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FRANKLIN A. GEVURTZ*

Vertical Restraints on Competition

This report addresses the application of United States “anti-trust” – or what other nations commonly refer to as “competition” – law to agreements between sellers and purchasers of goods and services, when those agreements impact competition. In other words, this report is concerned with “vertical,” as opposed to “horizontal,” restraints (horizontal referring to agreements between competitors). This report will proceed in two parts. Part I will provide a broad overview of the relevant statutes, enforcement mechanisms, and approach of United States law to vertical restraints. Part II will discuss how United States law currently applies to specific vertical restraints.

I. BACKGROUND

A. *The Applicable Statutes*

Section 1 of the Sherman Act¹ is the principal statute governing the legality of vertical restraints that impact competition within the United States. Section 1 outlaws every “contract, combination . . . or conspiracy” in “restraint of trade.” All contracts, however, literally restrict trade to some extent because parties bound to any agreement lose the freedom of action that they possessed before entering into the agreement.² Accordingly, the United States Supreme Court interprets Section 1 as prohibiting only those combinations that unreasonably restrain competition.³ Under this rule of reason, United States courts examine the impact of a challenged contract to determine whether, on balance, it promotes or destroys competition.⁴ Sometimes, however, the effect of the conduct is so plainly anticompetitive, and the practice so lacking of any redeeming virtue, that no elaborate evaluation of its impact is necessary in each case. United States courts deem these practices illegal per se.⁵ Examples of practices

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1. 15 U.S.C. § 1.

2. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains.”).

3. *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

4. *E.g., National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 690 (1978).

5. *E.g., Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

which are illegal per se include horizontal price fixing⁶ and horizontal division of markets.⁷ (By contrast, there is no list of agreements that are legal per se – perhaps for the simple practical reason that such a list would be boundless.)

Vertical restraints might also violate Section 2 of the Sherman Act.⁸ Section 2 makes it unlawful to “monopolize” or “attempt to monopolize.” Establishing a monopolization claim requires showing that the defendant possessed monopoly power in the relevant market, and willfully acquired or maintained that power, as distinguished from its growth or development as a consequence of a superior product, business acumen, or historic accident (in other words, the defendant acquired or maintained its power other than through conduct the law seeks to promote, or at least must tolerate from anyone).⁹ Establishing an attempt to monopolize requires showing that the defendant engaged in predatory or anticompetitive conduct, with a specific intent to monopolize, and with a dangerous probability of achieving monopoly power.¹⁰

Section 2 of the Sherman Act, unlike Section 1, can reach unilateral conduct. Vertical restraints, however, by definition arise in agreements between sellers and buyers – even though the agreement might be the result of coercion by one party who possesses market power – and so vertical restraints meet the requirement that there be a contract, combination or conspiracy in order for Section 1 to apply.¹¹ Discussion of the application of Section 2 to situations in which the plaintiff fails to show the existence of a vertical restraint (because there is no agreement as opposed to just unilateral action) is beyond the scope of this report. The law in the United States is not clear as to whether a vertical agreement involving a party with monopoly power might constitute monopolization in violation of Section 2 of the Sherman Act even though the agreement is not an unreasonable restraint of trade in violation of Section 1. Some United States court opinions, recently including the Court of Appeals decision in *Microsoft*,¹² have expressed this view, and parties with monopoly

6. *E.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940).

7. *E.g.*, *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972).

8. 15 U.S.C. § 2.

9. *E.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966).

10. *E.g.*, *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

11. *E.g.*, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 459 n.6 (1992); *Systemcare, Inc. v. Wang Lab Corp.*, 117 F.3d 1137, 1140 (10th Cir. 1997) (en banc decision reversed a prior precedent that had held a tying contract was a unilateral action). This is not to say that litigation involving purported vertical restraints does not often raise the issue as to whether there was, in fact, an agreement on something that might constitute an unreasonable restraint of trade versus just unilateral action. See text accompanying notes 57-65, 154 *infra*.

12. *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001). This was entirely dicta, since, as the Court of Appeals pointed out, the District Court in *Microsoft* had rejected the government's Section 1 exclusive dealing claim based upon

power cannot legally make all agreements that parties without such power are at liberty to make.¹³ Yet, market power of the defendant is a critical factor under the rule of reason in applying Section 1¹⁴ and so it is not clear why a vertical restraint imposed by a party with monopoly power would violate Section 2 but not also Section 1.

There is also some authority for the proposition that Section 3 of the Clayton Act¹⁵ might prohibit certain types of vertical restraints in situations not reached by Section 1 of the Sherman Act. Section 3 of the Clayton Act makes it unlawful to sell or lease goods on the condition that the purchaser or lessee does not use a competitor's goods, where the effect of the restriction "may be to substantially lessen competition or tend to create a monopoly." Section 3 of the Clayton Act is narrower than Section 1 of the Sherman Act, even with respect to agreements that foreclose the buyer's dealing with competitors of the seller, in that Section 3 only reaches restraints involving goods, whereas Section 1 can reach transactions involving goods or services.¹⁶ Does Section 3 of the Clayton Act, however, ban any vertical restraints not also prohibited by Section 1 of the Sherman Act? The United States Supreme Court at one time suggested that Section 3 of the Clayton Act would prohibit tying contracts in situations beyond those prohibited by Section 1 of the Sherman Act.¹⁷ Similarly, the United States Supreme Court at one time referred to the "broader proscription" of exclusive dealing contracts by Section 3 of the Clayton Act versus Section 1 of the Sherman Act.¹⁸ Most subsequent Federal court decisions in the United States, however, seem to have ignored such distinctions,¹⁹ and so it now appears that the main impact of Section 3 of the Clayton Act has been to serve as a justification for applying Section 1 of the Sherman Act against tying contracts in a more rigorous manner than the courts otherwise might have undertaken.²⁰

a complete misconception as to what the test was for showing such contracts were unreasonable.

13. *E.g.*, *United States v. United Shoe Mach., Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

14. See text accompanying notes 112-114, 139-142 *infra*.

15. 15 U.S.C. § 14.

16. See, *e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).

17. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 606-609 (1953). In *Times-Picayune*, the court stated that tying would be illegal under Section 3 of the Clayton Act if either the seller had a monopolistic position in the tying product's market, or the tie foreclosed a substantial volume of commerce in the tied product, but that the tie-in would only be illegal under Section 1 of the Sherman Act if both conditions existed.

18. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335 (1961).

19. *E.g.*, *Omega Environmental, Inc. v. Gilbarco, Inc.* 127 F.3d 1157, 1167 (1997); *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207, 1214 (9th Cir. 1977). But see *Tire Sound & Custom Tops v. Chrysler Motors Corp.*, 959 F.2d 468, 485 (3rd Cir. 1992).

20. See, *e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984) (reciting the Congressional concern with tying arrangements that led to the enactment of

There is also some authority for the proposition that Section 5 of the Federal Trade Commission Act²¹ might reach vertical restraints that do not violate either the Sherman or the Clayton Acts. Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition.” The United States Supreme Court has held that this allows the United States Federal Trade Commission to prohibit conduct, including vertical restraints such as exclusive dealing contracts, beyond the precise strictures of the Sherman and Clayton Acts.²² The Federal Trade Commission, however, has tended to follow an approach consistent with that used by courts applying the Sherman and Clayton Acts to vertical restraints like exclusive dealing contracts.²³

B. Enforcement Mechanisms

Briefly, two federal government agencies – the United States Department of Justice Antitrust Division (which can bring either civil or criminal actions in United States Federal courts for violations of the Sherman and Clayton Acts²⁴), and the United States Federal Trade Commission (which can issue orders to cease and desist from conduct that violates the Clayton and Federal Trade Commission Acts²⁵) – have authority to prosecute antitrust claims. Private parties – to whom the Clayton Act grants standing to sue in Federal court for treble damages when injured by violations of the Sherman or Clayton Acts²⁶ – bring, however, the vast majority of antitrust actions.²⁷ This is particularly the case when dealing with vertical restraints, which, for several decades, have not been a priority for the federal enforcement agencies.

C. Overview of the United States Approach to Vertical Restraints

Treatment of certain vertical restraints as per se illegal in the United States traces back to the United States Supreme Court’s 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons*.²⁸ This decision condemned agreements under which the manufacturer of proprietary medicines set the minimum price that distributors could charge in reselling the products. Over the next six decades, the

Section 3 of the Clayton Act as part of the reason for continuing to treat tying as illegal per se under Section 1 of the Sherman Act).

21. 15 U.S.C. § 45.

22. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321-322 (1966).

23. E.g., E. Thomas Sullivan & Jeffrey L. Harrison, UNDERSTANDING ANTI-TRUST AND ITS ECONOMIC IMPLICATIONS § 5.02[A][3] (4th Ed. 2003).

