providing assistance to businesses seeking to comply with Sections 2(d) and 2(e) of the Robinson-Patman Act.

[71] Mary Lou Steptoe, then Acting Director of the FTC's Bureau of Competition, stated that genuine cooperative advertising programs will evaluated under the rule of reason, but "where it appears that that agreements on minimum advertised price levels are part of an RPM agreement, they may be *per se* illegal." Mary Lou Steptoe, Speech Before the ABA Antitrust Section (Nov. 4, 1994) *reported in* Antitrust & Trade Reg. Rpt. (BNA) Vol. 67, No. 1689, at p. 586 (Nov. 17, 1994).

e. DOJ's *Playmobil* consent decree includes a prohibition on any co-op advertising program that gives lower rebates to dealers who advertise undesirable prices. 60 Fed. Reg. 9862 (1995).

f. In May 2000, the FTC accepted proposed consent decrees from the five largest distributors of prerecorded music settling charges that the companies' MAP programs violated Section 5. The FTC alleged the companies' policies, which required retailers seeking cooperative advertising funds to observe distributors' minimum advertised prices, effectively precluded many retailers from communicating prices below MAP to their consumers. Although the programs were not *per se* illegal, the FTC did conclude that the programs went well beyond typical cooperative advertising programs and facilitated interdependent conduct. In August 2000, the music companies and selected retailers settled a state attorneys general case, alleging that the MAP programs were instruments for price collusion for $143 million and injunctive relief. *See 30 States Attack Price Collusion by Music Distributors and Retailers*, 79 Trade Reg. Rep (CCH) 1971 (Aug. 11, 2000).

g. *Courts Support Rule of Reason Approach.* In *Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), the Fifth Circuit held that an automobile manufacturer's requirement that a dealer's cooperative advertising use the manufacturer's suggested resale price or no price at all should be analyzed under the rule of reason. The Fifth Circuit further held that the automobile manufacturer's advertising requirement was lawful under a rule of reason analysis because the manufacturer's requirement was supported by sound business judgment and federal statute required the manufacturer to affix a suggested retail price sticker to each new car which is to be sold in the retail market.[73]

[72] *But see Amway Corp.,* 93 F.T.C. 619 (1979). In *Amway Corp.*, the FTC disapproved Amway advertising rules which required dealers to use Amway-approved ad mats and scripts which did not include a space for an advertised price. The FTC concluded that these rules helped maintain Amway's prior policy of resale price maintenance which should be prohibited.

h. *State Enforcement.* MAP is an enforcement priority for NAAG, which regards minimum advertised price co-op advertising programs as per se illegal. NAAG will challenge if MAP is used to support an RPM policy.

(i) *What is Analyzed Under the Rule of Reason.* In analyzing a minimum advertising price program under a rule of reason, the court will consider various factors including (1) the manufacturer's justification for the advertising policy, (2) the manufacturer's market share and market power with regards to each product to which the advertising program is applied, (3) the importance of price advertising to competition in the sale of such products, and (4) the ability of dealers to convey price information to consumers by other means.[74]

(iii) A manufacturer does not violate Section 1 by failing to renew its distributorship agreement if the distributor cannot show that an antitrust injury occurred because of a decrease in competition.[75]

IV. VERTICAL NON-PRICE RESTRAINTS

This Section reviews the non-price restrictions suppliers place on dealers in reselling the supplier's products. Just like vertical price restrictions, see *supra* Section III, vertical non-price restrictions are also assessed under the rule of reason. This Section starts with (A) the policy and black letter law that generally structures non-price restraint doctrine. The Section then discusses the application of that doctrine to specific types of non-price agreements: (B) exclusive distributorships; (C)

[73] A number of courts have applied the rule of reason to a manufacturer's price-related policies that are intended to, and may in fact influence, dealers' resale prices, but leave dealers free to resell at whatever price they choose. *See, e.g., AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982) (manufacturer's requirement that dealer which received discount pass it on to dealer's customers does not violate Section 1 because dealer retained freedom to set own resale prices and decide whether to accept discount); *see also* Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976).

[74] *See, e.g.*, N. Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978).

[75] *See* Gen. Elec. Co. v. Latin Am. Imports, 227 F. Supp. 2d 685 (W.D. Ky 2002) (granting G.E.'s motion for summary judgment and holding that the concept of an antitrust injury requires a plaintiff to show that his injuries are the result of anticompetitive behavior).

territorial and customer restrictions; (D) restrictions under a dual distribution system; (E) location clauses, areas of primary responsibility, and profit pass-over arrangements; (F) group boycotts; (G) vertical bid rigging.

A. General Standards for Non-Price Vertical Restraints.

1. Competitive Effects of Non-Price Restraints.

a. Potential Competitive Effects.

Non-price vertical restraints frequently increase overall competition by promoting interbrand competition more than they reduce intrabrand competition. Non-price vertical restraints may (1) enable distributors to strengthen their organizations and compete more effectively with distributors of competitive products; (2) lower distribution costs by enabling each distributor to make the investment in its distributorship necessary to obtain economies of scale; (3) enable suppliers to obtain and retain stronger distributors strengthening its distribution system; (4) lead to improved product quality, service and safety by fostering close, long-term relationships between suppliers and distributors; and (5) facilitate entry of a new producer into a market by enabling distributors to recover initial market development costs.

b. Potential Anticompetitive Effects.

Although non-price vertical restraints generally have procompetitive effects, in some cases they may (1) eliminate or reduce intrabrand competition, (2) allow the prices of other brands to rise thereby reducing interbrand competition, or (3) facilitate collusion among competitors.[76]

[76] For example, dealers may induce all or almost all suppliers of a product to award exclusive territories. This could facilitate collusion among dealers by limiting the number of dealers that must agree to fix prices or restrict output and by protecting colluding dealers within a geographic market from the threat of outside competition in response to supracompetitive prices. In addition, suppliers may be able to use vertical restraints to facilitate a collusive scheme of their own. However, it was the Justice Department's position in the now withdrawn Vertical Restraint Guidelines that vertical restraints are unlikely to facilitate collusion unless the following three market conditions are met: (1) concentration is high in the primary market; (2) the firms in the secondary market using the restraint account for a large portion of sales in that market; and (3) entry into the primary market is difficult.

2. Applicable Law.

a. Section 1 of the Sherman Act.

b. Section 2 of the Sherman Act.

c. Section 5 of the Federal Trade Commission Act.

3. The Rule of Reason and the *Per Se* Rule.

a. *Per Se* Application Narrowed.

The Supreme Court has recognized that the scope of *per se* illegality should be narrow in the context of non-price vertical restraints. *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).[77]

b. *Per Se* Illegality in *Schwinn*.

In *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), the Supreme Court held that some non-price vertical restrictions (specifically territorial and customer restrictions) were *per se* unlawful where the supplier relinquished control over the product. *Id*. at 378-79. However, in situations where the supplier retained title, dominion and risk of loss with respect to its products, the rule of reason applied. *Id*. at 381-87.

c. Reversal of *Schwinn* to Rule of Reason.

However, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Supreme Court overruled *Schwinn* on the standard to be applied in assessing non-price vertical restraints and mandated a "return to the rule of reason that governed [non-price] vertical restraints prior to *Schwinn*." *Id*. at 59. The Supreme Court noted that in the context of non-price vertical restraints "departure

[77] For example, if a supplier adopts a bona fide distribution program embodying both non-price and price restrictions, the entire program can be analyzed under the rule of reason if the non-price restraints are plausibly designed to create efficiencies and if the price restraint is merely ancillary to the non-price restraints. *See*, *e.g.*, E. Sci. Co. v. Wild Heerbrugg Instr., Inc., 572 F.2d 883 (1st Cir. 1978).

from the rule of reason standard must be based on demonstrable economic effect rather than . . . upon formalistic line drawing." *Id*. at 58-59.

4. The Continuing Trend.

The clear trend since *GTE Sylvania* has been to analyze non-price vertical restraints under the rule of reason.[78]

5. The Market Power Requirement.

Theory predicts that a vertical restraint can affect consumer welfare only if the supplier has market power, *i.e.*, if the supplier can price above marginal cost.[79] Some courts have accepted this theoretical claim and have held that a vertical non-price restriction is reasonable, and thus legal, if the supplier has no market power.[80] Similarly, the European Union approach to vertical restraints specifies a safe harbor for restraints maintained by firms with market share less than 30%.[81]

6. Practical Proof Problems.

Although the theoretical distinction between vertical price restrictions and vertical non-price restrictions may appear clear, in practice it can be difficult to distinguish price and non-price vertical restrictions. *See*, *e.g.*, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

7. Vertical Non-Price Restraints as Exclusionary Practices

A vertical non-price restraint can be challenged under Section 2 when maintained by a monopolist or an aspiring monopolist.[82] Indeed, given the prerequisite of market power under the rule of reason, it seems likely that many vertical restraints invalid under Section 1 also could be invalid under Section 2.

B. Exclusive Distributorships.

1. Definition.

An exclusive distributorship typically provides a dealer with the right to be the exclusive outlet for a supplier's product in a given geographic area.

An "exclusive distributorship" should be distinguished from "exclusive dealing" (an agreement by a distributor to refrain from dealing in goods of a competitor, which are discussed in *Section V*) and "exclusive territory" (an agreement by the distributor to refrain from selling outside of a certain territory).

2. Rule of Reason Analysis.

Exclusive distributor arrangements are analyzed under the rule of reason. *Sylvania,* 433 U.S. 36 (1977). Indeed, such agreements are "presumptively legal." *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717, 736 (7th Cir. 2004); *Electric Communications Corp. v. Toshiba American Consumer Products*, 1997-2 Trade Cas. (CCH) ¶ 71,958 (2d Cir. 1997).

3. Case law.

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[78] *See AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d. Cir. 2006); *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 451 (7th Cir. 2007).

[79] The requirement of market power seems to accord with the spirit of the Supreme Court's doctrine on horizontal restraints. *See, e.g.*, Cal. Dental Assoc. v. FTC, 526 U.S. 756, 782 (Breyer, J., concurring in part, dissenting in part) ("I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? *(4) Do the parties have sufficient market power to make a difference?*") (emphasis added); *see also* Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

[80] *See, e.g.*, *Sylvania*, 433 U.S. 36 (1977) (holding that interbrand competition provides a "significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different branch of the same product"); JBL Enter., Inc. v. Jhirmack Enters., 698 F.2d 1011, 1017 (9th Cir. 1983) (holding that interbrand market power is a prerequisite to a violation); Valley Liquors, Inc. v. Renfield Importer, Ltd., 678 F.2d 742, 745 (7th Cir. 1982) (same); R.D. Imports Ryno Indus. Inc. v. Mazda Indus., 807 F.2d 1222 (5th Cir. 1986) (same).

[81] James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, Vertical Antitrust Policy as a Problem of Inference (2005) (citing Commission Regulation (EC) No. 2790/99 on the Application of Article 81(3) of the Treaty of Categories of Vertical Agreements and Concerted Practices, 1999 O.J. (L 336) and Guidelines on Vertical Restraints 2000 O.J. (C 291) 1), *available at* http://www.ftc.gov/speeches/froeb/050218verticalecon.pdf.

[82] *See* United States v. Dentsply Int'l, Inc., 399 F.3d 181 (3d Cir. 2005) (evaluating an exclusive dealing agreement under § 2); LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (holding a bundled rebate program, which arguably was a tying agreement, was exclusionary conduct); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (evaluating tying and exclusive dealing agreements under both § 1 and § 2 theories).

3 605 Vertical Restraints.DOC

Courts usually find exclusive distributor agreements to be reasonable restraints.[83] Indeed, such agreements are "presumptively legal." Courts even have allowed suppliers to terminate existing dealers to establish a new exclusive distributor or to expand the area of an existing dealer.[84] *See, e.g.*, *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802 (6th Cir. 1988).

Relevant factors include:

- whether the geographic scope is unreasonably broad;[85]
- whether the duration is excessive;[86]
- the distributor has exclusive appointments from other suppliers;[87]
- the dealer or supplier has dominant market power;[88]
- the exclusive dealer is given "veto" power over new dealer;[89]
- the supplier and exclusive dealer are in substantial competition resulting in a horizontal allocation of markets;[90]
- there is a product shortage or a shortage of alternative sources of supply;[91]
- the arrangement is part of a broader restrictive scheme;[92]
- the product is patented.[93]

C. Territorial and Customer Restrictions.

1. Definition.

In territorial and customer restriction arrangements, the dealer is restricted with respect to the territory in which, or the customers to whom, it may sell.

2. Evolution of the Doctrine.

[83] *See, e.g.*, *Sylvania*, 433 U.S. 36 (1977); Care Heating & Cooling, Inc. v. Am. Standard, Inc., 427 F.3d 1008 (6th Cir. 2005) (dismissing plaintiff's complaint for failure to state a claim under the rule of reason); Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717 (7th Cir. 2004); Gen. Corp. v. Caterpillar Inc., 172 F.3d 971 (7th Cir. 1999); Elect. Commun'c. Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240 (2d Cir. 1997); Murphy v. Bus. Cards Tomorrow, Inc. 854 F.2d 1202, 1205 (9th Cir. 1988); Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 808 (6th Cir. 1988); Three Movies of Tarzana v. Pac. Theaters, 828 F.2d, 1395, 1400 (9th Cir. 1987); Bowen v. N.Y. News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1985); Ron Tonkin Gran Turismo, Inc. v. Flat Distribs., 637 F.2d 1376 (9th Cir. 1981); Borger v. Yamaha Int'l Corp., 625 F.2d 390, 397 (2d Cir. 1980); Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1030 (2d Cir.); Knutson v. Daily Review, Inc. 548 F.2d 795, 804-05 (9th Cir. 1976); Fray Chevrolet Sales, Inc. v. Gen. Motors Corp., 536 F.2d 683 (6th Cir. 1976); Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972); Elder-Beerman Stores Corp. v. Federated Dep't Stores, 459 F.2d 138, 146 (6th Cir. 1972); Alpha Distrib. Co. v. Jack Daniels Distillery, 454 F. 2d 442 (9th Cir. 1972); Cartrade, Inc. v. Ford Dealers Adver. Ass'n, 446 F.2d 289 (9th Cir. 1971); Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969); E&L Consulting, Ltd. V. Doman Indus., 360 F. Supp. 2d 465 (E.D.N.Y 2005) (dismissing complaint for failure to allege an antitrust injury); Ticketmaster Corp. v. Tickets.com, Inc., 2003-1 Trade Cas. (CCH) ¶ 74,013 (C.D. Cal. 2003); Commercial Data Servers, Inc. v. IBM, 262 F. Supp. 2d 50 (S.D.N.Y. 2003); Moecker v. Honeywell Int'l, Inc., 144 F.Supp.2d 1291 (M.D. Fla. 2001); Bepco, Inc. v. Allied Signal, Inc., 2000 WL 1010264 (M.D.N.C. 2000); Cancall PCS, LLC v. Omnipoint Corp., 2000-1 Trade Cas. (CCH) ¶ 72,855 (S.D.N.Y. 2000); Newberry v. Washington Post Co., 438 F. Supp. 470- 474-75 (D.D. C. 1977); Ark Dental Supply Co. v. Cavitron Corp., 323 F. Supp. 1145 (E.D. Pa. 1971), *aff'd per curiam*, 461 F.2d 1093 (3d Cir. 1972).

[84] *See, e.g.*, Elect. Commun'c. Corp. v. Toshiba Am. Consumer Prods., Inc., 129 F.3d 240 (2d Cir. 1997); Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 808 (6th Cir. 1988); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735-36 (9th Cir. 1987); Ralph C. Wilson Indus. v. Chronicle Broad. Co., 794 F.2d 1359 (9th Cir. 1986); Seaboard Supply Co. v. Congoleum Corp. 770 F.2d 367, 374 (3d Cir. 1985); A.H. Cox & Co. v. StarMach. Co., 653 F.2d 1302, 1306 (9th Cir. 1981); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 297-98 (5th Cir. 1981); Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107 (5th Cir. 1979); Daniels v. All Steel Equip., Inc., 590 F.2d 111 (5th Cir. 1979); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc); Burdett Sound, Inc. v. Altee Corp., 515 F.2d 1245, 1248-49 (5th Cir. 1975); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418, 420-21 (D.C. Cir.); Retail Serv. Assocs. v. Conagra Pet Prods. Co., 759 F. Supp. 976, 979 (D. Conn. 1991); Inter-City Tire & Auto Center v. Uniroyal, Inc., 701 F. Supp. 1120, 1124 (D.N.J. 1988), *aff'd mem.*, 888 F.2d 1380 (3d Cir. 1989); First Med Rep. v. Futura Med. Corp., 195 F.Supp.2d 917 (E.D. Mich. 2002); MLC, Inc. v. N. Am. Phillips Corp., 671 F. Supp. 246, 257 (S.D.N.Y. 1987); Blaine v. Meineke Discount Muffler Shops, 670 F. Supp. 1107, 1112 (D. Conn. 1987); Phila. Fast Foods Inc. v. Popeyes Famous Fried Chicken, Inc. 647 F. Supp. 216 (E.D. Pa.); *E&L Consulting, Ltd. v. Doman Industries Limited*, 472 F.3d 23 (2d. Cir. 2006).

[85] *See, e.g.*, United States v. Chicago Tribune, 309 F. Supp. 1301 (S.D.N.Y. 1970).

[86] *See, e.g.*, Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir. 1976).

[87] *See, e.g.*, United States v. Blitz, 179 F. Supp. 80 (S.D.N.Y. 1959), *rev'd in part on other grounds*, 282 F.2d 465 (2d Cir. 1960).

[88] *See, e.g.*, Maris Distrib. Co. v. Anheuser-Busch, Inc., 302 F.3d 1207 (11th Cir. 2002) (affirming lower court's finding that defendant's 1-3% market share was insufficient for plaintiff to establish an unreasonable vertical restraint); 42nd Parallel N. v. E. Street Denim Co., 286 F.3d 401 (7th Cir. 2002) (upholding dismissal of challenge to vertical restraint because plaintiff failed to show defendants' dominant market power); Hershey Choc. Corp. v. FTC, 121 F.2d 968 (3d Cir. 1941).

[89] *See, e.g.*, Am. Motor Inns, Inc. v. Holiday Motor Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

[90] *See, e.g.*, United States v. Topco Assoc., Inc., 405 U.S. 596 (1972).

[91] *See, e.g.*, Wisdom Rubber Indus. v. Johns-Manville Sales Corp., 415 F. Supp. 363 (D. Haw. 1976).

[92] *See, e.g.*, United States v. Am. Smelting & Refining Co., 182 F. Supp. 834 (S.D.N.Y. 1960).

[93] *See, e.g.*, Sheet Metal Duct, Inc. v. Lindab, Inc., 2000 WL 987865 (E.D. Pa. 2000) (holding that the manufacturer as a patentee has the right to sell its product exclusively to one distributor, at any price).

Prior to *Schwinn*, territorial and customer restrictions were judged under the rule of reason. *E.g.*, *White Motor Co. v. United States*, 372 U.S. 253 (1963). After *Schwinn*, 388 U.S. 365 (1967), such agreements were held *per se* illegal. In *Sylvania*, 433 U.S. 36 (1977), the Supreme Court returned to the rule of reason. Rule of reason treatment is appropriate because these agreements can have procompetitive effects by increasing inter-brand competition.

Effectively such agreements are *per se* legal.[94]

3. *Per Se* Rule Potentially Applicable in Some Cases.

The Supreme Court in *Sylvania*, 433 U.S. at 58-59, reserved the possibility of applying the *per se* rule in particular cases. For example, if the customer or territorial restriction is a part of an agreement to maintain resale prices, it is *per se* unlawful.[95] That seems unlikely to be relevant under federal law now that the per se rule for RPM has been overturned in *Leegin*. One court held that an agreement between a supplier and its dealers

[94] *See*, *e.g.*, Murrow Furniture Galleries v. Thomasville Furniture Indus., 889 F.2d 524, 527-29 (4th Cir. 1989); Int'l Logistics Group v. Chrysler Corp., 884 F.2d 904, 907 (6th Cir. 1989); Murphy v. Bus. Cards Tomorrow, Inc. 854 F.2d 1202, 1204 (9th Cir. 1988); Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F.2d 802, 807-08 (6th Cir. 1988); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1582-83 (11th Cir. 1988); Dimidowich v. Bell & Howell, 803 F.2d 1473, 1481 (9th Cir. 1986); Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 315-16 (8th Cir. 1986); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1439 (7th Cir. 1986); O.S.C. Corp. v. Apple Computer, Inc. 792 F.2d 1464, 1469-70 (9th Cir. 1986); Beach v. Viking Sewing Mach. Co., 784 F.2d 746, 750 (6th Cir. 1986); Jayco Sys. v. Savin Bus. Machs. Co., 777 F.2d 306, 317-18 (5th Cir. 1985); Midwestern Waffles, Inc. v. Waffle House, Inc. 734 F.2d, 705, 711 (11th Cir. 1984); Mesirow v. Pepperidge Farm, 703 F.2d 339 (9th Cir. 1983); Mendelovitz v. Adolph Coors Co., 693 F.2d 570, 575-76 (5th Cir. 1982); Maykuth v. Adolph Coors Co., 690 F.2d 689 (9th Cir. 1982); Davis-Watkins Co. v. Service Merchandise Co., 686 F.2d 1190 (5th Cir. 1982); Sports Ct, Inc. v. Riddell, Inc. 673 F.2d 786 (5th Cir. 1982); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1357 (9th Cir. 1982); Copy-Data Sys. v. Toshiba Am., Inc. 663 F.2d 405 (2d Cir. 1981); Abadir v. First Miss. Corp., 651 F. 2d 422 (5th Cir. 1981).

[95] *See*, *e.g.*, United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944); Pitchford Sci. Instr. Corp. v. PEPI, Inc. 531 F. 2d 92 (3d Cir. 1975); Copper Liquor, Inc. v. Adolph Coors Co., 506 F.2d 934 (5th Cir. 1975); Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398 (2d Cir.); Ansul Co. v. Uniroyal, Inc. 306 F. Supp. 541 (S.D.N.Y. 1969), *aff'd in part and rev'd in part and remanded*, 448 F.2d 872 (2d Cir. 1971); Adolph Coors Co., 83 F.T.C. 32, 192-96 (1973), aff'd, 497, F.2d 1178 (10th Cir. 1974); Holiday Magic Inc., 84 F.T.C. 748, 1052 (1974); Chapiewsky v. g. Heileman Brewing Co., 297 F. Supp. 33, 36 (E.D. Wis. 1968); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 720 n. 4 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969); cf. Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Gen. Beverages Sales Co. v. East-Side Winery, 568 F.2d 1147, 1153 (7th Cir. 1978).

to restrict sales to particular geographic areas could violate Sections 1 and 2. *Hewlett-Packard Co. v. Arch Associates Corp.*, 1995-2 Trade Cas. (CCH) ¶ 71,201 (E.D. Pa. 1995).

If a supplier applies territorial distribution agreements in such a way that they horizontally restrain trade, the *per se* rule may apply. *See, e.g.*, *Coca-Cola Co. v. Omni Pacific Co, Inc,* 2000 WL 33194867 (N.D. Cal. 2000).

4. Factors Considered under the Rule of Reason.

Courts have examined:

- the purpose of the restriction;[96]
- the effects on inter- and intra-brand competition;[97]
- the market share of the supplier;[98]

[96] *See*, *e.g.*, Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F. 2d 802 (6th Cir. 1988); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575, 1583 (11th Cir. 1988); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356 (9th Cir. 1982); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 297-98 (5th Cir. 1981).

[97] Courts typically hold that an effect on intrabrand competition is insufficient by itself to find a violation. *See e.g.*, Murphy v. Bus. Cards Tomorrow, Inc., 854, F.2d 1202, 1205 (9th Cir. 1988) (effect on intrabrand competition is not relevant if there is intense interbrand competition); Crane & Shovel Sales Corp. v. Bucyrus-Erie Co., 854 F. 2d, 802, 806 (6th Cir. 1988) (effect on intrabrand competition alone is insufficient to survive a motion to dismiss); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1231 (8th Cir. 1987) (no adverse effect on interbrand competition where supplier lacked market power); Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356 (9th Cir. 1982) (no adverse effect on either intrabrand or interbrand competition); Copy-Data Sys. v. Toshiba Am., Inc., 663 F.2d 405, 410-11 (2d Cir. 1981) (insignificant market share and stiff interbrand competition minimized anticompetitive effects); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005-07 (5th Cir. 1981) (upholding territorial and customer restrictions where no adverse effect on interbrand competition established). In a 1995 consent decree, DOJ required Greyhound Bus Lines to abandon a provision in its leases to other bus companies precluding them from selling bus tickets within 25 miles of the terminal. United States v. Greyhound Lines Inc., Civil Action No. 1:95CV01852 (D.D.C. 1995).

[98] Courts typically require plaintiffs to make a threshold showing that a supplier's market share is sufficiently high that the overall market could be affected. *See, e.g.*, Murrow Furniture Galleries v. Thomasville Furniture Indus., 889 F.2d 524, 528-29 (4th Cir. 1989) (customer restrictions not anticompetitive where manufacturer lacked market power); Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215, 1231 (8th Cir. 1987) (territorial restrictions were supplier did not possess market power); Assam Drug Co. v. Miller Brewing Co., 798 F.2d 311, 318 (8th Cir. 1986) (territorial restrictions held reasonable where defendant's alleged market share of 19.1% could not have anticompetitive effect on interbrand competition); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1435 (7th Cir. 1986) (termination based on shipments to customers outside of territory not anticompetitive where manufacturer possessed a 2% market share). Holmes Prod. Corp. v. Dana Lighting, Inc., 958 F. Supp. 27 (D. Mass. 1997) (dismissing plaintiff's complaint that defendant procured agreements from lamp suppliers not to sell to defendant's competitors for failure to demonstrate market power or effect on

- any offsetting procompetitive benefits of the restraint.[99]
- whether there is a less-trade-restrictive means to accomplish the procompetitive benefit.[100]

D. Restrictions Under a Dual Distribution System.

1. Definition.

A dual distribution system exists where a supplier markets its products both through its own outlets and through independent dealers.

The difficult issue with these agreements is how to characterize them. Is the agreement a horizontal agreement between competitors because the supplier's own outlets compete with the independent dealers? Or is the agreement a vertical agreement between a supplier and a dealer?

2. Minority Position: *Per se* Illegal as a Horizontal Agreement

Some lower courts have characterized dual distribution arrangements as horizontal restraints and have held them to be *per se* unlawful.[101]

3. Majority Position: Rule of Reason.

The trend is to consider these restraints to be vertical agreements and therefore subject to the rule of reason.[102] Some courts simply apply the rule of reason in analyzing these arrangements without characterizing the restraints as vertical or horizontal.[103]

4. In 1999, General Electric entered into a consent judgment with the Department of Justice. GE maintained a dual distributorship system for certain specialized medical imaging equipment. In the consent judgment, GE agreed to eliminate a restriction in its licensing agreement for diagnostic software and medical imaging agreement. The provision had prohibited hospitals from performing third-party service contracts on equipment owned by other hospital. *See United States v. General Electric Co.*, 1999-1 Trade Cas. (CCH) ¶ 72,399, 83,707 (D. Mont. 1999).

E. Location Clauses, Areas of Primary Responsibility, and Profit Pass-Over Arrangements.

1. Definitions.

a. Location Clauses.

A location clause restricts the dealer to selling the supplier's products from a designated geographic location.

b. Area of Primary Responsibility.

An area of primary responsibility clause provides that each dealer must resell the supplier's products primarily (but not necessarily entirely) within a specified geographic

competition). If the supplier possesses only a small market share, the supplier's restrictions ordinarily will be upheld. *See, e.g.*, Bi-Rite Oil Co. v. Ind. Farm Bureau Coop Ass'n, 908 F.2d 200, 204 (7th Cir. 1990) (supplier's share of the market was too small to control output, price or competition); Carlson Mach. Tools, Inc. v. Am. Tool, Inc., 678 F. 2d 1253, 1259 (5th Cir. 1982) (supplier's share below 10%); Copy-Data Sys. v. Toshiba Am., Inc., 663 F.2d 405, 410-11 (2d Cir. 1981) (insignificant market share minimized anticompetitive effect).

[99] *See*, *e.g.*, Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1356 (9th Cir. 1982) (restrictions facilitated entry into new markets and wider availability of suppliers products); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 297-98 (5th Cir. 1981) (restrictions promoted interbrand competition by increasing product advertising); Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005-07 (5th Cir. 1981) (restrictions did not harm and "may have improved" interbrand competition).

[100] *See, e.g.*, Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1577 (11th Cir. 1983).

[101] *See, e.g.*, Pitchford Sci. Instr. Corp. v. PEPI, Inc. 531 F.2d 92, 101, 103-04 (3d Cir. 1975); Am. Motors Inns v. Holiday Inns, 521 F.2d 1230, 1253-54 (3d Cir. 1975); Hobart Bros. v. Malcolm T. Gilliland, Inc. 471 F.2d 894, 899 (5th Cir. 1973); Fontana Aviation, Inc. v. Brcch Aircraft Corp., 432 F.2d 1080, 1081-82, 1084-85 (7th Cir. 1970); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 720 n.4 (S.D.N.Y.), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969); United States v. CIBA-GEIGY Corp., 508 F. Supp. 1118 (D.N.J. 1976).

