RESALE PRICE MAINTENANCE — SEARCHING FOR A POLICY

*by Edward O. Correia**

Vertical price-fixing, agreements between sellers and resellers to set the reseller's prices, remains one of the most tortured areas of antitrust law. Since the Supreme Court decided *Dr. Miles*[1] in 1911, vertical price-fixing has been per se unlawful.[2] The Supreme Court has reaffirmed the per se bar many times in the intervening decades and continues to do so.[3] Nevertheless, the doctrine is vigorously criticized by many.[4] Vertical price-fixing remains a political battleground in Congress.[5] The Supreme Court has substantially narrowed the appli-

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1. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), held that an agreement between a drug manufacturer and a distributor to fix the distributor's prices violated the Sherman Act. The Court's conclusion did not turn on an assessment of the actual effects of the particular agreements at issue in the case or their reasonableness under the circumstances, but rather that such agreements "are injurious to the public interest and void." *Id.* at 408.

2. A rule that holds conduct "per se" unlawful means that the conduct will be held to violate the antitrust laws without regard to an analysis of its likely competitive effects. It is "presumed unreasonable without inquiry into the particular market context in which it is found." National Collegiate Athletic Association, v. Board of Regents, 468 U.S. 85, 100 (1984). In contrast, a "rule of reason" requires "a weighing of the the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition." Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761 (1984) (citing Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977)).

3. The Court declined to reverse the per se rule for vertical price-fixing in *Monsanto* despite the urginging of the Solicitor General to do so. 465 U.S. at 761-62 n. 7. Prior to *Monsanto*, the Court reaffirmed the rule in California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and Rice v. Norman Williams, 458 U.S. 654 (1982).

4. *See, e.g.*, Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Terry Calvani and Andrew G. Berg, *Resale Price Maintenance After Monsanto: A Doctrine Still at War with Itself*, 1984 DUKE L.J. 1163; Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (Pt.2)*, 75 YALE L.J. 373 (1966); George A. Hay, *Vertical Restraints After Monsanto*, 70 CORNELL L. REV. 418 (1985); and Tyler A. Baker, *Interconected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?*, 67 VA. L. REV. 1457 (1981). The doctrine, at least some variation of it also has its supporters. *See, e.g.*, Robert Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule against Vertical Price Fixing*, 71 GEO. L. J. 1487 (1983); John J. Flynn and James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitation of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987); William S. Comanor, *Vertical Arrangements and Antitrust Analysis*, 62 N.Y.U. L. REV. 1153 (1987).

5. Bills have passed both Houses of Congress during the 102d Congress addressing the per se rule as well as evidentiary rules in these vertical price fixing cases. 137 CONG. REC. S5605 (daily ed., May 9, 1991) (Senate passage of S.429); 137 CONG. REC. H7756-57 (daily ed., Oct. 10, 1991) (House passage of H.R. 1470). At this writing, no further action has been taken. Both bills are discussed *infra* notes 258-273 and accompanying text. A similar bill, S. 865, was reported favorably by the Senate Judiciary Committee in the 101st Congress. *Resale Price Maintenance Legislation is Needed to End Confusion in Case Law*, Antitrust & Trade Reg. Rep. (BNA) No. 1457, at 375 (March 15, 1990). Similar legislation, H.R. 1236, passed the House during the 101st Congress. *House Passes Vertical Price-Fixing Bill to Overturn Two Supreme Court Decisions*, Antitrust & Trade Reg. Rep. (BNA) No. 1462, at 577 (April 19, 1990). *See infra* notes 258-273 and accompanying text.

cation of the rule and the ability of plaintiffs to enforce it in two recent opinions, *Monsanto Co. v. Spray-Rite Service Corp.*[6] and *Business Electronics Corp. v. Sharp Electronics Corp.*[7] The rule is plagued with seemingly arbitrary and elusive distinctions as to what is and what is not prohibited.[8] In short, the law is unsettled and unsatisfactory.

This article reviews the evolution of the law through *Monsanto* and *Sharp*. It discusses alternative approaches to retail price maintenance ("RPM") policy, including recent Congressional proposals to codify in the antitrust statutes some version of the per se bar and evidentiary rules for proving agreements in vertical price-fixing cases. The article makes the following arguments. First, a workable standard for evaluating RPM, whether it is a form of the per se rule, a rule of reason, or any other approach, is inevitably tied to the definition of RPM agreements. Any rule regarding RPM should be based on some sensible and administrable definition of agreements. Second, any rule regarding RPM must be justified on the basis that it prevents economic harm to consumers. The most frequent situation when RPM can harm consumers is when dealers attempt to raise prices and restrict output through a traditional dealer cartel or through conduct by dealers acting individually that has the same effect. Third, there is no workable way of applying a rule of reason analysis to RPM, whether the situation involves the use of RPM by a single supplier, a supplier cartel, or a dealer cartel.

Thus, only two broad choices exist in developing RPM policy — a version of a per se bar on certain types of RPM agreements or per se legality. I argue here that the most workable rule, and one which best balances the competing considerations, would bar as per se unlawful agreements between suppliers and dealers that include assurances by dealers as to their prices.

I. EVOLUTION OF THE LAW

The law of vertical price-fixing, also referred to as "RPM" or resale price maintenance, was first established by the Supreme Court's decision in *Dr. Miles*.[9] The manufacturer in *Dr. Miles* entered into consignment agreements with some dealers and into conventional resale agreements with others. The latter included an express provision that the dealers would charge the "full retail price as printed on the packages, without reduction for quantity."[10] The manufacturer sued when an unauthorized wholesaler began to induce Dr. Miles' dealers to sell to it at discount prices so the wholesaler could in turn distribute the products, an early version of transhipping to an unauthorized distributor. The Court declared the resale price provisions invalid on two grounds: first, that the public was entitled to the benefits of retail price competition among the dealers,[11] and second, that

6. 465 U.S. 752 (1984).

7. 485 U.S. 717 (1988). *Monsanto* has made it more difficult for plaintiffs to prove RPM agreeements. *See infra* notes 65-118 and accompanying text. *Sharp* has made it more difficult to establish that supplier-dealer agreements to terminate discounters are per se unlawful. *See infra* 119-143 and accompanying text.

8. This is particularly true with regard to the definition of "agreements." *See infra* notes 48-64 and accompanying text.

9. Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

10. *Id.* at 380.

11. *Id.* at 408.

the seller could not impose upon the reseller this type of restriction since "a general restraint upon alienation is ordinarily invalid."[12]

Few would defend the second rationale today.[13] Sellers routinely impose on their dealers many types of restrictions viewed to be procompetitive or benign.[14] An antitrust rule should not be based on some theory that a firm should have "freedom" to act in a certain way apart from the resulting competitive effects. Rather, it must be justified by some sound economic argument about why it promotes consumer welfare.[15] Thus, the Court's second rationale for barring RPM, that the public is benefited by competition among retailers remains the principal argument for barring RPM.

Not surprisingly, the *Dr. Miles* opinion contains no real analysis of the thorny economic issues raised in analyzing RPM, though Justice Holmes' dissent provides some flavor of the controversy that was to arise later.[16] Defenders of a policy barring RPM today, therefore, are obliged to provide the economic rationale that *Dr. Miles* did not. The issue of economic harm is discussed below in Part V. First, we turn to the problem of agreements, which has dominated most RPM cases since *Dr. Miles*.

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12. *Id.* at 404.

13. One could attempt to justify the common law bar on restricting "alienation" (the freedom of dealers to resell) on three bases: (1) it deserves respect because it is old; (2) it imposes economic harm on consumers or sellers; or (3) there is some value to be placed on the commercial freedom of dealers apart from the actual effects on consumers or sellers. We should disregard the first notion altogether unless we are prepared to retain many other pre-twentieth century common law notions of fair competition. "[I]t is hardly the practice of this Court to embrace a rule of law merely on the grounds of its antiquity." United States v. Arnold, Schwinn & Co., 388 U.S. 365, 391 (1967) (Stewart, J., concurring). The second basis should be rejected as well since the point of any public policy, including antitrust policy, is to advance the public interest. Thus, a policy of protecting the freedom of alienation must ultimately be based on some principled distinctions between the freedom of dealers that advances the public interest and the freedom of dealers that does not. Thus, it would be clearer and more helpful simply to identify consumer welfare as the goal from the start. For an argument that there is some value to be placed on the "industrial liberty" of small entrepreneurs, *see* Rudolf J. Peritz, *A Genealogy of Vertical Restraints Doctrine*, 40 HASTINGS L. REV. 511 (1989).

14. This article follows the convention of referring to sellers and resellers as "supplier" and "dealers" because of the frequency with which these terms apply in actual cases. The principles of analysis apply to the generic seller-reseller relationship.

15. There is a vigorous debate about the goals of antitrust and whether, in light of the legislative history, they should be limited to economic considerations and how economic considerations should take into account the effects on consumers and sellers. *See* Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979); Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law?* 60 TEX. L. REV. 705 (1982); Robert M. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). In this article, it is assumed that the goal of RPM policy should be to advance the economic welfare of consumers. Unlike other areas of antitrust law, e.g., price-discrimination, mergers and monopolization, where "non-economic" values, such as the preservation of small entreprenuers, may be entitled to some weight in a conflict between economic and non-economic goals, RPM does not seem to raise significant non-economic values. For an argument that it does, *see* James J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. REV. 1125 (1987).

16. "The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. We must assume its retail price to be reasonable. . . . I see nothing to warrant my assuming that the public will not be served best by the company being allowed to carry out its plan." 220 U.S. at 412 (Holmes, J., dissenting).

A. The Birth, Death and Rebirth of *Colgate*

Because of the early declaration that RPM is per se unlawful, the history of RPM cases has largely been a dispute over what does and does not fit within the definition of RPM. In particular, the courts since *Dr.Miles* have struggled with the question of what is an "agreement" between a supplier and a dealer to fix the dealer's prices. The problem in identifying these agreements is different from that involved in identifying a horizontal price-fixing agreement between competitors. Unlike competitors, suppliers and dealers have an ongoing business relationship involving the very product whose price is at issue. They are expected to coordinate their activities to a large extent and to pursue common goals of increasing the sales of the product. A significant characteristic of the supplier-dealer relationship is that the supplier and the dealer have the ability to influence each other's actions by threatening to withdraw from the relationship. For example, the supplier has the ability to influence the dealer's marketing and sales practices by threatening to terminate it if it does not charge certain prices. A dealer has the ability to influence the supplier's behavior by threatening to stop doing business with it if the supplier deals with discounters.[17]

A bar on an agreement between two parties in a vertical relationship inevitably raises an important question: does a threat by one to the other to withdraw from the relationship, which influences the actions of the other, give rise to an agreement?[18] The Supreme Court was forced to address this question only eight years after *Dr. Miles* in *United States v. Colgate & Co.*[19] The Court found the evidence to show only that the manufacturer terminated its dealers when they failed to charge the manufacturer's suggested price.[20] On the basis of this record, the Court held that the manufacturer did not violate the Sherman Act.[21] Thus was born the second fundamantal principle of RPM law, the *Colgate* doctrine: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent judgment as to parties with whom he will deal.

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17. *See* VII PHILLIP AREEDA, ANTITRUST LAW 167 (1986).

18. The question does not often arise in the context of competitor relationships since competitors do not usually buy and sell from each other. However, in a case where competitors in one product buy and sell another product from each other, one competitor might threaten to refuse to continue to sell unless the other agreed to charge a particular price. If the second competitor, without making any express assurance, complied with the first competitor's preferences, there is a sound case for saying that the two competitors have agreed on price. The Supreme Court has found agreements where competitors have developed expectations of future conduct based on a pattern of past conduct. *See, e.g.*, United States v. Container Corp. of America, 393 U.S. 333 (1969) and United States v. United States Gypsum Co., 438 U.S. 422 (1978), where agreements were found based on the custom of competitors giving information in response to requests with the expectation that the requesting company would reciprocate in the future.

19. 250 U.S. 300 (1919).

20. *Id.* at 306. In *Colgate*, the government had charged the supplier with entering into agreements with its distributors to charge certain whoelsale and retail prices. The Supreme Court stated that it was bound by the trial court's construction of the indictment, which, the Court concluded, did not charge the defendant with "selling its products to dealers under agreeements which obligated the latter not to resell except at prices fixed by the company." *Id.* at 306-7. Instead, the Court interpreted the indictment to allege that the defendant allowed the distributors to charge whatever they wished, subject only to the possibility that they would be terminated. *Id.* at 307.

21. *Id.*

And, of course, he may announce in advance the circumstances under which he will refuse to sell."[22]

Colgate was the Court's first attempt to resolve the thorny question of whether an agreement is formed when a supplier influences the dealer to behave in a certain way by threatening to refuse to deal with it. The doctrine is more a policy decision than an analytical conclusion, one that attempts to accommodate the commercial realities of the supplier-dealer relation with the per se bar on RPM.[23] This kind of influence is not unique to supplier pressure on dealers, of course. It can run the other way, from dealers to suppliers.[24] In fact, the latter situation is the typical pattern when a valued dealer threatens to stop doing business with its supplier unless the supplier engages in a certain way, say, terminating rival dealers. The *Colgate* formulation declared a threat to discontinue dealing, through the supplier's advance announcement of the terms of the relationship, to be unilateral only. Yet the anomaly of this result soon became apparent. If a seller could threaten its dealer with termination for charging less than list price, and influence it to comply in order to avoid termination, couldn't it reach the same result forbidden by *Dr. Miles*?

The cases after *Colgate* never abandoned the *Colgate* doctrine. However, for forty years the Court seemed to regret its original formulation in *Colgate*. In a series of opinions, the Court found agreements where it was simply illogical to do so based on the principle stated in *Colgate*. In *United States v. Parke Davis & Co.*,[25] the Court found an agreement between a manufacturer and retailers when the manufacturer refused to sell to wholesalers if they in turn sold to discounting retailers.[26] The use of wholesalers was said to "go beyond mere announcement of his policy and the simple refusal to deal."[27] True enough, it was something more, but not something that is logically related to finding a meeting of the minds.[28] Under the Court's reasoning, if a supplier influenced a

22. *Id.*

23. *See, e.g.*, Baker, *supra* note 4, at 1474-77. "An alternative rationale for *Colgate* is 'the long recognized right of the trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal.'" *Colgate*, 250 U.S. at 307. "Rather than being a synonym for the absence of concerted action, this 'right' appears to have independent significance, shielding the manufacturer from liability under Section 1 *even though* there is concerted action and the kind of competitive effect condemned in *Dr. Miles*." *Id.* at 1476 (quoting *Colgate*, 250 U.S. at 307) (emphasis added). *See also* Robert Pitofsky & Kenneth W. Dam, *Is the Colgate Doctrine Dead*? 37 ANTITRUST L.J. 772, 787 (1968).

24. *See Sharp*, 485 U.S. at 746 n.12 (citing Areeda, *supra* note 17, at 167). (Stevens, J., dissenting.)

25. 362 U.S. 29 (1960).

26. "In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act. Although Parke Davis' originally announced wholesalers' policy would not under *Colgate* have violated the Sherman Act if its action thereunder was the simple refusal without more to deal with wholesalers who did not observe the [suggested wholesale price], that entire policy was tainted with the 'vice of . . . illegality' when Parke Davis used it as a vehicle to gain the wholesalers' participation in the program to effectuate the retailers' adherence to suggested retail prices." 362 U.S. at 45-46 (citing United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 724 (1944)).

27. 362 U.S. at 44.

28. "[I]t is difficult if not impossible even for a lawyer to understand why acquiescence induced by a refusal to deal for one reason (selling to price-cutting retailers) should make the conduct any more an 'agreement' than is acquiescence induced by a refusal to sell for a different reason (selling below the manufacturer's suggested price)." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 686 (1962).

dealer to whom it sold directly to charge a particular price by threatening termination, no agreement between the supplier and the dealer was formed. However, if the supplier sold to the dealer through a wholesaler, and influenced the dealer to charge a particular price by threatening to terminate sales to the wholesaler, an agreement between the supplier and the dealer was formed.[29] By involving the wholesaler, the supplier has still not obtained any assurance from the retailer as to future pricing practices. It has simply used the same technique of influencing behavior through threatening termination at the wholesaler level.[30] Moreover, the argument for finding an agreement between the supplier and the retail dealer is even weaker when the wholesalers are involved because there is no direct contact between the supplier and the dealer. Nevertheless, *Parke Davis* clearly signalled a willingess of the Court to stretch to find agreements to mitigate the impact of *Colgate*.[31] Justice Harlan's dissent concluded that the opinion had "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."[32]

In *Albrecht v. Herald Co.*,[33] the Court found an agreement between a newspaper publisher and its dealer, who was not charging the publisher's suggested price, when the publisher used an agent to solicit customers from the offending dealer to another dealer.[34] The Court characterized *Parke Davis* as having held that an agreement between the supplier and the retailers was formed "because their acquiescence in the suggested prices was secured by threats of termination."[35] Thus, the Court reasoned, if *Parke Davis* recognized an agreement based on coercion of retailers through the use of wholesalers, an agreement would also be formed if a supplier coerced a dealer to charge a particular price through the use of an agent soliciting away the dealer's customers.[36] Moreover, the Court stated that an agreement for purposes of the Sherman Act could be found based on unwilling compliance by the coerced dealer.[37]

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29. An agreement between the supplier and the wholesaler was also formed. *Parke Davis*, 362 U.S. at 46.

30. As the dissent notes, "[I] cannot see how such unilateral action, permissible in itself, becomes any less unilateral because it is taken simultaneously with similar unilateral aciton at the retail level." *Id.* at 55. (Harlan, J., dissenting).

31. The facts present in *Parke Davis* were sufficient to establish an agreement based on other theories. Representatives of Parke Davis visited retailers directly and obtained assurances about future pricing practices from them. *Id.* at 46. These assurances resulted in vertical agreements between Parke Davis and individual retailers. In addition, as Parke Davis made its rounds among the retailers, it encouraged them to stop advertising discount prices for particular products, telling them that one large retailer, Dart Drug, was willing to stop advertising discount prices if the others did, too. *Id.* at 35-36, 46. In this way, a horizontal agreement among the dealers was formed as well.

Justice Scalia's opinion in *Sharp* pointed to this evidence to make the point that *Parke Davis* was not a precedent for the proposition that RPM agreements do not require an agreement by a dealer to charge a particular price, and, therefore, the requirement announced in *Sharp* to prove such an agreement is not new. *Sharp*, 485 U.S. at 735. *See infra* notes 123-126 and accompanying text. Justice Scalia's statement is correct insofar as it refers to the actual holding of the case, but it does not reflect the reasoning of the majority in *Parke Davis*.

32. 362 U.S. at 49. (Harlan, J., dissenting.)

33. 390 U.S. 145 (1968).

34. *Id.* at 145.

35. *Id.* at 149.

36. *Id.* at 149-150.

37. "Under *Parke Davis*, petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with repondent's advertised price. Likewise,

In *Simpson v. Union Oil Co.*,[38] the Court reviewed an arrangement between an oil company and its dealers which provided that the lease of the station property, owned by the oil company, was terminable by either party at the end of each each year. The oil company had attempted to structure the arrangement as a consignment, whereby the oil company could set the retail price and allocate a portion of the price to the retailer. The Court found that the scheme was more akin to a traditional resale and distributional arrangement, allowing the oil company to control resale prices. Justice Douglas's opinion pointed to the threat to terminate the leases as a coercive device which effectively forced dealers to comply with suggested prices: "We made clear [in *Parke Davis*] that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is."[39]

These opinions cannot be recconciled with the original *Colgate* formulation. In the forty-five years after creating the formulation, the Court, without expressly saying so, attempted to avoid its result. Under *Colgate*, a seller who threatened its dealers with termination could often effectively force them to charge a particular price, even though the dealer had never given an assurance about its pricing policies. That anomalous result could have been expressly rationalized by the Court as the price for allowing suppliers to exercise freedom in selecting and terminating dealers. Instead, the Court chose to distort the *Colgate* formulation out of recognition.

The narrowing of the *Colgate* doctrine and the resulting hazards to a supplier in relying on it had the practical effect of making suppliers extremely wary of terminating dealers for discount pricing.[40] A 1960 court of appeals opinion said of the right to terminate a distributor unilaterally: "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicty as to be somewhat rare in this day of complex business enterprise."[41] The law was clearly unsatisfactory. Suppliers had the theoretical right to terminate dealers for any reason, including failure to charge suggested prices, but the practical limitations on the *Colgate* doctrine made the right too dangerous to exercise. Even if suppliers had reasons other than pricing policies for terminating dealers, they might be met with an antitrust claim that the termination was based on price.

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he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. United States v. Arnold, Schwinn & Co., 388 U.S. 365, 372 (1967)." *Albrecht*, 390 U.S. at 150 n. 6.

38. 377 U.S. 13 (1964).

39. *Simpson*, 377 U.S. at 17. The Court's statement is dictum, however, since there was an express agreement by the dealer to adhere to the supplier's prices. *Id.* at 15. In Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968), the Court said, in discussing the complaint of dealers that they were forced to comply with restrictive agreements, "each petitioner can clearly charge a combination between [the supplier] and himself as of the day he unwillingly complied with the restrictive franchise agreements [citing *Albrecht* and *Simpson*] or between [the supplier and other dealers], whose acquiescence in the [supplier's] firmly enforced restraints was induced by the 'communicated danger of termination' [citing *Schwinn* and *Parke Davis*]." 392 U.S. at 142.

40. The limitation on the supplier's freedom became particularly pronounced after Simpson since the consignment device was no longer available. *See* William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 934-35 (1987).

41. George W. Warner & Co. v. Black & Decker Mfg. Co., 277 F. 2d 787, 790 (2d Cir. 1960).

Relying on the Supreme Court's statements suggesting that compliance with suggested prices, obtained by coercing dealers with the threat of termination, would run afoul of *Colgate*, the Federal Trade Commission issued a complaint alleging an agreement based on such a theory. In *Russell Stover Candies, Inc.*,[42] the FTC alleged that a candy manufacturer had entered into agreements with its dealers by coercing them to comply with its suggested prices. By announcing in advance that it would terminate dealers who refused to comply, the FTC charged that there was an agreement within the meaning of Section 1 of the Sherman Act.[43] The Commission opinion found an agreement, citing the statements by the Supreme Court in *Albrecht*, *Parke Davis*, and *Simpson* that dealer compliance with suggested prices obtained by the threat of termination was an agreement for purposes of the Sherman Act. The Commission reasoned that, even though the Supreme Court had never expressly overruled *Colgate*, subsequent opinions demonstrated that the Court did not interpret it to immunize coerced compliance with suggested prices.[44] On appeal, the Eighth Circuit reversed, saying that it was up to the Supreme Court to announce the death of *Colgate*, not a court of appeals.[45] It vacated the Commission's order[46] and no petition for Supreme Court review was ever filed.