24. 15 U.S.C. §§ 4, 25.

25. 15 U.S.C. § 45(b). Persons subjected to such a cease and desist order can appeal to the United States Court of Appeals. 15 U.S.C. § 45(c).

26. 15 U.S.C. § 15.

27. Judicial Business of the U.S. Courts, available at <http://www.uscourts.gov/library>.

28. 220 U.S. 373 (1911).

United States Supreme Court extended per se prohibitions of vertical restraints also to include: certain tying contracts under which the seller of one product or service requires the purchaser to buy from the seller another product or service;²⁹ restrictions imposed by a manufacturer on where and to whom distributors of its products may resell its products;³⁰ and restrictions imposed by a manufacturer on the maximum price distributors of its products may charge in reselling its products.³¹

Academic commentary, often associated with the so-called University of Chicago school of thought, has criticized the per se prohibition of these vertical restraints. These commentators argue that a manufacturer normally does not restrict price and other competition among dealers in its products (so-called intrabrand competition) in order for dealers to reap supercompetitive profits, but rather to encourage provision of various services or other promotional efforts by its dealers – the incentive for which would be undermined if some dealers offered cut-rate prices while free-riding on the services or other promotional efforts of the higher priced dealers. Such services or other promotional efforts, in turn, will improve the manufacturer's ability to compete with products from other manufacturers (interbrand competition), or, in any event, increase sales; both of which would be a pro-competitive result.³² These commentators also have criticized the leverage theory that underlay the per se condemnation of tying arrangements. They argue that a party with a monopoly in one product normally cannot obtain additional supercompetitive profits by using tying contracts to leverage its monopoly into a complementary product, because any effort to raise prices on the second product above competitive levels would lower the total demand for the combined items and thereby cut into the monopoly profits the producer makes on the first product.³³

A significant milestone in the United States approach to vertical restraints took place in the Supreme Court's 1977 decision in *Continental T.V., Inc. v. GTE Sylvania*.³⁴ Accepting the basic Chicago school critique of vertical restraints on intrabrand competition, the United States Supreme Court overruled a previous decision and held that territorial, location and customer restraints imposed by manufacturers on distributors are subject to the rule of reason, rather than

29. *E.g.*, *Northern Pac. Ry. V. United States*, 356 U.S. 1, 5 (1958).

30. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967).

31. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

32. *E.g.*, Lester G. Tesler, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86 (1960). Other commentators have taken a less benign view of restraints on intrabrand competition. *E.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Geo. L. Rev. 487 (1983).

33. *E.g.*, Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19 (1957).

34. 433 U.S. 36 (1977).

illegal per se.³⁵ Nevertheless, the United States Supreme Court has not overturned the per se condemnation of vertical minimum price fixing. The court's reticence seems to stem largely from various actions by the United States Congress that suggest Congress intended to make vertical minimum price fixing illegal.³⁶ The same reticence has not extended to vertical agreements fixing maximum prices, where, responding to the simple reality that lower prices normally are good for consumers, the United States Supreme Court, in its 1997 decision in *State Oil v. Kahn*,³⁷ reversed an earlier decision and held that vertical maximum price fixing agreements are not illegal per se. Finally, four justices of the United States Supreme Court, in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,³⁸ were ready to do away with the per se illegality of tying arrangements, in favor of employing the rule of reason. A majority of the court, however, was unwilling to take this step, largely based upon the view that Congress seems to have wanted a per se condemnation of some tying.³⁹

Despite urging from academic commentators,⁴⁰ as well as an abortive effort in the 1980s by the United States Department of Justice to establish enforcement guidelines for vertical restraints,⁴¹ vertical restraint cases in the United States, by and large, do not reflect a structured analysis of pro- and anti-competitive impacts from the restraint. To begin with, retention of the per se prohibition of vertical minimum price fixing and tying contracts, when juxtaposed with a rule of reason approach under which (particularly for vertical non-price restraints on intrabrand competition) plaintiffs rarely win,⁴² has led to a situation in which vertical restraint cases often revolve around attempts by plaintiffs to fit the challenged conduct within the category of a per se prohibition. The result in such litigation is to eschew evaluation of the pro- and anti-competitive aspects of the restraint in the case at hand, except insofar as some elements of the definition of per se prohibited conduct might at times provide a rough

35. *Id.* at 70.

36. *E.g.*, *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984) (Brennan J., concurring); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n. 30 (1977) (pointing to Congress' repeal of the "fair trade" laws as evidencing Congress' intent for vertical price fixing to be illegal per se).

37. 522 U.S. 3 (1997).

38. 466 U.S. 2, 33 (1984).

39. *Id.* at 9-10.

40. *E.g.*, Lawrence A. Sullivan & Warren S. Grimes, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 6.5 (2000).

41. In 1985, the United States Department of Justice under the Reagan Administration published guidelines for evaluating non-price vertical restraints. 50 Fed. Reg. 6,263 (Feb. 14, 1985). After the Clinton Administration took office, the Department of Justice withdrew these guidelines. *Division to Recall Vertical Guidelines, Expand Amnesty Policy for Corporations*, 65 Antitrust & Trade Reg. Rep. (BNA) No. 1627 at 227 (Aug. 12, 1993).

42. *E.g.*, Robert Pitofsky, Harvey J. Goldsmith, & Diane P. Wood, *TRADE REGULATION: CASES AND MATERIALS* 672 (5th ed. 2003).

approximation of competitive impact. Yet, even application of the rule of reason to vertical restraints in the United States tends not to be a consistently structured undertaking. For one thing, the lack of guidance from the United States Supreme Court on how to apply the rule of reason to vertical restraints has allowed lower United States Federal courts to differ among themselves in their approach. In addition, conflicting antitrust philosophies between administrations of different political parties, coupled with the fact that private plaintiffs institute the bulk of litigation involving vertical restraints, means that there is no centralized enforcement criteria to impose discipline upon the area.

In any event, the vast majority of rule of reason cases concerning vertical restraints in the United States involve either vertical non-price (territorial, location or customer) restraints on intrabrand competition, or exclusive dealing contracts. Application of the rule of reason to both these situations typically begins with using market shares to assess the anticompetitive potential of the restraint. Yet, as discussed later, both what is measured and how much is enough for concern are different when evaluating vertical non-price restraints on intrabrand competition (as well as tying) – where the share of the defendant's sales in the relevant market serves as an indirect measurement of the defendant's market power and the corresponding inability of the market to discipline the defendant's actions – as compared with exclusive dealing cases, which generally examine the impact of exclusive dealing contracts by considering the share of the market foreclosed to competitors by such contracts.⁴³ Regardless of the particular restraint, however, market analysis in vertical restraint cases in the United States tends to be more slapdash than is the case in other antitrust contexts, such as evaluation of mergers and monopolization cases;⁴⁴ for example, it is rare in the vertical restraint context to see any formal analysis of potential competition or the like. Moreover, and again in contrast to other contexts such as merger cases, once the defendant's market share, or the percent of the market foreclosed by exclusive dealing contracts, crosses an initial threshold sufficient to convince the court that there might be an anticompetitive effect, there generally are not any clearly articulated successive thresholds of market power or foreclosure at which levels courts explicitly apply different standards in assessing a vertical foreclosure under the rule of reason. While important in an older United

43. *See, e.g.*, *Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass'n, Inc.*, 357 F.3d 1, 6-7 (1st Cir. 2004) (the fact that a university, which agreed to an exclusive dealing contract with one food supplier, may have market power over students looking for on campus snacks is irrelevant to foreclosure of customers open to competing food distributors).

44. *E.g.*, Herbert Hovenkamp, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 11.6b (3rd ed. 2005).

States Supreme Court decision,⁴⁵ more recent decisions by courts in the United States generally have not placed much significance on the possible cumulative impact if a number of sellers in the market employ the same vertical restraint.⁴⁶

Beyond using the defendant's typically small market share as a screening device to weed out most cases as not posing any anticompetitive risk, court opinions in the United States dealing with non-price restraints on intrabrand competition have generally not undertaken much analysis of the actual anti-competitive impact of the restraint. By contrast, as discussed later in this paper, United States courts looking at exclusive dealing contracts will examine a number of factors beyond the percent of the market foreclosed – including duration of the contracts, existence of entry barriers, and actual market performance – in order to assess the anti-competitive impact of exclusive dealing. Even in the exclusive dealing cases, however, court opinions in the United States do not attempt to measure the increase in the defendant's market power attributable to the challenged practice. Moreover, while some United States Federal court opinions have spoken of the need for the plaintiff to prove that the "probable (not certain) effect" of the challenged vertical restraint will be to raise prices or otherwise injure competition,⁴⁷ courts in the United States typically do not articulate any sort of precise standard against which to evaluate proof of an anti-competitive impact of a challenged vertical restraint.⁴⁸

Reflecting the different purposes for their use, the acceptable justifications (pro-competitive effects) for non-price restraints on intrabrand competition are somewhat different than the acceptable justifications for exclusive dealing contracts. The discussion later in this report of these specific restraints will address the commonly accepted justifications. Despite the notion that the rule of reason is supposed to be a balancing test, courts in the United States typically do not attempt to weigh the anti- versus pro- competitive impacts of vertical restraints; rather defendants normally prevail unless the plaintiff establishes market power or foreclosure sufficient to indicate an anti-competitive impact, and the defendant completely fails to put forth any sort of acceptable justification.⁴⁹

45. *Standard Oil Co. v. United States*, 337 U.S. 293, 309, 314 (1949).