[102] *See*, *e.g.*, Gordon v. Lewistown Hospital, 423 F.3d 184, 210 (3d Cir. 2005); Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 773-74 (8th Cir. 2004); E. Food Servs. V. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1, 5 (1st Cir. 2004); Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield, 373 F.3d 57, 61 (1st Cir. 2004); Hampton Audio Elec., Inc. v. Contel Cellular, Inc., 1992-1 Trade Cas. (CCH) ¶ 69,848 (4th Cir. 1992); Ill. Corp. Travel v. Am. Airlines, 889 F.2d 751 (7th Cir. 1989).

[103] *See*, *e.g.*, Elect. Commc'n Corp. v. Toshiba Am. Consumer Prods., 1997-2 Trade Cas. (CCH) ¶ 71,958 (2d Cir. 1997); Int'l Logistics Group v. Chrysler Corp., 884 F.2d 904, 906, (6th Cir. 1989); Ryko Mfg. Co. v. Eden Servs. 823 F.2d 1215, 1230-31 (8th Cir. 1987); Dimidowich v. Bell & Howell, 803 F.2d 1473, 1481 (9th Cir. 1986); Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 711 (11th Cir. 1984); Graphic Prods. Distribs. v. Itek Corp., 717 F.2d 1560, 1576-78 (11th Cir. 1983); Dart Indus. v. Plunkett Co. 704 F.2d 496, 498-99 (10th Cir. 1983); Davis-Watkins Co. v. Service Merch., 686 F.2d 1190, 1201-02 (6th Cir. 1982).

area. In some cases, if a dealer fulfills its sales obligations (in quotas or dollar terms) in the primary region, it may sell products outside the primary region.

c. Profit Passover Arrangement.

A profit-passover arrangement requires a dealer that resells the supplier's product outside a specified geographic area to pay a certain amount (usually a percentage of sales or profits) to the dealer in the receiving geographic area as compensation for post-sale and point of sale service.[104]

2. Rule of Reason Analysis.

While territorial and customer restrictions can totally foreclose intrabrand competition in some portion of the market, other vertical restrictions (including location clauses, areas of primary responsibility clauses, and profit-passover arrangements) might limit, but not necessarily eliminate, intrabrand competition. Thus, there is less cause to find these less restrictive agreements unreasonable restraints of trade.

Courts usually uphold location clauses[105] and typically uphold area of primary responsibility agreements[106]. Because a profit-passover arrangement serves as a disincentive for dealers to sell outside of their assigned regions, it has been challenged as unreasonable. Depending upon the circumstances surrounding the profit passover arrangement, courts have found such arrangements either lawful or unlawful.[107]

F. Group Boycotts.

1. Definition.[108]

Concerted refusals to deal are arrangements under which two or more parties agree not to deal with a third party.[109]

2. Horizontal Group Boycotts *Per Se* Illegal.

Group boycotts among competitors usually are found illegal under Section 1.[110] Indeed, courts assert that group boycotts are *per se* violations of Section 1 of the Sherman Act, *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) (applying the *per se* rule), although there are many exceptions to

[104] Profit-passover arrangements do not prohibit the dealer from selling to customers located outside its assigned territory. Rather, it requires the dealer to pay some compensation to the dealer in whose territory the sale is made.

[105] *See, e.g.*, Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755 (2d Cir. 1979); Golden Gate Accept. Corp. v. Gen. Motors Corp., 597 F.2d 676 (9th Cir. 1979); GTE Sylvania Inc. v. Cont'l T.V., Inc., 537 F.2d 980 (9th Cir. 1976) (en banc), *aff'd*, 433 U.S. 36 (1977), *on remand,* 461 F. Supp. 1046 (N.D. Cal. 1978) (summary judgment for defendant), *aff'd*, 684 F.2d 1132 (9th Cir. 1982); Salco Corp. v. Gen. Motors Corp., 517 F.2d 567 (10th Cir. 1975); Boro Hall Corp. v. Gen. Motors Corp., 124 F. 2d 822 (2d Cir. 1942).

[106] *See, e.g.*, Kestenbaum v. Falstaff Brewing Corp., 575 F. 2d 565, 572-73 (5th Cir. 1978); Santa Clara Valley Distrib. Co. v. Pabst Brewing Co., 556 F.2d 942 (9th Cir. 1977); Knutson v. Daily Review, Inc., 548 F.2d 795, 807-10 (9th Cir. 1976); Colo. Pump & Supply Co. v Febco, Inc. 472 F.2d 637 (10th Cir. 1973); Neugebauer v. A.S. Abdell Co., 474 F. Supp. 1053, 1070 (D. Md. 1979); Mitchell v. United States Surgical Corp., 1976-1 Trade Cas (CCH) ¶ 60,879 (S.D. Ohio 1976).

[107] *Compare* Superior Bedding Co., 353 F. Supp. at 1150-51 (finding reasonable a 7% passover fee based on gross sales paid to license in whose territory sales were made to compensate for advertising and sales expense by that licensee), *and* United States v. Topco Assocs., 1973-1 Trade Cas. (CCH) ¶ 74,391, at 93,798 (N.D. Ill.) (final judgment permitting passover arrangements providing for "reasonable compensation" for goodwill developed for product's trademark so long as they are not used "to achieve or maintain territorial exclusivity"), *aff'd*, 414 U.S. 801 (1973), *and Schwinn*, 291 F. Supp. 564 (profit passover permitted in final judgment) *with* Eiberger v. Sony Corp., 622 F.2d 1068, 1076-81 (2d Cir. 1980) (warranty fee passover unreasonable when it was designed to penalize extraterritorial sales and impede intrabrand competition), *and* Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc. 585 F.2d 821, 829 (7th Cir. 1978) (jury could have found passover fee to be unreasonable).

[108] *See also infra* Section VIII. Although vertical group boycotts and vertical refusals to deal often are discussed interchangeably, because a vertical group boycott may differ, albeit slightly, from a vertical refusal to deal, we address them separately in this outline. A vertical group boycott, in which a supplier and one of its distributors (distributor # 1) agree not to deal with another distributor (distributor # 2), also is a vertical refusal to deal. However, a vertical refusal to deal, in which a supplier unilaterally decides not to deal with a specific distributor (*i.e.*, supplier unilaterally decides not to deal with distributor # 2 without any prior arrangement or agreement with distributor # 1) is a vertical refusal to deal but is not a group boycott. In short, group boycotts are a subset of refusals to deal.

[109] Examples of group boycotts include: refusal to enter into new business relationships, refusal to continue existing business relationships, refusal of competing health care providers (physicians or hospitals) to deal with a health insurance company, refusal of a trade association to admit new members, or expulsion of existing members by a trade association. ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (THIRD) 77-86 (3d ed. 1992).

[110] *See, e.g.*, FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (holding that a group boycott designed to affect price, and not justified by plausible procompetitive justifications, are *per se* illegal, even if the defendants lack market power); N. Pac. Ry. v. U.S., 356 U.S. 1 (1958) ("[a]mong the practices which the courts have heretofore deemed to be unlawful in and of themselves are . . . group boycotts."); Wash. State Bowling Proprietors Ass'n, Inc. v. Pac. Lanes, Inc., 356 F.2d 371 (9th Cir. 1966) ("[g]roup boycotts are *per se* violations of the Sherman Act").

the *per se* rule, *see Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985) (applying the rule of reason because defendants lacked market power). Arguably these exceptions introduce some dissonance into the doctrine on horizontal group boycotts. *See FTC v. Indiana Federation of Dentists* (claiming to apply the rule of reason but actually employing an analysis more akin to a *per se* test).

3. Vertical Group Boycotts Judged under Rule of Reason.

Vertical group boycotts are judged under the rule of reason.[111] *Nynex Corp. v. Discon, Inc.,* 119 S. Ct. 493, 498 (1998) (holding that defendant's decision to switch to a competing supplier would be judged under the rule of reason because the "freedom to switch suppliers lies close to the heart of the competitive process that antitrust laws seek to encourage").[112]

4. Distinguishing Between Horizontal and Vertical Boycotts.

a. As the Supreme Court observed in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 (1977), "[t]here may be occasional problems in differentiating vertical restrictions from horizontal restrictions."[113]

b. In determining whether a group boycott arrangement is vertical or horizontal, the focus is on the relative market levels of the parties to the agreement, and not upon the particular level of the market which is being injured.[114]

c. In *United States v. Toys "R" Us,* Trade Reg. Rep. (CCH) ¶ 24, 516 (1998), the Commission found evidence of both vertical and horizontal restraints. The vertical restraints consisted of the manufacturers' acquiescence to Toys "R" Us' demand that they not sell certain types of toys to the warehouse clubs. The horizontal restraints consisted of their agreement to abide by Toys "R" Us' demand if their competitors did so as well. The Seventh Circuit affirmed the Commission's ruling, concluding that its decision "is supported by substantial evidence on the record, and that its remedial decree falls within the broad discretion it has been granted under the FTC Act." *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

d. In *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145 (9th Cir. 2003), the Ninth Circuit applied a rule of reason analysis to an agreement between the defendant, a gas utility firm, and a gas marketer. The plaintiff argued

[111] *See, e.g.*, IDT Corp. v. Building Owners & Managers Ass'n Int'l, No. 03-4113 (JAG) (D.N.J. Dec. 15, 2005) (rejecting plaintiff's characterization of the group boycott as horizontal, finding it to be a vertical boycott, and then dismissing the plaintiff's claim for failure to allege a violation under the rule of reason); Cancall PCS, LLC v. Omnipoint Corp., 2001 WL 293981 (S.D.N.Y. 2001) (plaintiff failed to allege an essential element of a *per se* group boycott: a horizontal agreement); Petrochem Insulation, Inc. v. N. Cal. & Nev. Pipe Trades Council, 1992-1 Trade Cas. (CCH) ¶ 69,814 (N.D. Cal. 1992) (vertical nature of agreement mandates rule of reason analysis).

[112] *See generally* Note, *Vertical Agreements to Terminate Competing Distributors:* Oreck Corp. v. Whirlpool Corp., 92 HARV. L. REV. 1160 (1979).

[113] *See, e.g.*, Med. Supply Chain, Inc. v. Gen. Elec. Co., 144 Fed. Appx. 708 (10th Cir. 2005) (accepting *arguendo* plaintiff's claim that the challenged agreement was a horizontal agreement, though it pretty clearly was vertical, and then dismissing the case because the defendants had no market power).

[114] United States v. Sealy, Inc., 388 U.S. 350 (1967); *see, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (territorial restrictions among manufacturers); Spectators' Communication Network, Inc. v. Colonial Country Club, et al., 253 F.3d 215 (5th Cir. 2001) (reversing the district court's finding of insufficient evidence of an agreement to enter a vertical boycott; district court had based its holding on the defendant's lack of an incentive to enter a boycott, but circuit court concluded that the defendant could be persuaded or forced into a conspiracy, even when lacking a financial incentive); In PrimeTime 24 Joint Venture v. NBC, 219 F.3d 92 (2d Cir. 2000) (reversing the district court's dismissal of a concerted refusal to deal claim, holding that "[a]lthough coordinated efforts to enforce copyrights against a common infringer may be permissible, copyright holders may not agree to limit their individual freedom of action in licensing future rights to such an infringer before, during, or after the lawsuit"); TV Commc'ns Network v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir. 1992) (boycott allegations do not state a claim when a television programmer and cable operators compete at different market levels); Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992) (relationship between physicians and hospital is vertical, precluding establishment of a per se illegal group boycott); Hobart Bros. Co. v. Malcolm T. Gilliand, Inc., 471 F.2d 894 (5th Cir. 1973) (per se violation for competitors at same level of market to allocate territories); In Re Beer Antitrust Litig., 2002 WL 1285320 (N.C. Cal. 2002) (holding that plaintiff claimed a vertical restraint, not a horizontal restraint, because the plaintiff had presented no evidence that the defendant's competitors had any part in creating the marketing plan that led to the alleged boycott); Cathedral Trading, LLC v. Chicago Board Options Exchange, 199 F. Supp. 2d 851 (N.D. Ill. 2002) (holding defendant's refusal to deal was vertical, not horizontal, when the plaintiffs are the consumers, not the competitors, of the defendant); Commercial Data Sys., Inc. v. Int'l Bus. Machines Corp., 2002 WL 1205740 (S.D.N.Y. 2002) ("a restraint is not horizontal because it has horizontal effects but because it is the product of a horizontal agreement"); Danielson Food Prod., Inc. v. Poly-Clip Sys., Int'l, 2000 WL 804691 (N.D. Ill. 2000); In Drug Emporium, Inc. v. Blue Cross of Western New York, Inc.,104 F. Supp. 2d 184 (W.D.N.Y. 2000) (holding that an exclusive provider agreement between an HMO and medical service providers was a vertical agreement); Toscano v. PGA Tour, Inc., 70 F. Supp. 2d 1109 (E.D. Cal. 1999) (holding that an alleged group boycott by the PGA tour and event sponsors against golfers was a vertical agreement); Nat'l Tire Wholesale, Inc. v. The Washington Post Co., 441 F. Supp. 81 (D.D.C. 1977), aff'd without opinion, 595 F.2d 888 (D.C. Cir. 1979) (horizontal restraint requires collaboration among competitors);

3 605 Vertical Restraints.DOC

that the court should find the agreement *per se* illegal because Montana Power and Northridge were indirect competitors (Montana Power owned a subsidiary gas marketer that competed with Northridge). The court chose not to characterize the agreement as either horizontal or vertical and simply applied a *rule of reason* analysis because the agreement had "plausible procompetitive justifications."

G. Vertical Bid Rigging.

1. Definition.

Bid rigging occurs where firms or individuals enter into a conspiracy to submit noncompetitive rigged bids and thereby allocate successful bids among competitors.[115]

2. Bid Rigging Schemes Can Take Various Forms.

Bid rigging can take various forms including: (1) comparing bids prior to submission;[116] (2) operating bid depositories;[117] and (3) rotating bids whereby potential bidders agree to refrain from bidding or knowingly submit noncompetitive bids.[118]

3. Horizontal Bid Rigging Schemes *Per Se* Unlawful.

Ever since the Supreme Court in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) declared that price-fixing agreements are *per se* unlawful, courts have applied the *per se* rule to conspiracies among competitors to rig bids.[119]

4. Vertical Bid Rigging Schemes Judged Under Rule of Reason.

[115] Where the collusive bidding results in a price below the complaining contractor's offering bid, the complaining contractor must establish both an antitrust injury and damages. *See*, *e.g.*, Matsushita Elect. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

[116] *See*, *e.g.*, United States v. W.F. Brinkley & Sons Constr. Co., 783 F.2d 1157 (4th Cir. 1986).

[117] *See*, *e.g.*, United States v. Bakersfield Ass'n Plumbing Contractors, Inc., 1958 Trade Cas. (CCH) ¶ 69,087 (S.D. Cal. 1958), *modified*, 1959 Trade Cas. (CCH) ¶ 69,266 (S.D. Cal. 1959).

[118] *See*, *e.g.*, United States v. Champion Int'l Corp., 557 F.2d 1270 (9th Cir. 1977).

[119] *See*, *e.g.*, United States v. Brown, 936 F.2d 1042 (9th Cir. 1991); Movie 1 & 2 v. United Artists Commc'n, 909 F.2d 1245 (9th Cir. 1990), cert denied, 501 U.S. 1230 (1991); United States v. MMR Corp., 907 F.2d 489 (5th Cir. 1990).

Courts which have considered vertical bid rigging schemes have analyzed them under a rule of reason.[120]

V. EXCLUSIVE DEALING ARRANGEMENTS

A. Definition.

Exclusive dealing arrangements generally take the form of agreements in which a buyer agrees to purchase products or services for a significant period of time exclusively from one supplier. Exclusive dealing arrangements are a type of vertical non-price restraint, but differ from the non-price restraints discussed in Section IV in that exclusive dealing arrangements restrict the dealers' freedom *of purchasing* while the restraints in Section IV restrict the dealers' freedom *of selling*. A related form of exclusive dealing arrangement is a requirements contract under which the buyer agrees to purchase its entire needs of a product or service from a single seller.[121] The principal issue in evaluating exclusive dealing arrangements is determining whether competitors are foreclosed from access to the relevant market.[122]

[120] *See*, *e.g.*, MHB Distribs. v. Parker Hannifin Corp., 800 F. Supp. 1265 (E.D. Pa. 1992) (vertical bid rigging scheme, under which manufacturer entered into a bid-rigging agreement with a distributor, involved a vertical agreement and must be analyzed under the rule of reason); Adv. Power Sys. v. Hi-Tech Sys., 1992-2 Trade Cas. (CCH) ¶ 69,989 (E.D. Pa. 1992)(complaint dismissed because counterclaim-defendant ("Hi-Tech") failed to allege that vertical bid-rigging scheme, under which plaintiff ("APS") and High-Tech's customer (IBM) allegedly rigged bids so that APS received inside information to assist it in the bidding process for IBM contracts, restricted competition in the relevant market).

[121] Requirements contracts are analyzed under the same standards as exclusive dealing arrangements. *See, e.g.,* Taggart v. Rutledge, 657 F. Supp. 1420, 1443-45 (D. Mont. 1987), *aff'd without published opinion*, 852 F.2d 1290 (9th Cir. 1988).

[122] A requirement that a buyer sell goods of competing manufacturers only from separate facilities, however, has been found not to be an exclusive dealing arrangement. Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90, 96-97 (2d Cir. 1987) (requirement that dealer sell other manufacturers' products from a separate showroom); Kellam Energy, Inc. v. Duncan, 668 F. Supp. 861, 883-84 (D. Del. 1987) (contract that precludes sale of competitors' products at only one location and does not prevent plaintiff from selling other products at other locations is not exclusive dealing arrangement). Exclusive distributorships and exclusive territories also should be distinguished from exclusive dealing. An exclusive distributorship typically provides a distributor with the right to be the exclusive outlet for a manufacturer's products or services located in a given geographic area; an exclusive territory gives the distributor the right to be the only seller of a manufacturer's products in a given area. Neither restricts the distributor from handling competitive products as does exclusive dealing.

Some courts have held that Section 1 of the Sherman Act and Section 3 of the Clayton Act do not impose liability upon a purchaser for an exclusive dealing contract. *See, e.g.*, Genetic Sys. Corp. v. Abbott Labs., 691 F. Supp. 407, 414-145 (D.D.C. 1988); McGuire v. Columbia Broad. Sys., 399 F.2d 902, 906 (9th Cir. 1968).

B. **Competitive Effects.**

Exclusive dealing arrangements can foreclose buyers from purchasing goods from alternative suppliers and thereby foreclose other suppliers' access to outlets for their products. However, exclusive dealing arrangements often are entered into for procompetitive reasons.

C. **Applicable Law.**

Exclusive dealing arrangements potentially are subject to Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 5 of the FTC Act. *See FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966) (holding Section 5 applies to exclusive dealing practices).[123]

1. Section 3 applies only to the lease or sale of commodities, while Section 1 and Section 5 apply to all products.

2. Section 1 and Section 3 both require agreement as opposed to wholly unilateral conduct.[124]

D. **Exclusive Dealing Not Illegal *Per Se***

Exclusive dealing arrangements have been treated more leniently by the courts than tying arrangements. Courts have recognized that exclusive dealing arrangements may have procompetitive effects, and have not considered them to be *per se* unlawful.[125]

[123] Note that an exclusive dealing agreement that is legal under these provisions might be illegal under other antitrust provisions, *e.g.*, Section 2. *See LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 157 n.10 (3d Cir. 2003) (en banc), *cert denied*, 124 S. Ct. 2932 (2004) ("The jury's finding against LePage's on its exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude the application of evidence of 3M's exclusive dealing to support LePage's § 2 claim."); *U.S. v. Dentsply Int'l, Inc.*, 399 F.3d 181, 185-86, 197 (3d Cir. 2005) ("Here, the Government can obtain all the relief to which it is entitled under Section 2 and has chosen to follow that path without reference to Section 1 of the Sherman Act or Section 3 of the Clayton Act. We find no obstacle to that procedure."), *cert denied*, 126 S. Ct. 1023 (2006).

[124] Because Section 3 is limited to arrangements involving "goods, wares, merchandise, machinery and supplies or other commodities," when services or intangibles are involved exclusive dealing can only be challenged under Section 1 of the Sherman Act or Section 5 of the FTC Act.

[125] *See* Stop & Shop Supermkt. Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57 (1st Cir. 2004) (the First Circuit analyzed an exclusive dealing agreement among prescription drug plan insurers, buyers, and sellers using the rule of reason, and noted that courts generally have held that such arrangements often provide competitive benefits).

In other words, exclusive dealing arrangements may be procompetitive by ensuring stable markets and encouraging long-term, mutually advantageous business relationships. *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

E. **The Two Standards for Analysis.**

The Supreme Court has established two very different standards for analysis of exclusive dealing arrangements.

1. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) ("*Standard Stations*") articulated the rule of "quantitative substantiality," which focused analysis on the percentage of the market foreclosed by the exclusive dealing arrangement.

   a. *Standard Stations* involved Chevron's exclusive dealing contracts with independent service stations whose sales totaled only 6.7% of the market and who constituted only 16% of all outlets in the relevant market. Other refiners, who accounted for 42% of sales, also used exclusive dealing arrangements.

   b. Justice Frankfurter eschewed a rule of reason analysis and concluded that "the qualifying clause of [Section 3] is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected" and that a contract involving only 6.7% of the market was sufficient. *Id.* at 314.

   c. It was also important to the Court that other refiners, who accounted for a substantial share of the market, also used such arrangements. *Id.*

   d. The Court focused on the defendant's "market control," which raised an inference that the exclusive dealing arrangement was designed to stifle competition rather than meet the legitimate needs of the parties.

   e. In *Standard Oil Co. v. United States*, for example, the Court discussed potential benefits of exclusive dealing arrangements:

      In the case of the buyer, they may assure supply, afford protection against rises in price, enable long-term

planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand. From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and particular advantage to a newcomer to the field to whom it is important to know what capital expenditures are justified-offer the possibility of a predictable market. They may be useful, moreover, to a seller trying to establish a foothold against the counterattacks of entrenched competitors. Since the advantages of requirements contracts may be sufficient to account for their use, the coverage by such contracts of a substantial amount of business affords a weaker basis for the inference that competition may be lessened than would similar coverage by tying clauses, especially where use of the latter is combined with market control of the tying device.

2. In contrast, in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), the Court adopted the rule of "qualitative substantiality," which is a more traditional rule of reason analysis, but did so without overruling *Standard Stations*.

   a. The Court proposed a three-part analysis: *first*, the relevant product market must be defined; *second*, the relevant geographic market must be identified; and *third*, the court must determine whether the competition foreclosed by the contract constitutes a "substantial share of the relevant market." *Id.* at 327-29.

   b. In evaluating competitive effects, the Court should consider "the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." *Id.* at 329.

   c. Applying this new standard of analysis to the case before it, the Court upheld a 20-year requirements contract affecting less than 1% of the market, emphasizing that no dominant seller was involved, there was a small market share, there was no tying, and there was no industry-wide practice of such contracts. The 20-year term was deemed not excessive because the public utility defendant needed an assured source of coal. *Id.* at 330-31.

   d. Although *Tampa Electric* was brought under Section 3 of the Clayton Act, courts rely on its analysis for cases arising under Sections 1 and 2 of the Sherman Act.[126]

3. The Supreme Court also briefly addressed exclusive dealing contracts in *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), where, citing both *Standard Stations* and *Tampa Electric*, the Court found that 30% market share was insufficient market power to justify a *per se* analysis of a tying arrangement and noted that respondents had not attempted to make the showing required to establish an unreasonable restraint under an exclusive dealing analysis. *Id.* at 30 n.51. In her concurring opinion, Justice O'Connor analyzed the agreement as an exclusive dealing contract and found it reasonable:

> In determining whether an exclusive-dealing contract is unreasonable, the proper focus is on the structure of the market for the products or services in question-the number of sellers and buyers in the market, the volume of their business, and the ease with which buyers and sellers can redirect their purchases or sales to others. Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal. When the sellers of services are numerous and mobile, and the number of buyers is large, exclusive-dealing arrangements of narrow scope pose no threat of adverse economic consequences. To the contrary, they may be substantially procompetitive by ensuring stable markets and encouraging

[126] *See, e.g.*, United States v. Dentsply Int'l., Inc., 399 F.3d 181 (3rd Cir. 2005); Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717 (7th Cir. 2004); E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d 1 (1st Cir. 2004); Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51 (1st Cir. 2003); Collins v. Assoc, Pathologists, Ltd., 844 F.2d 473 (7th Cir. 1988); Ind. Telcom Corp., Ind. v. Ind. Bell Tele. Co., Inc., 2001 WL 1168169 (S.D. Ind. 2001; MCM Partners, Inc. v. Nick Boscarino O.G. Serv. Corp., 1994-1 Trade Cas. (CCH) ¶ 70,547 (N.D. Ill. 1994); *Jame Fine Chems., Inc. v. Hi-Tech Pharm. Co., Inc.*, 2007 WL 927976 (D.N.J. 2007).

long-term, mutually advantageous business relationships. *Id.* at 45 (citation omitted).

4. Most courts have applied its qualitative substantiality test and ignored quantitative substantiality test.[127] Although market share continues to play a critical role in the analysis of exclusive dealing arrangements, it is only one factor to be considered and probably is not determinative unless either a very small share or a very large share of the market is foreclosed by the arrangement.[128]

Other factors that courts consider relevant include:

- the size and strength of the parties, the market share involved in the particular contract at issue;[129]
- the duration of the arrangement;[130]
- whether the agreement can be terminated;[131]
- whether such contracts are common in the industry, the effect on entry (*i.e.* the ability to secure alternate sources of supply or alternate outlets for sales),
- whether competition has flourished despite the arrangement;[132]
- the effect on interbrand competition; and[133]
- the justifications for the arrangement.[134]

[127] *See, e.g.*, Morales-Villalobos v. Garcia-Llorens, 316 F.3d 51 (1st Cir. 2003) (citing Tampa Electric in reversing the lower court's dismissal of plaintiff's claims, and stating that proving "substantial foreclosure" of a relevant geographic market is required to prove unreasonable deprivation of an opportunity to sell); Storer Cable Commc'ns, Inc. v. City of Montgomery Ala., 826 F. Supp. 1338 (M.D. Ala. 1993), *vacated by request of parties pursuant to settlement agreement*, 1993 U.S. Dist. LEXIS 19577 (M.D. Ala. 1993).

[128] Courts typically have upheld such restrictions when less than 10-20% of the relevant market (either in terms of sales or outlets) has been foreclosed. *See, e.g.*, Satellite Television & Assoc. Resources, Inc., v. Cont'l Cablevision, 714 F.2d 351, 357 (4th Cir. 1983) (foreclosure of 8% of households); Am. Motor Inns v. Holiday Inns, 521 F.2d 1230, 1252 (3d Cir. 1975) (14.7%); Cornwell Quality Tools Co. v. CTS Co., 446 F.2d 825, 831 (9th Cir. 1971) (10-15%); TAM, Inc. v. Gulf Oil Corp., 553 F. Supp. 499, 505-06 (E.D. Pa. 1983) (7% of sales; 5% of outlets); Beltone Elecs. Corp., 100 F.T.C. 68, 209-18 (1982) (foreclosure of 7-8% of dealers accounting for 16% of sales). While foreclosure of 20% to 30% of the market was a gray area before Jefferson Parish (*see, e.g.*, Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291 (9th Cir.) (long-term foreclosure of 24% of market unlawful), the concurring opinion in Jefferson Parish, finding exclusive dealing lawful without detailed analysis when 30% of the market was foreclosed, may foretell higher market share thresholds as a prerequisite to finding exclusive dealing unlawful. *See* Sewell Plastics, Inc. v. Coca-Cola, Inc., 720 F. Supp. 1196 (W.D.N.C. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990) (even market share of 40% would not enable bottling cooperative to increase prices profitably above the competitive level); Gonzales v. Insignares, 1985-2 Trade Cas. (CCH) ¶ 66,701, at 63,335 (N.D. Ga. 1985) (summary judgment for defendant; only 40% of consumers affected); Kidd v. Bass Hotels & Resorts, Inc., 136 F. Supp. 2d 965 (E.D. Ark. 2000) (summary judgment for defendant; 9% is not a substantial enough share of the relevant market to foreclose competition). *But see* Am. Health Sys., Inc. v. Visiting Nurses Ass'n of Greater Phila., 1994-1 Trade Cas. (CCH) ¶ 70,633 (E.D. Pa. 1994) (complaint that alleged foreclosure of 80% of market for patient referrals for home health care in geographic market was sufficient to state claim for illegal exclusive dealing arrangement).

[129] *See, e.g.*, Storer Cable Commc'ns, Inc. v. City of Montgomery Ala., 826 F. Supp. 1338 (M.D. Ala. 1993), *vacated by request of parties pursuant to settlement agreement,* 1993 U.S. Dist. LEXIS 19577 (M.D. Ala. 1993). DOJ brought a consent decree enforcement action against FTD for violating a consent decree by using an incentive program to steer florists away from competing floral wire services. United States v. FTD Inc., Civil Action No. 56-15748 (E.D. Mich. 1995).

