Pace Law Review

Volume 9
Issue 3 *Summer 1989*

Article 4

June 1989

Business Electronics v. Sharp Electronics - Vertical Restraints: An End to Antitrust Relief for Terminated Discounters

James R. Warnot Jr.

Recommended Citation

James R. Warnot Jr., *Business Electronics v. Sharp Electronics - Vertical Restraints: An End to Antitrust Relief for Terminated Discounters*, 9 Pace L. Rev. 507 (1989)

DOI: https://doi.org/10.58948/2331-3528.1493

Available at: https://digitalcommons.pace.edu/plr/vol9/iss3/4

Notes and Comments

Business Electronics v. Sharp Electronics Vertical Restraints: An End to Antitrust Relief for Terminated Discounters?

I. Introduction

The Sherman Antitrust Act of 1890[1] (the Act) was the legislative response to the accumulation of economic power which resulted from the Industrial Revolution.[2] The statute prohibits agreements between parties to restrict competition, which are known as restraints of trade.[3] It also prohibits a single firm from gaining excessive economic power, which is known as monopolization.[4]

Because of the Sherman Act's general terms, courts have used case law to establish a working body of judicial standards.[5] The Supreme Court has had many opportunities to apply these

---

1. Sherman Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1982)).

2. *See infra* notes 21-24 and accompanying text.

3. Section 1 of the Sherman Act provides criminal penalties for "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (1982). The Clayton Act of 1914 was passed to specify more clearly those acts which are illegal and to provide civil remedies in addition to criminal penalties for certain practices. *See* E. GELLHORN, ANTITRUST LAW AND ECONOMICS 27-30 (1981). Section 4 of the Clayton Act allows an injured private plaintiff to "recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a) (1982).

4. Section 2 of the Sherman Act provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize . . . shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2 (1982).

5. "Congress . . . did not intend the text of the Sherman Act to delineate . . . its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978). *See also* Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136 (1984).

standards to vertical restraints of trade[6] in the century since the Act was passed.[7] The Court, however, has not applied a consistent evidentiary standard to arrive at its decisions.[8] Over the last decade, the Court has narrowly construed the statute in favor of defendants[9] and has advocated examining the effect of challenged behavior on economic efficiency in determining whether a plaintiff will succeed in his action.[10]

The Supreme Court recently had an opportunity to remedy one of these evidentiary standard inconsistencies in a case involving the termination of a discounter[11] by a manufacturer in response to a competitor's complaints, where liability depends on whether the termination is characterized as a vertical price or nonprice restraint.[12] In *Business Electronics v. Sharp Electron-*

6. Vertical restraints are imposed by a party at a higher level in a distribution chain on a party at a lower level in a distribution chain. "For example, a retailer is related vertically to his distributor, and a distributor is related vertically to his supplier." Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitors' Complaints*, 49 BROOKLYN L. REV. 677, 680 n.19 (1983).

7. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (manufacturer established wholesale and retail prices by contract); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (limitations on number of retail franchisees and locations from which franchisees could sell).

In contrast, horizontal restraints are restrictive agreements between parties at the same level in a distribution chain. *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972) (association of supermarket chains which allocated sales territories to minimize competition).

8. The Court changed evidentiary standards for evaluating the illegality of restrictions on dealer territories and customers twice in fifteen years. White Motor Co. v. United States, 372 U.S. 253 (1963) (illegality of selling only to those dealers which agreed to sell only to customers not reserved to the manufacturer must be determined at trial); United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (restricting distributors to sell within exclusive territories is presumed to be anticompetitive and thus per se illegal); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (terminated dealer has the burden of showing that restrictions are anticompetitive).

9. *See Sylvania*, 433 U.S. 36 (plaintiff must show that territorial restrictions are anticompetitive); Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (terminated discounter must prove that its competitor and supplier conspired to achieve an unlawful objective); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986) (summary judgment granted when evidence is as consistent with independent action as with an illegal conspiracy).

10. *See, e.g., Sylvania*, 433 U.S. at 58-59.

11. "[T]he discounters of modern American marketing [are those] low overhead, high volume sellers who aggressively compete as to price." Pitofsky, *In Defense of Discounters: The No-Frills Case for a* Per Se *Rule Against Vertical Price Fixing*, 71 GEO. L.J. 1487, 1493 (1983).

12. Vertical price restraints are those restraints which specifically set a resale price.

ics,[13] the Court determined that the potential antitrust violation by the manufacturer should be judged using the rule of reason.[14] In reaching its decision, the Court characterized the restraint as nonprice, since the alleged offending parties did not have an agreement on specific prices or price levels.[15]

Because it will be exceedingly difficult for a plaintiff to prove an explicit price fixing agreement, a terminated discounter's chance of success in an antitrust case is now greatly reduced.[16] Indeed, since the *Business Electronics* decision, no dealer terminated in response to a competitor's complaints has prevailed against the manufacturer.[17]

By using the price/nonprice distinction to determine the proper evidentiary standard, the Court concentrates on the form

---

See infra notes 68-92 and accompanying text. They have consistently been ruled per se illegal. *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911). Vertical nonprice restrictions, such as restricted territories or customer sets, are those restraints which use means other than price to achieve the manufacturer's distributional objectives. *See infra* notes 93-113 and accompanying text. They are judged using the rule of reason. *See Sylvania*, 433 U.S. at 59. Customer restrictions can include, for example, reservation of particular customers for the manufacturer, *White Motor Co.*, 372 U.S. at 256, or prohibiting distributors from selling to unfranchised retailers, *Schwinn*, 388 U.S. at 371. The rule of reason takes all the circumstances of a given case into account to determine if damage to competition has actually occurred. *See* Pitofsky, *supra* note 11, at 1489. For a more detailed explanation of these evidentiary standards, see *infra* notes 39-67 and accompanying text.

13. 108 S. Ct. 1515 (1988).

14. *Id.* at 1520, 1525. *See infra* notes 39-52 and accompanying text for a discussion of the rule of reason.

15. *Id.* at 1521. The Court did not attempt to reconcile the inconsistent antitrust treatment given to similar conduct depending upon whether the termination is considered a price or nonprice vertical restraint. *See infra* notes 190-200 and accompanying text.

16. As the dissent in a recent post-*Business Elecs.* case has stated, "because price-fixing agreements are *per se* illegal, antitrust conspirators tend to be perceptive enough to avoid express written agreements and to deny the existence of any combination or conspiracy; they also tend to avoid leaving incriminating evidence lying about." The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148, 1163 n.6 (9th Cir. 1988) (Reinhardt, J., dissenting).

17. *See, e.g.*, *The Jeanery*, 849 F.2d 1148 (judgment notwithstanding the verdict granted to a manufacturer which terminated the plaintiff discounter after a threat by the plaintiff's competitor to discontinue its purchases from the manufacturer); Dunnivant v. Bi-State Auto Parts, 851 F.2d 1575 (11th Cir. 1988) (summary judgment for an auto parts supplier which terminated a retail dealer in response to plaintiff's competitors' discontinuing purchases from the supplier); Corrosion Resistant Materials Co. v. Steelite, Inc., 692 F. Supp. 407 (D.N.J. 1988) (summary judgment for manufacturer, initially denied, granted after *Business Electronics* decision).

of the restraint rather than its substantative effect on competition. This Note suggests that a set of objective factors should be used to determine whether terminating a discounter is likely to have anticompetitive effects. If so, that termination should be per se illegal regardless of whether it is a price or a nonprice restraint.[18]

Part II of this Note examines the development of vertical restraints law. A review of the theories interpreting the purposes of antitrust law is provided as a background for understanding the analysis of subsequent decisions. Included in this review are the rationales for the per se rule and the rule of reason standards. Part II continues with a review of vertical restraints cases, concluding with the development of discounter-termination case law. The facts and the lower court decisions of *Business Electronics* are provided in Part III, which concludes with an analysis of both Justice Scalia's majority opinion and Justice Stevens' dissent.

Part IV argues that the price/nonprice distinction is not a valid means for establishing evidentiary standards and that retention of a per se rule in certain circumstances is justified, especially in light of the legislative intent behind the Sherman Act. A proposed test in Part IV focuses on the probability that terminating a discounter will have an anticompetitive effect. Application of the proposed test to the facts of *Business Electronics* shows that although the Court's reasoning and enunciated standard is flawed, its result is sound: the case should be judged using the rule of reason. Part V concludes that using categories of conduct to establish rules, rather than concentrating on upholding the purposes of the Sherman Act, will provide a legal sanction for anticompetitive conduct in some cases. This is true because a given discounter termination can often fit into either the price or nonprice category.

---

18. Conversely, if the restraint is unlikely to have an anticompetitive effect, its legality should not turn on its characterization as price or nonprice.

II. Background

A. *Development of Antitrust Standards*

To evaluate the wisdom of the *Business Electronics* decision, it is necessary to understand the purposes of the Sherman Act and the development of the two evidentiary standards, the per se rule and the rule of reason.

Various inferences can be drawn from the general language of the Sherman Act. It is clear from the general wording of the statute that common-law principles were intended to be used to develop a set of judicially workable standards.[19] Application of these principles to restraints of trade generated the general rule that restraints ancillary to genuine business transactions are legal, while those whose only purpose is to restrain trade are not.[20]

---

19. The statute prohibits "*[e]very . . . restraint of trade . . . .*" 15 U.S.C. § 1 (1982) (emphasis added). For a discussion of the application of common-law principles to interpret this general language, see Easterbrook, *supra* note 5, at 136-37; Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 37 (1966).

20. For the preeminent discussion of this concept, see Judge Taft's opinion in United States v. Addyston Pipe & Steel Co., 85 F.2d 271, 278-91 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899):

> [T]he contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinions of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster.

Id. at 282-83.

1. *Purposes of Antitrust Law*

Following the Civil War, the United States expanded rapidly into an industrialized society.[21] A concentration of economic power accompanied this expansion, creating large business entities, known as trusts, which used their power to eliminate competition.[22] The public was outraged over the increased prices which resulted and called for legislation to end the anticompetitive conditions.[23] The Sherman Act was passed in response to this call.[24]

It is clear from its legislative history that the Act was intended to protect consumers from the harmful effects trusts had on competition.[25] However, opinions diverge in defining exactly what this means.

One school of thought, exemplified by the efficiency theory of the Chicago School of economists,[26] holds that "consumer welfare" is the sole purpose of the Sherman Act.[27] Although seemingly an attractive purpose, consumer welfare is not defined as one might think. It does not mean providing the lowest prices through the open competition of a multitude of competitors, but the improvement of "allocative efficiency without impairing productive efficiency . . . ."[28] The problem with this interpretation is

---

21. 1 E. KINTNER, FEDERAL ANTITRUST LAW § 4.1, at 126 (1980).