46. *E.g.*, *Barnosky Oils v. Union Oil Co.*, 582 F. Supp. 1332, 1335-37 (E.D. Mich. 1984).

47. *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 393-394 (7th Cir. 1984).

48. *E.g.*, *Stop & Shop Supermarket Co v. Blue Cross & Blue Shield of Rhode Island*, 373 F.3d 57, 66-68 (1st Cir. 2004); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

49. *E.g.*, *Hovenkamp*, *supra* note 44 at § 11.6b.

II. CURRENT APPLICATION OF UNITED STATES ANTITRUST LAWS TO SPECIFIC VERTICAL RESTRAINTS

A. *Illegal Per Se Restraints*

1. Vertical Minimum Price Fixing

As mentioned above,⁵⁰ agreements between manufacturers and distributors, that set a minimum price at which the distributor can resell goods purchased from the manufacturer, remain illegal per se under United States antitrust law. While avoiding the analysis of competitive impacts called for under the rule of reason, the per se prohibition of vertical minimum price fixing agreements creates in the United States, as it does elsewhere,⁵¹ its own difficult legal issues.

a. Use of Agents

Naturally, it would create economic chaos if courts treat every instruction by a principal to an agent regarding the price at which the agent is to sell the principal's goods as a per se violation of the Sherman Act. Hence, instructing such agents on the price they must charge does not equal illegal vertical price fixing.⁵² One problem with this rule arises, however, when manufacturers attempt to exploit it by formally designating all of their distributors as "agents" and by retaining nominal title to the goods until sold to the ultimate consumer. In situations in which it is evident that all that is going on is an attempt to circumvent the antitrust law, United States courts will ignore the formal designation of dealers as "agents," and the formal retention of title to the goods by the manufacturer, and apply the per se rule against vertical minimum price fixing.⁵³ Among the indicia of whether or not the court is dealing with a bona fide agency situation are the vastness of the distribution network denominated as agents,⁵⁴ the presence of a non-price purpose for the use of "agents" rather than independent distributors,⁵⁵ and, most especially, the degree to which the so-called agents bear the risks of the non-sale or decline in value of the "consigned" product.⁵⁶

50. See text accompanying note 36 *supra*.

51. *E.g.*, Volkswagen v. Commission, 2004 O.J. (C 71) 24 (the Court of First Instance refused to find an agreement on minimum prices when Volkswagen sent circulars to its German dealers exhorting them to maintain "strict price discipline" and not to grant discounts to customers on its WV Passat).

52. *E.g.*, United States v. General Electric Co., 272 U.S. 476 (1926); *Acquaire v. Canada Dry Bottling Co. of N.Y.*, 24 F.3d 401, 409-411 (2d Cir. 1994).

53. *E.g.*, *Simpson v. Union Oil*, 377 U.S. 13 (1964).

54. *Id.* at 20.

55. *E.g.*, *Illinois Corp. Travel, Inc. v. American Airlines*, 889 F.2d 751, 752 (7th Cir. 1989).

56. *E.g.*, *Ryco Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1223 (8th Cir. 1987).

b. Proof of an Agreement on Price

Finding the existence of a vertical price fixing agreement presents a different challenge than generally exists when dealing with horizontal price fixing, since, unlike competitors (who normally have no business contracting with each other), manufacturers must contract with their distributors. The question is whether such contracts contain an agreement on minimum prices.

For example, suppose a manufacturer announces the prices it wishes distributors of its product to charge, and that it will not sell to distributors charging less than such prices: Does any subsequent purchase of goods by a distributor from the manufacturer constitute the dealer's acceptance of a minimum price fixing agreement? In *United States v. Colgate*,⁵⁷ the United States Supreme Court held that the answer is no. In *Colgate*, the court reasoned that if the agreement between the manufacturer and distributor "allowed" the distributor to sell at whatever price the distributor chose, then the manufacturer's announcement of suggested prices, even when coupled with the manufacturer's announced refusal to sell to distributors who had disregarded those prices, constitutes unilateral conduct, rather than a combination or agreement in restraint of trade.⁵⁸

The problem with *Colgate* is that it constructs a critical legal edifice on a rather artificial distinction. Given that vertical minimum price fixing is illegal, the only practical sanction available to punish a dealer, who breaks a promise to adhere to minimum prices, is to cut off the dealer from future business. Under this circumstance, there is no realistic difference between an agreement between manufacturer and dealer for the dealer to charge a certain price – punishable by termination of the dealer if the dealer breaches the agreement – and the so-called unilateral action of a manufacturer announcing that it will cut off any dealer who does not adhere to the manufacturer's suggested price, and the dealer's subsequent adherence to the suggested price.

Subsequent cases applying *Colgate* illustrate both the fine distinctions it requires, as well as the tendency of courts to apply or distinguish the case with an eye toward the court's overall opinion of vertical minimum price fixing. During an era in which the United States Supreme Court was sympathetic toward the per se prohibition of vertical price fixing, decisions of the court narrowed the reach of *Colgate*. For example, in *United States v. Parke, Davis & Co.*,⁵⁹ the court found a conspiracy between the manufacturer and wholesalers, rather than unilateral conduct protected under *Colgate*. This conspiracy consisted of the manufacturer's enlisting the "participation"

57. 250 U.S. 300 (1919).

58. *Id.* at 307.

59. 362 U.S. 29 (1960).

of the wholesalers in enforcement of the manufacturer's pricing policy by threatening to cut off sales to any wholesaler who sold to retailers that did not follow the manufacturer's suggested retail price.⁶⁰

By the time the United States Supreme Court decided *Monsanto Co. v. Spray-Rite Service Corp.*,⁶¹ the court's attitude toward vertical restraints had changed. Actually, *Monsanto* is a somewhat schizophrenic decision. The Supreme Court affirmed the judgment against the defendant; finding adequate evidence of an agreement on prices in the existence of several communications by the manufacturer to its distributors complaining about their pricing and threatening them with termination.⁶² This reaffirms that, even in an era in which United States courts are more skeptical of the prohibition on vertical price fixing, manufacturers who attempt to cajole compliance with price guidelines through repeated threats overstep the bounds of unilateral conduct allowed by *Colgate*. On the other hand, *Monsanto* limits the ability to find a combination between the manufacturer and the non-terminated distributors simply because the manufacturer terminates a price cutting distributor following complaints about price cutting from distributors who are maintaining prices suggested by the manufacturer. The Supreme Court stated that the mere termination of a price cutting distributor, even if in response to complaints from other distributors, is not sufficient to prove the existence of an agreement to maintain prices between the manufacturer and the complaining distributors; rather, the plaintiff must produce evidence that tends to exclude the possibility that the manufacturer and the complaining distributors were acting independently (in other words, the plaintiff must show there was a quid pro quo from the complaining distributors in exchange for the manufacturer's terminating the price cutter).⁶³

In *Business Electronics Corp. v. Sharp Electronics Corp.*,⁶⁴ the United States Supreme Court went one step further when it comes to terminating price cutting distributors following complaints from other distributors. The plaintiff must do more than show that the termination was not independent of the complaint – which the plaintiff in *Business Electronics* presumably was able to do, since the termination followed an “it is either him or me” ultimatum from a powerful distributor, who threatened to no longer carry the manufacturer's product if the manufacturer sold to the price cutting distributor. The plaintiff must also show an agreement between the

60. *Id.* at 31-34.

61. 465 U.S. 752 (1984).

62. *Id.* at 765.

63. *Id.* at 763.

