Taming the Wayward Children of *Monsanto* and *Sylvania*: Some Thoughts on Developmental Disorders in Vertical Restraints Doctrine

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TAMING THE WAYWARD CHILDREN OF MONSANTO AND SYLVANIA: SOME THOUGHTS ON DEVELOPMENTAL DISORDERS IN VERTICAL RESTRAINTS DOCTRINE

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In recent years, several antitrust cases have involved the following scenario: A supplier, for example, a relatively small clothing manufacturer, sells to
a variety of different dealers, recommending that its product be sold at a particular price to consumers. Among its dealers are full-price retailers, such as major department stores or upscale boutiques. In addition, at least one of its dealers is a discount outlet that advertises prices below the manufacturer's suggested retail prices ("MSRP") and probably provides less pleasant retailing space, less pleasant changing facilities, less product display, and fewer service personnel than one might expect to find at the department store or boutique. At some point in time, one of the manufacturer's full-price retailers becomes aware that the discounter is competing for business by selling the product below MSRP. The retailer contacts the manufacturer and indicates that it will continue to retail the manufacturer's product only if the discounter is either brought into line—made to raise its prices—or terminated completely. The manufacturer responds by assuring the full-price retailer that it will resolve the matter. Subsequently, the manufacturer terminates the discounter after the discounter refuses to charge the MSRP.

On its face, this "upward coercion" scenario seems to constitute precisely the type of anticompetitive activity with which the antitrust laws are concerned. One firm succeeds in eliminating a competing firm from part of the market.

1. The terminology that seems to be in common usage is that a "distributor" sells products to other entities in the distribution chain, while a "dealer" sells to consumers. See John R. Allison, An Analysis of the Vertical Price-Nonprice Dichotomy, 21 AKRON L. REV. 131, 132 n.6 (1987). For convenience, I will refer to both categories as "dealers" unless referring to specific distributors in a particular case. Similarly, I will refer to both manufacturers and upstream distributors generically as "suppliers" in cases and examples when they are acting as the upstream entity in a transaction.

2. Often, this price is 200% of the wholesale price, commonly referred to in the industry as the "keystone" price. E.g., The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1150 (9th Cir. 1988); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905, 907 (4th Cir. 1986), cert. denied, 486 U.S. 1005 (1988); Robert F. Springer & H.E. Freh III, Deterring Fraud: The Role of Resale Price Maintenance, 59 J. BUS. 433, 444 & n.12 (1986); Robert L. Steiner, The Nature of Vertical Restraints, 30 ANTITRUST BULL. 143, 163-64 (1985). This industry rule-of-thumb may come about because retailers do not find it to be cost-effective to try to estimate consumer demand more precisely, but it also tends to stabilize high retailer margins by making tacit collusion easier. See Steiner, supra, at 164.


4. The relevant statute is 15 U.S.C. § 1 (Supp. V 1994), which provides in pertinent part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony. . . . Typically, courts and commentators view the broad phrasing of the statute as providing a wide grant of authority to the federal courts to develop a kind of common law relating to restraints of trade. See, e.g., 7 PHILLIP E. AREEDA, ANTITRUST LAW § 1501 (1986) (arguing that statutory language requires federal courts to "develop, refine, and innovate in the dynamic common law tradition"); William F. Baxter, Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law, 60 TEX. L. REV. 661, 663 (1982) (Congress adopted "a common-
a market, thus relieving some of the downward pressure that competition placed on the complaining firm's prices. Consumers appear to suffer because the lower prices are no longer available. The complaining firm has triumphed over its rival not by convincing consumers its own products or services are superior, but by coercing its supplier.\textsuperscript{5}

Despite the anticompetitive appearance of the upward coercion scenario, the federal courts that have addressed this issue in recent years have not treated it as though it raised especially serious concerns to consumers or to the competitive process. The Supreme Court held, in \textit{Business Electronics Corp. v. Sharp Electronics Corp.},\textsuperscript{6} an upward coercion case, that absent some agreement on a specific price or price levels an agreement between a manufacturer and a dealer to terminate a competing price-cutting dealer will be judged under the rule of reason.\textsuperscript{7} In practice, courts ruling on upward coercion cases seldom have found sufficient evidence of the type of specific price agreement that \textit{Sharp} requires.\textsuperscript{8} Once a court chooses to apply the rule of reason, the terminated dealer must establish the scope of the market in which it does business and prove that its termination harmed competition in that market.\textsuperscript{9} In practice, the terminated dealer is very unlikely to win a rule of

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\textsuperscript{5} There are also procompetitive interpretations of this scenario. For example, the supplier could have terminated the price cutter because it determined, based on the full-price retailer's threats, that the discounter was providing an insufficient level of services to support sales of its product and to help it effectively compete with other similar products. Part VI will address ways to resolve the ambiguous competitive effects of the upward coercion scenario.

\textsuperscript{6} 485 U.S. 717 (1988). I will refer to this case as \textit{Sharp} after the defendant and also in honor of the fine precision of the line-drawing that Justice Scalia utilizes in the case.

\textsuperscript{7} \textit{Id.} at 735-36.

\textsuperscript{8} See \textit{The Jeanery, Inc. v. James Jeans, Inc.}, 849 F.2d 1148, 1160 n.10 (9th Cir. 1988) (finding no evidence that alleged agreement included some agreement on price or price levels); \textit{Toys "R" Us, Inc. v. R.H. Macy & Co.}, 728 F. Supp. 230, 234-35 (S.D.N.Y. 1990) (same). \textit{Sharp} itself involved a dealer terminated after threats to the manufacturer by a competitor. \textit{Sharp}, 485 U.S. at 721.

\textsuperscript{9} See infra part II.A.
reason case and the difficulty of meeting these burdens may well discourage terminated dealers from bringing suit at all.

In addition, several federal courts have characterized the manufacturer's termination of the price-cutter in the upward coercion scenario as an "independent business decision" to favor one retailer over another. Because Section 1 of the Sherman Act only applies to concerted action, and not to independent termination decisions, this determination virtually precludes any antitrust scrutiny of the full-price dealer's threats. To the extent one be-

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13. It still would be possible to allege that the full-price retailer was violating § 2 of the Sherman Act by monopolizing or attempting to monopolize a particular retail market. See 15 U.S.C. § 2 (Supp. V 1994). However, to sustain such a claim, a plaintiff would have to demonstrate that the full-price retailer had significant market power. Spectrum Sports, Inc. v. McQuili-
lieves that the upward coercion scenario sometimes may lead to real competitive harms, this seems a peculiar result.

The cases in the past decade that analyze the upward coercion scenario and other vertical arrangements (those involving supplier-dealer relations) have relied on two important Supreme Court decisions: Continental T.V., Inc. v. GTE Sylvania, Inc.,14 ("Sylvania") and Monsanto Co. v. Spray-Rite Service Corp. ("Monsanto").15 The thesis of this article is that the "progeny" of these two cases have gone astray in ways that leave the law too lenient toward arrangements that potentially harm competition.16 This article suggests some doctrinal changes and refinements that should increase the scrutiny of supplier-dealer relations, while still allowing room for suppliers to arrange their distribution chains in an efficient manner.

This article begins with some general background for those readers unfamiliar with the extensive antitrust literature. Part II first places Sylvania and Monsanto in context by laying out the fundamental doctrinal dichotomies that govern antitrust law and then discusses the intellectual and judicial trend toward less restrictive antitrust policies.

Part III examines the existing case law to try to divine the purpose of the concerted action requirement in the context of vertical arrangements. It concludes that although the cases do not provide clear guidance, it is possible to glean from the cases an understanding that the purpose of the requirement, in vertical restraints cases, is to protect a supplier's right to organize its distribution chain efficiently. Essentially, the concerted action requirement establishes a minimum threshold of evidence that an antitrust plaintiff needs to offer before the courts will allow a jury to decide between its account of illegal conduct and the supplier's account of legitimate termination. Part IV examines the post-Monsanto concerted action cases in light of this purpose and the Supreme Court's precedents, and concludes that the lower federal courts need to be reined in or they will virtually eliminate antitrust liability for vertical restraints.

Although the problematic decisions discussed in Part IV may stem from the lower courts' broad reading of the Supreme Court's concerted action precedents, they may also arise out of a concern that the continued per se

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16. For the purposes of this article, I generally accept the view of those commentators who believe that enhancement of consumer welfare, as defined by economists, is the only important goal of antitrust. E.g., ROGER D. BLAIR & DAVID L. KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 7 (1983); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 69 (2d ed. 1993); Baxter, supra note 4, at 693-94; Easterbrook, supra note 4, at 138. However, I believe that commentators who are also concerned about such goals as protecting the independence of small business and preventing the concentration of economic power will be favorably inclined toward a number of my substantive proposals.
illegality of vertical price-fixing is inappropriate. This concern may stem from the Supreme Court itself. As a number of commentators have noted, the broad language in Sylvania, describing the beneficial uses of vertical non-price restraints, arguably applies to price-fixing as well.

In order to examine whether the lower courts are justified in expanding the concerted action requirement to protect vertical price-fixing, the article then turns to the question of the proper standard of liability for that conduct. Part V lays out the weaknesses in using either the rule of reason or the per se rule to evaluate the legality of vertical price-fixing. It first examines the precedents softening the dichotomy between the per se rule and the rule of reason and explains that existing law does not mandate adherence to either standard. It then demonstrates the complexity of the retail markets that provide the context for most vertical restraints and shows that this complexity makes the use of either the per se rule or the rule of reason problematic.

Part VI searches for a new form of analysis to best accommodate the empirical uncertainty about the costs and benefits of vertical minimum price-fixing, also known as resale price maintenance ("RPM"). It analyzes the market power screen suggested by some commentators and finds it both expensive and uncertain. It then lays out a new standard for liability: Vertical price-fixing will be illegal unless the supplier can show that it actually and reasonably believed it had procompetitive reasons for fixing prices and/or for terminating a price-cutting distributor. It then argues that Sharp draws the line between price and non-price restraints incorrectly, and that all agreements to terminate price-cutters because of their discounting should be treated under the new standard.

The "wayward children" of Sylvania and Monsanto—Sharp and the cases described in Part IV—may result in part from legitimate fears that overbroad antitrust standards encourage wasteful and frivolous lawsuits and over-deter efficient business behavior. Courts certainly need to consider the efficiency-enhancing aspects of the business arrangements they scrutinize and

17. Thus, they would find no concerted action in vertical price-fixing cases to prevent the almost certain liability that would follow if the cases were to proceed.


19. The discussions of price-fixing in this Article are intended to address only minimum price-fixing. Most commentators view vertical maximum price-fixing as having largely procompetitive effects. E.g., 8 AREEDA, supra note 10, ¶ 1600; BLAIR & KASERMAN, supra note 16, at 156-57; HOVENKAMP, supra note 13, § 9.4. However, the Supreme Court continues to view these arrangements as per se illegal. Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1890 (1990). While the analysis presented here certainly suggests that per se treatment is inappropriate, the proper contours of the legal treatment of vertical maximum price-fixing are beyond the scope of this article.

20. See infra part II.A for a description of this dichotomy.
should avoid spending scarce judicial resources on counter-productive litigation. However, to justify their decisions, the courts appear to rely heavily on possible procompetitive effects that may not exist in particular cases.\(^{21}\) Over-reliance on possible benefits surely can under-deter in the same way that overemphasis on possible harms can over-deter.

Obviously, sorting out the competitive impact of particular practices is difficult. However, the difficulty of determining the precise effects of an arrangement should not be used as an excuse to give up attempting to develop more thoughtful and sophisticated approaches to sorting out the helpful from the harmful. Courts interpreting the Sherman Act’s broad grant of authority should be responsible for developing mechanisms that focus inquiry on the realities of market conditions in particular cases, without requiring complex analysis well beyond the competence that reasonably can be expected of judges and jurors. This article proposes doctrinal refinements which are intended to serve this purpose.

Vertical restraints are likely to continue to be the focus of extended discussion. The Justice Department recently abandoned its 1985 guidelines that determine when it will bring actions challenging vertical restraints.\(^{22}\) These guidelines, developed during the Reagan administration, were quite skeptical of the possibility that vertical restraints cause competitive harm.\(^{23}\) Indeed, the Justice Department brought no legal challenges whatsoever to vertical restraints under the guidelines during the Reagan and Bush administrations.\(^{24}\)

Meanwhile, the Supreme Court, in *Eastman Kodak Co. v. Image Technical Services, Inc. (“Kodak”)*,\(^{25}\) addressed Kodak’s practice of requiring purchasers of its equipment to use Kodak personnel to service the equipment. The Court allowed the case to go to the jury despite the defendant’s argument, adopted by the dissent, that no possible harm to competition could arise from the practice.\(^{26}\) The Court, instead, relied on what it perceived to be actual evidence of competitive harm.\(^{27}\)

*Kodak* has already spawned much discussion about the proper role of economic theory in antitrust law, particularly regarding suppliers’ attempts to

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21. See infra part V.C.2.c.
24. 64 ANTITRUST & TRADE REG. REP. 286 (1993); Passell, supra note 22, at D2.
26. Id. at 2081-82, 2094-96 (Scalia, J., dissenting). Several commentators have since agreed. E.g., Bork, supra note 16, at 436-38; *Is Antitrust Law Coming Alive?*, CAL. LAW., Dec. 1992, at 33, 34.
27. Kodak, 112 S. Ct. at 2083, 2085, 2088 n.26, 2089 n.29.
control the distribution of their products. Attempts by the Justice Department to prosecute more vertical restraints cases should create similar controversy. This article hopes to contribute to the discussion by focusing on approaches that address both the range of potential competitive effects of vertical restraints and the ability of players within the legal system to evaluate those effects.

II. Sylvan and Monsanto: Some Background

To better analyze the issues involved in vertical restraints doctrine, it is helpful to examine the context in which the courts decided Sylvan, Monsanto, and their progeny. This section discusses first, the doctrinal structure of the law of vertical restraints and, second, the trend toward more lenient antitrust scrutiny of business.

A. The Dichotomies of Section 1 of the Sherman Act

The judicial elaboration of Section 1 of the Sherman Act largely consists of a series of doctrinal dichotomies. The most important of these dichotomies is that between the per se rule and the rule of reason, the two modes of analysis courts most commonly use when applying Section 1. Literally, the statute forbids every contract, combination, or conspiracy in restraint of trade. However, early in the history of the statute, the Supreme Court rejected a literal reading and determined that the act prohibited only unreasonable restraints of trade. The rule of reason and per se analysis "are but two methods of determining whether a restraint is 'unreasonable,' i.e., whether its anticompetitive effects outweigh its procompetitive effects."

Under a per se analysis, the plaintiff merely has to prove that the conduct in question occurred. The court will then conclusively presume that the conduct is anticompetitive. The defendant is allowed no defenses based on procompetitive effects of its conduct or on its lack of market power.
The Supreme Court states that it applies the per se rule when it feels that its experience with a particular restraint enables it "to predict with confidence that the rule of reason will condemn it."\textsuperscript{35}

The contours of rule of reason analysis are less clear.\textsuperscript{36} The purpose of the analysis is to determine whether a particular business arrangement, on balance, helps or harms competition.\textsuperscript{37} "Typical antitrust instructions in effect tell the jury to balance the pro- and anticompetitive tendencies of the restraint before it."\textsuperscript{38} Thus, in theory, any evidence relevant to competitive conditions should be admissible and must be weighed by the jury.\textsuperscript{39} Obviously, balancing these tendencies is very difficult.\textsuperscript{40}

\textit{Antitrust Law: Confusing Offenses with Defenses}, 77 GEO. L.J. 165, 170-79 (1988). Particularly in light of the softening of the per se rule, see infra part V.A, he argues that the "rule" really is a conclusion reached after some analysis that certain defenses should be forbidden. \textit{Id.} at 170-77. He argues therefore that the misleading term "per se" should be avoided. \textit{Id.} at 177-79. Although this is a helpful way to view the per se rule, this article will employ the traditional terminology because the Supreme Court continues to use it.

\textsuperscript{35} Atlantic Richfield Co., 110 S. Ct. at 1893.

\textsuperscript{36} See BORK, supra note 16, at 25 (arguing that nobody has worked out "a completely consistent and fully articulated" rule of reason).

\textsuperscript{37} Justice Brandeis, in \textit{Chicago Board of Trade}, provided an elaboration that "is often quoted as the quintessential expression of the rule of reason." BORK, supra note 16, at 43.

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the 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. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Board of Trade v. United States, 246 U.S. 231, 238 (1918). As is clear from its language, this "test" provides a list of relevant factors without much guidance as to how a decision-maker should take them into account. \textit{See BLAIR & KASERMAN, supra note 16, at 191 (test is unhelpful; judiciary has "failed to provide a truly manageable rule-of-reason standard" that would allow prediction of court decisions); St. John Barrett, \textit{Restrictive Distribution and the Assault of the "Free Riders,"} 7 J. CORP. L. 467, 468 n.9 (1982) ("The practical application of this rule is still very uncertain."); Easterbrook, \textit{supra} note 10, at 12 ("These formulations are empty.").

\textsuperscript{38} Phillip Areeda, \textit{The Rule of Reason—A Catechism on Competition}, 55 ANTITRUST L.J. 571, 582 (1986).

\textsuperscript{39} See \textit{Continental TV, Inc. v. GTE Sylvania, Inc.}, 433 U.S. 36, 49 (1977) (weighing of all factors necessary in deciding whether restrictive practice should be prohibited as imposing unreasonable restraint on competition); see also Altschuler, \textit{supra} note 10, at 34-35 (early history of courts interpreting \textit{Sylvania} suggested that they pursued "the kind of open-ended inquiry that takes all possible factors into account")

\textsuperscript{40} See, e.g., BLAIR & KASERMAN, \textit{supra} note 16, at 192 (determining net effect of restraint would make trials "extremely complex"); Areeda, \textit{supra} note 38, at 582 (no basis is given to jury for balancing pro- and anticompetitive tendencies of restraint); Arquit, \textit{supra} note 10, at 921-24 (theorizing balancing methods for courts to use); William S. Comanor, \textit{Vertical Price-Fixing, Ver-
In practice, courts have employed simplifying devices that tend to obviate the need for anyone to do the complex balancing. Most importantly, in a rule of reason case, courts generally require that the plaintiff show that the defendants have market power. This usually requires the plaintiff to define the relevant market. Plaintiffs who fail to offer evidence of the relevant market, or who fail to show that the defendant’s market share is sufficient to suggest market power, regularly lose summary judgment motions.

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Compared to the per se rule, the rule of reason significantly increases the burdens on the plaintiff and allows more room for the defendant to introduce exculpatory evidence. Thus, the decision between these two modes of analysis is often the most important step in antitrust litigation. Not surprisingly, the courts have developed a series of categories to aid them in making this decision, and the stark dichotomy between the two modes of analysis has in turn spawned a number of other dichotomies.45

The first of these is the dichotomy between horizontal and vertical restraints. The Supreme Court makes the following distinction: "Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints."46 This distinction can be a bit tricky in practice, particularly since agreements between firms at different levels often have anticompetitive effects in the horizontal market of one of the participants.47 For our purposes, however, we can employ the Supreme Court's somewhat arbitrary bright-line rule: A restraint is vertical where no agreement between firms on the same level of distribution is part of the arrangement.48

This article focuses on the proper legal treatment of vertical restraints. The typical vertical restraint case is brought by a dealer claiming that its dealership was terminated pursuant to an illegal conspiracy between its supplier and competing dealers.49

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47. See Altschuler, supra note 10, at 1 (line between vertical and horizontal restraints is "elusive"); Betty Bock, An Economist Appraises Vertical Restraints, 30 ANTITRUST BULL. 117, 121 (1985) (distinction between horizontal and vertical restraints "neither so plain nor so significant as current legal decisions and writings suggest"); see also Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1900 (1990) (Stevens, J., dissenting) (noting difficulty distinguishing vertical and horizontal restraints); Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582, 590-94 (8th Cir. 1987) (discussing whether dealer-coerced restraints should be treated as horizontal or vertical), cert. denied, 484 U.S. 1010 (1988).

48. See Sharp, 485 U.S. at 730, 734; see also id. at 742 (Stevens, J., dissenting) (noting arbitrary effects of applying this rule).

49. See PHILLIP K. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 1024 (Supp. 1992) (suits frequently involve dealer's claim that dealer was terminated by manufacturer because of price cutting); Allison, supra note 1, at 143 (most vertical cases are brought "by terminated dealers or distributors claiming that their termination resulted from their non-compliance with illegal vertical restraints"); Rudolph J. Peritz, A Genealogy of Vertical Restraints Doctrine, 40 HASTINGS L.J. 511, 511 (1989) ("recurring plot" in vertical cases is claim by terminated dealer "that its manufacturer is in league with rival dealers ... who want to restrain competition in the product"). As noted, the Department of Justice brought no vertical cases at all during the Reagan and Bush administrations. See supra note 24 and accompanying text.

A number of other recent cases have involved alleged conspiracies between hospitals and groups of doctors aimed at eliminating competition from other doctors in the same field or from non-M.D. medical specialists. See, e.g., Boczar v. Manatee Hosps. & Health Sys., Inc., 993 F.2d 1514 (11th Cir. 1993) (obstetrics and gynecology physician); Todorov v. DCH Healthcare Auth.,
VERTICAL RESTRAINTS

Analyzing vertical restraints involves two further dichotomies. The first of these is the distinction between price and non-price restraints. This distinction is important because, since Dr. Miles Medical Co. v. John D. Park & Sons Co. in 1911, vertical price restraints are per se illegal. By contrast, since Sylvania, vertical non-price restraints are analyzed under the rule of reason. Sylvania was a landmark decision because it reached this conclusion using an efficiency analysis. Parts V and VI will examine the appropriateness of the continuing application of the per se rule to vertical price-fixing.

Price and non-price restraints can be difficult to distinguish because agreements that do not explicitly involve setting prices often affect prices and may be intended to do so. Thus, plaintiffs' attorneys will claim that a particular restraint should be treated as a price restraint if it was intended to affect prices. In Sharp, the Supreme Court fixed the line between the two types of restraints: A vertical arrangement, even if it incorporates an explicit agreement to terminate a price-cutter, is not a "price" restraint unless it includes an agreement as to a specific price or price level. Part VI.D argues that there is no good economic justification for this line.

921 F.2d 1438 (11th Cir. 1991) (radiology technicians); Bolt v. Halifax Hosp. Medical Ctr., 891 F.2d 810 (11th Cir.) (medical staff physician), cert. denied, 495 U.S. 924 (1990); Anesthesia Advantage, Inc. v. Metz Group, 759 F. Supp. 638 (D. Colo. 1991) (certified registered nurse anesthetists); Sweeney v. Athens Regional Medical Ctr., 709 F. Supp. 1563 (M.D. Ga. 1989) (certified nurse-midwife). These cases arise in the same manner as dealer termination cases: Some doctors complain to the hospital (supplier) about practices of a competing medical professional. The hospital terminates or refuses privileges to the competitor, who then sues. The concerted action issues in these cases are similar to those in dealer termination cases as well: Did the hospital have an independent reason for terminating the competitor? Did the doctors conspire with the hospital? Because of these similarities, I will include these cases in my analyses of concerted action issues. However, the economics of the medical industry is complex and beyond the scope of this article. Thus, I will not consider the hospital cases in my discussion of the appropriate analysis of the reasonableness of the alleged restraints of trade.

50. 220 U.S. 373 (1911).
51. While Dr. Miles itself does not use the "per se" terminology, it has since been read to hold that vertical price-fixing is per se illegal. See, e.g., Diane Wood Hutchinson, Antitrust 1984: Five Decisions in Search of a Theory, 1984 Sup. Ct. Rev. 69, 112-13 (argument between manufacturer and its dealer on sale price condemned as vertical price-fixing); Posner, supra note 18, at 1 (resale price maintenance held per se illegal under § 1 of Sherman Act); David F. Shores, Vertical Price-Fixing and the Contract Conundrum: Beyond Monsanto, 54 Fordham L. Rev. 377, 377 (1985) (same).
53. See Tyler A. Baker, Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?, 67 Va. L. Rev. 1457, 1467 (1981) (justifications in Sylvania assume indirect effect on price); Bock, supra note 47, at 123 (price and non-price terms for transactions are interrelated); see also Easterbrook, supra note 10, at 14 ("Every restricted dealing arrangement is designed to influence price.").
54. Baker, supra note 53, at 1467.
The final relevant dichotomy is between concerted and independent action. The courts consistently have concluded that the language of Section 1 does not reach independent business behavior but rather requires proof of concerted action by two or more separate entities.56 In the context of vertical restraints, the significance of the concerted action requirement has been primarily laid out in two cases: United States v. Colgate Co.57 and Monsanto Co. v. Spray-Rite Service Corp.58 Colgate, decided in the early days of antitrust interpretation, held that a manufacturer did not violate Section 1 of the Sherman Act if it announced a policy of doing business only with those who resold its product at a certain price, and subsequently refused to do business with those who failed to comply with the policy.59 The Court distinguished cases in which the supplier used contractual provisions to force sellers to use their suggested prices.60

Monsanto, decided in 1984, reaffirmed Colgate61 and examined the type of evidence of concerted action a plaintiff needs in a vertical price-fixing case.62 The Court held that evidence that a supplier terminated a dealer, following complaints from other dealers about the terminated dealer's low prices, was not sufficient, standing alone, to allow the terminated dealer to bring a price-fixing case to a jury.63 Courts that have found insufficient evidence of concerted action in the context of the upward coercion scenario have relied on Colgate and Monsanto.64 To better understand Monsanto and Sylvania, and why they have led to the courts' recent lenient treatment of upward coercion, it is helpful to turn to a brief overview of some intellectual trends in antitrust law.

B. The Chicago School and the Supreme Court's Recent Antitrust Decisions

From the end of World War II to the mid-1970s, the Supreme Court's antitrust jurisprudence was decidedly anti-big business. The Court used the per se rule broadly in a wide range of cases and was notably hostile to all

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57. 250 U.S. 300 (1919).
60. Id. at 307-08.
62. Id. at 762-65.
63. Id. at 764.
forms of merger. By the late 1960s, almost all vertical restraints were illegal.

The cases of this period were widely criticized, particularly by the Chicago School of Law and Economics. These critics complained that the Court had improperly focused on certain goals, such as the preservation of small businesses, which were not appropriate concerns of antitrust law. Instead, they argued, the Court needed to focus exclusively on "consumer welfare." Robert Bork, one of the more important Chicago School critics, began his book, The Antitrust Paradox, with an introduction entitled "The Crisis in

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65. See, e.g., United States v. Topco Assoc's., Inc., 405 U.S. 596, 606-12 (1972) (invalidating horizontal territorial division by group of small grocery chains regarding jointly marketed products); Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 501-06 (1969) (invalidating merger between shoe manufacturers that left them with 2.3% of retail shoe outlets in U.S.); Brown Shoe Co. v. United States, 370 U.S. 294, 345-46 (1962) (merger tended to question validity of "tying" financing of prefabricated homes to sale of homes although amount of commerce involved was less than $190,000); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209-14 (1959) (alleged concerted refusal to deal with small appliance dealer would be per se illegal even though hundreds of other dealers in city).


69. See, e.g., Bork, supra note 16, at 81-89 (advancing arguments supporting this position); Cann, supra note 23, at 487-88 (for Chicago School, "basic goal of antitrust law is to maximize 'consumer welfare' "). Chicago adherents usually define "consumer welfare" in terms of maximizing the total wealth available to society, which is determined by adding consumer and producer surplus. Cann, supra note 23, at 488; see also Herbert Hovenkamp, Chicago and Its Alternatives, 1986 Duke L.J. 1014, 1018 ("[T]he maximization of ... the sum of consumers' surplus and producers' surplus is conventionally stated as the Goal of Chicago School antitrust policy."). As one commentator has pointed out, the term "consumer welfare" is somewhat misleading since it focuses on the total wealth available to society and not to consumers in particular. Harry S. Gerla, Discounters and the Antitrust Laws: Faces Sometimes Should Make Cases, 12 Corp. L.J. 1, 3 n.10 (1986). Chicago adherents generally examine increases or reductions in output to determine whether consumer welfare has been improved. See Fox & Sullivan, supra note 67, at 957 (listing beliefs of Chicago School world view); Wesley J. Liebeler, What Are the Alternatives to Chicago?, 1987 Duke L.J. 879, 880 (antitrust violation exists if challenged conduct created or increased ability to restrict output).
Antitrust.” In Bork’s view, the “crisis” resulted from the “paradox” of his title: Antitrust law in the late 1970s punished a large number of business arrangements which promoted efficiency and, therefore, harmed the consumers it was designed to protect. He argued for major changes in antitrust jurisprudence to insure that the courts did not punish or deter efficiency-enhancing business arrangements.

Another critic, Frank Easterbrook, has argued that it is extremely difficult to determine whether a practice is beneficial to the competitive process. He believes the harms from deterring beneficial conduct are likely to be substantially greater than those from allowing some anticompetitive practices to continue. Thus, Easterbrook argues that the courts should intervene only in a narrow set of cases when they are fairly certain that anticompetitive harm will result from the challenged activity.

Bork, Easterbrook, and other Chicago School critics have been very influential. Since the mid-1970s, the Supreme Court’s decisions in antitrust cases have moved significantly in the directions they have suggested. The Court has softened the per se rule in several areas and has attempted to apply economic theory and careful market analysis in a number of opinions. Undoubtedly, the Court also has been influenced by the more pro-business political climate, post-Watergate distrust of government, and the


71. BORK, supra note 16, at 4, 7.

72. Id.

73. Easterbrook, supra note 10, at 3.

74. Id. at 2-3. This is because supracompetitive prices attract entry and invite their own demise.

75. Id. at 39-40. Easterbrook also laid out this set of arguments in Frank Easterbrook, Comparative Advantage and Antitrust Law, 75 CAL. L. REV. 983 (1987).

76. See Page, supra note 67, at 1238, 1256-94 (discussing influence of Chicago School thinking on antitrust law and concluding that antitrust decisions and literature have “substantial[ly] accept[ed] . . . the Chicago models as identifying the relevant effects of antitrust practices”).

77. See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 293-98 (1985) (not all boycotts per se illegal; courts should consider efficiency arguments in assessing legality of particular boycott); Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 13-18 (1984) (not all tying arrangements per se illegal; per se status warranted only when seller has market power in tying product market or forcing otherwise likely).

78. See infra part V.A.

79. See Atlantic Richfield, Co. v. USA Petroleum Co., 495 U.S. 328, 339-40 (1990) (analyzing market impact to determine competitor has no standing to challenge vertical maximum price-fixing restraint); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-93 (1986) (using economic analysis to assess plausibility of predatory pricing claim); United States v. General Dynamics Corp., 415 U.S. 486, 497-504 (1974) (analyzing market structure to rebut presumption of illegality of merger). In addition, the Court explicitly limited the scope of an inquiry under § 1 to the effects of a restraint on “competitive conditions.” National Soc’y of Professional Eng’rs v. United States, 435 U.S. 679, 698 (1978). This may be read as a rejection of non-efficiency goals. See also Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citing Bork, supra note 16, at 66, for proposition that Congress intended Sherman Act as “consumer welfare prescription”). But see Page, supra note 67, at 1254 (finding these pronouncements “too ambig-
dicial appointments of recent conservative presidents. However, its citations to Bork and others\(^\text{80}\) suggest that the Chicago School has at least helped channel the Court's conservative and pro-business tendencies into a particular rhetorical form. The change in the Court's direction had been so striking that by the late 1980s one commentator could write that Chicago School thinking had "become the dominant tool for . . . antitrust analysis."\(^\text{81}\) Bork himself would write early in 1993 that "antitrust has moved a long way in the direction" that he and others had urged.\(^\text{82}\)

For our purposes, the most important manifestations of this trend were the *Sylvania* and *Monsanto* decisions, both of which discuss the efficiency-enhancing aspects of vertical restraints and use these insights to limit potential liability for vertical restraints.\(^\text{83}\) Since the Court decided these cases, the lower federal courts have become increasingly reluctant to impose on suppliers any liability for vertical arrangements.\(^\text{84}\) These courts seem to read *Sylvania* and *Monsanto* to mean that vertical restraints require little antitrust scrutiny because of their efficiency-enhancing potential. The remainder of this article argues that these courts have read the two cases too broadly and, as a result, they are failing to give sufficient scrutiny to business arrangements that may have harmful effects on consumer welfare.

### III. The Purpose of the Concerted Action Requirement in Vertical Restraints Cases

The concerted action requirement in vertical restraints cases has proved troublesome ever since the Supreme Court decided *Colgate*.\(^\text{85}\) Why should a supplier's explicit contracts with its dealers setting resale prices be illegal, while the same supplier's credible announcement that it will not do business with price-cutting dealers be immune from antitrust scrutiny? The effects on the market appear to be identical.\(^\text{86}\)

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84. See infra part IV.
85. See, e.g., Baker, supra note 53, at 1477 ("[T]he line between *Dr. Miles* and *Colgate* has remained one of the enduring enigmas of antitrust law.").
86. See 7 Areeda, supra note 4, ¶ 1441h (supplier can achieve same effects either way); Blair & Kaserman, supra note 16, at 160 (referring to line between *Dr. Miles* and *Colgate* as "distinction without a difference"); Thomas A. Piraino, Jr., *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 Notre Dame L. Rev. 1, 11 (1988) (distinc-
In the decade since the Supreme Court decided *Monsanto*, the lower federal courts have decided hundreds of cases that have referred to the concerted action requirement, many of which include significant analysis of what constitutes sufficient evidence of concerted action. The courts of appeals are in conflict over the application of *Monsanto* to several different types of fact patterns, and they have not reached a consensus as to the meaning of the case. Interestingly, amidst all the confusion as to the meaning of the "concerted action" requirement, the courts have engaged in little discussion about its purpose.