The court of appeals' rejection of the FTC's theory in *Russell Stover* suggested that *Colgate* had more vitality than might have been imagined from the Supreme Court's opinions over the last few decades. Nevertheless, there was still some doubt about how the Supreme Court would view the matter, should this issue reach the high court. However, in *Monsanto*, the Court in dictum appeared to reject the FTC's theory of agreements based on coercion.[47] Although there are still many unanswered questions about RPM agreements, the Court appears to have reaffirmed the proposition that two parties in a vertical relationship can influence each other's conduct through the threat of withdrawing from the relationship without forming an agreement. Any workable RPM policy must accommodate this principle.

B. RPM Agreements Today

RPM agreements, as they arise in actual litigation, present a number of anomalies. The plaintiff is typically a terminated dealer who, in order to recover, must claim antitrust injury resulting from some unlawful agreement.[48] Since the

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42. Russell Stover Candies, Inc., 100 F.T.C. 1 (1982).

43. *Id.* at 18.

44. "Our review of Supreme Court and lower court cases convinces us that, despite the Court's original pronouncement concerning the right of a manufacturer to threaten termination for failing to comply with pricing policies, that right has been circumscribed by a prohibition on the securing of unwilling compliance through the coercion inherent in threatened termination." *Id.* at 34.

45. Russell Stover Candies, Inc. v. F.T.C., 718 F.2d 256, 260 (8th Cir. 1983).

46. *Id.* at 260.

47. "Under *Colgate*, the manufacturer can announce its resale price in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto*, 465 U.S. at 761. The opinion is not entirely consistent on the point, but this statement probably reflects the Court's rejection of the theory of *Russell Stover*. *See infra* notes 81-82 and accompanying text.

48. RPM law might have developed so as not to require an agreement at all. The Supreme Court would be hard-pressed to interpret the Sherman Act as not requiring a showing of an agreement in an RPM case because of the express wording of section 1 of the Sherman Act. However, the FTC

dealer is no longer party to any agreement, by reason of the termination, the puzzle arises — what is the agreement that caused the injury? At one time or another, the courts have suggested several possible types of agreements which could serve as the theoretical underpinning of an antitrust claim in an RPM case: (1) an agreement between the supplier and the terminated dealer itself setting the terminated dealer's prices;[49] (2) an agreement between the supplier and other dealers setting the other dealers' prices;[50] (3) an agreement among other dealers to force the supplier to maintain dealer prices;[51] (4) an agreement between the

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could, in theory, pursue an RPM case without claiming an agreement on the basis that the Federal Trade Commission Act bar on "unfair methods of competition," 15 U.S.C. § 45(a), does not require such a showing. In fact, the Commission in FTC v. Beech-Nut Packing, 257 U.S. 441 (1922), did just that by finding liability for vertical price-fixing despite a stipulation that there was no contract to fix prices. *Id.* at 458. Since the company reinstated non-complying dealers after they gave express assurances that they would comply in the future, *Id.* at 449, there were clearly grounds for finding a traditional agreement. Nonetheless, the Supreme Court appeared to decide the case based on the assumption that there were no express or implied agreements. *Id.* at 455. However, the FTC has not chosen to pursue such a theory in recent years. Congress, of course, could decide to amend Section 1 and dispense with the requirement that the plaintiff prove an agreement, and proposals have been made to that effect. *See, e.g.*, Comment, *Dealers Coercing Manufacturers: A Proposal for a Unilateral Antitrust Offense*, 137 U. PENN. L. REV. 2335 (1989). None of the recent proposals in Congress attempt to abandon the agreement requirement, however. *See infra* notes 258-273 and accompanying text. For practical purposes, it is here to stay.

49. In a number of cases, including *Albrecht* and *Perma Life*, the Supreme Court suggested that the dealer could establish an unlawful agreement between itself and its supplier. Albrecht v. The Herald Co., 390 U.S. 145, 150 n.6 (1968); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142 (1968). A dealer who is a party to an RPM agreement is not barred from making a claim against the supplier because it is party to an unlawful agreement, at least when it does not bear "substantially equal responsibility for the violation." Eichler v. Berner, 472 U.S. 299, 310-11 (1985); *Perma Life*, 392 U.S. at 146 (White, J. concurring). The difficulty comes in the plaintiff's attempt to prove damages. If the terminated dealer could base its entire case, including lost profits from the termination, on an agreement that existed at one time between itself and the supplier, a dealer contemplating termination for discounting could agree to comply, then refuse to comply the next day. Such a result stretches, probably past the breaking point, the *Perma Life* principle that dealers can still recover even though they are parties to an unlawful agreement. (In *Perma Life*, the claim was for damages from being forced to comply with the restrictive franchise agreements. 392 U.S. at 137.) In addition, it is difficult to reconcile the claim of injury from an unlawful agreement with the fact that that the plaintiff's injury stems from refusing to comply with it. *See* Areeda, *supra* note 17, at 193-95. In the cases that allowed recovery for termination on the grounds that the supplier went "beyond" its *Colgate* rights, one would be hard-pressed to identify the actual unlawful agreement the court envisioned. As a practical matter, the conclusion is simply an equitable principle based on the hostility to RPM and the idea that a supplier who failed in an attempt to coerce the dealer to charge a certain price cannot escape damages by pointing to the lack of an agreement.

50. Here the dealer must prove that its supplier agreed with other dealers to maintain prices, that these agreements showed a policy or scheme of RPM, and, therefore, that the terminated plaintiff was injured for failing to comply with the unlawful scheme. This is the theory of RPM agreements contemplated in *Monsanto* and *Sharp*, and, particularly after *Sharp*, is the one plaintiffs typically must pursue. *See infra* note 115-119 and accompanying text.

Once the dealer proves that the supplier agreed with other dealers to set the other dealer's prices, Monsanto suggests that the plaintiff's termination can be presumed to result from the unlawful agreements. "If, as the courts below reasonably could have found, there was evidence of an agreement with one or more distributors to maintain prices, the remaining question is whether the termination of Spray-Rite was part of or pursuant to that agreement. It would be reasonable to find that it was, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated." *Monsanto*, 465 U.S. at 767.

51. Such an agreement would serve as a basis for a claim that a supplier was pressured by a dealer cartel to terminate the plaintiff. Although the injury is the same—termination for failing to comply with required prices—the theory of the violation is that there has been an unlawful horizontal price-fixing agreement. Because the form of the agreement is clearly horizontal, the court might not characterize the case as RPM at all and, instead, could award damages to the plaintiff based on a boycott theory. *See infra* notes 201, 205.

supplier and another person who is not part of the supplier-distributor relationship;[52] and (5) an agreement between the supplier and one or more other dealers to terminate the plaintiff in order to eliminate the terminated dealer's discounting.[53] In the decades since *Dr. Miles* and *Colgate*, the wide-ranging and often confusing theories of agreements have hindered the development of sensible RPM policy.

Terminated dealer plaintiffs in RPM cases have traditionally confronted the following dilemma. They cannot rely upon a showing of an agreement between the supplier and themselves for two reasons. First, the plaintiff typically wishes to base its damage claim on lost profits resulting from termination, not on lost profits resulting from compliance with an unlawful agreement to charge the required price. A complaint based on an agreement between the terminated dealer and the supplier leads only to damages for being forced to comply with a higher retail price.[54] Second, if all the plaintiff can point to is the supplier's termination of it for discounting, *Colgate* generally immunizes the supplier from liability.[55] Thus, plaintiffs have looked elsewhere to find an unlawful agreement.

The most frequent theory of a terminated plaintiff is that its supplier has entered into an unlawful RPM agreement with other dealers. In some cases, the plaintiff might be able to show that the supplier and other dealers actually agreed on the dealers' prices. The plaintiff would then argue that the injury was caused by its unwillingness to participate in the unlawful scheme.[56] In the typical case, however, the plaintiff cannot prove that the supplier actually agreed with other dealers to set prices.[57] In these cases, the most frequent theory of plaintiffs has been that the supplier has agreed with one or more other high price dealers to eliminate price competition by terminating the plaintiff.

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52. The theory of an unlawful RPM agreement between the supplier and some party other than a dealer stems from *Parke Davis* and *Albrecht*. In *Parke Davis*, the Court found an agreement between the supplier and a wholesaler based on the wholesaler's involvement. *See supra* note 26. The Court also suggested that use of a third party to monitor the dealer's prices might form an unlawful agreement. *Parke Davis*, 362 U.S. at 43. It also suggested that a monitoring system might result in an unlawful RPM agreement under the Federal Trade Commission Act in FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922). In *Albrecht*, the Court suggested that the plaintiff could show an unlawful agreement based upon the agreement between the supplier and an agent to solicit sales away from the plaintiff in order to force the plaintiff to comply with suggested prices. 390 U.S. at 150 n.6. Whatever vitality remained in the theory that an agreement to monitor prices is an unlawful RPM agreement has been rejected by *Monsanto* and *Sharp*. *See infra* notes 81-82 and accompanying text.

53. Unlike the cases where dealers have made assurances as to their own pricing practices, this agreement does not include such a price term.

54. *See supra* note 49.

55. Even if Colgate did not immunize the termination, the theory of an agreement would be strained since the dealer is terminated for failure to comply with an unlawful agreement rather than complying with one. In cases such as *Parke Davis* that allowed recovery based on a finding that the supplier "went beyond" its *Colgate* rights, the theory of agreements is obscure. *See supra* notes 25-31 and accompanying text.

56. This is the theory of injury discussed with approval in *Monsanto*. *See supra* notes 82-88 and accompanying text.

57. There are a variety of explanations for this difficulty. First, since express RPM agreements are unlawful per se, any agreements are likely the result of private conversations. Second, the supplier may not have obtained any express assurances from other dealers but may simply be relying on compliance resulting from the threat of termination. Third, the other dealers may be full price dealers content to charge list price without any agreement and without any need for the supplier to obtain assurances. In the first case, the agreements cannot be detected and proved. In the latter two cases, there are no agreements to prove.

Since the terminated dealer wishes to characterize the conduct as RPM, which is unlawful per se, its theory is either that the termination is indirect proof that the supplier and other dealers have agreed to certain dealer prices or that the supplier and the dealer have agreed to "set" dealer prices by terminating a dealer who is discounting. Under the latter theory, the alleged agreement does not directly "set" anyone's price in the sense that the remaining dealers have made assurances as to their pricing policies. However, terminating a discounting dealer certainly affects the degree of price competition among dealers. By agreeing to eliminate the discounter, the supplier and the remaining dealer have reduced price competition at the retail level. This theory did have a certain degree of acceptance by courts of appeals in several circuits and, thus, provided some basis for success in dealer termination cases.[58]

The theory that an agreement between a high price dealer and a supplier to terminate a discounter is per se unlawful, absent an agreement as to a dealer regarding its price levels, has now been rejected by the Supreme Court. In *Sharp*, the Court held that the per se rule against RPM agreements applies only to agreements in which a dealer has agreed to charge a particular price or price level.[59] However, the idea that an agreement to terminate a discounter should be subject to the per se bar of *Dr. Miles*, at least under some circumstances, was supported by the two dissenting Justices in *Sharp*[60] and has continued vitality in recent legislation proposed in Congress.[61] Thus, it deserves close review.

The leading case finding an RPM agreement between a complaining full-price dealer and a supplier to terminate a discounter to be per se unlawful is *Cernuto, Inc. v. United Cabinet Corp.*[62] There, a full price dealer approached the supplier, a cabinet manufacturer, and pressured it to terminate a rival dealer. The *Cernuto* court reasoned that the pressure of a single dealer on a supplier, which resulted in the termination of a competing supplier to eliminate price competition, could have the same effect as a horizontal price-fixing agreement.[63] The court attempted to distinguish between a supplier attempting to carry out its own marketing and distribution policies and a complaining dealer attempting to eliminate price competition. According to the court, if, in fact, the driving force behind the termination is a competing dealer's effort to eliminate competition, the effect is really "horizontal."[64]

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58. *See infra* notes 62-64 and accompanying text.
59. 485 U.S. at 735. *See infra* notes 123-126 and accompanying text.
60. *Id.* at 736.
61. *See infra* note 270 and accompanying text.
62. 595 F.2d 164 (3rd Cir. 1979). *See also* Zidell Explorations, Inc. v. ConVal Int'l., Ltd., 719 F.2d 1465 (9th Cir. 1983); Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1215 (4th Cir. 1983), *cert. denied*, 464 U.S. 894 (1983); Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466 (8th Cir. 1985).
63. 595 F.2d at 168.
64. The *Cernuto* court explained as follows:

> When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint,

The *Cernuto* case is one effort to deal with the most frequent fact pattern that occurs in RPM litigation — a discounter is terminated as a result of pressure on the supplier from high price competing dealers. Thus, it presents some of the central issues in formulating RPM policy: First, for purposes of Section 1, when should the courts find an "agreement" between the complaining dealer and the supplier? When one dealer pressures the supplier to terminate another dealer, should we view the complaining dealer and the supplier as having "agreed" to the termination? Or is it more sensible to view the dealer as simply communicating information or stating its intentions and the supplier as simply carrying out its own decision? Second, if there is an agreement, should it be viewed as an RPM agreement? The answer would seem to be yes if the complaining dealer gives assurances as to its own future prices, but such an assurance is not necessarily linked to the complaints abouts a rival dealer, and, for reasons discussed below, is not likely to be given by the complaining dealer. Finally, what are the economic effects of an agreement between dealers and suppliers setting the dealers' prices and agreements between dealers and a supplier to terminate another dealer in order to eliminate price competition? Can either of these types of agreements harm consumers?

Some of these questions have now been addressed by the Supreme Court. In *Monsanto*, the Court established some evidentiary rules for determining when the jury may consider the claim of an agreement between a complaining dealer and a supplier. In *Sharp*, the Court announced that, if there is an agreement, it must include an agreement as to dealer prices if it is to fall within the per se bar of *Dr. Miles*. These two decisions have signalled, at least for the time being, the death knell of the *Cernuto* theory of RPM agreements. As we shall see, it is extremely difficult to find any kind of supplier-dealer agreement after *Monsanto* in the familiar case where a discounter is terminated after complaints by rival dealers. After *Sharp*, even if an agreement is found, it is rare that such an agreement will be per se unlawful since it is unlikely that a complaining dealer and its supplier will have agreed on the complaining dealer's prices. One result of these developments is that plaintiffs lose most dealer termination suits in the summary judgment stage of the case. Another result is that Congress is seriously considering legislation to address both *Monsanto* and *Sharp*.

The per se rule still applies to bar agreements between dealers and suppliers if the agreement sets the price of the dealer who is the party to the agreement. Nevertheless, many commentators argue forcefully that even that narrow version of the per se rule should be discarded. In order to formulate sensible RPM policy and to evaluate the *Monsanto* and *Sharp* decisions, we must identify the rationale for any bar on RPM. In Part V, the article discusses the situations in which RPM agreements can harm consumers and in Part VI it discusses various policy alternatives. First, we turn to a more in depth look at the *Monsanto* and *Sharp* decisions.

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the desired impact is horizontal and on the dealer, not the manufacturer, level.

Id. at 168.

II. THE *MONSANTO* DECISION

A. The Facts in *Monsanto*

In *Monsanto*, the defendant, a manufacturer of pesticides, terminated a distributor after complaints from rival dealers. The principal question for the Court was what quantum of evidence was necessary for the trial court to allow jury consideration of plaintiff's claim of an agreement between the complaining dealers and the supplier. A central question, never directly addressed by the Court, is — what precise agreement is at issue? Is it the existence of an agreement between a complaining high price dealer and a supplier to terminate a discounter? Or, is it the existence of an agreement between the complaining dealer and the supplier that the complaining dealer would charge some price? Oddly enough, even though this question is at the center of the debate over RPM policy, the Court in *Monsanto* never said clearly which of these two types agreements it had in mind in establishing evidentiary requirements.

The issue, as framed by the lower court in *Monsanto*, was what evidence was necessary to allow the jury to consider whether a complaining dealer and a supplier agreed to terminate a discounter.[65] The court of appeals had allowed the case to go to the jury based on the requirement that the plaintiff had to show "that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors."[66] The Supreme Court held that this standard was insufficiently demanding on the plaintiff and attempted to formulate a more stringent test.[67]

If the question is whether a complaining dealer and a supplier have agreed that the supplier will terminate a discounter — or more narrowly, whether they have agreed to terminate a discounter in order to eliminate price competition — a number of standards are possible before allowing the jury to infer whether such an agreement existed. Some circuits had allowed a jury to infer an agreement if termination followed soon after complaints. Most circuits, however, had required proof of a causal connection.[68] A standard requiring only proof that termination "followed" complaints, of course, would be a significantly easier burden than a requirement of proof that termination was "in response to" complaints. The latter standard requires a showing of a causal link, thus opening up the question of the supplier's motivation. The Seventh Circuit had applied the more permissive first standard in *Monsanto*.[69]

65. Spray-Rite Service Corp. v. Monsanto Corp., 684 F.2d 1226, 1245 (7th Cir. 1982).
66. *Monsanto*, 465 U.S. at 759.
67. *See infra* notes 73-78 and accompanying text.
68. The Ninth Circuit had apparently adopted the standard in an early case that termination following complaints was sufficient to survive a motion for a directed verdict. Girardi v. Gates Rubber Co., 325 F. 2d 196 (9th Cir. 1963). In a later decision it, along with several other circuits, required a showing that the termination was caused by the complaints. Filco v. Amana Refrigeration, Inc., 709 F.2d 1257 (9th Cir. 1983), *cert. dismissed* 464 U.S. 956 (1983); Bostick Oil Co. v. Michelin Tire Corp. 702 F.2d 1207 (4th Cir. 1983), *cert. denied*, 464 U.S. 894 (1983); Blankenship v. Herzfeld, 661 F.2d 840 (10th Cir. 1981). The Eighth Circuit was split between this standard, advanced in Battle v. Lubrizol Corp. 712 F.2d 1238 (8th Cir. 1982), and a more stringent one stated in Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168 (8th Cir. 1982). On rehearing en banc, the court of appeals was

In formulating an evidentiary standard for sending a case to the jury on the issue of the existence of an agreement, the Court in *Monsanto* relied heavily on the Third Circuit's decision in *Sweeney*.[70] The *Sweeney* court appears to have assumed that the agreement question was whether the complaining dealer and the supplier had agreed to terminate a discounter in order to eliminate price competition.[71] The Court in *Monsanto* construed *Sweeney* as requiring a more stringent standard for jury consideration than evidence that complaints by high price dealers caused the termination. However, a better reading of *Sweeney* is that the Fifth Circuit, like most other circuits, required only a showing of causation.[72] This failure by the Court to specify what agreement is the subject of proof makes an already confusing opinion even more difficult. As we shall see, the question of what type of agreement is required to establish a per se liability was addressed in *Sharp*.[73]

Monsanto includes a number of statements intended to establish the appropriate evidentiary standards for jury consideration of the agreement issue. The Court's statements range from the specific, to the ambiguous, to the confusing and downright misleading. The Court's concluding summary of its decision states: "The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective."[74]

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equally divided. Roesch, Inc. v. Star Cooler Corp., 712 F.2d 1235 (1983) and Battle v. Watson, 712 F.2d 1238 (1983). The Supreme Court cited the Fifth, Second, Sixth and First Circuits as using a more stringent standard than proof that the termination was in response to complaints. *See* 465 U.S. at 795 n. 5 citing Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3rd Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, 459 U.S. 1007 (1982); Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982), *cert. denied*, 466 U.S. 931 (1984); and Bruce Drug, Inc. v. Hollister Inc., 688 F.2d 853 (1st Cir. 1982).

69. "We believe . . . that proof of termination following competitor complaints is sufficient to support an inference of concerted action. . . . Proof of distributorship termination in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action. Spray-Rite Service Corp. v. Monsanto Corp., 684 F.2d 1226, 1238-39 (7th Cir. 1982).

70. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105 (3rd Cir. 1980).

71. *See* the *Sweeney* court's discussion of the *Cernuto* decision. 637 F.2d at 114-5. *Sweeney* quotes the following passage from *Cernuto* with approval.

> "If Cernuto [the terminated discounter] can prove at trial that United [the supplier], Lappin [the agent for United] and Famous [the complaining high price dealer] conspired to protect Famous from price competition by Cernuto, and that United and Lappin terminated Cernuto at Famous' request and in pursuit of a price related end, then it can prevail on a price-fixing theory notwithstanding its failure to show any impact on competition involving [the relevant market]."

637 F.2d at 115 (citing *Cernuto*, 595 F.2d at 170).

72. In *Sweeney*, the Fifth Circuit stated, "The necessary first step toward appellant's proof of a prohibited § 1 conspiracy was proof of a causal relationship between competitor complaints" that a dealer was discounting and supplier action. 637 F.2d at 111. This language was not cited in *Monsanto*. Other statements in the Sweeney opinion indicate that by "first step," the court meant that this was the minimum evidentiary requirement to allow a jury to infer an agreement. *See, e.g.*, *id.* at 115: "*In the absence of evidence that [the supplier] decided to terminate [the discounter] because of competitor complaints and evidence of such a conspiracy*, it would have been improper for the court to allow the jury to speculate on the cause for Texaco's action." *Id.* (emphasis added).

73. *See infra* notes 123-126 and accompanying text.

74. *Monsanto*, 465 U.S. at 768. The Court takes this phrase from *Sweeney*, 637 F.2d at 111,

The first part of this standard — "evidence that tends to exclude the possibility of independent action" — seems fair enough as far as it goes. But what evidence *does* tend to exclude the possibility of independent action? The plaintiff in *Monsanto* obviously would argue that termination following soon after complaints, or, even more strongly, termination caused by complaints, *does* tend to exclude the possibility of independent action. Thus, this part of the standard offers little guidance.

The second part of the test — proof of a "conscious commitment to a common scheme to achieve an unlawful objective" — offers little additional help. What is the "common scheme" in the first place? And what is the "unlawful objective"? Such a formulation adds to the ambiguity by incorporating the issue of *legality* of the agreement into the issue of the *existence* of the agreement. Much of the difficulty in interpreting and applying *Monsanto* is that it was unclear about the types of agreements to which its evidentiary standards apply and what type of agreements are actually unlawful.[75]

If by the "common scheme," the Court means an agreement to eliminate a discounter, then the evidentiary focus is whether there was a meeting of the minds of the complaining dealer and the supplier that the supplier would eliminate the complaining dealer's price competition.[76] Complaints about the discounter's pricing practices followed by termination are evidence of such an agreement. On the other hand, if the "common scheme" is viewed as an agreement by the complaining dealer to charge list prices, the complaints about the discounter offer little evidence of such an agreement. In the typical case, a complaining dealer will be a full-price retailer, willing to carry the supplier's product at list prices as long as everyone else does. The complaining dealer may be complying with suggested prices in order to avoid termination, but *Monsanto* itself establishes that such "coerced" compliance does not constitute an unlawful agreement.[77] The high price dealer's complaints will rarely be accompanied by an assurance about its own pricing policies. Instead, it is seeking assurances from the supplier that it will terminate a discounter or force it to stop discounting. Thus, the typical situation — discounting by one dealer, followed by complaints by other dealers, followed by termination of the discounters — ordinarily will offer no evidence that the complaining dealers have provided *assurances* that they will not discount.