[130] The shorter the duration of the agreement, the less likely it is to be found unlawful. *Compare* Twin City Sportservice, 676 F.2d 1291 (9th Cir. 1982) (contracts in excess of ten years invalid), and Great Lakes Carbon Corp., 82 F.T.C. 1529, 1668-69 (1973) (no "business justification" for exclusive output contracts of 7 to 20 years duration in petroleum coke industry when the industry recovers cost of facilities in five years; five-year contracts permissible when new plant to be constructed and only three-year contracts justifiable when existing facilities involved) *with* Ferguson v. Greater Pocatello Chamber of Commerce, 848 F.2d 976, 982 (9th Cir. 1988) (six year lease upheld); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236-38 (1st Cir. 1983) (two year effective limit upheld); *see also* Thompson Everett, Inc. v. Nat. Cable Adver., 57 F.3d 1317 (4th Cir. 1995); Wallace Oil Co. v. Robert Michaels, Leo Fotopoulos, SPI Petroleum, Inc., 839 F. Supp. 1041 (S.D.N.Y. 1993)(a long term contract requiring that a gasoline owner make all gasoline purchases from a single wholesaler would be an unreasonable restraint of trade if it foreclosed competition).

[131] *See* Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997) (agreements terminable upon 60 days' notice); Paddock Publ'ns., Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996) (contracts terminable at will or on 30 days' to one year's notice); U.S. Healthcare, Inc. v. Healthsource, Inc. 986 F.2d 589 (1st Cir. 1993) (exclusivity clause terminable on 30 days or 180 days notice); Roland Machinery Co. v. Dresser Indus., Inc., 749 F.2d 380, 394-95 (7th Cir. 1984) (agreement terminable in less than one year was "presumptively lawful"); Satellite Fin. Planning v. First Nat. Bank, 633 F. Supp. 386, 397 (D. Del. 1986) (terminable on 180 days' notice); Beltone Elect. Corp., 100 F.T.C. 68, 210 (1982) (terminable on 30 days' notice).

[132] *See, e.g.*, Adv. Health-Care Servs., Inc. v. Radford Cmty Hospital, 910 F.2d 139, 151 (4th Cir. 1990); Collins v. Assoc. Pathologists, Ltd., 844 F.2d 473, 478-79 (7th Cir. 1988); Ralph C. Wilson Indus. v. ABC, 598 F. Supp. 694 (N.D. Cal. 1984), *aff'd sub nom.* Ralph C. Wilson Indus. v. Chronicle Broad. Co., 794 F.2d 1359 (9th Cir. 1986).

[133] *See, e.g.*, Orson v. Miramax Film Corp., 862 F. Supp. 1378 (E.D. Pa. 1994) (an art-film distributor's grant of an exclusive license to one exhibitor in a particular geographic market limited intrabrand competition, but most likely promoted competition between its films and other distributors' films. Accordingly, the vertical non-price restraint was reasonable and the court granted summary judgment to the defendant); *see also* Minn. Mining & Mfg. co. v. Appleton Papers, Inc., 35 F. Supp. 2d 1138 (D. Minn. 1999) (denying defendant's summary judgment motion because the relevant market was vulnerable to foreclosure); Storer Cable Commc'ns, Inc. v. City of Montgomery Ala., 826 F. Supp. 1338 (M.D. Ala. 1993), *vacated by request of parties pursuant to settlement agreement,* 1993 U.S. Dist. LEXIS 19577 (M.D. Ala. 1993); United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d. Cir. 2003), *cert. denied*, 125 S.Ct. 45 (2004) (MasterCard and Visa entered into exclusive arrangements with member banks whereby the banks could not issue American Express or Discover cards. The court found that these arrangements violated Section 1 of the Sherman Act because, among other things, they reduced interbrand competition).

The key question is to what extent are competitors precluded from competing in the market.[135]

F. Cases Invalidating Exclusive Dealing Arrangements

1. DOJ secured a consent decree from the nation's two largest waste disposal companies, who had market power in particular cities and who used exclusive contracts with three-year terms (plus automatic renewals for an additional three years). The decree precludes exclusive contracts for more than two years (plus a one-year renewal). *United States v. Waste Management Inc.*, Civil Action No. CV496-35 (S.D. Ga. 1996); *United States v. Browning-Ferris Industries Inc.*, Civil Action No. 96CV00297 (D.D.C. 1996).

2. In *Concord Boat Corp. v. Brunswick Corp.,* 21 F. Supp. 2d 923 (E.D. Ark. 1998), the court refused to overturn a jury verdict finding that defendant's discounting programs effectively required plaintiffs to purchase extremely high percentages of their total boat engine purchases from the defendant for terms as long as three to five years. These agreements prevented defendant's competitors from competing in the relevant market and allowed defendant to artificially elevate prices.

3. In *Wallace Oil Co. v. Robert Michaels, et al.,* 1994-1 Trade Cas. (CCH) ¶ 70,559 (S.D.N.Y. 1993), the district court held that a long-term contract requiring that a gasoline station owner make all gasoline purchases from a single wholesaler would be an unreasonable restraint of trade if it foreclosed competition. The district court further held that the economies of scale and the ability to plan in advance might make such contracts reasonable, but the possibility of reduced competition and increased consumer prices would also be relevant in determining whether the contract was unreasonable.

4. In *Storer Cable Communications, Inc. v. City of Montgomery Alabama*, 826 F. Supp. 1338 (M.D. Ala. 1993), *vacated by request of parties pursuant to settlement agreement,* 1993 U.S. Dist. LEXIS 19577 (M.D. Ala. 1993), the district court denied a motion to dismiss a counterclaim brought by a cable television operator against the existing local cable television operator, program suppliers, and distributors, alleging they had entered into an unlawful exclusive dealing arrangement. The district court held the defendant adequately alleged the anticompetitive effect of the arrangement and plaintiffs' market power by showing that (1) competition in interbrand market for cable television services was eliminated because existing operator provided cable service to 92% of all homes in area, (2) the exclusive contracts granted by suppliers with operator had a negative effect on interbrand market by reinforcing other operator's almost total market power, and (3) the exclusive dealing arrangement had effect of eliminating possible other sources of programming.

5. In *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), the Ninth Circuit invalidated a more than 10-year exclusive dealing arrangement imposed by a firm with a 24 percent market share because of the duration of the contracts, evidence of actual foreclosure, and the absence of any justification.

6. In *United States v. Dairymen, Inc.*, 1985-1 Trade Cas. (CCH) ¶ 66,638 (6th Cir. 1985) (unpublished opinion), , the Sixth Circuit affirmed a district court decision that a milk cooperative's exclusive dealing contracts to purchase 50% of the milk in the market by a firm with a 52-68% market share violated Section 3 because defendant failed to make any showing of the absence of adverse effects on its competitors.

7. In *Greater Providence MRI Ltd. P'ship v. Medical Imaging Network of Southern New England, Inc.*, 32 F. Supp. 2d 491 (D.R.I. 1998), the court denied defendant's motion to dismiss allegations that an exclusive agreement under which the HMO would only reimburse MRIs performed by Medical Imaging and

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[134] *See, e.g.*, Toscano v. PGA Tour, Inc., 201 F.Supp.2d 1106 (E.D. Cal. 2002) (granting defendant's motion for summary judgment because the Professional Golf Association's eligibility rules had sufficient pro-competitive justifications to negate plaintiffs' antitrust claims); Servicetrends, Inc. v. Siemens Med. Sys., Inc., 1995-1 Trade Cas. (CCH) ¶ 70,900 (N.D. Ga. 1995) (after "heavily weighing the customer's business justification" for entering exclusive multi-year contracts for servicing high-tech medical equipment, the court concluded that such agreements were lawful).

[135] *See, e.g.*, E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, 357 F.3d (1st Cir. 2004); United States v. Visa U.S.A., Inc., 344 F.3d 229 (2d. Cir. 2003), *cert. denied*, 125 S.Ct. 45 (2004); Dickson v. Microsoft Corp., 309 F.3d 193, 199 n.1 (4th Cir. 2002) (citing U.S. v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)); Seafood Trading Corp. v. Jerrico, Inc. 924 F.2d 1555, 1569-70 (11th Cir. 1991); Chuck's Feed & Seed Co. v. Ralston Purina Co., 810 F.2d 1289, 1295 (4th Cir. 1987); Susser v. Carvel Corp., 332 F.2d 505, 517 (2d Cir. 1964); Gordon v. Lewiston Hosp., 272 F. Supp. 2d 393 (M.D. Pa. 2003); R.J. Reynolds Tobacco Co. v. Philip Morris Inc., 199 F. Supp. 2d 362 (M.D.N.C. 2002); Bepco, Inc. v. Allied-Signal, Inc., 2000 WL 1010264 (M.D.N.C. 2000).

3 605 Vertical Restraints.DOC

its subcontractor foreclosed competition. The plaintiff claimed that this contract had the effect of reducing competition and facilitating a monopoly because physicians would not refer patients to MRI providers that could not offer coverage by all the HMOs, including the one party to the exclusive agreement. The court held that this allegation sufficiently stated an antitrust claim.

8. In *LePage's, Inc. v. Minn. Mining and Mfg. Co.*, 324 F.3d 141 (3d Cir. 2003), *cert. denied,* 124 S.Ct. 2932 (2004), the court held that 3M, a transparent tape manufacturer with a monopoly in the market, violated Section 2 of the Sherman Act by engaging in exclusionary conduct through the use of bundled rebates and exclusive dealing contracts with large customers such as Kmart, Staples, and Sam's Club. The court found that 3M had entered *de facto* exclusive dealing contracts with large customers for the purpose of achieving sole-source supplier status.

9. In *United States v. Visa U.S.A., Inc.,* 344 F.3d 229 (2d Cir. 2003), *cert denied*, U.S. (2004). the Second Circuit upheld a district court decision that MasterCard and Visa had violated Sherman Act Section 1 through their exclusive arrangements with member banks. Under these arrangements, the members banks could not issue American Express or Discover cards. The Second Circuit agreed with the District Court's conclusion that that MasterCard and Visa exercised market power and that they harmed competition. The court said that the "most persuasive evidence of harm to competition is the total exclusion of American Express and Discover from a segment of the market for network services," the segment being Visa and MasterCard member banks.

10. In *Marales-Villalobos v. Garcia-Llorens,* 316 F.3d 51 (1st Cir. 2003), the First Circuit reversed the District Court's grant of summary judgment for the defendants, which had held that the plaintiff had failed to define a relevant geographic market. The First Circuit found that the grant of summary judgment during the pleading stage was in error and that material issues of fact remained regarding the relevant geographic market.

11. In *Geneva Pharm. Tech. Corp v. Barr Lab.*, 386 F.3d 485 (2d Cir. 2004), the Second Circuit partially reversed the District Court's grant of summary judgment in favor of the defendants, a pharmaceuticals manufacturer and its supplier. The case

involved an exclusive dealing arrangement between Barr Laboratories, a manufacturer of generic warfarin sodium, and Brantford Chemicals, Inc., a supplier clathrate, the primary ingredient of warfarin sodium. The court held that the plaintiffs had made a *prima facie* case that the arrangement violated Section 1 of the Sherman Act. The court stated that the plaintiffs had produced evidence creating a material dispute of fact as to whether Brantford effectively controlled the entire supply of clathrate available to manufacturers of generic warfarin sodium. The court also cited evidence of high barriers to entry into the market for other clathrate suppliers, and evidence that the exclusive dealing arrangement had the potential to "freeze competitors out of the generic warfarin sodium market."

G. Cases Upholding Exclusive Dealing Arrangements.

1. Arrangements that shift exclusive contracts from one entity to another (*i.e.*, switching from an exclusive arrangement with one entity to an exclusive arrangement with another entity) have been upheld.[136]

2. Arrangements that can be terminated within a brief period and do not prohibit entirely the defendant from competing in the market are usually upheld.[137]

3. Where market shares are small, some courts have upheld arrangements by focusing only on de minimis foreclosure and ignoring all other issues. For example, in *Barr Laboratories Inc. v. Abbott Laboratories*, 1991-2 Trade Cas. (CCH) ¶ 69,675 (D.N.J. 1991), the court upheld an exclusive dealing arrangement imposed by a pharmaceutical manufacturer whose

[136] *See, e.g.*, Coffey v. Healthtrust, Inc., 955 F.2d 1388 (10th Cir. 1992) (affirming summary judgment for defendant, holding that the exclusive contract with plaintiff only "reshuffled competitors" (from the radiology group to Dr. Killebrew) which had no detrimental impact upon competition); Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994); Balaco, Inc. v. Upjohn Co., No. 92-0113, 1992 WL 131150 (E.D. Pa. 1992); Capital Imaging Assoc. v. Mohawk Valley Med. Assoc., 791 F. Supp. 956 (N.D.N.Y. 1992), aff'd, 996 F.2d 537 (2d Cir. 1993).

[137] *See e.g.*, U.S. Healthcare, Inc. v. Healthsource, Inc., 1992-1 Trade Cas. (CCH) ¶ 69,697 (D.N.H. 1992), *aff'd,* 986 F.2d 589 (1st Cir. 1993) (holding that an exclusive relationship which the defendant HMO had with physicians in New Hampshire that prevented these physicians from participating in plaintiffs' HMOs were not illegal because a number of competitors in the relevant market, the various health care financing plans were reasonably interchangeable, and competition had not been lessened).

market power increased only 1-2% during the six-year period at issue.[138]

4. In *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380 (7th Cir. 1984), Judge Posner concluded that a plaintiff must show two things to demonstrate that an exclusive dealing arrangement is unlawful: that it is likely to keep at least one significant competitor from doing business in the relevant market and that the probable effects of the exclusion will be to raise prices above competitive levels or otherwise injure competition. Based on evidence that alternative distributors were available and that an arrangement promoted interbrand competition, the arrangement was upheld without any reference to market shares and only a passing reference to its 90-day duration.[139]

5. In *Beltone Electronics Corp.*, 100 F.T.C. 68 (1982), the FTC upheld exclusive dealing arrangements among a hearing aid manufacturer and its distributors affecting 16% of sales and 7-8% of dealers because Beltone's share had fallen, there were few barriers to entry, new entrants had little difficulty finding distributors, and the arrangement promoted interbrand competition.

6. Arrangements lasting one year or less are presumptively valid. *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d at 380.

7. In *Omega Envt'l., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), the Ninth Circuit upheld an exclusive dealing arrangement which could foreclose up to 38% of the total market. The court reasoned that although the amount of the likely foreclosure was significant, the percentage substantially overstated the size of the true foreclosure and its likely anticompetitive effect.

8. In *Double D Spotting Service, Inc. v. Supervalu, Inc.*, 136 F.3d 554 (8th Cir. 1998) the Eighth Circuit affirmed dismissal of the plaintiff's complaint that argued that an exclusive dealings contract that fixed the price that one unloading service provider could charge at one supermarket warehouse was a *per se* violation of the Sherman Act. The court held that the arrangement was an isolated agreement concerning one warehouse and did not fix prices between different market levels.

9. In *CDC Technologies, Inc. v. IDEXX Laboratories*, 7 F. Supp. 2nd 119 (D. Conn. 1998) *aff'd,* 186 F.3d 74 (2d. Cir 1999), the district court upheld the exclusive dealing arrangement in which the defendant had an 80% market share, had foreclosed 50% of available distributors, and had documents in its files indicating that it intended to erect barriers to entry and block distribution channels. The court concluded that the plaintiff had failed to present evidence that a significant amount of competition was foreclosed by the defendant's exclusive dealing arrangement. CDC, which relied more on direct marketers than distributors, still had access to the consumer. In addition, the exclusive distributor agreements had 60-day terminability clauses and an additional supplier had recently entered the market.

10. In *Ajir v. Exxon Corp.*, 1999-2 Trade Cas. (CCH) ¶ 72,609 (9th Cir. 1999), the plaintiff alleged that Exxon was engaged in both illegal horizontal and vertical exclusive dealing arrangements stemming from its requirement that their franchisees (who serve as Exxon distributors but also compete in the sale of Exxon gasoline) only purchase gasoline from Exxon. After stating that these "hybrid relationships" are judged under the rule of reason as vertical constraints, the court granted summary judgment for Exxon, concluding that the plaintiff failed to prove that Exxon possessed sufficient market power.

11. In *United States v. Microsoft*, 87 F. Supp. 2d 30, 51-54 (D.D.C. 2000), the district court rejected the government's claim that Microsoft was engaged in illegal exclusive dealing arrangements with various computer companies. The court held that, under a rule of reason analysis, an exclusive dealing arrangement must "completely exclude" a competitor from the relevant market.

[138] *See*, *e.g.*, Ryko Mfg. Co. v. Eden Servs., 823 F.2d 1215 (8th Cir. 1987) (holding reasonable an exclusive dealing arrangement imposed by a firm with an 8-10% market share when there was no evidence that competitors had been prevented from obtaining effective distributors); Barnosky Oils, Inc. v. Union Oil Co., 582 F. Supp. 1332, 1335 (E.D. Mich. 1984) (refiner share of less than 1% too small to be substantial under *Tampa Electric*, especially where there are 19 other competitors); T.A.M., Inc. v. Gulf Oil Corp., 553 F. Supp. 499, 505-6 (E.D. Pa. 1982) (refiner market share of 7%).

[139] *Accord*, *e.g.*, Hendricks Music Co. v. Steinway, Inc., 689 F. Supp. 1501 (N.D. Ill. 1988) (arrangement involving a firm with 48% market share upheld because of absence of evidence of actual foreclosure; Roland relied on); Joyce Beverages of N.Y., Inc. v. Royal Crown Cola Co., 555 F. Supp. 271 (S.D.N.Y. 1983) (arrangement upheld because it promoted interbrand competition).

3 605 Vertical Restraints.DOC

While the government's exclusive dealing claim was not at issue in Microsoft's appeal to the D.C. Circuit, a portion of the court's opinion may cast doubt on the district court's standard of *complete exclusion*. The circuit court implied that precedent supported a 40% market exclusion standard, not the district court's *complete exclusion* test. *See United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Under the terms of the consent decree between Microsoft and DOJ entered into in 2002, Microsoft is forbidden from entering into any exclusive or fixed percentage agreements with IAPs, ICPs, ISVs, IHVs or OEMs for any Microsoft platform software.

12. In *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F. Supp. 2d 814 (M.D.N.C. 2000), the district court rejected the plaintiff's claim that Allied-Signal was engaged in an illegal exclusive dealership. The court held that Bepco failed to properly allege that it had actually been excluded from operating in the aftermarkets for valves in any relevant sales region.

13. In *PepsiCo, Inc. v. The Coca-Cola Co.,* 315 F.3d 101 (2d Cir. 2002), the court affirmed the granting of Coca-Cola's motion for summary judgment on the grounds that Pepsi had improperly defined its relevant market. Pepsi challenged Coca-Cola's "loyalty agreements" with its distributors, which prohibited them from selling competitors' soft drink products. Pepsi based its relevant market definition on the type of distributor used by a customer, and argued that Coca-Cola's agreements had anticompetitive effects on independent food service distributors (IFDs). Rejecting this market definition, the court found that Pepsi could not show that delivery by IFD was a significant factor in customer's purchasing decisions. Further, the court held that Pepsi could remain competitive through superior pricing.[140]

14.. In *Menasha Corp. v. News America Mktg. In-Store, Inc.,* 354 F.3d 661 (7th Cir. 2004), the Seventh Circuit upheld a grant of summary judgment for defendant engaged in exclusive dealing arrangements with retailers. The defendant was a producer of at-shelf coupon dispensers. It entered into contracts with retailers which required those retailers install the defendant's coupon dispensers exclusively. The District Court granted summary judgment for the defendant because it did not agree with the plaintiff's claim that at-shelf coupon dispensers constituted a distinct market. In upholding the District Court's decision, the Seventh Circuit found that coupons distributed by newspapers, on product packaging, and at checkout counters competed with the defendant's at-shelf dispensers.

15. In *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 661 (7th Cir. 2004), the Seventh Circuit rejected the plaintiff's argument that it did not need to define distinct product and geographic markets to bring a successful Section 1 action against an exclusive dealing arrangement when it could show that the defendant's behavior created direct anticompetitive effects.

16. In *Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n,* 357 F.3d 1 (1st Cir. 2004), the First Circuit upheld the District Court's dismissal of an antitrust challenge to an exclusive dealing arrangement between a university and Coca Cola. The university gave Coca Cola the exclusive right to sell its products through vending machines on campus. The plaintiff argued that vending machines on campus constituted a distinct market and that Coca Cola's control of those vending machines stifled competition. Both the District Court and the First Circuit disagreed with the plaintiff's characterization of the relevant market. Both courts found that the market included vending machines located outside the campus and controlled by other distributors. Thus, the arrangement between the university and Coca Cola did not give Coca Cola market power in the vending machine market.

17. In *Jame Fine Chems., Inc., v. Hi-Tech Pharm. Co., Inc.*, 2007 WL 927976 (D.N.J. 2007), the court rejected an exclusive dealing challenge after the plaintiff narrowly and arbitrarily defined the relevant product market. Rather than define it as all prescription 12-hour liquid cough and cold products, the plaintiff defined it as only the three products for which it manufactured generic equivalents. "By defining the relevant market so narrowly, and with parameters dictated by what Hi-Tech itself

[140] *See also* Apani Southwest, Inc. v. Coca-Cola Enters., Inc., 300 F.3d 620 (5th Cir. 2002) (dismissing bottled beverage seller's claims against a Coca-Cola bottler, in part because plaintiff's definition of the relevant geographic market was not economically significant and did not correspond to commercial realities of the industry).

3 605 Vertical Restraints.DOC

sells, Hi-Tech has failed to identify a proper relevant market," the court held. *Id.*

18. In *Reading International, Inc. v. Oaktree Capital Management, LLC*, 2007 WL 39301 (S.D.N.Y. 2007), the district court rejected a movie theater operator's challenge to a licensing arrangement between a national theater chain and film distributors. Because the plaintiff excluded theaters that were easily accessible to consumers, the court found a failure to define a relevant geographic market. The plaintiff's principal flaw was in viewing the market from the perspective of suppliers, rather than consumers.

H. Special Situations.

1. *Partial Requirements Contracts, Minimum Purchase Requirements, Sales Quotas*. Practices such as partial requirements contracts, minimum purchase requirements, and sales quotas generally are treated favorably because they do not foreclose completely competing sellers from outlets. Only partial restriction that effectively foreclose all purchases from competing suppliers have been held illegal.[141]

2. *Special Facilities Contracts*. A requirement that a distributor sell goods of different competing suppliers only from separate facilities is not an exclusive dealing arrangement.[142]

3. *Exclusive Provider Contracts*. Several jurisdictions have held that exclusive provider contracts for medical services do not violate the Sherman Act.[143]

4.. *Exclusive Intellectual Property Licenses:* "In the intellectual property context, exclusive dealing occurs when a license prevents the licensee from licensing, selling, distributing, or using competing technologies." Intellectual Property Guidelines at ¶ 5.4. The Guidelines state that, as in other areas, "exclusive dealing arrangements are evaluated under the rule of reason." *Id.*

Antitrust "Safety Zone": The Guidelines provide with respect to goods markets that, "absent extraordinary circumstances, the Agencies will not challenge an intellectual property licensing arrangement if (1) the restraint is not facially anticompetitive and (2) the licensor and its licensees collectively account for no more than twenty percent of each relevant market significantly affected by the restraint." Intellectual Property Guidelines at ¶ 4.3.

If an examination of the effect on competition among technologies or in research development is required, and if market share data are unavailable or inaccurate, then the Agencies will not challenge a restraint if "(1) the restraint is not facially anticompetitive and (2) there are four or more independently controlled technologies in addition to the technologies controlled by the parties to the licensing agreement that may be substitutable for the licensed technology at a comparable cost to the user." *Id.*

VI. TYING ARRANGEMENTS.

A. General Background of Tying Arrangements.

1. Applicable Law.

a. Tying arrangements may be challenged under Section 1 of the Sherman Act, Section 3 of the Clayton Act, and Section 5 of the Federal Trade Commission Act.

b. A seller's refusal to sell a tying product because the buyer will not accept the tied product is not covered by Section 3 of the Clayton Act, although the refusal may violate the Sherman Act and the FTC Act.

c. Because Section 3 of the Clayton Act applies only when both the tying and tied products are "goods, wares, merchandise, machinery, supplies or other commodities," tying arrangements involving such intangibles as medical services, credit, business and personal services, and trademarks or franchises cannot be challenged under

[141] *See*, *e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983); Magnus Petroleum Co. v. Skelly Oil Co., 599 F.2d 196 (7th Cir. 1979).

[142] *See*, *e.g.*, Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 814 F.2d 90 (2d Cir. 1987).

[143] *See*, *e.g.*, Balaklaw v. Lovell, 14 F.3d 793 (2d Cir. 1994) (hospital's exclusive contract with anesthesiology group did not significantly foreclose competition, and may in fact spur competition among groups competing for the exclusive contract); Ezpeleta v. Sisters Health Corp., 800 F.2d 119 (7th Cir. 1986).

Section 3.[144] However, tying arrangements involving services still may be challenged under Section 1 of the Sherman Act and Section 5 of the FTC Act.[145] In addition, because Section 3 of the Clayton Act applies only to "sales," it also has been held that there is no cause of action under this section unless the tied product is in fact purchased.[146]

d. Actions for tying in violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act may be brought in a number of ways including: (1) a civil action instituted by the U.S. Department of Justice; (2) a criminal action initiated by the U.S. Department of Justice (albeit unlikely); (3) a parens patriae civil action initiated by any state attorney general; (4) a civil action seeking damages initiated by "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws." Actions for tying in violation of Section 5 of the FTC Act can be enforced only by the FTC.

e. Most states have adopted statutes analogous to the Sherman Act and other federal antitrust statutes prohibiting tying arrangements.[147] Many states also have adopted "little FTC Acts" prohibiting unfair methods of competition and unfair and deceptive trade practices. Under some such statutes, what constitutes "unfair methods of competition" or "unfair or deceptive acts of practices" is less well-defined than in FTC proceedings.[148]

[144] *See, e.g.*, *Intellective, Inc. v. Massachusetts Mut. Life Ins. Co.*, 190 F. Supp.2d 600 (S.D.N.Y. 2002) (holding that plaintiff did not make out a claim under Section 3 because the tied product was a service, not a product); *Tele Atlas v. NAVTEQ Corp.*, 2005-2 Trade Cas. (CCH) ¶ 75,047 (N.D.C.A. 2005) (finding that Clayton Act did not apply to licensors of digital map data)..

[145] *See Bafus v. Aspen Realty, Inc.*, 236 F.R.D. 652 (D.Id. 2006) (granting class certification against defendant-realtors for a tying arrangement in violation of the Sherman Antitrust Act).

[146] *See, e.g.*, *Black Gold, Ltd. v. Rockwool Indus.*, 729 F.2d 676, 684 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984); *Smith Mach. Co. v. Hesston Corp.*, 1987-1 Trade Cas. (CCH) ¶ 67,563, at 60,385 (D.N.M. 1987), aff'd, 878 F.2d 1290 (10th Cir. 1989), *cert denied*, 493 U.S. 1073 (1990); *Unibrand Tire & Prod. Co. v. Armstrong Rubber Co.*, 429 F. Supp. 470 (W.D.N.Y. 1977).

[147] *See, generally, ABA Antitrust Section, State Antitrust Practice and Statutes* (1999).

[148] For example, North Carolina's "little FTC Act" (N.C. Gen Stat. § 75-1.1) looks to FTC

2. Definition and Competitive Effect.

a. A tying arrangement exists when a seller conditions the sale of one product or service (the "tying product") on the purchase of a separate product or service (the "tied product"), or the agreement that the tied product will not be bought from another supplier. Tying arrangement may involve services as well as products, and leases as well as sales.[149]

b. A single firm, which does not participate as a seller in the markets for both the tying and tied product, still can engage in illegal tying if the tying arrangement is achieved through the combined actions of closely affiliated firms.[150]

c. The competitive effect of tying is twofold: it forecloses competing sellers from selling tied products to purchasers and forecloses purchasers' access to other sources of supply for the tied product.[151]

d. "[T]he essential characteristic of an *invalid* tying arrangement lies in the *seller's exploitation of its control over the tying product to force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such 'forcing' is present, competition on the merits in the market for the tied item is restrained . . . . 'By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of a buyer's independent judgment as to the

precedent for guidance, but also incorporates by reference the common law of unfair competition." Unlike the federal antitrust laws, which have as their object the protection of "competition, not competitors," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), the common law of unfair competition is concerned with protection of individual competitors.

[149] *See, e.g.*, *United States v. Loews, Inc.*, 371 U.S. 38 (1962); *United Show Machine Corp. v. United States*, 258 U.S. 451 (1922).

[150] *See, e.g., Action Ambulance Service v. Atlanticare Health Services, Inc.,* 815 F. Supp. 33 (D. Mass. 1993).

[151] *See, e.g., Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).