22. *Id.* The trusts accomplished this by rapidly absorbing smaller businesses, often through predatory tactics, such as below cost pricing and industrial espionage. For a summary of these and other unfair methods used by the trusts, see E. GELLHORN, *supra* note 3, at 16-19.

23. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1147 (1981). For a discussion of the events surrounding the passage of the Sherman Act, see H. THORELLI, THE FEDERAL ANTITRUST POLICY (1955).

24. Fox, *supra* note 23, at 1147-48.

25. For a comprehensive collection of legislative history of the Sherman Act, see 1 E. KINTNER, THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES (1978).

26. The most complete statement of the Chicago School's position is found in R. BORK, THE ANTITRUST PARADOX (1978). Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926 n.2 (1979).

27. R. BORK, *supra* note 26, at 9.

28. *Id.* at 91. Allocative efficiency may be simply defined as making what the consumer wants, whereas productive efficiency is using the least amount of resources to do so. E. GELLHORN, *supra* note 3, at 41. For a more complete discussion see R. BORK, *supra* note 19. For an interpretation of legislative history supporting the efficiency model of the Chicago School, see Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966). According to the efficiency model, only that behavior which causes

that the organization which can produce goods most efficiently is probably the largest, most integrated organization — precisely the kind of economic entity the Sherman Act was passed to control.[29] Although the Act does not condemn large size per se,[30] an organization with an inordinately large market share is most able to engage in the type of practices the Act forbids, namely the "exclusion of competitors, the consolidation and persistence of monopoly power, and ultimately higher prices and reduced output."[31]

The second school of thought, sometimes called "Populist" or "Interventionist,"[32] argues that consumers' interests are protected by: "(1) dispersion of economic power, (2) freedom and opportunity to compete on the merits, (3) satisfaction of consumers, and (4) protection of the competition process as market governor."[33] This school advocates the preservation of competition by maintaining the freedom to compete, even at the risk of potentially higher short-term consumer costs. The theory contends that this protection of competition will result in lower costs over the long term.[34]

---

restriction of output is harmful and worthy of the attention of antitrust law. R. BORK, *supra* note 26, at 107-15.

29. *See supra* notes 21-24 and accompanying text; "[V]ertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor." Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 710 (7th Cir.) (Posner, J.) (summary judgment upheld where manufacturer displaced dealer in retail market), *cert. denied*, 469 U.S. 1018 (1984).

30. E. GELLHORN, *supra* note 3, at 112.

31. *Id. See also* Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CALIF. L. REV. 933, 938 (1987); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 59, 63-64 (1977) (White, J., concurring); Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 990-92 (1985).

32. *See* Piraino, *The Case for Presuming the Legality of Quality Motivated Restrictions on Distribution*, 63 NOTRE DAME L. REV. 1, 2 (1988); Fox, *supra* note 23, at 1143 n.12.

33. Fox, *supra* note 23, at 1182. In the context used, "on the merits" means free of the advantage a competitor has when a restraint of trade is in place. *Id.* at 1189. *See also* Flynn, *The "Is" and "Ought" of Vertical Restraints After Monsanto Co. v. Spray-Rite Serv. Corp.*, 71 CORNELL L. REV. 1095 (1986).

34. Fox, *supra* note 23, at 1142. "[I]t is not clear that antitrust enforcement has in fact imposed costs on consumers. Statements [of the Court] may be read as . . . supporting a process of competition that will probably benefit consumers over the long run." *Id.* at 1142 n.7.

The ambiguous statutory language and legislative history[35] of the Sherman Act do not resolve this dichotomy. Decisions of the United States Supreme Court indicate, however, that preservation of the opportunity to compete is the overriding concern of antitrust law. The Court stated that a restraint can be illegal even if its immediate effect is to reduce prices.[36] Reinforcing this view, the Court has also stated that "'one of [the Act's] purposes was to perpetuate and preserve, for its own sake and in spite of possible costs, an organization of industry in small units which can effectively compete with each other.'"[37] In more recent years the Court has impliedly reiterated this view.[38]

2. *The Rule of Reason*

Taken literally, the effect of the Sherman Act[39] would be to render all private business agreements illegal, since it is the intention and result of contracts between business parties generally to restrain trade to some extent. In *United States v. Trans-Missouri Freight Association*,[40] the Court used this literal inter-

35. "[The] simple [statutory] formulation is not self-defining, and conceals a diversity of possible objectives that are substantially consistent but yet sometimes inconsistent in critical respects." 1 P. AREEDA & D. TURNER, ANTITRUST LAW 7 (1978). "Neither the language nor the legislative history . . . is very illuminating about what specifically is allowed or prohibited." *Id.* at 14.

36. The Court made this statement in a case where the effect of the restraint was probably to maintain prices, not to reduce prices. Fashion Originators' Guild of Am., Inc., v. FTC, 312 U.S. 457, 467 (1941).

37. United States v. Von's Grocery Co., 384 U.S. 270, 274-75 n.7 (1966) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945)). Some have questioned this view as foreign producers with high quality goods have invaded the American market in recent years. *See generally* Piraino, *supra* note 32, at 19-23.

38. Reiter v. Sonotone Corp., 442 U.S. 330 (1979). "The essence of the antitrust laws is to ensure fair price competition in an open market." *Id.* at 342. *See also* NCAA v. Board of Regents, 468 U.S. 85, 104 (1984) (focus is to examine restraint in terms of its effect on competition). *Reiter* was used to support the efficiency model of antitrust law in Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986). However, in the same section of *Reiter* as is used to support this view, the Court states: "It is in the sound commercial interests of . . . purchasers . . . to obtain the lowest price possible within the framework of our competitive . . . system" and "the leading proponents . . . perceived . . . § 4 as a means of protecting consumers from overcharges resulting from price fixing." 442 U.S. at 342-43.

39. The Act provides criminal penalties for "*[e]very* contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1 (1982) (emphasis added).

40. 166 U.S. 290 (1897) (railroad association formed to determined rates, rules, and regulations held to be illegal).

pretation to hold price fixing and territorial divisions illegal because the statute prohibited every restraint of trade.[41] However, the Court quickly retreated from this position in *United States v. Joint Traffic Association*,[42] holding that legitimate business agreements which did not directly restrain interstate commerce were not proscribed by the Act.

The seeds of the current interpretations of the Sherman Act were sown in *Standard Oil Co. v. United States*,[43] the case which mandated dissolution of the Standard Oil trust.[44] The Court held that the broad statutory language was intended to cover unknown future undue restraints and not to prohibit ordinary business contracts.[45] The standard to be used in determining whether a restraint was undue was the "standard of reason."[46]

> The court must ordinarily consider the facts peculiar to the business to which the restraint is applied, 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, and the purpose or end sought to be attained are all relevant facts.[47]

The rule of reason standard is thus intended to take all competitive factors into account in determining whether a particular restraint is illegal.

Some courts have interpreted this rule as requiring proof of

41. *Id.* at 328.

> When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.

Id.

42. 171 U.S. 505, 568 (1898) (railroad association similar to that in *Trans-Missouri* held to be illegal).

43. 221 U.S. 1 (1911) (accumulation by trust of stock of majority of U.S. oil companies).

44. *See* E. GELLHORN, *supra* note 3, at 26.

45. 221 U.S. at 59-60.

46. *Id.* at 60.

47. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (rule prohibiting Board members from selling grain contracts after close of business at price other than closing price does not violate Sherman Act).

the existence of a relevant market and proof that the defendant has exerted power[48] in this market.[49] This approach has been criticized, however, as converting a Sherman Act section 2 case into a Sherman Act section 1 case.[50] The Supreme Court, on the other hand, has not generally required proof of market power to find an unreasonable restraint of trade.[51] In today's complex business environment, application of the rule of reason usually results in complicated, expensive litigation, which places an extreme burden on a plaintiff.[52]

3. *The Per Se Rule*

To eliminate the unfairness which the rule of reason places on the plaintiff,[53] courts have established a rule of per se liabil-

48. "Market power is the ability to raise prices by restricting output . . . . [I]n economic terms [it] is the ability to raise price[s] without a total loss of sales." 2 P. Areeda & D. Turner, Antitrust Law 322 (1978). Market power is one of the two elements of the offense of monopolizing, the other being "willful acquisition or maintenance of that power." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) (plumbing supply company illegally acquired and maintained market power).

49. *See, e.g.*, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987); Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185 (7th Cir. 1985).

50. *See supra* notes 3, 4 for the text of sections 1 and 2. By focusing on market power, attention is moved from the nature of the restraint to the structure of the industry, conflicting with the language of section 1, which prohibits restraints of trade, not monopolies. *See* Flynn, *supra* note 33, at 1145-46.

51. *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (failure of FTC to engage in market analysis in conducting rule of reason analysis not fatal to finding that Federation's policies violated antitrust statutes). "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." NCAA v. Board of Regents, 468 U.S. 85, 109 (1984) (NCAA's limitation on number of televised football games found to be anticompetitive using rule of reason analysis).

52. To illustrate the complexity of today's antitrust cases, consider Justice Powell's introduction to his opinion in a recent case:

> Stating the facts of this case is a daunting task. The opinion of the . . . Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long . . . . Two respected District Judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a forty-volume appendix in this Court . . . .

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1351 (1986). *See also* Pitofsky, *supra* note 11, at 1489. In an article written while he was at the University of Chicago, Judge Posner stated: "[T]he Rule of Reason is . . . little more than a euphemism for nonliability." Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 14 (1977).

53. The rule of reason is unfair due to the heavy evidentiary burden it places on the

ity if the "pernicious effect on competition and lack of any redeeming virtue"[54] eliminate the need for any "elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[55] Per se liability thus creates a presumption of liability which shifts the burden of showing a lack of anticompetitive effect to the defendant.[56] Per se liability has been imposed in cases dealing with market division,[57] horizontal[58] and vertical[59] minimum price fixing, group boycotts,[60] maximum price fixing,[61] certain types of reciprocal dealing,[62] tying,[63] and customer restrictions.[64] However, as American manufacturers have been assaulted by foreign competition in recent years,[65] commentators

plaintiff. Pitofsky, *supra* note 11, at 1489.

54. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (preferential routing agreements per se illegal).

55. *Id.*

56. *See* Flynn, *supra* note 33, at 1143; Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515, 1535 (1988) (Stevens, J., dissenting).

57. Market division exists when normally competing companies agree not to compete in certain geographic areas. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951) (allocation of international markets for bearings).

58. Horizontal price fixing is an agreement between competitors on the minimum prices to be charged. *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (agreements between competing oil companies to set prices).

59. Vertical price fixing is imposition of a price, below which the product may not be sold, by a party at a higher level in a distribution chain on a party at a lower level in that distribution chain. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

60. A group boycott is an agreement between several parties to act jointly to exclude another party, at either the same or an adjacent level in the distribution chain, from the relevant market. *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (conspiracy between manufacturers and department store not to sell to competing department store).