Part III seeks to uncover the purpose of the concerted action requirement in the context of vertical restraint cases. It first examines the rationale for the requirement in the context of horizontal restraints and concludes that this rationale does not apply well in the vertical context. It then surveys the Supreme Court's discussions of the issue and concludes that the Court has provided little guidance. Finally, it suggests a sensible reading of the requirement consistent with existing case law: To protect a supplier's right to order its distribution chain in a procompetitive fashion, the concerted action requirement acts as an evidentiary barrier that requires antitrust plaintiffs to have a certain quantum of evidence before taking their cases to a jury.

87. See infra part IV.

88. As one commentator concluded, *Monsanto* is "controversial and confusing." Doherty, supra note 11, at 981. See, e.g., Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 686 n.12 (4th Cir. 1992) (disagreeing with Ninth Circuit as to the application of *Monsanto* to tying cases); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, 878 F.2d 801, 806 n.4 (4th Cir. 1989) (disagreeing with Eighth and Eleventh Circuit position on evidentiary value of supplier's assurances to dealers about taking care of problems with competing dealer). In addition, the courts of appeals have developed different "tests" to determine whether plaintiff has met the *Monsanto* and *Matsushita* standards. Compare Gibson v. Greater Park City Co., 818 F.2d 722, 723-24 (10th Cir. 1987) (creating two-part test) with Helicopter Support Sys. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 (11th Cir. 1987) (creating different two-part test).

The Ninth Circuit decisions that vertical price-fixing is subject to the rule of reason have added to the confusion. See 49er Chevrolet, Inc. v. General Motors Corp., 803 F.2d 1463, 1467-68 (9th Cir. 1987) (vertical price-fixing subject to rule of reason), cert. denied, 480 U.S. 947 (1987); Taggart v. Rutledge, 657 F. Supp. 1420, 1440 (D. Mont. 1987) (same), aff'd without op., 852 F.2d 1290 (9th Cir. 1988). These decisions are flatly at odds with clearly articulated Supreme Court language. See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735-36 (1988) (retaining per se rule for certain vertical price agreements). For more examples of peculiar readings of the Supreme Court's precedents and of inter-circuit conflicts, see infra part IV.

89. See 7 Areeda, supra note 4, ¶ 1445d1 (Supreme Court never has developed or discussed theory of meaning of concerted action in vertical context); Thomas A. Piraino, Jr., *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 EMORY L.J. 311, 322 (1989) ("courts have not developed logical economic rationale" for the distinction between independent and concerted action in vertical cases). The Ninth Circuit did discuss the purpose for the requirement in one vertical restraints case, but relied entirely on the Supreme Court's analysis of the requirement in a horizontal context. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1152-53 (9th Cir. 1988) (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984)).


A. Concerted Action in Horizontal Cases

The Supreme Court has made clear its understanding of the purpose for the concerted action requirement in the context of horizontal agreements:

Concerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decision-making that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for the common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant antitrust scrutiny even in the absence of incipient monopoly.90

In contrast, an aggressive competitor acting independently may appear to restrain trade by limiting its rivals' opportunities, yet in fact may be simply competing vigorously. Thus, according to the Court, antitrust scrutiny of independent behavior is reserved for those entities that threaten monopolization.91 Otherwise, the threat of antitrust liability might dampen "the competitive zeal of a single aggressive entrepreneur."92

Although this explanation makes sense with regard to horizontal restraints, its application to vertical restraints is unclear. Concerted activity between suppliers and dealers does not seem "inherently . . . fraught with anticompetitive risk." Indeed, suppliers and dealers rarely can function as purely independent economic entities.93 Most businesses need some vertical agreements in order to function, and society certainly has little interest in requiring business entities to integrate their distribution networks completely.94 Moreover, although well-designed restraints may augment the market power of one or both of the participants, combinations between suppliers and dealers do not generally result in the aggregation of power in any particular market.95 By definition, vertical restraints involve entities operating in separate markets.

90. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984); see also 6 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1402a (1986) (giving similar rationales).
91. Copperweld, 467 U.S. at 767.
92. Id. at 768, 775.
93. See Bock, supra note 47, at 121-22 (discussing relationship between dealers and suppliers in vertical restraint cases).
94. See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 725 (1988) (calling encouragement of vertical integration through per se rules "perverse" and "hardly conducive to fostering the creation and maintenance of small businesses"). The use of separate entities in the distribution chain allows for efficiencies that occur with specialization and economies of scale. For example, a thumbtack manufacturer should not need to obtain retailing know-how to engage in its business. Nor would we expect to see it set up stores to retail only thumbtacks.
95. 7 AREEDA, supra note 4, ¶ 1437 (a "vertical restraint ordinarily does not increase anyone's market power"); Jean Wegman Burns, Rethinking the "Agreement" Element in Vertical Antitrust Restraints, 51 OHIO ST. L.J. 1, 11 (1990) (vertical arrangements do "not lead to an
Most importantly, as the courts have recognized in the last two decades, distribution arrangements and restrictions can create significant procompetitive effects, including increasing efficiency through cooperation and encouraging active promotion by dealers of the suppliers' products. For our purposes, the most significant procompetitive effect of vertical restraints is the avoidance of free-rider problems: situations in which one firm takes a "free ride" on the efforts of another. The most common example occurs in the retailing of complex products. Suppose one computer dealer provides its customers with information about the more complex features of its merchandise. It must pay to train its salespeople and, perhaps, to provide informational materials, so its prices reflect these costs. Another retailer advertises the lower prices it can afford to charge because of the savings it reaps by not providing information. Consumers may obtain information at the high-priced retailer, then purchase from the discounter. In the long-run, the high-priced retailer may not be able to continue selling the computers because it loses sales to the discounter. Yet the supplier may want the high-priced retailer to provide information in order to convince shoppers to purchase its computers, rather than others' or none at all. Thus the supplier may wish to force the discounter to raise its prices, to provide information, or both. If, as is quite possible, the total number of computers sold increases when dealers provide information, the restraints the supplier employs to insure the dissemination of that information fall within the Chicago School's definition of "efficiency."
Because of the possible procompetitive aspects of vertical restraints, the rationale for the concerted action requirement in horizontal cases simply does not apply.\textsuperscript{100} We actively want to encourage some of these agreements and certainly should not view them with uniform suspicion. Yet, without some idea of the function of the concerted action requirement, determining its proper scope in the vertical context will be difficult. However, as the following section demonstrates, prior to \textit{Monsanto}, the Supreme Court never articulated a clear purpose for the requirement.\textsuperscript{101}

\textbf{B. Colgate and Its Progeny}

The Supreme Court's first occasion to address the concerted action requirement in the context of a vertical restraint came in \textit{United States v. Colgate Co.}\textsuperscript{102} Colgate, a manufacturer, announced that it would refuse to do business with any dealer who did not utilize its MSRP. Subsequently, Colgate terminated a price-cutting dealer. The Court found no liability and distinguished \textit{Dr. Miles}, its earlier vertical price-fixing case, because in that case "the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell."\textsuperscript{103} By contrast, the Court found that Colgate's retailers had not agreed to sell at a particular price and, in fact, could sell at any price they chose, although they were aware they might "incur the displeasure of the manufacturer, who could refuse to make further sales" to them.\textsuperscript{104}

The limited analysis in \textit{Colgate} is not particularly compelling. The Court never addressed the obvious claim that Colgate made resale price maintenance an implied term of its distribution contracts, a term retailers necessarily agreed to when they agreed to do business with Colgate, and that the concerted action requirement was thus met.\textsuperscript{105} The key passages in \textit{Colgate}
do not address the precise reasons either for a concerted action requirement or for a ban on vertical price-fixing, and they certainly do not address their intersection. The Court merely said:

The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce — in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 106

Although courts and commentators today generally view *Colgate* as requiring concerted, as opposed to independent, action,107 nothing in this passage strongly supports that position. The Court did not refer specifically to the concerted action requirement as the basis for its decision.108 Tyler Baker has suggested that the Court was emphasizing a supplier’s “right” to choose its customers, although that “right” has no clear source in the statute.109 Whatever the Court’s initial rationale, *Monsanto’s* reading of the concerted action requirement as the source of the *Colgate* rule presently is dispositive.110 In any event, *Colgate* provides little help in our search for the rationale for a concerted action requirement.111

On its face, the announce-and-terminate strategy that the Court approved in *Colgate* created a safe harbor for suppliers that wished to influence

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*Conscious Parallelism and Refusals to Deal, 75 HARV. L. REV. 655, 688-89 (1962) (suggesting *Colgate* scenario be treated as tacit price-fixing agreement). By the time it decided *Colgate*, the Court already had recognized that implied contracts could fall within the ambit of § 1. See Baker, supra note 53, at 1474 (citing Eastern States Retail Lumber Dealers Ass’n v. United States, 234 U.S. 600 (1914)).


109. *Id.; accord Shores, supra note 51, at 388* (*Colgate* rests on exercise of manufacturer’s freedom to trade). Baker notes that the lower court opinion affirmed in *Colgate* had used language that suggested that it was assuming the existence of an agreement and discussing the legality of that agreement. Baker, supra note 53, at 1475.

110. In *Monsanto*, the Court reaffirmed *Colgate* and stressed that the holding of that case was based on the need to protect independent action from antitrust scrutiny. *Monsanto*, 465 U.S. at 761.

111. Rudolph Peritz has argued thoughtfully and convincingly that the historical confusion in vertical restraints doctrine, including the *Colgate* rule, is attributable to a tension between the Court’s simultaneous attempts to promote competition and to protect contract and property rights of both suppliers and dealers. Peritz, supra note 49 passim. While his analysis explains the continuing shifts in the doctrine and suggests further instability is likely, it does not provide a framework to predict future results or suggest clarifying rules.
their dealers’ prices. Subsequently, however, the Supreme Court decided a series of cases that, by defining implicit price-fixing agreements and price-maintenance systems as concerted action, substantially narrowed the possible reach of Colgate’s safe harbor. First, the Court indicated that the Dr. Miles rule extended beyond express price-fixing agreements to those “implied from a course of dealing or other circumstances.” However, it then went on to clarify that no agreement would be implied under Colgate from evidence that a manufacturer repeatedly pointed out its suggested prices to dealers and many of the dealers adopted those prices.

In the decades following Colgate, the Court, without clearly explaining its rationale, found concerted action in a sequence of cases, even in the absence of express price agreements. In FTC v. Beech-Nut Packing Co., the Court found that a supplier had gone “far beyond” the Colgate safe harbor. In addition to its policy of only selling to those who would follow its suggested prices, the supplier reinstated terminated dealers if they made satisfactory assurances that they would adhere to suggested prices. The supplier also employed a complicated tracing and record-keeping system to identify, track, and terminate distributors who cut prices or sold to price-cutters.

In United States v. Bausch & Lomb Optical Co., the Court again found that a supplier’s extensive system to ensure resale prices constituted an illegal conspiracy. The evidence demonstrated that the supplier sold only to wholesalers who agreed to sell to retailers who had “licenses” to sell the product. It circulated price lists, which both wholesalers and retailers understood determined their prices. Certificates were used to trace the sources of lenses found in the hands of unlicensed retailers. The Court

112. Interestingly, the supplier in Colgate engaged in monitoring behavior that later would be held to go beyond the Colgate safe harbor. See William R. Andersen, The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality, 54 WASH. L. REV. 763, 770 (1979) (allegations in Colgate would today be considered an “agreement”).
114. Frey, 256 U.S. at 210-11. The Court later called this holding into question. See United States v. Parke, Davis & Co., 362 U.S. 29, 40 (1960) (active inducement of unwilling retailers to abide by resale price policy constituted Sherman Act violation). However, it seems likely that it remains a correct statement of the law after Monsanto. See Monsanto, 465 U.S. at 763 (“[T]he manufacturer’s strongly felt concern about resale prices does not necessarily mean it has done more than the Colgate doctrine allows.”).
115. 257 U.S. 441 (1922).
116. Id. at 454.
117. Id. at 449.
118. Id. at 449-51. The Court stated that the facts showed “suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effective as agreements express or implied intended to accomplish the same purpose.” Id. at 455.
120. Id. at 714.
121. Id. at 715.
122. Id. at 714.
gave a broad reading to the concerted action requirement: "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with their assistance in effectuating its purpose is immaterial."

In United States v. Parke, Davis & Co., the Court again invalidated a manufacturer's system for trying to enforce its suggested prices. Here, the evidence showed that a manufacturer had refused to sell to wholesalers or retailers who would not abide by its suggested prices, and to wholesalers who sold to non-compliant retailers. The wholesalers cooperated with the manufacturer. There also was evidence of negotiations between the manufacturer and noncompliant retailers, which apparently resulted in understandings about prices and advertising and caused the manufacturer to renew relations with retailers it previously had terminated. The Court reviewed the cases on vertical price-fixing combinations and concluded that together they stood for the proposition that

an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to [its] suggested prices by means which go beyond [its] mere declination to sell to a customer who will not observe his announced policy.

The Court then found that the manufacturer had created just such a combination by involving wholesalers in its efforts to induce retailers to adhere to its prices.

In subsequent cases, the Court read Parke, Davis to hold that a supplier enters into an illegal price-fixing combination if it takes any steps beyond merely announcing its policy favoring certain prices and refusing to deal with those dealers who do not comply. In particular, the Court explained that the case meant that an illegal combination existed in two specific situations. First, an illegal combination would exist between a supplier and a dealer that

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123. Id. at 723. The Court characterized the evidence in the case as showing more than "mere acquiescence" to suggested prices, but rather the acceptance by the wholesalers "of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." Id.


125. Id. at 33-34.

126. Id.

127. Id. at 35-36.

128. Id. at 43 (emphasis in original).

129. Id. at 45.

unwillingly complied with the supplier’s pricing policy. Second, an illegal combination would exist where a supplier “firmly enforced” a policy by threatening termination and most of the dealers acquiesced to the threat. In both of these situations, an illegal combination is formed when dealers succumb to coercion from the supplier.

*Parke, Davis* and its immediate progeny were seen by some justices and commentators as effectively eviscerating *Colgate*. Justice Harlan sarcastically restated the holding of *Parke, Davis* as: “[T]here is no ‘combination’ when a manufacturer simply states a resale price and announces that [it] will not deal with those who depart from it; there is a combination when the manufacturer goes one inch further.” The majority justified the narrow gap between *Parke, Davis* and *Colgate* by focusing on the free will of the affected dealers, rather than on the independence of the manufacturer’s decision. The Court stated:

[A] seller’s announcement that [it] will not deal with customers who do not observe [its] policy may tend to engender confidence in each customer that if he complies his competitors will also. But if a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence which has the collateral effect of limiting price competition . . . the customers’ acquiescence is not then a matter of individual free choice prompted alone by the desirability of the product. The product then comes packaged in a competition-free wrapping—a valuable feature in itself—by virtue of the concerted action induced by the manufacturer.

The Court’s emphasis, despite its protestations that agreements are unnecessary, seems to be on some sort of implied agreement, albeit one formed under some duress, with “competition-free wrapping” as the consideration. Yet the Court failed to explain why it drew the line it did between this implied agreement and the agreements that might be implied in *Colgate*

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As Justice Harlan suggested, the Court provided no real economic justifications for its distinctions.\textsuperscript{138}

C. Concerted Action in the Modern Era of Antitrust: Monsanto and Matsushita

Since the new era of antitrust began with \textit{Sylvania}, the Court has decided two important cases addressing the standards for proving conspiracy in Section 1 cases: \textit{Monsanto} and \textit{Matsushita Electric Industrial Co. v. Zenith Radio Corp.}\textsuperscript{139} These cases have been viewed widely as quite radical shifts, significantly redefining the concerted action requirement.\textsuperscript{140}

1. \textit{Monsanto}

In \textit{Monsanto}, a distributor complained that the defendant manufacturer had terminated it pursuant to a vertical price-fixing conspiracy.\textsuperscript{141} The jury agreed, and the manufacturer appealed, claiming the distributor had presented insufficient evidence of concerted action.\textsuperscript{142} The United States Court of Appeals for the Seventh Circuit affirmed the verdict, holding that evidence that the manufacturer terminated the plaintiff in response to price complaints by competing distributors was sufficient to support the verdict.\textsuperscript{143} This focus on the other distributors' complaints distinguished the case from the Court's earlier vertical conspiracy cases, in which the primary evidence consisted of actions taken by the supplier to insure that its distributors conformed to its suggested prices. The case required the Court to determine the extent to which a competing distributor's complaints are evidence that the supplier and the distributor agreed to fix prices.

In addressing this question, the Court stressed two of the dichotomies this article laid out in Part II: the distinction between concerted and in-

\textsuperscript{137} See Baker, supra note 53, at 1478 (post-Colgate decisions “focused on the line and largely ignored the rationale”).

\textsuperscript{138} See Albrecht, 390 U.S. at 162-63 (Harlan, J., dissenting) (arguing that Court had not attempted to analyze when concerted action should be implied from supplier dictating price to dealer).

\textsuperscript{139} 475 U.S. 574 (1986).

\textsuperscript{140} See, e.g., Cann, supra note 23, at 497 (noting that Monsanto Court established substantial burden of proof regarding vertical price-fixing conspiracies in dealer termination cases); Doherty, supra note 11, at 981-82 (same); Marcy J. Levine, \textit{Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court}, 37 EMORY L.J. 171, 195 (1988) (Matsushita represented “complete reversal from the historical treatment of antitrust conspiracy cases); Roszkowski, supra note 18, at 134 (Monsanto “significantly increased” burden of proof); Randolph Sherman, \textit{The Matsushita Case: Tightened Concepts of Conspiracy and Predation?}, 8 CARDOZO L. REV. 1121, 1123 (1987) (Matsushita is “dramatically different” from earlier cases; Sylvania and Monsanto “drastically narrowed” vertical cause of action); David F. Shores, \textit{Narrowing the Sherman Act Through an Extension of Colgate: The Matsushita Case}, 55 TENN. L. REV. 261, 304 (1988) (Matsushita is “sharp departure from prior decisions”).


\textsuperscript{142} Id. at 757-58.

\textsuperscript{143} Id. at 758-59 (citing Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1238 (7th Cir. 1982)).
dependent action and the distinction between price and non-price re-
straints.\textsuperscript{144} The Court noted that discussions between suppliers and dealers
about prices and marketing strategy often constitute legitimate behavior,
providing necessary information to a supplier concerned with the operation
of the market for its products.\textsuperscript{145} Because it saw dealer complaints as a nor-
mal part of these discussions, the Court was concerned that if it allowed
plaintiffs to use complaints as their sole evidence of price-fixing agreements,
the result might be per se condemnation of either independent pricing deci-
sions or of non-price restraints that have some effect on prices. "If an infer-
ence of such an agreement may be drawn from highly ambiguous evidence,
there is a considerable danger that the doctrines enunciated in \textit{Sylvania} and
\textit{Colgate} will be seriously eroded."\textsuperscript{146}

To avoid this problem, the Court enunciated a new evidentiary standard.
Although it admitted that dealer complaints have some probative value,\textsuperscript{147} it
held that

something more than evidence of complaints is needed. There must
be evidence that tends to exclude the possibility that the manufac-
turer and the nonterminated distributors were acting indepen-
dently. . . . The antitrust plaintiff should present direct or
circumstantial evidence that reasonably tends to prove that the
manufacturer and others "had a conscious commitment to a com-
mon scheme designed to achieve an unlawful objective."\textsuperscript{148}

In its oft-cited footnote nine, the Court went on to say that the concept of a
common scheme required the plaintiff to show more than that the non-termi-
nated dealer conformed to the manufacturer's suggested prices. "It means as
well that evidence must be presented both that the distributor communicated
its acquiescence or agreement, and that this was sought by the
manufacturer."\textsuperscript{149}

\textit{Monsanto}'s evidentiary requirements have been viewed as creating a
new and higher burden for antitrust plaintiffs.\textsuperscript{150} Nevertheless, the Court ul-
timately held that the terminated distributor had offered sufficient evidence
to support the verdict.\textsuperscript{151} Indeed, the Court found "substantial direct
evidence of agreements to maintain prices."\textsuperscript{152} Monsanto, the manufacturer,

\begin{itemize}
  \item \textsuperscript{144} \textit{Id.} at 761.
  \item \textsuperscript{145} \textit{Id.} at 762-64.
  \item \textsuperscript{146} \textit{Id.} at 763.
  \item \textsuperscript{147} \textit{Id.} at 764 n.8.
  \item \textsuperscript{148} \textit{Id.} at 764 (quoting Edward J. Sweeney \& Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111
(3d Cir. 1980), \textit{cert. denied}, 451 U.S. 911 (1981)).
  \item \textsuperscript{149} \textit{Id.} at 764 n.9. The specific language the Court employed in the footnote has led courts
to suggest that agreements \textit{sought by dealers} and \textit{acquiesced in by suppliers} do not constitute
concerted action within the meaning of \textit{Monsanto}. See infra notes 294-320 and accompanying
text for a discussion of these cases.
  \item \textsuperscript{150} See sources cited \textit{supra} note 140; see also \textit{Business Elecs. Corp. v. Sharp Elecs. Corp.},
485 U.S. 717, 753 (1988) (Stevens, J., dissenting) (characterizing \textit{Monsanto} as creating "high
hurdle" and "strict test").
  \item \textsuperscript{151} \textit{Monsanto}, 465 U.S. at 765-68.
  \item \textsuperscript{152} \textit{Id.} at 765 (emphasis added).
\end{itemize}
threatened its price-cutting distributors with supply cutoffs if they did not raise their prices. In one instance, Monsanto even complained to the parent company of a noncomplying distributor. The parent instructed its subsidiary to comply, and the subsidiary then informed Monsanto that it would charge the suggested price. The Court also relied on a newsletter circulated by a distributor to its retailers after the author had met with Monsanto officials. The newsletter stated, among other things, that “every effort will be made to maintain a minimum market price level,” and strongly suggested that the manufacturer and distributors were cooperating to maintain prices.

Once the Court found evidence of a price-fixing agreement, the remaining question is whether the termination of [the plaintiff] was part of or pursuant to that agreement. It would be reasonable to find that it was, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated.

This passage suggests that once a plaintiff shows sufficient evidence of a price-fixing conspiracy, it needs only minimal evidence to show that its termination was linked to that conspiracy. In Monsanto, the Court held there was sufficient circumstantial evidence of that link. The manufacturer had specifically told the terminated distributor that price complaints were a cause of the termination. The distributor had been threatened with termination if it did not raise its prices, and had never been told of the non-price reasons the manufacturer later alleged were the cause of the termination.

Thus, when viewed in light of its actual resolution of its facts, Monsanto is hardly a restrictive case. In sum, the evidence of the conspiracy con-

153. Id.
154. Id. at 765-66. The key passage of the newsletter, as quoted by the Court, reads: In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons. So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. Also, as far as the national accounts are concerned, they are sure to recognize the desirability of retaining Monsanto's favor on a continuing basis by respecting the wisdom of participating in the suggested program in a manner assuring order on the retail level 'playground' throughout the entire country. It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final.

155. Id. at 767.
156. Id.
157. Id. at 767-68.
158. See Terry Calvani & Andrew G. Berg, Resale Price Maintenance After Monsanto: A Doctrine Still at War with Itself, 1984 DUKL J. 1163, 1195-96 (Monsanto's evidence of price-fixing is "speculative"); Hutchinson, supra note 51, at 122 ("[I]t is obvious that the Court [in Monsanto] intended to give juries great latitude" on concerted action question.); W.B. Markovits, A Focus on Reality in Antitrust: An Analysis of the Kodak Case, 39 FED. BAR NEWS & J. 592, 593 (1992) (Monsanto does not justify wide use of summary judgment); Piraino, supra note
sisted largely of Monsanto's attempts to coerce the plaintiff, and a few other dealers, into compliance with its MSRP and of the distributor's statements in the newsletter. These facts hardly suggest that huge amounts of evidence will be needed to meet the Monsanto test. Indeed, the Monsanto evidence is similar to the sort of coercion-based evidence of price-fixing the Court approved in Parke, Davis and its immediate progeny.

2. The Matsushita Gloss

While Monsanto clearly tried to set out a new evidentiary standard for establishing concerted action, it provided little guidance as to the standard's reach. Moreover, the case did little to elaborate the reasons for having a vertical conspiracy requirement at all. It never directly addressed why cases like Colgate are not treated as implied agreements, thus satisfying the language of Section 1.

Further hints as to the solution to these puzzles are found in Matsushita, where the Supreme Court again addressed the amount of evidence of concerted action a plaintiff must present to take a Section 1 case to a jury. In Matsushita, the Court addressed a claim that a group of Japanese electronics manufacturers had conspired to price their products below cost in the United States to drive American competitors out of business. The Court expressed concern that if plaintiffs could bring conspiracy claims too easily, the fear of litigation would deter firms from lowering prices to increase their sales, precisely the sort of behavior the Sherman Act is supposed to encourage. As a result, the Court again restated the standards for finding sufficient evidence of concerted action:

[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a [Section 1] case. Thus, in [Monsanto], we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of [Section 1] must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [Monsanto., 465 U.S., at 764. [Plaintiffs] . . . must show that the inference

89, at 321 ("It is difficult to understand how allowing a terminated dealer to reach a jury on the basis of such limited evidence could protect manufacturers from the undue application of the per se rule . . . "). Indeed, one lower court cited Monsanto for the proposition that federal courts allow wide latitude in interpreting circumstantial evidence to find inferences of conspiracy. Community Elec. Serv., Inc. v. National Elec. Contractors Ass'n, 869 F.2d 1235, 1246 (9th Cir.), cert. denied, 493 U.S. 891 (1989).

As Matsushita implied by incorporating Monsanto's language, the standards for granting a directed verdict and a summary judgment motion are the same. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (standard for granting summary judgment mirrors that for directed verdict under Federal Rule of Civil Procedure 50(a)). Thus, subsequent discussion will not distinguish between the two procedural postures.

159. As Matsushita implied by incorporating Monsanto's language, the standards for granting a directed verdict and a summary judgment motion are the same. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); see Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (standard for granting summary judgment mirrors that for directed verdict under Federal Rule of Civil Procedure 50(a)). Thus, subsequent discussion will not distinguish between the two procedural postures.

160. Matsushita, 475 U.S. at 577-78, 584.
161. Id. at 593-94.
of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [plaintiffs].\textsuperscript{162}

This language and other parts of \textit{Matsushita}\textsuperscript{163} seem to have diminished the reluctance of lower federal court judges to grant summary judgment in Sec-

\textsuperscript{162} Id. at 588 (some citations omitted).

\textsuperscript{163} \textit{Matsushita}'s other significant holding is that where a plaintiff's claim is economically implausible, the plaintiff "must come forward with more persuasive evidence to support their claim than would otherwise be necessary." \textit{Id.} at 587. The Court found the alleged conspiracy to price below cost economically implausible because the participants would have had to be willing to take losses that were difficult to recoup for a long period of time. \textit{See id.} at 588-93 (discussing rationale for predatory pricing and uncertainty of success as factor in assessing plausibility of plaintiffs' claims).

The "implausibility" language in \textit{Matsushita} has little relevance to most vertical restraints cases. Almost everyone concedes that non-price vertical restraints have the potential to enhance interbrand competition. Not only is it plausible that some suppliers would try to impose them, but also it would be surprising if they did not. Suppliers and dealers have logical reasons to enter vertical price-fixing arrangements. As Part V will elaborate, these arrangements can be used both to end free-rider problems and to facilitate cartels. Given the extensive use of resale price maintenance during the fair trade era, \textit{see infra} note 172, courts should always view attempts to fix resale prices as plausible. \textit{See Jones}, supra note 12, at 736 ("Vertical price restraints are rational, either as permissible corrections to free-riding, or as impermissible RPM restraints.")

Some have argued that suppliers have little incentive to try to maintain higher prices absent market power because any increase in price will result in lost sales to interbrand competition. \textit{E.g.}, MLC, Inc. v. North Am. Philips Corp., 671 F. Supp. 246, 256 (S.D.N.Y. 1987); A\textit{Reeda} \& H\textit{ovenkamp}, supra note 49, at 1026. However, unlike \textit{Matsushita}, where in the short term the alleged conspiracy necessarily reduced the conspirators' revenue, \textit{Matsushita}, 475 U.S. at 595, the short-term effect of a minimum price-fixing agreement may actually increase revenue. If demand proves sufficiently elastic and the price increase reduces profits, the conspirators easily can lower prices again without significant damage to themselves. Unlike those who attempt predatory pricing, price-fixing conspirators will know whether their scheme is successful quickly enough to avoid serious harm. Moreover, suppliers in a less than perfect market may agree to resale price maintenance because it may reduce pressure from dealers to lower their own prices. \textit{See Corey}, supra note 98, at 55 (if price-cutting is forestalled at retail level, manufacturer is relieved of pressure to lower own prices to support efforts of retailers to compete pricewise); Gerhart, supra note 52, at 426 (suppliers sometimes impose restraints to support "keeping their prices to dealers higher than would otherwise be possible"); Robert Pitofsky, \textit{The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions}, 78 COLUM. L. REV. 1, 16 (1978) (RPM can reduce dealer pressure on suppliers to depart from cartel prices); Shores, supra note 51, at 406-08 (vertical price-fixing provides way to avoid reduced sales that normally accompany raising prices by replacing free pricing at retail level with contract pricing, effectively sharing monopoly profits with retailers).

Similarly, dealer-coerced agreements should always be considered plausible. No monopoly profits or short-term losses are necessary to create benefits for the coercing dealer or distributor. H.L. Hayden Co., Inc. v. Siemens Medical Sys., Inc., 672 F. Supp. 724, 733 n.12 (S.D.N.Y. 1987), aff'd, 879 F.2d 1005 (2d Cir. 1989); \textit{see Bolt} v. Halifax Hosp. Medical Ctr., 891 F.2d 810, 820 (11th Cir.) ("If doctors in a hospital can exclude other doctors from practicing in that hospital, then obviously the remaining doctors can charge a higher price for their services."), \textit{cert. denied}, 495 U.S. 924 (1990). Moreover, if the purpose of the agreement is to eliminate a competitor, the actual termination of the competitor is a pretty strong indication that the conspiracy makes economic sense. \textit{See Instructional Sys. Dev. Corp. v. Aetna Casualty & Surety Co.}, 817 F.2d 639, 645-46 (10th Cir. 1987) (fact that goal of conspiracy actually is achieved means \textit{Matsushita} standard met). The supplier may have a variety of reasons for acceding to the coercing dealer. \textit{See
tion 1 cases. The results of this increased willingness to grant summary judgment will be discussed below. More significantly for our current purposes, the Court culled from Monsanto an emphasis on avoiding broad readings of antitrust law that may deter procompetitive conduct. This emphasis will form the basis of the following analysis regarding the purpose of the concerted action requirement.

D. The Concerted Action Requirement as a Screening Device in Price-Fixing Cases

Vertical restraints are not discrete agreements, but rather take place in the context of an ongoing relationship. The relationship between a supplier and a dealer is complex and shifting. They are simultaneously partners in a project to sell the suppliers' goods and competitors fighting to get the bulk of the available profits. At times they may get along well, at other times poorly. The supplier may be pleased with some aspects of the relationship and upset about others. The supplier-dealer relationship often ends after a long, unpleasant increase in friction between the parties that stems from a variety of causes.

\[\text{infra note 420.} \] The relative frequency of upward coercion and the fact that boycotts have historically been the means used by high-price retailers to eliminate discounters, Gerla, supra note 69, at 11, suggest that the Matsushita plausibility standard has little relevance to these cases.

164. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1362 (3d Cir. 1992) (summary judgment is no longer disfavored procedural shortcut), cert. denied, 113 S. Ct. 1262 (1993); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 659 n.4 (7th Cir. 1987) (citing Matsushita for proposition that summary judgment not really disfavored in antitrust law), cert. denied, 484 U.S. 977 (1987); Areeda & Hovenkamp, supra note 49, at 989 (lower courts now more ready to grant directed verdicts or summary judgments against conspiracy claims where evidence is merely consistent with existence of conspiracy); Jones, supra note 12, at 734 (under Monsanto and Matsushita, lower courts "have often improperly denied plaintiffs the opportunity to present their cases to the jury"); Popofsky, supra note 52, at 34 (marked increase in summary judgment dispositions of vertical price-fixing cases was predictable result of Matsushita).

165. See infra part IV.


167. See generally Goldberg, supra note 133 passim (describing legal and economic nature of vertical restraints).

168. See Steiner, supra note 2, at 158-60 (describing parallel adversarial and complementary nature of manufacturer-retailer relationship). As one commentator put it, in entering the relationship, they "in effect buy admission tickets to a game of skill in which they attempt to revise the rules in their favor without inducing the other party to quit." Goldberg, supra note 133, at 123-24.


For the moment, let us focus on price-fixing claims. The complexity of the supplier-dealer relationship tends to mean that when a supplier terminates a price-cutting dealer, the facts may support a number of different versions of the "cause" of what can usefully be thought of as a break-up. Given the per se treatment accorded to price restraints, a price-cutting dealer will naturally argue that the supplier terminated it because of its low prices. The supplier will give other accounts of the break-up that focus on activities of the dealer that harmed the supplier's ability to market its products.

Studies of suppliers' activities under the fair trade laws suggest that the price-fixing account often is plausible. However, evidence also supports the suppliers' alternative accounts. Many cases involve scenarios that suggest genuine free-rider problems. For example, suppliers may decide to eliminate mail-order dealers, who have low overhead costs or who provide little or no pre-sale information or post-sale service. In addition, a variety of business judgments by manufacturers, or bad behavior by dealers, can pres-

171. See infra notes 353-56 and accompanying text for a discussion of the proper application of Monsanto to non-price claims.

172. During much of the century, Congress allowed states to pass so-called fair trade legislation allowing vertical price-fixing. See Thomas R. Overstreet, Jr., Federal Trade Commission, Resale Price Maintenance: Economic Theories and Empirical Evidence 4-5 (1983) (describing legislation designed to remove federal antitrust obstacles to enforcement of retail price maintenance contracts sanctioned by states). At the height of the fair trade era in the middle of the century, over 40 states had enacted fair trade statutes. Id. at 4. Estimates of the volume of retail products that sold under employed resale price maintenance agreements during this period range from 4-10%. Id. at 113.