"tied" product's merits and insulates it from the competitive stresses of the open market.'"[152]

3. Policy Considerations and Enforcement History.

a. Early Supreme Court opinions viewed tying arrangements as "generally serv[ing] no legitimate business purpose that cannot be achieved in some less restrictive way,"[153] and thus "serv[ing] hardly any purpose beyond the suppression of competition."[154]

b. "Over the years, however, [the Supreme Court's] strong disapproval of tying arrangements has substantially diminished," and the assumption that tying arrangements are anti-competitive "has not been endorsed in any opinion since [*Fortner I*]."[155] Indeed, the Court has subsequently noted that "[m]any tying arrangements … are fully consistent with a free, competitive market."[156]

c. The DOJ's view during the Reagan Administration was that "[t]ying arrangements generally do not have a significant anticompetitive potential."[157]

d. However, Anne K. Bingaman, Assistant Attorney General of the Antitrust Division during the Clinton Administration, stated that she intended to bring cases involving vertical restraints, including tying arrangements. Indeed, in 1994 and 1995 the Justice Department filed its first tying cases in more than 10 years.[158]

e. The DOJ also brought a tying claim against Microsoft, alleging that the company conditioned its "Windows" operating system license on acceptance of its "Internet Explorer" web browser. The D.C. Circuit held, on appeal, that Microsoft's software bundling was subject to the *rule of reason*, rather than a *per se* analysis, and remanded the case to the District Court.[159] Microsoft subsequently entered into a consent decree with the DOJ, approved by the District Court, which imposed restrictions on Microsoft intended to "remedy the effects of Microsoft's anticompetitive behavior."[160]

f. *Intellectual Property Guidelines.*

The 1995 Guidelines state that the agencies are likely to challenge a tying arrangement if: (1) the seller has market power in the tying product, (2) the arrangement has an adverse effect on competition in the relevant market for the tied product, and (3) efficiency justifications for the arrangement do not outweigh the anticompetitive effects.[161]

Market Power: Significantly, the Guidelines state that the agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner.[162] The Supreme Court recently affirmed this position in *Illinois Tool Works, Inc. v. Independent Ink,*

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152 *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-13 (1984) (emphasis added).

153 See, *e.g.*, *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 503 (1969) (*Fortner I*)

154 *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949).

155 *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S.Ct. 1281, 1286-87 (2006).

156 *Id.* at 1287, 1292; *see also Jefferson Parish*, 466 U.S. at 11 ("not every refusal to sell two products separately can be said to restrain competition"); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 622 (1977) (*Fortner II*) (holding that tying sales of prefabricated homes with financing is not anticompetitive absent a showing of market power in the tying product market); *NCAA v. Board of Regents*, 468 U.S. 85, 104, n.26 (1984) (" . . . while the Court has spoken of a '*per se*' rule against tying arrangements, it has also recognized that tying may have pro competitive justifications . . .").

157 *See* DOJ Vertical Restraint Guidelines (1985).

158 *See, e.g.*, *United States v. El Paso Natural Gas Co.*, Civil Action No. 95-0067 (D.D.C. 1995) (DOJ obtained a consent decree involving the metering of natural gas); *United States v. Elec. Payment Services, Inc.*, 1994-2 Trade Cas. (CCH) ¶ 70,796 (D. Del. 1994) (DOJ obtained a consent decree against ATM network operator involving tying ATM processing to regional ATM network access).

159 *See United States v. Microsoft,* Corp., 253 F.3d 34 (D.C.Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

160 *U.S. v. Microsoft*, 231 F. Supp. 2d 144, 164 (2002).

161 1995 Intellectual Property Guidelines at ¶ 5.3.

162 *Id*. at ¶ 2.2.

Inc., finding that a patent does not create a rebuttable presumption of market power (see below).[163]

B. "*Per Se*" Illegality or Rule of Reason?

1. The *Jefferson Parish* decision describes two methods of proving that a tying arrangement is anticompetitive:

a. Per Se Illegality

In *Jefferson Parish,* the Court acknowledged that it has "condemned tying arrangements when the seller has some special ability-usually called 'market power'-to force a purchaser to do something that he would not do in a competitive market," but such "*[p]er se* condemnation-condemnation without inquiry into actual market condition is only appropriate if the existence of forcing is probable."[164] Therefore, the Court held that a tying arrangement is per se illegal if certain conditions are met (see below).

b. Rule of Reason Analysis

Absent a *per se* violation, a plaintiff must prove that a tying arrangement is anticompetitive by presenting evidence establishing an unreasonable restraint of trade in the relevant market for the tied product under the "rule of reason."[165] .

2. Elements of a *Per Se* Unlawful Tying Arrangement

Prior to *Jefferson Parish*, some courts required the plaintiff to establish that the alleged tie in fact had an anti-competitive effect in the market for the tied product. However, the *Jefferson Parish* Court held that certain tying arrangements are *per se* illegal without any further showing of anticompetitive effect *if* the following five preconditions are met:

(1) There are two separate and distinct products;

(2) Sale of the tying product is conditioned on the purchase of the tied product;

(3) The seller possesses "market power" over the tying product sufficient to "force" the buyer to purchase the tied product;

(4) There is an affect on a "not insubstantial" amount of interstate commerce; and

(5) The seller has a direct financial interest in the sale of the tied product.[166]

C. Elements of a *Per Se* Unlawful Tying Arrangement

1. Separate and Distinct Products.

a. Numerous courts have held that two tied products must be separate and distinct in order for the tying arrangement to be per se illegal.[167]

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[163] 126 S.Ct. 1281 (2006); *see also* Gerald F. Masoudi, Deputy Assistant Attorney Gen., Antitrust Div., Dep't. of Justice, *Intellectual Property and Competition: Four Principles for Encouraging Innovation*, speech given at Digital Americas 2006 Meeting in Sao Paolo, Brazil: Intellectual Property and Innovation in the Digital World (April 11, 2006); R. Hewitt Pate, Assistant Attorney Gen., Antitrust Div., Dep't of Justice, *Competition and Intellectual Property in the U.S.: Licensing Freedom and the Limits of Antitrust*, speech given at 2005 EU Competition Workshop in Florence, Italy (June 3, 2005).

[164] 466 U.S. at 13-15.

[165] *Id*. at 18, 29, 33-34 (O'Connor, J., concurring).

[166] *Jefferson Parish*, 466 U.S. 2, 12-13 (1984). For more recent statements of the per se standard, *see, e.g., Continental Trend Resources, Inc., v. OSY USA Inc.*, 44 F.3d 1465, 1481 (10th Cir. 1995); *Data General Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1178-79 (1st Cir. 1994).

[167] *See, e.g., Eastman Kodak Co. v. Image Technical Serv., Inc.*, 504 U.S. 451 (1992) (spare parts and maintenance service can be separate products if demand for parts is separate from demand for service); *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 1993-1 Trade Cas. (CCH) ¶ 70,239 (4th Cir. 1993) (a written description of real estate and photographs of the same property are not two separate products but are components of a single product, *i.e.*, information about specific real estate properties); *Abraham v. Intermountain Health Care, Inc.*, 394 F. Supp. 2d 1312 (D. Utah 2005) (holding that a health care plan and health care providers were not separate products capable of being unlawfully tied); *Paladin Assoc., Inc. v. Montana Power Co.*, 97 F. Supp. 2d 1013, 1027-30 (D. Mont. 2000) (stating that assignments of transportation and the practice of providing gas to customers did not constitute a separate product); *Dauro Adver., Inc. v. General Motors Corp.*, 75 F.Supp.2d 1165 (D. Colo. 1999) (holding that GM's cars and trucks constituted separate products from its advertising); *Red Lion Med. Safety, Inc. v. Ohmeda, Inc.*, 63 F. Supp. 2d 1218 (E.D. Cal. 1999); *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313 (C.D. Cal. 1992) (dismissing licensee's tying claim because Microsoft's license agreement did not require licensees to purchase additional products or prohibit them from purchasing products from other suppliers); *but see* Southern Pines *Chrysler-Plymouth, Inc. v. Chrysler Corp.,* 826 F.2d 1360 (4th Cir. 1987) (forcing purchase of less desirable models not tying); *Zschaler v. Claneil*

b. *Examples*:

In *Jefferson Parish* the Supreme Court held that anesthesiology services constituted a separate product from the other services and facilities provided by the defendant hospital in performing surgical operations. In so holding, the Supreme Court rejected the argument that anesthesiology and the other services and facilities should be considered one product since they constituted a "functionally integrated package of services." The Supreme Court held that the relevant test is not based "on the functional relationship between [the products], but rather on the character of the demand for the two items." In other words, the question is whether there were "two distinct markets for products that were distinguishable in the eyes of buyers."[168]

In *United States v. Microsoft Corp.,* the DOJ brought a tying claim against Microsoft, alleging that the company conditioned its "Windows" operating system license on acceptance of its "Internet Explorer" web browser in violation of the terms of a 1994 consent decree. On appeal, the D.C. Circuit concluded that the separate products test was poorly suited to the facts of the case because it may deter innovation and disadvantage consumers. Because the direct consumer demand test focuses on existing consumer behavior, it prevents companies from "integrating into their products new functionality previously provided by standalone products—and hence, by definition, subject to separate consumer demand."[169] Similarly, the indirect industry custom test deters innovation by comparing firms that have integrated functionalities with firms that have not yet done so. Thus, the separate products test may not take into account efficiency benefits of integration, and

Enter., Inc., 958 F. Supp. 929, 943 (D. Vt. 1997) (no evidence of separate availability of allegedly tied products); s*ee generally* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (FOURTH) 55-60 (4th ed. 1998) (listing factors and decisions on two products issue). Generally, whether there are two distinct products is a question of fact. *William Cohen & Son v. All American Hero, Inc.*, 693 F. Supp. 201, 205 n.4 (D.N.J. 1988).

168 466 U.S. at 19-21.

169 *U.S. v. Microsoft, Corp.,* 253 F.3d 34, 89 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

may treat newly integrated products unfairly. As a result of the weaknesses of the separate products test and of the court's inexperience with the efficiencies produced by software tying, the Court determined that *per se* analysis was not appropriate for this case. The Court thus remanded the tying claim to be analyzed under the *rule of reason*, which permits a cost-benefit analysis of software bundling.[170] Microsoft subsequently entered into a consent decree with the DOJ, approved by the District Court, which imposed restrictions on Microsoft intended to "remedy the effects of Microsoft's anticompetitive behavior."[171]

In *Park v. Thomson Corp.*, a law student brought a class action lawsuit against Thompson Corp., the creator of the BAR/BRI bar preparation course. The plaintiff alleged that the defendant had tied its Multistate Bar Exam course to its state-specific course in violation of the Sherman Antitrust Act. The court, noting that BAR/BRI's competitors sold the two courses individually, there must be separate demand for the two products. As a result, the court granted summary judgment in favor of the plaintiff on the issue of separate products.[172]

c. Courts have used various tests and standards to determine whether separate products exist, including:

(i) Whether the markets for the products are distinct (the "distinct markets test").[173]

170 *Id.*

171 *U.S. v. Microsoft*, 231 F.Supp. 2d 144, 164 (2002).

172 *Park v. Thompson Corp.*, 2007 WL 119461 (S.D.N.Y 2007).

173 *See, e.g., Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1994), *amending and withdrawing*, 995 F.2d 1324 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994); *Image Technical Service, Inc. v. Eastman Kodak Co.*, 903 F.2d 615, 616 (9th Cir. 1990), *aff'd*, 504 U.S. 451 (1992)(spare parts and maintenance service may form distinct markets if demand for parts can be separated from demand for services); *Faulkner Advertising Assoc. v. Nissan Motor Corp.*, 905 F.2d 769 (4th Cir. 1990) (wholesale vehicles and advertising form two distinct markets from the perspective of dealers and dealer associations); *McGee v. First Federal Savings and Loan Assoc.*, 761 F.2d 647, 648-49 (11th Cir. 1985), *cert. denied*, 474 U.S. 905 (1985) ("there is no legitimate consumer demand by a borrower to purchase loan-related appraisal services separate from the purchase of the loan

(ii) Whether it is the practice or custom of the seller and/or the rest of the industry to market and sell the products separately (the "industry custom test").[174]

(iii) Whether the two products are used "as a unit with fixed proportions" (the "functionally integrated test").[175]

(iv) Whether selling the products together generates efficiencies or technological improvement.[176]

itself"); *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 478 (7th Cir. 1988) (pathology services not distinct market from consumers' perspective); *Service and Training, Inc. v. Data General Corp.* 1990-1 Trade Cas. (CCH) ¶ 69,040 (D. Md. 1990) (repair services and diagnostic tool used for repairs found to constitute one product since the only legitimate use of the tool is to perform repairs thus there is no separate demand for the tool apart from service); *Parman*, 714 F. Supp. at 1305 (purchase of condominiums was separate product from leases for services within parking, maintenance etc., building); *but see O'Riordan v. Hong Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 116-117 (E.D.N.Y. 1989) (concluding membership in association and access to multiple listing service are not distinct products; court apparently uses functionally integrated test failing to mention distinct markets approach).

[174] *See, e.g., Montgomery County Association of Realtors*, No. L-90-2141 (D. Md. 1992) (holding that real estate listing information and photographs of listed houses were a single product based, in part, on a nationwide trend for multi-list associations to sell both listing information and photographs as part of a single data base); *Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc.*, 475 F. Supp. 973, 982 (D. Mass. 1979); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof. Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995) (local and multistate bar review courses were offered separately for 10 years, which indicates that they are separate products), *cert. denied*, 1995 WL 625402 (U.S. Jan. 8, 1996*); Sea-Land Serv. v. Atlantic Pacific Int'l, Inc.*, 61 F. Supp. 2d 1102 (D. Haw. 1999) (holding that shipping services and shipping containers were separate products because it was commonplace in the industry for shippers to negotiate lower rates for using their own containers); *Park v. Thomson* Corp., 2007 WL 119461 (S.D.N.Y. 2007) (holding that because the defendant's competitors sold the Multistate Bar Examination course and the state-specific course separately, the two courses were separate products).

[175] *See, e.g., Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1215 (9th Cir. 1977); *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,260 (7th Cir. 1996) (computers and operating systems are not separate products because a computer cannot function without an operating system); *In re Wang Laboratories, Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,288 (D. Mass. 1996) (same).

[176] *See, e.g., Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295 (D. Utah 1999) (holding that Microsoft could defeat plaintiff's claim of illegal tie of Windows 4.0 and MS-DOS 7.0 by demonstrating that "a valid, not insignificant, technological improvement ha[d] been achieved by the integration of two products"); *Associated Press v. Taft-Ingalls Corp.*, 340 F.2d 753, 759-64 (6th Cir. 1965), *cert. denied*, 382 U.S. 820 (1965). .

(v) Whether customers in fact bought or would buy the products separately (the "consumer demand test").[177]

d. Related issues:

(i) The separate product issue arises frequently in the franchising context where the question is whether the combination of goods and services offered as a single packaged franchise product is an illegal tying arrangement.[178]

(ii) Another issue is whether and under what circumstances a trademark and the products represented by the mark are a single product.[179]

[177] *See, e.g., Jefferson Parish*, 466 U.S. at 19 (holding that anesthesiology services constituted a separate product because, in part, patients often hire anesthesiologists separately and are billed separately for their services); *PSI Repair Serv. v. Honeywell, Inc.,* 104 F.3d 811, 815 (6th Cir. 1997), *cert. Denied,* 520 U.S. 1265 (1997) (in evaluating whether the allegedly tied products are separate products the trier of fact should examine whether there is sufficient consumer demand so that it is efficient for a firm to provide the products separately) (citation omitted); *Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147 (1st Cir. 1994); Parts and Electric Motors, Inc. v. Sterling Electronics, Inc.*, 826 F.2d 712 (7th Cir. 1987); *Chawla v. Shell Oil Co.*, 75 F.Supp.2d 626 (S.D. Tex. 1999) (dismissing the plaintiff's tying claim because it failed to allege that consumers desired to make their choice of gasoline brand separate from their choice of credit card readers); *In re Visa Check/MasterMoney Antitrust Litigation*, 2003-1 Trade Cas. (CCH) ¶ 73,995 (E.D.N.Y. 2003) (granting plaintiff's motion for summary judgment on tying claim because merchant demand for credit card services and merchant demand for debit card services was distinct, establishing that they are distinct products); *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.,* 311 F. Supp. 2d 1048 (D. Colo. 2004) (stating that the "test for determining whether two objects are separate products, as opposed to the same product, turns not on their function, but on the nature of any consumer demand for them").

[178] *See, e.g., Principe v. McDonald's Corp.*, 631 F.2d 303, 308 (4th Cir. 1980), *cert. denied*, 451 U.S. 970 (1981) (the lease of real property for construction of a franchised restaurant); *Subsolutions, Inc. Doctor's Assoc.*, 62 F. Supp. 2d 616 (D. Conn. 1999) (requirement that Subway franchisees purchase only Subway point of sale computers); *but see Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705 (11th Cir. 1984) (equipment and fixtures to be used on the franchise premises); *In re 7-Eleven Franchise Antitrust Litig.*, 1974-2 Trade Cas. (CCH) ¶ 75,429 (N.D. Cal. 1974). To the extent that franchise elements are not purchased separately (*e.g.*, trademark, store design, franchising services and assistance), the single product test may be met.

[179] *See Power Test Petroleum Distribs., Inc. v. Calcu Gas, Inc.*, 754 F.2d 91 (2d Cir. 1985) (the metes and bounds of a trademark are defined by the perceptions that exist in the mind of the public); *Jack Walters & Sons Corp. v. Morton Bldgs., Inc.*, 737 F.2d 698, 704-05 (7th Cir.),

(iii) Similarly, various works protected by a single copyright have been treated as a "single intellectual property" rather than as separate products.[180]

(iv) In order for a claim to survive summary judgment, the Ninth Circuit has required plaintiffs to define the tying and tied products from the perspective of end users for the products.[181]

2. Sale of Tying Product Conditioned on Purchase of Tied Product.

a. *Per se* unlawful tying requires that a supplier *condition* the sale of the tying product on the purchase of the tied product.[182]

b. Possible scenarios:

(i) If the buyer can purchase the tying and tied products separately on nondiscriminatory terms, there is no tie.[183]

cert. denied, 469 U.S. 1018 (1984); *Redd v. Shell Oil Co.*, 524 F.2d 1054, 1056-57 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976) *Shell Oil Co. v. A.Z. Serv.,* 990 F. Supp. 1406 (S.D. Fla. 1997) (gasoline sold by service station franchisee and franchisor's trademark inextricably interrelated and not separate products); *but see Mozart Co. v. Mercedes-Benz of North America, Inc.*, 593 F. Supp. 1506 (N.D. Cal. 1984) (automobiles and their replacement parts are separate products, even though both are marketed through franchised distributors). *See also William Cohen*, 693 F. Supp. at 206 (distinguishing distribution type trademark/franchise system from business format system);

180 *See, e.g., Metromedia Broadcasting Corp. v. MGM/UA Entertainment Co., Inc.*, 611 F. Supp. 415 (C.D. Cal. 1985).

181 *See Truck-Rail Handling, Inc. v. Burlington Northern & Santa Fe Railway Co.*, No. 05-16552, 2007 WL 2050860 (9th Cir. 2007).

182 *See, e.g., United States v. Loew's Inc.*, 371 U.S. 38, 45 (1962); *see also 305 East 24th Owners Corp. v. Parman Co.*, 714 F. Supp. 1296, 1305 (S.D.N.Y. 1989).

183 *See, e.g., Northern Pac. Ry. Co.*, 356 U.S. at 6 n.4; *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1331 (6th Cir. 1983); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376 (9th Cir. 1981), *cert. denied*, 454 U.S. 831 (1981); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 708 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); *See also Little Caesar Enterprises, Inc. v. Smith*, 34 F. Supp.2d 513 (S.D. Mich. 1998) (holding that franchise agreement was not an illegal tying arrangement because plaintiffs failed to demonstrate that the exercise of their contractual right to seek franchiser approval of alternate distributors would have been futile); *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145 (9th Cir. 2003); *Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988 (4th Cir. 1990) (students free to buy portraits elsewhere); *Davis v. First Nat'l Bank of Westville,*

(ii) The plaintiff need not actually purchase the tied product to bring a claim. This occurs when the seller refuses to sell the tying product unless the tied product is purchased or by selling the tying product separately but only at an unreasonably high price.[184]

(iii) A tied sale may also exist if the seller conditions the purchase of the tying product on the condition that the buyer not purchase the tied product from another seller.[185]

(iv) A reasonable, cost justified package discount will not be viewed as unlawful tying,[186] but the lack of a discount can be evidence that an illegal tying arrangement does not exist.[187]

(v) If the tied product is provided without charge, there is no illegal tie. But if there is a bundled price that covers costs of the tied product, there can be a tie.[188]

868 F.2d 206 (7th Cir. 1989) (borrowers free to seek banking services elsewhere); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517 (8th Cir. 1987); *Cia Petrolera Caribe, Inc. v. Avis Rental Car Corp.*, 735 F.2d 636 (1st Cir. 1984); *Shop & Save Food Markets, Inc. v. Pneumo Corp.,* 683 F.2d 27 (2d Cir. 1982); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977).

184 *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 814 (1st Cir. 1988); *United States v. Loews, Inc.*, 371 U.S. 38, 52, 54 - 55 (1962); *Xeta, Inc. v. Atex, Inc.*, 852 F.2d 1280, 1283 (Fed. Cir. 1988) (plaintiff failed to show that warranty of tying product conditioned or use of tied product was unreasonable, preliminary injunction denied).

185 *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992); *Western Duplicating , Inc. v. Riso Kagaku Corp. et al.,* 2000 WL 1780288 (E.D. Cal. 2000).

186 *See, e.g., Ramallo Bros. Printing, Inc. v. El Dia, Inc.,* 392 F.Supp.2d 118 (D.C.P.R. 2005); *Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970 (4th Cir. 1990) (developer of computer software program did not create illegal tying arrangement by discounting the price of software program to licensees who also purchased other related goods); *Robert's Waikiki U-Drive v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403, 1407 (9th Cir. 1984); *American Mfrs. Mut. Life Ins. Co. v. American Broadcasting-Paramount Theatres, Inc.*, 446 F.2d 1131, 1137 (2d Cir. 1971), *cert. denied*, 404 U.S. 1063 (1972).

187 *Rome Ambulatory Surgical Center, LLC v. Rome Memorial Hospital, Inc.,* 2005-1 Trade Cas. (CCH) ¶ 74,673 (N.D.N.Y. 2004).

188 *See, e.g., Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof. Publications, Inc.*, 63 F.3d 1540 (10th Cir. 1995), *cert. denied*, 116 S.Ct. 702 (Mem) (1996); *Sea-Land Serv. v. Atlantic Pacific Int'l, Inc.*, 61 F. Supp. 2d 1102 (D. Haw. 1999).

(vi) The mere threat that a seller will withhold the tying good unless the tied good is purchased is insufficient to establish a tie.[189]

(vii) If the condition is express on the face of the agreement, the element of conditioning may be directly inferred.[190]

(viii) A tying arrangement may be illegal if the seller's policy makes purchasing the tied and tying products together the only viable economic option.[191]

(ix) Evidence that a tying arrangement was the result of complex negotiation can negate a claim that the arrangement was illegal.[192]

c. "Coercion" or "forcing" requirement:

(i) Before *Jefferson Parish*, courts disagreed over whether coercion (*e.g.,* threats of sanctions, use of sanctions, policing, retaliation, use of black lists or short term leases, etc.) must be present in order to establish unlawful conditioning.[193]

(ii) *Jefferson Parish* required forcing as an "essential characteristic" of an unlawful tie.[194] Courts after *Jefferson Parish* have required coercion, evidence of "economic muscle," or an express contractual provision requiring the joint purchase.[195]

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[189] *See, e.g., Sean Julian v. George Weston Bakeries Dist., Inc.*, 2005-2 Trade Cas. (CCH) ¶ 74,920 (U.D. Me. 2005) ("threats that are not alleged to have been carried out are insufficient to establish a tie") (citation omitted); *Borschow Hosp. and Medical Supplies, Inc. v. Cesar Castillo Inc.,* 96 F.3d 10, 18 (1st Cir. 1996) ("Where a tying product has not been withheld, there is no tie."); *Logic Process Corp. v. Bell & Howell Publications Systems Co.,* 162 F.Supp.2d 533 (N.D. Tex. 2001) (dismissing tying claim where customers were not required to purchase equipment from defendant); *Moccio v. Cablevision Systems Corporation*, 2002 WL 1363269 (E.D.N.Y. 2002) (dismissing tying claim where subscribers could receive the MSGN channel without signing up for premium cable services).

[190] *See, e.g.,Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072 (1992); *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005); *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265 (11th Cir. 1999); *Systemcare, Inc. v. Wang Laboratories*, 117 F.3d 1137 (10th Cir. 1997); *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421 (9th Cir. 1995); *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 826 F.2d 712 (7th Cir. 1987); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978).

[191] *See, e.g., HDC Medical, Inc. v. Minntech Corp.*, 411 F.Supp.2d 1096 (D.Minn. 2006); *Ramallo Bros. Printing, Inc. v. El Dia, Inc.,* 392 F.Supp.2d 118 (D.C.P.R. 2005).

[192] *Rome Ambulatory Surgical Center, LLC v. Rome Memorial Hospital, Inc.,* 2005-1 Trade Cas. (CCH) ¶ 74,673 (N.D.N.Y. 2004).

[193] *Compare Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1130-1132 (6th Cir. 1981) (proof of coercion unnecessary) *with Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 540 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) (coercion "significant element") *and Bob Maxfield, Inc. v. American Motors Corp.*, 637 F.2d 1033, 1037 (5th Cir.), *cert. denied*, 454 U.S. 860 (1981) ("actual coercion is an indispensable element . . ." of an unlawful tie).

[194] 466 U.S. at 12

[195] *See, e.g., Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 927 (9th Cir. 2007) (finding a genuine factual dispute as to whether the practice of offering discounts to insurers who designate hospitals as their exclusive providers forces insurers to use services "as an implied condition of dealing or as a matter of economic imperative"); *Med Alert Ambulance, Inc. v. Atlantic Health System, Inc.*, No. 04-1615, 2007 WL 2297335 (D.N.J. 2007) (holding the testimony of three nurses who described a policy of reserving hospital beds for patients using defendant's ambulance services sufficient to satisfy the conditioning element); *Ramallo Bros. Printing, Inc. v. El Dia, Inc.,* 392 F.Supp.2d 118 (D.C.P.R. 2005); *Western Duplicating, Inc. v. Riso Kagaku Corp. et al.,* 2000 WL 1780288 (E.D. Cal. 2000) (finding that imposition of additional charges for use of materials not manufactured by the defendant and deceptive statements that such materials damaged defendant's products were sufficient evidence of a tying arrangement); *Discovision Ass'n v. Disc Mfr. Inc.*, 1997 WL 309499 (D. Del. 1997) (finding that defendant's threats of lawsuits unless customers accepted technology licenses constituted sufficient coercion to establish a tying claim); *Zschaler v. Claneil Enter.,* 958 F. Supp. 929, 944 (D. Vt. 1997) (refusing to infer coercion from the mere bundling of products); *Dauro Adver., Inc. v. General Motors Corp.*,75 F.Supp.2d 1165 (D. Colo. 1999) (holding that GM conditioned the sale of its vehicles on the sale of advertising by charging a one percent "contribution" for advertising on each vehicle); *Red Lion Med. Safety, Inc. Ohmeda, Inc.*, 63 F. Supp. 2d 1218 (E.D. Cal. 1999) (finding that customer testimony that they would have preferred to buy the tied product separately but did not do so because of the defendant's policy was sufficient evidence that they were "coerced to some extent"); *Advanced Computer Svs. of Michigan v. MAI Systems Corp.,* 845 F. Supp. 356 (E.D. Va. 1994) (holding that defendant's decision to selectively license its copyrighted software did not evidence an express or implicit tying agreement, even if it affected the ability of plaintiffs to service defendant's computers); *Medtronic MiniMed Inc. v. Smiths Medical MD Inc.*, 371 F.Supp. 2d 578 (D. Del. 2005) (holding that sale of insulin infusion pump was not tied to sale of insulin delivery device because defendant's customers were not contractually obligated to purchase the pump); *Compuware Corp. v. IBM Corp.*, 366 F. Supp. 2d 475 (E.D. Mich. 2005) (holding that defendant's refusal to discount software license unless customers purchased its software tools was sufficient evidence of forcing); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 991 (4th Cir. 1990) ("[S]eller must coerce the buyer into purchasing the tied product.") *Tic-X-Press v. Omni Productions Co.*, 815 F.2d 1407 (11th Cir. 1987); *Gonzalez v. St. Margaret's House Housing Dev. Fund*, 880 F.2d 1514, 1517 (2nd Cir. 1989); *Murphy v. Business Cards Tomorrow, Inc.*, 854 F.2d 1202, 1204 (9th Cir. 1988); *See also Webb v. Primo's Inc.*, 706 F. Supp. 863, 868-869 (N.D. Ga. 1988) (discussion of what acts constitute coercion sufficient to create a de facto tied sale in franchise context); *Aquatherm Indus. v. Florida*

3. The Seller Possesses Sufficient "Market Power" Over the Tying Product to "Force" the Buyer to Purchase the Tied Product.

a. To force the purchaser to buy the tied product, the supplier must have some "special ability" or "market power," and the *Jefferson Parish* Court suggested three contexts in which such forcing is probable: where the seller has a patent or similar monopoly, where the seller's share of the market is high, or where the seller offers a unique product. [196]

(i) *Patent, Copyright, or Trademark.* Early Supreme Court cases found market power where suppliers had a patent or copyright monopoly over the tying product.[197] However, the Supreme Court recently held in *Independent Ink* that a patent does not create a rebutable presumption of market power.[198] Courts have also generally refused to presume that a trademark confers economic power.[199]

(ii) *High market share.* In *Jefferson Parish*, the Supreme Court found a 30% market share within the relevant market insufficient to establish the requisite market power.[200] The trend seems to be to require the plaintiff to show extremely high market share to prove market power.[201] Moreover, even a very high market share does not necessarily mean that the defendant can exercise market power.[202]

(iii) *Unique Product.* A plaintiff can also demonstrate power by showing the tying product is "unique" (*e.g.*, patented or copyrighted) and not available from the seller's competitors.[203]

Power & Light Co., 145 F.3d 1258, 1263 (11th Cir. 1998), *reh'g denied,* 162 F.3d 100 (11th Cir. 1998), *cert. denied,* 119 S. Ct. 1356 (1999) (affirming dismissal of plaintiff's tying claim because plaintiff failed to show facts establishing the essential element of coercion); *see generally* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS (FOURTH) 60-62 (4th ed. 1999).