61. Maximum price fixing is imposition of a maximum price by a manufacturer on a distributor or retailer. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145 (1968) (imposition by publisher of maximum newspaper price).

62. Reciprocal dealing exists when two entities agree to buy goods from each other, to the exclusion of legitimate competition. *See, e.g.*, FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965) (parent company used its purchasing power to coerce its suppliers to buy from its subsidiary).

63. Tying exists when the sale of one product (the tying product) is conditioned upon future purchases of other products (the tied products). *See, e.g.*, Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (offer of credit services tied to purchase of prefabricated houses).

64. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

65. For a discussion of the inroads of foreign competition, see Piraino, *supra* note 32, at 19-23. In conjunction, the efficiency theory of antitrust law has gained more adher-

have called for narrower application of per se illegality,[66] and the Supreme Court has responded by eliminating per se illegality for vertical nonprice restraints.[67]

B. *Evolution of Vertical Price Fixing Doctrine*

The Supreme Court's first attack on vertical price fixing came in 1911. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[68] Dr. Miles, a pharmaceutical company, entered into contracts with its wholesale and retail dealers, setting the minimum prices for which its products could be resold.[69] The Court invalidated these contracts based on the common-law prohibition against restraints on alienation.[70] It also stated that the effect of these contracts was similar to the effect of horizontal price fixing agreements between dealers.[71]

The Court narrowed the *Dr. Miles* rule in *United States v. Colgate & Co.*[72] In *Colgate*, the manufacturer fixed resale prices by dictating that no sales would be made to dealers not adhering to its pricing policy.[73] The Court distinguished *Dr. Miles* because Colgate's policy was unilaterally imposed.[74] The agreement in *Dr. Miles* was presumably the result of bargaining between both parties.[75] This exemption from antitrust liability when resale prices are unilaterally imposed has come to be known as the

ents. *See supra* notes 26-31 and accompanying text for a discussion of the efficiency theory. "[T]he current national mood reflects a growing concern for productive efficiency. Meanwhile, antitrust law has become both target and scapegoat. Critics condemn decisions as frustrating the achievement of efficiency." Fox, *supra* note 23, at 1143.

66. *See, e.g.*, Posner, *supra* note 52; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966).

67. *Schwinn* was overruled in 1977 by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (application of per se rule must be based on demonstrable economic effect). *See infra* notes 107-112 and accompanying text.

68. 220 U.S. 373 (1911).

69. *Id.* at 375-80.

70. *Id.* at 404.

71. *Id.* at 408. For a discussion that this holding does not correctly state the common-law view and that there is a significant difference between a manufacturer-imposed vertical price restraint and a horizontal agreement between dealers *see* Hay, *Vertical Restraints After Monsanto*, 70 CORNELL L. REV. 418, 419-20 n.9, 421-23 (1985).

72. 250 U.S. 300 (1919).

73. *Id.* at 303.

74. *Id.* at 307-08.

75. Dr. Miles, Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 375-80 (1911).

"*Colgate*" doctrine.[76] The exemption from liability which *Colgate* offered was, however, considerably restricted in *United States v. Parke, Davis & Co.*[77]

Parke, Davis' catalog stated its policy to deal only with those who observed its pricing schedule.[78] In addition to this statement in its catalog, Parke, Davis representatives made visits to noncomplying dealers threatening to discontinue their supply.[79] The Court held that these actions went beyond a unilateral refusal to deal, and were thus per se illegal.[80] Although Justice Harlan's strongly worded dissent argued that the majority had emasculated *Colgate*,[81] the doctrine has found growing support in recent years.[82]

The Court further restricted the *Dr. Miles* rule in *United States v. General Electric Co.*[83] In this case, General Electric had consigned its electric lamps to agents which were under its strict control.[84] The Court allowed this agreement, distinguishing the agreements in *Dr. Miles* as mere attempts to create agencies when the dealers were in fact independent.[85] In *Simp-*

---

76. *See* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 763 (1984) (termination of discounter found not to be a unilateral action).

77. 362 U.S. 29 (1960).

78. *Id.* at 32.

79. *Id.* at 33-36.

80. *Id.* at 37-45. The Court reviewed several decisions which had restricted the *Colgate* holding in arriving at its decision. *See* FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922) (marking products to detect violations combined with reinstatement of dealership after assurances of future compliance were given goes beyond what is allowed by *Colgate*); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944) (wholesalers' active cooperation in plan negates application of *Colgate* doctrine).

81. "Scrutiny of the opinion will reveal that the Court has done no less than send to its demise the *Colgate* doctrine which has been a basic part of antitrust law concepts since it was first announced in 1919 . . . ." 362 U.S. at 49 (Harlan, J., dissenting).

82. The Court in Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761-64 (1984), expressly reaffirmed the *Colgate* doctrine. For lower court decisions subsequent to *Monsanto* using the doctrine in their decisions, see Burlington Coat Factory Warehouse Corp. v. Esprit De Corp., 769 F.2d 919, 923 (2d Cir. 1985) (evidence of discussions between competitor and manufacturer insufficient to rebut *Colgate* inference); Winter Hill Frozen Foods & Serv., Inc. v. Haagen-Dazs Co., 691 F. Supp. 539, 543 (D. Mass. 1988) (unilateral refusal to deal is allowed by the *Colgate* doctrine).

83. 272 U.S. 476 (1926).

84. The consignees' stock was returnable at the dictate of General Electric (GE). The lamps remained the property of GE and the proceeds from their sale were held in trust for GE by the consignees. The consignees could return unused stock and receive a commission for sales made. *Id.* at 481-83.

85. The Court thus further restricted *Dr. Miles'* rule of per se illegality for goods

son v. Union Oil Co. of California,[86] the Court limited the *General Electric* exemption from liability to consignors of patented goods where the consignor bore most of the risk of loss.[87] The *Simpson* rule — invalidating price fixing agreements pursuant to an agency contract — has subsequently been limited to cases in which "the name 'agent' [is given] to one who serves the same economic functions as an ordinary wholesaler or retailer"[88] to circumvent the rule against price fixing.[89]

Although the Justice Department in the Reagan administration encouraged challenges to the per se rule against vertical price fixing,[90] the Supreme Court has consistently held that ver-

---

consigned to a dealer in a valid agency contract. *See id.* at 487.

86. 377 U.S. 13 (1964).

87. *Id.* at 22-24. The *General Electric* Court, however, specifically stated that its holding was not limited to consignors of patented goods: "The owner of an article, *patented or otherwise*, is not violating . . . the Anti-Trust law, by . . . fixing the price by which his agents transfer the title from him directly to . . . [a] consumer." *General Electric*, 272 U.S. at 488 (emphasis added).

88. Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 726 (7th Cir. 1986) (airline which terminates travel agent not subject to per se liability).

89. *Id.* at 725-26. *See also* Kowalski v. Chicago Tribune Co., 854 F.2d 168, 172 (7th Cir. 1988) (newspaper distribution agreements are bona fide agency contracts). Prohibition of resale to unfranchised retailers by agent consignees was upheld in United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), wherein the Court held that the same restrictions on buyers are per se illegal. The holding of per se illegality was later overruled by Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). *See infra* notes 108-111 and accompanying text.

90. The Justice Department filed an amicus brief in *Monsanto*, advocating elimination of per se illegality of vertical price fixing. Brief for the United States as Amicus Curiae, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914). It has also published guidelines stating that only agreements which explicitly set resale prices are vertical price restraints and thus per se illegal. *See* U.S. DEP'T OF JUSTICE, VERTICAL RESTRAINT GUIDELINES, *reprinted in* 48 ANTITRUST & TRADE REG. REP. (BNA) Special Supplement, at 5 (Jan. 24, 1985). This position has been strongly criticized. Representative John Seiberling argues that, given the express intent of Congress in repealing the Fair Trade Laws in 1975, a radical change in the pro-consumer interpretations of the Sherman Act is unwarranted. Seiberling, *Congress Makes Laws; The Executive Should Enforce Them*, 53 ANTITRUST L.J. 175 (1984). Additionally, the Justice Department position has been repudiated by Congress in the Justice Department's 1986 Appropriations Bill, which stated:

> Whereas such policy guidelines are inconsistent with established antitrust law, as reflected in Supreme Court decisions and statements of congressional intent, in maintaining that such policy guidelines do not treat vertical price fixing when, in fact, some provisions of such policy guidelines suggest that certain price fixing conspiracies are legal if such conspiracies are 'limited' to restricting intrabrand competition . . . qualifying the accepted rule that vertical price fixing in any context is illegal per se; in stating that vertical restraints that have an impact upon

tical price fixing remains per se illegal.[91] The Court's consistent position has not, however, prevented extensive criticism of retention of the rule by commentators and judges.[92]

C. *Vertical Nonprice Restraints*

Nonprice vertical restraints are restraints which do not dictate resale prices. Typical nonprice restraints include restrictions on sales locations,[93] territorial restrictions,[94] customer restrictions,[95] modification of distribution systems,[96] and require-

---

> prices are subject to the per se rule of illegality only if there is an 'explicit agreement as to the specific prices. . .'; in stating that restraints imposed by a manufacturer at the request of dealers are vertical in nature and therefore not subject to the per se rule of illegality . . . .

Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1169 (1985).

91. *See* 324 Liquor Corp. v. Duffy, 107 S. Ct. 720 (1987) (state statute specifying minimum liquor retail price per se illegal); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (state regulation of retail wine prices per se illegal).

92. A greatly abbreviated sample of this criticism includes: Easterbrook, *supra* note 5; Posner, *supra* note 52; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 69 (1977) (White, J., concurring); Business Elecs. v. Sharp Elecs., 780 F.2d 1212, 1221-22 (5th Cir. 1986) (Jones, J., concurring), *aff'd*, 108 S. Ct. 1515 (1988); Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1438 (7th Cir. 1986). *But see* Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722, 730-31 (7th Cir. 1986) (Flaum, J., concurring) (criticizing Judge Easterbrook for dicta contrary to Supreme Court decisions).

The Supreme Court was not the only governmental body with an inconsistent approach to vertical price fixing. Between 1937 and 1975, through the Fair Trade legislation embodied in the Miller-Tydings and McGuire Acts, Congress allowed states to permit resale price maintenance when branded goods were "in free and open competition with commodities of the same general class produced and distributed by others . . . ." *See* Miller-Tydings Act, ch. 690, 50 Stat. 693 (1937), *amending* 15 U.S.C. § 1 (1890); McGuire Act, ch. 745, 66 Stat. 631 (1952). *See generally* United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956) (resale price maintenance not allowed when direct competition existed between independent wholesalers and drug company's wholesale operations). For an example of a state fair trade statute, see N.Y. GEN. BUS. L. § 369-a (McKinney 1968). This statute was amended in 1975 to prohibit all resale price maintenance. N.Y. GEN. BUS. L. § 369-a (McKinney 1984). However, despite manufacturers arguing that Fair Trade laws were necessary to protect full-service retailers, Congress found that the legislation resulted in higher prices for consumers and repealed both of the acts in 1975. H.R. REP. No. 341, 94th Cong., 1st Sess. 1 (1975).

93. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

94. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) (assignation of exclusive territories); Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975) (establishment of exclusive territories, eliminating independent retail dealers), *cert. denied*, 425 U.S. 936 (1976).

95. Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986) (assignment of

ments for retail promotion and services.[97]

The Supreme Court first faced the issue of vertical nonprice restraints in *White Motor Co. v. United States.*[98] In *White*, the Court declined to impose a rule of per se illegality on the restrictive territorial and customer clauses in a truck manufacturer's dealership agreements, professing a lack of knowledge of the economic consequences of such agreements.[99] In his dissent, Justice Clark argued that the motives of the company and its dealers were intertwined, thus clearly exhibiting concerted action to restrain competition.[100]

Four years later, the Court faced the issue of nonprice restraints again in *United States v. Arnold, Schwinn & Co.*[101] Schwinn, at the time the leading manufacturer of bicycles in the United States, had a complicated distribution system involving both independent dealers who bought the product outright and consignees.[102] This system entailed territorial and customer restrictions which enabled Schwinn to control the number of retailers in a given area.[103] The Court acknowledged the need for examining the impact of these practices on the marketplace,[104] but held that placing restrictions on those dealers who pur-

---

customers); Terry's Floor Fashions v. Burlington Indus., 763 F.2d 604 (4th Cir. 1985) (restricting sales to only residential consumers through pricing structure); H.L. Moore Drug Exch. v. Eli Lilly & Co., 662 F.2d 935 (2d Cir. 1981) (sales to wholesaler only if it had no retail stores), *cert. denied* 459 U.S. 880 (1982).

96. Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir.) (realignment of assigned territories), *cert. denied*, 108 S. Ct. 488 (1987), Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025 (2d Cir.) (replaced general brokers with direct brokers), *cert. denied*, 444 U.S. 917 (1979).

97. McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986) (failure to advertise, display, and service furniture in a manner consistent with manufacturer's policies), *cert. denied*, 108 S. Ct. 1728 (1988); National Marine Elec. Distrib. v. Raytheon Co., 778 F.2d 190 (4th Cir. 1985) (failure to maintain service department). For further discussion of retail promotion and service requirements, see *infra* notes 118-120 and accompanying text.

98. 372 U.S. 253 (1963).

99. "We need to know more than we do about the actual impact of these arrangements on competition to decide . . . ." *Id.* at 263.

100. *Id.* at 280 (Clark, J., dissenting).

101. 388 U.S. 365 (1967).

102. *Id.* at 368-71.

103. *Id.*

104. "[H]ere we must look to the specifics of the challenged practices and their impact upon the marketplace . . . ." *Id.* at 374.

chased the bikes outright was per se illegal.[105] The Court further held that restrictions on consignees should be judged according to the rule of reason.[106] The *Schwinn* decision prompted a firestorm of controversy and commentary, most of it critical of the decision,[107] resulting in the Court overruling *Schwinn* in *Continental T.V., Inc. v. GTE Sylvania Inc.*[108]

In his majority opinion, Justice Powell considered the complexity of vertical nonprice restraints, with their "potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition."[109] The Court recognized that vertical restraints may be necessary to induce dealers to provide needed services and thus, absent a "demonstrable economic effect,"[110] all vertical nonprice restrictions would be judged using a rule of reason evidentiary standard.[111]

The *Sylvania* decision was viewed with approval by advocates of the efficiency theory of antitrust law, who then began to call for elimination of per se illegality for vertical price restraints as well.[112] However, as noted previously, their calls have gone

105. *Id.* at 379.

106. The Court reiterated the *Dr. Miles* rule that "it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." *Id.* at 379.

107. For a bibliography of this commentary, see Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 48 n.13 (1977).

108. 433 U.S. 36 (1977). The *Sylvania* Court dictated that all vertical nonprice restraints, absent unusual circumstances, are to be judged using a rule of reason standard. *Id.* at 58-59. It did not elaborate on what these circumstances might be. *Id.*

109. *Id.* at 51-52. "Interbrand competition is the competition among the manufacturers of the same generic product . . . . In contrast, intrabrand competition is the competition between the distributors — wholesale or retail — of the product of a particular manufacturer." *Id.* at 52 n.19.

110. *Id.* at 58-59. This reasoning conforms with that of the efficiency school. *See supra* notes 26-29 and accompanying text. This analysis was first propounded by Aaron Director at the University of Chicago in the 1950s and elaborated in Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960). The work of Director formed the basis for the ideas of the Chicago School. *See* Posner, *supra* note 26, at 925-28.

111. *Sylvania*, 433 U.S. at 58-59.

112. *See, e.g.*, Bork, *Vertical Restraints*: Schwinn *Overruled*, 1977 SUP. CT. REV. 171; Posner, *supra* note 52. Judge (then-Professor) Posner later advocated that vertical restraints be judged per se legal, placing the evidentiary burden on the plaintiff to rebut the inference of legality. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

unheeded by the Supreme Court.[113]

D. *Discounter Termination Cases*

1. *Evolution of Case Law Prior to* Monsanto

In the situation where a discount dealer is terminated by a manufacturer pursuant to complaints from a competing full-price dealer, the paradox of attempting to categorize the termination as either a price or nonprice restraint for the purposes of determining the proper evidentiary standard is fully revealed. The terminated discounter will insist that its termination was part of a price fixing conspiracy between its competitor and supplier, hoping the court will invoke a rule of per se illegality.[114] The manufacturer, on the other hand, will just as strenuously argue that its decision was independently based on the discounter's failure to provide the services that the manufacturer feels are necessary to promote its product.[115] The problem for the manufacturer is that "it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices."[116] In spite of this difficulty, prior to *Business Electronics*, the Court had never required an explicit agreement on prices to find per se illegality in a discounter termination case.[117]

Termination of a discounter has traditionally been based upon the need to eliminate a "free rider."[118] A free rider is a

113. *See supra* notes 90-92 and accompanying text.

114. *See* Piraino, *supra* note 32, at 12.

115. *See infra* notes 118-120 and accompanying text.

116. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984). *See also infra* notes 191-192 and accompanying text. Assuming equal business efficiencies, the dealer which provides the fewest services will be able to charge the lowest price.

117. *See infra* text accompanying note 194. The definition of per se illegal price fixing often cited by the Court in the past is that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price . . . is illegal *per se*." United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940) (emphasis in original). *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 47 (1960); Simpson v. Union Oil Co. of California, 377 U.S. 13, 17 (1964). For a recent lower court decision using this language, see World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467, 1477 (10th Cir.) (relevant consideration is whether a dealer is coerced, not whether a specific price is set), *cert. denied*, 474 U.S. 823 (1985).

118. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

dealer which does not provide the same presale services as other dealers and, as a result, can charge a lower price.[119] Customers can thus utilize the presale services of the full-service dealer, such as product explanations and demonstrations, and then obtain a lower price at a discounter. The full-service dealer, upset at losing sales, may reduce services so that he can charge lower, competitive prices, thus completely upsetting the manufacturer's distribution strategy.[120]

With such divergent factors influencing their decisions, lower court holdings have, not surprisingly, been inconsistent.[121] Courts have repeatedly disagreed over whether termination of discounters in response to complaints from competitors created a sufficient inference of a price fixing conspiracy to justify imposition of per se illegality.[122]

This confusion is exemplified by two Third Circuit opinions, *Cernuto, Inc. v. United Cabinet Corp.*[123] and *Edward J. Sweeney & Sons, Inc. v. Texaco.*[124] The court found in *Cernuto* that if termination was in response to complaints, then "both the purpose and the effect of the termination was to eliminate competition at the retail level, and not, as in *Sylvania*, to promote competition at the manufacturer level."[125] Moreover, the *Cernuto* court characterized the restraint as horizontal because it resulted from a competitor's complaints.[126] Similar reasoning

119. For explanations of the free rider concept, see Telser, *supra* note 110; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 285 (1975); Posner, *supra* note 52, at 6-10.

120. If a manufacturer is attempting to enhance sales by projecting an upscale image, this strategy may be defeated by a free-riding discounter. *See, e.g.*, McCabes Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988). For arguments in favor of free riders see Pitofsky, *supra* note 11, at 1492-93; Comanor, *supra* note 31, at 990-92.

121. *See infra* notes 123-40 and accompanying text.

122. Professor Areeda has distinguished independent decisions to terminate from those which are a result of dealer coercion. "In the latter case, the manufacturer's compliance with the complainer's demand is more likely to be anticompetitive." 7 P. AREEDA, ANTITRUST LAW 166 (1986). However, a complaint alone by a dealer does not constitute coercive behavior.

123. 595 F.2d 164 (3d Cir. 1979).

124. 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

125. 595 F.2d at 168.

126. Perhaps less confusion would have been caused if the Court had said the effect is the same as if the restraint had been a horizontal restraint. This was the reasoning of

to that in *Cernuto* was used by panels of the United States Courts of Appeals for the Fourth,[127] Seventh,[128] Eighth,[129] and Ninth[130] Circuits in finding termination in response to complaints per se illegal.

Two years later, however, in *Edward J. Sweeney & Sons, Inc. v. Texaco,*[131] another panel of the Third Circuit obtained a different result from that in *Cernuto.* The court held that termination in response to a competitor's complaints was insufficient evidence from which to infer a price fixing conspiracy, especially given that Sweeney's quality problems contributed to its own termination.[132] The court stated that circumstantial evidence could be used to prove the conspiracy, but that there must be evidence of "a common scheme designed to achieve an unlawful objective."[133] Similar results to those in *Sweeney* were reached by panels of United States Courts of Appeals for the First,[134] Second,[135] Sixth,[136] Eighth,[137] Ninth,[138] and Tenth[139] Circuits.

---

the *Dr. Miles* Court. *See supra* note 71 and accompanying text. The confusion over use of this terminology is perpetuated in Justice Stevens' dissent in Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988). *See infra* notes 202-04 and accompanying text. For an explanation of this terminology in *Cernuto,* see 7 P. AREEDA, *supra* note 122, at 174; Comment, *Vertical Agreement as Horizontal Restraint: Cernuto, Inc. v. United Cabinet Corp.*, 128 U. PA. L. REV. 622 (1980). Congress has also considered these restraints as horizontal and subject to rules of per se illegality. *See supra* notes 90, 92.

127. Bostick Oil Co., Inc. v. Michelin Tire Corp.,Commercial Div., 702 F.2d 1207 (4th Cir.) (termination of tire discounter as a response to rivals' desire to eliminate a price cutter is a per se violation), *cert. denied*, 464 U.S. 894 (1983).