173. Obviously, where the price-cutter can afford to discount because it fails to provide services, characterizing the motive of the supplier in terms of "price" or "non-price" concerns will be hard. See Herbert Hovenkamp, Vertical Restraints and Monopoly Power, 64 B.U. L. Rev. 521, 521-22 (1984) (discussing this problem in context of Monsanto facts). The test proposed in Part VI for analyzing vertical price-fixing should eliminate much of the significance of the distinction, by allowing the supplier to show that it imposed price restraints to address concerns about dealer services.

174. See, e.g., H.L. Hayden Co., Inc. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1009 (2d Cir. 1989) (supplier terminated relationship with mail-order dental equipment sales company selling at 20-25% below full-service dealers); Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, 878 F.2d 801, 802-03 (4th Cir. 1989) (supplier terminated relationship with mail-order furniture dealer discounting 30-40%); O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1468 (9th Cir. 1986) (manufacturer terminated mail-order dealers because they could not provide necessary consumer services); National Marine Elec. Distrib., Inc. v. Raytheon Co., 778 F.2d 190, 191-92 (4th Cir. 1985) (supplier terminated mail-order dealer that had no service department); Computer Place, Inc. v. Hewlett-Packard Co., 607 F. Supp. 822, 826-27 (N.D. Cal. 1984) (supplier deemphasized mail-order distribution in favor of local, full-service dealers that could provide better support for customers), aff'd without op., 779 F.2d 56 (9th Cir. 1985); Moffat v. Lane Co., 595 F. Supp. 43, 45-47 (D. Mass. 1984) (furniture supplier terminated relationship with mail-order dealer discounting 25-40%).

William Andersen has argued that the object of most dealer promotional services is product differentiation, which in turn can undermine interbrand competition. Andersen, supra note 112, at 782. However, this ignores the fact that, for some products, product differentiation represents genuine differences in quality and features. Promotional activities connected with this kind of differentiation may well provide consumers with information that they want and need.
ent compelling reasons for termination. Reported cases contain many examples of these reasons, including a supplier's decision to restructure its distribution chain to eliminate certain dealers, poor financial or sales performance by the dealer, failure of the dealer to comply with non-price restraints, lies or fraud by the dealer, or simply obnoxious behavior by the dealer.

The real question underlying the concerted action cases seems to be how much evidence of the price-fixing version of the termination a terminated price-cutter must show to get its story heard by a jury. As noted, both Monsanto and Matsushita express concern that allowing a jury to infer anticompetitive activity from ambiguous evidence will deter procompetitive behavior. Reading Colgate through the lenses of these cases provides a possible justification that makes sense of the Court's apparently arbitrary line between independent and concerted action.

175. See Gerla, supra note 69, at 17, 25 & n.145 (manufacturers frequently have legitimate non-price reasons for terminating relationship); Thomas A. Piraino, Jr., Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis, 67 CORNELL L. REV. 297, 335-36 (1982) (courts frequently sustain termination of distributors for lack of diligence, inadequate service, dishonesty, poor financial condition, and low standards of cleanliness and appearance).


To understand this justification, imagine what would happen if *Colgate* were overruled. That is, suppose courts treated a supplier’s simple announcement of a resale pricing policy and termination of noncomplying dealers as enforcement of an illegal implied contract. Even when the supplier had terminated the dealer for a legitimate reason, the terminated price-cutter would be able to get a price-fixing case to the jury on remarkably little evidence: the announcement, the price-cutting, and the termination. A jury surely could infer the causal link from the manufacturer’s policy itself.

As the Supreme Court noted in *Sharp*, the supplier may have trouble convincing a jury that price was not its primary motivation for the termination.\(^{182}\) Because the supplier does not have the added protection of rule of reason analysis in a price-fixing case, this result would hamper a manufacturer’s efforts to terminate a price-cutting dealer for legitimate reasons. Moreover, it would strongly discourage a manufacturer from announcing even suggested retail prices, limiting helpful exchanges of information between itself and its dealers about effective pricing strategies. Surely it makes sense for a supplier to be able to collect information about the success of pricing strategies from its often far-flung dealers, process the information itself, and then reconvey it in the form of pricing suggestions.\(^{183}\)

Seen in this light, *Colgate*, at least as revived by *Monsanto*, is not really a case about some metaphysical difference between concerted and independent action, but rather a substantive decision to limit price-fixing allegations by insisting that a dealer produce a certain minimum quantity of evidence—greater than that normally required in a civil suit—in order to take its claims to the jury.\(^{184}\) The effect is to require more than just evidence of a pricing

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182. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 727-28 (1988). Long before *Monsanto*, Donald Turner suggested dealing with this problem by putting the burden on the plaintiff or the government to establish “a clear policy or pattern of refusals to deal which have in fact produced resale price maintenance by a substantial number of distributors.” Turner, supra note 105, at 690. In practice, this requirement might prove similar to *Monsanto’s*. Such a pattern or policy would likely leave behind the sort of evidentiary traces *Monsanto* requires.

183. A supplier-dealer relationship can be seen as a joint venture to sell products effectively at maximum profit. As partners in the venture, the dealers should be allowed to use the supplier as a clearinghouse of pricing information if it is efficient to do so. The information-sharing qualities of MSRP seem to be ignored by those who would forbid even suggested resale prices. See, e.g., Andersen, supra note 112, at 776-91 (arguing that suggested prices should be presumptively illegal for sake of predictability and doctrinal clarity); see also Steiner, supra note 2, at 197 (recommending that suppliers not be allowed to terminate dealers unilaterally for price-cutting). Andersen, for example, argues that if MSRP is not mandatory, it can have no redeeming effects. When dealers do not follow it, “no one benefits; the only effect is to create the illusion that the dealer price is something of a discount—a form of consumer fraud.” Andersen, supra note 112, at 791. However, in addition to conveying information among the players in the distribution chain, MSRP also provides information to consumers. Retail markets contain dealers who employ a wide variety of pricing and service strategies: some will employ MSRP and some will not. Consumers, who may have difficulty obtaining information about the particular strategy a given retailer employs, can use the relationship between actual price and MSRP as a signal conveying that information.

184. Cf. Shores, supra note 140, at 272 (“*Colgate* [precludes], as a matter of law, the inference of an agreement from facts which in reality would plainly support such an inference.”).
policy and a subsequent termination, but also some other evidence, like that adduced in *Monsanto*, suggesting that prices were genuinely the cause of the termination. Thus, the case may not really constitute an endorsement of the termination of price-cutting dealers as much as an acknowledgement of the difficulty that may occur when sorting through the reasons for the termination in the shadow of the *per se* rule.\textsuperscript{185}

This reading of *Colgate* also makes sense of the sequence of price-fixing cases that preceded *Monsanto*. In each of them, the evidence provided additional reasons to believe that the supplier actually was enforcing its pricing policies, either because it had set up an elaborate monitoring and enforcement system, or because it had repeatedly tried to influence its dealers' pricing decisions, or both. The pre-\textit{Monsanto} reading of these cases was that any activity of the supplier beyond simple announcement and termination was actionable. Commentators saw this rule, known as the *Colgate*-plus doctrine, as effectively overruling *Colgate*. Instead, the evidence-based approach suggests the doctrine is perfectly consistent with *Colgate*: If we are protecting non-price terminations rather than "independent" pricing decisions, any evidence beyond the *Colgate* threshold that clearly connects the termination to price policies should be sufficient to get a case to the jury.

This approach also suggests that *Monsanto* should be read fairly narrowly. In *Monsanto*, the Supreme Court rejected the Seventh Circuit's position that a terminated dealer could take its price-fixing case to the jury merely on a showing that it was terminated "in response to" competitors' price complaints. Again, suppose the Court had affirmed the Seventh Circuit's test. The terminated dealer's prima facie case would consist of a suggested price, price complaints, termination, and some other evidence that suggests a causal link, perhaps temporal proximity.

As the Supreme Court pointed out, this is not much evidence on which to base a price-fixing claim. The relationship between suppliers and dealers, as described in the case law, often resembles that between parents and children. Children complain constantly.\textsuperscript{186} Parents pay attention when they see fit. To discourage a parent from punishing one child merely because another had complained seems irrational. Yet "dealer expressions regarding their relations with the supplier and with other dealers often focus on price regardless of the underlying cause for the expressions."\textsuperscript{187} To allow an inference of price restraints, merely from evidence of all-too-common price complaints

\textsuperscript{185} This concern is somewhat lessened in the burden-shifting approach proposed in Part VI, despite its focus on motive, because the jury will specifically be instructed that a desire to raise prices is not necessarily illegal.

\textsuperscript{186} Some cases, for example, describe evidence that virtually all of a particular supplier's dealers were complaining about other dealers' prices. \textit{E.g.}, Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 661 (7th Cir.), cert. denied, 484 U.S. 977 (1987); O.S.C. Corp. v. Apple Computer, Inc., 601 F. Supp. 1274, 1288 (C.D. Cal. 1985), aff'd, 792 F.2d 1464 (9th Cir. 1986).

\textsuperscript{187} Allison, \textit{supra} note 1, at 164; accord George Hay, \textit{Vertical Restraints After Monsanto}, 70 CORNELL L. REV. 418, 432 (1985) (complaints focus on price-cutting because of more direct and noticeable threat); Hovenkamp, \textit{supra} note 173, at 522 (dealers naturally complained about
and subsequent termination, would make it very hard for a supplier to termi-
nate a dealer for non-price concerns once a competitor complained about the
dealer’s prices. A supplier that tried to enforce a non-price restraint in these
circumstances could be forced to explain to a skeptical jury that the prices
complained of were not the cause of its decision to terminate. In addition,
fear of per se liability might discourage dealers from exchanging information
about the workings of the market, in the form of complaints or otherwise,
with their suppliers. Yet exchange of market information obviously allows
both suppliers and dealers to run their businesses better. On the other hand,
Monsanto hardly contains a sweeping condemnation of the Colgate-plus doc-
trine. The case does not overrule or even question the continued viability of
Parke, Davis and its progeny.

To understand what Monsanto does require, it is helpful to consider the
role that the supplier’s motives play in concerted action analysis. As noted,
to get a vertical price-fixing case to the jury, a terminated distributor will
have to show evidence that its termination was the result of an agreement
between the supplier and someone else and that the agreement included
some price element. The supplier’s motive for terminating the distributor is
relevant to the analysis in two ways. It can show that the termination may
have occurred for reasons independent of any agreement. It can also show
that, although the termination was part of an agreement, the terms of the
agreement did not include prices.

Once the supplier presents evidence of either an independent or a non-
price motive for termination, the plaintiff must bring forward some evidence
of price-fixing to survive summary judgment. Yet some evidence that is con-
sistent with forbidden conspiracy will also be consistent with the particular
legitimate independent decision-making process claimed by the defendant.
Monsanto expressly holds that dealer price complaints fall into this category.
Evidence consistent with either explanation is precisely the evidence Matsu-
shita says is insufficient. Thus, to counter the defendant’s claim, plaintiff
must present evidence that is inconsistent with the defendant’s theory and
that therefore “tends to exclude” it. Matsushita’s use of the word “consis-
tent” makes clear that Monsanto’s “tend to exclude” test is really about find-
ing evidence inconsistent with the defendants’ account of legitimate
termination.

phenomenon that appeared to cause injury—price-cutting—rather than absence of skilled per-
sonnel cited by supplier).

188. See O.S.C. Corp., 601 F. Supp. at 1295 (inferring conspiracy from price complaints
“would virtually immunize a dealer from legitimate, vertically imposed requirements by a manu-
facturer once a competitor has complained”); Hay, supra note 187, at 432 (noting manufacturer’s
reluctance to terminate a free rider for violation of non-price restraints where jury could infer
price-fixing from termination and complaints).


190. As with any issue that deals with a defendant’s motivation, cases involving the reasons
for a dealer’s termination raise the question of what to do when the defendant had mixed mo-
tives. If there is evidence of more than one motive, evidence that otherwise meets the Monsanto
standard that the supplier was at least partially motivated by a price-fixing agreement should be
Read together, Matsushita, Monsanto, and Colgate protect a supplier’s ability to terminate dealers for legitimate reasons by setting minimum evidentiary requirements that a terminated dealer must meet to allege price-fixing.\textsuperscript{191} The dealer must show more than suggested prices, price complaints, and termination, because all of these are consistent with legitimate reasons for termination. However, as Monsanto’s facts make clear, the plaintiff’s evidence can be far short of the explicit contractual provision that provided the Dr. Miles paradigm for per se illegal price-fixing. As the Eleventh Circuit has noted, Monsanto is not an insurmountable burden: “This evidence need not be such that only an inference of conspiracy may be derived from it. It must, however, go beyond equivocal complaints and tend to exclude the inference of independent action.”\textsuperscript{192}

IV. THE METAPHYSICS OF CONSPIRACY: THE LOWER COURTS AND CONCERTED ACTION AFTER MONSENTO

The lower federal courts have struggled with the concept of “concerted action” in vertical restraint cases since the Supreme Court decided Monsanto.\textsuperscript{193} Many cases determined that the plaintiff did not show sufficient evidence\textsuperscript{194} of concerted action in circumstances that certainly are at odds with the purpose of the concerted action requirement detailed in Part III. To be fair, in some of these cases, the court probably would not have imposed liability anyway. A number of the cases involved non-price restraints, which probably had procompetitive effects and would likely have survived the ap-

\textsuperscript{191} The Ninth Circuit has tried to turn this concern into an explicit balancing test: [T]he trial court must consider whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, “sufficiently unambiguous” evidence that does not have these undesirable deterrent effects.

\textsuperscript{192} Helicopter Support Sys. Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530, 1534 n.4 (11th Cir. 1987) (emphasis in original); see also Moore v. Boating Indus. Ass'n, 754 F.2d 698, 711 n.22 (7th Cir.) (rejecting claim that for plaintiff to establish antitrust conspiracy from circumstantial evidence the evidence “must be inconsistent with any other rational conclusion”), vacated on other grounds, 474 U.S. 895 (1985).

\textsuperscript{193} See Flynn, supra note 10, at 1104-12 (describing varied approaches to application of Monsanto and question of what constitutes conspiracy). Apparently, this problem preceded Monsanto. In 1981, one commentator argued that the federal courts cited Colgate in “completely inappropriate contexts.” Baker, supra note 53, at 1484-85; see also Andersen, supra note 112, at 773-76, 777 (noting pre-Monsanto doctrinal confusion about proper interpretation of Colgate doctrine).

\textsuperscript{194} Throughout this Part, I use “sufficient evidence” to mean sufficient evidence of concerted action to survive a motion for summary judgment or directed verdict and to allow a jury to decide the issue.
plication of the rule of reason. In other cases, the plaintiffs failed to show sufficient evidence of harm to competition, so the courts' concerted action determinations were not crucial to the outcomes. Yet the broad language of the cases will serve as precedent for later cases where the restraints involved could have significant anticompetitive effects. If Monsanto is read to mean that a particular type of evidence is insufficient to show concerted action, then the underlying arrangement will be totally immune from antitrust scrutiny. Thus, the concern underlying Part IV is the courts' potential immunization of harmful conduct without leaving any opportunity to analyze its competitive impact.

Part IV examines the post-Monsanto concerted action cases and concludes that many lower federal courts are reaching results unsupported by policy or precedent. Part IV first looks at the broad application of two key passages in Monsanto, then examines cases involving explicit agreements and suppliers' policies restraining their dealers, and then examines cases like those described in the Introduction, involving dealers' attempts to coerce their suppliers. Part IV concludes with thoughts about how to restate Monsanto to clarify the concerted action requirement in vertical restraint cases.

A. Interpreting the Language of Monsanto

In the cases discussed in this section, courts arguably took one of two passages from Monsanto out of context and used the language to support grants of summary judgment. This section argues that these decisions were questionable interpretations of the Supreme Court's precedents.

1. "Tends To Exclude"

As noted, the "tends to exclude" standard of Monsanto and Matsushita means that the plaintiff must come forward with at least one piece of admissible evidence that is inconsistent with the defendant's claim that it acted independently. Some courts, however, seem to interpret the "tend to exclude" language to mean that, in order to get its case to the jury, the plaintiff must produce evidence that, taken as a whole, is more likely than not to support its claim. The Sixth Circuit, for example, has stated that "a plaintiff... fails
to demonstrate a conspiracy if, using ambiguous evidence, the inference of a conspiracy is less than or equal to an inference of independent action. In another case, a district judge found insufficient evidence of concerted action, stating: "I conclude that the evidence of a conspiracy, taken as a whole in the light of all the circumstances, is ambiguous. The entire course of conduct by the defendants is consistent with the pursuit of permissible independent business purposes." A number of other judges have used language suggesting that they are weighing the plaintiff’s evidence of concerted action in the summary judgment process.

This approach is inconsistent with the role of the judge in a summary judgment context and with the reasoning of Monsanto and Matsushita. As the Third Circuit recently noted in rejecting this approach to the Monsanto test, the judge’s role here is not to weigh the evidence.

To raise a genuine issue of material fact . . . the opponent need not match, item for item, each piece of evidence proffered by the movant. In practical terms, if the opponent has exceeded the “mere scintilla” threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the jury, “the plaintiff must produce evidence that makes it ‘more likely than not’ that its version of things is true”). The basis for this may well be Matsushita's language that plaintiffs “must show that [an] inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed [them].” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986); see also Markovits, supra note 158, at 593 (suggesting this language usurps jury’s role); cf. Shores, supra note 140, at 294 (arguing that duty to weigh evidence arises from “trends to exclude” language rather than quoted passage). Yet the Court later refers to the value of pieces of evidence that, standing alone, are consistent with legitimate explanations. Matsushita, 475 U.S. at 588. It does not refer to of all the evidence, consistent and inconsistent, taken as a whole, as the cases discussed in this section seem to suggest.

200. Riverview Invs., Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 483 (6th Cir.), cert. denied, 498 U.S. 855 (1990). While this language simply may be a poorly worded restatement of the Eleventh Circuit’s version of the standard, it certainly is susceptible to the interpretation that the judge must engage in some weighing of the evidence.


202. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1374 (3d Cir. 1992) (district court had found defendant’s independent reasons compelling “on balance” contrasted with plaintiff’s rebuttal evidence), cert. denied, 113 S. Ct. 1262 (1993); Arnold Pontiac-GMC v. General Motors Corp., 786 F.2d 564, 577-78 (3d Cir. 1986) (Becker, J., dissenting) (suggesting strong evidence of independent motive by manufacturer to fail to grant franchise to plaintiff negated probative value of evidence of competitors’ involvement in decision); In re Beef Indus. Antitrust Litig., 713 F. Supp. 971, 975-76 (N.D. Tex. 1988) (when plaintiffs rely solely on circumstantial evidence, inference of unlawful conspiracy must be the “compelling, if not exclusive, rational inference”), aff’d on other grounds, 907 F.2d 510 (5th Cir. 1990).


204. See Big Apple BMW, Inc., 974 F.2d at 1363 (inappropriate for court to resolve factual disputes and make credibility determinations); accord In re Coordinated Pretrial Proceedings, 906 F.2d 432, 438 (9th Cir. 1990) (allowing court to make such decisions would lead to dramatic judicial encroachment on province of jury); 10 Charles Alan Wright et al., Federal Practice and Procedure 574-75 (1983) (issues of fact not triable on summary judgment motion).
the opponent, even if the quantity of the movant’s evidence far outweighs that of its opponent.205

Monsanto also suggests that its test is not designed to promote judicial balancing of the evidence on summary judgment motions. In Monsanto, the Court explicitly rejected the defendant’s argument that its strong evidence contradicting that of the plaintiff supported a directed verdict: “The choice between two reasonable interpretations of the testimony properly was left for the jury.”206 In addition, as the Ninth Circuit has noted, if Monsanto and Matsushita mean that courts should grant summary judgment any time that both inferences of conspiracy and inferences of innocent conduct are plausible, they would effectively require that the plaintiff provide direct evidence of conspiracy in order to get its case to the jury.207 However, both cases clearly leave open a plaintiff’s right to rely on circumstantial evidence.208

Finally, the balancing approach is inconsistent with the purpose of the concerted action rule. If Monsanto is designed to assure that a terminated dealer has a minimum quantum of evidence before taking its case to a jury, the court’s role should be limited to examining whether the threshold has been reached. Its focus must be on the amount of the plaintiff’s evidence, rather than on how that evidence stacks up against that of the defendant.

Several circuit courts apply a kind of burden shift in cases raising Monsanto issues. Basically, they require that a plaintiff show more, or better, evidence of conspiracy once the defendant articulates a plausible legitimate explanation for its behavior.209 These cases are not inconsistent with the

205. Big Apple BMW, Inc., 974 F.2d at 1363.
206. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 767 n.12 (1984); see also id. at 768 n.14 (noting that "sharp conflict in the evidence" not enough to prevent case from going to jury); Markovits, supra note 158, at 593 (noting that these passages in Monsanto suggest that Court did not intend to change summary judgment standards).
207. Coordinated Pretrial Proceedings, 906 F.2d at 439.
208. Monsanto makes this point explicitly. Monsanto, 465 U.S. at 764. Matsushita implies the same thing by referring repeatedly to inferences that are to be drawn from evidence. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 593-94, 596-97 (1986). A number of lower courts have concluded that circumstantial evidence is still sufficient to take a concerted action claim to the jury. E.g., Big Apple BMW, Inc., 974 F.2d at 1360; Monument Builders of Greater Kansas City, Inc. v. American Cemetery Ass’n, 891 F.2d 1473, 1481 (10th Cir. 1989) cert. denied, Mount Washington Cemetery v. Monument Builders of Greater Kansas City, Inc., 495 U.S. 930 (1990); DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1515 (11th Cir. 1989), cert. denied, 494 U.S. 1081 (1990). However, since Monsanto, very few reported cases relying exclusively on circumstantial evidence have gone to the jury. See Piraino, supra note 89, at 323 (most courts have entered summary judgment in favor of manufacturers when terminated dealer has put forth only circumstantial evidence of conspiracy).
209. See Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1574 (11th Cir. 1991) (undisputed proof of legitimate business reason for defendant’s action sufficient to place burden on plaintiff to produce additional evidence of conspiracy); Market Force, Inc. v. Wauwatosa Realty Co., 906 F.2d 1167, 1171-72 (7th Cir. 1990) (plaintiffs must present evidence that excludes possibility of independent action when defendants establish that their behavior was consistent with that possibility); Landmark Dev. Corp. v. Chambers Corp., 752 F.2d 369, 371-72 (9th Cir. 1985) (per curiam) (undisputed proof of legitimate business reason for defendant action sufficient to place burden on plaintiff to produce additional evidence of conspiracy).
reading of *Monsanto* presented here. When the defendant fails to present a legitimate reason for its conduct, any evidence consistent with concerted action should be sufficient to survive summary judgment. However, once the defendant presents a legitimate explanation for its conduct, more evidence—evidence inconsistent with the legitimate explanation—may be needed to meet the *Monsanto* standard. However, this approach does not involve balancing. The court still must focus on whether the plaintiff has brought forth a specific kind of evidence, not on the relative weight or credibility of the plaintiff's evidence as compared to the defendant's.

2. "Conscious Commitment to a Common Scheme"

The *Monsanto* requirement that the plaintiff show evidence of a "conscious commitment to a common scheme" also has been read broadly by other courts. They have required evidence not simply that the co-conspirators agreed to a plan of action, but also that they share a common purpose.\(^{210}\) For example, one recent case suggested that there could not be a meeting of the minds in a vertical price-fixing case where the manufacturer's motive for terminating the plaintiff was to maintain prices while the non-terminated dealer's motive was to eliminate its competition.\(^{211}\) The problem with this analysis is that suppliers and dealers generally have different business interests. In a vertical non-price restraint case, for example, the manufacturer should want its dealers to make sufficient profits in order to have an incentive to work hard selling the manufacturer's products, but otherwise will want prices as low as possible.\(^{212}\) The dealers should want prices guaranteed so that they can obtain healthy profit margins without fear that price competition will lure away their customers.\(^{213}\) In fact, it is difficult to imagine a situation where vertical conspirators would have fully identical motives.\(^{214}\)

More importantly, motive is relevant to the question of concerted action only to determine if the parties have reached an agreement. The supplier's

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\(^{211}\) Adams Parker Furniture v. Ethan Allen, Inc., 1989-1 Trade Cas. ¶ 68,606, at 61,197-98 (D. Kan. 1987). This reading of *Monsanto* was not crucial to the case. Plaintiff had alleged a price-fixing conspiracy, and there was no admissible evidence of concern about prices by the non-terminated dealer that would justify treating any agreement as a price restraint.

\(^{212}\) See 7 AREEDA, *supra* note 4, ¶ 1453 (manufacturer wants dealer to make only as much profit as necessary to keep prices as low as possible); HOVENKAMP, *supra* note 13, at 249 (same).


\(^{214}\) See Fineman, 980 F.2d at 213 (motives of vertical conspirators vary); Burns, *supra* note 95, at 14-15 (same); see also Brent H. Felgner, *Retailers Grab Power, Control Marketplace, MARKETING NEWS*, Jan. 16, 1989, at 1 ("relationship between supplier and retailer always has been a struggle for power").
motive in terminating the distributor may be relevant where it suggests the supplier did not reach any agreement with a non-terminated distributor. For example, evidence of poor relations between the terminated dealer and supplier may show that any complaints or threats of the non-terminated dealer were simply not part of the termination decision and, thus, that there was no agreement.

However, if a supplier and a dealer in fact agree to terminate a price-cutting dealer, surely that agreement itself constitutes a "conscious commitment to a common scheme," regardless of what gains the parties separately hope to achieve from their agreement. For example, if two criminals cooperate on a mugging, they have conspired, even if one is doing it because she enjoys violence and the other because she needs money, or even if one is doing it only to help the other. The screening function of the concerted action requirement is not served by insulating from review cases where the reasons the defendants agreed to terminate the plaintiff differ, even if the termination is clearly to benefit one party to the agreement with no direct benefit to the other.

B. Explicit Agreements as Concerted Action

A second set of questionable lower federal court decisions find insufficient evidence of concerted action despite explicit agreements between the parties. This section will first examine cases in the context of vertical contracts in general and then focus on cases involving exclusive distribution provisions.

1. Contractual Provisions as Concerted Action

The language of Section 1 from which the concerted action requirement is derived bans "contracts, combinations, or conspiracies in restraint of trade." The explicit use of the word "contract" suggests that any explicit agreement between two parties should meet the concerted action requirement and subject the agreement to scrutiny to determine if it restrains trade within the meaning of the statute. However, several recent cases have called into question this fairly obvious reading of the statute.

In *H.L. Hayden Co. of New York v. Siemens Medical Systems, Inc.*, the Second Circuit affirmed summary judgment for a manufacturer of dental x-ray machines. The court found no evidence that the termination of the plaintiff distributor was part of a conspiracy between the manufacturer and other dealers. The plaintiff presented evidence that, after complaints from full-service dealers, the manufacturer developed a policy against mail-order

216. See supra note 4.
217. See Baker, supra note 53, at 1496 (where restrictions included in written contract, concerted action requirement no longer issue).
218. 879 F.2d 1005 (2d Cir. 1989).
219. Id. at 1015-17.
sales and got other dealers to sign agreements that included the policy then terminated the plaintiff for failing to comply. Both the court of appeals and the district court referred to the manufacturer's legitimate independent interest in eliminating free-rider problems. The two courts, however, never asked, "Independent of what?" Certainly, the manufacturer's interest is not independent of the individual agreements it signed with all its other distributors.

In Drabbant Enterprises v. Great Atlantic & Pacific Tea Co., the district court analyzed a claim by a landlord that a restrictive covenant the landlord had agreed to put into a shopping center lease was unenforceable as an unlawful restraint of trade. The court found no evidence of concerted action between the tenant grocery outlet that had insisted upon the provision and another grocery chain, and so denied the plaintiff's request for a preliminary injunction. However, the court nowhere considered that the covenant itself might have constituted concerted action between the tenant and the landlord.

These cases involve variations on classic boycotts where a business entity tries to prevent a competitor from getting customers or materials necessary to compete. In each of the cases, the courts never analyzed the alleged restraint under the rule of reason because they found no concerted action, despite express contractual language embodying an agreement between the parties. While boycotts may be legal under certain circumstances, the evidence that they can be anticompetitive suggests they should not be completely immune from antitrust scrutiny.

These cases appear to follow a suggestion made by several courts that "contract" in Section 1 has no independent meaning and that "contract, combination and conspiracy" is a compound noun simply meaning "concerted action." Yet, even if we accept that the explicit language of the statute

220. Id. at 1009-11.
223. Id. at 1570.
224. Id. at 1577-78.
225. The landlord should have had standing to challenge the provision in the same way that the buyer in Dr. Miles was allowed to challenge the enforceability of the price restraint in that case.
226. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959) (plaintiff asserted that manufacturers and distributors conspired with competitor to sell to plaintiff at highly unfavorable terms or refuse to sell at all); Eastern States Retail Lumber Dealers Ass'n v. United States, 234 U.S. 600, 605-06 (1914) (retailers conspired to prevent wholesalers from selling directly to public).
228. See Bork, supra note 16, at 334-37 (discussing anticompetitive effects of boycotts); Hovenkamp, supra note 13, ¶ 7.7, 7.8c (same); Gerla, supra note 69, at 11 (same).
does not give a special role to "contracts," no precedent or policy supports applying the language and results of these cases to vertical restraints.

Initially, in *Dr. Miles*, when the Supreme Court first found vertical price-fixing agreements to be illegal, its ruling was based solely on the terms of the contracts between the manufacturer and its distributors and retailers, which certainly suggests contracts alone are enough to meet the concerted action requirement. Evidence of contractual provisions also should meet *Monsanto*'s "tend to exclude" test. Although explicit language in written contracts agreeing, for example, to price terms does not prove beyond a reasonable doubt that both parties actually gave the matter thought and considered themselves bound by the language, those terms would certainly tend to exclude the possibility that the parties were acting independently. In fact, courts have considered contractual language to be direct, not circumstantial, evidence of agreement. And as several courts have noted, *Matsushita*'s standards, by their own terms, do not apply when there is direct evidence of conspiracy.

In addition, if the policy behind the concerted action requirement is to screen ambiguous cases, there is no reason to screen cases where the plaintiff presents direct evidence of contractual agreements. These agreements provide the clear indication of a specific purpose that *Colgate*-type announcements and terminations do not. Thus, when the contract's terms actually encompass the alleged restraint of trade, surely that is direct evidence of concerted action, and *Monsanto* should not come into play.

230. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408-09 (1911).
231. In dealer termination cases, the plaintiff will have to show, in addition to an agreement, that its termination was causally related to the agreement. However, as *Monsanto* pointed out, normally this will not be difficult once evidence of the agreement is established. See supra text accompanying notes 155-57.
232. Conceivably, price lists could be added as exhibits to a contract, for example, or price-fixing language could be buried in boilerplate language in a franchise agreement.
235. This is not to say that every time two defendants enter a contractual arrangement the concerted action requirement is met. Obviously, the terms of the contract must constitute the restraint of trade at issue. See Mosby v. American Medical Int'l, Inc., 656 F. Supp. 601, 605-06 (S.D. Tex. 1987) (contract between defendants not evidence of concerted action where it did not contain terms of alleged conspiracy). As one court noted, "the unlawful and unilateral conduct of one alleged conspirator cannot be imputed to the other alleged conspirator merely because the parties have entered into an otherwise lawful contractual agreement." Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 713 F. Supp. 937, 947 (E.D. Va. 1989), aff'd, 903 F.2d 988 (4th Cir. 1990).
VERTICAL RESTRAINTS

2. Exclusive Dealing as Concerted Action

Exclusive dealing or distribution contracts provide either that a dealer will be the sole outlet for a supplier in a given area or that the dealer will only carry the supplier’s products and not those of the supplier’s competitors. Obviously these contracts restrain trade to some extent by limiting the ability of the participants to choose their trading partners. However, because these contracts also have significant potential to enhance efficiency by lowering the transaction costs and uncertainty in relations between suppliers and dealers, they normally are not analyzed under the per se rule.

As the Seventh Circuit has noted, it is plausible to have a Colgate scenario with reference to exclusive dealing: The supplier simply announces and enforces a policy that it will not do business with dealers who handle competing products. However, judging by the cases, it is more common for suppliers and dealers to sign explicit contracts containing these provisions, contracts which some courts have found to constitute concerted action.

Several recent cases relying on Monsanto have found the existence of exclusive contracts to be insufficient evidence of concerted action between the contracting parties. One court relied on the language in Monsanto that a supplier may refuse to deal with whoever it wants, as long as it does so...

236. See Arquit, supra note 10, at 928-31 (describing how exclusive dealing arrangements restrain trade).
237. See 8 Areeda, supra note 10, ¶ 1655c (explaining how use of sole outlets ends competitor free-riding); Blair & Kaserman, supra note 16, at 26, 172-74 (discussing how exclusive dealing and requirements contracts promote efficiency); Arquit, supra note 10, at 928-31 (describing use of exclusive dealing agreement restraints).
238. See Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333 (1961) (contract to take requirements exclusively from one supplier illegal only if substantially lessens competition); Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949) (exclusive contract illegal if forecloses “substantial share” of line of commerce); 8 Areeda, supra note 10, ¶ 1653 (sole outlet agreements covered by rule of reason); Hovenkamp, supra note 13, § 8.12 (most courts of appeals follow Tampa Electric's rule of reason approach).
239. See Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 393 (7th Cir. 1984).