64. 485 U.S. 717 (1988).

manufacturer and the retained distributor in which the distributor consents to maintain prices.⁶⁵

The fact that the United States Supreme Court in *Monsanto* and *Business Electronics* dealt with cut-off distributors is a reflection of the reality that dealer terminations provide a fertile source of private antitrust plaintiffs. Nevertheless, other incentives that manufacturers provide for dealers to stick to suggested prices may be challenged as being, in effect, a vertical minimum price fixing agreement. For example, while simple cooperative advertising programs, in which the manufacturer offers to subsidize the dealers' advertising expenses, do not constitute illegal vertical price fixing – even though the manufacturer may condition the subsidy on the dealers' not including any price information (other than perhaps the manufacturer's suggested retail price) in the subsidized ads⁶⁶ – the United States Federal Trade Commission has found conduct illegal where manufacturers have gone further and conditioned the advertising subsidy on the dealers' not advertising prices below the manufacturer's suggested retail price even in advertisements paid for entirely by the dealers.⁶⁷ Along the same lines, the United States Federal Trade Commission has found rebates offered by a manufacturer to its dealers only on sales made by the dealers at or above the manufacturer's suggested prices to be illegal – at least in a case in which the rebates produced the dealers' entire profit margin.⁶⁸

2. Tying

As stated above,⁶⁹ the United States Supreme Court continues to treat tying arrangements, under which the seller agrees to sell one

65. *Id.* at 733-34. For a similar result in a very recent decision by an intermediate United States Federal appellate court, see *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11 (1st Cir. 2004). While the opinion in *Business Electronics* reflects the Supreme Court's skepticism as to the per se condemnation of vertical minimum price fixing, in fact, the Supreme Court's earlier decision to judge vertical non-price restraints under the rule of reason logically compelled the result in *Business Electronics*. After all, the impact of the manufacturer's decision to cut off the plaintiff distributor at the behest of the more powerful distributor effectively was to grant the more powerful distributor an exclusive distributorship; which is an action judged under the rule of reason. See text accompanying note 126 *infra*. As this discussion makes clear, the manufacturer's conduct in *Business Electronics* should still be open to challenge under the rule of reason, since there was an agreement; it just was not an agreement to maintain a price. By contrast, failure to rebut *Monsanto's* presumption that the manufacturer and the non-terminated distributors were acting independently would mean that there was no contract, combination or conspiracy to subject to the rule of reason (other than the obviously reasonable contracts selling goods to the non-terminated distributors).

66. *E.g.*, In re the Advertising Checking Bureau, 109 F.T.C. 146 (1987).

67. *E.g.*, In the matter of Sony Music Entertainment, Inc., 2000 WL 689147 (FTC, May 10, 2000) (albeit, the FTC stated that it was applying the rule of reason, rather than per se illegality, to this case).

68. In re American Cyanamid, 123 F.T.C. 1257 (1997).

69. See text accompanying note 39 *supra*.

item (the tying product or service) to the buyer only on the condition that the buyer also purchases a second item (the tied product or service) from the seller, as a practice that is illegal per se under Section 1 of the Sherman Act – as well as, in situations involving goods, violating Section 3 of the Clayton Act.⁷⁰ The designation of tying as illegal per se is somewhat misleading, however, since the elements required to establish the existence of an illegal tie-in (under either statute) call for a more extended analysis of the economic impact of the conduct than is the case in applying the per se rule in other contexts. Specifically, in order to establish the existence of an illegal tie-in, the plaintiff must prove four elements: (1) the tied item is a separate product or service from the tying item; (2) the seller requires buyers to purchase the tied item if the buyers wish to purchase the tying item; (3) the seller possesses some sort of advantage (market power) with respect to the tying item that makes buyers agree also to purchase the tied item; and (4) the tie must foreclose a “not insubstantial” amount of commerce to competitors of the seller.⁷¹ Even if the plaintiff establishes the existence of these elements, a court might nevertheless look at the justification for and reasonableness of the tie-in.

a. Two Products or One?

The fact that shoemakers sell shoes in pairs consisting of a right and a left shoe, and, depending on the design, complete with shoelaces – instead of separately selling right shoes, left shoes, and laces – illustrates that a threshold question in a tying case is whether the defendant is tying together separate products or services, rather than simply selling one product or service. The United States Supreme Court, in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*,⁷² set out the basic criteria for finding the existence of separate products: There must be sufficient consumer demand for the purchase of the tied product separately from the tying product so that it would be efficient to offer the tied product separately from the tying product. Among the facts the court in *Jefferson Parish* listed as evidencing the ability to sell efficiently the tied product (in that case, anesthesiology services) separately from the tying product (in that case, hospitalization) were the separate billing for the two items, the request by doctors for specific anesthesiologists, consumer differentiation between anesthesiology and other hospital services, the practice of other hospitals in allowing separate purchase of anesthesiology services, and the avail-

70. *E.g.*, *International Business Machines Corp. v. United States*, 258 U.S. 451, 458 (1936).

71. *See, e.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12-18 (1984); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1546 (10th Cir. 1995).

72. 466 U.S. 2, 21 (1984).

ability of other anesthesiologists who could have provided the services at the defendant hospital.⁷³ The United States Supreme Court applied the same test in its most recent opinion on tying – *Eastman Kodak Co. v. Image Technical Services, Inc.*⁷⁴ In *Kodak*, the court specifically rejected the argument that because there was a functional relationship between the tying product (parts to repair Kodak photocopy machines) and the tied product (Kodak photocopy machine repair service) – one was generally useless without the other – that there was only one product.⁷⁵

Instead of looking at consumer demand, some lower United States Federal courts have shoehorned into the “are they separate products?” issue an evaluation of the reasons for the alleged tying of separate items by the defendant: If there is some value to the consumer from the combination – lower cost or better utility – than the court will treat the combination as involving one product rather than two.⁷⁶ This sort of evaluation of utility in a particular case can be highly difficult since the practical utility of combining possible separate products into one package is often a contestable matter of trade-offs. For example, physical integration of items (technological ties) often may involve complicated engineering trade-offs in which the combination of components may enhance one performance attribute, while, at the same time, degrading some other performance attribute. To avoid delving into such complex questions, courts might be tempted to treat as one product any combination for which the seller could make a plausible claim of some advantage.⁷⁷ This approach, however, risks allowing sellers, whose purpose for the combination is anticompetitive, to avoid legal sanction by a post hoc rationalization of some advantage based upon looking only at the positive half of an engineering or other trade-off.

b. Requiring Purchase of the Tied Item

Just as the existence of a vertical price fixing agreement is often a contestable issue, so the question of whether the seller is insisting on a tie-in often might be in dispute. In the simplest case, the seller might deny that it refused to sell the tying item unless purchasers also bought the tied item. After all, the mere fact that a contract commits a purchaser to buy more than one product from the seller

73. *Id.* Actually, the United States Supreme Court may have expressed the test upside-down when it asked if there is sufficient demand for the purportedly tied item separately from the tying item. Hovenkamp, *supra* note 44 at § 10.5a.

74. 504 U.S. 451, 462 (1992).

75. *Id.* at 463. Despite the Supreme Court's rejecting this functional relationship argument, some lower United States Federal court judges refuse to get the message. *Digital Equip. Corp. v. Uniq Digital Technologies*, 73 F.3d 756, 761-2 (7th Cir. 1996).

76. *E.g.*, *Principe v. McDonald's Corp.*, 631 F.2d 303, 308 (4th Cir. 1980).

77. *E.g.*, *United States v. Microsoft Corp.*, 147 F.3d 935, 947 (D.C. Cir. 1998).

does not mean there is a tie-in. Such contracts exist all the time. The question is whether the contract resulted from the purchaser's desire to obtain more than one product from the seller, rather than the seller's insistence that purchase of the tied product accompany the purchase of the tying product.⁷⁸ Of course, certain contracts, such as ones requiring all future purchases of the allegedly tied product to be from the seller, might allow the inference that the seller insisted on a tie-in.⁷⁹ Also, large disparities in bargaining power between the seller and the purchasers might make a court willing to find that even not too subtle hints effectively communicated the seller's insistence on a tie-in.⁸⁰

Suppose, instead of insisting that it will only sell the tying item on the condition that the purchaser also buy the tied item, the seller takes some action that rewards the combined purchase or penalizes the separate purchase. Pricing combined purchases significantly less than separate purchases (so-called package discounts) can constitute a tie-in, just as much as a refusal to sell the tying item without the tied.⁸¹ On the other hand, discounts that do no more than pass on to the buyer the seller's cost savings from combined purchases are not a tie-in.⁸²

Jefferson Parish illustrates another tying mechanism. In *Jefferson Parish*, an exclusive dealing contract between a hospital and an anesthesiology group, that denied hospital privileges to other anes-

78. *E.g.*, *Paladin Assoc., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159-1162 (9th Cir. 2003) (disproof of insistence on a tie-in when only half of the customers for tying item also bought so-called tied item, and customers who bought allegedly tied item testified that they did so because they perceived it as a better value). *But see* *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1127 (6th Cir. 1981) (stating that coercive insistence on a tie-in is not part of tying case when contract commits buyer to purchase both tying and tied products from seller). The question of whether the seller insisted on a tying arrangement, however, is a somewhat different question than whether a buyer, who was faced with the seller's insistence on a tying arrangement, might still have purchased the tied product from the seller even without the seller's insistence on a tie-in. *E.g.*, *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 449 (3d Cir. 1977) (holding that the plaintiff does not need to prove that, without the tie-in, buyers would have purchased the tied item from someone other than the defendant).