128. Spray-Rite Serv. Co. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982) (termination of discount agricultural chemical distributor in response to competitors' complaints is per se illegal), *aff'd on other grounds*, 465 U.S. 752 (1984); Alloy Int'l Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222 (7th Cir. 1980) (explicitly following *Cernuto*).

129. Battle v. Lubrizol Corp., 673 F.2d 984 (8th Cir. 1982), *aff'd on rehearing*, Battle v. Watson, 712 F.2d 1238 (8th Cir. 1983) (en banc) (equally divided court disagreed with reasoning of earlier decision that termination at request of competing distributor, motivated by desire to eliminate price competition, is a per se violation), *cert denied*, 466 U.S. 931 (1984).

130. Zidell Explorations, Inc. v. Conval Int'l Ltd., 719 F.2d 1465 (9th Cir. 1983) (termination of price-cutting valve distributor at the request of a competing distributor is a per se violation).

131. 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

132. *Id.* at 110-11.

133. *Id.* at 111.

134. Bruce Drug, Inc. v. Hollister Inc., 688 F.2d 853 (1st Cir. 1982) (no per se violation when insufficient evidence to show that complaints caused the termination or that a conspiracy existed).

135. Schwimmer v. SONY Corp. of Am., 677 F.2d 946 (2d Cir.) (termination follow-

This confusion in the circuits mandated resolution by the Supreme Court, which attempted to clarify this matter in *Monsanto Co. v. Spray-Rite Service Corp.*[140]

2. Monsanto *and Subsequent Decisions*

The issue in *Monsanto* was whether a discounter's termination was sufficiently connected to a competitor's complaint to justify inferring a per se illegal conspiracy to fix prices.[141]

Spray-Rite was an authorized Monsanto distributor until its termination in 1968 following numerous price complaints from competing Monsanto distributors.[142] After declining to renew Spray-Rite's distributorship, Monsanto warned other price-cutters about similar termination if prices were not maintained.[143] It also described its intent to keep prices up in its dealer newsletter.[144]

The Court first noted the importance of distinguishing independent action from concerted action and distinguishing price restraints from nonprice restraints.[145] Since complaints about

---

ing complaints from dealers about plaintiff's shipping from New York to areas where volume discounts were not available was insufficient to find a violation of the Sherman Act), *cert. denied*, 459 U.S. 1007 (1982). *See also* H.L. Moore Drug Exch. v. Eli Lilly & Co., 662 F.2d 935 (2d Cir. 1981) (absent additional evidence, termination of a drug wholesaler following competitors' complaints is insufficient to find an illegal agreement), *cert. denied*, 459 U.S. 880 (1982); Oreck Corp. v. Whirlpool Corp., 639 F.2d 75 (2d Cir. 1980) (absent coercion of the supplier by the competitor, no per se violation exists), *cert. denied*, 454 U.S. 1083 (1981).

136. Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982) (insufficient evidence of conspiracy to find per se violation).

137. Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168 (8th Cir. 1982), *aff'd on rehearing*, 712 F.2d 1235 (8th Cir. 1983) (en banc) (equally divided court) (complaints by competitor combined with suggestion of price by manufacturer insufficient evidence of conspiracy to find a per se violation). This case was heard by the en banc panel on the same day as *Watson*, *cert. denied*, 466 U.S. 926 (1984).

138. Filco v. Amana Refrigeration, Inc., 709 F.2d 1257 (9th Cir.) (complaints are insufficient evidence of causal nexus), *cert. dismissed*, 464 U.S. 956 (1983).

139. Blankenship v. Herzfeld, 661 F.2d 840 (10th Cir. 1981), *later appeal*, 721 F.2d 306 (10th Cir. 1983) (absent direct evidence of conspiracy, termination subsequent to competitors' complaints inadequate to find per se liability).

140. 465 U.S. 752 (1984).

141. *Id.* at 755, 759, 764.

142. *Id.* at 757, 759.

143. *Id.* at 765.

144. *Id.*

145. *Id.* at 761. Independent action is, of course, legal under the *Colgate* doctrine.

free-riding discounters are a natural response of full-service dealers, the Court declined to find a conspiracy from the "existence of complaints," even if the termination was " 'in response to' complaints."[146] The Court held that something more was required, namely "evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently."[147] Justice Powell then stated that this evidence could be "direct or circumstantial . . . that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' "[148] The Court thus adopted the standard proposed in *Sweeney* and rejected the *Cernuto* court's inference of liability based on termination in response to complaints.[149] In spite of this increased evidentiary burden, the Court still held that the evidence was sufficient to find per se illegality.[150] The Court inferred a price fixing conspiracy from threats by Monsanto to withhold supplies from discounters and from an article in the Monsanto newsletter exhorting dealers to "ge[t] the 'market place in order.' "[151]

Litigation after the *Monsanto* decision continued unabated.[152] Unlike *Monsanto*, these decisions have generally favored defendants and many have been grants of summary judgment.[153]

See supra notes 72-82 and accompanying text. *Sylvania* dictates that nonprice restraints be judged by the rule of reason. *See supra* notes 108-111 and accompanying text.

146. 465 U.S. at 763.

147. *Id.* at 764.

148. *Id.* (quoting Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)). The Court incrementally increased this evidentiary burden in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986), where it held that an antitrust plaintiff could not withstand a defendant's motion for summary judgment if the evidence was as consistent with independent action as concerted action. The Court narrowed the scope of concerted action in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984), holding that a parent corporation is incapable of conspiring with its wholly owned subsidiary.

149. *See supra* notes 123-139 and accompanying text.

150. 465 U.S. at 765.

151. *Id.* at 765-66 (citing Joint Appendix at A-65, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (No. 82-914)).

152. As of February, 1989, over 300 antitrust decisions have cited *Monsanto* (LEXIS, Genfed library, Courts file).

153. *See* Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656 (7th Cir. 1987)(summary judgment affirmed), *cert. denied*, 108 S. Ct. 488; Lomar Wholesale Gro-

Unfortunately, rather than establishing firm standards, *Monsanto* left several issues unresolved.[154] Foremost among these is the Court's failure to define precisely what behavior constitutes price fixing and is thus per se illegal. Two examples will illustrate the confusion this failure has engendered.

In *O.S.C. Corp. v. Apple Computer, Inc.*,[155] a mail order discounter brought suit against Apple after being terminated. The dealer showed significant evidence of a price fixing conspiracy:

> (1) complaints to Apple about mail order dealers' price discounts; (2) the outright and sudden elimination of mail order sales and termination of those dealers who continued such sales; (3) several meetings involving dealer and manufacturer representatives in which mail order discounting was allegedly raised; (4) a conversational statement by Apple's president that while he could not legally discuss pricing, something was going to be done about price erosion; (5) an incident in which Apple allegedly coerced mail order dealers to 'get their prices up;' (6) Apple's alleged conditioning of new locations for mail order dealers upon their agreement to cease discounting; and (7) Apple's alleged agreement with one of the plaintiffs to not advertise prices.[156]

Nevertheless,[157] the Ninth Circuit held that the evidence was

---

cery, Inc. v. Dieter's Gourmet Foods, Inc., 824 F.2d 582 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 707 (1988); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604 (4th Cir. 1985) (summary judgment affirmed) (in the above cases, termination in response to complaints was held insufficient to find a per se violation in absence of agreement to set prices). Another factor weighing against antitrust plaintiffs is that advocates of the efficiency theory of antitrust law have been on many of the benches which rendered post-*Monsanto* decisions. *See* Illinois Corporate Travel, Inc. v. American Airlines, Inc., 806 F.2d 722 (7th Cir. 1986) (Easterbrook, J.); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.), *cert. denied*, 107 S. Ct. 880 (1987); Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698 (7th Cir. 1984) (Posner, J.), *cert. denied*, 469 U.S. 1018 (1984) (decisions against terminated dealer upheld in all three cases). All is not lost for plaintiffs however, as some courts have allowed vertical price fixing claims to go to the jury. *See* Helicopter Support Sys., Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1987) (summary judgment against terminated distributor denied); Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985) (jury verdict for terminated shoe discounter upheld when manufacturer had discussed action with plaintiff's competitor).

154. *See* Flynn, *supra* note 33, at 1096-99; Hay, *supra* note 71, at 433-35.

155. 792 F.2d 1464 (9th Cir. 1986).

156. *Id.* at 1468.

157. This evidence was assumed to be true for the purposes of a summary judgment motion and as such would have been significantly more than the Supreme Court found sufficient to infer a price fixing conspiracy in *Monsanto*. *See supra* text accompanying

"insufficient proof of an antitrust conspiracy," and upheld the trial court's grant of summary judgment.[158]

Compare *Apple* with *World of Sleep, Inc. v. La-Z-Boy Chair Co.*,[159] where the Tenth Circuit held evidence of a discounter's termination subsequent to a competitor's complaints, combined with a taped telephone conversation between the competitor and the manufacturer agreeing to "keep [the] prices up,"[160] sufficient to send the case to a jury, even though no specific prices were agreed to.[161] This evidence is significantly less than the Ninth Circuit found insufficient in *Apple* and similar to what the Supreme Court found sufficient in *Monsanto*. In light of this continued inconsistency in defining the scope of an illegal agreement, the Supreme Court granted certiorari to hear *Business Electronics v. Sharp Electronics*.[162]

III. Business Electronics v. Sharp Electronics

A. *The Facts*

Kelton Ehrensberger, who later incorporated as Business Electronics Corporation (BEC), was the sole dealer of Sharp Electronics Corporation (Sharp) calculators in the Houston area from 1968 until mid-1972.[163] Calculators were complex, unfamiliar products during this period and BEC concentrated on building its market share by selling at less than the suggested retail

---

note 151.

158. *Apple*, 792 F.2d at 1468-69.

159. 756 F.2d 1467 (10th Cir.), *cert. denied*, 474 U.S. 823 (1985).

160. *Id.* at 1476.

161. *Id.*

162. Business Elecs. v. Sharp Elecs., 107 S. Ct. 3182 (1987) (certiorari granted). The cases cited by the Court as evidence of the disagreement among the circuits were McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 108 S. Ct. 1728 (1988); Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986) (termination of dealer which did not comply with customer restriction not illegal unless price fixing agreement proved); Westman Comm'n Co. v. Hobart Int'l, Inc., 796 F.2d 1216 (10th Cir. 1986) (refusal to grant kitchen equipment dealership not per se illegal unless an agreement to fix prices exists), *cert. denied*, 108 S. Ct. 1728 (1988); Zidell Explorations, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465 (9th Cir. 1983); Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3d Cir. 1979); Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515, 1517 n.1 (1988).