The Third Circuit reached a similar result in Englert v. City of McKeesport, 872 F.2d 1144, 1150-52 (3d Cir.), cert. denied, 493 U.S. 851 (1989). The case is subject to different analysis because one party to the contract was a municipality that passed an ordinance creating an exclusive relationship with a particular contractor. Id. Arguably, this requires no acquiescence in the usual sense on the part of the other party. In addition, this contract might well be exempted from antitrust scrutiny because it involved state action. See, e.g., Town of Hallie v. City of Eau Claire, 471 U.S. 34, 47 (1985) (municipality's anticompetitive acts exempt from antitrust laws where “taken pursuant to a clearly articulated state policy”). However, the court did not rely on the municipal character of the contract, and its language certainly can be read to support the
independently. Another court relied on the fact that the supplier had independent reasons to give its dealer exclusive rights. Two other cases seemed to require that plaintiff establish that the parties to the exclusive distribution contract shared an anticompetitive purpose. These arguments do not support the courts' results.

First, an exclusive dealing contract hardly constitutes independent action. For the reasons detailed in the previous section, contractual provisions should be viewed as direct evidence of concerted action. Moreover, we would expect exclusive arrangements to be the product of bargaining, rather than of unilaterally imposed policies. When given an exclusive territory, a dealer is relieved from intrabrand competition and should be willing to pay in some way for this economic benefit. We would expect the supplier to try to exact some contractual advantage for conferring an exclusive territory. A Colgate-like independent announcement of policy seems less likely in this context than in situations where the supplier is imposing requirements on its dealers that the dealers may find burdensome. Thus, we would expect to find evidence of concerted action in conjunction with such exclusivity arrangements.

The argument that suppliers have independent reasons for creating exclusive dealers proves too much. Suppliers always have plausible legitimate reasons for limiting their distribution chains, which is why courts examine these restraints under the rule of reason. Yet plausible legitimate reasons should not shield an arrangement from any antitrust scrutiny. Moreover, this argument, like the common purpose argument, misconceives "independent" action. As previously noted, no common purpose is needed for vertical parties to act in concert; a mere agreement to act or refrain from acting should be sufficient.

The requirement that the common purpose be illegal suffers from an additional weakness. It seems to be based on Monsanto's requirement of evidence of a "conscious commitment to a common scheme designed to achieve an unlawful objective." As one court argued, since not all exclusive contracts are illegal, they cannot constitute an agreement to achieve the unlawful objective. Yet, in any rule of reason case, the question of

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243. *Ferguson*, 848 F.2d at 981.
244. See *Morgan, Strand, Wheeler & Biggs*, 924 F.2d at 1488 (contract insufficient to show concerted action because not all contracts illegal); *Castelli*, 702 F. Supp. at 1204-05 (plaintiff must show agreement to achieve anticompetitive purpose to support conspiracy claim).
245. See generally Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-59 (1977) (adopting rule of reason for vertical non-price restraints because they allow manufacturers to achieve efficiencies).
whether the agreement is illegal is left to the fact-finder. Given the complexity of rule of reason analysis, the parties often will have trouble determining in advance whether their actions are unlawful. To hold that this uncertainty results in finding that the concerted action requirement is not met would either eliminate all rule of reason cases for lack of concerted action or would graft a new scienter requirement onto Sherman Act civil cases. Nothing in *Monsanto* suggests that the Supreme Court intended either of these outcomes.\(^{248}\)

Finally, the idea that exclusive dealing contracts do not constitute concerted action serves no useful policy.\(^{249}\) This result does not screen out ambiguous cases. Instead, it insulates from antitrust scrutiny cases where either a supplier or a distributor refuses to deal with a potential business partner *because of* an agreement with the potential partner's competitor. Commentators have noted the potential for anticompetitive results from these arrangements.\(^{250}\) The existing screens surely are sufficient protection for their legitimate use.\(^{251}\)

### C. Concerted Action in Suppliers' Distribution Policies

This section addresses cases in which a court failed to find concerted action where suppliers terminated dealers to enforce a price or non-price distribution policy.\(^{252}\) Some of these courts granted summary judgment even though the plaintiff appeared to offer some evidence of concerted action.

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248. Civil cases under the Sherman Act do not require that the defendant actually know that its conduct is illegal. *See* United States v. United States Gypsum Co., 438 U.S. 422, 436 n.13 (1978) (civil violation can be proven by either unlawful purpose or anticompetitive effect). Given the traditional lack of a scienter requirement, the most logical reading of "conscious commitment to a common scheme designed to achieve an unlawful objective" is concerted action to achieve an end, which later is determined to be unlawful. *Monsanto*, 465 U.S. at 364. It seems implausible that the Supreme Court would change the scienter requirement without any discussion or dissent. Nothing in the discussions of *Monsanto*, *Matsushita*, or *Sharp* suggests that the Court believes it did so.

249. *See* 7 AREEDA, *supra* note 4, ¶ 1441h2 (arguing that assessing competitive impact of these contracts best done through substantive rules rather than through determining whether agreement exists).


251. Exclusive distribution contracts are analyzed under the rule of reason. 8 AREEDA, *supra* note 10, ¶ 1653. Exclusive dealing contracts are only illegal if they foreclose a substantial share of the relevant market. Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949).

252. A group of cases that might fall into this category are tying cases, in which the supplier allegedly tries to force a customer to accept a second product or service as a condition for obtaining a more desirable service or product. *E.g.*, Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 16 (1984). Some federal courts have questioned the existence of concerted action in some tying cases arising under Section 1 of the Sherman Act. *E.g.*, Service & Training, Inc. v. Data Gen. Corp., 963 F.2d 680, 686-87 (4th Cir. 1992); City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 650 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 96 (1992); *City of Chanute*, 955 F.2d at 658-59 (Seymour, J., concurring). Because the economic issues underlying these cases really are more akin to monopolization than to other distribution issues, *see* Will v. Comprehensive Ac-
1. Price Restraints

In *Winn v. Edna Hibel Corp.*, the plaintiff was a price-cutting dealer terminated by a manufacturer of collectible artwork. The plaintiff offered evidence that someone acting on behalf of a full-price competitor tape recorded a transaction in which the plaintiff sold one of the manufacturer's collectibles for less than MSRP. The competitor reported the transaction to the manufacturer, which reimbursed the competitor for the cost of the artwork. The manufacturer eventually terminated the plaintiff. The Eleventh Circuit stated that the manufacturer had legitimate interests both in maintaining the integrity of its products by keeping its prices high and in retaining the complaining dealer. It held that the plaintiff's evidence did not exclude the possibility that the manufacturer independently terminated the plaintiff in pursuit of those interests.

The court did not discuss the significance of the manufacturer's reimbursement of the dealer for its espionage, although providing financial rewards for information would seem to be a much greater degree of supplier involvement than merely receiving price complaints. Surely, a jury reasonably could infer that the reimbursement was employing its dealers to monitor adherence to its pricing scheme in ways forbidden by *Parke, Davis* and *Beech-Nut*. The reimbursement simply is inconsistent with a scenario in which the manufacturer independently decided to terminate the plaintiff because of dissatisfaction with the plaintiff's pricing.

Counting Corp., 776 F.2d 665, 669 (7th Cir. 1985) ("Tying is not cooperation among competitors, the focus of § 1, it is aggressive conduct akin to monopolization under § 2 . . . "), cert. denied, 475 U.S. 1129 (1986), I will not address these cases in detail. I mention them only to note that Monsanto's effects and the courts' reluctance to find evidence of concerted action extend even further than the cases covered in the text.

253. 858 F.2d 1517 (11th Cir. 1988).
254. *Id.* at 1518.
255. *Id.* at 1519.
256. *Id.* at 1520.
257. *Id.* The validity of the argument that maintaining the integrity of luxury or collector's items justifies resale price maintenance is beyond the scope of this article. However, at first blush, maintaining high prices by creating scarcity seems just the sort of behavior the antitrust laws were supposed to prevent. See Goldberg, *supra* note 133, at 114 (allowing supplier to use high price to signal high quality and thus encourage sales "is not an obviously desirable achievement"). This seems particularly true since some consumers believe that high price is a good indicator of high quality. Robert O. Herrmann, *Consumer Choice in the American Economy* 8, 71 (1988); Brian Sternthal & C. Samuel Craig, *Consumer Behavior: An Information Processing Perspective* 40 (1982); Donald R. Lichtenstein et al., *Price Perceptions and Consumer Shopping Behavior: A Field Study*, 30 J. Marketing Res. 234, 235 (1993). However, some commentators have suggested that decisions by a low-price, low-reputation dealer to carry less-well-known brands because they are carried by a high-reputation dealer is a form of free-riding. See Allison, *supra* note 1, at 132 & n.7 (citing sources).
258. In finding no evidence of concerted action, the court relied on the lack of evidence that the manufacturer either told the dealer to report violations or indicated that it would take action on the basis of such reports. *Winn*, 858 F.2d at 1520-21. Yet surely the reimbursement followed by the termination implies just such an arrangement and could be considered evidence that an agreement already was in place.
In *Cheatham's Furniture v. La-Z-Boy Chair Co.*, the court found no price-fixing conspiracy despite a manufacturer's attempts to embroil the plaintiff in a resale price maintenance scheme. The plaintiff, a terminated dealer, presented evidence that the manufacturer requested that the plaintiff raise its prices so the manufacturer could establish a resale price level that other dealers would follow. The manufacturer told the plaintiff that if it raised its prices, the manufacturer would make sure that other dealers would not undercut it. When the plaintiff refused to raise its prices, the manufacturer terminated it. The court found that, absent evidence of a price agreement between the manufacturer and non-terminated dealers, the manufacturer acted independently. Surely, however, the manufacturer's assurances constitute strong evidence, inconsistent with independent action, that the manufacturer had price agreements with its other dealers.

In *Isaksen v. Vermont Castings, Inc.*, the district court found insufficient evidence of price conspiracy between a manufacturer and a dealer that claimed it was coerced into adhering to the manufacturer's prices. Because the dealer did not explicitly indicate it was acquiescing to the manufacturer's price demands, but merely raised its prices, the court found that it had not met the requirements of *Monsanto*'s footnote nine, which demands that the acquiescence be both sought and received. The Seventh Circuit, per Judge Posner, reversed, properly finding that the district court had misread footnote nine:

If footnote 9 is interpreted this way, . . . a more explicit agreement would be required to establish concerted action under the Sherman Act than to establish a contract enforceable under the Uniform Commercial Code. We imagine that all the court meant was that the mere fact of adherence to suggested retail prices does not establish an agreement to adhere to them [negative citation omitted]. If adherence alone could prove an agreement to adhere, the *Colgate* privilege . . . would be nugatory. Footnote 9 is part of the discussion reaffirming *Colgate* . . . But we do not think the Court intended to go so far as to rule that if a supplier telephones a dealer and tells him, "Raise your price by next Thursday, or I'll ship you defective goods," and the dealer merely grunts, but complies, this is not actionable as an agreement to fix the dealer's resale price. If it were

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260. *Id.* at 571.
261. *Id.* at 572.
262. *Id.* at 571.
263. *Id.* at 572.
266. *Isaken*, 644 F. Supp. at 1100-01; *see also* Hay, *supra* note 187, at 435 (arguing that this is reasonable reading of *Monsanto*).
not, there would be very little left of the rule against vertical price-fixing, which the Court in *Monsanto* decided not to reexamine.\(^2\)\(^6\)\(^7\)

These three cases do not contain any evidence of the kind of genuine non-price concerns that motivate the Supreme Court's continued adherence to *Colgate*. In all three cases, the evidence suggested that the supplier was concerned exclusively with raising the plaintiff's prices. All three suppliers passed the *Colgate* threshold, respectively by paying for information, by promising protection from price competition, and by coercion. These three cases suggest that a number of courts do not believe the *Colgate*-plus doctrine survives *Monsanto*. Yet, as previously noted, *Monsanto* does not overrule *Colgate*-plus.

2. Non-Price Cases

In *Purity Products, Inc. v. Tropicana Products, Inc.*,\(^2\)\(^6\)\(^8\) a distributor claimed that a juice supplier terminated it for failure to adhere to territorial restraints.\(^2\)\(^6\)\(^9\) The distributor presented evidence that the manufacturer had a policy of doing business only with those distributors who agreed to limit sales to retailers in specific territories.\(^2\)\(^7\)\(^0\) To enforce this policy, the manufacturer employed color-coded pallets, investigated high sales volumes by distributors, and used transporters and brokers to detect and report violations.\(^2\)\(^7\)\(^1\) On its face, the case resembles a combination of two cases in which the Supreme Court found sufficient evidence of price-fixing agreements: *Bausch & Lomb*\(^2\)\(^7\)\(^2\) and *Parke, Davis*.\(^2\)\(^7\)\(^3\) However, the district court, in an opinion affirmed by the Fourth Circuit, found the plaintiff's evidence of concerted action insufficient.\(^2\)\(^7\)\(^4\)

In reaching its decision, the district court relied on the absence of evidence that anyone except the manufacturer played an active role in the decision to terminate the plaintiff.\(^2\)\(^7\)\(^5\) This is a remarkable requirement to graft

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\(^2\)\(^6\)\(^9\) *Id.* at 567.

\(^2\)\(^7\)\(^0\) *Id.* at 566-67.

\(^2\)\(^7\)\(^1\) *Id.* at 572-73.


\(^2\)\(^7\)\(^3\) See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 34 (1960) (manufacturer used firms in its distribution chain as agents to inform it of deviations from its suggested prices).

\(^2\)\(^7\)\(^4\) *Purity Products*, 702 F. Supp. at 572-73. The court distinguished *Parke, Davis* because the distributors were "merely" relaying information, not participating in the enforcement scheme. *Id.* at 574. The basis for this distinction is that, in *Parke, Davis*, the distributors were also asked not to do business with noncomplying retailers. *Id.*

\(^2\)\(^7\)\(^5\) *Id.* at 573. The court elaborated:

The purported participation of the routemen and the brokers in detecting and reporting violations of defendants' sales policy does not satisfy the concept of "a meeting of the minds" or "common scheme" to achieve an unlawful end, as required by *Monsanto*. 


onto the element of "concerted action." In Monsanto itself, there was no such evidence; the concerted action that the court upheld was the agreement to fix prices, not the agreement to terminate Spray-Rite. As the Court pointed out, the termination followed naturally from the price-fixing conspiracy: The manufacturer needed to terminate distributors who failed to comply to protect those who did and to set an example for those considering noncompliance. Similarly, in Purity Products, the agreement between the manufacturer and its distributors was to divide territories; the termination of the plaintiff protected those who complied and set an example for those who might not.

In W.A. Stratton Construction v. Butler Manufacturing Co., a manufacturer urged two of its dealers to enter into an agreement dividing territories between them. The dealers disagreed about the proper interpretation of the agreement, and the plaintiff's competitor complained to the manufacturer, which again met with the dealers and hammered out a new agreement. After the competitor complained further about the plaintiff's failure to adhere to the agreement, the manufacturer terminated the plaintiff.

The court stated, in dicta, that the plaintiff probably had presented insufficient evidence of concerted action between the manufacturer and the other dealer. It noted the absence of evidence of any consideration from

Neither an overt nor a tacit understanding or agreement to carry out an illegal scheme existed between the parties.

Id. (citation omitted). The Fourth Circuit's endorsement of Purity Products' insistence on dealer involvement in termination is particularly ironic given its view of the dealer coercion cases discussed in the Introduction and in part IV.D infra. On the one hand, Purity Products suggests that dealer terminations in support of manufacturer-imposed restraints will not be considered concerted action because the dealers are unlikely to participate in the termination decision except by complaining, which is protected activity under Monsanto. On the other hand, cases like Garment District hold that if a termination decision is dictated by threats from a powerful dealer—surely the type of "involvement" Purity Products suggests is crucial—the manufacturer's decision to "choose" one dealer over another also is an independent decision. See infra text accompanying notes 294-305. In fact, it is very difficult to imagine any scenario in which the Fourth Circuit would find a dealer termination decision to have been the product of "concerted action."


277. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 767 (1984). This is not to say that there need be no causal link at all between the termination and the conspiracy, just that it normally will be easy to find. 7 Areeda, supra note 4, ¶ 1465b. If, for example, the termination precedes the formation of a price-fixing conspiracy, obviously the causal link is lacking and a price-fixing claim should fail.


279. Id. at *7-8.

280. Id. at *8-12.

281. Id. at *12-13.

282. The plaintiff had claimed only that the agreement was a per se illegal horizontal territorial restriction. Id. at *14. The court held that the restraint was vertical, not horizontal. Id. at *19-24.

283. Id. at *16 n.5, *26, *28.
the competing dealer to the manufacturer for termination of the plaintiff.284 The court viewed the agreements between the two dealers as primarily vertical because of the manufacturer's involvement in the negotiations and the existence prior to the agreements of some limited imposition of territories by the manufacturer.285 Remarkably, however, it failed to consider whether the manufacturer's involvement in the contracting process was evidence that it was a participant in the agreements between the two dealers that all the parties acknowledged.

The requirement of consideration seems strange. If a manufacturer terminates a dealer for failure to comply with a territorial restraint agreement, why should some further involvement of the complying dealer be necessary? Again, Monsanto only requires evidence of a causal link between the termination and the agreement, not evidence that all parties to the conspiracy participated actively in every step.

What these cases have in common is their use of Monsanto to add to the plaintiff's burden in concerted action cases. Neither requirement created by these cases—consideration and an active role by the dealer in its competitor's termination—is actually found in Monsanto. Furthermore, although such evidence would be helpful to plaintiffs in vertical restraint cases, requiring it does not further the policy behind requiring concerted action, especially because neither consideration nor dealer participation in termination would necessarily be present in a typical resale-price-maintenance case.286

One final case involving enforcement of a supplier's policy demonstrates the lower courts' general reluctance to find concerted action. In Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.,287 discount dealers alleged that a furniture manufacturer terminated them pursuant to a vertical non-price conspiracy to eliminate mail-order sales.288 Their evidence demonstrated that the manufacturer had a policy against telephone and mail-order sales outside a dealer's territory, which it developed in response to dealer complaints and formulated with dealer involvement.289 After the manufacturer announced the plan, some dealers communicated their

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284. Id. at *16 n.5.
285. Id. at *19-24.
286. In both International Logistics Group, Ltd. v. Chrysler Corp., 884 F.2d 904 (6th Cir. 1989), cert. denied, 494 U.S. 1066 (1990), and Advisory Info. & Management Sys. v. Prime Computer, Inc., 598 F. Supp. 76 (M.D. Tenn. 1984), two similarly troubling cases within the Sixth Circuit, courts found that a supplier's non-price restraint was independent because the supplier did not need its dealers' acquiescence to implement its policy. While the plaintiffs in both cases failed to present particularly compelling evidence of concerted action, the language about acquiescence is troubling. Both policies at issue consisted of limits on the ability of dealers to resell the suppliers' products. International Logistics Group, 884 F.2d at 906-07; Advisory Info. & Management Sys., 598 F. Supp. at 82 n.3. Yet logically, resale restraints do require acquiescence to work; the dealers must refrain, for example, from selling outside allotted territories. It is troubling to imagine that the Sixth Circuit might apply the same logic to a price-fixing case, which would involve about the same level of dealer acquiescence.
287. 878 F.2d 801 (4th Cir. 1989).
288. Id. at 802.
289. Id. at 801-03, 805-06.
agreement with the new policy. In addition, some dealers reported the new policy to the plaintiffs' customers, and at least one dealer reported a violation to the manufacturer. The Fourth Circuit found insufficient evidence of concerted action, characterizing the events as an independent decision by the manufacturer to retain many dealers by sacrificing a few.

While the facts suggest that the manufacturer was attempting to address a genuine free-rider problem and would have survived a rule of reason challenge, the concerted action holding seems questionable on two fronts. First, the manufacturer's successful attempts to get dealer assurances seem to comply exactly with the requirements of Monsanto's footnote nine. Second, the dealers' involvement in the enforcement of the policy seems to bring the case within Parke, Davis. Like the other cases discussed in this section, Parkway Gallery shows that courts have used Monsanto—a case designed to protect suppliers from per se liability on questionable price-fixing claims—to prevent non-price rule of reason claims from reaching the jury. Yet these cases nowhere discuss what policies they are attempting to further with their decisions.

D. Concerted Action in Dealers' Coercion of Suppliers

Reported cases reflect that the scenario described in the Introduction to this article is fairly common: A distributor or dealer often tells a supplier that it will reduce or eliminate its business with the supplier unless the supplier stops doing business with a particular rival distributor or dealer. This section will examine the way that courts have treated this upward coercion scenario and will discuss the reasons the scenario should properly be viewed as concerted action.

290. Id. at 802-03.
291. Id. at 803.
292. Id. at 805-06.
293. The manufacturer was responding to complaints by dealers who provided display and sales assistance to customers. Many customers subsequently purchased the manufacturer's furniture by mail-order from the plaintiff at a discounted price. Id. at 801-03.
294. See, e.g., Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564, 573-74 (3d Cir. 1986) (automobile dealers pressuring manufacturer to forego expanding another dealer's product line); National Marine Elec. Dists., Inc. v. Raytheon Co., 778 F.2d 190, 192 (4th Cir. 1985) (electronic parts dealers complaining to manufacturer about mail-order dealer); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 613 (4th Cir. 1985) (evidence that one dealer threatened to stop doing business with supplier if it continued to deal with competitor); Ben Eifman & Son, Inc. v. Criterion Mills, Inc., 774 F. Supp. 683, 684-85 (D. Mass. 1991) (carpet dealer complaining to manufacturer about price-cutting competitor); see also Bailey's, Inc. v. Windsor Am., Inc., 948 F.2d 1018, 1024 (6th Cir. 1991) (evidence showed that supplier was aware of indirect threats when it terminated price-cutting dealer). A similar situation occurs when medical personnel threaten to resign from a hospital staff if the hospital hires or refuses to terminate competitors. See, e.g., Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1443 (9th Cir. 1988) (anesthesiologists threatened to leave hospital due to presence of competing nurse anesthetist); Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278, 282 (4th Cir.) (Motz, J., concurring) (noting evidence that members of medical-dental staff of hospital threatened "mass resignations" if podiatrist given staff privileges), cert. denied, 479 U.S. 972 (1986).
1. Upward Coercion as Independent Action

Several cases that have addressed the upward coercion scenario have failed to find concerted action. The Fourth and Ninth Circuits have provided the most detailed elaborations of this position.

In *Garment District, Inc. v. Belk Stores Services, Inc.*, a clothing manufacturer sold its products both to the plaintiff, a discount clothing store, and to a multi-store retail chain that sold the manufacturer's clothing at two hundred outlets. The chain used the one hundred percent mark-up over wholesale price that the court called the "industry's practice;" the plaintiff only marked up thirty to thirty-five percent. The chain threatened to stop doing business with the manufacturer unless the manufacturer stopped doing business with the plaintiff. The chain backed up its threats by excluding the manufacturer from a trade show and relegating its clothing to the basement. After meetings between representatives of the manufacturer and the chain, the manufacturer terminated the plaintiff, lying about the reason for the termination. It then sent a letter notifying the chain that it had terminated the plaintiff. Later, the chain tried to destroy all copies of the letter. The plaintiff also introduced evidence that the chain previously had convinced the same manufacturer to stop selling to other retailers and that the chain had convinced other manufacturers to stop selling to the plaintiff.

The Fourth Circuit found the plaintiff's evidence—threats, pretextual reasons for termination, and industry practice regarding pricing—insufficient to show that the manufacturer and the chain acted in concert to set prices. The court focused on the lack of evidence that the manufacturer had ever tried to enforce a particular price on one of its dealers, and referred to the manufacturer's decision to terminate a discounter "to avoid losing the business of disgruntled dealers" as a "legitimate, independent reason[ ]" for the termination.

*Garment District* starkly presents the issue of the purpose of the concerted action requirement. The case contains no reference to the existence of free-rider problems or potentially procompetitive, non-price restraints. Indeed, the court specifically refused to consider evidence that the termination

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296. *Id.* at 906-07.
297. *Id.* at 907.
298. *Id.* at 907, 911.
299. *Id.* at 906-07.
300. *Id.* at 907, 911.
303. *Id.* at 908 (citing National Marine Elec. Distribrs., Inc. v. Raytheon Co., 778 F.2d 190, 192 (4th Cir. 1985)).
304. *Id.* at 909.
had actually harmed competition because it believed the plaintiff had offered insufficient evidence of concerted action.\textsuperscript{305} Its statement that saving one dealer at the expense of another is legitimate and independent conduct basically means that no upward coercion case ever can be concerted action.\textsuperscript{306} Why read the concerted action narrowly where there is evidence of harm to competition? Why do upward threats plus acquiescence not equal concerted action?

The Ninth Circuit reached a similar result in \textit{The Jeanery, Inc. v. James Jeans, Inc.}\textsuperscript{307} A manufacturer of a popular brand of jeans suggested retail prices that were twice the wholesale price, but the plaintiff sold the jeans for less, leading the manufacturer to express disapproval.\textsuperscript{308} The manufacturer threatened to stop filling the plaintiff's orders unless it altered its pricing practices.\textsuperscript{309} A competing dealer complained about the price-cutting and threatened to stop purchasing the product unless the manufacturer stopped selling to the plaintiff.\textsuperscript{310} The manufacturer responded that it would "take care of things."\textsuperscript{311} Subsequently, the manufacturer refused to fill the plaintiff's orders until it discussed the plaintiff's pricing practices with the plaintiff's representative.\textsuperscript{312} When the manufacturer then refused to fill an order, the plaintiff sued.\textsuperscript{313}

The court characterized the competing dealer's threat as a "strongly worded complaint," insufficient under \textit{Monsanto} to survive summary judgment.\textsuperscript{314} It characterized the manufacturer's response not as acquiescence to the threat, but merely as an effort to "calm an angry customer."\textsuperscript{315} The court found the manufacturer's tactics not illegal coercion, but rather legitimate

\textsuperscript{305} \textit{Id.} at 910-11.
\textsuperscript{306} Of course, one could read the case narrowly to hold merely that the evidence did not show the dealer threats were sufficiently price related. However, the court's broad language about threats belies that reading. In any event, the combination of industry pricing practices and the absence of non-price restraints that might have demonstrated genuine procompetitive concerns should have constituted sufficient evidence of price concerns to take the case to the jury. Despite the weakness of its logic, at least one other court has followed \textit{Garment District} on this point to find no concerted action in an upward coercion case. Blanton Enters. v. Burger King Corp., 680 F. Supp. 753, 760-61 (D.S.C. 1988); see also Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 663 (7th Cir.) (citing \textit{Garment District} with approval on this point), \textit{cert. denied}, 484 U.S. 977 (1987).
\textsuperscript{307} 849 F.2d 1148 (9th Cir. 1988).
\textsuperscript{308} \textit{Id.} at 1150-51.
\textsuperscript{309} \textit{Id.} at 1159.
\textsuperscript{310} \textit{Id.} at 1150-51.
\textsuperscript{311} \textit{Id.}
\textsuperscript{312} \textit{Id.} at 1151.
\textsuperscript{313} \textit{Id.}
\textsuperscript{314} \textit{Id.} at 1157-59. The court also found no evidence of an agreement on price or price levels as required by \textit{Sharp} for per se treatment. \textit{Id.} at 1160 n.10. This seems strange in light of the industry practice of pricing at twice the wholesale price and the specificity of the complaint by the other dealer: "[W]e've got a guy right across from me that's selling your product for $5.00 off all the time." \textit{Id.} at 1158. The specificity of "$5.00 off" certainly suggested some understanding that the price was supposed to be $5.00 more than plaintiff charged.
\textsuperscript{315} \textit{Id.} at 1158.
pressure to get the plaintiff to sell at MSRP.\textsuperscript{316} Like the Fourth Circuit, the court concluded that the manufacturer had an independent reason for refusing to do business with the plaintiff: avoiding problems with other dealers.\textsuperscript{317}

The court focused its analysis on the lack of evidence of a general price-fixing conspiracy between the manufacturer and its many dealers.\textsuperscript{318} It found significant the absence of evidence that other dealers communicated acquiescence in the manufacturer's prices and that some of these dealers charged less than MSRP.\textsuperscript{319} However, the court's focus here is backward. The alleged conspiracy was not price-fixing arranged by a supplier, but rather a dealer-coerced termination. Here, the dealer's threat constituted a "request" for acquiescence, and arguably, the manufacturer acquiesced when it assured the dealer that it would "take care of" the problem.\textsuperscript{320} The other dealers' low prices did not demonstrate the absence of a price agreement, but instead strengthened the plaintiff's claim by suggesting that the manufacturer did not take its MSRP terribly seriously in the absence of threats from an important dealer. The court made no effort to explain why it was looking for a conspiracy involving all the dealers, rather than just an agreement between the manufacturer and the threat-maker. Like the Fourth Circuit in \textit{Garment District}, the court failed to address the purpose of the concerted action requirement at all.

If these cases are followed everywhere, they will insulate a threatening full-price retailer from any antitrust liability because, even if its supplier responds to its threats, courts will find no concerted action. The rest of this section will demonstrate that this result encourages anticompetitive behavior and extends far beyond anything contemplated by the Supreme Court.

2. Upward Coercion as Concerted Action

Several federal courts have found, or suggested that, the upward coercion scenario constitutes concerted action. Some, including the Third Circuit, have explicitly relied on threats by dealers to overcome the \textit{Monsanto} hurdle.\textsuperscript{321} Both the Eighth and Tenth Circuits have analyzed upward coercion

\textsuperscript{316} \textit{Id.} at 1159.
\textsuperscript{317} \textit{Id.} The court relied on \textit{Sharp}, which it read as holding "that a manufacturer can agree to terminate a price-cutting distributor in response to a complaint from another dealer." \textit{Id.} at 1160. This is a profound misreading of \textit{Sharp}, which only addressed the question of which agreements should be judged under the per se rule, and not whether an agreement was formed. See \textit{Business Elecs. Corp. v. Sharp Elecs. Corp.}, 485 U.S. 717, 720 (1988) ("We granted certiorari to resolve a conflict in the Courts of Appeals regarding the proper dividing line between the rule that vertical price restraints are illegal \textit{per se} and the rule that vertical nonprice restraints are to be judged under the rule of reason.")) (citations omitted).
\textsuperscript{318} \textit{The Jeanery}, 849 F.2d at 1157-60.
\textsuperscript{319} \textit{Id.} at 1160.
\textsuperscript{320} \textit{Id.} at 1163 (Reinhardt, J., dissenting). Whether this exchange was intended to "calm" the dealer, as suggested by the majority, or represented an acquiescence to the threat, as suggested by the dissent, is arguably a jury question. \textit{Id.} at 1163 n.5 (Reinhardt, J., dissenting).
\textsuperscript{321} See \textit{Big Apple BMW, Inc. v. BMW of N. Am., Inc.}, 974 F.2d 1358, 1375-78 (3d Cir. 1992) (evidence of dealer threats sufficient for antitrust liability), \textit{cert. denied}, 113 S. Ct. 1262
situations for unreasonableness, apparently assuming that concerted action was present.  

Other courts have indicated that they would reach similar results, either explicitly in dicta or by distinguishing evidence before them from situations in which threats were made.  This subsection argues that these courts have analyzed the upward coercion scenario correctly.

a) Precedent

The Supreme Court vertical restraint cases do not support the holdings of Garment District and The Jeanery.  Significantly, the Sharp case involved an example of the upward coercion scenario. In Sharp, the Fifth Circuit, after extended discussion, decided that the terminated dealer had produced sufficient evidence of concerted action. The Supreme Court did not question whether concerted action existed in the case and, indeed, seemed to categorize the situation as a vertical agreement. Of course, the manufacturer did not raise the concerted action issue directly with the Court. However, given the Fifth Circuit’s opinion, surely some of the jus-
tices would have raised the issue if it even had occurred to them that the apparent agreement between Sharp and its dealer did not constitute concerted action.\textsuperscript{330}

In addition, as previously noted, in several pre-\textit{Monsanto} cases the Supreme Court found that a supplier's active coercion of a dealer to adhere to a vertical restraint constitutes an agreement within the meaning of Section 1.\textsuperscript{331} Furthermore, as some courts have noted, \textit{Monsanto} itself found that the manufacturer's coercion of certain dealers to adhere to the suggested retail prices constituted direct evidence of a price conspiracy.\textsuperscript{332} As Judge Pos-

\textsuperscript{330} Concededly, the plaintiff in \textit{Sharp} adduced more evidence of concerted action than the simple version of the upward coercion scenario presented in the Introduction. The Fifth Circuit opinion reveals evidence that the manufacturer expressed concern about the plaintiff's prices prior to the other dealer's threats and that the non-price reasons for the termination were pretextual. See \textit{Sharp}, 780 F.2d at 1219 (explaining summary judgment denial). However, it seems unlikely that the \textit{Sharp} plaintiff would have been able to take its case to the jury under the analysis applied either in \textit{The Jeanery} or \textit{Garment District}.

\textsuperscript{331} See supra text accompanying notes 30-32. Some courts have suggested that the coercion cases do not survive \textit{Monsanto}. See Dimidowich v. Bell & Howell, 803 F.2d 1473, 1478 (9th Cir. 1986) (precedential value of coercion cases called in question by \textit{Monsanto}, modified), 810 F.2d 1517 (9th Cir. 1987); Ben Sheftall Distrib. Co. v. Mirta de Perales, Inc., 791 F. Supp. 1575, 1582 (S.D. Ga. 1992) (\textit{Monsanto} may have limited effect of \textit{Parke, Davis} on \textit{Colgate}); Newport Components, Inc. v. NEC Home Elecs. (U.S.A.), Inc., 671 F. Supp. 1525, 1546 (C.D. Cal. 1987) (continuing validity of coercion cases cast in some doubt by \textit{Monsanto}); see also Empire Volkswagen, Inc. v. World-Wide Volkswagen Corp., 627 F. Supp. 1202, 1207 (S.D.N.Y. 1986) (finding supplier's threats and coercive actions insufficient evidence of concerted action), aff'd, 814 F.2d 90 (2d Cir. 1987).