79. *E.g.*, *Response of Carolina, Inc. v. Leasco Response, Inc.*, 537 F.2d 1307, 1328 (5th Cir. 1978).

80. *E.g.*, *FTC v. Texaco, Inc.*, 393 U.S. 223, 228-9 (1968). *But see* *Borschow Hosp. & Med. Supplies, Inc. v. Cesar Castillo, Inc.*, 96 F.3d 10, 17 (1st Cir. 1996) (threats to withhold sales of tying product, unless buyer purchased tied product, did not create unlawful tying arrangement when the threats were never carried out).

81. *E.g.*, *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55, 62 (4th Cir. 1969) (huge disparity in price between package and separate purchase was a tie-in). Indeed, the prohibition in Section 3 of the Clayton Act expressly includes setting a price conditional on the buyer not using goods from a competitor.

82. *E.g.*, *United States v. Loews, Inc.*, 371 U.S. 38, 54-54 (1962). The cases are in conflict on whether "buy-one item, get a different item free" deals constitute tying. *Compare* *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 63 F.3d 1540, 1548 (10th Cir. 1995), *with* *Marts v. Xerox*, 77 F.3d 1109, 1113 (8th Cir. 1996).

thesiologists, effectively tied the patient's use of the hospital to the use of the anesthesiology group. This sort of physical, rather than written out in the contract, tie often exists when products consist of components that many consumers might have preferred to purchase separately. *United States v. Microsoft Corp.*⁸³ is the most famous recent case with such a technological tie-in. There, Microsoft bundled its browser software (Internet Explorer) with its operating system software (Windows), for example, by requiring personal computer manufacturers who installed its Windows operating system not to remove the Internet Explorer software that came with the Windows software, and even by designing the Windows software (in the case of Windows 98) in such a manner that consumers using Windows could not remove easily the Internet Explorer software. The court treated this as a tie-in.⁸⁴

Finally, suppose, instead of insisting that the purchaser buy a tied product from the seller itself, the seller insists that the purchaser buy from a specified third party. If the seller is getting some financial gain from the sales made by the third party, this can constitute a tie-in.⁸⁵

c. Power to Coerce Acceptance

In a well-functioning competitive market, a seller's insistence that a purchaser buy a tied product if the purchaser wants the tying product would be met by purchasers, who did not like the tie-in, buying from someone else. Hence, a critical question in tying cases in the United States is whether the seller had some sort of power to compel acceptance of the tie-in. In early United States Supreme Court tying decisions, the tying product was often patented, from which fact the court seems to have presumed, without discussion, the power to coerce acceptance.⁸⁶ Since then, the Supreme Court has struggled re-

83. 253 F.3d 34 (D.C. Cir. 2001).

84. *Id.* at 61. Some courts seem unable to locate the tie-in agreement in the case of a technological or physical tie-in. *E.g.*, *Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 541 (9th Cir. 1983) (refusing to find that the design of a new camera so that it would only take the defendant's new film was a tie-in, since there was no contract by the purchasers agreeing to the tie and so no Section 1 violation). This ignores the fact that an implicit term in a contract selling or leasing goods is the design of the goods in question.

85. *E.g.*, *FTC v. Texaco, Inc.*, 393 U.S. 223, 228 (1968).

86. *E.g.*, *International Business Machines Corp. v. United States*, 258 U.S. 451, 463 (1936). The court's approach in these cases ignores the fact that, while patents provide monopolies, they might not provide much market power if there exist equally desirable substitutes. In the 1990s, Congress amended the patent law to recognize in the context of patent abuse (albeit not antitrust litigation) that conditioning the right to use patented items on the purchase of something else was not illegal without the showing of market power. 35 U.S.C. § 271(d)(5). Along the same lines, United States Federal courts are increasingly skeptical of claims that the mere existence of a copyright or trademark for the tying product establishes market power. *E.g.*, *Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (trade-

peatedly to determine if defendants engaged in tying had adequate power to coerce acceptance so as to justify per se condemnation.⁸⁷

In its most recent tying decisions, the United States Supreme Court has gotten arguably more sophisticated in its market power analysis. In *Jefferson Parish*, the court rejected the existence of market power based upon the fact that 70 percent of the patients in the defendant hospital's geographic area went to other hospitals (in other words, the defendant had only a 30 percent share in the relevant market).⁸⁸ On a more liberal note, in *Kodak*, the United States Supreme Court held that Kodak had market power – despite its admitted lack of power in the market for photocopy machines⁸⁹ – because of its virtual monopoly as a source of spare parts for Kodak machines.⁹⁰ Significantly (and controversially), in deciding to focus on the

mark); *A.I. Root Co. v. Computer/Dynamics, Inc.*, 806 F.2d 673, 676-677 (6th Cir. 1986) (copyrighted software). *But see* *MCA Television Ltd. v. Public Interest Corp.*, 171 F.3d 1265, 1278 (11th Cir. 1999). The United States Supreme Court recently granted review to a decision of the Federal Court of Appeals for the District of Columbia Circuit (*Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005)) in a case that may clarify this area. In this case, the holder of a patent on a print head used for printing bar codes required licensees to buy ink from it. In a compromise between demanding that the plaintiff undertake an independent market analysis at one extreme, versus treating a patent as automatically establishing market power at the other extreme, the Court of Appeals held that the existence of a patent creates a rebuttable presumption that the patent holder has market power sufficient to render the tie-in illegal per se.

87. *E.g.*, *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953) (being the publisher of the sole morning and one of two afternoon newspapers in the city was insufficient market power to condemn a requirement that parties desiring to advertise in the morning paper also had to advertise in the afternoon paper); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 7-8 (1958) (land in desirable locations gave sufficient market power to compel purchasers of land to agree to ship goods on defendant's railroad; widespread agreement to the tie-in was itself evidence of power); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 622 (1977) (highly favorable loans did not reflect any power other than a willingness to offer favorable loan terms to induce purchase of high priced prefab homes).

88. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 26-27 (1984). In contrast to *Jefferson Parish's* refusal to find market power against a defendant that had only 30 percent of the market, a recent United States Federal District Court decision found that a defendant, who controlled four out of six Denver rock music radio stations representing 60 to 70 percent of the market, had adequate market power to constitute a tie-in as illegal per se. *Nobody in Particular Presents, Inc. v. Clear Channel Communications, Inc.*, 311 F. Supp. 2d 1048, 1093-1094 (D. Colo. 2004). One impact of *Jefferson Parish's* focus on the defendant's power in (or share of) a defined market is to force plaintiffs to introduce evidence on market definition. *E.g.*, *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 842 (5th Cir. 2002) (insufficient evidence defining geographic market was fatal to a tying claim). Another impact of this focus is to raise questions as to the continued viability of earlier cases that found market power based upon the tying product's "uniqueness" without regard to market definition and share. *E.g.*, *Bell v. Cherokee Aviation Corp.*, 660 F.2d 1123, 1127-1130 (6th Cir. 1981) (defendant controlled desirable land at airport).

89. Kodak had only a 23 percent share in the market for photocopy machines. *Image Technical Services, Inc. v. Kodak*, 903 F.2d 612, 616 n. 3 (9th Cir. 1990).

90. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 482 (1992).

aftermarkets for repair parts and services, instead of the initial market for photocopy machines, the court rejected the argument that any attempt by Kodak to exploit its parts monopoly by tying high priced Kodak repair services would simply lead customers to purchase other brands of photocopy machines. The court explained that the tie-in could exploit those customers who lacked the sophistication or sufficient information to estimate future repair costs when purchasing photocopiers, and, in addition, the tie-in could exploit those customers who bought Kodak equipment before Kodak instituted the tie-in and for whom switching machines would be expensive.⁹¹

d. Foreclosure of a Not Insubstantial Amount of Competition

The final element to establish an illegal per se tie-in turns out most of the time to be trivial. While the plaintiff must show some quantitative impact to the tie-in in terms of dollars of sales foreclosed to other competitors,⁹² the amount required is not large.⁹³ Under United States Supreme Court decisions, about the only significance to the foreclosure of competition element would be excluding a tie-in contract that affects just one customer, or tie-in contracts that force customers to purchase something they did not want at all, and, hence, would not have purchased from a competitor of the defendant anyway.⁹⁴ There is one other impact to this last element of an illegal per se tying claim. Lack of foreclosure of competition could provide a doctrinal explanation for the refusal of courts in the United States to treat the requirement that a dealer carry a manufacturer's entire product line, as a condition of carrying any of the manufacturer's products (so-called full line forcing), as an illegal tie-in – since such full line forcing does not preclude the dealer's buying from other manufacturers.⁹⁵

e. Reasonableness Reconsidered

Even though tying is listed as illegal per se, at least upon proof of the four elements set forth above, some United States Federal courts

91. *Id.* at ___. The divided responses of commentators to the *Kodak* decision reflects a fundamental disagreement between those who view the role of the antitrust laws as limited to promoting economic efficiency, and those who think these laws should serve a broader consumer protection purpose, including protecting consumers from tactics that exploit consumers' lack of information or sophistication. Compare Hovenkamp, *supra* note 44 at § 10.3b, with Sullivan & Grimes, *supra* note 40 at § 7.2c5.