163. Business Elecs. v. Sharp Elecs., 780 F.2d 1212, 1214-15 (5th Cir. 1986), *aff'd*, 108 S. Ct. 1515 (1988).

price, rather than by offering presale services.[164]

As their business relationship continued, "Sharp became dissatisfied with BEC's performance."[165] In mid-1972 Sharp threatened to cancel BEC's dealership.[166] Sharp maintained that this threat was due to BEC's poor sales performance, allegedly caused by inadequate presale service.[167] BEC presented evidence at trial, however, that Sharp's real concern was BEC's discount pricing.[168]

As a result of Sharp's concerns, it appointed Gilbert Hartwell as a second area dealer.[169] Hartwell offered full presale services, and there is evidence that he was initially offered an exclusive dealership, understanding that BEC would be terminated.[170] Sharp, desiring to learn more about the market before taking any action, did not terminate BEC.[171]

Although Hartwell was free to charge any price he wanted, and sometimes did give discounts, he generally adhered to Sharp's suggested pricing schedule.[172] He complained bitterly about BEC's prices, alleging that BEC was "free riding" on his presale services.[173] The complaints included conversations with and letters to Sharp's regional sales representative, national sales manager, and vice-president.[174]

Finally, in June, 1973, Hartwell gave "an ultimatum to Sharp — unless Sharp terminated BEC within 30 days, Hartwell would terminate his own Sharp dealership. Sharp responded by terminating BEC."[175]

---

164. *Id.* at 1215; Respondent's Brief at 3, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

165. 780 F.2d at 1215.

166. Petitioner's Brief at 3, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

167. 780 F.2d at 1215; Respondent's Brief at 3.

168. 780 F.2d at 1215. Sharp's Texas representative complained to BEC about its "'messing up' the market and 'creating dealer complaints.'" Petitioner's Brief at 3. Sharp's vice-president told BEC's owner to "'clean up his pricing structure.'" *Id.* at 4.

169. 780 F.2d at 1215.

170. Respondent's Brief at 4-5.

171. 780 F.2d at 1215.

172. *Id.*

173. *Id.*

174. Petitioner's Brief at 4.

175. 780 F.2d at 1215.

B. *Lower Court Decisions*

In response to its termination, BEC filed suit in the Western District of Texas alleging violation of section 1 of the Sherman Act.[176] The case was tried before a jury.[177] The court instructed the jury that a per se illegal agreement existed if BEC's termination was subsequent to an agreement between Hartwell and Sharp to eliminate price cutting.[178] The jury found the existence of such an agreement and returned a verdict for BEC.[179] The trial court judge denied Sharp's motion for judgment notwithstanding the verdict, or in the alternative, a new trial.[180]

On appeal, the Fifth Circuit repudiated the district court's theory of liability.[181] It held that termination of a discounter to eliminate price competition was inadequate evidence to support a finding of per se liability because "abstract lessening of intrabrand competition is not enough."[182] Acknowledging its conflict with decisions in other circuits,[183] the court reasoned that since many nonprice restraints, which are not per se illegal, have direct impact on prices,[184] the nonterminated "distributor must expressly or impliedly agree to set its prices at some level, though not a specific one."[185] The court did not explain how par-

---

176. Business Elecs. v. Sharp Elecs., No. 78 Civ. 1020 (W.D. Tex. July 11, 1975), *rev'd*, 780 F.2d 1212 (5th Cir. 1986), *aff'd*, 108 S. Ct. 1515 (1988).

177. 780 F.2d at 1214.

178. The jury charge was: "The Sherman Act is violated when a seller enters into an agreement or understanding with one of its dealers to terminate another dealer because of the other dealer's price cutting." 780 F.2d at 1215. In its introductory statement, the jury instruction stated:

> The general objectives of the antitrust laws, including the Sherman Act, are to preserve and advance our system of free and open competition, and to secure to everyone an equal opportunity to engage in a business trade and commerce of this country — a policy which is the primary feature of our private enterprise system.

Joint Appendix at JA-14, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910). Neither the Fifth Circuit nor the Supreme Court commented on this introductory statement.

179. Petition for cert. at 24a, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

180. *Id.*

181. 780 F.2d at 1215.

182. *Id.* at 1216 (quoting Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1116 (5th Cir. 1979)).

183. 780 F.2d at 1216.

184. *Id.*

185. *Id.* at 1218. The court used *Monsanto* to support this heightened evidentiary

ties could fix prices at a level without being specific.[186]

After holding BEC's evidence inadequate to support per se illegality based on this strict standard, the Fifth Circuit reversed the district court's decision.[187] BEC's request for a rehearing en banc was denied.[188] BEC then appealed to the Supreme Court and was granted certiorari.[189]

C. *Opinion of the Supreme Court*

1. *The Majority*

Justice Scalia, writing for the majority, concluded that per se illegality should have a narrow scope and that the Fifth Circuit had set forth the appropriate standard.[190] He interpreted *Sylvania* and *Monsanto* as dictating:

> that there is a presumption in favor of a rule-of-reason standard; that departure from that standard must be justified by demonstrable economic effect . . .; that interbrand competition is the primary concern of the antitrust laws; and that rules in this area should be formulated with a view towards protecting the doctrine of *GTE Sylvania*.[191]

The Court was concerned about the inability of juries to distinguish legitimate conduct designed to enhance services from a conspiracy to restrict competition, given that "price cutting

---

standard. *Id.* at 1217. In her concurrence, Judge Jones took the opportunity to assault the per se rule against vertical price restraints. "I believe this case perfectly illustrates the arguments why vertical price restraints should be tested under antitrust's Rule of Reason rather than, as *Monsanto* continues to require, per se illegality. There is no social benefit to subjecting manufacturers' pricing relationships with their distributors to potential per se illegality . . . ." *Id.* at 1221 (Jones, J., concurring).

186. One possibility would be a fixed mark-up above the wholesale price. If the wholesale price fluctuates, the price fixed would not be a specific one. It seems, however, that even in a market with fluctuating prices like that for calculators in the early 1970s, a manufacturer would publish new suggested retail prices when it changed its wholesale prices.

187. 780 F.2d at 1219-20.

188. Petition for certiorari at 2, Business Elecs. v. Sharp. Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

189. Business Elecs. v. Sharp Elecs., 107 S. Ct. 3182 (1987) (certiorari granted).

190. Business Elecs., 108 S. Ct. at 1519-21.

191. *Id.* at 1520-21. Justice Scalia ignored the clear impact on prices, concentrating on whether the agreement had the potential for reducing output. *Id.* at 1521. *See supra* notes 26-28 and accompanying text.

and some measure of service cutting usually go hand in hand."[192] It felt that if agreements such as that between Hartwell and Sharp to eliminate dealers which are not providing what the manufacturer considers adequate services are per se illegal, manufacturers would forego improvements to their distribution system rather than risk antitrust liability by terminating those dealers.[193]

After slightly modifying the Fifth Circuit's standard to require that an agreement on prices or price levels be proved before finding per se liability,[194] Justice Scalia then paradoxically stated that the evidentiary difficulty cannot be resolved by "invalidating as illegal *per se* only those agreements imposing vertical restraints that contain the word 'price,' or that affect the 'prices' charged by dealers."[195] Although he did not explain this statement, the discussion of *Sylvania* directly following it indicates that it may be an invitation to further challenges to the per se rule against vertical price fixing.[196]

The remainder of the majority opinion is devoted to repudiating Justice Stevens' dissent, stating that the common-law prohibition of restraints on alienation is inapplicable because the restraint at issue is not a price restraint;[197] the per se prohibition of horizontal price restraints is irrelevant to vertical agreements;[198] group boycott cases are inapplicable because they involve horizontal combinations;[199] and precedents cited by the dissent do not stand for the proposition that per se illegality does not require the setting of a price or price level.[200]

---

192. *Id.* at 1521. As the dissent points out, however, this type of fact finding by a jury is the heart of our judicial process. *Id.* at 1534 & n.17, 18. (Stevens, J., dissenting).

193. *Id.* at 1521. Given the probability that a manufacturer may terminate a discounter to implement improvements to its distribution scheme, the Court stated that a price fixing agreement does not so often follow from discounter termination to warrant per se illegality. *Id.* at 1523.

194. *Id.* at 1525.

195. *Id.* at 1521.

196. *Id.* at 1521-22.

197. *Id.* at 1524.

198. *Id.*

199. *Id.* at 1525. Justice Scalia criticized Justice Stevens' perpetuation of the confusion caused in *Cernuto* by his characterization of dealer termination based upon competitor complaints as a horizontal restraint. *Id.* at 1523 n.4. *See supra* note 126 and accompanying text.

200. 108 S. Ct. at 1525. Justice Scalia also criticized the dissent's characterization of

2. *The Dissent*

Emphasizing the difficulty of determining whether Sharp's conduct was a price or a nonprice restraint, Justice Stevens argued that the inquiry should focus on the nature of the restraint.[201] He acknowledged the lack of on-point precedent and made comparisons to other agreements involving both clearly unilateral actions by the manufacturer, which are not per se illegal, and those in which a group of competing dealers coerce the manufacturer to terminate the discounter, which are per se illegal.[202]

Since the consequences to BEC were identical to those which would result if a group of manufacturers or distributors conspired to exclude it from the market, the dissent argued that group boycott cases should control.[203] Because the only distinguishing feature is the number of conspirators involved, not whether the agreement is horizontal or vertical, Justice Stevens argued that the same rules should apply:

> Precisely the same goal was sought and effected in this case — the elimination of price competition at the dealer level. Moreover, the method of achieving that goal was precisely the same in both cases — the manufacturer's refusal to sell to discounting dealers . . . . [T]he difference is simply a difference in the number of conspirators.[204]

---

the agreement as a "naked" restraint. He pointed out that it is only a naked restraint if one assumes Sharp has no valid business justification for terminating BEC. *Id.* at 1522 n.3. *See supra* note 20 and accompanying text.

201. 108 S. Ct. at 1526-29 (Stevens, J., dissenting). Justice Stevens focused on the distinction between naked and ancillary restraints made in Judge Taft's seminal opinion in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899). *See supra* note 20. Justice Stevens noted that this opinion is "universally accepted as authoritative . . . [and has been praised as] 'one of the greatest, if not the greatest, antitrust opinions in the history of the law.' " 108 S. Ct. at 1527 (quoting R. BORK, *supra* note 26, at 26).

202. 108 S. Ct. at 1529.

203. *Id.* at 1531-32. These cases include United States v. General Motors Corp., 384 U.S. 127 (1966) (group of competitor's influencing manufacturer to terminate discounters held per se illegal), and Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (boycott of store owner by manufacturers at behest of competitor held per se illegal).

204. 108 S. Ct. at 1532. The counter-argument, of course, is that no conspiracy at all was involved and that Sharp's action was unilateral. The response to this counter-argument is that the jury found that a conspiracy did exist, a finding that neither the Fifth Circuit nor the majority took issue with. *See supra* note 179 and accompanying text.