196 *Jefferson Parish*, 466 U.S. at 12-14, 16, 17.

197 *See, e.g., Int'l Salt. Co. v. United States*, 332 U.S. 392 (1947); *Int'l Bus. Mach. Corp. v. United States*, 298 U.S. 131 (1936); *see also United States v. Loew's*, 371 U.S. 38, 45-47 (1962) (tying license of unpopular films such as "Gorilla Man" to license of popular films such as "Casablanca" raised presumption of restraint on competition).

198 126 S.Ct. 1281; *see also* Intellectual Property Guidelines at ¶ ¶ 2.2, 5.3 ("The Agencies will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner")

199 *See, e.g., Redd v. Shell Oil Co.*, 524 F.2d 1054, 1057 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Grappone*, 858 F.2d at 798 (brand of automobile not so unique as to give distributor market power); *Capital Temporaries, Inc. of Hartford v. Olsten Corp.*, 506 F.2d 658 (2d Cir. 1974); *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561, 1568-69 (N.D. Cal. 1984); *but see Siegel v. Chicken Delight Inc.*, 448 F.2d 43, 50 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (a recognized trademark may possess unique attributes and thus confer economic power).

200 *Jefferson Parish*, 466 U.S. at 26-27; 36-38 (O'Connor, J., concurring).

201 *See Med Alert Ambulance, Inc. v. Atlantic Health System, Inc.*, No 04-1615, 2007 WL 2297335 (D.N.J. 2007) (requiring "dominant" market share); *Continental Trend Resources, Inc. v. OXY USA, Inc.,* 44 F.3d 1465 (10th Cir. 1995) (< 10% market share insufficient); *Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.,* 21 F.3d 83 (5th Cir.), *cert. denied*, 115 S.Ct. 425 (1994) (17.5% of sugar cane land in relevant market insufficient); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1994), *amending and withdrawing*, 995 F.2d 1324 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994) (11% of software market insufficient to establish market power); *D.O. McComb & Sons v. Memory Gardens Management Corp.*, 1990-1 Trade Cas. (CCH) ¶ 69,072 (N.D. Ind. 1990) (60% share of burial market in county sufficient to show market power over sale of cemetery plots); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 796-797 (1st Cir. 1988) (regional distributor's market share of total car sales on imported car sales was too small to give it market power); *Western Power Sports v. Polaris Industries Partners*, 1990-1 Trade Cas. (CCH) ¶ 68,990 (D. Idaho 1990) (31% of the market in retail snowmobile industry not sufficient to constitute market power), *rev'd per curiam*, 951 F.2d 365 (9th Cir. 1991); *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F. Supp. 387, 399 (W.D. Pa. 1988) (30% share in home video market insufficient to show market power); *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561, 1569 (N.D. Cal. 1984) (19% insufficient); *Metzler v. Bear Automotive Serv. Equip. Co., SPX,* 19 F. Supp. 2d 1345, 1361 (S.D. Fla. 1998) (26% market share insufficient to establish market power); *Stunfence, Inc. v. Gallagher Sec. (USA), Inc.* 2002-2 Trade Cas. (CCH) ¶ 73,789 (N.D. Ill. 2002) (electric fencing manufacturer did not have market power sufficient to affect market for nuts, bolts, and brackets); *Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374 (3rd Cir. 2005) (finding that defendant manufacturer did not have market power in the hot air balloon tying product market because the market was competitive); *In re Wireless Telephone Services Antitrust Litigation*, 385 F. Supp. 2d 403 (S.D.N.Y. 2005) (24% share of wireless telephone service market insufficient to establish market power); *E&L Consulting, Ltd. v. Doman Ind. Ltd*., 360 F. Supp. 2d 465 (E.D.N.Y. 2005) (finding that defendant lumber producer lacked market power in the tying product market).

202 *See United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exch.*, 89 F.3d 233, 237 (5th Cir. 1996) (even if defendants had a 100% share of the market postulated by the plaintiffs, there was no showing that market power could be exercised under the circumstances); *Park v. Thomson Corp.*, No. 05 Civ. 2931, 2007 WL 119461 (S.D.N.Y. 2007) (refusing to find defendant's market share of 80–90% sufficient where the primary barrier to entry was its reputation for high quality service).

203 *See, e.g., Jefferson Parish*, 466 U.S. 1, 104 S. Ct. at 1560; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *United States v. Loew's, Inc.*, 371 U.S. 38 (1962); *Baxley-DeLamar Monuments v. American Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988) (cemetery plots may be unique); *Tic-X-Press v. Omni Promotions Co.*, 815 F.2d 1407 (11th Cir. 1987) (uniqueness); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1339-41 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3534 (1985); *Bell v. Cherokee Aviation Corp.*, 660 F.2d

b. *Other Factors:*

(i) The mere fact that a large number of purchasers accept the tie does not establish economic power to impose the tie.[204]

(ii) A monopoly position is not necessarily required to establish market power.[205]

(iii) Actual exclusion of competitors may show market power.[206]

1123, 1127-30 (6th Cir. 1981); *Sea-Land Serv. v. Atlantic Pacific Int'l, Inc.*, 61 F. Supp. 2d 1102 (D. Haw. 1999) (finding a genuine issue of material fact as to whether a 33-percent share of the market constituted sufficient market power when the defendant was in the "unique" position of having only two competitors coupled with a federal statute that created a barrier to future market entry); *Mozart Co. v. Mercedes Benz of North America, Inc.*, 593 F. Supp. 1506 (N.D. Cal. 1984); *but see A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673 (6th Cir. 1986) (*Loew's* presumption too broad); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665, 672 (7th Cir. 1985), *cert. denied*, 574 U.S. 1129 (1986) ('uniqueness' means the inability to offer a similar package, not simply the fact that no rival has chosen to do so); *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284 (11th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 505 n.2 (1969) ("[u]niqueness confers economic power only when other competitors are in some way prevented from offering the distinctive product themselves"); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 618-19 n.10, 621-22 (1977); *Parman*, 714 F. Supp. at 1306-1307 (condominium for sale to current tenants not unique); *Hack v. President and Fellows of Yale Coll.,* 237 F.3d 81 (2nd Cir. 2000) (the uniqueness of Yale's education does not confer sufficient economic power because students could freely attend school elsewhere); *Mich. Div.—Monument Builders of N. Am. v. Mich. Cemetery Ass'n*, 524 F.3d 726 (6th Cir. 2008) (holding that the uniqueness of land is insufficient to support a finding of market power).

[204] *See United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 618 & n.10 (1977) (may show "nothing more than a willingness to provide cheap financing in order to sell expensive houses"); *Yentsch v. Texaco, Inc.*, 630 F.2d 46, 58 (2d Cir. 1980); *Phillips v. Crown Central Petroleum Corp.*, 602 F.2d 616, 628 (4th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980); *but see Grappone, Inc. v. Subaru of New England, Inc.*, 534 F. Supp. 1282, 1290 & n.21 (D.N.H. 1982) (fact that regional automobile distributor could impose burdensome terms on an appreciable number of buyers (its dealers) was sufficient evidence of economic power).

[205] *See, e.g., Breaux Bros. Farms, Inc. v. Teche Sugar Co., Inc.* 21 F.3d 83 (5th Cir.), *cert. denied*, 115 S. Ct. 425 (1994); *Integon Life Ins. Corp. v. Browning,* 989 F.2d 1143 (11th Cir. 1993); *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336, 1345 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985); *Silkworth v. Cedar Hill Cemetery, Inc.,* 1993-1 Trade Cas. (CCH) ¶ 70,166 (Md. Ct. Spec. App. 1993); *Laserworks v. Pitney Bowes*, 1999 WL 33435671, (S.D. Ohio 1999), *aff'd*, 8 Fed. Appx. 380 (6th Cir. 2001).

[206] *See, e.g., Eastman Kodak Co. v. Image Technical Serv., Inc.,* 504 U.S. 451 (1992); *Jefferson Parish*, 466 U.S. at 16-17.

(iv) Most courts have taken the view that a franchisor can be found guilty of imposing an unlawful tie within the context of its relationship with its franchisees.[207]

c. *Market power must be measured in a relevant market.* An antitrust plaintiff must establish both the relevant product market and relevant geographic market in order to prove a *per se* illegal tying arrangement.[208] The relevant product market is defined in terms of goods that are reasonably interchangeable with the goods at issue.[209] The relevant product market is usually not limited to a manufacturer's own product line.[210] The relevant

[207] *See Collins v. Int'l Dairy Queen, Inc.*, 2 F. Supp. 2d 1465, 1472-73 (M.D. Ga. 1998) (citing cases for the general view that a franchisor can be found guilty of unlawful tying with its franchisees); *but see Wilson v. Mobil Oil Corp.*, 984 F. Supp. 450 (E.D. La. 1997) (measuring market power at the pre-contract stage of a franchisor-franchisee relationship because each franchisee had sufficient information to evaluate the franchise opportunity before being locked in and, consequently, holding that a franchisor did not have sufficient market power under either the *per se* rule or the rule of reason), *see also Queen City Pizza, Inc. v. Domino's Pizza*, Inc., 124 F. 3d 430 (3d Cir. 1997) (once franchise agreement is entered into allegations of tying on the part of the franchisor are not a proper subject of antitrust scrutiny), *reh'g denied,* 129 F.3d 724 (3d Cir. 1997), *cert. denied,* 118 S. Ct. 1385 (1998). *But see Ajir v. Exxon, Corp.*, 1999-2 Trade Cas. (CCH) ¶ 72,609 (9th Cir. 1999) (stating that there is no illegal tie where the alleged coercion results from the franchise method of conducting business, rather than the uniqueness of the individual product).

[208] *See, e.g., Baxley-Delamar Monuments Inc. v. American Cemetery Association*, 843 F.2d 1154 (8th Cir. 1991); *Cancall PCS, LLC v. Omnipoint Corp.*, 2000-1 Trade Cas. (CCH) ¶ 72,855 (S.D.N.Y. 2000); *Minnesota Ass'n of Nurse Anesthetists v. Unity Hosp.,* 5 F. Supp. 2d 694, 708 (D. Minn. 1998) (plaintiff failed to demonstrate a relevant geographic market in which defendant hospitals had market power); *Vermont Mobile Home Owners' Association, Inc. v. Lapierre*, 131 F. Supp.2d 553 (D. Vt. 2001) (plaintiff failed to establish relevant geographic market in which defendant mobile home park operator had market power); *Sean Julian v. George Weston Bakeries Dist., Inc.*, 2005-2 Trade Cas. (CCH) ¶ 74,920 (U.D. Me. 2005) (requiring that the relevant product market be asserted in a complaint stating a tying claim).

[209] *See, e.g., Allen Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 206 (3d Cir.), *cert. denied,* 115 S.Ct. 684 (1994); *A.I. Root Co. v. Computer Dynamics, Inc.*, 806 F.2d 673, 695 (6th Cir. 1986) ("[t]he essential test for ascertaining the relevant product market involves the identification of products or services that are either (1) identical to or (2) available substitutes for the defendants' product or service . . ."); *R.D. Imports Ryno Indus., Inc. v. Mazda Distrib. (Gulf), Inc.*, 807 F.2d 1222 (5th Cir. 1987); *Gen. Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335 (S.D. Fla. 2002) (dismissing claim that defendant tied sale of its Cuban cigars to sale of its other products because the relevant market for the tying products, which is the market for Cuban cigars in the United States, remains only speculative until the Cuban embargo is lifted).

[210] *See Continental Trend Resources, Inc. v. OXY USA, Inc.*, 44 F.3d 1465, 1482 (10th Cir. 1995); *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1994), *amending and withdrawing*, 995 F.2d 1324 (6th Cir. 1993) *cert. denied*, 114 S. Ct. 2700 (1994)(market

geographic market is the narrowest market broad enough that sellers from adjacent areas cannot compete on substantial parity with sellers included in the market.[211]

d. *Coercion or Forcing*. The "conditioning" or "forcing" can be done by refusing to sell the tying product unless the tied product is purchased, or by making the two products separately available but charging an unreasonably high price for the tying product.[212] However, where the buyer is free to take either product by itself there is no tying problem even though the seller also may offer the two items as a unit at a single price[213] (see discussion of "coercion" and "forcing" above).

4. Affect on a Substantial Amount of Interstate Commerce in the Tied Product.

a. *Measurement of Affect*. The affect on commerce in the tied product market is measured as the dollar value of all sales subject to the tying arrangement, not just the plaintiff's purchases.[214] Proof that a "not insubstantial" amount of commerce in the tied product is affected is relatively easy to demonstrate.[215] In *Jefferson Parish*, the Supreme Court said of its earlier cases, "[w]e have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby."[216] It is unclear whether this subtle change in words signals a change in the commercial impact required.

b. *Required Number of Purchasers*. In *Jefferson Parish,* the Court said that if only a single purchaser were forced to make a tied purchase, there would not be sufficient impact on competition.[217] However, the Ninth Circuit reversed summary judgment for a manufacturer on the ground that a tie to a single purchaser that affected a substantial volume of sales satisfied this standard.[218]

c. *Adverse Affect on Competition in the Tied Product Market.* There must be proof of actual market foreclosure in the market for the tied product. In *Jefferson Parish*, the Supreme Court stated in dicta that if the purchasers would not have bought the tied product at all in the absence of the tying arrangement, so that no market foreclosure was taking place, the requisite impact on the tied product market would not exist.[219] Thus courts may

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not limited to a single brand of software; claim that equipment buyers are "locked in" to software by large investment rejected where there is potential for reasonable interchangeability of supply); *International Logistics Group v. Chrysler Corp.*, 854 F.2d 904 (6th Cir. 1989); *Domed Stadium Hotel Inc. v. Holiday Inns*, 732 F.2d 480 (5th Cir. 1984); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.,* 140 F.3d 494, 514 (3d Cir. 1998) (all purchasers of prescription drugs and not just health maintenance organization (HMO) members with prescription drug benefits, was relevant product market; HMO members interchangeable with other customers).

[211] *See, e.g., Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc.*, 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984); *Surgical Care Ctr. of Hammond v. Hosp. Serv. Dist. No. 1*, 309 F.3d 836 (5th Cir. 2002) (affirming lower court holding that hospital could not be liable for an illegal tying arrangement without presenting evidence to establish the relevant geographic market).

[212] *See, e.g., United States v. Loews, Inc.*, 371 U.S. 38 (1962); *Paladin Assocs., Inc. v. Montana Power Co.,* 328 F.3d 1145 (9th Cir. 2003) (upholding summary dismissal of a tying claim because plaintiff could not prove that defendant's natural gas customers were coerced into buying assignments of a Canadian gas pipeline); *Monsanto Co. v. Scruggs,* 342 F. Supp. 2d 568 (N.D. Miss. 2004) (ruling against the plaintiff on a tying claim because the tied product, an herbicide, was the only one of its kind approved by federal law for use on particular crops).

[213] *See, e.g., Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *see also Monsanto Co. v. Scruggs*, 459 F.3d 1328 (5th Cir. 2006).

[214] *See, e.g., Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969); *Gonzalez v. St. Margaret's House Housing Dev. Corp.,* 880 F.2d 1514, 1518 (1st Cir.), *cert. denied*, 488 U.S. 955 (1988) (substantial enough in terms of dollar volume so as not to be *de minimis*); *Gordon v. Lewistown Hospital*, 423 F.3d 184 (3d Cir. 2005) (holding that evidence regarding the effect of a tying arrangement on the dollar volume of business in the tied product market is essential to showing an affect on a substantial amount of interstate commerce); *see also Park v. Thomson Corp.*, No. 05 Civ. 2931, 2007 WL 119461 (S.D.N.Y. 2007) (refusing to consider defendant's total revenues in deciding substantiality of alleged tying because some purchases were voluntary).

[215] *See United States v. Loew's Inc.*, 371 U.S. 38, 49 (1962) ($60,800 considered "not insubstantial"); *Compuware Corp. v. IBM Corp.*, 366 F. Supp. 2d 475 (E.D. Mich. 2005) ($43,000 considered "not insubstantial"); *but see M. Leff Radio Parts, Inc. v. Mattel, Inc.,* 706 F. Supp. 387, 399 (W.D. Pa. 1988) ($12,000 in multi-billion dollar industry insubstantial).

[216] 466 U.S. at 16

[217] 466 U.S. at 16.

[218] *Datagate v. Hewlett-Packard Co.*, 60 F.3d 1421 (9th Cir. 1995), *cert. denied,* 64 U.S.L.W. 3641 (U.S. March 25, 1996). *See also Sea-Land Serv. v. Atlantic Pacific Int'l, Inc.*, 61 F. Supp. 2d 1102 (D. Haw. 1999) (holding that a single purchase of approximately $3.4 million worth of products constituted a "not insubstantial" amount of commerce); *but see Cancall PCS, LLC v. Omnipoint Corp.,* 2001 WL 293981 (S.D.N.Y. 2001) (holding that no competition was foreclosed because plaintiff would not have bought handsets but for alleged tie).

[219] 466 U.S. at 16; *see, e.g., Wells Real Estate, Inc. v. Greater Lowell Board of Realtors,* 850 F.2d 803, 814-815 (1st Cir. 1988), *cert. denied*, 488 U.S. 955 (1988) (reading *dicta* in *Jefferson Parish* as limited to measuring "not insubstantial impact" element and not as a standing requirement).

examine competition in the tied product market, and, if competition either does not exist or has not been affected, the arrangement will be upheld.[220] Similarly, if the seller has a monopoly in the tied product market, any tying arrangement, by definition, cannot have an anticompetitive affect in the market for the tied product.[221]

5. Seller Must Have a Direct Financial Interest in the Sale of the Tied Product.

a. Many courts have adopted the requirement that a seller have a direct financial interest in the sale of the tied product.[222]

[220] *See Fox Motors, Inc. v. Mazda Distributors (Gulf), Inc.*, 806 F.2d 953 (10th Cir. 1986). *Boddicker v. Arizona State Dental Ass'n.*, 680 F.2d 66, 67 (9th Cir.), *cert. denied*, 459 U.S. 837 (1982) (no market in tied product to restrain); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 830 (9th Cir. 1981) (state law precluded competition in the market for tied product); *Driskill v. Dallas Cowboys Football Club, Inc.*, 498 F.2d 321, 323 (5th Cir. 1974) (defendant had monopoly in tied product); *Young v. Lehigh Corp.*, 1989-2 Trade Cas. ¶ 68,790 (N.D. Ill. 1989) (plaintiff was uninterested in market for tied product); *Cancall PCS, LLC v. Omnipoint Corp.,* 2001 WL 293981 (S.D.N.Y. 2001) (the fact that plaintiff purchased a product it would not have purchased if not for the alleged tie does not demonstrate anticompetitive effect on tied product market); *In re Wireless Telephone Services Antitrust Litigation*, 385 F. Supp. 2d 403 (S.D.N.Y. 2005) (finding that plaintiffs failed to establish an adverse affect on competition in the tied product market for handsets because consumers were able to purchase handsets from other manufacturers); *Reifert v. South Cent. Wisconsin MLS Corp.*, 450 F.3d 312 (7th Cir. 2006) (holding that because there was no competition in the Realtors Association market, there was no antitrust violation).

[221] *See, e.g., Reifert v. South Central Wisconsin MLS Corp.,* 2005-2 Trade Cas. (CCH) ¶ 74,919 (W.D. Wis. 2005) (finding that no rival realtor associations offered the allegedly tied product); *Coniglio v. Highwood Servs., Inc.*, 495 F.2d 1286 (2d Cir. 1974) (finding that defendant football team had monopoly in tied product market for tickets to preseason games); *Cancall PCS, LLC v. Omnipoint Corp.*, 2001 WL 293981 (S.D.N.Y. 2001) (finding that defendant wireless telephone service provider had monopoly in tied product market for handsets because the handsets were the only ones compatible with the defendant's network).

[222] *See, e.g., Beard v. Parkview Hospital*, 912 F.2d 138 (6th Cir. 1990) (rationale: seller not using power in the tying product market to invade the tied product market); *Carl Sandburg Village Condominium Ass'n. No. 1 v. First Condominium Development Co.*, 758 F.2d 203 (7th Cir. 1985); *Robert's Waikiki U-Drive v. Budget Rent-A-Car Systems, Inc.*, 732 F.2d 1403 (9th Cir. 1984); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1479-81 (9th Cir. 1983); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977); *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1317 (3rd Cir. 1975); *Crawford Trans. Co. v. Chrysler Corp.*, 338 F.2d 934, 938 (6th Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Nelligan v. Ford Motor Co.*, 262 F.2d 556, 558 (4th Cir. 1959).

b. If the seller does *not* have a direct financial or economic interest in the sale of the tied product, requiring the purchase of such product from a third party is not unlawful tying.[223]

c. Rebates or other financial inducements may satisfy the financial interest requirement.[224]

d. *Examples*:

In *Keystone Retaining Wall Sys., Inc. v. Westrock Inc.*, Keystone had a patented system for constructing retaining walls, which it licensed to distributors. The system involved use of a steel pin. Westrock claimed Keystone tied the patented system and the pin. The court granted Keystone's motion for partial summary judgment on the ground that the pins were sold by four superintendent manufacturers approved by Keystone and in which Keystone had no financial interest.[225]

In *Castegneto v. Corporate Express,* Castegneto, an independent contractor in the package delivery business, alleged that Corporate Express' requirement that he become a member of the National Independent Contractors' Association in order to be permitted to contract with Corporate Express was an illegal tie. The court disagreed, holding that the tying claim was not viable because the plaintiff was not forced to make a purchase from the defendants.[226]

In *Abraham v. Intermountain Health Care Inc.*, a group of optometrists who had been excluded from an insurance company's group of network providers sued the insurance

[223] *See, e.g., Thompson v. Metropolitan Multi-List Inc.*, 1991-1 Trade Cas. (CCH) ¶ 69,494 (11th Cir. 1991); *James B. Beard v. Parkview Hospital*, 912 F.2d 138 (6th Cir. 1990); *Directory Sales Management Corp. v. Ohio Bell Telephone Co.*, 833 F.2d 606 (6th Cir. 1987); *County of Tuolumne v. Sonora Community Hosp.,* 236 F.3d 1148 (9th Cir. 2001).

[224] *See Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 834-35 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979).

[225] No. 91-21-RE (D. Ore. Oct. 16, 1991).

[226] 13 F. Supp. 2d 114 (D. Mass. 1998).

company for alleged tying violations. The plaintiffs argued that the insurance company had tied the sale of insurance plans (the tying product) to the sale of eye care from in-network providers (the tied product). The court disagreed, however, and noted that the insurance company actually had to reimburse doctors who provided eye care to insured patients. Thus, rather than benefiting from the tying arrangement, the insurance company actually suffered economic loss as a result of it.

D. The Rule of Reason.

1. *Jefferson Parish*

a. In the concurring opinion in *Jefferson Parish*, four Justices agreed that the "*per se*" rule should be abandoned in favor of the rule of reason approach. The rule of reason analysis looks to the effects of the tie in the relevant market for the tied product. "A tie-in should be condemned only when its anticompetitive impact outweighs its contribution to efficiency."[227] The majority would use the rule of reason approach only as a fall back position when the *per se* elements are not all met.

b. The concurring opinion in *Jefferson Parish* noted that "[t]he "*per se*" doctrine in tying cases has always required an elaborate inquiry into the economic effects of the tying arrangement."[228] This necessary economic inquiry defeats the stated rationale for the *per se* rule which is precisely to avoid inquiry into actual market conditions in certain situations.[229] It appears that the only way to determine whether a seller can force a buyer to purchase a second, unwanted product in order to obtain the tying product, is to embark on an elaborate economic inquiry.

c. The concurring Justices would focus attention on any adverse economic effects or potential economic benefits which a tie might have. They assert that the *per se* doctrine may condemn an arrangement which economic analysis may show to be beneficial.[230]

3. Various courts have applied a rule of reason analysis to tying arrangements.[231]

4. *Examples:*

a. *Virtual Maintenance*

The Sixth Circuit specifically rejected a "rule of reason" theory of liability in tying arrangements in its 1994 decision in *Virtual Maintenance, Inc. v. Prime Computer, Inc.*[232] In *Virtual Maintenance, Inc.*, the plaintiff (Virtual) alleged that it was foreclosed from the market for hardware maintenance because the defendant (Prime) sold its "software support" only as part of a "package" that also included hardware maintenance on

[227] *Jefferson Parish*, 466 U.S. at 42 (O'Connor, J., concurring).

[228] *Id.* at 34 (note omitted).

[229] *See National College Athletic Association v. Board of Regents*, 468 U.S. 85, 104 n.26 (1984); *Smith Machinery Co., Inc. v. Hesston Corp.*, 1987-1 Trade Cas. (CCH) ¶ 67,563 (D.N.M. 1987), *aff'd,* 1989-2 Trade Cas. (CCH) ¶ 58,665 (10th Cir. 1989), *cert denied*, 457 U.S. 129 (1990).

[230] *Jefferson Parish* at 34, 35; *see also Martino v. McDonalds Systems, Inc.*, 625 F. Supp. 356 (N.D. Ill. 1985).

[231] *See, e.g., Park v. Thomson Corp.*, No. 05 Civ. 2931, 2007 WL 119461 (S.D.N.Y. 2007) (applying rule of reason in finding evidence of anticompetitive effects of integrated bar review courses); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.,* 959 F.2d 468 (3d Cir.), cert. denied, 506 U.S. 868 (1992) (holding that District Court should have analyzed the tying arrangement under the rule of reason); *County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148 (9th Cir. 2001) (applying rule of reason to tying arrangement requiring that C-section operations be performed by credentialed obstetricians and not by generalists); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998); *United Farmers Agents Ass'n, Inc. v. Farmers Insurance Exchange*, 89 F.3d 233 (5th Cir. 1996); *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996) (finding insufficient market power to support tying claim under either the per se rule or the rule of reason); *Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276 (4th Cir. 1987); *Volpp Tractor Parts, Inc. v. Caterpillar, Inc.*, 1995-2 Trade Cas. (CCH) ¶ 71,243 (W.D. Tenn. 1995) (manufacturer's requirement that dealers stock its parts did not adversely affect competition by competing parts manufacturers, who had access to alternative distribution systems); *Audell Petroleum Corp. v. Suburban Paraco Corp.*, 903 F. Supp. 364 (E.D.N.Y. 1995) (tying sale of propane handling facility to purchase of propane and transportation services could be unlawful under rule of reason, but was not per se illegal); *Randall v. Buena Vista County Hospital*, 75 F.Supp.2d 946 (N.D. Iowa 1999) (applying rule of reason analysis to tying cases where the evidence of a defendant's market power is not strong).

[232] 11 F.3d 660 (6th Cir. 1994), *amending and withdrawing*, 995 F.2d 1324 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994).

a specific type of mini computer (the 50 Series mini computers).[233] Virtual presented its case to the jury on two alternative *per se* theories (1) a tying market consisting of all CAD/CAM software, and (2) a tying market limited to PDGS software and software support and a rule of reason theory (Prime's tie-in "package" created an unreasonable restraint of trade in the hardware market). Without distinguishing between these theories, the jury returned a verdict in Virtual Maintenance's favor. The Sixth Circuit reversed and directed the district court to enter judgment in Prime's favor ("*Virtual I*").[234] On remand from the Supreme Court, the Sixth Circuit reaffirmed its decision in *Virtual I* to reject Virtual Maintenance's rule of reason theory *(i.e.*, Prime's tie-in "package" created an unreasonable restraint of trade in the hardware market) on the grounds that *Kodak* did not address a "rule of reason" theory of liability ("Virtual II").[235] The Sixth Circuit also reaffirmed in *Virtual II* its decision in *Virtual I* to reject one of Virtual Maintenance's *per se* theories (a tying market consisting of all CAD/CAM software) on the grounds that Prime possessed at most an 11% share of the market in CAD/CAM software which was insufficient as a matter of law to confer market power. However, the Sixth Circuit in *Virtual II* concluded that its decision to reject Virtual Maintenance's other *per se* theory (a tying market limited to PDGS software and software support) was misguided in light of *Kodak*. The Sixth Circuit held that the fact [t]hat Ford had many competitors to choose from when it made its initial decision to grant the exclusive license to Prime cannot . . . preclude as a matter of law" the narrow tying market limited to "Ford-required PDGS."[236] The Sixth Circuit then remanded the case for a new trial on the sole theory of a *per se* claim based on a tying product market of Ford-required PDGS software support.

b. *Microsoft*

[233] In *Virtual Maintenance*, defendant Prime sold four products or services: (1) "50JointJ Series" minicomputers; (2) computer software ("PDGS") (owned by Ford Motor Company and exclusively licensed to Prime by Ford) used with 50 Series mini computers which was a specific software for Computer Aided Design or Computer Aided Manufacturing ("CAD/CAM"); (3) "software support" included in Prime's exclusive license from Ford; and (4) "hardware maintenance" on 50 Series mini computers.