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which in turn cites the source as Klein v. American Luggage Works, Inc., 323 F.2d 787, 791 (3d Cir. 1963) which in turn cites the sources as United States v. Standard Oil Co., 316 F.2d 884, 890 (7th Cir. 1963). The original formulation in *Standard Oil* was: "The substantive law of trade conspiracies requires some consciousness of commitment to the common scheme." *Id.*

75. *Sharp* resolved the issue of what agreements are *per se* unlawful by requiring that they include a commitment by dealers to charge certain prices. *See supra* notes 123-126 and accompanying text. On the other hand, the *Monsanto* formulation applies to proof of any agreement between complaining dealers and suppliers, whether it is evaluated under a per se rule or a rule of reason.

76. It can be confusing to characterize an understanding between a high price dealer and a supplier to terminate a discounter as a "common scheme," since the complaining dealer and the supplier may be at odds over the pricing practices of the discounter. The complaining dealer is frequently threatening, expressly or by implication, that it will drop the supplier's line unless the discounter is terminated while the supplier may be hoping to retain both dealer. If the supplier agrees to terminate the discounter as the price to retain the high price dealer, the scheme is "common" in the sense that incentives of the two parties lead them to a common course of action even though the considerations for each are different.

77. *See infra* notes 81-82 and accompanying text.

At one point in the opinion, the Court seems to say that the "common scheme" it envisions is an agreement between high price dealers and the supplier that the high price dealers will not discount. Such a "meeting of the minds" or "common scheme" must extend beyond a showing that the distributor conformed to list price, said the Court. "It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer."[78] Here again, this formulation is not likely to apply to the communications between the complaining dealer and the supplier. If there is an assurance at all in the communication between the complaining dealer and the supplier, it is more likely to be the supplier's assurance that a discounting dealer be brought into line, not the complaining dealer's assurance that it will adhere to a particular pricing policy.

Monsanto contains a number of other significant propositions. First, it rejects the notion that distributors reporting on the actions of other distributors is harmful. *Monsanto* states strongly that distributor complaints about the actions of their rivals are natural and useful.[79] Such a declaration by the Court represents a dramatic change from some past opinions, which suggested that monitoring the pricing practices of dealers could lead to finding an unlawful RPM agreement because it goes beyond the unilateral conduct protected by *Colgate*.[80]

Another principle of *Monsanto* is an apparent rejection of the FTC's theory in *Russell Stover* that coercion of distributors to charge a certain price by threating termination constituted an agreement.[81] *Monsanto* reaffirmed *Colgate* and went further by stating that an announced policy of terminating dealers who discount, followed by dealer compliance motivated by a desire to avoid termination, cannot be challenged as an agreement under Section 1 of the Sherman Act.[82]

Finally, the *Monsanto* opinion discusses how an unlawful RPM agreement *can* be found. Ironically, the Court actually found an agreement on the record in the case and, therefore, affirmed judgment for the plaintiff. The most direct evidence of an agreement involved one between Monsanto, the supplier, and one of its discounting dealers. Monsanto, on more than one occasion, had threatened to terminate price-cutting dealers.[83] When one of the dealers balked at complying, Monsanto complained to the dealer's parent company. Thereafter, the parent

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78. *Monsanto*, 465 U.S. at 764, n.9.

79. The Court elaborated in the following manner:

> [C]omplaints about price cutters 'are natural — and from the manufacturer's perspective, unavoidable — reactions by distributors to the activities of their rivals.' . . . Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently.

Id.

80. *See, e.g.*, Bowen v. New York News, Inc., 366 F. Supp. 651, 658 (S.D.N.Y. 1973), *aff'd*, 522 F.2d 1242 (2d Cir. 1975), *cert. denied*, 425 U.S. 936 (1976).

81. *See supra* notes 42-46 and accompanying text.

82. "Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." *Monsanto*, 465 U.S. at 761.

83. *Id.* at 765.

instructed the subsidiary to comply and the dealer expressly assured Monsanto that it would.[84] Thus, the record of the case contains the most direct evidence of a price-fixing agreement possible, an express assurance by one dealer to the supplier that it will not discount.

Monsanto also suggested that other evidence short of express assurances would be sufficient to find an RPM agreement. Monsanto's dealers had circulated a newsletter that showed that dealers were aware that they would be terminated if they discounted and, arguably, that there was an understanding with Monsanto that they would not.[85] The Court suggested the correct interpretation of the newsletter was an issue for the jury.[86] Since the language of the newsletter was ambiguous — it could refer to a prior express agreement with Monsanto, an awareness that Monsanto might (acting unilaterally) terminate non-complying dealers, or even a horizontal agreement among the dealers — the Court's statement that the jury should resolve the issue is consistent with the rest of the opinion.

However, another statement by the Court cannot be so easily reconciled with the rest of the opinion. The Court noted that Monsanto sought agreement from a distributor to conform to the suggested price during the season when the product was in short supply. According to the Court, "The jury could have concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance."[87] Such a conclusion from this evidence would amount to establishing an agreement on the basis of compliance, coereced by the threat of termination, a proposition that the court rejected earlier in the opinion.[88] Thus, this offhand suggestion probably should be given little weight and is surely not enough to revive the coercion theory of agreements.

The express assurance provided by the balking dealer in *Monsanto* is illustrative of evidence needed to pass through the the narrow channel left by *Monsanto* for proving supplier-dealer agreements. There was no direct proof that the complaining full-price dealers had given Monsanto any assurances about their pricing policies. Only when Monsanto pressured the non-complying dealers did one of them begrudgingly provide an assurance, which rendered unlawful the entire scheme. Thus, the legality of the entire marketing arrangement, and Monsanto's liability, turned on the express assurance given by one of its dealers. If the other dealers had simply complied without giving express assurances, or had refused to comply and Monsanto had terminated them, or if the express assurance had never been detected, the plaintiff would have lost.

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84. *Id.*

85. The newsletter stated, in pertinant part, the following:

> [W]e are assured that Monsanto's company-owned outlets will not retail at less than suggested price. . . . Furthermore, those of us on the distribution level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outloook for continuity as one of the approved distributors during the future upcoming seasons. So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. . . . [H]armony can only come from following the rules of the game. . . .

465 U.S. at 765-76.

86. *Id.* at 766-7 n.11.

87. *Id.* at 765 n.10.

88. *See supra* notes 81-82 and accompanying text.

B. The *Monsanto* Standard for Agreements

Monsanto adopted a stringent evidentiary rule for finding agreements to avoid implicating the per se bar against RPM in cases where suppliers terminated discounters consistent with their own marketing objectives. However, in seeking to avoid an overly broad application of the per se rule, the *Monsanto* test of agreements, particularly as it has been applied by the lower courts, has taken on an unrealistic, if not completely arbitrary, quality. Courts routinely grant summary judgment against plaintiffs, finding insufficient evidence of an agreement, when there are communications between complaining dealers and suppliers that would be viewed as bilateral in other contexts.

The lower court cases following *Monsanto* show how difficult it is for a plaintiff to prove an agreement between the supplier and its dealers. In *Parkway Gallery*,[89] discount furniture dealers were engaging in telephone and mail order sales. After other dealers complained, the manufacturer revised its marketing policies to prohibit dealers from selling by mail or telephone order.[90] There was evidence that the new policy constituted "a very clear, concise pledge to its dealer network regarding the . . . discounters."[91] The supplier surveyed the reaction of the complaining dealers and the survey reported one dealer as stating it "totally agrees" with the new policy and "will abide totally."[92] The case reached the court of appeals after the trial court had granted summary judgment for the supplier. With very little analysis, the court concluded that "the evidence does not present a genuine issue of material fact as to whether the alleged conspirators acted independently. In our view, the evidence simply does not add the 'something more' required by *Monsanto* by rising to the level of a 'conscious commitment to a common scheme' or of a 'unity of purpose or a common design and understanding, or a meeting of minds.'"[93]

It is easy to conclude that the supplier and the complaining dealers in *Parkway Gallery* did not agree to the prices that the complaining dealers would charge. This conclusion would exclude the case from the per se rule under *Sharp*. However, it seems nonsensical to say that there was insufficient evidence for jury consideration of whether there was an agreement as to the termination of dealers who did not abide by the new policy. To say there is no "meeting of the minds" on at least this issue is stretching the definition of agreement out of recognition in order to avoid the effects of the per se rule. Nevertheless, the court's decision precluded the plaintiff's from arguing that the alleged agreement was per se

89. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801 (4th Cir. 1989).

90. *Id.* at 802.

91. *Id.* at 803.

92. *Id.*

93. *Id.* at 806. (citations omitted) The court went on to add a footnote expressly criticizing the Eighth Circuit opinion in McCabe's Furniture, Inc. v. La-Z-Boy Chair Co., 798 F.2d 323 (8th Cir. 1986), *cert. denied*, 486 U.S. 1005, (1988), and the Eleventh Circuit opinion in Helicopter Support Systems Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1987). Both of these cases are discussed below. *See infra* notes 99-107 and accompanying text. The *Parkway Gallery* court stated that these opinions "have in effect misconstrued [the phrase] 'tends to exclude the possibility of independent conduct,' (citing Matsushita Electric Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986)) to mean something like 'arguably consistent with the possibility of conspiracy.'" 878 F.2d at 806 n.4.

unlawful vertical price-fixing or an unreasonable non-price restriction unlawful under a rule of reason. According to the court, the strict evidentiary requirements of *Monsanto* apply whether the claim is evaluated under the per se rule or the rule of reason.[94]

In *James Jeans*,[95] a discounter was terminated after complaints from competing dealers. The supplier had discussions with complaining dealers about the discounter. One dealer said that he would drop the supplier if the discounter was not terminated. The supplier said it would "take care of things."[96] Again, there was apparently no agreement between the complaining dealers and the supplier as to the complaining dealers' prices, as envisioned by the Supreme Court in *Sharp*. Is it sensible, however, to say that there was no agreement between the complaining dealers and the supplier at all? The supplier and the dealer appear to have reached an understanding that the complaining dealer will continue to carry the supplier's product if the discounter is eliminated. Nevertheless, the court concluded that this evidence was insufficient to allow jury consideration of any conspiracy allegation.[97] According to the court, such evidence "falls far short of establishing an agreement to fix prices between the manufacturer and the complaining retailer. Neither does it tend to prove an agreement to terminate a retailer who has failed to follow the alleged resale price maintenance scheme."[98]

After *Monsanto*, it is still possible to prove an agreement— even an agreement with a price term as required by *Sharp*—but the circumstances in which it can be done are narrow. There are two principal categories of cases where courts have continued to find agreements in dealer termination cases. First, as in the actual facts in *Monsanto*, the plaintiff can point to cases where the supplier has obtained express assurances from other discounting dealers. These will rarely be the dealers who complain since, of course, they are the full price dealers who are upset about the discounting rivals. For example, in *World of Sleep*,[99] dealers complained to the supplier about a rival dealer who was discounting. The supplier attempted to stop a "price war" among its dealers and "extracted a promise" from one of the dealers who was discounting to keep its prices up.[100] The court found that this evidence was sufficient to send the allegation of a claim of conspiracy between the supplier and the dealer to the jury.[101] The court also stated that a terminated dealer may base a claim of injury from vertical price-fixing if it is terminated when other dealers agreed to charge a particular price.[102]

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94. *Id.* at 805.
95. The Jeanery, Inc. v. James Jeans, Inc., 849 F.2d 1148 (9th Cir. 1988).
96. *Id.* at 1151.
97. *Id.* at 1157. As to the statement by the supplier that it would "take care of things," the court said that it reflected "nothing more than an effort by a manufacturer to calm an angry customer." *Id.* at 1158. The dissent concluded that the majority had created, "in effect, a 'beyond all reasonable doubt' standard for finding a Section 1 agreement." *Id.* at 1163. The court also concluded that, even if there were an agreement between the supplier and a complaining dealer, there was no evidence that it included an agreement on price or price level as required by *Sharp*. *Id.* at 1160 n.10.
98. *Id.* at 1158.
99. World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir. 1985).
100. *Id.* at 1472.
101. *Id.* at 1476.
102. "A buyer who contends that a seller has taken action adverse to him as a means of enforcing price fixing may establish the requisite conspiracy by showing that although he refused to acquiesce

In *Helicopter Support Systems*,[103] the terminated plaintiff alleged a vertical price-fixing agreement between the supplier and other dealers. The district court had granted summary judgment for the defendant. However, the court of appeals pointed to telexes sent from the supplier to other dealers stating that "action has been taken regarding the . . . discounted parts on the U.S. market." One of the dealers responded, "Thank you for your prompt action. . . ."[104] The court stated that these facts might be sufficient to send the claim to the jury on the grounds that they constituted evidence of a commitment to terminate future discounters and an agreement by a dealer to report future violations.[105] However, more telling was an express agreement between the supplier and the other dealers to maintain resale prices. The distributorship agreement provided that the price list prepared by the supplier was binding.[106] This evidence was sufficient to allow jury consideration of the conspiracy claim.[107]

Second, the courts have also allowed the plaintiff to claim antitrust injury based on a horizontal agreement among the dealers. For example, in *Harkins Amusement Enterprises*,[108] a terminated dealer (a movie exhibitor) was able to show a "split agreement" — a horizontal agreement among other exhibitor dealers to allocate films among themselves. There was also evidence of active supplier involvement in the split agreement.[109] This evidence was viewed by the courts as sufficient to overcome *Monsanto's* requirements and to allow jury consideration of a claimed conspiracy involving the dealers and the supplier.[110] In *Arnold Pontiac*,[111] the plaintiff was denied a car dealership by the defendant. It was able to show that an association of other dealers acted jointly to pressure the defendant not to award the dealership. The other dealers, who formed an association, wrote a memo saying that the association would take collective action if the plaintiff got a dealership.[112] The court concluded this evidence of a horizontal agreeement was sufficient to show the possibility of a conspiracy among the dealers[113] and to satisfy the *Monsanto* requirement of "evidence that tends to exclude the possibility that [the defendant car manufacturer] acted independently" in terminating the plaintiff.[114] It is apparent from the opinion that the horizontal agreement was crucial in finding concerted action between the complaining dealers and the supplier. But how can the existence of a horizontal

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in the price fixing, other buyers agreed to the arrangement." *Id.* at 1475 (citing Black Gold, Ltd. v. Rockwool Indust. Inc., 729 F.2d 676, 685-86 (10th Cir. 1984), *cert. denied*, 469 U.S. 854 (1984)).

103. Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc., 818 F.2d 1530 (11th Cir. 1987).

104. *Id.* at 1535.

105. *Id.*

106. *Id.* at 1536. These agreements applied to overseas distributors, a fact that may account for the express nature of the agreement on resale prices.

107. *Id.* at 1536.

108. Harkins Amusement Enter., Inc. v. General Cinema Corp., 850 F.2d 477 (9th Cir. 1988).

109. *Id.* at 485.

110. *Id.*

111. Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987) (referred to by the court as *Arnold Pontiac II*).

112. *Id.* at 1336.

113. *Id.* at 1338.

114. Arnold Pontiac-GMC, Inc. v. General Motors Corp., 786 F.2d 564 (3d Cir. 1986) (referred to by the court as *Arnold Pontiac I*).

agreement among the dealers provide an evidentiary basis for finding a vertical agreement between the dealers and the supplier? In theory, there should be no difference between the evidence required to find an agreement between the supplier and one complaining dealer and a group of complaining dealers. The likely explanation for the court's opinion is that the horizontal agreement provided a way to distinguish the case from the typical complaining dealer-supplier relationship. Even if there is no logical connnection with the existence of a vertical agreement, the court felt the strict *Monsanto* requirements could be viewed as having been met.

C. Summary of the *Monsanto* Standard

Monsanto distorted the concept of agreements in order to further certain policy considerations, particularly the freedom of suppliers to choose and terminate dealers, just as *Colgate* and *Parke Davis* distorted the concept of agreements in order to achieve policies the Court wished to advance. *Monsanto* is a modern day corollary of *Colgate*, except that the focus is on the supplier's compliance with the dealer's request rather than on the dealer's compliance with the supplier's request. *Monsanto* rejected the idea that an agreement is formed when a dealer influences a supplier to behave in a certain way by threatening to terminate the relationship, just as *Colgate* rejected the idea that an agreement is formed when a supplier influences a dealer to charge a particular price by threatening termination. Like the Court in *Colgate*, the Court in *Monsanto* reached the result it felt to be good policy, while distorting the common sense concept of agreements.

The Court in *Monsanto* claimed to rely on *American Tobacco Co. v. United States*,[115] in stating that an agreement is proved when circumstances reveal "a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement."[116] *American Tobacco* stated a very broad conception of agreements, one that could be found based on "a course of dealing or other circumstances as well as an exchange of words."[117] When high price dealers complain about rival discounters and condition their future dealing on the supplier's terminating the discounter and, as a result, the supplier undertakes to terminate the discounter in order to preserve the relationship, it would seem to be a sensible conclusion that the supplier has "agreed" with the complaining dealer to terminate the discounter. The agreement is of the form: "I will agree to terminate the discounter if, in return, you agree to continue to carry my product." At the very least, these facts should create a jury question as to whether there is an agreement.[118]

115. 328 U.S. 781, 810 (1946).

116. 465 U.S. at 764 (quoting American Tobacco, 328 U.S. at 810).

117. 328 U.S. at 809-810.

118. The Court in Matsushita Elec. Indust. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986), characterized Monsanto as holding that "courts should not permit factfinders to infer conspiracies when such inferences are implausible. . . ." *Id.* at 593. Whatever the precise meaning of that statement in other contexts, it would seem that terminations resulting from a demand by high price dealers, coupled with some express or direct threat to drop the supplier's line, resulting in termination of a discounter, suggest a very plausible scheme to eliminate the price competition of the discounter. Unlike the agreement alleged in *Matsushita* — a conspiracy by twenty-one manufacturers of electronic appliances to monopolize the American market — it is entirely plausible that a large, high price dealer would enter into an agreement with a supplier to eliminate price competition from a discounter. Whether such an agreement should be unlawful is another issue.

If the conclusion that this understanding is an "agreement" had no significant policy consequences, then the Court might be willing to take a more common sense approach and conclude that there is a meeting of the minds. However, courts have frequently merged the questions of the *existence* and the *legality* of an agreement into a single factual analysis. *Monsanto* is no exception. The Court in *Monsanto* was undoubtedly concerned that a finding of agreement, based on complaints leading to termination of rival dealers, could have substantial implications for the legality of supplier-dealer relationships. As a result, it formulated confusing and unduly stringent evidentiary rules, which prevent juries from even considering whether these situations constitute constitute agreements at all.

The significance of the *Monsanto* formulation depends upon whether there are any consequences from finding a supplier-dealer agreement. After *Monsanto* was decided, it appeared that the standard would have serious consequences in RPM dealer termination suits. However, *Sharp*, to a large extent, has mooted the significance of the *Monsanto* standard by holding that RPM agreements must include a price term to be per se unlawful. Nevertheless, the formulation of an evidentiary standard in *Monsanto* has shown substantial confusion about how to find agreements in any supplier-dealer relationship and whether the claim is based on a per se theory or on a rule of reason.[119] Thus, *Monsanto* will have some significance in the occasional rule of reason case. In addition, if Congress chooses to reverse the result in *Sharp* and declare that agreements to terminate discounters in order to eliminate price competition are per se unlawful, the *Monsanto* formulation will once again have great significance.

III. THE *SHARP* OPINION

Monsanto dealt primarily with the problem of distinguishing unilateral from bilateral conduct. It left open the question of what kind of agreement, if one could be found, would be per se unlawful. In particular, *Monsanto* did not address the central proposition of *Cernuto*, that an agreement between a complaining dealer and a supplier to terminate a discounter is per se unlawful if motivated solely to eliminate price competition.

The facts in *Sharp* were similar to the typical pattern. The supplier had two dealers in the Houston area. One dealer complained about discounting by the other dealer and, eventually, threatened to stop doing business with the supplier.[120] Eventually, the supplier terminated the discounter who brought suit. At trial, the jury was instructed that it should find that a violation of the Sherman Act had occurred if the supplier had entered into an agreement with one of its dealers "to terminate another dealer because of the other dealer's price cutting."[121] The jury found such an agreement and judgment was entered for the plaintiff. The Fifth Circuit reversed, holding that, for an agreement to be unlawful per se, the supplier and the complaining dealer "must expressly or impliedly agree to set

119. *See, e.g.*, Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc., 878 F.2d 801, 805-806 (4th Cir. 1989) (*Monsanto* standards applicable in rule of reason as well as per se case).

120. Business Elecs., Inc. v. Sharp Elecs. Corp., 485 U.S. at 717, 721 (1988).

121. *Id* at 722.