The Dimidowich case relied on a statement by Phillip Areeda that unwilling compliance no longer states a cause of action after \textit{Monsanto}. See Dimidowich, 803 F.2d at 1478 (citing 7 Phillip E. Areeda, AN\textsuperscript{NT}R\textsuperscript{U}ST LAW \textsuperscript{1} 1451 (1986)). However, as his subsequent discussion makes clear, Areeda refers in the cited passage to claims where the only evidence of agreement is a supplier's Colgate-style policy plus the plaintiff's claim that it followed the policy unwillingly. See 7 Areeda, supra note 4, \textsuperscript{1} 1451 (discussing unwilling compliance after \textit{Monsanto}); Isaksen, 825 F.2d at 1164 (Posner, J.) (same). Areeda recognizes that concerted action still arises in situations in which the supplier puts individualized pressure on the dealer and the dealer gives (coerced) acquiescence. 7 Areeda, supra note 4, \textsuperscript{1} 1449-1451; 8 Areeda, supra note 10, \textsuperscript{1} 1630-1631. In any event, as Professor Areeda himself notes, the policy behind \textit{Colgate} does not apply to upward attempts at coercion. See infra text accompanying notes 336-48; 7 Areeda, supra note 4, \textsuperscript{1} 1457.


ner has stated, “A conspiracy is not less sinister because some of its members are intimidated, rather than bribed, into joining it.” As a definitional matter, if downward threats plus acquiescence equal conspiracy, the same should be true for upward threats, unless some policy reason demands treating them differently. The Jeanery suggested that Monsanto foreclosed this position by requiring that the supplier seek and the dealer give acquiescence. However, Monsanto nowhere explicitly foreclosed finding concerted action in upward coercion cases. More importantly, as the next section will show, the policies behind Monsanto suggest that upward coercion is more dangerous to competition and should be easier to attack than downward coercion.

b) Purpose

One of the concerns expressed by the Court in Monsanto was the need to allow the free flow of information within a distribution chain. The Court worried that deterring suppliers from acting on information they receive in the form of complaints would create irrational dislocations in the market. The Jeanery and a number of other cases have characterized upward threats as a form of complaint. This view makes sense if one sees the threat as a statement such as: “In present market conditions, I cannot afford to continue distributing your product. If you do not change the market conditions, I will cease doing business with you.” In response, the manufacturer can terminate a competitor, institute price restraints, negotiate with the threat-maker, or simply ignore the statement altogether. In all cases, the manufacturer has new information that it can use to decide how or whether to reorganize its distribution chain.

However, unlike other complaints, dealer threats are not necessarily purely informational in nature. They may be exertions of market power

333. Isaksen, 825 F.2d at 1163 (7th Cir. 1987).
334. See Gerla, supra note 69, at 14, 15 (arguing that Colgate does not foreclose finding of conspiracy in upward coercion cases); cf. 7 AREEDA, supra note 4, ¶ 1457 (logically, upward and downward coercion cases should be treated alike).
336. Monsanto, 465 U.S. at 763-64.
337. Id.
339. See 7 AREEDA, supra note 4, ¶ 1453c (dealer complaint about competing dealer may merely be stating that the truism that the complainer cannot profitably comply with the manufacturer's desire for certain services, or for prices facilitating costly services, if rival dealers without such services sell the same product for less”); Ned E. Barlas, Dealers Coercing Manufacturers: A Proposal for a Unilateral Antitrust Offense, 137 U. PA. L. REV. 2335, 2355-56 (1989) (arguing that full-price dealers' ultimatums simply communicate that supplier's marketing strategy of including discounters is not working).
340. The Jeanery, 849 F.2d at 1164 (Reinhardt, J., dissenting).
by powerful dealers. Indeed, Phillip Areeda has cited Garment District as an example of a harmful restraint on intrabrand competition caused by an exercise of dealer power. Because of the risk of anticompetitive harm, we should hesitate to follow Garment District and The Jeanery and completely immunize the conduct. After all, threatening a supplier is quite risky for retailers. If a retailer tries to force the supplier to accept supra-competitive pricing, its threats may backfire. The supplier may decide that it can sell more products at the lower competitive retail price and thus may allow the higher priced retailer to stop distributing its products. Given this risk, rational retailers would not attempt to threaten a supplier unless they have some suspicion that they may succeed, either because of their market power or because of the supplier’s indifference to pricing. Thus, once a retailer has made a threat, it seems fair to treat the threat as a sincere attempt to compel the termination of a rival, rather than a mere complaint about the condition of the market and to treat the supplier’s acquiescence as creating concerted action. This approach allows the supplier the opportunity to defend the threat and its consequences by convincing the jury that it acted for reasons other than the threat or, in a rule of reason case, that the agreement aided competition. It also allows the supplier to adjust its distribution system in the event that the “complaints” take the form of threats but does not encourage threats from full-price retailers by completely immunizing their conduct.

More importantly, Monsanto and Sylvania are designed, in part, to give suppliers the ability to organize their distribution systems in a way that maxi-

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341. Of course it is possible to argue that retailers and distributors generally have little market power because of the large numbers of players in the fields and the ease of entry. See supra note 10. If we believe that few dealers have real power, we might worry less about immunizing their conduct. However, small manufacturers might become very reliant on access to a single large dealer, and evidence in the cases suggests that these large dealers are not afraid to take advantage of their position. For example, one case described evidence of a speech by a department store chain executive to a meeting of retailers and garment manufacturers arguing that department stores, to end free-riding, should stop dealing with manufacturers who sold current season fashions to discounters. Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 921-22 (2d Cir. 1985). Another case described evidence that a retailer had announced that it would meet any competitor’s prices. However, when one discounter’s prices became so low they were difficult to meet, the retailer threatened suppliers that it would drop their product lines if they continued to sell to the discounter. Toys “R” Us, Inc. v. R.H. Macy & Co., 728 F. Supp. 230, 231-33 (S.D.N.Y. 1990).

342. Areeda, supra note 38, at 575 n.8.

343. See Jones, supra note 12, at 742-44 (arguing that acquiescence to “harmful threats” should constitute concerted action). Jones proposes a multi-factor test examining market conditions to distinguish threats from simple complaints. Id. at 743. This seems like an unnecessarily complex analysis for the court to undertake at the summary judgment stage. Common sense may be sufficient to make the distinction. If the proposal described in Part VI is adopted, the consequences of finding conspiracy will be somewhat reduced along with the need to be quite so precise in distinguishing threats from complaints.

344. Under the burden-shifting approach proposed in Part VI, even in a price-fixing case, the manufacturer could also try to show that it was attempting to deal with a free-rider problem.
VERTICAL RERAINTS

mizes their ability to compete. To fulfill this purpose, it makes sense to give the suppliers significant leeway to structure these systems. It makes less sense to give leeway to the dealers themselves. Many judges and commentators have noted that actions taken at the direction of dealers are different in kind than those taken by suppliers regulating their distribution chains. In these upwardly motivated cases, we need to worry that the purpose of coercion by a retailer or dealer is to eliminate competition from rivals on its own level. These cases are much closer in structure to horizontal boycotts, which are often subject to per se treatment. To immunize upward coercion cases, while still subjecting supplier-imposed restraints to the rule of reason, stands Sylvania and Monsanto on their heads.

The Jeanery and Garment District allow harm to intrabrand competition yet do not contain evidence that the supplier acted after making an assessment of its own needs, evidence that creates the presumption that the restraint will increase interbrand competition. The approach used in these cases also screens from the jury cases in which the manufacturer's independent reasons for terminating a dealer simply are much less likely to be at issue because strong evidence that the manufacturer is acting in furtherance of its threat-making dealer's interests exists.Upward coercion cases raise the specter of dealer cartels and oligopoly without clear procompetitive advantages.

E. Taming the Wayward Children

Separately, the cases in this part may simply be examples of work by lawyers and judges that is careless or not well reasoned. Together, however, they suggest more than sloppy reading of the Supreme Court's precedents, but rather a general attack on the ability of plaintiffs to survive summary judgment in vertical restraint cases. Judged solely by the facts and holdings of the Supreme Court's vertical concerted action cases, this anti-plaintiff trend is a bit bizarre. Since 1921, every Supreme Court case involving verti-

345. See supra part II.


348. Presumably, if the termination of the price-cutter was clearly in the manufacturer's interests, a mere suggestion or explanation by the other dealer would trigger termination. If the other dealer were forced to resort to threats, it suggests that the manufacturer did not see the termination as clearly furthering any truly independent needs.
cal restraints has found sufficient evidence of concerted action. Yet the lower courts have found in the language of Monsanto and Matsushita potent weapons to use against antitrust plaintiffs.

This turn of events has not been inevitable. As noted previously, it is possible to read Monsanto quite narrowly given its facts. Moreover, in Kodak, the Supreme Court recently indicated that it did not intend Matsushita to establish a new summary judgment standard or to be read broadly: "Matsushita demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." Yet between Monsanto, Matsushita, and the Supreme Court's other recent summary judgment jurisprudence, the lower courts clearly have gotten the message that summary judgment in antitrust cases is a good thing.

To be consistent with the policies of Sylvania and Monsanto, either the Supreme Court or Congress needs to clean up this area of the law. One possibility is simply to abandon as unworkable Monsanto's standards for showing concerted action. If, as Part VI suggests, the per se rule for vertical price-fixing is eliminated, the need to use the concerted action requirement as a screen will be lessened significantly. However, Monsanto is not necessarily unworkable. The Supreme Court could clarify it in ways that will make it work in the fashion suggested in Part III without completely freeing questionable vertical arrangements from any judicial scrutiny.

First, the Court could make clear that the concerted action requirement has little or no role to play in non-price rule of reason cases. Monsanto appears to have been designed to prevent questionable cases from falling into

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349. The last case to find no concerted action was Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921).
350. Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S. Ct. 2072, 2083 (1992). Of course, Matsushita's broad language might well have encouraged the belief that the case was a significant change in summary judgment law. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 599-601 (1986) (White, J., dissenting) ("If the Court does not intend such a pronouncement, it should refrain from using unnecessarily broad and confusing language.").
352. For example, one court explicitly noted that Monsanto and Matsushita represented a withdrawal from an earlier reluctance to grant summary judgment and demonstrated that the Court now freely approves summary treatment in antitrust cases. Texaco Puerto Rico, Inc. v. Medina, 834 F.2d 242, 247 (1st Cir. 1987). This seems to be part of a larger trend toward disfavoring civil plaintiffs in the federal system. See Samuel Issacharoff & George Loewenstein, Second Thoughts About Summary Judgment, 100 YALE L.J. 73, 87-94 (1990) (discussing lower court application of Supreme Court summary judgment holdings); Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 OHIO ST. L.J. 95, 107-08 (1988) (suggesting that recent Supreme Court decisions have eased ability to obtain summary judgment). The trend may predate the 1986 summary judgment cases. See Stephen Calkins, Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System, 74 GEOR. L.J. 1065, 1104, 1130-31, 1137-39 (1986) (discussing results of research project indicating increased use of summary judgment in antitrust area).
353. See Burns, supra note 95, at 38-39 (suggesting abandonment of Colgate distinction).
the unforgiving domain of the per se rule. Matsushita was also a per se case. Although courts regularly apply these precedents in non-price cases, rule of reason defendants have less to fear from a jury because the plaintiff must prove not only that the defendants conspired, but also that the conspiracy actually harmed competition. Given this additional burden on the plaintiff, treating a dealer’s acquiescence in its supplier’s non-price policies as concerted action should not unduly deter procompetitive conduct. Thus, worrying about the concerted action requirement in non-price cases makes little sense.

Second, the Court could make clear what the Monsanto standard means. Part III argued that Monsanto stands for the idea that the plaintiff must demonstrate some evidence inconsistent with the defendant’s account of a legitimate reason for termination. If this reading of the case is correct, clear Supreme Court guidance would eliminate much confusion, particularly in the important class of upward coercion cases. If the Court intended some other meaning, it would be helpful to have a more precise elaboration of the relevant standards.

The courts in many of the cases discussed in this Part appear very quick to expand the concerted action requirement to eliminate any antitrust scrutiny of vertical restraints. These courts may well believe that vertical restraints are generally harmless and therefore may want to limit the harms they believe are caused by the continued existence of the per se rule for price fixing. Part V develops reasons for the continued heightened scrutiny of vertical price restraints, and Part VI lays out a test that limits the harshest effects of the per se rule. The proposals in Part VI should limit the perceived need to soften the impact of the per se rule with questionable concerted action decisions.

V. TOWARD A NEW TEST FOR VERTICAL PRICE-FIXING

For more than three-quarters of a century, vertical price restraints have been per se illegal. Since the Supreme Court decided Sylvania in 1977, vertical non-price restraints have been judged under the rule of reason and rarely have been found to be illegal. Discomfort with the stark dichotomy between

354. See supra Part III.D; see also Calkins, supra note 352, at 1094 (discussing Monsanto Court’s effort to limit application of per se rule); Flynn, supra note 10, at 1143 (same); Piraino, supra note 86, at 318-19 (same); Shores, supra note 140, at 311 (same).
356. See 7 Areeda, supra note 4, ¶ 1437 (concerted action rules for price agreements may not be appropriate for non-price restraints); Barbara Ann White, Black and White Thinking in the Gray Areas of Antitrust: The Dismantling of Vertical Restraints Regulation, 60 GEO. WASH. L. REV. 1, 29 (1991) (arguing that most scholars believe that Court did not intend Monsanto standard to apply to non-price restraints); cf. Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380, 402 (7th Cir. 1984) (Swygert, J., dissenting) (questioning application of Colgate in non-price case).
357. For arguments that this type of thinking has governed particular cases, see Baker, supra note 53, at 1498; Blair & Harrison, supra note 98, at 1561; and Calkins, supra note 352, at 1067, 1082, 1094.
the per se rule and the rule of reason undoubtedly animated the Supreme Court's decisions in *Monsanto* and *Sharp*, as well as some of the awkward concerted action cases discussed in Part IV. After all, why should arrangements that have effects similar to those that motivated *Sylvania* fall under the ruthless guillotine of per se analysis?358

Yet in the years since *Sylvania*, the Court has blurred the dichotomy in other areas of antitrust law involving per se rules. This set of precedents, combined with continued critical commentary of current vertical restraints doctrine,359 suggests that a re-examination of the treatment of vertical price-fixing is in order. This Part argues that the existing forms of analysis are inadequate to deal with the issues raised by vertical price-fixing.

A. The Blurring of the Distinctions Between the Per Se Rule and the Rule of Reason

At one time, the Supreme Court could assert with confidence that a number of categories of business behavior—price-fixing, tying,360 and group boycotts361—were per se illegal.362 Business arrangements falling outside of these categories generally were judged under the rule of reason. However, in the past fifteen years, the Supreme Court has retreated from a strong dichotomy between per se and rule of reason analysis.

In a number of important cases, the Court has created an extra layer of judicial examination for all the traditional per se categories except vertical price-fixing. In a process known as the mini-rule of reason, the court examines the alleged illegal arrangement to determine if it looks like the kind of case for which per se treatment is appropriate. For example, in horizontal price-fixing cases, if the defendant can show evidence that the price-fixing arrangement helps make creation of a new product or market possible, or can show that the price-fixing might be justified by professional ethical norms,

358. See Steiner, *supra* note 2, at 144 (noting discomfort of commentators with dichotomy).
360. "Tying" occurs when a seller of goods or services makes the purchase of one good or service conditional on acquiring some more desired good or service. *Hovenkamp, supra* note 13, § 5.4d.
361. "Group boycott" is a shorthand phrase used to describe a business arrangement in which a group of firms jointly refuses to do business with another firm or firms, either completely or under certain conditions. Several kinds of patterns are characterized as boycotts. See FTC v. Superior Court Trial Lawyers Ass'n, 110 S. Ct. 768, 770 (1990) (competitors agree not to do business unless they receive a particular price); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 449 (1986) (competitors agree not to do business with customers except on particular non-price terms); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 286 (1985) (participants in joint venture refuse to let competitor participate); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959) (retailer convinces suppliers not to do business with retailer's competitor); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 461 (1941) (fashion designers refuse to sell to retailers who also sell unauthorized copies of clothing they have designed).
362. The Court also has held horizontal territorial divisions to be per se illegal. *E.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).
the Court will analyze the arrangement under the rule of reason rather than the traditional per se rule.\textsuperscript{363} The Court has developed similar approaches for boycott and tying cases.\textsuperscript{364} For our purposes, the importance of these analyses is the Court's willingness to move away from years of rhetoric about the per se rule by relying on economic theory, despite receiving no new instructions from Congress about the proper interpretation of the Sherman Act.\textsuperscript{365}

Other recent Supreme Court cases have blurred the line between the rule of reason and per se analysis further by creating a tougher version of rule of reason analysis. The Court stated that an antitrust plaintiff need not prove that the defendants had market power in a rule of reason case where the agreement in question is a "naked restraint" on trade—that is, a pure restraint on output not ancillary to any competition-enhancing arrangement.\textsuperscript{366} Once a court characterizes an arrangement as a naked restraint, the defendant bears the burden of producing evidence that the arrangement has significant procompetitive effects.\textsuperscript{367} Naked restraint analysis obviously


\textsuperscript{364}. In boycott cases, if the defendants can show that their arrangement possesses potential to improve competition or that they lack market power, they may be entitled to rule of reason analysis. Northwest Wholesale Stationers, 472 U.S. at 286. The Court has not made clear precisely which combination of elements is required to distinguish per se from rule of reason treatment. \textit{Id.} at 295, 298; see also \textit{FTC}, 110 S. Ct. at 774-75 (Court refuses to require showing of market power for per se treatment where defendants engaged in boycott to force District of Columbia to pay more for their services).

In a tying case, for a plaintiff to receive the benefits of per se treatment, the plaintiff must show that the defendant has some market power over the product or service it is using as a lever to force purchases of other goods. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 4 (1984). The market power may take the form of a unique product, like a patented good or land, or a market share of more than 30%. \textit{Id.} at 16-18, 26-28. In addition, even in some supposedly per se tying cases, the lower federal courts have allowed a narrow defense: that the tying arrangement was the least restrictive alternative necessary to achieve some procompetitive end. E.g., Mozart v. Mercedes-Benz of N. Am., Inc., 833 F.2d 1342, 1349 (9th Cir. 1987) \textit{cert. denied}, 488 U.S. 870 (1988); Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 828 F.2d 1033, 1040 (4th Cir. 1987), \textit{cert. denied}, 486 U.S. 1017 (1988).

\textsuperscript{365}. E.g., Northwest Wholesale Stationers, 472 U.S. at 295; Broadcast Music, 441 U.S. at 20-23.


The Eleventh Circuit has rejected the reading of \textit{NCAA} advanced here:

In \textit{NCAA}, the fact that the NCAA possessed power in the collegiate sports television market was obvious. The thrust of the Court's discussion... is actually to the effect that where "[a]s a factual matter, it is evident that petitioner does possess market power..." a lengthy economic analysis of market power is unnecessary. DeLong Equip. Co. v. Washington Mills Abrasive Co., 887 F.2d 1499, 1507 n.10 (11th Cir. 1989) (quoting \textit{NCAA}, 468 U.S. at 111).

\textsuperscript{367}. NCAA, 468 U.S. at 113; Areeda, supra note 38, at 578. While the case does not say so explicitly, the structure of Indiana Federation of Dentists suggests that it applies the same burden-shift. \textit{Indiana Fed'n}, 476 U.S. at 459-65.
makes it much easier for plaintiffs to win a limited group of rule of reason cases. Moreover, like the mini-rule of reason cases, these precedents suggest that creating intermediate positions between per se and the rule of reason is well within the bounds of existing case law.

After these cases, vertical restraints remain the only significant area of Section 1 jurisprudence starkly divided into traditional per se and rule of reason analysis. This suggests that the time is ripe for a re-evaluation of the appropriateness of the per se rule for vertical price-fixing. In order to better undertake this evaluation, it is useful to examine the operation of retail markets, which are the setting for many, if not most, vertical restraints cases.

368. The Court has not yet ruled on whether the exceptions to the per se rules it has developed in other areas apply to horizontal territorial divisions. Robert Bork has noted two possible reasons for the retention of the pure per se rule for vertical price-fixing. First, an influential political group, discount retailers, opposes the change. Bork, supra note 16, at xiii. Second, "[i]t may be the case that the Supreme Court is reluctant to change the rule . . . because the justices know that Congress, as presently constituted, would probably react by freezing that misguided doctrine in statutory law." Id.

369. The stare decisis argument in favor of retaining the per se rule for vertical price-fixing goes as follows: The Supreme Court has a long history of treating price and non-price restraints differently. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 500 (1940) ("In general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price."). Per se treatment of vertical price-fixing dates back to Dr. Miles in 1911. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911). Additionally, the per se rule has been reaffirmed repeatedly, even in the new era of antitrust law. See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724, 735-36 (1988) (vertical restraints per se illegal if they contain agreements on price or price levels); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761-62 (1984) (reaffirming per se analysis of vertical price restraints); Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1977) (same).

Moreover, Congress repealed statutory provisions allowing resale price maintenance in 1975. Sylvania, 433 U.S. at 51 n.18. Thus, the argument of implied congressional adoption of per se treatment of vertical price-fixing as part of the Sherman Act is relatively strong. See Monsanto, 465 U.S. at 769 (Brennan, J., concurring) (arguing that Congress has never enacted legislation overruling this interpretation of Sherman Act).

However, as the tampering in other areas suggests, antitrust law is often seen as having an evolving nature that allows the judiciary to continually reassess the suitability of the doctrines it has developed. See, e.g., Baxter, supra note 4, at 670 (explaining that this is exactly what framers of antitrust laws intended). For example, during the 1960s and 1970s, the Court performed a major flip-flop on the treatment of non-price vertical restraints although Congress did not amend the Sherman Act during this period. Compare White Motor Co. v. United States, 372 U.S. 253 (1963) with United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) and Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977). It seems sensible to at least examine whether the jurisprudence of the last 15 years applies to vertical price restraints as well.

Much of the analysis presented in the rest of this section might also suggest a re-evaluation of the benefits of full-blown rule of reason analysis for some non-price vertical restraints. Commentators have suggested a range of other options, from per se illegality, to creating categories of non-price restraints that would receive more searching scrutiny, to simply making these restraints per se legal. E.g. Bork, supra note 16, at 288; Altschuler, supra note 10, at 31-34; Bock, supra note 47, at 136-37; Easterbrook, supra note 4, at 135; Robert H. Heidt, A Redrafted Section I of the Sherman Act, 66 NOTRE DAME L. REV. 603, 604-05 n.12 (1991); Pitofsky, supra note 162, at 28-33; Posner, supra note 11, at 23; Roszkowski, supra note 18, at 135; Steiner, supra note 2, at 146.
B. The Complexity of Retail Markets

The most important characteristic of modern retail markets is the immense amount of product differentiation. "Product differentiation occurs when the offerings of sellers include unique features, even minor ones, that make price-quality comparisons between sellers difficult. When consumers become convinced that two similar products are different, it becomes more feasible for sellers to charge different prices for them." 370

Most consumer goods demonstrate a great deal of product differentiation. 371 Clothing comes in a bewildering array of styles, colors, fabrics, and sizes. 372 A category like "men's shirts" includes subcategories like "dress shirts," "sport shirts," "polo shirts," and "tee shirts," each of which includes items in several materials and different cuts, in hundreds of colors and patterns, and in an array of sizes (which are not uniform across the industry). Even if we define the relevant category narrowly, like men's white cotton medium three-button short-sleeved polo shirts, we still find significant product differentiation. For example, a shopping jaunt through the three department stores in one South Florida shopping mall revealed seventeen different brands of these shirts, four of which had more than one style, ranging in price from $9.99 to $62.50. 373 Studies show that many industries have increased their level of differentiation in recent years. 374 Even the breakfast cereal market, long seen as an example of unnecessary differentiation, 375 has seen an acceleration in the number of new brands introduced. 376

Dealers also try to differentiate themselves by using a variety of product-service packages. 377 When you buy clothing, for example, you can do so at establishments that vary tremendously in terms of the amount and type of information and service they provide, the convenience of their location, the acceptable methods of payment and the availability of credit, their policies about returning unwanted items, and the attractiveness of their displays and other amenities. Within the industry, a number of rough categories of retail-

370. Herrmann, supra note 257, at 91; see also J. Douglas Zona, Substitution Among Imperfect Substitutes, Address Before the American Bar Ass'n Section of Antitrust Law, Oct. 15, 1991, at 2-3 (noting that sellers can increase profits by differentiating products).


373. Janice Clement, Mall Survey (data on file with author).

374. See Pine, supra note 371, at 35-41 (discussing studies of various industries).


376. See Pine, supra note 371, at 40 ("In 1980, only 88 brands were available in the United States; by 1990, 205 brands were being sold.").

377. E.g., Blair & Kaserman, supra note 16, at 36-37; Bork, supra note 16, at 296; Herrmann, supra note 257, at 3.
ers have come into common usage: department stores, specialty stores, discount stores, warehouse clubs, and off-price outlets.

Subcategories exist as well; a retailer may call itself, for example, an "upscale discount store" or even a "moderate-priced department store company specializing in nationally branded and top-quality private label and casual apparel." In addition, consumers may purchase retail products from cata-


379. Department stores traditionally carry large assortments of items, stocking extensive choices of brands, styles, and colors. MICHAEL LEVY & BARTON A. WEITZ, RETAILING MANAGEMENT 43 (1992); Gail Hutchinson Kirby & Rachel Dardis, Research Note: A Pricing Study of Women's Apparel in Off-Price and Department Stores, 62 J. RETAILING 321, 329 (1986). They emphasize attractive store facilities and a variety of services: advice, assistance, delivery, and liberal return policies. LEVY & WEITZ, supra, at 44; Kirby & Dardis, supra, at 329. Indeed, the emphasis on presentation is such that the attorney for the bondholders of one large department store chain wondered whether its new chairman's "nuts-and-bolts approach is right for a retail company where glitz and glamour are necessary parts of the business." Stephanie Strom, Changing the Mood at Macy's, N.Y. TIMES, June 27, 1993, at F8. To cover larger inventories and services, they charge higher prices. HERRMANN, supra note 257, at 83-84. One study found that, on average, prices for women's apparel were 40% higher in department stores than off-price stores. Kirby & Dardis, supra, at 321.

380. Although specialty stores offer a limited range of products and generally have higher prices, they also offer a large assortment of, and more advice and service related to, the particular products they do sell. See HERRMANN, supra note 257, at 4, 83-84; LEVY & WEITZ, supra note 379, at 49 (concentrating on limited merchandise). They also, in effect, offer exclusivity and prestige. See Gretchen Morgenson, Here Come the Cross-Shoppers, FORBES, Dec. 7, 1992, at 90, 93 (selling to young people's egos).

381. Traditional discount stores offer relatively few brands, colors, and styles, proven best sellers, simpler facilities, and no clerk assistance. HERRMANN, supra note 257, at 84; LEVY & WEITZ, supra note 379, at 47.

382. Warehouse clubs sell a limited number of brands of common items in large bulk packages and often limit access to fee-paying members. Anthony Faiola, Food Fight: With Their Bargains in Bulk, Mammoth Warehouse Clubs Are Helping Redefine How We Buy Groceries, MIAMI HERALD, May 10, 1993 (Business Monday Section), at 26, 28; see also LEVY & WEITZ, supra note 379, at 53 (referring to these as "wholesale clubs").


Many off-price stores are not located at major shopping malls, so customers are denied the convenience that malls provide. Id. at 328; AMERICAN APPAREL MFRS. ASS'N, supra note 372, at 29. Recently, however, smaller malls dedicated entirely to off-price stores have sprung up. AMERICAN APPAREL MFRS. ASS'N, supra note 372, at 29.


385. Johnson, supra note 383, at F10. The company refers to its niche as "between upscale discounters and traditional department stores." Id. at F11.
logues or from in-home salespeople. While some customers have strong preferences for one type of shopping experience, retailers of similar products all compete with one another to some extent. As one Kmart manager noted, "Anyone who carries what we carry is our competition."

The widespread incidence of product and service differentiation is, of course, no accident. Current marketing wisdom is that successful companies capture market niches, small sub-markets that appeal to particular groups of consumers. Successful firms survey consumers and keep careful track of how well each item is selling in order to reformat their products to meet particular consumer needs. Thus, to compete, some firms redesign and repackage existing products or services to differentiate them and attract particular groups of consumers, rather than merely figure out how to provide the same products or services at lower prices. As one retailer put it, "The

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387. One survey found that 88% of those participating had shopped in a department store in the previous year, and 86% had shopped in a discount store during the same period. Discount Barriers Crashing Down, supra note 378, at 35. Although this does not indicate that any of these people were regular shoppers at either or both types of establishments, it does suggest that the two types of retailers probably compete to a significant extent.


389. See, e.g., Pine, supra note 371, at 90-93 (discussing replacement of mass producers with niche marketers); Robert T. Davis, Marketing Management: Becoming a Market-Driven Company, in The Portable MBA 174, 178 (Eliza G.C. Collins & Mary Anne Devanna eds., 1990) (population can be divided into subsets which strategist will manipulate); Drew Hyman & John Shingler, The Hierarchy of Consumer Participation as a Blueprint for Segmenting Consumer Strategies, in Am. Council on Consumer Interests, Annual Conference, Proceedings 233 (Mary Carsky ed., 1990) (identifying four types of consumers); Anne Moncreiff Arrarte, Traditional Stores Cutting Prices, Growing Larger, Adding Services, Miami Herald, May 10, 1993 (Business Monday Section), at 27, 29 (supermarket trade representative said finding niche and catering to it "the key" for independent supermarkets); see also Zona, supra note 370, at 2-3 (producers try to improve their market position through product differentiation). One author referred to current successful management systems as ones where managers recognize "that customers can no longer be lumped together in a huge homogeneous market, but are individuals whose individual wants and needs can be ascertained and fulfilled." Pine, supra note 371, at 6.

390. See Davis, supra note 389, at 190 (best managers are "forever in search of additional insights and market changes"); Anne Moncreiff Arrarte, Scent of a Shopper: Store Sniffs Out What You Like, Miami Herald, June 21, 1993 (Neighbors Section), at 26 (discussing the merits of keeping in touch with customer needs); Arrarte, supra note 389, at 27 (emphasizing focus-group studies); Wal-Mart Casts a Shadow of Concern upon P.R. Retailers, Caribbean Bus., July 18, 1991, at B9, B11.

391. See, e.g., William S. Comanor, Vertical Territorial and Customer Restrictions: White Motor and its Aftermath, 81 Harv. L. Rev. 1419, 1423 (1968) (firms have "considerable incentive" to differentiate products to limit substitutability and insulate themselves from price competition); see also Battle of Brands: Who's Winning?, Stores, May 1990, at 77 ("[F]rom the marketer's perspective, brands provide a means of differentiating one's position from competitor's in order to avoid direct price competition at retail.").

For recent real-life accounts of this phenomena, see, e.g., Kirby & Dardis, supra note 379, at 322, 329 (department stores develop private-label brands to avoid competition with off-price outlets for brand name clothing); Edmund L. Andrews, Long-Distance Giants Find Strength Amid Price Wars, N.Y. Times, July 23, 1993, at D1 (biggest long-distance telephone carriers
minute you get overly concerned about only price, it’s the beginning of the end. Even discount stores have to compete on the basis of service and presentation.

The pricing system itself is complex. “In many markets, price dispersion is substantial for identical or similar products.” Obviously full-service retailers and specialty stores generally charge more than off-price retailers and discount stores. But there is no easy relationship between service and price. Studies have found that the same store may employ relatively high prices on one good and relatively low prices on others. Some retailers employ loss leaders—popular goods advertised widely at prices that bring little or no revenue to the retailer—in order to draw people into the store to purchase goods with higher margins, while conveying the impression that the store’s

using “clever marketing gimmicks” in which specific discounts are offset by higher prices elsewhere); Arrarte, supra note 389, at 27 (grocery stores increase floor space to allow more items and give consumers “one-stop shopping”); Stuart Elliott, New! Improved! $100 Million Soap!, N.Y. TIMES, May 25, 1993, at D1, D22 (detergent producers introduce super-concentrated detergents to maximize shelf space in competitive market); see also Elliott, supra, at D1 (household-products market analyst notes that to keep consumers interested, manufacturers have to improve their products on periodic basis); Michael Janofsky, Discount Brands Grab the Spotlight, N.Y. TIMES, Apr. 24, 1993, at 17, 24 (manufacturers enhancing, reformulating, and repackaging traditional products to meet competition from discount brands).

In addition, because cost-cutting often involves unpleasant personnel cuts, managers may prefer other methods of competition. Davis, supra note 389, at 183. This may be particularly true if the labor force is unionized, which may mean that layoffs carry very high transaction costs.

392. Merrill, supra note 384, at C11; see also Davis, supra note 389, at 184 (“the business executive must develop a unique approach, the alternative being reliance upon price concessions”).

393. See Alison Fahey, Off-Price Chains Strike Back at Price Cutters, ADVERTISING AGE, July 16, 1990, at 28 (off-price chains improve facilities to compete with department stores); Johnson, supra note 383, at F10 (discounters likely to change service and store ambiance to meet new competition); Stephanie Strom, Kmart Predicts Profit Drop, Causing Retail Stock Selloff, N.Y. TIMES, June 23, 1993, at C1, C4 (discount stores competing on basis of quality of facilities); Wal-Mart Casts a Shadow, supra note 390, at B11 (Wal-Mart obsessed with customer service).

394. Howard Beales et al., The Efficient Regulation of Consumer Information, 24 J.L. & ECON. 491, 502 (1981); accord Amitai Etzioni, New Thinking About Why We Do the Things We Do, ACROSS THE BOARD, June, 1990, at 58 (discussing how price variations for same product can be explained by socioeconomic theories); Scott Maynes & Terje Assum, Informationally Imperfect Consumer Markets: Empirical Findings and Policy Implications, 16 J. CONSUMER AFF. 62, 73 (1982) (sellers sell high to less knowledgeable consumers and low to knowledgeable consumers); see also John W. Pratt et al., Price Differences in Almost Competitive Markets, 93 Q.J. ECON. 189 (1979) (finding “surprisingly large differences” in prices of 39 goods surveyed). A survey of several South Florida malls revealed some price differentials of over 15% on identical products at different department stores within the same mall. See Clement, supra note 373.