[234] *Id.*

[235] *Id.*

[236] 957 F.2d at 1320-21.

In *United States v. Microsoft*, the D.C. Circuit Court determined that *per se* analysis was inappropriate for the facts of the case, vacated the district court's finding of tying liability, and remanded the tying claim to be analyzed under the *rule of reason.*[237] Noting that software platform bundling is a new form of tying arrangement with which the courts have little experience, the court concluded that *per se* analysis created "undue risks of error and of deterring welfare-enhancing innovation."[238] Specifically, the court felt that the separate products test under the *per se* rule does not account for the efficiency gains of newly integrated products. The *rule of reason*, it believed, allows the court to balance the benefits of software bundling against the costs to consumers. The court declined to make a broad stand on the relative merits of the two standards, however, stipulating that its judgment applied only to the integration of new functionality into platform software. Nor did the court want to be viewed as "setting a precedent for switching to the rule of reason every time a court identifies an efficiency justification for a tying arrangement."[239] Nevertheless, the court maintained that the integration of new functionality into platform software warranted exception to the *per se* rule.

c. *Lifetime Doors*

In *Barber & Ross Co. v. Lifetime Doors, Inc.*, the United States Court of Appeals for the Fourth Circuit used a rule of reason approach to find a tying arrangement unlawful.[240] The defendant in the case (Lifetime) was a manufacturer of two types of doors – plain rectangular doors known as flush doors and molded doors known as six-panel doors. After encouraging the plaintiff to become an exclusive distributor, Lifetime instituted an "allocation system" which conditioned the purchase of six-panel doors on the purchase of flush doors. Ultimately, Lifetime required the plaintiff to purchase three flush doors for each six-panel door it wished to buy. Noting that there was adequate evidence to indicate that the "allocation system"

[237] 253 F.3d 34 (D.C.Cir. 2001), *cert. denied*, 122 S. Ct. 350 (2001).

[238] *Id.* at 89-90.

[239] *Id.* at 95.

[240] 810 F.2d 1276 (4th Cir. 1987).

unreasonably restrained competition, the Fourth Circuit affirmed a jury verdict in favor of the plaintiff for $2.1 million.

E. *Kodak* Reaffirmed the *Per Se* Rule

Eastman Kodak Co. v. Image Technical Services presented the Supreme Court with an opportunity to adopt the position of Justice O'Connor's concurrence in *Jefferson Parish* that tying arrangements should be scrutinized only under a rule of reason.[241] However, the Supreme Court declined to relax the standards for assessing tying arrangements announced in *Jefferson Parish*. Both the majority and minority opinions assumed the continued vitality of the *per se* rule.[242]

1. Facts.

In *Kodak,* the plaintiffs were independent service organizations (ISOs) and Kodak, the defendant, was a manufacturer of high volume photocopier and micrographics equipment. The ISOs alleged Kodak engaged in illegal tying under Sherman Act Section 1 and monopolization under Sherman Act Section 2 by permitting the sale of its parts only to those customers that either utilized Kodak's service or serviced their own equipment. According to the ISOs, Kodak illegally tied the sale of replacement parts (the tying product) to the purchase of its repair services (the tied product).

2. Procedural History.

The Ninth Circuit reversed the district court's entry of summary judgment for Kodak and held that Kodak's policy of not selling copier and micrographic replacement parts to the ISOs must be evaluated at trial.

3. Issue.

[241] 504 U.S. 451 (1992).

[242] *Kodak* has been widely discussed in the literature as the Supreme Court's most important antitrust rulings in years. *See, e.g.*, Janet L. McDavid, *Kodak Decision Revitalizes Tying Claims*, Franchise L.J., Vol. 12, No. 1 at 3 (Summer 1992) (discussing continuing vitality of the per se rule); George A. Hay, *Is the Glass Half-Empty or Half-Full: Reflections on the Kodak Case*, 62 Antitrust L.J. 177 (1993); Robert H. Lande, *Chicago Takes It On the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 Antitrust L.J. 193 (1993); Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of Kodak*, 63 Antitrust L.J. 483 (1995).

The issue for the Supreme Court on the tying claim was whether a "tie" existed and whether Kodak had the requisite "appreciable economic power" in the tying product market (replacement parts).

4. Holding and Rationale.

The Supreme Court held that a genuine issue of material fact existed as to whether (1) replacement parts and repair service are two distinct products, and (2) there was a tie between Kodak's replacement parts and repair service. Because there was a genuine issue of material fact as to these elements of a *per se* violation, the Supreme Court affirmed the Ninth Circuit's denial of Kodak's summary judgment motion.

The Supreme Court then addressed the significance of Kodak's power in the tying product market. The novel issue the Supreme Court needed to address was whether a seller without market power in the market for the sale of the primary product (*i.e.*, high volume photocopier and micrographics equipment) can be found to have the requisite market power in an after market for parts and service of the product. Although it acknowledged that Kodak did not have the requisite market power for high volume photocopier and micrographics equipment, the Supreme Court held that Kodak still could maintain supra-competitive prices for parts or service because buyers of Kodak equipment are "locked in" to the use of Kodak parts.[243] The Supreme Court noted that the existence of competition in the primary equipment market does not preclude, as a matter of law, a finding of market or monopoly power in the derivative after markets. The Supreme Court thus affirmed the Ninth Circuit's holding that a

[243] Lower courts have also found market power under the Kodak "lock in" theory. *See, e.g., Subsolutions, Inc. v. Doctor's Assoc.*, 62 F. Supp. 2d 616 (D. Conn. 1999) (holding that plaintiff established market power because franchisees were not limited to a single type of "point of sale" computer when they entered into their franchise agreement); *Dauro Advertising, Inc. v. General Motors Corp.*, 75 F.Supp.2d 1165 (D. Colo. 1999) (finding that the plaintiff properly alleged market power under the theory that cars and trucks not manufactured by GM were not reasonably interchangeable with GM cars and trucks); *but see Chawla v. Shell Oil Co.*, 75 F.Supp.2d 626 (S.D. Tex. 1999) (holding that the "lock in" theory does not apply when the alleged market power stems from the parties' contractual arrangement, rather than actual market power); *Hack v. President and Fellows of Yale College,* 237 F.3d 81 (2nd Cir. 2000) (holding that "lock in" concerns were not present in Yale policy requiring certain students to live on campus because the policy was disclosed before students applied for admission); *Psi Repair Services, Inc. v. Honeywell, Inc.,* 104 F.3d 811 (6th Cir. 1997) (rejecting "lock-in" premise in part because plaintiffs knew at time of purchase that they were buying a package that included at least two "tied" products), *cert. denied,* 520 U.S. 1265 (1997); *Metzler,* 19 F. Supp 2d at 1358-59 (rejecting "lock-in" claim because plaintiff did not produce evidence that a change in policy locked in the defendants' customers or that defendant had a policy of charging supra-competitive prices for parts and service).

genuine issue of material fact existed as to Kodak's market power in the alleged tying product market.[244]

F. *Independent Ink* Signals Possible Shift from "Per Se" Rule

In *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, Independent Ink alleged that Illinois Tool Works illegally tied the sale of its patented printer cartridge systems to the sale of its ink. On appeal from the Federal Circuit,[245] the Supreme Court unanimously rejected the presumption that a patent conveys market power because of the growing academic and agency consensus that the presumption should not apply.[246] In the course of the opinion, the Court observed that "[m]any tying arrangements … are fully consistent with a free, competitive market,"[247] possibly indicating an increased willingness to reconsider application of the per se rule in the future.[248] In addition to repeatedly asserting that tying arrangements are often pro-competitive, the Court cryptically declined to use the term "per se" in connection with anticompetitive effects. The opinion indicated the Court's reluctance to presume anticompetitive effects, and that such effects should instead be proven by monopolistic business practices: "[T]ying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in Morton Salt and Loew's. While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketplace conspiracy…that conclusion must be supported by proof of power in the relevant market rather than by mere presumption thereof."[249]

244 *Kodak* generally has been relied upon by many lower courts in assessing tying arrangements. *See, e.g.*, *Digital Equip. Corp. v. Uniq Digital Techs.*, 73 F.3d 756 (7th Cir. 1996); *Lee v. Life Ins. Co. of North America*, 23 F.3d 14 (1st Cir.), *cert. denied*, 115 S.Ct. 427 (1994) ; *Virtual Maintenance, Inc. v. Prime Computer, Inc.*, 11 F.3d 660 (6th Cir. 1994), *amending and withdrawing*, 995 F.2d 1324 (6th Cir. 1993), *cert. dismissed*, 114 S. Ct. 2700 (1994).

245 *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (2005).

246 126 S.Ct. at 1290-91*; see also, e.g.,* 35 U.S.C. § 271(d)(5).

247 126 S.Ct. 1281, 1292 (2006).

248 For further discussion, see *Tying Arrangements: Market Power Can't Be Presumed from Use of Patent as Tying Product*, BNA ANTITRUST & TRADE REGULATION REPORT, March 3, 2006, at 222; *Supreme Court Decisions Reveal Possible Shift on Tying and Joint Ventures*, DECHERT ON POINT, March 2006, issue 17; Stone, Gregory P. and Steven M. Perry, *A Review of Recent Developments in US Antitrust and IP Law*, GLOBAL COMPETITION REVIEW: THE ANTITRUST REVIEW OF THE AMERICAS 2006, at 41-42 (2005).

249 126 S.Ct. 1281.

G. Defenses and Justifications

1. *Generally*.

   a. Notwithstanding the rule of *per se* illegality, a tying arrangement that otherwise satisfies the foregoing test may not be unlawful if implemented for a legitimate business reason and if no less restrictive alternative is available.[250]

   b. A defendant may justify a tying restriction by proving its overall competitive reasonableness,[251] but a party seeking to defend a tying restriction on grounds of competitive justification carries a heavy burden of proof, as demonstrated by the unusually high failure rate of cases that have made the attempt.[252]

2. *Specific Defenses*.

   a. It generally is not a defense to tying that the tie is "necessary" to protect a trademark, goodwill or quality

250 *See, e.g.*, *International Salt Co. v. United States*, 332 U.S. 392 (1947); *IBM Corp. v. United States*, 298 U.S. 131 (1936); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998) (widespread acceptance of defendant's attempted tie of approval of additional pharmacies for participation in defendant's network to chains' offering network to their employees may not be evidence of market power, but may have been justified by legitimate business reasons).

251 *See, e.g., County of Tuolumne v. Sonora Community Hosp.*, 236 F.3d 1148 (9th Cir. 2001) (legitimate concerns with quality of patient care and rising insurance costs); *Westowne Shoes, Inc. v. Brown Group, Inc.* 104 F.3d 994 (7th Cir. 1997) (protecting a trademark from confusing and dilutive use); *Grappone Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988) (protecting consumer goodwill of a new firm attempting to enter the U.S. market); *Xeta, inc. v. Atex, Inc.*, 852 F.2d 1280 (Fed. Cir. 1988); *Mozart Co. v. Mercedes-Benz of North America, Inc.,* 833 F.2d 1342 (9th Cir. 1987); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir. 1961), *cert. denied*, 368 U.S. 931 (1961); *Susser v. Carvel Corp.,* 332 F.2d 505 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965).

252 *See, e.g., International Business Machines Corp. v. United States*, 298 U.S. 131 (1936); *International Salt Co. v. United States,* 332 U.S. 392 (1947); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987); *Tic-X-Press, Inc. v. Omni Promotions Co.,* 815 F.2d 1407 (11th Cir. 1987); *Carpa, Inc. v. Ward Foods, Inc.,* 536 F.2d 39 (5th Cir. 1976); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977).

when a less restrictive alternative (*e.g.*, product specifications) is available.[253]

b. Tying may be permissible if necessary to allow a new business to break into the market.[254]

c. Tied products sold under a trademarked sign or from equipment bearing the supplier's trademark have also been upheld.[255]

d. The need for compatibility with technologically sophisticated equipment used by a non-dominant firm has also been accepted as a justification if product specifications would not be adequate.[256]

e. Tying arrangements have been accepted where specifications for alternative products would have been so detailed, complex, or burdensome that substitutes would not have been practicable.[257]

f. Tying arrangements have been upheld if necessary to maintain a company's goodwill.[258]

[253] *See, e.g.*, *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033 (4th Cir. 1987); *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 593 F. Supp. 1506 (N.D. Cal. 1985), *cert. denied*, 488 U.S. 870 (1988) (court instructed that a business justification was a defense only if the tie was the least restrictive way to protect product quality and safety); *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39, 47 (5th Cir. 1976); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 51 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972). *But see Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1353 n.12 (9th Cir. 1982); *Susser v. Carvel v. Corp.*, 332 F.2d 505, 514-15, 519-20 (2d Cir. 1964), *cert. dismissed*, 381 U.S. 125 (1965); *Dehydrating Process Co. v. A.O. Smith Corp.*, 292 F.2d 653 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961) (finding tying justified based upon the need to protect trade secrets, product complexity, and purchasers' dissatisfaction with alternatives).

[254] *Jefferson Parish*, 466 U.S. at 23, 24 n.39, *citing United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd*, 365 U.S. 567 (1961) (per curiam).

[255] *See, e.g.*, *Redd v. Shell Oil Co.*, 524 F.2d 1054, 1056-57 (10th Cir. 1975), *cert. denied*, 425 U.S. 912 (1976); *Baker v. Simmons Co.*, 307 F.2d 458 (1st Cir. 1962).

[256] *See, e.g.*, *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 556 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[257] *See, e.g.*, *Standard Oil Co. v. United States*, 337 U.S. 293 (1949); *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

[258] *See, e.g.*, *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792 (1st Cir. 1988); *Westowne Shoes, Inc. v. Brown Group, Inc.*, 104 F.3d 994 (7th Cir. 1997).

g. Courts have acknowledged that tying arrangements may be justified where a technological improvement is achieved by the tie.[259]

h. At least one court has rejected a defendant's claim that it had no economic interest in the tied product as a defense.[260]

H. Full-Line Forcing.

1. Definition and Discussion.

Full line forcing is a variation of a tying arrangement whereby a manufacturer of a line of products (*e.g.*, models of an automobile manufacturer) requires its dealers to offer for sale the manufacturer's complete product line.[261] Full line forcing agreements do not prohibit the dealer from selling other manufacturers' products, but only require that the dealer stock the forcing manufacturer's full line.

2. Full Line Forcing May Be an Unlawful Tying Arrangement.

Full-line forcing may violate Section 1 of the Sherman Act or Section 3 of the Clayton Act, and may constitute an unfair method of competition under Section 5 of the FTC Act. Courts generally have subjected full line forcing to a tying analysis and

[259] *See, e.g., Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1325 (D. Utah 1999) (concluding that technological innovation may serve as a defense where "the evidence shows that a valid, not insignificant, technological improvement has been achieved by the integration of two products, then in essence a new product is created and a defendant is insulated from [Section] 1 tying liability"); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir. 2001) (finding that application of the per se rule could deter technological innovation, and remanding the tying claim to be analyzed under the *rule of reason*).

[260] *Sea-Land Serv. v. Atlantic Pacific Int'l, Inc.*, 61 F. Supp. 2d 1102 (D. Haw. 1999) (holding that the plaintiff need only demonstrate that the defendant was the seller of both the tying product and the tied product).

[261] *See, e.g.*, *Pitchford Scientific Instruments Corp. v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517 (8th Cir. 1987); *Earley Ford Tractor, Inc. v. Hesston Corp.*, 556 F. Supp. 544 (W.D. Mo. 1983); *David R. McGeorge Car Co., Inc. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974)..

have analyzed such restraints under both the *per se* rule and the rule of reason.[262]

3. *Examples*:

a. Rule of Reason Analysis

The Eleventh Circuit found rule-of-reason analysis appropriate in *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*[263] Southern Card challenged Lawson's requirement that Southern purchase "local view" postcards in amounts equal to its purchases of postcards bearing Disney characters. The court declined to find the arrangement unlawful per se as there was no showing that it would always or almost always tend to restrict competition and decrease output. Indeed, the court found the arrangement lawful under the rule of reason as it neither precluded other manufacturers from gaining access to the local view postcard market nor adversely impacted on consumer choice.

b. Per Se Rule Analysis

In *Six West Retail Acquisition, Inc. v. Sony Theatre Management Corp.,* the owner of Manhattan movie theatres alleged that Sony and its affiliates conditioned access to profitable motion pictures on the theatres' acceptance of the full line of films distributed by Sony.[264] This practice, known as "block booking" was previously held illegal *per se* by the Supreme Court.[265] The *Six West* Court agreed with defendants that evidence of coercion was necessary to make out a per se antitrust violation and that the plaintiffs had not proven such coercion existed. On the contrary, exhibitors testified that they would sometimes play films that they "did not want so much" to preserve their relationships with distributor. However, the court found that such an arrangement did not amount to coercion.

[262] *See, e.g., Smith Machinery Co. v. Hesston Corp.,* 878 F.2d 1290 (10th Cir. 1989) (rule of reason); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-11 (1966); *Adolph Coors Co.*, 83 FTC 32 (1973), *aff'd*, 497 F.2d 1178 (10th Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975).

[263] 138 F.3d 869 (11th Cir. 1998).

[264] 2004-1 Trade Cas. (CCH) ¶ 74,361 (S.D.N.Y. 2004), *aff'd*, 124 Fed.Appx. 73 (2d Cir. 2005)

[265] *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948).

4. Full Line Forcing is Usually Permitted.

a. Where dealer is free to handle competing product lines, full line forcing agreements have been upheld because it is difficult to prove that competition has been foreclosed.[266]

b. Full line forcing agreements have been upheld where plaintiff unable to establish other elements of the test for illegal tying arrangements.[267]

c. Full line forcing arrangements have been upheld where there was no evidence that a dealer had to acquire the entire line (as opposed to representative amount of the line).[268]

d. In at least one case, a court has held that the "mere existence" of a requirement that a full line be stocked, without evidence of adverse competitive impact, does not show an unreasonable restraint of trade.[269]

e. Courts have held that full-line forcing provisions cannot "amplify" the anticompetitive harm caused by an exclusive dealing provision; the full-line forcing provision itself must cause the harm.[270]

5. Full Line Forcing Arrangements that May Not be Upheld

[266] *See, e.g., Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517 (8th Cir. 1987); *Pitchford Scientific Instruments Corp. v. PEPI, Inc.*, 531 F.2d 92 (3d Cir. 1975), *cert. denied*, 426 U.S. 935 (1976); *McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332 (4th Cir. 1959).

[267] *See, e.g., Southern Pines Chrysler-Plymouth, Inc. v. Chrysler Corp.*, 826 F.2d 1360 (4th Cir. 1987)(plaintiff failed to demonstrate there were two separate products involved); *Seaward Yacht Sales v. Murray Chris-Craft Cruisers, Inc.*, 701 F. Supp. 766 (D. Ore. 1988)(plaintiff unable to show defendant had sufficient economic power to coerce its dealers to accept the full line requirements); *United Magazine Co. v. Murdoch Magazines Distribution, Inc.*, 146 F.Supp.2d 385 (S.D.N.Y. 2001) (plaintiff failed to demonstrate anticompetitive effects in the tied market).

[268] *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 964 F. 2d 186 (2d Cir. 1992).

[269] *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir. 1973).

[270] *Bepco, Inc. v. Allied-Signal, Inc.*, 106 F.Supp.2d 814 (M.D.N.C. 2000).

a. Full line forcing agreements are not permitted where the full line forcing agreement requires the dealer to purchase a specified quantity of products thereby precluding the dealer from selling competing products.[271]

b. Full-line forcing agreements are less likely to be upheld when they prevent competitors from distributing their products and thereby foreclose choice to the ultimate consumers.[272]

VII. RECIPROCAL DEALING ARRANGEMENTS

A. Definition.

Reciprocal dealing occurs when one party buys goods from another party only on the condition or understanding that the second party will buy other goods from the first party.[273] Reciprocal dealing arrangements may be based on express or tacit understandings and may take many forms including: (1) forced reciprocity (*i.e.*, the buyer uses its purchasing power to require the supplier to make reciprocal purchases from the buyer); (2) mutual reciprocity (*i.e.*, the buyer and supplier voluntarily engage in reciprocal dealing without any threat, coercion, or pressure); and (3) unilateral reciprocity (*i.e.*, the supplier voluntarily purchases from the buyer to maintain good will). This issue is rarely litigated.

B. Applicable Law

1. Section 1 of the Sherman Act.

The Supreme Court has not addressed the lawfulness of reciprocal dealing arrangements under Section 1 of the Sherman Act. However, numerous entities have entered in consent decrees resulting from reciprocal dealing arrangements in violation of Section 1.[274] In addition, a few courts have recognized that the actual practice of reciprocal dealing arrangements may be challenged under Section 1.[275]

2. Section 2 of Sherman Act.

Reciprocal dealing arrangements can be evidence of the requisite intent to obtain or maintain a monopoly in violation of Section 2.[276] Numerous entities have entered in consent decrees resulting from reciprocal dealing arrangements in violation of Section 2.[277]

3. Section 5 of the Federal Trade Commission Act.

Some reciprocal dealing arrangements, particularly if they are “coercive” or “forced” in nature, may constitute a violation of Section 5 of the FTCA. Numerous entities have either entered into consent decrees or given their assurances of compliance by affidavit in situations involving reciprocal dealing arrangements.[278]

4. Section 7 of Clayton Act.

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[271] *See, e.g.*, *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Early Ford Tractor, Inc. v. Hesston Corp.*, 556 F. Supp. 544 (W.D. Mo. 1983).

[272] *Southern Card & Novelty, Inc. v. Lawson Mardon Label, Inc.*, 138 F.3d 869 (11th Cir. 1998).

[273] *See, e.g.*, *Earley Ford Tractor, Inc. v. Hesston Corp.*, 556 F. Supp. 544 (W.D. Mo. 1983); *Brandeis Mach. Co. v. Barber Greene Co.*, 1973-2 Trade Cas. (CCH) ¶ 74,672 (W.D. Ky. 1973) (full line forcing agreement requiring dealers to buy unwanted stone crushing equipment to obtain asphalt equipment found unlawful).

[274] *See, e.g.*, *United States v. Grow Chemicals Corp.*, 1974-1 Trade Cas. (CCH) ¶ 75,133 (S.D.N.Y. 1974); *United States v. Jackson's Atlanta Ready Mix Concrete Co., Inc., et al.*, 1972 Trade Cas. (CCH) ¶ 73,827 (N.D. Ga. 1972).

[275] *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532 (7th Cir. 1986); *Ryals v. National Car Rental Sys.*, 404 F. Supp. 481, 484-86 (D. Minn. 1975); W.L. *Gore & Assocs. v. Carlisle Corp.*, 381 F. Supp. 680, 702-03 (D. Del. 1975), *aff'd in relevant part*, 529 F.2d 614 (3d Cir. 1976). *But cf. Diamond Shamrock Corp.*, 5 Trade Reg. Rep. (CCH) ¶ 22,825 (May 11, 1990) (terminating consent order barring reciprocity); *Georgia-Pac. Corp.*, 103 F.T.C. 203 (1984) (same); *Southland Corp.*, 102 F.T.C. 1337 (1983) (same); *Occidental Petroleum Corp.*, 101 F.T.C. 373 (1983) (same).

[276] *See, e.g.*, *M.L. Gore & Associates v. Carlisle Corp.*, 381 F. Supp. 680 (D. Del. 1974), *aff'd in relevant part*, 529 F.2d 614 (3d Cir. 1976).

[277] *See, e.g.*, *United States v. W.R. Grace & Co.*, 1972 Trade Cas. (CCH) ¶ 73,829 (S.D.N.Y. 1972); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945); *United States v. Armco Steel Corp.*, 1970 Trade Cas. (CCH) ¶ 73,283 (S.D. Ohio 1970); *United States v. Inland Steel Co.*, 306 U.S. 153 (1939); *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

[278] *See, e.g.*, *In re GAF Corp.*, 416 F.2d 1252 (1st Cir. 1969); *United States v. Union Camp Corp.*, 1969 Trade Cas. (CCH) ¶¶ 72,843, 72,689 (E.D. Va. 1969), *consent decree dismissed*, 1990-1 Trade Cas. ¶ 69,000 (E.D. Va. 1990); *In re California Packing Corp.*, 25 F.T.C. 379 (1937); *In re Mechanical Mfg. Co.*, 16 F.T.C. 67 (1932); *In re Waugh Equipment Co.*, 15 F.T.C. 232 (1931).

An acquisition that creates the likelihood of reciprocal dealing is unlawful under Section 7 of the Clayton Act.[279] However, this is not a theory that either the Department of Justice or the FTC has asserted in recent years.

C. Standards for Analysis of Reciprocal Dealing

1. Tying Analysis.

While the standard for determining the legality of particular reciprocal arrangements is not completely settled, some circuits have applied a tying analysis when examining reciprocity agreements.[280]

"[tying and reciprocal dealing] refer to similar phenomena. In each case one side of a transaction has special power in the market place. It uses this power to force those with whom it deals to make concessions in another market. In tying arrangements, a seller with economic power forces the purchaser to purchase something else to obtain the desired item. In reciprocal dealings a buyer with economic power forces a seller to buy something from it to sell its goods. In both cases the key is the extension of economic power in one market to another market."[281]

2. *Per Se* Rule Analysis.

[279] *See, e.g.*, *FTC v. Consolidated Foods Corp.* 380 U.S. 592 (1965); *see also Allis-Chalmers Mfg. Co. v. White Consol. Indus.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970); *United States v. ITT*, 306 F. Supp. 766 (D. Conn. 1969), *appeal dismissed*, 404 U.S. 801 (1971); *United States v. Ingersoll-Rand Co.*, 218 F. Supp. 530 (W.D. Pa.), *aff'd*, 320 F.2d 509 (3d Cir. 1963).

[280] *See, e.g.*, *Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979); *E.T. Barwick Indus v. Walter E. Heller & Co.*, 692 F. Supp. 1331 (N.D. Ga. 1987) (same legal standards apply to reciprocal dealing as to tying); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494 (3d Cir. 1998); *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532 (7th Cir. 1986); *Spartan Grain & Mill Co. v. Ayers*, 735 F.2d 1284 (11th Cir. 1984); *Industria Siciliana Asfalti v. Exxon Research and Engineering Co.*, 1977-1 Trade Cas. (CCH) ¶61,256 (S.D.N.Y. 1977); *but see Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1364, 40 U.C.C. Rep. Serv. 2d 107 (Fed. Cir. 1999).

[281] *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419, 425 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979)

a. Some courts treat reciprocal dealing arrangements as *per se* unlawful under the same conditions as they would treat tying arrangement as *per se* unlawful.

b. For example, in *United States v. General Dynamics Corp.*, the district court addressed whether a plaintiff must prove that it was coerced by defendant's buying power into purchasing the "tied" product, or whether reciprocal dealing is unlawful even if both parties entered into the arrangement voluntarily.[282] The district court concluded that a reciprocal dealing arrangement is *per se* unlawful, whether coerced or voluntary, if a not insubstantial amount of commerce is affected.[283] The court, however, found no violation because the government failed to prove that a substantial amount of commerce was involved.[284]

c. Several subsequent decisions have required that a plaintiff plead and prove coercion before a reciprocal arrangement will be held *per se* unlawful.[285]

3. Rule of Reason Analysis.

a. Even if a reciprocal dealing arrangement is found not to be *per se* unlawful, it may still violate the rule of reason.

b. For example, the Eleventh Circuit held that "[i]f the element of coercion involved in the case is not present, a court will analyze the case under the rule of reason," and explained that "where a plaintiff's evidence shows that one party has sufficient market power to unduly influence a second party to treat the first more favorably than the

[282] 258 F. Supp. 36 (S.D.N.Y. 1966).

[283] *Id.* at 57-59, 65-66.

[284] *See also Southern Concrete Co. v. United States Steel Corp.*, 535 F.2d 313, 317 (5th Cir. 1976) (reciprocity, which is defined as either the use of buying power to secure sales or an agreement between parties with equal purchasing power, has been identified as an anticompetitive practice), *cert. denied*, 429 U.S. 1096 (1977); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1018-19 (N.D.N.Y. 1980) (to prove reciprocity, plaintiff may demonstrate either that arrangement was coerced with a reciprocal motivation or that it was entered into with an understanding that the patronage would be mutual).

[285] *See, e.g.*, *Brierwood Shoe Corp. v. Sears, Roebuck & Co.*, 501 F. Supp. 144, 147-48 (S.D.N.Y. 1980); *Industria Siciliana Asfalti, Bitumi SpA v. Exxon Research & Eng'g Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,256, at 70,799 (S.D.N.Y. 1977).

free market would otherwise dictate, and the second party acts in conformity with the reciprocal arrangement, the plaintiff has proved the existence of an arrangement which unreasonably restrains trade."[286]

D. Reciprocal Dealing Typically Upheld

1. Despite the willingness of some lower courts to apply a *per se* standard in particular circumstances,[287] findings of actual violations have been rare.