[the dealer's] prices at some level, though not a specific one. The distributor cannot retain complete freedom to set whatever price it chooses."[122]

The *Sharp* opinion turned primarily on the proposition that an agreement between a complaining dealer and a supplier to terminate a discounter cannot be distinguished from a vertical non-price agreement, such as an agreement to establish an exclusive territory.[123] The Court reasoned that any vertical agreement, even one that does not result in dealer termination can be "attacked as designed to allow existing dealers to charge higher prices."[124] A vertical price agreement could facilitate the formation of a dealer or manufacturer cartel, but an agreement to terminate a discounter, without an agreement as to the price the remaining dealer will charge, is much less likely to do so.[125] Thus, the Court held that the agreement to terminate a discounter must be evaluated under a rule of reason.[126]

The dissenters in *Sharp*, Justices Stevens and White, would have held the agreement to be per se unlawful.[127] For the dissenters, the distinction to be drawn was between a "naked" and "ancillary" restraint.[128] Since the supplier was not alleged to have imposed any non-price vertical restraint on its dealers,[129] there was no purpose for terminating the discounting dealer other than eliminating price competition.[130] Moreover, the dissenters argued that pressure from a single dealer to terminate a discounter had the same effect as a threat from two dealers acting together, which would be per se unlawful.[131] Therefore, pressure from a

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122. Business Elecs., Inc. v. Sharp Elecs. Corp., 780 F.2d 1212, 1218 (5th Cir. 1986).
123. 485 U.S. at 728.
124. *Id.* at 728.
125. *Id.* at 726-27.
126. *Id.* at 735-36.
127. *Id.* at 758.
128. There is an ancillary discussion in the opinion concerning the difference between "ancillary" and "naked" restraints that deserves mention. The dissent characterized the agreement to eliminate the discounter as a "naked" restraint, citing the distinction drawn by Judge (later Chief Justice) Taft in United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). The dissent viewed the agreement to terminate the dealer in *Sharp* as a "naked" agreement to eliminate competition, since the termination was not related to any non-price vertical restrictions, such as exclusive territories or service requirements imposed on the dealers. 485 U.S. at 736-38. The majority argued that the termination of the discounter should be viewed as "ancillary" because there is a "quite plausible purpose of the restriction to enable [the remaining dealer] to provide better services under the franchise agreement." [note omitted] *Id.* In fact, both discussions are less than helpful. It is preferable to view the distinction between "naked" and "ancillary" as simply an early use of common law terminology to distinguish between agreements with no plausible efficiency justificaton and agreements with a plausible justification. To have a plausible efficiency justification, and, thus, warrant a rule of reason analysis, the agreement need not be associated or "ancillary" to any other agreement, although there usually will be some other business relationship between the parties, such as an integration of assets, a sale of assets, or a distribution agreement. It would be better to drop the terms altogether and use new ones — e.g., "plausible efficiency-enhancing" and "blatantly anticompetitive." The historical notion of "ancillary" restraint sometimes leads a court to assume that an efficiency-enhancing agreement cannot be "ancillary" unless it is associated with some other agreement. *See, e.g.*, Polk Bros., Inc. v. Forest City Enter., 776 F.2d 185, 189 (7th Cir. 1985).
129. *Id.* 485 U.S. at 739.
130. *Id.* at 743. Neither the existence of non-price vertical restrictions nor the significance of point-of-sale services is a reliable guide to which agreements to terminate discounters are competively harmful.
131. *Id.* at 742-43.

single dealer, which produced the same result, should be subject to the same legal standard.[132]

The essential disagreement between the majority and the dissenters in *Sharp* concerns the circumstances, if any, under which vertical agreements can harm consumers. The dissenters emphasized the distinction between independent action and joint action.[133] Since there clearly had been joint action that resulted in the elimination of price competition, the dissent would have found the essential elements for per se liability — an agreement that eliminates price competition with no plausible efficiency justification, e.g., promoting services by eliminating free-riding.[134] Moreover, the dissent equated the supplier-dealer agreement with a group boycott and would have have applied the per se analysis used in *United States v. General Motors Corp.*,[135] a case involving a horizontal agreement among dealers.[136]

The majority opinion, on the other hand, criticizes the dissent for applying a per se analysis to a vertical agreement. According to the majority, the dissent confuses the distinction between horizontal agreements and horizontal effects.[137] The majority opinion would confine the per se rule to true horizontal agreements among dealers[138] or to vertical agreements in which a dealer agrees to charge a certain price or price level.[139] The latter rule is justified, according to the majority, because of the Court's prior recognition of the possibility that explicit vertical price-fixing agreements can facilitate a manufacturer or dealer cartel.[140]

This disagreement is one of the central questions in antitrust policy regarding RPM. Can a vertical agreement between a single high price dealer and its supplier to terminate a discounter harm consumers, absent an express agreement by the high price dealer to charge a certain price? Horizontal agreements may create market power by allowing firms acting jointly to raise prices over competitive levels when a single firm cannot. This ability to create market power through agreements among competitors is the basis of the concern about horizontal agreements generally.[141] If a series of powerful dealers approach the supplier to demand that the supplier eliminate price competition, the effect may be the same as an actual dealer cartel. The dealers are exercising market power through collective action.

On the other hand, strictly vertical agreements, involving only one party at each level of the distribution chain, ordinarily do not create market power; they can only affect the level at which it is exercised.[142] When a single powerful dealer

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132. *Id.* at 743-44.
133. *See, e.g.*, *id.* at 741.
134. Although there was some evidence offered at trial that the discounting dealer was engaging in free riding, there were apparently no findings to that effect by the jury. Moreover, there were no non-price restrictions on the dealers that were violated by the discounter. *Id.* at 741 (Stevens, J., dissenting). "The termination was plainly the product of coercion by the stronger of two dealers rather than an attempt to maintain an orderly and efficient system of distribution." *Id.*
135. United States v. General Motors Corp., 384 U.S. 127 (1966).
136. *See infra* note 205 and accompanying text.
137. 485 U.S. at 741-42 n.4.
138. *Id.* at 733-36.
139. *Id.* at 735-36.
140. *Id.* at 725-26.
141. *See* VII PHILLIP E. AREEDA, ANTITRUST LAW 4 (1986).
142. "[T]he vertical restraint ordinarily does not increase anyone's market power but merely reflects the pre-existing market 'power' of one party." *Id.*

demands that a supplier terminate a discounter, the termination does eliminate price competition. However, is there a cause for antitrust concern? If a single powerful dealers demands that a discounter be terminated, it is difficult to conclude that market power has been created through the agreement. However, the agreement does allow the powerful dealer the ability to exercise its market power, perhaps in a way that it cannot exercise as effectively absent the agreement. This problem has taken on added practical significance because legislation pending in Congress would reverse the result of the *Sharp* decision and apply a per se analysis to certain dealer-supplier agreements to eliminate a discounter. This legislation and the harm to consumers from such agreements is discussed in parts V and VI of this article.

The majority in *Sharp* rejected the central proposition of *Cernuto*. Even if an agreement between a complaining dealer and a supplier to terminate a discounter could be shown, and even if there is no showing that the purpose of the agreement was to promote the providing of dealer services, the agreement to terminate the discounter is not per se unlawful. *Sharp*, in most cases, makes the evidentiary hurdles erected by *Monsanto* moot. Even if the plaintiff can prove that the supplier who terminated it agreed with a complaining dealer about the termination, it is unlikely to prove that the complaining dealer and the supplier agreed on the complaining dealer's prices.[143]

IV. THE RATIONALE FOR A RULE AGAINST RPM

The issues raised by *Monsanto* and *Sharp* are at the heart of antitrust policy regarding RPM. The thorny problems of finding agreements and identifying do not lend themselves to easy line-drawing. These two opinions chose to draw the line on the side of preserving the options of suppliers to structure and control their marketing and distribution policies. The consideration given primary weight is to avoid turning commercially routine and procompetitive dealer terminations into per se violations of the antitrust laws.

Do the legal standards formulated in these case leave the law in an unsatisfactory state? This question can only be answered by some reference to an underlying theory about when RPM, if ever, is harmful. RPM rules make no sense unless they reflect some satisfactory theory of harm. Thus, we turn to a review of rationale for a rule against RPM before evaluating the current state of the law.

Our understanding of RPM has clearly improved over intervening decades since *Dr. Miles*. One of the original arguments against RPM put forward by the Supreme Court in *Dr. Miles* — that RPM is an impermissible restraint on alienation — would not be defended by many observers today.[144] Moreover, we understand far better than the Court at the time of *Dr. Miles* the economic rationale for suppliers to eliminate intrabrand competition among dealers in order to promote interbrand competition. The traditional argument, first stated clearly by Professer Telser, is that the supplier can increase demand for its product by encouraging its dealers to engage in certain service and promotional activities.

143. *See supra* note 77 and accompanying text.
144. *See supra* note 13.

However, dealers will be less likely to do so if some can take a "free ride" off the efforts of the others. In order to prevent free riding, the supplier imposes a minimum price, discouraging any dealer from cutting price by cutting services.[145] Preventing free riding remains the most frequently offered rationale for RPM and the principal justification of those who would prefer a rule legalizing RPM or at least treating it less harshly.

On the other hand, the free rider argument has been challenged on a number of grounds. In particular, RPM often has been used in connection with consumer goods whose sale is not accompanied by significant services, e.g., toiletries and liquor.[146] Moreover, whatever benefits RPM provides in preventing free-riding and encouraging interbrand competition must be weighed against the potential harm which can come from vertical price restrictions. An additional consideration is that the objectives of promoting interbrand competition might be accomplished in less harmful ways, a conclusion which would suggest that a bar on RPM does not result in significant costs to supplier's marketing efforts. A final consideration is that whatever antitrust rule is applied to RPM, it should be capable of some consistent and fair application and it should not create such uncertainty and difficulties in application that it deters procompetitive conduct that is not barred by the rule.

In evaluating the bar on RPM, it is useful to identify four different situations when RPM could, at least in theory, harm consumers: (1) use of RPM by a single supplier in a competitive dealer market; (2) use of RPM by multiple suppliers to facilitate a supplier cartel; and (3) use of RPM by suppliers when it is the result of dealers exercising market power over the supplier. The last case can be further divided into three situations depending on the nature of the market power of the dealers: (a) a horizontal agreement among the dealers; (b) coordinated action by dealers but with no agreement; and (c) market power held by an individual dealer. Each of these situations is discussed below.

A. Use of RPM by a Supplier in a Competitive Dealer Market

Since *Dr. Miles*, the law has flatly barred RPM agreements even if they are employed by a single supplier and even if they are motivated solely by the supplier's desire to encourage service or promotional efforts by its dealers. In the simplest case, a supplier with market power imposes a minimum price on its dealers. In the absence of the restraint, one or more dealers would charge lower prices. In what sense, if any, can this situation harm competition? It is useful to discuss separately two cases: 1) those where the supplier wants its dealers to provide certain services accompanying sale, and, therefore, traditional free-riding is possible; and 2) those where services are insignificant.

1. Dealer Services and Free-Riding

When the supplier requires its dealers to charge some minimum price, retail prices are higher than in the absence of the requirement. However, it appears irrational for suppliers to reduce competition among its dealers simply to increase their profits. The supplier's incentive is to minimize distribution costs to the extent possible, consistent with maximizing its own profits.[147] Why then

145. Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

146. *See infra* note 151 and accompanying text.

147. "Manufacturers have an economic interest in maintaining as much intrabrand competition

would a supplier impose RPM if it results in increasing distribution costs? The most frequent answer is the familiar argument that the supplier is attempting to encourage its dealers to provide services or to engage in promotional activities. Dealers could choose to engage in these activities without a minimum price restriction, but they will have less incentive to do so if other dealers can take a free ride off their efforts. The guaranteed margin above the supplier's price encourages the dealers to engage in non-price competition by spending money on services and promotion with less opportunity for other dealers to take a free ride.[148]

No doubt, the free rider problem explains many situations when suppliers choose to restrict competition among their dealers, for example, through the use of territorial restrictions, such as location clauses and exclusive territories.[149] In some cases, it may explain the use of RPM although the historical evidence is weak.[150] Historically, RPM has been frequently applied to the sale of clothing, toiletries, liquor and candy, which are not accompanied by significant services.[151] A recent Federal Trade Commission study found "little evidence that RPM was imposed to prevent free-riding on product-specific dealer services" in the cases studied.[152] Instead, according to the study, RPM was used

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as is consistent with the efficient distribution of their products." Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56 (1977). A manufacturer is likely to view "the difference between the price at which [it] sells to [its] dealer and the dealer's price to the consumer [as its] cost of distribution, and any seller (even a monopolist) wants to minimize [its] costs." Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions,* 75 COLUM. L. REV. 282, 283 (1975); *See also* Robert H. Bork, *Vertical Restraints: Schwinn Overruled,* 1977 Sup. Ct. Rev. 171 (arguing that it is a "basic postulate" that the supplier "will not adopt marketing strategies that transfer money from his pocket to the pockets of retailers" and that this applies whatever the market share of the supplier). *Id.* at 188; Baker, *supra* note 4, at 1462-3.

148. The other dealers can still attempt to take a free ride and simply retain the higher margin in the form of higher profits. The assumption is that they will be forced to engage in non-price competition to retain customers, since they are precluded from engaging in price competition.

149. The *Sylvania* case is a good example of vertical restrictions working well. In *Sylvania,* the supplier, GTE Sylvania, used location clauses, a common non-price vertical restriction, which confines dealers to operate from a certain location. By the use of this method of distribution, the supplier was apparently able to encourage its dealers to do a better job of promoting, servicing and marketing the product. Its market share rose from 1-2% to 5% after instituting the new restrictions. *See* 433 U.S. at 38.

150. Part of the difficulty in determining how RPM has been used to prevent free-riding is that there is disagreement about how to define RPM in the first place. If one dealer cuts corners on services, and as a result, underprices its rival dealers, the supplier may say that the dealer has violated a non-price restriction, for example, the duty to provide warranty service or a showroom. The discounting dealer is likely to characterize the restriction as RPM. *See* Herbert Hovenkamp, *Vertical Restrictions and Monopoly Power,* 64 B.U. L. REV. 521, 526 (1984). Another problem is that the per se bar on RPM since *Dr. Miles,* except for the Fair Trade period, means suppliers have had every incentive to avoid its use, hide it or disguise it, making empirical assessments difficult. When it was used, it was frequently not associated with significant services. *See* Robert Pitofsky, *In Defense of Discounters; the No-frills Case for a Per Se Rule Against Vertical Price-Fixing,* 71 GEO. L.J. 1487, 1489-90 (1983). One theory is that RPM historically provided a way for suppliers to induce dealers to encourage consumers to buy its product by guaranteeing the dealer a high margin while protecting the dealer from loss of customers to dealers who would discount the brand. *See* Robert L. Steiner, *The Nature of Vertical Restraints,* 30 ANTITRUST BULL. 143, 162-65 (1985).

151. *See, e.g.,* Pitofsky, *supra* note 150; Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* in Staff Report, Bureau of Economics 177-97 (Federal Trade Commission 1983) (including tables showing items subject to RPM and Fair Trade restrictions).

152. *See* Ronald N. Lafferty, Robert H. Lande and John B. Kirkwood, *Impact Evaluation of FTC Vertical Restraints Cases* in Staff Report, Bureaus of Economics and Competition 27 (Federal Trade Commission 1984).

to "signal quality" by insuring that high price retail outlets, with reputations for quality, carry their products.[153] There are other problems with the free rider argument as well.[154] In short, the desire to avoid free-riding on services explains only a minority of cases of RPM.

In a case where the supplier is attempting to prevent free-riding through the use of RPM, is there any basis for applying antitrust rules on the theory that consumers are better off if there is unrestricted dealer competition? To answer that question, we need some test for evaluating whether consumers are helped or hurt by the supplier's restrictions on its dealers.[155] In theory, we could attempt to measure whether consumer surplus is increased or decreased by RPM in a particular case.[156] In practice, it is very difficult to measure how consumer surplus is affected by any actions by the supplier, because the effect depends on the shape of the consumers' demand curve, a set of preferences that is very difficult to identify. If a restriction results in increasing the demand of consumers so that

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153. The study explained:

> In each of the RPM studies, the consultants found that vertical restraints were being used to protect the signal of high quality created by the retailers' general method of doing business. By carrying the manufacturers' products, retail stores with high quality reputations signal that these products are of high quality, thereby helping the manufacturer establish or maintain their products' reputations.

Id. at 34. *See also* Howard P. Marvel, *Exclusive Dealing*, 25 J. L. & ECON. 1 (1982) where the idea of quality signalling is developed in connection with exclusive dealing.

154. It is highly unrealistic to assume that a supplier is attempting to prevent free-riding when RPM is associated with a single product carried in a store that offers hundreds or thousands of products. Product-specific services in such stores, e.g., information provided to consumers, can be negligible. While the high price dealer may create a desirable shopping environment, the discounter cannot take a free ride off expenditures for a luxurious environment since the consumer cannot take advantage of them in purchasing from the discounter. *See infra* notes 176-180 and accompanying text.

There is something of a puzzle, in fact, about the explanation of the historical use of RPM in connection with low priced items offered along with hundreds of others. One explanation may be that, in situations when dealers can influence dealer purchases, the supplier has an incentive to guarantee each dealer a minimum margin to encourage the dealer to steer the consumer toward its product. All suppliers may then be faced with the dilemma that they must follow suit. *See* Robert L. Steiner, *Vertical Restraints and Economic Efficiency* 10-11 (Federal Trade Commission Working Paper) (June 1982).

Another difficulty with the theory that a supplier imposes RPM on discount dealers in order to encourage services is that it can be highly unrealistic for the supplier to assume that a discount outlet could continue to offer the supplier's product in competition with a traditional retail outlet if it must offer the same price. The discount store is organized and marketed to consumers on the basis that it offers low prices in a less service-oriented environment. Imposing RPM on the discount store can effectively prevent it from profitably carrying the product. The discounter may, of course, find ways to continue to compete on price while complying with the supplier's policy, e.g., by offering favorable credit terms, free delivery or other services consistent with its operations. *See* AREEDA AND KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT, CASES 630-31 (4th ed. 1988).

155. A test for overall social welfare could take into account whether the sellers are better off from the use of RPM, too. Thus, an increase in supplier or dealer surplus would be valued as well as increase in consumer surplus. There is a good argument that the Congressional intent in passing the antitrust laws was to guard against transfers of wealth from consumers to producers and that higher prices to consumers resulting from an antitrust conspiracy cannot be justified by an equivalent increase in seller profits. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982). Thus, we are on safer ground in evaluating RPM based only on its effects on consumer welfare.

156. "Consumer surplus" is the amount consumers are willing to pay for a product in excess of the amount they do pay. *See* HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 4 (1985).

overall sales increase, and if all consumers are influenced in a similar way,[157] consumer surplus will increase if sales increase.[158] Thus, we could evaluate RPM on the basis of whether it causes sales to increase or decrease if an assumption is made that an increase in sales shows that demand by all consumers has increased.[159]

The ideal outcome for the supplier is to exploit fully whatever market power is associated with its product by charging a profit-maximizing price to its dealers. It has no interest in its dealers further restricting output to raise their own profits above competitive levels.[160] If the dealers are behaving competitively, the supplier can extract all the monopoly profits available and limit its dealers to competitive profits. Consumers, of course, lose to the extent that the supplier is able to exercise some market power.[161] However, they ordinarily benefit from the supplier's attempt to increase demand.[162] Therefore, if it is profit-maximizing for the supplier to employ RPM, it would seem that consumers benefit, too.

There are two objections to this conclusion. First, one might object on the grounds that, although the supplier is *trying* to expand sales, it can make a mistake and reduce them. For example, it could employ RPM when it results in services that are not highly valued by consumers, or it could err in estimating the need for RPM to prevent free-riding. In this case, rather than expand output, the use of RPM fails to push the demand curve outward sufficient to overcome the loss of sales from the higher price. The supplier and consumers would both be better off if the supplier were to allow price competition among its dealers. One of the best examples where such a mistake may actually have happened is Levi Strauss's efforts to maintain the minimum price of jeans.[163]

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157. There is a parallel shift in the demand curve toward increased demand at any particular price.

158. *See* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions and the New Antitrust Policy*, 98 HARV. L. REV. 983, 991 (1985).

159. This test, too, presents its own problems since it is difficult in practice to evaluate why sales go up or down. Professor, now Judge, Posner once proposed a test for vertical restrictions based on whether they result in an increase or decrease in output. Richard A. Posner, *The Rule of Reason and the Economic Approach; Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 18-19 (1977); later, he proposed a simple rule of per se legality for vertical restrictions on the grounds that it is difficult to measure effects on output. As an interim measure, he proposed requiring the plaintiff to demonstrate that the effect of the restraint was to reduce output or market share. Posner, *The Next Step*, *supra* note 4 at 21-26. It is argued below that we should assume, for purposes of RPM policy, that the sales are increasing when the supplier uses RPM in a competitive dealer market in an effort to increase sales. It is probably impractical to measure whether output has actually increased as a result of RPM restrictions in real litigation.

160. A supplier monopolist distributing through a single dealer monopolist (or a group of dealers acting as a cartel) results in lower output and higher prices than if the supplier monopolist dealt with a competitive dealer market. *See* FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 299-300 (2d ed. 1980). Thus, when a supplier with market power has set a profit-maximizing price, its dealers may attempt to raise prices above competitive dealer levels with the result that output is restricted even further. *See* Herbert Hovenkamp, *Vertical Restrictions and Monopoly Power*, 64 B.U. L. REV. 521, 532 (1984).

161. The supplier itself will attempt to exploit its own market power, by setting marginal cost equal to marginal revenue, and pricing above marginal costs. Although this behavior clearly does reduce consumer surplus, antitrust law has no answer to monopoly pricing by the innocent monopolist. The question is whether the restrictions on the supplier's dealers reduce consumer surplus further.

162. One argument against this conclusion is that, even if total sales increase, consumers overall do not benefit if infra-marginal consumers are not benefited by the seller's marketing methods. *See infra* notes 167-171 and accompanying text.

163. The FTC brought an enforcement action against the company alleging RPM, which was

The problem with basing antitrust policy on the possibility of a mistake is that it is inconsistent with the general assumption that firms behave so as to maximize profits. Given that the supplier *wants* to maximize profits and is in the most informed position to make a judgment about what marketing practice will achieve that objective, how can an antitrust policy be based on second-guessing it?[164]

The evidence as to what practice is in the seller's own interest in any real-life situation is at best ambiguous and probably incapable of any sensible review by a court.[165] A court that attempts to decide whether the supplier is really acting in its self interest is inevitably driven to substitute its own business judgment for the supplier's.[166] Such an approach is bound to produce arbitrary results. Therefore, for purposes of formulating antitrust rules, we should assume that a supplier who is attempting to maximize profits has not miscalculated but is aware of what policy is in its self interest. This same conclusion follows whether the supposed mistake is to retain RPM too long, to overestimate the value consumers will place on certain services or to set the minimum dealer price too high.

A second objection to the conclusion that the use of RPM to increase supplier profits benefits consumers is that an increase in sales may be associated with a reduction in consumer surplus. Professor Comanor has shown that RPM, even if it expands output, can lead to excessive services and a reduction in consumer surplus.[167] He points out that RPM can reduce consumer surplus, even though output has expanded, if "infra-marginal" consumers are not benefited

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resolved by a consent agreement. Levi Strauss & Co., 92 F.T.C. 171 (1978). A Commission consultant concluded that the company's retention of the policy was a mistake. When RPM was abandoned as a result of the suit, consumers benefited from lower prices and the company benefited from higher profits. *See* Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues* (March 1982) in Lafferty, Lande and Kirkwood, Impact Evaluations of FTC Vertical Restraints Cases 47-90 (Staff Report of Federal Trade Commission)(1984). *See also* Robert L. Steiner, *The Nature of Vertical Restraints*, 30 ANTITRUST BULL. 143, 178-183 (1985).

164. It can be argued that the dealer is in a better position than the supplier to know what services appeal to consumers. Unlike the supplier, the dealer has direct contact with consumers and has firsthand knowledge of their desire for point of sale services. On the other hand, only the supplier can evaluate the overall effect of a marketing strategy that must be implemented by a network of dealers. If the supplier has access to information from its dealers, it can presumably make some judgment about the strategy that maximizes its profits based on its sales to all dealers. Supplier access to dealers' information, in fact, was a principal concern of the Court in Monsanto. *See supra* note 79. Professor Scherer points out that RPM can be a clumsy instrument because it forces dealers, with different cost structures and supply curves, to charge the same price. Frederic M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 701 (1983). Thus, the need for a supplier to use a single price level for all its dealers means that some dealers will not be operating as efficiently as they could. In effect, they have too large a margin. The result is that it is not profit-maximizing for the dealers because sales are lost from higher prices, rather than increased through expanded services. Here, too, the supplier has made some judgment about the overall effect of a particular marketing strategy. Sales lost to certain dealers are, in effect, the price paid by the supplier to pursue a marketing policy of expanding total sales for all dealers. The policy question is whether the law should attempt to second-guess the supplier in its decision about the overall effect of the restriction.

165. Even in the Levi Strauss case, there is a competing hypothesis that the spurt in sales was caused by free-riding discounters, which ultimately hurt the company. *See* Thomas R. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* in Staff Report, Bureau of Economics, 121-122 (Federal Trade Commission 1983).