395. See Greg J. Duncan, The Dynamics of Local Markets: A Case Study of Cameras, 15 J. CONSUMER AFFAIRS 64, 72 (1981) (stores were not consistently high priced on all models offered); Maynes & Assum, supra note 394, at 72-74 (study of retailers showed that none offered consistently high or low prices across all varieties). The survey of South Florida stores replicated these results. See Clement, supra note 373.
prices are generally low.\textsuperscript{396} High-price retailers regularly lower prices on items that are not selling fast enough and often hold sales.\textsuperscript{397}

Consumers obviously will have trouble obtaining and processing all the information necessary to do optimal purchasing in the face of highly differentiated products, multiple product-service packages, and regularly fluctuating prices.\textsuperscript{398} Marketing studies suggest that many consumers do relatively little

\textsuperscript{396} E.g., Corey, supra note 98, at 53; Wal-Mart Casts a Shadow, supra note 390, at B10.

\textsuperscript{397} E.g., Kirby & Dardis, supra note 379, at 324-25 (survey of price comparisons); Gerla, supra note 69, at 4; Stephanie Strom, Retailers' Latest Tactic: If It Says $15, It Means $15, N.Y. Times, Sept. 29, 1992, at D1. One study of sales through 1984 found a significant increase in the amount of markdowns used by retailers in the 20-year period ending in 1984. B. Peter Pashigian, Demand Uncertainty and Sales: A Study of Fashion and Markdown Pricing, 78 AM. ECON. REV. 936, 940-41 (1985).

This markdown process can be seen either as adapting prices to the market or as a form of price discrimination. The stores gain higher margins from impatient or fashion-conscious consumers who will buy the product when it initially appears at the upper-end price. They then get successively lower margins as they lower their prices and groups of increasingly price-sensitive or fashion-unconscious people become willing to purchase. \textit{Cf.} Beales et al., supra note 394, at 507-08 ("[F]irm[s] with market power may contrive either price or quality dispersion in order to price-discriminate against consumers with less information or reduced ability to discover the better value."). This process, which operates over the course of a "season" in clothing, is very similar to descriptions of product life cycles for longer-lived products. This suggests that novelty sells products when they are new, and price increasingly sells products as they mature. \textit{See} Davis, supra note 389, at 187-88.

\textsuperscript{398} See Herrmann, supra note 257, at 4; Beales, et al., supra note 394, at 503-09 (describing possible information failures in retail markets); Kirby & Dardis, supra note 379, at 328 ("[c]ustomers incur costs when comparison shopping"); Maynes & Assum, supra note 394, at 65 ("[T]echnical complexity and multi-component nature of product make it difficult to assess both quality and price."). Consumers also may underestimate the value to themselves of obtaining information that is readily available. Beales et al., supra note 394, at 506; \textit{see also} Maynes & Assum, supra note 394, at 80-83 (noting consumers' tendency to underestimate extent of retail price dispersion); William L. Wilkie & Peter R. Dickson, Shopping for Appliances: Consumers' Strategies and Patterns of Information Search, Marketing Science Institute, Report No. 85-108 (1985), at 20 (consumers generally felt little uncertainty at beginning of search process leading to purchase of major appliances). Perhaps as a result, consumers often misidentify which retailers are discounters and which charge full-price. Discount Barriers Crashing Down, supra note 378, at 33. In addition, suppliers and dealers may provide misleading or irrelevant information. \textit{See} Warren S. Grimes, Spiff, Polish, and Consumer Demand Quality: Vertical Price Restraints Revisited, 80 CAL. L. REV. 815, 824 (1992) (advertising that is deceptive may skew consumer choices). One article concluded that "virtually no consumer product market meets the textbook ideal of perfect information and perfect competition." Beales et al., supra note 394, at 512.

The analysis in this article does not attempt to take into account the extent to which consumer tastes and beliefs about product differences are created by advertising. \textit{See} Donald I. Baker, Vertical Restraints in Times of Change: From White to Schwinn to Where?, 44 ANTITRUST L.J. 537, 540 (1975) (effect of merchandising in television age); Stephen J. Schnably, Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood, 45 STAN. L. REV. 347, 388-92 (1993) (discussing effect of advertising on consumers' understanding of themselves). It seems likely that questionable advertising claims are best dealt with outside the antitrust laws. \textit{See generally} Beales et al., supra note 394, at 513-39 (describing use of information remedies as alternatives to regulation to deal with misinformation). However, to the extent that consumers are acting based on questionable information, reliance on the market to provide efficient outcomes is less reasonable.
searching before purchasing even expensive products. The information problem has been exacerbated in recent years by demographic and workplace trends which leave many households with less time to do comparison shopping. Moreover, sellers may lack sufficient incentives to adequately provide this information.

Potential information failures suggest the possibility that some retail markets might not attain competitive equilibria. Similarly, product differ-

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399. One study of purchasers of large appliances found that one-third of the purchasers visited only one store and one-third considered only one brand. Wilkie & Dickson, supra note 398, at 8. Approximately 2.5 stores and brands were surveyed on average. Id. More than half of the purchasers consulted no independent sources of information such as Consumer Reports. Id. The total time spent shopping was also less than might be expected for relatively expensive durable goods. Seven-eighths of those surveyed spent less than eight hours shopping; almost half spent less than two hours. Id. at 11. These results were generally consistent with those of similar studies. Id. at 2.

This does not mean that consumers necessarily have inadequate information when purchasing. They may have prior familiarity with the stores or with the goods in question before starting the "shopping" process, and thus rely on the pre-existing knowledge more than the pre-purchase search. STERNTHAL & CRAIG, supra note 257, at 86; Peter H. Bloch et al., Consumer Search: An Extended Framework, 13 J. Consumer Res. 119 (1986); Wilkie & Dickson, supra note 398, at 11. In addition, those consumers who do obtain good information may have a disproportionate impact on the market by spreading by word of mouth the information they gather. Bloch et al., supra, at 124-25; Hyman & Shingler, supra note 389, at 234-35. However, these data do support the hypothesis that a significant number of consumers are not aware of all their options when they make purchases. The fact that these data were compiled concerning durable goods also suggests that the information situation for less expensive items might well be worse. See Linda K. Zimmerman & Loren V. Geistfeld, Economic Factors Which Influence Consumer Search for Price Information, 18 J. Consumer Aff. 119, 128-29 (evidence that relative size of expenditure increases search efforts). Moreover, some evidence exists that consumers often do not check prices at all before making purchases. STERNTHAL & CRAIG, supra note 257, at 239.

400. See, e.g., Herrmann, supra note 256, at 4-5; Berry, supra note 386, at 58-62 (discussing how increase of women in labor force and more time spent for physical and mental well-being has resulted in less time for comparison shopping); Eugene H. Fram & Joel Axelrod, The Distressed Shopper, AM. DEMOGRAPHICS, Oct. 1990, at 44 (marketing edge may now be to save shoppers' time); Molly O'Neill, Drop the Mop, Bless the Mess: The Decline of Housekeeping, N.Y. TIMES, Apr. 11, 1993, at 1, 13 (discussing loss of available time in modern life); Fred Tasker, Ragnet, MIAMI HERALD, Apr. 29, 1993, at G1 (same). Surveys of consumer behavior confirm the common sense suspicion that time availability is correlated with the amount of effort consumers put into comparison shopping, particularly for non-durable goods. See Sharon E. Beatty & Scott M. Smith, External Search Effort: An Investigation Across Several Product Categories, 14 J. Consumer Res. 83, 91 (1987) (demonstrating time availability is positively correlated with total search effort); Fram & Axelrod, supra, at 45 (indicating families are reluctant to infringe upon quality time by comparison shopping).

401. For example, providing information about a particular type of product creates benefits for competing brands, reducing incentives for any one seller to provide it. See Beales et al., supra note 394, at 503-04 (explaining how individual sellers have little to gain by unilaterally providing positive information about product class or negative information about competing product class). In addition, information provided by sellers may contain exaggeration and omission. See Maynes & Assum, supra note 394, at 65 (stating that net effect of seller control of information was biased and inaccurate information for consumer).

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entiation can yield market power in some circumstances.\textsuperscript{403} Thus, the complexity of these markets may yield some circumstances in which price-fixing can help the players attain monopoly profits.\textsuperscript{404} Although the actual frequency of monopoly profits at either the retailer or supplier level is beyond the scope of this article, the performance of the retail industry in recent years does not suggest that many retailers are making supracompetitive profits.\textsuperscript{405}

Even assuming that most retail prices are at or near those that would occur at competitive equilibria, the difficulty of getting complete information suggests a potential problem in these markets. Recent psychological studies of consumer choices among a bounded set of products reveal that the context in which the choice is made greatly influences decision-making.\textsuperscript{406} More spe-
specifically, an important series of studies by Itamar Simonson and Amos Tversky shows that, if a consumer is choosing between brands X and Y of a product, the presence or absence of a third brand, Z, or of the same brand offered from a different source at a different price, will significantly affect their preferences between X and Y. Indeed, "under certain conditions, the market share of a given brand increases rather than decreases when a new brand is introduced." For example, suppose consumers are presented a choice between two cameras, one of which, X, is priced higher but has nicer features than the other, Y. To begin with, consumers are equally divided between the two; neither is clearly a better option. Now suppose a third camera, Z, is introduced. Z is clearly worse than one but not both of the original two cameras; perhaps Z has the same features as X, but an even higher price. Consumers subsequently will choose the option that appears better than the newcomer more often than they had before, even though the newcomer provides no new information about the value of either of the pre-existing options. In other words, even though they have no new information about whether X or Y is a better buy, the fact that X looks good compared to Z, will make X look good compared to Y. Significant numbers of consumers who originally chose Y over X, will choose X over both Y and Z.

Puto, Market Boundaries and Product Choice: Illustrating Attraction and Substitution Effects, 10 J. CONSUMER RES. 31 (1983) (postulating that new item may increase desirability of similar items); Itamar Simonson, The Influence of Anticipating Regret and Responsibility on Purchase Decisions, 19 J. CONSUMER RES. 105, 117 (1992) (suggesting that concerns about future, regret, and responsibility can influence consumers’ purchase decisions); Itamar Simonson & Russell S. Winer, The Influence of Purchase Quantity and Display Format on Consumer Preference for Variety, 19 J. CONSUMER RES. 133, 137 (1992) (hypothesizing that as number of items purchased on shopping trip increases, consumer is more likely to purchase items he/she does not usually purchase); Amos Tversky & Daniel Kahneman, Loss Aversion in Riskless Choice: A Reference-Dependent Model, 106 Q.J. ECON. 1039, 1040-45 (1991) (considering implications of loss aversion for economic behavior); Amos Tversky & Eldar Shafir, Choice Under Conflict: The Dynamics of Defined Decisions, 3 PSYCHOL. SCI. 358, 358 (1992) (“[P]eople are more likely to defer choice when conflict is high than when it is low”); see also Hugh Phillips & Roy Bradshaw, How Customers Actually Shop: Customer Interaction with the Point of Sale, 35 J. MARKET RES. SOC. 51, 52-53 (1993) (arguing that because customers often make unplanned purchases, their interaction with shopping environment contributes greatly to their decision to buy).

407. Itamar Simonson & Amos Tversky, Choice in Context: Tradeoff Contrast and Extreme

408. Id. at 281. In one real-world example, a retailer introduced a second bread-baking appliance in its catalog at a very high price. This introduction greatly increased the sales of the pre-existing lower priced bread-baker. Id. at 293-94.

409. See id. at 285-88 (describing concept of asymmetric dominance); see also Joel Huber et al., Adding Asymmetrically Dominant Alternatives: Violations of Regularity and the Similarity Hypothesis, 9 J. CONSUMER RES. 90, 91-92 (1982) (adding alternative to choice set can increase probability of choosing item that dominates it); Srinivasan Ratneshwar et al., Toward Understanding the Attraction Effect: The Implications of Product Stimulus, Meaningfulness, and Familiarity, 13 J. CONSUMER RES. 520, 520-21 (1987) (explaining attraction effect and its boundary conditions).
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There are other related context effects. If the new product is clearly
better than one, but not both, of the existing products, consumers will favor
the newcomer over both.410 The introduction of an extreme alternative to
two existing alternatives will cause a significant number of consumers to
switch to the alternative that now appears to be in the middle.411 Simonson
and Tversky conclude that “context effects are both common and robust, rep-
resenting the rule, rather than the exception in choice behavior.”412

Because of the importance of context, and the imperfect dissemination
of information, firms in retail markets may have more to fear from certain
competitors than others.413 A consumer’s awareness of a particular low-
price competitor, for example, may take substantial sales away from a partic-
ular full-price retailer by making that retailer appear to be overpriced. One
recent news story further suggests the validity of context effects in retail
sales. Barneys, a clothing retailer that currently has a store in downtown
Manhattan, prepared to open a large store in midtown Manhattan.414 App-
arently in response, other Manhattan retailers remodeled their facilities and
announced a new emphasis on customer service.415 Several clothing design-
ers reportedly refused to sell to Barneys’ new store.416 “Some designers said
they did not want the store to compete with their own boutiques in the area,
a rather weak excuse, because almost every other large retailer there already
carries their lines. And a few hinted that these retailers pressured them not
to sell to the new Barneys.”417 Although the retailers denied this, they did
plant unflattering speculation about Barneys’ prospects in the ears of inves-
tors and vendors.418 While Barneys’ competitors may or may not be engaged
in upward coercion, the fuss attending the new store suggests the possible
importance of particular retailers to the context of shopping. After all, the
retail clothing market is crowded and the existing Barneys is a fifteen-minute
subway ride from midtown Manhattan stores. Why should the other retailers
care if Barneys opens a new store unless they believe its proximity to their
outlets will change consumer perceptions of their outlets?

Given these context effects, even in a market with several discounters, a
full-price retailer may have incentives to eliminate one particular discounting

410. See Simonson & Tversky, supra note 407, at 293 (suggesting that new product posi-
tioned as clearly superior to another brand is likely to benefit from asymmetric dominance
effect).
411. See id. at 292 (noting that this finding is contrary to intuition); Itamar Simonson,
Choice Based on Reasons: The Case Attraction and Compromise Effects, 16 J. CONSUMER RES.
158, 171-72 (1989) (suggesting that brands can sometimes benefit from being positioned between
alternatives).
412. Simonson & Tversky, supra note 407, at 293.
413. Cf. PINE, supra note 371, at 90-92 (noting how traditional mass production techniques
left market niches of unsatisfied customers that more flexible competitors filled).
415. Id. at D2.
416. Id.
417. Id.
418. Id.
rival or at least to assure that the products the discounter sells do not overlap with its own stock.\textsuperscript{419} Additionally, a supplier, faced with a choice between a large customer and a smaller one, might rationally elect to stick with the larger.\textsuperscript{420} The full-price retailer may not make monopoly profits if it succeeds in limiting the rivalry because higher prices may be necessary to cover its higher costs. However, consumer welfare may be harmed if some consumers, who would have purchased the product at the discounter's lower price, either purchase a less-favored brand or do not purchase at all.

This phenomenon, which we might call "targeted upward coercion," provides a sensible explanation for cases like *The Jeanery* and the Supreme Court's decision in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*\textsuperscript{421} In both of those cases, a higher priced dealer attempted to get suppliers to cut off a discounting rival. In both cases, the rival was in close physical proximity to the complaining dealer, a proximity that may have brought the price differential into the awareness of some significant number of consumers. In both cases, under classical economic theory, it is hard to see what the complaining dealer accomplished: the elimination of one rival from a crowded retail market should have little effect on consumer behavior. Yet the defendants in both cases obviously felt that a low-priced rival in the vicinity was a threat. Like vertical price-fixing agreements, targeted upward coercion might stem from both pro- and anticompetitive concerns. The complaining dealer might be suffering acute free-rider problems because of the proximity of the dis-

\textsuperscript{419} This is particularly true where the removal of a few high-visibility brand names, that consumers expect to see, may have a large effect on the discounter's appeal. See Gerla, *supra* note 69, at 19 (terming removal of high-visibility brands from discounters "devastating"); see also Comanor, *supra* note 23, at 1159 (suggesting similar results when discounter stocks limited number of recognized brands). Interestingly, some models of differentiated markets similarly suggest that market players can be susceptible to anticompetitive activity from rivals who are in proximity with them. See Campbell, *supra* note 403, at 1646-52 (describing impact of geographic and product characteristic proximity).

\textsuperscript{420} Commentators have suggested a large number of reasons that a supplier might accede to dealer pressure. Most obviously, the retailers may have market power. 8 AREEDA, *supra* note 10, \$ 1604; Pitofsky, *supra* note 163, at 20-21 & n.71. A recent survey of suppliers and retailers suggested that power has been shifting to retailers in recent years as the retail market has consolidated. Feigner, *supra* note 214, at 1.

Even if the dealers do not have market power in the traditional sense, the supplier may have reason to acquiesce. This may simply occur because it will make more sales with the larger retailer. See Barlas, *supra* note 339, at 2337, 2352-53; Comanor, *supra* note 23, at 1158-59; Steiner, *supra* note 2, at 172. In addition, the transaction costs of looking for a replacement for the threatening dealer may be high. 8 AREEDA, *supra* note 10, \$ 1604. The supplier may also give in because the reputational value of the larger retailer is important to the supplier's overall sales. This seems a likely issue in cases involving small manufacturers and large retailers in an industry with little brand loyalty. *See id.* (noting small manufacturers' dependence on dealers' willingness to stock product). Finally, Harry Gerla has suggested scenarios in which the suppliers' managers may have incentives to accede to coercion even if it is not in the supplier's long term interest. Gerla, *supra* note 81, at 913-15.

\textsuperscript{421} 359 U.S. 207 (1959).
count free-rider.\textsuperscript{422} Or the complaining dealer might simply be trying to eliminate a rival who, because of proximity and information gaps, makes consumers see the high-priced outlet in a different and unfavorable light. The latter seems a plausible explanation for \textit{The Jeanery}. In \textit{The Jeanery}, the defendants did not raise a free-rider problem.\textsuperscript{423} Additionally, purchasers of jeans do not need extensive pre- and post-sale services,\textsuperscript{424} and the complaining retailer was quoted as saying, "[W]e've got a guy right across from me that's selling your product for $5.00 off all the time."\textsuperscript{425} Thus, in considering the possible harmful effects of price-fixing, we must keep in mind the targeted upward combination scenario.

C. Problems with the Existing Tests

Vertical price-fixing creates analytic difficulties because it has both positive and negative uses. On the one hand, it is an effective tool to stop free-riding. If all dealers adhere to a single pricing scheme, no individual dealer has an incentive to cut back its services since there are no other means to attract the customers of full-service dealers. On the other hand, vertical price fixing can be used to facilitate either supplier or dealer cartels by making it easier for cartel members to detect attempts by renegade participants to deviate from the agreed cartel prices.\textsuperscript{426} This section demonstrates that both the per se rule and the rule of reason are inadequate tools for sorting out the competitive effects of resale price maintenance in light of the complexity of retail markets.

1. Problems with the Per Se Rule

The Supreme Court employs the per se rule when the likelihood of anticompetitive effects from a particular type of transaction is so great that the expense of particularized analysis is unwarranted.\textsuperscript{427} Given this approach,
the existence of plausible procompetitive effects arising from vertical price agreements strongly suggests that per se treatment is inappropriate.428

While the actual frequency of free-riding is unclear, it doubtless occurs sometimes.429 Free-riding probably is most common in complex markets where differentiated products require pre-sale information and common dealer service packages (such as warehouse stores) make provision of that information unlikely. Resale price maintenance provides guaranteed profit margins for dealers. These margins provide incentives to the dealers to employ a variety of services to make the product more attractive to customers.430 In particular, if a supplier faces a free-rider problem in its distribution chain, imposing resale price maintenance immediately eliminates the problem. The low-service dealer should not be able to steal customers from full-service rivals because it lacks any price advantage to help lure away their customers.431

Of course, contractual non-price restraints are a less restrictive way to force distributors to provide services that the supplier sees as important.432 However, commentators have suggested that contractual restraints may be expensive or difficult to monitor.433 A manufacturer may find it easier and

428. See BLAIR & KASERMAN, supra note 16, at 167 ("Judicial expediency . . . does not justify assigning a per se label to the resale price maintenance agreement."); White, supra note 356, at 44 (termining per se rule "too strong" and advocating case-by-case approach); see also 8 AREEDA, supra note 10, ¶ 1628 (defenders of per se rule must deal with fact that vertical price-fixing benefits consumers in "non-trivial" number of cases).

429. See supra text accompanying notes 173-75. See also 8 AREEDA, supra note 10, ¶ 1611 (conceding free-riding exists); Calvani & Berg, supra note 158, at 1182 n.69 (noting evidence of free-riding in furniture and computer sales); GOLDBERG, supra note 133, at 108 n.72 (quoting memo from manufacturer to its dealers detailing free-rider problem); Steiner, supra note 2, at 187 ("There is no doubt that manufacturers encounter free-riding problems.").

430. Warren Grimes has suggested that higher margins give dealers added incentive to provide customers with misleading or irrelevant sales information regarding products that give them the best return. Grimes, supra note 398, at 825-32. But as Grimes admits, retailers always have incentives to push the products with the highest margins, regardless of the existence of price-fixing. Id. at 839. In the absence of price-fixing, suppliers may lower their wholesale prices to give retailers incentives to promote their products, which leads to the same incentives for the retailers. In fact, absent a guarantee that all retail margins are the same, this problem will exist. Thus, it is hard to see that it should affect the antitrust treatment of vertical restraints.

431. See ALLISON, supra note 1, at 133 (asserting that vertical price restraints reduce free-riding in this fashion); GOLDBERG, supra note 133, at 108 (discussing how vertical price restraints squelch free-riders).

432. See 8 AREEDA, supra note 10, ¶ 1602 (describing how suppliers can restrain market by requiring distributors to provide "free" services); Andersen, supra note 112, at 788-89 (arguing that there are seldom sufficient benefits to competition that cannot be achieved by less restrictive means). There also may be more effective ways to eliminate free-riders under some conditions. See BLAIR & KASERMAN, supra note 16, at 41-42 (suggesting superiority of market division to price maintenance when physical commodity involves trade-ins).

433. E.g., BORK, supra note 16, at 291; GOLDBERG, supra note 133, at 107; BENJAMIN KLEIN & KEVIN MURPHY, Vertical Restraints as Contract Enforcement Mechanisms, 31 J.L. & ECON. 265,
cheaper to protect its high-service dealers from price competition than to create a system to check on the service, promotions, and facilities of each of its distributors. Thus, a per se rule may punish suppliers who are merely using the most cost-effective way to encourage their distributors to help them compete effectively.434

Moreover, per se treatment is not required merely because resale price maintenance and upward coercion may be used to facilitate cartels.435 Horizontal collusion by suppliers can be attacked directly. Moreover, other devices that facilitate collusion are not treated as per se illegal.436 Horizontal collusion in retail markets is easy to accomplish. These markets are complex, have low entry barriers, and often include a substantial number of players.437 Suppliers may resist participating in dealer collusion because dealer cartels increase dealer profit margins at the expense of suppliers.438 Although the possibility of cartel facilitation suggests some scrutiny of vertical price-fixing is necessary, there is enough doubt about the frequency of its use for collusive purposes to suggest that per se treatment is unduly harsh.439

**Dr. Miles** rests in part on the Supreme Court’s assertion that it saw no benefits to the manufacturer from a price-fixing arrangement, except the unacceptable benefit of helping its distributors and retailers fix prices.440 Today, the existence of the widespread belief that vertical price-fixing can yield procompetitive benefits,441 at least in limited circumstances, suggests that **Dr. Miles** should be overruled.442


434. See Turner, supra note 43, at 804 (sometimes RPM is only effective device to eliminate free-riders).


436. See HOVENKAMP, supra note 13, §§ 4.2 (discussing legal treatment of cartel facilitating devices).

437. See Arquit, supra note 10, at 927 (describing retailing in many industries); Baxter, supra note 10, at 944, 946-47 (retail markets generally are unconcentrated and have low entry barriers); Springer & Frech, supra note 2, at 434 (noting ease of entry into market and number of retailers).

438. See BORK, supra note 16, at 33, 290 (criticizing assumption that suppliers have same interest as dealers in maintaining cartel); Arquit, supra note 10, at 927 (manufacturer will not willingly participate in dealer cartels for this reason); Baxter, supra note 10, at 945 (suppliers likely to resist collection of monopoly rents by retailers); see also Goldberg, supra note 133, at 112 (arguing that retailers’ ability to coerce suppliers has declined “in the last generation”).

439. See 8 AREEDA, supra note 10, ¶ 1604 (arguing that concern about dealer’s power does not itself support per se rule).


441. See Comanor, supra note 40, at 990 (acknowledging that free-riding analysis of vertical restraints has become conventional wisdom).

442. A few commentators have suggested that vertical restraints can lead to the production of unnecessary or inefficient dealer services. See, e.g., 8 AREEDA, supra note 10, ¶¶ 1611, 1631
2. Problems with the Rule of Reason

Many commentators who are critical of the application of the per se rule to vertical price-fixing advocate analyzing all vertical restraints, price and non-price alike, under the rule of reason.\textsuperscript{443} However, this approach also has drawbacks. First, doing rule of reason analysis is extremely complex, particularly in the context of retail markets. Second, the application of the rule of reason in vertical cases virtually guarantees that the defendant will win the case, but there are potential harms that the legal system needs to take seriously that arise from price restraints that do not flow from non-price restraints. Third, empirical evidence of the procompetitive benefits of vertical price-fixing is not strong enough to justify effectively abandoning legal scrutiny altogether.

a) Difficulty of analysis

As noted in Part II, in a full-blown rule of reason case, the plaintiff must prove that the challenged business arrangement is, on balance, anticompetitive in a particular market. The defendant may present a wide range of evidence to demonstrate that the plaintiff’s market definition is incorrect and that the challenged practice has procompetitive effects. The factfinder is then required to determine the market and weigh the procompetitive and anticompetitive effects of the arrangement. The Supreme Court has provided little guidance as to how this process should work in practice.\textsuperscript{444} No one writing in this area appears to have great confidence in the ability of

\begin{footnotesize}

\textsuperscript{444} See, e.g., Altschuler, supra note 10, at 23, 30 (lamenting Sylvania’s limited analysis of what factors are relevant to appraisal of particular restraints under rule of reason); Gerhart, supra note 52, at 420 (characterizing Sylvania’s rule of reason standard as unworkable); Pitofsky, supra note 163, at 11 (predicting that Sylvania’s failure to provide guidance will breed further confusion and litigation).
\end{footnotesize}
factfinders to perform this task in general, let alone in the context of complex retail markets. As one commentator noted, "a 'rule of reason' trial tends to be long, arduous and expensive for the litigants—and not always very predictable in outcome."

First of all, defining markets is a difficult task. In a case like The Jeanery, for example, the factfinder would have to determine the market that includes a particular brand of designer blue jeans. It would have to consider a variety of difficult issues: Are the jeans part of some subclass of jeans (prewashed, straight-legged, button-fly) that has a separate following? Are some other types of casual slacks part of the same market? Do you include brands of jeans that are sold in nearby markets, but not available in the immediate vicinity?

The amount of information that might be relevant to this inquiry is obviously quite large, and much of it will be speculative at best. For example, one method of defining markets, examining cross-elasticity of demand, involves obtaining and analyzing detailed pricing and sales data from a large number of products. Even if the information is available, digesting it is likely to be expensive and time-consuming, perhaps requiring a battle of experts. Furthermore, in a market containing highly differentiated products, the task is made more burdensome because some products are only partial substitutes for others, and determining how much weight to give competition from these sources is problematic.

445. See, e.g., Areeda, supra note 38, at 582 (claiming that juries are asked to quantify harms and benefits without information and analytical tools economist would require); Altshuler, supra note 10, at 30 (citing juries' lack of economic sophistication); Easterbrook, supra note 10, at 11 (noting difficulty of getting 12 jurors to do what 12 economists cannot); Roszkowski, supra note 18, at 156-59 (asserting that rule of reason is incapable of judicial determination); see also Bork, supra note 16, at 37, 125 (referring to attempt to determine net effects of business practices on competition as "futile" and "impossible").

446. Baker, supra note 393, at 541.

447. See, e.g., Heidt, supra note 369, at 607-08 (defining relevant market is "answerable" inquiry); Markovits, supra note 158, at 595 (arguing that case law provides no particular aid in settling market definition disputes); Pitofsky, supra note 10, at 1489 (arguing that defining relevant geographic and product markets is extremely complicated).

448. Cross-elasticity of demand is a measure of the effect of price changes for one good on the quantity demanded of another. United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 400 (1956); Hovenkamp, supra note 13, § 2.2. For arguments that cross-elasticity can be used to define markets, see E.I. duPont de Nemours, 351 U.S. at 380-81; Hovenkamp, supra note 13, § 2.2.

449. Using cross-elasticities is further complicated because in practice they are asymmetrical: The price of one good can significantly affect the quantity purchased of another, while the reverse might not be true. See Stephen E. Lea et al., The Individual in the Economy: A Textbook of Economic Psychology 199 (1984) (discussing effects of price on demand).

450. Zona, supra note 370, at 4. In one real-life example, a major rental car company reportedly maintained that it was gaining market share at a time it was losing customers to rental car companies that did not have airport rental sites. It simply excluded off-airport rentals from its market definition. See Pine, supra note 371, at 60-61 (describing Hertz Corporation's manipulation of market statistics).
Once it defines a market, the factfinder must determine the effects of the challenged arrangement in that market. Again, complicated pricing and sales data might be employed, and experts may be needed to distinguish the effects of the particular restraint from those stemming from other factors. Overall, it is no wonder the process inspires little confidence.

One possible proxy for full-blown rule of reason analysis is simply to focus on the effect of the restraint on output. We know that resale price maintenance yields higher prices and, therefore, movement along the demand curve in the direction of lower output. This result is inefficient unless the provision of services by the newly-recompensed dealers results in an increase in the demand for the product sufficient to overcome the effect of the higher price. Thus, if the supplier's output increases as a result of the restraint, the restraint is efficient. While this process is helpful because it narrows the inquiry and eliminates the need to define markets, assessing a restraint's effect on output remains "a daunting task in the real world." Expert help is again likely to be needed to differentiate output changes caused by economic conditions, seasonal fluctuations, or fashion changes, from output changes caused by the restraint. Moreover, if the restraint is imposed at the beginning of a supplier-dealer relationship, determining its output effect requires the hypothetical determination of what the output would have been were the restraint not in place. Thus, the output proxy does not yield an analysis that gives more confidence in accurate outcomes. Another possible simplifying device, the market power screen, will be discussed in detail in Part VI.A.

Of course, the cynical answer to the concerns about the difficulties of proceeding under the rule of reason is that the real effect of its application is to make it nearly impossible for plaintiffs to win antitrust cases. The uncertainty and costs of putting together a rule of reason case undoubtedly deter some plaintiffs from bringing suit, and, as previously noted, the plaintiff's likelihood of victory appears to be slight. If we believe that there is almost nothing to fear from vertical price-fixing, or that the free-rider effects it may prevent are pervasive, then discouraging plaintiffs may be an acceptable result. Thus, we must next examine the benefits and harms caused by vertical price-fixing.

451. See Blair & Kaserman, supra note 16, at 161, 167 (arguing that output could be method of distinguishing between procompetitive and anticompetitive motivations); Baxter, supra note 10, at 946 (same); Posner, supra note 18, at 19 (suggesting that vertical restraints that increase output should be legal).
453. See Blair & Kaserman, supra note 16, at 167-68 (describing experts' treatment of various economic effects); Easterbrook, supra note 10, at 11 (describing factors economic experts may use to evaluate market).
454. See Jones, supra note 12, at 739 (move to rule of reason would be "tantamount to judicial sanction of" vertical price-fixing).
455. See supra note 10 and accompanying text.
b) Potential harms

As the Supreme Court has noted, and as even strong opponents of per se treatment acknowledge, vertical price restrictions can facilitate cartel pricing at both dealer and supplier levels.\(^4\)\(^5\)\(^6\) Some evidence suggests that much of the price-fixing that occurred during the era of fair trade laws was inspired by pressure from groups of retailers.\(^4\)\(^5\)\(^7\) Moreover, as discussed earlier, targeted upward coercion can remove particular competitors from the market. This can leave consumers with less choice about the product-service mix they wish to purchase and may reduce output.\(^4\)\(^5\)\(^8\) These results alone suggest that a

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Wesley Liebeler has argued that intrabrand dealer cartels should be treated under the rule of reason. He argues that they only affect the prices of one producer and thus cannot increase the market power of an individual product and thereby reduce output. Liebeler, *supra* note 52, at 5-6. However, if retailers handle multiple brands, they would have little reason to attempt to drive up prices of one product if they did not believe it would be profitable to do so, either because the supplier of the product has market power or because they are also trying to raise prices of the competing products. There seems little point in forcing the plaintiff to go through the complex exercise of demonstrating that suppliers or retailers have market power, particularly if a free-riding defense is available to the coerced supplier to cover procompetitive uses of price-fixing.

457. Andersen, *supra* note 112, at 787; see also Bowman, *supra* note 213, at 830-31, 838 (citing druggist industry as example); Carl H. Fulda, *Resale Price Maintenance*, 21 U. Chi. L. Rev. 175, 180 (1954) (citing legislative history of McGuire Act); Goldberg, *supra* note 133, at 113 (retail druggists primary supporters of RPM since early 1900s); Steiner, *supra* note 2, at 152 (explaining passage of fair trade laws due to pressure from dealers). Evidence also suggests that pressure from dealers has led to resale price maintenance in other countries. See 8 Areeda, *supra* note 10, ¶ 1604 (citing events in United Kingdom and Sweden); Bowman, *supra* note 213, at 829 (citing events in Great Britain and France).