2. In addition to the absence of market power or coercion,[288] cases have been disposed of on the grounds that the acts in question did not spring from any reciprocal motive,[289] that the purchase and sale were a single transaction not involving separate products,[290] that no substantial amount of commerce was foreclosed,[291] and that no contract, combination, or conspiracy was shown.[292]

VIII. VERTICAL REFUSALS TO DEAL

[286] *Key Enterprises v. Venice Hospital*, 919 F.2d 1550, 1562 (11th Cir. 1990).

[287] The Third, Fifth, Ninth and Eleventh Circuits have either held or observed in dicta that certain types of reciprocity may constitute *per se* violations. *See Betaseed, Inc. v. U & I Inc.*, 681 F.2d 1203 (9th Cir. 1982); *Spartan Grain & Mill Co. v. Ayers*, 581 F.2d 419 (5th Cir. 1978), *cert. denied*, 444 U.S. 831 (1979); *Key Enters*, 919 F.2d at 1562; *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 169 (3d Cir. 1979).

[288] *See Great Escape Inc. v. Union City Body Co., Inc.*, 791 F.2d 532, 537-38 (7th Cir. 1986) (buyer must have substantial market power tending to require seller to make the reciprocal purchases).

[289] *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1346 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980); *WIXT Television, Inc. v. Meredith Corp.*, 506 F. Supp. 1003, 1020 (N.D.N.Y. 1980).

[290] *Ryals v. National Car Rental Sys.*, F. Supp. 481, 486-87 (D. Minn. 1975); *see also Stavrudes v. Mellon Nat'l Bank & Trust Co.*, 353 F. Supp. 1072, 1077 (W.D. Pa.) (bank customers' willingness to open an interest-free account not a "product"), *aff'd*, 487 F.2d 953 (3d Cir. 1973).

[291] *Great Escape, Inc. v. Union City Body Co.*, 791 F.2d 532, 540 (7th Cir. 1986) (no anticompetitive effect when buyer simply terminates at-will contract with one supplier and enters into similar at-will contract with another); *WIXT Television*, 506 F. Supp. at 1020-21; *United States v. Airco, Inc.*, 386 F. Supp. 915, 923-26 (S.D.N.Y. 1974); *United States v. General Dynamics Corp.*, 258 F. Supp. 36, 59, 65-67 (S.D.N.Y. 1966).

[292] *United States v. Empire Gas Corp.*, 393 F. Supp. 903, 914-15 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977); *United States v. Airco Inc.*, 386 F. Supp. 915, 918-26 (S.D.N.Y. 1974); *W.L. Gore & Assocs. v. Carlisle Corp.*, 381 F. Supp. 680, 703 (D. Del. 1974), *aff'd in relevant part*, 529 F.2d 614 (3d Cir. 1976).

A. Definition.

Vertical refusals to deal arise where (1) a manufacturer refuses to enter into a relationship with a distributor, (2) a manufacturer terminates an existing distributor, or (3) a distributor (or purchaser) simply declines to purchase the products of the manufacturer.

B. Applicable Law.

1. The legality of a purchaser refusing to deal with suppliers is determined by application of the same general principles applied to manufacturers in the selection of their distributors.[293]

2. Parties have challenged vertical refusals to deal as unreasonable restraints of trade under Section 1 of the Sherman Act and, in the case of a firm with market power, as acts in furtherance of an attempt to monopolize or as monopolization under Section 2.[294] Vertical terminations of distributors in particular industries also are subject to specific federal statutes.[295]

3. Terminations to enforce exclusive dealing arrangements have been challenged under Section 3 of the Clayton Act. To establish a violation of § 3, an actual "condition, agreement or understanding" obligating the distributor not to deal in a

[293] *See, e.g.*, *Nifty Foods Corp. v. Great Atl. & Pac Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980); *Beltronics, Inc. v. Eberline Instrument Corp.*, 509 F.2d 1316, 1320 (10th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975); *Raiport Co. v. General Motors Corp.*, 366 F. Supp. 328, 330 (E.D. Pa. 1973), *aff'd without published opinion*, 547 F.2d 1163 (3d Cir. 1977).

[294] Refusals to deal for the purpose of acquiring or preserving a monopoly are unlawful. *See e.g.*, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927); *National Indep. Theater Exhibitors, Inc. v. Charter Fin. Group*, 747 F.2d 1396, 1402 (11th Cir. 1984) *cert. denied*, 471 U.S. 1056 (1985); *Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 279-81 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *Byars v. Bluff City News Co.*, 609 F.2d 843, 855-59 (6th Cir. 1979); *Southern Distrib. Co. v. Southdown, Inc.*, 574 F.2d 824, 828 (5th Cir. 1978); *Aviation Specialties, Inc. v. United Technologies Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978); *Universal Brands, Inc. v. Phillip Morris, Inc.*, 546 F.2d 30, 33 (5th Cir. 1977); *Poster Exch. v. National Screen Serv. Corp.*, 362 F.2d 571, 574 (5th Cir.), *cert. denied*, 385 U.S. 948 (1966); *Jerrold Elecs. Corp. v. Westcoast Broadcasting Co.*, 341 F.2d 653, 661 (9th Cir.), *cert. denied*, 382 U.S. 817 (1965); *J.H. Westerbeke Corp. v. Onan Corp.*, 580 F. Supp. 1173, 1185-90 (D. Mass. 1984); *TV SignalCo. v. AT&T*, 1981-Trade Cas. (CCH) ¶ 63,944, at 75,865 (D.S.D. 1981).

[295] *See, e.g.*, *Petroleum Marketing Practices Act of 1978*, 15 U.S.C. §§ 2801-06 (1988) (limiting the ability of an oil company to terminate an independent franchisee when it intends to operate a company-owned facility on the same premises); *Automobile Dealers Day in Court Act*, 15 U.S.C. §§ 1221-25 (1988) (requiring the manufacturer to act in good faith in terminating, canceling, or not renewing the franchise of a dealer).

competitor's products must be established.[296] This requirement is not met if the manufacturer merely seeks to persuade a distributor to handle its goods exclusively or terminates the distributor for failure to do so.[297]

C. Standards of Analysis.

1. Purpose and Effects Test.

The "purpose" and "effects" of a supplier's refusal to deal are the benchmarks courts typically use to determine whether the refusal constitutes an unreasonable restraint of trade.

"[A] refusal to deal becomes unlawful when it produces an unreasonable restraint on trade, *i.e.*, if there is an anticompetitive purpose or effect in selecting those with whom one will deal. . . . This requirement of illegitimate purpose or effect marks the distinction between concerted activity which is an innocent aspect of business and concerted activity which is inimical to competition."[298]

2. Need Evidence of Purpose and Effect.

Absent evidence that the supplier had an anticompetitive purpose in refusing to deal and the vertical refusal to deal had an adverse effect on competition, the refusal to deal will be upheld.[299] Some courts have suggested that, absent an anticompetitive effect, an anticompetitive intent will not render a refusal to deal unlawful under the rule of reason.[300]

3. Establishing Purpose and Effect.

The presence of an anticompetitive purpose or effect can be established in a number of ways.

a. Purpose or effect may be established where a refusal to deal harms, or is intended to harm, competition at the manufacturing level by weakening one of a relatively few

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[296] *See*, *e.g.*, *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 915-16 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

[297] *See*, *e.g.*, *Ron Tonkin Gran Turismo, Inc. v. Fiat Distrib.*, 637 F.2d 1376, 1388-89 (9th Cir.) *cert. denied*, 454 U.S. 831 (1981); *Dillon Materials Handling, Inc. v. Albion Indus.*, 567 F.2d 1299, 1306) (5th Cir.), *cert. denied*, 439 U.S. 832 (1978); *Timken Roller Bearing Co. v. FTC*, 299 F.2d 839, 842 (6th Cir.), *cert. denied*, 371 U.S. 861 (1962); *McElhenny Co. v. Western Auto Supply Co.*, 269 F.2d 332, 337-39 (4th Cir. 1959); *Empire Volkswagen, Inc. v. World Wide Volkswagen Corp.*, 627 F. Supp. 1202, 1206 (S.D.N.Y. 1986) (policy of requiring dealers to sell automobiles of competing manufacturers from separate facilities was not exclusive dealing arrangement), *aff'd*, 814 F.2d 90 (2d Cir. 1987); *Elliot & Frantz, Inc. v. RayGo, Inc.*, 379 F. Supp. 498, 501-02 (E.D. Pa. 1974).

[298] *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1115-16 (5th Cir. 1979); *see also Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978).

[299] *See*, *e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-95 (1986) (legal conclusion as to existence of predatory pricing determined by "economic realities"); *Monsanto*, 465 U.S. at 762 (analysis of economic effect of anticompetitive conduct); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51 (1977) (legality of arguably anticompetitive conduct should be judged primarily by its "market impact"); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 806-07 (6th Cir. 1988) (substitution of one distributor for another upheld absent allegation of anticompetitive effect at interbrand level); *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 735-36 (9th Cir. 1987) (termination of distributor upheld absent specific intent to harm competition); *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 642 (10th Cir. 1987) (plaintiff must prove that termination had an adverse effect on competition); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1223 (10th Cir. 1986) (refusal to deal upheld in absence of evidence of anticompetitive effect), *cert. denied*, 486 U.S. 1005 (1988); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 243-44 (6th Cir. 1982); *White v. Hearst Corp.*, 669 F.2d 14, 19 (1st Cir. 1982) (refusal to deal upheld in absence of evidence of anticompetitive purpose or effect); *Crown Beverage Co. v. Cerveceria Moctezuma, SA*, 663 F.2d 886, 888 (9th Cir. f1982) (per curiam) (same); *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 989 (9th Cir. 1980) (same); *Alloy Int'l Co. Hoover-NSK Bearings Co.*, 635 F.2d 1222, 1226-28 (7th Cir. 1980); *Golden Gate Acceptance Corp. v. General Motors Corp.*, 597 F.2d 767, 678 (6th Cir. 1979); *Oreck Corp.*, 579 F.2d at 133-34; *Fount-Wip, Inc. v. Reddi-Whip, Inc.*, 578 F.2d 1296, 1300 (9th Cir. 1978); *Northwest Power Prods. v. Omark Indus.*, 576 F.2d 83, 90 (5th Cir. 1978) (refusals upheld in absence of evidence of anticompetitive effect), *cert. denied*, 439 U.S. 1116 (1979); *Wilson v. I.B.E. Indus.*, 510 F.2d 986, 989 (5th Cir. 1975) (refusal to deal upheld in absence of evidence of anticompetitive effect); *Cartrade, Inc. v. Ford Dealers Advertising Ass'n*, 446 F.2d 289, 294 (9th Cir. 1971) (termination upheld where no anticompetitive intent shown), *cert. denied*, 405 U.S. 97 (1972); *Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136 (2d. Cir. 1998) (plaintiff's failure to plead its own market share allegedly absorbed by defendant as a result of the alleged anticompetitive conduct resulted in no facts from which the court could find injury to competition); *Discon Inc. v. Nynex Corp.*, 86 F. Supp. 2d 154 (W.D.N.Y. 2000) (claims dismissed because plaintiff failed to show actual market-wide adverse effect.); *Ezzo's Investments, Inc. v. Aveda Corp.*, 238 F.3d 420 (Table)(6th Cir. 2000) (dismissal of claim affirmed where plaintiff failed to identify adverse, anticompetitive effects); *42nd Parallel North v. E Street Denim Co.*, 286 F.3d 401 (7th Cir. 2002) (dismissal of claim affirmed because plaintiff failed to demonstrate anticompetitive effect).

[300] *See*, *e.g.*, *Jeanery Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1156 n.7 (9th Cir. 1988); *Cascade Cabinet v. Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir. 1983); *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030 (2d Cir.), *cert. denied*, 444 U.S. 917 (1979); *Lamb's Patio Theater v. Universal Film Exch.*, 582 F.2d 1068, 1070 (7th Cir. 1978) (per curiam); *H & B Equip. Co. v. International Harvester Co.*, 577 F.2d 239, 246 (5th Cir. 1978); *Northwest Power Prods.*, 576 F.2d 83, 90 (5th Cir. 1978), *cert, denied*, 439 U.S. 1116 (1979); *Edward J. Sweeney & Sons v. Texaco, Inc.*, 478 F. Supp. 243, 264 (E.D. Pa. 1979), *aff'd*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

distributors capable of handling the products of competing manufacturers.[301]

b. Purpose or effect may be established where a monopolist harms a potential competitor by denying it an essential input. This refusal to deal may be unlawful under Section 1 as well as under Section 2. [302]

c. An anticompetitive effect might be inferred from a manufacturer's termination of a discounting dealer after receiving complaints from another dealer because that termination represents an attempt by one distributor to use the manufacturer to restrain the competition of another distributor engaged in discounting.[303]

D. Legality of Various Types of Vertical Refusals to Deal.

1. A vertical refusal to deal can be used to enforce a restriction limiting the freedom of a distributor (1) to sell the manufacturer's products or (2) to purchase products from others. In such cases, the legality of such a refusal to deal is subject to the same standard as the underlying restriction sought to be enforced.[304]

[301] *See Skyview Distrib. v. Miller Brewing Co.*, 620 F.2d 750, 752 (10th Cir. 1980); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1347 (3d Cir.), *cert. denied*, 419 U.S. 869 (1975); *Industrial Bldg. Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1341-42 (9th Cir. 1970); *McDaniel v. Greensboro New Co.*, 1984-1 Trade Cas. (CCH) ¶ 65,792, at 67,284 (M.D.N.C. 1983); *Diehl & Sons v. International Harvester Co.*, 426 F. Supp. 110, 119 & n.13 (E.D.N.Y. 1976); *Castoe v. Amerada Hess Corp.*, 1976-2 Trade Cas. (CCH) ¶ 61,054, at 69,758-59 (S.D.N.Y. 1976); *see also Hydro Air, Inc. v. Versa Technologies, Inc.*, 599 F. Supp 1119, 1122-23 (D. Ct. 1984) (market for other manufacturer's products could be adversely affected).

[302] *See Home Placement Serv. v. Providence Journal Co.*, 682 F.2d 274, 278-79 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983).

[303] *But see Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723-26 (1988) (holding that a manufacturer's termination of a discounting dealer based on complaints from a competing distributor is not *per se* unlawful unless the termination is in furtherance of an agreement to maintain prices or price levels between the complaining dealer and the manufacturer); *see also Ezzo's Investments, Inc. v. Aveda Corp.*, 238 F.3d 420 (Table) (6th Cir. 2000) (rule of reason applied where supplier terminated discounting dealer and where facts did not suggest an agreement on price levels).

[304] *See, e.g., Winter Hill Frozen Foods & Servs. v. Haagen-Dazs Co.*, 691 F. Supp. 593, 544 (D. Mass. 1988) ("where a manufacturer's refusal to deal either promotes or enforces a trade policy which is unreasonable *per se* the manufacturer's refusal is a *per se* violation of Section 1"); *see also FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

2. Vertical refusals to deal to enforce tying arrangements have been found to be *per se* unlawful.[305]

3. Vertical refusals to deal to enforce resale price maintenance or vertical non-price restraints such as territorial and customer restrictions and location clauses[306] or exclusive dealing arrangements[307] have been subject to analysis under the rule of reason.[308]

[305] *See e.g., Barber & Ross Co. v. Lifetime Doors, Inc.*, 810 F.2d 1276, 1280 (4th Cir.) (refusal to deal effectuated illegal tying arrangements), *cert. denied*, 484 U.S. 823 (1987); *Black Gold, Ltd. v. Rockwool Indus.*, 729 F.2d 676, 686 (10th Cir.) ("if Rockwool used the refusal to deal with Black Gold to induce adherence by other customers to a tying arrangements . . . Rockwool would be liable under Section 1"), *aff'd on reh'g*, 732 F.2d 779 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984); *Call Carl, Inc. v. BP Oil Corp.*, 554 F.2d 623 (4th Cir.) (dictum), *cert. denied*, 434 U.S. 923 (1977); *Osborn v. Sinclair Ref. Co.*, 286 F.2d 832, 839 (4th Cir. 1960), *cert. denied*, 366 U.S. 963 (1961).

[306] *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 46, 54-59 (1977); *International Logistics Group v. Chrysler Corp.*, 884 F.2d 904, 906-07 (6th Cir. 1989) (dealer terminated for selling engines designated for international market in domestic market), *cert. denied*, 110 S. Ct. 1783 (1990); *H.L. Hayden Co. v. Siemens Medical Sys.*, 879 F.2d 1005, 1014 (2d Cir. 1989) (violating prohibition on mail order sales); *Murphy v. Business Cards tomorrow, Inc.*, 854 F.2d 1202, 1204-05 (9th Cir. 1988); *O.S.C. Corp. Apple Computer, Inc.*, 792 F.2d 1464, 1469-70 (9th Cir. 1986) (violating policy prohibiting mail order sales); *Mendelovitz v. Adolph Coors Co.*, 693 F.2d 570, 576-78 (5th Cir. 1982); *Maykuth v. Adolph Coors Co.*, 690 F.2d 689, 696 (9th Cir. 1982); *Dougherty v. Continental Oil Co.*, 579 F.2d 954, 961, 966 (5th Cir. 1978), *vacated and dismissed by stipulation*, 591 F.2d 1206 (5th Cir. 1979); *Manufacturers Supply Co. v. Minnesota Mining & Mfg. Co.*, 688 F. Supp. 303, 307 (W.D. Mich. 1988); *Computer Connection, Inc. v. Apple Computer Corp.*, 621 F. Supp. 569, 574 (E.D. La. 1985) (computer dealer terminated for violating dealer agreement through sale of "highly technical piece of equipment" that dealer was not authorized to sell; "requiring training of dealer personnel and a special sales program were valid concerns of the manufacturer, imposed upon its dealers as a whole").

[307] *See, e.g., Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991); *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1581 (11th Cir. 1988); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1233 (8th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988); *Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1295 (4th Cir.), *cert. denied*, 484 U.S. 827 (1987); *Dimidowich v. Bell & Howell*, 803 F.2d 1473,1478-81 (9th Cir. 1986); *Stearns v. Genrad, Inc.*, 752 F.2d 942, 947 (4th Cir. 1984); *Bratleboro Auto Sales, Inc. v. Subaru of New England, Inc.*, 633 F.2d 649, 651 (2d Cir. 1980); *Amplex of Md., Inc. v. Outboard Marine Corp.*, 380 F.2d 112, 115 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968); *Timken Roller Bearing Co. v. FTC*, 299 F.2d 839, 842 (6th Cir.), *cert. denied*, 371 U.S. 861 (1962); *McElhenny Co. v. Western Auto Supply Co.*, 269 F.2d 332, 337-39 (4th Cir. 1959); *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268, 272-73 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *In re Super Premium Ice Cream Distrib. Antitrust Litig.*, 691 F. Supp. 1262, 1266-67 (N.D. Cal. 1988), *aff'd without published opinion sub nom*, *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*, 895 .2d 1417 (9th Cir. 1990);*Carbon Steel Prods. Corp. v. Alan Wood Steel Co.*, 289 F. Supp. 584, 588 (S.D.N.Y. 1968).

[308] *See, e.g., Care Heating & Cooling, Inc. v. American Standard, Inc.*, 2005-2 Trade Cas. (CCH) ¶ 74,993 (6th Cir. 2005) (refusal to approve competing dealer as an authorized dealer analyzed under the rule of reason); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d

4. Vertical refusals that are used by retailers to force manufacturers to stop selling products to their competitors have been found to violate § 1 of the Sherman Act.[309]

5. Where a refusal to deal is a legitimate exercise of a firm's right as patentee, evidence of anticompetitive intent or effect will not result in a Sherman Act violation.[310]

802, 810 (6th Cir. 1988) (termination of a distributor that results in the elimination of intrabrand competition does not make out a case of anticompetitive purpose or effect at the intrabrand level); *Lomar Wholesale Grocery v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 589 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988); *O.S.C. Corp. v. Apple Computer, Inc.*, 792 F.2d 1464, 1469-70 (9th Cir. 1986) (computer dealer terminated for violating policy prohibiting mail order sales); *Computer Connection, Inc. v. Apple Computer Corp.*, 621 F. Supp. 569, 574 (E.D. La. 1985) (computer dealer terminated for violating dealer agreement through sale "highly technical piece of equipment" that dealer was not authorized to sell; "requiring training of dealer personnel and a special sales program were valid concerns of the manufacturer, imposed upon its dealers as a whole"); *Trans World Airlines v. American Coupon Exch.*, 682 F. Supp. 1476, 1484-85 (C.D. Cal. 1988) (travel agency terminated for dealing in brokered certificates), *aff'd in part and vacated in part*, 913 F.2d 676 (1990); *cf. Harkins Amusement Enters v. General Cinema Corp.*, 850 F.2d 477, 486 (9th Cir. 1988) (movie clearances, as vertical non-price restraints, evaluated under rule of reason), *cert. denied*, 488 :U.S. 1019 (1989); *Rutman Wine Co. v. E. & J Gallo Winery*, 829 F.2d 729, 734 (9th Cir. 1987) ("[O]nly vertical arrangements accompanying or implementing price-fixing schemes are to be considered *per se* violations. . . ."); *Three Movies of Tarzanan v. Pacific Theaters*, 828 F.2d 1395, 1398 (9th Cir. 1987) (vertical non-price restraints of trade are evaluated under rule of reason), *cert. denied*, 484 U.S. 1066 (1988); *Westman Comm'n v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1229 (10th Cir. 1986) (stating that "manufacturers should be free to choose and terminate their distributors free of antitrust scrutiny so long as their motivation does not involve illegal pricing or tying arrangements"), *cert. denied*, 486 U.S. 1005 (1988); *Hennessy Indus. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985) ("'only those vertical arrangements that accompany or implement a price fixing scheme are considered *per se* violations; other vertical arrangements must be tested under the Rule of Reason'" (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984); *MLC, Inc. v. North Am. Phillips Corp.*, 671 F. Supp. 246, 255 (S.D.N.Y. 1987) (vertical non-price arrangements are judged by rule of reason).

309 *See, e.g., United States v.Toys "R" Us, Inc.*, Trade Reg. Rep. (CCH) ¶ 24,516 (1998) (FTC issued order prohibiting a dominant toy retailer from refusing to deal with suppliers that refused to restrict sales to competing toy retailers, finding that such vertical arrangements exceeded the bounds of *Colgate* and violated § 1 of the Sherman Act); *see also United States v. Dentsply Int'l., Inc.*, Civ. No. 99-005 (D. Del. 1999) (Complaint) (alleging that defendant's refusal to deal with distributors that stocked competing lines of artificial teeth unreasonably restrained trade in violation of § 3 of the Clayton Act and § 1 of the Sherman Act and was willful maintenance of a monopoly in violation of § 2 of the Sherman Act); *United States v. Dentsply Int'l Inc.,* 2001 WL 624807 (D. Del. 2001) (summary judgment denied).

310 *See, e.g., In re Independent Service Organizations Antitrust Litigation*, 203 F.3d 1322 (Fed. Cir. 2000) (holding that Xerox did not unlawfully attempted to create a monopoly in the copier service market by refusing to sell patented copier product parts to certain independent service organizations because, absent evidence of sham, fraud, or illegal tying, the court would not inquire into the "subjective motivation" of Xerox in asserting its rights under patent law); *Intergraph Corp. v. Intel Corp.,* 88 F. Supp. 2d 1288 (N.D. Ala. 2000), *aff'd*, 253

E. Courts Typically Uphold Refusals to Deal

1. Evaluating Refusals to Deal.

   In evaluating the reasonableness of a particular refusal to deal, courts weigh all relevant evidence, including the business purpose for the termination and the market conditions in which the termination took place.

2. Upholding Refusals to Deal.

   After examining the manufacturer's purpose in refusing to deal and the effect of such refusal on competition in the relevant market,[311] courts often uphold suppliers' refusals to deal under the rule of reason. Very often, where a manufacturer "seeks no more than a better equipped and more aggressive distributor for his product, his conduct may in fact be more beneficial than detrimental to competition."[312]

3. Courts have upheld refusals to deal occurring in the course of a manufacturer's attempt to improve the efficiency of its distribution network, including steps undertaken to:

   a. achieve cost savings and operating efficiencies,[313]

F.3d 695 (Fed. Cir. 2001) (dismissing claim that Intel maintained a monopoly in the processor market because Intel was merely asserting its rights as patentee).

311 In *Recetas Por Menos, Inc. v. Five Development Corp.*, 368 F. Supp. 2d 124 (D.P.R. 2005), the court granted summary judgment in favor of a defendant shopping center that refused to renew its lease with a plaintiff pharmacy, concluding that a single shopping center was insufficient to constitute a relevant geographic market.

312 *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211, 1215 (9th Cir. 1970), *cert. denied*, 401 U.S. 939 (1970); *see also Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1232-33 (ed Cir. 1988) (movie distributor's selection of higher grossing theater consistent with its economic interests); *Three Movies of Tarzana v. Pacific Theaters*, 828 F.2d 1395, 1399-400 (9th Cir. 1987) (movie distributor's selection of theater for first-run movie was premised on sound business judgment that chosen theater would generate highest profits); *Famous Brands, Inc. v. David Sherman Corp.*, 814 F.2d 517, 524 (8th Cir. 1987) (withdrawal of product from unwilling distributor "'nothing more than aggressive salesmanship'") (quoting *Unijax, Inc. v. Champion Int'l, Inc.*, 683 F.2d 678, 685 (2d Cir. 1983)); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985); accord *McDaniel v. General Motors Corp.*, 480 F.Supp. 666 (E.D.N.Y. 1979), *aff'd*, 628 F.2d 1345 (2d Cir. 1980).

313 *See, e.g. Seafood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1570-71 (11th Cir. 1991) (franchisor's exclusive food distribution system lowered costs for franchisees); *Car Carriers,*

b. achieve broader geographic distribution,[314]

c. ensure adequate services for its products by eliminating free-riders,[315] and

d. achieve similar business purposes.[316]

4. *De minimus* impact on competition

Courts have upheld vertical refusals to deal when the impact on intrabrand competition is *de minimus.* [317]

5. Legitimate Business Reasons.

Provided there is a legitimate business justification for refusing to deal, refusals to deal have been upheld even in situations where:

Inc. v. Ford Motor Co., 745 F.2d 1101, 1110 (7th Cir. 1984) (replacement of car transporter seeking higher tariff with new transporter at lower price was pro competitive), *cert denied*, 470 U.S. 1054 (1985); *Auburn News Co. v. Providence Journal Co.*, 657 F.2d 273, 278 (1st Cir. 1981) (to achieve operating efficiencies), *cert. denied*, 455 U.S. 921 (1982).

314 *See, e.g., Westpoint Pepperell, Inc. v. Rea, 1980-2 Trade Cas.* (CCH) ¶ 63,341, at 75, 742, 75,444-45 (N.D. Ca. 1980); *Western Wholesale Liquor Co. v. Gibson Wine Co.*, 372 F. Supp 802, 806-07 (D.S.D. 1974).

315 *See, e.g., Seagood Trading Corp.*, 924 F.2d at 1572-73 (excluded distributor seeking to free-ride on franchisor's economies of scale); *H.L. Hayden Co. v. Siemens Medical Sys.* 979 F.2d 1005, 1014 (2d Cir. 1989) (prohibition on mail order sales legitimate means of restricting free-riding); *Three Movies of Tarzana v. Pacific Theaters*, 828 F.2d 1395, 1399 (9th Cir. 1987) (refusal to grant one of competing theaters first run of new movie was reasonable means of preventing free-riding on other theaters' advertising, *cert. denied*, 484 U.S. 1066 (1988).

316 *See, e.g., Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1582-83 (11th Cir. 1988) (suppliers have legitimate business interest in ensuring dealers are competent and financially capable to promote products); *National Marine Elec. Distribs. v. Raytheon Co.*, 778 F.2d 190, 193 (4th Cir. 1985) (upholding termination based on decision not to pursue mail order sales); *Suzuki of Western Mass., Inc., v. Outdoor Sports Expo, Inc.,* 126 F.Supp.2d 40 (D. Mass. 2001) (upholding boat show promoter's "priority dealer" rule in order to maximize the variety of models displayed).

317 *K.M.B. Warehouse Distrib. v. Walker Mfg. Co.*, 1994-1 Trade Cas. (CCH) ¶ 70, 609 (S.D.N.Y. 1994)(plaintiffs failed to present sufficient evidence of defendant's market power, so court concluded that plaintiffs had failed to carry initial burden of proving unreasonable restraint of trade and granted summary judgment to defendants). *But see 3M v. Graham-Field, Inc.,* 1997-2 Trade Cas. (CCH) ¶ 71,882 (S.D.N.Y. 1997) (65-70% market share sufficient to infer market power and effect on competition for purposes of surviving motion to dismiss claim of refusal to deal); *Floors-N-More, Inc. v. Freight Liquidators*, 142 F.Supp.2d 496 (S.D.N.Y. 2001) (dismissing claims involving alleged refusal to deal because plaintiffs failed to allege an adverse affect on competition).

a. in the absence of alternative sources of supply a manufacturer decides to abandon the geographic market or line of business,[318]

b. in the absence of alternative sources of supply a manufacturer is restricted in its ability to provide products to distributors by a supply shortage,[319]

c. the refusal results in a reduction in the number of independent distributors where a manufacturer replaces several non-exclusive distributors with a single exclusive distributor,[320] or even where

d. manufacturers with market power[321] on a unique product[322] have refused to deal.