The dissent was also troubled by the majority's "failure to attach any weight to the value of intrabrand competition."[205] Although *Sylvania* expressed the primacy of interbrand competition over intrabrand competition, it did not state that preservation of intrabrand competition is not important, only that interbrand competition is more important.[206]

In its final argument, the dissent stated that the *Monsanto* evidentiary hurdle is adequate to prevent liability where the manufacturer is legitimately attempting to improve his distribution system: (1) there must be " 'evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently,"[207] (2) "the terminated dealer must prove that the agreement was based on a purpose to terminate it because of its price cutting,"[208] and (3) the inference of price fixing may be rebutted by showing reasons for termination unrelated to price.[209]

In concluding, Justice Stevens used a quote from one of the main proponents of the efficiency model, former Judge Bork, to support his position: "[s]ince the naked boycott is a form of predatory behavior, there is little doubt that it should be a per se violation of the Sherman Act."[210]

IV. Analysis

Business Electronics demonstrates the anomalous result which occurs when conduct is judged per se illegal, or only illegal if unreasonable,[211] depending on a factor as ill-defined as whether it is a vertical *price* or *nonprice* restraint. Since the Supreme Court has continued to acknowledge that certain conduct should be per se illegal,[212] per se rules should be fashioned to

---

205. 108 S. Ct. at 1532.

206. *Id. See* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 52 n.19 (1977).

207. 108 S. Ct. at 1534 (quoting Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984)).

208. *Id.* at 1534-35.

209. *Id.* at 1535.

210. R. BORK, *supra* note 26, at 334. The majority opinion makes clear, however, that the Court considered BEC and Hartwell's conduct neither a naked restraint nor a boycott. *See supra* notes 197-200 and accompanying text.

211. *See supra* notes 39-67 and accompanying text.

212. *See supra* notes 90-92 and accompanying text. Congress has also continued its support for application of per se illegality in appropriate cases. *See supra* notes 90, 92.

implement the purposes of the Sherman Act: preservation of competition by allowing all qualified competitors to compete.[213] Conduct with a high probability of subverting this intent should be per se illegal.

A. *Price/Nonprice Distinction*

As *Business Electronics* aptly demonstrates, it is very difficult to distinguish price from nonprice vertical restraints in cases where a discounter is terminated subsequent to a competitor's complaint.[214] Furthermore, "the economic effect of . . . unilateral and concerted vertical price setting, [and] agreements on price and nonprice restrictions — is in many, but not all, cases similar or identical."[215] If a manufacturer desires to induce presale services, then the termination may be beneficial.[216] If the termination is a result of coercion by a competitor, however, its result may be increased prices to consumers without any benefit.[217] Because of the potential for harm to consumers, some vertical restraints, including some which do not specifically set prices, should be illegal without an elaborate investigation into their competitive effects.[218]

Since the Sherman Act is a statutory creation, the intent of

213. *See supra* notes 32-38 and accompanying text.

214. *See supra* notes 201-02 and accompanying text.

215. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 762 (1984). This point is not disputed by opponents of per se illegality for vertical restraints. *See* Easterbrook, *supra* note 5, at 140-43; Posner, *supra* note 52, at 6-10.

216. *See supra* notes 109-11, 118-20 and accompanying text. The assumptions used by advocates of the efficiency model in coming to this conclusion are "that the market is perfectly competitive, that a supplier's motive . . . is to maximize output, that complex organizations behave in accord with the model's definitions, and that the aggregate of the micro will reflect the macro common good." Flynn, *supra* note 33, at 1127. On the other hand, some consumers may have no need for presale services. From their perspective, the only result of the restraint is higher prices. *See* Comanor, *supra* note 31, at 990-92.

217. Advocates of the efficiency theory insist that no rational manufacturer will allow this behavior since it will reduce output and ultimately, his profit. *See* Easterbrook, *supra* note 5, at 140-42. Other motivations influence behavior, however: "Business managers frequently act in order to realize personal goals, including political power or personal security within their firms, as well as to build empires." Fox, *supra* note 23, at 1170.

218. Were this not so, the practical difficulties preventing a plaintiff from prevailing in a case using the rule of reason standard would allow harmful behavior to go unpunished. *See supra* note 52 and accompanying text.

Congress is relevant to this discussion. Although advocates of the efficiency model insist that vertical restraints will not have anticonsumer effects,[219] Congress clearly found to the contrary when it repealed the Fair Trade Laws.[220] Additinally, Congress re-emphasized its approval of per se rules in 1985 when it repudiated the Justice Department's Vertical Restraint Guidelines.[221]

Although not passed in the 100th Congress, a bill was proposed in 1987 which would legislatively roll back the evidentiary requirement dictated in *Monsanto*.[222] Even though the pronouncements of a subsequent Congress are not always relevant in determining the intent of a Congress which originally passed a bill, "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction."[223] Although Congressional statements describing the intent of a bill not passed are not particularly relevant,[224] those accompanying the 1975 Act and contained in the 1985 Act supporting retention of per se illegality for certain vertical restraints should certainly be accorded greater weight by the courts than they appear to have been given.

If the stimulation of product demand through provision of presale services is the real goal of a vertical restraint, then contractual arrangements could be used to achieve that goal, thus eliminating any dispute about the manufacturer's motive before it occurs.[225] When contractual arrangements provide for neces-

---

219. *See, e.g.*, R. BORK, *supra* note 26, at 290-91; Easterbrook, *supra* note 5, at 147.

220. *See supra* note 92.

221. *See supra* note 90.

222. The proposed bill would allow an inference of illegal activity if the termination of the discounter was " 'in response to' price-related communications from a rival dealer to a common supplier." H.R. REP. No. 421, 100th Cong., 1st Sess. (1987), *reprinted in* 53 ANTITRUST & TRADE REG. REP. (BNA) 763, 770 (Nov. 12, 1987).

223. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 380-81 (1969).

224. "[T]he Supreme Court most often relies on Congressional inaction when there has been active deliberation in response to administrative or judicial interpretations of statutes — so that the 'inaction' is arguably a reasoned acquiescence . . . ." W. ESKRIDGE & P. FRICKEY, LEGISLATION — STATUTES AND THE CREATION OF PUBLIC POLICY 773 (1988).

225. *See* Pitofsky, *supra* note 11, at 1493. Since vertical restraints are also imposed by contract, this suggestion would not burden the parties with an additional contract negotiation. *See* Piraino, *supra* note 32, at 5. This approach would directly impose requirements for the desired results on the dealer, not indirectly through imposition of vertical restraints.

Reliance on a higher price, for instance, to achieve the objective of increased presale services does not tell a dealer what that objective is. *See* Pitofsky, *supra* note 11, at 1493.

sary pre-sale services, the expectations of both parties are then clearly spelled out, making disputes less likely. When the inevitable disputes do arise, they can be resolved through actions to enforce the terms of the contracts, which are inherently less complex than antitrust actions.[226] It necessarily follows that the parties to the contract will be protected from antitrust liability because the document will clearly spell out the requirement for increased services, which would not be judged an unreasonable restraint on trade.[227]

B. *Proposed Evidentiary Standard*

To determine whether per se liability is warranted when a manufacturer terminates a discounter pursuant to a competitor's complaints, a court should examine whether the defendant has a significant market share, whether the product's consumers are primarily replacement buyers,[228] the complexity of the product, and its uniqueness.[229] A court would then choose whether per se liability is appropriate depending on whether or not the combi-

In fact, if the dealer in question has multiple products, "the idea that the manufacturer can induce better services or more amenable surroundings by raising the retail price on one item is ridiculous." *Id.* Advocates of the efficiency theory, however, argue that it is not necessary to specify what services are to be provided. By the manufacturer fixing the higher prices, a dealer's only intrabrand competitive advantage is the provision of more services. Moreover, the higher price enables them to afford providing these services. *See* Posner, *supra* note 119, at 283-84.

Termination of a dealer for noncompliance with the restraints poses an unnecessary inefficiency since temporary market dislocation results when the manufacturer must bring a new dealer into its distribution system. It is in a manufacturer's best interest to have as much intrabrand competition as possible, since this will lower consumer costs and therefore increase sales volume. *See* Piraino, *supra* note 32, at 5. *Cf.* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984) (irrational dislocation will result from preventing a manufacturer from reacting in response to a complaint).

226. *See supra* note 52 for an example of the complexity of antitrust cases. The Court has stated that antitrust is "complex . . . litigation where motive and intent play leading roles. . . ." Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 473 (1962).

227. Even prior to *Monsanto,* if a rational reason for terminating a dealer other than price fixing existed, no liability would be found. *See, e.g.,* Schwimmer v. SONY Corp. of Am., 677 F.2d 946 (2d Cir. 1981) (dealer had submitted false advertising vouchers for which it had been given credit), *cert. denied,* 459 U.S. 1007 (1982). *See also* Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986) (dealer repeatedly violated customer restrictions).

228. Replacement buyers are previous purchasers of a product who are either purchasing a new or additional item. *See generally* Comanor, *supra* note 31, at 990-92.

229. *See infra* notes 232-43 and accompanying text.

nation of these factors shows that harm to competition is likely.[230] A defendant would then be free to rebut the presumption of illegal conduct.[231]

1. *Factors Indicating Probability of Harm to Competition*

Having determined that per se rules should be retained, and that the distinction between price and nonprice vertical restraints is not a valid index in cases where a discounter is terminated subsequent to a competitor's complaints, a sufficiently stringent test must be developed to impose per se liability in appropriate cases without deterring conduct unlikely to harm competition. By applying a set of objective factors which courts can use to balance the probability of harm to competition against the potential benefits of efficient distribution, the current irrational policy, as exemplified by *Business Electronics*, can be rectified.

The most important factor in determining whether harm to competition is likely to occur when a manufacturer terminates a discounter pursuant to a competitor's complaints is whether the product in question has a significant market share.[232] Determination of what market share is significant to show market power has caused problems for courts in monopoly cases.[233] Factors influencing this determination have included market concentration,[234] uniqueness of the product,[235] and the applicable geographic market.[236]

---

230. *See infra* notes 244-51 and accompanying text.

231. *See supra* note 56 and accompanying text.

232. In this respect, the proposed analysis is similar to market power determination in a monopoly case. *See supra* notes 48-51 and accompanying text.

233. *See, e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945) (depending on how the market is defined, defendant's market share varied between thirty-three percent and ninety percent).

234. Market concentration is the degree to which a small number of companies control most of a particular market. In a recent case in the Seventh Circuit, for example, the court enjoined acquisition of one industrial dry corn seller by another, pending completion of FTC proceedings, because there were only six firms of any significance in the market. The court considered this to be a high degree of concentration. FTC v. Elders Grain Inc., 57 U.S.L.W. 2469 (7th Cir. Feb. 21, 1989). *See also* Telser, *supra* note 110, at 88.