166. *See infra* notes 235-245 and accompanying text.

167. *See* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 990-98 (1985).

significantly by the additional services. Although these infra-marginal consumers do not place a high value on services, the supplier's mix of price and service is determined by "marginal" consumers, i.e., those just willing to buy the product at the market price, who are heavily influenced by additional services. As a result, total output is greater despite the higher price even though the loss to the infra-marginal consumers outweighs the gain to the marginal consumers.[168]

This argument is useful in demonstrating that there are cases when consumer surplus may go down from the use of RPM even when output and supplier profits have gone up. However, there are two problems with this argument as a basis for antitrust policy. First, it is not at all clear how frequently consumer surplus actually goes down when total output expands.[169] More importantly, this loss in consumer surplus is not unique to supplier-dealer relationships. It occurs any time a seller increases quality or services in an effort to capture the loyalty of marginal consumers when infra-marginal consumers are not benefited or are benefited relatively little.[170] We could imagine the possibility, in any case where a seller decides to improve product quality, to spend money advertising, or to include the cost of point of sale services in the purchase price, that infra-marginal consumers benefit little.[171] The effect on consumer surplus depends on the shape of the demand curve that is assumed to exist. Thus, RPM is not really the culprit. The villain, if there is one, is that the price-quality-service mix is determined by the preferences OF marginal consumers. The fact that this conclusion applies in the case of all consumer goods and is not unique to supplier-dealer relationships makes it an inappropriate basis for antitrust policy. We expect private firms to maximize profits by appealing to marginal consumers and that competition "at the margin" determines the market clearing price. Suppliers distributing through dealers are no exception.

A third objection is that the supplier may be faced with an uncompetitive dealer market and may be forced to revise its marketing strategy because one or more of its dealers are attempting to raise dealer prices. If the dealers actually have sufficient market power in relation to the supplier to force it to impose RPM, the supplier's profits go down, not up.[172] Thus, this is not a case where the supplier is imposing RPM to increase its own profits. Instead, it may represent the use of RPM by a dealer cartel, or pressure by individual dealers that has the same effect. This very different situation is discussed below in Part V.C.

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168. *Id.* "Infra-marginal" consumers are those willing to pay relatively more for the product than other consumers. They enjoy a greater consumer surplus because the prices they are willing to pay exceed the market price by a larger amount than price marginal consumers are willing to pay exceeds the market price. The preferences of marginal consumers, i.e., those just willing to pay the market price, determine the supplier's level of investment in quality. Depending upon the marginal consumers' preferences, the supplier may be able to expand sales by increasing quality and price. *Id.* at 991.

169. A loss in consumer surplus occurs if the demand curve shifts outward more for marginal consumers than for infra-marginal consumers. If the demand curve shifts to the same degree for each, i.e., the shift is parallel, there is an overall increase in consumer surplus. *Id.* at 997.

170. *See, e.g.*, Pauline M. Ippolito, *Resale Price Maintenance: Economic Evidence from Litigation*, Staff Study, Bureau of Economics 22-23, (Federal Trade Commission, April 1988).

171. This result, in fact, may be typical since infra-marginal consumers, those willing to pay relatively higher prices, probably have substantial information about the product and need little persuading in the form of sales personnel, luxury showrooms and marketing.

172. *See infra* note 201 and accompanying text.

2. Promoting the Image of the Product

The discussion above dealt with the case where the supplier is using RPM to increase demand through encouraging its dealers to provide services to consumers. What about the case when the supplier is *not* attempting to encourage dealers to provide services but attempting to promote the prestige or quality image of the product? A recent Federal Trade Commission study concludes that the supplier's attempt to promote a quality image explained the use of RPM in the cases studied.[173] The theory of "quality signalling" assumes that consumers have poor information about product quality and good information about which stores carry which goods and which stores have high quality products.[174] The FTC study takes the perspective that high quality stores have incurred the expense of creating a high quality reputation, and discount dealers could engage in free-riding by carrying the same product without incurring the same expenses.[175] Thus, the argument goes, RPM can be used to prevent free-riding on the expenditure of resources for the creation of a high-quality reputation, which can undermine the incentive to create a high quality reputation.

RPM may be necessary in some cases to induce high price stores to carry the supplier's product,[176] and the willingness of high quality stores to carry a product may increase consumer demand and, thus, be good for consumers.[177] However, at the outset, it is important to recognize that in many cases, suppliers can maximize profits by distributing simultaneously through high price stores and discount stores. The supplier can successfully distribute through both types of stores because some consumers are willing to buy the product at high price stores to take advantage of point of sale services such as luxurious showrooms and attentive sales clerks while other consumers are willing to sacrifice these benefits for a lower price. Discounters cannot take a free ride off many types of point of sale services that attract consumers to high price stories, such as a luxurious showroom and attentive staff, since they are not transferable to a purchase from another store.[178]

The "quality signalling" argument carries little weight if consumers already have good information about quality from national advertising or other sources of information. In this case, discount stores do not take a free ride off the efforts of high price to obtain and convey information about quality.[179] Rather,

173. *See supra* note 152.

174. *See, e.g.*, Frederic M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 695 (1983). If the consumer already has good information about product quality, then he or she will be unwilling to spend more for the high price store's "certification" of quality.

175. FTC Staff Report, *supra* note 152, at 34.

176. In most cases, selective distribution can accomplish the same objective. *See infra* note 184 and accompanying text.

177. *See infra* notes 182-185 and accompanying text.

178. The argument that the consumer learns valuable information from the high price store's sales staff, then uses it to purchase at a lower price from a discount store, no doubt can apply in the case of complex products such as personal computers. Free-riding is not significant, however, where there is little additional information the consumer needs, for example, clothing sales, or where the availability of information is identical at high quality and discount stores. A discount store cannot take a free ride off a comforting, attentive salespeson who conveys only warmth and lavish attention.

179. To the extent high price stores increase their costs by obtaining and conveying quality information, when consumers already have it, they are simply less efficient than discount stores who do not incur the same costs.

consumers are simply choosing between alternative environments in which they wish to purchase products they know already to be of high quality. Similarly, some consumers may be willing to incur a somewhat high risk in assessing quality on their own. They are not willing to pay higher prices for a marketing policy that conveys the information that all a particular dealer's products are high quality.[180] As long as consumers do not rely on the fact that high price stores carry the product as a basis for buying the product for less at discount stores, there is no harmful free-riding.

In these cases — where the supplier can profitably distribute through high price and discount stores simultaneously — the supplier has the best of both worlds. It can attain a higher volume of sales by distributing through both channels and still avoid harmful free-riding. Consumers have the best of both worlds, too. Those who want more extensive services can shop at high price stores, and consumers who want less generous services and a lower price can shop at discount stores. The frequency with which suppliers pursue dual channel distribution shows that suppliers can often maximize profits in this way. There is a large gain to consumers when this situation exists, and antitrust policy should encourage it when it is consistent with the supplier's attempt to increase consumer demand.[181]

Unfortunately, this rosy scenario may prove untenable. First, there may be free-riding on services, significant enough to reduce overall demand.[182] Second, the "message" that the product is of high quality, which was conveyed by high price stores' willingness to carry the product, is undercut when consumers begin to turn to discount stores. As the price level at quality stores drops from this competition, the high price stores are unwilling to carry the product and the message of quality is lost. Third, the importance of high quality stores carrying the product may not be the "information" it conveys but the "image" of the product it promotes. As in the case of the quality message, the prestige image may break down as more discounters, and fewer high quality stores carry the product, further reducing demand for the product at high price stores. A final

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180. What expenditures for "quality signalling" are discouraged if discount stores carry the same product? The FTC study does not appear to empasize a particular practice by high quality stores but refers to their "general method of doing business." *See* FTC Study, *supra* note 152, at 35. It seems unlikely that high price stores spend more on testing quality than discount stores. Quality is widely known throughout the industry and, in fact, large scale purchasers such as discount stores are probably more efficent at assessing quality than smaller purchasers such as specialty stores. The expenditures for quality signalling probably amount to the higher marketing costs associated with creating a quality "image," which consumers associate with a practice of carrying only high quality products. This policy, if it can be relied upon, clearly has value to some consumers by reducing the risk of purchases, and increases the prices they are willing to pay.

181. Scherer explains the following:

> If consumers flock to the low-margin discount stores and shun the small, high-margin shops, they must do so because that is what they prefer. To prevent large retailers from pursuing a low-margin strategy . . . is to frustrate the adaptation of distribution channels to meaningful changes in consumer wants and to encourage the perpetuation of obsolete, inefficient channels. . . . Moreover, the widespread adoption of resale price maintenance tends to deprive consumers of a choice between buying on the basis of service and buying at the lowest possible price."

FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 592 (2d ed. 1980).

182. *See supra* notes 152-154 and accompanying text.

alternative is that the high price stores may believe that the fact that discount stores carry the item at all detracts from their own image and, thus, imposes a long term cost in the form of reduced consumer attraction to the store.[183]

If any of these considerations are important to the supplier, it has to make a choice. It can abandon the idea of inducing high quality stores to carry the product, it can terminate the discounting dealers, or it can use RPM to prevent discounting, with the expectation that RPM will encourage the high price stores to continue to carry the product. RPM may be used if the supplier believes it is important to maintain dual channels of distribution and, through use of RPM, it can retain a relationship with both types of dealers.[184]

As in the case where the supplier is attempting to increase demand through encouraging services, the supplier who is attempting to increase prestige or to signal quality is also attempting to increase demand. If the supplier is attempting to convey the message that its product is of high quality, it is relying on the perceived marketing policy of some stores to carry only high quality products. If the supplier is trying to create a prestige image for the product, it is relying on the commercial reality that consumers associate prestige with prodcuts carried by certain stores.[185] In all cases, however, the supplier is hoping to increase the desirability of the product in the consumer's mind and expand its sales and profits.

For the same reasons that it is inappropriate to apply an antitrust rule when the supplier is attempting to promote services, it is inappropriate when it is attempting to signal quality or to promote a prestige image. One may come to this conclusion more hesitantly (or not at all), particularly in the case of promoting "prestige." After all, what good is prestige? If the dealers were allowed to compete on price, they would drive down the price of the differentiated item, perhaps eliminating the market power of the supplier.[186] Thus, one might come to the conclusion that RPM is not justifiable when it is intended simply to increase the supplier's profits through promoting a "prestige" image and, therefore, that there is a stronger case for barring RPM when it is not associated with encouraging tangible dealer services.

The problem with this conclusion is that it is inherently paternalistic. By improving the image of the product, the supplier has expanded demand, just as it has when it includes point of sale services in the price of the product, or engages in advertising, or improves the product's quality. How are we to distinguish for purposes of antitrust law between increases in demand that are

183. It seems odd that, seventy years after *Dr. Miles*, we do not know which of these factors is most significant. Yet, it does seem that the traditional concern about free-riding on services is much less important than is frequently argued.

184. The FTC study suggests that selective distribution and RPM are alternative strategies for reaching the same result. In a case where the supplier is assured of the right to select dealers, but it is under the particular scrutiny of an FTC order not to engage in RPM, it can achieve the quality signalling objective by choosing to distribute only through high quality dealers. FTC Study, *supra* note 152, at 37-38.

185. Such a strategy can be effective in differentiating the product and creating some market power for the supplier, even when its share of the sales of similar products may be small. *See* Pitofsky, *supra* note 4, at 1492; LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 379 (1977).

186. Pitofsky, *supra* note 4, at 1492, n. 22.

socially beneficial and those that are not? The increase in consumer surplus may be the same in all both cases. Is some consumer surplus "real" and other consumer surplus "illusory"? The answer must be that it is hopeless to distinguish.[187] In the absence of deceptive claims, or other unfair marketing practices aimed at consumers, the fact that consumers are willing to pay more for prestige, just as they are willing to pay more for higher quality products, is a judgment that should be left to them.

3. Summary

There are two cases when suppliers use RPM to maximize their own profits: (1) to increase demand through encouraging dealers to provide services, and (2) to increase demand through promoting a prestige or quality image for the product. Neither case is a candidate for antitrust intervention. Prohibiting the use of RPM when the supplier is attempting to expand demand through promoting services must be justified on the theory that: (1) the supplier has made a mistake and the use of RPM reduces demand rather than expanding it; or (2) demand is expanded but total consumer surplus is reduced because infra-marginal consumers are not benefited. The first basis for an antitrust rule is untenable because the antitrust laws cannot guard against firms acting contrary to their own interest. The second basis is untenable because the loss of consumer surplus is a product of the shape of the demand curve and the importance of marginal consumers in determining the quality-service-price mix, factors which are not unique to the supplier-dealer relationship.

When a supplier uses RPM to promote a prestige image, it is attempting to increase demand just as it is when it is encouraging dealer services. One cannot adopt a different rule when demand is increased through an increase in a prestige or quality image without being paternalistic about consumer preferences. Antitrust policy is incapable of distinguishing between "bad" and "good" consumer surplus.

B. Facilitating a Manufacturer Cartel

Another possible basis for barring RPM is that it might be used to facilitate a supplier's cartel. Under some circumstances, suppliers could use RPM restrictions to facilitate a cartel among themselves. RPM could be used to faciliate a supplier cartel by reducing the incentives of suppliers to "cheat" on the cartel by reducing price. Once the RPM arrangement is in effect, a supplier is less likely to attempt to increase its market share by reducing price since it cannot be translated into a reduction of price at the dealer level.[188] RPM also makes the

187. The Supreme Court in *Sylvania* objected to the argument that product differentiation does not benefit consumers as "flawed by its necessary assumption that a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information about product availability, price, quality, and services." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56 n.25 (1977). Whether a "prestige image" is "socially desirable information" is more a broad policy judgment than an analytical conclusion. Thus, it is more appropriate for a Congressional determination than a matter for judicial interpretation of the Sherman Act. There seems to be no obvious way, in applying the current antitrust laws, to distinguish between the validity or intrinsic value of consumer preferences based on factual information regarding quality and those based on the prestige or image associated with a product.

188. *See, e.g.*, Contintental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51, n.18 (1977);

supplier's prices visible to the other members of the cartel since they are displayed in the form of suggested list prices. Supplier pricing is more easily coordinated if there is a well-known historical relationship between the supplier and dealer price levels. For example, in many segments of retailing, the "keystone" relationship — retail price is double wholesale price — has been widely used. In such cases, suppliers can easily monitor each other's prices by observing the retail prices of dealers.[189]

If suppliers are going to take the trouble (and the risk) to enter into an express agreement, it would be much simpler and more effective to agree on their own prices or output.[190] However, the rationale for attacking RPM, rather than the horizontal agreement itself, is that: (1) the horizontal agreement is difficult to detect and prove; (2) a bar on RPM has a prophylactic effect of discouraging the formation of the cartel since it removes a device for making it effective; or (3) the supplier "cartel" amounts only to a tacit understanding to coordinate prices, which does not rise to the level of an agreement under the Sherman Act. Barring RPM is, therefore, not a substitute for a theory of horizontal price-fixing, but a theory to use when horizontal pricing fixing allegations are inappropriate or unprovable.

How often does RPM facilitate a supplier cartel? A review of FTC and Justice Department cases alleging RPM showed that 36% of RPM cases brought from 1890 to 1983 *may* have involved a cartel, at either the supplier or the dealer level.[191] Supplier cartels constituted the major share of these cases, both for cases brought by the FTC and the Justice Department.[192] There is historical evidence, therefore, that RPM has often been associated with supplier cartels. On the other hand, the percentage of all cartel cases where RPM was utilized is small. Thus, it is possible to conclude that RPM is a less effective, and therefore, less frequent, method of stabilizing prices by competitors than other methods.[193]

Frederic M. Scherer, Fundamental Economics for Antitrust, in M. HANDLER, H. BLAKE, R. PITOFSKY AND H. GOLDSCHMID, CASES AND MATERIALS ON TRADE REGULATION, Appendix B, at 51. (2d ed. 1983); Pitofsky, *supra*, note 4, at 1491. Of course, the supplier could attempt to expand its market share at the expense of the other suppliers by reducing price and allowing its dealers to obtain a greater margin on resale of its products than from resale of the other products. *See* H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 9.3 (1983). The point is that RPM makes a price reduction less likely, not that it eliminates the supplier's incentives to reduce price altogether.

189. RPM itself is not necessary to monitor each other's prices. Suggested prices, which are equally visible, can accomplish the same objective.

190. *See* Stanley I. Ornstein, *Resale Price Maintenance and Cartels*, 30 ANTITRUST BULL. 401 (1985). Cartels with RPM have historically been a very small percentage of all horizontal conspiracy cases pursued by the Justice Department. Ornstein concludes that: "This suggests that RPM as a device for controlling price cheating is quite ineffective relative to other policing tactics." *Id.* at 419.

191. *Id.* at 431. One period, 1940-44, accounts for over one-third of Justice Department RPM cartel cases during this period. *Id.* at 420. There are a variety of explanations for this high level, including the aggressiveness of the Justice Department, the lingering effect of cartelization, which was initiated during the Depression, and the promotion of cartels by the passage of the Miller-Tydings Amendment, which legalized RPM in many states. *See id.* at 421 n.32.

192. *Id.* at 418-422.

193. *See* Ornstein, *supra* note 190. Ornstein's review uncovered only one supplier-cartel case where RPM was used in conjunction with other vertical restraints such that both non-price and price competition was eliminated. *Id.* at 418. He concludes that a truly effective supplier cartel using RPM is extremely rare. *Id.* at 418-19. Most price-fixing cartels, however, suffer from the weakness that they cannot prevent all non-price competition.

It is not an easy task to try to balance the harm of RPM in facilitating supplier cartels with the benefits RPM offers in promoting demand. In theory, we could attempt to balance the harm of the practice, e.g., its frequency and effectiveness in stabilizing a cartel, against its benefits as a mechanism for increasing consumer demand. The task of assessing the degree to which practices "facilitate" collusion, when there is no horizontal agreement, has proven to be a difficult one indeed. In *Ethyl Corp.*,[194] the FTC challenged a series of practices by four manufacturers of a lead additive, alleging that the practices facilitated price coordination. The Commission did not allege an agreement among the manufacturers.[195] Instead, the Commission found a violation of the FTC Act based on the theory that the harm to competition resulting from the practices outweighed any benefits to competition they might offer.[196] The FTC proceeded under the assumption that the Sherman Act did not apply since there was no agreement among the manufacturers. Yet, some of the challenged practices, such as most favored nations clauses and advance price announcement commitments, were vertical agreements between the manufacturers and their customers. If the Commission had chosen to characterize the case as a challenge to the use of these vertical agreeements, the case could have been brought under a Sherman Act theory of competitively harmful agreements.[197] Thus, it would have been similar to the theory that RPM agreements are unlawful because they facilitate collusion.

The court of appeals rejected the Commission's legal theory and reversed the Commission's decision.[198] According to the court of appeals, there is no liability under the FTC Act based on a claim that practices facilitate collusion, in the absence of an agreement among competitors, unless the practices are undertaken with an anticompetitive purpose or unless there is a complete absence of business justification for the practices.[199] Since enterprising counsel can usually come up with some possible business justification, the Second Circuit's standard is very difficult to meet.

The difference between the approach advanced by the FTC in *Ethyl* and the supplier cartel theory of RPM is striking. RPM is subject to a per se bar in part because it can facilitate supplier collusion. The FTC's more modest approach in *Ethyl* was to apply a rule of reason, balancing the competitive harm against the competitive benefits of the practices. The Second Circuit's standard is close to per se legality. Yet, the theory of harm from the facilitating practices challenged in *Ethyl* and the harm from RPM in facilitating a supplier cartel is very similar.[200]

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194. 101 F.T.C. 425 (1983).

195. *Id.* at 592.

196. *Id.* at 653-55.

197. Some practices alleged to be harmful in Ethyl were not the result of an agreements, horizontal or vertical, e.g., regularly providing notice of price increases to the press in advance of the notice required to customers by contract. A challenge to these practices could not be brought under the Sherman Act unless it was alleged that the competitors had entered into a horizontal agreement to follow the practice.

198. E.I. DuPont de Nemours & Co. v. FTC, 729 F.2d 128 (2d Cir. 1984).

199. *Id.* at 139-40.

200. The FTC's approach toward facilitating practices in Ethyl placed an even greater burden on the government than an analogous challenge of RPM restrictions in that the practices challenged in Ethyl had very limited (if any) business justification. For example, delivered pricing and base-point

The possibility that RPM helps facilitate a supplier cartel provides some rationale for barring it. However, the infrequency with which it might actually have this effect and the difficulty of distinguishing procompetitive and anticompetitive effects suggests that the supplier cartel rationale carries limited weight. In addition, it is at least an oddity that vertical agreements that can facilitate collusion are subject to such harsh treatment in some cases and such permissive treatment in others.

C. RPM Imposed by Dealers with Market Power Over the Supplier

A third possible basis for a bar on RPM is that RPM restrictions can result from dealers exercising market power over the supplier. RPM restrictions from dealers' exercising market power may not result in increasing demand for the product but, instead, may reduce demand by increasing price and dealer profits. In the simplest case, dealers can enter into a horizontal agreement to demand that the supplier impose and enforce RPM restrictions on all the dealers. The dealer cartel's preferred price, higher than the competitive retail price, becomes the supplier's required retail price. The supplier would prefer to see competition among its dealer network but it is forced to accede to the scheme because of the difficulties of obtaining alternative distribution. Unlike the case where the supplier has instituted RPM in a competitive dealer market, the imposition of RPM by a dealer cartel is inconsistent with the supplier's preferences in the sense that the supplier would not employ RPM restrictions if the dealer market were competitive. The possibility that RPM can be used to facilitate a dealer cartel has been recognized by the Supreme Court in a number of cases.[201]

1. Interbrand Dealer Cartels

When the dealer cartel extends across brands, the cartel pressures all the suppliers in a market to institute minimum dealer prices. From the point of view of consumers, the result is similar to a case where a supplier cartel agrees to restrict output and raise price. A multi-brand dealer cartel, if it can actually be organized, reduces sales and increases prices to consumers, thereby reducing consumer surplus. The question is not whether such an effect would be harmful, it clearly would, but how often the conditions exist for such a cartel to form and how significant RPM is in promoting it.

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pricing schemes have been viewed by many commentators as inconsistent with competition since individual sellers could benefit from reducing prices on short hauls; thus, tacit or express collusion is a more likely explanation. *See* McGee, *Cross-Hauling — A Symptom of Incomplete Collusion under Basing-Point Systems*, 20 S. ECON. J. 369 (1954); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMICS PERSPECTIVE 70-71 (1976); FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 325-34 (2d ed. 1980).

On the other hand, a tenable justification for RPM can be offered in many cases on the grounds that it promotes demand. A challenge to RPM as a facilitating practice would thus be even more difficult than the FTC's case in Ethyl. The FTC did not attempt to prove in *Ethyl* what would amount to an even more difficult case — that the practices were the inevitable result of collusion, i.e., that no firm would have engaged in the practice unless the others did, that the practices would only have been profitable if all firms followed them, and that, therefore, a horizontal agreement can be inferred. This higher burden might be placed on a private plaintiff. *See* Hovenkamp, *supra* note 160, at 539.