Under appropriate circumstances (*i.e.,* legitimate business reasons), a refusal to deal with a potential new distributor,[323]

318 *Cf. International Rys. of Cen. Am v. United Brands Co.*, 532 F.2d 231, 239-41 (2d Cir) (a customer of transportation services abandoned an unprofitable business operation, thus leading it to discontinue dealing with the railroad that supplied the transportation services; no violation found under Sherman Act § 1), *cert. denied*, 429 U.S. 835 (1976); *Viazis v. American Assn. of Orthodontists*, 314 F.3d 758 (5th Cir. 2002), *cert. denied,* 538 S.Ct. 1033 (2003) (upholding decision of manufacturer to discontinue a line of orthodontic products after receiving customer complaints, even after discussing the complaints with orthodontists).

319 *See, e.g., Schaben v. Samuel Moore & Co.*, 606 F.2d 831, 833-34 (8th Cir. 1979) (per curiam); *White Bag Co. v International Paper Co.*, 579 F.2d 1384, 1386-87 (4th Cir. 1974); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 298-300 (7th Cir. 1974); *Nebraska-Iowa Car Wash, Inc. v. Mobil Oil Corp.*, 1976-1 Trade Cas. (CCH) ¶ 60,849, at 68,744 (N.D. Iowa 1976); *Thomas v. Amerada Hess Corp.*, 393 F.Supp. 58, 74 (M.D. Pa. 175); *Intermar, Inc. v. Atlantic Richfield Co.*, 364 F. Supp. 82, 100-01 (E.D. Pa. 1973) (limiting supplies).

320 *See, e.g., Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 807 (6th Cir. 1988) (elimination of an entire set of distributors does not constitute a restraint of trade); *Valley Liquors, Inc. v. Renfield Importers*, 822 F.2d 656, 666 (7th Cir.) (realignment of exclusive distributors not unreasonable where supplier locked market power), *cert. denied*, 484 U.S. 977 (1987).

321 *See e.g., Paschall v. Kansas City Star Co.*, 727 F.2d 692, 704 (8th Cir) (en back) (upholding newspaper publisher's forward integration into distribution), *cert. denied*, 469 U.S. 872 (1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927-28 (2d Cir. 1980) (refusal of publisher of airline flight schedules to publish connecting flight schedules of commuter airlines did not violate § 5 of the FTC Act)), *cert. denied*, 450 U.S. 917 (1981).

322 *See Universal Brands, Inc. v. Philip Morris, Inc.* 546 F.2d 30 (5th Cir. 1977); *Venzie Corp. v. United States Mineral Prods. Co.*, 521 F.2d 1309, 1314-16 (3d Cir. 1975).

323 *See, e.g., Care Heating & Cooling, Inc. v. American Standard, Inc.*, 2005-2 Trade Cas. (CCH) ¶ 74,993 (6th Cir. 2005); *Lomar Wholesale Grocery v. Dieter's Gourmet Foods, Inc.* 824 F.2d 582, 591 (8th Cir. 1987), *cert. denied*, 484 U.S., 1010 (1988); *Westman Comm'n Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1224-25 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988);

the substitution of one exclusive distributor for another,[324] the consolidation of distribution into the hands of fewer distributors, and forward vertical integration by replacing independent distributors by manufacturer-owned outlets have all been upheld.

F. Antitrust Laws Protect Competition, Not Competitors

1. In upholding certain vertical refusals to deal, courts note that the antitrust laws are intended to protect "competition", not "competitors."[325]

2. For this reason, numerous courts have concluded that a distributor's termination following a merger does not generate antitrust injury and therefore does not establish antitrust standing.[326]

3. Because the antitrust laws are intended to protect competition and not individual competitors, the substitution of one distributor for another does not reduce the number of competing distributors.[327]

Hawkins v. Holiday Inns, 734 F.2d 342, 345 (6th Cir. 1980), *cert. denied*, 451 U.S. 987 (1981); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distribs.*, 637 F.2d 1376, 1388 (9th Cir), *cert. denied*, 454 U.S. 831 (1981); *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 396-97 (2d Cir. 1980); *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1115-17 (5th Cir. 1979).

[324] *See also Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 806 (6th Cir. 1988); *Drelling v. Peugeot Motors*, 850 F.2d 1373, 1380 (10th Cir. 1988); *Sierra Wine & Liquor Co. v. Heublein, Inc.* 626 F.2d 129, 133 (9th Cir. 1980) (per curiam; *Fuchs Sugars & Syrups, Inc. v. Amstar Corp.*, 602 F.2d 1025, 1030 (2d Cir), *cert. denied*, 444 U.S. 917 (1979); *Natrona Serv. v. Continental Oil Co.*, 598 F.2d 1294 (10th Cir. 1979); *Golden Gate Acceptance Corp. v. General Motors Corp.*, 597 F.2d 676, 678 (9th Cir. 1979).

[325] *See, e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Rutman Wine*, 829 F.2d at 734-35 (antitrust laws not designed to protect competitors); *Fine v. Barry & Enright Prods.*, 731 F.2d 1394, 1398-99 (9th Cir.) (restrictions on repeat appearances on quiz programs upheld as reasonable vertical refusals to deal; plaintiff must show injury to a market or competition in general, and not merely injury to individuals), *cert. denied*, 469 U.S. 881 (1984); *A.H. Cox & Co., v. Star Mach. Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981); *Borger v. Yamaha Int'l Corp.* 625 F.2d 390, 397 (2d Cir. 1980); *Precision Surgical, Inc. v. Tyco Int'l Inc.,* 111 F. Supp. 2d 586 (E.D.Pa. 2000); *Discon Inc. v. Nynex Corp.,* 86 F. Supp. 2d 154 (W.D.N.Y. 2000) (plaintiff must allege and show that defendant's conduct caused market-wide harm to competition, not just harm to plaintiff itself); *Care Heating & Cooling, Inc. v. American Standard, Inc.*, 427 F.3d 1008 (6th Cir. 2005) (dismissing unapproved dealer's complaint against manufacturer because complaint only alleged injury to competitor and not to competition in the market as a whole).

[326] *See, e.g., Florida Seed Co., Inc. v. Monsanto Co.,* 1997 WL 37130 at *3 (11th Cir. 1997) (plaintiff found to lack antitrust standing based on its termination after a merger was complaining "not about higher prices or about injury to competition, but about injury to itself").

[327] *Ace Beer Distributors v. Kohn*, 318 F.2d 283 (6th Cir.), *cert. denied*, 375 U.S. 922 (1963) ("The substitution of one distributor for another in a competitive market of the kind here involved does not eliminate or materially diminish the existing competition of distributors of the other beers . . . and, in our opinion, is not an unreasonable restraint of trade.")

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. AN OVERVIEW OF VERTICAL RESTRAINTS 2

A. Applicable Laws. 2

B. Enforcement. 3

C. Standard of Analysis. 11

III. VERTICAL PRICE RESTRAINTS 19

A. Definition of Resale Price Maintenance. 19

B. Competitive Effects of Resale Price Maintenance. 19

C. The Doctrine: The *Per Se* Rule and the Rule of Reason. 20

D. There Must be an Agreement for a Section 1 Violation. 22

E. The *Colgate* Exception 31

F. Variations on the Basic RPM Agreement. 34

IV. VERTICAL NON-PRICE RESTRAINTS 43

A. General Standards for Non-Price Vertical Restraints. 44

B. Exclusive Distributorships. 47

C. Territorial and Customer Restrictions. 49

D. Restrictions Under a Dual Distribution System. 52

E. Location Clauses, Areas of Primary Responsibility, and Profit Pass-Over Arrangements. 53

F. Group Boycotts. 55

G. Vertical Bid Rigging. 58

V. EXCLUSIVE DEALING ARRANGEMENTS

A. Definition. 59

B. Competitive Effects. 60

C. Applicable Law. 60

D. Exclusive Dealing Not Illegal *Per Se* 60

E. The Two Standards for Analysis. 61

VI. TYING ARRANGEMENTS. 75

A. General Background of Tying Arrangements. 75

B. "*Per Se*" Illegality or Rule of Reason? 80

C. Elements of a *Per Se* Unlawful Tying Arrangement 81

D. Rule of Reason Analysis. 98

E. *Kodak* Reaffirmed the *Per Se* Rule 102

F. *Independent Ink* Signals Possible Shift from "Per Se" Rule 104

G. Defenses and Justifications 105

H. Full-Line Forcing. 107

VII. RECIPROCAL DEALING ARRANGEMENTS 110

A. Definition. 110

B. Applicable Law 110

C. Standards for Analysis of Reciprocal Dealing 112

D. Reciprocal Dealing Typically Upheld 114

VIII. VERTICAL REFUSALS TO DEAL 114

A. Definition. 115

B. Applicable Law. 115

C. Standards of Analysis. 116

D. Legality of Various Types of Vertical Refusals to Deal. 118

E. Courts Typically Uphold Refusals to Deal. 121

F. Antitrust Laws Protect Competition, Not Competitors 124

Price maintenance remains illegal in Canada

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The United States Supreme Court recently overturned a nearly century-old ban on setting minimum resale prices. In *Leegin Creative Leather Products, Inc v PSKS, Inc*,[2] the Court stated that a manufacturer's agreement with a retailer to sell products of the manufacturer at or above a specified minimum price is no longer *per se* illegal. Instead, minimum resale price agreements are to be evaluated on a case-by-case basis under the 'rule of reason', which allows potential pro-competitive benefits to be weighed against potential anti-competitive effects. While the power of suppliers to set resale prices has been increased in the US, firms selling into Canada and their Canadian subsidiaries will need to be attentive to the stricter law which remains in force in Canada. Manufacturers and distributors operating on a pan-North American basis will therefore need to manage continental distribution chains carefully.

Historical evolution of the approach to resale pricing

The *Leegin* decision reverses the United States Supreme Court's 1911 decision in *Dr Miles Medical Co v John D Park & Sons Co*,[3] which held that it was *per se* illegal for a manufacturer and a distributor to agree on the minimum price the distributor could charge for the manufacturer's goods.

In 1919, the US Supreme Court provided a loophole to the prohibition in Dr Miles with its decision in *United States v Colgate & Co*,[4] which established a principle that became known as the 'Colgate Doctrine', whereby a manufacturer was allowed to set a 'unilateral minimum advertised price', or suggested retail price, and lawfully terminate retailers that failed to abide by its pricing policy (provided there was no explicit or tacit agreement between the manufacturer and the dealer) because: 'In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognised 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...'.[5]

Similarly, in respect of the imposition of maximum resale prices, the US Supreme Court ruled in *Albrecht v Herald Company*[6] (1968) that it was an automatic violation of antitrust laws for a newspaper publisher and an independent distributor to agree that the distributor would not charge customers more than the newspaper's suggested retail price. However, in 1997, *Albrecht* was overruled in *State Oil Co v Khan*,[7] which provided that the imposition of a maximum resale price was no longer *per se* illegal, but rather the 'rule of reason' should apply.

The changing approach to price maintenance parallels a gradual relaxation of the US approach to vertical non-price restraints. This change was heavily influenced by evolving economic theoretical and empirical work, which generally concluded that there are many non-anti-competitive reasons for vertical restrictions. The extension of a similar approach to vertical price restraints is not surprising from an economic perspective, since they often have similar rationales. The non-anti-competitive explanations include encouraging retailers to carry a product by providing adequate profit margins, or incentivising retailers to offer services to customers that could have the effect of increasing the manufacturer's sales (eg pre-sale service). Retailers may also be encouraged to maintain the cachet of the brand image.

The Canadian legal framework

In Canada, there is a criminal price maintenance offence, which may apply either vertically, such as when a distributor attempts by agreement or threat to force retailers to maintain resale prices at or above a minimum price, or horizontally, such as when two or more competitors agree not to discount their products.[8] The offence does not restrict the use of maximum resale prices.

Originally known as 'resale price maintenance', this

provision was introduced into Canadian Law in 1951 following the recommendations of the MacQuarrie Commission[9] to combat vertical pricing restraints imposed by 'dealers' against 'resellers' (eg a wholesaler requiring a retailer to resell the wholesaler's products at list price). In 1975, the provision was amended to include both vertical and horizontal pricing restraints.[10]

A person who contravenes the prohibition against price maintenance is subject to fines (no maximum) and/or five years' imprisonment. The Competition Act also allows parties affected by price maintenance to bring a civil action to recover their damages and costs, regardless of whether a criminal prosecution has occurred.[11]

Broadly worded prohibition

The basic offence of price maintenance is found at section 61(1) of the Competition Act, which stipulates two branches of price maintenance:

61(1) No person who is engaged in the business of producing or supplying a product... shall, directly or indirectly,

(a) by agreement, threat, promise or any like means, attempt to influence upward, or to discourage the reduction of the price at which any other person engaged in business in Canada supplies or offers to supply or advertises a product within Canada; or

(b) refuse to supply a product to or otherwise discriminate against any other person engaged in business in Canada because of the low pricing policy of that other person.

The price maintenance offence is intended to prevent manufacturers from putting upward pressure on resellers' advertised or selling prices. It is not necessary that such effects occur; it is sufficient to prove an attempt to influence or the refusal or discrimination that constitutes the offence. Similarly, no actual injury to competition need be shown, since price maintenance is a *per se* offence. Pro-competitive or efficiency-enhancing effects are not considered.

Interestingly, resellers may also commit the offence of price maintenance if they attempt to require a supplier to refuse to do business with other low-pricing resellers.[12]

Limited defences

The Competition Act allows for suggested retail prices, provided it is made clear to the reseller that it is not obligated to adhere to the suggested price and in no way would the reseller suffer in its business relations with the supplier if the supplier advertises or sells below the suggested price. It is prudent to include such a message on all price lists or other communications relating to suggested resale prices.

A supplier may refuse to supply a reseller that has a low-pricing policy if it can show that it reasonably believed that[13]:

a) the reseller was making a practice of using products supplied by the supplier as loss leaders, namely for purposes of advertising, rather than to make a profit;

b) the reseller was making a practice of using products supplied by the supplier for the purpose of attracting customers in the hope of selling them other products ("bait and switch"), rather than to sell the products at a profit;

c) the reseller was making a practice of engaging in misleading advertising in respect of the suppliers' products; or

d) the reseller was making a practice of not providing the level of service that purchasers of the product might reasonably expect from the reseller.[14]

It could be argued that these provisions reflect some pro-competitive rationales for price maintenance. However, these defences are quite limited in their scope of application. They do not give rise to a full 'rule of reason' analysis and do not apply to attempts to influence upward or discourage the reduction of resale prices by threat, promise, agreement or other like means.

Enforcement in Canada

Canada's Competition Bureau actively enforces the price maintenance provisions of the Competition Act. Some representative cases are summarised briefly below.

Vertical price maintenance

DEERE & COMPANY

Deere & Company entered into an agreement with US-based retailer Home Depot which contained 'unilateral minimum advertised price' provisions in respect of a new line of garden tractors. Although such a clause was permitted under the US Colgate Doctrine, it was not permissible under Canadian law. The Minimum Advertising Price Program, or MAP, in the agreement was actually not intended to apply in Canada. However, as indicated in the Agreed Statement of Facts filed in court, several of Deere's Canadian retailers nevertheless had the impression that they were not allowed to advertise below the minimum suggested price.

Following an investigation by the Competition Bureau, Deere avoided a criminal charge by settling the case, without admitting liability, with a 'restitution' payment whereby more than 8,600 consumers across Canada, who had bought a John Deere '100' series lawn-tractor from one of the company's Canadian dealerships between January and August 2003, received a five per cent cash rebate. In addition, to this C$1.2 million settlement, Deere & Company was subject to a five-year consent prohibition order requiring implementation of a competition law compliance programme and changes to its administrative and sales practices in Canada.[15]

TOYOTA

Under its Access Toyota 'no-hassle' automobile pricing program, Toyota Canada prohibited dealers from selling vehicles below 'Access/Drive-Away Prices' that were advertised on the internet. These minimum prices were determined by way of a weighted-average pricing formula that took into account 'price votes' submitted by Toyota's dealers via a special website.

As part of its 2003 settlement with the Competition Bureau, Toyota Canada agreed to make it clear to its dealers and sales people that they could sell vehicles for less than the Access Toyota price. The prohibition order included an order that Toyota prohibit its dealers from 'agreeing with and among each other to limit the discounts that they... will apply to Toyota vehicles'. As part of the settlement, Toyota also made voluntary donations totaling C$2.3 million to charitable organisations across Canada.[16]

STROH

In 2002, the Stroh Brewery Company (Quebec) Ltd pleaded guilty to charges of price maintenance on beer products and was sentenced to pay a C$250,000 fine.[17] The Competition Bureau's investigation revealed that Stroh had engaged in price maintenance for the sale of bottled beer in the Province of Quebec. In particular, in order to benefit from Stroh's volume-based discount programme, convenience stores and retail outlets were required to maintain the minimum retail prices specified by Stroh for six-bottle and 12-bottle cases of beer, thereby avoiding any discounting of the products.

RE/MAX

Several Re/Max companies, which were in the business of granting franchises for real estate brokerages under the Re/Max brand name, prohibited their franchises and sales associates from advertising commission rates. Moreover, in a number of instances, non-compliant sales associates were fired.

In 2003, as a result of an agreement between the Competition Bureau and the Re/Max companies, the Federal Court of Canada issued a prohibition order under section 34(2) of the Competition Act requiring the companies to change certain pricing and advertising policies. It also required Re/Max to refrain from: prohibiting its franchises or sales associates setting independent commission rates or advertising such rates; attempting to influence commission rates upwards by any means; and pressuring independent publishers to refuse advertising from any Re/Max franchise or sales associates because of the commission rates advertised.

EPSON CANADA

R v Epson Canada Ltd[18] is a particularly noteworthy illustration of the principle that no actual injury to competition need be shown and that pro-competitive or efficiency-enhancing effects are not a defence under the Canadian law. Epson was charged with price maintenance after inserting a clause into its standard dealer agreements that prohibited advertising of (but not sales at) prices below Epson's suggested retail price. Epson argued that the policy was necessary because its products required high pre-sale service, which would not be provided by full-service dealers unless they were shielded from the advertising of discounted prices by other dealers. An economic expert testified about the efficiency enhancing rationale for such a policy (eg, avoiding free rider problems whereby discount retailers benefited from Epson's marketing support without supporting the brand with the level of service that customers expect to accompany Epson products.). Nevertheless, the Court concluded that the offence was committed by the insertion of the clause into the dealer agreements and that possible efficiencies or beneficial marketplace effects were not a defence. The level of service defence also did not apply, as this was an example of an attempt to influence the resale price upwards, rather than a refusal to supply. On appeal, the fine was reduced from C$200,000 to C$100,000.[19]

MITSUBISHI PAPER MILLS

In 1997, Mitsubishi Paper Mills, Ltd,[20] pleaded guilty to one charge under section 61 for refusing to supply thermal fax paper to a Vancouver distributor because of the distributor's low pricing policy. The accused also pleaded guilty to a charge under Section 45, the conspiracy provision of the Competition Act, for fixing prices for thermal fax paper. The company

was convicted in the Federal Court of Canada and sentenced to a fine of C$850,000.

Horizontal price maintenance

It is notable that the prohibition of section 61 of the Competition Act applies to horizontal price maintenance agreements on a *per se* basis, unlike other anti-competitive arrangements that are penalised under the conspiracy provision of the Act. In addition, group boycotts that have a horizontal dimension may run afoul of this provision. The penalty levels are much lower than for the general conspiracy offence which is usually used for hard-core cartel behaviour. However, the Competition Bureau occasionally proceeds using a price maintenance prosecution where it may be easier to prove.

ROYAL LEPAGE

In 1994, *Royal LePage*, a national real estate company, and its regional vice-president were convicted in a contested price-maintenance case for promising to co-operate with a discount realtor in Calgary if that company increased the commission rates that it charged to home sellers.[21]

They were convicted for discriminating against two discount realtors because of their low pricing policies and were also convicted of attempting, by promise, to influence upward the prices charged by one of the discount firms. Royal LePage was fined C$200,000, a branch manager was fined C$25,000 and another manager was fined C$5,000.

Upstream price maintenance by resellers

Resellers who are concerned about discounting competitors occasionally overstep the permissible level of complaints to a supplier when they make their continued business relationship contingent upon the supplier cutting off the competing discounter.

RITTENHOUSE RIBBONS & ROLLS

In 1995, Rittenhouse Ribbons & Rolls Ltd[22] was convicted and fined C$98,000 in the Federal Court, Trial Division, in Toronto for attempting to induce a supplier of thermal facsimile paper to cut off supplies to a Vancouver distributor, because of the distributor's low pricing policy.

The company pleaded guilty to one charge under Section 61(6) of the Competition Act (refusal to supply). The illegal conduct involved pressure placed on a supplier by Rittenhouse Inc, a large American converter of fax paper which is also the parent company of Rittenhouse Ribbons & Rolls Ltd. The offence was identified as part of the broader thermal fax paper conspiracy investigations, which involved firms in Canada, the United States, Japan and Hong Kong.

Will Canada eventually follow Leegin?

The *Leegin* decision will encourage Canadian competition lawyers and their clients to revisit the issue of whether price maintenance should be decriminalised and made subject to a competitive effects test.

The VanDuzer Report

Well before the *Leegin* decision, Canada was debating the possibility of making price maintenance rules less rigid. In 1999, Canada's then-Commissioner of Competition engaged two University of Ottawa professors, J Anthony VanDuzer and Gilles Paquet, to conduct an independent study of the provisions of the *Competition Act* dealing with anti-competitive pricing and their enforcement by the Competition Bureau. The VanDuzer Report[23] concluded that horizontal price maintenance is unambiguously anti-competitive, while for vertical price maintenance, it would be best to employ a market power test under the provision of the Competition Act dealing with abuse of dominant position in order to weigh the pro-competitive and anti-competitive effects of a price maintenance policy.

The VanDuzer Report criticised the existing price maintenance provisions of the Competition Act for not reflecting the fact that anti-competitive vertical price maintenance is typically characterised by a supplier that:

- has market power, which limits opportunities for customers to obtain supply elsewhere; and
- does not have an efficiency-based justification, such as to increase service or prevent brand impairing practices (eg, the use of the supplier's product as a loss leader or a practice of misleading advertising by the reseller).[24]

Report of the House of Commons Standing Committee on Industry, Science and Technology

Following the VanDuzer Report, in a 2002 report entitled *A Plan to Modernize Canada's Competition Regime*,[25] the House of Commons Standing Committee on Industry, Science and Technology recommended a number of changes to the Competition Act, including the decriminalisation of the predatory pricing, price maintenance and price discrimination provisions of the Act. With the exception of horizontal price maintenance agreements among competitors (which

would be added to the revised Section 45 conspiracy provision), it proposed that these practices be added into the abuse of dominance (or monopolisation) provisions in the Act, which contain a rule of reason framework with a 'substantial lessening or prevention of competition' test.[26]

Many experts were given the opportunity to testify before the Industry Committee:

> 'All witnesses, except Bureau officials, who commented on price maintenance had a recurring theme: Vertical price maintenance should be decriminalised and horizontal price maintenance should be moved to the conspiracy provision. The Bureau, the lone dissenter, could only offer a higher success rate when prosecuting under a *per se* offence as its reason for departing from expert opinion.'[27]

However, in its published reaction to the Industry Committee's conclusions, the Government of the day reacted cautiously, concluding that the price maintenance recommendations should be deferred for later consideration in parallel with potential amendments to the conspiracy (cartel) offence.[28]

The Liberal Party, which had been in power in Ottawa at the time of the VanDuzer Report and which introduced Bill C-19, is no longer the ruling party. There has since been a change in government. The new minority Conservative Government has not treated competition policy as a legislative priority.

However, in July 2007, the Ministers of Industry and Finance announced the creation of a Competition Policy Review Panel, which was mandated to review key elements of Canada's competition and investment policies. The Panel has been asked to report by June 2008 with concrete recommendations to further enhance competitiveness in Canada. The Panel will seek opportunities for reform of Canada's competition law and foreign investment rules, especially the existing barriers to foreign ownership of banks, telecommunication companies and cultural industries. However, no mention was made of the pricing provisions of the Competition Act in the Panel's Consultation Paper.[29]

Conclusion

In light of the *Leegin* decision, international manufacturers, distributors and other suppliers that have Canadian operations or that sell into the Canadian market should be careful to avoid adopting a Canadian pricing policy based on US standards. Frequently, it will be necessary to modify such policies substantially or consider alternative advertising, distribution channel and pricing strategies for use in Canada.

While change to Canada's price maintenance rules is always a possibility, given the gradual pace of change in Canadian competition legislation generally and the fact that the current minority government has not designated the pricing aspects of competition policy as one of its legislative priorities, modification of the price maintenance provisions of the Competition Act will probably not occur any time soon. Canada is therefore likely to maintain its distinctively strict approach to price maintenance for the foreseeable future.

Notes

1 David Butler and Neil Campbell are partners in the Toronto office, and Larry Markowitz is a partner in the Montreal office, of McMillan Binch Mendelsohn LLP. For additional information about the firm's Competition Law Group, please visit www.mcmbm.com. Neil Campbell is also Senior Vice-Chair of the Antitrust committee.
2 127 S Ct 2705 (2007).
3 220 US 373 (1911).
4 *United States v Colgate & Co*, 250 US 300 (1919).
5 *Ibid* at p307.
6 390 US 145 (1968).
7 118 S Ct 275 (1997).
8 'Product' is defined in the Competition Act as including a service (section 2, Competition Act).
9 Report of the Committee to Study Combines Legislation and Interim Report on Resale Price Maintenance (MacQuarrie Report) (Ottawa: Queen's Printer 1951).
10 Report on the Roundtable on Resale Price Maintenance which was held by the Committee on Competition Law and Policy in February 1997, Organisation for Economic Co-Operation and Development (OECD) (Paris: 1997); and Report of the House of Commons, Standing Committee on Industry, Science and Technology, A Plan to Modernize Canada's Competition Regime, 1st Session, 37th Parliament, April 2002. Adopted by the Committee April 9, 2002, and tabled in the House of Commons on 23 April 2002.
11 See section 36 of the Competition Act.
12 See section 61(6) of the Competition Act.
13 See section 61(10) of the Competition Act.
14 See, for example: *R v HD Lee of Canada* (1980), 57 CPR (2d) 186 (Qué Sess of Peace).
15 See Agreed Statement of Facts and Prohibition Order, Fed Ct, No T-1836-04 (19 October 2004). See also Competition Bureau Press Release, 'Consumers to be Reimbursed by John Deere Limited: Competition Bureau Settlement Results in $1.19 Million in Rebates' (19 October 2004).
16 See Competition Bureau, News Release, 'Competition Bureau Settles Price Maintenance and Misleading Advertising Case Regarding the Access Toyota Program' (28 March 2003).
17 See Agreed Statement of Facts and Prohibition Order, Fed. Ct., No. T-1504-02 (4 October 2002). See also Competition Bureau Press Release, 'Competition Bureau investigation leads to a C$250,000 fine in a price maintenance case' (10 October 2002).
18 19 CPR (3d) 195 (1987) (Ont Dist Ct).
19 32 CPR (3d) 78 (1990) (Ont CA);
20 See Competition Bureau, News Release, 'Mitsubishi Paper Mills Ltd. Pleads Guilty to Two Charges Under the Competition Act' (17 February 1997).
21 *R v Royal LePage Real Estate Services Ltd* (1993), 50 CPR (3d) 161 (Alta Q B).
22 *Rittenhouse Ribbons and Rolls* (Competition Bureau, News Release of 18 December 1995, No 7375).
23 J Anthony VanDuzer & Gilles Paquet, *Anticompetitive Pricing Practices and the Competition Act: Theory, Law and Practice* (Hull: Competition Bureau, 1999).
24 Many of the VanDuzer Report's recommendations for reform of the Competition Act were included in the Bill C-19 proposed amendments to the Competition Act in late 2004. However, the price maintenance recommendations were not included in the

Bill, which, in any event, never became law.

25 House of Commons, Standing Committee on Industry, Science and Technology, A Plan to Modernize Canada's Competition Regime, 1st Session, 37th Parliament, April 2002. Adopted by the Committee 9 April 2002, and tabled in the House of Commons on 23 April 2002.

26 See sections 78 and 79 of the Competition Act.

27 House of Commons, Standing Committee on Industry, Science and Technology, *supra*, page 75. In its reaction to the recommendations of the House of Commons standing committee, the National Competition Law Section of the Canadian Bar Association agreed that section 61 of the *Competition Act* should be repealed and that vertical price maintenance should be dealt with under the provision dealing with abuse of dominant position (section 79) (Letter of Tim Kennish, Chairman of the National Competition Law Section of the Canadian Bar Association, to Allan Rock, Minister of Industry (August 28, 2002))

28 'Government Response to the Report of the House of Commons Standing Committee on Indusry, Science and Technology "A Plan to Modernize Canada's Competition Regime' (2002), available at: www.ic.gc.ca/epic/site/ic1.nsf/en/00116e.html

29 Available at: www.ic.gc.ca/epic/site/cprp-gepmc.nsf/en/h_00009e.html.