458. See *supra* text accompanying notes 421-25. Gerla, *supra* note 69, at 5 (explaining that "discounters enhance consumer sovereignty by providing a choice of product mix and ancillary services"). This is not to say that any exclusion of a potential competitor from a market is harmful. Competition means that some potential players will be excluded from markets because they are not as good at providing products and services as their rivals. Bork, *supra* note 16, at 137. The argument is that a firm's successful exclusion of a rival from a market should be suspect when it succeeds by threats or agreements that are unrelated to any benefit it confers on consumers. Thus, an exclusion to prevent a free-riding problem would be allowed; an exclusion in the absence of free-riding to prevent a group of customers from obtaining a product-service package they prefer would not be allowed. See id. at 332 (making this argument in support of holding in *Klor's*); see also infra part VI.C.

Robert Bork and Thomas Piraino apparently would deal with upward coercion cases by classifying them as horizontal, rather than vertical. Bork, *supra* note 16, at 288; Piraino, *supra* note 89, at 316-17. The difficulty with this position is that it may be hard to determine after the fact whether coercion was applied. See Baker, *supra* note 53, at 1505-06 (using General Motors and Sylvania as examples); Gerhart, *supra* note 52, at 440 (claiming difficulty inherent in approach makes it unworkable). Bork suggests focusing on industries in which almost all suppliers use similar restraints in order to determine dealer coercion. Bork, *supra* note 16, at 292. How-
system that essentially eliminates vertical price-fixing as a viable cause of action should be viewed with suspicion. As one commentator noted, “[t]here is a broad consensus that vertical restraints should be condemned if they directly facilitate horizontal collusion, at either the manufacturer or the dealer level.” Since price restraints are much more likely to do so than non-price restraints, price restraints should be scrutinized more carefully.

More importantly, vertical price-fixing tends to increase prices and therefore tends to reduce output. Of course, as the Supreme Court has noted, although all vertical restraints have the potential to increase prices, price restraints almost always do so. This observation is important in examining suppliers’ use of price restraints to provide sufficient profit margins ever, in the kind of context-specific exclusion described here, the full-price dealer may effectively change the context in which it sells by preventing a rival from obtaining a few specific products that consumers use as modes of comparison. Indeed, for products of which retailers typically carry only a couple of brands, the elimination of one of them from a particular rival might dramatically alter the context. Moreover, even if a dealer attempted to coerce its supplier, the supplier may have procompetitive reasons for agreeing to terminate a free-riding supplier. Thus, keeping the focus on the supplier’s motives seems a better way to handle the issue. In cases where the supplier has no reason but dealer coercion, the restraint will still be disallowed.


In addition, Barbara Ann White has argued that when suppliers use multi-brand retailers, vertical price-fixing will facilitate monopoly pricing because retailers selling all brands have no incentive to try to further interbrand competition. White, supra note 356, at 44-46. If empirically verified, this argument further suggests that per se legality for resale price maintenance is inappropriate. Id. at 47.

460. Arquit, supra note 10, at 926; see also Goldberg, supra note 133, at 117 (widespread agreement regarding illegality of vertical restraints that maintain horizontal cartel).

461. Airtight territorial restraints (those that effectively prevent dealers from selling outside their territories) may have similar effects to vertical price-fixing, and in fact may be worse because they eliminate intrabrand non-price competition. Piraino, supra note 86, at 6-7; Posner, supra note 11, at 9. The analysis here generally deals with other types of non-price restraints like contractual provisions requiring dealers to provide promotion or services. However, it is worth noting that even airtight territorial restrictions do not facilitate retail cartels in the way that price-fixing can.


463. A variety of sources suggest that fair trade leads to higher prices. See 8 AREEDA, supra note 10, ¶ 1604 (“resale price maintenance . . . produces higher consumer prices”); Corey, supra note 98, at 53-54 (asserting that fair trade pricing increased price of appliances and discount housing in post-World War II era); Doherty, supra note 11, at 964-65 n.13 (prices of goods rose under fair trade laws); Fulda, supra note 457, at 195-96 (pharmaceutical prices rose in fair trade areas); see also Bowman, supra note 213, at 849-58 (some but not all studies support this); but see Howard P. Marvel & Stephen McCafferty, The Political Economy of Resale Price Maintenance, 94 J. POL. ECON. 1074, 1075-76 (1986) (higher prices in fair trade due to use of same wholesale prices in jurisdictions with different legal regimes).

William Baxter has argued that the higher margins guaranteed by resale price maintenance may, in some cases, result in lower costs to the manufacturer as the dealer undertakes promotion
to encourage distributors to provide costly services that may improve inter-
brand competition by increasing output. Although in theory different forms
of vertical restraints may be economically equivalent,\textsuperscript{464} in practice, price and
non-price restraints may affect behavior differently. Faced with contractual
obligations to provide these services, but no price protection, distributors
have strong incentives to try to find the least costly way to provide them.\textsuperscript{465}
If freed from price competition, these incentives realistically are not as
strong.\textsuperscript{466} While distributors always have some interest in trying to increase
their profit margins by decreasing the costs of their inputs, events of the re-
cent recession make clear that businesses do not always expend significant
energy trying to cut costs unless they face either stiff competition or the pos-
sibility of losses.\textsuperscript{467}

Although in some cases, price-fixing may be a cheaper way to handle
free-riding than non-price restraints,\textsuperscript{468} the two should not necessarily be
treated interchangeably.\textsuperscript{469} Encouraging manufacturers to use contractual
costs, or may result in lower optimal wholesale prices. Baxter, supra note 10, at 945. However,
in most cases, higher margins almost certainly will increase consumer prices.
\textsuperscript{464} E.g., Blair & Kaserman, supra note 16, at 6; Piraino, supra note 86, at 8.

465. William Comanor has argued that vertical non-price restraints lead to higher prices
than price restraints. Comanor, supra note 23, at 1160. His analysis, however, ignores the incen-
tives retailers have in a competitive market to find cheaper ways to provide services. See 8
Areeda, supra note 10, ¶ 1611 (resale price maintenance may deny some dealers benefits that
come from changing lower prices due to lower costs).

466. See Barrett, supra note 37, at 474-75 (absent price competition, some retailers under
RPM may pocket profit rather than providing pre-sale services). A related argument on behalf
of non-price restraints is that price restraints may force consumers to pay more for services than
they actually value them. See Blair & Harrison, supra note 98, at 1559 (arguing that consumer
surplus may not increase, causing consumers not to value additional services by as much as cost
increases). Allowing dealers to compete in the setting of price levels for required services may
provide the distribution chain with better information about how much consumers value those
services.

467. Business entities, particularly in flush times, have some tendency to overspend on sala-
ries, facilities, and benefits. See, e.g., Gerla, supra note 81, at 896-97 (noting large incidence of
wasteful corporate behavior); Office Costs Are Faulted, N.Y. Times, May 3, 1993, at D5 (Treas-
ury Secretary Bentens criticizes financial institutions for wasteful spending). However, retailers
do institute new cost-cutting measures in response to new or intense competition. See Arrarte,
supra note 389, at 27 (supermarkets “getting more price-competitive” in response to competition
from discounters); Strom, supra note 393, at C1 (lowering of prices by Kmart to compete with
Wal-Mart); Stephanie Strom, Macy’s Plan Would Cut Costs Deeply, N.Y. Times, May 27, 1993,
at D5 (unveiling of Macy’s plan to cut back on personnel and management to emerge from
Chapter 11 status); Stephanie Strom, Signs of Life at Sears Roebuck, N.Y. Times, Oct. 25, 1992,
§ 3, at 1 (discussing Sears’ plan to do away with real estate and financial services to cut costs).

468. See supra text accompanying notes 433-34.

469. There also may be some tendency to overstate a supplier's policing costs. Robert Bork
argues that dealers quickly will provide information to suppliers if rivals breach price or territo-
rial restraints. Bork, supra note 16, at 291. The cases on vertical restraints suggest that dealers
are quick to report any perceived inequity, and so can be counted on to police other restraints as
well. Moreover, the costs of policing price-fixing may not be trivial. See Corey, supra note 96, at
58-59 (discussing high costs involved in General Electric investigation of fair trade violations);
Grimes, supra note 398, at 846-48 (discussing producers’ monitoring and enforcement costs in
administering vertical price restraints). In addition, suppliers may find it difficult to find the

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administering vertical price restraints). In addition, suppliers may find it difficult to find the
non-price restraints to achieve their procompetitive ends may encourage distributors to find ways to provide key services at lower cost, and thus to lower the prices of the products associated with them. Discounters already have had some success creating productive efficiencies in retailing through economies of scale and innovative service methods. Therefore, they should be allowed the opportunity to find efficient ways to meet suppliers' genuine distribution needs. After all, a fundamental premise of the antitrust laws is that the market should set prices and be employed to insure that better services are provided at less cost. Encouraging the use of non-price restraints may lessen the price impact on consumers and result in even greater output. As Robert Pitofsky has pointed out, discounters may "offer lower prices not because they fail to provide services, but because they provide them more efficiently."

c) The uncertain frequency of free-rider problems

Although vertical price-fixing can cause harm to consumer welfare under some circumstances, we might not want to expend resources sorting out the harmful cases if we believe that the practice yields procompetitive effects in most instances. However, the frequency of free-rider problems presents a difficult empirical question. Although there is evidence of some genuine free-rider problems, that they sometimes exist hardly justifies acceptance of a rule that effectively yields no scrutiny for vertical price-fixing. Significantly, a number of commentators have expressed skepticism that free-riding is the explanation for most resale price maintenance. Free-rider problems are more likely to exist in markets involving technologi-

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470. E.g., Subrata N. Chakravati, Planning for the Upturn, FORBES, Dec. 23, 1991, at 49, 49-50; Gerla, supra note 69, at 4-5; Grimes, supra note 398, at 850; Steiner, supra note 2, at 153-55. In Britain, the growth of efficient self-service supermarkets creating significant economies of scale has been attributed to the end of legal resale price maintenance for grocers. Chris Ryan, Trends Past and Present in the Package Holiday Industry, 9 SERV. INDUSTRIES J. 61, 61 (1989).

471. See Pitofsky, supra note 10, at 1493 (arguing against allowing manufacturers to set prices and to decide what mix of products and services will be made available to market).

472. Suppliers may have incentives to utilize price restraints even where non-price restraints are equally or even more efficient. Dealers will obviously prefer having guaranteed margins, and so may seek negotiating concessions in return for non-price restraints. Moreover, if the markets involved are not perfectly competitive, the harms from employing inefficient price restraints may not fall on suppliers, but on consumers.

473. Pitofsky, supra note 10, at 1493.

474. See supra text accompanying notes 172-73.

475. E.g., Barrett, supra note 37, at 472-73; Comanor, supra note 23, at 1157-60; Doherty, supra note 11, at 992; Gerhart, supra note 52, at 431-36; Pitofsky, supra note 10, at 1493; Roszkowski, supra note 18, at 145-47; F.M. Scherer, The Economics of Vertical Restraints, 52 ANTITRUST L.J. 687, 694 (1983); Steiner, supra note 2, at 189.
cally complicated products, such as computers and stereo systems.\textsuperscript{476} Yet many of the cases discussed in Part IV involve simpler products and include no evidence of free-riding.\textsuperscript{477} Many historical examples of resale price maintenance also involved simpler products.\textsuperscript{478} Additionally, some studies of specific instances of resale price maintenance have concluded that the parties did not enter the price-fixing arrangement to deal with free-rider problems.\textsuperscript{479}

\textsuperscript{476} Pitofsky, supra note 163, at 23; see also Hovenkamp, supra note 69, at 1020 (free-riding unlikely explanation for price restraints in markets for fungible products or products involving no point-of-sale service). Added skepticism comes from the press's treatment of resale price maintenance during the fair-trade era. Such noted left-wing organizations as Business Week, The Wall Street Journal, and Fortune attacked resale price maintenance during the 1950s. Fulda, supra note 457, at 186-87. Presumably, they had not yet discovered that price-fixing was helpful to suppliers. See also Hovenkamp, supra note 69, at 1014 (noting that resale price maintenance occurred for 50 years before free-riding explanation was developed).

\textsuperscript{477} E.g., The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1160 (9th Cir. 1988); Garment Dist., Inc. v. Belk Stores Servs., Inc., 799 F.2d 905 (4th Cir. 1986), cert. denied, 486 U.S. 1005 (1988); Purity Prods., Inc. v. Tropicana Prods., Inc., 702 F. Supp. 564, 567 (D. Md. 1988), aff'd, 878 F.2d 1081 (4th Cir. 1989). See also Springer & Frech, supra note 2, at 435 (arguing that number of vertical price-fixing cases do not seem to fit free-rider scenario).

In addition, a study of consumer purchases of major appliances found that about two-thirds of consumers did not rely primarily on information obtained during the search process to determine which items to buy. Wilkie & Dickson, supra note 398, at 23. The study also found that discount stores were much less successful at converting store visits into sales than appliance specialty stores or Sears, which presumably offer considerably more in-store information. Id. at 25. The products that were the subject of the study, refrigerators, washers, etc., are expensive and may have a number of complex distinguishing features. They seem likely subjects of free-rider problems. Yet the data suggests that more people look at the discount stores and then buy at Sears than the other way around.

\textsuperscript{478} See 8 AREEDA, supra note 10, ¶ 1604 (noting occurrence of resale price maintenance with products such as gasoline, paper, and beer); Bowman, supra note 213, at 835 (same); Fulda, supra note 457, at 179 (same); Steiner, supra note 2, at 188 (noting example of resale price maintenance involving low-price, staple items). Of course, even sellers of simple products may provide some information for first-time buyers that can lead to free-riding. See Fabricant, supra note 429, at 106 (describing possible free-riding in retail sales of cosmetics and other inexpensive products).

\textsuperscript{479} See, e.g., Comanor, supra note 23, at 1156 (noting two studies rejecting free-rider explanation); Fulda, supra note 457, at 192-93 (discussing evidence that RPM in drug industry was result of pressure form retail cartels); Stanley I. Ormstein & Dominique M. Hanssens, Resale Price Maintenance: Output Increasing or Restricting: The Case of Distilled Spirits in the United States, 36 J. INT'L ECON. 1, 16 (1987) (study of RPM of retail distilled spirits finds evidence of reduced output inconsistent with free-rider explanation). For example, one result of price-fixing under the fair trade regime was to increase greatly the sales by grocery stores of over-the-counter drugs. Fulda, supra note 457, at 191-92. Grocery stores are not likely to provide presale services for these products.

In addition, Steven Salop surveyed post-Sylvania antitrust cases, and found a relatively small number of cases discussing free-rider issues. Salop, supra note 52, at 168-69. Salop attributed this in part to the discomfort of attorneys and judges with these issues. Id. at 169. Yet given the focus on free-riding in the cases and literature, it is perhaps more plausible to suppose that there simply was little evidence to support such claims.
Proving the frequency of free-riding is, of course, a difficult proposition.\(^4\) As a result, courts and commentators advocating relaxed treatment of resale price maintenance tend to rely entirely on hypothetical discussions of free-riding and often fail to point to any empirical support.\(^8\) A recent Third Circuit case illustrates this point.

In *Big Apple BMW, Inc. v. BMW of North America, Inc.*,\(^7\) unsuccessful applicants for car dealerships claimed that the distributor had refused to do business with them because of pressure from other dealers, who feared price competition from the applicants. Their evidence consisted largely of statements suggesting that the dealers were opposed to the applicants, that the distributor, after initially encouraging the applicants, seemed to cool suddenly, and that the many reasons put forward by the distributor for refusing the applicants were all pretextual.\(^5\) The majority opinion found sufficient evidence of a price-fixing conspiracy to send the case to the jury.\(^6\)

The dissent, focusing on the plausibility of the defendant's free-rider arguments, noted that "the relevant literature" suggested that the distributor "had an interest in protecting its reputation and . . . image," that it "could have feared" free-rider problems, that it "may have acted in a desire to protect the investments of its dealers," and that it "had ample reason" to want to insure that its products were offered with adequate services.\(^6\) The use of hypothetical verbs is significant.\(^5\) Basically, the dissent argued that because the distributor had a legitimate reason, in theory, to refuse to do business with the plaintiffs, the court should ignore the evidence that the theoretical reasons were not the real ones.\(^6\) By reversing the lower court's grant of

\(^4\) Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1697, 1699 n.9 (1986); see also Hovenkamp, *infra* note 199, at 909 (empirical evidence of free-rider problems "has proven elusive").

\(^5\) Peritz, *infra* note 49, at 550-51; Popofsky, *infra* note 52, at 35; Steiner, *infra* note 2, at 152-53. For examples of these hypothetical discussions, see Wesley J. Liebeler, *Resale Price Maintenance and Consumer Welfare*: Business Electronics Corp. v. Sharp Electronics Corp., 36 UCLA L. Rev. 889, 893 (1989) (asserting without authority that non-price vertical restraints "usually adopted" to address free-rider problem); Passell, *infra* note 22, at D2 (quoting Charles Rule, Assistant Attorney General for antitrust during second Reagan administration as saying suppliers who use RPM are "probably" responding to free-riders). Frank Easterbrook has argued that if you locked 12 economists in a room to analyze a given business practice, one of them undoubtedly could develop a model that demonstrated the practice harmed competition under certain conditions. Easterbrook, *infra* note 10, at 11. Equally undoubtedly, of the same 12 economists, at least one would develop a model showing that, under certain assumptions, the practice could do no harm.


\(^7\) Id. at 1365-80.

\(^8\) Id. at 1363-64.

\(^9\) Id. at 1388 (Roth, J., dissenting) (emphasis added).


\(^11\) This position was not without support. As the dissent in *Sharp* pointed out, one can read the majority opinion in that case to hold that rule of reason treatment was appropriate in that case because of plausible free-rider concerns. Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 757 (1988) (Stevens, J., dissenting). Similarly, in a pre-*Sharp* case, Judge Posner...
summary judgment, the majority implicitly rejected this elevation of theory over evidence.488

In sum, there simply is no clear empirical evidence that strongly suggests that suppliers employ resale price maintenance primarily to address free-riding.489 If we move vertical price-fixing entirely into the rule of reason as presently applied, we would effectively shield many price-fixing arrangements from liability based on a theory that may or may not apply in the particular case. Because vertical price-fixing can also facilitate cartels and because it may be an unduly expensive way to address free-rider problems, we need more refined analysis than either the per se rule or the rule of reason can provide.

VI. A NEW MIDDLE GROUND

The complexity of retail markets makes both the per se rule and the wide-ranging rule of reason analysis clumsy tools for assessing vertical price-fixing. What is required is an intermediate methodology that allows the decision-maker to focus on the probable economic effects of price restraints without undertaking analysis that is unduly time-consuming or dauntingly complex.

This part first examines one commonly proposed middle ground, the market power screen, and concludes that in practice this screen will not prove less complex than the rule of reason. It then advocates replacing the traditional forms of Section One analysis with a presumption of illegality that the supplier can overcome by showing that it employed price restraints in the reasonable belief that it was addressing a free-rider or similar problem. The solution proposed relies on the motive of the supplier—that is, whether the supplier genuinely and reasonably believed it was acting to address a free-rider problem. Because this focus on the defendant's motive is not a common part of antitrust analysis, the analysis includes an explanation of why this is a useful technique for analyzing vertical restraints. This part concludes by arguing that the proposed burden-shifting analysis renders unnecessary the questionable distinction the Supreme Court created in Sharp to distinguish price from non-price restraints.

488. Note that this is not a case about what to do when the defendant has mixed motives. Rather, it was a case in which the plaintiff presented some pretty good evidence that the only motive had been to protect prices, and so it was entitled to a jury trial on the question of whether that had really been the motive for its termination.

489. See Page, supra note 67, at 1252 (state of empirical research "inadequate to resolve the dispute" as to most common reasons for using RPM).
A. The Market Power Screen

A number of commentators have suggested that courts require the plaintiffs to make a threshold showing that the defendant has market power before proceeding with a full rule of reason analysis in vertical restraints cases. The idea here is that a vertical restraint should be unable to harm competition by reducing output unless either the supplier or retailers have market power. As noted, many courts do apply this sort of screen in rule of reason cases.

The market power screen, however, is not particularly well tailored to distinguish between benign and harmful uses of price-fixing. The screen yields false negatives in cases where the vertical arrangement is disguising or facilitating horizontal collusion among small competitors. It also yields false negatives in some targeted upward coercion cases. It will yield false positives where a defendant with market power genuinely is using the restraint to deal with a free-rider problem. Of course, the court could deal with false negatives by allowing the plaintiff to demonstrate that the defendant is part of a collusive group that has market power, although this will greatly expand the scope of discovery. A court could deal with false positives during the subsequent rule of reason analysis.

A more significant problem is that a market power screen will require almost as much discovery and economic analysis as the full-blown rule of reason analysis. As noted, most courts require the plaintiff to define the mar-

490. E.g., Peritz, supra note 49, at 576; Posner, supra note 18, at 17-19; Steiner, supra note 2, at 146. Frank Easterbrook has advocated using a series of screens, including market power. Easterbrook, supra note 10, at 14-19; Easterbrook, supra note 4, at 159-68. One of the congressional proposals to address Monsanto and Sharp also included a market power screen. RPM and Telemarketing Fraud Bills Reach Top of Antitrust/Consumer Agenda on Hill, 62 ANTITRUST & TRADE REG. REP. (BNA) 27, 29 (1992).

491. E.g., Klein & Murphy, supra note 433, at 295; Posner, supra note 18, at 17; White, supra note 10, at 760.

492. See supra note 10.

493. This will be particularly true if the only defendant is the supplier. A focus on the supplier's market power would not recognize harm done by coercion by one or more dealers with market power or cases where the supplier was functioning as a coordinator for a dealer cartel. Robinson, supra note 100, at 613. However, even if the court allows the plaintiff to use the market power of the non-defendant dealers to meet the screen, the other problems discussed in the text remain.

494. Arquit, supra note 10, at 923-24; cf. Turner, supra note 43, at 803 (market power has nothing to do with whether non-price vertical restraints are efficient). Moreover, in order to successfully employ resale price maintenance to raise prices for whatever reason, either the supplier or the dealer has to have a little bit of market power. Tesler, supra note 99, at 87.

495. In addition, it would yield false negatives in those cases where the use of resale price maintenance in conjunction with multibrand retailers might yield supracompetitive pricing even without market power.

496. See Arquit, supra note 10, at 923 (defendant's market power "does not necessarily or even commonly suggest" that restraint is anticompetitive).

497. See White, supra note 10, at 761-62 (noting possibility of taking into account market shares of non-parties conspiring with defendants).
ket to establish the defendant’s market power. This will require the wide-ranging discovery and uncertain analysis normally connected with defining a market.

Frank Easterbrook has argued that a market power screen does not require defining markets. However, even if courts can roughly determine the defendant’s market power without precisely defining the relevant market, plaintiffs surely will be entitled to discovery on the wide variety of issues that may be relevant. For example, they should be permitted to show that consumer loyalty to a particular brand creates market power. They likely will be permitted to examine cost and pricing information to determine if the defendant is earning supracompetitive profits. Because the existence of entry barriers can help create market power, plaintiffs should be permitted to inquire into structural industry factors that might demonstrate entry barriers. In addition, since the Supreme Court has recognized in Kodak that information failures can lead to market power, plaintiffs should be entitled to discovery regarding the availability of information in the particular market. After this wide-ranging discovery, the court often will have to determine the market power of a defendant that produces a somewhat differentiated product in a complex market where consumers often lack important information. Thus, the market power screen not only yields time-consuming and expensive discovery, but also leaves the court with difficult analysis to perform at the end. In sum, the market power screen will create little benefit when compared to the full rule of reason analysis.

B. Motive as a Proxy for Market Effect

Determining the precise effect a vertical restraint will have in a complex retail market is quite difficult. To simplify the analytic process, we need to employ some proxy for market effect. Here, we will use the supplier’s motive for terminating the price-cutting dealer.

Motive arguably presents a problematic basis for antitrust liability. After all, some have argued that if a business arrangement improves consumer welfare, why should it matter if the defendant was thinking “bad” thoughts? On the other hand, the legal system presumably should forbid an arrangement that harms competition, even if the defendant did not intend

498. See supra note 10.
499. See supra text accompanying notes 444-47.
500. Easterbrook, supra note 10, at 22.
501. Cf. Popofsky, supra note 52, at 37 (noting that courts have refused to use market power screen to end litigation where product in question was unique, in market that had significant differentiation or barriers to entry, or simply unusual).
503. See supra part V.B.; see also White, supra note 10, at 760-61 (market power is difficult to ascertain).
504. See 7 Areeda, supra note 4, ¶ 1506 (“Discerning intention is no substitute for appraising conduct in the light of antitrust objectives.”).
to harm the market or its rivals.\textsuperscript{505} Moreover, the mental state of wishing ill-fortune on your rivals and total market control for yourself is, supposedly, the mental state that makes the competitive process operate.\textsuperscript{506} Thus, in certain cases, notably those involving allegations of predatory conduct against competitors, focusing on the evil gleam in the defendant's eye may well cause the factfinder mistakenly to see vibrant competitive behavior as undesirable conduct.\textsuperscript{507}

Yet vertical cases present different issues. Suppliers may make decisions about their distribution systems with nasty side glances at their direct competitors, but the looks they reserve for their dealers certainly will not be hostile, even if they are not always entirely loving. Thus, a court examining the suppliers' reasons for imposing or agreeing to a particular restraint is unlikely to confuse competitive fervor with bad intent. Of course, the focus must remain on the motivation of the supplier and not on that of the conspiring rival dealers, who obviously will not wish their competitors well.\textsuperscript{508}

More importantly, as many courts and commentators point out, a supplier is much more likely than a subsequent factfinder to understand the operation of the complex markets in which it trades and to understand the likely effects of the restraints it employs.\textsuperscript{509} Thus, rather than engaging in the difficult, if not impossible, task of determining the cumulative price and output effects of vertical price restraints, courts should defer to the opinions that the supplier itself held \textit{at the time it decided to impose the restraints.}\textsuperscript{510} Given the extensive information that the supplier possesses about the operation of its own business, its own opinion about why it acts provides the best guide to arriving at a useful guess about the true effects of the restraint.\textsuperscript{511} So with

\textsuperscript{505} See Areeda, supra note 38, at 578-79 ("An innocent purpose will not absolve a practice that objectively appears to have adverse and unredeemed effects."). Obviously, specific intent is important in criminal cases. See United States v. United States Gypsum Co., 438 U.S. 422 (1978) (holding that defendant's state of mind is element of criminal antitrust offense).

\textsuperscript{506} 7 \textsc{Areeda, supra note 4, § 1506; Bork, supra note 16, at 38-39.}

\textsuperscript{507} 7 \textsc{Areeda, supra note 4, § 1506.}

\textsuperscript{508} 8 \textsc{Areeda, supra note 10, § 1604.}

\textsuperscript{509} Goldberg, \textit{supra} note 133, at 111; Piraino, \textit{supra} note 89, at 342; see also Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 412 (1911) (Holmes, J., dissenting) ("The Dr. Miles Medical Company knows better than we do what will enable it to do the best business."); North Cent. Watt Count v. Watt Count Eng'g Sys., 678 F. Supp. 1305, 1314 (M.D. Tenn. 1988); Bork, \textit{supra} note 16, at 290 (explaining superior information and insight make suppliers' judgment more accurate than court's assessment); Easterbrook, \textit{supra} note 480, at 1700-01 (courts not capable of identifying "best" structure for particular markets).

\textsuperscript{510} Cf. \textsc{Hovenkamp, supra note 13, § 7.10 (arguing that motive serves as proxy for difficult market assessments in context of assessing reasonableness of trade association's quality standards).}

\textsuperscript{511} See 8 \textsc{Areeda, supra note 10, § 1607 (arguing that business is less likely to err than legal system about efficiency of restraint); Bork, \textit{supra} note 16, at 345 (suggesting that examining firm's intent is useful evidence of market conditions); John J. Tharp, \textit{Raising Rivals' Costs: Of Bottlenecks, Bottled Wine and Bottled Soda}, 84 \textsc{Nw. U. L. Rev.} 321, 373 (1990) ("It seems reasonable to ask businessmen to explain themselves when presented with plausible claims of anticompetitive injury and to defer to them when they provide credible efficiency justifications for their actions."); cf. Areeda, \textit{supra} note 38, at 579 (defendant's motive is useful as indicator
motive as our guide, we turn now to the specifics of a proposed test for the legality of vertical price-fixing.

C. A Burden-Shifting Approach to Analyzing Vertical Price-Fixing

To review, the per se rule provides a conclusive presumption that a restraint is unreasonable, a presumption that allows no defense. The rule of reason is a thorough inquiry into "reasonableness," which allows a defendant to introduce a broad range of information to justify its conduct. When the workings of the two rules are juxtaposed in this fashion, another possible way to determine "unreasonableness" leaps to mind: one could adopt rebuttable presumptions and allow a limited range of defenses. That is, once the plaintiff comes forward with sufficient evidence of the disfavored restraint, the burden would shift to the defendant to demonstrate that it employed the restraint for a legitimate purpose.\(^5\) This section proposes a specific burden-shift and then discusses its advantages.

that "a redeeming virtue might be present" in a particular restraint or "as an aid to characterizing ambiguous conduct as pro- or anticompetitive"); see also Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va. L. Rev. 821, 837-44 (1992) (discussing benefit of relying on party with best access to information).

This approach also should satisfy those who believe that antitrust law needs to take into account the extent to which individual managers' goals might vary from those of the firm or from those postulated by economic theory. E.g., Gerla, supra note 81, at 893-94; Herbert Hovenkamp, *Rationality in Law and Economics*, 60 Geo. Wash. L. Rev. 293, 294 & n.5 (1992). An examination of the actual decision-making process leading to a dealer termination will expose those instances where managers might be acting in a manner inconsistent with economic theory. See Gerla, supra note 81, at 913-16 (explaining managers may capitulate to distribution restraints to further personal interests even where supplier lacks market power).

512. Intermediate positions between the per se rule and the rule of reason, including variations on burden-shifting, have been suggested by other authors. See Baker, supra note 398, at 544-45 (proposing presumptive illegality of restraint where dealer shows any degree of market power); Baxter, supra note 10, at 948-49 (proposing plaintiff attacking vertical restraint have initial burden of proof to show restraint "facilitates the exercise or formation of market power", but burden shifts to defendant to show restraint was a response to market failure such as free-riding, followed by shift back to plaintiff to show bad faith or part of horizontal conspiracy); Cann, supra note 23, at 534-38 (advocating placing burden on supplier to show positive benefits of restraint once restrictions cross market share or similar thresholds); Flynn, supra note 10, at 1143-47 (proposing examination of all evidence with varying levels of presumption of legality depending on type of vertical restraint); Hay, supra note 187, at 441-44 (suggesting intermediate position based on analysis of market structure and supplier's reasons for using restraint); Robinson, supra note 100, at 614-18 (proposing showing of market power and gain by anticompetitive behavior as screen to filter meritless claims; based on filter analysis, court may choose per se or burden shifting approach); Scherer, supra note 475, at 706-07 (advocating rule of reason analysis with presumption of legality except where restraints are widespread).

Wesley Liebeler has proposed using the mini-rule of reason to deal with all vertical cases. Liebeler, supra note 481, at 909-11. In practice, since all vertical restraints have plausible procompetitive effects, all these restraints would probably fall into the rule of reason. See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 294 (1985) (per se rules appropriate were no plausible efficiency arguments); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 19-24 (1979) (applying rule of reason to blanket licensing arrangement in part due to existence of efficiencies). Thus, this proposal, absent the use of other screens, suffers from the same weaknesses as simply applying the rule of reason from the start.
1. The Structure of the Proposal

A rebuttable presumption, or burden shift, to address vertical price restraints might work along the following lines: if a terminated distributor proves that a supplier and competing distributors entered into a vertical price fixing arrangement that resulted in its termination, the defendants could avoid liability only if they established that the supplier genuinely and reasonably believed, at the time it imposed or agreed to the price restraint, that it did so in order to eliminate a free-rider problem. Presumably, the defense also would apply if the defendant could show another procompetitive concern that it was attempting to address with a price restraint. Because the same standards obviously would apply if the government could prove the existence of a price-fixing conspiracy.

514. An additional component that a court or Congress might add to the test is that the supplier must believe that the price restraint was reasonably necessary to defeat the free-rider problem. See Altschuler, supra note 10, at 59-61; (arguing that scope and existence of reasonably necessary test as part of rule of reason still unclear); Areeda, supra note 38, at 580-81; Baker, supra note 398, at 546 (proposing necessity defense in some vertical cases); cf. Commodo- re Business Machs. v. Montgomery Grant, Inc., No. 90 Civ. 7498, 1993 U.S. Dist. LEXIS 262, at *7 (S.D.N.Y. Jan. 13, 1993) (suggesting test of manufacturer's ability to take steps to stem sales from unauthorized dealers was whether actions taken were “reasonably necessary” to prevent unauthorized sales).

This requirement would force a supplier to impose non-price restraints unless it had good reason to believe that they would be too expensive to enforce. Given the advantages of non-price restraints, this requirement makes some economic sense. Moreover, because the common justification for allowing resale price maintenance involves precisely the situation where non-price restraints are inefficient, this requirement has the advantage of tailoring the defense narrowly to suit its purpose. On the other hand, the additional costs of complicating the litigation with this more subtle issue may mean that the requirement is not worth imposing. The mere difference in legal treatment of price and non-price restraints may be enough incentive for suppliers to prefer non-price restraints where they are efficient.