201. *See* Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726-28 (1988); California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980).

An interbrand dealer cartel is hard to organize and enforce. As in the case of supplier cartels, a concerted effort to coerce suppliers to impose RPM on dealers seems to be an indirect and cumbersome way to reach a horizontal price-agreement among dealers. It would be more effective for the dealers simply to agree on price. Moreover, the dealers must involve all or most of the suppliers in order to make the scheme effective. Those dealers who resist, or who are company-owned outlets, can take advantage of the higher retail price forced on the suppliers who do participate. Unlike an intrabrand dealer cartel, where dealers can pressure their suppliers to terminate discounters, a dealer in an interbrand cartel faces the problem that dealers of other suppliers may be discounting. It has no effective means of forcing the supplier of another brand to institute RPM or terminate a discounter, since its leverage comes from threatening to drop its supplier's product. These practical difficulties make interbrand dealer cartels a rarity, and one commentator has concluded there is no record in the case law of vertical restraints being used to facilitate an interbrand dealer cartel.[202]

2. Intrabrand Dealer Cartels

A more familar scenario, however, and the one usually encountered in actual litigation, involves an intrabrand dealer cartel. Dealers for a single supplier, in theory, can pressure the supplier to impose RPM on all the dealers. For an intrabrand dealer cartel to have some harmful effect, the supplier must have some market power in the brand. Otherwise, an attempt by the dealers to raise prices over competitive levels is destined to be ineffective. Unlike the interbrand dealer cartel, the dealers do have an effective mechanism for enforcing the cartel — the supplier's ability to terminate other dealers. This possibility, in fact, may make the cartel more stable than if the dealers depended simply upon their own horizontal agreement to enforce the cartel's price. In the latter case, there may be no enforcment mechanism as effective as the threat that the supplier will drive a non-complying dealer out of the market by terminating supplies. Without the involvement of the supplier, the only enforcement mechanism may be the implicit threat by each dealer to expand output and reduce price if others do.

The economic inefficiency resulting from a dealer cartel forcing a supplier to institute RPM is a special case of the more general situation of two monopolists in a vertical relationship.[203] The resulting output is less than if a monopolist in one market deals with firms behaving competitively in the other market. The members of a dealer cartel can attempt to increase their profits by forcing down the wholesale price or by raising the retail price. When the cartel acts to force up the retail price, it reduces output and drives up the distribution costs of the supplier.

A dealer cartel can take a number of forms. It can involve all the dealers, who simply utilize the supplier as a convenient enforcement mechanism. In such a case, all the dealers are content to go along with the supracompetitive retail price and rely on the supplier to coordinate their pricing levels. Since the supplier is losing profits to its dealers, it is not happy with the arrangement. However,

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202. *See* Hovenkamp, *supra* note 160, at 534.

203. *See* Frederic M. Scherer, *The Economics of Vertical Restraints*, 52 ANTITRUST L.J. 687, 690 (1983).

the supplier encounters barriers to alternative forms of distribution and cannot effectively "distribute around" the cartel, at least for less than the cost of the profits extracted by the cartel. When all or most dealers form a cartel to pressure a supplier with market power to institute RPM, there is no dispute that an effective dealer cartel can reduce consumer welfare by raising price over competitive levels, reducing output and generating excessive profits for the dealers.[204]

A much more realistic fact pattern, however, involves a dealer network which is divided. Some dealers prefer to keep prices up; others, because of their style of marketing and their cost structures, want no part of a supracompetitive price. These dealers, the discounters, want the freedom to charge low prices. In some cases, a group of high price dealers may enter into a horizontal agreement to pressure the supplier to keep the prices of the other dealers up and to terminate those who do not go along. This case lends itself to a traditional theory of horizontal price-fixing since competitors have entered into a horizontal agreement in an effort to raise their prices.[205]

It is frequently assumed that a dealer cartel cannot be effective unless all or almost all the dealers of a particular supplier participate.[206] Even if all the dealers agree to force up prices, there are a number of theoretical options open to the supplier to avoid the effects of the cartel. It has been pointed out that the supplier may: (1) report the cartel to the antitrust agencies; (2) sue the dealers claiming damages from lost sales; (3) "settle" with the cartel by agreeing to share in the cartel's profits (though at a lower profit level than if the dealers acted competitively); (4) stop dealing with the offending dealers and find new ones; or (5) integrate forward into retailing. He concludes that this large number options make it unlikely that a dealer cartel can have a significant effect in raising prices at the dealer level.[207]

Yet, each of the supplier's theoretical options for avoiding the effects of pressure from individual dealers may prove unattractive or very expensive. Litigation is a costly strategy, and the supplier has the same problem that any plaintiff has, proving the existence of an agreement among competitors who wish to conceal it. Integrating forward into retailing can require substantial investment and an entirely new marketing approach.[208] Dropping the offending dealers and finding new ones seems to be the easiest course, but, in many cases, the complaining dealers may be large department stores with a large market share, a favorable location, or other desirable characteristics. To the extent that the

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204. There is a dispute about whether it is necessary to bar the vertical agreements at all since the horizontal agreement is per se unlawful. Moreover, there is disagreement about how often the conditions necessary for an effective intrabrand cartel actually exist. *See infra* notes 206-208 and accompanying text.

205. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127, 140 (1966); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 743 (7th Cir. 1982).

206. *See, e.g.*, Baker, *supra* note 4, at 1489. Some commentators have suggested that a per se rule should apply to horizontal supplier or dealer cartels only if the cartel involved most of the suppliers or dealers in a market. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75, YALE L.J. 373, 406-7 (1966); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 12, 17 (1977).

207. Hovenkamp, *supra* note 160, at 533.

208. A strategy of forward integration can be particularly expensive if the products are sold through multi-product outlets, e.g., department or grocery stores. *See id.* at 534.

supplier is relying on a "prestige image," there may be only a few stores in any locality that can provide it. Individual stores may have a large share of the supplier's sales in a particular geographic area, or, may have accounts with the supplier in many geographic areas. Finally, a supplier confronted with demands from several existing dealers to maintain higher retail prices may fear the same response from possible alternative dealers who have similar characteristics. In short, those who assume that a supplier can easily "distribute around" the cartel, give too little weight to the importance to the supplier of particular kinds of dealers and the cost of finding alternative means of distributing the product.

3. Dealer Market Power Based on Coordinated Action

Dealers can have market power over the supplier even if there is no horizontal agreement among them. In a concentrated dealer market, e.g., a handful of high price departments stores distributing a large share of the supplier's product, dealers may act in a coordinated fashion to demand RPM restrictions without a horizontal agreement. This situation — when high price dealers, acting without an agreement among themselves, pressure the supplier to eliminate discounting — is the most frequent case that actually arises in RPM litigation. In this case, there is no horizontal agreement among dealers, at least one that can be proved. Instead, a series of full-price dealers, acting individually, approach a supplier to pressure it to eliminate discounting by some dealers. If there are provable agreements at all, there are only vertical agreements between each of the complaining dealers and the supplier to eliminate discounters.[209] Yet the high price dealers may have a powerful influence over the behavior of the supplier, e.g., they are favored by the supplier because of their large market share or other special characteristics. These favored dealers may have as much or greater leverage over the supplier as a group of dealers who have entered into a horizontal agreement to pressure the supplier.

An important question for formulating RPM policy is whether any antitrust rule should apply when there is no proof of a horizontal agreement among dealers but there is evidence that the market power of high price dealers has resulted in the supplier imposing RPM restraints. Prior to *Monsanto* and *Sharp*, some circuits applied the per se rule of *Dr. Miles* to supplier agreements with individual dealers to terminate discounters if the purpose of the termination was to eliminate price competition and if the courts viewed the "source" of the decision to terminate discounters to be the high price dealers, not the supplier.[210] This is the position taken by the dissenters in *Sharp*.[211] It is also the theory of the legislation pending before Congress.[212] Yet, there are difficult analytical problems in applying a theory that the termination of a discounter, "forced" on

209. *Monsanto* makes it difficult to establish that agreements are created in the course of these supplier-dealer communications, but it is more consistent with our traditional understanding of agreeements to conclude that there is often bilateral conduct when the supplier terminates a discounter in return for the assurances of the complaining dealers that they will continue to carry the supplier's product. *See supra* notes 115-118 and accompanying text.

210. *See, e.g.*, Cernuto Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979); Zidell Explorations, Inc. v. ConVal Int'l, Ltd., 719 F.2d 1465 (9th Cir. 1983). *See supra* notes 62-64 and accompanying text.

211. *See supra* notes 127-132 and accompanying text.

212. *See infra* note 270 and accompanying text.

a supplier by powerful dealers, has the effect of raising prices over competitive levels.

When a series of high price dealers reach agreements with their supplier to stop competing dealers from discounting; the effect may or may not be to force dealer prices above competitive levels. The high price dealers may be acting in a coordinated fashion to impose an RPM scheme on the supplier in order to maintain dealer prices at supracompetitive levels. On the other hand, the high price dealers may simply be communicating the fact that dual channel distribution is untenable for the reasons discussed above.[213] The high price dealers may be losing sales to discounters, forcing them to drop prices too low to achieve a normal return and, in turn forcing the supplier to make a choice about channels of distribution. Thus, the supplier's decision to terminate discounters at the request of the high price dealers may or may not be good for consumers, depending on whether the termination of discounters decreases consumer sales by increasing prices or increases consumer demand by promoting services, encouraging desirable dealer activity, or enhancing the prestige of the product. Here we come to a central difficulty in formulating a policy regarding RPM. There is no convenient and easily administrable way to distinguish between agreements between high price dealers and suppliers that result in output-reducing cartel effects and supplier-dealer agreements that further the supplier's own marketing strategy by increasing demand.

The distinction between agreements that reduce output and those that increase demand does not necessarily (or perhaps even very often) turn on the presence or absence of significant services. As we have seen, the supplier may decide it is more important to induce high quality stores to carry the product than to retain the volume of sales provided by discounting dealers even though free-riding on services is not a factor, e.g., in order to signal quality or to create a prestige image.[214] Thus, it can be futile to attempt to identify harmful dealer terminations on the basis of whether there are significant services involved.

Cernuto suggests that the distinction can be based on motivation. If the motive for terminating discounters stems from the complaining dealers, the court reasoned, the result is like that of a dealer cartel.[215] If the motivation stems primarily from the supplier's desire to prevent free-riding (and the complaining dealer is simply providing information about a free-riding problem), the court concluded that the termination would reflect the supplier's efforts to expand output.[216] "Motivation" is, however, a slippery concept. Separating the motives of two parties to a commercial agreement may be impossible when their self-

213. *See supra* notes 176-183 and accompanying text.

214. *See supra* notes 173-175 and accompanying text.

215. 595 F.2d at 168; *see also* Zidell Exploration, Inc. v. Conval Int'l, Ltd., 719 F.2d 1465 (9th Cir. 1983) ("[I]f a manufacturer deliberately withdraws its product from a price-cutting distributor at the request of a competing distributor as part of a conspiracy to protect the requesting distributor from price competition, the manufacturer has committed a per se violation of the antitrust laws."). *Id.* at 1469.

216. 595 F.2d at 168. *See also* VIII PHILLIP AREEDA, ANTITRUST LAW (1986) ("From the policy viewpoint, it can matter greatly whether manufacturer or dealer interests are being served. The former is more likely to seek efficient distribution; the latter is more likely to seek excess profits, which dampen interbrand competition."). *Id.* at 167; Hovenkamp, *supra* note 160, at 545; Wesley J. Liebeler, *Intrabrand 'Cartels' Under GTE Sylvania*, 30 UCLA L. REV. 1, 6-8 (1982).

interest is mutually dependent. Both the supplier and high price dealers have a motive to terminate a discounter under some circumstances, though for different reasons reflecting their different economic incentives and different roles in the relationship.

When high price dealers demand that their suppliers terminate discounters, they may not be attempting to force retail prices over competitive levels in order to earn excess profits. They may simply be complaining that they cannot earn normal profits at the price charged by discount dealers. The supplier's motive is to maximize its profits, and distributing only through the high price dealer may be more consistent with that objective than distributing only through discount stores. If the supplier is confronted with a choice, the supplier may be motivated to retain high price dealers at the expense of dropping discounters. It is impossible to distinguish the motive or source of the decision. The complaining dealer and the supplier are simply looking at opposite ends of the same commercial relationship.

The fundamental question in deciding whether an RPM restraint, implemented by the supplier in order to retain high price dealers, harms consumers is not the "source" of the restraint, but whether its effect is to increase demand or decrease sales.[217] In theory, we could attempt to compare sales before and after the restrictions are imposed. It is sometimes possible to make such a historical comparison, but this test is complicated by the inevitable presence of many factors that can influence sales.

Another possible indicator of whether the termination of discounters or imposition of an RPM requirement is harmful is whether the complaining dealers have market power. There cannot be harm to consumers unless dealers are exercising some market power over the supplier. Otherwise the supplier could "distribute around" the high price dealers if the result would be increased supplier profits. However, it is not easy to determine whether dealers are exercising market power over the supplier. Dealers can have market power over the supplier when all or most of the dealers in a market act as a cartel, i.e., pursuant to an agrement, when dealers act in a coordinated fashion absent an agreement, or even when a single powerful dealer acts alone. An evaluation of whether a group of dealers together or individual dealers have market power over the supplier depends on a number of factors, including the share of the dealer market represented by the dealers demanding RPM restriction, the difficulty of finding alternative dealers, the relationship that individual dealers may have with the supplier in other markets,[218] and the number of dealers who have particular characteristics important to the supplier.[219]

When dealers combine in a horizontal agreement to force an RPM scheme on these supplier, there is little problem in concluding the conduct should be barred. In this case, the market power is acquired unfairly (by the agreement) and its exercise is presumed to be unfair, too. Thus, the bar on horizontal

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217. *See supra* notes 155-162 and accompanying text; *see also* Hovenkamp, *supra* note 160, at 545.

218. For example, a large retailer may carry many of the supplier's products in many cities.

219. For example, there may only be a handful of dealers who convey the "image" the supplier wants to associate with its product.

agreements among dealers to force the supplier to maintain retail prices is based on two considerations: (1) the existence of the horizontal agreement provides a reasonable basis for presuming that the dealers are exercising market power over the supplier; and (2) such a rule provides a clear, understandable bar on conduct that is usually harmful and rarely procompetitive.

Market power over suppliers exercised by dealers acting in a coordinated fashion, when there is no provable agreement among them, presents a more difficult policy question. The Sherman Act does not bar pure oligopoly conduct, even if it has the same effects as an actual agreement among competitors.[220] Thus, neither the dealer oligopoly nor the dealer monopolist[221] who charges monopoly prices violate the Sherman Act. Thus, it could be argued that the exercise of market power through coordinated action is harmful but permissible. Moreover, it could be argued that any harmful effect of oligopolistic behavior by dealers is very limited since the ordinary limitations on the effectiveness of outright dealer cartels are even more pronounced when there is no actual agreement among the dealers to serve as a framework for coordinating their actions.

On the other hand, whether the complaining dealers have expressly agreed with each other to pressure the supplier, tacitly coordinated their approach to the suppliers, or were aware of and motivated by the actions of the other, the result may be the same — an increase in prices over competitive levels and harm to consumers. Retail markets may have only a handful of high price department stores carrying the supplier's product. This small number can effectively act in a coordinated fashion as long as they have some method for monitoring the actions of the others. High price dealers' insistence on the elimination of discounters or the maintaining of retail prices can be communicated to the other dealers through association newsletters, the trade press, or simply informal communications within the industry.[222] Unlike some "cheating" on cartels, which may not be widely known through the industry, complaints by high price dealers about discounters are widely known and openly discussed. Thus, high price dealers may be able to coordinate their actions and force the supplier to eliminate price competition without reaching a horizontal agreement. As in the case of the dealer cartel, the dealer market is not performing competitively, and the supplier is forced to adopt a marketing approach that reduces supplier profits and harms consumers.

4. *Exercise of Market Power by a Single Dealer*

Market power exercised by a single dealer presents the most difficult case. A single dealer can influence a supplier to impose RPM on another dealer or to terminate it in order to eliminate price competition.[223] There are frequent examples

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220. "Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parellelism' has not yet read conspiracy out of the Sherman Act entirely." Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954) (footnote omitted).

221. The example of a single retailer in a city will not seem so far-fetched to those who have shopped in a tiny rural town with a general store.

222. A good example of a powerful dealer attempting to encourage other dealers to follow its policy of demanding that its suppliers eliminate discounters was Federated Department Store's announcement that it would no longer deal with suppliers who sold to discount stores. *See* Burlington Coat Factory Warehouse Corp. v. Esprit de Corp., 769 F.2d 919 (2d Cir. 1985).

223. A recent case suggests one example where this effect occurred. In Toys "R" Us, Inc. v.

of cases in which a high price dealer's demands that a discounter be terminated results in the supplier's acquiescence and termination of the discounter.[224] A decision by the supplier to retain a high price dealer while terminating rival dealers does not necessarily mean that the high price dealer has market power over the seller. The dealer market may be quite competitive but the supplier is willing to eliminate price competition among its dealers because it believes that an exclusive arrangement the high price dealer will promote demand for the product by encouraging the provision of service or by promoting the image of the product. The high price dealer has no power to charge supracompetitive prices, however, since the supplier can easily turn to other dealers or distribute the product on its own.

There will be some cases, however, when the single dealer does have market power over the supplier and chooses to exercise it by demanding that the supplier eliminate a rival discounting dealer. When a single dealer with market power demands that the supplier terminate other dealers to eliminate price competition, the supplier is confronted by the choice between: (1) retaining a high price, relatively inefficient dealer while losing price competition for its product and (2) losing the high price dealer while retaining price competition for its product. Given this choice, the supplier will choose the strategy that maximizes its own profits. Since consumers' interests coincide with suppliers, at least in regard to the choice of the supplier's choice of dealers, they, too, are better off if the supplier retains the high price dealer if the supplier must choose at all.[225] The problem is that the supplier has to choose at all. Absent the market power of the high price dealer, the supplier may have retained dual channel distribution and both the supplier and consumers would be better off.[226]

R.H. Macy & Co., Inc., 1990-1 Trade Cases 68,890 (S.D.N.Y. 1990), a powerful retailer entered into an agreement with the supplier to terminate a discounter. The court granted summary judgment for the defendant but assumed that the evidence might show that the "sole precipitating cause of [the supplier's] refusal to sell certain lines of swimwear to Kids [the discounter] was the protest of Macy [the high price dealer]." *Id.* at 62,789.

224. Two cases, viewed by the Supreme Court to be examples of supplier cartels, Klor's, Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207 (1959) and Interstate Circuit Inc. v. United States, 306 U.S. 208 (1939), fit more easily into the typical pattern of powerful dealers pressuring the supplier to terminate discounters. In *Klor's*, the discounter was terminated after the rival high price department store pressured the suppliers. *Klor's*, 359 U.S. at 209. The case was argued on the theory that the suppliers had conspired to boycott the discounter. The Court did not deal directly with the agreement allegation but reversed the grant of summary judgment for the defendant on the grounds that the district court had erred in requiring that the plaintiff show actual injury to the public, such as higher prices. *Id.* at 210-14. In *Interstate Circuit*, discounting movie exhibitors were required to raise their prices after pressure on the supplier from the high price exhibitor chain. *Interstate Circuit*, 306 U.S. at 216-17. The Court upheld a district court finding of an agreement among suppliers to boycott the discounters, largely on the basis that the high price dealer wrote a joint letter to the suppliers of which they were all aware and that the suppliers failed to present evidence to rebut the inference of conspiracy. *Id.* at 219-27. It is very rare that a terminated discounter will be able to prove a horizontal agreement among suppliers, and the result in these cases can probably be attributed to their unique facts and the procedural posture in which they reached the Supreme Court.

225. On the other hand, if the high price dealer is exercising market power over the supplier by virtue of their relationship in a second market, the supplier may be forced to impose an RPM scheme that reduces its profits in the first market in order to avoid losses in another market. The supplier and the consumers in the first market both suffer. At least one court has held that a monopolist in one market violates section 2 of the Sherman Act if it uses monopoly power in that market to gain an advantage in another market. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

226. It is possible that the supplier would have reached the same decision to terminate the

Even if a dealer successfully exercises its market power by forcing the elimination of price competition, however, it is not obvious that such an exercise of market power should be unlawful. As a matter of general antitrust principles, innocently acquired market power is not unlawful,[227] nor is it unlawful for a monopolist to exercise market power so as to raise price or to extract favorable terms from buyers or sellers.[228] There is no bar on the exercise of monopoly power by a single seller unless the conduct is intended to exclude competitors, maintain the monopoly unfairly or acquire an advantage in another market. In short, conduct by a monopolist becomes unlawful only when it is used to create or maintain market power unfairly.[229]

The underlying problem when a dealer with market power forces a supplier to terminate a discounter is that the dealer market is not competitive. Given that the high price dealer has some power over the supplier, we expect it to extract the most favorable terms it can, either in setting its own price or in bargaining for a favorable arrangement with the supplier. Nevertheless, the ability to force the supplier to terminate a discounter provides a means for the dealer to exercise its market power, perhaps more effectively than it could do so by other means. Thus, there is a basis for barring this exercise of market power even if we do not bar other types of conduct when a monopolist exercises its market power.

Even if it is accepted that there are good policy reasons for barring this exercise of market power by the high price dealer, we still confront the problem of identifying when an agreement between a high price dealer and a supplier to eliminate a discounter has the effect of promoting consumer demand and when it has the effect of reducing demand through increasing price. This problem is particularly significant in drafting an antitrust rule since a broad rule that effectively barred all supplier-dealer agreements to eliminate discounters would bar many procompetitive agreements, e.g., supplier-dealer agreements to establish exclusive territories in order to promote demand.

D. Summary

RPM restrictions and the termination of discounting dealers can harm consumers when they are the result of high price dealers exercising market power over the supplier. However, it is not easy to identify when an RPM restriction is the harmful result of dealers exercising market power and when it is the result of suppliers attempting to increase consumer demand by inducing high price dealers to carry its product. This inability to distinguish between competitive and anticompetitive supplier agreements with high price dealers is at the heart of the dilemma in establishing RPM policy. Agreements between high price dealers to terminate discounters, or to impose RPM restraints, can have the same effects

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discounter regardless of the market power of the high price dealer. The supplier will not choose to retain the high price dealer, at the price of losing price competition among its dealers, unless it believes the high price dealer will produce more profits for the supplier. The question is whether consumer demand would have been even higher in the case of dual channel distribution and whether the high price dealer would have been willing to continue to carry the product if it had to operate in a competitive dealer market. If both are true, then consumers are worse off because of the high price dealer's ability to eliminate competition from the discounter.

227. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

228. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274-75 n.12 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

229. *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-03 n.28 (1985).

as a horizontal dealer cartel. On the other hand, high price dealers will seek agreements from suppliers to terminate discounters when they are simply attempting to maintain price levels sufficient to earn a reasonable return. The question for purposes of antitrust policy is what rule, if any, best advances consumers' interests. In part VI, we turn to a discussion of various policy alternatives.