92. *E.g.*, *Gordon v. Lewistown Hosp.*, 272 F. Supp. 2d 393, 447 (M.D. Pa. 2003).

93. *E.g.*, *United States v. Loew's, Inc.*, 371 U.S. 38, 48 (1962) (\$60,000 from tied product was enough); *Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1425-26 (9th Cir. 1995) (\$100,000 was enough).

94. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11-12 (1984).

95. *E.g.*, *Smith Machinery Co. v. Hesston Corp.*, 878 F.2d 1290, 1295-98 (10th Cir. 1989).

have been willing to consider the justifications asserted by the defendant for the tying arrangement, such as maintenance of product quality and protection of the defendant's goodwill.⁹⁶ The result is to blur further the distinction between per se illegality and the rule of reason when it comes to tying.

Of potentially more significance is the 2001 *Microsoft* decision by the United States Court of Appeals for District of Columbia Circuit.⁹⁷ As discussed earlier, this case involved a physical tie-in between Microsoft's Windows operating system and its Internet Explorer browser. Because of concern about stifling innovation, the Court of Appeals held that the trial court should have applied the rule of reason, rather than per se illegality, to this tie-in.⁹⁸ Two facts, however, render the significance of this decision uncertain. First, because the Court of Appeals condemned Microsoft's conduct as monopolization in violation of Section 2 of the Sherman Act, the Justice Department decided not to appeal the decision about the Section 1 tying claim to the United States Supreme Court – thereby confining the precedential value of the Court of Appeals' decision on tying. Also, the Court of Appeals limited its tying holding to claims based upon physically bundling operating systems and application software products together;⁹⁹ thereby leaving open the question of whether the court intended to replace per se condemnation of tying for all products in markets characterized by rapid product innovation, or whether this was simply a decision about certain types of software.

3. Reciprocal Dealing

The law in the United States with respect to reciprocal dealing – in which a prospective purchaser demands that the seller agree to

96. *E.g.*, *United States v. Jerrold Electronics Corp.*, 187 F. Supp. 545, 557 (E.D. Pa.), *aff'd per curiam*, 365 U.S. 567 (1961) (the court refused to find that the defendant's forcing buyers to purchase an entire community antenna system as a package from the defendant was an illegal tie-in during the first few years after the defendant introduced the system into the market, because the combined sale ensured the system worked and protected the seller's goodwill; but, as the industry developed, this justification no longer applied and the tie-in became illegal); *Levine v. BellSouth Corp.*, 302 F. Supp. 2d 1358, 1366 (S.D. Fla. 2004) (the court declined to find an unlawful tying arrangement when the defendant telephone company refused to supply DSL Internet service unless a customer also took local telephone service from the defendant, because, absent an interconnection agreement, the defendant could not provide DSL service over a local phone line offered by a different telephone company).

97. *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

98. *Id.* at 84. Hence, the rule of reason like approach recently used by the European Commission in condemning Microsoft for tying Microsoft's Media Player software to the Windows operating system (Case COMP/C-3/37.792, *Microsoft*, Commission Decision of 24 Mar 2004, online at <http://www.europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf>) is consistent with the United States Court of Appeals' decision involving tying by Microsoft, even if the European Commission's approach is not consistent with the continued per se prohibition of tying in the United States, other than in the *Microsoft* case.

99. 253 F.3d at 47.

buy from the purchaser before the purchaser will agree to buy from the seller – is much less developed than is the case with tying. Probably the most authoritative statement from the United States Supreme Court on the practice came in an opinion in which the Supreme Court upheld a Federal Trade Commission decision to block a merger, based upon the concern that the merger would lead to reciprocal dealing.¹⁰⁰ Lower United States Federal court decisions that have addressed reciprocal dealing usually have treated it like tying: if the plaintiff can show that the buyer, who is demanding such dealing, has market power as a buyer, then the court will condemn the reciprocal dealing as illegal per se.¹⁰¹ The rationale behind this result is also similar to tying: the concern is that the defendant is trying to leverage its power in one market into power in another market.¹⁰² The only difference is that the defendant is trying to leverage power as a buyer (monopsony power) in one market into power as a seller in another market, rather than trying to leverage power as a seller in one market into power as a seller in another.¹⁰³

B. Restraints Subject to the Rule of Reason

1. Vertical Maximum Price Fixing

As discussed above,¹⁰⁴ in 1997, the United States Supreme Court overturned the prior rule that agreements under which manufacturers impose maximum (as opposed to minimum) prices at which distributors can resell products purchased from the manufacturer are illegal per se, and instead held that United States Federal courts will evaluate such agreements under the rule of reason. Since then, almost no plaintiff has even attempted to show that a particular vertical maximum price agreement was unreasonable.¹⁰⁵

2. Tying in the Absence of Market Power

In *Jefferson Parish*, the United States Supreme Court pointed out that the failure to establish the market power prerequisite for per

100. *FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 594-95 (1965).

101. *E.g.*, *Brokerage Concepts Inc. v. United States Healthcare, Inc.*, 140 F.3d 494, 511 (3d Cir. 1998).

102. *E.g.*, *Betaseed, Inc. v. U and I, Inc.*, 681 F.2d 1203, 1245 (9th Cir. 1982).

103. Needless to say, the same criticisms of the leverage theory, and suggestions that the conduct may have more subtle pro- or anti-competitive effects, exist with respect to reciprocal dealing as exist with tying. *E.g.*, *Hovenkamp*, *supra* note 44 at § 10.8.

104. See text accompanying note 37 *supra*.

105. *E.g.*, *Kahn v. State Oil Co.*, 143 F.3d 362, 363-4 (7th Cir. 1998) (plaintiff waived rule of reason claim for vertical maximum price fixing); *Mathias v. Daily News L.P.*, 152 F. Supp. 2d 465, 485-86 (S.D.N.Y. 2001) (plaintiff's complaint for vertical maximum price fixing dismissed for failure to allege relevant market as necessary for a rule of reason claim). *But see* *Blanchard & Co. v. Barrick Gold Corp.*, 2003-2 Trade Cas. (CCH) ¶ 74,172 at 97,491 (E.D. La. 2003) (vertical agreement depressing prices for gold may hurt customers buying gold for investment).

se condemnation of a tie-in still leaves open the possibility of attacking the tie-in under the rule of reason.¹⁰⁶ The court in that case did not find the tie-in was unreasonable, and it is difficult to see how such a challenge could succeed in the face of a finding that the defendant lacked the market power to coerce acceptance of the tie-in.¹⁰⁷

3. Vertical Territorial, Location, and Customer Restrictions

As discussed above,¹⁰⁸ in its groundbreaking decision in *Sylvania*, the United States Supreme Court reversed the prior rule that restraints imposed by a manufacturer on the territories in which dealers could resell the manufacturer's products, or the locations from which dealers could resell the manufacturer's products, or the customers to whom the dealers could resell the manufacturer's products, were illegal per se. Now, all such non-price vertical restraints imposed by manufacturers on intrabrand competition are subject to the rule of reason. Application of this rule can confront United States Federal courts with two issues: (1) how does the court decide if a vertical non-price restraint on intrabrand competition in a particular instance is reasonable? and (2) when is the restraint in front of the court a vertical non-price restraint, and when it is something else still subject to per se illegality?

a. Applying the Rule of Reason to Vertical Territory, Location and Customer Restrictions

The Supreme Court in *Sylvania* did not spend time discussing how to apply the rule of reason to vertical non-price restraints on intrabrand competition, nor has the issue come back before the United States Supreme Court. The result has been to leave lower United States Federal courts to figure this out for themselves. In the years since *Sylvania*, several patterns have emerged from lower Federal court opinions in the United States applying the rule of reason to such agreements.

To begin with, contrary to the traditional notion that the rule of reason is supposed to balance anti- and pro-competitive impacts from the restraint in question, lower Federal courts, with a notable exception,¹⁰⁹ have not demanded a showing of pro-competitive justifica-

106. *E.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 28 (1984).