515. See Springer & Frech, supra note 2, at 435-36 (suggesting procompetitive alternative reasons for vertical price-fixing). Some commentators have suggested that one procompetitive use of resale price maintenance is to provide sufficient margins to encourage retailers to locate and promote the supplier's product in the stores in a way that maximizes its impact on consumers. Calvani & Berg, supra note 158, at 1183-84; Victor P. Goldberg, The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services, 79 Nw. U. L. Rev. 736, 738-44 (1984). This use of price-fixing seems suspicious. Fixing the price does not guarantee to the supplier that the margins are sufficient to entice the retailer to push its products. Other suppliers may outbid it. Weak sales in the context of a price fix might mean either that the price was set too high to attract consumers or too low to command retailer attention. A supplier concerned with favorable shelf space, location, and promotions would seem well-advised to contract for them directly. Cf. Pittofsky, supra note 163, at 21 (observing that supplier and dealer sometimes contract for post-sale service and repair). Coca-Cola and Pepsi-Cola, for example, use such agreements. Tharp, supra note 511, at 332-33. If a supplier demonstrated that it genuinely set the price in an attempt to achieve strategic placement in the stores, perhaps the defense should be allowed.

A similar argument can be made in response to image free-riding: the claim that discounters free-ride on the implicit quality claim made when a fancy store sells a particular product. See 8 AREEDA, supra note 10, ¶ 1613 (analyzing quality certification by elite dealers and free-riding off certification by discounters); Fabricant, supra note 429, at 105 (describing free-riding on “quality signalling”); Grimes, supra note 398, at 844-45 (analyzing use of RPM to certify image of product). Again it is unclear why non-price restraints would not meet suppliers'
discussions of the procompetitive effects of vertical restraints have focused primarily on free-riding.\textsuperscript{516} I will confine the rest of this analysis accordingly. If the defendant successfully asserts the defense, the plaintiff could still prevail under a full rule of reason analysis, but it would then have to present the much wider range of evidence required by that analysis.\textsuperscript{517}

Other commentators have made somewhat similar proposals,\textsuperscript{518} although the specific details of this variation are unique. Here, the supplier's genuine distribution needs in this regard. See id. at 845 (stating producer could limit distribution to elite outlets through non-price restraints). After all, suppliers are free to sell only to "quality" retailers. 8 AREEDA, supra note 10, ¶ 1601. Indeed, in the seminal article on free-riding, Lester Tesler argued that "no wise manufacturer would adopt a policy of retail price maintenance merely to get competing stores of different kinds to sell [its] product." Tesler, supra note 99, at 90.

A more sophisticated version of these arguments suggests that retail price maintenance, in conjunction with supplier monitoring of non-price restraints, could limit profits for non-complying retailers by limiting price competition, while providing complying dealers with quasi-rents as incentives. Klein & Murphy, supra note 433, at 268-69. Again, if the supplier could demonstrate that this was its intent, the defense could be allowed.

Another possible use of vertical price-fixing is to facilitate price discrimination. Tesler, supra note 99, at 103-04. The net consumer welfare effects of price discrimination are the subject of some debate. See, e.g., BORK, supra note 16, at 394-98 (arguing price discrimination generally benefits consumers); HOVENKAMP, supra note 13, ¶ 13.5 (noting potential harm from price discrimination). A court applying the burden-shift proposal would have to decide whether to allow the defense for price discrimination.

516. E.g., Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988); Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 55 (1977); Hovenkamp, supra note 173, at 524; Shores, supra note 51, at 400; see also Steiner, supra note 2, at 187-88 (attributing to modern Chicago School theorists view that most vertical restraints are imposed to address free-riding).

517. As the post-Sylvania non-price cases show, the plaintiff is very unlikely to prevail in such a case. See supra text accompanying notes 268-93. Thomas Piraino has suggested that if a supplier successfully asserts the motive defense, its actions become per se legal. Piraino, supra note 86, at 18. This has the advantage of preventing costly and uncertain rule of reason suits, but does forestall the opportunity for dealers to try to show that, for example, the restraint results in unwanted services. Because plaintiffs have so much trouble winning these cases, the difference may not be all that significant.

518. Donald Turner suggested this sort of burden-shift in a fairly general way. Turner, supra note 43, at 804; see also Pitofsky, supra note 10, at 1495 (resale price maintenance might be allowed if defendant could show "extreme examples of free-rider problems"). Phillip Areeda would place the burden on the defendants to disprove a series of structural factors that suggest anticompetitive effects. 8 AREEDA, supra note 10, ¶ 1633. Like the market power screen, this proposal incorporates market analysis and would be quite complex to administer.

The proposal that is closest to mine is that of Thomas Piraino, who developed in a series of articles a screen based on the supplier's motive for terminating the dealer. Piraino, supra note 175, at 319; Piraino, supra note 11, at 728-32; Piraino, supra note 86, at 4; Piraino, supra note 89, at 339-41. However, his analysis focuses on whether the supplier acted independently or as a result of retailer coercion, that is, on determining whether the supplier is acting from its "own purposes," or at the "behest" of retailers. Piraino, supra note 175, at 320; Piraino, supra note 11, at 729; Piraino, supra note 86, at 16; Piraino, supra note 89, at 317, 339, 353. This focus seems inappropriate for at least two reasons. First, the supplier's "independent" motive could be to facilitate a cartel at its own level. Second, the supplier, although terminating a price-cutter at the behest of retailers, could be trying to address a free-rider problem that the retailer's complaints brought to its attention. Piraino would deal with this last problem by allowing the defense if the supplier would have terminated the dealer even in absence of the dealer complaints. Piraino,
affirmative defense has both a subjective and an objective component. The subjective component is that the supplier actually must have believed that it terminated the price-cutting dealer to address a free-rider problem. Defendants should be able to meet the subjective component with contemporaneous internal documentation. The subjective component insures that the mere recitation of "free-riders" as a mantra in litigation will not insulate a supplier from liability for price-fixing. Otherwise, competent counsel might be tempted to assert imaginary free-rider problems, particularly considering the attention the Supreme Court has given to free-riding. Given the empirical uncertainty regarding the frequency of free-riding, to get the benefits of the defense, the defendants will have to show that the free-rider problem was a significant part of the supplier's motivation at the time it terminated the plaintiff. If they cannot show this, it seems reason-

supra note 89, at 360-61. Yet this seems an unduly hypothetical inquiry. The burden-shift proposed here merely asks if the supplier believed it saw a real free-rider problem, a somewhat simpler and more provable question than the one raised by Piraino.

Piraino also employs a number of questionable evidentiary and screening devices. First, Piraino's most recent elaborations of his analysis put the burden on the terminated dealer to prove the supplier's motive. Piraino, supra note 89, at 341-43; Piraino, supra note 11, at 729. This seems to me an unnecessary burden when the supplier has better knowledge of its own motives and easier access to the relevant evidence. See supra text accompanying notes 504-06. Indeed, in an earlier formulation, Piraino placed the burden on the supplier to show independent motivation once the plaintiff had shown a conspiracy to terminate it. Piraino, supra note 175, at 328-29.

In addition, Piraino argues that the relative market power of the parties can be used to sort out the cause of the termination. Piraino, supra note 89, at 362. He also argues that the supplier should only be able to claim the benefits of a positive motive if it can show real interbrand competition, and the existence of a "formal quality program." Piraino, supra note 86, at 23-25. However, bringing analyses of market power and interbrand competition into the equation significantly increases the scope of the inquiry and thus limits administrability, the primary benefit of the motive test. Requiring a "formal quality program" seems a very high burden. Shouldn't it be enough if dealer complaints reveal to a supplier a free-rider problem of which it was previously unaware?

519. See Calvani & Berg, supra note 158, at 1200 (noting that post-Monsanto use of free-rider argument is unsurprising). In one Third Circuit case, for example, beer suppliers claimed they employed exclusive territories to encourage effective promotion of their products, yet the evidence demonstrated that promotions were done at the national, not the local, level, so no free-rider problem could have existed. Fragale & Sons Beverage Co. v. Dill, 760 F.2d 469, 471-72 (3d Cir. 1985). One of my colleagues with experience representing the industry has suggested that in fact some beer promotions are local, so the free-rider problem was not hypothetical. Yet the fact remains that the defendants failed to get evidence of free-riding on local advertising before the court. See Eiberger v. Sony Corp., 622 F.2d 1068, 1079-80 (2d Cir. 1980) (rejecting free-rider claim inconsistent with evidence presented).


521. See 8 AREEDA, supra note 10, ¶ 1602 (cannot assume that challenged restraint actually serves claimed objective). Focusing on motive leaves open the question of what to do in mixed motive cases. In the employment area, the Supreme Court has resolved the mixed motive question by a type of burden shift. Once employees demonstrate that the impermissible motive played some role in their termination, the employer bears the burden of proving that it would have terminated the employee even in the absence of the impermissible motive. Price Waterhouse v. Hopkins, 490 U.S. 228, 244-45 (1989); National Labor Relations Board v. Trans-
able to assume that the supplier was engaged in price-fixing for one of the more sinister reasons. As the Second Circuit has stated, "[t]he failure of a business's management to note at the time what is later claimed by its lawyers to have been a mortal commercial wound weighs heavily against such a claim."

The objective component of this approach is that the supplier's belief must have been reasonable. This component is not intended to be a strict burden, but rather a small hurdle to prevent legally sophisticated defendants from planting a paper record that bears no relationship to reality. My assumption is that this part of the test would be met if the defendants identified a plausible free-rider problem in the relevant distribution chain. This, however, will not always be the case. For example, I suspect that a court would be quite skeptical of a supplier that claimed that it adopted resale price maintenance to insure adequate pre- or post-sale services with regard to the sale of milk.

This standard seems inappropriate in vertical price-fixing. Because complaints about free-rider problems will be entangled in other dealer complaints, particularly those about low prices, leaving the jury to sort out whether the supplier would have terminated in absence of the free-rider problem, or whether it would not have terminated absent the other incentives it had to do so, seems very complicated. In addition, it may invite the type of jury confusion between permissible and impermissible behavior that the Court condemned in Sharp and Monsanto. Instead, I suggest that so long as part of a supplier's motivation is a genuine reasonable concern about free-riding, the law should allow price-fixing. If in fact it acts in part to further a monopoly or cartel, other legal avenues remain to attack those problems.

522. Argus Inc. v. Eastman Kodak Co., 801 F.2d 38, 42 (2d Cir. 1986), cert. denied, 479 U.S. 1088 (1987). The court went on to find as a “telling blow” to a litigant's claim that “contemporary accounts of the reasons for its economic ailments consistently contradict its present position.” Id.; see also Hovenkamp, supra note 69, at 1015 (“after the fact explanations about why condemned conduct was really competitive must be taken with a bag or two of salt”).

523. See Gerhart, supra note 52, at 439 (evidence of subjective motive can be manipulated); Piraino, supra note 86, at 17 (recognizing that evidence may merely reflect counsel's recommendation about what motive should have been).

524. This is similar to Thomas Piraino's suggestion that the product must be one for which quality of service concerns are relevant. Piraino, supra note 86, at 23.

525. See Hovenkamp, supra note 13, § 6.6 (vertical restraints in markets for fungible products should be viewed with more suspicion). Judging by the Antitrust & Trade Regulation Report, dairy products seem to be the subject of a remarkable number of price-fixing conspiracies. See, e.g., Agriculture Dept's Will Debar Dairy that Pledged Guilty to Bid Rigging, 65 ANTITRUST & TRADE REG. REP. (BNA) 263 (1993) (school lunch program milk provider); Dairy Resolves Civil, Criminal Charges of Bid Rigging, Must Pay $4 Million Fine, 63 ANTITRUST & TRADE REG. REP. (BNA) 238 (1992) (conspiracy among competitors supplying milk to schools); Fourth Circuit Upholds Conviction of Co-op for Fixing Prices of Milk, 63 ANTITRUST & TRADE REG. REP. (BNA) 383 (1992) (1400-member cooperative rigged bids for school milk supply); Dairy Resolves ss1 Charges in Four Different Venues, 63 ANTITRUST & TRADE REG. REP. (BNA) 389 (1992) (large dairy supplier involved in four separate conspiracies); Dairy Resolves ss1 Charges in Seven Different Venues, 63 ANTITRUST & TRADE REG. REP. (BNA) 445 (1992) (suppliers allocated school customers).
The focus of the defense must be on the supplier's motivation. Competing dealers will always want to be rid of a price-cutting competitor, so their motivations are poor indicators of whether the restraint provides efficiency gains. As Monsanto suggests, the appropriate focus of the inquiry is not the cacophony of wheedling, suggestion, and complaint that is likely to arise out of the dealers in the normal course of business, but rather the supplier's actions and motivations. The existence of anticompetitive animus among rival dealers reveals nothing about whether the supplier's handling of its distribution chain is efficient.

This approach places the burden on the defendants because the supplier will clearly have better information regarding the nature of its own motives and the location of the evidence that demonstrates those motives. This is an area where history demonstrates that the possibility of anticompetitive activity is not unreasonable. If the supplier cannot demonstrate an acceptable justification for its behavior, it seems more reasonable to assume that it was acting for impermissible reasons than to force the plaintiffs to hypothesize motives and then disprove them.

2. Advantages of the Burden-Shifting Approach

The approach suggested here has a number of advantages over the current modes of analysis and over some of the alternatives that commentators have suggested. First, it focuses narrowly on the relevant questions. Commentators arguing against the per se rule want suppliers to be able to

526. Piraino, supra note 175, at 328-29.
527. White, supra note 10, at 758; see also 7 AREEDA, supra note 4, ¶ 1504 ("There is no reason for the court creatively to imagine possible justifications that the defendants have not adduced.").

Frank Easterbrook has argued that sometimes suppliers don't know the reasons that they apply restraints and thus that forcing them to explain themselves is unfair. Easterbrook, supra note 10, at 5-6. Yet his argument was made in the context of new kinds of restraints. Id. Vertical price-fixing has been around long enough for a number of plausible reasons for its implementation—both good and bad—to develop. A supplier that may be using a price restraint to exercise its market power, or yielding to a retailer cartel, should not be given the same benefit of the doubt as one who is trying an untested form of distribution restraint.

528. Another approach that would narrowly tailor the analysis would be to characterize agreements to terminate price-cutters without free-rider justifications as naked restraints. After all, these agreements are not necessary to the operation of the distribution contract. A litigant would argue that this was similar to the television limitation restrictions at issue in NCAA, which did not contribute to the procompetitive aspects of the other agreements between university athletic programs. NCAA v. Board of Regents, 468 U.S. 85, 117-20 (1984).

However, the Supreme Court, by rejecting the dissent's position in Sharp, has refused to characterize an agreement to eliminate a price-cutting competitor as a naked restraint. See Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 740-45 (1988) (Stevens, J., dissenting) (characterizing agreement at issue as naked restraint). The majority's position is also not unreasonable. One can see the agreement as "ancillary" to the larger distribution agreement because it might have the effect of eliminating free-rider problems that hinder the distribution of the product. Although, as Justice Stevens observed in his Sharp dissent, the elimination of price competition is not necessarily intertwined with the provision of better or more efficient services. Id. at 740 (Stevens, J., dissenting).
deal with free-riders. The burden-shift points the fact-finder precisely at that issue. Furthermore, it artfully deals with the empirical question about the extent of free-riding in the real world. If you believe that most vertical price-fixing attempts to prevent free-riding, then you should be comfortable with the burden-shift because, if you are correct, most resale price arrangements will be allowed. If you believe that vertical price-fixing rarely stems from free-rider problems, you also should be comfortable with the approach, because vertical price-fixing remains presumptively illegal.

Second, the streamlined cause of action will be much simpler to litigate, reducing the burden on courts and litigants. The parties need not adduce evidence related to market power or definition. In addition, fact-finders, who are generally unfamiliar with sophisticated economic tools, are probably better equipped to analyze a supplier’s motive than to determine the net effects on competition required by the rule of reason.

Third, the burden shift should not unduly burden procompetitive behavior. Should a supplier believe in good faith that it needs to set prices to solve a free-rider problem, it merely has to document its decision-making process.

Although the Court’s acceptance of the characterization of vertical price-fixing as a naked restraint would ameliorate some of the same problems as the burden-shift, the contours of the burdens of the parties in a naked restraint case are not yet clear. The approach suggested here has the advantage of clearly laying out the burdens on both sides.

529. The narrow focus is supported in Dr. Miles itself. In that case, the Supreme Court identified the common law restraint of trade doctrine as one of the sources of § 1, and noted that it had allowed contractual restraints only where “the restraint on one party is not greater than protection to the other party requires.” Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 406 (1911) (quoting Gibbs v. Baltimore Gas Co., 130 U.S. 396, 409 (1889)). As previously noted, the Dr. Miles Court was unable to identify any reason that the manufacturer “required” anything in a price-fixing contract. The burden shift allows protection not greater than that required where a manufacturer can affirmatively demonstrate that price-fixing is used to address free-riding, and is therefore consistent with the common law antecedents to which Dr. Miles refers.

530. See, e.g., Allison, supra note 1, at 132 (critics of per se rule for vertical price-fixing often focus on free-rider issue).

531. Because of the narrow focus, the burden-shift also addresses the concerns that underlie Robert Bork’s argument that, because a supplier generally can choose to perform retailing functions itself, nothing is lost to consumers if resale price maintenance is allowed. Bork, supra note 16, at 29. So long as the supplier can show that it reasonably believed that it was acting to run its distribution system most efficiently, we allow price-fixing. When RPM is used to support cartels, or as part of an exercise of dealer power, it is forbidden. The resulting analysis is similar to that Bork suggested for horizontal price cases: where the defendants can show that the restraints are needed to make a procompetitive venture function, they should be allowed. Id. at 279.

532. See Piraino, supra note 89, at 352, 363 (noting that courts commonly rely on factfinder to determine motive in antitrust cases); see also Bork, supra note 16, at 157 (noting that firm’s specific intent is not unduly difficult to prove); Gerla, supra note 69, at 15 (arguing that factfinders are familiar with sorting out motives). The focus on motive also eliminates a concern that a defense based on efficiencies will unduly focus on measurable economic information and ignore what is hard to measure. See Bork, supra note 16, at 127 (people tend to “measure what is susceptible of measurement and will tend to forget what is not”). Because the factfinder is not attempting to determine whether the practice is itself efficient, but merely whether the supplier really thought it was, this concern should not arise.
Even under the current system, some suppliers seem to generate paper records that verify free-rider concerns. While this simplified cause of action may generate more lawsuits, in addition to receiving the benefits of the *Monsanto* screen, suppliers can bring summary judgment motions on their affirmative defense where undisputed documentary evidence shows that their motivation for terminating the plaintiff was permissible. Because the focus is on the supplier's motive, stray documents referring to anticompetitive motivations on the part of non-terminated dealers should not be sufficient evidence to take a case to the jury.

Finally, this approach should allay the Supreme Court's worry that juries might have trouble distinguishing legitimate non-price concerns from illegal price-fixing because both may involve concerns over low price levels. Under the proposed approach, the court will specifically instruct the jury that price-fixing is allowed where the supplier has an appropriate motive. The defendants can present to the jury evidence of any procompetitive logic behind their actions. Compared to the per se rule, where the court simply tells the jury that price-fixing is illegal, the instructions and defense presentation available here should legitimate the idea that some attempts to control price are acceptable. The jury's focus will be placed narrowly on what the supplier was attempting to accomplish, thus minimizing the possibility that they will confuse procompetitive and anticompetitive behavior.

The solution proposed here is not ideal. Those convinced that most vertical price-fixing is malignant will worry that suppliers may be able to create

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533. See O.S.C. v. Apple Computer, Inc., 601 F. Supp. 1274, 1280-84 (C.D. Cal. 1985) (describing extensive evidence that manufacturer analyzed and identified genuine free-rider problems), aff'd, 792 F.2d 1464 (9th Cir. 1986); Sample, Inc. v. Pendleton Woolen Mills, Inc., 704 F. Supp. 498, 501 (S.D.N.Y. 1989) (clothing manufacturer provided evidence that its sales were "most successful in stores that were willing to carry a full array of its products, educate its salespeople about [its] products, and display [its] line separately from those of other manufacturers"); see also Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 751-52 (1988) (Stevens, J., dissenting) (arguing that if supplier terminates distributor for service-related reasons, it should be able to provide admissible evidence to prove its motivation).

534. See Piraino, *supra* note 86, at 28 (noting suppliers could bring summary judgment motions on free-riding defense).

535. *Sharp*, 485 U.S. at 727-28; see also Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1440 (7th Cir. 1986) ("antitrust liability should not turn on a court's guess as to which motive may have predominated" in termination decision following distributor complaints about price-cutting).

536. One commentator has proposed that liability for coercion cases be determined based on whether the coercing dealer had an acceptable motivation, informing the dealer that it could not profitably continue to sell under existing market conditions, or an unacceptable motivation, eliminating a competitor in a market in which it can afford to remain a participant. Barlas, *supra* note 339, at 2356-59. However, distinguishing the two situations runs square into the traditional problems with separating good from bad motivation for excluding rivals. See *supra* text accompanying notes 504-11. In the alternative, this test would require the factfinder to analyze complex cost information to determine if the coercing dealer was justified in its actions. See Barlas, *supra* note 339, at 2358 n.104 (explaining inquiry into coercion of conduct). Focusing on the supplier's actions seems easier and more in keeping with the reasons coerced terminations might be allowed.
plausible paper records that free them from liability despite some anticompetitive effects. This undoubtedly will happen on occasion. Those convinced that most price restraints are benign will find the rebuttable presumption too ready a weapon for grumpy terminated dealers, who will bring extortionate lawsuits. Undoubtedly, this too will happen on occasion. Yet both per se legality and per se illegality are simply too heavy-handed to measure restraints that have both good and bad uses. Until market research can confirm the actual frequency of free-riding and related problems, we have to employ some mechanism to try to assess vertical price restraints. Focusing on the supplier's motive has at least two virtues. It bears a clear relation to the question of what sort of effects the restraint is likely to have and it does not require that the judicial system undertake costly and complex analysis.

D. Distinguishing Price from Non-Price Restraints: Eliminating the Sharp Distinction

As long as we retain some distinction between price and non-price restraints, the question will remain where to draw the line between them. This brings us back to Sharp, which held that in order to constitute price-fixing, a vertical agreement must contain an understanding as to a specific price or price level. A non-terminated distributor's general complaint about low prices is insufficient to meet this standard.

The line drawn by the Court in Sharp is somewhat arbitrary in practice. Under its approach, a court's choice between the per se rule or the rule of reason turns on the precise wording of the price complaints and threats made by the non-terminated distributor. The threat, "Dammit, Louise, if you don't get Cheap-Mart to raise their prices, I'll never do business with you again!" contains no explicit price agreement, and is evidence only of a restraint that will be judged under the rule of reason. The threat, "Dammit, Louise, if you don't get Cheap-Mart to start charging your MSRP, I'll never do business with you again!" contains an explicit price term, and may well be evidence of a per se violation. The choice between the per se rule and rule of reason analysis makes an enormous difference to the way a case proceeds and to its likely outcome. Making this important determination turn on the particular

537. Cynically, those convinced that these restraints are mostly benign may be better off acceding to some middle position than allowing resale price maintenance to fall fully into the rule of reason. An intermediate position is less likely to tempt Congress to codify the per se rule for vertical price-fixing, a step both houses have been leaning toward since the Supreme Court decided Monsanto. See, e.g., RPM and Telemarketing Fraud Bills Reach Top of Antitrust/Consumer Agenda on Hill, 62 ANTITRUST & TRADE REG. REP. (BNA) 29 (1992) (House and Senate to confer on bills addressing RPM); Metzenbaum Reintroduces Legislation on Resale Price Maintenance Standards, 60 ANTITRUST & TRADE REG. REP. (BNA) 275 (1991) (Senate bill explicitly codifies per se illegality rule); House Passes Vertical Price-Fixing Bill to Overturn Two Supreme Court Decisions, 58 ANTITRUST & TRADE REG. REP. (BNA) 577 (1990) (House bill overturning Monsanto and Sharp); Brooks offers Bill on Standards in Resale Price Maintenance Suits, 56 ANTITRUST & TRADE REG. REP. (BNA) 363 (1989) (House bill explicitly codifying per se illegality rule).

language the parties employed seems a bit bizarre, especially given the fortu-
ties of the discovery process and the possibly faulty, and always self-inter-
ested, memories of the participants. 539

The Court justified the line it drew in *Sharp* by arguing that the potential
competitive danger from vertical price-fixing is the facilitation of cartels at
either the dealer or the supplier level. 540 It stated that, absent some agree-
ment on price or price levels, either the supplier or the distributor would find
it too difficult to organize and maintain a cartel. 541 The Court seemed to
believe that, faced only with a vague agreement to keep prices higher, some
cartel members would lower their prices just a bit to attract more customers
and would eventually eliminate the efficacy of the cartel. Thus, according to
the Court, agreements lacking specific price terms do not "almost always
tend[ ] to restrict competition and reduce output," and should not be subject
to per se scrutiny, 542 particularly since the supplier may be terminating the
dealer in order to resolve a free-rider problem. 543

However, if the Court adopts the burden-shifting approach outlined
here, some of the concerns it expressed in *Sharp* would be eliminated. The
dire consequences of per se treatment are ameliorated and, if in fact the sup-
plier is terminating the price-cutter because of free-riding, it can prove that.

In addition, *Sharp* assumes that the only thing to fear when a supplier
terminates a price-cutter distributor is a cartel based on specific price-agree-
ments. This assumption is incorrect. It is based on a model of fungible prod-
ucts in which price is the only mechanism for competition. In complex
differentiated retail markets, where multiple prices for the same goods are to
be expected, the insistence that a unitary price is needed to prove harm to
competition seems overstated. "If information is poor, price dispersion for
identical products also occurs, even in unconcentrated markets." 544 The
elimination of particular classes of competitors may have effects similar to
classic cartels by ensuring that a whole group of low-price alternatives are
unavailable. Focusing on specific price levels ignores the possibility that a
full-price retailer may not want to keep its prices at a high level forever.
Rather, it may want a chance to reap high profit margins when it first puts a
product on the shelves, then to lower the price as sales warrant. Thus, it does
not want a price fixed in stone by the supplier. Rather, it wants protection
from price competition during the period it first puts the product on the
shelves when its profit margins are likely to be the largest. Thus, to maximize
its profits, the retailer may not want a price-fixing agreement, but simply the
elimination of particular rivals that put its pricing in a bad light.

539. See Burns, supra note 95, at 28 n.192 (noting possibility of supplier manipulation of
price negotiations to evade *Sharp* distinction).
541. *Id.* at 727; see Ben Elfman & Son, Inc. v. Criterion Mills, Inc., 774 F. Supp. 683, 686 &
n.7 (D. Mass. 1991) (describing this as justification for *Sharp* holding).
543. *Id.* at 728.
544. Beales et al., supra note 394, at 510.
In addition, the Court’s analysis does not take into account the targeted upward coercion scenario described above. Sharp is a classic upward coercion case. Indeed, the problem Sharp addresses—agreements to terminate those whose prices are “too low”—should occur mainly in upward coercion cases. It is hard to imagine a supplier trying to orchestrate a joint agreement not to price “too low” among all its dealers. As noted, in upward coercion cases a large dealer may have good reason to try to eliminate a rival whose low prices and proximity cast the dealer in an unfavorable light. Unless the result is to eliminate a free-rider problem, the successful implementation of this form of upward coercion means that some consumers will have less choices and may pay higher prices, and output may be reduced, with no resulting efficiency gains. Thus, courts should use the burden-shifting approach for upward coercion cases as well as for other price-fixing cases.

Obviously, the threatening dealer could achieve results similar to those in upward coercion cases by insisting on an exclusive dealing arrangement, thus effectively eliminating the discounter from the market. However, exclusive dealing arrangements necessarily entail a wide range of procompetitive advantages that justify rule of reason treatment. By contrast, the procompetitive effects of the upward coercion scenario—the elimination of free-rider problems—are covered by the proposed narrow defense. If a dealer wants to obtain the more favorable antitrust status of an exclusive dealership, it should have to bargain for it and provide the concomitant efficiencies that justify the more lenient treatment.

Thus, the Supreme Court or Congress should eliminate the Sharp distinction as the basis for differentiating price from non-price restraints in vertical cases. Where price is any part of the agreement between the supplier and distributors, or is part of the full-price dealer’s threats in an upward coercion case, the courts should treat the conspiracy as a price restraint. Evidence that meets this test in upward coercion cases might include attempts by a dealer to influence a supplier to raise the prices of competing dealers or price complaints incorporated into threats to the supplier.

Although this opens up more cases to more thorough scrutiny, defendants retain two strong protections for their procompetitive activities. First, the Monsanto screen ensures that no case will survive summary judgment absent some evidence that the supplier sought to fix prices or that it succumbed to a dealer’s price-based coercion. Price complaints by other

545. See supra text accompanying notes 419-26.
546. See supra text accompanying note 426.
547. Gerla, supra note 69, at 11-12.
548. Phillip Areeda has argued that successful upward coercion by a large dealer constitutes a harmful restriction on intrabrand competition. Areeda, supra note 38, at 575.
549. See supra text accompanying notes 41-43.
550. See Bork, supra note 16, at 304-05 (discussing these efficiencies and noting that party getting exclusive rights should have to bargain for them).
551. See White, supra note 356, at 33-34 (stating Monsanto’s high standard for showing price-fixing eliminates danger of unduly deterring procompetitive restraints).
dealers, standing alone, still will not trigger the rebuttable presumption.\textsuperscript{552} Second, the defense for suppliers addressing genuine free-rider concerns will allow the supplier to terminate a free-rider even if a full-price dealer has engaged in coercion.\textsuperscript{553} The legitimate uses of price agreements will not be penalized. Thus, sufficient protection of the competitive process will exist to address the concerns the Court raised in \textit{Sharp}.\textsuperscript{554}

\section*{VII. Conclusion}

The cases I have called the wayward children of \textit{Sylvania} and \textit{Monsanto} largely represent the attempts of the lower federal courts to cope with the somewhat Delphic pronouncements of the Supreme Court suggesting that only limited antitrust scrutiny of vertical restraints is appropriate. These courts apparently have learned from the Chicago School that too much antitrust regulation can deter efficient business conduct. However, the courts have gone too far in immunizing from liability conduct that historical evidence suggests can be used for anticompetitive purposes.


\textsuperscript{553} Justice Stevens' dissent in \textit{Sharp} suggests that where the agreement to terminate a price-cutter comes at the behest of a competing distributor, there can be no procompetitive justification. \textit{See} Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 754-56 (1988) (Stevens, J., dissenting). This approach fails to consider that the competing distributor, even with price complaints, might succeed in pointing out to its supplier genuine free-rider problems that led to its price complaints. \textit{8 Areeda, supra} note 10, ¶ 1604; Allison, \textit{supra} note 1, at 133 (supplier concern about dealer non-price behavior may arise from price complaints by other dealers). As \textit{Monsanto} suggests, the supplier should not be foreclosed from acting merely because it received information from a self-interested distributor, but once price becomes part of the termination agreement, it should have to show clear evidence that it believed the termination would increase competition.

\textsuperscript{554} One recent article argues that the supplier should not be held liable in upward coercion cases. Barlas, \textit{supra} note 339, at 2336-37. The argument is that, faced with a coercive choice between dealers, a supplier makes a rational decision to choose the larger. Given the coercive scenario, this decision benefits consumers by maximizing output. \textit{Id.} at 2352-54. However, making suppliers liable encourages them to resist anticompetitive dealer coercion, which should make dealers less likely to attempt coercion in the first instance. Holding coerced suppliers liable also is consistent with the law of horizontal boycotts. Participants in boycotts are liable even if they are on a different level of distribution than the target of the boycott and, apparently, even if their participation was coerced by the target firm's rivals. \textit{See}, \textit{e.g.}, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 210-14 (1959) (although evidence suggests boycott of retailer arose out of "private quarrel" with competitor, participating suppliers treated as equally liable).
Today, the challenge for those interested in antitrust jurisprudence is to devise modes of analysis that attack genuinely anticompetitive conduct and take into account the fears of overdeterrence expressed by Bork, Easterbrook, and others, but do not involve such complexity that the judicial system cannot reasonably undertake them.

This article has attempted to provide such a mode of analysis for vertical price-fixing. It demonstrated that the concerted action requirement in vertical cases can best be seen as a substantive screen that provides a minimum level of evidence that a plaintiff needs to take a price-fixing case to the jury. The effect of this screen is to insure that suppliers can terminate price-cutting dealers for valid reasons without automatically risking protracted litigation. When measured against this rationale, many of the lower court concerted action cases make little sense and tend to immunize restraints that may not be efficient. This article suggested ways in which the Supreme Court could clarify its holding in *Monsanto* to insure that the concerted action requirement was properly applied in vertical restraint cases.

The overuse of the concerted action requirement might represent an attempt by the lower courts to subvert the per se rule for vertical price-fixing. Thus, this article next examined the continued viability of that rule. Because the retail markets that form the setting for many vertical restraints are often very complex, the traditional modes of analysis are inappropriate. The per se rule does not take into account possible efficient uses of price-fixing, and the rule of reason is simply inadministrable in complex markets.

This article proposed the creation of a presumption of illegality for vertical price-fixing. This presumption could be overcome if the supplier shows that it genuinely and reasonably employed the price restraint to further a competitive goal such as the elimination of free-riders. This approach is narrowly focused on the appropriate issue, the purpose of the restraint, and is much simpler for the courts to administer than analyses that rely on determinations of market power or competitive impact. Although the solution is not ideal, it is preferable to using an unrelated screen, like a broad concerted action requirement, or an unadministrable one, like the rule of reason.

Almost all commentators concede that vertical price-fixing has both anticompetitive and procompetitive uses. However, scholars disagree about the frequency of either. The complexity of analyzing the effects of these restraints without much empirical guidance can easily lead to a desire to abandon examining them at all. Perhaps this is the motivation behind the broad readings of *Sylvania* and *Monsanto* that the "wayward children" employ. This article has attempted to find a manageable approach to allow real judges and juries to deal with the genuine competitive concerns raised by vertical price-fixing, despite their complexity and uncertain frequency. If the legal system does not adopt the solutions suggested here, perhaps it at least will adopt the aspiration of focused and manageable antitrust analysis.