V. POLICY ALTERNATIVES

It is argued above that there is no harm to consumers from RPM when it is employed by a supplier to increase consumer demand in a competitive dealer market. There is some historical evidence that RPM has helped facilitate supplier cartels, though the evidence as to how frequently and effectively RPM has been used is limited. Similarly, the use of RPM to facilitate interbrand dealer cartels is rare, though it is theoretically possible. There is a stronger case that powerful dealers may force prices over competitive levels by extracting agreements from suppliers to eliminate discounters or to subject them to RPM restrictions. High price dealers, acting in a cartel, or under some circumstances acting individually, can drive up distribution costs and reduce sales and consumer welfare.

While supplier agreements with individual dealers can raise retail prices over competitive levels, it is very difficult to distinguish these cases, where the result is similar to a dealer cartel, from cases where the high price dealers are maintaining a margin sufficient to earn a reasonable return. Harmful cases cannot be distinguished on the basis that no significant point-of-sale services are involved or that terminations of discounters are dealer-motivated rather than supplier-motivated.

This section reviews some alternative policy approaches to RPM and how they take account of these competing considerations — (1) per se legality; (2) a rule of reason analysis; and (3) legislation pending in Congress to address the *Monsanto* and *Sharp* decisions. It concludes with a recommendation for a simple rule barring dealer assurances about future pricing practices.

A. Per Se Legality

Those who advocate a rule of per se legality for vertical price restraints generally agree that supplier and dealer cartels can reduce efficiency and that RPM, under some theoretical circumstances, could be used to facilitate such a cartel. However, they argue that there is no need to maintain a rule barring a strictly vertical price agreement for the following reasons: (1) a supplier or dealer cartel is unlawful based on standard rules governing horizontal agreements; (2) even if a supplier cartel cannot be detected, RPM is a relatively ineffective, and therefore rare, way to maintain it; (3) a dealer cartel must extend to all suppliers in order to force prices above competitive levels, or, must involve all the dealers of a single supplier with market power, and these circumstances are rare; (4) even if a dealer cartel cannot be detected, the supplier can avoid its effects by disrupting the cartel, finding other dealers or integrating forward into retailing; and (5) whatever minor harm results from the use of RPM to facilitate the formation of supplier or dealer cartels that go undetected is greatly outweighed by the procompetitive effects of RPM in most cases.

The position in favor of per se legality both overstates the benefits of RPM and understates the harm that may result from it. RPM — if defined as an agreement between a supplier and a dealer in which the dealer provides assurances about its prices — is rarely necessary to achieve the objective of encouraging dealer services or quality signalling. Typically, a supplier can achieve both objectives through selective distribution or non-price agreements with the dealers.[230] It is true that in some cases, the supplier will prefer to use RPM, e.g., if it wants to maintain a distribution relationship with both types of dealers. Therefore, there is some cost to barring RPM in interfering with the supplier's marketing strategy, but it is limited because of the opportunities for achieving the same result in other ways.[231]

The per se legality position understates the harm that may result from RPM because it assumes that dealer cartels can be barred by rules applicable to horizontal price-fixing. It is difficult to detect and prove horizontal price-fixing agreements under almost any circumstances. In the case of horizontal agreements among dealers, neither the supplier nor the terminated dealers have an effective means of detecting and proving dealer agreements. Moreover, demands on suppliers by high price dealers to maintain dealer prices typically do not involve a horizontal agreement at all. In an environment in which vertical price restraints were per se legal, dealer cartel effects would arise, not only from undetected horizontal agreements among dealers, but also from a series of vertical agreements between high price dealers and suppliers. These agreements would take the form: "I agree to carry your product, but you must promise to restrict the price of other dealers." The result would be a series of vertical agreements including express assurances by dealers regarding future prices. These agreements would be immune from challenge under any standard, per se or rule of reason. Moreover, these agreements would be per se legal even if the supplier has market power, the required price is supracompetitive, and some or all of the dealers have tacitly coordinated their demands but have not reached a horizontal agreement.

An express agreement between a supplier and a dealer requiring the supplier to set another dealer's prices might be viewed as horizontal, given that one dealer is a party to an agreement setting the price of its competitor. However, like non-price agreements between suppliers and dealers, e.g., allocating territories, these would likely be viewed as vertical and, therefore, per se lawful (under a rule of per se legality).[232] In addition, the high price dealers could reach the same result

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230. The right of the supplier to select dealers unilaterally without fear of antitrust liability is the heart of the *Colgate* doctrine. *See supra* notes 19-22 and accompanying text. As the Court has stated, "[I]f nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others," the manufacturer "may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967). Of course, if the attempt to engage in selective distribution, e.g, through refusal to deal with discounters, is characterized as RPM, and, therefore barred under *Dr. Miles*, selective distribution is not an "alternative" at all.

231. Not only can the supplier terminate dealers who do not comply, it can announce in advance and implement a policy of terminating discounters, which can have the effect achieving compliance by those who fear termination. *See supra* notes 81-82 and accompanying text. The right of unilateral termination, coupled with the wide discretion to use non-price vertical restraints, allow a dealer to achieve the supplier's objectives in the vast majority of cases without resort to an agreement with the dealer as to its pricing policies.

232. In Eastern Scientific Co. v. Wilde Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978), *cert. denied*, 439 U.S. 833 (1978), the court held that an agreement between dealers and their supplier under which the supplier would maintain minimum dealer prices outside their territories was subject to a rule of reason. 572 F.2d at 885. It is likely that the courts would analyze a series of supplier-dealer agreements under which a supplier undertook to require all dealers to charge a particular price

by refusing to deal with the supplier unless the supplier had obtained assurances about the other dealers' pricing practices. A rule of per se legality would encourage high price dealers to make such demands on their suppliers and, thus, would promote the frequent use of these agreements when the supplier attempted to use dual channel distribution. Not only would it encourage individual dealers to seek such agreements from suppliers, it would encourage high price dealers to coordinate their demands on suppliers, but without doing so pursuant to a provable agreement.

When a supplier obtains express assurances about future pricing from its dealers, these assurances contribute substantially to the stability of pricing among dealers by creating a high degree of certainty among all dealers that no one will discount.[233] Without express assurances from other dealers, competing dealers are left with uncertainty about the pricing practices of their rivals. Periodic discounting, even by normally high price dealers, remains a possibility. A rule of per se legality, however, would allow a series of vertical agreements which had the effect of stabilizing prices among dealers.

A final consideration that weighs against a rule of per se legality is that it forecloses any challenge to the use of RPM when it is being used to facilitate a supplier or interbrand dealer cartel. Although these cases will be rare, it is possible that suppliers could use RPM to facilitate uniform pricing. A rule of per se legality would forcelose any challenge to the use of these practices, no matter how persuasive the evidence.

B. Rule of Reason for RPM

The most frequently proposed alternative to a per se rule against RPM is a rule of reason.[234] Under a rule of reason, it is argued, suppliers would be free to structure their own marketing and distribution activities, including the use of RPM where it is the most effective means of promoting dealer services or marketing goals desired by the supplier. If a particular use of RPM reduced competition significantly, a rule of reason analysis could be applied. Moreover, the same rule governing non-price vertical restraints would be applied to vertical price restraints, eliminating a distinction that often appears arbitrary. Despite the appealing argument for a rule of reason, an examination of how the rule would be applied shows that it would lead to arbitrary results or, in practice, amount to a rule of per se legality.

1. Applying a Rule of Reason to RPM Used by a Single Supplier

In *GTE Sylvania*,[235] the Supreme Court stated that vertical non-price restraints should be assessed under a rule of reason. In applying the rule of reason, the

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as vertical agreements unless the whole scheme was "imposed" on the supplier by a dealer cartel. *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966).

233. "Uncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier. (citations omitted) Without an agreement with the remaining dealer on price, the manufacturer both retains its incentive to cheat on any manufacturer-level cartel (since lower prices can still be passed on to consumers) and cannot as easily be used to organize and hold together a retailer-level cartel." (note omitted) Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 727 (1988).

234. *See* Baker, *supra* note 4. at 1520; George A. Hay, *Vertical Restraints After Monsanto*, 70 CORNELL L. REV. 418, 436-41 (1985); William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CAL. L. REV. 933, 948-49 (1987) (suggesting one approach as at least preferable to current law).

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

courts are to compare the harm from restrictions on intrabrand competition with the benefits to interbrand competition.[236] Applying a rule of reason to RPM would presumably require the same balancing. In fact, however, it is impossible to compare these two effects of RPM in any meaningful sense if the restrictions simply reflect the supplier's own efforts to maximize profits. Assume a simple case where a supplier has a large market share and distributes through several dealers who compete against one another. If the supplier decides to insitute RPM, where there is no suggestion of pressure from high price dealers or an attempt to coordinate pricing with other suppliers, is there any workable method of evaluating the "loss" in intrabrand competition and comparing it to the "gain" in interbrand competition? The only possible way is to somehow second guess the supplier's own marketing decision by concluding that the effect of eliminating price competition among the dealers is to increase dealer profits at the expense of the supplier, i.e., that the supplier is not acting in its own self-interest.

In the few rule of reason cases that have reached the court of appeals since *GTE Sylvania* dealing with vertical restrictions, the plaintiff almost always lost, and, in the rare case that it did not, the court decided the supplier was not acting in its own self-interest. In *Eiberger*,[237] the defendant, Sony Corporation, had instituted a warranty fee, which had the effect of preventing its dealers from selling outside their territory.[238] The court of appeals' analysis was based on a comparison of the reduction in intrabrand competition with the possible benefit to interbrand competition from the restrictions.[239] Initially, it rejected the contention that Sony was a new entrant, a status which the court said might justify more lenient treatment of its restrictions.[240] After finding that the restriction eliminated any competition among Sony dealers, the court rejected Sony's argument that the warranty fee was necessary to insure that dealers provide warranty service. The court pointed to a previous Sony plan, which allowed some competition among dealers but which insured warranty service by requiring that the selling dealer pay a fee to the dealer in the customer's territory if the non-selling dealer would be responsible for warranty service. In effect, the court found that the new warranty plan was too restrictive and the same objective could be achieved with a plan that did not completely prevent dealer competition.

One might fault this analysis on a number of grounds. First, whatever analysis one adopts in a rule of reason case, it would seem that the first step would be to determine if the supplier has market power. Those who suggested a rule of reason for RPM would require as a first step that the defendant have some market power in the relevant product.[241] Since neither the supplier, nor the dealers acting together could raise price above competitive levels if the supplier had no market power, this threshold requirement is inherent in any rule of reason

236. 433 U.S. at 51-56; *see also* Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir. 1981), *cert. denied*, 454 U.S. 864 (1981); Muenster Butane, Inc. v. Stewart Co., 651 F.2d 292, 297-8 (5th Cir. 1981).

237. Eiberger v. Sony Corporation of America, 622 F.2d 1068 (2d Cir. 1980).

238. *Id.* at 1079.

239. *Id.* at 1079-80

240. *Id.* at 1080.

241. *See, e.g.*, Baker, *supra* note 4, at 1520; Hay, *supra* note 234, at 440-1; Baxter, *supra* note 234, at 948-50.

analysis.[242] Here, Sony was found to have 12% of the market.[243] This market share is too small from which to infer market power.

The second problem, however, is the more important one for purposes of the present discussion. How did the Court conclude that the previous Sony policy was somehow "less restrictive"? It could come to such a conclusion only by deciding that the second Sony plan reduced sales more than the first by discouraging dealers from competing with each other outside their territory. In other words, Sony was not acting in its own interest.[244] The problem of having to second-guess the supplier's marketing decisions plagues the analysis of all cases where a single supplier uses RPM, i.e., it is not the result of pressure from a dealer cartel or of a coordinated effort to raise price by a suppier cartel. In a case where a single supplier has allowed its dealers to compete on price, there is no meaningful way to evaluate the overall effect of imposing RPM on all dealers. If the Supreme Court's balancing test, stated in *Sylvania*, is applied, the increase in prices resulting from the elimination of dealer price competition must somehow be weighed against any increase in services. Not only are these two factors impossible to quantify in any meaningful sense, a conclusion that loss in competition is on balance bad for consumers must be based on the tenuous assumption that the supplier is not acting in its self interest.

If a case did proceed on the basis of a rule of reason analysis, and the plaintiff succeeded in showing that the supplier had market power, what then?

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242. One problem is how to define market power. First, many suppliers of branded goods in markets characterized by product differentiation and extensive advertising have some power over price even though they have only a small share of sales of all brands of similar products. *See supra* note 185. Second, the threshold standard of market power for purposes of antitrust liability should turn in part on the policy basis of the antitrust rule at issue. For example, a number of circuits have suggested that "market power" in a vertical restraints rule of reason case means that the supplier has a monopoly share of the market. *See* JBL Enters., Inc. v. Jhirmack Enters. Inc., 698 F.2d 1011, 1017 (9th Cir. 1983); Graphic Prods. Distribs. Inc.. v. Itek Corp., 717 F.2d 1560, 1568 (11th Cir. 1983); Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982); Muenster Butane, Inc. v. Steward Co., 651 F.2d 292, 298 (5th Cir. 1981). Such a test could require that the supplier have at least 50% or more of a market and perhaps even as much as 70%. *See* Domed Stadium Hotel, Inc. v. Holiday Inns, Inc. 732 F.2d 480, 489 (5th Cir. 1984) (dictum) ("[A]bsent special circumstances, a defendant must have a market share of at least fifty percent before he can be guilty of monopolization"); Lynch Business Mach., Inc. v. A.B. Dick Co., 594 F. Supp. 59, 67 (N.D. Ohio 1984) (monopoly power requires market share over 50%); Garside v. Everest & Jennings Int'l, 586 F. Supp. 389, 394-95 (E.D. Cal. 1984) (57.9% to 64.2% of relevant market standing alone insufficient); Stepp v. Ford Motor Credit Co., 623 F. Supp. 583, 592 (E.D. Wis. 1985) (suggesting in dictum that 75%-80% share is necessary).

The concept of monopoly share, developed for purposes of section 2 of the Sherman Act, is a highly restrictive test. The line between unlawful and lawful conduct can be exceedingly vague, and setting an unduly restrictive test for monopolization risks deterring aggressive competitive behavior, such as price-cutting, developing new products, and expanding capacity. Applying a market power test in a vertical restraints case presents different considerations where the conduct can be more narrowly defined. More fundamentally, market share "should be at most a point of departure in determining whether monopoly power exists." Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 1000 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). In any event, the argument here is that the use of RPM by a single supplier in a competitive dealer market should be assumed to be procompetitive. Thus, the market share of the supplier in this context is irrelevant.

243. *Eiberger*, 622 F.2d at 1080.

244. Undoubtedly, the fact that Sony had used a prior plan, which the court viewed to more competitive, influenced its decision. The district court apparently found that the dealers engaged in a horizontal conspiracy. Eiberger v. Sony Corp. of America 459 F. Supp. 1276, 1284 (1978); *see also* Posner, *The Next Step*, supra note 4, at 22.

Because there have been no RPM rule of reason cases (and very few vertical rule of reason cases of any kind) we have little guidance from the courts about how such an analysis would proceed. However, there are some statements from the courts which suggest that the plaintiff's burden would be insurmountable. For example, would the plaintiff have to establish that the RPM agreements were raising prices over competitive levels? But what are "competitive levels"? The supplier would argue that the higher price levels are justified by the effort to encourage dealers to provide certain services, which increase demand for the product. The plaintiff would be forced to argue that the vertical restrictions are actually harmful to the supplier and that total sales and supplier profits would increase if the supplier adopted a strategy of allowing price competition. It is a reasonable assumption that the courts could never make sense of such a case, and that plaintiffs would rarely if ever succeed.[245]

2. Rule of Reason in the Supplier Cartel Case

Since RPM can be used to facilitate a supplier cartel, in theory at least, a rule of reason analysis might be employed to determine when its use is promoting price coordination among suppliers. Whatever harm it caused in reducing price competition could be balanced against the benefits to suppliers to pursuing their marketing efforts to increase consumer demand. Since coordinated pricing could occur only in a concentrated market with certain other structual characteristics, such as entry barriers and perhaps relatively homogenous products, the allegations could be dismissed early on if these factors were not present.

However, even with a requirement that these structural characteristics be present, these cases would be virtually unmanageable. Assume the worst case — a highly concentrated market in which each supplier uses RPM and the RPM price level is identical. There is insufficient evidence of a horizontal agreement, so the case must be brought on a theory that RPM is somehow facilitating the coordination of supplier pricing. How could a court weigh the theoretical benefits of RPM compared with the potential for encouraging price coordination by the suppliers? The plaintiff would have an extremely difficult time of establishing even a very rough measure of either side of the equation — the benefits of the RPM scheme and the degree of supracompetitive pricing by suppliers.

The FTC's allegations in *Ethyl* are again instructive. There, the price levels were relatively uniform over a long period. The market was highly concentrated

245. The plaintiff's problems are not over, even if it could somehow carry its burden on this point. There are additional questions of whether its termination was "caused" by the RPM agreements, whether it has suffered antitrust injury, and how the damages from that injury should be calculated. The plaintiff will want to argue that the unlawful agreements between the supplier and the other dealers are the source of its injury. A threshold difficulty is concluding that the plaintiff is injured by these agreements, since the supplier has a right to terminate the plaintiff under *Colgate* anyway. Might then it be argued that the only parties suffering antitrust injury are the consumers who must buy at inflated prices? The Court in *Monsanto* assumed that an RPM agreement between a supplier and some dealers is the cause of the discounter's termination because the RPM scheme will only work if non-complying dealers are terminated. "[T]he remaining question is whether the termination of Spray-Rite was part of or pursuant to that [RPM] agreement. It would be reasonable to find that it was, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those will not comply will be terminated." *Monsanto*, 465 U.S. at 767. In other words, the Court assumed that the unlawful scheme would disintegrate if the discounter was not terminated and, thus, that the plaintiff would not be terminated but for the unlawful scheme.

with four companies controlling the entire market and two companies controlling 70%.[246] The companies followed an almost identical pattern in pricing and had excess profits. The structure of the market was highly susceptible to collusion, including high concentration, a homogeneous product, and high barriers to entry. The FTC challenged a number of practices, including agreements to provide advance announcements of price increases,[247] "most favored nation" clauses, which guaranteed a buyer would get the lowest price offered to others, and delivered pricing agreements. It would be difficult to find a case where a market was more susceptible to facilitation of collusion, yet the Second Circuit found the FTC's legal standard insufficently demanding.[248] Even the FTC warned that its theory should be applied cautiously since it did not provide firms a bright line test.[249] The likely lesson from the FTC's experience in *Ethyl* is that a rule of reason analysis as applied to an RPM-supplier cartel case is unmanageable.

3. A Rule of Reason in a Dealer Market Power Case

If a plaintiff can prove a horizontal agreement among dealers to force the supplier to eliminate price competition from discounters, the case can be decided on the basis that the horizontal agreement is per se unlawful.[250] There is no need to resort to a rule of reason analysis. However, if the theory of the plaintiff is that a series of high price dealers have pressured the supplier to institute an RPM scheme, a rule of reason could be applied to analyze the individual supplier-dealer agreements. In such a rule of reason case, the dealer would be obliged to show these agreements — either agreements to maintain the dealers' prices or agreements to to terminate discounters — are tending to increase distribution costs over the level that would be achieved in a competitive dealer market. The supplier (who is probably a defendant even though it, at least in theory, is a victim of the dealer pressure) as well as the dealer defendants would defend the RPM restrictions on the grounds that they encourage dealers to provide services or that a sufficent margin between wholesale and retail is required to induce high price dealers to carry the product, thereby promoting the products prestige and quality image.

The plaintiff then confronts the problem that is discussed in part V — how are the supplier-dealer agreements RPM that raise prices over competitive levels to be distinguished from RPM restraints that increase consumer demand? As we have seen, since the supplier may be attempting to increase demand by promoting the product's image, dealer services may not be involved. The plaintiff might try to prove that the high price dealers are making excessive profits. In addition to the general problem of identifying some meaningful profit levels, there may not

246. *In re* Ethyl Corp., 101 F.T.C. 425, 608 (1983).

247. In addition to the advance announcements guaranteed by contract, the companies followed the practice of providing an extra "grace period" of notice, during which time the initiator of a price increase could determine if the other companies were going to follow its lead. If the other companies did not follow the price leader, the leader typically cancelled the change. The result was that prices were generally and even short periods of non-uniformity were avoided.

248. *See supra* notes 198-199 and accompanying text.

249. For example, the FTC emphasized that the danger of frivolous cases was minimized by the fact that the Commission would apply prosecutorial discretion in bringing cases. *Ethyl*, 101 F.T.C. at 652. This protection is, of course, unavailable if private parties can pursue a similar theory.

250. *See supra* note 205.

be excess profits, only excess services.[251] The plaintiff could attempt to prove that the "source" of the RPM scheme is the high price dealers, rather than the supplier. As we have seen, however, it is often impossible to segregate the motives of the supplier and the high price dealers since their incentives are inter-related.[252]

A final possibility is that the terminated plaintiff could attempt to prove that the challenged agreements are the result of an uncompetitive dealer market. If the dealer market is performing competitively, the supplier's decision to terminate discounters or to institute RPM must result from the supplier's attempt to increase consumer demand. Thus, only if the dealer market is not performing competitively is there the possibility that the termination harms consumers. There a number of problems with this test however. First, it would require an assessment of the alternative forms of distribution open to the supplier, a complex question involving barriers into retailing in a particular area, the importance of dealer characteristics such as location and reputation, the importance of the supplier's relationship with the dealer in other markets, and so on.

Even if it could be agreed that the dealer market was not performing competitively and, therefore, that the dealers had some power over the supplier, it is not necessarily the case that agreements with individual dealers to eliminate discounters are bad for consumers. The issue is whether the loss in price competition is outweighed by the benefits that the high price dealer offers in promoting the image of the product, encouraging services or signalling quality. If the RPM restraint, or the termination of the plaintiff is the result of pressure on the dealer from a horizontal agreement among dealers, we assume, as a policy matter, that the termination is harmful.[253] The supplier appears "forced" to accept the loss of price competition in order to retain the high price dealers.[254]

If the termination of the discounter, or the RPM restriction, is the result of high price dealers tacitly colluding, but where no actual agreement exists or can be detected, the termination may still be harmful if it enables the remaining dealers to stabilize prices at levels in excess of those that would prevail in a competitive dealer market. However, it is difficult, perhaps impossible, to determine whether the primary effect of the supplier-dealer agreements is to stabilize price at supracompetitive levels or increase consumer demand. If the supplier chooses to terminate the discounter, it must prefer to retain the high price dealers at the expense of foregoing price competition. However, if the high price dealers were unable to coordinate their demands on the supplier, the result might be that the supplier would be able to retain the high price dealers as well as the discounter. The question is whether the supplier's decision is the result of the oligopoly power of these dealers or the benefits they offer in increasing demand.