107. *E.g.*, *CCBN.COM, Inc. v. Thomson Fin., Inc.*, 270 F. Supp. 2d 146, 154-55 (D. Mass. 2003); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 743 F. Supp. 353, 357-59 (E.D. Pa. 1990), *aff'd*, 959 F.2d 468 (3d Cir. 1992). *But see* *In re Wireless Telephone Servs. Antitrust Litig.*, 2003-2 Trade Case (CCH) ¶ 74,133 at 97,201-02 (S.D.N.Y., 2003) (dismissing illegal per se, but not rule of reason, tying claim).

108. See text accompanying notes 34-35 *supra*.

109. *Eiberger v. Sony Corp.*, 622 F.2d 1068, 1081 (2d Cir. 1980) (in the absence of a legitimate purpose for a "warranty fee" demanded by the manufacturer from dealers on products sold outside their assigned territories, the fee was illegal under the rule of

tions for vertical territorial, customer or location restraints until the plaintiff demonstrates some anti-competitive impact (beyond simply that the restraint, by its nature, limits intrabrand competition).¹¹⁰ Some courts reach this result by stating that the law is only concerned with interbrand competition¹¹¹ – hence precluding the need for balancing by rendering the reduction in intrabrand competition irrelevant. More commonly, lower Federal courts have used the defendant manufacturer's share of the interbrand market as a screening device to determine the potential for any anti-competitive impact – the theory being that competition from other brands of the product in question will discipline dealers of products produced by manufacturers who lack market power, even if the dealers are protected from intrabrand competition.¹¹² Under this approach, a manufacturer's market share of less than 20 percent or thereabouts becomes fatal to the plaintiff's claim¹¹³ – as is the plaintiff's failure to produce evidence defining the relevant market¹¹⁴ or establishing the manufacturer's share¹¹⁵ – while one of the few victories for a plaintiff under the rule of reason came against a manufacturer that had over 70 percent of the market.¹¹⁶

Assuming the plaintiff gets past the market power barrier, courts will examine the justifications offered by the defendant for the restraint. While there are numerous specific justifications, they often fit into two broad camps: encouraging dealers to spend money and effort promoting the manufacturer's products – including providing pre- or post-sale service – by removing the concern about competing dealers free riding on the promotional efforts;¹¹⁷ and ensuring product quality and efficiency by limiting distribution channels.¹¹⁸ Courts differ significantly on the degree to which they seriously scrutinize the manufacturer's justifications in the particular case. A few have rejected the application of the proffered justification to the particular restraint at hand when the evidence showed some other motivation by the defendant,¹¹⁹ application of the restraint did not fit the

reason – even though the manufacturer was not shown to have significant market power).

110. *E.g.*, *Ryco Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231 (8th Cir. 1987).

111. *See, e.g.*, *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 806-809 (6th Cir. 1988).

112. *E.g.*, *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

113. *E.g.*, *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 (8th Cir. 1986).

114. *E.g.*, *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082, 988 (D. Neb. 2004).

115. *E.g.*, *Ezzo's Invest., Inc. v. Royal Beauty Supply, Inc.*, 243 F.3d 980, 988 (6th Cir. 2001).

116. *Graphic Products v. ITEK Corp.*, 717 F.2d 1560, 1570-71 (11th Cir. 1983).

117. *E.g.*, *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 49 (1977).

118. *E.g.*, *Adolph Coors Co. v. A & S Wholesalers*, 561 F.2d 807, 811 (10th Cir. 1977).

119. *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1012-13 (3d Cir. 1994) (minutes suggesting ulterior motive).

justification,¹²⁰ there was no basis in fact for the concern expressed by the manufacturer,¹²¹ or less onerous means existed for the manufacturer to achieve its professed aims.¹²² Numerous courts, however, have done little more than repeat and accept without question professed, or even just possible, justifications for challenged restraints on non-price intrabrand competition.¹²³

b. Characterization Issues Regarding Purported Vertical Non-price Restraints

Given the difficulty of prevailing under the rule of reason, anti-trust plaintiffs in the United States attempt to avoid the characterization of the restraint in question as a vertical non-price restraint. Earlier, this paper discussed the common attempt to cast the action as vertical price fixing. Alternatively, plaintiffs may attempt to characterize the conduct as a horizontal restraint. One possibility for characterizing the restraint as horizontal occurs if the manufacturer, itself, also distributes its product at the wholesale or retail level in potential competition with independent distributors upon whom the manufacturer has placed territorial, location or customer limitations (so-called "dual distribution"). In the absence of a binding decision from the United States Supreme Court on dual distribution, lower Federal courts in the United States have taken different approaches. Some had categorized the restraint as horizontal and illegal *per se*.¹²⁴ The overwhelming trend among lower courts, however, is to treat restrictions in dual distribution situations as vertical and apply the rule of reason.¹²⁵

4. Exclusive Distributorships and Dealing Promised by Sellers

Often, instead of the manufacturer imposing restrictions upon where and to whom its distributors can resell its products, it is the manufacturer that agrees to the request of one distributor not to sell

120. *Com-Tel v. DuKane Corp.*, 669 F.2d 404, 411 (6th Cir. 1982) (controlling free-riders and efficient distribution rationales did not jibe with isolated exclusion of one potential purchaser).

121. *Graphic Products v. ITEK Corp.*, 717 F.2d 1560, 1578 n.32 (11th Cir. 1983) (no evidence that free riders were impairing the provision of adequate service).

122. *Eiberger v. Sony Corp.*, 622 F.2d 1068, 1076 (2d Cir. 1980) (the purported purpose of the warranty fee imposed by the manufacturer on dealers selling outside of assigned territories could have been achieved simply by requiring those dealers to pay non-selling dealers for warranty service the non-selling dealers actually performed). *But see American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1249-1250 (3d Cir. 1975) (application of a rigid no less restrictive alternative test would place an undue burden on the ordinary conduct of business).

123. *E.g.*, *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 810 (6th Cir. 1988).

124. *E.g.*, *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 899 (5th Cir. 1978).

125. *E.g.*, *Electronics Communics. Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243-44 (2d Cir. 1997).

to competing distributors (thereby granting an exclusive distributorship). Alternately, a seller of a component product may agree to the request of one user of the product not to sell to competitors of that buyer. The United States Supreme Court has not specifically addressed such restraints. Nevertheless, it seems clear that such restrictions are also subject to the rule of reason.¹²⁶ Moreover, since the impact of exclusive distributorships is to limit intrabrand competition, lower Federal courts in the United States analyze the potential anti-competitive impact of, and justifications for, exclusive distributorships in the same manner as vertical territorial, customer and location restraints.¹²⁷

The analysis under the rule of reason changes in the case of an agreement exclusively to supply a component product to one buyer. Here, the concern is not the loss of intrabrand competition, but rather the possible harm to interbrand competition. A recent case, *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs, Inc.*,¹²⁸ illustrates the possibility. There, a producer of a generic blood thinning drug obtained the agreement by a producer of a key ingredient for the drug not to sell the ingredient to other buyers. The Court of Appeals held that if the plaintiff (a potential competing producer of the generic blood thinning drug) could prove that the ingredient would not be available for a significant period of time from other sources, then the conduct could violate Sections 1 and 2 of the Sherman Act.¹²⁹

Antitrust plaintiffs in the United States have tried to avoid application of the rule of reason to exclusive distributorships by invoking the per se illegality of group boycotts. The theory works if two or more dealers collaborate to pressure a manufacturer into cutting off another dealer.¹³⁰ An agreement, however, between a manufacturer and a single dealer to cut off another dealer is not a group boycott and not illegal per se.¹³¹

5. Exclusive Dealing Promised by Buyers

Exclusive dealing contracts, in which distributors or consumers promise only to purchase from one seller, are also subject to the rule of reason – or at least to an approach approximating the rule of reason even if not always formally designated as such. At one time, it appeared that the United States Supreme Court would follow a sim-

126. See, e.g., *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 46 (7th Cir. 1996).

127. E.g., *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982).

128. 386 F. 3d 485 (2d Cir. 2004).

129. *Id.* at 506, 508-510.