235. *See infra* note 243 and accompanying text.

236. *See* E. GELLHORN, *supra* note 3, at 91-112. *See also* 2 P. AREEDA & D. TURNER, *supra* note 48, at 321-88.

Since the same types of problems as those in determining market power in monopoly cases may occur in determining significant market share in discounter termination cases, a court should not undertake an elaborate inquiry, such as it would in a rule of reason analysis.[237] Only in those cases in which the market share in question is very small, such as when a company is either newly entering a market or, although established, has been unsuccessful in its competitive activities, should a market share be considered insignificant. However, no firm line should be drawn; if the market share is arguably significant, the inquiry should continue forward to whether the reduction in intrabrand competition resulting from terminating a discounter is likely to be offset by increases in interbrand competition.[238]

This increase in interbrand competition is likely to occur only if the level of presale services maintained by the termination is desired or required by the market in question.[239] The other three factors address this point: whether the product's consumers are primarily replacement buyers, the complexity of the product, and the uniqueness of the product.

If customers are not interested in or have no need for presale services, price increases caused by providing them will not benefit consumers or increase interbrand competition.[240] Customers who fall into this category are often return buyers of an established product who are already knowledgeable about the product.[241] Buyers of a newly developed product or new buyers, however, are likely to need the kind of presale services which vertical restraints can induce. The key to this factor is thus whether the consumers of a given product are primarily replace-

237. *See supra* notes 46-52 and accompanying text.

238. This is the same principle advocated by the Court in examining typical non-price vertical restraints. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-56 (1977).

239. *Id.* at 55.

240. *See supra* note 217 and accompanying text.

241. *See* Comanor, *supra* note 31, at 990-92. The efficiency school argument to this point is that interbrand competition will resolve this problem since these consumers will buy a competing product if they do not value the presale services more than the increase in prices. *See* Piraino, *supra* note 32, at 5. But many of these consumers are "infra-marginal" — they are willing to pay more for the product than the price which existed prior to imposition of the requirement for presale services. These consumers will continue to buy the product yet receive no benefit from the increased presale services. *See* Comanor, *supra* note 31, at 990-92.

ment buyers.

Another consideration is that the complexity of a product will dictate the degree of presale services required. There should be no need for extensive presale services for simple products and thus no reason for the imposition of vertical restraints intended to induce these services.[242]

Finally, if a product is unique, by definition it has little or no interbrand competition. There should be no need for presale services besides advertising for a unique product unless it is either complex or its consumers are predominantly first-time buyers.[243]

In applying this four-part standard, the first determination should be whether the terminated dealer is a discounter and has been terminated pursuant to a competitor's complaints. If it is not a discounter, consumers are not harmed by the termination since they can purchase the product for the same price elsewhere.[244] If the manufacturer has acted without input from others, there has been no "contract, combination . . . or conspiracy"[245] and the *Colgate* doctrine applies.[246]

Once it has been determined that a discounter was terminated pursuant to a competitor's complaints, the next inquiry is whether the terminating party has a significant market share.[247] If not, the illegality of the termination should be analyzed using the rule of reason.

If the terminating party has a significant market share, then the analysis proceeds to whether any of the other three factors is present: (1) whether the buyers are primarily new buyers; (2) whether the product is complex; and (3) whether the product is

---

242. Although advertising is not, strictly speaking, a customer service, it may be required to promote a product. The dealer may thus require some of the protection provided by vertical restraints even for simple products. *See* Posner, *supra* note 52, at 4-5. For a general discussion of antitrust considerations of advertising, see R. BORK, *supra* note 26, at 314-20.

243. *See supra* notes 240-42 and accompanying text. For example, the manufacturer of a unique, complex product attempting to break into an established market may require presale promotion and services.

244. The competing dealer which complained presumably has a ready supply available.

245. 15 U.S.C. § 1 (1982).

246. *See supra* notes 72-76 and accompanying text.

247. *See supra* notes 232-38 and accompanying text.

unique.[248] If any of these factors is present, the manufacturer has a legitimate concern about pre-sale services and it is plausible that the termination is a result of these concerns.[249] The termination should then be judged using the rule of reason. Only if none of these factors is present should the termination be per se illegal.

An exception to the above test should be applied in those cases where the terminated discounter's retail operation is a large, multiproduct outlet. In those cases, increased prices are unlikely to produce the increased services allegedly desired by the manufacturer.[250] Unless the manufacturer can show that the discounter refused to agree contractually to provide presale services, its termination should then be judged per se illegal if the manufacturer has a significant market share.[251]

Although this test obviously does not provide a bright line standard, using it to determine the scope of per se illegality in a case where a discounter is terminated pursuant to a competitor's complaints will effectuate the purposes of antitrust law. The proposed test requires a more searching inquiry than is applied in most per se illegality cases,[252] but it does not require examination of the market effect of the termination, which would be required in a rule of reason analysis.[253] Reliance on a bright line standard between price and nonprice vertical restraints has led to the disparate treatment which similar conduct receives today.[254] Our judicial system is accustomed to performing balancing tests;[255] to require it to perform an evaluation of several ob-

248. *See supra* notes 240-43 and accompanying text.

249. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 55 (1977).

250. *See supra* note 225.

251. *See supra* notes 225-27 and accompanying text.

252. In vertical price fixing cases, for example, all that is required to apply per se illegality is the existence of an agreement to set prices. *See supra* notes 68-92 and accompanying text. *Cf.* FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), where the Court examined whether particular reciprocal dealing had a probable anticompetitive impact before implicitly holding it per se illegal.

253. *See supra* notes 46-52 and accompanying text.

254. *See supra* notes 154-62 and accompanying text.

255. For example, the law of torts abounds with balancing tests. To determine if a duty exists in a negligence action, the utility of an actor's conduct must be balanced against the probability and severity of the harm risked. W. KEETON, D. DOBBS, R. KEETON, D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984). In an action for nuisance, the gravity of the harm from the activity must exceed the utility

jective factors to determine the proper evidentiary standard in discounter termination cases should not be an undue burden.

2. Business Electronics

Application of the proposed test to *Business Electronics* yields a result which agrees with that of the Court: the potential antitrust violation resulting from Sharp's termination of BEC should be judged using the rule of reason.

Calculators in the early 1970's, were relatively new.[256] The competition for business was fierce, and the market consisted of many firms with small market shares selling similar products.[257] Sharp's market share was thus not significant, and the harm to intrabrand competition caused by BEC's termination was not likely to harm interbrand competition.[258] Under the proposed test, the inquiry terminates here and dictates that the illegality of Sharp's actions be judged using the rule of reason.[259] Even if Sharp's market share had been significant, application of the other proposed factors would dictate that the rule of reason be used.[260] Not only were calculators new and their consumers thus primarily first-time buyers, but their operation was also complex.[261] Because many competing calculators offered similar features, any particular product was not unique.[262] Thus all of the factors which show that Sharp would have a legitimate concern for presale services were present. The large, multiproduct outlet exception would not apply because "BEC's only business was to buy calculators from Sharp . . . and sell them at retail."[263] Application of the proposed test thus clearly shows that Sharp's termination of BEC should be judged using the rule of reason.

---

of the conduct for the conduct to be considered unreasonable. RESTATEMENT (SECOND) OF TORTS § 826(a) (1979).

256. Respondent's Brief at 3, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

257. *Id.* at 8.

258. *See supra* notes 232-38 and accompanying text.

259. *See* text accompanying note 247.

260. *See supra* notes 239-43, 248-49 and accompanying text.

261. Respondent's Brief at 3, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

262. *Id.* at 8.

263. Petitioner's Brief at 3, Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515 (1988) (No. 85-1910).

V. Conclusion

The purpose of the Sherman Act is to assure fairness to consumers by preserving the right of business entities to compete in the marketplace.[264] The rules which have resulted from the Act's common-law evolution dictate that most vertical price restraints are per se illegal,[265] whereas vertical nonprice restraints are illegal only if proven to be unreasonable.[266]

Rather than attempting to remedy the disparate treatment which results from using this distinction to evaluate the potential antitrust violation in a discounter termination case, the Supreme Court dictated that only restraints which include an agreement on price or price levels are per se illegal.[267] The results of this reasoning produce a dividing line similar to that drawn in *Schwinn* between nonprice restraints on buyers as opposed to the same restraints on consignees, which the Court repudiated in *Sylvania*.[268] The Court has just drawn the line in a different place for a different type of restraint. Hopefully this artificial distinction will be repudiated more quickly than was the distinction in *Schwinn*.[269]

The goals of the Sherman Act can be realized in a discounter termination case only by having judicial standards which focus on the probable effects of a discounter's termination. The test proposed to determine the probability of harm to competition would require a court to examine a set of objective factors to determine if a discounter's termination was contrary to the goals of the Sherman Act. If the court concluded that a discounter's termination was contrary to these goals, the court would declare it per se illegal.[270] In this way, potentially beneficial conduct will not be condemned because it fits into a certain category and truly harmful conduct will be recognized as such. Using this test, the conduct of Sharp in *Business Electronics*

264. *See supra* notes 19-38 and accompanying text.

265. *See supra* notes 68-92 and accompanying text.

266. *See supra* notes 93-113 and accompanying text.

267. Business Elecs. v. Sharp Elecs., 108 S. Ct. 1515, 1525 (1988).

268. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977). *See supra* notes 108-11 and accompanying text.

269. Ten years elapsed between *Schwinn* and *Sylvania*. *See supra* notes 101-08 and accompanying text.

270. *See supra* notes 244-51 and accompanying text.

would be judged using the rule of reason.[271]

Dissatisfaction with the results of the common-law evolution of the Sherman Act exists both among advocates who wish to constrict the scope of per se illegality as well as among those who would preserve or expand it.[272] Failure to adopt a rational approach, such as the one suggested, will only preserve the unsatisfactory current approach, shifting the line dividing per se illegal from rule of reason cases as the political and economic climate change and as different antitrust theories pass in and out of vogue.

James R. Warnot, Jr.

271. *See supra* notes 256-63 and accompanying text.

272. *See* R. Bork, *supra* note 26; Easterbrook, *supra* note 5; Posner, *supra* note 52. *Cf.* Flynn, *supra* note 33; Pitofsky, *supra* note 11; Comanor, *supra* note 31.

Pace Law Review

Volume 9, Number 3
Summer 1989

Pace University School of Law
White Plains, New York

INDEX TO ARTICLES AND COMMENTARIES

INDEX TO BOOK REVIEWS

INDEX TO FILM REVIEW

INDEX TO REPORTS

INDEX TO NOTES AND COMMENTS

INDEX TO TRIBUTES

INDEX TO AUTHORS

SUBJECT INDEX