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251. Even if the high price dealers are successful in imposing the RPM scheme on the supplier, they are confronted with the problem of competing away their excess profits through service competition.

252. *See supra* notes 213-222 and accompanying text.

253. *See supra* note 205.

254. Such an assumption, while justified on policy grounds, is not correct in every case. The conspiring dealers may not have market power, even acting together, so that the result is no different than if the dealers acted alone. Even if the conspiring dealers have market power by acting together, the supplier's decision may be no different than if each dealer had approached the supplier individually. The fact that the dealers perceived a need to act together, however, suggests that the supplier would have preferred to have retained price competition rather than lose individual high price dealers.

It seems unlikely a court could weigh the competiting effects in a manageable way.

Where the termination is a result of an agreement with a single powerful dealer, the supplier must believe that its profits will be higher by retaining the high price dealer over the discounter. Consequently, the advantages that the high price dealer offers in promoting demand must outweigh the advantage of discount pricing. The underlying problem in this case is that the dealer has acquired some ability to engage in monopoly pricing, e.g., because of barriers into retailing in a particular area. The supplier may prefer a more competitive retailing market and more choice among high quality dealers, but, given the choice that is available, the supplier's self-interest is to choose the high price dealer. The termination of the discounter is a manifestation of the power of the individual dealer and, therefore, there is a basis for barring this particular exercise of market power. However, the plaintiff confronts the same problem in the single dealer case as in the case where a series of dealers have pressured the supplier — competitively harmful agreements are very hard to distinguish from competitively benign agreements.

As in the case of the supplier cartel case, even if the plaintiff could somehow surmount all these evidentiary hurdles and prove that the supplier-dealer agreements harmed consumers, it would still have to prove causation and antitrust injury. *Monsanto* assumed that the termination of a discounter was attributable to an RPM scheme since the scheme would not work if dealers were not terminated for failing to comply.[255] In the absence of the agreements, the supplier would presumably have retained the plaintiff as a dealer.[256] Assuming the court accepts the plaintiff's theory of causation, there is the question of damages. In a straightforward dealer termination case, the plaintiff's argument is that it has lost profits from being terminated as a result of an unlawful RPM scheme. If it is assumed that the termination constitutes antitrust injury, the calculation of damages would be straightforward. However, the Seventh Circuit has taken the position that a dealer who saves money by reducing services cannot recover for sales lost when it can no longer take the free ride.[257] This approach begs the question by assuming that the plaintiff's "free ride" was somehow an improper exploitation of a procompetitive scheme to encourage the provision of services. Unless the plaintiff could argue that cutting corners on services was, in fact, the desirable competitive result, a bar on recovery of damages from the inability to cut services and lower price would doom the plaintiff's chances for recovery.

4. *Summary of the Rule of Reason Approach*

A rule of reason case approach in a case where RPM is used by single supplier is impossible to apply in a meaningful sense because a finding that the

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255. *Monsanto*, 465 U.S. at 767.

256. A conclusion that RPM agreements with the other dealers did not cause the plaintiff discounter's termination, for example, on the grounds that the supplier had the right to terminate the discounter under *Colgate*, would mean that no one, except consumers and the government, could bring an RPM case. If there is to be a rule against RPM, it is important that terminated dealers be able to enforce the rule since they are clearly in the best position to detect violations and vindicate the rule.

257. Local Beauty Supply, Inc. v. Lamaur, Inc., 787 F.2d 1197, 1200-1204 (7th Cir. 1986).

scheme is unreasonable means the supplier is not acting in its self interest. Thus, there should be no effort to apply an antitrust rule in such a case at all. Although there are legitimate concerns about the effects of RPM in a supplier or dealer cartel case, applying a rule of reason in these cases is probably unmanageable in actual litigation. In a supplier cartel case, the plaintiff will have a very difficult burden of establishing that the use of RPM is facilitating price coordination and that such an effect, if it can be established at all, outweighs the procompetitive use of RPM to promote consumer demand. In a dealer cartel case, the plaintiff will be forced to prove that the RPM restrictions are the result of dealer pressure to raise retail prices over competitive levels, rather than simply efforts by high price dealers to earn a reasonable return. In practice, it is virtually impossible to distinguish these cases. The result of all these difficulties is that the cases will produce arbitrary results, or more likely, a de facto rule of per se legality.

C. Pending Legislation: Can Congress Do Better?

During the last several sessions of Congress, legislation has been introduced to modify the RPM rules developed by the Supreme Court.[258] During the 102d Congress, legislation passed the Senate designated as S.429.[259] Also during the 102 Congress, legislation passed the House designated as H.R. 1470.[260] The original drive for RPM legislation began with the *Monsanto* opinion. The bills introduced during the 100th Congress contained two basic provisions — a codification of the per se rule against RPM and a modification of the Monsanto evidentiary standards for jury consideration of agreements. The principal policy question was — what evidence is necessary to prove that a complaining dealer and a supplier reached an agreement? The *Sharp* decision introduced another controversy relating to RPM —should an unlawful RPM agreement include a price term? As often has been the case, the political debate shifted as the Supreme Court continued to develop antitrust rules. Thus the bills introduced after *Sharp* have contained a provision reversing *Sharp's* requirement that an RPM agreement include a price term.[261]

Prior to *Monsanto*, some circuits had allowed jury consideration of the plaintiff's allegation of an agreement if the plaintiff showed termination of a discounting dealer following complaints by high price dealers about the discounter. Others required a more demanding test — that the plaintiff show that the termination was caused by the complaints.[262] The legislation, as it passed the House, adopted this more stringent standard. It provided that the jury may infer an agreement if there has been: (1) a complaint from a dealer regarding "price competition" by another dealer; and (2) a termination "in response to such communication."[263] A termination (or refusal to supply) is "in response to a

258. The legislation proposed in the 101st Congress was introduced by Representative Brooks as H.R. 1236, 101st Cong., 1st Sess., 135 CONG. REC. H510 (Mar. 2, 1989) and by Senator Metzenbaum as S. 865, 101st Cong., 1st Sess., 135 CONG. REC. S4435 (Apr. 19, 1989). Similar bills were introduced in the 100th Congress. H.R. 585, 133 CONG. REC. H252 (Jan. 8, 1987) and S. 430, 133 CONG. REC. S1483 (Feb. 2, 1987).

259. 137 CONG. REC. S5605 (daily ed., May 9, 1991).

260. 137 CONG. REC. H7756-57 (daily ed., Oct. 10, 1991).

261. *Resale Price Maintenance Legislation is Needed to End Confusion in Case Law*, Antitrust & Trade Reg. Rep. (BNA) No. 1457, at 375 (March 15, 1990).

262. *See supra* note 68.

263. H.R. 1470 § 2(a).

communication" if the communication is a "substantial contributing cause" of the termination.[264] This evidence is "sufficient to raise the inference" that there was an agreement to "set, change or maintain prices in violation of [the Sherman Act]".[265]

The Senate language regarding the evidentiary requirement for jury consideration is somewhat different. Under the legislation as it passed the Senate, the jury would be allowed to consider the plaintiff's allegation of an agreement if a supplier: (1) "received from a competitor [of the plaintiff] an express or reasonably implied request or demand that the seller take steps to curtail or eliminate price competition by the claimant. . ."; and (2) "terminated the claimant as a buyer of such good or services . . . and such request or demand was the major cause of such termination . . ."[266] To satisfy the causation requirment, the supplier must "expressly or impliedly acquiesc[e] to the request or demand, or" take some other actions to stop price competition by the discounter prior to the termination.[267] If these requirements are met, the jury must be allowed to consider whether the defendant and a competitor of the plaintiff "engaged in concerted action to set, change, or maintain prices for such good or service in violation of [the Sherman Act]."[268]

Both bills also codify a per se rule price for minimum price-fixing by providing that an agreement between a supplier and a dealer to set the dealer's minimum price is per se unlawful.[269] Finally, both bills directly address the *Sharp* decision by including an identical provision: "An agreement between the seller of a good or service and the purchaser of a good or service to terminate another purchaser as a dealer or to refuse to supply such other purchaser because of that purchaser's pricing policies shall constitute a violation of this section, whether or not a specific price or price level is agreed upon."[270]

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264. *Id.*
265. *Id.*
266. S. 429, § 8(a)(1)((B).
267. *Id.* at § 8(a)(1)(c).
268. *Id.* at § 8(a)(1)(A).
269. H.R. 1470 provides that "the fact that the seller of a good or service and the purchaser of such good or service entered into an agreement to set, change, or maintain the price (other than a maximum price) of such good or service for resale shall be sufficient to constitute a violation [of the Sherman Act]." Section 2(b). S. 429 provides:

> [T]he fact that the seller of a good or service and the purchaser of a good or service entered into an agreement to set, change, or maintin the resale price of a good or service shall be sufficient to constitute a violation of a [the Sherman Act or the Federal Trade Commission Act], except that this section shall not apply when the agreement to set, change, or maintain the resale price of a good or service is an agreement to set, change, or maintain the maximum resale price of a good or service.

Id.

270. *See* H.R. 1470, § 2(b). The Senate provision differs slightly by including the requirement that discounting is the major cause of the termination. S. 429, § 8(b). It could be argued that the provisions of the bill addressing the *Monsanto* evidentiary standards are sufficient to reverse the result in Sharp on their own. Both bills provide that the evidentiary standards are sufficient to allow the jury to consider whether there has been "concerted action to set, change, or maintain prices." H.R. 1470, § 2(a); S. 429 § (a)(1)(A). Since both bills provide that any agreement to set, change or maintain price is a violation of the Sherman Act, the jury could find liability without having to find that the supplier and the complaining dealer agreed on a specific price. Apparently, the sponsors felt that the bills required additional specific language on this point.

Both bills would allow jury consideration of a claim of "agreement" in many more cases than *Monsanto* permits. In the typical case, a discounter has begun to take away sales from other dealers. One or more of the dissatisfied dealers approach the supplier, complaining about the discounter's practices. The supplier may then terminate the discounter in order to placate the unhappy full price dealers. Under the House bill, the threshold standard of a "communication regarding price competition" would be met if the complaining dealers complained about the discounter's pricing practices. Under the more stringent standard of the Senate bill, the threshold standard would presumbably not be met unless the complaining dealers threatened, expressly or implicitly, to stop doing business with the supplier. The courts would have to evaluate the plaintiff's evidence to determine if these showings had been made, but the presence of such communications seem to be issues capable of straightforward determination.

A more difficult issue is causation. Is a discounter terminated "because of" the price communication or threat? It would seem that in cases where the termination follows soon after the complaints, and certainly where the complaining dealers threaten to stop doing business, there is a strong evidence that the termination is caused by the demands of the other dealers. If the supplier is influenced by the complaints to terminate the discounter, there is an entirely sensible basis for allowing the jury to consider whether there is an agreement based on an express or implied assurance by the supplier that it will terminate a discounter in return for an express or implied assurance by the complaining dealer that it will continue to carry the supplier's product.[271]

The seeming aribtrariness of the cases following *Monsanto* in rejecting the plaintiff's claim of an agreement understandably provoked a reaction in Congress. The bills introduced in the House and Senate attempt to provide some reasonable evidentiary threshold for determining when a high price dealer and its supplier have reached an agreement, typically an agreement of the form: "I will continue to be your dealer if you agree to terminate my discounting competitor." These provisions of the bill were formulated originally after the *Monsanto*, and before the *Sharp*, decisions. Ironically, they have much less significance after *Sharp*, since the plaintiff has won a hollow victory if it proves a supplier-dealer agreement to terminate it, only to lose its case on the grounds that there is no supplier-dealer agreement as to price. Because of the significant impact of the *Sharp* decision, the bill also attempts to provide a manageable framework for identifying anticompetitive dealer terminations. The assumption of these bills is that an anticompetitive termination can be identified on the basis that it is intended only to eliminate price competition.[272]

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271. The determination of whether there is an agreement should turn on whether two parties have reached a meeting of the minds to act in a way they would not in the absence of the understanding. These seem to be the essential principles of American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946) and Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594-96 (1986). Thus, if the supplier provides an express or implied assurance to one dealer that it will terminate a discounter in return for the express or implied assurance by the complaining dealer that it will continue to carry the supplier's product, the relationship between the supplier and the dealer contains the essential elements of an agreement.

272. "When a competitor is eliminated pursuant to a vertical agreement solely because of its pricing policies, the impact on competition and consumer welfare is clear." S. Rep. No. 102-42, 102d Cong., 1st Sess. at Part II B.

As we have seen, it is exceedingly difficult to distinguish between agreements to terminate a discounter that result in allowing high price dealers to earn an adequate return and agreements that result in forcing retail prices over competitive levels. The distinction does not necessarily turn on the significance of point of sale services or the "source" of the restrictions. Similarly, it does not necessarily turn on whether there is a purpose to eliminate price competition since supplier decisions to retain high price dealers in order to promote demand often involves sacrificing price competition among its dealers. Instead, the underlying question is whether the high price dealers are exercising their market power to drive distribution costs over competitive levels and reduce output, an assessment that is probably unmanageable in actual litigation. Some dealer terminations, forced by pressure from high price dealers are anticompetitive; some are not. Any administrable rule is necessarily overinclusive or underinclusive.

It is appropriate for Congress to decide on which side of this dilemma the law should err. If the concern is that high price dealers are frequently able to force prices over competitive levels though pressuring the supplier in an uncompetitive dealer market, then it is appropriate to legislate an overinclusive rule. On the other hand, if the more typical situation when suppliers terminate discounters is that suppliers are advancing their own interest by inducing high price dealers to carry their product, the rule should allow these terminations. The failure of Congress to act on these bills suggests that, as is often the case in the antitrust area, there may not be a sufficient consensus for Congressional decision.[273] Therefore, there is a substantial possibility that the Supreme Court may continue to set antitrust policy regarding RPM just as it has done since *Dr. Miles*. In the absence of a legislative change, the next part proposes a (relatively simple) rule that is consistent with the general trend in case law in this area.

D. A Per Se Rule for Dealer Assurances

The discussion so far shows that formulating RPM policy requires solving two problems: (1) how should we define "agreements" in the context of an RPM case; and (2) how should we identify supplier-dealer agreements that harm consumers. The problem of defining agreements is complicated by the unique nature of the vertical relationship, in particular, the fact that one party can influence the other by threatening to withdraw from the relationship. The problem of identifying harmful agreements is complicated by the difficulty of distinguishing supplier-dealer agreements that increase consumer demand from supplier-dealer agreements that raise prices over competitive levels.

The most workable antitrust rule for RPM is a simple per se bar on dealer's providing assurances about their future pricing policies. A rule barring assurances by dealers both simplifies the problem of identifying agreements and avoids an

273. At the close of the 101st Congress, the Senate failed to act on the legislation even though it had passed the House and had been favorably reported by the Senate Judiciary Committee. *See supra* note 5. While there was substantial support for the Senate version of the bill, its opponents had threatened a filibuster. *See* Paul M. Barrett, *Law*, Wall St. J., Oct. 22, 1990, at B3A. The administration has threatened a veto of the legislation pending in the 102d Congress. "Resale Price Fixing Bill—U.S. Views," 7 Trade Reg. Rep. (CCH) ¶ 50,601 at 48.413 (June 25, 1991). The recent history of antitrust legislation shows that, ordinarily, a high degree of consensus is required for any significant change in the antitrust statutes.

unworkable rule of reason analysis to be applied to supplier-dealer agreements. A series of express agreements to maintain price between the suppliers and and its dealers, generally known to competing dealers, provides a high degree of certainty to dealers who wish to see prices stabilized at a supracompetitive levels.[274] A rule that allowed dealers to provide express assurances as to pricing practices would encourage high price dealers, with substantial leverage over the supplier, to reach agreements with their supplier of the following form: "I will deal with you if you agree to require your other dealers to charge a minimum price." A bar on such assurances prevents the supplier from carrying out the high price dealers' desire to obtain such assurances, thereby stabilizing pricing by dealers.

Although the path from *Dr. Miles* to *Sharp* has been circuitous, the law today essentially provides that it is per se unlawful for a dealer to provide price assurances to its supplier.[275] There are many advocates for a continued erosion of *Dr. Miles*, however, either by the adoption of a rule of reason for all RPM cases or adoption of a rule of per se legality. As is argued above, the consequences of adopting a rule of reason are essentially the same as adopting a rule of per se legality. A rule of per se legality would prevent the application of the antitrust laws to any type of supplier-dealer agreements regarding dealer prices as long as a horizontal agreement among dealers could not be established. Such a rule would encourage the use of express contractual provisions to maintain resale prices, which would promote price stability among dealers, and it would prevent the application of the antitrust laws to the use of RPM that may facilitate a supplier cartel.

A per se rule limited to a bar on dealer assurances excludes cases where the supplier agrees with dealers to eliminate discounters but the remaining dealer provides no assurances as to its pricing practices.[276] The legislation considered in Congress during the 102d Congress retains a per se bar on these agreements if the purpose is to eliminate price competition.[277] As we have seen, such a rule is necessarily overinclusive because the "purpose" to eliminate price competition is present whether the effect of the agreement is to increase consumer demand or to increase prices over competitive levels. The difficulty of distinguishing between procompetitive and harmful supplier agreements to eliminate price competition by other dealers is clearly the most difficult problem in formulating such a rule. It may be appropriate for Congress to enact an overinclusive rule since the alternative rule, announced in *Sharp*, is clearly underinclusive in that it does not apply the per se rule to all harmful situations. Nevertheless, the political realities suggest that the result in *Sharp* may not be reversed by legislation and, therefore, RPM policy must develop consistently with the principle of *Sharp*.

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274. The *Sharp* opinion makes this point in explaining its requirement that an agreement should include a price term to fall within the per se rule. *Sharp*, 485 U.S. at 727.

275. Some statements in *Monsanto* suggest that there may be other avenues for finding an agreement that might meet the *Sharp* requirement for application of the per se rule. *See supra* notes 85-88 and accompanying text. However, the principal thrust of *Monsanto* itself as well as the cases following it show that the plaintiff is probably going to have to find proof of an assurance given by some dealer in order to invoke the per se rule.

276. *Sharp* applies a rule reason to these agreements but it is unclear when, if ever, a rule of reason analysis would conclude such agreements are unlawful in view of the difficulty of identifying when such agreements are harmful.

277. *See supra* note 270 and accompanying text.

One objection to a per se rule barring dealers from providing assurances about their pricing policies to suppliers is that high price dealers could achieve the same result by reaching an agreement with the supplier to terminate discounters altogether. If the latter agreement is subject to a rule of reason and, therefore, rarely subject to challenge, why apply a per se rule to the first agreement? Although the effects of these two cases are similar in many cases, assurances about prices provided to the supplier by dealers are more prone to stabilizing dealer prices at supracompetitive levels than dealer compliance with suggested prices that results only from fear of termination. Express assurances give a high degree of confidence to all dealers that price competition will not break out among rivals. In most markets, there is occasional discounting, even by dealers who generally follow a policy of charging list prices. If express assurances are obtained from all dealers, however, dealers can be confident that their rivals can discount only by breaching their distribution contract and subjecting themselves to a damage action. In short, if the supplier is barred from obtaining express price assurances in order to satisfy the request of high price dealers, there is a greater likelihood that beneficial price competition will occur.

Moreover, the principal objection to a broad rule against RPM is that it inhibits the supplier's ability to prevent free-riding and to signal quality by inducing high price, prestige dealers to carry its product. A per se rule that bars suppliers from obtaining assurances on price does not prevent them from terminating discounters or from agreeing with high price suppliers to do so. In addition, it provides a much greater degree of clarity and administrability than a rule that attempts to distinguish harmful supplier-dealer agreements to terminate discounters from procompetitive ones. Thus, under a simple rule barring dealer assurances, the supplier has substantial freedom to structure its marketing and distribution practices and to respond to the commercial reality that it may have to choose between inducing high price dealers to carry its product in order to promote demand and the benefits of vigorous price competition among its dealers.

A remaining question is what kind of assurances should constitute an agreement for purposes of such rule. *Colgate*, as restated by *Monsanto*, means that an RPM agreement is not formed when a dealer complies with suggested prices to avoid termination.[278] *Colgate* and *Monsanto* established that an agreement is not formed when one party to a vertical relationship influences the other to comply with its preferences by threatening to withdraw from the relationship. This principle seems firmly established in antitrust jurisprudence. Thus, there must be some affirmative conduct on the part of the dealer to result in an agreement.

An express statement clearly qualifies as affirmative conduct that can establish an agreement, but what conduct short of an express statement should be sufficient? How are we to fashion a definition of "assurances" that it is consistent with our common sense notion of agreements, that can be understood by those who must comply with it, and that advances the underlying policy of the rule? Unfortunately, this area of anitrust law, more than most, seems to be lead to elusive and seemingly arbitary rules. Professor Areeda suggests that efforts by

278. *See supra* notes 81-82 and accompanying text.

suppliers to induce its dealers to comply with suggested prices can be divided into "simple enforcement" and "complex enforcement," and the latter might be sufficient to result in an agreement.[279] Such a test, however, would likely promote confusion and excessive litigation as well as producing results that seemed arbitary and downright silly to those who had to live with it.

On balance, the best test for "assurances" is simply that the dealer has given some express indication that it would comply with certain pricing policies. The express indication would not have to be given in any particular words (or even by words alone if conduct was deemed sufficiently communicative). However, the point is that a jury would have to find that a dealer communicated an assurance that it would comply, not simply that it complied because of the fear that it would be terminated. Such a definition of assurances would bar verbal as well as written assurances, and it certainly would prevent the use of any contract provisions regarding dealer prices.

VI. CONCLUSION

No possible antitrust rule for RPM is completely satisfactory. In fact, all seem to have more than the ordinary quality of arbitrariness one associates with other antitrust doctrines. One of the great costs of RPM policy no doubt has been to deter behavior by suppliers that does not amount to harmful RPM, but which is subject to a claim by a terminated dealer that it does. Any sensible RPM policy has to be based on some administrable rule that focuses on the situations most likely to be competitively harfmul and should include some workable concept of "agreements." Moreover, such a policy must be justified on the basis that it prevents economic harm to consumers. A simple per se rule barring dealer assurances has the advantage that it is administrable and limited to situations where competitive harm is most likely. In addition, it leaves suppliers with substantial freedom to employ alternative marketing and distribution techniques. In particular, selective distribution, including the termination of dealers who discount and agreements to create exclusive distributorships is clearly protected.

279. *See* VII PHILLIP AREEDA, ANTITRUST LAW 92-94 (1986) ("On the 'simple' side of that line would be announcement and termination, monitoring of dealer performance through one's own employees or otherwise, and the use of third parties to effect the termination (to carry the message or to contact customers or replacement dealers). On the 'complex'side of that line would be individualized negotiation, directly or through third parties, which seeks to obtain dealer complaince and which makes clear that the supplier prefers to obtain compliance rather than replace the disobedient. Holding meetings with dealers to exhort them, repeated exhortation, and perhaps forbidding third parties from dealing with the disobedient could also be 'complex' enforcement."). *Id.* at 92.