130. E.g., *Big Apple BMW v. BMW of North America*, 974 F.2d 1358, 1364 (3rd Cir. 1992).

131. See, e.g., *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

pler approach to such contracts. Specifically, in *Standard Oil Co. v. United States*,¹³² the Supreme Court held that exclusive dealing contracts for goods would violate Section 3 of the Clayton Act any time the contracts foreclosed competitors from selling to a substantial share of the line of commerce affected.¹³³ The court found that the defendant oil company's contracts, which required gas stations selling its gasoline only to carry its gasoline, met this standard when the contracts covered 6.7 percent of the gasoline sold in the relevant area.¹³⁴ In *Tampa Electric Co. v. Nashville Coal Co.*,¹³⁵ however, the Supreme Court backed away from the simple approach of *Standard Oil* by stating that whether an exclusive dealing contract violated the antitrust law depended upon a range of factors beyond just the percent of the market occupied by the contracts.¹³⁶ Based upon this guidance, lower United States Federal courts have examined a number of factors to determine the legality of exclusive dealing contracts in an approach that appears generally to follow the rule of reason, regardless of whether the case arises under Section 1 of the Sherman Act¹³⁷ or Section 3 of the Clayton Act.¹³⁸

A primary factor in determining the anti-competitive impact of exclusive dealing contracts is the percentage of the relevant market foreclosed by such contracts to competitors of the defendant.¹³⁹ This is consistent with the traditional concern that exclusive dealing contracts can lead to monopoly power by foreclosing the market to competitors of the defendant, or can preserve monopoly power by forcing new market entrants to create their own new distribution system. The need to quantify the percentage of the market foreclosed to competing sellers can lead to a dispute as to what is the relevant market¹⁴⁰ or to dismissal if the plaintiff fails to meet the burden of proof on market definition.¹⁴¹ Significantly, the 6.7 percent market foreclosure sufficient to condemn the agreements in *Standard Oil* would no longer be near enough to produce the same result today; instead

132. 337 U.S. 293 (1949).

133. *Id.* at 299-300.

134. *Id.* at 314.

135. 365 U.S. 320 (1961).

136. *Id.* at 329.

137. *E.g.*, *Minn. Ass'n of Nurse Anesthetics v. Unity Hospital*, 208 F.3d 655, 660 (8th Cir. 2000).

138. *E.g.*, *Omega Environmental, Inc. v. Gilbarco, Inc.* 127 F.3d 1157, 1162 (1997).

139. *E.g.*, *Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass'n, Inc.*, 357 F.3d 1, 8-9 (1st Cir. 2004).

140. *E.g.*, *Omega Environmental, Inc. v. Gilbarco, Inc.* 127 F.3d 1157, 1163 (1997) (dispute over the whether the relevant market consisted just of sales to distributors of gasoline dispensing equipment, or whether it included the total sales of such equipment, both to distributors and direct from manufacturers to major oil companies).

141. *E.g.*, *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 309 F.3d 836, 842 (5th Cir. 2002).

courts probably would require foreclosure greater than 30 or 40 percent before ruling exclusive dealing contracts illegal.¹⁴²

In addition to the share of the market covered by exclusive dealing contracts, courts examine a number of other factors to determine the possible anticompetitive impact of the contracts. The duration of the contracts is of prominent importance here – the notion being that if the buyers can terminate the contracts on short notice, then competitors can still enter the market by persuading buyers to terminate their exclusive dealing contracts¹⁴³ – albeit, some courts have been willing to look at practical, as well as contractual, limitations on the ability of dealers to terminate exclusive dealing arrangements.¹⁴⁴ The presence or absence of entry barriers,¹⁴⁵ and disadvantages to alternative distribution channels beyond that foreclosed by exclusive dealing contracts,¹⁴⁶ are also relevant. Finally, some courts have looked for direct evidence as to whether the exclusive dealing contracts impacted competition; for example, a court might conclude based upon the success of rival sellers as well as price trends in the market that the exclusive dealing contracts pose no danger,¹⁴⁷ or a court might demand that the plaintiff prove from evidence other than just market foreclosure that the probable effect of the restraint will be to raise prices above the competitive level or otherwise injure competition.¹⁴⁸ As a result of these added factors, some courts have upheld exclusive dealing contracts even in situations in which the agreements covered a very large percentage of the market.¹⁴⁹

If the plaintiff can show an anticompetitive impact, then courts will examine the defendant's justifications for the exclusive dealing contracts.¹⁵⁰ Among justifications courts have found persuasive are

142. *E.g.*, *Stop & Shop Supermarket Co v. Blue Cross & Blue Shield of Rhode Island*, 373 F.3d 57, 68 (1st Cir. 2004).

143. *E.g.*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598 (1st Cir. 1989) (exclusivity clause terminable on 30 days' notice normally is close to a de minimus constraint).

144. *See, e.g.*, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 1, 12 (3d Cir. 2005) (notion that competitors could steal away distributors under terminable at will exclusive dealing arrangement with dominant supplier was unrealistic). *But see* *Omega Environmental, Inc. v. Gilbarco, Inc.* 127 F.3d 1157, 1162 (1997) (disregarding as unimportant expert testimony that distributors under easily terminable exclusive dealing contracts would not abandon dominant supplier's line for a new product).

145. *E.g.*, *CDC Tech., Inc. v. IDEXX Labs, Inc.* 186 F.3d 74, 80 (2d Cir. 1999).

146. *E.g.*, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 1, 13-4 (3d Cir. 2005).

147. *E.g.*, *Omega Environmental, Inc. v. Gilbarco, Inc.* 127 F.3d 1157, 1162 (1997) (noting entry into the market and expansion of a rival to the defendant, despite the exclusive dealing contracts, as well as industry trends of increasing output and decreasing prices).

148. *E.g.*, *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 393-395 (7th Cir. 1984).

149. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) (agreements upheld despite covering at least 75 percent of the market).

150. *E.g.*, *Eastern Food Services, Inc. v. Pontifical Catholic University Services Ass'n, Inc.*, 357 F.3d 1, 5 (1st Cir. 2004).

ensuring distributors dedicate themselves to promoting the manufacturer's products,¹⁵¹ and ensuring stability of supplies and prices.¹⁵² While courts generally accept such justifications, the recent *Microsoft* decision illustrates some limitations. Microsoft had agreed with internet access providers (like AOL) to provide promotion and support for their services in exchange for the access providers not promoting (and limiting the distribution of software for) internet browsers that competed with Microsoft's Internet Explorer. Microsoft's justification was to keep software developers focused on applications for Microsoft's operating systems. The Court of Appeals held that this rationale, while not unlawful, was not a pro-competitive reason for the exclusive dealing contracts.¹⁵³

Finally, in some cases, there can be a dispute over whether the challenged conduct is even an exclusive dealing contract. For example, a seller might invoke *Colgate* to argue that refusing to sell to dealers carrying competing merchandise is unilateral conduct.¹⁵⁴ Also, some cases raise the issue of whether contracts that simply provide incentives for exclusive dealing, or limitations rather than prohibitions on buying from competitors, equal an unreasonable exclusive dealing contract.¹⁵⁵ The recent *Microsoft* decision provides an illustration. One part of the case involved contracts under which Microsoft required personal computer manufacturers to include an icon for Internet Explorer in order to receive the license to install the Windows operating system. The Court of Appeals treated this essentially as exclusive dealing – the theory being that the manufacturers under such agreements would not install competing internet browsers with another own icon because two browser icons could confuse customers and lead to more helpline calls.¹⁵⁶

151. *E.g.*, *Flash Electronics, Inc. v. Universal Music & Video Dist. Corp.*, 312 F. Supp. 2d 379, 388 (E.D.N.Y. 2004).

152. *E.g.*, *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring).

153. *United States v. Microsoft Corp.*, 253 F.3d 34, 60 (D.C. Cir. 2001). The court's opinion contains little explanation as to how this justification differed from justifications for exclusive dealing that courts have found acceptable.

154. *E.g.*, *Roland Machinery Co. v. Dresser Indus.*, 749 F.2d 380, 393 (7th Cir. 1984).

155. *E.g.*, *Stitt Spark Plug Co. v. Champion Spark Plug Co.*, 840 F.2d 1253, 1257-58 (5th Cir. 1988) (court allowed incentives for exclusive dealing); *Empire Volkswagen v. World-Wide Volkswagen Corp.*, 814 F.2d 90, 97 (2d Cir. 1987) (held that it is acceptable to preclude dealers from showing competing cars in the same showroom).

156. *United States v. Microsoft Corp.*, 253 F.3d 34, 60 (D.C. Cir. 2001). Not surprisingly, the European Union also has confronted the issue of when it is legal for firms with significant market power to provide incentives for exclusive dealing. *E.g.*, *British Airways Plc. v. Commission*, Case T-219/99 (2003) (condemned loyalty bonuses given by British Airways to travel agents designed to encourage the agents to push British Airways tickets over other airlines).

CONCLUSION

During the more than a century of their existence, United States antitrust laws have experienced cycles of greater and lesser vigor in their enforcement. For the last three decades, in large part due to the critique of the "Chicago school," the United States has been in a period of lesser enforcement of these laws. One significant manifestation of this trough has been increased judicial acceptance of vertical restraints on competition. Whether or not this acceptance has created a significant divergence between the laws regarding vertical restraints on competition in the United States versus in Europe – as some writers have claimed¹⁵⁷ – is less obvious and depends upon the specific restraint involved.

157. James C. Cooper, Luke Froeb, Daniel P. O'Brien & Michael Vita, *A Comparative Study of United States and European Union Approaches to Vertical Policy*, working paper available at <http://www.ssrn.com/abstract=699582>.